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Great American Judges

AN ENCYCLOPEDIA

Great American Judges

AN ENCYCLOPEDIA

VOLUME ONE A–K

John R. Vile

Foreword by Kermit L. Hall

Santa Barbara, California Denver, Colorado Oxford, England

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Dedicated to those individuals
throughout American history
who have used their positions
as judges and justices to
perpetuate constitutional government
and equal justice under the law

Contents

List of Sidebars xiii

Foreword, *Kermit L. Hall* xvii

Introduction, *John R. Vile* xxi

Special Acknowledgments xlv

VOLUME ONE

Shirley Schlanger Abrahamson (1933–), *Jennifer Harrison* 1

Florence Ellinwood Allen (1884–1966), *Angela White* 8

Samuel Ames (1806–1865), *Henry B. Sirgo* 20

Charles Fremont Amidon (1856–1937), *Tim Hurley* 25

John Appleton (1804–1891), *Judith Haydel* 32

David L. Bazelon (1909–1993), *Geoffrey P. Hull* 39

Roy Bean (1825–1903), *John R. Vile* 46

Griffin Bell (1918–), *Stephen Louis A. Dillard* 55

Rose Elizabeth Bird (1936–1999), *Sara Zeigler* 66

Hugo Lafayette Black (1886–1971), *Tinsley E. Yarbrough* 75

Isaac Blackford (1786–1859), *J. Mitchell Pickerill* 84

Luther Lee Bohanon (1902–), *Jace Weaver* 93

Hugh Lennox Bond (1828–1893), *Peter G. Fish* 102

Robert H. Bork (1927–), *Scott D. Gerber* 111

Louis Dembitz Brandeis (1856–1941), *Bruce Allen Murphy and Maria A. Fekete* 121

John R. Brown (1909–1993), *Clyde Willis* 131

Warren Burger (1907–1995), *Frank Guliuzza* 141

Benjamin N. Cardozo (1870–1938), *Otis H. Stephens* 153

Walter Clark (1846–1924), *William G. Ross* 161

George Franklin Comstock (1811–1892), *Douglas P. Sadler* 168

Thomas McIntyre Cooley (1824–1898), *James W. Ely Jr.* 175

William Cranch (1769–1855), *Clyde Willis* 182

John Davis (1761–1847), *Robert W. Smith* 191

Matthew Paul Deady (1824–1893), *Henry Sirgo* 196

Charles Cogswell Doe (1830–1896), *James Wagoner* 205

Thomas Drummond (1809–1890), *Kevin Collins* 212

Frank Hoover Easterbrook (1948–), *J. Mitchell Pickerill* 221

Henry White Edgerton (1888–1970), *Dean Alfange Jr.* 229

Richard Alan Enslen (1931–), *Christopher Smith* 239

Stephen J. Field (1816–1899), *James W. Ely Jr.* 247

Jerome New Frank (1889–1957), *William D. Pederson* 257

Felix Frankfurter (1882–1965),
Bruce Allen Murphy and Arthur Owens 264

Henry Jacob Friendly (1903–1986), *Ronald Kahn* 273

John Bannister Gibson (1780–1853),
Donald Grier Stephenson Jr. 287

Horace Gray (1828–1902), *Clyde Willis* 296

Nathan Green Sr. (1792–1866), *M. Keith Siskin* 304

Augustus Noble Hand (1869–1954), *Mark A. Fulks* 311

Learned Hand (1872–1961), *Ken Gormley* 319

John Marshall Harlan (1833–1911), *Linda Przybyszewski* 330

John Marshall Harlan II (1899–1971), *Tinsley E. Yarbrough* 338

William Harper (1790–1847), *John R. Vile* 345

William Henry Hastie (1904–1976), *Tyson D. King-Meadows* 351

Clement Furman Haynsworth Jr. (1912–1989), *Lisa Pruitt* 361

John Hemphill (1803–1862), *Susan Coleman* 370

A. Leon Higginbotham Jr. (1928–1998), *David Schultz* 377

Oliver Wendell Holmes Jr. (1841–1935),
William D. Pederson 383

James E. Horton Jr. (1878–1973), *Virginia L. Vile* 391

Charles Evans Hughes (1862–1948), *Mark Byrnes* 400
Sarah Tilghman Hughes (1896–1985), *James W. Riddlesperger Jr.* 407
Frank M. Johnson Jr. (1918–1999), *Michael J. Gerhardt* 415
William Wayne Justice (1920–), *Anthony Champagne* 424
James Kent (1763–1847), *Herbert A. Johnson* 433
Alex Kozinski (1950–), *Mitch Sollenberger* 442

VOLUME TWO

Kenesaw Mountain Landis (1866–1944), *Christopher Whaley* 449
Harold Leventhal (1915–1979), *Melanie K. Morris* 457
Hans A. Linde (1924–), *John David Rausch Jr.* 463
Robert R. Livingston Jr. (1746–1813), *Robb A. McDaniel* 471
Joseph Henry Lumpkin (1799–1867), *Paul DeForest Hicks* 479
John Marshall (1755–1835), *Herbert A. Johnson* 487
Thomas Alexander Marshall (1794–1871), *Sara L. Zeigler* 497
François-Xavier Martin (1762–1846), *Michael S. Martin* 502
Carl Eugene McGowan (1911–1987), *Myra Norman* 511
Harold R. Medina (1888–1990), *J. Woodford Howard Jr.* 519
Abner J. Mikva (1926–), *John David Rausch Jr.* 530
William Mitchell (1832–1900), *Kathleen Uradnik* 537
Lewis Morris (1671–1746), *Andrew G. Braniff* 547
Constance Baker Motley (1921–), *John R. Vile* 556
Alfred P. Murrah (1904–1975), *Douglas Clouatre* 563
Isaac C. Parker (1838–1896), *Lorien Foote* 571
John Johnson Parker (1885–1958), *Peter G. Fish* 583
Theophilus Parsons (1750–1813), *Sara L. Zeigler* 596
Edmund Pendleton (1721–1803), *W. Hamilton Bryson* 602
Milton Pollack (1906–), *Kathleen Uradnik* 607
Richard A. Posner (1939–), *Ronald Kahn* 615

Cuthbert Winfred Pound (1864–1935), *Dean Alfange Jr.* 629
William H. Rehnquist (1924–), *Derek H. Davis* 639
Richard Rives (1895–1982), *Douglas Clouatre* 649
Spencer Roane (1762–1822), *Douglas Clouatre* 655
Thomas Ruffin (1787–1870), *John R. Vile* 662
Edward George Ryan (1810–1880), *Kevin Collins* 668
Walter Vincent Schaefer (1904–1986), *Brannon P. Denning* 677
Samuel Seabury (1873–1958), *Tim Hurley* 683
Samuel Sewall (1652–1730), *Carol Loar* 689
George Sharswood (1810–1883), *Kevin Collins* 696
Lemuel Shaw (1781–1861), *Kermit L. Hall* 704
John Joseph Sirica (1904–1992), *Cornell Clayton* 712
George Washington Stone (1811–1894), *Ellen Barrier Garrison* 720
Harlan Fiske Stone (1872–1946), *Peter G. Renstrom* 726
Joseph Story (1779–1845), *Michael W. McConnell* 733
Roger Brooke Taney (1777–1864), *Norman B. Ferris* 741
Roger John Traynor (1900–1983), *Jennifer Harrison* 753
St. George Tucker (1752–1827), *Otis H. Stephens* 760
Elbert Parr Tuttle (1897–1996), *Brandi Snow Bozarth* 768
Arthur T. Vanderbilt (1888–1957), *G. Alan Tarr* 775
J. Waties Waring (1880–1968), *Tinsley E. Yarbrough* 783
Earl Warren (1891–1974), *Paul J. Weber* 790
Jack B. Weinstein (1921–), *Kathleen Uradnik* 800
J. Harvie Wilkinson III (1944–), *Barbara A. Perry and Henry J. Abraham* 807
John Minor Wisdom (1905–1999), *David Schultz* 814
James Skelly Wright (1911–1988), *Kenneth M. Holland* 821
Jonathan Jasper Wright (1840–1885), *Susan Coleman* 828
George Wythe (1726–1806), *Robert W. Smith* 835
Charles E. Wyzanski Jr. (1906–1986), *Kathleen Uradnik* 841

Appendix A:
Great American Judges Listed by Year of Birth 851

Appendix B:
Great American Judges Listed by Century 853

Appendix C:
Great American Judges Listed by Birth Year, Years of Life, Nation or State of Birth, Colleges Attended, and Courts over Which They Presided 855

Appendix D:
United States Supreme Court Justices Listed by Name, Years of Life, Nation or State of Birth, Education, Years of Prior Judicial Service, and Years of Service on the Court 867

How Well Do You Know Your Great American Judges? 875

Selected Bibliography 887

About the Editor and Contributors 919

Index 927

Sidebars

Georgia Bullock and the Los Angeles Women's Court, 4
Annette Abbott Adams (1877–1956), 16
Esther McQuigg Morris (1814–1902), 19
William Paul Moss, 29
Kirvin Kade Leggett (1857–1926), 49
Joseph A. Peel: A Judge as Murderer, 51
W. E. "Bill" Richburg, 52
Clarence Thomas (1948–), 58
Joseph R. Grodin (1930–), 72
Howell Heflin (1921–), 80
John L. Niblack, a Hoosier Judge, 88
Richard A. Hefner (1874–1971), 94
Antonin Scalia (1936–), 118
Benjamin Barr Lindsey (1869–1943), 124
William Shaw Richardson (1919–), 148
Emilio Miller Garza (1947–), 158
"Golden Rule" Jones (1846?–1904), 164
Moses Hallett (1834–1913), 200
Sampson, Edith Spurlock (1901–1979), 216
Frank M. Coffin (1919–), 224
William Henry Beatty (1838–1914), 249
David S. Terry (1823–1889), 252
Samuel H. Silbert (1883–1976), 261
Guido Calabresi (1932–), 269
Penny J. White (1956–), 306

John C. Knox (1881–1966), 322
Sol Wachtler (1930–), 326
Richard Reid (1838–1884), 334
West H. Humphreys (1806–1882), 347
Thurgood Marshall (1908–1993), 354
Alberto R. Gonzalez (1955–), 375
Joe E. Brown Jr., 379
Sadie Lipner Shulman (1891–1998), 385
Jack Montgomery (1930–1994), 394
Ruth Bader Ginsburg (1933–), 410
Thomas Goode Jones (1844–1914), 420
Joseph Force Crater (1889–1930?), 437
Samuel A. Weiss (1902–1977), 454
Charles Z. Smith (1927–), 466
Rufe McCombs (1918–), 482
Sir Edward Coke (1552–1634), 492
Ellen Morphonious (1929–), 508
Jose Alberto Cabranes (1940–), 525
Robert Gollmar (1903–1987), 541
George Robertson (1790–1874), 544
Shirley Mount Hufstedler (1925–), 558
Robert L. Williams (1868–1948), 566
The "Hanging Judge"—
The Popular Image of Judge Isaac Parker, 577
George Jeffreys (c. 1645–1689), 580
Judge Robert Satter on the Differences between
Trial and Appellate Judging, 588
Louis H. Pollack (1922–), 610
John T. Noonan Jr. (1926–), 618
Sandra Day O'Connor (1930–), 646
George Lewis Ruffin (1834–1886), 666
Reah Mary Whitehead (1883–1972), 671
The Judge and Jury from Hell, 693

Judy Sheindlin (1942–), 718
Early United States Supreme Court Justices and Circuit-Riding Duties, 737
Kirby Benedict (1810–1874), 748
James Wickersham (1857–1939), 756
Bruce McMarion Wright (1918–), 796
George Mason (1725–1792), 837
Burnita S. Matthews (1894–1988), 843
Joseph A. Wapner (1919–), 849

Foreword

"I do not think," Alexis de Tocqueville wrote in the 1830s, "that any other nation in the world has organized judicial power in the same way as the Americans." What caught Tocqueville's eye was that at all three levels of American government, judges distributed through their decisions the costs, benefits, and rewards of the social system they supported. His views about the judiciary are as valid today as they were nearly two centuries ago. Although courts in theory are places of reasoned justice based on the rule of law, in practice the actions of their judges have reflected prevailing social assumptions about matters as diverse as witchcraft, race relations, gender roles, right of privacy, and the purposes of private property. In America, to turn once again to Tocqueville, eventually every political issue has become a legal cause and the courts the forum for its resolution. Yet Americans also cling to the oft-repeated phrase that we are "a nation of law" and with it to an unprecedented faith in the law and by extension judges.

The American judiciary is unique for the concept of judicial federalism that it embraces. America has had since its inception two distinct systems of courts, one federal, the other state. Traditionally, scholars of the judiciary have emphasized the federal system generally and the Supreme Court of the United States in particular. This stress on the justices and their work has produced over the previous century the "high court myth" that calibrates the entire American judicial system by the actions of nine justices. This perspective is not altogether unreasonable; any attention to the judiciary in American history must take serious account of the power of the Supreme Court. There is also a pervasive, if unfounded, cultural view that every citizen deserves to be able to start a case at the lowest level and end it with an appeal to the United States Supreme Court.

Nothing could be further from the truth, however; the federal nature of American courts makes exactly the opposite the norm. Although there are overlaps and confusion at times between the function of state and federal courts, these two institutional bodies exist in parallel with each other. The great body of American justice has taken place and continues to take place in state courts and to a much lesser extent in the lower federal courts, not

the Supreme Court. Even more important, the American judicial system is centered in the states, not in the nation.

The numbers make the point clearly. In 2000, the last year for which full data are available, there were an estimated 92 million cases of all types (civil, criminal, traffic, and juvenile) filed in the states, the District of Columbia, and the territories. This number is probably low, since the scheme of reporting of such cases lacks a uniform standard in every state, and many more cases are filed than are ever reported. On the other hand, there were about 1.8 million cases filed in 1998–1999 in all of the federal courts, the great bulk of which were in the lower federal courts. In 2001 there were approximately 7,100 matters of all types brought to the United States Supreme Court. The justices of the high court in that year decided only seventy-five cases, meaning that the vast majority were dismissed without hearing or formal written opinion. Perhaps the most dramatic way to underscore the significance of state court judges is to remember that in 2000 there were about ten times more cases filed in the state of California than were filed in *all* of the federal system. About 98 percent of all of the litigation in the United States, then, occurs in state courts, and the great bulk of litigation in the federal courts occurs at the district and to a lesser extent the court of appeals level. Rare is the litigant who has his or her case heard by the justices of the United States Supreme Court.

There are others ways of thinking about the relationship of state and federal courts. Today, there are 113 federal courts compared with more than 20,000 state courts. The state of California alone has 250 separate courts. The same picture holds for the number of judges. The federal courts have about 846 appellate (courts of appeal) and trial court judges (district); the states have more than 28,000. California alone has more than 2,000 judges. That means that for every federal judge there are more than twenty-five state judges and for every federal constitutional court there are about 175 state courts. Most Americans, even though they may pay attention to the increasingly well publicized work of the Supreme Court, realize justice in the often less than glamorous surroundings of state and lower federal courts.

Nevertheless, in structure and substance it is the federal nature of the American judiciary that makes it distinctive. For example, state courts of last resort, usually called supreme courts or courts of appeal, typically have played the decisive role in shaping the major substantive areas of American law, such as torts, contracts, criminal procedure, property rights, and state constitutional rights. In a variety of areas, the decisions made by these courts have generated high levels of public controversy. For example, during the late nineteenth century, state appellate courts crafted major decisions establishing the doctrine of substantive due process and with it new guarantees permitting corporations to establish what they considered effi-

cient hours and conditions of work. In the last part of the twentieth century, at least one-half of the state courts of last resort ordered legislators to provide not only greater funding for public schools but also a guarantee of a more equitable distribution of funds to all public school students. These state courts acted based on their own constitutions, not the federal Constitution, and they did so at a time in which the United States Supreme Court made it clear that it would not mandate equal opportunity in educational facilities based on the equal protection and due process clauses of the Fourteenth Amendment. These often contentious decisions, such as the Ohio Supreme Court's holding in *DeRolph v. Ohio* (2001), spawned demands for the removal of the offending judges.

State courts have proven volatile in part because of the ways in which their judges reach the bench. Unlike the federal judiciary, who are appointed by the president with the advice and consent of the Senate and hold their offices during good behavior, most state court judges, since the middle of the nineteenth century, have been selected through one of several different modes of popular election and hold their office for fixed terms, usually five to twelve years.

State court judges have had to share the jurisprudential stage in a sometimes uneasy role with the federal government. Throughout most of the nation's history the United States Supreme Court has given great deference to decisions made by state courts to interpret conclusively state law, although its justices have struck down far more state laws, often ones supported by state courts of law resort, than federal statutes. Yet deference has usually been the byword. The Supreme Court in 1938, for example, did much to extend the power of the state courts when it decided *Erie Railroad v. Tompkins*. That decision revised the historic ruling in *Swift v. Tyson* (1842), which held that when federal courts heard cases involving citizens of different states, the law applied should be based on whatever general legal principles seemed proper. Justice Louis D. Brandeis's opinion in *Erie*, however, held that the law to be applied by the federal courts had to be the law of the state in question. The effect was to make state courts even more important, not just in settling matters of state law but also, in selected areas, in federal judicial interpretation of that state law.

The lower federal judiciary has been a source of controversy as well. Initially, the framers sharply limited the role of these courts, but with the Removal Act of 1875, which permitted cases in state courts to be removed to the lower federal courts based on the existence of a question arising under the federal Constitution, they have become effective voices of federal law. The bulk of the cases decided in these courts have been and continue to be civil rather than criminal matters, although as Congress has significantly increased the number of federal crimes, the criminal dockets of the district

courts, and the appeals taken from them to the courts of appeals, have grown markedly.

As Tocqueville reminded us, what makes the American judicial system unique is not the nine justices of the Supreme Court but instead the federal scheme of state and lower federal judges who have historically distributed the costs, benefits, and rewards of American life. These volumes build on that perspective and are, therefore, a welcome addition to scholarship about the American judiciary.

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Introduction

These volumes, which I am proud to introduce and edit, are intended to be a fitting complement to two previous volumes entitled *Great American Lawyers: An Encyclopedia.*[1] At the time I edited the first set of volumes for ABC-CLIO, I did not have the second in mind, but one set of volumes led so logically into the other that in retrospect it is difficult to know how I could have contemplated the first venture without also contemplating the second. In a sense, both sets of books flow from a common stream in that the last biographical attempt to look exclusively and comprehensively at lawyers throughout U.S. history[2] dealt with both groups together.

Lawyers and Judges

There are all kinds of quips about the difference or differences between lawyers and judges. W. Curtis Bok's fictional judge Ulen thus observed that "a judge is a member of the bar who once knew a Governor," whereas journalist H.L. Mencken claimed that "a judge is a law student who marks his own exams."[3] In the contemporary United States, at least, although not all lawyers are judges, almost all judges (at least beyond the rank of justice of the peace[4]) are expected to have been lawyers,[5] and some individuals have distinguished themselves in both careers. Readers will thus not be surprised that some lawyers described in *Great American Lawyers* are included in these volumes as well—albeit in each case, the entries have both a different author and a different focus.

At the Constitutional Convention of 1787, Benjamin Franklin noted that in Scotland "the Barristers or Doctors" appointed the judges or "lords of Sessions." Franklin further observed, with his usual wit, that "they elect the most learned, Doctor, because he has the most business wh[ich] they may divide when he becomes a Judge."[6] The processes of judicial selection in the United States can be quite convoluted. At the federal level, all judges and justices (*justice* being the term generally used to denote judges on state supreme courts and the United States Supreme Court) are appointed by the president, with the "advice and consent" of the Senate,

which has, in the administrations of Bill Clinton and George W. Bush, increasingly taken its time before even considering the candidates.[7] Some states replicate this selection procedure; others rely on partisan or nonpartisan election or on some combination of the two systems—often dubbed the Missouri and California plans.[8]

State and federal courts are organized into numerous divisions, with most states having systems, sometimes with an extra layer or two of courts and sometimes with different nomenclature,[9] that replicate the judicial hierarchy. In that system, the United States Supreme Court is the chief appellate court over a system of thirteen lower appellate courts (United States Courts of Appeal) and ninety-four U.S. trial courts (or courts of original jurisdiction) known as United States District Courts.[10] Generally, a single judge presides over United States District Courts and other trial courts, whereas appellate courts tend to be collective bodies.[11] Although federal courts handle both civil cases (involving disputes between individuals) and criminal cases (involving prosecutions for crimes by the states), states sometimes divide their courts into civil and criminal divisions. Benjamin Franklin's hope that judges would be the cream of the crop may not always prove true, especially in state courts where judges are elected, and/or retained, on the basis of their personal popularity. Still, one might expect that American judges as a group will be at least as distinguished as, if not more so than, the wider ranks of those from whom they are drawn.

Although this set of books follows a set published about lawyers, historically, the office of judge probably preceded that of the office of lawyer. Biblical accounts of the prophet Moses[12] and King Solomon[13] (as well as earlier accounts of "judges" who served both military and judicial functions[14]) demonstrate that rulers from time immemorial have been expected to provide for the just and peaceable resolution of conflict (the Bible often likens God Himself to a judge[15]). As readers acquainted with the trial of Socrates will know, in Athens the people often acted as the judge (and jury), but again the role of the lawyerly advocate, or sophist, appears to have developed from the fact that some individuals were better able to defend themselves than were others in front of such an assemblage. In colonial America, colonial legislatures, often in conjunction with governors, served as judges long before legal training or legal advocacy was common.[16] Even political philosophers as recent as John Locke[17] and the Baron de Montesquieu (both of whom significantly influenced the American framers) made little distinction between the executive and judicial functions.[18]

Familiarity with the legal system is a prerequisite for both lawyers and judges,[19] and yet the roles can otherwise be quite dissimilar. Although lawyers sometimes assume roles as servants of the court, they are expected to engage in zealous advocacy on behalf of their clients.[20] The American

legal system has been identified as resting on a "fight theory" of justice that hearkens back to trial by combat; truth and justice are supposed to emerge from the clash of advocates passionately committed to clients on both sides of the controversy.[21]

Judges, by contrast, are supposed to act not as advocates for one or another side but as impartial observers above the fray. As a judicial oath used on the Isle of Man puts it, judges "shall do justice between cause and cause as equally as the backbone of the herring doth lie midmost of the fish."[22] Judges are likely to enter the courtroom dressed in black robes and be seated behind a partition and physically elevated at a bench above other trial participants, although this does not impress all observers equally. American political theorist Joel Barlow, who was an enemy to almost all forms of hierarchy and a friend to the French Revolution, noted in 1791, with respect to judicial customs and other forms of outward show, that:

> It is a full acknowledgment on his part [the individual in such a costume], that the government is bad, and that he is obliged to dazzle the eyes of the people, to prevent their discovering the cheat. When a set of judges on the bench take the pains to shroud their heads and shoulders in a fleece of horse-hair, in order to resemble the bird of wisdom, it raises the strong suspicion, that they mean to palm upon us the emblem for the reality.[23]

Moreover, a number of judges portrayed in this book have defied convention by refusing to wear judicial robes.

However they are perceived, unlike lawyers, judges are not expected to exhibit passion in the courtroom, nor (except in some cases of justices of the peace and very low functionaries) can they legally take fees from clients on either side. One of the problems that judges face in states that provide for judicial elections, or electoral confirmations, is that judges sometimes have to remain silent even in the face of criticisms that they would readily rebut were they directed to them as lawyers or to their clients.[24] Judges are associated with impartiality, which is in turn associated with justice. Judges, especially those at the trial level, should undoubtedly balance a commitment to justice with an understanding of when mercy is appropriate. One of the most memorable descriptions in the English language related to mercy is attributed to an individual (perhaps significantly, a woman, Portia, posing as a judge, Balthazar) serving in the capacity of a judge:

> The quality of mercy is not strain'd,
> It droppeth as the gentle rain from heaven
> Upon the place beneath. It is twice blest:
> It blesseth him that gives and him that takes.

'Tis mightiest in the mightiest, it becomes
The throned monarch better than his crown.
His scepter shows the force of temporal power,
The Attribute to awe and majesty,
Wherein doth sit the dread and fear of kings;
But mercy is above this sceptred sway,
It is enthroned in the hearts of kings,
It is an attribute to God himself;
And earthly power doth then show likest God's
When mercy seasons justice. [25]

A writer, who identified the list of judicial virtues "with the dogged unreality of a Boy Scout handbook," said that judges are expected to be "honest, wise, patient, tolerant, compassionate, strong, decisive, articulate [and] courageous."[26] John Adams wrote that "judges, therefore, should be always men of learning and experience in the laws, of exemplary morals, great patience, calmness, coolness, and attention. Their minds should not be distracted with jarring interests; they should not be dependent upon any man, or body of men."[27]

In his essay "On Judicature," England's Francis Bacon noted that "judges ought to be more learned than witty, more reverend than plausible, and more advised than confident."[28] Significantly, Bacon did not follow his own counsels and was later impeached by the parliament for his own judicial misbehavior.

Sitting on the Fine Line between Law and Politics: The Role of Judges in the United States

The judicial branch is the third of three branches of government outlined in the United States Constitution, and this placement appears to be intentional and instructive.[29] The legislative branch, elected directly by the people and subject to relatively short terms (two years for members of the House of Representatives and six years for members of the Senate, who were, until adoption of the Seventeenth Amendment, appointed by their state legislatures), was expected to be the most powerful, exercising legislative powers in general and the "power of the purse" in particular. The executive branch, headed by a president indirectly elected to four-year terms and now limited to two full terms by the Twenty-second Amendment, was described in Article 2 of the U.S. Constitution and was invested with the "power of the sword." The judicial branch of the federal government, whose members are appointed by the president with the advice and consent of the Senate and serve for life terms, was listed last and was defended by advocates of the new

Constitution on the basis that its members would exercise the mere "power of judgment."[30] Significantly, Article 3 is the sketchiest of the three distributing clauses in the Constitution. It specifies only the existence of the Supreme Court and a chief justice and leaves—as Franklin D. Roosevelt's "court-packing" plan would later show[31]—the total number of justices, the system of lower federal courts, and the relationship between state and federal courts to be worked out by subsequent practice and legislation.

The very fact that Alexander Hamilton thought that it was necessary to defend the role of the judiciary under the new Constitution against anti-Federalist criticisms suggests that the role of judges is not without ambiguity in a democracy. The primary anomaly results from the fact that, because they are appointed "during good behavior" or, essentially, for life terms, judges fit uneasily into a representative system committed to majority rule,[32] albeit more comfortably with the doctrine of a constitutional government of separated powers and checks and balances. This anomaly was heightened when in *Marbury v. Madison* (1803), Chief Justice John Marshall and his Court claimed not only the power, reaffirmed by subsequent judges and justices, to interpret laws (so-called statutory interpretation) but also the power to void laws that judges believed to be contrary to the U.S. Constitution (the power of judicial review).[33] This development is arguably a key ingredient to constitutional supremacy, but the line between constitutional supremacy and judicial supremacy can be a fine one. Presidents as diverse as Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and Ronald Reagan have from time to time questioned whether judges have exceeded constitutional mandates in interpreting the Constitution.[34] In his First Inaugural Address, after acknowledging that Supreme Court judgments needed to be accepted in individual cases, Abraham Lincoln went on to say:

> At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.[35]

A scholar's or politician's attitude toward the judiciary and its occupants is frequently shaped by that scholar's or politician's perception of the role that the judiciary will play or is playing. Thus, in attempting, with apparent success, to persuade his friend James Madison of the value of adding a bill of rights to the new Constitution, Jefferson wrote persuasively from France on behalf of an independent judiciary:

> 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 hands 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. In fact, what degree of confidence would be too much for a body composed of such men as Wythe, Blair, and Pendleton? On characters like these the "civium ardor prava jubentium" [popular passion for corrupt desires] would make no impression.[36]

When subsequently faced with a judiciary stacked by his Federalist opposition, however, Jefferson referred to the judiciary as a "'corps of sappers and miners' working to undermine federalism."[37] As president, Jefferson thought he had the responsibility of making his own independent decisions in regard to matters of constitutional interpretation.[38]

The debate about the appropriate role of judges continues to this day and is the subject of extensive commentaries by judges themselves.[39] Both judges and scholars of judicial process have generated literature focusing on the respective merits of judicial activism and judicial restraint,[40] and it is often difficult to separate one's assessment of a judge's life and work from that judge's decisions related to the two elected branches and to the policies that the judge's decisions appear to have facilitated. Moreover, legal realists long ago cast doubt on the image of judges as detached observers; the image of detachment has been furthered by advocates of critical legal studies, scholars who emphasize the role of concepts of race and gender, as well as law-and-economics scholars.[41] Although few scholars appear to have been convinced that judicial judgments were chiefly affected (as has sometimes been charged) by what judges ate for breakfast, the realists and succeeding generations of critics have succeeded in deflating the view of complete judicial objectivity.[42] Moreover, the behavior of individual judges may be further put to the test in appellate courts that exercise collective decisionmaking.[43]

Americans often draw lines between what is within the legal sphere and what is in the political sphere.[44] Although judicial realists have argued with some persuasiveness that the two spheres cannot be kept completely separate, there is arguably virtue in attempting to see that the courts are removed from at least some of the "political" influences that are associated with members of the other two branches. It is not considered appropriate to "lobby" a judge, except perhaps through the formal mechanisms of *amicus curiae* (friend of the court) briefs. Similarly, at the federal level, judges do not run for election or reelection and have no "constituents" other than justice and the public as a whole. As a result, however, judges sometimes

are omitted from discussions of American political leaders. A notable and otherwise fine book lists every member of Congress that has ever served, every president and vice president, and every cabinet officer but has no listing of judges or justices.[45]

Current Treatments of American Judges: Second Fiddle to Litigators

There are, to be sure, some books that include a number of Supreme Court justices among influential American leaders. Indeed, some books are exclusively devoted to biographies of each of the U.S. Supreme Court justices.[46] These books, like the study of American courts in general,[47] arguably overemphasize the role of appellate courts and their judges over trial courts and their judges.[48] As in the case of lawyers, there are some notable biographies of individual judges—albeit not nearly as many as there are of lawyer litigators and United States Supreme Court justices,[49] many of whom have had multiple biographies written about them. Still, there are few attempts at collective treatments of judges, aside from those who have served on the United States Supreme Court.[50]

In popular culture, the combatant lawyers generally appear much more dramatic than the judges who serve as their umpires.[51] Apart from *First Monday* and *The Court,* both relatively short-lived recent television dramas that purported (but, especially in the first case, failed rather miserably) to model themselves on decisionmaking in the United States Supreme Court, I know of only one contemporary television drama, *Judging Amy,* that focuses, in large measure, on a judge. In this case she is a juvenile court judge whose home life usually proves more interesting than her decisions.[52] By contrast, there are literally scores of such programs, from *Perry Mason* through *Matlock*, *Law and Order*, *Ally McBeal*, *JAG* (about the Judge Advocates General Corps), *Philly*, and of course *Rumpole of the Bailey,* that focus on lawyers.[53] As in real-life trials,[54] lawyers are frequently heroes of novels (consider Harper Lee's classic *To Kill a Mockingbird*), movies, and plays, but judges rarely are.[55] There is a relatively recent variety of television program, epitomized by Judge (Joseph) Wapner, Judge Judy (Sheindlin), and Judge (Joe) Brown, that portrays judges making decisions and dishing out lots of advice in small claims matters that litigants have presumably allowed to be televised in attempts to gain their allotted fifteen minutes of fame. I am probably not the only one who suspects that, as in academic politics, the rhetoric and drama are so great, and arguably not representative of judging in general, precisely because the stakes are so small.[56]

Choosing the Judicial Greats: Neither Scientific nor Arbitrary

These reflections on the need for greater knowledge of noteworthy judges have led in large part to the formulation of this book. No single volume, or set of volumes, can redress the balance. I hope, however, that this set can at least point to judges in a variety of different courts who have made important contributions to the American system of justice.

In many ways, these volumes take *Great American Lawyers* as their template, but I hope I have profited from editing the first work in preparing the second. As with that work, the central problem has been identifying those judges most worthy of inclusion.[57] There is an extensive literature on the subject of rating U.S. presidents and Supreme Court justices, which I reviewed in the introduction to *Great American Lawyers*,[58] and some literature on ranking lawyers, but very little has been published on ranking other judges. The problem is further complicated by the fact that judges who serve within a single state (especially a small one), or even within a single federal judicial circuit, are unlikely to get the same kind of attention as members of the United States Supreme Court, whose decisions affect the entire nation.

I began by attempting to formulate a list of about 100 judges. As in the case of the *Great American Lawyers* volumes, I realized that twenty-five years of study of American constitutional law had left me with knowledge of many United States Supreme Court decisions and Supreme Court justices but with few other known starting points. I knew, of course, of Judge Learned Hand, of Benjamin Cardozo's reputation as a trial judge before he joined the United States Supreme Court, of a number of famous lawyers such as George Wythe and Edmund Pendleton who became judges, and of judges such as James Horton and John Sirica who had demonstrated courage in famous cases (the case of the Scottsboro Boys and the Nixon tapes case). I also knew a number of contemporary judges such as Griffin Bell, Rose Bird, Robert Bork, Richard Posner, and Frank Easterbrook, in some cases (like Bird's and Bork's) for controversies surrounding their appointments and/or retention and in others (like Posner's) for their extrajudicial writings. A recent article demonstrates that law school casebooks tend to focus disproportionately on a small number of appellate judges, with Judges Richard Posner and Frank Easterbrook being the most cited contemporary lower appellate judges and with Benjamin Cardozo, Fred Friendly, and Learned Hand still getting a disproportionate share of citations from earlier eras.[59]

As in the case of the previous work, it is therefore not surprising that I found that many other scholars, whether they were political scientists, historians, or law professors, knew little more about state and lower court fed-

eral judges than I did. This required that I come up with a plan for identifying judges who would be most worthy of inclusion in this book.

After reviewing the judges that William Draper had included in his work on *Great American Lawyers*, I spent several weeks combing through lists of judges in the World Catalog (a computerized database of more than 40 million records) on my university's library web site and at various web sites such as amazon.com and barnesandnoble.com, which along with ebay.com have served as subsequent sources of books for my own essays on lesser-known figures. I also looked at books dealing with American constitutional history and with famous American trials[60] as well as such volumes as *Unlikely Heroes* that focused on judges from particular time periods. From there, I put together the names of judges whose names appeared most frequently, following up by reading shorter sketches, when I could find them, in the *American National Biography*[61] and elsewhere.

After putting together this list, I sent surveys to about 150 scholars whom I had identified, many from my earlier research on lawyers. I asked scholars to indicate which judges they would recommend, which they would not recommend, and which were unknown to them and to return their responses in preaddressed and stamped envelopes. I also asked respondents to identify up to twenty-five judges that they considered the most outstanding in American history. I gave respondents a list of Supreme Court justices deemed in other surveys to have been "great" who would be included,[62] but I specifically asked those whom I surveyed not to include other Supreme Court justices unless they believed they merited inclusion on the basis of their careers prior to their appointment to the United States Supreme Court. I also asked respondents to identify judges who were not on the list but who they thought should have been so included.

Not surprisingly, many respondents knew only a handful of judges listed. Still, a surprising consensus developed around a key group of judges. All seventy-seven respondents who knew Benjamin Cardozo believed that he should be included. Similarly, there were seventy-five positive recommendations and no negative ones for Learned Hand. Seventy-three of seventy-four scholars who responded on Richard Posner voted positive, with a single respondent specifically noting that its author was "uncertain of his jurisprudence" (but perhaps familiar with his extrajudicial writings). Other top vote getters included Thomas M. Cooley, William Cranch, Frank Easterbrook, Jerome Frank, Henry Friendly, John Bannister Gibson, William Hastie, Frank M. Johnson Jr., James Kent, Hans Linde, Robert Livingston, John J. Parker, Theophilus Parsons, William Paterson, Spencer Roane, Lemuel Shaw, Robert John Traynor, St. George Tucker, Arthur Vanderbilt, John M. Wisdom, and Skelly Wright. Such individuals also were frequently cited on the list of the top twenty-five judges. Few respondents attempted

to list the top twenty-five judges, but of those who did, results appeared to confirm the importance of the judges listed above. The individual nominated most frequently (nine times) as the top judge was Learned Hand.[63]

There is special difficulty in objectively ranking contemporaries or individuals who served as judges but who are primarily associated with other positions. Thus, the votes on Kenesaw Mountain Landis—who is chiefly known for his work as a baseball commissioner—were split. Similarly, there were split assessments of Rose Elizabeth Bird (presumably with positive votes coming chiefly from liberals and negative votes coming primarily from conservatives), Robert Bork (presumably with positive votes coming chiefly from conservatives and negative votes coming primarily from liberals), Clement F. Haynsworth Jr., Constance Baker Motley, and others. Occasionally, a scholar would respond with exasperation, as in the case of a Texas respondent who noted that he had never heard of a Texas judge on my first list—a judge who, not surprisingly, did not make the final cut.[64]

Although the votes to recommend clearly exceeded those not to recommend in the case of Judge Roy Bean, many scholars were obviously concerned that Bean's notoriety as a judge stemmed in part from qualities of prejudice and quick decisionmaking that do not generally reflect positively on the bench.[65] Ultimately, the threshold proved relatively low. I ended up including all judges who received at least five more positive votes than negative. I also gave a good look at any judge who was independently nominated by two or more respondents. Despite my initial intention not to include individuals who had been described in the *Great American Lawyers* book, I ultimately decided to include such individuals as William Hastie, John Marshall, Edmund Pendleton, and George Wythe who had clearly distinguished themselves in both capacities. I also added at least another dozen names on the basis of nominations that I received.

I know that there have been many great judges and justices in American history, especially those who have served at the state level and who have not written autobiographies sharing or touting their own lives or accomplishments, who are not in this book. I have made an effort to be as fair minded and as objective as I could and to tap into as much wisdom from other professors as I could in choosing entries for this book. Although I tried to make selections fairly and rationally, I make no pretense that the choices have been completely scientific, and I would welcome surveys by other individuals with better statistical training in such matters and wider contacts than I.

As in the case of the *Great American Lawyers* book, it is particularly difficult to find a proportional number of outstanding women and minority judges, not because of any lack of talent within either group but because the legal profession had barely even begun opening up to either group until well

into the twentieth century.[66] As in the last volume, I hope to have provided some balance by including shorter essays on outstanding, and/or newsworthy, individuals who did not make the top 100 list but whose lives and stories will be of interest to readers. I trust that, taken together, the entries in this book will be representative, albeit not exhaustive, of the types of individuals who have achieved greatness serving on the American bench in a variety of state and federal venues. I also aimed for as much geographical diversity as I could get, attempting to include a number of judges from the early American western territories as well as from more established venues.

Judging as an Honorable Calling Essential to the Perpetuation of Constitutional Government

I have known relatively few judges in my lifetime. I am a political scientist rather than an attorney, so I have met most of the judges with whom I have been acquainted through my experience as a mock trial coach rather than as a result of real cases in which I was a participant. Those judges that I know have been good examples of American values. Similarly, I have found many of the stories of the judges in this work to be inspiring. I continue to believe deeply in the importance of an independent judiciary to the perpetuation of constitutional government in the United States. I also continue to favor a system of executive appointment and legislative confirmation (although I am concerned about the current confirmation process and do wish that senators would avoid the politics of delay that have characterized their actions in both the Clinton and current Bush administrations) to life terms like the one in use at the national level. I will be pleased if these volumes widen public knowledge about, and appreciation of, individuals who have served as judges in a variety of courts, trial and appellate, state and national. I will be even more pleased if this work persuades individuals contemplating legal careers or judicial service that these can be highly honorable callings and that they can have a positive effect through such service on the perpetuation of this great constitutional republic and its principles.

John R. Vile
Middle Tennessee State University
17 September 2002

Notes

1. John R. Vile, ed., *Great American Lawyers: An Encyclopedia*, 2 vols. (Santa Barbara, Calif.: ABC-CLIO, 2001).

2. William Draper Lewis, *Great American Lawyers*, 8 vols. (Philadelphia: John C. Winston, 1907).

3. Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France*, 7th ed. (New York: Oxford University Press, 1998), 21. The Mencken quotation is cited in a footnote.

4. See Donald Dale Jackson, *Judges* (New York: Atheneum, 1974), 36–61.

5. Abraham, *The Judicial Process*, 98–99, notes that in France judges follow a different career path than lawyers and that being a judge "is not viewed as a reward for legal excellence or renown as it is in both Britain and in the United States."

6. Max Farrand, ed., *The Records of the Federal Convention of 1787*, 4 vols. (New Haven, Conn.: Yale University Press, 1966), 1:128.

7. Arlen Specter, "Let's Agree on a Timely Basis to Break the Judicial Nominations Gridlock, the Senate Needs to Vote on Schedule," *Legal Times*, 8 July 2002, 8.

8. See Abraham, *The Judicial Process*, 20ff. In recent years there has been a variety of books that have examined judicial nomination and selection processes. See, for example, Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* (Lanham, Md.: Rowman and Littlefield, 1999); Stephen L. Carter, *The Confirmation Mess: Cleaning Up the Federal Appointment Process* (New York: Basic Books, 1994); John Massaro, *Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations* (Albany: State University of New York Press, 1990); and Norman Vieira and Leonard Gross, *Supreme Court Appointments: Judge Bork and the Politicization of Senate Confirmations* (Carbondale: Southern Illinois University Press, 1998).

There is continuing debate about the need for appointees to the United States Supreme Court to have prior judicial experience. After reviewing the list of notable justices, including Chief Justice John Marshall, who had not served in prior judicial positions, Felix Frankfurter argued that such experience was unnecessary. He contended that "greatness in the law is not a standardized quality" and that "judicial experience is not a prerequisite for that Court" (Walter F. Murphy and C. Herman Pritchett, *Courts, Judges, and Politics: An Introduction to the Judicial Process, 4th ed.* [New York: Random House, 1986], 163). The issue of prior trial court and judicial experience is addressed in "Litigators as Judges" in Vile, *Great American Lawyers*, 2:493.

9. Thus, in the state of New York, the Supreme Court, which is divided into twelve districts, is the highest trial court, whereas the highest appellate court in the state, which would most readily correspond to the United States Supreme Court, is called the Court of Appeals. See Daniel Kramer, "New York," in Herbert M. Kritzer, ed., *Legal Systems of the World: A Political, Social, and Cultural Encyclopedia*, vol. 3 (Santa Barbara, Calif.: ABC-CLIO, 2002), 1149–1152.

10. Abraham, *The Judicial Process*, 151–269.

11. Thus, a single judge typically presides over a United States District Court case, whereas United States Circuit Court judges typically sit in three-judge panels, and there are nine members of the United States Supreme Court (a chief justice and eight associates). This is one of the reasons I think it is important to have a volume about great judges that includes individuals from both kinds of courts. The skills that a judge or justice might exercise in collective decisionmaking, where

compromise and interpersonal relationships with colleagues can be extremely important, may be somewhat different than those exercised by a judge making decisions on his or her own, albeit with the knowledge that such decisions may later be reexamined by higher courts.

12. Exodus 18:13–26 describes how Moses's father-in-law, Jethro, advised him to divide the judicial duties he had assumed over the people with other wise men, taking only the most difficult cases for himself. This passage certainly prefigures the modern division between trial and appellate courts.

13. I Kings 3:16–28 describes how King Solomon ascertained a child's natural mother by threatening to divide the child between two women, both of whom claimed the infant, by cutting him in half. King Solomon was able to identify the birth mother as the one who opposed this grisly solution. 2 Samuel 15:1–4 further describes how Absalom, the son of King David (against whom he would soon lead an uprising), curried popular favor by telling people that he knew that their causes were just and that he wished he could be appointed as a judge on the king's behalf to dispense justice to them.

14. This arrangement, described in the biblical book of Judges, eventually led to near anarchy. See John R. Vile and Andrew W. Foshee, "Domestic Politics in the Book of Judges," *Journal of Political Science* 16 (Spring 1988): 33–42. Notable judges included Gideon, Samson, and, significantly, at least one woman, Deborah. After the judges came the kings (including David and Solomon, mentioned above) who, like the judges before them, exercised both military and judicial functions.

15. Thus, in a passage immediately preceding the one that describes the wolf dwelling with the lamb and the calf and the lion (the basis for early American paintings of the "Peaceable Kingdom") and generally understood by Christians to be a description of the Messiah, Isaiah 11:3–5 (King James Version) notes that "he shall not judge after the sight of his eyes, neither reprove after the hearing of his ears: But with righteousness shall he judge the poor, and reprove with equity for the meek of the earth: and he shall smite the earth with the rod of his mouth, and with the breath of his lips shall he slay the wicked. And righteousness shall be the girdle of his loins, and faithfulness the girdle of his reins."

16. Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989), 18.

17. Locke referred to the three parts of government as the legislative, the executive, and the federative, the latter dealing with matters of foreign policy, rather than as the legislative, executive, and judicial. See John Locke, *Two Treatises of Government*, ed. Peter Laslett (New York: New American Library, 1965), 409–411, paras. 243–243 of *The Second Treatise*.

18. Montesquieu divided the powers of government into "the legislative; the executive in respect to things dependent on the laws of nations; and the executive in regard to matters that depend on the civil law." See Baron de Montesquieu, *The Spirit of the Laws*, 2 vols., trans. Thomas Nugent (New York: Hafner Press, 1949), 1:151–152.

Francis Bacon once stated that "the twelve Judges of the realm are as the twelve lions under Solomon's Throne. They must be lions, but yet lions under the throne,

being circumspect that they do not check or oppose any points of sovereignty." Quoted in Catherine Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke* (Boston: Little, Brown, 1957), 294. On the same page, Bowen notes that Edward Coke disagreed. In contrast to Bacon, Coke argued that "the King is under God and the law!"

19. Surprisingly, however, the judicial branch is the only one for which the U.S. Constitution does not establish age, citizenship, and residency requirements. For an explanation of this omission, see John R. Vile and Mario Perez-Reilly, "The U.S. Constitution and Judicial Qualifications: A Curious Omission," *Judicature* 74 (December-January 1991): 198–202.

20. For a comparison of the central ethical standards that have been recognized by the American Bar Association for lawyers and judges, see Thomas R. Van Dervort, *American Law and the Legal System: Equal Justice under the Law*, 2d ed. (Albany, N.Y.: West Legal Studies, 2000), 18–19.

21. Jerome Frank, "The 'Fight' Theory versus the 'Truth' Theory," in Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton, N.J.: Princeton University Press, 1949), 80–102.

22. Curtis Bok, *Backbone of the Herring* (New York: Alfred A. Knopf, 1941), 10.

23. "A Letter to the National Convention of France," in *The Political Writings of Joel Barlow* (1796; reprint, New York: Burt Franklin, 1971), 189. I have modernized spellings by substituting *s* where appropriate for *f*.

24. Traciel V. Reid, "The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White," *Judicature* 83, no. 2 (September-October 1999): 68–77. This norm might change with the United States Supreme Court's recent decision in *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002), in which it invalidated a canon of judicial conduct in Minnesota that prohibited a candidate for judicial office from "announcing his or her views on disputed legal or political issues."

25. See William Shakespeare, *The Merchant of Venice*, act 4, scene 1, in *The Riverside Shakespeare* (Boston: Houghton Mifflin Company, 1974), 276–277.

26. Jackson, *Judges*, 7.

27. Matthew Spalding, ed., *The Founders' Almanac: A Practical Guide to the Notable Events, Greatest Leaders and Most Eloquent Words of the American Founding* (Washington, D.C.: The Heritage Foundation, 2002), 165.

28. *The Essays or Counsels, Civil and Moral of Francis Bacon*, ed. Samuel Harvey Reynolds (Oxford: The Clarendon Press, 1890), 365. On the same page, Bacon went on to note the admonition "Cursed is he that removeth the landmark." Bacon commented: "The mislayer of a mere stone is to blame; but it is the unjust judge that is the capital remover of landmarks, when he defineth amiss of lands and property. One foul sentence doth more hurt than many foul examples; for these do but corrupt the stream, the other corrupteth the fountain. . . ."

29. I have drawn much of this analysis from my book *A Companion to the United States Constitution and Its Amendments*, 3d ed. (Westport, Conn.: Praeger, 2001), but I believe the analysis generally reflects contemporary scholarly understandings of the U.S. Constitution.

30. This terminology was used in Alexander Hamilton's *Federalist* No. 78. See Alexander Hamilton, John Jay, and James Madison, *The Federalist* (Washington, D.C.: Robert B. Luce, 1976), 504.

31. Frustrated by judicial decisions invalidating many of his proposed New Deal programs, President Roosevelt had presented a plan by which one member would be appointed to the Supreme Court for every justice over the age of seventy who did not resign. This plan was ultimately defeated, and there is still debate as to what impact the proposal had on the Supreme Court's so-called switch-in-time-that-saved-nine, in which it began to give relatively wide berth to legislative decisions regarding economic regulations. The Court's turnabout was first reflected in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). See William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995).

32. Alexander Bickel referred to this as the "counter-majoritarian difficulty." See Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2d ed. (New Haven, Conn.: Yale University Press, 1986), 16–22.

33. 1 Cranch (5 U.S.) 137 (1803).

34. John R. Vile, "The President and the Supreme Court," in *Guide to the Presidency*, 2d ed., ed. Michael Nelson (Washington, D.C.: Congressional Quarterly, 1996), 1351–1404, esp. 1372–1380.

35. Quoted in Walter F. Murphy, James E. Fleming, and Sotirios A. Barber, *American Constitutional Interpretation*, 2d ed. (Westbury, N.Y.: The Foundation Press, 1995), 317.

36. Letter from Thomas Jefferson to James Madison, dated 15 March 1789, cited in Alpheus Thomas Mason, *Free Government in the Making: Readings in American Political Thought*, 4th ed. (New York: Oxford University Press, 1985), 288. Analyzing this quotation, David N. Mayer, *The Constitutional Thought of Thomas Jefferson* (Charlottesville: University Press of Virginia, 1994), noted that all three of the judges Jefferson cited were state judges (*Great American Judges* contains entries on both Pendleton and Wythe) and that Jefferson's chief disagreements with judges centered on their interpretation of states' rights. It should be noted that in the Declaration of Independence, Jefferson's indictments against the English king had included accusations that "he has obstructed the administration of justice, by refusing his assent to laws for establishing judicial powers. He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." See Vile, *A Companion to the United States Constitution*, 7.

37. Mayer, *The Constitutional Thought of Thomas Jefferson*, 257.

38. Jefferson's view, identified as "departmentalism," is described in Murphy, Fleming, and Barber, *American Constitutional Interpretation*, 269–270.

39. For a bibliography that covers writings on judging by judges from the publication of Benjamin Cardozo's *The Nature of the Judicial Process* (1921) through 1993, see Shirley S. Abrahamson, Susan M. Fieber, and Garbielle Lessard, "Judges on Judging: A Bibliography," *St. Mary's Law Journal* 24 (1993): 995.

40. See, for example, Christopher Wolfe, *Judicial Activism: Bulwark of Freedom or*

Precarious Security? (Pacific Grove, Calif.: Brooks/Cole Publishing Company, 1991); Stephen C. Halpern and Charles M. Lamb, eds., *Supreme Court Activism and Restraint* (Lexington, Mass.: Lexington Books, 1984); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: The University of Chicago, 1991); and Jeremy Rabkin, *Judicial Compulsions: How Public Law Distorts Public Policy* (New York: Basic Books, 1989). Literally dozens of books, including the Murphy, Fleming, and Barber volume previously cited, have tackled the related question of the methods that judges and justices should use to interpret the Constitution and the extent to which they should be guided by constitutional language and principles and the extent to which they should be able to look for guidance to other sources of inspiration and instruction. There is also continuing debate about the degree to which other branches of government should share constitutional interpretation with the United States Supreme Court. See, for example, Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, N.J.: Princeton University Press, 1999).

41. See Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, "Inside the Judicial Mind," *Cornell Law Review* 86 (May 2001): 778. Judges may well behave differently when they serve on panels, as on the United States Supreme Court, than when they make judgments individually.

42. For a recent article that uses surveys to conclude that judges, in this case federal magistrate judges, are subject to "cognitive illusions that can produce systematic errors in judgment," see Guthrie, Rachlinski, and Wistrich, "Inside the Judicial Mind," 777. For an excellent book that attempts to analyze the degree to which the United States Supreme Court decision in *Bush v. Gore* (2001) and decisions in other election-related cases were based on political, as opposed to legal, considerations, see Howard Gillman, *The Votes That Counted: How the Court Decided the 2000 Presidential Election* (Chicago: The University of Chicago Press, 2001).

43. The most provocative book on the subject of judicial decisionmaking in a group context remains Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1971). For discussion of the difficulty that one highly successful and brilliant man had in adjusting to the group deliberations of the United States Supreme Court, see H. N. Hirsch, *The Enigma of Felix Frankfurter* (New York: Basic Books, 1981).

44. See, for example, Eugene W. Hickok and Gary L. McDowell, *Justice vs. Law: Courts and Politics in American Society* (New York: The Free Press, 1993).

45. *American Political Leaders, 1789–2000* (Washington, D.C.: CQ Press, 2000).

46. See, for example, Clare Cushman, ed., *The Supreme Court Justices, Illustrated Biographies, 1789–1995*, 2d ed. (Washington, D.C.: Congressional Quarterly, 1995); Melvin I. Urofsky, ed., *The Supreme Court Justices: A Biographical Dictionary* (New York: Garland Publishing, 1994); and *Justices of the United States Supreme Court* (New York: Macmillan Reference USA, 2001). For essays on the current Supreme Court justices, see Barbara Perry, *"The Supremes": Essays on the Current Justices of the Supreme Court of the United States* (New York: Peter Lang, 2001); for an account of an earlier Court, see Charles M. Lamb and Stephen C. Halpern, *The*

Burger Court: Political and Judicial Profiles (Urbana: University of Illinois Press, 1991); for a much earlier Court, see Scott Gerber, *Seriatim: The Supreme Court before John Marshall* (New York: New York University Press, 1998). Although most of the above accounts are scholarly, the Court sometimes becomes the object of journalistic vitriol. See, for example, Drew Pearson and Robert S. Allen, *The Nine Old Men* (Garden City, N.Y.: Doubleday, Duran and Company, 1937), a book written at the time of the court-packing crisis.

For more scholarly analyses, see *Justices of the United States Supreme Court* and Leon Friedman and Fred L. Israel, eds., 5 vols., *The Justices of the United States Supreme Court: Their Lives and Major Opinions* (New York: Chelsea House Publishers, 1995–1997). G. Edward White has written a fine book entitled *The American Judicial Tradition: Profiles of Leading American Judges* (New York: Oxford University Press, 1976), but, despite the implication of its title, this volume deals mostly with judges who have served on the United States Supreme Court. Also see The Oliver Wendell Holmes Devise, *History of the Supreme Court of the United States*, 12 vols. (New York: Macmillan, 1971 and years following), and Kenneth Bernard Umbreit, *Our Eleven Chief Justices: A History of the Supreme Court in Terms of Their Personalities*, 3d ed. (New York: Harper and Brothers, 1938).

Many contemporary reference books to the United States Supreme Court include short biographies of Supreme Court justices. See, for example, Abraham, *Justices, Presidents, and Senators,* and Lisa Paddock, *Facts about the Supreme Court of the United States* (New York: H.W. Wilson Company, 1996). For an interesting twist on the topic, see J. Myron Jacobstein and Roy Mersky, *The Rejected: Sketches of the 26 Men Nominated for the Supreme Court but Not Confirmed by the Senate* (Milpitas, Calif.: Toucon Valley Publications, 1993).

47. Frank*, Courts on Trial*, 222–224. Frank, 222–223, noted that: "In legal mythology, one of the most popular and most harmful myths is the upper-court myth, the myth that upper courts are the heart of court-house government. This myth induces the false belief that it is of no importance whether or not trial judges are well-trained for their job, fair-minded, conscientious in listening to testimony, and honest. In considerable part, this belief arises from the fallacious notion that the legal rules, supervised by the upper courts, control decisions. But the false belief about the unimportance of the trial judge's activities is also encouraged by another tenet of the upper-court myth, i.e., that the upper courts on appeal can and will safeguard litigants against the trial judge's mistakes concerning the facts. I think that by now the reader knows how delusional that notion is. . . ."

48. In a thoughtful article, John Philip Reid attempted to account for the near fixation on biographies of United States Supreme Court justices. He noted that such justices are preferred in part because scholarly writers typically focus on constitutional law and in part because it is so much easier to gather materials about them. Reid also noted that like lower federal judges, the justices who are likely to receive the most attention are those such as Wilson, Story, Shaw, Hughes, Stone, Frankfurter, and so on who are associated with law schools. See "Biographies of Titans: Holmes, Brandeis, and Other Obsessions: Commentary beneath the Titans," *New York University Law Review* 70 (June 1995): 653–676.

49. Reid, "Biographies of Titans," 654, noted that "we in the United States may expect that by the next decade we will have published each year as many biographies of Oliver Wendell Holmes as are published in Great Britain of Horatio Nelson."

50. There are a few notable exceptions, but each appears to focus on judges who have served during a particular time period, on a particular court, or in the midst of an extraordinary crisis. Thus, Jack Bass wrote *Unlikely Heroes: The Dramatic Story of the Southern Judges of the Fifth Circuit Who Translated the Supreme Court's Brown Decision into a Revolution for Equality* (New York: Simon and Schuster, 1981). Jack Peltason focused on U.S. district judges during the civil rights era in *Fifty-eight Lonely Men: Southern Federal Judges and School Desegregation* (Urbana: University of Illinois Press, 1971). Timothy S. Huebner recently published a fine work that deals with southern justices in the nineteenth century; his subjects include Spencer Roane, John Catron, Joseph Henry Lumpkin, John Hemphill, Thomas Ruffin, and George W. Stone. See *The Southern Judicial Tradition: State Judges and Sectional Distinctiveness, 1790–1890* (Athens: University of Georgia Press, 1999).

A number of books have covered the history of a particular state supreme court or the justices that have sat on it. See, for example, James W. Ely Jr., ed., *A History of the Tennessee Supreme Court, 1796–1998* (Knoxville: The University of Tennessee Press, 2002); John W. Green, *Lives of the Judges of the Supreme Court of Tennessee, 1796–1947* (Knoxville: Archer and Smith, 1947); J. Edward Johnson, ed., *History of the Supreme Court Justices of California*, 2 vols. (San Francisco: Bender-Mose Company, 1963–1966); Gerald T. Dunne, *The Missouri Supreme Court: From Dred Scott to Nancy Cruzan* (Columbia, Mo.: University of Missouri Press, 1993); Walter W. Manley II, E. Canton Brown Jr., and Eric W. Rise, *The Supreme Court of Florida and Its Predecessor Courts, 1821–1917* (Gainesville, Fla.: University Press of Florida, 1999); Thomas R. Morris, *The Virginia Supreme Court: An Institutional and Political Analysis* (Charlottesville, Va.: University Press of Virginia, 1975); Russell K. Osgood, ed., *The History of the Law in Massachusetts: The Supreme Judicial Court, 1692–1992* (Boston: Supreme Judicial Court Historical Society, 1992); Charles H. Sheldon, *The Washington High Bench: A Biographical History of the State Supreme Court, 1889–1991* (Pullman, Wash.: Washington State University Press, 1992); and G. S. Rowe, *Embattled Bench: The Pennsylvania Supreme Court and the Forging of a Democratic Society, 1684–1809* (Newark: University of Delaware Press, 1994). Also see G. Alan Tarr and Mary Cornelia Aldis Porter, *State Supreme Courts in State and Nation* (New Haven, Conn.: Yale University Press, 1998).

There are a few reference books that contain short biographies of state and/or lower federal judges. These include Harold Chase, Samuel Krislow, Keith O. Boyum, and Jerry N. Clark, *Biographical Dictionary of the American Judiciary* (Detroit: Gale Research Group, 1976); Bicentennial Committee of the Judicial Conference of the United States, *Judges of the United States* (Washington, D.C.: U.S. Government Printing Office, 1983); a very helpful web site for federal judges entitled "Judges of the United States Courts," available at <http://air.fjc.gov/history/judges_Ffrm.html>; and Diana R. Irvine, ed., *The American Bench: Judges of the Nation, 2001/2002,* 12th ed. (Sacramento, Calif.: Foster-Long, 2001), which includes only living judges. Some states have complements, as in *California Courts and*

Judges (Santa Ana, Calif.: James Publishing, 2002). David O'Brien has edited a book of essays that balance reflections by Supreme Court justices with those from other courts. See his *Judges and Judging: Views from the Bench* (Chatham, N.J.: Chatham House Publishers, 1997). Similarly, Norman Dorsen has edited a book, *The Unpredictable Constitution* (New York: New York University Press, 2002), in which a group of United States Supreme Court justices and United States appellate judges discuss a variety of contemporary topics.

Books that reflect the political thoughts of both judges and justices include Bernard Schwartz, *Main Currents in American Legal Thought* (Durham, N.C.: Carolina Academic Press, 1998), and Morton Keller, *Affairs of State: Public Life in Nineteenth Century America* (Cambridge: Belknap Press of Harvard University Press, 1977). For other collective portraits that focus chiefly on lower court judges, see Jackson, *Judges;* Joseph C. Goulden, *The Benchwarmers: The Private World of the Powerful Federal Judges* (New York: Weybright and Talley, 1974), which takes a fairly negative view of U.S. district judges; and Charles R. Ashman, *The Finest Judges Money Can Buy: And Other Forms of Judicial Pollution* (Los Angeles: Nash Publishing, 1973), in which the author's views are also quite negative.

51. The analogy is taken from Morris R. Cohen's introduction to Louis P. Goldberg and Eleanore Levenson's highly critical book, *Lawless Judges* (1935; reprint, New York: Negro Universities Press, 1969), iv.

52. An earlier sitcom, *Night Court*, featured Harry Anderson playing Judge Harry Stone, but, however comic, the role was hardly heroic. There may well be other programs about which I (because I blissfully spend far more time reading and writing books than I do viewing television) do not know.

53. I spend much of my time coaching undergraduate mock trial teams. It is probably significant that, although students play the roles of both attorneys and witnesses, outsiders play the role of judges. Similarly, in college alternate dispute resolution competitions, students play the roles of attorneys, mediators, and clients, with outsiders as judges. In moot court competition (which models appellate rather than trial advocacy), competitors play the part of attorneys with outsiders serving in the role of judges.

54. Judge Lance Ito, the trial judge in the O. J. Simpson case, gained considerable notoriety, albeit probably not much additional respect, during the trial (he was frequently featured on the *Tonight Show,* which regularly portrayed "the dancing Itos," a group of Ito look-alikes). See Milton C. Cummings Jr. and Davis Wise, *Democracy under Pressure*, 8th ed. (Fort Worth, Tex.: Harcourt Brace College Publishers, 1997), 262. In the Simpson case, however, several lawyers, including prosecutors Marcia Clark and Christopher Darden as well as defense attorneys Johnnie Cochrane, F. Lee Bailey, Robert Shapiro, and Alan Dershowitz (frequently touted as "The Dream Team"), shared, and often dominated, the limelight.

55. A noteworthy exception to the glorification of lawyers over judges is political scientist Walter F. Murphy's novel, *The Vicar of Christ* (New York: Macmillan, 1969). In the novel the lead character, Dellan Walsh, goes from being a Korean War hero to chief justice of the United States Supreme Court and eventually becomes pope. Murphy is, of course, a longtime student of the Supreme Court.

56. This observation appears confirmed by reports from my students that former major Ed Koch of New York City has presided over the program *Animal Court,* in which disputants apparently quarreled over bites that rival pets have given one another and the like.

The television series *Picket Fences* did sometimes feature a rather wise and sympathetic judge, but most loyal viewers will be more likely to remember the more humorous lawyer Wambaugh. Similarly the star of television's *Night Court* was better known for his humorous lines than for personifying justice.

I have often seen the sentiment about academic politics attributed to Dr. Henry Kissinger, but I am not sure if Kissinger was the first to make this observation.

57. This problem is inherent in almost any compilation of "tops," as, for example, in the controversy over Judge Richard Posner's recent attempt to list the 100 top public intellectuals. See Richard Morgan, "Judging Public Intellectuals," *The Chronicle of Higher Education* 48 (18 January 2002), A6, in which Morgan commented on Posner's book, *Public Intellectuals: A Study of Decline* (Cambridge: Harvard University Press, 2002).

58. See Vile, *Great American Lawyers,* xxiv–xxv, note 21. Since that time, William D. Peterson and Norman W. Provizer, eds., have published a new edition of *Great Justices of the U.S. Supreme Court: Ratings and Case Studies,* now entitled *Rating Game of the Greatest Supreme Court Justices: Polls and Case Studies* (in press). Roscoe Pound enumerated a list of top ten American judges in a book first published in 1938. In chronological order, they were John Marshall, James Kent, Joseph Story, John Bannister Gibson, Lemuel Shaw, Thomas Ruffin, Thomas McIntyre Cooley, Charles Doe, Oliver Wendell Holmes, and Benjamin Nathan Cardozo. See Pound, *The Formative Era of American Law* (Boston: Little, Brown, 1938; reprint, Gloucester, Mass.: Peter Smith, 1960), 30–31, note 2. Bernard Schwartz's *A Book of Legal Lists* (New York: Oxford University Press, 1997) also ranked judges other than those who have sat on the United States Supreme Court. Schwartz listed (on p. 131) the following ten individuals (all of whom are included in *Great American Judges*): Lemuel Shaw, James Kent, Benjamin Cardozo, Learned Hand, Charles Doe, Thomas Cooley, John Bannister Gibson, Roger John Traynor, John Appleton, and Arthur T. Vanderbilt. Schwartz's list of the top United States Supreme Court justices (p. 7) included John Marshall, Oliver Wendell Holmes, Earl Warren, Joseph Story, William J. Brennan Jr., Louis D. Brandeis, Charles Evans Hughes, Hugo Black, Stephen Field, and Roger Brooke Taney. Schwartz balanced this with a list of the "Ten Worst Supreme Court Justices" (p. 29). Leonard W. Levy, in "Lemuel Shaw: America's 'Greatest Magistrate,'" in *Seasoned Judgments: The American Constitution, Rights, and History* (New Brunswick, N.J.: Transaction Publishers, 1995), p. 357, said that "no other state judge through his opinions alone had so great an influence on the course of American law." Darien A. McWhirter, *The Legal 100: A Ranking of the Individuals Who Have Most Influenced the Law* (Secaucus, N.J.: Carol Publishing Group, 1998), focused chiefly, albeit not exclusively, on Anglo-American law. The book included eighteen United States Supreme Court justices (J. Marshall, Warren, Holmes, Brandeis, the first Harlan, Hughes, Black, Douglas, Frankfurter, Cardozo, T. Marshall, Brennan, Story, John-

son, Field, Miller, Bradley, and O'Connor), three English judges (William Mansfield, Edward Coke, and Alfred Denning), and five individuals who served on courts other than the United States Supreme Court (George Wythe, Lemuel Shaw, Thurmond Arnold, John Hemphill, and Learned Hand). Of the last five judges, however, Wythe is cited chiefly for his role as a law professor and Arnold for his work as a regulator.

For an incomplete "Dishonor Roll" of over forty judges who were convicted of crimes and/or removed from office, see David Stein, *Judging the Judges: The Cause, Control and Cure of Judicial Jaundice* (Hicksville, N.Y.: Exposition Press, 1974), 22–32.

59. Miti Gulati and Veronica Sanchez, "Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks," *Iowa Law Review* 87 (May 2002): 1141–1212. This article, although primarily focusing on the "superstar" effect, by which casebook writers select opinions from judges who are already well known, also found (p. 1187) positive correlations between the number of times that judges' opinions are cited in casebooks and such factors as the number of years they had served on the bench, whether they had at one time served as law professors (and were thus presumably more attuned to what other professors were seeking), the eliteness of the law schools from which they had graduated, presence on the Seventh Circuit (which was found to have set very high standards for opinion writing, especially since Judge Posner's appointment to that bench), and the number of dissents they had written. The authors also suggested (p. 1192) that a quality factor might be at work. They suggested that decisions are more likely to be used for casebooks that reflect "Innovativeness, Analytical Depth, Clarity, Well-Articulated Facts, Good Hypotheticals, Use of Law and Economics [which is based on a relatively understandable analytical framework], Use of Humor, and [Minimal] Use of Footnotes." Ultimately, however, the authors concluded that a few superstars are quoted in today's casebooks, as in those of the past, much more than one would expect simply on the basis of the quality of their opinions.

60. Again, many such volumes were listed in Vile, *Great American Lawyers*. See note 37 on pp. xxvii–xxviii.

61. As in the *Great American Lawyers* set, this work proved indispensable for *Great American Judges*. See John A. Garraty and Mark C. Carnes, eds., *American National Biography*, 24 vols. (New York: Oxford University Press, 1999). Dumas Malone, ed., *Dictionary of American Biography*, 10 regular and 10 supplemental volumes (New York: Charles Scribner's Sons, 1963), also proved to be useful.

62. The list was taken from a now somewhat dated 1970 survey, found in Abraham, *Justices, Presidents, and Senators*, 369–370, of sixty-five scholars. It includes the following names: John Marshall, Joseph Story, Roger Taney, Louis Brandeis, Harlan Fiske Stone, Benjamin Cardozo, John Marshall Harlan I, Oliver Wendell Holmes Jr., Charles Evans Hughes, Hugo Black, Felix Frankfurter, and Earl Warren (I think it is likely that Cardozo and Holmes would be included in *Great American Judges* on the basis of their lower court services, even had neither ever served on the United States Supreme Court). To this list I added the two most recent Supreme Court justices, Warren Burger and William Rehnquist, hoping that they

would give some insights into the modern Supreme Court. Respondents to my survey persuaded me to include Stephen Field, who arguably deserved inclusion for work he did as a California Supreme Court justice prior to joining the United States Supreme Court, and John Marshall Harlan II for the quality of his legal reasoning. Many other scholars listed other contemporary justices that they thought should be on the list. I have great respect for the Supreme Court and trust that future scholars seeking assessments will recognize that my own selection of Burger and Rehnquist was based simply on their roles as chiefs and not an attempt to weigh the respective merits of their jurisprudence against other members of the contemporary Court, many of whom have outstanding records in their own rights.

63. Hand's preeminence undoubtedly stems in part from Gerald Gunther's magisterial biography *Learned Hand: The Man and the Judge* (New York: Alfred A. Knopf, 1994), but the fact that Gunther's biography is so compelling stems not only from Gunther's fine prose but also from the character of his subject.

64. The "judge" was Judge K. K. Leggett, whose title of "judge" turned out to be largely honorific since he served as a federal referee in bankruptcy rather than as a judge in a regular court. Leggett is profiled in Vernon Gladden Spence, *Judge Legett of Abilene: A Texas Frontier Profile* (College Station: Texas A and M University Press, 1977).

65. There is arguably a certain ambiguity in the term *great* that sometimes allows it to be confused with *notorious*. Those familiar with *Time* magazine's annual selection of "Man of the Year" will recognize that those who have had the greatest impact in any given year have not always been those who have contributed the most positively to society.

Political scientist Paul Weber, in a perceptive review of *Great American Lawyers* in *The Law and Politics Book Review* 11 (December 2001), 601, noted that the subjects of that work were "clearly not the unsung heroes of American law." Although some of the judges in these companion volumes, *Great American Judges*, are known in part by their extrajudicial writings, I believe that current standards of expected judicial conduct make it far less likely that the individuals in this work are "self-promoters." Current canons of judicial ethics make it far more difficult for judges to do this than for attorneys. Moreover, judges such as Judge Wapner or Judge Judy, who achieve their fame on television, are unlikely to be rated highly by their real-life colleagues.

66. I addressed this issue in *Great American Lawyers*, xxiv–xxv in notes 30 and 31. For a book that addresses the attitudes of sitting black judges, see Linn Washington, ed., *Black Judges on Justice* (New York: The New Press, 1994). Jessie Carney Smith, ed., *Black Firsts: 2,000 Years of Extraordinary Achievement* (Detroit: Visible Ink Press, 1994), lists the following African American firsts among judges (see pp. 167–169): William Henry Hastie (1904–1976), first black on the federal bench; Irving Charles Mollison (1899–1962), first black on a United States Customs Court; James Benton Parsons (1911–1993), first black on a United States District Court in the continental United States; Constance Baker Motley (1921–), first black woman judge; Robert Frederick Collins (1931–), first modern black on a federal court in the Deep South; Joyce London Alexander (1949–), first black woman

judge in Massachusetts; Amalya Lyle Kearse (1937–), first black woman on a United States Court of Appeals; Odell Horton (1929–), first black federal judge in Tennessee; Reginald Walker Gibson (1927–), first black on a United States Claims Court; Ann Claire Williams (1949–), first black woman judge on the federal bench in Chicago; and Thelton Eugene Henderson (1933–), first black chief judge in the United States District Court of Northern California. Columbus Salley listed three African Americans among the top 100 influential African Americans: Thurgood Marshall (# 22), Marion Wright Edelman (#93), and Clarence Thomas (#98). See *The Black 100: A Ranking of the Most Influential African-Americans, Past and Present* (New York: Carol Publishing Group, 1993).

Dawn Bradley Berry's book, *The 50 Most Influential Women in American Law* (Los Angeles: Lowell House, 1997), included the first woman judge (a justice of the peace), Esther McQuigg Morris (1814–1902); a Kansas City municipal court judge, Tiera Farrow (1880–1971); Florence Ellinwood Allen (1884–1966) from the United States Sixth Circuit Court of Appeals; United States Supreme Court Justices Sandra Day O'Connor and Ruth Bader Ginsburg; and California's Rose Elizabeth Bird for a total of six judges, two of whom sit on the United States Supreme Court. McWhirter, *The Legal 100*, included a number of women among the most influential individuals who have shaped Anglo-American law, but the only judge among them is Supreme Court Justice Sandra Day O'Connor, listed as ninety-eighth.

Lois Duke Whitaker, *Women in Politics: Outsiders or Insiders*, 3d ed. (Upper Saddle River, N.J.: Prentice Hall, 1999), p. 289, noted that "although the percentages of female judges have yet to meet those of female lawyers, their numbers show a significant increase in the last decade." From 1980 to 1997, the number of women serving as federal judges jumped from 5.4 to 17.4 percent; as state supreme court justices, from 3.6 to 20 percent; as state trial judges, from 2.4 to 9 percent; and as lawyers, from 8 to 25 percent. Most dramatic was the jump in the percentage of women receiving law degrees, up from 30 percent in 1980 to 47 percent in 1997 (p. 280). Whitaker noted that in 1997, seven states had no women supreme court justices, twenty-two had one woman justice, fourteen had two women justices, and seven had three women justices (p. 284).

For an excellent discussion of women on the bench, see "Women on the Bench: A Different Voice?" *Judicature* 77, no. 3 (November-December 1993).

It is interesting that one of the female judges I was able to locate in the nineteenth century was "Temperance Smith," who was supposed to have been assigned by President Grant to aid Judge Isaac Parker. It turns out that Smith was the fictional creation of Georgia Di Donato in *Woman of Justice* (New York: Avon, 1980), who noted at the front of her book that "license has been taken in the portrayal of specific incidents and events to show what *might* have been, or perhaps what *should* have been."

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Those respondents whose names I know (though some titles may be missing) include many scholarly friends as well as others that I know only by reputation or as a result of publications of theirs that I have read. They are as follows: Henry J. Abraham, James Hart Professor of Government and Foreign Affairs Emeritus, University of Virginia; David N. Adkinson, Curators' Distinguished Teaching Professor of Political Science and Law, University of Missouri–Kansas City; Dean Alfange, Professor Emeritus, Political Science, University of Massachusetts, Amherst; Judge Griffin Bell (as one would expect, neither Judge Bell nor Judge Posner, cited below, voted for himself); Herman Belz, Rockville, Maryland; David Bodenhamer, Professor of History, Purdue University at Indianapolis; Stanley C. Brubaker, Department of Political Science, Colgate University; Anthony Champagne, School of Social Sciences, University of Texas at Dallas; Cornell Clayton, Department of Political Science, Washington State University; Douglas Clouatre, Department of Political Science, Kennesaw State University; Susan Coleman, Department of History and Political Science, West Texas A and M University; Clare Cushman, Director of Publications,

Supreme Court Historical Society; Professor James C. Davies, Eugene, Oregon; Derek H. Davis, Baylor University; Brannon P. Denning, College of Law, Southern Illinois University; Steve Dillard, federal appellate law clerk for Judge Daniel A. Manion; James W. Ely Jr., Milton R. Underwood Professor of Law and Professor of History, Vanderbilt University; Paul Finkelman, Chapman Distinguished Professor of Law, the University of Tulsa College of Law; Peter G. Fish, Professor of Political Science and Law, Duke University; Lorien Foote, Department of History, University of Central Arkansas; Peter J. Galie, Political Science Department, Canisius College; Scott D. Gerber, Pettit College of Law, Ohio Northern University; Michael Gerhardt, Arthur B. Henson Professor, William and Mary Law School; Richard A. Glenn, Department of Government, Millersville University; Ken Gormley, Duquesne University School of Law; Gerald Gunther, William Nelson Cromwell Professor of Law, Stanford University; Kermit L. Hall, President, Utah State University; Jennifer Harrison, Instructor, College of William and Mary; Judith Haydel, Political Science, McNeese State University; Charles Hobson, The Papers of John Marshall, Institute of Early American History and Culture, College of William and Mary; Kenneth M. Holland, Department of Political Science, University of Memphis; Morton Horwitz, Harvard Law School; J. Woodford Howard Jr., Thomas P. Stran Professor Emeritus of Political Science, Johns Hopkins University; Timothy S. Huebner, Department of History, Rhodes College; Harold Hyman, Department of History, Rice University; Herbert A. Johnson, Hollings Professor of Constitutional Law, University of South Carolina School of Law; Ronald Kahn, James Monroe Professor of Politics and Law, Oberlin College; Thomas Keck, Political Science, University of Oklahoma; Charles Lamb, Department of Political Science, SUNY Buffalo; David Langum, Cumberland School of Law at Samford University; William E. Leuchtenburg, Professor of History, the University of North Carolina at Chapel Hill; Michael Lewyn, John Marshall Law School, Atlanta, Georgia; Michael J. Lynch, Law Library Director and Professor of Law, John Marshall Law School, Atlanta, Georgia; Michael W. McConnell, Presidential Professor, University of Utah College of Law; the Honorable Gilbert Merritt, Judge, United States Sixth Circuit Court of Appeals; Walter F. Murphy, Professor of Political Science, Emeritus, Princeton University; David Neubauer, Department of Political Science, University of New Orleans; Karen O'Connor, Department of Political Science, American University; James W. Paulsen, South Texas College of Law; William D. Pederson, American Studies Endowed Chair, Louisiana State University in Shreveport; Barbara Perry, Political Science, Sweet Briar College; J. Mitchell Pickerill, Department of Political Science, Washington State University; Mark Pohlmann, Political Science, Rhodes College; Judge Richard A Posner;

John David Rausch Jr., West Texas A and M University; John P. Reid, New York University School of Law; Peter Renstrom, Political Science, Western Michigan University; James W. Riddlesperger, Political Science, Texas Christian University; Eric W. Rise, Department of Criminal Justice, University of Delaware; Don Roper, Department of History, SUNY New Paltz; William G. Ross, Professor of Law, Cumberland School of Law at Samford University; Ralph Rossum, Professor of Constitutional Law, Claremont McKenna College; John M. Scheb, Political Science, University of Tennessee, Knoxville; David Schultz, Professor, Graduate School of Public Administration, Hamline University; JoAnn M. Scott, Department of History and Political Science, Ohio Northern University; Henry B. Sirgo, Political Science, McNeese State University; M. Keith Sisken, Burger, Sisken, Scott and Goad, Murfreesboro, Tennessee; Christopher Smith, Department of Political Science, Michigan State University; Thaddeus Smith, Department of History, Middle Tennessee State University; Mitchel A. Sollenberger, Ph.D. candidate, Catholic University of America; G. Alan Tarr, State University of New Jersey Rutgers at Camden; Kathleen Uradnik, Political Science, St. Cloud State University; Melvin Urofksy, Center for Public Policy, Virginia Commonwealth University; Michael Vorenberg, Department of History, Brown University; Paul J. Weber, Department of Political Science, University of Louisville; Tinsley Yarbrough, Research Professor of Political Science, East Carolina University; and Sara Zeigler, Political Science, Eastern Kentucky University.

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ley, at the Marshall-Wythe School of Law at the College of William and Mary, provided information about a sculpture of the college's two namesakes.

Many of the scholars listed above have also contributed entries to this book. They and their credentials are listed elsewhere in this book. Each has my sincere appreciation and thanks, but none but me can be held responsible for deciding which judges should be included in this work. In order to provide for a greater diversity of views, I have not taken on as many major entries in this work as I did in *Great American Lawyers*, but I have written most of the shorter sidebar essays, often relying fairly heavily on the source or sources cited there.

Great American Judges

AN ENCYCLOPEDIA

ABRAHAMSON, SHIRLEY SCHLANGER

(1933–)

Shirley Schlanger Abrahamson
AP Photo/Andy Manis

Women used to be exceptions in the field of law, particularly as judges, and the history of women lawyers in Wisconsin is no different. In the nineteenth century, women advanced in the legal field owing to the efforts of Lavinia Goodell, who overcame de jure discrimination and exclusion. During the twentieth century, efforts by women in the legal field were mainly to gain de facto acceptance and equality. Until the 1960s, women were not seriously considered for positions in law and were mainly tolerated as legal secretaries. By the mid-1960s, however, women were becoming

more of a common sight in law schools, and by the end of the decade, the number of women lawyers in the bar began to increase. The number of women judges, however, did not increase with the same intensity as women lawyers. In 1970, Olga Bennett of Viroqua was elected judge of the Vernon County Circuit Court, and in 1978, several additional women circuit judges were appointed. In 1976, Shirley Abrahamson was appointed to the Wisconsin Supreme Court; however, for the seventeen years from 1976 to 1993, Abrahamson remained the only woman on the court. Two more female judges joined Abrahamson in 1993 and 1995, respectively, making Abrahamson the first and only woman to serve on the Wisconsin Supreme Court until 1993. She was elected to a ten-year term in 1979 and then reelected in 1989 and 1999. On 1 August 1996, she became the chief justice of the Wisconsin Supreme Court.

Before joining the Supreme Court, Abrahamson had her own private practice in Madison for fourteen years and taught at the University of Wisconsin Law School for fourteen years. Originally a New York native, she received her bachelor's degree from New York University in 1953, her law degree from Indiana University Law School in 1956, and her doctorate in juridical science from the University of Wisconsin Law School in 1962. In addition, she has received fourteen honorary doctorate degrees, and she is an elected fellow in the American Academy of Arts and Sciences and an elected member of the American Philosophical Society as well as a fellow of the Wisconsin Academy of Sciences, Arts, and Letters. She and her husband, Seymour Abrahamson, also a professor, have a son, Daniel.

With over forty years of involvement in Wisconsin law, Abrahamson has been at the forefront of the Wisconsin legal system, with the last twenty-six years in a system dominated by men. She oversees the training, practices, and court operations for approximately 500 municipal, district, and appellate court judges, as well as another 300 court employees. In addition, Abrahamson and her team set rules of professional conduct for the 18,600 licensed attorneys and the admission to the Wisconsin bar. In a 1999 discussion between Abrahamson and the editor of *The Verdict,* John Barry Stutt, regarding the future of the justice system, Abrahamson contended that judges and lawyers are beginning to recognize that the public actively participates in the work of the courts. With this in mind, Abrahamson has led the implementation of various outreach programs, including various Supreme Court and county court visitor's guides, as well as various speakers bureaus describing the court system. Abrahamson herself has assisted in the implementation of these methods and the education of the public regarding the "three pillars" of the judicial system. She referred to these as "(1) the fair and efficient adjudication of disputes and administration of justice which are the primary functions of the judicial system; (2) partnership with

the public whose confidence is essential to the work of the courts; and (3) collaboration as an independent branch of government with our partners in government." She further commented, "My task as a supreme court justice is to reach a decision resolving the dispute before us, based on the facts of the case and the law which I am charged with interpreting and applying."

To further the interpretation and collaboration effort, Abrahamson spearheaded an effort to assist the courts in defining the realm of domestic abuse. The Wisconsin Supreme Court received funding in 1995 under the Federal Court Improvement Program to assist the court system in a more prompt response to child and family services, or CHIPS (Children in Need of Protection or Services). In connection with the CHIPS project, the court system began a statewide effort, Wisconsin Families, Children, and Justice, which promoted the development of both short- and long-term approaches to family law issues.

In addition to demonstrating leadership on family law issues, the Wisconsin Supreme Court has attempted, in recent years, to discern the universal role that state judges might play in the twenty-first century. Abrahamson has encouraged the establishment of relationships beyond the national borders of the United States. She laments the paradox in the legal system in the United States, which is essentially that American lawyers have been eager to spread what Abrahamson terms the "virtues of the American legal system" even though U.S. lawyers rarely look for answers beyond the national borders. The internationalization of U.S. law firms, as well as the establishment of offices abroad, has resulted in additional international business connections and, therefore, more legal issues to consider. In her research, Abrahamson has used the concept of informed consent, which concerns the type of information patients should be given before scheduling a medical procedure, as a basis for further research regarding the difference in standards between the practice of law in the United States and abroad. She contends that the laws of a country are rooted in the history and traditions of a country, and using the 1996 case, *Gould v. American Family Mutual Insurance Company*, concerning a Wisconsin farmer with Alzheimer's disease who attacked the head nurse on his ward, as an example, Abrahamson has argued for an attention to precedents set by international cases. The Gould case provides an example, Abrahamson argued, of the failure of the U.S. court system to consider legal developments in other nations. Other nations, including Japan and Australia, have refused to hold mentally challenged individuals liable for behavior such as that exhibited by Gould. This raises the tension in U.S. tort law, however, essentially questioning whether the law's primary function should be faultfinding or victim compensation. Abrahamson contends that the courts should not assume that the adoption of a policy by one state would make that position

Georgia Bullock and the Los Angeles Women's Court

Georgia Bullock, who was born in 1879 or 1880, was California's first woman judge. A single mother of two, Bullock had attended the University of Southern California Law School when the Los Angeles Women's Court was established in 1914. She served for two years as a de facto judge and was eventually appointed in late December 1924 to the Police Court, which was transformed in 1926 to a municipal court.

Bullock, who believed that "the salvation of women must be through women" (Cook 1993, 146), lobbied for a court that would deal exclusively with the problems of women (proceedings were often closed to men who might use the facts they learned for blackmail or other nefarious purposes), and she often used her position as a woman to suggest that she was better able to understand the needs of other women than men would be. The author of an article on Bullock noted that "she rejected criticism that her group of women officers had become hardened to the unsavory case stories reported in her court. She said their 'mother-love' instinctively went out to the unfortunate female defendants whom they were encouraging to return to rectitude. In speaking to women's clubs, Bullock emphasized that many 'who have slipped and fallen can be reclaimed'" (149). The same author noted that "her policy was to place first offenders who were 'good girls' on probation, and she claimed a sixth sense in knowing which girls were good. In 1927, she and her staff arranged to find jobs or return home about 150 girls 'infected with the movie virus' who were out of funds and engaging in petit larceny or worse" (149). While using such rhetoric, Bullock also appeared to share feminist sentiments. In 1938, she taught a night class, "Women's Legal Rights in California," at the law school from which she graduated (150).

Bullock successfully ran for reelection in 1927, but the fact that she had argued that she was "'peculiarly' suited to Women's Court" made it difficult to seek advancement to other courts (Cook 1993, 151).

(continues)

the correct position, thereby making additional inquiry into the case pointless. The world, she argues, is "now our courtroom. The question confronting our courts . . . is whether we are willing to do what it takes to be world-class players."

Similarly, Abrahamson has been involved in the inquiry regarding the interdependence between science and law, particularly in the field of genetics. The impact of advances in human genetics on society and the legal system is currently under evaluation, as is the usage of deoxyribonucleic acid (DNA) technology to identify perpetrators of a crime. With increasing biotechnical advances, particularly in the field of genetics, the legal field is increasingly becoming more involved; legal foundations and resolutions

(continued)

Losing an initial election to the post, she was subsequently appointed to the Los Angeles Superior Court in 1931 and reelected the following year. One of the advertisements that she and her supporters ran asked: "With 158 men judges in the Superior Court and not a single woman—Is it not reasonable to ask for one woman judge of Georgia Bullock's ability and high ideals?" (151).

Even on that court, however, Bullock's assignments often reflected her gender. Thus, "in the 1930s she handled domestic relations cases, in the 1940s juvenile cases, and in the 1950s adoptions" (Cook 1993, 153). Bullock remained on the Superior Court of Los Angeles for twenty-five years, retiring in 1955 at the age of seventy-six. Until 1949, she was the only woman to have served on a Los Angeles court.

Bullock's work on the court was widely reported in the media, but she was unsuccessful in having either Herbert Hoover or Franklin D. Roosevelt appoint her to the federal bench. Moreover, the creation of special bureaus to deal with the problems of women and children eroded the role that Bullock had carved out as a judge of women's issues. Moreover, her strategy ultimately proved somewhat counterproductive:

> In choosing a conceptual foundation for the legitimacy of her exercise of authority, Bullock was a pragmatist. She used rhetoric that would bring her campaign funds, influential supporters, and votes. The rhetoric of gender difference served her purpose to break the male monopoly of the courts and to give her moral authority over disadvantaged women, but the rhetoric of gender sameness and equality was the only available basis for claiming scientific competence to handle legal disputes involving powerful economic interests. (Cook 1993, 155)

Although modern courts are not segregated by gender, an increasing number are presided over by women. Without pioneers like Georgia Bullock, this would not be possible.

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must be sound in both science and law in order to resolve important human problems.

In cases exploring the human condition and evidence used in trial, Abrahamson has often dissented from the majority view. For example, the Wisconsin Supreme Court upheld a 1999 circuit court ruling regarding a man in Wisconsin who had been put on probation for five years for fathering nine children by four women and not maintaining child support for any of them. The circuit court had ruled that if he had any additional children, he would be sent to jail for eight years. An uproar ensued because opponents felt that the state was intervening in the right of procreation and defining parenting as a "privilege" rather than a "right." Similarly, in terms of evi-

dence seized at a trial, the majority opinion of the court was that as long as law enforcement officials had the evidence needed from a no-knock raid, then a search warrant was unnecessary. Abrahamson argued, "The exception betrays Wisconsin's longstanding commitment to excluding illegally seized evidence from use at trial."

In considering evidence and criminality, the 1996 case of *Woznicki v. Erickson* concentrated on whether public employees are entitled to de novo judicial review. In this case, a records personnel staff member, who was not a district attorney, released information in accord with Wisconsin's open records law (Statute 19.31-.39). This case raised issues of constitutionality and the protocol of one individual's deciding to disclose privacy information. Since this case involved open records law requests for the personnel file and telephone records of Thomas Woznicki, a school district employee, and Woznicki had been the subject of a criminal investigation, the district attorney decided to release the records and notified Woznicki, who sought an injunction to prevent the release of the records. The circuit court denied his appeal, although it did order that the district attorney avoid disclosure of information should Woznicki appeal. When he did appeal, the court of appeals held that the personnel records of public employees are, by definition, already exempt from disclosure, thereby remanding the case and directing the circuit court to issue the injunction. The Wisconsin Supreme Court reviewed the case, reversed the court of appeals, and remanded the case to the circuit court, thereby arguing that the personnel records of public employees are subject to the open records law. The Supreme Court determined that individuals affected by the release of requested public records, without the option of personal review, would not be able to safeguard their privacy. Consequently, the central issue was whether the de novo judicial review considered implicit in open records law was applicable when the guarantor of the public records was not a district attorney. Abrahamson concluded that "the key to determining the status of records under the open records law is the nature of the records, not their location. . . . Records containing personal information . . . implicate the same concerns of protection of privacy and reputation," regardless of the guarantor. "Denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied."

The consideration of statutes is obviously a large part of a Supreme Court justice's work. Abrahamson compared this concept to a real-life concept:

> A statute provides simply and unequivocally that a landlord can evict any tenant who keeps a pet. Everyone, of course, knows what a pet is. Keep a pet, you can be evicted. The "pet" in question, however, turns out to be a three-inch goldfish named Tootsie, doted on by its owner the tenant and lodged in a

bowl of water. What do you, the judge, do? Evict or not? . . . If you refuse to evict, are you wrestling ambiguity from the jaws of clarity? Crossing the line from judging to lawmaking?

In practice, statutes are tested on a daily basis. In the 3 April 2001 case *Steven Theuer v. Labor and Industry Review Commission, Ganton Technologies, Inc., and North River Insurance Company* (Supreme Court of Wisconsin, case no. 00–1085), an appeal from the Racine County Circuit Court, the latter supported a decision made by the Labor and Industry Review Commission that health insurance premiums should be excluded from the calculation of an employee's average weekly wage for the determination of disability benefits, in accord with Wisconsin Statute 809.61. The dispute, therefore, in this case concerned statutory interpretation and whether the commission excluded health insurance premiums in the calculation of the weekly wage and disability benefits. Although the Department of Workforce Development excluded the cost of health insurance, Theuer appealed on the basis of this exclusion. The sole issue concerned the issue of deference; as Abrahamson and the Supreme Court agreed with Theuer that payment of health insurance premiums was invaluable to employees, the justices upheld the commission's interpretation of the statute and the words *thing of value*. This again demonstrates Abrahamson's determined approach to the interpretation of the law and, specifically, her concentration on the value of the law.

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ALLEN, FLORENCE ELLINWOOD

(1884–1966)

Florence Ellinwood Allen achieved many firsts throughout her career. She was the first female assistant prosecutor, the first female judge, and the first woman to sit on both a state supreme court and a federal court of general jurisdiction (Russ 2001, 2). In addition, she was the first woman to try a murder case and sentence a man to death, the first female chief justice of a federal circuit court, and the first woman to be considered for a Supreme Court nomination.

Florence Ellinwood Allen
Library of Congress

Before the Robe

Allen was born in Salt Lake City, Utah, in 1884 to a non-Mormon family. Her father, Clarence Emir Allen, initially moved the family there from Ohio after he was diagnosed with tuberculosis, from which he unexpectedly recovered (Tuve 1984, 4). He studied law and claimed a seat in the territorial legislature with a worker-friendly platform (5). Emir helped to draft Utah's first constitution, making it the second state to include female suffrage. He eventually became a populist U.S. senator (6). Florence Allen's mother, Corinne Tuckerman Allen, was the first female to be admitted into Smith College (Allen 1965, 9). Unwelcome in the male-dominated work sphere, educated women of the time like Allen's

mother donated their talents to a variety of social causes, including opposition to polygamy.

Allen's parents greatly valued education. She began to study Greek and Latin when she was seven (Harding 2001, 2), but Allen's first love was music. In 1904 she earned a degree in music from Western Reserve University in Ohio (Ginsburg and Brill 1995, 281) and became an accomplished pianist. Allen's father insisted that she travel to Berlin with her mother and one of her sisters (Russ 2001, 4). She stayed there for two years, studying music and German and writing musical reviews (Harding 2001, 4). She then returned to Cleveland, where she taught at a private school, critiqued music for the *Plain Dealer,* and earned a master's degree in political science and constitutional law at Western Reserve.

In 1909 she entered the University of Chicago as the only woman among 100 law students (Ginsburg and Brill 1995, 1). She ranked at the top of the class by the end of the first year (Harding 2001, 4). Her male classmates accepted her, saying she had a "masculine mind" (Russ 2001, 4). After the New York League for the Protection of Immigrants offered her employment, however, she left Chicago and enrolled at New York University (NYU). She placed second in her class when she graduated in 1913, then earned the seventh-highest score ever on the Ohio bar in 1914 (5).

While in law school, Allen also assisted in the fight for women's suffrage. She campaigned actively in Ohio, where she assisted Maud Wood Park, who headed the National College Womens' Equal Suffrage League (Ginsburg and Brill 1995, 281). Allen gave ninety-two speeches in Ohio in support of suffrage during just one of her summer vacations from law school (Russ 2001, 3). Upon graduation from NYU, she was unable to obtain employment with a law firm in Utah, so she created her own ("Florence Ellinwood Allen" 2001, 1). She rarely spoke of the blatant discrimination she faced, however.

Allen volunteered for the Cleveland Legal Aid Society. She earned a mere $875 during her first year of practice (Russ 2001, 6). In what she considered to be her most important work at the time (Harding 2001, 7), in 1916 she succeeded in arguing a case before the Ohio Supreme Court that upheld laws allowing women to vote in East Cleveland and Lakewood city elections (Russ 2001, 6).

In 1919, Allen was hired as the first female assistant prosecutor in the country. Stephen Young, Cuyahoga County head prosecutor, complimented her competence "to do a man's job" (Ginsburg and Brill 1995, 2). Allen stated that "she would do the same work men did and try every case assigned to her" (Tuve 1984, 53). Her private practice was going so well at this point that she took a pay cut by accepting the position (Russ 2001, 6).

She only held the job a year before a constitutional amendment gave her the career opportunity she sought.

"Should I Call You 'Miss' or 'Your Honor'?"

The Nineteenth Amendment not only allowed women to vote but also made them eligible to run for office (Kravitch 1999, 5). Allen decided to run as an independent for the Court of Common Pleas in Cleveland because it was "an opportunity to do much good from a woman's point of view" (Russ 2001, 6). She received much support from her fellow suffragists, Mayor Tom L. Johnson, and the local press (Gleisser 1999, 13S). The *Cleveland Press* ran a sample ballot on its front page with "large black arrows pointing to the name of Florence Allen" (Tuve 1984, 56). Although only one-third of eligible women voted nationally that year (56), Allen overwhelmingly defeated her nine male opponents, becoming the first woman in the United States to be elected to a court of general jurisdiction.

Allen immediately faced conflict over her job responsibilities. The other eleven judges began talks about establishing a Court of Domestic Relations and placing her in charge (Harding 2001, 7). She promptly refused: "I didn't see why I should sit on the Domestic Relations bench, when I'm an old maid, and there are so many fathers on the Bench" (Russ 2001, 6). She also supported women in her juries, telling *American Magazine*, "The women, so far as I can tell, make just as good jurors as the men" (Harding 2001, 9).

When she arrived, more than 6,000 cases were backlogged (Tuve 1984, 56). Victims were being kept in jail for months "for their protection," while those accused were out on bail. During her two years on the court, she sped up the case system, presiding over 892 cases (Russ 2001, 7). Higher courts reversed her only three times. Allen always maintained a professional image in the courtroom. Attorneys were unsure as to whether to call her "'Miss,' or 'Mrs.' or 'Ma'am,' or 'Your Honor'" (Tuve 1984, 57). She insisted upon "Judge Allen." She always wore her robes, and her sessions promptly began at nine in the morning.

Eight of her cases were murder trials. One in particular, the "Black Hand" case, received nationwide attention. Frank Motto was accused of robbing and killing two men. Members of his "gang" had been found guilty in the past of robbery and murder (Allen 1965, 55). Two "unwholesome-looking characters" entered the courtroom as the case began. A search revealed concealed weapons in their possession, and they were jailed. Allen and the jury (containing two women) then received a threatening letter stating that "The day Motto dies, you die" (56). Several black hand-shaped outlines had been drawn on the letter, dubbing the Motto trial the "Black

hand" case (Russ 2001, 7). "I was too young to be scared," Allen recalled in her autobiography. "It amused me" (Allen 1965, 56). She proceeded with the trial with police protection. The jury found Motto guilty of murder in the first degree "without recommendation of mercy," and Allen sentenced him to death (56).

Allen also oversaw a case involving the alleged criminal activities of a fellow judge. William McGannon, chief justice of the Cleveland Municipal Court, was tried for perjury that was allegedly committed during two former murder trials, one of which resulted in a hung jury and the other in a verdict of not guilty (Allen 1965, 58). McGannon was found guilty in Allen's court. She silenced his protests, calmly telling him that he received a "perfectly fair trial" (Tuve 1984, 59). "Judges cannot think that they are above the law," she scolded as she sentenced him (Allen 1965, 62).

Moving On Up

In 1922, Allen ran for the Ohio Supreme Court and beat out six candidates for the vacant position ("Florence Ellinwood Allen" 2001, 1). She was the first woman to run for a position on a court of last resort. She valued the contribution she was making for women, but she somewhat resented the publicity being the first brought her (Allen 1965, 64).

She faced tension upon arriving at her new position. James Robinson, a fellow judge who did not support women's working outside the home, was "particularly outraged" by her election (Allen 1965, 79). She claims they later became "good friends." She had a knack for telling when her colleagues were uncomfortable with her presence: "I was aware of a certain uneasiness among the men and all at once I had an inspiration. 'While I don't smoke, myself,' I said, 'I shall be delighted if any of you will do so whenever he wishes.' There was a sigh of relief. One judge drew out his pipe, another lighted a cigar, and we proceeded under less strain" (79). Just as in law school, she eventually won the respect of her male colleagues.

Allen's election assured a liberal majority on the court. During her time there, the Ohio Supreme Court issued progressive opinions favoring workers' rights, proportional voting, protest rights, and mandatory psychiatric exams for insane defendants (Russ 2001, 8). Her liberal position alienated the Daughters of the American Revolution (DAR), a former supporter, which at one point put her on its "black list."

When she first arrived at court, her colleagues attempted to embarrass her with a case about "whether sex has value" (Massie 1995, 2). *Scott v. State of Ohio* involved the safety director of Youngstown, who was charged with accepting bribes in return for protection of criminals. A woman "testified that he had made improper proposals to her and promised to overlook

her family's sale of liquor if she would go riding with him and 'show him a good time'" (Tuve 1984, 98). The defendant claimed this was not "sufficient evidence" because he did not solicit "any valuable or beneficial thing." In her opinion, Allen wrote, "The test of value must necessarily be the desire of some person or persons, not necessarily of most persons or all persons, for the thing in question. The court holds that the defendant solicited 'a valuable thing' of Katherine Orchowsky" (*Scott v. State of Ohio*). Allen's colleagues assumed that she would be unable to last through the case. "She was a single woman and wasn't supposed to know anything about sex," said Harry Franken, spokesperson for the Ohio Supreme Court (Massie 1995, 2). Once again, she broke through the stereotype and proved to her male co-workers that she could do her job.

Allen ran for reelection in 1928, winning by a landslide with a majority of more than 350,000 voters (Russ 2001, 9). She served a total of eleven years on the Ohio court (Ginsburg and Brill 1995, 3) before Franklin D. Roosevelt (FDR) offered a promotion.

Almost at the Top

When Judge Smith Hickenlooker of the United States Sixth Circuit Court of Appeals—which covers Michigan, Kentucky, Tennessee, and Ohio (Russ 2001, 2)—died in 1933, many feminists began to campaign for Allen's appointment to the federal bench (9). Carrie Chapman Catt sent a letter recommending Allen to the head of the Democratic Party's Women's Division. Ironically, Allen's primary opposition came from the National Association for the Advancement of Colored People (NAACP). While on the Ohio Supreme Court, Allen had ruled against a black woman (in *Weaver v. Board of Trustees of Ohio State University*) who claimed she was being discriminated against by being placed in a separate house from that of her classmates. Citing *Plessy v. Ferguson*, Allen ruled that "purely social relationships cannot be regulated by law and that no constitutional right had been violated" (Allen 1965, 91).

The Senate unanimously confirmed Allen in 1934. "Florence Allen was not appointed because she was a woman. All we did was to see that she was not rejected because she was a woman," said Atty. Gen. Homer Cummings. The *New York Times* printed, "[f]or better or worse, woman is taking her place alongside of man in American public life" (Russ 2001, 10, citing an editorial, "Place Aux Dames," *New York Times*, 8 March 1934, 18). Allen was the first woman to reside on a federal court of general jurisdiction ("About Florence Ellinwood Allen" 2001, 1).

Once again, Allen faced hostility from her co-workers. One judge "went to bed for two days" in protest (Allen 1965, 95). Three judges refused to

congratulate her on her appointment (Ginsburg and Brill 1995, 5). When court was in session, the male judges dined each day at the University Club, which excluded women. Allen ate lunch alone in her office. She was also forced to use the public restroom for weeks before she received the authority to adopt her own bathroom (Kazaks 1994, 559).

The most significant case of Allen's career came during her time at the Sixth Circuit. Eighteen local electric companies protested the constitutionality of FDR's New Deal contribution to Tennessee, arguing that "the real purpose of the [Tennessee Valley Authority] was to sell electric power" (Tuve 1984, 117), not "to control the flooding of the river," as the Tennessee Valley Authority Act claimed. The power companies sought an injunction against implementation of the act as well as the further building of dams in the area (Allen 1965, 106). Allen, joined by two district judges, acted as the presiding judge in *Tennessee Electric Power Company v. The Tennessee Valley Authority* (Tuve 1984, 118).

The plaintiffs provided experts who argued that rural areas did not demand power because "there were only 'low-rental houses, shacks and Negro cabins, where neither the landlords nor the tenants are willing to install electricity'" (Tuve 1984, 121). The case consisted of more than 1,000 exhibits and seven weeks' worth of testimony (Allen 1965, 109). Ultimately, Allen found that "the TVA did not conspire to destroy private utilities, the municipalities were not coerced to buy its power, that the private companies would not be forced to lower rates, and, most importantly, that the function of the TVA was flood control and navigation and that power production was incidental" (Tuve 1984, 121). Allen offered to let her two fellow judges revise and sign her opinion, but they insisted that her name should head the decision (Allen 1965, 111). Allen proceeded to read all 8,000 words of the decision in court (Tuve 1984, 121). The United States Supreme Court affirmed her judgment (*Tennessee Electric Power Company* 1939).

Allen remained on the court until she retired in October 1959 ("About Florence Ellinwood Allen" 2001, 1). She became the first female chief justice in 1958 (Ginsburg and Brill 1995, 3).

Ouch . . . Oh, There's the Ceiling!

Allen unsuccessfully ran as an independent for the U.S. Senate in 1926, campaigning for international peace (Ginsburg and Brill 1995, 3). Four years later, she ran for the House of Representatives under a Democratic bid but lost that election as well. Talk began after her appointment to the Court of Appeals of a potential Supreme Court nomination. FDR did not appear to hold Allen's gender against her, and Allen and Eleanor Roosevelt

were somewhat acquainted (Allen 1965, 110). Support came from feminists as well as local newspapers. The National Association of Women Lawyers and the National Federation of Business and Professional Women's Clubs were once again behind her (Tuve 1984, 123). FDR had an opportunity to nominate four justices from 1937 to 1939 (123). Allen was suggested for every opening. She was ultimately passed over, however, for Hugo L. Black, Stanley Reed, Felix Frankfurter, and William O. Douglas (125). Most had more political experience than did Allen. By contrast, "Allen's best qualification was her judicial experience; Roosevelt did not make appointments on the basis of judicial experience" (126). Ultimately, Allen was not overly optimistic of her future as a Supreme Court justice, accurately predicting that "a Supreme Court appointment 'will never happen to a woman while I am living'" (Ginsburg and Brill 1995, 3). Sandra Day O'Connor was appointed fifteen years after Allen's death (Russ 2001, 11). President Truman also considered and rejected her (11). Truman decided not to nominate her because fellow justices reported that a woman "would make it difficult for them to meet informally, with robes, and perhaps shoes, off, shirt collars unbuttoned and discuss their problems and come to a decision" (quoted in Tuve 1984, 64).

Was Allen a Feminist?

While Allen was establishing a career in a "man's world," feminism divided into two factions. One, which called for an Equal Rights Amendment, advocated absolute equality between the genders. The other, which Allen supported, advocated protective legislation for women to compensate for physical differences between the genders.

Allen firmly believed that "women functioned in a separate sphere" (Tuve 1984, 96). Many historians call her a paradox, for her beliefs hardly matched her insistence on being given the same responsibilities as her male colleagues. She believed women added a "moral backing" to the legal process (60). Although her contemporaries considered her a liberal progressive, she called herself a "liberal conservative" (Russ 2001, 10) and identified herself in a *Time* magazine article as "middle-of-the-roadish" (Tuve 1984, 126). Conservative women's organizations, including (at least for a time) the DAR and the Young Women's Christian Association, supported her.

Allen believed that her male colleagues would ultimately accept her if she proved that she could handle her job. "I had learned that judges who were at first opposed to women officials accepted us when we handled our work steadily and conscientiously" (Allen 1965, 96). In her autobiography, Allen recalled a particular case where she tripped down a flight of stairs and lost one and a half teeth. She was prepared to hear a case the next day

when the presiding judge said, "You can't possibly sit; we'll have to postpone the case" (98). She insisted upon hearing the case immediately and ultimately won some respect from Judge Hicks, who told her she had written "a damn fine opinion" on the case.

Sexism ran high outside as well as inside the courtroom, particularly in the press, which commented for more than thirty years on the fact that she had her hair bobbed. The only time Allen was publicly dismayed at a newspaper's words, however, was shortly after her loss of an appointment to the United States Supreme Court. After FDR appointed Douglas, the *Daily Washington Merry-Go-Round* carried a column that stated Allen was passed over because her "[case] record perhaps is worse than any other prominent federal judge's" (Allen 1965, 112). Allen had been reversed only once while on the United States Court of Appeals and twice on the Ohio Supreme Court. "They meant to kill me forever," Allen said of the newspaper in her autobiography (113).

Despite her support for protective legislation, she fought for the elimination of the double standard against women. She once said, "It's so worthwhile being a judge, because, if I make good, I can help prove that a woman's place is as much on the bench, in City Council, or in Congress, as in home" (Russ 2001, 8). She spoke out against the "double burden" of paid work and housework (Ginsburg and Brill 1995, 3). She saw no contrast in her desire to maintain her femininity and her ambitions. She once told a group of young women, "Neither forget nor remember that you are a woman, paradoxical as that sounds. Ask no sex favors, and don't be masculine in dress or manners . . . unconscious femininity is an aid in public life" (3).

Allen's desire for pacifism blended well with her feminism. She initially began to support the antiwar movement through her speeches advocating the League of Nations. She became active in human rights through the International Bar Association ("About Florence Ellenwood Allen" 2001, 1). Her pacifism was somewhat limited, as she did support World War I, but the loss of both of her brothers from the war solidified her commitment to the antiwar movement (Russ 2001, 8). She became convinced that World War I would never have happened "if women had had the vote." When the League of Nations failed, she later supported the United Nations and the Court of International Justice (Allen 1965, 122). Ultimately, human rights became a central issue for Allen, as it is for many feminists.

Conclusion

Today, approximately 25 percent of all federal judges are female (Russ 2001, 2). But during most of Allen's time on the bench, she was the only one. The next woman to be appointed was Burnita Shelton Matthews, who be-

Annette Abbott Adams (1877-1956)

Like Florence Allen, Annette Abbott achieved a number of legal firsts for American women. After obtaining her bachelor's degree from the University of California (she had previously earned a degree from the California State Normal School at Chico) and teaching, she became one of the first women in her state to become a high school principal. When she earned her law degree from the University of California in 1912, she was one of the first women to do so. She subsequently became the first woman to serve as an assistant U.S. attorney and the first to be a U.S. attorney (serving in the northern district of California). She was the first woman to serve as an assistant to the U.S. attorney general, and she was the first woman to preside over an appellate court in California.

Born in Prattville, California, in 1877, Abbott took the last name of Mortin Adams, whom she married in 1906, although the two were childless and divorced. After graduating from law school, she joined Marguerite Ogden in a law partnership, and in a case defending a client accused of aiding "white slavery," or prostitution, she so impressed the opposing counselor, U.S. attorney John Preston, that he extended an offer to her to become one of his assistants. Pres. Woodrow Wilson appointed her as a U.S. attorney in 1918, and she served in 1920 as an assistant attorney general before returning the next year to private practice. As a government attorney, she helped successfully argue for the constitutionality of the Eighteenth Amendment in the case of *Dillon v. Gloss* (1921).

Her support for Franklin D. Roosevelt was rewarded by her appointment as a spe-

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came the first female federal district judge fifteen years after Allen's appointment (10). In 1920, when Allen was first elected to a court, only eighty-four of 6,500 lawyers in Ohio were women—1.3 percent (6). As the "First Lady of the Law, " Allen literally paved the way for women in the legal system.

Women have acknowledged her accordingly. In 1948, female graduates of NYU's law school began the Florence Allen Scholarship Fund (Allen 1965, 144). NYU also presented Allen with the Albery Gallatin Award (the first to be awarded to a woman) in 1960 (146). In 1993, the Ohio Supreme Court added a portrait of Allen to its collection (Suddes 1993, 1).

Allen wrote a number of books. *This Constitution of Ours* was considered to be "a course of good citizenship" appropriate for immigrants and others unfamiliar with the U.S. Constitution (Cook 1981, 7). *The Treaty as an Instrument of Legislation* demonstrated her intense interest in international affairs, which focused primarily on the abolition of war (Allen 1952, 121). *To Do Justly*, her 1965 memoirs, tells of her unique life in a simple and somewhat detached manner.

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cial counsel to U.S. attorney general Homer C. Cummings, where she was again successful in litigation, this time in recovering land that had been fraudulently obtained from the government. After Adams was unsuccessful in obtaining a position on the federal judiciary, California governor Culbert J. Olson appointed her to preside over the California Court of Appeals in 1942. She was elected to a twelve-year term in that post the same year and remained there until her retirement in 1952. She died in Sacramento in 1956.

As both a lawyer and judge, Adams often had to battle gender stereotypes. Like other female attorneys of the time, she was often referred to as a "Portia" (after the Shakespearean character in *The Merchant of Venice*) or dismissively referred to as a "girl" (Horton). Once when opposing prosecutors asked jurors whether it would prejudice their case if they had to ask some "nasty questions" in the presence of a female attorney, Adams rose to the occasion by asking the jurors if they would be prejudiced if she had to ask such "nasty questions" in the presences of (male) counselors who were so young (Horton). Although she was a strong supporter of woman's suffrage, she apparently played down her role in public so as not to hinder her chances for political advancement.

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Many scholars have questioned why Allen never married or became a mother. Allen never seriously entertained such questions. She was influential because of the untraditional roles she took in society, not the traditional ones. Allen accomplished her job with confidence and precision. She broke through barriers in order to prove her worth and did so seemingly with little effort.

Allen died from heart failure on 12 September 1966 at the age of eighty-two (Russ 2001, 12). During her life, she succeeded against the odds with ambition, intelligence, common sense, and a talent for succinctness.

Angela White

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Esther McQuigg Morris: The Nation's First Woman Judge (1814-1902)

The first woman in the United States who served in a judicial capacity appears to have been Esther McQuigg Morris of Wyoming—also the first state to extend voting rights to women. Born in Peru, Illinois, McQuigg was orphaned and later widowed before marrying John Morris and migrating to Wyoming. Morris was a milliner who was not trained as a lawyer but who had helped gain passage of the law granting the vote to Wyoming women. In 1870 the commissioners appointed Morris to replace P. S. Barr, the justice of the peace for South Pass City, Wyoming, after he sarcastically suggested that if women could vote, they might as well take his office. Morris's first decision was a case in which she recused herself from deciding whether Barr's claim to the office, which he then decided he wanted back, was valid.

Morris's husband, John Morris, a saloon keeper, was apparently even more opposed to her office than was Barr. When her husband disrupted her proceedings, she fined him for contempt of court and sent him to jail. A book noted that her motto was "justice first, then after that the law" (Morello 1986, 220). Morris is also reported to have admonished lawyers quarreling before her with the words, "Behave yourselves, boys" (220).

Although she served for less than a year, Morris's tenure was widely reported. From a slab bench in her rough log cabin, she performed numerous marriages and tried over seventy cases about a variety of matters in over eight months of service. She eventually had to swear out a warrant for assault and battery against her husband, and after they then separated, she gave up her job and moved to Laramie, Wyoming, where she continued to lobby for equal rights for women (Berry 1997, 50). A lawyer described her work positively: "To pettifoggers she showed no mercy, but her decisions were always just" (50). Morris described her own contributions as a justice of the peace as follows: "Circumstances have transpired to make my position as Justice of the Peace a test of women's ability to hold public office and I feel that my work has been satisfactory, although I have often regretted that I was not better qualified to fill the position. Like all pioneers, I have labored more in faith and hope" (quoted in Morello 1986, 221).

Morris, regarded in her adopted state as the Mother of Equal Rights, has been memorialized by Wyoming by the erection of a nine-foot bronze statue in Statuary Hall in the U.S. Capitol Building and by another statue near the Wyoming capitol in Cheyenne (Berry 1997, 51).

Only a few other women in the United States served as judges in the nineteenth century, and barriers continued long thereafter. When Susie M. Sharp became chief justice of North Carolina in 1975, a journalist asked, "What if she were forced with trying a case of rape? Wouldn't that be too much for her delicate sensibilities?" Sharp replied in a letter to a newspaper: "In the first place, there could have been no rape had not a woman been present, and I consider it eminently fitting that one be in on the 'pay-off'" (quoted in Morello 1986, 242).

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AMES, SAMUEL

(1806–1865)

Samuel Ames
Library of Congress

Samuel Ames was chief justice of Rhode Island and Providence Plantations from 1856 until shortly before his death in 1865. He was instrumental in establishing the importance of the role of the judiciary as a branch of government and strongly articulated the Whig position that the power of the chief executive in government is limited. Additionally, in his capacity as court reporter, he set the standards for court reporting that would make possible precedent sharing among state appellate courts.

Chief Justice of Rhode Island and Providence Plantations Samuel Ames illustrates the importance of state supreme court justices and other state judges. Samuel Ames served as a Whig link between Federalist chief justice of the United States John Marshall and Republican chief justice of the United States William Howard Taft. Marshall fashioned the power of judicial review for the Supreme Court in *Marbury v. Madison* (1803), much to the chagrin of Pres. Thomas Jefferson. A century and a half later, native New Englander and former president William Howard Taft argued against Theodore Roosevelt's notions of judicial recall and stewardship theory of the presidency. Ames preceded Taft in lamenting the threat that too much democracy could pose to the judiciary and so to a free society. An examination of Ames's thought that promoted an anti-executive ideology in the

period to which Arthur Schlesinger referred as "the Age of Jackson" makes it clear why the label Whig was applied to Ames's thinking.

Sociologically and politically Ames embodied how the Whigs were largely the heirs of the Federalist party and the precursors of the Republican party. He was an Episcopalian, a faith that Federalists disproportionately shared and that Republicans disproportionately share today; and he was the offspring of a wealthy merchant, a not uncommon circumstance for a Federalist two centuries ago or a Republican in modern times. Like Whig legislator and future Republican president Abraham Lincoln, Ames worked as a corporation lawyer for railroads. The scholarly Ames even coauthored a major book on corporations and promoted the idea that the United States should be thought of as a corporation. In the context of the nineteenth century, where the concept of the municipal corporation was promoted in legal circles, this was not such a radical notion.

Samuel Ames was born on 6 September 1806 to Mr. and Mrs. Samuel Ames Sr. in Providence, Rhode Island. He received his education first in public schools, which originated in New England, and later at Phillips Academy in Andover, Massachusetts. The able student entered Brown University at the age of thirteen in 1819 and earned a bachelor's degree in 1823.

He spent two years reading law in the office of Gen. Samuel W. Bridgham and studied for a year at the first law school founded in the United States, the Litchfield Law School, located in Connecticut (Magrath 1998, 304). He was admitted to the Rhode Island bar in 1826, and demand for his services was so great that he had to open a branch office in Boston.

Although his practice was lucrative, the scholarly Ames found the work tedious and was better suited to a position in which he could utilize his finely honed writing and political skills. The marital life of Samuel Ames had an interesting connection to his political life. His brother-in-law, Thomas Dorr, an advocate of universal suffrage and like Ames a member of the Rhode Island bar, was a major nemesis of Ames, who—being an orthodox Whig partisan—was fearful of the possible leveling effects of democracy. Nonetheless, Ames married Mary Throop Dorr in 1838, and together they happily reared offspring Mary, Sullivan, William, Edward, and Samuel in Providence (Magrath 1998, 305).

Both Ames and Dorr, as befit well-born New Englanders, were active in politics. But most members of the upper strata in Rhode Island viewed Thomas Dorr—who maintained that all white men, even those who were not property owners, should be granted the right to vote as was being done in the states that joined the Union following its formation by the original thirteen states—as a traitor to his class. Samuel Ames served on the city

council of Providence, as speaker of the Rhode Island House of Representatives, and on numerous commissions. He wrote numerous tracts, under the pseudonym of *Town Borne*, that attacked the expansion of suffrage (Magrath 1998, 306). Controversy over the expansion of the franchise was hardly unique to Rhode Island in the first half of the nineteenth century. At the New York state constitutional convention of 1821, a ferocious debate ensued over whether the franchise should be granted for the purpose of election of state senators to those who were not freeholders. The convention finally decided that the franchise would be extended (Stedman 1979, 53–54).

Another matter on which Ames and Dorr disagreed was how the constitution that would be established in Rhode Island would empower the governor. Dorr largely wrote the People's Constitution, which provided for three strong branches of government. Ames vigorously supported the adoption of the work of the Law and Order Convention, which produced a document that "was eventually adopted" and "did not embrace the doctrine of strict separation of powers" (Conley 1999, 302). In order to appreciate the differing perspectives of these two former Phillips Academy schoolmates on executive power, one has to bear in mind that the impact of the presidency of Andrew Jackson, with its emphasis on a strong presidency and the concomitant empowerment of common people through expansion of the franchise, was still reverberating throughout the nation. Dorr advocated mass enfranchisement, whereas Ames dreaded its potential leveling effects, the more prevalent view among well-read and politically active individuals of Ames's and Dorr's social class.

C. Peter Magrath noted the high point of the conflict between Ames and Dorr in the following passage: "The quartermaster general of the Rhode Island militia, Ames was one of the leading defenders of the state arsenal at the Dexter Training Grounds in Providence when his brother-in-law Thomas Dorr attempted to seize it on the night of May 17, 1842" (1998, 313). Dorr was leading an effort to install an entirely new system of government in Rhode Island ("Dorr, Thomas Wilson" 1998, 138).

The scholarly bent and influence of Samuel Ames are demonstrated by the fact that he pioneered as chief justice of Rhode Island an idea that became diffused throughout the nation—the high-quality publishing of appellate court decisions. Ironically, Ames—who did so much to develop a high standard of reporting appellate court decisions—came under fire for his reporting in the case of *Robert H. Ives v. Charles T. Hazard, et al.* Ames had begun his service on the Rhode Island Supreme Court in 1856 and was sworn in as reporter of decisions of the court on 3 April 1857. Hazard petitioned the General Assembly of Rhode Island to take action against Ames, whom he accused of libeling him in his reporting of the case (*Remarks of Hon. Samuel Ames* 1859, 5). Not surprisingly, Charles T. Hazard had also

been unhappy with the disposition of the case to which he had been a party by the Rhode Island Supreme Court. Samuel Ames, in prepared remarks, responded to the attack that the appropriate venue for such a petition was the judiciary of the state, not the legislature. Additionally, he (Ames) was now "the object of . . . a gross libel. . . ." This "was a libel, laid upon the desk of every member of the Assembly, in which these accusations against me were made" (8). A joint committee of the General Assembly of Rhode Island unanimously exonerated Ames on 10 February 1859 (*Speech of Hon. Joseph M. Blake* 1860–1869?, 6–7). A case that Ames decided in his first term on the Rhode Island Supreme Court played a pivotal role in his being labeled by legal historians "the Great Chief Justice" (Magrath 1998, 83). In the case the chief justice stated that the power of the governor under the constitution, which had been drafted by the Law and Order Convention and adopted in 1843, amounted to nothing. Associate Justice George A. Brayton and Associate Justice Sylvester G. Shearman, both of whom had served as delegates to the convention, aided Ames in his research in *Taylor v. Place*. Ames ratiocinated that since the *chief* executive power of the state was vested in the governor, clearly the bulk of the executive power was not vested in the office. There was no such limitation with the courts, as the judicial power with no limitations was lodged by the constitution in the courts. The constitution adopted in 1843 clearly elevated the status of the Supreme Court, which previously only had a statutory basis.

Whereas the legislature was clearly superior in power to the governor, it could not infringe on the province of the courts, which were entrusted with protecting property, liberty, and stability in society. The G. and D. Taylor Company won settlements against garnishees of a manufacturing company for payment of debts. The garnishees appealed to the General Assembly to order a new trial. It so ordered, and they won the trial. G. and D. Taylor subsequently appealed to the Supreme Court to reinstate its initial award on the grounds that the legislature could not overturn court verdicts, a proposition with which Samuel Ames agreed (Magrath 1998, 309).

Samuel Ames was a man of integrity. Although he had built a lucrative practice based on corporate clients, and he probably suffered no remorse in light of his upper-strata background in *Taylor v. Place* when he favored the position of the creditors over the position of the debtors, he did not wholeheartedly accept the arguments of business lawyers when those clashed with acts of the Rhode Island General Assembly. His stance was that statutes were to be presumed constitutional. As Peter Magrath has observed, "he rejected arguments . . . that the regulation of private property could be often voided on the vague ground that it violated 'due process of law'" (1998, 311). He maintained in *State v. Keeran* (1858) that the place to avoid arguably unwise legislation was at the legislative ballot box.

If Winston Churchill was accurate when he observed that Clement Attlee "was a very modest man with plenty to be modest about," a corollary proposition about Samuel Ames might be put forth that he was a very proud man with plenty to be proud about. Still, toward the end of his days, Samuel Ames was brought to some financial grief at the hands of friends, and he did not succeed in finishing a romantic novel, to which he had devoted considerable efforts.

The legacy of Ames as a man of justice as well as of letters continues today. Frank J. Williams, who currently holds the position of chief justice of Rhode Island and Providence Plantations, is an ardent student of the history of the Rhode Island Supreme Court and an accomplished Abraham Lincoln scholar.

Henry B. Sirgo

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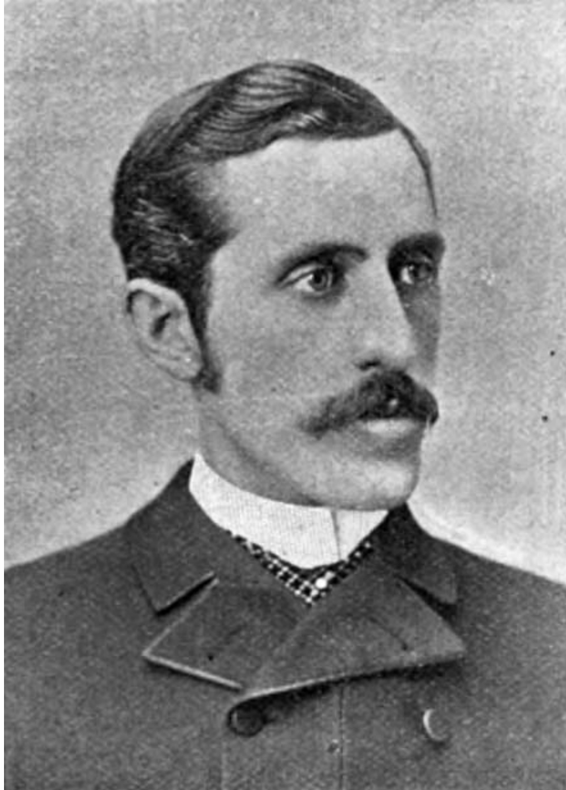
AMIDON, CHARLES FREMONT

(1856–1937)



Charles Fremont Amidon
Orin G. Libby Manuscript Collection, Elwyn B. Robinson Department of Special Collections

A judge with strong political convictions faces the question of how those convictions will affect his or her work on the bench. The question is the more urgent if the judge has strong democratic sentiments, because any influence of those political beliefs on judicial rulings may frustrate the people's will as expressed through their laws. At a time when the charge that judges make political rulings is commonplace, it is useful to look back to another time when the country had very different political divisions in order to see how a deeply principled, democratic judge addressed the problem.

Charles Fremont Amidon was descended from Roger Amadowne, a Huguenot who fled France for England, and from there came to America in the 1630s. By the mid-nineteenth century one branch of the family was in western New York, where Charles was born on 17 August 1856, in a toll-house near Clymer. His father, John Smith Amidon, was a zealous, itinerant minister of the United Brethren of Christ. It was his mother, born Charlotte Curtis, who encouraged the boy's nascent love of learning, telling him that one day he would be able to read more than the few books in the household. The family supported the abolitionist cause, and their home served as a way station on the

Underground Railroad for fleeing slaves. The family was poor, and only with difficulty was Charles able to attend Hamilton College in central New York, where his strong intellect helped him to remedy his backwardness in some subjects. His early hardships may help to explain his later humane, progressive opinions.

Amidon graduated from Hamilton in 1882, at age twenty-five. He accepted a position as the only teacher in a high school in Fargo, North Dakota, then a raw frontier town. In his first class was Beulah McHenry, from a farm north of Fargo, who would graduate valedictorian, study for three years at the University of Minnesota and a year at Drexel Institute in Philadelphia, and then return to North Dakota. There she married Amidon in 1892. She worked for women's voting rights and was active in women's clubs and church affairs. The couple had five children.

After just one year Amidon quit teaching to read law in a Fargo law office. One of the partners, John D. Benton, had been a boyhood friend of Grover Cleveland, which would prove valuable to Amidon later. The other partner, Alfred D. Thomas, would be the first federal judge in the new state of North Dakota; Amidon would succeed to the post on Thomas's death. In 1886, at the age of thirty, Amidon was admitted to the practice of law and formed a partnership in Fargo with Calvin Bradley, a classmate from Hamilton. When Thomas moved to the bench, the two joined in partnership with Benton. Amidon's practice flourished in the growing community.

On its admission to the Union in 1889, North Dakota was populated largely by immigrant farmers, with a substantial remaining population of Native American Indians as well. Amidon chaired a committee to propose revisions to the state's legal code to accommodate the law to changing frontier conditions. From the bench, too, he would address the legal issues that arose in such a society.

District Judge Thomas died in 1896. President Cleveland appointed Amidon to replace him, and the Senate confirmed the nomination despite substantial opposition. For most of his thirty-two years on the bench Amidon would be North Dakota's only federal judge, serving frequently as well on the Eighth Circuit Court of Appeals, from which review was direct to the Supreme Court.

To understand Amidon's career it is necessary to understand his political views. Those views were "progressive," but that term did not mean then what some take it to mean now; and indeed, Amidon's convictions cut across today's liberal-conservative divide. Progressivism was an attempt to apply familiar principles to the changing conditions of an industrial, modernizing society. It therefore had both a liberal and a conservative face. Amidon believed that the law, including the Constitution, should be interpreted flexibly to meet new conditions. Courts should not interfere with

government's assertions of new power over the economy, as some courts were doing at the time, and in some cases property rights would have to give way to larger social concerns. He was sympathetic, too, to the nascent labor movement and vigorously protected the right of free speech during World War I when there was little tolerance for dissent. Yet he just as firmly believed that the United States properly was a melting pot and that immigrants had a positive duty to assimilate to the larger culture. His recognition of increased governmental power did not mean that he favored the setting of policy by the courts—quite to the contrary, he believed that the courts must defer to democratic experiments in the exercise of governmental power, so much so that he favored allowing the voters to recall judges when they saw fit. Thus his views stood in stark contrast to those of many modern liberals who use the courts to thwart democratic decisionmaking. Finally, he shared progressivism's emphasis on self-restraint; he supported Prohibition and firmly opposed obscenity. Amidon's articulation of this philosophy in judicial opinions and in private letters allowed him to exercise an influence on public policy far beyond what might be expected from one so far, physically and culturally, from the nation's centers of power. His correspondents included Theodore Roosevelt, whom he long admired, and Sen. Robert M. LaFollette of Wisconsin, the Progressive Party candidate for the presidency in 1924.

Already in his thirties, Amidon's hair had turned white. A later portrait shows a lean, intelligent face with a mustache and prominent nose. He was known to question witnesses himself during trials; he was more interested in getting to the heart of the matter than in the sparring of lawyers (Smemo 1986, 71–72). He always insisted that the understanding of the law must come from "life" and not theory. In cases involving injuries to railroad workers, for instance, he would visit the scene of the injury, talk to workers, and observe the operation of any machinery involved.

When the federal government was attempting to protect land owned by Indians from being transferred to whites, Amidon wrote influential opinions defining restrictions on such transfers and upholding the government's "standing" (its right to be a party to a suit), such as those in *Shulthis v. McDougal*, 170 F. 529 (8th Cir. 1909), *app. dismissed*, 225 U.S. 561 (1912), and in *United States v. Allen*, 179 F. 13 (8th Cir. 1910). His humaneness found expression in cases involving the rights of aliens as well. In *Ex Parte Gytl*, 210 F. 918 (D.N.D. 1914), Austrians who had settled in Canada had unwittingly entered U.S. territory. They were arrested, and the government intended to deport them back to Austria, which would have worked a considerable hardship. Amidon heard of the situation and encouraged the filing of a petition for habeas corpus; in the ensuing litigation, he ruled that those in detention should be deported only back to Canada, their home. "They do

not cease to be human beings simply because they are aliens, nor are they wholly outside of the protection of the Constitution" (*Ex Parte Gytl*, 921).

With World War I came a wave of popular intolerance of dissent, expressed among other things in federal legislation against subversive speech. Under the Espionage Act of 1917, made more sweeping by the Sedition Act of 1918, disloyal utterances could lead to a fine or imprisonment. North Dakota, with its large immigrant population and its Non-partisan League, an agrarian movement identified by some with socialism, saw more prosecutions relative to population than any other state. Its level of convictions, however, was quite low, thanks largely to Amidon's efforts (Smemo 1986, 129–130). Even some of those who criticized him at the time later credited him with rising above the passions of the moment.

Thus Amidon read the law narrowly to dismiss the indictment of a man who said that "this is a rich man's war and it's all a graft and a swindle" and that "if you don't believe it, just look at the price of wheat" (*United States v. Schutte*, 252 F. 212 [D.N.D. 1918]). In a number of other cases he dismissed the charges or instructed the jury in such a way that they returned a verdict of not guilty. Yet he did not render the antisubversion laws wholly ineffective. When a minister, a German immigrant, was accused of praising the German war effort and leading his congregation in prayer for a German victory, Amidon refused to set aside the guilty verdict and castigated the defendant for having failed to assimilate. "Your body has been in America, but your life has been in Germany," he told the defendant (Smemo 1986, 142–143).

In general, although Amidon believed that the law had to be read flexibly to take account of the varied and changing circumstances of "life," he never believed himself to be substituting his judgment for that of the lawmakers. This is clear from those occasions on which he bluntly criticized the law he had to apply and expressed disapproval of the ruling he himself was handing down. Thus in *In re Aasand*, 7 F.2d 135 (D.N.D. 1925), creditors sought to set aside a discharge in bankruptcy on the ground that the credit had been obtained through fraud. Amidon wrote that "just administration of the bankruptcy law requires" such a power, but he concluded that "it is not conferred by the present act" and refused to set aside the discharge (*In re Aasand*, 137).

After the war Amidon's significant decisions were concentrated in the areas of Prohibition, the activities of the agrarian Non-partisan League, and the rights of labor. Even before the passage of the Prohibition amendment to the federal Constitution, he interpreted federal law as prohibiting even the carrying of alcohol into a dry state for personal use (Smemo 1986, 155, 156–157). In *Scott v. Frazier*, 258 F. 669 (D.N.D. 1919), *rev'd on other grounds*, 253 U.S. 243 (1920), taxpayers challenged the constitutionality of

William Paul Moss

Although it is common to focus on a judge's judicial career, judges themselves often find other aspects of their lives to have been far more important, as is indicated by the autobiography of William Paul Moss. Born in western North Carolina in 1886, Moss attended Hiawassee College in Georgia, started out as a schoolteacher, migrated to Tennessee and then westward, earned his law degree at Valparaiso University in 1912, and then headed to a number of Western states and territories before finally settling in Odessa, Texas, where he was the town's first attorney. There he served as city attorney and as private counsel before being sworn in in 1949 as judge of the Seventieth Judicial District in West Texas, a job he no longer held when he published his book in 1954.

Focusing most of his book on youthful adventures and on his ranches in Texas and New Mexico where he loved to raise cattle and hunt, Moss described his life as having been divided into three parts, "cattle, law, and oil" (Moss 1954, 143). Although Moss portrayed himself as conscientious in his duties as a lawyer and judge, he seemed far more intent on proclaiming his love for his adopted city and state, with both of which he identified himself closely.

Moss's comments on judging do give some insight into the law at his time. He noted that he received a salary of $7,000 per year and took special note that of forty attorneys in one county, one was a "lady lawyer, respected and quite successful, too" (Moss 1954, 156). Although he had a law degree, apparently his job did not specifically require it but rather that one be "learned in the law," a qualification that he believed could be "widely" stretched (157). In describing his job, Moss observed that "the judge passes upon all questions of law, subject to the right of appeal to the appellate courts" (157). His jurisdiction included both civil and criminal matters.

Noting that "there is a great deal of honor and distinction connected with the office of a judge," Moss observed that "it is only at the bar of justice that we meet humanity at the crossroads" (1954, 157). Moss wrote that most of the cases he heard could be divided into those dealing with, or stemming from, "divorce, adoption, theft, mistakes, poor environment, and just plain dishonesty" (160). He commented on the irony of seeing numerous cases where individuals were attempting to get divorces while others couples were valiantly attempting to adopt children. He further observed that although Texas did not require the appointment of counsel for indigent defenders, "I usually appoint a lawyer, a young member of the bar, to defend without compensation" (160).

Moss believed that a judge should try "to make his courthouse into a temple of justice," and he believed this involved keeping his mind "on the spirit of the law rather than its technicalities" (1954, 164). He observed: "A country judge is, in many respects, like a country lawyer. He has to know a little bit about everything. There are times when he may not even know much about the law" (165). One gets the impression that, although Moss knew the law, many of the people appearing before his court would have been far more impressed with his own close identification with his state and region and its potentialities and problems.

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legislation inspired by the Non-partisan League establishing various state agencies to run grain elevators, provide loans, and engage in other economic activity for the benefit of North Dakota farmers. The taxpayers contended that taxing them for such "private" purposes worked a deprivation of property without due process in violation of the Fourteenth Amendment to the federal Constitution. Amidon upheld the constitutionality of the legislation. His reasoning in large measure summed up his judicial philosophy:

> The line of legislative power has been steadily advancing as society has come to believe increasingly that its welfare can best be promoted by public as distinguished from private ownership of certain business enterprises. Laws which at one time were invalid, have at a later period been sustained by the same court. . . .
>
> What may be done by the state to protect its people and promote their welfare cannot be declared by a priori reasoning. New evils arise as the result of changing conditions. If the state remains static, while the evils that afflict society are changing and dynamic, the state soon becomes wholly inadequate to protect the public. (*Scott v. Frazier,* 674–675)

Similarly, in *Dakota Coal Co. v. Fraser,* 283 F. 415 (D.N.D. 1919), *rev'd as moot,* 267 F. 130 (1920), Amidon upheld the actions of the state's governor in seizing and operating coal mines during a strike, when the coal was needed for heating homes during a severe cold spell. Amidon showed sympathy with the labor movement, braking the move toward indiscriminate use of court injunctions against striking workers. In one influential decision, *Great Northern Ry. Co. v. Brosseau,* 286 F. 414 (D.N.D. 1923), he enjoined both the strikers *and* the company from committing unlawful acts.

The war years were a great strain upon Amidon; by the 1920s his health and vigor were in decline. He handled fewer trials as the decade progressed, though he continued his appellate work for the Eighth Circuit. In view of his health, a second federal judge was appointed for North Dakota in 1921.

Amidon retired from the bench in 1928. Thereafter he and his wife were usually at their new home in California. Amidon's body continued to weaken but his mind did not; he served as mentor to younger lawyers and even studied atomic physics. In the 1930s the couple began spending winters in Arizona, and Amidon died there of a heart attack on 26 December 1937, at age eighty-one. Beulah survived him, living until 1950 and the age of ninety-three.

Tim Hurley

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APPLETON, JOHN

(1804–1891)

John Appleton, chief justice of Maine, is best known as a legal reformer. He was instrumental in reorganizing the Maine court system, changing Maine's rules of evidence to allow parties in civil suits to testify and juries to decide for themselves the credibility of witnesses in open court, and changing the Maine state law to allow criminal defendants to testify under oath. He was one of the first proponents of the principle of laissez-faire constitutionalism.

John Appleton
Library of Congress

John Appleton was born in New Ipswich, New Hampshire, on 12 July 1804. His father, John Appleton, was descended from a prominent family in Suffolk, England. Samuel Appleton, his first American ancestor, settled in the Massachusetts colony during the Puritan migration. His mother was Elizabeth Peabody Appleton of Wilton, New Hampshire. Her father was a blacksmith, and her family had been in America since 1635. He had one sister, Elvira. His mother died when he was four years old, and he was reared by an aunt.

Appleton's formal education began in his hometown, and he attended the New Ipswich Academy. In addition to learning the standard curriculum of the time, which consisted of English grammar, geography, philosophy, and religion, he elected to study Latin. His early command of Latin is reflected in his later published writings and opinions. He was admitted to Bowdoin College in 1818, when he was fourteen years old. There he stud-

ied the classics, mathematics, and religion under the direction of his uncle, the Reverend Jesse Appleton, president of Bowdoin College.

Although Appleton's goal was to study law, he could not afford the fees upon his graduation from Bowdoin in 1822, so he taught for about a year. He was an assistant teacher at the Dummer Academy in Byfield, Massachusetts, and he taught briefly in Watertown, Massachusetts, where one of his students was Benjamin Robbins Curtis, who became the United States Supreme Court justice famous for his dissent in *Dred Scott v. Sandford* (1857). After Appleton's short teaching career, he began his study of law, first with George F. Farley, then with his father's cousin, the Honorable Nathan D. Appleton. Although John Appleton was admitted to the bar at Amherst, New Hampshire, in 1826, he began his legal practice at Dixmont, Maine. Shortly thereafter he moved to Sebec, Maine, where he had an opportunity to build a more lucrative legal practice. He was a justice of the peace in 1828–1829, and he also held the position of Sebec town treasurer. He moved to Bangor, Maine, in 1832 and practiced law with Elisha H. Allen. In 1834 he married Sarah Allen, Elisha's sister. They had four sons and one daughter, who died young. Sarah died in 1874, and in 1876 Appleton married Annie Greely. Appleton also practiced law with John B. Hill, and later he and his cousin, Moses L. Appleton, formed a partnership that lasted until 11 May 1852, when John Appleton was appointed to the Maine Supreme Court. He was appointed chief justice on 24 October 1862 and remained on the bench until his retirement on 30 September 1883 at the age of seventy-nine. He died in Bangor, Maine, on 7 February 1891 at the age of eighty-seven. He is buried in Mt. Hope Cemetery in Bangor.

John Appleton loved books, especially classical and popular literature. He also kept abreast of the political times. He corresponded for years with the English philosopher John Stuart Mill, with whom he shared a common perspective on many political issues of the day, including international relations, slavery, and the duties of citizenship (Hamlin 1908, 71). Appleton was generally regarded as a man of high moral standards and intellectual vigor, a zealous student of the law, and an able advocate. Honesty, frugality, diligence, punctuality, and sobriety were the virtues by which Appleton lived. He incorporated them into his opinions from the bench, and he also taught them to his children. His temperament, training, and character were well suited to his judicial career. As a judge he was considerate and kind to young lawyers who appeared before him, but he had a tendency to make hasty rulings, hand out harsh sentences, and show bias in delivering jury instructions. In fact, he admitted his bias and justified it as a necessary step to doing justice. He believed that a judge's training and experience enabled him to appreciate and evaluate evidence better than a jury could; therefore it was a judge's duty to assist the jury in this endeavor (Gold 1990, 37).

Affiliations and Activities

In 1825 John Appleton received a master of arts degree from Bowdoin and in 1860 an honorary doctor of laws degree. Among other activities on behalf of the college, he was president of the Bangor alumni association. He was a member of the board of trustees for more than twenty years (Gold 1990, 162). Appleton regularly attended and supported the Unitarian church. He encouraged educational pursuits and gave lectures on legal topics as a means of educating the public about the law. His political affiliation was initially with the Whig Party, although in some respects his political positions were closer to those of Jacksonian democracy (Gold 1990, 26). In later life he allied himself with the Republican Party. Despite his political beliefs, his forays into the world of partisan politics were brief. He was a Whig delegate to the Penobscot County convention that nominated state legislative and county candidates, and he was a delegate-at-large to the 1845 Whig gubernatorial convention. Although he did not actively participate in politics, his political party affiliations led to his appointment to judicial positions. He was appointed reporter of decisions for the Maine Supreme Court in 1841 and, despite his Whig affiliations, he was appointed to the Maine Supreme Court in 1852 by Democratic governor John Hubbard.

Reform of the Maine Court Structure and Codification of the Maine Constitution

In 1850 Appleton chaired a commission appointed by the Maine legislature to study the state's court system. His final report for the commission recommended restructuring the state court system, increasing the number of supreme court judges, and ending the practice of allowing judges to hear appeals from trials over which they presided. In 1852 the Maine legislature instituted his suggested reforms. In 1875 the legislature appointed him to arrange and codify the Maine constitution, which it adopted in 1876.

The Search for Truth

There are few published works about John Appleton's life, judicial career, or legal reform efforts. Most are references in biographical notes, remembrances by members of the bar, and obituaries. The most fruitful sources of information are in analyses of legal reform, judicial philosophy, and constitutional interpretation. By far the most comprehensive account of his life, his philosophy, his judicial career, and his legacy as a legal reformer is David M. Gold's *The Shaping of Nineteenth-Century Law: John Appleton and Re-*

sponsible Individualism (1990). Gold placed Appleton's writings, both on and off the bench, in the context of his belief in equality, individual freedom, and personal responsibility and in holding defendants responsible for their actions. These values guided his decisions in civil as well as criminal cases (774–775). Appleton was also a firm proponent of judicial self-restraint and tried to guard against substituting his own views for those of the popularly elected branches of government. He also believed, however, that the law protected the rights of citizens against encroachment from any source, including government (11). When a law encroached on the rights of citizens, favoring one class of citizens over another, he did not hesitate to declare it unconstitutional.

Appleton began his drive for legal reform early in his professional life and continued it until he retired from the bench in 1883. Early in his legal career he began writing essays on a variety of legal topics. His first four essays were published in 1828 and 1829 for a weekly newspaper, *The Yankee*. His articles on evidence published in the late 1820s and the 1830s accorded with the writings of the English utilitarian philosopher Jeremy Bentham. Appleton was a devoted disciple of Bentham, who argued in his 1827 five-volume *Rationale of Judicial Evidence* that all available evidence should be presented to civil juries so they can arrive at the truth. In the early nineteenth century, the common law rules of evidence did not allow certain categories of persons to testify in court because their testimony was regarded as inherently untrustworthy (for example, atheists, husbands and wives, infamous persons, and persons with a stake in the outcome of the case). Appleton believed that the search for truth was the prime function of courts, and the truth could only be discovered if the jury was allowed to hear all of the evidence in a case, from every available source. Between 1829 and 1860 he published twenty articles, most of which dealt with the law of evidence. They culminated in *The Rules of Evidence: Stated and Discussed* (1860). In the preface to *The Rules of Evidence,* Appleton articulated his belief:

> All persons, without exception, who, having any of the organs of sense, can perceive, and perceiving can make known their perceptions to others, should be received and examined as witnesses.
>
> Objections may be made to the credit, but never to the competency of witnesses.
>
> While the best evidence should always be required, the best existing and attainable evidence should not be excluded, because it is not the best evidence of which the case in its nature is susceptible.
>
> The best mode of extracting testimony, orally, in public, and before the tribunal which is to decide upon the facts in dispute, should be adopted on all occasions, and before all courts, when practicable. The only exception to the

> universality of this rule is one arising from special delay, vexation and expense in its observance; as, in case of sickness, or the absence of witnesses. (iii)

Although he believed that most criminal defendants were in fact guilty, Appleton argued that they, too, should be allowed to testify in court, because their testimony would facilitate the search for truth (Gold 1990, 60–61). The Maine legislature adopted Appleton's suggested reform of the common law rules of evidence in civil cases in 1856. In 1864, largely due to Appleton's efforts, Maine became the first state to allow criminal defendants as well as civil parties to testify in court.

Civil Rights of Minorities

John Appleton's legal reform efforts extended to attempts to improve the legal rights of blacks. In response to the United States Supreme Court's 1857 *Dred Scott* decision, the Maine Senate asked the Maine Supreme Court whether the state's black residents were entitled to vote as U.S. citizens (Resolution, 16 March 1857 [1857], Me. Res. 95). In *Opinions of the Justices*, 44 Me 505 (1857), the court said yes. Appleton's opinion closely followed the reasoning of the *Dred Scott* dissenting opinion of his former student, Benjamin Robbins Curtis. When, in 1864, U.S. senator Charles Sumner began work on a bill to allow blacks to testify in federal courts under oath, Appleton wrote him a long letter supporting Sumner's position and protesting the practice of not allowing nonwhites to testify in court under oath. Sumner's own arguments opposing southern state laws that precluded blacks from testifying followed the arguments of Appleton and Bentham: All evidence that furthers the search for truth at trial should be admitted. John Appleton's belief in the legal equality of blacks is evident not only in his judicial opinions but also in his personal life. During the Civil War he argued that blacks should be allowed to fight for the Union. His son, John Francis Appleton, inspired in no small part by his father's views about equality and the evils of southern slavery, actively sought out and was given command of a black brigade in Louisiana (Gold 1991, 174).

Laissez-Faire Constitutionalism

Laissez-faire constitutionalism involves a commitment to the values of individualism, free and open market competition, and a belief that government should not engage in economic regulation of business. Adherence to these values led to the development of the concepts of substantive due process and freedom of contract. They were first articulated on the United States Supreme Court as an interpretation of the due process clause of the Four-

teenth Amendment in the dissenting opinion of Justices Field and Bradley in the *Slaughterhouse Cases* (1873). Some state courts, particularly in the industrial states of the Northeast, were receptive to, and contributed to, the articulation of the doctrine. Although Maine was not a major industrial state, three Maine Supreme Court opinions, all authored by John Appleton, are considered to be classic, pioneering expressions of laissez-faire constitutionalism (Gold 1991, 371–372).

The first two cases involved an attempt by the Town of Jay to loan money collected from taxes to private developers to encourage new economic development in the town. The Town of Jay could not issue bonds to finance the loan without the Maine legislature's approval. The legislature requested an advisory opinion of the Maine Supreme Court, and in *Opinions of the Justices,* 58 Me. 590 (1871), Appleton, writing for the court, declared that the legislature did not have the constitutional authority to grant such permission to the town. The Maine legislature approved the loan anyway, and in *Allen v. Inhabitants of Jay,* 60 Me. 124 (1872), the court struck down the law. In his opinion for the court Appleton declared that the legislature did not have authority to grant the permission because the purpose of the loan was to redistribute tax money collected from the public to benefit a private, not a public, enterprise. In *Brewer Brick Co. v. Inhabitants of Brewer,* 62 Me. 62 (1873), the court struck down a state law that levied a tax on all manufacturing establishments because it was not uniformly applied. Writing for the court, Appleton declared: "It can never be admitted that the constitution of this State permits or allows the taxation of a portion of its citizens for the private benefit of a chosen few, and that the taxes raised for such a purpose shall be assessed without reference to uniformity of taxable property, or equality of ratio" (*Brewer Brick Co.,* 76). These cases illustrate that when he believed the occasion warranted, Appleton—despite his general adherence to the principle of judicial self-restraint, which fosters an initial presumption of constitutionality of legislative actions—was willing to examine the substance of legislation and strike it down as unconstitutional, especially if the law favored one group over another, thus violating his strong commitment to equality.

One final opinion is notable for its insight into John Appleton's legal erudition as well as his character. Maine law made it a crime to kill or wound "domestic animals." In *State v. Harriman,* 75 Me. 562 (1884), Clifford J. Harriman was charged with killing Rich, John D. Miller's dog. The court ruled that dogs were not "domestic animals" under Maine law, so Harriman could not be convicted of violating the statute. In his dissent, Appleton used his notable intellectual and legal acumen to argue that dogs were indeed "domestic animals," supporting his argument with a wealth of evidence, extending back to Ancient Egypt and Rome: "From the time of the

pyramids to the present day, from the frozen pole to the torrid zone, wherever man had been there has been his dog. . . . The dog was a part of the agricultural establishment of the Romans . . . Olway the Poet says of them, 'They are honest creatures / And ne'er betray their masters, never fawn / On any they love not'" (*State v. Harriman,* 566–567). He went on to marshal substantial legal arguments to bolster his position.

John Appleton might not be included in the top echelons in the pantheon of the truly "great" judges, and his ultimate influence on legal reform in a wider context than the state of Maine is debatable (Gold 1990, 165–169; Fisher 1997, 665–668). A close examination of his life and works, however, is essential to an understanding of the history of legal reform in the United States in the early nineteenth century, especially as it relates to the history and development of the rules of evidence and the evolution of the democratic values of equality and individualism.

Judith Haydel

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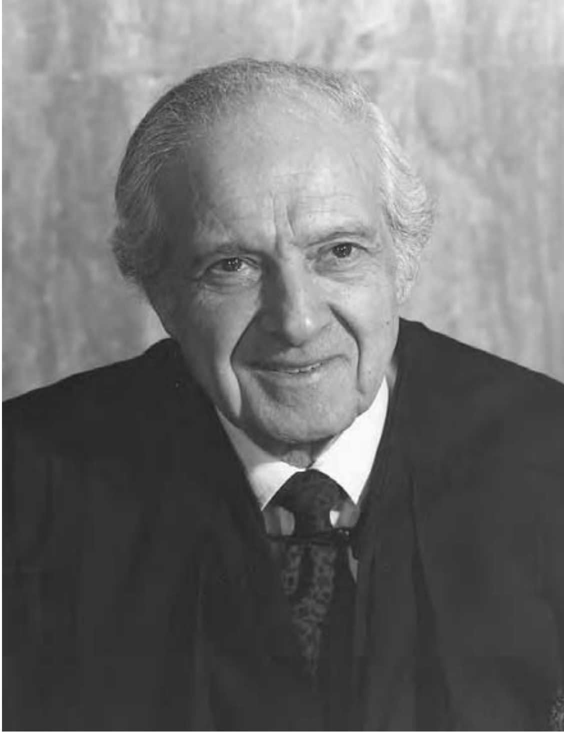
BAZELON, DAVID L.

(1909–1993)



David L. Bazelon
Bazelon Center for Mental Health Law

David L. Bazelon (BAA-zeh-lawn) was chief judge of the United States Court of Appeals for the District of Columbia Circuit, a court dubbed by many as the second most important court in the nation behind the United States Supreme Court, from 1962 to 1978. Judge Bazelon was born in northern Wisconsin (Superior) in 1909 to Israel and Lena Bazelon. His father, who ran a general store, died when David was two, leaving his mother and eight siblings "nothing. That's something you live with as you grow up," he later told a *New York Times* reporter (Taylor 1985, 20). After his father's death the family moved to Chicago, where David attended public schools. He graduated from Northwestern University in 1931 with a B.S. degree in law and was admitted to the bar in 1931. During his college years he worked as an usher and store clerk to pay his way.

Bazelon engaged in the private practice of law from 1932 until 1935, when he was appointed as assistant U.S. attorney for the Northern District of Illinois. He served in that capacity until 1940, when he returned to private practice until 1946. That year Pres. Harry Truman appointed him as assistant U.S. attorney general. He initially served in the lands division, then moved to the Office of Alien Property as division head in 1947. In 1949 President Truman appointed him to the United States Court of

Appeals for the District of Columbia Circuit. He was confirmed in 1950 and became the youngest judge ever appointed to a federal appeals court. He served that court until his retirement in 1985. He was chief judge from 1962 until 1978, and senior judge until 1986. At the time of his death from pneumonia in 1993, he was suffering from Alzheimer's disease. He was survived by his wife Miriam (Kellner), whom he married in 1936, and his two sons, James A. and Richard Lee Bazelon.

During his tenure on the Court of Appeals, Judge Bazelon made a name for himself as a judicial activist. He believed it was the duty of the judges to bring to bear as much information as they could in their cases in order to make informed decisions. Supreme Court associate justice William Brennan wrote of Bazelon, "I suspect that ultimately his reputation will rest on a much broader base: his long and continuing struggle to break down artificial barriers to the free flow of information, and to establish a means by which the expertise of countless disciplines may illuminate the imponderable dilemmas that courts must daily confront" (Bazelon 1988, xii).

Because there are no "state" courts in Washington, D.C., Bazelon's court was the appellate court for all criminal and civil cases as well as for cases involving federal agencies such as the Federal Communications Commission and the Nuclear Regulatory Administration. His judicial activism often placed him at the center of social and political controversy. He was involved in seminal cases concerning the Watergate scandal during the administration of President Nixon, the Federal Communications Commission, the regulation of dichlorodiphenyltrichloroethane (DDT), and mental health.

At the height of the McCarthy era, Judge Bazelon ordered the army to reinstate a clerk typist who had apparently been discharged because of doubts about her loyalty. The Civil Service Commission's Loyalty Review Board determined that there was not a disloyalty problem and ordered her reinstated. The army then dismissed her on grounds of lack of suitability. Judge Bazelon wrote,

> The Supreme Court "has recognized that 'a badge of infamy' attaches to a public employee found disloyal." Though appellant was ostensibly cleared on loyalty charges, the charges on which she was found unsuitable are of the 1292 §13 same stuff and stain. The Commission's action kept the word of promise to the ear but broke it to the hope. And now—two and one-half years later—it finds that "the matters dealt with would fall more properly within the coverage of Executive Order No. 10450," to wit, the loyalty-security order. (*Burrell v. Martin*, 232 F.2d 33, 39–40 [D.C. Cir. 1955])

Judge Bazelon's court became involved in the growing public concern about the safety of the use of DDT as a pesticide following the 1962 publi-

cation of Rachel Carson's *Silent Spring*. In *Environmental Defense Fund, Inc. v. Environmental Protection Agency,* 439 F.2d 584 (D.C. Cir. 1971), Judge Bazelon ordered the secretary of agriculture to begin proceedings to suspend the use of the pesticide DDT after it had been determined by the secretary that there were substantial public safety questions about the use of DDT.

In 1973 Bazelon was in the position of ordering the president of the United States, Richard M. Nixon, to turn over to the Watergate special prosecutor tape recordings of conversations that had taken place in the White House. In *Nixon v. Sirica,* Bazelon countered the president's claim of executive privilege, saying,

> The practice of judicial review would be rendered capricious—and very likely impotent—if jurisdiction vanished whenever the President personally denoted an Executive action or omission as his own. This is not to say that the President should lightly be named as a party defendant. As a matter of comity, courts should normally direct legal process to a lower Executive official even though the effect of the process is to restrain or compel the President. Here, unfortunately, the court's order must run directly to the President, because he has taken the unusual step of assuming personal custody of the Government property sought by the subpoena. (*Nixon v. Sirica,* 487 F.2d 700, 709 [D.C. Cir. 1973])

Other significant decisions authored by Judge Bazelon include a number of cases involving the rules and regulations of the Federal Communications Commission (FCC). For example, in *National Citizens Committee For Broadcasting v. FCC,* 555 F.2d 938 (D.C. Cir. 1977), Bazelon upheld the FCC regulation prohibiting the joint ownership of broadcast stations and newspapers in the same market.

Judge Bazelon's most important contributions, both on and off the bench, involved mental illness—the criminal defendant's responsibility for actions when mentally ill and the plight of the mentally ill in society in general. His most controversial decision was *Durham v. United States,* 214 F.2d 862 (D.C. Cir. 1954), where the young judge tackled the M'Naghton rule on the insanity defense to criminal conduct. The defendant had a long history of minor criminal activity and institutionalization and treatment for mental illness. By all testimony the defendant was of unsound mind at the time of the commission of the crime. The M'Naghton rule required that a person accused of a crime could only be acquitted by reason of insanity if at the time of the crime he "did not know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." To that, some courts, including the District of Columbia Circuit, had added that the crime must not have been the result of an "irresistible

impulse." The M'Naghton rule had long been challenged by contemporary psychiatrists. Bazelon wrote, "The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element of that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior" (*Durham v. United States*, 871). "In this field of law as in others," he added, "the fact finder should be free to consider all information advanced by relevant scientific disciplines" (872). He then changed the definition of criminal insanity to be, "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect" (874).

Almost twenty years later, in *United States v. Brawner*, 471 F.2d. 969 (D.C. Cir. 1972), the "Durham rule" was abandoned. The court, in an *en banc* hearing, formulated a new test for the insanity defense based on whether, "as a result of mental disease or defect, he [the defendant] either lacked substantial capacity to conform his conduct to the requirements of the law or lacked substantial capacity to appreciate the wrongfulness of his conduct" (*United States v. Brawner*, 1008). Bazelon concurred that the Durham rule had not succeeded as a legal rule. What it did do, he said, was to fuel "a long and instructive debate which uncovered a vast range of perplexing and previously hidden questions. And the decision helped to move the question of responsibility from the realm of esoterica into the forefront of the critical issues of the criminal law." It did not actually do much to change the way the courts conducted insanity defenses. "Neither *Durham* nor *Brawner* lets slip our well-guarded secret that the great majority of responsibility cases concern indigents, not affluent defendants with easy access to legal and psychiatric assistance" (1012). The activist Bazelon chided the rest of the court,

> It is an attitude sharply at odds with the spirit of experimentation, inquiry, and confrontation that have characterized so much of our work in this field. *Brawner* offered us an opportunity to explore the most difficult questions—to what end do we maintain the defense? and how can we facilitate a meaningful use of the defense by all defendants, including indigents who must rely on the government for expert assistance? If the Court's decision today rests on the belief that nothing is wrong which cannot be cured by fixing a new label to our test, then eighteen years' experience has surely been wasted. (1013)

Although the Durham rule was ultimately abandoned, other Bazelon decisions relating to mental health were longer lived. *Rouse v. Cameron*, 373 F. 2d 415 (D.C. Cir. 1966) established the right of a mental patient to receive appropriate treatment, and *Lake v. Cameron*, 364 F. 2d 657 (D.C. Cir.

1967) added that the treatment had to be in the least restrictive alternative setting. In *Rouse,* the defendant had been acquitted by reason of insanity from the offense of carrying a dangerous weapon (a handgun), an offense punishable by imprisonment of up to one year. He had been involuntarily held in a mental hospital for three years. Judge Bazelon's opinion established a right to petition for habeas corpus for release if there was not treatment for the illness. In *Lake,* a sixty-year-old woman was confined to the mental hospital because she was "suffering from a mental illness with the diagnosis of chronic brain syndrome associated with cerebral arteriosclerosis." She wandered about and often could not remember her name, birthday, or the date. Her habeas corpus petition was to be released into care of family members or into a less restrictive environment. Judge Bazelon wrote, "Deprivations of liberty solely because of dangers to the ill persons themselves should not go beyond what is necessary for their protection." . . . "Though she cannot be given such care as only the wealthy can afford, an earnest effort should be made to review and exhaust available resources of the community in order to provide care reasonably suited to her needs" (*Lake v. Cameron,* 660).

Off the bench, Judge Bazelon often spoke and wrote on mental health law. The Mental Health Law Project, an advocacy group that had been formed by attorneys and professionals, some of whom had worked on the significant cases in Bazelon's court, changed its name to the Judge David L. Bazelon Center for Mental Health Law after his death in 1993. He had been a lecturer in psychiatry at Johns Hopkins University School of Medicine. He was a member of the advisory board of the Division on the Legal, Ethical and Educational Aspects of Medicine, Institute of Medicine, National Academy of Sciences. He lectured at law and medical schools across the United States. He was awarded honorary LL.D. degrees from Colby College (1966), Boston University (1969), The Albert Einstein College of Medicine in Yeshiva University (1972), Northwestern University (1974), and the University of Southern California (1977).

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519 (1978), a unanimous United States Supreme Court (seven to zero with two justices not participating) rebuked Bazelon's activism. The Supreme Court overruled Bazelon's decision that required the Atomic Energy Commission's Advisory Committee on Reactor Safeguards to discuss problems with nuclear reactors in layman's terminology in its reports. Writing for the Court, Justice Rehnquist chastised Bazelon, saying,

> Our view is confirmed by the fact that the putative reason for the remand was that the public did not understand the report, and yet not one member of the supposedly uncomprehending public even asked that the report be remanded.

> This is surely, as petitioner Consumer Power claims, "judicial intervention run riot." . . . The Commission very well might be able to remand a report for further clarification, but there is nothing to support a court's ordering the Commission to take that step or to support a court's requiring the ACRS to give a short explanation, understandable to a layman, of each generic safety concern. (*Vermont Yankee Nuclear Power v. Natural Resources Defense Counsel, Inc.)*

Bazelon was not timid about joining political debate off the bench. During the presidency of Ronald Reagan, the "get tough on crime" approach became politically popular. In a 1981 speech to the International Association of Chiefs of Police, President Reagan asserted, "It's obvious that prosperity doesn't decrease crime—just as it's obvious that deprivation and want don't necessarily increase crime. The truth is that today's criminals, for the most part, are not desperate people seeking bread for their families. Crime is the way they've chosen to live" ("Excerpts from President's Address" 1981, 18). Judge Bazelon countered in a later speech at Vanderbilt University, "Only the blind or the willful can deny the clear association of this kind of crime with the culture of poverty and discrimination still tolerated in every American city. From my experience, I would warrant that more than 90 percent of the defendants in prosecutions for violent street crimes come from the bottom of the socioeconomic ladder" ("U.S. Appeals Judge" 1982, 33).

Chief Justice Warren Burger, who had served on the District of Columbia Circuit Court with Bazelon until being appointed to the United States Supreme Court by President Nixon in 1969, told the American Bar Association in 1981 that poverty was not the principal cause of crime and that the solution to increased crime was "the deterrent effect of swift and certain consequences" ("Judge Bazelon Criticizes Burger's Speech" 1981, 22). Judge Bazelon apparently responded in a speech to the Western Society of Criminologists that increasing penalties would not deter crime, especially for street criminals from disadvantaged homes. "It is no great mystery why some of these people turn to crime. They are denied the sense of order, purpose and self esteem that makes law-abiding citizens" (22).

Judge Bazelon's overriding concern for the have-nots of society is reflected in his reply to those who were concerned that society was becoming too litigious. In a commencement speech at the University of Washington Law School, he remarked,

> For nearly 200 years of this nation's history few blacks, Hispanics or Asian-Americans, to name only a few of the victims of oppression, would have thought of taking their claims to court. They knew they would receive no hearing there. If the so-called "litigation crisis" is due in any significant part to

the increase in social expectations of the disadvantaged and to society's growing sensitivity to these issues, and I believe it is, then in my opinion the increase in litigation is a healthy one. ("Two Voices That Helped Shape the Law" 1993, 38)

Geoffrey P. Hull

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BEAN, ROY

(1825–1903)

Roy Bean
(center), trying a horse thief. Library of Congress

It might seem odd for some readers to find an entry on Roy Bean in *Great American Judges*, not only because he was known for being such a rascal but also because he appears to be as much myth as legend. One might just as soon picture finding an essay on Paul Bunyan in a book entitled *Great American Loggers* or on David Crockett (who did actually serve for a time as a member of the U.S. House of Representatives from Tennessee before moving to Texas and dying at the Alamo) in *Great American Legislators*. Still, this author is convinced that Bean deserves his place among America's judges if for no other reason than that elements of his legend survive not only in popular history but also in judicial lore.

Roy, or "Phantly," Bean was born to a poor family in Mason County, Kentucky, in 1825 and did not assume the job as a justice of the peace that made his "the law West of the Pecos [River]" in Texas until he was almost sixty. Prior to this time, there was little other than his own strutting sense

of importance that would justify individuals in thinking that Bean would ever be anything but the occasional plaintiff in a lawsuit or defendant in a criminal case. Probably limited to less than three months of formal education (and sometimes charged, much to his indignation, with being illiterate), Bean seems initially to have succeeded largely by moving to places where his older brothers had established themselves and using their reputations and positions for private gain.

In his teens, Roy joined his brother Sam in a trading post in Chihuahua, Mexico, before leaving town after killing a man (Watson 1998). When Roy moved to San Diego in 1849, he found that his brother Josh had been elevated to the position of alcalde (the Spanish equivalent of mayor) in San Diego, and he took full advantage of the situation as he strutted about town, engaging in local amusements, and sporting a sombrero. He eventually ended up confined in a local jail after winging a rival in a duel with pistols on horseback before escaping, likely with the help of a local senorita (Sonnichsen 1943, 32).

Upon his escape, Roy again caught up with his brother Josh, this time in San Gabriel, near Los Angeles, where he was running a saloon. Unfortunately, his brother was soon thereafter assassinated, probably as a result of a love triangle; the boom times petered out; and Roy moved on. Whether just before his move from California Roy was inefficiently hanged (he apparently bore scars of a rope around his neck that he subsequently usually covered with a bandana) as a result of killing a man in a duel and was cut down by the girl he loved after the rope stretched far enough for his toes to touch the ground may never be fully known, but whatever the circumstances, they hardly seemed to have provided adequate training for a subsequent judicial career.

Sometime in 1858 or 1859, Roy moved to Old Mesilla, New Mexico, where he relocated his brother Sam, who was operating a combination saloon/restaurant/boarding house and serving as sheriff. Sam was more than willing to put Roy to work as a deputy, and the two apparently engaged in what support they could for the Confederacy, focusing mostly on the financially rewarding task of running cotton through the Yankee blockade.

Roy subsequently moved to San Antonio, Texas, where he cleverly countersued in a civil suit over improper appropriation of a wagon train. He established himself in an area that came to be called Beanville, and in 1866 he married eighteen-year-old Virginia Chavez, by whom he was to have three children.

Again, Bean's reputation hardly foreshadowed a judicial career. On at least one occasion, his wife charged him with domestic violence, and when he later moved on to West Texas, he appears to have taken his children but not his wife. In San Antonio, Bean continued the kind of sharp, and uneth-

ical, business practices for which he had been known elsewhere. His offenses included selling watered-down milk, butchering and selling stray cattle, and either cutting and selling wood from land owned by others or splitting profits with or fining those he discovered doing so. When confronted with a customer who said, “We found a minnow in the milk yesterday,” Bean initially tried to bluff his way out of the obvious by swearing an oath and responding, “that’s what comes of watering them cows at the river” (Sonnichsen 1943, 59). In a similar vein, Bean was once alleged to have collected “damages” from a friend whose stray bulls had “seduced” his cows (95).

At age fifty-six, Bean still had wanderlust, and he decided to head for West Texas, where there was reputed to be no law. At the time, the railroads were building lines across the barren West Texas landscape, and Bean rightly figured that the hundreds of workers would pay to quench their thirst. He began his saloon in what was then largely a tent city of railroad workers named Vinegaroon, near a place known as Eagle’s Nest where violence and mayhem were common, and moved on with the workers when the boomlet burst. After spending a brief time in the town of Strawbridge (later called Sanderson), where a competing bar owner as streetwise as Bean appears to have spiked Bean’s alcohol with kerosene, Bean moved on to Langtry. Contrary to the movie version in which Bean comes into town, shoots practically everyone, and then proclaims his own authority, in an area needing a semblance of order, if not law, Bean appears initially to have been appointed as a justice of the peace in 1882 by a Commissioners’ Court (Sonnichsen 1943, 80). He held this position, off and on, for the rest of his life—winning most elections, apparently stealing others, and occasionally losing but continuing to serve in his position anyway. Even before his appointment, Bean appears to have served in this capacity on a “self-appointed” basis (81).

Almost anyone with enough bluster to try to fill the shoes would have been welcome if for no other reason that, without some form of local justice, Texas lawmen would literally have had to take miscreants hundreds of miles for judgments. When defendants complained about their fines, Bean was just as likely to raise as to lower them. With his own past experiences with the law, his extreme confidence, and his belief in his own self-importance, he could generally outbluff the most defiant of them. Moreover, many of his rough-and-tumble frontier constituents probably shared not only in his offbeat sense of humor but also in his own contempt for legal niceties and formalities.

Most of the stories about Roy Bean originated in Langtry. For much of his time there, Bean engaged in a feud with Jesus P. Torres, who owned much of the town. Both owned bars, and their competition for customers was a con-

Kirvin Kade Leggett: The "Judge" Who Was Not a Judge (1857–1926)

The term *judge,* like the term *colonel,* may sometimes be used as an honorary title rather than as the designation for an individual who presides over a court. Such was largely the case with Kirvin Kade Leggett, a Texas pioneer who moved to Buffalo Gap in West Texas shortly after studying law in a lawyer's office and shortly thereafter moved to Abilene, Texas, when he realized that the railroad would be coming through that town. In Abilene Leggett continued his work in law; helped found Simmons College (now Hardin-Simmons University), Abilene Christian College, and McMurry College; sat on the board of what is now Texas A and M University; and became primarily known as a businessman and entrepreneur.

Distinguishing himself as an attorney, Leggett was often referred to as a "judge" even by a newspaper, the *Taylor County News,* which had written that "the *News* is no toady. No one is going to be called General, Colonel, Major, Captain, or Professor, who has not seen service, or who is not legally entitled to the appellation" (Spence 1977, 91).

In 1898, Leggett was appointed to a seven-year term as a referee for the newly established bankruptcy courts that Congress created, and in this capacity he worked closely with Judge Edward R. Meek of the United States District Court for the Western District of Texas. Although his official title was Mr. Referee, "from the beginning lawyers throughout the nation recognized the judicial nature of the referees' duties—their judgments in actual court cases—and the referees usually were called judges" (Spence 1977, 109). During his service as a referee, Leggett heard 636 cases and established a reputation for fairness to all sides. His biographer noted that "not a single incident is recorded in court files or local newspapers of an attempt to appeal a Leggett judgment in bankruptcy court" (112).

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tinuing source of friction. Long a friend of the railroads, whose employees he had fed, hydrated, and entertained, Bean apparently got the railroad's support both in securing a place for his bar (and courtroom) and even in occasional frauds that he perpetrated on railroad officials—claiming, for example, that an old mule killed on the tracks was a valuable animal and getting far more compensation than was otherwise warranted.

Despite rumors and numerous threats to do so, there is no evidence that Bean ever hanged a man; indeed, although tourists to Langtry were long shown a "hanging tree," on this subject Bean's legendary quality appears to meld with that of "hanging judge" Isaac Parker of the Arkansas Territory,

who is described in another entry of this book and about whom there appears to be almost as much myth as about Bean. Still, there are plenty of stories about Bean that show a rough-and-ready form of judging that at times is shocking, at times is amusing, and at times appears to incorporate a rough sense of justice. One author noted that "Roy Bean's justice was governed by greed, prejudice and a dash of common sense" (Watson 1998, 100).

As to legal texts, Bean appears to have had a single volume of the Texas statutes, which he cited when he chose and otherwise tended to ignore; he claimed to have used newer editions to help start fires and once tore out an offending page that did not seem to conform to his judgment in a case. Although he had authority to marry people, the law did not give Bean the technical authority to grant divorces, but as one who reputedly would end his marriage ceremonies with the words, "And may God have mercy on your souls," he thought it inconsistent to be able to marry people and not rectify the error. This logic, plus the fees generated, apparently persuaded him that he had authority both to tie and to untie marital knots. This power undoubtedly promoted the peace and happiness of the natives, especially those of Mexican origin, whom Bean generally treated quite paternalistically and who generally reciprocated with a mixture of fear and respect.

Law and justice often conflicted when fees were involved, and Bean tailored his own form of "justice" to his own financial needs. In one of the best known examples, portrayed in the 1973 Paul Newman movie "Life and Times of Judge Roy Bean," a man's body was brought to Bean with a pistol concealed on his person and forty dollars in his pocket. Bean fined the man forty dollars, which he pocketed, for carrying a concealed weapon! On another occasion, Bean certified the death of three men (at a coroner's fee of five dollars each) who were among a group of ten who had fallen from a high railroad bridge but were not yet dead—why spend another journey to certify the inevitable, which apparently occurred within the next three-day period (Sonnichsen 1943, 125–126)?

Bean mixed business with pleasure, and rounds of drinks, of which Bean himself was a fairly liberal consumer, frequently punctuated his trials. After announcing "Order, by Gobs! Order in this court," Bean was said to have begun many a session by proclaiming, "This honorable court is now in session, and if any galoot wants a snort before we start, let him step up to the bar and name his pizen [poison]" (Watson 1998, 96). On at least one occasion during his long feud with Jesus Torres, Bean apparently ordered Torres to buy everyone a round of drinks in Bean's own saloon.

Bean also bent justice to accommodate force and racism. After an Irishman killed a Chinese railroad worker in a fight, and a sizable group of Irishmen showed up at Bean's saloon court to follow the proceedings, Bean

Joseph A. Peel: A Judge as Murderer

Every profession has its bad apples, but judges accused and convicted of planning a murder must be relatively rare. Such a man was Joseph A. Peel. A graduate of Stetson School of Law, Peel began practicing law in Florida in 1949, occupying offices in a building where Phillip D. O'Connor, the state attorney, practiced. Soon after he began practice, Peel, a married man with small children, was elected to serve as a municipal judge in West Palm Beach.

As a judge Peel made the acquaintance of Floyd (Lucky) Holzapfel, a West Palm Beach mechanic, and George David Lincoln, both with unsavory reputations. All three became partners in moonshining and gambling operations as well as selling protection to others involved in similar businesses (as judge, Peel was able to warn of impending raids or draw up search warrants that would later be thrown out of court on technicalities). Although handsome and charming, Peel does not appear to have been a very accomplished attorney. Faced with a second hearing before longtime Florida Circuit Court judge Curtis Chillingworth, on grounds that he had improperly advised a client who was still married that her divorce was final (Chillingworth had gone easy on Peel on a previous plea), Peel decided to have Chillingworth murdered.

Although the judge's body was never found, in 1953 he and his wife were apparently kidnapped about midnight from their beachfront home by Holzapfel and Lincoln, carried out to sea, and drowned. It took years before investigators were able to finger Peel, with Phillip O'Connor leading a zealous prosecution team that relied on audio tapes of conversations with Peel and his accomplices in motel rooms as well as on the testimony of Holzapfel (who had already been sentenced to death) and Lincoln (whose testimony had been purchased with the extension of immunity in three murder cases including that of the Chillingsworths). Peel, who had become involved in a number of other dishonest schemes, had already resigned from the bar, but he attempted to help his attorney, Carlton Welch, another Stetson graduate, during his own trial.

Peel maintained a confident public demeanor throughout most of the trial, which was held in Fort Pierce, Florida, in 1961 under the watchful eyes of Judge D. C. Smith. Peel took the stand in his own defense for the murder of Judge Chillingworth, admitting to having desired to kill Holzapfel, of whom he claimed to have been afraid, but denying a role in Chillingworth's murder. The jury convicted Peel as an accessory before the fact to Judge Chillingworth's murder but recommended that he receive mercy; the conviction called for a mandatory sentence of life in prison. The case, which is documented in a book by Jim Bishop, remains a shocking example of how even judges are not immune from corruption.

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W. E. "Bill" Richburg

Texas justice is sometimes portrayed as unique. This arises in part because of the state's western heritage, in part because of the facts and legends surrounding Judge Bean, and in part because of the state's continuing high rate of capital punishment (Tuma 2002, 555–559). Texas also continues to rely more extensively than some states on justices of the peace, with an eighteen-year-old high school graduate named John E. Payton unseating an incumbent by winning 82 percent of the vote in an election to the justice's office (with its more than $38,000 a year in salary) in Collin County in 1990 ("New Kid on the Bench" 1990, 46).

W. E. "Bill" Richburg has established himself as a Texas legend, alternatively called the "Law West of the Trinity," the "best-known judge in Texas," and the "most famous justice of the peace in America" (quoted from other articles, some from newspapers, in Tuma 2002, 578). With two years of education at Jefferson Law School, but no law degree (and a greater proclivity to resort to the phone book than to regular law books), Richburg kept order in the poverty-stricken, minority-dominated area of Oak Cliff, Dallas, where he served from 1944 until 1972. His son succeeded him and served in the post for seventeen additional years.

Recognizing the difficulty of his constituency to be available at regular trial times, Richburg kept his office open ten hours a day and on weekends. Concerned more with keeping the "peace" than with following the strict requirements of the law, he has been described by a recent scholar as "a problem solver, not a legal technician" (Tuma 2002, 581). Unlike judges who used, or (as in the case of Judge Bean) were reputed to use, capital punishment to keep the peace, Richburg was best known for issuing literally thousands of "peace bonds," which obligated individuals who violated them either to pay the amount of the bond or go to jail. Bonds could reach as high as $50,000 and apparently usually proved successful in separat-

(continues)

looked through his law book and found that although the law spoke of killing one's fellow man, it said nothing about killing a Chinaman and dismissed the case (Tuma 2002, 561). On a later occasion, Bean appears to have bent the law, and spent considerable money, to free his own son Sam, who, like his father in earlier years, had been charged with murder in a dispute challenging his honor and who may have fired the shot at his father's command that he vindicate himself.

Just as David Crockett was known for his exploits with animals, Bean apparently kept a pet bear, Bruno, tied outside his saloon. At a time when prisons were nonexistent on the frontier, many a defendant apparently waited tied to a nearby tree for Bean's "court" to convene. It is doubtful that they shared in the beer that Bean so generously gave to, and encouraged visitors to buy for, his bear.

(continued)

ing would-be combatants. On one occasion Richburg solved a community problem by ordering ice cream and making the bickering parties cool off by eating together (583).

Richburg developed unique ways of assessing the truthfulness of witnesses who appeared before him. He developed his own "lie-detector" test consisting of a red and green light; he used the red light to inform witnesses when he thought they were lying. He also chewed on a long unlit cigar, which he sometimes appeared to devour completely during testimony, diverting witnesses' attention so it would be more difficult for them to make up stories; allowed witnesses to argue in his presence; and sometimes even recruited bystanders to help assess truthfulness.

Performing over 8,000 weddings, including one when the bride was in labor, Richburg also handled other domestic matters, including divorces, which were not technically within his jurisdiction. On one occasion, he heeded a wife's request to prevent a neighbor from hanging her underwear on the clothesline where the wife believed it taunted (and perhaps seemed to beckon) her husband. On another occasion, Richburg solved a custody dispute between two women over a small child by putting them at opposite ends of a hallway and observing the one to which the child chose to go (Tuma 2002, 585).

As paternalistic and unconventional as were his judgments, Richburg was recognized as an effective problem solver who, much like Judge Bean, met the needs of his constituents, who continued to elect him. Among the hundreds of individuals who attended or sent best wishes to Richburg on his retirement were Lyndon Johnson, Judge Sarah T. Hughes, and Wes Wise, the Dallas mayor (Tuma 2002, 580).

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In 1896 Bean captured worldwide attention when he helped host a fight between champion boxers Bobby Fitzsimmons and Peter Maher after Texas, New Mexico, and Arizona all forbade on their soil the blood sport that promoter Dan Stuart of El Paso had promised. Stuart feigned one move after another until paying customers got on a train without knowing where the fight would be held and arrived in Langtry. Bean, who reveled in the publicity, had constructed a bridge across the Rio Grande and allowed the fight (a short bout that Fitzsimmons won) to take place in nearby Mexico.

In a land known for legends, tales of Bean's exploits grew quickly, and it was not long before trainloads of tourists would stop to see the stout man with the long white beard and his Jersey Lilly Saloon. Ever the entrepreneur, Bean rarely had ready change for anyone unwary enough to offer a gold coin or large bill for a drink, and such tourists ended up having to

decide whether to wait for change or miss the train. Alternatively, Bean might fine those who swore at his tardiness an amount for the crime of profanity just equal to the change that the customer owed.

Bean, whose own marriage had long been on the rocks, became known for his infatuation with Lillie Langtry (the Jersey Lily), whose picture Bean kept in his bar and for whom he claimed, apparently without foundation, he had named the town. There is debate about whether he actually saw and/or talked with the actress in person, but he did apparently correspond with her, and she made a visit to the town not long after his death in 1903.

Bean loved to tell and embellish stories about himself, and many, like those of David Crockett, have to be taken with a grain of salt. Despite this author's efforts to do so in this entry, the truth may never be completely separated from fiction. In truth, Bean was a larger-than-life figure. He continues to epitomize the "rough-and-ready" style of justice (what, in English law, is often called "equity" as opposed to "law") and sheer bravado and gumption that were needed to keep order on the frontier. Absent the majesty that contemporaries often equate with the law, which is reflected in the diplomas and certificates that contemporary judges hang from their walls to signify their legal training, and the architectural symbolism of modern courts, Bean often had to "bluff" his way to enforce his judgments from a "court" that was little more than a barroom. For better or worse, his exploits will long be remembered after those of many more conscientious judicial luminaries are forgotten.

John R. Vile

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BELL, GRIFFIN

(1918–)

Griffin Bell
Corbis

The shadow of Griffin Bell looms large across the landscape of jurisprudence in the United States. Over the course of his distinguished fifty-five-year legal career, Bell has compiled an impressive list of achievements, serving as the managing partner of Atlanta's premier law firm, the chief of staff to the governor of Georgia, the U.S. attorney general, legal adviser to three U.S. presidents, the "lawyer of last resort for some of the nation's largest corporations," and, for over fourteen years, an influential federal appellate judge.

Griffin Boyette Bell was born on 31 October 1918 in Americus, Georgia, to Adlai Cleveland Bell, a cotton farmer, and Thelma Leola Pilcher Bell. A. C. Bell laid the foundation for his son's future career in law and politics at an early age, taking the youngster to numerous campaign rallies and trials at the local courthouse. Fortunately, the boy's intellect was more than sufficient to meet his father's ambitions for him. He was extremely intelligent, graduating from Americus High School at the age of fifteen. Bell then attended Georgia Southwestern College and worked as a Firestone salesman before being drafted by the army in 1941. After completing Officer Candidate School, he served as a company commander for more than 500 soldiers during World War II, eventually attaining the rank of major. Bell credits his time in the army as the most valuable management experience he could have received for a career in the law. It was also during this time period that

he met his bride-to-be, Mary Powell. The Bells were married for almost sixty years before Mary's passing in the fall of 2000. Their marriage produced one son, Griffin Jr., and two grandchildren, Griffin III and Katherine. Judge Bell is now married to Nancy Kinnebrew Bell.

In 1946, after receiving an honorable discharge, Griffin Bell took advantage of the G.I. Bill by enrolling at Mercer University's law school in Macon, Georgia. In addition to his legal studies, Bell clerked for the law firm of Anderson, Anderson and Walker and served as the first city attorney of Warner Robbins, Georgia. In 1947, after just four quarters of study, he passed the Georgia bar on his first attempt. One year later, he graduated from Mercer with honors. Since that time, Bell has received the Order of the Coif from Vanderbilt University's law school and honorary degrees from several other colleges and universities.

Griffin Bell began his legal career with Lawton and Cunningham, a historic Savannah law firm that once "sued the federal government to recover the value of the cotton that Gen. William Tecumseh Sherman had burned on his 'march to the sea'" (Murphy 1999, 29). In 1952, he left Savannah to become a named partner of Matthews, Owens and Maddox, a law firm located in Rome, Georgia. But he only stayed in Rome for a "spell," leaving just one year later to join the prestigious Atlanta law firm of King and Spalding (formerly known as Spalding, Sibley, Troutman and Kelly). Upon arriving at King and Spalding, he immediately "began to lead the firm toward a more involved role in government affairs" (Murphy 1999, 40). In 1958, after just five years, he became the firm's managing partner and one year later was named chief of staff to S. Ernest Vandiver, the newly elected governor of Georgia. As chief of staff, Bell was the architect of the Sibley Commission, a blue ribbon panel designed to conduct hearings throughout the state "for the purpose of educating segregationists on the inevitability of public school desegregation" (Patterson 1977). The commission is universally credited with being the vehicle that saved Georgia's public school system.

In 1960, Bell was asked to cochair Sen. John F. Kennedy's presidential campaign in Georgia. He agreed to do so "before it was by any means certain a Catholic and a 'liberal' on civil rights could carry that state" (Patterson 1977). In one of their first meetings, Kennedy asked Bell whether he would be embarrassed to campaign on behalf of a Catholic. Bell replied, "Not at all. But I am embarrassed for our country that you would think to ask me that question" (Murphy 1999, 71). In the end, Kennedy won the election and carried Georgia by a larger margin than in any other state. Afterward, Robert Kennedy, the president's brother and new U.S. attorney general, contacted Bell to inquire as to whether he was interested in a position or appointment with the federal government. Bell told him it was his understanding that two judgeships might open up on the United States Court of

Appeals for the Fifth Circuit, at that time the nation's largest federal appellate court, and that he would certainly be interested in being considered for one of them. President Kennedy gladly obliged, nominating the forty-two-year-old Bell for a judgeship on the Fifth Circuit on 6 October 1961. But instead of waiting for the Senate to confirm the nomination, Kennedy decided to make Bell a recess appointment because of "the circuit's mounting caseload problems" (Barrow and Walker 1998, 29). The U.S. Senate confirmed Bell's nomination by an overwhelming margin the following spring.

Griffin Bell brought a forceful personality to the Fifth Circuit. A cross between Mark Twain and John Marshall, Bell was plain spoken, witty, charming, politically savvy, and extremely intelligent. He joined the court during one of the most turbulent times in our nation's history. The country was in the midst of a social revolution, and the Fifth Circuit—with jurisdiction over the Deep South states of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas—was the primary battleground in the struggle for civil rights. As tensions rose to a boiling point, the Fifth Circuit was called upon to dispense justice and maintain societal order. Never one to sit on the sidelines, Bell wasted little time entering into the fray and quickly became one of the court's most respected and influential jurists. As a judge, he unequivocally enforced the civil rights of black Americans, served as a bridge between the activist judges of the court and states' rights advocates, masterfully accommodated the competing interests of warring civil rights litigants to achieve commonsense solutions in the most complex of cases, and was a leader in the fight to preserve neighborhood schools on a nonracial basis.

Judge Bell was unquestionably one of the court's strongest civil rights enforcers. He fervently believed in the rule of law and had little patience for segregationist-minded government officials seeking to evade or defy court orders or deny blacks their civil rights. In *United States v. Barnett* (1963–1965), Bell voted with the majority of the court in ordering the University of Mississippi to admit James Meredith as a student, enjoining the governor of the state from interfering with his admission, and holding the governor in civil contempt for attempting to do so. In *Evers v. Jackson Municipal Separate School District* (1964), he reversed a district court's dismissal of complaints seeking desegregation of the public school systems of Jackson, Biloxi, and Leake County, Mississippi, eloquently noting that schools are not truly desegregated until "inhibitions, legal and otherwise, serving to enforce segregation have been removed . . . [and black children] are 'afforded a reasonable and conscious opportunity to apply for admission to any schools for which they are eligible without regard to their race or color, and to have that choice fairly considered by the enrolling authorities.'" In *United States v. Lynd* (1965), he authored an opinion holding a state court clerk in civil contempt for willfully disregarding a court order allowing

Clarence Thomas: A New Kind of African American Justice (1948–)

Clarence Thomas is only the second African American to be appointed to the United States Supreme Court, and his philosophy is very different from that of Thurgood Marshall, the former civil rights litigator and the African American that Thomas replaced.

Thomas was born in 1948 in Pin Point, Georgia, a southeast community whose name aptly described its small population. Abandoned by his father, Clarence's mother helped support the family, but when she was remarried, Clarence and a brother were raised by his grandfather, Myers Anderson, an independent businessman in Savannah. Thomas went to Catholic parochial schools before enrolling in Immaculate Conception Seminary in Missouri, where he began study for the priesthood. Dismayed by antiblack prejudice that he encountered there, Thomas transferred to Holy Cross College in Massachusetts, where he helped found the Black Student Union and supported the Black Panthers. He graduated with honors and subsequently attended Yale Law School but felt that he was under extra pressure because of the affirmative action program under which he had been selected.

After graduating from law school, Thomas worked for John Danforth, then the Republican attorney general for Missouri. He later worked as Danforth's legislative assistant when Danforth was elected senator. In 1982, Pres. Ronald Reagan appointed Thomas as assistant secretary for civil rights in the Department of Education. Reagan later promoted him to be director of the Equal Employment Opportunity Commission, where he worked for almost eight years.

In 1990, Pres. George Bush appointed Thomas to serve as a judge on the United States Court of Appeals for the District of Columbia. The next year, Bush nominated Thomas to replace outgoing Justice Thur-

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blacks to register to vote. In *Turner v. Goolsby* (1965–1966), Bell crafted an innovative desegregation order placing the school system of Taliaferro County, Georgia, into a receivership after local officials closed down the county's only white school and secretly arranged for those children to attend schools in adjoining counties.

One of Judge Bell's most important enforcement decisions was *United States v. Hinds County School Board* (1969), a case involving the development and implementation of desegregation plans in thirty-three Mississippi school districts. This case came about after the Supreme Court reversed and remanded a Fifth Circuit order giving the state additional time to desegregate, holding "the continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible" (*Alexander v. Holmes County Bd. of Educ.* 1969). In

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good Marshall. Many African American groups were uncomfortable with Thomas because his conservative philosophy—and his opposition to the use of racial quotas—was quite different from that of most other contemporary black leaders. Nonetheless, few expected that his confirmation hearings would prove as divisive and explosive as they became after onetime employee Anita Hill, another African American who was then a law professor at the University of Oklahoma, accused Thomas of having sexually harassed her when she worked for him at the Equal Employment Opportunity Commission. Thomas, who had strong support from Senator Danforth, directly confronted these charges in public hearings—he likened the hearing to "a high-tech lynching for uppity blacks" (Cushman 1995, 530)—that left many with questions, but he was narrowly confirmed by a vote of fifty-two to forty-eight (530).

Thomas continues to articulate a conservative philosophy on the Supreme Court, often voting with fellow conservative Antonin Scalia. Unlike the loquacious Scalia, Thomas rarely makes comments from the bench, preferring to listen to oral arguments rather than to participate in public debate. Shortly after joining the Court majority in the decision that resulted in confirming the election of George W. Bush in the case of *Bush v. Gore* (2000), Thomas had a rare interview with high school students, subsequently aired on television, in which he denied that political considerations played a part in that or in other decisions. Thomas remains a rare role model for African Americans who demonstrates both that one can rise from humble circumstances to the highest court in the land and that the color of one's skin does not determine an individual's political views. Thomas has reportedly received a large advance from a book company to publish the story of his life.

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an extraordinary move, the Court ordered the Fifth Circuit immediately to fashion and implement desegregation plans for each school district, even though the school year was already well under way. Chief Judge John R. Brown wasted little time in assigning Bell the difficult task of handling the case. Brown's reasons for doing so were obvious to the other members of the court. By that time, Bell had proven himself to be a brilliant tactician and a deft negotiator. As the "man in the middle," he was adroit "in the use of compromise" and "had the ability to bring together opposing sides, to find a common ground, and reconcile differences" (Barrow and Walker 1998, 28). A judge who frequently hunted with Bell claimed that he was so persuasive "[he could] talk the birds out of the trees to sit on his shoulder" (28). His colleagues had no doubt that he could handle this complex and unwieldy case. Bell did not disappoint. He began by summoning all of the school

superintendents to New Orleans for a meeting. According to one witness, "He read the riot act to them—He told them they were desegregating next month whether they liked it or not" (Strasser 1977). After flashing the "big stick," Bell turned on his trademark charm. He spent several weeks conferring with civil rights lawyers, school board attorneys, and local officials about the details of the respective desegregation plans and the manner in which they would be implemented. This innovative approach "drew praise from all sides" and helped safeguard "the public's perception of judicial even-handedness" (Bass 1998a, 1505). More important, the *Hinds* decision marked a turning point for the Fifth Circuit's desegregation jurisprudence. In the past, if a circuit panel found fault with a district court's desegregation order, it would simply reverse and remand the case with instructions to develop a new plan. In the meantime, schools would remain segregated. After *Hinds*, however, the status quo during desegregation litigation was a desegregated school system.

Judge Bell was the Fifth Circuit's leading critic of using busing as a means of disestablishing the "separate but equal" school systems of the past. Although Bell strongly believed in both the legal and moral correctness of *Brown v. Board of Education* (1954), that black children have a fundamental constitutional right to attend school with white children and receive the same quality of education, he did not favor *integration*—that is, busing children several hours across town to achieve "a racial ratio [in each school] that reflected the total school population in the geographic entity" (Murphy 1999, 129). In his opinion, busing had nothing to do with equal protection and everything to do with social engineering. Bell interpreted *Brown* as giving black students "freedom of choice to go to schools, primarily in their own neighborhoods" (129). In this respect, he favored a strict neighborhood-school policy, with a majority-to-minority transfer policy that allowed students to transfer to a school outside of their neighborhood so long as the transfer did not have the effect of increasing the majority of the students' race at that school. If segregated schools still existed after the implementation of this policy, Bell advocated pairing nearby schools together as a means of further "disestablishing the dual school system" (101). Although Bell's argument did not, initially, carry the day, his valiant fight to preserve neighborhood schools remains praiseworthy. Many historians lavish praise on the activist members of the Fifth Circuit for requiring busing, but the real-world consequences of their actions have been devastating for public schools. Bell believes that the decline of public education in the United States is inextricably linked to the judiciary's decision to impose "forced integration and mandatory busing" on the schools: "Anybody with one eye and half sense should have known that busing would ruin them. The neighborhood strengths were lost" (132).

In addition to his formal participation on the bench, Bell also distinguished himself as an expert in the area of judicial administration, establishing "many of the Fifth Circuit's innovative screening and expediting processes" (U.S. Senate Committee on the Judiciary 1977, 6). He held several leadership roles in this area, serving as the chairman of the Federal Judicial Center's Committee on Innovation and Development (1968–1970), as a director of the Federal Judicial Center (1973), and as chairman of the American Bar Association's Commission on Standards of Judicial Administration (1976). He also took time from his judicial duties to serve as chairman of the Atlanta Commission on Crime and Juvenile Delinquency (1965–1966).

During his fourteen-plus years on the Fifth Circuit, Judge Bell participated in over 3,000 cases and authored more than 1,000 opinions. His reputation as jurist was such that four separate presidents (Kennedy, Nixon, Carter, and Reagan) had Bell on their short list of potential Supreme Court nominees. But as the fall of 1975 approached, Bell was restless. The intellectually challenging civil rights cases had come and gone, and he now spent the majority of his time dealing with "a heavy load of criminal and habeas corpus matters," work that he considered boring and dreary (Field Van Tassel 1993, 354). Around that same time, lawyers from King and Spalding paid him a visit and asked him whether he would consider leaving the bench and rejoining the firm. The offer was tempting. Bell loved practicing law, and he missed working with clients. After a few months, he informed his fellow judges that he had decided to resign. They were taken aback by his announcement. It was highly unusual for a federal appellate judge to relinquish a lifetime appointment, and Bell was, at that time, only the fourth judge to ever resign from the Fifth Circuit. Although his colleagues were disappointed by the decision, they were nothing but complimentary of his service to the court. Judge Bryan Simpson summed up their collective sentiment nicely, noting that Bell "was a tower of strength, and I think his strength has been that he's been a balance wheel. He always took the center ground, and he can draw people from either side when we get in these real tough fights" (Murphy 1999, 140).

When Griffin Bell decided to step down from the bench, he thought his career as full-time public servant was over. But eleven short months later, everything changed. A childhood acquaintance, Jimmy Earl Carter, had been elected the thirty-ninth president of the United States and selected Bell to be his U.S. attorney general. Although he had no desire to return to government service, Bell's patriotism was such that he could not refuse a president's request to serve his country. His selection, however, created a firestorm of controversy, and several members from Bell's own party led the charge to derail his nomination. After being subjected to one of the most

contentious Senate confirmation fights in modern history, the Senate Judiciary Committee voted ten to three, with one senator voting present, to recommend his confirmation to the full Senate. On 25 January 1977, the U.S. Senate voted seventy-five to twenty-one to confirm him. Later that day, Chief Justice Warren E. Burger swore in Bell as the nation's seventy-second U.S. attorney general.

Griffin Bell has been called one of the greatest attorney generals of the twentieth century. Under his leadership, the Department of Justice had an active legislative agenda on issues such as judicial administration, criminal justice reform, and intelligence reform. Bell also helped reshape the federal judiciary by overseeing the selection of 152 new judges and in the process appointed more blacks, women, and Hispanics to the bench than any other administration had up to that point. His primary achievement, however, was "rebuilding the Justice Department as a neutral zone in government [and] . . . restoring the integrity of the FBI and our foreign intelligence agencies in the wake of Watergate" (Barry 2000). At the time of Bell's resignation, in August 1979, Chief Justice Burger remarked that "[n]o finer man has ever occupied the great office of attorney general of the United States or discharge[d] his duties with greater distinction" (Murphy 1999, 302).

In the years following his return to King and Spalding, Griffin Bell has established himself as one of the country's premier lawyers and most prolific rainmakers, bringing numerous and profitable clients to the firm. Although he handles a variety of complex legal matters, he is nationally recognized for his expertise in conducting internal investigations of high-profile corporate crime (for example, E. F. Hutton check-kiting scandal; *Exxon Valdez* oil spill; Dow Corning breast implant controversy). He has also received a great deal of media attention for his *pro bono* representation of Eugene Hasenfus, an American mercenary shot down in Nicaragua while delivering arms to the Contras; serving as Pres. George H. W. Bush's private attorney during the Iran-Contra investigation; and guiding the Atlanta Committee for the Olympic Games through a congressional investigation into actions taken by committee members during the bidding process.

In addition to his private practice, Judge Bell has continued to serve his country in a variety of leadership roles. In 1980, he led the U.S. delegation to the Conference on Security and Cooperation in Europe. He has also served as cochairman of the Attorney General's National Task Force on Violent Crime (1981); a member of the Secretary of State's Advisory Committee on South Africa (1985 to 1987); a director, and then chairman, of the Ethics Resource Center (1986 to 1991); a member of the Board of Trustees of the Foundation for the Commemoration of the United States Constitution (1986–1989); vice chairman of President Bush's Commission on Federal Ethics Law Reform (1989); a member of the Webster Commis-

sion, which, in March 2002, issued its report on Federal Bureau of Investigation (FBI) security programs and Russian spy Robert Hanssen; and a member of the ad hoc advisory committee established by Secretary of Defense Donald Rumsfeld for the purpose of developing rules to govern military tribunals (2002). During the Clinton impeachment process, he was one of nineteen legal scholars asked to testify before the House Judiciary Committee on the historical origins of impeachment. In 1984, Bell received the Thomas Jefferson Memorial Foundation Award for excellence in law, and he was recently named one of the 100 Georgians of the century.

Judge Bell's political clout remains considerable. In recent years, this onetime Democrat has taken to endorsing Republican presidential candidates. He lent his support to Vice Pres. George H. W. Bush in 1992, Sen. Robert Dole in 1996, and Gov. George W. Bush in 2000. During the presidential election controversy of 2000, Bell visited the recount site and served as one of the Bush team's key advisers. He also filed an *amicus* brief on behalf of the American Center for Law and Justice in *Bush v. Gore* (2000). After the election, Bell served as a member of president-elect Bush's transition advisory team for the Department of Justice. Although these actions have no doubt raised eyebrows in the Democratic Party, Bell insists that he is not a Republican: "I haven't switched parties, I consider myself to be an independent" ("Griffin Bell, Carter's Attorney General" 1996).

Griffin Bell's life is an American success story. Born into humble circumstances, he reached the heights of his profession through a combination of talent, ambition, and an indefatigable work ethic. More important, when positions of power provided him with an opportunity to make a difference, he consistently rose to the occasion. As a judge, his "intelligence and evenhandedness in administering justice guided the South and the nation through some of its most perilous times" (Barry 2000). With all of his achievements, this is Bell's greatest legacy: his commitment to the rule of law and the equal rights of all citizens.

Stephen Louis A. Dillard

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BIRD, ROSE ELIZABETH

(1936–1999)

Rose Elizabeth Bird
Corbis

Rose Bird, who served as the chief justice of the Supreme Court of California from 1977 to 1986, was a frequent target of political debates over the ideological role of the judiciary and the proper use of judicial power. In almost every job she held, she played a pioneering role, being the first woman ever to hold the position. Like most pioneers, Bird was subjected to a disproportionate level of pubic scrutiny and criticism. Her importance as a judge is a reflection not so much of her actions but of the reaction of others to decisions that raised few questions when made by her male predecessors and colleagues.

Bird was born on 2 November 1936 in Arizona. Her mother was the influential parent—Bird had only limited contact with her father, who died shortly after her parents separated when Bird was five years old. The family, consisting of Bird's mother and her two older brothers, then moved to New York. Anne Bird provided her daughter with a model to follow, working to support her family without assistance and encouraging both sons and daughter to pursue college degrees. Bird's own activism began as early as high school, with work in student government and as a volunteer for the Adlai Stevenson campaign. Campaigning for an uncharismatic Democrat in a largely Republican area gave Bird an early taste of working against the odds. Indeed, fighting the odds would characterize

her professional and personal life, as Bird struggled to overcome sex discrimination to be accepted at work and to engage in a twenty-five-year battle with cancer that first appeared in 1976.

Rose Bird attended Long Island University on a full scholarship, graduating in 1958 with a major in English. She deferred her admission to the graduate program in political science at the University of California, Berkeley, choosing to work for a year and save money for living expenses. After entering graduate school, Bird received a Ford Foundation grant for a one-year internship with the California legislature. She accepted this internship, which melded nicely with her goal of becoming a journalist, with a focus on politics and foreign policy.

The internship experience convinced Bird that she would make a greater impact as a lawyer than as a political scientist or journalist. She shifted her course of study to law, transferring to Boalt Hall, the law school at Berkeley. There, she met Edmund G. (Jerry) Brown, who would later be elected to the office of governor and would then appoint Bird to the state Supreme Court.

Rose Bird's legal career began with a clerkship for the Nevada Supreme Court in 1965. She was the first woman ever to serve the court in that capacity. Upon completing her clerkship and returning to California, Bird sought a position in the public defender's office and, after several rejections, was hired by Donald Chapman, head of the Santa Clara Public Defender's Office. Bird described her colleagues' reaction to Chapman's decision in an interview: "They thought a woman would be a killjoy. They were afraid they wouldn't be able to continue their Friday afternoon get-togethers. Whoever won a case during the week would buy a bottle and they'd sit around and tell their war stories. They thought if a woman was present, they couldn't swear" (Medsger 1983, 14).

Although the fears were not realized—Bird participated in the Friday "meetings" and bought bottles—the fear reflects the problems she faced in operating in a male-dominated profession. It was not simply a matter of proving her competence. She also had to confront the fear (and often, the reality) that the presence of women would change the working environment.

Bird was a highly effective criminal defense attorney and, in the early 1970s, was employed by Stanford Law School to team-teach clinicals to law students. She was an extremely popular instructor and was frequently lauded by students for her teaching ability. Despite her success in her practice and in her academic career, Bird left both posts in 1974, hoping to open a private practice. Shortly thereafter, she volunteered to help her old law school friend Jerry Brown with his gubernatorial campaign. Upon Brown's victory, he appointed Bird to serve as his secretary of agriculture.

She was the first woman ever to hold a cabinet-level position in the California state government.

It was during her service as secretary of agriculture that Bird was first diagnosed with breast cancer, in 1976. She underwent a mastectomy but declined radiation and chemotherapy, opting instead for exercise and dietary changes. She shifted to a strict vegetarian diet consisting mostly of raw foods. Bird's doctors disapproved and predicted that she would survive less than two years. Although she did suffer a minor recurrence in 1977, that episode was followed by a twenty-year remission. Bird also ignored the usual injunction to reduce stress in her life. Instead, she increased it dramatically by accepting Brown's nomination of her for the position of chief justice in 1977.

The nomination itself was controversial. Brown's relationship with the judiciary was tense—he publicly stated that "judges were lazy and didn't deserve a raise" (Medsger 1983, 9). Bird's position in Brown's cabinet, her former role as a public defender, and her utter lack of judicial experience convinced many judges that Brown's purpose in appointing Bird was to provide himself with a voice and seat on the court. Bird faced significant opposition. Nineteen of the eighty deputy district attorneys in Santa Clara came out against her nomination. A number of Republicans in the state legislature were vocal opponents. Roger Mahoney, who would later become archbishop of Los Angeles, wrote a letter decrying her emotional instability. Oddly, the major state law enforcement groups remained silent, although they would later lead efforts to recall Bird and to deny her electoral victory. The widespread fear was that Brown had given the state's judicial "plum" to an inexperienced, liberal activist who also had the singular disadvantage of being female. Bird's nomination was confirmed, and she was sworn into office in 1977. She was the first woman to sit on the California Supreme Court and the first woman to hold the position of chief justice.

Did Bird become the liberal activist that her opponents feared? She was certainly liberal, and she took an active role in fulfilling her public duties. Her initial "activism" was most apparent in the area of judicial administration. She alienated the court staff by sending in a transition team to learn the essentials of her new role as administrator, rather than relying upon the staff to bring her up to speed once she took office. The director of the Administrative Office of the Courts, Ralph Kleps, quickly became an enemy. When Bird took office, Kleps asked her to sign papers delegating some administrative functions to him, as prior chief justices had done. To him, the request was routine, a detail necessary to the continued smooth functioning of the office. Bird refused to sign. Believing that she had fully to understand all of the duties before she could determine which should be delegated, Bird decided to delegate incrementally. As Bird explained:

> Unless you understand what you're delegating, you're not fulfilling your proper responsibility. . . . Now, perhaps you ought to delegate a lot of duties which you simply can't do. And I have done that since. But at that point when I was coming in, I didn't know what delegations I was giving because I didn't know what the responsibilities were of the Chief in these areas, and I wasn't about to turn them over to someone that I didn't know very well. . . . I don't do things blindly. (Medsger 1983, 57)

Bird's sense of responsibility and her firm unwillingness to adapt to the existing structure and norms made her even more unpopular with the established staff. Even if she had opted to retain the established practices, it is unlikely that she could have "blended in." She was the first woman chief justice and had been brought in by the governor to "reform" the judiciary.

Bird instigated other reforms that angered those who had benefited from the old system. Rather than allowing justices to retain permanent clerks (who would often draft opinions for the justices), Bird shifted to a rotation of clerks and asked that justices do more of their own writing. Rather than asking retired justices to fill in for absent justices, she supplemented the ranks of substitutes with lower court judges, arguing that they needed an opportunity to learn the practices of the Supreme Court. She refused to allow those former justices who had lost retention elections to hold any temporary positions in the judiciary. These were not insignificant changes, and the discomfort with such change is understandable. Yet even the most minor alteration was the subject of public scrutiny. The replacement of the desk in the chief's office, the changing of locks, and recarpeting (most done at Bird's personal expense) were the subject of reporter questions and news stories.

Clearly, Bird was an activist as an administrator. Was she a liberal activist as a judge? To an extent, the answer to the question is "yes." As should be expected, she heard arguments in many controversial cases and wrote opinions that conservatives characterized as profoundly liberal and improper obstructions of legislative will. Yet Bird's opinions were soundly reasoned and well grounded in the law. Governor Reagan appointees who were openly ideological in their opinion writing did not receive the kind of scrutiny or criticism that was the norm for a Bird opinion.

One of Bird's controversial opinions concerned the constitutionality of Proposition 13, a voter initiative that allowed for a recalculation of property values for tax purposes only upon its transfer (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization,* 22 Cal.3d 208 [1978]). The proposition was passed in response to the rapid increase of home values due to a booming real estate market in most of California's metropolitan areas. As a result of increases in market value, taxes (which are based on

property value) increased, often to a level beyond the means of the homeowners. The court upheld the constitutionality of the measure, with Bird in dissent. Bird argued against the proposition on equal protection grounds—she contended that the measure would have the practical effect of taxing one homeowner at a much higher level than his/her neighbor, simply because he or she had acquired the property more recently and at a higher price. That effect, she contended, treated similarly situated individuals differently and thus violated the equal protection guarantee of the Fourteenth Amendment to the U.S. Constitution. Bird was correct in her assessment of the practical impact of Proposition 13—it did result in disproportionate taxation of recent buyers. Whether or not such inequality is violative of the Fourteenth Amendment is a matter of continuing legal debate.

Bird was branded as a "pro-criminal" justice for the position taken in the case of *People v. Caudillo* (21 Cal.3d 562 [1978]). Bird voted with the majority in deciding that rape did not constitute "great bodily injury" for the purpose of a statute designating "great bodily injury" as an aggravating factor for sentencing those convicted of a number of crimes, including rape. The majority's argument was that, if rape was the crime itself, rape could not also be an aggravating factor. Of course, the papers reported that the chief justice and her liberal colleagues believed that rape involved only insignificant injury to the victim.

In another "liberal" decision, Bird voted (again, with the majority) to overturn an appeals court ruling suspending a busing plan that was being used to desegregate the Los Angeles County schools (*Crawford v. Los Angeles County Board of Education*, 17 Cal.3d 280 [1976]). That decision was characterized as an imposition of busing, although it simply upheld the district's proposed solution to a degree of racial segregation that violated the U.S. Constitution.

Then came the election day disaster of 1978. Bird won retention, but barely, gaining only 51.7 percent of the vote. The *Los Angeles Times*, in the election day edition, ran a story alleging that the court had delayed release of a key decision on prison terms for criminals who used a gun during the commission of a violent crime. The delay was purportedly engineered by the chief justice and her allies to improve Bird's chances of winning retention.

It is certainly true that Bird's vote in the case of *People v. Tanner* (24 Cal.3d 514 [1979]) would have done her no good at the polls. The ruling allowed a judge to strike the "use of gun" portion of the charge in a particular case. In the instance in question, the defendant, a former security consultant claiming to be conducting a test, used an inoperable, unloaded weapon. The prosecutor supported the judge's decision, arguing that the mandatory sentence required if the weapons charge remained would be un-

reasonably lengthy. The decision could be regarded as another "pro-criminal" decision by a liberal chief justice.

After allegations of the delay appeared, Bird herself requested an investigation. The subsequent proceedings served to keep the matter firmly in the headlines, along with casting doubt on the integrity of the Commission on Judicial Performance. The only justice who gave testimony substantiating the allegations was William Clark, a Reagan appointee whose credibility was dubious. Considered an ideologically motivated justice, Clark was singularly unqualified—he failed to complete law school and passed the bar exam on the second try. Clark later became Reagan's national security adviser and was regarded by his colleagues as ill versed in the law and governed solely by political concerns in his judicial decisionmaking. He was certainly a Bird opponent. The commission found no evidence to support the allegations of delay.

Perhaps the most prevalent accusation against Bird was that she torpedoed the death penalty in California. Certainly, Jerry Brown was an opponent of capital punishment who knew that Bird's personal views coincided with his own. The Bird court overturned sixty-one of the sixty-four death sentences that came before it on automatic appeal. The chief justice voted to overturn the sentence in all sixty-four cases. Even the most minor flaw would induce Bird to vote against a death sentence—in her view, the penalty was too serious and too irrevocable to allow for toleration of any error, however minor or apparently harmless. This was the position Bird adopted in justifying her "no" votes. Bird was hardly the only justice, however, who had made decisions opposing the death penalty. The majority voted with her in sixty-one of those sixty-four appeals. Prior to her tenure on the court, in 1972, the court had declared the penalty unconstitutional under the California constitution. A subsequent legislative act was struck down in 1976, on the ground that the United States Supreme Court had declared mandatory death sentences similar to those the act required to be unconstitutional. The penalty was restored in California legislatively in 1977 and then replaced by an initiative passed in 1978.

The cumulative impact of controversy and unpopularity resulted in Bird's defeat in her 1986 retention election. Two other liberal justices, Justices Reynoso and Grodin, were also defeated. As Justice Reynoso noted at a memorial service for Bird,

> During her tenure, the body politic of California changed. For decades, there had been an unstated agreement among the political parties that the judiciary would not be the subject of partisan political attack. I recall my own appointment to the Court of Appeal. . . . . Just over five years later, when I was named

Joseph R. Grodin (1930–)

Although much of the attention was focused on Chief Justice Rose Bird, she was one of three California justices who were rejected in the retention election of 1986. One of the other justices to lose his seat, Joseph R. Grodin, has authored an informative and reflective book not only about that experience but also about the workings of appellate courts in general and the California Supreme Court in particular.

Born in 1930, Grodin was educated at the University of California at Berkeley and then earned a law degree from Yale University. After serving in a California firm where he quickly became a partner, Grodin taught for a year at the law school at the University of Oregon and later at the Hastings Law School, where he specialized in labor law. He served for two years as an associate justice of the California Court of Appeal and then for one year as its presiding justice. Gov. Jerry Brown Jr. appointed Grodin to the California Supreme Court in 1982. After a campaign waged largely on law and order issues, including the court's application of the death penalty, he was ousted in the retention election of 1986, after which he returned to teaching at Hastings.

In describing the role of a judge, Grodin steered between those who believe that judges simply discover the law and those who believe that they make it. Grodin believes that in interpreting both laws and constitutions, judges have to bring contemporary standards of the community to bear but that they also face many legal and institutional restraints.

It is not surprising that Grodin has serious reservations about the way that the public assesses judges in elections. Grodin explained some of the handicaps that a judge faces:

> I did not fully appreciate . . . the handicaps that canons and traditions of judicial ethics and decorum impose on a judge in such an election. Unlike most candidates

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> to this court, the change was dramatic, the hearing contentious, many witnesses appeared and the vote was divided. Partisan politics was in full bloom. During Chief Justice Rose Bird's tenure, she was subjected to several recall political campaigns and to two confirmation votes. She understood that court decisions that angered powerful groups or protected nonmajoritarian rights would jeopardize her position. She remained true to her oath of office; she enforced the Constitution and applied it equally to all. ("In Memoriam" 2000, 1310)

After her 1986 defeat, Bird retired to private life, as she was too controversial to be employable by most law firms. The University of California–Los Angeles (UCLA) offered her an academic post, but she declined it because it would not allow her to continue to care for her mother in San Fran-

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> for elective office, I could make no campaign promises.
>
> If I knew about opinions yet to be filed that would be pleasing to the voters (as was the case), I could not talk about them. My "platform" was limited to my past. (1989, 172)

Grodin is particularly concerned about voters who use a "scorecard" approach to voting, which implies that judges should tailor their decisions to desired outcomes rather than to legal requirements. He noted that "to concentrate on the results without considering the reasons seems hardly a legitimate means of evaluating judicial performance" (1989, 177). He is also concerned about the role that fund-raising can exert on elections. Grodin noted that:

> During the campaign I declared that it was my goal to go to bed election night knowing, as best one can know such things, that I had not decided any case differently because of the election. I believe I achieved that goal, but I have to recognize that I may be wrong. At no time while I was on the court did I participate in or overhear any discussion as to how a particular opinion would "play" in the public ear. Any judge who articulated such a concern would have been frowned at by his colleagues. But one would have to be superhuman not to *think* about such things—Justice Kaus said it was like brushing your teeth in the bathroom and trying not to notice the crocodile in the bathtub. And having thought about them, how does a judge make sure that they do not influence his or her opinion one way or the other—by yielding unconsciously to public pressure or bending over backward to avoid it? (177)

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cisco. Bird continued to do volunteer work and to care for her mother until the older Bird's death in 1991. Rose Bird's breast cancer recurred in 1996, and she underwent a second mastectomy. She lost her battle with cancer on 4 December 1999 and was cremated.

Sara Zeigler

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BLACK, HUGO LAFAYETTE

(1886–1971)

Hugo Lafayette Black
Photographed by Harris & Ewing, Collection of the Supreme Court of the United States

Although invariably ranked among the great justices, Hugo Black also remains one of the more controversial figures in the Supreme Court's history. Revelations of his past membership in the Ku Klux Klan (KKK) marred his 1937 appointment to the bench, creating doubts among some about his commitment to racial equality that his judicial record would never entirely dispel. His status as the Court's spokesman in *Korematsu v. United States* (1944), upholding World War II sanctions against Japanese Americans, was no help either. Nor was his defense of *Korematsu* in an interview published after his death, particularly his remark that "they all look alike to a person not a Jap" ("Justice Black" 1971, 96).

Major themes in Black's jurisprudence provoked considerable debate as well. Throughout most of his career, Justice Felix Frankfurter and disciples of the Frankfurter version of judicial self-restraint condemned Black as a result-oriented jurist bent on molding the Constitution to his personal predilections, with the justice's absolutist interpretation of the First Amendment and advocacy of total incorporation of the Bill of Rights into the Fourteenth Amendment's restrictions on state power the principal targets of their concerns. During Black's last decade on the bench,

on the other hand, advocates of an expansive, "living" Constitution derided as "simplistic" and outmoded Black's attempts to limit the Constitution's meaning to its language and the intent of its framers, especially his unwillingness to recognize a "right of privacy" or other unenumerated freedoms, as well as his refusal to extend the Fourth Amendment to eavesdropping and the First to "symbolic" speech or to hold that people may exercise their First Amendment rights wherever they happen to be. At every stage of his career and since, it seems, persons of vastly different constitutional persuasions have found elements of the justice's jurisprudence deeply disturbing.

Justice Black's rise to a seat on the nation's highest tribunal was as remarkable as his career was to be controversial. The son of an alcoholic storekeeper and farmer was born in rural Clay County, Alabama. He received only a rudimentary legal education in the University of Alabama's two-year law program and served briefly as a police court judge early in his career. But his intelligence, iron will, and sheer drive—qualities inherited largely from his beloved mother—enabled him to become one of Birmingham's most successful lawyers. In 1926, he won election to the U.S. Senate; and in 1937 he became Pres. Franklin Roosevelt's first appointee to the Supreme Court.

Black's pre-Court career offered mixed signals about the sort of judicial record he might develop. Birmingham's business leaders considered the aggressive labor union lawyer a "Bolshevik." As a local prosecutor, he authored a grand jury report accusing police of third-degree tactics, especially against African American suspects. His vehement Senate attacks on economic privilege and support for a thirty-hour workweek alarmed even Roosevelt. And Black's relentless investigations of lobbyists and utility holding companies, among other targets, inflamed his critics.

As an attorney, however, Black had not been above appeals to the racial and religious bigotry of jurors. When a Methodist minister killed a Catholic priest who officiated at the marriage of the minister's daughter to Pedro Gussman, a Puerto Rican paperhanger, Black won an acquittal for the defendant. Bringing floodlights into the courtroom to accentuate the groom's dark complexion, the future justice showed the jury a picture of Gussman taken before "the witness had his hair worked on," then declared, "you've had the curls rubbed from your hair since you had that picture taken" (Newman 1994, 81). During the trial, Black reportedly referred to Gussman as "a negro, a dago, or a Porto Rican" (81).

There was also his Klan membership. Black initially resisted joining the hooded society. But in the 1920s, the Klan enjoyed a huge membership and tremendous political influence. Ku Klux Klan support was critical to a politician's success in Alabama. Black joined the organization in 1923. He resigned at the beginning of his first Senate race in 1926 and later said that

he had joined the Klan largely because many Alabama jurors were also members. But he won election to the Senate with Klan support and maintained close Klan ties until the early 1930s and the decline in its influence.

Black's KKK affiliation prompted one group to condemn 4 October 1937, the day he took his seat on the Court, as "Black Monday." But the justice's early support of civil liberties claims, even in highly charged racial cases, soon converted many of his critics into staunch admirers. His opinion for the Court in *Chambers v. Florida* (1940), overturning the murder convictions and death sentences of four young blacks on coerced confession grounds, was especially influential in enhancing his civil libertarian credentials.

Consistent with his populist Senate stance, the justice quickly joined in the Court's dismantling of its pre-1937 laissez-faire precedents. Echoing themes common in his Senate speeches, he vigorously rejected any authority of judges to rule on the "reasonableness" of federal and state economic controls. But he also became a leader in the Court's growing commitment to the protection of Bill of Rights and related noneconomic safeguards from government interference.

Black's self-assurance and the tenacity with which he pursued his positions rankled a number of his colleagues, especially Felix Frankfurter and Robert H. Jackson, who considered the justice insufficiently deferential to the political branches of government and their clear inferior. However slender his academic credentials might have been, though, Black became not only a dominant figure in the Court's decisionmaking but one of its intellectual leaders as well.

Especially early in his career, Black's critics complained that he was unduly result oriented. Throughout his years on the bench, however, he arguably embraced a positivist jurisprudence that, in his judgment, limited the potential for judges, such as those of the laissez-faire era, to impose their personal preferences on the Constitution and the people's elected representatives. Judges, he contended, should construe constitutional provisions according to their literal meaning or the intent of their framers. Only in relatively rare, penumbral situations, in which the Constitution's text and the historical record proved unavailing, should jurists give a provision the construction they believed to have the greatest intrinsic merit. To the extent consistent with his commitment to literalism and historical intent, he also preferred relatively fixed constitutional interpretations that limited the scope of judicial discretion.

Black's positivism led him largely in liberal-activist directions through much of his career. The laissez-faire majority, in his view, had simply engrafted their economic views on the Constitution's text; and he enthusiastically joined the Court in overturning those precedents. In fact, Black

opposed all judicial review of the reasonableness of economic controls. When Justice Harlan Fiske Stone indicated in *United States v. Carolene Products Co.* (1938) that economic regulations were to be presumed constitutional but would be struck down if found completely lacking in any rational basis, Black refused to join that part of Stone's opinion, finding it unduly intrusive on legislative prerogative.

Terming himself a "backward country fellow," for whom words meant what they said, the justice assigned a literal, absolutist interpretation to the First Amendment command that Congress "make no law" abridging its freedoms. And although he did not formally adopt such a stance in his opinions until the 1950s, unpublished opinions and other materials in his papers make clear that he embraced absolutism at least by 1940–1941. Based on such thinking, he opposed all obscenity and libel laws, among other regulations. In fact, his last opinion on the Court—a concurrence in the *Pentagon Papers Cases* (1971)—was a stirring reaffirmation of his commitment to absolutism. During oral argument of those cases, he seemed both amused and bemused by one lawyer's assertion that "no law" does not mean "no law."

By 1939, Black was also advancing his total incorporation thesis to Justice Frankfurter and other colleagues. But his position was not based on any notion that justice required the complete application of the Bill of Rights to the states. Instead, his study of the records relating to the Fourteenth Amendment's adoption convinced him that the amendment's framers intended its first section to incorporate all the guarantees of the Bill of Rights, thereby making them binding on the states and localities. A majority never accepted his position, advanced most fully in his dissent for *Adamson v. California* (1947). During his last decade on the bench, however, he had the satisfaction of watching the Court apply most of the Bill of Rights to the states through its theory of selective incorporation.

Nor was Black's positivism confined to civil liberties issues. Since the Constitution granted Congress, not the courts, the commerce power, for example, he refused to join decisions striking down state commercial regulations as an "undue" burden on interstate commerce. When his old friend Harry Truman seized the nation's steel mills to avert a strike during the Korean War, Black gave short shrift to the expansive contentions of the president's counsel regarding the scope of "inherent" presidential power. Authorizing the seizure of private property was a job for the nation's lawmakers, not its executive officials. Instead of carrying out laws adopted by Congress for dealing with work stoppages in industry, declared Black, Truman had unconstitutionally made and enforced his own "law."

Although the advocacy of total incorporation and First Amendment absolutism that dominated much of Justice Black's career supported broad ju-

dicial authority over government action, his positivist jurisprudence also limited the reach of judicial control in many areas—as became increasingly evident in civil liberties cases decided during his final decade on the bench. Since the Fourth Amendment forbade only "unreasonable" searches and seizures, he extended police more deference in that field than most of his colleagues were willing to acknowledge. Given the amendment's reference only to the seizure of tangible items ("persons, houses, papers, and effects"), he would not extend its reach to eavesdropping. He also doubted that any warrant authorizing the bugging of possible future conversations could satisfy the amendment's requirement that warrants "particularly describ[e]" the things to be seized.

Black's positivism limited the scope of his First Amendment viewpoint as well. He refused to agree that its guarantee to "freedom of speech" went beyond its literal language to include "symbolic speech," such as flag burning, or the conduct involved in such "speech-plus" activities as picketing and parades. He also warned repeatedly that First Amendment freedoms could be exercised only where people had a right to be for such purposes. In *Adderley v. Florida* (1966), for example, he spoke for a five-four majority in upholding the jail-ground trespass convictions of civil rights demonstrators. He also vigorously dissented when a majority overturned the suspension of schoolchildren for wearing black armbands to school as a form of antiwar protest. Challenging the majority's assumption that students and teachers carry their First Amendment rights onto school property, subject only to what courts consider "reasonable" regulation, he complained that the Supreme Court made a poor national school board.

Black also accorded considerably greater discretion to government's application of general laws to expression in public buildings than on streets and sidewalks. He dissented in *Brown v. Louisiana* (1966), for example, when a majority struck down the breach-of-peace convictions of young blacks, who had staged a sit-in at a small parish library in Louisiana. Disorderly conduct in a library, he argued, should be governed by different standards than those applicable to the streets. Along similar lines, during his last term Black joined a dissent from the Court's decision in *Cohen v. California* (1971), overturning the disorderly conduct conviction of a young man who wore a jacket bearing an offensive epithet in the corridor of a courtroom.

The potentially limitless scope of the Constitution's equal protection and due process guarantees presented special problems to a jurist of Black's positivist leanings. For that reason, the justice preferred to limit equal protection largely to its historic racial context. He did join the Court's use of the guarantee in reapportionment cases; but when he spoke for the justices in requiring congressional districts of substantially equal populations, he rested

Howell Heflin
(1921–   )

Best known as a large and folksy U.S. senator who served from 1979 to 1997, Alabama's Howell Heflin attended Birmingham-Southern, served as a marine in the South Pacific and was decorated for his service during World War II, and then studied law at the University of Alabama, graduating in 1948. The son of a Methodist minister, Heflin came from a prominent Alabama family that included an uncle, Sen. Cotton Tom Heflin, an early-twentieth-century U.S. senator from Alabama known for his racism. Howell Heflin earned a much different reputation.

After obtaining his law degree, Heflin set up a private practice in Tuscumbia, Alabama, supplementing his income by teaching political science at nearby Florence State Teachers College. Active in community affairs, Heflin was appointed as an attorney for the County Commission and served as chairman of the Board for Education for ten years. Over time, he became known as "the Perry Mason of North Alabama" (Hayman 2001, 132, citing a phrase coined by a writer from the *Florence Times*), gradually shifting most of his focus from criminal to civil work. Heflin and a friend also started a newspaper, known as *The Valley Voice*, during that time.

With his legal reputation growing, Heflin became president of the Alabama Bar Association in 1965. He helped create a Citizens' Conference to recommend judicial reforms during his tenure, and the American Bar Association gave its Award of Progress to the state organization at the end of his term. The Alabama court system was widely perceived to be ill organized and backward, and despite the fact that his earnings would be reduced from more than $100,000 to $22,000 a year if he won, Heflin decided in 1970 to run for the office of chief justice of the Alabama Supreme Court. Heflin handily won the election and took office in January 1971. In his first year as chief, he succeeded in getting a number of judicial reform bills through the state legislature and created a Department of Court Management that eliminated judicial backlogs. He also instituted orientations for new judges and training for more experienced ones and helped institute new Alabama Rules of Appellate Procedure.

Alabama's constitution of 1901 was viewed as antiquated, but Heflin decided to concentrate his efforts on reform of Article 6, dealing with the judiciary, rather than the entire document. He had to do so at a time when George Wallace, the governor then known for his race baiting, did not support reform. Heflin arranged for a Second Citizen's Conference on Alabama

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his opinion in *Wesberry v. Sanders* (1964) on what he apparently considered the more concrete constitutional command that representatives be elected by the people rather than on the vague contours of the equal protection guarantee. He generally dissented, moreover, when the Court struck down other nonracial restrictions on the franchise, such as the poll tax.

Black completely rejected as a distortion of the provision's language and

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State Courts in 1973 (Hayman 2001, 177) and used its influence to get the state legislature to support constitutional amendments. He then worked to get the amendments adopted in a statewide referendum. The judicial amendments were tied to another amendment favored by the Farm Bureau to charge farmers one dollar for each pig they sold, so proponents of the amendments advocated "Pigs and Judges" (183, quoting Heflin). The new amendments furthered the doctrine of separation of powers by resulting in significantly greater judicial independence. Amendments provided for, among other things, a unified state judiciary, general rule making by the state supreme court, limiting most judgeships to those with law degrees, increased professional standards, and vesting broader administrative powers in the chief justice (184). Funding for most courts was also moved from the county to the state level. Heflin subsequently worked for implementing legislation for the amendments but shared responsibility with his successor, Chief Justice Bo Tobert (who had much better relations with Governor Wallace), for getting such legislation adopted. In 1976, the Association of Trial Lawyers selected Heflin as the nation's most outstanding appellate judge, and, in his last year as chief justice (Heflin chose not to run for reelection), he was president of the Conference of Chief Justices of the United States. After leaving his position in 1977, Heflin served for a time as the Tazewell Taylor Visiting Professor of Law at the College of William and Mary.

Heflin is known for telling stories about a fictional country lawyer he dubbed "No-Tie Hawkins," whose trademark was his refusal to wear a tie in court. Heflin would tell how a waiter, asked what he thought about No-Tie becoming a judge, responded: "He'll make a fine judge. If he don't fine no more than he tips, he'll make the greatest judge in the world" (Hayman 2001, quoting Heflin, 200).

Heflin and Wallace both started out seeking the Democratic nomination for the U.S. Senate in the 1978 race, but Wallace dropped out, and Heflin went on to win. Heflin proceeded to gain a reputation as a U.S. senator for integrity, progressivism, and independence, making some of his most critical decisions (including his decision not to vote to confirm Judge Robert Bork to the United States Supreme Court) as a member of the Senate Judiciary Committee. Heflin retired from the U.S. Senate in 1979, having succeeded in maintaining a reputation for integrity and competence as a lawyer, a justice, and a senator.

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early history the substantive due process doctrine under which judges rule on the reasonableness of legislation. Although he first registered his opposition to that formula in attacking the pre-1937 Court's laissez-faire precedents, he also objected to the modern Court's use of substantive due process and related devices as a basis for recognizing unenumerated noneconomic rights. When a majority, in *Griswold v. Connecticut* (1965), struck down a

ban on contraceptives and found a right of marital privacy in the penumbras of the Bill of Rights, the Ninth Amendment, and substantive due process, the justice vigorously dissented, accusing his colleagues of embracing a natural-law or sociological brand of jurisprudence. For Black, the amendment process was the appropriate medium for keeping the Constitution in tune with the times or evolving conceptions of justice and fairness. He did not directly confront the abortion issue before leaving the bench. His remarks in the Court's conferences left no doubt, however, that he would have dissented had he been on the Court when a majority, in *Roe v. Wade* (1973), invoked substantive due process as the basis for a right of abortion.

Black was equally opposed to the use of due process as a device for recognizing standards of procedural "fairness" mentioned nowhere in the Constitution's text. Due process had its origins in the provision of the English Magna Charta forbidding government to take away a person's life, liberty, or property except by the "law of the land." Embracing that standard, Black argued that due process only required government to follow established laws and procedures in infringing upon individual life, liberty, or property. Thus, when the Court held in *In Re Winship* (1970) that proof of guilt beyond a reasonable doubt was a requirement of "fundamental fairness" implicit in due process, Black registered a pointed dissent.

There was also a limit to Black's willingness to subject ostensibly private action to constitutional prohibitions on state action. Invoking a public-function rationale, he spoke for the Court in *Marsh v. Alabama* (1946), subjecting a company town to First Amendment obligations. When the Court extended the *Marsh* doctrine to shopping centers in *Food Employees v. Logan Valley Plaza* (1968), however, he dissented. Emphasizing that the company town at issue in *Marsh* had all the attributes of any other town except public ownership, he termed Logan Valley Plaza a "very strange town." Since the First Amendment, as applied to the states through the Fourteenth, extended only to state action, the extension of its requirements to private shopping centers constituted, in his judgment, a deprivation of private property without due process of law.

Justice Black agreed that substantial state influence over otherwise private activities could convert them into state action subject to constitutional obligations. In *Shelley v. Kraemer* (1948), for example, he joined the Court in overturning a state injunction issued to enforce the terms of a racially restrictive housing covenant against a couple who wished to sell their home to an African American. He also voted to uphold Congress's use of its commerce power to forbid segregation in public accommodations. In *Bell v. Maryland* (1964), however, he vigorously rejected the proposition that the equal protection clause, standing alone, forbade trespass prosecu-

tions of black sit-in participants who remained in a restaurant over the owner's objections. The active intervention of a state court had been necessary to enforce the racially restrictive covenant at issue in *Shelley*. But in *Bell,* the state was merely applying its racially neutral trespass laws in behalf of a restaurant owner, whatever his motives. The owner's bigotry, in Black's judgment, could not be attributed to the state. Along similar lines, during his last term he spoke for a majority in turning back a challenge to the decision of Jackson, Mississippi, to close its swimming pools rather than operate them on a desegregated basis. Since a city had no constitutional obligation to operate swimming pools in the first place, Black declared, it was free to close them, whatever the underlying psychological motives for its decision.

As the Court's 1971 term approached, the elderly justice, plagued by declining health and convinced of his imminent demise, retired from the bench, bringing to an end a thirty-four-year tenure. A week later, on 25 September 1971, he died. To a greater degree than most justices, it can be argued, he had been concerned less with the immediate outcome of cases than with establishing limits to the scope of judicial discretion in a democratic society.

Tinsley E. Yarbrough

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BLACKFORD, ISAAC

(1786–1859)

Isaac Blackford
Library of Congress

Isaac Blackford is best known for his thirty-five years as a judge on the Indiana Supreme Court (1817–1853) and, perhaps most significantly, for his collection of the court's opinions, published as *Blackford's Reports*. Often described as a quiet, somber, and reclusive man, Blackford led a very public life before, during, and after his long tenure on Indiana's high court. He remains regarded as one of Indiana's greatest judges and one of the greatest American judges of the frontier era.

Born in Bound Brook, New Jersey, on 6 November 1786, Blackford was the son of Joseph Blackford, a local merchant of English descent, and Mary Staats Blackford. In 1802, at age sixteen, he enrolled at Princeton College as "Isaac Newton Blackford," but it appears that he added the middle name and did not continue to use it thereafter (Honeyman 1916, 4). He graduated from Princeton in 1806. At Princeton, he studied the classics, including Latin and Greek, but it was his study of Blackstone's *Commentaries* during his senior year that inspired Blackford to choose a career in law (Withered 1998, 118). In a class of fifty-four—Princeton's largest up to that time and for twenty years afterward—Blackford's classmates included three future governors, three future U.S. senators, and four judges of state supreme courts (Alexander 1881, 2). Among these was James Iredell of North

Carolina, who eventually served as governor, U.S. senator, and state supreme court judge and who was the son of United States Supreme Court justice James Iredell.

Upon graduating from Princeton, Blackford "read law" in the law office of Revolutionary War hero Col. George McDonald in Middlebrook, New Jersey (Honeyman 1916, 5). After about a year, Blackford left Colonel McDonald and continued his training in the office of Gabriel Ford, of Morristown, whose home had been General Washington's headquarters during the Revolutionary War. Ford later became a justice on the New Jersey Supreme Court. In 1810, Blackford was admitted to the New Jersey bar (5). Approximately one year later, however, he left New Jersey and emigrated westward.

According to historical accounts, the reasons behind Blackford's decision to leave New Jersey for the Northwest Territory in 1811 are unknown (Withered 1998, 118). Upon moving to present-day Indiana, Blackford first resided and practiced law in Brookville, then became a cashier at the Vevay branch of the territorial bank, and shortly thereafter became editor of a newspaper in Vincennes. In 1813, he became clerk and recorder of Washington County. Later that year, Blackford was selected to be the clerk of the territorial House of Representatives, located in Corydon—the capital of the Indiana Territory at the time. Blackford resigned in 1814 when territorial governor Thomas Posey appointed him as the president judge of the First Territorial Circuit Court. When Indiana became a state in 1816, Blackford was elected to the state's House of Representatives, as a representative of Knox County. On his thirtieth birthday, the twenty-nine members of the House convened and unanimously selected Blackford as the first speaker of the House.

Like his previous professional positions, Blackford's tenure as speaker of the House was short lived. Less than a year into statehood, Judge John Johnson, one of three judges on the newly organized state Supreme Court, unexpectedly died. The young court had not yet issued any decisions. Under the 1816 Indiana Constitution, the governor appointed Supreme Court judges for seven-year terms. It is reported that during Johnson's funeral, Gov. Jonathon Jennings

> first signified to Blackford his intention to appoint him to that high office. They were walking arm in arm to the grave; and after discoursing in a low tone, and somewhat at length, upon the excellent traits of the deceased, Governor Jennings made known his purpose. Blackford was completely overcome by the announcement, and as usual on such occasions, lost his voice and all power of expression. Finally, regaining his composure, he besought the gover-

> nor not to do so silly a thing. He urged his want of years, his inexperience, his limited knowledge of the law, and the superiority of other men, half a dozen whom he named. (Alexander 1881, 2)

The governor insisted, and the speaker relented. Blackford's commission to the court was dated 10 September 1817.

After his initial appointment by Jennings in 1817, Blackford was reappointed to the bench four more times by four different governors and served more than thirty-five years—one year longer than Chief Justice John Marshall served on the United States Supreme Court. While on the Supreme Court, Blackford won the hand of his former mentor Colonel McDonald's daughter Caroline, who was fourteen years younger than Blackford. They were married in 1820. A year later, Caroline died giving birth to a son named George, after his grandfather, the colonel. George Blackford died an early death in approximately 1839. The loss of his wife and only child are believed to have contributed to Blackford's well-known "hermit like existence" and "reticent" disposition (Withered 1998, 19).

Despite his affinity for the law and his taciturn temperament, Blackford was a candidate for several elected offices while serving on the court. In 1825, the Whig Party nominated Blackford for governor, although he was not consulted prior to being nominated (Honeyman 1916, 8). He lost the election to James Brown Ray by a popular vote of 13,040 to 10,418. And the following year he was a candidate for the U.S. Senate, but he lost to William Hendricks by a single vote in the Indiana General Assembly. Although he lost both of these elections, Blackford was a popular public figure in Indiana. In 1836, a new county was carved out of the existing Jay County in east-central Indiana and named Blackford County in honor of the judge.

Of his many accomplishments during his long life of public service, Blackford is most well known for his *Blackford's Reports*. Having studied Blackstone at Princeton, Blackford was committed to the common law method of legal reasoning, hence his insistence on the use of precedent. In fact, he has been described as a "classical precedent judge" (Withered 1998, 19). One of his contemporaries once wrote of him: "The principal characteristic of the mind of Judge Blackford is caution. He never guesses. He is emphatically a book judge. Declamation with him is nothing, precedent and good authority, everything" (Smith 1858, 85). At the time he was appointed to the Indiana Supreme Court, there were no provisions for publishing the court's opinions. In his early opinions Blackford relied on precedent from England and occasionally from state courts whose opinions were published. He thought it imperative, however, that Indiana's court opinions be published and widely disseminated. By the middle of the 1820s, Blackford was single-handedly collecting and editing the opinions of the court,

taking painstaking efforts to assure accuracy, clarity, and grammatical precision (Alexander 1881, 2). He selected and edited those opinions he believed to be the most important legal decisions of the court and intermittently published eight volumes between 1930 and 1950.

In the preface to the first volume of *Blackford's Reports*, published in 1830, Blackford wrote:

> This volume of Reports, containing the decisions of the Supreme Court of the State during the first ten years of the government, is respectfully submitted to the Public. The adjudications of the Court, constituting a part of the law of the country, should be generally known; and it is hoped that their publication will be satisfactory and useful. It is not anticipated that the work will be found free from imperfections. The Reporter, however, has spared no exertion to render it accurate and acceptable; and he confides it, with cheerfulness, to the liberality of his fellow citizens. (*Blackford's Reports* 1817, 1:2)

Blackford's Reports were not only essential to the development of law in Indiana but "were acknowledged as some of the finest in the field and were widely quoted in both the United States and Britain" (Withered 1998, 119).

