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Supreme Court Historical Society

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GENERAL STATEMENT

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

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

Since 1975, the Society has been publishing a *Quarterly* newsletter, distributed to its membership, which contains short historical pieces on the Court and articles detailing the Society's programs and activities. In 1976, the Society began publishing an annual collection of scholarly articles on the Court's history entitled the *Yearbook*, which was renamed the *Journal of Supreme Court History* in 1990 and became a trimester publication in 1999.

The Society initiated the **Documentary History of the Supreme Court of the United States, 1789–1800** in 1977 with a matching grant from the National Historical Publications and Records Commission (NHPRC). The Supreme Court became a cosponsor in 1979. Since that time the project has completed six volumes.

The Society also copublishes **Equal Justice Under Law**, a 165-page illustrated history of the Court, in cooperation with the National Geographic Society. In 1986 the Society cosponsored the 300-page **Illustrated History of the Supreme Court of the United States**. It sponsored the publication of the **United States Supreme Court Index to Opinions** in 1981, and funded a ten-year update of that volume that was published in 1994.

The Society has also developed a collection of illustrated biographies of the Supreme Court Justices which was published in cooperation with Congressional Quarterly, Inc., in 1993. This 588-page book includes biographies of all 108 Supreme Court Justices and features numerous rare photographs and other illustrations. Now in its second edition, it is titled **The Supreme Court Justices: Illustrated Biographies, 1789–1995**.

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

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

The Society has approximately 5,600 members whose financial support and volunteer participation in the Society's standing and ad hoc committees enables the organization to function. These committees report to an elected Board of Trustees and an Executive Committee, the latter of which is principally responsible for policy decisions and for supervising the Society's permanent staff.

Requests for additional information should be directed to the Society's headquarters at 244 East Capitol Street, NE, Washington, D.C. 20003, telephone (202) 543-0400, or to the Society's website at www.supremecourthistory.org.

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

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Introduction

Melvin I. Urofsky
Chairman, Board of Editors

This issue of the **Journal** again displays the infinite variety of threads that make up the tapestry of Supreme Court history. Once more I ponder how much the study of our third branch of government has changed since I was a graduate student, or even a law student two decades later. Back in the 1960s, "constitutional history" essentially meant the study of "great cases," and, while these cases were handed down by Justices who sat on the Supreme Court of the United States, one did not examine either the Justices' jurisprudential philosophy or the institutional workings of the Court. There were only a few judicial biographies available, and only Alpheus T. Mason's book on Harlan Fiske Stone really examined the Court's inner workings. As for the cases themselves, not until Anthony Lewis published **Gideon's Trumpet** in 1964 did we begin to look past the actual holdings of the cases to the people involved and their stories.

In this issue we get a taste of the wide range of work now being written about the Court, its members, and its decisions. Linda Przybyszewski, who last year gave us **The Republic According to John Marshall Harlan,** is now at work on a study of religious thought and the judiciary in the late nineteenth century, and her examination of Justice David J. Brewer tells us much about the Court and the cultural context in which it operated. Along the lines of looking at the real people behind the cases, Ronald B. Flowers examines the Macintosh case, which, although famous in its time, is less well known than some of the other decisions on citizenship and pacifism. Douglas Clyde Macintosh will strike many people as a good man, and lead us to wonder at the strangeness of laws that kept him from becoming an American citizen.

We sometimes forget that before men and women become Justices, they must be appointed by a President, who will often have his own agenda. Calvin Coolidge, whose term in office is noted primarily for his effort not to do anything, apparently did have some ideas about the type of men he wanted on the nation's high court. As Russell Fowler shows in

these pages, Coolidge named some very interesting people to the Bench.

Interest in the Cherokee cases continues unabated, and Associate Justice Stephen Breyer chose them as the topic for the Society's Annual Lecture, which he delivered in June. We also get a glimpse of some internal issues that the Court and its members must occasionally face in the article by Artemus Ward on William O. Douglas's retirement. The 1999 Hughes-Gossett student essay prize was awarded to Professor Ward, who was then a doctoral student at Syracuse University.

And finally, if anyone doubts the wide-ranging nature of current scholarship on the Court, our regular book reviewer, D. Grier Stephenson, Jr., leads us through the current crop of studies.

All told, this is another rich feast, and no one can complain about this type of food for thought.

The Cherokee Indians and the Supreme Court

STEPHEN BREYER

In 1838, the United States and the State of Georgia forced the Cherokee Indian tribe to leave its home in Georgia and move to the West. The tribe did not want to move. It believed it had a legal right to stay, and in the early 1830s it brought two actions at law designed to enforce that legal right in the Supreme Court of the United States. The story of those lawsuits is a story of courts caught in a collision between law and morality on the one hand and desire and force on the other. It forces us to examine the relation between law and politics, particularly with respect to the Court's ability to enforce its judgment during the early years of the Republic.

I Background

We shall begin the Cherokee story during the Revolutionary War. With their Creek and Choctaw neighbors, the Cherokees hunted, fished, and made their homes upon land that now comprises Northern Georgia and Eastern Tennessee. Unfortunately, they supported the British—the wrong side—during the war. However, in May 1777 they signed a peace treaty with the newly independent American states that permitted them to retain their land in Georgia. In a second treaty, the Treaty of Hopewell, and then a third treaty named after the Holston River, the United States promised it would protect Cherokee land and guaranteed its boundaries. Congress ratified the third treaty, which contained that guarantee, in Philadelphia in 1793, well after the U.S. had adopted its Constitution and the thirteen independent states had become a single nation.

During the next forty years, the Cherokee tribe dramatically changed its way of life. In 1817, those who wished to lead the hunting and fishing life (about one third of the tribe) moved to Arkansas, under the auspices of a treaty with the U.S. that gave the hunters and fishermen Arkansas land. The Cherokees who remained in Northern Georgia turned to agriculture for their livelihood; they lived as farmers, much as did the nearby Georgians. They used an alphabet developed by a tribal leader,

Under the leadership of the great Chief John Ross, the Cherokees adopted a formal Constitution in 1827.

Sequoyah. They established a printing press. They built a capital, called New Echota. And in 1827, under the leadership of the great Chief John Ross, the tribe adopted a Constitution similar in some respects to that of the United States. At that time the Cherokee population in Northern Georgia stood at about 13,500—including, I am sorry to say, 1,277 black slaves.

Since at least the early 1820s, the Cherokees had made it very clear that they were happy on their tribal lands in Northern Georgia and did not want to move. President Monroe sent Commissioners to the Cherokees to see if they would sell their lands. The Council of Chiefs replied, "It is the fixed and unalterable determination of this nation never again to cede one foot more of our land." The chiefs then sent a delegation to Washington to remind the President that "the Cherokees are not foreigners, but the original inhabitants of America" and "they now stand on the soil of their own territory." The delegation added that "they cannot recognize the sovereignty of *any State* within the limits of their territory."

Why, one might ask, was it necessary to emphasize this last point—that a state could not exercise its "sovereignty" within the limits of the Cherokee territory? The answer is that the state of Georgia seemed determined to exercise that sovereignty, preferably by taking the Cherokees' territory for itself. In 1802, the federal government had promised Georgia it would try to extinguish Indian title to Indian land in that state. By 1824, Georgia complained that the government was moving too slowly. In reply, President Monroe stated that the federal government would use only peaceful and reasonable methods to remove the Indians.

Georgia decided to take matters into its own hands. It negotiated a removal treaty, the Treaty of Indian Spring, with representatives of the Creek tribe, whose land was to the south of the Cherokees'. President John Quincy Adams learned that the treaty was the product of treachery and formally denounced it, but the Georgians ignored the denunciation and began to survey the Creek tribe's land, which they claimed as their own. The Creeks


PROTECTION

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CHEROKEE PHŒNIX.

VOL. I. NEW ECHOTA, WEDNESDAY JUNE 25, 1828. NO. 18.

The Cherokees established a printing press and issued a newspaper from their capital city, New Echota, featuring articles both in English and in the native Cherokee language, which had been developed into a written language by Sequoyah, a tribal leader.

protested, threatening force. The federal government backed them up. However, the Georgians refused to back down. The Georgia legislature passed resolutions claiming that Georgia owned the land. President Adams sent an Army general with a letter ordering that the land survey stop. Georgia's Governor Troup replied that he felt it his "duty to resist to the utmost any military attack which the Government of the United States shall . . . make upon . . . Georgia," and he ordered Georgia's militia to be held "in readiness." He added that the United States had become the "unblushing all[y]" of "savages," and that he refused to submit the dispute to the Supreme Court because "that court, being of exclusive appointment by the Government of the United States, will make the United States the judge in their own cause." At the last moment, however, the federal government received word that the Creeks might sell their land. The U.S. negotiated with the tribe, treaties were signed, and in 1828 the Creeks "voluntarily" ceded the last of their territory in Georgia.

Aware of the Creeks' predicament, the Cherokees were determined to avoid their fate. However, two further developments spelled disaster for this goal: the election of Andrew Jackson in 1828 and the discovery of gold on Cherokee lands in 1829. The first weakened federal opposition to the takeover; the second led the Georgians to redouble their efforts to take possession of the land. In 1829, Georgians simply entered the Cherokee lands in order to work the gold mines, despite both federal laws and Cherokee laws that prohibited anyone from settling or trading on Indian territory without a license. The Georgia legislature passed laws confiscating much Cherokee land, nullifying all Cherokee laws within the confiscated territory, prohibiting meetings of the Cherokee legislative council, ordering

The presidential election of Andrew Jackson in 1828 and the discovery of gold on Cherokee lands spelled disaster for the tribe. Above, Jackson is sworn in by Chief Justice John Marshall, who would deliver the Court's opinion in favor of the Cherokees.

the arrest of any Cherokee who influenced the tribe to reject emigration west, and even forbidding Cherokees to dig for gold on their own land. And Georgia's Governor wrote to President Jackson asking for withdrawal of federal troops from the gold fields. (He was urged on by a Georgia judge who complained of the "deep humiliation" he felt due to the exercise of federal power "within the jurisdiction of Georgia," while adding that he "would disregard" any U.S. Supreme Court "interference" in "cases" arising before him "from the act of Georgia.") Jackson did not resist: he withdrew the federal troops, he negotiated a removal treaty with the neighboring Choctaws, and he urged the Cherokees to come to terms. He announced that, treaties to the contrary notwithstanding, a state had the right to extend its laws to cover Indian land within its boundaries. And he supported enactment of an Indian Removal Bill in Congress that authorized the President to offer an exchange of western lands with any tribe "now residing within the limits of the states or territories." As a political symbol, it meant much more than its letter.

Many Northerners opposed this bill. Representative Henry Storrs of New York

found it senseless to "remove the Indians for their own good from a community where they had pleasant homes, churches, and schools," and send them "to a wilderness." Representative William Ellsworth of Connecticut accused the Southerners of mercenary motives that drove their efforts to take over the Indians' possessions. Representative Horace Everett of Vermont cried out that "the evil . . . is enormous; the violence is extreme; the breach of public faith deplorable; the inevitable suffering incalculable." The Southerners replied with arguments based on states' rights, adding that the New Englanders had long ago expelled Indian tribes from their own land. The result was a narrow victory for Jackson and the South: the bill passed the House 102 to 97.

At this point the Cherokees faced a set of Georgia laws that effectively took their land away from them, a Georgian political victory in the federal Congress, and a president whose sympathies seemed to lie with the Georgians and who was asking them to negotiate their own removal. What could they do?

The Cherokees hired William Wirt to file a lawsuit against the state of Georgia. A political enemy of President Jackson and a former U.S. Attorney General, Wirt was a great constitutional lawyer and a seasoned Supreme Court advocate.

What the Cherokees did was refuse to negotiate. The Cherokee Legislative Council adopted a resolution stating "we have no desire to see the President on the business of entering into a treaty for exchange of lands," but "we still ask him to protect us" in accordance with the "[federal] treaties provided for our protection." They added, "[w]hen we [do] move, we shall move [not to the West, but] by the course of nature to sleep under *this* ground which the Great Spirit gave to our ancestors." After consulting with Daniel Webster and others, the Cherokees then hired a lawyer, William Wirt. Wirt was one of the greatest constitutional lawyers of his day, a political enemy of Jackson, and a former United States Attorney General. He advised the Cherokees to file a lawsuit.

II The First Lawsuit

Wirt had very little doubt about the substantive merits of his clients' legal claim. Article VII of the Treaty of Peace and Friendship of 1791, entered into by the United States and the Cherokees, stated that the "United States shall guarantee to the Cherokee nation [] all their lands not hereby ceded." The Constitution itself made "Treaties" the "Supreme Law of the Land." And the Supreme Court had made clear twenty years before—in the Yazoo lands case, *Fletcher v. Peck*—that it would strike down state laws that violated constitutional provisions. Of course, Georgia's Governor George Troup had fulminated against *Fletcher* at that time. ("The foundations of the Republic are shaken," he remarked, "and yet the judges sleep with tranquility at home." And he asked, "Why . . . do the judges who passed this decision live and live unpunished?"). By 1830, however, the Supreme Court's power to announce decisions that upheld the supremacy of federal law seemed well established. How then could Georgia, in a manner consistent with federal

laws and treaties, extend its legal power to include Cherokee lands, thereby taking from the Cherokees land that had not been "ceded"? As Wirt pointed out, "many distinguished men" had assured the Cherokees "that the Supreme Court would protect them and that they had only to secure eminent counsel to effect their object."

However, Wirt still faced serious obstacles. How could he get his case to the Supreme Court? Should he file a lawsuit in the lower federal courts, say, against the United States, or perhaps against President Jackson or Secretary of War John Eaton? Such a lawsuit would, in effect, seek a mandatory injunction requiring the United States or its officers to enforce treaty obligations, using force if necessary, to require the state of Georgia to back down. Such a suit would directly involve the President or his Cabinet. It would dramatically illustrate the questions of political and institutional power at issue. And a request for injunctive relief would invite the Court to consider whether the question raised was a "political question" beyond the Court's power to resolve. Wirt rejected this approach.

What about a civil case, perhaps for "trespass," against individual Georgians who had entered Cherokee land? The trespassers would point to Georgia laws as a defense, and Wirt could then reply that Georgia's laws violated the terms of treaties and the federal Indian Nonintercourse Act as well. Hence the state's laws were invalid and provided no defense. However, Wirt would then have to deal with the Georgia courts, or perhaps the lower federal courts sitting in Georgia, and Georgians were unlikely to prove sympathetic to his claim.

In fact, a criminal case in Georgia at this time showed what might happen. The Georgia courts had convicted a Cherokee named Corn Tassel of murdering another Cherokee on Cherokee land. Wirt took control of Corn Tassel's case and appealed the conviction to the Supreme Court, a legal alternative that the Supreme Court, in *Martin v. Hunter's Lessee* (1816), and *Cohens v. Virginia* (1821), had made clear was legitimate. The Supreme Court sent the local judge notice that the appeal had been filed. The judge immediately sent the Supreme Court's writ to Georgia's Governor Gilmer, who transmitted it to the state legislature, along with the message: "So far as concerns the executive department, orders received from the Supreme Court in any manner interfering with decisions of the courts of the state in the constitutional exercise of their jurisdiction will be disregarded, and any attempt to enforce such orders will be resisted with whatever force the laws have placed at my command." The legislature then "[r]esolved that the State of Georgia will never so far compromise her sovereignty as an independent state as to become a party to the case sought to be made before the Supreme Court by the writ in question." The legislature authorized Corn Tassel's execution to proceed, and Corn Tassel was hanged two days later.

Understandably, Wirt concluded that he could not rely upon Georgia's courts. Instead, he decided to sue Georgia directly. The Constitution itself said that the "Supreme Court shall have original Jurisdiction" in all cases "in which a State shall be Party." Hence, Wirt could avoid the lower courts with their risks of delay or worse. He was aware that the Eleventh Amendment denied that the "Judicial power of the United States" extended to lawsuits "commenced . . . against one of the . . . States by Citizens of another State, or by . . . Subjects of any Foreign State." However, the Cherokee Nation was not a "citizen" or "subject" of any State. Rather, it was itself a state, perhaps a "foreign" one. So the Eleventh Amendment posed no obstacle, and in January 1831, Wirt filed a lawsuit on behalf of the Cherokee nation, *Cherokee Nation v. Georgia*, in the Supreme Court of the United States. He sought an injunction forbidding Georgia and its officers from enforcing "the laws of Georgia . . . within the Cherokee territory, . . . [as] designated by treaty between the United States and the Cherokee Nation."

Georgia did not file an answer; nor did it make any appearance in the case.

At oral argument, Wirt dwelled at some length upon the enforcement problem. "Will you decline a jurisdiction clearly committed to you," he asked, "from the fear that you cannot, by your own powers, give it effect . . . ?" He maintained that it is "part of the sworn duty of the President of the United States to 'take care that the laws be faithfully executed.' . . . It is your function to say what the law is." In any event, "is this Court to anticipate that the President will not do his duty [or] . . . that a defendant State will not do her duty in submitting to the decree of this Court?" There is "a moral force in the public sentiment of the American community which will . . . constrain obedience. At all events, let us do our duty, and the people of the United States will take care that others do theirs."

On March 18, 1831, the Supreme Court handed down its decision. "If courts were permitted to indulge their sympathies," Chief Justice Marshall wrote, "a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, . . . have yielded their lands by successive treaties," and this application is made simply to "preserve" a "remnant" (that is, merely that portion of the Cherokees' former territory that "is necessary to their comfortable subsistence"). Nonetheless, a Court divided 4 to 2 (with Justices Thompson and Story in dissent) concluded that there was *no* jurisdiction.

The Court conceded that a State was indeed a "party" and that fact gave the Court "original jurisdiction" under the second paragraph of Article III, Section 2. However, it added, the Court could exercise judicial power over such a case only if the "judicial Power" of the United States, as defined in the first paragraph of Article III, Section 2, extended to that case. This paragraph lists the matters to which the "judicial Power" extends. It specifies that the federal judicial power does "extend to . . . Controversies" between a "State" and "foreign states," but the Court concluded that the Cherokee Nation is not a "foreign state." Rather, according to Chief Justice Marshall, its "relation to the United States resembles that of a ward to his guardian": the Indian tribes are "domestic dependent nations."

Marshall also noted that the "bill" would require "us to control the legislature of Georgia, and to restrain the exertion of its physical force"—an "interposition by the court" that might be "questioned" as "savour[ing] too much of the exercise of political power to be within the proper province of the judicial department." However, the Court's holding of no Article III jurisdiction "makes it unnecessary to decide this question."

Strangely absent from Chief Justice Marshall's opinion is an explicit discussion of a related (but different) jurisdictional claim that one of the Cherokees' lawyers had made. The first paragraph of Article III, Section 2, says that the "judicial Power" of the United States also shall extend to cases "arising under . . . Treaties." The Cherokees had argued that their case arose under a treaty. Consequently, they said, the first paragraph extends the federal judicial power to the case, and the second paragraph provides original jurisdiction in the Supreme Court. Chief Justice Marshall did not describe the flaw, if any, in this jurisdictional logic.

In any event, although the Cherokees had lost on the law, the Chief Justice delivered additional views from the Bench. In these remarks, which one observer described as "an extra-judicial opinion," Marshall said that he thought "so much of the argument of counsel as was intended to prove the character of the Cherokees as a State, as a distinct political society, separated from others, capable of managing their own affairs and governing itself, has, in the opinion of a majority of the Judges, been completely successful." He also suggested that "the mere question of right to their lands might perhaps be decided by the Court in a proper case with proper parties."

Still, as one contemporaneous letter writer put it, a "universal gloom, corresponding to the former elevation of their hopes, prevailed throughout the [Cherokee] nation." Many Cherokees seemed ready to negotiate. Encouraging this defeatist mood, Georgia's Governor wrote to President Jackson that if "the Cherokees are to continue inhabitants of the State, they must be rendered subject to the ordinary operation of the laws . . . The State must put an end to even the semblance of a distinct political society among them." Georgia sent additional guards to the gold fields. And it passed new, more restrictive laws.

III The Second Decision

Then, when all seemed lost, a new case gave grounds for hope. One of the new Georgia laws required "all white persons residing within the limits of the Cherokee nation" to have a license from the Governor and to take an "oath" to support the laws of Georgia. Governor George Gilmer decided to apply the law to a group of missionaries from New England, working in Cherokee country, who were encouraging the Cherokees to refuse to emigrate. He wrote to one of them, S. A. Worcester, asking him to take the oath of allegiance. Worcester replied that he understood he was "liable to arrest," were he to remain on Cherokee lands without having taken the oath, but he denied having "excited the Indians to oppose the jurisdiction of the state." He made clear that he thought Georgia's actions were wrong, and he concluded: "I could not conscientiously take the oath which the law requires," for it would amount to "perjury for

Missionary Samuel Austin Worcester became a friend of the Cherokee Nation and translated the Bible and hymns into Cherokee. He refused to take the oath of allegiance to Georgia, because he thought the state's actions against the Cherokees were wrong.

one who is of the opposite opinion," and, "in the present state of feeling among the Indians, [would] greatly impair or entirely destroy my usefulness as a minister of the gospel among them." Worcester sent with his letter a copy "of the gospel of Matthew" and a hymnbook that he had translated into the Cherokee language. In July 1831 Worcester and ten other missionaries were arrested.

They were tried in September, found guilty and sentenced to several years of hard labor in prison. Governor Gilmer offered pardons if the missionaries would take the oath. Nine of the eleven accepted the offer, but Worcester and a colleague refused. Jeremiah Evarts—a member of the American Board for Foreign Missions, the group that had sent the missionaries to Cherokee territory—wrote to Worcester that "[i]f you leave, I fear the Cherokees will make no stand whatever . . . [Y]our leaving in these circumstances would greatly endanger, if it did not utterly ruin, the cause of the Cherokees . . . The people of the U.S. would say the case is hopeless. [However,] the most intelligent members of Congress are of the opinion that the Supreme Court will sustain the Indians and that the people of the U.S. will yield and a settlement will be made. That this would be done is the only earthly hope of the Cherokees, and it is of immense importance to this country and to the civilized world."

Here was the case Wirt had been waiting for. Georgia would not treat Worcester as it had treated Corn Tassel, whom it had executed post haste. Nor would Georgia release Worcester. Wirt, now representing Worcester, filed a notice of appeal in the Supreme Court. Georgia's new Governor, Wilson Lumpkin, sent the Court's notice to appear to the state legislature along with a message stating that he would "disregard all unconstitutional requisitions" and would "resist Federal usurpation." The legislature resolved that any "attempt" by the Supreme Court "to reverse the decision of the Superior Court . . . will be held by this state as an unconstitutional and arbitrary interference in the administration of her criminal laws and will be treated as such."

Nonetheless, from February 20 through February 23, 1832, the Supreme Court heard arguments in the case of *Worcester v. Georgia*. Again, Georgia refused to appear. The argument on the petitioner's side was straightforward, devoted mostly to the substantive legal merits. And on March 3, 1832, Chief Justice Marshall delivered the opinion of a nearly unanimous Court.

Jurisdiction, he said, posed no problem. Section 25 of the Judiciary Act "enumerates the cases in which the final judgment . . . of a state court may be revised in the Supreme Court." They include those "where . . . the validity of a treaty" is questioned (and the lower court holds the treaty invalid) or where a statute of any state is challenged "on the ground of [its] being repugnant to the Constitution, treaties, or laws of the United States and the [lower court decision] is in favor of [the] validity" of the state statute. This case called into question the Cherokee treaties and also the Georgia statute. (Both were issues, he might have added, "arising under" the federal Constitution, treaties or laws, and hence were within the scope of Article III's grant of judicial power.) "It is, then, we think, too clear for controversy that the act of Congress by which this Court is constituted has given it the power, and of course imposed on it the duty, of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the judicial department have no discretion in selecting the subjects to be brought before them." In sum, the Court could not refuse to hear the case, lest, contrary to *Cohens v. Virginia*, it deny jurisdiction to hear all criminal cases coming to it from state courts.

The Court did not find the merits of the case much more difficult. Marshall recited at some length the history of relations between the Indian tribes and the European nations, the colonies, and the United States. He pointed out that none had ever extinguished tribal in-

dependence, that all had treated the Indians "as nations capable of maintaining the relations of peace and war," that Great Britain and the United States had entered into treaties with Indian tribes, and that the United States had entered into specific treaties with the Cherokees in which it promised to stop other American citizens from settling on Cherokee lands, promised to be the sole and exclusive regulator of trade with the Indians for their own "benefit and comfort," and guaranteed to the Cherokees all their lands not ceded under the treaties. Congress, Marshall pointed out, recognized "the several Indian nations as distinct political communities having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."

The Chief Justice concluded that the "Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress . . . The act of the State of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity."

Marshall added that Worcester consequently had been "seized, and forcibly carried away, while under the guardianship of treaties" and while "under the protection of the United States. He was seized while performing, under the sanction of the chief magistrate of the Union, those duties which the humane policy adopted by Congress had recommended. He was apprehended . . . under colour of a law which has been shown to be repugnant to the Constitution, laws, and treaties of the United States." Marshall noted that, had *property* been so taken, the law would entitle its owner to its return, and "it cannot be less clear when the [state's] judgment affects personal liberty." Finally, Marshall announced that "[i]t is the opinion of this Court that the judgment of the [Georgia] Superior Court" must be "reversed and annulled."

Worcester was to go free. The Cherokees had won. Or had they?

IV The Aftermath

After the Court's decision was announced, Justice Joseph Story wrote to his wife: "Thanks be to God, the Court can wash their hands clean of the iniquity of oppressing the Indians and disregarding their rights." Writing four days later to George Ticknor, he added that "The Court has done its duty. Let the Nation now do theirs." Story noted, however, that "Georgia is full of anger and violence . . . Probably she will resist the execution of our judgment, and if she does, I do not believe the President will interfere."

Sad to say, Justice Story was correct. The Supreme Court issued its opinion on March 3, 1832, immediately following it with a mandate that reversed and annulled the Georgia judgment. On March 17, Worcester's lawyers asked the Georgia court to receive the mandate and release the prisoners. The Georgia court simply refused. Indeed, it refused to record anything, including its own decision not to obey the Supreme Court's ruling.

The Georgia court did allow the lawyers to make an affidavit about what had happened. But when those lawyers then asked Governor Lumpkin to release the prisoners, he would put nothing in writing, saying, "You got around [Judge] Clayton, but you shall not get 'round me." It seemed that Georgians themselves understood their Governor's position, a position that he clarified the following November in his annual message to the State legislature: "The Supreme Court," he said, has "attempted to overthrow the essential jurisdiction of the State in criminal cases. . . . I have, however, been prepared to meet this usurpation of Federal power with the most prompt and determined resistance."

When Congressman John Quincy Adams of Massachusetts, along with other Northern representatives, complained that "no steps have been taken by the Government of the United States to prevent these manifest violations of its laws," Congressman Augustin Clayton of Georgia replied that they "were meddling with what did not concern them," that the Supreme Court's judgment "would be resisted with the promptitude and spirit which became Georgians," and that the judgment "would [never] be executed till Georgia was made a howling wilderness." That state, he added, would "rather give up your Union, . . . [than] submit to be scourged by savages."

Congressman Thomas Foster of Georgia responded to claims that the Union itself was at stake with the following arguments: first, the Supreme Court was not "unbiased and impartial"; second, the question at issue was "political"; third, *Cohens v. Virginia* (which permitted the Supreme Court to review state criminal decisions) was wrongly decided; fourth, the "powers of the States" were being "swallowed up by the judiciary"; fifth, since "there has been no common umpire designated to determine questions of contested power, . . . each State as a party has a right to judge for itself . . . of the infractions of the Constitution" and "to resist the exercise of any power by the Federal Government not granted to it"; and sixth, neither Court nor President could "command a posse sufficient to carry" the judgment "into effect." The words "civil war" began to appear in the congressional debates.

What about the President? He had made clear that, in his view, the state legislatures "had the power to extend their laws over all persons living within their boundaries," and that he possessed "no authority to interfere." When he vetoed the national Bank Bill in July, Jackson reminded that it is "as much the duty" of Congress and the President "to decide upon the constitutionality" of bills as "it is of the supreme judges." Thus, in his view, "[t]he authority of the Supreme Court must not . . . be permitted to control the Congress or the Executive."

The *New York Daily Advertiser* pointed out that the President "has said . . . that he ha[s] as good a right, being a co-ordinate branch of the government, to order the Supreme Court as the Court ha[s] to require him to execute its decisions." And popular wisdom quoted Jackson as having said, "Well, John Marshall has made his decision, now let him enforce it." The two missionary prisoners, of course, remained in jail. It is thus no wonder that John Marshall wrote to Joseph Story: "I yield slowly and reluctantly to the conviction that our Constitution cannot last."

Then, just when all seemed lost, the wheel of fortune began to turn again; Georgia's resistance was overcome, and the missionaries were freed. This change took place because a different state—South Carolina—decided that the time was ripe to put Georgia's nullification theory into practice. On November 24, 1832, eighteen days after Georgia's Governor Lumpkin promised the legislature's "determined resistance" to the implementation of the Cherokee decision, South Carolina promulgated its own "Nullification Ordinance." The ordinance essentially nullified a federal tariff law. It announced that "it shall not be lawful . . . to enforce the payment of duties imposed by the [federal] acts within the limits of this State." The state courts would have to follow "state law" on the matter; nor would any appeal to the Supreme Court be "allowed," or the printing of any record for the purposes of such an appeal, and any person attempting to take such appeal "may be dealt with as for a contempt of court."

President Jackson suddenly began to understand the nature and gravity of the problem. On December 10th, he published a reply to South Carolina, saying: "I consider, then, the power to annul a law of the United States, assumed by one State, incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized

by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed." Jackson immediately supported Congressional enactment of a Force Bill that would give federal officials adequate powers to enforce the federal laws. Jackson consequently found new friends in Daniel Webster and Chief Justice Marshall, who saw that the President at last had begun to understand the importance of their arguments for national sovereignty. A few weeks made quite a difference. (As Harold Wilson would later point out, "a day is a long time in politics.")

What, then, about Georgia? The publication *United States Telegraph* wrote that "no person but a Jackson or Van Buren man can see any essential difference between the cases of Georgia and South Carolina." Worcester had said from prison that he might bring his case right back to the Supreme Court; in light of his newfound position on the limits of states' rights, Jackson began to say that he would carry into effect any decision that the Supreme Court might make. In short order, the newspapers began to predict that a "settlement of the Cherokee case" was at hand.

Before the Supreme Court could meet for its 1833 Term, friends of Georgia's Governor Lumpkin visited Worcester in prison. They said the Governor had told them that, if the missionaries would withdraw their suit, they would be discharged from prison, immediately and unconditionally. The American Board for Foreign Missions considered the matter and expressed its opinion that they should accept a pardon. After all, the Supreme Court decision had established their right to be free and the right of the Cherokees as well "to protection from the President from the aggressions of Georgia." What more would be gained by maintaining another lawsuit and remaining in prison?

Consequently, on January 8, 1833, Worcester wrote to Wirt and instructed him to stop all legal proceedings. He wrote to Governor Lumpkin, in effect requesting a pardon, while adding that "we have not been led to the adoption of this measure by any change of views in regard to the principles on which we have acted." When Worcester heard that the governor considered this latter remark an insult, he quickly wrote a second letter, apologizing and adding that it is "our intention simply to forbear the prosecution of our case and to leave the question of the continuance of our confinement to the magnanimity of the State." On January 14, 1833, Governor Lumpkin signed a proclamation ordering the missionaries' release.

V Conclusion

The great Supreme Court historian Charles Warren later observed about this decision that the prestige and the authority of the Court went from a near-disastrous nadir in late 1832 to its strongest position in fifteen years by the opening of the 1833 Term in January. But what of the Cherokees? Had they not also won the case? What happened to them?

On December 29, 1835, at New Echota, the Cherokees supposedly signed a treaty agreeing to their removal from Georgia to the West. Let me state the matter more accurately. Approximately three to five hundred members of the Cherokee tribe, a tribe with a total population of over 17,000, went to New Echota and agreed to the treaty. Virtually every other member of the tribe immediately protested the treaty, claiming that it had been obtained through trickery. Despite protests against the treaty by representatives of the remaining Cherokees, the United States Senate ratified the treaty by a majority of one.