In addition to *Blackford's Reports*, Judge Blackford was well respected for his own legal ability and opinions and his influence in the opinions of his brethren. In Blackford's first term, the Indiana Supreme Court decided three cases. In the first case, *Averil v. Dickenson*, 1 Blackf. 3 (1817), the court unanimously dismissed an appeal from Switzerland County Circuit Court because the clerk of the Circuit Court had not executed an appeal bond. In addition to being the first case decided during Blackford's tenure on the court, the case is noteworthy because it marked the first use of precedent by the court (Withered 1998, 16). Per Justice Jesse L. Holman, the opinion of the court cited *Hardin v. Owings*, 4 Ky. 214, 1 Bibb. 214 (1808), a Kentucky Court of Appeals ruling that had dismissed an appeal for the same reason. Although Blackford did not author the opinion, his influence is evidenced by the strict reliance on precedent.

Only a few years into Blackford's first term, the Indiana Supreme Court heard two appeals involving the contentious issue of slavery and involuntary servitude. Under federal law, the Northwest Ordinance of 1787 proscribed slavery and involuntary servitude in the Northwest Territory. Federal officials, however, had interpreted the ordinance to forbid only the introduction of new slaves into the territory, and thus the status of slaves already residing in the territory was unaffected. When Indiana was admitted to the union as a state, the antislavery forces made up a majority of the new state's Constitutional Convention. As a result, the 1816 constitution

John L. Niblack, a Hoosier Judge

Born at the turn of the twentieth century near Vincennes, Indiana, John L. Niblack was raised largely by his maternal grandparents after his mother died when he was a youngster. He did a variety of jobs, including selling newspapers and doing farm work, to earn money as a young man. After receiving a certificate after ninety days at a teachers' colleges, he spent his first full year of work as a schoolteacher.

Initially failing to qualify for the marines, Niblack attended Purdue University for a year before enlisting in the navy but saw no overseas duty during World War I. After the war, he earned his bachelor's degree from Indiana University in 1922 and then spent a number of years as a newspaper reporter (covering a number of notable trials) before finishing law school at night, serving as an assistant prosecutor, and then being elected to the Indiana state senate. In that time both as a reporter and as a Republican legislator, he saw how powerful an influence the Ku Klux Klan exercised in his state, but he disagreed with the Klan's racist beliefs and, in contrast to many other aspiring politicians, refused to join.

In 1941 Niblack, who had since gone into private legal practice, was appointed to head a police court, and he continued to serve in a number of judicial offices, including as a judge on the Superior Court and as a Circuit Court judge of the Nineteenth Judicial Circuit in Marion County, to which he was elected to three successive six-year terms from 1956 to 1974. In his first five years of service on the police court, which he later helped reform, Niblack found that he was "usually confronted by a Prosecutor without any preparation, a policeman without a warrant, and a defendant without any defense, except maybe some fellow had hired a lawyer who he hoped was an intimate friend of the Judge, or better yet, had something on the Judge" (Niblack 1973, 262). Niblack also found that he "fought a vigorous, continuous, and often losing action with the professional bondsmen" (263), many of whom he believe to be corrupt.

Once confronted with a prosecutor, Virgil Norris, who held that a defendant, Fruster Jones (from whom the police had illegally seized evidence), should be convicted because "everyone knows Fruster Jones is no good and has a long record," Niblack called for a copy of the Indiana state constitution. He read aloud, "Every person shall be secure in his house, his property, his person and his effects except Fruster Jones, whom Deputy Prosecutor Norris says is no good." When Norris re-

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explicitly prohibited slavery. Article 11, Section 7 read: "There shall be neither slavery nor involuntary servitude in this State, otherwise than for punishment of crimes, whereof the party shall have been duly convicted."

In 1820, the Indiana Supreme Court was first asked to rule on the legal status of slaves in *The State v. Lasselle*, 1 Blackf. 60. Polly, "a woman of color," had petitioned the Knox County Circuit Court to issue a writ of

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sponded, "Judge, that doesn't say that!" Niblack responded "Well, that's what you want it to read. The mantle of the law protects everyone alike—good or bad" (Niblack 1973, 274).

A raconteur whose autobiography dwells at length on events in his childhood and pranks during his college years, Niblack also expressed strong political opinions. He defended the Indiana system of judicial election, which he thought was superior to the federal system of appointments. Niblack argued that "our Federal judges are appointed for life and many of them become autocrats and irresponsible, but are not subject to recall. It is a sad thing, as the United States is in the grip of an oligarchy of 300 Federal judges who believe in a government of men and not of written laws, and are doing away with elected grassroots self government" (Niblack 1973, 331). Strongly opposed to school busing, Niblack argued that "if forcing children to attend a certain school because of race was unconstitutional in 1954, it is unconstitutional in 1972" (333).

Niblack enjoyed telling humorous stories. He reported that as he was at the coffee counter one morning during a recess, a man rushed in:

> He turned to me and said, "I have to be in Judge Niblack's Court in a minute. Where is the Court?" I told him and he added "What kind of a judge is he? They tell me he's a mean old Son-of-a-Bitch!"
>
> "O, I think you'll find him fair," I replied. The young man rushed up the stairs, and in a few minutes I went in the back door, donned my robe and mounted the bench. I had to laugh inwardly when I saw the poor fellow stretching his head above the crowd, a look of horror on his face. He got probation, as a person has it made in Court if he gets the judge amused. (Niblack 1973, 348)

Niblack professed to have done his best as a judge but acknowledged falling short of the ideal. As Niblack described a judge, he is supposed to have "the wisdom of Solomon, the patience of Job, the hide of a Rhinocerous, the compassion of a mother, the stubbornness of a mule, the ideals of Lincoln and the energy of a dynamo" (1973, 349–350).

In addition to serving as a judge, Niblack was active both as president of the Central Indiana Contract Bridge League and as an official with the United States Golf Association for Public Links Affairs in Indiana.

Reference:

Niblack, John Lewis. 1973. *The Life and Times of a Hoosier Judge*. N.p.

habeus corpus. She claimed that she was being unconstitutionally held as a slave by Col. Hyacinthe Lasselle, who was "the principal tavern keeper in Vincennes and whose family was one of the oldest French families in Indiana" (Withered 1998, 17). Lasselle argued that his family had purchased Polly "from the Indians in the Territory northwest of the river Ohio" prior to the ordinance of 1787, and therefore his "ownership rights" preexisted

the ordinance and could not be negated (1 Blackf. 60). The Circuit Court judge ruled for Lasselle without mention of the Indiana constitution.

On appeal, the Indiana Supreme Court unanimously reversed the Circuit Court and ordered the release of Polly. In Justice James Scott's opinion for the court, the ruling was based entirely on the Indiana constitution of 1816. Citing Article 11, Section 7, as well as provisions securing individual rights to "life and liberty" and the pursuit of "happiness and safety," the court declared: "It is evident that by these provisions, the framers of our constitution intended a total and entire prohibition of slavery in this State; and we can conceive of no form of words in which that intention could have been more clearly expressed" (1 Blackf. 4). According to the court, the clear language of the constitution precluded any claim of preexisting ownership rights. A year later, the court extended the *Lasselle* holding to indentured servants, in *The Case of Mary Clark, A Woman of Color,* 1 Blackf. 122 (1821).

Although Blackford did not author the court opinions in those cases, it is probable that he had considerable influence in the decisions (Withered 1998, 19). Blackford's abhorrence for slavery was passionate and well documented (Woollen 1883, 350). In fact, Blackford later refused to support fellow Whig and Indiana resident William Henry Harrison's candidacy for the presidency in 1836 and 1840 largely because of pro-slavery positions taken by Harrison when he was territorial governor (Withered 1998, 19). Blackford even took the rather drastic measure of leaving the Whig Party and joining the Democrats in order to distance himself from Harrison's candidacy (Woollen 1883, 350).

Blackford also played an important role in defining the reach of juries in criminal cases under the 1816 constitution, and his judicial opinions on the matter had a later impact on related provisions in the 1851 constitution. The 1816 constitution was nearly identical in form and substance to the Kentucky constitution of 1799 and the Ohio constitution of 1802 (Rucker 1999, 456). Section 10 of the Bill of Rights provided in relevant part, "[I]n all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases." In *Townsend v. State,* 2 Blackf. 151 (1828), a divided court ruled that the right of juries to determine matters of law was not a general power of juries and did not apply other than in libel cases. Justice Blackford dissented in the two-to-one decision and argued that juries could determine issues of law as well as facts in all criminal cases. Eight years later, the court reconsidered the issue in *Warren v. State,* 4 Blackf. 150 (1836). Writing for a unanimous court, Blackford effectively overruled *Townsend* in a four-sentence opinion that declared that a jury in a criminal case had the power to determine

issues of law as well as fact. In effect, the ruling established a constitutional right to jury nullification.

When a second Constitutional Convention convened in 1850 for the purposes of drafting a new constitution, a committee on rights and privileges was formed. Among other provisions for the new Bill of Rights, the committee considered revisions of the old Section 10. Referring to relevant Indiana Supreme Court decisions, one delegate stated: "It is now admitted to be well settled law, that, in a criminal case, the jury has an unquestionable right to decide upon questions of law as fact, although they may differ from the Court in doing so" (Rucker 1999, 459). The committee decided to draft two separate provisions to the Bill of Rights—one to address libel and the other to address the role of the jury. When ratified in 1851, Article I, Section 19, of the new Indiana constitution read: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." Blackford's interpretation of the role of the jury under the 1816 constitution was now made explicit in the 1851 constitution.

The 1851 constitution also ended the practice of gubernatorial appointment of judges and instead provided for judicial elections. Blackford was defeated in his electoral bid to remain on the court by his colleague, Judge Samuel E. Perkins, who had originally been appointed to the court in 1846. Blackford's last term on the court expired 3 January 1853, after which he opened a private law practice in Indianapolis, his home for the previous twenty years. The transition from thirty-five years on the bench to private practice was not a smooth one (Honeyman 1916, 8). Two years after Blackford had left the Indiana bench, Pres. Franklin Pierce appointed Blackford as a judge on the newly created Court of Claims in Washington, D.C. He served on that court until his death in 1859.

J. Mitchell Pickerill

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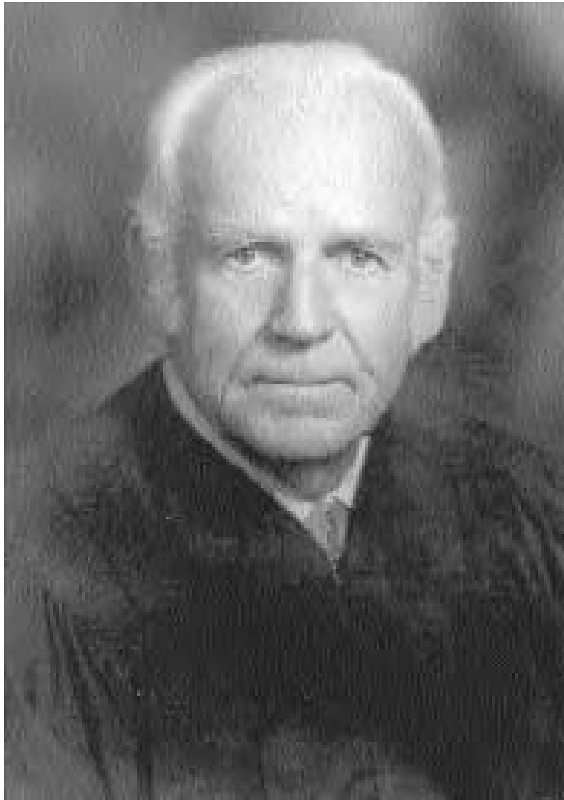
BOHANON, LUTHER LEE

(1902–)



Luther Lee Bohanon
Oklahoma University Carl Albert Center

As a United States District Court judge, Luther Bohanon did more to shape modern Oklahoma in the 1960s and 1970s than any other individual. Involved in some of the most controversial cases of his era, he also made important contributions to constitutional jurisprudence in the United States and authored some of the most eloquent opinions penned by a U.S. judge.

Luther Bohanon was born on 9 August 1902 in Fort Smith, Arkansas, to William Joseph Bohanon and Artelia Hickman Bohanon. Telia, as his mother was known, died less than a year later, and his father married Lucy Alice Cain Cox, who was largely responsible for his upbringing. In 1905, the family relocated to the Choctaw Nation in Indian Territory (later Oklahoma).

Admitted to the University of Oklahoma in 1922, Bohanon entered the University of Oklahoma School of Law in 1924 after only two years of undergraduate education. He received his LL.B. in 1927. Admitted to the bar the same year, he established a legal practice in Seminole, Oklahoma, where he also served as assistant county attorney. Two years later, he formed a partnership with Alfred P. Murrah. In 1931, Murrah and Bohanon moved to Oklahoma City.

Richard A. Hefner
(1874–1971)

Robert Hefner epitomizes the self-made American whose contribution as an Oklahoma Supreme Court justice was but one of many that he made during a long and productive life. Born in 1874 near Lone Oak in Hunt County, Texas, to a relatively poor farm family, Hefner had little time for formal education during his childhood, which included living in a sod house and herding sheep. Baptized in 1887, Hefner adopted the view of Romans 8:28 that "All things work together for good to them that love God" (Trafzer 1975, 10). After clearing his family's debts after his father died when Hefner was twenty-one, he entered the North Texas Baptist College. There he met Eva Maurine Johnson, whom he would later wed.

Hefner went to on earn a law degree with honors from the University of Texas, and he moved in 1907 to Beaumont, Texas, which was then an oil boomtown. He joined a partner to form a law firm and began to specialize in laws related to oil and gas. Approached in Beaumont by Native Americans who wanted to clear titles to land they had received under the Dawes Severalty Act of 1887, Hefner traveled to Washington, D.C., and to Ardmore, Oklahoma, deciding to move to the latter city in 1908. There he was able to put his knowledge to work not only in representing major oil companies but also in buying thousands of acres of land, many of which would later prove to be rich in oil. During that time Hefner developed a widely used deed for oil and gas rights and founded his own oil company. He also began a life of public service, working in his church, taking positions as the city attorney for Ardmore, and serving as president of the Ardmore Board of Education and then as Ardmore's mayor.

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The partnership continued until Murrah was appointed and confirmed as a federal judge in 1937.

Bohanon began serving as a member of the Oklahoma National Guard in 1919. In April 1942, he accepted a captain's commission in the Judge Advocate General's Corps of the United States Army Air Corps. He was discharged in October 1945 and resumed his legal practice in Oklahoma City with Lynn Adams and Bert Barefoot.

Bohanon's practice was largely corporate. His firm represented companies such as Hughes Tool and Occidental Petroleum and acted as general outside counsel for Kerr-McGee Corporation, headed by longtime friend Robert S. Kerr. As an attorney, Bohanon's highest profile case was *Otoe & Missouria v. United States*, the first case to deal with the issue of compensation for Native American land claims based on aboriginal title rather than treaty.

Commenced in 1939, the landmark case was shelved during World War II. Prior to U.S. entry into the war, however, Bohanon, as a member of the

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Long called a "judge" by his neighbors, Hefner was asked by his friends to run for office as one of the nine justices of the Oklahoma Supreme Court, which heard only civil cases. He won the office in 1927 and served a single six-year term, subsequently deciding not to run either for reelection to this office or (as many of his friends had hoped) for the position of state governor. As a justice, Hefner moved to Oklahoma City. Hefner authored 504 opinions during his term, including a case invalidating the governor's removal of an individual from the State Highway Commission and another involving the law that should govern the transfer of an estate when a widow had died before deciding whether she would accept the conditions of her husband's will or those established by law. (For Hefner's years on the court, see Trafzer 1975, 68–97.)

Hefner's home in Oklahoma City, later donated to the Oklahoma Heritage Association, was one of great opulence, but he kept a common touch and was elected as mayor of Oklahoma City, an office in which he served from 1939 to 1947, during which time his family narrowly escaped a kidnapping attempt. As mayor, Hefner was able to get support to build a new city reservoir (named Lake Hefner in his honor), and he helped secure the Tinker Air Force Base. Hefner was a strong supporter of the effort of the United States in World War II, encouraging enlistments, raising money, and promoting the sale of bonds.

Hefner retired from public life in 1947, but he continued to be engaged in a variety of activities, including work with his company, which his sons then operated. In 1949, Hefner and his son Robert Hefner Jr. (also a lawyer and businessman) were both inducted into the Oklahoma Hall of Fame. Hefner's wife died in 1962, and he passed away in 1972.

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platform committee of the Democratic National Convention in 1940, was able to secure his party's commitment to settlement of Indian land claims. During the same period Bohanon also forged an enduring friendship with Earl Warren, who served on the Committee on Resolutions of the Republican National Convention. Following the war, *Otoe & Missouria* was the first case heard by the newly created Indian Claims Commission. Although heard in the late 1940s, the suit was not finally settled until 1965. According to Bohanon, the case taught him the truth of the maxim that an "Indian lawyer should live to be as old as Methuselah, have the patience of Job, and the wisdom of Solomon" (Chapman 1965, 237).

Bohanon was also instrumental in uncovering corruption and the sale of judicial opinions by members of the Oklahoma Supreme Court in the Selected Investments scandal of the late 1950s. His work eventually led to convictions against three of the court's nine justices on charges of bribery and income tax evasion.

In 1961, Bohanon's friend Robert Kerr, by then a powerful U.S. senator, recommended Bohanon to fill a vacancy on the federal bench, covering all three of Oklahoma's judicial districts. Despite an "unqualified" rating by the American Bar Association because of his age and a supposed lack of substantial litigation experience, and over the objection of Atty. Gen. Robert Kennedy, Pres. John Kennedy nominated Bohanon, largely owing to the influence of Kerr. Confirmed by the Senate, Bohanon was sworn in by his former law partner Alfred Murrah on 7 September 1961. Historian Arthur Schlesinger wrote, "So Bohanon became a judge—and turned out, to general surprise, not too bad, at least on civil rights" (1978, 375).

In October 1961, Dr. Alonzo Dowell, an Oklahoma City optometrist, filed suit on behalf of his minor son, seeking integration of the Oklahoma City public schools. The case was assigned to Bohanon. On the bench for only a month, he had the first of a number of sensitive and emotionally charged cases that would make his name a household word (and often in a pejorative context) for two decades.

On 11 July 1963, in *Dowell v. Board of Education*, Judge Bohanon declared the provision of the Oklahoma state constitution requiring separate schools for blacks and whites unconstitutional, pursuant to the United States Supreme Court's ruling in *Brown v. Board of Education*. By his decision, he also became the first federal judge to order the simultaneous integration of faculties and staffs as well as students. He wrote, "One of the basic foundations of America's strength, and one of the keys to its greatness, is the right to have equal public schools for all our children. The right of each American child to enjoy free equal schools. If any white child were denied such right all would be indignant; why not let it be so with our Negro children" (219 F. Supp. 447 [WD Okl. 1963]).

The ruling met with hostility both from the public and the local press. The school board attempted numerous evasions. Bohanon was forced to issue multiple further opinions. After the Tenth Circuit Court of Appeals struck down one such ruling in an opinion written by Alfred Murrah and remanded to him, Bohanon took the highly unorthodox step of simply reinstating his prior order. On appeal, the Supreme Court upheld Bohanon. Although he felt vindicated by the ruling, it shattered his friendship with his former law partner, who sent him only a terse note, reading, "Dear Judge: You were right and we were wrong—may justice always prevail" (Weaver 1993, 95). The two never spoke again.

In 1972, in *Dowell IV*, Bohanon made full use of the Supreme Court's ruling in *Swann v. Charlotte-Mecklenburg Board of Education* and directed what, up to that time, was the most massive court-ordered desegregation plan in U.S. history. He thus joined such dedicated southern judges as Frank Johnson, Skelly Wright, and John Minor Wisdom, who implemented and en-

forced the Supreme Court's *Brown* edict in spite of opposition and ostracism, even death threats. During his tenure, Bohanon would also strike down discrimination in public housing and the state militia.

In 1967, Bohanon presided over the trial of Oklahoma speaker of the House J. D. McCarty on charges of income bribery, perjury, and tax evasion. Though McCarty was a powerful legislator and a former ally of Bohanon's friend Kerr, Bohanon won some of his few universal plaudits from the press for his propriety in the case's conduct. McCarty was sentenced to six years in prison.

In *Battle v. Anderson,* a civil rights suit brought by a prison inmate, Bohanon found that the Oklahoma state penitentiaries systematically denied prisoners their most basic constitutional rights and ordered state officials to correct the situation. He wrote, "The Court has the authority and duty to insure that the Constitution does not stop at the prison gate, but rather inures to the benefit of all, even those citizens behind prison walls" (447 F. Supp. 524 [ED Okl. 1977]). His opinion, issued on 15 March 1974, became a benchmark of institutional adjudication. Running sixty legal-sized pages, it contained forty-three separate orders, relating to everything from overcrowding to access to legal books and enforced idleness. Among other innovative rulings, the decision became the first to recognize the legitimacy of the Black Muslim faith as a religion. When asked if the order could be enforced, Bohanon replied, "It can be enforced. You can't just put a man in a five-by-eight box and tell him he can't exercise . . . say he can't read books . . . deny him medical care" (Weaver 1993, 126). The threat was implicit: a massive writ of habeas corpus to release all prisoners being held under unconstitutional conditions if recalcitrant state officials refused to obey.

State officials, however, did fail to comply. Judge Bohanon had retained jurisdiction for just such an eventuality and ordered regular compliance hearings. Once more, as in the school board case, he was involved in a protracted legal battle and at odds with public opinion. Though he denied it, Bohanon essentially took over the state prison system and ran it from the bench for the next decade.

In 1977, Bohanon was forced to issue another order, when state officials still had not brought the penal system up to constitutional standards. He wrote, "Persons are sent to prison as punishment, not *for* punishment" (*Battle v. Anderson,* 447 F. Supp. 525). Although stopping short of finding a constitutional right to rehabilitation, he did declare that "it is incumbent on the incarcerating body to provide the individual with a healthy habilitative environment" in which rehabilitation could occur (525). Though state officials appealed the decision, the Tenth Circuit affirmed it.

A year later, when he found the prison system still in noncompliance with his earlier orders, Bohanon reached the end of his tether. He issued a

scathing opinion, directing compliance with the prior rulings. According to a biography of Bohanon, *Then to the Rock Let Me Fly,*

> The threat that had only been implicit in previous opinions was now made painfully explicit. Within three months, Bohanon charged, the wooden dormitories at the Lexington correctional facility were to be closed. Within ten months, the state legislature would appropriate sufficient funds to replace deficient cell houses at Granite and McAlester or those facilities would be shut down. In any event, the deficient cell blocks were to be permanently closed no later than May 1, 1981.
>
> Construction of their replacements had to begin within fourteen months.
>
> Obedience to Bohanon's other prior orders was again directed, and tight time schedules were laid down to ensure compliance. The order closed with the familiar quotation from the King James version of the Gospel according to Saint Matthew: "I was in prison, and ye came unto me." (Weaver 1993, 131)

Bohanon would not relinquish control of the prison system until 7 December 1983. Asked if the framers of the Constitution would be surprised to learn that the document they drafted guaranteed prisoners 3,300 calories per day and sixty square feet of living space, he laughed and replied, "Yes, I guess they would." He continued, however, "They'd be surprised because they didn't live through what we've lived through and haven't seen the horrible abuses that go on. They were men of tremendous morality. If they were alive today, with our modern standards of conduct, I don't think they would disagree" (Weaver 1993, 137). As a judge, Bohanon believed that the Constitution should be interpreted not solely as the framers viewed it but as their principles would require them to view it today (137).

During the early years of his involvement in the *Battle* case, Bohanon sat as part of a three-judge panel hearing an important Native American land case, *Choctaw Nation v. Cherokee Nation*. The controversy grew out of a pet project of Oklahoma senator Robert Kerr, the Arkansas River Navigation Project, designed to make that tributary navigable and bring river traffic to Oklahoma. In 1966, as work on the project proceeded, the Cherokee Nation filed suit against the state of Oklahoma over ownership of the bed of the Arkansas River. The Choctaws and Chickasaws intervened subsequently. In 1970, the case reached the United States Supreme Court as *Choctaw Nation v. Oklahoma.* In an opinion by Justice Thurgood Marshall, the high court ruled that the Indians and not the state held title to the riverbed.

Though the Supreme Court decision settled the question of ownership between the Native Americans and the state, it left open the issue of own-

ership among the Native nations themselves. After a trial before the three-judge panel (composed of Bohanon and Judges William J. Holloway Jr. and Fred Daugherty), Bohanon was selected to write the opinion because of his extensive experience in Indian litigation during the *Otoe & Missouria* case. In a carefully crafted opinion, he reviewed the relevant treaties and precedents such as *Cherokee Nation v. Georgia* and *Worcester v. Georgia* to decide title to the riverbed section by section.

As Bohanon's major cases went, *Choctaw Nation v. Cherokee Nation* was relatively calm. It inspired none of the press and public outcry that accompanied *Dowell* or *Battle*, for instance. The more controversial ruling in the case had been made by the Supreme Court. Bohanon was merely implementing its directive. As *Choctaw Nation v. Cherokee Nation* was concluding, however, he received the last of his controversial constitutional cases, *Rutherford v. United States*.

In 1975, Juanita Stowe, a terminally ill cancer patient, brought suit to prohibit the U.S. government from preventing the importation of the unproven drug laetrile for use in her treatment. Judge Fred Daugherty, who had just sat on the three-judge panel with his colleague Bohanon in *Choctaw Nation v. Cherokee Nation*, heard and denied the petition. After Stowe's death, two other cancer victims, Glen L. Rutherford and Phyllis S. Schneider, filed an amended complaint, and the case was reassigned to Bohanon.

On 14 August 1975, the judge ruled that for cancer patients "to be denied the freedom of choice for treatment by laetrile to alleviate or cure their cancer, was and is a deprivation of life, liberty or property without due process of law guaranteed by the Fifth Amendment to the Constitution of the United States" (*Rutherford v. United States*, 399 F. Supp. 1213 [WD Okl. 1975]). He issued a temporary injunction, allowing importation of laetrile for medical purposes. Appeals and more hearings followed.

On 5 December 1977, Bohanon made his temporary injunction permanent. Relying on the constitutional right of privacy articulated in *Roe v. Wade*, he declared, "Freedom of choice necessarily includes freedom to make a wrong choice, and there is much force to the argument that matters of the type herein under discussion should be left ultimately to the discretion of the persons whose lives are directly involved" (*Rutherford v. United States*, 429 F. Supp. 513 [WD Okl. 1977]).

The case reached the Supreme Court, and in an opinion by Thurgood Marshall issued on 18 June 1979, the Court unanimously reversed a Tenth Circuit decision affirming Bohanon's order. In its affirmance, the appellate court had not reached the constitutional issues. After the Supreme Court ruling, however, it reluctantly dealt with them and rejected the privacy

claim. The controversy continued for another seven years, as Bohanon sought some means to uphold the plaintiffs' claims. Finally, in late 1986, he was forced to dissolve his injunction.

Judge Bohanon's opinions in *Rutherford* rank as perhaps the most creative and carefully argued progeny of *Roe v. Wade.* Though he was ultimately reversed, his decisions are coming under new scrutiny as a woman's right to choose comes under increasing attack by opponents and as proponents seek to extend the right of privacy to a patient's right to die.

Dowell, Battle, and *Rutherford,* among other lesser-known opinions, marked Luther Bohanon as one of the most liberal and activist judges to sit on the federal bench. Yet, ironically, he sees himself as a strict constructionist. He always believed, he said, that if the Constitution did not protect the marginalized of society—minorities, women, the poor, the illiterate, prisoners, the critically ill—it was of no value to anyone (Henderson 1974, 4). His decisions also show, however, that, in fidelity to the Constitution, one need not have personal regard for those whose rights one seeks to vindicate. Bobby Battle, the plaintiff in the prison case, tried on two occasions to see the judge after his release from prison, but Bohanon refused. "I just didn't see any point in that," he said (Weaver 1993, 136).

Judge Bohanon's rulings often put him at odds with both the powerful and the public at large. One of his rare discussions of *Rutherford,* however, encapsulated his judicial philosophy. In a 1978 interview, he declared, "Any time you clothe a man with power and he's afraid to use it for fear of reprisal, you don't have a judge. A judge should determine what the law is, what the facts are and act accordingly. He should not determine what the public says or thinks" (Fritze 1978, 21). Late in his life, he received acclaim he had not sought during his active career. In 1979, both houses of the Oklahoma state legislature passed resolutions commending him. In 1990, he received an honorary doctorate from Oklahoma City University and was given a Humanitarian Award in recognition of his work on civil rights and civil liberties by the National Conference of Christians and Jews. That same year, the Oklahoma City chapter of the American Inns of Court renamed itself the Luther Bohanon Inn of Court.

Jace Weaver

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BOND, HUGH LENNOX

(1828–1893)

Ardent Maryland Unionist-Republican, Judge Bond served on Baltimore's criminal court during the Civil War and as U.S. circuit judge for the Fourth Circuit (Maryland, Virginia, West Virginia, North and South Carolina) during and after Reconstruction. A forceful advocate for the political rights of African Americans in former slave states, he presided over some of the great political trials in the United States, and in the Gilded Age, his decisions promoted economic nationalism and industrial capitalism.

Hugh Lennox Bond
Maryland Historical Society

Hugh Lennox Bond was born in Baltimore, Maryland, to a family with pre-Revolutionary War ancestors in Maryland's Harford County. He was one of fifteen children born to clergyman-physician Thomas Emerson Bond, onetime editor of the *Christian Advocate* and a founder of Baltimore's first medical school, and to Christina (Birckland) Bond. His family moved to New York, where Bond attended New York University from which he graduated in 1848. Returning to Baltimore, he read law in the office of Dobbins and Talbot prior to his admission to the bar in 1851. Two years later he married Anne Griffin Penniman, a Boston native and daughter of a Baltimore-based agent for northern manufacturers; the couple had three sons. Opposed to slavery, he cast his lot with Henry Winter Davis in the American ("Know-Nothing") party and in 1861 followed Davis into the new Union party in a slave state that harbored many pro-southern sympathizers. Meanwhile, he developed a successful law prac-

tice notable for skillful *pro bono* work. When a vacancy on the city's criminal court opened in 1860, pro-Union governor Thomas Hicks appointed the thirty-two-year-old attorney to fill it. Disfranchisement of Confederate sympathizers and Union army control of the polls enabled Bond in 1861 to win election to that judgeship. He retained the seat until 1867, when the resurgent Democratic party under the state constitution adopted that year legislated him out of it. Unfazed, he carried the Republican gubernatorial banner that year, only to suffer crushing defeat.

Bond, a staunch Lincoln supporter, served as the spokesman for the radical faction of the Union party from 1864 to 1870. Although he believed blacks to be inherently inferior to whites, he also believed that the races shared a common humanity that required equality of citizenship without roiling the prevailing social system. Thus he strenuously advocated emancipation of Maryland's slaves and, as free persons, their legal and economic rights secured through education linked to universal manhood suffrage. His work on behalf of the Association for the Moral and Educational Improvement of the Colored People (nicknamed Timbuctoo) made segregated education accessible to black youth excluded from state-supported white schools and won him praise from William Lloyd Garrison's *Liberator*.

As a city judge in tumultuous times, Bond played a key role during the Civil War. An ambush by a riotous pro-Confederate Baltimore mob in the bloody "Battle of Pratt Street" of the Sixth Massachusetts Regiment en route to defend Washington involved Bond as statesman and judge. One of a three-member committee appointed by Governor Hicks, Bond met with Lincoln and Gen. Winfield Scott seeking assurance that future troop movements would be diverted around the city. Thereafter, he charged the grand jury to indict the rioters for murder. To defuse the volatile situation, city officials prohibited the display of flags, and seventy-five loyalists who had hoisted the national flag filed habeas corpus petitions in his court; Bond discharged them. To further the emancipation cause, he ordered a levy into military service from among Maryland's slave population. Bond acted forcefully following emancipation under Maryland's 1864 constitution to defeat a discriminatory apprenticeship system devised by Eastern Shore and southern Maryland planters to reenslave black children. His reliance on antidiscrimination provisions in the 1866 Civil Rights Act was later echoed by Fourth Circuit justice Salmon P. Chase in *In re Turner* (24 F. Car. 337 [C.C.D.Md. 1867] [No. 14,247]). However loyal Bond was to the Union, he stood fast for judicial independence as attested by his charge to the criminal court grand jury to indict members of a quasi-military tribunal established to try civilians, a step Bond deemed unlawful in the absence of martial law and where the civil courts remained open.

Shorn of his judicial office after 1867, Bond received a warm endorse-

ment for collector of customs in Baltimore. Supporters praised him for "his labors in the cause of the Union and the enfranchisement and education of the colored people" and noted that "no one . . . has surpassed him in fearlessness and usefulness, while he has borne obloquy and persecution such as few have been called to endure. To a high order of ability—and personal integrity—he adds that power of will and practical executive force so conspicuously shown by his administration of the Criminal Court . . ." (petition dated April 1869 headed by William J. Albert, found in Simon 1995a, 339–340). The collectorship failed to materialize, but a judgeship was proffered him.

Congress in 1869 authorized for each circuit a roving circuit judge intended to relieve busier Supreme Court circuit riders of the task and to mitigate the localistic tendencies of district judges. The district and new circuit judges would sit to constitute the circuit courts, which were federal courts of general jurisdiction. President Grant initially nominated for the Fourth Circuit judgeship Maryland state judge George A. Pearre. The nominee's alleged indifferent Republicanism resulted in tabling and subsequent withdrawal of his nomination. Bond became Grant's second choice when nominated on 6 April 1870. The candidate's reputed radicalism gave senators pause, delaying until 13 July the favorable, if narrow, twenty-eight to twenty-one confirmation vote. The 1891 Circuit Court of Appeals Act automatically made Bond judge of that new intermediate appellate court, and he sat in Richmond, Virginia, with circuit justice Melville W. Fuller and two district judges ceremoniously to open it on 16 June 1891.

Hardly had he taken his oath of office than Bond rode his circuit and into the turmoil of Reconstruction prevailing south of the Potomac. Terrorism associated with the Ku Klux Klan impacted federal courts in North and South Carolina where the legal consequences of the Civil War fused law and politics by virtue of the enforcement acts of 1870 and 1871 based on the Fourteenth and Fifteenth Amendments. Carrying supreme national power to the grassroots of the conquered, if recalcitrant, South, Bond presided over the great South Carolina Klan trials held in 1871–1872. He sat with elderly and faint-hearted district judge George Bryan, but Bond dominated the proceedings to assure a biracial jury of Republicans and to bring about convictions of night-riding Klansmen whose atrocities had terrorized upcountry South Carolina. The desperate situation impelled the president to declare martial law, suspend the writ of habeas corpus in nine counties, and use the army to apprehend the Klansmen. At stake in one of the noteworthy political trials in the United States was the meaning and scope of the war amendments and the enforcement acts. The former criminal court judge experienced little difficulty in upholding two of the prosecution's eleven indictment counts. Both rested squarely on the statutory

prohibitions against conspiracies to interfere with prevailing voting rights exercised in federal and state elections (*United States v. Crosby,* 25 F. Cas. 701 [C.C.D.S.C. 1871] [No. 14,893]). State-imposed electorate qualifications unrelated to race, color, or previous condition of servitude, however, remained beyond the power of Congress (*Ex parte McIllwee,* 16 F. Cas. 147 [C.C.D.Va. 1870] [No. 8,820]).

Bond did not welcome innovative prosecution arguments that cast a broad mantle of national protection over all ex-slaves of whatever gender or age, suggestions that the amendments conferred positive rights on individuals, or arguments that they nationalized specific protections accorded by the Bill of Rights, especially the Second and Fourth Amendments. Reflection caused him to divide with Bryan in order to facilitate Supreme Court review of the incorporation of the right to bear arms as well as of the court's power to try the common law crime of murder. Thus Bond failed to grasp an opportunity to reshape fundamentally the constitutional dimensions of nation-state relations. Yet the trials rendered publicly visible the plight of black citizens and the costs of Reconstruction. He imposed fair sentences on convicted Klansmen, but their lack of repentance for their heinous crimes only strengthened his belief that southern whites suffered a serious moral defect derived from slavery.

Bushwackers targeted not only blacks but also federal lawmen attempting to enforce unpopular laws, especially the Civil War excise tax on distilled spirits. Pursuit of "moonshiners" exposed federal revenue agents to danger and to state prosecution for trespass, assault and battery, and murder. The death of "moonshiner" Amos Ladd, shot by four revenuers who thereafter lingered in a South Carolina jail during a lengthy habeas corpus battle between the federal and state courts, preceded a sensational trial before Bond and a biracial jury in 1882. His jury charge stressing the perilous duty of such officials and their right of self-defense led to acquittal and vindication of national enforcement power.

Constitutional opportunities not grasped in the Klan trials were subsequently foreclosed by the Supreme Court in the *Slaughterhouse Cases* (1873), which eviscerated the "privileges or immunities" clause of the Fourteenth Amendment. Nevertheless Bond sought to breathe life into that clause, reasoning that in light of the economic rights at stake in *Slaughterhouse,* that precedent meant "that the United States by force of the fourteenth amendment was not clothed with authority to enforce the rights common to all men, but those only peculiar to citizenship" in the case at hand to allow unobstructed voting in a municipal election (*United States v. Petersburg Judges of Elections,* 27 F. Cas. 506, 509 [C.C.E.D.Va. 1874] [No. 16,036]). Consequently, Congress could protect "such rights, privileges and immunities as the states or the United States confer upon them because of

their citizenship to the United States . . ." (509). Whether or not the enforcement act stipulated race as the reason for obstruction of voting was immaterial because "Congress thought to cut the thing up by the roots . . ." (*United States v. Petersburg,* 510). The Supreme Court rejected Bond's expansive constitutional and statutory interpretation, and Congress responded by revising the law to rest on Article I, Section 4, of the Constitution, thereby confining voting protection to federal elections. Bond held the reenacted law applicable to Virginia's poll tax system (*United States v. Munford* 16 F. 223 [C.C.E.D.Va. 1883]). Similarly, he held that Congress might empower deputy marshals to maintain federal elections in peace and order at polling places as well as to prevent voting frauds, whether or not such impediments to fair federal elections derived from state hostility or neglect or from organized bands of conspirators or even from "one evil-disposed person" (*In the Matter of Engle, Ross, Stitcher, et al.*, 1 Hughes 592, 596 [C.C.D.Md. 1877]).

Incarceration of the South Carolina Board of State Canvassers for their defiance of a state Supreme Court order directing the board to change its previously certified vote count in the 1876 Hayes-Tilden presidential election embroiled Bond in a divisive political case. Having issued a friction-inducing writ of habeas corpus to the state's highest court, he heard the case in a seething mob atmosphere enveloping Columbia. Vaguely asserting that the board, having certified the Republican electors pledged to Rutherford Hayes, acted "in a federal capacity, . . . in pursuance of a law of the United States" and under Article II, Section 1, of the Constitution, Bond boldly held that the state court had acted beyond its jurisdiction and discharged the confined board members. His resolute action promoted Hayes's cause in the presidential election, the outcome of which pivoted on the contested electoral votes of several states, including those of South Carolina (*Case of the Electoral College*, 8 F. Cas. 427 [C.C.D.S.C. 1876] [No. 4,336]). This decision, complained one contemporary, was "an index of the extreme views that Judge Bond held as to the rights of the federal government and absence of the rights of the states" ("Hugh Lennox Bond" 1901, 420).

Economic nationalism marked Bond's treatment of state laws protective of local markets and producers. Invoking the legacy of Chief Justice Marshall against Maryland's dairy interests, he struck a blow for national free trade in holding unconstitutional the state's criminalizing of the possession and sale of oleomargarine shipped interstate and remaining in its original package (*In re McAllister,* 51 F. 282 [C.C.D.Md. 1892]). A similar fate befell North Carolina's antidrummer license tax designed to protect local merchants by excluding out-of-state sample salesmen. The "silent" commerce clause, Bond declared, safeguarded interstate sale and delivery of goods prior to their becoming intermingled with other property within the state

(*In re Spain,* 47 F. 208 [C.C.E.D.N.C. 1891]). "Manifestly unconstitutional" was Virginia's oyster law privileging its residents in oystering and shellfishing in waters that the state claimed as its property. "From this privilege, common to all citizens of Virginia," Bond observed, "all non-residents are excluded. . . .," contrary to the privileges and immunities clause of the Constitution's Article 4 (*Ex parte McCready,* 15 F. Cas. 1345 [C.C.E.D.Va. 1874] [No. 8,732]). Maryland's 1884 oyster tax law suffered the same fate on the same constitutional ground as well as on that afforded by the commerce clause and by Article 1's prohibition on state-imposed tonnage taxes (*Booth v. Lloyd,* 33 F. 593 [C.C.D.MD. 1887]; *Ex parte Insley,* 33 F. 680 [C.C.D.Md., 1887]).

Northern and foreign investors in Virginia's antebellum bonds floated to finance the Old Dominion's internal improvements, later ravaged by war, found a haven in Bond's court, giving rise to lengthy litigation known as the Virginia Coupon cases. The state in 1871 refinanced its prewar public debt to reflect the severance of West Virginia. Unique among former Confederate states, its new 6 percent bonds bore tax-receivable coupons that when tendered by taxpayers in lieu of money became the "cut-worms of the treasury." Subsequent legislative efforts to repeal or otherwise inhibit use of the coupons met stern rebuff by Bond, who presided over the only judicial forum beyond the control of the state's ascendant Readjuster Party committed to crushing the coupons. In the leading case, *Baltimore & Ohio R. R. Co. v. Allen* (17 F. 171 [C.C.W.D.Va. 1883]), Bond split with district judge Robert W. Hughes. Bond enjoined Virginia officials from refusing to receive the tendered coupons as payment of taxes owed and from seizing the railroad's rolling stock for nonpayment, thereby inflicting irreparable harm by destroying the line's utility. Assertions that a court-ordered equitable remedy violated the Eleventh Amendment struck Bond as unwarranted, a view endorsed by the Supreme Court (*Baltimore & Ohio R. R. Co. v. Allen,* 174–176; aff'd *Allen v. Baltimore & Ohio R.R. Co.* 114 U.S. 311 [1885]). Evasive state-orchestrated coupon-avoidance strategies persisted, leading Bond to lecture Virginia politicians, "That it is the law of the land that upon the tender of the tax-receivable coupons for the payment of taxes, whether received or not, the taxes are paid, and any levy upon the property of the tax-payer, after such tender, is a trespass (any state law is the contrary notwithstanding), for which damages are recoverable"—even punitive damages (*Willis and Wife v. Miller,* 29 F 238 [C.C.E.D.Va. 1886]).

Economic development depended on the protection and free flow of capital in the form of private credit provided by risk-taking investors. Their protection held a high value for Bond. Confederate sequestration laws seizing valuable stock owned by "alien enemies" residing in the North and transferring it to "rebel" ownership were deemed the unlawful acts of an

illegitimate government (*Perdicaries v. Charleston Gaslight Co.* 19 F. Cas. 216 [C.C.D.S.C. 1877] [No. 10,973]). Less perfidious but also detrimental to creditors were state policies favorable to insolvent debtors that shielded assets from creditors. National bankruptcy power, once exercised, conferred exclusive jurisdiction on U.S. courts and, the judge stressed, swept aside interfering state court proceedings (*Watson v. Citizen's Savings Bank,* 29 F. Cas. 427 [C.C.D.S.C. 1874] [No. 17,279]). The bankruptcy law permitted state authorized "homestead exemptions." Bond strictly construed them (*In re Lambson,* 14 F. Cas. 1047 [C.C.D.S.C. 1877] [No. 802g]; *In re C. H. McMurran,* 2 Hughes 107 [C.C.E.D.Va. 1875]). Exemption laws could not apply to judgments on debts created prior to enactment of such laws. "We must not if we can avoid it," he declared in *In re Dillard,* "give to the act of Congress such a construction as would be contrary to reason and justice . . . and subversive of the fundamental principles of the social compact" (7 F. Cas. 703, 706 [C.C.E.D.Va. 1873] [No. 3,912]).

Railroads symbolized the industrial age; their development received Bond's approval. He cast a protective mantle over railroad consolidation in Virginia, an accomplishment of visionary railroad builder William Mahone. "Credit is a delicate thing," Bond observed, in rebuffing a challenge to Mahone's handiwork, the Atlantic, Mississippi and Ohio Railroad, in which investors had staked millions as against the complainant's five shares in one of the merging lines (*Tyson v. Virginia & Tennessee R. Co.,* 24 F. Cas. 493, 494 [C.C.W.D.Va. 1871] [No. 14,321]). With lines stretching 400 miles from Norfolk to Bristol, Mahone's company defaulted on its $5.5 million mortgage debt in the wake of the 1873 panic, thereby becoming exposed to piecemeal sale detrimental to efficient and economical operations. Sitting with Fourth Circuit justice Morrison R. Waite and district judge Hughes, Bond joined to place the road in court-supervised receivership but rejected claims against the company's assets lodged by workers and suppliers notwithstanding the "great hardship" thereby inflicted upon them (*Skiddy v. Atlantic, Mississippi and Ohio R.R. Co.,* 22 F. Cas 275, 282 [C.C.E.D.Va. 1879] [No. 12,922]). Sale of the line in 1881 to northern capitalists saw it reorganized as the Norfolk and Western Railroad Company. Similar treatment by Bond of the South Carolina Railroad at the instigation of aggrieved northern stockholders witnessed that line's purchase by a New York syndicate to become in 1899 part of the Southern Railway system.

Industrialization spawned human costs. Bond, an exponent of the Protestant work ethic, individualism, and freedom, embraced liability-limiting common law defenses in industrial accident cases even over the impassioned protests of court of appeals colleague Nathan Goff (*The Serapis,* 51 F. 91 [4th Cir. 1892]). Stern application of the criminal law marked Bond's treatment of rebellious guano miners in the sensational 1889 Navassa

Island murder case. A violent workplace insurrection on the tiny Caribbean island involved the grisly murder of five white supervisors of the Baltimore-based Navassa Phosphate Company, felled by desperate black contract laborers held in virtual slavery conditions. Whether the Maryland circuit court enjoyed jurisdiction in the case depended on whether the nation had inherent power to acquire possessions discovered by its citizens. Bond held that it did, and the jury convicted forty black defendants of various crimes. He imposed on three ringleaders death sentences affirmed by the Supreme Court (*Jones v. United States*, 137 U.S. 202 [1890]), later commuted to life imprisonment by Pres. Benjamin Harrison.

Judge Bond was ill with heart disease for a year prior to 24 October 1893, when he died of an internal hemorrhage at his Baltimore residence. Carried away was a brilliant raconteur, a quick-witted orator, a believer in the forward march of civilization and in America's destiny under God's providence. Courage, duty, and ability stamped his judicial career. At his death, the *Baltimore-American* editorialized: "Few jurists of this country have been confronted with more perplexities than Judge Bond, not the least of which was a general prejudice against him in the judicial circuit over which he presided because of his strong political opinions during the Civil War and the fearless and uncompromising manner in which he expressed them . . ." (1893b, 4).

Peter G. Fish

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BORK, ROBERT H.

(1927–)

ROBERT H. BORK
Wally McNamee/Corbis

ROBERT HERON BORK IS ONE of the two or three most famous United States Court of Appeals judges of the twentieth century. Despite Bork's impressive record as a judge, however, his fame is attributable at least as much to his off-the-bench experiences as it is to his tenure as a jurist.

Robert Bork was born on 1 March 1927 in Pittsburgh, Pennsylvania. His father, Harry Philip Bork, worked for a large steel company and was very much occupied with his job. His mother, the former Elizabeth Kunkle, was his intellectual sparring partner during his formative years. "My mother and I used to sit up and argue late into the night about anything and everything," Bork said in a 1998 interview ("A Conversation with Robert Bork" 1998, 1). A lawyer in the making, clearly. Interestingly, however, Bork originally planned to be a journalist. It was only later, after a second stint in the Marine Corps, that he decided to enroll in law school. He earned his law degree from the University of Chicago in 1953. He had earned his undergraduate degree from that same university—one of the most prestigious in the nation—in 1948. He was married to the former Claire Davidson from 1952 until her death in 1980. They had three children together: Robert, Charles, and Ellen. Judge Bork has been married to the former Mary Ellen Pohl since 1982.

Bork is a member of the Illinois and District of Columbia bars. He has been a partner at a major law firm, taught at Yale Law School, and served as solicitor general and as acting attorney general of the United States and was nominated by Pres. Ronald Reagan to the United States Supreme Court. He has authored numerous books and articles, and he regularly appears as a commentator on national television. He currently serves as the John M. Olin Scholar in Legal Studies at the American Enterprise Institute in Washington, D.C., and as a law professor at Ave Marie School of Law in Ann Arbor, Michigan. He holds honorary degrees from Creighton University, Notre Dame Law School, Wilkes-Barre College, Brooklyn Law School, DeSales School of Theology, and Adelphi University.

Bork was nominated to the United States Court of Appeals for the District of Columbia Circuit by President Reagan on 7 December 1981, to a seat vacated by Carl E. McGowan. He was confirmed by the Senate on 8 February 1982 and received his commission on 9 February 1982. He resigned his seat on the Court of Appeals on 5 February 1988 after suffering through one of the most divisive Supreme Court confirmation processes in U.S. history.

Bork had an outstanding record as an appeals court judge. In fact, no opinion he authored had been reversed by the Supreme Court prior to his nomination to that court (one since has been). His most controversial opinion is almost certainly *Oil, Chemical and Atomic Workers International Union Local 3–499 v. American Cyanamid Company* (1984). In that case a chemical company adopted a policy that female employees of childbearing age were not entitled to hold jobs that exposed them to toxic substances considered unsafe for fetuses. The chemical company made an exception for female employees who showed they had been surgically sterilized. The government issued a citation that the chemical company's policy violated the general duty clause of the Occupational Safety and Health Act. (The general duty clause requires employers to furnish employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees.) An administrative law judge vacated the citation. That decision was then affirmed by the Occupational Safety and Health Review Commission.

Writing for a unanimous three-judge panel that included future Supreme Court justice Antonin Scalia, Judge Bork affirmed the order of the commission that the chemical company's policy was not a hazardous working condition. Judge Bork acknowledged that the women involved in the dispute "were put to a most unhappy choice" (get sterilized or quit). After a detailed examination of "precedent, congressional intent, and the unforeseeable consequences of a contrary holding," however, he concluded that the

chemical company's fetus protection policy "did not constitute a 'hazard' within the meaning of the OSH Act" (741 F.2d 444, 450).

Judge Bork's opinion in *American Cyanamid* was heavily criticized during his Supreme Court confirmation process. His critics claimed that the opinion was a prime example of his opposition to women's rights. Bork strongly rejected this characterization of the case (and of his position on women's rights more generally). He maintained that the decision was "grossly distorted" by his opponents and that "no one who troubled to learn the facts and the law" would have viewed the case as anything other than a "cut-and-dried" exercise in statutory interpretation (Bork 1990, 327, 328). Indeed, he pointed out that everyone who reviewed the policy in question—the administrative law judge, the Occupational Safety and Health Review Commission, the secretary of labor—deemed it a straightforward case.

American Cyanamid is also an excellent illustration of Judge Bork's view that moral choices are for legislators, not judges. He wrote in the case:

> As we understand the law, we are not free to make a legislative judgment. We may not, on the one hand, decide that the company is innocent because it chose to let women decide for themselves which course was less harmful to them. Nor may we decide that the company is guilty because it offered an option of sterilization that the women might ultimately regret choosing. These are moral issues of no small complexity, but they are not for us. Congress has enacted a statute and our only task is the mundane one of interpreting its language and applying its policy. (741 F.2d, 445)

Dronenburg v. Zech (1984) is another of Judge Bork's more prominent opinions. In that case, Bork, writing for the same three-judge panel that had decided *American Cyanamid,* affirmed the decision of the trial court to uphold a navy petty officer's discharge for engaging in homosexual acts. The petty officer admitted he was a homosexual and that he had repeatedly engaged in homosexual conduct in a barracks on the navy base. He argued, however, that the navy's policy of mandatory discharge for homosexual conduct violated his constitutional rights to privacy and equal protection of the laws.

Judge Bork, in his opinion for the unanimous panel, revisited in considerable detail the Supreme Court's privacy decisions, including the landmarks *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973). He spent the most significant portion of his opinion discussing *Doe v. Commonwealth* (1976), in which the nation's highest court summarily affirmed a federal district court judgment upholding a Virginia statute making it a crime to engage in private consensual homosexual conduct. Bork wrote of that precedent: "If a

statute proscribing homosexual conduct in a civil context is sustainable, then such a regulation is certainly sustainable in a military context. That the military has needs for discipline and good order justifying restrictions that go beyond the needs of civilian society has repeatedly been made clear by the Supreme Court" (741 F.2d 1388, 1391).

Judge Bork made clear in *Dronenburg,* as he had in *American Cyanamid,* that moral choices should be made by legislators, not judges. He also made clear that courts—especially lower courts—should be reluctant to create new constitutional rights. Two years later Bork's analysis was proved correct when the Supreme Court in *Bowers v. Hardwick* rejected the claim that there is a constitutional right to engage in homosexual conduct—the same claim that had been at issue in *Dronenburg.*

Judge Bork issued a number of other important opinions during his tenure on the District of Columbia Circuit, including opinions interpreting the scope of the Freedom of Information Act (*Wolfe v. Department of Health and Human Services* [1988]) and the Federal Communication Commission's "fairness doctrine" (*Telecommunications Research and Action Center and Media Access Project v. FCC* [1986]). Perhaps his most sweeping opinion, however, was authored in concurrence in *Tel-Oren v. Libyan Arab Republic* (1984).

In *Tel-Oren,* plaintiffs, dozens of foreign citizens who were torture survivors and representatives of persons murdered in a foreign country, filed suit in the United States District Court for the District of Columbia against several foreign entities. Plaintiffs alleged that defendants had committed multiple tortious acts in violation of the law of nations, the United States' treaties, the United States' criminal law, and common law. The District Court dismissed the action for lack of subject matter jurisdiction and statute of limitations violations. The Court of Appeals affirmed the dismissal in a *per curiam* opinion. Each member of the three-judge panel filed a separate concurring opinion, however.

Judge Bork's opinion was the most detailed and scholarly of the three. He advanced three principal arguments for affirming the dismissal of plaintiffs' action: (1) treaties do not provide a cause of action for the plaintiffs; (2) customary international law does not provide a cause of action for the plaintiffs; and (3) the law of nations, with very few exceptions, does not provide a cause of action. Put more simply, Judge Bork maintained that nations may have a cause of action under international law, but individuals do not. In effect, Bork's opinion denied individuals the right to seek redress for international human rights violations in U.S. courts.

President Reagan nominated Judge Bork to the United States Supreme Court on 1 July 1987 to fill the seat of the retiring Lewis F. Powell—the so-called "swing vote" on an ideologically divided Court. Many liberals feared

that Bork would tilt the Court in a conservative direction, and they therefore fought vigorously to defeat his nomination. (Ironically, Bork had been a socialist in his younger days. He became a conservative while in law school.) Indeed, the day after Bork was nominated to the nation's highest court, Sen. Edward M. Kennedy (D-Mass.) made a nationally televised speech on the Senate floor in which he declared:

> 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, schoolchildren could not be taught about evolution, writers and artists would 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 often the only protector of the individual rights that are the heart of our democracy. (Bork 1990, 268)

Bork has stated publicly that "every line [of Kennedy's speech] is a lie" ("A Conversation with Robert H. Bork" 1998, 8). In fact, a major portion of Bork's most famous book, *The Tempting of America* (1990), is devoted to exposing the politics of his confirmation process.

It is perhaps inevitable in a system administered by politicians—senators and presidents are concerned about reelection, after all—that the confirmation process for Supreme Court justices would be political. But the level of partisanship to which Robert Bork was subjected was without precedent and, with the possible exception of the 1991 confirmation battle over Clarence Thomas's nomination to the high court, still is. A new verb—"Bork"—has been added to William Safire's *Political Dictionary* to describe what happened to Judge Bork: to "attack viciously a candidate or appointee, especially by misrepresentations in the media."

This said, there was a bright side to Judge Bork's Supreme Court confirmation process: It reinvigorated the debate over how the Constitution should be interpreted. Put succinctly, Robert Bork was, and continues to be, the leading proponent of the view that judges should interpret the Constitution as it was "originally understood" by the people who wrote and enacted it. According to Bork, "[t]he orthodoxy of our civil religion, which the Constitution has been aptly called, holds that we govern ourselves democratically, except on those occasions few in number though crucially important, when the Constitution places a topic beyond the reach of majorities" (Bork 1990, 153). Judge Bork regards a jurisprudence of original understanding as the only legitimate approach to constitutional interpretation, because "[o]nly [that] can give us law that is something other than, and superior to, the judge's will" (Bork 1986, 26), and only that will eliminate the "anomaly of judicial supremacy in democratic society" (Bork 1971, 2).

Judge Bork's approach to constitutional interpretation—unquestionably a reaction to the so-called "judicial activism" of the liberal Warren Court—was, and continues to be, widely criticized by the left. The gist of the criticism is that originalism is methodologically impossible (for example, which framer is Bork talking about?) and substantively unattractive (for example, most of the framers would be considered racists and sexists by today's standards). Bork's approach to reading the Constitution continues to enjoy wide support among scholars and judges, however, including members of the Supreme Court such as Chief Justice William H. Rehnquist and Associate Justices Antonin Scalia and Clarence Thomas.

Judge Bork has not limited his writing to the field of constitutional theory. He established his academic reputation in antitrust law, and his 1978 book on the subject, *The Antitrust Paradox: A Policy at War with Itself,* remains highly influential (a second edition was published in 1993). More recently, Bork has written about what he perceives as the decline of American culture. In his 1996 book *Slouching Towards Gomorrah: Modern Liberalism and American Decline,* he maintains that the United States is a nation in moral crisis whose very foundation is falling apart. Perhaps not surprisingly, the conservative Bork suggests that the root of the decline is the rise of modern liberalism and its twin pillars of radical egalitarianism (the equality of outcomes rather than opportunities) and radical individualism (the virtual elimination of limits to personal gratification). *Slouching Towards Gomorrah* was widely praised by the right, but roundly condemned by the left—echoes of his confirmation battle.

What, though, is Robert Bork's legacy? What makes him a fitting subject for a book about great American judges? He was a fine judge; there is simply no question about that. People may disagree with some of the votes he cast and with some of the opinions he wrote, but it is difficult to deny the quality of his reasoning. It is impossible to ignore the fact that the United States Supreme Court reversed him only once. This said, Robert Bork's greatest contribution to the judicial process is the level of awareness he brought to the American people about the politics of judicial selection and judicial decisionmaking. In fact, he resigned his seat on the District of Columbia Circuit—a court that is almost universally regarded as second only to the Supreme Court in turns of significance—to continue his efforts in educating the public. As Judge Bork himself put it in his 7 January 1988 letter of resignation to President Reagan:

> The crux of the matter is that I wish to speak, write, and teach about law and other issues of public policy more extensively and more freely than is possible in my present position.

A few years ago I said:

In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge. The sole task of the latter—and it is a task quite large enough for anyone's wisdom, skill, and virtue—is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.

That was my view then. It is my view now. Though there are many who vehemently oppose it, that philosophy is essential if courts are to govern according to the rule of law rather than the whims of politics and personal preference. That view is essential if courts are not to set the social agenda for the nation, and if representative democracy is to maintain its legitimate sphere of authority. Those who want political judges should reflect that the political and social preferences of judges have changed greatly over our history and will no doubt do so again. We have known judicial activism of the right and of the left; neither is legitimate.

With deep gratitude for your confidence in me, for appointing me to this court and nominating me to the Supreme Court, I will always remain

Yours truly,
Robert H. Bork. (Bork 1990, 317–319)

Scott D. Gerber

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Antonin Scalia
(1936-)

Since his ascension to the Supreme Court in 1986, Antonin Scalia, the intellectual field general of the modern-day conservative legal movement, has "overseen—some say singlehandedly—a basic shift in the court's underlying approach to the law and the Constitution" (Marquand 1998, 1). Through his steadfast adherence to originalism—interpreting the Constitution according to its original meaning—and textualism, interpreting statutes and regulations according to their plain meaning, Scalia has forced his fellow justices to "be more self-conscious about how they interpret the law" (10).

Antonin Gregory Scalia was born in Trenton, New Jersey, on 11 March 1936. The only child of Samuel Eugene Scalia, a Sicilian immigrant and professor of Romance literature, and Catherine Panaro Scalia, an elementary school teacher, Scalia grew up as "an exceptional child of the East Coast Roman Catholic intelligentsia" (Brisbin 1997, 11). After graduating as the class valedictorian of Saint Francis Xavier Military Academy, an all-male Jesuit preparatory school, he decided to attend Georgetown University. While in college, Scalia studied abroad in Switzerland at the University of Fribourg. In 1957, he graduated from Georgetown *summa cum laude* and was once again the valedictorian of his class. Scalia then attended Harvard Law School, where he served as note editor of the law review and graduated *magna cum laude* in 1960. Afterward, he spent a year traveling in Europe as a Sheldon Fellow of Harvard University. Before leaving for Europe, however, he married Radcliffe graduate Maureen McCarthy, daughter of a Massachusetts physician, whom he met and to whom he became engaged during law school. The Scalias have been married for over forty years and have nine children—five sons and four daughters.

In 1967, after approximately seven years of private practice with the law firm of Jones, Day, Cockley and Reavis in Cleveland, Ohio, Scalia headed south to teach law at the University of Virginia (UVA). In 1971, he took a leave of absence from UVA to serve as general counsel for the Nixon administration's Office of Telecommunications Policy. As general counsel, he "successfully negotiated a major agreement between industry leaders to organize the growth of cable television" ("Antonin Scalia," The Oyez Project). In 1972, President Nixon nominated Scalia to a five-year term as chairman of the Administrative Conference of the United States, "which studied ways to improve the efficiency of governmental processes" ("Antonin Scalia," The Oyez Project). In 1974, he resigned from his teaching position at UVA after accepting an appointment to be the assistant attorney general in charge of the Justice Department's Office of Legal Counsel. After President Ford was defeated in the presidential election of 1976, Scalia became a scholar in residence with the American Enterprise Institute for Public Policy Research, a prominent conservative think tank in Washington, D.C. During that period he eased back into academia, serving as a visiting law professor at Georgetown University in the spring of 1977. Later that fall, Scalia moved his ever-expanding family to Chicago, pur-

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chased a former fraternity house to accommodate them, and taught at the University of Chicago Law School until 1982, leaving only once to teach as a visiting law professor at Stanford University during the 1980–1981 academic year. He also served on the board of visitors for Brigham Young University's J. Reuben Clark Law School, as the editor of *Regulation Magazine*, and as the chairman of the American Bar Association's Administrative Law Section and its Conference of Section Chairs.

On 15 July 1982, President Reagan nominated Antonin Scalia to fill a vacancy on the prestigious United States Court of Appeals for the District of Columbia Circuit. The U.S. Senate unanimously confirmed him, and he took the oath of office on 17 August 1982. During his four-year tenure on the District of Columbia Circuit, Scalia wrote 133 opinions, many of which emphasized his belief that the judiciary plays a limited role in our tripartite system of government (Brisbin 1997, 35). His judicial colleagues held him in high regard and "remember him most for his willingness to engage in dialogue over matters of law" ("Antonin Scalia," The Oyez Project). On 17 June 1986, President Reagan nominated Scalia to be an associate justice on the Supreme Court of the United States. The U.S. Senate once again confirmed his nomination unanimously, and on 26 September 1986 he became the first Italian American Supreme Court justice (Marquand 1998). He was also the first Roman Catholic to earn appointment to the Court since Justice William Brennan (Hall 1992, 756).

From the outset, it was clear that the hallowed halls of the Supreme Court had never seen anything quite like Antonin Scalia. A "theatrically engaging" jurist, Scalia is a "serial questioner of sorts who relishes the high-stakes oral arguments" (Elsasser 1997), during which he displays a "distinctly aggressive style—at turns provocative, testy and witty"—that can "range from a controlled explosion to a dancing light-hearted mockery" and unnerve the attorneys who appear before him (Marquand 1998, 1). One Court watcher has opined, "if mind were muscle and the Court sessions were televised, Scalia would be the Arnold Schwartzenegger of American jurisprudence" ("Antonin Scalia," The Oyez Project). Scalia's charismatic judicial temperament is no less evident in his forceful, intelligent, and lucid opinions, which oftentimes contain a dash of "impish humor" and frat boy sarcasm. Unwilling to compromise his jurisprudential principles, he does not hesitate to issue blistering dissents in cases where he believes the Court majority's decision offends them. Although his stridency has, at times, alienated him from other justices, it has also garnered him a devout following. One admirer even maintains a web site called the "Cult of Scalia."

Justice Scalia's voting record is generally described as being *politically* conservative. This superficial characterization, however, trivializes his sincere commitment "to construct a coherent theory of constitutional interpretation" (Elsasser 1997), one that accords First Amendment protection to flag burning and prohibits the police from using a thermal imaging device on a criminal suspect's private residence without a search warrant. As the leading evangelist of the originalist movement, during his speaking engagements Scalia also never hesitates to denounce the idea of an ever-

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morphing "living Constitution." He believes that the Constitution, like any other "statute," must be interpreted according to its original meaning. As he explains in *A Matter of Interpretation: Federal Courts and the Law,* an insightful summary of Scalia's brash brand of conservative jurisprudence, "It is the law that governs, not the intent of the lawgiver. That seems to me the essence of the American ideal. . . . A government of laws, not men. Men may intend what they will; but it is only the laws they enact which bind us" (Scalia 1997, 17).

Although Scalia's surpassing legal genius is universally recognized, his controversial opinions have produced a legion of critics in the legal academy. They complain that his originalist jurisprudence "tend[s] to freeze the Constitution in time rather than allow it to speak to contemporary needs" (Marquand 1998, 11). But even liberal scholars such as Ronald Dworkin acknowledge the profound impact that Scalia has had on constitutional jurisprudence, conceding, perhaps with a note of irony, "We are all originalists now" (10). Thus, whether one accepts or rejects Antonin Scalia's judicial philosophy, there is little question that he will be remembered as one of this nation's greatest and most influential jurists.

Stephen A. Dillard

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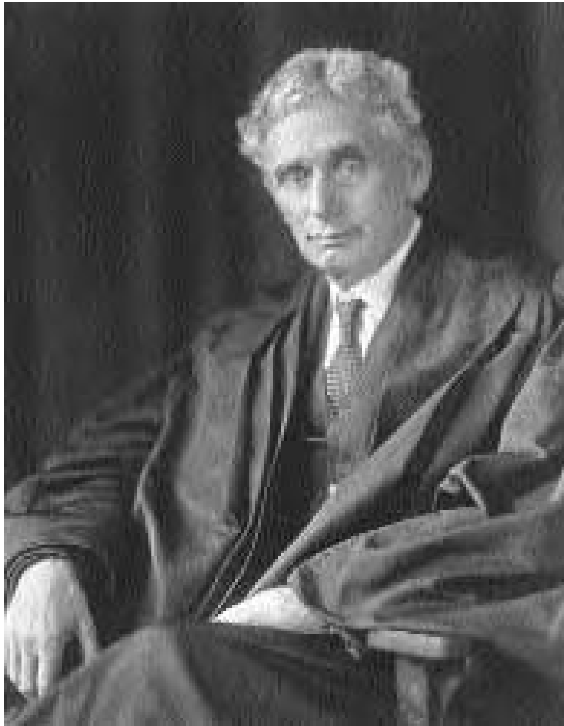
BRANDEIS, LOUIS DEMBITZ

(1856–1941)



Louis Dembitz Brandeis
Photographed by Harris & Ewing, Collection of the Supreme Court of the United States

Any list of the greatest American judges of all time would have to include Louis D. Brandeis, not only because he was the first Jewish justice on the United States Supreme Court but also because he came to exemplify the jurisprudential posture of "self-restraint" on that body. The foundations of that judicial philosophy can be found in his life before coming to the Court.

Louis David Brandeis was born on 13 November 1856 in Louisville, Kentucky, as the youngest of four children to Adolph and Frederika (Dembitz), both immigrants from Prague, Czechoslovakia. Brandeis's earliest childhood was shaped by the Civil War, as the family was forced to move temporarily to Indiana for its safety. A family of abolitionists, the Brandeises angered their neighbors in Louisville by treating their African American household servants as if they were members of their own family. Louis grew up in a family enamored with books, music, and politics, perhaps best typified by his revered uncle, Lewis Dembitz, a refined, educated man who served as a delegate to the Republican convention in 1860 that nominated Abraham Lincoln for president.

Louis was a serious student in languages, and other basic courses, and in his early years achieved scholastically at the absolute top level. Though the

family came from Jewish roots, and others in their extended family observed a strict form of Judaism, the Brandeises practiced a relaxed form of Christianity by celebrating holidays such as Christmas and Easter. It was Lewis Dembitz's strict observance of orthodox Judaism, and his profession as a lawyer, that so enamored his nephew Louis that the young man later changed his middle name from "David" to "Dembitz" to honor his uncle.

In 1872, Adolph Brandeis became so concerned about the impending economic depression that he moved his family to Europe for what they thought would be a fifteen-month trip. In actuality, this turned out to be three of the most formative years in Louis's life. After failing the entrance exam for the academically challenging Gymnasium in Vienna, Louis enrolled in the Annen-Realschule school in Dresden, Germany, for two years, where he excelled. It was this training that Brandeis later credited for teaching him critical thinking and for his desire to return to the United States to study law.

Once back in the United States in 1875, Brandeis, then at the tender age of nineteen, enrolled in Harvard Law School. Despite the fact that he entered the school without any formal training and without financial assistance from his family, who had suffered from severe financial reversals, he proved to be an extraordinary student. Harvard at that time was spurred by newly arrived Dane Professor of Law, Christopher Columbus Langdell, to change from the more traditional study of memorizing "black letter" case law to the use of Socratic teaching and the "case method" in order better to instruct students in legal reasoning. In time, Brandeis began to demonstrate considerable skills as a budding judge with his participation in the Pow-Wow law club, an activity similar to today's law school moot courts.

While in law school, Brandeis's eyes began to fail, likely because of eyestrain caused by the large amount of reading done using gas lights. Despite being told by doctors that he should give up his studies entirely, he continued his studies by hiring fellow law students to read to him while he memorized the legal principles. His academic work, and acute memorization talents, proved to be so impressive that he graduated as the valedictorian at Harvard, achieving what was then the highest grade point average in the history of the legendary school.

After graduation in 1877, Brandeis moved to St. Louis to practice law with his brother-in-law, James Taussig. After a year of practice there, he returned to Boston, where, as the first Jewish attorney in the city's history, he joined Harvard Law School classmate Samuel D. Warren Jr. to establish the Brandeis and Warren law firm. Brandeis established an unusual firm, earning considerable sums by representing wealthy corporate clients gained from his considerable Jewish American contacts and his German American background while also taking *pro bono* cases against large utilities and the

railroads for impoverished people. In time, he became known as "the People's Attorney."

Brandeis's success filling in for Prof. James Bradley Thayer's course, "Evidence,'" at Harvard was so renowned that he was offered an associate professorship in the school. He failed to take the position, however, because of his shaky health. Health matters continued to dominate his life after marrying his second cousin, Alice Goldmark, on 23 March 1891, only to discover that her health was so frail that in addition to his other duties he would have to manage the family's domestic affairs. Nevertheless, the Brandeises were blessed with two daughters, Susan and Elizabeth.

Although Brandeis's law business grew to the point that his firm was able to add two partners, he also found the time to take a part-time position as a professor of business law at the Massachusetts Institute of Technology from 1892 to 1894. It was after Brandeis's law firm became Brandeis, Dunbar, and Nutter, where he would serve as the senior partner from 1897 to 1916, that he did some of his most important legal work for the general public. When the Boston Elevated Railway company was given legislative support to operate the city's transportation, Brandeis successfully led the fight to maintain public control of this business. Three years later, Brandeis formed the Public Franchise League, through which he was able to engineer the public consolidation of the Boston area utility companies. These successes led to his exclusion from the Boston Brahmin high society, which already had significant anti-Semitic elements. Even though he was now an outsider, Brandeis continued to labor vigorously, at his own expense, for the good of the public. It was during this period that he began to discuss the possibility of the creation of some form of state unemployment insurance that would protect workers from the vagaries of economic cycles beyond their control.

In 1908, Brandeis changed the nature of argumentation before appellate courts when he appeared before the United States Supreme Court to argue the case of *Muller v. Oregon*. In a case involving the state regulation of hours for working women, legislation that the Court at that time was disallowing as a restriction on the "liberty of contract" of employers said to be protected by the Fourteenth Amendment's due process clause, Brandeis's legal argument was not based on the case law, which failed to support his position defending the state's right to pass such legislation. Rather, he presented a considerable body of social science data to prove the obvious fact that women were different from men and then to argue from that posture that the long-term social and economic repercussions of protecting women in this manner were positive for the country. After winning the case, and being commended by the Supreme Court for employing this approach, this new "Brandeis Brief" was increasingly used, most notably in the *Brown v. Board of Education* case in 1954 that desegregated public schools.

Benjamin Barr Lindsey (1869–1943)

Few American judges were better known or more controversial in their time than Benjamin Barr Lindsey, who was born in Jackson, Tennessee, in 1869, where he spent most of his youth before moving with his family to Denver, Colorado. He was subsequently recruited to attend the elementary school section of Notre Dame in Indiana and later enrolled at Southwestern Baptist University, which was then a preparatory school. Lindsey's father committed suicide when Benjamin was eighteen, and faced with the responsibility of taking on multiple jobs to support his family and himself, Benjamin himself fired a revolver at his head a year later, only to be spared when the cartridge failed to explode.

Lindsey studied law in a Denver law office and was admitted to the bar in 1894. Serving from 1899 to 1902 as a public administrator and guardian, Lindsey was appointed as a county judge at the age of thirty-one, where he served for the next twenty-six years (Larsen 1972, 23).

When Lindsey ascended to the bench, juveniles were often tried and punished as adults. Shortly after his rise to the bench, Lindsey was faced with a youth whose mother screamed in agony after Lindsey sentenced her son to reform school for stealing coal. Lindsey visited the poverty-stricken home of the youth's family (the youth's father was dying of lead poisoning that he had contracted on his job) and discovered that the son had been stealing coal to keep the family warm. Subsequently reducing the youth's sentence to probation, Lindsey came to believe that youthful offenders should be treated as delinquents who needed to be corrected and schooled rather than as criminals. Lindsey soon became an avid reformer who became known as the "Kids' Judge" and had such trust in children that he was often able to send children to detention school unescorted.

Lindsey also developed a civil proceeding whereby courts could try juveniles without giving them a criminal record but also had power to fine or even jail recalcitrant youth for civil contempt (Larsen 1972, 40). Lindsey helped draft the Colorado Adult Delinquency Act of 1903, which held adults responsible when they contributed to the delinquency of a minor ("Benjamin Barr Lindsey"). Lindsey refused to wear a judicial gown and was known for establishing rapport with youthful offenders and delivering words of advice to them in what critics derisively labeled "Lindsey's Sunday School" (Larsen 1972, 69). On one occasion, Lindsey paid a $500 fine rather than reveal evidence about a killing that a youth had provided in confidence to him during a private hearing.

Discovering graft at the local level, Lindsey believed that government and business were often allied against the people. Lindsey wrote a book entitled *The Beast* (1910), designed to expose such corruption. He advocated a variety of Progressive reform measures, many of which he helped get adopted by the Colorado legislature. Favorable news reports of his courtroom proceedings and his own penchant for self-promotion propelled Lindsey into

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the public eye, and he continued to contribute to a variety of reform efforts, including the push for woman's suffrage.

Lindsey achieved his greatest notoriety for his views on sexuality, which he eventually published in a book titled *The Companionate Marriage* (1927). Lindsey reported many of his own frank conversations with youth engaged in sexual behavior and concluded that they needed accurate information about birth control and access to contraceptives. He did not, as was often alleged, favor the custom of couples living together without benefit of marriage, but he did believe that relatively liberal divorce laws were appropriate for those who did not have children, and he did not express condemnation when he reported on extramarital affairs of couples living in "open marriages" where both knew and approved of such activities. Soured on the Catholic Church of his father, Lindsey remained an opponent of what he considered to be hypocrisy.

Met with a deluge of critics, many religiously motivated, who charged that Lindsey was advocating "barnyard marriage," Lindsey also encountered strong opposition from the Ku Klux Klan. Initially given a narrow electoral lead in his 1923 race for the Juvenile Court of Denver, Lindsey's election was eventually invalidated by higher courts, who were also sympathetic to the Klan and who had been undoubtedly shocked by Lindsey's seeming lack of propriety in commenting on public issues. Subsequently disbarred from the practice of law in Colorado for fees he had accepted in connection with work he had done in a divorce case in a New York court (a disbarment that was widely viewed as politically motivated and that was eventually rescinded), Lindsey continued to earn money as a provocative speaker and moved to Los Angeles where he had also been accepted to the practice of law. In the meantime, he had attended a New York church where he had publicly challenged a critical bishop during a Sunday sermon and had been expelled from the sanctuary.

More favorably received in California, Lindsey was elected as a Superior Court judge in Los Angeles but was denied appointment by his colleagues to the Juvenile Court position that he desired. Less effective as a reformer in California than he had been in Colorado, Lindsey continued to press for such measures, and he did succeed in forming the Children's Court of Conciliation and became its first presiding judge in 1939. Lindsey died four years later of a heart attack.

A Lindsey biographer has called Lindsey his own worst enemy (Larsen 1972, 149), noting that he often exaggerated his already impressive achievements and that his flair for "showmanship" was sometimes at war with his image as a judge. Although his biographer credited Lindsey with "a talent for legal improvisation," he noted that "Lindsey did not have a 'judicial temperament,' even though he spent almost half a life time as a judge" (19, 25). Lindsey was a maverick, but he continues to be ranked among "the leading American reformers of the twentieth century" (267).

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As time went on, Brandeis became increasingly visible in the American Zionist movement. Having been introduced by his uncle Lewis Dembitz to Zionist Jacob De Haas, Brandeis became impressed with his work in this area. Brandeis's involvement in bringing a negotiated end to the New York garment workers' strike in 1912 and participation in a variety of Jewish organizations in the face of the prevailing anti-Semitism in the United States galvanized his desire to work for Judaism. In 1914, this evolution culminated in his becoming the leader of the American Zionism Movement.

Brandeis paid a price for his religious and public legal efforts after he was named by Pres. Woodrow Wilson to replace the deceased Joseph R. Lamar for the United States Supreme Court. Though Brandeis was a Republican, Wilson, a Democrat, appointed him to the seat because of his reformist and Progressive views. The Senate, witnessing the explosive opposition to the appointment that was fueled largely by anti-Semitism and the bigoted leadership of the American Bar Association, delayed his confirmation for the seat for nearly half a year before finally confirming him to the seat by a forty-seven to twenty-two vote, to the great delight of President Wilson.

The combination of Brandeis's native intelligence and sense of decency, the reformist traits that he exhibited as "the People's Attorney," and his ability to harness those instincts in the social science approach to the law typified by his Brandeis Brief, fueled by his brilliance as a jurist, might have led some to expect an "activist" approach to his work. But Brandeis proved only half of this expectation to be correct. Although he was indeed a brilliant jurist, and one who continued to labor for the interests of the people, once he donned the judicial gown he seemed to renounce his reformist posture in favor of the adoption of the "self-restraint" posture. Now, whenever possible, he voted to leave legislation in the hands of elected representatives rather than having the justices use the Constitution as a means for drafting laws from the bench.

The best explanation of Brandeis's judicial philosophy came in the 1936 case of *Ashwander v. Tennessee Valley Authority*, dealing with a stockholder challenge to the construction of the Wheeler Dam. In arguing that the litigant had no basis for bringing this suit, Brandeis explained that the Court must "refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it" (297 U.S. 341). Otherwise, Brandeis would leave political issues for resolution by the elected representatives, or by a state government, which could serve, he argued in *New State Ice Co. v. Liebmann* (1932), as a "laboratory" of democracy (285 U.S. 311). Seeking to help states gain the necessary power to govern, Brandeis ruled in *Erie Railroad v. Tompkins*—a landmark 1938 "diversity of citizenship" case involving a man who was injured by a

train in Pennsylvania but sued the railroad in New York, the home of its corporate headquarters, because it was possible in that jurisdiction to secure damages—that "except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern" (304 U.S. 78). So, the federal court decision would now be the same as if it were tried in the appropriate state court.

Even though Brandeis remained an ascetic "self-restraint" jurist on the bench, off the bench he satisfied his "social activist" roots by secretly working through then–law professor Felix Frankfurter. Using Frankfurter as a political lieutenant of sorts, Brandeis placed money in an account for him and peppered him with suggestions for legislation, law review topics to pursue, and people to be contacted in seeking to propose political actions that Brandeis could not accomplish in his judicial role. Working through his daughter and son-in-law, he was able to propose the sort of state unemployment insurance plan that would eventually be adopted by the federal government.

Another important exception to Brandeis's self-restraint posture came in the areas of civil liberties dealing with the freedom of political speech under the First Amendment and the right of privacy against police searches under the Fourth Amendment. In a period dating from World War I through the 1920s, which was marked by the highly conservative nature of the Supreme Court toward personal liberties, the alternative position was characterized by the phrase "Holmes and Brandeis Dissenting" for the opinions that the two men wrote challenging their brethren's views.

In a series of World War I cases dealing with defendants who had been denied their right to free speech under a series of laws protecting the military draft and the government's right to prosecute the war, Brandeis and Oliver Wendell Holmes Jr. developed the position of "clear and present danger" in an effort to protect free speech. Since the First Amendment seemed to bar Congress from making any law restricting free speech, and the government was now prosecuting people for the actions that resulted from the speech, they argued that the link between the speech and the action must now be shown to be "clear and present," or, rather, immediate. Although in the early cases, *Schenck v. United States*, *Frohwerk v. United States*, and *Debs v. United States*, Holmes was willing to allow the argument that the United States was at war to justify the restriction of speech, by the time the Court ruled in the case of *Abrams v. United States*, Brandeis had helped to bring Holmes to a new position. In this case dealing with a Russian immigrant trying to encourage American workers to strike during the war in support of the workers in Revolutionary Russia, Holmes and Brandeis now argued that the immigrant's words were "poor and puny anonymi-

ties" that represented so little a threat to this country that his freedom of speech should not be restricted (250 U.S. 629).

As the years passed, Brandeis, spurred by his appreciation for democracy, education, and the value of free speech, continued to argue vigorously for the benefits of protecting free speech even in wartime because of its educational value and the importance to democracy. In the 1920 case of *Schaefer v. United States*, dealing with a group of editors for a German language newspaper in Philadelphia who were convicted of obstructing military recruitment efforts and aiding enemies of the United States by publishing false reports, Brandeis argued in dissent that free speech must be protected even in times of war. As he argued, "no jury acting in calmness could reasonably say that any of the publications set forth in the indictment was of such a character or was made under such circumstances as to create a clear and present danger, either that they would obstruct recruiting or that they would promote success of the enemies of the United States" (252 U.S. 483). That same year, two other cases allowed him to expand on this view. In the case of *Pierce v. United States*, dealing with the author of another publication charged with causing insubordination in the armed forces, Brandeis argued once again in dissent the dangers to democratic governmental progress "if efforts to secure it by argument to fellow citizens may be construed as a criminal incitement to disobey the existing law" (252 U.S. 273). In *Gilbert v. Minnesota*, dealing with a state law that prohibited any interference with the military enlistment effort, Brandeis believed that the statute was "an act to prevent teaching that the abolition of war is possible" (254 U.S. 334). He also argued that the freedoms of speech and the press, which were obstructed by the statute, affect the "rights, privileges, and immunities of one who is a citizen of the United States; and it deprives him of an important part of his liberty" (336).

All of these opinions culminated in Holmes and Brandeis's 1927 concurring opinion in *Whitney v. California*, dealing with the prosecution of a woman for "aiding" the Communist Labor Party. Although Justice Sanford, writing the majority opinion for six other justices, purported to use the now popular "clear and present danger" test to uphold the conviction, Holmes and Brandeis refined their definition of the test to the point that conviction should not have occurred: "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion" (274 U.S. 377). As for the idea of protecting speech even in times of crisis, they argued: "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the

function of free speech to free men from bondage of irrational fears" (376–377). They went on to say: "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty . . ." (377).

A year later, Brandeis argued in the case of *Olmstead v. United States* that individual privacy should be protected from government invasion. After the Court ruled that telephonic wiretapping by the police was permissible under the Fourth Amendment because there had been no physical trespass and no seizure of anything other than electronic impulses, Brandeis, seizing on an argument he had once made in a law review article, argued for the need to be able to update the protections in the Constitution, in this case leading him to call for the protection of "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men" (277 U.S. 478).

In the final years of his career, Brandeis, like the rest of the Court, initially combated the New Deal of Franklin D. Roosevelt (FDR), which went against everything Brandeis had ever preached in opposition to the concepts of "bigness" and "centralization" in the federal government and the need to return to the states. After repeatedly ruling against the National Industrial Recovery Act's effort to centralize federal government control of businesses, in cases such as the *Panama Refining Company v. Ryan* and *Schechter v. United States,* he declared in *Louisville v. Radford* that a federal bankruptcy law, the Frazier-Lemke Act, was unconstitutional, after which he proclaimed to an FDR aide that this decision represented "the end of this business of centralization" (Schlesinger 1960, 280). But even though Brandeis was brilliant, he proved to be less prescient on this issue, as two years later he was one of the jurists testifying before the Senate Judiciary Committee seeking to scuttle FDR's plan to "pack the Court." Finally, as the court-packing plan was in the process of failing to be passed, he became part of the Court majority voting in support of the New Deal's programs. In the end, Brandeis, like the Court's majority, switched his views on economic matters, supported the centralized federal New Deal, and proclaimed in 1938 that the Court's interest would now be devoted to the issues of civil rights and liberties while choosing to defer to the political branches on economic matters.

Brandeis retired in early 1939, only to be replaced by another legendary jurist, William O. Douglas. Brandeis died in 1941. After all of his accomplishments, for as long as Supreme Court justices are discussed, Louis Dembitz Brandeis will remain among the greats for his commitment to democracy, social justice, and egalitarianism, always with an eye toward the proper role of jurists in a political world.

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BROWN, JOHN R.

(1909–1993)

John R. Brown
Library of Congress

John R. Brown was a member of the United States Court of Appeals for the Fifth Circuit for thirty-eight years from 1955 until his death in 1993. It is a noteworthy coincidence that Judge Brown's surname is the same as that of the lead plaintiff in the case that epitomizes not only the historical period in which he served but also his judicial tenure. *Brown v. Board of Education* and its wake dominated the Fifth Circuit's activities from the beginning to the end of his term, and from the beginning Judge Brown became one of the court's leading proponents of judicial activism as the tool for dismantling segregation in the six Deep South states that stretch from El Paso to Miami. After twelve years on the bench Judge Brown assumed the duties of chief judge, and for the next twelve years he was an innovative administrator of the largest and busiest circuit in the nation. In December 1979 Judge Brown—then seventy years old, the mandatory retirement age for chief judges—assumed senior

status but continued to be an active member of the court, hearing cases for yet another dozen years.

Background

John Robert Brown was born in Nebraska in 1909, but by his own account became an indoctrinated Texan where he lived and worked after 1932 (Brown Memorandum c. 1963). He attended public school in Holdrege, Nebraska, attended the University of Nebraska for three years, and was granted a BA degree from Nebraska in 1930 after his first year of law school at the University of Michigan. At Michigan, Brown earned a juris doctor degree in 1932 with what at the time was the highest grade point average earned. At Michigan he was a member of the Order of the Coif, the national law school honor society, and on the law review staff. After studying law, which he did "not knowing what else to do," Brown set off for Texas "unknown, without friends, acquaintances, introduction or otherwise" (Brown Papers). Nevertheless, a notable law firm in Houston employed the aspiring young attorney. Working for the firm of Royston and Razor was a momentous change for Brown. As he later put it, "for one raised in the dry area of Nebraska 20 miles from a river and no place to swim, I ended up as an admiralty and maritime lawyer" (Brown Papers). Except for a tour of military duty during World War II, Brown specialized in admiralty and maritime law—becoming the senior active partner—at Royston and Razor until his judicial appointment in 1955.

Brown's military service during World War II began as a recommissioned officer in June 1942—he had been commissioned as a Reserve Officer Training Corps graduate from Nebraska—and ended as port commander in Cebu and Tacloban, in the Philippine Islands. His administrative experience during wartime became a valuable asset when he was on the bench, especially during the years he was chief judge of the Fifth Circuit Court, and earlier when the chief judge gave him the responsibility for making case assignments. Following military service, Brown returned to his law practice and became politically active, serving as chair of the Harris County Republican Party, Texas State Republican Committee member, and an Eisenhower delegate at the 1952 Republican Convention in Chicago.

Judicial Activist

As Dean Frank T. Read, who coauthored the definitive history of the Fifth Circuit's activities during 1954 to 1973, observed, "few could have predicted that John R. Brown, the Republican-Texas admiralty lawyer, would become an adept constitutional scholar and would eventually be recognized

as one of the Deep South's four great civil rights appeals judges" (Read and McGough 1978, 52). The four that Read referred to were Judge Richard T. Rives, Judge Elbert P. Tuttle, Judge John Brown, and Judge John Minor Wisdom. Burke Marshall, assistant attorney general in charge of the Civil Rights Division from 1961 to 1965, referring to these four judges, stated that "if it hadn't been for judges like that on the Fifth Circuit, I think *Brown v. Board of Education* would have failed in the end" (Bass 1981, 17).

Richard T. Rives, a Democrat, was a politically active trial lawyer in Montgomery, Alabama, when President Truman appointed him to the Fifth Circuit. One client that Rives successfully represented was the Macon County, Alabama, Board of Registrars in a 1947 case that found Thurgood Marshall on the opposite side (*Mitchell v. Wright et al.* [USDC ED Ala. 1947]). Yet, any doubt that may have existed as to Judge Rives's position on civil rights disappeared after his 1956 decision in the case that became known as the "headstone at the grave of *Plessy v. Ferguson*." The case involved the famous Montgomery, Alabama, bus boycott ignited by the arrest of Rosa Parks and led by the Reverends Ralph Abernathy and Martin Luther King Jr. Refusing to follow the Supreme Court's 1896 precedent in *Plessy* that permitted the segregation of races in public transportation if the facilities were equal, Judge Rives wrote the majority opinion for himself and Judge Frank Johnson ruling the state and local actions to be violations of the due process and equal protection clauses of the Fourteenth Amendment. The case, *Browder v. Gayle* (142 F. Supp. 707 [USDC MD Ala. 1956]), was affirmed by the United States Supreme Court (*Gayle v. Browder,* 352 U.S. 903 [1956]), with Thurgood Marshall appearing for the appellants. This time he and Rives were on the same side.

Liberals Elbert P. Tuttle and John Minor Wisdom, and Judge Brown along with conservative Benjamin F. Cameron of Meridian, Mississippi, were Republicans appointed by President Eisenhower between 1955 and 1957. With a trial practice in Atlanta, Georgia, Tuttle had established himself as willing to take on unpopular causes and clients and is best known in this regard for representing an accused indigent in the landmark case of *Johnson v. Zerbst* (304 U.S. 458 [1938]) in which the Supreme Court held for the first time that the federal government must furnish appointed counsel for indigent defendants under the Sixth Amendment.

John Minor Wisdom practiced law in New Orleans where he also taught law part-time, contributing to legal scholarship in the fields of estates, trusts, and admiralty. Before his judicial appointment, Wisdom had been a member of Eisenhower's President's Committee on Government Contracts, which monitored employment discrimination in situations where federal contracts were involved. President Eisenhower also charged the committee with encouraging voluntary compliance with antidiscrimination standards.

Judge Brown established a liberal-activist position early in his tenure on one of the major legal, political, and moral issues of the twentieth century: the implementation of the United States Supreme Court's *Brown v. Board of Education* decisions. The Supreme Court decided *Brown I* (1954) less than a year before President Eisenhower nominated Judge Brown and *Brown II* (1955) less than four months before he assumed office. Overseeing the implementation of *Brown* in the Deep South was no easy task for the Fifth Circuit. Many state and local authorities were extremely loath to carry out *Brown's* mandate. Following the Supreme Court's decision in *Gayle v. Browder* (1956), officials in several southern states indicated that they would refuse to integrate public transportation (Huston 1956). An example of how extreme and intransigent local governments could be—and Judge Brown's reaction—was a 1972 case involving a Florida county school superintendent's claim that "it could not assure that Negro students were not being discriminated against because it did not have a Congressional definition of the term 'Negro'" (*United States v. Flagler County School District,* 457 F.2d 1402 [5th Cir. 1972]). Judge Brown, lamenting that in the long history of desegregation cases the Court had "heard of everything, everything, that is, until today" and upholding the trial court's order for the immediate implementation of a unitary school system, tersely commented that the "School District has apparently had no difficulty identifying Negroes for the purpose of segregating them. For desegregation they can be identified with similar ease" (1402). Judge Brown had little patience for dilatory practices by local officials who were seriously affecting lives of children. He expressed his attitude toward delay in a case in which a district judge held that a school district's gradual step-by-step integration plan that began with integrating the first grade class each year after that until complete was a "prompt and reasonable start toward full compliance" (*Price v. Denison Independent School District Board of Education,* 348 F.2d 1010 [5th Cir. 1965]). In his opinion vacating the district court's judgment and ordering a stepped-up integration plan, Judge Brown acknowledged that much had happened since the court had entered the initial desegregation order and declared: "and many things have happened since then—not the least of which is that five years have gone by. And for this constitutional right, time alone is of great moment. Already some of these children have graduated. For them delay has meant denial for all time. The time for reviewing or redeveloping the undulating administrative doctrines evolved by us for the implementation of *Brown* is over" (1010).

Judge Brown stated his judicial philosophy very forcefully and eloquently in a dissenting opinion in *Gomillion v. Lightfoot,* a case that turned out to be a landmark case in which the United States Supreme Court on appeal established that a change in municipal boundaries that denied voting rights

based on race is unconstitutional. In 1957, the Alabama legislature enacted a statute that changed the municipal boundaries of Tuskegee. The change removed all but four or five of the qualified African American voters and none of the qualified white voters from the city. The Circuit Court upheld the trial judge's dismissal, stating that the right to establish a municipality's boundary is an act of sovereign state power reserved to the states by the Tenth Amendment and cannot be restricted by the courts even where "as in incidence of it, Negroes would be purposely excluded from the municipality and from participation in its affairs" (*Gomillion v. Lightfoot,* 270 F.2d 594, 598).

Judge Brown's dissent in *Gomillion* clearly established him as a forceful judicial activist with a nationalist perspective who was willing to interpret the Constitution broadly to further the liberal agenda in race relations. In opposing the panel's majority, he declared: "It is axiomatic that in a federal system the laws of the individual states cannot be supreme. For even in a field reserved expressly to the States or to the people it is the Constitution which assures that. . . . There is no local matter which is not subject to potential examination for Constitutional defects." Moreover, Brown declared: "I make no apologies for the view that the business of judgment in constitutional fields is one of searching for the spirit of the Constitution in terms of the present as well as the past, not the past alone" (270 F.2d 594, 602, 604). The Supreme Court upheld Judge Brown's position and views the following year in *Gomillion v. Lightfoot* (364 U.S. 339 [1060]).

To be sure, although many admired the role of Judge Brown and his colleagues as the South's vanguard in carrying out *Brown,* they also had antagonists. Not only did Judge Cameron pejoratively label them "the Four" in a dissenting opinion, but he also made an exhaustive examination of case assignments in civil rights cases to prove that Chief Judge Tuttle and Judge Brown, who had served as assignments judge since directed by Chief Judge Joseph Hutcheson, were stacking the deck against local governments by placing a majority of liberals on each civil rights panel. Judge Cameron's examination revealed that of the cases that came before the Fifth Circuit between June 1961 and 1963, "the Four," who constituted a minority of the court, were appointed as a majority panel in nearly 90 percent of the civil rights cases. Moreover, a member of "the Four" wrote more than 90 percent of the court's opinions in civil rights cases (*Armstrong v. Board of Education,* 323 F.2d 333, 354 [5th Cir. 1963]). At a meeting of the court's members in Houston soon following Judge Cameron's charges, the court avoided an outright crisis, and with some changes in the manner in which cases were assigned, moved on with business as usual.

Judge Cameron's allegations not only created a tempest within the court but also generated a cannonade from the outside. When the U.S. senator

from Mississippi, Democrat James O. Eastland, the powerful chair of the Senate Judiciary Committee, got wind of Cameron's charges, he dispatched committee investigators to look into the matter. To thwart the liberals on the Fifth Circuit, Senator Eastland—a persistent opponent of racial integration—snatched a United States Judicial Conference proposal that called for the Fifth Circuit to be split on the basis that it was administratively too large. The Eastland Plan called for the establishment of a new circuit composed of Texas and Louisiana that would take the two liberal judges, Brown from Texas and Wisdom from Louisiana, leaving his home state of Mississippi along with Georgia and Florida in the Fifth with a conservative majority. Although initially unsuccessful, a variation of Eastland's plan was set up on 1 October 1981, but ironically, Eastland's home state remained in the Fifth Circuit at New Orleans with Texas and Louisiana instead of going with the new Eleventh Circuit covering Alabama, Georgia, and Florida.

Judicial Administrator

Judge Brown became chief judge of the Fifth Circuit Court of Appeals on 17 July 1967 and served in this role for the next twelve years, during which he made significant administrative innovations and improvements for conducting the Fifth Circuit's caseload. The circuit's caseload was heavy enough when Judge Brown assumed the chief judge's position, but it immediately became much more so with the United States Supreme Court's order in *Green v. County School Board of New Kent County* (391 U.S. 430 [1968]) rejecting the "deliberate speed" approach to desegregation and requiring instead "meaningful and immediate progress." Nonetheless, as Read and McGough described it, Judge Brown "became a catalyst for action, urging the adoption of innovative new procedures that were to revolutionize traditionally sluggish appellate procedures" (1978, 54).

Three of Judge Brown's administrative changes stand out. First, the judicial panel initially selected to hear a case was permanently assigned the case so that a new or different panel would not have to take the time to travel the same learning curve each time the case reappeared for subsequent action. Second, Judge Brown established a screening process in which a single judge would screen each new case to classify it in such a way that important cases would receive more time than the less significant, with the frivolous receiving scant attention. In short, it provided for determining which cases should be argued orally or decided on briefs only (see 5th Cir. R. 34). Third, the court adopted a local Rule 21, which permitted the Circuit Court to save time and effort by adopting the lower court opinion as its own when it affirmed the lower court decision (see 5th Cir. R. 47.6).

Although Judge Brown's administrative changes made the overburdened

court more manageable, they were not without criticism. Permanent panels became expert in their particular geographic or legal field but were deemed to lose the benefit of cross-fertilization; many attorneys resented the curtailment of time allocated for oral argument; and many deemed Rule 21 as permitting the court to shirk its duty to support its decisions. Criticism did not deter Chief Judge Brown. As he stated years later when asked about Rule 21, "We were desperately trying to dispose of a lot of cases with genuine movement, an accelerated movement toward integration—I mean integration, not desegregation—without involving ourselves in a lot of conceptual discussions about reasons. We were of the view then, and I still am, that the worst thing you can do today is write an opinion" (Read and McGough 1978, 54).

Humorist

Judge Brown wrote 1,487 opinions during his thirty-eight-year tenure on the Fifth Circuit Court of Appeals. He was roundly praised for the freshness and clarity of his writing style, which was compatible with his no-nonsense approach to getting on with the business at hand. Yet, as one of his former law clerks put it, "he refused to believe that legal writing had to be dull writing" (Rosenthal 1993, 909). His colleague, Judge Elbert Tuttle, claimed that any one of Judge Brown's written opinions qualified as an "intellectual masterpiece." Tuttle went on to say that Brown "had a great sense of humor and often made his most telling remarks using humorous illustrations" (Tuttle 1993, 903). For example, take his pithy analysis of the issue in *Gordon v. Green* (602 F.2d 743, 744 [5th Cir., 1979]): "As we see it, the only issue currently before the Court in these five consolidated cases is whether verbose, confusing, scandalous, and repetitious pleadings totaling into the thousands of pages comply with the requirement of 'a short and plain statement' set forth in F.R.Civ.P. 8. We think that the mere description of the issue provides the answer." A perfect example of Judge Brown's humor can be found in the following ditty from *United States v. VenFuel, Inc.* (602 F.2d 747, 749 [5th Cir., 1979]):

> This case presents a vicious duel,
> Between the U.S. of A. and defendant Ven-Fuel.
> Seeking a license for oil importation,
> Ven-Fuel submitted its application.
> It failed to attach a relevant letter,
> And none can deny, it should have known better.
> Yet the only issue this case is about,
> Whether a crime was committed beyond reasonable doubt.

Ven-Fuel was convicted of fraudulent acts,
By the Trial Court's finding of adequate facts.
We think it likely that fraud took place,
But Materiality was not shown in this case.
So while the Government will no doubt be annoyed,
We declare the conviction null and void.

Judge Brown's humor found particular expression in his use of subheadings, and one of the best examples is *City of Houston v. Federal Aviation Administration* (679 F.2d 1184 [1982]), a case involving a challenge to a Federal Aviation Agency regulation that prohibited flights in and out of Washington's National Airport for travelers beyond a 1,000-mile perimeter. Judge Brown began the opinion as follows:

> This flight from Houston, Texas to our Nation's Capital takes us to both Dulles International and Washington National Airports. The Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., will serve as our flight plan, and the Supreme Court as air traffic control. In the course of our flight, our passengers—the City of Houston, American Airlines and the Federal Aviation Administration—will be informed of our conclusion that Department of Transportation regulations imposing a "perimeter rule" upon flights to and from Washington National Airport are valid and thus, as we disembark, we shall deny the petitions for review. (1186)

The subheadings include:

Destination: Washington Capital City
You Can't Get There from Here
We've Only Just Begun
You Deserve National Attention
The Long and Short Haul of It
Final Approach.

Legacy

Our nation has received an inheritance from John R. Brown's judicial tenure, and we can sum it up in the words he used to describe his civic duty when delivering a high school graduation speech in Holdrege, Nebraska. Speaking on the Biblical passage from Genesis 4:9, the young Brown asked, "Am I my brother's keeper?" He answered, "I am my brother's keeper" (Tuttle 1993, 903). That duty, as Judge Brown saw it, which he never deserted, required affirmative action not only to eradicate wrongs of the past but to

redress those wrongs. He forcefully stated his position on the issue of affirmative action in a case involving a suit that challenged a Texas grand jury selection process on the grounds of deliberate racial inclusion, stating that

> When that class is a racial group and, moreover, a racial group which historically has been the object or victim of state-generated discrimination, the selectors can perform their constitutionally-imposed duty only by being conscious of that class. This means they must be conscious of that race. And they must be conscious that the system contrived or followed by them has as its conscious aim the supplying of persons of that race for inclusion in the "universe." (*Brooks v. Beto,* 366 F.2d 1, 23 [5th Cir., 1966])

Thus, consistent with the goal of Rule 21 to make "genuine movement" rather than "conceptual discussions about reasons," Judge Brown declared that the "evil and the evil practices are not theoretical. They are realities. The law's response must therefore be realistic" (*Brooks*, 23). In fact, it was Judge Brown's vision and duty that prompted him to remain on the bench with senior status after retirement for an additional thirteen years. As he put it in 1990, the "task of eliminating hatred and discrimination is still a goal to be achieved, and if whatever we accomplished in that acute period of 1960 to 1975 serves as an illustration of how things can be bettered, why, it's a very happy memory and recollection for having been a part of it" (Elder 1997, 2).

Judge Brown's shadow continues. Dean Frank Read put Brown's legacy in stark relief during a discussion at a symposium at the South Texas College of Law in 1997. Dean Read told the symposium audience that "we are here among giants to honor a giant," namely John R. Brown, for his efforts in civil rights. The topic of the symposium was "The Fifth Circuit and Civil Rights: From Brown to Hopwood." Brown is *Brown v. Board of Education;* Hopwood is *Hopwood v. Texas*, 236 F.3d 256 (5th Cir., March 1996), *cert. denied,* 633 U.S. 929 (2001), in which the new United States Court of Appeals for the Fifth Circuit held that the University of Texas School of Law could not use race as a factor in deciding which applicants to admit. Of this holding, Dean Read had this to say: It "abandoned the court's history, the region's history, and it misunderstands history. To suggest that affirmative action be abandoned in one generation . . . spits on the record of the greatest civil rights tribunal in the United States" (Elder 1997). Following the recent holding in *Grutter v. Bollinger* (6th Cir., 2002), in which the United States Court of Appeals for the Sixth Circuit upheld the affirmative action admissions program of the University of Michigan Law School that considered race, the Supreme Court may soon resolve the different positions, and in doing so—harking back to *Gomillion v. Lightfoot*—decide Judge Brown's

ultimate legacy in the states covered by the Circuit Court of Appeals for the Fifth Circuit.

Clyde Willis

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BURGER, WARREN

(1907–1995)

Warren Burger
Photograph by Robert S. Oakes, National Geographic Society, Courtesy of the Supreme Court of the United States

When film historians recount the events surrounding the making of the film *Gone with the Wind*, one pivotal story is the casting of Scarlett O'Hara. The film's producers searched nationally, and even internationally, to find the right actress. Casting the other leading role, the part of Rhett Butler, did not cause similar difficulty. The consensus was that only one actor, Clark Gable, fit the part. Not only did he look the way most people envisioned the character, but Gable could also act. Indeed, his performance brought Rhett Butler to life on the screen. It has been said that if Hollywood were to cast the role of United States Supreme Court chief justice, it would need look no further than Warren E. Burger. When Burger was sworn in as chief justice in June 1969, he was tall and handsome and sported a full head of wavy white hair. He was exactly as America's chief magistrate should look (Randall 2002). The question that Court watchers advanced was simple: "He *looks* the part, but can he act?"

After a run of seventeen years, the evidence would suggest that Warren Burger could *not* act—that, in many respects, he failed to measure up to the demanding role of chief justice. Most reviewers have not been kind. They

proclaim, rather forcefully, that Burger was *not* an important jurist. In fact, some have suggested that he was unable to grasp many of the finer points of law in cases that came before the Court during his tenure (O'Brien 1996). He was not thought to be an outstanding writer or even particularly well prepared for either oral argument or conference debate (Blasi 1983). Further, he did not receive high marks as the Court's leader. Unlike his predecessor, Earl Warren, Burger was not able to pull the justices together into a team to decide seminal cases. Whereas many of the important Warren Court decisions were unanimous, Burger's Court was riddled with plurality opinions and five-to-four splits (O'Brien 1996). Too, and most acutely unlike Earl Warren, Burger's Court was not thought to be revolutionary. To those who wanted the chief justice to promote and perpetuate the Warren Court's approach to civil rights and liberties, Burger was a failure (Irons 1999). Likewise, many of those who deplored the Warren Court's activism and were therefore pleased with Burger's appointment to the high court found Burger to be a disappointment precisely because Burger's tenure produced no "counter-revolution" (McGuire 2002; Savage 1992).

The question one might ask is what warrants Burger's inclusion in a volume purporting to discuss America's "great judges"? In addition to serving as a representative for a modern Court with many other able members, perhaps the answer can be found in the voluminous job description assigned to the chief justice of the United States Supreme Court. The position of chief justice is most certainly unlike any other in public life in the United States. Its holder must perform the full range of responsibilities required of any other justice. The chief justice hears and decides cases; in so doing, he or she interprets the Constitution; the chief justice usually shoulders at least as much of the workload as the other justices with respect to writing opinions—all while scheduling the Court and presiding over oral argument and conference debates. Additionally, the chief justice has many ancillary responsibilities, such as serving as the chairman of the board of the National Gallery of Art and the chancellor of the Smithsonian Institution. Furthermore, the chief justice is not only "first among equals" on the Supreme Court but also the central administrator of the judicial system throughout the entire United States. It is in this latter role, the role of chief administrator, that Warren Burger excelled. As an administrator, the consensus seems to be that he was, indeed, a great judge (Tamm and Reardon 1981).

Warren Earl Burger was born the fourth of seven children to Charles and Catherine Burger on 17 September 1907—on the 120th anniversary of the signing of the Constitution. He was born in St. Paul, Minnesota, and he embodied many of the values native to his home state (Anderson 1995). Burger's father was a railroad car inspector and a traveling salesman. His upbringing was described as "relatively poor" (Baum 1998).

As a working-class child, Burger had a busy childhood. He worked on a farm, was employed at the local newspaper, and performed various other odd jobs. He demonstrated a talent for sculpting and for news writing. Burger served as editor for his school newspaper and reported for the local paper. Too, he was an excellent student. Burger was awarded a scholarship to Princeton but declined the offer because he believed that it would leave him unable to contribute to his family financially. Consequently, he attended college locally and worked his way through school as an accountant (Anderson 1995).

Burger married Elvera Stromberg, a school teacher. And, as many students of the Supreme Court are aware, Harry Blackmun, a childhood friend who would later serve as Burger's colleague on the Court, was their best man. Burger took pre-law night classes at the University of Minnesota from 1927 to 1929. In 1931, he graduated magna cum laude from St. Paul College of Law (now William Mitchell) with an LL.B. (Anderson 1995).

After law school, Burger's legal career had several incarnations. For instance, he worked as an attorney in one of St. Paul's leading law firms for twenty-one years. During his time in St. Paul, he taught adjunct classes at St. Paul College of Law and was heavily involved in civic affairs. He was among those who organized the first St. Paul Council on Human Relations and, in that capacity, helped find housing for Japanese Americans who were relocated to Minnesota. Likewise, he worked to reform the St. Paul Police Department, prompting the department to provide training to officers respecting how to interact with minorities in the community. Too, Burger, the local attorney in private practice, was active in the Minnesota Republican Party (Anderson 1995). He helped elect governor Harold Stassen and was the leader of the Minnesota delegation at the 1948 Republican convention (during Stassen's abbreviated run for the presidency). At the 1948 convention, he met Richard Nixon who, as president, would appoint Burger to the Supreme Court. In 1952, Burger again was visible at the Republican convention, this time working to nominate Dwight Eisenhower (Blasi 1983; O'Brien 1996).

Burger's legal career entered a second phase subsequent to Eisenhower's election. Tapped by Eisenhower to serve as assistant attorney general in the Civil Division of the Justice Department, Burger became an important Washington attorney and, later, an influential judge (Schwartz 1987). During his brief time in the Justice Department, he made a reputation for litigating civil suits against wealthy Greek ship owners and for defending a prominent physician, fired by the government because of disloyalty during the McCarthy era, because the solicitor general refused to argue the case. In 1955, President Eisenhower appointed Burger to sit on the Court of Appeals in Washington, D.C. In his thirteen years on the appellate court,

Burger garnered the various kinds of experience that would later serve him well on the Supreme Court. He did a comparative study of U.S. and European penal systems and organized an appellate judges' seminar at New York University. Too, he chaired an eight-year study for the American Bar Association regarding "standards of criminal justice" and became a student, and critic, of the way the various judicial systems managed the increasing overload of cases (Anderson 1995).

In 1968, Earl Warren announced that he would soon retire from the bench. The announcement provided Pres. Lyndon Johnson with ample opportunity to fill Warren's position with a Democrat—or at least a judge committed to advancing Warren's interpretive style and substance—before the fall election. After Johnson's efforts to elevate associate justice Abe Fortas failed, it became clear that the new president, Richard Nixon, would nominate Warren's successor. On 21 May 1969, Nixon selected Judge Warren Burger to serve as chief justice of the United States Supreme Court (Woodward and Armstrong 1979). In less than a month, the Senate confirmed Judge Burger with a seventy-four-to-three vote (Randall 2002). Thus, Burger was about to embark on the third and perhaps most important—certainly the most prominent—phase of his legal career.

Almost from the outset, Chief Justice Burger found himself in choppy waters. First, he succeeded an important chief justice. Although Earl Warren was both revered and despised, he had presided over the Court when it handed down critical landmark decisions—the kind that people can identify by a single name (for example, *Brown, Mapp, Gideon, Miranda*). The Warren Court contributed to the public's perception that the Supreme Court is the primary protector of rights and liberties and that it should be viewed as a barrier against majority tyranny by the popularly elected branches of government (McCloskey 1960).

Second, Burger was appointed by what most assumed to be a conservative president—certainly one who ran on a "law-and-order" theme. Therefore, many conservatives expected that his Court would move dramatically to undercut or even directly counter the Warren Court's "revolution." Of course this expectation was unrealistic (Irons 1999). Although few would dispute that Burger's successor, William Rehnquist, is a stalwart conservative and an effective leader on the Court, even Rehnquist has not been able to effectuate a "counterrevolution" (consider the litany of cases most closely associated with the Warren Court's revolution that remain good law).

Nonetheless, there was no counterrevolution during Warren Burger's tenure on the Court, and conservatives found that very troubling. Why not? Initially, Burger did not have the kind of support necessary on the Court to carry out a serious reconsideration of those Warren Court cases often thought to be the most controversial. The Court was populated with

Eisenhower appointments—some of whom were never ideological conservatives—and judges appointed by John F. Kennedy and Lyndon Johnson (O'Brien 1996).

Eventually, Burger did have the number of justices sufficient to put a dent into the Warren Court's most controversial jurisprudence. President Nixon was able to appoint a total of four justices. Within a little more than a decade, two others justices appointed by Republican presidents (John Paul Stevens, appointed by Gerald Ford, and Sandra Day O'Connor, by Ronald Reagan) joined the four Nixon justices. Even though Republicans had appointed most of the justices on the Court, there was some drifting away from fidelity to conservative interpretive and ideological principles. Perhaps the most noteworthy movement came from Justice Hugo Blackmun, Burger's longtime friend from Minnesota. Although initially dubbed as "the Minnesota Twins," Burger and Blackmun did not vote in lockstep as many supposed. Over time, Blackmun became an important member of the liberal voting bloc on the Court. Too, there are those who believe that the Court, particularly from the mid-1970s until the early 1980s, became a very cautious Court unwilling to bring about serious change (Wasby 1993; Louthan 1991). It was certainly not a collection of justices determined to foster a revolution.

One additional reason for the Court's lack of punch lay with the chief justice himself. A successful chief justice must demonstrate both social and task leadership (O'Brien 1997). Burger was not particularly effective at either. He was not regarded as a deep judicial thinker or as one who crafted precise opinions. Nor was he thought to possess Earl Warren's keen political ear. Therefore, since he was not a towering jurist or an effective politician from within the Court, often Burger did not command the respect that he needed from those on the Court. And, even though most regarded him as a gracious and well-intentioned fellow, his leadership style was off-putting. He became emotional, was often thought to be pompous, and insisted upon formalities (Baum 1998; Louthan 1991). Perhaps most irritating was his tendency to switch his vote in order to retain the authority, traditionally enjoyed by a chief justice who votes in the majority, to assign opinions (Guliuzza 1993). As a result, Burger presided over a Court that was without a clear voice. Was the Burger Court an activist judicial body that actually served to further the "rights revolution"? After all, the Burger Court struck down the death penalty (*Furman v. Georgia,* 1972) and authorized court-ordered busing as a means of ending de jure segregation (*Swann v. Charlotte-Mecklenburg,* 1971). It was the Burger Court that discovered the woman's right to choose an abortion for an unwanted pregnancy (*Roe v. Wade,* 1973), the Burger Court that retained the exclusionary rule and perpetuated *Miranda.* The Burger Court voted to accept affirmative action policies

as legitimate when necessary to foster diversity (*University of California v. Bakke,* 1978). Alternatively, one might argue that Burger's Court did begin a movement back to the right. For instance, the Court ultimately upheld the constitutionality of capital punishment (*Gregg v. Georgia,* 1976), tipped the balance back toward law enforcement officers in their efforts to fight crime (see the lengthy list of cases discussed in Walker and Epstein 1993; Schwartz 1987; Blasi 1983), authorized communities to restrict materials thought to be obscene (*Miller v. California,* 1973), and came forward with the opinion that likely put the nail in the coffin of the Nixon presidency (*U.S. v. Nixon,* 1974). Furthermore, one might argue that it was the Burger Court, particularly in its last couple of years, that set the table for the kinds of conservative activism associated with the Rehnquist Court (Schwartz 1987; Louthan 1991).

If there is a body of jurisprudence that might typify the Burger Court's confusion, it is with respect to the establishment clause of the First Amendment. In 1971, the Court, in an opinion authored by Warren Burger, *Lemon v. Kurtzman,* decided to deny salary supplements and other state-sponsored supports to parochial schools. In *Lemon,* Burger offered the infamous three-prong test to determine whether government support for religion is unconstitutional. Not only has *Lemon,* and its progeny, failed to satisfy either those who clamor for strict separation or those who want some form of accommodation of religion, it has set in motion a body of case law that has been described as a disaster (Guliuzza 2000).

Therefore, if one evaluates Warren Burger as a jurist or even as a leader on the Court, he does not receive high marks. It certainly was not from lack of effort. Perhaps his most important opinion, in the *Nixon* decision, was the result of forty-two consecutive days of work and hundreds of hours spent crafting his thoughts (O'Brien 1997). Nonetheless, one still might ask the question: "Why was Burger a great judge?" Burger's greatness stems from his work outside of the Court. His devotion to judicial administration almost places Burger in a class by himself.

William Howard Taft was, arguably, the first chief justice to take his role as chief judicial administrator seriously. In fact, Taft actively lobbied the Congress for additional responsibilities and power for the chief justice (Wasby 1993). Of course, it is worth noting that, during Taft's tenure, the size and scope of the judiciary in the United States was substantially smaller. Since then, the administrative responsibilities of the chief justice have increased dramatically, and they are generally not a welcome part of the job.

Burger, however, unlike any chief justice since Taft, understood the importance of the administrative responsibilities and actually relished the opportunity. He was nominated at a time when the American judiciary

needed reform, and he was willing to take on the challenge. And, perhaps most important, he brought the right combination of experiences to the position. He had more than twenty years in private practice. He understood how the system impacted upon those in the judicial trenches. Too, as a federal appellate court judge, he had a reputation as an advocate for judicial reform. Just how seriously did Burger take his administrative responsibilities? During his confirmation hearings, Judge Burger was asked to describe his understanding of the judicial duties of chief justice. He noted that his primary duty would be that of any other judge—to decide cases. But, as Burger elaborated:

> Above and beyond that . . . the Chief Justice of the United States is assigned many other duties, administrative in nature. I would think that he has a very large responsibility to try to see that the judicial system functions more efficiently. He should certainly be alert to trying to find these improvements. . . . *And I would expect to devote every energy and every moment of the rest of my life to that end should I be confirmed.* (Quoted in Tamm and Reardon 1981, 449; emphasis added)

Once confirmed, Burger made good on his pledge. Although every chief justice shoulders administrative responsibilities, and a few make an effort to implement reforms, it was not until Burger "that sustained progress in the administration of justice began to be made on a national scale" (Tamm and Reardon 1981, 448).

One might divide Burger's record of success as an administrator into several areas: professional management, working with the other branches of government, training, his relationship with state and national courts, and the like. Burger believed that it was essential to make the courts work more effectively. In fact, Burger claimed that there is a linkage between management and justice (Wasby 1993; Walker and Epstein 1993). With that in mind, Burger implemented several administrative reforms on the Supreme Court. He streamlined the calendar and oral argument. He gave careful scrutiny to the myriad appeals filed *in forma pauperis*. He introduced modern technology to the federal courts and their staffs (for example, the Supreme Court's first copying machines and word processors). As a result, Burger helped increase the productivity of the average federal judge by 30 percent (Tamm and Reardon 1981, 454).

Outside the Court, Burger emphasized the need for trained judicial managers. When Burger was confirmed, only four states were training court managers. Within a decade, and largely as a result of Burger's urging, more than 350 persons were trained as court managers throughout the United States. Court management became an area of specialization in legal education.

William Shaw Richardson (1919-)

Because it is the only state with a legal system based on civil law (code-made law dating back to Napoleon that is associated with former French and Spanish rulers) rather than English common law, or judge-made law, Louisiana is often the exception that has to be footnoted in American books of laws. Hawaii, the last of the fifty states, is also exceptional in that, prior to American control, a monarch governed the islands. Like Louisiana, with its rich ethnic heritage, Hawaii continues to have a polyglot mix of races from other Pacific Islands as well as from the American mainland.

Just as members of ethnic minorities and females (who have long been underrepresented in the judiciary) often take special pride in individuals appointed to the United States Supreme Court who share their characteristics, so, too, these factors can be important at the state level. Native Hawaiians took special pride when in March 1966, fellow native William Shaw Richardson, former Democratic Party official, chief clerk of the state senate, and then lieutenant governor, was installed as chief justice of the five-member Hawaii Supreme Court. Richardson served in this job from 1966 through 1982.

Born to Wilfred Kelelani and Amy Lan Kyau (Wung) Richardson in 1919, who came from a noble line of island descent, Richardson attended English grammar schools on the islands, graduated in 1941 from the University of Hawaii, and earned his law degree from the University of Cincinnati. Richardson had begun has law career as an assistant judge advocate general during World War II. He married Amy Corinne Ching in 1947, and they had three children. Joining other soldiers who returned to Hawaii from the war, Richardson (who like other members of the service was not required to pass the bar) had supported the Democratic Party largely because of its willingness to open up the political process to native Hawaiians who were challenging white Republican rule. Nominated for chief justice by Gov. John Anthony Burns as only the second justice who was part Hawaiian (the first was Kauikeaouli, Kamehameha III), Richardson continued to have weekly lunches with the governor and other longtime friends. Although this undoubtedly furthered communications between the two branches, it also raised some eyebrows among those concerned about undue political influence. In later years Richardson, who believed in loyalty to past associates, was also accused of being insensitive to rules regarding nepotism (Dodd 1985, 136).

In an early decision Richardson and his colleagues had to recuse themselves from a case questioning their appointment of Matsuo Tababuki, of Japanese ancestry, to the board of the Bishop estate fund, designed to provide education for children of native Hawaiian descent. A substitute panel affirmed this appointment.

As chief, Richardson became known for being a liberal activist. Whereas prior Hawaii Supreme Courts had based their decisions largely on legal precedents from English common law, Richardson and a majority of his colleagues were willing to consider prior Hawaii customs. This willingness expressed itself in two main areas, namely in matters related to freshwater and shorelines—both of which interfered

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with property rights as interpreted under English common law and the Fifth Amendment (which prohibits "takings" without "just compensation"). In what came to be known as the *McBryde Case*, later disputed in U.S. federal courts, the Hawaii Supreme Court held that water not needed for the actual needs of landowners was reserved for public use (Dodd 1985, 59). Similarly, in a series of cases, the Hawaii Supreme Court under Richardson's leadership reversed earlier decisions allowing private ownership of land to the shoreline and held instead that the debris or vegetative line would mark the new boundary between private and public land (63). The court noted that: "public policy as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible" (quoted 64). In a similar vein, the Richardson court decided that new land created by lava flows was not considered to be "accretion" under common law but "avulsion," which should again result in public benefits. Like the Warren Court, whose principles it often affirmed, the Richardson court focused not so much on existing precedents as on what the justices thought was most consistent with fundamental fairness (74). Like Warren, Richardson was praised less for his intellect or legal scholarship than for "his interpersonal skills" and for his "highly intuitive and charismatic . . . personality and leadership" (125).

One of Richardson's primary accomplishments as chief was working with the governor to establish a law school at the University of Hawaii so that natives would not have to attend law school on the mainland. Richardson succeeded in getting the law school not only established and built but also accredited by the American Bar Association during his watch. In the process, he received criticism for setting standards that some considered inadequate to be admitted to the Hawaii bar.

In conjunction with his administrative director of the Courts, Lester E. Cingcade, and deputy director Tom "Fat Boy" Okuda, Richardson also succeeded in unifying and modernizing the Hawaii court system. Richardson received help in this endeavor from the National Center for State Courts (now located in Williamsburg, Virginia), which he helped to found and over which he served as president in 1980. Richardson managed to achieve relative budgetary independence from the executive branch, institute a separate personnel system, unify the courts, establish procedures for disciplining errant lawyers and judges, and create an intermediate court of appeals, which was initially opposed by the Hawaii Bar Association. Sometimes criticized as an empire builder, Richardson nonetheless pushed ahead with what he believed to be in the best interest of justice.

In 1982, Richardson left the bench after being appointed by his colleagues as a trustee of the Bishop Estate. In an unusual move, he was granted a ten-year term, allowing him to serve until age seventy-three rather than having to accept the otherwise mandatory retirement age of seventy. In 1983, the same year he began his service as trustee, the Board of Regents of the University of Hawaii named the law school after him that he had done so much to found. Boardrooms at the National Center for State Courts have also been named in his honor.

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In the federal judicial system, Burger advocated for circuit executives and an increased role for magistrate judges. He pushed Congress successfully to create the Office of Administrative Assistant to the Chief Justice and the Judicial Fellows Program (Tamm and Reardon 1981).

As chief justice, Burger persistently lobbied the other branches of government (O'Brien 1996). He made needs of the judiciary known to Congress, especially when the legislature increased the Court's jurisdiction or passed statutes that impacted negatively upon the judiciary without consulting with judges (for example, the Speedy Trial Act of 1974). He successfully lobbied Congress to put an end to three-judge district court panels, he argued for increasing the number of federal judges and reducing mandatory jurisdiction, and he worked with legislators to pass the Commission on Revision of the Federal Court Appellate System—the Hruska Commission (Wasby 1993; Tamm and Reardon 1981).

In addition to his efforts to secure training for professional court managers, he worked to see that others involved in the judicial process were adequately prepared. He helped to establish the National Center for State Courts and the National Judicial College in Las Vegas, Nevada. Too, he supported and served on the faculty of New York University's Institute of Judicial Administration's Appeal Judges' Seminar. Burger founded and endorsed not only organizations that provided an opportunity for lawyers and judges to receive training but also those that commissioned research and collected information for scholars and practitioners. Burger also spoke out forcefully for reforms in legal education, calling on law schools to spend more time preparing students to be ready for practice immediately after graduation (Wasby 1993; Tamm and Reardon 1981).

Furthermore, Chief Justice Burger's understanding of his administrative role took him into areas that other chief justices tended to leave alone. He worked very hard to establish positive relations with state courts and state judges. He grew to know many state judges by name and advocated reduced federal jurisdiction in areas that he thought more properly belonged to the states (Wasby 1993). He spoke out for prison reform and on behalf of alternative dispute resolution before it would come into vogue. Finally, he prepared the Supreme Court building to make it more attractive and accessible to the public (Tamm and Reardon 1981).

Subsequent to his retirement from the Court, in 1986, Burger served at the request of President Reagan as the chair of the Bicentennial Commission for the United States Constitution. Burger took on the challenge of educating Americans about their Constitution with great relish. The commission sponsored and established projects in schools and on college campuses. It sponsored television documentaries and judicial seminars. Further,

it provided for the distribution of copies of the Constitution throughout the country (Anderson 1995).

Warren Burger died on 25 June 1995—about a year after his wife's death and only months after publishing the book *It Is So Ordered: A Constitution Unfolds* (Randall 2002). What was Burger's legacy? He was a singularly effective administrator. Former American Bar Association president Chesterfield Smith remarked: "In my opinion, and I am confident in the opinion of most of my professional colleagues, Chief Justice Burger has been the single-most effective, innovative, and significant figure in this country in the area of judicial improvement in recent times" (quoted in Tamm and Reardon 1981).

In 1986, the Conference of State Chief Justices and State Court Administrators passed a resolution that was even more emphatic. The conference said that Burger had done "more than any person in history to improve the operation of our nation's courts" (quoted in Anderson 1995, 481).

Was Warren Burger an outstanding constitutional scholar? Probably not. Did he always lead the Court effectively? Undoubtedly not. Burger was magnificent, however, in his role as America's "chief judge."

Frank Guliuzza

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CARDOZO, BENJAMIN N.

(1870–1938)

Benjamin N. Cardozo
Photographed by Harris & Ewing, Collection of the Supreme Court of the United States

By the time of his appointment to the United States Supreme Court in 1932, Benjamin Nathan Cardozo was recognized as the most outstanding state appellate judge in the United States. In addition, his extrajudicial writings and lectures had established him as a preeminent scholar in the field of jurisprudence. He was the overwhelming consensus choice to fill the "scholar's seat" on the Supreme Court, occupied for the preceding thirty years by Justice Oliver Wendell Holmes Jr.

In spite of initial reservations, Republican president Herbert Hoover was persuaded to nominate Cardozo, a New York Democrat and Sephardic Jew, even though two other New Yorkers, Justices Charles Evans Hughes and Harlan Fiske Stone, and one other Jew, Justice Louis D. Brandeis, were then serving on the bench.

Although Cardozo served only six years on the high bench, judges, lawyers, and legal scholars consistently rank him among the most outstanding Supreme Court justices. And yet it is generally recognized that Cardozo exercised even greater influence as a common law judge. From 1914 to 1932, he served as a member of the New York Court of Appeals, assuming the position of chief judge in 1927. A number of the opinions that he wrote

during that period, especially in the fields of torts and contracts, remain influential and are still reprinted in law school casebooks.

Cardozo had an engaging rhetorical and literary style that enabled him to communicate effectively not only with other members of the bench and bar but also with students, teachers, and scholars in law, political philosophy, and the social sciences. His seminal work, *The Nature of the Judicial Process*, originally delivered as the Storrs Lectures at Yale Law School in 1921, attracted immediate and widespread attention. In that book and in his later books, *The Growth of the Law* (1924) and *The Paradoxes of Legal Science* (1928), Cardozo challenged many of the assumptions that had characterized the formalistic judicial decisionmaking of the nineteenth and early twentieth centuries. It was unusual and refreshing for a judge to acknowledge publicly and in print the law-making function that he inevitably performed in discharging his duties. Cardozo did not hesitate in recognizing the legislative function of the judge: "I take judge-made law as one of the existing realities of life" (quoted in Hall 1947, 109). Cardozo, who is generally identified with the school of sociological jurisprudence, regarded the selection and balancing of choices as the most vital and at the same time the most difficult task facing the judge. In reaching a decision that requires any degree of creativity or innovation, the judge must carefully weigh a great number of factors. Custom, precedent, statute, accepted moral and ethical standards of the community, considerations of social utility, claims of stability, and claims of progress—all these, Cardozo maintained, go into the process of adjudication.

Benjamin Nathan Cardozo was born in New York on 24 May 1870. He and his twin sister, Emily, were the youngest of the six children of Albert Cardozo and Rebecca Nathan Cardozo. The Nathans and Cardozos were prominent Sephardic Jewish families who had emigrated to New York in the mid-eighteenth century. Benjamin's mother died in 1879, and his older sister Ellen (Nell) assumed major responsibility for raising the younger children.

At the time of Benjamin's birth, his father, Albert, was a justice of the Supreme Court of New York, a trial court of general jurisdiction. Albert Cardozo was closely associated with Tammany Hall and owed his judicial appointment to the influence of William M. "Boss" Tweed. Exposure of the Tweed ring in the early 1870s led to the downfall of Albert Cardozo. Following an investigation, the Association of the Bar of New York brought several charges of "mal and corrupt conduct" against him. Rather than face impeachment, Albert Cardozo resigned his judicial position in April 1874 and returned to private law practice. He died in November 1885, shortly after Benjamin Cardozo began his studies at Columbia College.

Biographers have speculated about the extent to which Benjamin Cardozo might have been affected by the early death of his mother and by his

father's professional disgrace. Cardozo, who never married, was a very private person, and most of his extensive personal correspondence was destroyed, presumably in accordance with his wishes, immediately after his death. All agree that he adhered to the highest ethical standards in his professional and personal life. Some have surmised that his determination to achieve a high level of success in the legal profession was influenced by his desire to enhance the reputation of the Cardozo family.

Benjamin Cardozo received his formal education from private tutors including Horatio Alger, who, from 1883 to 1885, prepared him for the Columbia College entrance examinations. Cardozo graduated near the top of his class in 1889, having completed a broadly based course of study in the liberal arts. He graduated with honors in Greek, Latin, political economy, and philosophy. He then completed two years of study at Columbia Law School. He simultaneously pursued a joint program in public law offered by the School of Political Science, completing his M.A. in 1890. During his second year of law school study, he took additional graduate courses in philosophy.

Since law school graduation was not a prerequisite for admission to the bar, Cardozo chose not to complete the third year of the law school curriculum at Columbia. His decision may have been influenced by the law school's major change of curriculum from the "textbook" method to the "case" method of instruction introduced some years earlier at Harvard Law School. He was admitted to the bar in 1891 and immediately entered practice with his older brother, Albert. Benjamin Cardozo pursued a highly successful legal practice in New York for more than twenty years. He gained an early mastery of New York legal procedure and in 1904 published his first book, *The Jurisdiction of the Court of Appeals of the State of New York.* He quickly developed skills as a litigator, ultimately specializing in appellate advocacy. In addition, he developed considerable expertise in the field of real estate law. Recognized as a "lawyer's lawyer," he was frequently employed by other attorneys to argue their cases before the New York Court of Appeals. By 1913, Cardozo was well prepared to launch his judicial career. In November of that year, he was elected to the Supreme Court of New York, a trial court of general jurisdiction. He took his seat on this tribunal on 5 January 1914 but five weeks later was designated by Gov. Martin Glynn to serve on the New York Court of Appeals. Cardozo was elected to a full term in 1917 and remained on this court until 1932. While serving on the Court of Appeals, Judge Cardozo actively participated in the establishment of the American Law Institute in 1923 and served for a number of years as its vice president. The purpose of the institute was to provide "restatements" of the law in various fields for the benefit of judges, practicing attorneys, law students, and the general public. In 1926, Cardozo was

elected chief judge; he assumed office on 1 January 1927. He remained in this position until his appointment to the United States Supreme Court in 1932.

Hoover nominated Cardozo to the Supreme Court on 15 February 1932. The Senate Judiciary Committee unanimously approved his nomination on 20 February, followed by unanimous Senate confirmation, without a roll call vote, on 24 February. Cardozo officially joined the Supreme Court on 14 March 1932. His period of active service ended as a result of a heart attack on 10 December 1937. He suffered a serious stroke in early January and died on 9 July 1938.

Space limitations permit only brief comment on a few of Cardozo's many important judicial opinions. He delivered one of his most influential Court of Appeals opinions in the 1916 case of *MacPherson v. Buick Motor Company* (217 N.Y. 382, 111 N.E. 1050). Donald MacPherson was injured when one of the wheels of his newly purchased Buick collapsed, causing him to be thrown from the car. The question at issue was whether the manufacturer, Buick Motor Company, owed a duty of care and vigilance to anyone other than the car dealer (the immediate purchaser). The prevailing view in 1916 was that unless a contract existed between the manufacturer and the consumer, the manufacturer of a defective product was not liable for negligence to the latter. This rule was generally applicable, but an exception was recognized for imminently dangerous products. Since New York courts broadly interpreted this exception, Cardozo was able to persuade his colleagues that, in effect, the exception had swallowed the rule. Cardozo realized that the law must be adapted to changing technological circumstances. His rationale is summed up in the following statement: "Precedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing situation requires them to be" (*MacPherson v. Buick Motor Company*, 391).

Cardozo's emphasis in the *MacPherson* case was on the expansion of liability in a complex and increasingly industrialized society. But Cardozo was also sensitive to the importance of stability in the law and was quite willing to impose limits on the liability of defendants, including corporations. This point is well illustrated in his majority opinion in the famous 1928 case of *Palsgraf v. Long Island R.R.* (248 N.Y. 339, 162 N.E. 99).

On 24 August 1924, Helen Palsgraf was standing with her two daughters on a railroad platform waiting to catch a train to Rockaway Beach for a Sunday outing. A passenger carrying an innocent-looking package attempted to board a moving train a short distance from where Mrs. Palsgraf was standing. The passenger lost his balance, and a guard on the platform,

in attempting to push him onto the train, apparently jostled the passenger's arm, causing the package he was carrying to fall to the tracks. It turned out that the package contained fireworks that immediately exploded, causing damage to the nearest car and toppling a penny scale "many feet away." The scale fell on Mrs. Palsgraf, injuring her, and she sued the Long Island Railroad, alleging negligence in handling the boarding passenger. In reversing a judgment and award of damages in Mrs. Palsgraf's favor, Cardozo focused on the notions of duty, risk, and foreseeability. Writing for a four-member majority, he stated: "The risk to be perceived defines the duty to be obeyed . . . it is a risk to another or to others within the range of apprehension" (248 N.Y. 344). He concluded in effect that the guard who jostled the passenger had no duty of care to Mrs. Palsgraf standing some distance away. Accordingly, injury to her was not foreseeable. The majority emphasized that "nothing in [the] appearance" of the package of fireworks gave notice "that the falling package had in it the potency of peril to persons thus removed" (341). Justice William Andrews, in a strong dissent representing the view of the three-member minority, stated that a person's duty to act reasonably was owed to society as a whole. The dissent maintained that limitation of liability in negligence actions was based not on duty, risk, and foreseeability but on proximate cause wherein "because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point" (352).

The *Palsgraf* case generated an enormous amount of legal commentary. It is still used as a teaching tool in most law school torts courses. Virtually every law student in the United States must at some point grapple with the complex issues posed in the *Palsgraf* case.

Throughout his judicial career, Cardozo displayed a flair for the catchy phrase. In a 1921 case he rejected a railroad's argument that it was not liable to a passenger who was injured when he attempted to come to the aid of his cousin who had fallen from the train trestle. Cardozo dismissed the railroad's attempt to evade liability by succinctly observing, "Danger invites rescue" (*Wagner v. International Railway*, 232 N.Y. 176, 133 N.E. 437 [1921]). In rejecting the exclusionary rule barring the admission of evidence obtained in violation of the constitutional right against unreasonable searches and seizures, Cardozo stated the classic dilemma posed by the rule: "The criminal is to go free because the constable has blundered" (*People v. Defore*, 242 N.Y. 13, 150 N.E. 585 [1926]).

During less than six years of active service on the Supreme Court, Justice Cardozo wrote more than 100 opinions. He tended to support New Deal measures against constitutional attacks, but not without exception. For example, he wrote for a unanimous Court in 1935 in holding that Congress violated the Tenth Amendment when it authorized the conversion of a

Emilio Miller Garza
(1947-)

Emilio Garza, who was considered for an appointment to the United States Supreme Court at the time that Clarence Thomas was selected for that post in 1991, still appears to have a chance for an appointment to the high court. Born in San Antonio, Texas, in 1947, Garza earned B.A. and M.A. degrees at Notre Dame, served three years as a captain in the Marine Corps, and earned his J.D. degree at the University of Texas. He subsequently served as an associate and a partner in the San Antonio law firm of Clemens, Spencer, Welmaker and Finck before being appointed in 1988 by President Reagan as a United States district judge in Texas and in 1991 by Pres. George Bush Sr. as a judge for the United States Fifth Circuit Court of Appeals, where he now serves. Garcia, who is single, is generally perceived as a conservative judge but one who is deferential to legislators and is not extremely ideological.

Given the intense controversy that has engulfed so many recent judicial nominations, it should not be surprising to find that Garza's decisions have become the subject of intense scrutiny. As a judge for more than ten years, Garza has a longer "paper trail" than some other possible nominees. Although no such trail is definitive, this one might indicate positions that Garza would take as a United States Supreme Court justice. Seeking to analyze this trail in a recent article, political science student Alec Ewald concluded that Garza's voting record in civil liberties decisions had been far more conservative than that of other conservatives on the same court (Ewald 2002). Ewald proceeded to examine Garza's record in specific areas.

Ewald found that although Garza's voting record was conservative in capital punishment cases, in his most important case,

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state-chartered savings and loan association into a federal savings and loan association without consent of the state (*Hopkins Federal Savings & Loan Association v. Cleary*, 296 U.S. 315 [1935]). He regarded this measure transforming savings and loan associations from "creatures of the state" to "creatures of the federal government" as a clear violation of state sovereignty. On the other hand, he brushed aside Tenth Amendment objections in two major decisions upholding the Social Security Act of 1935 (*Steward Machine Company v. Davis*, 301 U.S. 548 [1937]; *Helvering v. Davis*, 301 U.S. 619 [1937]). He took a balanced approach in addressing constitutional questions in the field of criminal procedure. Thus, he joined the majority in reversing the convictions of the Scottsboro defendants in 1932 on the ground that their due process rights had been violated as a result of their ineffective representation by counsel (*Powell v. Alabama*, 287 U.S. 45 [1932]). In the famous 1937 case of *Palko v. Connecticut*, however, he expressed unwillingness to "incorporate" the double jeopardy provision of the Fifth Amend-

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Flores v. Johnson, Garza was highly critical of an expert witness whose competence was not raised in the lower court. It is thus possible that Garza "could add a measure of unpredictability to the Court's capital-punishment deliberations" (Ewald 2002, 14). Based on his review of cases, Ewald believed that Garza would allow for the expansion of governmental search-and-seizures powers under the Fourth Amendment (15). Ewald further thought that Garza's opinions in civil rights and discrimination cases were more liberal than those of his colleagues, but Ewald attributed this largely to the fact that Garza's colleagues were more conservative in this area (15). Ewald concluded that on issues relating to "the separation of church and state" Garza's record "is one of unblemished conservatism" and that Garza, who is a Roman Catholic, appears unusually passionate on the subject (15). Finally, although Garza's votes have conformed to United States Supreme Court decisions relating to abortion, Ewald noted that Garza frequently did so while indicating that he believed the precedents he was citing were mistaken.

As a conservative Hispanic American with prior judicial experience, Garza might be an extremely attractive nominee for a Republican president. Ewald's analysis of Garza's record, however, led Ewald to conclude that a Garza nomination could well "turn into a referendum on abortion rights in the U.S. Senate, with other issues—including Garza's conservative views on criminal justice and the Establishment Clause, and his potential to be the Court's first Hispanic justice—obscured or ignored" (Ewald 2002, 17).

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ment into the Fourteenth Amendment, thereby making it applicable to the states (302 U.S. 319). In Cardozo's view, only those rights that are "of the very essence of a scheme of ordered liberty" had been "absorbed" into the Fourteenth Amendment. He did not regard protection against double jeopardy as a fundamental right—a view that has since been repudiated by the Supreme Court (*Benton v. Maryland,* 395 U.S. 784 [1969]). On the other hand, Cardozo accorded fundamental importance to freedom of speech, regarding it as "the matrix, the indispensable condition, of nearly every other form of freedom" (*Palko v. Connecticut,* 302 U.S. 319 [1937]).

Benjamin Cardozo had enormous influence throughout his judicial career. During his lifetime and immediately following his death, he received virtually universal praise from his judicial colleagues, leaders of the bar, and, especially, legal scholars. By all accounts, he had a number of redeeming personal qualities. Characteristics of politeness, kindness, gentleness, and modesty often appear in descriptions of his personality. He was also

hardworking and ambitious and enjoyed the praise of others. In recent years, several biographies have been published providing more balanced critical appraisals of Cardozo's contributions to the law. See, for example, *Cardozo* by Andrew O. Kaufman (1998; this is the most extensive and authoritative biography to date); *The World of Benjamin Cardozo: Personal Values and the Judicial Process* by Richard Polenberg (1997); and *Cardozo: A Study in Reputation* by Richard A. Posner (1990). Although not necessarily agreeing with his contemporaries that he was a "saint," even the "revisionist" writers generally acknowledge Cardozo's greatness as a judge and legal scholar.

Otis H. Stephens

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CLARK, WALTER

(1846–1924)

Walter Clark
Library of Congress

Few state jurists have attained the national prominence of Walter Clark, who advocated social and economic reform both on and off the bench during his thirty-five years as a member of the Supreme Court of North Carolina. Clark's extrajudicial writings and speeches stimulated public discourse about the proper role of judges, and Clark's judicial decisions helped transform the common law to serve the needs of a modern industrial society.

The eldest son of prominent Roanoke planters, Clark was born in North Carolina in 1846. A Confederate officer at age fifteen, Clark participated in the battles of Antietam and Fredricksburg. After graduating first in his class at the University of North Carolina, Clark studied law on Wall Street and in the District of Columbia at the Columbian Law School—now George Washington University National Law Center—before his admission to the North Carolina bar at age twenty. Clark established a law practice in Halifax and managed a family plantation. He later served as a superior court judge from 1885 until 1889, when he was appointed to the North Carolina Supreme Court, to which he was later elected and often reelected and on which he served until his death in 1924. Clark was chief justice from 1903 until 1924.

From the beginning of his career, Clark was a tireless advocate of populistic social and economic reform. His views had widespread appeal in a state

that suffered from chronic agricultural depression and whose citizens endured harsh working conditions in farms and factories and were governed by a conservative oligarchy that opposed change. Although Clark's often radical opinions helped to ensure his repeated reelection to the bench, they also thwarted his higher political ambitions since they antagonized powerful North Carolina interests. An ardent opponent of centralization of economic power, Clark favored nationalization of the telegraph and telephone systems and regulation of the charges of common carriers. He also advocated increased taxation of unimproved land and greater support for public education at all levels.

Clark's major national prominence was derived from his prolific and vehement criticism of the federal judiciary. From 1896 until his death, Clark castigated the United States Supreme Court and lower federal courts for their numerous decisions striking down state and federal economic and social regulatory legislation. Clark's spicy attacks appeared in much-read and widely reprinted articles in such prominent national publications as *North American Review, Arena, American Law Review, Central Law Review,* and *Independent*. As Clark declared in one typical turn-of-the-century article, "the Constitution is at the mercy of organized and powerful combinations of money, and it is imperative that we rescue it from their hands" (Clark 1903, 517). In addition to his copious writings, Clark denounced the Court's "usurpation" of power in speeches throughout the nation over a long period of time. Clark's highly publicized attack on the Court at the University of Pennsylvania Law School in April 1906 marked the beginning of an intensification of criticisms of the Court by liberal activists.

As a remedy for what he perceived as abuse of the power of judicial review of legislation, Clark consistently advocated election of federal judges for limited terms. Beginning in about 1913, Clark's criticisms of the courts grew even more strident, and he began to advocate abolition of federal judicial review by legislation or constitutional amendment. In addition to speaking and writing in opposition to judicial review, Clark advised Senators Marion Butler of North Carolina, Robert L. Owen of Oklahoma, and Robert M. LaFollette of Wisconsin on unsuccessful measures to curtail judicial review and elect federal judges. Clark also periodically urged the abolition or drastic alteration of the Fourteenth Amendment, the due process clause of which courts used as a vehicle to review and often nullify progressive legislation. Believing that the Constitution itself had failed to keep pace with advances in popular democracy, Clark during the early twentieth century also called for a federal constitutional convention to draft a new constitution that would place more power in the hands of the people by providing for direct election of U.S. senators, the president, and federal judges and by eliminating the presidential veto power. Clark opposed the

widespread movement for recall of judges on the ground that popular election of judges would make recalls unnecessary. He did not favor proposals to require supermajorities for nullification of legislation on the ground that they did not eliminate judicial review.

Although many populists, progressives, and labor leaders during that period attacked the federal courts and urged various measures to restrain the federal judiciary, Clark was the only prominent jurist who criticized the courts. His unique role as a judicial critic of the federal judiciary enhanced the prominence of his criticisms and gave his warnings about "judicial oligarchy" a credibility that was lacking in similar remarks by politicians, journalists, and academicians. Although none of Clark's proposals for radical judicial reform were enacted, his criticisms, together with those of other critics of the courts, may have encouraged federal judges to exercise more deference to social and economic regulatory legislation and may have promoted the appointment of more liberal judges.

Recognizing that the chief justiceship of North Carolina was not the ideal platform from which he could seek the curtailment of judicial review and advancement of social reform, Clark ran for the U.S. Senate in 1912 on a progressive platform that advocated a federal income tax, the popular election of U.S. senators, prohibition of child labor, stronger antitrust legislation, and limitations on the hours of labor.

Although Clark's defeat in the Senate race ended his quest for higher political office, he continued to entertain hopes of attaining a seat on the United States Supreme Court. Clark's best chance for nomination to the Court probably occurred in 1914, inasmuch as the president was the progressive Democrat Woodrow Wilson, and the open seat was informally reserved for a southerner. Although Wilson reportedly told a group of North Carolinians that he was seriously considering Clark's appointment, Clark's age (sixty-seven) probably foreclosed his appointment.

Clark's most direct impact on social and economic reform was made quietly and incrementally in his 3,235 judicial opinions during his long tenure on the Supreme Court of North Carolina. In contrast with his opposition to judicial activism in reviewing the constitutionality of legislation, Clark's decisions helped to remold the common law, particularly in cases involving workers, consumers, and children. In one opinion, for example, Clark ruled that an eleven-year-old boy who had lost an eye in a factory accident was too young to be deemed contributorily negligent. In other decisions, Clark's opinions eroded the doctrine of assumption of the risk for injured employees, imposed a high standard of duty of care upon railroads for the safety of their passengers and employees, and held that customers of telegraph companies could recover for mental anguish in negligence cases.

Clark's opinions were also sympathetic toward organized labor. In one of

"Golden Rule" Jones (1846?–1904)

Samuel Jones entered the American Progressive scene in the last decade of the nineteenth century. He led the city of Toledo, as well as the state of Ohio, into the Progressive era by instituting the Golden Rule in business practice and politics. Jones's approach to living the message of Jesus earned him the lifelong nickname of "Golden Rule," and until his death, Jones attempted to create his own utopia in a world that could not accept his social ideas.

Samuel Jones began his life in an impoverished Welsh family. Around the age of sixteen, however, he left the family and moved to Pithole, Ohio, where he searched for ways to get rich in the oil industry. Although he did not fulfill his goal immediately, Jones was able to earn a fortune by striking oil a few years later and establishing the Acme Sucker Rod Company. After making his fortune, Jones gave much of it away to aid those who were poor. He fashioned his factory on reform principles such as the eight-hour workday, paid vacation, and higher wages. The only rule he applied to the factory and its workers was the Golden Rule, which he hung on the factory's wall. (Jones was greatly influenced by Charles Sheldon's book *In His Steps*, which proposed that individuals should base moral decisions on the answer to the question, "What would Jesus do?")

In 1897, Golden Rule Jones applied his business approach to politics when he was elected mayor of Toledo. A self-proclaimed Republican and Methodist who was friends with Eugene Debs and William Jennings Bryan, he was also a critic of political parties and of organized religion. The Republican Party nominated Jones initially as its dark horse candidate and was soon disappointed when he proclaimed himself an independent (although his views were most consistent with socialism). Jones used his new position to promote Christian reform without the aid of a church and sometimes against established church beliefs. The local churches, as well as reformer Jane Addams, criticized him for not taking a strong stand against the evils of drink and prostitution in his town.

Jones first served as a judge on the police court of Toledo in June 1897 when he exercised his power to appoint himself as the city's substitute judge, something that had not been done by a mayor for at least a decade. For all the cases that came before him, he tried to apply the Golden Rule, which for Jones meant that no one would be incarcerated, no matter what the crime. Golden Rule Jones believed that the courts committed crimes by not providing the poor with representation or a fair trial and by jailing citizens without probable cause. As judge, Jones paid for legal repre-

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his final decisions, for example, Clark contravened recent United States Supreme Court precedent in holding that a labor union could not be sued because the common law did not permit actions against unincorporated associations. Clark also dissented in a decision that upheld a preliminary injunction against picketing by strikers who were not alleged to have engaged

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sentation of anyone who needed it, and he charged policemen with harassment. Except for those few cases involving the policemen, Jones dismissed every case that he reviewed during his time on the bench.

The first case that the "Golden Rule" judge reviewed was that of disturbance of the peace by nine black men. After Jones greeted each man by name and expressed surprise at their charges, he dismissed the case and sent the men back to the streets, telling them to become better citizens. Jones believed that he had done for these men exactly what he would have wanted done for himself. Soon after this first case, Jones wrote the speech, "What is Crime, and Who Are the Criminals," which he gave throughout Ohio between 1901 and 1902. He also advocated the repeal of the Habitual Criminal Act, which was adopted in 1902.

Jones's notoriety as judge grew when he dismissed a case of robbery in which the defendant pleaded guilty. Jones told the town that he could not override God's laws with the laws of the man-made courts, and he would leave punishment in the hands of God, not men. The political leaders of the town fought for a law that would place the power to appoint judges in the hands of the court clerk rather than the mayor, and in 1902, the Fraser Bill, which specified these new requirements for appointment, passed. Before the bill was effected later that year, Jones served one more time in the position that he coveted. As he had done during his previous terms, Jones dismissed every case and ended his short career as judge with the case of a concealed weapon. Jones ordered the accused man to produce the weapon and then pronounced judgment: The case would be dismissed on condition that the gun was destroyed. In the presence of the town officials, the accused destroyed his gun with a sledgehammer provided by Samuel Jones himself.

Even though Samuel Jones never adhered to conventional justice and the letter of the law, his implementation of the Golden Rule led to reform of the court system. According to Jones, God provided justice and punishment, and the earthly courts provided mercy to criminals in order to instruct them in the ways of God and of good citizens. Because of Jones, the poor received representation and fair trials, and police harassment was curbed in Toledo. Jones's reforms later influenced the Ohio penal code. Although arguably impractical, Golden Rule Jones attempted to embody Christianity. When his term as substitute judge ended in 1902, Jones continued to serve as mayor of Toledo until his death from complications from pneumonia on 12 July 1904.

Virginia Louise Vile

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in violence or intimidation, even though the United States Supreme Court had held that legislation permitting such injunctions was not necessarily unconstitutional.

Faithful to his criticism of judicial nullification of regulatory legislation, Clark voted to uphold the constitutionality of significant progressive

statutes. For example, he was part of the majority that sustained the constitutionality of a state commission that regulated railroads and telegraph companies. He also joined a unanimous 1908 decision upholding North Carolina's child labor law as a valid exercise of the police power.

Clark was less successful in transforming the law in cases involving the rights of women. For example, Clark dissented from the court's 1912 ruling that women who owned real property could not be counted as "freeholders" for the purpose of a statute providing that special school districts could be formed upon a petition of one-fourth of the freeholders within the district. In arguing that the legislature had intended to include women, Clark pointed to the rising status of women, who had become "members of the bar, bank presidents, physicians and ministers" and had obtained the suffrage in numerous states and foreign nations. Clark declared that "it is not the province of the courts . . . to delve in the debris of a rejected and barbarous legal system to defeat and set aside steps which the Legislature may take in accord with the spirit of advancing civilization" (*Gill v. Board of Commissioners,* 166 N.C. 176, 196).

Similarly, Clark in 1915 dissented from a decision that invalidated a statute permitting women to serve as notary publics on the ground that women could not vote. Clark's dissent protested that this "was a purely political question, and the Legislature was acting with an intelligent understanding of changed economic conditions and in a humane desire to do justice to a deserving class, and with full recognition of their obligation to serve the Constitution" (*Bickett v. Knight,* 169 N.C. 333 [1915]), which did not prohibit the appointment of women to public office.

Despite his hostility toward federal judicial review, Clark never opposed judicial review by state courts with elected judges because he believed that election of judges would encourage judicial restraint and would facilitate the removal of judges who thwarted the popular will. Accordingly, it is not surprising that Clark himself sometimes voted to nullify state legislation that contravened progressive ideals. In a 1923 case, for example, Clark dissented from a decision that upheld the constitutionality of a statute that exempted taxation of stocks in out-of-state corporations. Clark believed that the law sheltered the income of the wealthy and contended that it violated a section of the state constitution that provided for taxation of all stocks. In another case, Clark ruled that the legislature could not provide for the imprisonment of a tenant or sharecropper for defaulting on his obligations to his landlord without good cause because the state constitution prohibited imprisonment for debt except in cases of fraud.

In addition to having progressive views on economic issues, Clark was liberal on many personal liberties issues. In particular, Clark, a Methodist, was a champion of religious freedom. In 1913, Clark publicly argued that a

constitutional amendment to permit the reading of the Bible in public schools would unfairly discriminate against non-Protestants, who constituted only about 1 percent of the state's population. In 1921, Clark eloquently expressed his abhorrence of anti-Semitism in a decision reversing a lower court ruling that had dismissed an action by a plaintiff who appeared to have been assaulted by a public official because he was a Jew.

Clark's attitudes toward African Americans was more problematic. Although Clark's views on blacks may have been enlightened by the standards of his time, he failed to question the legal disabilities that North Carolina and other states imposed upon African Americans. He also evinced a remarkable lack of understanding of the racial implications of lynching.

It is not clear whether Clark, who died before the federal courts began regularly to exercise judicial review on behalf of civil liberties, would have favored judicial review used in support of the ideals he espoused. Clark's opposition to federal review of state criminal procedures suggested that he might not have favored federal activism on behalf of civil liberties. It is possible, however, that Clark's devotion to human liberty would have led him to embrace federal judicial activism to curb abuse of personal rights by elected officials.

Although Clark failed to curb federal judicial power and might not even have wished to curb it if he had foreseen that the courts would become guardians of personal liberty, his warnings about the hazards of judicial power provided many useful reminders that judges should be ultimately accountable to the people for their decisions.

William G. Ross

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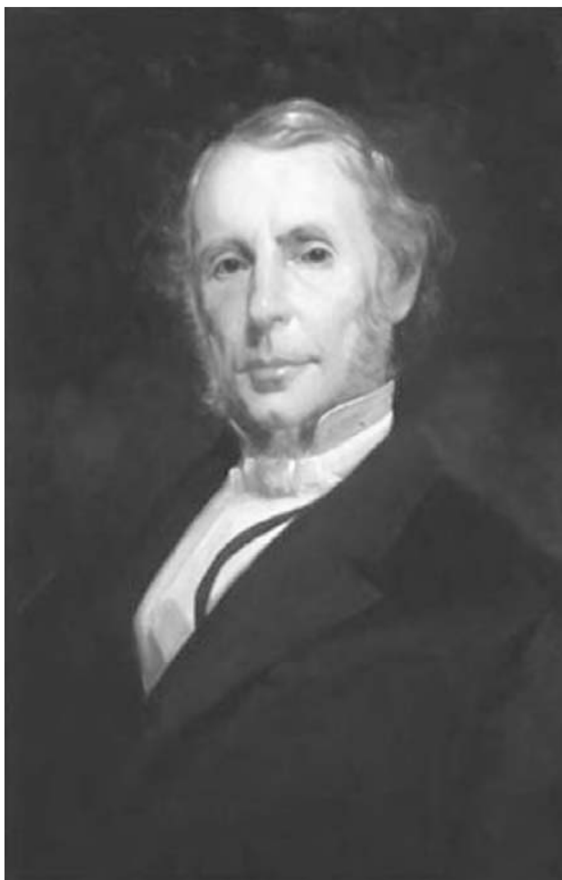
COMSTOCK, GEORGE FRANKLIN

(1811–1892)


George Franklin Comstock
Library of Congress

George Franklin Comstock left an indelible imprint on the judicial history of the state of New York. A lauded jurist, he was also an accomplished attorney, public servant, and philanthropist.

George Franklin Comstock was born in Williamstown, New York, on 24 August 1811. His father, Serajah Comstock, had served as a noncommissioned officer in the Revolutionary War, fighting at both Bunker Hill and Yorktown. After the war, Serajah settled as a small farmer in Williamstown. George Comstock lost his father at the age of fourteen and moved along with his mother and stepfather to the nearby village of New Haven, New York.

Comstock's boyhood was largely spent in poverty. His education involved overcoming great obstacles. He first attended school at the Four Corners, where he avidly read Plutarch as well as novelists such as Sir Walter Scott and James Fennimore Cooper. He briefly attended Ellisburg Academy in Jefferson County. In 1832 he entered Union College in Schenec-

tady, New York. The record of his matriculation there is somewhat unusual. He entered as a member of the sophomore class and paid fees for four terms. He was absent for examinations during the third term of the sophomore year, and again during his entire senior year, for which he was asked to remain home for one term by the president of the college because of some "prank." Comstock, whose financial situation was not good, instead accepted a position teaching Greek and Latin in a private school in Utica, New York, went on to teach in Syracuse, and continued teaching there until the college sent him his diploma. Later in his life, the college awarded Comstock the degree of doctor of laws, for distinguished service.

Comstock began studying law in Utica in the office of Judge Hayden, an older lawyer. In Syracuse he went to the office of Col. William Dodge, former state senator turned district attorney. Dodge had little business, so in 1836 Comstock entered the office of Noxon and Leavenworth. Prior to his admission to the bar, he was allowed to practice in the justice's court and *ex gratia* (by grace) in the county court. One term he had five cases and won all of them. He rode the county in his practice, earning "five dollars for a day's work, and paid a dollar and fifty cents for a horse and buggy" (Kenneson 1909, 200). Comstock was admitted to the bar in July 1837 and immediately entered into a partnership with Noxon and Leavenworth. He subsequently married a daughter of Noxon's, named Cornelia.

Comstock soon became a very well regarded lawyer. A fellow lawyer once remarked of him:

> A client of mine had two cases pending in the United States Supreme Court, for which he desired counsel of the highest ability, and I suggested Comstock. His selection was fully justified, for he prepared two of the ablest and most exhaustive arguments which I had ever read. I remember listening to an account by Mr. Justice Strong of some of the prominent practitioners before the Supreme Court, when he said to me "but in your own state you have a man who is certainly the equal if not the superior of any of these," and on inquiring as to whom he referred, he replied that his name was Comstock. (Strong 1914, 229)

Later in life, Comstock himself remarked, "I did not take to jury practice much. As a general rule, I had no faith in juries. They were Noxon's forte" (Kenneson 1909, 201). A fellow attorney said of Comstock that:

> I cannot imagine Comstock as being a great jury lawyer, and yet I can readily understand that his impressive personality and the weightiness of his utterances would be well calculated to sway a jury, not because their intellects had grasped, or had yielded assent to his arguments, but because, coming from

> him, what he said must be true. . . . A certain majestic quality attached to him as one who ruled, and there was an absence of the quality calculated to persuade. (Strong 1914, 231)

On 3 November 1846, the state of New York adopted a new constitution, which created a Court of Appeals, which was to be the highest court in the state. It was composed of eight judges, four of whom were elected and four of whom were judges from the state Supreme Court. The legislature provided for the appointment of a reporter for the new court. The governor, lieutenant governor, and attorney general were jointly responsible for the appointment. Comstock was appointed first reporter of the Court of Appeals in 1847 and served a full term of three years. The first four volumes of the reports, known as *Comstock's Reports,* show the work of both the court and of Comstock himself for the three-year period. Comstock later remarked that his time serving as reporter was the best schooling he ever received in the law. While serving, he continued to practice. He appears as counsel in his reports twenty-three times over the course of his term and twice faced his father-in-law and partner, B. David Noxon, and split the honors.

At the end of Comstock's first term, Henry R. Selden, later a judge for the Court of Appeals, became a candidate for the post of reporter. The political landscape was now different, with the governor supporting Comstock, whereas the lieutenant governor and attorney general supported Selden. One day those two men walked into the governor's office and said that they had come to appoint a reporter. The governor took his leave, and Selden was appointed. Comstock refused to give up his seat, and a legal battle ensued. Comstock ultimately won his post back, then promptly resigned.

Following his term as reporter, Comstock was nominated as solicitor for the Treasury by President Fillmore and confirmed by the U.S. Senate in 1851. He was nominated for this post in part because of his father-in-law, who was active in politics as a member of the Whig party. Comstock resigned this office after a short time, drawing pay only for January, February, and March of 1852. Following his resignation, he resumed his law practice.

In 1855, Charles H. Ruggles, a judge on the Court of Appeals, resigned. An election was held in November of that year, and Comstock was selected to fill the remainder of the term, which began on 1 January 1856 and ended on 31 December 1861.

During his term, he wrote 149 published opinions, ten of which were dissents. His contemporaries of the New York Bar Association wrote that:

> They [Comstock's opinions] were all marked with the stamp of eminent ability. But his great reputation as a judge rests chiefly upon his opinions in a few

> cases, which involved the determination of great questions, and the evolution and application of principles of permanent value. These opinions are elaborated with the greatest care, and exhibit great logical power, the most discriminating analysis, and profound learning. They settled new questions in our jurisprudence, and the cases in which they were written, have become leading cases upon the branches of law to which they relate. (New York State Bar Association 1893, 132)

The third opinion Judge Comstock wrote was in the famous case of *Wynehamer v. the People*. Its ability greatly impressed the bar and gave him a reputation as one of New York's great judges. The case involved the constitutionality of the Act for the Prevention of Intemperance, Pauperism, and Crime, passed by the New York legislature on 9 April 1855. Judge Comstock called the act one of "fierce and intolerant proscription" (Kenneson 1909, 213). Comstock's opinion held that, as to liquors owned at the time the act took effect, the act deprived the owners of said liquor of their property without due process of law and was therefore unconstitutional. It further held that as the unconstitutional portions of the act could not be separated from the remainder, the entire act was invalid. At the time of the passage of the act, liquor was property like any other, and just as inviolate, held the court. The opinion noted that, as alcohol was more prone to abuse than other property, the legislature did have a right to regulate its sale and use. This act, Comstock felt, was not an attempt to regulate, however, but to prevent practically all beneficial use of intoxicating liquors. He repudiated the argument that a court could declare a law invalid, though in violation of no constitutional restraint, as against natural rights. Comstock instead relied on the notion that due process of law could not mean the same action that deprived a person of his property, as that would render constitutional restraint of the legislature irrelevant.

Numerous comparisons were drawn between the act and other laws, which had been deemed constitutional. Comstock repudiated the notion that this act was no different than certain excise and licensing laws by saying that those laws were merely attempts to regulate alcohol, not abolish it. It could be differentiated from the Embargo Act because of its intent to destroy property, rather than to protect it.

Judge Comstock's longest opinion was in the case of *Curtis v. Leavitt*. Leavitt was the receiver of an insolvent corporation, the North American Trust and Banking Company. He petitioned to have two mortgages made by the company to trustees and the bonds that secured them declared void, the property then being turned over to him for the repayment of unsecured creditors. The case was incredibly complex, with many parties and many issues. Comstock's opinion, which held the mortgages and bonds valid, was

ninety-one pages in length and is a prime example of his clear analysis and sustained reasoning.

The court was also called upon to rule on another case involving the collapse of the North American Trust and Banking Company. In *Tracy v. Talmage,* the state of Indiana had sold the company $1,200,000 in bonds, knowing that the company intended to violate the terms of its charter by reselling them, accepting as payment certificates of deposit that the company had no authority to issue. Judge Selden wrote the opinion on the case as a whole. The receiver of the company made a motion to reargue the case, which had been previously decided in favor of the state of Indiana. Judge Comstock wrote the opinion on that motion. In it, he held that the state's sale of the bonds to the corporation was lawful, even if the state knew that the company intended to violate its charter, so long as the state did nothing to further this violation. He did hold that the certificates of deposit issued to the state by the company were invalid but that the state could disaffirm the contract and seek to recover the fair value of the bonds.

Judge Comstock wrote opinions in numerous other case, many of them dealing with very complex financial issues. He was considered an expert in a number of legal specialties. One contemporary said of him that "he was called on largely for opinions on questions of trusts, and if he had removed to New York [rather than remaining in Syracuse], he would have occupied the foremost place at the bar" (Strong 1914, 239).

The only case in which Comstock dissented that was reviewed was *The People ex rel. The Bank of the Commonwealth v. The Commissioners of Taxes and Assessments for the City and County of New York.* In that case, the issue was whether or not the state of New York had the right to tax the capital gains of the bank invested in U.S. bonds. The court held that the state did have that right. Comstock held that it did not. The Supreme Court of the United States unanimously reversed the holding of the court, thus effectively vindicating Comstock's judgment.

Some of Comstock's dissents seem preferable to the actual rule sent down by the Court. In *Lawrence v. Fox,* a Mr. Holly owed $300 to a Mr. Lawrence. Holly had loaned $300 to Fox, upon Fox's promise to repay the $300 to Lawrence the next day. Lawrence then sued Fox to recover the $300. The court held that Lawrence's suit was valid and that it should continue. Comstock dissented, reasoning that Fox's promise was given to Holly, not to Lawrence. Lawrence, he said, was not party to the contract between Fox and Holly. Comstock remarked that it would be "a monstrous proposition to say that a person was party to a contract for the purpose of suing for his own advantage, and not a party to it for the purpose of being sued" (Kenneson 1909, 212). Unfortunately, Comstock's view was not adopted. The law on this matter remained horribly confused for years to come.

Upon the end of his term Comstock was renominated, for the post of chief judge, but was ultimately defeated by his opponent, William B. Wright, who was a Republican. George Franklin Comstock was an uncompromising Democrat, which, in 1861, in large part explains his defeat.

Following his retirement from the bench Comstock resumed his practice of law. During that period, there was a great deal of grumbling around the state about the judicial system of the state of New York. The voters of the state approved a measure to convene a constitutional convention to revise and amend the state constitution. Judge Comstock was selected as a delegate to the convention, which was held in 1867. Comstock served both on the judiciary committee and the committee for salt springs in the state. The judiciary committee's task was to restructure the system of state courts. The committee greatly changed the system, including the creation of a new Court of Appeals. These actions largely did away with the problems that had necessitated the calling of the convention in the first place.

Judge Comstock had an instrumental role in the creation of the new court and held out hopes that he would be appointed its first chief judge. He was to be disappointed, however, as political machinations kept him off the bench. He continued in his practice of law until late in his life. In 1887, Judge Comstock was "attacked with vertigo, which was incidental to a severe form of kidney disease. . . . At this time, he was nearly seventy-six years of age and grave fears of his death were then entertained. . . . Judge Comstock's mind was then clearly not in its right state, and although the most alarming symptoms had disappeared, his health had since been precarious" ("Obituary" 1892, 5). Those fears were realized when Judge George Franklin Comstock passed away in September 1892.

In 1869, Comstock had begun the movement that moved Genesee College to Syracuse and brought about its reorganization as Syracuse University. He personally contributed money and served on the board of trustees for over two decades. He also actively pursued many business opportunities in Syracuse, the failure of some of which caused him great embarrassment later in life.

Judge Comstock left behind a legal system and body of law that were in much better shape than when he found them. His careful analysis and meticulous reasoning are deeply imprinted in the body of law. He was perhaps the most revered judge the state of New York has ever had. The New York Bar Association later said of him that:

> The thorough and exhaustive character of his judicial action has . . . been thought to resemble that of John Marshall in the Supreme Court of The United States. . . . The death of George Comstock leaves a void which cannot be filled. He will be missed by the church, of which he was an active member,

by the bar, of which he was an ornament, and by society, with whose interests he had long been identified." (New York State Bar Association 1893, 132)

Judge Comstock has, both by his contemporaries and history, been affirmed as a jurist of the highest possible order.

Douglas P. Sadler

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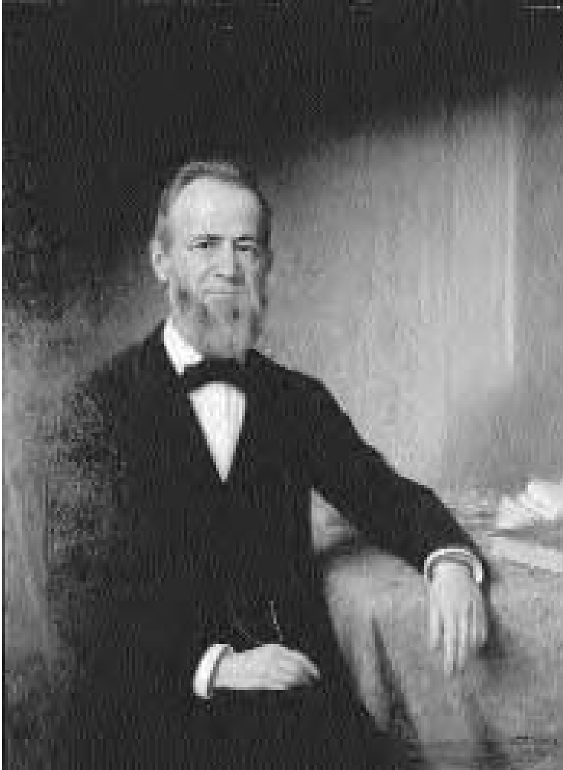
COOLEY, THOMAS MCINTYRE

(1824–1898)



Thomas McIntyre Cooley
Michigan Supreme Court Historical Society

Considered by many to be the preeminent jurist and legal thinker of his time, Thomas M. Cooley served on the Michigan Supreme Court for twenty years. Astute commentators have suggested that his influence in the late nineteenth century was greater than that of many of his now more famous contemporaries, such as Dean Christopher Langdell of Harvard and Oliver Wendell Holmes Jr. (Carrington 1997, 495).

Cooley was born on 6 January 1824 in Attica, New York. The tenth of fifteen children, he grew up in the frontier environment of western New York, working on his family's farm. From an early age he showed academic promise, apparently being the only one of his siblings to attend Attica Academy, the local high school. Following three years at Attica Academy, Cooley studied law under Theron Strong, a prominent former congressman from western New York, until 1844, when Cooley left New York to begin his own career in the Midwest. He landed in Adrian, Michigan, where he continued his legal studies under various attorneys before being admitted to the Michigan bar in 1846—the same year in which he married Mary Horton.

Cooley began his career as a lawyer handling a wide array of legal issues. Initially his career advanced slowly, but he soon became a leading citizen of

Adrian, holding local political office and important positions in various other organizations, even serving as the editor of a local newspaper. During this period he gained a reputation as "a radical and a reformer" (Jones 1966, 98). In 1853, Cooley left Adrian for the more urban setting of Toledo, Ohio. While in Toledo, he ran as a Democrat for a local judicial position in 1854. He was defeated and soon after returned to Adrian to open a law office there.

In 1856 Cooley left the Democratic Party and joined the newly formed Republican Party, but he was always influenced by the principles of Jacksonian democracy, which he had absorbed in his youth. Michigan's Republican legislature appointed him to "compile the state's laws" in 1857, and a year later he was named the court reporter of the Michigan Supreme Court. By 1859 he had gained a wide reputation as an intelligent and able attorney and was chosen to be one of the University of Michigan's first law professors. Cooley's students at Michigan included future Supreme Court justices William Day and George Sutherland and renowned attorney Clarence Darrow.

Although Cooley displayed quite radical leanings before the Civil War, stating at one point that "everything in the moral and political world as well as the physical is better torn down and rebuilt every ten years" (Williams 1986, 144), the ravages of war tempered his views toward revolutionary change. Following the conflict he often stressed the importance of respect for the past, stating in 1863 that the "[t]he lawyer is and should be conservative" (Williams 1986, 144).

In 1864 Cooley was elected to the Michigan Supreme Court and served there for twenty years until he was defeated for reelection in 1885. While on the Michigan Supreme Court, Cooley was regarded as perhaps the finest jurist of his generation. Many sought his appointment to the Supreme Court of the United States, but he never received the honor, likely because his own Republican Party considered him too independent. During his time on the bench, Cooley continued to write prolifically, including treatises on the law of taxation and torts. In 1868 Cooley published his most influential work, *The Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*. The treatise, a seminal work on constitutional law, was the most widely cited law book in the latter half of the nineteenth century. One reviewer of the fifth edition pronounced that "[the treatise] is cited in every argument and opinion on the subjects of which it treats, and not only is the book authoritative as a digest of the law, but its author's opinions are regarded as almost conclusive" (Carrington 1997, 497; citing 27 Alb. L.J. 300 [1883]). In *Constitutional Limitations*, Cooley espoused a broad reading of the due process clause and provided much of the

intellectual basis for courts to fashion the due process norm into a substantive restraint on legislative power.

Since his youth Cooley had been a quiet, rather unassuming fellow. Perhaps the first thing one might notice about Cooley was that his physical size was quite small; he never weighed more than 130 pounds in his life. He spoke in an unimposing and characteristic high-pitched voice. His work ethic and industry, though, were unmatched. He often slept no more than four hours a night. He never took a vacation during his working years—something he reportedly regretted later in life—often remarking that his work was his recreation (Wise 1987, 1541). Cooley possessed a Jacksonian faith in the common man and in commonsense reasoning, and that faith spilled over into his judicial style. As one modern commentator remarked: "He wrote [opinions] not to inspire his readers with an appreciation of the cosmos, nor to attract the notice of fellow judges, but to be understood by Michigan lawyers and any other citizens who might take an interest in his decisions" (Carrington 1997, 523).

Cooley was an elected judge, and he apparently supported the idea of an elective judiciary. One critique often leveled at the practice is that elected judges will be beholden not to the law but to partisan interests and public opinion. From early in his career, however, Cooley demonstrated that this critique could not be properly leveled at him. In one of his first cases, *People v. Blodgett* (1865), Cooley wrote an opinion that struck down a popular but unconstitutional law. The Michigan legislature had passed a statute that allowed soldiers to vote in elections that occurred while they were away in service. As Cooley noted, though, the Michigan constitution plainly stated that a citizen must be present in the state to cast a vote. He asserted that no matter how popular a law might be, it could not be upheld if contrary to the constitution.

Cooley further displayed his judicial independence in *People v. Salem* (1870). In this case, he also elucidated one of the central themes of his judicial philosophy, namely that the state should treat all citizens and industries equally. Some background is necessary to understand the importance of the *Salem* decision. In the mid-nineteenth century, Michigan's constitution, like the constitutions of many other states, was amended to prohibit the use of state money to finance railroads. Because of these constitutional restrictions, the rail companies turned to municipalities to help finance their growth. Michigan's legislature passed laws that allowed local governments to collect taxes for aid to railroad companies. Similar laws were attacked in the courts of many states, and the majority of state supreme courts upheld such legislative acts as constitutional.

In 1864, the Michigan legislature passed an act specifically authorizing

the community of Salem to aid a private railroad company. The railroad company sought a court order to compel the town to provide financial aid, previously voted by public referendum, for the building of railroad track. Writing for the Michigan Supreme Court, Cooley held that the act was unconstitutional because it betrayed the principle that a government could only tax its citizens for "public purposes." Cooley recognized that railroads benefited the public, but he stressed that "the [railroad] when constructed, is nevertheless to be exclusively private property, owned, controlled, and operated by a private corporation for the benefit of its own members" (*Salem*, 20 Mich. 477–479). The opinion revealed Cooley's deep belief that the state should not play favorites; rather, it should treat all its citizens equally. That the power of taxation should be used to benefit private interests was particularly vexatious to Cooley because "the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger" (*Salem*, 20 Mich. 487). Cooley expressed a similar fear in *East Saginaw Manufacturing Co. v. the City of East Saginaw* (1869). He warned that if perpetual tax exemptions were permitted, then influential business interests would soon attain those tax exemptions for their property, shifting the burden of taxation to less powerful interests.

One should not take from the discussion of Cooley's independence that he saw a judge's role as a superlegislator, striking down any laws he thought unwise. Cooley actually took a rather restrained view of his role as a judge: "Cooley regarded it as his professional duty to reflect and express the moral precepts and expectations of the people of Michigan, not to change them to his own taste or even to that of his fellow lawyers" (Carrington 1997, 523). His disdain for judicial overreaching is reflected in a statement he made in one of his later opinions: "There is ground for the belief that statutes have been assaulted by courts on objections that purported to be grounded in the constitution, but which, if plainly stated, would resolve themselves into this: that the judges did not like the legislation" (Jones 1966, 112–113, citing *State of Michigan v. Iron Cliffs Co.* [1884]). In practice, Cooley upheld legislative statutes with which he likely disagreed in many cases.

In the late nineteenth century there was a movement in the United States toward enhancing local government. Many legislatures passed laws, called "home rule" charters, in an effort to limit the power of the state over localities. Cooley's Jacksonian faith in local government made him the prime judicial supporter of this move toward local self-government. In Cooley's view, local governments were not mere creatures of the legislature but derived their power from the state constitutions themselves. This right to local self-government was, in Cooley's mind, an important limitation on

state governmental power, and thus, the state legislature did not have the power of coercion over local government.

Perhaps his most well known judicial application of his views on local government came in the case of *People v. Hurlbut* (1871). In that case, the court considered whether the state legislature could pass a statute to appoint permanent officers to the Detroit board of public works. Cooley's opinion actually preserved the statute in part, but it nonetheless reflected his deep belief in the importance of local self-government. He noted that the issue of local governmental authority was so important that addressing it required "careful scrutiny of the structure of our government, and an examination of the principles which underlie free institutions in America" (*Hurlbut,* 24 Mich. 95). Cooley then embarked on a lengthy defense of the importance of local governments in our constitutional scheme. Cooley concluded his historical defense of local government status by stating: "The state may mould local institutions according to its views of policy or expediency; but local government is [a] matter of absolute right; and the state cannot take it away" (108).

Cooley also authored important opinions on education. At issue in *Stuart v. School District No. 1 of Kalamazoo* (1874) was whether school districts could use tax money to support free high schools that offered courses in foreign languages. The court held that such taxation was permissable. Cooley's opinion, both in language and in effect, however, extended far beyond this specific issue. He widely praised the "ideal of public education," citing a statement of John D. Pierce, the former superintendent of Michigan schools, that the purpose of free public education was "to furnish good instruction in all the elementary and common branches of knowledge, for all classes of the community, as good indeed, for the poorest boys of the state as the rich man can furnish for his children with all his wealth" (*Stuart,* 30 Mich. 81). The influence of Cooley's opinion apparently extended beyond the borders of Michigan because it was cited some forty-five years later in a history of public education as being quite influential in the "growth of tax-supported high schools" nationwide (Jones 1966, 118 n.67).

Cooley confronted the issue of education and race in *People v. The Board of Education of Detroit* (1869). In 1867, the state of Michigan had amended the law governing its education system to provide that "all residents of any district shall have an equal right to attend any school therein." The Michigan legislature, however, had previously passed special legislation that allowed segregation in Detroit schools. Cooley held that the 1867 amendment gave every child irrespective of "race or color, or religious belief, or personal peculiarities . . . an equal right to all the schools" (*Board of Detroit,* 18 Mich. 410). He thus ordered that Detroit schools accept an African American boy who had been denied admission because of race.

Like other judges of the era, Cooley heard a steady stream of tort cases arising out of railroad and industrial accidents. He generally adhered to common law principles in resolving such cases but was sharply critical of the emerging practice of instituting tort suits on the basis of contingency fees.

Although state courts in Cooley's time did not espouse the rights of the criminally accused to nearly the same extent as modern courts, one could say that Cooley's court was ahead of its time in many respects. One commentator noted that his "Jacksonian opposition to special privilege" and his regard for equality under the law led him to take important steps toward fairness to defendants on which later judges could build (Ashby 1985, 544–545).

Cooley was also a strong advocate for the freedom of the press; in particular, he saw the press as an important check on corruption in public institutions. In *Atkinson v. The Detroit Free Press Co.* (1881), Cooley dissented from a decision in which an attorney had brought a libel suit, charging that a newspaper had wrongly published an article concerning improper advice he had given to a public official. Cooley argued that the press served an important role in exposing fraud on the public and that that role should not be hindered by forcing "every word and sentence [to be] uttered with judicial calmness and impartiality" (*Atkinson,* 46 Mich. 383).

Ironically, it was a decision in which Cooley found a Democratic newspaper guilty of libel that may well have contributed to his electoral defeat (Edwards 1987, 1563). In *Maclean v. Scripps* (1883), a prominent Michigan professor and doctor sued the *Evening News* for libel for a story about an affair the doctor allegedly had with a patient. The doctor claimed the story was false and was printed with malicious intent. The jury believed the doctor and awarded him $20,000 in damages. On appeal, the Michigan Supreme Court upheld the award. Though Cooley did not write the majority opinion he joined it, and he did write an opinion that denied a rehearing to the newspaper. Cooley began the denial opinion by noting that "[n]o court has gone further than this in upholding the privileges of the press and very few so far." He concluded, however, that a jury in this case could reasonably conclude that the "publication was made in entire disregard of the plaintiff's rights, and from interested motives" (*Maclean,* 52 Mich. 253). The following year when Cooley was up for reelection, the Democratic newspapers, especially the *Evening News,* lambasted Cooley, frequently referring to the *Maclean* decision and Cooley's role in it. In the end, though, it is difficult to say how much influence these articles and the *Maclean* decision played in Cooley's defeat because that year not a single Republican candidate won office, so it is just as likely that Cooley was simply caught in a Democratic landslide.

Cooley remained active after his career on the bench ended. Early in 1887, Cooley was appointed as a receiver of Jay Gould's Wabash Railroad.

In part because of this experience, Cooley was almost universally seen as the best choice to head the newly created Interstate Commerce Commission (ICC), a federal agency charged with regulating perceived problems in the railroad industry. Pres. Grover Cleveland, in making the appointment, believed that Cooley was the only man with enough integrity and expertise to be accepted by both the railroad industry and its critics. Suffering from poor health, Cooley resigned from the ICC in 1891. In his later years, Cooley remained one of the most respected figures in the legal community, serving as president of the American Bar Association in 1894. He was often asked to offer opinions in newspapers and journals on such wide-ranging topics as the federal income tax, the annexation of Hawaii, and the morality of lotteries (Jones 1987, 358–368).

Judge Thomas M. Cooley was by all accounts one of the greatest judges in U.S. history. His obituary in the *New York Evening Post* boldly testified to this fact: "For the thirty years succeeding the war, from 1865 on, there was, perhaps, no lawyer in the United States so universally conceded to be of the first rank, as Judge Cooley. We do not remember to have heard his preeminence as a judge and commentator questioned even in private" (Wise 1987, 1543).

James W. Ely Jr.

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CRANCH, WILLIAM

(1769–1855)

William Cranch
Library of Congress

For sixty-eight continuous years William Cranch served the legal community in Massachusetts and the District of Columbia. He was a member of the bar in both jurisdictions and served as a city land commissioner in the District of Columbia. There he was a charter member of the Circuit Court of Appeals of the District of Columbia, which he served for fifty-four years, forty-nine of those as chief judge. During his judgeship, Cranch reported the Supreme Court's decisions during the first fifteen years of Chief Justice John Marshall's tenure and compiled six volumes of decisions from Marshall's years on the bench.

William Cranch was born in the Boston suburb, Weymouth, Massachusetts, on 17 July 1769. He was the son of Richard Cranch, a watchmaker who moved from Kingsbridge, Devonshire, England, to Braintree, Massachusetts, in 1746. In 1762 Richard married Mary Smith, a sister of Abigail Smith, who became the wife of John Adams in 1764. Richard was a member of the Massachusetts legislature and served on the Court of Common Pleas. William Cranch received classical tutoring at the Haverhill home of his uncle and aunt, the Reverend William and Elizabeth Smith Shaw, then attended Harvard College, where he graduated with his cousins John Quincy and Charles Adams in 1787. Both Cranch and John Quincy graduated with honors—elected to Phi Beta Kappa—and presented

papers at graduating ceremonies. On 6 April 1795 Cranch married Nancy Greenleaf, the sister of a real estate entrepreneur with whom Cranch would have a long but unsuccessful business relationship. Nancy Greenleaf was also the sister of Rebecca Greenleaf, the wife of the famous lexicographer Noah Webster, who advised Cranch on matters relating to the publication of his reports. William and Nancy Cranch had ten children.

After graduating from Harvard, Cranch read law in the office of his wife's brother-in-law, Thomas Dawes, who became a justice on the Massachusetts Supreme Court. In 1790 Cranch was admitted to practice law in the Court of Common Pleas, and by 1793 he was admitted to practice before the Massachusetts Supreme Court. After engaging in private practice in Baintree without much economic success, Cranch moved to Haverhill to assume the practice of a recently deceased cousin, John Thaxter. During that period, Cranch also served for a time as justice of the peace in Essex County. Although enjoying a successful practice in Haverhill, Cranch came to the conclusion that "the lot of the small-town lawyer held too little promise for him" (Kramer 1978, 69). Thus, he moved to Washington, D.C., to become legal counsel for a real estate venture, the Columbia Society, with James Greenleaf. Cranch also had ties to the Potowmack Company that George Washington and others established in 1784 to build a series of canals that would make the Potomac more navigable. In an interesting twist of circumstances, some speculative ventures that involved Cranch and his clients found their way to the Circuit Court for the District of Columbia and to the United States Supreme Court. In one case, William Cranch duly reported the opinion by Chief Justice John Marshall (*Pratt v. Carroll*, 8 Cranch 471 [1814]). Another case was *Ames Greenleaf, Plaintiff in Error v. James Birth*, 34 U.S. 292 (1835).

After leaving the real estate business as a counsel for entrepreneurs and a would-be entrepreneur himself, Cranch briefly returned to a more traditional law practice, assuming the Georgetown practice of a recently deceased nephew. Yet, economic troubles continued to hound him, so much so that he began to seek public employment, first as a clerk for the United States Supreme Court, then as clerk of the U.S. House of Representatives. His economic problems became so great that Cranch had to resort to Maryland's insolvency laws for protection. A Federalist member of the Maryland Senate and state judge, Gen. Uriah Forrest, purchased Cranch's belongings at the bankruptcy sale but permitted Cranch to retain possession while repaying the total auction price (Kramer 1978, 99). Soon afterward, Pres. John Adams appointed him to the post of city land commissioner for the District of Columbia. Cranch's participation as a member of the board that managed the building of Washington, D.C.—a position dependent on the pleasure of the incumbent president—lasted but two months, as President

Adams gave him one of the 1801 midnight appointments. Adams appointed Cranch to one of three positions on the Circuit Court for the District of Columbia established by the Judiciary Act of 1801 a month earlier (2 Stat. 89, 13 February 1801). Adams also appointed James Marshall, the brother of Chief Justice John Marshall, to serve with Cranch.

Cranch's presidential appointment came on 3 March 1801. On the following day, as Thomas Jefferson was taking the presidential oath, Cranch went to Secretary of State John Marshall's office and retrieved his commission, thus escaping the fate of William Marbury and other judicial officers whose commissions the new secretary of state, James Madison, withheld (Kramer 1978, 109–110). On 29 April 1802, the new Congress, dominated by Jeffersonian Republicans, enacted the Judiciary Act of 1802, thus abolishing many circuit judgeships created by the Judiciary Act of 1801. The new law did not affect Cranch's position, however. In fact, President Jefferson appointed Cranch as the chief judge of the court on 21 February 1806, the position he occupied until his death in 1855. Cranch gave President Jefferson credit for a nonpartisan nomination. In a letter to his father, he explained that

> [Jefferson] probably understood it to be a pretty general wish among all parties and thought it a good opportunity to gain credit for impartiality in appointing a federalist to office. . . . [And he thought] that the Judges ought to rise in regular promotion, in order to destroy the hope that any compliance with the wishes of a President may lead to higher honors; or in other words, to prevent as much as possible, the executive influence in the Judicial department. (171)

Nonetheless, Cranch continued to think that Jefferson "was an unscrupulous demagogue and refused to alter that view even when confronted with the most immediate evidence to the contrary" (171).

The early Circuit Court for the District of Columbia that Cranch served was a strange tribunal. For one thing, its sessions alternated between Washington City north of the Potomac, where it applied Maryland law, and Alexandria south of the river, where it applied Virginia law. For another, without any plan for the municipal governance of the district, the Circuit Court performed many administrative tasks. One of the first orders of business for the midnight appointees was to appoint a clerk for the court's office in Washington County, who turned out to be Cranch's recent benefactor, Uriah Forrest. Another example of Federalist partisanship was the effort by Cranch and Marshall in 1801 to obtain an indictment for common law seditious libel against Samuel Harrison Smith, the editor of a Republican-oriented newspaper called the *National Inteligencer*. Smith had published a piece entitled "A Friend to Impartial Justice" that accused federal judges of

destroying freedom of expression, executing unconstitutional laws, and encouraging nonresistance to tyranny and called for their removal without regard to their life-tenured positions. Cranch and Marshall issued the warrants, but after hearing the chief judge and the U.S. attorney speak against Smith, the grand jury refused to indict him (Kramer 1978, 124–127). In March 1805, Cranch was a witness for Supreme Court justice Samuel Chase in his Senate impeachment trial presided over by Vice President Aaron Burr. Cranch had listened to one of Chase's truculent charges given to the grand jury of the Circuit Court sitting at Baltimore in 1803 in which Chase attacked the repeal of the Judiciary Act of 1801. Although the House of Representatives had found that the charge was "an intemperate and inflammatory harangue," Cranch found it to be neither, and so testified in the Senate (169).

Although Cranch's early ventures brought little success, he spent over half a century on the bench as an "able jurist, indefatigable worker, and gentle man" (Wald 1992, 1150). During Cranch's tenure, appeals from the District of Columbia circuit were reversed much less than appeals from other circuits (Kramer 1978, 325). Moreover, during the first half of the nineteenth century, the Circuit Court for the District of Columbia became a busy intersection for cultural and political conflict involving many notable people and events. Three of Cranch's cases illustrate this point. An early case involved the nation's first professional architect and engineer, Benjamin Henry Latrobe; the trial of Anne Newport Royall concerned one of America's first female journalists and muckrakers; and the trial of Dr. Reuben Crandall was one of the first prosecutions against an abolitionist.

Following Latrobe's appointment by President Jefferson, and the completion of the South Wing of the capitol with magnificent interiors, the government called Latrobe back to rebuild the structure after the British razed it during the War of 1812. Following a quarrel that Latrobe had with the Board of Commissions, however, he resigned amid extremely acrimonious circumstances and was forced into bankruptcy. After Judge Cranch—who had served on the same Board of Commissioners that haunted Latrobe—ruled that Latrobe could not keep his architectural books, they were sold to satisfy creditors, and Latrobe served a time in jail as punishment for his debt (Allen 2001, 123).

The trial of Anne Newport Royall was a significant case for Judge Cranch on two grounds. First, it was a trial involving a high-profile personality with close ties to the Jackson administration, and, second, it illustrated how the judge eluded politically sensitive situations by focusing on some finer points of law. Royall was a prolific social and political critic—an early muckraking Ida Tarbell—who had attacked the Reverend Ezra Styles Ely and his Presbyterian congregation for proposing a Christian political

party to incorporate religious principles into civic affairs. After unsuccessful attempts to convert Royall, members of Ely's congregation appeared before the grand jury and successfully obtained an indictment accusing her of being a "common scold." Before the trial, Judge Cranch, with one judge dissenting, dismissed the two counts of the indictment on technical grounds. Royall was put to trial for being a disagreeable woman who had become a public nuisance to her community. Following the public trial, the jury convicted Royall, whereupon her attorneys petitioned the court to arrest the judgment, claiming that since the offense carried the obsolete punishment of "dunking," the underlying offense was also obsolete. Judge Cranch upheld the conviction, but instead of examining the merits of the case, he conducted an exhaustive examination of the meaning of *dunking* and concluded that the common law did not limit punishment for scolding to dunking. Therefore, he denied the motion to arrest and sentenced Royall to a fine and costs, which Jackson's secretary of war, John Eaton, paid (*U.S. v. Royall*, 27 F. Cas. 908).

The Crandall affair occurred in the midst of riots in the city and congressional activity that resulted in the adoption of the infamous Gag Rule that precluded any debate in the House of Representatives concerning abolition of slavery. The U.S. attorney, Francis Scott Key, obtained indictments against Dr. Crandall for seditious libel by "publishing malicious and wicked libels, with the intent to excite sedition and insurrection among the slaves and free colored people of this District" (Kramer 1978, 304). After a lengthy trial following eight months of jail confinement, the jury acquitted Crandall of the charges. Soon thereafter Crandall died of tuberculosis that he contracted in jail, and Cranch's cousin, John Quincy Adams, continued an unrelenting twelve-year campaign to repeal the Gag Rule.

As a judge Cranch is best known for his dissent in *United States v. Bollman & Swartwout*, which Chief Justice John Marshall later vindicated when the case was appealed to the Supreme Court. Dr. Erick Bollman and Samuel Swartwout, two participants in Aaron Burr's alleged scheme to invade Mexico and establish an independent government, were arrested on a warrant for treason based on allegations of five men, including another of Burr's coconspirators, Gen. James Wilkins. Wilkins was a United States Army commander and governor of the Louisiana Territory who was secretly in the pay of Spain. Cranch dissented from the court's order that the defendants stand trial for treason because they had not actually "levied war" against the United States. He interpreted the constitutional language in Article III, Section 3, that "treason against the United States, shall consist only in levying War against them" to mean that it excluded everything but the actual levying of war. Some of Cranch's dissent, which he penned in the

face of political and public pressure, is extremely apropos of conditions in the United States following the events of 11 September 2001:

> In times like these, when the public mind is agitated, when wars, and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of a court to be peculiarly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. The worst of precedents may be established from the best of motives. We ought to be upon our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the constitution; for although we may thereby bring one criminal to punishment, we may furnish the means by which an hundred innocent persons may suffer. The constitution was made for times of commotion. In the calm of peace and prosperity there is seldom great injustice. Dangerous precedents occur in dangerous times. It then becomes the duty of the judiciary calmly to poise the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude. (24 F. Cas. 1189, 1192 [1807])

Following the Circuit Court's order to stand trial and denying bail, Bollman and Swartwout successfully petitioned the Supreme Court for a writ of habeas corpus. In granting the defendants' relief, Chief Justice Marshall—echoing Cranch—opined that "however flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason" (*Ex parte Bollman and Ex parte Swartwout,* 8 U.S. 75, 125 [1807]).

A more lasting legacy than his judicial tenure is perhaps Cranch's role as court reporter for the United States Supreme Court from 1801 to 1815, a period that coincided with the court's move to Washington, D.C., and the appointment of John Marshall as its chief justice. In fact, in the years before the government undertook responsibility for reporting judicial opinions, it is unlikely that the Supreme Court would have attained its remarkable prestige without the work of Cranch and the other early court reporters. To be sure, Cranch's court reporting was in part economically motivated, and one that fared no better than his law practice or his real estate ventures. Nonetheless, he brought a measure of professionalism to the endeavor, concerned as he was with the lack of reported decisions in the development of law in the new federal republic. For, as he wrote in his first reported volume,

> Much of that *uncertainty of the law,* which is so frequently, and perhaps so justly, the subject of complaint in this country, may be attributed to the want of American reports. Many of the causes, which are the subject of litigation in

> our courts, arise upon circumstances peculiar to our situation and laws, and little information can be derived from English authorities to lead to a correct decision. Uniformity, in such cases, can not be expected where the judicial authority is shared among such a vast number of independent tribunals, unless the decisions of the various courts are made known to each other. (1 Cranch iii [1804])

Moreover, Cranch viewed his court reporting function as compatible with his judicial philosophy, which was what we might today call strict constructionism. Witness his remarks that in "a government which is emphatically stiled [*sic*] a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports" (1 Cranch iii [1804]). Judge Cranch's judicial credo held that judges should concern themselves with interpreting and applying the law "undisturbed by the clamor of the multitude" (Warren 1924 and 1926, 303). Yet, Cranch was an ardent supporter of majority rule. As early as November 1787 Cranch wrote John Adams regarding anti-Federalist claims that simple majority could not abandon the Articles of Confederation because the language in Article 13 of the articles declared the articles to be a perpetual union. Cranch argued: "Was not that article made by the majority of the people? and have not the majority of the people the same right to pass an Article repealing the 13th Article?" (Kaminski and Saladino 1983, 226).

By 1815 his duties as chief judge of the Circuit Court required Cranch to stop reporting Supreme Court decisions. Yet, he continued to engage himself in many outside activities. He maintained his court-reporting avocation, compiling six volumes of cases decided by the Circuit Court and his opinions in cases that litigants appealed from the Commission of Patents. A congressional enactment of 3 March 1837 authorized the chief judge of the District of Columbia Circuit to hear appeals from the commissioner of patents.

Judge Cranch was also active in the public affairs of Washington. In 1818–1819, at the request of Congress, Cranch drafted a unified code of laws for the District of Columbia that would have rectified the anomalous situation of having Maryland and Virginia law exist side by side. Although never adopted, the code included such progressive provisions as the abolition of capital punishment. Indeed, Cranch was a political progressive in many ways. He was a persistent and ardent opponent of slavery, duels, and alcohol and an early supporter of public education in Washington, D.C. He published a memoir of John Adams in 1827, and a year later, along with William Thomas Carroll, was appointed as one of two members of the faculty of a new law school at Columbian College that was the city's first law

school and a predecessor of the George Washington University School of Law. Cranch served as the president of the Capitol Hill Seminary for Young Ladies and the Society for the Promotion of Temperance and organized the Washington Library Company. He was elected to the American Academy of Arts and Sciences and the American Antiquarian Society. Cranch was privileged to administer the presidential oaths of office to John Tyler in 1841 and Millard Fillmore in 1850.

At age eighty-six, Judge Cranch was still at work on the bench he had served for fifty-four years. He had led a life totally dedicated to establishing a strong and effective judicial system for the District of Columbia, and "after six decades in residence in what had begun as a 'dismal swamp,' having contributed admirably to the jurisprudence both of the district and of the new American nation," he died on 1 September 1855 (Joyce 1999, 665).

Clyde Willis

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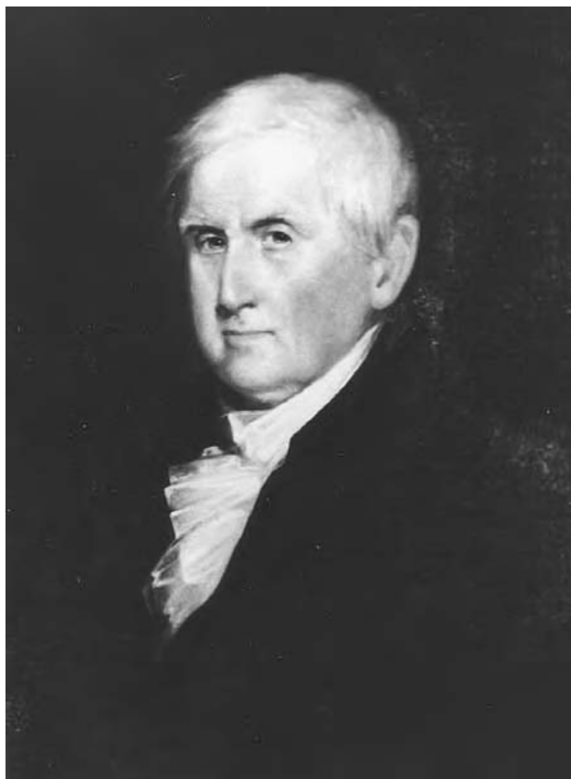
DAVIS, JOHN

(1761–1847)



John Davis
Courtesy of Pilgrim Hall Museum, Plymouth, Massachusetts

John Davis, lawyer, politician, and judge, served as federal judge for the District of Massachusetts from 1801 to 1841.

Davis was born in Plymouth, Massachusetts, on 25 January 1761. His father, Thomas, was born in Albany, New York, and lived in North Carolina before settling down to a mercantile career in Plymouth. His mother, Mercy Hedge Davis, was a member of one of Plymouth's wealthiest and most prominent merchant families. Davis graduated from Harvard College in 1781. He returned to Plymouth, read law, and was admitted to the bar in 1786. The same year, he married Ellen Watson, daughter of William Watson, a Plymouth merchant. Davis thus solidified his position in the town's political and commercial elites. The marriage lasted until Ellen Watson Davis's death in 1832.

In 1788, Davis represented Plymouth at the Massachusetts ratifying convention and was the youngest member of that body. He rose rapidly in Massachusetts politics, representing Plymouth in the House of Representatives and the Senate. He acquired a reputation as a firm and wise Federalist and caught the eye of national figures. Congressman Fisher Ames considered him "a man of genius and worth" (Gibbs 1846, 1:230). In July 1795 Secretary of the Treasury Oliver Wolcott appointed Davis comptroller. The

position was not a lucrative one, and in 1796 Davis resigned to resume private practice and moved his family from Plymouth to Boston. Davis did not stay out of office long, as President Washington appointed Davis the U.S. attorney for the District of Massachusetts in 1796. Davis now climbed the legal rather than the political ladder. In February 1801 John Lowell resigned as federal judge for the District of Massachusetts. Pres. John Adams, in one of his final acts, appointed Davis to the vacant slot on 18 February 1801. The Senate confirmed the appointment on 20 February, and the commission was delivered the same day.

Davis spent the next forty years on the federal bench. As his district included one major port and several secondary ones, Davis's court quickly became known as the admiralty court. Davis heard a steady stream of sea-born cases, involving prize claims, rules of salvage, marine insurance, and sailors' contracts. Davis's skill in handling them gave him a reputation as the nation's premier admiralty judge. In 1839 Justice Joseph Story dedicated his *Commentaries on the Law of Agency* to Davis with a lengthy tribute. "In the earlier part of your judicial career you led the way in exploring the then untrodden paths of Admiralty and Maritime Jurisprudence, and laid the profession under lasting obligations by unfolding its various learning and its comprehensive principles," Story wrote (Gannett 1847, 30). An admiralty jurisdiction was a particularly heavy burden, as the judge alone heard all cases. Upon retiring, Davis remarked that it would be a "great relief to the judge" if such cases were tried by jury (*Federal Cases* 1894–1897, 30:1304).

Admiralty law was lucrative to its practitioners but rarely rose to the level of a constitutional case. Toward the end of Davis's first decade on the bench, his docket was crowded with cases related to the Embargo Act of 22 December 1807 and related acts, touching on the constitutional power to regulate trade. The most important such case that Davis decided was *United States v. The William*, heard in September 1808. On 17 March 1808, the brigantine *William* transferred goods to the *Nancy* while at sea. On 11 May 1808, the *William* transferred goods to the *Mary* while in port in Lynn, Massachusetts. The goods were intended for export, in violation of the Embargo Act and of the first supplementary act of 9 January 1808. Counsel for the owners of the *William* argued that the Embargo Act was unconstitutional, exceeding Congress's authority to regulate commerce.

Davis did not want to decide a constitutional case and "wished, that this paramount question of constitutionality, when gentlemen had determined to rely on it, should have been reserved for the higher tribunals of the nation" (*Federal Cases* 1894–1897, 28:615). If forced to rule at all, Davis would rule only on the narrowest question, whether or not Congress had the power to prohibit exports by sea. He explicitly refused to deal with the question of all exports. Davis concluded that a constitutional objection would

fall under one of three categories: a law that contradicted a restriction on congressional power, a law exercising a power not granted (but also not specifically denied) to Congress, or a law that exceeded a grant of power to Congress. Passage of the Embargo Act, as a regulation of commerce, was specifically granted to Congress, so the constitutional objection could come only on the third category, whether the Embargo Act was a law that exceeded an enumerated power. The question became, did the power to regulate commerce extend to the power to suspend all commerce with foreign nations? Furthermore, did the federal courts have the power to determine whether an act of Congress exceeded the powers granted to Congress?

Davis examined several federal cases but found none to guide his ruling. He then turned to *The Federalist*. *Federalist* #78 specifically mentioned that the federal courts were the only place to define the limitations on Congress. Davis believed that his reading of *The Federalist* revealed a limited power of judicial review: "that the power to declare them [acts of Congress] void exists, only, in cases of contravention, opposition or repugnancy, to some express restrictions of provisions in the constitution" (*Federal Cases* 1894–1897, 28:619). The court could determine whether or not an act was constitutional as an absolute question, not a matter of degree. "To determine where the legislative exercise of discretion ends, and usurpation begins, would be a task most delicate and arduous" (28:620).

Davis concluded that his court could not judge whether or not the Embargo Act exceeded a constitutionally granted power, but simply whether or not the Embargo Act violated a specific constitutional prohibition. He decided that it did not. The power to regulate commerce was limited only by the treaty power. Congress had the power not only to promote commerce but to restrict it as well. Precedent favored the Embargo Act, as the commercial restrictions passed in 1798 had never been constitutionally challenged. The fact that the Embargo Act had no expiration date was immaterial to the constitutional question, and Davis argued that the appearance of a permanent restriction might be necessary for the success of the act.

"I say nothing of the policy of the expedient. It is not within my province," Davis wrote. "But on the abstract question of constitutional power, I see nothing to prohibit or restrain the measure" (*Federal Cases* 1894–1897, 28:621). Davis was likely forced, however, to declare a policy he disapproved as constitutional. His mother's and wife's families, as well as his brothers, were all merchants. Davis closed his opinion with an ode to commerce. "I lament the privations, the interruption of profitable pursuits and manly enterprise, to which it has been thought necessary to subject the citizens of this great community," Davis wrote. "Commerce, indeed, merits all the eulogy, which we have heard so eloquently pronounced, at the bar. It is the welcome attendant of civilized man, in all his various stations. It is

the nurse of arts; the genial friend of liberty, justice and order; the sure source of national wealth and greatness; the promoter of moral and intellectual improvement; of generous affections and enlarged philanthropy" (28:623).

Davis's duties as district judge included sitting on the First Circuit Court, which included New Hampshire, Rhode Island, and the District of Maine, as well as Massachusetts. Davis considered the circuit court a burden, given the high volume of cases in district court. The arrival of Justice Joseph Story on the circuit in 1812 eased that burden. Story wrote nearly all of the circuit's opinions and streamlined its procedures. The two judges agreed on the general principle of federal supremacy and collaborated to make sure that important cases reached the highest possible courts. In June 1815 Davis heard the case of *DeLovio v. Boit,* concerning an insurance policy taken out by a group of Boston merchants on a Havana-based slave ship. The insurers argued against federal jurisdiction. In September Davis ruled for the insurers, which was unusual as Davis generally voted for federal jurisdiction in all maritime cases. Story heard the case on circuit and reversed Davis. Story and Davis also collaborated in the case of *Sturgis v. Crowninshield.* Story believed that New York's bankruptcy law of 1811 violated both the contract clause of the Constitution and Congress's power to pass bankruptcy laws. Story had already argued that state bankruptcy laws were unconstitutional. Before the trial began Story and Davis agreed to divide without issuing opinions. They rendered a split decision in October 1817, insuring that the landmark case would go to the Supreme Court. Chief Justice Marshall, writing for the Court, ruled that the act violated the contract clause but that states could pass their own bankruptcy laws in the absence of a federal statute

The case of *Peabody v. Proceeds of Twenty-Eight Bags of Cotton,* from March 1829, was more representative of the cases Davis regularly heard. On 27 August 1806, Samuel Peabody's schooner *Equality* found twenty-eight bags of cotton abandoned on the high seas. The cotton was sold for salvage, with a portion held back in case the original owners came forward to claim the cargo. None ever did, and Peabody filed suit to receive the remainder of the proceeds. Andrew Dunlap, district attorney for Massachusetts, moved that the remaining money rightfully belonged to the United States.

Davis concurred with earlier rulings, one by Joseph Story, that gave Peabody a right of salvage with regard to abandoned property. Yet Davis found no cases or law that dictated what should be done with the portion set aside for the original owner. Davis reviewed the law of nations, particularly the Rhodian, Roman, and early modern law, and saw a general tendency to grant the sovereign power the right to at least some of the salvage proceeds. Lord Stowell, the leading light of British maritime law and a corresponding

influence on American law, ruled that abandoned property was for the benefit of the government. Davis considered "the rules and usages of nations . . . to be a portion of our own maritime law" (*Federal Cases*, 1894–1897, 19:47). As the cotton was salvaged on the high seas, outside of any state jurisdiction, Davis ruled the remaining proceeds belonged to the U.S. Treasury.

Davis resigned from the federal bench on 10 July 1841. By that time he had also resigned most of his other public functions. He was an officer of Harvard College for more than thirty-five years, serving as a fellow from 1803 to 1810, treasurer from 1810 to 1827, and an overseer from 1827 to 1837. Harvard awarded him an LL.D. in 1842. Dartmouth College conferred the same honorary degree in 1802. Davis joined Boston's elite Federal Street Church in 1797 and served as deacon from 1817 to 1846. Davis was long active in the Massachusetts Historical Society, including a stint as president, and published an edition of Nathaniel Morton's *New-England's Memorial* in 1826. Davis died in Boston on 14 January 1847.

Robert W. Smith

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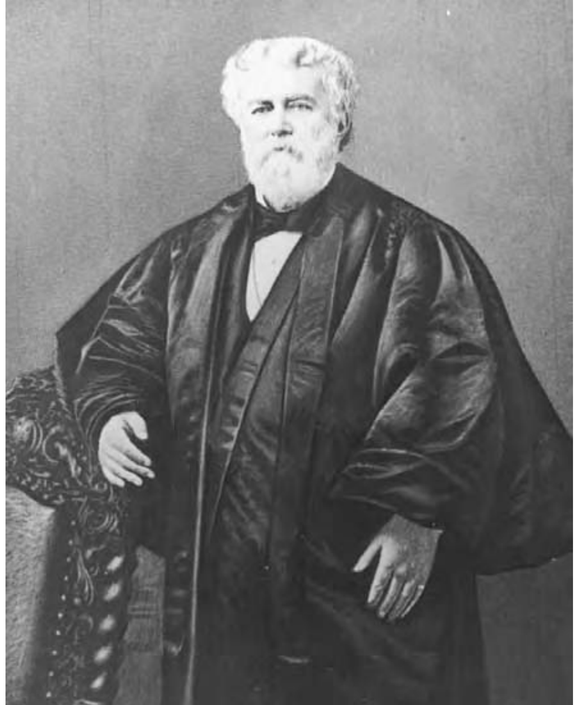
DEADY, MATTHEW PAUL

(1824–1893)



Matthew Paul Deady
Oregon Historical Society

If George Washington is the indispensable man of the United States of America, then Matthew Paul Deady is the indispensable man of the state of Oregon. Like his boyhood political and military hero Andrew Jackson, he had Irish ancestry, studied law, and led a full life. Deady was born in Maryland; his father had been born in Cork County, Ireland ("Deady" 1930, 168), and his mother was born and reared in Baltimore (Mooney 1984, 577). Matthew Paul was their first-born child. His mother died of tuberculosis in 1834. Deady availed himself of the well-stocked library of his father, who was both a teacher and a farmer; he himself taught school and promoted libraries and educational efforts through most of his life. Farming was quite another matter, and he left his father's Ohio farm at the age of sixteen, permanently estranged despite an effort by the younger man at reconciliation in 1859 (Overmeyer 1935, 85). Matthew Paul Deady remained in Ohio and pursued education at Barnesville Academy and concurrently served four years as a blacksmith's apprentice ("Deady" 1930, 168). After completing his formal education at Barnesville Academy, he taught school and studied law in the office of Judge William Kennon Sr. (1793–1881), a former member of the U.S. House of Representatives. The influence of Kennon reinforced in the al-

ready bookish Deady a predilection to pursue the more cerebral path of the judgeship rather than the emotional career path of the practicing attorney. Matthew Paul Deady was admitted to the Ohio bar on 27 October 1846 (Overmeyer 1935, 22).

Judge Kennon also inspired Deady to go west. Kennon read extensively about Oregon and dreamed of going there but was bound to St. Clairsville, Ohio, by his position on the state supreme court and family responsibilities (Overmeyer 1935, 24). Also predisposing Deady to move to Oregon in particular was his own eloquence. He belonged to a debating society and supported the position that mining country such as that of California was nothing but a breeding ground for barbarism (27). The judge also provided an indispensable connection in the person of a Whig politician named Cal Johnson. Johnson, an old friend of Kennon's, had received a government appointment that included free transportation for six to the Far West. Since Johnson had no family, Deady was able to persuade the judge to get Johnson to allocate one of the slots to Deady (29). Unfortunately, the two fell out in Fort Leavenworth, Kansas, and Deady was stranded there during a cholera epidemic. Deady secured a position as a blacksmith on a government train to Fort Kearney, Nebraska, from where he was able to join an expedition to Oregon.

A little over two years after gaining admission to the Ohio bar, Deady arrived in southern Oregon, where he first taught school and then practiced law in Lafayette, Oregon. Deady became a pivotal figure in the development of the legal, political, and cultural institutions of Oregon. In 1850 he was elected to the territorial House of Representatives. Six months later he codified the territorial laws into a single volume, the first of many such efforts that followed. Deady set high standards of proofreading whether he was working on the Code of Civil Procedure or the Code of Criminal Procedure (Belknap 1962, 27–28). In 1851 he was elected to the upper house of the territorial legislature, which elected him as its president in 1852 (Mooney 1984, 579). Deady was instrumental in the passage of legislation that established the Oregon Academy in Lafayette and served as a member of its first Board of Trustees (Overmeyer 1935, 251). Such behavior patterns would persist throughout his life; for example, in 1884 he drafted a resolution that established a school of law in Portland (Clark 1975, 447).

In conjunction with a newspaper editor and two other politicians, Deady formed the Democratic Salem Clique, which dominated Oregon politics until 1858 when Democratic party influence was weakened for a decade owing to the issue of slavery and the clash of personalities.

The collapse of the Salem Clique was prelude to Republican Abraham Lincoln's success in Oregon in the 1860 presidential election (Mooney

1984, 579). Although Deady's ability to realize his ambition of judicial office was aided by the Salem Clique, his ability to retain it until his death in 1893 was not harmed by its dissolution.

New Democratic president Franklin Pierce appointed Deady to the territorial Supreme Court in 1853, where he served until Oregon entered the Union as a state in 1859. Deady settled in the Umpqua Valley, since his circuit made up the five southern counties of the Oregon Territory. Consistent with his life-long support of education, he helped build the Umpqua Academy (Overmeyer 1935, 251). Even though winning election to the new state supreme court in 1859, he never served but instead accepted Pres. James Buchanan's appointment to the position of "Oregon's first United States district judge, which he retained until his death in 1893" (Mooney 1984, 580). This appointment led him to move to Portland, which remained his home for the rest of his life. Despite his modest means, he was able to whet his voracious and catholic appetite for reading by taking on the official responsibility of purchasing most of the books for the Portland Library Association (Overmeyer 1935, 294).

During his tenure on the territorial Supreme Court, he was able to win election to the Oregon constitutional convention in 1857. The delegates elected him to preside, and he prescribed measures that were adopted, such as six-year terms for judges and four-year terms for statewide elected officials. Deady would later reverse a number of positions that he advocated at the convention. He opposed state-chartered corporations on the grounds that Oregon's agricultural egalitarian way of life was preferable to the drudgery and filth of industrial life, yet in 1862 he would draft the state's general incorporation statute (Mooney 1993, 88–89). An even more profound change would take place in Deady's racial attitudes and positions.

Deady was the only delegate to be elected to the convention on a proslavery platform, and during his campaign he voiced his support for the United States Supreme Court's *Dred Scott* decision (Mooney 1984, 581). He proposed an amendment for the franchise to be restricted to "the pure white race" (584). As harsh as his attitude was toward Negroes, his estimation of the Chinese was lower. There was little to suggest that he would become as U.S. district judge the foremost defender of the Chinese in Oregon.

Almost two decades intervened between his service at the constitutional convention and his rendering of decisions in which he clearly empathized with Chinese who were suffering from discrimination. Deady has been commonly referred to as a pharisee because of his love of the ritual of Anglo jurisprudence, but Deady, a devoted churchman throughout his life, valued the ritual of the courts not inherently but because it promoted justice. Above all he consistently abhorred barbarism, which he certainly came to see as being directed against the Chinese in Oregon.

Deady consistently expressed empathy with the Chinese in racial discrimination cases that were brought before him beginning in 1876 and that continued until his death in 1893. He delivered one of his celebrated opinions in the case of *Baker v. City of Portland* (1879). The Oregon legislature in 1878 passed a law that prohibited the use of Chinese labor on street and public improvement projects contracted for by municipalities. Since the defendant was employing Chinese, the contract with Portland was declared "null and void." Judge Deady ruled for the defendant by holding that "the Oregon law did violate the Burlingame Treaty and therefore was invalid under the supremacy clause of the federal Constitution" (Mooney 1984, 591). The defendant contractors had cited the Burlingame Treaty, which had been entered into with China and which contained a "most favored nation" guarantee (591). This was one of numerous times that Deady cited a treaty to uphold the rights of Chinese immigrants. The injunction was still granted on behalf of Portland by circuit judge Charles Bellinger of the Multnomah County Court on the grounds that the Chinese exclusion was part of the contract. In issuing his opinion Bellinger, who succeeded Deady in the position of federal district judge in 1893 and like most lawyers and judges of the era was unenlightened in his racial views, never conceded the validity of Deady's reasoning. The defendants appealed Bellinger's ruling. Associate Justice of the United States Stephen J. Field (1816–1899), a California Democrat who had been nominated by Pres. Abraham Lincoln and was highly fond of Deady, was in Portland performing circuit duty for the Ninth Circuit. Field affirmed Deady's decision. Ultimately the Oregon Supreme Court voided Bellinger's decision (592–593). In other decisions, Deady voided ordinances that harassed Chinese laundry operators and that punished opium smoking in the privacy of one's own home. In the latter opinion he observed that opium smoking as opposed to whiskey drinking or tobacco smoking was being singled out because it was practiced by the Chinese (607).

Admiration for the quality of Deady's opinions was not the only factor that made him attractive to Justice Field. Deady, who earned a modest salary, was always interested in obtaining additional income. For example, he wrote weekly letters for the *San Francisco Chronicle*. Deady's willingness to accept money and free passes from railroads endeared him to Field, who engaged in similar behavior, and earned the ire of Republican Ogden Hoffman, who served from 1851 to 1891 as U.S. district judge for northern California. Hoffman, a descendant of a Federalist who had served as attorney general of New York, disdained politics, which also contrasted with the activities of Deady and of Field (the latter actively sought the Democratic presidential nomination a couple of times). Interestingly, Deady in his later years more frequently voted Republican than Democratic and was an active

Moses Hallett (1834-1913)

Although judges created under Article III of the U.S. Constitution dealing specifically with the judiciary have life tenure, judges created under other articles may not. Thus, judges who were appointed under congressional powers established in Article I to U.S. western territorial courts prior to their statehood were appointed by the president and approved by the Senate to four-year renewable terms. Such judges often served singly as trial judges and collectively as appellate judges over these same cases. Often depicted as outside "carpetbaggers," it appears that many territorial judges were in fact men of great ability and dedication, some of whom had actually settled in the territories prior to their appointments.

Among those who began his judicial career as a judge of the Colorado Territorial Court was Moses Hallett. Born in Galena, Illinois, in 1834, he attended Rock River Seminary and Beloit College, read law under a Chicago attorney, and practiced there briefly before moving to Colorado, where he joined Hiram P. Bennet in a short but productive partnership and was one of the first attorneys formally admitted to practice in the territorial courts. When Pres. Andrew Johnson appointed Hallett to the territorial bench in 1866, he was only thirty-two years old (Guice 1972, 97). By then, he had already served as a Colorado delegate to the U.S. Congress and enjoyed an active legal practice.

Hallett served as the chief of the Colorado territorial bench from 1866 to 1877, and in contrast to many other judges who had been appointed from the East, he appears to have been generally popular in the territory. He wrote major decisions dealing with mining, water law, and railroad cases. He was particularly noted for his definition of a lode as "a body of mineral or mineral bearing rock within defined boundaries in the general mass of the mountain" (quoted in Guice 1972, 123). Hallett also modified the English system of common law of ri-

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participant in the 1872 Republican National Convention. He confided to his diary in 1887 that "since 1884–5 [?64–65] at least, when I read Jeffersons [*sic*] works, Websters [*sic*] speeches and Marshalls [*sic*] *Life of Washington*, the trial of Burr and much other contemporary matter, I have been substantially a Federalist" (Clark 1975, 511).

In 1869 it became evident that Congress would establish a judgeship for the California circuit. The three major contenders were Deady, Hoffman, and Lorenzo Sawyer. The latter won it as a compromise choice. Deady had the support of Field but was damaged in the eyes of President Grant by the publicity surrounding his decision in *McCall v. McDowell* (1867). Christian G. Fritz has written that "in that case Deady had ruled that a civilian illegally imprisoned by a military commander for exulting at the news of Lincoln's assassination could recover damages" (1991, 44). When Hoffman re-

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parian right, which gave water rights to those who owned the banks of a river, by allowing miners who did not own riverbanks to continue, as they had previously done, to divert such water to their operations in extracting ore, thus allowing their claims to be more productive (125).

Hallett was a busy man who also advised the national government on Indian policy, directed the Denver Young Men's Christian Association, served as a trustee of a church, and was a director of the Denver Club. Like other territorial judges, Hallett rode the circuit, serving as a trial judge in lower court disputes and as an appellate judge when they were appealed. After he once observed that the same jurors were always seated in a court in the San Juan region, the sheriff told Hallett that because the benches were rough and had splinters, service was limited to the men who had britches with leather seats (Guice 1972, 103). Unlike some frontier judges, Hallett established a reputation for dignity and for due process. On one occasion, Hallett remarked that "the right of every defendant to his day in court is inviolable and in every case it ought clearly to appear that he has enjoyed it" (104).

The only judge on his court to survive the "Grant Purge," Hallett was nominated by President Grant to the United States District Court of Colorado when the territory became a state in 1877, and he served until his retirement in April 1906. Hallett was named in 1892 as the first dean of the University of Colorado Law School at Boulder, where he taught constitutional law. A sharp businessman, he was an active investor in land but does not appear to have enriched himself through abuse of the public trust. Hallett's estate was valued at close to a million dollars at his death in 1913.

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sponded gingerly to an inquiry from U.S. Senator Cornelius Cole (R-Calif.) about his expectations concerning the position, the result was a telegram to Grant that indicated that Ogden Hoffman would be satisfied as long as Deady did not get the position (44).

Hoffman also opposed, to all appearances with success, the appointment of Deady as the first president of the University of California (Clark 1975, xxiii). This may have been a blessing in disguise to Deady, as the longest single tenure of the first six presidents of what is now the University of California–Berkeley was five years ("Presidents of the University and Chancellors"). Deady continued to be an asset to the advancement of education in Oregon, including exercising great influence on the establishment and governance of the University of Oregon. Not withstanding their differences, Ogden Hoffman Jr. and Matthew Deady had amicable relations (xxiii).

One area in which circuit judge Lorenzo Sawyer came into conflict with and generally prevailed over U.S. district judge Matthew Deady was in the realm of land title disputes in Portland. In September 1850, Congress enacted the Oregon Donation Act, which provided 320 acres to each single "white settler" male and 640 acres to each married "white settler" male, with 320 acres going to the wife (Mooney 1993, 67). The legislation set the stage for three cases that dealt with a conflict between formal legal title and "the equitable, possessory claims of Portlanders who had bought and improved small parcels" (74). Ralph James Mooney observed the following outcome, which was upheld in a Supreme Court decision announced by Justice Stephen Field:

> So it was that most early Portland land purchasers finally prevailed against the original proprietors and their heirs holding federal patents to disputed parcels. District Judge Matthew Deady's view of the cases, emphasizing security of formal legal title, preservation of common law conveyancing principles, and literal reading of early deed language, generally did not prevail. Instead it was Circuit Judge Lorenzo Sawyer's view, favoring more fact-oriented, equitable decisions even at the expense of greater legal certainty, which the Supreme Court twice affirmed. (1993, 78)

The United States Supreme Court affirmed most of Deady's opinions that it heard, once affirming five on a single day. Similarly, Deady's decisions on admiralty law have withstood the test of time.

The press and bar praised Sawyer and Deady for their opinions in what Deady refers to as the "Debris case," *Woodruff v. The North Broomfield Gravel Mining Co., et al.*, when the two sat as judges of the Ninth Circuit hearing an appeal from the California federal district court. Debris, particularly that from hydraulic gold mining, was damaging streams, rivers, and watersheds. This bode badly for farmers and other members of the public. Malcolm Clark Jr. has noted that although Deady's concurring opinion was "shorter and pithier" than Sawyer's, it rested on Deady's statement of an enduring truth: " . . . It is a fundamental idea of civilized society, and particularly such as is based upon common law, that no one shall use his property to injure the right of another. . . . From this salutary rule no one is exempt—not even the public—and the defendants must submit to it. Without it the weak would be at the mercy of the strong and might would make right" (Clark 1975, 438).

His concurring opinion in the 1883 case was one of the highlights of what Deady considered to be a remarkable year. He confided to his diary, "There were 42 cases ranging from May 10th, 1883 to June 14, 1884—a pretty good years [*sic*] work. Indeed I think my best and that does not in-

clude my opinion in the Debris case. . . ." (Clark 1975, 447). Of particular importance to Oregon during most of Deady's service on the bench as Oregon's first and only U.S. federal district judge were his decisions in the realm of admiralty and maritime law, owing to the state's relative inaccessibility via modes of transportation other than by ship.

The 1789 Judiciary Act conferred jurisdiction in this area to the federal district courts (Mooney 1993, 78). Deady's decisions were indispensable for Oregon, which was overwhelmingly dependent on the sea for its transportation needs during his tenure. He pursued justice in the numerous cases that came before him, and his sympathies were usually with merchants, seamen, and passengers. Implicit in nineteenth-century maritime law was the idea that goods would be transported safely. In *The Pacific* (1861), the ship owners had added the written statement "not accountable for contents" to a shipment of mirrors sent from San Francisco to Portland, which arrived in a shambles. This dodge to avoid liability did not pass Deady's scrutiny (82). Although rigidly formalistic in his approach to land title disputes, he was more pragmatic and equitable in his handling of admiralty and maritime cases. When a British sixteen-year-old apprentice seaman was injured on the high seas owing to negligence and left unattended by the ship's British captain, Deady held that his court did have jurisdiction and that it would be uncivilized to leave the case unresolved until all the parties were back in Britain. Ralph J. Mooney observed the following concerning the resolution of *The City of Carlisle* (1889): "Instead, Deady awarded the sailor $500 compensation for expenses, including a voyage home, and $1,000 for the 'gross neglect and mistreatment. . . . whereby his injury and suffering were much aggravated'" (81).

Matthew Paul Deady not only wrote widely cited judicial opinions and codified laws but also kept an extensive diary that dealt with matters as varied as lectures delivered to law classes, meals, train trips, his evaluations of sermons, his wedding anniversaries, Mrs. Deady's neuralgia, and his bladder (Clark 1975, 576–577). Not long before the end, the six-foot two-inch auburn-haired Deady noted with concern that his weight was down to 224 pounds. When death came in March 1893, he was surrounded by his family.

Henry Sirgo

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DOE, CHARLES COGSWELL

(1830–1896)

Charles Cogswell Doe
New Hampshire Historical Society

Charles Doe's legal career was unique because thirty-seven of his forty-two years as a lawyer were spent as a member of the New Hampshire Supreme Court. He served as the chief justice of this court from 1876 until his death in 1896. During this tenure he made significant contributions to the state's civil procedure, and his decisions had national impact on the theory of torts and the laws governing evidence (Garraty and Carnes 1999, 68).

Justice Doe's New Hampshire roots dated back to 1663 with family landholdings at Sagamore Creek in lower Portsmouth. This land belonged to Charles Doe's great-great-grandfather Nicholas Doe, who died in 1691. The Does of New Hampshire prospered through speculation and land acquisition for services in the French and Indian War. Charles Doe was the son of Joseph Doe, a Newmarket selectman, who served in numerous official roles and reestablished the Doe fortune to the benefit of his heirs (Reid 1967, 14–16).

Charles Doe, the fourth son and youngest of the six children born to Joseph and Mary Doe, grew up in Somersworth, New Hampshire, in a world made for a boy, in the countryside known as the river uplands (Reid 1967, 28–29).

Charles Doe began his formal education at Berwick Academy, one of the oldest academic institutions in the state of Maine and the pride of South Berwick. In nineteenth-century New England, an academy was the symbol

of a rural community's cultural maturity, a mark of quality that set it apart from less advanced towns (Reid 1967, 30–31). Young Charles would attend several other well-known academies in the region, spending time at Exeter and Andover. While at Andover he was exposed to the leadership of headmaster Samuel Harvey Taylor, a strong disciplinarian. The environment at Andover was more cosmopolitan and intellectually stimulating than at his previous schools.

Upon completing his secondary education, Charles Doe spent a year at Harvard before leaving under suspicious circumstances in response to hazing from upperclassmen. Charles Doe enrolled in Dartmouth College and received his degree in 1849. Following the completion of this formal education at some of the finest academic institutions in New England, he began his training for a career in the law. The education he received over the next several years would have a strong influence on his career as a jurist.

Charles Doe's legal education began in the offices of Daniel Christie, who practiced in Dover, New Hampshire, from 1823 to 1870, participating in nearly every important jury trial in the county. The future justice learned hard work, diligence, and much more from observing the great lawyer practicing his profession. Ironically, Christie was tied to the old common law and was described as "the greatest living expositor among us of the Common Law of England" (Reid 1967, 44–45). By contrast, Charles Doe was suspicious of English authorities and believed that some precedents, the lifeblood of common law, were "frivolous formality." His later reforms of civil procedure and evidence law would have been appalling to his mentor, Daniel Christie (44).

Upon completing three years of service in the Christie law firm, Charles decided to broaden his legal education and enrolled in the Dane Law School at Harvard. The two instructors at Harvard were Professor Theophilus Parsons and Judge Joel Parker. "They were privileged to mold a generation of lawmakers, a generation of legislators, and a generation of judges. During Charles Doe's year alone there were two future senators, two future governors, and two ambassadors, one to France, the other to Great Britain; not to mention future members of the judiciary in Delaware, Indiana, Maryland and other jurisdictions" (Reid 1967, 47).

The legal education Charles Doe received at Harvard from Parsons and Parker greatly influenced his decisionmaking when he later changed the practice of law in New Hampshire. From Parsons, Charles Doe embraced "his dislike for the technical side of the law, especially certain aspects of pleading and property . . ." (Reid 1967, 48). Judge Parker, a former New Hampshire jurist, had authored the landmark case *Britton v. Turner,* 6 N.H. 481 (1834), which involved a plaintiff who contracted to perform a job at a

fixed price to be paid upon completion. The plaintiff unjustly refused to finish the work and sued to recover the value of the work performed. The majority rule at the time would not allow an apportionment award, and recovery could only be made by completion of the entire contract. Judge Parker viewed these as technical arguments that caused an injustice to the plaintiff. Rejecting precedent, Judge Parker opined that plaintiff could recover on a quantum merit the value of the benefit that the defendant had received, deducting damages resulting from the breach (48–49). The decision was accepted by the lawyers of New Hampshire and became good law.

> For Charles Doe this was to be the importance of *Britton v. Turner:* . . . In the name of both reason and justice Joel Parker had successfully rejected precedent, as Judge Doe was to do in many revolutionary decisions. Doe made reason and justice the cornerstones of his jurisprudence and carried to extremes the argument that unreasonable and unjust precedents have no binding authority and that the court may take the initiative in substituting moral judgment for technical rules. (49)

Upon completing his first term at Harvard, Charles Doe chose to return to Dover in 1854 and begin the practice of law. The young Doe possessed a firm practical foundation learned while working for Daniel Christie and strong legal theory learned while at Harvard Law School. This training and education helped make him a good lawyer and great jurist. Charles Doe's early legal career involved routine legal matters, including public service as a solicitor of Strafford County and the private practice of law. More important was his political journey in the volatile abolition movement of New Hampshire. He began his legal career as a pro-unionist Democrat and ended up a Republican as a result of the *Dred Scott* decision. Though he believed in national unity, he was strongly opposed to slavery. Charles Doe became the leading stump speaker for the Republican Party in southern New Hampshire. His political transformation was well documented and soundly criticized by many of the local Democratically controlled newspapers. The young Doe was eventually rewarded for his loyal service to the Republican cause by an appointment to the Supreme Court as an associate justice at the age of twenty-nine (77–80).

Justice Doe's appointment, though viewed as political partisanship, placed him in one of the most arduous positions in the state:

> The bench was not divided between appellate and trial courts, and the judges took turns presiding at *nisi prius* [jury] trials in each of New Hampshire's ten counties. Even the law term, at which appeals were heard en bloc, was not

> confined to the state capital but was held at various shire towns, although for this purpose the state was divided into five districts, the appeals of two counties being disposed of at one session. (Reid 1967, 80–81)

The significance of this arrangement was the exposure Justice Doe received in the handling of individual trials. He came to the Supreme Court with very little practical experience in the daily workings of the law. Justice Doe was exposed to this heavy caseload for the first fifteen years of his tenure on the court.

The practice of law in mid-nineteenth-century New Hampshire was very formalized and writ/pleading driven, based on the old common law causes of action. Many a lawyer's case would fail owing to his improper choice of writ, including debt, trover, trespass, assumsit, or replevin. During the course of trial the lawyer might elicit evidence establishing a different cause of action than the one pleaded. The end result would be the dismissal of the claim because of improper pleadings. Justice Doe found this result unacceptable and went about changing the civil procedure of his state through court decisions rather than through legislative codification. Justice Doe's judicial philosophy concerning a plaintiff's cause of action was simple. If a legal right had been violated, the court must vindicate that right even if it must be creative in the resolution of the case (Reid 1967, 97).

Justice Doe's efforts at changing the procedures of practice in his native state took more than twenty years. He continually rendered decisions at the trial court level, allowing the parties to amend their cause of action under the principle that all actions were by amendment mutually convertible. These decisions were routinely overturned at the appellate level until he assumed the position of chief justice. In 1879, in *Stebbins v. Lancashire Ins. Co.*, 59 N.H. 143 (1879), the court ruled that an amendment may be made at any stage of the proceedings to prevent injustice and that the form of action may be changed by amendment. This decision stood as the cornerstone to Justice Doe's judicial revolution in the courts of New Hampshire (Reid 1967, 98).

Once *Stebbins* became precedent, Justice Doe used this case to expand the principle of amendment to avoid other technicalities that might deny the claimant recovery. In the same year of the *Stebbins* decision, Justice Doe in the landmark case of *Metcalf v. Gilmore*, 59 N.H. 417 (1879), allowed the amendment of a pleading in law to be converted to a pleading in equity (Reid 1967, 100). The significance of Justice Doe's decisions on procedure was the manner in which these changes were accomplished. They were instituted through decisions of the court instead of statutory revisions by the legislature. Justice Doe's efforts in reforming the procedures of his jurisdic-

tion were recognized by other jurisdictions that struggled with these same issues following his death.

> An illustrious exponent in this field of endeavor was Chief Justice Doe, of New Hampshire. It appears that no judge in any of the states has been more active than he in simplifying court procedure, and in expediting litigation, so that today court procedure in New Hampshire is perhaps, more simplified, and in a better working basis than any other state in the Union. Due largely to the efforts of Chief Justice Doe, a case can probably be brought more readily to a final hearing and decision with less delay and obstruction from technicalities in New Hampshire, than in any other state. Illustrating the tremendous power that a strong man can exert, when his energies are applied in a given direction. (Reid 1967, 104)

Justice Doe's decisions in reforming the civil procedure of New Hampshire and the national impact of these decisions are a true tribute to his intellect, hard work, and dedication to the legal profession. These efforts alone would justify his being considered one of the nation's top ten common law appellate jurists of his time (Garraty and Carnes 1999, 698).

The chief justice was not content to deal innovatively with the civil procedures of his state but took on other thorny legal doctrines before his court. Justice Doe made a tremendous contribution in the law of evidence. He introduced the principle that the best evidence rule should involve a question of fact to be decided by a jury, instead of its exclusion being determined by a judge through the use of a legal presumption. This fact versus law dichotomy became the basis for Professor John Henry Wigmore's interpretation of the best evidence rule in his notable *A Treatise on the System of Evidence in Trials at Common Law* (first published in four volumes, which were later expanded to ten, in 1904–1905). Professor Wigmore considered Charles Doe and James Bradley Thayer the leading nineteenth-century reformers of the American law of evidence. Justice Doe's approach to evidence granted the New Hampshire Supreme Court the ability to create a new standard in the area of criminal insanity. Justice Doe's dissenting opinion in *Boardman v. Woodman*, 47 N.H. 120 146 (1865), concerning the verdict on the issue of the sanity of the testator of a will laid the groundwork for later decisions on criminal insanity (Reid 1967, 114–115).

The accepted rule of law was the M'Naghten rule that required a showing that the defendant suffered from a mental illness that caused the person to act. This was considered a legal presumption and treated as a question of law. The New Hampshire Supreme Court in two appellate decisions, *State v. Pike*, 49 N.H. 399, 488 (1870), and *State v. Jones*, 50 N.H. 369–70

(1871), created a new approach to criminal insanity labeled the New Hampshire Doctrine. This theory did not gain much favor outside the state until 1950, when the basic principles were adopted by the United States Court of Appeals for the District of Columbia in creating the Durham Rule as an alternative to the M'Naghten test. The *Pike* and *Jones* decisions made the question of criminal insanity a question of fact for juries, which opened the trial process to unrestricted psychiatric testimony from both lay and expert witnesses (Reid 1967, 115).

Justice Doe's approach to the law was simple in principle and supported by brilliant legal reasoning and boldness of thought. His approach to life was very unassuming and occasionally eccentric. A visitor to Concord, New Hampshire, in the early 1890s could easily mistake the chief justice for a farmer or country storekeeper. He wore a sort of brown frock coat, coarse pants, and heavy boots, or brogans, which had seldom seen boot black. In the summer he would top off his person with a battered straw hat; in the winter he would don a cloth cap with ear flaps. By his dress and habits, he tried to demonstrate that the attributes of plain living and high thinking were quite compatible (Henning 1909, 311–313).

The judge was also a great believer in the benefits of fresh air. He would insist on windows being opened in his home and his court even in the dead of winter. Many a New Hampshire lawyer commented that to attend the "Law Term" when the chief justice was presiding was equal to a trip to the Arctic regions ("Editor's Note" 1896, 161).

Justice Doe died on 13 March 1896 in the railway station in Rollinsford, New Hampshire, on his way to the law term in Concord, the state capital. Due to his sudden death, no painting of the great chief justice appears in the Supreme Court of New Hampshire. Thus, in death as in life, his name and fame are identified with the unique simplicity that he so praised.

Professor Wigmore, the leading authority on the subject, noted Justice Doe's contribution to evidence law. Wigmore's treatise on the subject of evidence bears this dedication: "To the memory of the public services and the private friendship of two masters in the law of evidence, Charles Doe of New Hampshire, Judge and Reformer, and James Bradley Thayer of Massachusetts, Historian and Teacher." Wigmore thus recognized Doe along with a former teacher. The work done by Chief Justice Doe in the field of evidence was significant for its insight and lasted well into the twentieth century.

Crawford Henning, professor of law at the University of Pennsylvania, provided an excellent description of Justice Doe and his body of work as a jurist:

> In no particular region was he such a pioneer as he was in the field of practice and evidence; but wherever his love of investigation and criticism led him to

> prospect he discovered some new vein of high grade ore. He was an engineer who was never deterred or controlled by previous reports, however authoritative, from making his own explorations whenever he believed that accepted views were at war with reason. His opinions generally contain an accurate analysis of all the prior cases on the point involved, even where they are not original in their presentation of argument and illustration. (Henning 1909, 290–291)

Finally, Professor Henning borrowed words from a historian of the Holy Roman Empire who described the attributes of a great medieval reformer: "'His was that rarest and grandest of gifts; an intellectual courage and power of imaginative belief which, when it has convinced itself of aught, accepts it fully with all its consequences, and shrinks not from acting at once upon it.' So Judge Doe steadfastly believed in a golden age of the common law . . . not only in his imagination but in concrete reality he restored that age as he conceived it" (Henning 1909, 314).