General Wool, who was in command of the federal troops in Cherokee territory, communicated the facts of the Cherokees' resistance to President Jackson. The President responded with a letter in which he ordered enforcement of the treaty; said that he "had ceased to recognize" any Cherokee government; forbade the Cherokees to assemble to discuss the treaty; and directed that a copy of

his letter be shown to Cherokee Chief John Ross, after which "no further communication by mouth or writing should be held with him concerning the treaty." General Wool later reported that the Cherokees were "almost universally opposed to the Treaty." He said that the great majority of the tribe was "[s]o determined in their opposition" that they had refused to "receive either rations or clothing from the United States lest they might compromise themselves in regard to the treaty," that they "preferred living upon the roots and sap of trees rather than receive provisions" from the federal government, that "many thousands . . . had no other food for weeks," and that many "said they will die before they leave the country." Wool described the whole scene as "heartrending," adding that, were it up to him, he "would remove every Indian tomorrow beyond the reach of the white men who, like vultures, are watching, ready to pounce upon their prey and strip them of everything they have." "Yes sir," he said, speaking of the Cherokee people, "ninety-nine out of every hundred, will go penniless to the West." In short, the Cherokees won their legal battle and lost the war.

Governor Lumpkin later became an Indian commissioner, "commissioned to execute the Treaty of December 1835 with the Cherokee Indians." When he was asked by a few of the Cherokees' lawyers for payment of their bills, he wrote that their efforts had been "arduous, long and often unpleasant," that they had supported the "weaker of the two contending communities" in a struggle "with a stronger one"; and that the "best interest of the Cherokee people would have been promoted . . . by avoiding the conflicts and controversies" into which the legal representation had plunged them. In his stated view, the lawyers' "labors from first to last have been one unmitigated curse to the Cherokee people." Wirt himself apparently received only $500 on a claim for $20,000.

I shall end the story here. There is an obvious winner, the Supreme Court of the United States; an obvious loser, the Cherokee tribe; and an obvious irony, namely that the Supreme Court and the Cherokee tribe were *allies*, fighting *on the same side* of the issues. The story may also provide support for those who believe that politics and force, not law, determine the facts of history. However, I would draw a different lesson, one about the insufficiency of a judicial decision alone to bring about the rule of law. It helps us understand John Marshall's comment that the "people made the Constitution, and the people can unmake it." It further helps us understand that our constitutional system does not consist only of legal writings. It consists of habits, customs, expectations, and settled modes of behavior engaged in by lawyers, by judges and by the general public, all developed gradually over time. It is *that* system, as actually practiced by millions of Americans, that protects our liberty.

One hundred and twenty-five years after *Worcester*, the Supreme Court decided another case, *Cooper v. Aaron*, which involved a different governor who was defying a different Court order, this time an order demanding that black children enter the door of a white school. This time the President sent in paratroopers; and the children entered that schoolhouse. Perhaps President Jackson's actions helped President Dwight D. Eisenhower to understand both the importance of enforcing a rule of law and the importance of protecting fundamental liberties. And perhaps that experience can help us understand our own responsibility to preserve and to pass on the traditions, habits, and expectations of behavior that underlie our modern system, creating the freedom we enjoy, not just on paper, but in reality. If so, then a dangerous episode in the Court's history, and a tragic story in the history of the Cherokee tribe, may at least help others whose basic liberties are threatened.

The Religion of a Jurist: Justice David J. Brewer and the Christian Nation

LINDA PRZYBYSZEWSKI

During a banquet to celebrate Justice John Marshall Harlan's twenty-fifth year on the Supreme Court of the United States in 1902, Justice David J. Brewer gave a speech in which he teased his colleague. Brewer explained to the distinguished audience that Harlan "goes to bed every night with one hand on the Constitution and the other on the Bible, and so sleeps the sweet sleep of justice and righteousness."[1] The image may be comical, and Harlan bristled a little when a reporter for the *Washington Post* asked about the remark during an interview in 1906. Yet Harlan embraced the parallel: "The Bible is supreme in respect of all matters with which it deals, and the Constitution is supreme in this country in respect to all civil matters of national concern."[2] The truth in Brewer's remark about Harlan calls attention to an idea common to the minds of nineteenth-century Americans: the link between religious faith and legal thought.

Until fairly recently, this link has gone largely neglected by legal historians. Perhaps this is because of fears about the oppression of religious minorities: paying attention to such beliefs among historical figures might be mistaken for an endorsement of their views. The impact of the legal realists is probably also responsible for this neglect. The realists sneered at the previous generation of legal formalists as legal theologians spouting transcendental nonsense, thus making antireligious metaphors the metaphors of choice for criticizing legal theory. Whatever the cause of this neglect, the result is that we have been left with the impression that the separation of church and state should cover the topic of religion and the law in the nineteenth century.

However, scholars have begun to reveal the neglected history of the personal religious faith of judges and lawyers of the previous century, and to investigate the impact it had on their work. For example, Stephen A. Siegel has noted how the first assumption of many nineteenth-century American writers of legal treatises was that the first—and still reigning—Lawgiver was God himself. Siegel quotes an 1868 volume by Joel Bishop, a

writer of several popular works, in which he explains that "[w]hen there is a concurrence of all the circumstances essential to a sound administration of justice . . . 'Almighty God' appears in the midst of the tribunal where it sits and reveals the right way to the understandings of the judges, as surely as he appears in the tempest on the ocean and teaches each water-drop where to lie."[3] In like fashion, Howard Schweber has argued that the men who organized nineteenth-century American legal education relied upon the same traditional model of scientific learning used by Protestant theologians who believed that their religious studies, like all branches of knowledge, merely revealed the laws of Nature's God.[4]

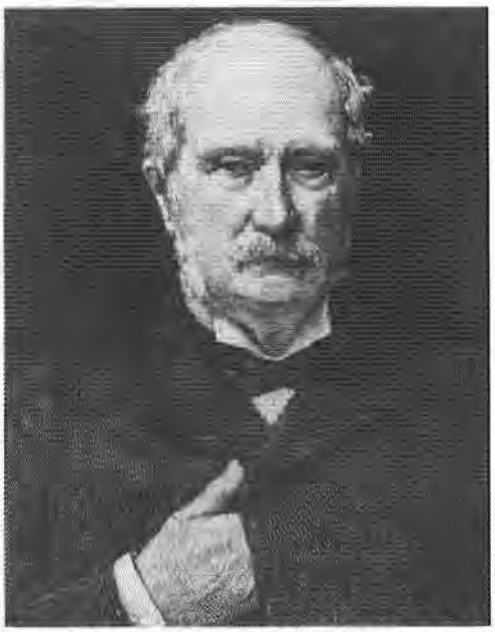
Similarly, my book, **The Republic According to John Marshall Harlan**, explains that the first Justice Harlan believed that the United States was destined to follow a providential plan of perfecting and spreading the legal equality of men.[5] This is one of the reasons for his famous dissent from *Plessy v. Ferguson* in 1896, in which he declared that "Our Constitution is color-blind."[6] A transcript of Harlan's lectures on constitutional law, delivered at Columbian University (now George Washington University) in 1897–1898, records his religious explanation for American history. Of *Dred Scott v. Sandford*, he told his students: "I think I may say that that case was a work of special Providence to this country, in that it laid the foundation of a civil war which, terrible as it was, awful as it was in its consequences in the loss of life and money, was in the end a blessing to this country in that it rid us of the institution of African slavery."[7] Harlan considered his own particular brand of Christianity, Presbyterianism, as essential to the Republic because "it teaches man to read the Bible, and invites every one to freely utter his opinions, despite any authority that may attempt to control his thoughts. Aye, it teaches him to resist, as did his fathers, any authority that would assume to trample upon the rights of man."[8]

As Harlan's identification of Presbyterianism with republicanism makes clear, to know that a judge was religious is not enough. Christian sects multiplied over the course of the nineteenth century in the United States, and their members argued over issues ranging from baptism to biblical interpretation. Although many of the Founding Fathers were deists who believed in a Creator but rejected traditional Christianity, evangelical Protestantism ran contrary to the expectations of men like Thomas Jefferson by spreading during the first half of the nineteenth century. The arrival of large numbers of Catholics from Ireland provoked fears among Protestants of Papist conspiracies. New theological challenges to Protestant orthodoxy began with the Unitarians and Transcendentalists, and snowballed after the Civil War as the discoveries of science cast doubt upon the literal truth of the Bible. By the end of the century, many conservative Protestants felt themselves to be on the defensive and went on the attack as fundamentalists defending the Bible and orthodox beliefs. In this maelstrom of religious belief and nonbelief, the particular faith of individual judges affected how they thought of their world and their place in it.

Justice Brewer may have felt free to tease Harlan about his dual devotion because he shared it: his family background was rich in religious tradition. Brewer was born in 1837 in Smyrna, now in Turkey, to missionary parents set on converting the Greeks to Protestantism. One of his father's reports from 1838 back to his sponsor, the New Haven Ladies' Greek Association, boasted "We have been instrumental in circulating the Scriptures and Tracts through all the regions of the seven apocalyptic Churches . . .[9] The elder Brewer returned to the United States with his family in 1838 and worked for missionary and antislavery causes. His work had a great effect upon his children: Justice Brewer noted that four of his siblings worked for the American Missionary Association.[10] The law as a profession was only a slightly less important family tradition. Justice

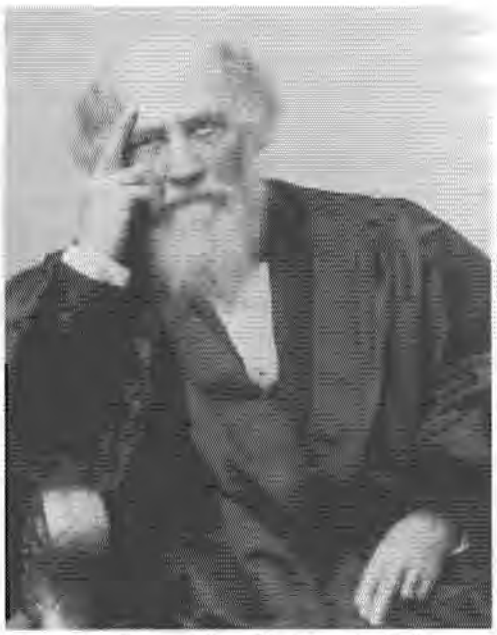
Brewer's uncles, his mother's brothers, were themselves the sons of a minister. David Dudley Field was a lawyer, scholar, and leader of the codification movement, and Stephen J. Field sat on the Supreme Court of the United States from 1863 to 1897.

Having returned to the United States as an infant, David J. Brewer attended Wesleyan College for two years and then finished his degree at Yale College in 1856. After reading law in the office of David Dudley Field and graduating from the Albany Law School in 1858, Brewer went to practice law in Kansas, where he also helped organize the First Congregational Church of Leavenworth.[11] He served as a lower state judge, then on the Kansas Supreme Court from 1871 to 1884, and then as a federal judge on the Eighth Circuit Court from 1884 to 1889. He then joined his uncle as an Associate Justice on the Supreme Court and served until his death in 1910.



David J. Brewer read law in the office of his uncle, David Dudley Field (above), before graduating from Albany Law School in 1858. In addition to being a lawyer and a scholar, Field was a leader of the codification movement and published *Draft Outlines of an International Code* in 1872.

Both Stephen J. Field and Brewer have been caricatured for their conservative jurisprudence. Their political critics and earlier historians depicted them as men who misinterpreted the Constitution in order to benefit corporations and their wealthy owners at the expense of the public. This was an era in which the Court's record on corporate regulation and labor issues became a political issue. Field's dissent from the Court's first interpretation of the Fourteenth Amendment in 1873, *The Slaughter-House Cases*, was one of the sources for the doctrines of liberty of contract and substantive due process, which protected employers and corporations from regulation. During the 1896 presidential election, Democratic candidate William Jennings Bryan argued that the people needed to have direct control over the judiciary.[12] The most infamous case of the era, *Lochner v. New York* (1905),[13] struck down a New York state law that prohibited bakers from working more than ten hours a day, six days a week, on the ground that it violated their right to liberty of contract. Field was already gone by this time, but his long tenure and influence on the Court



Brewer's other uncle, Stephen J. Field, was appointed to the Supreme Court in 1863. Brewer would share the Bench with him from 1889 until Field's retirement in 1897.

allowed scholars to lay at least part of the blame for *Lochner* at his door. However, Field was not, as charged, a social Darwinist devoted to a laissez-faire theory of government. Charles W. McCurdy has shown that Field was instead an old Jacksonian Democrat opposed to anything he considered class legislation designed to favor a select group.[14] Field was more concerned about the Bank of the United States than the theories propounded in Charles Darwin's **The Origin of Species**.

Brewer's judicial record was also generally conservative, and he is known for his votes against the interests of labor and in favor of corporations. Speaking for a unanimous Court, Brewer denied Eugene V. Debs, leader of the American Railway Union, a writ of habeas corpus after he was convicted of contempt of court for violating a federal injunction against the union's organization of the Pullman strike in 1894.[15] He voted with the majority in *Lochner*. He also wrote the majority opinion in *Reagan v. Farmers' Loan and Trust Company* in 1894, which struck down railroad rates set by a state commission.

Just as Field's reputation has evolved over the years, so scholars have started to take a new look at Brewer. They have noted his religious faith, but more attention needs to be paid to it as the foundation of his thought.[16] His mutually reinforcing vision of religion and law can explain at least part of his record on the Bench. Brewer left behind an unparalleled set of off-the-Bench speeches and articles: copies of over 100 of his speeches dating from the 1880s to 1909 survive in published or manuscript form. Indeed, Brewer could have been voted "Judge most likely to give a speech" at the turn of the last century. Oratory itself interested him; he edited a ten-volume set of "The World's Best Orations," published in 1899. Brewer addressed adults, undergraduates, and children. He spoke before audiences of life insurance agents, bar association members, Bible teachers, and divinity students. His articles—many of them reprints of his speeches, some of which he was paid for—appeared in everything from the *Atlantic Monthly* and the *International Monthly* to the *Sunday School Times* and *The Christian Endeavor World*. Some sets of his lectures, delivered before college audiences, were published as books.

Brewer was usually earnest and often quoted from the Christian Bible and popular Protestant hymns. He often ended his speeches, as the Christian Bible itself ends, with accounts of the second coming of Jesus Christ. Brewer also addressed current political and legal issues. He could also be funny; a trip to Chicago warranted a joke about the stockyards—which is doubtless one of the reasons he kept being invited back.

Some of his articles focused exclusively on legal issues, such as the reform of the jury system, but it is astonishing how often he would slide into religious questions on a topic we might assume to be strictly legal or secular. For example, his 1905 speech entitled "The Enforcement of Arbitral Awards" on international arbitration opens and closes with religious hymns.[17] A passage from an 1891 speech on "The Protection of Private Property from Public Attack," given before the graduating class of Yale Law School, shows how close the two subjects were to Brewer's mind. He was discussing the power of eminent domain, i.e., the power of the state to take private property for public purposes so long as it paid for it. This was an issue of great importance: under the doctrine of substantive due process, some businessmen argued, certain kinds of regulation actually amounted to confiscation of their property. Brewer drew on a passage found in the Book of Micah 4:4: "In the picture drawn by the prophet of millennial days, it is affirmed that, 'They shall sit every man under *his* vine and under *his* fig tree, and none shall make them afraid: for the mouth of the Lord of hosts hath spoken it.' If we would continue this government into millennial times, it must be built upon this foundation."[18] He then went on to call for an amendment to

Justice Brewer (left, with Justice Harlan) was keenly interested in oratory and frequently gave speeches to audiences of life insurance agents, bar association members, Bible teachers, and divinity students. Brewer often quoted from the Bible and from Protestant hymns, usually ending his speeches with accounts of the second coming of Jesus Christ.

the Constitution that would incorporate the Declaration of Independence and its natural law theory.

Brewer is known for announcing from the Bench, in the unanimous opinion *Church of the Holy Trinity v. United States* (1892), that the United States "is a Christian Nation."[19] As proof, he listed all of the ways in which Protestant Christianity permeated public life, from the prayers that opened sessions of Congress to oaths taken by witnesses in the country's courtrooms. Historians of religion would agree that Protestantism was effectively established in the United States on an informal and voluntary basis, although the complaints of Catholics and Jews against deliberate or thoughtless discrimination leads to questions about just how voluntary this establishment was.[20] Brewer was clearly taken with the idea he had expressed, because he

elaborated on it in a series of lectures in 1905 at Haverford College in Pennsylvania entitled "The United States: A Christian Nation" and invoked these ideas in other speeches.

So what did Brewer mean when he said the United States is a Christian nation? To begin with, what did he mean by Christian?

Brewer was a Congregationalist, a sect that took its name from the refusal of its Puritan founders to acknowledge any higher institutional authority than the congregation itself. By the nineteenth century, the Congregationalist churches had split over revivalism and given birth to the Unitarians, who rejected traditional Christian doctrines, especially that of the Trinity. Brewer never went that far, but he clearly had broken with the Calvinism of the Puritans. Like other liberal Protestants of the era, he emphasized God's love for humanity and the ethical teachings of Jesus Christ and believed that, under God's guidance, humanity would progress until it brought about God's kingdom on earth as foretold in the Bible. This meant that he abandoned or downplayed more traditional doctrines that were central to the beliefs of his Puritan ancestors: human depravity and sin, Christ's atonement for human sin through his sacrifice on the cross, and eternal damnation. In fact, Brewer dismissed theological doctrine entirely as unimportant.

Brewer conceived of God and Jesus Christ, whom he almost always called "the Master," as primarily a comfort to humanity. In a speech that he gave in several places in 1899, he recounted Beatrice Harraden's short story of a painter who had lost his Christian faith only to refind it shortly before his death. Renewed by this faith, the painter's last act was to finish his painting depicting "an infinite God, with omnipotent arms underneath and supporting the bleeding head of a suffering and fainting Christ." Humanity needed to believe in God, Brewer explained, so as to feel that "the everlasting arms are evermore beneath the wearied, suffering, bleeding children of earth."[21]

This focus on humanity appeared constantly in Brewer's religious writings, including those where he tried to cope with challenges to traditional Christianity. Early in the century, Protestant theologians had been able to enlist science to demonstrate how God's natural laws ruled both the physical and moral worlds. By the late nineteenth century, however, geologists argued that the earth was far older than the Bible's accounts, while biologists embraced Charles Darwin's theory of natural selection, which allowed scant room for an all-loving Creator or the literal truth of Genesis. Faced with these challenges, Brewer turned inward to humanity itself for proof of the divine inspiration of the Bible. For example, he refuted agnostics before an audience at the Bible Training School in New York City in 1904 with the argument that "the very fact that this Book is such a comfort to the toiling and burdened ones of earth is among the evidences that it is true, because a lie can never be an enduring comfort and consolation."[22] In this speech and in many others, Brewer quoted Christ's gentle command from the Gospel according to Matthew 11:28: "Come unto me, all ye that labor and are heavy laden, and I will give you rest." The nonbeliever was effectively rebuked by Christianity's satisfaction of emotional needs. Brewer often quoted the poem "The Song of the Washer Woman." The title character's comforting faith in Jesus convinces the poem's faithless narrator that "Human hopes and human creeds/Have their root in human needs," so he would be loath to deny "Any hope that song can bring . . . ."[23] It was as though Brewer were prepared to answer the theological problem of evil—in a nutshell, if God is all good and all powerful, why is there evil in the world?—with the very fact of evil or, more precisely, with the promise of eventual comfort and heaven. Brewer reasoned that, since God is all good and all-powerful, he will comfort those who have suffered evil on earth in the afterlife. In speaking of his own quandaries as a judge, Brewer told a Congregational audience in 1904 that

"the inevitable failure of justice in this life is an assurance of a life to come."[24] In this speech, entitled "The Religion of a Jurist," Brewer explained that, while listening from the Bench to "the confused, conflicting voices of the court-room I have heard the majestic and prophetic words of the great Apostle [Paul]: 'For this corruptible must put on incorruption, and this mortal must put on immortality.'"[25] Brewer saw his own inadequacies as a man and a judge as proof of God's complete sufficiency to right wrongs.

Like other liberal Protestants, Brewer focused on Christ's ethical lessons more than his divine nature. Christ instructed his followers on how they should behave towards one another, and Brewer took these instructions to heart. During his speech at the fiftieth meeting of the American Missionary Association in 1896, he quoted Christ, as recorded in Matthew, saying that feeding the hungry and clothing the naked, "such is the divine test of true religion."[26] Brewer congratulated the missionary workers for serving Christ by what they had done for the least of his brothers and assured them that Christ would welcome them into heaven as reward.

Brewer also believed that these kinds of moral reform efforts by men and women could help bring about the thousand years of peace and righteousness predicted in the Book of Revelation. This made him a postmillennialist, since he believed that Jesus Christ would appear only *after* humankind had prepared the way for him. Brewer worked in the name of this belief on behalf of the peace movement and international arbitration. Before the Civil War, the peace movement in United States was small and limited to religious pacifists like the Quakers and Mennonites. After the Civil War it grew, and ministers and lawyers cooperated on larger projects. For example, it was a Congregational minister who was largely responsible for organizing an international conference that prompted Brewer's uncle, David Dudley Field, to write **Draft Outlines for an International Code** in 1872.[27] Brewer shared this interest in international law and taught a course on it at Columbian University. He explicitly identified legal institutions as the fulfillment of biblical prophecies of peace. For example, in a speech from 1896 on legal education, Brewer said that the lawyer will "bring in the glad day when the spear shall be turned into a plowshare and the sword into a pruning hook, and nations learn war no more."[28] Brewer was paraphrasing one of his favorite biblical passages from the prophet Isaiah 2:4 telling of the last days.

Brewer was aware of two schools of thought in international law, what we might call justice versus convention, and he identified the school of justice in religious terms. In a speech from 1901, given before the New England Society of Pennsylvania, entitled "United States: A World Power?" he defined the school of justice as based on "a broad affirmation that principles of right and justice determine what are those rules and alone give them sanction."[29] Indeed, many treatises on international law by American writers of the nineteenth century invoked the Creator as the great Lawgiver and relied on natural law. Theodore Dwight Woolsey, President of Yale College (Brewer's alma mater) from 1846–1871, explained in the first chapter of his **Introduction to the Study of International Law** (first published in 1860) that "[i]n order to protect the individual members of human society from one another, and to make just society possible, the Creator of man has implanted in his nature certain conceptions which we call rights, to which in every case obligations correspond."[30] According to Brewer, the second school of international law was based on the idea that only "that which has been assented to by the great family of civilized nations" was international law and otherwise each nation may act as it pleases "irrespective of the interests of others."[31] Brewer declared proudly that the foreign policy of the United States was simply the Golden Rule—which may have been news

to the rest of the world. In any case, he ended this 1901 speech with millennial aspirations and an invocation of the Book of Revelation by St. John the Divine: "Along life's toilsome way for unnumbered centuries the race has marched, looking evermore to the new heavens and new earth on the far distant heights; and as from century to century it slowly ascends its mountain path the vision grows brighter and brighter, nearer and more glorious. Under the inspiration of the Pilgrims, humanity took a step upward and forward. May it be our blessed privilege, as it is our own birthright of duty to lead to still loftier heights and a larger foretaste of that peace and joy and glory which shall fill the world when John's dream is fulfilled and the new heavens and new earth become the home of the race."[32]

Brewer was a frequent speaker at the Mohonk Conferences on international arbitration, organized by Quaker Edward Everett Hale in 1895, which were largely responsible for popularizing the peace movement in the United States. The movement had its first important victory in the organization of the Hague Conference in 1899 at which twenty-six nations agreed to establish the Permanent Court of International Arbitration; the United States signed on but stipulated that the Monroe Doctrine must still be considered in force. Brewer saw the Hague Conference as the fulfillment of the Christian millennialist impulse. His speech on the Hague Conference at the 1905 Mohonk Conference ended with quotations from a hymn welcoming the coming of Jesus Christ, the Prince of Peace.[33]

Premillennialist Christians, who expected Christ to come before any reign of peace and righteousness on earth was to be counted on, considered people like Brewer presumptuous in their faith in human efforts. After all, the passage from Isaiah of which Brewer was so fond indicates that the exercise of supernatural power is essential to the com-

Brewer saw the 1899 Hague Peace Conference (pictured), where 26 nations agreed to establish the Permanent Court of International Arbitration, as the fulfillment of the Christian millennialist impulse.

ing of eternal peace: it is God, not the Hague, who "shall judge among the nations, and shall rebuke many people: and they shall beat their swords into plowshares, and their spears into pruning hooks: nation shall not lift up sword against nation, neither shall they learn war any more." However, unlike antebellum evangelicals, who placed most of their emphasis on a personal relationship with Jesus that would bring on their own spiritual rebirth, most postwar Protestants—especially the liberals—did not envision as much active supernatural intervention in their lives. The peace work, then, had to be done by men like Brewer.

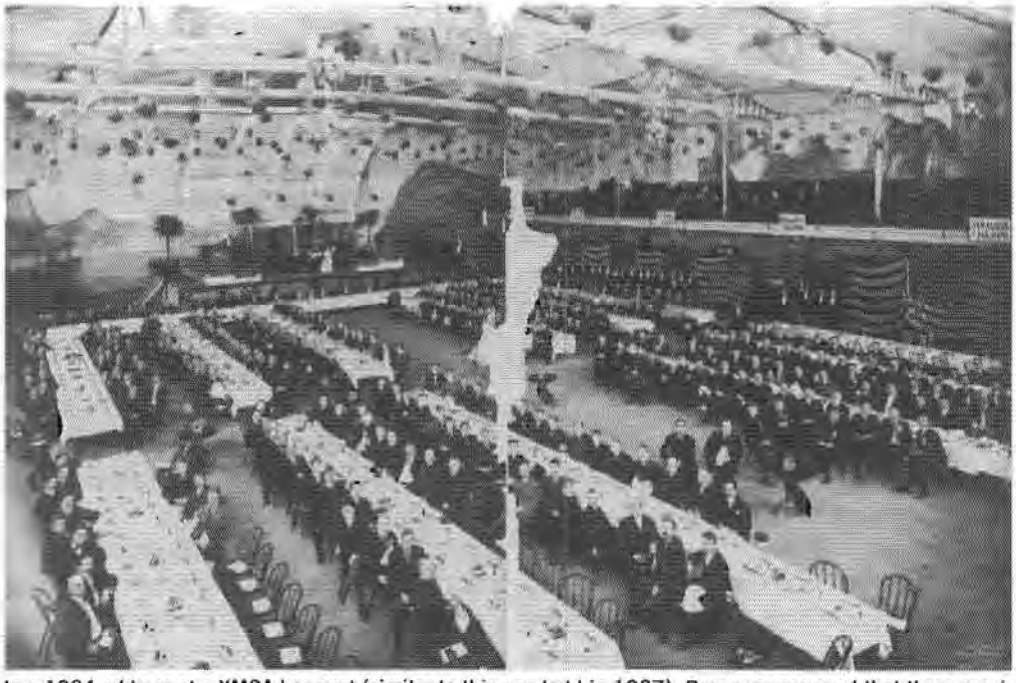
By the early twentieth century, Brewer thought that his version of Christianity was ecumenical. After all, he had stopped using the Inquisition under the Catholic Church as his prime illustration of religious oppression, and had praised Pope Leo XIII in 1903 for his efforts on behalf of the reunification of all Christians.[34] He also praised the YMCA in 1904 for its nondenominationalism, and spoke in favor of the unity of all Christian churches at the Inter-Church Conference on Federation in 1905.[35] However, to Brewer, ecumenicalism meant only that all Christians should be like him: liberal Protestants who disdained doctrine as he did. In a speech in 1899, Brewer explained that arguments about the Trinity, incarnation, and atonement were unimportant because man would not be judged by God according to "the clearness of his intellectual convictions . . . but by the purity of his life and the sweetness of its touch upon others."[36] He once mocked a minister whose sermon tried to count the number of the faithful who had died and gone to heaven and the number of sinners in hell in order to calculate when God would fulfill the biblical prophecies of the judgment day: "A minister should never spend time talking about anything, belief one way or the other . . . which will change no man's life and conduct."[37] In 1904 he praised Henry Ward Beecher, a popular nineteenth century and originally Congregational minister known for downplaying religious doctrine. Beecher's was a religion of the heart. Brewer predicted that Beecher "will be known and loved long after he who fashioned into form the most logical creed has been buried in the cold oblivion of unread history."[38] In 1902, he quoted approvingly the passage in Ellen Thorneycroft Fowler's 1900 novel **The Farringdons** in which a character claimed her husband confused theological doubts with indigestion. "So sure as he touches a bit of pork, he begins to worry hisself about the doctrine of Election," she complained.[39] Dismissing arguments about the Trinity, incarnation, atonement, and election only made ecumenicalism possible by requiring conservative sects to abandon their strong doctrinal beliefs in order to cooperate with liberal sects. Brewer was calling not so much for ecumenicalism as for liberal Protestantism to become the universal form of Christianity among Americans.

Brewer's dismissal of doctrine may have been in part provoked by the higher criticism of the Bible coming out of Germany during the nineteenth century. The higher critics treated the Bible as a historical and literary work instead of a sacred text; they pointed out the contradictions it contained and redated its parts. Their arguments cast doubt on its authorship as the divinely revealed word of God. Conservative theologians, such as those at the Princeton Theological Seminary, reacted by insisting on inerrancy: *every* word in the Bible was divinely inspired; mistakes had not been made even by early copyists who nodded over their work. Liberals like Brewer, on the other hand, coped with the assaults of the higher critics by yielding ground. In an 1897 speech to divinity students, Brewer argued that "[w]hatever may be the truth as to the nature, relations and purposes of Christ, no one doubts that His life stands as the mightiest and the most uplifting force that has entered into human history."[40] In 1901 he recounted that his son had instructed his grandson "in order to suggest the difference between narrative of

fact and allegory" that "the words of the Master were all true" but the Book of Revelation "might be considered something like a dream."[41] Brewer rejected a literal reading of Christ's encounter with the devil in Matthew 4:2–11 as "grotesquely and absurdly false," but suggested that this story was "magnificently and superbly true" as a depiction of Christ realizing his divine power in confronting the temptation to use it to benefit, attract, and bully humankind.[42]

Lessening the authority of the Bible allowed Brewer to imagine more useful ways of spending Sunday than did his New England forebears, who limited people to churchgoing and Bible-reading. Liberal Protestants' observance of the Sabbath made it "not merely rest from the ordinary toils of the week, but one in which the companionship of friends, the sweet influences of nature, and lessons from the higher forms of music and other arts are recognized as among its benedictions." Such practices were "more really Christian" than the strict Sabbath of the Puritans.[43] So Brewer defined his brand of liberal Protestantism of the turn-of-the-century as the *real* Christianity. He once went so far as to look forward to the "cooperation of all, Gentile or Jew" in moral reform projects, so that they could all look forward to being welcomed into heaven by Christ![44]

As Justice Brewer effectively included all Americans, whether they would have liked it or not, within his particular spiritual framework, so he placed all of Western history within a Protestant framework even if it took some doing to make it fit. The United States became the final triumph of Christianity. For example, he announced in his 1904 address to the YMCA that 400 years ago the races fought one another, the masses were uneducated, and "religion, the religion of Christ, was largely buried beneath a mass of superstitions" while "the Bible was a chained book." Then, three providential events occurred: Gutenberg invented movable type, the Protestant Reforma-



In a 1904 address at a YMCA banquet (similar to this one held in 1907), Brewer announced that three providential events occurred in religious history: Gutenberg invented movable type, the Protestant Reformation freed the Bible, and America was discovered as a haven for the religiously oppressed. In his view, America represented the final triumph of Christianity.

tion freed the Bible, and America was discovered as a haven for the religiously oppressed. This was no coincidence. It suggested "that in the councils of eternity it was thought out long before man began to be, that here in this Republic, in the Providence of God, should be worked out the unity of the race—a unity made possible by the influences of education and the power of Christianity."[45]

Brewer's account of the settling of the North American continent continued this Protestant narrative. In an 1897 speech that must have appealed to his audience, which was made up of Sons of the Pilgrims of Charleston, South Carolina, he paraphrased Chapter 12 of Genesis to explain that, although other races circled the globe looking for treasure and adventure, the English came seeking only a home. Just as Abraham obeyed God's command to seek out Canaan, so "did the pilgrims leave country and kindred and homes in the faith that God was leading them to a second Canaan, where should be the homes of themselves and their children forever."[46] Surely, being sons of the Pilgrims, most of his listeners would have noted to themselves that God had also promised Abraham that He would make him a great nation. Brewer saw this kind of religious patterning throughout American history, as did many Protestant Americans, who saw the Bible as "the story above all other stories."[47] Brewer used a civic version of Christian typology, which interprets how Old Testament events foreshadow those of the New Testament: he found types in the Bible who foreshadowed important Americans. For example, he told a Kansas audience in 1895 that "John Brown of Osawatomie [Kansas, the scene of Brown's fight with proslavery men] was the John the Baptist, the forerunner of Abraham Lincoln."[48] His listeners would have thought as well of the parallel between Christ crucified for all men's sins and Lincoln martyred for the country's sin of slavery.