James Wagoner

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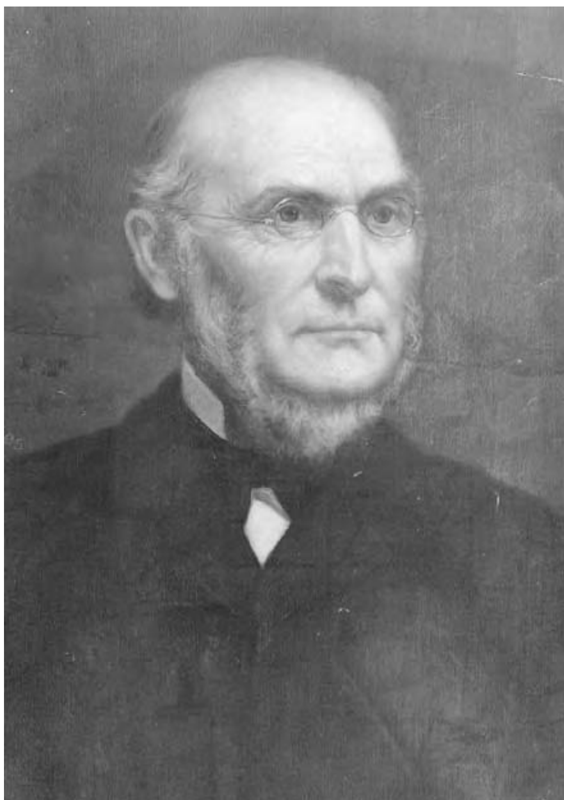
DRUMMOND, THOMAS

(1809–1890)

Thomas Drummond, district and circuit court judge, is little remembered today. During the thirty-four years (1850–1884) in which he sat on the federal bench, however, he was a jurist highly esteemed by his peers for his probity, his concise and clear decisions, his indefatigable work ethic, and his genuine kindness to all fledgling attorneys who appeared before his court. A jurist in a legal world far less formed than today's, Drummond served against a backdrop of monetary and financial crises, labor unrest, civil war, and the great Chicago fire. He was judge of the United States Court for the District of Illinois (1850–1855), the United States Court for the Northern District of Illinois (1855–1869), and the United States Seventh Judicial Circuit Court, comprising Illinois, Indiana, and Wisconsin (1869–1884).



Thomas Drummond
U.S. District Court for the Indianapolis Division of the Southern District of Indiana

Drummond was twice supported by the bar for a position on the United States Supreme Court: in 1873, for the chair of chief justice, left vacant by the death of Salmon P. Chase; and again in 1876, for the chair of retiring Associate Justice David Davis. Pres. William Howard Taft, later to become chief justice himself, in describing Drummond as "one of the great judges of the country," wrote, "While Judge Drummond was never promoted to the Supreme Court, everyone who

came in contact with him felt that he was of the material and temper of which Supreme Court judges ought to be made" ("Presentation to the United States District Court" 1913, 13).

Family

Born 16 October 1809, in Bristol Mills, a small peninsula village in Bristol Township, Lincoln County, Maine, Thomas Drummond was the eldest of four children born to James and Jane (Little) Drummond Jr. The Drummond family, émigrés from Falkirk, Scotland, had settled in Bristol in 1764. The Little family, of Newcastle, Maine, also numbered itself among the earliest New England settlers.

Drummond's mother died when he was but eleven years old. His father, who remarried, was, by turn, a sea captain and a farmer. A lifelong resident of Bristol, he held various town offices and also served a term in the Maine legislature. He died in 1837, when Drummond was twenty-eight.

Education

A product of local schools, the young Drummond attended, successively, Lincoln, Farmington, and Monmouth Academies in Maine. He matriculated at Bowdoin College, in Brunswick, in 1826. Not quite twenty-one, he graduated in 1830. That September he moved to Philadelphia to begin legal studies with William T. Dwight. When Dwight forsook the law for the ministry, Drummond completed reading law in the office of Thomas Bradford. In March 1833 he was admitted to the Philadelphia bar and practiced there for the next two years.

Law Practice

In 1835 he relocated to Galena, Jo Daviess County, in the northwest corner of Illinois. Located on the Galena River, the town was just beginning its ascendancy as a commercial and shipping center. Believing Galena to have better business prospects than the newly formed town of Chicago (incorporated in 1833; population 350), Drummond began his commercial law practice. Crucial to the lead mining industry in the area, Galena would soon become the busiest river port between St. Paul and St. Louis.

In 1839 Drummond married the former Delia Sheldon, of Wisconsin, and shortly thereafter sought political office. Besting the Democrat Thomas H. Campbell, Drummond, a Whig, was elected to the Illinois House of Representatives for the 1840–1841 session. He declined, however, to seek a second term and never again entered elective politics. For the next ten

years he cultivated his law practice, representing bankers, merchants, and businessmen. He attained a preeminent position in a Galena legal community that would come to produce men of national prominence; among them were John A. Rawlings, Grant's secretary of war; Elihu B. Washburne, diplomat and secretary of state, also in the Grant administration; and Edward D. Baker, future senator of Oregon.

District Court

With the death of Judge Nathaniel Pope in January 1850, Whig president Zachary Taylor nominated Drummond to the United States District Court, District of Illinois. He was confirmed by the Senate and received his commission 19 February 1850.

During the October 1853 term, Drummond adjudicated an important case of admiralty law. His decision in *The Flora* (Case No. 4,878. 9 Fed. Cas., 291–294) was believed to be the first case declaring that "the doctrine that the admiralty jurisdiction of the district courts, upon the western lakes and rivers, did not depend upon the [congressional] act of Feb. 26, 1845" (293 n) or, in fact, on any enabling act of Congress; but, rather, that jurisdiction was granted by the authority of the Constitution itself. This early decision was later characterized as "the conception of a masterful mind and of incalculable benefit to shipping, protecting it from the divergent and conflicting laws of the states bordering upon these waters, and [it] gave to commerce the protection of a certain and equitable code of law" ("Presentation to the United States District Court" 1913, 4).

On several occasions during the 1850s, Abraham Lincoln represented clients before the Drummond bench. In 1854 Judge Drummond and Supreme Court justice John McLean presided over a patent infringement case involving Cyrus McCormack and the John Manny Company. With nationally prominent eastern lawyers retained as counsel on both sides, the Manny Company defense team decided, as a strategic maneuver, to retain the services of a "local" lawyer—someone who would be known to the court and the judge. Although they doubted that raw-boned Illinois could produce a lawyer of serious competence for a case this important, the attorneys, nonetheless, settled on A. Lincoln (in fact, their second choice). When Lincoln's less-than-impressive physical appearance seemed to confirm their worst fears, however, they contrived to ignore his presence and discarded, unread, his written arguments. They did, however—against Lincoln's initial objection—pay him $1,000 dollars for his nonperformance. Among the lawyers guilty of this precipitous and erroneous assessment of Lincoln's legal and oratorical skills was Edward M. Stanton, Lincoln's future secretary of war.

Judge Drummond, of course, was well acquainted with Lincoln's legal skills. As recently as 1853 Lincoln had appeared before him as attorney for the plaintiffs in *Columbus Ins. Co. v. Curtenius et al.* (Case no. 3,045, 6 Fed. Cas., 186–193). Of Lincoln the lawyer, Drummond would later write, ". . . his mind was so vigorous, his comprehension so exact and clear, and his judgments so sure, that he easily mastered the intricacies of his profession, and became one of the ablest reasoners and most impressive speakers at our bar. With a probity of character known to all, . . . he was perhaps one of the most successful jury lawyers we have ever had in the State" (Browne 1913, 142–143).

In March 1855, with the District of Illinois now divided into a Northern District, headquartered in Chicago, and a Southern District, based in Springfield, Judge Drummond was reassigned to the Northern District of Illinois. Samuel H. Treat was appointed judge of the Southern District. In late 1854 Drummond relocated to Chicago.

During the Civil War, Judge Drummond was a strong Republican supporter of the Union and of President Lincoln. An organizing member of the Union Defense Committee of Chicago, he often spoke publicly on behalf of the war effort. Nonetheless, in 1863, when Union general Ambrose Burnside, commander of the department of the Ohio (including Chicago), issued a military order and dispatched armed troops to suppress the publication of a stridently oppositional Democratic newspaper, the *Chicago Times*, for "repeated expression of disloyal and incendiary sentiments," Drummond rose in opposition. Reasoning in support of the constitutional right to freedom of speech and the primacy, outside an active theater of war, of civil authority over military, Drummond temporarily stayed Burnside's order, pending a hearing. "It is desirable," he said, "that we should know whether we live under a government of law or under a government simply of force" (Gregory 1907, 515). The next day, 20,000 people held a public rally opposing Burnside's actions. The following day Lincoln rescinded the order.

Circuit Court

On 8 December 1869, Pres. Ulysses S. Grant nominated Drummond to the bench of the United States Circuit Court for the Seventh District. He was confirmed by the Senate and received his commission on 22 December 1869.

Throughout the 1870s, Judge Drummond adjudicated a series of cases involving the railroads. It is, in great measure, upon these decisions that his historical reputation rests. These decisions, mostly forgotten today, helped to calm a turbulent time in U.S. history.

Edith Spurlock Sampson (1901–1979)

Edith Spurlock Sampson was born in Pittsburgh, Pennsylvania, on 13 October 1901. She began her career as a social worker, became an attorney and a diplomat, and then, finally, the first black woman elected as a judge in the state of Illinois (and only the fifth black woman judge in U.S. history).

Sampson was one of eight children born into a working-class home to parents Louis and Elizabeth Spurlock. She was educated in the Pittsburgh public schools, although by the time she was in high school, she occasionally had to leave school in order to work to help support her family. She graduated from Peabody High School in Pittsburgh around 1918 and subsequently entered the New York School of Social Work. Around 1921 or 1922, she married Rufus Sampson, a field-worker for the Tuskegee Institute. They relocated to Chicago.

For several years after their move to Chicago, Sampson cared for her deceased sister's two young children while attending the University of Chicago's School of Social Service Administration. She subsequently worked full-time as a social worker for the Illinois Children's Home and Aid Society and the Young Women's Christian Association while attending night school at the John Marshall School of Law. She graduated with an LL.B. in 1925 but failed the bar exam. While working as a probation officer, she sought additional legal training, enrolling in the Loyola University Law School. She graduated with the LL.M. degree in 1927—the first woman ever to do so at Loyola. She was admitted to the Illinois bar that same year and began practicing law. She was admitted to the bar of the United States Supreme Court in 1934. In addition to her legal practice, she served as a probation officer and as a referee in the Cook County Family Court. In 1947, she was appointed an assistant state's attorney.

In 1949, Sampson's career took an unexpected turn, with a temporary hiatus from legal practice. The National Council of Negro Women selected her to serve as the organization's representative in a public relations effort sponsored by the State Department. The America's Town Meeting of the Air Program sent more than two dozen individuals, representing a variety of civic, cultural, and labor organizations, on a tour of Europe and Asia during which they presented programs and held roundtable discussions of leading social and po-

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The post–Civil War years saw a rapid expansion of the national economy. Industries, particularly railroads, built in excess of the nation's need. Banks extended credit beyond safe limits. From 1869 to 1873, nearly 30,000 miles of railroad were built at a cost of $1.4 billion. High-interest-rate bonds secured much of this debt.

The Panic of 1873 began with the collapse of the financial empire of Jay Cooke. Other financial houses followed. By 1874, eighty-nine railroads, na-

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litical issues of the day, most of which were broadcast by radio. At the conclusion of that tour in 1950, her time of public service did not end. Instead, Pres. Harry Truman appointed her as an alternate delegate to the United Nations, the first black woman to serve in such a capacity for the United States. She held that position until 1953. She also served as a member-at-large on the U.S. delegations to the North American Treaty Organization (NATO) and to the United Nations Educational, Scientific, and Cultural Organization (UNESCO). Sampson continued to represent the United States in one or more of these bodies throughout the 1950s and early 1960s. As a part of the State Department's anti-Communist public relations efforts, Sampson became a much-sought-after speaker, both in the United States and abroad, on the subject of the "Negro condition" in the United States, countering Communist propaganda on that subject. Her activities in that respect were subsequently much criticized by black leaders and by others who rejected the propaganda efforts of the United States during the "Red Scare."

Sampson continued her legal career in Chicago in the late 1950s, and it bore the imprint of her previous experiences in social work and in the "human relations" aspect of citizen foreign policy. After serving as a judge in Chicago's municipal court, primarily handling divorce proceedings, she was elected in 1962 as an associate justice on the Circuit Court of Cook County, Illinois—the first African American woman to hold that title. In that position, she frequently handled landlord-tenant disputes and earned a reputation for siding consistently with tenants at the expense of landlords. After her death on 8 October 1979, Sampson was much lauded in the Chicago press for her work ethic, deep sense of caring for people, and years of public service.

Sampson's papers are in the Schlesinger Library on the History of Women in America at Radcliffe College, Cambridge, Massachusetts.

Lisa Pruitt

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tionally, had defaulted on their bonds. Business failures amounted to $225 million. During the next four years of depression—one of the worst in American history—wages plummeted and 3 million laborers lost their jobs. In Chicago, furthermore, the economic effects of Mrs. O'Leary's cow's great fire of 8 October 1871 further exacerbated the local condition. Large numbers of skilled and unskilled labor had poured into the charred city to rebuild it. In five years the population of Chicago increased by 100,000; but

also, by 1873, tens of thousands were unemployed. A $7–10 pre-fire weekly wage for skilled labor dropped to $2.50 for a workweek of about sixty hours.

By the middle of 1876, nearly 16,000 miles of railroads (involving $300 million in bonds and almost twice that in stock), wholly or partly within Drummond's circuit, had defaulted in their payments of interest on bonded indebtedness. Unable to meet operating expenses, they had passed into the hands of receivers appointed by, and reporting to, Judge Drummond. During this crisis Drummond controlled and oversaw the operation of more miles of railroad than Vanderbilt and Gould combined.

Amid these facts Drummond decided *Turner et al. v. Indianapolis, B. & W. Ry. Co. et al.* (Case no. 14,259, 24 Fed. Cas, 366–367). He held that indebtedness to suppliers and those who operate and care for the property of creditors of a railroad is analogous to a first lien and must be paid before any other debt. This had been Drummond's practice, in fact, for several years before this 1878 ruling. The Supreme Court, in *Fosdick v. Schall* (99 U.S. 235), subsequently upheld the practice and the decision. Justice Jenkins, speaking of this case in 1913, said, "No one decision [of Drummond's], I take it, has had greater significance than this, or has been of greater consequence to the country" ("Presentation to the United States District Court" 1913, 6).

In 1877 a 10 percent reduction in wages (already severely depressed), affecting all railroad workers on all major U.S. railroads, precipitated a national strike. Eighty thousand railroad workers, and 450,000 in related industries, were involved. Nine state governors and most newspapers—at a time when the rights of working people were, at best, poorly defined—viewed the work stoppage not as a legal "strike" but as an "insurrection." Federal troops were used to quell the unrest.

In earlier cases of work stoppage, courts had tried strikers on conspiracy charges; but conspiracy law proved ineffectual at controlling strikes. Such criminal jury trials were slow and difficult to prove. With no legal mechanisms in place to deal with labor unrest and the possible violence that might attend it, Judge Drummond made, as legal historian Lawrence Friedman described it, "virtuoso use of contempt power" to control the "rioters"/"strikers" on railroads in his receivership. In *King et al. v. Ohio & M. Ry. Co.* (Case no. 7,800, 14 Fed. Cas, 539–543) and *Secor v. Toledo, P.& W. R. Co.* (Case no. 12,605, 21 Fed. Cas, 968–973), Drummond ruled that a strike against a railroad in receivership constituted contempt of court and was to be treated in a summary manner. Federal troops could be, and were, sent against demonstrating workmen. Strikers could be, and were, jailed.

The virtue in Drummond's decision to turn receivership orders into standing injunctions against strikes was that courts could act quickly to control possible violence; the vice, of course, was that striking workmen

were deprived of due process. (See Philip S. Foner, *The Great Labor Uprising of 1877* [1977] and Gerald G. Eggert, *Railroad Labor Disputes, The Beginnings of Federal Strike Policy* [1967].)

One last consideration of Drummond railroad decisions: On 4 July 1874, United States Supreme Court justice Davis, Circuit Court judge Drummond, and District Court judge Hopkins rendered a decision of historical consequence in Madison, Wisconsin. *Piek et al. v. Chicago & N. W. Ry. Co. et al.* (Case no. 11,138, 19 Fed. Cas, 625–627) challenged the constitutionality of that state's Potter Law, an early example of the Granger Laws. The court found the law constitutional.

Passed in May 1874, the Potter Law established maximum rates, by classification, for railway freight and passenger traffic. More significantly, however, it established a railroad commission to enforce the new rates. The Patrons of Husbandry, a farm movement popularly called "the Grange," had championed the law. Repealed two years later, it nonetheless signaled a new era of public scrutiny and regulatory agencies for railroads and commerce.

Last Years

Judge Drummond retired from the bench in 1884, at the age of seventy-five. At his last public appearance, in 1888, he addressed a banquet honoring the newly appointed chief justice of the Supreme Court, Melville Weston Fuller (a fellow Bowdoin alumnus and Maine native).

On 15 May 1890 Thomas Drummond died, after a brief illness, at his home in Wheaton, just outside Chicago. He was a widower, his wife having predeceased him in 1874. The Drummonds had seven children, two sons and five daughters. A lifelong Episcopalian, Judge Drummond was a member of St. James Episcopal Church in Chicago and is buried at Graceland Cemetery in that city.

Kevin Collins

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EASTERBROOK, FRANK HOOVER

(1948–)

Frank Hoover Easterbrook
Courtesy of Frank Easterbrook

Frank Easterbrook is known as a prolific, and sometimes controversial, legal scholar and federal judge for the Seventh Circuit Court of Appeals. He is considered one of the key conservative judicial appointments made by Pres. Ronald Reagan in the 1980s and is most closely associated with fellow Seventh Circuit judge Richard Posner and the "law and economics" movement, rooted at the University of Chicago Law School. Easterbrook's legal scholarship has been voluminous and highly influential, ranging from commentaries on antitrust, intellectual property, and civil rights laws to theories of statutory and constitutional interpretation. His influence on the bench has likewise been far reaching, bringing law and economics–style reasoning and his own brand of "textualism" to both statutory and constitutional interpretation.

Easterbrook was born in Buffalo, New York, on 3 September 1948 to George E. Easterbrook and Vimy H. Easterbrook. His maternal grandfather, Frank Y. Hoover, was a second cousin of Pres. Herbert Hoover. Easterbrook's brother, Gregg, is a well-known journalist and commentator, most recently for the *New Republic*. Frank Easterbrook received his B.A. from Swarthmore College in 1970, where he graduated with high honors in

economics and political science and was elected to Phi Beta Kappa. After graduating from Swarthmore, he attended the University of Chicago Law School, receiving his J.D., *cum laude*, in 1973. In law school, he was the topics and comments editor for the *University of Chicago Law Review,* and he was a member of the Order of the Coif.

Easterbrook went on from law school to clerk for Judge Levin H. Campbell on the United States Court of Appeals for the First Circuit from 1973 to 1974. He was admitted to the bar in 1975, in the District of Columbia. From 1974 to 1979, he served in the solicitor general's office in the U.S. Department of Justice, first as an assistant to the solicitor general (1974–1977) and then as deputy solicitor general (1978–1979). In the solicitor general's office, Easterbrook had the opportunity to influence the legal position of the U.S. government in the Supreme Court and other judicial decisions; however, as a holdover from the Nixon and Ford administrations under President Carter's solicitor general, Wade McCree Jr., Easterbrook's positions on legal issues were often outnumbered by those of Carter appointees (see Kalt 1998).

For example, when the Supreme Court granted certiorari in *The Regents of the University of California v. Bakke*, 438 U.S. 265, in 1977, there was pressure from various sources for the government to participate in the case, but initially, McCree was not strongly committed to a position. Drew Days, the head of the Civil Rights Division at the Department of Justice, argued that the U.S. government should take a strong position in favor of the university and affirmative action. Easterbrook took a different position and argued that the government ought to view the Constitution through colorblind lenses and support Bakke's position. The solicitor general's office was lobbied by some of the more liberal members of the Carter administration, such as Health, Education, and Welfare secretary Joseph Califano, to support affirmative action (Kalt 1998, 726). Seeing that he "stood alone" in the solicitor general's office, Easterbrook explored various ways of avoiding the merits of the case or at least tempering the government's support for affirmative action (728–729). In the end, McCree and Days were the primary authors of an amicus brief that supported the constitutionality of affirmative action but opposed quotas and "in its main thrust, said that the record in the case was inadequate to determine the proper result for Bakke himself" (730).

In 1978, Easterbrook was appointed to the University of Chicago Law School faculty as assistant professor of law. He was on leave from July 1978 through June 1979, during which he remained in the solicitor general's office. At the University of Chicago, Easterbrook was promoted to professor of law in 1981, and he was the Lee and Brena Freeman Professor of Law from 1984 to 1985. He was a member of the Securities and Exchange Com-

mission's Advisory Committee on Tender Offers in 1983, and he was also principal employee at Lexecon, Inc., Chicago, Illinois, from 1980 to 1985. He was elected to the American Law Institute in 1983 and to the American Academy of Arts and Sciences in 1992. Easterbrook also served as an editor of *The Journal of Law and Economics* from 1982 until 1991.

As a law professor, Easterbrook quickly and firmly established himself as part of the "law and economics" school of legal thought, which maintained (and continues to maintain) its unofficial home at the University of Chicago Law School. The law and economics school has been appropriately characterized as a legal philosophy that "sets economic efficiency as its goal, balances benefits against costs to decide questions of law, and rejects value-laden concepts such as substantive due process . . ." (Marcus 1988, 38). Easterbrook was a prolific legal scholar from the outset, publishing in various top-tier law journals on a myriad of topics; in the early 1980s, he published numerous articles on antitrust law, securities regulations, statutory construction, and constitutional interpretation (for example, Easterbrook 1981, 1984a, 1984b, 1985). Easterbrook's scholarly adherence to the law and economics philosophy, and his insistence that judicial decisions should have clear and strong connections to text of statutes or the Constitution, did not go unnoticed by officials in the Reagan administration.

On 25 February 1985, Pres. Ronald Reagan nominated Easterbrook for a newly created seat on the United States Court of Appeals for the Seventh Circuit in Chicago. Easterbrook was confirmed by the Senate on 3 April 1985, and he received his commission the next day. Easterbrook, who personified the young conservative, was one of several of that ilk appointed by Reagan. Among the appointees, several had also been academic lawyers prior to their appointments. At least one commentator described the state of judicial affairs at the time as "the Bench's Conservative Baby Boom" (Lauter 1985, 30). The thirty-six-year-old Easterbrook was appointed by Reagan in the same wave as forty-year-old Harvie Wilkinson (Fourth Circuit), thirty-eight-year-old Kenneth Starr (District of Columbia Circuit), and thirty-four-year-old Alex Kozinski (Ninth Circuit), among others. The ages of these appointees were fifteen to twenty years younger than the average age of appointees from the three previous administrations and were largely viewed by court observers as the Reagan administration's attempt to leave a lasting imprint on the federal judiciary (see Lauter 1985; Norton 1986). Easterbrook's name also frequently accompanies mention of other Reagan judicial appointees, such as Robert Bork and Antonin Scalia, both of whom are also former law professors, served in the Justice Department, served on the federal Court of Appeals, and were nominated to the Supreme Court by President Reagan (of course, Scalia was confirmed to the high court but Bork was not).

Frank M. Coffin
(1919–)

One of the most thoughtful expositions of the role of a federal appellate judge has been penned by Frank M. Coffin. Born in Maine in 1919, Coffin attended Bates College and the Harvard Business School before serving as a lieutenant in the United States Navy. Subsequently earning a law degree from Harvard, he went into private practice in Maine and served as a U.S. representative from that state from 1957 to 1961. Pres. Lyndon Johnson appointed Coffin to the United States Court of Appeals for the First Circuit, where he served until taking senior status in 1989. He was the court's chief judge from 1972 to 1983.

In his book on appellate courts, Coffin discussed how appellate courts developed, how appellate judges go about their business, how they work together as a group, and how they attempt to think. Coffin's own experience may not be characteristic of the judges in other circuits, but in describing the collegiality that he shared with his fellow judges, Coffin noted that he could "think of no other contemporary

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Although Easterbrook was appointed to the bench along with many other "Reagan conservatives," he is usually associated most closely with Judge Richard Posner, also on the Seventh Circuit, also an ex-professor of law from the University of Chicago Law School, also a prolific legal scholar, and appointed by Reagan to the bench in 1981. Posner may be considered the godfather of the "Chicago school" of law and economics by most, but Easterbrook, who is ten years younger and often described as Posner's protégé, is generally viewed as equally, or nearly as, influential as a judge on the Seventh Circuit. Most news articles written about the contemporary Seventh Circuit mention Easterbrook and Posner in the same breath. As early as 1988, court watchers were making claims such as, "Together, they've helped transform a circuit" (Marcus 1988, 38). Together they have also been described as "dynamic legal thinkers" (Rosen 1995, A29) and "first rate judges because they are first rate writers" (Kilpatrick 1996, 5A).

While on the bench, Easterbrook, along with Posner, has been a prolific opinion writer, writing far more opinions per term than the average number written by circuit court judges—frequently, Posner and Easterbrook are the top two opinion writers on all of the federal courts of appeals (see George 2001, 51; Marcus 1988). Not only does Easterbrook produce a large number of judicial opinions, but he is considered one of the best writers in terms of quality as well; his opinions are generally considered well reasoned and clear with well-supported conclusions (Kilpatrick 1996; Rosen 1995). Undoubtedly, Posner and Easterbrook have both had a significant influence on

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institutional grouping that reaches the level of intimate, equal, permanent, independent, and single-minded collegiality" (Coffin 1980, 171).

After reviewing the works of scholars who viewed judges as oracles who discover the law as well as those who believed that judges "make" laws, Coffin described the qualities that he thought judges should embody:

> Judging is most certainly not a matter of mystical revelation. Neither is it all logic or all science. Nor is it all a matter of institutional competence or a search for neutral principles. Finally, it is not the systematic application of a comprehensive theory of social utility or moral values.
>
> Judging is a mixture of all of these, the formula for the wisest and most just mixture remaining as yet unrevealed. (Coffin 1980, 245)

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the Seventh Circuit as well as a broader influence on legal theory and interpretive theories.

In decisions involving economic regulations, the two usually take similar positions, adhering to economic-style analyses and favoring outcomes that maximize economic and market efficiency. For example, in *International Union, United Automobile, and Aerospace and Agricultural Implement Workers v. Johnson Controls, Inc.*, 886 F.2d 871 (1989), a woman sued her employer, Johnson Controls, for sex discrimination because the employer had a policy, due to the risk of birth defects, of excluding women capable of becoming pregnant and bearing children from certain jobs that involved high exposure to lead. The Seventh Circuit heard and decided the case *en banc*. In a 7–4 decision, the majority of the court held that the corporate policy was lawful and did not amount to sex discrimination by Johnson Controls. In fairly scathing dissents, both Easterbrook and Posner argued that women are perfectly capable of deciding for themselves whether they want to bear the risks associated with lead exposure and whether or not they plan to become pregnant. Easterbrook saw this as a clear violation of the plain meaning of the *text* of Title VII of the Civil Rights Act of 1964, which "forbids employers 'to discriminate against any individual . . . because of such individual's . . . sex'" (*International Union*, 908). Moreover, Easterbrook considered in detail the effects such policies could have on the national labor market, concluding that 15 to 20 million women could lose jobs, and if these types of policies were adopted nationwide, women would have signif-

icantly less access to high-paying industrial jobs. The United States Supreme Court granted certiorari in the case and unanimously reversed the Seventh Circuit decision, essentially agreeing with Easterbrook and Posner (*United Automobiles v. Johnson Controls Inc.*, 499 U.S. 187 [1991]).

Easterbrook and Posner are not clones, however, and they have disagreed in some high-profile cases. For example, in *Edmund v. Goldsmith,* 183 F.3d 659 (1999), they disagreed on whether it is constitutional under the Fourth Amendment's search and seizure clause for police officers to set up roadblocks to search cars for drugs. Writing for the majority in a two-to-one decision, Posner held that roadblocks conducted in Indianapolis involving searches of completely randomly chosen vehicles for the sole purpose of finding drugs was a violation of the Fourth Amendment. Easterbrook disagreed and wrote a dissent in which he argued that in the case at hand, the police roadblock was reasonable, minimally intrusive, and a very successful means of confiscating illegal drugs. In the same year as the *Edmund* case, Easterbrook and Posner again disagreed over a constitutional issue—this time with Easterbrook writing for the majority. At issue in *Hope Clinic v. Ryan,* 195 F.3d 857 (1999), was the constitutionality of Illinois and Wisconsin statutes that banned "late-term," or "partial birth" abortions. Writing for a five-to-four majority of the *en banc* decision, Easterbrook held that the bans on partial birth abortions could be applied constitutionally. Posner disagreed and wrote a sharp dissent in which he accused the states of attempting to circumvent the constitutionally protected right of women to seek abortion.

These latter two decisions by the Seventh Circuit indicate that although Easterbrook and Posner may be like minded on many issues, especially economic ones, they view some issues, particularly certain constitutional issues, through different-colored lenses. Although Posner's view of the Constitution strikes a chord with a more civil libertarian view of the Constitution, Easterbrook's view is more likely to accept government regulation over individuals in some areas. Easterbrook is especially opposed to the use of substantive due process doctrine to invalidate governmental regulations, as his views in the late-term abortion case made clear (see also Wilson 1986).

In addition to the quantity and quality of his judicial opinions, Easterbrook has remained an active and prolific legal scholar while on the bench, continuing to publish books and a seemingly unending number of law review articles (for example, Easterbrook 1981, 1998)—"some of them scholarly," he glibly notes on his University of Chicago home page (http://www.law.uchicago.edu/faculty/easterbrook/). His academic writings continue to be influential. In fact, in a recent study of legal citations by Fred R. Shapiro (2000), Easterbrook is considered one of the most cited legal scholars of all time. According to that study, Easterbrook is the twenty-first most cited

legal scholar of all time, and of young legal scholars (age fifty or younger), Easterbrook ranks second only to fellow University of Chicago law professor Cass Sunstein (424–425).

Easterbrook's productivity, the quality of his writings, and his generally conservative approach to adjudication have landed his name on Republicans' lists for vacant Supreme Court seats on at least two occasions. In 1987, when Justice Lewis Powell retired, Easterbrook's name was apparently on a Justice Department list of those considered to replace him, and when Robert Bork's nomination for that post was defeated, Easterbrook was again considered a potential nominee by many (Wermiel and Hume 1987; Marcus 1987). Eventually, of course, Anthony Kennedy was confirmed as Powell's replacement. It has also been reported that Easterbrook's name may be on Pres. George W. Bush's list of potential Supreme Court nominees (Deibel 2000). Although an Easterbrook nomination to the Supreme Court would certainly appeal to many Republicans and conservatives, some observers speculate that Easterbrook will be passed over for fear of a contentious confirmation battle due to his solidly conservative record and what is perceived as an abrasive and abrupt personality and temperament (Marcus 1988); not surprisingly, his supporters prefer to characterize his style as refreshingly blunt, honest, and to the point (see Rosen 1994). Although it remains to be seen whether he will eventually be tapped for the Supreme Court, Easterbrook's legacy promises to be influential and long-standing.

J. Mitchell Pickerill

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EDGERTON, HENRY WHITE

(1888–1970)

Henry White Edgerton
Library of Congress

Henry White Edgerton served on the United States Court of Appeals for the District of Columbia from 1938 until the time of his death in 1970. He was a consistent defender of the interests of minorities, labor, the poor, the espousers of unpopular causes, and others likely to be looked down upon by society. As one of his law clerks has observed, he believed that "liberty required the protection of the weak and the despised" (Babcock 1995, 710). His opinions were often precursors, both in reasoning and result, of the decisions of the Supreme Court in the Warren era.

Although he was born in Rush Center, Kansas, on 20 October 1888, his parents—Charles E. Edgerton and Annie White Edgerton—were longtime residents of upstate New York, and Edgerton attended school in Binghamton and Ithaca, New York, until his father, a government economist, moved his family to Washington, D.C. He began college at the University of Wisconsin in 1905, where he remained for two years, subsequently enrolling in Cornell, where he graduated in 1910. He evidenced his sympathy for the social and economic underdog even as a young man by stating in his college yearbook that he aspired to be a labor agitator. After graduation, he went to Europe and attended lectures in the School of Law at the University of Paris, after which he entered

Harvard Law School, and received his law degree from there in 1914. Admitted to the bar in 1916, he practiced law with firms in St. Paul, Minnesota, and Boston, Massachusetts, and worked briefly at the Library of Congress, before accepting a faculty appointment at Cornell Law School in 1916, a position he was soon obliged to relinquish because of his declared opposition to the entry of the United States into World War I (Metzger 1970, 37). He returned to the practice of law with one of the leading law firms in Boston in 1918, remaining there until 1921, when he was appointed to the law faculty at George Washington University. He taught there for eight years, then became professor of law at Cornell in 1929. He taught there (except for a period of leave in 1934–1935 when he served in the Department of Justice as a special assistant to the attorney general in the Antitrust Division) until his appointment by Franklin Roosevelt in 1937 to be associate justice of the United States Court of Appeals for the District of Columbia—a title that changed to circuit judge when Congress redesignated the court as a Circuit Court of Appeals in 1948. He served as chief judge of that court from 1955 to 1958, when he reached the age of seventy. He became a senior circuit judge in 1963 and continued in that position until his death at his home in Washington, D.C., on 23 February 1970.

Edgerton's legal scholarship while a faculty member was highly regarded. So renowned a jurist as Benjamin Cardozo, in his 1927 Carpentier Lectures at Columbia, specifically cited two of the articles Edgerton wrote while at George Washington, describing them as "illuminating," supported by "a wealth of illustration," and marked by "discernment and understanding" (Cardozo 1928, 34, 86). Some stir was caused by an article that he wrote shortly before his judicial appointment in which he reviewed every instance of Supreme Court invalidation of acts of Congress passed prior to the inauguration of Franklin Roosevelt and concluded that, without regard to the merits of any of the decisions, the invalidations overwhelmingly burdened the relatively underprivileged members of society in favor of the relatively well off (Edgerton, 1937). The article raised concern among senators who feared that he might be unwilling to exercise the power of judicial review, and he was summoned to appear before a subcommittee of the Senate Judiciary Committee to explain his position to committee members who had also received letters and phone calls denouncing him for his views on World War I and describing him as "an enemy of the capitalistic system and a member of the Socialist party" (*New York Times,* 3 December 1937, 1, 9). When asked by the senators whether he believed in the legitimacy of judicial review and whether he would be prepared to declare laws unconstitutional, he emphatically answered both questions affirmatively, and prompt confirmation followed (U.S. Senate 1937, 3–7).

On the bench, Judge Edgerton was a path breaker. He was the first federal judge to appoint a woman law clerk, and the first to appoint an African American law clerk (Babcock 1995, 709). He was also the first (in a dissenting opinion four years before *Brown v. Board of Education*) to declare racial segregation in public schools to be a violation of the Constitution. Such segregation, he declared in 1950, "fosters prejudice," "aggravates the disadvantages of Negroes and helps to preserve their subordinate status," and "exists because the people who impose it consider colored children unfit to associate with white children," and thus cannot constitutionally be required by an agency of government (*Carr v. Corning* 1950, 32–33). Prior to that opinion, he also anticipated the Supreme Court decision forbidding judicial enforcement of racially restrictive covenants, arguing in dissents in 1945 and 1947 that the 1926 decision of the Supreme Court apparently affirming the validity of such covenants (*Corrigan v. Buckley*) did not preclude courts from having "nothing to do with such a contract unless to prevent its enforcement or performance" (*Mays v. Burgess* 1945, 875) and that, whatever the legality of these covenants, "the Constitution forbids courts to enforce . . . racial restrictions on transfer and use of property" (*Hurd v. Hodge* 1947, 240). In the latter case, the Supreme Court reviewed the decision from which Judge Edgerton had dissented and reversed it, affirming Edgerton's position, and concluding in it and its companion case that state court enforcement of racially restrictive covenants constitutes state action in violation of the equal protection clause of the Fourteenth Amendment (*Shelley v. Kraemer* 1948, 20) and that their enforcement in the courts of the District of Columbia would be contrary to the public policy of the United States (*Hurd v. Hodge* 1948, 35).

Another landmark decision of the Supreme Court that had its precursor in the opinions of Judge Edgerton was *New York Times v. Sullivan* in 1964, in which the Court placed constitutional limits on the common law of libel in cases where the plaintiff was a public official seeking damages for defamation against a critic of his performance of his official duties. That case involved an attempt by public officials and judges in Alabama to silence critics of the state's racially discriminatory policies by bringing libel suits against individuals, newspapers, and broadcasters attacking those policies and obtaining large jury awards that would be affirmed by the state's courts. The Supreme Court, reversing the affirmance by the Supreme Court of Alabama of a libel judgment against the *New York Times*, in favor of a city commissioner, based on an advertisement in the *Times* objecting to racial injustice in the state that neither mentioned nor alluded to the commissioner, announced the rule that a critic of the official conduct of a public official could not constitutionally be held liable for damages for that criticism unless it was proved that the criticism was knowingly false or

made in reckless disregard of the truth. In his opinion for the Court, Justice Brennan mentioned Judge Edgerton by name (*New York Times v. Sullivan* 1964, 272) and quoted a long passage from his opinion in the 1942 case of *Sweeney v. Patterson* as being a proper statement of the law. In that case, Sweeney, a member of Congress from Ohio, brought a libel action against the publisher of a Washington newspaper that had printed a column by the political commentator, Drew Pearson, that accused Sweeney of opposing a nominee for a federal judicial appointment because the nominee was Jewish. Writing for a unanimous panel of the Court of Appeals affirming a district court ruling granting summary judgment to the publisher, Judge Edgerton had declared that the imposition of

> liability for erroneous reports of the political conduct of officials reflect[s] the obsolete doctrine that the governed must not criticize their governors. . . . [All citizens] are vitally concerned in the political conduct and views of every member of Congress. . . . Information and discussion will be discouraged, and the public interest in public knowledge of important facts will be poorly defended, if error subjects its author to a libel suit without even a showing of economic loss. Whatever is added to the field of libel is taken from the field of free debate. (*Sweeney v. Patterson* 1942, 458)

Judge Edgerton had the opportunity to reiterate that view four years prior to the Supreme Court's *Sullivan* decision when he dissented from the affirmance by the Court of Appeals of a libel judgment in favor of Maj. Gen. Harry Vaughan (military aide to, and crony of, Pres. Harry Truman), based on a caption under a picture of Vaughan in a national magazine suggesting that unspecified "charges" against him made by Drew Pearson were confirmed by the statements of witnesses before a Senate committee. Edgerton maintained that *Sweeney v. Patterson* should have governed the case because the caption obviously had reference to Vaughan's conduct of his official duties and thus, even if it was erroneous, under *Sweeney* no award of damages should have been permissible (*Curtis Publishing Co. v. Vaughan* 1960, 31). To be sure, Judge Edgerton did not contend for a rule as far reaching as that adopted by the Supreme Court in *Sullivan,* for he would not have forbidden a libel award in a suit by a public official where there was a "charge of crime, corruption, gross immorality or gross incompetence" or where the defamatory falsehood caused the official to lose his elected or appointed position or otherwise to suffer economic loss (*Sweeney v. Patterson* 1942, 457, 458), but his recognition that libel suits by public officials can seriously curtail free debate on matters of public importance was certainly the key element underlying the Supreme Court's decision.

Because the Court of Appeals for the District of Columbia had appellate

jurisdiction over the conduct of criminal trials that would normally be the concern of state courts, criminal cases constituted a significant portion of its docket, and Judge Edgerton consistently displayed a strong concern for protecting the rights of accused persons. His philosophy in this regard was epitomized in a statement in an opinion issued late in his career: "The courts of the District of Columbia should not content themselves with enforcing the minimum standards which the Constitution requires. They should also set for the Nation an example of respect for the rights of citizens" (*Jones v. United States* 1964, 868). It was a philosophy that motivated his actions throughout his years on the court.

One of his first dissents as a judge demonstrated his commitment to defend prisoners against the potential abuse of police interrogation tactics. In 1939, he argued, in a lone dissent on this particular issue, that a confession obtained by police after an all-night interrogation of a murder suspect who was in a drunken stupor and had to be repeatedly reawakened and who was, in that condition, taken in the rain to the crime scene in pajamas, should not have been admitted into evidence. Such treatment, he declared, "may have worn down his resistance until the need for peace drove him to say, regardless of the truth, what seemed necessary in order to get it" (*McAffee v. United States* 1939, 34). In support of his opinion, he cited the findings in the 1931 report of the Wickersham Commission on the topic of lawlessness in law enforcement regarding the evils of the "third degree" and the danger it creates of inducing false confessions (Chafee, Pollak, and Stern 1931, 181–187). That same concern was cited by the Supreme Court four years later when it held, in the exercise of its supervisory power over the administration of criminal justice in the federal courts, that confessions obtained by federal law enforcement officials during a period of unnecessary delay in bringing an arrested person before a magistrate to be informed of his rights would be inadmissible in federal trials (*McNabb v. United States* 1943, 344).

Judge Edgerton's insistence on scrupulous regard for the rights of criminal defendants was reinforced by his concern for assuring equal treatment for minorities and the poor. As early as 1948, he dissented from the brusque dismissal by the majority of a Court of Appeals panel of a claim that a prosecutor's use of peremptory challenges to dismiss every black in the venire in the trial of a black defendant was a denial of due process. The Supreme Court had held in 1880 that blacks could not be systematically excluded from juries by excluding them from the lists from which grand jurors and trial jurors would be drawn (*Strauder v. West Virginia,* 1880), and Edgerton maintained that "the rule against excluding Negroes from the panel has no value if all who get on the panel may be systematically kept off the jury" by the use of peremptory challenges (*Hall v. United States* 1948, 166). Edgerton's reasoning was not accepted by a majority of the Supreme Court in

1965, when the Court held that the exclusion of blacks from a jury through peremptory challenges in any single case could not overcome the presumption that the prosecutor was legitimately seeking an impartial jury (*Swain v. Alabama* 1965, 222). In 1986, however, the Court repudiated that position and declared, as had Judge Edgerton, that inasmuch as "the Constitution prohibits all forms of purposeful racial discrimination in selection of jurors," it "forbids the prosecutor to challenge potential jurors solely on account of their race" (*Batson v. Kentucky* 1986, 88–89).

With regard to the poor, Judge Edgerton strongly opposed procedural rules that threatened denial of equal justice to those without the ability to pay for it. He believed in the soundness of the Supreme Court's conclusion in *Griffin v. Illinois* that the judicial system "can no more discriminate on account of poverty than on account of religion, race, or color" (*Griffin v. Illinois* 1956, 17).

He argued in dissent that the grounds for dismissing an appeal where the appellant is proceeding *in forma pauperis* should be no different from those recognized when the appeal is prepaid, for the employment of a looser standard "prevents the petitioner because he is poor from proceeding with an appeal he could proceed with if he were rich" (*Cash v. United States* 1958, 741). He also challenged the form of sentence that provides the alternative of fine or imprisonment as incompatible with the *Griffin* decision because, under it, only those unable to pay the fine need suffer imprisonment (*Wildeblood v. United States* 1960, 594).

Beyond doubt, the most courageous struggle of Judge Edgerton's judicial career related to the decision of the constitutional issues that arose from the perceived need to preserve national security against the threat of subversion in the early Cold War period. Soon after the Cold War began, cases started coming to his court involving contempt of Congress convictions of witnesses who refused to answer questions before the House Un-American Activities Committee, appeals by persons denied security clearances or dismissed from government employment on the basis of allegations of questionable loyalty, and suits by organizations seeking to have their names removed from the attorney general's published list of Communist or subversive groups. In the cases in each of these areas in which he participated, the Court of Appeals invariably ruled in favor of the government, and Judge Edgerton dissented.

He contended that it was a violation of due process for the attorney general to list an organization as Communist or subversive without notice or hearing (*Joint Anti-Fascist Refugee Committee v. Clark* 1949, 87), a position that was sustained by the Supreme Court (*Joint Anti-Fascist Refugee Committee v. McGrath* 1951). He dissented passionately when the two other judges on the three-judge panel hearing the case upheld the dismissal of a

government employee from a nonsensitive position because questions as to her loyalty had been made in confidential reports stating that unnamed persons had identified her with the Communist Party. He pointed out that the dismissal had been effected "[w]ithout trial by jury, without evidence, and without [her] even being allowed to confront her accusers or to know their identity." How, he asked, can an individual defend "against vague assertions of unseen and unknown persons?" (*Bailey v. Richardson* 1950, 66, 68). Nevertheless, the United States Supreme Court by an equally divided vote affirmed the decision of the panel majority without opinion (*Bailey v. Richardson* 1951). In 1955, Edgerton dissented from the judgment of a panel majority holding that Congress had empowered the president to authorize the dismissal of government employees in nonsensitive positions on grounds of national security, arguing that the law in question applied only to employees in agencies whose responsibilities related to security (*Cole v. Young* 1955, 341–343), a contention that was supported by a majority of the Supreme Court in 1956 (*Cole v. Young* 1956). The Supreme Court in 1960, however, after being chastened by intense political opposition to decisions such as that, did not sustain his position (which had initially been written as a majority opinion for a three-judge panel but which became a dissent when the panel was reversed, five to four, after a rehearing by the full Court of Appeals) that, in the absence of a hearing and without providing any explanation, the navy could not force a cook employed by a contractor running a cafeteria on a naval installation to lose her job by withdrawing her security badge and thus denying her access to the installation (*Cafeteria and Restaurant Workers Union v. McElroy* 1960, 193–195). The Supreme Court, also five to four, ruled that the navy had full control over access to its installations and did not have to grant a hearing or give specific reasons for excluding anyone from an installation on security grounds (*Cafeteria and Restaurant Workers Union v. McElroy* 1961).

The first case to come before the Court of Appeals for the District of Columbia involving contumacious witnesses before the House Un-American Activities Committee was *Barsky v. United States* in 1948, in which the court affirmed the convictions for contempt of Congress of officials of an organization who refused to produce the records of that organization as demanded by the committee. By a vote of two to one, the court held that the threat to national security posed by a group whose members were allegedly sympathetic to the cause of communism justified the committee's demand for its records and that the interest in protecting national security outweighed any cost to freedom of speech resulting from a congressional inquiry into political beliefs (*Barsky v. United States* 1948, 246–247). Public fear of internal subversion was so great at the time that opposition to any form of attack on persons having past or present sympathy for left-wing causes was

virtually politically impossible. The Supreme Court—apart from Justices Black and Douglas—was unwilling to defend the constitutional freedoms of such persons, and judges of the lower federal courts shared in that attitude. It was noted at the time that persons in the film industry, like others in other walks of life, who stood up to the Un-American Activities Committee "were promptly cited for contempt of Congress, and were indicted, tried, and convicted in the district courts of the United States where their constitutional objections to the power of the Committee received short shrift" (Bontecou 1960, 38). Henry Edgerton was one of a very few federal judges (Judge Charles Clark of the Second Circuit and Judge David Bazelon of the District of Columbia Circuit were others) who had the temerity to argue in defense of the constitutional rights of political dissidents.

Judge Edgerton was the dissenter in the *Barsky* case, pointing out that legislative inquiries into political beliefs abridge speech by making people "wary of expressing any unorthodox opinions" and that the purpose of such inquiries was plainly to impose penalties on those who might hold them (*Barsky v. United States* 1948, 252–260).

The Supreme Court declined to review the *Barsky* decision, but in 1956, Judge Edgerton, this time joined by Judge Bazelon, momentarily provided a two to one majority in *Watkins v. United States* to reverse the contempt conviction of another witness before the committee, one who testified about himself but refused to identify as Communists persons he believed to have left the party. The decision of the panel was reversed, however, when the full court voted to rehear the case, and Judge Edgerton, joined only by Judge Bazelon, filed his initial opinion as a dissent, asserting that the committee's inquiry had no valid legislative purpose but only the invalid one of exposing the political beliefs of dissidents (*Watkins v. United States* 1956, 691–694). This time the Supreme Court chose to intervene, and it reversed the Court of Appeals on the technical ground that the committee had not made clear to Watkins the pertinency of the questions he was asked to the question under inquiry by the committee, so that he could not know whether he was required by the law (which only made unlawful the failure to answer pertinent questions) to answer (*Watkins v. United States* 1957, 200–215). The political pressure on the Supreme Court after this decision was sufficient to persuade a majority to step back, and in 1959, a five-justice majority chose to disregard what had been said in the *Watkins* case and upheld a contempt conviction in a case not obviously distinguishable from *Watkins* (*Barenblatt v. United States*), a case in which, as was to be expected, Judge Edgerton voted to overturn the conviction and thus dissented from the five-to-four affirmance of it by the Court of Appeals (*Barenblatt v. United States* 1958, 136–138). After 1962, when the composition of the Supreme Court changed, however, no other convictions of recalcitrant wit-

nesses before legislative committees investigating alleged subversion were upheld by the Court, and Judge Edgerton's opinions in this area effectively became the law.

In 1956, Yale University conferred an honorary doctorate of laws degree on Judge Edgerton, declaring in its citation that he represented "one of the truest voices of our constitutional tradition."

Dean Alfange Jr.

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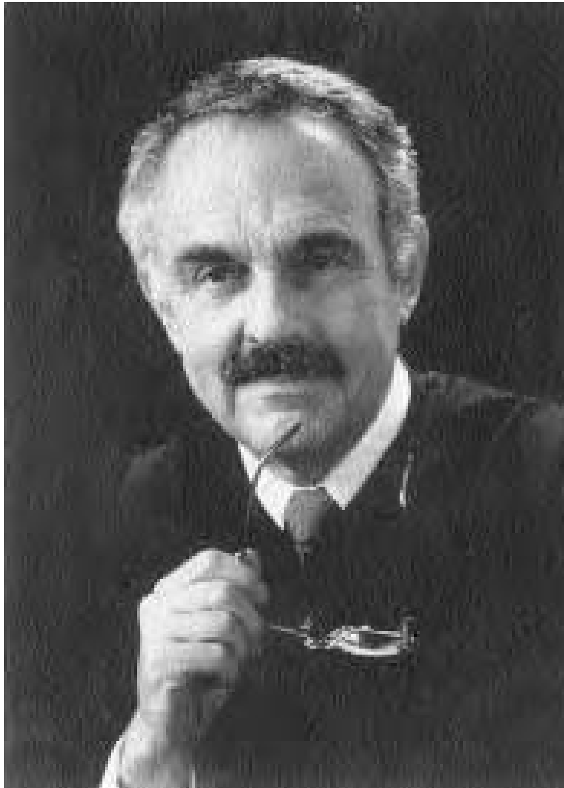
ENSLEN, RICHARD ALAN

(1931–)



Richard Alan Enslen
Courtesy of Judge Richard Alan Enslen

U.S. district judge Richard Alan Enslen distinguished himself as a federal judge noted for using his judicial authority to protect constitutional rights. Moreover, he served as a national leader in the implementation of alternative dispute resolution (ADR) techniques in the federal courts.

Richard Alan Enslen was born in Kalamazoo, Michigan, on 28 May 1931, the son of E. T. and Pauline Enslen. His father was a photographic engraver, and his mother was a homemaker. He left Kalamazoo College as a sophomore in 1951 to join the United States Air Force at the start of the Korean War. Upon leaving military service, Enslen worked his way through the Wayne State University School of Law in Detroit. He received his LL.B. degree in 1958 and returned to Kalamazoo to practice law. He interrupted his legal career in 1965 to serve as the director of the Peace Corps in Costa Rica until 1967. Returning to Kalamazoo, he became a state district judge in 1968. He returned to private law practice in 1970. Later, he was an unsuccessful Democratic candidate for Congress. In 1979, Pres. Jimmy Carter nominated Enslen for appointment as a U.S. district judge for the Western District of Michigan. After a quick confirmation process in the U.S. Senate, Enslen began his federal judicial service in Kalamazoo. While

serving as a federal judge, he earned an LL.M. degree from the University of Virginia School of Law in 1985. He also coauthored several reference books on constitutional law, including *The Constitutional Law Dictionary* (Chandler, Enslen, and Renstrom 1985). Judge Enslen was elevated to chief judge of the Western District of Michigan in 1995, and he served in that capacity until 2001. Since then he has continued his regular service as a U.S. district judge.

As an attorney in the 1970s, Enslen gained local prominence as the lead attorney for the National Association for the Advancement of Colored People (NAACP) in a controversial school desegregation lawsuit that brought court-ordered busing to the Kalamazoo public schools. Enslen's efforts provided a preview of his later judicial career in which he demonstrated a consistent willingness to protect constitutional rights without regard to the popularity of his decisions. His federal judicial career has consistently reflected his view that the Bill of Rights is an antimajoritarian document and that federal judges must use their authority to protect the constitutional rights of unpopular individuals and political minorities despite opposition from government officials, the news media, or public opinion.

Many judges secure their place in history through notable judicial opinions that define law and public policy. This path to prominence is less accessible to trial court judges because enduring interpretations of law concerning controversial issues typically come from the United States Supreme Court or other appellate courts. Thus, many outstanding trial court judges labor in relative obscurity. Their service as fair and thoughtful overseers of litigation is often recognized only within their local communities.

If evaluations of judicial greatness focus only on judicial opinions that provide enduring definitions of law, such evaluations will neglect the important accomplishments of trial court judges. Trial courts are the "workhorses" of the court system that determine the human consequences of judicial processes. They serve to define the legal questions that are later considered by appellate courts. Moreover, these courts oversee the implementation, or lack thereof, of appellate decisions defining law and public policy. As a result, individual trial court judges may have less-noticed yet monumentally important impact. Judge Richard Alan Enslen of the United States District Court for the Western District of Michigan is just such a judge.

Judge Enslen handled notable cases that shaped public policy and demonstrated his commitment to constitutional rights. *Bergman v. United States* (565 F. Supp. 1353 [1983]) involved a lawsuit against the federal government by a man who had been injured as a Freedom Rider during the 1960s civil rights movement. In 1961, the bus in which Bergman traveled

with other civil rights advocates was subjected to a violent, planned attack by the Ku Klux Klan in Alabama. Like his fellow Freedom Riders, Bergman was severely beaten as nearby police officers ignored the attacks. Years later, he filed a lawsuit against the federal government when new information revealed that the Federal Bureau of Investigation (FBI) had had prior knowledge that the Freedom Riders would be attacked, yet the agency did nothing to prevent the attacks. Moreover, a paid FBI informant actually participated in the attacks. Throughout the pretrial process, the government resisted Judge Enslen's orders requiring them to provide evidence about the FBI's knowledge and actions. In ruling on motions, Judge Enslen took a strong stand against the government's efforts to hide relevant evidence. He eventually sanctioned the government for its refusal to comply with the legal requirements of judicial procedure. In Judge Enslen's words, "The trial in this case was not permitted to proceed solely because of the flagrant disobedience of the government. . . . [T]he obligation of the Federal Bureau of Investigation cannot 'transcend' the interests of this lawsuit where that obligation would thwart and denigrate the interests of justice under this nation's system of laws" (*Bergman v. United States,* 1366). Judge Enslen's rulings against the federal government gained national media attention. Although the plaintiffs won only a modest financial award, Enslen's actions sent a message to the federal government about the judiciary's authority to insist on compliance with judicial orders. He also set an example for other trial judges who might face similar governmental disobedience in subsequent cases.

In 1998, Judge Enslen presided over a civil lawsuit alleging that jail officers in Lansing, Michigan, had unlawfully caused the death of a mentally ill arrestee. The man was asphyxiated when six officers pressed his chest to the floor and left him facedown on his cell floor, bound in restraints. The officers' actions were recorded on the jail's videotape system. A jury eventually rendered a $12.9 million judgment against the city and the officers. Although Judge Enslen did not make the decision about liability in the case, his efforts to ensure a fair trial that would be free from appealable errors epitomized the trial judge's role in shepherding civil lawsuits that have enormous importance. Judge Enslen's commitment to fairness for all parties was reflected in his unsuccessful efforts to educate the individual officers being sued that their interests would be best protected through representation by separate attorneys instead of being jointly represented by the city's single attorney. Ultimately, Judge Enslen's opinion rejecting the city's motion to overturn the verdict lamented the inadequate representation provided to the individual officers who lost the lawsuit as well as their improper actions that led to the man's death in the jail cell. With respect to the deceased victim, an impoverished African American man, Judge Enslen

emphasized his consistent concern that the promise of the Constitution be fulfilled for all Americans:

> This was almost a case of "justice denied" because, but for the video, there would have been no contradictory evidence to the testimony of the Defendants [that is, the jail officers]. Defendant City even tried to suppress or alter the Coroner's report. This should cause court observers to wonder how many similar cases went unproved without the awful, but truthful eye of the camera. In this case the camera cast a long shadow of shame on the Defendants and their counsel. . . . [The jury's verdict] serves as reminder to those who would trammel the rights of the poor and helpless that this is a nation of justice. (*Swans v. City of Lansing,* 65 F. Supp. 2d, 650)

The case did not merely gain compensation for the deceased man's family. It also had a broad impact on restraint procedures used by law enforcement and jail personnel who had learned from Lansing's experience that "hog-tying" suspects facedown on the floor can lead to needless deaths and expensive lawsuits. As a result, many agencies changed their procedures and training practices, and in all likelihood, future deaths, injuries, and lawsuits have been avoided.

Judge Enslen's own decisionmaking had a very direct impact on public policy in cases concerning practices in Michigan's prisons. During the 1980s, with the assistance of the American Civil Liberties Union, prisoners in Michigan filed a lawsuit alleging a broad array of constitutional rights violations in state correctional institutions. In his opinion in *Knop v. Johnson* (667 F. Supp. 467 [1987]), Judge Enslen found several constitutional rights violations. He declared that prison officials improperly handled prisoners' legal correspondence and that prisoners endured "cruel and unusual punishments" by being deprived of proper winter coats when required to go outdoors during the winter. He required the state to remedy the denial of toilet access to prisoners who were confined to cells without plumbing. In addition, Judge Enslen's finding that prisoners had inadequate access to the courts led to the development of an innovative program in which prisoners were trained to work as paralegals in order to assist their fellow prisoners in preparing legal documents (*Knop v. Johnson,* 685 F. Supp. 636 [1988]). When Judge Enslen insisted that state officials change their training and procedures to prevent corrections officers from subjecting prisoners to racial slurs and discrimination, he articulated his consistent commitment to equal justice for all Americans:

> Racial discrimination has been and is such a societal plague that I firmly believe every governmental entity is obligated, albeit not always constitutionally

> required, to expend every effort to eradicate it completely from public life. This moral and societal obligation extends in particular to the Michigan Department of Corrections, to which society has entrusted the care, treatment, and punishment of those who predominantly come from the politically, economically, and socially powerless sectors of our society. . . . (*Knop v. Johnson*, 667 F. Supp., 511)

Although Judge Enslen faced strident criticism from public officials for protecting criminal offenders, his dedication to the Bill of Rights pushed corrections officials to remedy constitutional violations that had imposed impermissible hardships on convicted offenders in Michigan's prisons.

Trial court judges often help to shape the law through their initial decisions in cases that later move through the court system for ultimate decision by the United States Supreme Court. Because of his willingness to tackle difficult issues, Judge Enslen's decisions have initiated appeals that helped to shape the law for the entire nation. In *Americans United for Church and State v. School District of the City of Grand Rapids* (546 F. Supp. 1071 [1982]), Judge Enslen found a violation of the establishment clause of the First Amendment when a public school system provided instructors for classes in religious schools. Judge Enslen's decision was ultimately endorsed by the United States Supreme Court in *School District of the City of Grand Rapids v. Ball* (473 U.S. 373 [1985]), as an opinion by Justice William Brennan gave a nationwide application to the principle of constitutional law that developed initially from Enslen's reasoning and conclusions. This decision has since been somewhat modified by the United States Supreme Court decision in *Agostini v. Felton* (1997).

In an another case, Judge Enslen presided over a jury trial in which a defendant was convicted of conspiring to distribute marijuana. After the verdict, the defendant filed a motion asking Judge Enslen to overturn the verdict because he claimed that there was insufficient evidence presented by the prosecution to prove the defendant's guilt beyond a reasonable doubt. Despite the fact that the defendant's motion was filed one day after the seven-day deadline for such motions under the Federal Rules of Criminal Procedure, Judge Enslen granted the motion and overturned the conviction. Judge Enslen decided to consider the motion as if it were filed on time, "[b]ecause I believe that a refusal to hear this motion would result in grave injustice" (*United States v. Rupert*, 48 F.3d, 191 [6th Cir. 1995]). Judge Enslen's decision reflected his conclusion that it was more important to prevent the imprisonment of a man whose guilt was not adequately proven than to worry about deadlines for filing such reversal motions. Moreover, Judge Enslen's decision demonstrated his conclusion that judges possess the authority to create exceptions to procedural rules in order to ensure that

the ends of justice are achieved. In this case, the United States Supreme Court disagreed with Judge Enslen's conclusions and an opinion by Justice Antonin Scalia required that the defendant's conviction be reinstated because the motion was filed one day too late (*Carlisle v. United States*, 517 U.S. 416 [1996]). Although the Supreme Court disagreed with Judge Enslen and established a national rule at odds with Enslen's conclusions, his actions helped to clarify an important issue concerning law and the extent of judges' authority. Judge Enslen's forthright action may ultimately provide the basis for a different rule if some future Supreme Court comprises justices who share Enslen's conclusion that it is more important to avoid mistakenly sending a man prison than it is to follow each precise detail of procedural court rules.

Although several of Judge Enslen's cases have gained national attention and helped to shape law and public policy, his most enduring impact on the judicial system may ultimately stem from his role in reshaping the nature and accessibility of judicial processes. Judge Enslen became one of the leading advocates of alternative dispute resolution (ADR) within the federal courts as a means to increase the effectiveness of case processing while reducing the expense and delays suffered by litigants (Enslen 1988). Through Judge Enslen's leadership and example, the Western District of Michigan became known among federal district courts as an innovative court that used court-annexed procedures, such as summary jury trials, mediation, and arbitration, to foster settlement in civil cases. Judge Enslen was one of the pioneers in the use of summary jury trials, a procedure in which a body of citizens drawn from the community listens to arguments from each side in a case and then issues a quick, nonbinding decision. The results of the summary jury process can effectively educate opposing attorneys about their prospects for success if their case were to go to trial. As a result of hearing the verdict in the summary jury proceeding, one or both sides in a civil lawsuit usually becomes much more willing to accept a quick, negotiated settlement. Judge Enslen is noted for attempting to match an appropriate ADR method with the nature of the case and needs of the litigants and attorneys (Woodley 1997, 587).

Judge Enslen also served as a role model for other federal district judges in his use of U.S. magistrate judges as authoritative judicial officers empowered by Congress to handle a wide array of judicial tasks. Congress created the office of U.S. magistrate in 1968 to provide assistance to district judges in handling various motions, warrants, prisoner petitions, and other matters. Later, Congress expanded the magistrates' authority to handle nearly any judicial task, except presiding over felony trials. Although many district judges balked at permitting magistrates in their courthouses to handle anything more than minor tasks, Judge Enslen provided a notable example

for the innovative and broad use of magistrates in all judicial tasks authorized by Congress. A national study of U.S. magistrate judges found that several district judges expanded their use of magistrate judges after observing the effective operations in Enslen's courthouse where the magistrate judge was given significant authority (Smith 1990, 88).

Judge Enslen's pioneering role as an advocate and innovator in the use of ADR was clearly acknowledged when Sen. Joseph Biden invited Enslen to be the lone federal district judge to testify before the Senate Judiciary Committee in support of the Civil Justice Reform Act of 1990. Judge Enslen's testimony did not endear him to traditionalist judges who resisted innovations in case processing, especially since he chided other judges for failing fully to utilize resources and innovations (Smith 1992, 189). Congress enacted the Civil Justice Reform Act to encourage the development of innovations to reduce expense and delay in civil litigation. Because of Judge Enslen's prominence as an innovator, Congress designated the Western District of Michigan as one of two demonstration districts assigned to experiment with case management innovations that could later be applied to courts throughout the country. Judge Enslen's performance as an innovator and pioneer in court reform helped to shape decisions made by Congress, the federal judiciary, and individual judges about methods to improve case-processing procedures throughout the country.

Judge Enslen's commitment to facilitating settlement is also reflected in major cases that shaped law and policy. In his decision identifying numerous constitutional rights violations in Michigan's prisons, Judge Enslen did not immediately impose his own remedies. Instead, in accordance with his preferred approach, he ordered prison officials to develop a feasible plan for remedying constitutional violations. He continually pushed corrections officials to refine their proposals until their plans fulfilled constitutional standards (*Knop v. Johnson*, 685 F. Supp. 636 [1988]).

Judge Enslen also applied his orientation toward facilitating settlement to resolve a difficult case concerning Native American fishing rights in Lake Michigan. In order to reach an agreement in the dispute concerning nineteenth-century treaties, he appointed a special master with expertise on the subject to oversee pretrial processes and facilitate settlement negotiations. As a result, the parties to the dispute reached agreements in two separate cases that resolved fishing rights issues for the period from 1985 through the year 2020 (*Grand Traverse Band of Chippewa and Ottawa Indians v. Director, Michigan Department of Natural Resources*, 971 F. Supp. 282 [1995]).

Although trial judges are important decisionmakers within their courts' jurisdictions, most individual trial judges have relatively little impact on the definition of law and the development of court processes. By contrast,

Judge Richard Alan Enslen has used his position as a U.S. district judge to make notable impacts on law and policy through his exceptional concern for the protection of individuals' constitutional rights. Moreover, his role as an innovator and leader in court reform has contributed significantly to innovations in the processing of cases in federal courts throughout the United States.

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FIELD, STEPHEN J.

(1816–1899)

Stephen J. Field
Library of Congress

The most influential Supreme Court justice of the Gilded Age, Stephen J. Field, led a major shift in the jurisprudence of the Supreme Court and pioneered a broad interpretation of the Fourteenth Amendment as providing substantive limits on state governmental action. Indeed, much of Field's judicial career can be understood as an effort to define and preserve liberty in the rapidly changing United States by restraining the power of government.

Stephen J. Field was born in Haddam, Connecticut, on 4 November 1816—the sixth child of a strict Congregationalist minister. Field's parents were from old New England families, and both his grandfathers had served as officers in the Revolutionary War. Stephen Field's generation of the family would achieve even more prominence than their predecessors. Stephen became a Supreme Court justice. His eldest brother, David Dudley Field, was a well-known New York lawyer, legal reformer, and political figure. Another brother, Cyrus, would become a successful businessman who helped to finance the transatlantic cable. A nephew, David J. Brewer, served on the United States Supreme Court for twenty years. Field never shared his father's religious commitment, but a strong sense of moral values permeated his judicial opinions.

Field moved with his family from Connecticut to Stockbridge, Massachusetts, when he was three years old. He stayed there until the age of thirteen,

when he went with his eldest sister and her husband to present-day Turkey to establish schools for the education of women. During his two and a half years there, Field spent much of his time studying foreign languages, including modern Greek, French, Italian, and Turkish.

In 1832, Field returned to the States and began studying at Williams College. During the summers of his college years, Field assisted Theodore Sedgwick II, a prominent political economist who lived in Stockbridge. Sedgwick's thinking greatly influenced Field. Sedgwick argued that democracy's greatest protector was not the legislature because, as he saw it, legislators had only the best interests of their own constituencies in mind. True protection of democracy must come from someone who looks out for the best interest of the people as a whole. Sedgwick argued that this protection lay primarily in the executive veto power; Field would come to believe that it rested in the power of judicial review (McCurdy 1986, 6–7).

Field graduated first in his class at Williams College in 1837. Soon after, he moved to New York City to study law with his brother, David Dudley. Admitted to the New York bar in 1841, Field practiced law with his brother in New York City until 1848, when he left for a tour of Europe. In 1849, he moved to California, where gold had been recently discovered. Unlike many others, though, Field had no intention of searching for gold. Instead, he saw the gold rush as an opportunity to begin a law practice in San Francisco.

After just two weeks in San Francisco, Field determined that he would have more success in the interior. Field stopped in what he described as a "tent city" of about 1,000 people and decided to make his residence there. Soon after his arrival, Field suggested that the community should organize a town government. At a public meeting the next morning the people did just this, naming the town Marysville and choosing Field to serve as alcalde.

An alcalde was an officer under Spanish and Mexican law who served various roles comparable to mayor, sheriff, and judge. Though less formal than his later positions on the bench, it was as alcalde that Field gained his initial judicial experience (Pomeroy 1909, 10–11). He became quite adept at resolving criminal affairs, rate disputes, arguments over wages, and various other controversies. His work was greatly respected in Marysville and the surrounding areas. The California legislature, however, soon reorganized the local government system, and Marysville elected a new government of which Field was not a part.

Judge William R. Turner replaced Field as the highest-ranking judicial officer in Marysville. Large egos and political differences caused the two men to clash almost immediately. In Field's first appearance as an attorney before Turner, the two exchanged verbal insults. Turner threw Field in jail and had him disbarred. The California Supreme Court eventually set aside the charges against Field and reinstated him to the bar, but Field would not

William Henry Beatty (1838–1914)

William Henry Beatty had the rare distinction of having served as a chief justice on two different state supreme courts. Born in Monclova, Ohio, in 1838 to Henry Oscar and Margaret Boone Beatty, his family moved first to Kentucky and later to California. William's father was an attorney, and William went to the University of Virginia in 1856 to get a legal education and subsequently joined his father's practice in Sacramento, California, in 1858 before moving to Nevada in 1863.

Elected shortly thereafter as a district judge for Lander and Pine Counties, he was subsequently elected an associate justice of the Nevada Supreme Court, where he sat from 1875 to 1880. He served as chief justice during his last two years. He then returned to California. Appointed to the Supreme Court to fill a vacancy left by the chief justice in 1888, he was twice reelected to twelve-year terms and continued serving as chief until just before his death in 1914.

Beatty was a pioneer in areas of the law especially prominent in the Far West. Although Justice Stephen Field, who served as a California Supreme Court justice before being appointed to the United States Supreme Court, is far better known in the area, a prominent scholar has said that Beatty actually developed more mining law than did Field (Reid 1995, 673).

Beatty certainly appears to have been highly regarded by fellow members of the California bar. The bar's tribute, which reflected some of the dangers of the frontier, appears to incorporate those qualities that individuals are likely to associate with the best of judges:

> He feared no man, and . . . he never failed to meet unflinchingly every danger.
>
> Throughout his long life he knew but one fear, and that was the fear of doing an injustice to his fellow man. His judgments sprang from his convictions alone, unswayed by popular clamor, uninfluenced by thought of consequences. ("Memorial of the Life" 1915, 803)

This tribute further observed that "his opinions are the works of a master, not only in their logic and in their evidences of profound learning, but also in the literary quality which marks the cultured scholar" ("Memorial of the Life" 1915, 803). This same tribute noted both that Beatty had a good sense of humor and that he was a good storyteller who particularly reveled in telling tales of the early West. The tribute ended by observing that Beatty "put honor before opportunity; he revered the law and strove to make it always the instrument of justice; he loved his friends; he feared not his foes, and he dedicated his life to the highest service of the Commonwealth" (804).

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forget Turner's ruling. In the fall of 1850, Field was elected to the California legislature, and in one of his first legislative acts, Field voted to reorganize the judiciary, sending Turner to an obscure part of the state. The bitter rivalry between Field and Turner reached something of a crescendo in a near shoot-out on the floor of the California legislature in 1851.

Field served in the legislature for only four months, but he accomplished a remarkable amount. Prior to Field's arrival, California law was a quagmire of American precedents, English common law, Mexican law, and crude frontier practices. Perhaps his greatest contribution as a legislator was his work in codifying California's laws into a single body of law that could be applied universally in California's courts.

Defeated in a bid for the U.S. Senate, Field returned to Marysville in 1851. He soon built a lucrative law practice in the town. He remained in private practice until he was elected as a Democrat to the California Supreme Court in the fall of 1857. Before his term officially began, however, one of the sitting justices died, so the governor appointed Field to fill the vacancy in October 1857. A major part of Field's work on the California bench was to continue what he began in the state legislature; namely, dealing with a complex amalgamation of law from Mexican traditions, British common law, and precedents from the eastern states that often conflicted with one another.

Disputes over land ownership were foremost in the minds of Californians. When settlers and miners came west during the gold rush, they settled on whatever land they found uninhabited, assuming it to be unclaimed. Disputes arose when holders of Mexican grants claimed to own the same land. Much of Field's legacy on the California Supreme Court lay in his attempts to deal with conflicts between miners, settlers, and holders of Mexican grants. Field generally was quite protective of the rights of Mexican grant holders, especially when they had received a patent from the United States, and he helped develop a consistent body of law in the area (Kens 1997, 77).

Perhaps the most well known of Field's cases on the California bench centered around John C. Fremont's claim to land at Las Mariposas. Fremont held a Mexican land grant for property that contained some of the most profitable gold mines in the state. Prior to Field's arrival on the California Supreme Court, it had been determined in another lawsuit that the property belonged to Fremont. After the first suit, Fremont leased the land to a man named Biddle Boggs, and in 1858, just after Field arrived on the court, Boggs brought suit to eject a mining company that had continued to mine the land after Fremont's claim was settled. Protracted litigation ensued. Although the California Supreme Court first held that the company had an implied license to mine, the court reversed its position following a change in the composition of the bench.

Field wrote the majority opinion in the second Boggs case (1859), making it clear that he was sympathetic to the holders of land grants. Field declared that an implied license could not trump the rights of a private landowner. For Field the case was about the right to be secure in one's property: "There is something shocking to all our ideas of the rights of property in the proposition that one man may invade the possessions of another, dig up his fields and gardens, cut down his timber and occupy his land, under the pretense that he has reason to believe there is gold under the surface" (14 Cal. 279, 380).

Even Field's personal life gave rise to constitutional controversy. Field and David S. Terry, who had quarreled violently while both served on the California Supreme Court, would cross paths again thirty years later. Field was a United States Supreme Court justice and was performing his duties on the federal circuit in California. Terry's wife came before Field in a suit involving a prior marriage. Terry served as her attorney, and Field ruled against them. The verdict enraged the couple, and Terry threatened to shoot Field. The attorney general appointed deputy marshal David Neagle to serve as Field's bodyguard. When Terry accosted Field in a restaurant, Neagle, suspecting that Terry was armed and dangerous, fatally shot Terry. It was later discovered that Terry had been unarmed, and Neagle was arrested for murder by California authorities. The federal circuit court granted Neagle a writ of habeas corpus. The case reached the Supreme Court, which held in *In re Neagle* (1890) that Neagle was acting under federal law and could not be tried in state court. Field did not participate in the decision.

Field's work on the California Supreme Court earned him a good reputation, and his name was on the list of possible nominees to the United States Supreme Court in the early 1860s. The Republicans in Congress, fearing that the Court might undermine Union efforts in the Civil War, devised a plan to add a tenth justice to the Court. On 3 March 1863 Congress passed a law that reorganized the West Coast judicial circuit and provided that a tenth justice of the Supreme Court would be appointed to serve the circuit. Field had strong support for the nomination from many western politicians; further, his brother, David Dudley Field, wielded strong influence in the Republican party, having played a major role in Lincoln's rise. Although he was a Democrat, Field was loyal to the Union, something Lincoln desperately needed on the Court. On 6 March 1863, Lincoln nominated Field, and the Senate confirmed him on 10 March. Congress returned the Court to a nine-justice bench in 1869, but Field remained on the Court until 1897—a period longer than any previous justice. Irascible and overbearing, Field was nonetheless a forceful and able advocate for his views among the justices.

David S. Terry: Dueling Justice (1823–1889)

David Terry led one of the most colorful and tragic lives of any American jurist. He was born in Kentucky in 1823. Terry's mother took him to Texas when she and her husband split up. In Texas, Terry imbibed the spirit of the frontier, with an exaggerated sense of personal honor and support for states' rights and slavery. After studying law in the office of an uncle, T. B. J. Hurley, Terry joined the gold rush to California in 1849 and settled in Stockton where, like others of his day, he was not unaccustomed to engaging in physical conflict, the bowie knife being his weapon of choice. Terry also became involved in politics. Although usually a Democrat, he was elected to the California Supreme Court as a Know Nothing candidate (a party that opposed immigration) in 1855, three years after marrying Cornelia Rummels, a Texas cousin who appears to have had a stabilizing influence on him and with whom he was to have a number of children.

As justice, however, Terry became involved in controversy with a Vigilance Committee that arose in San Francisco and led the city into a near state of anarchy. During a scuffle with this group, Terry pulled his bowie knife and wounded a Vigilance Committee member in what he thought to be an act of self-defense. Fortunately, Terry's victim recovered, and the committee spared Terry's life.

As a Supreme Court justice, Terry is described as being neither "great" nor "mediocre" (Buchanan 1956, 71). Credited with common sense, Terry was a strong supporter of states' rights and established a reputation for integrity. Although not renominated for the court, Terry became involved in a controversy with a U.S. senator from California named David C. Broderick, who opposed secession. Responding to a perceived insult, Terry engaged in a duel in which he killed Broderick, who became something of a martyr to the northern cause.

Although Terry had won fairly, the duel brought Terry in public disapprobation, and he moved briefly to Nevada, where he engaged in mining law before finally being exonerated in a California court. Terry retained his love for the South, however, and, in addition to unsuccessfully trying to tilt California to the southern cause, Terry went to Richmond, Virginia, and saw some action in the Civil War. Afterward, he briefly settled in Mexico as a rancher before heading back to the White Pine area of California, which he left again for a time to do legal work in Nevada.

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Much of Field's most well known work on the Court came in the form of dissenting opinions that would influence later Court majorities. In particular, Field argued vigorously that the provisions of the Fourteenth Amendment contained substantive, as well as procedural, checks on governmental power. In the *Slaughterhouse Cases* (1873), for instance, Field argued in dis-

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Often excoriated for his past violent behavior as well as his support for the Confederacy, Terry won a degree of respectability in the 1870s, during which his legal practice in California flourished. Toward the end of that decade he was an important force in the California Constitutional Convention where, although not representing the party that represented workingmen, Terry stood up for them and acknowledged the failure of his earlier views on state sovereignty. Much of Terry's reputation for integrity was restored during that time.

Terry subsequently became involved in the headline-grabbing proceedings of Sarah Althea Hill and William Sharon, a wealthy former U.S. senator from Nevada. The issue involved whether the two (who had been living together) had been legally married (which, in turn, involved the validity of a "secret" contract between them), and, if so, what moneys Hill was to inherit. Terry moved from playing a minor role on Hill's behalf to taking on most of her case. After the death of his first wife, Terry subsequently married Sarah (Senator Sharon had died before the end of the legal contest). Although the relationship appears to have been a loving one, Sarah was high tempered, and the union eventually led to Terry's demise.

Trying to defend his new wife's honor, Terry was involved with her in an altercation that may have led to her miscarriage and that landed them both in jail for a six-month term. During his stay there, Terry made threats against United States Supreme Court justice Stephen Field, who had presided over the appeal of the Hill case while he had presided over the California Supreme Court before being appointed to the United States Supreme Court.

Apparently by coincidence, the Terrys ended up on the same train as Justice Field, then riding circuit in California, who was accompanied by a U.S. marshal. Perhaps hoping to preempt his wife from even more precipitate action, Terry (apparently unarmed) approached Justice Field and either tapped him on the shoulder or physically struck him in the face. Field's bodyguard responded by firing two shots that killed Terry. This action in turn led to a famous United States Supreme Court decision, *In re Neagle* (135 U.S.1 [1890]) in which the Court vindicated the president's power to exercise inherent powers in providing protection to Justice Field. Terry's wife was devastated by his death and was admitted to a mental hospital in 1892. She died forty-five years later in the same facility.

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sent that the Fourteenth Amendment protected the right of people to pursue lawful occupations. The Louisiana statute at issue prohibited the slaughtering of animals within the city of New Orleans by all persons except the Crescent City Live-Stock Landing and Slaughter-House Company. The statute was defended on health and safety grounds, and the

majority accepted it as such. Field agreed that the state could regulate the slaughtering of animals on health and safety grounds but not that it could simultaneously create a monopoly for one corporation. In Field's view, this infringed on the rights of other New Orleans butchers, many of them small business owners, who now could not work in the occupation of their choice. Field stated that the Fourteenth Amendment protected "the equality of right among citizens in the pursuit of the ordinary avocations of life" and that this grant of a monopoly to one corporation violated the "right of free labor" (83 U.S. 36, 109–110).

Field further expounded his views on the protections of the Fourteenth Amendment in *Munn v. Illinois* (1877). The central issue of *Munn* was whether a state rate regulation, which set a maximum charge for grain elevators, violated the Fourteenth Amendment by depriving the operators of their property without due process of law. A seven-to-two majority sustained the rate regulation, holding that because grain elevators were "clothed with a public interest," the state could regulate their rates and thus there was no deprivation of property (94 U.S. 113, 126). In dissent, Field argued that government would cease to be free if the legislature were allowed to run roughshod over the rights of its citizens, with no relief in the courts. Further, he contended that "affected with the public interest" could only mean that states could regulate businesses that had received some form of public subsidy, not entirely private corporations—any other definition would put all forms of private property at risk of government regulation and confiscation.

Field also made clear in *Munn* that he had a more expansive understanding of what "property" rights entailed. For Field, people could retain title and possession of their property but still be effectively deprived of it under the Fourteenth Amendment. Field argued that interference with the use of property could amount to a deprivation because "[a]ll that is beneficial in property arises from its use" (94 U.S. 112, 141). Consequently, for Field, regulation of rates constituted a deprivation of property because it interfered with the right of elevator operators to use their property to make a profit.

Field's economic liberty jurisprudence came to fruition after Melville W. Fuller became chief justice in 1888. Field did much to strengthen the constitutional protection of private property rights and influenced the direction of the Court long after his retirement.

Field also championed the rights of property owners in other contexts. For example, he concurred in the famous case of *Pollock v. Farmers Loan & Trust Co.* (1895), in which the Court struck down the 1894 federal income tax. He wrote a separate opinion in which he denounced the levy as class legislation that imposed a different rule for rich and poor and warned: "The present assault upon capital is but the beginning" (157 U.S. 429, 607).

Field did not only employ the Fourteenth Amendment as a shield for economic interests. In *Ho Ah Kow v. Nunan* (1879) and *In re Quong Woo* (1880) Field, while on the federal circuit bench, held that San Francisco ordinances directed at disadvantaging the Chinese immigrants violated the Fourteenth Amendment's equal protection principle. Field asserted that the Fourteenth Amendment protected the rights of all persons, no matter their race or origin. On the other hand, like most jurists of the age, he was generally unsympathetic to the civil rights claims of blacks.

Field authored a number of other noteworthy opinions. In *Cummings v. Missouri* (1867) and *Ex Parte Garland* (1867) he invalidated Civil War–era loyalty oaths as unconstitutional ex post facto laws. In *Illinois Central Railroad v. Illinois* (1892), Field relied on the public trust doctrine to strike down a large grant of submerged land along the Chicago waterfront to a railroad. Writing for a narrow majority, he reasoned that such lands were held in trust for the public. As this case indicates, Field was not a handmaiden for corporate interests. He opposed the grant of special privileges to business and was sympathetic to the claims of injured industrial employees.

In 1880, Field unsuccessfully sought the Democratic party nomination for president. The idea of a Supreme Court justice running for the presidency was not as foreign in Field's time as it might seem today, but the fact that Field remained on the bench during his candidacy did create a "sense of impropriety" in the minds of some observers (Kens 1997, 175). Although his mental powers began to slip in the mid-1890s, Field at first resisted suggestions that he retire. He was finally persuaded to resign in 1897. Historians feel that Field stayed on the Court longer than he should have. Field died in Washington on 9 April 1899.

James W. Ely Jr.

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FRANK, JEROME NEW

(1889–1957)

Jerome New Frank
National Portrait Gallery, Smithsonian Institution

As a legal philosopher, law professor, attorney, political reformer, and judge, Jerome Frank's greatest contribution to American law was as the author of *Law and the Modern Mind* (1930), a seminal influence on modern legal thought. Frank was among the leading figures in legal realism, the most important school of jurisprudence in the twentieth century. During the sixteen years he served as a federal appellate judge, Frank successfully blended the worlds of judicial activism and political reform.

Origins

Born on 10 September 1889 in New York City, Jerome New Frank was the only son among the three children of Herman and Clara New Frank, descendants of German-Jewish immigrants. In the Horatio Alger tradition, his father became a cultured and prominent attorney; his mother was a musician. When Frank was seven years old, his family relocated to Chicago, where he attended public schools, graduating at age sixteen from Hyde Park High School.

Political and Legal Education

Immediately after completing high school, Frank entered the University of Chicago, intending to study literature with the goal of becoming a fiction writer. Instead, an encounter with Charles E. Merriam (1874–1953), one of

the most important political scientists of the twentieth century, who is considered the father of the behavioral movement in political science and founder of the American Political Science Association, changed the course of Frank's life. Merriam's magnetic personality and political interest drew Frank into the emerging field of political science. It became his major undergraduate interest, and by the time he received his Ph.B. in 1909, he had taken all of Merriam's courses at the University of Chicago. Student and mentor eventually met again in Washington, D.C., during the heady days of New Deal reform.

At the insistence of his father, Frank entered the University of Chicago Law School that fall even though he still considered a writing career as his goal. As an undergraduate, Frank had had the opportunity to associate with Merriam; in law school he took courses from some of the most prominent law professors of the first half of the twentieth century. Among them was Roscoe Pound, who became the father of sociological jurisprudence.

An early measure of Merriam's influence on Frank is that he took a year's leave from law school to serve as Merriam's secretary while Merriam was a reform alderman on Chicago's city council. During that period, Frank became engaged to Florence Kiper, a poet and playwright also from Chicago. It was his fiancée who persuaded him to return to law school and complete his degree when he was reluctant to resume his legal studies after working for Merriam.

In 1912, Frank received his doctor of jurisprudence degree with the distinction of earning the highest grade point average ever achieved at the law school. That same year he was admitted to the Illinois bar.

Frank and Florence Kiper were married in 1914 and had one child, a daughter named Barbara. Frank drafted a novel that remained unpublished, and for a short time he served as president of the Book and Play Club in Winnetka, Illinois, where they lived. The couple was active in Chicago's intellectual life, and their circle included Rebecca West, John Gunther, Sherwood Anderson, Ben Hecht, Max Eastman, and Sinclair Lewis.

Legal, Political, and Academic Practice

For more than twenty years, Frank practiced law. He was associated initially with Levinson, Becker, Cleveland and Schwartz, a Chicago law firm that specialized in corporate law and whose clients included major industries, banks, and railroads. It took him just seven years to attain full partnership in that firm (in 1919), yet the Merriam influence lingered and Frank became involved in political reform movements such as the transportation system in Chicago with its labor disputes between municipal streetcar owners and employees.

In 1928, Frank ended his association with his Chicago law firm to join Chadbourne, Stanchfield, and Levy in New York City. Although he was now associated with one of the largest corporate law firms in the United States and his income was increased, Frank did not enjoy working on Wall Street. Neither Frank nor his wife enjoyed New York as much as they had Chicago.

Frank's ticket from Wall Street to Washington, D.C., came two years later with publication of *Law and the Modern Mind*. Like Harold D. Lasswell, Frank was a pioneer in applying the concepts of Sigmund Freud to his profession. After his daughter had suffered a psychosomatic paralysis of her legs, Frank had taken her to a psychiatrist. He liked the psychiatrist so well that he himself underwent psychoanalysis for six months, and apparently through these sessions he was able to come to terms with his feelings about his father, who had pushed him into the legal profession instead of allowing him to pursue his goal of being a writer.

Law and the Modern Mind became the single most important book of the legal realism movement, attacking the political status quo and stunning the legal world. Frank rejected both natural law and legal positivism, which held that judges need only apply rules to facts to arrive at preordained decisions. Frank stressed the uncertainty rather than the certainty of the decisionmaking process. Psychological factors of the judges influenced their decisions, Frank argued. He believed that the law is a substitute for a childish need for an authoritarian father and that judges rationalize their desired conclusions.

Publication brought with it academic attention, and by 1932 he was a lecturer at the New School for Social Science Research in New York and a research associate at Yale Law School, the epicenter of legal realism in the 1920s and 1930s. Frank continued his association with Yale until his death, and through it he formed lasting friendships with William O. Douglas, Thurman Arnold, Abe Fortas, Harold Lasswell, and other leading figures of the era.

After his move to New York City, he came to know law professor Felix Frankfurter and wrote to him seeking a job in Franklin Roosevelt's New Deal administration. Frankfurter was the Harvard Law School professor who found the legal talent for the New Deal, and Frank soon became one of Felix's "Happy Hot Dogs." Another of Frank's friends, Charles Merriam, was the major political scientist involved in outlining plans for development of the modern presidency through his service on the Louis Brownlow Committee, appointed by Roosevelt in 1936 to redesign and expand the presidency. The Brownlow Committee *Report* issued in 1937 is second in importance only to *The Federalist Papers* in the development of the American presidency.

Frank was appointed the first general counsel in the new Agricultural Adjustment Administration (AAA). The Office of the General Counsel was a major liberal reform center during the New Deal. From Frank's talented legal staff emerged leaders whose names became familiar to the American public in later years: Adlai Stevenson, the Democratic presidential candidate in 1952 and 1956; Abe Fortas, justice of the Supreme Court of the United States; Thurman Arnold, senior partner in the Washington, D.C., law firm of Arnold, Fortas, and Porter; Telford Taylor, a Nuremberg war crimes prosecutor and Columbia University law professor; and Alger Hiss, a president of the Carnegie Endowment for Peace who was jailed for perjury during the infamous McCarthy hearings. Frank and his liberal staff came into conflict with the administrators of the AAA, who favored a conservative approach.

Frank was a member of the famous "brain trust" of Franklin Delano Roosevelt (FDR), which helped to draft the National Industrial Recovery Act (NIRA) of 1933, especially the provision to guarantee labor's right to bargain collectively. Among Frank's enduring contributions was to assist in creating the *Federal Register,* which publishes the regulations of all administrative agencies of the federal government.

In 1933, he created the Federal Surplus Relief Corporation to administer procurement and distribution of agricultural surpluses to hungry Americans. Although the nonprofit corporation was allowed to die in November 1935, the year that Frank was fired, it had established a precedent for federal food distribution that would serve as the model for later school lunch, food stamp, and other similar federal food programs.

For a brief time after his dismissal from the AAA, Frank was appointed by FDR as a special counsel for the Reconstruction Finance Corporation's dealings with railroad reorganization because of his acknowledged expertise in railroad matters. Frank's reduction to a mere "passionate anonym" working in the shadow of Jesse H. Jones, the longtime "czar" of the New Deal credit establishment, however, prompted Frank to return in December 1935 to New York. There he resumed private law practice for nearly two years. Even during this period, however, he performed part-time legal work for Harold Ickes, secretary of the interior, to allow the Public Works Administration (PWA) to make loans to county power development projects. It was Frank who won the government's case, *Alabama Power Company v. Ickes* (1938). He also became the main founder of the National Lawyers Guild.

Frank reentered full-time government service in December 1937 after William O. Douglas suggested to FDR that he appoint Frank to an opening on the Securities and Exchange Commission (SEC), which Douglas chaired. Following Douglas's appointment to the Supreme Court, Frank was elevated to SEC chair. In that position, he came into conflict with

Samuel H. Silbert
(1883–1976)

After Samuel H. Silbert's birth in Riga, Latvia, in 1883, his father died when he was young, and his mother moved the family first to New York and then to New Jersey, where Silbert worked as a paperboy to help make ends meet. When his mother later moved to California, Silbert arrived virtually penniless in Cleveland (sleeping his first couple of nights in a train station) to work in a jewelry store. There he attended the Central Institute and night school at the Cleveland Law School, entering the bar in 1907.

In 1911 Silbert became a prosecutor, and four years later he successfully ran for a position as a municipal court judge in Cleveland, where he served until he won election in 1924 to the Court of Common Pleas. He was elected and reelected to this office through 1968 and, at the time of writing his life story, in 1963, was hoping to run again thereafter. He served as the Common Pleas Court's chief justice from 1954 to 1962 and was then elected by his colleagues as chief justice emeritus for life.

Silbert's life story is filled with fascinating anecdotes. As a prosecutor, Silbert helped an unemployed immigrant, facing circumstances much like his own when he first arrived in Cleveland, get a job rather than convict him of vagrancy. When he reached the Municipal Court, Silbert, who had not previously touched tobacco but had been told that spitting "was a sign of a first-class judge," secretly practiced until he could hit the spittoon from twenty-four feet away, but later found he had to break himself from the tobacco habit (Silbert 1963, 60).

Once called to sentence a woman for fortune-telling, Silbert had her read his palm. After she said, "Oh, Judge, I see thirty days in the workhouse. Please be more lenient," Silbert responded, "And ruin your reputation as a seer?" (Silbert 1963, 54). On another occasion, Silbert hailed a cab whose driver continually took off with a burst of speed, then slowed down, looked around, and sped up again. Arriving at the courthouse, the driver said, "I'm sorry I didn't get you here any sooner, but there's a son-of-a-bitch named Silbert on the traffic bench and I was afraid of getting caught." Without turning around, Silbert handed him his card as he left (53).

In a divorce case, Silbert once tried unsuccessfully to get a couple to reconcile and then announced to the woman that "I'll therefore give you the sum of $40 [alimony] per month." Her husband replied, "That's mighty fine of you judge. And to show you I'm not as bad as you think, I'll give her a couple of bucks myself" (Silbert 1963, 173).

Silbert did not believe the death penalty was effective, but on three occasions he followed the law of his day and sentenced a person to die. He was prouder of the criminal sentenced to life in prison for murder, in whose pardon he was able to concur (Silbert 1963, 134).

Silbert opposed rules still followed in many jurisdictions that prevent jurors from taking notes. He noted that "far from being charged with misconduct," jurors who take notes "should be praised for showing enough interest in the case to try to keep the facts straight so that justice would be done" (Silbert 1963, 166).

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conservative Wall Street businessmen who did not share his view that the SEC should protect the investing public. Nonetheless, Frank tried to nationalize Wall Street holding companies under the Public Utility Holding Company, and he reorganized the New York Stock Exchange.

During his tenure on the SEC, Frank completed his major work on economics, *Save America First* (1938), urging isolation in U.S. foreign policy. But by 1941 because of Adolf Hitler's invasion of European nations, Frank had changed his foreign policy views.

The Judge and "Doing Justice"

In the spring of 1941, President Roosevelt, on the suggestion of William O. Douglas and others, nominated Frank to replace Robert P. Patterson on the Second Circuit Court of Appeals. It was an ideal assignment for Frank since his chambers were in the Foley Square Courthouse in New York City and the circuit comprised Connecticut, Vermont, and New York, including Wall Street. During his tenure, the Second Circuit had the heaviest caseload among the federal appeals courts. His colleagues included preeminent judges: Learned Hand, who had been a federal judge since 1909; Augustus Hand, Learned's first cousin; Thomas Swan and Charles E. Clark, both former deans of the Yale Law School; and John Marshall Harlan, who served on the court until the 1950s when he was appointed to the Supreme Court of the United States.

Both before and during his sixteen-year judgeship, Frank knew a number of justices of the Supreme Court of the United States. He was closest to William O. Douglas, then Felix Frankfurter, followed by Hugo Black and Robert Jackson. He was on a first-name basis with most of the justices, and as a result, he enjoyed more success in the Supreme Court than any other member of the Second Circuit. Hugo Black described Frank as "one of the great judges."

Frank's jurisprudence consisted of "doing justice" and showing legal respect for individual dignity. He wrote 597 opinions in concurrence and 128 dissents while on the bench. The justices of the Supreme Court of the United States agreed with Frank in 70.6 percent of his cases. He was referred to by name by at least eleven justices in their opinions on thirty-nine occasions. Known for his opinions on civil liberties and the rights of suspects, Frank was praised often for the literary quality of his work as well as his legal analyses. The Supreme Court relied on Frank's contributions in *Bruton v. United States* (1968), regarding admission of evidence against one defendant that is inadmissible against other codefendants. He is perhaps best remembered for *United States v. Roth* (1956), involving a standard for obscenity.

In addition to his duties as a jurist, Frank maintained his faculty appointment at the Yale Law School, teaching weekly in New Haven, where the Franks had moved in 1951 from New York City. In addition, he was a visiting lecturer at Brandeis University.

Despite his professional commitments, Frank still found time to write. He wrote four additional books. The title of *If Men Were Angels* (1942), dedicated to William O. Douglas, was taken from *The Federalist Papers*. It defends the use of federal administrative agencies. *Fate and Freedom* (1945) is Frank's critique of deterministic theories in science, history, economics, and philosophy. His next book, *Courts on Trial* (1949), critiqued the entire fact-finding process in the legal system. His final book, *Not Guilty* (1957), which he coauthored with his daughter, was published posthumously. It presented evidence in which innocent persons were found guilty because of witnesses' mistakes, flawed memories, and lost documents. The book was completed just two days before he died of a heart attack on 13 January 1957.

William D. Pederson

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FRANKFURTER, FELIX

(1882–1965)

Felix Frankfurter overcame the humble origins of a Jewish immigrant faced with the onslaughts of American anti-Semitism throughout his life to become one of the most famous, and enigmatic, men ever to serve on the United States Supreme Court. Seemingly abandoning his radical liberal tendencies as an attorney and Harvard law professor, he represented one of the most vocal proponents of the "self-restraint" posture on an increasingly liberal Court.

Felix Frankfurter
Photographed by Harris & Ewing, Collection of the Supreme Court of the United States

Frankfurter was born on 15 November 1882 in Vienna, Austria. At the age of twelve, he and his family emigrated to New York City's impoverished lower east side. Despite being unable either to read or speak a word of English, after learning the language he demonstrated such brilliance in the city's public schools, and City College of New York, that he gained admission in 1902 to the prestigious Harvard Law School. There he amassed such a distinguished academic record that his final grade point average was second at the time only to the legendary Louis D. Brandeis. Despite his distinguished academic record, after graduating in 1906 Frankfurter, as a nonpracticing Jew in an extremely anti-Semitic time, initially found it difficult to gain employment before joining the distinguished New York law firm of Hornblower, Bryne,

Miller, and Potter. Soon thereafter, he accepted a position with Henry Stimson, the U.S. attorney for the Southern District of New York. In 1911 he followed Stimson, who had been appointed secretary of war, to Washington, D.C, where he served as a law officer in the Bureau of Insular Affairs. When Frankfurter's position in the War Department became tenuous after the election of Woodrow Wilson in 1912, he accepted a professorial position at Harvard Law School two years later.

Before beginning his tenure as a law professor, Frankfurter's life was changed permanently when he began dating Marion Denman, the daughter of a Massachusetts Congregational minister. Theirs was an unconventional relationship, given Frankfurter's tendency to dominate those around him and Marion's frail health, resulting in frequent mental breakdowns. The relationship with a woman who was not Jewish deeply disturbed Frankfurter's mother, with whom he was very close, leading him to feel caught between the two women. Eventually Frankfurter and Denman would marry in 1919. Frankfurter's view of religion as "an accident of birth" greatly affected his later political activity and judicial decisionmaking.

By 1921, Frankfurter was given a chaired position at Harvard Law School, from which he waged frequent battles with A. Lawrence Lowell, the president of Harvard Law, and the conservative anti-Semitic Boston Brahmin community on behalf of the legal interests of the oppressed, socialists, and religious minorities. When Lowell proposed in 1922 a quota that would limit the number of Jewish students in Harvard Law, Frankfurter helped to defeat the plan. Frankfurter also was involved in the controversial appeal of the case of Tom Mooney, a California labor leader who had been convicted and sentenced to death for a fatal 1916 bombing. Placed in charge of a commission that argued unsuccessfully to President Wilson that Mooney's conviction was based upon perjured testimony, Frankfurter was himself accused by former president Theodore Roosevelt of being "engaged in excusing men precisely like the Bolsheviki in Russia."

When Nicola Sacco and Bartolomeo Vanzetti, two Italian anarchists, were accused of shooting a paymaster in South Boston in 1920, and eventually were sentenced to death on what seemed to many to be perjured and concocted evidence, once again Felix Frankfurter took up their cause. His journalistic crusade on behalf of what he called the "good shoe maker" and the "poor fish peddler" further isolated him from his Harvard peers and the Brahmin society. The fight became even more personal when President Lowell was appointed by the Massachusetts governor to look into the fairness of their convictions. But Frankfurter continued to display the courage of his liberal convictions as he battled without success to save the men's lives.

During these years Frankfurter became an avowed Anglophile, visiting

Great Britain with increasing frequency and expanding his huge circle of friends and associates around the globe. His love of legal order, the common law system, and the British legal system, which he studied while spending 1920 at Oxford, greatly affected his later judicial career. In time, based on his brilliance, his highly visible publishing record, and his personal relationship with various members of the Supreme Court, most especially Oliver Wendell Holmes and Louis D. Brandeis, Frankfurter became the foremost law professor in the nation. From his conversations with Holmes and Brandeis, he gained such an appreciation for the "self-restraint" jurisprudential posture on the Court, a position far different from the life he had been leading as an attorney, that this view would later come to shape his role on the judiciary.

When Franklin D. Roosevelt (FDR) was elected president in 1932, Frankfurter helped to appoint so many talented people to the New Deal administration that they became known as "Felix's Happy Hot Dogs." Having by this time moved to Washington, D.C., making it necessary to commute back and forth to Harvard for classes, Frankfurter could not seem to decide whether he was a government outsider or insider as he advised his friends and protégés in government as well as the president. Continuing his personal quest to be accepted, which he had previously faced when he moved in the world of Boston Yankees and among Wall Street's lawyers, but never achieving that status continually reminded him, he complained, of "his father and his face." Comfortable as he was with serving as a backroom government operator, he turned down both a seat on the Supreme Judicial Court of Massachusetts and, in 1933, the opportunity to become the solicitor general for the United States. Instead, he spent the year serving as the Visiting Eastman Professor at Oxford. So, he spent his time seeking to direct the New Deal from the academic world while also serving as Louis D. Brandeis's political lieutenant. Brandeis made money available for Frankfurter to undertake lobbying efforts for political activities suggested by Brandeis, while also peppering Frankfurter with proposals for law review article topics and other policy suggestions to be pursued.

It was FDR's controversial "Court-packing plan" in 1937, seeking to change the direction of the justices' decisionmaking by proposing a reorganization that would add one new justice for every one over the age of seventy up to a limit of fifteen, that severely tested Frankfurter's ability to balance his outsider/insider role with the New Deal and his intimate friendships with both Brandeis and the president. Knowing that the president was demanding loyalty, but also knowing the damage that such a plan could wreak on the Supreme Court, Frankfurter chose not to comment publicly on the program. Although the actual nature of his views are not fully known because of the tragic disappearance of his diaries from that

year, given his love for the Court, his respect for Louis D. Brandeis, who was then being attacked by proponents of the plan, his admiration for the legal establishment coming from his experiences in England and at Harvard, and his views on judicial self-restraint, this bold executive attempt to coerce the Court should have made it something that Frankfurter would oppose. On the other hand, his deference to the government and his personal affection for Roosevelt surely tugged him in the other direction. His silence in the face of what must have been for him a difficult struggle over his loyalties confused the legal community but also positioned him well with the president for any future appointments.

That opportunity came almost immediately when Benjamin Cardozo unexpectedly died. In 1939 Frankfurter was appointed to what eventually became known as "the Jewish seat" on the Court (even though for a two-week period, Louis D. Brandeis was still serving).

Once on the Court, the question became whether he would follow the radical legal posture of his early career or adopt the extreme "self-restraint" posture of his mentors, Holmes and Brandeis. The answer, it turned out, was both, as he expressed the latter view while sometimes following the former if it suited his policy aims. And in the process, because of his abrasive personal style, the expectation that he would lead the Court instead disintegrated into a great deal of personal acrimony on the bench.

Frankfurter joined the Court just one year after the announcement in a footnote to the *United States v. Carolene Products Co.* case that it was willing to give stricter scrutiny to cases involving the Bill of Rights and the Fourteenth Amendment, political speech cases, and cases involving "discrete and insular minorities" while deferring to the legislature in economic cases. Almost immediately after coming to the Court, however, Frankfurter announced that he was prepared to abandon his radical liberal reformist past and defer to the legislature in all cases.

In 1940, he revealed his "self-restraint" direction in *Minersville v. Gobitis*, dealing with a challenge by the Jehovah's Witnesses to the state of Pennsylvania's public school requirement that children salute the flag. Despite the claim that this violated the establishment clause of the First Amendment by forcing this group to worship a "graven image" that was forbidden by their religion, Frankfurter wrote the opinion for the Court upholding the legislative action saying that in times of war patriotism must be encouraged by the state.

When the Court reversed itself three years later and upheld the religious group's challenge to the law in the 1943 *West Virginia State Board of Education v. Barnette* case, Frankfurter, spurred by his love of the United States and President Roosevelt during a time of war, offered in dissent the classic statement of his self-restraint posture:

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as Judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. (319 U.S. 646–647)

In taking this position, Frankfurter forfeited his chance to lead other New Deal justices such as William O. Douglas, Hugo Black, and Frank Murphy, thus setting the stage for what would become over the next fourteen years an increasingly vitriolic environment on the Court.

Many times Frankfurter's version of judicial self-restraint made him appear to be conservative on the bench, to the disappointment of those who expected him to become a New Deal liberal on the bench. One such example came in the 1943 *Schneiderman v. United States* case, dealing with the revocation of citizenship for a Communist Party leader because of allegations that he had fraudulently procured his citizenship and was now charged with failing to demonstrate the required "attachment to the constitution" for such status. Although the Court ruled for Schneiderman, Frankfurter wrote in dissent that for him patriotism took on near religious overtones and required him as a judge to support the state: "As one with no formal ties to any religion, perhaps the feelings that underlie religious forms for me run into intensification of my feeling of American citizenship" (Lash 1975, 211).

It was in the World War II cases dealing with the government's policy creating curfews and removing and eventually interning 110,000 Japanese American citizens on the West Coast—*Hirabayashi v. United States* (1943), *Yasui v. United States* (1943), *Korematsu v. United States* (1944), and *Ex Parte Endo* (1944)—that Frankfurter argued most vociferously for supporting the wartime policies of President Roosevelt. This was done even in the face of contrary evidence to the claims that these internees represented a threat to the nation and of Frankfurter's own understanding of the problems faced by a "vilified and persecuted minority." Instead, Frankfurter argued in a concurring opinion in *Korematsu:* "That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as 'an unconstitutional order' is to suffuse a part of the Constitution with an atmosphere of unconstitutionality" (323 U.S. 224–225).

Guido Calabresi (1932–)

Although Justice Antonin Scalia is the only individual of Italian descent to serve on the United States Supreme Court, he is not the only such individual to have been a federal judge. Another prominent person who now serves as a judge on the United States Court of Appeals for the Second Circuit is Guido Calabresi. Calabresi was born in Milan, Italy, in 1932 before his parents fled to the United States to escape the rising tide of fascism. Calabresi became a U.S. citizen in January 1948. He earned undergraduate degrees at Yale and at Oxford University (where he had a Rhodes scholarship) and a law degree from Yale, after which he served as a law clerk to Justice Hugo Black.

That clerkship was followed by thirty-five years of service at Yale where, at the age of twenty-nine, he became the youngest full professor in the law school's history. He subsequently went on to become a popular dean, serving from 1985 until his appointment by former law student Bill Clinton in 1994 (Purdum 1994, B7). Among Calabresi's publications is a book, *The Costs of Accidents: A Legal and Economic Analysis*, which has been called a "seminal" work in the field of torts (B7).

Although a liberal, Calabresi defended Clarence Thomas, a Yale graduate, and had a reputation as a law school dean for speaking positively about prior graduates, especially those, such as President and Mrs. Clinton, who had gone on to distinguish themselves. He was an early backer of Bill Clinton's candidacy for president, and that support undoubtedly helped him get his nomination to the court.

There was some concern at the time of his appointment that Calabresi's appointment would block the advance of Jose Cabranes, the first native Puerto Rican then serving on a United States District Court, but although Cabranes has yet to be appointed to the United States Supreme Court, President Clinton appointed Cabranes within a year to serve on another vacancy on the same court to which Calabresi had been appointed.

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Adamson v. California was a 1947 case dealing with whether the state of California was required to observe the Fifth Amendment, which did not then apply to the states, in a capital murder case in which the defendant's choice not to take the stand in his own defense was used by the prosecution as one of its arguments for his guilt. In arguing that the Bill of Rights should not be applied to state governments through the Fourteenth Amendment's due process clause, Frankfurter stated that legal rights in such cases should be interpreted by the state judges and only reviewed on a case-by-case basis

by the United States Supreme Court to determine whether they had been fair in their actions.

Then in the 1949 case of *Kovacs v. Cooper,* Frankfurter revealed his disagreement with the *Carolene Products* footnote that the Bill of Rights should be protected by the Court as "preferred freedoms" with almost no state interest used to outweigh them. In this case dealing with a Trenton, New Jersey, ordinance that prevented amplified sound trucks from driving through city streets because they created "loud and raucous noises," Frankfurter explained in his concurrence why he believed that the Court should not use a "more exhaustive form of judicial scrutiny" for free speech cases: "The objection to summarizing this line of thought by the phrase 'the preferred position of freedom of speech' is that it expresses a complicated process of constitutional adjudication by a deceptive formula. And it was Mr. Justice Holmes who admonished us that 'To rest upon a formula is a slumber that, prolonged, means death.' Such a formula makes for mechanical jurisprudence" (336 U.S. 96).

Time and again, Frankfurter seemed to side with the government in important civil liberties cases. For example, in *Dennis v. United States,* the 1951 Smith Act prosecution of American Communist Party leaders, Frankfurter balanced the need for national security over the right to advocate even in theory the overthrow of the government.

Despite these views, Frankfurter at times exhibited almost a split personality on the Court, showing a tendency to take an activist approach in some types of civil rights and liberties cases despite his self-proclaimed "self-restraint" posture. In *Carlson v. Landon,* decided in 1952, Frankfurter dissented from a majority decision to uphold the deportation of a group of five alleged communists. In arguing in dissent that the attorney general had reached beyond his power by treating the five men as a group rather than on a case-by-case basis, Frankfurter wrote: "In these cases the Attorney General has not exercised his discretion by applying the standards required of him. He evidently thought himself under compulsion of law and made an abstract, class determination, not an individualized judgment" (342 U.S. 564).

Then nine years later, in 1961, in the case of *Culombe v. Connecticut,* dealing with the improper, near torture tactics used by the Connecticut police department to gain a confession, Frankfurter wrote the opinion for a deeply divided Court in arguing that the police tactics here were unjust. After advocating for years that he was prepared to overturn police behavior under the Fourteenth Amendment due process clause if it "shocked the conscience," Frankfurter wrote here: "It would deny the impact of experience to believe that the impression which even his limited mind drew from his appearance before a court which did not even hear him, a court which

may well have appeared a mere tool in the hands of the police, was not intimidating" (367 U.S. 633).

Relying on his appreciation for the U.S. education system that had made it possible for this immigrant's son to rise to such a lofty governmental position, Frankfurter also took an activist approach in cases dealing with education. In the 1948 *McCollum v. Board of Education* case, dealing with whether the so-called released time public school program in which students could be "released" and taught religion during the course of a normal school day represented an unconstitutional establishment of religion by the state, Frankfurter ruled against the program. For him, students would receive a better education if they remained "scrupulously free from entanglement in the strife of sects" (333 U.S. 216–217).

Then, in the 1952 *Wieman v. Updegraff* case, a First Amendment challenge to whether forcing professors to sign loyalty oaths during the Red scare period conflicted with their right of academic freedom, Frankfurter, the onetime highly controversial law school professor, wrote: "To regard teachers—in our entire education system, from the primary grades to university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry. . . . They must have the freedom of responsible inquiry by thought and action" (344 U.S. 225).

By the end of his career, though, Frankfurter once again displayed self-restraint in the 1962 case of *Baker v. Carr,* a case exploring whether the Fourteenth Amendment's equal protection clause could be used to force states to redistrict in order to equalize the impact of every person's vote. Having urged the Court for years not to decide such cases because they represented nonjusticiable "political questions" and would, in his words, propel the Court into a "political thicket," Frankfurter now dissented from the Court's agreement to decide such cases. In what would serve as his valedictory on the Court, he urged in dissent "the caution not to undertake decision where standards meet for judicial judgment are lacking, the reluctance to interfere with matters of state government in the absence of an unquestionable and effectively enforceable mandate, the unwillingness to make courts arbiters of the broad issues of political organization historically committed to other institutions and for whose adjustment the judicial process is ill-suited" (369 U.S. 289). Rather, for him: "There is not under our Constitution a judicial remedy for every political mischief. . . . In a democratic society like ours, relief must come though an aroused popular conscience that sears the conscience of people's representatives" (270).

But Frankfurter's chance to argue that courts are unsuited to decide issues like these came to an end when he suffered a severe stroke later that year. He died three years later, on 22 February 1965.

Despite the enigmatic and sometimes almost schizophrenic nature of his decisions, Felix Frankfurter will be remembered as one of the most powerful, infamous, controversial, and yet still respected jurists of the twentieth century, if not of all time. For many, though, the question will remain whether a man of Frankfurter's brilliance could have achieved even more if his approach to his tenure on the Court had been different.

Bruce Allen Murphy and Arthur Owens

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FRIENDLY, HENRY JACOB

(1903–1986)

Henry Jacob Friendly
Courtesy of Art & Visual Materials, Special Collections Department, Harvard Law School Library

Henry Friendly was one of the most important federal appeals court judges in U.S. history. His opinions in the areas of administrative law, securities regulation, and federal jurisdiction were particularly notable. As both a judge and a scholar, Friendly continues to influence judicial decisionmaking and scholarship.

Education and Early Practice

Friendly was born on 3 July 1903 in Elmira, New York, to Leah Hallo and Myer H. Friendly, the president of the Friendly Boot and Shoe Company. After graduating from the Elmira Free Academy in 1919, Friendly became an undergraduate history major at Harvard College. Judge Carl McGowan reports that after Prof. Felix Frankfurter convinced Friendly to try law school for a year, Friendly became convinced that he had found his calling. During the summer of his second year in law school, Judge Friendly served in the U.S. attorney's office in New York. He received an A.B. from Harvard College in 1923 and an LL.B. from Harvard Law School in 1927, where he became a legend. Blessed with a photographic memory, "his academic record was the highest in the modern era," according to Paul Freund (Ackerman et al. 1986, 1716); Friendly edited the *Harvard Law Review*.

Prof. Felix Frankfurter selected Judge Friendly to clerk for Supreme Court justice Louis Brandeis in 1927–1928. Friendly went from his clerkship into private practice, passing the New York bar in 1928. Several years later, Harvard Law School unsuccessfully tried to lure Friendly from private practice to teaching. In 1930, he married Sophie S. Stern, the daughter of the chief justice of the Pennsylvania Supreme Court. They had a son and two daughters.

Friendly was in private practice in New York City from 1928 to 1959. After clerking for Brandeis, he joined the prominent New York City law firm of Root, Clark, Buckner and Ballantine, becoming a partner in 1937. In this firm, as a young lawyer he was an apprentice to future Supreme Court justice John Marshall Harlan. As in law school, Judge Friendly achieved an extraordinary reputation. In 1946, he helped found Clary, Gottlieb, Friendly and Hamilton, which he headed from 1946 to 1959. He became an expert in railroad reorganizations and a corporate lawyer for Pan American World Airways, over which he served as a director, vice president, and general counsel. Friendly helped obtain new air routes for Pan Am and devised techniques to finance air transportation and "send planes all over the world without risk of seizure by creditors, and other untoward interruptions," according to Erwin Griswold (Ackerman et al. 1986, 1721).

Nomination and Service on the United States Circuit Court of Appeals, Second Circuit, New York City

On 10 March 1959 President Eisenhower nominated Friendly, a Republican, to the seat on the United States Court of Appeals for the Second Circuit, New York City, vacated by Harold Medina. The Senate confirmed Friendly on 9 September 1959, and he received his commission the next day. Both New York Republican senators, Jacob Javits and Kenneth Keating, initially favored federal district court judge Irwin R. Kaufman, but by the time of the Senate hearings, the senators supported Friendly. Friendly served as chief judge between 1971 and 1973.

In 1974, Judge Friendly changed his status from an "active" judge of the court to a "senior" judge. Even in this semiretired state, he worked on more than 125 cases a year. He provided distinguished service as the presiding judge of the Special Railroad Court under the Railway Reorganization Act. The stewardship of this court was "Friendly's most challenging task, the successful performance of which merits the gratitude of the nation" (Wisdom 1984, 67). Friendly was not active in public service until Eisenhower appointed him to the Second Circuit. He did fund-raising for Harvard Law School and while on the circuit court served on Harvard University's Board

of Overseers from 1964 to 1969. He was adviser to the American Law Institute's Federal Securities Code, which was written by his mentor Prof. Louis Loss of Harvard. Friendly's brilliance in public service centered on his work as a federal appeals court judge, comparable in his generation only to the legendary Judge Learned Hand. Friendly received the Presidential Medal of Freedom in 1977 and the Thomas Jefferson Memorial Award in Law in 1978. Beset with failing eyesight and grieving over the death of his wife, Friendly committed suicide in 1986 at age eighty-two, a decision apparently guided by "the same deliberate, controlling, and reasoning self that guided the rest of his life" (Gewirtz 1986, 2054).

Friendly as Judge

Judge Richard A. Posner, who clerked for Friendly, described him as "the greatest federal judge of his time—in analytic power, memory, and application, perhaps of any time. His opinions have exhibited greater staying power than any of his contemporaries on the federal courts of appeals" (Ackerman et al. 1986, 1724). Posner emphasized Friendly's "brilliance and industry . . . rich and varied practical experience and his less well-known modesty and matter-of-factness" (1724). He was also known for his "unfailing grace" (Randolph 1999, 3). Friendly's opinions demonstrated intense reasoning and straightforwardness.

Friendly's stature is based on many factors. These include (1) the exquisite quality and craft of his opinions and their continued use in law school casebooks; (2) membership on the Second Circuit in New York during the period of internationalization and growth of securities markets, business, and finance; (3) the writing of an unusually large number of important cases while on the Second Circuit Court; (4) his reputation for brilliance; (5) close ties with Supreme Court justices, academic leaders, and law clerks whom he mentored; (6) seminal legal publications and distinguished lectures; and (7) the landmark cases, articles, and books that he wrote, particularly in the areas of securities, administrative law, and federal jurisdiction. Friendly was pragmatic before it was fashionable to be so. Judge Posner is among modern-day pragmatists who have lionized Friendly.

Quality and Craft of His Opinions

In 1963, Justice Felix Frankfurter told Friendly that he regarded him "as the best judge now writing opinions on the American scene" (according to Paul Freund in Ackerman et al. 1986, 1715). Harvard Law's dean Irwin Griswold wrote that Henry Friendly "was the ablest judge of my generation" (Acker-

man et al. 1986, 1720). During his twenty-seven years' service as an appellate judge, Friendly became particularly well known for crafting lucid judicial decisions on a wide range of legal issues including securities law, administrative law, and federal jurisdiction as well as admiralty and criminal law. Harvard professor Louis Loss believed that Friendly "did more to shape securities law than any judge in the country" (Ackerman et al. 1986, 1722).

Scholars have lauded Friendly and circuit judge Learned Hand as the most preeminent judges of their age who never were selected for the Supreme Court. Both men "lifted judicial craftsmanship to the level of high art . . . were great 'balancers' and great formulators of balancing tests . . ." and exhibited an "astonishing versatility, an at homeness in a wide range of subjects and levels of complexity." "Both were keenly aware of the limitations of judicial office and the deference due other decision-making institutions" (Goodman 1984, 10).

Moreover, Friendly achieved his reputation even though he had less room than Supreme Court justices and than appeals court judges in other circuits to make grand statements of constitutional law principles. Being in Manhattan, near the home bases of the securities industry and of large corporations, Friendly continually faced cases that presented narrowly technical or factual issues. He had to write opinions on even these cases on a slate of Second Circuit precedents written by such great judges as Learned Hand and Jerome Frank (Sachs 1997). Moreover, Friendly impacted administrative law, even though the District of Columbia Circuit hears most cases relating to federal agencies.

Friendly showed unbelievable, even unmatched, industry in writing majority opinions. Between 8 November 1961 and 23 March 1977, Friendly wrote an average of 36.3 opinions a year, whereas his colleagues averaged 24.2 opinions a year. With regard to securities law, where he made the greatest legal impact, Friendly's output of fifty-six securities decisions in this period "was more than triple the output of sixteen of his colleagues and more than double the outputs of the remaining four colleagues" (Sachs 1997, 809).

Pragmatism Mixed with Justice: The Jurisprudence of Judge Friendly

Perhaps the most important reason for Friendly's continued stature as a judge is the way he went about deciding cases by interweaving pragmatism, facts, principles, and precedent. Although concerned with principles, Friendly did not support "Grand Theory" and its application, and he cautioned against "an exaggerated devotion to *stare decisis*" (Friendly 1967,

viii). Friendly explained, however, that he tried to write his decisions clearly, saying that

> the decider should cerebrate rather than emote about what he is deciding; that he should endeavor to provide a principle that can be applied not simply to the parties before him but to all having similar problems; that he should tell what he is doing in language that can be understood rather than indulge in flights of rhetoric; and that if he finds a principle is not working properly, he should qualify or overrule it candidly and openly rather than to profess adherence while reaching inexplicable results. (viii)

On Friendly's death, Prof. Paul Freund wrote, "Grand Theory, whether in history or in law, had seemingly no appeal to Friendly. He had learned to dig for more measured and discrete purposes, in order to make fairer and more rational connections, to build more serviceable structures" (Ackerman et al. 1986, 1719). Friendly's scholarly writings largely dealt with particular tangible issues that he faced as a practicing appellate judge.

Friendly viewed the judge's role as that of encouraging Congress and administrative agencies to establish clear standards that would create more settled expectations as to which actions were permissible and which were not. He constantly criticized "[Government's] failure to develop standards sufficiently definite to permit decisions to be fairly predictable and the reasons for them to be understood" (Friendly 1967, 90). Believing that the development of standards was also crucial to fair and consistent judicial decisionmaking, Friendly worked to establish legal tests that administrators and other judges could apply.

As in securities and administrative law, Friendly advocated consistency in criminal procedure in order to achieve equal and just treatment under the law. He emphasized that "the law should provide like treatment under like circumstances" (Friendly 1967, 101), and he sought to achieve this by developing standards. Friendly also believed, however, that where no rational standards or principles were possible, the government should leave outcomes to the marketplace. In what is now common practice, as early as 1967 Friendly argued that since no rational standards for giving out radio and television licenses were possible, they should proceed by auctions to the highest bidder.

Scholars differ as to whether Friendly was a judicial activist. He wrote in the activist age of the Warren Court in the 1960s through 1986. Although he was an innovative judge in an age of judicial activism and administrative reform, he emphasized that innovation should not undermine judicial craftsmanship, pragmatism, and a respect for the limits of courts as institutions, especially when they engage in judicial review (Friendly 1973, 13–14).

Administrative Law

Administrative law was Friendly's first love. Friendly and Frankfurter were considered the "dominant voices in administrative law" for many decades (Randolph 1999, 8). Through Friendly's scholarly writings and opinions, he "mapped the course of the modern doctrines of administrative law . . . [and] we can say with assurance that he has made the resulting landscape all the better" (17). Friendly defined administrative law as "includ[ing] the entire range of action by government with respect to the citizen or by the citizen with respect to the government," excepting matters of criminal law and civil actions (4).

In the aftermath of the landmark Supreme Court decision in *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1970), Friendly's ruling in *National Nutritional Foods Ass'n v. FDA*, 491 F. 2d 1141 (2d Cir.) (1974) remains the leading case explaining the extent to which litigants may probe the mental processes of administrative decisionmakers. Holding that "inquiry into the mental processes of administrative decisionmakers is usually to be avoided," Friendly ruled that such inquiry may be required if it is "the only way there can be effective judicial review" (Randolph 1999, note 37).

Friendly's decision in *Toilet Goods Association v. Gardner,* 360 F.2nd 677, 684 (2d Cir.)(1966) also had a significant impact on administrative law. It dealt with the novel question of whether there could be preenforcement judicial review of an agency's regulations. In *Toilet Goods,* Judge Friendly devised a new test balancing the appropriateness of the issues for decision by courts and the hardship of denying judicial relief (see Randolph 1999, 8–9). Friendly analogized challenges to agency regulations to challenges to the constitutionality of statutes. He issued the decision in *Toilet Goods* when the United States Supreme Court was considering *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967). The Supreme Court adopted Friendly's analysis almost word for word, and it has remained part of the fabric of administrative law.

Before *Abbott,* courts exercised judicial review only when a rule was enforced, not when it was promulgated, but "[a]fter Abbott Laboratories reviewing practice changed radically" (Breyer and Stewart 1985, 1186). Friendly advocated increasing agency rule making, in place of case-by-case adjudication, while enabling federal courts to determine the procedural fairness of rule-making processes by exercising judicial review. Federal courts should pragmatically decide when preenforcement review is required but should use caution in permitting such review. Friendly advocated a judicial sliding scale in deciding whether to permit preenforcement review. For Friendly, pragmatism and justice were intertwined. Courts must decide cases one at a time; general broad-based principles must not be imposed on

courts making such decisions. The impact of *Toilet Goods* on citizen and group access to administrative decisionmaking was enormous. It encouraged legal advocacy by public interest groups, permitted more forceful government policies and rules, and provided clearer rules to the economic and social system.

As in all doctrinal areas, Friendly's scholarship enhanced his stature. His decisions often included innovations that he had articulated in scholarly writings. In his book *The Federal Administrative Agencies: The Need for a Better Definition of Standards*, Friendly wrote, "The basic deficiency, which underlies and accounts for most serious troubles of the agencies, is the failure to 'make law' within the broad confines of the agencies' charters; that once this basic deficiency is remedied, other ills will largely cure themselves . . ." (Friendly 1962, viii).

"Some Kind of Hearing"

Friendly laid the groundwork for changes in administrative procedures, which became important in the Supreme Court's interpretation of key environmental legislation. Friendly argued for the importance of hearings in administrative agencies, as the government allocated more resources that affected the lives of citizens and impacted businesses and corporations. In 1975, Friendly published "Some Kind of Hearing." In arguments that courts have since repeated, he maintained that the more serious the hearing, the more important it was to provide procedures for fairness. Friendly's major concern was that agencies establish standards and "devise procedures that are both fair and feasible" (Friendly 1975, 1315).

Friendly explored the conditions under which administrative hearings are necessary. Friendly noted that in *Frost v. Weinberger* (1975) he introduced a test for deciding the level of procedural safeguards that mandated an administrative hearing: "The required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it" (Friendly 1975, 1278). Friendly described, in order of importance, the following core elements of a fair hearing: an unbiased tribunal; notice of the proposed action and the grounds asserted for it; an opportunity to present reasons why the proposed action should not be taken; rights to call witnesses, to know the evidence against one, and to have decisions based only on the evidence presented; the right to counsel; the making of a record and a statement of reasons; public attendance; and judicial review (1279–1295).

Randolph noted that less than a year after Friendly's publication of "Some Kind of Hearing," "the Supreme Court adopted Friendly's approach

in *Mathews v. Eldridge* (424 U.S. 319 [1976])" (1999, 15). The Court established a sliding scale of procedural safeguards. In *Mathews*, the Supreme Court said that procedures through which the Social Security Administration determined eligibility for disability benefits did not require a full evidentiary hearing. Friendly worried that if courts required too complex and time-consuming procedural safeguards, states would have less moneys to provide citizens with services. Agencies needed to have some kind of hearing, however, so that governments did not make arbitrary decisions affecting the lives of citizens. Courts must provide reasons whether agencies should expand, diminish, or even eliminate elements of hearings depending on the agency and the type of decisions to be made. In some agencies informality would reign, in others not.

Securities Law

Prof. Louis Loss wrote that "Judge Friendly . . . did more to shape the law of securities regulation than any judge in the country" (Ackerman et al. 1986, 1723). Friendly authored more than 100 majority opinions in this area (Goodman 1984, 11). "His name appears in ten securities opinions of the United States Supreme Court as well as in three-hundred-fifty-five securities opinions of the lower federal courts outside the Second Circuit. Nineteen of his opinions . . . have appeared as principal cases in securities regulation casebooks" (Sachs 1997, 781).

Friendly's contribution to securities regulation included the finding in 1980 of an implied private right to action in the Commodity Exchange Act in *Leist v. Simplot*. Similarly, in *Rosenfeld v. Black* (445 F. 2nd 1337 [2nd Cir. 1971]), Friendly noted that a fiduciary, a retiring investment adviser, cannot get a fee from his successor in compensation for arranging for the substitution. Friendly exercised creativity in *Rosenfeld* by applying equity principles that imposed a higher standard than the morals of the marketplace required.

Friendly so hated white-collar crimes such as fraud that he once described a securities case as "another of those sickening financial frauds which so sadly memorialize the rapacity of the perpetrators and the gullibility, and perhaps also the cupidity, of the victims" (Goodman 1984, 11). He did not want the law to allow customers to shift the risk of market decline to brokers, however (12). Friendly said that courts must look at each question of federal civil liability for violation of exchange or dealer association rules on a rule-by-rule basis and not use an all-or-nothing approach (14).

Between 1968 and 1983, Friendly wrote five of the seven cases that came to the Second Circuit relating to transnational securities. He understood the peculiar problems of international security transactions. As noted by

Prof. Louis Loss, Friendly saw that something more than the previously articulated general principles were needed if the securities market was to became global in the computer age (Ackerman et al. 1986, 1722). In a series of decisions in the 1970s, "Judge Friendly blazed a trail through this largely uncharted terrain" (Goodman 1984, 19). Innovation and moderation, or minimalism, were key elements of Friendly's court opinions. Quoting Judge Learned Hand, Friendly wrote "[The judge] must endeavor to puzzle out what the legislature would have deemed desirable, not what he would have thought. Attempt this he must; yet we cannot reasonably expect that fallible human beings will always be capable of selflessness so sublime" (22).

Friendly was far more cautious than most federal judges and justices during the period when federal courts were expanding the right to sue. Friendly pushed in the opposite direction during the late 1970s and 1980s, however, when the Supreme Court retrenched on the implied rights to sue under securities law. Friendly thus found that Congress's failure to eliminate a private remedy when it amended the Commodity Act Exchange Act in 1974 implied a willingness, and even a desire, to retain it (Goodman 1984, 15).

In addition to his serving in the Second Circuit, the "Mother Court" of securities regulation, Friendly's reputation in securities law was aided by the close relationships with his mentors, including Supreme Court justices Louis Brandeis, Felix Frankfurter, and John Marshall Harlan. Friendly also maintained a lifelong friendship with Harvard's Louis Loss, the leading securities scholar of the day. Loss edited important sentences in draft opinions, supplied specific ideas, and inspired modes of analysis, such as the Extraterritorial Reach of Rule 10b–5 in securities law. In *Goldberg v. Meridor* (567 F. 2d 209 [2d Cir. 1977]), Friendly altered his opinion based on Loss's suggestions, sometimes including nearly verbatim, albeit unattributed, statements from his friend (Sachs 1997, 796–800).

Federal Jurisdiction

Friendly was very interested in federal jurisdiction. As a judge in the 1960s and 1970s, Friendly was concerned that Congress and the Supreme Court were overburdening federal courts by expanding the rights of action to them. In 1973, he published *Federal Jurisdiction: A General View.* Friendly urged Congress and the Supreme Court to exercise restraint in order to combat the growing number of federal cases. Friendly wrote, "My thesis will be that the general federal courts can best serve the country if their jurisdiction is limited to tasks which are appropriate to courts, which are best handled by courts of general rather than specialized jurisdiction, and where the knowledge, tenure and other qualities of federal judges can make a distinctive contribution" (Friendly 1973, 13–14).

Friendly believed that federal courts were uniquely equipped to protect rights guaranteed by the Constitution, to enforce civil rights legislation, to deal with controversies between citizen and the federal government, to apply federal criminal law, and to interpret and to apply acts of Congress (both old and new) that protected consumers, investors, and the environment. He also saw federal courts as central to the interpretation and implementation of federal labor and antitrust legislation and such traditional federal specialties as admiralty, bankruptcy, and copyright. He believed that the federal courts should help control the states so that local requirements that were either too narrow or too expansive would not impede congressional policy. He thought that motor vehicle accident litigation should not be in any courts, much less federal courts, and he favored weighing the total elimination or drastic curtailment of the availability of diversity jurisdiction. He also encouraged the establishment of more specialized federal courts. Ahead of his time, in 1973 he called for a specialized federal patent court with trial jurisdiction and a court of tax appeals to unburden traditional federal courts.

Friendly delivered his most important federal jurisdiction decision in *T. B. Harms Co. v. Eliscu,* 339 F.2d 823 (2d Cir. 1964), which "stands unchallenged after two decades as the leading judicial discussion of the intractable problem of defining cases arising under federal law" (Currie 1984, 7). In *Harms* Friendly set out a general test under which an action would arise:

> [W]e think that an action "arises under" the Copyright Act if and only if the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement or for the statutory royalties for record reproduction . . . or asserts a claim requiring construction of the Act, . . . or, at the very least and perhaps more doubtfully, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim. (7–8)

Currie noted, "At least three opinions of Judge Friendly, each over ten years old, stand as the principal authorities on one side of important and disputed questions of federal jurisdiction that the Supreme Court has yet to resolve" (6).

Criminal Procedure

In the area of criminal procedure Friendly found himself at odds with the judicial activism of the Warren Court. Friendly was central to the national debate over the Fifth Amendment's right against self-incrimination. Friendly expressed his concern over the implications of the Supreme Court's decision in *Escobedo v. Illinois* (1964), which affirmed the right of

suspects to have their lawyers present during questioning, and *Miranda v. Arizona* (1966), which required the police to inform suspects of their right to remain silent. Friendly thought these decisions tipped the scales too much in favor of criminals and that criminals were using the privilege to shield themselves from the law. He thought that police officers should have the right to question suspects before taking them into custody.

Frank Goodman wrote, "In the field of criminal procedure, Judge Friendly's most notable contributions have come from the lectern rather than the bench. In a series of lectures at the U of Cincinnati in 1968 . . . he delivered one of the most powerful critiques ever made of the privilege against compulsory self-incrimination . . ." (Goodman 1984, 23). Two years later in the 1970 Ernst Freund Lectures at the University of Chicago, Friendly set out his thesis that ". . . convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence" (Friendly 1970, 142). Friendly continued, "[My] aim is to restore the Great Writ to its deservedly high estate and rescue it from the disrepute invited by current excesses" (143). Friendly argued that the criminal justice system spent a disproportionate amount of funds and resources on frivolous collateral attacks, rather than on the actual trials of accused persons: "The system needs revision to prevent abuse by prisoners, a waste of the precious and limited resources available for the criminal process, and public disrespect for the judgments of criminal courts" (172). Friendly also argued,

> In applying the Bill of Rights to the states, the Supreme Court should not regard these declarations of fundamental principles as if they were a detailed code of criminal procedure, allowing no room whatever for reasonable difference of judgment or play in the joints. The "specifics" simply are not that specific . . . The Bill of Rights ought not to be read as prohibiting the development of "workable rules," or as requiring the states forever to confirm their criminal procedures to the preferences of five Justices reached on a record whose extreme facts may have induced the rapid formulation of a principle broader than the empirical investigation would show to be wise and without illumination such a study would afford. . . . (Friendly 1967, 262–265)

In the area of criminal procedure, Frank Goodman observed elements of "pragmatism, federalism, and democratic theory" in Friendly's evocation of judicial restraint (Goodman 1984, 26). Goodman believed that Friendly's restraint was evocative of "the pragmatist's faith in the efficacy of experimentation" (26). In *Johnson v. Glick* (481 2d 1028 [1d Cir. 1973]), Friendly formulated a nuanced standard of due process in a case when a prisoner charged his guard with unnecessary use of excessive and brutal punishment.

In several key decisions, however, Friendly protected criminal defendants. Thus, in *Braithwaite v. Manson*, 527 F.2d 363 (2d Cir.) (1975), which the Supreme Court overruled, Friendly wrote, "[eyewitness] identifications unnecessarily obtained through impermissibly suggestive procedures must be excluded without regard to their probable accuracy in the particular case; and that no rule less stringent 'can force police administrators and prosecutors to adopt procedures that will give fair assurance against the awful risks of misidentification'" (Goodman 1974, 27).

As in other fields, Friendly sought fair procedures by government agencies. He thought agencies should develop procedures pragmatically as courts used their powers of judicial review. Friendly did not want federal courts to develop principles and rights that would straitjacket the ability of legal advocacy groups and experts to work out fair and efficient administrative procedures and agencies to meet the needs of those seeking redress from government.

Ronald Kahn

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GIBSON, JOHN BANNISTER

(1780–1853)

John Bannister Gibson
Library of Congress

A Pennsylvania jurist for forty years and the commonwealth's longest-serving chief justice, John Bannister Gibson helped to fashion the law of his state during its formative years. His dissenting opinion in *Eakin v. Raub* (1825), reprinted today in nearly every casebook on American constitutional law, stands as the most telling rebuttal by a sitting judge to United States Supreme Court chief justice John Marshall's defense of judicial review in *Marbury v. Madison* (1803).

The third of the four sons of George and Anne West Gibson (a daughter died in infancy), John was born 8 November 1780 at Westover Mill along Sherman's Creek in Spring Township in a section of Cumberland County, Pennsylvania, that today lies in Perry County. The nearest settlement was Carlisle, the county seat, about twelve miles south on the other side of Blue Mountain. Elizabeth De Vinez, John's paternal grandmother, was the child of a French count and a Huguenot and taught both French and Spanish to her children and oldest grandchildren. As early as 1722, John's Scotch-Irish paternal grandfather, George Gibson, kept the Hickory Tree Tavern, and it was from this property along the road from Philadelphia to Wright's Ferry (now called Columbia), about 100 yards east of present-day Penn Square, that the city of Lancaster was laid out in 1730 in newly organized Lancaster County. John's maternal grandfather was Francis West, a colonial judge in

Cumberland County, who was a cousin of portrait artist Benjamin West. The last name of his maternal grandmother was Wynne.

John's paternal grandparents had three children in addition to his father, George. A son (also named John) was a colonel in the American army and commanded Fort Pitt in 1781. One of the two daughters married Simon Snyder who, as governor, later launched John's judicial career. John's father, George, seemed also to prefer military life to running the family mill. On General Washington's orders, he was in charge of transporting English troops captured at the battle of Yorktown, Virginia, for incarceration at York, Pennsylvania. Indeed, it was probably from one of his father's military assignments during the Revolutionary War that John's middle name "Bannister" derived: George was well acquainted with John Banister, a Virginia lawyer who was also a member of the Continental Congress. (John added the second *n* to the spelling as an adult.) Colonel George Gibson remained in the army after the war but was mortally wounded in action in 1791 along the Wabash River in western Ohio in the ill-fated expedition led by Gen. Arthur St. Clair against the Miami Indians.

Anne Gibson struggled to keep the mill going. She opened a school, taught her boys, and nurtured them in the tenets of the Episcopal Church. John learned the skills of hunting and fishing from his older brothers. In about 1795 he enrolled in a grammar school operated by Dickinson College in Carlisle and shortly matriculated at the college. Thus, he may not have met a student from Maryland by the name of Roger B. Taney who graduated from Dickinson in 1795 and who, in 1836, would become the fifth chief justice of the United States. But he did meet Hugh Brackenridge, whom Gibson would succeed on Pennsylvania's supreme bench and who befriended the new student by giving him access to his personal library, reported to be the largest in the county.

Before completing requirements for a degree, Gibson withdrew from Dickinson in 1797 or 1798 to study law under the tutelage of Carlisle attorney Thomas Duncan (who would later sit with Gibson on the state's high court) and was admitted to the Cumberland County bar on 8 March 1803. A tutorial relationship with an established lawyer was the route almost everyone took into the legal profession in Gibson's day. One "read law" under another's guidance—typically for several years—and learned by asking, by doing, and by observing. Education in law schools would not become the preferred, and then the required, preparation for practice until the twentieth century. By age twenty-three it was already apparent that Gibson shared the physical characteristics of most of the Gibson men. He had reached six feet, three inches in height and possessed a large well-proportioned frame. Although facial features suggested determination and firmness, he had a genial disposition and unpretentious speech.

In 1803, the town of Carlisle counted slightly more than 2,000 souls. Besides the college, it boasted an army garrison, was a jumping-off point for travel west across the mountains, and was a stop along the busy trading route leading south into Maryland and the Shenandoah Valley of Virginia. Local opportunities, however, seemed inadequate. Within the span of several years Gibson was admitted to the bars of Allegheny and Beaver Counties in western Pennsylvania and to the bar in Hagerstown, Maryland, before returning to Carlisle. Was this the pattern of a struggling or an upwardly mobile young attorney? The record is unclear. Yet by all accounts he was convivial and knew how to relate to people. These qualities may explain his election to the 1810–1811 and 1811–1812 sessions as Cumberland County's delegate to the state house of representatives, where he advocated internal improvements on a wide scale and chaired the judiciary committee.

He also found time for a courtship with Sarah Work Galbraith, who was ten years younger and the child of Col. Andrew and Barbara Kyle Galbraith of Carlisle. The two were married on 8 October 1812 in the Galbraith home by the Reverend Henry Wilson, the local Presbyterian pastor. Their union yielded eight children, with two boys and three girls surviving into adulthood. As appalling as the loss of three offspring in childhood might seem today, the Gibsons were fortunate by early-nineteenth-century standards. Others endured even greater loss. It was an era when medicine lagged well behind the progress of other sciences. Sarah Gibson survived her husband by eight years, dying on 25 January 1861.

Gibson's career as a practicing lawyer was short. On 16 July 1813, Governor Snyder named Gibson presiding judge of the court of common pleas (Pennsylvania's court of general jurisdiction) for the newly created eleventh judicial circuit in the northeastern part of the state. The appointment necessitated Gibson's relocation to Wilkes-Barre in Luzerene County, but he conducted trials as far away as a log house in Wellsboro in Tioga County, some eighty-five miles northwest of his new residence. Given the primitive transportation of the day, the judge surely spent as much time in stagecoaches as he did on the bench.

Upon the death of Justice Brackenridge, Gibson's Carlisle mentor, Snyder named Gibson to the Supreme Court of Pennsylvania on 27 June 1816, where he joined Chief Justice William Tilghman and Justice Jasper Yeates. The high court's roster was increased to five in 1826, and upon Tilghman's death Gov. John Andrew Shulze commissioned Gibson chief justice on 18 May 1827. Under the constitution of 1790, judicial selection lay entirely in the governor's hands. During his thirty-seven-year tenure, Gibson participated in roughly 6,000 cases and authored more than 1,200 opinions that are spread over nearly six dozen volumes of published reports. Because the supreme court also possessed *nisi prius* or trial jurisdiction (eliminated

entirely by the constitution of 1874) in certain cases, Gibson delivered numerous charges to juries that were never reported.

Gibson's promotion, however, did not end the need for travel, even though he maintained a home in Carlisle until his death. Then as now, the state supreme court was a peripatetic body. That is, rather than sitting in Harrisburg, the capital after 1812, it sat each year in various locations across the commonwealth. During 1825, for example, the March term was held in Philadelphia, the May term in Lancaster, the June term in Sunbury, the September term in Pittsburgh, the October term in Chambersburg, and the December term in Philadelphia again. Lawyers typically traveled with the justices from site to site and roomed and dined at the same hotels. On one occasion Gibson and attorney James Buchanan shared the same room. Buchanan's loud snoring annoyed Gibson, prompting the latter to release the window shade with such velocity as to shake the future fifteenth president out of his slumbers. Buchanan awoke, inquired about the noise, only to fall back to sleep and into his snoring. Gibson tried the same tactic again but to no avail.

By the 1820s Gibson had learned to play the violin, to tune pianos, and to enjoy Shakespearean drama. He not only contributed to legal periodicals but wrote pieces occasionally for scientific journals on medical and geological subjects as well. He was also an artist, having completed a self-portrait at age twenty-one. Surely an uncommon accomplishment among American jurists, he practiced dentistry on the side, at least in his later years. This seems to have come about after gum disease caused the loss of otherwise sound teeth. Unable to find someone in Carlisle or Philadelphia willing to reassemble them into a plate, he fashioned one himself and thus was able to retain his own teeth, if in removable form, until his dying day.

When Gibson joined the supreme bench, judicial review—the authority of courts to invalidate the actions of other branches of government that, in the judges' view, violated the Constitution—was in its infancy. Supreme courts of several states had occasionally exercised the power, and justices of the United States Supreme Court assumed the existence of the power in the 1790s, but it was not until 1803 in *Marbury v. Madison* that the United States Supreme Court, in an opinion by Chief Justice John Marshall, invalidated an act of Congress and defended its right to do so as deriving from the theory of a written constitution. The Pennsylvania Supreme Court had not yet exercised this power, although from time to time various justices opined that they could do so when confronted with a clear violation. Judicial review, declared Gibson in 1817, was appropriate "in extreme cases only" (*Moore v. Houston*, 196).

Yet during the next eight years, Gibson reconsidered even this modest position. He was not alone. The decade of the 1820s was a veritable petri

dish of proposals in and out of Congress to rein in the federal judiciary. Thus in the otherwise unimportant 1825 case of *Eakin v. Raub,* Gibson deployed a dissenting opinion to deny the legitimacy of judicial review by any court, state or federal, unless expressly authorized by the Constitution. There was no such authorization in the U.S. Constitution for the federal courts and none in the Pennsylvania constitution for state courts. Gibson conceded that a Pennsylvania court might invalidate a state statute if it violated the *federal* Constitution, but that was only because of a grant of authority Gibson found in the supremacy clause in Article 6 of the U.S. Constitution.

Gibson's opinion in *Eakin* was a point-by-point refutation of Marshall's assertion of the power in *Marbury.* "[I]n what part of the constitution are we to look for this proud pre-eminence?" asked the Pennsylvanian. To invalidate a statute that had been properly enacted amounted to "a usurpation of legislative power. . . . It is the business of the judiciary to interpret the laws, not scan the authority of the lawgiver; and without the latter, it cannot take cognizance of a collision between a law and the constitution. . . . [T]o affirm that the judiciary has a right to judge of the existence of such collision, is to take for granted the very thing to be proved." Although he admitted that the Constitution was superior to an ordinary statute, "it is a fallacy to suppose that they can come into collision *before the judiciary*" (*Eakin v. Raub,* 347–348).

Marshall had said that judges did violence to the Constitution if they applied an unconstitutional statute. Not so, answered Gibson. "The fallacy . . . is, in supposing that the judiciary adopts the acts of the legislature as its own. . . . The fault is imputable to the legislature, and on it the responsibility exclusively rests" (*Eakin v. Raub,* 354). In response to Marshall's argument that an absence of judicial review would lead to unlimited legislative power and so would deny the people the advantages of a written constitution, Gibson insisted that a constitution remained "an instrument of inestimable value" because it "render[ed] its first principles familiar to the mass of the people" (354). If the legislature violated the Constitution, the people would seek retribution at the polls. Besides, a error in constitutional interpretation by appointed judges would be far more difficult to correct than an error in interpretation by elected representatives.

Some believe that Gibson's bold argument in *Eakin* cost him a seat on the United States Supreme Court. Gibson was in fact one of three individuals whom Pres. Andrew Jackson considered to fill the vacancy created by the death of Justice Bushrod Washington in 1829. Moreover, nationalists such as Daniel Webster regarded Gibson's views as downright dangerous and strongly opposed his candidacy. But Jackson was hardly a fan of judicial power. Moreover, Gibson's brother Gen. George Gibson had served in Jack-

son's command in Florida and knew the president well. So the story seems more complicated.

Jackson's selection of Pennsylvania attorney and member of Congress Henry Baldwin in place of Gibson more probably reflected the president's desire to curb the influence of Vice Pres. John C. Calhoun, who had also served as vice president in the preceding administration of John Quincy Adams and who in the Senate had blocked Jackson's nomination of Baldwin as treasury secretary. Pennsylvania politics at that time was defined in terms of competition between the "family party" that deplored a high protective tariff and the "amalgamation party" that favored one. Both sought to capitalize on Jackson's popularity by supporting him in the election of 1828. The family party, with which Gibson was aligned, hoped to propel Calhoun into the White House in 1832, on the expectation that Old Hickory would not seek a second term. When Calhoun supported Gibson's nomination and the amalgamation forces mobilized a massive lobbying campaign on Baldwin's behalf, Jackson's nod to the latter was hardly a surprise.

Gibson recanted on judicial review in the 1840s because the people's representatives had "sanctioned the pretensions of the courts to deal freely with the acts of the legislature, and from experience of the necessity of the case" (*Norris v. Clymer,* 281). The former reference was to the convention that produced the constitution of 1838 that, by its silence on the subject, seemed to countenance judicial review. Judicial reformers managed only to impose fixed judicial terms and senate confirmation of judicial nominees.

The second reference harkened to a peculiarity of Pennsylvania law: The commonwealth had long had no system of equity jurisprudence. (Equity attempted to achieve fairness in particular cases and had developed in England as an alternative to sharp edges of the common law.) Instead, Pennsylvania judges administered some equity through common law channels, and in a sharp departure from the principle of separation of powers, the legislature routinely dispensed equity through private bills. Largely at Gibson's nudging, the legislature granted complete equity jurisdiction to the state courts in 1836, but in succeeding years continued to intrude statutorily into matters now presumably the exclusive province of the judiciary. In 1843, for example, a statute seemed to allow an illegitimate child to dispose of property that the mother had willed to others. That construction, Gibson held, would sanction arbitrary power and would violate the "law of the land" clause in the state constitution. Were that the intention, "it would become our plain imperative duty to obey the immediate and paramount will of the people expressed by their voices in the adoption of the Constitution, rather than the repugnant will of their delegates acting under a restricted, but transcended authority" (*Norman v. Heist,* 174). This was precisely the basis of Marshall's reasoning in *Marbury* in defense of judicial

review. Perhaps Gibson had come to the conclusion that the people were not always the trusted guardians of the constitution, as he had supposed nearly two decades before.

In other contexts Gibson's expansive view of the power of the legislature minimized the number of instances in which he might vote to invalidate a statute. Always a supporter of state-sponsored internal improvements, Gibson upheld a statute in 1840 that allowed railroads to lay track across private property. Against the argument that no provision in the constitution authorized the practice, Gibson concluded that the clause banning the taking of private property for public use without compensation was an enabling, not a disabling, provision, inasmuch as there was no "express constitutional disaffirmance" of what the statute allowed (*Harvey v. Thomas*, 66). In an upending of the theory of the federal Constitution, Gibson reasoned that under the state constitution the legislature possessed all powers except those that had been prohibited.

One of the longest cases in the published reports during Gibson's time on the court was *Commonwealth v. Green*, decided in Philadelphia in 1839 on appeal from a *nisi prius* trial (one in which a judge presides over a jury trial) conducted by Gibson's colleague Justice Rogers. The specific issue was whether trustees elected in 1838 by the General Assembly (the national governing body) of the Presbyterian Church (U.S.A.), meeting in Philadelphia, had been legally chosen. Underlying the litigation was a schism within the church. The "old school" faction at the 1837 General Assembly had exscinded several presbyteries (regional governing bodies) containing some 60,000 communicants because the old school faction rejected a "new school" action by the General Assembly of 1801 that allowed an exchange of clergy, among other accommodations, with the Congregational Church in newly settled, but sparsely populated, areas. Delegates from the exscinded presbyteries, where such exchanges in this allegedly unholy alliance had been commonplace, were denied seats and votes at the 1838 gathering. The jury held for the new school side, concluding that the 1838 assembly acted contrary to the church's legislatively granted articles of incorporation of 1799. Gibson for the supreme court found a preponderance of the evidence favored the old school and reversed. Exasperation with both sides, however, was apparent in his opinion, as he admonished Presbyterians to behave "decently and in order" (605).

Gibson's opinions reflected unbounded faith in the common law tradition, modified to meet the needs of a new nation, that had been inherited from English courts. Accordingly, he opposed the codification movement in U.S. law, preferring adaptable judge-made rules to systematically arranged and detailed legislative enactments. "It [codification] is always adapted to the circumstances of a single case in the mind's eye of the con-

structor," Gibson wrote in a review for the *American Law Register* two months before his death, "and when it is required to work on any other, it works badly or not at all. . . . It is this propensity to generalize that leads to perpetual tinkering at the statutes, till they are at last a wretched piece of unintelligible patch-work. This would be prevented by not attempting to do too much, and leaving the rest to the courts" (Porter 1855, 135).

Moreover, his career displayed a keen sense of survival. When the constitution of 1838 replaced tenure during "good behavior," which had paralleled the federal practice, with a system of fifteen-year terms for the justices, incumbent justices were to be retired at three-year intervals in order of seniority. Through prearrangement Gibson resigned his seat, was reappointed by Gov. Joseph Ritner, and was thereby assured of the longest possible tenure among his colleagues. Soundly criticized in the press for this action, Gibson was frank in his own defense: Approaching sixty, he doubted his ability to reestablish himself financially in the practice of law. After a constitutional amendment in 1850 made all judicial offices elective, Gibson, who strenuously objected to the change, was the only justice chosen to continue in office. He may have lost some faith in the people, but apparently they had not lost faith in him. But the amendment cost him the chief justiceship, which was now to rotate.

Gibson was in Philadelphia for a term of court when he died at the United States Hotel on Chestnut Street in the early morning hours of 3 May 1853 in his seventy-third year. Jeremiah Black, who had succeeded Gibson as chief in 1851, wrote much of the inscription still legible on Gibson's monument, which stands in the cemetery a few blocks from the center of Carlisle: "In the difficult science of jurisprudence he mastered every department, discussed almost every question, and touched no subject which he did not adorn." Gibson's life reflected a conviction that the judiciary, operating within its proper bounds, would play a positive role in the American experiment in free government.

Donald Grier Stephenson Jr.

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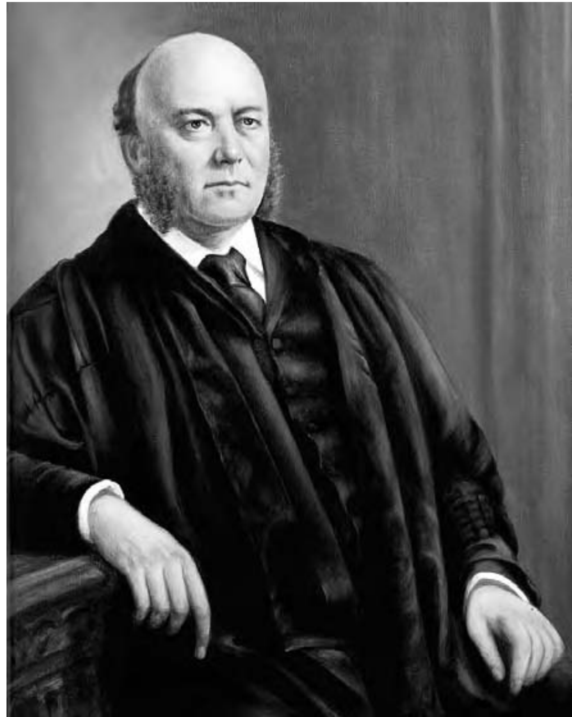
GRAY, HORACE

(1828–1902)

A MEMBER OF A FAMILY OF extremely successful foreign-trade merchants for two generations in Boston, Horace Gray, along with his half-brother, the renowned legal scholar John Chipman Gray, joined ranks with some of the most famous members of the legal profession in the nineteenth-century United States. During a career that spanned five decades, Horace Gray served the legal profession as a practicing attorney, court reporter, associate justice and chief justice of the Supreme Judicial Court of Massachusetts, and associate justice of the United States Supreme Court.



HORACE GRAY
Collection of the Supreme Court of the United States

Horace Gray's grandfather, William Gray, began a successful shipping career with letters of marque issued by the Continental Congress to expand the small Continental navy (Mitchell 1961, 4). William Gray was joined by several of his sons, including Horace, the father of Justice Horace Gray. The junior Horace Gray was born in Boston, Massachusetts on 24 March 1828. His mother, Harriet Gray, died of consumption when young Horace was still a child. Gray's famous half-brother, John Chipman Gray, one of the premier legal scholars in American history, was born in 1839 after Horace senior remarried.

In 1841, at age thirteen, the junior Horace Gray enrolled in Harvard College, from which he graduated four years later. Following graduation

from Harvard, Gray traveled in Europe, where he received news that his father's business had become bankrupt. With this news, Gray, although an aspiring ornithologist, returned home in 1848 and enrolled in Harvard's law school. At Harvard, Gray and fellow law student C. C. Langdell had the habit of studying law by examining all the judicial decisions bearing upon the legal issue instead of relying solely on abstract rules in textbooks and treaties, which had been the norm. Langdell went on to set up the now famous case-study method of instruction at Harvard that is still the dominant method used by most U.S. law schools, and Gray went on to write some of the most historically based, scholarly opinions of his generation. Admitted to law practice in 1851, Gray began a thirteen-year law practice working in Boston with attorney John Lowell, who later sat as a judge on the United States District Court for Massachusetts and the First United States Circuit Court of Appeals in Boston. Within a year he became acting reporter of decisions for the Massachusetts Supreme Judicial Court with the illness of Luther Cushing. Cushing was the jurist and clerk of the Massachusetts House of Representatives who is well known for his *Cushing's Manual: Rules of Proceeding and Debate in Deliberative Assemblies*.

The Supreme Judicial Court appointed Gray to be the official reporter of decisions in 1854, a position he held for six years. Not counting the volumes of Cushing Reports that he completed, Gray edited sixteen volumes of court records that, along with his independent writing, earned him considerable respect as a legal scholar. The Massachusetts attorney general described Gray's work as a court reporter for the Supreme Judicial Court of Massachusetts in a 1903 memorial following Gray's death:

> This exacting work he performed with characteristic ability, leaving in every volume of the reports evidence not alone of his own increasing and accurate knowledge of the law, but illustrations of his power of quick and complete apprehension of the issues of the cases, their reports manifesting always his wonderful lucidity and precision of statement. His notes, appended to many cases, are veritable text-books, containing great store of learning and summarizing the entire record of former adjudicated cases. They have become accepted as having almost the authority of judicial decisions. (Malone 1903, 615)

During the ten years that Gray served as reporter for the Supreme Judicial Court, he argued thirty-one cases before the court, winning twenty-four and losing seven. Gray's extracurricular scholarly writing included a lengthy note on the famous Writs of Assistance case argued by James Otis in 1761 that appeared in a historical volume of the state's reports (Quincy's Reports of 1864) and an elaborate essay coauthored by John Lowell criticizing the infamous 1857 *Dred Scott* decision of the United States Supreme

Court published by *The Monthly Law Reporter.* During the Civil War, Gray served as legal counsel to Massachusetts governor John A. Andrew.

Gray's performance as reporter for the Supreme Judicial Court placed him in good stead to become a member on the court. In fact, he was a candidate three times: once in 1860, again in 1863, and in 1864 when at the age of thirty-six he became the youngest judge to sit on Massachusetts's highest judicial tribunal. Originally called the Superior Court of Judicature, the Supreme Judicial Court was established in 1692 and is the oldest appellate court in continuous existence in the Western Hemisphere. It grew out of the demise of the Court of Oyer and Terminer ("hear and determine") that was established to try the Salem witchcraft trials in 1692. Several judges from the Court of Oyer and Terminer that convicted and sentenced nineteen people to death in the witchcraft trial sat on the new Superior Court of Judicature, including Samuel Sewell. Notable members of the Supreme Judicial Court included Thomas Hutchinson, who presided over the controversial Writs of Assistance case; John Adams, who was chief justice from 1775 to 1777 (though, owing to his political activities, he never served); and Oliver Wendell Holmes Jr., who was chief justice from 1899 until he joined the United States Supreme Court in 1902 to fill the vacancy left by the death of Horace Gray.

Gray's work product as a jurist was prodigious. During seventeen years on the Massachusetts bench, Gray averaged writing an opinion every four and one-half days, compiling more than 4,500 pages in the reports (Mitchell 1961, 60). The volume of opinions is more impressive considering that he tried jury cases during his early years on the bench and was chief justice during his last nine years. Just as reporter Gray's notes that he appended to the reported cases could be considered textbook treatments of the law, his judicial opinions can be considered "legal monographs on the special questions which he [was] dealing" (Williston c. 1908, 170). As one observer described Gray's style, "He believed that an exhaustive collection of authorities should be the foundation of every judicial opinion on an important question. He has been heard to say that, in every such decision, all the important cases bearing upon the question under consideration should be referred to, in order that there might be presented a complete review of the history and development of the law involved" (Malone 1903, 613). Gray's style was well served by a photogenic memory and keen research talents. As one of Gray's colleagues put it, he had a remarkable memory that "would direct his thumb and finger to some obscure volume of English reports of law or equity, [and] was almost like the scent of a wild animal or bird of prey" (Supreme Judicial Court, quoting Hoar 1904, 162).

Gray's first written opinion on the court set the tone for his style. The case, *Pomeroy v. Trimper,* 90 Mass 398 (1864), involved a writ of replevin

that described "one brown heifer, [and] one grey heifer." The officer's return stated that "the within named brown cow" and "the grey cow" had been replevied. The defendant resisted the writ, based on, among other grounds, the variance between the writ's "heifer" and the return's "cow." Judge Gray upheld the writ but not summarily. He found only one historical example where the distinction between a heifer and a cow made a difference. Holding that the heifer-cow distinction was a distinction without a difference, Gray disposed of the mundane matter, citing eight English cases from the year 1535, twenty-six cases from five states, one federal case, twenty-one statutes, and one treatise.

Although Gray's attention did not miss the opportunity to elucidate relatively insubstantial points of law, he was also instrumental in forming the law of Massachusetts and the nation. One of his most notable decisions was *Saltonstall v. Sanders*, 93 Mass. 446 (1865), which helped delineate the boundary of a charitable trust. The testator, Sanders, had bequeathed more than $300,000 of his estate in trust for "the furtherance and promotion of the cause of piety and good morals, or in aid of objects and purposes of benevolence or charity, public or private, or temperance, or for the education of deserving youths" (83 Mass. 456). The prevailing rule held, on the one hand, that noncharitable perpetual trusts were void as a violation of the doctrine against perpetuities, and on the other hand, that a public or charitable trust may be perpetual and may leave the mode of application and the selection of particular objects to the discretion of the trustees. The plaintiffs in *Saltonstall* claimed that since the terms of the trust instrument permitted objectives that could be "public or private," it did not qualify as a purely public, that is, a charitable trust. Gray undertook an extended exegesis of the phrase *objects and purposes of charity, public or private* and the term *benevolence*. He examined law as remote as the 1576 Statute of 43 Elizabeth II, c. 4. This opinion added an important element to the law of charitable trusts, namely, that a "good charitable use is 'public,' not in the sense that it must be executed openly and in public; but in the sense of being so general and indefinite in its objects as to be deemed of common and public benefit" (456).

Gray's decision in *Jackson v. Phillips*, 96 Mass. 539 (1867), which established that abolitionist activities constituted a charitable use, is another of his often-quoted opinions. In fact, the United States Supreme Court has cited it in no less than four cases. Jackson's will contained a trust that directed the executors "to use and expend at their discretion, without any responsibility to any one, in such sums, at such times and such places, as they deem best, for the preparation and circulation of books, newspapers, the delivery of speeches, lectures, and such other means, as, in their judgment, will create a public sentiment that will put an end to negro *[sic]* slavery in

this country" (96 Mass. 586). In response to a claim that this was not a public-charitable trust, Gray opined in elegant words befitting the subject matter that

> The peaceable redemption or manumission of slaves in any manner not prohibited by law is a charitable object. . . . It would be an anomaly in a system of law, which recognized as charitable uses the relief of the poor, the education and preferment of orphans, marriages of poor maids, the assistance of young tradesmen, handicraftsmen and persons decayed, the relief of prisoners and the redemption of captives, to exclude the deliverance of an indefinite number of human beings from a condition in which they were so poor as not even to own themselves, in which their children could not be educated, in which marriages had no sanction of law or security of duration, in which all their earnings belonged to another, and they were subject, against the law of nature, and without any crime of their own, to such an arbitrary dominion as the modern usages of nations will not countenance over captives taken from the most barbarous enemy. (568)

Judge Gray's holdings in *Saltonstall v. Sanders* and *Jackson v. Phillips* became leading cases on the law of charitable trusts. An example of the extent to which his opinions held sway is found in *Irwin v. Swinney*, 44 F. 2d 172 (W.D.Mich. 1930), wherein the district judge, relying heavily on Judge Gray's opinions of sixty-five years earlier, declared that "the great learning and ability of Judge Gray, which at a later time distinguished him even among his distinguished associates on the United States Supreme Court, give especial weight to his views" (44 F. 2d at 174).

Not all of Gray's cases dealt with the matrix of common and statutory law in a progressive way. A case in point is *Lelia J. Robinson's Case*, 131 Mass. 367 (1881), decided eight years after he became chief justice and one year before becoming an associate justice of the United States Supreme Court. Lelia Robinson was the only female member of her 1881 class and the first woman to graduate from Boston University Law School. Ranked fourth in her class, she graduated *cum laude*. The statute governing application to practice law provided that "a citizen of this [Massachusetts], or an alien who has made the primary declaration of his intention to become a citizen of the United States, and who is an inhabitant of this State, of the age of twenty-one years and of good moral character, may, on the recommendation of an attorney, petition the Supreme Judicial or Superior Court to be examined for admission as an attorney . . ." (Mass. Stat. 1876, c. 197).

Justice Gray, writing for a unanimous court that denied Robinson's petition, recognized the general rules of construction that provided that the "word 'citizen,' when used in its most common and most comprehensive

sense, doubtless includes women" and the "rule that 'words importing the masculine gender may be applied to females,' [and] and like all other general rules of construction of statutes, must yield when such construction would be either 'repugnant to the context of the same statute,' or 'inconsistent with the manifest intent of the Legislature'" (131 Mass., 376–377).

Nonetheless, Gray went on to hold that "a woman is not, by virtue of her citizenship, vested by the Constitution of the United States, or by the Constitution of the Commonwealth, with any absolute right, independent of legislation, to take part in the government, either as a voter or as an officer, or to be admitted to practice as an attorney," and "no inference of an intention of the Legislature to include women in the statutes concerning the admission of attorneys can be drawn from the mere omission of the word 'male'" (131 Mass., 376–377, 382). Therefore, since England did not permit women to practice law at the time of Massachusetts's separation from the mother country, and Massachusetts had not specifically included women in the statute, Robinson's petition to join the bar was denied.

After Judge Gray became the chief justice of the Supreme Judicial Court in 1873, he concentrated on cases that involved pleading and practice issues, assigning important substantive cases to others on the bench. His administrative duties as chief justice left him little time to continue writing the long scholarly opinions that characterized his years as associate judge (Mitchell 1961, 97–98). According to Williston, in 1875 Gray hired a young Harvard law graduate as his clerk, a practice that was to become a national tradition. Although hiring judicial clerks had been common, they were usually professional stenographers and typewriters rather than fresh law graduates. Gray continued to hire law graduates after he became an associate justice on the United States Supreme Court, paying their salary from his own pocket until the government began funding clerk salaries (Williston c. 1908, 157–158). Two notable graduates clerked for Gray at the United States Supreme Court: Samuel Williston, the ultimate authority on contract law whom every twentieth-century law student has read, clerked for Gray in 1889; Louis Brandeis followed Williston the next year, twenty-six years before he became an associate justice on the same bench.

On 9 January 1882, Associate Justice Horace Gray arrived for work at the United States Supreme Court as the Court continued to grapple with the division of power between the branches of government and the national and state government. Gray was notable as a strong proponent of congressional power. He quickly made his attitude toward congressional power clear with a broad interpretation of the necessary and proper clause in *Julliar v. Greenman,* 110 U.S. 421 (1884), also known as the *Legal Tender case*. Upholding the power of Congress to issue paper money in peacetime, Gray declared that "the words 'necessary and proper' are not limited to such

measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which are conducive or adapted to the end to be accomplished and which in the judgment of Congress will most advantageously effect it" (110 U.S., 440). Gray's opinion in this case was characterized by a prominent historian of the Supreme Court as "the most sweeping opinion as to the extent of Congressional power which had ever theretofore been rendered" (Warren 1924, 3:374).

In another important case, *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), Gray recognized broad authority for Congress in immigration matters. "In our jurisprudence, it is well settled that the provisions of an act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty" (149 U.S., 720). Yet, Gray did not grant unrestricted power to Congress. The case involving Wong Kim Ark is an example. Wong, born to Chinese parents in San Francisco in 1873, traveled to China in 1890. The U.S. collector of customs denied Wong reentry, claiming authority under the Chinese Exclusion Acts. In *Wong Kim Ark v. United States*, 169 U.S. 649 (1897), Gray, elevating the Constitution above the act, declared that the "Fourteenth Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States" (169 U.S., 692).

At the age of sixty-one, after four decades of intimacy with the law, Justice Gray fell in love and married Jane Matthews, the daughter of his Supreme Court colleague, Stanley Matthews. A dozen years later on 3 February 1902, Gray suffered a disabling stroke from which he died later that year as he faced the cool autumn breeze at his seaside home on the Atlantic Ocean at Nahunt, Massachusetts. Gray's legacy is the scholarly approach that he brought to the bench. In the words of Samuel Williston, Gray was "the most learned American judge of his generation" (Williston c. 1908, 168), and his lengthy, didactic opinions reflected such learning for a half-century.

Clyde Willis

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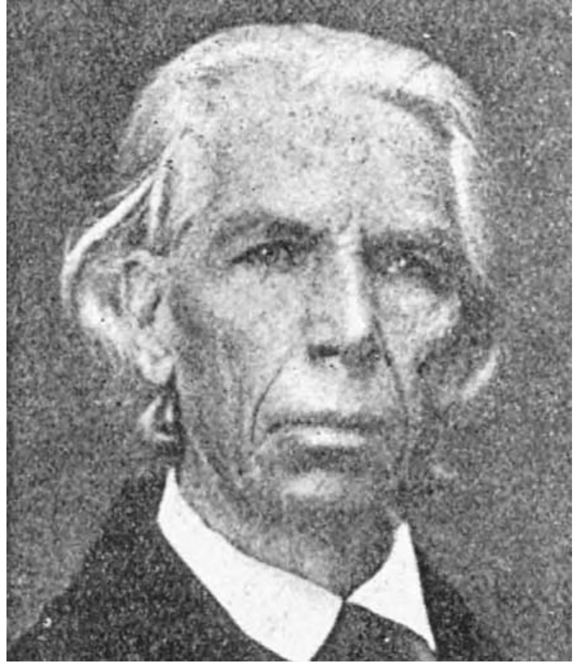
GREEN, NATHAN, SR.

(1792–1866)



Nathan Green Sr.
Vise Library, Cumberland University

Shortly after the death of Nathan Green, the Middle Tennessee bar adopted a statement highlighting his life. The bar noted that: "He possessed in his youth but few of the advantages of education but with a strong will, a vigorous intellect and an eager thirst for distinction, he soon placed himself upon a level with those who had been favored by higher opportunities" (Green 1947, 92). The bar further described Green as "the pillar of the judicial system, the keystone of its arch. And there was something grand and awe-inspiring about him" (quoted in Sturgis 1998, 385).

Born the son of a planter in Amelia County, Virginia, in 1792, Nathan Green dedicated his life to public service, serving as a soldier, lawyer, legislator, educator, and, most notably, judge, where his legacy has endured for generations. While living in his native Virginia, Green studied law prior to serving in the War of 1812, after which time he moved to Franklin County, Tennessee, and began to practice law. Thereafter, Green moved to Wilson County, Tennessee, where he was elected to the state senate in 1826. Following a brief stint as a legislator, Green was elected to the bench, where he was to have such an impact that he became known as the "father of our equity jurisprudence" in Tennessee (Caldwell 1898, 141).

As a judge, Green was not afraid to voice his strong opinions on very controversial issues, even in the face of public opposition. For example,

during the years immediately preceding the Civil War, he issued an opinion stating that slaves were, in many ways, the equals of their owners. Additionally, Green insisted upon steadfast adherence to the letter of the Constitution and did not hesitate to strike down legislative acts that, in his mind, violated constitutional principles. Simply put, Nathan Green espoused an approach that was ahead of its time.

Chancellor

Nathan Green's judicial career began in 1827, when he was elected to the newly created Tennessee Chancery Court. At the time of its creation, the Chancery Court had only two divisions, East and West, and Green was elected as the chancellor for East Tennessee. While serving as chancellor, Green was appointed to a special court created by the Tennessee legislature in 1830 solely for the determination of lawsuits filed by the Bank of Tennessee against its own officers. By legislative act, this newly formed court was composed of one judge of the Supreme Court (Jacob Peck), one chancellor (Green), and one Circuit Court judge (William E. Kennedy) and was to be governed by the "principles governing the courts of chancery," with no right to appeal from its decisions (*Bank of the State v. Cooper,* et al., 1831 WL 1032 [Tenn. Err. and App. 1831] at 2 and 6).

Green's selection to the special court is noteworthy principally because it gave rise to his first published opinion, in the case of *Bank of the State v. Cooper, et al.*, in which he ruled that the special court of which he was a member was unconstitutional. In *Cooper,* the Bank of Tennessee filed suit against Charles Cooper (clerk of the bank) and others, alleging that Cooper misappropriated bank funds for his own use. The defendants responded by pleading that the members of the special court had "no power or authority to hear, try, and determine said complaint, nor [had] they jurisdiction thereof, by the constitution of the United States and the constitution of Tennessee . . ." (*Bank of Cooper* 1831, 1). Writing for a unanimous court, Green agreed with the defendants and held that the act creating the special court was unconstitutional. Specifically, Green held that, by removing the absolute right to a jury trial (since there was no right to a jury in Chancery Court) and the right to appeal, the act creating the special court was unconstitutional.

An examination of certain excerpts from Chancellor Green's opinion in *Cooper* provides a glimpse into his strong judicial presence and principles. For example, Green stressed that the right to "trial by jury has been considered, in England and America, as the most distinguishing badge of liberty" (*Bank of Cooper,* 3). In addition, Green criticized the legislation's limited

Penny J. White
(1956–)

Although California's Rose Bird is perhaps the best-known example, she is not the only justice who has fallen victim to successful partisan attack. Tennessee's Penny J. White became a similar casualty of a retention election in 1996.

Born in Kingsport, Tennessee, in 1956, White graduated from East Tennessee State University before earning a J.D. at the University of Tennessee and the LL.M. from Georgetown University, where she was a Prettyman Fellow. After she practiced law in Johnson City, Tennessee, the voters of the First Judicial Circuit elected her in 1990 to serve as a circuit judge (the first woman so to serve). Democratic governor Ned McWherter subsequently appointed her first to the Court of Criminal Appeals and then in 1994 (at age thirty-eight) to the Tennessee Supreme Court to succeed a justice who resigned to work on a gubernatorial campaign.

Although previous retention elections had been fairly routine, White's became snagged in a controversy that began with a decision in *State v. Odom* (928 S.W.2d 18 [Tenn. 1996]). Although the decision in the case upheld the conviction of an individual who had raped and killed an elderly woman, a narrowly divided court led by Chief Justice Adolpho A. Birch Jr. (only the second African American justice in the state's history) overturned the death sentence of the criminal on the basis that the fact that rape accompanied the murder did not, in and of itself, mean, as the law required, that "the murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death" (quoted in Ely 2002, 308).

Although she had merely concurred in the decision, White had the misfortune of being the only judge up for a vote in the 1996 retention election. She was opposed by a variety of victims' rights groups as well as by Republican governor Don Sundquist and Republican senators Fred Thompson and Bill Frist. For her part, White felt restrained by the judicial code of ethics, but a history of the court that includes that time period noted that her "basic message was that capital punishment was permitted by law in Tennessee and that she would affirm a death penalty that was imposed in accordance with the law. 'If I were inter-

(continues)

application to cases involving the Bank of Tennessee and its officers: "Legislation is always exercised by the majority. Majorities have nothing to fear, for the power is in their hands. *They* need no written constitution, defining and circumscribing the powers of the government. Constitutions are only intended to secure the rights of the minority" (4).

It is interesting to note that Green's emphasis on equal protection under the law in this opinion occurred in 1831, over a century *before* the landmark equal protection decisions issued by the United States Supreme Court. Green closed his *Cooper* opinion with the following sentiment:

(continued)

ested in changing current law,' she insisted, 'I would run for the legislature'" (Ely 2002, 309). White lost in a hotly contested contest in which voter turnout was still a negligible 55 percent. Republican governor Sundquist subsequently appointed circuit judge Janet Holder of Memphis to White's position; Holder's appointment did appear to tilt the court into a more pro–capital punishment direction (Ely 2002, 320).

Heartened by success, some, but not all, opponents of Justice White subsequently took aim at Justice Birch in 1998 when he came up for voter reconfirmation. Republican political leaders, however, generally either supported Birch or at least made no negative statements against him. As a result, he won his retention election by 54 percent.

White, who is now a law professor, recently wrote an article about the use of judicial performance evaluations (largely based on surveys of attorneys and other participants in the judicial process) in which she commended the use of "objective judicial evaluation guidelines" that have been developed by a committee of the American Bar Association. These standards focus on integrity, knowledge, and understanding of the law; adjudicative skills; the performance of managerial responsibilities; and the execution of professional and public service responsibilities (White 2000, 1068–1071). White contrasted these standards, which she approves, with standards based upon "the outcome of their [judges'] decisions":

> Such evaluation boils down to whether the judge held for or against the criminal defendant or civil plaintiff or found in favor or against capital punishment or punitive damage. No effort is made to analyze the legal issues, the constitutional requirements, applicable judicial precedent, or legislative mandates in any case. Only the outcome is considered in an extreme vacuum. (White 2000, 1074)

In contrast to electoral judgments, White does not believe that "legitimate factor-based performance evaluations . . . threaten the independence of the judiciary" (1075).

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> I have the highest respect for the legislature as a coordinate department of the government; and whenever they pass an act, the presumption is in favor of the power; nor are we to disregard it upon a mere doubt, nor unless constrained by the high obligations imposed by our oaths to support the constitution. But when we *cannot* enforce the act and support the constitution, the act is not law, and imposes no obligation. (5)

With that, Chancellor Green, writing for a unanimous court, struck down the act at issue and thereby disbanded the very court upon which he sat.

Clearly, as his first published opinion demonstrates, Nathan Green was not afraid to stand on principle, even if such was contrary to public opinion.

Supreme Court of Tennessee

In 1831, Green was elected to the Tennessee Supreme Court of Errors and Appeals. In 1834, Tennessee adopted its constitution, and Green was reelected to the reorganized Tennessee Supreme Court. While on the Supreme Court, Green continued his steadfast adherence to principle in the face of contrary public opinion, which was evident in his 1846 opinion in the case of *Ford v. Ford* (1846 WL 1497 [Tenn. 1846]). In that case, the late Loyd Floyd made a will directing that his slaves be emancipated upon his death and further devising a portion of his land to the slaves. Floyd named his sons as executors of the will, but they refused to act in that capacity, so the slaves (by their next friend) filed suit to probate the will. Although the case was decided on other grounds, Judge Green's opinion is noteworthy for his discussion of slavery:

> A slave is not in the condition of a horse or an ox. His liberty is restrained, it is true, and his owner controls his actions and claims his services. But he is made after the image of the Creator. He has mental capacities, and an immortal principle in his nature, that constitute him equal to his owner but for the accidental position in which fortune has placed him. The owner has acquired conventional rights to him, but the laws under which he is held as a slave have not and cannot extinguish his high-born nature nor deprive him of many rights which are inherent in man. (*Ford v. Ford,* 2)

Obviously, these sentiments were extraordinary considering the time (1846) and location (Tennessee) of their utterance. Judge Green's legal conclusion in *Ford* was also remarkable: He ruled that, even though the slaves were not technically free until the will was proved, the mere bequest of freedom in such a document was sufficient to allow the slaves to file suit:

> The conclusion is that, although until the will is proved they have no legal evidence that they are free, yet the bequest of freedom in the paper purporting to be a will confers upon them a right to invoke the action of the proper tribunal that this evidence of their freedom may be afforded. If this were not so, the right of the owner to emancipate, and the right of the slave to receive his freedom, might be alike frustrated, if the executor named in the will shall refuse to act—a conclusion which would shock humanity, and be an indelible stigma on our jurisprudence. (2)

Once again, as in *Cooper,* Judge Green did not avoid a controversial decision. This steadfast adherence to principle marked his judicial career.

The Later Years

Green retired from the bench in 1852, after serving on the Tennessee Supreme Court for over twenty years, then the longest tenure in the history of that court. Prior to Green's retirement, a new law school had been formed at Cumberland University in Wilson County, Tennessee. During his vacation time, Green taught and lectured at the school, and upon his retirement from the bench, he accepted a full-time professorship at the university (Ely 2002, 88). During his years as a professor, Green continued to voice his strong opinions on social issues, as evidenced by an open letter he penned, opining that the U.S. Congress had the right to abolish slavery in the District of Columbia (Green 1947, 94). This position, along with his views opposing secession from the union, drew the ire of pro-slavery groups, who denounced Green as disloyal to the South, urged him to move to a free state, and warned prospective students not to attend Cumberland University.

In spite of his antisecession views, Green ultimately sided with the South when the Civil War broke out and even ran (unsuccessfully) for a seat on the Confederate Congress. During the war, the law school was closed, but Green resumed his teaching duties after the war. Unfortunately, his health had begun to decline, but he "had frequently said, in reply to the remonstrances of his friends, that he wished to wear out and not to rust out" (Caldwell 1898, 142). Nathan Green died on 30 March 1866, at the age of seventy-four.

Green's Legacy

Today, more than a century after his death, Nathan Green's legacy looms large. One can take the measure of the man from the following descriptions: "Physically Judge Green was tall and imposing in stature, being six feet, six inches high; his voice was loud and strong, and his manner serious, earnest and dignified" (Green 1947, 95). It was also said that "in everything that he did, earnestness, sincerity and power were manifest. As an advocate he possessed almost none of the graces, but was rich in substantial qualities. Physically he lacked symmetry, but he spoke with vehemence, and it need not be said that he reasoned with power. His methods were straightforward and direct. He was wanting in wit, humor and fancy, but never in logic" (Caldwell 1898, 143).

These accounts of Nathan Green, emphasizing such descriptive words as

imposing, strong, and *power,* should come as no surprise, considering the manner in which he conducted himself as a jurist. As illustrated by his opinions in *Cooper* and *Ford,* Nathan Green was clearly not afraid to stand on principle, even in the face of contrary popular opinion.

As if the judicial career of Nathan Green were not impressive enough, his descendants carried on the high standards he set. His son, Nathan Green Jr., served as chancellor of Cumberland University law school and taught law for sixty-three years (Merritt 1961, 138). Described six years earlier as "the oldest teacher in the State of Tennessee" and as "having taught more law students than any other living man," Nathan Green Jr. went home to finish grading exams on the eve of his ninety-second birthday in February 1919, died that evening, and had his casket adorned with the ninety-two red roses that his students had planned to present to him for his birthday (Langum and Walthall 1997, 113–114). Grafton Green, the grandson of Nathan Green, served on the Tennessee Supreme Court for nearly thirty-seven years of which twenty-four were as chief justice.

It has been said of Nathan Green that "no other Tennessee judge, with the single exception of [John] Haywood, has so powerfully or permanently impressed himself upon the jurisprudence of Tennessee and none has left a more admirable record" (Green 1947, 95). Nathan Green's legacy will certainly endure throughout the ages.

M. Keith Siskin

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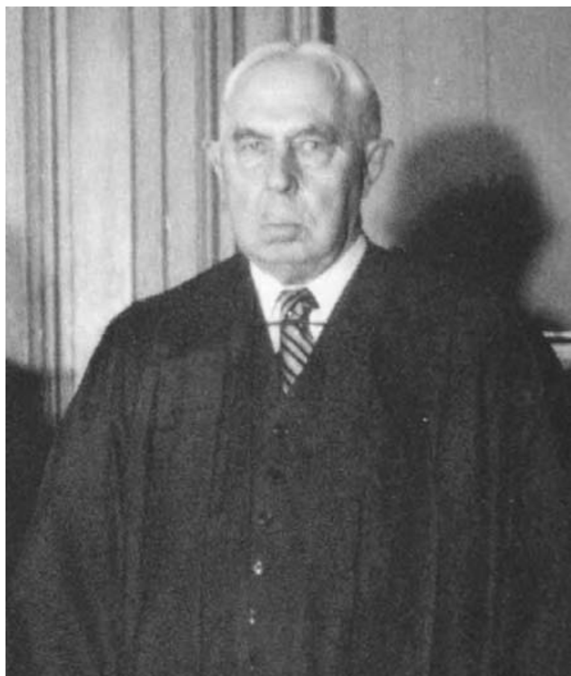
HAND, AUGUSTUS NOBLE

(1869–1954)



Augustus Noble Hand
Erich Hartman/Magnum

Judge Augustus Noble Hand served on the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit. His greatest contribution was in the development of obscenity law and came in his opinions in *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930), and *United States of America v. One Book Entitled* Ulysses *by James Joyce*, 72 F.2d 705 (2d Cir. 1934). These opinions initiated a fundamental change in the legal standard applicable to the government's censorship of obscenity.

Augustus Noble Hand was born into a prominent family in the legal community on 26 July 1869 in Elizabethtown, New York. His grandfather, Augustus Cincinnatus Hand, was a lawyer, state senator, U.S. representative, state constitutional convention delegate, and judge on the New York Supreme Court and New York Court of Appeals. His father, Richard Lockhart Hand, and his uncles, Samuel Hand and Clifford Hand, were all prominent lawyers in New York. But his most famous relative was his cousin, Learned Hand, who served with him on the District Court and the Court of Appeals. In thirty years as a trial and appellate judge, Learned Hand distinguished himself through his exemplary literary skills and garnered a reputation as a vigilant defender of the right to freedom of speech. Many legal scholars consider him the greatest American judge ever.

Augustus Hand received his primary education at home, in the local schools of Elizabethtown, New York, and Phillips Exeter Academy before moving on to college. In 1886, he enrolled in Harvard College, where he concentrated on classical studies and graduated *summa cum laude*. After college, he worked and read law in his father's law office for a year. In 1891, he enrolled in Harvard Law School, where he served as the editor of the law review for two years. He graduated in 1894, receiving both his L.L.B. and A.M. degrees. Throughout his life he received honorary doctorate degrees from many colleges, including Harvard, Columbia, Princeton, and Yale.

After graduating from law school, Hand joined the New York City law firm Curtis, Mallet-Prevost and Colt. In 1901, when his uncle Clifford Hand died, he left that Wall Street firm to join his uncle's law firm, Hand, Bonney and Jones. He practiced primarily estate law and litigation, serving as the trustee of many estates and once representing the Venezuelan government.

In 1914, after twenty years practicing law, Hand was appointed to the United States District Court for the Southern District of New York by Pres. Woodrow Wilson. As a trial judge, he presided over a diverse caseload, including bankruptcy and business disputes, patents and copyrights, admiralty and tax matters. Although he generally chose not to publish his written opinions, he authored several notable opinions. Among them were opinions holding that the Associated Press could enjoin the International News Service from using its news items until the daily newspapers could be printed, that when a government conducts business as a corporation rather than through its agents the corporation is liable for contractual obligations, and that the president could prevent a company from laying an unauthorized submarine cable between the United States and another country.

Judge Hand also distinguished himself through his written jury instructions, which were coveted by lawyers as clear guides on the law. Despite the reputation his jury instructions earned, the only one to have survived the passage of time is his explanation of the First Amendment in the post–World War I espionage trial of Max Eastman. In the Eastman case, Judge Hand instructed the jury on the constitutional right to free speech:

> It is the constitutional right of every citizen to express his opinion about the war or the participation of the United States in it; about the desirability of peace; about the merits or demerits of the system of conscription, and about the moral rights or claims of conscientious objectors to be exempt from conscription. It is the constitutional right of the citizen to express such opinions, even though they are opposed to the opinions or policies of the administration; and even though the expression of such opinion may unintentionally or indirectly discourage recruiting and enlistment. (Chafee 1941, 578)

By recognizing the individual's right to protest the country's participation in the war and the policies enacted to sustain that participation in that jury instruction, Judge Hand authored a broad interpretation of the First Amendment right to freedom of speech. His jury instruction preceded by several years the United States Supreme Court's recognition of the "clear and present danger" doctrine, which afforded broad protection to the speech of political protesters.

Perhaps Judge Hand's most important contribution as a district court judge came in his advocacy of the creation of naturalization examiners to alleviate the burdensome process of naturalizing immigrants. In Judge Hand's day, district court judges were called upon to hear testimony from immigrants seeking citizenship and pass on their moral character, their belief in the Constitution, and their adherence to naturalization law. Judge Hand proposed a system of examiners who would interview prospective citizens and report to the judge, making the process more efficient for the courts. The U.S. Congress later adopted this proposal.

In 1927, after thirteen years as a trial court judge, Judge Hand was appointed to the United States Court of Appeals for the Second Circuit by Pres. Calvin Coolidge. Only the most revered appellate judges are cited by name when their opinions are relied upon by other courts in subsequent cases. Judge Hand is such a judge. For his time as an appellate judge, he is most often cited for his opinions holding that only a defrauded purchaser or seller has standing to sue under the securities act, discussing the nature of peril at sea as a justification for action by the vessel in relation to its cargo, and discussing the nature of a limitation proceeding in admiralty law. In other notable cases, he opined that the taking of fingerprints from arrested criminal suspects was a slight interference justified by the common interest in seeking justice and that individuals assume some risk in choosing to associate with others and, if hailed into court because of such an association, must rely on the justice system to judge them fairly. A testament to Judge Hand's reputation as a jurist is found in the fact that he is often cited for concurring in an opinion regarding the scope of appellate review over the findings of trial courts where there in no issue as to the credibility of witnesses. In that case, merely by joining in the majority opinion, Judge Hand brought additional credibility to the court's holding.

Judge Hand's World War II–era opinion discussing the nature of religion and the scope of protection afforded to conscientious objectors is frequently relied upon by courts addressing similarly vexing issues. In 1943, Judge Hand wrote the opinion of the court in the case of Mathias Kauten, a man convicted of failing to obey the order of the local draft board to report for induction into the armed services. Kauten, an atheist, had claimed to be a conscientious objector based upon personal philosophical and political

considerations. He appealed his conviction, seeking recognition of his conscientious objector status. Drawing upon the experiences of historical figures, such as Socrates and Martin Luther, Judge Hand wrote:

> It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets. (*United States v. Kauten*, 133 F.2d 708 [2d Cir 1943])

Judge Hand concluded that Kauten's philosophical and political objections to World War II were different than religious conscientious objection to war in general. He refused to afford Kauten any protection as a conscientious objector and affirmed his conviction.

But Judge Hand's most notable opinions came in the area of obscenity. His opinions in this area of law are notable, not because they have been repeatedly cited through the years but because they ushered in an era of radical reformation of the government's ability to censor obscenity. When Judge Hand was appointed to the appellate court, the prevailing test for obscenity was found in *Regina v. Hicklin*, L.R. 3 Q.B 360 (1868). This test required a determination of whether the work charged as obscenity tended to deprave and corrupt the morals of those individuals whose minds are susceptible to such influences. Under *Hicklin*, courts were to consider the negative impact of a work on the morals of society without considering its literary, artistic, educational, or scientific merit. The effect of isolated passages on the most susceptible reader could render a book obscene.

In 1930, Judge Hand wrote the court's opinion in *United States v. Dennett*, 39 F.2d 564 (2d Cir. 1930), crafting an exception to the *Hicklin* test for works with educational or scientific merit by finding the test inapplicable to such works. Mary Dennett was the mother of two adolescent boys whom she wanted to teach about sex. Unsatisfied with the publications available on the subject, she wrote a pamphlet entitled "Sex Side of Life." Her goal was to instruct her children and aid other parents in instructing theirs. Her pamphlet was soon in high demand among educators, religious groups, and parents. It was published and distributed through the mail, leading to Dennett's conviction for mailing obscene matter in violation of federal law.

In writing the opinion for the court, Judge Hand reviewed the pamphlet and quoted from it at length. He found that the pamphlet was written as an

aid for parents educating their children regarding sex. Dennett sought to provide specific information regarding the physiological, scientific, moral, and emotional aspects of sexual relations. To do so, she employed a frank discussion of all aspects of the reproductive system, including the proper terminology of the sexual organs and their functions. The pamphlet was a serious attempt to discuss sexual matters and provide instruction with an explanation of the facts. It was not an attempt to indulge lascivious appetites. Judge Hand concluded that the main effect of the pamphlet was accurately to present information about sex in a manner with serious educational and scientific merit and, as such, it could not be considered obscene. Accordingly, Dennett's conviction was reversed.

Although Judge Hand's opinion in *Dennett* did not directly challenge the general rule on obscenity, by refusing to apply the *Hicklin* test it was the first case to break from the general rule. In *Dennett's* wake other courts found the *Hicklin* test inapplicable or recognized exceptions that freed material from the charge of obscenity. *Dennett* set the stage for Judge Hand to revisit the issue and further redefine the nature of obscenity.

Four years after *Dennett,* Judge Hand was again faced with the issue of obscenity when writing the court's majority opinion in *United States v. One Book Entitled* Ulysses *by James Joyce,* 72 F.2d 705 (2d Cir. 1934). The government confiscated a copy of James Joyce's *Ulysses,* alleging that it was obscene. The government sought to have the confiscated copy destroyed and importation of additional copies prohibited. At trial, the government identified numerous passages from the book that it contended were obscene and justified forfeiture, destruction, and a ban on importation. The trial court found the book nonobscene, however, concluding that it was a sincere effort rendered by an artist in a new literary style. The trial court also found that the book, as a whole, did not arouse sexual impulses or lustful thoughts in the average person. The government's case was dismissed, and the importation of *Ulysses* was allowed.

When the government appealed, the issue for the appellate court was whether the importation of *Ulysses* could be prohibited under a federal law that barred importation of, among other things, obscene books. The government sought to overturn the trial court's ruling, arguing that the passages on thirty-three pages made the book in its entirety obscene. These passages contained sexual and excretory references ranging from mere insinuation to explicit description. Nevertheless, a two-judge majority, composed of Judge Hand and his cousin Judge Learned Hand, affirmed the ruling of the trial court.

In writing for the court, Judge Hand recognized that James Joyce was a pioneer in a new literary genre that was a topic of considerable academic discussion. He described the challenged portions of the book as extreme vul-

garity. He readily conceded that many passages were obscene under any definition of obscenity but found that they were relevant to the central theme of the book. He said the obscene passages "are relevant to the purpose of depicting the thoughts of the characters and are introduced to give meaning to the whole, rather than to promote lust or portray filth for its own sake" (*Ulysses* 1934, 706–707). Speaking for the court, he concluded that "the book as a whole is not pornographic, and, while in not a few spots it is coarse, blasphemous, and obscene, it does not, in our opinion, tend to promote lust" (707). Then, relying upon his opinion in *Dennett*, he found that literature was entitled to the same immunity from the charge of obscenity as educational and scientific works.

Judge Hand was careful not to endorse *Ulysses*. In fact, he believed that litigating the issue only served to promote the book, and he endeavored to craft an opinion that could not be used as publicity. Although criticizing specific passages, he applauded the book as a "sincere portrayal with skillful artistry" (*Ulysses* 1934, 707). He dismissed the sexual content as "submerged" and said it had "little resultant effect" and commented that "the book depicts the souls of men and women that are by turns bewildered and keenly apprehensive, sordid and aspiring, ugly and beautiful, hateful and loving" (707). He found that, rather than having a lustful effect on the reader, the book caused feelings of "pity and sorrow for the confusion, misery, and degradation of humanity" (707). Throughout his opinion, Judge Hand criticized the objectionable passages while dismissing any libidinous effect; he criticized the quality of the book while recognizing its literary merit. He was, at once, on both sides of the issue. And in the end, he announced a new test for obscenity: "the effect of the book as a whole is the test" (707). It was a test that emanated from the review he performed in his opinion. It was a test that was unavoidable in a literate society. To hold otherwise, Judge Hand reasoned, would result in the unjustifiable censorship of many literary classics.

The inevitability of Judge Hand's new obscenity test was foretold by Judge Martin T. Manton's dissenting opinion. Judge Manton disagreed with his colleagues, asking rhetorically, who could doubt the obscenity of the book having read the objectionable excerpts? He recounted the history of the *Hicklin* standard and argued that it should be applied without exception. He concluded that prior cases clearly established that a book might be found obscene because of certain passages alone. Yet, he was compelled to address the broader issue of literature, classics, and masterpieces: the work as a whole. "Masterpieces," he wrote, "have never been produced by men given to obscenity or lustful thoughts" (*Ulysses* 1934, 711). Thus, he argued that the presence of obscene passages removed a book, as a whole, from the realm of literature.

With his opinions in *Dennett* and *Ulysses,* Judge Hand ushered in a new era in the development of obscenity law and laid the *Hicklin* test to rest. In place of the excerpts-based test, he created a test based upon the entire work. Sitting as he did on an intermediate appellate court, however, Judge Hand's opinions were not the final word. Only the United States Supreme Court could bring Judge Hand's test to fruition. The Supreme Court obliged in *Roth v. United States,* 354 U.S. 476 (1957). It that case, the test for obscenity became whether the dominant theme of the work, considered as a whole, appealed to the prurient interest, as determined by the average person applying contemporary community standards. Later, in *Miller v. California,* 413 U.S. 15 (1975), the Supreme Court, speaking through Chief Justice Warren Burger, clarified the obscenity test again. Under the *Miller* test, a work can only be considered obscene if the dominant theme of the entire work is obscene, if in the view of the average person it appeals to the prurient interest, and if it lacks any serious literary, artistic, political, or scientific value. The emergence of this test is Judge Hand's legacy: His opinions were the first to break free of the long-standing *Hicklin* test. His opinions brought an end to the rigid prohibition of allegedly obscene works.

During his career as a jurist, Judge Hand earned a reputation for being open minded and fearless, wise and unwavering (Wyzanski 1948, 573). He passed away in his sleep on 28 October 1954 while vacationing in Vermont. Upon his death, he was remembered for inspiring faith in the legal system. Lawyers and litigants knew that every case before Judge Hand would be resolved "selflessly, fearlessly, wisely . . . and to the best of his understanding of the law" (Horsky 1955, 1119). He was also remembered for his equanimity, discipline, and wisdom. He was described as "the most human of persons," who "abhorred pretentiousness" and "enjoyed intellectual joust" (Clark 1955, 1113). He was a judge who possessed "wisdom—more than mere knowledge" ("With the Editors" 1955, vii).

Mark A. Fulks

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HAND, LEARNED

(1872–1961)

Learned Hand
Library of Congress

Billings Learned Hand is widely regarded as one of the preeminent judges in American history. His name is discussed in the same breath as Oliver Wendell Holmes Jr., Louis Brandeis, and Benjamin Cardozo. He has been quoted in Supreme Court opinions and scholarly publications more often than any lower court judge in the United States. Ironically, he never earned an appointment to the United States Supreme Court, despite being mentioned as a likely candidate for decades.

Judge Hand distinguished himself serving on the United States District Court and the United States Court of Appeals for the Second Circuit, based in New York City, from 1909 until his death in 1961. His reputation, however, was not earned for mere longevity on the bench. Hand was able to tackle obscure areas of law—torts, contracts, and tax law—and bring reason to them. He could take a mass of cases, unorganized splinters and shards of ideas, and painstakingly fit them into a glittering stained glass window that illuminated an entire field for the rest of the legal world.

Both on and off the bench, Learned Hand could be moody, playful, gruff, brilliant, and petulant. His personal life was marred by a brooding uncertainty about his own talents, and a marriage—to Frances Finke—that was complex and often disrupted by long physical separations. Yet Hand

survived to the age of eighty-nine, still married to his first love and equally devoted to the rule of law. By that time, it would be written that Learned Hand was "universally acknowledged as the greatest living judge in the English-speaking world" (Griffin 1973, 9).

Billings Learned Hand was born on 27 January 1872 in Albany, New York. He was the son of Samuel Hand (a prominent lawyer in New York) and Lydia Coit Hand. Hand's family enjoyed a rich tradition of prominence in the legal profession and public service. The boy's grandfather, Augustus, had established a law practice in Elizabethtown, New York, where he also served in the U.S. Congress and the New York state senate, as a delegate to the Democratic National Convention in 1868, and as an associate justice of the New York Supreme Court. The boy's father, Samuel, transplanted his family to Albany, where he established an equally solid reputation among the bench and bar, serving briefly on the New York Court of Appeals (Griffin 1973, 3).

Billings Learned (who loathed his first name and assumed the nickname "B") attended private school in Albany, excelling at academics rather than athletics. When "B" was fourteen, his father died unexpectedly, prompting the boy to spend his summers in the family seat of Elizabethtown, where his uncle (Richard Hand) practiced law. Here, he established a lifelong friendship with his cousin, Augustus "Gus" Hand. Future summers became synonymous with adventures in Elizabethtown; the two boys became inseparable. The cousins would never suspect that, in adulthood, they would count themselves among the most powerful and influential jurists in the United States.

"B" enrolled at Harvard College in 1889, following in the footsteps of his cousin Gus. He first majored in mathematics but soon found the subjects of economics and philosophy more intellectually appealing. Hand's questioning mind led him to become a religious skeptic and agnostic, a fact that he wistfully regretted in future years. But he never regretted wrangling with words and ideas. Hand was elected to Phi Beta Kappa and served as class orator, graduating from Harvard College *summa cum laude*. Although he considered pursuing a doctorate in philosophy, and earned a master of arts out of sheer interest, Hand succumbed to family pressure and entered Harvard Law School in 1893. As a law student, Hand found his niche. He excelled at complex courses; he served as an editor of the prestigious law review; he found mentors in Dean Christopher Columbus Langdell and Professors James Barr Ames and James Bradley Thayer. (Thayer's firm belief in judicial self-restraint would later become Hand's own jurisprudential polestar for the rest of his career.)

Upon graduation from Harvard Law School in 1896, Hand returned to Albany, where his mother still lived. There he taught a law course at the University of Albany and grudgingly established a law practice from 1897

until 1902. It was in that year that Hand married Frances Finke of Utica, a beautiful Bryn Mawr graduate with social graces he believed himself to lack. Hand (who now went by his middle name "Learned") moved his bride to New York City and handled routine foreclosures, mortgages, and estates for another seven years. His law practice never inspired great enthusiasm within his soul. At the same time, he busied himself writing for influential periodicals including the *Harvard Law Review,* he waded into matters of civic reform, and he established valuable connections in New York's intellectual circles. It was in part through those connections that Pres. William Howard Taft named Hand to the federal district court in 1909. (His cousin Gus, to Hand's great satisfaction, was appointed to the same court in 1914.)

As a federal trial judge, Hand gradually earned a reputation as a free thinker who labored over opinions to bring clarity (and at times unconventional wisdom) to difficult subjects. In 1917, he authored a controversial opinion in *Masses Publishing Co. v. Patten* (244 Fed. 535 [S.D.N.Y. 1917]), involving the First Amendment freedom of speech in the anti-Communist climate of World War I. A young Judge Hand concluded that the mailing of antiwar materials—by a left-wing magazine—could not be prosecuted under a federal statute prohibiting subversive speech because it did not involve "direct incitement" to illegal action. Hand's opinion was subsequently overruled by the Second Circuit Court of Appeals. Soon thereafter, the Supreme Court embraced a "clear and present danger" test (*Schenck v. United States,* 249 U.S. 47 [1919]) that allowed stiff governmental restrictions on speech viewed to be subversive. But Hand did not accept defeat. He initiated a quiet, persistent correspondence with Supreme Court Justice Oliver Wendell Holmes Jr., pressing his point. Gradually, Hand persuaded Holmes that the clear and present danger test should be reconfigured so that it was more protective of First Amendment freedoms (Gunther 1994, 161–167).

In 1924, Pres. Calvin Coolidge elevated Learned Hand to the United States Court of Appeals in New York. Three years later, his cousin Gus followed him to that appellate bench. On this court, which came to be known as the "Top Commercial Court in the U.S.," Learned Hand rose to national prominence. It was not through pomp and circumstance, but through sheer intellect, that Hand made his mark. He took enormous pride in drafting his own opinions, which were known for their clear, brilliant, philosophical, near-poetic quality. The judge composed on a writing board, often with his feet propped up on the desk. He patiently filled his ink pen with an eye dropper, in a single room surrounded by law books, an oriental rug on the floor (Gormley 1997, 41–42). Although Hand was a perfectionist, he was also an incurable artiste who enjoyed amusing himself (and the bar) by writing in verse. In one admiralty case, the opinion began:

John C. Knox
(1881-1966)

John C. Knox served from 1918 to 1955 as a United States district judge for the Southern District of New York. He was chief judge from 1948 to 1955 and remained on senior status until his death in 1966. In 1940, Knox published an engaging account of his career.

Born in Waynesburg, Pennsylvania, in 1881, Knox went on to attend Waynesboro College and the University of Pennsylvania Law School. Initially returning home to practice, he was elected at a very early age as a justice of the peace but soon decided to accept the challenge of a larger city and moved to New York City. There he worked from 1905 to 1913 as a lawyer for the Title Guarantee and Trust Company and then from 1913 to 1918 as assistant U.S. attorney for the New York Southern District.

Knox took great pride in the fact that the New York District Court was the first ever to be organized under the U.S. Constitution and that its first judge, Judge Duane, was sworn in on the same day as John Jay, the first chief justice of the United States Supreme Court (Knox 1940, 144). Knox was also proud of the fact that both Learned and Augustus Hand served on the district court before being elevated to higher appellate courts.

When Pres. Woodrow Wilson appointed Knox to a district judgeship, Knox realized that his new position called for a different approach to his job. He explained:

> For five years I had been a prosecutor—that is, a person whose task it was to be partisan and positive. My duties had forced me to prosecute many individuals, many groups, and many organizations and corporations. In order to do so effectively, I myself had first to be convinced of their wrong doing.
>
> Now, as a judge, my duty required that my mind be open. Preconceived ideas had no place there. Those who came before me for trial were, in the eyes of the law, innocent until they had been proved guilty. Every privilege due them under the law must be granted, even though now and then, some malefactor should escape the just penalty of his acts. (Knox 1940, 146)

Knox presided over, and explained, many different areas of the law that presented him with issues he had to decide. He ruled, for example, that James Joyce's

(continues)

> Mable had a rotten line
> Its hemp not worth a damn
> But everywhere that Mable went
> Her line would let her slam. (42)

Hand could be gruff, overbearing, and abrupt with lawyers while digesting oral arguments. His temper could be explosive at times. (Legend has it that while Hand was judging a moot court at Yale, one student stood up to

(*continued*)

Ulysses was not obscene, a decision reviewed by two appellate courts, including one presided over by Augustus Hand. Knox handled cases involving patents and copyrights, construction of subway tunnels, bankruptcies, telephone reimbursements, Prohibition, mobsters, and even the trials of spies and saboteurs.

A Democrat appointed to his position by Woodrow Wilson, Knox admired Franklin D. Roosevelt's early efforts to combat the Great Depression. Although he recognized that some might question whether it was appropriate for a sitting judge to express his views, Knox in a speech to the Sons of the American Revolution nonetheless decided to speak out against Roosevelt's so-called court-packing plan (in an apparently uncoordinated action, Chief Justice Charles Evans Hughes also sent a letter to the Senate denying that the Court was behind in its work). Knox observed in his speech that:

> the question I am about to discuss is without a partisan aspect. In very truth its implications and its possibilities are so far reaching, and the effect of the adoption of the proposal the President has lately made to the Congress contains too many potentialities, that the duty devolves upon every man—whatever his position—to declare himself for or against the suggestion.

He continued later in his speech:

> The effort of the President to achieve his policies should, and must, stop short of the impairment of the authority and dignity of our court of last resort. If it be that the court has been mistaken in some of its recent pronouncements, it is my preference to endure the consequences of its past and future errors rather than subject the personal, religious, and political freedom of the American people to the risk and danger that always are to be found in power that in concentrated too closely. (Knox 1940, 329)

This speech indicates that just as he had recognized that a judge needed to have a different mind-set than a prosecutor, so, too, Knox, who lectured at the Brooklyn School of Law of St. Lawrence University and at the Long Island College of Medicine (on medical jurisprudence), understood the continuing need for judicial independence.

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deliver his argument in front of the imposing judge and fell over in a dead faint.)

Yet Hand treated the law with a reverence that was contagious. He taught his law clerks, in the words of Oliver Wendell Holmes Jr., "not by precept, but by example" (Gormley 1997, 46). On one occasion, Hand looked up from his desk and asked his law clerk, with a sense of urgency: "Sonny, to whom am I responsible?" The law clerk appeared befuddled. Hand continued: "Everybody ought to be responsible to somebody. To

whom am I responsible? Nobody can fire me. Nobody can cut my pay. Nobody can make me decide, tell me what to decide. Not even those nine bozos in Washington who sometimes reverse me. To whom am I responsible?" Hand looked around the room, then pointed to the shelves of law books surrounding him: "To those books about us. That's to whom I'm responsible." Then he resumed his work (Gormley 1997, 46). It was Hand's unwavering adherence to the rule of law that made him a legend even among the most towering minds of the legal profession.

Frances Hand gave birth to three daughters (Mary, Frances, and Constance) who kept the family busy and vibrant. The Hands spent summers in the literary-artistic community of Cornish, New Hampshire, populated by such notables as the sculptor Augustus Saint-Gaudens, the artist Maxfield Parish, and Scribners' editor Max Perkins. But Frances Hand's relationship with her husband was at times punctuated with restlessness and ennui. She favored Cornish over New York and traveled frequently, often leaving her husband to plunge himself into his work (Gunther 1994, 176–189).

During retreats to New Hampshire at what he called the "Low Court," Hand enjoyed hiking wooded trails and consuming literature. But in New York, he was single minded. Judge Hand worked, agonized, and produced masterful opinions, beginning and ending each day with a four-mile trek (weather permitting) to and from his brownstone home on 65th Street, to clear his mind. After dinner, he would settle into the sprawling library—containing books on subjects from law to chemistry to geography—and channel his energy toward bringing excellence to every case on his desk.

On at least four occasions, Hand was considered for appointment to the Supreme Court, but fell short of the ultimate prize of the profession. "Always the bridesmaid, never the bride," he would quip (Gormley 1997, 44). In 1922, while still a district judge, Hand was first considered for a vacancy created by the resignation of Justice Pitney. On this occasion, Chief Justice Taft, who had appointed Hand while president, wrote directly to President Harding, warning him that Hand, who had supported Theodore Roosevelt's Bull Moose Party campaign in 1912 against incumbent Taft and had endorsed progressive causes, had turned out to be "a wild Roosevelt man and a progressive" (Nelson 1983, 13). In 1930, at age fifty-eight, Hand was fleetingly considered by President Hoover when Chief Justice William Howard Taft retired because of ill health, but the political stars realigned, and the nomination went to Charles Evans Hughes. Again in 1937, Franklin D. Roosevelt (FDR) reportedly flirted with the idea of appointing Hand but ruled it out because of Hand's age. (In a touch of irony, FDR gave the seat to Wiley B. Rutledge, who died long before Hand.) Again, in 1942 FDR was pressed (by Justice Felix Frankfurter and others) to appoint the now-famous seventy-year-old judge to the nation's highest court. Roosevelt,

however, had opposed septuagenarians on the Court with his 1937 court-packing plan and quickly scrapped the idea (Gunther 1994, 274–275, 418–428, 569–570; Nelson 1983, 13, 18–19).

Hand's fame meanwhile soared. His craggy face, stern features, and huge, quizzical eyebrows made him immediately recognizable as a judge's judge. He also became, to his own surprise, an unlikely American folk hero. In 1944, his "The Spirit of Liberty" speech—delivered in New York City's Central Park at a ceremony attended by over a million and a half Americans, including 150,000 newly naturalized citizens—captured the imagination of listeners and was reprinted in newspapers across the country. In Hand's brief but eloquent speech, he told the assembled crowd: "The spirit of liberty is the spirit that is not too sure that it is right; the spirit of liberty is the spirit that seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias" (Nelson 1983, 196; Gunther 1994, 547–552). Absolute silence followed Hand's presentation. His words became a symbol of hope for a nation torn by grief and uncertainty during World War II.

Hand was sixty-seven when he became senior circuit judge (the equivalent of chief judge). Under his leadership, the Second Circuit came to be known as the "ablest court now sitting." A foreign observer called it "the strongest tribunal in the English-speaking world" (Schick 1970, 121–122). Hand, along with his cousin Gus, Thomas Walter Swan (former president of Yale Law School), Jerome Frank, and others, made the Second Circuit a powerhouse among benches in the United States.

Hand himself wrote nearly 3,000 opinions during his career, on subjects ranging from admiralty, to patents, to copyright, to tax, to antitrust, to search and seizure. In the landmark decision of *United States v. Associated Press* (52 F.Supp. 362 [D.C.N.Y. 1943]), Hand ruled that bylaws of that news organization that permitted members to veto the admission of competitor newspapers amounted to an illegal monopoly under the Sherman Antitrust Act. In *Gilbert v. Commissioner* (248 F.2d 399 [2d Cir. 1957]), Hand devised a new approach to analyzing tax avoidance cases under the Internal Revenue Code, which the Supreme Court quickly embraced in *Knetsch v. United States* (364 U.S. 361 [1960]).

Hand was liberal by natural predilection. But his jurisprudential approach was decidedly conservative, placing heavy emphasis on adherence to precedent and congressional intent as reflected in black-and-white statutory language. In a famous quip, Hand railed against judicial activism when it came to interpreting the U.S. Constitution, declaring: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not" (Gunther 1994, 659).

Sol Wachtler: An Apparent Case of Jekyll and Hyde (1930–)

Few judges have risen higher or fallen faster than Sol Wachtler. Born in Brooklyn, New York, in 1930 to a father who was a traveling salesman and a mother who was a Russian immigrant, Wachtler spent much of his childhood in the South. Subsequently enrolling in a joint B.A. and LL.B. program at Washington and Lee University in Lexington, Virginia, Wachtler distinguished himself in debate, journalism, and a number of other activities that demonstrated great political skills. Toward the end of his college career, he married Joan Wolosoff (who came from a family of considerable financial means), who had transferred from Goucher College to Sarah Lawrence and who, after raising their four children, would become a social worker.

After Sol's stint in the army, the Wachtlers moved to New York, where Sol got a job with a law firm and eventually built a house close to Joan's parents on Long Island. A liberal Republican, Sol was elected to the town council in 1963 and was later chosen as the town supervisor of North Hempstead. A rising star, sometimes referred to as "the Great White Jewish Hope" (Wolfe 1994, 49, 87), Wachtler attracted the attention of Republican governor Nelson Rockefeller. In partial reward for an unsuccessful election Wachtler had waged as a Republican for the position of Nassau county executive, Rockefeller appointed Wachtler to a seat on the New York State Supreme Court in Nassau (which, unlike the comparably named federal court, is not the highest court in the state), where he began serving in 1968. Generally admired for his work on that court, Sol was a good campaigner. In part by using television advertisements that portrayed him as a "law and order candidate" (Wolfe 1994, 70), he was elected in 1972 to the New York Court of Appeals. He continued to be a highly visible speaker and a respected jurist, known for fairness and for his ability to tell good stories and deliver a punch line with near-perfect timing.

Wachtler caught the attention of Democratic New York governor Mario Cuomo, who appointed him as chief of the New York Court of Appeals (New York's highest court) in 1985. Once appointed, Chief Wachtler sometimes found himself in public conflict with Cuomo's budget priorities and might even have had a chance to unseat Cuomo or run on the national Republican ticket. Within two years of his appointment to New York's highest court and to the seat once held by Benjamin Car-

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Hand's contribution to American law went beyond his printed opinions. He was a founder of the American Law Institute (ALI) in 1923 (an organization of lawyers, law professors, and judges dedicated to clarifying and improving the law), actively working on its restatements and helping to transform the ALI into a prestigious body. He shaped a long line of law clerks who, under his watchful gaze, became famous twentieth-century lawyers in

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dozo, however, the handsome judge who was a symbol of moral rectitude began a secret affair with Joy Silverman, an attractive thrice-married stepcousin much younger than he, whose inheritance he helped administer. Wachtler helped Joy ingratiate herself with top Republicans, including presidential candidate George Bush Sr., who, after his election, considered appointing her as a foreign ambassador. When Silverman attempted to cool the relationship with Wachtler, he became obsessive, a condition that may have been aggravated by medication he was taking and/or by psychological problems. Wachtler continued to be honored for his work on the bench, receiving a number of honorary degrees.

In order to keep Joy, Wachtler began mailing a series of letters, under the names of two fictitious characters he had devised, threatening her and her teenage daughter in language so vulgar and abusive that it was initially difficult for investigators to believe it could have come from him. It was not until 1993 that he was finally apprehended by Federal Bureau of Investigation agents for extortion, after he had demanded $20,000 in cash. This was apparently the first indication that Wachtler's wife had of his extramarital life and his illegal activities; on the night of his arrest, Wachtler was bringing bagels home.

Wachtler resigned from the court in 1993. Initially considering pleading not guilty by reason of insanity, Wachtler eventually pled guilty of using interstate facilities to threaten kidnapping and blackmail (Wolfe 1994, 140). He was fined and sentenced to fifteen months in prison, where he appears to have inflicted injuries on himself to fake an attack by another inmate (254–257) and was eventually transferred and treated for psychiatric problems. After his release from prison, Wachtler published his prison reflections, which called for prison reform.

Wachtler's fate continues to baffle those who knew him. In an interview with Barbara Walters, Wachtler noted the irony: "The Talmud teaches us that a person who serves as a judge sits beside God, and I was given that privilege for twenty-five years, and it's lost to me now" (quoted in Wolfe 1994, 256).

Since his release, Wachtler has lectured at a number of law schools and secured a position in 1997 as a professor at the Touro Law School ("Sol Wachtler").

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their own right. This impressive lineup of clerks would include Charles Wyzanski Jr. (noted New Dealer and federal judge), Archibald Cox (solicitor general during the Kennedy administration and Watergate special prosecutor), Elliot Richardson (cabinet member and adviser to numerous presidents), and Gerald Gunther (constitutional scholar and Hand biographer).

Learned Hand's formal retirement from the court in 1951 did little to

slow him down. He remained busy with judicial duties, regularly sitting for oral arguments. In 1952, a book of his writings, *The Spirit of Liberty,* was published to much acclaim. On the occasion of his fiftieth year of consecutive service on the federal bench—the longest streak for a federal judge in U.S. history—Hand was honored at an extraordinary session of the Second Circuit in the federal courthouse at Foley Square. Justice Felix Frankfurter, in paying tribute to Hand, told the audience: "After every one of us in this room will no longer be here, long after that, Learned Hand will still be serving society so long as law will continue to exercise its indispensable role in helping to unravel the tangled skein of the human situation" (Gunther 1994, 673).

The great Judge Hand seemed almost invincible. In old age, he continued to regale friends with renditions of Gilbert and Sullivan operettas; he hopped around the house with grandchildren clinging to his back reciting *Br'er Rabbit* tales; and he took continued joy in singing traditional American folk tunes of the Civil War era, which were later recorded for the Library of Congress.

But Hand was not invincible, as he recognized. He became stooped and slow moving as he entered his eighties; he suffered a serious blow when his cousin Gus died in 1954. His mental stamina, however, remained undampened.

In 1958, Hand delivered the Holmes Lectures at Harvard Law School (later published as *The Bill of Rights*) in an emotional homecoming. Speaking to a packed hall at his alma mater, on three consecutive nights, Hand was characteristically provocative and blunt. In recalling the invaluable lessons that he had learned from his law professors, sixty years earlier, Hand stated: "Again and again they have helped me when the labor seemed heavy, the task seemed trivial, and the confusion seemed indecipherable. From them I learned that it is as craftsmen that we get our satisfactions and our pay. In the universe of truth they lived by the sword; they asked no quarter of absolutes and they gave none" (Gunther 1994, 654). Hand fixed his gaze on the students in the crowd and implored them: "Go ye and do likewise" (654).

But Hand went on to raise eyebrows in his speech when he issued a stern call to the Warren Court to halt its newly embraced judicial activism. (One commentator wrote that Hand's speech was intentionally designed to "flutter the gowns" of the Supreme Court justices [Gunther 1994, 659].) At the conclusion of his three-day lecture in Austin Hall, Hand concluded by quoting the words of Benjamin Franklin, in an address to the Constitutional Convention of 1787: "'[T]he older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others'" (659).

Learned Hand died in New York City on 18 August 1961, five months short of his ninetieth birthday. The London *Times* wrote in an obituary: "[T]here are many who will feel that with the death of Learned Hand the golden age of the American judiciary has come to an end" (Gunther 1994, 679). Those who knew Hand, and who learned from his tireless efforts to seek perfection in the law, believed that his shining career represented the beginning—not the end—of that golden age.

Ken Gormley

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HARLAN, JOHN MARSHALL

(1833–1911)

SUPREME COURT JUSTICE JOHN Marshall Harlan is best known today for his dissents in favor of civil rights protections for blacks. In *Plessy v. Ferguson* (1896), when the Supreme Court ruled that the Fourteenth Amendment allowed for separate-but-equal facilities for the two races, Harlan protested that "our Constitution is color-blind, and neither knows nor tolerates classes among citizens" (15 U.S. 539). Thurgood Marshall, the first black to sit on the Court, found inspiration in those words when he worked for the National Association for the Advancement of Colored People. When the Court declared that separate was inherently unequal in *Brown v. Board of Education* in 1954, scholars first turned serious attention to Harlan. He began appearing on lists of great judges because of his dissent in *Plessy*.

JOHN MARSHALL HARLAN
Library of Congress

At the time of his death in 1911, however, Harlan was better known for his dissents in favor of corporate regulation, especially the *Great Trust Cases* of that year. Black Americans appreciated Harlan's record on civil rights, but it was Harlan's support for federal antitrust laws that caused the mainstream newspapers to memorialize him as the people's judge. He was seen as a judicial champion of the common good who was willing to take on the corporate robber barons. Harlan's evolving reputation proves that the definition of judicial greatness changes over time to reflect society's beliefs and values. Harlan himself underwent a revolution in his beliefs before he came to the Court.

Harlan was born in Kentucky, the son of James Harlan, a lawyer and Whig politician, and Eliza Shannon Davenport, who came from a farming

family. James owned half a dozen slaves, but recent deoxyribonucleicacid (DNA) analysis indicates that he did not father a child by a slave woman as was rumored (see Gordon 1993, which offers important information on slave holding by the Harlans). John Harlan attended Centre College in Danville, Kentucky, and then the Law School at Transylvania University in Lexington. He was admitted to the bar in 1853 and began work in his father's firm in Frankfort, Kentucky. Three years later, he married Malvina French Shanklin of Evansville, Indiana, the daughter of a merchant. They had six children, including John Maynard, whose son John Marshall would also become a Supreme Court justice.

Harlan's only early judicial experience was for the Franklin County Court from 1858 to 1861. More important to his legal thought were his experiences during the years after the Civil War. When the war broke out, Harlan was committed to both the Union and to slavery, and he raised and led the Tenth Kentucky Volunteer Infantry until March 1863. Some have suggested that Harlan's resignation was an angry response to Abraham Lincoln's Emancipation Proclamation in January 1863, but it was more likely prompted by the death of his father in February and the need to salvage the family law business.

Still, Harlan continued to oppose emancipation and campaigned for Gen. George B. McClellan when he ran against Lincoln in 1864. Harlan denounced the Thirteenth Amendment, which abolished slavery in 1865, and the Fourteenth Amendment, which granted blacks civil rights in 1866. He complained that the amendments "would work a complete Revolution in our Republican system of Government" and urged whites to oppose the extension of political rights to black men (Hartz 1940, 31). During Harlan's term as attorney general of Kentucky from 1863 to 1867, he prosecuted Union general John M. Palmer in 1866 for violating Kentucky's slave code in his efforts to recruit black men into the army and thus free them and their families. But by the late 1860s, Harlan had begun to reconsider his position on civil rights.

Harlan was faced with a stark political choice. His father's Whig party was gone. The Democratic party supported white supremacy, which Harlan had been taught was natural, but it also supported terrorism against blacks and white Union men. Since Kentucky had remained a Union state during the war, it also remained unreconstructed afterward, and tens of thousands of its white native sons returned from the Confederate Army in no mood to assent to emancipation. Thousands of blacks fled the state. The Republican party championed the radical doctrine of black civil rights, but at least it stood for law and order and the constitutional nationalism that Whigs had always held dear.

Harlan may have recalled his father's example in choosing between

them. Although a slaveholder, James Harlan was remembered by his family as a man who disapproved of abuses of power by whites. John's wife, Malvina, recalled how John "never forgot" James's indignation at the brutality of a white slave driver one Sunday morning (Harlan 2001). John must have found Republicans' radical racial doctrines less disturbing than the deadly white terrorism sponsored by the Democrats. By 1868, Harlan had joined the Republican party. He and his law partner in Louisville, John E. Newman, welcomed into their firm Benjamin H. Bristow, a future secretary of the treasury, who was then one of the few federal attorneys actively enforcing the Civil Rights Act of 1866. Harlan now celebrated the end of slavery, championed black civil rights, and denounced the Klan. He ran for governor and lost in 1871 and 1875. By 1876, Newman was dead and Bristow had resigned from the firm, so Harlan partnered with Augustus E. Willson, who would be elected governor of Kentucky in 1907.

Harlan's rise to national office began with the Republican convention in 1876, when he threw the support of the Kentucky delegation to Rutherford B. Hayes after it became clear that Bristow had no chance. The grateful Hayes appointed Harlan in 1877 to the Louisiana Commission that tried to make sense out of that state's disputed gubernatorial election. Later that year, Hayes nominated Harlan for an opening on the Supreme Court. Although Harlan's early opposition to civil rights policies was thrown up against him, the Senate confirmed Harlan in November 1877, and he took his seat the next month. He would serve until his death in October 1911, one of the longest tenures on a court that Harlan described to Melville Weston Fuller as "the most elevated place on the earth" (Przybyszewski 1999, 75).

What linked Harlan's economic and civil rights decisions was a vision of constitutional nationalism. Harlan was eager to support economic growth that would bind the regions together again after the Civil War. He interpreted the interstate commerce clause more broadly than the rest of the Court to forbid all forms of economic discrimination by the states. But as this national marketplace grew, it gave rise to corporations of unprecedented size and power that many Americans feared were corrupting the political system and bullying the small businessman. Congress reacted by passing the Sherman Anti-Trust Act in 1890, but the Court rejected a prosecution of a sugar refining monopoly in *United States v. E. C. Knight Company* in 1895 on the grounds that Congress had no power to regulate manufacturing. Harlan protested with vehemence that only federal power could counter such monopolies. If Congress could not act, then what should the people do if "another *combination*, organized for private gain and to control prices, should obtain all the large flour mills in the United States; another of all the salt-producing regions; another, of all the cotton mills, and

another of all the great establishments for slaughtering animals, and the preparation of meats?" (156 U.S. 43, 45 [1895]).

Harlan also expressed concern for unrestrained upperclass power in his dissent from the second income tax decision, *Pollock v. Farmers' Loan and Trust Company (II)* in 1895. The majority held that Congress had to apportion an income tax according to the populations of the states, which would have defeated the law's purpose of shifting the burden of federal taxation from consumers to the wealthy. Harlan explained that Congress had been trying to adjust the revenue system so that the owners of rental property, stocks, and bonds paid their "fair share of the burdens of taxation" (158 U.S. 601, 676 [1895]). Conservatives complained that Harlan's delivery of his opinion resembled that of a Populist politician, but he was more sarcastic in private letters. To his friend August Willson, he wrote, "It is a curious fact in my experience that I never knew a *very* rich man who was not astute in attempting to evade the payment of his proper share of taxes. Those whose *business* in life is to clip coupons from bonds as a general rule are indignant at the thought of their being required to pay taxes" (Przybyszewski 1999, 173). From the bench, Harlan confessed that "I have a deep, abiding conviction, which my sense of duty compels me to express, that it is not possible for this court to have rendered any judgment more to be regretted than the one just rendered" (158 U.S. 601, 671–672 [1895]). He suggested that the Constitution be amended to allow Congress to impose an income tax, which was done in 1913 with the Sixteenth Amendment.

Harlan witnessed the success of later antitrust prosecutions, yet he was fearful that the Court had overstepped its powers in frustrating congressional power. The Court did define interstate commerce more broadly in 1904 when Harlan delivered a majority opinion in *Northern Securities Company v. United States,* holding that the interstate commerce clause could cover an exchange of company stock by two railroads. The public's approval of this decision probably grew out of the fact that it thwarted the plans of two notorious robber barons: J. P. Morgan and James J. Hill. The public applauded again when Harlan despaired over the reasoning of the *Great Trust Cases* of 1911, which held that the Standard Oil and American Tobacco Companies had violated the Sherman Act and should be broken up. Harlan concurred and dissented in these decisions because he feared that the Court's position that the act prohibited only unreasonable restraints of trade, not all restraints of trade, would allow the brethren to choose which monopolies should be broken up in the future. Harlan complained in *Standard Oil Company of New Jersey et al. v. United States* that "there is abroad, in our land, a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction" (221 U.S. 1, 105 [1911]). He must have felt some satis-

Richard Reid: Martyred Judge (1838–1884)

Judges are generally associated with applying the law, and its accompanying punishments, to others, but judges are themselves sometimes the victims of violence. Such was the case of Richard Reid of Kentucky, whose publicized assault at the hand of an attorney apparently drove him to madness and suicide. Reid was born in Kentucky in 1838. He began attending Baptist College in Georgetown, Kentucky, in 1855 and distinguished himself for his conscientiousness and his academic achievements there, subsequently serving for a time as a professor of Latin and Greek at the institution. While teaching, Reid also began reading law under Judge Duvall, with whom he was boarding, and he subsequently decided to take up the practice of law in Versailles, Kentucky.

In Versailles, Reid entered a partnership with the state's lieutenant governor and also made plans to marry. These plans were interrupted by the Civil War (Reid supported the South, but his health made him incapable of service) and by the death of his fiancée, Sarah T. Jameson of Missouri, two weeks before their scheduled nuptials. Reid later formed a law partnership at Mt. Sterling with his brother and later with Judge Richard Apperson. Although it appeared for some years that he would live out his days as a confirmed bachelor, Reid subsequently married Elizabeth Jameson, a graduate of Christian College in Columbia, Missouri, who was working at Woodford Female College in Versailles, Kentucky.

Reid and his wife established a happy life that included raising a son and giving shelter to a number of other relatives. Reid took an increasingly prominent role in his local Christian Church, where he was a Sunday School teacher and elder. Reid was also increasingly recognized for his legal skills. In 1879, Judge John M. Elliott of the Circuit Court was assassinated in office, and Reid was encouraged by his friends to seek that seat. He narrowly lost the election to Judge Thomas F. Hargis, who was judge of the Criminal Court, but supporters of both candidates were pleased with Reid's campaign, and when the legislature created a Superior Court in 1882, Reid easily won election to the post, and served for a time at its acting chief justice. Reid's wife, who gathered materials from a wide variety of sources in writing her husband's biography, reported that his decisions "were models of clearness, pure diction, legal acumen; they were definite, positive,

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faction in the public approval that greeted his protest. Grateful letters arrived from all over the country and one of his sons reported from Chicago that "many people from all walks of life have spoken to me about it, uniformly in praise of your position" (Przybyszewski 1999, 197).

Just as Harlan believed in a national economy governed by broadly wielded national power, so he thought that civil rights should be governed by broad national standards. The importance that Harlan placed on na-

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conclusive; and since the days of Robinson [an earlier judge], no man more rapidly achieved so enviable a reputation, or more preeminently combined within himself the elements that constitute the wise and upright Judge" (Reid 1886, 160). In 1883 Reid became a candidate for the Court of Appeals.

Reid's advance was then thwarted by tragedy. On 16 April 1884, Reid was invited to the office of John J. Cornelison, an attorney who had apparently lost in a disciplinary proceeding before Reid's court (although it does not appear that Reid had participated directly in this decision). Cornelison, a member of Reid's church, who was subsequently expelled from the church for his behavior, then ferociously beat Reid with his hickory walking stick, probably striking from twenty-five to seventy-five blows. It is perhaps indicative of the time and place that many, including Reid's own relatives, wanted to exact personal revenge, and he was commended by many for showing restraint in not sanctioning such action but trusting to God and to the courts for vindication. Apparently, Cornelison continued to make disparaging comments about Reid and his family, further adding to Reid's physical agony and giving him popular justification had he chosen to exact revenge. Reid was further concerned about his wife's health and, largely because of his physical condition, about his prospects in the pending election.

Beset with worry, and suffering with continuing headaches, Reid apparently killed himself on 15 May 1884 in the office of a fellow judge. A note, believed to have been written by Reid, said: "Mad, mad! Forgive me, dear wife, and love to the boy [his son]" (Reid 1886, 478). His friends believed that any madness from which Reid suffered was directly attributable to the terrible beating that had been inflicted upon him and to his consequent suffering. Cornelison was subsequently tried for assault and battery with intent to commit murder and was sentenced to three years in the county jail and fined one cent (501).

Reid's fate, like that of Judge Elliott, established that the role of a judge could be a dangerous one. Using religious imagery common in her day, Reid's wife likened Reid's sufferings to those of Christ and Cornelison's actions as akin to those of Judas. Reid's role as a martyr was furthered by his own decision not to seek personal revenge or allow his relatives to inflict it on his behalf.

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tional standards for rights is further reflected in his support for the idea that the states were bound by the Bill of Rights because the Fourteenth Amendment's due process clause incorporated those previously national guarantees. Harlan argued explicitly and implicitly that a national standard of rights would apply whether in criminal prosecutions, such as *Hurtado v. People of California* (1884), or in property cases, such as *Smyth v. Ames* (1898). In a parallel development, Harlan's new commitment to antislavery

appeared in both his economic rights and civil rights decisions. In his *Standard Oil* dissent, he explained that the Sherman Act was passed because one kind of slavery had been destroyed by the Civil War, yet "the country was in real danger from another kind of slavery . . . the slavery that would result from aggregations of capital in the hands of a few individuals and corporations . . ." (221 U.S. 1, 83 [1911]). Harlan understood racial discrimination as a remnant of chattel slavery. In the *Civil Rights Cases* in 1883, the Court held that discrimination in public accommodations owned by private individuals fall neither under the prohibitions of the Fourteenth Amendment, since it barred only state action, nor under those of the Thirteenth Amendment, since it barred only slavery. Prompted by his wife, Harlan relied extensively on Justice Roger B. Taney's opinion in the *Dred Scott* case of 1857 to prove that emancipation meant the end of such discrimination. Taney had written that even free blacks had no rights that a white man was bound to respect during the time of slavery. Therefore, Harlan reasoned, emancipation under the Thirteenth Amendment meant more than the end of chattel slavery; it meant the establishment of "universal *civil freedom*" (109 U.S. 3, 34 [1883]). When private facilities served the public, Harlan argued, they fell under the state action prohibitions of the Fourteenth Amendment as well.

As the first important decisions on segregation, the *Civil Rights Cases* garnered a great deal of public interest, and most of the white public seems to have thought the matter settled—so much so that by the time of *Plessy v. Ferguson* in 1896, mostly only black Americans were paying attention. This time, state action under the Fourteenth Amendment was undeniably at issue. But now, the Court upheld Louisiana's law segregating railroads on the grounds that the Fourteenth Amendment did not require social equality. Harlan protested that such discrimination violated civil equality and made his famous declaration that our Constitution is color-blind. In eloquent words, he warned the Court that "the destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law" (163 U.S. 437, 560 [1896]). Prophetic words, yet Harlan's dissent in *Plessy* also indicated the limits of his understanding of civil equality, limits that caused him to break his own color-blind rule.

In *Plessy,* Harlan assured "the white race" that it would remain dominant, "for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty" (163 U.S. 437, 559 [1896]). Only by doing right by blacks could whites live up to their own standards, according to Harlan. Such beliefs rested upon a notion of white racial identity that may explain Harlan's acquiescence to *Pace v. Alabama* in 1882 in which the

unanimous Court upheld a law that punished interracial adultery more severely than same-race adultery and his unwillingness to say anything about segregated public schools in his opinion in *Cumming v. Richmond Board of Education* in 1899 and his dissent from *Berea College v. Kentucky* in 1908. The social intimacy of public schooling and sexual relations challenged the very racial identity that helped inspire Harlan to protect black civil rights. Harlan did not openly oppose mixing of the races, but he was clearly uncomfortable enough with the idea of interracial intimacy and integrated public schools to fall silent when their prohibition came before the Court. Harlan failed to apply the color-blind rule to these cases because he remained color conscious.

Harlan ascended to the lists of judicial greats by a complicated path. During his lifetime, he was applauded for his antitrust position; during our lifetimes, he has been praised for his civil rights dissents. Harlan once explained to a class of law students why men would serve in public office despite the low salaries: "I cannot tell, except from the feeling of the ambition that is planted in the breast of every man to live after he is dead and gone in the memory of his fellow citizens" (Przybyszewski 1999, 190). Whatever yardstick posterity uses, Harlan would be pleased to have found his name on a list of great judges.

Linda Przybyszewski

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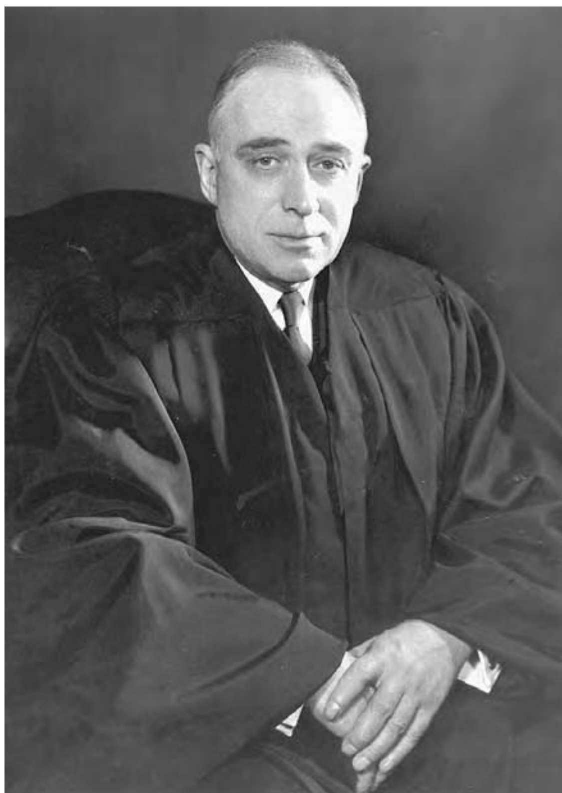
HARLAN, JOHN MARSHALL, II

(1899–1971)



John Marshall Harlan II
Photographed by Harris & Ewing, Collection of the Supreme Court of the United States

The Warren Court (1954–1969) embraced a number of elements in the jurisprudence of the first Justice John Marshall Harlan, who served on the United States Supreme Court from 1899 to 1911. To cite only two examples, Warren-era precedents substantially adopted Harlan's total incorporation thesis, applying most—though not all—of the safeguards of the Bill of Rights to the states through its interpretation of the Fourteenth Amendment. Like the first Harlan, Warren and a majority of his colleagues also endorsed a broad interpretation of the Reconstruction amendments, rejecting the "separate but equal" doctrine and endorsing broad congressional power to enforce their provisions. The first Justice Harlan's grandson, the second Justice Harlan, served on the United States Supreme Court from 1955 until 1971. Ironically, he was a major critic of many Warren Court precedents, refusing to endorse his grandfather's thinking in a variety of constitutional fields. Indeed, since Felix Frankfurter had left the Court in 1962, at the beginning of the Warren Court's most "liberal-activist" period, Harlan II, not Frankfurter, should probably be considered the most significant judicial critic of Warren-era civil liberties trends.

John M. Harlan, which Harlan II preferred to be called as a way of distinguishing himself from his illustrious grandfather, was born in Chicago on 20 May 1899. His father, John Maynard Harlan, was a Chicago alderman and mayoral candidate who achieved political prominence as an opponent of the city's traction (streetcar) interests and their grip on local politics. Failed political campaigns and the resulting financial strains on his law practice ultimately took their toll on John Maynard's reformist zeal. He became counsel to the very traction interests he had previously opposed and attracted other lucrative clients as well. While he was never to enjoy the financial success of many of his contemporaries—and, indeed, would die in poverty—the security his new clients provided and his family's impeccable social connections placed the Harlans in the center of Chicago society.

Young John Marshall would spend little of his life in Chicago, however. His father enrolled him at an early age in a Canadian boarding school, and the family spent their summers at his Grandfather Harlan's Quebec vacation home. At school in Canada, the youth soon overcame homesickness and excelled in both academics and sports. After a final year at a Lake Placid, New York, preparatory school, he enrolled in the class of 1920 at Princeton, where he compiled an outstanding academic record and was president of the student newspaper.

Following completion of his undergraduate degree, Harlan studied law and jurisprudence for three years as a Rhodes Scholar at Oxford's Balliol College. On his return to the United States, he took a position with Root, Clark, Buckner and Howland, the prestigious Wall Street firm now known as Dewey, Ballantine. Emory Buckner, the firm's chief litigator, became the young associate's mentor and chief influence on the development of Harlan's career in the law. Convinced that study at Oxford had hardly equipped Harlan for a law practice in the United States, Buckner insisted that his charge complete the two-year law program at New York Law School. Harlan won admission to the bar in 1924 and, under Buckner's watchful eye, quickly became a skilled litigator. When Buckner became U.S. attorney in 1925, he made Harlan his chief assistant and vigorously prosecuted prohibition cases under the Volstead Act, which both detested. In the late 1920s, Harlan also assisted Buckner when, as a special state attorney general, the elder attorney prosecuted the Queens borough president on municipal corruption charges.

In the 1930s, Buckner's health deteriorated, and Harlan was placed in charge of Root, Clark's litigation section. Following service with military intelligence during World War II, he returned to the firm and an impressive array of corporate clients, becoming one of the nation's foremost attorneys in antitrust and related litigation. Among his most notable clients were the Du Pont brothers, whom he defended from antitrust charges growing out of

their grip on General Motors and the United Rubber Company. Harlan won a victory in that trial, but as a new justice later watched in dismay the Supreme Court's reversal of the district court's ruling. Justice William J. Brennan's opinion in the case, Harlan privately remarked, revealed a "*superficial* understanding of a really impressive record" (Yarbrough 1992, 135).

Even before the Du Pont trial ended, Harlan's career had taken a sharp and permanent turn. Although never particularly active in politics, he had worked in a number of Republican (GOP) campaigns and enjoyed close ties with influential New York Republicans, including Gov. Thomas E. Dewey and one of the governor's principal advisers, Herbert Brownell. On becoming president in 1953, Dwight D. Eisenhower named Brownell to the post of attorney general. When a vacancy opened on the United States Court of Appeals for the Second Circuit, Brownell offered Harlan the position. Particularly given his value to their firm, several of Harlan's partners attempted to dissuade him from leaving his lucrative Wall Street practice for a life in public service. But Harlan accepted the nomination; and on 13 January 1954, the president submitted his name to the Senate. Less than a month later, the Senate confirmed the appointment; and in late March, Harlan took the oath of office.