One might think that the First Amendment's ban on Congress's power to establish a religion would hamper Brewer's effort to identify his country as a Christian nation. Far from it. One of Protestantism's original emphases was on freeing the individual Christian from the control of the established Catholic Church of Europe and its Latin Bible, available only to the priests. Brewer drew on this tradition and argued that nothing should stand between the Christian and God, neither church nor state. He also used the very words of Christ as recorded in the Gospels to justify nonestablishment. In a series of lectures on "American Citizenship" delivered before the students of Yale College in 1902, Brewer explained that "the very fact that [the United States] has no Established Church makes one of the highest credentials to the title of a christian [sic] nation." Any nation that tends to establish a religion "fails to recognize the immortal truth contained in the Master's words 'my kingdom is not of this world.'" The United States Constitution merely "recognized that truths which underlies christianity [sic], to-wit, that love not law is the supreme thing."[49] According to Brewer's interpretation, when Christ encountered the devil in the wilderness and refused to perform miracles or to accept the devil's offer of all the kingdoms of the world in exchange for his devotion, Christ was refusing "to attract the race by the displays of [his] magnificence, and by force to transform the rebellious into pure and loving children of the father."[50] Instead, humankind was left free to choose Christ, and Protestants best recognized this freedom. In contrast, as Brewer explained in 1905 to members of a Congregational Club, the Catholic Church "tells" its parishioners what to believe.[51] Freedom of conscience, a Protestant principle, required legal disestablishment.

This emphasis on volunteerism in spiritual matters found its counterpart in Brewer's legal thought. The fundamental justification of Brewer's belief in limited government may have been, not social Darwinism or corporate loyalties, but Jesus Christ. In 1895 Brewer explained that there were three social move-

ments which had dangerous appeal for good people: first, "that government do more and the individual do less"; second, "a more complete subjection of one's habits of life to the general judgment of what is best"; and third, "the swallowing up of the individual will and action in that of the corporation and organization." All would lead to slavery. The correct pattern to follow was that of the Gospel, where "there is no threat, no intimidation, no coercion, no boycott."[52] He drew a more dramatic parallel in a speech before the Virginia State Bar Association in 1906 when he condemned the "constantly broadening" exercise of the police power. "My heart responds," he explained, "to the gentle invitation of the Man of Galilee, 'Come unto me all ye that labor and are heavy laden and I will give you rest.'" He rejoiced in Christ's offer to prepare a place for him in his father's house in the Gospel according to John 14:2, but "if the Almighty should come and say to me that I *must* enter the kingdom of heaven, there is something in my Anglo-Saxon spirit which would . . . from my lips the reply, 'I won't.'" Of course, Brewer had no real fear that the Lord was going to strong-arm him into heaven. His comparison was between Christ's invitation to the free soul and the government's powers of compulsion. Although at other times he would praise the policeman for keeping order in the cities, Brewer believed that voluntary Christianity was the primary means by which humans could create a better place on earth. He concluded: "In short, I believe in the liberty of the soul, subject to no restraint but the law of love, and in the liberty of the individual, limited only by the equal rights of his neighbor."[53]

Brewer found this cherished liberty born of Christianity expressed in the Declaration of Independence, which he treated as a document as legally binding upon the nation as the Constitution. In 1904 he called it "a living and glowing truth."[54] He once explained, in an 1899 speech before the Liberal Club of Buffalo, New York, that his father's abolitionist convictions, based on the Declaration of Independence, "instilled into my youthful soul . . . the conviction that liberty, personal and political, is the God-given right of every individual, and I expect to live and die in that faith."[55]

In light of his judicial record on labor issues, one is hardly surprised to find Brewer invoking this divinely approved version of liberty to condemn unions. What is surprising is how often he condemned corporations in the same breath. According to Brewer, both destroyed the liberty of the individual. In a 1906 speech to the alumni of Yale College, he complained that unions announced to the worker "Every one come into our midst or you shall not work" while "corporations gather the wealth together and then demand that the individual must put his wealth and business into their hands, or be crushed."[56] In 1904, he warned the students of Albany Law School to beware of corporate clients who were interested in lobbying and corrupting Congress.[57] He also worried about the concentration of land into few hands and suggested that landowners seeking to have their property platted for city use be required to donate six to twelve percent of it for schools or public buildings or parks.[58] The unparalleled prosperity brought by economic growth in the late nineteenth century worried a man who knew the choice was between God and Mammon. He considered Christianity to be "the only sure antidote" to materialism.[59]

In an age when public figures who are quick to quote Scripture are also often caught up in scandals, some may wonder how seriously to take Brewer's confessions of faith. Or they may ask, which came first, his conservative legal thought or a form of Christianity that would justify it? Admittedly, the Christian Bible has been liable to astonishingly varying interpretations, and some of Brewer's interpretation of the New Testament is poor. For example, there may be no coercion or boycott in the Gospel, but the threat of eternal damnation would probably qualify as intimidation. None-

theless, without any evidence that Brewer's apparently heartfelt words were mere mouthings designed either to impress or intimidate others, it is a poor historian who can dismiss them outright.

More damaging to Brewer's religious reputation than the unproven charge of hypocrisy would be the conservative Christian's condemnation of liberal Protestantism as the thin edge of the wedge of secular humanism. For Christian fundamentalists of the early twentieth century, the liberal Protestant emphasis on morality over theology made the mistake of making humankind more important than Jesus Christ. There is one apparent slip of the tongue in a 1906 speech by Brewer to the Yale alumni of his class of 1856 that suggests a kernel of truth in such a criticism. It appears to have been a spontaneous speech, because it lacks the coherence, the rhetorical questions, and the lengthy quotations from hymns that are typical of Brewer's work. It must have been taken down by someone for publication in the *Yale Alumni Weekly*, where it appeared. The copy of this speech in the Brewer Family Papers at the Yale Archives contains two telling corrections in longhand. After condemning capital and labor combinations, Brewer is recorded to have cried out "give to the individual man the right to look up into the heaven, with neither pope, nor cardinal, nor bishop nor assembly nor anything else *between him and that power within ourselves which makes for righteousness*; and give him the right to look up politically to the government of his Nation with nothing between him and that government but what is absolutely necessary for his neighbor's protection" (emphasis added).[60] Obviously, Brewer was once again setting up Congregationalism, which has neither pope nor assembly, as the superior form of Christianity.

More interesting is the meaning of the changes made to the first part of the sentence. The correction makes it read this way: no one stood between the individual "*and that infinite power outside ourselves which makes for righteousness*" (emphasis added).[61] Did the note-taker make this single set of errors in taking down Brewer's speech? Or did Brewer actually say what was recorded in the alumni magazine and come to regret it? In voicing this paean to the individual, had Brewer slipped and forgotten for a moment his Maker? I tend to think so. Although the reference to an innate moral sense in the recorded version of the speech fits into a general Protestant belief that God had planted such a sense into each human soul, the correction implies that Brewer feared that, in his enthusiasm, he had failed to give full credit where it was due. He fixed the passage in order to make clear, if only to himself, that the ultimate source of righteousness was the God who had made the free individual.

The slip of the tongue indicates how the religious foundation for legal thought could be left behind in the twentieth century. If we sketch out a brief, admittedly artificial, genealogy of the relationship of religion and law in Brewer's life, we can start by noting that religious faith was essential to the antislavery efforts of men like Rev. Josiah Brewer. With its emphasis on natural law and the Declaration of Independence, the antislavery movement helped give rise to the doctrines of liberty of contract and substantive due process. In Brewer's mind, the other side of the free individual was his religious obligation to help the less fortunate and to value faith over materialism. Subtract the obligations and one would indeed have the heartless social Darwinist advocating laissez-faire. Brewer cherished both the liberty *and* the obligations: he too went to bed every night to sleep the sweet sleep of justice and righteousness.

ENDNOTES

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[2]"James M. Murrow, 'Talks with Notable Men,' *Washington Post*, Feb. 23, 1906" (Interview with John M. Harlan, typescript), John Marshall Harlan Papers, University of Louisville School of Law, Louisville, Kentucky.

[3]Stephen A. Siegel, "Joel Bishop's Orthodoxy," *Law and History Review* 13 (Fall 1995): 215–59, 238.

[4]Howard Schweber, "The 'Science' of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education," *Law and History Review* 17 (Fall 1999): 421–466.

[5]Linda Przybyszewski, **The Republic According to John Marshall Harlan** (Chapel Hill: University of North Carolina Press, 1999).

[6]163 U.S. 537, 559 (1896).

[7]John Marshall Harlan, Constitutional Law Lectures, 1897–98, 12 March 1898, John Marshall Harlan Papers, Library of Congress, Manuscript Division, Washington D.C.

[8]John Marshall Harlan, Speech at Presbyterian Social Union of Philadelphia banquet in response to the toast, "The Courts in the American System of Government," 27 March 1905, John Marshall Harlan Papers, University of Louisville School of Law, Law Library, Louisville, Kentucky.

[9]F. P. Brewer, **Sketch of the Life of Rev. Josiah Brewer, Missionary to the Greeks**, n.p., 1880. The churches of Asia were apocalyptic to the Rev. Josiah Brewer because the Book of Revelation 1:11, which describes the Second Coming of Christ, is addressed by its author St. John the Divine to those churches specifically.

[10]David J. Brewer, "Jubilee Anniversary: Address Delivered at the Fiftieth Annual Meeting of the American Missionary Association, October 12, 1896," 10, Brewer Family Papers, Yale University Library, Manuscripts and Archives.

[11]Michael J. Brodhead, **David J. Brewer: The Life of a Supreme Court Justice, 1837–1910** (Carbondale: Southern Illinois University Press, 1994), 9.

[12]Alan Furman Westin, "The Supreme Court, the Populist Movement, and the Campaign of 1896," *Journal of Politics* 15 (1953): 3–41.

[13]198 U.S. 45 (1905).

[14]Charles W. McCurdy, "Stephen J. Field and the American Judicial Tradition," in **The Fields and the Law** (San Francisco: United States District Court of for the Northern District of California Historical Society/Federal Bar Council, 1986), 5–19. *See also* Howard Gillman, **The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence** (Durham, NC: Duke University Press, 1993).

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

[16]Brodhead's biography and Owen M. Fiss's article "David J. Brewer: The Judge as Missionary," in McCurdy, **The Fields and the Law**, *supra* note 14 at 53–63 both address Brewer's religious faith and its relationship to his law to some degree. More recently, J. Gordon Hylton has focused on the impact Theodore Dwight Woolsey (the president of Yale College during Brewer's tenure) had upon Brewer's view of public regulation, in "David Josiah Brewer and the Christian Constitution," *Marquette Law Review* 81 (1998): 417–425, and "David Josiah Brewer: A Conservative Justice Reconsidered," *Journal of Supreme Court History* 19 (1994), 45–64.

[17]David J. Brewer, "The Enforcement of Arbitral Awards," in Edward Everett Hale and David J. Brewer, **Mohonk Addresses** (Boston: Ginn and Company, 1910).

[18]David J. Brewer, **The Protection to Private Property from Public Attack** (New Haven: Law Department of Yale University, 1891), 21.

[19]149 U.S. 457, 471 (1892).

[20]Robert T. Handy, **A Christian America: Protestant Hopes and Historical Realities**, 2nd ed. rev. (New York: Oxford University Press, 1984).

[21]David J. Brewer, **The Twentieth Century from Another Viewpoint** (New York: F. P. Revell, 1899), 45–47.

[22]David J. Brewer, "A Plea for the Bible," 27; clipping from **The Ram's Horn** (September 10, 1904), Scrapbook III, Brewer Family Papers, Yale University Library, Manuscripts and Archives.

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[24]David J. Brewer, "The Religion of a Jurist," *Outlook* 80 (June 24, 1905), 534.

[25]I Corinthians 15:53, quoted in *ibid.*, 535.

[26]David J. Brewer, "Jubilee Anniversary: Address Delivered at the Fiftieth Annual Meeting of the American Missionary Association, October 12, 1896," *supra* note 10 at 5.

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[29]David J. Brewer, "The United States: A World Power?", 68, December 22, 1901, Brewer Family Papers, Yale University Library, Manuscripts and Archives.

[30]Theodore Dwight Woolsey, **Introduction to the Study of International Law**, 6th ed. (New York: Charles Scribner's Sons, 1908), 1.

[31]Brewer, "The United States: A World Power?", *supra* note 29 at 68.

[32]Brewer, "The United States: A World Power?", *supra* note 29 at 74.

[33]Brewer, "The Enforcement of Arbitral Awards," in Hale and Brewer, **Mohonk Addresses**, *supra* note 17 at 115.

[34]David J. Brewer, "Address to the Association of the

Northwestern Mutual Life Insurance Company," 1903, 53, Brewer Family Papers, Yale University Library, Manuscripts and Archives.

[35]David J. Brewer, "Address to the YMCA," October 16, 1904, Brewer Family Papers, Yale University, Manuscripts and Archives; "Address on a Federation of Christian Denominations, Social Responsibilities of the Christian Church," 1905, Brewer Family Papers, Yale University Library, Manuscripts and Archives.

[36]Brewer, **Twentieth Century from Another Viewpoint**, *supra* note 21 at 38.

[37]Brewer, **Pew to the Pulpit**, *supra* note 23 at 49.

[38]David J. Brewer, "Addresses at the Academy of Music" 1904, Scrapbook III, 24, Brewer Family Papers, Yale University Library, Manuscripts and Archives.

[39]David J. Brewer, **American Citizenship** (New York: Charles Scribner's Sons, 1902), 92; Ellen Thorneycroft Fowler, **The Farringdons** (New York: D. Appleton and Company, 1900), 41.

[40]Brewer, **Pew to Pulpit**, *supra* note 23 at 72.

[41]Brewer, "The United States: A World Power?", *supra* note 29 at 73.

[42]Brewer, **Twentieth Century from Another Viewpoint**, *supra* note 21 at 52–53.

[43]David J. Brewer, **The United States: A Christian Nation** (Philadephia: J. C. Winston, 1905), 56.

[44]Brewer, "Address on a Federation of Christian Denominations," *supra* note 35 at 2.

[45]Brewer, "Address to the YMCA," *supra* note 35 at 6.

[46]David J. Brewer, "Address on the Home to the Sons of the Pilgrims, Charleston, South Carolina," December 22, 1897, 3, Brewer Family Papers, Yale University Library, Manuscripts and Archives.

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[48]David J. Brewer, "Some Thoughts on Kansas," before the Bar Association of Kansas, January 16–17, 1895, 61, Brewer Family Papers, Yale University Library, Manuscripts and Archives.

[49]Brewer, **American Citizenship**, *supra* note 39 at 21–22.

[50]Brewer, **Twentieth Century from Another Viewpoint**, *supra* note 19 at 52–53.

[51]David J. Brewer, "The Congregationalist, An Independent," 6, Brewer Family Papers, Yale University Library, Manuscripts and Archives.

[52]Brewer, "Some Thoughts on Kansas," *supra* note 48 at 67, 69–70.

[53]David J. Brewer, "Two Periods in the History of the Supreme Court," **Report of the Eighteenth Annual Meeting of the Virginia State Bar Association Held in Hot Springs, August 7th, 8th and 9th, 1906**, 23–24.

[54]David J. Brewer, "The First Duty of a Citizen to His City: Obedience," clipping from *The Washington Times* (April 10, 1904), section 3, 2, Brewer Family Papers, Yale University Library, Manuscripts and Archives.