Harlan served on the Second Circuit just over a year, writing opinions in twenty-three cases. With one exception, his appeals court caseload bore little resemblance to the broad constitutional issues he later confronted on the Supreme Court. The exception was *United States v. Flynn,* involving the Smith Act prosecutions of thirteen second-string leaders of the American Communist Party. The charges against Flynn and her co-conspirators were essentially the same as those at issue earlier in *Dennis v. United States,* in which the Second Circuit and the Supreme Court had rejected First Amendment and related constitutional challenges to Smith Act prosecutions of eleven top Communists. In his opinion affirming the convictions, Harlan appeared, if anything, to give government even wider latitude in such cases than the appeals court and Supreme Court majority had in *Dennis.* In fact, one commentator compared Harlan's approval of criminal punishment for speech "which may result in an attempt at" illegal overthrow of government to the "law of constructive treason in the worst days of the English common law" (Yarbrough 1992, 86).

Flynn hardly damaged Harlan's reputation with the Eisenhower administration. As the anti-Communist crusade of Wisconsin senator Joseph McCarthy began to focus increasingly on the White House, causing the GOP considerable embarrassment, Harlan also raised his voice against McCarthyism, albeit without mentioning the senator by name. When Justice Robert H. Jackson, a New Yorker, died in October 1954, Brownell again

promoted Harlan for the vacancy. The next month, the White House submitted Harlan's name to the Senate.

The nomination was greeted enthusiastically in most quarters, but four months would pass before Harlan received the Senate's approval. Southern segregationists delayed a confirmation vote in order to postpone the Supreme Court's further consideration of the school desegregation cases for which an initial ruling had been announced the previous May. They were also concerned about the nominee's ties to Herbert Brownell and Thomas Dewey (a recent addition to Harlan's old firm), who were leaders in the racially progressive northeastern wing of the GOP. North Dakota Republican William Langer was then opposing all nominations until the White House chose a nominee from his state. Conservatives in both parties were concerned, too, about the nominee's "international leanings," including his Oxford education and especially his membership, however nominal, on the national council of the Atlantic Union Committee. Mere membership in such an organization, critics claimed, smacked of support for "One World" government and the subordination of national and state law to the dictates of international agreements.

But for all their rhetoric, opponents could muster only eleven votes against confirmation. On 17 March 1955, the day after the Senate's vote, President Eisenhower signed Harlan's commission. On 28 March, he took his seat on the high bench.

The Court's newest member had met Felix Frankfurter years earlier through his mentor Emory Buckner. On the bench, Harlan quickly joined Justice Frankfurter's restraintist bloc. He also developed a jurisprudence similar to Frankfurter's in many ways. Like the elder jurist, Harlan was convinced that the political processes and respect for principles of separation of powers and federalism were more effective safeguards of individual rights than constitutional guarantees. In part perhaps as a result of his experiences at Oxford, he was also a common law jurist who supported rulings closely tied to the facts of individual cases rather than decisions based on sweeping constructions of constitutional provisions. In the common law tradition, he was strongly devoted as well to the rule of precedent, even those earlier decisions with which he disagreed. Only when cases were, to his mind, clearly distinguishable from earlier rulings, or where the justices were badly divided over the proper approach to an issue, was he willing to challenge arguable precedent. Since each extension of the Court's one-person, one-vote principle in reapportionment cases struck him as distinct from earlier decisions in that field, for example, he continued to challenge the propriety of the Court's involvement in what Frankfurter termed the reapportionment "thicket." Divisions among the justices over the obscenity issue enabled

him, moreover, to continue urging a narrow role for Congress in the control of obscenity, over which the national government had no explicit constitutional authority, while endorsing broad regulatory power for the states under their respective police powers. Otherwise, however, Harlan respected even those precedents he had initially opposed.

Harlan's opinions clearly reflected elements of his jurisprudence. He rejected, for example, Justice Hugo Black's absolutist interpretation of the First Amendment, contending instead that all individual freedoms must be balanced against the interests of society. He was particularly deferential to government in national security cases raising First Amendment and related issues. In *Barenblatt v. United States* (1959), for example, he spoke for the Court in upholding a congressional inquiry into academics with Communist affiliations, concluding that the interest in preservation of the nation obviously outweighed Barenblatt's First Amendment interests. His late-term dissent in the *Pentagon Papers Cases* (1971) was equally deferential to governmental authority over national security.

Harlan's regard for principles of federalism made him especially reluctant to encroach upon state powers. Embracing due process as a flexible, evolving guarantee of fundamental fairness rather than a rigid and expansive set of rules, he opposed the Warren Court's use of the Fourteenth Amendment due process clause as a vehicle for applying most of the Bill of Rights to the states. When a majority, for example, held in *Duncan v. Louisiana* (1968) that the Sixth Amendment right to trial by an impartial jury was applicable to the states through the Fourteenth Amendment, Harlan dissented, arguing that a jury was not necessary to assure defendants a fair trial under the due process guarantee and rejecting again the contention that the Fourteenth Amendment incorporated the specific provisions of the Bill of Rights. When the Court later concluded that neither federal nor state juries were required to number twelve jurors, despite precedents mandating twelve-member federal juries, Harlan charged that the incorporation process was forcing his colleagues to dilute Bill of Rights standards in federal cases in order to avoid undue intrusion upon state authority via the incorporation formula.

Harlan did not mean, of course, that due process included in its meaning no guarantees comparable to the specifics of the Bill of Rights; in *Gideon v. Wainwright* (1963), for example, he agreed that states were required to provide appointed counsel for indigent defendants. He insisted, however, that his position in no way rested on the notion that the Fourteenth Amendment incorporated the Sixth Amendment right to counsel in federal cases. Instead, he simply considered appointed counsel essential to due process. In both federal and state cases, moreover, the justice was reluctant to impose broad constitutional restrictions on criminal proceedings. He objected to

the *Miranda* warnings, for example, as based on an unduly expansive conception of coerced confessions and the Fifth Amendment guarantee against compulsory self-incrimination. Citing primarily considerations of federalism, he also refused to join the Court's extension of the exclusionary rule to the states in *Mapp v. Ohio* (1961).

Harlan was also a critic of the Warren Court's expansive reading of the equal protection guarantee. He joined the Court's school desegregation decisions and most other racial discrimination rulings. He found insufficient state action to justify judicial intervention in certain race cases, however. He dissented, for example, in *Reitman v. Mulkey* (1967), when the Court declared unconstitutional a California constitutional amendment giving people absolute discretion in the sale or rental of housing. Although the majority viewed the challenged scheme as encouraging private discrimination, Harlan saw it as merely placing the state in a neutral position on the issue. The justice objected as well to the Court's extension of the strict judicial scrutiny accorded "suspect" classifications beyond race to other forms of discrimination. He objected, for example, when the Court, in *Harper v. Virginia Board of Elections* (1966), declared a state poll tax unconstitutional and when it suggested that classifications based on economic status were inherently suspect. Harlan assumed the same stance seeking to limit the expansion of suspect categories in cases overturning laws that disadvantaged children based on their status of birth.

The justice was particularly critical, however, of the "fundamental rights" branch of the Warren Court's "new" equal protection jurisprudence, subjecting to strict review laws that discriminated against people in the enjoyment of fundamental "rights" or "interests," including those not mentioned in the Constitution's text. He dissented, for example, when the Court, in *Shapiro v. Thompson* (1969), subjected to strict scrutiny a state's one-year residency requirement for welfare benefits; the Court majority took the position that the law at issue burdened interstate travel and limited access to the "necessities of life." Harlan agreed, of course, that the due process guarantee included within its meaning rights not enumerated in the Constitution. In his view, however, governments could regulate such interests so long as their laws were rationally related to a legitimate state interest. The Court's approach, by contrast, clothed the judiciary with undue supervisory power over lawmakers and executives.

Harlan's regard for the "passive virtues" did not mean, of course, that he invariably sided with government in civil liberties cases. He spoke for the Court in *NAACP v. Alabama* (1958), recognizing a freedom of association as an implicit guarantee of the First Amendment and overturning Alabama's heavy-handed campaign to secure access to the controversial organization's state membership list. In *Poe v. Ullman* (1961), he concluded that

a Connecticut ban on the use of contraceptives violated a constitutional right of privacy, assuming such a stance four years before the Court's historic decision striking down that law in the *Griswold* case. Late in his term, he spoke for the Court in *Cohen v. California* (1971), overturning the conviction of a young man who wore a jacket bearing an offensive epithet in a courtroom corridor. Emphasizing that one person's "vulgarity" was another's "lyric" and that language serves emotive as well as cognitive functions, Harlan concluded that government attempts to excise particular objectionable words from the public vocabulary smacked of censorship.

Justice Harlan's eyesight had steadily deteriorated over the years. By the mid-1960s, he was virtually blind and heavily dependent on his law clerks. In August 1971, he was hospitalized, suffering from the chronic back pain that his physicians ultimately diagnosed as terminal spinal cancer. Hugo Black, his jurisprudential antagonist and close personal friend, was near death as well. Out of respect for his senior colleague, Harlan delayed his own retirement until Black's was announced in mid-September. Ten days later, and only two days before his colleague's death, Harlan also retired. He died on 29 December 1971.

Justice Harlan thought it inevitable that judges play a creative role in constitutional interpretation but embraced the view, espoused by law professor Herbert Wechsler, that judicial decisions should be based on "neutral principles" transcending the judge's personal preferences. Justice Black scored Harlan's flexible, evolving approach to constitutional meaning as an open invitation to judicial lawmaking, whereas Harlan dismissed as an elusive quest Black's search for clear commands—binding on judges as well as legislators and executives—in the Constitution's text and the intent of its framers. Each admired the other, however, for recognizing the risks that inordinate judicial power poses for a democratic society.

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HARPER, WILLIAM

(1790–1847)

William Harper
Courtesy of South Carolina Library, University of South Carolina, Columbia

Until the conclusion of the Civil War and the ratification of the Thirteenth Amendment in 1865, many judges had to struggle with the issue of slavery. A good number of these judges, especially those in the North, often recognized that there was a conflict between existing laws of the state and nation, what political theorists sometimes call positive laws, and what judges regarded as the dictates of morals or conscience, or what theorists would call natural law. In such situations, some judges chose to enforce positive laws that they themselves believed to be unjust and against natural law. Although never serving as a regular judge, Abraham Lincoln was among those who took the position that states with the institution of slavery had the right to maintain slavery and enforce laws maintaining the same, but that the institution should not be allowed to expand to other states or territories.

Although some judges in the South had moral conflicts similar to those in the North, they were more likely than northern judges to accept the legitimacy of slavery. Most early southern leaders who helped write and launch the U.S. Constitution took the position that slavery was at best a “necessary evil,” whose ills might not be as great as the evils of immediate

emancipation. As the debate between abolitionists (who portrayed slavery as an absolute evil) and slave apologists intensified in the early nineteenth century, however, prominent southern leaders increasingly took the position that slavery was, in fact, a “positive good.” Few individuals were more associated with this view than was William Harper, who served on the South Carolina Court of Appeals from 1830 until his death in 1847.

Born to an Irish Wesleyan missionary family on the island of Antigua in the Leeward Islands in 1790, Harper emigrated with his family to Boston in 1795. The family subsequently moved first to Baltimore, Maryland, and then to Columbia, South Carolina. William was apparently the first individual to be admitted to South Carolina College, from which he graduated. He studied medicine for about a year, read law with a Judge Nott, taught school for a while, and enlisted as a private in the War of 1812 and was discharged as a sergeant. In 1816, he married Catherine Coalter of Columbia, South Carolina, and practiced law with William C. Preston, who married one of his wife’s sisters (Hamilton). Although Harper was himself of humble birth, Edward Bates, who served as Abraham Lincoln’s attorney general, as well as Hamilton R. Gamble, a future governor of Missouri, also married sisters of his wife.

Perhaps influenced by Gamble, Harper moved to Missouri in 1818. While there, he was first appointed (in 1819) and then elected as state chancellor. He also served as a member of the Constitutional Convention of 1821. Upon returning to South Carolina in 1823, he served as the state reporter and authored a volume of law reports; was appointed and served briefly to fill a vacant seat in the U.S. Senate (1826); served for a short time as a state legislator and was elected (1828) speaker of the South Carolina House of Representatives; served as state chancellor from 1828 to 1830; was elected to the South Carolina Court of Appeals, from which he appears to have resigned briefly in 1835, before resuming the office; and tried, apparently without much success, to run a farm (Hamilton).

Although he did not come from a slave-owning family, had only a few slaves himself, and was reputed to be a gentle master who tried to reason with them, Harper was convinced that slavery was natural. He outlined his views in a speech entitled “Memoir on Slavery” before the South Carolina Society for the Advancement of Learning that was later published as *Slavery in the Light of Social Ethics*. Harper argued that in “every civilized society, there must be an infinite variety of conditions and employments, from the most eminent and intellectual, to the most servile and laborious” (Mason and Baker 1985, 460–461). Harper went on to indicate that “the Negro race, from their temperament and capacity, are peculiarly suited to the situation which they occupy, and not less happy in it than any corresponding class to be found in the world” (460–461). Like other slave apologists of the

West H. Humphreys (1806-1882)

The U.S. Civil War (1861–1865) presented governmental officials in the South, including judges, with the question of loyalty. Among those caught in the middle was Democrat West H. Humphreys, who had been born in West Tennessee in 1806 to a judge who later turned to banking. West studied in his father's law office, spent some time at Transylvania University in Kentucky, and received his license to practice law in 1828.

Humphreys, who was aligned with both Andrew Jackson and James K. Polk, served as a Tennessee state legislator, as state attorney general, and as a reporter for the Tennessee Supreme Court, where he edited the *Reports of Cases* from 1839 to 1851. Pres. Franklin Pierce appointed Humphreys as a United States district judge in 1853. As the conflict between North and South deepened, Humphreys became an advocate of secession, and when secession came, Humphreys was the only southern federal judge who failed to resign his seat, despite being appointed by Pres. Jefferson Davis as a judge for the district court of the Confederate States of America. Records of the period show that the records of his new court simply "began where those of the United States left off" (Brake 1998, 36). Among the cases Humphreys presided over in his new capacity were those involving the sequestration of the property of United States Supreme Court justice John Catron of Tennessee and of future U.S. president Andrew Johnson, whom Humphreys declared to be an enemy of the confederacy.

It is not surprising that the U.S. House of Representatives chose to impeach Humphreys, charging him with seven offenses including "high treason" and "malfeasance in office" (Brake 1998, 41). Humphreys did not appear to defend himself, and the Senate convicted him on 26 June 1862, although he continued to sit as a Confederate judge for another year. Eventually captured by Union troops in December 1864, Humphreys was later exchanged as a prisoner of war, pledged allegiance to the Union, and was pardoned by Andrew Johnson. Humphreys continued his law practice, became active in the temperance movement, and died in 1882.

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day, such as John C. Calhoun and George Fitzhugh, Harper favorably compared the condition of slaves (whose needs from birth to death were said to be taken care of by their masters) to that of industrial workers who lacked comparable security. Not content simply to ignore the assertions of equality in the Declaration of Independence, which the abolitionists frequently cited, Harper went on to ask: "Is it not palpably nearer the truth to say that no man was ever born free, and that no two men were ever born equal?" (460–461). Noting how individuals were born into unequal circumstances,

Harper further opined that "wealth and poverty, fame or obscurity, strength or weakness, knowledge or ignorance, ease or labor, power or subjection, mark the endless diversity in the condition of men" (460–461). Harper observed that, during his day, women and juveniles were recognized as both "human and rational beings" but that, like African Americans, they did not share in full rights. Denying that the issue of slavery was one of "natural rights," he argued that they were matters "to be settled by convention, as the good and safety of society may require" (461).

In an opinion in *McCrady v. Hunt,* Harper dissented from two colleagues who had invalidated South Carolina's "test oath." This oath required all state military officials to pledge allegiance to the state of South Carolina (at a time when the state was in conflict with national authorities over the legitimacy of protective tariffs) and had been challenged as a violation of both federal law and of the state constitution, which contained its own oath. Although Harper's arguments are now discredited, contemporaries viewed them as articulate defenses of state sovereignty and of other foundations of the doctrines of nullification and secession that eventually led to the U.S. Civil War (Brawley 1907, 230–231). Harper's argument also serves as a reminder that John Marshall's nationalism was not always accepted at the state level, or even, as Roger Taney's decision in *Dred Scott v. Sandford* (1857) would later indicate, by other members of the United States Supreme Court.

Harper did not confine his support for nullification to the courtroom. He explained his willingness to give speeches and write pamphlets on the subject in a manner that indicated that he did not think he could divorce his role as a judge from that of a citizen. Denying that such matters fell under the rubric of "party politics," he observed:

> The interests of the whole State to which my services are due, and still greater interests, are involved. A judge has the feelings and interests of a man and a citizen. It is not within the range of probability that I shall ever be called to act or decide officially on any of the topics which are now canvassed, and I can not think it indecorous that I should endeavor to explain and enforce opinions which I had formed and avowed long before I was invested with my present character. (Brawley 1907, 231)

Despite his willingness to participate in the nullification controversy, on the bench Harper appears to have been an advocate of what scholars today would identify as judicial restraint. In a case, *McDowall v. McDowall,* involving construction of a will, in which a lower judge appeared to have made a mistake as to a ruling of fact, Harper justified standing by that decision: "I am satisfied, however, that when the question is *re judicata* [settled

law] the true rule is this, that what the parties have once had the opportunity of litigating in the course of a judicial proceeding they shall not draw into question again, but that whatever might properly have been put in issue shall be concluded to have been put in issue and determined . . ." (Brawley 1907, 227). Harper continued: "It may appear a matter of hardship that the intention of the testator, which seems to have been so clearly expressed, should be disappointed, but it would be a greater public detriment that the boundaries of jurisdiction should be confounded" (227).

As a judge, Harper was commended for his patience. The chief justice of the Court of Appeals compared Harper to Chief Justice John Marshall of the United States Supreme Court. The chief justice noted that Harper had once told him that "though I am satisfied in favor of the party about to speak, yet I had rather hear him; he may in endeavouring to support his side of the case, show me where he is wrong" (Brawley 1907, 236).

Harper was an effective apologist for slavery in part because he was such a good writer, but he had other skills that enhanced his reputation as well. A biographer at the beginning of the twentieth century characterized Harper as follows:

> He had all the qualities of a great judge: spotless integrity, acute intellect, retentive memory, immense learning, dignity, patience and suavity, which commanded the unqualified esteem and respect of his associates and of the bar, in whose opinion he is entitled to rank with the great masters of the law, while the generosity of his character, his kindness of heart, and the simplicity and gentleness of his manner, greatly endeared him to all who knew him in private life. (Quoted in Brawley 1907, 238)

Although twentieth-century citizens may find it difficult to respect judges who advocated slavery, there were undoubtedly many, like Harper, whose opinions were based on the best lights available to them and whose judicial careers can still be respected for other qualities that they brought with them to the bench. Harper's life and work demonstrate that as long as judges are drawn from the ranks of men and women, they will continue to reflect not simply the highest ideals of the law but also some of the prejudices and errors of the cultures in which they live.

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HASTIE, WILLIAM HENRY

(1904–1976)

WILLIAM HENRY HASTIE
Bettmann/Corbis

AN ASTUTE LEGAL SCHOLAR, devout believer in the democratic promise, and a champion of civil rights, William Henry Hastie used litigation, social commentary, and political activism to place the plight of African Americans into the lexicon of twentieth-century American jurisprudence. In 1937 Pres. Franklin D. Roosevelt appointed the experienced attorney, former *Harvard Law Review* editor, and holder of a doctorate in juridical science from Harvard University to the esteemed position of federal judge of the District Court of the Virgin Islands. Hastie would be the first African American appointed to the federal judiciary, but that presidential appointment would not be the last for the "man of missions" (Ware 1984, 212), nor could it accurately encapsulate the scope of his influence on U.S. politics.

Lineage perhaps destined William H. Hastie to greatness in his struggle against bigotry and his pursuit of continuity between American societal practices and American idealism. Hastie's mother, Roberta Childs, descended from an African princess sold into chattel slavery after being kidnapped in 1794 by English privateers while she sailed for France from Madagascar. The princess's descendants were ultimately sold to an enslaver, Samuel Childs, who settled in the South. In 1867, Roberta Childs was born—and thrust into an age of political uncertainty over the future rela-

tionship between persons of color and the democratic experiment. Roberta grew up to become a schoolteacher in Chattanooga, Tennessee, after receiving formal training at Fisk University and Talladega College. There she met and later married senior William Henry Hastie, a former student of mathematics at Ohio Wesleyan Academy and a graduate of Howard University's College of Pharmacy. Like Roberta's ancestor, William's training was limited by bigotry and racism, although he did become the first black clerk in the U.S. Patent Office. On 17 November 1904 in Knoxville, Tennessee, Roberta gave birth to the younger William Henry Hastie—who would later be praised for pursuing freedoms for all Americans and for employing what seemed to be at his genetic disposal: actuarial-like sharpness, judicious prescriptions for actualizing theoretical commitments to civil rights, and a deep understanding of history.

Hastie learned the importance of history from his parents and from faculty at the renowned Paul Lawrence Dunbar High School in Washington, D.C. At Dunbar, Hastie and friends W. Montague Cobb and Charles Drew were constantly reminded of education's role in defeating racism. As biographer Gilbert Ware proclaimed, Dunbar propelled all of its faculty and students, whether the latter were enrolled in college-preparatory programs or not, to "choose brains rather than bricks or bullets as their ammunition in the war against racism" (Ware 1984, 9). The famed 1919 race riot in Washington, D.C., seemed to set the stage for Hastie's life: a 1921 graduation as valedictorian from Dunbar High, entrance into New England's prestigious Amherst College that fall, and an eventual 1925 graduation with Phi Beta Kappa honors. Although African Americans continued to prove themselves entitled to the full rights and privileges of democratic citizenship, advocates for democracy abroad ignored pleas for democratic practices at home.

What Hastie gained from his experiences at Dunbar and Amherst was passed unto his students at Bordentown Manual Training School, known also as the New Jersey Manual Training and Industrial School for Colored Youth. Hastie became a renowned teacher and role model, moving easily within a curriculum for black youth that "maximized educational practicality and minimized the dysfunctionalism of Washington's and Du Bois' philosophies" (Ware 1984, 25). The two years at Bordentown provided Hastie with more than just a means of earning money for graduate school or an opportunity to help mold the minds of black youth; they strengthened his conviction to pursue a career in law and an education from Harvard Law School. In 1927, he entered Harvard's law school intent on improving on the scarcity of the 1,230 black attorneys out of 160,000 who were practicing in the United States according to a 1930 census report.

In the 1920s, African Americans had become all too aware of the symbiotic relationship between racial oppression and America's legal system. Not

only did the white American Bar Association (ABA) exclude black lawyers, leading to the establishment of the black National Bar Association in 1926, but often the members of the ABA neglected to take on civil rights cases. According to the leading black lawyer of the time, Charles Hamilton Houston, black exclusion from the legal profession paralleled "opposition to [black] participation in government," thereby ensuring "that the services of the Negro lawyer as social engineer [were] needed" (Ware 1984, 29). As such, the scarcity of black lawyers in the South (for example, one per 9 million) contributed to the legal protection of civil rights violations, violence perpetuated against civil rights advocates, and state-sanctioned actions to disenfranchise black citizens.

Harvard Law School was far from a bastion of Northeastern liberalism; in fact, its exalted educated professors often shared the same views of blacks held by mainstream America. In remarking on Hastie's adeptness at legal reasoning, renowned legal scholar and professor of constitutional law Felix Frankfurter once said that his student was "not only the best colored man we have ever had but he is as good as all but three or four outstanding white men that have been here during the last twenty years" (Ware 1984, 28). For Hastie, this comment was not a compliment about his intellect but the unfortunate outgrowth of "rationalizing" distinctions based on color and the derivative of arguments founded upon supposed innate black inferiority. Professor Frankfurter's future ascension to the Supreme Court underscored the interaction between racial perceptions and jurisprudence. It also underscored how legalism often disadvantaged civil rights advocates and strengthened social inequalities.

When Hastie graduated from Harvard Law School in 1930 with an LL.B. degree, he numbered among the nine African Americans upon whom Harvard had conferred LL.B. degrees between 1920 and 1930. He had also followed his cousin, famed civil rights attorney Charles Hamilton Houston, as the second African American editor of the *Harvard Law Review*. Attorney Hastie's talents as a skilled writer and orator were soon put to work in the firm of Houston and Houston in Washington, D.C., and as a faculty member of Howard University Law School. In 1930, the National Association for the Advancement of Colored People (NAACP) embarked on a groundbreaking legal strategy to challenge civil and political rights violations. Together, the NAACP, Howard University, Charles Hamilton Houston, William Hastie, and a former law student at Howard, Thurgood Marshall, would become centerpieces in deconstructing the constitutional protections of state-sanctioned discriminatory behavior. Indeed, Hastie's 1931 admittance to the District of Columbia bar and his 1932 graduation from Harvard Law School with the degree of doctor of juridical science were instrumental in his endeavors to push American democracy forward.

Thurgood Marshall (1908–1993)

Ninety-nine justices served on the United States Supreme Court before the first African American was appointed. Few individuals had more distinguished themselves prior to their appointments than the appointee Thurgood Marshall.

Marshall was born in Baltimore, Maryland, in 1908, to a mother and father who were respectively a schoolteacher and a sleeping car porter. Marshall attended a segregated high school, graduated with honors at Lincoln College in Pennsylvania in 1930, and went on to graduate first in his law school class at Howard University, where Professor William Hastie and Dean Charles Houston served as his mentors. Initially in private practice in Baltimore, Marshall devoted much of his time to the National Association for the Advancement of Colored People (NAACP) and later joined Houston, who was special counsel to the New York NAACP. When Houston left that position, Marshall replaced him, later serving as the chief legal counsel, and eventually as director, of the NAACP's Legal Defense and Education Fund.

Gaining a reputation as "Mr. Civil Rights" (Cushman 1995, 477), Marshall led the fight first to win cases in which African Americans were denied the equal rights to which the reigning "separate but equal" doctrine entitled them and then to overturn the doctrine itself. Marshall's victories included decisions that struck down "all-white" primaries, judicial enforcement of racially restrictive covenants, and segregation in education.

Brown v. Board of Education (1954) was Marshall's greatest legal victory. Utilizing a variety of social and economic data, Marshall convinced the Court that racial segregation in American education led to feelings of inferiority among African Americans that adversely affected their motivation to learn. The Court agreed and struck down segregation in education—and later in other areas as well—as a violation of the equal protection clause of the Fourteenth Amendment. Marshall continued his work for civil rights despite what he considered the slow pace in implementing the *Brown* decision.

In 1961, Pres. John F. Kennedy appointed Marshall to the United States

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Hastie's efforts coincided with the wave of optimism surrounding the 1932 election of Democrat Franklin D. Roosevelt. During that time Hastie's longtime friend and fellow editor at the *Harvard Law Review,* Nathan R. Margold, had submitted a report to the NAACP detailing a rationale for moving away from piecemeal challenges of segregation to "attack instead the states' practices of failing to make the facilities for blacks actually equal to those provided for whites" (Ware 1984, 44). The NAACP would then present "the proper case" before the Supreme Court to force it to deal with inequities in state compliance with the principles underlying the *Plessy v. Ferguson* decision. Although the Court had declared state seg-

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Court of Appeals for the Second Circuit, and after considerable wrangling, the Senate confirmed him by a vote of fifty-four to sixteen. None of the 112 opinions that he authored in that position were overturned (Cushman 1995, 495). Pres. Lyndon Johnson subsequently appointed Marshall as U.S. solicitor general, where he was responsible for arguing a number of cases for the U.S. government involving the implementation of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Marshall won fourteen of nineteen cases that he argued before the United States Supreme Court during that time, including *Harper v. Virginia Board of Elections* (1966), in which the Court struck down poll taxes (Vile 2001, 2:495).

Saying that "It is the right thing to do, the right time to do it, the right man and the right place" (Vile 2001, 2:496), President Johnson subsequently appointed Marshall to the United States Supreme Court to succeed Justice Tom Clark. Confirmed in 1967 by a vote of sixty-nine to eleven, Marshall served on the Court until he retired in June 1991. Marshall was known as one of the Court's most liberal members, and he frequently allied himself with Justice William Brennan. Like Brennan, Marshall, who did not believe the penalty was just, eventually filed a dissent in all death penalty cases. Marshall also voted for affirmative action to advance racial minorities and was a strong advocate of the rights of criminal defendants. Especially in his later years, Marshall often dissented from the Court's judgments as it began to issue more conservative rulings in those and other areas.

Marshall died in January 1993. The recipient of numerous awards during his lifetime, Marshall will most likely be remembered both for his brilliant work as a strategist and civil rights litigator and for being the first African American to serve on the United States Supreme Court. Marshall's replacement, Clarence Thomas, also an African American, has advanced a much more conservative philosophy on the bench than did his predecessor.

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regation of schools constitutional in 1927, Hastie soon persuaded the NAACP that the separate-but-equal doctrine of Jim Crow "was vulnerable to attacks that would erode it and might lead to its destruction sooner than most people thought possible . . ." (45). This vulnerability, interestingly enough, rested on the peculiarities of southern education: the propensity to segregate and the fiscal inability to maintain adequate and separate facilities for segregated graduate and professional-level education. Forcing states to follow the *Plessy* precedent to all of its illogical, fiscally unsound, morally suspect, and constitutionally tenuous conclusions could erode the edifice of Jim Crow from within.

Hastie lost the NAACP's first major civil rights case, *Hocutt v. Wilson* (North Carolina, 1933), testing the vulnerability of segregated graduate and professional-level education. Judge M. W. Barnhill ruled against attorney Hastie and his client, Thomas R. Hocutt, who had challenged the decision of the University of North Carolina (UNC) not to admit Hocutt to the School of Pharmacy. Hocutt believed that UNC had denied him admission due to race and also refused to withdraw his lawsuit, given the state's inability to assure financial assistance for tuition to attend out-of-state schools. In court, UNC argued that admissions were denied if an applicant failed to furnish a copy of his college transcript, which constituted noncompliance with the university's requirements for admittance. The state also argued that the relief sought, a writ of mandamus, was improper; that the court could not overstep its authority and compel the university registrar to forgo his legal duty by disobeying a state law requiring segregation in education. Although Hastie lost, he gained the admiration of the legal community and was compelled to elevate his judicious interrogation of state discriminatory behavior. Indeed, as Hastie recalled years later: "It started something. It was a first step toward eliminating the legal and moral contradiction of racism in the scheme of education for life in a democratic society" (Ware 1984, 53). Years later, Hastie would win and gain fame by eloquently arguing the principles of state action and the Supreme Court's authority in providing proper relief in two historic civil rights cases: *Smith v. Allwright* (321 U.S. 649, 1944), which eliminated the constitutional protection for the "white primary" in federal elections, and *Morgan v. Virginia* (328 U.S. 393,1946), which dealt with segregation in public transportation. The language and constitutional principles in both cases would soon find their way into the historic *Brown v. Board of Education* (1954), argued by former student and friend Thurgood Marshall. In fact, between 1939 and 1949, Hastie served as either consultant or co-counsel in twelve of the nineteen cases Marshall litigated before the United States Supreme Court, and when asked in which ones Hastie was integral, Marshall is said to have extolled "all of them" (McGuire 1988, xiv).

Hocutt helped establish William Henry Hastie as an innovative legal strategist in the NAACP's litigation against discrimination in the 1930s and 1940s. It also attracted the attention of Secretary of the Interior Harold L. Ickes, who inquired about a black attorney credentialed and skilled enough to handle being an assistant solicitor. Colleague Nathan R. Margold suggested Hastie because of his "brilliance at Harvard during the year (1927–1928)," and constitutional scholar Felix Frankfurter, also Hastie's former instructor, "put in a good word" (Ware 1984, 81). In 1933, Hastie resigned from his private law practice to accept the position of assistant solicitor of the Department of Interior.

In that position, Hastie was instrumental in writing the historic Organic Act of 1936. It granted U.S. Virgin Islanders rights as citizen, abolished property and income requirements for voting, and clarified the status of islanders of native and Danish stock and those living in the United States, Puerto Rico, and the Canal Zone as U.S. citizens. Hastie's work on the Organic Act was an extension of his commitment to furthering democratic practices, particularly given the previous Supreme Court rulings that the Constitution did not require a granting of full citizenship rights to "nationals" or people of unincorporated territories such as the Virgin Islands.

His work on the Organic Act and judicious insight led Ickes to submit Hastie's name to President Roosevelt for a seat on the United States District Court in the Virgin Islands. Hastie was opposed by Attorney General Homer S. Cummings, who believed that the "appointment of a colored continental would offend Virgin Islanders" (Ware 1984, 85), although the islands were over 80 percent black. In spite of this opposition, Roosevelt submitted Hastie's name in 1937 to the Senate, perhaps not knowing that during confirmation hearings powerful Judiciary Committee member senator William H. King (Utah) would soon impugn Hastie's ability to "maintain 'a judicial point of view' about the interaction between black islanders and the government" (Ware 1984, 86). On 19 March 1937, William Hastie was confirmed as the first black federal magistrate of the United States and served as federal district judge from 1937 to 1939.

He subsequently resigned from the federal bench to steward the Howard University Law School as dean and professor of law. One year later, in 1940, Hastie accepted an appointment to become civilian aide to Secretary of War Henry L. Stimson. By this time, Hastie had already gained national attention as one of Roosevelt's "black cabinet" members, serving with the likes of Mary McLeod Bethune, Eugene Kinckle Jones, Robert Vann, and William Trent. He served from 1941 to 1943, ultimately resigning in protest over the War Department's posture toward racial friction, the relentless opposition to integrating army ranks, and persistent failure to protect black troops from white civilian violence. Hastie returned to Howard University, more resolved than ever to fight discriminatory action through public expression, litigation, and coordinated action, even publishing a pamphlet in 1943 called *On Clipped Wings* detailing the discriminatory policies of the War Department.

The opportunity to continue his efforts came in 1945 when Pres. Harry S. Truman nominated Hastie to succeed Charles Harwood as the governor of the Virgin Islands. In 1945, Truman had considered nominating Hastie for the United States Court of Appeals for the District of Columbia but relented over the likelihood of southern senatorial opposition and the growing "states' rights" campaign. Hastie's confirmation hearings were con-

tentious, often with questions centering on Hastie's involvement with civil rights organizations such as the National Lawyers Guild, the Southern Conference for Human Welfare, and the National Association for the Advancement of Colored People. Hastie prevailed and was confirmed on 1 May 1946; he served until 1949, when islander opposition to his efforts at political accountability forced him to reconsider repositioning himself in the flurry of civil rights litigation and politics.

During the 1948 presidential campaign, President Truman called on Governor Hastie to help strengthen the president's degree of black political support in key states. Hastie complied by encouraging the black electorate to consider the potential civil rights and economic impact of a Harry Truman, Thomas Dewey, Strom Thurmond, or Henry Wallace presidency. Truman rewarded Hastie's campaign assistance by appointing Hastie judge of the Third United States Court of Appeals, whose "jurisdiction and residential distribution of sitting judges included four from Pennsylvania, one from New Jersey, one from Delaware, and none from the Virgin Islands" (Ware 1984, 227). He was eventually confirmed nearly nine months after Truman made the nomination, over opposition from black lawyers in Philadelphia and from whites who opposed having a former governor of the Virgin Islands overseeing a seat "most appropriately" belonging to a native Philadelphian. Once again, the Senate could not prevent the soldier for democracy from prevailing to illuminate the power of objective jurisprudence; as he had earlier argued in *Morgan,* that neither the Court nor federalism could allow states to engage in activities marked by "disruptive local practices bred of racial notions alien to our national ideals, and to the solemn undertakings of the community of civilized nations as well" (189). In 1968, Hastie became chief judge of the Circuit Court during a decade when the ABA finally began to admit black lawyers; he served with distinction until 1971, when he assumed senior status and went into official but quasi-retirement at the age of sixty-six.

In a biographical essay on William H. Hastie, scholar Kermit Hall suggested, "Ironically, in his new office [as appellate judge] the great crusader for civil rights had few opportunities to advance the agenda he pursued in the courtroom for more than two decades. Scarcely, two dozen of his 486 opinions dealt with civil rights" (Hall 2001, 349). Hall suggested that Hastie was much more restrained in exercising "judicial power" than his former student, Supreme Court justice Thurgood Marshall.

All of the cases that Hastie wrote dealing with civil rights did not involve racial discrimination, but they provided systematic and principled inquiry into the substantive and procedural due process elements of the Fourteenth Amendment. Like other judges of his time (and many strong jurists to follow), Hastie carefully considered the consequences of extending gov-

ernmental power, and he "classified certain procedural aberrations as well as substantive intrusions upon liberty under the heading of 'special and extreme objectionableness'" (Rusch 1978, 807).

For example, Hastie consistently voted to sustain challenges to coerced confessions or testimonies made under the due process clause—*United States ex rel. Godfrey v. Yeager* (1964), *United States ex rel. Dickerson v. Rundle* (1970), and *United States ex rel. Catena v. Elias* (1971). Hastie's objection to extending governmental power reflected his self-identified commitments to constitutionalism, federalism, judicial restraint, stare decisis, and popular sovereignty (see, for example, *United States ex rel. Scoleri v. Barniller* [1962], *U.S. ex rel. Bolish v. Maroney* [1969], *Alton v. Alton* [1953], *Ross v. Maroney* [1967], *U.S. ex rel. Auld v. Warden of New Jersey State Penitentiary* [1951], and *Sinatra v. New Jersey State Commission of Investigation* [1970]).

These philosophical and legalistic commitments led Hastie to vote against many of the logical extensions inherent in the very social-political strategies he helped frame as an advocate for the NAACP interested in the Fourteenth Amendment. For example, in *Lynch v. Torquato* (343 F.2d 370, 1965) Hastie declined to apply the equal protection clause broadly enough to confirm challenges to the Democratic Party's use of a precinct unit voting system to choose party leadership. He did not believe that "the normal role of party leaders in conducting internal affairs, other than primary or general elections" (372), could enable the court to invest the Democratic Party with the attributes of state action, a concept he and Marshall used to invalidate the same party's barring of black participation (that is, white primary) in *Smith v. Allwright* (1944). Unlike his advocacy for judicial activism in *Allwright*, his take on the circumstances of the *Torquato* case impelled Hastie to keep with the tradition of judicial propriety. In an interview given and published three years before the *Torquato* decision, Hastie remarked that judicial moderation was essential to preserving "the image of an objective arbiter of human and social problems" (Rusch 1978, 812, citing Dixon 1962, 4). It was this aptitude for applying neutral adjudication, even in cases akin to ones in which he was personally and racially involved, that was the everlasting mark of Hastie's jurisprudence.

Judge Hastie should be remembered for what Chief Justice Warren Burger acknowledged as his "finely attuned judicial temperament" (Rusch 1978, 818). Hastie should also be commemorated for his faith in Madisonian democracy and the rule of constitutionalism. It is a fitting footnote that the language in Chief Judge Hastie's sole dissent in *Lemon v. Kurtzman* (310 F. Supp 35) became fodder for the Supreme Court's later reversal concluding that state aid to parochial and other nonpublic schools under the Pennsylvania Nonpublic Elementary and Secondary Education Act (1968) violated the establishment clause of the First Amendment. Although Hastie

disagreed with the overall proposition of finding legislative intent, he was committed to procedural and substantive due process. The famous three-pronged test for determining constitutionality of alleged violations of the establishment clause could fittingly be called the "Hastie-Lemon Test."

Tyson D. King-Meadows

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HAYNSWORTH, CLEMENT FURMAN, JR.

(1912–1989)

Clement Furman Haynsworth Jr.
Bettmann/Corbis

Clement Haynsworth served as a judge on the United States Fourth Circuit Court of Appeals from 1957 to 1989 and was its chief from 1964 to 1981. Nominated to the United States Supreme Court in 1969 but not confirmed, he continued on the Fourth Circuit for another twenty years.

Clement Furman Haynsworth was born in 1912 in Greenville, South Carolina. He attended Furman University in Greenville, graduating *summa cum laude* in 1933 with an A.B. degree. He subsequently attended Harvard Law School, the third generation of his family to do so. He graduated fifty-first in his class of 399 in 1936, receiving the J.D. degree. Immediately upon finishing his degree, he returned to South Carolina, was admitted to the bar, and joined the family law firm—Haynsworth, Perry, Bryant, Marion and Jonstone. The firm specialized in corporate law. The outbreak of World War II interrupted Haynsworth's corporate law career. He entered the United States Navy as a lieutenant and served as an intelligence officer at bases in Charleston and San Diego from 1942 to 1945. At the conclusion of the war, he returned to the Greenville firm, becoming a senior partner in 1946. The same year, he married Dorothy Merry Barkley, also of Greenville.

Haynsworth's judicial career began in 1957. A self-described "Eisenhower Democrat," Haynsworth was actively involved in fund-raising for the Republican president's 1956 reelection campaign (*The Scribner Encyclopedia of*

American Lives). When an opening became available on the Fourth Circuit Court of Appeals the next year, Eisenhower nominated Haynsworth for the position. Congress promptly approved the appointment, and Haynsworth assumed the seat that he would hold until his death in 1989. He served as chief justice of the Fourth Circuit from 1964 to 1981, when he assumed the title of senior justice.

During the course of his career, Haynsworth became widely regarded as a distinguished jurist, respected by his peers. He wrote approximately 640 opinions in his thirty-two years on the Fourth Circuit, earning a reputation as having a moderate judicial temperament, and was known as a "good administrator" in a "hardworking" and "efficient" court (Frank 1991, 18). His first opinion—significant only for that reason—was a patent case involving a tobacco harvester (*Long Manufacturing v. Holliday,* 246 F.2d 95, 4th Circuit [1957]). According to Haynsworth's biographer and fellow attorney, John P. Frank, the judge's first opinion to win widespread notice and admiration came in 1961. *Markham v. City of Newport News* (292 F.2d 711, 4th Circuit [1961]) declared that "suits against counties, cities, or other lesser governmental units could be brought in federal courts and should not be limited to state courts" (19). A few years later, in 1964, another Haynsworth opinion indicated his view that citizens should be allowed to sue government agencies for wrongdoing (*Switzerland Company v. Udall,* 337 F.2d 56, 4th Circuit [1967; Frank 1991, 19). A third important decision, *Rowe v. Peyton,* extended the right of habeas corpus. This particular decision marked a departure from the Supreme Court unusual for Haynsworth. Chief justice of the Supreme Court Earl Warren later applauded Haynsworth's decision as an appropriate anticipation of the highest court's subsequent rulings (383 F.2d 709, 4th Circuit [1967]; Frank 1991, 19). Another widely influential ruling established the "proper test for insanity in criminal cases" (*U.S. v. Chandler,* 393 F.2d 920, 4th Circuit [1968]; Frank 1991, 19). Haynsworth's opinion in another case became "standard instruction for students in law schools" (19). *Wratchford v. S. J. Groves and Sons Company* "set forth rules to determine when there is sufficient evidence to go to a jury" (405 F.2d 1061, Fourth Circuit [1969]).

With a distinguished twelve-year career on the bench, Haynsworth quickly moved to the short list of candidates for the Supreme Court when Abe Fortas resigned in 1969. Sen. Ernest Hollings (D-SC) put Haynsworth's name forward and urged Pres. Richard Nixon to nominate the judge. Nixon did so on 18 August 1969. The nomination initially met with a favorable response. Haynsworth was widely viewed within the legal community as a moderate, and the American Bar Association promptly issued the opinion that he was "highly qualified" to serve on the nation's

highest court (Frank 1991, 29). Opposition quickly emerged, however, and coalesced around two main issues. The most vociferous and voluminous opposition, led by the National Association for the Advancement of Colored People (NAACP), centered on the charge that Haynsworth was conservative on civil rights matters and would seek to roll back the gains made by African Americans under the Warren Court. A second area of opposition focused on Haynsworth's relationship to labor and business. George Meany, president of the American Federation of Labor–Congress of Industrial Organizations (AFL-CIO), challenged the judge on the grounds that his rulings on cases involving labor consistently favored business. On a related matter, Haynsworth's supposed pro-business leanings led to accusations of conflict of interest related to the judge's rulings on cases involving companies in which he owned stock.

Haynsworth's career extended over a period, the 1950s through the 1970s, coinciding with the upheavals of the civil rights movement. Since the Fourth Circuit served Maryland, West Virginia, Virginia, and the Carolinas, it was inevitable that Haynsworth would preside over many important cases that arose from challenges to the southern social order. It was a number of those cases that became subjects of controversy when Haynsworth was nominated to the Supreme Court.

As a member and later chief justice of the Fourth Circuit, Haynsworth heard several cases involving the desegregation of schools and arising out of *Brown v. Board of Education* (1954). One such case, *Dillard v. Charlottesville* (308 F.2d 920, 1962), involved public schools in the city of Charlottesville, Virginia. In response to tensions over integration of the schools under the *Brown* decision, the school board established a rule allowing students whose race put them in the minority in a school to transfer out of that school and into one in which they would be in the majority. The stated purpose of the rule was to allow a remedy for students who found the process of integration too traumatizing. The rule did not explicitly challenge desegregation; in theory, integration of the schools would continue apace. Technically, any African American student in a predominantly white school could transfer to a school in which African Americans were the majority. In reality, however, the rule rolled back desegregation. The only transfers that occurred involved white students leaving majority-black schools for predominantly (or entirely) white schools. The Fourth Circuit ruled for the plaintiff, arguing that the school board's rules violated the spirit of *Brown*. Haynsworth dissented from the majority opinion, arguing that the rule did not violate *Brown* because the same privilege of transfer was permitted to students regardless of race. Because the rule did not violate the letter of the law, it could not, according to Haynsworth, be regarded as illegal. Haynsworth

further argued that it was not unreasonable to allow school districts some latitude in responding to individual requests for school transfers, given the often traumatic nature of the process of integration.

Another important school desegregation case that later became the subject of controversy was *Griffin v. Board of Supervisors* (322 F.2d 332 4th [1963]). In that case, the plaintiff challenged a plan in Prince Edward County, Virginia, to close public schools rather than integrate them. The plan had been implemented in response to the *Brown* decision. The lawsuit made its way through the system and ended up in the Fourth Circuit Court of Appeals in 1963. The Fourth Circuit declined to rule on the merits of the case. With Haynsworth writing the majority opinion, the Fourth Circuit ruled that the Virginia Supreme Court should rule on the case before it moved into the federal court system. Haynsworth and his colleagues held the view that, although operating a segregated school system violated federal law, not having a school system at all did not. It became a question of state law as to whether the officials of a county could simply refuse to operate public schools. Some observers, at the time and subsequently, viewed this decision as tacit support for the plan and an indication that Haynsworth supported segregation. The United States Supreme Court reversed the Fourth Circuit, stating that it was unnecessary to delay matters by involving the Virginia Supreme Court. The fact that other counties in the state operated public schools while Prince Edward did not in effect denied equal protection of the laws to all school-aged children in the county. The Supreme Court "ordered the reopening of the public schools," thus reversing Haynsworth's ruling (Frank 1991, 20).

Three years later, Haynsworth dissented from the majority ruling on another case involving the same plaintiff and defendant (*Griffin v. County School Board,* 363 F.2d 206, 4th Circuit [1966]). This time, school officials held secret meetings with representatives from several private, all-white schools in order to arrange to transfer public funds to those schools. An appeal regarding the legality of such funding arrangements was pending before the court at the time, but the court had not issued orders to prevent transfers from taking place. The school board members were trying to accomplish the transfer of funds before the Fourth Circuit had a chance to make a ruling on the issue. Despite the fact that they had not yet issued any orders, the majority on the court held the school officials in contempt. Haynsworth explicitly condemned the school officials' actions, calling them "contemptible" and "unconscionable" (U.S. Congress 1969, 593) He nevertheless wrote a dissenting opinion in which he argued that the court could not issue a citation for contempt of court orders when no court orders had been issued. Civil rights activists subsequently pointed to this case as evidence that Haynsworth was a segregationist. His supporters argued, to

the contrary, that the dissenting opinion did not “evidence an anti–civil rights position. Instead, it illustrate[d] an adherence to careful statutory construction and a respect for the proper role of the judiciary” (461).

In addition to numerous school desegregation cases, Haynsworth’s opinions regarding the desegregation of several health care facilities also became matters of contention at the Senate hearings on the judge’s nomination to the Supreme Court. *Eaton v. Board of Managers of James Walker Memorial Hospital* (261 F.2d 521, 4th Circuit [1958]) involved charges that the hospital discriminated against black physicians in granting hospital privileges. Haynsworth joined with the majority in an opinion that since the hospital in question was a privately funded and privately operated facility, no state-directed action was at issue. In the absence of state action, the hospital could extend privileges to whomever it wished (U.S. Congress 1969, 462). Although a majority concurred in the opinion, including the Fourth Circuit’s most left-leaning justices, Haynsworth’s opponents later pointed to this particular case as evidence of Haynsworth’s anti–civil rights views.

Five years later, *Simkins v. Moses H. Cone Memorial Hospital* (323 F.2d 959, 4th [1963]) effectively marked a move of the Fourth Circuit in a different direction from that which the *Eaton* case had established. Like James Walker Memorial Hospital, Moses H. Cone Hospital had been privately founded and continued to operate as a private hospital. Also like Walker, Cone was a segregated facility. When it was built, however, Cone had received some federal construction funds through the Hill-Burton Act. At that time (mid-1940s), the Hill-Burton Act contained no language regarding the eligibility of segregated facilities for funding. A lawsuit filed against Cone nevertheless brought into question whether a private facility could receive any federal funds if the facility engaged in racially discriminatory practices. A majority on the Fourth Circuit ruled that it could not. Haynsworth, however, dissented on the grounds that, even though it received some federal funds, Cone Hospital had been privately founded and primarily privately operated and thus no state-directed action figured in its racial discrimination. He cited *Eaton* as the controlling authority, whereas the majority on the court maintained that *Eaton* had been undermined by other cases and thus did not apply in *Simkins*. Haynsworth’s opponents in the hearings regarding his appointment to the Supreme Court frequently cited *Cone* as evidence that Haynsworth was a segregationist. His supporters, to the contrary, argued that Haynsworth was “highly persuasive” in his use of case law in preparing his dissent. He had also cogently argued that, since Congress was at that time debating an amendment to Hill-Burton that would outlaw discrimination by facilities that received federal funds, it was clear that such antidiscriminatory provisions did not already exist. Haynsworth’s supporters maintained that the judge’s dissent in *Simkins*

demonstrated his respect for and knowledge of law rather than racial prejudice (Frank 1991, 20; U.S. Congress 1969, 458, 462).

In a third case, again involving James Walker Memorial Hospital (*Eaton v. Grubbs* 329 F.2d 210, 4th Circuit [1964]), Haynsworth joined with the majority in ruling that the hospital could not receive any federal funds if it practiced racial discrimination. In a special concurrence, Haynsworth wrote that although he did not agree with the court's decision in *Simkins*, he recognized the controlling authority of *Simkins* in *Eaton v. Grubbs*. Haynsworth's opponents had charged that the judge was resisting the movement of both the Fourth Circuit and the Supreme Court toward a stance favorable to civil rights activism and could not be trusted to respect prior rulings. His proponents, in contrast, pointed to *Eaton v. Grubbs* as evidence of Haynsworth's principled commitment to stare decisis, or the controlling authority of existing court decisions unless explicitly overturned (U.S. Congress 1969, 462).

In addition to his record on civil rights cases, Haynsworth's relationship to labor and business became a lightning rod for opposition to his nomination. George Meany, testifying in behalf of the AFL-CIO, cited seven decisions authored by Haynsworth that were "anti-labor," all of which the Supreme Court subsequently overturned. One case in particular came up repeatedly as evidence of Haynsworth's supposed antiunion proclivities. In *Textile Workers Union v. Darlington Manufacturing Company,* Haynsworth had issued a ruling favorable to the Darlington plant's parent company, Deering-Milliken. Deering-Milliken had closed the Darlington plant after the workers voted to unionize. The Textile Workers Union sued, but the Fourth Circuit Court ruled on the company's side. Haynsworth wrote the opinion in which the Court "upheld the employer's right to close an individual textile mill for antiunion purposes" (Frank 1991, 396). On appeal, the Supreme Court subsequently ruled in favor of the union, overturning the Fourth Circuit's opinion (*The Scribner Encyclopedia of American Lives* 1999). Like his counterparts arguing on civil rights matters, Meany used such examples in order to portray Haynsworth as out of step with the direction of the Warren Court. Haynsworth's proponents countered by listing thirty-six cases in which Haynsworth had decided with the majority in favor of labor (69–70).

Meany's testimony portraying Haynsworth as consistently antiunion in his rulings opened the door to additional testimony regarding the judge's supposedly cozy relationship with big business, particularly the large textile concerns in North and South Carolina. Perhaps the most damaging testimony in the Senate hearings centered on accusations that Haynsworth ruled in cases where he should have removed himself for having a conflict of interest. The Deering-Milliken case highlighted just such an issue.

Haynsworth was part owner in a vending machine business, Vend-a-Matic, that had a contract with one of Deering-Milliken's textile mills. It was not the Darlington Manufacturing Plant, and Vend-a-Matic had won the contract in a competitive bid process. Nevertheless, opponents pointed out that even an appearance of a conflict of interest was unacceptable and, they said, indicated a lack of judgment unbefitting someone seated on the nation's highest court.

Haynsworth's opponents also listed another area of apparent impropriety. They noted that the J. P. Stevens textile corporation frequently engaged in litigation heard before the Fourth Circuit Court. Haynsworth owned a considerable amount of J. P. Stevens stock, which his opponents said he should have sold when he was first appointed to the court. That he had failed to do so constituted a conflict of interest and was, according to the opponents, a major violation of judicial ethics that rendered him unfit to serve as a Supreme Court Justice. Haynsworth responded that it was neither a conflict of interest nor a violation of judicial ethics. Because J. P. Stevens had been a major client of his family's law firm, he had disqualified himself from serving on any cases involving the corporation. Because he would never rule on a case involving the company, he argued, there was no conflict of interest in holding large amounts of stock.

Another question of apparent conflict of interest emerged in regard to a case involving the Brunswick Corporation. Brunswick, a supplier of bowling alley equipment, had been involved in a dispute with the owner of a building that had housed a bowling alley. When the bowling alley went bankrupt, both Brunswick and the landlord had outstanding claims; they went to court in order to determine which of them would have priority in the settlement of the bowling alley's debts. The case was heard before the Fourth Circuit on 10 November 1967. The judges ruled unanimously in behalf of Brunswick, and the final ruling was issued on 1 February 1968. Meanwhile, in December, Haynsworth had a routine end-of-year meeting with his investment adviser. As he had with many of his clients, the adviser recommended that Haynsworth purchase stock in Brunswick. Haynsworth followed his advice and purchased 1,000 shares for $16,000, even though he knew of and had participated in the favorable ruling for Brunswick, a decision that had not yet been made public. His opponents argued that Haynsworth should have refrained from buying the stock or disqualified himself from the case. Haynsworth and his proponents argued that the judge could neither legally nor ethically disqualify himself from the case because the rules for disqualification stated that the justice would need to have a "substantial" interest in a corporation before taking such an action. Otherwise, he was obliged to serve in his usual capacity with the court. Haynsworth and his supporters maintained that under no definition of the

word could the judge's 1,000 shares of Brunswick stock (out of a total of 18 million shares) be considered substantial (Frank 1991, 45–46). Since it did not qualify as a substantial interest, Haynsworth saw no problem in going forward with the purchase—a seemingly insignificant decision that proved to be the undoing of his Supreme Court nomination.

The majority report of the Senate Judiciary Committee, issued on 12 November 1969, recommended that Haynsworth's nomination be approved. The hearings had taken their toll, however. Despite an endorsement from the American Bar Association and widespread support among sitting judges across the nation, accusations of professional misconduct, anti–civil rights attitudes, and antilabor views weighed heavily in the minds of senators. Furthermore, the relationship between President Nixon and the Senate was rocky, to say the least. The circumstances surrounding Abe Fortas's resignation still rankled many in the Senate, and they were not disposed to look favorably on any nomination by Nixon. On 21 November 1969, the Senate rejected Haynsworth's nomination by a vote of fifty-five to forty-five.

Haynsworth decided to return to his seat on the Fourth Circuit Court of Appeals, following in the footsteps of his mentor, Judge John Parker. Parker had been nominated for the Supreme Court in 1930 and, like Haynsworth, had been rejected by the Senate. Parker returned to the Fourth Circuit and became a renowned and distinguished jurist with a long and influential career. Likewise, Haynsworth returned to the Fourth and served on the bench for another twenty years. Ironically, his first decision upon his return was a progressive ruling that ordered five school districts to integrate their schools immediately (Frank 1991, 128). He went on to write hundreds of decisions and served with such distinction that Congress named the federal courthouse in Greenville, South Carolina, after him. Haynsworth died in Greenville on 22 November 1989.

Lisa Pruitt

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HEMPHILL, JOHN

(1803–1862)

John Hemphill
Texas State Library and Archives Commission

John Hemphill, chief justice of both the Republic of Texas and the state of Texas, has been likened to John Marshall. "Their work was similar, in that each was called on to lay the foundations of an enduring jurisprudence for a newly-born government . . . [although] the questions decided by Hemphill, as Chief Justice of Texas, do not approach in breadth and scope the problems to which Marshall devoted his legal acumen and statesmanship" (Hart 1949, 395). Yet the fact that Hemphill's stature as an eminent jurist extends far beyond the state's boundaries may be attributed to the reach of the decisions rendered by the Texas Supreme Court during his tenure as chief justice. In the areas of land titles, marital property, and the homestead exemptions, the Texas cases established the precedents adopted by many other states, especially in the West.

John Hemphill was born near Blackstock in Chester County, South Carolina, in 1803. He was the fifth child of Rev. Dr. John Hemphill, pastor of Presbyterian churches in the Rocky Creek area, and Jane Lind. Both parents were of Scotch-Irish descent. Following Jane Hemphill's death, Rev. Hemphill married Mary Nixon in 1811. Hemphill began his education under the tutelage of local schoolmaster James Young, who actually resided

with the Hemphill family for a time. Hemphill then attended other local schools before entering Monticello Academy at Winnsboro, Fairfield District, where in 1823 he obtained a diploma certifying his proficiencies in mathematics, Latin and Greek, and English literature.

Hemphill then joined the junior class of Jefferson College (later Washington and Jefferson), an institution associated with the Presbyterian Church, located in Canonsburg, Pennsylvania. He graduated second in his class in September 1825. Hemphill returned to South Carolina and taught school but soon determined that he did not enjoy teaching beginning students. Despite opposition from his father, who wanted his son to follow the father's footsteps into the ministry, Hemphill began studying law in the office of D. J. McCord, an attorney in Columbia, in 1828. He was admitted to practice in the Courts of Common Pleas the next year and to the Courts of Equity in 1831.

Hemphill and McCord established a partnership in Sumter District of South Carolina; Hemphill's attention was quickly diverted to journalism as he began writing essays for the local pro-slavery, pronullification newspaper, the *Sumter Gazette*. This drew him into conflict with Maynard Richardson, editor of the competing paper, who opposed nullification. The two engaged in fisticuffs on the courthouse steps that left Hemphill with three minor stab wounds, sparked a riot among the townspeople, and eventually led to a duel between the two. The violence did not deter Hemphill, and he continued to express his opinions in speeches and as editor of the *Gazette*, a post that he took over in September 1832. His fiery rhetoric led to a duel with Mordecai Levy in 1833. Hemphill was slightly wounded when Levy's bullet struck his shooting hand.

In 1835, Hemphill joined the U.S. forces sent to Florida during the second Seminole war. There he contracted a disease (probably malaria or hepatitis) that resulted in a medical discharge and that would plague him the remainder of his life. Although Hemphill returned to his practice in Sumter, he abandoned it in 1838 to move to Washington-on-the-Brazos in Texas. He received his Texas license from Judge R. M. Williamson on 10 September 1838 and immediately began to study Spanish. Hemphill quickly established himself as an authority in the Spanish civil law, especially with regard to land grants.

Pres. Mirabeau B. Lamar offered Hemphill the position of secretary of the treasury of the Republic of Texas in 1839, but Hemphill declined it. Hemphill relocated his office to Bastrop and was selected as district judge in 1840. By virtue of that appointment, he joined the other six district judges as a member of the Supreme Court. Later that year, while holding court in San Antonio, he was a bystander to the breakdown of negotiations between the government and Comanches who been kidnapping settlers. A bloody

rampage, known as the Council House Fight, erupted, and as the slightly wounded Judge Hemphill later described the incident, he "reluctantly" felt compelled to disembowel his Comanche assailant with a Bowie knife (Huebner 1999, 103). Hemphill then joined in the pursuit of the Comanches and participated in the return of one of the captives to her family.

Hemphill's legal expertise, combined with his military exploits, brought him attention, and on 5 December 1840 he was selected as chief justice of the Texas Supreme Court, a post he held for the next eighteen years. The republic's Supreme Court met only haphazardly, and for a year and half, beginning in 1842, it did not convene at all. During the interim, Hemphill joined Gen. Alexander Somervell's military expedition to the Rio Grande. The finances of the republic were in dire straits, and a bill was passed reducing the salaries of judges elected after 1842 but maintaining the salaries of incumbent judges. Hemphill and Judge R. E. B. Baylor resigned and were promptly reelected by Congress at the lower salary. Although his name was floated as candidate for the presidency of the republic in 1843 and 1844, Hemphill opted not to run, citing his long-standing and "enervating" health problems (Curtis 1971, 1–53).

He did, however, agree to serve as a delegate from Washington County to the 1845 convention to consider annexation of Texas to the United States and to prepare a state constitution. The delegates immediately approved annexation and moved on to draft the constitution. Not surprisingly, Hemphill was named as the chair of the judiciary committee. The convention adopted Hemphill's plan for a three-member Supreme Court, a system of district courts, and the appointment of judges by the governor with the approval of two-thirds of the Senate (Cornyn 1995, 1164–1166). Paulsen summarized the work of the Convention: "Texians (as they liked to call themselves) invented the homestead [exemption protecting the home from forced sale by most creditors], implemented the concept of universal jury trial, and accomplished the first successful merger of law and equity. Moreover, when Texas entered the union as a community property state, it did so as the first American jurisdiction to provide constitutional recognition for married women's property rights" (Paulsen 1996, 641).

With the annexation, the Supreme Court of the republic was dissolved without achieving any significant degree of prestige. Only 170 opinions were issued during its desultory sessions, and no official edition of the opinions was ever published (Cornyn 1995, 1171). The court's limited consequence primarily was due to the substantial difficulties it faced in establishing law on a frontier where outbreaks of hostilities with neighboring nations and Native Americans were frequent. Further complicating their task was that Texas had been a colony of Spain and a state of Mexico, nations that adhered to the civil law rather than common law tradition

whereas most residents and lawyers were accustomed to the common law system. Although Congress officially adopted the common law in 1840, certain elements of civil law, including procedures for pleading and substantive property law, were kept (1118).

"As a highest court of a new nation, the Supreme Court of the Republic of Texas had no prior decisions to offer guidance" (Paulsen 1986, 271). Merely obtaining law books was a challenge. In 1840, Comanches raided Linnville and took two female captives as well as seizing a shipment of Hemphill's books, consisting of the United States Court Reports and a summary of Spanish law in English. According to the account of one of the victims, the books were hung from the Indian's saddles by the threads holding the books together, and pages were removed to roll cigarettes. The women were forced to read from the books for their captors' amusement (271). Although Hemphill eventually accumulated a library of over 2,400 volumes, he obviously could not transport many volumes when riding circuit or traveling to wherever the court was meeting.

After annexation, Hemphill was unanimously approved as the first chief justice and was joined on the bench for the next eleven years by two associate justices, Abner S. Lipscomb, a fellow South Carolinian, and Royal T. Wheeler from Vermont. The chief justice accounted for the smallest number of written opinions, about 25 percent, but his opinions tended to be longer. Hemphill generally drafted the decisions of the court dealing with community property, women's rights, and real estate—the three areas most influenced by the Spanish-Mexican tradition. Although relations between Lipscomb and Wheeler were sometimes rocky, with Hemphill acting as conciliator, the court showed surprising unanimity in its reported decisions, with only three dissents from 1846 to 1857 (Huebner 1999, 105).

The members of the Supreme Court rode circuit on impassable roads, always subject to attack, and held court in crude courthouses to apply justice in a frontier setting. The constitution of the republic had called for the adoption of the common law with modifications to fit the circumstances as the justices saw fit. The justices of the new state continued on that path and "drew on a mix of Spanish civil law, English common law, and American decisions in formulating their opinions. Many times they ignored precedent altogether" (Huebner 1999, 106). This was especially true in the areas of the homestead exemption and marital property.

The antecedents of protecting property from forced sale by certain creditors is somewhat of a mystery. Even though the concept did not originate in the state, Texas extended the protection to every family's home (Paulsen 1994, 309). The Supreme Court, primarily through the pen of Hemphill, honed the law protecting debtors in such cases as *Cobbs v. Coleman*, 14 Tex. 594 (1855), which extended the exemption to all Texas residents,

married or single, and *Shepherd v. Cassiday,* 20 Tex. 24 (1857), which stated that temporary absences from the property did not void the exemption. The homestead exemption and its interpretations had been adopted in some form by forty states and territories by 1870. "In Texas the confluence of a large debtor population, an expansive frontier, a traditional southern hostility to concentrated economic power and the presence of Spanish law created a legal principle that soon spread throughout the nation" (Huebner 1999, 113).

"[W]hen Texas entered the union as a community property state, it did so as the first American jurisdiction to provide constitutional recognition for married women's property rights" (Paulsen 1996, 642). Under the common law system, the wife lost her legal identity when she married, and the husband controlled the property. In *Jones v. Taylor* (7 Tex. 240 [1851]), Hemphill decried the loss as "irrational and barbarous . . . and is the result of rules equally unreasonable and equally tinged with the reading of the dark ages" (256). In *Wood v. Wheeler,* 7 Tex. 13 (1851), he wrote that "husband and wife are not one under our laws . . . [s]o far as the rights of property are concerned; they are distinct persons as to their estates . . . [c]o-equals in life" (19). Hemphill, often styled the father of the Texas community property system, proudly declared in *Edrington v. Mayfield,* 5 Tex. 363 (1849), that the common law in this area had been "totally expunged" from the state's jurisprudence (366). The decisions of the court, chiefly the work of the chief justice, often provided the precedent in other community property states, and debates in states such as New York and Wisconsin that considered (and rejected) the system were studded with references to Texas (Paulsen 1996, 641–688).

Although Hemphill vigorously fought for the property rights of married women, he remained single, although scholars agree that he did have a slave mistress who bore him two daughters whom he sent to Wilberforce University in Ohio. His estate included four slaves (Huebner 1999, 125). Texas law prohibited emancipation of slaves, but the Supreme Court ruled that the master could emancipate them in another state as was done through a will in *Purvis v. Sherrod,* 13 Tex. 140 (1854). Huebner characterized the court's decisions toward slavery and slaves as favoring "the recognition of slave humanity" (115).

In 1859, Hemphill was elected to the U.S. Senate. His reasons for abandoning his judicial career at this tumultuous time to rejoin the political fray are unknown. In the Senate, the new senator actively represented his state's interests and, among other matters, argued for better mail service, increased funding for the militia, and larger settlements for damages due to Indian raids. He soon reverted to the days of his youth and gave impassioned speeches about nullification and the right of secession. He was expelled

Alberto R. Gonzalez (1955-)

Alberto Gonzalez has to date had little judicial experience, but he is widely considered to be a strong contender for a Supreme Court vacancy should one or more occur in the Bush administration. Gonzalez was born the second of eight children in 1955 in San Antonio, Texas, to parents who were Mexican immigrants and whose two-bedroom house in Houston had no hot running water. Gonzales went first to the Air Force Academy and then (after deciding that he was interested in law) to Rice University before graduating from Harvard Law School. He was subsequently hired by the Houston firm of Vinson and Elkins before being tapped in 1995 to serve as Gov. George Bush's legal counsel, then as secretary of state, and then on the Texas Supreme Court, where he was elected but served for not quite two years (1999–2000) before moving with Bush to Washington to serve as chief White House counsel.

As White House counsel, Gonzalez has assembled a conservative team that has been responsible for vetting nominees to lower federal courts. He also informed the American Bar Association that the administration will no longer allow it to clear judicial nominations before they are sent to the Senate for confirmation. Gonzalez has defended Vice President Cheney's claim of executive privilege in withholding some documents from the General Accounting Office as well as supporting Bush's plans to try individuals responsible for the 11 September 2001 terrorist attacks in military courts.

Although he has leaned toward conservative policies as Bush's counsel, Gonzalez was generally regarded as a moderate during his brief service on the Texas Supreme Court, and he is widely respected for his integrity. A partner at his former law firm noted that "he's the kind of person you could play high-stakes poker with on the telephone and let him hold the cards, and you would be perfectly comfortable that the cards are counted straight" (quoted in Yardley 2000, 19).

If chosen to serve on the United States Supreme Court, Gonzalez could be the first Hispanic ever to serve in that position (Benjamin Cardozo was a Jew of Sephardic—Spanish and Portuguese—heritage). This, as well as his young age (and, thus, potentially longer years of judicial service), his past loyalty to Bush, and his lack of an extensive "paper trail" that might be picked apart in Senate hearings, would be likely to make him an attractive nominee. Significantly, after first appointing Dick Cheney to vet potential vice presidential nominees, Bush later chose Cheney for that office. It is possible that he will make the same choice in the case of the person most responsible for vetting nominees to lower federal courts.

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from the U.S. Senate in March 1861, when official news of Texas's secession arrived in Washington, but he had already been elected to the first congress of the Confederate States of America. A signer of the constitution of the new nation, Hemphill rejected an appointment as the district judge for the state of Texas (Curtis 1971, 73–83). He was defeated as a candidate for the Confederate Senate but continued to serve as a delegate until his death in Richmond, Virginia, on 4 January 1862. His body was returned to Austin and interred at the state cemetery (Hart 1949, 413).

Hemphill's imprint on Texas cannot be discounted, but the legacy of his jurisprudence has propagated throughout the nation. He led a court that was forced by circumstances to cut its own path and persuaded his colleagues to seek the governing principles from a variety of sources. Although a confirmed Hispanophile and exponent of the civil law system, he eschewed rigidity and pragmatically embraced legal tenets that worked in the political culture of a new country and a new state.

Susan Coleman

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HIGGINBOTHAM, A. LEON, JR.

(1928–1998)

A. Leon Higginbotham Jr.
Wally McNamee/Corbis

A. Leon Higginbotham Jr. was a federal district court and appellate judge whose personal and professional life was intertwined with the struggle against racism and discrimination. Judge Higginbotham experienced racism, segregation, and Jim Crow laws in his youth, as a student, as a practicing attorney, on the bench as a judge, and in his post- and off-bench activities as both a civil rights activist and noted scholar. He was a federal district court judge in Pennsylvania, a member of the Third Circuit Court of Appeals, and the third African American to serve as a chief judge at the federal appellate level. In two of his books, *Shades of Freedom* (1996) and *In the Matter of Color* (1978), as well as in dozens of articles, Judge Higginbotham explored the role of race in the law back to the early settlement of America, and his Ten Precepts of American Slavery powerfully described the persistence of racism in American history. In 1991, Judge Higginbotham published an open letter to Clarence Thomas, who had been nominated to be on the Supreme Court by President Bush, sharply criticizing his views on civil rights. Higginbotham was the recipient of over sixty honorary degrees, a prolific public speaker, and an avid writer of guest editorials in numerous newspapers. Finally, in 1995 President Clin-

ton awarded him the Presidential Medal of Freedom, the highest civilian award in the United States.

Aloyisus Leon Higginbotham Jr. was born on 25 February 1928 in Trenton, New Jersey, to working-class parents. His mother was a maid for wealthy families; his father was a laborer. He attended a segregated four-room schoolhouse and was the first student in forty years to go on to the segregated junior high school in an academic track. Graduating from high school at age sixteen, in 1944 he entered Purdue University in Indiana as an engineering student, at a time when the school had 6,000 white and twelve black students. He and the other black students lived separately in an unheated attic, often forced to wear coats, shoes, and earmuffs to bed to keep warm. When he went to the university president to complain and to request that he and the other black students be allowed to live with the other students, he was told by the president that "the law doesn't require us to let colored students in the dorm, we will never do it, and you either accept things as they are or leave the university immediately" (Caplan 1996, 71). In his writings, Judge Higginbotham described that incident as the impetus for his becoming a lawyer and subsequently transferring to Antioch College. There he was on a scholarship, befriending Coretta Scott, future civil rights activist and the wife of Martin Luther King Jr. Higginbotham graduated in 1949, and he was accepted by Yale Law School.

During his first year of law school he traveled to Washington, D.C., to hear Thurgood Marshall argue in *Sweatt v. Painter* in favor of black defendants who sought admission to the University of Texas Law School. Later Higginbotham participated in Yale's moot court finals. Presiding over the contest was John W. Davis, the attorney who argued in favor of the separate but equal doctrine in the 1954 *Brown v. Board of Education* case. After the competition Davis congratulated the white contestants, but ignored Higginbotham. Together, these two incidents reinforced Higginbotham's commitment to using the law to eradicate racism.

Upon graduation near the top of his class, Higginbotham traveled to Philadelphia searching for a job. An alumni representative who had received a recommendation from the Yale dean wrote to Higginbotham telling him he would have no problem finding a job. Yet when they met, and the representative realized that Higginbotham was black, the man told Higginbotham that there was nothing he could do for him. Instead, the man gave him the telephone number of two black lawyers he knew. Eventually Higginbotham clerked for Justice Curtis Bok of the Pennsylvania Supreme Court, worked for the Philadelphia district attorney's office, and then formed a small partnership with another black attorney. While practicing law, he also became active in the local chapter of the National Association for the Advancement of Colored People (NAACP).

Joe E. Brown Jr.

Known by many television viewers simply as "Judge Brown," Judge Joe E. Brown Jr., who serves as a trial judge in Shelby County, Tennessee (Memphis), is an African American who grew up in the Watts section of Los Angeles and was known for his street smarts and his novel sentences even before he became a television celebrity in *Judge Joe Brown*. Earning both his undergraduate and law degrees at the University of California, Los Angeles, Brown was elected as a judge in 1990. He is concerned over the high numbers of fellow African Americans that he sees before his court, and he views himself as a type of "village chieftain" (Washington 1994, 48).

Believing that jail often serves as "a viable option" or " a rite of passage," especially for African American youth, Brown has provided for restitution in nonviolent crimes by what he calls "reverse theft," in which he allows a victim to come to the criminal's house and take an item (up to a designated value) of the victim's choosing. Brown also often sentences defendants to community service, requires them to complete their general equivalency diplomas (GEDs), or makes them register to vote. He requires others to read the *Autobiography of Malcolm X*, and he worked to establish a boot camp for convicted criminals on a Memphis college campus.

Almost bragging that "a judge has the power," Brown believes that "a judge should be able to walk the streets of the community he serves, without an armed escort, at all hours of the day and night. If he can't do that, he doesn't have any business sitting as a judge" (Washington 1994, 57–58).

An advocate of strong role male models, Brown is far more outspoken than one might expect for a judge. He refers to the number of incarcerated African American males as "a quiet kind of genocide" (Washington 1994, 47) and has little regard for what he considers to be white-sanctioned racism. It is certainly unusual to read an essay in which a judge ends by noting that a president, Ronald Reagan, is a "fool" who "needs to burn in hell" (64), but Brown did not get where he is by hiding his opinions, and he does not seem likely to start.

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A major break in Higginbotham's life came in 1962 when Pres. John F. Kennedy wished to diversify the federal courts by placing more blacks on them. Hoping to prepare Higginbotham for such an appointment, Atty. Gen. Robert Kennedy helped Higginbotham be appointed to the Federal Regulatory Commission, thereby making him the first African American named to an independent regulatory commission. In 1964, when Higginbotham was thirty-six, President Johnson appointed him to a federal district court judgeship in Philadelphia. In 1977 President Carter elevated him to the Third District Court of Appeals, and in 1989 he became chief judge of the Third Circuit. Higginbotham was only the third African American to become a chief judge. He took senior status in 1991 and

retired in 1993. After he retired from the bench, he taught at Harvard University, where his wife also taught, until his death in 1998.

A survey of the over 650 published opinions of his as a judge (334 of which he personally authored) demonstrate him to be a judicial centrist, yet his life experiences marked him as an ardent civil rights supporter and advocate. Judge Higginbotham is most noted for *Commonwealth v. Local 542, International Union of Operating Engineers*, in which a litigant asked the judge to recuse himself from a case dealing with racial discrimination, claiming that he was biased in the case because he was an outspoken African American on civil rights issues. He responded: "So long as white judges preside over matters where white and black litigants disagree, I will preside over matters where black and white litigants disagree" (Caplan 1996, 72). Other opinions also broke important legal ground. For example, *In re Professional Hockey Antitrust Litigation*, which was eventually upheld by the United States Supreme Court, gave judges new authority to transfer cases in complex antitrust litigation. *Zenith Radio Corporation v. Matsushita Electrical Industrial Corporation* was a multiyear antitrust case that also raised important questions about jurisdiction and venue. *In re Bobroff* clarified bankruptcy law and how tort claims against a debtor's estate should be handled. And in *Everett v. Schramm* and *Hahn v. United States* he opened the jurisdictional door of the federal courts to litigants who sought to sue the government. Even though he eventually ruled against them, Judge Higginbotham was committed to giving all an opportunity to have their day in court.

Yet it is really his civil rights rulings that were considered most important to him. For example, in *United States v. Graham*, he dissented from an opinion that affirmed the conviction of tax protestors who were convicted the night before the Jewish holiday of Yom Kippur despite a request from at least one juror to be dismissed from the jury for religious reasons. Judge Higginbotham argued that these jurors might have felt pressure from the majority to vote to convict as a result of their request. He also dissented in *United States v. Bjerke*, a case prosecuting Lyndon LaRouche supporters for violating a law barring charitable solicitation on post office grounds. He compared these individuals to other unpopular groups in the past, such as the Jehovah's Witnesses, contending that the LaRouche supporters were being prosecuted because of their beliefs.

It was Judge Higginbotham's off-the-bench activities and writings that brought him the most fame. He helped, for example, to create the Yale affirmative action plan that would later assist other African Americans, such as Clarence Thomas, to get into that law school. He served as legal counsel to former South African president Nelson Mandela's Childrens' Fund and sat on the board of directors for the *New York Times* and *National Geographic*. After leaving the bench in 1993, he worked on the losing side in the

Supreme Court case *Shaw v. Reno* and on a series of other cases. All of them dealt with the Voting Rights Act, redistricting, and protecting the rights of minorities to secure fair legislative representation. He served as the special counsel to the Congressional Black Caucus, and he became an ardent critic of the Rehnquist Court and its numerous five-to-four opinions that Judge Higginbotham described as rolling back civil rights for African Americans by emasculating the Voting Rights Act. It was the judge's scholarship and his public criticism of Clarence Thomas that won him most of his fame.

Thurgood Marshall was the first African American appointed to the United States Supreme Court. He had a distinguished record as a lawyer advocating for civil rights that continued throughout his twenty-four years on the Court. Had a Democrat been president at the time, Judge Higginbotham might well have been nominated to fill Marshall's seat when he retired in 1991. Instead, President Bush nominated Clarence Thomas to succeed Marshall. Thomas had headed the Equal Employment Opportunity Commission, and his record there, as well as Thomas's own statements criticizing affirmative action and civil rights law, revealed him to be a critic of many of the types of programs for which Justice Marshall had fought. Openly critical of Thomas while still on the federal bench, Judge Higginbotham published what was described as an "open letter" to Clarence Thomas in the *University of Pennsylvania Law Review* (Higginbotham 1991). He took Thomas to task for his criticism of civil rights law and of Justice Marshall, accusing Thomas of ignoring the legacy of segregation and discrimination against African Americans. He also accused Thomas of ignoring the impact that the civil rights movement had had on Thomas, including the affirmative action plan at Yale and his right to buy a house in a traditionally all-white neighborhood. Overall, Judge Higginbotham was perplexed by Thomas's claim that he was a conservative, effectively describing him as insensitive and a hypocrite when it came to civil rights.

In terms of scholarship, Judge Higginbotham was the author of dozens of articles and books, including *In the Matter of Color: Race and the American Legal Process: The Colonial Period* (1978), his first book, and *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* (1996). *In the Matter of Color* documented the role of race in American law from the seventeenth century to the Revolutionary War. A winner of numerous book awards, it painted a picture of how the laws on slavery evolved and the ways that the legal system came to regard and treat African Americans as second-class citizens. *Shade of Freedom* continued that analysis up to 1992, but more important, his books came to describe what he called the Ten Precepts of American Slavery. These precepts, or assumptions, included the belief that blacks were inferior, that they were property, and that they were to be kept powerless if white mastery over them were to

continue. Although these ten precepts were a visible part of the American legal system prior to the Civil War, Higginbotham contended that the American legal system still embodied them and that the struggle for African American civil rights was a continuous battle to root them out.

A. Leon Higginbotham's legacy was as a tireless and compassionate advocate of civil rights. Be it through his writings that described the law of slavery, Jim Crow, or segregation, his judicial opinions, his public battle against Clarence Thomas, his private life work, or the personal discrimination he experienced as an African American, Judge Higginbotham inspired many of his law clerks and colleagues to become civil rights advocates, and he also represented an inspiration to those looking for examples of individuals who lived what they believed.

David Schultz

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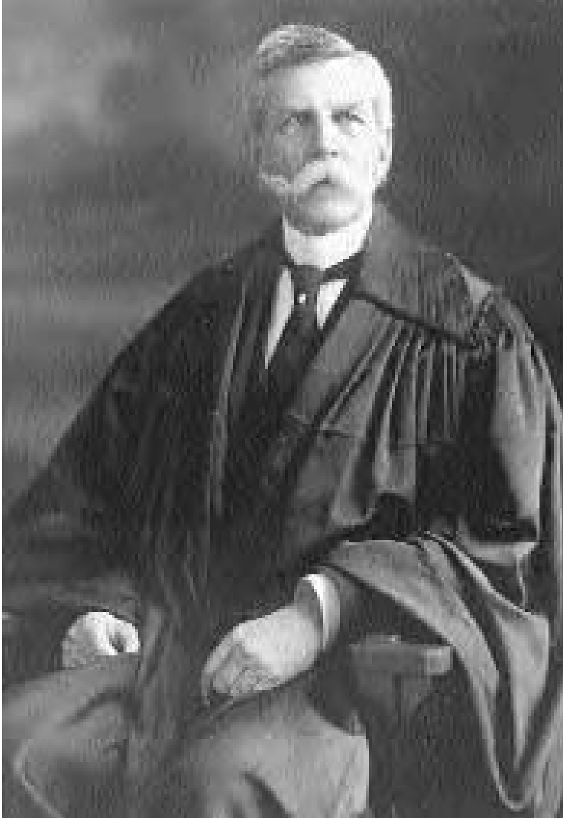
HOLMES, OLIVER WENDELL, JR.

(1841–1935)



Oliver Wendell Holmes Jr.
Photographed by Harris & Ewing, Collection of the Supreme Court of the United States

Oliver Wendell Holmes Jr. is the only United States Supreme Court associate justice whose imprimatur transcends American jurisprudence to that of a popular icon lionized in literature and drama and immortalized on a U.S. postage stamp. Scholars consistently rank him among the top ten United States Supreme Court justices. Holmes authored both the greatest book on American law, *The Common Law* (1881), and the seminal "clear and present danger" standard still cited in First Amendment free speech cases. His written opinions are remarkable for their brevity as well as cogent arguments, making Holmes perhaps the most quoted twentieth-century justice. His influence upon life in the United States was reflected in 1945 when his biography, *Yankee from Olympus* by Catherine Drinker Bowen, became a national bestseller. Holmes is the only Supreme Court justice who has been the subject of a popular Broadway play, Emmet Lavery's "The Mag-

nificent Yankee" (1946), adapted into a well-regarded Hollywood movie in 1950.

Origins

The scion of Massachusetts aristocracy, Oliver Wendell Holmes Jr. was born in Boston on 8 March 1841, the first of three children born into a life of privilege and wealth provided by their socially prominent family. His father, Oliver Wendell Holmes Sr., was a contemporary of Abraham Lincoln. The senior Holmes was both a professor at Harvard Medical School and an accomplished literary figure who helped found the *Atlantic Monthly* and wrote a variety of essays and poems that earned him popular acclaim. After briefly studying law at Harvard, the elder Holmes settled on medicine as his profession. His major contribution to medicine was his work in preventing childbirth fever. Meanwhile, he presided over a Boston salon that attracted a virtual who's who among the liberal intelligentsia of the time: Ralph Waldo Emerson, Henry Wadsworth Longfellow, James Russell Lowell, Harriet Beecher Stowe, and Wendell Phillips—his distant abolitionist cousin—along with Republican senator Charles Sumner and Benjamin Curtis, the Supreme Court justice who dissented in *Dred Scott*. Exposure to this mix of activists helped mold young Holmes's adult perspective.

The views of his doting mother, an antislavery advocate, also influenced the mature jurist. Amelia Lee Jackson, the daughter of Judge Charles Jackson, who served for ten years on the Massachusetts Supreme Judicial Court, married her distant cousin, Oliver Wendell Holmes Sr. She passed along to her favorite child, Oliver Wendell Holmes Jr., a tall, slender build as well as self-confidence and a sense of duty. From his father came his belief in science and his ability to write.

Education

A student in private schools in his younger years, Holmes entered Harvard College in 1857 at sixteen years of age, the same age at which his father had begun study there. By the time he graduated in 1861, the younger Holmes, again emulating his father's college career, had been designated as class poet. But unlike his father, the younger Holmes was an idealistic and romantic youth, learning more outside of the classroom than inside it. Poets John Ruskin, Thomas Carlyle, and family friend Ralph Waldo Emerson inspired Holmes. His favorites also included Alfred Lord Tennyson and Sir Walter Scott, both of whom inspired a youthful Theodore Roosevelt, who as president would nominate Oliver Wendell Holmes Jr. to the Supreme Court of the United States.

Sadie Lipner Shulman
(1891-1998)

Sadie Lipner Shulman, who was born in New York City in 1891, distinguished herself as an attorney and judge. One of two women in her class at Boston University in 1911, Shulman graduated *cum laude* before turning twenty-one and began practice in Boston. In 1926 she served as assistant corporation counsel for the city, the first woman to act in such a capacity.

When Gov. Frank G. Allen appointed her to the Dorchester District Court in 1930, she was the first woman to serve as a judge in the city. She served for forty-two years on the bench and then continued practicing law through her late eighties ("The Honorable Sadie Lipner Shulman"). A delegate to the 1924 Republican convention, Shulman was the first woman elected as president of the Boston University Law School Alumni Association. She helped establish a scholarship program for women at the Boston University Law School in 1953, and she later contributed money for a women's study lounge. She was also active in a number of other university, religious, and civic-related organizations. She was married to Charles Shulman and shared a law office with him while he was alive.

Shulman loved her work on the bench and hated to retire. In an example of quick justice that has been described as her "most controversial case," Shulman once sentenced a juvenile driver of a stolen vehicle who had killed a pedestrian to go to the funeral home to view the victim's body. Noting that "it was a terrible thing to experience," she further observed that "I believe that if there is anything you can show a person in reality that will help them or prevent them from repeating a wrong, then it should be done" ("The Honorable Sadie Lipner Shulman"). Shulman did not want to retire from judging, noting that "I was always happiest when I was on the bench" ("The Honorable Sadie Lipner Shulman"). In remarks at her funeral, a grandson, James David Shulman, noted that in her later years, she would sometimes wander the halls of her nursing home in Johnson City, Tennessee, where she stayed, "sentencing" individuals on the premises ("Remarks," 1998).

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Military Service

The American Civil War affected Holmes more profoundly than his formal schooling; it colored his worldview for the rest of his life. His military experience left permanent physical, philosophical, and psychological marks on him. He enlisted with the Massachusetts militia in spring 1861, prior to college graduation, and left Boston and his family for the first time in his life.

Holmes was shot three times—in the chest, neck, and heel—at Ball's Bluff, at Antietam on Constitution Day 1862, and at Chancellorsville. For the rest of his life, Holmes kept both his bloodstained uniform and the bullets that had wounded him.

In July 1864, near the end of his military service, Holmes was at Fort Stephens in Washington, D.C., when Pres. Abraham Lincoln visited the battlefront. The combat-savvy Captain Holmes, himself six feet, three inches tall, yelled to his lanky commander in chief, "Get down, you damn fool, before you get shot" (Rawley 1996, 18). The largely inexperienced former militia captain—now a Confederate target in a top hat—obeyed.

His military service precipitated a lasting transformation in Holmes. Youthful idealism was supplanted by an enduring belief in national survival, democracy, and pragmatism; the idealist became a skeptic. Like most Union soldiers, Holmes initially had little regard for America's sixteenth president, who, in addition to his other shortcomings, was uncouth by Boston society standards. Holmes, like many others, changed his opinion about Lincoln.

Legal Training, Practice, and Teaching

After his active duty, Holmes attended Harvard Law School from 1864 to 1866. Before graduation, he made the first of many trips to England and met John Stuart Mill, legal scholars Frederick Pollock and Frederic Maitland, as well as Lord Bryce and Joseph Chamberlain. On his return to Boston, Holmes entered a law clerkship. In 1867, he was admitted to the bar, and for the next fourteen years he practiced law in Boston. He first joined the law firm of Chandler, Shattuck and Thayer (1866–1871), where George Otis Shattuck became a father figure for him. When he left that firm in 1871, it was to open his own law office with his younger brother.

A year before he launched his own firm, Holmes had been recruited by Charles William Eliot, the new Harvard University president, to teach constitutional law. By 1872, he was teaching jurisprudence during the deanship of Christopher Columbus Langdell, who revolutionized the teaching of law through the case method. Yet Holmes objected to Langdell's approach to the law and remained at the school for only one year. In 1872, Holmes also entered into a fifty-seven-year, childless marriage to Fanny Dixwell, his childhood friend and daughter of his schoolmaster.

It was during this eventful period in his life that James B. Thayer, the junior partner in the firm where Holmes first practiced, recruited him to assist with the editing of the twelfth edition of *Commentaries on American Law* by James Kent, the U.S. equivalent to English legal giant William Blackstone. After three years of working on the edition, and to Thayer's

chagrin, Holmes not only elevated himself to the main editor but also interjected his viewpoint on the commentary.

In 1873, Holmes entered into partnership with the George Shattuck and William Adams Monroe law firm established in 1870, the same year that Holmes became coeditor of the new *American Law Review* for which he wrote articles.

Transition to the Bench

Holmes's editing of Kent's classic attracted considerable professional notice, but it was his publication in 1881 of *The Common Law* that served as his passport to the bench and assured his place in U.S. law history. The publication grew from a dozen lectures that Holmes delivered the preceding year at the Lowell Institute in Boston. Holmes expounded on his own view of the law. Influenced by his father's scientific methodology and his wartime disillusionment with moral idealism, Holmes essentially applied Charles Darwin's notion of evolution asserted in the 1859 *On Evolution of Species* to the development of law. The famous opening of *The Common Law,* "The life of the law has not been logic, but experience" (Holmes 1881, 1), broke with the natural law tradition. It posited instead positive—or manmade—law as a response to the changing needs of the community. Natural law and Blackstone were suddenly passé. From Holmes's perspective, law was evolutionary and subject to natural selection.

Within a year of publication of *The Common Law,* Harvard president Charles William Eliot and the fellows of Harvard University elected Holmes as professor of law. Soon afterward, Republican governor John Long nominated Holmes to the seven-member Massachusetts Supreme Judicial Court, where his maternal grandfather had served also. Holmes ascended to that bench on 3 January 1883.

The Judge and Justice

Holmes served for twenty years on the Massachusetts court and became its chief justice in 1899. While on the state court, he wrote nearly 1,300 opinions in which he applied his jurisprudence to Massachusetts law. His opinions showed deference to the elected branches of government, reflecting his overall judicial restraint. Holmes's standard in judging constitutional cases would become, as he once wrote, "Does it make you vomit?" Both on the state court and the Supreme Court of the United States, Holmes would give the elected branches of government the benefit of any doubt, unless they blatantly violated constitutional provisions. His jurisprudence rested

on evolution and the needs of society rather than on social class and individual rights. His much-later reputation as the "Great Dissenter" first emerged on the Massachusetts court. For example, in the six-to-one opinion in *Vegelahn v. Guntner* (1896), he dissented. Holmes refused to allow the upholsterers' union, represented by George M. Guntner, to engage in violent behavior and obstruction to the entrance of the factory of the Frederick O. Vegelahn furniture company. But despite his social elitism and aloofness from common folk, Holmes would not forbid peaceful picketing or boycotting, in contrast to the Court majority. The workers were demanding a raise and only a nine-hour workday.

One of Holmes's many addresses, "The Soldier's Faith," a tribute to the heroism of soldiers based on his Civil War experience, caught the attention—perhaps shame—of Theodore Roosevelt. Roosevelt's fixation on military service could be traced to his father's avoidance of military service in the Civil War by hiring a substitute to fight in his place. After the death of United States Supreme Court Justice Horace Gray (1881–1902), also a former chief justice of the Massachusetts Supreme Judicial Court, Roosevelt nominated Holmes to fill the "Massachusetts seat." His nomination was strongly supported by Henry Cabot Lodge, nine years Holmes's senior but a former student in Holmes's constitutional law course at Harvard and a longtime friend of Roosevelt. Upon unanimous Senate confirmation without debate, Holmes became the first justice appointed to the United States Supreme Court in the twentieth century.

Holmes's tenure extended through four chief justices of the Supreme Court of the United States, and he set the historical record for writing the most opinions: 873. Although he wrote fewer dissents than many, these became part of his most important legal legacy as they formed the basis for new precedents. His dissents and opinions are characteristically brief—he wrote them while standing and would stop when he became tired—and known for their beauty of language as well as brevity.

Perhaps his most famous dissent was in *Lochner v. New York* (198 U.S. 45, 1905), in which he accused the majority of reading economic social Darwinism into the Constitution, despite his personal contempt for socialism: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*" (54). Further irony stems from the fact that although he had little regard for individual rights, Holmes's most important opinions concerned First Amendment guarantees of free speech during wartime. In *Schenck v. United States* (1919), he wrote the unanimous opinion stating that freedom of speech is not absolute. He coined his "clear and present danger" standard. When the majority misapplied his standard, however, he dissented in *Abrams v. United States* (1919), in which he favored "the market-place of ideas" over repression. In *Gitlow v. New York* (269 U.S. 652, 1925), Holmes

dissented with the declaration, "Every idea is an incitement" (673). He supported individual rights as a social good.

The Judicial Legacy

Although he served with distinction on the bench for half a century, Holmes is best remembered for an earlier contribution: writing what is considered the best book on U.S. law. In *The Common Law,* he moved law from a natural law perspective to a positive law basis, laying the intellectual framework for the most important development of twentieth-century U.S. jurisprudence, the legal realism movement that underpinned Franklin D. Roosevelt's New Deal. Holmes's fundamental belief in a nation's survival, democracy, and pragmatism allowed him to move beyond both precedent and a rigid social Darwinism to formulate the first basis for allowing freedom of speech. He empowered individual ideas in a mass democracy by advancing a philosophy of judicial restraint toward the elected branches of government.

The oldest person ever to sit on the nation's highest court, Holmes retired at ninety years of age—at the suggestion of Chief Justice Charles Evans Hughes and his brethren—ultimately subject to the same inevitable law of evolution that he first had advocated while a young attorney. Holmes lived three years after retirement, dying on 6 March 1935, two days before his ninety-fourth birthday, at his home in Washington, D.C. He was buried next to Fanny, who died in 1929, in Arlington National Cemetery, the final resting place of many other Civil War veterans. Although he seldom made charitable contributions during his lifetime, Holmes left the bulk of his material wealth to the U.S. government that he had served so faithfully during his career on the high court.

William D. Pederson

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HORTON, JAMES E., JR.

(1878–1973)

James E. Horton Jr.
Bettmann/Corbis

After days of listening to the evidence against the fated young men known as the Scottsboro Boys, the jury reached a verdict for the first of the boys to be tried: guilty. The verdict was neither unexpected nor much disputed. One man, however, had doubts—doubts that would lead him to make one of the most courageous judicial decisions of the twentieth century. With this act, which occurred during his last year of service on the bench, Judge Horton sacrificed his future judicial career and distinguished himself as one of America's "'finest jurists'" (Linder 2000, 571).

James Edwin Horton Jr. was born and raised in Limestone County, Alabama, by his father, James Edwin Horton, and his mother, Emily. His parents met during the Civil War while Horton served under Gen. Daniel S. Donelson, Emily's father. The lineage of James Horton Jr. also included John Branch, secretary of the navy to Andrew Jackson and governor of North Carolina; Rachel Jackson, wife of Pres. Andrew Jackson (a great-aunt); and Rodah Horton (state legislator of Alabama for Madison County). James Horton Sr. followed in the family's tradition of public service by becoming the commissioner of Limestone County and then the probate judge for Athens, Alabama, until 1904, when he retired.

James Junior, known to family and friends as "Jim Ed" (Goodrich 1974, 27), spent his childhood amid the atmosphere of politics and the farm his father ran as a planter. Although the Horton family had once owned slaves (Goodman 1994, 196), Horton's later judgments would reveal that he considered all men equal under the law. After attending high school in Alabama, Horton moved to Tennessee to attend Vanderbilt as a medical student. He transferred the next year to Cumberland University in Lebanon, Tennessee, where he earned a bachelor of arts degree and then a bachelor of laws, which he received in 1897. James Horton's university education in the law was unusual for the time, as in the late 1800s, most men only read the law and apprenticed with a local lawyer in order to became lawyers themselves (Carter 1979, 193). When Horton finished his education, he returned to Athens, Alabama, and clerked for his father in probate court.

Soon afterward, Horton began his own practice in the city, which he expected to continue without much interruption (Carter 1979, 193). His private career changed to one of public concern when he ran for the state legislature in 1906. Horton lost the race to the older Benjamin Blount Peete but ran again in the next election. In 1910, Horton won a seat in the legislature, which he held until 1915 when he was appointed as the chancellor of the North Chancery Division of Alabama for two years (the remaining time of an unfinished term). While he served in the state legislature, Horton was part of the "judiciary, temperance, and commerce and common carriers committees" (Goodrich 1974, 29). He believed that Prohibition was wrong and that each community should choose for itself, but by following the will of the people he represented, he presented a bill that provided for the shutdown of a local dispensary of alcohol. He supported election reforms of districting counties and also pushed for the improvement of state roads.

When the Chancery appointment (consisting of a judgeship over equity courts) ended prematurely with the reconfiguring of the courts into circuit courts, Judge Horton continued his private law practice in Athens, as well as his farming. During that time, Horton courted his former sweetheart, Anna Hobbs Frierson, a recent war widow. The two were married in 1922; Horton was forty-four years old and Anna thirty-five. The next year, their first son was born, James Edwin Horton III, and their son Donelson Branch was born two years later (Goodman 1994, 33–35).

The same year that Horton married Anna, the Athens Bar Association convinced him to run for the new office of judge for the Eighth Circuit Court in Alabama (Goodman 1994). Horton was elected for the term of six years and then reelected in 1929. As a judge, Horton was known for his relaxed attitude in the courtroom (Carter 1979, 193) but also for his work ethic—he held court from 8:30 A.M. until 5:30 P.M. or later. His reputation as a fair judge spread, and local lawyers often sought his court for their trials

(Goodman 1994, 38). It was during Judge Horton's eighth year on the bench that the Scottsboro tragedy began.

On 25 March 1931, nine black boys were forced from a train in Scottsboro, Alabama. Initially, the nine youths were charged with assault of white boys, who claimed they had been pushed off the train. The nine blacks—Charlie Weems, Haywood Patterson, Olen Montgomery, Willie Roberson, Clarence Norris, Ozie Powell, Andrew Wright, Leroy Wright, and Eugene Williams—ranging in age from thirteen to twenty, were taken to the local jail and charged with assault and rape. The rape charges came after the arrests at the train. Two young white girls who had been found on the train during the round-up, Victoria Price and her friend Ruby Bates, claimed that the two of them had been raped on the train by all nine boys that had been arrested, even though only four of the boys knew each other, and many of the boys had been located in different freight cars and gondolas.

Because the charges were made by white girls against black boys, the community flew into outrage, condemning all nine boys and preparing a lynch mob. The lynching was stopped on the night of the arrest, but tempers continued to flare, and the boys were passed quickly to the courts just twelve days after their arrests. Many of the boys were tried together in trials lasting less than a day each. The cases continued in succession under Judge Alfred E. Hawkins, at times beginning even before the previous juries had left the courtroom to make their decisions. In only four days, all nine boys were found guilty, and eight were given the death penalty.

The cases made their way to the United States Supreme Court in 1933. In *Powell v. Alabama,* the Court decided that the boys had not been provided with "due process" under the Fourteenth Amendment because of inadequate counsel. The case was remanded to the lower courts, and the verdicts were reversed. When the state reviewed the cases again, the venue was changed from Scottsboro to Decatur, Alabama, where Judge Horton had jurisdiction.

On 27 March 1933, Judge Horton convened court in the second trial of Haywood Patterson. Attorney General Thomas M. Knight, a man with great political ambition, conducted the case for the prosecution, and Samuel Liebowitz, a Jewish lawyer from New York, represented Patterson for the defense. For four days, the defense argued for two motions of dismissal based upon jury discrimination against blacks; however, Judge Horton denied both motions, and jury selection began. In his first charge to potential and future jurors, Horton voiced his view on equality in the courtroom. He told the jurors that "when it comes to the courts we know neither native nor alien, we know neither Jew nor Gentile, we know neither black nor white. . . . It is our duty to mete out even handed justice'" (Carter 1979, 202).

Jack Montgomery (1930–1994)

As in the case of lawyers, the public perceptions of judges may often differ significantly from the perceptions of those who have to work with them closely. Appointed as a Criminal Court judge for the Jefferson County Court in Birmingham, Alabama, in 1975, Jack Montgomery was never opposed in any of his four reelection attempts (prior to his 1986 election, Montgomery's car sported a bumper sticker that said "File against me and die" [Joynt 1997, 98]). Yet many colleagues realized that the violent, hard-drinking, gun-toting, insulin-dependent man who was married five times and was known for dispensing his own version of "Jack's law" knew—long before he resigned in 1992 after being indicted for racketeering, extortion, and bribery—that he should not be serving.

Born in 1930 in Tickfaw, Louisiana, Montgomery had an early history that is difficult to trace because he so embellished it with tall tales, many now known to be false. There is speculation that the stories he made up about being tortured as a prisoner of war during the Korean War were ways of coping with an abusive childhood at the hands of his father, but it is probably impossible to know for sure. It is known that Montgomery attended Howard College in Birmingham (now Samford University) on the GI Bill and later returned to the Cumberland Law School on the campus.

As a lawyer, Montgomery was a flashy dresser who often wore a jacket with question marks on the inside lining, which he would flash at the jury during prosecution arguments. Using his brief experience as a substitute judge and his political connections to gain appointment as a judge, Montgomery quickly set himself apart by refusing to wear a black robe. He explained that "anyone who needs to wear a black dress to prove that he's a judge isn't really fit to be a judge" (Joynt 1997, 47). Regularly appearing on local television not long after his appointment, Montgomery was called the "Slamming Judge" (57), and he spun yarns on television akin to those told by and about Judge Roy Bean in an earlier generation. Asked on one program what he thought of defense attorneys, Montgomery responded that "they're all right if you cook them properly" (59).

Often racist, profane, abusive, and harassing in the courtroom, where his personality seemed to swing with his blood-

(continues)

Throughout the trial of Haywood Patterson, Judge Horton continued to display his belief in equality. He was often seen shaking hands with black reporters, and he either struck racial words from the record or told the jury to disregard them. To Horton, the evidence of the case was paramount over the color of the defendant and the religious race of the defense attorney. He listened with the jury to the contradictory testimony of Victoria Price, the prosecution's star witness, to the stories of observers on the train and from the posse, and to the medical evidence presented by Dr. Bridges for the prosecution.

(continued)

sugar levels, Montgomery was able to get by with a lot because much of what he did was not the subject of written records that could be reviewed. Montgomery enjoyed putting fear into defendants by flipping a coin and telling them that the outcome would determine whether they got prison or probation. Once challenged by Birmingham mayor Richard Armstrong for setting bail too low, Montgomery turned the tables by setting bail in a case before him at $9 trillion, apparently a record (Joynt 1997, 129).

As Montgomery's behavior in both his personal life and in the courtroom became more and more erratic, evidence surfaced that he was selling justice, but after being caught red-handed taking bribes and having resigned from the bench, he continually delayed his trial for racketeering and extortion of ten defendants by claiming to be physically and psychologically unable to stand for trial. After having been arraigned before United States district judge Sharon Lovelace Blackburn, the only woman judge in the state at the time, Montgomery broke a hip while running naked down his driveway and shortly thereafter cut himself with a chainsaw.

Two days before his sentencing, Montgomery was found in his basement, dead of a gunshot wound. Despite the appearance of a suicide, no gun was ever found, adding to his legend. His autopsy did not substantiate his claims of prior memory loss, but because he had not yet been sentenced when he died, he could no longer be declared guilty. Judge Blackburn declared his legal innocence but attempted to make his fate a warning to other judges tempted to cut corners:

> Jack Montgomery's reputation shall enjoy no such privilege, however, in spite of what happens to his criminal record. His disgrace and ignominious death may be the only aspects of his existence that survive in the public memory. His name will continue to carry a stain of corruption.
>
> After hearing the evidence in the trial of Jack Montgomery's codefendant, Greg Jones, this Court is convinced that Montgomery put justice on the auction block and thereby made a mockery of the high office with which the public had entrusted him. He defiled that office, and betrayed the people's trust, for the love of money. Public infamy seems an inadequate consequence for his wrongdoing. (Quoted in Joynt 1997, 212)

Reference:

Joynt, Steve. 1997. *Jack's Law: The Rise and Fall of Renegade Judge Jack Montgomery*. Birmingham, Ala.: Crane Hill Publishers.

Determined not to allow the courtroom in Limestone County to attain the atmosphere of a mob as it had in Judge Hawkins's courtroom, Judge Horton stopped the proceedings one day to announce that he would quash any uprising that came into court or attempted to reach the participants in the courtroom outside of the court. Angrily, he gave orders for the guards to be prepared to kill anyone who made an attempt on the life of a participant. Judge Horton expressed his distaste for the possible lynchers by calling them "'cowardly murderers'" and condemning any man who "'would charge the guilt or innocence of any being without knowing of their guilt or inno-

cence'" (Goodman 1994, 175). Judge Horton declared his intent to protect the defendants and also to review their cases without assigning guilt or innocence to them. He would listen to the evidence and make a decision based solely on the testimony given in court.

Two parts of Patterson's trial seem to have affected Judge Horton more than any other testimonial evidence. Both parts dealt with medical testimony and the doctors who had been called to testify for the prosecution. The first doctor called to the stand was R. R. Bridges. Dr. Bridges testified that although Victoria Price claimed to have bruises and cuts over most of her body, only a scrape or two could be located upon physical examination. Also, although she claimed to have been raped by nine men, including Willie Roberson who was incapable of sexual intercourse due to syphilis and gonorrhea, only a small sample of semen could be obtained from her vagina. The semen sample that was found was not only minuscule, it was also nonmotile. Dr. Bridges confirmed upon cross-examination that most sperm lived from twelve hours to two days inside the female body.

The second doctor called to the stand was excused upon the wish of the prosecutor. Dr. Marvin Lynch, however, took Judge Horton aside and confided to him that he did not believe the women were raped that day in March. His examination of the women confirmed Dr. Bridges' testimony, and Lynch emphasized that neither girl was physically distressed as she should have been after such a traumatic affair. Judge Horton was astonished, and he begged the doctor to testify, but Dr. Lynch declined because he wished to keep his newly formed medical practice in Scottsboro in business. When Judge Horton returned to the bench, he allowed the trial to continue, but he tucked the information Dr. Lynch had shared with him into the back of his mind to be used upon his personal examination of the case.

Judge Horton exhibited his keen interest in the case and in his fair weighing of the evidence as each witness took the stand. Often he would lean over the bench in order to observe a witness clearly. When a black man or white man or woman took the stand, he weighed each of their words with the same sense of fairness and justice. A white person's words were not more convincing to Horton than a black man's testimony. Each were equal and merited consideration. At one point, Judge Horton was so concerned with watching the witness that he removed himself from the bench completely and sat with the audience so that he would have full view of Ruby Bates as she changed her previous testimony to say that she had never been raped.

At the close of the arguments for both sides, Judge Horton instructed the jurors on their duty. He told the jurors that they must "take the evidence, sift it out and find the truths and untruths and render [a] verdict" (Linder 2000, 569). He reminded the men that they were only to try Haywood Pat-

terson for rape, not for his color or for his attorney. In considering the question of rape, Judge Horton expressed his concern to the jury that they should not rely heavily on the testimony of Victoria Price or Ruby Bates, as both girls were "'women of the underworld'" and of "'easy virtue'" (Goodman 1994, 134). The prosecution must have met its burden of proof against the defendant, and for Horton, "if . . . the conviction of this defendant depends on the testimony of Victoria Price, and [the jury is] convinced that she has not sworn truly, . . .[the jury] could not convict the defendant" (Goodrich 1974, 80). In his conclusion of the jury instructions, Judge Horton charged the jury to find and reveal the truth in the case, stressing that the jurors should follow God's law as well as man's law in making their important decision.

When the jury announced its decision of guilt and death by execution in Haywood Patterson's second trial, Judge Horton did his duty under the law by setting a date for the execution of the young man. He sentenced Patterson to death on the sixteenth day of June of that year. After Horton announced the sentence for the accused, however, he suspended the sentence and postponed the eight remaining trials. Judge Horton gave as grounds for his decision the need personally to "[determine] that a fair and impartial trial was possible" (Goodman 1994, 153).

Horton knew that a jury acquittal would have been more likely to convince observers of the Scottsboro Boys' innocence than his own reversal of the verdict, but he was determined that he could still do justice for the Scottsboro Boys even if no one else would before or after him (Carter 1979, 264). He continuously contacted state officials, including state prosecutor Knight. Horton's discussion with Knight, in particular, provided insight into Horton's intentions. He asked Knight not to proceed with the remaining eight cases, and Horton wanted the state to pardon Haywood Patterson. The prosecutor's office soon responded with a negative answer to the judge's request, and with cautionary words: If Horton annulled the verdict, he could hardly expect to gain reelection; the prosecutor knew the community would support him in the forthcoming election for state lieutenant governor if he continued with the trials (and he did win the election). Judge Horton responded with the conviction he had had from the very beginning of the Scottsboro trials: "'What does that have to do with the case?'" (Carter 1979, 264).

So on 22 June 1933, Judge Horton reconvened the court. Having much to say, but nothing to hear on the defense's motion for a new trial, he immediately began reading from his seventeen-page bench decision. He stated that he would not entertain any of the constitutionality questions posed by the defense. The only legal question that had merit to him was that of whether or not the jury verdict was consistent with the evidence presented during

the trial. With that condition on his argument, Horton reviewed for his captive audience the facts that were presented in the case, point by point, concentrating heavily on two witnesses: Victoria Price and Dr. Bridges.

Horton's study of medicine thirty years before had sharpened his mind for medical testimony in trials, and it was precisely the medical testimony in Patterson's trial that he relied upon to decide whether or not the verdict was fair. Judge Horton outlined for the court every piece of medical testimony that contradicted Victoria Price's testimony. He included the impossibility that Olen Montgomery, who was nearly blind, and Willie Roberson, who had syphilis, could have raped the two women. He reminded the court that Price's physical condition did not match her description of being beaten and raped. Price had only a few scrapes on her body; there were no stains on her person or clothing; only a trace amount of semen could be found; and the semen was nonmotile only an hour after she claimed to have been raped by nine boys. He concluded his discussion of Price by saying that "the proof [tended] strongly to show that she knowingly testified falsely in many material aspects of the case" (Goodman 1994, 177).

Judge Horton leaned upon his belief in Christianity as a guiding path to truth and justice, and he told of his belief that injustice could be carried into future generations. He, therefore, would attempt to stop the injustice he saw in the form of the unbelievable accusations against the Scottsboro Boys:

> History, sacred and profane, and the common experience of mankind teach us that women of the character shown in this case are prone for selfish reasons to make false accusations both of rape and of insult upon the slightest provocation or even without provocation . . . for ulterior purposes. . . .
>
> The testimony of the prosecutrix in this case is not only uncorroborated, but it also bears on its face indications of improbability and is contradicted by other evidence, and in addition thereto, the evidence greatly preponderates in favor of the defendant. It therefore becomes the duty of the Court under the law to grant the motion made in this case." (Goodrich 1974, 101)

Judge Horton exercised his right to overturn the jury verdict based upon the evidence in the trial, and he ordered a new trial for Haywood Patterson, hoping that he would not be prosecuted again (Carter 1979, 269). That day, however, Attorney General Knight reported his intention of continuing with prosecution.

In October, Knight achieved his goal of removing the sympathetic Judge Horton from the bench over the Scottsboro Boys. Chief Justice Anderson of the Alabama Supreme Court asked Horton to recuse himself from the cases, and Horton did as he was asked. His role in the famous cases ended

essentially in June, but his actions during the period of time that the cases were under his jurisdiction had further-reaching impacts than the tiny courtroom in Decatur, Alabama. His decision set the stage of the United States for the upcoming fight against racial prejudice and against the unjust courtroom procedures that were being practiced across the country. His decision also introduced the idea that a white woman was not always morally superior or legally more protected or believed than a black man (Goodman 1994, 183). Because of his stance in protecting African Americans, Judge Horton, whose own tall lanky physique resembled that of the former president, became known to some as the "second Lincoln" (Goodman 1994, 206).

In December 1933, the Athens bar signed a petition to encourage James Horton to run for reelection as judge of the Eighth Circuit Court. Horton accepted their petition and ran the following May. When he lost in the primaries, losing most votes in Morgan County where the trial was held, he retired to his farm and his private law practice. For years, he held the position of attorney for the Tennessee Valley Authority until he retired full-time to his farming and cattle raising.

At the age of eighty-two, Horton continued to believe that he had done justice by the Scottsboro Boys. He had done what he thought God and the law had dictated that he do. To him, there was but one choice—to dismiss the jury's guilty verdict that had been based on prejudice and fear rather than upon the evidence in the case. He had done his duty and was only responsible to himself and to his Creator. He could go to his grave thirteen years later knowing that he had practiced the law of his family, of his God, and of his country—"let justice be done though the heavens may fall" (Carter 1979, 273).

Virginia L. Vile

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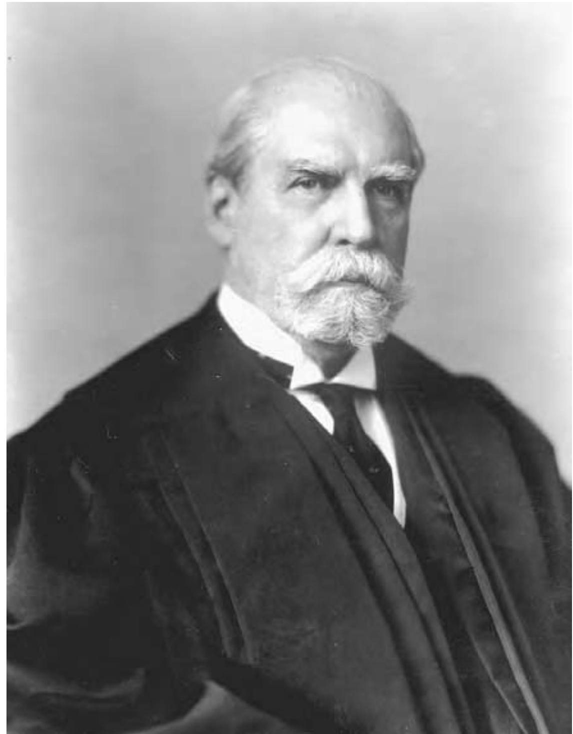
HUGHES, CHARLES EVANS

(1862–1948)

Described by Justice Robert Jackson as a man who "looks like God and talks like God," Charles Evans Hughes ranks as one of the nation's greatest judges. He served two stints on the United States Supreme Court, as an associate justice from 1910 to 1916 and as chief justice from 1930 to 1941. Renowned for his intelligence, integrity, and hard work, Hughes led the Court as it struggled with cases stemming from Pres. Franklin Roosevelt's New Deal.



Charles Evans Hughes
Photographed by Harris & Ewing, Collection of the Supreme Court of the United States

Hughes, the only child of David Charles Hughes and his wife Mary Catherine Connelly, was born on 11 April 1862 in Glens Falls, New York. Hughes's father was a Baptist preacher (he converted to the faith from Methodism to placate Mary's Baptist parents) who had emigrated to the United States from Wales in 1855. The family moved several times, ultimately settling in New York City just before Charles's twelfth birthday. The boy proved highly intelligent and quickly found public school stifling. At age six he proposed to his parents that they tutor him at home according to what he called the "Charles E. Hughes' Plan of Study." They agreed to Charles's request and directed his rigorous studies for the next five years. He returned to the public schools at age eleven, graduating from high school two years later.

In 1876, Hughes enrolled in Madison College (now Colgate University) to study for the ministry. After two years, Hughes transferred to Brown University, a larger institution in a more cosmopolitan setting. At Brown, Hughes pursued his "love of a good time" by going to the theater, playing cards, attending baseball games, and joining a fraternity (Hughes 1973, 39–40). More important, he also developed a keen interest in the law and decided to pursue a legal career rather than one in the ministry. He continued to excel academically, was admitted to Phi Beta Kappa, and, in 1881, graduated third in his class at the age of nineteen.

To earn money for law school, Hughes then spent a year teaching at a private school in Delhi, New York; he read law in his spare time. He entered Columbia Law School in the fall of 1882, graduating with highest honors in 1884, at age twenty-two. That summer Hughes passed the New York bar examination with a nearly perfect score. He joined the prestigious New York City law firm of Chamberlin, Carter, and Hornblower, where he had worked while studying at Columbia.

Hughes's talent and hard work enabled him to advance quickly. He became a partner when the firm reorganized as Carter, Hughes, and Cravath in 1887. The following year Hughes married Antionette Carter, the daughter of one of his partners, in a ceremony conducted by Hughes's father. Their happy marriage endured until Antionette's death in 1945. The Hugheses had three daughters and one son, Charles Evans Hughes Jr., who served as U.S. solicitor general in 1929–1930.

Exhausted from overwork and suffering poor health, Hughes left his private practice in 1891 and took a position teaching law at Cornell University. Hughes enjoyed teaching, and his health recovered, but the low pay—along with encouragement from his father-in-law—prompted Hughes to leave Cornell and rejoin his old firm in 1893. Practicing corporate law, Hughes prospered financially and built a good reputation in the New York bar.

Hughes first entered public life in 1905, when he became special counsel to a committee of the New York state legislature investigating price gouging by gas and electric utilities. Shortly thereafter, he was asked to help investigate the life insurance industry. His work—which helped lead to a variety of reforms and price reductions in those industries—attracted national attention from the press and public, and he won praise for his diligence, independence, and integrity. In 1906, although he did not actively seek it for himself, Hughes received the Republican nomination for governor of New York (Pres. Theodore Roosevelt orchestrated the nomination). He went on to defeat the Democratic nominee, newspaper magnate William Randolph Hearst, in the general election.

As governor, Hughes proved to be more concerned about governing with

efficiency, logic, and fairness than with political posturing or partisan maneuvering. He convinced the legislature to enact measures improving workers' safety, backed the establishment of public service commissions to regulate industry, and advocated outlawing racetrack gambling. In 1908, William Howard Taft asked Hughes to be his vice presidential running mate. Hughes declined the offer and instead ran for, and won, reelection to a second two-year term as governor.

In April 1910, President Taft made another offer: He asked Hughes to join the United States Supreme Court to fill the associate justice slot opened by the death of David Brewer. This time Hughes accepted, and the Senate confirmed his nomination on 2 May. Two months later, when Chief Justice Melville Fuller died, many expected that Taft would elevate Hughes to be chief justice. Indeed, Taft had once told Hughes that he would like to see him in that position. After long deliberation, however, Taft passed over Hughes and nominated Associate Justice Edward D. White to become chief justice.

Hughes served as an associate justice from 1910 to 1916. During that time, he wrote 151 opinions, of which thirty-two were dissents. In only nine of the cases for which Hughes wrote the majority opinion did any other justice write a dissent (Anderson 1995, 308). Hughes served on the bench with—and developed a friendship with—the legendary Oliver Wendell Holmes, although the two frequently disagreed on cases.

As a Republican who supported moderate social reform, Hughes typically backed the right of the national and state governments to regulate commerce and to protect workers. He also usually gave a broad interpretation to the First Amendment and the equal protection clause of the Constitution (Glad 1999, 417). In *Bailey v. Alabama* (1911), Hughes wrote the majority opinion that extended federal protection to workers—frequently African Americans or immigrants—who were victimized by labor contracts. In the *Minnesota Rate Cases* (1913), he supported an expansion of the power of states to regulate intrastate commerce. In the *Shreveport Rate Case* (1914), Hughes argued that the national government could regulate intrastate commerce when that commerce was intertwined with interstate commerce.

Hughes dissented in two noteworthy 1915 cases. In *Coppage v. Kansas*, he objected to the court's decision to forbid the Kansas legislature from outlawing employment contracts, favored by many employers, that prohibited workers from joining unions. Another dissent involved one of the most sensational criminal cases of the period. Hughes joined Holmes in dissenting to the Court's decision, in *Frank v. Mangum*, to uphold the murder conviction of Atlanta factory owner Leo Frank. The two decried what they saw as a trial marred by mob intimidation (Frank was Jewish, and anti-Semitic feeling surrounded the court proceedings).

Hughes was a natural choice for the 1916 Republican nomination for president. Not only did he have an enviable record of public service and a glowing national reputation, as a sitting justice he had been able to avoid taking sides when his Republican party split in 1912 over whether incumbent William Howard Taft or former president Theodore Roosevelt should be the party's presidential nominee. As had been the case with his gubernatorial races, Hughes received his party's nomination somewhat reluctantly and with virtually no effort on his own behalf. In the telegraph message of acceptance he sent to the party convention, he noted that he had not sought the nomination. "I have wished to remain on the bench," he wrote. "But in this critical period in our national history, I recognize that it is your right to summon and that it is my paramount duty to respond" (Pusey 1963, 332). That same day, 10 June 1916, Hughes resigned from the Supreme Court (he is the only justice to have been nominated for president while on the bench).

Hughes narrowly lost the election to Democratic incumbent Woodrow Wilson. Hughes won 254 electoral votes to Wilson's 277, and he received 8,538,221 popular votes to Wilson's 9,129,606 (Glad 1999, 417). Had Hughes carried either Ohio or California—states in which the Republican party was bitterly divided—he would have won the presidency. Disappointed, Hughes returned to private legal practice in New York City, becoming the senior member of the firm of Hughes, Rounds, Schurman, and Dwight. There he represented some of the nation's most prominent corporations and argued several cases before the Supreme Court.

Pres. Warren G. Harding appointed Hughes secretary of state in March 1921, a position Hughes kept after Calvin Coolidge succeeded to the presidency in 1923. Hughes proved to be a powerful member of the cabinet and a highly effective diplomat. He helped orchestrate the 1922 agreement among the world's leading naval powers to freeze the naval arms race, promoted the World Court, and arranged a treaty among four nations to promote security in the Pacific and another among nine nations to recognize the territorial integrity of China and the Open Door policy. Hughes also focused considerable attention on Latin America and helped resolve disputes among the region's nations.

Exhausted from hard work, and hoping to rebuild his personal fortune, Hughes resigned from the State Department in 1925 and resumed his private legal practice. He still supported what he termed the "institutions of peace," however, and served part-time in several high positions, including as head of the U.S. delegation to the Sixth Pan-American conference in 1928 and as a judge on the Permanent Court of International Justice.

On 3 February 1930, Pres. Herbert Hoover nominated Hughes to be chief justice of the United States Supreme Court. Unlike his confirmation as an

associate justice twenty years earlier, and much to his distress, Hughes encountered significant opposition to his nomination. His detractors, including many progressives, disliked Hughes's long background in corporate law and charged that he represented "the influence of powerful combinations in the political and financial world" (Anderson 1995, 310). Nevertheless, by a vote of fifty-two to twenty-six, the Senate confirmed Hughes on 13 February. Eleven days later, he assumed his position. At sixty-seven, he was the oldest man ever confirmed as chief justice.

Hughes led the Court through a tumultuous period in its, and the nation's, history. The Court heard numerous important cases during his tenure, many stemming from the efforts of Pres. Franklin D. Roosevelt to use government intervention to curb the Great Depression. Hughes continued his lifelong habit of hard work, and he shouldered much of the Court's workload. During his eleven years as chief justice, he wrote 283 decisions and twenty-three dissents. Hughes brought another great quality—diplomacy—to his new role. He normally took the middle ground between the Court's liberal and conservative wings and managed to limit the ill feelings between them.

In cases involving civil liberties and the Bill of Rights, Hughes typically defended the rights of individuals. He supported the "selective incorporation" theory, in which the Court made certain provisions of the national Constitution's Bill of Rights apply to state governments. Hughes voted in favor of free speech rights in cases such as *Stromberg v. California* (1931) and *Herndon v. Lowry* (1937). In the notorious Scottsboro Boys cases, he backed the rights of the accused: for the right of counsel in *Powell v. Alabama* (1932) and the right to a fair trial in *Norris v. Alabama* (1935). Hughes also expressed his disgust with the racist practices common in the legal system in other cases, including *Brown v. Mississippi* (1936).

On the economic issues, Hughes often voted with the Court's conservatives to strike down pieces of Roosevelt's New Deal legislation. He wrote the opinion in *Schechter Poultry Co. v. United States* (1935), which overturned the National Industrial Recovery Act. In 1936, Hughes voted to invalidate the Agriculture Adjustment Act in *United States v. Butler.*

Frustrated by the Court's actions, Roosevelt proposed in February 1937 that he be allowed to appoint one additional justice to the Court for each sitting justice over the age of seventy (six of the sitting justices exceeded that age). Although he claimed that he simply wanted to ease the justices' workload, the president's true goal was transparent: He wanted to "pack" the Court with justices who would support the New Deal. Chief Justice Hughes took the unusual step of writing a letter to the Senate Judiciary Committee. The letter—in which Hughes rejected Roosevelt's argument

that the justices could not handle their workload—helped turn the tide against Roosevelt's proposal, which was not enacted.

Even more important in the defeat of the court-packing plan, however, was the shift in the Court's attitude toward government intervention in the economy. Hughes led the Court toward greater acceptance of the New Deal—and avoidance of a constitutional clash between the president and the Court. Hughes and Justice Owen Roberts began siding with the liberals on the Court to support the New Deal legislation. This change is often called "the switch in time that saved nine."

The change was signaled by the Court's opinion, written by Hughes, in *West Coast Hotel Co. v. Parrish* (1937), which upheld a Washington State minimum wage law for women, and in *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937), which upheld the National Labor Relations Act. In the next three years, Hughes voted with the majority of his colleagues to uphold such New Deal measures as the Social Security Act, the Public Utilities Act, a revised Agriculture Adjustment Act, and the Fair Labor Standards Act. These decisions made Roosevelt's plan to save the New Deal by packing the Court seem unnecessary.

Scholars have debated whether Hughes started to change before Roosevelt announced his plan or in response to it. In any event, Hughes clearly believed that the law—and the Supreme Court—must respond to societal shifts, such as those wrought by the Great Depression, in order to maintain legitimacy and credibility. He preferred, however, to see Court doctrines changed through reinterpreting precedents rather than overturning them (Glad 1999, 420).

Hughes was a highly effective administrator of the Supreme Court. He kept a tight rein on the courtroom, enforcing strict time limits on oral arguments. In the justices' private conferences, Hughes skillfully guided the discussion of his colleagues, allowing all to speak yet keeping the conversation on track. According to Justice Felix Frankfurter, Hughes "never checked free debate, but the atmosphere which he created, the moral authority which he exerted, inhibited irrelevance, repetition and fruitless discussion" (1956, 141). Bolstered by his near photographic memory, Hughes offered cogent summaries of each case before the justices. He exercised great influence on the other justices but always acted fairly and courteously toward them.

Determined to retire before his abilities diminished, Hughes left the Court on 1 July 1941 at the age of seventy-nine. He spent his retirement in Washington, D.C., being with his family and organizing his papers.

He died on 17 August 1948 of congestive heart failure, at his summer home on Cape Cod, Massachusetts.

Mark Byrnes

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HUGHES, SARAH TILGHMAN

(1896–1985)

Sarah Tilghman Hughes
Center for Media Production, University of North Texas. Photograph by Squire Haskins.

Sarah T. Hughes was a leader in the judiciary in Texas for fifty years, first as a state district judge and then as a federal district judge. Most famous for her role in administering the presidential oath of office to Lyndon B. Johnson following Pres. John F. Kennedy's assassination, Hughes had a long and distinguished career as a trailblazer for women on the bench. She also made significant contributions to jurisprudence, especially in serving on the court that first overturned the Texas abortion law in *Roe v. Wade*.

Born in Baltimore, Maryland, on 2 August 1896, Sarah Tilghman was a member of a distinguished colonial family in the United States. Her parents were James Cooke and Elizabeth Haughton Tilghman, and she counted as ancestors Tench Tilghman, a member of George Washington's staff during the Revolutionary War, and Matthew Tilghman, a representative in the First Continental Congress. She graduated from Goucher College in Baltimore, spent two years as a teacher, and then worked for the Metropolitan Washington, D.C., police force while attending law school at George Washington University. She graduated in 1921. While in law school, she met and then married fellow law student George E. Hughes, a native of Texas. The couple moved to Dallas, Texas, in 1922.

After moving to Texas, Hughes began her law practice in Dallas, initially in practice with her husband. After two years, her husband went to work for the Veteran's Administration and Hughes practiced on her own. Her interest in politics grew throughout the 1920s as she adjusted to the conservative climate of Texas, a mood diametrically opposed to her own philosophy. In 1930, she made her own plunge into politics, running for and being elected to the Texas state legislature—only the second woman to achieve that office. In the legislature, Hughes worked for progressive reforms in a variety of areas, including enhancing the professionalism of the Texas legal system, making it easier for poor people to appeal court rulings *in forma pauperis,* and enhancing the rights of juveniles in courts. She had a role in protecting the permanent mineral rights of state lands for use in education, she helped draft a new divorce law for the state, she worked to give women equal rights in a variety of contexts, and she helped lead the fight to defeat a sales tax.

In 1935, a vacancy occurred in a state district court in Texas. Hughes, who had formed an alliance with Gov. Jimmy Allred, was selected to fill the position. Her confirmation was a very difficult process; women were still rare in law, could not yet serve on juries, and were not yet represented in the Texas judiciary. Moreover, her reputation as a firebrand liberal in conservative Dallas was the cause for opposition among some in the Dallas bar. State senator Claude Westerfeld attempted to invoke senatorial courtesy against Hughes, arguing in part that "she is a married woman and should be home washing dishes" (Riddlesperger 1980, 19). Reaction to Westerfeld's statement was strong and in Hughes's favor. She immediately donned an apron and had her picture in the paper washing dishes and then was easily confirmed (Riddlesperger 1980, 19). After her confirmation, she began service as a state district judge and was elected to the post in 1936. She remained in her state judicial position until being appointed to the federal bench in 1962. On the state bench, her primary jurisdiction concerned juvenile delinquency and domestic relations. She presided over court without the traditional black robe. Her decisions reflected her position as an advocate for the rights of juveniles and her conviction that adequate facilities for juveniles and education were the keys to rehabilitation. She gained a reputation for being a "hard sell" on divorce cases and often tried to counsel couples to reconcile. She earned a reputation as a no-nonsense jurist who had fewer reversals than any other state judge in Dallas. Sen. Ralph Yarborough, long a political ally of Hughes, saw her as having "one of the most outstanding judicial trial records of any district judge in her state" (108 *Congressional Record* 4342–4343).

She unsuccessfully sought higher office several times, running for Congress and for the Texas Supreme Court. President Truman had wanted to

appoint her to the Federal Trade Commission, but she declined. She also had allowed her name to be placed in nomination as vice president at the 1952 Democratic convention as a way to encourage more women to seek public office.

While a state district judge, Hughes was active in a number of organizations and pursued political change, especially with regard to the rights of women. She was active in the Business and Professional Women's Club (BPW), ultimately serving as president of the National Federation of BPW in 1943. She pursued an equal rights amendment for women in that organization. She also wrote academic articles favoring the right of women to serve on juries and favoring the drafting of women into military service. She worked tirelessly for the United Nations Educational, Scientific and Cultural Organization, believing that it was the best chance for achieving world order and world peace.

In 1961, a federal district judge position opened up in Dallas, and Hughes made it known that she was interested. She faced several obstacles in her appointment—Dallas District Attorney Henry Wade wanted the position, there was a struggle between Sen. Ralph Yarborough and Vice Pres. Lyndon Johnson over the appointment privileges of senators, and Hughes, at sixty-four, was older than the American Bar Association (ABA) guidelines for appointment as district judge allowed. Eventually, Johnson and Yarborough agreed that they both backed Hughes for the office and preferred her to Henry Wade. President Kennedy was favorable as well, for Hughes had been a strong supporter in the close 1960 election in Texas. The American Bar Association, however, gave Hughes a "not recommended" rating because of her age. It was here that the raw power of Sam Rayburn as Speaker of the House came into play. Rayburn had a bill supported by Robert F. Kennedy held up in the House Judiciary Committee. When Kennedy came to ask the Speaker about the bill, Rayburn told him that it would be reported out as soon as Hughes's nomination went forward. Kennedy, then thirty-five, replied that she was disqualified by the ABA because she was "an old, old woman." Rayburn, now in his upper seventies, replied "Sonny, everybody seems old to you" (Steinberg 1975, 338). Hughes's appointment went forward the next day and was easily approved by the Senate. Hughes became only the second woman ever to sit on the federal bench.

Perhaps Hughes's most defining moment came on 22 November 1963. On that day, she was among those who waited for President Kennedy to arrive at his luncheon in Dallas and was told of his death. She was called by Vice President Johnson to come to Air Force One, where she administered the oath of office for the presidency. Hughes was surprised at the national attention she received, saying that "it isn't something I actually did—just something that happened" (Hughes 1969, 54).

Ruth Bader Ginsburg (1933–)

Long before Pres. Bill Clinton appointed her in 1993 as the second woman to sit on the United States Supreme Court (Sandra Day O'Connor, appointed by President Reagan, was the first), Ruth Bader Ginsburg had established a formidable reputation for herself as a scholar and a litigator.

Born to a Jewish immigrant family in Brooklyn, New York, in 1933, Joan Ruth Bader was encouraged in her educational endeavors by her mother, who died of cancer the day before her daughter graduated from high school. Ruth went on to attend Cornell University, where she was elected to Phi Beta Kappa. After graduating, she married Martin Ginsburg, who also aspired to be an attorney, and after he served for two years in the military in Oklahoma, they both attended Harvard Law School, where she joined the class behind him as one of only nine women accepted that year. Serving as a mother to a daughter Jane and nursing her husband through a bout with cancer, Ruth Ginsburg made the law review at Harvard and also at Columbia (apparently the first and only individual ever to do so), where she transferred after her husband got a job with a law firm. Named a Kent Scholar, Ginsburg tied for first in her graduating class at Columbia. Turned down for a clerkship by United States Supreme Court justices, Ginsburg clerked for New York's district judge Edmund L. Palmieri and then worked on a comparative law project involving Swedish and American law at Columbia University. From Columbia, Ginsburg moved to Rutgers University, where she began offering classes related to women's rights, and she later became the first tenured woman law professor at Columbia University.

Ginsburg's work on behalf of equal rights for women has been likened to Thurgood Marshall's work on behalf of African Americans. Ginsburg was the first individual to head the Women's Rights Project of the American Civil Liberties Union, and in addition to writing numerous briefs arguing that the equal protection clause of the Fourteenth Amendment was a solid basis for women's rights, Ginsburg went on to win five of six cases that she argued before the United States Supreme Court, often taking cases involving unequal treatment of men. Although the

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Hughes preferred to be remembered for the record that she made on the federal bench in her time there. She served from her appointment in 1962 until her death in 1985, the last ten of those years as a senior judge. Over that time, she heard a number of cases that had an impact on constitutional law. Her judicial philosophy was forthrightly held. She was a liberal judicial activist and proud of it, often publicly expressing approval of the Warren Court Supreme Court decisions and saying that the judiciary had the duty to carry out constitutional requirements when the legislative and executive branches failed to act. She also was not concerned about being reversed in

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Court did not subject sexual classifications to the most exacting scrutiny that Ginsburg advocated (the "compelling state interest" test), it did agree to an intermediate standard of review that required that states do more than show a mere "rational basis" for its gender classifications.

In 1980, Democratic president Jimmy Carter appointed Ginsburg to the prestigious United States Court of Appeals for the District of Columbia. In 1993, Clinton appointed her to the United States Supreme Court seat vacated by retiring justice Byron White, and the U.S. Senate confirmed her by a vote of ninety-seven to three. Ginsburg was only the second woman to serve on the Court, but she was also the first Jewish justice to serve since Justice Arthur Goldberg had retired in 1965.

Ginsburg has maintained a reputation on the United States Supreme Court as a moderate liberal. Her best-known decision is probably her 1996 opinion in *United States v. Virginia*. In that case, she declared that the previously all-male Virginia Military Institute had to provide equal opportunity for women to serve as cadets. Ginsburg has also established herself as a strong believer in strict separation of church and state, in separation of powers, and in Congress's power to exercise broad powers over the states under the interstate commerce clause—an issue on which she has often voted differently from Sandra Day O'Connor (Abraham 1999, 321). Ginsburg and her friend Antonin Scalia, who has a much more conservative political orientation, are usually the most talkative members of the United States Supreme Court, frequently interrupting the attorneys who argue before them.

Ginsburg has written and edited four books, and she has delivered many speeches and published numerous scholarly papers. She has received numerous honorary degrees and was the first woman placed in the Gallery of Greats at Columbia's School of Law (Vile 2001, 1:290).

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pursuit of her judicial philosophy. Being reversed, she said "never bothers me in the slightest, and sometimes I don't even read the decision when I've been reversed because I figure that they are just like me and they can view the law and the facts differently" (Hughes 1969, 35).

In criminal cases, Hughes soon became known as being supportive of the procedural rights of the accused. In habeas cases, she most frequently decided in favor of the accused and was only once reversed by the Fifth Circuit. She ruled, for example, that the government was obliged to pay for a psychiatric exam for someone claiming insanity as a reason for committing

a crime and that someone convicted of murder without malice in a first trial could not be convicted of murder with malice in a subsequent trial. Her overall record was not exclusively pro-defendant, but the ex-policewoman was interested in law enforcement agencies' living up to the letter of procedural due process. Similarly, Hughes was not a fan of long sentences, saying that "five years is long enough to rehabilitate anyone who can be rehabilitated" (Riddlesperger 1980, 57–58). She remained a strong opponent of the death penalty.

Hughes had her most important local impact as she supervised bringing the Dallas jail into compliance with federal standards. Believing that the purpose of incarceration was rehabilitation, she was predictably critical of inadequate jails. To the petitioner's charges that the Dallas County jail was not up to federal standards in a variety of ways, Hughes agreed. She ruled in *Taylor v. Sterrett* (344 F. Supp. 411, 1972) that "the correctional programs and facilities of the Dallas County Jail are in desperate need of upgrading and expansion" (421). Her supervision over the Dallas jail lasted several years, changing the way that the jail treated prisoners and ultimately requiring the building of a new facility to meet minimum guidelines. The *Taylor* decision was widely cited in cases requiring the upgrading of jail facilities. Hughes was praised by supporters of more humane treatment of prisoners and vilified by those who thought that federal judges had no place telling a county how to treat prisoners. The Fifth Circuit removed Judge Hughes from her supervision of the case in 1979, a responsibility given to the newly created Texas Commission on Jail Standards.

In statewide politics, Hughes had her longest-lasting impact in her handling of the infamous "Sharpstown Scandal." The scandal came about when a Texas banker offered to sell bank stock to high public officials in Texas at a low price in exchange for more lenient banking laws. The stock would then be increased in value, and the officials could sell it for a tidy profit. In the case that arose from allegations of improper trading, Hughes was the presiding judge. The case that followed, *S.E.C. v. National Bankers Life Insurance Company* (324 F. Supp. 189), was not difficult in law but important because it involved potentially a number of the highest public officials in Texas, including Gov. Preston Smith, Lt. Gov. Ben Barnes, speaker of the house Gus Mutscher, and former attorney general Waggoner Carr. The fraud case was not an important constitutional case and was upheld by the Fifth Circuit. But it was an essential political case, uncovering fraud at the highest levels of Texas government, starting a movement for ethics reform, and ending the public careers of a number of officials (Kinch and Procter 1972, 24).

In constitutional law, Hughes's longest-lasting impact was in the area of the right to privacy. She played a role in declaring both the Texas sodomy

law and, more important, the Texas abortion law, unconstitutional. In the sodomy case, Hughes ruled that the Texas law violated the right to privacy. Her decision in *Buchanin v. Batchelor* (308 F. Supp. 729, 1970) found the Texas law overly broad, especially as it related to the private behavior of married couples. In *Roe v. Wade (*314 F. Supp. 1217, 1970), Hughes acted as a judge on a three-judge panel that found that both single women and married couples had a right to choose whether to have children. Without question, this was the single most important case in which Judge Hughes took part. In it, she participated in overturning the Texas abortion law allowing abortion only to save the life of the mother. The Supreme Court reviewed the case, confirming it in part and reversing it in part. The basic finding outlawing a so narrowly defined state law was upheld and became the basis for the landmark United States Supreme Court decision on abortion.

Finally, Hughes's decisions as a judge had an impact on interpretations of civil rights laws. She had a supervisory role in applying the findings of Supreme Court school decisions in the schools of Dallas and Wichita Falls, Texas. In Wichita Falls in 1970, a case that Hughes later saw as one of her most important, she "ordered zone lines redrawn between predominantly white and Negro elementary schools," as reported by the *Dallas Morning News* (28 August 1970, 1). The Dallas case, in 1974, found "white institutional racism" in the Dallas schools and ordered that the school system stop resisting "every effort to make the changes which have been decreed and which they should know are inevitable. The law will be followed, says the School Board, but then only after every effort has been made to resist. There has been an utter lack of leadership . . ." (*Hawkins v. Coleman,* 376 F. Supp. 1338, 1974).

In all, Judge Hughes's career is perhaps more significant for her trailblazing the way for other women in the state and federal judiciary than for the impact her decisions had on the development of constitutional law. She served as a judge in Texas for sixteen years before a woman could be a juror in her court! Her judicial philosophy was that of an activist, and she was best known perhaps for putting into effect decisions of the Warren Court in the local setting. Sarah Hughes never reached the physical stature of even five feet in height, but she was a giant in Texas judicial history. Hughes died on 23 April 1985 at Presbyterian Hospital in Dallas at the age of eighty-eight.

James W. Riddlesperger Jr.

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JOHNSON, FRANK M., JR.

(1918–1999)

Frank M. Johnson Jr.
Library of Congress

Few if any lower court federal judges have ever had more of an impact on the legal, social, and political orders of their home states, region, and the nation than Frank M. Johnson Jr. Born in the small town of Delmar, Alabama, on 30 October 1918, Johnson lived and worked most of his life in Alabama, where he became beloved and hated as a federal district judge from 1955 until his appointment as a federal court of appeals judge in 1979. In a series of clashes with state authorities, including his law school classmate Gov. George C. Wallace, Judge Johnson persistently and unflinchingly sided with civil rights plaintiffs to do equal justice under law. His progressive rulings rendered in spite of intense social pressure, ostracism, and death threats had ramifications well beyond the borders of his beloved Alabama by distinguishing him as a model of a courageous judge who actively addressed the failures of state authorities to live up to their constitutional obligations.

The hallmarks of Johnson's steely resolve and stern discipline as a judge were evident well before his appointment as a judge. He was a staunch Republican at a time and place where Republicans were generally scarce. He was proud that one of his great-grandfathers had served as the first Republican sheriff of Fayette County (near Winston County where he had been

born, grew up, and would practice law) and that his father had been active in Republican politics and been the only Republican to serve in the Alabama legislature during his single term as a representative there. After graduating first in his class from the University of Alabama Law School, Johnson joined the army and earned the Purple Heart and Bronze Star for his performance commanding an infantry company in the Normandy hedgerow fighting. After recuperating from his injuries, Johnson deftly handled the court-martial defense for a sergeant who admitted to beating and otherwise mistreating prisoners of war. Subsequently, he left the army and began to practice law and follow his father's example by becoming involved in Republican politics. In 1948, he met Herbert Brownwell, who was on a visit to Alabama as campaign manager for then-presidential candidate Thomas Dewey, and Johnson became a delegate supporting Dewey at the Republican national convention. In 1952, Brownwell managed the presidential campaign of Dwight D. Eisenhower, and Johnson served as the president of Veterans for Eisenhower in Alabama. After the election, Brownwell became Eisenhower's attorney general and named Johnson as the U.S. attorney for the Middle District of Alabama. Four years later, Johnson had the support of the state's Republican leadership to fill a vacancy on the federal district court in Montgomery. Although local Democrats were split in supporting Johnson's bid, Alabama's two senators were supportive, and President Eisenhower made a recess appointment of Johnson as federal district judge in October 1955. The appointment made Johnson, then thirty-seven, the youngest federal judge in the United States.

No sooner had Johnson become a judge than he confronted the first of the many civil rights challenges that would ultimately distinguish his career. In 1956, Johnson served on a special three-judge panel with circuit judge Richard Rives and fellow district judge Seybourn Lynne in *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956). Rives and Johnson joined in an opinion striking down an Alabama statute and city ordinance requiring racial segregation in public transportation, including Montgomery's municipal buses. In the course of affirming the opinion, the United States Supreme Court took the dramatic step of explicitly overruling its original decision upholding the separate but equal doctrine in *Plessy v. Ferguson*, 163 U.S. 537 (1896). In the decade after *Browder*, Rives and Johnson joined together on other three-judge panels to strike down segregation and discrimination in almost every facet of Alabama life, including schools, parks, jury selection, higher education, voting, and legislative apportionment.

Not long after *Browder*, Johnson's public clashes with George Wallace began. Early in 1959, as a state circuit judge, Wallace refused to allow federal civil rights commissioners to examine voting records in two Black Belt counties. Johnson ordered Wallace to produce the records or face jail or

contempt. Wallace tried to dramatize the conflict as a confrontation "between a sovereign state judge and his court on one side and the federal government and its court on the other" (quoted in Bass 1981, 81). Wallace contrived to turn the documents over to federal authorities in the most embarrassing manner possible, so that Johnson eventually ruled that although "accomplished through means of subterfuge, George C. Wallace did comply" with his order (quoted 81). In his campaign for the governorship shortly thereafter, Wallace ridiculed anyone who suggested he had complied with Johnson's order.

Over the next fifteen years, Wallace ridiculed Johnson publicly as the judge placed Alabama's prison system, highway patrol, property tax assessment, mental health agency, and the public education system all under the supervision of his court. In another dramatic contest, *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965), Judge Johnson articulated the "proportionality principle" as a test for balancing requests to use public property for speech activity against the government's claim that the property should be reserved for its more regular uses. *Williams* involved a request for an injunction authorizing a mass protest march from Selma to Montgomery, Alabama. In issuing the injunction, Johnson explained that the "extent of a group's constitutional right to protest peaceably . . . must be . . . found and held to be commensurate with the enormity of the wrongs being protested and petitioned against" (240 F. Supp. 108). The result of this injunction is well known—the Selma-to-Montgomery march energized the civil rights movement and helped to provide a powerful statement to the nation, ultimately helping to lead even to the enactment of the Voting Rights Act of 1965.

Wallace's attacks on Johnson defined both men for all time. Wallace's allies regularly inveighed against Johnson, publicly urging "responsible Dixie citizens to blacklist federal judges, their family, and their friends" (Seymore Trammel quoted in Kennedy 1978, 178). They insisted that federal judges like Johnson "should be scorned, they and their families should be ostracized by responsible Southerners" (Trammel quoted 178). In one particularly famous tirade, Wallace fulminated against Johnson as an "integrating, scalawaging, carpet-bagging, race-mixing, bold-faced liar" who "hasn't done anything for Alabama except to help destroy it" (quoted in Yarbrough 1981, 87). On another occasion, Wallace went so far as to suggest Johnson was in need of a "barbed-wire enema," for which Wallace apologized later in life (quoted in Bass 1994, 3). Shortly before his death, Wallace asked the judge to forgive his strident defense of segregation and derision of the judge and the federal courts, but Johnson refused to accept the apology. Instead, Johnson suggested Wallace's forgiveness would have to come from a higher authority.

Perhaps the most high profile case in which Johnson provoked the hostility of Wallace and other state officials was *Carr v. Montgomery County Board of Education*, 289 F. Supp. 647 (M.D. Ala. 1968), which involved the desegregation of the Montgomery school system. Judge Johnson maintained jurisdiction over the case—and over many features of the practical administration of the public schools—for more than a decade. Johnson considered the case to have been among his most important accomplishments. He was especially innovative in fashioning a unique structural remedy in which the United States, all of the parties, and the public were ultimately involved in assessing the alternatives being considered. He was especially resolute in both identifying and proposing remedies for certain constitutional violations. In one important ruling, he ordered faculty integregation in schools in Montgomery "so that in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system" (Bass 1994, 262). He set specific steps over a period of years to reach that objective.

Although the United States Court of Appeals for the Fifth Circuit reversed Johnson's order desegregating the faculty of the Montgomery schools, the United States Supreme Court unanimously affirmed him. In his opinion for the Court, Justice Hugo Black, another native Alabamian, took the unusual step of repeatedly mentioning Johnson by name. After tracing the history of the litigation, Justice Black specifically mentioned that Judge Johnson's "patience and wisdom are written for all to see and read on the pages of the five-year record before us" (Bass 1994, 262).

Johnson's boldness in fashioning constitutional remedies was one of his hallmarks as a judge. For instance, in *United States v. U.S. Klans*, 194 F. Supp. 897 (M.D. Ala. 1961), he granted the Justice Department's request for an injunction against those Ku Klux Klan groups that threatened or assaulted the Freedom Riders and against the Montgomery commissioner of public affairs and the chief of police for "willfully and deliberately fail[ing] to take measures to ensure the safety of the students and to prevent unlawful acts of violence upon their persons" (194 F. Supp. 900). Five months later, in *Lewis v. Greyhound*, 194 F. Supp. 210 (M.D. Ala. 1961), Judge Johnson held unequivocally that Greyhound and a range of public officials were liable for enforcing the desegregation of bus stations and other travel-related facilities, working his way through a maze of denials, pretexts, and equivocations to reach his conclusions.

Judge Johnson's creativity extended to protecting the civil rights in contexts other than racial discrimination. In cases such as *Frontiero v. Laird*, 341 F. Supp. 201, 209 (1972) (Johnson, J., dissenting), and *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966), he required that the government refrain from imposing special burdens on women solely on account of their gender. In *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), he re-

quired the state of Alabama to improve the deplorable conditions that those involuntarily committed to the state's mental hospitals had to endure. In *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), Judge Johnson ordered the state to observe constitutionally minimum standards of care for the state's prison population. The shocking conditions in Alabama's state prison system included "lack of sanitation . . . in living areas, infirmaries, and food service" and "unguarded, overcrowded dormitories, with no realistic attempt by officials to separate violent, aggressive inmates from those who are passive or weak" and led to "rampant violence" (406 F. Supp. 329).

By the time Jimmy Carter was elected president in 1976, Frank Johnson was already a legendary figure in the South. President Carter offered but Johnson declined appointments as deputy attorney general and as director of the Federal Bureau of Investigation. In 1979, Johnson accepted an appointment as a judge on the United States Court of Appeals for the Eleventh Circuit. As a circuit judge, Johnson's passionate commitment to protecting the constitutional liberties of unpopular minorities never wavered. In *Jager v. Douglas County School District*, 862 F.2d 824 (11th Cir. 1989), he agreed that a high school's practice of requiring a lone dissenter to sit quietly during an invocation before the start of a varsity football game violated the establishment clause. In *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985), Johnson authored the appellate opinion boldly striking down Georgia's antisodomy statute. He confined his opinion for the court to the constitutionality of limiting prosecutions under the statute to gays and lesbians and concluded that such prosecutions would not be constitutional because they conflicted with the Supreme Court's line of decisions granting a significant realm of privacy within a private home, which had been the locale in which the criminal misconduct had taken place. In yet another case, *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985), Judge Johnson dissented to the Eleventh Circuit's rejection of a defendant's challenge to his sentencing based on a statistical study showing that the killers of white victims in Georgia were more likely than the killers of black victims to receive a death sentence. The judge based his dissent on the cruel and unusual punishment clause of the Eighth Amendment rather than, as the majority did, on the equal protection clause. He reasoned that this starting point or basis would provide more easily identifiable constitutional boundaries for monitoring, because they depended more on effects (the pattern of death sentences imposed) than on the intentions of the prosecutors, juries, and judges making the decisions. Even though the United States Supreme Court overturned Johnson in both the *McCleskey* and *Hardwick* cases, his opinions caused him to win the admiration of many academics and civil libertarians as one of the staunchest defenders of civil liberties ever to sit on the lower federal courts.

Thomas Goode Jones
(1844-1914)

The School of Law at Faulkner University in Montgomery, Alabama, is named after one of the state's distinguished judges, Thomas Goode Jones. Jones was the first of eight children born to Samuel Goode and Martha Ward Goode Jones. Samuel was an engineer and a strong patron of religious and educational institutions. Thomas Jones began attending the Virginia Military Academy in 1860 at the age of fifteen but left with the equivalent of an honorary degree to fight in the Civil War, initially serving under Stonewall Jackson. Although he was only twenty when the war ended, Jones had been wounded a number of times and had been promoted to the rank of major. He helped lead one of Lee's last offensives against Grant and was present at the surrender at Appomattox.

Jones began reading law during the war and continued to do so during a brief, but ultimately unsuccessful, stint as a farmer. He also later sat in a class taught by A. J. Walker, chief justice of Alabama's Supreme Court. In the meantime, he had married Georgena Caroline Bird, with whom he would have thirteen children. Jones also served for a time as an editor of a Montgomery newspaper, the *Daily Picayune*. In 1870, Jones was selected to publish the *Alabama Reporter*, which he did for ten years. He served as a Montgomery alderman, speaker of the Alabama House of Representatives, a captain of the Alabama militia, and an active member of the Alabama bar, which later elected him as its president. Although he opposed what he considered to be unfair Reconstruction policies, Jones established a reputation for attempting to heal the wounds between North and South that had been sparked by the Civil War.

In 1887, Jones led the committee that drafted a state legal code of ethics, which became the first such code to be adopted in the nation. The code began with a quotation from George Sharswood, who had written "An Essay on Professional Ethics": "There is, perhaps, no profession after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law. There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the lines of strict integrity; in which so many delicate and difficult questions of duty are constantly arising" (quoted in Eidsmoe 2001, 145). This Code of Ethics became the guide for ten other such state codes adopted between 1887 and 1906 and later strongly influenced the code first approved by the American Bar Association in 1908.

After drafting the Alabama legal code of ethics, in 1889 Jones was elected on the Democratic ticket as Alabama governor and served for two terms, during which the state established a number of educational institutions. As governor, Jones exhibited the wisdom that one might expect of a judge. Faced with the decision as to whether to pardon an African American who had been sentenced to death for a brutal murder but about whose guilt Jones had doubts, the governor sent a thirty-day stay of execution to the sheriff but instructed that the condemned man not be told about it. The stay was only to be

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granted if the man continued to deny his guilt on the gallows. When he confessed instead, as per Jones's orders, the execution proceeded as planned (Eidsmoe 2001, 154).

In 1901 Jones participated in an Alabama constitutional convention, where he appears to have played a major role. Jones accepted separation of the races but advocated equal state funding of public education and racial justice and strongly opposed lynch law. This same year, Pres. Theodore Roosevelt appointed Jones as a federal judge for the Middle and Northern Districts of Alabama, where he served until his death in 1914. Roosevelt later told friends that Jones was the proudest appointment of his administration.

As a judge, Jones struck down Alabama laws regulating railroads, which he believed to be confiscatory and thus in violation of the due process clause of the Fourteenth Amendment. Although he had fought for the South during the Civil War, Jones took the lead in upholding federal laws against peonage, a kind of virtual slavery premised on the right to contract one's services in exchange for upkeep but enforced against those who wanted to escape it by state law. Similarly, Jones attempted to use the due process clause of the Fourteenth Amendment to uphold federal laws against lynching. Jones argued that the state assumed an affirmative obligation when it took prisoners into custody and was duty bound to protect them under the due process clause. Thus in *Ex Parte Riggins*, Jones argued that:

> The power given Congress to see that the state performs the duty, naturally includes power to protect the right, and remove obstacles which prevent the state's performing the duty. Has it no power to do so? Must the spirit of the [Fourteenth] amendment be sacrificed to the letter? What is the spirit of the amendment? It goes to this extent at least: that the citizen, when the state undertakes to enforce rights of individuals or society against him, shall have actual enjoyment of the benefits of due process of law at its hands. Lawless acts by private individuals, which snatch such benefits from the citizen, certainly defy and frustrate the purposes of the amendment. Why has not Congress, which is given power "to enforce" this amendment, power to punish such lawlessness, which directly and inevitably defeats the purpose of the amendment? (*Ex Parte Riggins*, 134 F. 404 [1904], 419)

Ultimately, however, Jones recognized that his view of the amendment was at odds with that of the United States Supreme Court and that his will had to give way to that of the higher court.

Although Jones has been described as a "conservative activist," a recent account of Jones's life and career observed that "he led the way toward reform in several key areas of individual rights and equal treatment under the law" (Eidsmoe 2001, 218). Jones was further described as having had "a commitment to working within the established order to achieve liberty and justice" (220). The inscription on Jones's grave at Oakwood Cemetery in Montgomery describes him as a "Warrior Statesman Jurist" (225).

Reference:

Eidsmoe, John A. 2001. "Warrior, Statesman, Jurist for the South: The Life, Legacy, and Law of Thomas Goode Jones." *Jones Law Review* 5 (2001): 51–225.

Over the years, Johnson often took the time to explain his conception of judging and to defend himself against charges of unprincipled activism. He explained that he did not consider himself a "high theorist" (quoted in Abrams et al. 2000, 1381). His concern was thus not with abstract reasoning or constitutional principles but rather the practicalities of doing justice in the context of a given case. He creatively fashioned relief equal to the task at hand. He explained, "[I]f we, as judges, have learned anything from *Brown* v. *Board of Education,* it is that prohibitory relief alone affords but hollow protection from continuing abuse by recalcitrant governments" (Johnson 1979, 910). He rejected the label "activist" because, in his view, "[t]he courts possess only so much power as the other branches relinquish" by failing to observe their constitutional obligations (912). Judge Johnson further defended his decisionmaking as grounded not in his own personal morality but rather "the political morality implied by the Constitution . . ." (909). As he explained, "Adjudication of constitutional issues requires an openness of mind and a willingness to decide the issues solely on particular facts and circumstances involved, not with any preconceived notion or philosophy regarding the outcome of the case" (Johnson 1977, 468–469).

For Johnson, the judgment required to approach constitutional questions appropriately entailed reason, courage, and integrity. Reason implied an obligation to use the tools of a jurist's trade when deciding cases; courage meant "not physical bravery, but the moral courage to do what is right in the face of certain popularity and public criticism"; and integrity referred not merely to honesty or good ethics but rather implied a "passion for justice informed by a deep and abiding compassion that propels the judge toward not only the logical conclusion—but also the just conclusion" (Johnson 1991, 966–970).

Johnson retired from the bench in 1996. By the time he retired, he had received so many honorary degrees that he no longer accepted them in order to save time for other activities. Yet, for many people he might have seemed antiquated as a jurist from a bygone era. It is possible that for many Alabamians and southerners who grew up under the constitutional doctrines and remedies he helped to fashion, the overt discrimination and state intransigence he confronted seemed to be relics of the past. For many others, he will, however, always be the model of the courageous judge risking social ostracism and condemnation to do equal justice under law. For these people, Frank Johnson was and always will be, as Yale Law School professor Owen Fiss once described him, "the John Marshall of the federal District Courts" (quoted in Bass 1994, 89).

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JUSTICE, WILLIAM WAYNE

(1920–)

Called "the czar of Texas," "the real governor of Texas," and "the law East of the Pecos," federal district judge William Wayne Justice is known for his activism in institutional litigation. His activism in lawsuits involving the Texas public school system, the juvenile incarceration system, the placement of the mentally retarded, and the Texas prison system have led to calls for his impeachment and to criticisms and mistreatment of himself and his family and have made him the target of at least two death plots (Mithoff 1998, 9).

William Wayne Justice
Alan Pogue/Austin Chronicle

Justice was an unlikely candidate for one so upsetting to the established order. Born on 25 February 1920, he was a sickly child born to overprotective parents. William's mother was Jackie May Hanson, who had been a schoolteacher; she married William Davis Justice (known as Will Justice) in 1910. Will had been a school principal but had become a lawyer in 1913 after working in a Tyler, Texas, law office and studying law through an extension course. The Justices settled

in east Texas, in Athens, the county seat of Henderson County (Kemerer 1991, 4–5).

There was never doubt that William Wayne would follow in his father's footsteps. When William Wayne was seven, Will put his son's name on his law office door and from then on, according to William Wayne, "I never seriously questioned the idea" (Kemerer 1991, 3). William Wayne was going to be a lawyer.

As a lawyer, Will Justice was exceptionally able. He was elected district attorney of a three-county district and in his first two years in that position, he claimed that he tried 155 jury cases and won 147 of them. Will then went into private practice and, as a defense attorney, handled over 200 capital cases. None of his clients ever received more than a forty-year sentence. Will's prowess as a defense lawyer gained him considerable regional fame and it was said of him, "[t]here is no justice in East Texas except Will Justice" (Kemerer 1991, 5; Mithoff 1998, 11).

Graduating from high school in Athens in 1937, William Wayne attended the University of Texas at Austin for two years as an undergraduate and then entered its law school. He took the bar and passed in February 1942, then entered the United States Army in the summer of 1942. Although sent to India near the end of the war, Justice did not see combat, and in 1946 he left the army, returned to Athens, and promptly entered the practice of law with his father (Kemerer 1991, 10–17).

At that point it seemed that William Wayne was destined to be a small town lawyer in a three-lawyer firm in rural east Texas. His life seemed set—in practice with his father, who was a masterful trial lawyer, and by birth a member of the elite in a small southern town. On 16 March 1947, William Wayne married Sue Rowan; their only child, a daughter named Ellen, was born in 1949. William Wayne was president of the local Rotary, became a Mason, and served as commander of the local Veterans of Foreign Wars post. For several years he served as Athens city attorney while also in private practice. He had a busy legal practice that encompassed all areas of law (Kemerer 1991, 17–26, 30–31). And for much of that time, William Wayne practiced law "in the shadow of his father," who was "a man he revered above all men" (Mithoff 1998, 9).

In that era, Texas was a one-party Democratic state. Like his father, William Wayne had a strong interest in politics, especially politics with a strong populist tinge. One of the east Texas Democratic populists with whom Will had developed ties was C. R. Yarborough, who was justice of the peace in Henderson County when Will was district attorney. As the years went by, Will and William Wayne developed ties to the Yarborough family, one of whom was C. R.'s son Ralph (Cox 2001, 31). That friendship proved

key to William Wayne's career, since Ralph was to become U.S. senator from Texas and a key supporter of William Wayne's appointment as U.S. attorney and then as federal district judge.

In 1941, William Wayne had limited involvement in Lyndon Johnson's unsuccessful campaign for the U.S. Senate against archconservative W. Lee O'Daniel. In 1946, Justice supported the unsuccessful gubernatorial candidacy of liberal Homer Rainey. In 1947, Justice became involved in the Young Democrats of Texas, and in 1948, he was a Truman-Barkley loyalist at the state Democratic convention. In what proved to be a decision as crucial to his career as his friendship with the Yarborough family, in 1948 Justice became the Henderson County manager for Lyndon Johnson's campaign for the U.S. Senate against conservative Coke Stevenson. Though Justice came to dislike Johnson, finding him a most disagreeable personality, Johnson was never to forget that Justice had backed him in that 1948 hotly contested Democratic primary campaign that put Johnson in the U.S. Senate and on the pathway to the presidency. In later years, Justice increasingly affiliated himself with the liberal, Ralph Yarborough wing of the Democratic Party (Kemerer 1991, 38, 45–47).

Although he considered running for both Congress and state district judge, with the election of the Kennedy-Johnson ticket, the office of U.S. attorney for the Eastern District of Texas became vacant, since it had been filled by an Eisenhower appointee. In spite of a patronage fight between Vice President Johnson and Senator Yarborough, Justice was appointed U.S. attorney. Yarborough had the friendship and long-standing family ties with Justice, and Johnson remembered Justice's support in his 1948 campaign.

Justice took office on 1 July 1961 as the U.S. attorney. He had responsibility for a forty-one county region. Justice reveled in the job, finding it the most enjoyable work he ever did. His most important case during his tenure as U.S. attorney was the prosecution of what was called "slant-hole" drilling. The "slant-hole" drillers would obtain leases near productive oil fields and then drill in a diagonal direction to tap into the oil under the fields and siphon off the oil. It was believed that more than $100 million worth of oil was stolen by this drilling technique. Very little action was taken against the "slant-hole" drillers at the state level. These men tended to be wealthy and were often big campaign contributors. Additionally, since the victims were big oil companies and the perpetrators were independent oilmen, public opinion was not favorable to prosecution. Justice, therefore, sought prosecutions under federal law. He was faced with an unsympathetic judge, and even though his prosecutions were successful, the criminal penalties imposed were minimal. Nevertheless, Justice's criminal prosecutions led to the filing of numerous successful civil actions by leaseholders who had had oil stolen from beneath them (Kemerer 1991, 50–55).

With the death of federal district judge Joe Sheehy in February 1967, Justice became a candidate for appointment to the federal bench. Strongly supported by Senator Yarborough and nominated by President Johnson, Justice was easily confirmed by the Senate. On 29 June 1968, Justice was sworn in as a federal district judge for the Eastern District of Texas (Kemerer 1991, 67–71).

As a federal district judge, it was not long until Justice began developing a reputation for being controversial. Justice once explained, "As soon as I began to practice law with my father, . . . I realized that a lawyer's duty as an advocate requires him or her not only to contemplate, but actually to participate in the development of the law" (Justice 1989, 657). Whether Justice participated in the development of the law much as a lawyer is doubtful, but there is no doubt of his tremendous impact as a federal trial court judge. As a former law clerk to Justice and now a leading attorney explained,

> He would preside over cases involving the desegregation of the Texas public school system, statewide reform of the juvenile incarceration system, the community placement of the mentally retarded, the desegregation of federal public housing, the reform of the state prison system, and the education of undocumented alien children. He would order school districts in the Rio Grande Valley with large Spanish-speaking populations to provide bilingual education, and enjoin the Tyler Junior College from refusing to admit students based on the length of their hair.
>
> He would find a right to free speech on the campus and in the hospital and in the street and on the picket line, and he would find a right to free speech in the forest in the particularly controversial case of United States v. Rainbow Family. He would insist that his law clerks read carefully every habeas corpus petition, and he granted more writs in cases alleging inadequate counsel than any judge in recent memory.
>
> We see in these historic opinions, which now consume approximately a thousand pages of the reported cases, the sweeping pronouncements and the prodigious detail of the findings of fact and conclusions of law. (Mithoff 1998, 9–10)

Early in his judicial career, Justice made it clear that his liberal political philosophy would be reflected in his judicial philosophy as well. He held that the Tyler Junior College rule against long hair that prohibited extreme hair styles was unconstitutional. Justice found that the college's contention that longhaired students were prone to violence was spurious (*Lansdale v. Tyler Junior College*, 318 F. Supp. 529 [E.D. Tex. 1970]). That decision was followed by a decision ordering the desegregation of Tyler, Texas, schools (*United States v. Tyler Independent School District*, Civil Action No. 5176

[E.D. Tex. 27 July 1970]). Another desegregation suit became one of the first of many major decisions affecting Texas governmental agencies. It was a suit against several school districts that accused the Texas Education Agency of ignoring federal law by allowing continuing federal aid to dual school systems and permitting boundary changes to maintain those school systems. The inclusion of the Texas Education Agency in the suit gave the case statewide significance (*United States v. Texas*, 321 F. Supp. 1043 [E.D. Tex. 1970]). Ultimately Justice issued comprehensive orders making the Texas Education Agency responsible for desegregation, though his biographer pointed out, "Justice's state-wide desegregation order was an ambitious undertaking with limited payoff" (Kemerer 1991, 142).

That case was not to be the end of Justice's major forays into the Texas policy process, however. A far more successful effort at judicial policymaking occurred in a challenge to the treatment of juvenile offenders (*Morales v. Turman*, 326 F. Supp. 667 [E.D. Tex. 1971]). In a five-week trial, widespread brutality in Texas reform schools was found that was either tolerated or encouraged by officials in the institutions. There were also arbitrary disciplinary procedures, harsh punishments, and inadequate rehabilitation programs. Justice ordered comprehensive relief, including limits on punishments and closings of two schools. An ombudsman was appointed to monitor the court order. Three years later, the Fifth Circuit ordered a new trial, and after further wrangling, a settlement was reached. With the settlement, significant reforms came about. It proved a successful effort on Justice's part in initiating change in juvenile corrections in Texas (Justice 1992, 8–9; Kemerer 1991, 144–181). And Justice seemed to learn from this major institutional lawsuit. Claimed Justice, "*Morales* illustrates an old adage: If you are confronted with a refractory mule, in order to get its attention, you need to hit it—hard—right between the eyes" (Justice 1992, 8–9). What Justice was saying was that to succeed in reforming a recalcitrant institution, it was necessary to shock it with a drastic remedy.

A suit against conditions in state facilities for the mentally retarded led to a lengthy and time-consuming battle in which Justice partially succeeded in achieving his goal of increasing the community placement of the mentally retarded (*Lelsz v. Kavanagh*, 98 F.R.D. 11 [E.D. Tex. 1982]). But the case also showed the difficulty a federal district judge has in managing massive institutional litigation where there is legislative underfunding, state intransigence, and bureaucratic inertia. The lawsuit, though inactive for several years, was initially filed in 1974, and in 1985 Justice was continuing to superintend the litigation that was generating almost daily motions. Finally, in late 1985, Justice transferred the case to another judge. At that point, Justice was simply overwhelmed. He was working seven days a week, and yet he had over 1,100 civil actions on his docket. He was involved in still

another major institutional litigation case involving the Texas prison system and was under criticism from other judges for his case backlog, the unusually large number of law clerks working for him (he had five instead of two), and his oversight of so much institutional litigation (Kemerer 1991, 334–335).

His most famous decision involving institutional reform involved the Texas prison system. The case, *Ruiz v. Estelle* (503 F. Supp. 1265 [S.D. Tex. 1980]), illustrates Justice in his most activist, institutional reform mode. Justice's predecessor had handled prisoner lawsuits in summary fashion and initially that was also Justice's approach. Justice, however, became increasingly suspicious of conditions in the Texas prison system, and he instructed his law clerks to inventory the complaints from prisoners. They fell into four categories: (1) brutality, (2) inadequate medical care, (3) overcrowding, and (4) summary discipline. Justice then asked his law clerks to find a representative plaintiff for each type of claim. He then ordered the cases consolidated for trial and selected a skilled attorney to represent the plaintiffs. Relying on the advice of Judge Frank Johnson, who had been involved in Alabama prison litigation, Justice ordered the Department of Justice to appear as *amicus curiae* with all the discovery powers of parties to the litigation. In this lawsuit, Justice admitted, "I was not a potted plant" (Justice 1990, 2–6). Again, the lawsuit dragged on for years with fierce resistance from the state. But Justice was able to bring about significant changes in the Texas prison system. Malcolm Feeley and Edward Rubin wrote,

> The patriarchal regime, the building tenders, and the primitive living conditions were gone; professional guards, medical personnel, educational programs, and a federally trained superintendent had appeared in their place. Hundreds of millions of dollars, perhaps as much as a billion, had been spent as a result of the court's orders. In the largest, most bitterly contested prison case in American history, and almost certainly one of the largest and most bitterly contested legal cases in the history of Anglo-American law, the court had won a decisive, if potentially unstable victory. (1998, 95)

Yet, Justice was also accused of ignoring reasonable criticisms of his assuming far more expertise in prison administration than he had. For all the desirable consequences of *Ruiz v. Estelle*, Justice also made the task of running Texas prisons much more difficult, resulting in much less control over prison violence and a decline in the morale of prison employees (DiIulio 1990, 69).

Justice was fully cognizant of the criticisms of his judicial activism, noting, for example, that several of his decisions had been made into campaign issues. Justice, however, insisted that he was not a judicial activist in the

sense that he made decisions that overturned precedents or statutes based upon personal constitutional values. He argued that he made little law in his career. As a federal district judge, he pointed out that every legal ruling was reviewable by the United States Court of Appeals for the Fifth Circuit and ultimately by the United States Supreme Court. He did admit that he was a judicial activist in the sense that he had imposed and monitored expansive remedies pursuant to the evidence showing a constitutional injury. Justice stressed that he thought it was the obligation of a district court judge to determine the existence of constitutional injuries and to impose appropriate remedies, and, noted Justice, if the defendant was reasonable and cooperative, courts needed to take few remedial steps. On the other hand, when defendants were "obstinate, obdurate and unregenerate," detailed remedies were needed. In discussing his juvenile incarceration and prison reform cases, Justice claimed he had no apologies. He found a constitutional violation, and he had a duty to remedy that violation. To his critics who have argued that he had no business getting involved in institutional litigation, he responded that that was simply "rhetoric of demagogic politicians" and some judges. Since bureaucratic institutions have entrenched cultures and habits, Justice argued that it was necessary to include effective sanctions along with legal decisions. Responding to a criticism that judges should defer to the wisdom of the state institution, Justice stressed that in some cases high officials in agencies were unaware of conditions within their own agencies, that officials tend to take criticism of their agency personally rather than remedy a problem, and that there is a problem with bureaucratic inertia. Finally, in responding to the criticism that a single judge is ill equipped to make important decisions about state institutions, Justice agreed that it was preferable for institutions to correct their own constitutional violations. He claimed, however, that that assumes the institutions will act in good faith. Unfortunately, that had not been Justice's experience. Thus, Justice believed that the remedial action against institutions about which he had become famous (or in some circles notorious) was nothing more than performing the traditional role of the judge—resolving disputes and remedying wrongs (Justice 1992, 1–13).

Justice wanted to be an appellate judge and in 1979 submitted his name for one of the openings on the Fifth Circuit Court of Appeals. Although it was during the Carter administration, Justice was not selected for that bench or for a seat on the Court of Appeals for the District of Columbia for which he was also considered (Kemerer 1991, 109–111). In 1980 he became chief judge of the Eastern District of Texas, a position he held for ten years. He took senior status on 30 June 1998 at the age of seventy-eight after thirty years on the bench. By that time his impact as a trial court judge had

been enormous, especially in reference to public policy in Texas and as one of the leading practitioners of judicial activism in institutional litigation.

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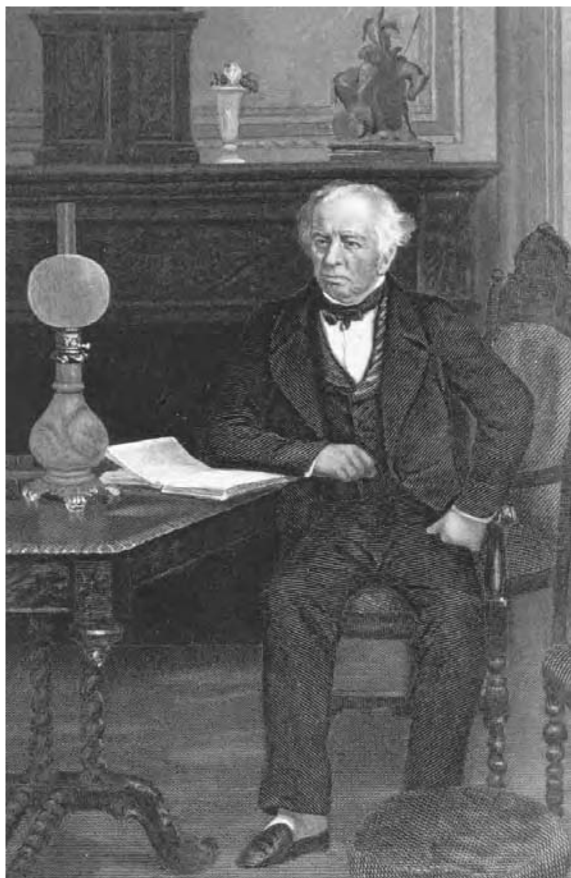
KENT, JAMES

(1763–1847)



James Kent
Library of Congress

James Kent was a pioneering law professor, chief justice of the New York Supreme Court, and subsequently chancellor of the state of New York, but his fame rests primarily upon authorship of his four-volume *Commentaries on American Law,* the first comprehensive treatise on U.S. public and private law. His *Commentaries* earned him the sobriquet "the American Blackstone" (after English legal commentator William Blackstone, who wrote the magisterial *Commentaries on the Laws of England*), and the treatise remained a primary source for legal education and practice throughout the nineteenth century.

The first son of lawyer Moss Kent (ca. 1732–1794) and Anna Rogers Kent (?–1763), James Kent was born at Fredericksburgh in Dutchess County, New York, on 31 July 1763. Educated at home by tutors, he matriculated at Yale College in 1777 and was awarded his bachelor of arts degree in September 1781. Apprenticed to Egbert Benson, a Poughkeepsie lawyer then serving as New York's attorney general, Kent proved to be a diligent student who at intervals was oppressed by the difficulty and tedium of clerkship education. In January 1785 he was admitted as an attorney before the New York Supreme Court; three months later he married Elizabeth

Bailey (1768–1851) of Poughkeepsie and moved to his wife's hometown to begin practice as junior partner to Gilbert Livingston. A strong Federalist, Kent was nevertheless elected to the New York Assembly from Clintonian Dutchess County (1790–1793). While in the city he struggled to maintain his family by his law practice and was only slightly more successful launching a career as the sole law professor at Columbia College, from which he resigned in 1797 because of declining student enrollments. Fortunately his past support for gubernatorial candidate John Jay (1745–1829) in the hotly disputed 1792 election resulted in successive appointments by Governor Jay: as a master in chancery (1796); as recorder of the Court of Common Pleas for the City and County of New York (1797), and in February 1798 as an associate justice of the New York Supreme Court. Liberated from the need to reside in New York City, the Kents decamped for Dutchess County and shortly thereafter settled in the state capital, Albany, where they resided until Kent's retirement in 1823.

Kent's Supreme Court appointment carried varied responsibilities, some dating from the colonial origins of the court. First, and most physically demanding, were the circuit duties inherent in the Supreme Court's position as the superior trial court of general jurisdiction. Kent's earliest circuit assignment included the shires of western New York bordering upon the Great Lakes and including the Finger Lakes. Second, the court sat *en banc* at Albany to determine disputed points of law, with its decisions subject to appellate review by the Court of Errors and Impeachments, a joint tribunal composed of state senators, the five Supreme Court judges, and the chancellor. Third, Kent and his colleagues on the Supreme Court served on the Council of Revision, which was charged with approving or vetoing New York statutes on constitutionality grounds.

Elevated to the chief justiceship in 1804, Kent had already established dominance in the deliberations of the Supreme Court and the Court of Errors and Impeachment. To a large degree this was owing to his thorough and exhaustive scholarship coupled with strong persuasive abilities. In addition, he adopted the practice of writing *per curium* opinions that conveyed his ideas but masked his contribution to their contents. The lack of printed American law reports, coupled with Kent's respect for English law, combined to make him a strong advocate of following English precedent, even principles evolved after American independence. His respect for English common law, viewed by many as contrary to American republicanism, was based upon the view that it was derived from "natural justice" and that it represented the accumulated wisdom and experience of many generations of wise and learned judges. Accordingly, he saw members of the legal profession as the natural guardians of liberty and property as the bedrock of U.S. society. Suspicious of legislative excesses, he favored the accretive and

adaptable process of judicial activity to achieve moderate and flexible growth in the law. Preferring settled and established practices, Kent was uncomfortable with innovations in the law or sudden and extensive reforms. Basic to his legal thought was the principle that to be effective all law must be in accord with the customs and practices of the people.

Viewed by many scholars and most of his contemporaries as a political and economic conservative, Kent was not averse to establishing the legal foundations upon which economic growth could take place. Since his opinions were among the first in America to appear in print, he made a major contribution to American law even before his *Commentaries* began to appear in 1826. He was a strong contender for the incorporation of commercial law into American common law rules, continuing the process instituted by Lord Mansfield in eighteenth-century England. As a judge Kent sought to find negotiability in dealing with credit instruments such as warehouse receipts and bills of lading. In *Cruger v. Armstrong* (1802), he began to lay the foundation for negotiable bills of exchange drawn upon a depositor's bank, known in modern banking as personal checks. In dealing with sales contracts, Kent relied upon *caveat emptor,* "let the buyer beware," to make most sales final, subject to the requirement that the seller did not intentionally conceal defects in the merchandise.

Essentially a free trader, Kent manifested his adherence to Adam Smith's 1776 *Wealth of Nations* in numerous opinions from the bench and in his speeches before the 1821 New York Constitutional Convention. He was against protective tariffs and in the Council of Revision voted to veto statutes that limited foreign corporations from gaining access to New York markets. He strongly favored state support of internal improvement projects, including the construction of the Erie Canal, however. Thus Kent's free trade proclivities were braked by his sense of the need to maintain economic and social balance. He fully agreed with Alexander Hamilton's program to establish the Bank of the United States but earlier had pointed out that the special incorporation of the Bank of New York was needed to prevent the flow of specie to Philadelphia's newly incorporated Bank of North America. He also was apprehensive that industrialization might permit master capitalists to exercise domination over their workers and the propertyless masses.

New York's pioneering enactment of general corporation laws (1811) brought Justice Kent into contact with new and controversial modes of conducting business. He strongly supported the limited partnership as one form of organization, and it was made available by an 1822 statute. Kent departed from his economic idol, Adam Smith, by giving support to most forms of corporate organization. He agreed with Smith, however, in condemning corporations that would restrict competition. Once a corporate

charter had been issued, Kent defended the property interests inherent in the enterprise. In 1807 he voted in the Council of Revision to invalidate a legislative statute that varied the mode of electing Columbia College's trustees, anticipating by twelve years John Marshall's more famous decision in the *Dartmouth College* case.

In the Court of Errors Kent became familiar with the steamboat controversy between inventor Robert Fulton and his associates on one side and competing operators on the other. The judge had also been present at the 1807 trials when Fulton's steamboat, perfected with the sponsorship of Robert R. Livingston, qualified for the legislature's monopoly award. *Livingston v. Van Ingen* presented the Court of Errors with two issues: (1) Did the patenting authority of the federal government preclude such a New York grant, and (2) was the monopoly of navigation contrary to the federal commerce power? Kent joined the majority with an opinion affirming the validity of New York State's grant to Livingston of the exclusive right to navigate steamboats in New York waters. He asserted that the federal Constitution reserved all power to the states except those that the federal Constitution expressly granted to Congress or that were conferred by necessary implication. The state's authority to issue an exclusive privilege, and to restrict navigation on state waters, was concurrent with federal powers to issue patents and regulate interstate commerce. He conceded that when state authority conflicted with federal power, the supremacy clause made federal action paramount. Until Congress acted, however, the states might appropriately legislate. This narrow construction of federal authority over interstate commerce excluded what would later become known as the "dormant commerce clause." By Kent's definition of residual state power, only positive enactments by Congress could limit the states in their exercise of a concurrent power. Thus New York's grant of exclusive rights to navigate was not invalidated, either by the patenting authority of the federal government or by the power to regulate commerce. Furthermore, federal patents merely conferred an ownership right; the exercise of those rights was necessarily subject to state authority.

As a Supreme Court justice James Kent was involved in criminal trials and appeals, including seditious libel prosecutions. *People v. Croswell* (3 Johns. Cas. 360, 1804) was decided by the full court on appeal from the conviction of a Federalist printer who allegedly defamed Pres. Thomas Jefferson. Since the four Supreme Court justices who heard arguments divided equally on the motion for a new trial, the matter seemingly ended with the conviction affirmed. The New York legislature subsequently enacted statutes, however, providing that juries in seditious libel cases were to determine both the law and the facts and that defendants could prove truth as a defense to the charge of seditious libel. Kent's opinion supporting a new

Joseph Force Crater: The Case of the Disappearing Judge (1889–1930?)

One of the most publicized criminal mysteries of the twentieth century remains what happened to Judge Joseph Force Crater. Crater was born in Easton, Pennsylvania, in 1889 and went on to graduate from Lafayette College and Columbia Law School. A lawyer who was fascinated by politics and who had long dreamed of becoming a judge, Crater worked closely with the Democratic machine in New York known as Tammany Hall. He began working for Judge Robert F. Wagner, a New York Supreme Court justice who was elected a U.S. senator in 1927.

Crater went into private practice but was appointed by then New York governor Franklin D. Roosevelt (later U.S. president) to the New York Supreme Court in April 1930. After 6 August, Crater disappeared (he was officially declared dead in 1937), provoking a nationwide manhunt that left his fate or his whereabouts a mystery. Crater appears to have been last seen by witnesses as he left in a cab for the theater just after 9:00 P.M. (Stewart 1992, 27). Earlier in the day, an assistant had helped him stack folders in a number of briefcases and portfolios. Months later, his wife (who would later remarry and divorce) reported finding a number of envelopes in a dresser drawer leaving money, bonds, and insurance policies and listing individuals who owed him money.

Speculation continues as to whether Crater disappeared on purpose or whether he was the victim of foul play, murdered perhaps as part of a blackmail scheme or for fear of what he knew. Although giving the appearance of a faithful family man who was idolized by his wife for his integrity, Crater was called "Goodtime Joe" by many showgirls who knew him (Stewart 1992, 30). He was also known to have been involved in a business deal that appeared to have been crooked at a time when Judge Samuel Seabury was successfully investigating corruption. There was additional evidence that Crater may have purchased his seat on the New York Supreme Court.

Surprisingly, Crater was not the first individual who had served on the New York Supreme Court and disappeared. Something similar had happened when John Lansing, a former delegate to the U.S. constitutional convention who had served not only as a New York justice but also as the state's chancellor, disappeared in December 1829, after leaving a hotel to send a letter (Bradford 1981, 53).

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trial for Harry Croswell has long been held a milestone in the history of a free press. He drew upon legal history to demonstrate that mid-sixteenth-century English cases recognized a jury's right to determine both the law and the facts in a seditious libel case. By 1704 the jury's role had been questioned, however, and it had virtually disappeared in England by 1731. Kent pointed out that these changes were never fully accepted by the legal profession and that in 1792 a parliamentary statute restored the jury's authority. He further argued that when an act innocent in itself becomes criminal by virtue of the accused's state of mind, intent becomes a material fact as well as an element of the crime. Denying the jury's responsibility to determine the criminal intent prevented the defendant from receiving a fair trial.

Similar historical analysis and logic supported Kent's discussion in *People v. Croswell* of the truth as a defense to seditious libel. "As libel is a defamatory publication, made with a malicious intent, the truth or falsehood of the charge may, in many cases, be a very material and pertinent consideration with the jury, . . ." he wrote (3 Johns. Cas., 377). When published materials accurately exposed the venality of a public official, it was poor public policy to punish the informer for seditious libel. Refusing truth as a defense was a product of English Star Chamber proceedings, and post-revolutionary history in the United States demonstrated rejection of this mode of suppressing freedom of the press. Although Kent's *Croswell* opinion represents a major step in securing freedom of the press, Kent subsequently tended toward a more ambiguous position when called to balance protections against libel against the need for an orderly society and dignified administration of government.

In February 1814, after nearly ten years of service as chief justice of the Supreme Court, James Kent was appointed chancellor. The Chancery Court, like the Supreme Court, had colonial antecedents that, for the most part, mirrored the practice and substantive law of the English High Court of Chancery. Kent made it clear that he intended to follow the precedents of the English court. The quality of his chancery decrees resulted in New York's becoming one of the leading sources of equity jurisprudence in the United States, and Kent became a figure of national significance.

In his earliest years at the bar and as law professor at Columbia, Kent had expressed dissatisfaction with the expense and delays in litigation, with particular attention to the cumbersome proceedings in New York's Chancery Court. As chancellor he was in a position to change things, and he proceeded by instituting modest procedural reforms. He was less successful in altering substantive law, since his decrees were subject to appeal to the Court of Errors. His concern for the protection of creditor's rights brought him into frequent conflict with the Court of Errors, which he grew to consider a court of inferior quality. Since the five justices of the Supreme Court

and the senatorial members' numbers vastly outnumbered him, Kent's single vote and persuasive abilities did little to save him from frequent reversals. Kent served as chancellor from 1814 to 1823, when he reached the age of sixty and was forced into mandatory retirement by provisions of the 1821 state constitution. These were difficult years, complicated by the unpopularity of his political and economic views with his fellow members of the Court of Errors.

The most famous litigation during Kent's chancellorship involved the Livingston-Fulton monopoly of steamboat navigation in New York waters. Although some issues had been resolved in *Livingston v. Van Ingen,* there were other questions of law and constitutionality outstanding. The interstate commerce issue was first presented to Chancellor Kent in *Livingston v. Ogden and Gibbons* (1819). Aaron Ogden, a licensee of Livingston, operated a steamship from New York to New Jersey, with a transfer of passengers to Gibbons's vessel that carried them from Staten Island to Paulus Hook (modern Jersey City). Kent noted that the issue was one of territorial jurisdiction and cited the 1808 New York statute that declared the waters of Staten Island Sound to be New York territorial waters. Since Ogden was a Livingston licensee, the chancellor refused to enjoin his navigation. He did issue an injunction against Gibbons, however, who operated without such a license.

Ogden v. Gibbons came on for a hearing in Kent's court in the fall of 1819, and the chancellor refused to dissolve his previously issued injunction against Thomas Gibbons. Since the 1793 Federal Coasting Licensing Act was asserted as a basis upon which the New York steamboat legislation was invalid, Kent took special pains to deny that Congress intended the Licensing Act to supersede state legislation. He also rejected Gibbons's contention that the Ogden license was to navigate to Elizabeth-town Point, but that Gibbons was navigating to Halsted's Point, a harbor across the creek from Ogden's landing. Both Kent and the Court of Errors, which affirmed his decree (1820), relied heavily upon the constructions and constitutional issues resolved in *Livingston v. Van Ingen.*

After Kent was retired from the chancellorship, the Supreme Court of the United States considered *Gibbons v. Ogden* (1824), reviewed on a writ of error issued to the New York Court of Errors. Seizing upon the 1793 Federal Coasting Licensing Act, Chief Justice John Marshall challenged Kent's view that it did not supersede state legislation. According to Marshall, the Licensing Act constituted congressional action that manifested an intention to regulate commerce. Therefore New York state laws that interfered with Gibbons's right to navigate under the 1793 act were unconstitutional. Marshall inferred but did not expressly state (as did Justice William Johnson), however, that the federal commerce power was exclusive. Instead he

recognized that state authority to legislate under constitutional state powers might come into conflict with federal regulation under the commerce clause. In those cases he implied that the United States Supreme Court would determine whether the federal regulation was entitled to supremacy. Despite Marshall's sweeping interpretation of federal authority under the commerce clause, the issues presented and his interpretation of the Licensing Act precluded him from dealing with Kent's view of the "dormant commerce clause" and reserved state powers. Nor did he comment upon the related assertion that power over interstate commercial activity was concurrent. As the powers of the federal government were contracted by the Taney Court, Kent may well have been discomforted by the Court's expansion of Kent's position that in the absence of congressional action, states might legislate in the area of interstate commerce.

Kent's retirement at the age of sixty in 1823 proved to be an unanticipated blessing—it provided him twenty-three years of publishing before he perished. His *Commentaries on American Law* proved to be as successful financially as it was prestigious professionally. A friend estimated that sales netted the author no less than $5,000 per annum, more than he had earned in any of his judicial roles. Royalties permitted him to buy an attractive home in New York City and enjoy an active life of entertaining and travel. He was the first president of the New York Law Institute, established in 1826. He received honorary doctorates of law from the University of Pennsylvania, Dartmouth College, Harvard University, and Columbia University. Shortly after retirement he opened a New York City office as chambers counsel and enjoyed a steady income as a lawyer's lawyer. Traveling widely throughout the United States, he visited with his friends and correspondents, including Joseph Story and John Marshall. Having started his career with an ill-starred attempt at law teaching, he spent his twilight years nationally recognized for his scholarship and comprehensive knowledge of the law.

Herbert A. Johnson

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KOZINSKI, ALEX

(1950–)

Judge Alex Kozinski has played a vital role as a defender of individual freedoms for more than two decades. While serving on the federal bench, Judge Kozinski has demonstrated a repeated concern for protecting all types of personal liberties. He has written many landmark decisions ranging from abortion cases to the right of publicity. Yet his most profound work can be found in his First Amendment jurisprudence. Specifically, Kozinski finds the subordinate position that commercial speech currently holds under the banner of the First Amendment appalling and has set out to rectify this situation through his academic and judicial writings. Much of Judge Kozinski's drive to defend individual freedoms comes from his experience as a youth growing up in a war-torn Europe. Indeed, his is truly an American success story, as he rose from humble beginnings to become one of the nation's most prominent federal judges.

Alex Kozinski
Courtesy of Alex Kozinski

Born in Bucharist, Romania, in 1950, Kozinski fled with his parents Moses and Sabine from communist repression in his homeland to Vienna when he was eleven years old. His family would eventually come to the United States and settle in Hollywood, California, where his father would

run a grocery store. Early on in life Kozinski showed little promise in school, where he did only enough to remain unnoticed. Much of this may have been part of his mother's insistence that he should never stand out. As a Holocaust survivor, she was deeply affected by the horrible events she saw and made her son aware that "the ones on the end are the ones who get shot" (Richtel 2001, 8). Kozinski became a naturalized citizen of the United States on 20 December 1968.

It was not until Kozinski went to college that he began to realize his potential. While at the University of California at Los Angeles, Kozinski excelled, graduating *magna cum laude* in 1972. He continued on at its law school and proved to have an equally outstanding career. There he found time to become the managing editor of the *UCLA Law Review* while showing the remarkable ability to graduate first in his class in 1975. After a distinguished academic career, he served as clerk to Ninth Circuit judge (now Supreme Court justice) Anthony M. Kennedy (1975–1976). The following year Kozinski moved on to the United States Supreme Court, where he clerked for Chief Justice Warren E. Burger (1976–1977). Kozinski was initially employed as a private attorney for five years, before joining President Reagan's legal team, first as deputy legal counsel and then as assistant counsel. In 1982, Reagan appointed Kozinski to the position of chief judge of the newly inaugurated United States Court of Claims in Washington, D.C. In little over three years, with few resources and much efficiency, Kozinski reduced its inherited backlog, carried out all administrative functions as his position as chief justice required, and built a solid reputation as a fair and thoughtful judge. This impressive résumé gave Reagan reason to elevate Kozinski to the United States Court of Appeals for the Ninth Circuit in 1985. At age thirty-five, Kozinski became the youngest judge to sit on a federal bench since William Howard Taft in 1892.

As a newly appointed member of the Ninth Circuit, Judge Kozinski quickly established his conservative voting record, but he has tempered this with a libertarian bent that produces many of his most well read opinions. Kozinski has become one of the great defenders of the First Amendment in the nation. No matter the content of the speech or the context of the debate, Judge Kozinski has never backed down in his fight to protect all forms of communication. For example, in one of the most highly publicized cases of the past decade, Judge Kozinski overturned a controversial civil lawsuit in *Planned Parenthood v. American Coalition of Life Activists* (2000), an opinion that is better known as the "Nuremberg Files" case.

The "Nuremberg Files" case centered on a web site run by pro-life activists. The site contained a listing of names and other personal information about doctors who performed abortions. Three of the doctors whose names appeared on the "Nuremberg" site were murdered. Planned Parent-

hood filed a lawsuit under the Racketeer Influenced Corrupt Organizations Act (RICO), maintaining that the site was the center of a criminal conspiracy to commit murder. A jury decided to reward damages and terminate the site. On appeal, Judge Kozinski determined that the Constitution afforded the web site First Amendment protections. He likened the case to the 1982 Supreme Court opinion, *NAACP v. Claiborne Co.,* in which the Court ruled that statements of violence made by the National Association for the Advancement of Colored People (NAACP) were protected by the First Amendment. Kozinski, drawing on the heart of the *NAACP* opinion, determined that unless the web site "'authorized, ratified, or directly threatened' violence," then none of its statements could be held accountable for the murders (*Planned Parenthood* 2000, 1014). Harking back to previous examples of political protest, he stated:

> Extreme rhetoric and violent action have marked many political movements in American history. Patriots intimidated loyalists in both word and deed as they gathered support for American independence. John Brown and other abolitionists, convinced that God was on their side, committed murder in pursuit of their cause. In more modern times, the labor, anti-war, animal rights and environmental movements all have had their violent fringes. As a result, much of what was said even by nonviolent participants in these movements acquired a tinge of menace. (1014)

Judge Kozinski's statement highlighted the lack of ideological deference played to any view. The First Amendment, according to Kozinski, should make no distinction concerning the content of one's speech. Indeed, this view has continually run through all of Kozinski's opinions and has generally shaped his understanding of free speech rights.

In the area of commercial speech, or speech tied to advertising, Kozinski hopes to elevate it into the realm of First Amendment protection. Currently, the Supreme Court has stated in *Central Hudson Gas & Electric Corp. v. Public Services Com.* (1980) that commercial speech does not share the same rights as other forms of expression. Judge Kozinski finds this conclusion difficult to accept, and he has set out to call into question the present state of the doctrine. Kozinski has continually stated his discomfort in his judicial writings; however, his greatest impact has largely taken place in academic circles. His first defense of commercial speech, "Who's Afraid of Commercial Speech?" published in the 1990 *Virginia Law Review,* has been cited over 100 times in various law reviews. In the article, Kozinski stated that "the Supreme Court plucked the commercial speech doctrine out of thin air" (Kozinski 1990, 627). The case was *Valentine v. Chrestensen*

(1942), in which the Supreme Court failed to cite any of its previous opinions in ruling that the First Amendment does not protect commercial speech. Kozinski went on to assert that many courts had trouble applying this ruling. Indeed, numerous cases began to question *Valentine*, which meant that a "new branch" of law soon emerged (630). The Supreme Court tried to rectify this problem, but as Judge Kozinski argues, *Valentine's* progeny *Central Hudson*, though bestowing some commercial speech protections, actually confused the issue even more. According to Kozinski, the only viable solution to the current problem would be to give equal protection to all speech.

Judge Kozinski continues to write in defense of commercial speech, and in fact his writings have had a profound effect not only on academic circles but also on the courts. The Second, Fourth, Ninth, and Tenth Circuits have all cited his law review articles; however, the greatest sign of Kozinski's impact has been seen in select Supreme Court cases. For example, in *44 Liquormart, Inc. v. Rhode Island* (1996) the Court cited Kozinski's articles in its majority and concurring opinions. Just being cited should serve well to highlight the importance of Kozinski's research; however, the extension of his reasoning into the Court's opinion displays a mild retreat from *Central Hudson*. Looking at the concurring opinion, Justice Clarence Thomas drew on Kozinski's negative view of the current commercial speech doctrine. Thomas openly questioned the "historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech" that is at the heart of *Central Hudson* (*44 Liquormart* 1996, 522–523). Moreover, Justice Thomas has argued this point in two subsequent cases: once in *Greater New Orleans Broadcasting Ass., Inc. v. U.S.* (1999), where he restated his skepticism of *Central Hudson*, and again in *Lorillard Tobacco Company v. Thomas Reilly* (2001), where he again rather forcefully asserted, "I doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech" (*Lorillard* 2001, 572). Although it is tough to gauge, Kozinski has taken note of the impact of his writings: "I do see people and different courts citing the articles on commercial speech and there does appear to be some movement toward changing the law in this area. However, I think that it would be a little optimistic to say that the law will soon change, though it is a hopeful sign that courts are beginning to notice some of the problems with the commercial speech doctrine" (Hudson, "Federal Appellate Judge").

Judge Kozinski's success in First Amendment jurisprudence has not prevented him from building a distinguished record in other areas. For example, he has led the charge in opposing a policy that would allow for the unlimited monitoring of 30,000 federal court system employees over their

e-mail correspondence and other web-based activity. Kozinski's crusade led the members of the Ninth Circuit to order the shutdown of internal monitoring software until the Judicial Conference (a body of twenty-seven judges that decides policy for the federal court system) would finally resolve the matter. During this period, Judge Kozinski forced the issue with a highly visible campaign that included extensive coverage by major newspapers, an op-ed article in the *Wall Street Journal*, and a guest appearance on CNN's *Greenfield at Large*. In the op-ed article, addressed to fellow federal judges, Kozinski warned that "[t]he policy . . . would radically transform how the federal courts operate" ("Privacy on Trial"). In short, the professional functions of judging are at risk: "Like most judges, I had assumed that keeping case deliberations confidential was a bedrock principle of our judicial system. But under the proposed policy, every federal judge will have to agree that court communications can be monitored and recorded if some court administrator thinks he has a good enough reason for doing so" ("Privacy on Trial"). The Judicial Conference voted in late September 2001 to reinstate the policy but with restrictions on the degree of monitoring permitted. Thanks to Judge Kozinski's efforts, the ruling will likely have an immediate impact on all U.S. employees who are subject to workplace computer monitoring. If judges were leery of unrestricted monitoring for federal court employees and themselves, it would seem difficult for them to rule against the curtailment of private workplace surveillance of the Internet.

Judge Kozinski's libertarian struggle is not isolated to mere judicial politicking. The right of publicity has kept Kozinski active in his pursuit to protect people from First Amendment infringements. This right is directly rooted in tort law where an individual is protected from the commercialization of his or her name, image, or likeness without his or her permission. It is basically a form of intellectual property. The benefit of being on the Ninth Circuit is that one hears cases from the western states, in particularly Hollywood, California, where the television and movie industries reside. This privilege has given Judge Kozinski the opportunity to voice his opinion on some of the most interesting cases in the United States. In one such case, *Vanna White v. Samsung Electronics* (1993), the Ninth Circuit rejected a motion for rehearing an opinion that centered around game show hostess Vanna White's successful challenge of a commercial that used a robot wearing a dress and a wig while posing next to an imitation Wheel of Fortune wheel. In dissent, Judge Kozinski attacked the expanded view of intellectual property rights, stating that the decision gave "White an exclusive right not in what she looks like or who she is, but in what she does for a living" (*Vanna White* 1993, 1515). Such an opinion, Kozinski reasoned, prevents the public from benefiting from the ideas of others. He went on to

state that this would not only curtail free speech but also hurt society as a whole: “Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it’s supposed to nurture” (1513). The above infringement violates free speech because it narrows the use of ideas. Such a proposition, according to Kozinski, is “unparalleled in First Amendment law” (1519).

Judge Kozinski has had a remarkable career, and he has played a key role in forming a greater understanding of First Amendment jurisprudence. Although I have emphasized his accomplishments in this field, he should not be pigeonholed into one particular area of the law. Perhaps Kozinski’s greatest legacy will be in First Amendment case law, but such an assertion is difficult to make of a career that is only now coming into focus. At this time, Kozinski has been seen as something of a maverick in judicial circles, but as the citation of his works suggests, he is also well respected by his peers. Only time will tell if an elevation to the Supreme Court will be in his future. Even without such an honor, Alex Kozinski will remain a judge who is a loyal defender of individual freedoms for all Americans.

Mitch Sollenberger

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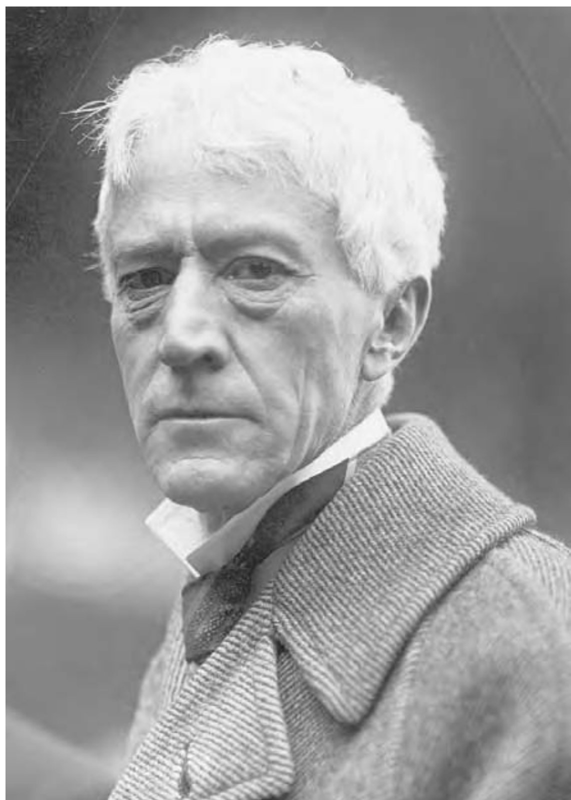
LANDIS, KENESAW MOUNTAIN

(1866–1944)



Kenesaw Mountain Landis
Underwood & Underwood/Corbis

Although Kenesaw Mountain Landis is best known as the first commissioner of major league baseball, he also garnered nationwide attention as a federal jurist. Serving as U.S. district judge for the Northern District of Illinois from 1905 to 1922, Landis presided over high-profile cases involving parties such as Standard Oil of Indiana, American labor leader William D. Haywood, and socialist leader Victor Berger. The strict discipline Landis exhibited from the bench convinced baseball executives to name him as professional baseball's first commissioner in 1921. Landis did not disappoint; his actions as commissioner did much to restore public confidence in the game that had been mired in the controversy surrounding the 1920 "Black Sox" scandal.

Landis was born on 20 November 1866 in Millville, Ohio, to Dr. Abraham Hoch Landis and Mary Kumler Landis. He was the couple's sixth child and their fourth son. Dr. Landis had served as a surgeon in the Union Army during the Civil War. During the battle of Kennesaw Mountain in northwest Georgia, a portion of Sherman's larger campaign known as the March to the Sea, Dr. Landis established a surgical headquarters in the shadow of the mountain. While he was tending to the medical needs of a Union infantryman, a Confederate cannonball ricocheted off a tree and

struck Landis in the leg. A fellow surgeon promptly amputated the shattered limb.

After the birth of the future judge, it took Dr. and Mrs. Landis some time to decide on his name. In fact, the delay in providing a name prompted both family and community members to suggest a deluge of different names. Mary Landis did not like the name Abraham, so when Dr. Landis suggested calling their son "Kenesaw," the name and alternate spelling stuck. Clearly, the site of the doctor's personal tragedy remained in his thoughts.

Early influences on young Landis were his mother's religious zeal (which he did not follow) and his father's interest in journalism and politics. Mary Landis's ancestors had held positions as church bishops and a college president. Her father was among the first three United Brethren missionaries to visit Africa. The combinative influences of evangelism, journalism, and staunch Republicanism (Dr. Landis had converted from the Whig party to become a lifelong Republican) provided physically small Kenesaw the tools he would later exhibit to cower most who appeared before his bench.

Kenesaw was not the only child of Dr. and Mrs. Landis to gain notoriety. Son Walter became a famous newspaper writer and was later named as the first postmaster of Puerto Rico by Pres. Theodore Roosevelt. John Landis followed his father's footsteps into the medical profession. As health commissioner of Cincinnati, Ohio, he successfully transformed many of the unsanitary conditions existing at that time in that city. Frederick Landis and Charles Landis both served Indiana as U.S. congressmen and were serving in that capacity during the years of the Theodore Roosevelt presidency when Kenesaw was appointed to the federal bench.

When the Landis family moved to Logansport, Indiana, Kenesaw helped meet family expenses by delivering newspapers. He also took an early interest in baseball. Gifted with seemingly limitless energy and considerable agility, Landis played many sports, but baseball and bicycle racing were his favorites. During the early 1880s, the five-foot six-inch Landis played first base for a semipro baseball team in Goosetown. He became the team's manager at the age of seventeen. Kenesaw was offered a professional contract, but he turned it down, stating that he simply preferred to play for sport and the enjoyment of the game.

American history was Landis's favorite academic subject, particularly anything concerning Abraham Lincoln. His penmanship was far from perfect, however, and algebra proved to be the cause of Landis's dropping out of school at age fifteen. His father would not learn of this until six months later.

Disappointed with his single-dollar-per-week wage for delivering newspapers, Landis began working for three dollars per week as a junior clerk in Logansport's principal grocery store. He soon left the store to work as an errand boy in the dispatcher's office at the Vandalia Railroad. Denied an op-

portunity to become a brakeman for the rail company, Landis went to work for his brother Charles at the *Logansport Journal*. His duties included covering proceedings at the Cass County Courthouse. There, Landis became interested in the new profession of shorthand court reporting. After completing a training class, Kenesaw became the circuit court reporter in Lake County, Indiana. He held this position from 1883 to 1886.

In 1886, the young man dubbed "Squire" by his siblings (due to his imperious air) became involved in Republican politics. His friend Charles F. Griffin won the post of Indiana secretary of state. Landis became Griffin's aide. While serving in that capacity, the future judge became a member of the Indiana bar. Two years later, he left the secretary of state's office to read law with the Marion, Indiana, law firm of Custer and Stevenson.

A lack of clients convinced Landis that he needed a formal legal education. He attended the Y.M.C.A. Law School in Cincinnati for one year, and then he transferred to the Union College of Law in Chicago (now a part of Northwestern University). He graduated, was admitted to the Illinois bar, and hung out his shingle in Chicago all in 1891.

In 1893 Dr. Abraham Landis's former commanding officer, Walter Q. Gresham, became Pres. Grover Cleveland's secretary of state. Gresham, in turn, named the twenty-six-year-old Kenesaw as his personal secretary. During his two years in Washington, Secretary Gresham became ill, and Landis began attending cabinet meetings in his place. So impressed with Landis was President Cleveland that he offered Gresham's aide the post of minister to Venezuela. That position did not appeal to Landis, and he declined. He left Washington upon Gresham's death.

The twenty-eight-year-old Landis returned to Chicago to practice law in 1895. That was also the year he married Winifred Reed. The couple would have three children: a son, Walter Reed (named in honor of Walter Gresham); a daughter, Susanne; and a third child, Winnifred, who died soon after birth in 1901.

Kenesaw formed a partnership with James Uhl (former ambassador to Germany) and Frank James (former assistant postmaster general). He also became a regular fixture at games of the Chicago Cubs. Landis's favorite Cub was pitcher Mordecai Peter Centennial "Three Finger" Brown. In fact, Landis once asked an opposing lawyer, "Can't we get a postponement of the case until tomorrow? Brownie is pitching against Matty [Christy Mathewson] and I just can't miss that" (Watson 2000, 120).

Although he had been employed by a Democratic administration, Landis became heavily involved in Illinois Republican politics. In 1904, he served as campaign manager for gubernatorial candidate Frank Lowden. Lowden did not win that election (though he would later serve two terms as governor of Illinois), but Landis's actions and progressive attitude attracted the

attention of Pres. Theodore Roosevelt. So, in 1905 when a jurist was needed for the newly created seat in the United States District Court for the Northern District of Illinois (which included Chicago and surrounding areas), Roosevelt appointed Landis.

Landis's antics on the bench angered many, but no one could argue that his courtroom was boring. He was known to squinch his nose, as if smelling an odor, if he believed that an attorney's line of questioning was suspicious. He told one witness, "Now, let's stop fooling around and tell exactly what did happen, without reciting your life history" (Watson 2000, 121). Once, when an aged defendant complained that he would never live long enough to complete a five-year sentence, Landis scowled at him and said, "Well, you can try, can't you?" (121).

Landis gained fame from the 1907 case involving the indictment of John D. Rockefeller's Standard Oil on 1,462 counts of accepting rebates from the Chicago and Alton Railroad. The six-week case was highlighted by Landis's order compelling Rockefeller to come to Chicago and testify in the matter. Once Rockefeller was on the witness stand, the judge did not hesitate to prod him when the latter seemed hesitant to answer certain questions. Not only did Rockefeller lose the case, but Landis imposed a then-unprecedented $29.24 million fine against Standard Oil. Upon learning of the verdict, Rockefeller stated, "Judge Landis will be dead a long time before this fine is paid" (Watson 2000, 121). He was right, for the verdict was later overturned on appeal.

The "Ryan Baby" case also cast Landis into the media spotlight. Mrs. Dolly Matters, the widow of a prominent Chicago banker, brought the baby home to Chicago from a visit to Canada. She claimed the child was the banker's posthumous heir. A shop girl from Ontario, Margaret Ryan, claimed, however, that she was actually the child's mother. She also claimed that hospital workers in Canada told her that her child had died at birth. Since no blood or genetic tests existed at that time, Landis had only the witnesses' testimony on which to base his decision. He awarded the child to Ryan. Although the United States Supreme Court reversed the judge's decision, he was later vindicated by a Canadian court decision awarding the child to Miss Ryan.

As the United States entered World War I in 1917, Landis's son Reed enlisted in the military and later earned his pilot's wings. Reed served with Britain's Twenty-Fifth Zero Squadron in France, and he took part in several battles. Reed's air kills once ranked him third behind Eddie Rickenbacker and Elliot Spring among American flying aces. Proud Kenesaw even considered enlisting, but Secretary of War Newton Baker asked him to serve stateside as a civilian.

The judge's sense of patriotism was exhibited in 1917 when he heard his

first major sedition case involving members of the International Workers of the World (IWW). William "Big Bill" Haywood, then the IWW secretary, and 103 other members were charged with obstructing the nation's war program. Haywood and 93 other defendants were found guilty. Landis promptly handed down sentences totaling more than 807 years and fines in excess of $2.3 million. When the verdict was sustained on appeal, Haywood fled to Russia.

Landis also presided over the trial of Victor Berger, who was an editor and Socialist congressman from Milwaukee, and six other Socialist leaders who were also charged with impeding the U.S. war effort. Judge Landis loudly condemned and sentenced each of the defendants to twenty years in Leavenworth. On appeal, however, the defendants were granted bail in exchange for their future silence on matters involving the government and the war effort. Berger and his associates agreed.

War veterans and civilians affected by war who came before Judge Landis often gained his sympathy. Fred Still, who had been a worker on a freighter torpedoed by a German submarine, wrote a threatening letter to a government official demanding twenty-four dollars in back pay. When Still appeared before Landis, the judge learned that exposure from the sinking had caused Still to contract tuberculosis. The indictment was immediately quashed, and Kenesaw had the defendant sent to the hospital. Further, he personally saw to it that Still received his back pay.

Judge Landis's temper and reputation as a maverick have been well documented. He once imposed the maximum sentence allowed by law on a wealthy cattleman who was convicted of selling diseased animals. Pres. Woodrow Wilson, thinking the punishment too severe, commuted the sentence a few months later. The day after Landis learned of the president's actions, six men were found guilty in Landis's court of stealing sugar from freight cars. In setting them free, the judge proclaimed, "Stealing sugar is no more deserving of a prison sentence than selling diseased cattle" (Spink 1947, 25). Outraged by Kenesaw's act, President Wilson briefly considered asking for his resignation.

Judge Kenesaw Landis was most criticized, however, for the leniency he showed to an eighteen-year-old messenger who, while he was employed at a Chicago brokerage house, had stolen $750,000 worth of Liberty bonds. The bonds were later recovered, and Landis dismissed the charges. Stirring a great deal of public outrage, he stated, "I am going to set this boy free. I wish I had the power to jail the men who sent him out with $750,000 in bonds" (Spink 1947, 26).

Professional baseball first appeared in Landis's court in 1915, when the Federal Baseball League brought an antitrust suit against the American and National Leagues. The Federal League was seeking recognition as baseball's

Samuel A. Weiss (1902–1977)

Kenesaw Mountain Landis was not the only individual to establish himself in careers both as a judge and in professional sports. Like Landis, Samuel A. Weiss must surely rank among America's most colorful judges. Born in 1902 in Krotowoez, Poland, Weiss was brought to Glassport, Pennsylvania, as an infant. After graduating from Glassport High School, the stocky five-foot four-inch Weiss attended the University of Pittsburgh. Rejected by the football team there, he subsequently served as captain of the football team at Duquesne University during his years in law school.

Weiss set up a local law office and won nine of his first ten cases, including a homicide defense case that was precipitated when he wrote a cease and desist order for a friend that resulted in a confrontation in which his friend defended himself (Kelly 1947, 20–21). The judge noted that "it looks to me like you caused and won your first murder case" (21).

Weiss was elected to two terms in the lower house of the Pennsylvania legislature, where he supported Democratic and Progressive causes, including generous workmen's compensation legislation, but was unsuccessful in getting reform of the fee system used by justices of the peace. Weiss ran for the U.S. House of Representatives in 1940 and served there until 1945. During those years, Weiss also served as a referee for the National Professional Football League and was known as "the Sports Congressman of the nation" (Kelly 1947, 53). Weiss worked vigorously to keep professional sports alive during World War II, and he lobbied for the "Ernie Pyle" bill that provided higher pay to members of the armed forces who were serving in combat zones. He later supported the GI Bill of Rights.

Because he was Jewish, Weiss was sometimes the object of invective, especially

(continues)

third professional league. Landis heard the case quickly, but then he took the matter under advisement for several months. The financially troubled Federal League was eventually forced to sell out. Not only were the major league owners ecstatic over the result, but many Americans were also of the opinion that baseball would have been thrown into chaos had Landis ruled that organized baseball was a trust that needed to be broken up.

The baseball owners' gratitude toward Judge Landis was not forgotten when, in 1920, the American public became aware of the 1919 World Series fix. Public confidence in organized baseball was badly shaken, and the owners realized that powerful leadership would be needed in order to restore Americans' faith in the game. Landis was a logical choice. On 12 November 1920, a representative group of baseball owners visited the judge's Chicago courtroom. Hearing the owners' voices at the rear of the courtroom, the judge's voice boomed, "There'll be less noise in this courtroom or

(continued)

from Rep. John E. Rankin of Mississippi. In answering false charges that Rankin brought to the House floor, Weiss uttered words that showed his own loyalty to the nation and his understanding of its ideals.

> I am an immigrant lad, but I love my country just as dearly as does the gentleman from Mississippi. I am a Jew and proud of my heritage, but nothing transcends my love for my country, the country that guarantees to all of us freedom of religion, to worship as we desire to meet the needs of our souls, freedom of the press, and freedom of speech. No individual or group in this country, including the gentleman from Mississippi, has any priorities on America or its priceless freedom. All of us trace our heritage to some foreign source, including the gentleman from Mississippi. (Kelly 1947, 84)

During his third term in Congress, Weiss was elected to the Court of Common Pleas in Pittsburgh, Pennsylvania, where he presided from 1946 to 1967. As a judge he also continued his officiating on the football field. In 1946, at a home-field game at Duquesne, Weiss refused to give in to demands from the visiting Tennessee football team that African American player Charles Cooper be benched. Deciding, "No Cooper, no game," Weiss announced that ticket moneys would instead be refunded to the 3,000 individuals in attendance. Weiss earned a reputation, in the legislature, on the football field, and in the courtroom for knowing when to blow his whistle (Kelly 1947, 140).

Weiss retired in 1967 and served in 1968 as president of the Pennsylvania State Judicial Administration. He died in 1977.

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I will order it cleared" (Watson 2000, 121). After the docket was completed, Landis invited the group into his chambers, where he was offered the job as professional baseball's first commissioner. Kenesaw voiced his flattery, but he opined that he did not want to leave the important matters before him as a jurist. The owners told him that he could retain both positions, earning $7,500 as judge and $42,500 as commissioner. Landis agreed and served in both capacities until he resigned from the bench in 1922.

Although all eight indicted members of the "Black Sox" were acquitted, Commissioner Landis banished all eight men from professional baseball for life, stating, "Regardless of the verdict of juries, baseball is entirely competent to protect itself against crooks, both inside and outside the game" (Watson 2000, 121). Over the next four years, Landis blacklisted seven other players and suspended thirty-eight more, either for throwing games or, more often, for failing to disclose that they had been approached by

gamblers. When Bing Crosby attempted to buy an interest in the Pittsburgh Pirates, Landis refused because Crosby owned racehorses.

Landis had demanded absolute authority, and the owners acquiesced. The commissioner's power was demonstrated when he ordered Babe Ruth not to play in lucrative postseason barnstorming games. Ruth refused a summons to Landis's office and proceeded to play in the games. The commissioner promptly fined Ruth an amount equal to his entire 1921 World Series bonus and suspended him for the first six weeks of the 1922 season. During spring training, Ruth asked Landis for a pardon, but he received a two-hour lecture instead.

Along with Ruth, Commissioner Landis restored the public's confidence in the game. Hard though he was, many players, owners, and fans greatly respected his love for and protection of the game. Landis clearly opposed most changes proposed to increase attendance, however. He opposed integration, night baseball, and the farm system.

Landis remained baseball's commissioner for twenty-three years, and he did not miss a single World Series until 1944, when he was admitted to the hospital after complaining of shortness of breath. At seventy-eight, he had battled respiratory problems and prostate cancer for many years. In November 1944, the owners renewed Landis's contract as commissioner, but he died a week later. Two weeks after his death, he was inducted into the Baseball Hall of Fame. His Cooperstown plaque reads: "His integrity and leadership established baseball in the respect, esteem and affection of the American people."

Christopher L. Whaley

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LEVENTHAL, HAROLD

(1915–1979)

Harold Leventhal
Courtesy of Art & Visual Materials, Special Collections Department, Harvard Law School Library

The expertise in regulatory issues that Harold Leventhal developed during his tenure in the executive branch served him well as a judge on the Court of Appeals for the District of Columbia Circuit, a court whose docket features a heavy concentration of cases presenting questions of that nature. Political scientist Jeffrey Brandon Morris characterized Judge Leventhal as a "hard-nosed [jurist] . . . in whom practicality was joined with compassion, [who] . . . brought to the court a quick-witted, superbly analytical and cultivated mind and a ready pen" (2001, 198). Harold Leventhal was born to Broadway theater producer Jules Joseph Leventhal and the former Sadie Wolcher on 5 January 1915 in New York City. He earned the A.B. degree from Columbia University (Green prize) in 1934, graduating Phi Beta Kappa. In 1936 Leventhal graduated first in his class from Columbia School of Law, earning the LL.B. degree (Toppan and Odronaux prizes). He was also editor in chief of the *Columbia Law Review.* Leventhal was admitted to the New York State bar in 1936 and the District of Columbia bar in 1946.

Prior to his appointment to the federal bench in 1965, Harold Leventhal's diverse career spanned both government service and private practice. He served as a law clerk for United States Supreme Court justices Harlan

Fiske Stone (1937–1938) and Stanley Reed (1938). Upon completion of these clerkships, Leventhal took a position as an attorney in the Office of the Solicitor General of the United States, 1937–1938 and 1938–1939. Harold Leventhal then moved to the U.S. Department of the Interior, becoming chief of litigation in the Bituminous Coal Division from 1939 to 1940. He served as assistant general counsel in the U.S. Office of Price Administration from 1940 to 1943, resuming this position briefly in 1946. Leventhal also served his country as a U.S. Coast Guard Reserve lieutenant commander from 1943 to 1946. Near the end of World War II, Leventhal joined the staff of Justice Robert Jackson during the Nuremberg Trial proceedings from 1945 to 1946.

Harold Leventhal subsequently left full-time government service, practicing law in the firm Ginsburg and Leventhal from 1946 to 1965. During that period, however, he continued government service in a limited capacity. In 1948, Leventhal served as executive officer of the Hoover Commission Task Force on Independent Regulatory Commissions. He briefly returned to the U.S. Office of Price Administration from 1951 to 1952, serving as general counsel. Additionally, Leventhal served as chief counsel to the Democratic National Committee from 1952 to 1965.

Leventhal also lectured at several prestigious institutions. He was visiting lecturer on regulated industries at Yale Law School (1957–1962); Regents lecturer at the University of California, Los Angeles (1974); Mooers lecturer at The American University (1975); and Sulzbacher lecturer at Columbia University (1976). On 1 March 1965, Pres. Lyndon B. Johnson appointed Harold Leventhal to the Court of Appeals for the District of Columbia Circuit, filling the seat vacated by Wilbur K. Miller.

Judge Harold Leventhal died unexpectedly after suffering a heart attack on 20 November 1979, following a tennis match with one of his law clerks in Washington, D.C. By special dispensation from Pres. Jimmy Carter, Harold Leventhal was interred at Arlington National Cemetery.

Judge Leventhal was considered a member of the liberal bloc of the District of Columbia Circuit. He was neither an unabashed judicial activist nor an unyielding judicial restraintist. Leventhal acknowledged inherent limitations of judicial intervention, endorsing prudent judicial activism in appropriate circumstances. According to Judge Leventhal,

> The courts should not shrink from entering political thickets when necessary to correct injustice, and they will not. But they should not plunge ahead blindly. The biblical ram that got its horns caught in the thicket was sacrificed. That was a noble step forward for mankind, as the Old Testament taught the use of animals to replace human sacrifice. But today's thickets re-

quire no judicial sacrifice. How should courts proceed in political thickets? Carefully; pragmatically. (1977, 387)

He is uniformly remembered as a brilliant, incisive, articulate, inquisitive, compassionate jurist and a warm, generous mentor. Judge Leventhal wrote opinions in a wide variety of doctrinal areas including criminal procedure, immigration, libel, privacy, civil rights, free speech, and trusts and estates.

Judge Harold Leventhal's legacy remains most pronounced in the area of administrative law. One of his most notable opinions focused on the non-delegation doctrine. At issue in *Amalgamated Meat Cutters v. Connally* (337 F. Supp. 737 [D.D.C. 1971]) was whether Pres. Richard Nixon's 1971 order imposing a ninety-day price and wage freeze pursuant to the Economic Stabilization Act of 1970 constituted an impermissible delegation of legislative authority to the executive branch.

Writing for a three-judge panel, Leventhal struck a balance between the union's argument that the delegation of authority was substantial and unrestrained and the government's position that the scope of delegated authority was far greater than that exercised by the president. The court held that the president's action fell squarely within the broad authority expressly delegated to the executive branch by Congress. Delegation of authority itself was not necessarily problematic; the critical factor, the court reasoned, was accountability in exercising delegated authority. Judge Leventhal concluded that "a standard of fairness and equity" was implicit in both the statute and its legislative history (337 F. Supp. 757). Therefore, Congress had established confines, albeit generous ones, for appropriate executive action. The exercise of delegated authority, then, was not limitless and devoid of accountability. Moreover, judicial review of such agency action provided an additional safeguard against potential abuse of delegated authority.

Perhaps Leventhal's most significant contributions to administrative law were articulated in *Greater Boston Television Corp. v. Federal Communications Commission* (444 F.2d 841 [D.C. Cir. 1970]). The question presented in this case focused on the criteria and rules applied by the Federal Communications Commission (FCC) to applicants seeking or renewing broadcast licenses. Specifically, the court held that the FCC's decision that renewal applicants must meet the identical criteria required of new applicants was neither unreasonable nor arbitrary. In the majority opinion, Judge Leventhal identified three important considerations for conducting judicial review of agency decisionmaking. First, courts have an obligation to assure that agencies have engaged in reasoned decisionmaking. Agency decisions must be the product of a rational, deliberative process rather than whim.

Second, Leventhal noted that judicial intervention was appropriate "if

the courts become aware . . . that the agency has not taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decisionmaking" (444 F.2d 851). Essentially, application of the hard look doctrine required judges carefully to scrutinize the decisionmaking process an administrative agency employed and the information upon which it based its conclusion. Such judicial inquiry, Judge Leventhal explained, should be triggered by a number of "danger signals" attracting the courts' attention. Courts should focus, for example, on whether the agency adhered to established, conventional procedures and whether the agency's conclusions were based on facts and reason.

Although the hard look doctrine clearly provides a rationale for careful judicial scrutiny of agency decisionmaking, Judge Leventhal did not perceive it as a blunt instrument to be wielded by activist judges against administrative agencies. Rather, Leventhal viewed the hard look doctrine as a means of promoting the public interest. The characterization of the respective roles played by administrative agencies and the courts as a "partnership" to promote the public interest comprised Leventhal's third consideration. Judge Leventhal surmised: "The court is in a real sense part of the total administrative process, and not a hostile stranger [to agencies]. . . . This collaborative spirit does not undercut, it rather underlines the court's rigorous insistence on the need for conjunction of articulated standards and reflective findings, in furtherance of even-handed application of law, rather than impermissible whim, improper influence, or misplaced zeal" (444 F.2d 852).

A third Leventhal opinion in administrative law is noteworthy because, in concert with the opinion written by Chief Judge David Bazelon, it further clarified the nature of judicial review of agency decisionmaking. At issue in *Ethyl Corp. v. Environmental Protection Agency* (541 F.2d 1 [D.C. Cir. 1976]) was whether the Environmental Protection Agency (EPA) had acted properly by requiring annual reductions of lead content in gasoline pursuant to its authority under the Clean Air Act to regulate gasoline additives having emissions that constituted health hazards. The court held that the EPA's decision was neither arbitrary nor capricious and, therefore, did not constitute an abuse of discretion.

In concurring opinions, Leventhal and Bazelon exchanged their respective visions of the nature of the hard look doctrine. Bazelon argued that judicial inquiry should focus exclusively on process; courts should determine whether a sound decisionmaking procedure had been established by agencies and avoid inserting themselves into substantive aspects of agency decisions. Conversely, Leventhal insisted that courts necessarily must concern themselves with substantive elements of agency decisions as well as with process. Judicial attention to substance as well as procedure, critics sur-

mised, provided a rationale for potentially intrusive judicial interference with agency decisionmaking. Responding to his critics' assertion, Judge Leventhal articulated a sophisticated conception of judicial review: He underscored the necessity of judicious application of careful scrutiny by the courts, endorsing judicial restraint while cautioning that restraint must not degenerate into judicial neglect.

A fourth opinion of significance in administrative law focused on hybrid rule making. At issue in *American Airlines, Inc. v. Civil Aeronautics Board* (359 F.2d 624 [D.C. Cir. 1966]) was whether an agency had exceeded its rule-making authority in promulgating a rule restricting the sale of space on flights at wholesale rates to cargo-only carriers, thus excluding passenger airlines ("combination-carriers") from this practice. Combination-carriers argued that the rule effectively modified their licenses in the absence of formal adjudication.

Judge Leventhal, writing the majority opinion for an *en banc* circuit, recognized the importance of agency rule making to the administrative process. He acknowledged the appropriateness of agency use of its rule-making authority to resolve disputes of a recurring nature, refusing to endorse the argument that agencies were required to adjudicate in instances where rule making modified existing licenses. Leventhal insisted that

> rule making is a vital part of the administrative process, particularly adapted to . . . sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and that such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making. (359 F.2d 629)

Judge Leventhal articulated a position that was characteristically nuanced. Despite the endorsement of a generous application of rule-making authority, administrative agencies did not enjoy unfettered exercise of this power. Exercise of agencies' rule-making authority as a substitution for formal adjudication was confined to congressionally established parameters and judicial standards that agency action be neither unreasonable nor arbitrary.

Harold Leventhal distinguished himself on the federal bench as a jurist whose intellectual prowess, life experience, and sophisticated understanding of the law as it relates to American society enabled him to render balanced, reasoned decisions that promoted the public interest. In summarizing Judge Leventhal's legacy in the area of administrative law, former law clerk Robert T. Haar observed that

> when you look at Judge Leventhal's contributions to administrative law . . . [it appears that they] flow[ed] . . . very naturally from his belief in public service and his optimism about Government. The Judge believed that when Government agencies strayed from their legislative mandate or otherwise engaged in conduct which was fairly characterized as arbitrary and capricious, it was seldom because of bad faith or incompetence. For the Judge, the problems arose because you were asking good people to do difficult things, often for the first time. So the Judge saw judicial review of agency action as a constructive dialogue. The way to ensure that good people did the right thing most of the time was to ask them what they were doing and why they were doing it. This seemingly simple idea revolutionized agency rulemaking in the 1970s. ("Presentation" 1991, 95)

Essentially, Judge Harold Leventhal strove to achieve "pragmatic justice" (Leventhal 1967, 239).

Melanie K. Morris

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LINDE, HANS A.

(1924–)

Hans A. Linde
Courtesy of Hans A. Linde

Hans A. Linde, legal scholar and Oregon Supreme Court justice, championed the philosophy that state judges should seek guidance in their state constitutions before consulting the federal Constitution. The movement Linde sparked later evolved into "new judicial federalism." Linde was born on 15 April 1924, in Berlin, Germany, the son of Bruno and Luise Linde. With the rise of the Nazis, the Linde family left Germany in 1933, moving to Copenhagen, Denmark, and finally arriving in Portland, Oregon, when Hans was fifteen. After serving briefly in the United States Army (he was naturalized in 1943, while in basic training at Camp Roberts, California), he attended Reed College in Portland, graduating in 1947 at the top of his class. He married Helen Tucker in 1945; they had two children.

In 1950, Linde earned a law degree from the University of California, Berkeley, where he was editor of the law review. Shortly after graduation, he moved to Washington, D.C., to serve as a law clerk for United States Supreme Court justice William O. Douglas. At the end of his clerkship, Linde remained in Washington, D.C., to work in the Office of the Legal Adviser of the Department of State. He also served as an adviser to the U.S. delegation to the United Nations General Assembly. In 1953, the Lindes returned to Portland. While in private practice, he volunteered as an

adviser to the U.S. Senate campaign of Richard Neuberger, a Democratic state legislator who successfully defeated the Republican incumbent in 1954. Linde moved back to Washington in 1955 to work as Neuberger's legislative assistant. In 1958, Linde was appointed to the faculty of the University of Oregon School of Law in Eugene. He was a professor there until his appointment to the Oregon Supreme Court in 1977 (Witt 1989).

As a law professor, Linde developed his theory of the primacy of state constitutions in a number of widely read law review articles. Under Chief Justice Earl Warren, the United States Supreme Court applied many federal constitutional protections to state actions, relegating state constitutions to "legal swamplands (necessary perhaps, but no reason to visit them)" (McIntosh and Cates 1997, 67). Writing in the *Oregon Law Review,* Professor Linde advocated the primacy of state law and "denounced the common practice of reading state Bill of Rights provisions to be identical to those found in the federal constitution" (68). To render a decision according to Linde's philosophy, a state judge should consult the state constitution first, giving only a secondary consideration to federal law (McIntosh and Cates 1997, 68). In his article, he chided the Oregon Supreme Court for ignoring the Oregon constitution in its rulings. Members of the Oregon Supreme Court heard Linde's message. McIntosh and Cates recorded that "on at least three occasions the justices made specific reference to his [Linde's] article in their published opinions, each time stating their disagreement" (68).

Linde had a close working knowledge of the Oregon constitution. In 1961 and 1962, he was a member of the Oregon Constitutional Revision Commission. As chairman of the drafting subcommittee, he drafted changes to the Bill of Rights (Article 1), Article 7 on the judiciary, and Article 5 on the executive (Summers 1984, xiii). Linde also did appellate work on briefs submitted to the Oregon Supreme Court. He wrote the *amicus* brief the Oregon Newspaper Publisher's Association submitted to the court in the case of *Deras v. Myers* (272 Ore. 47, P.2d 541 [1975]). Basing its decision on the Oregon constitution, the court struck down limits on political campaign spending, about a year before the United States Supreme Court issued a similar ruling in *Buckley v. Valeo* (424 U.S. 1 [1976]).

Linde coauthored a casebook, *Legislative and Administrative Processes*, that was published in 1976. In the book, he argued that the procedures of policymaking and implementation are as important as the policy itself. The procedures followed in designing the policy determine the effect of the policy. The book received positive reviews.

In 1976, Oregon governor Robert Straub, a Democrat, appointed Hans Linde to fill the vacancy in the Oregon Supreme Court caused by Chief Justice Kenneth O'Connell's retirement. Linde took his seat as an associate justice on the seven-member court in January 1977. He campaigned for elec-

tion to a full term in 1978 and faced no opposition in the nonpartisan race. Judge Patricia Wald related that the Oregon justice was interviewed in 1979 for a spot on the United States Court of Appeals for the District of Columbia (1996, 216). Linde was not nominated. After a hard-fought reelection campaign in 1984, he was reelected to a second six-year term. Linde remained on the Oregon Supreme Court until he retired in January 1990.

As a member of his state's highest court, Linde had an opportunity to implement his legal theory of the primacy of state constitutions. The first case the court heard with its newest justice was *State v. Flores* (280 Ore. 273; 570 P.2d 965 [1977]), a civil liberties case in which a Hispanic defendant waived his Miranda rights during a four-hour police interrogation. The four-person majority decision followed the Fourth Amendment of the U.S. Constitution as applied by the United States Supreme Court. Linde and two colleagues dissented, stating that the Oregon constitution provided more guarantees of individual liberty and should be applied before invoking federal constitutional provisions (McIntosh and Cates 1997, 69).

Linde was able to apply his philosophy to other significant cases the court heard in his first year. In *State ex rel Johnson v. Woodrich* (279 Ore. 31; 566 P.2d 859 [1977]), he was in the majority. The case involved a criminal defendant who offered an insanity defense. Using provisions from the state and federal constitutions, the court determined that the defendant could not be compelled to answer questions regarding the criminal act during a pretrial psychiatric examination. Although voting with the majority, Linde wrote a concurring opinion in which he argued that the ruling should have been derived exclusively from the Oregon constitution. Linde wrote the majority opinion in a case in which the court ruled that a defendant accused of a minor traffic infraction was guaranteed the right to legal representation (*Brown v. Multnomah County District Court,* 280 Ore. 95; 556 P.2d 52 [1977]). According to McIntosh and Cates, "his opinion repeatedly refers to the Oregon Bill of Rights and only occasionally to the Fourteenth Amendment" (1997, 70).

Justice Linde was able to persuade a majority of his colleagues of the correctness of his philosophy. The Oregon Supreme Court adopted Linde's position in the majority opinion in *Sterling v. Cupp* (290 Ore. 611; 625 P.2d 123 [1981]). In this case, male inmates of the Oregon State Penitentiary sued to stop prison officials from assigning female correctional officers to duties that involved frisking male inmates or the observation of male inmates in showers or toilets. In the opinion, which limited searches of intimate body areas by members of the opposite sex in cases other than emergencies, Linde wrote, "The proper sequence is to analyze the state's law, including its constitutional law, before reading a federal constitutional claim" (290 Ore. 611; 625 P.2d 126).

Charles Z. Smith (1927–)

Charles Z. Smith was born to a Cuban father and an African American mother in Florida in 1927 and has been known for achieving a remarkable number of firsts in his life. He was the first nonwhite to serve as a judge in the state of Washington, the first to be a superior judge in Washington, the first ever to serve on the American Bar Association's Standing Committee on the Federal Judiciary, and the first and only to serve on the Washington Supreme Court (Washington 1994, 187, 201).

Smith's parents separated before he was grown, but he was already living with the family of Dr. William H. Gray Jr., who was then president of Florida A and M University. Smith served in the United States Marines, then graduated from Temple University and moved to Washington, where he graduated from the law school at the University of Washington and served as a law clerk to a Washington Supreme Court justice. From there he joined a prosecuting attorney's office and later worked with Attorney General Robert Kennedy investigating and prosecuting union corruption.

After returning to Seattle, Smith was appointed to the municipal court and later to the Superior Court of King County, where he served from 1966 to 1973 and gained a reputation for innovative alternatives to prison, including literacy classes and community service. In 1973, Smith became a law professor at the University of Washington, where he served for a time as an associate dean before being appointed in 1988 to the Washington Supreme Court.

Smith says that he never actually pursued a judicial career and that "I never wanted to be a first anything, except my wife's first husband" (Washington 1994, 193). He has attributed his firsts to "being at the right place at the right time," but he also has noted that as a retired Marine lieutenant colonel with good credentials, people often consider him to be "safe" (200). Smith noted that "being a person of color means that you have extraordinary stresses that persons not of color don't have" (193), and he detailed elaborate security measures he has taken as a result of threats that he has received as a judge.

As a member of the American Bar Association's Standing Committee on the Federal Judiciary, Smith encouraged the committee to look at the cultural awareness of individuals before deciding whether they were good appointees. Smith is convinced that a judge needs to be a person of absolute integrity. He commented: "If a person loses sight of his or her integrity and humanity that person will not be successful in any endeavor, particularly not the practice of law. The practice of law is an honorable profession where integrity is just as important as ability. The person who wishes to function effectively in the practice of law at any level must have integrity and sensitivity" (Washington 1994, 199).

Smith continues to battle for greater minority representation in the judiciary. Asked whether he was excited about being the first nonwhite appointed to the court, Smith responded negatively and explained: "I'll be excited when there are five [out of nine] women on this court. I'll be excited when my daughter—if my daughter who is a lawyer wants to be a judge—is appointed to the supreme court. I'll be excited when my granddaughter—if my granddaughter who is two years old becomes a lawyer and wants to become a judge—is appointed to the supreme court" (Washington 1994, 208).

Reference:

Washington, Linn, ed. 1994. *Black Judges on Justice*. New York: The New Press, 186–208.

Linde was presented with an opportunity more fully to apply his philosophy in the 1983 case *State v. Kennedy* (295 Ore. 260; 666 P.2d 1316). Kennedy had been convicted of theft in a second trial after the first trial ended in a mistrial because of the prosecutor's misconduct. The appeals court in Oregon reversed the conviction, citing a few United States Supreme Court opinions. After the Oregon Supreme Court denied review, the state appealed to the United States Supreme Court. The Supreme Court reversed the decision on the basis of double jeopardy and due process under the federal Constitution and remanded the case back to the Oregon appeals court. The appeals court upheld the conviction based on Oregon law. The defendant appealed to the Oregon Supreme Court for review. Writing for a unanimous court, Linde began his opinion by stating "the history of this case demonstrates the practical importance of the rule, often repeated in recent decisions, that all questions of state law be considered and disposed of before reaching a claim that this state's law falls short of a standard imposed by the federal constitution on all states" (295 Ore., 262).

The United States Supreme Court expanded constitutional protections under Chief Justice Earl Warren. The Court under his successor, Warren Burger, turned away from increasing constitutional protections; thus, by the 1980s, liberals and libertarians looked to the states for protection from government. Justice Linde, as a leader of the movement for increasing judicial reliance on state constitutional law, became a lightning rod for supporters of "law and order."

Linde decided to seek reelection to a second six-year term in 1984. The nonpartisan elections for the Oregon Supreme Court are usually quiet events in which the incumbent faces token opposition. The 1984 election was different. Linde faced two opponents: Albin Norblad III, a judge from Marion County; and David Nissman, a Lane County deputy assistant district attorney. Nissman, the more active candidate because Norblad was slowed by a heart condition, was endorsed by law enforcement groups and Mothers Against Drunk Driving. These groups saw Linde as soft on crime because of his rulings limiting police power to search suspects and the government's power to impose the death penalty. A member of the Multnomah County district attorney's office wrote a letter to the editor describing the incumbent justice as "Public enemy number one." Throughout the campaign, Dep. Asst. Dist. Atty. Nissman and his supporters regularly referred to Linde as "Professor" Linde, never Justice Linde.

One case cited by the Nissman campaign as evidence that Linde was soft on crime was *State v. Lowry* (295 Ore. 337; 667 P.2d 996 [1983]). Police, searching for weapons on a person suspected of driving while intoxicated, found a bottle containing what was later determined to be cocaine. Linde's

opinion held that the Oregon constitution required the police to have a search warrant before they could analyze the bottle's content.

The Nissman campaign listed Linde's positions in a "Fellow Oregonian" letter. The Nissman for Justice Committee concluded its lengthy list by stating "the keystone of his [Linde's] judicial career has been his tinkering with the Oregon Constitution by inventing previously unknown rights for criminal defendants. Searches that are absolutely legal under our federal bill of rights now run afoul of mysterious new rules created by Linde" (Collins 1991, 759–760). Nissman also challenged Linde's productivity on the court, suggesting that the justice was too much of an academic to be allowed to interpret laws. As a sitting justice, Linde indicated that it was not proper for him to defend decisions in which he had participated.

With 45 percent, Justice Linde received the most votes in the May 1984 primary. Nissman received 25 percent of the vote, coming in third behind Judge Norblad (29 percent). Since Oregon election law specified that a runoff election must be held if no candidate received more than 50 percent of the vote, Linde faced Norblad in November 1984. Linde won the runoff election.

Most observers would agree that Linde contributed to the development of state constitutional law, but McIntosh and Cates reported that Linde considered his contributions to Oregon tort law more significant (1997, 73). He held a conservative position on the judiciary's role in tort law, arguing that judges should issue rulings based on legal authority and not public policy criteria. According to Forell, Linde's view "is that state court judges should neither let their personal values show nor base their decisions on their own policy judgments" (1991, 816). In short, judges should avoid making decisions based on weighing competing social demands because such decisions would be political decisions.

Linde outlined his philosophy on torts in his dissent in *Harrell v. Travelers Indemnity Company* (279 Ore. 199; 567 P.2d 1013 [1977]). The case involved an automobile accident for which the plaintiff had received compensatory and punitive damages after a jury trial. The defendant's insurance company paid the compensatory damages but refused to pay the punitive damages. The plaintiff then sued the company, and a jury found in favor of the insurance company because the driver's liability insurance made no mention of coverage for punitive damages. The majority decided in favor of the insurance company, arguing that allowing insurance companies to cover punitive damages would frustrate efforts to discourage reckless driving and driving while intoxicated. In his dissent, Linde advocated judicial self-restraint. He pointed out that there was no policy developed by the legislature limiting punitive damages and argued that in the absence of such legislation the companies should have to pay.

Justice Linde created a new tort through his majority opinion in *Nearing v. Weaver* (295 Ore. 702; 670 P.2d 137 [1983]). Henrietta Nearing filed suit against the city of St. Helens and two of its police officers. She claimed that she had suffered personal injury due to the officers' failure to enforce Oregon state law protecting women from spousal abuse. Nearing's estranged husband physically assaulted her male friend after the police had assured her that the husband would be arrested for violating a restraining order. In his decision, Linde argued that the law created statutory liability and that the officers were liable for injuries sustained because they did not follow the law. "Oregon is the only jurisdiction in the United States in which police officers have been held strictly liable for injuries caused by a third party" (McIntosh and Cates 1997, 77–78). Responding to Chief Justice Ed Peterson's dissent, Linde pointed out that he was not making new law, only applying public policy that had been enacted by the legislature.

By the late 1980s, Justice Linde was the senior member of the court. Traditionally, the court elects the senior justice as chief justice. When his turn came, Linde refused the position. He did not want the administrative responsibilities of chief justice.

Justice Hans Linde retired from the Oregon Supreme Court on 31 January 1990. "The intellectual godfather" of the state court revival returned to academia (Toobin 1985, 11). He taught as a visiting professor at numerous law schools. In 2002, he was the Distinguished Scholar in Residence at the Willamette University College of Law in Oregon. He also served on the Oregon Law Commission, a body created in 1997 by the state legislature to conduct a continuous program of law reform. Since leaving the Supreme Court, Linde's writings have included numerous stinging critiques of the initiative process (Linde 2001). Even after retiring from the bench, Linde has continued to work in the area of state constitutional development.

John David Rausch Jr.

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LIVINGSTON, ROBERT R., JR.

(1746–1813)

Robert R. Livingston Jr.
Library of Congress

Robert R. Livingston, first chancellor of the state of New York, forged one of the great legal and political careers of any American age. Dubbed "the American Cicero" for his oratory by no less than Benjamin Franklin, Livingston had a hand in many of the epochal moments of the founding generation. A patriot during the Revolution, Livingston sat on the committee to write the Declaration of Independence, served as the first American secretary for foreign affairs during the war, helped lead the New York State Convention to ratify the Constitution, negotiated the Louisiana purchase, and financed Robert Fulton's steamboat project. Perhaps most memorably, Livingston administered the oath of office to George Washington, swearing him in as the first president of the United States. Yet, for all that, he seems to have dropped into a historical oubliette, noted for having been on the scene but rarely acknowledged alongside his more famous peers as a shaper of events. Nothing exemplifies this state of affairs better than his judicial career, of which few records and no systematic scholarship survive.

Over several generations, the Livingston family became one of the most prominent in the colony of New York. Landowners and lawyers, the Livingstons showed talents for enterprise and political machination that

greatly enlarged their estates in the century prior to the Revolution. Robert Robert Livingston Jr., son of New York Supreme Court justice Robert Robert Livingston Sr.—given the redundant middle name to distinguish him from his father, Robert, and the various other family Roberts—was born on 27 November 1746 in New York City and was the great-grandson of the original Robert Livingston, the first lord of the manor. With such a mad proliferation of namesakes, the family took to calling its members by their titles. Robert Robert, the father, was "the Judge"; Robert Robert Jr., the son, eventually became known as "the Chancellor."

Given his privileged upbringing, Robert R. Livingston Jr. exhibited the high ambitions and aristocratic temperament that one would expect from a feudal scion. But the clan had also embraced Whiggish politics. In the New York of the 1760s, family dominated partisan divisions, and the Livingstons competed against the DeLanceys for political preeminence in the colony. Despite their elitism, the Livingstons were often seen as the "popular" party: defenders of Presbyterianism, resistant to Parliament, suspicious of property taxation. Such positions came at a cost. When the DeLanceys ran on a campaign of "No lawyer, no Presbyterian!" in 1768, taking advantage of backlash against the Stamp Act riots, the judge lost his seat in the colonial Assembly. He was later banned outright when the DeLanceys imposed a rule preventing the election of Supreme Court judges to the legislative body, although he continued to win elections (Dangerfield 1960, 39–40). The judge's son, Robert R. Jr., experienced these events during his formative years, and they influenced the agrarian ideology he carried with him into the Revolutionary War.

The young Robert was raised in New York City but spent holidays at the family's country estate, Clermont. Despite their tendency toward Presbyterianism, he was baptized in the Church of England and then enrolled at King's College, an Anglican hotbed, at the age of fifteen. Robert received an education in the classics and showed an early gift for rhetoric. He also became a close friend to John Jay, later the first chief justice of the Supreme Court of the United States. At the time of their graduation in 1765, Livingston and Jay delivered commencement speeches on the themes of "liberty" and "peace," respectively. The *New York Gazette* offered particular praise to Livingston, opining that "many of the audience pleased themselves that the young orator may prove an able and zealous asserter, and defender, of the rights and liberties of his country, as well as an ornament to it" (quoted in Scott 1907, 440).

After graduation Livingston began his legal apprenticeship, first under the strict tutelage of William Livingston, his father's cousin, later under the much less structured supervision of William Smith Jr., who left his charges alone to sort out the complexities of Blackstone, Finch, and Coke. He was

admitted to the bar and shortly thereafter formed a partnership called Messrs. Jay, Livingston and Co. Although the partnership lasted from 1768 until 1772, it was only active for two years. Livingston also joined an elite organization of lawyers known as the Moot who met in taverns to dine and debate complex legal issues, ultimately handing down mock decisions. From this, he and Jay hatched a plan to invent their own inferior court judicial positions and propose themselves to the governor for appointments. The scheme was snuffed out by the DeLanceys, but Governor Tryon offered Livingston a position as recorder for the state of New York to compensate (Dangerfield 1960, 47–49). The position was less than what he had hoped for, but it gave him his first opportunity to preside over criminal trials. By 1775 Livingston's opposition to royal policies deprived him of the job.

Although his judicial career momentarily stalled, Livingston's political career soared. He was elected to the Continental Congress in 1775 and served intermittently until 1785. One of the congress's most active members, Livingston played an especially important role in setting judicial policy: Through his committee work, he helped create a national court of appeals and drafted commissions and instructions for its judges. When he was offered a nomination to serve on this court, however, he declined. Livingston's best-known responsibility during these years was his appointment to the committee that authored the Declaration of Independence, alongside Thomas Jefferson, John Adams, Benjamin Franklin, and Roger Sherman. Livingston's selection was likely an effort to co-opt his colony at a time when its participation was in doubt. But events relegated him to a marginal role. In poor health, and representing a state that could not decide what it wanted—other than to bind the hands of its delegates—Livingston stayed silent as Jefferson wrote the document and Adams and Franklin made the revisions. Although Livingston supported independence, which he saw as inevitable, he pushed for delay, suggesting that Americans might attract more support from Spain and France after a few more military victories had been won. Called home, Livingston never signed the final declaration.

Back in New York, Livingston sought to create a stable system of state governance. He served in the state Congress, sat on its Council of Safety, consulted on its military policy, and joined the convention to craft a new state constitution. The resulting product, authored mainly by Jay, with Livingston and Gouvernor Morris as his primary advisers, was a model of conservative republicanism—designed to promote independence while securing the rights of the propertied classes. Grounded in freeholder suffrage, the new government enacted a variety of checks to keep its branches within constitutional limits. The judiciary figured prominently in this process, particularly through institutions in whose design Livingston had a strong hand. The Councils of Revision and Appointment played significant roles

in checking legislative and executive power: The former, made up of governor, chancellor, and Supreme Court, could veto legislative acts absent a two-thirds override; the latter, consisting of governor and four senators, dispensed patronage. The state courts built upon a hierarchy inherited from the British. The Supreme Court was the high court of law, the Chancery Court presided over questions of equity, and both were reviewed by the Court for the Trial of Impeachments and Correction of Errors, consisting of the chancellor, the Senate, and the Supreme Court (Dangerfield 1960, 88–91).

Conveniently, the convention decided to make initial appointments themselves, selecting Jay as the chief justice of the Supreme Court and Livingston as chancellor, technically the second highest position in the state after the governor. The Chancery Court was a holdover from British rule, but it had always been an underdeveloped institution. Chancery courts had originally emerged in England as alternatives to the rigid formalism of the law proper, which dealt only with actual harms to land, slaves, or specie and which imposed procedural restraints on evidence. Petitioners who fell outside these strictures could go directly to the king, who often delegated the broad power to grant equity to a clergyman known as "chancellor." In theory, equity courts were meant to compensate for the deficiencies of legal positivism by providing a less-structured forum within which the principles of "natural justice" might find voice (Mitford 1816, 2–3).

New York's chancery was created by ordinance of the lords of trade in England in 1701 but was rarely used. The early court consisted of the governor and his council, hence combining executive and judicial power. Conflicts over judicial authority between royal governors and colonial assemblies left the court unpopular, promoting regular but unsuccessful attempts by the Assembly to kill the court. When prerevolutionary tensions began to build, such a court smacked more than ever of arbitrary power. Nonetheless, Livingston, Jay, and the other conservative revolutionaries came to see the court as a useful check on the popular legislature and as an avenue for personal advancement, thus justifying its ongoing existence. The New York constitution drawn up in 1777 provided that the chancellor would serve during good behavior until the age of sixty. Presumably, this exclusion of the barely aged would prevent a court based so heavily on the chancellor's sole discretion from degenerating too much with his advancing years. In any event, Livingston occupied his position as the state's first chancellor from 1777 until 1801, by which time he was only fifty-five. The position was imbued with symbolic grandeur. D. T. Blake, a master and solicitor during the state court's early history, described the institution as "a tribunal, almost of time immemorial, with jurisdiction and powers emanating from justice, connected with the guardianship of widows, orphans, and all persons

under divine visitation—in short, a tribunal before which no species of grievance, remediless at common law, can make its appearance in vain" (Blake 1818, xii). It should be no surprise that Livingston, an aristocratic American Whig with a strong sense of noblesse oblige, should find so much resonance in being titled "the Chancellor."

Livingston's approach to the job was more social than scholarly. The Chancery met several times a year in New York and Albany, but Livingston increasingly held court at his Clermont estate—a long and difficult trip from the city (Dangerfield 1960, 277). The minimalism in court structure also extended to its recordkeeping. Not until 1814, with the appointment of James Kent as New York's third chancellor, did the legislature require the publication of court reports. As a result, the substance of Livingston's chancellorship is something of a mystery. On taking the job, Kent disparaged the tenure of his predecessors: "The office . . . had no charms. The person who left it was stupid, and it is a curious fact that for the nine years I was in that office there was not a single decision, opinion, or dictum of either of my two predecessors (Chancellor Livingston and Chancellor [John] Lansing) from 1777 to 1814, cited to me or even suggested. I took the court as if it had been a new institution and never before known in the United States" (quoted in Scott 1907, 452–453). Kent's contempt for Lansing—an antifederalist who defended democracy and laissez-faire—is understandable; his dismissal of Livingston, who had expedited Kent's own admission to practice before the Chancery Court, may be either an indication of his concerns for structure and precedent or a product of his vanity. Jefferson offered a more positive portrayal when he described Livingston as "in every sense of the word, a wise, good, and great man, one of the ablest of American lawyers and statesmen" (quoted 451). Politics may also play a role in these evaluations. After he was snubbed for a major appointment in Washington's first administration, Livingston defected from the Federalists to the Jeffersonians, a move that also exacerbated a growing rift with Jay, who was not similarly denied.

Despite the absence of any chancery records, there are extant indications of Livingston's judicial philosophy and informal records of cases in which he was involved. Records of the Council of Revision show that he opposed "the confiscation and alienation laws directed against the Loyalists, laws granting special powers to the magistracy (lest the freedom of the citizenry be endangered), special taxes, the paper money bill of 1786, and the bill of 1785 to abolish slavery in New York" (Hayes 2002, 3). He was less than consistent on the issue of the Loyalists. Although Livingston continued to reassure Jay and Alexander Hamilton that he opposed punitive treatment of former Tories, he later dabbled in populism upon realizing that he could profit from speculation in Loyalist properties. Hamilton, who as a national-

ist was suspicious of any man who would leave a post as secretary of foreign affairs to return to a state chancellorship, saw Livingston's opportunism as a betrayal (McDonald 1979, 75).

Not surprisingly, Livingston and Hamilton interacted often within the narrow confines of New York state law and politics. Hamilton argued cases before the Chancery Court, including *Le Guen v. Gouverneur and Kemble,* where he and Aaron Burr were co-counsel, and *Schuyler v. Ten Eych,* where he and Burr were opposing attorneys. In the former case, Hamilton represented Louis Le Guen, a Frenchman involved in a complex dispute over a shipment of West Indian cotton and indigo being warehoused in New York while he searched for a buyer who could transport the goods for sale in Europe. The case, a series of suits and countersuits, bounced between the law and equity courts. In one critical turn, Livingston ruled that the New York brokers, Gouverneur and Kemble, could introduce fraud charges against Le Guen in Chancery Court even though that issue had not originally emerged in the law trial. On this, he was overturned by the full Court of Errors, including both Kent and Lansing. The effect of the reversal was to restrict the chancellor's power to intervene in cases with settled jurisdiction in other courts (Goebel 1969, 2:82–85).

Livingston and Hamilton were allies in one of their most significant encounters: At the New York convention for ratifying the constitution, they led the nationalist cause. But neither man trusted the other. Hamilton consulted with the chancellor's estranged cousin, Robert Livingston Jr., during a case of intrafamily land dispute. The chancellor had built a grist mill on the stream bordering the two estates, to which he claimed exclusive rights. Infuriated, the manor lord pledged either to take his cousin to court or hire a gang to tear the mill down. Hamilton counseled prudence, but the breach was too deep. The effect of these events was to convince Hamilton that the chancellor's principles stopped at his own purse. After the manor lord's death, the chancellor reached out to his son by delivering a partly favorable opinion from the bench as to the division of the estate and handling of creditors, resulting in an ultimate reconciliation (Dangerfield 1960, 280–281).

Late in his chancellorship, Livingston became consumed with private enthusiasms: a water company that would serve as a republican bank (a Burr scheme), the speculations of natural history and scientific farming, and the quest to revolutionize transportation with steam power. He secured a monopoly from the state to pursue steamboat navigation on the Hudson River, although his early experiments were failures. After resigning as chancellor to become Jefferson's minister to France, however, he met Robert Fulton, who had the practical sense to complete the project. Once it proved successful, the two men found themselves competing with unlicensed rivals

despite a state law imposing a stiff fine and boat confiscation on offenders. In *Livingston v. Van Ingen,* Livingston and Fulton sought to shut down their competitors, including James Van Ingen. The former chancellor found little sympathy when the case went before the Chancery Court, now controlled by Lansing. Appealing to natural law and Justinian's *Institutes,* Lansing held that rivers, like the air and sea, were given by God to all mankind and that any restrictions would violate the "privileges" of other states' citizens under the U.S. Constitution. Livingston objected: All civil laws violate "nature," and such a principle would prevent a state from ever granting monopolies to foster internal improvements. At the Court of Errors, Chief Justice Kent overturned Lansing, ruling that he had misread the Constitution and that monopolies must be presumed legitimate (Dangerfield 1960, 418–421). Aside from the interest it holds for involving each of New York's first three chancellors, this case also set up the more famous *Gibbons v. Ogden*—after Livingston's death, Chief Justice John Marshall decided against his heirs in *Gibbons* on grounds of national commerce power.

The judicial career of Robert R. Livingston Jr. was long and varied. If at times he resembles a founding era Forrest Gump—always in the picture, never at its focus—this results from his historical misfortune of having been a near-great in an age of titans. Taken on their own terms, his accomplishments outweigh his reputation, an ironic fate for a New York aristocrat who sought so long for the honor of a public legacy.

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LUMPKIN, JOSEPH HENRY

(1799–1867)

Joseph Henry Lumpkin
Hulton Archive

Joseph Henry Lumpkin, Georgia's first chief justice, played an important role in establishing the state supreme court on a firm foundation. Under his leadership, the court overcame widespread opposition to centralized judicial authority, which had kept Georgia from establishing a high court until 1845, more than fifty years after it became a state. In one of his earliest opinions, *Choice v. Marshall,* 1 Ga. 97 (1846), Lumpkin made his judicial philosophy clear: "We are prepared, although in our *judicial infancy,* to advance to the front rank in this warfare of principle against precedent. Beyond that, we dare not go. Judges cannot alter a law. . . . Their business is to declare what the law is, and not what it ought to be" (106).

Lumpkin was born near Lexington in Oglethorpe County, Georgia, the ninth of eleven children of John and Lucy Hopson Lumpkin, who had moved there from Virginia in 1784. Although his older brother, Wilson, a two-term governor of Georgia and member of the U.S. Senate, did not attend college, Lumpkin started his undergraduate studies at the University of Georgia in 1816. When the university suspended classes following the death of its president, Lumpkin transferred to Princeton (then named the College of New Jersey), where he graduated with honors in 1819.

Following graduation, he returned to Lexington and studied law in the office of Thomas W. Cobb, whose career included service in the U.S. House

and Senate and as a judge of the superior court. Lumpkin was admitted to the bar in 1820 and the following year married Callender Cunningham Grieve, a native of Scotland. His law practice flourished in an age of circuit-riding lawyers and judges as he established a reputation for hard work and effective advocacy.

He served one term (1824–1825) in the state legislature as an ally of Gov. George M. Troup, a staunch champion of states' rights in Georgia's long-running conflict with the federal government on a number of issues, but primarily over Creek Indian lands. Although Lumpkin never ran again for public office, he maintained an active interest in politics, changing his affiliation over time from the Troup faction at the state level to the regional State Rights party and then to the national Whig party. In a letter to one of his daughters in 1853, he described his political independence, writing that he generally voted the Whig ticket, "but if the Democratic candidate is the better man or my personal friend, I unhesitatingly vote for him, in preference to his Whig opponent" (Lumpkin, Joseph Henry. Papers).

Lumpkin's eloquence as a trial lawyer was noted by many of his contemporaries and, combined with his reputation for intellect and integrity, made him one of the most successful lawyers in the state at an early age. His expertise in criminal law led to his appointment, at age thirty-four, as one of three commissioners to draft a revision of the Georgia Penal Code, which was enacted in 1833. Because of the absence of a supreme court in Georgia prior to 1845, the superior court judges met periodically in convention to achieve greater uniformity among the judicial districts. The first report of their combined decisions was published in 1836 by G. M. Dudley, who included a commentary by Lumpkin, indicating the prominent position he had achieved in the legal profession by that time.

While he was building his legal practice, Lumpkin was also involved in various educational, religious, and reform activities. Throughout his life he promoted several ideas for state funding of public secondary schools, primarily aimed at developing qualified students for colleges and universities in the state, who could, in turn, become teachers. In 1820, he helped found a literary society at the University of Georgia and thereafter maintained an active interest in the university's affairs as a former student, parent, faculty member, and longtime member of the board of trustees.

Lumpkin was a devout evangelical Christian whose religious commitment began with his conversion experience at a Methodist camp meeting in the early 1820s. Although he was raised as a Baptist, he joined the Presbyterian Church in 1828 and was active throughout his life in many aspects of church governance. At the same time, he became deeply involved in the temperance movement at both the state and national levels. At the first National Temperance Convention at Philadelphia in 1833, he was named

one of sixteen vice presidents, and he served as president of the state temperance society for ten years.

His early reformist views caused a good deal of controversy within Georgia on more than one occasion. In a speech he gave at Boston in 1833, which received substantial negative coverage in Georgia newspapers, he made a clear declaration of support for emancipation. Twenty years later, in *Cleland v. Waters,* 16 Ga. 496 (1854), however, he noted in hindsight that "the true character of the institution of slavery had not been fully understood and appreciated at the South; and that she looked to emancipation, in some undefined mode, in the uncertain future, as the only cure for the supposed evil" (514).

Even after he no longer supported emancipation, Lumpkin agreed in 1847 to become a vice president of the American Colonization Society, whose mission was to send freed blacks to Africa. In *American Colonization Society v. Gartrell,* 23 Ga. 448 (1857), however, he ruled against the society, stating that "I was once, in common with the great body of my fellow citizens of the South, the friend and patron of this enterprise. I now regard it as a failure, if not something worse" (464). By then, he had also become convinced that slavery was divinely sanctioned, claiming in his report on law reform to the Georgia legislature: "Being recognized and regulated by the Decalogue, it will, we have every reason to believe, be of perpetual duration" (*Southern Recorder,* 4 December 1849).

When Georgia's supreme court was finally created in 1845, Lumpkin was elected by the legislature to the longest term of the three original judges. He was from the outset, therefore, generally recognized as the presiding judge, although it was not until 1863 that he was officially made chief justice. There were many defects in the legislative design of the court, but the greatest burden facing Lumpkin and his fellow judges was a requirement that they hold sessions at least annually in nine different cities within the state's five judicial districts. Also, unlike appellate courts in some other states, where reviews were limited to points of law, the Georgia court had to examine all errors alleged in each bill of exceptions.

In its first full year (1846), the court reversed superior court decisions in forty-four of the seventy-two cases it reviewed. One of Lumpkin's opinions, *Nunn v. State,* 1 Ga. 243 (1846), has received considerable attention in recent years, because of his review of the constitutional right to bear arms and his conclusion that "the right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, not *such* merely as are used by the militia, shall not be infringed" (251).

In a report submitted to the legislature in 1849, Lumpkin made a number of recommendations for legal reform in Georgia. He proposed a fusion of

Rufe McCombs (1918–)

Born in Decatur, Georgia, in 1918, Rufe Dorsey Edwards decided that she wanted to become a lawyer when in 1924 she was inspired by watching attorney Schley Howard in court. On the same day, she felt unjustly treated when a judge, citing her age, refused to allow her to tell her own story about how a neighbor girl had hurled a stone that had hit her in the head and resulted in the loss of much of her vision in one eye.

Overcoming an additional problem with stammering in her youth, some of which was spent in Jacksonville, Florida, Rufe eventually won a speaking award as a high school senior and went to Duke University on scholarship but later transferred to the University of Georgia. There she met her future husband, Mac McCombs, and was accepted into the Lumpkin Law School, where she was a student editor of the *Georgia Bar Journal.* During her schooling there, she reported that a professor asked her not to attend classes during his discussion of the law related to rape (McCombs 1997, 82).

When Edwards graduated, she found firms were more interested in her secretarial abilities than in her legal skills, and as World War II began, she was able to go to Washington, D.C., where she worked with the U.S. Department of Agriculture and became a hearings examiner. During that period she and Mac McCombs were married by Peter Marshall, who served with such distinction as a U.S. Senate chaplain. Later they moved to Atlanta, Georgia. She was there diagnosed with tuberculosis and had to quit her job and undergo long and painful treatments. She subsequently devoted time to raising a daughter, Grace, who was born in 1958.

When McCombs thought of returning to the legal profession, it was still difficult for women to find legal work, but she secured a job heading the Georgia Legal Services Program in Columbus, Georgia. She worked there from 1969 to 1975, secured a fair amount of attention, and successfully battled colon cancer, which required major surgery.

In 1975, McCombs successfully ran for a position as a Municipal Court judge in Columbus. She later discovered that she was the first woman in Georgia to win election to a judicial seat to which she had not been previously appointed (McCombs 1997, 167). McCombs, however, opposes affirmative action on behalf of women and has said that "Never have I wanted or sought a position based upon my gender" (168). When someone said that it was the right time for a woman to be elected to such a post, she said, "I'd much rather feel I got elected because I was qualified" (169).

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law and equity, following the example of David Dudley Field, author of New York's 1848 Code of Civil Procedure. He also sided with such noted legal reformers as Justice Joseph Story and Timothy Walker in promoting codification of Georgia's laws and argued that "it is right that every man should be enabled to read and understand the law for himself—and for this

(continued)

In 1978 McCombs ran unopposed for a state court judgeship. Once faced with an immigrant from China who wanted to give a special oath that involved dismembering a chicken, McCombs instead persuaded him to give an oath "as grandfather to grandmother" (McCombs 1997, 178). On another occasion, she had a bailiff escort out a visitor who had come to her courtroom dressed in a shower cap, a terry cloth robe, and pink slippers by noting that, as judge, she was the only one in the court permitted to wear a robe. As a judge, McCombs was often publicly critical of higher federal judges who she believed had strayed from their jobs as jurists into that of legislators.

In 1982 McCombs successfully ran against Albert Thompson (the first African American appointee in the position in Georgia) to become a Superior Court judge, but she did not make race an issue and believes that Thompson was hurt by a controversial decision he had made invalidating the death sentence for a juvenile. She later recalled a divorce case when she was a Superior Court judge, in which an attorney was questioning a witness about her marital faithfulness. After first claiming to have been absolutely faithful to her spouse and denying any extramarital affairs, the woman then said, apparently much to her counselor's chagrin, "Well, no one besides *my own attorney*" (McCombs 1997, 193). Initially opposed to capital punishment, McCombs says that her service on the court persuaded her that this penalty was sometimes appropriate. Throughout her career, McCombs found that people were sometimes surprised to see a female in her position. On one occasion where she did not realize the mistake until they were on their way, McCombs allowed her husband to speak before a college audience that had invited "Mr." Judge McCombs to speak.

Georgia has a mandatory retirement age for judges at seventy-five, but since retiring from her position, McCombs has continued to hear cases as a senior Superior Court judge. McCombs believes that perfect justice can only be established by God; in the meantime, humans have to do the best they can. McCombs recalls walking as a girl in her mother's shadow and watching their silhouettes: "I believe Justice seeks out Truths—the shadow of God. Too often though, Justice fails to see anything but its own silhouette. In order to find Truths, Justice must arch its back and walk uprightly. Human justice is a puny reflection of absolute Truths, but until God reveals to us more than just His shadow, it is our best hope" (McCombs 1997, 218).

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purpose it should be divested of all technicality and intricacy, as far as possible" (*Southern Recorder,* 4 December 1849).

As the sectional conflicts over slavery grew more intense, Lumpkin became increasingly concerned about the need for economic reform in Georgia and elsewhere in the South in order to achieve greater self-sufficiency. In his

speeches as well as his judicial opinions, he promoted reduction of the South's dependence on agriculture and development of a more balanced economy by encouraging business and banking. In *Young and Calhoun v. Harrison and Harrison,* 6 Ga. 130 (1849), he wrote: "Civilization must advance; the improvements of society, diffusing plenty and prosperity, knowledge and refinement and morality all around, must not, cannot be restrained" (149).

He took a pragmatic approach to balancing economic interests, a decisionmaking approach that has been termed "legal instrumentalism" in recent years. In *Hightower v. Thornton,* 8 Ga. 486 (1850), he cited corporations as "proof, and in no small degree the cause of unparalleled advancement of modern civilization" (505), yet he also recognized a need to protect the poor and uneducated from the abuses of corporate powers. In *Mims v. Lockett,* 20 Ga. 474 (1856), he called for a change in the harsh common law rules, which still favored the rights of creditors over debtors in Georgia. His Protestant ethic, however, made him a strong believer in the need for hard work and self-reliance. Upholding a conviction for vagrancy in *Waddel v. State,* 27 Ga. 262 (1859), Lumpkin wrote, "I am quite satisfied that a large portion of the population of our towns could be convicted on stronger proof than this. It is time to give them a scare" (263).

During his service on the Supreme Court (1845–1867), Lumpkin wrote roughly one-third of the nearly 3,800 opinions contained in volumes 1 through 35 of the *Georgia Reports.* He authored more than half of the approximately sixty cases that dealt with important issues affecting the legal status of slaves, however, indicating that he had a strong interest in shaping Georgia's law as well as its public policy on slavery issues. Lumpkin's slavery opinions have probably received more attention from legal scholars over the past thirty years than those of any other southern jurist, with the possible exception of Thomas Ruffin. There was no uniform law of slavery among the southern states. As Lumpkin noted in *Bryan v. Walton,* 14 Ga. 185 (1853): "The condition of the African race is different in every slave State" and, therefore, "we must have recourse to our own local laws . . . and to such principles as are dictated by the peculiar genius of our people, and policy of our institutions" (199).

Economic factors were important considerations in many of his slavery decisions, as in *Cleland v. Waters,* 19 Ga. 35 (1855), in which he noted that "slaves constitute a portion of the vested wealth and taxable property of the State; that without them, a large part of our most productive lands would be worthless" (43). A number of his opinions reveal his racist and paternalistic views of blacks, but in *Cleland* he affirmed his religious conviction that "true, slaves are property . . . still they are rational and intelligent beings. Christianity considers them such . . ." (41).

Lumpkin's dedication to leading the Supreme Court caused him to turn down an appointment by Pres. Franklin Pierce to the newly formed federal court of claims in 1855 and also to decline a position in 1860 as the first chancellor of the University of Georgia. Even after Georgia's secession, his commitment to his role as chief justice was a factor in his declining Gov. Joseph Brown's offer of one of Georgia's seats in the Confederate Senate. The one diversion he did make from his judicial duties was in founding the law school at the University of Georgia in 1859. Lumpkin, his son-in-law, Thomas R. R. Cobb, and William Hope Hull formed the original faculty of what was initially chartered as the Lumpkin Law School.

The Supreme Court continued to hold sessions throughout the Civil War, and in *Edmonson v. Union Bank of Tennessee,* 33 Ga. 91 (1861), Lumpkin observed that President Lincoln was waging an "unnatural and unconstitutional war upon a portion of the states" (93). Five of his sons fought for the Confederacy, and his son-in-law, Thomas R. R. Cobb, was killed at Fredericksburg shortly after his promotion to brigadier general. In *Armstrong v. Jones,* 34 Ga. 309 (1866), Lumpkin commented that at the end "the Confederacy itself was extinguished, as completely as if its last champion had perished when Stonewall Jackson fell. Submission to the victorious North was absolute . . ." (312). Although his health was deteriorating in 1866, he still managed to write more than his usual one-third of the opinions issued by the court that year. The court held its first session of the following year on 4 June 1867 without him, and he died the next day at his home in Athens, Georgia.

Lumpkin is widely recognized as the most influential judge in Georgia during the early years of the Supreme Court. His political independence and leadership skills guided the court toward the front rank and earned him the highest respect from his fellow Georgians. Although he was an orthodox conservative in his pro-slavery views, he was also a proponent of economic, social, and legal reforms that would benefit the South while preserving its culture.

Paul DeForest Hicks

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Note: A collection of Lumpkin's papers is held by the Hargrett Rare Books and Manuscript Library at the University of Georgia. These include letters, mainly between Lumpkin and his daughter, Callie Lumpkin King, that are on loan to Hargrett from the Alexander King Law Library at the University of Georgia School of Law. Lumpkin's judicial opinions can be found in the *Georgia Reports,* vols. 1–35; see also the memorial to Lumpkin in volume 36.

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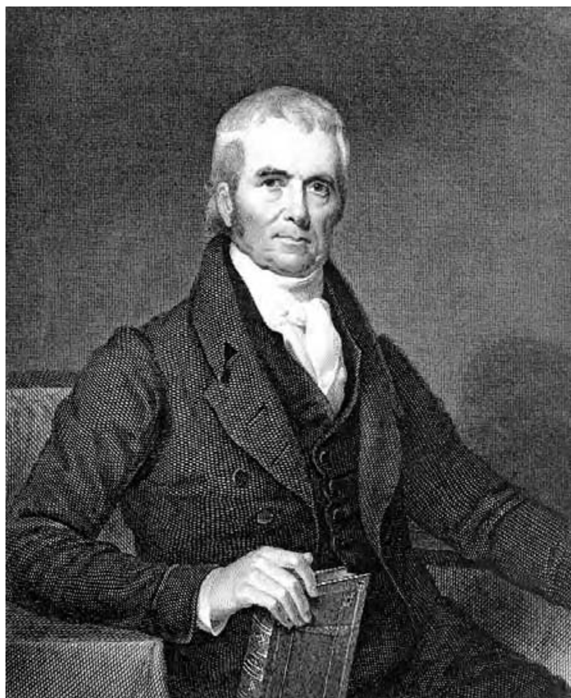
MARSHALL, JOHN

(1755–1835)



John Marshall
Library of Congress

John Marshall was the firstborn son of Thomas Marshall (1730–1802) and Mary Randolph Keith Marshall (1737–1809) and was related through his mother to his future political rival, Pres. Thomas Jefferson. He was born near Germantown in Fauquier County, Virginia, on 24 September 1755 and educated at home by his mother and tutors. Subsequently, he was tutored by the Reverend Archibald Campbell at the Campbelltown Academy, where James Monroe was a fellow student. The Reverend James Thomson, an Episcopal clergyman from Scotland, completed Marshall's classical training with further tutoring. Both Marshall and his father joined the specially trained Virginia militia units as war with Britain became imminent in 1774 and 1775. After commissioned service in the Culpeper Minutemen and the Virginia Continental Line (1775–1779), John Marshall attended about three months of law lectures delivered by George Wythe at the College of William and Mary in 1780. While pursuing his studies he met and began his courtship of Mary Willis Ambler (1766–1831), whom he married on 3 January 1783.

Admitted to practice by the county court of Fauquier County on 28 August 1780, Marshall soon became active in local politics. Elected to represent Fauquier County in the Virginia House of Delegates (May 1782), he resigned his seat on 30 November 1782 to take his place as a member of the

Council of State, where he served for seventeen months. After his move to Richmond in early 1783, Marshall was again elected a Fauquier delegate in May 1784, doubtless qualifying by land ownership in Fauquier rather than by residence. Thereafter, he represented the city of Richmond, or Henrico County, from 1785 through 1788, in 1789 through 1790, and in 1795. In the House of Delegates he was a strong voice for national unity and for fiscal integrity in international and interstate transactions. As a Henrico district delegate to the June 1788 Virginia Ratifying Convention, Marshall was chosen by his proratification colleagues to refute arguments against the proposed federal judiciary and to deliver two other speeches supporting ratification of the federal Constitution.

Marshall's only judicial experience prior to his appointment as chief justice of the United States Supreme Court was a two-and-a-half-year term as recorder of the Richmond City Hustings Court (1785–1788). As an elected member of the Richmond City Common Hall, he was automatically a member of the Hustings Court, which was the municipal equivalent of Virginia's county courts, exercising broad general jurisdiction in civil cases and minor criminal jurisdiction in misdemeanors and acting as an examining court in the case of felonies. In trials of accused slaves, however, the Hustings Court exercised felony jurisdiction, including the power to impose capital punishment. Traditionally, the recorder of the court was an attorney, who presided over Hustings Court proceedings and who also was charged with prosecution and defense of cases involving the city.

Following his 1783 relocation to Richmond, Marshall's practice shifted to the higher state courts—the General Court, the High Court of Chancery, and the Court of Appeals. He rapidly gained a reputation for skill and logic in oral argument and was an acknowledged leader of the Richmond bar by 1787. The practice was rich and varied, providing him with mercantile clients along the East Coast and opportunities to assist Revolutionary War veterans in disposing of pay certificates and utilizing land grants. Among his more famous clients was Robert Morris of Philadelphia (1734–1806), the "Financier of the Revolution," whose daughter would later marry Marshall's brother, James Markham Marshall. The extended litigation over the Fairfax proprietary between the Commonwealth of Virginia and the heirs of Thomas, Lord Fairfax (1693–1781), involved Marshall at first as attorney for the Fairfax interests and later as a purchaser of the manor lands set aside as the lord's private property. With the opening of the United States Circuit Court for Virginia in early 1790, Marshall's active state appellate practice was augmented by a large number of federal cases in which Marshall defended Virginia debtors against their pre-Revolutionary British creditors. This group of cases formed the basis for his only argument before the United States Supreme Court, *Ware v. Hylton* (3 Dallas 199 [1796]).

As an active and influential Virginia Federalist, Marshall was offered several federal appointments by President George Washington. The needs of his growing family, coupled with financial commitments to the purchase of Fairfax manor lands, forced him to devote his energies to law practice. Pres. John Adams persuaded Marshall to accept a diplomatic assignment as one of three special envoys to France in what would become famous as the XYZ Mission (1797–1798). The French Directory refused formally to receive the U.S. ministers, and French intermediaries suggested that a bribe was required before negotiations could began. Along with his colleagues, Charles Cotesworth Pinckney (1746–1823) and Elbridge Gerry (1744–1814), Marshall vehemently refused to offer a bribe, both as a matter of principle and because they considered that such an act would compromise U.S. neutrality between France and Britain. As spokesman for the group, Marshall became a hero in the United States when the text of his rejection letter was published by the Adams administration. His triumphal return to the United States marked a major step on his way to national political stature.

At George Washington's insistence, Marshall campaigned for and won a seat in the U.S. House of Representatives, where he served from 4 December 1799 to 8 May 1800, when he resigned to accept John Adams's appointment as secretary of state. While in the House, Marshall defended President Adams's decision to extradite Jonathan Robbins to Britain to stand trial for crimes committed on a British naval vessel. Marshall was also a member of the committee that drafted the short-lived Bankruptcy Act of 1800. As secretary of state he directed diplomatic negotiations with revolutionary France, which were finally stabilized by ratification of the Consular Convention of 1800. President Adams's frequent absences from the capital required that Secretary Marshall pass upon many official appointments and supervise the day-to-day operations of the federal government. When the chief justiceship fell vacant unexpectedly in late 1800 and prompt action was required by the circumstances, President Adams nominated Marshall for the position on 20 January 1801. Marshall's confirmation by the Senate a week later launched a thirty-five-year judicial career that markedly altered the course of U.S. constitutional history and reshaped both the administration and the public image of the United States Supreme Court.

As chief justice, John Marshall achieved three major goals: (1) He reshaped the institutional structure and decisionmaking process of the Supreme Court; (2) he exercised leadership both within the Court and in the political arena, emphasizing the Court's unanimity in the pronouncement of federal law; and (3) he established the foundations upon which the Court would become the most active and most respected propounder of U.S. constitutional law. All three aspects of his work became immediately

apparent in the announcement of the Court's 1803 opinion in *Marbury v. Madison* (1 Cranch 137).

Marshall took his seat on the Supreme Court bench at a time when the Jeffersonian Republican party dominated both the legislative and executive branches. The Court was at perhaps the lowest level of prestige it ever reached in both professional stature and public support. Composed of relatively elderly justices, it delivered its opinions seriatim—that is, each justice speaking separately—and its time and energy were sapped by the statutory requirement that the justices ride circuit throughout the United States for the trial of cases at the United States circuit courts.

Marbury v. Madison, also known as the Mandamus Case, refused an invitation to issue a writ of mandamus to Secretary of State James Madison. The relief was requested by William Marbury, who had been commissioned a District of Columbia justice of the peace but whose commission had been withheld by the incoming secretary of state, James Madison. After upholding in principle Marbury's right to the commission, Marshall considered the Supreme Court's original jurisdiction in light of Article 3 of the federal Constitution. Since mandamus powers were not conferred upon the Supreme Court by the Constitution, Congress was incapable of so expanding the Court's authority by enacting the Judiciary Act of 1789. Pointing out that the Constitution was a superior body of law to which federal statutes were required to conform, Marshall held that it was the Court's duty to follow the Constitution and to hold the statute void. Since the lower federal courts had already utilized judicial review, as had several state courts, this concept was scarcely original to John Marshall. It did proclaim the Supreme Court's intention, however, judicially to review congressional statutes when appropriate cases were brought before it.

The *Marbury* opinion's promulgation early in Marshall's chief justiceship gave notice that the Supreme Court was entering a new era. The use of an "opinion of the Court" would become a characteristic not only of the Marshall Court but of most successive eras of the Court's history. Marshall's political astuteness and his persuasive talents among his colleagues have been standards against which future chief justices have been judged. Leadership qualities of the chief justices have been noted in terms of their achieving unanimity of opinions among their colleagues and also in regard to shaping and protecting the public image of the Supreme Court. In addition, the collegial atmosphere of the Marshall Court, shaped to a considerable degree by its social ostracism in Jeffersonian Washington, welded the justices into a self-protecting small group, willingly accepting the gentle but skillful efforts of Marshall toward "image building" and achieving consensus among differing judicial viewpoints. Finally, six days after the *Marbury* decision was announced, the Supreme Court, in an opinion delivered by Justice William

Paterson, upheld the Jefferson administration's constitutional power to require Supreme Court justices to ride circuit and try cases in the lower federal courts (*Stuart v. Laird,* 1 Cranch 299 [1803]). In *Stuart* the Court skillfully avoided a direct confrontation with the Republican-controlled Congress. By acquiescing in congressional authority to regulate the lower federal courts, it provided assurances that the Marshall Court would not use judicial review to inhibit legislative policymaking even in regard to the federal judiciary. Correspondence between the justices shows that Chief Justice Marshall was influential in gaining agreement concerning the Supreme Court's circuit-riding duties, even though he recused himself from participating in the decision because he decided the case below, in the United States Circuit Court for Virginia. This deference to congressional policymaking was also demonstrated by the Supreme Court's willingness to uphold the legality of Thomas Jefferson's 1807 embargo legislation.

Beginning with *Fletcher v. Peck* (6 Cranch 87 [1810]), Marshall began to expand the scope of the Constitution's contract clause (Article 1, section 10). Prohibiting state laws and actions that impaired the obligations of contract, the provision was doubtless intended by the framers to protect interstate and foreign commercial traders against state laws or court rules that inhibited the collection of debts. In *Fletcher* Marshall held that a state land grant obtained through bribery could not be revoked by a subsequently elected legislature if property rights had vested in innocent purchasers for value. Further extension of contract clause protection was sanctioned by Marshall's opinion for the Court in *Dartmouth College v. Woodward* (4 Wheaton 518 [1819]), which invalidated a New Hampshire state statute that purported to revoke the 1769 royal charter granted to Dartmouth College. Here the chief justice held that the state, by succession to the sovereign rights of the Crown, was precluded from destroying the educational institution whose charter had formed the basis upon which private donors contributed to its support. Both *Fletcher* and *Dartmouth College* found their origin in Marshall's belief that security of private property rights was essential to a stable and flourishing American economy. Although his primary reliance was upon enlarging the scope of the Constitution's contract clause, he also saw the sanctity of private property as one of the basic foundations of a republican polity. This broader basis upon which to protect property rights involved Marshall in what would be his first dissent in a constitutional law case. In *Sturgis v. Crowninshield* (4 Wheaton 122 [1819]), the Supreme Court, in an opinion delivered by Marshall, had invalidated a New York state insolvency law that altered rights of creditors that arose prior to the effective date of the statute. From the 1827 decision in *Ogden v. Saunders* (12 Wheaton 213), from which Marshall dissented, it becomes clear that *Sturges*'s narrowly focused opinion resulted from a compromise

Sir Edward Coke (1552-1634)

Although the U.S. Constitution led to some distinct differences, law in the United States continues to be shaped by the heritage of common, or judge-made, law, which was inherited from England (by contrast, judicial rulings in many European democracies are based on judicial application of the civil code, especially prominent in France and Spain). English judges undoubtedly shaped American expectations of what judges were supposed to do. Few, if any, British judges have been more important to either the history of England or that of the United States than Sir Edward Coke.

Born in Norfolk County, England, Coke attended Trinity College at Cambridge University, received his legal training at London's Inner Temple, and became a member of the bar in 1578. He rapidly rose in his profession and served in a number of high offices under Queen Elizabeth I, including that of solicitor-general, speaker of the House of Commons, and attorney general. Coke became particularly known for his ferocity as a prosecutor in the latter position as he took on Essex, Southampton, Raleigh, and the conspirators in the Gunpowder Plot aimed at blowing up Parliament.

James I, still known for his doctrine of the "divine right of kings," elevated Coke to chief justice of the common pleas and, later, to chief justice of the King's Bench, but in these positions Coke began to interpose the common law against increasingly broad claims of royal prerogative. Basically, James believed that he was accountable only to God, whereas Coke believed that the king was also under the common law. When James I claimed the right to preside over the Star Chamber, Coke objected that "the King cannot take any cause out of any courts and give judgment upon it himself" (Bowen 1957, 304). Coke's *Reports* continued with the story:

> Then the King said that he thought the Law was founded upon Reason, and That he and others had Reason as well as the Judges. To which it was answered by me, that true it was that God had endowed his Majesty with excellent science and great endowments of Nature. But his Majesty was not learned in the Laws of his Realm of England; and Causes which concern the life, or Inheritance, or Goods, or Fortunes of his Subjects are not to be decided by natural Reason but by the artificial Reason and Judgment of Law, which requires long Study and Experience before that a man can attain to the cognizance of it; and that the Law was a golden Metwand [metewand, or measuring rod] and Measure to try Causes of the Subjects, which protected his Majesty in safety and Peace: With which the King was greatly offended, and said that then he should be under the Law, which was treason to Affirm (as he said). To which I said that . . . the King should not be under man, but under God and the Laws. (304–305)

Many scholars regard *Bonham's Case* (1610) as a prelude to Chief Justice John Marshall's assertion of the power of judi-

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cial review (to ascertain whether legislation adopted by Congress was constitutional) in *Marbury v. Madison* (1803). In *Bonham's Case*, involving the legitimacy of a fine imposed on an unlicensed doctor, Coke further extended judicial power over Parliament, declaring that "when an Act of Parliament is against common right and reason, the common law will control it and adjudge such Act to be void" (Bowen 1957, 315). Ironically, this idea survived better in America than in England, where the idea of parliamentary sovereignty was fairly firmly established by the time of the American Revolution and was, in fact, one of the primary bones of contention between the mother country and her colony.

Coke's primary conflict continued to be with the king rather than the Parliament. In one confrontation just before his dismissal from the chief justiceship of the King's Bench in 1616, all the justices except Coke agreed that they would stay the trial of a case involving the king's prerogative. Coke alone had responded "that when the case should be, he would do that [which] should be fit for a Judge to do" (Bowen 1957, 374).

Dismissed from his judicial post, Coke went on to lead parliamentary opposition to the king's assumption of prerogative powers—opposition that led the king to imprison Coke briefly in the Tower of London. Coke was also influential in the impeachment of Francis Bacon, his longtime nemesis. More than any other figure in England, Coke was responsible for utilizing the principles of the Magna Charta (1215) to defend the rights of Parliament and of the people. Coke increasingly became known as the "oracle" of the common law, and his influence persisted through a number of writings and reports, including his *Institutes*, the first volume of which (first published in 1628 and generally known as *Coke on Littleton*) continued to be a primary staple in the education of lawyers in early American history.

The last paragraph of Coke's *Institutes* indicated, in the language and spelling of his era, his understanding, rooted deep in common law, of the need for constant revision of the law:

> And for that we have broken the ice, and out of our owne industry and observation framed this high and honourable building of the jurisdiction of the courts, without the help or furtherance of any that had written of this argument before, I shall heartily desire the wide hearted and expert builders (justice being *architectonica virtus*) to amend both the method or uniformity, and the structure it selfe, wherein they shall finde either want of windowes, or sufficient lights, or other deficiency in the architecture whatsoever. And we will conclude with the aphroisme of the great lawyer [Edmund Plowden] and sage of the law (which we have heard him often say) *Blessed be the amending hand.* (Bowen 1957, 524)

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among the justices engineered by the chief justice. In 1819 as in 1827, they were sharply divided over the contract clause's restrictions upon state legislation touching insolvency proceedings. By 1827 Marshall was forced into dissent to defend his minority position. Apparently he believed that by their agreement the parties were bound by their freely given consent reenforced by principles of natural law and that any state interference with contract rights violated the federal Constitution's contract clause.

The contract clause decisions underline Marshall's strong attachment to private property as the bedrock upon which a prosperous commercial economy and virtuous republic were based. To an extent this mirrored Lockean philosophy that relied upon individual initiative and sanctity of property to maximize the stability and prosperity of the entire community. In an age marked by the rise of the common man to the exercise of electoral power, Marshall's property-related decisions may seem in retrospect to have been constructed to form a legal foundation for the rise of capitalism. Yet Marshall did not consider private property rights to be absolute, and he readily upheld regulatory legislation when the exercise of governmental power was essential to protect the public welfare.

Similarly, Marshall's views of the federal union and the extent of the federal government's power cannot be simplified by classifying him a "nationalist," either in political or economic terms. In his view of the federal union there was a clear and precise acknowledgment that within the limited sphere of federal activity prescribed by the Constitution, there was an essential balance between the police powers reserved to the states and the broad grants of national authority contained in the Constitution's enumeration of federal authority. The classic expression of that tension occurs in the two classic commerce clause decisions: *Gibbons v. Ogden* (9 Wheaton 1 [1824]) and *Willson v. Black Bird Creek Marsh Company* (2 Peters 245 [1829]). *Gibbons* set forth a broad and comprehensive definition of the interstate commerce clause, providing a basis upon which virtually all economic activity might fall within federal regulatory power. Marshall took care, however, to recognize that in the execution of their constitutionally recognized police powers, the various states might legitimately touch upon matters already regulated by Congress, and in such situations state laws would not be unconstitutional. He expressly refused to hold that the commerce clause was vested exclusively in Congress, preferring to leave the extent of federal power delineation to future adjudication by the Supreme Court. Such an occasion arose in *Willson*, in which matters of public health and safety were arguably an adequate basis upon which the Court might overlook a technical state intrusion into Congress's right to control navigation upon tidal creeks. In a short opinion for the Court, the chief justice used a balancing approach to declare the state action constitutional.

A similar federal-state tension existed in regard to the exercise of federal power under the necessary and proper clause and the concurrent power of taxation as it existed in both federal and state governments. In what is probably Marshall's most forthright statement of federal supremacy, *M'Culloch v. Maryland* (4 Wheaton 316 [1819]), he held that the Bank of the United States was an instrumentality of the U.S. government, justified constitutionally under a doctrine of implied powers and by a broad construction of the necessary and proper clause (Constitution, Article 1, section 8). As such, the bank could not be subjected to an arbitrary and discriminatory Maryland tax upon its bank note issue. Since the bank drew its authority from the sovereign people of all the states, it was inimical to the principle of supremacy for such a federal instrumentality to be taxed by the sovereign people of only one state. On the other hand, the chief justice felt it necessary to point out that in areas where the state of Maryland might legitimately tax its own citizens, it might tax federal instrumentalities similarly situated, presumably limited to situations where the tax was not discriminatory.

Delineating Marshall's care and caution in setting forth principles of federal power should not detract from his substantial achievements both within the Supreme Court and in articulating judicial positions that enhanced the power of the federal government. To him is due the credit for regularizing conference procedure, opinion delivery, and decision delivery. These vastly strengthened the chief justice's control of the Court and provided an ostensible public image of unanimity among the justices. To him is due the politically wise and cautious consideration of cases on appeal and the use of jurisdictional technicalities to avoid confrontation with the coordinate branches of the federal government. Finally, to him is due the great achievement of his judicial generation—putting flesh and muscle upon the skeletal federal Constitution they had been given by the 1787 Philadelphia convention.

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MARSHALL, THOMAS ALEXANDER

(1794–1871)

Thomas Alexander Marshall
Courtesy of Sara Zeigler

Thomas Alexander Marshall, a member of a Kentucky family with extensive political connections, served as a justice on the Kentucky Court of Appeals (at the time, the state's highest court) from 1835 to 1856 and again from 1866 to 1867. During his service on the court, Marshall held the position of chief justice multiple times. Although relatively little is recorded about his private life, his distinguished career in public service during one of the most turbulent periods in U.S. history marks him as a jurist of significant influence.

Marshall was born on 15 January 1794 in Woodford County, best known for its production of the items necessary to the profitable Kentucky "sins" of drinking bourbon, betting on the horses, and using tobacco. He was the second son of Humphrey Marshall, who played a leadership role in the successful effort to separate the territory that became Kentucky from Virginia. Humphrey Marshall wed a well-connected woman who shared his surname. Mary Marshall, mother of Thomas Alexander, was the sister of United States Supreme Court chief justice John Marshall, who authored key opinions that consolidated and solidified the power of the U.S. judiciary. Thomas

Alexander thus received an early education in politics, both legislative and judicial. In addition to observing his uncle's career, he was witness to his father's national-level political activity. Humphrey Marshall was elected to the U.S. Senate several times and ran as a staunch Federalist. In 1809, Humphrey's disagreement with another famous Kentuckian, Henry Clay, resulted in a duel, in which Clay was wounded. The Kentucky oath of office, given to all public officials, now requires that officials eschew participation in duels.

Given the harsh feelings between the elder Marshall and Henry Clay, it is ironic that Thomas Alexander married Eliza Price, the niece of Henry Clay, in 1816. Miss Price was reputed to be one of the loveliest women in Kentucky at the time. Certainly, for a young man with political aspirations, a niece of Henry Clay was a good "catch."

Thomas Alexander Marshall began his legal practice in 1816, after graduating from Yale in 1815 and studying law in Kentucky for a year. His political career began with a speech denouncing debt relief acts passed by the state legislature in late 1825 and early 1826. The acts resolved the state's fiscal challenges by authorizing the production of new currency and declaring it legal tender for all debts—past, present, and future. Marshall was a firm opponent, viewing the acts as both irresponsible and ineffective. Shortly afterward, Marshall was elected to the state legislature, beginning his term in 1826. He also served as a legislator at the national level, winning a single term to the U.S. House of Representatives in 1831.

It took little time for Marshall to move from the legislature to the judiciary. Like most states in the early nineteenth century, Kentucky used gubernatorial appointment as its means of judicial selection. Marshall was appointed to the high court by Governor Morehead in 1835 and was its chief justice from 1846 to 1849 and from 1854 to 1856. In 1849, Kentucky convened a constitutional convention, which altered the method of judicial selection from appointment to election. Kentucky was divided into four districts, each of which would select a judge for the Court of Appeals. At that time, Marshall expressed reluctance to run. He feared that his long tenure on the court had left him isolated from his constituents and incapable of winning the solid electoral support needed to retain his seat. Friends and colleagues prevailed upon Marshall to run, and he consented. His judgment about his political influence was proven incorrect—Marshall won his district by a significant margin.

During Marshall's tenure on the Court of Appeals, he had the opportunity to write on issues both mundane and divisive. Although most of the court's work focused on the crucial, but routine, work of building a body of precedent in matters such as contracts, probate, and marriage, the question

of slavery dominated a number of key cases. Marshall declined to air his personal views on the slavery questions, and his opinions show a careful deference to the actions of the legislature.

Marshall's decisions were characterized by a painstaking, almost mind-numbing attention to detail. A decision regarding a land patent (*Gossum v. Sharp's Heirs*, 37 KY 14) demonstrated a thorough knowledge of the particulars of the parties' arguments as well as the specific features of the parcel in dispute. Several paragraphs were devoted to the names given to two sinkholes on the property, lest there be confusion as to which sinkhole was to be improved by one of the parties. In this case, as in all of his opinions that I have reviewed, Marshall carefully analyzed each claim, identifying precedents to support the ruling. That said, Marshall was fully prepared to abandon those common law practices that, in the specific context, would produce absurd results. The law was to be useful, practical, and flexible. Marshall clearly articulated this position in the case of *Turman v. White's Heirs*, in refusing to follow a well-established common law rule "as it is confessedly an arbitrary rule, out of the reach of common men, and not accordant with their notions of the meaning and effect of language; as it was founded upon a state of things which has not existed for centuries in England, and never in this State, and as it was intended to advance a policy at war with our institutions, and of which there has never been a trace in our State" (14 Monroe 56, 1854).

Marshall showed no inclination to depart from tradition in his rulings on marriage law. His opinions on marital disputes were consistently conservative and directed toward the preservation of the union, happy or unhappy, regardless of the preferences of the parties involved. One biographer attributed Marshall's position to the happiness of his own marriage, which endured for over half a century (Wolf 1908). Endurance, of course, did not necessarily represent a blissful union in a state that strictly limited divorce. The Marshalls' marriage was widely regarded as a successful union, however, and may have influenced Marshall's views. In denying relief to a wife who attempted to sue her husband for violating the terms of a privately drafted separation agreement, Marshall offered a rare glimpse into his personal opinion on the centrality of the marital institution to the moral integrity of a well-ordered state.

> The principle involved, however, is of deeper consequence than the mere adherence to the doctrine of the common law in relation to the disability of the husband and wife to contract with each other. The disability is itself founded in the wisest policy, and is an essential muniment *[sic]* to the inviolability of the nuptial contract, and to the maintenance of the institution of marriage.

> The well-being of society, as well as the policy of the law and the objects and duties of the marital contract require, that those who are united in marriage should live together. The law, indeed, furnishes, and can furnish, no coercive remedy for enforcing this duty. But, in addition to the inducements which are held out by the law of nature and the customs of society, in this very disability to contract with each other, in the utter incapacity, by their own mere will, to absolve each other from the reciprocal rights and duties which the law of their contract has imposed upon them, in the consequent dependence of the wife upon the husband, and the continued liability of the husband to support the wife, the law furnishes powerful motives, which operate most strongly upon those who might be least moved by other considerations, to the promotion of harmony and peaceful cohabitation in married life. (*Simpson v. Simpson,* 34 KY 141–142, 1836)

The most contentious political problem of Marshall's day was slavery, and there is no shortage of Court of Appeals cases on that issue in Kentucky. Although Kentuckians were more ambivalent about the "peculiar institution" than their neighbors farther to the south, Kentucky remained a slave state until the adoption of the Thirteenth Amendment in 1865. The fact that it bordered the North (and thus was on the route to freedom for fugitive slaves) complicated matters for Kentucky legislators and judges. Marshall's own views on slavery (unlike his clearly articulated perspective on marriage) were not clear. He was known as a strong proponent of states' rights but also as a staunch supporter of his uncle-by-marriage and noted abolitionist Henry Clay. There is no evidence that Marshall himself owned slaves.

In his judicial opinions, Marshall steered a safe course between the claims of the two competing factions, upholding pro-slavery laws without lauding them. In *Graves v. Allan* (52 KY 190, 1852), a case involving the will of a "free man of color" that granted bequests to his enslaved relations, Marshall ruled slaves could not hold bequeathed property because, like married women, they did not enjoy property rights. Yet Marshall also denied the slaveowners' claim to the same property, claiming that a bequest to their slaves was not the legal equivalent of a bequest to the owners. In short, Marshall declared the will to be utterly unenforceable, despite his affirmation of the testator's right to make bequests generally. The case maintained a delicate balance, recognizing the full legal rights of the freeman as well as the validity of laws denying those same rights to slaves.

Marshall also demonstrated a willingness to uphold antislavery statutes, holding constitutional an 1833 law prohibiting the importation of slaves into Kentucky (*Commonwealth v. Griffin,* 42 KY 208, 1842). Marshall's most famous opinion, the holding in *Strader v. Graham* (39 KY 350, 1840),

again shows his unwillingness to take a political stand on slavery and his adeptness at balancing competing claims. This was a case of some historical import, as it was appealed to the United States Supreme Court and affirmed by that body. In the case, a testator and slaveholder, Charles Wilkins, emancipated his slave, David, in Wilkins's will. The executors of the estate, however, deeded David to one Mr. Snead, a creditor of Wilkins, upon determining that the resources remaining to the estate were insufficient to meet Wilkins's obligations to his creditors. Carefully analyzing the relevant (and conflicting) statutory law relating to the transfer of human property and the right of a testator to emancipate a slave, Marshall ruled that the executors could not reverse David's emancipation to meet obligations to creditors. The creditor Snead, however, could seek relief in Chancery, and David, as a beneficiary of the will, might well be required to satisfy the debt. Given that David's sole asset was his labor, he might well be committed to involuntary servitude in order to satisfy the debt, reversing the emancipation in fact if not in law. But that was a matter for Chancery, and Marshall withheld his thoughts.

During much of his tenure on the Court of Appeals, Marshall served as a professor of law at Transylvania University in Lexington (1836–1850). His elected term on the Court of Appeals ended in 1856, and Marshall returned to private practice. In 1866, Yale honored Marshall by conferring upon him the degree of doctor of laws. During that same year, Chief Justice Simpson died, and Marshall was appointed by the governor to complete the term as chief justice. In 1867, Marshall retired to private life, after performing that last public service for the state of Kentucky. He died in 1871, at the age of seventy-seven.

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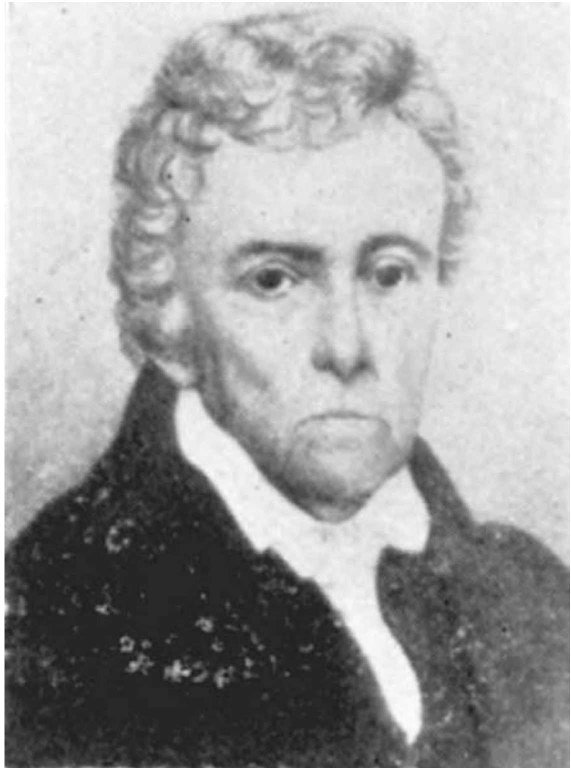
MARTIN, FRANÇOIS-XAVIER

(1762–1846)

François-Xavier Martin served as judge of the Superior Court, Territory of Mississippi (1809–1810); judge of the Superior Court, Territory of Orleans (1810–1813); attorney general of the state of Louisiana (1813–1815); judge of the Supreme Court of Louisiana (1815–1836); and chief judge of the Supreme Court of Louisiana (1836–1846). From his seat on the bench and through voluminous writings and compilations, Martin helped standardize and Americanize Louisiana's judicial system during the antebellum era.



François-Xavier Martin
Louisiana Historical Society

Born in Marseilles, France, on 17 March 1762, into a successful merchant family, Martin received his education at home under the tutelage of the family's priest. In 1782, Martin traveled to Martinique, where he joined an uncle who supplied provisions for the French navy. After that business failed, Martin ventured in 1784 to New Bern, North Carolina, where he eventually became a printer's assistant and, after a period of training, opened his own printing business. Once that concern was running smoothly, he began studying law. Martin later became a U.S. citizen.

Martin gained a firm knowledge of the common law, was admitted to the North Carolina bar in 1789, hung his shingle, and developed a thriving

practice. In his spare moments, he wrote a series of treatises on duties and, in 1802, translated into English Robert Pothier's *Treatise on Obligations Considered from a Moral and Legal View.* Thanks to his success as a printer, the North Carolina legislature hired him to compile the statutes from the state's territorial period and, later, a revised version of the general assembly's acts from throughout its history. In 1806, Martin won his own seat in the House of Commons.

On 7 March 1809, Pres. James Madison appointed Martin superior court judge of the Mississippi Territory. A year later, on 10 March 1810, Madison appointed Martin to the same position in the Territory of Orleans. The Orleans Territory included most of modern Louisiana and consisted of a hodgepodge of cultures, nationalities, and religions plus divergent political and legal traditions.

Martin's most significant actions in Louisiana would revolve around his work in Americanizing the state's judicial system by synthesizing Anglo-American common law practices with French and Spanish civil law traditions. A judicial system based on civil law constrained judges to reach decision by referring only to state-imposed, written law codes. Civil law allowed for little judicial independence and creativity, as judges presented their decisions by listing relevant code citations. Spain and France utilized the civil law system, and it thus had been the primary focus for colonial Louisiana law. Common law, on the other hand, prevailed in the Anglo-American colonies. It flowed from a number of different legal streams—judicial decisions, customs, legislation—and allowed for more freedom and power on the part of judges in creating rulings and through the stare decisis concept, which allowed judicial interpretation of laws and held that judgments rendered became part of the common law. Louisiana's judicial system eventually combined elements of civil and common law, but this outcome was by no means determined in the early 1800s. Creole inhabitants strongly supported a civil form, whereas more recent American transplants favored common law.

The law that created the Orleans Territory had not required usage of the common law, but Pres. Thomas Jefferson wanted the territory to become more like other U.S. states and territories, so he urged Gov. W. C. C. Claiborne to foster the common law's use. Jefferson and Claiborne knew, however, that changing from strictly civilian to strictly common law would create conflict with the inhabitants. Therefore, the territory's first legal compilations emanated from a civil law outlook and included a mixture of French and Spanish precedents with smaller instances of Anglo-American common law. Despite this, common law proponents, most of whom were not Louisiana natives, almost immediately began to institute Anglo-

American practices. American lawyers trained in the common law poured into the territory, and almost all of the judges appointed in that period had trained in the common, not the civil, law.

Martin, as a native of France with technical skill in the common law, proved uniquely qualified to serve as an active participant in the blending of legal traditions. The court he joined in 1810 possessed exclusive jurisdiction in capital cases, jurisdiction in criminal cases with possible prison sentences of more than six years, and original and appellate jurisdiction in civil cases of more than $100. It was the territory's only court of appeals. Judges served four-year terms, held jurisdiction over separate districts, and earned $2,000 per year. The judges traveled among five appellate districts.

The territorial supreme court lacked uniformity and standardization—each of the three judges was entirely autonomous and the code of laws then in force, stemming as it did from complex and varied antecedents, confused more often than it illuminated. Martin found such disorder unsuitable and drew on his past experience as a printer and compiler to publish case reports. The reports allowed judges to know what was going on in each other's courts and also provided much needed information for the general public.

The most important of Martin's early decisions dealt with slavery. The Orleans Territory's sizable population of free persons of color presented legal difficulties with which most other southern states did not have to deal. In *Adele v. Beauregard* (1810), Martin declared that descendants of Indians, of one white parent, or of free black parents could be considered persons of color, as opposed to pure Africans, who were to be presumed slaves. This argument became important in subsequent court decisions, especially in cases of slaves petitioning for freedom.

When the Orleans Territory became the state of Louisiana in 1812, its new constitution called for a state supreme court modeled after other U.S. state courts. This new court consisted of between three and five judges (they were not referred to as justices), appointed by the governor, who served until retirement or removal and earned $5,000 per year. The new court had no jurisdiction over criminal matters, but it did establish rules for bar admissions. The court met in one of two districts: the eastern, headquartered in New Orleans, and the western, based originally in Opelousas. Martin served on the committee to create the rules and regulations of the court.

Martin became Louisiana's first attorney general in 1813. He did, however, go before the court at its very first meeting to be admitted, along with seven other lawyers, as an inaugural member of the state bar. Following the resignation of one of the original members, Martin became a judge of the Supreme Court on 1 February 1815.

At the time of Martin's appointment, the War of 1812 had just ended, and Gen. Andrew Jackson controlled New Orleans. Jackson had declared martial law, and his declaration led directly to Martin's earliest ruling. Even after the British threat to New Orleans faded, the general had ordered arbitrary arrests and imprisonments, arrested federal district judge Dominick Hall, and attempted to stop the Louisiana Supreme Court from meeting. In Martin's first ruling from the court, he judged that Jackson's martial law was illegal and represented nothing more than a usurpation and suspension of powers granted the courts by the people.

In 1816, the Louisiana legislature called for the first comprehensive compilation of territorial and state laws, and Martin, experienced in this sort of task, took the job. Within a year, he produced the three-volume *A General Digest of the Acts of the Legislature of the Late Territory of Orleans and of the State of Louisiana, and the Ordinances of the Governor under the Territorial Government*. The *General Digest* included all ordinances issued by territorial and state governors, all legislative acts, and pertinent public documents. Martin arranged the laws by topic while maintaining their original wordings. The book came out in both French and English and, like his earlier reports, is yet another example of Martin's emphasis on uniformity.

The continued search for judicial and legal uniformity can also be seen in Martin's case reports. Since arriving in Louisiana, he had collected copies of other courts' decisions and made notes on his own. He later added these to his series of case reports, the *Orleans Term Reports* and *Louisiana Term Reports*, which contained the Supreme Court's judgments, the former for the territorial period and the latter for the state. Each report included a case summary, arguments made, and decision rendered. The first two volumes had been completed by 1813, when he took a break while serving as attorney general. He resumed his task following his appointment as Supreme Court judge. By 1830, he published another seventeen volumes. Martin saw the reports as a way of combating the lack of uniformity in addition to sheer lack of knowledge about judicial decisions, and the *Reports* became vastly useful: Judges and lawyers used them to establish precedents, and legislators used them as references while creating laws.

By 1830, the state's growth and the court's expanded jurisdiction made the job increasingly difficult. In 1836, Martin, by then completely blind, replaced George Mathews as chief judge of the Louisiana Supreme Court.

Besides helping to standardize and unify the Louisiana judiciary through his writings, as a judge of the Supreme Court, Martin participated in the bringing of Anglo-American common law practices to Louisiana's judicial system. Perhaps more than any other instance, Martin's ruling in *Reynolds v. Swain* (1839) solidified the dominance of the common over the civilian law and helped define the role of the judiciary in Louisiana.

Reynolds v. Swain established the judiciary's role in light of the Louisiana Code of 1825 and certain statutes of 1828 that had repealed all laws preceding the 1825 code. The case centered on a verbal agreement for the rental of a New Orleans tenement. Although the details of the case are not particularly relevant today, what is important is that the district court judge used *Christy v. Casanave* (1824) as a precedent in a favorable ruling for Reynolds. Swain et al. appealed to the Louisiana Supreme Court, where Thomas Slidell presented their case. Although Slidell presented a technical argument that the verbal agreement should not have been binding, his more important argument said that the *Christy v. Casanave* precedent could not have been used by the district court because it preceded the 1825 code and the repealing statutes that had disavowed all previous law. The big question facing the Martin court in 1839 was this: Did Louisiana judges have to base their decisions only on the Louisiana Code of 1825? In other words, would civil law triumph, or would the common law be maintained?

Martin, knowing the future implications of the court's actions, wrote the decision himself. After quickly dispensing with Slidell's first argument, the chief judge turned his attention to the second, and more important, matter. Martin said that, although the 1825 code and the 1828 repealing statutes had indeed nullified all previous laws, they only extended to those laws directly addressed by them. He also declared that the code and statutes only applied to laws, not previous judicial decisions.

Thus, in one decision, Martin not only upheld the lower court's decision but also validated the idea that, although law codes were important for judicial decisions, they did not provide the sole authority for decisions. The *Reynolds v. Swain* decision ended any notion that the court should be restricted by a civilian code. In reality, the decision did not change much in the court's actual proceedings; it really only justified what the court had been doing for decades. It provided the most enduring legacy of Martin's tenure as chief judge of the court and proved to be the culmination of the Louisiana judiciary's Americanization in the antebellum period.

For all of his earlier positive impact on the Louisiana judiciary, and although he rendered perhaps his most important decision in 1839, in his later years Martin proved an obstacle to progress. By February 1839, retirements left Martin as the only judge on the court. His solitary position, in addition to basic procedural flaws and a rapidly increasing caseload in the wake of the Panic of 1837, led to a logjam on the court's dockets. Even the appointment of two young and enthusiastic judges, George Eustis and Pierre Adolph Rost-Denis, in early 1839, could not speed up the situation. Eustis and Rost-Denis gave up considerable economic enticements to join the court, but, facing Martin's obstinate refusal to reform the court's operations, they both resigned within a few months of their appointment. Mar-

tin, once a path breaker in judicial matters, had become so conservative and set in his ways that he refused to accept change.

Eventually, with the appointment of several capable judges in late 1839, the court's business sped up somewhat, but not enough to diminish the mountain of pending cases. Public outrage over the overwhelming caseload led, in part, to the calling of a constitutional convention in 1845. The new constitution restructured the state's judicial system, instituting an eight-year limit on judges' terms. On 18 March 1846, the date of the reconstituted court's first meeting, Martin retired from the bench. Nine months later, on 12 December 1846, he died.

Besides his importance from a legal and judicial standpoint, Martin led a life marked by intellectual and pecuniary pursuits. He received honorary doctorates from both the University of Nashville and Harvard University and was a member of the Order of Ancient Free and Accepted Masons and the Academy of Marseilles. Outside the courtroom, Martin's interest in history led to the publication of his *History of North Carolina* (1806–1807) and the *History of Louisiana from the Earliest Period* (1827–1829).

Martin lived a miserly existence. Stern and serious by temperament, his appearance tended toward the slovenly and unkempt. Contrary to his spendthrift look, however, Martin exhibited a talent for accumulating material wealth. He had extensive real estate holdings in New Orleans, made interest-bearing loans to friends and associates, and even used his influence as a judge to pressure the state to buy copies of his *Digests* and *Reports*. By the time he died in 1846, Martin had amassed a fortune of $400,000.

Martin's wealth, combined with his blindness, led to the extension of his influence on Louisiana judicial traditions even after his death through a dispute over his will. A lifelong bachelor with no children, Martin left everything he owned to his brother, Paul Barthelemy Martin, also of New Orleans, by means of an olographic (written in his own hand) will. The will created unexpected problems for Paul Martin, however. Louisiana attorney general William A. Elmore filed a motion to have the will invalidated, claiming that Paul had faked the will, that François-Xavier could not have written it himself due to his blindness, and that François-Xavier had actually planned on leaving his wealth to relatives in France. Elmore argued that the will had been created to get around an 1842 law that provided for a 10 percent tax on estate wealth distributed overseas; Paul had been set up as sole heir so that he could redistribute the money to their French relatives without having to pay the tax. After witnesses for both sides testified, Judge E. A. Canon, on 15 March 1846, ruled that the attorney general had been correct in challenging the ruling, that François-Xavier Martin could not have written the olographic will without help, and that he had intended to evade the estate tax law.

Ellen Morphonious (1929–)

Although presidents appoint federal judges with the advice and consent of the Senate, many state judges are elected. Candidates for judgeships are frequently able to appeal to the sentiment of the public, often disgusted and frightened by rising crime rates, by stressing how hard they will be on criminals. Ellen Morphonious appears to be such a judge.

Born Lydia Ellen James in a small wooden house without running water or indoor plumbing in North Carolina in 1929, Ellen grew into a beautiful blond woman who modeled and participated in beauty contests before serving as a legal secretary in Florida. It was in that position that she decided to become an attorney, obtaining entrance to the University of Miami Law School, as was then possible, despite the fact that she had not received an undergraduate education.

Despite three pregnancies in law school resulting in two sons and one stillbirth, Morphonious (by then using the name of her first husband) graduated and joined former Florida governor Fuller Warren as a junior law partner. Her first case, before the Florida Supreme Court, involved a suit over her scores on the second bar exam (she failed the first time), which had apparently been lowered by one of Warren's enemies to keep her from passing; these scores were invalidated, and Morphonious passed on her third try.

Defeated in her first campaign for a judgeship in 1960, Morphonious continued work in politics and hosted a radio program, where she vented her conservative views. She subsequently became an assistant district attorney in Dade County, Florida. When she ran in 1970 for a judgeship of a felony court, she succeeded and quickly obtained notoriety for dispensing quick and stiff penalties. She kept a model

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Paul Martin's attorneys appealed the case to the Louisiana Supreme Court, where Justice Pierre Adolph Rost-Denis wrote the decision: Despite his blindness, François-Xavier Martin indeed could have written the will, and Paul Martin was the sole heir. Rost also admonished the government for bringing suit. Even from the grave, François-Xavier Martin influenced Louisiana's legal and judicial practices.

Michael S. Martin

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(continued)

of an electric chair in her chambers as "a symbol of the ultimate form of justice and retribution" (Morphonious 1991, 261). She tried presiding over civil trials for a time but found that she enjoyed criminal work much more.

Known variously as "the Hanging Judge," "Maximum Morphonious," and "the Time Machine" for her stiff sentences, she had a way of capturing the public's attention both by what she did and said in the courtroom and by a tempestuous personal life. Married and divorced three times, Morphonious not only admitted to, but also described, a number of her extramarital affairs in a book written with the help of an editor of the *Miami Herald* (Morphonious 1991).

Being a woman at a time when women attorneys and judges were relatively rare might have made it more difficult to obtain a job as a prosecutor and win her first election. Morphonious admitted, however, that she once got a campaign supporter to persuade an opponent not to run against her when she ran for reelection by asking, "You don't want to get your ass whipped by a woman, do you?" (Morphonious 1991, 210).

Morphonious believes that her life experiences mellowed her during her years on the bench. She still takes pride in her judgments and believes that, although often tough, they were, for the most part, fair. She relishes the story of a man on trial in her court for attempted rape. The prosecutor was questioning the man's accuser: "And where did you shoot the defendant?" The woman answered, "In the groin." Morphonious's short response was not necessarily that of a typical judge. She replied, "Nice shot" (Morphonious 1991, 16).

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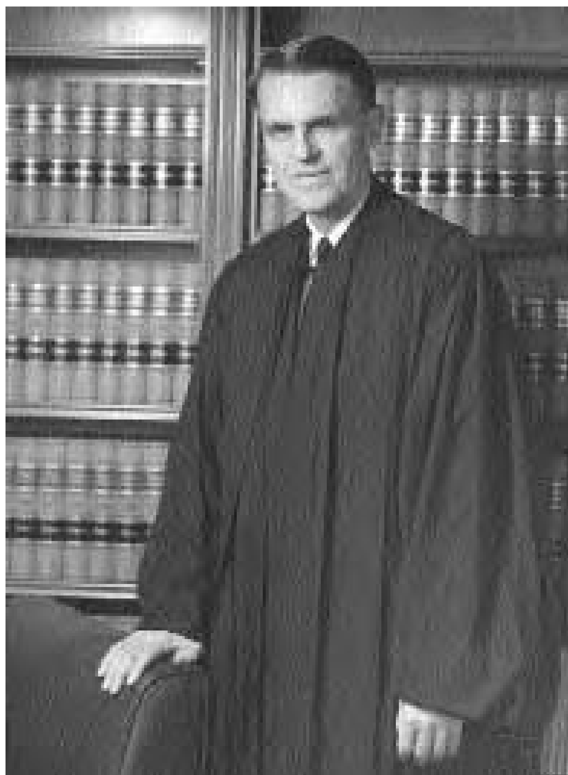
MCGOWAN, CARL EUGENE

(1911–1987)



Carl Eugene McGowan
Courtesy of Josephine P. McGowan Gardner

In her remarks at Judge McGowan's memorial service, Chief Judge Patricia M. Wald described McGowan in the following manner. "He was a Judge for all seasons: a worldly man who understood both government and politics, an intellectual who successfully examined every premise, a philosopher in search of principles to resolve the dilemmas of a modern Democratic society; a writer who knew how to say what he wanted his readers to know; a revered colleague steadfastly moving the court towards common ground" (Wald et al. 1988b, LXXXIX).

Many scholars consider the United States Court of Appeals for the District of Columbia Circuit to be second in importance only to the United States Supreme Court. Pres. John F. Kennedy appointed McGowan to this court in 1963. McGowan became the strong center of this court in the 1960s and 1970s. During that time the court confronted such landmark issues as freedom of the press and the Pentagon papers; national integrity and the Watergate prosecutions; the revolution in criminal defendants' rights; the restructuring of U.S. administrative law; the rights of congressional plaintiffs; tensions within the separation of powers; the reach of the president's treaty powers; and the privacy of presidential papers (Wald et al. 1988b, LXXXIX).

Supreme Court justice Lewis F. Powell Jr. noted that the Court of Appeals for the District of Columbia was a court widely respected as an authority on federal criminal law and procedures. Justice Powell went on to say that "during that period, Judge McGowan established a reputation as a thoughtful and philosophically neutral judge, whose informed vote often proved decisive on the issues at hand" (Powell et al. 1988, 681).

John H. Pickering, a member of the District of Columbia and New York bars, called McGowan a true "Washington lawyer" because of his experiences; his recognized expertise in public, administrative, and regulated law; and his deep conviction that private lawyers have public responsibilities. His expertise and scholarship made him a perfect choice for the District of Columbia Circuit where the principal focus is on the regulatory interplay between the public and the private sectors (Wald et al. 1988a, 222–223).

Carl E. McGowan was born on 7 May 1911 in Hymera, Indiana, to James W. and Gertrude Cooper McGowan. James McGowan was a grain miller by trade. In 1920 the McGowan family moved from Hymera to Paris, Illinois, where Carl completed elementary and high school, graduating as valedictorian of his high school class. He earned degrees from Dartmouth College in 1932, where he was elected to Phi Beta Kappa, and from Columbia Law School in 1936, which he attended on a full scholarship.

Carl McGowan married Josephine Perry of Boston, Massachusetts, in 1944. He and Josephine had four children—three daughters, Mary, Rebecca, and Hope, and one son, John.

McGowan began his legal career working for the Manhattan law firm now known as Debevoise and Plimpton from 1936 to 1939. In 1939 he left the law firm to join the faculty of the Northwestern School of Law in Evanston, Illinois. He served on the faculty until 1942, when he enlisted in the naval reserve. He was assigned to the Navy Department in Washington, D.C., where he worked with Adlai Stevenson. After the war, he briefly went into private practice in Washington, D.C. In 1948, he and his family moved back to Illinois, where he again joined the faculty at the Northwestern Law School. From 1949 to 1953 he served as counsel to the governor of Illinois under Adlai Stevenson. McGowan and Bill Blair were the co-architects of Stevenson's 1952 presidential campaign. In 1953 McGowan moved to Chicago and joined Ross, McGowan, Haries and O'Keefe, where he specialized in regulated industries. He remained with the firm until his appointment to the appeals court. McGowan also served as general counsel to the Chicago and North Western Railway from 1957 to 1963.

John F. Kennedy nominated Carl McGowan to the United States Court of Appeals for the District of Columbia Circuit on 15 January 1963. He was confirmed by the Senate on 15 March 1963 and received his commission on 27 March 1963. McGowan served as chief judge in 1981 and assumed

senior status on 31 August 1981, serving in this capacity until his death on 21 December 1987.

McGowan served on the United States Court of Appeals for the District of Columbia Circuit during tumultuous times in the 1960s and 1970s. During those two decades the court ruled on a wide range of issues including freedom of the press, criminal defendants' rights, separation of powers, and privacy of presidential papers. Through all these decisions Judge McGowan quickly established himself as a centrist and pragmatic jurist whose nearly 500 opinions "were illumined by clear reason, lucid expression, sure wisdom and, not infrequently, surprising wit" (Wald et al. 1988b, LXXXIX). In addition to authoring some 500 opinions while on the court, McGowan also wrote twenty-five articles and ten book reviews for various law journals.

During his twenty-five-year tenure on the Court of Appeals for the District of Columbia, Judge McGowan sat on panels that decided issues involving four of the six presidents under whom he served. He sat on Watergate-related cases such as *United States v. Hunt,* 514 F.2d 270 (D.C. Circuit 1975); *Mitchell v. Sirica,* 502 F.2d 375 (D.C. Circuit 1974); and *Senate Select Committee on Presidential Campaign Activities v. Nixon,* 498 F.2d 725 (D.C. Circuit 1974). McGowan wrote the opinion in *Nixon v. Administrator of General Services,* 408 F. Supp. 321 (DDC 1976), which was later affirmed by the Supreme Court, 433 U.S. He also authored such important administrative law decisions as *Industrial Union Department, AFL-CIO v. Hodgson,* 499 F.2d 467 (D.C. Circuit, 1974) (Wald et al. 1988a, 214).

One of Judge McGowan's earliest, and one of his better-known, opinions was in *Luck v. United States* in which he questioned the fairness of impeaching criminal defendants who testified by automatically introducing evidence of other prior crimes. McGowan ruled that a trial court must weigh the prejudicial impact of the admission of a criminal defendant's record of prior crime in determining whether to admit that evidence to impeach the credibility of his testimony (Powell et al. 1988, 681–682).

Luck v. United States raised two issues. The first issue was the voluntariness of the defendant's admission to the police as testified to by the police officer when it was apparent that the defendant's counsel was about to raise an objection. Judge McGowan ruled that the handling of the issue of voluntariness raised by the counsel's objections did not comport with the procedural standards prescribed by the Supreme Court in *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.ed.2d 908 (1964).

The second issue raised was the automatic introduction of a prior conviction by the prosecutor for impeachment purposes. The defendant argued that the prior conviction should not have been introduced on the grounds that the defendant had been a juvenile at the time of the earlier crime and that the conviction could not be introduced in evidence for any purpose

including impeachment of credibility. The government contended that because at the time of the 1961 offense the juvenile court had waived jurisdiction over the appellant and he had been treated as an adult in the district court and sentenced under the Youth Corrections Act, this prior conviction was admissible for impeachment purposes. Judge McGowan ruled that the court agreed with the government that juveniles tried as adults could have their convictions introduced as evidence in a subsequent trial. The court disagreed, however, with the notion that the prosecution is always entitled to introduce an earlier conviction to impeach a defendant's testimony.

> To the extent, however, that the Government's position implies that the prosecution is always entitled to introduce a juvenile's earlier conviction as an adult following upon waiver of jurisdiction over him by the Juvenile Court, we do not agree. Section 305 is not written in mandatory terms. It says in effect, that the conviction "may," as opposed to "shall" be admitted; and we think the choice of words in this instance is significant. The trial court is not *required* to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case. (*Luck v. United States*, 348 F.2d 763 [1965])

The *Luck* Doctrine, as it came to be called, ultimately was adopted by a majority of the other circuits, and the trial court's discretion is now incorporated in Rule 609 of the *Federal Rules of Evidence* (Powell et al. 1988, 682).

Another one of McGowan's rulings that had national consequences was *Nixon v. Administrator of General Services*, decided in 1976. Former president Richard Nixon sued in federal court over the ownership and access to his presidential papers. In particular, he claimed that the Presidential Recordings and Materials Preservation Act, which was designed to allow public access to papers whose ownership he claimed, was unconstitutional on numerous grounds. These grounds included separation of powers, executive privilege, right to privacy, freedom of speech, freedom of association, equal protection under the law, and violation of the Bill of Attainder clause prohibiting legislative punishments without benefit of a trial.

A three-judge panel headed by Judge McGowan held that the act did not impinge separation of powers and did not violate any claim of the former president to executive privilege; that any intrusion on the former president's constitutional right to privacy was outweighed by the legitimate government objectives served by having the former president's materials screened by archivists; that any intrusion on the former president's freedoms of speech and association was more than balanced by the governmental interest involved; that the act did not deny equal protection to the for-

mer president; and that the act neither constituted a bill of pains and penalties nor a bill of attainder. In writing his opinion, Judge McGowan emphasized that the question before the court was narrow—"Is the regulatory scheme enacted by Congress unconstitutional without reference to the content of any conceivable set of regulations falling within the scope of the Administrator's authority under section 104(a)?" (*Nixon v. Administrator of General Services*, 408 F. Supp. 321 [1976]). The United States Supreme Court upheld Judge McGowan's ruling (433 U.S. 425, 1977).

Judge McGowan was also a legal scholar, writing twenty-five articles for various law journals during his tenure on the court. His scholarly focus was the role of the appeals court and the separation of powers among the three branches of government. His articles included one on presidents and their papers. The article traced the development and modification of the concept of private ownership of presidential papers, summarizing the historical development of the concept and the resultant problems. The article also reviewed the events and issues surrounding President Nixon's resignation and subsequent attempts to maintain ownership of his presidential papers. Finally, McGowan discussed Congress's attempt to resolve the question of private ownership through the passage of the Presidential Records Act and then described the problems that remained. In spite of these problems, McGowan believed that the Presidential Records Act of 1978 was important. He hoped that the preservation of papers relating to the federal government would also be good for Congress and for judges (McGowan 1983, 409–437).

McGowan's study of the appellate system and the expansion of its duties is especially relevant given the Court Reform Act of 1970. That act transformed and expanded the duties of the United States Court of Appeals for the District of Columbia Circuit. The law transferred trial and review of local civil and criminal cases to a newly enlarged and revitalized local District of Columbia court system. The law further gave the District of Columbia Circuit review over a vast number of federal administrative agencies' decisions that had previously been handled in other courts.

McGowan viewed the role of the appeals court with its functions of reviewing district court decisions and agency regulations, as well as adjudication of cases raising issues on which the Supreme Court had already spoken, as central to the court system.

> The role of the courts of appeals in resolving novel issues of constitutional law, however, is only half of the picture. Equally important is the appeals courts' adjudication of cases raising issues on which the Supreme Court has already spoken. Because the High Court can only sketch the broad outlines of constitutional DOCTRINE, it remains for the lower courts to apply prece-

dent, elaborate or clarify it, and extrapolate from it. Because appeal from the district courts to the appeals court is right and because most litigation never reaches the Supreme Court, it is in the courts of appeals that the Supreme Court's sketch is worked into a fully drawn landscape. (McGowan 1986c, 1942)

Several of McGowan's articles in the 1970s dealt with the relationship between Congress and the courts. Pointing out that, with the exception of the limited original jurisdiction reposed in the Supreme Court by the Constitution, the business of the federal courts depended on the affirmative action of Congress, McGowan described how the trend toward enlarging the duties of the courts was vastly accelerating. His own court had become increasingly preoccupied with civil litigation involving the federal government. This expansion of the duties of the appellate court, especially in the District of Columbia, had come about when Congress made broad delegations of authority to department heads or new commissions to implement regulations with provision for judicial review. Judicial review was tied to variously articulated standards—arbitrariness, rational basis, or substantial evidentiary support in the record (McGowan 1976, 1588–1589).

Judicial review of agency actions has become an important part of the appellate courts' activities. McGowan believed this role to be important in the checks and balances of power of the federal government. In a response to Judge Loren A. Smith, who described and criticized a trend toward "judicialization," McGowan defended the courts' role in review of agency actions, noting that the courts actually interfere with agency proceedings infrequently.

What purpose does judicial review of agency action serve? The answer to this question is simple and clear. Judicial review serves as a check on the power of the administrative agencies. Given that Congress has the power, as in *Chaney*, to abolish judicial review in some areas of administrative law, the path chosen by Congress seems clear. Rather than directly controlling the agencies, Congress largely has chosen to use the courts as a check on administrative power. (McGowan 1986b)

Although McGowan agreed with the role of the courts in review of agency actions, he was also concerned with the growing caseload of the appellate courts with no corresponding increase in resources. In the late 1970s and early 1980s, Judge McGowan wrote several articles examining the increasing caseloads of the appellate courts while the Supreme Court was limiting the number of cases reviewed. In the late 1970s, Congress was considering legislation to reduce the caseloads in the appellate courts. The

proposal was to abolish diversity jurisdiction of the appellate courts, whereby these courts heard civil cases between citizens of different states. Judge McGowan agreed with this concept, stating that the state courts could handle these types of cases.

A second trend, limiting access to the appellate courts by restricting the reach of federal habeas corpus, concerned McGowan, however. He observed that "elimination of federal diversity jurisdiction would enable a shift toward a more appropriate distribution of judicial power for our contemporary situation. But retrenchment in the area of federal authority over cases involving federal law should proceed with caution" (McGowan 1978, 544).

Judge McGowan also wrote about the relationship of the executive branch with the other two branches of government. In 1986, McGowan analyzed the scope of the presidential veto power, reviewing the history and debate surrounding the design of the veto clauses and highlighting the veto's role in U.S. political and legal history. The article also examined the pocket veto, about which the District of Columbia Circuit had made an important ruling that the United States Supreme Court has yet to confirm or overrule. McGowan concluded that the veto power continued to play an important role in the separation-of-powers scheme of our political system.

> The veto is really but one single check in our separation of powers scheme. As an instrument of conflict, it has many salutary effects on our political system; it focuses the public eye on disputes between the executive and Congress; it provides a check on the legislature's tendency to dominate our tripartite government; and it serves as a countervailing policy tool for the President. The veto does not create conflict simply for conflict's sake. Disputes arising out of the veto keep our government running on an even keel, even though the waters are sometimes rough. For the most part, however, the veto power has admirably performed its function. (McGowan 1986a, 820)

Judge Carl McGowan's service on the United States Court of Appeals for the District of Columbia Circuit came at a time of great turmoil and change in U.S. history. His reputation as a pragmatic jurist and a legal scholar enabled him to navigate through a wide range of potentially divisive issues. His decisions and his articles continue to provide guidance to judges and scholars who continue to confront these matters.

Myra Norman

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MEDINA, HAROLD R.

(1888–1990)

Harold R. Medina
Bettmann/Corbis

Harold Raymond Medina became the most famous federal trial judge in the mid-twentieth century by presiding over two great political trials: *United States v. Foster* (1949), which became known on appeal as *Dennis v. United States* (1950–1951), and *United States v. Morgan* (1953). He was also a distinguished member of the United States Court of Appeals for the Second Circuit (1951–1980) and the first known Hispanic to reach either level of the federal judiciary.

His persona is essential to understanding his contributions and controversial standing as a jurist. "Bright, able and a ham actor," as his student Justice William O. Douglas described him, Medina was a born teacher and colorful showman whose warmth and humor converted classrooms and courtrooms into live theater (Howard 1989, 15). He loved public attention and worked to get it, too. The Hollywood presence he projected—good looks, strong physique, dapper clothes, snazzy cars, volatile temper, and huge ego—tended to overshadow his serious side. He was a religious man, an erudite collector and reader of great literature in several languages, and a systematic perfectionist at work and play. Abstract subjects and theories, such as economics, jurisprudence, and political science, bored him. Because he thought and taught by talking aloud and telling stories, he was attracted

to English styles of trial by colloquy. Even this exuberant individualist sometimes wondered if he had the requisite judicial temperament.

Medina was born on 16 February 1888 in a middle-class section of Brooklyn, New York. The elder son of Joaquin Adolfo Medina and Elizabeth Fash Medina, he was reared in that same section of Brooklyn. Family and assimilation values were strong in his upbringing. His father, a prosperous Mexican importer and naturalized citizen who came from an affluent planter family in Merida, Yucatan, was educated at Seton Hall Academy in New Jersey and spoke unaccented English. His mother, a New York Episcopalian of Dutch ancestry, banned Spanish and Catholicism from the house.

Harold Medina attended public school No. 44 in Brooklyn, where he was called a "greaser" during the Spanish-American War, and finished high school in 1905 at the private Holbrook Military Academy in Ossining, New York. A very intelligent and diligent student, he graduated from Princeton University in 1909, tenth in his class, with an A.B. degree, a Phi Beta Kappa key, and highest honors in French. At Princeton, he made two life-shaping decisions. Overcoming feelings of being an outsider and fierce rejections by a protective mother, he successfully wooed his mate, Ethel Forde Hillyer, a beautiful woman from a socially prominent family, who became his gyroscope. He also chose his vocation and picked Columbia to be near his fiancée.

At Columbia Law School (1909–1912), he discovered his legal talents and never looked back. He showed exceptional gifts in grasping distinctions, digesting cases, organizing them into whole subjects, and teaching others what he knew. He made the law review, married in 1911, and passed the bar exam before graduating in 1912 as co-head of his class.

Ambitious and energetic, he became a leader of the New York City bar between the two world wars in a "three-ring circus" of teaching, scholarship, and private practice—plus numerous sideshows. Each began modestly but interacted powerfully in his personal and professional development. As a part-time associate professor at Columbia Law School, he taught New York procedure and practice and wrote authoritative works on that hypertechnical subject. Only Harold Medina could have called those Saturday morning eight o'clocks "my Jolly Classes" ("Special Session" 1990, CI). He also created and taught at night a systematic bar review cram course. From 1914 to the early 1940s, roughly 90 percent of New York City lawyers took this course at thirty-five dollars apiece, earning him a small fortune.

In his main act of private practice (1912–1947), he rose slowly from an ill-paid law clerk and bungling novice to a well-respected advocate and senior member of a Manhattan firm, Medina and Sherpick. He was best known as a "lawyer's lawyer" who handled colleagues' tough work on appeal. In that period he argued over 1,300 appeals, mostly in New York courts.

Having learned what not to do from appeals, he emerged in the Depression and war years as an independent general practitioner and bar association leader in the public eye. He matched wits with such stars as John W. Davis, Joseph M. Proskauer, and Max D. Steuer and a future justice, John Marshall Harlan II. Medina became a vice president of the prestigious Association of the Bar of the City of New York, a director of the American Judicature Society, and president of Manhattan's Lawyers Club. Bucking trends toward specialization, his forte became complex litigation, from trial through appeals, requiring a mastery of both grand strategy and exact details. Central to his style as a combative scrapper were a powerful memory and speaking without notes, traits he gradually developed after watching the great Samuel Seabury wreck an important argument in Albany by fumbling his note cards. For big cases Medina practiced before two witnesses that never lied: his mirror and his wife.

As an advocate he experienced hostile audiences in several highly politicized trials. These cases included *People v. Marcus* in 1932–1933 following the largest bank collapse of the Great Depression; *MacAdams v. Cohen* in 1932, a defeat that led to Fiorello La Guardia's election as mayor; and *Fay v. New York* in 1947, an attack on blue-ribbon juries in which a five–four majority of the United States Supreme Court rejected his trail-blazing argument that intentional discrimination by class, race, or sex could be inferred from statistical patterns. This issue returned to him on the bench and reverberates still in affirmative action suits.

Medina's greatest triumph at the bar was his intrepid defense of Anthony Cramer against charges of treason for harboring Nazi saboteurs in World War II. Serving as assigned counsel without pay or expenses for three years in *Cramer v. United States* (1945), he fought doggedly from trial through two oral arguments at the Supreme Court and persuaded a narrow majority to reverse Cramer's conviction under the two-witness rule of the U.S. Constitution. Cramer's case was the first and foremost treason case decided by the Supreme Court on the merits and the tribunal's sole decision in World War II that enforced and enlarged constitutional limits on national war powers. The decision set a standard that led officials to charge lesser offenses during the Cold War and perhaps the current war on terrorism. Medina's battle ranks among the great episodes in American history in which a prominent lawyer braved personal and public hostility to defend the rights of a popularly despised accused. His brilliant oral argument in the first hearing before the justices impressed several Court insiders as the finest they had ever heard. His adversary, solicitor general Charles Fahy, placed Medina among the century's great appellate advocates who grasped the secret of oral argument: "Be oneself" (Howard 1966, 57).

In 1947 Pres. Harry S. Truman nominated Medina to be a federal judge

in the Southern District of New York, the nation's oldest and busiest federal trial court. The Senate confirmed him unanimously, and he took office at age fifty-nine. His selection was the only victory for a new bar association strategy to recommend qualified nominees for lifetime federal judgeships as an alternative to those sponsored by politicians. Though his supporters played racial cards to block rivals, his ethnic origins figured little in the decision. Hispanics were a small minority at the time. His appointment was hailed as a triumph of professionalism over politics—the best since Augustus Hand—while the self-styled political babe-in-the-woods rejoiced that his long dream for a judgeship had come true without lifting a finger or incurring political debts (Howard 1989). Initially euphoric, Medina echoed traditional theory that judges best learn their roles as lawyers en route to the bench. The work, he said, was "just what my whole career has fitted me to do" ("Special Session" 1990, CII). Soon, he felt like an inexperienced freshman grappling with unfamiliar problems of patents, sentencing, and administrative regulation. The greatest irony was that within eighteen months Judge John Knox assigned his fresh, apolitical heavyweight two of the most politically significant megatrials in the twentieth century: *United States v. Foster* (1949), better known as *Dennis v. United States* (1950–1951) and also known as the *Communist Conspiracy* case, and *United States v. Morgan* (1948–1953), also known as the *Investment Banking* case. Each dispute involved a major conspiracy theory in U.S. politics, taken to court after Congress and executive officials failed to resolve it. Both trials challenged fair process as well as Medina's physical and moral stamina. Overlapping in time, they dominated his first six years on the bench and made him a controversial national celebrity and symbol of integrity. Few if any federal trial judges in American history had a greater impact on society in so short a span.

The *Communist Conspiracy* case was a controversial show trial and landmark in the law of free political speech. As the Cold War darkened in 1948, Truman's Justice Department charged twelve top leaders of the Communist Party USA under the Smith Act with knowingly conspiring both to advocate violent overthrow of the U.S. government and to organize and be members of a political party that propagated Marxist-Leninist doctrines of violent revolution. One goal was to settle long-standing legal conflicts over the scope of federal power to combat subversive advocacy, propaganda, and fifth columns. The criminal charges and the evidence followed Federal Bureau of Investigation director J. Edgar Hoover's strategy of fighting ideology with ideology.

The result was a sensational trial in which both sides engaged in a propaganda battle over the meaning of Marxist-Leninist ideas, and the defense tried to put the court on trial before the world. These embers smoldered

while Medina, inexperience showing, let a challenge to the jury selection system go on too long. His close supervision of the voir dire jury selection process produced a mixed jury straight out of central casting, led by an African American forewoman. He was discomfited by charges of putting books on trial but accepted them technically as tools of conspiracy under witness Louis F. Budenz's theory that the writings of Marx, Lenin, and Stalin were Aesopian language for revolution. Obtuse debates over party dialectics bewildered Medina. Fireworks erupted over concrete proofs of secret organization, internal dictatorship, tight discipline, and false names in party cells as presented by surprise undercover agents, especially Herbert A. Philbrick, whose exploits fascinated the country in a best-seller and a 1952 television series entitled *I Led 3 Lives*.

Almost as dramatic were Medina's struggles to control his court. His persona offered a ripe target for judge baiting and reversible error. Supported by noisy pickets outside and delegations within, defense lawyers attacked his motives, ignored his orders, and demonstrated in court. He endured most of this with studied calm but sometimes stalked off the bench, face red with fury, to calm down. Increasingly he gave them tit for tat. Less noticed was how he would cool off after such blow-ups and start over. By summer, he had full control and withstood external pressures such as a Peekskill riot in which a defendant was injured. In the late 1940s, when Americans were naive about communism and even the defendants wore suits and neckties, the specter of radicals ganging up on a federal judge was deeply shocking. Congressman Emanuel Celler, Medina's Columbia classmate, demanded his impeachment for losing control. The mass media depicted him as Judge Patience fighting evil at high noon in Foley Square. Even intimates saw untapped reservoirs of courage and gumption. His biggest worry was nervous collapse.

The most important event in his judicial career, Medina thought, was his charge to the jury. He could easily have ducked the First Amendment issues in his first criminal case. Judge G. Murray Hulbert in preliminary hearings had already ruled out the membership charge as unconstitutional (a view Medina shared) and upheld the advocacy and organizing charges under the "bad tendency" test of *Gitlow v. New York* (1925), a test that the Second Circuit had recently reaffirmed. Offering leadership instead, Medina wrote the best summary of the defense position in print, took judicial notice of dangers in subversive advocacy, and saved the Smith Act by a compromise between clashing free-speech doctrines known as the "incitement to future action" test. Rejecting "bad tendency" as too restrictive and Justice Brandeis's "no time for counter-speech" standard as impractical in these circumstances, he ruled that the government could curb advocacy that was specifically intended to incite unlawful action as speedily as circumstances would

permit. Many contemporaries praised this standard as a statesmanlike advance in free speech principles during dangerous times.

The jury convicted all defendants, and the judge sentenced them to five years in jail, except for war hero Robert Thompson, who got three. In a swift surprise, he charged five defense attorneys and Eugene Dennis (who acted as his own counsel) for conspiring to obstruct justice and impair his health, convicted them himself, and sentenced them to jail for contempt of court.

This trial made Medina the most famous trial judge in the United States, if not the world, and a folk hero to millions. Lionized by newspaper and magazine chains and demonized on the Left, he remained a controversial figure for decades. He was criticized for making arbitrary rulings, stifling free speech, contributing to the fray, punishing counsel vindictively, fanning anticommunist hysteria, and courting publicity in his many posttrial speeches (Belknap 1977; Kutler, 1982). The Court of Appeals and the Supreme Court affirmed his rulings by divided majorities in *Dennis v. United States* (1951) and in *Sacher v. United States* (1952). On 11 June 1951 President Truman nominated Medina to succeed the great jurist Learned Hand on the United States Court of Appeals for the Second Circuit, and the Senate unanimously affirmed. Meantime, Medina remained by designation on the *Morgan* case.

The largely forgotten *Investment Banking* case (*United States v. Morgan*), which took over four years to litigate, tested Progressive–New Deal theories of a Wall Street money trust in a huge civil antitrust trial without a jury. In what many regarded as the most important lawsuit in Wall Street history, the Justice Department charged seventeen top investment banks, including Morgan Stanley, Goldman Sachs, Lehman Bothers, and every partner, with conspiring from 1915 to 1947 to restrain trade, monopolize, and fix prices in negotiated underwriting of new securities, thereby controlling the large corporations they financed and the U.S. securities markets. The central premise was that the Glass Steagall Act of 1934 and the Securities and Exchange Commission (SEC) had failed to prevent the "Club 17" from recovering former clients and excluding competitors after commercial and investment banks were separated in 1935. For want of incriminating contracts or agreements, the conspiracy had to be inferred from unwritten customs and norms of the trade by constructing a legal realist mosaic composed of thousands of evidentiary pieces from documents, office memos, and depositions regarding syndicate agreements plus statistical patterns of continuous banker-client relations. Every public offering of stocks and bonds handled by the defendants between 1915 and 1947 was potentially in this "history of the industry" case, totaling an estimated 100,000 pages of printed documents at the start.

Jose Alberto Cabranes (1940-)

The first Puerto Rican ever appointed to a court on the U.S. mainland, Jose Cabranes has served on both a United States District Court for Connecticut and on the United States Court of Appeals for the Second Circuit. Born in 1940, Cabranes's family moved to the Bronx when he was five. Cabranes attended public schools. He then graduated from Columbia University in 1961 and from Yale Law School in 1965 and received an M.Litt. degree from Queens' College, Cambridge, in 1967.

Cabranes worked with Casey, Lane and Mittendorf in New York City after returning to the United States before becoming a law professor at Rutgers University. From there he became a special counsel to the governor of Puerto Rico and then a general counsel at Yale University, where he also lectured at the law school. It was in 1979 that Cabranes was nominated by Pres. Jimmy Carter to the United States District Court in Connecticut. Fifteen years later, Pres. Bill Clinton appointed Cabranes to the Court of Appeals.

Cabranes established himself in the district court as "a skilled, pragmatic trial judge" (Tabor 1994, 5). As he was strongly supported by the Hispanic community, many had hoped that he might be appointed as the first Hispanic judge on the United States Supreme Court to replace Justice Harry Blackmun in 1994, but that appointment went instead to Justice David Breyer. Although once a registered Democrat, Cabranes has developed a reputation for defying "ideological labels" (5). One of his best-known decisions was a Connecticut case in which he invalidated the state's closed primary law that limited voting to registered party members.

A strong critic of what he has regarded as overly prescriptive federal sentencing guidelines, Cabranes has supported the rights of minorities while also warning against "victim mentality" (Tabor 1994, 5). In 1979, Cabranes wrote a book, *Citizenship and the American Empire*, dealing with the citizenship of Puerto Ricans, and he has written other articles in law journals. Cabranes has been active in community affairs, serving as one of five judges appointed in 1988 to a Federal Courts Study Committee.

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Though great issues of power and money were at stake, the litigation had a strong procedural cast. The main goal of the Antitrust Division of the Department of Justice was replacing negotiated underwriting of new securities with public competitive bidding as the prime method of capitalizing big business and foreign governments. The SEC thought that the competitive bidding process was unworkable. Medina's tribunal struggled continuously over the best way to litigate the dispute. In a triumph for rising judicial opposition to the Antitrust Divisions's legal realist techniques, the proceeding produced the most thorough official airing of these oft-investigated charges—and a total defeat for the idea of a Wall Street conspiracy in the U.S. political economy (Carosso 1970, 1973). *Morgan* was the only defeat for Thurman Arnold's famous antitrust initiative in the late New Deal, when Arnold headed the Antitrust Division of the Department of Justice.

Procedural leadership was Medina's main contribution to the case. A strong champion of pretrial discovery, he skillfully negotiated compromises in "powwows" that substantially reduced the documentary intake and improvised imaginative time savers, which became normal practice. Most important, his unorthodox rulings to meld the government's legal realist approach with traditional narrative methods and his activist style of trial by colloquy broke the case apart. And it exposed a new dimension in enduring debates over personal predilections in judging: To what degree may judges shape the way a case is presented to suit the way they think?

Lawyers likened *Morgan* to 1,500 little trials under one tent. Medina's decision to subject each bit of evidence to microscopic examination produced an exhaustive and exhausting trial punctuated by blowups, makeups, and brilliant debates. He again feared a nervous breakdown, and the government formally charged him with personal bias (Kramer 1988, 46, 59–60). Inexorably, theories fell as facts were found, for a very simple reason. Prosecutors, having prepared to build a legal realist mosaic by aggregation of documentary phrases and statistics, were woefully unprepared to show that each piece of the mosaic was sound, much less narrate a full story of collusion in various public offerings in the common law way. The judge required all these standards to prove conspiracy by customs. Even the two prosecution witnesses, railroad magnate Robert R. Young and bond leader Harold L. Stuart, refuted key conspiracy charges. The fatal flaw was weak theory leading to weak facts.

Medina's lengthy opinion was extolled as an important state paper, became required reading in business schools, and enhanced his reputation as a great judge. To insulate the decision from direct appeal to the Supreme Court, he maximized facts and minimized law and excised a furious blast at the Antitrust Division for abuse of process. The incoming Eisenhower team did not appeal, and the great Wall Street conspiracy theory faded into his-

tory. Medina was content. An economic conservative, more interested in process than legal theory or public policy, he believed above all in the common law tradition. His credo was: Get the facts and justice of the case right, then the law will grow naturally (a summary of his sentiments as expressed in an interview with the author of this entry on 3 December 1979).

This outlook partly explains why Medina never matched the performances of Learned Hand or his own successor, Henry J. Friendly, on the Court of Appeals. Few did. Also, he spent only five years in active service before taking senior status in 1958 with reduced seniority and workload. Then, too, appellate work is collective, not solo, and his prime audiences were practitioners more than intellectuals.

Still, he had a distinguished appellate career. Medina classified his circuit opinions into three groups. First were institutional cases that significantly affected public law. The most influential were *Lawrence v. Devonshire Fabrics, Inc.* (1959), which advanced arbitration as a legal alternative to adjudication in resolving disputes; and *Eisen v. Jacquelin & Carlisle* (1968), allocating the costs of notifying parties in class action lawsuits, an increasingly important form of group action via litigation. Second were "stinkers," his term for opinions that clarified complex factual disputes. A dramatic instance was *United States v. Ortega* (1972), a drug smuggling case that figured in a hit movie, *The French Connection.* Third were maverick decisions giving justice a human face. In *Wolff v. Selective Service Local Board* (1967), he proudly asserted jurisdiction over draft board reclassifications of students who protested the Vietnam War. Fine work, such as *In re Franklin National Bank Securities Litigation* (1978), continued to the end.

As he aged, colleagues regarded a mellowed Medina with affectionate respect. They valued his vast experience and thoroughness at work and admired his contagious zest in the art of living. He was a social leader on the court, translating Latin legal documents with Learned Hand for fun and arranging rousing entertainments at circuit conferences. He heard his last cases on his ninety-second birthday, the oldest federal judge in service. He retired on 30 April 1980 looking forward to new life and projects: translating *Don Quixote,* cruising on the *QE II,* and gleefully leading Princeton Parades in a golf cart in his late nineties. He died of heart failure on 14 March 1990 at age 102 in a nursing home at Morristown, New Jersey, and is buried next to his wife near their home in Westhampton, Long Island.

Over his long career Medina received twenty-five honorary degrees from colleges and universities, including Columbia, MIT, Princeton, and Tulane, plus scores of awards, citations, and medals. A faculty chair and a classroom are named in his honor at Columbia Law School. He was especially proud of two symbols of his lifestyle: a record of three consecutive Medina generations making the law review at Columbia and a baseball signed by all the

Brooklyn Dodgers, which Jackie Robinson gave him in 1952 when Medina and the lawyers took a break to reduce tension in the *Investment Banking* case.

In the final reckoning, his talents were probably better suited for the reactive functions of trial courts than for the reflective functions of deciding appeals. The *Dennis* case, for good or ill, was a major watershed in the history of free speech. In hindsight the Justice Department bears prime responsibility for taking an ideological approach to controlling a quasi-legal, quasi-underground organization of Stalinists bankrolled by Moscow, which led to needless sacrifice of principle. Though Medina was naive about communism, his charge did not retreat from what free speech law was but rather from what civil libertarians wanted it to be: the clear and present danger test. And even that formula offered no escape from the trap of forecasting perils that courts are ill equipped to gauge. Just as he upheld federal power to punish subversive advocacy, so his emphasis on specific intent and incitement substantially advanced constitutional protections for free speech in the teeth of perceived crisis—an uncommon event in history. The Warren Court reaffirmed this standard in *Yates v. United States* (1957) and moved the bar closer to action during calmer times in *Brandenburg v. Ohio* (1969). Medina should have requested another judge to hear his contempt charges (as he initially decided to do), but he did not do so for fear of crippling judicial power in future political trials. Though Judge Julius J. Hoffman ignored his advice in the Chicago Seven trial (*United States v. Dellinger* 1972), Judge John J. Sirica cited his example in the Watergate scandal.

Medina was a pragmatist who found truth in particulars. In *Morgan,* he never would have dreamed of condensing a great antitrust case with a general theorem like Learned Hand's famous Bull Moose dictum—bigness is bad—in *United States v. Aluminum Company of America* (1945). Medina's piecemeal way in *Morgan* nevertheless settled a major public controversy over financing big business and legitimated a subtle form of competition in an increasingly global economy. If he talked and taught too much publicly about his experiences, Medina comforted and inspired millions in troubled times as a cheerleader of American values. As he confessed, "I'm a rah-rah boy myself" ("Special Session" 1990, CIX).

J. Woodford Howard Jr.

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MIKVA, ABNER J.

(1926–)

Abner J. Mikva, congressman and White House counsel, was a judge on the United States Court of Appeals for the District of Columbia Circuit. Because of its jurisdiction over policies set by most federal agencies and departments, the court is considered the second most important court in the country after the United States Supreme Court. Mikva was born in Milwaukee, Wisconsin, on 21 January 1926, the son of Ukrainian immigrants. The family was on welfare for a number of years during Mikva's youth until his father was able to obtain a job with the Works Progress Administration in 1937, a fact that explains Mikva's political ideology. After graduating in 1943 from Washington High School in Milwaukee, he briefly attended the University of Wisconsin before enlisting in the Army Air Corps. In 1945, he returned to the University of Wisconsin and then studied at Washington University in St. Louis from 1946 to 1947. Mikva married Zorita "Zoe" Wise in 1948; they had three daughters.

Abner J. Mikva
Ellis Richard/Corbis Sygma

In 1951, Mikva graduated with honors from the University of Chicago School of Law, where he served as editor of the law review. He clerked for U.S. Supreme Court justice Sherman Minton in 1951–1952. A reform Democrat running against Chicago mayor Richard Daley's machine, Mikva

was elected to the Illinois House of Representatives in 1956 in spite of Daley's opposition. In 1966, Mikva unsuccessfully challenged a Democratic incumbent for the U.S. House of Representatives. By 1968, the incumbent no longer enjoyed Daley's support, and Mikva was elected with Daley's assistance. He subsequently lost Daley's support after voicing concerns about the mayor's tactics during the turbulent 1968 Democratic convention in Chicago. In 1971, the Illinois legislature redrew congressional districts, putting Mikva in a congressional district represented by another popular Democrat. Mikva moved from the south side of Chicago to Evanston, Illinois, to run in an open seat in a very affluent district. Republican Sam Young defeated him in 1972. In the wake of Watergate, Mikva defeated Young by a slim margin in 1974 to return to Congress. He was reelected in 1976 and 1978, both times by very small margins. In the Illinois legislature and the U.S. House of Representatives, Mikva was known as a leading advocate of handgun control. For this reason, the National Rifle Association (NRA) exerted great effort to block his reelection efforts.

After the 1978 general election, Mikva had tired of exhausting and expensive congressional campaigns. He asked Pres. Jimmy Carter to be considered for appointment to a federal judgeship. Congress had passed the Omnibus Judgeship Act in 1978, creating 152 new federal judgeships, so the president was able to honor the congressman's request. Carter nominated Mikva to the United States Court of Appeals for the District of Columbia Circuit in 1979.

As a member of Congress, Mikva had the respect of many of his colleagues, including many Republicans. This bipartisan support was evident during the confirmation hearings held by the Senate Judiciary Committee. The committee received letters from ex-president Gerald Ford, a former Republican leader in the House. Other endorsements came from former attorney general Edward H. Levi, dean of the University of Chicago School of Law when Mikva was a student, as well as Reps. Robert Michel of Illinois and John J. Rhodes of Arizona.

Several conservative members of Congress opposed Mikva's nomination because they were concerned about his ability to separate the job of a legislator from that of a federal judge. During the debate on the Senate floor preceding the confirmation vote, Sen. Strom Thurmond of South Carolina argued: "I do not think he will exercise the proper judicial restraint. . . ." Thurmond continued: "Mr. Mikva is not only an advocate, but an uncompromising one, a partisan, firmly committed to his personal preconceptions of the Constitution" (*Congressional Record,* 25 September 1979, S 26030). Sen. Gordon Humphrey of New Hampshire reported that, in a legal industry newspaper, the nominee identified the court system as "an important nonlegislative road to reform" (*Congressional Record,* 25 September 1979,

S 26045). Several conservatives revisited the failed nominations of Judges Clement Haynsworth Jr. and G. Harrold Carswell to the United States Supreme Court earlier in the decade. Sen. Humphrey pointed out that Mikva believed that judges sometimes have to operate outside of popular opinion, "judges who swim upstream" (*Congressional Record,* 25 September 1979, S 26033). The senator reminded other senators that liberals believed Haynsworth and Carswell were out of the mainstream, and the two men were not confirmed. The same judicial activism argument also was lodged against Patricia Wald, President Carter's nominee for the other new seat on the District of Columbia Circuit Court.

More vigorous opposition came from Mikva's nemesis, the National Rifle Association. Because of his support of gun control legislation, the NRA spent more than $1 million in a six-month lobbying effort to block Mikva's nomination (Dold 1996). The NRA's message was that groups like it would not receive a fair hearing in a court with Mikva sitting as a judge. The NRA also argued that he was constitutionally disqualified from taking the judgeship. The group claimed that because Mikva was a member of Congress when the Omnibus Judgeship Act was passed, the Constitution's Article 1, section 6, clause 2 prohibited him from filling one of the vacancies created by the law. In addition, he was a member of Congress who voted for a judicial pay increase to take effect in 1979. The NRA's campaign, and the constitutional question, almost worked. The Senate Judiciary Committee voted by a slim margin (nine to six) to send Mikva's confirmation to the floor. Despite sharp debate on the Senate floor, with Sen. James McClure of Idaho declaring, "Mr. Mikva will go to any length to get your guns and my guns" (*Congressional Record,* 25 September 1979, S 26038), Mikva was confirmed on a fifty-eight–thirty-one vote. Seventeen Republican senators voted to confirm, and nine Democrats voted no.

The confirmation fight continued for two more years. Senator McClure filed a lawsuit on the day of the confirmation vote, challenging the constitutionality of Mikva's appointment. A federal district court rejected the suit because McClure lacked standing. McClure had authored the law on which he based his claim in the lawsuit that he filed. The United States Supreme Court denied the senator's appeal (see *McClure v. Carter,* 513 F. Supp 265 [D. Idaho 1981], aff'd sub. nom. *McClure v. Reagan,* 454 U.S. 1025 [1981]).

In 1979, Mikva joined a court in transition. Conservatives in Congress and the Nixon administration stripped the District of Columbia federal courts of criminal jurisdiction in reaction to a series of rulings that expanded criminal defendants' rights issued by the District of Columbia Circuit Court under the leadership of Chief Judge David Bazelon. By the end of the 1970s, the Court of Appeals primarily heard cases arising out of the actions of federal regulatory agencies. The court had always had jurisdiction over appeals

of administrative decisions, but in the 1970s, public interest groups began to look to the court to protect the environment, consumers, and workers. Through their rulings, judges rewrote administrative regulations.

Court personnel changed rapidly after Mikva joined the court, largely as judges appointed by Presidents John F. Kennedy and Lyndon Johnson retired. Patricia Wald was President Carter's first appointee to the court; Mikva was the second. In 1980, two more Carter appointees joined the pair: Harry Edwards replaced Bazelon and Ruth Bader Ginsburg filled the vacancy caused by the death of Judge Harold Leventhal.

Former California governor Ronald Reagan defeated President Carter in 1980, a significant event in Mikva's career on the bench. The Reagan administration was elected on a platform that included a promise to appoint less activist judges to the federal bench. From 1982 through 1987, eight judges, primarily conservatives, were appointed to the court: Robert Bork (1982), Antonin Scalia (1982), Kenneth Starr (1983), Laurence Silberman (1985), James Buckley (1985), Stephen Williams (1986), Douglas Ginsburg (1986), and David Sentelle (1987). According to some observers, as the number of conservative judges grew, rancor among the judges increased (see Banks 1999).

Judge Mikva was involved in an incident that almost led to a physical confrontation over ideological differences. Banks related that "it became so turbulent in the court that the *New York Times* reported that Judge Laurence Silberman threatened to assault Judge Mikva over a particularly contentious affirmative action case" (1999, 7). Silberman did not actually assault Mikva, but reports of the outburst probably prevented the Bush administration from nominating Silberman to a Supreme Court vacancy.

Mikva downplayed the court's ideological conflict in a 1989 law review article. He made the observation that "it was never sweetness and light at this court" (Mikva 1989a, 1063). Despite the perception that the court deals largely with dry, administrative matters, the rules and regulations it decides can become issues in an ideological conflict. The article, actually an introduction to a symposium reviewing the court's term, provided an enlightening exposition on the jurisdiction and history of the District of Columbia Circuit Court. Mikva concluded the article by observing: "pick a controversial subject in our democracy, and you can find at least two points of view expressed by judges of the D.C. Circuit" (1068). Differences of opinion were to be expected (1068).

In 1991, Mikva became chief judge of the District of Columbia Circuit after Patricia Wald stepped down two years before the end of her term. Federal law prescribes that the longest-serving judge who is not yet sixty-five years old becomes chief for seven years or until age seventy. Judge Wald stepped down just before Mikva's sixty-fifth birthday. Some observers spec-

ulated that the action was meant to deny Judge Silberman the position, but Mikva said Wald had made a promise to take this action when President Carter appointed them in 1979.

During his sixteen years on the bench, Mikva wrote over 300 decisions. A number of these decisions dealt with government regulation of speech. One such ruling, *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States* (708 F.2d 760 [D.C. Cir. 1983]), dealt with the refusal of the Federal Aviation Administration to approve an advertisement as suitable for public display at Washington National Airport and Dulles International Airport. Despite the willingness of the Trade and Cultural Council to pay for the space and the availability of space, the ad was rejected as a political message. Mikva ruled, "In the absence of demonstrably compelling, countervailing reasons, the government may not ban political advertisements from the display advertising areas at National and Dulles Airports." Judges Wald and Wright joined him in the unanimous decision (774).

A more controversial decision involved the National Highway Transportation and Safety Administration (NHTSA) rule-making process on automobile air bags. In *State Farm Mutual Automobile Insurance Co. v. Department of Transportation* (680 F.2d 206 [D.C. Cir. 1982]), Mikva ruled that the NHTSA had exceeded its delegated authority when it rescinded rules requiring air bags as standard equipment in cars. The rule change was one attempt by the Reagan administration to reduce regulation of U.S. industry. The United States Supreme Court agreed with Mikva's decision that the administration needed congressional authority to rescind the rule (*Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 [1983]). Mikva's opinion curbed the ability of the Reagan administration to dismantle the regulatory structure in the country without congressional approval.

One example of a routine administrative law question with a political outcome was *Steffan v. Aspin* (8 F.3d 57 [D.C. Cir. 1993]). Joseph Steffan was a midshipman at the United States Naval Academy who was expelled from the academy and denied a commission as an officer after informing a superior officer that he was a homosexual. The academy applied a Department of Defense rule specifying that a service member must be discharged if he or she admits to being a homosexual. Writing for a unanimous three-judge panel, Mikva ruled Steffan's expulsion was "not rationally related to any legitimate goal" (70) and was, therefore, unconstitutional. According to F. Bruce Dold (1996), Mikva told him that he took great pride in overturning the Defense Department rule, even though his ruling was reversed by the whole court meeting *en banc* (*Steffan v. Perry* 41 F.3d 677 [D.C. Cir. 1994]).

Public interest groups criticized Mikva's ruling in *Public Citizen v. United States Trade Representative* (5 F.3d 549 [D.C. Cir. 1993]). Public Citizen, an

environmental public interest group, sued under the provisions of the Administrative Procedures Act (APA) to force the president to file an environmental impact statement on the North American Free Trade Agreement (NAFTA). The APA allows citizens and groups to sue if they believe a federal agency's final action in a matter is harmful to the public good. Actions by the president are exempted from the APA, however. Mikva wrote for a unanimous three-judge panel when he found that the court had no jurisdiction in the matter because NAFTA was an action by the president and not by a federal agency. The decision reversed a lower court ruling. Shortly thereafter, Congress approved NAFTA, and the Supreme Court denied certiorari in Public Citizen's appeal.

Mikva worked to improve the public image of the judiciary, and the legal system in general, throughout his career and into his retirement. In 1985, he became the chairman of the Section on Individual Rights and Responsibilities of the American Bar Association (ABA), the only sitting federal judge to head an ABA section. His goal was to increase the size of the section using political campaign tactics. This activity became controversial for the judge when the conservative Washington Legal Foundation filed a complaint against Mikva, claiming that his leadership of the section conflicted with his judicial responsibilities. As a result of the complaint, he stepped down as chairman before the end of his term.

He expressed concern about the role of television, especially the genre of television court shows, in providing a picture of U.S. legal processes. In an article published in *TV Guide*, Mikva critiqued *The People's Court* and the activities of Judge Joseph A. Wapner. He wrote, "Judge Wapner prepares his viewers for a knowledgeable discourse on American law about as much as the doctors on *M*A*S*H* prepared their audiences to perform surgery" (1989b, 14). Mikva's verdict was that the show "does for the law what *Dynasty* was doing for monogamy" (14).

Mikva's name was often mentioned as a possible Supreme Court nominee. He would have accepted a nomination if offered, but twelve years of Republican presidents frustrated his ambitions. After Pres. Bill Clinton's election in 1992 brought the Democratic Party back into power in the executive branch, Mikva told reporters, "I'm too old, too white, too male, and too liberal" to be nominated (Adelman 1997, 31). The closest he got to serving on the Supreme Court was portraying a chief justice swearing in the new president in the 1993 feature film *Dave*.

In 1994, President Clinton named Mikva to the post of White House counsel, the legal adviser to the president. To take the post, he retired from a lifetime appointment on the bench. While Mikva was working for President Clinton, one of his adversaries was Kenneth Starr, his former colleague and the newly appointed independent counsel leading the investiga-

tion of the Clintons' failed Whitewater real estate deal. After an exhausting year of long hours in the Clinton White House, Mikva retired from public service in 1995. He returned to Chicago as a visiting professor at the University of Chicago School of Law. In a long career, Abner Mikva served in all three branches of the federal government.

John David Rausch Jr.

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MITCHELL, WILLIAM

(1832–1900)

William Mitchell
National Archives

Justice William Mitchell wrote over 1,600 opinions during his tenure on the Minnesota Supreme Court, the quality and clarity of which placed him among the most accomplished judges of his generation.

William Mitchell was born on 19 November 1832 to John and Mary Henderson Mitchell, Scottish immigrants who had settled in Welland County, Ontario, just over the U.S. border near Niagara Falls, New York. The first of eleven children, Mitchell was raised on the couple's farm and educated in Canada. He attended college in the United States, graduating from Jefferson College in Cannonsburg, Pennsylvania, in 1853.

While at Jefferson College, Mitchell became close friends with fellow student Eugene Wilson, whose father practiced law in Morgantown, Virginia (now West Virginia). Upon graduation, Mitchell and Wilson returned to Morgantown, where the two men "studied the law" under Eugene's father. (Instead of attending law school, prospective lawyers at that time learned their craft by studying and serving as an apprentice to an established practitioner. This process, called "studying the law" or "reading the law," is still recognized by a few states, but it is exceedingly rare for a person to be admitted to the bar in this manner.)

Mitchell stayed in Morgantown for four years, studying law and teaching in a local school. In March 1857, he was admitted to the bar in Virginia. Unlike the situation today, in which a lawyer must be admitted to practice in each state where he or she wishes to work, bar admission at that time in Virginia meant the ability to practice law in any state. Mitchell and Wilson took advantage of this fact and headed west. In April 1857, the two young lawyers traveled by steamboat up the Mississippi River to the frontier town of Winona, in the territory that would soon become the state of Minnesota. The two liked what they saw, stayed, and quickly established a law partnership in the city's downtown district.

The Wilson and Mitchell law partnership did not last long, because Eugene Wilson was soon appointed to serve as a U.S. district attorney. Wilson would go on to have a notable career in public service, both in the Minnesota legislature and the U.S. Congress. In fact, many of Mitchell's law partners and colleagues became distinguished public servants. Mitchell's next partner, Daniel S. Norton, was elected to the U.S. Senate not long after the partnership was formed. Mitchell then joined with William H. Yale, a former lieutenant governor, in creating the law firm of Mitchell and Yale, which lasted until Mitchell was appointed to the bench in 1881.

Mitchell quickly distinguished himself as a smart, hardworking, and fair-minded attorney. He labored tirelessly at his law practice and in community service, serving a term in the state legislature, a term as county attorney, and several years on the Winona city council. He also served on various public and private boards and was a founding member of the Winona Bar Association. He became the first president of the newly formed Winona and Southwestern Railroad Company as well as president of the newly incorporated Winona Savings Bank. Indeed, Mitchell participated in and guided the growth of the town during a time of significant expansion.

Shortly after establishing his law practice, Mitchell returned to Morgantown to marry Jane Hanway Smith, a widow with one child. The couple returned to Winona and had three daughters. The marriage survived ten years, until the death of Mrs. Mitchell in 1867. Mitchell married again in 1872, to Frances Merritt Smith, also a widow with one child. William and Frances Mitchell had two children, a daughter who died in infancy and a son, William DeWitt Mitchell, who would also become a distinguished law practitioner and public servant.

The Mitchell family lived in downtown Winona, a few blocks from his law office. During his years of practice, Winona matured from a frontier town with few businesses and city services to a large, bustling barge city on the Mississippi River. The economic development of Winona and other river and frontier communities set the stage for many of the issues that William Mitchell would soon face as a judge. The United States was grow-

ing and changing as the railroads facilitated the increasing industrialization of the nation and made it easier for its population to move westward. Judges in the post–Civil War era, particularly state judges, were often called upon to oversee this unprecedented growth by resolving questions regarding land rights; railroad rates, subsidies, and regulations; employer/employee relations; ownership and use of natural resources, particularly waterways; contract interpretation rules; and the developing theory of negligence liability in tort law.

In 1874, Mitchell was elected to serve as judge of the District Court of the Third Judicial District of Minnesota, an area that covered much of present-day southeastern Minnesota. His first service on the Minnesota Supreme Court occurred shortly thereafter in 1877, when he was specially appointed by the governor to hear the case of *State of Minnesota v. Young*, concerning the use of parole (oral) evidence to complete a sealed agreement. At that time, the Minnesota high court consisted of only three justices. Two of the justices had previously participated in the case and had to recuse themselves for the appeal. Mitchell and attorney Samuel Lord were appointed to take the place of the recused justices. Mitchell wrote the opinion of the court, which was well received in the legal community (Jaggard 1909, 394–395). Consequently, when the state legislature voted to increase the size of the Supreme Court in 1881, Gov. John S. Pillsbury appointed Mitchell to one of the two new seats as associate justice, a position to which he would twice be reelected and would hold until 1900.

Justice Mitchell's tenure on the bench can be characterized first as prolific. He routinely worked seven days a week, completing several opinions a week, during his entire nineteen-year Supreme Court career. He wrote all of his own opinions, as well as required factual summaries and accompanying documents, without the benefit of typewriters or secretaries, let alone computers and word processing programs. An early biographer of Mitchell credited his work ethic to his Scottish and Protestant upbringing, which stressed hard work, clean living, and dedication to pubic service (Jaggard 1909, 388, 395–396). Although Mitchell was not a member of any particular church, he demonstrated these values in both his personal and professional life. During his rare times of relaxation, he pursued fishing, hunting, and gardening—three endeavors that remain extremely popular in Minnesota today.

Although the quantity of Mitchell's opinions was impressive, it was their consistent quality, as judged by his peers, that distinguished Mitchell's judicial tenure. His opinions are characterized by a strong command of statutory and common law, common sense, and a clear, accessible writing style. Mitchell was widely regarded as a brilliant judge with an enviable grasp of the historical development of the law, but his opinions did not show intel-

lectual elitism or arrogance. They were written in a concise, straightforward manner that was generally understandable to laypersons. He explained rules of law so that those who needed to use them could follow them, a fact that was especially important given the numerous areas of emerging law that the Supreme Court was asked to interpret.

Mitchell's approach to oral arguments was similarly nonelitist. He treated attorneys with respect, listened to them attentively, and did not interrupt arguments to make observations or force his views upon counsel (Lees 1920, 381). He was perceived, both as a lawyer and a judge, as scholarly, fair-minded, reserved, and exceptionally courteous—a model country lawyer who did not forget his roots, even when his intellect and reputation propelled him to the state capital and service on the state Supreme Court.

Many of Justice Mitchell's opinions for the Supreme Court announced new legal principles. This was not because Mitchell was an "activist" judge, bent on creating new law—far from it. Rather, his opportunity to create new law, or to clarify confused existing law, stemmed from the time in which he served, during which the law expanded and changed in a number of substantive areas. In short, Mitchell's opinions reflected the realities of late-nineteenth-century life. Like many judges of his time, Mitchell was called upon to decide numerous railroad land grant cases that analyzed the rights of the states both to give land to railroad companies and subsequently to regulate and tax them; riparian rights cases governing how individuals could use and develop water resources on their land; and "freedom of contract" cases governing the relationship between employers and employees as well as between businesses and their competitors.

Mitchell's approach to these cases, and to his docket generally, was rather conservative. He neither believed in substituting judicial opinions for legislative judgments nor was likely to recognize new individual rights. But Mitchell was not a dogmatic practitioner of judicial restraint. He embraced new rules when the old ones became obsolete or could no longer be justified given current conditions. For example, he rejected the widely held rule that a landowner who suffers damage to his property could sue only in the county in which his land was located, noting that the rule, while well established, made little sense in modern times (*Little v. Railroad Company;* Jaggard 1909, 421). He also upheld the state's Sunday business closing laws but rejected the traditional reliance on Christian practices as the justification for them. Instead, Mitchell argued, such laws must be created and defended in secular terms, as an exercise of the state's police power (the inherent power of state government to ensure the protection and to promote the well-being of its citizens). Minnesota had the power to force certain businesses to close on Sunday, but this power could be exercised only for legitimate, nonreligious

Robert Gollmar: A Wisconsin Country Judge (1903-1987)

Although he spent most of his time as a judge on the bench in rural Wisconsin, Judge Robert Gollmar presided over some bizarre trials. These included the trial of Edward Gein, who was convicted of decapitating a woman and whose murder served as inspiration for one of Gollmar's books as well as a novel by Robert Bloch and a Hitchcock film, both entitled *Psycho* ("Robert H. Gollmar").

The son of a circus operator, Gollmar attended law school at the University of Wisconsin in 1925 and practiced in Baraboo, Wisconsin, until he was elected as a Sauk County judge in 1956. He subsequently became a state circuit judge in 1961 and served in that capacity until his retirement in 1973. Thereafter, he worked in Milwaukee as a criminal court reserve judge and later as an acting judge in the Twenty-Fifth Circuit, from which he retired.

Despite handling a number of cases involving multiple murders and other heinous crimes, Gollmar prided himself on his humor, which is evident in his books. He noted that a man who had threatened his life in the courtroom was later released by prison psychiatrists. They noted that "this man has incurable homicidal tendencies. We can do nothing for him, and we, therefore, are returning him to society" (Gollmar 1979, 52). On another occasion he pointed with irony to the note of optimism in the report of a social worker who observed that a defendant who had been convicted and released after attacking a small girl had subsequently been convicted for attacking an older one: "We are making real progress with this young man. Now he is attacking girls of his own age" (53). On another occasion, he reported that an elderly doctor who acted as the coroner in a murder case, when asked whether he had performed an autopsy, responded with surprise, "What for? She was dead, wasn't she?" (80).

Reflecting on more than twenty-five years of service as a judge, Gollmar cited Lord Chancellor Lyndhurst's definition of a good judge and followed with a comment of his own:

> "First, he must be honest. Second, he must possess a reasonable amount of industry. Third, he must have courage. Fourth, he must be a gentleman. And then if he has some knowledge of law it will help."
>
> If I fulfill that definition, I am satisfied. (Gollmar 1979, 187)

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purposes (*State v. Petit;* Jaggard 1909, 403). Similarly, Mitchell found unconstitutional the state's attempt to build a grain elevator under the guise of the police power, holding that the state had exceeded the scope of that power by using it for this purpose (*Rippe v. Becker;* Jaggard 1909, 413).

Many, if not most, of Justice Mitchell's opinions were based on the common law. The common law is a body of law—made by judges incrementally in their opinions—that is based upon history, tradition, and local practice. In his groundbreaking 1977 book *The Transformation of American Law, 1780–1860,* Harvard historian Morton Horwitz argued that many nineteenth-century judges used the common law as a tool to shape the development of the rapidly industrializing nation and specifically to facilitate economic growth through decisions that favored the use of natural resources and adopted contract, tort, and workplace rules that favored business over labor. The classic example offered by Horwitz to support his argument was the demise at the hands of common law judges of the long-held legal rule protecting the "first user" of property (particularly waterways) from interference by others. Through a series of judicial decisions, that rule eventually gave way to a new legal rule favoring those who put property to a "reasonable" (that is, productive) use. Horwitz argued that, in adapting this and other established legal rules to meet the demands of industrialization, state judges embraced an "instrumental" use of the law to promote economic development and expansion, an approach they maintained throughout the nineteenth century.

Although Horwitz's analysis focused largely on state judges from the eastern United States, one might apply his analysis to Justice Mitchell as well. In a sense, Mitchell was a conservative justice in that he did not perceive any role for the judiciary in announcing public policy or extending civil rights and liberties. In another sense, however, Mitchell was progressive in that he embraced his common law duties and was not afraid to adapt existing legal principles to the changed circumstances of the late nineteenth century (Lees 1920, 383–386). In doing so, he often adopted the views of his earlier East Coast counterparts who, in Horwitz's view, may not have been as neutral in their judicial orientation as they believed themselves to be.

On the other hand, Justice Mitchell was at various times accused of being both a Jacksonian and a Populist. Although he had started out as a member of the Republican Party, Mitchell changed his affiliation to the Democratic Party during Reconstruction. This decision did not affect his reelection to the bench in 1888 and 1894, when he was renominated by both parties and subsequently reelected. In 1900, he failed to win the endorsement of the Republican Party, however, although he did receive the nomination of the Democratic and Populist Parties. The state Republicans behaved in a par-

ticularly partisan manner that year; Mitchell was at the same time opposed by "great vested interests [in the party], because of his supposed populistic rulings" and also by "radicals [in the party], because of [his] imaginary corporate leanings" (Jaggard 1909, 398–399). Perhaps as a consequence, he narrowly lost his reelection bid that year and retired to private law practice with his son. Not even a year into his retirement, William Mitchell died of a stroke on 21 August 1900.

Mitchell had other judicial opportunities during his lifetime. He was nominated by President Harrison to serve on the Eighth Circuit Court of Appeals, but the nomination was later withdrawn. After losing reelection to the Minnesota Supreme Court, he was offered the chief justiceship of Puerto Rico, which he declined. He was also slated to become the dean of the new St. Paul College of Law, in St. Paul, Minnesota, but died prior to assuming the office.

Thus, Mitchell's entire judicial career was served on state benches. This fact, however, does not diminish his accomplishments, for he was widely considered among the top judges of the nation, federal or state, during his tenure. Renowned Harvard law professor James Bradley Thayer, for example, called Mitchell "one of the best judges in this country" and observed that "[o]n no court in the country today is there a judge who would not find his peer in Judge Mitchell" (Jaggard 1909, 398).

Mitchell's son, William DeWitt Mitchell, honored his father's legacy by becoming an accomplished lawyer in his own right. The younger Mitchell graduated from Yale University and the University of Minnesota School of Law. He practiced law in St. Paul for a number of years and was eventually appointed U.S. solicitor general by Pres. Calvin Coolidge and U.S. attorney general by Pres. Herbert Hoover. He declined nomination to the Supreme Court in 1933, supporting soon-to-be justice Benjamin Cardozo. In 1934, the Supreme Court made him chair of its advisory committee for developing the Federal Rules of Civil Procedure, through which he has had a lasting impact. The family legacy continued with William Mitchell's grandchildren, who also became distinguished members of the bar (Heinlen 2000, n.p.).

In 1956, the original St. Paul College of Law and the Minneapolis–Minnesota College of Law merged to form William Mitchell College of Law. Although William Mitchell did not live to become dean of the St. Paul College of Law, his name and legacy are carried on in the distinguished alumnae and alumni of this law school, who include U.S. Supreme Court chief justice Warren Burger and many prominent state and federal judges, attorneys, and elected officials.

Kathleen Uradnik

George Robertson
(1790–1874)

George Robertson distinguished himself as a member of Congress, as a representative in the Kentucky legislature, as a professor at Transylvania University, and as a member of the Kentucky Court of Appeals. He served in that court from 1828 until 1843, all but his first year as chief justice, and again from 1864 until 1871, the last year of which he was again chief.

Born in Mercer County, Kentucky, in 1790 to pioneers Alexander and Margaret Robinson, George Robertson received an education under the tutelage of Joshua Fry and subsequently attended, but did not graduate from, Transylvania University. After a plan to go to Princeton proved futile, he read law under Samuel McKee, a representative to Congress, and was licensed to practice by the age of nineteen. Married that same year, Robertson's early years were financially difficult, and he often supplemented his meager earnings by winning at cards, which he believed helped him to learn about human nature (Wilson 1908, 376).

In about 1812, he was appointed as a prosecuting attorney in Garrard County, and in 1814 he became a tax assessor. With a growing legal reputation, he was elected to Congress in 1816, but apparently his success was due at least as much to his ability to play the fiddle as to his oratory (Wilson 1908, 380). Publishing a widely heralded essay opposing a new gubernatorial election, Robertson entered Congress in 1817 and was twice reelected, although he did not serve out his third term. He appears to have taken notable positions on a number of key issues of the day, including the organization of the Arkansas Territory and slave presence there, the sale of public lands, and recognition of South American countries (Coulter).

Ever desirous of returning to the law and earning income for his family, he was instead elected in 1823 to the state House of Representatives from 1824 to 1826 and off and on until 1853. During three years he served as house speaker. Appointed to the Court of Appeals in 1828, he served there until 1843, later being again elevated to that position in his final years. Robertson was a professor at Transylvania from 1835 until 1858, teaching law to more than 1,200 lawyers (Wilson 1908, 388) at a time when Transylvania was one of the main training grounds for the legal profession west of the Alleghenies.

Robertson had only two other colleagues on the court, and the burden of his work required that he write his opinions quickly, but his opinions were still known for their lucidity as well as for occasional rhetorical flourishes. Joseph Story and James Kent were among those who commended the quality of his court's written opinions (Wilson 1908, 393).

Robertson, who favored blending common law with civil law principles, believed in the "malleability" of the common law. As he explained:

> An adjudged point, unreasonable or inconsistent with analogy or principle,

(continues)

(continued)

> should not be regarded as conclusive evidence of the law, unless it shall have been long acquiesced in, or more than once affirmed—and unless, on a survey of all material considerations, you feel that it is better to adhere to it than, by overruling it, to produce uncertainty and surprise. *Stare decisis* should be thus, and only thus, understood and applied. Stability and uniformity require that authority, even when conflicting with principle, should sometimes decide what the law is. But, in all questionable cases, follow the safer guides—reason and the harmony of the law in all its parts. (Quoted in Wilson 1908, 398)

Elsewhere referring to "the onward spirit of the age" and to "the expanded and still expanding genius of the common law," Robertson went on to cite reservations that portrayed judges in a more conservative light:

> We know that a zealous and inconsiderate spirit of innovation and improvement requires the vigilance and restraint of both reason and law. We are fully aware, also, of the fact that, when such a spirit is abroad, private rights are in peculiar danger, unless sternly guarded by the judiciary; and we are not sure that such guardianship is not most needed in a government where whatever is popular is apt to prevail, at first and often at last, only because it is *vox populi*. (Quoted in Wilson 1908, 399)

Robertson appears to have introduced innovations into a number of areas of the law. He wrote a decision in *Griswold v. Hepburn* (opposing payment of paper money for prior debts incurred by the government) that was first affirmed and later overturned by the United States Supreme Court in the *Legal Tender Cases*. He wrote innovative decisions on the liability of employers for fellow-servants, on the law of mental illness, on domestic relations, and on cases where ignorance of the law, or intoxication, might serve as mitigating factors (Wilson 1908, 400–401).

Although he initially opposed emancipation (Coulter), Robertson—who had once spoken eloquently in opposition to the doctrine of states' rights laid down in the Kentucky Resolution of 1798—remained loyal to the Union. He appears, however, to have accepted his second term of service on the court largely to beat out the candidate supported by the state's military government.

Identified in William Draper Lewis's *Great American Lawyers* (1908) as one of the great lawyer/judges of his age, Robertson has slipped into relative obscurity. He appears nonetheless to have been a good example of a competent and conscientious lawyer and judge who often put service to the bench over the financial rewards that he might have achieved had he devoted himself solely to the bar.

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MORRIS, LEWIS

(1671–1746)

Lewis Morris
Library of Congress

Lewis Morris was a trailblazer of early American law and politics. As a jurist he attained greatness for his steadfast belief in justice above all things. Morris's most influential decision was a dissent, delivered in the case of *King v. Van Dam,* holding that a royal governor could not create a court of equity simply to serve his own purposes. The publication of that dissent led to his dismissal as chief justice of the New York Supreme Court and to the infamous trial of newspaper publisher Peter Zenger that stands as a testament to the importance of an independent judiciary.

Lewis Morris was born on 15 October 1671 in New York City. He was the only child of Richard and Sarah Pole Morris, who had emigrated to the colonies from Barbados in 1670. Both of his parents died only a year after his birth, in 1672, and soon after his uncle, Lewis Morris Sr., came to New York and took charge of raising him and managing the Morris estate in New York. Although Lewis Sr. was seventy-two years old when he took control of the Morris estate, he was active in the New York and East Jersey business community, and the estate grew quickly. Lewis Sr. was also politically active and was appointed to both the New York and East Jersey Council and Court of Common Right. These political connections eventually helped young Lewis in his own political career. Lewis Sr. was a devout Quaker, and he raised young Lewis Morris in a

strict Quaker home. During the early part of his lifetime the younger Morris was also an active churchman, serving from 1697 to 1700 as a vestryman of Trinity Church and encouraging the Society for the Propagation of the Gospel in its missionary enterprises.

When he was eighteen, Morris rebelled against the strict household maintained by his aunt and uncle and left home. He traveled throughout the colonies and into the Caribbean, where he eventually settled, working as a scrivener, or one who drew up legal documents, in Jamaica for about a year. Upon his return to New York in 1691, both of Lewis's adopted parents passed away within a year, and he assumed control of the Morris estate. By that time, the estate was one of the largest in the provinces of New York and East Jersey, comprising a 6,200-acre estate in East Jersey, known as Tinton Manor; a 1,920-acre manor in New York City, later known as Morrisania Manor; and a 1,500-acre tract of land on Long Island. His position as a landed aristocrat played a large role in his political and judicial philosophy, and throughout his life he defended both the interests of property owners and the Crown. Later in 1691, he married Isabella Graham, daughter of a New York City political power broker and relative to several high-ranking members of the British parliament and military. The two remained married for over fifty-five years, and during that time, Isabella gave birth to fifteen children. Morris was a devoted father and family man, but he spent little energy on business affairs, preferring the fields of law and politics.

Morris was a noted man of both letters and science and quickly accumulated one of the largest private libraries in the colonies. He also considered himself a poet. His first known poem, in which he contrasted the brave and principled patriot's opposition to a tyrant, foreshadowed his future battles against the English governors (Sheridan 1981, 13–14).

Young Morris quickly began to establish his life in politics. In 1692, at the young age of twenty-two, he accepted the first political appointment of his half-century political career when he became a member of the East Jersey Council of Gov. Andrew Hamilton and a judge on the Court of Common Right. On his first day on the bench, Morris faced the case of *Fullerton v. Jones,* involving proprietary property rights. At that time the province of New Jersey was split into two portions, East and West New Jersey. A small council of land proprietors, who owned title through royal grant, politically controlled each region. In *Fullerton,* a New Jersey group of proprietary property rights holders were seeking to eject a subsequent patentee who had been given possession of the land by a New York governor (Sheridan 1981, 23). After two years of argument, Morris and his fellow justices sent the case to the jury with instructions to annul the rights of the subsequent property holders in order to protect the proprietary rights of the landed aristocracy. The jury nullified this instruction, however, and upheld the

dwellers' property rights. Morris and the other judges on the East Jersey court would not abide being overruled by a jury composed of nonlanded individuals and reversed the jury's decision. Ironically, forty years later Morris was the financial backer of a group that argued for jury nullification in the landmark slander case against John Peter Zenger.

Morris was both ambitious and contentious. In 1698, he became embroiled in the first of many disputes with colonial governors. He contested the appointment of Jeremiah Basse as Andrew Hamilton's successor as governor of New York and East Jersey and was eventually removed from both his position on the Governors Council and on the Common Court. Morris protested Basse's appointment on the ground that the choice had been made by only ten of the required sixteen land proprietors. After his dismissal, he and his fellow former judges staged a protest of Basse's newly formed Provincial Court that almost ended in bloodshed and resulted in Morris's arrest and fine for denying the authority of the new court. Morris's combativeness continued throughout a career in which Morris placed his principles over possible political consequences.

After this political setback, Morris traveled to England to promote the transfer of the power to choose governors from the council of land proprietors to the Crown. This policy switch was in direct contrast with his previous support of the land proprietors in the provinces, but it was not without purpose. For at the same time, he promoted himself to be first royal governor of the newly created province of New Jersey. His effort to become governor failed, but Queen Anne ended the proprietary system of political control and renewed Crown control over the province. In exchange for this transfer of power, Morris garnered the confirmation of the proprietors' rights to the land of New Jersey against all other patentees (Stelhorn and Birkner 1982, 55). The contacts that Morris made on his trip had both long- and short-term benefits for his career. Upon his return, Morris subsequently mounted a vigorous offensive against the new governor, Lord Cornbury. Despite these protests, he was named to Governor Cornbury's council in 1703. Of course his constant attack on Cornbury's policies led to his removal in 1704. Morris evidenced his view that owning property was an undeniable right in this assault on Cornbury, and this view soon became engrained in the American philosophical lexicon. For example, Morris continually assailed Cornbury for undermining the colonists' *liberties* as that term referred to title to land. Morris and the assembly censured Cornbury for invading the "rights" of the proprietors of the colony, those "rights" being their "Title to their Lands and Rents, violently and Arbitrarily forced from them . . ." (Hutson 1994, 214). Morris was reinstated to the Council upon appeal to the queen, but shortly thereafter, Cornbury removed him again.

Cornbury was removed from office and was replaced by Robert Hunter in 1710. Morris became the most prominent supporter of the newly appointed governor, even naming a son after him. Morris's connections to Hunter led to Morris's appointment as chief justice of the Supreme Court of New York in 1715. In that role, he became the first native-born chief justice of the colony. He also continued to serve upon the Governor's Council for New Jersey. His relationship with Hunter was very close, and in fact in 1714 he collaborated with Governor Hunter on the production of the first play written and published in a British colony (Sheridan 1981, 117). Morris's relationship with Hunter demonstrates that he objected not to English authority but to arbitrary and unchecked authority. Moreover, Morris was a vociferous and constant supporter of the Crown, despite the limits on liberty imposed by the British on the early colonists.

Morris's dichotomies were reflected in his views on slavery. During his tenure as chief justice, Morris took the opportunity in a case to hold that slaves were men and that a slave had the right to take the life of a white man who threatened the life of his master or mistress. Despite this view, he owned about sixty slaves who worked on his manors until he relinquished control of his estates to his son upon being appointed governor of New Jersey in 1738.

Morris's views of factionalism were also inconsistent with his own practice. In the March 1727 Supreme Court term, he charged a grand jury to be wary of the dangers of political factionalism, which he equated with unwarranted or irresponsible criticism of the administration in power:

> The Histories of all Nations abound with melancholy Instances of the terrible effects of Faction; which, when let loose, has been like an impestuous Torrent, capable of overturning all that lay in its Way; and those of our own Country are not without flagrant Examples, what small Sparks seditious Arts have blown into Flame, not easily to be extinguished, and not long since endangered the Constitution it self; therefore no Care or Caution can be too much, to check such Things in their first Appearance. (Sheridan 1981, 139)

Given this caution concerning faction, it is no small irony that he helped plant the seeds of the American Revolution. Morris's conflict with Governor Cosby, which was rife with seditious and factional railings against authority, led directly to the trial of Peter Zenger and was described by Morris's own grandson Gouveneur Morris as "the germ of American freedom, the morning star of that liberty which subsequently revolutionized America" (Few 1997, 46).

By the time newly appointed Governor Cosby arrived in New York in 1732, Chief Justice Lewis Morris was one of the greatest political figures of

his time. He was also already the center of the opposition to Cosby's administration. Morris had used his position as chief justice to consolidate his position as the center of anti-executive political machination even before Cosby's arrival. Morris was experienced in the ways of provincial politics, and it was said of him, "tho' he was indolent in the management of his private affairs, yet, thro' the love of power, he was always busy in matters of a political nature, and no man in the colony equaled him in the knowledge of the law and the arts of intrigue" (Moglen 1994, 1506).

Almost immediately, Cosby fell prey to Morris's political machine. Cosby demanded half the pay that senior New York Council member Rip Van Dam had received as acting governor in 1731 during the year before Cosby's arrival. Van Dam countered that he would only share half of his salary if Cosby would split any money received as prerequisites of his office from the time of Cosby's appointment in 1731 until his arrival in New York. Cosby refused this offer and filed suit in the New York Supreme Court, asking the court to sit as a Court of Exchequer, or equity. This would have avoided a jury trial in which a jury of New York colonists, more likely to be sympathetic to Van Dam, would have sat in judgment of their new governor. Many colonists, including Morris, despised courts of equity as arbitrary tribunals composed of high government officials reminiscent of the Star Chamber. Historically, equity courts were generally not sympathetic to common men who were not well connected to the government. Believing that the governor's request was an unlawful creation of a court of equity, Morris refused to hear the case.

His opinion in *King v. Van Dam* describing the case's jurisdictional error has been described as more polemical than legal (Sheridan 1981, 156), but his reasoning was sound. He argued that since the king himself could not create a court of equity without the consent of Parliament, then the king could not delegate that power to a provincial governor, without legislative constraint. Morris's opinion traced the history of judicial powers in the provinces and as a result even called into question the validity of the courts of chancery (Morris [1733] 1929, 2–8). He concluded that only the legislature could create courts and set the limits of their jurisdiction. The combination of the executive branch with the judicial branch of government would result in tyranny. As a result he concluded that "no less or other authority than that of the whole Legislature can erect a court of equity" (Morris [1733] 1929, 2). Subsequently, Morris published his opinion and distributed it throughout the province with a bluntly worded letter addressed directly to Governor Cosby. He stated:

> If Judges are to be intimidated so as not to dare to give any opinion, but what is pleasing to the Governour, and agreeable to his private Views, the People of

> this Province, who are very much concern'd, both with respect to their lives and Fortunes, in the Freedom and Independence of those who are to judge of them, may possibly not think of themselves so secure in either of them as their laws and his majesty intends they should be. (Morris [1733] 1929, 15)

When the Supreme Court reconvened, and Morris learned that his opinion was in fact the minority voice on the three-member panel, he stormed out of the courtroom, describing his peers as "mean, weak and futile" (Sheridan 1981, 152). After Morris departed, Cosby suspended Morris as chief justice, and two days later replaced him with James DeLancey. Van Dam's lawyers objected to the court's continuing to hear the case on the ground that Morris's removal was invalid because Supreme Court justices should be commissioned *quam diu se bene gesserint* (as long as they proved to be honest, or in good behavior) rather than *quam diu nobis placuerit* (at our pleasure). The objection was overruled, and Van Dam was ordered to pay Cosby his money in equity. Morris never again served as a judge.

Morris used the momentum gained from the case to expand his political party. Leaders of the Anti-Cosby Morrisites were Lewis Morris, Rip Van Dam, and Van Dam's two lawyers, James Alexander and William Smith. In Peter Zenger and his newly founded paper, the *New York Weekly Journal,* they saw an opportunity to broaden the impact of their diatribes against the governor. Zenger, eager for their business, became their willing pawn. Soon anonymous letters written by Morris, Van Dam, and others, criticizing the governor, filled Zenger's paper. The journal was an early form of the *Drudge Report,* filled with scandal and satire largely attacking Governor Cosby. This article, attributed to Morris, calls on the citizens of New York not to fall prey to the easy answer of joining the Governor's cause:

> Let this wiseacre (whoever he is) go to any country wife and tell her that the fox is a mischievous creature that can and does do her much hurt, that it is difficult if not impracticable to catch him, and that therefore she ought on any terms to keep in with him. Why don't we keep in with serpents and wolves on this foot? Animals much more innocent and less mischievous to the public than some Governors have proved. A Governor turns rogue, does a thousand things for which a small rogue would have deserved a halter; and because it is difficult if not impracticable to obtain relief against him; therefore it is prudent to keep in with him and join in the roguery. . . . (*New York Weekly Journal* 1734)

Cosby was so incensed that he publicly burned issues of the *Weekly Journal.* Eventually he had Zenger arrested for libel and put on trial. The information on which Zenger was tried echoed Morris's dissent in *King v. Van*

Dam: "I think the law itself is at an end; we see . . . men's deeds destroyed, juries arbitrarily displaced, new Courts erected without consent of the Legislature, . . . by which it seems to me, trials by juries are taken away when a Governor pleases" (Glendon 1996, 50). Although the writings in the weekly journal were printed anonymously, this excerpt truly represents the Morrisite philosophy.

The new chief justice, DeLancey, set bail for Zenger at £400, a virtually unheard-of amount. Zenger's supporters, including Morris, were very wealthy and could have easily raised the bail, but poor Zenger was worth more to the cause as a symbol of the governor's tyranny, so they left him in jail. Their strategy was to base Zenger's defense on the truth of the *Journal* articles, thereby trying Cosby in the process. Zenger's lawyer Andrew Hamilton made an impassioned plea to the jury in support of the liberty to expose and oppose tyranny by speaking and writing the truth without fear of prosecution. Hamilton admitted that Zenger had published the statements in question, but he asserted that the printer could not be convicted of libel for printing the truth. His novel argument was that the jury should determine not only whether Zenger had printed the statements but also whether the statements were legally libelous. These contentions were unsupported by English common law, in which truth was not a defense for libel. Judge DeLancey agreed that truth was not a defense and instructed the jury that it was to determine only whether Zenger had published the statements, leaving the legal determination of libel to the court. In fact, in a murder trial before the New York Supreme Court in 1716, Morris himself had noted of a charge to the jury that the jury "must" return particular verdicts if it finds specified facts to have been proven (*King v. Andrew Brooststead* [New York 1716]). Zenger was eventually acquitted and released, signifying one of the first known cases of jury nullification. In 1733, the Morrisites won sweeping victories in various local elections. Morris himself defeated a Cosby appointee in an election as representative of Westchester County to the Provincial Assembly.

After the trial, Lewis Morris left New York in November 1734, accompanied by his son, Robert Hunter Morris, and spent a futile eighteen months in London seeking vindication and reinstatement to judicial office by the Privy Council. Morris pointed out the dangers to the property and liberties of the subjects created by arbitrary removal of judges. Morris hoped that the gubernatorial power of removal in the colonies would be restricted in the future and made to conform to the laws of England. He urged that judicial independence required a royal declaration that judges would not be removable at the pleasure of a governor but only at the pleasure of the Crown. These requests largely fell on deaf ears. The lords of the Board of Trade in London, however, later declared that Morris's removal had been illegal

(Finkelman 1994, 31). This removal remains the only specific removal from judicial office by a governor that is recorded in the entire controversy over judicial tenure in the American colonies (Smith 1976, 1116).

Morris's political career was revived in 1738 when the Crown severed the political connection between New York and New Jersey, and he became governor of New Jersey. His appointment, which made him the first appointed American provincial governor, was based largely on his previous contacts with the Crown as well as the fact that he had been a constantly squeaking wheel in the ear of the Crown. Unfortunately, his administration was not successful. It was marked by confrontations with the general assembly over taxation, support of the militia, issuance of bills of credit, and validity of land titles. Though he had challenged the royal prerogative as represented by Cornbury and Cosby, he permitted no questioning of his own authority or of his royal charge. He frequently lectured the provincial assembly on its duties and complained to the lords of trade in 1740 that the legislators "fancy themselves to have as much power as a British House of commons, and more" (Sheridan 1991, 23). He allowed no criticism of Parliament, noting that "a British Parliament can abolish any Constitution that they deem inconvenient or disadvantageous to the trade of the nation or otherwise" (Stelhorn and Birkner 1982, 56).

In 1739 Gov. Lewis Morris, with the unanimous advice of his Council, appointed his son, Robert Hunter Morris, as chief justice of the Supreme Court. Perhaps with his own experience in mind, he specifically designated Robert's appointment to last during good behavior. Morris's heirs reflected his contentious nature and belief in principle over consequences. When his grandson Lewis Morris was about to sign the Declaration of Independence, his brother cautioned that his signature could cost him all his property. Morris, a plainspoken founder, responded, "Damn the consequences, give me the pen" (Hawke 1976, 210).

Lewis Morris died on 21 May 1746 in Kingsbury, New Jersey. His belief in the need for an independent judiciary laid the foundation of the current system of separation of powers that serves to guarantee freedoms and liberties from executive excesses. It is appropriate that the name Morris derives from the Welsh *mawr* and *rys*, meaning "brave man," as he was one of the first of a long line of great American patriots and judges who bravely stuck to their principles in the face of great personal costs.

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MOTLEY, CONSTANCE BAKER

(1921–)

In addition to winning nine of ten civil rights cases that she argued before the United States Supreme Court, Constance Baker Motley was the first African American woman to serve in the New York state senate, the first to serve as president of the Manhattan borough, and the first to fill a seat on the federal judiciary in the United States. Appointed by Pres. Lyndon B. Johnson to the United States District Court for the Southern District of New York in 1966, she became chief judge of that court in 1982 and took senior status in 1986.

Constance Baker Motley
Library of Congress

Born to an immigrant family from the island of Nevis in the West Indies, Constance Baker was born in New Haven, Connecticut, in 1921 as one of twelve children of Willoughby Alva Baker and Rachel Huggins Baker. Her father was a chef at a Yale University fraternity. Although New Haven was far more hospitable to African Americans than was the Deep South, Constance's early years were not free from discrimination, as when she was denied access to a local beach. A tall girl who took on a number of leadership positions within the local African American community, she came from a family that did not have the financial means to send her to college and that expected her to become a hairdresser. Instead, a white businessman, Clarence Blakeslee, who heard Constance give a speech, was so impressed that he agreed to finance her college education. She began her undergradu-

ate education by heading south to Fisk University in Nashville and finished her degree in economics at New York University. She then earned her law degree from Columbia, where she was one of the few women enrolled.

Thurgood Marshall, one of the twentieth century's greatest litigators and most important civil right lawyers (who would also become the nation's first African American United States Supreme Court justice), subsequently employed her as a clerk at the Legal Defense Fund of the National Association for the Advancement of Colored People (NAACP), and Motley, who has also looked to Florence E. Allen (another federal judge) as a role model, continues to regard Marshall as one of her most important mentors and role models. Motley gradually rose in the ranks of the Legal Defense Fund, arguing cases involving equal pay for African American schoolteachers in the South and opening up colleges and universities to African Americans, including James Meredith, whom she helped get admitted into the University of Mississippi. She argued her first case in a southern courtroom that displayed a gigantic mural of splendidly attired white plantation owners and their wives in hooped shirts on one side and black slaves on the other (Brenner 1994, 68), but even in such circumstances she was rarely intimidated.

Especially in the South, Motley was considered something of an oddity because it was unusual for individuals of both her race and her gender to be lawyers, and courts were often packed with observers who came to see the "New York" lawyer in action. Motley was among the lawyers who helped with the briefs for the case of *Brown v. Board of Education* (1954) that overturned *Plessy v. Ferguson* (1896) and declared that the doctrine of "separate but equal" would no longer be tolerated in the area of racial relations, and especially in public schooling. She was often the only female counsel in the major civil rights cases of her era. She got to know Dr. Martin Luther King Jr. and defended him and other civil rights leaders who engaged in peaceful "sit-in" demonstrations.

Although she never received the recognition and adulation that Thurgood Marshall and a number of other lawyers from that era received from the black community, her profile was sufficient to enable her to run successfully for a seat in the New York state senate in 1964, and she was subsequently selected by the New York City Council to serve as Manhattan borough president. The first day she went as part of her job to attend a meeting of the Board of Estimate, she was stopped by a policeman, who—observing her color and not knowing her job—warned her that there would be "no picketing today, lady" (Barron 1999, B2). In the meantime, her legal work had come to the attention of Atty. Gen. Ramsey Clark and New York senator (himself a former attorney general) Robert Kennedy. Although Kennedy apparently later moderated his support over a political controversy, they recommended her for a judicial nomination.

Shirley Mount Hufstedler: Appellate Judge and Secretary of Education (1925-)

United States Supreme Court justice Ruth Bader Ginsburg has singled out Shirley Mount Hufstedler as one of three women pioneers on the lower federal bench (the others Ginsburg listed were Florence Ellinwood Allen and Burnita Shelton Matthews, who are covered elsewhere in these volumes). Shirley Mount was born in Denver, Colorado, in 1925 and earned her undergraduate degree at the University of New Mexico before graduating at the top of her law class at Stanford Law School. She subsequently married Seth Martin Hufstedler in 1949, entered private practice, and worked in the Los Angeles firm of Beardsley, Hufstedler and Kemble from 1951 to 1961. In 1960, she worked with the California attorney general in a complex case involving litigation over the Colorado River, a case that eventually made its way to the United States Supreme Court. The next year she was appointed to the Los Angeles Superior Court, a trial court, and in 1966 to the California Court of Appeal.

In 1968, Pres. Lyndon Johnson appointed Hufstedler to the United States Court of Appeals for the Ninth Circuit, and she served in that capacity for eleven years. Pres. Jimmy Carter appointed her in 1979 to head the newly created Department of Education. Hufstedler served in that capacity for two years, leaving a reputation for professionalism that was important to the new department.

After leaving that post, Hufstedler resumed private practice but continued her concern with public affairs, including arms control and the establishment of closer relationships with Eastern European nations (Ginsburg and Brill 1995, 287). Hufstedler has received numerous honorary degrees, and she chaired a U.S. Commission on Immigration Reform in 1996–1997.

Justice Ginsburg noted that, although Hufstedler was thought for a time to be a prime candidate for an appointment to the United States Supreme Court, "she never tailored her opinions to please the home crowd, or the White House crowd" (Ginsburg and Brill 1995, 286). Ginsburg noted that Hufstedler was a particularly passionate defender of the right to privacy and an opponent of myths of inferiority that are designed to undervalue the contributions of groups of citizens.

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President Johnson initially recommended Motley to the Second United States Court of Appeal, but faced with strong objections from Mississippi's Senator John Eastland and others who had long opposed civil rights, Johnson withdrew her nomination to the Second Circuit and nominated her instead for the post of a United States district judge. Still pressured by Eastland and other southern opponents of civil rights, the Senate took its time, but it confirmed her in this post, which she assumed in 1966. At the time, the only other women federal judges were Sarah Hughes of Dallas, Bonita Matthews (in the District of Columbia), Florence Allen on a United States Court of Appeals, and Mary H. Donlon, a New York City customs judge (Motley 1998, 214). Even though the New York Southern District Court was the largest such court in the nation, with twenty-four judges, at the time of her appointment Motley was the only woman or minority to serve on that court (210). Apparently unaware of her reputation for professional dress as an attorney, two men from the Queens Bar Association wanted to know whether she would appear on the bench in "one of those bright flowered dresses that women wear" and were relieved to hear her respond, "Of course not" (218).

Most stories about Motley, as well as her own remembrances, concentrate on her exciting and tireless years as a civil rights advocate. With her experience arguing such cases as a federal judge, it is not surprising that she appears to have amassed a solid record as a United States district judge as well. She has been showered with honorary degrees by many universities and by awards from civil rights organizations.

United States district judges are trial judges, and they hear a variety of criminal and civil cases. Motley has proved to be no exception. In 1982, she presided over a case in which she sentenced a number of Croatian nationalists to long jail terms for murder, arson, and extortion. She had previously given careful consideration to the legitimacy of search warrants that police officers had used to obtain evidence in this case as well as police use of an alleged confession. Motley's consideration of each issue individually (she accepted the legitimacy of the search warrant based in part on testimony from an informant but concluded that the confession should be suppressed) demonstrated a careful weighing of each issue (see *United States v. Ljubas et al.*, 1982). Similarly, although she ruled that the ABC television network had not, in writing its show "The Greatest American Hero," infringed on "Superman" works owned by Warner Brothers, Motley also ruled in a follow-up case that the suit had not been frivolous and that ABC was not therefore entitled to an award of lawyers' fees (*Warner Brothers v. ABC*, 1982).

In 1987, Motley delivered a powerful blow for the rights of defendants when she declared that police could only detain suspects for twenty-four

hours before charging them with an actual crime ("Constance Baker Motley," *Encyclopedia of World Biography Supplement*). That same year, Motley ruled on behalf of a black carpenter, Samuel Richards, who had been passed up for promotion to a foreman's position by the New York Board of Education. Although the white individual who had received the promotion had a slightly higher civil service score, Motley was able to show that Richards was better qualified by education and experience, that the board bypassed its own procedures for choosing among the top three candidates in such circumstances, that it failed even to conduct the requisite interview, and that its decision in Richards's case was part of a more pervasive pattern of discrimination and failure to implement affirmative action hiring policies that demonstrated discriminatory intent (*Richards v. New York City Board of Education,* 1987).

In 1988, Motley was generally credited for her no-nonsense handling of the so-called Wedtech bribery case. It involved multiple defendants and dozens of witnesses. Completing such a complicated case within a five-month period was regarded as a significant achievement (French 1988, 32). A reporter noted that Motley was known for her "daunting glare and sharp rebuke she gives to any lawyer who oversteps courtroom bounds" (32). She rebuked one lawyer by stating that "what you just said to me indicates that you are either not familiar with this court, or you are trying to pull my leg" (32). She has been described as "judicial, formal, [and] precise" (Brenner 1994, 66). That observer has further noted that "unlike many of the civil-rights activists of her generation, she is far more comfortable discoursing on the history of the Fourteenth Amendment than delivering an impassioned speech" (66).

In 1991, Motley had a major impact on academic life when she delivered a powerful award for punitive damages against Kinko's Graphics Corporation. Motley found in *Basic Books Inc. et al. v. Kinko's Graphics Corporation* that the "course packs" that Kinko's was preparing for classes went far beyond "fair use" and were designed not so much to spread knowledge to students as to impair legitimate copyright rights of individuals and companies who had published scholarly articles. In her decision, she made it clear that she was awarding punitive damages with the clear intent of stopping Kinko's from continuing the practice.

In 1994, Motley applied principles from civil rights litigation to the issue of women's rights. At issue was the case of Dr. Cynthia Fisher, who had been denied tenure in the Vassar Biology Department. In a meticulous review of the facts, Motley was able to show that over a thirty-year period the department had never tenured a married woman but had penalized them, presumably because many, like Dr. Fisher, had taken some time from their

scholarly studies in order to raise their families. Dissecting the evidence regarding research and publication, teaching, and other university contributions on which the department and the college had denied Fisher tenure, Motley found that Dr. Fisher had credentials that exceeded those of male colleagues who had been tenured during the same time period. Motley further found that the department's proffered reasons for denying tenure to Fisher were "disingenuous, pretextual and clearly made in bad faith" (*Fisher v. Vasser College,* 1202). In ruling that Dr. Fisher should either be awarded her job and back pay or the difference between what she was then making as a social worker (a career she had chosen after being denied tenure) and what she would have made had she been given tenure, Motley noted that "[i]n the case at hand, plaintiff has presented evidence of a virtual smoking gun" (1229).

In a still more recent case involving education, Motley ruled that the Board of Education of New York was still not making sufficient efforts to provide education, especially special education programs, for individuals who were incarcerated on Rikers Island (Forero 2000, B3). Motley also ruled in a recent case that Pam Martens and Judith Mione, who had raised charges of sexual harassment against brokerage house Smith Barney, had to abide by their own contracts and submit their own claims to an arbitration process (Chapelle, "Smith Barney Wins Boom-Boom Round").

Motley learned to be tough and meticulous as a lawyer, and this same toughness and thoroughness appears to have characterized her judicial rulings. She and her husband, real estate broker Joel Motley, have a son who graduated from Harvard Law School and is a practicing lawyer. Numerous civil rights organizations and colleges have honored Motley for her work as a litigator and a judge. Motley believes that the legal profession remains open to persons of color. She notes that "lawyers are natural leaders and activists in the black community. More and more blacks will become involved in policy making agencies, in government, in politics, in business and diplomacy—in areas where blacks have not been before and where decisions and changes are going to be made" (quoted in "Constance Baker Motley," *Notable Black American Women*). Motley has written a number of law review articles as well as her autobiography, *Equal Justice under Law.* She is critical of Justice Clarence Thomas, the second African American Supreme Court justice, for his opposition to affirmative action and, despite her optimism about the role that African Americans can play in the U.S. legal system, remains concerned that the nation is suffering a reaction against African American progress similar to that which occurred after the period of Reconstruction (Motley 1998, 229–247).

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Note

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MURRAH, ALFRED P.

(1904–1975)

Alfred P. Murrah
AP Photo

As one of the youngest federal judges ever appointed to the bench, Murrah became a fixture in the Tenth Circuit Court of Appeals. Murrah is known mostly for his work as an administrator, attempting to improve the judicial system, and as the second director of the Federal Judicial Center.

Alfred Murrah was one of the pioneers of the last frontier in the United States, the state of Oklahoma. Murrah was born in Oklahoma on 27 October 1904, three years before the Oklahoma territory became a state. His father, George Washington Murrah, had five children by his first wife, Lucy, and a single child, Alfred, by his second wife, Lanora. Alfred's mother died when he was eight, and his childhood involved hard work, as his family had few financial resources. After graduating from high school, Murrah entered the University of Oklahoma in 1922, graduating with a law degree in 1928. During his college years Murrah struggled to finance his education, being forced to work at a variety of jobs to pay the bills. After graduation, Murrah established a law firm, partnering with Luther Bohannon. The firm focused on workmen's compensation cases, a growing field in the 1930s. At the same time Murrah met and married Agnes Milam in

1930. The Murrahs had three children, a boy and two girls. His son, Paul, also attended law school and worked as an attorney.

As his law practice expanded and became centered in Oklahoma City, Murrah moved beyond the legal realm into the political realm, participating in state politics. He helped manage both state legislative races and federal congressional races. One such race saw him supporting Josh Lee, who ran in 1936 for U.S. senator. Lee won and when given the opportunity to recommend a man for an open federal court vacancy in Oklahoma, he chose Murrah. After a flurry of internal fighting among Oklahoma Democrats, Franklin Roosevelt sent up the nomination and Murrah was confirmed. Murrah took his seat on 12 March 1937, becoming a federal district judge at the age of thirty-two.

Murrah served in that position for four years. During that period Murrah earned a reputation as a prolabor judge, not surprising for a Roosevelt appointee. In one important decision that reached the Supreme Court, *Williams v. Jewel Tea* (1940), Murrah argued for a broad interpretation of the federal commerce power and sought to uphold the Fair Labor Standards Act. The Supreme Court agreed with Murrah, using the *Williams* case to support broad congressional power to regulate the economy.

Most cases heard by Murrah, though, did not become national precedent. In the late 1930s, Oklahoma had a frontier image, with the state and federal governments having difficulty controlling the population. One area of contention was the production and sale of liquor in Oklahoma, which was a dry state at the time. The large number of cases and the difficulty in trying them led Murrah to play the unusual role of judge and defense counsel in one case. Murrah argued before a jury on behalf of a defendant. The defendant was convicted; then Murrah returned to his position as judge and sentenced the defendant. Playing these two roles was an example of how the legal system was just beginning to develop in the state and how Murrah was able to act in a judicious manner.

His abilities soon earned him a reputation in the sparsely populated state. With the retirement of a judge from the Tenth Circuit Court of Appeals, Murrah was mentioned and then appointed to the vacancy. He became one of the youngest appeals court judges on 9 September 1940. He was only thirty-six years old. It would be from this position that Murrah would serve nearly thirty years and earn a national reputation as a reformer of the federal judicial process.

The Tenth Circuit Court of Appeals heard cases originating in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. The court had its main center in Denver, Colorado, though the judges would travel throughout the states to decide appeals. When Murrah became a judge, he had three colleagues, and by the time he retired in 1970, there were seven. The

growth of the court's membership matched the growth in population in the Rocky Mountain states. The Tenth Circuit, as with all federal appeals courts, heard appeals of decisions from federal district trial courts. The cases before the appeals courts usually involved federal law or an interpretation and application of the U.S. Constitution.

In 1940 the Tenth Circuit was only a decade old, and the types of cases it was hearing were disputes over the new federal labor and commerce regulations passed by Congress during the New Deal. Murrah and his colleagues, three of four being Roosevelt appointees, tended to rule in favor of national regulations and those agencies created to enforce the law. The Tenth Circuit also heard numerous Indian cases involving land disputes and disagreements over who owned mineral wealth beneath the land. Many of the cases handed down by the judges involved interpretation of complex laws and contracts that brought little attention to them.

During that time Murrah proved to be the type of judge favored under the Roosevelt administration. He refused to involve the federal courts in economic or property rights issues but was active in using the judiciary in other individual rights or civil liberties cases. This stance earned Murrah a reputation as a rising young jurist. It also earned him the friendship of his colleagues, who were twenty to thirty years older. The small size of the court, only four judges, was also conducive to close working relationships.

In 1949, the number of judges was increased to five. The change in membership was followed by a change in the focus of the court. As courts accepted New Deal laws, challenges to economic regulations diminished. At the same time, following the lead of the Supreme Court, the Tenth Circuit heard more appeals of cases involving civil liberties issues.

One case authored by Murrah in 1956 has particular significance in modern times. A U.S. citizen, William Colepaugh, was arrested in the United States during World War II. He was charged with acting with the German government to commit sabotage in the United States. Under direct presidential order, Colepaugh was named an enemy combatant and tried before a military court, where he was found guilty and sentenced to death.

In the case of *Colepaugh v. Looney* (1956), which was an appeal of that decision, Murrah asserted the right of Colepaugh to appeal to the civil courts the decision handed down by the military tribunal. At the same time Murrah, writing for two other judges, recognized the president's power as commander in chief to define war crimes against the United States, to charge people under those crimes, and to use military commissions to convict them. Although the case did not receive widespread attention at the time, the decision to uphold the president's war power and use military tribunals for enemy combatants could serve as precedent and argument for future action.

Robert L. Williams
(1868–1948)

Born on a farm in Pike County, Alabama, in 1868, Robert L. Williams would become a moving force in the constitutional convention that drafted Oklahoma's constitution, its first chief justice, and its third governor. He was then appointed as a United States district judge for the Eastern District of Oklahoma and finally served on the United States Tenth Circuit Court of Appeals.

Educated in rural Alabama schools, Williams enrolled in Southern University at Greensboro, Alabama, where he earned his bachelor's degree. After an intensive six months of reading law under Col. William S. Thorington in Montgomery, Alabama, and passing the bar, Williams moved briefly to Oklahoma, only to return to Alabama. Converted under the evangelism of Samuel (Sam) Porter Jones, he returned to Southern University to earn a master's degree in theology and serve for a time as a minister of the Methodist Episcopal Church. Apparently relatively unsuited to the job and perhaps disappointed by his failure to win the hand of a woman, Williams returned to the Indian Territory in what is today Oklahoma. There he entered into a law partnership and quickly established himself as a leading attorney in Durant, in partnership with William Elbert Utterback.

An ardent Democrat (who supported Williams Jennings Bryan and a variety of Populist and Progressive measures while strongly opposing socialism and later resisting elements of Franklin D. Roosevelt's New Deal), Williams rose quickly in party ranks and became a national committeeman. He helped push for Oklahoma statehood, favoring a single new state combining the Oklahoma and Indiana Territories rather than two separate entities. One of 112 delegates elected to the constitutional convention that met in Guthrie, Oklahoma, he favored such Progressive measures as the initiative and referendum, taxation of railroad properties, and the direct primary. In conjunction with the men who were to become the state's first governor (a position that Williams himself coveted) and the state's first speaker of the House of Representatives, Williams appears to have had a major impact on the drafting of the constitution, serving as chair of the Committee on Railroads and Public Service Corporations and as a member of several other important committees.

After Oklahoma was admitted into the Union as the forty-sixth state, Williams was elected to the state Supreme Court, whose other four members unanimously selected him as their chief. In just over six years on the court (1908–1914), he wrote more than 500 opinions. These included a decision upholding an innovative banking law; a ruling (later overturned by the United States Supreme Court) upholding Oklahoma's grandfather clause (Williams, who had taken Robert E. Lee's last name as his middle name as a youth, never appears to have sought the black vote and held rather conventional paternalistic southern views of African Americans) and the decision (reaffirmed by the United States Supreme Court in *Coyle v. Smith)* permitting Oklahoma to move its state capital from Guthrie to Oklahoma City, thus giving it an equality with previously admitted states. While serving on the high bench, Williams prepared and published an annotated state constitution.

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In 1914, Williams began his successful quest to serve as Oklahoma governor and took his oath in early 1915. Known in his first two years chiefly for applying business principles to gain efficiency and maintain fiscal austerity in government, Williams also supported the use of prison labor and worked diligently to help the U.S. cause during World War I.

Limited to one term, Williams was appointed by Woodrow Wilson to the United States District Court for the Eastern District of Oklahoma in 1919. An opponent of Prohibition, Williams, who had health problems and had given up drinking upon ascending the bench, nonetheless found that much of his caseload consisted of such cases. Often brusque and almost always willing to speak his mind, he frequently attacked the Women's Christian Temperance Union, once saying: "Under a monarch of Europe a man may distill his liquor, but in America the laws have strangled initiative. There is less liberty in this country today than under a monarchy" (quoted in Dale and Morrison 1958, 294). Williams appears to have allowed many first-time small-time offenders to go free rather than enforce the letter of the Prohibition law. On other occasions, Williams permitted fathers to whip their sons with a leather strap so that they would not be forced to send them to reform school.

Williams's district included many Indian claims; in one case, determination of a Native American's rightful heirs required more than 20,000 pages of testimony (Dale and Morrison 1958, 306). Williams was typically merciful to first offenders and harsh with hardened criminals. He sentenced one such offender to death under the Lindbergh Kidnapping law for kidnapping a police officer who was wounded but did not die as a result of the experience. Behind the scenes, Williams appears to have continued to influence Oklahoma politics.

In 1937, Franklin D. Roosevelt appointed Williams as a judge for the United States Tenth Circuit Court of Appeals with the understanding, which Williams honored, that he would retire at the age of seventy. Williams became a strong friend and supporter of Judge Alfred P. Murrah during that time.

An unmarried man with a brusque exterior, Williams was a strong supporter of the Methodist Church and of other causes that he favored. Once, responding to critics who referred to him as an old bachelor, Williams replied that he was "married to Oklahoma" (quoted in Dale and Morrison 1958, 359). He served on the board of directors of the Oklahoma Historical Society from 1915 to 1948 and helped establish both a historical journal and a building for housing and researching Oklahoma historical documents. He served as president of the Historical Society from 1938 until his death in 1948.

A competent businessman who became a fairly large landowner and whose estate was valued at about $400,000 at the time of his death, Williams, who put great emphasis on initiative, thrift, and self-help, did not always please his tenants, but he appears to have tried to treat them fairly. Although he held more offices than most contemporaries, his strengths and weaknesses appear fairly representative of many other frontier jurists who helped to settle the West.

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Dale, Edward Everett, and James D. Morrison. 1958. *Pioneer Judge: The Life of Robert Lee Williams*. Cedar Rapids, Iowa: The Torch Press.

The early 1950s saw Murrah write decisions in two cases that would become Supreme Court precedent. In *Lee Optical v. Williamson* (1954), Murrah agreed with his two colleagues in striking down part of a law that treated ophthalmologists and optometrists differently than opticians in fitting people for eyeglasses. *Lee* was a rare case in the 1950s in which the federal courts struck down a state economic regulation. The Supreme Court proceeded to overturn the Tenth Circuit's opinion, refusing to become involved with regulation of the economy by the state.

Although *Lee* represented one of the last economic liberty cases decided by the federal courts during the period, the Tenth Circuit decided two cases that steered a new direction for the federal courts. The issue was that of segregation of public schools and universities. In *McLaurin v. University of Oklahoma* (1948), Murrah was one of three judges who ruled that a university policy of refusing McLaurin into its graduate school based on his race violated the Fourteenth Amendment. The Tenth Circuit followed Supreme Court precedent in banning such blatant segregation and ordered that McLaurin be admitted.

The university then segregated McLaurin in every aspect of his education ranging from the classroom to the cafeteria. McLaurin challenged the new form of segregation in 1950, but three judges of the Tenth Circuit, including Murrah, upheld the university policy as following the separate but equal doctrine found in the Court precedent of *Plessy v. Ferguson* (1896). The United States Supreme Court disagreed with the Tenth Circuit, ruling that the University of Oklahoma's segregation of McLaurin was unconstitutional and requiring the state to integrate him within the graduate program. In both of the McLaurin cases, Murrah and his colleagues played the role of federal judges in applying Supreme Court cases and following those decisions.

McLaurin proved to be the major school desegregation case heard by the Tenth Circuit during Murrah's tenure there. Unlike the southern circuits, the Eleventh and the Fifth, the Tenth Circuit was spared many of the political confrontations associated with federal judges attempting to operate public schools. As the 1960s began, the Tenth Circuit began to focus more on civil liberties and cases involving the rights of criminal defendants. At the same time Murrah began a new job within the Tenth Circuit, that of chief judge.

Although all judges within a circuit court of appeals are considered equals, the chief judge of a circuit has greater responsibilities, including assigning lower court judges and determining which colleagues will sit on which appeals. Murrah obtained that post in August 1959. During his decade-long service as chief judge, Murrah found himself embroiled in political controversies while at the same time earning a national reputation as a judicial reformer.

Murrah was instrumental in getting his former law partner, Luther Bohannon, appointed to a district court judgeship in Oklahoma. Murrah had to spend nearly a year lobbying his home state senators, the Senate itself, and the American Bar Association to get Bohannon the nomination and confirmation. It was during this fight that Murrah displayed his political abilities.

He was less effective in handling a dispute with Stephen Chandler, another federal district judge in Oklahoma. The problems began with a dispute over Chandler's presiding in a case involving Occidental Petroleum. The circuit judges agreed that Chandler should remove himself from the case, but the judge disagreed and went to court to have his colleagues' opinion overturned. The fight turned nasty as Chandler clashed frequently with the other judges, forcing them to strip him of all the cases he was hearing at that moment and prohibit him from hearing any future cases. Chandler went to court to challenge this decision, arguing that the Tenth Circuit judges had abused their power. The case worked its way slowly through the federal judicial system. During that time, Chandler and his colleagues exchanged accusations and verbal attacks. The case reached the Supreme Court and was decided in 1970, after Murrah had left the court. In *Chandler v. Tenth Circuit*, the Supreme Court ruled for the circuit judges, upholding their decision to strip the district judge of his power to hear and decide cases. The entire episode was a black mark on the judiciary and the Tenth Circuit. Unlike his many other ventures, this time Murrah proved unable to fashion a compromise or use his political skills to defuse a conflict.

With controversy dogging the internal workings of the Tenth Circuit during most of his years as chief judge, Murrah also had to serve as a judge deciding appeals. The 1960s saw a deluge of appeals from criminal defendants who were taking advantage of the Supreme Court's rulings that applied the Bill of Rights to state governments. The Tenth Circuit decided many cases involving search and seizure, right to counsel, self-incrimination, and juvenile rights. Murrah applied those rulings, though few reached the Supreme Court on appeal. Overall, Murrah authored over 800 opinions for the Tenth Circuit during the almost thirty years of his tenure. As the 1960s came to a close, retirement beckoned for Murrah. After almost thirty years on the Tenth Circuit and more than thirty years as a federal judge, the time was ripe for him to move off of the bench. But Murrah's reputation as a judicial reformer opened another job for him, that of director of the new Federal Judicial Center.

Murrah's job as director was tied to his previous efforts on the Tenth Circuit. As chief judge he had administrative responsibilities within the circuit. But Murrah also was involved in attempting to improve courtroom procedure throughout the entire judicial system. Starting in the mid-1950s,

Murrah headed a judicial commission that studied trial procedure and produced a booklet on the issue for federal judges to use when faced with prolonged cases. He also led a committee examining how to improve pretrial procedures in order to shorten trials. To accomplish his goal, Murrah was forced to use all of his political skills by lobbying Congress, testifying before a Senate committee, and overseeing passage of a federal statute on the issue. Murrah also worked on creating a standard set of sentencing guidelines for judges in order to make sentences fairer. All of Murrah's efforts earned him a national reputation among his fellow judges. He also became friends with several justices, including William Douglas and Byron White, and worked with another judicial reformer, Warren Burger, who would become chief justice and one of the judges who would pick Murrah for the job as director of the Judicial Center.

Murrah became director of the three-year-old center in 1970. The Judicial Center was created by Congress to improve the federal judicial system by helping train judges and staff members, including court clerks, mediators, and probation officers. The center also conducted studies of the federal judiciary, attempting to discover problems and devise solutions. Under Murrah the center became active in running seminars for judges, helping them work through difficult issues of administering the courts and effectively running trials.

As director, Murrah also had senior status. Retiring from full-time work on the Tenth Circuit, he still occasionally served as a judge, pinch-hitting when there was a vacancy or an additional judge was needed. Murrah remained active as a judge and administrator until his death on 30 October 1975.

Murrah's contribution to the law could be found both inside and outside the courtroom. He was recognized as one of the most important legal figures in Oklahoma, serving as a lawyer and district judge as Oklahoma found its legs as a state. His legacy was continued with the naming of the law library at the University of Oklahoma and of the federal building in Oklahoma City. It was the Alfred P. Murrah federal building that was destroyed by a terrorist bomb in April 1995.

Douglas Clouatre

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PARKER, ISAAC C.

(1838–1896)

Isaac C. Parker
National Archives

As federal judge for the United States District Court in the Western District of Arkansas, Isaac Parker was notorious across the United States. He exercised sole authority over the largest federal judicial district in the United States, sentenced 161 men to the gallows, and engaged in a public and bitter controversy with the Supreme Court and the U.S. attorney general. Although Parker's contemporary reputation was based on his fame as the "hanging judge," his role in U.S. judicial history is more complex. His actions initiated public debate over the role of appellate courts in capital cases. Appeals from his court created a body of Supreme Court decisions protecting the right to self-defense. And Parker's decisions in the court at Fort Smith, which had jurisdiction over Indian Territory, extended federal law at the expense of Native American tribal sovereignty.

Born 15 October 1838 in Belmot County, Ohio, Isaac Charles Parker was the youngest son of Joseph and Jane Shannon Parker. Influenced by his maternal uncle, the governor of Ohio, Parker at age seventeen chose the legal profession as a career. His legal training consisted of reading, self-study, and apprenticeship with a local attorney. He passed the bar in 1859, moved to St. Joseph, Missouri, and joined the firm of another maternal uncle, D. E. Shannon. Parker opened his own office in 1861 and the same year was elected to the first of three terms as city attorney. After he switched to the

Republican party in 1864, voters elected him county prosecutor for the Ninth Judicial Circuit. Four years later, Parker defeated a Democratic incumbent and became judge of the Twelfth Missouri circuit (Tuller 2001, 14–26).

Parker was politically ambitious and served only two years of his judicial term. He clearly intended to use the law as a means of political advancement. In 1870 and 1872 voters elected him to the U.S. House of Representatives for the Seventh Congressional District. Parker proved a loyal party man, and when the Democratic majority in Missouri gerrymandered his district, President Grant rewarded him with a presidential appointment. Parker requested the United States Court for the Western District of Arkansas, a scandal-ridden bench whose corruption had made national headlines (Tuller 2001, 36–40).

Parker's appointment was the direct result of Reconstruction politics. Arkansas was recovering from the aftermath of the Brooks-Baxter war, a violent controversy between factions of the Republican party in Arkansas. The previous judge was a corrupt politician who accepted bribes, seldom held court, and allowed his marshals to embezzle from the federal government. Parker was a political appointee: He had minimal experience, but he was not from Arkansas, he was loyal to Grant and the Stalwarts, and he had never faced corruption charges. The Senate unanimously confirmed Parker in March 1875. On 10 May, eight days after his arrival in Fort Smith, Parker opened court (Tuller 2001, 49–51).

Parker inherited a unique court. It was the largest federal judicial district in the United States and the costliest to run, since it covered 74,000 square miles and included the Indian Territory. The court was the busiest criminal court in the federal system. In addition to its jurisdiction over statutory offenses and federal law over the American Indians, it possessed common law jurisdiction over U.S. citizens in the Indian Territory, an area infested with fugitive criminals. Parker thus had a high proportion of criminal cases on his docket. The most unusual feature of Parker's court was the power granted to its sitting judge. Due to congressional oversight, the district court at Fort Smith also had circuit court powers. This meant that Parker, as circuit judge, sat in appeal over cases coming out of his own district court. Only during the last third of his tenure did Parker become subject to the same appeals process as other federal jurists (Tuller 2001, 42–46, 93–96, 162; Burton 1995, 47–50; Stolberg 1988a, 7).

Parker immediately set to work reforming his court. Parker viewed federal law as the agent of "civilization" in Indian Territory and frequently juxtaposed the "order and tranquility" of the law with the "savageism and brutality" of the lawless. He believed that certain punishment and definite retribution prevented and halted crime. Parker's ideal criminal court was

"vigorous, impartial, just, and most efficient" (Stolberg 1988b, 21; see also Tuller 2001, 4–5). Parker broke sharply with the practice of his corrupt predecessor. He held court six days a week from eight in the morning to sundown. He tried, convicted, and sentenced quickly. He increased the efficiency of the court and doubled law enforcement efforts in Indian Territory. In his first term he executed six murderers in public hangings. Parker quickly reversed the image of the court at Fort Smith and gained a national reputation for the swift punishment of lawbreakers (Tuller 2001, 52–69; Stolberg 1988b, 11–12).

Most of the court's business arose from its jurisdiction over Indian Territory. The most commonly prosecuted offense in the Parker court was introducing liquor into Indian Territory in violation of the 1834 Indian Intercourse Act. Violent crime constituted one-fourth of the court's business. Despite Parker's efforts, crime always exceeded punishment in Indian Territory. From 1875 to 1896, grand juries issued 3,942 indictments for murder alone. Only 161 of the alleged killers were finally convicted and sentenced. Even though the sheer size of the Western District inhibited the efficient enforcement Parker sought, he still disposed of more than 12,000 criminal cases during his tenure (Tuller 2001, 104–110, 159–163).

Parker's national notoriety stemmed from his seemingly frequent use of the gallows. In his twenty-one years at Fort Smith, Parker sentenced 161 men to death, and seventy-nine of these were executed, many of them publicly and in groups of two or more. No other federal judge in history executed as many men; no other saw as many capital cases. But Parker's fame rested on cases representing less than 1 percent of his docket. And in his capital trials, an inflexible federal statute usually tied his hands. In U.S. courts during Parker's tenure, the mandatory sentence for murder and rape was death by hanging. The federal statute provided no distinction between degrees of murder (Burton 1995, 47; Tuller 2001, 64–65). Parker himself was ambivalent toward the death penalty; he wept in court the first time he sentenced a man to die, never attended an execution, and later in life told a reporter that he favored abolishing executions provided there was certainty of punishment.

Throughout his tenure, Parker advocated a prison system geared toward rehabilitation and reform of criminals. Acting against Justice Department mandates, he sent men to prisons in Michigan and Illinois rather than closer institutions he believed were poorly run. He consistently sent young boys to reformatories instead of prisons, even when they were over the maximum age. In a letter to the attorney general in 1885, Parker argued that men were "largely criminals from surrounding circumstances" (Stolberg 1988b, 22–23). He believed the "object of punishment is to lift the man up, stamp out his bad nature and wicked disposition, that his better and God-

given traits may assert themselves, and so govern and direct him that he becomes a good citizen, of use to himself and his fellow men" (22–23).

Parker often aided citizens and lawyers who sought executive clemency, the sole recourse for capital convicts in the early years of the Parker court. From 1875 to 1880, the majority of Parker's death sentences were not carried out. Lawyers and citizens used the pardon process to prevent many of the scheduled executions. Parker himself supported many of the applications for clemency, and the president tended to follow the recommendations of the district judge, either for or against clemency (Tuller 2001, 67–83).

Although much of Parker's judicial work involved common law cases, he also presided over important cases involving the court's jurisdiction over Indian Territory. In his rulings Parker consistently upheld U.S. sovereignty over tribal lands and limited the power of tribal courts. In several instances, Parker claimed jurisdiction over cases involving adopted citizens of Indian nations. In *Ex Parte Morgan* (1883), he denied Indian tribunals the authority to extradite. The judge did rule against settlers who tried to encroach on Indian land or government land set aside for Indians in *U.S. v. D.L. Payne* (1881) and *Ex Parte Rogers* (1885), but his real concern in these cases was upholding federal authority. He made this point forcefully in *Cherokee Nation v. Southern Kansas Railway* (1888). Congress had given the railroad permission to build a line across the Cherokee nation provided the Cherokee were justly compensated. The Cherokees, asking for an injunction against construction, argued that their nation was sovereign under federal treaty and therefore Congress could not grant the right of way. Parker ruled for the railroad and argued that the United States had ultimate sovereignty over all lands within its borders (Burton 1995, 67–68; Tuller 2001, 115–118).

Parker also initiated a judicial instruction that is important in trial procedures today. The members of a jury returned and told Parker they were deadlocked. Parker instructed the jurors candidly to reexamine their opinions; jurors on each side should consider if the other side was right. Deadlocked juries today are often given similar instructions, known as the "Allen charge," after the case over which Parker presided (Kopel 2000, 316).

Parker's last sixteen years on the bench were embroiled in controversy. In the 1880s, Congress gradually reduced Parker's jurisdiction and amended the appeals process. Congress cut Parker's jurisdiction in half in 1883, but this did little to reduce his caseload. The white population in Indian Territory continued to grow, and with it grew the court's criminal business. Fort Smith remained the most expensive court in the federal judicial system and did more business in 1886 than before 1883. In 1889, Congress drastically reduced the judge's power. The jurisdiction of his court was again curtailed, but more important, the Criminal Appeals Act stripped him of his circuit

court powers and gave persons convicted of capital offenses the right of appeal to the Supreme Court. This subjected Parker to the same appeals process as any other district judge in the United States and ended his status as the most powerful judge in America (Tuller 2001, 122–137; Stolberg 1988a, 14).

What developed in the wake of these reforms was a battle between Parker and the Supreme Court. Between 1891 and 1897, the Supreme Court heard appeals in forty-four of Parker's capital convictions. Thirty-one of these were reversed and only twelve upheld. The Court, whose opinions were increasingly critical of the judge, believed Parker continuously erred on several points. First, Parker continued the antebellum practice of giving jury charges that instructed the jury on the verdict. His charges, some of them ranging from forty to seventy typed pages, commented not only on specific points of law but on the merits of the evidence. In some charges he clearly favored the prosecution and implied that the defendant was probably guilty. Second, the Court took issue with Parker on two points of law: flight from the scene of a crime and self-defense (Stolberg 1988a, 17; Murphy 1939, 77–79; Tuller 2001, 79–80, 138–143).

From 1893 to 1896, the Supreme Court handed down a series of decisions, some of them written by John Marshall Harlan, arising from the Parker court on the issue of self-defense. Of the nine cases from Parker's court, eight won reversals. The cases became an important body of decisions that laid the foundation for a 1921 opinion that upheld and extended the right to armed self-defense (Kopel 2000, 294–298). In *Beard v. United States* (1895) and *J. Rowe v. United States* (1896), the Court reversed Parker. In both cases, Parker had instructed the jury that the defendants had the duty to retreat and try to avoid in every way possible taking the assailant's life. The Court ruled that there was no duty to retreat before using deadly force (306, 317–318). In addition, the Court in *Rowe* held that Parker, rather than allowing the jury to evaluate the facts, had improperly told the jury what conclusion to reach. The Court reversed Parker on self-defense in *Thompson v. United States* (1894) and *Gourko v. United States* (1896). In both cases, Parker had instructed the jury that carrying a handgun could be considered evidence of deliberation and a premeditated intent to kill (299–303).

The Court became increasingly irritated with Parker as he continued practices they had already ruled in error. In *Starr v. United States* (1894), the Court reversed Parker because, quoting Proverbs, he told a jury that flight should be considered evidence of guilt. The Court ruled that flight was one of several circumstances a jury could consider but was not alone sufficient proof of guilt. The opinion rebuked Parker for ignoring Court corrections on similar cases (Shirley 1988, 182–183; Kopel 2000, 302,

311–312). But Parker again issued similar instructions to a jury and was again reversed in *Alberty v. United States* (1896).

Parker, for years unregulated by higher courts, had missed the evolution of the law. In the antebellum era, judges often instructed juries on the verdict. On his deathbed, Parker said, "I have been accused of leading juries. I tell you a jury should be led . . . if they are guided they will render justice" (Tuller 2001, 156). But after the Civil War, there was a trend toward greater regulation of judicial behavior, greater standardization, and a more technical appellate procedure. A judge's written charges addressed only specific points of law. Since Parker's decisions were not subject to appeal from 1875 to 1889, he missed these legal developments. Parker continued the common law traditions of an earlier age in U.S. legal history and would not adapt when challenged (Tuller 2001, 154–155; Stolberg 1988a, 8, 20). Thus the Supreme Court continually chastised Parker for his "animated arguments" and his invasion of the "appropriate province of jury fact-finding" (Kopel 2000, 308–309).

Parker publicly lashed out against the Supreme Court and became embroiled in a bitter public feud with the attorney general. In 1895, Cherokee Bill, whom Parker had sentenced to death but whose case was on appeal, shot a guard while trying to escape the Fort Smith jail. Parker, in an interview with the *St. Louis Globe-Democrat,* blamed the Supreme Court for the guard's death. Cherokee Bill was still in the jail because he was waiting for the outcome of his appeal. Parker then attributed the upsurge in murders in the Indian Territory to the number of Supreme Court reversals. He told the reporter that the Court released convicted murderers on the "flimsiest of technicalities" (Tuller 2001, 148). Supreme Court justices, according to Parker, did not have enough experience in criminal cases to overrule the decisions of trial judges. The number of reversals impaired justice because they undermined public belief in the courts' responsiveness and the "certainty of punishment" that was central to deterring crime (148; see also Shirley 1988, 156–157; Stolberg 1988b, 21). The next year, Parker wrote an article for the *North American Review* in which he argued that a recent increase in crime was due to the corruption of the appeals process. His suggested two reforms for appellate courts: judges who were experienced in criminal law and speedy consideration of cases. But his central suggestion was the following: "I would brush aside all technicalities that did not affect the guilt or innocence of the accused. I would not permit them to act on a partial record, or on any technical pleas concocted by cunning minds. I would provide by law against the reversal of cases unless upon their merits innocence was manifest. The guilt or innocence of the party should be the guide" (Parker 1896, 667–674).

The "Hanging Judge"— The Popular Image of Judge Isaac Parker

Isaac Parker served as a federal district judge for twenty-one years at Fort Smith, Arkansas. During his tenure, the Western District of Arkansas had jurisdiction over crimes involving American citizens and violations of federal law in the Indian Territory. This unusual jurisdiction led to an extraordinary situation, with the court nearly overwhelmed with criminal trials; in the twenty-one years Parker served, the court processed over 13,000 cases. As part of his duties, the judge handed a mandatory death sentence to those defendants who were found guilty of the crimes of murder or rape. Of the 161 people who received the death sentence from Judge Parker, seventy-nine took the final plunge of justice from the gallows, often in multiple executions, which received nationwide attention (Burton 1995, 46–71).

Following the termination of the court's jurisdiction over Indian Territory, and the death of Judge Parker in 1896, only a few years passed before the first book detailing the judge's career was published. A collaborative effort between an attorney who defended cases against Parker, a former juror, and a former hangman, *Hell on the Border* was released early in 1899. A 700-page murder novel, the book provided a short overview of the court and focused primarily on the men executed on the gallows and other famous individuals associated with the court. S. W. Harman, a former juror in the court, intended the book to promote the career of George Maledon, a part-time hangman during Parker's tenure. In the process, *Hell on the Border* set the standard interpretation of Judge Parker as a strict but kind-hearted jurist, a friend to Native Americans, sent by President Grant to clean up the Indian Territory (Harman [1898] 2001, 87). The men behind the book did not hesitate to promote themselves; J. Warren Reed, a Fort Smith attorney who had defended a number of famous criminals before the judge, was consistently depicted as the lawyer who never lost his cases (106–115). Maledon's role as hangman was elevated from part-time status to the "Prince of Hangmen" (106–115). Even with self-professed exhaustive research, the authors of *Hell on the Border* perpetrated considerable errors in the course of the book, ranging from errors in dates and the number of executions, to using dime novels as primary sources. Poorly received following its initial publication, the book was largely forgotten until a heavily condensed reprint was published in the 1950s. In addition to creating the Parker image, *Hell on the Border*'s significance comes from its extensive use by over a century of authors.

After languishing in local obscurity for nearly fifty years, Judge Parker reemerged on the national scene through works such as *Hanging Judge*, *He Hanged Them High*, *Court of the Damned*, *Law West of Fort Smith*, and others. With the exception of *Hanging Judge*, by Fred Harvey Harrington (the first book with this title), all of these were popular works, focusing on the more sensational aspects of Parker's career. Each of these books echoed the sentiment of and borrowed heavily from *Hell on the Bor-*

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der. Homer Croy, a Missouri journalist, wrote the most influential of these books, the nationally distributed *He Hanged Them High*. Croy's work did not stop with the already established elements of the Parker myth but substantially added to them. Among his inventions were the "facts" of Judge Parker's watching each execution from his office window and crying each time he sentenced a man to die and the depiction of Isaac Parker as a zealot, a "fanatical judge who hanged eighty-eight men" (Croy 1952, 12).

Beginning in the 1960s, Judge Parker and the federal court at Fort Smith became popular subjects in the genre of Western literature. Depending on the plot and narrative needs of the individual author, authors depicted Parker and the court at Fort Smith through both the traditional and fanatical stereotypes. The majority of these modern-day dime novels fall within the predictable confines of the genre, mirroring the sources used in composing the work: witness such titles as *Hanging Judge* by Elmer Kelton (1969), *Zeke and Ned* by Larry McMurtry and Diana Ossana (1997), and *Hell on the Border* by J. M. Thompson and Fred Bean (2002). Throughout most of these fictional works, the judge is little more than a judicial boogeyman, used to great dramatic effect, as in a scene in *Johnny Blue and the Hanging Judge* in which the main characters appear in court before Judge Parker, and in attendance are Belle Starr heckling from the audience and Buffalo Bill Cody waiting to testify (West 2001, 198). In many of these books the judge is depicted along hauntingly similar lines to the other so-called hanging judge of the West, Roy Bean (who does not in fact ever appear to have presided over a hanging). The fanatical stereotype of the judge, as a man bent on justice no matter the cost, is the most popular use of Judge Parker; even while decrying other writers for portraying the judge as mean spirited, most authors use the very same stereotype. A self-published book took Homer Croy's image of the fanatical judge one step further and depicted Judge Parker as a religious fanatic who condemned men to die in order to bring them to salvation (Moore 1998, 6).

A small number of fictional works rise from the masses to challenge the prevailing stereotypes. The most famous fictional work written about Judge Parker is Arkansas native Charles Portis's novel, *True Grit*. Published in 1968, the book was almost immediately turned into a motion picture starring John Wayne. In *True Grit*, Judge Parker is depicted fairly distantly but in the traditional fashion (Portis 1968, 39–56). Although in reality there were almost no female employees in the court, author

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The Justice Department and the Supreme Court did not concede that Parker was being overruled on mere technicalities. In 1896, Solicitor General Edward B. Whitney decided not to pursue appeals in which Parker had plainly not corrected earlier instructions from the Supreme Court and began to file confessions of error. Outraged, Parker published a letter attacking Whitney, whom he accused of providing "security to criminals" (Tuller 2001, 150). Whitney responded in a public letter stating that Parker refused

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Georgia di Donato provided a woman's perspective on the frontier venue of Judge Parker's court in *Woman of Justice*. The main character, Temperance Smith, a circuit judge assigned to Parker, strongly disagrees with capital punishment (di Donato 1980, 39). The positive role of African Americans is conveyed in *Black Marshal*, a fictional telling of the life of deputy marshal Bass Reeves, in which both the title character and Judge Parker are viewed as valiant servants of justice (Burchardt 1981, 181).

Universally remembered as "the Hanging Judge," Isaac Parker's popular image in film and print is a blending of fact and folklore. Depicted as a strong, well-meaning defender of justice, or as a fanatical zealot bent on hanging 100 outlaws, Isaac Charles Parker's legacy has in many ways come down to how he is remembered and not for the accomplishments of his lengthy career.

Eric Leonard

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to accept instructions and was "ignorant and careless" with the law (151). This brought in the attorney general, who admonished Parker for his legal and personal conduct. He reprimanded Parker for insubordination and said his jury charges were continually open to criticism for being misleading and declaratory (151–152).

On 17 November 1896, soon after his exchange with his superiors and just before his court's jurisdiction over Indian Territory expired, Parker died

George Jeffreys
(c. 1645-1689)

In the United States, federal judges are appointed by the president with the advice and consent of the Senate, but once in office, judges can attain considerable independence. For all practical purposes, there are few if any rewards that a president can confer upon a lawyer other than nomination for a judicial office, and once an individual reaches the Supreme Court, there is no higher honor that a president can bestow. By contrast, kings in early England could extend many rewards to lawyers and judges whom they favored. One of Thomas Jefferson's complaints in the Declaration of Independence centered on the lack of an independent judiciary.

One example of such royal influence on judging is illustrated by the career of George Jeffreys. Born sometime between 1645 and 1648 and later attending Trinity College at Cambridge, Jeffreys was subsequently admitted for law training at the Inner Temple, where he spent five years. In 1671 London elected Jeffreys as a common sergeant, a position in which he apparently recognized that he could gain further advancement by furthering the interests of the king, Charles II. In 1678, Jeffreys became recorder of London, during which time he enhanced himself in royal eyes by prosecuting the Popish Plot and later presiding over the "Bloody Assizes" of 1685 in which he meted out strong punishments (including many sentences to death) to individuals who had participated in Monmouth's Rebellion. Elevated in 1683 to chief justiceship of the King's Bench and in 1685 to the chancellorship of England, Jeffreys helped James II control the Church of England through an Ecclesiastical Commission on which Jeffreys sat, before James II fled the nation after the arrival of Holland's King William and his wife Mary, who subsequently took over the throne. Jeffreys was arrested and sent to the Tower of London, where he died of complications apparently brought on by the gall and/or kidney stones that had long

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in Fort Smith at the age of fifty-eight (Tuller 2001, 157). His other accomplishments, and his duel with the Supreme Court, were soon obscured by his reputation as the "hanging judge." A sensational book appeared shortly after his death, entitled *Hell on the Border,* which served as the basis for most work on Parker until the 1990s. Books and films, including *True Grit* and Clint Eastwood's *Hang 'em High,* cared little for historic accuracy in their portrayal of Parker and the court at Fort Smith. Because the Parker court tried so many famous outlaws, many books ostensibly on Parker focused on the lurid details of crime in Indian Territory rather than on the judge's work. Recent scholarship is beginning to correct this problem, however, as more scholars look beyond the gallows in their portrayal of this controversial and complex judge.

Lorien Foote

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troubled him and that might have contributed to his reputation for heavy drinking and bad temper.

Jeffreys was generally regarded as an able lawyer, but his royalist bias often affected his conduct and rulings on the bench. He lived at a time during which hanging followed by drawing and quartering (or, in the case of women, burning at the stake) was a fairly standard punishment for treason, and, particularly in retrospect, many of his judgments look barbaric. Convicted of perjury for testimony given during the Popish Plots, Titus Oates is said to have received over 2,250 lashes as a result of one of Jeffreys' judgments (Hyde 1948, 201).

Jeffreys was known for his invective from the bench. An observer once described Jeffreys as behaving himself "more like a jack-pudding than with that gravity which beseems a judge" (quoted in Hyde 1948, 99). Jeffreys once silenced a woman witness by saying "Nay, prithee, mistress, be not so full of tattle, so full of clack" (168), and he upbraided an attorney who was rubbing in a point that he had made by comparing him to a hen: "Lord, sir, you must be cackling too. We told you your objection was very ingenious, but that must not make you troublesome. You cannot lay an egg but you must be cackling over it" (176). When asked how he "came off" after an appearance in Jeffreys' courtroom, a defendant commented: "I am escaped from the terrors of that man's face which I would scarce undergo again to save my life; and I shall certainly have the frightful impression of it as long as I live" (quoted 261).

Described by one writer as "the very worst judge that ever disgraced Westminster Hall" (quoted in Hyde 1948, 14), Jeffreys serves as testimony to the value of an independent judiciary and as an example of what can happen when judicial judgments are clouded by the desire to please a king for personal advancement.

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PARKER, JOHN JOHNSON

(1885–1958)

John Johnson Parker
Library of Congress

John J. Parker served for thirty-three years as judge and, from 1931 to his death in 1958, as presiding (senior) judge of the United States Court of Appeals for the Fourth Circuit. During that time he was a nominee for associate justice of the United States Supreme Court as well as a legal reformer and leader in federal judicial administration. An exponent of the "New South," he developed a pre-New Deal southern constitutionalism protective of the region's economic development, upheld key components of the New Deal's recovery program, grappled during World War II with civil liberties issues ignited by Jehovah's Witnesses and with the beginnings and burgeoning of the civil rights movement, and, during the Cold War, presided over important Smith Act and presidential power cases.

Parker was born on 20 November 1885 in Monroe, North Carolina, the eldest of four children. His well-educated mother, Frances Ann Johnston of Edenton, North Carolina, was a descendant from William Bradford of Plymouth Colony, a line of early North Carolina governors, and United States Supreme Court associate justice James Iredell (1790–1799).

The daughter of an Episcopal clergyman, she married John Daniel Parker, who eked out a living as an independent grocer.

The younger John Parker worked his way through the University of North Carolina, where he came under the enduring influence of maverick philosophy professor Horace H. Williams and won academic prizes and student government offices prior to receiving his A.B. degree in 1907 and his LL.B. degree in 1908. The six-foot Parker, somewhat reserved in demeanor, had a genial personality and a low-key sense of humor. On 23 November 1910 he married Maria Burgwin Maffitt, a member of an old and prominent Wilmington family. They had three children.

His law practice began in 1908 with David Stern in Greensboro followed by a brief solo practice in his hometown. Thereafter he formed a partnership with Amos M. Stack in Monroe (1910–1919), becoming senior partner in the firm of Stack, Parker and Craig (1919–1922). He moved to Charlotte in 1922 where, until 1925, he headed the firm of Parker, Stewart, McRae and Bobbitt. Both firms developed large general civil and criminal practices in the Carolinas. Parker skillfully argued cases in state and federal trial and appellate courts. Among them was the legendary Peacock murder case wherein Parker's adroitness won acquittal by reason of insanity for his physician client who had shot to death in broad daylight the police chief of Thomasville, North Carolina. Parker successfully represented southern country banks warring against the Federal Reserve Bank's "par clearance" system that discriminated against them. Parker's renown as a criminal lawyer and litigator resulted in his appointment as special assistant to the U.S. attorney general (1923–1924) prosecuting alleged frauds in World War I government contracts.

Parker's path to a federal judgeship coursed through state Republican politics. He joined that party in 1908 when he cast his lot with the dominant "lily-white" and anti-Bryan "business respectables" faction that promoted North Carolina's economic development. Climbing the political ladder, he carried the Republican banner in losing races for congressman (1910), state attorney general (1916), and governor (1920) and also served as GOP national committeeman and delegate-at-large to the Republican National Convention (1924). He supported a myriad of typical progressive reforms as well as tariff protectionism and woman's suffrage. And in 1920, to counter the state Democratic party's customary race-baiting strategy, he publicly disavowed the support of black Carolinians, proclaiming that African Americans did not care to participate in politics and the Republican party did not want them to.

To fill the vacancy created by the death of South Carolinian Charles A. Woods, Pres. Calvin Coolidge gave Parker a recess appointment to the

United States Court of Appeals for the Fourth Circuit on 3 October 1925 and nominated the forty-year-old attorney on 8 December 1925; the Senate confirmed him on 14 December. Following Herbert Hoover's 1928 electoral triumph, Parker received consideration for the solicitor and attorney generalships prior to his nomination on 21 March 1930 to fill the Supreme Court vacancy caused by the sudden death of Associate Justice Edward T. Sanford. Hoover's nomination reflected political, sectional, and jurisprudential considerations. The youthful nominee's "paper trail" of 184 published opinions received little attention with a single exception—*United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Co.* (18 F. 2d 839 [4th Cir., 1927]). That opinion ignited massive opposition from members of organized labor and their putative allies in academe, the press, and the Senate. Although the constitutionality of antiunion "yellow-dog" employment contracts could not then be challenged, however loudly decried, the scope of the original injunction, modified by Parker, against United Mine Workers of America (UMWA) organizing efforts was targeted. Additionally, acting National Association for the Advancement of Colored People (NAACP) director Walter White led a frenetic grassroots lobbying campaign, primarily through black churches, against the nomination. No evidence of Parker's alleged racism emerged either from his judicial opinions or from his associations, which included membership on the North Carolina branch of Will W. Alexander's Commission on Interracial Cooperation. Rather, the NAACP's case rested solely on Parker's 1920 political statement. Thus transmogrified by his opponents' stereotyping, Parker suffered defeat of his nomination in the Senate (forty-one–thirty-nine) on 7 May 1930, and his quests for appointments in 1941, 1942–1943, 1945, and 1954 proved futile.

On the three-judge Court of Appeals, Parker initially sat with ex-Virginia readjuster and senior judge Edmund Waddill Jr. and John C. Rose of Baltimore. His later colleagues included such distinguished jurists as Morris Ames Soper and Simon E. Sobeloff, Armistead M. Dobie and Clement F. Haynsworth Jr. On that court and on three-judge district courts, he heard more than 4,000 arguments and wrote opinions in approximately 1,500 cases, many found in volumes 8–253 of the *Federal Reporter, Second Series*. His opinions reflected a pronounced ability to grasp complicated issues of fact and law and to apply his belief that law was the life principle of society, which itself was an ever-changing organism. Law therefore was not static. "It is," he wrote in *Marshall v. Manese*, "based on reason, arises out of the life of the people, and must change as the conditions of that life change" (85 F. 2d 944, 948 [1936]). Yet he eschewed the role of "judicial legislator," recognizing legislators as preeminent law makers and the subor-

dinate place of an intermediate appellate court judge in the judicial hierarchy. Ambiguity or gaps in the law or cues that a Supreme Court shift was at hand encouraged his exercise of judicial discretion.

Parker early developed a constitutional jurisprudence supportive of the emerging public service state and of regional economic development. Thus he regarded exercises of reserved state police powers as conducive to economic progress, not as threats to private property. That Lincolnton, North Carolina, directed a railroad to replace its wooden bridge, formerly stipulated by ordinance, with a concrete structure impressed him as reasonable and not violative of the Constitution's obligation of contract, commerce, or due process clauses (*Carolina & Northwestern Ry. v. Lincolnton*, 33 F. 2d, 719 [4th Cir., 1929]). Similar self-restraint marked his treatment of Virginia's "Cedar Rust" law designed to protect the state's valuable apple crops by destroying cedar trees that hosted the deadly fungus disease. To Fourteenth Amendment substantive due process arguments, Parker asserted that the state law "does not authorize the taking of one man's property for another man's benefit, but it is a reasonable regulation of the use of property in furtherance of the public welfare" (*Kelleher v. French*, 22 F. 2d 341, 343 [W.D.Va., 1927]). And he looked benignly on exercises of state taxing powers albeit constrained by Supreme Court decisions favoring injunctive relief for taxpayers.

Parker's embrace of governmental regulation of business was tempered by a distinct regional bias favorable to southern economic development. He viewed railroad freight rates fixed by the Interstate Commerce Commission (ICC) as constituting a national internal tariff system that discriminated against southern producers, shippers, and consumers. High ICC-approved interstate rates encouraged him to discover "independent movements" of freight subject to lower state-fixed intrastate rates (*Atlantic Coast Line R.R. v. Standard Oil Co.*, 12 F. 2d 541 [4th Cir., 1926]). Conversely, lowered ICC rates for northern carriers in the Great Lakes bituminous coal trade could threaten the survival of southern mine operators distant from ultimate markets in the North. ICC suspension of similarly lowered "Lake Cargo Coal" rates by the southern carriers led Parker to probe the agency's motives and to hold that neither statutes nor even the Constitution's commerce clause empowered the ICC to equalize intersectional industrial as distinguished from transportation conditions (*Anchor Coal Co. v. United States*, 25 F. 2d 462 [S.D.W.Va., 1928]). The controversial *Red Jacket* case likewise reflected Parker's perception of the deleterious impact on southern mine operators and their labor forces, once their competitive edge in distant coal markets had been dulled by national labor standards associated with unionization. Adhering to prevailing Supreme Court precedents respecting federal jurisdiction, he enjoined the union from persuading miners under "yellow dog"

employment contracts to break their contracts (join the union while remaining in the employer's workforce). The faltering southern bituminous industry soon spiraled into deep depression, however, causing Parker to lament "the plight of those engaged in the coal industry, whether as operators or miners"; but he was compelled to hold a producer cartel an unlawful monopoly (*United States v. Appalachian Coals, Inc.*, 1 F. Supp. 339, 349 [S.D.W.Va., 1932]). Emerging in the twilight of an expiring economic order, Parker's constitutionalism was marked by a combination of realism and optimism, by a sober reflection on the painful economic plight of the region, and by eternal optimism about the future of the South's human and natural resources.

That in the depths of the Great Depression the national government might aid the South and its people resonated with Parker's Hamiltonian proclivities. Early in 1934 he publicly declared that there existed "no reason why [the] national government should not foster the healthy growth and development of [the] nation by encouragement to agriculture, industry, education, road building, and other activities essential to the national welfare. . . ." "There is," he continued, "nothing in our constitutional theory which prevents the national government using its powers for the relief of suffering and to place industry again on its feet" (Parker 1934, 382). Constitutional theory became practice in March–April 1935 when Depression-induced revisions in the Bankruptcy Act reached his court. Holding congressional power over the subject to be plenary and capable of meeting the exigencies of modern debtor-creditor relationships, he upheld the constitutionality of the Corporate Reorganization Act (*Campbell v. Alleghany Corp.* 75 F. 2d 947 [4th Cir., 1935]) and the Frazier-Lemke Farm Mortgage Moratorium Act (*Bradford v. Fahey,* 76 F. 2d 281 [4th Cir., 1935]), only to be subsequently whipsawed by the Supreme Court in construing the latter act (*Wright v. Vinton Branch of Mountain Trust Bank,* 85 F. 2d 973 [4th Cir. 1936], rev. 300 U.S. 440 [1937]). Parker's "Buzzard's Roost" opinion came down in February 1936. Over conservative colleague Morris Soper's dissent, Parker upheld that portion of the National Industrial Recovery Act authorizing federal loans to state and local governments for public works, in this instance a public electric power plant. He rejected Tenth Amendment limitations on Congress's constitutional power to tax and spend as well as delegation of powers and substantive due process arguments raised by Duke Power Co. (*Greenwood County v. Duke Power Co.,* 81 F. 2d 986 [4th Cir. 1936]). Parker also favorably construed the Railway Labor Act in June when he held that Congress could bring within its collective bargaining provisions even "backshop employees" not directly involved in interstate commerce and rejected the railroad's "liberty of contract" argument (*Virginian Railroad Co. v. System Federation* 40, 84 F. 2d 641 [4th Cir. 1936]).

Judge Robert Satter on the Differences between Trial and Appellate Judging

In a reflective book, Judge Robert Satter of the Connecticut Superior Court, a statewide trial court of general jurisdiction, reflected on the difference between judging at the trial level, where judges weigh both the law and the facts, and the appellate level, where judges typically focus on the legality of prior proceedings. Noting that a friend on the Connecticut Supreme Court viewed judges as more "detached," Satter said that such detachment is not as easily achieved at the trial level and tried to describe how he did come to his decisions:

> In the appeals court the parties are faceless abstractions, the passions of the trial muffled in the printed appeal record. But to me on the trial bench the litigants have names I remember, personalities that engage me, emotions that involve me. Clearly I do not decide a case on the basis of my liking one party more than the other. But I am keenly conscious of the impact of my decision on the lives and fortunes of flesh-and-blood people. The cases that stimulate me the most are not the ones that are challenging intellectually, as much as I enjoy them, but the ones about whose outcome I care very much. (Satter 1990, 78)

Satter believes that judges must seek both to "apply the law" and "also strive for justice." He explained: "In that regard he is like an artist as to beauty. An artist does not paint beauty. He paints a picture and hopes to create beauty. A judge does not decide justice. He decides the cases before him and hopes to achieve justice. I do this in every one of my cases" (78–79).

Later in his book, Satter told about a law professor, an appellate judge, and a trial judge who go duck hunting and agree that the first to kill a duck will get ten dollars, but whoever shot another kind of bird would lose five. Satter continued:

> By a flip of a coin, the professor went first. A winged creature flew over; the professor took aim and hesitated: "It has the markings of a water fowl; it may be a duck, but on the other hand. . . ." By then it had

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Parker, encouraged by economic conservative Soper, initially hesitated to depart from the Supreme Court's direct-indirect commerce clause test that prevailed prior to the high court's 1937 "switch-in-time" with respect to the National Labor Relations (Wagner) Act and the Public Utility Holding Company Act. Parker did approve federal support for agriculture under the commerce power but not under the taxing power, unless exercised to raise revenue. So too Parker approved national power to control rivers and streams within states.

Parker believed courts existed to curb governmental excesses and to assure government's role as a liberating rather than an oppressive force in

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> vanished. The appellate judge went next. Spotting a flapping animal in the sky, he said, "It could be our prey, but let me check this bird catalog." By then it was gone. Now it was the trial judge's turn. As a fowl came into sight, the judge shot and shouted, "It's a bird; I hope it's a duck." (1990, 93)

Satter observed that "I'm afraid on the bench I have shot many a buzzard that way" (93).

Satter noted that one difference between trial judges and judges of the United States Supreme Court is that decisions of trial judges and lower appellate judges can be reversed on appeal. Satter further noted that reversal of a trial judge is more personal than a lawyer's loss:

> There is a difference between lawyers losing a case and judges being reversed. Lawyers try the cases that come their way. They are stuck with whatever the facts are on their side of the dispute. Moreover, they have to contend with unreliable witnesses, opposing counsel, and intractable law.
>
> They have plenty of legitimate excuses for not winning. A trial judge, however, has no place to hide. He determines the facts from the evidence, chooses the legal principles to apply, and makes a decision that is his own and for which he must take complete responsibility. His professional pride always rides heavily on how he fares under appellate court scrutiny. (Satter 1990, 228)

Despite these observations, Satter went on to observe that trial court judges' "'batting averages' before the appeals courts have little effect on their reputation with the bar or their colleagues" (231). Satter explained:

> The judge with few reversals may take only easy cases and decide them strictly in accordance with black letter law. The judge with many reversals may be willing to take difficult and involved cases, which other judges are eager to avoid, and he may courageously fashion thoughtful opinions that seek to extend the boundaries of the law. A judge of the latter kind is one of the most respected members of the Connecticut trial bench. (231)

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Satter, Robert. 1990. *Doing Justice: A Trial Judge at Work*. New York: Simon and Schuster.

economic life. When the government condemned a water power site, he thought that there was "no reason in law, in justice or in common honesty that it should not pay compensation" based on such projected use (*United States v. Twin City Power Co.*, 215 F. 2d 592, 601 [4th Cir., 1954]). The Supreme Court disagreed (350 U.S. 222 [1956]), as did the Roosevelt Court in flatly rejecting Parker's determination in *Hope Natural Gas Co. v. Federal Power Commission* that the agency's valuation of the enterprise resulted in a rate base that he deemed "arbitrary and unreasonable," saying that it deviated from "statutory requirements and [was] violative of the due process clause of the Fifth Amendment . . ." (134 F. 2d 287, 300 [4th Cir., 1943];

rev. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 [1944]). Even in National Labor Relations Board cases, he asserted that where the board deviated from law, acted arbitrarily or unreasonably, or abused its discretion, the court was justified "in refusing enforcement of an order entered by the Board in exercise of the power entrusted to it by Congress" (*Newport News Shipbuilding & Dry Dock Co., v. NLRB*, 101 F. 2d 841 [4th Cir., 1939]). Yet his opinion in *NLRB v. Highland Park Mfg. Co.* (1940) upholding the board's finding of bad faith on the employer's part led Sen. Robert Wagner, author of the labor act, to praise Parker's opinion as "an exhaustive and brilliant analysis of the collective-bargaining process . . ." and to insert its full text into the *Congressional Record* (86 *Cong. Rec.* pt. 14 [76th Cong., 3d sess.], 1484 [1940]).

Important issues of civil liberties came before Judge Parker in the 1940s and 1950s to which he applied various reason-based pragmatic balancing tests. The war years saw him challenged by Selective Service cases brought by Jehovah's Witnesses seeking classifications as "ministers" rather than as conscientious objectors, in which classification they would be exempt even from "work of national importance" (*Smith v. United States*, 148 F. 2d 288 [4th Cir., 1945]). However unfavorably Parker came to regard the Witnesses' claims via habeas corpus writs for exemptions from a general secular law, he took a different view of the plight of Witness children who sought an exemption from West Virginia's compulsory flag salute law. In the face of eroding Supreme Court precedent upholding such a law, he weighed asserted religious freedom against the state's interest and found the latter wanting. "The salute to the flag," he opined, "is an expression of the homage of the soul. To force it upon one who has conscientious scruples against giving it, is petty tyranny unworthy of the spirit of this Republic and forbidden . . . by the fundamental law" (*Barnett v. West Virginia Board of Education*, 47 F. Supp. 251, 255 [S.D.W.Va. 1942]).

Especially dangerous to national security during the Cold War era was international communism. Influenced by his experience as alternate American judge at the International Military Tribunal in Nuremberg, Germany (1945–1946), where he materially contributed to development of the critical conspiracy issue, Parker echoed the Supreme Court's decision in *Dennis v. United States* (341 U.S. 494 [1951]) respecting the inutility of the "clear and present danger" test when there existed evidence of a conspiracy to overthrow the U.S. government by force and violence. The associations and advocacy of six Maryland communist leaders were, he warned, "pregnant with potential evil, which, while hidden from view in normal times, is likely to assert itself as an irresistible force when some national crisis presents an opportunity for a putsch or a coup d'etat" (*Frankfeld v. United States*, 198 F. 2d 679, 682 [4th Cir., 1952]). The subsequent and notable

prosecution of Junius Scales under the Smith Act's membership clause again found Parker viewing the case through the prism of conspiracy theory derived from *Dennis* and *Frankfield*, both of which rested on indictments under the act's advocacy provision (*Scales v. United States*, 227 F. 2d 587 [4th Cir., 1955]).

Parker deferred to state powers over crime control. He eschewed incorporating provisions of the Bill of Rights into the due process clause of the Fourteenth Amendment, thus rendering them applicable to state criminal procedures. He consistently treated alleged errors in such proceedings with a due process–based "fair trial" rule. Deference to state prerogatives in crime control surfaced in his repeated attempts in his judicial and administrative capacities to curb the use of writs of habeas corpus collaterally to attack final decisions of state supreme courts.

A rising volume of race relations cases confronted Parker beginning in the 1940s. The first wave involved employment discrimination cases pitting black railroad workers against labor unions and employers in *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen* (1944). Heeding the Roosevelt Court's restraint on judicial interference with labor policy, the Fourth Circuit denied jurisdiction under the Railway Labor Act in a case involving blatant union racial discrimination. High court reversal encouraged a predisposed Parker to approve a class action lawsuit against the union in 1945 and to enjoin its discriminatory policies and award back pay to the black firemen in 1947. Analogous job discrimination cases brought by black employees against railroads and rail unions received similarly favorable treatment from Parker.

Black public schoolteachers suffering employment discrimination likewise received a favorable reception from Parker. As early as 1940 in *Alston v. School Board of City of Norfolk*, he had struck down on Fourteenth Amendment grounds salary schedules that set lower pay for black teachers who were equally as qualified as higher-paid whites. Following arguments including those by Thurgood Marshall and William H. Hastie, he stated: "that an unconstitutional discrimination is set forth . . . hardly admits of argument" (112 F. 2d 992, 995 [4th Cir., 1940]). In the midst of court-ordered school desegregation seventeen years later, he assailed a South Carolina statute barring NAACP members from state employment. A schoolteacher challenge to the public employment exclusion law split a three-judge district court wherein two judges favored abstention. Parker vehemently dissented, arguing that the court had a duty to take jurisdiction. Distinguishing the Smith Act cases, he declared: "The right to join organizations which seek by lawful means to support and further what their members regard as in the public interest . . . is protected by the constitutional guarantees of free speech and freedom of assembly; and such right is one of the

bulwarks of liberty and social progress" (*Bryan v. Austin,* 148 F. Supp. 563, 569 [E.D.S.C. 1957]).

Political rights asserted by black citizens also received powerful judicial support from Parker. He held the white South Carolina Democratic party primary unconstitutional in *Rice v. Elmore* (1947) as denying every black South Carolinian "any effective voice in the government of his state and his country" (165 F. 2d 389). Subsequently, in *Baskin v. Brown* (1949) he enjoined a further attempt by the Palmetto State to elude the Fourteenth Amendment's "state action" doctrine by privatizing the party primary process. Although Parker suggested future close scrutiny of state poll taxes in *Michael v. Cockerell* (1947), in *Lassiter v. Taylor* (1957) he treated literacy tests warily when evidence of their discriminatory administration was lacking.

Parker accorded a high value to state power when social relations between the races were involved as in public parks and elementary and secondary public education. An abiding concern with maintaining interracial peace and recognition of his role as an intermediate court judge with limited "law-making" capacity also suggested prudence. That the Supreme Court in the then recent *Sweatt v. Painter* case (1950) had refused to reconsider the prevailing "separate and equal" doctrine derived from *Plessy v. Ferguson* (1896) cautioned Parker when confronted with direct constitutional challenges to that doctrine in *Boyer v. Garrett* (public parks) (1950) and in *Briggs v. Elliott* (1951). Unlike dissenting District Judge J. Waties Waring (E.D.S.C.), in the latter case, Parker adhered to stare decisis and ordered the Clarendon County South Carolina school board to equalize but not to eliminate segregated educational facilities. Supreme Court reversal in *Brown v. Topeka* returned the case to the Fourth Circuit. Ever seeking to promote peace and reason in an emotive domain, Parker construed *Brown* to mean that "[n]othing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution . . . does not require integration; it merely forbids discrimination. It does not forbid segregation as it occurs as the result of voluntary action, but forbids the use of governmental powers to enforce segregation" (*Briggs v. Elliott,* 132 F. Supp. 776, 777 [E.D.S.C., 1955]). The Parker Doctrine constituted a reasonableness test to be met by state officials. State-mandated administrative procedures to be exhausted by plaintiffs prior to federal judicial proceedings met the test unless such procedures offered mere exercises in futility intended merely to delay compliance with *Brown.* Thereafter the court, in the face of Virginia's Massive Resistance strategy, issued *per curiam* decisions in the last months of Parker's life, ordering specific steps aimed at desegregating the state's school systems.

Although Parker preferred changes in race relations fostered by a Chris-

tian spirit rather than by changes spawned by legal coercion, he faithfully performed his constitutional duty. As with economic regulation and labor cases, so with race relations cases—he sometimes stood a step ahead of a changing Constitution in the hands of the Supreme Court and sometimes a short step behind that Court. His well-supported and carefully crafted opinions written in crisis times constitute the legacy of a jurist who perceived both the powers of and limitations on a judge of a court "in-between" trial and supreme courts.

As acting or regular presiding judge, Parker administered his circuit and was a member of the national policymaking Judicial Conference of the United States (1930–1958). He served on sixteen conference committees, including the Advisory Committee, and chaired several. His efforts aided enactment of the Administrative Office of the U.S. Courts Act of 1939, Federal Court Reporters Act of 1944, Federal Youth Corrections Act of 1950, and the Interlocutory Appeals Act of 1958. They also contributed to preservation of broad federal diversity of citizenship jurisdiction and to compensation of counsel and public defenders for indigent defendants provided for by law.

Parker was active in the American Law Institute and the American Bar Association (ABA). His service on the latter's committees began in 1931 and reflected an abiding interest in law reform, judicial administration, criminal law, and international law and relations. As a leader in the ABA Section of Judicial Administration (1934–1958) and in the Judicial Conference and as judicial adviser to the U.S. high commissioner for Germany (1949), Parker promoted judicial reforms to reduce popular influence over courts and expand judges' control of judicial proceedings, to enhance institutional autonomy of the judiciary, and to unify, simplify, and centralize intrajudiciary procedures and administration.

From numerous public platforms, Parker advanced his optimistic view that Americans as individuals and as a nation could surmount all obstacles and master their environment. He worked tirelessly as a member of the University of North Carolina (UNC) Board of Trustees (1921–1958) and as a firm supporter of the North Carolina College for Negroes in Durham. He served as a member of the UNC presidential search committee that nominated Frank Porter Graham. Parker thereafter became a stalwart supporter of the president—a leading southern liberal. The judge urged on the board racial integration of UNC's professional schools in the 1950s; after *Brown II* in 1955, he called on the board to reverse its segregation policies forthwith.

Parker served his state as a member of the North Carolina Constitutional Commission (1931–1932). The proposed constitution reflected Parker's administrative theory through its provisions for flexible legislative taxing

power and a stronger executive with budget and veto powers as well as an appointed council of state and a unified judicial system under control of the chief justice of the supreme court. He also performed important extrajudicial services for the nation, sitting with Judges Learned Hand (Court of Appeals, Second Circuit) and Joseph C. Hutcheson Jr. (Court of Appeals, Fifth Circuit) on the Advisory Board on Just Compensation to the War Shipping Administration. Appointment to the International Military Tribunal attested to Parker's rising prominence as a spokesman for "internationalism." He became an early advocate of a United Nations organization, led by the United States and equipped with military capabilities. As the Cold War waxed, he publicly warned against Communist-bloc military power, warmly endorsed aid to Greece and Turkey in 1947, and supported both universal military training and the North Atlantic Treaty Organization. Isolationism manifested in the Bricker Amendment to limit the president's power to make treaties and to enter into executive agreements evoked Parker's sharp public criticism. Nevertheless, in *United States v. Capps* (1953), he held that inherent presidential power to make executive agreements was limited by express constitutional grants of power to Congress, especially when Congress had enacted laws on the basis of such grants.

Parker was a devout and active member of the Protestant Episcopal Church. He served as the denomination's delegate in 1945 to the National Study Conference of the Commission on a Just and Durable Peace of the Federal Council of Churches chaired by John Foster Dulles, and in November 1957 he became chairman of the General Crusade Committee of the Billy Graham Charlotte Crusade. Judge Parker was felled by a heart attack on 17 March 1958 at the Mayflower Hotel in Washington, D.C., while attending the Judicial Conference.

Peter G. Fish

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PARSONS, THEOPHILUS

(1750–1813)

THEOPHILUS PARSONS
Library of Congress

THEOPHILUS PARSONS SERVED as the chief justice of Massachusetts from 1806 until his death in 1813. A well-known Federalist, Parsons was appointed to the court by Gov. Caleb Strong, who sought a jurist who possessed the virtues of independence, firmness, and respect for the vital role of the court in developing principles of law. Chief Justice Parsons proved to be such a jurist.

Theophilus Parsons was born to Moses Parsons and Susan (Davis) Parsons in Byfield, Massachusetts, in 1750. His father was a minister; he completed a degree at Harvard in 1736 and devoted his life to the study of theology. Susan Parsons was an active participant in parish activities and was known for her love of books and learning. Both the love of learning and the solid religious grounding were passed on to Theophilus (the name means "lover of God"), who demonstrated interest in a variety of academic fields and whose respect for religious knowledge formed a major theme of his official charges to juries delivered from the bench.