[55]David J. Brewer, **The Spanish War: A Prophecy or an Exception** (Buffalo, NY: Liberal Club, 1899), 16–17.

[56]David J. Brewer, "Justice Brewer on the Individual," *Yale Alumni Weekly* (June 26, 1906), 865.

[57]David J. Brewer, **Legal Ethics: Address Delivered at Commencement of Albany Law School, June First, 1904** (Albany, NY: Union University, 1904), 8–9.

[58]Brewer, "Address on the Home to the Sons of the Pilgrims," *supra* note 46 at 34; "The First Duty of a Citizen to His City: Obedience," *supra* note 54 at 2.

[59]Brewer, **The United States: A Christian Nation**, *supra* note 43 at 87.

[60]Brewer, "Justice Brewer on the Individual," *supra* note 56 at 865.

[61]*Id.*

The Naturalization of Douglas Clyde Macintosh, Alien Theologian

RONALD B. FLOWERS

On May 25, 1931, the Supreme Court of the United States decided the case of *United States v. Macintosh.*[1] It was one of the most famous cases of its era. *The Christian Century* compared it to the infamous *Dred Scott* case.[2] In the same editorial, it said the decision "outrages the nation's conscience," and called it "incredible," "monstrous," "the inevitable death of spiritual religion."[3] Who was Douglas Clyde Macintosh, why did he have a case before the Supreme Court, and why did a liberal Protestant magazine become so exercised about it?

Douglas Clyde Macintosh was born in Canada in 1877 and received his undergraduate degree from McMaster University in Toronto. In 1904 he became a graduate student at the University of Chicago. He was ordained to the ministry of the American Baptist Church in 1907. That same year he returned to Canada to teach in a small college. In 1909, the same year he completed his Ph.D. at the University of Chicago, he was invited to join the faculty of Yale Divinity School.[4] At the time of his case, he was Chaplain of the Yale Graduate School and Dwight Professor of Theology in the Divinity School, one of the luminaries of the faculty.

In 1925 Macintosh filed with the U.S. District Court in New Haven, Connecticut, a declaration of intent to become a citizen. On March 18, 1929, he filed his application for naturalization. As part of that process, an applicant had to complete a form that provided pertinent information for the application. Question 20 on that form asked, "Have you read the following oath of allegiance?" which was then quoted. After the quotation the form asked: "Are you willing to take this oath in becoming a citizen?" Macintosh answered both halves of this question "Yes." Question 22 asked: "If necessary, are you willing to take up arms in defense of this country?" Macintosh answered the question: "Yes, but I should want to be free to judge of the necessity."[5]

This was not an acceptable answer to the government. Some background is necessary to understand why. The Naturalization Act of

1906, operative at the time of Macintosh's application, required that an applicant for citizenship take an oath in which one promised to "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same" and demonstrate that one was "attached to the principles of the Constitution of the United States, and well disposed to the good order . . . of the same."[6] Consequently, the actual oath of naturalization read:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly to _____, of whom I have heretofore been a subject; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; and that I will bear true faith and allegiance to the same.[7]

This oath appeared as Question 20 on the preliminary form. The applicant was asked if he/she was willing to take the oath to become a citizen. Macintosh answered "Yes." So it was not his response to the oath that got him in trouble, but his desire to qualify his answer about bearing arms.

Prior to Macintosh's application for citizenship, the Supreme Court had already decided a case, *United States v. Schwimmer*, in which the applicant for naturalization was not willing to promise to bear arms in defense of the country.[8] Rosika Schwimmer was an internationally known feminist and pacifist. When she was confronted with the naturalization questionnaire, she answered Question 22 "I would not take up arms personally." She expanded on her refusal to fight in war by saying "I am an uncompromising pacifist for whom even Jane Addams is not enough of a pacifist. I am an absolute atheist. I have no sense of nationalism, only a cosmic consciousness of belonging to the human family."[9] The Supreme Court denied Schwimmer's citizenship. Jus-

Hungarian-born peace activist and feminist Rosika Schwimmer was denied U.S. citizenship because she refused to promise to bear arms in defense of her country. Conscientious objectors "are liable to be incapable of the attachment for and devotion to the principles of our Constitution that are required of aliens seeking naturalization," wrote the Court in 1929.

tice Pierce Butler, writing for a majority of six, held that the only way a person could defend the Constitution was by bearing arms: "That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution."[10] The fact that Schwimmer was a famous person, a public speaker, and an aggressive pacifist enabled Justice Butler to overlook the fact that she was female, over fifty years old, and thus could not have served in the military if she had wanted to. A second reason for denying her citizenship was that she might influence others to become pacifists. Consequently, she was not attached to the principles of the Constitution as required by the Naturalization Act and thus could not be a citizen.[11]

Douglas Clyde Macintosh's application for naturalization was considered in a preliminary hearing on June 10, 1929. Because he had answered Question 22 with a conditional answer, he submitted a statement to the examiner to clarify his answer. That statement contained the following:

> I am willing to do what I judge to be in the best interests of my country, but only insofar as I can believe that this is not going to be against the best interests of humanity in the long run. I do not undertake to support "my country, right or wrong" in any dispute which may arise, and I am not willing to promise beforehand, and without knowing the cause for which my country may go to war, either that I will or that I will not "take up arms in defense of this country," however "necessary" the war may seem to the Government of the day.
>
> It is only in a sense consistent with these statements that I am willing to promise to "support and defend" the Government of the United States "against all enemies, foreign and domestic." But, just because I am not certain that the language of questions 20 and 22 will bear the construction I should have to put upon it in order to be able to answer them in the affirmative, I have to say that I do not know that I can say "Yes" in answer to these two questions.[12]

The formal naturalization hearing was before District Court Judge Warren B. Burrows on June 24, 1929. At this hearing, Macintosh elaborated on his views on bearing arms. He said that

> . . . his first allegiance was to the will of God, defined as what was morally right and for the ultimate well-being of humanity, and that after that he would put allegiance to one's country as coming before all merely individual and private interest. He stated further that he was ready to give to the United States, in return for citizenship, all the allegiance he ever had given or ever could give to any country, but that he could not put allegiance to the government of any country before allegiance to the will of God.[13]

He also said that he did not anticipate engaging in propaganda against any war in which the United States might fight, but that he could not even promise that in advance, without knowing the circumstances.[14]

Another way that Macintosh tried to distinguish himself from Rosika Schwimmer and to make his own position on war perfectly clear was to say that he was not a pacifist. The evidence presented for that assertion was that Macintosh had served in World War I. In June 1916, he was appointed a chaplain in the Canadian army and served at the front in the area of Vimy and in the battle of the Somme. Macintosh returned to teach in November 1916. In the next year, he made about forty speeches rallying support for the Allied war

Canadian Douglas Clyde Macintosh had served at the front in World War I as a chaplain in the Canadian army and, upon return home, had made about forty speeches rallying support for the Allied war effort. At right the wounded in the battle of the Somme, where Macintosh served, are taken away by ambulance.

effort. In the spring of 1918 he became an American Y.M.C.A. agent, working in France, including service at the front near St. Mihiel until the war was over.[15]

Mentioning Macintosh's war record, of which he seemed to be proud, gives occasion to interrupt the narrative of his case to examine his views on war and peace. He wrote that his experience in the war and reflection on it had led him to some conclusions. While serving as a chaplain, he had firmly believed in the cause of the Allies and in the effort to fight a war that was supposed to end all wars. He exhorted soldiers to serve their country and the future welfare of humanity in general by fighting in that noble cause. But the end of the war, and the fact that the peace turned out badly, taught him some things.

> One is a profound distrust of war as a way of settling anything. And in view of the menace to civilization of unnecessary war, it now seems to me highly immoral for an individual to promise beforehand to support what he may have to regard at the time as an unnecessary and immoral war.[16]

What is an immoral war? There are several reasons why a war may be morally unjustified. It may have an unjust motivation. Or, perhaps it has a just cause, but it may have been launched prematurely, before all legitimate means of conflict resolution had been tried. It may be that justice can never be the result of the war. Or the injustices inflicted on the other side may be out of proportion to the injustices originally experienced. That is, it may be better to suffer some injustices than to inflict the devastation associated with modern warfare. A war of self-defense would be, in the abstract, a morally justified war. But there is the terrible destructiveness of modern war and the distressing tendency of nations to justify any war they begin as defensive.[17]

On the basis of his statements accompanying the preliminary form and in open court, the negative recommendation of the Naturalization Examiner, and—one assumes—the precedent of *Schwimmer*, Judge Burrows denied Macintosh's application for citizenship. The reason given was "Attachment to the principles of the Constitution not shown."[18]

It did not take long for this decision to attract attention. There was some commentary

in the secular press, most of it deploring the denial of citizenship. Typical was an editorial in the *New York World*:

> No sensible government would do what has now been done: deliberately, by a trick question, provoke a purely theoretical debate over whether the will of the majority or the will of God is to prevail in a hypothetical case. Such debates are interesting, but governments ought to avoid them like the pest. They ought not to ask elderly women and superannuated professors of divinity whether they are prepared to surrender their convictions in advance in the event of a war against X.[19]

Another paper editorialized:

> If you put allegiance to conscience first, then you cannot be true to the principles of the United States Constitution, and cannot be a good citizen. Such is the absurd and dangerous decision of Federal Judge Burrows of New Haven, Conn. . . . For a country founded on the principles of religious freedom, such a dictum is untrue. For a country with a Quaker President [Herbert Hoover], it is inconceivable. For a country in which millions of splendid citizens hold the views thus outlawed, it is a mockery. For a country which initiated and signed an international treaty for the renunciation of war, it is hypocrisy.[20]

The *New York World* ran a long article based on an interview with Professor Macintosh. It gives a picture of the man and his ideas.

> There is little about this Yale theologian to identify him with the usual articulate ecclesiastical foes of war. He doesn't speak at peace conventions. A small, gray, mild-looking man in tweed knickers, there is nothing violent about him, not even his opinions or his cry for peace.
>
> He is a man who has tried to keep his mind free. He is a Baptist, but far from fundamentalism. . . . Though religion is his profession, he has never signed a creed. He has always been wary of pledges for the future.
>
> He is a man of good will. For such a man "the supreme sacrifice" is not to be killed, but to kill.

The article asserts that he believed that in America there ought to be room for a person to follow his conscience. That was the reason he intended to appeal his case.[21]

The Christian Century argued that Christianity would not have survived in the ancient world if the early Christians had not had the conviction that they must obey God rather than man. But now, "If Judge Burrows' decision is to stand, there might as well be written over the doors of naturalization courts: 'No Christians need apply.'" The theory of government articulated by Judge Burrows was completely pagan because it subordinated the conscience of any person, applicant for citizenship or citizen alike, Christian or not, to the will of the state. It made a mockery of the naturalization oath, or any other civil oath, that normally was affirmed with the phrase, "So help me God." Under the *Macintosh* doctrine, the will of the state took precedence over one's conscientious belief in God.[22]

Macintosh's lawyer was Charles E. Clark, Dean of Yale Law School. Although Dean Clark was Macintosh's lawyer at the District Court, as the case was appealed the New York law firm of Davis, Polk, Wardwell, Gardiner and Reed entered the picture.[23] The "Davis" of this firm was John W. Davis, one of the most esteemed lawyers in America. Macintosh could hardly have had more respected counsel.[24] By the time he took

Macintosh's case in 1929, he had been a member of the U.S. House of Representatives for two terms, the Solicitor General of the United States, the U.S. Ambassador to Great Britain, and a candidate for President in 1924 (he was a compromise selection after the 103rd ballot at the Democratic convention). During his years as Solicitor General and in private practice, he argued 140 cases before the Supreme Court, 67 of those in five years, more than any other lawyer up to his time. He was known as an advocate of consummate skill.[25] Justice Oliver Wendell Holmes, Jr., said: "Of all the persons who appeared before the Court in my time, there was never anybody more elegant, more clear, more concise or more logical than John W. Davis."[26]

Davis was enthusiastic about arguing the case. He believed strongly in the American tradition of religious freedom. He believed that the Macintosh case would enable him to uphold that tradition and argue that one's conscientiously held religious beliefs about war should not be the basis for denial of citizenship. It would enable him to express his abiding belief in the primacy of personal rights over government power. He believed that a person of Macintosh's intellectual and moral caliber was eminently qualified for citizenship. His biographer says that "he felt more keenly about this case than almost any he ever argued."[27]

The case was argued at the Court of Appeals for the Second Circuit on May 19, 1930, before Judges Martin T. Manton, Learned Hand, and Thomas W. Swan. On June 30, a decision in Macintosh's favor came down, Judge Manton writing for a unanimous court.[28]

The decision began with the assertion that it was appropriate for the Naturalization Examiner to inquire into the religious and philosophical beliefs of an applicant for naturalization. Given that the naturalization law requires that an applicant be of good moral character, attached to the principles of the Constitution, and willing to support and defend the Constitution, it is only natural that the government may explore the beliefs of the applicant. However, "Question 22 is merely informative" to the court and not dispositive of the case at hand. Citizens have a duty to fight

John W. Davis (left) argued Macintosh's appeal with great enthusiasm because he believed strongly in the American tradition of religious freedom. In his view, the intellectual and moral caliber of Macintosh (right), a professor of theology at Yale Divinity School, made him eminently qualified for citizenship.

in defense of the country, but it is "well-recognized" that if one has a religiously based conscientious objection to fighting, that person "does not lack nationalism or affection for his government." Judge Manton demonstrated that the principle was "well-recognized" by citing, in two footnotes, statutes from six states and constitutional provisions from 22 states that exempted persons with religious scruples against bearing arms from that responsibility. He also asserted that "Congress has recognized that persons having conscientious scruples against bearing arms shall be exempt." The principal examples he cited and described were the Militia Act of June 2, 1916[29] and the Selective Draft Act of May 18, 1917.[30] "This federal legislation is indicative of the actual operation of the principles of the Constitution . . . ."[31]

Next, Manton equated the beliefs of one who was a selective conscientious objector—refusing to fight only in wars considered to be unjust—and persons who have objections to fighting in all wars. The two kinds of objectors are the same because of their common desire to preserve peace and eliminate war. Manton ended this section by declaring that "the rights of conscience are inalienable and out of the reach of government."[32]

Manton further held that a person who refuses to enter military service because of conscientious scruples, so long as there is no effort to obstruct the war effort or to persuade others to do so, does not act against either society or the Constitution. Furthermore, it does not matter if the objector is not a member of a sect that teaches conscientious objection. That is, membership in a peace church is convincing evidence of religious scruples against participation in warfare, but nonmembership in such a group does not suggest that one is incapable of possessing such scruples. The government should not treat applicants for citizenship differently from native-born citizens.[33]

Finally, Manton distinguished this case from *Schwimmer*. She was a strict pacifist; Macintosh was willing to fight in wars he considered just. She was an atheist; Macintosh based his conscientious objection on his conception of the will of God.

> This applicant, from his answers, indicates an upright sense of obligation to his God, and has carefully explained his willingness to be a citizen of the United States, assuming the responsibilities and obligations of its form of government, and at the same time he has a high regard for his general duty to humanity. He wishes to keep pure his religious scruples.
>
> Applicant's application for citizenship should have been granted. The order is reversed, with directions to the District Court to admit appellant to citizenship.[34]

The Supreme Court granted a writ of certiorari on November 24, 1930. The government's argument in its brief laying out its case against Macintosh, submitted over the name of Solicitor General Thomas D. Thacher, was fairly simple. Macintosh did not deserve to be naturalized because he did not conform to the requirements of the Naturalization Act of 1906. The evidence of that is that he reserved to himself the right to determine when he would fight in a war.