Parsons followed his father's educational path, graduating from Harvard in 1769. Shortly after graduation, he founded a school at Falmouth and served as the sole teacher. He continued as a teacher through 1773 while studying the law with an eminent Falmouth lawyer who shared his first

name—Theophilus Bradbury. Parsons's legal career began in July 1774 when he was admitted to practice. He practiced in Falmouth until the town's destruction in the 1775 attack by British forces under the leadership of Adm. Samuel Graves. At that point, Parsons returned to the town of his birth and resumed his legal career.

Parsons then became active in Massachusetts politics. At approximately the same time that Thomas Jefferson was drafting the Declaration of Independence, the leaders of Massachusetts began to draft a constitution. Upon the recommendation of the state House of Representatives, each town selected delegates to draft a constitution. The constitution was duly drafted and was rejected by the people by an overwhelming margin. Parsons, a conservative, strongly opposed the proposed constitution, fearing that the liberties granted therein might easily degenerate into license. He, along with other prominent citizens, was appointed to a committee charged with the duty of preparing a report on the proposed constitution. This "convention" took place in Essex County in 1778 and produced a document known as the Essex Result. Contemporaries credited Parsons with its authorship. The report contained compelling arguments favoring separation of powers, the creation of a Bill of Rights, and (unsurprisingly) judicial independence. The text of the writing reflected a pragmatic grasp of the need for an efficient and powerful government, combined with an understanding of the ways in which corrupt officials might abuse such power. Parsons wrote at length on the issue of judicial independence, insisting that judges should hold office during good behavior and that the power of removal be divided between the executive and legislative branches.

When a new convention was created to draft a state constitution in 1779, Theophilus Parsons served as part of the Essex delegation. Although John Adams (who later became the nation's second president) drafted the new constitution, the principles expressed by Adams's fellow Federalists in the Essex Result were incorporated. By the time of his marriage to Elizabeth Greenleaf in 1780, Parsons was a prominent citizen and well-established lawyer, with a flourishing Essex County practice. He was thirty years old.

According to the memoirs compiled by his son, Parsons, who was a delegate to the Massachusetts ratifying convention, also played a prominent role in developing the first amendments to the U.S. Constitution, collectively referred to as the Bill of Rights. Despite the fact that the amendments were drafted as a means of pacifying the anti-Federalists, the twenty-five-man committee charged with drafting the amendments was composed entirely of Federalists. Although the authorship of the propositions that became the Bill of Rights was never conclusively established, the younger Parsons believed that his father played a pivotal role. He summarized his father's political convictions as follows:

> My father stood firmly and consistently, in every word and act of his life among them who desired a well and wisely balanced government, which should be strong enough to guard liberty from license and anarchy on the one hand and from the iron hand of oppression on the other. His natural proclivity was certainly to the extreme of conservatism . . . but when called upon to express or form a solemn determination, he seems to me to have labored . . . to find and stand upon the just medium. (Parsons [1859] 1970, 106)

After the framing of the U.S. Constitution, Parsons retreated from public life, focusing upon his legal practice and his many hobbies. An enthusiastic scholar, he was fascinated by the sciences, particularly mathematics, astronomy, and optics. Articles on these topics appear in his manuscripts, suggesting that his level of knowledge was significant. Parsons's son (also named Theophilus Parsons) related numerous anecdotes concerning the neighbors' reactions to his father's more outlandish hobbies. The elder Parsons conducted experiments, some of which involved the use of lenses to cast inverted images on the opposite wall. He apparently so frightened one servant that his wife insisted that he change the room used for his experiments so that images would be cast into the garden rather than onto the street, where passers-by might be alarmed (Parsons [1859] 1970, 277). This love of academic pursuits, combined with a propensity for scientific precision, was characteristic of Parsons and was reflected in his approach to the law. He valued succinctness, adherence to established principles, and fact-based argumentation. He was the stereotypical scholar, paying little attention to his appearance. The younger Parsons explains: "He was inattentive to his dress, to the last degree and scarcely seemed to know what he had on, or how it was put on; and was as much under the constant supervision of my mother as one of her younger children" (328).

As a lawyer, Parsons showed little interest in the rhetorical flourishes valued by other members of the Massachusetts bar. As a judge, he demonstrated a decided impatience with lawyers who insisted upon appealing to the emotions and prejudices of juries.

Parsons's first judicial appointment to the Supreme Judicial Court at age fifty-six was also his last. Harvard conferred the degree of doctor of laws upon Parsons in 1804, acknowledging the public respect that made his appointment to the bench possible. Brown University took slightly longer to recognize Parsons's accomplishments, conferring a degree in 1809, after Parsons had served as chief justice for three years. He was elevated from the rank of lawyer to judge in 1806, when Governor Strong appointed him to succeed Chief Justice Francis Dana as the leader of the Massachusetts Supreme Judicial Court. Bypassing such eminent jurists as Theodore Sedgwick, who sat on the court, Governor Strong sought an "outsider" who

would be free to reform the administration of the judicial system. Some of the most intractable problems were those that continue to plague the legal system—protracted proceedings, backlog, long-winded lawyers. Parsons's skill in pleadings and logic, combined with his utter intolerance for lengthy diatribes, did much to streamline legal proceedings in Massachusetts.

Many were surprised when Parsons accepted the appointment as chief justice. He was not a wealthy man—his sizable family, his library, and his experiments consumed discretionary income. As a practicing lawyer, he refused to accept payment from widows or clergymen, representing them without charge (and undoubtedly attracting them as clients). According to one estimate, Parsons took an 85 percent cut in pay when he accepted the chief justiceship (Oesterle 1992, 128n. 8). Perhaps this explains Parsons's later insistence upon increases in judicial salaries, backed by threats to leave the bench in the absence of such increases.

As chief justice, Parsons was not afforded the luxury of hearing only cases of pressing political and legal import. In the early nineteenth century, judges rode circuit, traveling across the state to hear the trials of jury cases in every county of the commonwealth. Parsons, not a young man at fifty-six and fondly regarded by family members as a hypochondriac, was obliged to cover a substantial territory. He took this aspect of his job seriously, relishing the opportunity to educate jurors on the sanctity and significance of the law. His instructions to the grand jury, read in each county, contained reflections about the vital role to be played by the citizenry in upholding and protecting the rule of law. The charge to the grand jury, which consumes four pages of very small print in the younger Parsons's memoirs of his father, emphasized the same values Parsons expounded throughout his public career. In clear and forthright language, he outlined the need for a well-educated and watchful citizenry, informed by religious morality and motivated by a love of liberty, to hold their officials accountable through a thoughtful use of the electoral process. Without noting the incongruity of judicial appointment, Parsons reminded the jurors of their solemn duty to uphold the law without preference or prejudice.

Parsons was also respectful of the jurors' time, allowing lawyers to waste none of it. In a letter from Zachariah Eddy, provided to Parsons's son for use in the memoirs, the prominent member of the Massachusetts bar described Parsons's courtroom demeanor:

> Judge Parsons was very provident of time. He would not permit it to be uselessly spent. He had not much patience with counsel or client who had not his case prepared; nor would he hear impertinent or irrelevant testimony, or groundless argument. He said the multitude of cases called for promptness, as did the finances of the county. When a term ended, he would enjoin counsel

> to be better prepared in their cases in time to come (and sometimes, to *read their books*), that the time and money of the county might not be wasted. (Parsons [1859] 1970, 172)

Lawyers did not bear this treatment in silence. When one beleaguered lawyer, who had heard Parsons argue cases, protested that "Your Honor did not argue your own cases in the way you require us to," Parsons had a ready reply. Wrote Theophilus Jr.: "'Certainly not,' was the reply; 'but that was the judge's fault, not mine'" (Parsons [1859] 1970, 208). Parsons even threatened to jail a dear friend who insisted upon presenting arguments directly to the jury without submitting them to the court's prior scrutiny for evidentiary relevance. Efficiency was the hallmark of Parsons's courtroom.

Parsons's accomplishments were not limited to administrative reforms. His legal opinions and commentaries were collected into a volume entitled "Commentaries on American Law." These decisions influenced some of the most important decisions relating to the power of government to regulate private economic institutions. Massachusetts was a national leader in economic development, particularly with regard to corporate charters. In fact, Massachusetts was the first state to enact a statute of incorporation. Although many charters were granted in the late eighteenth and early nineteenth centuries, the legal meaning of incorporation was ambiguous. When disputes arose, judges had few places to seek guidance. A landmark Massachusetts case, *Wales v. Stetson* (2 Mass. 143, 1806), served as precedent for Story's opinion in *Dartmouth College v. Woodward* (17 U.S. 518). The issue was the same in both cases—although legislatures had routinely amended corporate charters without the assent of the firm prior to 1806, the issue was first adjudicated in this case. Parsons wrote the opinion, deciding in favor of the corporation. He wrote, "We are satisfied that the rights legally vested in this, or any corporation, cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the original act of incorporation" (2 Mass. 144).

As his son attested, Parsons sought the middle ground. Although he felt compelled to limit the power of the legislature arbitrarily to amend charters, he gave precise instructions as to how the legislature might accomplish its purpose and avoid coming before the court in the future. Under Parsons's leadership, the Massachusetts Supreme Judicial Court also infused the corporation with legal personhood, allowing it to sue and be sued in a court of law (Oesterle 1992, 146). Parsons balanced his Federalist preference for a strong central government against the knowledge that legislatures, left unchecked, would not honor its contracts. The advantage was ultimately to the legislature, which could amend charters if fair warning were provided. As the executors of the public will, that was as it should be.

Parsons served as chief justice until his death in 1813, establishing a reputation as an activist and reformer. In the year of his appointment to the bench, he was chosen as a fellow of Harvard College, serving as an active member of the College Corporation until he became too ill to work. During the last two years of his tenure as chief justice, he was plagued by illness that was not a manifestation of his tendency to predict his imminent demise with every ache. Although he fulfilled his duties without fail, family members noticed a change in demeanor, a lessening of Parsons's usual vigor and enthusiasm. According to the younger Parsons, his father's many physicians diagnosed "hydrocephalic apoplexy" or an accumulation of water upon the brain. In November 1813, Theophilus Parsons died.

The younger Theophilus Parsons, whose memoirs provide such a thorough account of his father's life, was sixteen when the elder Parsons died. He followed his parent's career path, pursuing the study of law and rising to prominence in his own right. Unlike Parsons Sr., the son never ascended to the bench and pursued his own scholarly interests in academia, as a professor of law at Harvard University, the institution so beloved by his father.

Sara L. Zeigler

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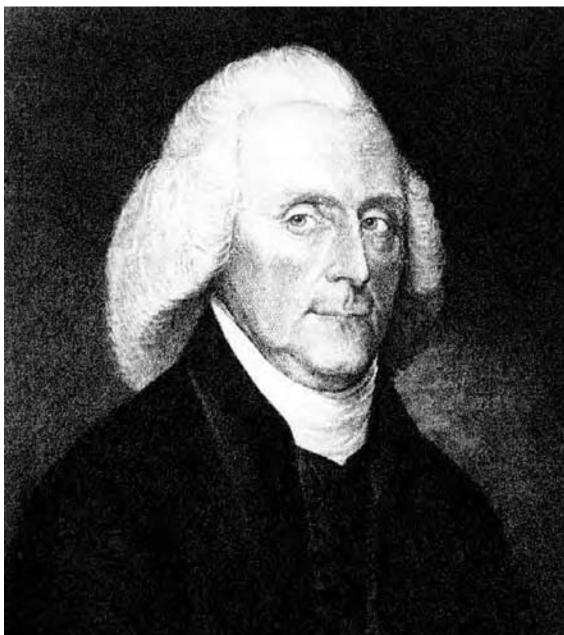
PENDLETON, EDMUND

(1721–1803)



Edmund Pendleton
Library of Congress

Judge Edmund Pendleton was the head of the Virginia judiciary from its professionalization upon independence from Great Britain until his death. It was in his court and under his eye that John Marshall, Bushrod Washington, St. George Tucker, Spencer Roane, and the other lawyers of the first period of republican Virginia refined their legal skills. His steady example influenced in one way or another a remarkable generation of lawyers and judges.

Edmund Pendleton was born on 9 September 1721 in Caroline County, Virginia. His parents, Henry Pendleton (1684–1721) and Mary Taylor (1688–1770), were both members of the gentry; they were educated and solvent but not wealthy. Edmund learned the law as an articled, or apprentice, clerk to Benjamin Robinson (1689–1761), the clerk of Caroline County. The clerk of the county was a lawyer who attended to the procedure of the county court and kept the lay justices of the peace on the proper procedural course during litigation in their court. Thus, an apprenticeship to a clerk of court was equivalent to that to a practicing lawyer.

After being "strictly" examined by Edward Barradall (1704–1743), attorney general of Virginia, Pendleton was licensed to practice law in the county courts of Virginia on 25 April 1741. He began his practice in the County Court of Caroline County and in the neighboring counties and was

soon appointed king's attorney (the public prosecutor) of nearby Essex County. In 1746, he moved his practice to the General Court in Williamsburg and rapidly distinguished himself in competition with a talented and well-educated bar. From 1751 until the end of the colonial era, Pendleton also sat regularly and faithfully on the County Court of Caroline County.

After becoming established at the bar, Pendleton taught law to a succession of local boys who were apprenticed to him. The two most famous of these were two of his own cousins, John Penn (1740–1788) and John Taylor of Caroline (1753–1824). Penn moved to North Carolina to practice law and was a signer of the Declaration of Independence. Taylor practiced law in Caroline County and Richmond but is better known for his writings on agricultural and political theory.

Pendleton was also active in politics, serving continuously in the Virginia House of Burgesses, the lower house of the General Assembly, from 1752 until the end of the colonial period. He was then elected to the newly formed House of Delegates in 1776 and was made its first speaker. He also represented Virginia in the Continental Congress in 1774 and 1775. He, George Wythe (1726–1806), and Thomas Jefferson (1743–1826) were appointed a committee of the General Assembly, upon independence, to revise the statute law of Virginia in the light of the new Constitution. He was chosen to preside over the Virginia Constitutional Convention of 1788. Though politically conservative, Pendleton actively supported independence from Great Britain and the adoption of the federal Constitution.

After independence, the county courts were retained, but a new system of high courts at the capital was needed. These new high courts were to be filled by professionally trained lawyers, rather than by laymen, as the colonial courts had been.

In 1778, the new Court of Chancery and the new General Court were created. The initial judges on the Court of Chancery were Pendleton, the presiding judge; George Wythe, who sat there until his death in 1806; and Robert Carter Nicholas, who died in office in 1780. Pendleton's next judicial post was president of the Court of Appeals. Thus he served as the head of the Virginia judiciary from 1778 until his death in 1803.

As the spokesman of the court, he must have had a permanent effect on the new Virginia bench and bar not only in terms of legal philosophy but also as to judicial demeanor and public example. He was a learned lawyer and a skillful advocate. He was a modest person, however, who never felt any need for ostentation. He sought public service but never public honors. He was highly intelligent but never intellectually arrogant. He was always approachable and never haughty. The result was that, after his first election to public office, he was never opposed for reelection, and his positions of

public trust were given him without any solicitation on his part because it was well known that he would act in them to the general satisfaction of the general public and not for his personal self-interest.

During his twenty-five years on the appellate bench in Virginia, he sat with several colleagues who also distinguished themselves as jurists. George Wythe (1726–1806) was undoubtedly the best. Spencer Roane (1762–1822) overlapped Pendleton on the Court of Appeals from 1795 to 1803. John Blair (1732–1800) sat with Pendleton from 1780 to 1789, when he resigned to become one of the original justices on the Supreme Court of the United States.

Many of the lawyers who practiced in Pendleton's court and learned from his legal insights and judicial opinions went on to distinguish themselves in their own times. John Marshall (1755–1835) and Bushrod Washington (1762–1829) went on to sit on the Supreme Court on the United States. Edmund Randolph (1753–1813), the attorney general of Virginia, and Charles Lee (1758–1815) were appointed the first and second attorneys general of the United States. St. George Tucker (1752–1827) succeeded Pendleton on the Court of Appeals; he also was the second professor of law at the College of William and Mary, an editor of Blackstone's *Commentaries*, and later the federal judge for the District of Virginia. John Taylor of Caroline (1753–1824) had a very lucrative practice in the Court of Appeals before retiring to devote his time to political philosophy. There were many others who are now no longer remembered outside of Virginia, except perhaps for John Wickham (1763–1839) and George Hay (1765–1830), who argued in the trial of Aaron Burr, which was reported nationally.

Pendleton's judicial opinions were reported by Bushrod Washington (1762–1829) and by Daniel Call (1765–1840), two of the lawyers who regularly practiced in his court, and by John Brown (1750–1810), who was the clerk of his court. John Marshall also reported some of Pendleton's decisions, sixteen of which were printed by Call (sadly, Marshall's manuscript has been lost).

Although no individual case in Pendleton's court stands out as a radical milestone of jurisprudence, an act of the legislature that was signed into law by the governor was declared to be unconstitutional by the Court of Appeals in 1788. Even though it was not a matter of formal litigation between a plaintiff and a defendant, the *Remonstrance* or *Cases of the Judges* was reported in Call's *Reports* at volume 4, page 135. In early 1788, the General Assembly attempted to reorganize the high courts in such a way that it happened that the judges' workload would have been substantially increased (with no increase in pay). The judges on the Court of Appeals declared the act unconstitutional because it interfered with the independence of the judiciary and violated the constitutional provision for the separation of pow-

ers within the state government. In response, the governor called the General Assembly into special session to respond to the problem. The result was an amicable compromise. The courts were reorganized in a different way so that no sitting judge would be required to accept additional judicial duties, and the judges voluntarily resigned their commissions in the old courts and accepted new commissions in the new Court of Appeals. Thus, it was established that an act of assembly could neither increase the judicial workload of sitting judges nor remove them from their judicial offices and that this was a matter of constitutional law.

Generally, the Court of Appeals of Virginia, under the guidance of Pendleton, found the locus of sovereignty in republican Virginia to be in the people as a whole. The people of Virginia expressed their political will in the written constitution of 1776. This constitution divided the government of Virginia into three independent branches: the legislature, the executive, and the judiciary. Thus, the constitution was above the government. Interpreting the constitution, a legal document, was a matter of law, and the law, as well as its interpretation, was the function of the judiciary. Thus, the Court of Appeals was to review the acts of the other branches of the government as a matter of constitutional law. One aspect of Virginia constitutional law was the separation of powers among the branches of government, and this required that the judiciary give great deference to the legislature when construing a statute. For the judiciary to legislate would be for the court unconstitutionally to usurp the legislative function of the General Assembly. A corollary to this principle is that when confronted by a constitutional issue in a legislative act, the court should, if it can, resolve the issue without declaring an act of assembly unconstitutional. A good example of this is the case of *Commonwealth v. Caton,* 4 Call 5 (1782). Pendleton and the majority of the court, with impressive legal skill, avoided the constitutional issue (where George Wythe was willing to indulge in an unseemly confrontation with the legislature).

Led by Pendleton, the courts of Virginia applied the common law of England to resolve the cases brought before them for resolution. Although there was some flirtation at the time with abolishing all British institutions, including the common law, and starting all over from first principles, this nonsense was never seriously considered by the Virginia lawyers and judges of Pendleton's generation. In fact, in 1776, an act was passed by the General Assembly stating that the common law of England was the common law of Virginia. Many believed that the war was fought to preserve English law and institutions because they guaranteed the general principle of the rule of law. The common law of England was the guarantee of property rights, which is the foundation of liberty, being a check on the government. To tax or confiscate a private person's property without consent or author-

ity, that is, without representation, is against the law. Thus, the common law was to be preserved as the basis of legal judgments. The English common law had to be applied in republican Virginia in an intelligent way, however, in order to suit the new political order without upsetting settled expectations of property and contract rights. This was accomplished under the firm guidance of Edmund Pendleton in Virginia and passed on to the federal judiciary by Blair, Washington, Marshall, Tucker, and Hay.

Edmund Pendleton was married twice but had no surviving children. He died in Richmond on 26 October 1803 and was buried in his native Caroline County, Virginia.

W. Hamilton Bryson

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POLLACK, MILTON

(1906–)

Milton Pollack
Bettmann/Corbis

With more than thirty-five years on the bench of the Southern District of New York, federal judge Milton Pollack has earned his status among giants, particularly for his handling of the Drexel Burnham Lambert mass class action and other high-profile securities cases.

Milton Pollack was born on 29 September 1906 in New York City, the son of Russian Jewish immigrants. His father was a successful clothing manufacturer. Pollack attended Columbia University, where he graduated from college in 1927 and law school in 1929. Shortly after his admission to the bar, the stock market crashed, bankrupting businesses and banks alike, creating record unemployment, and plunging the United States into deep depression. In this time of financial upheaval, Pollack began his practice with the law firm of Gilman and Unger, representing bankrupted shareholders in lawsuits against their stockbrokers and banks. No one could have predicted that, sixty years later, Pollack would still be handling the same kinds of cases—this time as a federal judge for the Southern District of New York.

In response to the stock market tragedy, and to the misery caused by the ensuing Great Depression, Congress passed landmark legislation to oversee the nation's securities markets. The Securities Act of 1933 and the Securities and Exchange Act of 1934 sought to make the trade in securities more open and honest and thereby to regain investors' confidence in the stock

market and the economy generally. Congress created the Securities and Exchange Commission (SEC) to implement this legislation. It was given the primary duty of protecting investors by making and enforcing rules for the offering and trading of securities. Pres. John F. Kennedy's father, Joseph Kennedy, was appointed the first chairman of the SEC.

SEC investigations of brokerage houses and banks generated plenty of litigation to keep the young lawyer busy. Pollack continued his practice with the firm until 1937, when the Gilman and Unger law firm became Unger and Pollack. This partnership lasted until 1944, when Pollack formed his own firm.

By 1967, Milton Pollack had been practicing law for almost forty years, and one might have expected him to begin thinking about retirement. But Pollack had other ideas. On 12 June 1967, Pres. Lyndon B. Johnson appointed him to become a judge on the United States District Court for the Southern District of New York, located in Manhattan. Amazingly, as of this writing, Judge Pollack is still there, actively handling a significant caseload at age ninety-five!

Judge Pollack, however, does not qualify as a great judge on the basis of his longevity alone. He is most famous for presiding over the massive class action and bankruptcy litigation arising out of the failure of the investment banking firm of Drexel Burnham Lambert and the indictment of its managing director, Dennis Levine, and its head of high-yield securities, Michael Milken. Judge Pollack himself considers the resolution of the Drexel Burnham litigation his crowning achievement—and for good reason. The litigation commonly called *Drexel Burnham* actually consisted of over 180 lawsuits, even the smallest of which alleged damages in the millions of dollars. In fact, the total claimed damages for the litigation exceeded 30 *billion* dollars. At the company's request, Judge Pollack also presided over Drexel Burnham's bankruptcy in 1990, which required him to liquidate and distribute billions of dollars of the firm's assets. Yet the *Drexel Burnham* litigation, which many feared would clog the federal courts for a decade or more, was resolved by the judge in only three years, a truly tremendous feat considering its enormous size and complexity (Kennedy 1995, 75).

The investment banking firm of Drexel Burnham Lambert was once a powerhouse of Wall Street. Led by a select group of talented, ambitious, and ultimately unscrupulous managers and traders, the firm developed and championed what came to be known in the 1980s as the "junk bond" market. The 1980s were a time of unprecedented mergers and acquisitions, in which large companies would attempt to purchase other companies, often against their will. Although corporate mergers are not unusual, the number and scope of mergers in the 1980s were. For a time it seemed as if every major U.S. corporation was either a pursuer or a target; large, well-established

companies were swallowed up, sometimes by much smaller, lesser-known competitors. Companies that did not wish to be acquired by others were forced to fight off the "corporate raiders" for their survival.

This flurry of mergers and acquisitions activity was made possible in large part by the use of "junk bonds." Bonds are issued by both public and private entities as a way to raise money. An investor purchases a bond from the entity, which promises to pay it back with interest. The government and various credit agencies rank bonds by, among other things, the likelihood that they will be paid back. *Junk bond* is the colloquial term for a bond that has received a low rating, indicating that its purchaser is assuming significant risk that the bond will not be paid. In exchange for taking that risk, the investor is promised a significantly higher interest rate on his or her investment. But, as the name implies, junk bonds are not for most investors and are by that rating considered below investment grade.

During the first half of the decade, corporate mergers were often funded with these bonds. Investment banking and brokerage houses made tremendous amounts of money by issuing junk bonds to investors on behalf of corporate raiders, who would then use the proceeds to fund their acquisitions in a process known as the leveraged buyout or LBO. The money generated by this process became far too tempting for Wall Street brokers and deal makers, who sought advantage in the market by, among other things, trading on inside information about the raiders and their targets. Eventually, the approach of taking over companies through leveraged buyouts began to crumble, like a giant pyramid scheme, when the debts that came due could not be paid.

The beginning of the end of the junk bond era came in 1986, when the U.S. government began to indict the first in a series of Wall Street financial leaders, charging them with crimes ranging from securities fraud and insider trading to perjury and racketeering. At the same time, investors who had lost billions in the collapse of the junk bond market began civil lawsuits against their brokers, brokerage houses, banks, and anyone else who had had a hand in their losses. Most of these lawsuits were filed in the Southern District of New York, the district that includes Wall Street, although suits appeared across the country.

To handle the myriad of civil lawsuits against Drexel Burnham arising out of these complex events, the federal judicial Panel on Multi-District Litigation consolidated and directed all of the cases to Judge Pollack. The judge, with his many years of securities practice experience, plus his years of handling securities cases on the bench (an inevitability for any federal judge who sits in Manhattan), was a natural choice. As described earlier, the litigation consisted of nearly 200 cases, with hundreds of thousands of plaintiffs, ranging from individual and corporate investors to the U.S. government itself, claiming billions of dollars in damages. The fact that

Louis H. Pollack
(1922-)

Judge Louis H. Pollack of the United States District Court for the Eastern District of Pennsylvania has enjoyed a distinguished academic and judicial career. Pollack was born in New York City on 7 December 1922. He attended Harvard College, graduating in 1943. Upon graduation, he served in the United States Army until the end of World War II. He entered Yale Law School in 1946. After receiving his law degree, Pollack served as a law clerk to Supreme Court justice Wiley B. Rutledge.

During the 1950s, Pollack held a variety of legal positions, working as an associate attorney for a major law firm, a special assistant to U.S. ambassador-at-large Philip C. Jessup, and the assistant counsel for the Amalgamated Clothing Workers. In 1955, he joined the faculty of the Yale Law School. He served as dean of the school from 1965 to 1970. In 1974, Pollack left Yale to join the faculty at the University of Pennsylvania Law School. He served as its dean from 1975 to 1978.

Pollack is widely considered one of the nation's leading constitutional law scholars. He has authored numerous law review articles on American legal history and constitutional law, including studies of distinguished legal figures such as Justices Thurgood Marshall and Felix Frankfurter. He is the author of *The Constitution and the Supreme Court: A Documentary History* (1966).

Pollack has also written on and worked extensively for civil rights issues. Before his appointment to the bench, he served for many years as vice president of the Legal Defense Fund of the National Association for the Advancement of Colored People. While at Yale, Professor Pollack helped to broker a settlement of the famous Birmingham, Alabama, civil rights boycott of 1963. In 1977, he served as an international observer at the inquest examining the death of South African antiapartheid activist Steven Biko, founder of the country's Black Consciousness Movement. As a judge, Pollack participated in a historic rehearing of *Plessy v. Ferguson* and a tribute to the original litigants in *Brown v. Board of Education*, both sponsored by Harvard Law School.

Pres. Jimmy Carter appointed Pollack to the district court, and he was sworn in on 8 September 1978. Even after his appointment to the bench, Pollack has continued to publish regularly in legal journals and law reviews. He comments frequently on the role of the judge, judicial and legal ethics, and legal professionalism. In the

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Judge Pollack was now in his mid-eighties might have caused some to question his selection; for Judge Pollack, however, it was never an issue.

No litigation like it had ever been seen before or has been seen since. Judge Pollack worked tirelessly through countless evenings and weekends to organize the litigation and bankruptcy and move them forward. He certified the civil lawsuits as a class action and worked with the parties toward

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mid-1990s, for example, he participated as a witness before the Commission on Separation of Powers and Judicial Independence, created by the American Bar Association to examine the nature and extent of judicial independence in the federal and state courts and to investigate potential threats to that independence.

During his long judicial tenure, Pollack has become one of the nation's most widely respected federal judges. He has handled a number of high-profile cases, including the civil rights litigation arising out of the city of Philadelphia's 1985 attempt to raid a row house inhabited by members of the antigovernment group MOVE (the Christian Life Movement). When the members dug in, the city's Police Department, with authorization from the mayor, dropped a bomb on the group's rooftop gun turret in an attempt to create a hole large enough to allow officers to drop teargas canisters into the building. The roof caught fire, and the fire went quickly out of control. It burned an entire city block, killing eleven people (including five children) and leaving over 250 people homeless.

More recently, Judge Pollack caused a sensation when he ruled that Federal Bureau of Investigation (FBI) fingerprint identification (matching) procedures were too subjective and therefore not reliable as evidence. He concluded that the identification process known as "ridgeology" did not conform to accepted scientific standards as set forth by the Supreme Court in *Daubert v. Merell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Judge Pollack backed up his decision with a carefully constructed forty-nine-page opinion that detailed the flaws in fingerprint identification methods.

The FBI and the Justice Department immediately asked for a rehearing on the issue, and after the presentation of extensive testimony and other evidence on the bureau's procedures, Judge Pollack reversed his earlier ruling (*U.S. v. Llera-Plaza*, No. 98–362–10. E.D. Pa., 13 March 2002). Even though the judge changed his mind, however, he showed both courage and independence in refusing to accept such evidence as a matter of course. By putting the government to its proof, he publicized the shortcomings in fingerprint identification processes; it is clear in the aftermath of the case that the debate started by the judge on this issue is far from over.

Judge Pollack elected senior status in 1991. He has not, however, elected to slow down. To this day, he continues to maintain an active and impressive schedule of judicial service, academic writing, and teaching.

Kathleen Uradnik

obtaining a single, global settlement of claims. In 1991, he approved a settlement in excess of $2 billion for Drexel Burnham's creditors in the bankruptcy. In 1992, he approved a $1.3 billion settlement in the class action against over 200 officers and directors of Drexel Burnham and the firm's related entities. It was an incredible judicial achievement, one that would not have been possible without Pollack's knowledge, organizational skills,

dogged persistence, and commitment to achieving a complete and equitable resolution of all claims.

One might think that, given the lessons investors learned in the 1980s, a situation like that of Drexel Burnham would never happen again. Far from it. In 2001, Judge Pollack threw out a lengthy, high-profile complaint filed by disgruntled investors against prominent stock analyst Mary Meeker and her employer, Morgan Stanley Dean Witter. The eight related class action lawsuits sought damages against Meeker and the firm arising out of losses from the precipitous drop in value of numerous Internet company stocks, including Amazon.com and eBay.com. Judge Pollack dismissed the complaint in a curt three-page opinion. Said Pollack: "I got so mad reading that complaint . . . [the plaintiffs] had no business saying the nasty things that they did" (Neumeister 2001, n.p.). Pollack admonished plaintiffs for their "irrelevant" and "inflammatory" claims, which may have allowed the investors to vent their frustrations, but which were not grounded in law (n.p.). Pollack observed that the same phenomena he saw while practicing law at the time of the 1929 stock market crash was repeating itself yet again: Investors caught up in the fury of profit making during times of economic boom seek to blame others after their money is lost in times of economic bust. These losses may permit legal action, as they did in the Drexel Burnham litigation, but, as the judge recognized, a legally cognizable cause of action does not accompany every bad investment.

The *Drexel Burnham* case, although the biggest, was not the only milestone in Judge Pollack's long career. The judge himself identified his most noteworthy cases upon receiving the Devitt Award in 1995 (Pollack 1995, 71). They include *Chris Craft v. Piper Aircraft Corporation* (determining whether an unsuccessful corporate bidder for a company can sue for damages under securities laws), *Miller v. Wells Fargo Bank International Corporation* (deciding that a bank was not a secured creditor of a bankrupt corporation), *Corbin v. Federal Reserve Bank* (challenge to receiver arising from the insolvency of the then twentieth-largest bank in the United States), *Rodman v. Grant* (dismissing a trustee's lawsuit against former officers and directors of a bankrupt corporation), *Gartenberg v. Merrill Lynch* (dismissing shareholders' derivative lawsuit alleging excessive compensation for management of mutual fund), *Curtiss-Wright v. Kennecott* (denying a preliminary injunction to prevent a corporation from terminating a tender offer), *SEC v. Banca Della Svizzera Italiana* (compelling a foreign bank to reveal information pertinent to the SEC's prosecution of an insider trading lawsuit), *Seagram v. St. Joe Mineral Corporation* (granting an injunction against a corporation that would rather dissolve itself than allow hostile takeover), *Standard & Poor's v. Commodity* (enjoining the latter's unlicensed use of the S &

P 500 Stock Index), and *Moss v. Morgan Stanley* (dismissing securities and racketeering claims against the brokerage house). As these cases indicate, Judge Pollack has spent much of his judicial career deciding novel and complex legal issues arising out of the rise and fall of some of the nation's largest corporate and financial institutions.

The Devitt Award, given annually to the federal judge who has made the greatest contribution to justice, is only one of a host of awards received by Judge Pollack. In addition, he received the John Jay Award from his alma mater, Columbia University; the Ford-Stein Prize; the New York County Lawyers' Distinguished Service Award; the French Legion of Honor Chevallier; the Proskauer Award from the Federation of Jewish Philanthropies; and the Learned Hand Award (Pollack 1995, 71). Among a host of philanthropic endeavors, the judge and his wife, Moselle Erlich Pollack, have endowed scholarship, loan, and award programs for college and professional students. The judge has proved a loyal Columbia graduate as a past alumni director, alumni president, and guest lecturer.

Apart from his work on the bench, Judge Pollack is highly regarded for his work in judicial administration. While serving on the Panel for Multi-District Litigation, he helped to create many of the rules and procedures he would later use with much success in the *Drexel Burnham* litigation. He was a member of the Judicial Conference of the United States, serving for nearly twenty years on its Committee on Court Administration. He also served on its Trial Practice and Techniques Committee, Subcommittee to Examine Possible Alternatives to Jury Trial in Complex Civil Cases, and on various personnel committees. He was a member of the Board of Editors of the *Manual for Complex Litigation*. He also participated actively in various Southern District committees to revise its various rules of court.

In 1983, Judge Pollack elected senior status on the court. Senior status enables a judge nearing retirement to reduce his or her caseload with no concomitant reduction in salary. Of course, a judge could simply choose to retire and continue to draw his or her full salary. Increasingly, however, federal judges are choosing to keep working instead of retiring, thereby donating their time to the judiciary. Judge's Pollack's gift in this regard has been enormous, as he has served as a senior judge for almost twenty years and has continued to maintain a full (and current) caseload throughout. As of this writing, he is ninety-five years old, thirty years past his retirement age and still working his standard fifty-hour weeks. Said the judge in 2001: "Having a daily occupation keeps me alive, and I have no plans to leave" (Markon 2001, n.p.). Thus the judge's highly regarded and distinguished career continues—indefinitely.

Kathleen Uradnik

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POSNER, RICHARD A.

(1939–)

Richard A. Posner
Reuters NewMedia Inc./Corbis

Richard Posner is the most influential and prolific judge to sit on the court of appeals bench in the last two decades. A distinguished, prolific, and inventive scholar, Posner has had a significant impact on American intellectual life. Posner has brought the law and economics approach to judicial decisionmaking, especially in the key doctrinal areas of contracts and torts.

Education and Professional Activities before Appointment to United States Circuit Court of Appeals

Posner was born on 11 January 1939 in New York City. The family moved to the suburb of Scarsdale in 1948. His father began in the jewelry business, attended law school, became a criminal defense lawyer, and gained wealth as a moneylender in the New York slums. His mother politically was a communist.

Posner graduated from Yale in 1959, *summa cum laude*, and was elected to Phi Beta Kappa. An English major, he wrote a senior honors thesis on Yeats's poetry and briefly considered a career as an English professor (MacFarquhar 2001, 84). He graduated first in his class at Harvard Law School in 1962, was president of the *Harvard Law Review*, and earned additional honors.

Following graduation Posner clerked for United States Supreme Court justice William J. Brennan Jr. After that he worked in Washington, D.C., during the Kennedy and Johnson administrations. From 1963 to 1965 he was assistant to Commissioner Philip Elman of the Federal Trade Commission and from 1965 to 1967 he assisted two solicitor generals of the United States, Erwin Griswold and future Supreme Court justice Thurgood Marshall. Posner served as general counsel of President Johnson's Task Force on Communications Policy. He also was a member of a task force on economic issues and a commission to study the Federal Trade Commission (1969).

He has been married to the former Charlene Horn for forty years, and they have two sons and three grandsons. Son Kenneth is a securities analyst in New York, and Eric, a law professor at the University of Chicago, also writes on law and economics.

For many years, Posner considered himself a liberal democrat. While serving as an associate professor of law at Stanford, however, Posner met several conservative economists from the University of Chicago and was surprised to discover that he agreed with them. He moved to the University of Chicago in 1969 (MacFarquhar 2001, 86). "For the past ten years or so, Posner has called himself a pragmatist, meaning that he believes that there is no objective way to choose between incompatible moral positions. Pragmatism has a bracingly impious air that he finds exhilarating"(88). He taught law full-time at Chicago until his appointment in 1981 to the Seventh Circuit Court of Appeals, also in the Windy City.

Among the most distinguished and prolific scholars ever to sit on a United States Court of Appeals, before joining the bench Posner wrote several books, including *The Economics of Contract Law* (1978), *Antitrust Law: An Economic Perspective* (1980), the classic *Economic Analysis of Law*—now in its fifth edition—and *The Economics of Justice* (1981). He also wrote numerous articles, most exploring the application of economics to such diverse legal subjects as antitrust, public utility and common carrier regulation, torts, contracts, and procedure. He called for major reforms in antitrust policy, proposed and tested the theory that judges use the common law to promote economic efficiency, urged wealth maximization as a goal of legal and social policy, contributed to the economic theory of regulation and legislation, and extended economic analysis into such fields as family law, primitive law, racial discrimination, jurisprudence, and privacy. He founded and edited the *Journal of Legal Studies,* was a research associate of the National Bureau of Economic Research (1971–1981), and was the first president (1977–1981) of Lexecon Inc., a firm that provided economic and legal research in antitrust, securities, and other litigation.

Posner continues to teach part-time at the University of Chicago. He is

known for his “freakish productivity” (MacFarquhar 2001, 78). To date, Posner has written thirty-one books, more than 300 articles, and nearly 1,900 judicial opinions (78). In early 2002 Posner heard his 4,000th case. Posner wrote, “To say that all 4,000 cases have been interestingly different would be a bit of an exaggeration, but only a bit; that is what makes the job fun” (Posner, “Diary,” 15 January).

The titles of the books he has published since becoming a judge demonstrate the continuing breadth of his interests. They include *Cardozo: A Study in Reputation* (1990), *The Essential Holmes* (1992), *Sex and Reason* (1992), *Private Choices and Public Health: The AIDS Epidemic in an Economic Perspective* (1993), *Overcoming Law* (1995), *Aging and Old Age* (1995), a second edition of *The Federal Courts* (1996), *Law and Legal Theory in England and America* (1996), a revised and enlarged edition of *Law and Literature* (1998), *An Affair of State: The Investigation, Impeachment, and Trial of President Clinton* (1999), *The Problematics of Moral and Legal Theory* (1999), a second edition of *Antitrust Law* (2001), and *Public Intellectuals* (2001).

As the most notable proponent of the law and economics approach to legal theory and practice, Richard Posner is a primary opponent of normative, philosophical approaches to the law, as best exemplified by philosopher Ronald Dworkin. Posner is a public intellectual. His articles, commentary, and book reviews appear in prestigious journals in law, economics, and social sciences as well as in popular journals of opinion.

Prior to becoming a federal judge, Posner had offered expert testimony before a wide range of congressional committees and government agencies. Since becoming a judge, Posner has appeared before a congressional committee to discuss administrative issues facing federal courts (Posner 1996). In 1999 Posner was selected to mediate the government’s antitrust lawsuit against Microsoft. Case managers apparently thought that Microsoft would accept him “because of his hostility to antitrust law” and the government “because of his hostility to cartel-like behavior that threatened a free market” (MacFarquhar 2001, 87).

Posner enjoys making controversial arguments, especially in his books: “Posner likes to take topics, like sex and race, that are normally accorded a certain sentimental deference and treat them with jarring candor. In *Sex and Reason* (1992), he argued that the sex drive was subject to the control of rational calculation” (MacFarquhar 2001, 81). “He once argued . . . that a higher proportion of black women than white women are fat because the supply of eligible black men is limited, thus black women find the likelihood of profit from an elegant figure too small to compensate for the costs of dieting” (78). Posner admits to thriving on arguing against the conventional wisdom of the day:

John T. Noonan Jr.
(1926–)

Some judges gain almost as much recognition for their writing off the court as for their decisions on the bench. John T. Noonan Jr. is a good example. Like Benjamin Cardozo, Richard Posner, and Henry Friendly, Noonan is the epitome of the scholar judge.

Born in Boston, Massachusetts, in 1926, the son of a lawyer, Noonan proceeded to earn an undergraduate degree at Harvard, pursue graduate study at Cambridge University, earn master's and doctor's degrees from Catholic University, and then get a law degree from Harvard. After serving on the staff of the National Security Council and as a member of a Boston law firm, Noonan became a law professor at the University of Notre Dame. He subsequently moved to the University of California, where he also served as chair of the Department of Religious Studies. He married Mary Lee Bennett, an art historian, and they have three children. He fit comfortably into academic life and won a number of high academic honors (including grants to study at Princeton, the Woodrow Wilson Center in Washington, D.C., and Stanford) before Pres. Ronald Reagan nominated him in 1985 to the United States Ninth Circuit Court of Appeals (headquartered in San Francisco). Despite some opposition from prochoice proponents, he was confirmed by the U.S. Senate and has been serving ever since. He is currently the senior judge on that court.

A recognized scholar of Catholic canonical law, prior to his appointment to the bench Noonan had published such classic studies as *The Scholastic Analysis of Usury* (interest), *The Church and Contraception*, *The Morality of Abortion*, *Persons and Masks of the Law*, and *The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams* ("John T[homas] Noonan, Jr."). Noonan continues to lecture widely, and his appointment to the bench appears to have done little to slacken his scholarly production. In 1986, an enlarged version of his earlier study of *Conception: A History of Its Treatment by the Catholic Theologians and Canonists* was published. Since being

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> Negligible work rarely attracts much criticism; it's simply ignored. Only when a work gets under people's skin do they bother to criticize it, and the deeper under the skin it gets the shriller the criticism. Often the reason a work gets under one's skin is that it shakes one's faith in oneself, one's values, or one's career. . . . When academics step outside the ring of critical fire that is one of the glories of the academic culture at its best, the risk of their falling flat on their faces is very great. (Posner, "Diary" 17 January)

Posner has received numerous honorary degrees. He is a fellow in the American Academy of Arts and Sciences, the American Law Institute, and the British Academy.

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appointed to the bench, he has also published *The Believer and the Powers That Are: Cases, History, and Other Data Bearing on the Relation of Religion and Government* (1987), *The Responsible Judge* (1993), and *The Lustre of Our Country: The American Experience of Religious Freedom* (1998). A more recent book, *Narrowing the Nation's Power: The Supreme Court Sides with the States*, is critical of recent United States Supreme Court decisions expanding state sovereign immunity. Noonan also has criticized recent United States Supreme Court decisions that narrow congressional authority under Section 5 of the Fourteenth Amendment and, in Noonan's judgment, unduly increase the Court's own authority (Greenhouse 2002).

A committed Roman Catholic who has served on a number of church commissions, Noonan nonetheless believes that canonical law, like other forms of law, develops over time. Although he remains a strong opponent of the United States Supreme Court decision in *Roe v. Wade* (1973) legalizing abortion, Noonan has taken a more liberal position on the issue of birth control and on other issues than has the church as a whole. Despite the failure of many of his views to prevail, Noonan has maintained an optimistic view of the future of Catholicism in the United States (McGreevy 2002).

An observer has argued that as a jurist Noonan has not completely satisfied either conservatives or liberals. Thus, he has expressed deep reservations about the death penalty, opposed the deportation of a Salvadoran refugee who feared persecution in her native land, and written a strong opinion in 1995 (later affirmed by the United States Supreme Court) opposing assisted suicide (McGreevy 2002). Noonan's clerks note that he addresses individuals who appear before him, even noncitizens, by their full names in an attempt to treat them respectfully (McGreevy 2002).

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Posner provided a glimpse of his variegated life in a diary that he wrote for *Slate.com* during the week of 14 January 2002:

> I have a busy week ahead—a day of hearing appeals, three two-hour classes on the law of evidence, an after-dinner speech Tuesday on civil liberties and national security and a priority for Sunday was finishing up the draft of my speech. And finishing up a short paper on the economics of international law. And working on two articles that I am writing with an economist, one on presidential pardons . . . and another on copyright law, focusing on an issue of considerable theoretical interest: Should copyrights be perpetual, rather than limited to the lifetime of the author plus 70 years? And on a book on legal

pragmatism and democratic theory. And on a sixth edition of a textbook-treatise on economic analysis of law, my specialty. (Posner "Diary," 14 January)

Service on the United States Circuit Court of Appeals, Seventh Circuit, Chicago, Illinois

Ronald Reagan nominated Richard Posner in October 1981 to a seat on the Seventh Circuit Court of Appeals, which Phillip Willis Tone had vacated. The Senate quickly confirmed Posner, who served as chief judge from 1993 to 2000.

Larissa MacFarquhar portrayed Posner as a lighthearted and joyful participant in daily proceedings on the bench. Posner compared himself to his cat—as "cold, furtive, callous, snobbish, and playful, but with a streak of cruelty" and "like an imperfectly housebroken pet" (MacFarquhar 2001, 79–80). MacFarquhar described Posner as a "Bench Burner," "the most mercilessly seditious legal theorist," and "one of the most powerful jurists of the generation." She continued, "He comes up with what strikes him as a sensible solution, then looks to see whether precedent excludes it" (78). She described Posner in court as "harsh, but not nasty" but "frequently bored by the arguments the lawyers presented, and tending to lead the discussion in the direction of issues that interested him" (81).

Posner has criticized contemporary judges who rely on their clerks to write their opinions. He explained that "it's a mistake on a number of grounds: The more you write, the faster you write; only the effort to articulate a decision exposes the weak joints in the analysis; and the judge-written opinion provides greater insight into the judge's values and reasoning process and so provides greater information not least to the judge" (Posner "Diary," 14 January).

Judicial Decisionmaking as an Exemplar of Pragmatism

Blomquist characterized *Dower v. United States* (1981), Posner's first written opinion, as "remarkable" for its discussion of facts in a story form similar to "fiction or good journalism" (2000, 685). Posner's early opinions "exhibit an overarching attention to policy concerns; what might be viewed as the purpose of rules, the pragmatic functioning of relevant legal doctrine, or the advisability of choosing one body of potentially applicable principles over another . . ." (690). Posner's pragmatism is central.

In 1999, Judge Posner defined what he meant by pragmatic adjudication: "'Pragmatist' judges always try to do the best they can do for the present and the future, unchecked by any felt *duty* to secure consistency in princi-

ple with what other officials have done in the past . . ." (Posner 1999, 241). A pragmatic judge is concerned "with securing consistency with the past only to the extent that deciding in accordance with precedent may be the best method for producing the best results for the future" (241) Responding to criticism that a pragmatist judge is unprincipled and fails to take past decisions into account, Posner distinguished the way in which the past is more important for the pragmatist judge than for the "judicial positivist." To the pragmatist, the past provides "sources of information" that can (and should) be used to inform one's opinion but are not "authorities," ensuring that the judges act directly in accord with their dictates (242). In *Overcoming Law,* Posner wrote, "Pragmatism would treat decision according to precedent . . . as a policy rather than as a duty" (1995, 4). For Posner, the wisdom of the prior rule can only be determined by looking at empirical information of the application rules in the past, the facts in the case, and the possible effects of continuing or modifying the rule in the future. Posner rejects judicial minimalism for its own sake. He does not think that courts should be restrained from a particular ruling just because the legislature or the Supreme Court has previously ruled otherwise.

For Posner, the pragmatist judge can be an activist problem solver who facilitates societal progress: "The pragmatist believes in progress without pretending to be able to define it, and believes that it can be effected by deliberate human action" (Posner 1995, 5). Therefore courts can be an important venue for progress in society. Progress is a process; it is not defined in principled terms as more democracy and citizen participation, or more access to political process, or based on some moral theory of equality or fair distribution of goods.

Because judges cannot know absolute truth, pragmatic judges will search for facts and keep skeptical, flexible minds. A good judge gathers as much information as possible about a case while being skeptical of finding the one absolutely true and good decision. Posner believes that judges must not be dogmatic and must view the world outside the court as social and as contextual, not as natural (Posner 1995, 6–7).

Posner acknowledged that pragmatist judges seek to optimize certain values. Rejecting the idea of reasoning "top-down" from moral or constitutional theory as Dworkin, John Hart Ely, and other legal scholars have advocated, Posner argues that the pragmatist judge understands the common law as based "on the 'as if' assumption that judges try to maximize the wealth of society" (Posner 1992, 434). Posner seeks to demonstrate the importance of reasoning from the bottom up, through empirical evidence and the close analysis of a particular case. At the core of his view of judicial decisionmaking is what Posner calls "interpretation." In responding to Dworkin, Posner wrote,

> I agree there isn't much bottom-up reasoning. We don't ever really "start" from a mass of cases or from a statute or from a clause of the Constitution. To read a case, to read a statute, a rule, or a constitutional clause presupposes a vast linguistic, cultural, and conceptual apparatus. . . . And, if, as is so common, the case or statute or other enactment is unclear, and maybe even when it seems quite clear, the reader, to extract or more precisely to impute its meaning, must *interpret* it; and interpretation, we know, is as much creation as discovery. (435)

Posner summarized: "I would abandon, however, as too ambitious, too risky, too contentious, the task of fashioning a comprehensive theory of constitutional law, an 'immodest' top-down theory intended to guide judges. At the same time I would allow judges to stretch clauses—even such questionable candidates as the Due Process Clause—when there is a practical case for intervention" (446–447).

In *Slate.com,* Judge Posner further explained his pragmatic approach:

> Applied to law, it asks judges to weigh consequences rather than to steer by abstractions such as "property," "liberty," "rights," "justice," "fairness," and "equality." The judge who thinks he can reason his way to what is "just" and "fair," a self-appointed moral virtuoso, is unlikely to think seriously about the practical consequences of his decisions. May we be spared those judges, as well as the ones who shirk responsibility for their decisions by imagining themselves a mere transmission belt for conclusions reached hundreds of years ago by the all-knowing framers of the Constitution. The judge is a *responsible* official, not an oracle; and his responsibility is to use the resources of text, history, and precedent to help him reach practical results that are responsive to the needs of the present day. (Posner "Diary," 17 January)

Posner distrusts morality as a motivational force. He has observed that "knowing the moral thing to do . . . furnishes no motive, and creates no motivation, for doing it" (MacFarquhar 2001, 84). Only through the imposition of prohibitions and penalties, though incentives, can the law alter what an individual will actually do in a given situation. Linda Fisher identified the core elements of Posner's pragmatism:

> He is highly empirically oriented, with the goal of producing those legal rules and decisions that are best for society. . . . Justice and morality are not defined by reference to an absolute standard, but rather by social norms and traditions. He [Posner] . . . retains his previous emphasis on economics as a policy since par excellence, along with its goal of wealth maximalization, but subordinates

> that specific goal to the overall pragmatic goal of rendering decisions to improve society. (2001, 456)

As a founder of the law and economics theory of jurisprudence, Posner's opinions reflect the goal of wealth maximization. Fisher argued, however, that he subordinates this goal to "the overall pragmatic goal of rendering decisions that improve society" (2001, 456). Fisher identified Posner with an "[a]ttitude rather than a dogma; an attitude whose 'common denominator' is a future-oriented instrumentalism that tries to deploy thought as a weapon to enable more effective action" (5).

Posner's court opinions also demonstrate "his broad search for empirical information that can usually inform decision making . . . his openness and candor . . . [and] the wide scope of issues he believes to be appropriately addressed in legal decisions" (Fisher 2001, 465–466). Fisher observed that "at their best, these efforts can produce strongly reasoned decisions that are supported by a combination of logic, good policy, relevant factual information, and, where appropriate, precedent and applicable text" (466–467).

Posner has written over 1,900 court opinions. More of his cases have appeared in law school casebooks than those of any other United States Court of Appeals judge; in this area, Posner is one of two "Giants in a World of Pygmies" (Gulati and Sanchez 2002). Mitu Gulati and Veronica Sanchez counted the number of opinions by federal court judges who were active from August 1995 to August 1997 that appeared in 300 casebooks in use in U.S. law schools from June 1999 to May 2000. Such casebooks included 118 of Posner's opinions. By comparison, 45 percent of the judges studied had zero to five opinions in casebooks and 44 percent of the circuit court judges studied had six to nine. The two closest judges to Posner, Judges Easterbrook and Winter, had 56 and 35 cases in lawbooks, respectively. Posner had an entry rate of 6.94 cases per casebook; Easterbrook's entry rate was 4.92, and Wood's was 3.00 (Gulati and Sanchez 2002, 1155, 1166). When the number of Posner's and Easterbrook's torts and contracts opinions in casebooks are compared with those of prior circuit court giants—Cardozo, Friendly, and Hand—only Cardozo comes close to Posner (1179). The reasons that Posner and these other judges dominate the legal "canon" include their role in the academy and the fact that they write opinions that are "clear, concise, fully theorized, innovative, irreverent, placed in historical context, illustrative, and humorous" (1153). Fellow judges also frequently cite Posner's decisions. In a sophisticated study of the citations of 205 individual judges sitting on the courts of appeals in 1992 with six or more years of tenure at the end of 1995, Posner topped the list (Landes, Lessig, and Solimine 1998, 288–292).

Posner's Impact on Case Law

Posner has impacted areas as diverse as First Amendment freedom of speech, criminal law, intellectual property, social insurance, and labor law. Jeffrey Stempel argued that Posner's background in economics creates blind spots that vary from field to field: "On insurance cases . . . Posner is almost without judicial peer. But where the topic is employment discrimination or civil rights, Posner's econominalism plays an arguably counterproductive role and insensitivity often replaces sensitivity" (2000/2001, 10). Stempel cited Posner as an example of "the 'cerebration' of insurance law—increased focus and in-depth analysis of not only policy language but the intent, purpose, and context of insurance arrangements as well as the role of risk and insurance in the modem world" (12).

Stempel identified ten dominant aspects of Posner's insurance jurisprudence. They are (1) neutrality between insurance companies and policyholders, (2) application of pragmatism rather than morality, (3) lack of emotional involvement in cases and issues, (4) emphasis on the good faith obligation of contract for all parties in a case, (5) respect for literal contract interpretation without slavish adherence to it, (6) emphasis on "the purpose of the transaction and the context of the dispute" (2000/2001, 17), (7) "a moderate, reasonable and nuanced view of the ambiguity doctrine," (8) acknowledgment "that insurance law remains largely a matter of state law but also accounts for the growing body of a federal common law of insurance in ERISA cases" (20), (9) "considerable self-consciousness about both his own jurisprudential approach and the implications of legal theory and judicial approach for real case outcomes," and (10) writing characterized by "clarity, wit, and distinctively memorable prose" (23).

Stempel contrasted his admiration of Posner's decisionmaking in insurance cases with criticism of Posner's bias toward commercial entities in contract and labor law. There he believed "Posner's jurisprudence is interesting, arguably correct, but disturbingly resistant to the rights of workers at the expense of opposing commercial entities" (2000/2001, 42). To illustrate this criticism, Stempel cited *Herzberger v. Standard Insurance Co.* (2000) involving "the issue of when ERISA plans have discretionary authority over health benefits claims" (43). Posner sought to create a uniform national rule for deciding these cases. Stempel stated, "Posner's system seems slanted toward employer prerogatives at the expense of fair treatment of workers and beneficiaries" (45).

Similarly, Leonard Bierman concluded that "Judge Posner views labor unions as 'worker cartels' designed to raise the price of labor above the competitive level" (Bierman 1985, 881). Through an analysis of Posner's Na-

tional Labor Relations Board (NLRB) cases, Bierman demonstrated that Judge Posner is all too willing "to override the Board's decisions whenever necessary to enforce the spirit of neutrality expressed in the Taft-Hartley amendments" (884). Because Posner believes that the NLRB has been pro-union rather than a neutral player, "Posner has ignored the Board's administrative expertise and readily overturned several Board decisions" (906).

In employment discrimination cases, Stempel contended that Posner's generally excellent opinions have underappreciated "workplace realities" and read antidiscrimination laws too narrowly. Acknowledging that Posner's opinions occasionally display "appreciation for the grittiness of the real world" and that his voice is "helpfully informative," Stempel thought that "in employment cases Posner's sensitivity runs toward the employer" (2000/2001, 49–50, 62).

In explaining Posner's economics-based decisionmaking, Eric Beal pointed to Posner's philosophy that "economists speak in terms of incentives, not of moral character" (Beal 2000/2001, 85). Beal demonstrated that in insurance contract cases Posner views "moral hazard [as a] malleable concept which should be applied to both sides of an agreement and that allocates the risks of uncertain future events" (102). Still, Beal concluded, "Posner's decisions are laudable for giving thoughtful and thorough treatment of insurance and moral hazard issues" (102).

Beatrice Beltran argued that Posner believes that "tort law is intended to serve more as a deterrence mechanism versus a compensatory mechanism. Therefore, the tort system should not be regarded primarily as a form of insurance" but "as a means of deterring behavior that society deems risky and undesirable" (2000/2001, 157–158).

A good example of Posner's view of tort law is *Pomer v. Schoolman* (1989), involving a farmhand, Pomer, whose legs were seriously mangled by a farm machine. Although Pomer may not have been informed of the dangerousness of the machine, Posner held that "Pomer knew that the accident was caused only by his momentary lapse of judgment. . . . Thus in terms of deterrence, Pomer was in the best possible position to prevent this accident. It would be in error to shift the responsibility for this gruesome accident onto other parties who were in no position to prevent the accident" (Beltran 2000/2001, 172–173).

With regard to contract law, Lawrence Cunningham demonstrated that Posner's law and economics approach to law emphasizes efficiency as a value over virtue, which Cardozo emphasized in such decisions. Consequently, Posner's ultimate concern is "to promote contract relationships that in turn 'promote the efficient allocation of resources'" (1995, 1413). Cunningham wrote:

> Posner is more apt to locate the basis of contract in reliance and has employed that doctrine in clever ways to limit the scope of liability in contract. He brings to contract law an interpretive literalism that resists implication or the construction of standards of conduct based on traditional norms such as good faith as unjustifiable paternalism. Posner is deeply, philosophically committed to freedom of contract and seizes on judicial opportunities to advance this principle. (1455)

Posner has supported free speech in some notable decisions. In *American Amusement Machine Association v. Kendrick* (2001), Posner invalidated an Indianapolis ordinance blocking minors' access to violent video games. Posner agreed that the Indianapolis ordinance was a content-based speech restriction and that the language in the ordinance was "unconstitutionally vague" (Calvert 2002, 4). Characteristically, Posner based his decision not on previous precedent or principle but on historical and sociological data. His opinion also demonstrates his rhetorical flair for sociocultural commentary: "Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age . . ." (5).

Linnemeir v. Board of Trustees of Purdue University Fort Wayne (2001) involved a suit brought against Purdue University, Fort Wayne, by Republican state legislators who opposed the performance of the play *Corpus Christi*. They believed it was blasphemous. Posner upheld the lower federal court decision permitting the play to be staged. Posner disagreed, however, with the trial court's ruling that the theater was a limited public forum (Harrison 2002, 187). Instead, Posner wrote, "the school authorities and the teachers, not the courts, decide whether classroom instruction shall include work by blasphemers" (187). This might allow censorship based on university standards of "decency."

Critics of Posner's pragmatism and empiricism argue that they result in fewer restrictions on judges and less principled decisions. Linda Fisher wrote, "The costs of his [Posner's] approach . . . however, on both theoretical and practical levels, can include a lack of restraint that might give the pragmatic judge more power than a formalist judge, or at least substitute empirical formalism for analytical formalism" (2001, 467).

Fisher chose *United States v. Shannon* (1997) and *United States v. Thomas* (1998), which involved whether statutory rape should count as a "violent" act, to make her critique (2001, 475). Instead of basing his opinion on the Wisconsin state statute that applied in *Shannon,* Posner looked into other state statutes and empirical evidence (477). He rejected the view that just because sex occurred under a particular age, it should be considered violent. Instead, he focused on empirical fact. Posner ultimately decided that sex

with a thirteen-year-old was "a crime of violence" for sentencing purposes (478). He used a similar technique in *Thomas* to reach the opposite conclusion. *Thomas* involved the statutory rape of a sixteen-year-old as a violent offense, which would have added fifteen years to a burglar's sentence. Although Illinois had set the age of consent at seventeen, Posner relied on sociological and medical data supporting the increased independence and maturity of a sixteen-year-old girl to make decisions and to consent to sex.

Conclusion

Posner is one of the nation's most influential judges. His impact stems not simply from his numerous decisions but also from his genius as a scholar of unmatched brilliance, productivity, breadth, and depth and from his prodigious efforts to fulfill the role of public intellectual. Although his brilliance and influence are rarely questioned, his pragmatic approach remains quite controversial.

Ronald Kahn

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POUND, CUTHBERT WINFRED

(1864–1935)

CUTHBERT WINFRED POUND
Library of Congress

CUTHBERT POUND SERVED FOR almost thirty years on the courts of the state of New York—for ten years on the Supreme Court (the trial court in the state system)—and for just under twenty years on the New York Court of Appeals, the state's highest appellate court. His years on the Court of Appeals (1915–1934) closely coincided with the tenure on that court of Benjamin Cardozo. That was a period in which the judiciary faced repeated constitutional attacks on legislation aimed at protecting workers, tenants, and consumers against the economic dominance of employers and property owners, with the constant need to reexamine and reshape common law doctrines that were no longer suited to the needs of the twentieth century. Pound committed himself to meeting these challenges with dedication and conviction and consistently resisted the efforts of the economically powerful members of society to use the courts to preserve their power in the face of demands for change. A scholarly analysis of his judicial career concluded that he "was close to preeminence in his ability to differentiate between the interests of the privileged class to which judges belong and the interests of society, in

his prevailing impulse to protect the interests of the unprivileged" (Edgerton 1935, 45).

Judge Pound was born in June 1864 in Lockport, New York, a city that he regarded as his home throughout his life. His parents, Alexander Pound and Almina Whipple Pound, were longtime residents of the area, and his older brother, John Pound, was for many years a leading attorney in the city. Judge Pound studied history and political science at Cornell University for three terms after his graduation from high school in Lockport, leaving Cornell in 1884 to study law in his brother's law office. He was admitted to the New York bar in 1886 and practiced law with his brother until 1895, when he joined the faculty of the law school at Cornell. While in Lockport, he was city attorney from 1889 to 1891; he served in the state senate for one term in 1894–1895 but was not reelected. He was an active legislator in his brief period of service, most notably responsible for leading the successful effort in the senate to win approval of the state constitutional amendment to provide for women's suffrage, adopted by the legislature in 1895. He was appointed to the state Civil Service Commission in 1900 by Gov. Theodore Roosevelt and remained on the commission for four years, serving as its president from 1902 to 1904. He was a member of the Cornell faculty for nine years, resigning in 1904 on the death of his brother, to return to Lockport to take over his brother's practice. He remained deeply devoted to Cornell all his life, however, and he was a member of its Board of Trustees from 1913 until his death.

Pound became counsel to Gov. Frank Higgins in 1905, and Higgins appointed him in 1906 to fill a vacancy on the state Supreme Court. Pound was elected to a fourteen-year term on that court in the following year. In 1915, Gov. Charles Whitman appointed Pound to serve on the Court of Appeals as an auxiliary judge because of a backlog on the court's docket, and he was elected to a fourteen-year term on that court in 1916. He was reelected in 1930; in 1932, when Benjamin Cardozo, then chief judge, was appointed to the United States Supreme Court, Gov. Franklin Roosevelt appointed Pound to succeed Cardozo. Later in that year he was elected to that position, but he was only able to serve as chief judge for two years before reaching the mandatory retirement age of seventy in 1934. His death resulted from a cerebral hemorrhage suffered while he was speaking at a dinner in his honor in Ithaca, New York, shortly after his retirement. He died the next day, 3 February 1935.

Judge Pound's judicial approach was characterized by a refusal to be tightly bound by legal forms developed in previous centuries, particularly as these impeded the attainment of social justice, and by a readiness to accept legal change where it served to promote the public welfare. He emphatically rejected the idea that the meaning of state and federal constitutions

was frozen in time and could not be reinterpreted in later eras to accommodate the different needs of those eras and the new demands placed on government by the recognition of those needs. He expressed his philosophy forcefully in a 1923 lecture:

> The world cannot be run forever on the lore of Coke or Mansfield or Eldon. Justice, not law, is the greatest interest of man on earth and we may be sure that as a constitution is nothing but a law, emanating from the people, not imposed upon them from above, the people . . . will not hesitate to prefer a constitution of common right to a constitution of mere legalism. . . . Good government, therefore, rests on the will of the constituent sovereign people and not on the temporary written expression of such will. The constitution is the slave, not the master of its creator. (Pound 1923, 410–411)

Perhaps no judicial opinion he wrote in his career more clearly reflected his beliefs or received greater recognition than one he wrote while still on the state Supreme Court, prior to his elevation to the Court of Appeals. In 1910, he became the first U.S. judge to uphold the constitutionality of a workmen's compensation statute, in this case a New York law modeled after the English Workmen's Compensation Act of 1897, that overrode the common law rules under which an employee could not recover from an employer for job-related injuries unless he could prove negligence or other fault on the part of the employer. For Pound, the enactment raised no serious constitutional questions. The common law, he wrote, was always subject to alteration or abrogation by the legislature, which had here done nothing more remarkable than shift liability for injuries resulting from the hazards of certain types of employment from the employee to the employer. And placing liability for damages on the employer when he was not at fault did not constitute a deprivation of property without due process of law, for due process did not withdraw from the legislature "power to pass all manner of necessary and wholesome acts for the protection and well being of the public, although such acts may interfere with personal liberty and the right to do what one will with his own" (*Ives v. South Buffalo Railway Co.* 1910, 923–924).

Judge Pound's decision was promptly reversed by the New York Court of Appeals, which held that the due process clause of the state constitution, if not also the U.S. Constitution, prohibited the legislature from altering the common law to place liability for job-related accidents on an employer who was free from fault (*Ives v. South Buffalo Railway Co.* 1911). But, as Pound might have predicted, the Court of Appeals did not have the last word either. In his 1923 lecture, he observed: "When the courts push limitations on legislative power to a 'dryly logical extreme' unpopular decisions are not

infrequently followed either by constitutional amendments or by decisions more in keeping with the spirit of the times" (Pound 1923, 410). So it was in this case. The New York constitution was amended two years after the ruling of the Court of Appeals to empower the state legislature to enact workmen's compensation laws. With regard to the U.S. Constitution, the Supreme Court, in a series of decisions culminating in the *Arizona Employers' Liability Cases* in 1919, held, over the vigorous objections of a conservative minority, that such laws did not violate the due process or equal protection clauses of the Fourteenth Amendment, thus providing support for Pound's judgment that "that which the people deem just and necessary they will have. . . . Historical backgrounds, constitutional precedent and the traditions of the fathers will be appealed to in vain as against a determined desire for an extension of the powers of government" (410).

Upon his elevation to the New York Court of Appeals, Pound continued to decline to impose constitutional barriers to economic regulations "which the people deem just and necessary," even though these might affect the traditional property rights of employers and landlords. His nineteen years of service on that court covered a period when judges commonly saw themselves as indispensable protectors of vested property rights and actively employed constitutional doctrines such as substantive due process to frustrate legislative efforts to ameliorate some of the social injustice that could result from the unfettered exercise of economic power. But Pound was not one of their number. And, somewhat surprisingly, given the conservative inclinations of the judiciary in those years, he frequently found his position affirmed by a narrow majority of the United States Supreme Court, as had been the case with regard to workmen's compensation. A well-known instance was his majority opinion upholding the New York emergency housing laws of 1920, in which the legislature sought to deal with the housing crisis in the major cities caused by the migration of population in World War I and the cessation of housing construction during the war. The law temporarily prevented landlords in those cities from dispossessing tenants whose leases had expired and who were willing to pay a fair and reasonable rent, rather than the exorbitant rents that the landlords, under the existing conditions, were able to demand. In response to the argument that these restrictions deprived landlords of their property without due process of law, Pound declared: "Either the rights of property and contract must when necessary yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare" (*People ex rel. Durham Realty Corp. v. LaFetra* 1921, 443). A month after this decision, the United States Supreme Court, by a vote of five to four, upheld

the New York housing laws on appeal in a separate case brought in federal district court (*Marcus Brown Holding Co. v. Feldman* 1921).

Another instance was a famous case in the early New Deal period. In 1933, the New York legislature, faced with a crisis in the dairy industry caused by the inability of milk producers to obtain a price for their product equal to the cost of its production, passed a series of laws to regulate the sale and distribution of milk, including setting a minimum price for the retail sale of milk to consumers. A due process challenge to the laws had precedent on its side because the United States Supreme Court, in a series of cases in the 1920s, had held that price-control regulations were violative of due process except with regard to "businesses affected with a public interest," a category in which the dairy industry did not appear to fall. Judge Pound, speaking for all but one of the participating members of his court, was undeterred. He had no doubt that the legislature's authority included the power to control prices in order to avert the destruction of an industry vital to the state's economy or that "[t]he policy of non-interference with individual freedom must at times give way to the policy of compulsion for the general welfare" (*People v. Nebbia* 1933, 272). The decision to uphold the law was affirmed, five to four, by the United States Supreme Court, which held that "[t]he phrase 'affected with a public interest' can . . . mean no more than that an industry, for adequate reason, is subject to control for the public good" (*Nebbia v. New York* 1934, 536).

Judge Pound's willingness to support the political branches in their efforts to attain their social goals did not, however, extend to legislative efforts to abridge civil liberties, particularly the right of political dissidents to freedom of speech and assembly. In one case, a city ordinance prohibited meetings or assemblages on the public streets without a permit from the mayor, who denied an application for a permit for a Socialist meeting, stating that he would grant no permits to Socialists. The Court of Appeals sustained a denial of habeas corpus relief, and Pound alone dissented. Regardless of the constitutionality of the ordinance on its face, he contended, application of the law to silence groups whose views were disapproved by the mayor was "unauthorized, arbitrary and oppressive" and thus a violation of the constitutional guarantees of free speech and assembly (*People ex rel. Doyle v. Atwell* 1921, 107–108). Although Pound conceded the constitutionality of the ordinance on its face, the United States Supreme Court, when it became receptive to free speech claims in the following decade, was to hold void on their face laws that granted standardless discretion to public officials to issue or deny permits for meetings or for the distribution of literature, on the ground that such laws invited discriminatory application (*Hague v. C.I.O.* 1939).

In the historic case of *Gitlow v. New York*, the defendants had distributed

a manifesto advocating mass action in support of revolutionary socialism and were convicted under the New York Criminal Anarchy law, which prohibited advocacy of overthrow of organized government by force or violence. The Court of Appeals in 1922 sustained the convictions. Because the United States Supreme Court had only recently upheld the constitutionality of convictions under the federal Espionage and Sedition Acts for the distribution of revolutionary literature (*Abrams v. United States* 1919), to dissent in the *Gitlow* case, as did Judge Pound, joined by Judge Cardozo, required an approach not based on constitutional law. Therefore, Pound instead argued that the New York law only forbade the advocacy of anarchy, that is, the absence of government, and, since revolutionary socialism called for a totalitarian dictatorship of the proletariat, its advocacy was not a violation of the statute (*People v. Gitlow* 1922, 154–158). The majority of the Court of Appeals refused to read the law so narrowly, and a majority of the United States Supreme Court upheld its constitutionality, with Justices Oliver Wendell Holmes Jr. and Louis Brandeis dissenting (*Gitlow v. New York* 1925).

Shortly after he joined the Court of Appeals, Judge Pound published a brief law review article questioning whether what were regarded in the law as "voluntary" confessions were in fact voluntary. At the time, the law in New York was that confessions were considered voluntary, and thus admissible as evidence, if they had not been induced by threats or by the assurance that one would not be prosecuted. But Pound saw that that statutory rule did not provide an adequate measure of the voluntariness of a confession. Suppose, he wrote, that an accused who is illegally in custody and has neither been arraigned nor allowed access to counsel is questioned for long hours without food or rest, and finally confesses. For Pound, the fact that he had neither been threatened nor given assurance that he would not be prosecuted did not establish that the confession was voluntary. He was likely to have confessed simply "because he hoped to end the inquisition. . . . [A]nd whether the statement be true or false, our sense of justice revolts at a conviction based [solely] on a finding by the jury that such a statement is voluntary" (Pound 1916, 80). If there were independent evidence to corroborate the statements in the confession or to prove guilt, Pound would not reverse a conviction on the ground that a confession had been illegally obtained (*People v. Trybus* 1916). But where there was indisputable evidence that a confession had been obtained by violence (although it was rare to find indisputable evidence because police and prosecutors routinely concocted explanations to cover their wrongdoing regardless of the strength of the evidence of it), he would hold it inadmissible as a matter of law and not allow the question of its voluntariness to be given to the jury. In 1930, he wrote for a unanimous court ordering a new trial where a murder convic-

tion was based on a confession obtained after a lengthy interrogation—occurring after the district attorney had left the suspect "in the hands of three police officers"—from which the suspect emerged with severe bruises and a blackened eye, as corroborated by the testimony of an examining physician and by a nude photograph of him that was ordered taken by a judge over the objection of the district attorney. Pound angrily declared that such "[l]awless methods of law enforcement should not be countenanced by our courts even though they may seem expedient to the authorities in order to apprehend the guilty" (*People* v. *Barbato* 1930, 178). But an effective judicial corrective for these practices had to await the Warren Court.

During the years in which Pound served on the bench, courts had to contend with common law rules that had developed in other eras and that had become inappropriate for the new economic and social realities of the modern industrial age. Pound was considerably more willing to abandon these outmoded rules than his colleagues, who were generally reluctant to do so because departing from existing rules went against the normal desire of judges to maintain stability in the law. Therefore, he frequently had difficulty in persuading the court to join him in setting old rules aside. In one striking instance, Pound expressed intense exasperation when the Court of Appeals, on the basis of the common law fiction that a husband and wife were a legal unity, held that a wife could not bring a tort action against her husband. Pound responded: "When time makes ancient rules of personal rights and remedies uncouth, illogical and productive of harm, they need not be inexorably insisted upon" (*Allen* v. *Allen* 1927, 575).

Karl Llewellyn, in his exhaustive study of the ways in which appellate courts perform their function in a common law system, ranked Pound among the finest of the common law judges and described him as "a judge with a consistent record of craftsmanship, forthrightness, and earthy common sense" (1960, 106). The case Llewellyn chose as an example of these qualities was another in which Pound dissented when the Court of Appeals insisted on clinging to obsolete rules. It involved a suit against a municipality by a householder whose family had contracted typhoid fever from contaminated water piped into his home by the city. The city demurred, pointing out that it had never expressly warranted that its water was pure and wholesome, and the majority of the court sustained the demurrer, noting that, under the common law, "a private water company or a municipality is not an insurer nor liable as a guarantor of the quality of the water it furnishes to its customers." Pound sharply and succinctly rejected that conclusion. "I fail to comprehend," he argued, "how we can escape the application of the doctrine of implied warranty of wholesomeness," since the householder should be entitled to rely on the purity of the water delivered by the city (*Canavan* v. *City of Mechanicville* 1920, 476, 481).

But there were areas in which Pound had greater success. Early in his tenure on the Court of Appeals, he wrote a majority opinion (only one judge dissenting) that narrowed the doctrine of contributory negligence, under which an employer could escape liability for a work-related injury to an employee if the employee was also at fault. Pound held that it was the employer's duty "to exercise reasonable care for the safety of the employee" and that, where "the employer's negligence causes the dangerous conditions," he can be held liable even if he gave generalized warnings of the existence of danger, unless the employee was guilty of gross negligence (*Larkin* v. *New York Telephone Co.* 1917, 32). And he wrote for a unanimous court holding that statutes abrogating the "fellow-servant" rule and providing for the liability of an employer even where the injury to an employee was caused by the negligence of a co-worker also applied where the injury was caused by the willful misconduct, as opposed to the negligence, of the co-worker, if the wrongful act was "intended and believed to be for the interest of the [employer]" (*Encarnacion* v. *Jamison* 1929, 223–224).

Judging was Cuthbert Pound's life, and when he was obliged to retire from the bench on 31 December 1934, having reached the mandatory retirement age, he stepped down only with great reluctance, remarking in the "Concerning the Alumni" section of the *Cornell Alumni News* that "I would be guilty of the grossest hypocrisy if I said that this was anything more than the saddest moment of my life. The play is done, the curtain drops, and I say farewell with the deepest regret" (17 January 1935, 10). Ironically, he was to die just over one month later.

Dean Alfange Jr.

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REHNQUIST, WILLIAM H.

(1924–)

William H. Rehnquist
Dane Penland, Smithsonian Institution, Collection of the Supreme Court of the United States

Born on 1 October 1924 in Milwaukee, Wisconsin, William Hubbs Rehnquist was the son of a first-generation Swedish American, William B. Rehnquist. Although his father never attended college, his mother Margery held a degree from the University of Wisconsin and was fluent in five foreign languages (Jenkins 1985, 31). Graduating from high school in 1943, Rehnquist won a scholarship to Kenyon College in Gambier, Ohio. After only one semester, however, he chose to leave school and join the Army Air Corps as a weather observer. After he returned from Africa following the war, he enrolled in Stanford University and graduated Phi Beta Kappa with a degree in political science in 1948 (U.S. Senate Committee on the Judiciary 1971, 2, 7, 12, 56–57; Shapiro 1978, 109; Martz, McDaniel, and Malone 1986, 20; Lord and Work 1986, 18). Rehnquist then pursued and received an M.A. degree in political science from Stanford and a second M.A. in government from Harvard.

Rehnquist decided to return to Stanford to enter law school, where he graduated first in his class in 1952 (U.S. Senate Committee on the Judiciary 1971, 12; Martz, McDaniel, and Malone 1986, 20; Lord and Work 1986, 18). Sandra Day O'Connor, appointed to the Supreme Court in

1981, sometimes dated Rehnquist at Stanford. In reflecting upon their law school days, O'Connor noted, "He quickly rose to the top of the class and, frankly, was head and shoulders above all the rest of us in terms of sheer legal talent and ability" (U.S. Senate Committee on the Judiciary 1971, 12). During the 1971 Senate confirmation hearings on the appointment of Rehnquist to the Supreme Court, a former law school professor recalled, "As a student he was nothing short of brilliant, dogged in his determination to achieve excellence and persistent in his expectation of excellence on the other side of the podium" (John B. Hurlbut, letter to Sen. James O. Eastland, 28 October 1971, in U.S. Senate Committee on the Judiciary 1971, 8). Following his graduation from Stanford Law School, Rehnquist served an eighteen-month clerkship term under Supreme Court justice Robert H. Jackson. In 1953, Rehnquist moved to Phoenix, Arizona, where he was associated with the firm of Evans, Kitchel and Jenckes. He won widespread respect among his colleagues for his integrity, diligence, unusual intellectual abilities, and professional competence. One professional colleague in 1971 remarked, "He is an outstanding lawyer, completely thorough, scholarly, perceptive, articulate, and possessed of the utmost integrity as well as a keen wit" (Jarrel F. Kaplan, letter to Sen. Edward W. Brooke, 27 October 1971, in U.S. Senate Committee on the Judiciary 1971, 8).

In February 1969, Pres. Richard Nixon appointed Rehnquist as assistant attorney general in the Office of Legal Counsel, U.S. Department of Justice. He was responsible for the resolution of most of the legal questions that did not relate to litigation. In this position, he became highly respected among his colleagues. In 1971, President Nixon nominated Rehnquist, then age forty-seven, as an associate justice of the Supreme Court (*Report of the Standing Committee* 1971, 132; Shapiro 1978, 110).

From Justice to Chief Justice

Despite his outstanding legal record and considerable reputation, Rehnquist's nomination to the Supreme Court did not receive uniform approbation. Those who questioned his nomination were predominantly civil libertarians concerned about his past support of various conservative causes. In describing his judicial philosophy, Rehnquist alluded to the importance of construing the Constitution in light of the framers' original intent, determined from available sources (see, for example, Shapiro 1978, 19, 55, 81–82, 138, and 167). Judicial conservatism has remained a guiding principle for Rehnquist ever since.

Although Rehnquist is widely recognized as one of the brightest and most efficient justices on the Court, his influence on the Court took time to develop. In 1986, University of Virginia law professor A. E. Dick Howard

observed: "No one on the Court writes with more style, force or assurance. It is hard to match his agility in shaping a record and marshaling arguments to reach a conclusion" (Lord and Work 1986, 18). For a decade after his coming onto the Court, however, the Court's majority seemed unsympathetic to Rehnquist's entreaties from the right. Rehnquist seemed perfectly comfortable in disagreeing with many of the Court's decisions. Gradually, however, Rehnquist's keen intellect and insights began to influence the Court. By the 1980s, a more conservative Court had begun to emerge with Justices Byron R. White, Lewis F. Powell Jr., Sandra Day O'Connor, and Chief Justice Warren E. Burger often voting with Rehnquist. By 1982, long before the retirement of Chief Justice Burger, Yale law professor Owen Fiss was calling Rehnquist the "leader" of the Court (Lord and Work 1986, 18; Fiss and Krauthammer 1982, 14). Following Burger's retirement in June 1986, Pres. Ronald Reagan nominated Rehnquist as the sixteenth chief justice of the Supreme Court. After numerous acrimonious hearings, the U.S. Senate confirmed his nomination on 17 September 1986.

Rehnquist is credited with reducing the size of the Court's docket, deciding only seventy-five cases in 1995, less than half of the number in the 1984 term and the lowest number since the 1953 term. Some have criticized Rehnquist's reduction of the docket as enabling him to gain greater control of the Court. Because he limited the number of civil rights cases and increased cases that reopen the issues of federalism, Rehnquist is seen as shifting the Court from a somewhat liberal agenda to a more conservative one (Davis 1999, 146). Nevertheless, Rehnquist is generally appraised as efficient and effective in his leadership of the Court. According to his Court colleagues, his relaxed but professional style brings calm and stability to a body of jurists dealing with many of the most emotion-laden issues of the day. He also received high marks for fairness in presiding over the 1998 U.S. Senate impeachment proceedings of Pres. William Clinton.

Rehnquist's Judicial Philosophy

Among the commentators who have closely scrutinized his written opinions and voting patterns, considerable agreement emerges concerning certain distinctive doctrines that guide Rehnquist in his decisionmaking. A selective examination of three of these key doctrines—strict constructionism, judicial deference, and an advocacy of states' rights—will serve to depict Rehnquist in a wider judicial context.

Strict Constructionism

A common way of analyzing judges relates to methods of construing the Constitution. Judges differ not only as to the meaning of constitutional pro-

visions but also as to the interpretive approaches they employ. There are essentially two models of constitutional interpretation: the strict constructionist and the evolutionist.

The evolutionist model permits changes in the scope of constitutional provisions as contemporary thinking and social conditions shed new light on constitutionally expressed norms. Under the evolutionist interpretation, what is constitutional in one era may become unconstitutional in the next, and vice versa (Kleven 1983, 3). Evolutionism departs, then, in varying degrees, from the specific intent of the framers, although it may not be totally fair to suggest, as Rehnquist has, that evolutionist decisions are in no way "tied to the language of the Constitution" (Rehnquist 1976, 698).

The model of strict constructionism holds that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution" (Ely 1980, 1). In modern parlance, this model is referred to as "interpretivism." Although the name is new, the theory is not. Its roots go back at least to Supreme Court justice Joseph Story (1811–1845).

Professor Ronald Dworkin has suggested that the strict constructionist model is premised on two positive tenets: that law is objectively determinable and that law is logically separate from moral values that are arbitrary or subjective (1977, 14–22). Dworkin's description is succinct and insightful and can readily be discovered in Rehnquist's writings. Judges who depart from the constitutional text cease being judges and become, in Rehnquist's estimation,

> [a] small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country. . . .
>
> Beyond the Constitution and the laws in our society, there simply is no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments. (Rehnquist 1976, 693, 704)

In other words, a judge's function is to adhere to the text and abstain from making moral judgments. Such judgments are, according to Rehnquist, better left to the legislator who, even though no wiser than the judge, is at least more democratically accountable in a majoritarian-based republic. Such was the rationale for Rehnquist's dissent in *Roe v. Wade,* 410 U.S. 113 (1973). The Court majority enunciated a "right of privacy" arising out of various constitutional amendments that would be applied to the states through the Fourteenth Amendment, but Rehnquist objected on the grounds that such a right "was apparently completely unknown to the drafters of the Amendment . . . the drafters did not intend to have the Fourteenth Amendment

withdraw from the States the power to legislate with respect to this matter" (*Roe* 1973, 198, 200).

Judicial Deference

Deference reflects a judge's view of the role of the courts in relation to other branches of government. At one extreme, a judge could take the perspective that a court should decide anew the wisdom of every governmental action coming before it. By contrast, a judge could go to the opposite extreme and totally defer to all decisions made by other branches of government. That no judge does this in practice demonstrates that all judges to some degree are activists. If, for example, the popular branches of government exceed the limits of their constitutional powers, judges must become, in Rehnquist's words, "the keepers of the covenant" (Rehnquist 1976, 698). In placing proper limitations upon the other branches of government in keeping with the Constitution, the judge becomes (appropriately, by all accounts) an activist.

Rehnquist's dissent in *Furman v. Georgia* (408 U.S. 238 [1972]) illustrates his adherence to the principle of judicial deference to decisions of state governments. Reacting to the Court majority's decision to invalidate the Georgia death penalty as cruel and unusual punishment, Rehnquist protested: "The Court's judgments today strike down a penalty that our nation's legislators have thought necessary since our country was founded" (*Furman* 1972, 465). Although admitting that "overreaching the legislative and executive branches may result in the sacrifice of individual protections that the Constitution was designed to secure against action of the State," he insisted that the "judicial overreaching" evident in the decision sacrificed "the equally important right of the people to govern themselves" (*Furman* 1972, 470).

The same deference theme was expressed by Rehnquist in his dissent from a five-to-four decision in *Trimble v. Gordon* (430 U.S. 762 [1977]), which invalidated an Illinois law prohibiting interstate inheritance by illegitimate children from their fathers. Rehnquist reasoned that policy decisions are to be made by the people through their elected representatives, not by judges. He added that the "Constitutional Convention in 1787 rejected the idea that members of the federal judiciary should sit on a council of revision and veto laws which it considered unwise" and that the "Civil War Amendments did nothing to alter that decision" (*Trimble* 1977, 778).

Federalism

On the question of the balance of power between the federal and state governments, Rehnquist is a strong proponent of state sovereignty and the limitation of congressional power in regard to states' rights. In *Trimble v.*

Gordon (430 U.S. 762 [1977]), Rehnquist argued that the framers presumed that all power resided in the people of the states and was only delegated in limited spheres to the federal government. All authority that was not explicitly delegated by the Constitution was reserved for the states and citizens of the states (*Trimble* 1977, 777–778).

Rehnquist might be expected to ground his principles of federalism in the text of the Constitution or in established precedent. One might expect a search of historical data for answers to questions about the relationship between the states and the federal governments. To the contrary, Rehnquist's opinions are often marked by a structural mode of analysis, not unlike the structurism used by those who view the Constitution as an evolving document. His departure from historical interpretation is particularly evident in *Usery* (Davis 1989, 150).

Perhaps the centerpiece of Rehnquist's theory of federalism is his majority opinion in *National League of Cities v. Usery* (426 U.S. 833 [1976]), an opinion later overruled in *Garcia v. San Antonio Metropolitan Transit Authority,* 105 S. Ct. 1005 (1985) but still viewed by some scholars as the centerpiece of Rehnquist's federalism (Powell 1982, 1325). In *Usery,* the Court held that Congress could not require state or local governments to pay the minimum wages applicable to individuals. Rehnquist wrote that the structure of the Constitution withheld from Congress any power to regulate the operating of "states as states" (*Usery* 1976, 845). *Usery* reintroduced into the Court's jurisprudence the long-absent doctrine of state sovereignty and discredited the conventional wisdom that there was virtually no enforceable judicial limit on congressional power. Although the *Usery* case has not been followed in later Supreme Court cases, it remains central to Rehnquist's constitutional jurisprudence.

In order to preserve the "original understanding at Philadelphia," Rehnquist minimizes the impact of the Civil War amendments. Of particular note is his systematic rejection of the Court's doctrine of selective incorporation first adopted in *Gitlow v. New York* (268 U.S. 652 [1925]). Rehnquist referred to the doctrine as "the mysterious process of transmogrification by which [a guarantee of the Bill of Rights] was held to be 'incorporated' and made applicable to the States by the Fourteenth Amendment" (*Carter v. Kentucky* 1981, 309). He further labeled incorporation as a "judicial building block" used by the Court to construct constitutional doctrine with an "increasingly remote" and even "incomprehensible" connection to the Constitution text (*Snead v. Stringer* [102 S. Ct. 536 (1981)]).

Rehnquist's continuing defense of a federalist position can be seen in several recent Court decisions. In *U.S. Term Limits, Inc. v. Thornton,* Justice Clarence Thomas, joined by Justices Antonin Scalia, O'Connor, and Rehnquist, wrote the dissenting opinion, in which he argued that "nothing

in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates. . . . The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people" (*U.S. Term Limits* 1995, 845). In *New York v. United States*, 505 U.S. 144 (1992), the Rehnquist Court held that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program" (*New York* 1992, 188).

With regard to the First Amendment, Rehnquist has been willing to approve of its incorporation into the Fourteenth Amendment only in a limited sense. In *Buckley v. Valeo*, Rehnquist stated:

> I am of the opinion that not all of the strictures which the First Amendment imposes upon Congress are carried over against the States by the Fourteenth Amendment, but rather that it is only the "general principle" of free speech, that the latter incorporates.
>
> Given this view, cases which deal with state restrictions on First Amendment freedoms are not fungible with those which deal with restrictions imposed by the Federal Government. . . . (*Buckley v. Valeo* [424 U.S. 291 (1976)])

In a 2000 case, Rehnquist again adopted a federalist position in negotiating the space between free speech rights and state police powers, thus emphasizing the limited application of the Fourteenth Amendment. In *Hill v. Colorado*, the Court ruled by a six-to-three majority to limit the free speech in certain areas surrounding health clinics and the people attempting to enter such clinics. In this case, he joined, not the usual Thomas and Scalia, but rather Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, Stephen G. Breyer, and Sandra Day O'Connor (George).

One of the most significant Rehnquist-era developments is the Court's extensive alteration of established standards for interpretation of the First Amendment's religion clauses. The result has been a movement of the Court from a strong separationist view toward a more conservative position that carves out significantly more space in the public sphere for governmental accommodation of religion. It is probably a mistake, however, to view Rehnquist as essentially "proreligion." Rather, this development more likely reflects his view that governments at all levels should be entitled to formulate their own policies on religion (see D. Davis 1991).

Rehnquist's use of these three principles—strict constructionism, judicial deference, and federalism—serves his understanding that the constitutional framers intended to disfavor federal interference with state sovereignty, a principal justification for a number of commentators to characterize Rehnquist as a judicial activist (Powell 1982; Fiss and Krauthammer, 1982; Boles

Sandra Day O'Connor (1930–)

As of the beginning of 2003, 113 individuals had served on the United States Supreme Court. Of these, only two have been women. Republican president Ronald Reagan appointed the first woman, Sandra Day O'Connor, in 1981 (the 106th justice to serve on the Court), and Democratic president Bill Clinton appointed the second woman, Ruth Bader Ginsburg (the 112th justice) in 1993.

Reagan's appointee, Sandra Day O'Connor, was born in El Paso, Texas, in 1930 and spent most of her early life with her parents and younger siblings on a large Arizona ranch and, during the school year, with a grandmother who lived in El Paso. After graduating from high school at the age of sixteen, Day earned her undergraduate and law degrees at Stanford in five years, serving on the *Stanford Law Review* and graduating third in her law school class (future chief justice William Rehnquist was first). Declining an offer as a legal secretary at a time when women were not always welcomed into the legal profession, O'Connor became a deputy county attorney in San Mateo, California. She later joined her husband, John O'Connor, in an overseas military assignment with the Judge Advocate General's Corps in Germany, where she worked as a civilian lawyer for the Quartermaster Corps. After the couple returned to Arizona, O'Connor temporarily put full-time employment on hold as she raised three sons and participated in a variety of volunteer jobs and political activities.

In 1965, O'Connor served as an Arizona assistant attorney general, and she was appointed in 1969 to the Arizona Senate, to which she was twice reelected. In 1972 she became the first woman ever to be elected as the majority leader of such a body. Two years later, O'Connor won election to the

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1987). Rehnquist claims that history demonstrates the congruence of his states' rights theory with the intent of the framers and excludes alternative interpretations (*Trimble v. Gordon* 1977, 777). State sovereignty and limited federal government are authentic expressions of a central strand of U.S. constitutional philosophy. As noted by legal scholar Jefferson Powell, in the Jeffersonian tradition, the transcendent goal of freedom is unattainable unless the national government is kept as small and unobtrusive as possible (1982, 1364). "This vision of limited government has haunted our history from its beginning," said Powell, "and is reflected frequently . . . in the opinions of Justice Rehnquist" (1364). Even the patron saint of strong national government Abraham Lincoln found it necessary to invoke Jefferson and his ennobled ideals, stating that "the principles of Jefferson are the definitions and axioms of a free society" (Abraham Lincoln, letter to Committee of Boston Republicans, 16 April 1859, quoted in Powell 1982, 1364). Rehnquist's constitutional theory taps into this almost sanctified tra-

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Maricopa County Superior Court, and in 1979, the Arizona governor appointed O'-Connor to the Arizona Court of Appeals. In 1981 President Reagan fulfilled a campaign promise to find a qualified woman for the job by appointing her to the United States Supreme Court to replace Potter Stewart, who was retiring from that body. During her confirmation hearings, O'Connor responded to how she would like to be remembered by saying that she would like for her tombstone to read "Here lies a good judge" (Cushman 1995, 509). She was confirmed by a ninety-nine–to–zero vote; although her record of prior judicial service was relatively slender, she had served in all three branches of state government and was the only member of the Court to have held elective office.

On the Supreme Court, O'Connor has affirmed her prior reputation as a moderate conservative. When Justice Lewis Powell was on the Court, the two often voted together; today, she often votes with Justice Anthony Kennedy. O'Connor's votes have been particularly important in cases involving affirmative action, in cases involving states' rights, and in matters of church and state. In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), Justice O'Connor joined Justice Anthony Kennedy in a concurring opinion authored by Justice David Souter arguing that the Court's controversial decision legalizing most abortions in *Roe v. Wade* (1973) should not be overturned.

Conservative in temperament and in judicial philosophy, O'Connor has nonetheless proved to be a trailblazer for other American women, and she is widely admired as a judicial role model.

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dition in U.S. intellectual history, says Powell, and it is that which gives his federalism such appeal.

Derek H. Davis

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RIVES, RICHARD

(1895–1982)

Richard Rives
Library of Congress

Judge Richard Rives served during a pivotal period of U.S. judicial history. His appointment to the Fifth Circuit Court of Appeals in New Orleans dropped him into the maelstrom that was the effort by the federal judiciary to integrate southern society. Rives joined his colleagues in enforcing the rulings of the Warren Court and suffered under the general opprobrium of southern politicians and the public.

Richard Rives was born on 15 January 1895 in Montgomery, Alabama. Rives avoided most of the formal education required of modern lawyers. After attending Tulane University in 1913, he studied under a local lawyer and passed the bar exam at the ripe age of nineteen. He spent several years in the courtroom as a lawyer and served as the president of the Montgomery and the Alabama Bar Associations. He befriended Hugo Black, helping in one of the senator's election campaigns. This connection made him a prominent figure in the national Democratic Party and within judicial circles in Washington once Black was appointed to the United States Supreme Court. Rives even argued a case before the justice, his only before the Supreme Court.

Rives was also involved in the many political battles of the Alabama legislature during the 1940s. Although he was not a legislator himself, he testi-

fied frequently before committees in favor of or in opposition to certain legislation. During the 1940s he worked in the campaigns of various Alabama gubernatorial candidates. He also represented a local county government in a voter discrimination case. During the early days of the Truman administration he was mentioned as a possible appointee to the Fifth Circuit Court of Appeals although he had no judicial experience at the state or federal level. The death of his son delayed that appointment, but in May 1951 he was confirmed and took his seat as a federal appellate judge.

At the time of Rives's arrival, the Fifth Circuit was one of the largest appeals courts in terms of geography. It stretched across the Deep South and included Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas. Cases involving federal law or the national Constitution that originated in those states could be appealed to the Fifth Circuit court located in New Orleans.

As with other federal appeals courts, the Fifth Circuit heard most of its cases in three-judge panels, with different groupings of judges for each case. This tradition required Rives to work with different colleagues, most of them southerners, some supportive of integration in the South, others not. But during his nearly thirty years as a federal judge, Rives participated in some of the most important cases, making decisions that either broke new ground in the law or enforced the decisions already handed down by the United States Supreme Court.

Rives's early years on the court were quiet, but as the federal courts became more involved in the civil rights movement and southern judges were given the job of enforcing new integration decisions handed down by the Supreme Court, Rives found himself involved in increasing controversy. One of the most important of those United States Supreme Court opinions was in *Brown v. Board of Education* (1954), which struck down the segregation of public schools and the separate but equal doctrine. The result of this decision was a series of political acts that directly challenged the legal structure in the South and led to court cases eventually appealed to the Fifth Circuit.

One of those cases was *Browder v. Gayle* (1956). Rives sat as one of three judges hearing an appeal of a lower court decision. In *Browder,* Alabama laws requiring segregation in bus travel in the state were challenged as unconstitutional. A bus boycott in Montgomery, Alabama, challenged the same ordinance and made the case a legal and political issue of the first order. Browder's attorneys argued before Rives and two other judges that the *Brown* decision had struck down all segregation statutes as unconstitutional under the Fourteenth Amendment.

The court split in the decision. Rives wrote for himself and another judge. In his decision he stated that the separate but equal doctrine that

was used to segregate public facilities had been struck down in *Brown* and should also be struck down for the use of buses. In *Browder,* Rives moved beyond the Supreme Court decision, taking it to its logical end and using judicial power to strike down a law.

The *Browder* decision drew different reactions from white and black leaders. The bus boycotts broadened in Alabama as boycott participants were emboldened by the support given them by the court decision, whereas white politicians in the state and throughout the South denounced Rives and his colleagues. After *Browder,* Rives would find that many of his old friendships and political connections ceased, and he was shunned in his hometown.

Rives's decisions showed that he was willing to use his opinions to carry out Supreme Court decisions. This boldness would be necessary in another series of cases involving the controversy over the integration of public schools and implementation of the *Brown* decision.

Beginning in the late 1950s, formerly segregated school districts were required to integrate. A flurry of court cases followed, with lower district court decisions being appealed to the Fifth Circuit by the losing side. One such set of appeals originated in the New Orleans school district. The series of court arguments and rulings in this area earned Rives a reputation as a strict enforcer of integration.

The New Orleans School District had been ordered to integrate by a federal judge but had refused. The school board was backed by a series of special laws passed by the Louisiana legislature delaying integration, declaring school holidays, and threatening to shut down the entire school district if integration were attempted. Lower courts struck the laws down, and the state appealed. Rives heard these appeals along with Judge Herbert Christenson and Judge Skelly Wright.

The hearings before the three judges had a circus atmosphere to them. The Louisiana attorney general denounced the judges in open court and stomped from the room. He was cited for contempt. After the hearing the three judges unanimously struck down several state laws they saw as undermining their order to desegregate. The ruling placed integration back on the fast track. At the same time the judges assumed almost total power over the New Orleans school system. They issued injunctions against every high state official in Louisiana, ranging from the governor to all district attorneys in the state to mayors and sheriffs, prohibiting all of them from any involvement in the New Orleans school district. This blanket prohibition was unprecedented and drew action from the one institution not covered by the judges, the Louisiana legislature.

Several special legislative sessions followed with passage of laws allowing the state to take control of the New Orleans school district. The legislators

also created a school holiday for the first day partly integrated schools were to open. Judge Rives and his two colleagues reacted immediately, striking down all of the legislators' works in the strongest possible language. Rives entered the fray for the first time by writing the court's opinion and accusing the Louisiana legislature of using the old secessionist doctrine of nullification. The lawmakers, according to Rives, had attempted to use state law to override the Constitution as interpreted by the Fifth Circuit.

The result of this was a stiffening of the opposition and a political furor that did little to enhance the reputation of the Fifth Circuit, the state legislature, or the effort to integrate southern schools. Rives silently agreed to Wright's opinions but in that silence he showed his support for strong judicial efforts to integrate schools. It was only with the intervention of the federal government that the standoff between New Orleans and the Fifth Circuit was settled.

Efforts to integrate state universities in the South also produced legal controversy. The best known of these was the attempt by James Meredith to enroll as the first black student at the University of Mississippi. The governor of Mississippi, Ross Barnett, refused to allow the admission and was found in contempt. The order was appealed to the Fifth Circuit. Barnett demanded a jury trial in his contempt hearing, an issue that complicated the case.

The judges of the Fifth Circuit sat *en banc* for the case, meaning all of the judges of the court, rather than simply a panel of five, heard oral arguments and wrote a decision. Rives participated in the hearing and decision, questioning the constitutional reasoning used by the governor in refusing to follow the judiciary's decisions. The court split on whether Barnett was to receive a jury trial for his contempt hearing. Rives joined three colleagues in denying that right while four other justices upheld Barnett's constitutional right to have a jury decide his case.

Rives also sat in a case in which a three-judge panel of the Fifth Circuit overruled a federal judge in Savannah, Georgia, who refused to allow integration to occur in the Savannah school district. That judge, Frank Scarlett, refused to enforce the *Brown* decision and struck down repeated attempts by the Savannah district to integrate. His order was overturned by Rives.

Rives's work on the Fifth Circuit was the product of efforts of several of his colleagues, many of whom shared his belief in using judicial power to order public officials to do what they saw as their constitutional duty. During the 1950s, the South was solidly Democratic, but several judges of the Fifth Circuit were Republicans who sought to open the political processes in the region and make the South competitive for the Republican Party. Three of the judges, Elbert Tuttle, John Minor Wisdom, and John Brown, were Re-

publicans who had supported Dwight Eisenhower for president. Tuttle was from Georgia, Wisdom from Louisiana, and Brown from Texas. Each of the three worked to create pro-Eisenhower delegations to attend the 1952 Republican convention. These delegations helped Eisenhower earn the nomination, then go on to win the presidency. The three men's efforts were not forgotten, and as openings occurred on the Fifth Circuit, they earned appointments to the court.

The three Republicans joined the Democratic Rives to form "the Four." This name was given the group of judges who voted consistently to require integration of the South. At the same time they refused to allow federal judges to delay reforms of voting rights and equal education.

Yet Rives did not have the same close relationship and level of agreement with all of his Fifth Circuit colleagues. Some of the Democratic judges on the court took issue with Rives's views on judicial power, states' rights, and integration. Judge Benjamin Cameron wrote several opinions castigating Rives and his opinions. Rives responded in private letters to Cameron and his colleagues. Although the immediate controversy died down after a short time, there remained a residue of tension between the two, particularly over legal issues.

One area of disagreement among all of the judges was the pace and method of desegregating public schools in the South. The Republican judges, including Judges Tuttle and Wisdom, supported broad-based policies; Rives approved a slower approach. In his rulings he allowed local school districts in Alabama to make reassignments of individual students to achieve a level of integration even if it was not complete. Rives's views were different than the policies created in the 1970s in which judges had large groups of students transported by buses to suburban and urban school districts.

Rives also reflected during his later career the turn away from judicial decisions in all cases involving integration. He became part of the growing trend away from judicial control and oversight of every decision made by local governments. In the 1970 case of *Thompson v. Palmer,* Rives rendered a decision for a closely divided Fifth Circuit court. The *Thompson* case involved the closing of all public swimming pools in Jackson, Mississippi. The decision was made after the city was ordered to integrate the pools. The full court of appeals, all fifteen judges, heard the arguments that the closing represented racial discrimination. Eight judges disagreed, with Rives in the lead. Rives upheld the closures as nondiscriminatory, noting that whites and blacks were both denied access to public pools. Rives refused to create group rights based on race, and his decision in *Thompson* was upheld by the Supreme Court in *Palmer v. Thompson* (1971). Rives's usual supporters in the Fifth Circuit, Judges Wisdom and Tuttle, dissented in the case, arguing for group rights.

Judge Rives also avoided a controversy involving the nomination of a Fifth Circuit judge to the United States Supreme Court. G. Harrold Carswell was Richard Nixon's second choice to fill the judicial vacancy created by the resignation of Abe Fortas. The judges of the Fifth Circuit, where Carswell had been serving, signed a letter of support for Carswell, but once it was presented to the Senate, Judges Tuttle and Wisdom withdrew their support. Their action and comments drew the court into a typical Washington political battle and did not help the Fifth Circuit in appearing to be nonpartisan.

After nearly fifteen years on the Fifth Circuit, Rives retired, retaining senior status. That position allowed him to work part-time as a judge on that court. He continued to sit in three-judges panels when needed and occasionally with the entire circuit court. During his last years of service Rives had a more limited calendar, and in October 1981 he was reassigned to serve on the newly created Eleventh Circuit that split off from the Fifth Circuit and included the states of Alabama, Florida, and Georgia. He served briefly in the Eleventh, dying on 27 October 1982 in his hometown of Montgomery, Alabama.

Judge Richard Rives had a considerable impact on U.S. law and the political issues of his era. As a judge on the Fifth Circuit Court of Appeals he was faced with enforcing the Supreme Court's desegregation decisions against uncooperative state officials. In doing so he strained the powers of the federal courts, using them to force state officials to carry out the law as he saw it. Rives operated within a society fighting change and disdainful of anyone who tried to make those changes.

Douglas Clouatre

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ROANE, SPENCER

(1762–1822)

Spencer Roane
Courtesy of the Library of Virginia

A political and legal leader in Virginia during his twenty-six years on the Virginia Court of Appeals (1795–1822), Spencer Roane often clashed with the Marshall Court on the scope of federal and state judicial power.

The early years of the American republic witnessed some of the greatest debates about the scope and reach of federal and state power. Many of the issues of that day were debated within the courts. The main supporter of federal power was Chief Justice John Marshall of the United States Supreme Court. One of his chief rivals and a representative of state power was Judge Spencer Roane of the Virginia Court of Appeals. During the first two decades of the Marshall Court (1801–1835), Roane offered the arguments for greater state independence from the federal government. Although Roane found himself on the losing side of the federal-versus-state debate, he contributed greatly to it, offering an alternative to expanding federal power.

Spencer Roane was born in Essex County, Virginia, northeast of Richmond, on 4 April 1762; his father, William Roane, was a leader in the American Revolution and a political leader in Virginia. Roane was part of the state's gentry with a political career before him. He attended William and Mary with two future Supreme Court justices, Bushrod Washington

and John Marshall, and heard George Wythe lecture on the law, lectures that he supplemented with self-study. Roane was admitted to the bar in 1782 and served briefly in the Virginia House of Delegates, where he was a colleague of John Marshall and Patrick Henry. Henry had considerable influence on Roane, who grew to distrust centralized government and worried about the loss of states' rights under the new Constitution. Roane followed Henry when he became governor, serving on the Council of State, an advisory board for the governor.

Roane's political career, though, was limited. In 1787 and 1788 he participated in the Virginia debate over ratification of the newly written constitution. He stated in letters and articles that the national government was provided with too much power under the constitution. These beliefs followed him through his subsequent judicial career.

That career began in 1789 when Roane was elected by the Virginia legislature to serve on the general court, the main trial court in the state. Roane was active in asserting the independence of the courts from political influence. In 1792 he issued a decision in which he struck down a state law that attempted to limit judicial power. Roane reasoned that the state constitution was fundamental law and could not be overridden by the Virginia legislature. Roane's conception of judicial review and the power of the courts was adopted by the federal courts a decade later by Roane's chief judicial rival, John Marshall.

Roane's abilities earned him attention from Virginia legal circles. When an opening occurred in the Virginia Court of Appeals, Roane earned the nod, taking his seat in 1795 at the age of thirty-three. The court of appeals was the highest court in the state and one of the main forums for those favoring state power over federal power in Virginia and the South. The battles between the federal and Virginia state courts prompted many important legal rulings during the first three decades of the Constitution.

The Alien and Sedition Acts presented one of the earliest clashes between federal and state power. The second of these acts prohibited seditious speech criticizing the national government and leaders. Leaders in Virginia, particularly James Madison and Thomas Jefferson, offered the Virginia and Kentucky Resolutions as a response. The resolutions rejected the right of the national government to limit political speech in such a manner and reserved for the states the authority to refuse to enforce a federal law that went against the constitutional powers of government.

Roane agreed with the resolutions though he had no role in their construction. He was most influenced by the call of state nullification of federal laws that were unconstitutional. This declaration of state sovereignty and power would be offered up by Roane during subsequent constitutional cases when Virginia claimed that the federal courts could not overrule state courts.

The election of Jefferson as president promised a changed relationship between the national and state governments. It has been subsequently suggested that Roane was Jefferson's choice to be Supreme Court chief justice after the resignation of Oliver Ellsworth. But the outgoing president, John Adams, appointed John Marshall to that position. His rise to chief justice in 1801 marked the beginning of a two-decade duel between the United States Supreme Court and the Virginia Court of Appeals, between John Marshall and Spencer Roane.

John Marshall was the consummate federalist, a man who agreed with the Hamiltonian idea of a national state bound together by commerce. He also saw state legislatures and politicians as the greatest threat to the economic development of the country. Marshall sought to expand judicial power to protect property rights. It was inevitable he would clash with the judges in the highest court of the largest and most powerful of southern states. Several Marshall Court cases originated in Virginia, and others prompted loud disagreements from Roane.

One decision, though, that did not draw Roane's ire was Marshall's decision in *Marbury v. Madison* (1803), which is recognized as having established judicial review, that is, the power to examine and strike down unconstitutional acts of federal legislation. Roane supported the power of federal judges to void national laws that were unconstitutional; moreover, because the decision in *Marbury* referred to federal power, it did not threaten the state sovereignty so jealously guarded by the judge. Another case, though, struck at the power of the state and its courts.

The first great clash between Roane and Marshall originated in a dispute between British loyalists and revolutionaries in Virginia. One such loyalist, Lord Fairfax, had his estate seized and sold by the state of Virginia. Fairfax's heirs claimed ownership of the same land, selling that interest to several Virginians, including John Marshall. The heirs claimed that the dispute over the land had been settled by the Jay Treaty, which protected the property of British loyalists from government seizure.

The case reached the Virginia Court of Appeals, which upheld the seizure of the land. That decision was overturned by the federal Supreme Court, which ruled the Jay Treaty took precedence over any state law. The case then returned to the Virginia Court of Appeals where Roane issued a decision directly challenging the power of the federal courts. Roane stated in a sweeping opinion that the Supreme Court had no power to overturn a state court decision. He ruled that the federal law that granted it that power, the Judiciary Act of 1789, was unconstitutional in granting the Supreme Court jurisdiction over state court decisions. Roane's argument in *Martin v. Hunter's Lessee* (1816) was one of the most direct attacks on federal judicial power and one in a series of arguments that the Constitution was composed

by the states, which retained considerable independence, including the functioning of their courts systems separate from the federal courts.

Roane's arguments had little effect on the Supreme Court when *Martin* was appealed to the justices for a second time. In his response, Justice Joseph Story ruled that under the Constitution and the law, federal courts could overrule state courts in matters involving federal law or treaties. According to Story, the federal Constitution was supreme over the states, and because the federal courts were granted the power to interpret that Constitution, their interpretation would always be final.

The dispute over the power of state courts in *Martin* established the supremacy of the federal courts and placed state judges under the authority of federal judges when considering the reach of federal law and treaties. Roane saw his claim of state court independence completely rejected by the Supreme Court.

Although his public battles with the Marshall Court are better known, Roane was also involved in interpreting the Virginia constitution and the transformation of Virginia from a British colony to a sovereign state. One of the major issues in Virginia during Roane's life was the role of religion in the new society. While a legislator, Roane had opposed a religious assessment against Virginians. This tax would have been used to fund the state church. As a judge on the Court of Appeals, Roane was asked to rule on a law that was meant to disestablish the Episcopal Church as the official religion of the state.

The 1802 law allowed Virginia to seize abandoned church property and sell it. The reasoning for the seizure was that as an established church, the property had been purchased with state funds. Under the new Virginia constitution and with a series of resolutions that ended the state church in Virginia, the state was no longer able to maintain church property at its own expense. The Episcopal Church went to court, arguing that the law violated the constitutional prohibition against seizure of property.

Roane wrote for the court in the case of *Turpin v. Locket* (1804) and upheld the state law as a proper disestablishment of religion. The land could be seized because the state of Virginia had decided that there would be no state church. The Episcopal Church appealed to the Supreme Court, which overruled Roane and struck down the law. This decision, though, did not draw a response from the judge either in his court writings or in his other favorite forum, the Richmond newspaper he had helped to create.

Holding strong views and having served in a political office, Roane sought forums for stating his constitutional views on state power and the federal Constitution. That forum was the newspaper that Roane helped create along with others who agreed with his views. Roane was a member of the most prominent and politically connected trio of Virginians, known as the Rich-

mond Junto. Thomas Ritchie and William Brockenbrough joined Roane in opposing the federal judiciary and the broad reading of constitutional power favored by Marshall. Ritchie was the publisher of one of the more strident and influential states' rights newspapers in the South. He cofounded the *Richmond Enquirer* with Roane, and the men used its pages to express their opinions about many of the important Marshall Court opinions. William Brockenbrough was also a judge in the lower Virginia courts. He used his opinions to express his states' rights views and also wrote in the *Enquirer.*

As Roane and Marshall clashed, the judge found another prominent ally in Virginia. The retired Thomas Jefferson grew professionally closer to Roane, offering his own letters and published comments in support of Roane's views. Roane served on a commission that chose to locate Jefferson's University of Virginia on the grounds of Center College. He also participated in the debate with Jefferson over the establishment of the entire educational system in Virginia. In this debate, Roane displayed his usual concern for individual rights and protection against state coercion. He disagreed with Jefferson's call for a literacy requirement to vote and with Jefferson's views on religion. These disagreements over Virginia politics did not sour their agreement on national politics, though Jefferson was heard to say at the opening of the University of Virginia that Roane could not have taught at the university because of his lack of scholarship.

Spencer Roane served on the Virginia Court of Appeals until his death in 1822. It was during his last years on the court that the greatest dispute over federal and state relations broke into the open. The Marshall opinion in *McCulloch v. Maryland* (1819), creating a broad congressional power to create agencies to carry out federal laws, drew an anonymous response from Roane. Writing under the name of Hampden, a figure in British history, Roane used the pages of the *Richmond Enquirer* to take issue with the *McCulloch* decision. Roane argued that the case represented an aggrandizement of congressional power to such a degree that there was no limit on the type of laws that Congress could pass. Because *McCulloch* overturned a state law, Roane worried that Congress had been made supreme to state law and that state independence was being taken away. Roane's Hampden essays drew a response from Marshall defending his decision.

In 1821, Roane directly clashed with Marshall and his Court. The case, *Cohens v. Virginia,* dealt with a federal lottery. Cohens sold tickets for the federal lottery in Virginia, which had a state law against such lotteries. He was charged with violation of the law and fined. Cohens appealed to the Virginia Court of Appeals, which took the stand that the state law banning lotteries overrode the federal law in Virginia. Cohens's appeal to the United States Supreme Court drew an immediate response from Roane.

Roane argued that Cohens's case could not be heard by the Supreme

Court. According to Roane, the Eleventh Amendment, which prohibited individuals from suing a state in federal court, prohibited appeals of state court decisions in federal courts. Hence the Virginia Court of Appeals would be the last court to hear and decide Cohens's case.

Chief Justice Marshall and the Court disagreed. Marshall stated that the Eleventh Amendment did not apply to appeals because appeals established the supremacy of the federal courts over state courts when ruling on federal law. *Cohens* was a partial victory for Roane in that Marshall upheld Cohens's conviction under state law (deciding that Congress had not intended for residents of the District of Columbia to sell tickets in states where such sale was illegal), but the ruling on federal judicial power served as another defeat in Roane's crusade to limit the ability of federal courts to overturn state decisions.

Roane's response to the *Cohens* decision proved to be his last battle with Marshall. Using the *Enquirer,* Roane wrote five essays under the name Algernon Sidney. In his writings, Roane criticized Marshall's opinion as sophistry, arguing that by making the federal courts supreme he was ignoring the checks and balances system of the Constitution. Roane noted that the Constitution represented a compact between the states that allowed for state sovereignty. According to Roane, *Cohens* was another example of aggrandizement of federal power at the expense of the states.

Roane died at home on 4 September 1822 after an extended illness. Interestingly enough, he had spent his last years living on a property that was next to John Marshall's estate. Yet these two neighbors had been unable to bridge the differences in their constitutional views. With his death, many of Roane's views on states' rights were adopted by others less interested in constitutional theory than in asserting political goals of secession.

Roane's role in the development of constitutional theory in the formative years of the Constitution tended to be negative. Most of his arguments for state judicial supremacy were rejected by the Supreme Court and the American public. Roane is best remembered as a polemicist rather than a legal scholar. Yet Roane's judicial writings extended beyond the major Supreme Court cases. Many of his state rulings protected individuals from excessive state power. At the same time, the theme of his arguments for less government decentralization became more popular during the final decades of the twentieth century as states began to reassert their own authority.

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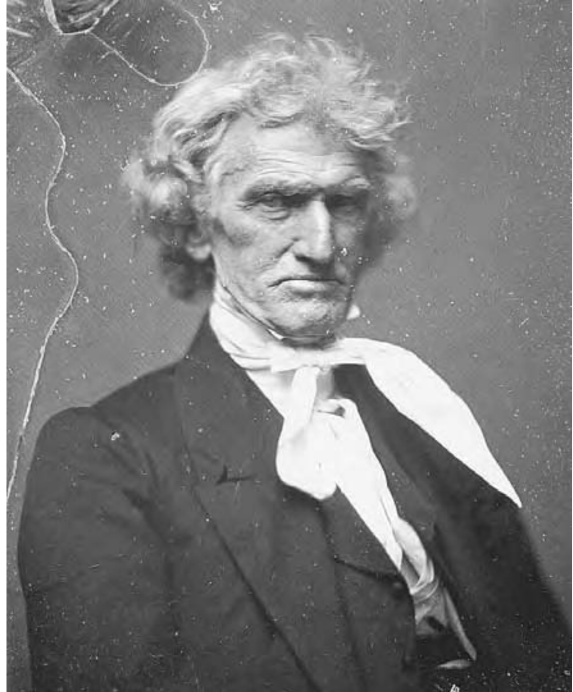
RUFFIN, THOMAS

(1787–1870)



THOMAS RUFFIN
National Archives

THOMAS RUFFIN IS REGARDED as one of the antebellum South's most important judges. After he had served on the North Carolina Superior Court from 1816 to 1818 and from 1825 to 1829, the state legislature selected Ruffin to serve on the state Supreme Court, where he stayed from 1829 to 1852. He spent the years from 1833 to his retirement from the bench as chief justice. During his time on the bench, which included an additional year of service from 1858 to 1859, he rendered decisions in about 1,500 cases (Morris 1999, 45). Prior to being appointed a judge, Ruffin had established himself as an accomplished, albeit aggressive, attorney, and he was active in North Carolina politics, especially during his early career. As a judge, Ruffin's opinions were noted for their "pragmatism" and their "flexibility" (Huebner 1999, 131).

Thomas Ruffin was born to Sterling and Alice Roane Ruffin in King and Queen County, Virginia, in November 1787. His mother was a first cousin of Virginia judge Spencer Roane. When Thomas Ruffin was relatively young, his family moved to North Carolina, where Ruffin attended school before going to the College of New Jersey, today's Princeton University. On his return, Ruffin read law under Archibald D. Murphey, a prominent attorney in the Piedmont area of North Carolina whose advocacy of "educational advancement, internal improvements, and constitutional reform"

undoubtedly influenced Ruffin (Huebner 1999, 133). Ruffin gained admission to the bar in 1808, marrying Annie M. Kirkland of Hillsboro the next year. In 1813, Ruffin was elected to the North Carolina House of Commons where, in three years, he became speaker. A Jeffersonian Democrat, he also served as a presidential elector for James Monroe and as a later supporter of William Crawford (after which he appears to have become fairly disillusioned with politics). He was widely respected and also served for a time as president of the State Bank of North Carolina, apparently rescuing it from probable bankruptcy.

After his appointment to the North Carolina Supreme Court, Ruffin moved to Alamance County. He was a successful planter who owned more than 100 slaves whom he employed on plantations in Rockingham and Alamance Counties (Morris 1999, 45). Although he never formally opened a law school, Ruffin also mentored many North Carolinians seeking entrance to the bar (Heubner 1999, 134). An active Episcopalian, Ruffin was generally considered to be a southern gentleman who was "hard-working, warm, humane, and religious" (Yanuck 1955, 460), but his personal beliefs did not always translate into policies, especially toward slaves, that individuals would today associate with Christianity.

Ruffin is, in fact, probably best known for his decision in the case of *State v. Mann* (1829). Faced in this decision with a master who had shot and wounded a slave as she fled from chastisement and refused to heed his call to stop, Ruffin refused to convict the slave owner of battery. Focusing on what he believed to be the societal benefits of slavery, Ruffin concluded that "the power of the master must be absolute to render the submission of the slave perfect" (quoted in Yanuck 1955, 462). Like other judges from the period who noted that there was sometimes a disjunction between law and justice when slavery was at issue, Ruffin went on to justify his view that the master's violence was limited only by state law with the observation that

> as a principle of moral right every person in his retirement must repudiate it. . . . But in the actual condition of things it must be so. There is no remedy. This discipline belongs to the state of slavery. They cannot be disunited, without abrogating at once the rights of the master, and absolving the slave from his subjection. It constitutes the curse of slavery to both the bond and free portions of our population. But it is inherent in the relation of master and slave. (Quoted 462–463)

Ruffin thus subordinated his views of morality to what he believed to be the necessities of a slave economy.

In other cases, Ruffin did somewhat modify the severity of his judgment. In particular in *State v. Hoover* (1839), Ruffin was willing to convict a slave

owner who had cruelty tortured and killed a slave. In yet another case, however, *State v. Caesar* (1849), Ruffin was the only one of three judges who was unwilling to mitigate the punishment for an attack by a slave on whites who were abusing a fellow slave. Ruffin reasoned that slaves were expected to behave in an obsequious manner, consistent with their status (Heubner 1999, 150–151). In other decisions involving slavery, Ruffin was more understanding, commending a trustee who decided to sell slave children from a single family as a group rather than splitting them apart and also allowing slave owners to manumit their slaves (Yanuck 1955, 469–470).

Although Ruffin's language in *State v. Mann* had suggested that he viewed slavery as a moral evil, as the slavery debate progressed, Ruffin actually argued, in conjunction with other slave apologists, such as Judge William Harper, that the system of "mixed labor" in the South was superior to that elsewhere. As one of Ruffin's most able commentators has explained, "by the middle of the 1850s, Ruffin believed that paternalistic slavery was the highest ideal to which southern society could aspire. In simplest terms, slavery served the public good—the interests of whites and blacks" (Heubner 1999, 153).

Fortunately, Ruffin's legacy extended beyond his arguments on behalf of slavery. One of his positive legacies was his fight for judicial independence. Faced shortly after his election with a decrease in judicial salaries—which troubled Ruffin not so much for its effect on his own finances as for its effect on the independence of the judicial branch—he was able to assert some judicial authority in *Hoke v. Henderson* (1833). North Carolina had adopted legislation requiring that judicial clerks, who had previously been appointed, now be elected. When clerk Henderson refused to resign, in an opinion that stressed the importance of judicial service during good behavior, Ruffin was able to vindicate his claim by holding that the office constituted a type of property and that the legislature had no authority to deprive individuals of such property (Huebner 1999, 136–137). An astute observer of Ruffin's life observed that this decision appeared to mark a turning point, after which the state began to grant courts greater independence and treat them with greater respect (137).

Although industrialization is more frequently associated with the nineteenth-century North than the South, the South too was facing issues dealing with the expansion of new industries and modes of transportation. At about the same time that Chief Justice Roger Taney was modifying earlier rulings by the Marshall Court on property to accommodate progress (most notably in the 1837 case of *Charles River Bridge v. Warren Bridge*), state judges were coping with similar issues. Lemuel Shaw, the chief justice of the Massachusetts Supreme Court, is often credited with allowing states to appropriate property under their right of eminent domain, which provides

that owners of such condemned property be given "just compensation." Ruffin also contributed to this development, issuing an opinion in *Wellington, et al., Petitioners* (1834) that upheld the right of the state legislatures to facilitate progress by permitting such appropriations. Ruffin's decision apparently went even further in its reasoning than did Shaw's in recognizing that, even when railroads were privately owned, their construction contributed to a legitimate "public purpose" (Heubner 1999, 138–139). Significantly, Ruffin was willing to allow five men to decide on the value of the property seized by the government rather than requiring a jury of twelve, as some thought the Constitution required (140).

Many of Ruffin's cases involved criminal law, and in this area, Ruffin had a reputation for toughness. He refused to require "malice aforethought" in convicting a man of biting off an enemy's ear in a fight (Heubner 1999, 142). Similarly, he refused to exonerate individuals who provoked opponents into a fight and then killed them under the guise of self-defense. In one case he observed that "To follow a person and seek a combat with him for the purpose of killing him, and covering the act with the pretense of a dangerous resistance to a moderate assault, is nothing less than wreaking a diabolical vengeance" (*State v. Martin,* 1841, as quoted 143).

Comparing Ruffin to other southern judges of the time period, Timothy Heubner has noted that he resembled them "in accumulating a substantive record upholding the convictions of violent criminals. Relying on North Carolina precedent and established common-law authorities, Ruffin consistently upheld the instructions of trial judges that involved the distinctions among murder, manslaughter, and excusable homicide" (1999, 145).

Although many judges choose to die in harness, Ruffin retired from the Supreme Court in 1852 and resumed his life as a planter (serving from 1854 to 1860 as president of the North Carolina Agricultural Society) while maintaining an interest in the preservation of judicial independence. As war approached, Ruffin first tried to seek compromise, and he was one of the most elderly men who attended the Old Gentleman's, or Peace, Convention in 1861 in Washington, D.C., in an attempt to avoid civil war. Ruffin initially proclaimed that "I came to maintain and preserve this glorious Government! I came here for Union and peace!" and that "I was born before the Constitution was adopted. May God grant that I do not outlive it" (quoted in Huebner 1999, 155). Faced with intransigence by both pro- and antislavery forces, however, Ruffin's attitude hardened during the course of the convention. Although never as vehement in support of the southern cause as his firebrand cousin, Virginia's Edmund Ruffin, Ruffin nonetheless viewed the war as a legitimate exercise of the right of revolution.

At the end of the war Ruffin succeeded in obtaining a pardon from Pres. Andrew Johnson. Although Ruffin opposed the more liberal constitution

George Lewis Ruffin (1834-1886)

George Lewis Ruffin was the first African American to graduate from the Harvard Law School or from any law school in the United States. He was the oldest of eight children born to George Washington Ruffin and Nancy Ruffin, free blacks then residing in Richmond, Virginia. Mrs. Ruffin (apparently with her husband's consent) later moved with her children to Boston, largely in the hopes of securing a better education than would be possible for them in the South. George had moved to Boston at age seventeen the previous year. After graduating from the public schools of Boston, Ruffin became a barber.

In 1864 Ruffin attended the First National Convention of Colored Men, held in Syracuse, New York. Inspired in part by Frederick Douglass, Ruffin began to study in the law offices of Harvey Jewell when he returned to Boston. He entered the Harvard Law School in 1868 at the age of thirty-four and graduated after two semesters.

In 1870 Ruffin was elected to the Massachusetts legislature, and although he was defeated as a Labor candidate for the position of state attorney general during his second term, he placed as the fourth of seven candidates (Smith 1995, 218). Ruffin, who was later elected to the Boston Common Council, practiced law in Boston. He was a strong supporter of the presidency of Ulysses S. Grant and wrote the introduction to Frederick Douglass's autobiography.

Although Ruffin had continued to support the Republican candidate for governor after Benjamin Butler had switched parties and run for that post as a Democrat, the victorious Butler nonetheless nominated Ruffin to fill a vacancy in the state district court for Charleston. After confirmation by the executive council, the governor proudly swore in Ruffin. Ruffin noted: "I can only account for this action

(continues)

drawn up by a Reconstruction government, in 1870 he advised his son against joining the Ku Klux Klan, believing that "the whole proceeding is against law and the civil power of government and assumes to supersede by taking the power of trying, condemning, and punishing in their own hands" (Heubner 1999, 159). Ultimately, then, Ruffin acknowledged greater allegiance to the rule of law than to the southern system that he had tried so long to uphold.

John R. Vile

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of his excellency on the ground that he wished to testify, in a complimentary manner, his pleasure that a representative of my race had at length been confirmed for the position" (quoted in Smith 1995, 230).

Only two other African Americans in Massachusetts had previously held judicial posts, one as a justice of the peace and the other as a county magistrate (Smith 1995, 230–231). Ruffin's tenure was cut short by death from kidney failure three years after his appointment as a judge. His wife, Josephine St. Pierre Ruffin, became a leader in the women's movement.

Often discouraged by the hypocritical rhetoric of American freedom when compared to the treatment that African Americans received, Ruffin identified with members of his race who had not been born free and who had not been accorded the opportunities he had received. The author of the most comprehensive article on Ruffin noted that

> George Lewis Ruffin, born free, could have determined that his stature as the descendant of free black parents separated him from the plight of his people. He might have determined that a Harvard law degree lifted him above the obligation to assist his people to fight for a better social and political position in America. On the contrary, Ruffin made the plight of black people his plight and used his Harvard law degree to fight for the liberation of black people from the badges of slavery. He never turned his back on his people. He impressed the world with his brilliance; the tongues of white and black people across the country spoke of it, forever sealing his name in the history of Harvard Law School, in America's legal and political history, in African-American history, and in the history of Boston, freedom's birthplace. (Smith 1995, 235)

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RYAN, EDWARD GEORGE

(1810–1880)

Edward George Ryan
Wisconsin Historical Society

Edward George Ryan, lawyer, publisher, politician, orator, and —from 1874 to 1880—third chief justice of the Wisconsin Supreme Court, was a man of extraordinary legal ability. Appointed 16 June 1874 by Gov. William Taylor, Ryan was sixty-four years old when he replaced retiring Chief Justice Luther S. Dixon. Although Ryan's legal skills as an attorney were well admired, he had no judicial experience. The wisdom of Taylor's decision, however, was quickly reaffirmed when Ryan, a lifelong Democrat running unopposed in a dominantly Republican state, was popularly elected on 16 April 1875.

From 1874 to 1878 Ryan's presence dominated the three-man court. In addition to issuing his own opinions, often on the most complex cases, he also supplied the legal reasoning and arguments for many cases assigned to fellow justices Orasmus Cole and William P. Lyon.

The quantity of the work was astonishing. In 1875, for example, the court, convening two terms each year, heard 228 cases. By July, Ryan had lost fifteen pounds from the strain and labor (all opinions were hand written by the justices themselves) (Beitzinger 1955, 593). Harlow Orton, who would, with David Taylor, soon become a justice himself—when the legisla-

ture, in 1878, expanded the court to five members—wrote of Ryan that year: "He brings all the learning and all the law . . . His opinions are not only conclusive, but exhaustive of all the subjects embraced" (594; Beitzinger offered a complete discussion of the Ryan court justices). Legal historian and lawyer Joseph A. Ranney, describing, more than a century later, the experience of reading a Ryan declamation, noted, "one feels as though one is listening to an irascible but brilliant pedagogue examine the topic at hand from all angles, like a toy, and then produce a decision that seems at the time definitive and unanswerable" (Wisconsin's Legal History: Part II. Available at <www.wisbar.org>).

Edward George Ryan was a complex personality of unfathomable and irreconcilable themes. He himself judged his life, excepting his judicial labors, a failure. Possessed of a querulous and splenetic spirit of pathological proportion, his existence was an endless fuse of destructive petty quarrels woven from the combative threads of suspicion, arrogance, and intolerance. When ignited by some random spark from his mercurial temperament, all would abruptly explode.

Few were unaware of this dark facet of Ryan's character. William Vilas, friend and future Wisconsin senator, noted that Ryan's temper "made him terrible to his friends as well as his enemies; tyrannical, perhaps sometimes cruel . . . violent and hostile where he should have been friendly." It should be noted, however, that Ryan's demon temper never reduced him to incoherence; he never lost control on the bench; and the passion for perfection, which his temper betrayed, motivated the court to a higher standard.

Other aspects of Ryan's character were tragic. A deeply religious man who authored his own prayers and recited them daily—"Give me grace to bear patiently, to consider diligently, to understand rightly and decide justly" read one, in part (Winslow 1912, 313)—he nonetheless possessed little tolerance for those less gifted than himself. A champion of the individual over all combinations of power—economic, political, military—his wellspring was *passion against* privilege and its consequent injustice, not *compassion for* fallible human beings.

An Irish émigré, born and raised in a country without racial strife, Ryan was, nonetheless, an avowed racist. His private library, some 1,400 volumes, contained the treatises on ethnology and anthropology that had persuaded him that blacks were "an inferior and degraded" race. Mankind, he held, was a hierarchy of white intelligence at the top and black physicality at the bottom. Slavery was "a great social evil," and, although he profited nothing from the "peculiar institution," still, by the terms of his evolutionary view, it was "a necessary evil" (Beitzinger 1960, 56).

If blacks occupied the base of Ryan's social caste system, women occupied the apex. But the Ryan schema produced the same effect for both groups—

a kind of "frozen" exclusion by some principle of "otherness" that removed them from the fluid and privileged domain of white maleness.

Despite these tragic flaws of character, his contemporaries—supporters and detractors alike—acknowledged Justice Ryan as one of the nation's leading jurists. His aggressive passion forged and distilled creative decisions in Wisconsin tax law, the conduct of railroad and insurance industries, the emerging area of corporate tort liability, government regulation and oversight, legal ethics, and the relationship of federal and state courts. Justice John Winslow wrote that Ryan's life had "added vastly to the standing and prestige of (the) Court"; that his legal opinions "left a monument to his memory more enduring than brass or marble" (Winslow 1912, 306). On questions of the power of the state to control its own creations, the great corporations, Ryan helped to rebalance the equation between the controlling effect of industrial wealth and the free agency of human beings.

Edward George Ryan was born 13 November 1810 at New Castle House estate, near the village of Enfield, Meath County, Ireland. The second son of Edward and Abby (Keogh) Ryan, and one of ten children, young Edward was "born and educated in full sight of wealth but inheriting no share of it beyond its refining influence" ("Ryan Obituary" 1880). The family, initially prosperous, lost everything when their landholding fell into debt. An annuity set aside by the Keogh grandfather, however, guaranteed the education of all the Ryan children. Young Edward, from 1820 to 1827, attended an all-boys Jesuit boarding school, Clongowes Wood College, in Kildare.

In 1830 Ryan emigrated to the United States. For six years he lived in New York City, reading law, teaching school, and immersing himself in the Democratic politics of Tammany Hall. He was naturalized 9 April and admitted to the bar 13 May 1836. Both events were easy formalities for those with Tammany Hall patronage. That same year he relocated to Chicago.

In Chicago, often ill, he practiced law. He served briefly, in 1841, as state's attorney for the Seventh Judicial Circuit. He also published, from 4 April 1840 to 22 August 1841, a Democratic newspaper, the *Chicago Tribune* (not the precursor of today's *Chicago Tribune*). Often embroiled in fisticuffs, but never as victor, he once challenged an adversary to a duel, only to be disdainfully dismissed. Prof. Alfons Beitzinger, the authoritative voice on Ryan's life, wrote, "Ryan was . . . recognized as a singularly rare character—an Irishman who could not fight. 'Who hasn't licked Ryan?' became a byword in Chicago" (1960, 12).

In 1842 Ryan married Mary Graham, of Dixon, Illinois, and moved to Racine, in territorial Wisconsin. In 1846 he gained prominence as a delegate to the first state constitutional convention, authoring the radical antibanking provision that ultimately defeated the constitution. But with the untimely death of his wife in 1847, Ryan, with two infant children, moved

Reah Mary Whitehead (1883–1972)

Washington State's first female judge, Reah Mary Whitehead, was born in Kansas City, Missouri, in 1883 and moved to Seattle in 1890. She began work as a legal stenographer in Alaska at the age of sixteen and subsequently enrolled at the School of Law at the University of Washington. She graduated and passed the bar in 1904. Initially working as a clerk for a judge and then for a prosecutor, she was appointed in 1909 as the first woman prosecutor in the state of Washington but was initially largely consigned to office work. She ran for the office of justice of the peace for the King County, Washington, Seattle District Court in 1914 and won the election over nine male competitors.

As a judge, Whitehead's cases were limited to civil matters involving no more than $100, but she also adjudicated criminal matters. Reporters were often so taken with the novelty of a female judge that their reports primarily focused on what she wore and how she looked. Whitehead believed that it was important for women to serve as judges. During a reelection campaign, she once said:

> There is no sex in brains. I didn't originate that statement, I simply adopted it in setting forth my belief that a woman is just as mentally capable as a man and that the State of Washington and King County in particular should have a woman superior court judge to even up matters. Don't get the idea that I think that I or any other woman can do judicial work better than a man. That's just the point at issue. It's that a woman's viewpoint plus a man's viewpoint equals the human viewpoint. And that is what our courts need. (Bragg 1998, 154)

Whitehead married a retired grocer named Frank Sidney Harrison in 1931, but she retained her maiden name, and they later divorced.

Whitehead retired after seven terms on the bench and was replaced by another woman. Whitehead died in 1972.

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to Milwaukee. In 1848 he opened a law firm. (Today, twenty-five name changes later, its descendant is Michael Best and Friedrich LLC, the 150th largest law firm in the nation. Its client list, overcoming the Ryan antibanking stand, has included the five largest banks in Milwaukee.)

In 1850 Ryan married Caroline Willard Pierce, of Massachusetts. This union produced seven children, three of whom died before the age of three.

During the next quarter century Ryan was a commanding presence in the legal history of the new state. He appeared, from 1849 through 1874, in 375 cases (eighty-two before the Wisconsin Supreme Court, eleven before the United States Supreme Court; see Beitzinger 1956, table). In 1853 he argued for the impeachment of Judge Levi Hubbell, for accepting bribes; in

1854 he argued *In re Booth,* a high-profile fugitive slave law and states' rights controversy; in 1855, against his own party's interest, he represented Republican Coles Bashford's successful challenge, on grounds of fraud, of Democrat William Barstow's gubernatorial election (by a plurality of 157 votes), where Ryan's high-profile nonpartisanship impressed and calmed an inflamed state.

In 1862 Ryan authored *Address to the People by the Democracy of Wisconsin.* Called "the Ryan address," it attacked the "unconstitutional" aspects of the Lincoln administration's conduct of the war. The resultant storm, however, ended any possible political career for Ryan. Many branded him a copperhead and a traitor. In 1863, with Republicans carrying the elections, Ryan, buried in opprobrium, sank into oblivion. From 1866 to 1869 he participated in only fifteen legal cases. Finally, in April 1870, financially impoverished and repudiated by the Democratic Party, Ryan sought and was elected to the post of Milwaukee city attorney on the independent Citizens ticket. Reelected in 1871 and 1872, he lost the 1873 election.

On 16 June 1873, with the young Robert La Follette in the audience, Ryan addressed the graduating class of the Wisconsin Law School. In this famous address, he sculpted the ethical obligations of all members of the legal fraternity. He also warned of "vast corporate combinations of unexampled capital" where "money [took] the field as an organized power . . . [and] the question [arises] . . . which shall rule—wealth or man; which shall lead—money or intellect; who shall fill public stations—educated and patriotic free men, or the feudal serfs of corporate capital" (1873, 31–32).

The following June Ryan took his seat on the state supreme court.

Edward George Ryan, age seventy, died 20 October 1880, at his Madison home. The last years of his life were difficult. Estranged from wife and family, he, as Judge Jenkins noted, "Died as he lived, grand, gloomy and peculiar, wrapped in the solitude of his own originality" (Clark 1895, 250).

Christened a Roman Catholic, Ryan had, in the 1850s, become an Episcopalian. Taken by train to Milwaukee, he was buried there from St. James Episcopal Church. Having died in near penury, Ryan rested in an unmarked grave for many years. In 1909 the state bar of Wisconsin raised funds for the white granite obelisk that now delineates his resting place at the Forest Home Cemetery.

Most judges are best known by their cases. A brief summary of some notable Ryan cases follows.

Attorney General v. Chicago & Northwestern R. Co. (1874) was Ryan's first and greatest decision. It covered eighty-five pages and took almost four hours to deliver orally. It established the principle that corporations are subordinate to the state.

Ryan's exhaustive treatment of all issues involved—the power of the leg-

islature to effect original charter, the state constitutional grant of original jurisdiction, the use of injunction as a prerogative writ—was breathtaking. Roscoe Pound, noted Professor Beitzinger, wrote that Ryan's opinion was "the leading American decision for the visitatorial jurisdiction of courts over corporations at the suit of the state" (1960, 120; see also 113–122).

Wight v. Rindskopf (1877) was a sharply worded decision decrying the exchange of immunity for evidence in a case—"corruption in the administration of public justice beyond justification" was Ryan's characterization (Winslow 1912, 350). He wrote that an attorney's retainer was a "sacred confidence" imposing "a duty" on him that his "professional learning and skill," his true strength, be practiced in "open contest" (350). A lawyer's "forensic ability is the only true professional influence on the course of justice," he said, concluding, "a lawyer may devote himself professionally to the legitimate business of his client; but he cannot be retained in whatever may not be rightfully and lawfully done. He may defend a wrong done in the past, but he cannot be privy to the doing of a wrong in the present. The profession is not sinless but its sins are all unprofessional" (350).

State ex rel. Drake v. Doyle (1876) involved Wisconsin's power to impose conditions on out-of-state corporations wishing to do business in the state. Collaterally, it involved a clarification of state and federal court jurisdiction. The United States Supreme Court, in *Insurance Company v. Morse* (1874), had found an 1870 Wisconsin statute, which prohibited a foreign company from removing actions brought against it in state courts to U.S. courts, unconstitutional and the licensing agreement made with respect to it void. Subsequently, a new 1872 Wisconsin law provided that if any foreign company licensed in Wisconsin petitioned to remove an action pending against it to a federal court, its license to do business in the state would be revoked.

Ryan wrote in *State ex rel. Drake v. Doyle*, "the State, having power to exclude entirely foreign corporations, had necessarily power to license them to enter the state upon condition of their forbearing to exercise a right, and revoke that license upon their attempting to exercise it" (Winslow 1907, 110). Later, the United States Supreme Court, in *Doyle vs. Continental Insurance Co* (1876), essentially upheld Ryan's reasoning.

In the Matter of the Motion to Admit Goodell (39 Wis. 232, 1875), the remarkable Lavinia Goodell, Wisconsin's first female lawyer, admitted to the Rock County bar on 17 June 1874, was denied admission to the Wisconsin State Supreme Court bar. Seen through the prism of today's urgent concerns for sexual equality of the workplace, it is the most well known and notorious of Judge Ryan's decisions. In 1875 it also met with national criticism (see Cleary 1991).

Ryan wrote,

> There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. . . . Womanhood is moulded for gentler and better things. (39 Wis. 245)

Then, deserting all caution, he opined,

> The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as in the profession of law, are departures from the order of nature; and, when voluntary, treason against it. (245)

Craker v. Chicago & North Western Railway Co. (1875) held that a corporation is not liable for punitive damages for the willful acts of the employee unless it ratifies them. Called the Kissing Case, Ryan's gracefully piercing, sarcastic Irish wit was well displayed. A railroad, sued by a woman kissed against her will by its conductor, opined, in its defense, that the woman might have had a claim against it for assault if a third party had kissed her, as the conductor's protection against such an event would have been faulty. The railroad argued, however, that it was not liable, since it was its own employee that made the assault.

Ryan responded,

> It is contended . . . that if one hire out his dog to guard sheep against wolves, and the dog sleep while the wolf makes way with a sheep the owner is liable; but if the dog play wolf and devour the sheep himself, the owner is not liable. . . . The carrier's contract is to protect the passenger against all the world. The appellant's construction is that it was to protect the passenger against all the world *except* the conductor whom it appointed to protect her, reserving to the shepherd's dog a right to worry the sheep. No subtleties in the books could lead us to sanction so vicious an absurdity. (Winslow 1907, 112)

Kevin Collins

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Schaefer, Walter Vincent

(1904–1986)

Walter Vincent Schaefer
Illinois Issues, *University of Illinois at Springfield*

Often named along with his friend Chief Justice Roger Traynor of the California Supreme Court as one of the leading scholar-judges on state courts, Walter Schaefer served on the Illinois Supreme Court from 1951 to 1976, before returning to the private practice of law and to the classroom at Northwestern University Law School where he had taught before being named to the bench. While serving as a state supreme court justice, Schaefer collected numerous accolades and honorary degrees and delivered some of the most prestigious lectures in the leading law schools, including the Oliver Wendell Holmes lectures at the Harvard Law School.

Schaefer was born in Grand Rapids, Michigan, in 1904 and received both his bachelor's and law degrees from the University of Chicago. Schaefer characterized his performance at Chicago as "pretty good" though "no world beater" (Jenner 1979, 694) and by all accounts devoted considerable time to his third-base position on Chicago's baseball team (before Chicago's president Robert M. Hutchins decreed that it would abandon varsity athletics) and its tennis team. The tennis team on which Schaefer played won the Big Ten championship two years in a row, and Schaefer's doubles partner went on to play on a Davis Cup team (694). Schaefer's devotion to intercollegiate athletics was such that when, during his junior year, he was in danger of having

enough credits to graduate, he simply switched his major so he could return his senior year and serve as captain of the tennis team (Schaefer 1986, 1154).

Admitted to the Illinois bar in 1928, Schaefer spent the next two years drafting statutes for the Legislative Reference Bureau in the state capital, Springfield. It was there that he developed a passion for clarity and brevity, two traits that marked his later judicial decisions (Ward 1979, 1153). His experience as a legislative draftsman led directly to one of the seminal events both of his early career and of the legal history of the state of Illinois.

In 1931, a number of young Illinois lawyers, including Walter Schaefer and Albert Jenner (founding partner of the Chicago firm Jenner and Block), formed the Younger Members Committee on Amendment of the Law along with other lawyers who had, like Schaefer, served in the Legislative Reference Bureau. With the blessing of the senior members of the Chicago Bar Association, the Younger Members Committee set about to reform the law in Illinois. For the next several years, the committee drafted, introduced, and orchestrated the passage of acts that reformed and codified the law in the probate, mortgage, and criminal law (Jenner 1979, 694–695).

At about the same time, a distinguished group of scholars was completing a statute intended to replace Illinois's common law pleading system with a modern pleading and practice statute. The Illinois Bar Association then became involved, and its young members Jenner and Schaefer were dispatched to compare the draft against the Illinois Revised Statutes. By mid-October 1931, they had finished their work and made recommendations to the Drafting Committee; the revised draft was then sent to practitioners and judges for comment. After further discussion, the draft was submitted to the Illinois General Assembly in 1933, and Jenner and Schaefer were dispatched to aid the assembly as the bill made its way through the legislative process. The new Civil Practice Act was signed into law in 1933 and took effect the following year. But Jenner and Schaefer's role was not yet complete. Not only did they annotate the act, they also toured the state with the new president of the state Bar Association making presentations and otherwise explaining the new act. The two young lawyers, now close friends, then prepared the new rules for the Illinois Supreme Court and even taught a night class for lawyers wishing to become conversant with its intricacies. Owing to his experiences in Illinois, Schaefer was then invited to assist Yale Law School dean Charles Clark in preparing the Federal Rules of Civil Procedure (Jenner 1979, 697–698).

Following his work in New Haven, Schaefer left for Washington, D.C., one of many bright young lawyers attracted to the energy and excitement surrounding the first New Deal. Schaefer worked for the Agricultural Adjustment Administration (headed for a time by future federal judge Jerome

Frank) and the Reconstruction Finance Corporation. He then returned to Illinois to work as assistant corporation counsel for the city of Chicago (Jenner 1979, 698–699).

In 1940, Schaefer joined the faculty at Northwestern University's law school, a position that he held—excepting only a two-year interlude as a bankruptcy referee occasioned by the war-induced drop in law school enrollment—until 1951, when he was appointed to the state high court. At Northwestern Schaefer taught, among other courses, civil procedure and evidence. His former students fondly remembered him as an individual possessed of "an almost biblical pragmatism" (Allen 1979, 692). Former colleagues at the law school commented not only on Schaefer's unabashed enthusiasm for "the Kids," as he called his students, but also for his wise and patient mentoring of junior faculty members (Allen 1986, 1149–1150). As one former colleague reflected upon the occasion of Schaefer's retirement from the Illinois Supreme Court:

> His kindly and agreeable manner, his solid stock of legal learning, his tenacious patience in trying to communicate that learning to others, his capacity for useful and stimulating reflection about the larger ends of the law, his ability to relate established legal principles to the realities of the moment and to identify the resulting tensions and their possible solvents, his willingness to contemplate, and actively to forward, evolution and development of those principles by the uses of reason—all served as badges of his value in the classroom as well as visible precursors of the great judicial career which ultimately was to be his. (McGowan 1979, 679)

Schaefer's judicial career was due in large part to serendipity. Illinois has an elective judiciary, and the mid-century Illinois constitution provided that the governor could fill vacancies on the state supreme court only if they occurred in the final year of the occupant's term. Such a contingency occurred in March 1951, and Gov. Adlai Stevenson appointed Schaefer to fill the vacancy. According to one friend of both men, upon learning of the vacancy, Governor Stevenson exclaimed "Now I can have Walter!" (McGowan 1986, 1151). Almost immediately after Schaefer began serving, however, he had to run in the June election. The election was not a shoo-in, as Schaefer was in a district composed of Cook County and neighboring counties not known for their support of Democratic candidates. Nevertheless, the head of the Cook County Democratic organization, future Chicago mayor Richard J. Daley, was persuaded to mobilize his base to elect Schaefer. "To him," wrote one commentator, "must go most of the credit for assuring Walter's judicial career" (1151). Thereafter, Schaefer won reelection to the bench until his retirement in 1976.

Perhaps the most famous case in which Justice Schaefer participated was that of *People v. Escobedo* (190 N.E.2d 825 [1963]), in which the Illinois Supreme Court held that a suspect's confession to the crime of murder was admissible despite the fact that the suspect's lawyer was denied the opportunity to advise his client while in police custody. The United States Supreme Court disagreed, found that Escobedo's right to legal counsel was violated when the police refused him access to his lawyer, and held that his confession should have been excluded (*Escobedo v. Illinois*, 378 U.S. 478 [1964]).

The *Escobedo* case was controversial, as was the later *Miranda* case, in which the Supreme Court held, among other things, that when placed under arrest, a person had to be apprised of his right to remain silent and his right to an attorney. Critics of the Warren Court decisions complained that the decisions placed too many restrictions on law enforcement officers, with public safety suffering as a result.

Justice Schaefer was among these critics. Soon after being appointed to the bench, Schaefer was asked to deliver the prestigious Oliver Wendell Holmes Lectures at the Harvard Law School for 1956. There, he sounded a cautionary note about the Supreme Court's apparent, though still nascent, desire to nationalize constitutional criminal procedure (Schaefer 1956). But his criticisms were not the simplistic "law and order" polemics that were the staple of politicians and pundits during the 1960s. Schaefer often criticized the Court's constitutional pronouncements for promising more than the Supreme Court—or any court for that matter—could deliver.

For example, he criticized the Supreme Court's decision in the *Miranda* case for giving insufficient attention to the likely effects of a defendant's choice to remain silent. He faulted that decision for failing to "fairly advis[e] the suspect of all of the relevant considerations that bear upon his choice," for example, the fact that whether or not adverse commentary upon a decision to remain silent is permitted, "not even the Supreme Court can prevent the judge or the jurors who are trying the case from drawing adverse inferences from the silence of a defendant, whether at a trial or before it" (Schaefer 1969, 10). Although he agreed "that a suspect should not be compelled to answer and that a defendant should not be required against his will to take the witness stand," it was his opinion that "it is entirely unsound to exclude from consideration at the trial the silence of a suspect involved in circumstances reasonably calling for explanation, or of a defendant who does not take the stand. It therefore seems to me imperative that the privilege against self-incrimination be modified to permit comment upon such silence" (Schaefer 1966a, 520).

He was also a critic of the exclusionary rule that rejected evidence seized in violation of the Fourth Amendment. But again his criticism was of a different flavor than most. Schaefer felt that the rule was deficient because of

its underinclusiveness. He noted that "it is available only to those who are formally charged with criminal offenses. It does not bear at all upon the overzealous officer whose victims never appear in court. Thus, it does little to curb the obvious potential for evil in the promiscuous use of stop and frisk as a technique of harassment" (Schaefer 1969, 14).

His other writings focused on the technique of judging. In 1955, for example, he delivered the Ernst Freund lectures at the University of Chicago Law School. There, he discussed analogical reasoning used by common law judges to keep the law supple by enabling it to adapt to changes in circumstances. He went on to ask whether such reasoning by analogy was not also appropriate when dealing with statutory materials, given the growing involvement of legislatures in law reform and their disinclination to keep their work product up-to-date (Schaefer 1966b). Another perennial concern of Schaefer's was with how the Supreme Court handled the implementation of its decisions: whether it would make new constitutional rules retroactive or whether they would operate only prospectively (Schaefer 1982, 1967).

In recognition of his contributions to the bench and bar, Schaefer was awarded the American Bar Association's medal for service to the cause of American jurisprudence. He was similarly feted by the American Judicature Society and the Illinois Bar Association, both in 1977. In addition to the distinguished lectures he gave at Harvard, Chicago, Northwestern, and New York University, Schaefer was the recipient of honorary degrees from Northwestern, the University of Chicago, John Marshall Law School, Lake Forest College, Notre Dame University, and DePaul University. He was also a member of the American Law Institute and the American Academy of Arts and Sciences. Justice Schaefer died in 1986 at the age of eighty-two.

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SEABURY, SAMUEL

(1873–1958)

Samuel Seabury
Library of Congress

In the year 1873 in the city of New York, wealth was in the hands of a few and government in the hands of criminals. In that year on Washington's birthday, 22 February, Samuel Seabury was born in the rectory of the Church of the Annunciation on West Fourteenth Street. He would dedicate his life to fighting poverty and governmental corruption.

One of Seabury's ancestors, another Samuel Seabury, was the first Episcopal bishop in America and an obstreperous loyalist during the Revolution. Seabury's father, William Jones Seabury, was a professor of canon law; his mother was Alice Van Wyck Beare Seabury. Seabury was always interested in his genealogy and held with pride to his family's tradition of strong moral conviction.

At age eleven Seabury went to England with his father and saw the Inns of Court. The experience soon had him speaking of a career as a lawyer. But old and distinguished in America as his family was, its members were not wealthy, and when he entered New York Law School in 1891, he had to support himself. He graduated in 1893, but not yet being twenty-one and so ineligible to take the bar examination, he took postgraduate courses, hearing lectures by future president Woodrow Wilson and future president and United States chief justice Charles Evans Hughes. Seabury was admit-

ted to the bar in 1894 and practiced with the firm of Seabury and Pickford. He enjoyed good success in the several years that he practiced.

The writings of, and Seabury's acquaintance with, economist Henry George exerted a profound early influence on Seabury's political beliefs. George's essential idea was that although each human being properly owns his own labor and the economic value that flows from it, it is unjust that persons are born into a world where others already have appropriated all the raw material (which he called "land") upon which that labor might be exercised. His solution was for society to regard land as a common good, with its possessor paying a tax that would function as a sort of rent on the unimproved value of the land. Because there was to be no other tax, George's followers were sometimes called "single taxers." Although George's view might today be regarded as close to economic libertarianism and therefore not especially concerned with the plight of the poor, it was in fact intended as a solution to the problem of poverty and in its day was regarded by many as dangerously socialistic. Seabury became an enthusiastic convert.

In 1899 the Independent Labor Party, later joined by the Republican and other parties, nominated the twenty-six-year-old Seabury for justice of the City Court. This court handled civil (noncriminal) cases in which the amount in controversy did not exceed $2,000. The notorious political machine of Tammany Hall was powerful in the city then, and the standard bribe for Tammany endorsement for a judgeship on the lower courts was $10,000; for the Court of Appeals, $25,000. Seabury and his fellow reform candidates hoped to break this system. Although he spent less than forty dollars on the campaign, it attracted some attention in the press. Seabury campaigned on the themes of the single tax and opposition to corruption. But Tammany was too well entrenched, and Seabury and his fellow reform candidates were defeated. From that time forward his critics tried to characterize him as a dangerous radical, a tactic made easier by his blunt, outspoken public statements.

The next year Seabury married. Maud Richey was not quite the girl next door—she lived down the street in the house in which Clement Clarke Moore had written "A Visit from St. Nicholas"—but their fathers both were professors at the General Theological Seminary and the two families were close. The wedding took place on 6 June1900, their fathers and one other minister presiding. Maud was a quiet but strong woman, and the marriage would prove a happy one, though childless. They lived in an inexpensive house in the city; later they would have a house in East Hampton, Long Island, with a large library, and Seabury would write a "Historical Sketch" of the town that would be "published for the community" in 1926.

In 1901 Seabury ran for the City Court again, as candidate of the Citizens Union Party. He and his fellow reform candidates campaigned for gov-

ernmental honesty; corruption in the Metropolitan Street Railway Company received particular mention. He long would champion the cause of public ownership of such natural monopolies as utilities and urban transportation networks; he later collected his thoughts on the subject in *Municipal Ownership and Operation of Public Utilities in New York City* (1905). This time Seabury was elected, becoming the youngest justice of the City Court up to that time, at a salary of $10,000 a year for a term of ten years.

Seabury found that his position required him to address the problems both of the litigants before him and of the court itself. He discovered that the clerks of the court were embezzling the fees owed to jurors and sheriffs. The chief clerk was an officer in the Tammany organization and refused to act on Seabury's information. Seabury had to expose the matter to the press before the chief clerk would remove the thieves from their offices.

Seabury discovered too that the Metropolitan Street Railway Company, whose corruption had been an issue in the campaign, had an arrangement with the court clerk to have one of its employees sit on juries in cases where it was a party, to influence the jurors in favor of the company, and that the company also paid outright bribes to jurors. The man impersonating a juror was convicted, and five clerks were removed, but Seabury's efforts to procure additional prosecutions were impeded by an uncooperative district attorney.

Seabury's work product was prodigious. He worked remarkably long hours, and his written opinions are notable for their clarity and logical rigor. On one occasion another judge had fallen behind in writing his opinions and Seabury volunteered to write them for him. The judge in question was pleased with them, but under influence from Tammany changed the result in one, a suit for recovery of fees for boarding horses, while keeping most of the same text that Seabury had written. Seabury disagreed with the new outcome and as a result wrote both the majority and dissenting opinions in the case (*Bailey v. Kraus*, 39 Misc. 845 [1903]).

In addressing the range of human affairs that came before his court, Seabury began to reveal his style of judging and his judicial philosophy. His rather formal demeanor served him well as a judge, and though on a personal level some found him rather remote, he unquestionably had a capacity for subtle humor. His philosophy of legal interpretation was that the reading of the law should be flexible enough to reflect changing social realities. He consistently favored freedom and the rights of labor. His continuing activity in the Henry George Society prompted the *New York Sun* to comment that the "Boy Judge . . . does not act on the theory that persons holding judicial office should either be reticent or inactive in political matters."

In 1905 Seabury maneuvered to avoid receiving the mayoral nomination of the Municipal Ownership League, putting forth instead a political ally, the muckraking journalist William Randolph Hearst. Seabury ran for justice

of the Supreme Court, in New York the highest trial court. Hearst lost the election, probably through fraud, and Seabury too went down to defeat. But in the election of 1906, in which Hearst was defeated in his race for governor, Seabury was elected to the Supreme Court as the candidate of both the Democratic Party and the Independence League (a successor to the Municipal Ownership League). He was thirty-three years old. Just before assuming his new duties he completed *The Law and Practice of the City Court of the City of New York,* which long served as a standard reference work.

He was distinctly unimpressed with his colleagues on the Supreme Court, whom he regarded in the main as pompous, poker-playing political hacks. With his outspokenness it was not long before some of them became his enemies. They could not fail to be impressed, however, by his output of opinions.

His progressive tendencies continued unabated. He ruled that the police could not search premises on mere suspicion of criminal activity in *Fairmont Athletic Club v. Bingham,* 113 N.Y.Supp. 905 (1908), and upheld the attempt of the fire commissioner to require owners of tenements to install fire-prevention equipment in *Lantry v. Hoffman,* 55 Misc. 261, 105 N.Y.Supp. 353 (1907). In a case that garnered considerable attention, he ordered the reinstatement of a fired schoolteacher, a married woman, on the ground that her absence from work to have a child could not be considered "neglect of duty" (*People ex rel. Peixotto v. Board of Education,* 82 Misc. 684, 144 N.Y.Supp. 87 [1913]; *rev'd,* 160 App. Div. 557, 145 N.Y.Supp. 863; *aff'd,* 212 N.Y. 463, 106 N.E. 307 [1914]). Though his ruling was reversed by the Supreme Court's Appellate Division and that reversal was upheld by the Court of Appeals, in the end the commissioner of education agreed with Seabury and voluntarily reinstated the teacher.

Seabury apparently was amused by a suit to collect $200 for the sale of a set of forty-two volumes of the works of the French philosopher and writer Voltaire, in which the defendant claimed that the contract was invalid because the works in question were obscene (*St. Hubert Guild v. Quinn,* 64 Misc. 336, 118 N.Y.Supp. 582 [1909]). The defendant objected specifically to *The Philosophical Dictionary* and *The Maid of Orleans.* Seabury conceded that the works, especially the latter, did contain some material offensive to modern tastes. He noted, however, that a contract for sale of a book could not be declared illegal "unless its sale or publication violates the criminal law" (118 N.Y.Supp., 584) and concluded that "[u]nder no reasonable construction can our law be held to declare the sale or publication of the works of Voltaire a crime" (584). The defendant was perhaps unfortunate in the judge assigned to the case; a year or two earlier Seabury had himself written some rather turgid verse in praise of the "Mocker, scoffer, sceptic" Voltaire.

A case receiving intense scrutiny was that of Charles Becker, a police

lieutenant at whose behest several gangsters (all with names like "Lefty Louie") killed a gambler who was about to testify in court about Becker's involvement in a gambling enterprise. Becker's first conviction was reversed, and Seabury presided at the second trial. His impartiality was such that the *New York World* said that he looked "as if his face had been carved out of stone." Becker was again convicted, and this time the result stood on appeal. In 1915 the state electrocuted him.

Seabury broke with Hearst, believing that the publisher was more interested in personal ambition than the public good, but he continued his political involvement. He successfully intervened in favor of Morris Quasha, a Jew whom the bar's "character committee" refused to approve for the practice of law, though he had passed the bar examination and provided thirty testimonials as to his character, with no evidence against him. In 1913 Seabury received the Progressive Party's nomination for the Court of Appeals, New York's highest court, along with the renowned jurist Learned Hand, but without the endorsement of a major party the cause was hopeless, and both men lost. Early in 1914 Gov. Martin Glynn was to appoint a new justice to that court to fill a vacancy, and the candidates came down to Seabury and Benjamin Cardozo. The governor vacillated endlessly, repeatedly telling first one man and then the other that he was his choice, until the matter became a standing joke between the two judges. Finally Cardozo received the nod. But later that year Seabury, with the backing of both the Progressive and Democratic Parties, won election to the Court of Appeals himself.

He was to serve on this court for barely a year and a half. His opinions in that short time were characteristic of him. In *People ex rel. Somerville v. Williams,* 217 N.Y. 40, 111 N.E. 252 (1916), he held that a state employee could not be fired for refusing to make a political contribution. An important dissent of his favored the rights of workers. At issue was the interpretation of the relatively new workmen's compensation law. These laws were enacted to provide compensation for work-related injuries, as against the old system in which various legal doctrines such as assumption of the risk and contributory negligence generally shielded employers from liability. Seabury argued that the statute was "a new step in the field of social legislation" that should be "interpret[ed] in accordance with the spirit which called it into existence" (*In re Carroll v. Knickerbocker Ice Co.,* 218 N.Y., 445, 113 N.E. 507 [1916]). Thus, common law rules restricting what evidence the worker could offer should not apply. Though his view did not prevail on the court, it influenced the legislature (435).

In 1916 former president Theodore Roosevelt told Seabury that he would support him for the gubernatorial nomination of the Progressive Party, which Roosevelt controlled. In reliance on this promise, Seabury secured

the nomination of the Democratic Party for governor. Confidently expecting to receive the Progressive endorsement as well, he resigned from the court. Roosevelt then announced that "no Progressive should vote for Mr. Seabury." Without that party's nomination, Seabury's chances were ruined, but he campaigned vigorously nonetheless, losing to Charles Whitman. Privately he told Roosevelt to his face that he was a "blatherskite" (an inane, babbling person), an incident he recounted often later in life.

Seabury never returned to the bench. His later career was marked by further unsuccessful political action, including chimerical hopes for the Democratic presidential nomination in 1932 and the Republican gubernatorial nomination in 1934. He achieved great success, however, in investigations into city corruption in the 1930s.

His beloved wife, Maud, died in 1950, leaving him bereft. He declined seriously in the 1950s and was declared incompetent to handle his affairs in 1955 due to senile dementia. He died on 7 May 1958 at age eighty-five. His funeral drew hundreds of people who knew at first hand of his unflinching integrity.

Tim Hurley

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SEWALL, SAMUEL

(1652–1730)

Samuel Sewall
Library of Congress

Samuel Sewall is best known as one of the judges in the Salem witch trials of 1692, but his real contribution to history lies in his thirty-six-years' service on the Supreme Court of Judicature of Massachusetts, including ten years as chief justice. He was widely esteemed as a man of honor and integrity and as one of the first to speak out against slavery and for the rights of Native American Indians.

Sewall was born in Bishop Stoke, Hampshire, in England, the son of Henry Sewall Jr. and Jane Dummer. His father had been sent to Massachusetts in 1635, as a twenty-year-old, to establish a plantation for his family in Newbury; Sewall's mother had emigrated at age nine. The two of them, along with her parents, returned to England in 1646, where Henry served as the minister for North Baddesley until he returned to settle permanently in Massachusetts in 1659. Samuel, his mother, and his siblings followed in 1661.

Sewall's formal education began in England. He learned to read at the petty school in North Baddesley before being sent to a grammar school in Romsey, where he started learning Latin. After his arrival in Newbury, he continued his education under Thomas Parker, a highly educated minister with an M.A. from Oxford and a Ph.D. from Franeker University in the Netherlands. When Sewall was fifteen, his father took him to Harvard,

where he was tested in his knowledge of Latin and Greek. Having passed the entrance exam and completed a transcription of the university's laws, he became a student in 1667. He received his A.B. in 1671 and his M.A. in 1674. His master's thesis was entitled "An Peccatum originale sit & Peccatum & Poena" (Whether Original Sin Is Both Sin and a Punishment).

After completing his M.A., Sewall returned home, where he refused an offer to become the minister at Woodbridge, New Jersey. At that time he married Hannah Hull, daughter of John Hull, one of the wealthiest merchants and landowners in Boston. He and Hannah had fourteen children, six of whom lived to adulthood; three of them survived Sewall. His son Joseph became a minister at the Old South Church and was later chosen as president of Harvard. Sewall's wife died in 1717. He married Abigail Tilley in 1719; she died in 1720, and he married Mary Gibbs in 1722. He had no children with either of these women.

Sewall joined his father-in-law in business, and in 1681, the General Court appointed him to manage the colony's printing press, a position he held for three years. In 1683, he was elected as a member of the General Court, representing the same town his father-in-law had represented; after Hull's death, Sewall took his place on the Court of Assistants, a combination legislature, executive council, and criminal court. When Massachusetts lost its charter in 1684, Sewall turned his attention back to business matters.

The loss of the charter threatened many colonists' land titles; in an attempt to secure his rights, Sewall sailed to England in November 1688, where he learned that James II had been overthrown. Sewall spent a year in England, taking care of business and unofficially helping Increase Mather, who was there trying to get the colony's charter restored. Upon Sewall's return to Boston, he was almost immediately reelected to the General Court.

By the time the new governor, Sir William Phips, arrived in 1692, over 100 people were in jail in Salem, accused of witchcraft. Phips set up a Special Court of Oyer and Terminer to deal with the cases and appointed Sewall to that court. His fellow judges included William Stoughton, who served as chief justice, Bartholomew Gedney, John Hathorne, John Richards, Nathaniel Saltonstall, Peter Sergeant, and Wait Winthrop. When Saltonstall resigned in disgust after the first trial, he was replaced by Jonathan Corwin. Sewall's brother Stephen served as court clerk. The Salem witch trials are one of the most notorious episodes in American history, not only because nineteen defendants were convicted and hanged (including Sewall's friend from Harvard, George Burroughs) and one other defendant, Giles Corey, was pressed to death for refusing to plead, but also because the court allowed the admission of spectral evidence—testimony by the so-called afflicted girls as to the identities of the apparitions they claimed were tormenting them. Sewall may have had misgivings during the trials, but his diary,

which is otherwise a valuable source, is relatively silent about the trials and his reactions to them. In the midst of the trials, he did write his cousin in England that he was "'perplexed p[er] witchcrafts: six persons have already been condemned and executed in Salem'" (Winslow 1964, 127). Beyond that hint, however, we know little of his feelings at the time.

The trials ended in September; Sewall seemed relieved. Soon afterward, he was one of those on the General Court who pushed for a colony-wide day of fasting and repentance to atone for the harm caused by the trials; the measure failed for several years before finally passing. Sewall drafted the proclamation, and the day was set for Thursday, 17 January 1697. At the Old South Meeting House that day, Sewall passed a note to his minister, Samuel Willard (who had vehemently opposed the use of spectral evidence during the trials) for Willard to read to the congregation. This declaration read, in part, "Samuel Sewall, . . . being sensible, that as to the Guilt contracted upon the opening of the late Commission of Oyer and Terminer at Salem . . . is, upon many accounts, more concerned than any that he knows of, Desires to take the Blame and shame of it" (Sewall 1973, 367). The statement then went on to ask both man's and God's forgiveness. It is a remarkable admission on the part of Sewall, who had become convinced that the deaths of two of his children in 1696 were God's punishment for his role in the trials. Sewall was the only one of the Salem judges to apologize, and his experience on this court was to have a profound effect on the rest of his life: It almost certainly influenced his concern over proper procedure and due process as a Superior Court judge and may well have influenced his efforts to help Native American Indians and to persuade his fellow colonists to end slavery.

The Salem witch trials have been the subject of many books, plays, and films, most famously Arthur Miller's *The Crucible,* which he adapted for the screen in 1996. Sewall does not appear in the play but is a character in the film. Because so little is known of the judges' words or actions during the trials, any claims as to Sewall's conduct during the trial are pure speculation. More seriously, though, the leading judge in *The Crucible* is Thomas Danforth, who was not one of the judges of Oyer and Terminer at the time.

Governor Phips's return not only resulted in the Court of Oyer and Terminer, but it also restored legitimate government to Massachusetts, as Phips brought with him the colony's new charter. As part of this charter, a new legislative body was created, and Sewall was elected to the upper house, the Governor's Council. Members of the council were elected by votes cast both in the council and in the General Court, or lower house. It was not uncommon for council members to hold multiple positions; Sewall was a member of the council from 1692 until 1725 and combined his activities on the council with several other public positions, including Superior Court judge.

In addition to setting up the new legislature, Governor Phips set up a proper court, the Superior Court of Judicature, and Sewall became one of the first judges. He was joined on the court by several of his fellow Salem judges: William Stoughton, John Richards, and Wait Winthrop. In theory, the governor had the authority to appoint the judges. In practice, however, "the advice and consent of the [Governor's] Council took the form of an actual vote" (Flaherty 1989, 117). Like his fellow judges, Sewall had no formal legal training. (The first formally trained lawyer on the court was not appointed until 1712; by 1718, he had been joined by two others.) On his trip to England in 1688–1689, Sewall had observed several court sessions and had asked some relatively technical questions of lawyers and judges. Back in Boston, he began importing English legal manuals and made a real effort to acquire a working knowledge of the law. By the time he died, he had acquired a collection of at least twenty-six volumes of Massachusetts, English, and colonial law, all of which he seems to have studied and used. Sewall's efforts to educate himself in the law were typical of the period; it was common for judges to learn from experience, books, colleagues, and lawyers who appeared before them.

Massachusetts law in that period was not just a carbon copy of English common law, however; it was based on a combination of common law, Biblical precepts, statutes, and local custom. Sewall's behavior on the bench reflected this amalgam. Although he upheld Puritan beliefs about the Sabbath, drunkenness, theater, and proper attire, he was also concerned with ensuring that defendants received due process regardless of their social status.

One of the most revealing examples of this concern occurred in 1700, when Sewall became disturbed by the conduct of a fellow Superior Court judge, John Saffin. Saffin had entered into a written contract with a black servant, promising to release him after seven years. At the end of the period, Saffin refused to release the servant, Adam, claiming that Adam had not fulfilled his end of the bargain. Sewall was critical of Saffin's actions, both in refusing to release the man (against Sewall's order) and for engineering his elevation to the Superior Court, where he refused to recuse himself from his own case. The servant, Adam, was eventually released, but the case prompted Sewall to write a tract against slavery, *The Selling of Joseph*. According to Winslow, this was the "first public plea" against enslaving blacks, and Sewall continued to distribute copies of it for years, despite its cool reception (Winslow 1964, 162). In 1719, he wrote to a fellow judge who was to hear a case of a white man accused of killing his slave, reminding him that "the poorest Boys and Girls within this Province, such as are of the lowest condition; whether they be English, or Indians, or Ethiopians. They have the same right to Religion and Life, that the Richest Heirs have" (167).

The Judge and Jury from Hell

Many students of literature will be familiar with Stephen Vincent Benet's fictional story "The Devil and Daniel Webster," in which Webster successfully defends Jabez Stone from the terms of a contract he has made with Satan. Benet described the jurors, all Americans but all literally from hell, as follows:

> For there was Walter Butler, the loyalist, who spread fire and horror through the Mohawk Valley in the times of the Revolution; and there was Simon Girty, the renegade who saw white men burned at the stake and whooped with the Indians to see them burn. His eyes were green, like a catamount's, and the stains on his hunting shirt did not come from the blood of The deer. King Philip was there, wild and proud as he had been in life, with the Great gash in his head that gave him his death wound, and cruel Governor Dale, who broke men on the wheel. There was Morton of Merry Mount, who so vexed the Plymouth Colony, with his flushed, loose, handsome face and his hate of the godly. There was Teach, the bloody pirate, with his black beard curling on his breast. The Reverend John Smeet, with his strangler's hands and his Geneva gown, walked as daintily as he had to the gallows. The red print of the rope was still around his neck, but he carried a perfumed handkerchief in one hand. One and all, they came into the room with the fire of hell still upon them, and The stranger named their names and their deeds as they came, till the tale of Twelve was told. (Benet 1942, 40)

With bravado, Webster commented on his disappointment at not seeing Benedict Arnold but was informed that he was "engaged upon other business" (Benet 1942, 41).

As judge, the devil had selected "Justice Hathorne," whom he described as "a jurist of experience." Hathorne, who had presided over some of the Salem witch trials, was none other than one of the forebears of the novelist Nathaniel Hawthorne.

In Benet's tale, the jury ultimately acquitted Stone, noting that "even the damned may salute the eloquence of Mr. Webster" (Benet 1942, 43).

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Sewall also used his dual positions on the council and on the bench to try to protect Native Americans. In 1699 he had become the treasurer of the Society for the Propagation of the Gospel in New England, a group dedicated to Christianizing the Indians. Sewall was inspired in part by a belief that the Indians were one of the lost tribes of Israel and spent both time and money to see that churches were built to serve the Indians. He was also motivated by simple humanity, and in 1705, he managed to alter the wording of a bill that outlawed marriages between blacks and whites; the original draft of the bill had included Indians, but Sewall warned that he feared

such a measure would "be an Oppression provoking to God and that which will promote Murders and other Abominations" (he added that he had managed to include a clause allowing blacks to marry one another) (Sewall 1973, 532.). Sewall wrote in 1716 that he had tried to prevent blacks and Indians being "rated with Horses and Hogs, but could not prevail" (822). Sewall was also one of the first to propose a formal and permanent boundary between Indians and whites (something the Indians also wanted) on the grounds that such a boundary was the only way to prevent further war and bloodshed. Although he retained Puritan beliefs about proper conduct and dress, he was well ahead of his time on other issues.

Sewall was also willing to uphold a defendant's legal rights, even when the other party in the case was rich and powerful. In 1705 two carters, Thomas Trowbridge and John Winchester Jr., had allegedly refused to move their carts out of the road and allow Governor Dudley's carriage to pass. An altercation broke out, though the governor and the two carters each told different versions of the events; when a justice of the peace arrived, the governor had the two carters arrested. Despite the objections of the governor and his son the attorney general, Sewall insisted that the men be allowed bail on the grounds that only those charged with felonies or treason were to be denied bail. Sewall wrote in his diary that he was happy to have "been instrumental" in getting the men released (Sewall 1973, 536).

Dudley did not stop there, though. Prior to the trial, he tried to influence the outcome of his case by reading a statement of his version of events at a council meeting on 12 January 1706. (Like Sewall, several of the Superior Court judges who were to hear the case were also council members.) Dudley also accused Sewall of preparing to report that "quarts of blood [were] running out of Trowbridge's horses." Sewall denied the accusation but did argue that the justice of the peace who had been present when the carters were arrested should not have drawn his sword; the governor defended the justice of the peace. When the case finally came to trial in November 1706, the two defendants were acquitted (Flaherty 1989, 127; Winslow 1964, 146–147). Sewall's actions in this case are even more remarkable given the fact that Superior Court judges served only at the pleasure of the Crown (Flaherty 1989, 121).

Sewall was sworn in as chief justice of the Superior Court in April 1718, following the death of Wait Winthrop. Governor Shute had intended to appoint Paul Dudley, the attorney general and son of the former governor, to the position, but the governor was successfully convinced by Sewall that as a man of standing in the community and as the only judge to have served since 1692, he deserved the position. He also reminded the governor that he had "'not miss'd Bristol Circuit for more than Twenty years together'" (Flaherty 1989, 119). Sewall held the position of chief justice until he re-

signed from it in July 1728 at the age of seventy-six. At the time of his resignation, he had served on the Superior Court for thirty-six years, traveling throughout the colony several times a year.

In 1722, Sewall once again intervened to protect the rights of Indians. At a council meeting, he voiced his concerns over a plan to arrest leaders of an Indian rebellion and to force them to pay for the costs of the uprising. If the leaders were unwilling to cooperate, the plan called for them to be captured and brought to Boston. Sewall expressed his doubts about the legality of this move; such was Sewall's reputation and influence that the scheme was postponed (Flaherty 1989, 125).

Sewall's public life began winding down in 1725, when he resigned his position on the Governor's Council, despite the pleas of a deputation sent to change his mind. He resigned as probate court judge for Suffolk County in 1728, a position he had held since 1715. He also resigned from the Superior Court in 1728. During his thirty-six years as a Superior Court judge, Samuel Sewall worked to ensure that the law was administered fairly and honestly. He personified the behavior that he believed all judges should exhibit: "May the Judges always discern the Right, and dispense Justice with a most stable, permanent Impartiality" (Sewall 1973, 714). Sewall died on 1 January 1730.

Carol Loar

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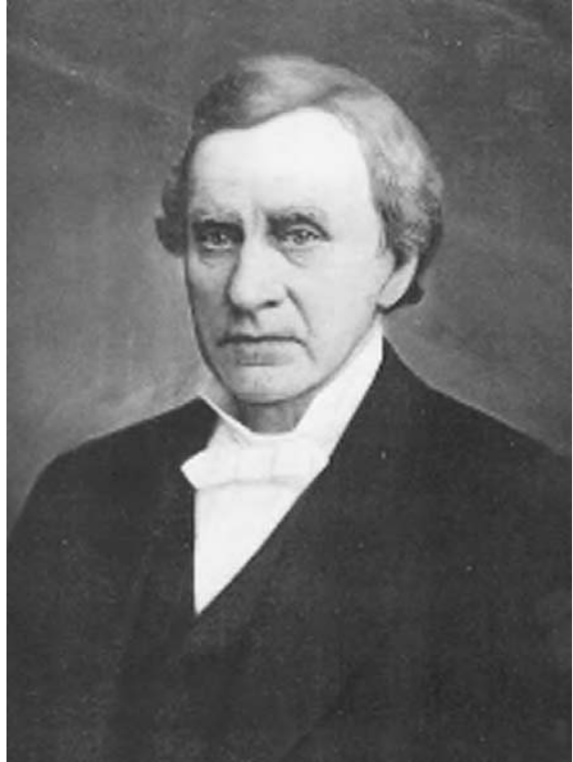
SHARSWOOD, GEORGE

(1810–1883)



George Sharswood
Library of Congress

From the earliest colonial times through the end of the nineteenth century, the city of Philadelphia was, as one writer phrased it, "the cynosure [that is, guiding star] of the legal profession in [America's] early national period" (Nash 1965, 205). Steeped in English legal tradition, Philadelphia's lawyers, many of whom had had years of study in Great Britain's Inns of Court, were the sons of the elite of the city. The Philadelphia bar was thought to be the equal of the bar of Westminster Hall. "I have never met a body of men more distinguished by acuteness and extensive professional information than the members of the Philadelphia bar," wrote British scholar and diarist Thomas Hamilton in 1833 (205).

George Sharswood, the son of a lumber salesman, was a product of this august legal tradition. He was a legal scholar, lecturer (1836–1883) and law professor (1850–1868), Pennsylvania legislator (three terms), district court judge (1845–1867, including nineteen years as presiding, or "president," judge), and Pennsylvania Supreme Court justice (1867–1882, four years of which he served as chief justice). A lifelong resident of Philadelphia, he was one of America's most outstanding jurists. On 8 January 2002, the Philadelphia Bar Association, marking its bicentennial, enshrined Sharswood in its Hall of Fame, noting, "Sharswood was considered by

lawyers to be a great judge. He had a reputation for being extremely practical, decisive, rigidly impartial, quick to grasp facts, firm in controlling the courtroom, and lucid in his jury charges."

Sharswood was a prolific author and annotator. His first published work, an article on the Revised Code of Philadelphia, was written when he was but twenty-four. An expert in many areas of the law, his writings often became standard textbooks in the U.S. law schools of the period. His 1859 edition of *Blackstone's Commentaries on the Laws of England, with Notes and a Life of the Author,* written with special reference-use for U.S. lawyers, was his best-known work. Here, and in other writings, can be found one of the central tenets of his judicial philosophy: "Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness according to his own views of his interests and the dictates of his conscience, unrestrained except by equal, just and impartial laws" (Ransier).

An incomplete list of his other books includes *Roscoe on Criminal Evidence* (1835), *Leigh on Nisi Prius* (1838), *Stephens on Nisi Prius* (1844), *Russell on Crimes* (1844), *English Common Law Reports* (in 1847 he indexed, with George W. Biddle, volumes 1–47; in 1853 he annotated volumes 66–90), *Byles on Bills of Exchange* (1852), *The Common Law of Pennsylvania* (1855), *Lectures on Commercial Law* (1856), *Lectures Introductory to the Study of the Law* (1870), *Tudor's Leading Cases in Mercantile and Marine Law, with American Notes and References* (1873), *Starkie on Evidence* (1876), and *Smith on Contracts* (1879). Many of these books saw multiple revised editions throughout his lifetime. His most influential work, *Essay on Professional Ethics* (1854), is still referenced today. In 1907 it became the basis for the American Bar Association's first ethical code, *The Canons of Professional Ethics*.

Sharswood's commitment to teaching began in his twenties. He lectured, intermittently, at the Law Academy of Philadelphia for forty-seven years. The academy, a professional social and debating society for lawyers and students, founded in 1821, made him a vice-provost (1835–1853) and then provost (1836–1883). He also served one term (1836–1837) as its president. His last address, delivered 13 March 1883, two months before his death, chronicled the history and aims of that institution.

At the University of Pennsylvania, where he taught for eighteen years, Sharswood was instrumental in guiding the state's transitional period in legal education from an office-apprenticeship system (two to three years of study and clerkship under the guidance of a practicing attorney, called a "preceptor") to a two-year program of systematic university training. Constituting a faculty of one, Sharswood accepted the position of professor of law on 2 April 1850. At that time there were only fourteen other law

schools in the United States. His initial class, including practicing attorneys, numbered fifty.

In 1852 Sharswood became the Law School's first dean. He increased the faculty to three, adding professors Peter McCall, a future Philadelphia mayor, and Elihu Spencer Miller, a published scholar and colleague from the Law Academy. He continued to lecture, twice a week, in international, constitutional, commercial, and civil law. Although the "preceptor" system of legal education continued, by 1856 the Law School's bachelor of law degree sufficed to meet all requirements for admission to the bar. From 1872 to 1883 Sharswood was a trustee of the university and president of the Alumni Society.

When Columbia University and New York University established law schools in 1858, they both granted Sharswood honorary LL.D. degrees. In the 1860s Sharswood, with George W. Biddle, organized a political economy club. For years it met twice a month, with various members delivering papers on the works of economists Adam Smith, John Stuart Mill, David Ricardo, and others.

George Sharswood, the sixth generation of American Sharswoods, was born in Philadelphia, 7 July 1810, to George and Esther (Dunn) Sharswood. The elder Sharswoods had left England in 1665, settling in New London, Connecticut. Subsequently, they moved to Cape May, New Jersey, before settling in Philadelphia, about 1706.

When his father died, tragically, on 2 February 1810 at the young age of twenty-two—some five months before his son's birth—the burden of young George's upbringing fell to his widowed mother, Esther, and his paternal grandfather, James. Grandfather Sharswood, an educated man of considerable accomplishment, effected young George's primary education. A captain in the American Revolution, he had amassed a considerable fortune in lumber, had served as a state legislator, and had authored newspaper articles critical of the first Bank of the United States.

In 1825, at the age of fifteen, Sharswood enrolled, as a sophomore, at the University of Pennsylvania. He studied in the Classical Department and graduated 31 July 1828 with highest honors, delivering the salutatory address in Latin. That August he began the study of law in the office of Joseph R. Ingersoll, his preceptor for three years. Sharswood later recalled this experience as one of the best of his life. He was admitted to the bar 5 September 1831 at the age of twenty-one. Forsaking active legal practice, however, he continued his scholarly pursuits. In 1834 he delivered "An Address upon the Rights of the States" to the States Rights Association of Pennsylvania, articulating his opposition to governmental proscription of personal liberties and actions.

A lifelong Democrat, Sharswood began his political career in 1837 with his election to the Pennsylvania legislature. Leaving the legislature, he was elected, 1838–1840, to successive terms on the Select Council of Philadelphia. He closed his political career with reelection to the legislature in 1841 and 1842. In 1841, as a member of the judiciary committee that also included the ardent abolitionist Thaddeus Stevens, he debated a proposal to abolish imprisonment for debt—a subject, at the time, of intense and bitter feelings. The measure became law.

That same year, Sharswood accepted a position as secretary on a committee of bank shareholders formed to examine the failure of the second Bank of the United States. The bank, established in 1816, collapsed amid great political entanglements in 1836. At the demise of the second bank, president Nicholas Biddle, a Philadelphian, incorporated, at a cost of $6 million, its Philadelphia branch bank. Highly questionable and risky operations, however, squandered the new state bank's reputation and credit, and in 1841 it also failed. Sharswood authored two highly respected reports (the second a critical rejoinder) that demonstrated a remarkable grasp of the entire complicated financial affair. Missouri senator Thomas Hart Benton, an implacable foe of the second bank, in his autobiographical memoir *Thirty Years View,* reproduced the report with admiration and agreement (1856, chap. 87).

Democratic governor Francis R. Shunk nominated Sharswood for the position of associate judge of the District Court for the City and County of Philadelphia on 8 April 1845. Unanimously confirmed by the Senate, Sharswood was not yet thirty-five when he took his seat. Subsequently, with the resignation of president judge Joel Jones, Sharswood became the new president judge on 1 February 1848.

On 27 November 1849, Judge Sharswood married Mary Chambers, the daughter of Pennsylvania State Supreme Court justice George Chambers of Chambersburg.

In 1850 the judiciary became elective, specifying ten-year terms for District Court judges. Elected president judge in 1851, Sharswood was the unanimous and independently nominated candidate of all five existing political parties. In 1861 his reelection was again without opposition.

The District Court's docket in 1848 had a backlog of 1,600 cases, with new filings numbering more than a thousand a year. The delay between filing and hearing was about one year. With the concurrence of Associate Justices John Innis Clark Hare and George M. Stroud, Sharswood's court set itself a Herculean task; meeting ten months a year, it resolved that a trial should be finished on or before midnight of the day it began. Thus, by precariously balancing the notion of "due consideration" with the dictum "jus-

tice delayed is justice denied," the court, by 1855, reduced its arrears to about a stable 600 cases a year, even as the number of new cases filed annually increased dramatically (Biddle 1883, 12; Dickson 1907, 136).

During Sharswood's career on the District Court bench, he wrote more than 4,000 opinions, many of them, of necessity, concise and brief. Many more were delivered orally. Testimony exists that litigants were consistently satisfied with the fairness of their hearings, and the legal quality of the court's decisions was astonishing. Of 156 Sharswood decisions appealed to the State Supreme Court, only thirty-two were reversed. His opinions from 1850 to 1868 are contained in volumes 1–6 of *The Philadelphia Reports*.

In 1862 the federal government passed the Legal Tender Act, issuing "greenbacks" (not convertible to metal on demand) to defray the cost of the Civil War. The act's constitutionality was brought before Sharswood's court in *Borie v. Trott* (5 Philadelphia Reports, 366). The court found the act legal; but in a fifteen-page dissenting opinion, relying on a strict interpretation of the Constitution's grant of limited powers and meticulously citing all relevant cases and history, Sharswood found the new federal notes to be not "money" but "bills of credit" and not "legal tender." The Constitution, he said, sanctioned only coins or metallic money. The thoroughness of his opinion became the classical expression, in future arguments, for all those who opposed "paper money."

In this century, Sharswood's views on "hard money" appear antiquated. Taken in a larger historical context, however, they are not. In the nineteenth century the debate over "hard money" versus "paper money" was, after slavery, the second most hotly debated national topic. Metal money was, by its nature, of limited supply—its value more stable. Paper money, easily printed, fluctuated with the supply on hand. Established states, like Pennsylvania, and their banks—conservative, well established and able to be lending institutions—had a vested interest to be protected by *in specie* repayment (value loaned should be repaid in equal value). On the other hand, frontier "emerging" states, with their speculative entrepreneurial efforts, wars, and revolutions, benefited more by borrowing at stable value (hard money) and repaying in inflated paper money of inferior purchasing power.

The economist John Kenneth Galbraith wrote that the basic tension between *in specie* and paper money was the monetary mechanism that established our economy and developed our entire nation (1971, chap. 3). Beneficial within limits, but destructive when uncontrolled, paper money functioned as a taxation of the established where actual taxation would have been unacceptable. Because it had the immoral virtue of losing some of its worth as more of it was printed, it provided, in effect, a discount on the repayment of debt. The opposition of these two "money" policies, he wrote, was a very beneficial dialectic for the development of America.

All accounts of Judge Sharswood's life portray him as a kindly and agreeable man. One wonders, however, if his sense of humor would have embraced an incident that occurred in 1736 when Pennsylvania was an "emerging" state. Benjamin Franklin, a fellow Philadelphian, was an enthusiastic supporter and printer of paper money. When his press was so busy in 1736 printing paper money that his *Pennsylvania Gazette* was not published on time, Franklin once printed an apology, explaining that he had been busy "laboring for the publick Good to make Money more plentiful" (Galbraith 1971, 54).

The debate between metal and paper money interests was, in fact, a debate about money supply and not merely the "form" that money should take. Judge Sharswood's decision, based on a conservative constitutional view, was a well-reasoned legal argument for a tight money supply. Today, those debates take place among money supply theorists at the Federal Reserve Bank—and, in paper money.

In 1867 Sharswood was elected to a fifteen-year term as associate justice of the Pennsylvania Supreme Court, besting the Republican candidate, Henry W. Williams (Williams would later join him on the court). Because the court met in Philadelphia, Harrisburg, and Pittsburgh, Sharswood resigned from the university, giving his last lecture on 30 April 1868.

Eleven years later, on 6 January 1879, he became, by priority of commission, the court's chief justice, occupying the vacated chair of George W. Woodward. He retired, with the expiration of his term, in January 1883.

Sharswood's decisions are cataloged in volumes 57–102 of the *Pennsylvania State Reports*. Three, of historical interest, are cited here. Others, encompassing other areas of law, are addressed in Biddle (1883, 25–37).

In *Audenried v. Philadelphia and Reading Railroad* (68 Pa. St. 377), the correct function of a preliminary injunction was a matter of discussion. Sharswood, noting that an injunction, as a measure of mere temporary restraint, should not be used as a tool to accomplish other ends, wrote, "A tribunal that finds itself unable directly to decree a thing, ought never to attempt to accomplish it by indirection" (378). His conservative view of injunction is clearly at odds with that of Illinois federal judge Thomas Drummond (1809–1890).

In December 1871 Justice Sharswood wrote the opinion in *Carrie S. Burnham v. Louis Luning, George Lewis, and Joseph Haughton* (9 Phil. Rep. 241). Burnham, a twenty-one-year-old female resident of Philadelphia, sued election officers for "refusing her vote" under the definition of a "freeman." The suit was denied, Sharswood reasoning that "under the word 'freeman' in the constitution of Pennsylvania, Article III, sec. 1, the right of voting is confined to citizens of the male sex" (241).

In 1879 the court heard *Kane v. Commonwealth* (89 Pa. St. 522). The

question at issue was whether a jury's duty was to judge the law as well as the facts in a criminal case. In deciding affirmatively, Sharswood said, "the power of the jury to judge of the law in a criminal case was one of the most valuable securities guaranteed by the Bill of Rights" of Pennsylvania (527).

Justice George Sharswood died at his Philadelphia residence, 322 South Thirteenth Street, early on the morning of 28 May 1883. He was seventy-three years old and had spent the final fifteen years of his life quietly resigned to the chronic and severe physical pain associated with the fistula that claimed his life. (He once confessed to a friend that he had not experienced a single conscious pain-free hour during all of those years.)

He had also suffered the loss of his entire household. Mary, his beloved wife of only eight years, had died 8 November 1857. Their only son, a lawyer, but also a fragile consumptive for many years, had passed away shortly before Sharswood's retirement. His devoted mother, Ester, had predeceased him in 1865.

In addition to having been past president of the Philadelphia Institution for the Deaf and Dumb, Sharswood, a Presbyterian, had been a member and trustee of Philadelphia's Tabernacle Presbyterian Church, a trustee of the Presbyterian General Assembly, and a director of the Theological Seminary at Princeton.

Today, a commemorative medallion and inscription honoring Justice George Sharswood grace the Thirty-fourth Street entrance of the Law School's Silverman Hall in Philadelphia.

Kevin Collins

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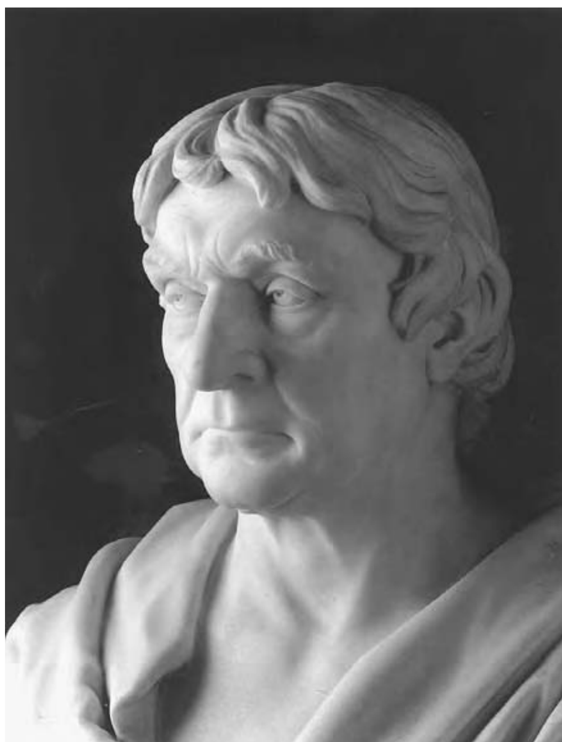
SHAW, LEMUEL

(1781–1861)



LEMUEL SHAW
Social Law Library, Boston

CHIEF JUSTICE OF THE SUPREME Judicial Court of Massachusetts from 1830 to 1860, Lemuel Shaw wrote approximately 2,200 opinions. These opinions covered a broad scope of jurisprudence, with the exception of admiralty, and no state judge's work so profoundly shaped not only his own times but the path of American law for generations to come. Bernard Schwartz, in *A Book of Legal Lists* (1997, 130), ranked Shaw as the greatest non–Supreme Court judge in U.S. history. Shaw's main biographer, Leonard W. Levy, concluded: "No other state judge through his opinions alone had so great an influence on the course of American law" (1957, 3).

Shaw was born on 9 January 1781 in Barnstable, Massachusetts, the second son of the Reverend Oakes Shaw, an Episcopalian minister, and his second wife, Susanna Hayward. Oakes Shaw educated his son at home, except for a few months at a private school in Braintree. Lemuel Shaw entered Harvard in 1796 and graduated four years later with high honors. He studied law with David Everett and entered practice in Boston in November 1804. His practice was lucrative; his political life was active.

Shaw became engaged in 1802 to Nancy Melville, daughter of Maj. Thomas Melville of Boston, but she died before they were married. On 6

January 1818 Shaw married Elizabeth Knapp, daughter of Josiah Knapp of Boston. She died in 1822, leaving a son and a daughter. The latter became the wife of acclaimed author Herman Melville, nephew of Shaw's former fiancée. Melville is believed to have modeled at least one fictional character on Shaw, namely the lawyer figure in "Bartleby," an essay that appeared in *Putnam's Monthly* in 1853. As Shaw would do in *Brown v. Kendall* (1850), the lawyer in the essay emphasized the word *prudent*. Other literary critics believe that Melville's portrait of Guinea in *White-Jacket* reflected Shaw's ambivalence on slavery. Still other critics believe Shaw influenced Melville's treatment of substantive and procedural criminal matters in *Billy Budd,* and they find links particularly with Shaw's approach to guilt and innocence in his charge to the jury in *Commonwealth v. Webster* (1850). In any event, on 29 August 1827 Shaw married Hope Savage, daughter of Dr. Samuel Savage, and with her had two sons.

Shaw had a wide and varied political career that prepared him well for service on the bench. He was elected to the Massachusetts General Court and served in 1811–1814, 1820, and 1829 and in the Senate in 1821–1822. He was also elected to the Massachusetts constitutional convention in 1820, where he played a leading role. He drafted the first charter for the city of Boston and held a number of offices for the city prior to beginning his service on the bench.

Gov. Levi Lincoln appointed Shaw to the position of chief justice of the Supreme Judicial Court on 30 August 1830. Immediately, his salary dropped from $20,000 a year to $3,500, but by that time Shaw had amassed considerable wealth and was eager to join the state's highest court. He served three decades, resigning on 21 August 1860 to the overwhelming acclaim of the Massachusetts bar.

During Shaw's time the chief justice sat not only to hear appeals but to try cases as well. In both areas, Shaw left an indelible impression on American law. The smaller of his judicial tasks involved presiding over trials, several of which became landmarks in U.S. legal history. As a trial judge, Shaw earned a reputation for thoroughness, patience, and an unexcelled capacity to charge juries.

Those skills were tested in the 1834 trial of anti-Catholic rioters who destroyed the Ursuline convent in Charlestown (*Commonwealth v. Buzzell,* 33 Massachusetts Reports 153). At the trial of the rioters, who were convicted, Shaw was scrupulously fair, even when faced with virulent anti-Catholic prejudice. During the trial, Shaw noted that "witnesses of all religious persuasions are placed on the same footing, each is to stand on his own individual character" (Levy 1957, 268).

Shaw also presided over other highly visible criminal trials. Perhaps the most notorious was the 1850 proceeding against Prof. John White Webster,

of Harvard University, who was convicted of murdering Dr. George Parkman (*Commonwealth v. Webster,* 59 Massachusetts Reports 295 [1850]). Webster, the editor of the *Boston Journal of Philosophy and the Arts*, had borrowed extensively from Parkman, perhaps the best-known man in Massachusetts. When Parkman learned that Webster was attempting to borrow money on already-mortgaged property, he demanded immediate payment and threatened to have Webster removed from his prestigious faculty position. Webster retaliated by killing Parkman, butchering his body, and stuffing part of it down a laboratory privy. The case generated enormous public interest and considerable criticism of Shaw, notably for his decision to allow the courtroom audience to change every ten minutes, which permitted more than 60,000 people to glimpse the proceedings, and, even more important, for his three-hour charge to the jury. That charge, which has been the subject of heated debate among legal scholars, effectively placed the burden on Webster to prove his innocence rather than on the Commonwealth to prove his guilt.

Controversy followed Shaw into other areas of the law, especially matters involving race and slavery. There is no doubt that Shaw had an unstinting commitment to a free society. For example, in the case of *Commonwealth v. Aves* (18 Pickering 193 [1836]), Shaw addressed the question of whether a six-year-old slave girl, Med, who had traveled from New Orleans with her female master, had become a free person as a result of having journeyed into the free territory of Massachusetts. Thomas Aves, the father of the owner, kept the young girl during her stay in Boston. Antislavery groups in the city sought a writ of habeas corpus to have the girl freed, but Aves refused to release her, claiming that he had a duty to return her to her owner, his daughter. The question posed to Shaw was whether a slave brought temporarily into a free state could become permanently free.

Shaw forthrightly condemned slavery. He held that the peculiar institution could not exist in the commonwealth and that it was "contrary to natural right, to the principles of justice, humanity and sound policy" (18 Pickering 210). With those ringing words, Shaw ordered Med freed and laid down the principle that slavery could only exist by local, positive law. Antislavery advocates in Boston greeted the decision enthusiastically, but Shaw's actions in freeing Med only partially captured the reality of his beliefs. Shaw also had substantial doubts about the capacities of African Americans, and as a matter of law, he also supported the rights of owners of fugitive slaves.

In the home state of abolitionist leader William Lloyd Garrison, there had been substantial progress directed toward improving the condition of the African American population. Massachusetts, for example, by 1849 had rescinded a law that prohibited interracial marriage and passed another that ended the practice of Jim Crow segregation on railroads. Several cities in the

commonwealth had also abolished separate schools for African American students, although Boston was not one of them. To that end, Charles Sumner in 1849 argued before Shaw and his colleagues that such schools should be abolished in the city, where they had existed for more than half a century.

Shaw spoke for a unanimous court in *Roberts v. City of Boston* (5 Cushing 198 [1849]), holding that the school committee that operated the Boston schools had the power to impose segregation by race. Shaw noted that the plaintiff had access to an existing African American school and that it was as well prepared to serve the children who attended as were the all-white schools in the city. The committee that ran the schools, Shaw continued, had the authority to decide who might attend a particular school, whether on the grounds of race, color, or religion. Shaw agreed not only that the committee had the power to decide the matter but also that it had the capacity to decide what was in the best interests of the citizens and the children in doing so. If it believed that schools segregated by race were appropriate, then so be it. Shaw recognized that prejudice existed in society, but he also concluded that there was nothing that the law and courts could do about it. That prejudice, he noted, "is not created by law, and probably cannot be changed by law" (Levy 1957, 115). What Shaw did require, in light of an equal protection clause in the Massachusetts constitution, was that all schools provide for their students in the same way. In short, Shaw read the concept of "separate but equal" into the American law of race relations.

That concept had greater vitality nationally than it did in Massachusetts. In the case of the latter, the state's legislature in 1855 responded to abolitionist demands by eliminating race, color, or religious opinions as a basis to determine entry into a public school. Nationally, however, the concept of separate-but-equal enjoyed considerable longevity, and southern legislators and judges regularly cited Shaw's opinion in *Roberts,* even after adoption of the Fourteenth Amendment, to sustain a segregated social order. The Supreme Court of the United States finally discredited the doctrine in *Brown* v. *Board of Education of Topeka* (347 U.S. 483 [1954]).

Antislavery and abolitionist criticism of Shaw reached a crescendo in 1851 when he refused to issue a writ of habeas corpus to free Thomas Sims, purportedly a slave owned by a rice planter in Chatham County, Georgia. Under the authority of the Fugitive Slave Act of 1850, the U.S. magistrate in Boston took Sims into custody and imprisoned him in the jury room of the Boston Court House. As the magistrate initiated proceedings against Sims before federal magistrate George Ticknor Curtis, Samuel E. Sewall, an antislavery advocate, asked Shaw to issue the writ to bring Sims before the Supreme Judicial Court on the ground of illegal detention.

In *Sims Case* (7 Cushing 285 [1851]), Shaw seemingly reversed course from his earlier decision involving the slave child Med, much to the chagrin

of Boston's militant antislavery forces. After briefly consulting his associates, Shaw refused to help free Sims. He concluded that his court lacked any authority to decide the question of whether Sims was a freeman or a slave; that question, under the 1850 federal law, properly belonged to the federal magistrate. In effect, Shaw, an opponent of slavery, gave preference to his ideas about the role of a judge, which stressed the need to follow the law, even if it meant that he had to subordinate his personal and political views to do so. The abolitionist leader Wendell Phillips denounced Shaw "in terms that a gentleman would hardly apply to a pickpocket" (Levy 1957, 95). Recent historians have been equally as critical, charging that Shaw preferred to use the mask of the law as a way of hiding his moral duty to do everything he could to undermine the evil of slavery.

Shaw established his greatness through a strong sense of duty as a judge, his fidelity to the law as he understood it, and his resoluteness in the face of hostile opponents. These qualities became particularly clear in his capacity as an appellate judge. Shaw did not achieve distinction based on the literary quality of his opinions, which were often verbose and overwrought; instead, Shaw's greatness stemmed from the reasoned majesty of those opinions. He managed through them not only to accommodate the law of the commonwealth but U.S. law more generally to the rise of market-driven capitalism.

The court's 1842 term was among its most important, and during that term Shaw gave expression to two enduring concepts in U.S. labor law: the fellow servant rule and the legality of labor unions.

Lemuel Shaw did not originate the idea of the fellow servant rule, which courts in both England and South Carolina had articulated earlier. What Shaw did, however, was to take the existing weak rule and turn it into something greater. The rule held that a servant, or employee, injured through no fault of his or her own by a fellow servant could only seek an action for damages against the employee ("fellow servant") who had done the injury, not against the employer of that person. The rule, which Shaw articulated in *Farwell v. Boston and Worcester Railroad* (4 Metcalf 49 [1842]), relieved American capitalism, at a critical moment in its development, of the direct costs associated with industrial accidents and shifted those costs to the workers. The decision was widely cited both in the United States and in England.

Shaw's other significant decision in 1842 involved the law of labor conspiracies. Since the middle of the fourteenth century, English law had made it a crime to conspire to organize workers with the goal of improving their conditions of labor. As a result, trade unionism was severely restricted; those who engaged in collective organizing efforts faced criminal prosecution, fines, and jail. Early American courts had adopted the concept as well.

Most American judges subscribed to the so-called wage-fund theory that held that there was only a fixed amount of national income available for wages, which meant that employers had to be free to hire whomever they wanted and at a level dictated by the balance sheet. More than a dozen cases had ended in convictions between 1806 and 1842, when Shaw issued his opinion in *Commonwealth v. Hunt* (4 Metcalf 111 [1842]).

The case began in 1840 when Jeremiah Horne, a member of the Boston Journeymen Bootmakers' Society, refused to pay a fine to the society for doing extra work without compensation, a practice that violated the society's rules. Even after his employer agreed to pay the fine, Horne remained resolute, and largely because he feared a strike by other workers, his employer discharged him from his position. Horne then complained to the district attorney in Boston, Samuel D. Parker, who sued the society as a criminal conspiracy. The society members were found guilty, but they appealed to Chief Justice Shaw and his court.

Shaw's achievement in *Commonwealth v. Hunt* was to exercise fidelity to established doctrine involving the law of labor while giving trade unionists the legal support they needed to organize. Shaw recognized that in some instances trade unions might conspire to serve bad purposes, but the mere act of being part of a union did not constitute a conspiracy. Moreover, Shaw concluded, a union might appropriately engage in activities that would provide assistance to its members in time of trouble, improve intellectual or social conditions, improve their craftsmanship, and even raise their wages. Since these were lawful ends, it was also appropriate, and lawful, to form a union with just such purposes and to have it operate as a closed shop, one in which the union could require that only its members be employed by an owner.

The decision in *Hunt* came at particularly critical moment in the history of labor and the law. On the one hand, labor was busy with an increasingly active agenda of organizing its growing ranks; on the other hand, legal reformers were pressing for wholesale codification of the common law, a development that Shaw opposed. In this instance, Shaw was able to adapt the law to the growing realities of the industrial labor market while retaining the prerogative of judges to invoke the common law process to promote social change. Shaw, in the end, wanted to make certain that he and his fellow judges, not just legislators enacting codes, retained the power to change and adapt the law to new social circumstances.

Shaw's skill at adapting settled law through the judicial process resulted a year later in another enduring milepost, *Brown v. Kendall* (6 Cushing 292 [1850]). The emerging American market economy depended on rewarding people who were willing to take risks and engage in ventures for productive ends. The traditional rules covering torts—civil wrongs—provided that a

person acted at his or her own peril. What the emerging market economy needed, however, was a rule that put greater emphasis on blameworthiness. That meant the law had to be structured in such a way that the injured person had to show why the law should shift the loss onto the one who caused the injury. Liability became a necessary condition of fault instead of being the indiscriminate product of all acts that caused an injury.

Shaw's opinion in *Kendall* held that a plaintiff had to demonstrate either that the intention of the defendant who caused the injury was unlawful or that he or she was at fault. If the injury was unavoidable and the defendant had acted without blame, then there could be no liability. What Shaw decided, what he read into American law, was that those who engaged in economic activity should not be exposed to liability for the consequences of pure accidents, unless a prudent person could have foreseen the possibility of harm. As a result, risk-creating enterprises were viewed as less hazardous than they had been under the common law.

A year later, Shaw added to his view that the law and courts should assist entrepreneurs. At the heart of doing so was the definition of the state's police powers—those powers of the legislature to deal with health, safety, morals, and welfare. In *Commonwealth v. Alger* (7 Cushing 53 [1851]), Shaw broadly defined the scope of those powers.

The case involved a defendant, Alger, who had erected a wharf in violation of legislative boundary lines. Alger claimed that since he had built the wharf entirely on his property the law had no application and was invalid. His legal counsel insisted that the state could only interfere with Alger's property rights if it compensated him justly when doing so. Shaw, however, took a dramatically different tack. He emphasized that public rights took precedence over private rights and that all private property was subject to restraint in its use for the public good. Shaw noted that the legislature has the power "of defining and securing the rights of the public" and "to make such reasonable regulations as they judge necessary to protect public . . . rights" (7 *Cushing* 104). For the next century, the aggressive view of the police power struck by Shaw would gradually prevail over a strict laissez-faire ideology. The rise of the police powers also fitted with one of Shaw's other goals: placing courts and legislatures in the position of building the strength of the commonwealth by constantly balancing individual rights against the need for government to shape the public good.

Shaw was an important and influential judge because he combined a respect for the development of public policy through the courts with a belief that his responsibility was to interpret the law as he understood it. Thus Shaw left a legacy of judging in which he once observed that "[i]t is not enough to say, that the law is so established. . . . The rule may be so good a rule. . . . But some better reason must be given for it than that, so it was

enacted, or so it was decided" (Levy 1957, 334). He managed, therefore, to fix what he deemed enlightened public policy at the root of all legal principles, and that approach made it possible for him to domesticate the received common law of England and to make the result compatible with the practical realities of a rapidly expanding economy and growing state power. Oliver Wendell Holmes Jr., himself one of the nation's most eminent jurists, observed about Shaw that "[f]ew have lived who were his equal in their understanding of the grounds of public policy to which all laws must be ultimately referred" (1881, 106).

Kermit L. Hall

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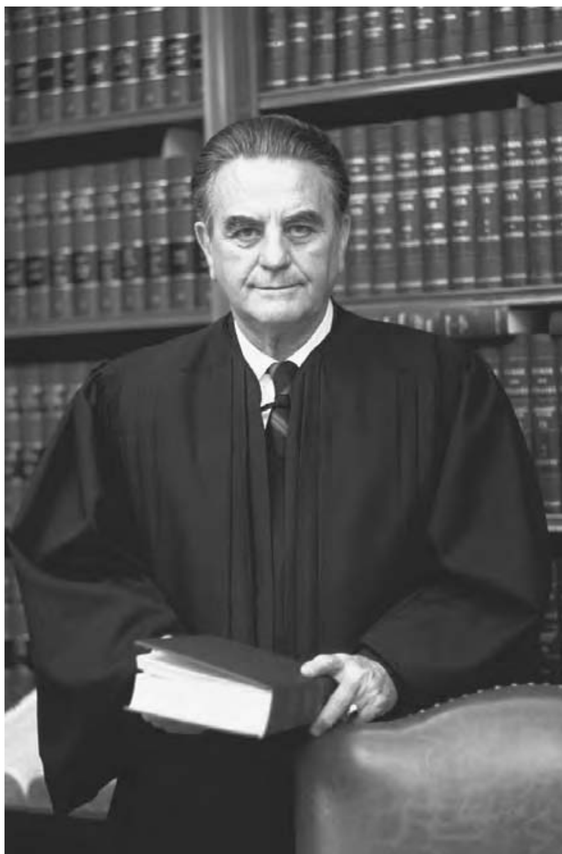
SIRICA, JOHN JOSEPH

(1904–1992)



John Joseph Sirica
Bettmann/Corbis

John J. Sirica was the United States district court judge whose persistence in presiding over the Watergate cases led to Pres. Richard Nixon's resignation. Sirica's order that tape recordings of White House conversations about the Watergate break-in be made available to prosecutors set him on collision course with President Nixon, who invoked executive privilege to argue that the tapes were not subject to judicial scrutiny. In a historic ruling the Supreme Court upheld Sirica's order in *United States v. Nixon* (1974), precipitating Nixon's fall from power. Sirica was known as a tough, unpredictable trial judge. His stubborn pursuit of the facts during the Watergate cases, however, made him a national celebrity. Several colleges conferred honorary degrees on him, and *Time* magazine named him "Man of the Year" in 1973.

John Sirica was born in Waterbury, Connecticut, 19 March 1904. He was the son of an Italian immigrant father, Ferdinand Sirica, and a second-generation Italian American mother, Rose Zinno. According to Sirica's own account, his childhood was the "sad odyssey" of a poor immigrant family during Depression-era America (Sirica 1979, 19). The family moved from town to town, his father failing in one business venture after

another, until finally settling in Washington, D.C., in 1919, where his father made a modest living as a pool hall operator and barber. Others have disputed this account, however, noting that the Siricas wintered in Florida and were buying property in Miami even at the height of the Depression. The senior Sirica had been arrested for violation of the Volstead Act. Although the charges were later dropped, there is some evidence that the pool hall and barber shop he operated may have been fronts for illegal bootlegging and gambling (Adler 2000).

Whichever account is accurate, Sirica's youth was not one of privilege, and he began working early to support himself. He was a mechanic's helper, a garbage man, a life guard, and a boxing instructor at the local Young Men's Christian Association (YMCA). The latter skill he put to use on more than one occasion while helping his father with unruly customers at the pool hall. In 1921, he graduated from Columbia Preparatory School with what he said was the equivalent of two or three years of high school. In those years only a high school diploma was needed for law school, and Sirica, encouraged by his father and his uncle, Fonzi Sirica, entered George Washington School of Law. Unprepared for the rigors of law school, however, Sirica dropped out after a few weeks. The following year he applied and was admitted to Georgetown Law School, but again he gave up after only a month. Finally, in 1923, Sirica was readmitted to Georgetown and persevered, graduating in the middle of his class three years later in June 1926.

While in law school Sirica began fighting exhibition bouts to earn extra money. Unsure of his ability to make it in the legal profession, he considered becoming a professional prize fighter. In July 1926, while waiting for the results of the bar exam, he fought his only professional bout, winning a ten-round welterweight match in Miami. After the fight his parents were furious with the younger Sirica and convinced their son to stick with the law and return to Washington, D.C., to look for work.

Sirica was turned down by most of the city's major law firms. Eventually, in 1926 he landed a job practicing criminal law in the office of a friend of one of his former YMCA sparring partners. For the next few years he apprenticed to Bert Emerson, a skilled trial lawyer and one of Sirica's closest friends. Sirica's early legal career lacked promise. He struggled to make it through law school, and once in practice, he lost his first thirteen court-assigned felony cases. He barely made enough money to pay his rent. Once, in desperation, he punched a vice squad policeman during an argument in the prosecutor's office.

In 1930, Sirica was offered a job by another former sparring companion, Leo Rover, who had been appointed U.S. attorney by President Hoover. A condition for becoming an assistant U.S. attorney, however, was obtaining the endorsement of two Republican members of Congress. Up to that

point, Sirica had been uninterested in politics and unconcerned with party labels. Through family connections he was able to secure the endorsements of two Republican members of Congress and the position. During the next three and a half years, Sirica gained valuable trial experience prosecuting nearly 200 cases. More important, this position cemented his political affiliation. His father had been a staunch Democrat who disliked Hoover, but the junior Sirica later said that he "never forgot" the favor Republicans had done for him, and from that point on politics became "sort of a hobby" (Sirica 1979, 33–36).

With Franklin Roosevelt's election, Sirica left the U.S. attorney's office in 1934 and began his own law office. For the next fifteen years Sirica survived with a meager practice. One of his few important cases during that period was a defense of journalist Walter Winchell against a libel suit. The law business, however, was scarce, and Sirica turned to promoting prize fights to help his financial situation. The venture failed, but Sirica developed a lifelong friendship with the former heavyweight champion Jack Dempsey. He and Dempsey briefly toured the country selling war bonds during World War II, and Dempsey later became best man at Sirica's wedding to Lucile Camalier in 1952.

While waiting for work in his private practice, Sirica became increasingly active in Republican politics. He later wrote that "I had it in the back of my mind that some day I'd like to be a federal judge, and thought that my work in politics might help" (Sirica 1979, 37). In 1940 he was elected to the Republican state committee in Washington, D.C., and actively campaigned for Wendell Willkie in 1940, Thomas Dewey in 1948, Robert Taft in 1952, and Dwight Eisenhower and Richard Nixon in 1956.

His politicking paid off. Sirica soon developed close friendships with influential members of the Washington establishment, including Federal Bureau of Investigation director J. Edgar Hoover and Sen. Joseph McCarthy. He served as general counsel to the House Select Committee to Investigate the Federal Communications Commission in 1944, and in 1949 he was offered the chief counsel position for a McCarthy committee investigating communist infiltration of the government. That same year, however, Sirica accepted a position with Hogan and Hartson, a large Washington law firm that needed an attorney with trial experience and was impressed by Sirica's growing political connections. For the first time in his life Sirica was making a comfortable salary. Fortunately, his wife, Lucile, convinced him to pass on the McCarthy job, which, in the event, went to Roy Cohn. Had Sirica accepted the position, it would have undoubtedly ended any opportunity he had for becoming a federal judge.

Sirica was offered, but declined, an appointment by Eisenhower in 1956 to be a commissioner of immigration. The following year Judge Henry A.

Schweinhaut retired from the United States District Court for the District of Columbia. This time Sirica called in his political favors. His friendship with officials in the Eisenhower Justice Department, including Deputy Attorney General William Rogers, the official charged with screening the administration's judicial nominees, secured him the appointment. He was nominated by President Eisenhower on 25 February 1957, received his commission on 28 March, and was sworn in as a federal district court judge on 2 April 1957.

During the next fifteen years Sirica's work on the bench was routine, though not particularly distinguished. He had a relatively high rate of reversal by the court of appeals, and his opinions were known neither for their erudition nor legal craft. In fact, in a court "known for its thoughtful and progressive jurists, he was regarded near the bottom in depth of legal knowledge" (Sussman 1974, 131). In those years, because of its territorial status, district court judges in Washington, D.C., acted both as federal judges and, in some ways, as state court judges, hearing large numbers of relatively minor criminal cases. Sirica quickly developed a reputation for being tough on crime. His working-class background, his experience as a prosecutor, and a lingering lack of confidence in his own legal acumen shaped his approach to judging. He was known as an outspoken judge who did not allow traditional ideas of courtroom procedure or legal technicality to thwart his search for the truth. He often questioned witnesses himself, he was uninhibited when instructing juries, and he was quick to reject plea bargains if he felt defendants were getting off too easily. Local reports nicknamed Sirica "Maximum John" because of his willingness to impose stiff sentences (Barnes 1992).

In 1971, Sirica assumed the role as chief judge of the District of Columbia District Court, a position based on seniority. A year later, while presiding over a grisly murder trial, Sirica learned of the Watergate break-in. Seven men were arrested for breaking into the headquarters of the Democratic National Committee in the Watergate complex. At least three of these individuals—E. Howard Hunt, G. Gordon Liddy, and James McCord—had clear ties to the Nixon campaign. As chief judge, Sirica knew that assigning the case posed a dilemma. If it were tried by a Republican-appointed judge, there would be charges of cover-up, but if it went to a Democratic appointee, there would be charges of overzealousness. With a reputation as a publicity hound, Sirica eventually decided to take the case himself.

The original trial of the Watergate burglars ended in January 1973 with convictions of the men on relatively minor charges for the break-in and conspiracy. The defendants, however, remained silent about any involvement by higher officials in the Nixon administration. Sirica's handling of the trial was criticized in the press. During the trial he had ignored standard

procedures in selecting a jury; he issued, but then reversed, a pretrial order that sought to gag nearly all press coverage of the case; and he jailed the Washington bureau chief of the *Los Angeles Times* for refusing to turn over information from interviews conducted by the newspaper (Sussman 1974, 131–133).

Sirica himself later recounted his frustration with the trial. His instincts told him that there was more to the case than a botched burglary by low-level operatives in the Nixon administration. In an unusual move, Sirica ordered presentencing investigations for the seven defendants but let the convicted men know that the severity of their sentences would depend heavily on whether they cooperated with ongoing investigations by Congress and other federal prosecutors. Within weeks James McCord delivered a letter to Sirica, which the judge read aloud in open court. The letter charged that perjury had been committed in the initial trial and that bribes had been made to the defendants in exchange for their silence. Sirica was outraged and later recounted that he found the "whole thing disgusting." He deferred sentencing McCord but imposed stiff provisional sentences of up to forty years on the remaining defendants, leaving open the possibility of reduction for those who decided to cooperate (Sirica 1979, 84–90).

From that point on the Watergate scandal quickly began to unravel. During subsequent federal grand jury and congressional investigations the existence of the White House tapes became known. The tapes revealed that Nixon had approved plans for a cover-up just six days after the Watergate break-in. When Sirica issued a subpoena for the tapes, a long legal battle ensued in which the president claimed the tapes were protected by executive privilege. Attorneys for Nixon pressured Sirica, arguing in court that what was at stake was "nothing less than the continued existence of the presidency as a functioning institution" ("Man of the Year," 15). Sirica disagreed. In an opinion praised by legal scholars as unexpectedly erudite, he argued that the president's lawyers had failed to provide "any reason for suspending the power of courts to get evidence and rule on questions of privilege in criminal matters simply because it is the President of the United States who holds the evidence" (15). On 24 July 1974, a unanimous Supreme Court upheld Sirica's order. Faced with certain impeachment in the House of Representatives, Nixon announced his resignation fifteen days later.

Sirica went on to preside over the trials of several top Nixon aides, including H. R. Haldeman, John Ehrlichman, and former attorney general John Mitchell, each of whom was found guilty. In all, more than nineteen top administration officials were convicted or pled guilty to violations of the law. Sirica reduced the sentences of most who cooperated with prosecutors but handed down tough sentences on those who remained recalcitrant.

Critics contend that Sirica's handling of the trials was arbitrary and that he overstepped his judicial role. His heavy-handed questioning of witnesses from the bench and his use of the provisional sentencing procedure was criticized by legal scholars. Philip Kurland, from the University of Chicago, called it "a form of extortion" and something for which Sirica deserved to be censured ("Man of the Year"). Despite the criticism, Sirica's tactics were upheld on appeal. Upholding G. Gordon Liddy's conviction on conspiracy and burglary charges, United States Court of Appeals judge Harold Leventhal in *United States vs. Liddy* (509 F. 2d 428 [1974]) wrote: "Judge Sirica's palpable search for the truth in such a trial was not only permissible, it was in the highest tradition of his office as a federal judge" (442).

Sirica's courage and tenacity in getting to the truth during the Watergate affair also won him deep public respect. In choosing him "Man of the Year" in 1973, *Time Magazine* wrote: "Exposure of wrongdoing is, of course, the first requisite in achieving justice—and Sirica deserves the prime credit for taking those vital initial steps." Perhaps more broadly, his handling of the Watergate cases was seen as an important "vindication of the legal system at a time of great stress" and national peril ("Man of the Year").

Within a year of concluding the Watergate cases, Sirica retired as chief judge of the district court and assumed senior status. Countless books have been written and movies produced about Watergate. Most focus on the actions of the Nixon White House or those involved in investigating the scandal. In 1979 Sirica wrote his own book, entitled *To Set the Record Straight*, detailing his experience during the trials. He retired from the bench in 1986. He died 14 August 1992.

Had it not been for Watergate, John Sirica's career probably would be unworthy of historical note. Nevertheless, if great cases make great judges, Sirica is an extraordinary example. Whether his career exemplifies what is wrong, or what is right, with the U.S. judicial system has been debated. Sirica's nomination to the bench was a reward for political service to the Republican Party, his educational background was mediocre at best, and he was known as a careless and irritable trial judge. Nevertheless, at time of great constitutional peril, John Sirica rose to the occasion. He has been called "a tough, tenacious, patriotic Harry Truman of the Bench" ("Man of the Year"). His refusal to bend against the full panoply of power of the president of the United States during a moment in history established him as a lasting symbol of the American judiciary's insistence on the rule of law.

Cornell Clayton

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Judy Sheindlin
(1942–)

Best known as the outspoken star of television's *Judge Judy,* Judy Sheindlin was born in Brooklyn, New York, in 1942 and was hired in 1972 as a prosecutor of juvenile delinquents. Ten years later, New York City mayor Ed Koch appointed Sheindlin to preside over a family court in the Bronx. Judy's second husband (whose last name she now shares) was also appointed to a criminal court, with Judge Judy subsequently being made Manhattan's supervising judge and her husband elevated to the New York Supreme Court (Sheindlin 1997, 5).

Judge Judy has strong opinions on every topic she addresses. She opposes what she believes is undue regard for "victims," many of whom have brought problems upon themselves. She frequently refers to juveniles as "punks" and believes that delinquents should find their first experience in court to be "an excruciating experience they will never want to repeat" (Sheindlin 1997, 37). She opposes the use of probation and thinks that even juveniles with public defenders should have to pay some of their fees. She is a harsh critic of the foster care system, especially when it pays relatives for supporting children, and she believes that fathers and mothers should, whenever possible, share custody of children of divorce. She prides herself on awarding custody to men in cases where their wives have unjustifiably accused them of sexual abuse.

Sheindlin has noted that there are "two kinds of judges." She explained:

> Some liken their jobs to that of an umpire; they sift through information that lawyers provide. Then they make decisions based on that information.
>
> I am generally unhappy with that approach, unless the lawyering is superb, be-

(continues)

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(continued)

> cause without quality information you can make mistakes.
>
> In life, as on the bench, you are either passive or active. I prefer the second kind of judging—where the court actively seeks the truth. I ask a lot of questions. (1997, 161)

Sheindlin advocates an open judicial system but seems to betray concern over public opinion in a story about a prosecutor who asked for "an adjournment in contemplation of dismissal" in the case of a fourteen-year-old accused of sodomizing a four-year-old, who was too traumatized to testify. Noting that "I could just see the headlines: SLAP ON WRIST BY SOFT FAMILY COURT JUDGE RESULTS IN TRAGEDY," Judge Judy instead asked the prosecutor to call his first witness, and when he was unable to do so, he had to withdraw charges, thus succeeding in helping her dodge "the potential media bullet" (Sheindlin 1997, 206).

Sheindlin summarized her views of personal responsibility as follows:

> If you want to eat, you have to work.
> If you have children, be prepared to take care of them.
> If you break the law, it is your fault. Be prepared to pay.
> If you tap the public purse, be prepared to account. (1997, 238)

In addition to calling for increased responsibility, Judge Judy enjoys telling stories of her career. Once, facing a father whose denials of paternity conflicted with a blood test, she asked how he could be so certain. He responded, "Because I was wearing a condominium." Judge Judy replied that "his condominium obviously had a hole in the roof" (Sheindlin 1997, 19).

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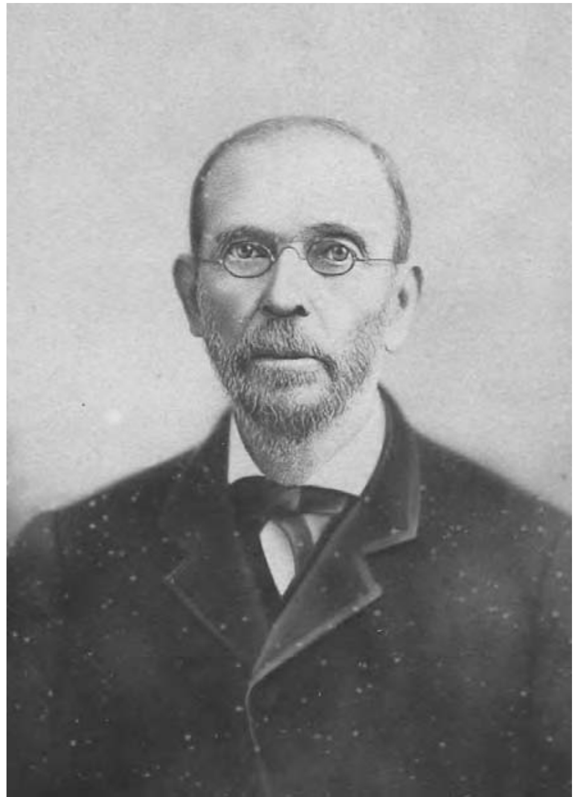
STONE, GEORGE WASHINGTON

(1811–1894)



George Washington Stone
Alabama Department of Archives and History

Alabama Supreme Court justice George Washington Stone built his reputation on hard work and conscientious attention to detail. During his twenty-eight years on the bench he wrote over 2,400 opinions extending through volumes 40–100 of the official reports of the court (the *Alabama Reports* for 1856–1865 and 1876–1894). By the time of his death he had, in the words of the *Albany* (New York) *Law Journal*, helped make the Alabama Supreme Court "one of the ablest in the country" (Huebner 1999, 185).

Born 24 October 1811 in Bedford County, Virginia, one of ten children of Micajah and Sarah (Leftwich) Stone, George Washington Stone moved to Lincoln County, Tennessee, at the age of six. Micajah Stone prospered there but died when George was only sixteen, making it impossible for his son to attend college. George instead used his small inheritance to study law with James Fulton, a member of the bar in Fayetteville, Tennessee, after completing his schooling in old-field (privately subscribed) schools and local academies.

In 1834 he married Mary Gillespie of Franklin, Tennessee, and the couple immediately moved to Talladega County, Alabama. Within months

Stone had been admitted to the Alabama bar, and five years later he joined the state's Supreme Court bar. He was to spend twenty-six of the next sixty years in private legal practice, eighteen of those years in partnership with men who, like Stone himself, would serve as justices of the Alabama Supreme Court.

Described by a contemporary as a "laborious and careful" attorney, Stone proved to be a master of chancery court practice although he was "never very successful before juries," owing to his plain oratory (Caffey 1909, 169). This lack of oratorical skills and his "somewhat austere demeanor" kept Stone from achieving widespread personal popularity, and he seldom succeeded as candidate for elected office. He was, however, "universally respected and by his intimates much beloved" (191).

Stone began his legal career in Sylacauga, Alabama, serving also for a time as the town's postmaster. He moved next to the town of Talladega, where from 1840 to 1843 he practiced law with William P. Chilton, the first of Stone's law partners who later became a justice of the Alabama Supreme Court.

Following the death of his first wife in 1849, Stone married Emily Moore and relocated to her home in Lowndes County, where he worked in partnership with Thomas J. Judge, whom he succeeded on the Supreme Court in 1856. After the disorder of Reconstruction forced Stone off the court in 1865, he practiced in partnership with David Clopton and James H. Clanton in Montgomery. In 1876 Stone was reappointed to the Supreme Court, where David Clopton joined him in 1884.

Stone, a firm supporter of Andrew Jackson, had become active in the Democratic party in Talladega County soon after he began his career there, and he later helped organize the first bar association in the county. In August 1843, Gov. Benjamin Fitzpatrick appointed Stone judge of the Ninth Circuit Court to fill an unexpired term. The legislature elected him to a full six-year term in December of that year, but Stone chose not to stand for election after the death of his first wife, retiring from the bench in 1849.

In 1856 the General Assembly elected Stone an associate justice of the Supreme Court, a position to which he was reelected in 1862. The first legislature that convened after the defeat of the Confederacy called on Stone and J. W. Shepherd, editor of the *Alabama Reporter,* to prepare a revised penal code for the state that incorporated the postwar changes in the criminal code. Stone continued to serve on the Supreme Court until Provisional Gov. Lewis E. Parsons removed all three members of the court from office in 1865.

In March 1876 the first legislature that convened after the redemption of the state by the Democratic party once again selected Stone to a vacancy on the Supreme Court, this one caused by the death of his former law partner,

Thomas J. Judge. Stone was elected by the people to a six-year term on the court in 1880 and was appointed chief justice in 1884 by Gov. Edward A. O'Neal, a position to which the people reelected him in 1886 and 1892. He remained chief justice until his death on 11 March 1894 at the age of eighty-three, becoming one of the longest-serving justices in Alabama history.

Stone's importance to the judicial history of Alabama does not rest on his length of service, however, but on the number and quality of the decisions that he wrote and on his contribution to the professionalization of the practice of law in the state. Although Stone was neither well educated nor particularly brilliant, his opinions were, his contemporaries noted, "clear and vigorous" ("Chief Justice George W. Stone" 1970, 165) and marked by "sturdy common sense" (Caffey 1909, 183).

During his first term on the court, Stone wrote 491 opinions, an average of 49 per year. Between 1876 and 1894 he wrote 1,958 opinions, an average of 109 per year. "The numbers are more remarkable," a contemporary noted, "when it is known that he never employed a stenographer but wrote very slowly in his own hand" (Caffey 1909, 182). Although rendered in the midst of the political turmoil of the Civil War, two of Stone's decisions concerning conscription laws enacted by the Confederate government marked him as a moderate on the issue of states' rights. In reaching these decisions he relied on opinions rendered earlier by the United States Supreme Court, and that Court later cited Stone's wartime decisions in its own opinions.

In *Ex parte Hill in re Willis v. Confederate States* (1864), Stone recognized a dividing line between the rights of local and general governments that had to be "kept distinct" (38 Alabama 455). While conceding that the line was "sometimes difficult of ascertainment," he nonetheless argued that it "must when discovered be respected" (455). Stone also maintained that if an officer of either government exercised its legitimate power erroneously, correction could only come from courts within that government. Conversely, Stone held, a state or national court could give redress only when an officer of the other government clearly exercised power outside that government's jurisdiction (38 Alabama 429).

In *State ex rel. Dawson, in re Strawbridge and Mays* (1864), Stone, unlike some other Confederate judges, followed previous rulings by the United States Supreme Court that when there was a conflict between state and federal law, and each acted within its own legitimate domain, national law took precedence (39 Alabama 367). In both decisions Stone clearly acknowledged an inviolable domain for both state and national governments, whether federal or confederate.

In a speech to the Alabama Bar Association in 1889, Stone spoke glowingly of the contributions of modern technology to social progress and urged judicial science "to keep pace with the necessities of this progress"

Stone 1889, 112). In numerous post–Civil War cases, Stone himself, drawing on United States Supreme Court decisions such as the *Slaughter House Cases* and *United States v. Cruikshank*, helped develop what his first biographer called "an excellent body of corporation law in Alabama" (Caffey 1909, 185).

In *Perry v. New Orleans, Mobile and Chattanooga Railroad Company* (1876), for example, Stone wrote that state legislatures (but not, in this case, the city of Mobile) were entitled to use their police power to facilitate projects in the public interest, including railroads (55 Alabama 425). In other cases he conferred on corporations all the rights of a natural person, and on more than one occasion he struck down state laws that treated railroads or other companies differently from individuals. Stone thus brought Jacksonian antimonopoly and antiprivilege ideology forward into a period of economic and corporate transformation, thereby becoming a participant in what Timothy Huebner has described as the "maturing national legal culture" (Huebner 1999, 184).

Stone penned his most influential opinions in a series of cases restricting the use of self-defense arguments in murder cases. Beginning with the 1860 case *McManus v. State,* he "set the tone for thirty years of decisions by the Alabama Supreme Court in the area of manslaughter, homicide, and self-defense" (Huebner 1999, 176). In that case Stone not only denounced the southern code of honor that promoted violence but also unequivocally asserted that "an insult, or an assault, or an assault and battery, which does not endanger life or member, furnishes no excuse for taking life" (36 Alabama 293).

The common law doctrine of a "duty to retreat" lay at the heart of Stone's arguments. In *Ex parte Nettles* (1877) he explicitly rejected an earlier, more lenient decision by the Mississippi Supreme Court, which he linked with a growing "carnival of manslaughter" (58 Alabama, 274). In *Bain v. State* (1881), Stone drew on Blackstone's *Commentaries* to establish unambiguous criteria for justifiable homicide: The defendant must not "provoke or encourage the difficulty"; the defendant must be "so menaced . . . as to create a reasonable apprehension of the loss of his life"; and there must be no "reasonable mode of escape" for the defendant (70 Alabama, 7). In *Myers v. State* (1878), Stone reiterated his contention that encouraging or provoking a fight nullified self-defense (62 Alabama 599); and in *Cleveland v. State* (1888), he put the "burden on the defendant to show that he had no alternative" to murder (86 Alabama 10).

Stone also worked to limit the application of the state's concealed carry law (*Polk v. State*, 62 Alabama 237) and the use of the insanity defense (*Shorter v. State*, 63 Alabama 129). During Stone's lifetime his campaign to curtail brutality in the state often put him at odds with many of his fellow

southern justices. But in the next century Justice Oliver Wendell Holmes Jr. cited several of Stone's opinions on self-defense as precedent in cases before the United States Supreme Court, reflecting a new distaste for legalized violence.

The scholarly inclinations and meticulous craftsmanship displayed in Stone's opinions, along with his own high professional and personal standards, made him a natural leader in the movement to elevate the standing of the bench and bar in the state. He began in 1841 by helping organize a bar association in the community in which he had just entered practice, and in 1879 he played a central role in organizing the Alabama Bar Association. During his last years on the Supreme Court he used the association's annual meetings to advocate judicial reform, especially consolidation of common law and equity jurisdiction into a single court system and simplification of pleadings in civil suits. Although he saw little progress toward these goals during his lifetime, in the 1950s Alabama adopted most of the reforms that Stone had advocated.

Stone moved to Montgomery after his first appointment to the Supreme Court and lived there until his death, a period of thirty-eight years. His second wife died in 1862, and in 1866 he married Mary (Harrison) Wright, who along with three children, George Washington Stone, Martha S. Griffin, and William J. Stone, survived him. He played the violin entirely by ear and in his later years enjoyed employing his instrument to entertain his children and grandchildren in his Montgomery home, where he also spent many hours cultivating an extensive flower garden.

Like several other justices before him, Stone enjoyed writing verse, and in 1871 he published a small volume of his work. A contemporary who read the book later remarked that he was amazed that "such meritorious judicial opinions and such unmeritorious verse . . . could have been written by the same man" (Caffey 1909, 188). Today, however, his poetry places him squarely if peripherally in the mainstream of late-nineteenth-century humorous poetry.

The year before his death the Alabama Bar Association organized a celebration in honor of his fiftieth anniversary on the bench and presented him with a silver cup. When he died on 11 March 1894, Alabama's attorney general, William L. Martin, paid tribute to Stone in the official report of the Supreme Court as "an able and reliable lawyer and a learned and upright judge" ("Memorial" 1893, xx). Following Stone's burial in Oakwood cemetery in Montgomery, Gov. Thomas G. Jones declared in an official proclamation: "No man ever lived in Alabama who did her more honor; and none ever died within her borders whose loss was a greater calamity to the state" (Caffey 1909, 167).

Thus ended George Washington Stone's half-century of service to Alabama. He had achieved his success not by brilliance or personal magnetism but by diligence and devotion to his profession during a career spanning five decades, from Andrew Jackson to William Jennings Bryan.

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STONE, HARLAN FISKE

(1872–1946)

Harlan Fiske Stone was an associate justice of the United States Supreme Court from 1925 to 1941 and chief justice from 1941 to 1946. Pres. Calvin Coolidge nominated Stone as the replacement for Justice Joseph McKenna on 5 January 1925. Stone was the first Supreme Court nominee to appear before the Senate committee, which was examining his qualifications. Stone effectively responded to the questions posed by the committee's members and was subsequently confirmed by a seventy-one–six Senate vote on 5 February 1925. When Chief Justice William Howard Taft resigned in 1930, many expected Stone to succeed him. Taft, however, fearing that Stone would be unable to persuade the justices to decide cases unanimously or coalesce behind a single rationale, did not recommend Stone for the position. Taft's concern prompted President Hoover to appoint Charles Evans Hughes instead. Stone served as an associate justice until 12 June 1941, when Pres. Franklin Roosevelt nominated him to replace Hughes as chief justice. The U.S. Senate unanimously confirmed Stone as chief justice on 27 June 1941. Stone, a Republican, was one of only two chief justices nominated to the position by a president from the other political party (Edward D. White was the other) and was one of

Harlan Fiske Stone
Harris & Ewing, Collection of the Supreme Court of the United States

only three chief justices elevated from the rank of associate justice (White and William H. Rehnquist were the others).

Stone was born in Chesterfield, New Hampshire, on 11 November 1872 to Frederick Lawson Stone and Ann Sophia (Butler) Stone. He grew up on the family farm, where he acquired his independence, diligence, and sense of civic obligation. Although his rural New England upbringing was a significant influence on his development, he eventually chose a college education over the farm life. He took his B.A. (1894) and M.A. (1897) degrees from Amherst College, where he graduated Phi Beta Kappa and served as class president three times. He taught high school to finance his law school education at Columbia. He completed his law degree at Columbia in 1898 and was admitted to the New York bar the following year. Stone began his legal practice with the New York firm of Sullivan and Cromwell in 1899 and eventually became head of its litigation division. Among his clients was the banker J. P. Morgan. While he developed his own Wall Street practice at Sullivan and Cromwell he also served on the law faculty at Columbia. In 1910 he was named dean of Columbia Law School. Stone engaged in the academic life in addition to maintaining his law practice, and he published frequently in law reviews and other professional journals. During his tenure as dean, Columbia gained prominence as one of the country's leading schools of legal realism jurisprudence. He married Agnes Harvey in 1899, a marriage that lasted forty-seven years, until his death. Stone and his wife had two sons.

Calvin Coolidge, who succeeded to the presidency on the death of Warren Harding in 1923, was Stone's friend and Amherst classmate. Coolidge brought Stone to Washington the following year to replace U.S. attorney general Harry Daugherty, whose tenure as head of the Justice Department had been severely damaged by corruption, including the Teapot Dome scandal. Coolidge not only wanted the scandal fully investigated but also wanted to restore the image of the Justice Department. Coolidge needed someone with extraordinary leadership skills as well as unquestioned integrity. Stone clearly possessed both of these attributes. Stone was "less concerned with finding proof of past abuses, grave as these were, than with establishing standards for the future" (Mason 1956, 149). Although Stone held the position of attorney general for only a year prior to his appointment as associate justice, he was able to effect substantial organizational changes in the Justice Department and rebuild its institutional stature. He made a number of personnel changes within the Justice Department, one of which was to name J. Edgar Hoover to head the Federal Bureau of Investigation. Under Stone's predecessor, the government's legal business had been badly handled. Stone required that the department's permanent legal staff prepare and argue all cases "and in major cases the brief presented by

the Attorney General himself" (167). Because he enforced the law "'without fear or favor,' especially his 'overzealous' activity in purging the Justice Department of corruption and his efforts to enforce the anti-trust laws," some believed Stone to have been "kicked upstairs" when he was appointed to the Supreme Court (Mason 1956, 182). Alpheus T. Mason, author of the definitive biography on Stone, rejected this explanation. He concluded instead that Coolidge's decision to appoint Stone was prompted by Stone's record, one "marked by fearlessness and independence, as head of the Justice Department, achievements that excited the admiration of even its traditional critics; his political services during the 1924 campaign, and personal friendship" (182–185).

In 1925 Stone joined a conservative Court headed by William Howard Taft. The Court included the "Four Horsemen"—Justices Pierce Butler, James McReynolds, George Sutherland, and Willis Van Devanter—whose views led them categorically to oppose the New Deal initiatives a decade later. Many expected Stone to join the conservative majority. Almost immediately, however, Stone became the third member of the Court's moderate-liberal bloc, joining Oliver Wendell Holmes Jr. and Louis Brandeis. As a member of the Hughes Court, Stone was often found with Justices Brandeis and Benjamin Cardozo on the minority side in many significant economic regulation rulings. As was true of Holmes and Brandeis, Stone advocated the judicial self-restraint view. He believed that policy matters are the exclusive domain of the legislative branch, and Stone sought not to substitute his own policy preferences for those of elected legislators.

Stone embraced such principles as judicial self-restraint long before he began his service on the Supreme Court. He offered a series of lectures at Columbia in 1915 that were subsequently published as a book entitled *Law and Its Administration* (1967). The views contained in the volume were considered conservative, but he supported using the Fourteenth Amendment to extend federal Bill of Rights guarantees to the state level. He spoke of the Fourteenth Amendment as a "powerful and efficient agency in the protection of civil liberty from encroachment of state governmental action and from the injustice of special and class legislation" (Stone 1967, 147). He saw the "popular desire for justice" as the foundation of a "just and adequate legal system." "True law reform" began, in his view, "with the stimulation in the public mind of the love of justice, its education as to the nature of law, and the grave importance of delegating its administration only to those who are fit to bear that responsibility" (194). He adhered to many of these views throughout his judicial career but continually adapted his jurisprudence at the same time. He admitted in 1938 that he would be "surprised if there were not many things in *Law and Its Administration* with which I do not agree today" (Mason 1956, 124).

Stone had no previous judicial experience when Coolidge first nominated him for the Supreme Court. Nonetheless, he provided invaluable guidance for judges in his insightful opinions. Stone was a strong proponent of judicial deference to legislative judgment. Stone was a partisan Republican and was privately critical of Franklin Roosevelt and much of his New Deal. As a restraintist, however, he chose not to impose his own political preferences on elected legislators. One of Stone's greatest opinions came in his dissent in *United States v. Butler* (1936). The case involved review of the Agricultural Adjustment Act of 1933, which attempted to stabilize prices of agricultural products and provide financial benefits to U.S. farmers. The plan was to pay farmers not to produce on some of their acreage. The benefit payments were to come from revenues raised by a tax imposed on processors of various farm commodities. A six-justice majority struck down the measure as an unconstitutional infringement of the sovereign powers of the states.

Stone's dissent in *Butler* was grounded on his restraintist outlook. To Stone, the majority in *Butler* read the Constitution too narrowly. In an emergency such as the Great Depression, judges ought not question the means chosen by Congress to put its delegated powers into effect. Stone offered two "guiding principles of decision which ought never be absent from judicial consciousness." One was that courts are "concerned only with the power to enact statutes, not with their wisdom." The second was that although unconstitutional exercise of power by the legislative and executive branches of the government is subject to judicial restraint, "the only check upon our own exercise of power is our own sense of self-restraint." Stone argued that the Court had not followed these guidelines in deciding *Butler.* The food processing tax was struck down, he suggested, not because Congress could not levy a tax to defray public expenditures, "but because [of] the use to which its proceeds are put is disapproved" (297 U.S., 78–79).

Judicial self-restraint was again evident in Stone's majority opinion in *United States v. Darby Lumber Co.* (1941), which upheld the Fair Labor Standards Act (FLSA) of 1938. Many observers regarded the FLSA as Congress's last New Deal enactment. The ruling reversed *Hammer v. Dagenhart* (1916), and Justice Stone spoke for a unanimous Court. Interstate commerce, Stone contended, "should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions." The "motive and purpose" of a regulation of interstate commerce "are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control" (*Darby Lumber,* 312 U.S., 115). The goods produced and marketed by the lumber company, Stone concluded, were part of a stream of commerce and were clearly within the reach of the federal commerce power. Stone argued that the Tenth Amendment's reserve clause "states but a

truism that all is retained which has not been surrendered." There is nothing about the amendment or its origin to suggest that its purpose "was other than to allay fears that the new government might seek to exercise powers not granted" (*Darby Lumber,* 124). Until relatively recently, this portion of Stone's *Darby* opinion put into cold storage the Tenth Amendment jurisprudence known as "dual federalism," which had been used effectively to restrict the commerce power.

Stone remained on the minority side of most split decisions until the Court's doctrinal change of 1937. As a result of this change, Stone became part of the moderate-liberal majority until he became chief justice. During the infamous "court-packing" controversy of 1937, Stone indicated to Roosevelt that he did not support changing the Court's size. At the same time, he understood Roosevelt's frustration with the Court and was active behind the scenes in urging appointment of justices with the judicial philosophy of Justices Brandeis, Cardozo, and himself. After 1937, the Court essentially deferred to economic regulation initiatives both at the federal and state level. The new consensus on government power to regulate the economy did not generalize to all other constitutional issues, however. Cases containing civil liberties questions became more frequent as World War II neared, and these issues would prove to be even more divisive than economic questions. The Roosevelt appointees on the Court were more than willing to speak their minds on these matters, causing Stone to refer to justices such as Hugo Black, William Douglas, and Frank Murphy as "wild horses." Stone's relations with most of the Roosevelt-appointed justices, both before and after his elevation to chief justice, were "strained" at best. The duties of chief justice took their toll on his judicial opinions—his best opinions came prior to his elevation to chief justice.

Perhaps Stone's greatest contribution to U.S. law came in his majority opinion in *United States v. Carolene Products Co.* (1938). In *Carolene Products,* the Hughes Court upheld a federal law that prohibited the interstate shipment of so-called filled milk, which was skimmed milk mixed with animal fats. What made this opinion significant was the famous Footnote 4, where Stone suggested that there may be a "narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution such as those of the first ten amendments . . ." (304 U.S. 152). He offered an exception to the doctrine of judicial self-restraint. The Court should subject statutes dealing with civil liberties and discrimination issues to a more searching examination than laws pertaining to economic matters. This opinion clearly suggested a "double standard." It affirmed the self-restraint approach except when personal liberties are affected by government actions. Paradoxically, the *Carolene Products* opinion suggested that statutes that restrict individual

rights should be subject to a closer scrutiny because the rights protection provisions of the Bill of Rights and the Fourteenth Amendment occupy a "preferred position." Although the legislature should be allowed to correct its own mistakes in other contexts, the directive must not apply when legislative bodies cannot take corrective action. Federal court judges continue to cite the *Carolene* footnote, and the doctrine retains analytic value when courts are considering constitutional limits on government.

The analytic power of the "preferred freedom" approach was immediately evident in Stone's dissent in *Minersville School District v. Gobitis* (1940). The Court ruled in *Gobitis* that the country could ask its citizens to engage in such patriotic behavior as saluting the flag. The Jehovah Witnesses challenged compulsory participation in flag salute exercises by school children on free exercise of religion grounds. Justice Frankfurter said for the majority that "conscientious scruples" cannot relieve citizens from obedience to "general law not aimed at the promotion or restriction of religious beliefs" (310 U.S., 594). Stone was the only justice to disagree. He argued that the "very essence of the liberty" protected by the First Amendment "is the freedom of the individual from compulsion as to what he shall think and what he shall say. . . ." If the Bill of Rights guarantees are to have meaning, he continued, "they must be deemed to withhold from the state any authority to compel belief or expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion" (604). Heeding his "preferred freedoms" directive, he concluded that "careful scrutiny of legislative efforts to secure conformity of belief and opinion by a compulsory affirmation of the desired belief, is especially needful if civil rights are to receive any protection" (606). The position Stone advanced in *Gobitis* was sufficiently compelling that when the Court reexamined the compulsory flag salute issue less than three years later, five members of the Court joined Stone to overrule *Gobitis* in *West Virginia State Board of Education v. Barnette* (1943).

His five-year tenure as chief justice began just before Pearl Harbor and concluded less than a year after the end of World War II. Although Stone was regarded as one the great contributors to U.S. law, he was strikingly ineffective as chief justice. His elevation had been universally praised, but his distaste for administrative work and his inability to unify his fractious Court diminished his reputation and produced a decline in the public's perception of the Court's dignity and authority. In many ways, the chief justiceship was an unhappy ending to Stone's otherwise illustrious public life. In the minds of some of his colleagues, the basic problem was his inability to resolve conflict among the members of the Roosevelt Court he was chosen to lead.

Stone is not regarded as a successful chief justice because that term includes the capacity to lead the Court. Stone was almost sixty-nine when he

succeeded Hughes, and he would serve only a comparatively brief time as chief justice. Nonetheless, most constitutional scholars rank him as one of the great associate justices to sit on the Court. He was an intellectual with an open mind and clear sense of justice. The thinking contained in his insightful opinions had a profound influence on the Warren Court and its expansion of constitutional rights during the 1960s. He served as chief justice until he suffered a stroke on 22 April 1946. He was stricken as he completed his dissent in *Girouard v. United States*, and he died in Washington, D.C., of a cerebral hemorrhage later that day.

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STORY, JOSEPH

(1779–1845)

Joseph Story
Library of Congress

In his thirty-five years on the United States Supreme Court, from 1811 to his death in 1845, Joseph Story made a more profound mark on American law than any other associate justice. Despite his appointment by a Republican president, Story joined with Federalists John Marshall and Bushrod Washington to craft a strongly nationalist jurisprudence in an age of centrifugal sectionalism. At the same time, his scholarly treatises on equity, commercial law, and constitutional law, written from his perch as Dane Professor at the Harvard Law School, shaped U.S. lawyers' understanding of common law, making Story an American Blackstone. He was a bastion of New England legal conservatism. Andrew Jackson—who had a different constitutional vision—called him "the most dangerous man in America" (McClellan 1971, 55).

Story was born on 18 September 1779 in Marblehead, Massachusetts. His father, a physician, participated in the Boston Tea Party; was a Son of Liberty; fought at Lexington, Concord, and Bunker Hill (afterward tending to the wounded); became a surgeon in the revolutionary army; and served with Washington at Long Island, White Plains, and Trenton. Story thus grew up with stories of revolutionary heroism and a native ardor for the new Republic.

On Sundays, the Story household attended a Congregationalist (Puritan) Church, where his Uncle Isaac preached the fallenness of man and the need for repentance and regeneration in the spirit of New Light Calvinism. At home, there were twice-daily prayers, but his father's theology inclined more toward the doctrines of Enlightenment Christianity with its less pessimistic view of human nature. Later, at Harvard College, Story would convert to Unitarianism and still later serve as national president of that denomination—which did not keep him from lecturing (in opposition to fellow Unitarian Thomas Jefferson) that Christianity is part of the common law.

After studying at Harvard College (where, as class poet, he wrote an embarrassingly bad graduation anthem, called "Reason"), he read law with Samuel Sewall in Marblehead and later with Samuel Putnam in Salem. In 1801, he opened a law office in Salem, a Federalist stronghold, and after a slow start became a leading advocate. The high point of his private practice was representation of the Massachusetts purchasers of Yazoo properties, leading to his one and only argument before the Supreme Court, *Fletcher v. Peck* (1810). The side that Story represented prevailed in the opinion that Chief Justice John Marshall authored.

Story also became active in Democratic-Republican (then often still called anti-Federalist) politics. Nicknamed "Orator Jo," he was a popular speaker at Republican rallies, as a result of which he was physically assaulted by a Federalist bully and—more seriously—lost the hand of his first love, whose family could not stomach his politics or his religion. He was elected to the Salem Town Committee, to three terms in the state House of Representatives, and to a partial term in the U.S. Congress, where he offended party leaders by opposing President Jefferson's trade embargo. His political career ended when President Madison appointed him to the Supreme Court, after three other candidates turned down the job. At thirty-two years of age, Story was the youngest justice ever to serve.

In light of Story's early warm support of Washington and Adams and later alliance with Marshall, Webster, and the lingering Federalist establishment of Massachusetts, his affiliation with the party of Jefferson calls for some explanation. Part of the explanation surely lies with his father's Republicanism, Story's religious heterodoxy, and his youthful enthusiasm for Rousseau. Part lies with the fact that greater opportunities seemed to present themselves with up-and-coming Republican merchants than with the hidebound and exclusive Federalist aristocracy of Massachusetts. But the deeper explanation probably lies with the peculiar antinationalist turn taken by New England Federalists after the Adams presidency, culminating in the Hartford Convention. Story, always the nationalist, had little patience with the Federalists' unprincipled opposition to the Louisiana Purchase and was infuriated by the disloyalty of many New Englanders during

the troubles with England, including flirtation with secession. In many respects, however, Story never accepted Republican orthodoxy—especially its attacks on the judiciary. Even before his appointment to the bench, Jefferson called Story a "pseudo-republican" (Newmyer 1985, 59).

Although presumably appointed to be a counterweight to John Marshall's Federalist jurisprudence, Story quickly became the chief justice's friend and close ally. That is not to suggest, however (as some have thought), that Story became a mere acolyte to the great Virginian. Story maintained a surprising degree of independence, dissenting seven times between 1812 and 1816—more than any other justice, including William Johnson, the first "great dissenter." Off the Court as well, in his capacity as Dane Professor at Harvard Law School and as a prolific writer of legal scholarship, Story expounded the principles of nationalistic constitutionalism and of capitalistic common law—though it should be noted that his capitalism was one in which corporations were strictly required to meet their contractual obligations, seamen (the laborers of the leading industry of New England) were protected from cruelty and exploitation, and the treaty rights of Indians were protected. In a lecture to his Harvard students, Story commented: "The oppressor may belong to the very circle of society in which we love to move" (Newmyer 1985, 153).

As a nationalist and a supporter of a powerful and independent judiciary, Story's zeal exceeded even that of Marshall. On circuit, he crafted opinions expanding the implied power of the executive to control foreign affairs and the implied authority of federal courts to punish common law crimes, and on both issues was reversed by the full Court, including Marshall.

It should be stressed that although Story and Marshall championed an expansive view of congressional powers—for example, in *McCulloch v. Maryland* (1819), upholding the Bank of the United States, and in *Gibbons v. Ogden* (1824), affirming congressional authority over interstate transportation—this was not in service of a national regulatory agenda (though the precedents were later cited in support of the New Deal). Rather, Story and Marshall used national power to unleash entrepreneurial activity from the constraints of state mercantilism and populism. To Story and Marshall, the promise of the Union was one of a great, commercially dynamic common market, in which merchants, industrialists, and the forces of early modern capitalism would flourish and contracts would be held sacred. Thus, it is significant that in *McCulloch,* the Court spared a privately owned, nationally chartered bank from disruptive state taxation, and in *Gibbons,* the Court enabled a competitive carrier to avoid the monopolistic policy of the state of New York.

Story's most celebrated and important opinion was *Martin v. Hunter's Lessee* (1816). The case concerned ownership of extensive tracts of land in

northern Virginia. One set of claimants traced title to Lord Fairfax, a Loyalist who fled the country during the Revolution. (These claimants included John Marshall, who did not sit in the case, as well as other members of the Marshall family.) The other claimants traced title to Virginia confiscation statutes and an interpretation of Virginia common law under which foreigners could not inherit property. In *Fairfax's Devisee v. Hunter's Lessee* (1813), the Supreme Court upheld the Fairfax claims, overturning a contrary decision of the high court of Virginia. In a provocative opinion, Story declared that the Virginia court had erred in its interpretation of common law and the meaning of a Virginia statute. Story also held that Virginia law was preempted by federal treaties with Britain guaranteeing the property rights of British citizens.

On remand, the Virginia Court of Appeals, led by the redoubtable Judge Spencer Roane, Marshall's next-door neighbor in Richmond and the intellectual leader of the Virginia states' rights movement, declined to comply with the Supreme Court's ruling. The Virginia Court of Appeals held that the statute giving the Supreme Court authority to review state court decisions involving federal issues—Section 25 of the Judiciary Act of 1789—was unconstitutional. Nowhere in the Constitution was the Supreme Court explicitly granted appellate jurisdiction over state courts. The Virginia Court of Appeals agreed that it was bound by the federal Constitution and laws but denied that it was bound to obey the Supreme Court's interpretations of them. According to the Virginians, the two systems of courts—state and federal—were instrumentalities of separate sovereigns, not answerable one to the other.

On appeal, the case—now styled *Martin v. Hunter's Lessee*—became a disquisition into the very nature of sovereignty in the U.S. constitutional system. Story, writing again for the Court in the absence of the chief justice, found that Congress had power "by necessary implication" to grant jurisdiction to the Supreme Court in cases involving federal law. Such appellate authority was essential to ensure uniformity of decisions interpreting federal law and to overcome "State prejudices, state jealousies and state interests." Moreover, Story maintained that Congress is *required* to do so. "The judicial power must therefore be vested in some court, by Congress: and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose, that, under the sanction of the constitution they might defeat the constitution itself; a construction which would lead to such a result cannot be sound" (14 U.S. 326, 347, 329).

In asserting jurisdiction over state courts, Story struck a mighty blow for uniformity of U.S. law. Without a single tribunal to resolve conflicting interpretations, federal law would be different in every state. Moreover, in light of the weakness of federal administrative institutions in the early years

Early United States Supreme Court Justices and Circuit-Riding Duties

In an attempt to make justice more accessible, some state supreme courts are required to hold sessions in different parts of the state, but justices typically have access to modern forms of transportation and find themselves housed in appropriate buildings wherever they meet. By contrast, circuit riding greatly added to the strain on the life of judges in early America (and later on the frontier), particularly those, including Supreme Court justices, who had the responsibility of "riding circuit" over large areas relatively distant from the nation's capital—which was first located in New York and Pennsylvania. The Southern Circuit, for instance, comprised North and South Carolina and Georgia.

Supreme Court justice James Iredell, who served on the United States Supreme Court from 1790 to 1799, reported having traveled more than 1,900 miles on a single tour of his circuit where he would join with U.S. district judges to render circuit court decisions. He described passing through barren land, encountering flooding, being the victim of highway robbery, and having to seek lodging in private houses where inns were either nonexistent or filthy and boisterous. Iredell noted that his circuit duty made him "a Post Boy" and complained about "perpetual traveling, and almost continual absence from home" (quoted in Fish 2002, 21).

The author of an excellent recent history of federal justice in the mid-Atlantic states noted that the Southern Circuit, "characterized by great geographical distances, places of court located in the remote interior, a poor transportation system and sparse public accommodations, posed special hardships" (Fish 2002, 20). The presence of Supreme Court justices in the hinterlands may, however, have helped to keep the early justices in contact with the people and may have in turn served to educate the people in the principles of the new Constitution.

Reference:

Fish, Peter G. 2002. *Federal Justice in the Mid-Atlantic States: United States Courts from Maryland to the Carolinas, 1789–1835*. Washington, D.C.: Administrative Office of the United States Courts.

of the Republic, it is hard to see how the federal government could achieve its purposes without the ability to use the apparatus of state judicial enforcement.

In a more theoretical respect, too, Story's opinion in *Martin* struck a blow for constitutional union. Addressing the Virginia court's contention that "such an appellate jurisdiction over State Courts is inconsistent with the genius of our governments and the spirit of the constitution" because "the latter was never designed to act upon State sovereignties, but only upon the people"—an argument still alive and well in modern federalism theory—Story responded that it was "a mistake" to suppose that "the constitution

was not designed to operate upon States in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the States in some of the highest branches of their prerogatives" (14 U.S. 342–343). Thus Story boldly contradicted the very heart of states' rights constitutional theory.

Did Story go too far? Unlike his mentor, Marshall, who knew when to retreat as well as when to advance, Story tended to press his theories to their logical extent, without regard to opposition. *Martin* was a mighty blow for federal judicial power, but perhaps it was too ambitious. Congress has never accepted the view that it is obliged to vest the full judicial power of the United States in federal courts, and even the Supreme Court has retreated from the view that it has authority to overturn state court interpretations of state law in cases within its appellate jurisdiction.

In a similar vein, Story's opinion for the Court in *Swift v. Tyson* (1842) established the power of federal courts in diversity cases to create a national common law in commercial matters—a decision reversed about a century later, in *Erie Railroad v. Tompkins* (1938). He also expanded the powers of the federal courts over maritime and admiralty cases—a jurisdiction they continue to exercise. Had Story's constitutional vision prevailed—sweeping federal court jurisdiction armed with federal common law for commercial and other civil matters, crimes, and admiralty—the federal courts might well have superseded both states and Congress as the primary lawmaking authority for the nation.

Also notable were Story's majority opinion in *Terrett v. Taylor* (1815) and concurrence in *Dartmouth College v. Woodward* (1819), both of which protected private corporations from state alteration of their charters. These decisions laid the framework not only for private corporate enterprise but also for an independent sector of religious, educational, and charitable institutions. *Terrett* involved a Virginia statute asserting state ownership of the "glebe lands"—income-producing property for the support of the parish minister—held by the Episcopal Church, which had been the established church of the Virginia colony. *Dartmouth College* involved a state takeover of a college founded by royal charter, with the benefit of land grants. In both contexts, Story found that these mixed public-private institutions had become irreversibly "private" and that the state no longer had authority to seize control over their property.

Story's most enduringly problematic decision was *Prigg v. Pennsylvania* (1842), striking down Pennsylvania's personal liberty law, which enabled putative slaves to challenge their status before a jury before being carried back to the South as fugitives. He ruled that this law conflicted with the fugitive slave clause, which, he said, was a fundamental part of the bargain

that had stitched together the original Union. The opinion was greeted with satisfaction in the South and excoriated by abolitionists. But there was another side to the coin. Under the theory of *Prigg,* state governments were not permitted to interfere with slave recovery, but they also could not be required to assist in it. Some—including Story's son—have argued that *Prigg* was a victory for freedom in disguise. In most respects, Story was a strong advocate of moderate antislavery measures, such as exclusion of slavery from the territories and suppression of the slave trade. But in its inattention to the problem of due process for free blacks wrongly accused of being slaves, the *Prigg* opinion seems to betray those principles.

In addition to his judicial career, Story was one of the most influential and prolific legal scholars in the nineteenth-century United States and thus the model for the scholar-judge. In 1829, at a time when Harvard Law School had dwindled to a single student, he reluctantly moved to Cambridge and became a professor and head of the law school, which he reformed and revitalized. Based on his lectures, Story published major treatises: *Bailments* (1832), *Bills of Exchange* (1843), *Promissory Notes* (1845), *Conflict of Laws* (1834), *Equity Jurisprudence* (1836), and *Equity Pleading* (1838). His most famous and enduring scholarly effort, the three-volume *Commentaries on the Constitution* (1833), was the leading work on the subject for decades and has been cited frequently by the Supreme Court. Written in opposition to the increasingly radical states' rights theories of such thinkers as John C. Calhoun and John Taylor of Caroline, who envisioned the Constitution as a compact among sovereign states, Story forcefully expounded the nationalist theory of constitutional union. Sovereignty, according to Story, devolved upon the entire people of the United States after independence—and not on the states. The people, in turn, formed a "more perfect Union" in 1787 without intercession from the state governments. That theory was controversial in 1833, and it remains contested today.

The third volume of Story's *Commentaries* contained a clause-by-clause explanation of each part of the Constitution—the first of its kind—with citations to relevant opinions, mostly of the Marshall Court. Perhaps most interestingly, Chapter 5 set forth nineteen "rules of interpretation" to guide judicial construction of the fundamental charter. It reflected Story's aspiration to create a "science" of law and thus to distinguish the objective arena of legal decisionmaking from the realm of politics. This was the birthplace of constitutional law as a serious field of study. Whether Story succeeded in his attempt to establish legal objectivity—indeed, whether any such enterprise can ever succeed—is the question at the heart of constitutional theory now as it was when it was written.

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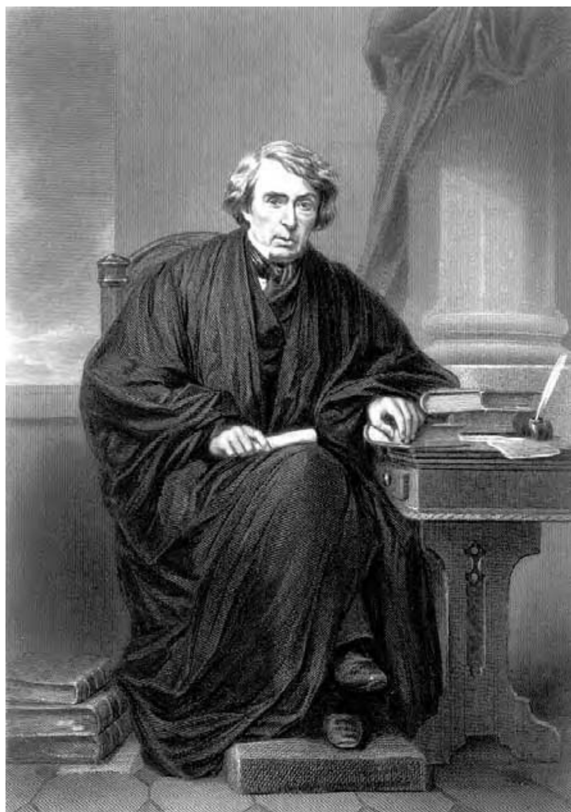
TANEY, ROGER BROOKE

(1777–1864)



Roger Brooke Taney
Library of Congress

Had his reputation not been irrevocably blemished in old age by his leading role in enunciating the infamous *Dred Scott* decision, Roger Brooke Taney (pronounced "Tawney") would probably be considered one of the most eminent judges ever to sit on an American bench. Certainly he was one of the most influential.

Taney entered the world on 17 March 1777, the second of four sons born to Michael Taney, who owned a large tobacco plantation located on the Patuxent River at the mouth of Battle Creek in Calvert County, Maryland. Taney's mother, Monica, was the daughter of Roger Brooke, a wealthy neighbor. A Federalist and a leading member of the Maryland General Assembly, Taney's father was a hard-drinking, impetuous, domineering outdoorsman who was a strong Roman Catholic. In his seventies he stabbed a neighbor to death in a quarrel over a woman and fled to Virginia, where he died two years later after being thrown from a horse (Swisher 1961, 8–14, 103–104).

Roger Taney graduated from Dickinson College at Carlisle, Pennsylvania, in 1795 at the age of eighteen after only three years of residence. He was the valedictorian of his class of twenty-four graduates. After a year spent largely in foxhunting, he began reading law in the office of Judge Jeremiah T. Chase of Annapolis and was admitted to the Maryland bar on

19 June 1799, after which he opened his own law office, also being elected in October 1799 to the House of Delegates as a Federalist (Lewis 1965, 3–35).

In 1800 a Jeffersonian landslide swept many Federalists, including Taney, out of public office. He then relocated his law practice in March 1801 to the little town of Frederick in western Maryland, where there was less competition for business. As his practice rapidly expanded, he gradually overcame an innate shyness and greatly grew in self-confidence. On 7 January 1806 he married Anne Phebe Charlton Key, the sister of a former college classmate, Francis Scott Key. Anne, born on 13 June 1783, gave Taney six daughters (all raised as Episcopalians like their mother) and one son, who died in infancy (Lewis 1965, 37–45).

During the period from 1803 to 1812, Taney was repeatedly a candidate for public office, but without success. Finally in 1816 he was elected to the state senate. Meanwhile, despite a frail physique that at times forced him to take to his bed after arguing a difficult case, he began to win a reputation for diligence, honesty, mastery of the most complicated features of the law, and a disposition to represent unpopular clients, some of whom he was convinced were guilty, in order to assure them an adequate defense. For example, in 1811 he defended Gen. James Wilkinson, accused of committing treason against the United States, at a court martial trial that culminated in a not guilty verdict (Swisher 1961, 45–49, 59–60, 73–74; Lewis 1965, 74–75).

Taney's most momentous achievement during that period was his successful defense in March 1819 of the Reverend Jacob Gruber, a Methodist minister from Pennsylvania who was indicted in Washington County for allegedly inciting slaves "to commit acts of mutiny and rebellion" while preaching to a crowd estimated at 3,000 persons, including at least 400 Negroes. Taney's opening statement in Gruber's behalf cogently expressed his own views on the subject of slavery. "Mr. Gruber," Taney declared,

> did quote the language of our great act of national independence, and insisted on the principles contained in that venerated instrument. He did rebuke those masters who, in the exercise of power, are deaf to the calls of humanity; and he warned them of the evils they might bring upon themselves. He did speak with abhorrence of those reptiles who live by trading in human flesh and enrich themselves by tearing the husband from the wife and the infant from the bosom of the mother; and this, I am instructed, was the head and font of his offending. . . . So far is he from being the object of punishment, in any form of proceeding, that we are prepared to maintain the same principles and to use, if necessary, the same language here in the temple of justice and in the presence of those who are the ministers of the law. . . .

> A hard necessity indeed compels us to endure the evil of slavery for a time. . . . It cannot be easily and suddenly removed. Yet, while it continues, it is a blot on our national character; and every real lover of freedom confidently hopes that it will be effectually, though it must be gradually, wiped away. (Lewis 1965, 76–79)

At the time of his marriage Taney himself owned at least three slaves and acquired others thereafter. By 1821, however, he appears to have emancipated all but two of them, who were too old to care for themselves. Although he represented slave owners in several runaway slave cases, he also held the office of vice president of the American Colonization Society, of which his brother-in-law, Francis Scott Key, was one of the founders, and he fully supported the objective of the society, which was to establish a haven for freed Negroes in Liberia (Steiner 1970, 55–56, 376; Lewis 1965, 44, 76).

In February 1823 Taney relocated his law office to Baltimore, which was then the second-largest city in the United States. Two years later he began arguing cases in the United States Supreme Court, the first significant one of which was *Etting v. Bank of the United States* (1826). Accusing officials of the Bank of the United States of corruption, Taney eventually obtained a settlement for his Maryland clients, despite the opposition of Chief Justice John Marshall and two of the five other Supreme Court justices. This initial encounter with the Philadelphia-based banking behemoth and his own association with Maryland state banks whose directors tended to resent the Bank of the United States as an arrogant monopoly foreshadowed Taney's future support of Pres. Andrew Jackson's "war" against the federal bank (Lewis 1965, 86–89).

On 3 September 1827, Maryland's governor appointed Taney to the post of state attorney general, an office whose duties were arduous although the pay was pitiful. Taney probably owed his selection to having ably represented the state government in the Supreme Court case of *Brown v. Maryland* (1827), resulting in a landmark decision by Chief Justice Marshall that under the interstate commerce clause of the U.S. Constitution, no state could tax imports from a foreign country or from another state. Although Taney lost this initial battle with mercantile interests, his ardent defense of states' rights versus federal power presaged many of his own later opinions from the bench (Swisher 1961, 114–115).

In 1831, largely because of the Peggy Eaton affair (in which President Jackson rose to the defense of the wife of his secretary of war, who had been snubbed by the wives of some of his cabinet members), vacancies materialized in President Jackson's cabinet. Old Hickory then prevailed upon Taney to become U.S. attorney general, in which capacity he provided Jackson

with many of the arguments presented in Jackson's 10 July 1832 message to Congress vetoing a bill to extend the charter of the Bank of the United States. Oddly, in view of Taney's later opinions on the subject of judicial authority, Jackson's veto message asserted that despite the precedent of *M'Culloch v. Maryland* (1819), a decision of the Supreme Court upholding an act of Congress was not binding upon the chief executive if he believed such an act to be unconstitutional. Moreover, regarding the question of whether an act of the federal government was necessary and proper and therefore constitutional, Taney (through Jackson) put the greatest emphasis on the word *necessary,* in contrast to the much greater weight placed upon the word *proper* by Chief Justice Marshall (Lewis 1965, 129–165).

After Jackson was reelected in November 1832, he decided that the U.S. Treasury deposits should be removed from the Bank of the United States and transferred to state-chartered banks. When Secretary of the Treasury William J. Duane refused to do this, Jackson removed him from office and replaced him with Taney, who promptly issued the removal order. In June 1834, however, Taney's nomination as treasury secretary became the first cabinet appointment ever rejected by the Senate. He was therefore forced to resign his office (Lewis 1965, 178–180; Swisher 1961, 286–289).

On 15 January 1835 a grateful Jackson nominated Taney to fill a vacancy on the United States Supreme Court. The Senate, dominated by anti-Jackson Whigs, promptly rejected the appointment. But a determined president seized the opportunity provided by the death of Chief Justice Marshall late that year once again to nominate Taney to the Court. This time the Senate, after considerable debate, approved the appointment on 8 April 1836, thus enabling Taney, at the age of fifty-nine and in precarious health, to begin a tenure of twenty-eight years as chief justice of the United States (Lewis 1965, 239–251).

Despite frequent illnesses of one kind or another and an onerous requirement to ride circuit, a duty of Supreme Court justices not eliminated by Congress until 1869, Taney still managed in his methodical fashion to write approximately 300 Supreme Court opinions, only seven of which were dissents. In only twenty-six cases did he differ from a majority of the justices without writing a formal dissent. And he participated, of course, in hundreds of additional cases, the written opinions in regard to which he generously assigned to fellow justices (Steiner 1970, 448; Lewis 1965, 314, 337).

When Taney joined the Court, he inherited from a divided Marshall Court a controversy involving a legislative charter to build a bridge, the so-called Warren Bridge, across the Charles River at Boston. The construction of the new bridge was opposed by the Charles River Bridge Company, whose own toll bridge had been chartered in 1786. The essence of the plaintiffs' argument was that the state had violated a contract embodied in

the original charter, which they maintained had conferred by implication an exclusive privilege to build and operate such a facility. The issue, then, was whether the construction of the new bridge violated the contract clause of the U.S. Constitution and the Marshall Court's ruling in *Dartmouth College v. Woodward* (1819), which had held that state legislative charters creating corporations were contracts that could not afterward be legislatively altered, even for the public good (Swisher 1974, 73–81).

In delivering the decision of the Supreme Court in *Charles River Bridge v. Warren Bridge* (36 U.S. 420, 1837), Taney drew heavily upon Marshall's opinion in the case of *Providence Bank v. Billings* (29 U.S. 514, 1830), which stipulated that a corporation's privileges "do not flow necessarily from the charter, but must be expressed in it, or they do not exist" (562). Since "the object and end of all government is to promote the happiness and prosperity of the community by which it is established," Taney declared, such a government would be of little value "if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation" (548). The entire community, Taney asserted, "have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, . . . shall not be construed to have been surrendered or diminished by the State, unless it shall appear by plain words that it was intended to be done" (449–450). Thus, by requiring that state contracts be construed strictly, the Taney Court facilitated national economic development and provided protection for community rights over corporate property rights. Years later Justice John Archibald Campbell was to declare in regard to the Charles River Bridge decision that "no opinion of the Court more fully satisfied the legal judgment of the country, and consequently none has exerted more influence upon its legislation" (Lewis 1965, 289; see also Kutler 1977, 87–89, 114–119).

Also important in limiting the power of corporate monopolies was the Taney Court's decision in *West River Bridge v. Dix* (1848), in which it upheld the right of eminent domain, allowing state legislatures to appropriate corporate property for public use with just compensation (Swisher 1974, 471).

As government at the state and local level became more democratic during the Jackson era, the Taney Court handed down decision after decision supporting the constitutional right of state legislatures to enact social welfare laws even at the expense of private interests. Chief Justice Marshall had ruled in *Fletcher v. Peck* (1810) that a state legislature had no right because of the limitations of natural law to void a private contract, even if such an instrument was the product of extensive public corruption. Thus he implicitly recommended the judicial process as a weapon that private economic interests might use against governmental interference with their

activities. But Taney, who never mentioned the law of nature as limiting legislative activity, consistently ruled that only the most narrow restrictions applied to such activity, and these were to be largely decided by state courts, not by federal tribunals (Newmyer 1968, 64–68; Smith 1973, 122–123).

Taney's support for community rights over corporate rights was not unlimited. In rendering the Supreme Court's decision in *Ohio Life Insurance & Trust Co. v. Debolt* (1854), he maintained that the will of the sovereign people of a state, expressed contractually in a corporate charter, created a constitutional obligation that could not afterwards be impaired by a legislative act attempting to invalidate it, even if the power to enter into the original contract had been "indiscreetly and injudiciously exercised" (Lewis 1965, 120–123). And in its decision in *Bank of Augusta v. Earle* (1839), the Taney Court ruled that if a corporation chartered in one state was permitted by that instrument to do business in another state, it could do so because of the comity clause in the Constitution, unless expressly prohibited by law in the other state (Swisher 1974, 115–121).

When it came to setting boundaries for the exertion of federal authority over the states, Taney was less hesitant than when dealing with issues involving corporate privilege. To the chief justice, a state's innate police power was ordinarily supreme over federal authority within that state. Perhaps the most cogent of his many rulings in this vein was his opinion in the *License Cases* (46 U.S. 504, 1847) in which he defined state "police powers" as "nothing more or less than the power of government inherent in every sovereignty" (583). In almost every case in which state regulatory laws were challenged in the United States Supreme Court while Taney was chief justice, on the ground that they usurped federal authority under the interstate commerce clause, Taney voted to sustain the legislation of the states. His emphasis upon the broad reach of the police power of the states and his insistence that a state might enact laws affecting interstate commerce as long as they did not conflict with federal legislation exercised a dominant influence upon future court decisions for years to come (Smith 1973, 130–139).

There was one notable exception to Taney's emphasis on states' rights, illustrated by his opinion in the landmark case of *Propeller Genesee Chief v. Fitzhugh* (1852), in which he ruled that a state's authority did not override that of the federal government on the navigable waters of the American interior. Departing from English admiralty law, whose precedents extended inland only as far as waterways were affected by the tides of the sea, Taney declared that the maritime jurisdiction of U.S. admiralty courts extended to all navigable streams and lakes, whether affected or not by ocean tides. In view of the enormous amount of commerce affected by this judgment, perhaps Justice John Catron was not in error when he wrote to future president James Buchanan that the *Genesee* decision and a clarifying companion, *Fretz v. Bull*

(1852), had "in their practical consequences . . . more in them than any fifty others ever made by the Supreme Court." (Swisher 1974, 446). As noted in a contemporary law journal, the *Genesee* decision provided that all disputes involving "every stream of any importance in the United States" must be decided not in state tribunals but in federal courts. One of Taney's biographers asserted that the Genesee opinion was his "most important contribution to jurisprudence" (Steiner 1970, 292–296; see also Swisher 1974, 442–447).

Notwithstanding the enhancement of federal jurisdiction provided by the *Genesee* decision, Taney and a majority of his colleagues endeavored throughout his tenure as chief justice to formulate a doctrine less favorable to federal power over interstate commerce than that expressed by Chief Justice Marshall in *Gibbons v. Ogden* (1824), in which Taney's predecessor broadly interpreted the meaning of the word *commerce* insofar as it applied to the exercise of federal power upon the waterways of a state. Dissenting in a five–four decision entitled the *Passenger Cases* (48 U.S. 283, 1849), Taney maintained that under the Constitution the Congress lacked the power to compel a sovereign state to admit any person "whom it might deem dangerous to its peace" (466) or to "abridge the power of taxation in the States" (480). And writing the Court's majority opinion in *Luther v. Borden* (48 U.S. 1, 1849), he ruled that federal courts must "adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State" (40). The United States Supreme Court, "the final appellate power," as Taney declared in *Ableman v. Booth* (62 U.S. 520, 1859), whenever any question arose regarding the legitimacy of an act of Congress, would stand behind the rights of the states (Lewis 1965, 130–134; Kutler 1977, 101–105, 110–113).

It would so stand in regard to the most controversial issue in all of U.S. history—that of human bondage. In the *Ableman* decision the Court upheld the Fugitive Slave Act of 1850, widely hated in the North, "in all of its provisions." No state could interfere with the operation of that detestable law. Taney's insistence that public officials in nonslave states were obligated to enforce it had already been made clear in a partial dissent in *Prigg v. Pennsylvania* (1842). Despite his insistence upon limiting narrow property rights expressed in such decisions as that involving the Charles River Bridge, he maintained in Prigg that the obligation "of the state authorities to protect the master when he is endeavoring to seize a fugitive from his service" was "necessarily implied" (Kutler 1977, 110–113, 149).

Five years later the Supreme Court was again confronted with the fugitive slave problem. Its decision in *Jones v. Van Zandt* (1847) upheld the constitutionality of the original Fugitive Slave Act, which provided heavy penalties for harboring or concealing a runaway slave, even if state laws encouraged such forms of defiance. In response to this decision, Salmon P.

Kirby Benedict (1810–1874)

Kirby Benedict is not well known today, but he was an associate of Abraham Lincoln in Illinois and served terms as both an associate judge and a chief justice of the Judicial Court in New Mexico when it was still a territory. Born in Kent, Connecticut, in 1820, Benedict went to Ohio when he was twenty-one and subsequently read law in Natchez, Mississippi, under John Anthony Quitman, where he also appears to have acquired knowledge of French and Spanish. First admitted to the bar in Ohio, he later settled in Illinois, where he served for six years as a probate judge of Macon County, a county that he also represented for a time in the state legislature. Riding circuit in Illinois, Benedict came to know Abraham Lincoln, Stephen Douglas, and David Davis (who later served on the United States Supreme Court).

In 1853, Pres. Franklin Pierce appointed Benedict to be an associate judge of the Third Judicial District of New Mexico, a job that included work on the Supreme Court for the territory. Although three judges were supposed to be there, Benedict often found himself as the only judge on call. He moved his family to New Mexico in 1855 and appears to have served conscientiously. In 1857, Pres. James Buchanan appointed Benedict to serve as chief justice, a term that he began in 1858. During his time in New Mexico, Benedict wrote more Supreme Court decisions than did any of his colleagues (Hunt 1961, 122). As chief justice his work was primarily exercised in the first district. Known for having far more dramatic oratory than Lincoln, in one case where Benedict found a man guilty of first-degree murder, he ended a long speech with:

> The Court was about to add, Jose Maria Martin, "May God have mercy on your soul," but the Court will not assume the responsibility of asking an allwise Providence to do that which a jury of your peers has refused to do.
>
> The Lord will not have mercy on your soul! (Quoted in Hunt 1961, 81)

Benedict, who had already gained knowledge of Spanish, apparently also learned the customs of the people he gov-

(continues)

Chase of Ohio, later to become Taney's successor as chief justice, passionately protested against its requirement that free men in free states must actively assist slaveholders to repossess their human property. Senator Chase even went so far as to declare that Congress was in no way bound to accept the Supreme Court's interpretation of the Constitution (Pfeffer 1967, 147–149).

Then came Taney's ruling in *Dred Scott v. Sandford* (1857), which invalidated the 1820 Missouri Compromise, which had banned slavery from the Northwest Territories. The *Dred Scott* decision energized antislavery opinion in the North, thus becoming one of the principal causes of the Ameri-

(continued)

erned; in an early case, he had to resolve a conflict over which of two Native American tribes was entitled to a disputed portrait of St. Joseph. At the time of his arrival, peonage (whereby an individual could contract out his or her own, and in some cases, his or her children's services in payment for debt), albeit not chattel, slavery was legal in New Mexico and continued into effect in 1867. Although slavery was sanctioned for a time, Benedict remained faithful during the Civil War to the Union, and remembering his old friendship, Lincoln reappointed Benedict as a chief justice in 1862. Benedict was one of three men who revised and codified the territory's laws in 1865. Writing to Lincoln in July 1864, Benedict described the kind of men that were needed in the territory: "Send us good men. A narrow and mischievous mind and spirit should never be sent here. No one should be sent here who is not courageous, persevering, and of the highest integrity. He should have manners, deportment, and the bearing of a gentleman with good sense enough to make no wanton or unprovoked controversies" (quoted in Hunt 1961, 168).

Benedict helped found the Historical Society of New Mexico and was an active Mason. Opponents accused him of demagoguery and drunkenness (both charges of which appeared to have elements of truthfulness), and Pres. Andrew Johnson replaced Benedict with Col. John P. Slough. Slough was subsequently shot, and Benedict was among the lawyers who successfully defended his killer. Showing contempt for the court in a later case, Benedict was disbarred and refused to apologize for three years. His reapplication to the bar brought inquiry into his behavior, including intemperate articles attacking public officials that he had published as editor of the *New Mexico Weekly Union*. Benedict withdrew his application for reinstatement and died shortly thereafter in 1874. He had become indebted by his many years of service, and his property was sold at auction. Benedict's wife returned virtually penniless to Illinois.

Reference:

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can Civil War. In *Dred,* Taney reiterated his opinion that the Constitution protected a slaveholder's right freely to possess his human property in all the territories of the United States. The widespread outrage over this decision ranged from the outright rejection of its validity by such antislavery men as Chase and Horace Greeley of the New York *Tribune* to a reluctant obedience among such moderate Republicans as Sen. William Seward of New York and Abraham Lincoln of Illinois, both of whom suggested that a future Supreme Court would adopt a contrary view (Swisher 1974, 599–650).

Late in 1860 slave states began to leave the Union, and early in 1861 the Civil War began. At once Taney's domination of the Supreme Court began

to diminish. When he declared in *Ex Parte Merryman* (1861), a circuit opinion, that Pres. Abraham Lincoln's suspension of the writ of habeas corpus in Taney's home state of Maryland was an unconstitutional usurpation of congressional power, Lincoln simply then and thereafter ignored the rulings of the chief justice. It became evident that Taney's authority had vanished in the chaos of war. Lincoln, moreover, was soon able to add four new justices to the Supreme Court, drastically altering the ideological balance on that tribunal to the point that Taney, in declining health and entirely opposed to the administration's military assault against the South, had little influence on jurisprudence during his final years on the bench (Newmyer 1968, 145).

Exemplifying the chief justice's shrinking stature was his dissent in the *Prize Cases* (1863), which dealt with (1) whether the president could constitutionally institute a naval blockade of the southern coastline in the absence of a congressional declaration of war, and (2) whether, if an actual war existed, it was a conflict between sovereign nations or merely an armed rebellion against a national government. In a five–four decision, with Taney in the minority, the Supreme Court ruled that an actual war had existed at the time that Lincoln (with Congress not in session) had proclaimed the blockade and that such a state of war had created a "military necessity" that allowed Lincoln to exercise vast powers as commander in chief of the nation's armed forces. It was not, however, such a war as would justify foreign nations in granting formal recognition to the southern Confederacy as a sovereign nation; it was in this sense merely a domestic rebellion allowing the South only limited belligerent rights. Taney thought otherwise, concurring in the dissenting declaration of Justice Samuel Nelson that the conflict could not have become an actual war until legitimized by Congress and that absent such a legal war, the blockade could not be legal either (Swisher 1974, 884–892; Kutler 1977, 161–164; Newmyer 1968, 145–146).

Remaining to the last a strict constructionist opposed to any appeal to "natural law" or to "necessity," Taney consistently demanded even during the desperate days of the Civil War that the exercise of federal power be limited to what was explicitly allowed by the actual wording of the Constitution. His emphasis on state sovereignty was exemplified by his decision in the case of *Kentucky v. Denison* (1861). The governor of Kentucky had requested a mandamus ordering the governor of Ohio to deliver one Willis Largo, accused of trying to aid a slave to escape from Kentucky, for trial. Taney ruled for an unanimous Court that the Constitution granted the executive authority of a state in which a crime had been committed, once the alleged perpetrator had been "charged in the regular course of judicial proceedings," to demand that the executive authority of "the State in which

he is found" turn over the accused, "without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled." Neither the Constitution nor the Fugitive Slave Act, however, provided any "means to compel the execution of this duty, nor inflict any punishment for neglect or refusal." Indeed, the right to exercise such a power through the agency of a federal court ruling "would place every State under the control and domination of the general government," something clearly not allowed by the Constitution. Thus, in his last important Supreme Court decision, Taney continued to insist on a severely limited federal authority over the states, which was consistent with his opinion that the southern slave states had a constitutional right to secede from the Union and could not be compelled by force to stay (Steiner 1970, 438–442, 449–450).

Deeply depressed at the horrors of the North-South conflict and at his own helplessness, as demonstrated by the *Merryman* case, in the face of what he considered were the unconstitutional acts of the Lincoln administration, Taney rapidly declined in health as the Civil War progressed and hardly left his house during the final months of his life. He died on 12 October 1864 at the age of eighty-seven and was buried next to his mother in the Jesuit cemetery in Frederick, Maryland (Steiner 1970, 518–521).

Taney's greatest judicial achievement had been to bring U.S. jurisprudence "into accord with the political and economic currents of the Age of Jackson" by making "a substantial body of decisional law" inherited from the Marshall Court relevant to the new era (Newmyer 1968, 90). He was a man of great personal integrity, modesty, simplicity, and courtesy; diligent and devoted to his duty as he saw it. He was much admired for his unceasing struggles against chronic ill health to achieve mastery of the most intricate aspects of the law applicable to whatever case he had been called upon to judge. Unfortunately his stubborn tendency to look backward to the uncertain lessons of the distant past, rather than to adjust his thinking to the insistent requirements of a rapidly changing and expanding nation, ensured that he would confront increasing opposition, bringing down upon himself "a tempest of aspersions" that ultimately blemished his place in history (Steiner 1970, 538). Especially for removing the Treasury deposits from the Bank of the United States, for ruling in the *Dred Scott* decision that all of the western territories must be open to slavery, and for publicly and privately denouncing as unconstitutional many of the measures taken by President Lincoln to preserve the American Union, Taney was at the end of his life the object of much obloquy and his death was viewed "as the removal of a barrier to human progress" (Steiner 1970, 539). Yet the great majority of his constitutional decisions have been almost universally judged to have

been "sensible and sound," and the modern consensus is that—in the words of one of his best biographers—"He was a great judge and a good man" (Steiner 1970, 320–325, 522–542; see also Newmyer 1968, 90–94).

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TRAYNOR, ROGER JOHN

(1900–1983)

Roger John Traynor
California State Archives

Considered one of the most influential jurists of the twentieth century, Roger John Traynor established various protocols on tort and product liability law, and he helped to establish the principle that some defendants could be held liable in the absence of fault. Born in 1900 in Park City, Utah, Traynor received his bachelor's, doctorate, and jurist degrees from the University of California at Berkeley. He taught political science and law at Berkeley from 1926 to 1940 before accepting a position as justice on the California Supreme Court, a position he held for thirty years. He became chief justice in 1964, a position he held for six years. During his tenure on the court, Traynor wrote more than 900 opinions and became known as an innovator who abandoned earlier precedents, particularly in the expansion of rights for criminal defendants. At his death, at the age of eighty-three, he had contributed to many of the major doctrinal developments in contract law.

Traynor's tenure on the California Supreme Court marked unprecedented change, not only in the state of California but also in the United States as a whole. The years 1940 to 1970 were historically important since these were the decades in which the New Deal, the New Frontier, and the Great Society each had an impact on social and judicial norms. His thirty

years on the court mirrored the major demographic and technological changes in the country as a whole, but particularly reflected the trends in California. Traynor, as both jurist and chief justice, reflected the concern that government, whether at the state or national level, should be a principal agent of change. At the beginning of his career in 1940, the concept of affirmative government was just getting off the ground, and by the time he retired in 1970, the movement for affirmative government had reached its peak. During his thirty-year quest for judicial change, Traynor attempted to force government to make an affirmative response to social problems; in many ways, therefore, he was an activist in a world of affirmative government, but one who thought that such activism could be consistent with rationality and impartiality.

In order to explain the judicial process more clearly, Traynor often used metaphors associated with the clearing of a forest. He would compare legal precedents to trees, with the obscure ones blocking out the light and barring progress and the more secure ones providing guidance and nurture to the soil. The task of the judge would be to prune carefully, removing the diseased wood without cutting down all the trees. Therefore, Traynor wanted to prune the underbrush, and he felt that brush clearing would induce progress without violence to other structures. By limiting the unjust features of an application (pruning), or overruling (chopping it down), Traynor felt he could make some judicial headway.

This sort of academic comparison marked many of Traynor's judicial opinions and resembled his application of scholarly analysis to many of his decisions. In fact, he published frequently, including essays such as "The Ways and Meanings of Defective Products and Strict Liability" and "War and Peace in the Conflicts of Laws," which led to Traynor's changes in the common law for California and set precedents across the nation. For example, his opinion in the defective products case *Escola v. Coca Cola Bottling Company* created the principle that a manufacturer whose "defective" product injures another is liable for injuries that could be traced to the product's defectiveness. This case set a precedent for subsequent liability cases, and by the 1960s, the authors of the *Restatement of Torts,* as well as numerous jurisdictions, had adopted Traynor's approach. Today, consumers injured by "defective" products sue manufacturers directly in tort in most areas, directly following Traynor's lead. In considering the conflict of laws, Traynor wrote in "War and Peace": "When there is no clearing, [the judge] must chop his way through, however clumsily, and hope that scholars will speed their reinforcements." With this in mind, Traynor applied the theory of interest analysis, and its emphasis on the law of "forum state," which reserved choice of law questions for those situations in which the forum state did not have an interest in policy application. Traynor applied this policy to two

decisions later in his career, *Bernkrant v. Fowler* (55 Cal. 2d 588, 1961) and *Reich v. Purcell* (67 Cal. 2d 551, 1961).

Traynor refused to follow protocol, and by the time he began his tenure as a justice, the concept of judicial deference had overtaken the judicial system, the limitations of which Traynor acknowledged. Traynor felt that the basic responsibility of lawmaking review remained with the court system, as he noted in an essay, "The Unguarded Affairs of the Semikempt Mistress," in which he argued that both legislative and judicial lawmaking are in a constant state of change. The relationship between the two types of lawmaking is often symbiotic rather than competitive; once a court followed through with an application, the legislature might revise the court's ruling if found to be offensive. In essence, Traynor created a common law rule patterned on the treatment of those who execute the law. Traynor felt that the legislative process only furthered his zeal for action; he wanted to determine a way that judges could make optimal use of legislative statutes. Traynor was guided by a results-oriented approach, despite the criticism given to this approach; he felt that rationality linked the dispassionate judge and the "results-oriented" judicial decision that critics often viewed as one sided. Traynor expounded upon this belief in "Statutes Revolving in Common Law Orbits," by arguing that the "primary internal characteristic of the judicial process is that it is a rational one." A judge, Traynor argued, should not simply "write up" a person's feelings, and if one bases a decision on personal opinion, then this is hardly being impartial for an office that prides itself on impartiality. The real concern, therefore, seems to be not only in remaining impartial but also in avoiding arbitrariness. Impartiality, Traynor argued, served as a constraint on judicial decisionmaking, by making certain that decisions would not be biased. Traynor advocated a more moralistic approach, specifically concentrating on the facts-based, rational approach, rather than an arbitrary approach that relied on one-sided opinions.

In keeping with this rational-based approach, and not one that relied on public sympathy, Traynor was instrumental in the *Alien Land Law* cases and other immigration cases. For example, in the case of *Sei Fujii v. State of California,* which covered the land claims of Sei Fujii, and its precedent, the case of Kajiro Oyama and his family, Traynor made headlines. The original case, surrounding Kajiro Oyama and his family, who sought permission in 1937 to borrow $4,000 to finance the subsequent crop growth, originated with the concept of Japanese internment. In 1942, Oyama and his family were removed from the West Coast as part of the World War II containment policies, but in 1944, the state of California filed a petition to revert the Oyama property to the state. In the subsequent 1946 California Supreme Court case, the California Supreme Court upheld the action of the state to "escheat" the land, or revert the property to the state. In cases

James Wickersham: A Judge in Frontier Alaska (1857-1939)

Law is generally regarded as a civilizing influence, and much is owed to those who are the first to bring law to the frontier. Few frontiers could have been much wilder than the one that arose in Alaska as a result of gold finds there at the end of the nineteenth century. One of the pioneer judges is that area was James Wickersham.

Born in Patoka, Illinois, in 1857, Wickersham had studied law under Gov. John McAuley Palmer in his office in Springfield. Wickersham subsequently practiced law in the Washington territory from 1883 until 1900, serving as a probate judge of Pierce County from 1884 to 1888 and later as the Tacoma city attorney and a member of the Washington state house of representatives. Pres. William McKinley appointed Wickersham as a United States district judge for Alaska in 1900, a position that he held until 1908. He resigned in 1908 to serve as an elected delegate to Congress from Alaska and served in that capacity from 1909 to 1921 and from 1931 to 1933.

Much like early American Supreme Court justices, Wickersham had to "ride circuit" in Alaska (although the flyleaf to his book is more accurate in referring to his court as a "floating" court), beginning in Eagle City (his headquarters was later moved to Fairbanks) and moving from one town to another in mainland Alaska and the Aleutian Islands to dispense justice. Much of his work centered around thefts, murders, and mining claims (such matters were often settled before his arrival by lynch law), his most famous case being that to the title of the Kennecott copper mine. In a number of towns he was responsible for building the first courthouses and jails, often largely financed by license fees from saloons. In Nome, Wickersham succeeded Judge Arthur Noyes, who had been removed for colluding with shysters and claim jumpers to cheat miners out of their legitimate claims and whose court had a serious backlog of cases, which Wickersham worked diligently to complete. When he arrived to preside over the court, Wickersham did much to clear the air by announcing that he would no longer meet privately with attorneys but that all business would be done in open court (Wickersham 1938, 366). As a judge Wickersham compiled and edited the first seven volumes of the *Alaska Territory Law Reports* as well as *A Bibliography of Alaskan Literature*.

Not all of Wickersham's cases involved criminal law or mining. His very first case after assuming the Alaskan bench was to return a dog that had been stolen from an Indian chief, who took great care first to

(continues)

in which such petitions are upheld, they usually involve a decedent who has died intestate, without the possibility of inheritance, a profile that did not fit Oyama. Escheat may also be used to cover cases of abandonment of property, but not in the case of Oyama since he and his family had no choice but to move. Oyama appealed to the United States Supreme Court,

(continued)

ascertain that there was no greater white chief than Wickersham in the area (Wickersham 1938, 43–44). In another case, Wickersham helped an Indian who had shot what he believed to be a moose only to discover that he had instead killed a "white man's moose," namely a mule (200).

Wickersham delighted in the geography of Alaska and filled his life story with descriptions of his travels and of the terrain and customs of the area. He was in the first group that unsuccessfully attempted in 1903 to scale the heights of Mt. McKinley and later introduced a bill in Congress to establish the Mt. McKinley National Park (Wickersham 1938, 202). Wickersham appeared to have taken delight in rustic circumstances that would have intimidated many others with his legal background and education.

As a territorial judge, Wickersham served for a four-year term. Decisions involving high-value mining claims often brought Wickersham enemies. He noted that:

> There was never a closed season for protection of the district judges in Alaska as there was for brown bear and other varmints. Most of our early Alaska judges were removed from office upon secret charges without notice or a hearing; all of them were maliciously assailed and more or less intimidated in the performance of their judicial duty without an opportunity to defend their judicial acts or character from the secret malice of disappointed litigants. (Wickersham 1938, 434)

Himself investigated by an assistant, W. A. Day, in the U.S. attorney general's office, Wickersham was vindicated, with Day reporting that he was

> an able, honest, and upright judge; that he administers justice promptly and firmly; that he possesses the confidence of the people of his division; that his long residence in western communities and his familiarity with mining laws and customs peculiarly fit him for the position he holds; that he deserves reappointment, and that the best interests of the people of the third division,—and of all Alaska for that matter,—would be subserved by his continuance in office. (Quoted 441)

Still, Wickersham's reconfirmation was blocked by filibusters, and Roosevelt gave him four recess appointments before he was finally reconfirmed for his second judicial term.

Wickersham's subsequent election is a testament to the confidence that those who knew him had in his character. Wickersham eventually made his home in Juneau.

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and its 1948 ruling justified the right of the Oyama family to its land. Similarly, the *Sei Fujii v. State of California* (38 Cal. 2d 718) case of 17 April 1952 resulted in the ability of a noncitizen to purchase and own property in his own name. California Supreme Court chief justice Phil S. Gibson, along with support from fellow justice Traynor and Justices Carter and

Edmonds, wrote the majority opinion, essentially following on the heels of the *Oyama v. California* case. In 1948, Fujii had purchased an undeveloped lot in East Los Angeles, and after that time the United States Supreme Court had ruled in *Oyama v. California* that noncitizen parents who were ineligible for citizenship could purchase land as gifts for their children who were born as citizens. Fujii, who had graduated from the University of Southern California Law School, wanted to test the law, and the state of California tried to take his property, a motive favored by Superior Court judge Wilbur C. Curtis. After Fujii appealed to the California Supreme Court, Traynor and fellow judges overruled the lower court's decision. Both the *Fujii* and *Oyama* cases resulted in the declaration of the Alien Land Law as unconstitutional on 4 November 1956.

In conjunction with the upholding of integrity, while Traynor was chief justice he created a Code of Judicial Conduct. As head of a committee first formulated by the American Bar Association, Traynor felt that all judges should be evaluated equally, hence the code of conduct. The canons included the following: (1) that a judge should uphold the integrity and independence of the judiciary, (2) that a judge should avoid impropriety and the appearance of impropriety in all of his or her activities, and (3) that a judge should perform the duties of his or her office impartially and diligently. Traynor wanted to avoid contention, yet at the time, he also wanted to legitimize the public office in which he firmly believed.

It was in the field of tort law, the law of accidents and personal injury, that Traynor distinguished himself. Traynor distinguished between acts of an administrative or legislative discretion that had been immune from tort liability and acts that led to government tort liability. In *Johnson v. State of California* (69 Cal. 2d 782, 293 [1968]), the issue of the California Tort Claims Act, which provided that a public entity was not liable for an injury or failure to adopt an enactment, reached the court. In this case, the state upheld a suit against the California Supreme Court for failure to warn foster parents about the dangerous tendencies of those children under their care. Similarly, in 1963, Traynor authored *Greenman v. Yuba Power Products Inc.*, the first case to adopt the doctrine of strict liability in tort. Previous cases, such as *Henningsen v. Bloomfield Motors, Inc.*, a 1960 New Jersey court case, had moved liability from contract law to tort law. When Justice Traynor issued the *Greenman* decision in 1963, the American Law Institute was involved in the revision of tort law.

Similarly, in an appeal case, *Paul Robert Cohen v. California,* entered 22 October 1969, the appellant was charged with "engaging in tumultuous and offensive conduct" that violated the peace-keeping statute of California. The appellant was sentenced to thirty days in the county jail, but after appeal to the Superior Court, the decision was reversed, thereby allowing the

state to petition for a rehearing. This resulted in the reversal of the judgment of conviction, and the state again petitioned. After the fifth appeal, the appellant filed a petition for rehearing, although the petition was denied on 13 November 1969. The appellant then filed a petition for hearing before the California Supreme Court, although this petition was denied on 17 December 1969 by a four-to-three vote, with Chief Justice Traynor as one of the three dissenters. The case returned to the appellate courts, making any judgment on the appellant level the highest possible, since Traynor's Supreme Court refused to hear the case. This case brought into question whether the use of a four-letter word with sexual connotations worn on a jacket in relation to the draft should be referred to as "offensive conduct," since the appellant did not engage in, or threaten, any acts of violence. Ultimately, the United States Supreme Court overruled the lower court, deciding that this was an example of permissible speech that fell within neither the category of "fighting words" nor of "obscenity," since it was neither directed toward a specific individual nor erotic in nature.

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TUCKER, ST. GEORGE

(1752–1827)

St. George Tucker
Courtesy of the Library of Virginia

Long before *Marbury v. Madison* was decided, Virginia jurist St. George Tucker embraced a conception of judicial review fully consistent with the views of Chief Justice John Marshall. For instance, as an attorney, he wrote in his unpublished notes in support of his argument as *amicus curiae* in the 1782 *Commonwealth v. Caton* case: "[The judiciary] alone . . . can decide what is or is not Law and consequently . . . on the validity or nullity of different Laws contradicting each other" (Treanor 1994, 523). In his opinion as judge in the 1788 *Kamper v. Hawkins* case (3 Va. 20, 23), he said, "[T]he judiciary are bound to take notice of the constitution, as the first law of the land; and . . . whatsoever is contradictory thereto, is not the law of the land" (81). That Tucker's views were consistent with those of Marshall is shown by the wording of the opinion of the Supreme Court by Chief Justice Marshall in *Marbury v. Madison* (1 Cranch [5 U.S.] 137): "[I]f a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty" (178). Although Tucker was not alone in his early endorsement of judicial review, his articulation of this constitutional principle as early as 1782 places him among the first advocates of this far-reaching judicial power.

At the beginning of the nineteenth century, St. George Tucker was recognized as one of the most distinguished jurists and legal scholars in America. He served as a member of Virginia trial and appellate courts from 1788 to 1811 and as a United States district judge in Virginia from 1813 until his retirement in 1825. For more than thirteen years, beginning in 1790, he held the chair of professor of law and police at the College of William and Mary, previously occupied by George Wythe. Tucker had studied law under Wythe's supervision, as had such prominent public figures as Thomas Jefferson, John Marshall, and Spencer Roane.

Although widely recognized as an outstanding judge and law professor, St. George Tucker was probably best known as the editor of an American edition of William Blackstone's *Commentaries.* In the postrevolutionary generation, law students and practicing attorneys in America relied heavily on Blackstone's *Commentaries on the Laws of England.* In an effort to make this indispensable source more relevant to the needs of practitioners, Tucker expanded Blackstone's four-volume treatise by "Americanizing" the text through extensive annotations and by adding a number of essays on important aspects of American constitutional and political thought. With the publication of his five-volume edition in 1803, Tucker became known as the American Blackstone.

During his long career of public service, St. George Tucker held a number of other important public positions. For example, he served as a member of the Virginia Council of State in 1782, as a delegate to the Annapolis Convention of 1786, and as an active participant on a committee charged with the responsibility of revising the laws of Virginia in 1792. In addition, immediately prior to his appointment as professor of law and police, Tucker served briefly as rector of the College of William and Mary.

Tucker's significant accomplishments were not confined to the field of law. He displayed considerable literary talent as the author of over 200 poems, several plays, and a number of literary essays. He wrote widely (and often satirically) on a number of divisive political issues including the Jay Treaty, which he opposed, and the Louisiana Purchase, which he approved. A true "renaissance man," he was also an inventor, amateur astronomer, and avid gardener.

In a brief biographical sketch, it is impossible to do full justice to the range and depth of St. George Tucker's life and work. But even a brief summary of his most important judicial opinions and observations on the federal Constitution makes it clear that Tucker's contribution to the formative years of the American republic deserves the attention that has long eluded him.

St. George Tucker was born near Port Royal on the British-held island of Bermuda on 10 July 1752. The given name "St. George," passed down from generation to generation, was introduced into the family when the English-

man George Tucker of Milton in Kent married Elizabeth St. George around 1600. The Tucker family emigrated to Bermuda in the mid-1600s and, long before St. George's birth, had achieved prominence on the island. The youngest of six children of Henry Tucker and Anne Butterfield Tucker, St. George showed an early interest in entering the legal profession.

After two years of literary and classical study in a private school operated by the Reverend Alexander Richardson, St. George began reading law in 1770 under the direction of his uncle, John Slater, the attorney general of Bermuda. The original plan was for St. George to study law at the Inns of Court in London, but his father's financial reverses led to the less expensive, alternative choice of the College of William and Mary in Virginia. Entering the college late in 1771, St. George graduated after completing a general course of study the following year. He then undertook an individualized course of legal study under the supervision of the prominent Williamsburg attorney (later law professor and judge) George Wythe. Tucker was admitted to the legal profession in 1774, but his practice of law was soon interrupted by the outbreak of the American Revolution.

In the spring of 1775, Tucker began working with his father and a number of Virginia leaders to establish favorable commercial relations between America and Bermuda. For roughly the next three years, he engaged in a number of highly lucrative trading ventures, smuggling salt and ammunition to Virginia in exchange for corn, indigo, and other products produced on the mainland. Through these efforts, he soon gained financial independence. In September 1778, he married the widow Frances Bland Randolph, one of whose three sons later gained political prominence as John Randolph of Roanoke. Tucker participated actively in the education of his stepsons and assumed responsibility in helping to manage his wife's three large plantations. By the late 1770s, Tucker, still in his late twenties, had become a member of Virginia's planter elite.

During the final stages of the American Revolution, St. George Tucker saw military action as a militia volunteer. Appointed major of cavalry, he took part in the Battle of Guilford Courthouse in North Carolina early in 1781, receiving a minor leg wound in an effort to prevent one of the American regulars from retreating. Promoted to the rank of lieutenant colonel, he was present at the siege of Yorktown, where he was asked to serve on the governor's staff as a French translator, facilitating communications between American officers and members of Lafayette's staff. During the final stages of the siege, Tucker kept a diary in which he recorded the daily movements of the army. His account is now recognized as an important source of firsthand information on the final stages of the campaign that led to the surrender of General Cornwallis.

With the end of hostilities, St. George Tucker returned briefly to plantation life but soon launched his legal career. He rapidly gained prominence as a leader of the Virginia bar. In October 1782, he presented an argument before the Virginia Court of Appeals in Richmond in opposition to the conviction of three prisoners for violation of Virginia's treason statute. Serving as *amicus curiae* rather than as a representative of the prisoners, Tucker argued that the treason statute was in conflict with the state constitution and that the Virginia Court of Appeals should invalidate it. Tucker argued that conflicts between the constitution and statutes should be resolved in favor of the former. He referred to "those Fundamental Principles of our Government, of which the Judiciary Department is constituted the Guardian" (Treanor 1994, 526). Although the Virginia Court of Appeals did not invalidate the statute in this case, two members of that tribunal, George Wythe and James Mercer, expressed support for judicial review. Among those present during the argument of this highly publicized case was John Marshall, then a twenty-seven-year-old attorney practicing law in Richmond. Marshall was obviously aware of Tucker's views as well as those of Edmund Randolph, who also argued in support of judicial review in the *Case of the Prisoners*. This may help to explain Marshall's later endorsement of judicial review at the Virginia Ratifying Convention of 1788 and his confident assertion of that power in *Marbury v. Madison*.

Tucker's law practice flourished during the 1780s, and early in 1788, the General Assembly elected him to a seat on the General Court, a tribunal with statewide original jurisdiction. This professional triumph was offset by personal tragedy. Shortly before his judicial appointment, Tucker's wife, Frances, died a few weeks after giving birth to their sixth child. Later in 1788, Tucker moved his family to Williamsburg, where he spent most of the remainder of his life. In October 1791, he married Lelia Skipwith Carter, daughter of Sir Peyton Skipwith, widow of George Carter, and mother of two children.

For more than a decade beginning in 1790, Tucker divided his professional attention between his teaching and research duties at William and Mary and his judicial responsibilities on the General Court. He soon became a recognized leader of that tribunal, as evidenced by his scholarly opinion in the 1793 case of *Kamper v. Hawkins* (1 Va. Cas. 20 [1793]). In seriatim opinions, all five judges of the court agreed in holding unconstitutional a state law that sought to give equitable powers to judges of the District Court. At that time, a sharp distinction existed between chancery courts and courts of law. A Virginia statute of 1792 granted district judges the equitable power to issue injunctions, authority previously exercised only by judges of the Chancery Court.

Reflecting his strong commitment to judicial independence, Tucker concluded in *Kamper v. Hawkins* that this statute clearly violated the Virginia constitution. In his view, the constitution "provided that the judiciary department should be arranged in such a manner as not to be subject to legislative control" (3 Va. 23). The constitution, Tucker maintained, expressed the sovereign will of the people. The judge had a duty to invalidate a legislative act if, in the course of deciding a case, he concluded that the act conflicted with the constitution. The parallel between Tucker's reasoning and that of Marshall in *Marbury v. Madison* is obvious. Tucker's opinion in *Kamper* provided strong support for Marshall's conclusion *Marbury v. Madison* that "it is emphatically the province and duty of the judicial department to say what the law is" (1 Cranch 177). (For other examples of Tucker's position on judicial review, see *Woodson v. Randolph,* 1 Brockenbrough and Holmes Reports 128 [General Court 1796] and *Turpin v. Locket,* 6 Call Reports 113 [Court of Appeals, 1804].)

In 1796, Tucker wrote an essay entitled "A Dissertation on Slavery: With a Proposal for the Gradual Abolition of It, in the State of Virginia." He sent this essay to the Virginia General Assembly, which courteously acknowledged its receipt but took no action on Tucker's proposal. In a letter dated 28 August 1797, Tucker's friend, Thomas Jefferson, who himself had previously advocated the gradual abolition of slavery, thanked Tucker for providing him with a copy of the "pamphlet" and expressed general support for Tucker's proposal (Ford 1904, 334–336). Although both Tucker and Jefferson were slaveholders who by no means endorsed the principle of racial equality, it is significant that they and other southern leaders in the late eighteenth century were willing to go on record in opposition to the institution of slavery.

The seminal publication of Tucker's American edition of Blackstone's *Commentaries* in 1803 was followed early the next year by his controversial election to the Virginia Court of Appeals and by his resignation from the William and Mary faculty. Because of a long-standing disagreement with the William and Mary administration, Tucker welcomed the opportunity to sever his connection with the college. The administration had objected to Tucker's practice of teaching his law students at home where he had full access to his law library. He viewed the administration's efforts to require him to teach on campus and to meet regularly with students in their rooms at the college as degrading and showing a lack of confidence in a person of his professional attainments (for discussion, see Cullen 1987, 140).

The Virginia Assembly elected Tucker to fill a vacancy on the Court of Appeals resulting from the death of Judge Edmund Pendleton on 23 October 1803. Tucker, who was identified with Virginia's eastern establishment,

was actively opposed by Judge Archibald Stuart, a colleague on the General Court, who resided in the western part of the state. Before the legislators voted, however, Tucker was compelled to deal with unsubstantiated allegations of attempted bribery. Thomas Bailey made these allegations in writing shortly after his gambling conviction in Staunton, Virginia, in early September 1803. Tucker and his colleague, Judge Joseph Jones, had presided at Bailey's trial. In essence, Bailey asserted that Tucker had offered to rule in his favor in exchange for 100 guineas. Tucker, who "had a reputation as a 'hanging judge' in gambling cases" (Cullen 1987, 166), was enraged by this accusation and immediately took steps to refute it. He gathered numerous affidavits from prominent residents of Staunton attesting to his excellent character and to Bailey's reputation as a "liar," "swindler," and "cheat." Tucker demanded that the Virginia House of Delegates investigate Bailey's charge and, after a "select committee" considered this request along with a petition from Bailey restating his allegation, the General Assembly unanimously accepted the committee's report exonerating Tucker. On 6 January 1804, the General Assembly elected Tucker to the Court of Appeals by a vote of 115 to 82 (for additional background, see Cullen 1987, chap. 9).

St. George Tucker served as an active and influential member of the Virginia Court of Appeals from 1804 until 1811. Most of his opinions were fact specific, dealing with disputes over such matters as land titles, wills, and estates. He avoided an opportunity to address an important constitutional issue when he recused himself from participating in an 1810 decision reversing one of his own earlier rulings broadly interpreting the scope of the federal treaty power. Significantly, the United States Supreme Court, in 1813, reversed the Virginia Court of Appeals and reaffirmed Tucker's original interpretation. Tucker's broad view of the federal treaty-making power is particularly striking in light of his strong states' rights orientation as a Jeffersonian-Republican (for background, see Golove 2000, 1075).

Expressing dissatisfaction with the increasing workload of the Court of Appeals and what he regarded as unconstitutional legislative encroachments on the court's independence, Tucker resigned his life-tenured judgeship in 1811. Vowing never again to hold public office, Tucker returned to private practice in Williamsburg. In 1813, however, he accepted an appointment by Pres. James Madison to serve as United States district judge for the district of Virginia.

In addition to work at the trial level, United States district judges during that period shared Circuit Court duty with United States Supreme Court justices. In this capacity, Tucker frequently sat with Chief Justice John Marshall, whose circuit included Virginia. On one notable occasion in June 1813, Tucker filed a Circuit Court memorandum addressing an interesting

constitutional question. He maintained that a provision authorizing treble damages for violation of a federal patent statute was a penal measure. According to Tucker, "a prosecution by a private person for a penalty that is three times more than its real damages cannot be distinguish'd in principle from a criminal prosecution . . ." (Hobson 1993, 7:410). He concluded that such a penalty amounted to an ex post facto law in violation of the federal Constitution (*Evans v. Jordan & Morehead;* see Hobson 1993, 7:409–411). The Supreme Court had previously held that the ex post facto restriction was limited to criminal cases. Adhering to this view, John Marshall disagreed with Tucker's expansive interpretation. The Supreme Court later affirmed Marshall's position. Tucker's view on this question underscored his strong commitment to the broad protection of individual rights.

St. George Tucker resigned from the United States District Court in 1825. He retired to the home of his son-in-law, Joseph C. Cabell, in Nelson County, Virginia, where he died on 10 November 1827. Throughout his career as judge and legal scholar, he emphasized the importance of judicial independence, limited government, and individual liberty. His influence as a champion of states' rights was significant prior to 1860. The nationalist views advanced by Alexander Hamilton, John Marshall, Joseph Story, Daniel Webster, and Abraham Lincoln, however, became dominant in the aftermath of the Civil War, and the judicial opinions as well as the legal commentaries of St. George Tucker were soon forgotten.

Late in the twentieth century, however, a number of legal scholars began to express renewed interest in Tucker's work. In addition to his contribution to the early development of judicial review, his lengthy 1803 essay, "View of the Constitution of the United States," endorsed a view of civil liberties in many respects consistent with contemporary interpretation. For example, Tucker's understanding of the "right of the people to keep and bear arms," embodied in the Second Amendment, represents an increasingly influential perspective. He saw this right as broad and unconditional, observing that "this may be considered as the true palladium of liberty. . . ." "The right of self-defense," he added, "is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction" (Tucker 1999, 238–239). In addition, Tucker accorded broad scope to federal and state constitutional provisions guaranteeing freedom of speech and the press.

St. George Tucker made significant contributions to early American constitutional development at state and federal levels. He was also an influen-

tial legal scholar and educator. He was a prolific writer, not only on legal subjects but on political and literary themes as well. Future scholarship should include a full-scale biography of this extraordinary individual.

Otis H. Stephens

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TUTTLE, ELBERT PARR

(1897–1996)

Elbert Parr Tuttle
Library of Congress

Judge Elbert Parr Tuttle served as judge on the Fifth and Eleventh Circuit Courts and as chief judge on the United States Court of Appeals for the Fifth Circuit from 1961 to 1968. It was in this position that Tuttle, the grandson of a Civil War veteran who fought for the Union, brought about the integration of the University of Georgia and contributed to the desegregation of the South as only part of his illustrious career.

Elbert Tuttle was born 17 July 1897 in Pasadena, California, to parents Guy Harmon Tuttle and Margie Etta Tuttle (née Parr). Before entering college, he studied at Punahou Academy in Honolulu, Hawaii. While the family was living in Honolulu on the island of Oahu, Tuttle became a charter member of the now-famous Outrigger Canoe Club of which his father was president. The Tuttle family—Elbert, his father, and his brother Malcolm—were among the first nonnative Hawaiians to take up the sport of surfing.

Tuttle left Hawaii to begin college at Cornell University, where

he earned an A.B. in 1918. While there he served as president of his senior class. Two years later when he went on to Cornell Law School, he was Order of the Coif and editor in chief of the law review, earning an LL.B. in 1923 and finishing first in his class. He was also awarded two honorary LL.D. degrees: one from Emory University in 1958, the other from Harvard University in 1965.

Elbert Tuttle met his wife, Sara Sutherland Tuttle, in 1917 in Jacksonville, Florida. Unable to afford the trip home to Hawaii for the summer, Tuttle decided to stay with the family of a fraternity brother, Strawn Perry, for the summer. On the day he arrived in Jacksonville, Elbert met Sara Sutherland at a swimming party, and the two were inseparable thereafter. During the same trip, Elbert met another individual who would be important in his life: Sara's brother, Bill Sutherland, with whom Elbert would later enter into a partnership to practice law. Tuttle once remarked that "my entire life was shaped by the Cornell circumstances that originally brought me to Florida, since marrying a Florida girl and becoming acquainted with the south are the circumstances that caused me to decide to move to the south after graduating from law school in 1923" (Aman 1996, 2).

Between graduating from college and making the decision to enter law school, Tuttle worked as a journalist in New York for the *New York Sun* and in Washington, D.C., for the *American Legion Weekly*. Tuttle had worked his way through college at Cornell working on the *Cornell Daily Sun* with such individuals as E. B. White and Sam Howe, and pursuing journalism seemed to him to be the natural next step in his career. He gave up journalism in 1920, however, to enter law school at Cornell and pursue a different career.

Elbert Tuttle and Sara Sutherland were married during his time at Cornell Law School and later had two children, Elbert and Jane. When he graduated from law school, the couple chose to settle in Atlanta, Georgia, owing largely to the fact that Sara's family lived in the South and her brother, Bill, was practicing law in Atlanta as well. Elbert was admitted to the Georgia bar in 1923. He joined an established firm in Atlanta, Anderson, Rountree and Crenshaw, but his real desire was to go into partnership with his brother-in-law Bill Sutherland. The opportunity came in 1924 when Sutherland won a case in the Georgia Supreme Court, earning a fee of $2,500. The two believed that this would be enough money to cover their expenses for a year and so formed the law firm of Sutherland and Tuttle.

World War II brought an interruption to Tuttle's legal career. He had enlisted in the army during World War I and became a Flying Cadet in the Observation Corps of the United States Field Artillery. The use of airplanes by the army was new and untried and required much training. World War I ended while Tuttle was still engaged in that training. He served in the

Georgia National Guard until the United States entered the conflict of World War II. He served as a combat soldier in World War II, commanding a battalion of the Seventy Seventh Infantry Division of the United States Army, which took part in the invasions of Guam, Leyte, and Okinawa. Tuttle suffered several wounds and was heavily decorated for his service. He was awarded the Legion of Merit, the Purple Heart with Oak Leaf Cluster, and the Bronze Star. He was discharged in 1946 as a colonel and entered the United States Army Reserves as a brigadier general for the 108th Airborne Division.

After the war, Tuttle returned to the practice of law in Atlanta until 1953, when he took the position of general counsel to the U.S. Department of the Treasury. He was working for the Department of the Treasury when he was appointed to the United States Court of Appeals for the Fifth Circuit in 1954. The Fifth Circuit was made up of Georgia, Florida, Alabama, Louisiana, Mississippi, and Texas. At the time of Tuttle's appointment, six judges sat on the Fifth Circuit, and traditionally one judge was appointed from each of the six states encompassed. Tradition also dictated that when a judge died or resigned, his replacement would be chosen from his home state. In 1954, however, Congress created a seventh judicial seat for the growing Fifth Circuit, and the president in office was Dwight Eisenhower, for whom Tuttle had worked as a campaign strategist. Eisenhower nominated Tuttle to the new seat on 7 July 1954, and his confirmation proceeded without incident. The Senate confirmed his nomination on 3 August 1954. Thus, Tuttle became the only Republican on the Fifth Circuit at the time and also the only member who had not been raised in the South among its deep-seated racial prejudices. In 1961, Tuttle was elevated to chief judge of the Fifth Circuit, and he served in that capacity until 1968, a time period that encompassed the peak of the civil rights movement. He continued to serve as a judge on the Fifth Circuit until 1981 when the circuit was split into the Fifth and Eleventh Circuits, at which time he became a member of the Eleventh Circuit Court.

Admired by his peers for many things, Judge Tuttle is respected for his willingness to try new things, such as the sport of golf, which he took up at the age of sixty-nine. Although he started playing much later in life than most golfers, he became an avid and accomplished golfer, taking advantage of his travel on the court circuit to play at different courses.

Of course, Judge Tuttle is most admired for his accomplishments in his legal career, throughout which he showed great character, integrity, and decisiveness. A revealing example of these virtues is Tuttle's argument as an attorney before the Supreme Court in the case of *Johnson v. Zerbst*, perhaps the most frequently cited decision in the constitutional law of criminal procedure. When a marine accused of counterfeiting was not informed by the

trial judge that he had a right to counsel, the American Civil Liberties Union (ACLU) asked Elbert Tuttle to handle the appeal. When the Fifth Circuit Court of Appeals held that there was no affirmative duty of the trial court to inform an accused of his right to counsel, Tuttle continued to pursue the case despite the fact that the ACLU had no more money to spend on counsel or court costs. When Tuttle finally argued the case before the Supreme Court, having spent his own money to progress that far, he won by a six–two decision, with the Court holding that trial of an accused without a knowing waiver of the right to counsel violated the due process clause of the U.S. Constitution.

In his career as a judge, Tuttle often held fast to his dissenting opinions, refusing to be swayed by the majority or by popular opinion. In fact, several of Judge Tuttle's dissents ultimately became law upon appeal. For example, in *Wesberry v. Vandiver* in 1962, the Fifth Circuit held that the issue of the constitutionality of Georgia's county-unit system was a political question that the court could not decide. Judge Tuttle disagreed, stating in his dissent that he thought the issue was fully justiciable and that the county-unit system was clearly unconstitutional, and the Supreme Court, in a majority decision penned by Justice Black, agreed with him. The same happened again in 1966 in *Bond v. Floyd* when the Supreme Court once again agreed with Judge Tuttle's dissent and ruled that the Georgia legislature could not refuse to seat an elected state representative because of his public lack of support for the Vietnam War.

One of Judge Tuttle's most famous decisions, however, was one that he made while sitting alone as chief justice of the United States Court of Appeals for the Fifth Circuit. In the struggle to desegregate southern universities, and particularly those in Georgia, black leaders had chosen several promising high school students over a course of years to represent the cause. As colleges such as the University of Georgia fought their efforts, each case in turn became moot as the students were forced to pursue their educations at traditionally black universities. When Charlayne Hunter and Hamilton Holmes applied for admission at the University of Georgia (UGA) in an effort led by the National Association for the Advancement of Colored People, they were in danger of the same fate as their predecessors. UGA had used numerous delay tactics before finally denying both students admission, and almost two years had passed before Judge Tuttle heard the case.

In September 1960, these two students filed suit, more than a year after their initial applications for admission. Judge William A. Bootle, a United States District Court judge for the Middle District of Georgia, heard the case and decided that the matter required a full trial to determine whether UGA had denied Hunter and Holmes admission because they were black. After a full trial, Judge Bootle ruled in favor of the plaintiffs on 6 January

1961, only three days before registration for the coming term closed. Hunter and Holmes would have to register for classes within three days or allow the university another school term to find new ways to fight, possibly with the help of the Georgia legislature, which had previously shown a willingness to engage in creative legislation to preserve segregation. But when the state presented its motion for a stay of the order pending appeal, Judge Bootle granted that motion at 9:30 A.M. on Monday, 9 January, the very day that registration would close.

Constance Baker Motley, one of the attorneys representing the plaintiffs, called Judge Tuttle's office asking how soon he could hear an appeal of the order to stay the decision. Tuttle agreed to hear the matter in Atlanta that afternoon at 2:30 if she could have the notice of appeal filed by that time. Judge Tuttle was troubled by the matter of authority: He knew that the Court of Appeals could lift Judge Bootle's stay, but could he do so sitting alone, as there was no time to convene a panel of three judges? Tuttle set his clerks to work on this question and then dove into the research himself, finally finding the authority to act in statute. Having done so, Judge Tuttle took the bench at exactly 2:30, knowing that the criticism and anger that would surely come out of the day's proceedings would rest on his shoulders alone. In a short opinion, Tuttle reversed the order of stay, emphasizing that the stay would allow the ongoing denial of a constitutional right for the two students. With the stay lifted, Hunter and Holmes were able to register for classes that very afternoon, and they began classes at the University of Georgia on Wednesday, 11 January 1961, thus desegregating the institution.

Certainly Judge Tuttle was instrumental in this and many other civil rights cases, several of them quite notable. His influence is as apparent in the sheer number of cases he heard, however, as it is in the importance of some of those cases. During his career as a judge, Tuttle sat more often than most other judges, turned out opinions more promptly than most judges, and wrote more opinions each year than most judges. In fact, he wrote over 1,400 opinions in his career. It has also been said that Judge Tuttle was always prepared for each case that came before him for oral argument, often asking the questions that were the key to the case's outcome.

Judge Tuttle's work ethic and willingness to do for himself the work that most judges would assign to a clerk are perhaps best exemplified by an incident observed by Anne Emanuel, one of his clerks from 1975 to 1976. During the energy crisis, she observed that he personally placed upon each light switch in the office a sticker reading, "Turn Off the Light When Not in Use," and then proceeded to turn off each light (Aman 1996, 8). Tuttle was also heavily involved in the Atlanta community, serving as president of the Atlanta Chamber of Commerce, president of the Atlanta Bar Association, president of the Lawyer's Club of Atlanta, trustee of the Atlanta Commu-

nity Chest and the Atlanta Planning Council, director of the Atlanta Children's Home and Piedmont Hospital, and trustee on the boards of Atlanta University, Morehouse College, and Spellman College as well as of his alma mater, Cornell University.

At the end of a very distinguished career for which President Carter awarded him the Presidential Medal of Freedom, Elbert Parr Tuttle passed away on 23 June 1996. He was ninety-eight years old and was still sitting on the United States Court of Appeals for the Eleventh Circuit.

Brandi Snow Bozarth

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VANDERBILT, ARTHUR T.

(1888–1957)

Arthur T. Vanderbilt
Bettmann/Corbis

Arthur T. Vanderbilt was the nation's leading judicial reformer during the middle decades of the twentieth century. As chairman of the New Jersey Judicial Council from 1930 to 1947, he advocated fundamental changes in the New Jersey court system, ultimately succeeding when New Jersey adopted a new constitution with a revised judicial article in 1947. As president of the American Bar Association from 1937 to 1938, he made reform of the administration of justice his top priority. In 1939 he helped draft the statute creating the nation's first body dedicated to judicial administration, the U.S. Administrative Office of the Courts. Two years later, he helped draft the Federal Rules of Criminal Procedure, which were designed to simplify procedures, increase fairness, and eliminate expense and delay. Appointed chief justice of the newly created New Jersey Supreme Court in 1948, he used his position to establish the state's court system on a firm foundation, transforming what had been regarded as the nation's worst court system into one of its best. While serving as chief justice, he founded the Institute of Judicial Administration, which was dedicated to the task of promoting judicial reform nationwide, and he remained president of the institute until his death. Thus, one can view Arthur Van-

derbilt's service as chief justice (1948–1957) as the culmination of a lifelong commitment to improving the administration of justice.

Arthur Vanderbilt was born in Newark, New Jersey, on 7 July 1888. After graduating from Wesleyan University in 1910 and Columbia University School of Law three years later, he returned to Newark and entered private practice. Until he became a judge, Vanderbilt maintained a highly successful law practice. But he was far more than a distinguished attorney. In 1914, as his law practice was getting established, Vanderbilt began teaching evening classes at New York University Law School, and he continued teaching on a part-time basis for twenty-nine years. Appointed dean of the New York University (NYU) Law School in 1943, he dramatically enhanced the school's flagging reputation by creating the NYU Law Center, now housed in a building that bears his name. In 1921 Vanderbilt was appointed county counsel for Essex County (New Jersey), an office that he held for twenty-six years. He was appointed to Wesleyan University's Board of Trustees in 1934 and continued in that position until his death in 1957. Finally, as noted, Vanderbilt actively campaigned for judicial reform in New Jersey and nationwide.

Vanderbilt was also a major political figure in New Jersey. Following his graduation from law school, Vanderbilt became identified with the Republican reformers advocating "clean government" in Essex County. Ironically, given his opposition to Democratic political machines and in particular to Mayor Frank Hague of Jersey City, the boss of the Hudson County machine, Vanderbilt developed into something of a political boss himself. He served as president of the Essex County Republican League, and his leadership of the Essex County Clean Government organization gave him a power base that enabled him to play a role as "kingmaker" in the state. In 1946 he endorsed Alfred Driscoll as the Republican candidate for governor, and Clean Government's strong support for Driscoll was decisive in securing him the Republican nomination and a victory in the general election in November.

Ever eager to promote judicial reform, Vanderbilt had extracted from Driscoll as the price of his support a promise to make constitutional reform the centerpiece of his administration. Governor Driscoll called for a constitutional convention in his inaugural address, and one was convened in June 1947. Because he was recuperating from a stroke suffered in May of that year, Vanderbilt did not attend the 1947 constitutional convention. He avidly followed the proceedings, however, especially the activities of the Committee on the Judiciary. Governor Driscoll had consulted Vanderbilt about who should serve on the committee, and the committee's leadership shared Vanderbilt's commitment to modernization of the New Jersey judiciary. The committee endorsed and the convention adopted many of the rec-

ommendations that Vanderbilt had initially proposed through the New Jersey Judicial Council. Among these was the creation of a new court, the New Jersey Supreme Court, to replace the state's antiquated Court of Errors and Appeals.

When Governor Driscoll appointed Vanderbilt as the first chief justice of the New Jersey Supreme Court, Vanderbilt recognized that this was a unique opportunity to implement his reform agenda. The 1947 constitution designated the chief justice as "the administrative head of all the courts in the State," and Vanderbilt likened his position "to that of chairman of the board and president of a business concern" (Vanderbilt 1955, 98). He devoted his energies to asserting managerial control over New Jersey's courts and making them more efficient. Prior to 1947, each of New Jersey's various courts had operated autonomously, developing its own rules and procedures and managing its own caseloads. With Vanderbilt this changed. As chief justice, his first priority was to introduce a "simplification of procedure, so that technicalities and surprise may be avoided, and so that procedure may become a means of achieving justice rather than an end in itself" (10). In 1948 he took the first step toward that end by standardizing judicial procedure throughout the state, promulgating rules of procedure based on the Federal Rules of Civil Procedure. The rules of practice and procedure remained a concern for Chief Justice Vanderbilt, however, who insisted that they be continually reassessed to determine how effectively they promoted justice. In fact, he completely revised New Jersey's rules of procedure only five years after their initial adoption.

When Vanderbilt became chief justice, another problem demanding attention was delay in New Jersey's trial courts. Vanderbilt aggressively attacked the problem of case backlogs. He moved judges from their normal assignments to assist in courts plagued by heavy caseloads and congestion. He also demanded greater productivity from the state's judges. Court rules were adopted prescribing the number of hours per week that a judge should sit on the bench. Vanderbilt required each judge to submit to the New Jersey Administrative Office of the Courts a weekly report listing the cases and motions heard and the cases still unresolved. Vanderbilt personally reviewed these reports, and judges who failed to dispose of cases expeditiously could expect to be contacted by the Administrative Office of the Courts or by Vanderbilt himself for an explanation. The chief justice also published these weekly reports, using publicity to put pressure on laggard judges to mend their ways. Many judges resented the loss of their traditional autonomy, but Vanderbilt's methods worked. By 1950 the case backlogs had disappeared, and New Jersey's courts were among the nation's most efficient.

Because these and other changes met with resistance from many New Jersey judges, Vanderbilt had to devote considerable effort to persuasion

and arm twisting. Indeed, he estimated that his administrative responsibilities consumed one-third of his time. He was also forced to fight a continuing battle with political forces in the state legislature that sought to limit the judiciary's independence by asserting legislative control over judicial rule making. This battle culminated in Chief Justice Vanderbilt's most important and most controversial decision, *Winberry v. Salisbury* (74 A.2d 406 [NJ 1950]).

Winberry raised a question crucial to the autonomy of New Jersey's reconstituted judiciary: Did the supreme court or the state legislature have ultimate control over the rules of judicial procedure? The New Jersey legislature insisted that it had authority to revise by statute the procedural rules adopted by the supreme court, because the constitution of 1947 gave the supreme court its rule-making power "subject to law." Writing for a five-member majority, Vanderbilt disputed this interpretation, asserting that

> The only interpretation of "subject to law" that will not defeat the objective of the people to establish an integrated judicial system and which will at the same time give rational significance to the phrase is to construe it as the equivalent of substantive law as distinguished from pleading and practice. . . . The phrase "subject to law" . . . serves as a continuous reminder that the rule-making power as to practice and procedure must not invade the field of the substantive law as such. While the courts necessarily make new substantive law through the decisions of specific cases coming before them, they are not to make substantive law wholesale through the exercise of the rule-making power. (74 A.2d, 410)

In sum, so long as the supreme court confined its rule making to procedural matters, its exercise of this power could not be overridden by the legislature.

Vanderbilt's opinion was vehemently attacked. Justice Clarence Case refused to join the chief justice's opinion, insisting that it was not necessary to construe the constitutional provision in order to resolve the case. More important, Vanderbilt's opinion appeared to fly in the face of constitutional history. In its report to the convention, the Committee on the Judiciary had expressly indicated that it considered "subject to law" to mean subject to legislation. And Vanderbilt himself, in a letter to the convention objecting to inclusion of the phrase, had interpreted it the same way. Thus, although Vanderbilt's position may have secured the independence of the judiciary and promoted better administration of the courts, it more closely resembled a usurpation than a faithful interpretation of the constitution.

Winberry reveals a great deal about Vanderbilt. It demonstrates his concern for the institutional position of the New Jersey Supreme Court and his willingness to take action to protect it. He later defended judicial rule mak-

ing by noting that it allowed for reassessment of court procedures "without waiting for stated legislative sessions and without burdening already overworked legislators" (Vanderbilt 1963, 108). Yet it seems likely that a concern to protect the autonomy of the judicial branch, as well as a skepticism about legislative expertise in the area, were far more important in explaining his position. *Winberry* also shows Vanderbilt reaching out to address a politically explosive issue rather than deciding the case on narrow grounds. This willingness, even eagerness, to confront controversial questions is consistent with his more general understanding of the judicial role. In both judicial opinions and extrajudicial writings, Vanderbilt categorically rejected the canons of judicial restraint (134–139). Finally, despite the dubious argument advanced in *Winberry*, the key point is that Vanderbilt prevailed. The reforms of 1947 that Vanderbilt had championed and Vanderbilt's own stature had created a reservoir of support on which he could draw in repelling what he perceived as an attack on the New Jersey Supreme Court. The press and bar unanimously supported Vanderbilt; and in the face of that sentiment, his opponents in the New Jersey Assembly were forced to shelve plans for a constitutional amendment and accept the decision (Tarr and Porter 1988, 193–194).

Another contentious case was *Tudor v. Board of Education of Rutherford* (100 A.2d 857 [1953]). The Gideons International received permission from the Board of Education of Rutherford to distribute copies of the Gideon Bible to students in the borough's public schools, over the objection of Catholic and Jewish parents who complained that it was a sectarian book inconsistent with their beliefs. Speaking for the New Jersey Supreme Court, Chief Justice Vanderbilt agreed. In a scholarly opinion, Vanderbilt reviewed the history of religious conflict within Christianity and the growth of religious toleration. He noted, without attempting to resolve, the continuing controversy over whether the First Amendment was meant to erect a "wall of separation" between church and state. What was indisputable, Vanderbilt emphasized, was that neither the state nor its instrumentalities could show a preference for one religion over another. Reviewing the testimony at trial, Vanderbilt concluded that the Gideon Bible was a sectarian book. Drawing upon a wealth of precedent and testimony, he demonstrated that its distribution by the school amounted to an endorsement of a particular creed and would be perceived as such by students and their parents. Vanderbilt's thoughtful analysis convinced his colleagues on the court and averted political repercussions.

Vanderbilt was, however, less successful in persuading his fellow justices to subject long-established common law doctrines to critical scrutiny. A case in point is *Fox v. Snow* (76 A.2d 877 [1950]), in which Vanderbilt wrote one of his most eloquent opinions. Relying on stare decisis, the

majority in *Fox* adhered to a technical rule of law in interpreting a will, despite (in Vanderbilt's words) "the deleterious effects of the rule and the lack of any sound principle to support it" (882). In dissent, Vanderbilt refused to "put the common law in a self-imposed straitjacket" (882). Quoting Justices Oliver Wendell Holmes and Benjamin Cardozo in support of his position, he argued that judges should not hesitate to repudiate doctrines that lacked support in reason or public policy and should "adapt the law to the needs of the living present" (882–883). Thus, Vanderbilt was as willing to jettison outmoded legal doctrines as he was to replace ineffective rules of procedure. He concluded:

> We should not permit the dead hand of the past to weigh so heavily upon the law that it perpetuates rules of law without reason.
>
> Unless rules of law are created, revised, or rejected as conditions change and as past errors become apparent, the common law will soon become antiquated and ineffective in an age of rapid economic and social change. It will be on its way to the grave. (76 A.2d 885)

How does one measure the greatness of a judge? One measure might be the recognition and honors bestowed upon the judge by his contemporaries. Vanderbilt scores well on that measure. His leadership in judicial reform earned him honorary degrees from thirty-two universities as well as awards from (among others) the American Bar Association, the American Judicature Society, and the New Jersey and New York State Bar Associations (Vanderbilt 1976, 216–217). Vanderbilt was avidly sought out as a lecturer: His two books, *The Challenge of Legal Reform* (1955) and *The Doctrine of the Separation of Powers and Its Present-Day Significance* (1963), were based on lecture series given at the University of Virginia and at the University of Nebraska. The Eisenhower administration seriously considered him for a position on the United States Supreme Court, but Vanderbilt's advancing age and his commitment to implementing reform in New Jersey led him to demur.

Another measure of judicial greatness is the legacy that a judge leaves behind. On this measure too, Chief Justice Vanderbilt scores well. Vanderbilt catapulted the New Jersey courts to an unaccustomed position of prominence and respect, and his national reputation helped shield them from political attack. He also furnished the New Jersey Supreme Court with an example and an implicit challenge: namely, how to live up to the tradition of judicial excellence that he had founded and personified. This legacy continues long after Vanderbilt's death: The national prominence of the current New Jersey Supreme Court can be seen as vindicating his efforts. As Chief Justice Robert Wilentz observed in 1982: "The experience of that re-

form is so strong, and its meaning so clear, that is still moves us substantially in New Jersey" (quoted in Buchsbaum 1982, 33).

Vanderbilt's legacy extended beyond the borders of New Jersey. His agenda for judicial modernization was adopted by reformers throughout the nation, as well as in several foreign countries (Vanderbilt 1976, 217). For example, he created the first state Administrative Office of the Courts, and every state has followed his lead. Indeed, when the National Center for State Courts was established, its first director was Edward McConnell, who had headed New Jersey's Administrative Office of the Courts under Vanderbilt. The Institute of Judicial Administration that he founded has become known nationally and internationally for its services to the administration of justice. Perhaps Justice William J. Brennan Jr., who had served with Vanderbilt before his elevation to the United States Supreme Court, put it best: "He is one of the very great judges of our time. His contribution toward the improvement of judicial administration and substantive law are an imperishable monument to this legacy" (quoted in Gerhart 1980, 296).

G. Alan Tarr

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WARING, J. WATIES

(1880–1968)

J. Waties Waring
Courtesy of South Carolina Library, University of South Carolina, Columbia

Long before the Warren Court began the modern revolution in civil rights law, a Charleston, South Carolina, federal district judge with impeccable social credentials outraged white citizens of his city, state, and region with decisions requiring equal pay for black and white teachers, outlawing South Carolina's white primary, and rejecting the state's whites-only law school, as well as a vehement dissent decrying segregated public schools as "*per se inequality*" and strident attacks on the southern "slavocracy" in forums throughout the nation. Julius Waties Waring's roots and early life furnished hardly a clue to his later court record. Waring was born on 27 July 1880, an eighth-generation Charlestonian whose father's family had first settled there in 1683, only thirteen years after the city's founding. Following education at a local private academy and the College of Charleston, he read law with a prominent trial lawyer, hung out his shingle, and steadily developed a successful private practice. His social position continued to flourish as well, especially following his marriage in 1913 to Annie Gammell, a well-connected woman with a prestigious Meeting Street home south of Broad Street, an area wherein resided the elite of Charleston society, known to inhabitants and outsiders alike as the "S.O.B.'s."

Waring also became active in Democratic politics, cultivating associations that led to his being named assistant U.S. attorney in 1914. His caseload ran the gamut from a shipboard murder, to counterfeiting, mail fraud, and wartime sabotage, to countless liquor prosecutions under what Waring considered the "terrible" Volstead Act (quoted in Yarbrough 1987, 7). Among his most celebrated prosecutions was one arising from the 1917 sinking of the German freighter *Liebenfels* in Charleston harbor.

When the Democrats lost the presidency in 1920, Waring established a law practice with D. A. Brockington. The firm throve through the 1920s, handling a good deal of real estate law, a large federal practice, and the legal affairs of the city's morning and evening dailies, as well as other business clients.

Waring and Brockington fell on relatively hard times during the Depression. But in 1931, newly elected Charleston mayor Burnet Rhett Maybank invited Waring—his friend and mentor—to join his administration; and the city council appointed the future judge to the post of corporation counsel, or city attorney, a position Waring was to hold until his elevation to the federal bench. Waring also continued to cultivate close ties with South Carolina's low-country segregationist politicians, including the colorful and demagogic Ellison D. "Cotton Ed" Smith, the dean of the U.S. Senate.

In 1942, Waring's political connections paid off handsomely with his appointment as United States district judge for South Carolina's eastern district. Charlestonians were proud of their native son. The *News and Courier* of 19 December 1941 called him "an accomplished and industrious lawyer, of long and successful experience, a man of excellent character." As late as 1945, the College of Charleston awarded its graduate an honorary doctorate of laws. By that point, however, a combination of circumstances was at work that would soon make the judge a pariah even among his family and closest friends.

For the first two years of his tenure, Waring's caseload and decisions were largely uneventful. In 1944, however, he issued the first of several remarkable rulings. In two cases, he ordered the equalization of pay for black and white teachers in Charleston and Richland County (Columbia). Pressed by the judge in another case, the state created a law school for blacks. When South Carolina repealed all its laws regulating party primaries in a campaign to preserve its all-white Democratic primary as a private affair beyond the reach of the Fifteenth Amendment's ban on racial discrimination at the polls, Waring struck the scheme down in *Elmore v. Rice* (72 F. Supp. 516, 1947), inviting South Carolinians "to rejoin the Union" (528).

The next year the Democratic state convention limited party membership to whites only and allowed African Americans to vote in the party's primaries—tantamount to general elections in solidly Democratic South

Carolina—only if they took an oath of allegiance to "states' rights" and segregation. But in *Brown v. Baskin* (1948), the judge rebuffed that stratagem as well. He had also appointed a black bailiff; eliminated a number of discriminatory practices in his court, including the race-coding of jury lists and segregated seating of jurors; and become increasingly hostile on the bench toward counsel for the state.

Waring later attributed what he termed his growing "passion for justice" to a number of factors. In 1945, he had abruptly divorced Annie Gammell, his devoted wife of more than thirty years, to marry Elizabeth Hoffman, a northerner wintering in Charleston with her second husband. The new Mrs. Waring was reportedly shocked at the more sordid aspects of southern race relations, especially the prompt acquittal by a jury in Judge Waring's court of a town police chief who had blinded a young black with his billy club. At Elizabeth's urging, she and the judge began reading Myrdal's *An American Dilemma* and other classic studies of southern racial mores in a campaign to raise their consciousness about the evils of discrimination.

Breaking completely with the judge's segregationist past, the Warings also began entertaining prominent blacks in their Meeting Street home and speaking to African American and racially mixed audiences in Charleston and elsewhere. In a speech to the city's black Young Women's Christian Association (YWCA) branch, Mrs. Waring scorned the "decadence" of southern whites. Shortly thereafter, she reiterated her charges on *Meet the Press* while also condoning interracial marriage. Nor were avowed opponents of racial reform their only targets. Railing against the "false god of gradualism" in speeches around the nation, Judge Waring ridiculed Mississippi editor Hodding Carter, Ralph McGill of the Atlanta *Constitution*, and other southern liberals who opposed immediate desegregation and advocated racial reform through voluntarism rather than federal force. Such gradualists, the judge charged, were more dangerous than unabashed racists.

The Warings had now become almost completely isolated from white Charlestonians. Certain of his relatives and close friends later contended that they had been willing to continue their association with the couple, but the Warings had broken off relations with them. Others expressed outrage at the judge's divorce and harangues against the South, yet denied that Waring's civil rights decisions had influenced their feelings. Following the divorce, the judge had purchased the Meeting Street house from Annie Gammell, who moved into the rented kitchen house of a nearby home. But Charleston whites suspected that Waring had stolen the house from the compliant Miss Annie, relegating her to the humble rooms she would occupy until her death in 1954 while the judge and his new bride enjoyed the comfort of his first wife's home.

Hostile southern reaction to the Warings went well beyond ostracism by

friends and relations. On the floor of the U.S. House of Representatives, South Carolina congressman L. Mendel Rivers accused the judge of advocating "force" in the cause of civil rights, according to the Charleston *News and Courier*. Backed by petitions signed by thousands of his state's citizens, Rivers urged the House to impeach Waring. Mississippi segregationist John Rankin went further, exclaiming, as recorded in the *Congressional Record* (1950, vol. 96, pages 4930–4932), that Waring was "crazy" and should be confined to a mental institution. After Mrs. Waring's speech to the YWCA, offensive telephone calls became a nightly occurrence. Youths taunted her as the "witch" of Meeting Street. While the Warings were in New York, a small cross was burned in front of their house. In October 1950, a window pane was shattered and the front-door screen punctured. The Warings claimed that shots were fired and demanded an intensive Federal Bureau of Investigation investigation. But police found only pieces of mortar, and the *News and Courier*, on which the judge's nephew Tom Waring served as managing editor, dismissed the incident as the prank of teenagers.

Concerned that Waring's public statements had exceeded the bounds of judicial propriety, other judges often declined to attend affairs held about the country in the couple's honor. In the eyes of many, however, they were courageous symbols of the struggle for racial justice. Following the stoning incident, supportive blacks and whites from several southern states made a pilgrimage to the Warings' home, offering moral support to the couple. Although not nearly so extensive as Mrs. Waring thought warranted, national press coverage, including profiles in the *New York Post* and *Collier's* as well as the African American press, was overwhelmingly sympathetic. Accepting the Warings' contention that shots had been fired at their home, *Post* columnist Max Lerner described their "lonely vigil amidst the encircling hostile spears" of whites in "darkest Charleston" (12 October 1950). For a time, Tom Waring attempted to persuade friendly national journalists to publish details of his uncle's personal life, but to no avail.

While controversy swirled around the Warings, the judge became involved in another significant civil rights case. The couple now numbered among their friends prominent African American civil rights leaders. Although hardly consistent with the canons of judicial ethics, Waring urged National Association for the Advancement of Colored People (NAACP) executive director Walter White and other association officials to file a suit in his court challenging segregated public schools and what he considered the "sophistry" of the "separate but equal" doctrine the Supreme Court had endorsed in *Plessy v. Ferguson* (1896) (Waring, J. Waties. Papers. 6 January 1950).

Eventually, the case Waring wanted came before him. For several years, Joseph Albert DeLaine, a black teacher and minister in rural Clarendon County, had been seeking modest improvements in educational opportunities for black students in the county's woefully inadequate segregated schools. Subjected to a reign of terror for his audacity, the Reverend DeLaine and his family soon left the state. Later, a suit seeking bus transportation for Clarendon's black students was filed in Judge Waring's court. That case was dismissed on technical grounds. Thurgood Marshall and other NAACP lawyers then persuaded twenty black Clarendon parents to file *Briggs v. Elliott,* contending that the county's black schools were clearly inferior to those provided white students. At a pretrial conference, Judge Waring agreed that it would be easy for the plaintiffs to prove gross inequities in Clarendon's segregated school system. He suggested, however, that the plaintiffs withdraw their suit and file a new one attacking not only the obvious inequalities in the Clarendon County schools but also the constitutionality of segregated education in itself.

In those days, a constitutional challenge to a state policy had to be heard before a three-judge panel. The court chosen to hear the new *Briggs* suit consisted of Judge Waring, appeals court chief judge John J. Parker, and district judge George Bell Timmerman. By southern standards, Judge Parker, a North Carolina Republican, had developed a relatively liberal record on the federal bench. Like most other southern progressives, however, Parker thought it the wiser course to delay desegregation and improve the quality of black schools pending substantial improvements in the economic and social conditions of African Americans. Judge Timmerman was even less likely than Parker to reject segregated education and the *Plessy* "separate but equal" doctrine.

After a trial, the panel voted two-to-one to accept South Carolina's promise to equalize its segregated schools and refused to overturn *Plessy.* In a vehement dissent in *Briggs v. Elliott* (98 F. Supp. 529 [1951]), Judge Waring condemned segregation as nothing more than a remnant of slavery. Citing the testimony of witnesses for the plaintiffs that the "mere fact" of segregation had a "deleterious and warping effect upon the minds of children" (547), he scorned segregated education as *"per se inequality"* (548).

Waring had been deeply disappointed, although hardly surprised, that he was unable to secure Judge Parker's vote to overturn segregation. He was heartened, however, at the generally favorable national reaction to his *Briggs* dissent. Myles Horton of the controversial Highlander civil rights school in Tennessee predicted that Waring's opinion would one day become "the law of the land" (Waring, J. Waties. Papers. 6 June 1951. Horton to Waring). Horton, of course, was prophetic. Albeit in more conciliatory language and

without mentioning the controversial Waring's name, Chief Justice Earl Warren essentially tracked Waring's rationale in his unanimous opinion for *Brown v. Board of Education* (1954), *Briggs*, and companion cases.

More than two years before the Supreme Court's desegregation ruling, the Warings had departed Charleston for a life of "exile" in New York. By 26 January 1952, the judge had served ten years on the federal bench and was eligible, given his age, for retirement at full salary. On that date, he sent President Truman and Judge Park letters indicating his intention to retire on 15 February.

For the judge's close associates, the reasons for his decision were not difficult to fathom. His distaste for Judge Parker's *Briggs* opinion and its endorsement of *Plessy* ran so deep that he had declined to serve further on the three-judge panel. He had also become increasingly disenchanted with what he considered to be the timidity of Charleston blacks and their failure to bring more civil rights cases into his court. After the cross burning and stoning incidents, the Warings' circle of black friends had steadily dwindled; and their feelings had been hurt the previous Christmas, when black children who traditionally serenaded prominent white families passed 61 Meeting Street and sang instead at the nearby home of a Waring enemy. Perhaps his retirement, he wrote a friend, would put Charleston blacks "on their mettle," bolstering their courage. Finally, as a retired judge, Waring would be completely free to speak out on civil rights issues, no longer muzzled—if ever he had been—by the dictates of judicial propriety.

On learning of his retirement, admirers praised Waring's record and resolve in letters to newspapers and private correspondence. Undated clippings in the Waring papers show that in an admiring editorial, the *New York Times* termed the judge "a Judge Worthy of Honor" and that even the Charleston newspapers greeted the announcement with what Judge Waring later conceded was "tasteful" restraint. The *Courier* editorialized that "aside from 'crusading' on the Negro question," the judge had compiled an excellent judicial record. When Septima Clark, one of the Warings' closest black friends and a future leader in the modern civil rights movement, asked that the *Courier* reprint the *Times* editorial, Tom Waring readily obliged.

In New York, the Warings enjoyed the adulation denied them by white Charlestonians. When the Supreme Court's desegregation ruling was announced on 17 May 1954, prominent civil rights leaders, including Walter White and NAACP board members, gathered at the Warings' small Fifth Avenue apartment as much to honor their hosts as the Court's ruling. Later that year, the couple returned to Charleston for ceremonies praising the judge's contributions to racial justice, with one speaker comparing Waring's rejection of his segregationist past to the Apostle Paul's conversion.

The Warings would remain in the North until their deaths. During the twilight of his life, the judge continued his efforts in behalf of racial equality, becoming a board member of the American Civil Liberties Union and president of an organization attempting to provide food, clothing, and agricultural supplies to blacks in the rural South. As in the past, he also remained contemptuous of the fainthearted in the struggle for civil rights. When Alabama senator John Sparkman, the Democrats' 1952 vice presidential nominee, appeared to reject the civil rights plank in the party's platform, Waring urged Adlai Stevenson, the party's presidential candidate, to reject his running mate's statements. When a *New York Times* columnist endorsed the 1957 Civil Rights Act as at least a beginning, Waring scorned the statute as more loophole than law. He repeatedly clashed, moreover, with NAACP and other civil rights leaders he considered insufficiently zealous in their pursuit of racial reform.

Nor had white Charlestonians forgiven their native son and his second wife. Judge Waring died on 20 January 1968, Elizabeth in late October the same year. The judge's body was returned to Charleston's Magnolia Cemetery for burial. Over 200 blacks were present, fewer than a dozen whites. Family and friends still considered the judge's rulings and attacks on their society acts of revenge for their refusal to accept his divorce and second wife rather than a reflection of Waring's sincere commitment to civil rights.

But time—and changing political realities—can heal wounds and blur memories. South Carolina's white politicians now vie for black votes. The Warings' African American friends, including Septima Clark and Ruby Cornwell, became active in a variety of biracial civil affairs. In 1981, Charleston's mayor placed a sculpture honoring Waring's memory in the city council chamber, overlooking the federal courthouse.

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WARREN, EARL

(1891–1974)

Earl Warren was one of only three chief justices of the United State Supreme Court to have an era named after him. The Warren Court (1954–1969) was arguably the most important—and certainly the most written about—since the Marshall Court (1801–1836), and the Warren Court's record of accomplishment far exceeds that of the Taney Court (1836–1859). Whether those accomplishments will endure through the ages or be a momentary liberal aberration in a Supreme Court history dominated by conservatives remains to be seen.

Earl Warren
Harris & Ewing, Collection of the Supreme Court of the United States

Warren was born to a family of exceedingly modest circumstances in Los Angeles, California, in 1891. His parents, Methias (Matt) and Chrystal (Hernlund) Warren, were émigrés from Scandinavia. Earl Warren lived from the age of three in Bakersfield, a hot, dusty railroad town on the edge of the desert. At the age of seventeen he enrolled at the University of California in Berkeley, where he stayed until he graduated from law school in 1914. Bakersfield provided an enormously formative environment that helps explain his actions and passions decades later as chief justice.

The Warrens moved to Bakersfield in 1894 after Matt was fired and blacklisted by the Southern Pacific Railroad for participating in a strike.

Matt was a rail repairman, car inspector, and eventually a foreman. Apparently the blacklist did not get to Bakersfield, as the Southern Pacific hired Matt there as well. He never made more than a modest salary but, unlike the majority of his peers, did not smoke, drink, or gamble, and he had a passionate interest in education. He also had a reputation as being extraordinarily tightfisted, but as a result he was able to provide a relatively stable home and save enough to send his only son to college. He was disappointed he could not do the same for his daughter, Ethel.

As a young boy Earl himself worked as a railroad caller—running to alert workers when an incoming train needed work. As he related in his memoirs, "I witnessed crime and vice of all kinds countenanced by corrupt government. . . . The things I learned about monopolistic power, political dominance, corruption in government, and their effect on the people of a community were valuable lessons that would tend to shape my career throughout life . . ." (Warren 1977, 31). Matt Warren was murdered in his home in Bakersfield in 1938. His killer was never found.

Earl Warren remembered his train trip from Bakersfield to Berkeley in 1908 as both literally and symbolically refreshing. Feeling the sea breezes for the first time in his life, he resolved to live his life in the Bay area. Warren did not particularly stand out as a student at Berkeley. He had average grades, and although he made numerous friends, he did not run for student government or otherwise show that talent for public office or winning elections he would display later in life. But neither was he particularly docile. Boalt Hall, Berkeley's law school, employed the Socratic method, which required students to dialogue with professors in class. Students often ended up embarrassed or humiliated in these exchanges. Despite a warning from the dean that he might not graduate, Warren refused to participate. Nor did he obey the strict rule against outside employment. It was a breach that could have had him expelled if members of the administration had discovered his work. They never did.

One of the most formative experiences during these years was Warren's decision to join an organization called the Lincoln-Roosevelt League. This was a group made up of members from the Democratic, Republican, and Progressive parties interested in reform politics. Warren offered his services to one of the league leaders, Hiram Johnson, who ran for governor as a reform Republican and won. Johnson remained one of Warren's role models. He was an activist, reform-minded governor who vowed to put an end to the dominance of the Southern Pacific railroad in California politics. The Lincoln-Roosevelt League later changed its name to "Progressives," and although Warren continued to espouse its values of bipartisanship, good government, and public morality, he identified himself, perhaps somewhat lightly, as a Republican. On the other hand, when he later ran for public

office he had no qualms about running in the Democratic and Progressive primaries as well as that of the Republican party.

Once he graduated Warren had difficulty finding a career niche. He worked first as an entry-level lawyer for the Associated Oil Company in San Francisco. Unhappy to be treated more like a clerk than a lawyer, he moved within a year to Robinson and Robinson, an Oakland firm. Finding himself once again doing research for other attorneys and with a meager salary, he strategized with two Berkeley classmates to form their own firm. Before they could put it together, the United States entered World War I, and Warren opted to enlist. He served only from September 1917 to December 1918 and never left the country, but during that time he stood out as a good manager of men and was commissioned an officer. After his release from the army, he found a position as staff attorney for the judiciary committee of the state legislature. This was the beginning of a lifelong career in public service.

In 1920 a position as deputy district attorney of Alemeda County (Oakland) opened up. Warren applied and was accepted. Since the pay was low, most deputies had traditionally practiced law on the side and given as little time and energy to their public duties as they could get away with. Warren was different. He began an enthusiastic five years of litigating, opinion writing, and advising the county Board of Supervisors. He quickly became one of two chief deputies. In 1925 the district attorney resigned, and Warren was appointed as acting district attorney. In 1926 he was elected in his own right and served for the next twelve years.

In 1921 the young deputy district attorney met a young widow, Nina Palmquist Meyers; they dated for four years until after Warren was appointed district attorney and felt he was finally making enough money to support a family. They married and had six children: James, a son from Nina's previous marriage whom Earl adopted, and five of their own—Virginia, Earl Jr., Dorothy, Nina Elizabeth (known as Honeybear), and Robert. The image of an "all-American family" certainly helped Warren in his political career, but he and Nina made strenuous efforts to separate their public and private lives, rarely entertained for political reasons, and kept their children sheltered from the battles of political life.

During those years Warren refined his political and management skills: long-range planning, thorough preparation for every case, an exquisite sense of timing, and a keen ability to form and use public opinion. He was affable, gregarious, and tough and tried to emphasize nonpartisan cooperation, an appealing combination that garnered widespread newspaper support. Warren also developed a theme that proved to be extraordinarily popular and led to the development of a statewide reputation: professionalizing law enforcement. Warren pushed for extensive training of police officers

and even for courses in California colleges, a radical idea at the time. He also worked for "coordination" among the three major law enforcement groups—sheriffs, local police, and the state's district attorneys—but was careful to insist on the independence of each. In a brilliant stroke Warren developed a lobby group from among these constituencies that became a powerful political force in Sacramento.

Becoming attorney general of California was a natural next step, and in 1938 Warren filed for the nomination in the Democratic, Republican, and Progressive parties. He was selected by all three and won an overwhelming majority of votes. In his *Memoirs*, Chief Justice Warren indicated that he had fully intended to end his career in this position, but several unforeseen events intervened. The first was that he found himself working for a highly partisan Democratic governor, Culbert Olson. As one biographer expressed it, "Olson saw Warren as a Republican and a potential political rival, and consequently as a man to be isolated" (White 1982, 53). The two seemed to clash on every major political issue, and Warren found it exceedingly difficult to maintain his nonpartisan stance. Things came to a head with the attack on Pearl Harbor on 7 December 1941. Governor Olson determined to take all law enforcement into his own hands and as part of his isolation strategy refused even to consult his attorney general. Warren found this personally insulting and dangerous. Although he and the governor actually had similar views on a number of political issues, Warren developed a visceral and lasting dislike of Olson.

The second event was the decision to remove people of Japanese ancestry from the West Coast and relocate them to "internment camps" in the interior of the country. Warren was intimately and intensely involved in that decision—urging military commanders to move quickly and decisively to remove the citizens of Japanese extraction. Although he later regretted this decision as racist and unnecessary, at the time it was popular in California. It reinforced Warren's reputation as a tough, no-nonsense attorney general.

The two events—Olson's continuous efforts to snub and isolate Warren, and his popularity as a result of his law enforcement credentials and war efforts—combined to convince Warren that he should oppose Olson in the 1942 election for governor. Warren won the contest with 57 percent of the vote. He had run as much out of spite and frustration as out of conviction, but at the age of fifty-two Earl Warren found himself governor of California.

Warren's ten years as governor are hard to categorize in standard political terms. He continued to be an amazingly popular politician, being reelected twice by large pluralities. This did not go unnoticed on the national scene, as he was the first Republican star since Roosevelt had swept the Republicans out of power in 1932 and launched the New Deal. But was he liberal or conservative? In fact, he was a bit of both, and a bit of a commonsense

visionary as well. He began as governor by cutting taxes and establishing a financial reserve for emergencies. But he also worked for prison reform; he increased spending for higher education and assistance for the elderly and the mentally ill; and most interesting from a twenty-first-century perspective, he pioneered a compulsory health insurance system. Some commentators see a progression from conservative early days as governor to liberalism in his later years, but Warren can be just as easily classified as a pragmatic problem solver who saw government as a means to help those in California who needed help. He continued to have sensitivity for the underdogs in society. Thus while he joined in the anti-Communist crusades after World War II, he was willing to make distinctions and try to protect academic freedom, freedom of speech, and due process. This did make him suspect in the eyes of some and was the basis for decades of distrust between him and Richard Nixon.

Much to Warren's astonishment, Gov. Thomas Dewey of New York asked Warren to run for the office of vice president on the national Republican ticket in 1948. Republican leadership continued to be impressed with Warren's ability to draw voters and also by the Electoral College votes of California. The candidates did not know each other personally before the electoral campaign, and Warren had shown little interest in partisan politics and even less in national issues, but he consented to run because he felt he owed it to the party. When Truman pulled off his famous come-from-behind victory, Warren returned to his governorship with some relief. When he won a third term by over a million votes, however, Warren received extensive national publicity and was touted as presidential material.

The 1952 Republican National Convention was filled with intrigues that led in a roundabout way to Warren's nomination to the Supreme Court. There was a real potential for a deadlock between the two main candidates, Dwight Eisenhower and Robert Taft. Warren was seen as the logical compromise candidate or at least the favorite son who could pledge California's votes to either candidate. But it did not happen. Eisenhower was nominated on the first ballot. Warren genuinely liked Eisenhower and campaigned actively for him. In return, Eisenhower respected Warren's administrative abilities and intimated that he would like him to take a cabinet position. Warren responded that the only position in which he had an interest was a Supreme Court seat. Eisenhower or one of his aides then promised Warren "the first available seat" on the Court, not anticipating that it would be the chief justice position. Chief Justice Fred Vinson died of a heart attack on 8 September 1953. Warren's nomination was announced on 30 September.

The Warren Court was one of the most activist Courts since the founding of the Republic. It had as profound and comprehensive an impact on

U.S. society as any Court in history. Indeed, the Warren Court practically defined political liberalism in the post–World War II era and set much of the national agenda for the next half century. It began with an assault on racial segregation. The Court's unanimous decision in *Brown v. Board of Education* (1954), declaring that legally segregated schools are inherently unequal, is arguably the most important event in race relations since ratification of the Fourteenth Amendment in 1868. It overruled *Plessy v. Ferguson* (1896), a fifty-eight-year precedent, and signaled the Court's willingness to plunge into political thickets where state and federal legislators refused to tread. Technically *Brown* dealt only with education, but its principled argument was sweeping, and dozens of cases followed that outlawed segregated public transportation, public accommodations, housing, employment, and even marital relations.

Nothing reveals Chief Justice Warren's management of the Court more poignantly than the drama behind the scenes while *Brown v. Board of Education* was being decided. The case was originally argued in 1952, but the Court was bitterly divided. Justices Hugo Black, Harold Burton, William O. Douglas, and Sherman Minton favored overruling *Plessy.* Justices Stanley Reed and Tom Clark and Chief Justice Fred Vinson wanted to uphold *Plessy,* and two justices, Robert Jackson and Felix Frankfurter, although expressing personal distaste for segregation, were fearful of the political and social impact of a Supreme Court decision that overturned both precedent and legislation in such a volatile area. Justice Frankfurter prevailed upon the Court to hold the case over until the 1953 term, during which it was reargued. When Chief Justice Vinson died and Warren was appointed, the balance shifted dramatically. Warren let it be known to the other justices that he thought segregation was immoral and would vote to overturn *Plessy,* but he asked them all to consider how this could be done to best serve the country. By his willingness to take suggestions and to compromise—for example, by establishing the principle but delaying implementation until states had an opportunity to propose means to do so in a second case, *Brown v. Board of Education II* (1955), and by using moderate language for the principle and vague language for implementation, ". . . with all deliberate speed"—Warren was able to command unanimity, a remarkable achievement at the time.

Segregation was only the first problem the Warren court addressed. Other issues included (1) forcing state legislatures to reapportion so that each citizen's vote counted as much as every other citizen's (*Baker v. Carr* [1962], *Reynolds v. Sims* [(1964]); (2) limiting the federal government's ability to intimidate and destroy careers and reputations by using its investigative powers (*Watkins v. United States* [1957], *Greene v. McElroy* [1959]); (3) limiting local governments' abilities to require or even allow prayer in public schools

Bruce McMarion Wright (1918–)

Few judges have had more controversial careers than Bruce McMarion Wright. Born in Princeton, New Jersey, in 1918 to a white mother and a black father, Wright attended segregated schools at Princeton and was later told by both Princeton (where he had been awarded a scholarship before his ethnicity was known) and Notre Dame University that his attendance at these universities would be offensive to the large number of southerners who attended. Wright was expelled from Virginia State University when he made fun of religious exercises on the campus and eventually graduated from all-black Lincoln University in Pennsylvania.

Subsequently enrolling at Fordham University law school, Wright was drafted, served in the army in Europe as a private, and was decorated for his service. Insulted when trying to board a ship back to the United States, Wright, who had written some poetry during the war, went absent without leave for eighteen months in Paris, making the acquaintance of Langston Hughes and Leopold Sedar Senghor, who was later to become the president of Senegal.

Reluctantly returning to the United States, whose racism he detested, Wright enrolled at the New York University Law School and became a clerk at a prestigious New York City firm, Proskauer, Rose, Goetz and Mendelsohn, where he was dissuaded from continuing. Wright set up a private practice, much of which involved handling legal matters for prominent African American musicians with whom he often toured both in the United States and abroad. Wright is very open about his own life, which has involved being married to five women (two of whom apparently died during the marriage) and fathering five sons. Wright worked, beginning in 1967, for the Human Resources Administration of New York City.

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(*Engel v. Vitale* [1962], *Abington School District v. Schempp* [1963]); (4) enhancing the government's power to regulate economic activities to enhance safety, honesty, and fairness (*NLRB v. Gissel Packing Co.* [1969], *Brown Shoe Co. v. United States* [1962]); and (5) most controversial, protecting the rights of those accused of crimes (*Mapp v. Ohio* [1961], *Gideon v. Wainwright* [1963], *Escobedo v. Illinois* [1964], *Miranda v. Arizona* [1966], *Terry v. Ohio* [1968]). It was one of Warren's strengths that he could assign majority opinions, even in major precedent-setting cases, to other justices who might have a particular interest in the issue. Warren liked to win, but he did not need the spotlight.

Aside from race relations, no initiatives of the Warren Court triggered more public reaction than its largely successful effort to protect the rights of criminal defendants. With twenty-two years in California law enforcement, Earl Warren had more experience than all other justices on the bench com-

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Mayor John Lindsay appointed Wright to the criminal court of New York City in 1970, but Wright's reputation for dealing leniently with criminals and setting low bail for those he believed were not at risk for fleeing was so notorious (he was frequently referred to as "Turn 'em Loose Bruce") that he received numerous threats on his life and was for a time reassigned to the civil court. Frequently investigated and censured at least once by the Judiciary Relations Committee, Wright was regarded as a hero to many African Americans, and he was appointed in 1983 to the New York Supreme Court. The author of works of poetry as well as of two books detailing his career and his views of the differences between justice as it is meted out to blacks and whites in the United States, Wright has often provoked controversy by his speeches. He served for a time as a visiting professor at the Cooper Union for the Advancement of Science and Art.

A judge with a distinct attitude, Wright is a religious skeptic and is definitely not enamored with the American political system. He explains: "I have had a long and passionate love-hate affair with the law. I remain unforgiving of the so-called Founding Fathers, those pious thieves who took over what has become America, while banishing the Indians to remote ghettos we call reservations" (Wright 1996, 206). Wright still professed, however, to be following judicial ideals: "I never thought of myself as a 'liberal,' in any event. My efforts on the bench were, I hope, in the tradition of humanism: honor the presumption of innocence and give everyone, accuser and accused, a fair trial, whether in the civil or criminal side" (203).

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bined and wrote with confidence. Indeed, of the 235 opinions Warren authored, sixty-nine or nearly a third concerned criminal law and procedure. No case caused more controversy than his opinion in *Miranda v. Arizona* in which he laid out guidelines for the famous Miranda warnings that must be read to all criminal suspects at the time of their arrest and before they can be questioned: "You have the right to remain silent; anything you say can be used against you in court; you have the right to talk to a lawyer before questioning and to have a lawyer with you during questioning. You may stop questioning at any time. If you cannot afford a lawyer one will be provided for you." Warren also made clear that evidence gathered in violation of these stipulations could not be used as evidence in a court of law.

Conservatives were apoplectic. "Impeach Earl Warren" signs went up across the country. With the passage of time, scholars have been able to evaluate the impact of the changes in criminal process initiated by the

Warren Court: Neither convictions nor the number of confessions declined measurably. Rarely did a guilty person go free. The most important result of the Warren Court's jurisprudence was increased education and training of police forces across the country. This was exactly the agenda Warren had had as attorney general.

One endeavor in which Warren was not entirely successful was in leading the investigation of Pres. John F. Kennedy's assassination. Appointed to head a commission by Pres. Lyndon Johnson despite his reluctance, Warren wanted to publish a definitive report putting to rest American fears of an international conspiracy. The Warren Commission Report had quite the opposite effect. Much of the blame can be laid on the chief justice himself. Because he wanted a quick report, the commission staff did not vigorously pursue evidence collected by the Federal Bureau of Investigation and the Central Intelligence Agency; did not follow up on alternative theories that more than one bullet was fired, possibly from different locations; and refused to allow graphic pictures to accompany the report. Warren also insisted on a unanimous opinion by committee members and was willing to water down statements to get it. The Warren report was widely attacked as a cover-up or, at best, a sloppy, unprofessional piece of work. Although the commission's results have never been disproved, the damage to Warren's reputation was significant.

Chief Justice Earl Warren was a liberal, activist judge. He saw his role as guiding the judicial system to promote the ethical values imbedded in the Constitution—equality of opportunity; liberty for individuals to speak, read, write, and associate as they saw fit without government censorship; the right of government to regulate businesses for the common good; and protection of those minorities most vulnerable to abusive government power, Negroes and those accused of crime. For all his successes, Earl Warren did not forget the lessons he learned during his early years in Bakersfield. His legal opinions were neither brilliant nor subtle. He argued in clear, simple language buttressed with moral passion. He strove to do what was right for the country and did not hesitate to create new law to make it happen. Warren retired from the Supreme Court in 1969 and died of congestive heart failure on 9 July 1974

Paul J. Weber

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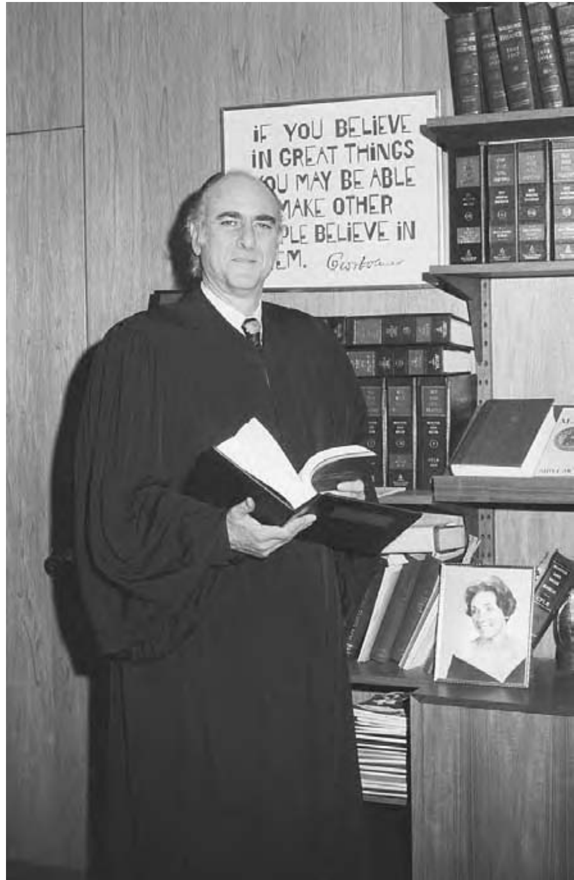
WEINSTEIN, JACK B.

(1921–)



JACK B. WEINSTEIN
Bettmann/Corbis

OFTEN CONTROVERSIAL, ALWAYS outspoken, federal district judge Jack B. Weinstein, who was appointed to the United States District Court for the Eastern District of New York in 1967, has spent a career handling the types of cases that give other judges fits.

Jack B. Weinstein was born on 21 August 1921 in Wichita, Kansas. His grandparents were poor Russian Jewish immigrants who had come to the United States at the turn of the century. His family returned to Brooklyn, his mother's birthplace, in his youth. He was raised in an urban, working-class family; his father was a salesman, his mother a nurse.

He attended Brooklyn College in Brooklyn, New York, graduating in 1943. After serving as a lieutenant in the navy in World War II, Weinstein enrolled in Columbia Law School. He graduated in 1948 and clerked for the Honorable Stanley H. Fuld of the New York Court of Appeals. He began private practice in New York City thereafter. During the next twenty years, he served in a variety of public roles, including special counsel for the New York Joint Legislative Committee on Motor Vehicle Problems, counsel to a New York state senator, research assistant for the New York Senate,

consultant for the New York Temporary Commission on Courts, and reporter for the New York Advisory Committee on Practice and Procedure.

In 1952, he became an associate professor of law at Columbia Law School, advancing to full professor in 1956. Upon joining the federal bench, he became an adjunct professor at the law school, a position he still holds. He has also served as an adjunct professor at New York University School of Law, Brooklyn Law School, and George Washington University School of Law in Washington, D.C. In addition, he has served as a visiting scholar and lecturer at many law schools and professional organizations.

Pres. Lyndon B. Johnson appointed Weinstein to the federal bench in the spring of 1967. Interestingly, Judge Weinstein had declined previous offers to serve on the federal judiciary—he had been asked to serve, for example, in the Southern District of New York, which includes Manhattan. This time, however, President Johnson had asked him to serve in the Eastern District—his hometown of Brooklyn—and Weinstein readily agreed. He explained to another judge that the Eastern District (which encompasses Long Island) had been his father's sales territory; it was the right place for him to be (Sifton 1996, 77). Weinstein took his seat at the court on 1 May 1967. He served as chief judge of the district from 1981 to 1988 and became a senior judge in 1993. He continues to serve in the Eastern District.

Weinstein's judicial career has now spanned three and one-half decades. He is perhaps best known for his willingness and ability to manage the most complex cases, particularly mass class action tort litigation. Judge Weinstein has become famous for his work on these high-profile cases, which have included the Agent Orange case, brought by Vietnam veterans exposed to the chemical defoliant during their military service; asbestos litigation, which numbered over 90,000 separate cases; diethylstilbestrol (DES) litigation, brought by women who, having taken the dangerous drug to prevent miscarriages, bore children who had severe birth defects; carpal tunnel (repetitive stress) injury litigation; and a significant portion of the recent antitobacco litigation cases—among others.

Mass class action tort cases are characterized first by their huge number of litigants, which commonly number in the thousands, and even tens of thousands. An army of counsel and their support staff represents these plaintiffs. The defendants, who are typically the manufacturers of products believed to be dangerous or defective, are similarly armed. Added to the fray are the defendants' insurance companies and their lawyers, secondary insurers, and so on. As a result, the number of active participants before the court in such a case can easily number in the hundreds. The main issue in the litigation might seem straightforward—plaintiffs claim that they have been harmed by the defendant's negligence in manufacturing, marketing, or

using a product—but proving that claim rarely is. Millions of pages of evidence may be produced; hundreds of depositions taken; hundreds of procedural and evidentiary motions filed. Outcomes often depend on how a jury views the conclusions of competing expert witnesses, who argue over complex scientific research that may or may not link the product to the damage that has been done. Given the risks involved in getting the jury to understand such testimony, and with juries generally, many of these cases are settled out of court, with counsel for plaintiffs typically taking 30 to 40 percent of any award as their contingent fee.

How, then, does an individual plaintiff—one person among thousands who will probably never meet his or her lawyer, let alone appear in court—receive justice? This complicated but essential question lies at the heart of Judge Weinstein's management of complex litigation. In his book, *Individual Justice in Mass Tort Litigation* (1995), Weinstein described the balance the judges must strike between obtaining justice for the injured and resolving these conflicts in a procedurally fair and efficient manner. Weinstein analyzed numerous reform proposals and suggested many of his own, developed over the years from his experiences on the bench.

Weinstein's phrasing of the central questions of his book revealed much about the person and the judge: "How can we provide each plaintiff and each defendant with the benefits of a system in mass torts that treats him or her as an individual person? How can each person obtain the respect that his or her individuality and personal needs should command in an egalitarian democracy such as ours?" (1995, 3). In his work on the bench, in his civic involvements, and in his outspoken stands on controversial political and legal issues, Jack Weinstein has demonstrated a fundamental respect for people and a deep commitment to ensure justice not only for the litigants before him but for society as a whole.

Judge Weinstein's judicial philosophy is not without controversy, of course. Critics consider him an "activist" judge who directs the settlement of cases toward a result that he believes is fair. Lawyers for the tobacco industry, for example, recently watched in dismay as plaintiffs' attorneys used a procedural device for case management called the "consolidated case rule" to steer antismoking lawsuits into his courtroom, a practice that the judge allegedly facilitated (Bradley 2000). Similarly, in *Agent Orange on Trial* (1986), author Peter Schuck portrayed Weinstein as a tough-minded judge intimately involved in pressuring the defendants to settle a case where liability was not clear-cut.

Weinstein, for his part, has not let criticism affect his approach to litigation, which he acknowledges is highly managerial. Weinstein embraces a kind of "hands on" and "roll up the sleeves" approach, a fact best demonstrated by his refusal to wear judicial robes. Instead, he dresses in a suit and

tie and, except at trial, sits down with lawyers at the counsel table, rather than addressing them from the bench. Judge Weinstein's official photograph for the Eastern District, hanging among auspicious portraits and photos of judges in their full judicial regality, shows him in that simple suit and tie, his standard judicial attire (Gleeson 1996, 83).

Although Judge Weinstein is best known for adjudicating and writing about mass tort cases, he has been outspoken on numerous other legal issues. For example, in 1993 he briefly refused to accept drug cases in his courtroom, in opposition to the Federal Sentencing Guidelines for drug offenders (and particularly its mandatory minimum sentencing provisions). He is a vocal critic of America's War on Drugs and has argued repeatedly for reform of national drug policy. In an opinion piece for the *New York Times*, for example, Weinstein called the policy "self-defeating" and encouraged the nation to develop an approach that would "reduce the violence, moral degradation, and waste associated with drugs in a more humane, effective, and cost-efficient way" (1993, op. ed.).

In that article, Weinstein noted the high proportion of young African American men jailed for drug offenses, challenging his readers to consider whether this fact is evidence of "an overlooked moral dilemma" in our criminal justice system (op. ed.). Weinstein has also questioned the disparate impact of the death penalty on minority defendants. He adamantly opposes capital punishment, doubting its deterrence value and decrying the procedural shortcomings in death penalty cases, which he has labeled "intolerable." He concluded in a *New York Law Journal* article: "Conditions change. Our view of what is required of a humane and caring people should change with the times. . . . [There is] no excuse for unnecessary cruelty and inhumanity" (2000, n.p.).

In the mid-1990s, Judge Weinstein decided the case of *Ayeni v. Mottola*, which concerned the Secret Service's decision to invite CBS News along as it executed a search warrant in Babatunde Ayeni's home. The Secret Service served the warrant to Mrs. Ayeni, who was wearing only a nightgown, and the agents, with cameras and audiotape rolling, proceeded to tear apart the household in front of a fearful Ayeni and her five-year-old son. Repeated requests by Mrs. Ayeni to stop the taping were unheeded, as the camera crew proceeded to film both the Ayenis and their personal possessions and documents.

Both the criminal case against Mr. Ayeni and the civil case filed by the Ayenis against the Secret Service and CBS News came before Judge Weinstein. The judge first required CBS to produce its videotape and then excluded it as evidence in the criminal matter, concluding that the taping had rendered the search unreasonable. He also allowed the civil lawsuit to continue, rejecting the parties' claim that they were entitled to government

immunity. A decision by the Second Circuit Court of Appeals subsequently affirmed Weinstein's decision. After a split in the federal circuit courts emerged, the Supreme Court agreed to hear the similar case of *Wilson v. Layne*, which arose when a *Washington Post* reporter and cameraman accompanied police on a raid of Charles Wilson's home. The high court unanimously held that law enforcement agencies can be sued for bringing the media (or any other third party, for that matter) along on raids and related undertakings. It agreed, as Judge Weinstein had pointed out in *Ayeni*, that in accordance with the Fourth Amendment, the sanctity of one's home must be protected from unreasonable government searches and seizures.

A staunch advocate for social justice and the rights of individuals, Weinstein angered many when he ruled in 2001 that the rights of parents and children in New York City's foster care system were being abridged by the city's inadequate provision and compensation of court-assigned counsel; he subsequently ordered an increase in pay for these Family Court attorneys *(In re Sharwline Nicholson)*. In the case, Weinstein fumed about the city's routine of taking children away from battered mothers, arguing that such a practice ignored the plight of battered women and punished them for being battered. Similarly, Weinstein caused a stir in 2002 when he ruled that the United States cannot deport an immigrant who is a felon unless the government first considers the impact deportation will have on his or her children who remain in this country *(Beharry v. Reno)*. Weinstein also raised the ire of many when he concluded that gun manufacturers could be held liable to the victims of gun violence for the negligent marketing of handguns, a decision that was subsequently reversed on appeal *(Hamilton v. Accu-Tek)*.

Judge Weinstein has had his share of reversals, which apparently bothers him not at all. When asked by the *New York Times* for his opinion of two potential Supreme Court justices, he told the newspaper that both were worthy candidates, noting "I'd be proud to be reversed by either of them" (Gleeson 1996, 83). Although some may quarrel with his rulings, no one disputes the fact that Jack Weinstein is a brilliant, highly organized, and extremely efficient judge. He is widely regarded as a leading expert in civil procedure and evidence. Thousands of law students have encountered Weinstein through the legal casebook of which he is one author, *Evidence: Cases and Materials* (1997), which continues to be the benchmark in the field. He has also written over 100 articles and reports on a wide range of subjects, including not only torts and evidence but also civil procedure, ethics, constitutional law, and Judaism. He has lent his expertise to numerous prominent boards and committees, including the Presidential Commission on Catastrophic Nuclear Accidents (having presided over the legal

challenges to the construction of a nuclear power plant in Shoreham, New York); the Carnegie Commission on Science, Technology, and Government Task Force on Science and Technology in Judicial and Regulatory Decision-Making; the Subcommittee on Federal Jurisdiction of the Committee on Court Administration of the Judicial Conference of the United States; and the American Law Institute's Complex Litigation Project.

Over the years, Judge Weinstein has received numerous honorary degrees and legal and civic awards. He was awarded the Stanley H. Fuld Award of the New York State Bar Association (NYSBA) (2000) for his exceptional contributions to commercial law and litigation. He previously had received the NYSBA's Gold Medal Award (1998), the highest honor bestowed by the state bar. He was also awarded the Judicial Recognition Award of the National Association of Defense Lawyers and the William J. Brennan Award of the New York State Association of Criminal Defense Lawyers. He was named the *National Law Journal*'s "Lawyer of the Year" for 1993.

Judge Weinstein also received the Devitt Distinguished Service to Justice Award (1994), presented annually to the federal judge who has made the most significant contribution to justice. In summarizing the decision of the Devitt selection panel, federal district judge Oliver Gasch noted simply that "the breadth of [Weinstein's] judicial service to the cause of justice is incomparable" (1994, 76). In typical fashion, Weinstein donated the $15,000 cash award on behalf of himself and his wife, Evelyn, to the children's playroom at the Long Island College Hospital in Brooklyn. He even refused to accept reimbursement for the travel expenses he incurred to attend the award presentation, because he did not want to appear to accept a gift from the award's sponsor, a prominent legal publishing company. Said Judge Weinstein, "I don't like to take anything of value from anybody" (Schmickle and Hamburger 1995).

In 1993, Judge Weinstein assumed senior status on the district court. Typically used by judges as a transition to retirement, it permits a judge significantly to reduce his or her caseload and judicial duties. Not surprisingly, Weinstein has been a senior judge in title alone, refusing to slow down or shut up. At age eighty-one, he continues to make significant contributions to the federal bench and will likely do so for some time to come.

Kathleen Uradnik

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WILKINSON, J. HARVIE, III

(1944–)

J. Harvie Wilkinson III
Courtesy J. Harvie Wilkinson

Judge J. Harvie Wilkinson III, chief judge of the United States Court of Appeals for the Fourth Circuit (with jurisdiction over Maryland, Virginia, West Virginia, and North and South Carolina), was born in New York City on 29 September 1944, the son of J. Harvie Jr. and Letitia Nelson Wilkinson. A Phi Beta Kappa, *magna cum laude* B.A. graduate from Yale University in 1967, he entered the United States Army for two years of service (1968–1969). Subsequently, he became an outstanding student at the University of Virginia's School of Law, where he served with distinction on its law review and became a member of the Order of the Coif, receiving his J.D. in 1972. He was then admitted to the Virginia state bar.

Evincing an early interest in public affairs, he had tried his hand at a political career by running for Congress as a Republican candidate for the U.S. House of Representatives from what was the Third District of Virginia in 1970. Failing in that quest—in a personal interview with Henry J. Abraham he referred to it as a "humblingly unsuccessful campaign" (17 November 1970)—he did, however, receive a three-year appointment to the Board of Visitors (trustees) of the University of Virginia from that state's first Republican governor, Linwood A. Holton. "Jay"

Wilkinson, as he is known to friends and family, was the youngest person ever to have served on that prestigious board.

During the same period, the future judge was asked by Richmond attorney and newly nominated associate justice of the United States Supreme Court, Lewis F. Powell Jr., to become his first clerk upon Powell's confirmation by the Senate in late 1971. Wilkinson would serve Justice Powell with characteristic personal dedication and professional excellence during the latter's first two terms on the highest court in the land. To the young lawyer it would prove to be a defining experience both professionally and personally, the warm relationship between the two men continuing until Justice Powell's death in 1998. At the end of his clerkship in June 1973, Wilkinson married Lossie Grist Noell. Two children, James Nelson and Porter Noell, were born to that union.

The youthful Wilkinson's first post-clerkship position was his 1973 appointment as an assistant professor of law at the University of Virginia, specializing in constitutional law. A mere two years later the popular young teacher was promoted to the rank of associate professor, receiving the coveted Alumni Board of Trustees Teaching Award in 1976. He continued to teach until 1978 when, seeking a new experience, he became the editorial page director for the Norfolk, Virginia, *Virginia-Pilot*. It proved to be an interesting stint for the bright member of the literati, who held the position for three years. He then returned to his erstwhile post at the University of Virginia as professor of law in 1981, serving in that capacity on a full or partial basis until 1984.

During that three-year period he entered federal government service when Pres. Ronald Reagan appointed him deputy assistant attorney general in the Civil Rights Division of the Department of Justice in 1982. He held that post for one year. On 30 January 1984, having resumed full-time teaching at Virginia, Wilkinson was honored and delighted to be nominated by Reagan as a judge on the United States Court of Appeals for the Fourth Circuit.

Given the nominee's versatile and successful career experience, and his broad bipartisan political support in Virginia, confirmation was expected to be smooth. His academic, legal, intellectual, and personal qualifications and characteristics were demonstrably stellar. Indubitably, here was one of the "best and brightest" lawyers in the land. Yet opposition to the nomination surfaced quickly. Beyond customary and predictable quotidian political considerations, it focused on two aspects: one, Professor Wilkinson's lack of trial court experience; the other, and ultimately more contentious and protracted, his conservative political philosophy. A moderate in the Powell tradition, Wilkinson's writings and public statements testified to that philosophical commitment, albeit always in wholly objective, carefully reasoned

compass, as his three books penned prior to his nomination demonstrated. Democratic senators launched a prolonged assault on the nominee's Weltanschauung, resorting to a filibuster in late July when Wilkinson's confirmation seemed all but certain. They were aided by the opposition of a few liberal Republicans, notably Senator Arlen Specter (Pa.), whose constituency contained a large number of African Americans, who disapproved of what they viewed as Wilkinson's hostile position on racial busing and aspects of affirmative action. Ultimately, Wilkinson's supporters succeeded in invoking cloture, and confirmation came on 9 August 1984, more than seven months after his nomination.

Written in clear, lucid, elegant language, Judge Wilkinson's books and articles have made major contributions to the realm of public law and policy. His first tome, *Harry Byrd and the Changing Face of Virginia* (1968), written when its author was only twenty-four years old, is a fascinating analysis of the so-long-entrenched powerful political Byrd machine and its inevitable, gradual, and ultimate decline. *Serving Justice: A Supreme Court Clerk's View* (1974) represents an incisive, informative, and warm account of the position of Supreme Court clerks, how they are selected, the range and extent of their labors and influence, and their relationship with "their" justice(s). The Court and its personnel come to life in the book's eminently readable pages, and Wilkinson wisely avoided violating the tribunal's traditional confidentiality, unlike more recent post-clerkship books by his successors. The third volume, arguably his most important prior to his nomination to the Court of Appeals, *From Brown to Bakke: The Supreme Court and School Integration* (1979), constituted a trenchant examination of such contentious issues as racially mandated public school attendance and busing, as well as the ongoing vexatious problems of affirmative action, with its still unsolved questions of constitutionality and legality. Wilkinson's most recent book is his 1997 publication, *One Nation Indivisible: How Ethnic Separatism Threatens America*. It is a sophisticated treatment of the contemporarily daunting issues of diversity, group-centered claims to entitlements, and multiculturalism. Wilkinson has written countless law review articles and manifests an unusually high profile in the popular media, publishing commentaries for national newspapers on the need to support federalism's role for state political power and the importance of maintaining the present size of the U.S. judiciary.

Judge Wilkinson's tenure on the Fourth Circuit has dovetailed neatly with the generally conservative jurisprudence of that Court of Appeals. As a proponent of strong state power, vis-à-vis the federal government, his rulings and opinions have typically coincided with those of the Rehnquist Court. Characteristic of this posture was Wilkinson's concurring opinion in *Brzonkala v. Virginia Polytechnic Institute* (169 F.3d 820 [1999]), in which the

Fourth Circuit invalidated the portion of the Violence Against Women Act (VAWA) that created *civil* remedies in *federal* courts for female victims of violent crimes. Congress had passed the act, including the challenged section in *Brzonkala,* under its interstate commerce power, contending that violence against women had a direct impact on the nation's economy. Wilkinson's concurrence read like a scholarly treatise on judicial restraint and federalism. He distinguished the Fourth Circuit's invalidation of the relevant portion of VAWA from earlier examples of Supreme Court judicial activism during the New Deal and Warren Court eras. He asserted that the Fourth Circuit, and the Supreme Court in its recent pro-state decisions, "preserve[d] Congress as an institution of broad but enumerated powers, and the states as entities having residual sovereign rights" (893). In so doing, Wilkinson argued, the courts temporarily eschewed the preferred position of judicial restraint in order to conserve core constitutional principles. Contrasting the VAWA decision, and other profederalism cases from the 1990s, with activist decisions from the New Deal and Warren Courts, Wilkinson contended that the latter two ruled as they did with favored constituencies and substantive results in mind. He concluded that the judges' role "in this modern era is not as substantive adjudicators, but as structural referees" (895). Although Wilkinson's distinction between modern conservative judicial activism and older versions practiced by preceding courts did not entirely convince liberal commentators, the Fourth Circuit's chief judge proved yet again that he is one of the federal judiciary's most intellectual members. In addition, the United States Supreme Court upheld the Fourth Circuit's ruling in Brzonkala's appeal to the high tribunal. The narrow five-to-four majority, led by Chief Justice William Rehnquist, agreed with Wilkinson's reasoning that Congress had overstepped its interstate commerce authority in creating a civil remedy for women victims of violent crime.

Wilkinson's conservatism was also evident in his narrow reading of the Americans with Disabilities Act (ADA) in *EEOC v. Sara Lee Corporation* (237 F.3d 349 [2001]). He ruled that the act does not require an employer to deviate from its nondiscriminatory seniority policy in order to accommodate a worker, especially when that worker is not substantially limited in a major life activity (the threshold criterion for invoking the ADA). On behalf of the Fourth Circuit, he also refused to allow an ADA suit, for want of subject matter jurisdiction, brought by five purchasers of handicapped parking placards against North Carolina's Division of Motor Vehicles. The plaintiffs claimed that a federal regulation, promulgated under the ADA, prohibited public entities from charging a fee to cover the costs of accessibility programs designed to assist the disabled. Wilkinson concluded that

the regulation exceeded Congress's Fourteenth Amendment, Section 5 remedial powers, as interpreted by the United States Supreme Court in *City of Boerne v. Flores* (521 U.S. 507 [1997]).

Judge Wilkinson has been equally abstemious in applying the Individuals with Disabilities Education Act (IDEA) to the question of mainstreaming disabled students. Combining his penchant for judicial restraint with his affirmance of federalism, he has concluded that "the IDEA does not grant federal courts a license to substitute their own notions of sound educational policy for those of local school authorities, or to disregard the findings developed in state administrative proceedings" (*Hartman v. Loudoun County Board of Education,* 118 F.3d 998 [1997]). In addition, Wilkinson has ruled that the IDEA does not provide for compensatory or punitive damages (*Sellers v. School Board of Manassas, Virginia,* 141 F.3d 524 [1998]).

Nevertheless, Wilkinson has been willing to uphold broader constructions of congressional and national power when the legislature is clearly acting under constitutional authority. In validating a Fish and Wildlife Service regulation that limits the taking of red wolves on private land, Wilkinson wrote for the Fourth Circuit that "because the regulated activity substantially affects interstate commerce and because the regulation is a part of a comprehensive federal program for the protection of endangered species[,] [j]udicial deference to the judgment of the democratic branches is therefore appropriate" (*Gibbs v. Babbitt,* 214 F.3d 486 [2000]).

Likewise, Wilkinson has supported what he has described as the clear meaning and intentions of recent congressional acts regulating modern technology. In *Zeran v. America Online, Inc.* (129 F.3d 327 [1997]), he ruled that the Communications Decency Act "plainly immunizes computer service providers like AOL from liability for information that originates with third parties" (328). In a case that came to the Fourth Circuit under the Anticybersquatting Consumer Protection Act, Wilkinson determined that the congressional statute protected Volkswagen from the bad-faith actions of an on-line service provider, Virtual Works, Inc., that had registered the domain vw.net with the intention of selling it to the better-known Volkswagen automobile company (*Virtual Works, Inc. v. Volkswagen of America,* 238 F.3d 264 [2001]).

Modern technology has also impinged on the traditional realm of criminal rights, and the Fourth Circuit has not been immune from suits invoking rights to deoxyribonucleicacid (DNA) testing to determine guilt or innocence in criminal cases. In an opinion written in early 2002, Judge Wilkinson surprised some liberal observers by not opposing a prisoner's access to DNA testing using technology that was unavailable at the time his Virginia conviction for rape became final. Yet holding the line against judicial

creation of a constitutional right to such testing, Wilkinson called on legislatures to establish the rules of access to DNA examinations, lest meddlesome courts "deaden the life-force of democracy" (*Harvey v. Horan*, 285 F.3d 298 [2002]).

In civil liberties cases involving church/state issues, Wilkinson has demonstrated an accommodationist stance, ruling against strict separation of religion and government. He wrote the opinion for a unanimous Fourth Circuit panel that cleared the way for Columbia Union College (an institution affiliated with the Seventh-day Adventist Church) to receive aid from the state of Maryland (*Columbia Union College v. Oliver*, 254 F.3d 496 [2001]). The state had argued that the college was "pervasively sectarian" and that to provide it funding would violate the First Amendment's establishment clause. Wilkinson "recognize[d] the sensitivity of this issue and respect[ed] the constitutional imperative for the government not to impermissibly advance religious interests" (510), but he concluded that "by refusing to fund a religious institution solely because of religion, the government risks discriminating against a class of citizens solely because of faith" (510). In this case, "[b]ecause state aid is allocated on a neutral basis to an institution of higher education which will not use the funds for any sectarian purpose, . . . Columbia Union qualifies for [Maryland's] funds" (498).

In another First Amendment case, Judge Wilkinson, voting with the majority in a nine-to-three *en banc* Fourth Circuit decision, reached what might seem to be an ostensibly conservative result with an arguably liberal rationale, which proves how imprecise ideological labels can be. The court ruled that an individual could not be denied the right to erect a Christmas crèche outside the Fairfax County, Virginia, government center because the county banned nonresidents from using the space (*Warren v. Fairfax County*, 196 F.3d 186 [1999]). In his elegantly crafted concurrence, the circuit's chief judge reasoned: "To limit a forum such as this one to those who live within the [Fairfax County] jurisdiction is to balkanize our civic dialogue. . . . Speech in America cannot be that parochial. . . . Surely a speaker is entitled to spread the faith or the political gospel beyond the community in which she lives" (199).

J. Harvie Wilkinson III is frequently cited as a potential nominee to the United States Supreme Court under a Republican administration. His superb academic and professional credentials; keen intellect; talent for fluent, cogent, eloquent writing; and effective leadership skills would make him the ideal candidate for the high bench, including its chief justiceship. Judicial appointment politics, however, especially in the post-Bork era, can derail even the most qualified candidate, particularly one with a public record as extensive as Judge Wilkinson's. Yet given a propitious alignment of polit-

ical factors, this soft-spoken Virginian might follow in the footsteps of his personal and judicial hero, United States Supreme Court justice Lewis F. Powell Jr.

Barbara A. Perry and Henry J. Abraham

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WISDOM, JOHN MINOR

(1905–1999)

John Minor Wisdom
Bettmann/Corbis

John Minor Wisdom was a federal appeals court judge who changed the face of education and civil rights in the South in the 1960s as he enforced the Supreme Court's *Brown v. Board of Education* decisions mandating that schools be racially integrated. From 1957 until he took senior status in 1977, Judge Wisdom was the intellectual leader of a groups of judges on the old Fifth District Court of Appeals who decided numerous cases and ordered school districts throughout the South to take affirmative steps to integrate educational facilities.

Judge Wisdom authored nearly 1,500 opinions during his tenure, with his most notable decisions addressing issues of civil rights, school integration, and the Ku Klux Klan. In addition to serving as a Fifth Circuit judge, from 1975 till his death in 1999 he served on the Special Court for the Regional Reorganization of Railroads, serving as the presiding judge from 1986 on. He also was a judge from 1968 to 1979 on the Multi-District Litigation Panel, presiding from 1973 to 1979. Recognized for his many accomplishments, his awards included in 1989 the Devitt Distinguished Service to Justice Award; in 1991 he received the Lewis F. Powell Award for Professionalism and Ethics; in 1993 President Clinton awarded him the Medal of Freedom; and in 1996 he received the American Bar Association's highest award. Finally, in 1994, the Court of Appeals building in New Orleans was named after him.

John Minor Wisdom was born in New Orleans in 1905 and received his B.A. from Washington and Lee University in 1925. He then studied at Harvard University for about a year before attending Tulane Law School, graduating first in his class in 1929. In 1931 he married, and he and his wife, Bonnie, had been married for almost sixty-eight years at the time he died. His wife was a noted Shakespeare and Marlowe scholar, and together they had three children. From 1929 to 1957 he was in private practice, starting his own law firm with a law school classmate. To this day, Stone, Pigman, Walther, Wittmann and Hutchinson remains one of the preeminent law firms in New Orleans. While in private practice John Wisdom successfully handled groundbreaking litigation, including *Schwegmann Brothers v. Calvert Distillers Corporation,* 341 U.S. 384 (1951), an important antitrust case that struck down Louisiana laws that had permitted price-fixing.

In addition to maintaining a legal practice, John Wisdom served in the United States Army during World War II (1942–1946) as a lieutenant colonel working on intelligence matters. He was active in his community, serving as director of the New Orleans Urban League and president of the New Orleans Council of Social Agencies. At a time when Louisiana and the rest of the South were solidly Democratic, John Wisdom helped found and became active in the New Orleans Republican Party. During the 1952 Republican presidential convention, he successfully fought to get Dwight Eisenhower's delegates seated, ultimately helping Eisenhower secure the party's presidential nomination.

In 1953 Wisdom was nominated by President Eisenhower to the federal bench. Wisdom turned him down but eventually accepted a second nomination to the Fifth Circuit Court of Appeals in 1957. In 1957, the Fifth Circuit included Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas. It was split in 1980 into the Fifth and Eleventh Circuits, with the new Fifth including Texas, Louisiana, and Mississippi, and the Eleventh including the remainder of the states from the old Fifth Circuit.

At the time Judge Wisdom was appointed to the court, the federal judiciary in the South was in the midst of enforcing the recently decided *Brown v. Board of Education* decisions that declared the separate but equal doctrine unconstitutional. As a result of the Supreme Court's declaring an end to the racial segregation of schools, school districts in the South bitterly opposed efforts to integrate. This opposition ranged anywhere from ignoring the order or closing schools to, in the case of Alabama and Mississippi, using state national guard troops to keep African American students out. Within the context of the Supreme Court's orders to integrate the schools and under the light of the emerging civil rights movement, Judge Wisdom took the bench and issued his opinions. Those who saw the court's decisions as destroying the southern way of life labeled him and Fifth Circuit

judges Elbert Tuttle of Georgia, Richard Rives of Alabama, and John Brown of Texas as "the Four." These four judges, along with federal district court judge Frank Johnson of Alabama, were influential in reshaping the law and civil rights in the South from the 1950s to the 1960s.

Although Judge Wisdom's nearly 1,500 opinions affected many areas of the law, he was most famous in the area of civil rights. Perhaps his most visible opinions were *Meredith v. Fair,* 298 F.2d 696 (5th Cir. 1962) and 305 F.2d 343 (5th Cir. 1962). In the first case, at issue was whether applicants could be required to submit certificates from University of Mississippi alumni regarding their character and fitness for admission to the school. James Meredith applied to the university and indicated in his application that because he was black he could not get the certificates because the school was all-white, and it would be difficult for any of these alumni to support the candidacy of an African American. Judge Wisdom struck down the alumni certificates as unconstitutional and enjoined the school from employing them as an admissions requirement. According to Wisdom:

> We hold that the University's requirement that each candidate for admission furnish alumni certificates is a denial of equal protection of the laws, in its application to Negro candidates. It is a heavy burden on qualified Negro students, because of their race. It is no burden on qualified white students.
>
> The fact that there are no Negro alumni of the University of Mississippi, the manifest unlikelihood of there being more than a handful of alumni, if any, who would recommend a Negro for the University, the traditional social barriers making it unlikely, if not impossible, for a Negro to approach alumni with a request for such a recommendation, the possibility of reprisals if alumni should recommend a Negro for admission, are barriers only to qualified Negro applicants. It is significant that the University of Mississippi adopted the requirement of alumni certificates a few months after *Brown v. Board of Education* was decided. (298 F.2d, 701–702)

These two decisions resulted in James Meredith's being the first African American to be admitted to the University of Mississippi. But that only occurred after four attempts by another judge to stay Wisdom's opinion, after Gov. Ross Barnett of Mississippi personally obstructed Meredith's registration, and after a riot that required use of federal troops and tear gas to maintain order at the school.

Another famous opinion of Judge Wisdom's was that in *United States v. Original Knights of the Ku Klux Klan,* 250 F. Supp. 330 (E.D. La. 1965). This case grew out of events in Bogalusa, Louisiana, where in 1965 militant black activists were confronted by Louisiana's largest klavern of the Ku Klux Klan (KKK). The U.S. Department of Justice moved for an injunction

against the Bogalusa Klan to prevent it from interfering with the civil rights of the black activists. But the attorney for the defendants argued that the Klan was a private organization, beyond the reach of civil rights laws. A special three-judge district court headed by John Minor Wisdom issued the requested order. In doing so, his opinion provided a historical overview of the Klan's history of violence and intimidation, concluding that it "otherwise interfered with (1) Negroes exercising their civil rights, (2) persons encouraging Negroes to assert their rights, and (3) public officials, police officers, and other persons seeking to accord Negroes their rights. These acts are part of a pattern and practice of the defendants to maintain total segregation of the races in Washington Parish" (250 F. Supp., 343).

The court not only enjoined the Klansmen from engaging in intimidation and threats but also required the Bogalusa Klan to file monthly reports detailing its meetings and membership. Judge Wisdom's decision both illuminated the scope of activities that the Klan engaged in and provided the basis for future legal strategies by groups such as the Southern Poverty Law Center to cripple the ability of the KKK to harass African Americans.

United States v. Louisiana, 225 F. Supp. 353 (E.D. La. 1963), was another of Judge Wisdom's more important decisions, and it addressed voting rights. The state of Louisiana had a law that required new applicants to vote to be able to understand and orally explain any passage of the U.S. or Louisiana constitution. The law, not surprisingly, systematically excluded new African American applicants from voting. Judge Wisdom described this requirement as a "wall" to registration that must come down:

> A wall stands in Louisiana between registered voters and unregistered, eligible Negro voters. The wall is the State constitutional requirement that an applicant for registration understand and give a reasonable interpretation of any section of the constitutions of Louisiana or of the United States. . . . We hold: this wall, built to bar Negroes from access to the franchise, must come down because it was a violation of the Fifteenth Amendment, and the equal protection clause of the Fourteenth Amendment, as well as several other sections of the Constitution. (225 F. Supp., 355)

It was in the area of school desegregation that Judge Wisdom made his biggest impact, however. For example, *Singleton v. Jackson Municipal Separate School District,* 348 F.2d 729 (5th Cir. 1965) was one of numerous school desegregation cases that Judge Wisdom and the Fifth Circuit decided. Wisdom ruled that the court would attach great weight to the standards for desegregation plans set by the Office of Education of the Department of Health, Education, and Welfare (HEW). More important, Judge Wisdom expressed his impatience with the southern resistance to integra-

tion, stating: "The time has come for footdragging public school boards to move with celerity toward desegregation" (348 F.2d, 729).

More important, in *United States v. Jefferson,* 372 F.2d 836 (5th Cir. 1966), *affd per curiam* 380 F.2d 385 (5th Cir. 1967), Judge Wisdom and the Fifth Circuit held that states had an affirmative duty to integrate formerly de jure segregated public school systems by incorporating the HEW standards for a school desegregation plan. According to Wisdom, the only school desegregation plan that meets constitutional standards is one that works (372 F.2d, 847). He called for an immediate dismantling of the old segregated school system, "lock, stock, and barrel" (372 F.2d, 878). The judge declared: "The clock has ticked the last tick for tokenism and delay in the name of deliberate speed" (372 F.2d, 896). Not only was the *Jefferson* opinion significant in articulating an affirmative duty on the part of states to desegregate, but appended to it was a model decree indicating how to implement an integrated school system. This model decree was subsequently used by other courts, and, more important, Wisdom's language in *Jefferson* was employed a year later by the Supreme Court in *Green v. County School Board of New Kent County,* 391 U.S. 430, 442 (1968), a case ordering states to integrate immediately. It also paved the way for *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971), an important decision that eventually gave the federal courts the authority to order busing to achieve racial integration of schools.

Judge Wisdom's jurisprudence often anticipated other trends in civil rights policy. In *Weber v. Kaiser Aluminum & Chemical Corporation,* 563 F.2d 216 (5th Cir. 1977), at issue was whether a private company could voluntarily institute an affirmative action policy to remedy past discrimination in hiring without violating Title VII of the 1964 Civil Rights Act. The Fifth Circuit majority said no, but in dissent Judge Wisdom noted that Kaiser Aluminum had perhaps violated discrimination law in the past through its hiring and argued that if an affirmative action plan, adopted in a collective bargaining agreement, was a reasonable remedy for an arguable violation of Title VII, it should be upheld. Wisdom's dissent in *Weber v. Kaiser Aluminum & Chemical Corporation* formed the basis for the United States Supreme Court's opinion overturning the majority decision in that case. The Court held that an employer and a union could voluntarily agree on an affirmative action plan without violating Title VII (*revd sub nom. United States Steelworkers v. Weber,* 443 U.S. 193 [1978]).

Besides being noted for his crusading decisions on civil rights, Judge Wisdom was a stickler for language and precision. He was noted for precision in writing opinions, and whenever new law clerks began working for him, he would hand them several writing style books, including his own personal list of rules that came to be known as Wisdom's Idiosyncrasies. The judge

was a scholar and fluent in several languages, as evidenced by his opinion in *Block v. Compagnie Nationale Air France,* 386 F.2d 323 (5th Cir. 1967), where, in an effort to understand the Warsaw Convention rules regarding the liability of airlines in the event of accidents, he wrote an opinion that flowed from French to English and back to French.

Judge Wisdom took senior status on the Fifth Circuit in 1977, but he remained active and committed to eradicating racial discrimination till his death in 1999. In June 1998 at age ninety-three, less than a year before his death, the judge—in *Valley v. Rapides Parish School Board,* 145 F.3d 329 (5th Cir. 1998)—wrote an impassioned dissent from a panel decision upholding a Louisiana school district's attempt to split the district in two, thus creating an all-white system and an all-black system: "The . . . majority opinion is . . . a blatant attempt to establish a special public school district for whites in a limited area known as the white section of Alexandria. . . . It is incredible that half a century after Brown, one should have to ask for an en banc judgment to prevent the establishment of a school for whites in a public school system" (145 F.3d, 334).

During his tenure as a judge, Wisdom had more than ninety-five law clerks, many of whom rose to high levels of prominence. For example, Lamar Alexander subsequently became governor of Tennessee, secretary of education, a presidential contender, and a U.S. senator. Bill Pryor became attorney general of Alabama, and Ricki Tigert Helfer served as chair of the Federal Deposit Insurance Corporation. Other clerks went on to become law school professors or judges. Overall, Judge John Minor Wisdom's impact on civil rights, the law, and those who worked with him was immense.

David Schultz

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WRIGHT, JAMES SKELLY

(1911–1988)

James Skelly Wright
National Portrait Gallery

J. Skelly Wright was one of the most liberal and activist judges ever to sit on the federal bench. He was the first United States district judge in the Deep South to order school desegregation following the United States Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) that separate schools were unconstitutional. As a member of the District of Columbia Circuit Court of Appeals he made controversial decisions in the areas of affirmative action, campaign spending, environmental protection, business regulation, and judicial review of administrative agency decisionmaking. Apart from those appointed to the United States Supreme Court, Skelly Wright is among the best-known federal judges of the last half of the twentieth century.

James Skelly Wright was born in New Orleans, Orleans Parish, Louisiana, on 14 January 1911 to James E. and Margaret (Skelly) Wright. He was the second of seven children. His mother was of Irish descent, and the children were raised as Roman Catholics. Skelly Wright's uncle, Joseph P. Skelly, was one of the leaders of the Regular Democratic Organization, the machine that ran the city. Joseph Skelly found a job for Skelly Wright's father, a plumber, with the city as inspector for the New Orleans Sewage and Water Board. Despite these political connections, the family was poor

and lived in a downtown working-class neighborhood known as the Irish Channel.

Wright attended public schools in New Orleans. He aspired to be a lawyer but could not afford to attend Tulane University, from which many of the leading attorneys of New Orleans, who practiced in large downtown law firms, had graduated. Instead, after winning a scholarship, he enrolled at Loyola University, a Jesuit institution, in the combined undergraduate/law program, a program that allowed him to finish with a law degree in six rather than seven years. He took summer courses at Tulane in order to earn a teaching certificate and transferred to Loyola's night law school so that he could teach mathematics and history during the day at a public high school. He received the bachelor of philosophy (Ph.B.) degree in 1931 and the LL.B. in 1934.

He was unable to find law-related work in the depths of the Great Depression and continued to teach high school until 1936, when he became a lecturer at Loyola University. Wright's first big break occurred in 1937 when he was appointed an assistant U.S. attorney for the Eastern District of Louisiana, a position he held for five years. His uncle, Joseph Skelly, by then a city commissioner, landed him the job. His uncle had approached Allen J. Ellender, the new U.S. senator from Louisiana, whose election had been supported by the Regular Democratic Organization. Wright began his work as a prosecutor in the narcotics section.

During World War II he served as a lieutenant commander in the United States Coast Guard. He spent most of his war service in London as a member of the legal staff of Adm. James Stark. On 1 February 1945, he married Helen Patton, a secretary in the United States Embassy in London. Her father had been a navy admiral and chief of the U.S. Coast and Geodetic Survey, and she had attended Sweet Briar College in Virginia. They had one son, James Skelly Wright Jr., born in 1947, who became a practicing lawyer in Washington, D.C.

In 1945 Skelly Wright resumed his position as assistant U.S. attorney. In 1946 he left New Orleans to engage in the private practice of law in Washington, D.C., his wife's home. He specialized in maritime and shipping cases. He unsuccessfully argued one case before the United States Supreme Court, *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459 (1947), in which he contended that submitting a convicted murderer to the electric chair twice (the first time the machine had malfunctioned) was "cruel and unusual punishment" in violation of the Eighth and Fourteenth Amendments. In 1947 Wright formed a partnership with John Ingoldsby and Marvin Coles.

Early in 1948, the position of U.S. attorney in New Orleans became vacant. Wright spoke to Senator Ellender to express interest in the position,

and later in the year he returned to New Orleans, following his appointment by Democratic president Harry S Truman to the office of U.S. attorney for the Eastern District of Louisiana. Wright remained loyal to Truman, and the president renewed the prosecutor's appointment after his victory in the November election. Most of Wright's Democratic associates in Louisiana had alienated Truman when they supported Strom Thurmond's 1948 third-party Dixiecrat campaign for the presidency.

In June 1949 a vacancy occurred on the Fifth Circuit Court of Appeals. Wright did not contact either of Louisiana's senators because of their support for the Dixiecrats in the last election; instead he went straight to Tom Clark, the U.S. attorney general, and told him that he was interested in the position. Truman was happy to make the nomination. The chief judge of the Fifth Circuit, Joseph C. Hutcheson Jr., objected, however, on the grounds that the thirty-eight-year-old Wright was too young and inexperienced. Hutcheson suggested to Truman that he promote Wayne G. Borah from the district court to the court of appeals and appoint Wright to fill Borah's vacancy. The president agreed.

On 21 December 1949, while Congress was in recess, Truman appointed Wright to the United States District Court for the Eastern District of Louisiana. Truman submitted Wright's nomination to the Senate on 5 January 1950. Although Truman had snubbed them in the nomination process, both of Louisiana's senators, Ellender and Russell Long, supported Wright's candidacy. The Senate confirmed the nomination on 8 March 1950.

The Desegregation of the New Orleans Schools

Wright's role in the elimination of racial segregation made him the most hated man in Louisiana in the 1950s and 1960s. He crossed the Rubicon on segregation just a few months after his confirmation as a federal judge. Following the United States Supreme Court's decision to desegregate the University of Texas Law School in *Sweatt v. Painter,* 339 U.S. 629 (1950), on the grounds that separate law schools could never be equal, a three-judge district court in October 1950 ordered the desegregation of the Louisiana State University Law School. Judge Wright wrote the opinion for the unanimous panel (*Wilson v. Board of Supervisors of Louisiana State University,* 92 F. Supp. 986). Wright acknowledged that the *Wilson* case marked his decision no longer to accept the status quo in race relations in Louisiana.

On 5 September 1952, A. P. Tureaud, a black civil rights lawyer associated with the National Association for the Advancement of Colored People, filed a lawsuit to desegregate the public schools in New Orleans, *Bush v. Orleans Parish School Board.* Wright was in the battle of his life, for Louisiana was determined to maintain racial segregation and was willing to

use every method of resistance, short of violence, that it could muster. Between 1954 and 1963, the Louisiana legislature passed more than a hundred resolutions and laws opposing desegregation in defiance of the Supreme Court, more than any other state.

Wright asked Chief Judge Hutcheson to appoint a three-judge district court to hear the case as allowed by section 2281, volume 28, of the United States Code when a plaintiff challenges the constitutionality of a state law in federal court. Hutcheson agreed such a court was required and appointed District Judge Herbert Christenberry and Circuit Judge Wayne Borah to join Wright on the panel. In 1955, in *Brown v. Board of Education II,* 349 U.S. 294, the Supreme Court entrusted the implementation of its decision that segregated schools are unconstitutional to the United States district courts, which were instructed to proceed "with all deliberate speed."

The special three-judge district court convened for the first time on 1 December 1955. Because of the clarity of the Supreme Court's decision in *Brown* that segregated schools violate the equal protection of the laws clause of the Fourteenth Amendment, Christenberry and Borah withdrew from the panel, since no serious constitutional question remained, leaving the case to Wright alone. On 15 February 1956, Wright became the first district court judge within the Fifth Circuit (Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida) to issue an injunction ordering a school board to abolish racial segregation. For Wright his decision was the logical outcome of the South's defeat in the Civil War and the subsequent changes to the U.S. Constitution made during Reconstruction. Wright concluded his opinion, "We are, all of us, freeborn Americans, with a right to make our way, unfettered by sanctions imposed by man because of the work of God" (*Bush v. Orleans Parish School Board,* 138 F. Supp., 341–342).

Wright enjoined the members of the Orleans Parish School Board "from requiring [or] permitting segregation of the races in any school under their supervision" and ordered the board "to make arrangements for admission of children to such schools on a racially nondiscriminatory basis" (138 F. Supp., 342). A spokesman for the board responded to Wright's decision, "We will not integrate" (quoted in Baker 1996, 265). The Louisiana legislature unanimously passed a resolution declaring Wright's decision to be in violation of the U.S. and Louisiana constitutions. The board itself filed thirty-six delaying motions. The only prominent supporter of Wright's desegregation order was Joseph Francis Rummel, archbishop of the Catholic Archdiocese of New Orleans. The intense resistance of the school board, the Louisiana legislature, and the governor made the *Bush* case distinctive, and the conflict became known as "the second battle of New Orleans."

On 15 July 1959, the black plaintiffs returned to Wright's courtroom to demand compliance. In 1958 the Supreme Court had dealt harshly with

the attempts by the governor and legislature of Arkansas to delay desegregation in defiance of federal district court orders (*Cooper v. Aaron,* 358 U.S. 1). Wright ruled that there had been too much deliberation and not enough speed and ordered the school board to produce a plan for desegregating the schools by 1 March 1960. He suggested that the board begin by desegregating one grade a year. He called upon the news media, public and private leaders, church officials, and the school board not to excite the white community and produce a violent confrontation with federal authorities similar to that in Little Rock, Arkansas. In October, Wright extended the deadline to 16 May 1960.

When the parties convened on that date, the school board presented no plan to desegregate. Wright decided that he had had enough and that, although other judges might allow still more delay, he was going to force the school board to comply. He came up with his own plan, even though he had no experience in educational administration. He ordered desegregation of the first grade at the opening of the school year in September. Black six-year-old children could attend the formerly all-white elementary school nearest their home. Desegregation would proceed, he ordered, at the pace of one grade per year. Wright thus became the first federal judge in the Fifth Circuit to set a specific date for integration of the public schools. When the governor of Louisiana, Jimmie Davis, threatened to take over the New Orleans schools and close them in order to prevent their desegregation, Wright issued an injunction to him and the attorney general.

The school board requested a postponement of the September date for implementing the court's decision, and Wright granted one until 14 November 1960, six days following the presidential election. He said that the U.S. Justice Department had asked him to delay the order until after the election in order not to embarrass Vice Pres. Richard Nixon's campaign for the presidency. When a committee of the state legislature attempted to take control of the Orleans Parish school system and to shut down the schools in order to evade Wright's desegregation order a few days before its implementation, Wright issued an injunction prohibiting all interference with New Orleans schools by the state of Louisiana. On Sunday, 13 November, facing open rebellion from the state government, Wright took the extraordinary step of issuing a restraining order against the governor, his cabinet, and every member of the state legislature prohibiting any interference with the next day's desegregation. It was the first time that a federal judge had issued an injunction to an entire state legislature.

Nearly all of Wright's New Orleans friends abandoned him and his wife, including his best friend from law school, Emile Wagner, who was now an elected member of the school board committed to maintaining separate schools for the races. Wright, aware that 90 percent of the white people of

New Orleans hated him, kept to himself, ate lunch alone, and stayed at home when not at work. He walked as far from the curb as possible, afraid that a pedestrian would push him into traffic. The Wrights received volumes of hate mail and crank telephone calls. The city posted a twenty-four-hour police guard around the judge's home. An effigy of Wright hung on the grounds of the Louisiana Capitol with a swastika on the back and a hammer and sickle on the front and a label hanging from the neck saying "J. Wrong." There were several cross burnings on his lawn. Nationally, however, he became a hero. *Time* magazine named him to a judicial honor roll, and newscasters referred to him as one of the most courageous judges in the South. His rulings would have ended his judicial career before the age of forty had he been an elected state judge. Because he was a federal judge, however, he was immune from retaliation and became a monument to life tenure.

Wright as an Appellate Judge

Wright's courage was noticed by the Kennedy administration. In the fall of 1961 Atty. Gen. Robert Kennedy telephoned Wright to inform him that Pres. John Kennedy wanted to promote Wright to the Fifth Circuit but that the implacable opposition of both Louisiana's Democratic senators, Allen Ellender and Russell Long, and Mississippi senator James Eastland, chairman of the Judiciary Committee, made it impossible. Then E. Barrett Prettyman retired from the United States Court of Appeals for the District of Columbia, and President Kennedy offered the position to Wright, knowing that southern senators would be happy to get the hated judge out of the South. Wright accepted and Kennedy announced the nomination on 15 December 1961. The Senate Judiciary Committee and then the full Senate confirmed Wright without objection on 28 March 1962. The assassination of President Kennedy in November 1963, however, ended any chance that Skelly Wright would be promoted to the Supreme Court.

During his twenty-five years on the Court of Appeals, Wright was a member of the liberal, activist bloc, which formed a majority until Pres. Richard Nixon began making judicial appointments in 1969. Wright consistently ruled in favor of groups that were politically weak and subjected to discrimination by the majority, including blacks, homosexuals, the criminally accused, environmentalists, and political dissidents. Wright's hero was Supreme Court justice Hugo Black. Wright's method of judging was "result-oriented" as opposed to formalistic. In 1982, he described his judicial thinking process thus: "I want to do what's right. When I get a case, I look at it and the first thing I think of automatically is what's right, what should be done—and then you look at the law to see whether or not you can do it. . . .

I am less patient than other judges with law that won't permit what I conceive to be fair" (quoted in Baker 1996, 493).

Between 1950 and 1962, Wright taught law as an adjunct faculty member at his alma mater, Loyola University. As a circuit judge, he gave numerous speeches, many of which were published in law reviews, in which he defended his controversial judicial views. The best-known case with which Wright was associated during his years on the District of Columbia Circuit Court of Appeals was the Pentagon Papers case, *New York Times v. U.S.*, 403 U.S. 713 (1971). Wright was the sole dissenter on a three-judge panel that issued an injunction to prevent newspapers from publishing stolen classified documents. Wright was vindicated eleven days later when a majority of Supreme Court justices ruled against censorship of the press on First Amendment grounds.

Wright served as chief judge from 1978 to 1981. He assumed senior status on 1 June 1986. His service as a federal judge terminated on 6 August 1988, at the age of seventy-seven, when he died of prostate cancer at his home in Westmoreland Hills, Maryland.

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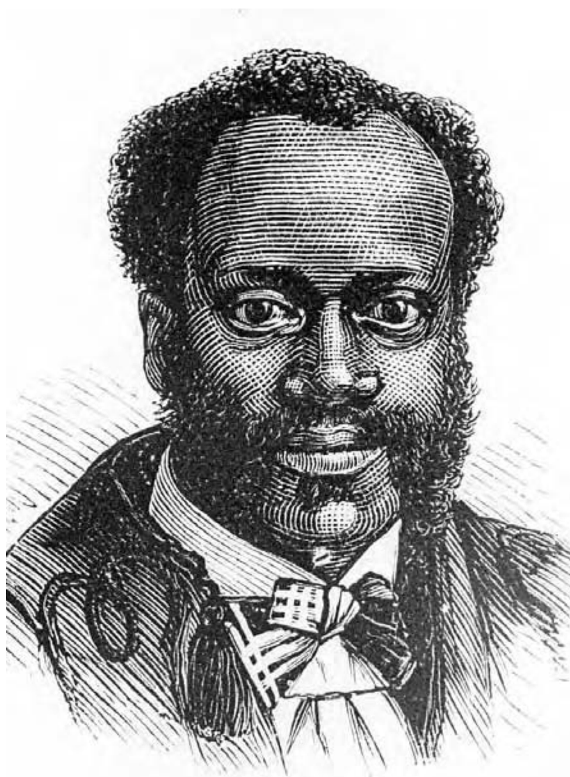
WRIGHT, JONATHAN JASPER

(1840–1885)



Jonathan Jasper Wright
Courtesy of South Carolina Library, University of South Carolina, Columbia

Jonathan Jasper Wright, associate justice of the South Carolina Supreme Court from 1870 to 1877, was the first African American to sit on any state's highest court, and "it would take almost another century for another African-American to be appointed to an American court of last resort" (Walsh 1997, 294). Although Wright was the focus of extensive national attention on attaining the position, his judicial career ended in disgrace and his life in obscurity. Members of the public and scholars essentially ignored his accomplishments for almost a century; in recent decades, however, his reputation and record of public service have been revived and reconstructed.

Wright was born on 11 February 1840 in Luzerne County, Pennsylvania. He was the son of Jane and Samuel Wright, a runaway slave from Maryland. The elder Wright purchased a farm at Springville, Susquehanna County, Pennsylvania, in 1854 and encountered all the economic problems faced by most small farmers (Woody 1933, 115). The younger Wright first attended the local public schools, but at fifteen, he began private studies with abolitionist and former Presbyterian missionary Dr. William Wells Pride. He then attended Lancasterian Academy in New York, where he graduated in 1860.

Wright's first professional position was teaching school at Montrose in his home county while he read law at the offices of Bentley, Fitch, and Bentley. After four years, he moved to Wilkes-Barre to a new teaching position and continued his legal studies at the chambers of Judge O. Collins. He also became active in politics—participating in both Fredrick Douglass's first national convention of African Americans and the Pennsylvania State Equal Rights Convention for Colored People (Gergel and Gergel 2000, 37–38).

In 1864, Wright sought admission to the Pennsylvania bar. Judge Ulysses Mercur informally, but unambiguously, indicated that any effort by Wright to become an attorney would be unsuccessful. Upon this denial, Wright joined the American Missionary Society and was sent to Beaufort County, South Carolina, to establish schools for illiterate black military personnel stationed there. Wright was apparently successful in his efforts as within a year he wrote that all of the men could read the New Testament. In addition, he participated in civic activities and gave public lectures including one to a crowd of 5,000 on the anniversary of emancipation (Gergel and Gergel 2000, 39).

Wright returned to Pennsylvania when he learned that Judge Mercur had departed from the bench, an event that revived Wright's hope of obtaining license to practice law. Indeed, the new judge, B. F. Skinner, gave him the examination and approved the application on 18 August 1866. Wright thus became the first black attorney in Pennsylvania. Not all observers agreed with Judge Skinner's decision, however, and the local newspaper described Wright as impudent for even seeking the opportunity (Gergel and Gergel 2000, 40).

When Wright's attempt to establish his own practice was unsuccessful because of lack of business, he obtained a position with the Freedman's Bureau and returned to South Carolina as a lawyer for the federal government. In February 1867, Wright and William J. Whipper became the first blacks to appear as attorneys in legal proceedings in South Carolina in the case of *United States v. William T. Bennett,* which involved the assault by a white man on a black man (Gergel and Gergel 2000, 40). A year later, Wright, Whipper, and Robert B. Elliott achieved another first when they were the first African Americans to be admitted to the South Carolina bar (Woody 1933, 121).

Wright resumed his political activities and was elected to the state constitutional convention from Beaufort County. His stand on issues before the convention reflected his life experiences. As a former teacher, he strongly advocated public schools, although he did not support either compulsory education or segregated schools. His feeling was that black students would

not seek to attend white schools, a prediction that proved correct during the Reconstruction era. As the son of a small farmer, he fought for protection of homesteads from forced sales by creditors and against any limits on state indebtedness in order that the money would be available to help the poor. As the victim of racial bias and the son of a former slave, he opposed life tenure of judges and pointed to Chief Justice Roger Taney, author of *Scott v. Sandford,* as an example of judicial arrogance and isolation (Underwood 2000, 16–17).

Wright served on South Carolina's judiciary committee and thus was instrumental in structuring the constitution's judicial section. It was upon his motion that a three-member Supreme Court was created. He opposed public election of appellate judges and instead supported selection of judges by the legislature as the representatives of the people—the method adopted by the convention—while advocating the election of inferior court judges (Underwood 2000, 16–17).

Wright was elected as state senator from Beaufort, which set up his selection to fill the unexpired term as associate justice of the Supreme Court by a joint session of the South Carolina legislature in 1870. His chief opponent was his former co-counsel and house member, Whipper, who was known as a contentious member of the radical wing of the Republican Party. Wright, more of a centrist, was able to forge a coalition between the more moderate Republicans and Democrats and thus win the position. Later that year, he was elected to a full six-year term (Gergel and Gergel 2000, 44, 46).

Wright joined Chief Justice Franklin D. Moses Sr., "the first Jewish chief justice ever elected by any state," and Associate Justice A. J. Willard, a law school graduate from New York, on the bench (Gergel and Gergel 2000, 46). Woody described the 1870–1877 court as consisting of "Moses, a scalawag, Willard, a carpet-bagger, and Wright, a Negro" (1933, 118), but he offset those harsh comments by identifying Moses as a "man of experience, integrity, and recognized ability" and Willard as a "well-trained lawyer" (118). Contemporary newspapers described the events when Wright first assumed the bench. Chief Justice Moses "turned in his seat, bowed, and shook hands with Wright" while Justice Willard made "no sign of recognition whatever" (*Charleston Daily Courier,* 4 February 1870 and *Charleston Daily News,* 4 February 1870). The antipathy toward Wright's selection was not limited to Willard, but in other quarters, there was great jubilation. Even newspapers that routinely railed against the power of black politicians supported Wright's appointment—if indeed a black was to fill the position.

As a justice, Wright was diligent and participated in nearly all of the cases heard by the court during his tenure. Woody wrote that "he seems to

have been assiduous in attention to his duties and to have performed them creditably" (1933, 122). Wright's judicial philosophy has been characterized as formalism or strict adherence to the law, essentially divorcing himself from his personal attitudes and ideology about the subject matter of the litigation. Judicial formalists eschewed making moral or policy decisions, an approach denounced by critics because it favored the elites. In addition, Wright strongly believed in following established precedent. "Judge Wright's adherence to formalism as a jurisprudential method, and perhaps his proclivity not to offend the white establishment, may have influenced him to decide cases before him without emphasizing race, class or community disability or personal standing" (Smith 2000, 77).

Most of the cases reaching the Supreme Court during Wright's service involved debts or property, but the difficulties of Wright's position became immediately apparent when those cases involved matters concerning lingering effects of slavery. For example, in *Calhoun v. Calhoun*, 2 S.C. 283 (1870), the court faced the question of whether debts for the purchase of slaves survived the war and South Carolina's attempt to abolish such debts; Wright concurred in Chief Justice Moses's opinion that the contract underlying the debt was valid. In *Russell v. Cantwell*, 5 S.C. 477 (1875), Russell brought suit for malicious prosecution for events that occurred while he was a slave. Although Wright had declared during the constitutional convention that slavery was always illegal, his opinion as a justice was that, according to the law at the time of the event, Russell could have not brought the suit as a slave and that bar still existed in 1875.

The case that led to Wright's fall from grace began in the contested election of 1878. In the governor's race, former slave owner and Confederate general Wade Hampton was at the top of the Democratic ticket and Daniel Chamberlain, incumbent reform governor, was the titular head of the divided Republican Party. The election was marred by violence and allegations of corruption and resulted in each faction's claiming victory and the establishment of rival legislatures and governors. The Supreme Court dealt with the legislative issue first and found the Democratic body to be legally constituted.

The putative governors each issued pardons to prisoners to provide the test case to move the matter into the courts. In *Ex parte Norris*, 8 S.C. 408 (1877), in the absence of Chief Justice Moses who had been incapacitated by a stroke, Justices Willard and Wright approved the pardon issued by Hampton, effectively recognizing Hampton as governor, although by agreement, the decision was not immediately made public. On 27 February 1877, Willard wrote the order that was endorsed by Wright indicating his concurrence; however, two days later, Wright produced a contradictory order indicating that, upon reflection, he had altered his opinion The Clerk's Office

released the original order on 2 March. Speculation immediately swirled as to Wright's motivations and the pressures to which he was subjected; Wright actually fled the state for a time for fear of reprisals (Woody 1933, 122–127).

Within days, efforts to remove Wright from the court solidified with the creation of a house committee to investigate his activities, and on 6 June 1877, Wright was impeached on the grounds of drunkenness, a charge that has since been discounted. Recognizing the probable outcome since other prominent Republicans were being forced from office by the Democratic legislature, Wright resigned in August 1877 (Gergel and Gergel 2000, 64–65).

The next year, Wright's reputation was further tainted during hearings about corruption by former governors Chamberlain and Franklin Moses Jr. From his jail cell, Moses alleged that, during consideration of *William Whaley v. Bank of Charleston,* 5 S.C. 189 (1873), Chamberlain, an attorney in the case, approached Moses to act as broker and to offer Wright a bribe to break the stalemate between Chief Justice Moses and Willard. Wright vehemently denied his participation in the scheme, and the investigative committee was unable to confirm that Wright even had knowledge of the conspiracy (Gergel and Gergel 2000, 66–67).

From 1872 to 1881, Wright served on the Board of Trustees of Claflin College, one of the first institutions of higher education established for black students in South Carolina. Wright himself had been awarded the LL.D. degree from Avery College, Allegheny City, Pennsylvania, shortly after his election and was appointed as Chair of Law at Claflin in 1881. Following his resignation from the bench, Wright combined his professions of teaching and law by establishing his law practice in Charleston and conducting classes for Claflin (Fitchett 1943, 47, 49). Wright's law practice was only moderately successful, owing, in part, to poor health as a result of tuberculosis. He died 19 February 1885 and was buried at the Calvary Episcopal Church, Charleston (Gergel and Gergel 2000, 69–70).

Assessment of the quality of Wright's work on the bench has been mixed. Journalist John Reynolds, a contemporary of Wright's, reported that many thought that Wright was not capable of authoring the opinions credited to him and that they were actually prepared by someone else (Lengel 1997, 41). James Lengel pointed out, however, that Reynolds produced no evidence to support that statement and that opinions attributed to Wright often employed Pennsylvania law as precedent as would be expected of a lawyer trained in that state (44). Woody commented that the opinions in "all the important cases involving novel points of law or large political or economic interests" were produced by either Moses or Willard, although Wright's "written opinions were clearly expressed and judicious in tone" (1933, 121).

Although the early commentaries were not laudatory, Wright's reputation as a jurist has undergone something of a resurgence in recent decades. In his analysis of Wright's work, Chief Justice J. Clay Smith, a law professor at Howard University, argued that although "Wright's ability to influence legal history and create binding precedential authority was severely limited by the small number of cases that he was assigned," Wright remained "one of the finest legal minds . . . [of] Reconstruction" (2000, 75). Of the 426 signed opinions during the seven-year period, Wright authored only ninety or 21 percent, whereas Willard produced 162 opinions or 38 percent and Moses was the most prolific, authoring 175 or 41 percent of the signed opinions. Although extant records do not permit the exact determination of the number of cases assigned to each judge, it appears that the caseload was not divided equally among the three because of the disproportionate number of signed opinions by the other justices (75–76). Jaffe argued that Smith overstated Wright's impact on South Carolina jurisprudence because only eight of Wright's opinions were deemed controlling by later courts and that, although Wright was certainly an important historic figure, he did not rate among the great legal scholars (2001, 11). Instead, "he was a conservative justice who stayed well within the bounds of safe, legal reasoning for his time" (12).

Whatever the evaluation of Wright as a jurist, there is no disagreement on Wright's eminence in the legal history of South Carolina and of the nation. Wright occupies a noteworthy place in American judicial history because of his unique accomplishments. In one of his public addresses, Wright spoke of his dream of leaders noted not for their party, not for their section of the nation, nor their race but for their "ability to perform well the duties to be committed to their charge" (Woody 1933, 131). The restoration of his stature as a leading jurist of Reconstruction has been the product of such assessment.

Susan Coleman

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WYTHE, GEORGE

(1726–1806)

George Wythe *(right)*
Statue at Marshall-Wythe Law School,
College of William & Mary.
Sculpted by Gordon S. Kray.

George Wythe, Virginia lawyer, legislator, and law professor, served as a judge on Virginia's High Court of Chancery from the court's inception in 1778 to his death in 1806.

Wythe, the son of Thomas and Margaret Walker Wythe, was born in Elizabeth City County (now Hampton), Virginia, sometime in 1726. The first Wythes arrived in Virginia about 1680. On his mother's side, Wythe descended from the Pennsylvania pioneer George Keith. Thomas Wythe died in 1729, leaving Margaret Wythe to raise George; his older brother, Thomas; and his younger sister, Anne. Margaret Wythe launched George's education in the Greek and Latin classics, which eventually formed the course of study for Wythe's law students. About 1742 Wythe began to study law with Stephen Dewey, his uncle by marriage and king's attorney for Charles City County. Dewey was apparently an inattentive mentor and left Wythe to master the law on his own.

As a second son, Wythe inherited none of his father's estate.

After completing his legal training, Wythe set out to practice law and make his fortune in the Shenandoah Valley of Virginia. He lived in Spotsylvania County, practiced mainly in Orange County, and was also admitted in Augusta and Caroline Counties. Zachary Lewis, king's attorney for Spotsylvania, chose Wythe as an associate, and Wythe became the busiest lawyer in the area, apart from Lewis himself. Wythe cemented his connection to the Lewis family by marrying Lewis's daughter Anne on 26 December 1747. Both the marriage and the partnership were short lived. Anne Lewis Wythe died on 8 August 1748, and soon after Wythe returned to the tidewater, settling in Williamsburg.

Wythe's cousin by marriage, longtime judge and burgess Benjamin Waller, guided Wythe's entry into the Williamsburg area legal and political establishment. He was admitted to the York and Warwick (now Newport News) County bars in 1748 and established a reputation for exhaustive preparation of cases and spotless integrity. Wythe began his political career in 1748 as clerk of the Privileges and Elections committee and the Propositions and Grievances committee of the House of Burgesses. Wythe reached the top of the legal profession as Peyton Randolph's temporary replacement as attorney general, serving from January 1754 to May 1755.

In 1755 Wythe inherited his brother's estate and married Elizabeth Taliaferro. Her father, Richard, is said to have designed the couple's house on the Palace Green. Wythe's political fortunes rose less steadily than his legal career. He was first elected a burgess for Williamsburg in 1754. He lost elections for an Elizabeth City County seat in 1756 and 1758. William and Mary sent him to the House of Burgesses in 1758, as did Elizabeth City County in 1761 and 1766. Wythe resigned to become clerk of the House of Burgesses in 1768 and the same year served as mayor of Williamsburg. Wythe was at the center of the capital's intellectual and social life. He was an intimate of Lt. Gov. Francis Fauquier and introduced his first law student, Thomas Jefferson, to the upper strata of Virginia society.

Wythe's prominence in Virginia propelled him to the national stage. He was elected to the Continental Congress in 1775 and took his place on the pro-independence side. He returned to Virginia in 1776 and was elected speaker of the House of Delegates in 1777. The same year he helped revise the laws of Virginia with Thomas Jefferson and Edmund Pendleton. Wythe wrote bill 92, establishing an admiralty court (ignored by the legislature), and bill 93, creating a Court of Appeals consisting of the judges of the High Court of Chancery, General Court, and Court of Admiralty (passed by the legislature). In 1787 Wythe returned to Philadelphia as a member of the Constitution Convention. The next year he chaired the Committee of the Whole at the Virginia ratifying convention.

George Mason (1725–1792)

Often assumed to have been a lawyer because of his role in drafting both the Virginia Declaration of Rights and the state's first constitution, Virginia's George Mason of Gunston Hall was a self-educated planter. Despite his lack of legal training, Mason was appointed a commissioner of the peace in Fairfax County, Virginia, in 1747. A scholar explained that "[b]y inheritance Mason belonged to the privileged class of gentlemen justice who were expected to assemble at the courthouse once a month to govern the county and decide lawsuits without compensation of any kind except prestige" (Horrell 1989, 34). Mason was dropped, apparently for poor attendance, in 1752 but rejoined the court in 1764. Perhaps in part because of poor health, Mason continued his record of spotty attendance, even when serving as the court's chief judge. As a commissioner, Mason served as a representative for the "country" party who opposed tax levies that were advocated by the merchants in Fairfax (Mason believed that since commissioners were appointed, albeit now under a constitution that Mason had himself largely authored, this violated the principle of "no taxation without representation").

Accepting a rare appointment as a delegate to the U.S. Constitutional Convention of 1787, Mason gave a strong speech opposing slavery but ultimately opposed the new Constitution both because it lacked a bill of rights and because it provided for what he considered to be the overcentralization of powers. This position led to a sad rift with George Washington, George Mason's longtime neighbor and friend. Mason's decision not to swear allegiance to the new Constitution appears to account for his resignation from his court in 1789. Attempting to account for the fact that Mason clung so long to a judge's chair that he so rarely occupied, one writer has concluded that, however lowly, Mason's office allowed him to serve, as in the Roman republic that he so admired, as "a tribute of the people" (Horrell 1989, 55). Today, there are very few judicial posts left where gifted men like Mason, without formal legal training, can serve.

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Wythe's longest-lasting contribution to American law was as a teacher. In December 1779, the board of visitors of the College of William and Mary appointed Wythe the professor of law and police, the first such professorship in the country. From his chair, Wythe launched the careers of the Virginia and American legal and political elite. Wythe's students included several future governors of Virginia, future president James Monroe, and future chief justice John Marshall. Wythe stepped down in 1790, replaced by St.

George Tucker, a future federal district court judge and also a Wythe student. Wythe moved to Richmond in 1791, where he continued to take on law students, among them Henry Clay.

The longest phase of Wythe's career was his tenure as a judge of the High Court of Chancery from 1778 to 1806. The Virginia legislature created the chancery court in 1778 and unanimously elected Wythe, Edmund Pendleton, and Robert Carter Nicholas as the first judges, with Pendleton as the presiding judge. The were sworn in on 6 April 1778. The chancellors also sat on the Court of Appeals. The legislature created a separate Court of Appeals in December 1788, elevating Pendleton and John Blair to the new court and leaving Wythe as sole chancellor. Wythe doubtless could have been promoted to the highest state court or to a federal court if he wanted but preferred to remain at the chancery. By 1802 the caseload was too much for one chancellor to administer justice. That year the legislature divided the High Court of Chancery into three districts, sitting at Staunton, Richmond, and Williamsburg. Wythe served as chancellor for the Richmond district until his death on 8 June 1806.

Wythe's first decade as a judge cannot be completely reconstructed, as the court records burned in 1865. The most important Court of Appeals case in the Wythe era, *Caton v. Commonwealth* (1782), was popularly known as the Case of the Prisoners and was an early instance of judicial review. James Lamb, Joshua Hopkins, and John Caton were convicted of treason on 15 June 1782. The trio appealed to the General Assembly for a pardon. The House of Delegates voted to grant one, but the Senate did not. The Treason Act of 1776 gave the power to pardon traitors to the General Assembly, but the constitution gave the pardoning power to the governor and council of state unless the law directed otherwise. In October, the General Court heard the case and sent it to the Court of Appeals. Pendleton convened the court on 29 October and heard arguments on 31 October. The ultimate decision hung on whether the Court of Appeals could hear the case, whether the court could declare a law unconstitutional, and if so, whether the Treason Act was unconstitutional.

The court rendered its decision on 2 November. According to Pendleton's notes, Wythe "at first doubted of the Jurisdiction but afterward expressed himself satisfied" that the Court of Appeals could hear the case. Wythe went on to argue that "an Anti-constitutional Act of the Legislature would be void, and if so, that this Court must in Judgement declare it so, or not decide according to the Law of the land. However that the Treason Act was not against the Constitution, and therefore the concurrence of the senate was necessary to the Pardon of a Traitor, and this paper not a pardon" (Pendleton 1967, 2:426–427). Daniel Call attributed a longer speech to

Wythe and a more ringing defense of judicial review. Wythe proposed to tell the legislature, "here is the limit of your authority; and hither shall you go, but no further" (quoted in Brown 1981, 249).

As chancellor, Wythe heard equity cases, mostly involving wills, land claims, and payment of debts. The revolution threw each of these into confusion, leaving Wythe no shortage of work. Wythe considered the High Court of Chancery as a dispenser of pure justice. Wythe believed equity courts had an advantage over common law courts, because an equity court could command the execution of an agreement such as a will or deed, whereas a common law court could only assess and grant damages (Wythe 1795, 60). Wythe saw no conflict between equity and common law courts. Equity courts stepped in when the common law could not grant adequate relief; "in proceeding thus, the court of equity maintains a perfect harmony with the court of common law, or is not at variance with it" (33). The equity courts could grant the relief that the common law court "reluctantly withholds," thereby "accomplishing the main design of both, which is the attainment of justice" (33).

The more political instincts of Edmund Pendleton, presiding over the Court of Appeals, frequently frustrated Wythe's quest for pure justice. Wythe's 1795 collection, *Decisions of Cases in Virginia in the High Court of Chancery, with Remarks upon Decrees of the Court of Appeals, Reversing Some of Those Decisions*, is self-explanatory. The collection demonstrated the depth of Wythe's learning, with frequent references to Roman and English law. Wythe also showed his displeasure with the Court of Appeals, casting himself as a scholar thwarted by the baser instincts of his superiors. Wythe complained that he was "bound to accept the decrees of the court of appeals," but did so with "the poignancy which Galileo suffered, when, having maintained the truth of the Copernican in opposition to the Ptolemaic system, he was compelled, by those who could compel him, to abjure the heresy" (44). Pendleton planned to respond but decided against it upon learning that Wythe had sold few copies.

Wythe's most important case as sole chancellor was *Page v. Pendelton and Lyons* in 1793. The case revolved around the politically charged issue of payment of prewar debts to British merchants. In 1783 the Virginia legislature allowed debtors to pay into the state loan office, which would assume the debts and pay them off in worthless paper money. The peace treaty of 1783 prohibited any interference with the collection of prewar debts. Wythe ruled that Virginia had no right either to absolve Virginians of their debts to British merchants or to alter the means by which those debts were to be paid. Again, Wythe cast himself as the agent of pure and impartial justice, having taken "an oath, which no human power can dispense, that

he will do equal right to all manner of people" (Wythe 1795, 132). Equal justice to British merchants meant that the paper money from the loan office did not constitute payment of the debts.

One of Wythe's last cases, *Hudgins v. Wright* (1806), demonstrated the problem slavery presented to the political and legal thought of revolutionary Virginia. Three generations of women claimed by Hudgins argued that they were descendants of free woman, and therefore free. Wythe put the burden of proof on the master. As he could not prove the women were slaves, Wythe ruled them free, not only as a matter of law but also as a birthright of all people. Higher courts upheld Wythe on the issue of burden of proof, but not on that of natural right.

Wythe served the law all his life, but in the end it failed him. Wythe had no children and willed his estate to his sister's grandson, George Wythe Sweeney. Sweeney had been forging checks of his granduncle's account and needed money. On 25 May 1806, Sweeney poisoned Wythe's morning coffee. Wythe lingered long enough to disinherit his grandnephew, before dying on 8 June 1806. Sweeney was acquitted for lack of evidence.

Robert W. Smith

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WYZANSKI, CHARLES E., JR.

(1906–1986)

Charles E. Wyzanski Jr.
Courtesy of Art & Visual Materials, Special Collections Department, Harvard Law School Library

Brilliant, contemplative, and committed to the ideals of democracy and justice, district court judge Charles E. Wyzanski made his mark not only on the law, but seemingly on everyone he met.

Charles Wyzanski was born in 1906 into a well-to-do family in Brookline, Massachusetts, a prosperous suburb of Boston. As a child, he attended prestigious private schools, including Phillips Exeter Academy, that fostered his lifelong love of learning. He attended Harvard University, graduating in 1927 and earning Phi Beta Kappa honors. Through his prestigious family and schooling, Wyzanski became connected to a circle of friends and colleagues that was destined to change American government and law. Its members—ranging from Oliver Wendell Holmes Jr., who encouraged young Charles to go to law school, to Judges Augustus and Learned Hand, to Prof. Felix Frankfurter and the best and brightest minds of Pres. Franklin Roosevelt's New Deal administration—would become giants in their fields, in a period of political and legal creativity the likes of which the United States has not seen since.

Wyzanski's tenure at Harvard Law School was impressive. He earned almost straight A grades, made the law review, and graduated *magna cum laude*. The relationships he built at law school proved seminal in directing

his legal, and later his judicial, career. On the recommendation of Prof. Felix Frankfurter, Wyzanski was offered clerkships on the United States Court of Appeals for the Second Circuit with both Augustus Hand and Learned Hand. These judges profoundly influenced the young law graduate. At the conclusion of his clerkships, he went to work for the law firm of Ropes and Gray in Boston. His life in private practice, however, was short lived. Wyzanski refused an assignment to write a brief against an anti-injunction law because he believed that the law was both valid and desirable (Freund 1987, 711). Such defiance could typically result in the discharge of a young associate attorney, but in this case news of Wyzanski's decision made its way through well-connected New England channels all the way to Pres. Franklin Roosevelt. Roosevelt appointed Wyzanski, who was only three years out of law school, to become solicitor of the Department of Labor, serving under labor secretary Frances Perkins, the nation's first female cabinet member.

At first, Wyzanski represented the Department of Labor by helping to draft key New Deal legislation, including the National Recovery Act. He was transferred to the Justice Department in 1935, where he defended the Labor Department in a number of soon-to-be famous New Deal court cases. The most important of these was undoubtedly *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (1937). In *Jones & Laughlin,* the Supreme Court, in a notable departure from its previous approach to New Deal legislation, upheld the National Labor Relations Act and, with it, Congress's ability to address the nation's ongoing economic crisis by regulating interstate commerce and labor-management relations.

In 1941, when Wyzanski was just thirty-five years old, President Roosevelt appointed him to the federal district court in Massachusetts. Wyzanski loved the district court because it gave him independence and allowed him to connect with and educate the lawyers, clients, and jurors who came before him at trial (Freund 1987, p. 712). He turned down offers for the appellate court, choosing instead to stay in his first judicial appointment—which he did for the next forty-five years.

Wyzanski's intellectual brilliance and love of law made him a superlative judge. His judicial philosophy was strongly influenced by Judges Augustus and Learned Hand and Jerome Frank, Justices Oliver Wendell Holmes Jr. and Louis Brandeis, and his former academic mentor–turned–justice Felix Frankfurter. Wyzanski earned a reputation for his extensive and unending reflection on the judge's role. Indeed, his attitude toward judging was not only the product of his background but also of his extensive knowledge of history and philosophy. Wyzanski was extremely well read and had a penchant for including subtle, arcane, and yet adept references to history and literature in his writings and conversations.

Burnita S. Matthews (1894–1988)

Burnita Shelton Matthews was the first woman ever to serve as a United States district court judge. Born in Copiah County, Mississippi, she aspired as a child to be a lawyer (her father was a clerk in a chancery court), but her parents sent her to study piano and voice at the Conservatory of Music in Cincinnati while sending her brother to law school.

During World War I, Matthews moved to Washington, D.C., and worked for the Veterans Administration while attending night school at the National University Law School (now part of George Washington University), where she received her LL.B. degree in 1919 and her LL.M. the following year. As a law student, she joined pickets in front of the White House in favor of woman's suffrage. During her time in law school she married Percy A. Matthews, who was also a lawyer.

Refused entry into the Veterans Administration Legal Department (the local bar association also initially rejected her application for membership), Matthews opened her own office and, in 1920, became the National Woman's Party's lawyer. Unsuccessful in persuading the Supreme Court not to take the party's property across from the U.S. Capitol for the construction of the current Supreme Court building, Matthews is credited with winning a generous allotment for this governmental taking, and she established friendship with a number of U.S. senators.

Matthews taught at the Washington College of Law during the 1930s and 1940s and was appointed to a new United States district court judgeship by Pres. Harry Truman in 1949. Although confirmed, she was given the cold shoulder by her male colleagues, one of whom openly stated that "Mrs. Matthews would be a good judge" except for the fact that "she's a woman" (quoted in Greenhouse 1988, 27). As a woman, Matthews chose females for clerks both in order to show her confidence in them and so that others could not attribute her own legal work to men.

Initially given many of the more technical cases that the male judges did not like, Matthews presided over some high-profile trials, including a 1957 bribery trial of Teamster's vice president Jimmy Hoffa, who was acquitted, and a case involving the rights of Black Muslins to conduct religious services while in prison. Matthews continued to serve until 1968, when she took senior status, thus continuing to try cases before a number of courts. Her husband died the following year, but Mrs. Matthews continued hearing cases until five years before her death, after a stroke, in 1988.

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Wyzanski rejected the notion that judges should be social or political activists, yet he also rejected the traditional notion that judges simply "interpret" the law. The distinction between making and interpreting the law was too simplistic for Wyzanski. Rather than engage in a debate over terminology, Wyzanski offered a view not of what the judge should *do,* but rather of what kind of person the judge should *be*. For Wyzanski, the judge had a noble calling and had to be up to the task. That meant he or she should be not only smart and well prepared for such work, but, more important, cautious and humble in undertaking it. He recognized that judges in the U.S. legal system might exercise awesome power; for Wyzanski, the question was whether and under what circumstances they should do so.

Wyzanski argued, for example, that the judiciary has a special role to play in the protection of civil rights and liberties and should act decisively to preserve them. He believed that judges should be courageous in the face of political opposition and criticism. Nevertheless, this fact did not give judges *carte blanche* on the bench, because Wyzanski also and even more strongly stressed the judge's obligation to recognize his or her own limitations. A judge, he pointed out, is not elected and has no special entitlement in deciding matters of policy. A true democrat, Wyzanski argued that the true power of the nation rested not in its judiciary, but in its people. The people, through their elected officials, were the nation's legitimate policymakers; interference or second-guessing by the judiciary was tantamount to substituting a judge's values for the people's. Because Wyzanski recognized that judges to varying degrees would forget or ignore this distinction, he insisted that, as a first requirement, they be careful, contemplative, moral actors who understood both their historical and current roles in the larger system of governance. He was especially concerned that judges, and indeed all participants in the U.S. legal system, recognize its enduring norms and values and aim to set a high, selfless standard in their work.

Wyzanski's philosophy served him well when he received his most famous case, *United States v. United Shoe Machinery Corporation* (1953). Today, this landmark antitrust case is best known for the principle that the federal government has the authority to break up a corporation that has committed antitrust violations. The nature and extent of this power have been explored continually since *United Shoe*. Examples include the breakup of American Telephone and Telegraph (AT & T) into numerous "baby Bell" telephone companies and most recently the federal government's ongoing litigation against Microsoft Corporation, in which it has sought to divide the corporation into smaller independent companies to remedy its alleged monopolistic practices.

The United Shoe Corporation, a manufacturer of the machinery used to make leather shoes, had been in litigation for decades over its business

practices before this particular case came before Judge Wyzanski. Competitors argued that United Shoe had been engaging in a long, concerted effort to drive its competition out of business. Rival companies, and then the U.S. government itself, sued United Shoe in a series of cases alleging unfair, anticompetitive, and monopolistic business practices. This particular lawsuit, which came before the judge in the late 1940s and was not ultimately resolved until the 1960s, was by his own admission Wyzanski's favorite, as it posed new, significant, and exciting questions of law.

The case centered on United Shoe's alleged ongoing violations of the Sherman Antitrust Act. The Sherman Act, passed by Congress in 1890, prohibits restraint of trade by a single business or coalition of businesses that act as a monopoly. Recognizing that the case would involve complex economic analysis of the shoe-making industry, including its markets and sales, Judge Wyzanski took the then-unheard-of step of appointing a Harvard economist to be his law clerk. Carl Kaysen, a new assistant professor of economics at Harvard, was recommended to the judge by his Harvard colleagues (Kaysen 1987, 713). Despite opposition from the corporation's counsel, Kaysen served as clerk for two years, during the trial of United Shoe. He attended the trial in person as often as he could; when his teaching schedule conflicted with it, Kaysen received daily trial transcripts by messenger from the judge (714).

The *United Shoe* trial proved long and complex. Throughout the trial, which ended in the summer of 1952, economist Kaysen and Judge Wyzanski discussed the evidence at length. Kaysen wrote an expert report to the judge summarizing his economic analysis of the case. A few months later, in February 1953, Judge Wyzanski ruled that United Shoe had engaged in monopolistic practices in violation of the Sherman Act. With victory in hand, the federal government asked Judge Wyzanski to impose "divestiture" on United Shoe—to break up United Shoe into three separate companies to end its monopoly. Wyzanski refused and instead subjected the company to extensive sanctions and restrictions aimed at reducing its power and making the market for its products more competitive. He issued a remedial order and asked the parties to report on the progress of its implementation.

The United States thus continued to monitor United Shoe's activities under the judge's remedial decree. In 1965, the Justice Department reported to Judge Wyzanski that United Shoe was continuing its monopolistic practices and once again asked that the company be split, this time into two entities. The judge again refused, noting that the government had not met the legal standard that would compel him to alter his earlier remedial order. Disappointed that Judge Wyzanski had once again left United Shoe intact, the government appealed this decision to the United States Supreme Court. In 1968, the high court held that Judge Wyzanski was not, as he had

concluded, limited in his ability to change his initial remedial order. Instead, Judge Wyzanski had both the authority and the obligation to change the remedial decree to see that its goals were met. The Court remanded the case to Judge Wyzanski, to determine whether the remedies he ordered had worked and, if not, to modify the decree to see that its goals were met. After the Court's ruling and upon further reflection, Judge Wyzanski finally ordered divestiture.

The *United Shoe* case set the stage for subsequent government attempts to break up what it believed to be monopolistic companies. In 1969, the Justice Department sued International Business Machines (IBM) for antitrust violations, a lawsuit it later dropped. In 1974, it sued AT & T and forced the eventual creation of numerous smaller telephone providers (which, over time, have grown quite large themselves). Finally, in 1990 the government sued the Microsoft Corporation, alleging that it had monopoly power over various technologies, including computer operating systems. In 2000, United States District Court judge Robert Penfield Jackson found for the government and ordered Microsoft's divestiture. Microsoft appealed Jackson's rulings, and the parties involved settled on a resolution that did not require the breakup of Microsoft (Memorandum opinion, *United States of America v. Microsoft Corporation,* Civil action 98-1232, U.S. District of Columbia, November 1, 2002).

Judge Wyzanski is often credited with being the first federal judge to break up a U.S. corporation. That is not entirely correct, as Judge Wyzanski repeatedly refused to impose the ultimate punishment until after the Supreme Court ruled. More accurately, Judge Wyzanski is remembered as a trailblazer in the area of antitrust whose careful and considered approach to *United Shoe* set a very high standard for subsequent attorneys and judges to follow. Indeed, it is a fitting testament to the judge that both the government and Microsoft cited his opinion in *United Shoe* to make their respective cases.

Judge Wyzanski's contributions to federal law are not limited to the field of antitrust. As indicated earlier, he firmly believed that a judge should act courageously to uphold the civil rights and liberties of citizens, even when doing so was politically unpopular. He had the chance to do just that in the case of *United States v. Sisson* (1969). Sisson refused to be inducted into the armed services during the Vietnam War, a violation of the Military Selective Service Act. He argued that the Vietnam War was illegal, immoral, and unjust. But Sisson refused "conscientious objector status" because his beliefs were particular to the Vietnam War, rather than to wars in general. Consequently, he was brought to trial and convicted by a jury of willfully violating his induction order.

Upon motion by Sisson after the trial, Judge Wyzanski set aside his con-

viction. The judge concluded that Sisson had acted sincerely and according to his conscience. Prior to that time, it was typical for someone seeking conscientious objector status to prove that he or she was precluded from military service by membership in a particular religion. Sisson was not a member of an organized religion but nevertheless claimed the "right of conscience" to excuse him from service. Judge Wyzanski agreed, noting that persons like Sisson, whether religious or not, could be excused from the draft if their objection was based on "profound moral beliefs which constitute the central convictions of their beings" (297 F. Supp., 911).

Predictably, the United States appealed Judge Wyzanski's decision. A divided Supreme Court ultimately held that it had no jurisdiction over the case and could not review the judge's decision because it was tantamount to an acquittal. In setting aside the jury's decision, Judge Wyzanski had effectively acquitted the defendant from criminal wrongdoing, and Sisson was freed. Although ultimately the *Sisson* case did not resolve the issue of whether one can object to specific wars, Judge Wyzanski offered a compelling argument that religious affiliation should not be required for a person who refuses military service on the grounds of conscience.

This case illustrates well Judge Wyzanski's contemplative nature as a judge, as well as his refusal to adjudicate in a politically expedient manner. Other evidence is found in his criticism of the Nuremberg Trials, where he argued that the tribunal and its procedures would not serve as a model for future resolutions of international law and were susceptible to becoming propaganda devices that did not serve the interests of justice (1946). Wyzanski's commentary was controversial, of course, particularly because such contemporaneous remarks were unusual for a sitting judge. But in true Wyzanski fashion, he authored another article a few months later in which he disagreed with himself and made significant counterarguments in support of the proceedings (1947b). In the best lawyerly and scholarly fashion, he argued both sides of the case thoughtfully and convincingly.

Wyzanski kept busy with numerous other endeavors besides judging. A loyal Harvard alumnus, he served as president of the Harvard Board of Overseers and as a senior fellow at the Harvard Society of Fellows. He was a longtime trustee of the Ford Foundation, as well as a counselor of the American Law Institute. He taught law and government at Harvard and law at the Massachusetts Institute of Technology, Stanford, and Columbia. From 1965 to 1971 he served as chief judge of the District of Massachusetts and then assumed senior status on the court. He was still serving on the bench upon his death in 1986 at the age of eighty.

A few years before his death, he and his colleague (now United States Supreme Court justice) Stephen Breyer attended a meeting of the Administrative Office of the Courts, where the presenter explained all of the new

forms and paperwork that federal judges would now be required to fill out and described the Office's new telephone number that enabled litigants across the nation to be instantly connected to the Office when they wished to complain about a federal judge. The judges in the audience, of course, were incredulous. But Judge Wyzanski, in his thoughtful way, simply observed that "[S]oon I shall be in judicial heaven, with Learned Hand and Augustus Hand and Jerome Frank; and I won't have to put up with any of this" (Breyer 1987, 710).

Following Judge Wyzanski's death, several tributes to him were included in volume 100 of the *Harvard Law Review.* Authors included Prof. Edward H. Levi, *New York Times* columnist Anthony Lewis, and attorney Elliot Richardson as well as Stephen Breyer, Paul Freund, and Carl Kaysen. In his memorial tribute, Justice Breyer concluded that "it is for giving me a glimpse of that 'judicial heaven,' where he rightly belongs, that I am grateful to the judge" (1987, 710).

Kathleen Uradnik

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Joseph A. Wapner: Judge of the People's Court (1919–)

Best known for his role in the popular television series *The People's Court,* Judge Joseph A. Wapner had many years of practical experience as a judge prior to becoming a television celebrity. After earning his diploma at the University of Southern California (USC), Wapner went into the army and served during World War II, during which time he was wounded in action in the Philippines. He subsequently returned to USC and earned a law degree. Appointed as a municipal court judge in 1959, he became a superior court judge in 1962 and served until 1979 (serving pro tem for some time as a justice on the California Court of Appeals), after which he began his television show, in which both parties agree to accept his judgment in small claims matters.

In his book *A View from the Bench,* Wapner stressed the human elements of being a judge. He believes that judges need to embody the virtues of "empathy, intelligence, compassion, deliberation, and courage" (1987, 13). Using as an illustration a case in which he invalidated a police search, Wapner said that "'law and order' begins with everyone following the Constitution—and I mean *everyone,* from policemen to presidents" (38). Wapner also emphasized the need for community, which he believes has been eroding in recent years. Unlike judges who emphasize their toughness on criminals, Wapner said that "'Throw the book at them' is a recipe for an unfeeling society which may function by some kind of casebook or statute book, but doesn't have the kind of human qualities that a working society must have" (66). He added, "In my courtroom, I dealt with human beings" (66).

Wapner is a strong advocate of settling cases prior to trial whenever possible. He often handed out fortune cookies that said, "Lean settlement better than fat lawsuit" (Wapner 1987, 156). Wapner believes that jury settlements are too often like a lottery, and he envisioned himself as an impartial observer who could listen to both sides and "save most of the rigmarole of the formal, drawn-out legal process" (162). He noted that "If my peers from the Superior Court could say only one thing about me, I would hope it would be that Joe Wapner could feel other people's pain enough to know that settlement is a wonderful way to resolve a case" (203).

Again, in contrast to some judges who attack higher courts for broad interpretations of the Constitution, Wapner cited a case in which constitutional law was interpreted and said that "I believe the process of reinterpreting and reinvigorating the Constitution and every kind of legal procedure is so vital that I hardly mind at all being reversed" (1987, 216). He further observed that "The glory is that the American law can accommodate the pain of the people before it, the concern of thousands of judges, who can feel that pain, and then, far more often than not, render justice" (227).

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Appendix A

Great American Judges Listed by Year of Birth

Samuel Sewall (1652–1730)
Lewis Morris (1671–1746)
Edmund Pendleton (1721–1803)
George Wythe (1726–1806)
Robert R. Livingston Jr. (1746–1813)
Theophilus Parsons (1750–1813)
St. George Tucker (1752–1827)
John Marshall (1755–1835)
John Davis (1761–1847)
François-Xavier Martin (1762–1846)
Spencer Roane (1762–1822)
James Kent (1763–1847)
William Cranch (1769–1855)
Roger Brooke Taney (1777–1864)
John Bannister Gibson (1780–1853)
Lemuel Shaw (1781–1861)
Isaac Blackford (1786–1859)
Thomas Ruffin (1787–1870)
Nathan Green Sr. (1792–1866)
Thomas Alexander Marshall (1794–1871)
Joseph Henry Lumpkin (1799–1867)
John Hemphill (1803–1862)
John Appleton (1804–1891)
Samuel Ames (1806–1865)
Thomas Drummond (1809–1890)
Edward George Ryan (1810–1880)
George Sharswood (1810–1883)
George Franklin Comstock (1811–1892)
George Washington Stone (1811–1894)
Stephen J. Field (1816–1899)
Thomas McIntyre Cooley (1824–1898)
Matthew Paul Deady (1824–1893)
Roy Bean (1825–1903)
Hugh Lennox Bond (1828–1893)
Horace Gray (1828–1902)
Charles Cogswell Doe (1830–1896)
William Mitchell (1832–1900)
John Marshall Harlan (1833–1911)
Isaac C. Parker (1838–1896)
Jonathan Jasper Wright (1840–1885)
Oliver Wendell Holmes Jr. (1841–1935)
Walter Clark (1846–1924)
Charles Fremont Amidon (1856–1937)
Louis Dembitz Brandeis (1856–1941)

Judges born in the same year are arranged alphabetically rather than by birthday.