The brief argued that the Court of Appeals held that once a person is admitted to citizenship, that person has equal rights with the native-born citizen. This means that "his conscientious or religious scruples against bearing arms *prior* to naturalization should be as tenderly regarded as if he were a citizen."[35] However, it maintained, the court was wrong. The only grounds on which a person may be granted citizenship are those explicitly contained in the Naturalization Act, which do not make any exceptions for those who have conscientious scruples against participating in warfare. Furthermore, the Court of Appeals was wrong in asserting that Macintosh was a conscientious objector based on religious be-

liefs! We have seen that Macintosh had argued from the beginning that he was not a pacifist, as a way of distinguishing himself from the denial of citizenship to thorough-going pacifists demonstrated in *Schwimmer*. He was not a pacifist because he was willing to participate in wars he considered to be just, as his own service in World War I showed. Now the government turned that argument back on him. Because he wanted to judge for himself about the justification of a war, he was not opposed to all war on the basis of conscientious or religious scruples. Apparently the government believed that an individual's judgment about whether a war is just could not be based on the individual's religious beliefs. "The position of respondent is *merely* that of a highly educated man with that deep sense of right and wrong which every applicant for citizenship is presumed to possess, seeking to transfer from Congress to himself, the right to determine whether the defense of this country requires him to bear arms."[36] If he seeks to transfer that determination to himself rather than Congress, he is out of conformity with the Naturalization Law. Applicants for citizenship cannot be naturalized unless there has been strict compliance with statutory requirements.

The fact that Macintosh could not take the oath of naturalization without mental reservation mitigates the nature of the oath itself. An oath has no authority if it is taken with mental reservations. When, on Question 20 of the preliminary form, Macintosh was asked "Are you willing to take this oath in becoming a citizen?" he answered "Yes." But

> [h]e was unable to give an affirmative answer unless his interpretation of the oath was adopted. His interpretation of the oath left him free to use his own judgment, or follow his own conscience as to what were the best interests of the United States. His judgment and conscience in this respect would be governed by his views as to the best interests of humanity. It is difficult to conceive of a more vague and intangible basis for allegiance than this. . . . Such an oath can not be taken with any qualifications or reservations if the statute is to be satisfied.[37]

The brief now centered on what it had only hinted at before. The decision of the Court of Appeals was inconsistent with *United States v. Schwimmer*. There the Supreme Court had said that willingness to bear arms is necessary to qualify for citizenship. In that light, it is simply impossible for one who wants to avoid military service because of conscientious or religious views to become a citizen. The Court of Appeals had granted Macintosh citizenship because the Congress had provided for exemptions for native-born citizens who were conscientious objectors, and applicants for citizenship should be treated the same, i.e., no more should be required of an applicant for citizenship than for a natural-born citizen. The government said that this argument was irrelevant.

> The test is not what rights are permitted to citizens after citizenship but what requirements are imposed by the naturalization statutes. . . . Those conscientious objectors whom we have among our citizens are dealt with in the best way possible, but the naturalization statutes afford no ground for inferring that Congress intended to show the slightest tolerance for the individual view of alien applications which might interfere with full and complete performance of the duties of citizenship.[38]

Aside from what motivated them to object to war—religiously-informed conscience or conscience alone—the government saw *Schwimmer* and Macintosh's case as exactly parallel. The subject in each case refused to comply completely with the authority of Congress and the President in case of war.

For all these reasons, it was clear that Macintosh could not wholeheartedly swear "to support and defend the Constitution and laws of the United States against all enemies, foreign and domestic" and satisfy the Court that he was "attached to the principles of the Constitution" as required by law. Consequently, the Solicitor General urged the Supreme Court to reverse the Court of Appeals and affirm the decision of the District Court.

The brief prepared by John W. Davis's firm on behalf of Macintosh was considerably more elaborate than the government's. It was organized around four points. The first of these asserted that Congress had not demanded that applicants for citizenship promise in advance to bear arms in any and all future wars. Congress had at various times excluded Chinese, those opposed to organized government, and polygamists, among others, but had never explicitly legislated that those with conscientious objections to war be excluded. The government claimed that Macintosh vitiated the oath of naturalization by wanting to take it with mental reservations. However, Macintosh had never sought to alter the oath; he was willing to take it as it was written. One does not take an oath with mental reservations unless one's beliefs and attitudes are inconsistent with the oath. Given that the Constitution and statutes did not demand that an applicant for citizenship bear arms contrary to religious objections, Macintosh's mental reservations were not inconsistent with the oath.[39]

Taking a different tack, the Macintosh brief pointed out that in the Constitution and the statutes of the land, when an oath is mentioned, there is also the option for a person to make an affirmation. This was principally out of deference to Quakers, who historically have been conscientious objectors to war. Furthermore, the oath of allegiance required of all persons being naturalized is essentially the same as that administered to all public officials except the President. Article 2, Section 1 of the Constitution details the words the President is to say on taking office, but gives the option of "oath or affirmation." Article 6 of the Constitution requires that all office holders "shall be bound by Oath or Affirmation." It is clear by implication from that language that those having religious objections to war are not to be excluded from any public office, even the presidency. Furthermore, Article 6 specifically says that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

> We submit, therefore, that since a person with conscientious religious scruples against bearing arms is not precluded from taking either the oath of office or the oath of allegiance, it is idle to contend that the respondent in entertaining such scruples "refused to take the oath without qualification or mental reservation" and that consequently he should be denied citizenship.[40]

The brief also attempted to reinforce this point by arguing that the government had tried to show that Macintosh's objections to unjust wars were not based on religious scruples, but only his own judgment. However, it was explicitly asserted in his statement before the District Court that "his first allegiance was to the will of God, defined as what was morally right and for the ultimate well-being of humanity."[41]

The second major point of the brief supporting Macintosh's case was that the Constitution and the laws of the United States do not require that a person with religious objection should bear arms. The argument began with a survey of the laws of several of the original states, before the ratification of the Constitution, showing that they rather uniformly made some provision for those who had religious objections to military service. It then turned to the debate in the First Congress. Acutely conscious of the concern in the various states to accommodate matters of conscience, James

Madison introduced into the House on June 8, 1789 a list of amendments to the Constitution, including language that would excuse from military service those who had religious scruples against such service. Because of the necessity for brevity of language, the provision for excusing objectors from bearing arms was "merged and incorporated into Article I of the Bill of Rights."[42] Moreover, a survey of the laws pertaining to the formation of militias and the conscription of soldiers for them "further proves that the Constitution and laws of the United States have *always* recognized that persons having religious scruples against bearing arms need not do so."[43] The same principle was incorporated in the constitutions of many states after the formation of the United States.

The brief continued this point by noting that the Supreme Court had interpreted the Free Exercise Clause of the First Amendment in such a way as to support Macintosh's request for exemption from bearing arms. It cited *Reynolds v. United States*[44] and *Davis v. Beason*,[45] cases articulating the principle that the free exercise of religion may be limited by government, but only when religious behavior is contrary to the peace and good order of society. Conscientious objection to war, particularly selective conscientious objection such as Macintosh's, is not religious behavior inimical to the welfare of society, particularly given that most people are willing to fight in any and all wars. So, "we submit, in the light of the prior adjudication of this Court and of other courts, that the constitutional protection of religious freedom does embrace conscientious scruples against bearing arms in a war."[46]

The third point of Macintosh's brief was that the government may not require an applicant for citizenship to forego a privilege held by native-born citizens. A naturalized citizen enjoys all the privileges of the native-born except eligibility for the presidency.[47] Naturalization is not really a favor the government confers. Once Congress has set the conditions for citizenship, "the alien has a right which no court can deprive him."[48] To require an applicant for citizenship to promise to bear arms in wars against which he might have religious scruples puts that person in an unequal relationship with the native-born. Thus he must relinquish a privilege enjoyed by the natural-born citizen as a price of citizenship. "That is the manifest result of the fixed principle of our Constitution, zealously guarded by our laws, that a citizen cannot be forced and need not bear arms in a war if he has conscientious scruples against doing so."[49]

Finally, the brief asserted that the decision of the Court of Appeals granting Macintosh citizenship was consistent with *United States v. Schwimmer*. That view was based on the fact that Professor Macintosh and Schwimmer were very different people. The brief put Schwimmer in the worst possible light, concluding she would not "recognize or give to the United States the modicum of allegiance" that citizens should.[50] On the other hand, it recalled that Macintosh had testified to the District Court "that he was ready to give to the United States, in return for citizenship, all the allegiance he . . . ever could give to any country, but that he could not put allegiance to the government of any country before allegiance to the will of God."[51] The brief stated that no thinking Christian could promise more to the country than Macintosh had. It also pointed out that, unlike Schwimmer, Macintosh was willing to fight in wars he thought were justified, as his war record showed—that, unlike her, he was not a pacifist.[52]

The government had noticed that Macintosh did not give an unequivocal promise that he would not engage in antiwar propaganda. His lawyers responded by saying that he claimed no more than the average citizen, who is guaranteed freedom of speech by the Constitution. He did not want to promise to forfeit his rightful freedom of speech. The brief concluded the free speech issue with this strong statement: "More and more it becomes

evident that the government contends in this case for the naturalization only of persons who will become uniform, unthinking, slavish robots. The government would demand that right and wrong, God and conscience be bent to nationalism. It is a doctrine fit only for despots."[53]

The case was argued before the Supreme Court on April 27, 1931. The decision, five to four against Macintosh, was announced May 25. Justice George Sutherland wrote for the Court, Chief Justice Charles Evans Hughes in dissent. Justice Sutherland set the tone for his opinion by asserting that "[n]aturalization is a privilege, to be given, qualified, or withheld as Congress may determine, and which the alien may claim as of right only upon compliance with the terms which Congress imposes."[54] He then proceeded to justify the government's inquiry into a person's beliefs on certain issues, including whether they are willing to bear arms in national defense, in order to determine whether they are fit to become good citizens. Part of being a good citizen is to be willing to support the government in war as well as peace, and whether they are willing to help in defending the country, "not to the extent or in the manner he may choose, but to such extent and in such manner as he lawfully may be required to do." Macintosh had been examined and found to be of good character and conduct, so the case revolved on his views on his participation in national defense.[55] After a long review of Macintosh's statements in his application and in the hearing before the District Court, Sutherland concluded that he was unwilling to take the naturalization oath except on his own terms. Consequently, the case was ruled by *Schwimmer*. There the Court had said that it is

Justice George Sutherland (seated at right) wrote the Court's majority opinion in *Macintosh*, and Chief Justice Charles Evans Hughes (center), joined by Justices Holmes, Brandeis, and Stone, issued his first dissent. "When one's belief collides with the power of the State," wrote Hughes, "the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the State has always been maintained."

the duty of citizens to defend the country by force of arms when it becomes necessary, and that, when objectors to war influence other people to do the same, that may be more harmful to the nation than their own nonparticipation in war. Because Macintosh qualified his willingness to fight or to refrain from propaganda, *Schwimmer* required that he not be admitted.[56]

Sutherland acknowledged that war is a terrible thing and peace is to be desired by all civilized people. However, so far in human history, the impulse to war has seemed to be stronger than the inclination to peace. Consequently, the Founders wrote war powers into the Constitution. And when the nation calls to implement the war powers of the Constitution, there can be no exceptions to service except for those provided in the Constitution itself or in international law. Whatever exemptions from the waging of war there may be must be derived from acts of Congress, not the scruples of any individual.[57] In fact, Congress had repeatedly made exemptions for native-born conscientious objectors. That record had been so long it seemed that some thought the situation was permanent. That was particularly so in this case. Then Sutherland quoted a rather long passage from "the carefully prepared brief of respondent" that contained the sentence quoted above and repeated here: "[It] is the manifest result of the fixed principle of our Constitution, zealously guarded by our laws, that a citizen cannot be forced and need not bear arms in a war if he has conscientious scruples against doing so." Sutherland replied:

> This, if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him.[58]

Several of the news accounts of the reading of this opinion said that Sutherland raised his voice to emphasize some points.[59] This was surely one of those places. Following hard on that was another, in which Justice Sutherland wrote an astonishing statement of his own, and probably also raised his voice. He pointed out that the flaw in Macintosh's attitude toward defending the country was that he wanted to reserve to himself the judgment as to when he should fight, and to base his choice on the will of God. However,

> When he speaks of putting his allegiance to the will of God above his allegiance to the government, it is evident, in the light of his entire statement, that he means to make *his own interpretation* of the will of God the decisive test which shall conclude the government and stay its hand. We are a Christian people (*Holy Trinity Church v. United States* 143 U.S. 457, 470–471), according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. But, also, we are a Nation with the duty to survive; a Nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God.[60]

Sutherland followed this statement of civil religion with a "slippery slope" argument. Macintosh refused to take the oath except in an altered form, a form consistent with his understanding of a just war. If his attitude

were to prevail, if the Court should allow him citizenship, where should the line be drawn? "It is not within the province of the courts to make bargains with those who seek naturalization. They must accept the grant and take the oath in accordance with the terms fixed by the law, or forego the privilege of citizenship." Professor Macintosh refused to accept the terms of the oath as prescribed by law. He must forego citizenship.[61]

Chief Justice Charles Evans Hughes began his dissent by acknowledging that citizenship is a privilege that the government may grant or withhold, that Congress sets the conditions by which citizenship may be granted, and even that Congress has the authority to require an applicant for citizenship to promise to bear arms in the event of war. In respect to the last, however, the question was whether Congress had in fact required such a promise. For Justice Hughes, the answer was clearly "No." For there to be certainty, Congress should express its intent on the matter in explicit language, as it had on other matters, such as whether or not the applicant was a polygamist. It had not done so. Macintosh had unjustly been denied citizenship: he had none of the forbidden beliefs or behaviors, and Congress had not explicitly required the promise to bear arms.[62]

Hughes then turned to the fact that the oath of naturalization is essentially the same as the oath required of office holders and similar to that required of the President. The office holders' oath contained the phrase "that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; . . . " Given that Article 6 of the Constitution says: "but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States" and that many have struggled heroically to establish and maintain religious freedom, it is impossible that Congress should frame the oath to require a religious test. More specifically, Congress had not required those with religiously based objections to war to promise to fight as a condition of being naturalized. There are other ways of defending the country than actually wielding arms. It is clear that native-born office holders are not required by their oath to violate their religious beliefs or practices, or their consciences. The naturalization oath should be understood in the same way, given that the language of the two oaths is virtually identical. So, applicants for citizenship should be treated the same as native office holders, not differently.[63]

Hughes did not allow Sutherland's statement that the will of the government is the same as the will of God to go unanswered.

> When one's belief collides with the power of the State, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the State has always been maintained . . . The essence of religion is a belief in a relation to God involving duties superior to those arising from any human relation. As was stated by Mr. Justice Field, in *Davis v. Beason*, 133 U.S. 333, 342: "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character and of obedience to his will." One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in a supreme allegiance to the will of God . . . And, putting aside dogmas with their particular conceptions of deity, freedom of conscience itself implies respect for an innate conviction of paramount duty . . . There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintain-

> ing the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power.[64]

The government had made much of Macintosh's refusal to promise to fight in those wars he considered unjust, so that he would take the oath with mental reservations. Hughes did not find this grounds for exclusion, for Macintosh's attitude was not novel: many people of great political importance had held similar views. If Congress had recognized the legitimacy of the refusal to fight in all wars, as it had in conscription laws and—at least by implication—in the oath for office, there was no reason why it could not be equally solicitous of those who had objection to only some wars. The idea of "attachment to the principles of the Constitution" was not inherently opposed to the tradition of freedom of conscience.

Newspapers around the country carried the story of Macintosh's defeat. The *United Press* ran an interview with Professor Macintosh himself, which is instructive about his immediate reaction to his defeat and his determination about his position.

> Professor Douglas Clyde Macintosh, the theology teacher who was declared "ineligible" for United States citizenship because he would not fight in wars "against the will of God," was disappointed but philosophical to-day as he considered the supreme court [sic] decision.
>
> "I rather expected it," he told the United Press correspondent who brought him word of the decision at his study in Dwight Hall, one of the old Yale divinity school [sic] buildings.
>
> He seemed to meditate a moment and then asked quickly: "How did they stand?"
>
> His face brightened with evident satisfaction when he was informed that his stand had won the support of the famous liberal trio of the supreme court [sic] Justices Holmes, Brandeis and Stone and caused Chief Justice Hughes to align himself with the minority and write his first dissenting opinion.
>
> Prof. Macintosh will not modify his views in order to gain citizenship, he said.
>
> "I'm not budging from my stand one bit," he asserted. "I will make no further attempt to obtain citizenship if my point of view is inacceptable."[65]

Apparently this was the only interview he gave about his case. It seems that he was very disappointed in his defeat.