Charles Evan Hughes (1862–1948)
Cuthbert Winfred Pound (1864–1935)
Kenesaw Mountain Landis (1866–1944)
Augustus Noble Hand (1869–1954)
Benjamin N. Cardozo (1870–1938)
Learned Hand (1872–1961)
Harlan Fiske Stone (1872–1946)
Samuel Seabury (1873–1958)
James E. Horton Jr. (1878–1973)
Julius Waties Waring (1880–1968)
Felix Frankfurter (1882–1965)
Florence Ellinwood Allen (1884–1966)
John Johnson Parker (1885–1958)
Hugo Lafayette Black (1886–1971)
Henry White Edgerton (1888–1970)
Harold R. Medina (1888–1990)
Arthur T. Vanderbilt (1888–1957)
Jerome Frank (1889–1957)
Earl Warren (1891–1974)
Richard T. Rives (1895–1982)
Sarah Tilghman Hughes (1896–1985)
Elbert Parr Tuttle (1897–1996)
John Marshall Harlan II (1899–1971)
Roger John Traynor (1900–1983)
Luther Lee Bohanon (1902–)
Henry Jacob Friendly (1903–1986)
William Henry Hastie (1904–1976)
Alfred P. Murrah (1904–1975)
Walter Vincent Schaefer (1904–1986)
John Joseph Sirica (1904–1992)
John Minor Wisdom (1905–1999)
Milton Pollack (1906–)
Charles E. Wyzanski Jr. (1906–1986)
Warren Burger (1907–1995)
David L. Bazelon (1909–1993)
John R. Brown (1909–1993)
Carl Eugene McGowan (1911–1987)
Clement Furman Haynsworth (1912–1989)
Harold Leventhal (1915–1979)
Griffin Bell (1918–)
Frank M. Johnson Jr. (1918–)
William Wayne Justice (1920–)
Constance Baker Motley (1921–)
Jack B. Weinstein (1921–)
Hans A. Linde (1924–)
William H. Rehnquist (1924–)
Abner J. Mikva (1926–)
Robert H. Bork (1927–)
A. Leon Higginbotham Jr. (1928–1998)
Richard Alan Enslen (1931–)
Shirley Schlanger Abrahamson (1933–)
Rose Elizabeth Bird (1936–1999)
Richard A. Posner (1939–)
J. Harvie Wilkinson III (1944–)
Frank Hoover Easterbrook (1948–)
Alex Kozinski (1950–)

Appendix B

Great American Judges Listed by Century

Colonial Times

Lewis Morris (1671–1746)
Samuel Sewall (1652–1730)

Eighteenth Century

Edmund Pendleton (1721–1803)
George Wythe (1726–1806)

Nineteenth Century

Samuel Ames (1806–1865)
John Appleton (1804–1891)
Roy Bean (1825–1903)
Isaac Blackford (1786–1859)
Hugh Lennox Bond (1828–1893)
George Franklin Comstock (1811–1892)
Thomas McIntyre Cooley (1824–1898)
William Cranch (1769–1855)
John Davis (1761–1847)
Matthew Paul Deady (1824–1893)
Charles Cogswell Doe (1830–1896)
Thomas Drummond (1809–1890)
Stephen J. Field (1816–1899)
John Bannister Gibson (1780–1853)
Horace Gray (1828–1902)
Nathan Green Sr. (1792–1866)
John Marshall Harlan (1833–1911)
John Hemphill (1803–1862)
James Kent (1763–1847)
Robert R. Livingston Jr. (1746–1813)
Joseph Henry Lumpkin (1799–1867)
John Marshall (1755–1835)
Thomas Alexander Marshall (1794–1871)
François-Xavier Martin (1762–1846)
William Mitchell (1832–1900)
Isaac C. Parker (1838–1896)
Theophilus Parsons (1750–1813)
Spencer Roane (1762–1822)
Thomas Ruffin (1787–1870)
Edward George Ryan (1810–1880)
George Sharswood (1810–1883)
Lemuel Shaw (1781–1861)
George Washington Stone (1811–1894)
Roger Brooke Taney (1777–1864)
St. George Tucker (1752–1827)
Jonathan Jasper Wright (1840–1885)

Twentieth Century

Shirley Schlanger Abrahamson (1933–)
Florence Ellinwood Allen (1884–1966)
Charles Fremont Amidon (1856–1937)
David L. Bazelon (1909–1993)
Griffin Bell (1918–)
Rose Elizabeth Bird (1936–1999)
Hugo Lafayette Black (1886–1971)
Luther Lee Bohanon (1902–)
Robert H. Bork (1927–)
Louis Dembitz Brandeis (1856–1941)
John R. Brown (1909–1993)
Warren Burger (1907–1995)
Benjamin N. Cardozo (1870–1938)
Walter Clark (1846–1924)
Frank Hoover Easterbrook (1948–)
Henry White Edgerton (1888–1970)
Richard Alan Enslen (1931–)
Jerome Frank (1889–1957)
Felix Frankfurter (1882–1965)
Henry Jacob Friendly (1903–1986)
Augustus Noble Hand (1869–1954)
Learned Hand (1872–1961)
John Marshall Harlan II (1899–1971)
William Henry Hastie (1904–1976)
Clement Furman Haynsworth (1912–1989)
A. Leon Higginbotham Jr. (1928–1998)
Oliver Wendell Holmes Jr. (1841–1935)
James E. Horton Jr. (1878–1973)
Charles Evans Hughes (1862–1948)
Sarah Tilghman Hughes (1896–1985)
Frank M. Johnson Jr. (1918–)
William Wayne Justice (1920–)
Alex Kozinski (1950–)
Kenesaw Mountain Landis (1866–1944)
Harold Leventhal (1915–1979)
Hans A. Linde (1924–)
Carl Eugene McGowan (1911–1987)
Harold R. Medina (1888–1990)
Abner J. Mikva (1926–)
Constance Baker Motley (1921–)
Alfred P. Murrah (1904–1975)
John Johnson Parker (1885–1958)
Milton Pollack (1906–)
Richard A. Posner (1939–)
Cuthbert Winfred Pound (1864–1935)
William H. Rehnquist (1924–)
Richard T. Rives (1895–1982)
Walter Vincent Schaefer (1904–1986)
Samuel Seabury (1873–1958)
John Joseph Sirica (1904–1992)
Harlan Fiske Stone (1872–1946)
Roger John Traynor (1900–1983)
Elbert Parr Tuttle (1897–1996)
Arthur T. Vanderbilt (1888–1957)
Julius Waties Waring (1880–1968)
Earl Warren (1891–1974)
Jack B. Weinstein (1921–)
J. Harvie Wilkinson III (1944–)
John Minor Wisdom (1905–1999)
Charles E. Wyzanski Jr. (1906–1986)

Appendix C

Great American Judges Listed by Birth Year, Years of Life, Nation or State of Birth, Colleges Attended, and Courts over Which They Presided

Name	*Years*	*Nation or State of Birth*	*Undergraduate Education*[i]	*Graduate and/or Legal Education*[ii]	*Service as Judge or Justice*
Samuel Sewall	1652–1730	England	Harvard	M.A. Harvard	MA Gen. Ct. 1683–1684 MA Oyer & Terminer, 1692 Sup. Ct. of Judicature 1692–1718 Chief Justice of Ct. of Judicature, 1718–1728
Lewis Morris	1671–1746	NY	None	None	East Jersey, Court of Common Right, 1692–1698 Chief Justice, Supreme Court of NY, 1715–1733
Edmund Pendleton	1721–1803	VA	None	Read law	VA Court of Chancery, 1778–1779 VA Court of Appeals, President 1779–1803
George Wythe	1726–1806	VA	Tutoring	Read law	VA High Court of Chancery, 1778–1806
Robert Livingston Jr.	1746–1813	NY	King's (Columbia)	Read law	Chief, NY Chancery Court, 1777–1801
Theophilus Parsons	1750–1813	MA	Harvard	Read law	Chief Justice MA, 1806–1813
St. George Tucker	1752–1857	Bermuda	William & Mary	Read law	General Court of Virginia, 1788–1804 Virginia Supreme Court of Appeals, 1804–1811 U.S. District Judge, Virginia, 1813–1825
John Marshall	1755–1835	VA	Tutoring	William & Mary (Wythe) Read law	Chief Justice, U.S. Supreme Ct., 1801–1836
John Davis	1761–1847	MA	Harvard	Read law	Federal Judge, MA, 1801–1841

François-Xavier Martin	1762–1846	France	Tutored	Read law	Superior Court, Mississippi Territory, 1809–1810 Superior Court, Territory of Orleans, 1810–1813 Louisiana Supreme Court, 1815–1846 Chief Judge, Louisiana Supreme Court, 1836–1846
Spencer Roane	1762–1822	VA	William & Mary	William & Mary (Wythe) Read law	General Court of Virginia, 1789–1795 Virginia Court of Appeals, 1795–1822
James Kent	1763–1847	NY	Yale	Read law	Associate Justice, NY Supreme Court, 1798–1804 Chief Justice, NY Supreme Court, 1804–1814 Chancellor, New York, 1814–1823
William Cranch	1769–1855	MA	Harvard	Read law	D.C. Circuit Court, 1801–1855 Chief Judge of D.C. Circuit, 1806–1855
Roger Taney	1777–1864	MD	Dickinson	Read law	Chief Justice, U.S. Supreme Court, 1836–1864
Joseph Story	1779–1845	MA	Harvard	Read law	Assoc. Jus., U.S. Supreme Court, 1811–1845
John Bannister Gibson	1780–1853	PA	Dickinson	Read law	PA Court of Common Pleas, 11th Cir., 1813–1816 PA Supreme Court, 1816–1853
Lemuel Shaw	1781–1861	MA	Harvard	Read law	Chief Justice MA Supreme Court, 1830–1860
Isaac Blackford	1776–1859	NJ	Princeton	Read law	1st Territorial Circuit Ct. of IN, 1814–1816 Supreme Court of IN, 1817–1853 U.S. Court of Claims, 1855–1859
Thomas Ruffin	1787–1870	VA	Princeton	Read law	North Carolina Superior Court, 1816–1818, 1825–1829 North Carolina Supreme Court, 1829–1852, 1858–1859 Chief Justice, NC Supreme Court, 1833–1852

Name	*Years*	*Nation or State of Birth*	*Undergraduate Education*[i]	*Graduate and/or Legal Education*[ii]	*Service as Judge or Justice*
William Harper	1790–1847	Leeward Islands	South Car. College	Read law	Chancellor, Territorial Court of MO, 1819–1823 Chancellor, South Carolina, 1828–1830 Court of Appeals, South Carolina, 1830–1835, 1835–1847
Nathan Green Sr.	1792–1866	VA		Read law?	Tennessee Chancery Court, 1826– Tenn. Supreme Court of Errors & Appeals, 1831–1834 Tennessee Supreme Court, 1834–1852
Thomas A. Marshall	1794–1871	KY	Yale	Read law	KY Court of Appeals, 1835–1856, 1866–1867
Joseph H. Lumpkin	1799–1867	GA	Princeton	Read law	Supreme Court of GA, 1845–1866
John Hemphill	1803–1862	SC	Jefferson College	Read law	Texas District Judge & TX S. Court, 1840 Chief Justice, TX Supreme Court, 1840–1859
John Appleton	1804–1891	NH	Bowdoin	Read law M.A. Bowdoin	Associate, Maine Supreme Court, 1852–1862 Chief Justice, Maine Supreme Court, 1862–1883
Samuel Ames	1806–1865	RI	Brown	Read law Litchfield, CT	Chief Justice, Rhode Island Supreme Ct., 1856–1865
Thomas Drummond	1809–1890	ME	Bowdoin	Read law	U.S. Court of District of Illinois, 1850–1855 U.S. Court for Northern Dis. of IL, 1855–1869 U.S. 7th Judicial Circuit Court, 1869–1884
Edward George Ryan	1810–1880	Ireland	Jesuit Boarding School	Read law	Chief Justice, Wisconsin Supreme Court, 1874–1880

George Sharswood	1810–1883	PA	U. PA	Read law	District Court for Philadelphia, 1845–1867 President Judge of above, 1848–1867 PA Supreme Court, 1867–1882 Chief Justice, PA Supreme Court, 1879–1883
George F. Comstock	1811–1892	NY	Union College	Read law	New York Court of Appeals, 1856–1861
George W. Stone	1811–1894	VA		Read law	North Carolina 9th Circuit Court, 1842–1849 North Carolina Supreme Court, 1856–1865 North Carolina Supreme Court, 1876–1894 Chief Justice, 1884–1894
Stephen Field	1816–1899	CT	Williams College	Read law	California Supreme Court, 1857–1863 Associate Justice, U.S. Supreme Court, 1863–1897
Thomas M. Cooley	1824–1898	NY	Attica Academy High School	Read law	Michigan Supreme Court, 1865–1885 Chair, Interstate Commerce Comm., 1887–1891
Matthew Deady	1824–1893	MD	Barnesville Academy	Read law	Territorial Court of Oregon, 1853–1859 U.S. District Judge, Oregon, 1859–1893
Roy Bean	1825–1903	KY	None	None	Texas Justice of the Peace 1882–1903. Not always there by official appointment or election.
Hugh Bond	1828–1893	MD	New York U.	Read law	Baltimore Crim. Ct., 1861–1867 U.S. 4th Circuit., 1870–1893
Horace Gray	1828–1902	MA	Harvard	Harvard	Mass. Supreme Court, 1864–1882 Chief Justice, MA Supreme Court, 1871–1882 U.S. Supreme Court, 1882–1902
Charles Doe	1830–1896	NH	Harvard: attended Dartmouth: graduated	Read law Harvard	NH Supreme Court, 1859–1896 Chief Justice NH Supreme Court, 1876–1896

Name	*Years*	*Nation or State of Birth*	*Undergraduate Education*[i]	*Graduate and/or Legal Education*[ii]	*Service as Judge or Justice*
William Mitchell	1832–1900	Canada	Jefferson College	Read law	District Court, 3d Circuit, Minnesota, 1874–1881 Minnesota Supreme Court, 1881–1900
John Marshall Harlan	1833–1911	KY	Centre College	Transylvania U.	Franklin County Court, 1858–1861 Associate Justice, U.S. Supreme Court, 1877–1911
Isaac C. Parker	1838–1896	OH	None	Read law	12th Missouri Circuit, 1868–1870 U.S. District Court (W. AK), 1875–1896
Jonathan J. Wright	1840–1885	PA	Lancasterian Academy	Read law	S. Carolina Supreme Court, 1870–1877
Oliver Wendell Holmes, Jr.	1841–1935	MA	Harvard	Harvard	Massachusetts Supreme Court, 1883–1902 Chief Judge of MA Supreme Court, 1899–1902 U.S. Supreme Court, 1902–1932
Walter Clark	1846–1924	NC	U. N. Carolina	Columbia Law School (D.C.)	Superior Court Judge, North Carolina, 1885–1889 North Carolina Supreme Court, 1889–1924 Chief Justice, NC Supreme Court, 1903–1924
Charles F. Amidon	1856–1937	NY	Hamilton College	Read law	U.S. District Court, North Dakota, 1896–1928 Sometimes worked on U.S. 8th Circuit Ct. of Appeals
Louis Brandeis	1856–1941	KY	Annen–Realschule, Germany	Harvard	U.S. Supreme Court, 1916–1939
Kenesaw M. Landis	1866–1944	OH	None	Union College of Law (Chicago)	U.S. District Judge, Northern Illinois, 1905–1922

Charles Evan Hughes	1862–1948	NY	Colgate Brown	Columbia	Associate, U.S. Supreme Court, 1910–1916 Chief Justice, U.S. Supreme Court, 1930–1941
Cuthbert Pound	1864–1935	NY	Cornell	Read law	New York State Supreme Court, 1906–1915 New York Court of Appeals, 1918–1934 Chief Justice, NY Court of Appeals, 1932–1934
Augustus N. Hand	1869–1954	NY	Harvard	Harvard	U.S. District Court (Southern Dist. N.Y.), 1914–1927 U.S. 2d Circuit Court, 1927–1954
Benjamin Cardozo	1870–1938	NY	Columbia	M.A. Columbia Columbia Law	NY Supreme Court, 1913–1917 NY Court of Appeals, 1917–1932 Chief, 1926–1932 U.S. Supreme Court, 1932–1938
Learned Hand	1872–1961	NY	Harvard	M.A. Harvard Harvard	U.S. District Court, New York, 1909–1924 U.S. Court of Appeals, 2d Cir., 1925–1951 Senior Judge, U.S. 2d Cir., 1948–1951 Senior Status, U.S. 2d Cir., 1951–1961
Harlan Fiske Stone	1872–1946	NH	Amherst	Columbia	Associate, U.S. Supreme Court, 1925–1941 Chief Justice, U.S. Supreme Court, 1941–1946
Samuel Seabury	1873–1958	NY		NY Law School	New York City Court, 1901–1906? New York Supreme Court, 1906–1914? New York Court of Appeals, 1915–1916
James Edwin Horton Jr.	1878–1973	AL	Vanderbilt	Cumberland U. Cumberland U	Chancellor, N. Chancery Division of AL, 1915–1917 8th Circuit Court of Appeals, 1928–1935
Julius Waties Waring	1880–1968	SC	College of Charleston	Read law	U.S. District Judge (Eastern, SC), 1942–1952
Felix Frankfurter	1882–1965	Austria	City College of NY	Harvard	U.S. Supreme Court, 1939–1962

Name	*Years*	*Nation or State of Birth*	*Undergraduate Education*[i]	*Graduate and/or Legal Education*[ii]	*Service as Judge or Justice*
Florence E. Allen	1884–1966	UT	W. Reserve	M.A. Western Reserve New York University	Cleveland Ct. of Common Pleas. 1920–1922 Ohio Supreme Court, 1922–1934 U.S. 6th Circuit Ct., 1934–1959
John J. Parker	1885–1958	NC	U. of NC	U. North Carolina	U.S. 4th Circuit Court of Appeals, 1925–1958
Hugo Black	1886–1971	AL		University of Alabama	Police Court, 1910–1911 U.S. Supreme Court, 1937–1971
Henry White Edgerton	1888–1970	KS	U. of Wis. Cornell	Harvard	U.S. Court of Appeals, D.C., 1937–1970 Chief Judge, U.S. Ct. of Appeals, D.C., 1955–58 Senior Judge, U.S. Ct. of Appeals, D.C., 1963–70
Harold Medina	1888–1990	NY	Princeton	Columbia	U.S. District Court (Southern NY), 1947–1951 U.S. 2d Circuit Court of Appeals, 1951–1958 Senior Status, 2d Circuit, 1958–1980
Arthur T. Vanderbilt	1888–1957	NJ	Wesleyan	Columbia	Chief Justice, New Jersey Supreme Court, 1948–1957
Jerome Frank	1889–1957	NY	Chicago	Ph.D. Chicago	U.S. 2nd Circuit Court of Appeals, 1941–1957
Earl Warren	1891–1974	CA	Berkeley	Berkeley	Chief Justice, U.S. Supreme Court, 1953–1969
Richard T. Rives	1895–1982	AL	Tulane	Read law	U.S. 5th Circuit Court of Appeals, 1951–1981 Chief Judge, U.S. 5th Circuit, 1959–1960 Senior Status, U.S. 5th Circuit, 1966–1981 Senior Status, U.S. 6th Circuit, 1981–1982
Sarah T. Hughes	1896–1985	MD	Goucher Col.	Geo. Washington	Texas State District Court, 1935–1962 U.S. District Court, Texas, 1962–1985

Elbert Tuttle	1897–1996	CA	Cornell	Cornell	U.S. 5th Circuit Court of Appeals, 1954–1981 Chief Judge, 5th Circuit, 1961–1968 U.S. 6th Circuit Court of Appeals, 1981–1996
John Marshall Harlan II	1899–1971	IL	Princeton	Oxford NY Law	U.S. 2nd Circuit Court of Appeals, 1954–1955 U.S. Supreme Court, 1955–1971
Roger John Traynor	1900–1983	UT	Berkeley	Berkeley	Justice, California Supreme Court, 1940–1970 Chief Justice, CA Supreme Court, 1964–1970
Luther Lee Bohanon	1902–	AR	U. of OK	U. of Oklahoma	U.S. District Court for Oklahoma, 1969–1974 Senior Judge, U.S. Oklahoma, 1974–
Henry J. Friendly	1903–1986	NY	Harvard	Harvard	U.S. 2d Circuit Court of Appeals, 1959–1986 Chief Judge, 1971–1973 Senior Judge, 1974–1986
William Hastie	1904–1976	TN	Amherst	Harvard	U.S. District Court, Virgin Islands, 1937–1939 U.S. 3d Circuit Court of Appeals, 1950–1976 Chief Judge, 1968–1976
Alfred Paul Murrah	1904–1975	OK	U. of Oklahoma	U. of Oklahoma	U.S. District Court, 1937–1940 U.S. 10th Circuit Court, 1950–1975 Chief Judge, U.S. 10th Circuit, 1959–1970? Senior Status, U.S. 10th Circuit, 1970?–1975
Walter V. Schaefer	1904–1986	MI	Chicago	Chicago	Illinois Supreme Court, 1951–1976
John J. Sirica	1904–1992	CT	Columbia Prep. School	Georgetown	U.S. District Court, D.C., 1957–1986 Chief Judge of D.C. District, 1971–1974 Senior Status, 1977–1986
John M. Wisdom	1905–	LA	Washington & Lee	Tulane	U.S. 5th Circuit Court of Appeals, 1957–1977 Senior Status, U.S. 5th Circuit, 1977–1999

Name	*Years*	*Nation or State of Birth*	*Undergraduate Education*[i]	*Graduate and/or Legal Education*[ii]	*Service as Judge or Justice*
Milton Pollack	1906–1999	NY	Columbia	Columbia	U.S. District Court, Southern District NY, 1967–
Charles Wyzanski Jr.	1906–1986	MA	Harvard	Harvard	U.S. District Court, MA, 1941–1986 Chief, 1965–1971 Senior Status, 1971–1986
Warren Burger	1907–1995	MN	U. Minnesota	St. Paul C. of Law	U.S. Court of Appeals for D.C., 1955–1969 Chief Justice, U.S. Supreme Court, 1969–1986
David Bazelon	1909–1993	WI	Northwestern B.S. in law		U.S. Ct. of Appeals for D.C., 1950–1919 Chief Judge, D.C. Appeals, 1962–1978 Senior Judge, D.C. Appeals, 1978–1986
John R. Brown	1909–1993	NE	U. of Nebraska	U. Michigan	U.S. 5th Circuit Ct., 1955–1979 Senior Status, 1979–1991?
Carl McGowan	1911–1987	IN	Dartmouth	Columbia	U.S. D.C. Circuit Ct. of Appeals, 1963–1987 Chief Judge, 1981 Senior Status, 1981–1987
Skelly J. Wright	1911–1988	LA	Loyola U.	Loyola U.	U.S. District Ct., E. LA, 1950–1962 U.S. Ct. of Appeals for D.C., 1961–1988 Chief Judge, D.C. Circuit, 1978–1981 Senior Status, 1986–1988
Clement F. Haynsworth	1912–1989	SC	Furman	Harvard	U.S. 4th Circuit Court, 1957–1989 Chief Judge, 4th Circuit, 1964–1981
Harold Leventhal	1915–1979	NY	Columbia	Columbia	U.S. Court of Appeals, D.C., 1965–1979

Griffin Bell	1918–	GA	GA Southwestern	Mercer	U.S. 5th Circuit Court of Appeals, 1961–1975
Frank M. Johnson	1918–	AL		U. Alabama	U.S. Federal District Judge, 1955–1979 U.S. 11th Circuit, 1979–1996
William Wayne Justice	1920–	TX	U. of Texas	U. Texas, Austin	U.S. District Judge (East Texas), 1968–1998 Chief Judge, 1980–1998 Senior Status, 1998–
Constance Baker Motley	1921–	CT	Fisk NYU	Columbia	U.S. District Judge (Southern NY) 1966– Chief Judge, 1982–1986 Senior Status, 1986–
Jack Weinstein	1921–	KS	Brooklyn College	Columbia	U.S. District (Eastern NY) 1967– Chief Judge, 1981–1988 Senior Judge, 1993–
Hans A. Linde	1924–	Germany	Reed	Berkeley	Oregon Supreme Court, 1977–1990
William Rehnquist	1924–	WI	Kenyon Stanford	MA, Stanford/ Harvard	Associate Justice, U.S. Supreme Court, 1971–1986 Chief Justice, U.S. Supreme Court, 1986–
Abner J. Mikva	1926–	WI	U. Wisconsin Washington U. (St. Louis)	Chicago	U.S. Circuit Court, D.C., 1979–1994
Robert Bork	1927–	PA	Chicago	Chicago	U.S. Circuit Court, D.C., 1982–1988
Leon Higginbotham Jr.	1928–1998	NJ	Purdue Antioch	Yale	U.S. District Court, PA, 1964–1977 U.S. 3d Circuit, 1977–1993 Chief Judge, 3d Circuit, 1989–1991

Name	*Years*	*Nation or State of Birth*	*Undergraduate Education*[i]	*Graduate and/or Legal Education*[ii]	*Service as Judge or Justice*
Richard A. Enslen	1931–	MI	Kalamazoo Col.	Wayne State Univ. VA (LL.M.)	State District Judge, Michigan, 1968–1970 U.S. District Judge (Western MI), 1979– Chief Judge, U.S. District, Western MI, 1999–2001
Shirley S. Abrahamson	1933–	NY	New York U.	Indiana Law School Univ. of Wisconsin	Justice, Wisconsin Supreme Court, 1976–1996 Chief Justice, Wisconsin Supreme Court, 1996–
Rose Elizabeth Bird	1936–1999	AZ	Long Island U.	Berkeley	Chief Justice, California Supreme Court, 1977–1986
Richard Posner	1939–	NY	Yale	Harvard	U.S. 7th Circuit Court of Appeals, 1981– Chief Judge, 1993–2000
J. Harvey Wilkinson III	1944–	NY	Yale	U. Virginia	U.S. 4th Circuit Court of Appeals, 1984–
Frank Easterbrook	1948–	NY	Swarthmore	Chicago	U.S. 7th Circuit Court of Appeals, 1985–
Alex Kozinski	1950–	Bulgaria	UCLA	UCLA	U.S. Court of Claims, 1982–1985 U.S. 9th Circuit Court of Appeals, 1985–

[i] In early years, students sometimes went directly from high school to law programs, so some individuals who received degrees from law schools will not have an undergraduate affiliation listed.

[ii] In colonial times, individuals sometimes served on the bench without any formal college education. Even in the early years of the Republic, when American law schools were scarce or nonexistent, lawyers often "read law" in the offices of attorneys rather than continuing formal legal training in a university setting. George Wythe was among the notable lawyers (and judges) who was known for his work in mentoring new lawyers in this fashion.

Appendix D

United States Supreme Court Justices Listed by Name, Years of Life, Nation or State of Birth, Education, Years of Prior Judicial Service, and Years of Service on the Court

Name	*Years*	*Nation or State of Birth*	*Undergraduate Education*	*Law School*	*Prior Judicial Experience St./Fed./Total*	*Appointing President*	*Yrs. of Ser. U.S. Sup. Ct.*
John Jay*	1745–1829	NY	King's College	Read law	0–2–2	Washington	1789–1795
John Rutledge	1739–1800	SC	None	Read law/Middle Temple	0–6–6	Washington	1739–1800
William Cushing	1732–1810	MA	Harvard	Read law	0–29–29	Washington	1790–1810
James Wilson	1742–1798	Scotland	St. Andrews	Read law	0–0–0	Washington	1789–1798
John Blair Jr.	1732–1800	VA	William & Mary	Middle Temple	0–11–11	Washington	1790–1796
James Iredell	1751–1799	England	None	Read law	0–1/2–1/2	Washington	1790–1799
Thomas Johnson	1732–1819	MD	None	Read law	1–1 1/2–1 1/2	Washington	1793–1806
William Paterson	1745–1806	Ireland	Col. of N.J. (Princeton)	Read law	0–0–0	Washington	1793–1806
John Rutledge*	1739–1800	SC		Read law/Middle Temple	0–6–6	Washington	1795–1800
Samuel Chase	1741–1811	MD	None	Read law	0–9–9	Washington	1796–1811
Oliver Ellsworth*	1745–1807	CT	Yale/Col. of N.J.	Read law	0–5–5	Washington	1796–1800
Bushrod Washington	1762–1829	VA	William & Mary	Read law	0–0–0	Adams	1799–1829
Alfred Moore	1755–1810	NC	None	Read law	0–1–1	Adams	1800–1804
John Marshall*	1755–1835	VA	None	William & Mary	0–0–0	Adams	1801–1836
William Johnson	1771–1834	SC	Col. of N.J.	Read law	0–6–6	Jefferson	1804–1834
Henry B. Livingston	1757–1823	NY	Col. of N.J.	Read law	0–0–0	Jefferson	1807–1823
Thomas Todd	1765–1826	VA	Liberty Hall (W& L)	Read law	0–6–6	Jefferson	1807–1826
Gabriel Duvall	1752–1844	MD	None	Read law	0–6–6	Madison	1811–1835

Joseph Story	1779–1845	MA	Harvard	Read law	0–0–0	Madison	1812–1845
Smith Thompson	1768–1843	NY	Col. of N.J.	Read law	0–16–16	Monroe	1823–1843
Robert Trimble	1779–1828	VA	KY Acad. (Translv.)	Read law	9–2–11	J.Q. Adams	1826–1828
John McLean	1785–1861	NJ	None	Read law	0–6–6	Jackson	1830–1861
Henry Baldwin	1780–1844	CT	Yale	Read law	0–0–0	Jackson	1830–1844
James Wayne	1790–1867	GA	Col. of N.J.	Read law	0–5–5	Jackson	1835–1867
Roger B. Taney*	1777–1864	MD	Dickinson	Read law	0–0–0	Jackson	1836–1864
Philip P. Barbour	1783–1841	VA	William & Mary	Read law	6–2–8	Jackson	1836–1841
John Catron	1786–1865	PA	None	Read law	0–10–10	Jackson	1837–1865
John McKinley	1780–1852	VA	None	Read law	0–0–0	Van Buren	1838–1852
Peter V. Daniel	1784–1860	VA	Col. of N.J.	Read law	4–0–4	Van Buren	1842–1860
Samuel Nelson	1792–1873	NY	Middlebury	Read law	0–22–22	Tyler	1845–1872
Levi Woodbury	1789–1851	NH	Dartmouth	Litchfield	0–6–6	Polk	1845–1851
Robert C. Grier	1794–1870	PA	Dickinson	Read law	0–13–13	Polk	1846–1870
Benjamin R. Curtis	1809–1874	MA	Harvard	Harvard	0–0–0	Fillmore	1851–1857
John A. Campbell	1811–1889	GA	UGA/West Point	Read law	0–0–0	Pierce	1853–1861
Nathan Clifford	1803–1881	NH	None	Read law	0–0–0	Buchanan	1858–1881
Noah H. Swayne	1804–1884	VA	None	Read law	0–0–0	Lincoln	1862–1881
Samuel F. Miller	1816–1890	KY	Transylvania (M.D.)	Read law	0–0–0	Lincoln	1862–1890
David Davis	1815–1886	MD	Kenyon	N. Haven Law (Yale)	0–14–14	Lincoln	1862–1877
Stephen J. Field	1816–1899	CT	Williams	Read law	0–6–6	Lincoln	1863–1897

Name	*Years*	*Nation or State of Birth*	*Undergraduate Education*	*Law School*	*Prior Judicial Experience St./Fed./Total*	*Appointing President*	*Yrs. of Ser. U.S. Sup. Ct.*
Salmon P. Chase*	1808–1873	NH	Dartmouth	Read law	0–0–0	Lincoln	1864–1873
William Strong	1808–1895	CT	Yale	Yale	1–11–12	Grant	1870–1880
Joseph B. Bradley	1813–1892	NY	Rutgers	Read law	0–0–0	Grant	1870–1892
Ward Hunt	1810–1886	NY	Union	Litchfield	0–8–8	Grant	1873–1882
Morrison B. Waite*	1816–1888	CT	Yale	Read law	0–0–0	Grant	1874–1888
John Marshall Harlan	1833–1911	KY	Centre	Transylvania/Read law	0–1–1	Hayes	1877–1911
William B. Woods	1824–1887	OH	Western Res./Yale	Read law	12–0–12	Hayes	1881–1887
Stanley Matthews	1824–1889	OH	Kenyon	Read law	0–4–4	Garfield	1881–1889
Horace Gray	1828–1902	MA	Harvard	Harvard	0–18–18	Arthur	1882–1902
Samuel Blatchford	1820–1893	NY	Columbia	Read law	15–0–15	Arthur	1882–1903
Lucius Q.C. Lamar	1825–1893	GA	Emory College	Read law	0–0–0	Cleveland	1888–1893
Melville W. Fuller*	1833–1910	ME	Bowdoin	Read law/Harvard	0–0–0	Cleveland	1888–1910
David J. Brewer	1837–1910	Turkey	Wesleyan/Yale	Albany	5–14–19	Harrison	1890–1910
Henry B. Brown	1836–1913	MA	Yale	Yale/Harvard	16–0–16	Harrison	1892–1903
George Shiras Jr.	1832–1924	PA	Ohio U./Yale	Yale	0–0–0	Harrison	1893–1895
Edward D. White	1845–1921	LA	Mt. St. Mary's Georgetown	U. of LA (Tulane)	1 1/2–0–1 1/2	Cleveland	1894–1910
Rufus W. Peckham	1838–1909	NY	None	Read law	0–0–0	Cleveland	1896–1909

Joseph McKenna	1843–1926	PA	Benicia Collegiate Institute	Read law	5–5–10	McKinley	1898–1925
Oliver W. Holmes Jr.	1841–1935	MA	Harvard	Harvard	0–20–20	T. Roosevelt	1902–1932
William R. Day	1849–1923	OH	Michigan	Michigan	0–0–0	T. Roosevelt	1903–1922
William H. Moody	1853–1917	MA	Harvard	Harvard/Read law	0–0–0	T. Roosevelt	1906–1910
Horace H. Lurton	1844–1914	KY	Chicago	Cumberland U.	16–10–26	Taft	1910–1914
Charles E. Hughes	1862–1948	NY	Colgate/Brown	Columbia	0–0–0	Taft	1910–1916
Edward D. White*	1845–1921	LA	Mt. St. Mary's Georgetown	U. of LA (Tulane)	1 1/2–16–17 1/2	Taft	1910–1921
Willis Van Devanter	1859–1941	IN	Indiana Asbury (DePauw)	U. Cincinnati	7–1–8	Taft	1911–1937
Joseph R. Lamar	1857–1916	GA	Washington & Lee	Read law	0–2–2	Taft	1911–1916
Mahlon Pitney	1858–1924	NJ	Princeton (B.A. & M.A)	Read law	0–11–11	Taft	1912–1922
James C. McReynolds	1862–1946	KY	Vanderbilt	Virginia	0–0–0	Wilson	1914–1941
Louis D. Brandeis	1856–1941	KY	Annen–Realschule, Germany	Harvard	0–0–0	Wilson	1916–1939
John H. Clarke	1857–1945	OH	Western Reserve	Read law	2–0–2	Wilson	1916–1922
William H. Taft*	1857–1930	OH	Yale	Cincinnati	8–5–13	Harding	1921–1930
George Sutherland	1862–1942	England	Brigham Young	Michigan	0–0–0	Harding	1922–1938
Pierce Butler	1866–1939	MN	Carleton	Read law	0–0–0	Harding	1923–1939
Edward T. Sanford	1865–1930	TN	Tennessee	Harvard (M.A., LL.B)	14–0–14	Harding	1923–1920
Harlan Fiske Stone	1872–1946	NH	Amherst	Columbia	0–0–0	Coolidge	1925–1941
Charles E. Hughes*	1862–1948	NY	Colgate/Brown	Columbia	6–0–6	Hoover	1930–1941

Name	*Years*	*Nation or State of Birth*	*Undergraduate Education*	*Law School*	*Prior Judicial Experience St./Fed./Total*	*Appointing President*	*Yrs. of Ser. U.S. Sup. Ct.*
Owen J. Roberts	1875–1955	PA	Pennsylvania	Pennsylvania	0–0–0	Hoover	1930–1945
Benjamin N. Cardozo	1870–1938	NY	Columbia	Columbia	0–18–18	Hoover	1932–1938
Hugo L. Black	1886–1971	AL	U. Alabama Medical	U. Alabama	0–1 1/2–1 1/2	F.D.R.	1937–1971
Stanley F. Reed	1884–1980	KY	Ky. Wesleyan/Yale	Virginia/Columbia/ Sorbonne	0–0–0	F.D.R.	1938–1957
Felix Frankfurter	1882–1965	Austria	City College of N.Y.	Harvard	0–0–0	F.D.R.	1939–1962
William O. Douglas	1898–1980	MN	Whitman College	Columbia	0–0–0	F.D.R.	1939–1975
Frank Murphy	1890–1949	MI	Michigan	Michigan, Lincoln's Inn Trinity College, Dublin	0–7–7	F.D.R.	1940–1949
James F. Byrnes	1879–1972	SC	None	Read law	0–0–0	F.D.R.	1941–1942
Harlan Fiske Stone*	1872–1946	NH	Amherst	Columbia	16–0–16	F.D.R.	1941–1946
Robert H. Jackson	1892–1954	PA	None	Albany	0–0–0	F.D.R.	1941–1954
Wiley B. Rutledge	1894–1949	KY	Maryville C./Wisconsin	Colorado	4–0–4	F.D.R.	1943–1949
Harold H. Burton	1888–1965	MA	Bowdoin	Harvard	0–0–0	Truman	1945–1958
Fred M. Vinson*	1890–1953	KY	Centre College	Centre College	5–0–5	Truman	1946–1953
Tom C. Clark	1899–1977	TX	V.M.I./ Texas	Texas	0–0–0	Truman	1949–1967
Sherman Minton	1890–1965	IN	Indiana (LL.B.)	Yale (LL.M.)	8–0–8	Truman	1949–1956
Earl Warren*	1891–1974	CA	CA (Berkeley)	CA (Berkeley)	0–0–0	Eisenhower	1953–1969

John M. Harlan II	1899–1971	IL	Princeton	Oxford/NYU	1–0–1	Eisenhower	1955–1971
William J. Brennan Jr.	1906–1997	NJ	U. Pennsylvania	Harvard	0–7–7	Eisenhower	1956–1990
Charles E. Whittaker	1901–1973	MO		U. Kansas City Law	3–0–3	Eisenhower	1957–1962
Potter Stewart	1915–1985	OH	Yale/Cambridge	Yale	4–0–4	Eisenhower	1958–1981
Byron R. White	1917–2002	CO	Colorado	Yale	0–0–0	Kennedy	1962–1993
Arthur J. Goldberg	1908–1990	IL	Crane Jr./DePaul/ NW	Northwestern	0–0–0	Kennedy	1962–1965
Abe Fortas	1910–1982	TN	SW (Rhodes)	Yale	0–0–0	L.B. Johnson	1965–1969
Thurgood Marshall	1908–1993	MD	Lincoln University	Howard	3 3/4–0–3 3/4	L.B. Johnson	1967–1991
Warren E. Burger*	1907–1995	MN	U. Minn.	St. Paul College of Law	13–0–13	Nixon	1969–1986
Harry A. Blackmun	1908–1999	IL	Harvard	Harvard	11–0–11	Nixon	1970–1994
Lewis F. Powell Jr.	1907–1998	VA	Washington & Lee	Harvard	0–0–0	Nixon	1972–1987
William H. Rehnquist	1924–	WI	Stanford	M.A. Harvard/ M.A. Stanford/ LL.B. Stanford	0–0–0	Nixon	1972–1986
John Paul Stevens	1920–	IL	Chicago	Northwestern	5–0–5	Ford	1975–
Sandra Day O'Connor	1930–	TX	Stanford	Stanford	0–6 1/2–6 1/2	Reagan	1981–
William H. Rehnquist*	1924–	WI	Stanford	M.A. Harvard/ M.A. Stanford/ LL.B. Stanford	14–0–14	Reagan	1986–
Antonin Scalia	1936–	NJ	Georgetown/U. Fribourg	Harvard	4–0–4	Reagan	1986–
Anthony M. Kennedy	1936–	CA	Stanford/London Sch.	Harvard	12 1/2–0–12 1/2	Reagan	1988–
David H. Souter	1939	MA	Harvard/Oxford	Harvard	1/2–12–12 1/2	Bush	1990–
Clarence Thomas	1948	GA	Holy Cross	Yale	1/2–0–1/2	Bush	1991–

Ruth Bader Ginsburg	1933	NY	Cornell	Harvard/Columbia	13–0–13	Clinton	1993–
Stephen G. Breyer	1938	CA	Stanford/Magdalen	Harvard	14–0–14	Clinton	1994–

*Indicates that an individual was appointed to serve as a chief justice. In cases where a chief was appointed from within the Court, prior years of experience on the Supreme Court are included in years of experience as a federal judge.

Materials for this appendix were primarily gathered from Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* (Lanham, Md.: Rowman & Littlefield Publishers, 1999), see especially pp. 38–40 and 377–381. Information about educational degrees was primarily taken from Lisa Paddock, *Facts about the Supreme Court of the United States* (New York: H. W. Wilson Company, 1996).

How Well Do You Know Your Great American Judges?

Which great American judge:

* Was the only woman to serve on the Wisconsin Supreme Court prior to 1993? [Shirley S. Abrahamson]
* Was the first woman to sit on both a state supreme court and a federal court of general jurisdiction? [Florence Ellinwood Allen]
* Set high standards for publication of appellate court decisions while serving as chief justice of the Rhode Island Supreme Court? [Samuel Ames]
* Served from 1896 to 1921 as the only federal judge in North Dakota? [Charles F. Amidon]
* Pushed for legal and constitutional reform before being named chief justice of Maine? [John Appleton]
* Served on the United States Circuit Court for the District of Columbia and was influential in reshaping the M'Naghton Rule that had applied to insanity? [David L. Bazelton]
* Was a notorious Texas judge ("the law West of the Pecos") who once fined a dead man forty dollars for carrying a concealed weapon and then pocketed the fee? He was also known for telling newlyweds, "And may God have mercy on your souls." [Roy Bean]
* Served as an attorney general in the administration of Pres. Jimmy Carter after having previously stepped down from his position as a judge on the United States Fifth Circuit Court of Appeals? [Griffin Bell]
* Became embroiled in controversy for what were regarded as her liberal decisions as chief justice of the California Supreme Court and was denied reconfirmation by the voters? [Rose E. Bird]

* Was discovered to have been a member of the Ku Klux Klan prior to his appointment to the United States Supreme Court but went on to have an illustrious career arguing that the entire Bill of Rights should be applied to the states through the Fourteenth Amendment? [Hugo L. Black]
* Served for more than thirty-five years on the Indiana Supreme Court and authored a series of notable court reports? [Isaac Blackford]
* Is credited with having done more to shape Oklahoma law in the 1960s and 1970s than any other individual? [Luther Lee Bohanon]
* Served on the United States Fourth Circuit during and after Reconstruction and was known both for defending the rights of African Americans and for promoting economic nationalism and industrial capitalism? [Hugh Lennox Bond]
* Was the solicitor general who carried out President Nixon's order to fire Special Prosecutor Archibald Cox, was subsequently denied a seat on the United States Supreme Court, and is today considered to be a champion of conservative jurisprudence? [Robert H. Bork]
* Was the first Jew to serve on the United States Supreme Court and the man who, prior to his appointment, authored a famous kind of legal brief that still bears his name? [Louis D. Brandeis]
* Was a Texan who became a judicial activist on the United States Fifth Circuit Court of Appeals, where he served from 1955 to 1993? [John R. Brown]
* Was appointed as chief justice of the United States Supreme Court when Earl Warren retired and is well known for his efforts on behalf of streamlining judicial administration? [Warren Burger]
* Made his reputation on the New York Court of Appeals where he served from 1914 to 1932 prior to being appointed to the United States Supreme Court and remains one of the most quoted federal judges in law school casebooks? [Benjamin N. Cardozo]
* Made his reputation as a North Carolina Supreme Court justice for criticizing the federal judiciary and advocating constitutional reforms? [Walter Clark]
* Served on the New York Court of Appeals and was influential in reorganizing Genesee College into Syracuse University? [George F. Comstock]
* Served on the Michigan Supreme Court for twenty years before becoming the first head of the Interstate Commerce Commission? [Thomas M. Cooley]
* Served for fifty years as a member of the Circuit Court of Appeals of the District of Columbia but is more frequently recognized as an early compiler of United States Supreme Court decisions? [William Cranch]
* Served from 1801 to 1841 on a federal district court of Massachusetts, where he developed a reputation for his rulings on admiralty law? [John Davis]

* Served both on the territorial court of Oregon and as the state's first federal judge? [Matthew P. Deady]
* Served for thirty-seven years on the New Hampshire Supreme Court? [Charles C. Doe]
* Served as a federal judge in Illinois during the time that Abraham Lincoln practiced in the state? [Thomas Drummond]
* Is the contemporary judge on the United States Seventh Court of Appeals most closely associated with Judge Richard Posner and his views on law and economics? [Frank H. Easterbrook]
* Served on the United States Circuit Court of Appeals for the District of Columbia and declared racial segregation to be unconstitutional four years before the United States Supreme Court agreed with him in its historic decision in *Brown v. Board of Education* (1954)? [Henry White Edgerton]
* While serving as a federal judge in Michigan has developed a reputation for his work on alternate dispute resolution in federal courts? [Richard A. Enslen]
* Was believed to have been the target of an assassination attempt by a former colleague on the California Supreme Court while serving as a United States Supreme Court justice? [Stephen J. Field]
* Authored *Law and the Modern Mind* before serving for sixteen years as a federal appellate judge? [Jerome N. Frank]
* Was a Harvard law professor and strong supporter of Franklin D. Roosevelt's New Deal before being appointed to the United States Supreme Court, where he surprised many individuals by his conservatism? [Felix Frankfurter]
* Was a onetime law clerk to Supreme Court justice Louis Brandeis who served on the United States Second Court of Appeals and was especially known for his rulings on administrative law? [Henry J. Friendly]
* Served as Pennsylvania's longest-serving Supreme Court justice and once authored a dissenting opinion questioning the doctrine of judicial review whereby federal courts can declare congressional laws to be unconstitutional? [John Bannister Gibson]
* Served as a reporter for the Supreme Judicial Court of Massachusetts before being appointed as an associate justice where he served for seventeen years before being appointed to the United States Supreme court? [Horace Gray]
* Served as chief justice of the Tennessee Supreme Court, a position that was later occupied by his grandson? [Nathan Green Sr.]
* Was a cousin of Learned Hand who helped craft an exception to the Hicklin Test, which was at the time applied to obscenity law? [Augustus N. Hand]
* Was a New York judge who is often cited as the most capable twentieth-century judge who was never appointed to the United States Supreme Court? [Learned Hand]

* Authored the famous dissent in *Plessy v. Ferguson* (1896) in which he opposed the doctrine of "separate but equal" in race relations? [John Marshall Harlan]

* Was the grandson of an earlier Supreme Court justice, also known for his dissents, albeit largely from a liberal court rather than a conservative one? [John Marshall Harlan II]

* Served as a chancellor in both Missouri and South Carolina and was known for his defense of slavery? [William Harper]

* Was a highly successful attorney for the Legal Defense Fund of the National Association for the Advancement of Colored People before being named as the first African American federal judge? [William H. Hastie]

* Was a long-serving judge on the United States Fourth Circuit who was rejected by the Senate for the United States Supreme Court but was eventually honored when the federal courthouse in Greenville, South Carolina, was named after him? [Clement F. Haynsworth Jr.]

* Served as chief justice of both the Republic and the state of Texas and has been likened to John Marshall for the influence he had on law within the state? [John Hemphill]

* Was only the third African American to serve as a chief judge in a federal appellate court and wrote an "open letter" to incoming United States Supreme Court justice Clarence Thomas criticizing his views on civil rights? [A. Leon Higginbotham Jr.]

* Fought and was wounded in the U.S. Civil War, authored *The Common Law,* and went on to become one of the best-recognized and longest-serving United States Supreme Court Justices? [Oliver Wendell Holmes Jr.]

* Was the courageous Alabama judge who overturned a jury verdict in the *Scottsboro Boys* case, lost his bid for reelection, and subsequently retired to his farm? [James E. Horton Jr.]

* Was a former New York governor who resigned from the United States Supreme Court in an unsuccessful bid for the presidency but later served as chief justice during Franklin D. Roosevelt's proposed "court-packing plan"? [Charles Evans Hughes]

* Was the federal district judge in Texas who swore in Lyndon B. Johnson as president after the assassination of Pres. John F. Kennedy? [Sarah Tilghman Hughes]

* Was an activist federal judge who enforced civil rights decisions, ordered reform, and was once told by Alabama governor George Wallace that he needed a "barbed wire enema"? [Frank M. Johnson Jr.]

* Was described as "the law East of the Pecos" and was known for his activism in cases involving Texas public schools, the juvenile justice system, and the treatment of the mentally ill and of prisoners? [William Wayne Justice]

* Is probably better known for his *Commentary on American Law* than for his service as New York chancellor? [James Kent]
* Was born in Romania, serves on the United States Fourth Circuit Court of Appeals, and is well known for his view that commercial speech should be accorded the same constitutional protection as other speech? [Alex Kozinski]
* Was a former United States district judge in Illinois but is best known for his role as a baseball commissioner, in which role he helped restore a reputation of integrity to the sport? [Kenesaw Mountain Landis]
* Served on the United States Court of Appeals for the District of Columbia from 1965 to 1979 and is best known for his decisions involving administrative law? [Harold Leventhal]
* Has served on the Oregon Supreme Court and is best known for championing the view that state judges should consult their own constitutions before looking at the U.S. Constitution? [Hans A. Linde]
* Was the first chancellor of New York, helped negotiate the purchase of the Louisiana Territory, and later became involved in the steamboat monopoly case that led to the famous United States Supreme Court decision in *Gibbons v. Ogden* (1824)? [Robert R. Livingston Jr.]
* Is generally credited with being the most influential individual in establishing the Georgia Supreme Court on a firm foundation? [Joseph Henry Lumpkin]
* Served on the United States Court of Appeals for the District of Columbia during the 1960s and 1970s and often expressed his views in law journals on matters involving separation of powers? [Carl E. McGowan]
* Was a cousin of Thomas Jefferson best known for having been both a participant in, and the decider of, the case of *Marbury v. Madison* (1803), which established the power of the United States Supreme Court to invalidate unconstitutional federal legislation? [John Marshall]
* Was married to the sister of Chief Justice John Marshall, with whom he shared his surname, and served multiple times as chief justice of the Kentucky Supreme Court? [Thomas A. Marshall]
* Served for many years on the Louisiana Supreme Court and is credited with helping to standardize and "Americanize" the Louisiana legal system? [François-Xavier Martin]
* Is best known for presiding over the trial of leading American Communists under the Smith Act in a case later appealed to the United States Supreme Court as *Dennis v. United States* (1951)? [Harold R. Medina]
* Served as a congressman and White House counsel before being appointed to the United States Circuit Court for the District of Columbia? [Abner J. Mikva]

* Was a nineteenth-century judge, first in a United States district court and then on the Minnesota Supreme Court, who subsequently had a law school named after him? [William Mitchell]
* Is best known for having been fired as chief justice of the New York Supreme Court for a dissent denying the power of the royal governor to create a court of equity simply to serve his own purposes? [Lewis Morris]
* Was the first African American woman to serve in the New York state senate and on the federal judiciary? [Constance Baker Motley]
* Was a pioneer in Oklahoma justice who had a federal building named after him that was later the target of domestic terrorists? [Alfred P. Murrah]
* Served in Fort Smith, Arkansas, where he gained the reputation as perhaps the nation's foremost "hanging judge"? [Isaac C. Parker]
* Served on the United States Court of Appeals for the Fourth Circuit, was rejected by the Senate for a nomination to the United States Supreme Court, but continued his strong advocacy for the "New South"? [John J. Parker]
* Served toward the end of his life as chief justice of the Massachusetts Supreme Court, where he was credited with bringing about administrative reforms? His opinions were later collected in a volume called *Commentaries on American Law.* [Theophilus Parsons]
* Headed the Virginia judiciary from 1778 until 1803 and was sometimes involved in controversy with Virginia judge George Wythe? [Edmund Pendleton]
* Has served for more than thirty-five years as a United States district judge in New York, where he is well known for his handling of the Drexel Burnham Lambert mass class action suit and other high-profile cases? [Milton Pollack]
* Is both one of the most prolific writers and most-cited contemporary federal judges in the United States and who also serves as a law professor at the University of Chicago? [Richard A. Posner]
* Served for almost thirty years as a judge in New York and was a colleague of Benjamin Cardozo when both sat on the New York Court of Appeals? [Cuthbert W. Pound]
* Succeeded Warren Burger as chief justice of the United States Supreme Court and is one of only two justices to have presided over an impeachment of a U.S. president in the U.S. Senate? [William H. Rehnquist]
* Was an Alabama native who served on the Fifth Circuit Court of Appeals during the period in which that court made many historic rulings upholding and enforcing United States Supreme Court decisions relating to racial desegregation? [Richard Rives]
* Was a neighbor of Chief Justice John Marshall who articulated a very different view of federalism during his years as a member of the Virginia Court of Appeals? [Spencer Roane]

* Served as a prominent antebellum North Carolina judge who once refused to convict a slave owner who had shot and wounded a slave who fled from his chastisement and refused to stop? [Thomas Ruffin]

* Was born in Ireland and went on to become the third chief justice of the Wisconsin Supreme Court, where he was recognized for his acumen and productivity? [Edward George Ryan]

* Served on the Illinois Supreme Court from 1951 to 1976 and earned a reputation as a leading scholar-judge of state courts? [Walter V. Schaefer]

* Became known as a prominent New York reformer but resigned from his seat on the New York Court of Appeals in the unfulfilled expectation that he would receive Theodore Roosevelt's endorsement for governor? [Samuel Seabury]

* Apologized for his participation in the Salem witch trials and went on to serve for thirty-six years on the Supreme Court of Judicature of Massachusetts, including ten years as its chief justice? [Samuel Sewall]

* Was known for his extensive publications, his work as a law professor, and his service on a Pennsylvania district court and the Pennsylvania Supreme Court? [George Sharswood]

* Wrote Boston's first city charter before serving for thirty years as chief justice of the Massachusetts Supreme Court, where his decisions included the case of *Roberts v. City of Boston* (1849), in which he decided that the Constitution as then written (at that time there was no Fourteenth Amendment) did not prohibit racial segregation? [Lemuel Shaw]

* Became best known for his trial court decision in the Watergate tapes case but had considered becoming a prize fighter and actually participated in a professional welterweight match while he was awaiting the results of his bar exam? [John J. Sirica]

* Served for many years on the Alabama Supreme Court and was known for helping to professionalize the practice of law within the state? He also published humorous poetry, for which, however, his reputation is not as strong. [George Washington Stone]

* Was a former Columbia Law School dean who authored perhaps the most famous footnote in American case law in the *Carolene Products* Case prior to being elevated as chief justice of the United States Supreme Court, where he had previously served as an associate justice? Scholars do not generally credit his skills as a chief justice as much as they do his opinions. [Harlan Fiske Stone]

* Was a colleague of John Marshall on the United States Supreme Court and became known both as a Harvard lecturer and as the author of *Commentaries on the Constitution?* [Joseph Story]

* Was the chief justice who succeeded John Marshall on the United States Supreme Court and was well known for his decision in the *Charles River*

Bridge case prior to what is almost universally regarded as his disastrous decision in the *Dred Scott* case? [Roger Brooke Taney]

* Taught law and political science at the University of California at Berkeley before serving on the California Supreme Court for thirty years (six as chief justice), in which role he is considered to have been one of the most influential judges of the twentieth century? [Roger John Traynor]
* Edited and adapted Sir William Blackstone's *Commentaries on the Laws of England* for an American audience and served on the Virginia Court of Appeals from 1804 to 1811? [St. George Tucker]
* Was the grandson of a Civil War veteran, was born in California, studied in Hawaii, and served from 1961 to 1968 on the United States Fifth Circuit Court of Appeals, where he was a major figure in leading decisions related to racial desegregation? [Elbert Parr Tuttle]
* Served as chief justice of the New Jersey Supreme Court and is widely recognized as one of the leading judicial reformers of the twentieth century? [Arthur T. Vanderbilt]
* Was an eighth-generation Charlestonian whose civil rights decisions as a United States district judge eventually alienated him from most prominent members of that community? [J. Waties Waring]
* Served as governor of California and a Republican vice presidential nominee before becoming one of the most influential United States chief justices in U.S. history? During his service, the Supreme Court issued its historic opinion in *Brown v. Board of Education*. [Earl Warren]
* Has served for more than thirty years as a United States district judge in New York and authored a book entitled *Individual Justice in Mass Tort Litigation?* [Jack B. Weinstein]
* Wrote about his experiences as a clerk to United States Supreme Court justice Lewis Powell before being appointed to the United States Fourth Circuit Court of Appeals, where he has continued to publish scholarly books and articles? [J. Harvie Wilkinson III]
* Is considered to have been the intellectual leader of the judges on the United States Fifth Circuit Court of Appeals who issued major decisions involving civil rights cases from the 1950s through the 1970s? [John Minor Wisdom]
* Was the first United States district judge to order desegregation after the United States Supreme Court's decision in *Brown v. Board of Education* (1954) and was later appointed to the District of Columbia Circuit Court of Appeals, where he continued to issue controversial rulings? [James Skelly Wright]
* Became the first African American ever to sit on a state supreme court, serving on the South Carolina bench from 1870 to 1877? [Jonathan Jasper Wright]

* Served as the first professor of law in America and later as a Virginia chancellor, where he frequently came into conflict with Edmund Pendleton? He counted Thomas Jefferson and Henry Clay among his students before being poisoned by his nephew. [George Wythe]
* Was a prominent member of Franklin D. Roosevelt's "brain trust" before his appointment to a federal district court in Massachusetts, where he served for many years? [Charles E. Wyzanski Jr.]

Questions about judges described in sidebar boxes rather than in full entries: Which American judge:

* Was the first woman to both serve as an assistant U.S. attorney general and preside over a California appellate court? [Annette Abbott Adams]
* Served as a chief justice on both the Nevada and California supreme courts? [William H. Beatty]
* Came to know Abraham Lincoln while riding circuit in Illinois and was later appointed to a federal court in New Mexico, where he helped found the state's historical society? [Kirby Benedict]
* Is an African American judge in Memphis, Tennessee, who has starred in a television program in which he resolves disputes of individuals who appear before him? [Joe E. Brown Jr.]
* Became California's first woman judge? [Georgia Bullock]
* Was the first Puerto Rican ever appointed to a U.S. court on the mainland? [Jose Alberto Cabranes]
* Was born in Milan, Italy, became dean of the Yale Law School, and now serves on the United States Second Court of Appeals? [Guido Calabresi]
* Was a judge on the United States First Circuit Court of Appeals who penned a book entitled *The Ways of a Judge: Reflections from the Federal Appellate Bench?* [Frank M. Coffin]
* Was one of the most prominent English judges and is often associated with the idea that even a nation's highest legislative body is subject to judicial oversight? [Sir Edward Coke]
* Was a New York judge best known for continuing speculation about his unsolved disappearance? [Joseph Force Crater]
* Is a judge of Hispanic background who serves on the United States Fifth Circuit Court of Appeals and was considered for the United States Supreme Court in a nomination that eventually went to Justice Clarence Thomas? [Emilio M. Garza]
* Was the first Jewish woman ever to be appointed to the United States. Supreme Court? [Ruth Bader Ginsburg]
* Presided over a trial that became the basis for the Alfred Hitchcock film *Psycho?* [Robert Gollmar]

* Served on the Texas Supreme Court prior to being chosen by George W. Bush as his chief White House counsel? [Alberto R. Gonzalez]
* Returned to teaching at Hastings Law School after being ousted from the California Supreme Court in the same election that ousted Chief Justice Rose Bird? [Joseph R. Grodin]
* Served as chief of the Colorado territorial bench from 1866 to 1877 and then on the first United States District Court of Colorado from 1877 to 1906? [Moses Hallett]
* Served as chief justice of the Alabama Supreme Court prior to serving as a senator from that state? [Howell Heflin]
* Served as a justice of the Oklahoma Supreme Court and as a mayor of Oklahoma City and later donated his opulent house to the Oklahoma Heritage Association? [Richard A. Hefner]
* Served as the nation's first secretary of education after having previously served on the Ninth United States Circuit Court of Appeals? [Shirley Mount Hufstedler]
* Became the only federal judge siding with the Confederate States of America who was impeached and removed from office? [West H. Humphreys]
* Served in a succession of high English judicial offices and has a reputation for being among that nation's most "bloody" judges? [George Jeffreys]
* Became identified with the title "Golden Rule" when, as a police court judge, he tried to avoid incarcerating anyone? [Samuel Jones]
* Served as a United States district judge in New York, where he decided that James Joyce's *Ulysses* was not obscene and spoke out against Pres. Franklin D. Roosevelt's "court-packing plan"? [John C. Knox]
* Was a Texan long referred to as a "judge," who later became an official "referee" on bankruptcy matters before the United States District Court for the Western District of Texas? [Kirvin Kade Leggett]
* Served as a judge in both Colorado and California and was best known for his outspoken views on behalf of juvenile justice and sex education? [Benjamin B. Lindsey]
* Became the first woman in Georgia to win an elected judicial position to which she had not been previously appointed? [Rufe McCombs]
* Was one of the greatest civil rights litigators of the twentieth century, who went on to become the first African American United States Supreme Court justice? [Thurgood Marshall]
* Served, without a law degree, as a commissioner of the peace in Fairfax County, Virginia, and eventually opposed ratification of the U.S. Constitution that was being advocated by his neighbor George Washington? [George Mason]

* Was the first woman ever to serve as a United States District Court judge? [Burnita S. Matthews]
* Served as a criminal court judge in Birmingham, Alabama, and apparently killed himself after being accused of racketeering and extortion? [Jack Montgomery]
* Wrote a book in which she described herself as "America's Toughest Judge"? [Ellen Morphonious]
* Served as a justice in the peace in Wyoming, where she is believed to have been the first U.S. woman to have served as a judge? [Esther McQuigg Morris]
* Was a self-proclaimed "country judge" in Texas, where he was sworn in in 1949 as judge of the seventieth judicial district? [William P. Moss]
* Served in a variety of Indiana courts and helped initiate reforms of the state police courts? [John L. Niblack]
* Is a prominent scholar of Catholic canonical law who has continued to publish prolifically since his appointment to the Ninth United States Circuit Court of Appeals? [John T. Noonan Jr.]
* Served as an Arizona legislator before becoming the first woman ever appointed to the United States Supreme Court? [Sandra Day O'Connor]
* Served as a municipal judge in West Palm Beach and plotted to kill Florida circuit judge Curtis Chillingworth and his wife? [Joseph A. Peel]
* Recently reversed one of his earlier rulings in which he had questioned the scientific accuracy of fingerprint analysis? [Louis H. Pollack]
* Was a nineteenth-century Kentucky judge who was ferociously beaten by an attorney and apparently killed himself? [Richard Reid]
* Served as Hawaii's lieutenant governor before being installed as chief justice of the Hawaii Supreme Court? [William Shaw Richardson]
* Served as a Texas justice of the peace and became best known for issuing "peace bonds"? [W.E. "Bill" Richburg]
* Served as a law professor at Transylvania University (where he taught more than 1,200 lawyers) during part of the time that he served on the Kentucky Court of Appeals? [George Robertson]
* Was the first African American to graduate from the Harvard Law School and became a state district judge for the city of Charleston, Massachusetts? [George Lewis Ruffin]
* Was a diplomat before being elected as a judge in Cook County, Illinois? [Edith S. Sampson]
* Has written a book about his work as a Connecticut trial judge? [Robert Satter]

* Became the first U.S. citizen of Italian ancestry to be appointed to the United States Supreme Court and quickly established himself as one of the Court's most outspoken conservative members? [Antonin Scalia]
* Is best known as the star of the television show *Judge Judy?* [Judy Sheindlin]
* Once ordered a juvenile to attend the funeral of a pedestrian he had hit while driving a stolen car and later roamed the halls of her nursing home "sentencing" fellow patients? [Sadie L. Shulman]
* Was an Ohio judge born in Latvia and generally known simply as "Judge Sam"? [Samuel H. Silbert]
* Was born in Cuba to a Cuban father and an African American mother and became the first nonwhite judge to serve on the supreme court for the state of Washington? [Charles Z. Smith]
* Was gunned down by a federal marshal protecting United States Supreme Court justice Stephen Field? [David S. Terry]
* Is the second African American to serve on the United States Supreme Court and has established himself as a conservative who rarely questions attorneys during oral arguments? [Clarence Thomas]
* Was the chief judge of the New York Court of Appeals who was often suggested as a gubernatorial candidate before being convicted for threatening kidnapping and blackmail? [Sol Wachtler]
* Is best known as the onetime star of television's *The People's Court?* [Joseph A. Wapner]
* Served as a Pennsylvania congressman before being elected to the Court of Common Pleas in Pittsburgh and then, as during his service as a member of Congress, continued to officiate at college football games? [Samuel A. Weiss]
* Was denied reelection to the Tennessee Supreme Court when she became embroiled in controversy related to an opinion involving the death penalty? [Penny J. White]
* Served as the first female judge in the state of Washington? [Reah Mary Whitehead]
* Served as a United States district judge for Alaska and later served as a representative to the U.S. Congress from that state? [James Wickersham]
* Helped draft Oklahoma's constitution, served as a member of the state's judiciary and as a governor, and went on to serve as both a United States district judge and a judge on the Tenth United States Circuit Court of Appeals? [Robert L. Williams]
* Is an African American judge who was often called "Turn 'em Loose Bruce" for decisions that were regarded as being overly lenient toward criminals? [Bruce McMarion Wright]

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Index

AAA (Agricultural Adjustment Administration), 260, 678–679, 729
ABA. *See* American Bar Association
Abbott Laboratories v. Gardner, 278
ABC television network, 559
Ableman v. Booth, 747
Abolitionists
  John and Charlotte Amidon, 25–26
  Brandeis family, 121
  charitable trust established, 299–300
  Salmon P. Chase, 747–748. *See also* Chase, Salmon P.
  Henry Clay, 498, 500
  Reuben Crandall, 185, 186
  and *Dred Scott,* 748–749
  murder committed by, 444
  Lemuel Shaw criticized by, 707
  Thaddeus Stevens, 699
  See also Emancipation of slaves
Abortion
  judges' opinions, 82, 159, 619
  late term/partial birth abortion, 226
  "Nuremberg Files" case, 443–445
  Planned Parenthood v. Casey, 647
  See also Roe v. Wade
Abrahamson, Shirley Schlanger, 1–7, 866
Abrams v. United States, 127–128, 388, 634
Absentee voting, 177
Academic freedom, 271, 626
Accused persons, rights of. *See* Criminal suspects' rights; Defendants' rights
ACLU (American Civil Liberties Union), 242–243, 410, 789
Activism. *See* Conservative activist judges; Judicial activism; Liberal activist judges
Adams, Annette Abbott, 16–17
Adams, John
  and William Cranch, 182, 183–184, 188
  and John Davis, 192
  Declaration of Independence, 473
  and John Marshall, 489, 657
  and Massachusetts, 298, 597
Adams, John Quincy, 182–183, 186
Adamson v. California, 78, 269–270
Adderly v. Florida, 79
Address to the People by the Democracy of Wisconsin (Ryan), 672
Adele v. Beauregard, 504
Administration, judicial/court
  Griffin Bell's leadership, 61
  Warren Burger as administrator, 142, 146–147, 150, 151
  reforms, 68–69, 136–137, 599–600. *See also* Judicial reforms
  Arthur Vanderbilt and, 775–776, 781
Administrative hearings, 278–280
Administrative law
  delegation of authority to executive branch, 459
  Felix Frankfurter and, 278
  Henry Friendly and, 276, 278–280
  judicial review of agency actions, 459–461, 516
  Harold Leventhal and, 459–462
  Abner J. Mikva and, 534–535
Administrative Office of the U.S. Courts Act (1939), 593, 775, 847–848
Administrative Procedures Act, 535
Admiralty and maritime law
  John Davis, 191–195, 856

Matthew Deady, 202, 203
Learned Hand, 321–322
jurisdiction, 203, 214, 746
ADR (alternative dispute resolution), 239, 244–245
Adultery, 336–337
Advertising. *See* Commercial speech
Affirmative action
African American judges and, 58, 355, 380, 381, 561
John R. Brown and, 138–140
Burger Court decisions, 145–146
Fay v. New York and, 521
racial quotas, 59
University of California v. Bakke, 146, 222
voluntary institution, 818
for women, 482
AFL-CIO, 363, 366
African American judges
Adolpho A. Birch, Jr., 306, 307
Joe E. Brown, 379
William H. Hastie, 351–360, 863
A. Leon Higginbotham, Jr., 377–382, 865
Thurgood Marshall, 354–355, 873. *See also* Marshall, Thurgood
Constance Baker Motley, 556–562, 772, 865
Louis H. Pollack, 610–611
George Lewis Ruffin, 666–667
Edith Spurlock Sampson, 216–217
Charles Z. Smith, 466
Clarence Thomas, 58–59, 873. *See also* Thomas, Clarence
Bruce M. Wright, 796–797
Jonathan J. Wright, 828–834, 860
African Americans
attorneys, 352–353, 358, 561, 829. *See also specific attorneys*
during Civil War and Reconstruction, 103, 104–105
Walter Clark's attitudes toward, 167
exclusion from juries, 233–234
first federal law clerk, 231
freemen, 500, 504
John Marshall Harlan I and, 331–332
Ku Klux Klan harassment of, 240–241, 418, 816–817. *See also* Ku Klux Klan
John J. Parker and, 584, 585, 593
Richard Posner on black women, 617
prisoners, 379, 803
Bass Reeves (deputy marshal), 578
segregation/desegregation. *See* Desegregation; Desegregation of public education; Segregation; Segregation in education
J. Waties Waring and, 784–789
J. Harvie Wilkinson opposed, 809
witness testimony, 36
See also Affirmative action; African American judges; Civil rights; Slavery; Voting rights; *and specific individuals*
Agent Orange case, 801, 802
Agostini v. Felton, 243
Agricultural Adjustment Administration (AAA), 260, 678–679, 729
Agriculture Adjustment Act, 404, 405
Airlines, 461
Alabama
civil rights protests, 133, 417, 610, 650, 651
constitution, 80–81, 421
James Edwin Horton, Jr., 391–399, 861
Thomas Goode Jones, 420–421, 724
judicial corruption, 394–395
judicial/court reform, 80–81, 724
Ku Klux Klan, 240–241, 418
legal ethics code, 420
Marsh v. Alabama, 82
mental health system, 418–419
Jack Montgomery, 394–395
NAACP v. Alabama, 343
New York Times *v. Sullivan,* 231–232
Pace v. Alabama, 336–337
prison system, 419
school desegregation, 417, 418
Scottsboro Boys cases, 158, 391, 393–399, 404
segregated transportation, 133, 416, 650–651
Swain v. Alabama, 233–234
voting, 134–135, 416–417
See also Alabama, U.S. District Court for; Alabama Supreme Court; Fifth Circuit Court of Appeals
Alabama Power Company v. Ickes, 260
Alabama, U.S. District Court for
Frank M. Johnson, Jr., 96–97, 133, 415–423, 429, 865

Alabama Supreme Court
Howell Heflin, 80–81
George Washington Stone, 720–725, 859
Alaska. *See* Wickersham, James
Alexander, James, 552
Alexander, Lamar, 819
Alexander v. Holmes County Board of Education, 58–59
Alger, Horatio, 155
Alien and Sedition Acts, 656
Alien Land Law cases, 755–758
Aliens, rights of, 27–28. *See also* Immigrants
Allen, Clarence Emir, 8, 9
Allen, Florence Ellinwood, 8–18, 557, 558, 559, 862
Allen v. Baltimore & Ohio R.R. Co., 107
Allen v. Inhabitants of Jay, 37
Allred, Jimmy, 407
Alston v. School Board of City of Norfolk, 591
Alternative dispute resolution (ADR), 239, 244–245
Amador Valley Joint Union High School District v. State Board. of Equalization, 69–70
Amalgamated Meat Cutters v. Connally, 459
Amendment, principal of, 208
American Airlines, Inc. v. Civil Aeronautics Board, 461
American Amusement Machine Association v. Kendrick, 626
American Bar Association (ABA)
Warren Burger and, 144
Bush administration not vetting nominations with, 375
code of ethics, 420, 697
Committee on the Federal Judiciary, 466
Thomas Cooley as president, 181
discrimination, 353, 358
federal judge guidelines, 409, 466
Clement Haynsworth supported, 362–363, 368
judicial evaluation guidelines, 307
Abner J. Mikva and, 535
nominations opposed, 126, 409
John J. Parker and, 593
Section of Judicial Administration, 61, 593
American Civil Liberties Union (ACLU), 242–243, 410, 789
American Colonization Society, 481, 743
American Communist Party. *See* Communist Party
American Cyanamid case, 112–113
American Federation of Labor–Congress of Industrial Organizations (AFL-CIO), 363, 366
American Law Institute, 155, 275, 326, 593, 758
American Telephone and Telegraph (AT&T), 844, 846
American Tobacco Company, 333–334
American Zionist movement, 126
Americans United for Church and State v. School District of the City of Grand Rapids, 243
Americans with Disabilities Act, 810–811
America's Town Meeting of the Air Program, 216–217
Ames, Samuel, 20–24, 858
Amidon, Beulah McHenry, 26, 30
Amidon, Charles Fremont, 25–31, 860
Amidon, Charlotte Curtis, 25–26
Amidon, John Smith, 25–26
Anchor Coal Co. v. United States, 586
Anne, Queen of Great Britain and Ireland, 549
Anticybersquatting Consumer Protection Act, 811
Anti-Semitism, 126, 167, 264, 402, 687
Antisodomy laws. *See* Sodomy laws
Antitrust law/cases
Du Pont brothers' trial, 339–340
Great Trust Cases of 1911, 330, 333–334, 336
In re Professional Hockey Antitrust Litigation, 380
Microsoft case, 617, 844, 846
Schwegmann Brothers v. Calvert Distillers Corporation, 815
Sherman Anti-Trust Act, 325, 332, 845
United States v. Aluminum Co. of America, 528
United States v. Associated Press, 325
United States v. E. C. Knight Co., 332–333
United States v. Morgan, 519, 524, 526–527
United States v. United Shoe Machinery Corporation, 844–846
Zenith Radio Corporation v. Matsushita Electrical Industrial Corporation., 380

The Antitrust Paradox (Bork), 116
Appeals, 234, 574–575. *See also* Appellate courts; *and specific cases and courts*
Appellate courts
  appellate procedure streamlined, 136–137
  Hruska Commission, 150
  Isaac Parker's suggested reforms, 576
  publishing of decisions, 22. *See also* Court reporting
  role and duties, 515–516
  trial vs. appellate judging, 588–589
  See also Federal courts; *and specific courts*
Appleton, John, 32–39, 858
Appointment of judges. *See* Judicial appointment
Arizona
  Arizona Employers' Liability Cases, 632
  Miranda v. Arizona, 145, 283, 343, 680, 797–798
  Sandra Day O'Connor, 646, 647. *See also* O'Connor, Sandra Day
Arizona Employers' Liability Cases, 632
Arkansas, 824–825
Arkansas, U.S. District Court for the Western District of, 572, 577
  Isaac C. Parker, 49–50, 571–582, 860
  See also Indian Territory
Arkansas River bed, ownership of, 98–99
Armed forces. *See* GI Bill of Rights; Military tribunals; Navy, U.S.
Arms, right to bear, 481, 766
Armstrong v. Jones, 485
Arnold, Thurman, 259, 260, 526
Arrest, 241–242, 313. *See also* Criminal suspects' rights; Defendants' rights
Ashwander v. Tennessee Valley Authority, 126
Association, criminal, 313
Association, freedom of, 343, 514
AT&T, 844, 846
Atkinson v. The Detroit Free Press Co., 180
Atlantic, Mississippi and Ohio Railroad, 108
Atlantic Coast Line R.R. v. Standard Oil Co., 586
Atomic Energy Commission, 43–44
Attorney General v. Chicago & Northwestern R. Co., 672–673
Attorneys General, U.S.
  Griffin Bell, 61–62
  Ramsey Clark, 557
  Tom C. Clark, 823. *See also* Clark, Tom C.
  Homer Cummings, 12
  John Mitchell, 716
  Harlan Fiske Stone, 727–728. *See also* Stone, Harlan Fiske
  Roger B. Taney, 743–744. *See also* Taney, Roger B.
  See also Kennedy, Robert
Audenried v. Philadelphia and Reading Railroad, 700
Automobiles, 156, 468, 534. *See also* General Motors
Averil v. Dickenson, 87
Ayeni v. Mottola, 803, 804

"Bad tendency" test, 523. *See also Gitlow v. New York*
Bader, Ruth. *See* Ginsburg, Ruth Bader
Bailey, Thomas, 765
Bailey v. Alabama, 402
Bailey v. Kraus, 685
Bailey v. Richardson, 234–235
Bain v. State, 723
Baker, Constance. *See* Motley, Constance Baker
Baker v. Carr, 271, 795
Baker v. City of Portland, 199
Baldwin, Henry, 292, 869
Baltimore, Maryland, 103–104
Baltimore & Ohio R.R. Co. v. Allen, 107
Bank of Augusta v. Earle, 746
Bank of the State v. Cooper, et al., 305–307
Bank of the United States, 699, 735, 743, 744. *See also M'Culloch v. Maryland*
Banking
  foreign banks, compelling information from, 612
  Investment Banking case, 524, 526. *See also United States v. Morgan*
  James Kent and, 435
  personal checks, 435
  See also Money
Bankruptcy laws/cases
  Bank of the United States, 699
  Bankruptcy Act (1800), 489, 587
  Hugh L. Bond's rulings, 108
  constitutionality of state bankruptcy laws, 194
  Corporate Reorganization Act, 587
  Drexel Burnham case(s), 607, 608–612, 613
  Frazier-Lemke Act, 129, 587
  Benjamin Latrobe's bankruptcy, 185
  Kirvin Kade Leggett and, 49
  in New York, 194
  North American Trust and Banking Co., 171–172
Banzetti, Bartolomeo, 265

Barenblatt v. United States, 236, 342
Barnes, Ben, 412
Barnett, Ross, 652, 816
Barr, P. S., 19
Barsky v. United States, 235
Barstow, William, 672
Baseball, 449, 450, 451, 453–456, 527–528
Bashford, Coles, 672
Basic Books, Inc. et al. v. Kinko's Graphics Corporation, 560
Baskin v. Brown (*Brown v. Baskin*), 592, 784–785
Basse, Jeremiah, 549
Bates, Ruby, 393, 396, 397. *See also* Scottsboro defendants
Batson v. Kentucky, 234
Battle, Bobby, 100. *See also Battle v. Anderson*
Battle v. Anderson, 97–98, 99, 100
Baylor, R. E. B., 372
Bazelon, David L., 39–45, 236, 460–461, 532, 533, 864
Beal, Eric, 625
Bean, Josh, 47
Bean, Roy "Phantly", 46–54, 578, 859
Bean, Sam, 47
Beard v. United States, 575
Beatty, William Henry, 249
Becker, Charles, 686–687
Beharry v. Reno, 804
Beitzinger, Alfons, 669, 670, 673
Bell, Griffin, 55–65, 865
Bell v. Maryland, 82–83
Bellinger, Charles, 199
Beltran, Beatrice, 625
Benedict, Kirby, 748–749
Benet, Stephen Vincent, 693
Bennett, Olga, 2
Bentham, Jeremy, 35
Benton, John D., 26
Benton, Thomas Hart, 699
Benton v. Maryland, 159
Berea College v. Kentucky, 337
Berger, Victor, 453
Bergman v. United States, 240–241
Bickett v. Knight, 166
Biddle, Nicholas, 699
Biden, Joseph, 244
Bierman, Leonard, 624–625
Bill of Rights
  Hugo Black on incorporation, 82–83
  Felix Frankfurter on incorporation, 269–270
  Henry Friendly on incorporation, 283
  incorporation through due process, 82, 338, 342, 591. *See also* Due process; Fourteenth Amendment
  Theophilus Parsons's role in developing, 597
  "preferred freedoms" directive, 270, 730–731
  selective incorporation, 78, 404, 644
  total incorporation thesis, 78, 335, 338
  See also specific amendments and rights
The Bill of Rights (lectures and book by L. Hand), 327
Birch, Adolpho A., Jr., 306, 307
Bird, Rose Elizabeth, 66–74, 866
Birth year, judges listed by, 851–852, 856–866
Black, Hugo Lafayette, 75–84, 862, 872
  and *Brown v. Board of Education,* 795
  Guido Calabresi and, 269
  First Amendment views, 79, 236, 342
  Jerome Frank and, 259
  Frank Johnson and, 418
  as New Deal justice, 268
  retirement, 83, 344
  Richard Rives and, 649
  Harlan F. Stone and, 730
  Supreme Court appointment, 14, 76
  Wesberry v. Vandiver, 771
  as Skelly Wright's hero, 826
Black, Jeremiah, 294
"Black Hand" murder trial, 10–11
Black Marshall (Burchardt), 578
"Black Sox" scandal, 449, 454, 455
Blackburn, Sharon Lovelace, 395
Blackford, Isaac, 84–92, 857
Blackford's Reports (Blackford), 84, 86–87
Blackmun, Harry A., 143, 145, 525, 873
Blackstone, William, 433, 604, 697, 761
Blair, John, Jr., 604, 606, 838, 868
Blake, D. T., 474–475
Blakeslee, Clarence, 556
Block v. Compagnie Nationale Air France, 819
Blue laws. *See* Sunday business closing laws
Boardman v. Woodman, 209
Boggs, Biddle, 250–251
Bohanon, Luther Lee, 93–101, 563, 568, 863
Bollman, Erick, 186–187
Bond, Hugh Lennox, 102–110, 859
Bond v. Floyd, 771
Bonds, 172
Bonham's Case, 492–493
Bootle, William A., 771–772
Borah, Wayne G., 823, 824
Bork, Robert H., 81, 111–117, 223, 533, 865

Boston, Massachusetts, 122–123, 265, 706, 707–708
Charles River Bridge v. Warren Bridge, 664, 744–745
Boston University Law School, 300, 385
Bowers v. Hardwick, 114
Boyer v. Garrett, 592
Brackenridge, Hugh, 288
Bradley, Joseph P., 36–37, 870
Braithwaite v. Manson, 284
Brandeis, Louis Dembitz, 121–130, 860, 871
as clerk, 301
Felix Frankfurter and, 127, 266, 267
Henry Friendly and, 274, 281
Gitlow dissent, 634
and Harlan F. Stone, 728
and Charles Wyzanski, 842
Brandeis Brief, 123, 126
Brandenburg v. Ohio, 528
Brennan, William J., Jr., 872
cases, 232, 243
other judges and, 40, 340, 355, 616, 781
Brewer, David J., 247, 402, 870
Brewer Brick Co. v. Inhabitants of Brewer, 37
Breyer, Stephen G., 645, 847–848, 873
Bridges, R. R., 394, 396, 398. *See also* Patterson, Haywood
Briggs v. Elliott, 592, 786–788
Bristow, Benjamin H., 332
Britton v. Turner, 206–207
Broadcast licenses, 459–460
Brockenbrough, William, 659
Broderick, David C., 252
Brokerage houses, 609, 612. *See also* Investment banking firms; *and specific firms*
Brooks v. Beto, 139
Browder v. Gayle, 133, 416, 650–651
Brown, Edmund G. (Jerry), 67–68, 71, 72
Brown, Joe E., 379
Brown, John R., 59, 131–140, 652–653, 864
Brown v. Baskin (*Baskin v. Brown*), 592, 784–785
Brown v. Kendall, 705, 709–710
Brown v. Louisiana, 79
Brown v. Maryland, 743
Brown v. Multnomah County District Court, 465
Brown v. Topeka, 592
Brown v. Topeka Board of Education
attorneys, 354, 356, 378, 557. *See also* Marshall, Thurgood
Luther Bohanon's implementation, 96–97
"Brandeis Brief" used, 123
Brown II, 134, 795, 824
Fifth Circuit Court of Appeals and, 60, 131, 133, 134, 651–652, 653, 814. *See also specific judges*
Fourth Circuit Court of Appeals and, 363–364
William Hastie's cases and, 356
impact, 650, 795
opposition to implementation, 96, 134, 651–652, 815–816
John J. Parker's interpretation, 592
speed of implementation, 134, 136, 354, 653, 795, 817–818, 824
Supreme Court divisions, 795
See also Desegregation of public education
Brownell, Herbert, 340–341, 416
Brownlow Committee *Report* (in 1937), 260
Brunswick Corporation, 367–368
Bruton v. United States, 263
Bryan, George, 104, 105
Bryan, William Jennings, 164, 566
Bryan v. Austin, 591–592
Bryan v. Walton, 484
Brzonkala v. Virginia Polytechnic Institute, 809–810
Buchanan, James, 198, 290, 746–747, 748
Buchanin v. Batchelor, 412–413
Buckley, James, 533
Buckley v. Valeo, 464, 645
Buckner, Emory, 339, 341
Budenz, Louis F., 523
Buick Motor Company, 156
Bullock, Georgia, 4–5
Burchardt, Bill, 578
Burger, Warren E., 141–152, 864, 873
Griffin Bell and, 62
clerks, 443
on William Hastie, 359
Miller v. California, 146, 317
Alfred P. Murrah and, 570
Supreme Court appointment, 44, 143, 144
voting with Rehnquist, 641
Burger Court, 142, 144–147, 467, 641, 872–873. *See also* Burger, Warren E.; *and specific justices*
Burlingame Treaty, 199
Burnham, Carrie S., 701
Burns, John Anthony, 148
Burnside, Ambrose, 215
Burr, Aaron, 185, 186, 476, 604

Burrell v. Martin, 40
Burroughs, George, 690
Burton, Harold H., 795, 872
Bush, George H. W. (1924–), 58–59, 62, 63, 158, 327
Bush, George W. (1946–), 59, 63, 227, 375
Bush v. Gore, 59, 63
Bush v. Orleans Parish School Board, 823–826
Business
  Clement Haynsworth and, 363, 366–368
  incorporation statutes, 600
  mergers, 608–609. *See also Drexel Burnham* case(s)
  Richard Posner and, 624–625
  See also Antitrust law/cases; Corporate law and corporate regulation
Busing, 60, 70, 240
  Swann v. Charlotte-Mecklenburg Board of Ed., 96, 145, 819
  See also Desegregation of public education
Butler, Benjamin, 666–667
Butler, Marion, 162
Butler, Pierce, 728, 871

Cabranes, Jose Alberto, 269, 525
Cafeteria and Restaurant Workers Union v. McElroy, 235
Calabresi, Guido, 269
Calhoun, John C., 292, 346–347, 739
Calhoun v. Calhoun, 831
Califano, Joseph, 222
California
  Annette Abbott Adams, 17
  Adamson v. California, 78, 269–270
  Alien Land Law cases, 755–758
  busing, 70
  Cohen v. California, 79, 344, 758–759
  death penalty, 71
  gold rush, 248, 250–251
  housing discrimination, 343
  Shirley Mount Hufstedler, 558
  judicial system, 250. *See also* California Supreme Court
  obscenity laws, 146
  People v. Tanner, 70–71
  Proposition 13, 69–70
  David S. Terry, 251, 252–253
  tort law, 758–759
  Joseph Wapner, 535, 849
  Earl Warren and, 790–794
  Whitney v. California, 128–129
  See also Los Angeles; San Francisco
California, University of, 146, 201, 222, 791
California Supreme Court
  William Henry Beatty, 249
  Rose Elizabeth Bird, 66–74, 866
  Stephen J. Field and, 248, 249, 250–251
  Joseph R. Grodin, 71, 72–73
  Roger J. Traynor, 753–759, 863
Call, Daniel, 604, 838–839
Cameron, Benjamin F., 133, 135–136, 653
Campaign spending limits, 464
Campbell, Archibald, 487, 745
Capital gains tax, 172
Capital punishment. *See* Death penalty
Cardozo, Albert, 154
Cardozo, Benjamin N., 153–160, 861, 871
  background, 154–155, 375
  Carpentier Lectures, 230
  William D. Mitchell and, 543
  New York Court of Appeals, 153–154, 155–157, 687
  Richard Posner compared to, 623
  Cuthbert Pound and, 629
Carlisle v. United States, 244. *See also United States v. Rupert*
Carlson v. Landon, 270
Carolina & Northwestern Railway v. Lincolnton, 586
Carr, Waggoner, 412
Carr v. Corning, 231
Carr v. Montgomery County Board of Education, 418
Carrie S. Burnham v. Louis Luning, George Lewis, and Joseph Haughton, 701
Carroll, William Thomas, 188–189
Cars, 156, 468, 534. *See also* General Motors
Carswell, G. Harrold, 532, 654
Carter, Jimmy
  and Griffin Bell, 61–62
  cabinet members, 222, 558
  circuit court nominees, 379, 411, 531, 532, 533
  district court nominees, 239, 525, 610
  and Frank Johnson, 419
  and Leventhal's interment, 458
  Elbert Tuttle awarded Medal of Freedom, 773
Carter v. Kentucky, 644
Case, Clarence, 778
Case of Mary Clark, A Woman of Color, 90
Case of the Electoral College, 106

Case of the Prisoners (*Caton v. Commonwealth*), 763, 838
Caseloads
appellate courts, 516
Charles E. Hughes, 323
William Wayne Justice, 428–429
François-Xavier Martin, 506–507
New Jersey trial courts, 777
Isaac Parker, 573, 574
Philadelphia District Court, 699–700
Richard Posner, 623
Edward G. Ryan, 668
Cash v. United States, 234
Cates, Cynthia L., 464, 468
Caton, John. *See Caton v. Commonwealth*
Caton v. Commonwealth (*Case of the Prisoners*), 763, 838
Catron, John, 347, 746–747, 869
Catt, Carrie Chapman, 12
Caveat emptor, 435
CBS News, 803–804
Celler, Emanuel, 523
Central Hudson Gas & Electric Corporation v. Public Services Com., 444, 445
Century, judges listed by, 853–854
Chamberlain, Daniel, 831–832
Chambers v. Florida, 77
Chancery courts, 474, 551, 603, 763–764, 838–840. *See also* New York Chancery Court
Chandler, Stephen, 568
Chandler v. Tenth Circuit, 569
Chapman, Donald, 67
Charitable trusts, 299–300
Charles II, 580
Charles River Bridge v. Warren Bridge, 664, 744–745
Charlottesville, Virginia, 363–364
Chase, Salmon P., 103, 212, 747–748, 749, 870
Chase, Samuel, 185, 868
Checks, personal, 435
Cheney, Dick, 375
"Cherokee Bill" (prison escapee), 576
Cherokee Nation, 98–99, 574
Chicago, Illinois, 217–218, 254, 528
Chicago, University of, Law School
faculty, 258, 535, 616
Jerome Frank and, 258
"law and economics" school of thought, 221, 223, 225
Walter Schaefer's lectures, 681
women at, 9
Chicago and Alton Railroad, 452
Chicago Times, 215
Chickasaw people, 98–99
Chief justices of the U.S. Supreme Court
Warren E. Burger, 141–152, 864, 873. *See also* Burger, Warren E.; Burger Court
Salmon P. Chase, 103, 212, 747–748, 749, 870
Oliver Ellsworth, 868
Melville W. Fuller, 104, 219, 254, 332, 402, 870
Charles Evans Hughes, 400–406, 861, 871. *See also* Hughes, Charles Evans; Hughes Court
John Jay, 434, 472–473, 474, 475, 868. *See also* Jay, John
leadership qualities, 490
list of judges, 866–874
John Marshall, 487–496, 856, 868. *See also* Marshall, John; Marshall Court
William H. Rehnquist, 639–648, 865, 873. *See also* Rehnquist, William H.; Rehnquist Court
role and responsibilities, 142, 146–147
John Rutledge, 868
Harlan Fiske Stone, 78, 457–458, 726–732, 861, 871, 872
William Howard Taft, 20, 146, 324, 871. *See also* Taft, William Howard; Taft Court
Roger B. Taney, 288, 336, 664, 741–752, 857, 869
Fred M. Vinson, 794, 795, 872
Morrison B. Waite, 870
Earl Warren, 95, 142, 144, 362, 788, 790–799, 862, 872. *See also* Warren, Earl; Warren Court
Edward D. White, 402, 726–727, 871
See also United States Supreme Court; Warren, Earl
Child support, 5
Childbirth, leave of absence for, 686
Childs, Roberta, 351–352
Chillingworth, Curtis, 51
Chinese immigrants/Chinese Americans, 198–199, 254, 302
Chippewa Indians, 245
Choctaw Nation v. Cherokee Nation, 98–99
Choctaw Nation v. Oklahoma, 98–99
Choice v. Marshall, 479
Chris Craft v. Piper Aircraft Corporation, 612
Christenberry, Herbert, 824
Christenson, Herbert, 651

Christie, Daniel, 206
Christy v. Casanave, 506
Churchill, Winston, 24
Cingcade, Lester E., 149
Citizenship, 302, 357. *See also* Diversity of citizenship; Fourteenth Amendment
The City of Carlisle case, 203
City of Houston v. Federal Aviation Administration, 138
Civil Justice Reform Act (1990), 245
Civil law, 372–373, 503–504, 505–506
Civil lawsuits. *See* Liability; Libel law/cases; Negligence; Tort law; *and specific cases*
Civil liberties
  Hugo Black and, 77, 78
  Felix Frankfurter and, 269–271
  John M. Harlan II and, 340, 342, 343–344
  Charles E. Hughes and, 404
  Frank Johnson and, 419
  Alex Kozinski and, 442
  John J. Parker's rulings, 590–591
  George Sharswood on, 697
  J. Harvie Wilkinson's rulings, 812
  See also specific cases, issues and Constitutional amendments
Civil rights
  civil rights acts, 225–226, 332, 355, 818
  Emilio Garza's opinions, 159
  granted through Fourteenth Amendment, 331. *See also* Fourteenth Amendment
  great appeals judges, 132–136, 653. *See also* Bell, Griffin; Brown, John R.; Rives, Richard T.; Tuttle, Elbert Parr; Wisdom, John Minor
  John Marshall Harlan I and, 330, 331–332, 334–337
  William Hastie and, 353–356, 358–359
  A. Leon Higginbotham and, 377, 380–382
  Sarah T. Hughes and, 413
  induction cases. *See* Draft
  Frank Johnson and, 415
  in Maine, 36
  Constance Baker Motley and, 557, 559–560
  John J. Parker's rulings, 591–593
  Louis Pollack and, 610
  of prison inmates. *See* Prisons and prisoners
  scarcity of black lawyers, 352–353
  J. Waties Waring and, 786–789
  John Wisdom and, 816–819. *See also* Wisdom, John Minor
  Charles Wyzanski on judges' role, 844
  See also Civil Rights movement; Marshall, Thurgood; National Association for the Advancement of Colored People; *and specific cases and issues*
Civil Rights Act (1866), 332
Civil Rights Act (1964), 225–226, 355, 818
Civil Rights Cases (1883), 336
Civil Rights movement
  Alabama protests, 133, 417, 610, 650, 651
  equal protection clause and, 82–83
  First Amendment freedoms and, 79
  Freedom Riders, 240–241, 418
  See also Civil rights; *and specific cases and individuals*
Civil suits. *See* Liability; Negligence; Tort law; *and specific cases*
Civil War
  Hugh Lennox Bond during, 103
  character debated, 750
  Chicago Times suppressed, 215
  Walter Clark during, 161
  Confederate sequestration laws, 107–108
  Nathan Green Sr., during, 309
  John Marshall Harlan I during, 331
  Oliver Wendell Holmes, Jr., during, 385–386
  Thomas G. Jones during, 420
  loyalty issues, 254, 347. *See also specific judges*
  Joseph Lumpkin during, 485
  nullification and secession doctrines, 348. *See also* Nullification; Secession
  Thomas Ruffin and, 665
  Ryan address, 672
  Roger B. Taney during, 749–751
  David Terry during, 252
  Union naval blockade, 750
  See also Reconstruction
Claiborne, W. C. C., 503
Clark, Charles E., 236, 262, 678
Clark, Malcolm, Jr., 202
Clark, Ramsey, 557
Clark, Septima, 788, 789
Clark, Tom C., 355, 795, 823, 872
Clark, Walter, 161–167, 860

Clark, William, 71
Class action lawsuits, 801–802
  Drexel Burnham case(s), 607, 608–612, 613
Clay, Henry, 498, 500
Clean Air Act, 460
Cleland v. Waters, 481, 484
Clemency, 420–421, 574
Clerks, judicial
  books by, 809
  corruption, 685
  first African American federal clerk, 231
  Learned Hand and, 323–324, 326–327, 842
  Hoke v. Henderson, 664
  William W. Justice's clerks, 429
  Burnita S. Matthews's clerks, 843
  opinions written by, 620
  John Minor Wisdom and, 818, 819
  See also specific individuals
Cleveland, Grover, 26, 181, 451
Cleveland Court of Common Pleas, 10–11, 261
Cleveland v. State, 723
Clinton, Bill
  impeachment, 63, 641
  judicial nominees, 269, 410, 411, 525, 646
  Medal of Freedom awarded by, 377–378, 814
  Whitewater investigation, 535–536
Cobb, Thomas R. R., 485
Cobb, Thomas W., 479–480
Cobbs v. Coleman, 373–374
Codification of the law, 293–294, 482–483, 505
Coffin, Frank M., 224–225
Cohen v. California, 79, 344, 758–759
Cohens v. Virginia, 659–660
Coke, Sir Edward, 492–493
Cole, Cornelius, 201
Cole, Orasmus, 668
Cole v. Young, 235
Colepaugh, William, 565
Colepaugh v. Looney, 565
Collective bargaining, 260, 587, 590. *See also* Organized labor
Colorado
  Moses Hallett, 200–201
  Hill v. Colorado, 645
  Benjamin Barr Lindsey, 124–125
Colorado, U.S. District Court of, 201
Columbia Law School, 520, 727, 728, 801
Columbia Union College v. Oliver, 812
Comanche people, 371–372, 373
Commentaries on American Law (Kent), 386–387, 433, 435, 440
"Commentaries on American Law" (Parsons), 600
Commentaries on the Constitution (Story), 739
Commentaries on the Law of Agency (Story), 192
Commentaries on the Laws of England (Blackstone), 433, 604, 697, 761
Commercial regulation. *See* Corporate law and corporate regulation; Interstate commerce; Intrastate commerce
Commercial speech, 442, 444–445, 534
Commodity Exchange Act, 280, 281
Common law
  changing realities and, 635
  Sir Edward Coke and, 492–493
  defined, 542
  equity vs. common law courts, 839. *See also* Equity courts; Equity jurisprudence
  Felix Frankfurter and, 266
  John B. Gibson and, 293–294
  John M. Harlan II and, 341
  James Kent and, 434–435
  in Louisiana, 503–504, 505–506
  Thomas A. Marshall and, 499
  in New Hampshire, 206, 208
  nineteenth-century use of, 542
  Richard Posner on pragmatism and, 621
  George Robertson on the malleability of, 544–545
  in Texas, 372–373
  Arthur Vanderbilt and, 779–780
  in Virginia courts, 605–606
The Common Law (Holmes), 383, 387, 389
Commonwealth v. Alger, 710
Commonwealth v. Buzzell, 705
Commonwealth v. Caton, 605
Commonwealth v. Green, 293
Commonwealth v. Griffin, 500
Commonwealth v. Hunt, 708–709
Commonwealth v. Local 542, International Union of Operating Engineers, 380
Communications Decency Act, 811
Communist Conspiracy case. *See Dennis v. United States*
Communist Party, 128–129, 268, 270, 340, 522–524, 590–591. *See also Dennis v. United States;* McCarthy era
Community property laws, 374

The Companionate Marriage (Lindsey), 125
Complex litigation, 613, 801–802. *See also* Class action lawsuits; *and specific cases*
Comstock, George Franklin, 168–174, 859
Comstock's Reports (Comstock), 170
Confederate States of America, 107–108, 376, 485. *See also* Civil War
Conference of State Chief Justices and State Court Administrators (1986), 151
Confessions
  admissibility when counsel right violated, 680
  coerced confessions, 77, 359
  degree of voluntariness, 634
  manner of obtaining, 233, 270–271, 634–635
Conflicts of interest, judicial, 366–368, 535
Congress, U.S.
  agency-creating power, 659
  and appellate caseloads, 516
  Warren Burger's lobbying, 150
  commercial regulation powers. *See* Interstate commerce: federal authority
  D.C. Court of Appeals designated Circuit Court, 230
  and federal jurisdiction, 281–282
  and immigration matters, 302, 313
  manufacturing regulation, 332
  money-issuing authority, 301–302
  relationship to courts, 490–491, 515–516, 736–737
  George Robertson elected, 544
  SEC created, 608
  and state sovereignty/rights. *See* Nation-state relations; State sovereignty; States and states' rights
  taxing authority, 333, 495. *See also* Taxation
  U.S. magistrate office created, 244–245
  See also House of Representatives; Senate confirmation [hearings]; *and specific acts*
Connecticut, 81–82, 158–159, 270–271, 343–344, 525
  Robert Satter, 588–589
  See also Griswold v. Connecticut
Connecticut, U.S. District Court of
  Jose Alberto Cabranes, 269, 525
Conscientious objection, 313–314, 590, 846–847
Conservative activist judges
  Thomas Goode Jones, 420–421, 724
  J. Harvie Wilkinson, 810. *See also* Wilkinson, J. Harvie
  See also Judicial activism
Constitution, U.S.
  admiralty jurisdiction of district courts granted, 214
  Article Three, 200
  Bicentennial Commission, 150–151
  Walter Clark's views, 162
  Constitutional Convention, 836, 837
  Nathan Green, Sr., on, 306
  Theophilus Parsons's role in developing, 597
  supremacy clause, 291
  See also Constitutional interpretation; *and specific amendments*
Constitutional interpretation
  Hugo Black, 75–76, 78
  Luther Bohanon, 98, 100
  Robert Bork, 115–116
  Louis D. Brandeis, 123, 126–127
  John R. Brown, 135
  Walter Clark on, 162
  William Cranch, 186
  Frank Easterbrook, 226
  Richard Enslen, 240
  evolutionist model, 642
  Felix Frankfurter, 268, 269–271
  Henry Friendly, 283
  John Bannister Gibson, 291, 292–293
  Augustus Hand, 312–313
  Learned Hand, 325
  John Marshall Harlan I, 336
  John Marshall Harlan II, 342–344
  William Hastie, 359–360
  laissez-faire constitutionalism, 36–38, 77–78, 81
  John Marshall, 489–495
  originalist approach, 115–116, 118
  John J. Parker, 587
  Richard Posner, 240, 621–622
  Cuthbert W. Pound on, 630–631
  primacy of state constitutions theory, 463, 464–469
  William Rehnquist, 641–647
  Spencer Roane, 657–660

strict constructionism, 641–643
textualism, 118, 221
St. George Tucker, 766
Joseph Wapner on, 849
See also Judicial review; *and specific cases*
The Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union (Cooley), 176–177
Constitutional nationalism, 331, 332
Constructionism, strict, 641–643. *See also* Constitutional interpretation; Rehnquist, William H.
Contempt of court, 236, 364–365, 524, 652
Continental Congress, 473, 603, 836. *See also* Declaration of Independence
Contraception, 81–82, 125, 343–344, 619
Contract clause, 491, 494, 745, 746
Contract law, 625–626
Cooley, Thomas McIntyre, 175–181, 859
Coolidge, Calvin
cabinet/bureaucratic appointees, 403, 543, 727
judicial appointees, 313, 321, 585, 726
Cooper, Charles (Bank of Tennessee clerk), 305
Cooper, Charles (football player), 455
Copley, John Singleton (Lord Chancellor Lyndhurst), 541
Coppage v. Kansas, 402
Copyright, 559–560
Corbin v. Federal Reserve Bank, 612
Corbury, Lord, 549–550
Corey, Giles, 690
Cornelison, John J., 335
Corporate law and corporate regulation
Corporate Reorganization Act, 587
corporations subordinate to state, 672–673
Dartmouth College v. Woodward, 436, 491, 600, 738, 745
John Marshall Harlan I and, 330
incorporation statutes, 600
James Kent's views, 435–436
licensing of out-of-state corporations, 673
Taney Court rulings, 664, 744–746
Virginia disestablishment and, 658, 738
See also Antitrust law/cases; Business; Interstate commerce; Securities law
Corporate Reorganization Act, 587
Corpus Christi (play), 626
Corrections officers. *See* Prisons and prisoners
Corrigan v. Buckley, 231
Corruption, judicial
Joseph F. Crater, 437
Levi Hubbell, 671
William McGannon, 11
Jack Montgomery, 394–395
Franklin D. Moses, 832
Arthur Noyes, 756
Oklahoma Supreme Court, 95
Joseph A. Peel, 51
Tammany Hall and, 154, 684–685
St. George Tucker accused of, 765
Sol Wachtler, 326–327
Jonathan J. Wright accused of, 832
See also Bean, Roy
Cosby, William, 550–553
Counsel, right to
before/during questioning, 282–283, 680, 797
indigent defendants, 133, 342
Johnson v. Zerbst, 133, 770–771
Samuel Jones and, 164–165
for minor traffic offenses, 465
Miranda and, 283, 797. *See also Miranda v. Arizona*
Scottsboro Boys cases and, 158, 393, 404
in Texas, 29
Court management. *See* Administration, judicial/court
Court Reform Act (1970), 515–516
Court reporting
Alabama Reports, 720
Samuel Ames, 20, 22
Blackford's Reports, 84, 86–87. *See also* Blackford, Isaac
Coke's Reports, 492, 493
Comstock's Reports, 170
Thomas Cooley, 176
William Cranch, 182, 183, 187–188
in Georgia, 480, 484
Horace Gray, 297, 298
West Humphreys, 347
Kenesaw Mountain Landis, 451
François-Xavier Martin, 504, 505
New York Chancery Court, 475
of Edmund Pendleton's opinions, 604

Pennsylvania State Reports, 700, 701
Courts on Trial (Frank), 263
Cox, Archibald, 327
Coyle v. Smith, 566
Craker v. Chicago & North Western Railway Co., 674
Cramer, Anthony, 521
Cramer v. United States, 521
Cranch, William, 182–190, 857
Crater, Joseph Force, 437
Crawford v. Los Angeles County Board of Education, 70
Crime and poverty, 44
Crimes against judges, 51, 334–335, 424, 437, 840. *See also* Terry, David S.
Criminal Appeals Act, 574–575
Criminal defendants
  ability to pay for appeal, 234
  flight as evidence of guilt, 575–576
  indigent defendants, 133, 342
  prior convictions, 513–514
  See also Confessions; Counsel, right to; Defendants' rights; Insanity, criminal
Criminal suspects' rights
  confessions, 233, 634–635. *See also* Confessions
  counsel before/during questioning, 282–283, 680, 797. *See also* Counsel, right to
  Henry W. Edgerton's concern for, 233
  eyewitness identifications, 284
  fingerprinting, 313
  interrogations, 233
  Miranda rights, 282–283, 680. *See also Miranda v. Arizona*
  See also Defendants' rights
Crosby, Bing, 455
Croswell, Harry, 436, 438
Croy, Homer, 578
The Crucible (Miller), 691
Cruel and unusual punishment clause, 419, 643
Cruger v. Armstrong, 435
Culombe v. Connecticut, 270–271
Cumberland University law school, 309, 310
Cumming v. Richmond Board of Education, 337
Cummings, Homer S., 12, 357
Cummings v. Missouri, 254
Cunningham, Lawrence, 625–626
Cuomo, Mario, 326
Currie, David P., 282
Curtis, Benjamin Robbins, 33, 36, 384, 869
Curtis Publishing Co. v. Vaughan, 232
Curtis v. Leavitt, 171–172
Curtiss-Wright v. Kennecott, 612
Cushing, Luther, 297

Dakota Coal Co. v. Fraser, 30
Daley, Richard, 530–531, 679
Dallas, Texas, 409–413
Danforth, John, 58, 59
Dartmouth College v. Woodward, 436, 491, 600, 738, 745
Daugherty, Fred, 99
Davis, David, 212, 219, 748, 869
Davis, Henry Winter, 102
Davis, Jefferson, 347
Davis, John (1761–1847), 191–195, 856
Davis, John W. (*Brown* attorney), 378
Day, W. A., 757
Day, William R., 176, 871
Days, Drew, 222
DDT (pesticide), 40–41
De Haas, Jacob, 126
Deady, Matthew Paul, 196–204, 859
Death penalty
  Rose Bird's views, 71
  clemency, 420–421, 574
  constitutionality, 145, 146
  electric chair malfunction, 822
  Flores v. Johnson, 158–159
  in Georgia, 145, 643
  "hanging judges." *See* Bean, Roy; Parker, Isaac C.
  mandatory death sentences, 573, 577
  Thurgood Marshall and, 355
  Rufe McCombs's views, 483
  Scottsboro Boys cases, 397–398
  Samuel H. Silbert and, 261
  in Tennessee, 306–307
  victim's race and unequal imposition, 419
  Jack B. Weinstein's opposition, 803
Debs v. United States, 127
Debt, 166, 484, 699. *See also* Bankruptcy
Decisions of Cases in Virginia in the High Court of Chancery, with Remarks upon Decrees of the Court of Appeals (Wythe), 839
Declaration of Independence, 473, 554, 603
Deering-Milliken company, 366–367
Defective product liability, 156, 754

Defendants' rights
  appeal to Supreme Court, right to, 574–575
  detention without charge, 559–560
  DNA testing, 811–812
  double jeopardy provision, 158–159, 467
  eyewitness identifications, 284
  fair trial right, 404. *See also* Scottsboro defendants
  Sarah T. Hughes and, 411–412
  jury trial right, 305–306, 342
  Thurgood Marshall and, 355
  proof beyond reasonable doubt, 82
  testify, right to, 32, 36
  See also Counsel, right to; Criminal suspects' rights; Due process; Substantive due process
DeLaine, Joseph Albert, 787
DeLancey, James, 552, 553
DeLancey family, 472, 473
DeLovio v. Boit, 194
Dembitz, Lewis, 121, 126
Dempsey, Jack, 714
Dennett, Mary, 314–315. *See also United States v. Dennett*
Dennis, Eugene, 524. *See also Dennis v. United States*
Dennis v. United States, 270, 340, 519, 522–524, 528
  John J. Parker's rulings and, 590, 591
  See also United States v. Foster
Deras v. Myers, 464
Desegregation
  of hospitals, 365–366
  of public transportation, 133, 134, 356, 416, 650–651. *See also* Transportation
  See also Desegregation of public education; Higher education
Desegregation of public education
  in Alabama, 417, 418
  Griffin Bell and, 57–60
  John R. Brown and, 131
  busing, 60, 70, 96, 145, 240, 819
  faculty, 418, 591–592
  in Georgia, 56, 58, 652
  John M. Harlan II and, 343
  Clement Haynsworth's rulings, 363–365
  in Los Angeles, 70
  in Louisiana, 651–652, 819, 823–826
  in Oklahoma, 96–97
  opposition to, 96, 134, 651–652, 815–816, 819, 823–826
  Parker Doctrine, 592
  speed of implementation, 134, 136, 354, 653, 795, 817–818, 824
  in Texas, 413, 427–428
  in Virginia, 592
  Skelly Wright's rulings, 821
  See also Brown v. Topeka Board of Education; Higher education
Detroit, Michigan, 179
"The Devil and Daniel Webster" (Benet), 693
Devitt Distinguished Service to Justice Award, 612, 613, 805, 814
Dewey, Thomas E., 340, 341, 416, 714, 794
di Donato, Georgia, 578
Dillard v. Charlottesville, 363–364
Dillon v. Gloss, 16
Disability benefits, 7
Disabled persons' rights, 810–811
Disappearance of judges, 437
Discrimination
  in the ABA, 353, 358
  anti-Semitism, 167, 687. *See also* Anti-Semitism
  against Chinese, 198–199, 254
  Richard Enslen on, 242–243
  Fay v. New York, 521
  Emilio Garza's opinions, 159
  John Marshall Harlan I on, 336
  housing, 82, 231, 343
  libel suits brought against critics of racially discriminatory policies, 231–232
  Constance B. Motley's experiences, 556, 557
  sex discrimination. *See* Sex discrimination; Women's rights
  See also Desegregation; Desegregation of public education; Employment discrimination; Race and racism; Segregation; Segregation in education
District of Columbia, U.S. Court of Claims for, 443
District of Columbia, U.S. District Court for, 715
  John J. Sirica, 528, 712–718, 863
District of Columbia Circuit Court
  William Cranch, 184–187, 188. *See also* Cranch, William
  Kenneth Starr, 223
  See also District of Columbia Circuit Court of Appeals

District of Columbia Circuit Court of Appeals
David L. Bazelon, 39–45, 236, 460–461, 532, 533, 864
Robert H. Bork, 111, 112–114, 116, 533. *See also* Bork, Robert H.
Warren E. Burger, 44, 143–144. *See also* Burger, Warren E.
William Cranch, 182
early years, 182, 184–187, 188
Henry White Edgerton, 229–238, 862
Ruth Bader Ginsburg, 411. *See also* Ginsburg, Ruth Bader
ideological conflicts, 533
importance, 39, 511, 530
jurisdiction and duties, 232–233, 515–516, 532–533
justices not nominated for, 430, 465
Harold Leventhal, 457–462, 533, 865
Carl Eugene McGowan, 112, 273, 511–518, 864
Abner J. Mikva, 530–536, 865
Antonin Scalia, 112–114, 119, 553. *See also* Scalia, Antonin
United States v. Brawner, 42
J. Skelly Wright, 821, 826–827. *See also* Wright, J. Skelly
Diversity of citizenship (*Erie R.R. v. Tompkins*), 126–127, 738
Divorce, 125, 407, 483, 499–500
DNA evidence, 4, 811–812
The Doctrine of the Separation of Powers and Its Present-Day Significance (Vanderbilt), 779
Doe, Charles Cogswell, 205–211, 859
Doe v. Commonwealth, 113–114
Dormant commerce clause, 436
Dorr, Thomas Wilson, 21, 22
Double jeopardy, 158–159, 467
Douglas, William O., 872
and *Brown v. Board of Education,* 795
dissidents' rights defended, 236
on Harold Medina, 519
other judges and, 259, 262, 463, 570, 730
Supreme Court nomination, 14, 129
Dowell, Alonzo, 96. *See also* *Dowell v. Board of Education*
Dowell v. Board of Education, 96, 99, 100
Dower v. United States, 620
Doyle v. Continental Insurance Co., 673
Draft, 527, 590, 846–847
Dred Scott v. Sandford
Benjamin Curtis's dissent, 33, 36
Matthew Deady's support, 198
Charles Doe affected by, 207
Horace Gray's criticism of, 297–298
Roger B. Taney's opinion, 336, 741, 748–749
Drexel Burnham case(s), 607, 608–612, 613
Driscoll, Alfred, 776
Dronenburg v. Zech, 113–114
Drummond, Thomas, 212–220, 858
Du Pont brothers' antitrust trial, 339–340
Dudley, Thomas, 694
Due process
anti-strike injunctions and, 218–219
Hugo Black's views, 80–82
Walter Clark's views, 162
Thomas Cooley's influence on norms, 176–177
Felix Frankfurter's views, 269–271
Moses Hallett on, 201
John M. Harlan II's views, 342–343
Hope Natural Gas Co. v. Federal Power Commission, 589–590
incorporation of rights through. *See* Bill of Rights
interrogation tactics and, 233, 270–271, 359. *See also* Confessions; *Miranda v. Arizona*
Thomas G. Jones's rulings, 421
jury selection and race, 233–234
New York's liquor proscription act and, 171
John J. Parker and, 591
price control regulations and, 633
Scottsboro defendants' rights violated, 158, 393. *See also* Scottsboro defendants
security concerns and, 234
Samuel Sewall and, 692
substantive due process, 36–37, 80–82, 226, 252–254, 586
workman's compensation laws and, 632
See also Fifth Amendment; Fourteenth Amendment

Duncan v. Louisiana, 342
Dunlap, Andrew, 195
Durham Rule, 41–42, 210
Durham v. United States, 41–42
Dworkin, Ronald, 120, 617, 621–622, 642

Eakin v. Raub, 287, 291
East Saginaw Manufacturing Co. v. The City of East Saginaw, 178
Easterbrook, Frank Hoover, 221–228, 866
Eastland, James O., 136, 826
Eastland, John, 559
Eastman, Max, 258, 312–313
Eaton, John, 186
Eaton v. Board of Managers of James Walker Memorial Hospital, 365
Eaton v. Grubbs, 366
Eavesdropping, 79. *See also* Employees: Internet surveillance; Wiretapping
Economic Stabilization Act (1970), 459
Edgerton, Henry White, 229–238, 862
Edmonson v. Union Bank of Tennessee, 485
Edmund v. Goldsmith, 226
Edrington v. Mayfield, 374
Education. *See* Desegregation of public education; Higher education; Legal education; Parochial education; Public education; Segregation in education; *and specific institutions*
Edwards, Harry, 533
Edwards, Rufe Dorsey. *See* McCombs, Rufe Dorsey Edwards
EEOC (Equal Employment Opportunity Commission), 58, 810
EEOC v. Sara Lee Corporation, 810
Eighth Amendment, 419, 643
Eighth Circuit Court of Appeals
  Charles Fremont Amidon, 26, 27, 860. *See also* Amidon, Charles Fremont
Eisen v. Jacquelin & Carlisle, 527
Eisenhower, Dwight D.
  and Herbert Brownell, 340, 416
  circuit court appointees, 133, 143, 274, 361–362, 653, 770, 815
  and John Sirica, 714–715
  Supreme Court appointees, 340–341, 794
Elections
  closed primaries, 525
  1876 presidential election, 106, 831–832
  party use of precinct voting systems, 359
  state and local elections, 104–106
  white primaries, 356, 359, 592, 783, 784
  See also Judicial election(s); Reapportionment; Redistricting; Voting rights
Eleventh Amendment, 107, 660
Eleventh Circuit Court of Appeals, 136, 419, 654, 768, 770, 815. *See also* Fifth Circuit Court of Appeals; Johnson, Frank M., Jr.; Rives, Richard T.; Tuttle, Elbert Parr
Eliot, Charles William, 386, 387
Ellender, Allen J., 822, 823, 826
Ellsworth, Oliver, 868
Elmore, William A., 507–508
Elmore v. Rice, 784
Ely, Ezra Styles, 185–186
Emancipation of slaves
  American Colonization Society, 481, 743
  Thirteenth Amendment, 331–332
  by will, 308–309, 374, 500, 501
  See also Abolitionists
Embargo Act (1807), 192–194, 491
Eminent domain, 664–665, 745
Emmanuel, Anne, 772
Employees
  contracts forbidding union membership, 402, 585, 586–587
  disabled employees, 810
  employer liability for injury. *See* Liability; Negligence
  Internet surveillance, 445–446
  length of workday, 123, 164
  minimum wage laws, 405, 644
  personnel records and privacy rights, 6
  Richard Posner and workers' rights, 625
  pregnancy and work hazards, 112–113, 225–226
  workmen's compensation laws, 631–632, 687
  See also Employment discrimination; Organized labor; Sex discrimination
Employment discrimination, 560, 591, 625, 784. *See also* Discrimination; Sex discrimination
Encarnacion v. Jamison, 635
Endangered species protections, 811

Enforcement acts, 104–105. *See also* Fifteenth Amendment; Fourteenth Amendment
Enfranchisement. *See* Voting rights
Enslen, Richard Alan, 239–246, 866
Environmental Defense Fund, Inc. v. Environmental Protection Agency, 40–41
Environmental Protection Agency, 40–41, 460–461
Episcopal Church, 658, 738
Equal Employment Opportunity Commission (EEOC), 58, 810
Equal protection
alumni certificate requirements and, 816
Hugo Black's views, 79–80, 82–83
Nathan Green, Sr.'s views, 305–307
housing discrimination and, 82, 231, 343
Lynch v. Torquato, 359
Nixon papers and, 514
poll taxes and, 343. *See also* Poll taxes
redistricting and, 271
welfare residency requirements and, 343
women's rights and, 410–411. *See also* Women's rights
workman's compensation laws and, 632
See also Fourteenth Amendment
Equity courts, 551, 763–764, 839
Equity jurisprudence, 293, 304, 438
Erie Railroad v. Tompkins, 126–127, 738
Escheat, 755–756
Escobedo v. Illinois, 282–283, 680, 796
Escola v. Coca Cola Bottling Company, 754
Espionage Act (1917), 28, 634
"An Essay on Professional Ethics" (Sharswood), 420
Essay on Professional Ethics (Sharswood), 697
Establishment clause. *See* Separation of church and state
Ethics, codes of, 420, 697, 758
Ethyl Corporation v. Environmental Protection Agency, 460–461
Etting v. Bank of the United States, 743
Eustis, George, 506
Evaluations, judicial, 307
Evans v. Jordan & Morehead, 766
Evening News (Detroit), 180
Everett v. Schramm, 390
Evers v. Jackson Municipal Separate School District, 57
Evidence
fingerprints, 313, 611
government refusal to provide, 241
immunity in exchange for testimony, 673
pretrial discovery, 526
in the Salem witchcraft trials, 690, 691
sufficient for jury trial, 362
See also Evidence rules; Witness testimony; *and specific cases*
Evidence rules
admission against one defendant of evidence inadmissible against codefendants, 263
John Appleton and reforms, 32, 35–36
Jeremy Bentham on, 35
best evidence rule, 209
exclusionary rule, 680–681
illegally seized evidence, 6, 157, 680–681
Miranda violations, 797
prior conviction, admissibility of (*Luck* Doctrine), 513–514
See also Evidence; Witness testimony
Evolutionist model of constitutional interpretation, 642. *See also* Constitutional interpretation
Ewald, Alec, 158–159
Ex parte Bollman and Ex parte Swartwout, 186–187
Ex parte Garland, 254
Ex parte Gytl, 27–28
Ex parte Hill in re Willis v. Confederate States, 722
Ex parte Insley, 107
Ex parte McCready, 107
Ex parte McIllwee, 105
Ex parte Merryman, 750
Ex parte Morgan, 574
Ex parte Nettles, 723
Ex parte Norris, 831–832
Ex parte Riggins, 421
Executive branch, 459, 516–517, 594
executive power, 20–21, 23, 78, 459, 516–517
executive privilege, 41, 514
Eyewitness identifications, 284

FAA (Federal Aviation Administration), 138, 534
Fahy, Charles, 521
Fair Labor Standards Act (1938), 405, 564, 729
Fair trial, right to, 404. *See also* Scottsboro defendants

Fair use, 560. *See also* Copyright
Fairfax estates, 488, 657–658, 735–736
Fairfax's Devisee v. Hunter's Lessee, 736. *See also Martin v. Hunter's Lessee*
Fairmont Athletic Club v. Bingham, 686
Farwell v. Boston and Worcester Railroad, 708
Fay v. New York, 521
FBI. *See* Federal Bureau of Investigation
FCC. *See* Federal Communications Commission
FDA (Food and Drug Administration), 278
FDR. *See* Roosevelt, Franklin D.
The Federal Administrative Agencies (Friendly), 279
Federal Aviation Administration (FAA), 138, 534
Federal Baseball League, 453–454
Federal Bureau of Investigation (FBI), 241, 327, 419, 522, 611. *See also* Hoover, J. Edgar
Federal Coasting Licensing Act (1793), 439
Federal Communications Commission (FCC), 41, 114, 459–460, 714
Federal courts
  appellate courts, 22, 136–137, 150, 515–516, 576, 588–589
  Congress's relationship to, 490–491, 515–516, 736–737
  deference to state constitutions, 747
  E-mail and web activity monitoring policy, 445–446
  Federal Court Improvement Program, 3
  Henry Friendly on, 281–282
  judicial appointment criticized, 89. *See also* Judicial appointment
  magistrate judges, 244–245
  Joseph Story and courts' power, 736–738
  supremacy, 194, 658–660
  See also Supreme Court, U.S.; *and specific circuit and district courts*
Federal Judicial Center, 61, 569–570
Federal Jurisdiction: A General View (Friendly), 281–282
Federal Power Commission, 589–590
Federal Rules of Civil Procedure, 543, 678
Federal Rules of Criminal Procedure, 775
Federal Rules of Evidence (Powell et al.), 514
Federal Trade Commission (FTC), 407–408, 616
Federalism, 463, 643–647. *See also* Nation-state relations; State sovereignty; States and states' rights
The Federalist Papers, 193, 260
Feeley, Malcolm, 429
Fellow servant rule, 635, 708
Field, David Dudley, 247, 248, 251, 482
Field, Stephen J., 36–37, 199, 200, 202, 247–256, 859, 869
Fifteenth Amendment. *See* Enforcement acts; Voting rights
Fifth Amendment, 158–159, 269–270, 283–284. *See also* Due process; Property rights; Substantive due process
Fifth Circuit Court of Appeals, 650, 770, 815
  Griffin Bell, 55–65, 865
  Wayne G. Borah, 823, 824
  John R. Brown, 59, 131–140, 652–653, 864
  and G. H. Carswell's Supreme Court nomination, 654
  Herbert Christenson, 651
  and desegregation. *See specific cases and judges*
  Eleventh Circuit established from, 136, 654, 770, 815
  "The Four," 132–136, 653. *See also* Brown, John R.; Rives, Richard T.; Tuttle, Elbert Parr; Wisdom, John Minor
  Emilio M. Garza, 158–159
  Sarah T. Hughes and, 411, 412
  Frank Johnson's faculty desegregation order reversed, 418
  judicial administration, 135–137
  William W. Justice considered, 430
  Richard T. Rives, 133, 135, 416, 649–654, 862
  Elbert Parr Tuttle, 133, 135, 137, 652–653, 654, 768–773, 863
  John Minor Wisdom, 133, 135, 652–653, 654, 814–820, 864
  J. Skelly Wright and, 96–97, 651, 823
Fillmore, Millard, 170, 189
Fingerprints, 313, 611

Finke, Frances. *See* Hand, Frances Finke
First Amendment
Hugo Black's views, 75, 78, 79, 342
Augustus Hand's explanation, 312–313
John M. Harlan II and, 340, 342
Alex Kozinski and, 442, 443–445, 446–447
private property and, 82
William Rehnquist's views, 645
See also Press, freedom of the; Separation of church and state; Speech, freedom of
Fisher, Cynthia, 560–561
Fisher, Linda, 622–623, 626–627
Fisher v. Vassar College, 560–561
Fishing rights, 245
Fiss, Owen, 422, 641
Fitzsimmons, Bobby, 53
Flag salute laws, 267, 590, 731
Fletcher v. Peck, 491, 734, 745–746
Flight as evidence of guilt, 575–576
The Flora case, 214
Flores v. Johnson, 158–159
Florida
cases involving, 77, 79, 134
Curtis Chillingworth, 51
Ellen Morphonius, 508–509
Joseph A. Peel, 51
Floyd, Loyd, 308. *See also Ford v. Ford*
Fong Yue Ting v. United States, 302
Food and Drug Administration (FDA), 278
Food Employees v. Logan Valley Plaza, 82
Football, 454, 455
Ford, Gabriel, 85
Ford, Gerald, 145, 531
Ford v. Ford, 308–309
Formalism, 831
Forrest, Uriah, 183, 184
Fortas, Abe, 144, 259, 260, 362, 368, 654, 873
44 Liquormart, Inc. v. Rhode Island, 445
"forum state," law of, 754–755
Fosdick v. Schall, 218
Fourteenth Amendment
Hugo Black's interpretation, 75–76, 78
California's Proposition 13 and, 69–70
citizenship defined, 302. *See also* Citizenship
civil rights granted to blacks, 331
Walter Clark's opposition, 162
double jeopardy incorporation, 158–159
Stephen J. Field's opinions, 247, 252–255
incorporation of the Bill of Rights. *See* Bill of Rights
Lochner v. New York, 388
privileges or immunities clause, 105. *See also Slaughterhouse Cases*
Harlan Fiske Stone on, 728
See also Due process; Enforcement acts; Equal protection; Substantive due process; Voting rights
Fourth Amendment. *See* Privacy rights; Search and seizure
Fourth Circuit Court
Hugh Lennox Bond, 102–110, 859
Morrison R. Waite, 108
Fourth Circuit Court of Appeals
Clement Furman Haynsworth, Jr., 361–369, 532, 585, 864
John Johnson Parker, 368, 583–595, 787, 788, 862
J. Harvie Wilkinson III, 223, 807–813, 866
Fox v. Snow, 779
Frank, Jerome, 257–263, 325, 842, 862
Frank, Leo, 402
Frank v. Mangum, 402
Franken, Harry, 12
Frankfeld v. United States, 590–591
Frankfurter, Felix, 264–272, 862, 872
on Hugo Black, 75, 77
Louis D. Brandeis and, 127, 266, 267
and *Brown v. Board of Education,* 795
Jerome Frank and, 259, 262
Henry Friendly and, 273, 275, 281
Learned Hand and, 324, 327
John M. Harlan II and, 338, 341
William Hastie and, 353, 356
on Charles E. Hughes, 405
Supreme Court nomination, 14, 267
and Charles Wyzanski, 841
Franklin, Benjamin, 327, 473, 701
Fraud, 280
Frazier-Lemke Farm Mortgage Moratorium Act, 129, 587
Free speech, right of. *See* Speech, freedom of
Freedom of Information Act, 114

Freedom Riders, 240–241, 418
Fremont, John C., 250–251
Freund, Paul, 273, 277, 848
Friedman, Lawrence, 218
Friendly, Henry Jacob, 273–285, 527, 623, 863
Frist, Bill, 306
Fritz, Christian G., 200
Frohwerk v. United States, 127
From Brown to Bakke (Wilkinson), 809
Frontier judges. *See* Territorial judges
Frontiero v. Laird, 418
Frost v. Weinberger, 279–280
FTC (Federal Trade Commission), 407–408, 616
Fugitive Slave Act (1850), 707, 738–739, 747–748, 750–751
Fuller, Melville Weston, 104, 219, 254, 332, 402, 870
Fullerton v. Jones, 548–549
Fulton, Robert, 436, 439, 476–477
Furman v. Georgia, 145, 643

G. and D. Taylor Company, 23
Gable, Clark, 141
Gag Rule, 186
Galbraith, John Kenneth, 700
Garcia v. San Antonio Metropolitan Transit Authority, 644
Gartenberg v. Merrill Lynch, 612
Garza, Emilio Miller, 158–159
Gasch, Oliver, 805
Gasoline additives, 460
Gay rights. *See* Homosexuality
Gayle v. Browder, 133. *See also Browder v. Gayle*
Gein, Edward, 541
A General Digest of the Acts of the Legislature of the Late Territory of Orleans and of the State of Louisiana, and the Ordinances of the Governor under the Territorial Government (Martin), 505
General Motors, 339–340
Genetics, 4–5, 811–812
George, Henry, 684, 685
Georgia
  codification of laws, 482–483
  county-unit system, 771
  court reporting, 480, 484
  death penalty (*Furman v. Georgia*), 145, 643
  desegregation, 56, 58, 652, 771–772
  legal reforms, 481–483
  legislature's refusal to seat anti-war representative, 771
  Joseph Henry Lumpkin, 479–486, 858
  Rufe D. E. McCombs, 482–483
  sodomy laws, 652
  See also Bell, Griffin
Georgia, University of, 485, 771–772
Gerry, Elbridge, 487
GI Bill of Rights, 454
Gibbons, Thomas, 439
Gibbons v. Ogden, 439–440, 477, 494, 735, 747
Gibbs v. Babbitt, 811
Gibson, John Bannister, 287–295, 857
Gibson, Phil S., 757–758
Gideon v. Wainwright, 342, 796
Gideons International, 779
Gilbert v. Minnesota, 128
Gill v. Board of Commissioners, 166
Ginsberg, Douglas, 533
Ginsburg, Ruth Bader, 410–411, 533, 558, 645, 873
Gitlow v. New York, 388–389, 523, 633–634, 644
Glass Steagall Act (1934), 524
Glynn, Martin, 155
Goff, Nathan, 108
Gold, David M., 34–35
Goldberg, Arthur J., 411, 873
Goldberg v. Meridor, 281
Golden Rule, 164–165
Goldman Sachs (*United States v. Morgan*), 524, 526–527
Gollmar, Robert, 541
Gomillion v. Lightfoot, 134–135
Gone With the Wind (film), 141
Gonzalez, Alberto R., 375
Goodell, Lavinia, 1, 673
Goodman, Frank, 283
Gordon v. Green, 137
Gossum v. Sharp's Heirs, 499
Gould v. American Family Mutual Insurance Company, 3
Government, state. *See* States and states' rights; *and specific states*
Government, U.S. *See* United States government
Grand Theory, 276–277
Grand Traverse Band of Chippewa and Ottawa Indians v. Director, Michigan Department of Natural Resources, 245
Granger Laws, 219
Grant, Ulysses S., 104, 200–201, 214, 215, 572, 666
Graves v. Allan, 500
Gray, Horace, 296–303, 388, 859, 870
Gray, John Chipman, 296
Great Northern Ry. Co. v. Brosseau, 30
Great Trust Cases of 1911, 330, 333–334, 336

Greater Boston Television Corporation v. Federal Communications Commission, 459–460
Greater New Orleans Broadcasting Association, Inc. v. United States, 445
Green, Grafton, 310
Green, Nathan, Jr., 310
Green, Nathan, Sr., 304–310, 858
Green v. County School Board of New Kent County, 136, 818. *See also* Desegregation of public education: speed of implementation
Greenleaf, James, 183
Greenman v. Yuba Power Products, Inc., 758
Greenwood County v. Duke Power Co., 587
Gresham, Walter Q., 451
Griffin v. Board of Supervisors, 364
Griffin v. County School Board, 364–365
Griffin v. Illinois, 234
Griswold, Irwin, 275–276, 616
Griswold v. Connecticut, 81–82, 113, 343–344
Griswold v. Hepburn, 544
Grodin, Joseph R., 71, 72–73
Gruber, Jacob, 742–743
Grutter v. Bollinger, 139
Guilt beyond a reasonable doubt, 82
Gun control, 531, 532
Guns, 804. *See also* Arms, right to bear
Gunther, Gerald, 327
Guntner, George M., 388
Gussman, Pedro, 76

Haar, Robert T., 461–462
Habeas corpus, 362, 411, 516, 591, 750
Hahn v. United States, 390
Hair length, 427
Hall, Dominick, 505
Hall, Kermit, 358
Hall v. United States, 233
Hallett, Moses, 200–201
Hamilton, Alexander, 435, 475–476
Hamilton, Andrew, 548, 553
Hamilton, Thomas, 696
Hamilton v. Accu-Tek, 804
Hampton, Wade, 831
Hand, Augustus Noble, 262, 311–318, 320, 841, 842, 861
Hand, Frances Finke, 319–320, 321, 324
Hand, Learned, 262, 311, 319–329, 861
- clerks, 323–324, 326–327, 842
- Just Compensation advisory board, 594
- other judges compared to, 275, 276, 527, 528, 623
- quoted by H. Friendly, 281
- and the *Ulysses* case, 315, 322–323
- and Charles Wyzanski, 841, 842

Hanging Judge (Harrington), 577. *See also* Parker, Isaac C.
"Hanging judges." *See* Bean, Roy; Parker, Isaac C.
Hard look doctrine, 460
Hardin v. Owings, 87
Harding, Warren G., 324, 403
Hardwick v. Bowers, 419
Harlan, James, 330–331, 332
Harlan, John Marshall (1833–1911), 330–337, 575, 860, 870
Harlan, John Marshall II (1899–1971), 262, 274, 281, 338–344, 521, 863, 872
Harmon, S. W., 577
Harper v. Virginia Board of Elections, 343, 355
Harper, William, 345–350, 858
Harrell v. Travelers Indemnity Company, 468
Harrison, William Henry, 90
Harry Byrd and the Changing Face of Virginia (Wilkinson), 809
Hartman v. Loudoun County Board of Education, 811
Harvard Law Review, 273, 321, 353, 615, 848
Harvard Law School
- African American students, 352, 353, 666. *See also specific students*
- Louis D. Brandeis and, 122, 123
- *Brown* and *Plessy* revisited, 610
- faculty, 206, 265, 273–274, 275–276, 320, 353, 380, 386, 387, 733
- Felix Frankfurter and, 264, 265
- Augustus Hand and, 312
- Holmes lectures, 327, 677, 680
- teaching methods, 122, 155, 297, 386
- women at, 410
- Charles Wyzanski and, 841–842, 847

Harvey v. Thomas, 293
Hastie, William Henry, 351–360, 863
Hathorne, John, 690, 693
Hawaii, 148–149
Hawkins, Alfred E., 393. *See also* Scottsboro defendants
Hawkins v. Coleman, 413
Hay, George, 604, 606
Hayes, Rutherford B., 106, 332

Haynsworth, Clement Furman, Jr., 361–369, 532, 585, 864
Haywood, William "Big Bill", 453
Hazard, Charles T., 22–23
He Hanged Them High (Croy), 577, 578. *See also* Parker, Isaac C.
Health insurance, 7
Hearst, William Randolph, 401, 685–686, 687
Heflin, Howell, 80–81
Hefner, Robert A., 94–95
Heifer-cow distinction, 299
Helfer, Ricki Tigert, 819
Hell on the Border (Harman), 577. *See also* Parker, Isaac C.
Hemphill, John, 370–376, 858
Henning, Crawford, 210–211
Henningsen v. Bloomfield Motors, 758
Henry, Patrick, 656
Herzberger v. Standard Insurance Co., 624
Heubner, Timothy, 665
Hicklin test, 314, 315
Higginbotham, A. Leon, Jr., 377–382, 865
Higgins, Frank, 630
Higher education
  affirmative action, 146, 222
  funding for religiously affiliated colleges, 812
  law schools. *See* Legal education; and *specific law schools*
  racial discrimination and desegregation, 12, 353, 356, 378, 557, 568, 593, 652, 771–772, 816, 823
  sex discrimination, 411
  See also specific colleges and universities
Hightower v. Thornton, 484
Hill, Anita, 59
Hill, James J., 333
Hill, Sarah Althea, 251, 253
Hill v. Colorado, 645
Hill-Burton Act, 365
Hirabayashi v. United States, 268
Hispanic American judges, 522
  Jose Alberto Cabranes, 269, 525
  Emilio M. Garza, 158–159
  Alberto R. Gonzalez, 375
  Harold R. Medina, 274, 519–529, 862. *See also Dennis v. United States*
  Charles Z. Smith, 466
Hiss, Alger, 260
Ho Ah Kow v. Nunan, 254
Hocutt, Thomas R., 356
Hocutt v. Wilson, 356
Hoffman, Elizabeth, 785–786, 788–789. *See also* Waring, J. Waties
Hoffman, Julius J., 528
Hoffman, Ogden, Jr., 199, 200–201
Hoke v. Henderson, 664
Holder, Janet, 307
Hollings, Ernest, 362
Holloway, William J., Jr., 99
Holmes, Hamilton, 771–772
Holmes, Oliver Wendell (father), 384
Holmes, Oliver Wendell, Jr., 383–390, 860, 871
  and Felix Frankfurter, 266
  free speech cases, 127–129, 321, 388–389. *See also Schenk v. United States*
  Gitlow dissent, 634
  and Learned Hand, 321, 323
  and Charles E. Hughes, 389, 402
  Massachusetts Supreme Judicial Court, 298, 387–388
  on resting upon formula, 270
  "scholar's seat," 153
  on Lemuel Shaw, 711
  and Harlan Fiske Stone, 728
  George W. Stone's opinions cited, 724
  and Charles Wyzanski, 841, 842
Holzapfel, Floyd "Lucky", 51
Home rule charters, 178
Homestead exemption, 373–374
Homicide
  by judges, 51
  justifiable homicide, 723
  mandatory death sentences, 573, 577. *See also* Parker, Isaac C.
  as self-defense, 575, 665, 723–724
Homosexuality, 113–114, 412–413, 419, 534
Hoover, Herbert
  attorney general, 543
  Georgia Bullock not appointed, 5
  Frank Easterbrook's relationship to, 221
  and John Sirica, 713–714
  Supreme Court nominees, 153, 156, 324, 403–404, 585, 726
Hoover, J. Edgar, 522, 714, 727. *See also* Federal Bureau of Investigation
Hope Clinic v. Ryan, 226
Hope Natural Gas Co. v. Federal Power Commission, 589–590
Hopkins Federal Savings and Loan Association v. Cleary, 157–158
Hopkins, Joshua. *See Case of the Prisoners*
Hopwood v. Texas, 139
Horne, Jeremiah, 709
Horton, James Edwin, Jr., 391–399, 861

Horton, James Edwin, Sr., 391
Horton, Miles, 787
Horwitz, Morton, 542
Hospitals, desegregation of, 365–366
House of Representatives, U.S.
Gag Rule, 186
West H. Humphreys impeached, 347
Thomas Alexander Marshall, 498
Abner J. Mikva, 531
Isaac C. Parker, 572
House Un-American Activities Committee, 234, 235–237
Samuel A. Weiss, 454–455
Housing
emergency housing laws, 632–633
racial discrimination, 82, 231, 343
Houston, Charles Hamilton, 353, 354
Howard, A. E. Dick, 640–641
Howard University Law School, 353, 354, 357
Hubbell, Levi, 671
Hudgins v. Wright, 840
Hufstedler, Shirley Mount, 558
Hughes, Charles Evans, 400–406, 861, 871
appointed chief justice, 324, 403–404, 726
caseload, 323
and Oliver Wendell Holmes, Jr., 389, 402
lectures, 683
Hughes, Sarah Tilghman, 53, 407–414, 559, 863
Hughes Court, 728, 871–872. *See also* Hughes, Charles Evans; *and specific justices and cases*
Hulbert, G. Murray, 523
Human rights, 15, 114
Humorous judges, 137–138, 321–322, 541
Humphrey, Gordon, 531
Humphreys, West H., 347
Hunt, E. Howard, 715–716. *See also* Watergate scandal
Hunter, Charlayne, 771–772
Hunter, Robert, 549
Hurd v. Hodge, 231
Hurlbut, John B., 640
Hutcheson, Joseph C., Jr., 135, 594, 823, 824
Hutchinson, Thomas, 298

IBM, 846
ICC (Interstate Commerce Commission), 181, 586
Ickes, Harold L., 260, 356, 357
If Man Were Angels (Frank), 263
Illinois
Escobedo v. Illinois, 282–283, 680, 796
grain elevator rate regulation, 254
Griffin v. Illinois, 234
illegitimate children and interstate inheritance, 643–644
legal reforms, 678
redistricting, 531
Edith Spurlock Sampson, 216–217
Walter Vincent Schaefer, 677–682, 863
See also Chicago; Illinois, U.S. District Court of
Illinois, U.S. District Court of
Thomas Drummond, 212, 214–215. *See also* Drummond, Thomas
Kenesaw Mountain Landis, 449–456, 860
Illinois Central Railroad v. Illinois, 254
Immigrants, 198–199, 302, 313, 804
In re Aasand, 28
In re Carroll v. Knickerbocker Ice Co., 687
In re Dillard, 108
In re McAllister, 106
In re Neagle, 253
In re Professional Hockey Antitrust Litigation, 380
In re Quong Woo, 254
In re Spain, 106–107
In re Turner, 103
In re Winship, 82
In the Matter of Color (Higginbotham), 377, 381–382
In the Matter of Engle, Ross, Stitcher, et al., 106
In the Matter of the Motion to Admit Goodell, 673–674
Income tax, 254, 333. *See also* Taxation
Incorporation of business, 600. *See also* Corporate law and corporate regulation
Incorporation of the Bill of Rights. *See* Bill of Rights
Indian Claims Commission, 95. *See also* Native Americans: land claims
Indian Territory, 572, 573, 574. *See also* Parker, Isaac C.
Indiana, 87–90, 91, 172. *See also* Indianapolis
Indiana Supreme Court
John Johnson, 85
Isaac Blackford, 84–92
John L. Niblack, 88–89
Samuel E. Perkins, 91
James Scott, 90
Indianapolis, Indiana, 226, 626
Individuals with Disabilities Education Act, 811
Informed consent, 3

Insanity, criminal, 41–42, 209–210, 362, 411–412, 465
Insolvency. *See* Bankruptcy
Institute of Judicial Administration, 775, 781
Institutes (Coke), 493. *See also* Coke, Sir Edward
Insurance, 7, 468, 624
Insurance Company v. Morse, 673
Integration, racial. *See* Desegregation; Desegregation of public education
Integrity, 466
Intellectual property rights, 446–447
International Business Machines (IBM), 846
International law, 114
International Military Tribunal, 590, 594
International precedents, 3–4
International Union, United Automobile, and Aerospace and Agricultural Implement Workers v. Johnson Controls, Inc., 225–226
International Workers of the World (IWW), 453
Internet, 445–446, 612, 811
Interpretivism, 642. *See also* Constructionism, strict; Story, Joseph
Interrogations
  law enforcement's conduct, 233, 270–271, 634–635, 680
  Miranda rights waived during, 465
  right to counsel before/during questioning, 282–283. *See also* *Miranda v. Arizona*
  See also Confessions
Interstate commerce
  contract clause, 491, 494. *See also* Contract clause
  John Davis on regulation, 193–194
  dormant commerce clause, 436
  Embargo Act (1807), 192–194, 491
  federal authority, 192–194, 436, 439–440, 477, 494, 564, 747–748, 796
  Gibbons v. Ogden, 439–440, 477, 494, 735, 747
  John Marshall Harlan I and, 332, 333
  James Kent and, 435
  John J. Parker's rulings, 587–588
  price control regulations, 586, 633
  state regulations, 78, 106–107, 402, 672–673, 743. *See also specific states*
  United States v. Darby Lumber Co., 729–730
  See also Antitrust law/cases
Interstate Commerce Commission (ICC), 181, 586
Intrastate commerce, 402
Investment banking firms
  Drexel Burnham case(s), 607, 608–612, 613
  United States v. Morgan, 519, 524, 526–527
Iredell, James, 84–85, 737, 868
Irwin v. Swinney, 300
Italian American judges
  Guido Calabresi, 269
  Antonin Scalia, 118–120, 873. *See also* Scalia, Antonin
IWW (International Workers of the World), 453
J. P. Stevens corporation, 367
J. Rowe v. United States, 575
Jackson, Andrew, 291–292, 347, 391, 505, 733, 743–744
Jackson, Mississippi, 57, 83, 653
Jackson, Robert H., 77, 259, 400, 458, 640, 795, 872
Jackson, Robert Penfield, 846
Jackson v. Denno, 513
Jackson v. Phillips, 299–300
Jaffe, Caleb Adam, 833
Jager v. Doublas County School District, 419
James, Frank, 451
James I of England, 492–493
James II of England, 580
James, Lydia Ellen. *See* Morphonius, Ellen
James Walker Memorial Hospital, 365, 366
Japanese Americans, 75, 268, 755, 793. *See also* Oyama, Kajiro and family
Javits, Jacob, 274
Jay, John, 434, 472–473, 474, 475, 868
Jay Treaty, 657, 761
Jefferson, Thomas
  Declaration of Independence, 473
  invoked by Lincoln, 646
  judicial appointments, 184, 185
  and Robert R. Livingston, Jr., 475, 476
  and John Marshall, 20, 487, 657
  and the Orleans Territory, 503
  and Spencer Roane, 657, 659
  and slavery, 764
  on Joseph Story, 735
  Virginia and Kentucky Resolutions, 656

and George Wythe, 761, 836
Jeffreys, George, 580–581
Jehovah's Witnesses, 267, 590, 731
Jenner, Albert, 678
Jennings, Jonathon, 85–86
Jewish judges
Louis D. Brandeis, 121–130, 860, 871. *See also* Brandeis, Louis Dembitz
Benjamin N. Cardozo, 153–160, 861, 871. *See also* Cardozo, Benjamin N.
Felix Frankfurter, 264–272, 862, 872. *See also* Frankfurter, Felix
Ruth Bader Ginsburg, 410–411, 533, 558, 645, 873
Arthur J. Goldberg, 411, 873
Franklin D. Moses, Sr., 830, 831, 832, 833
Sol Wachtler, 326–327
Jack B. Weinstein, 800–806
Samuel A. Weiss, 454–455
See also Kozinski, Alex
John Manny Company, 214
Johnny Blue and the Hanging Judge, 578
Johnson, Andrew, 347, 665, 749
Johnson, Cal, 197
Johnson, Frank M., Jr., 96–97, 133, 415–423, 429, 865
Johnson, Hiram, 791
Johnson, John, 85
Johnson, Lyndon B.
and the chief justice position, 144
circuit court appointees, 224, 458, 558
district court appointees, 379, 556, 608, 801
and William Wayne Justice, 426, 427
and Thurgood Marshall, 355
oath of office, 407, 409
and W. E. Richburg, 53
Johnson, William, 439, 735, 868
Johnson Controls, Inc., 225–226
Johnson v. Glick, 283
Johnson v. State of California, 758
Johnson v. Zerbst, 133, 770–771
Joint Anti-Fascist Refugee Committee, 234
Jones, Fruster, 88–89
Jones, Jesse H., 260
Jones, Samuel "Golden Rule," 164–165
Jones, Thomas Goode, 420–421, 724
Jones v. Taylor, 374
Jones v. United States (1890), 108–109
Jones v. United States (1964), 233
Jones v. Van Zandt, 747–748
Joyce, James. *See Ulysses* obscenity trial
Judges
birth year listings, 851–852, 856–866
Luther Bohanon on, 100
Robert Bork on, 113, 116–117
Benjamin Cardozo on legislative function, 154
century listing, 853–854
and the Civil War, 347. *See also* Civil War; *and specific judges*
Frank Coffin on, 225
conflicts of interest, 366–368, 535
Thomas Cooley on, 178
exceptions to procedural rules, 243–244
forester analogy, 754
Jerome Frank on, 259
Felix Frankfurter on, 268
Frank Johnson on, 422
William W. Justice on obligations of, 430
John C. Knox on, 322
in the late-nineteenth century, 539, 540
Joseph Lumpkin on, 479
Lord Chancellor Lyndhurst on, 541
John Niblack's description, 89
political convictions, 25. *See also specific judges*
Richard Posner on, 620–622
qualities of great judges, 349
William Rehnquist on nonconstructivist judges, 642
responsibility to rule of law, 323–324
royal influence on, 580–581
Robert Satter on trial vs. appellate judges, 588–589
Judy Sheindlin on, 718–719
Charles Z. Smith on integrity of, 466
Roger Traynor on, 755
Joseph Wapner on, 849
Charles Wyzanski on, 844
Judicial activism
David Bazelon, 40, 43–44. *See also* Bazelon, David L.
John R. Brown, 131. *See also* Brown, John R.
Jerome Frank, 257
Felix Frankfurter and, 270–271
Henry Friendly and, 277, 282

Learned Hand's opposition, 325, 327
Sarah T. Hughes, 410–413
Frank Johnson, 416–419, 422. *See also* Johnson, Frank M., Jr.
Harold Leventhal on, 458–459
William Rehnquist, 645–646. *See also* Rehnquist, William H.
Roger Traynor, 754
Patricia Wald accused of, 532
Earl Warren, 794–798. *See also* Warren, Earl; Warren Court
Jack B. Weinstein, 802. *See also* Weinstein, Jack B.
J. Harvie Wilkinson and, 810. *See also* Wilkinson, J. Harvie
J. Skelly Wright, 821–827
See also Conservative activist judges; Liberal activist judges
Judicial administration. *See* Administration, judicial/court
Judicial appointment, 89, 165, 200, 580–581. *See also* Senate confirmation [hearings]; *and specific judges*
Judicial clerks. *See* Clerks, judicial
Judicial Conference, 446, 593, 613
Judicial corruption. *See* Corruption, judicial
Judicial deference, 643, 755. *See also* Restraint, judicial; *and specific judges*
Judicial election(s)
Rose E. Bird, 70–72
campaigns, 72–73, 508
Walter Clark's advocacy, 162
Thomas Cooley and, 177, 180
John B. Gibson and, 294
in Indiana, 89, 91
in Kentucky, 498
Hans A. Linde, 464–465, 467–468
William Mitchell, 542–543
John Niblack's defense, 89
in Oregon, 467–468
Walter Schaefer, 679
Walter V. Schaefer, 679
George Sharswood, 699, 701
Penny White, 306–307
Jonathan Wright's opposition, 830
Judicial independence, 580–581, 597, 664, 778–779. *See also* Zenger, Peter, trial of
Judicial performance evaluations, 307
Judicial recall, 20, 27
Judicial reforms
in Alabama, 80–81, 724
Rose E. Bird, 68–69
Walter Clark's opinions, 162–163
Charles Doe, 208–210
evidence rules, 32, 35–36
Alfred P. Murrah, 569–570
in New Jersey, 775, 777–779
in New York, 438
John J. Parker and, 593
Isaac Parker's suggestions, 576
Theophilus Parsons, 599–600
reform acts, 245, 515–516
George Washington Stone, 724
Arthur Vanderbilt, 776–779, 780–781
See also Administration, judicial/court
Judicial restraint. *See* Restraint, judicial
Judicial review
of agency actions, 459–461, 516
Bonham's Case and, 492–493
Walter Clark's views, 162, 166, 167
John Davis's views, 193
Henry W. Edgerton and, 230
John B. Gibson's views, 290, 291, 292–293. *See also Eakin v. Raub*
Nathan Green, Sr., 305
vs. judicial deference, 643
John Marshall's support, 490–491, 760, 763, 764. *See also Marbury v. Madison*
pre-enforcement review, 278–279
Spencer Roane's views, 656
Supreme Court and, 230, 490–491
St. George Tucker's views, 760–761, 763
J. Harvie Wilkinson and, 810
George Wythe and, 838–839
See also specific cases
Judiciary (judicial branch)
authority over government compliance, 241
independence. *See* Judicial independence; Zenger, Peter, trial of
See also specific courts and states
Judiciary Act (1789), 203, 490
Judiciary Acts (1801 and 1802), 184, 185
Juliar v. Greenman, 301–302
Junk bonds, 608–609. *See also Drexel Burnham* cases

Juries
criminal insanity a question of fact, 210
deadlocked juries, 574
determination of facts, 436, 438
in "The Devil and Daniel Webster," 693
instructions to, 312–313, 574, 575–576, 599, 706
judgment of law, 702
juror's request for dismissal on religious grounds, 380
jury selection, 139, 233–234, 523
note taking, 261
nullification, 90–91, 549, 553, 846–847
reach in criminal cases, 90–91
repeat juries, 201
women barred from, 408, 413
See also Jury trial
Jury trial
fair trial right, 404
right to, 305–306, 342
sufficient evidence for, 362
summary jury trial, 244
See also Juries
Justice, Department of
Antitrust Division, 526
under Griffin Bell, 62
Warren Burger and, 143
corruption, 727–728
and *Dennis v. United States*, 528. *See also Dennis v. United States*
injunction against Bogalusa Klan, 816–817
and *Ruiz v. Estelle*, 429
and Skelly Wright's integration order, 825
Charles Wyzanski and, 842
See also Attorneys General, U.S.
Justice, William Davis (Will), 424–425
Justice, William Wayne, 424–431, 865
Juvenile offenders and juvenile corrections, 124, 125, 407, 424, 428, 513–514

Kalamazoo, Michigan, 179, 240. *See also* Enslen, Richard Alan
Kamper v. Hawkins, 760, 763–764
Kane v. Commonwealth, 701–702
Kansas, cases involving, 402, 574. *See also Brown v. Topeka Board of Education*
Kaufman, Irwin R., 274
Kauten, Mathias, 313–314
Kaysen, Carl, 845, 848
Keating, Kenneth, 274
Kennedy, Anthony M., 227, 443, 647, 873
Kennedy, Edward M. (Ted), 115
Kennedy, John F.
assassination investigation, 798
desire to diversify federal courts, 379
judicial appointments, 56–57, 96, 354–355, 409, 511, 512, 826
Kennedy, Robert, 56–57, 96, 379, 466, 557, 826
Kennedy, William E., 305
Kennon, William, Sr., 196–197
Kent, James, 386–387, 433–441, 475, 476, 477, 544, 857
Kentucky
cases involving, 234, 337, 644, 750–751
judicial election, 498
Thomas Alexander Marshall, 497–501, 858
Richard Reid, 334–335
George Robertson, 544–545
slavery, 500–501
Virginia and Kentucky Resolutions, 656
Kentucky v. Denison, 750–751
Kerr, Robert S., 94, 96, 97, 98
Key, Francis Scott, 186, 743
King, Martin Luther, Jr., 133, 557
King, William H., 357
King et al. v. Ohio & M. Ry. Co., 218
King v. Van Dam, 547, 551–552
Kirby, Benedict, 748–749
Kissing Case, 674
Kleps, Ralph, 68
Knetsch v. United States, 325
Knight, Thomas M., 393, 397, 398. *See also* Scottsboro defendants
Knop v. Johnson, 242–243, 245
"Know Nothing" party, 252
Knox, John C., 322–323, 522
Korematsu v. United States, 75, 268
Kovacs v. Cooper, 270
Kozinski, Alex, 223, 442–448, 866
Ku Klux Klan
Hugo Black's membership, 75, 76–77
Bogalusa Klan, 816–817
and Freedom Riders, 240–241, 418
John Marshall Harlan I's denunciation, 332
Benjamin Lindsey opposed, 125
John Niblack and, 88
Thomas Ruffin and, 666
South Carolina Klan trials, 104–105
Kurland, Philip, 717

Labor movements, 28, 30. *See also* Organized labor
Ladd, Amos, 105
Laetrile, 99–100
LaFollette, Robert M., 27, 162
Laissez-faire constitutionalism, 36–38, 77–78, 81
Lake v. Cameron, 42–43
Lamar, Joseph R., 126, 871
Lamar, Mirabeau B., 371
Lamb, James. *See Case of the Prisoners*
Landis, Kenesaw Mountain, 449–456, 860
Landis family, 449–450, 451, 452
Langdell, Christopher Columbus, 122, 297, 320, 386
Langer, William, 341
Langtry, Lillie, 53
Langtry, Texas, 48–50, 52–54
Lansdale v. Tyler Junior College, 427
Lansing, John, 437, 475, 476, 477
Lansing, Michigan, 241–242
Lantry v. Hoffman, 686
Larkin v. New York Telephone Co., 635
Larouche, Lyndon, supporters of, 380
Lasselle, Hyacinthe, 88–90
Lassiter v. Taylor, 592
Lasswell, Harold D., 259
Latrobe, Benjamin Henry, 185
"Law and economics" school of thought, 221, 223, 225, 624–626. *See also* Posner, Richard A.
Law and Its Administration (H. F. Stone), 728
The Law and Practice of the City Court of the City of New York (Seabury), 686
Law and the Modern Mind (Frank), 257, 259
Law clerks. *See* Clerks, judicial
Law enforcement officers
  Charles Becker conviction, 686–687
  and eyewitness identifications, 284
  interrogations and confessions, 233, 270–271, 634–635, 680. *See also* Interrogations
  news media invited on searches/raids, 803–804
  restraint procedures, 241–242
  spousal abuse protection law not enforced, 469
  Earl Warren and, 792–793, 796–797
  See also Criminal suspects' rights; Defendants' rights
Lawrence v. Devonshire Fabrics, Inc., 527
Lawrence v. Fox, 172
Lawyers
  African Americans, 352–353, 358, 561, 829
  Brown v. Board of Education, 354, 356, 378, 557. *See also* Marshall, Thurgood
  charged with contempt, 524
  Abraham Lincoln, 214–215
  Edward Ryan on, 673
  women, 1, 12, 14–16, 300–301, 673–674
  See also Attorneys General, U.S.; Counsel, right to; *specific individuals*
Le Guen, Louis, 476
Le Guen v. Gouverneur and Kemble, 476
Lee, Josh, 564
Lee Optical v. Williamson, 568
Legal education, 593
  African Americans, 352, 353, 378, 380, 381, 610, 666
  casebooks, 623, 804
  in colonial America, 692
  and *Palsgraf,* 157
  George Sharswood's texts, 697
  teaching methods, 122, 155, 297, 697–698, 791
  women, 9, 300, 385, 482
  See also specific individuals and institutions
Legal instrumentalism, 484
Legal realism, 259
Legal representation, right to. *See* Counsel, right to
Legal Tender Act, 700. *See also* Money
Legal Tender cases, 301–302, 544
Leggett, Kirvin Kade, 49
Legislative and Administrative Processes (Linde), 464
Legislative branch
  Nathan Green, Sr., on, 306, 307
  power, 176–177, 291–293, 551
  relationship to judiciary, 23, 551
Lehman Brothers, 524, 526–527
Leist v. Simplot, 280
Lelia J. Robinson's Case, 300–301
Lelsz v. Kavanagh, 428
Lemon v. Kurtzman, 146, 359–360
Lengel, James, 832
Leventhal, Harold, 457–462, 533, 865
Levine, Dennis, 608. *See also Drexel Burnham* case(s)
Levy, Leonard W., 704
Levy, Mordecai, 371
Lewis, William Draper, 545
Lewis v. Greyhound, 418
Liability
  and contributory negligence, 635

defective product liability, 156, 754
fellow servant rule, 635, 708
of gun manufacturers, 804
limitation of liability, 156–157
mentally ill arrestee's death, 241–242
See also Negligence; Tort law
Libel law/cases
Thomas Cooley's rulings, 180
against Reuben Crandall, 186
Henry White Edgerton's opinions, 231–232
New York Times *v. Sullivan,* 231–232
People v. Croswell, 436, 438
public officials as plaintiffs, 231–232
reach of juries, 90
against Samuel H. Smith, 184–185
truth as defense, 438, 553
Zenger trial, 547, 549, 550, 552–553
Liberal activist judges
Rose Elizabeth Bird, 68–72
Walter Clark, 161–167, 860
Sarah T. Hughes, 410–413
Frank Johnson, 416–419, 422. *See also* Johnson, Frank M., Jr.
Samuel Jones, 164–165
William Wayne Justice, 424–431
Abner J. Mikva, 530–536
William Shaw Richardson, 148–149
J. Skelly Wright, 821–827
See also Judicial activism; Warren, Earl; Warren Court
License Cases, 746
Liddy, G. Gordon, 715–716. *See also* Watergate scandal
Liebowitz, Samuel, 393. *See also* Patterson, Haywood
Limited partnerships, 435
Lincoln, Abraham
Samuel Ames compared with, 21
at the battlefront, 386
and Kirby Benedict, 748, 749
1860 election, 197
Jeffersonian principles, 646
as lawyer, 214–215
Joseph Lumpkin on, 485
and states' right to maintain slavery, 345
and the Supreme Court, 251, 750
Lincoln, George David, 51
Lincoln-Roosevelt League, 791
Lindbergh Kidnapping law, 567
Linde, Hans A., 463–470, 865
Lindsey, Benjamin Barr, 124–125
Linnemeir v. Board of Trustees of Purdue University Fort Wayne, 626
Lipscomb, Abner S., 373
Livingston, Robert, Jr. (cousin of Robert R. Livingston, Jr.), 476
Livingston, Robert R., Jr. ("the Chancellor"), 471–478, 856. *See also Livingston v. Van Ingen*
Livingston, Robert R., Sr. ("the Judge"), 472
Livingston v. Ogden and Gibbons, 439
Livingston v. Van Ingen, 436, 439, 476–477
Llewellyn, Karl, 635
Local government, 82, 134–135, 178–179. *See also specific cities*
Lochner v. New York, 388
Lodge, Henry Cabot, 388
Long, John, 387
Long, Russell, 823, 826
Lord, Samuel, 539
Lorillard Tobacco Company v. Thomas Reilly, 445
Los Angeles, California, 4–5, 70, 125
Loss, Louis, 275, 276
Louisiana
Brown v. Louisiana, 79
constitution, 504, 507
judicial system, 148, 502, 503–504, 505–506
Ku Klux Klan, 816–817. *See also* Ku Klux Klan
Louisiana ex rel. Francis v. Resweber, 822
François-Xavier Martin, 502–510, 857
school desegregation, 651–652, 819, 823–826
slavery issues, 504
voting rights, 817
See also New Orleans
Louisiana, U.S. District Court for the Eastern Division of
J. Skelly Wright, 823–826. *See also* Wright, J. Skelly
Louisiana ex rel. Francis v. Resweber, 822
Louisville v. Radford, 129
Lowden, Frank, 451–452
Lowell, A. Lawrence, 265
Lowell, John, 192, 297–298
Loyalty oaths, 271
Luck v. United States, 513–514
Lumpkin, Joseph Henry, 479–486, 858
Luther v. Borden, 747
Lynch, Marvin, 396
Lynch v. Torquato, 359
Lynching and attempted lynching, 167, 393, 395–396, 421

Lyndhurst, Lord Chancellor, 541
Lynne, Seybourn, 416. *See also Browder v. Gayle*
Lyon, William P., 668

MacAdams v. Cohen, 521
MacFarquhar, Larissa, 620
Maclean v. Scripps, 180
MacPherson, Donald, 156
MacPherson v. Buick Motor Company, 156
Madison, James, 184, 503, 656, 734, 765
Magistrate judges, U.S., 244–245
"The Magnificent Yankee" (Lavery), 383–384
Magrath, C. Peter, 22, 23
Maher, Peter, 53
Mahone, William, 108
Mahoney, Roger, 68
Maine. *See* Appleton, John
Maledon, George, 577
Mandamus Case. *See Marbury v. Madison*
Manton, Martin T., 316
Mapp v. Ohio, 343, 796
Marbury, William, 184, 490. *See also Marbury v. Madison*
Marbury v. Madison, 20, 290, 490–491, 657, 760–761
  Eakin v. Raub as rebuttal, 287, 291
  and St. George Tucker's opinions, 760, 763, 764
Marcus Brown Holding Co. v. Feldman, 632–633
Margold, Nathan R., 356
Markham v. City of Newport News, 362
Marriage, 125, 499–500, 635, 693–694. *See also* Adultery; Contraception
Marsh v. Alabama, 82
Marshall, Burke, 133
  See also Marshall, John
Marshall, Humphrey, 497, 498
Marshall, James Markham, 184, 488
Marshall, John, 487–496, 856, 868
  Dartmouth College v. Woodward, 436, 491, 600, 738, 745
  Ex parte Bollman and Ex parte Swartwout, 186–187
  and the Fairfax estates, 488, 736
  Fletcher v. Peck, 491, 734, 745–746
  Gibbons v. Ogden, 439–440, 477, 494, 735, 747
  Marbury v. Madison, 20, 287, 290, 291, 490–491, 657, 760–761
  T. A. Marshall and, 497
  other judges compared to, 348, 349, 422
  Edmund Pendleton and, 602, 604, 606
  Spencer Roane and, 655–656, 657–660
  Roger B. Taney and, 743
  St. George Tucker and, 760, 763, 764, 765–766
  See also Marshall Court
Marshall, Thomas Alexander, 497–501, 858
Marshall, Thurgood, 354–355, 873
  Brown v. Board of Education, 354, 356. *See also Brown v. Topeka Board of Education*
  Choctaw Nation v. Oklahoma, 98
  Gayle v. Browder, 133
  Ruth Bader Ginsburg compared to, 410
  William Hastie and, 353, 356, 358
  inspired by *Plessy* dissent, 330
  Mitchell v. Wright, 133
  Constance B. Motley and, 557
  and the NAACP, 330, 353, 354, 787
  Richard Posner and, 616
  Supreme Court replacement, 58–59, 381. *See also* Thomas, Clarence
  Sweatt v. Painter, 378. *See also Sweatt v. Painter*
Marshall Court
  character, 490
  court reporter, 182, 183
  Gibbons v. Ogden, 439–440, 477, 494, 735, 747
  justices listed, 868–869. *See also specific justices*
  Marbury v. Madison, 20, 287, 290, 291, 490–491, 657
  M'Culloch v. Maryland, 495, 659, 735
  Spencer Roane vs., 655, 657–660
Martens, Pam, 561
Martial law, 505
Martin, François-Xavier, 502–510, 857
Martin, Paul Barthelemy, 507–508
Martin, William L., 724
Martin v. Hunter's Lessee, 657–658, 735–738. *See also* Fairfax estates
Maryland
  Bell v. Maryland, 82–83
  Benton v. Maryland, 159
  Hugh Lennox Bond, 102–104. *See also* Bond, Hugh Lennox
  Brown v. Maryland, 743
  commercial regulation, 106, 107
  communist leaders prosecuted, 590–591
  constitution, 103

funding for religiously affiliated colleges, 812
habeas corpus suspended, 750
M'Culloch v. Maryland, 495, 659, 735
Marysville, California, 248
Mason, Alpheus T., 728
Mason, George, 837
Massachusetts
African Americans, 666–667, 706–707
anti-Catholic rioting, 705
colonial Massachusetts, 298, 689–695
constitution, 597
incorporation statute, 600
See also Boston; Massachusetts Supreme Judicial Court
Massachusetts, U.S. District Court of
John Davis, 191–195, 856
Charles E. Wyzanski, Jr., 327, 841–848, 864
Massachusetts Supreme Judicial Court (Supreme Court of Judicature), 298
court reporting, 297, 298
Horace Gray, 296–303, 859. *See also* Gray, Horace
Oliver Wendell Holmes, Jr., 298, 387–388. *See also* Holmes, Oliver Wendell, Jr.
notable members, 298
Theophilus Parsons, 206, 596–601, 856
Samuel Sewall, 298, 689–695, 707, 734, 856
Lemuel Shaw, 664–665, 704–711, 857
Masses Publishing Co. v. Patten, 321
Mathews v. Eldridge, 279–280
A Matter of Interpretation: Federal Courts and the Law (Scalia), 120
Matters, Dolly, 452
Matthews, Burnita Shelton, 15–16, 558, 559, 843
Matthews, Stanley, 302, 870
Mays v. Burgess, 231
McAffee v. United States, 233
McBryde Case, 148–149
McCall v. McDowell, 200
McCarthy, Joseph, 340, 714. *See also* McCarthy era
McCarthy era
Burrell v. Martin, 40
John M. Harlan II during, 340–341
Alger Hiss jailed, 260
loyalty oaths and academic freedom, 271
John Sirica during, 714
suspected dissidents' rights violated, 234–237
Earl Warren during, 794
See also Communist Party; *Dennis v. United States*
McCarty, J. D., 97
McClesky v. Kemp, 419
McClure, James, 532
McCollum v. Board of Education, 271
McCombs, Rufe Dorsey Edwards, 482–483
McCord, James, 715–716. *See also* Watergate scandal
McCormack, Cyrus, 214
McCrady v. Hunt, 348
McCree, Wade, Jr., 222
McCulloch v. Maryland. See M'Culloch v. Maryland
McDowall v. McDowall, 348–349
McGannon, William, 11
McGough, Lucy S., 136
McGowan, Carl Eugene, 112, 273, 511–518, 864
McIntosh, Wayne V., 464, 468
McKenna, Joseph, 726, 870
McKinley, William, 756
McLaurin v. University of Oklahoma, 568
McLean, John, 214, 869
McManus v. State, 723
McNabb v. United States, 233
McReynolds, James C., 728, 871
M'Culloch v. Maryland, 495, 659, 735
McWherter, Ned, 306
Meany, George, 363, 366
Med (slave girl), 706
Medina, Harold R., 274, 519–529, 862. *See also Dennis v. United States*
Meek, Edward R., 49
Meeker, Mary, 612
Melville, Herman, 705
Mental health, 42–43, 418–419, 428. *See also* Insanity, criminal
Meredith, James, 557, 652, 816
Meredith v. Fair, 816. *See also* Meredith, James
Merriam, Charles E., 258, 259–260
Metcalf v. Gilmore, 208
Metropolitan Street Railway Company, 685
Michael v. Cockerell, 592
Michigan
constitution, 177
Thomas McIntyre Cooley, 175–181, 859
Native American land claims, 245
prisons and prisoners' rights, 241–243, 245
segregation/desegregation, 179, 240
Michigan, U.S. District Court for the Western District of
Richard Alan Enslen, 239–246, 866
Microsoft case, 617, 844, 846
Mikva, Abner J., 530–536, 865

Military tribunals, 103, 375, 565, 590, 594
Milk, 633. *See also United States v. Carolene Products Co.*
Milken, Michael, 608. *See also Drexel Burnham* case(s)
Mill, John Stuart, 33, 386, 698
Miller, Arthur, 691
Miller v. California, 146, 317
Miller v. Wells Fargo Bank International Corporation, 612
Mims v. Lockett, 484
Minersville School District v. Gobitis, 267, 731. *See also* Flag salute laws
Minimum wage laws, 405, 644
Mining law, 200, 202, 249, 250–251
  John J. Parker's opinions, 586–587
  James Wickersham and, 756, 758
Minnesota, 128, 402, 539, 540, 542
  William Mitchell, 537–543, 546, 860
Minnesota Rate Cases, 402
Minors, 163, 626, 626–627
Minton, Sherman, 530, 795, 872
Mione, Judith, 561
Miranda v. Arizona, 145, 283, 343, 680, 797–798. *See also* Counsel, right to
Mississippi
  Mississippi Territory Superior Court, 502, 503
  segregation/desegregation, 57, 83, 557, 652, 653, 816
Mississippi, University of, 557, 652, 816
Missouri. *See Cummings v. Missouri*
Mitchell, William (father), 537–543, 546, 860
Mitchell, William DeWitt (son), 538, 543
Mitchell v. Wright et al., 133
M'Naghton rule, 41, 209
Money
  Legal Tender cases, 301–302, 544
  paper vs. hard money, 700–701
  personal checks, 435
  postwar payment of pre-Revolution debts, 839–840
  See also Banking
Monopolies. *See* Antitrust law/cases
Monroe, James, 487, 837
Montgomery, Alabama, 133, 416, 418, 650. *See also* Freedom Riders
Montgomery, Jack, 394–395
Montgomery, Olen, 393, 398. *See also* Scottsboro defendants
Mooney, Ralph James, 202, 203
Mooney, Tom, 265
Moonshiners, 105
Morales v. Turman, 428
Morgan, J. P., 333, 727. *See also* Standard Oil
Morgan Stanley [Dean Witter], 524, 612, 613. *See also United States v. Morgan*
Morgan v. Virginia, 356, 358
Morphonius, Ellen, 508–509
Morris, Esther McQuigg, 19
Morris, Gouvenor, 473, 550
Morris, Jeffrey Brandon, 457
Morris, Lewis (1671–1746), 547–556, 856
Morris, Lewis (grandson of Lewis Morris), 554
Morris, Lewis, Sr. (uncle of Lewis Morris), 547–548
Morris, Robert Hunter, 553, 554
Moses, Franklin D., Sr., 830, 831, 832, 833
Moss, William Paul, 29
Moss v. Morgan Stanley, 613
Motley, Constance Baker, 556–562, 772, 865
Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 534
Motto, Frank, 10–11
MOVE row-house bombing, 611
Muller v. Oregon, 123
Municipal boundaries, 134–135
Municipal incorporation, 82
Municipal Ownership and Operation of Public Utilities in New York City (Seabury), 685
Munn v. Illinois, 254
Murder. *See* Homicide
Murphy, Frank, 268, 730, 872
Murrah, Alfred P., 93–94, 96, 563–570, 863
Mutscher, Gus, 412
Myers v. State, 723

NAACP. *See* National Association for the Advancement of Colored People
NAACP v. Alabama, 343
NAACP v. Claiborne Co., 444
NAFTA, 535
National Association for the Advancement of Colored People (NAACP)
  Briggs v. Elliott, 787. *See also Briggs v. Elliott*
  William Hastie and, 353–356, 359
  Kalamazoo school desegregation suit, 240

Legal Defense Fund, 557, 610
Thurgood Marshall and, 330, 353, 354, 787
Constance Baker Motley and, 557
NAACP members barred from state employment, 591–592
NAACP v. Alabama, 343
NAACP v. Claiborne Co., 444
New Orleans school desegregation suit, 823–826
1930s legal campaign, 353–356
nominations opposed by, 12, 363, 585
and the UGA desegregation case, 771
J. Waties Waring and, 786–787, 788
National Bankers Life Insurance Company, 412
National Bar Association, 353
National Center for State Courts, 149, 150, 781
National Citizens Committee For Broadcasting v. FCC, 41
National Highway Transportation and Safety Administration, 534
National Industry Recovery Act (1933), 129, 260, 404, 587
National Labor Relations Act, 405, 588
National Labor Relations Board cases, 405, 590, 625, 842
National League of Cities v. Usury, 644
National Nutritional Foods Association v. FDA, 278
National Rifle Association (NRA), 531, 532
National security, 234–237, 342. *See also* McCarthy era; Sedition; Smith Act; Speech, freedom of; Treason
Nation-state relations
Hugh L. Bond and, 105
John R. Brown's views, 135
incorporation of the Bill of Rights. *See* Bill of Rights
John Marshall's views, 494–495
M'Culloch v. Maryland, 495, 659, 735
nullification, 348, 371, 374, 376, 651–652, 656
primacy of state constitutions theory, 463, 464–469
secession, 347, 348, 374, 376, 751. *See also* Civil War
state/local election voting rights, 104–106
See also Civil War; Secession; State sovereignty; States and states' rights; *and specific issues*
Native Americans
Charles F. Amidon and, 27
fishing rights, 245
land claims, 94–95, 98–99, 245, 574
Samuel Sewall and Native rights, 689, 691, 693–694
sovereignty, 574
James Wickersham and, 756–757
Robert L. Williams and, 567
See also Indian Territory; *and specific peoples*
Natural law vs. positive law, 345, 387, 389
The Nature of the Judicial Process (Cardozo), 154
Navassa Islands murder case, 108–109
Navy, U.S., 113–114, 235, 534, 750
Neagle, David (S. Field's bodyguard), 251, 253
Nearing, Henrietta, 469
Nearing v. Weaver, 469
Nebbia v. New York, 633
Negligence
The City of Carlisle case, 203
contributory negligence, 163, 635
mass class action suits, 801–802. *See also* Class action lawsuits
negligent marketing of handguns, 804
Palsgraf v. Long Island R.R., 156–157
See also Liability; *and specific cases*
Nelson, Samuel, 750, 869
Neuberger, Richard, 464
Nevada, 249
New Deal
Louis D. Brandeis and, 129
Benjamin Cardozo's rulings, 157–158
court-packing plan, 129, 266–267, 323, 324–325, 404–405, 730
Jerome Frank and, 259–260
Charles E. Hughes and, 400, 404–405
legal talent, 259–260, 266
Walter Schaefer and, 678–679
Charles Wyzanski and, 842
See also Roosevelt, Franklin D.; *and specific acts and departments*
New Hampshire
Charles Cogswell Doe, 205–211, 859

judicial system, 206, 208–210
New Hampshire Doctrine, 209–210
New Jersey, 548–550, 554, 775–779. *See also* Morris, Lewis (1671–1746
New Jersey Supreme Court, 777, 779
Robert Hunter Morris, 554. *See also* Morris, Robert Hunter
Arthur T. Vanderbilt, 775–781, 862
New Mexico. *See* Benedict, Kirby
New Orleans, Louisiana
school desegregation, 651–652, 823–826
Slaughterhouse Cases, 36–37, 105, 252–254
John Minor Wisdom and, 814–815. *See also* Wisdom, John Minor
New State Ice Co. v. Liebmann, 126
New York (state)
bankruptcy law (1811), 194
capital gains tax, 172
constitution, 170, 173, 435, 471, 473–474, 476, 632
emergency housing laws, 632–633
equity jurisprudence, 438
Fay v. New York, 521
general corporation laws, 435–436
Gitlow v. New York, 388–389, 523, 633–634, 644
Charles E. Hughes as governor, 401–402
before independence, 547–556
judicial reforms, 438
Larkin v. New York Telephone Co., 635
liquor proscription act, 171
Lochner v. New York, 388
navigation rights, 436, 439, 476–477
Nebbia v. New York, 633
New York v. United States, 645
Samuel Seabury, 437, 521, 683–688, 861
suffrage, 22
Jack B. Weinstein and, 800–801. *See also* Weinstein, Jack B.
workmen's compensation, 631–632, 687
See also New York Chancery Court; New York City; New York Court of Appeals; New York Court of Errors and Impeachments; New York Supreme Court
New York, U.S. District Court for the Eastern District of
Jack B. Weinstein, 800–806, 865
New York, U.S. District Court for the Southern District of, 559
Augustus Noble Hand, 311, 312–313. *See also* Hand, Augustus Noble
Learned Hand, 321. *See also* Hand, Learned
John C. Knox, 322–323
Harold R. Medina, 522–528. *See also Dennis v. United States;* Medina, Harold R.
Constance Baker Motley, 556–562, 772, 865
Milton Pollack, 607–614, 864
New York Bar Association, 170–171, 173–174, 805
New York Chancery Court, 438, 474–475
James Kent, 438–439, 475. *See also* Kent, James
John Lansing, 437, 475, 476, 477
Robert R. Livingston, Jr., 471–478, 856. *See also Livingston v. Van Ingen*
New York City
Board of Education, 560, 561
courts, 434, 684–685
foster care system, 804
Tammany Hall, 154, 437, 684–685
See also Medina, Harold R.; Seabury, Samuel
New York Court of Appeals (state), 170, 173
Benjamin N. Cardozo, 153–157, 687. *See also* Cardozo, Benjamin N.
George Franklin Comstock, 168–174, 859
Cuthbert Winfred Pound, 629–637, 861
Samuel Seabury, 687–688. *See also* Seabury, Samuel
Sol Wachtler, 326–327
New York Court of Errors and Impeachments, 434, 436, 438–439, 474, 476, 477. *See also* Kent, James
New York Supreme Court, 434, 474
Albert Cardozo, 154
Benjamin N. Cardozo, 155. *See also* Cardozo, Benjamin N.
Joseph Force Crater, 437
John Jay, 474, 868. *See also* Jay, John
James Kent, 433, 434. *See also* Kent, James
Robert R. Livingston, Sr. ("the Judge"), 472
Lewis Morris, 547, 549–552. *See also* Morris, Lewis [1671–1746]

Cuthbert Winfred Pound, 629, 630, 631–632. *See also* Pound, Cuthbert Winfred
Samuel Seabury's campaign, 685–686
Sol Wachtler, 326
Bruce M. Wright, 796–797
Zenger trial, 547, 549, 550, 552–553
New York Times *v. Sullivan,* 231–232
New York Times *v. United States,* 827
New York University law school, 9, 16, 776, 801
New York v. United States, 645
New York Weekly Journal, 552–553. *See also* Zenger, Peter, trial of
Newman, John E., 332
Niblack, John L., 88–89
Nineteenth Amendment. *See* Voting rights: for women
Ninth Amendment, 82. *See also* Privacy rights
Ninth Circuit Court
Stephen J. Field, 199
Anthony M. Kennedy, 443
Ninth Circuit Court of Appeals
Shirley Mount Hufstedler, 558
Alex Kozinski, 223, 442–448, 866
John T. Noonan, Jr., 618–619
Nissman, David, 467–468
Nixon, Richard M.
cases involving, 41, 146, 513, 514, 515, 716. *See also* Watergate scandal
and William Rehnquist, 640
and Antonin Scalia, 118
and John Sirica, 714
Supreme Court nominees, 44, 143, 144, 145, 362–363, 368
Nixon v. Administrator of General Services, 513, 514
Nixon v. Sirica, 41
Nondelegation doctrine, 459
Non-Partisan League, 28, 30
Noonan, John T., Jr., 618–619
Norblad, Albin III, 467, 468
Norfolk and Western Railroad Company, 108
Norman v. Heist, 293
Norris, Clarence, 393. *See also* Scottsboro defendants
Norris, Virgil, 88–89
Norris v. Alabama, 404
Norris v. Clymer, 293
North American Free Trade Agreement (NAFTA), 535
North American Trust and Banking Company, 171–172
North Carolina
antidrummer license tax, 106–107
constitution, 593–594
handicapped parking placard fees, 810–811
judicial independence, 664
François-Xavier Martin and, 503
John J. Parker and, 584, 593–594. *See also* Parker, John Johnson
Susie M. Sharp, 19
women's rights, 166
North Carolina, University of, 356, 593
North Carolina Supreme Court
Walter Clark, 161–167, 860
Thomas Ruffin, 484, 662–667, 857
North Dakota. *See* Amidon, Charles Fremont
Northern Securities Company v. United States, 333
Northwest Ordinance (1787), 87
Northwest Territory, 85, 87, 748
Norton, Daniel S., 538
Not Guilty (Frank and Kristen), 263
Noxon, B. David, 169, 170
Noyes, Arthur, 756
NRA (National Rifle Association), 531, 532
Nuclear regulation, 43–44. *See also* Atomic Energy Commission
Nullification, 348, 371, 374, 376, 651–652, 656. *See also* Secession
Nullification of juries, 90–91, 549, 553, 846–847
Nunn v. State, 481

Obscenity law/cases
Augustus Hand's opinions, 311, 314–317
John M. Harlan II and, 341–342
Hicklin test, 314, 315
Miller v. California, 146, 317
Roth v. United States (United States v. Roth), 263, 317
St. Hubert Guild v. Quinn, 686
Ulysses trial, 311, 315–317, 322–323
United States v. Dennett, 311, 314–315, 317
Occupational safety
Hugh L. Bond's rulings, 108
Walter Clark's rulings, 163
pregnancy and work hazards, 112–113, 225–226
Occupations, lawful, 252–254
O'Connor, Phillip, 51
O'Connor, Sandra Day, 14, 145, 410, 411, 645, 646–647, 873

Ogden, Aaron, 439
Ogden, Marguerite, 16
Ogden v. Gibbons, 439. *See also Gibbons v. Ogden*
Ogden v. Saunders, 491
Ohio
  Florence Ellinwood Allen, 11–12, 16, 862. *See also* Allen, Florence Ellinwood
  Brandenburg v. Ohio, 528
  Cleveland Court of Common Pleas, 10–11
  Mapp v. Ohio, 343, 796
  Samuel H. Silbert, 261
  women lawyers, 12, 16
  women's suffrage, 9
Ohio Life Insurance & Trust Co. v. Debolt, 746
Oil, Chemical and Atomic Workers International Union Local 3–499 v. American Cyanamid Company, 112–113
Oil drilling, 426
Oklahoma
  Luther Bohanon and, 93–99. *See also* Bohanon, Luther Lee
  capitol moved, 566
  constitution, 566–567
  desegregation, 96–97. *See also Dowell v. Board of Education*
  Robert A. Hefner, 94–95
  Native American land claims, 94–95, 98–99
  prison system, 97–98
  school desegregation, 96–97
  Robert L. Williams, 566–567
  See also Murrah, Alfred P.
Oklahoma, University of, 568, 570
Oklahoma, U.S. District Court of
  Luther Lee Bohanon, 93–101, 563, 568, 863
Okuda, Tom "Fat Boy," 149
Olmstead v. United States, 129
Olson, Culbert J., 17, 793
Omnibus Judgeship Act, 532
One Nation Indivisible (Wilkinson), 809
Ophthalmologists and optometrists, 568
Opinions of the Justices (44 Me. 505), 37
Orchowsky, Katherine, 11–12
Oregon, 123, 202
  Matthew Paul Deady, 195–199, 859
  Hans A. Linde, 463–470, 865
Oregon Territory, 197–198. *See also* Oregon
Organic Act (1936), 357
Organized labor
  Walter Clark's rulings, 163–165
  collective bargaining, 260, 587, 590
  contracts forbidding union membership, 402, 585, 586–587
  Clement Haynsworth opposed, 363, 366
  legality of unions, 708
  picketing, 164–165, 388
  Richard Posner's views, 624–625
  racial discrimination by unions, 591
  and the Railway Labor Act, 587, 591
  and voluntary affirmative action, 818
  See also Labor movements; National Labor Relations Act; *and specific unions*
Originalism, 115–116, 118
Orleans Territory Superior Court, 504
  François-Xavier Martin, 502–505. *See also* Martin, François-Xavier
  See also Louisiana
Orton, Harlow, 668–669
Otoe and Missouria v. United States, 94–95
Ottawa Indians, 245
Overcoming Law (Posner), 617, 621
Owen, Robert L., 162
Oyama, Kajiro and family, 755–758
Oyster regulations, 107

Pace v. Alabama, 336–337
The Pacific case, 203
Page v. Pendleton and Lyons, 839–840
Palko v. Connecticut, 158–159
Palmer, John M., 331
Palmer v. Thompson, 653. *See also* Jackson, Mississippi
Palsgraf, Helen, 156–157
Palsgraf v. Long Island R.R., 156–157
Paper money, 700–701, 839–840. *See also* Money
Pardons. *See* Clemency
Park, Maud Wood, 9
Parker, Isaac C., 49–50, 571–582, 860
Parker, Joel, 206–207
Parker, John Johnson, 368, 583–595, 787, 788, 862
Parkman, George, 705–706
Parochial education, 146, 243, 359–360
Parsons, Theophilus, 206, 596–601, 856
Passenger Cases, 747
Paterson, William, 490–491, 868
Patients' right to treatment, 99–100

Patriotism, 267, 268. *See also* Flag salute laws; McCarthy era; Sedition; Treason
Patterson, Haywood, 393, 393–398. *See also* Scottsboro defendants
Patterson, Robert P., 262
Paul Robert Cohen v. California, 79, 344, 758–759
Paulsen, James W., 372
Payton, John E., 52
Peabody, Samuel, 195–196
Peabody v. Proceeds of Twenty-Eight Bags of Cotton, 195–196
"Peace bonds," 52–53
Peacock murder case, 584
Pearre, George A., 104
Pearson, Drew, 232
Peck, Jacob, 305
Peel, Joseph A., 51
Pendleton, Edmund, 602–606, 765, 838, 839, 856
Penn, John, 603
Pennsylvania
  court of common pleas, 289
  equity jurisprudence, 293
  first African American attorney, 829
  Lemon v. Kurtzman, 146, 359–360
  George Sharswood, 420, 696–703, 859
  slaves and freemen, 738–739, 742–743
  See also Philadelphia
Pennsylvania, University of, Law School, 610, 697–698
Pennsylvania, U.S. District Court for the Eastern District of
  Louis H. Pollack, 610–611
Pennsylvania Supreme Court, 289–290
  John Bannister Gibson, 287–295, 857
  other members, 288, 289, 294, 378
  George Sharswood, 696, 701–702. *See also* Sharswood, George
Pentagon Papers Cases, 78, 342, 827
Peonage, 421, 749
People ex rel. The Bank of the Commonwealth v. The Commissioners of Taxes and Assessments for the City and County of New York, 172
People ex rel. Doyle v. Atwell, 633
People ex rel. Durham Realty Corporation v. LaFetra, 632
People ex rel. Peixotto v. Board of Education, 686
People ex rel. Somerville v. Williams, 687
People v. Barbato, 634–635
People v. Blodgett, 177
People v. The Board of Education of Detroit, 179
People v. Caudillo, 70
People v. Croswell, 436, 438
People v. Defore, 157
People v. Escobedo, 680. *See also Escobedo v. Illinois*
People v. Hurlbut, 179
People v. Nebbia, 633
People v. Salem, 177–178
People v. Tanner, 70–71
People v. Trybus, 634
The People's Court (TV show), 535
Perdicaries v. Charleston Gaslight Co., 107–108
Perkins, Samuel E., 91
Perry v. New Orleans, Mobile and Chattanooga Railroad Company, 723
Philadelphia, Pennsylvania, 611, 696, 699. *See also* Sharswood, George
Philbrick, Herbert A., 523
Phips, Sir William, 690, 691–692
Pickering, John H., 511
Piek et al. v. Chicago & N. W. Ry. Co. et al., 219
Pierce, Franklin, 91, 198, 347, 485
Pierce, John D., 179
Pierce v. United States, 128
Pillsbury, John S., 539
Pinckney, Charles Cotesworth, 487
Planned Parenthood of Southeastern Pennsylvania v. Casey, 647
Planned Parenthood v. American Coalition of Life Activists, 443–445, 446–447
Plessy v. Ferguson, 133, 330, 336, 416, 610. *See also* Separate-but-equal doctrine
Poe v. Ullman, 343–344
Poetic judges, 137–138, 321–322, 724, 797
Police. *See* Law enforcement officers
Police power(s), 540, 542, 586, 710, 723, 746
Political dissidents, 234–237. *See also* Communist Party; *Dennis v. United States;* Speech, freedom of
Poll taxes, 106, 343, 355, 592
Pollack, Louis H., 610–611
Pollack, Milton, 607–614, 864
Pollock v. Farmers Loan & Trust Co., 254, 333
Polly (slave), 88–90
Pomer v. Schoolman, 625
Pomeroy v. Trimper, 299

Popish Plots, 580, 581
Portis, Charles, 578
Portland, Oregon, 199, 202
Posey, Thomas, 85
Positive law vs. natural law, 345, 387, 389
Positivism, 259. *See also* Black, Hugo Lafayette
Posner, Richard A., 221, 225–226, 275, 615–628, 866
Potter Law, 219
Pound, Cuthbert Winfred, 629–637, 861
Pound, Roscoe, 258, 673
Poverty and crime, 44–45
Powell, Jefferson, 646–647
Powell, Lewis F., 114, 227, 511, 641, 647, 808, 873
Powell, Ozie, 393. *See also* Scottsboro defendants
Powell v. Alabama, 158, 393, 404. *See also* Scottsboro defendants
Pragmatism, judicial
  Henry Friendly, 275, 276, 283. *See also* Friendly, Henry Jacob
  Richard A. Posner, 620–623, 626. *See also* Posner, Richard A.
  Thomas Ruffin, 662. *See also* Ruffin, Thomas
Precedent
  Isaac Blackford and, 86, 87
  danger of setting in troubled times, 187
  established by Texas cases, 370
  Learned Hand and, 325
  John M. Harlan II and, 341–342
  international precedents, 3–4
  James Kent and, 434, 438
  Joel Parker and, 206–207
  Jonathan J. Wright and, 831
Pregnancy, 112–113, 225–226, 686. *See also* Abortion
Presbyterian Church General Assemblies (1837, 1838), 293
President of the United States, 41, 514, 516–517, 594. *See also* Executive branch; *and specific presidents*
Presidential Recordings and Materials Preservation Act, 514, 515
Press, freedom of the, 180, 215, 231–232, 827. *See also* First Amendment; Zenger, Peter, trial of
Preston, John, 16
Pretrial discovery, 526
Price controls, 586, 633, 815
Price, Victoria, 393, 394, 396, 397, 398. *See also* Scottsboro defendants
Price v. Denison Independent School District Board of Education, 134
Prigg v. Pennsylvania, 738–739, 747
Primaries
  closed primaries, 525
  white primaries, 356, 359, 592, 783, 784
Prisoners, Case of, 763, 838
Prisons and prisoners
  African Americans, 379, 803
  in Alabama, 419
  compliance with federal standards, 412
  debt, imprisonment for, 166, 699
  DNA testing, 811–812
  education programs, 561
  in Michigan, 241–243
  in Oklahoma, 97–98
  in Oregon, 465
  Isaac Parker and, 573–574
  religious services, 843
  restraint procedures, 241–242
  in Texas, 412, 429
  See also Juvenile offenders; Prisoners; Prisons
Privacy rights
  and antisodomy laws, 412–413, 419
  Hugo Black's views, 76
  common law as guarantee, 605–606
  Doe v. Commonwealth, 113–114
  news media invited on searches/raids, 803–804
  and the Nixon papers, 514
  personnel records, 6
  William Rehnquist on, 642–643
  wiretapping, 129
  workplace Internet surveillance, 445–446
  See also Abortion; Contraception; *Roe v. Wade*
Prize Cases, 750
Procedural rules, 243–244
Product liability, 754. *See also* Liability
Progressivism, 26–27, 164–165, 166–167, 566. *See also* Lincoln-Roosevelt League
Prohibition, 28, 392, 567. *See also* Temperance movement
Propeller Genesee Chief v. Fitzhugh, 746–747
Property rights
  in California, 250–251, 755–758
  contract clause and, 491, 494
  corporate property rights. *See* Corporate law and corporate regulation; Interstate commerce

damage suits outside locality, 540
disestablishment and, 658, 738
emergency housing laws, 632–633
eminent domain, 664–665, 745
Stephen J. Field's opinions, 254–255
"first use" vs. "reasonable use," 542
homestead exemption, 373–374
John Marshall's views, 491, 657–660, 738. *See also* Marshall, John
proprietary property rights, 548–549
rate regulation and, 254
of slave holders, 748–749
state police powers and, 542, 586, 710
Wellington, et al., Petitioners, 665
of women, 372, 374
See also Fifth Amendment; Fourteenth Amendment
Proposition 13 (California), 69–70
Providence Bank v. Billings, 745
Pryor, Bill, 819
Psychiatric examinations, 411–412, 465
Psycho (Bloch book/ Hitchcock film), 541
Public Citizen v. United States Trade Representative, 534–535
Public education
Bibles in schools, 166–167, 779
county refusal to operate schools, 364
First Amendment rights, 79
flag salute laws, 267, 590, 731
Individuals with Disabilities Education Act, 811
instructors provided to religious schools, 243
NAACP members barred from teaching, 591–592
neighborhood schools, 60
prayer/religious instruction, 271, 419, 795–796
racial pay inequities, 591, 784
tax-supported education, 179
See also Desegregation of public education; Segregation in education
Public transportation. *See* Transportation
Public trust doctrine, 254
Public Works Administration (PWA), 260
Publicity, right of, 446–447
Puerto Rican judges. *See* Cabranes, Jose Alberto
Pugh v. Locke, 419
Purdue University, 378
Purvis v. Sherrod, 374
PWA (Public Works Administration), 260

Quasha, Morris, 687
Quiz on judges, 875–886

Race and racism
ABA and, 353, 358
Hugo Black and, 75, 76–77
John R. Brown on, 139
Joe E. Brown's views, 379
Matthew Deady and, 198–199
death penalty, 419
Richard Enslen on, 242–243
John Marshall Harlan I and, 336–337
A. Leon Higginbotham and, 378, 380
housing, 82, 231, 343
interracial adultery, 336–337
jury selection, 139, 233–234
libel suits against critics of discriminatory policies, 231–232
lynching, 167, 393, 395–396, 421
John J. Parker charged with, 585
professional sports, 455
Edward Ryan on, 669
segregation issues. *See* Desegregation; Desegregation of public education; Segregation; Segregation in education
universities and law schools, 12, 353, 356, 378, 557, 568, 593, 652, 771–772, 816, 823
See also Discrimination; Ku Klux Klan; Slavery; Voting rights; *and specific racial and ethnic groups*
Racketeer Influenced Corrupt Organizations Act (RICO), 443–444. *See also Planned Parenthood v. American Coalition of Life Activists*
Radio licenses, 41, 277
Railroads
Attorney General v. Chicago & Northwestern R. Co., 672–673
Audenried v. Philadelphia & Reading R.R., 700
Roy Bean and, 49
Hugh Lennox Bond's rulings, 107, 108
Carolina & Northwestern Ry. v. Lincolnton, 586
Cherokee Nation v. Southern Kansas Ry., 574
collective bargaining right, 587

T. Drummond's receivership decisions, 215–219
and eminent domain, 665
Erie R.R. v. Tompkins, 126–127, 738
Farwell v. Boston & Worcester R.R., 708
fixed freight rates, 586
Thomas G. Jones's rulings, 421
and lands in the public trust, 254
municipal funding, 177–178
New Deal reorganization, 260
Northern Securities Co. v. United States, 333
Palsgraf v. Long Island R.R., 156–157
passenger kissed by conductor, 674
Perry v. New Orleans, Mobile & Chattanooga R.R. Co., 723
race-based employment discrimination, 591
Standard Oil indicted for accepting rebates, 452
Wagner v. International Railway, 157
workers' strikes, 218–219
Railway Labor Act, 587, 591
Railway Reorganization Act, 274
Randolph, Edmund, 604, 763
Rankin, John E., 454
Ranney, Joseph A., 669
Rape
as aggravating factor in rape cases, 70
attempted rapist shot by victim, 509
mandatory death sentences, 573, 577
and the Scottsboro Boys cases, 393, 396–397
statutory rape, 626–627
woman law student asked to avoid lecture, 482
women judges and, 19, 306–307
Rayburn, Sam, 409
Read, Frank T., 132–133, 136, 139
Reagan, Ronald
Bicentennial Commission, 150
Joe E. Brown on, 379
campaign platform, 533
circuit court appointees, 119, 221, 223, 225, 618, 620
and William Clark, 71
on crime, 44
district judge appointments, 158
judicial appointees (generally), 69, 223, 533
and Alex Kozinski, 443
regulation reduction attempts, 534
Supreme Court nominations, 14, 112, 114, 119, 145, 223, 410, 641, 646, 647. *See also* Bork, Robert H.; O'Connor, Sandra Day
and Clarence Thomas, 58
and J. Harvie Wilkinson, 808
Reapportionment, 79–80, 341, 795. *See also* Redistricting
Receivership, 218–219
Reconstruction, 104–109, 331–332. *See also* Civil War
Reconstruction Finance Corporation, 260, 679
Redistricting, 271, 795. *See also* Reapportionment
Reed, J. Warren, 577
Reed, Stanley F., 14, 458, 795, 872
Reeves, Bass, 578
Reforms, judicial. *See* Judicial reforms
The Regents of the University of California v. Bakke, 146, 222
Regina v. Hicklin, 314, 315
Rehnquist, William H., 116, 144, 639–648, 726–727, 810, 865, 873. *See also* Rehnquist Court
Rehnquist Court, 381, 873. *See also* Rehnquist, William H.; *and specific justices*
Reid, Richard, 334–335
Reitman v. Mulkey, 343
Religion
Walter Clark and religious freedom, 166–167
conscientious objection, 313–314, 590
flag salute laws and, 267, 590, 731
Augustus Hand on, 314
Virginia disestablishment, 658, 738
See also First Amendment; Separation of church and state
Remonstrance (Case of the Judges), 605–606
Rent control, 632–633
Restraint, judicial
Felix Frankfurter, 264, 267–268. *See also* Frankfurter, Felix
Henry Friendly and, 283
Learned Hand, 320. *See also* Hand, Learned
John M. Harlan II, 341. *See also* Harlan, John Marshall II
William Harper, 348–349
Hans A. Linde and, 468
Harlan Fiske Stone, 728–730. *See also* Stone, Harlan Fiske

Arthur Vanderbilt's rejection, 779. *See also* Vanderbilt, Arthur T.
J. Harvie Wilkinson and, 811. *See also* Wilkinson, J. Harvie
See also Brandeis, Louis Dembitz; Holmes, Oliver Wendell, Jr.; Judicial deference
Revolutionary War, 288, 487, 597, 762–763. *See also* Continental Congress; Declaration of Independence
Reynolds, John, 832
Reynolds v. Swain, 505–506
Reynoso, Cruz, 71–72
Rhode Island, 21–22, 23, 445
Samuel Ames, 20–24
Rice v. Elmore, 592
Richards, John, 690, 692
Richards, Samuel, 560
Richards v. New York City Board of Education, 560
Richardson, Elliot, 327, 848
Richardson, Maynard, 371
Richardson, William Shaw, 148–149
Richburg, W. E., 52–53
Richmond Enquirer, 658–659, 660
Richmond, Virginia, 488
RICO Act, 443–444. *See also* *Planned Parenthood v. American Coalition of Life Activists*
Riparian rights, 200–201
Ritchie, Thomas, 659
Ritner, Joseph, 294
Rives, Richard T., 133, 135, 416, 649–654, 862
Roane, Spencer, 602, 604, 655–661, 662, 736–738, 857
Roberson, Willie, 393, 396, 398. *See also* Scottsboro defendants
Robert H. Ives v. Charles T. Hazard, et al., 22–23
Roberts, Owen J., 405, 871
Roberts v. City of Boston, 707
Robertson, George, 544–545
Robinson, Jackie, 528
Robinson, James, 11
Robinson, Lelia J., 300–301
Rockefeller, John D., 452
Rockefeller, Nelson, 326
Rodman v. Grant, 612
Roe v. Wade, 145
cited in *Dronenburg v. Zech,* 113
and *Planned Parenthood v. Casey,* 647
William Rehnquist's dissent, 642–643
Rutherford v. United States and, 99, 100
substantive due process invoked, 82
Texas decision, 407, 413
See also Abortion
Roman Catholic judges
Emilio M. Garza, 158–159
John T. Noonan, Jr., 618–619
Antonin Scalia, 118–120, 873. *See also* Scalia, Antonin
See also Ryan, Edward George; Taney, Roger B.; Wright, J. Skelly
Roosevelt, Eleanor, 13–14
Roosevelt, Franklin D.
black cabinet, 357
"brain trust," 260
circuit court appointments, 230, 567
court-packing plan, 129, 266–267, 323, 324–325, 404–405, 730
district court appointments, 564, 842
Japanese internment policy, 268
New York judicial appointments, 437, 630
nonjudicial appointments, 260, 262, 357, 842
Supreme Court nominations, 13–14, 76, 324–325, 726
and women judges, 13–14, 16–17
See also New Deal
Roosevelt, Theodore
and Charles F. Amidon, 27
and Felix Frankfurter, 265
and Charles E. Hughes, 401
judicial appointments, 384, 388, 421, 452
judicial recall and presidential stewardship, 20
and the 1912 presidential nomination, 403
nonjudicial appointments, 630
and Samuel Seabury, 687–688
Rosenfeld v. Black, 280
Rost-Denis, Pierre Adolph, 506, 508
Roth v. United States (United States v. Roth), 263, 317
Rouse v. Cameron, 42–43
Rowe v. Peyton, 362
Royal prerogative, 492–493
Royall, Anne Newport, 185–186
Rubin, Edward, 429
Ruffin, George Lewis, 666–667
Ruffin, Thomas, 484, 662–667, 857
Ruiz v. Estelle, 429
Rule 21, 136–137, 139
Rules of evidence. *See* Evidence rules
The Rules of Evidence (Appleton), 35–36
Russell v. Cantwell, 831
Ruth, Babe, 455

Rutherford, Glen L., 99–100
Rutherford v. United States, 99–100
Rutledge, John, 868
Rutledge, Wiley B., 324, 610, 872
Ryan, Edward George, 668–675, 858
Ryan, Margaret, 452

Sacco, Nicola, 265
Sacher v. United States, 524. *See also Dennis v. United States*
Saffin, John, 692
Salem Clique, 197–198
Salem witchcraft trials, 298, 690–691
Sales contracts, 435
Saltonstall v. Sanders, 299, 300
Salvage rights, 195–196
Sampson, Edith Spurlock, 216–217
San Francisco, California, 252, 254
Sanford, Edward T., 128, 585, 871
Satter, Robert, 588–589
Savannah, Georgia, 652
Save America First (Frank), 262
Sawyer, Lorenzo, 200, 202
Scales, Junius, 591
Scales v. United States, 591
Scalia, Antonin, 118–120, 873
  D.C. Circuit Court of Appeals, 112–114, 119, 533
  U.S. Supreme Court, 59, 116, 118–120, 223, 244, 411, 644–645
Scarlett, Frank, 652
Schaefer v. United States, 128
Schaefer, Walter Vincent, 677–682, 863
Schecter Poultry Co. v. United States, 129, 404
Schenk v. United States, 127, 321, 388. *See also* Speech, freedom of: "clear and present danger"
Schneider, Phyllis S., 99. *See also Rutherford v. United States*
Schneiderman v. United States, 268
School District of the City of Grand Rapids v. Ball, 243
School segregation/desegregation. *See* Desegregation of public education; Segregation in education
Schwartz, Bernard, 704
Schwegmann Brothers v. Calvert Distillers Corporation, 815
Scott, James, 90
Scott v. Frazier, 28, 30
Scott v. The State of Ohio, 11–12
Scottsboro defendants (Scottsboro Boys), 158, 391, 393–399, 404
Seabury, Samuel, 437, 521, 683–688, 861
Seagram v. St. Joe Mineral Corporation, 612
Search and seizure
  Hugo Black's views, 79
  exclusionary rule, 157, 680–681
  Emilio Garza's opinions, 159
  news media invited on searches/raids, 803–804
  roadblocks, random drug searches at, 226
  search warrants, 559
  during traffic stops, 467–468
  See also Evidence rules
SEC. *See* Securities and Exchange Commission
SEC v. Banca Della Svizzera Italiana, 612
S.E.C. v. National Bankers Life Insurance Company, 412
Secession, 347, 348, 374, 376, 751. *See also* Civil War; Nullification
Second Amendment, 481, 766
Second Circuit Court of Appeals
  Jose Alberto Cabranes, 269, 525
  Guido Calabresi, 269
  Charles E. Clarke, 236, 262
  Jerome Frank, 262–263, 325, 842, 862
  Henry Jacob Friendly, 273–285, 527, 623, 863
  Augustus Noble Hand, 262, 311–318, 861. *See also* Hand, Augustus Noble
  Learned Hand, 319–329, 842. *See also* Hand, Learned
  John Marshall Harlan II, 340. *See also* Harlan, John Marshall II
  Thurgood Marshall, 354–355. *See also* Marshall, Thurgood
  Harold R. Medina, 274, 519–529, 862. *See also* Medina, Harold R.
  Constance B. Motley considered, 559
Secor v. Toledo, P. & W. R. Co., 218
Secret Service, 803–804
Securities and Exchange Act (1934), 607–608
Securities and Exchange Commission (SEC), 262, 608
  and the *Investment Banking* case, 524, 526. *See also United States v. Morgan*

SEC v. Banca Della Svizzera Italiana, 612
S.E.C. v. National Bankers Life Insurance Co., 412
Securities law, 276, 280–281, 313
Sedgwick, Theodore, 248, 598
Sedition
Abrams v. United States, 127–128, 388, 634
IWW case, 453
People v. Croswell, 436, 438
Sedition Act, 28, 634
See also Gitlow v. New York; Treason
Segregation
John Marshall Harlan I and, 336–337
pools, 83, 653
in public accommodations, 82–83, 336
in public transportation, 133, 356, 416, 418, 650–651, 706
Earl Warren's views, 795
See also Desegregation; Desegregation of public education; Segregation in education; Separate-but-equal doctrine
Segregation in education
in Boston, 707
in Detroit, 179
effects on students, 354
John Marshall Harlan I's opinions, 337
higher education. *See* Higher education
Parker Doctrine, 592
private, all-white schools, 364–365
student transfers, 363–364
unconstitutionality first declared, 231
J. Waties Waring and, 783
See also Desegregation of public education; *Plessy v. Ferguson*
Sei Fujii v. State of California, 755, 757–758
Selden, Henry R., 170, 172
Self-defense, 575, 665, 723, 723–724
Self-incrimination, right against, 283–284, 680
Sellers v. School Board of Manassas, 811
Senate confirmation [hearings]
Robert Bork, 81, 112, 114–115, 223
Louis D. Brandeis, 126
Warren Burger, 144
Benjamin Cardozo, 156
Stephen J. Field, 251
Emilio Garza (future), 159
Ruth Bader Ginsburg, 411
John M. Harlan II, 341
William Hastie, 357–358
Clement Haynsworth, 362–363, 366–368
Oliver Wendell Holmes, Jr., 388
Charles E. Hughes, 404
Thurgood Marshall, 355
Abner J. Mikva, 531–532
Constance Baker Motley, 559
John J. Parker, 585
Richard Posner, 620
William Rehnquist, 640, 641
Roger B. Taney, 744
J. Harvie Wilkinson, 808–809
Sentelle, David, 533
Sentencing
clemency, 420–421, 574
"fine or imprisonment" incompatible with *Griffin,* 234
guidelines, 570, 803
Kenesaw Mountain Landis, 452, 453
length of sentences, 412
mandatory sentences, 573. *See also* Parker, Isaac C.
Ellen Morphonius, 508–509
John Sirica, 715, 716–717
Bruce M. Wright, 797
Separate-but-equal doctrine
Briggs v. Elliott, 592, 786–788
William Hastie on, 355
Thurgood Marshall's fight against, 354
McLaurin v. University of Oklahoma, 568
Plessy v. Ferguson, 133, 330, 336, 416
rejected/struck down, 133, 338, 416, 650–651, 795. *See also Brown v. Topeka Board of Education*
Roberts v. City of Boston, 707
Sweatt v. Painter, 378, 592
See also Desegregation; Desegregation of public education; Segregation; Segregation in education
Separation of church and state
Bible distribution in schools, 779
funding for religiously affiliated colleges, 812
Emilio Garza's views, 159
invocations before sports events, 419
William Rehnquist's views, 645
released-time program, 271
school prayer limited/disallowed, 795–796
support for parochial education, 146, 243, 359–360
three-pronged test for determining constitutionality, 360
Virginia's disestablishment, 658, 738
See also First Amendment; Religion

Separation of powers, 514–515
Sequestration laws, 107–108
Serving Justice (Wilkinson), 809
Seventeenth Amendment. *See* Prohibition
Seventh Circuit Court of Appeals
  Frank Hoover Easterbrook, 221–228, 866
  Richard A. Posner, 221, 225–226, 275, 615–628, 866
Seventh District Circuit Court
  Thomas Drummond, 212–220, 858
Sewall, Samuel, 298, 689–695, 707, 734, 856
Sex, age of consent for, 626–627
Sex and Reason (Posner), 617
Sex discrimination
  jury service, 408, 413
  against lawyers/judges, 1, 14–16, 300–301, 673–674. *See also specific individuals*
  married professors denied tenure, 560–561
  pregnancy and work hazards, 112–113, 225–226
  teacher fired over absence for birth, 686
  VMI case, 411
  See also Women; Women's rights
"Sex Side of Life" (Dennett), 314–315
Sexual assault, 674. *See also* Rape
Sexual education, 314–315
Sexual harassment, 59, 561
Sexuality, 125. *See also* Homosexuality
Shades of Freedom (Higginbotham), 377, 381–382
The Shaping of Nineteenth-Century Law (Gold), 34–35
Shapiro, Fred R., 227
Shapiro v. Thompson, 343
Sharon, William, 253
Sharp, Susie M., 19
Sharswood, George, 420, 696–703, 859
Shaw, Lemuel, 664–665, 704–711, 857
Shaw v. Reno, 380–381
Sheindlin, Judy, 718–719
Sheldon, Charles, 164
Shelley v. Kraemer, 82, 83, 231
Shepherd v. Cassiday, 374
Sherman, Roger, 473
Sherman Anti-Trust Act (1890), 325, 332, 845
  Great Trust Cases of 1911, 330, 333–334, 336
  See also Antitrust law/cases
Shreveport Rate Case, 402
Shulman, Sadie Lipner, 385
Silberman, Laurence, 533, 534
Silbert, Samuel H., 261
Silverman, Joy, 327
Simkins v. Moses H. Cone Memorial Hospital, 365–366
Simpson, Bryan, 61
Sims, Thomas, 707–708
Sims Case, 707–708
Singleton v. Jackson Municipal Separate School District, 817–818
Sirica, John Joseph, 528, 712–718, 863
Sixteenth Amendment, 333. *See also* Income tax
Sixth Amendment. *See* Counsel, right to; Jury trial
Sixth Circuit Court of Appeals, 12–13, 139. *See also* Allen, Florence Ellinwood
Skiddy v. Atlantic, Mississippi & Ohio R.R. Co., 108
Slaughterhouse Cases, 36–37, 105, 252–254
Slavery
  George Lewis Ruffin and, 667
  Hugh L. Bond's views, 102, 103, 105
  charitable trust to promote end to, 299–300
  freedom as birthright, 840
  Fugitive Slave Act, 707, 738–739, 747–748, 750–751
  Gag Rule, 186
  Nathan Green on, 305, 308
  James Harlan and, 330–331, 332
  John Marshall Harlan I and, 331–332
  William Harper and, 345–348
  John Hemphill and, 374
  Higginbotham's Ten Precepts, 377, 381–382
  in Indiana, 87–90
  Joseph Lumpkin and, 481, 484
  Thomas A. Marshall and, 500–501
  François-Xavier Martin's rulings, 504
  Lewis Morris's views, 550
  Northern vs. Southern judges' understanding, 345–346
  in the Northwest Territory, 87, 748
  Prigg v. Pennsylvania, 738–739, 747
  Thomas Ruffin's rulings, 663–664

Edward Ryan's views, 669, 671
Samuel Sewall's views, 689, 691, 692
Lemuel Shaw's views, 705, 706, 707–708
South Carolina post-emancipation cases, 831
states' right to maintain, 345
Roger B. Taney's views, 336, 741, 742–743, 747–749. *See also Dred Scott v. Sandford*
Thirteenth Amendment, 331
St. George Tucker's views, 764
wills, emancipation through, 308–309, 374, 500, 501
See also Abolitionists; African Americans; Civil War; *Dred Scott v. Sandford;* Peonage
Slavery in the Light of Social Ethics (Harper), 346–348
Slidell, Thomas, 506
Slouching Towards Gomorrah (Bork), 116
Smith, Adam, 435, 698
Smith, Charles Z., 466
Smith, Chesterfield, 151
Smith, J. Clay, 833
Smith, Loren A., 516
Smith, Preston, 412
Smith, Samuel Harrison, 184–185
Smith Act (1951), 522, 523, 528, 591. *See also Dennis v. United States*
Smith Barney brokerage house, 561
Smith v. Allwright, 356, 359
Snead v. Stringer, 644
Snyder, Simon, 288, 289
Social Security Act (1935), 158, 405
Social welfare laws (state), 745–746
Socialists, 453, 633. *See also Gitlow v. New York*
Sociological jurisprudence school, 154
Sodomy laws, 113–114, 412–413, 419
"The Soldier's Faith" (address by Holmes), 388
"Some Kind of Hearing" (Friendly), 279
Somervell, Alexander, 372
Soper, Morris Ames, 585, 587, 588
Souter, David H., 645, 647, 873
South Carolina
constitution, 346, 348, 830
education, 591–592, 786–788
1876 presidential election, 106, 831–832
first black attorneys, 829
William Harper, 345–350, 858
Klan trials, 104–105
moonshiners, 105
post–Civil War slavery cases, 831
voting rights, 592, 783, 784–785
Jonathan J. Wright, 828–834, 860
South Carolina, U.S. District Court for the Eastern District of
J. Waties Waring, 592, 783–789, 861
Spanish civil law, 372–373
Sparkman, John, 789
Specter, Arlen, 809
Speech, freedom of
Charles F. Amidon and, 28
Buckley v. Valeo, 464, 645
Benjamin Cardozo's views, 159
Christmas crèches, 812
"clear and present danger," 127–129, 313, 321, 383, 388, 528
and clothing, 79, 344, 758–759
Dennis v. United States, 270, 340, 519, 522–524, 528
Frankfeld v. United States, 590–591
Gilbert v. Minnesota, 128
Gitlow v. New York, 388–389, 523, 633–634, 644
Augustus Hand's explanation of, 312–313
John M. Harlan II and, 340, 342, 344
Oliver Wendell Holmes, Jr. and, 127–129, 321, 388–389
Charles E. Hughes and, 404
"incitement to future action" test, 523–524
Alex Kozinski and, 442–447
Masses Publishing Co. v. Patten, 321
and the Nixon papers, 514
permits, issuance/denial of, 633
Richard Posner's rulings, 626
proportionality principle, 417
symbolic speech, 79
and *United States v. Foster,* 523. *See also United States v. Foster*
United States v. Rainbow Family, 427
Whitney v. California, 128–129
See also First Amendment; McCarthy era; Sedition; Smith Act

The Spirit of Liberty (speech/book by L. Hand), 325, 327
Standard and Poors v. Commodity, 612–613
Standard Oil, 333–334, 336, 452, 586
Standard Oil Company of New Jersey et al. v. United States, 333–334, 336
Standards, 277, 278, 307
Stanton, Edward M., 214
Stare decisis, 359, 366
Starr, Kenneth, 223, 533, 535–536
Starr v. United States, 575–576
Stassen, Harold, 143
State ex rel. Drake v. Doyle, 673
State ex rel. Dawson, in re Strawbridge and Mays, 722
State ex rel. Johnson v. Woodrich, 465
State Farm Mutual Automobile Insurance Co. v. Department of Transportation, 534
State of Minnesota v. Young, 539
State sovereignty
  Hopkins Federal Savings and Loan Association v. Cleary, 157–158
  William Rehnquist's views, 643–644, 646
  Spencer Roane's views, 656, 657–658, 736–738. *See also* Roane, Spencer
  Roger B. Taney's views, 745–748, 750–751
  United States v. Butler, 404, 729
  J. Harvie Wilkinson's views, 809–810
  See also Nation-state relations; States and states' rights
State v. Caesar, 664
State v. Flores, 465
State v. Harriman, 37–38
State v. Jones, 209–210
State v. Keeran, 23
State v. Kennedy, 467
The State v. Lasselle, 88–90
State v. Lowry, 467–468
State v. Mann, 663, 664
State v. Martin, 665
State v. Odom, 306
State v. Pettit, 542
State v. Pike, 209–210
States and states' rights
  bankruptcy laws, 194
  commercial regulation, 78, 106–107, 402, 436, 439–440, 672–673, 743. *See also* Interstate commerce
  corporate regulation. *See* Corporate law and corporate regulation
  elections, 104–106
  housing covenants, enforcement of, 82, 231
  incorporation of the Bill of Rights. *See* Bill of Rights
  James Kent's views, 436
  Martin v. Hunter's Lessee and, 736–738. *See also Martin v. Hunter's Lessee*
  police power, 540, 542, 586, 710, 723, 746
  power over local governments, 178–179
  primacy of state constitutions theory, 463, 464–469
  William Rehnquist's views, 643–646
  Spencer Roane's views, 655, 657–660
  George Sharswood and, 698
  social welfare laws, right to enact, 745–746
  George W. Stone's stance, 722
  Joseph Story's views, 739. *See also* Story, Joseph
  Roger B. Taney's views, 743
  See also Nation-state relations; State sovereignty
"Statutes Revolving in Common Law Orbits" (Traynor), 755
Statutory rape, 626–627
Stebbins v. Lancashire Ins. Co., 208
Steffan, Joseph, 534
Stempel, Jeffrey, 624, 625
Sterling v. Cupp, 465
Steven Theuer v. Labor and Industry Review Commission, Ganton Technologies, Inc., and North River Insurance Company, 7
Stevens, John Paul, 145, 645, 873
Stevenson, Adlai, 66, 260, 512, 679, 789
Stewart, Potter, 647, 873
Still, Fred, 453
Stimson, Henry L., 265, 357
Stone, George Washington, 720–725, 859
Stone, Harlan Fiske, 78, 457–458, 726–732, 861, 871, 872
Stone Court, 731, 871–872. *See also* Stone, Harlan Fiske; *and specific justices*
Story, Joseph, 733–740, 857, 869
  codification promoted, 482
  Dartmouth College v. Woodward, 600, 738. *See also Dartmouth College v. Woodward*
  on federal court supremacy, 658
  other judges and, 192, 194, 440, 544
Stoughton, William, 690, 692

Stowe, Juanita, 99. *See also* *Rutherford v. United States*
Stowell, Lord, 195–196
Strader v. Graham, 501
Strauder v. West Virginia, 233
Strikes, 127, 164–165, 218–219, 388
Strong, Caleb, 596, 598–599
Stuart, Dan, 53
Stuart, Harold L., 526
Stuart v. Laird, 490–491
Stuart v. School District No. 1 of Kalamazoo, 179
Sturgis v. Crowninshield, 194, 491, 494
Substantive due process, 36–37, 80–82, 226, 252–254, 586. *See also* Due process
Suffrage. *See* Voting rights
Summary jury trials, 244
Sumner, Charles, 36, 384, 707
Sumter Gazette, 371
Sunday business closing laws, 540, 542
Sundquist, Don, 306, 307
Sunstein, Cass, 227
Supreme Court, U.S.
  administration, 146–147
  African American justices. *See* Marshall, Thurgood; Thomas, Clarence
  Henry Baldwin, 292, 869
  Hugo Lafayette Black, 75–84, 862, 872. *See also* Black, Hugo Lafayette
  Harry A. Blackmun, 143, 145, 525, 873
  John Blair, Jr., 604, 606, 838, 868
  Joseph P. Bradley, 36–37, 870
  Louis D. Brandeis, 121–130, 860, 871. *See also* Brandeis, Louis Dembitz
  William J. Brennan, Jr., 40, 232, 243, 340, 355, 616, 781, 872
  David J. Brewer, 247, 402, 870
  Stephen G. Breyer, 645, 847–848, 873
  building, 150, 843
  Warren E. Burger, 141–152, 864, 873. *See also* Burger, Warren E.; Burger Court
  Harold H. Burton, 795, 872
  Pierce Butler, 728, 871
  Benjamin N. Cardozo, 153–160, 861, 871. *See also* Cardozo, Benjamin N.
  John Catron, 347, 746–747, 869
  Salmon P. Chase, 103, 212, 747–748, 749, 870
  Samuel Chase, 185, 868
  circuit-riding duties, 490, 491, 737, 765–766
  Tom C. Clark, 355, 795, 823, 872
  Walter Clark and, 162, 163
  clerks' books, 809
  court reporting, 182, 183, 187–188
  criticisms of, 162–163
  Benjamin Robbins Curtis, 33, 36, 384, 869
  David Davis, 212, 219, 748, 869
  William R. Day, 176, 871
  and Matthew Deady's decisions, 202
  William O. Douglas, 14, 129, 872. *See also* Douglas, William O.
  Oliver Ellsworth, 868
  Federal Rules of Civil Procedure committee, 543
  Stephen J. Field, 36–37, 199, 200, 202, 247–256, 859, 869
  Abe Fortas, 144, 259, 260, 362, 368, 654, 873
  "Four Horsemen," 728
  Jerome Frank and, 262–263
  Felix Frankfurter, 264–272, 862, 872. *See also* Frankfurter, Felix
  Melville W. Fuller, 104, 219, 254, 332, 402, 870
  Ruth Bader Ginsburg, 410–411, 533, 558, 645, 873
  Arthur J. Goldberg, 411, 873
  Horace Gray, 296–303, 388, 859, 870
  Learned Hand and, 319, 321, 324–325
  John Marshall Harlan I (1833–1911), 330–337, 575, 860, 870
  John Marshall Harlan II (1899–1971), 262, 274, 281, 338–344, 521, 863, 872
  Oliver Wendell Holmes Jr., 383–390, 860, 871. *See also* Holmes, Oliver Wendell, Jr.
  Charles Evans Hughes, 400–406, 861, 871. *See also* Hughes, Charles Evans
  James Iredell, 84–85, 737, 868
  Robert H. Jackson, 77, 259, 400, 458, 640, 795, 872
  John Jay, 434, 472–473, 474, 475, 868
  William Johnson, 439, 735, 868
  and Frank Johnson's rulings, 418, 419
  judges considered for, 13–14, 212, 227, 291–292, 779

and judicial review, 230, 490–491. *See also* Judicial review; *Marbury v. Madison*
jurisdiction, 281–282, 490
Anthony M. Kennedy, 227, 443, 647, 873
and laissez-faire constitutionalism, 36–37, 77–78
Joseph R. Lamar, 126, 871
list of judges, 866–874
John Marshall, 487–496, 856, 868. *See also* Marshall Court
Thurgood Marshall, 354–355, 873. *See also* Marshall, Thurgood
Stanley Matthews, 302, 870
Joseph McKenna, 726, 870
John McLean, 214, 869
James C. McReynolds, 728, 871
Sherman Minton, 530, 795, 872
Frank Murphy, 268, 730, 872
Samuel Nelson, 750, 869
Sandra Day O'Connor, 14, 145, 410, 411, 645, 646–647, 873
on procedural rule exceptions, 244
Isaac Parker's conflicts with, 571, 575–579
William Paterson, 490–491, 868
potential (future) candidates, 227, 375, 535
and Cuthbert Pound's rulings, 631, 632–633
Lewis F. Powell, 114, 227, 511, 641, 647, 808, 873
procedural safeguards for administrative hearings, 279–280
Stanley F. Reed, 14, 458, 795, 872
William H. Rehnquist, 639–648, 865, 873. *See also* Rehnquist, William H.; Rehnquist Court
Spencer Roane's conflicts with, 657–660
Owen J. Roberts, 405, 871
F. Roosevelt's court-packing plan, 129, 266–267, 323, 324–325, 404–405, 730
John Rutledge, 868
Wiley B. Rutledge, 324, 610, 872
Edward T. Sanford, 128, 585, 871
Antonin Scalia, 118–120, 873. *See also* Scalia, Antonin
David H. Souter, 645, 647, 873
John Paul Stevens, 145, 645, 873
Potter Stewart, 647, 873
Harlan Fiske Stone, 78, 457–458, 726–732, 861, 871, 872
Joseph Story, 733–740, 857, 869. *See also* Story, Joseph
supremacy of, 736–737
George Sutherland, 176, 728, 871
William Howard Taft, 20, 146, 324, 871. *See also* Taft, William Howard
Roger B. Taney, 288, 336, 664, 741–752, 857, 869
tenth justice added during Civil War, 251
Clarence Thomas, 58–59, 873. *See also* Thomas, Clarence
unconfirmed nominees, 583, 585, 654. *See also* Bork, Robert H.; Haynsworth, Clement Furman, Jr.
Willis Van Devanter, 728, 871
Fred M. Vinson, 794, 795, 872
Earl Warren, 95, 142, 144, 362, 788, 790–799, 862, 872. *See also* Warren, Earl; Warren Court
Bushrod Washington, 291, 602, 604, 606, 655–656, 868
Byron R. White, 411, 570, 641, 873
Edward D. White, 402, 726–727, 870
See also Chief justices of the U.S. Supreme Court; *and specific cases and constitutional issues*
Supreme Courts, state. *See specific state Supreme Courts*
Sutherland, George, 176, 728, 871
Swain v. Alabama, 233–234
Swan, Thomas Walter, 262, 325
Swann v. Charlotte-Mecklenburg Board of Education, 96, 145, 819
Swans v. City of Lansing, 241–242
Swartwout, Samuel, 186–187
Sweatt v. Painter, 378, 592
Sweeney, George Wythe, 840
Sweeney v. Patterson, 232
Swift v. Tyson, 738
Switzerland Company v. Udall, 362

T. B. Harms Co. v. Eliscu, 282
Taft, William Howard
as chief justice, 20, 146, 324, 726, 871
on Thomas Drummond, 212–213

judicial appointments, 321, 402
and the 1912 presidential nomination, 403
Taft Court, 728, 871. *See also* Taft, William Howard; *and specific justices*
Tammany Hall, 154, 437, 684–685
Taney, Roger B., 288, 336, 664, 741–752, 857, 869
Taxation
California's Proposition 13, 69–70
distilled spirits excise tax, 105
federal authority, 333, 495
food processing tax, 729
income tax, 254, 333
of interstate imports, 743
laissez-faire constitutionalism and, 37
M'Culloch v. Maryland, 495, 659, 735
John J. Parker and, 586, 587
poll taxes, 106, 343, 355, 592
Pollock v. Farmers Loan & Trust Co., 254, 333
and public education, 179
and railroads, 177–178
stocks, 166
tax avoidance cases, 325
Virginia Coupon cases, 107
See also specific states
Taylor, David, 668
Taylor, John, 603, 604, 739
Taylor, Samuel Harvey, 206
Taylor, Telford, 260
Taylor, Zachary, 214
Taylor v. Place, 23
Taylor v. Sterrett, 412
Television, 41, 277, 459–460, 559, 803–804. *See also* Intellectual property rights
Television court shows, 379, 535, 718, 849. *See also* Sheindlin, Judy
Tel-Oren v. Libyan Arab Republic, 114
Temperance movement, 480–481, 567. *See also* Prohibition
The Tempting of America (Bork), 115
Tennessee, 13, 305–307
Joe E. Brown, 379
Nathan Green, Sr., 304–310, 858
See also Tennessee Supreme Court
Tennessee Electric Power Company v. The Tennessee Valley Authority, 13
Tennessee Supreme Court
Adolpho A. Birch, Jr., 306, 307
Grafton Green, 310
Nathan Green, Sr., 308–309. *See also* Green, Nathan, Sr.
West H. Humphreys (court reporter), 347
Penny J. White, 306–307
Tennessee Valley Authority, 13, 126
Tenth Amendment, 157–158, 729–730. *See also* nation-state relations; State sovereignty; States and states' rights
Tenth Circuit Court of Appeals, 564–565, 568
cases affirmed, 97, 99
Stephen Chandler, 569
Alfred P. Murrah, 93–94, 96, 563–570, 863
Robert L. Williams, 566–567
Term limits, 644–645
Terret v. Taylor, 738. *See also* Episcopal Church
Territorial judges
appointment terms, 200
Matthew Paul Deady, 197–198. *See also* Deady, Matthew Paul
Moses Hallett, 200–201
François-Xavier Martin, 502–504. *See also* Martin, François-Xavier
Isaac C. Parker, 49–50, 571–582, 860
Terry, David S., 251, 252–253
Texas, Republic of, 370–373. *See also* Texas (state
Texas (state), 578, 859
annexation to U.S., 372
Roy Bean, 46–54
common and civil law, 372–373
constitution, 372
John Hemphill, 370–376, 858
Hopwood v. Texas, 139
Sarah Tilghman Hughes, 53, 407–414, 559, 863
William Wayne Justice, 424–431, 865
juvenile corrections, 424, 428
legal reforms, 407
Kirvin Kade Leggett, 49
William Paul Moss, 29
oil, 426
prison system, 412, 429
privacy rights, 412–413
property rights, 372, 373–374
W. E. Richburg, 52–53
school desegregation, 413, 427–428
Seventieth Judicial District, 29
Sharpstown Scandal, 412
See also Texas, Republic of
Texas, University of, Law School, 378, 592

Textile Workers Union v. Darlington Manufacturing Company, 366–367
Textualism, 118, 221
Thayer, James Bradley, 209, 210, 320, 386–387, 543
Then to the Rock Let Me Fly (Weaver), 98
Third Circuit Court of Appeals
William H. Hastie, 358. *See also* Hastie, William Henry
A. Leon Higginbotham, Jr., 377–382, 865
Thirteenth Amendment, 331–332. *See also* Emancipation of slaves
Thomas, Alfred D., 26
Thomas, Clarence, 58–59, 873
and affirmative action, 58, 380, 381, 561
Guido Calabresi and, 269
compared to Thurgood Marshall, 355, 381
Higginbotham's criticism of, 377
opinions and views, 116, 445, 644–645
Thompson, Albert, 483
Thompson, Fred, 306
Thompson, Robert, 524. *See also United States v. Foster*
Thompson v. Palmer (pool desegregation), 83, 653
Thurmond, Strom, 531, 823
Tilghman, William, 289
Time magazine, 712, 717, 826
Timmerman, George Bell, 787
Tobert, Bo, 81
Toilet Goods Association v. Gardner, 278–279
Toledo, Ohio, 164–165
Torres, Jesus P., 48–49, 50
Tort law
Guido Calabresi's work, 269
liability and, 709–710. *See also* Liability
Hans A. Linde and, 468–469
Richard Posner's views, 625
spouse vs. spouse, 635
Roger Traynor and, 758–759
Joseph Wapner on settlement, 849
See also Class action lawsuits; *and specific cases*
Townsend v. State, 90
Tracy v. Talmage, 172
Traffic stops, 467–468
The Transformation of American Law (Horwitz), 542
Transportation
airlines, 461. *See also* Federal Aviation Administration
automobiles, 156, 468, 534. *See also* General Motors; National Highway Transportation and Safety Administration
busing, 60, 70, 96, 145, 240, 819
congressional authority, 735. *See also Gibbons v. Ogden*
safe transport of goods, 203
segregation/desegregation, 133, 134, 356, 416, 650–651, 706
See also Railroads
Transylvania University, 501, 544
Traynor, Roger John, 753–759, 863
Treason, 186, 521, 742, 763, 838. *See also* Sedition
A Treatise on the System of Evidence in Trials at Common Law (Wigmore), 209, 210
Trespassing, 79, 82–83
Trial courts and judges, 240, 241–242, 588–589. *See also specific judges*
Trimble v. Gordon, 643–644, 646
Trowbridge, Thomas, 694
True Grit (Portis book/John Wayne film), 578
Truman, Harry S
circuit court appointments, 39–40, 133, 524
and Harold Medina, 521–522, 524
nonjudicial appointments, 357–358, 823
steel mills seized, 78
and women judges, 14, 217, 407–408, 843
Tucker, St. George, 602, 604, 606, 760–767, 838–839, 856
Tudor v. Board of Education of Rutherford, 779
Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 591
Tureaud, A. P., 823. *See also Bush v. Orleans Parish School Board*
Turman v. White's Heirs, 499
Turner, William R., 248, 250
Turner et al. v. Indianapolis, B & W. Ry. Co. et al., 218
Turner v. Goolsby, 58
Turpin v. Locket, 658
Tuskegee, Alabama, 134–135
Tuttle, Elbert Parr, 133, 135, 137, 652–653, 654, 768–773, 863
Tweed, William M. "Boss," 154
Tyler, John, 189
Tyler Junior College (Texas), 427
Tyson v. Virginia & Tennessee R. Co., 108

Uhl, James, 451

Ulysses obscenity trial, 311, 315–317, 322–323
"The Unguarded Affairs of the Semikept Mistress" (Traynor), 755
Unions. *See* Organized labor
United Automobiles v. Johnson Controls, Inc., 226. *See also* Johnson Controls, Inc.
United Mine Workers of America v. Red Jacket Consolidated Coal and Coke Co., 585, 586–587
United Rubber Company, 339–340
United States Constitution. *See* Constitution, U.S.
United States government
  administrative hearings, 278–280
  agencies, suits against, 362, 535
  attorneys general. *See* Attorneys General, U.S.
  development of procedures/standards, 277, 284
  executive branch. *See* Executive branch; President of the United States; *and specific agencies and presidents*
  judicial branch. *See* Appellate courts; Federal courts; Judiciary; Supreme Court, U.S.; *and specific circuit and district courts*
  judicial review of agency actions, 459–461, 516
  legislative branch. *See* Congress; House of Representatives; Legislative branch; Senate confirmation [hearings]
  refusal to provide evidence, 241
  states' relationship to. *See* Nation-state relations; State sovereignty; States and states' rights
  suits against allowed in federal courts, 362, 380
  See also Administrative law
United States Navy. *See* Navy, U.S.
United States of America v. One Book Entitled Ulysses *by James Joyce*, 311, 315–317. *See also Ulysses* obscenity trial
United States Supreme Court. *See* Supreme Court, U.S.
United States v. Aluminum Company of America, 528
United States v. Appalachian Coals, Inc., 587
United States v. Associated Press, 325
United States v. Barnett, 57. *See also* Meredith, James
United States v. Bjerke, 380
United States v. Bollman & Swartwout, 186–187
United States v. Brawner, 42
United States v. Butler, 404, 729
United States v. Capps, 594
United States v. Carolene Products Co., 78, 267, 270, 730–731
United States v. Chandler, 362
United States v. Crosby, 105
United States v. Darby Lumber Co., 729–730
United States v. Dellinger (Chicago Seven trial), 528
United States v. Dennett, 311, 314–315, 317
United States v. Flagler County School District, 134
United States v. Flynn, 340
United States v. Foster, 519, 522–524, 528. *See also Dennis v. United States*
United States v. Graham, 380
United States v. Hinds County School Board, 58–60
United States v. Jefferson, 818
United States v. Kauten, 313–314
United States v. Ljubas, 559
United States v. Llera-Plaza, 611
United States v. Louisiana, 817
United States v. Lynd, 57–58
United States v. Morgan, 519, 524, 526–527
United States v. Munford, 106
United States v. Nixon, 146, 712
United States v. Original Knights of the Ku Klux Klan, 816–817
United States v. Ortega, 527
United States v. Petersburg Judges of Elections, 105–106
United States v. Rainbow Family, 427
United States v. Roth (Roth v. United States), 263, 317
United States v. Royall, 185–186
United States v. Rupert, 243–244
United States v. Schutte, 28
United States v. Shannon, 626–627
United States v. Sisson, 846–847
United States v. Texas, 428
United States v. The William, 192–194
United States v. Thompson, 626–627
United States v. Twin City Power Co., 589

United States v. United Shoe Machinery Corporation, 844–846
United States v. U. S. Klans, 418
United States v. VenFuel, Inc., 137–138
United States v. Virginia, 411
United States v. William T. Bennett, 829
University of California v. Bakke, 146, 222
United States Southwest Africa/Namibia Trade & Cultural Council v. United States, 534
United States Term Limits, Inc. v. Thornton, 644–645
Utah, 8

Vagrancy, 484
Valentine v. Chrestensen, 444–445
Valley v. Rapides Parish School Board, 819
Van Dam, Rip, 551, 552. *See also King v. Van Dam*
Van Devanter, Willis, 728, 871
Van Ingen, James, 477. *See also Livingston v. Van Ingen*
Vanderbilt, Arthur T., 775–781, 862
Vanna White v. Samsung Electronics, 446–447
Vassar College, 560–561
Vaughan, Harry, 232
Vegelahn v. Guntner, 388
VenFuel, Inc., 137–138
Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council, Inc., 43–44
Veterans, 454
Video games, 626
Vilas, William, 669
Vinson, Fred M., 794, 795, 872
Violence Against Women Act, 809–810
Virgin Islands (U.S.), 351, 357–358. *See also* Hastie, William Henry
Virginia
  bar admission (mid-1800s), 538
  "Cedar Rust" law, 586
  Christmas crèche displays, 812
  Cohens v. Virginia, 659–660
  constitution, 603, 605, 656, 658, 764, 837
  Coupon cases (antebellum bonds), 107
  court system, 603, 605–606, 763–764, 836, 838–840. *See also* Virginia Court of Appeals
  desegregation cases, 363–364, 592
  disestablishment, 658, 738
  Fairfax estates, 488, 657–658, 735–736
  homosexual conduct laws, 113–114
  George Mason, 837
  Morgan v. Virginia, 356, 358
  oyster laws, 107
  poll taxes, 106, 343, 355
  pre-Revolution debt repayment, 839–840
  railroads, 108
  treason statute, 763, 838
  St. George Tucker, 602, 604, 606, 760–767, 838–839, 856
  United States v. Virginia, 411
  Virginia and Kentucky Resolutions, 656
  George Wythe, 835–841, 856. *See also* Wythe, George
Virginia, University of, 659, 807–808
Virginia Court of Appeals, 605, 838
  Edmund Pendleton, 602–606, 765, 838, 839, 856
  Spencer Roane, 602, 604, 655–661, 662, 736–738, 857
  St. George Tucker and, 763, 764–765. *See also* Tucker, St. George
Virginia Military Institute (VMI), 411
Virtual Works, Inc. v. Volkswagen of America, 811
VMI (Virginia Military Institute), 411
Voir dire, 523
Volkswagen, 811
Voting rights
  literacy tests, 592
  in Louisiana, 817
  in Michigan, 177
  municipal boundaries and, 134–135
  in New York, 22
  poll taxes, 106, 343, 355, 592
  in Rhode Island, 21–22
  in South Carolina, 784–785
  state and local elections, 104–106
  United States v. Lynd, 57–58
  Voting Rights Act, 355, 381, 417
  white primaries, 356, 359, 592, 783, 784
  for women, 8, 9, 17, 19, 26, 701, 843
  See also Elections; Fourteenth Amendment; Redistricting
Voting Rights Act (1965), 355, 381, 417

Wachtler, Sol, 326–327

Waddell v. State, 484
Wade, Henry, 409
Wagner v. International Railway, 157
Wald, Patricia, 465, 522, 532, 533–534
Wales v. Stetson, 600
Walker, Timothy, 482
Wallace, George C., 80, 81, 415, 416–417
Wapner, Joseph A., 535, 849
War, 268, 521. *See also* Military tribunals; *and specific wars*
"War and Peace" (Traynor), 754
Ware, Gilbert, 352
Ware v. Hylton, 488
Waring, J. Waties, 592, 783–789, 861
Warner Brothers v. ABC, 559
Warren, Earl, 95, 142, 144, 362, 788, 790–799, 862, 872. *See also* Warren Court
Warren, Samuel D., Jr., 122
Warren Bridge, 664, 744–745
Warren Court
  character, 142, 144
  criticism of, 680–681
  equal protection jurisdiction, 343. *See also* Equal protection
  free speech in times of crisis, 528
  John M. Harlan II and, 338, 341–343. *See also* Harlan, John Marshall II
  impact and importance, 790, 794–795
  incorporation of the Bill of Rights, 338, 342, 464, 467. *See also specific amendments, cases and rights*
  issues addressed, 795–796. *See also specific cases and issues*
  judicial activism, 327
  justices listed, 872–873. *See also specific justices*
  Harlan Fiske Stone's influence, 732
  See also Warren, Earl; *and specific cases*
Warren v. Fairfax County, 812
Warren v. State, 90–91
Washington, Bushrod, 291, 602, 604, 606, 655–656, 868
Washington, D.C., 91, 184–188. *See also headings beginning with* District of Columbia
Washington, George, 183, 288, 471, 489, 734, 837
Washington (state)
  Charles Z. Smith, 466
  Reah Mary Whitehead, 671
Water, wholesomeness of, 635
Water rights, 98–99, 200–201
Watergate scandal, 40, 146, 513, 528, 712, 715–717
Watkins v. United States, 236, 795
Watson v. Citizen's Savings Bank, 108
Wealth of Nations (Smith), 435
Weaver v. Board of Trustees of Ohio State University, 12
Weber v. Kaiser Aluminum & Chemical Corporation, 818
Webster, Daniel, 291, 693
Webster, John White, 705–706
Webster, Noah, 183
Wechsler, Herbert, 344
Wedtech bribery case, 560
Weems, Charlie, 393. *See also* Scottsboro defendants
Weinstein, Jack B., 800–806, 865
Weiss, Samuel A., 454–455
Welfare residency requirements, 343
Wesberry v. Sanders, 79–80
Wesberry v. Vandiver, 771
West Coast Hotel Co. v. Parrish, 405
West River Bridge v. Dix, 745
West Virginia
  flag salute laws, 267, 590, 731
  jury pools, 233
West Virginia State Board of Education v. Barnette, 267–268, 731
Westerfeld, Claude, 407
Wheeler, Royal T., 373
Whipper, William J., 829, 830
White, Byron R., 411, 570, 641, 873
White, Edward D., 402, 726–727, 870
White, Penny J., 306–307
White, Vanna, 446–447
White, Walter, 585, 786, 788, 871. *See also* National Association for the Advancement of Colored People
White v. Crook, 418
Whitehead, Reah Mary, 671
Whitewater investigation, 535–536
Whitney v. California, 128–129
"Who's Afraid of Commercial Speech?" (Kozinski), 444–445
Wichita Falls, Texas, 413
Wickersham, James, 756–757
Wickersham Commission report (1931), 233
Wickham, John, 604
Wieman v. Updegraff, 271
Wight v. Rindskopf, 673
Wigmore, John Henry, 209, 210
Wildeblood v. United States, 234

Wilentz, Robert, 779–780
Wilkins, Charles, 501
Wilkins, James, 186
Wilkinson, J. Harvie, 223, 807–813, 866
Wilkinson, James, 742
Willard, A. J., 830, 831, 832, 833
Willard, Samuel, 691
William and Mary, College of, 761, 764, 837. *See also* Wythe, George
Williams, Eugene, 393. *See also* Scottsboro defendants
Williams, Frank J., 24
Williams, Robert L., 566–567
Williams, Stephen, 533
Williams v. Jewel Tea, 564
Williams v. Wallace, 417
Willis and Wife v. Miller, 107
Williston, Samuel, 301, 302
Wills
  emancipation of slaves through, 308–309, 374, 500, 501
  freeman's bequest to enslaved relatives, 500
  François-Xavier Martin's will, 507–508
Willson, Augustus E., 332, 333
Willson v. Black Bird Creek Marsh Company, 494
Wilson, Eugene, 537, 538
Wilson, Woodrow
  federal district judge appointments, 312, 322, 567
  and Kenesaw Mountain Landis, 452
  lectures, 683
  1912 election, 403
  Supreme Court nominees, 126, 163
  and the Tom Mooney case, 265
  U.S. attorney appointed, 16
Wilson v. Board of Supervisors for Louisiana State University, 823
Wilson v. Layne, 804
Winberry v. Salisbury, 778–779
Winchester, John, Jr., 694
Winslow, John, 670
Winthrop, Wait, 690, 692, 694
Wiretapping, 129
Wisconsin, 3, 219, 671–673. *See also* Gollmar, Robert
Wisconsin Supreme Court
  Shirley Schlanger Abrahamson, 1–7, 866
  Edward George Ryan, 668–675, 858
Wisdom, John Minor, 133, 135, 652–653, 654, 814–820, 864
Witness testimony
  defendants' right to testify, 32, 36
  immunity in exchange for, 673
  prior conviction, admissibility to impeach testimony, 513–514
Wolff v. Selective Service Local Board, 527
Woman of Justice (di Donato), 578
Women
  affirmative action for, 482
  domestic violence, 804, 809–810
  first federal law clerk, 231
  as freeholders, 166
  jury service, 10, 408, 413
  lawyers, 1, 12, 14–16, 300–301, 673–674
  legal education, 9, 300, 385, 482
  minimum wage laws, 405
  Richard Posner on black women, 617
  property rights, 372, 374
  Edward Ryan's views, 669, 674
  See also Rape; Sex discrimination; Women judges; Women's rights; *and specific individuals*
Women judges
  Shirley Schlanger Abrahamson, 1–7, 866
  Annette Abbott Adams, 16–17
  Florence Ellinwood Allen, 8–18, 557, 558, 559, 862
  Rose Elizabeth Bird, 66–74, 866
  Sharon Lovelace Blackburn, 395
  Georgia Bullock, 4–5
  first woman judge, 19
  Ruth Bader Ginsburg, 410–411, 533, 558, 645, 873
  Janet Holder, 307
  Shirley Mount Hufstedler, 558
  Sarah Tilghman Hughes, 53, 407–414, 559, 863
  Burnita Shelton Matthews, 15–16, 558, 559, 843
  Rufe D. E. McCombs, 482–483
  Ellen Morphonius, 508–509
  Esther McQuigg Morris, 19
  Constance Baker Motley, 556–562, 772, 865
  Sandra Day O'Connor, 14, 145, 410, 411, 645, 646–647, 873
  Edith Spurlock Sampson, 216–217
  Sadie Lipner Shulman, 385
  statistics, 15
  Penny J. White, 306–307
  Reah Mary Whitehead, 671
Women's rights
  Florence E. Allen and, 14–15

Walter Clark and, 166
Ruth Bader Ginsburg and, 410–411
Horace Gray on, 300–301
Frank Johnson and, 418
in North Carolina, 166
voting rights, 8, 9, 17, 19, 26, 701, 843
See also Sex discrimination
Wong Kim Ark v. United States, 302
Wood v. Wheeler, 374
Woody, R. H., 830–831, 832
Workday, length of, 123, 164
Workmen's compensation laws, 631–632, 687
World War I, 27, 28, 127–129, 453
World War II
citizen tried as enemy combatant, 565
conscientious objection, 313–314
"Ernie Pyle" bill, 454
sanctions against Japanese Americans, 75, 268, 755, 793. *See also* Oyama, Kajiro and family
Woznicki v. Erickson, 6
Wratchford v. S. J. Groves and Sons Company, 362
Wright, Andrew, 393. *See also* Scottsboro defendants
Wright, Bruce McMarion, 796–797
Wright, J. Skelly, 96–97, 651, 821–827, 864
Wright, Jonathan Jasper, 828–834, 860
Wright, Leroy, 393. *See also* Scottsboro defendants
Wright v. Vinton Branch of Mountain Trust Bank, 587
Writs of Assistance case, 297
Wyatt v. Stickney, 418–419
Wynehamer v. the People, 171
Wyoming. *See* Morris, Esther McQuigg
Wythe, George, 603, 605, 763, 835–841, 856
students, 487, 656, 761, 762, 837–838. *See also specific individuals*
Wyzanski, Charles E., Jr., 327, 841–848, 864

X.Y.Z. Mission, 489

Yale, William H., 538
Yale Law School
faculty, 262, 378, 458, 610
and legal realism, 259
and race, 378, 380, 381
Yarborough, Ralph, 407, 409, 425–426, 427
Yasui v. United States, 268
Yates v. United States, 528
Yeates, Jasper, 289
"Yellow-dog" employment contracts. *See* Organized labor: contracts forbidding union membership
Young, Robert R., 526
Young, Sam, 531
Young, Stephen, 9
Young and Calhoun v. Harrison and Harrison, 484
Younger Members Committee on Amendment of the Law, 678

Zenger, Peter, trial of, 547, 549, 550, 552–553
Zenith Radio Corporation v. Matsushita Electrical Industrial Corporation, 380
Zeran v. America Online, Inc., 811
Zionism, 126