Over the next week or two after the decision, the press gave the case considerable attention. There was a similar case following Macintosh's through the courts. Marie Averil Bland had been a nurse who had gone to France just after the war to nurse war casualties among the American forces. On the basis of this experience, plus her strong Christian faith (she was Episcopalian), she came to the conviction that war was contrary to the ethics of Christ. Unlike Macintosh, she was a pacifist, objecting to fighting in any war, although she was quite willing to be a nurse in wartime. A native of Canada, she applied for American citizenship and was denied. The District Court cited *Schwimmer* as precedent. Her case was argued before the Supreme Court the same day as Macintosh's and was decided the same day. She was also denied citizenship. However, both the opinion and the dissent in her case were very short, for all acknowledged that the decision in her case was controlled by the reasoning in *Macintosh*.[66]

The press coverage of the two cases was heavily weighted toward Macintosh's. He

was, after all, a much more public person than Miss Bland, and all the interesting Court rhetoric was contained in the opinions in his case. In one article, however, the day after the decision, the headline read: "U.S. Won't Deport Professor, Nurse, Denied Citizenship." They surely took some comfort in that. However, the article said, the Labor Department, which had oversight of naturalization, would henceforth be more aggressive in barring pacifists from citizenship.[67]

The press coverage did not just report the facts of the Court's decisions; there was much editorial commentary as well. Heywood Broun, in his syndicated column, said of the Justices:

Although Professor Macintosh was very disappointed by the Court's decision, he chose not to modify his stand or make further attempts to obtain citizenship. The government made no effort to deport him.

> The nine human beings concerned in handing down a verdict . . . behaved in accordance with their glandular alignment and their personal prejudices . . . But no nine men in any kind of robes are sufficiently powerful to alter the fact that the chief duty of the individual is not and never has been to the Constitution alone. There is no sort of law or amendment which can wipe out the human conscience.[68]

The Baltimore Sun said: "As an expression of a national ideal, the decision of the majority of the Supreme Court of these United States is disheartening. They have made the nation safe for morons." The *Tacoma Ledger* opined: "It's lucky for Herbert Hoover that his Quaker family got into this country before the Supreme Court delivered that arms-bearing decision." The Salem, Oregon *Statesman* said: "The court draws the line on finespun and senseless theory while opening the floodgates to the riff-raff of the world."[69] The *New York Times* expressed doubt that the decision denying Macintosh citizenship would pass the "rule of reason," given Macintosh's character.[70] Another paper said "We favor a new declaration of 'inalienable right' which will confirm the right of judges to be perfect asses." After examination of the majority and dissenting opinions "we favor conferring the degree of Doctor of Asinity upon members of the majority."[71]

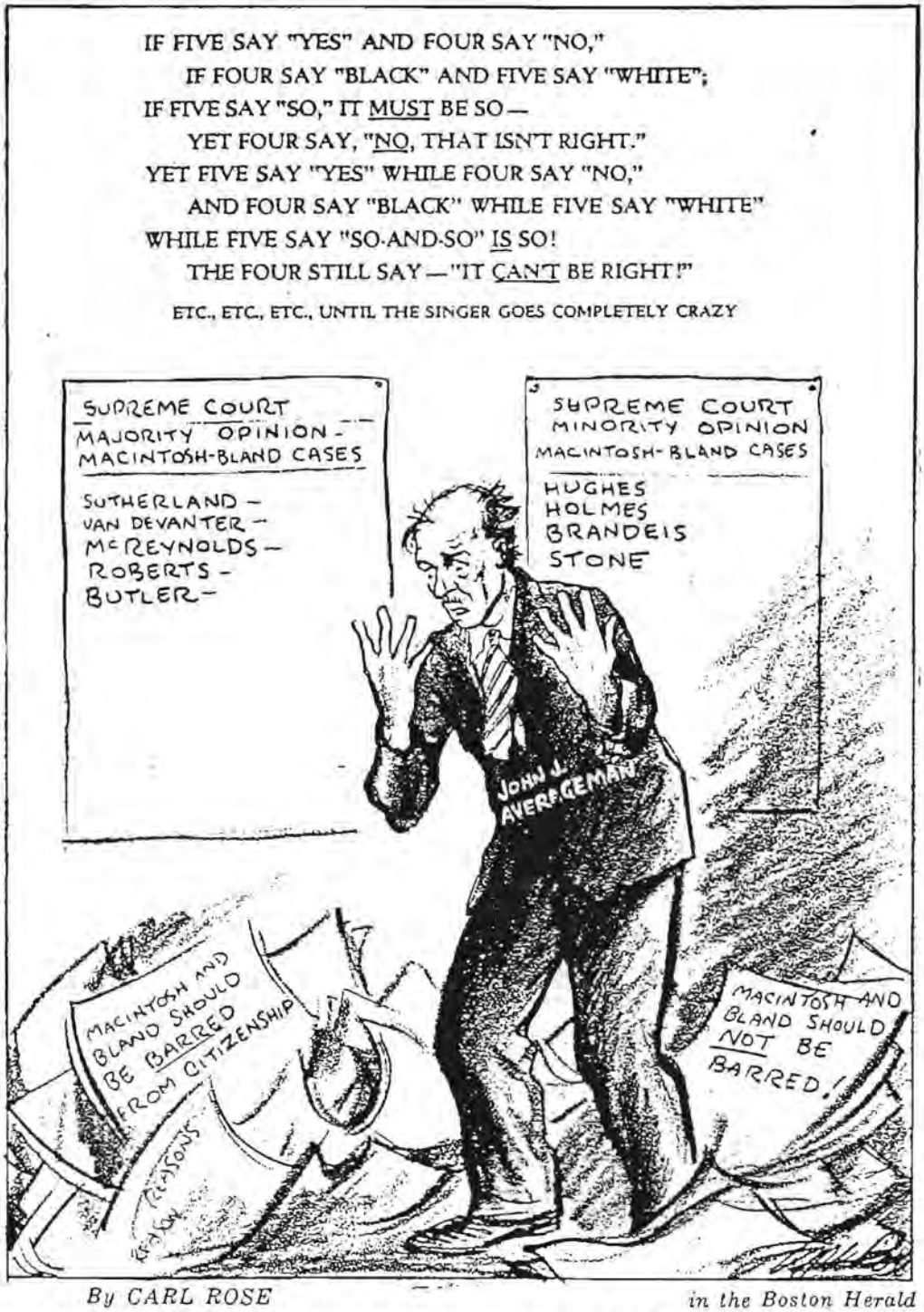
Not all the editorial comment in the secular press was pro-Macintosh; many agreed with the decision of the Court. The general theme of these was that those applying for citizenship want something from the country, and they ought to be willing to give something in return. The *Ann Arbor News* wrote of Bland and Macintosh:

> After all they have no inherent right to become Americans. The conditions for citizenship must be set up by the nation, and not by the individuals. If the resulting hardship for them is too severe, they are privileged to change their minds . . . [I]n a crisis, if it comes, [America] has a right to expect every citizen to perform his duty. The native born cannot be required to fight and the naturalized citizens be given immunity. If America is worth living in, it is worth fighting for.[72]

Another paper agreed: "No one wants war and no one wants oppression, but when the structure of the democracy is threatened, under which thrive our liberties, base, indeed, is the man or woman who will not lend a shoulder to its support. No other sort is entitled to American citizenship."[73] The *Philadelphia Record*, in a column sensitive to the complexities of the case, finally agreed with the themes just expressed. The writer assumed, as many of those writing in these other papers did, that Macintosh and Bland were people of high quality, but maintained that personal excellence was not the issue: the issue was the principle of equality of obligation with native-born citizens. "True liberalism champions individual rights—but does not exalt them to the point of countenancing philosophic anarchism."[74]

When one examines the religious press, there is no agreement with the Supreme Court, but enormous and vociferous opposition. Before turning to the press per se, it is interesting to notice that clergy mentioned the case in sermons and sometimes devoted entire sermons to it. Dr. Harry Emerson Fosdick, famous pastor of the Riverside Church in New York, was extensively quoted. He said that he, like Macintosh, would not support a morally wrong war. He affirmed Chief Justice Hughes' dissent as representative of true religion and true Americanism. Just a few days after the decision was announced, he also articulated a theme that was repeatedly asserted by the religious community: the idea that the decision "announces in a particularly obnox-

AT FOURS AND FIVES AGAIN



By CARL ROSE *in the Boston Herald*

Press reaction to the *Macintosh* decision in the secular press was mixed, but opposition by the religious press was vociferous and unanimous. This cartoon mocks the Court's close split in *Macintosh* and in *United States v. Bland*, a decision upholding the denial of U.S. citizenship to Marie Averil Bland, a Canadian nurse who was a pacifist.

ious form the doctrine of the nation's right to conscript conscience . . . The nation in war time will conscript our children, conscript our property, conscript our business . . . Has the nation, however, so taken the place of God Almighty that it can conscript our consciences?"[75] Reverend George A. Crapullo, pastor of the Irvin Square Presbyterian Church, Brooklyn, said: "If Jesus were here today and applied for American citizenship, he would be politely informed that he was not eligible."[76]

Several denominations passed resolutions in their conventions expressing discontent with the Macintosh decision. Macintosh himself received letters from four denominational conventions, three Baptist and one Presbyterian.[77] The language of the Texas Baptist Convention is typical of the views expressed. It is a strong statement of the Baptist tradition of support for religious liberty, freedom of conscience, and the belief that loyalty to the will of God is paramount to loyalty to the state.[78]

The religious press exploded in anger against the Supreme Court. Here are some representative samples: From the Northern Baptist *Baptist*: "No more serious situation has faced the Christian church in a generation than is provoked by this announcement." "In the event of another war, it is likely, under the law as the Supreme Court has defined it, that the jails will be filled to overflowing. There may come a time when it will be a disgrace for a Baptist, with his spiritual heritage, to be out of jail." From the Methodist *Christian Advocate*: "The highest interests of the nation are safe only in the hands of those who refuse a blind allegiance to any requirement or practice which violates the sense of their own most sacred obligations to God." From the Church of the Brethren *Gospel Messenger*: "We have begun the suicidal business of refusing to accept the sort of people who have made civilization possible." And from the Seventh-day Adventist *Liberty*: "The decision of the Court puts the government in the position of attempting to coerce the conscientious convictions of citizens rather than to punish them for outright violations of the law."[79]

The most outspoken journal was the liberal, nondenominational *The Christian Century*. The *Century* ran articles critical of the government's position from the time Macintosh was first denied citizenship by the District Court. For example, it said of Judge Burrows' decision: "Never has a completely pagan theory of government been stated with more rigorous consistency or more unambiguous clarity . . ."[80] What raised the journal's indignation to white-hot levels was Justice Sutherland's equation of the will of the government with the will of God. That was what caused the outburst mentioned at the beginning of this article. The problem, stated succinctly, was that in this case "for once the religion of Christ comes squarely and uncompromisingly face to face with the religion of nationalism."[81]

According to the Supreme Court, all those who believe in God and seek to live by the will of God will now have to look to the government, which will tell citizens what the will of God is. The Court's doctrine is equivalent to Prussianism. It represents the deification of the state and thus is a denial of monotheism. It portends the death of spiritual religion. "The decision of the supreme court [sic] in the Macintosh case is the most complete and clear-cut enunciation of the doctrine of the supremacy of the state over the individual conscience—or in other words, of the Cult of the Omnipotent State—ever formulated."

Lest one think that the case involves only applicants for citizenship, the doctrine of the state asserted by the Court applies equally to native-born citizens. All people who live in the country are subject to the "Omnipotent State." That is the reason that the decision is so morally monstrous and intolerable. "It stretches over all citizens the pagan panoply of a nationalistic God before whom all must bow in reverence." Consequently, the doctrine propounded by the Court "is tyranny in

its worst form." Every citizen who believes in God is affected. But, more broadly, every citizen who believes in freedom and the rights of conscience is affected.

> *The Christian Century*, on its part, takes its place beside Dr. Macintosh. We refuse to accept the constitution [sic] as interpreted by this decision of the supreme court [sic]. Our conscience is not for sale. We give no government the power to conscript our religion. We refuse to bow down and worship the state. We refuse to bear arms or to aid in any way a war which we believe contrary to the will of God.
>
> This may be treason—it is not for us to say. But if it be treason, let the defenders of tyranny make the most of it![82]

It was not enough just to rail against the Supreme Court and the doctrine of the state that it had posited. *The Christian Century* formulated a document, the "Declaration of an American Citizen" (one magazine called it "a new declaration of independence"[83]), and encouraged all Americans to sign it and send it to Congress and the President. The mechanism for this was publication of the "Declaration" in the *Century* and thirty-two other religious or denominational papers. Readers were encouraged to cut it out, sign it, and return it to the *Century* or to the paper in which they read it. The editors of the various papers would compile the responses and send them to Washington. It was a grass-roots movement to express to Congress and the President the dissatisfaction of the people over the state of affairs created by *Macintosh*.

The document was a long one with ten "Whereas" clauses, including one containing Justice Sutherland's paragraph equating the will of the nation with the will of God and one containing Chief Justice Hughes' refutation of that concept. Other "Whereas" clauses commented on the dire implications of the Court's doctrine or praised America's tradition of liberty of conscience. The meat of the document, expressing the action to which the signer promised to carry out, read:

> Therefore, I, a native-born citizen of the United States, solemnly refuse to acknowledge the obligation which the supreme court [sic] declares to be binding upon native-born citizens. I have not promised, expressly or tacitly, to accept an act of Congress as the final interpretation of the will of God, and I will not do so. In my allegiance to my country I withhold nothing, not even my life. But I cannot give my conscience. That belongs to God. I repudiate the obligation which the Supreme Court's decision would impose upon me, and declare that the imposition of such an obligation is the essence of tyranny. I refuse to be bound by it.[84]

Independently of *The Christian Century*, a similar initiative was launched by theologians, clergy, and other religious leaders. Principally under the inspiration of Reinhold Niebuhr, Professor of Theology at Union Theological Seminary in New York, a statement was drawn up to be sent to the President and Congress. It also expressed dissatisfaction with the *Macintosh* decision. There were forty-eight initial signers, but the hope was to gain 2,000 before the petition was sent to Washington. Professor Niebuhr said that the petition was "not a matter of indignation, but of common sense." The petition said that some of its signers could not, because of conscience, participate in any war. Others, like Macintosh, wanted to make a judgment about the legitimacy of the war before they would participate. But they all agreed with Chief Justice Hughes that it is imperative to recognize a duty to a power higher than the state.[85]

It may be that the editor of *Liberty* magazine best summed up the foreboding of the religious community about this case. "Without

Reinhold Niebuhr, professor of theology at Union Theological Seminary in New York, spearheaded the drafting of a petition by theologians, clergy, and religious leaders that was sent to Congress and the President. The petition condemned the *Macintosh* decision and declared that its signers, like Macintosh, would not participate in a war that they did not deem legitimate.

claiming the gift of prophecy, we predict that this will mark the beginning of an era of intolerance. It is dreadful to contemplate what might occur when the war dogs are loosed, if in times of peace an unbiased tribunal like the Supreme Court of this nation can so far misunderstand the spirit of America."[86]

Because of this wide press coverage, Macintosh received many letters, often from people he did not know. One of the more interesting letters he received was from a sixteen-year-old student in a military academy. He said he had been interested in Professor Macintosh's case from the beginning, but now even more so. At his school they were singing "The Star Spangled Banner" in chapel when he noticed this line in the third stanza: "Then conquer we must, when our cause it is just." The student said: "Now it seems to me that this statement sung by all good Americans should have some influence to bear on your case. Since the United States Government refuses to grant you your citizenship papers, because of your refusal to fight in an unjust war, it would be pertinent to ask why this statement could not be used as a defense." He then wished Macintosh the best of luck in his efforts for citizenship.[87]

In addition to wide coverage in the secular and religious press, there were also commentaries about the case in law journals. Most of these were more reporting—"case notes"—than analyses. Some of them supported the majority opinion,[88] some of them the dissent.[89] Typical of the former was the argument that Macintosh's petition for naturalization was unsound because he was not willing to submit to all laws, but just some laws, while the oath demands a pledge to obey the laws as a system, not just those with which the applicant agrees. "In short, the Macintosh principle is nothing less than the *right of individual secession*." If the Court had agreed to that principle, the door would have been opened to ever greater exceptions to the law on the part of succeeding waves of applicants.

The dissent was flawed because it did not hold Macintosh to the standard of the religious exemptions laws. The law required religious objectors to war to be members of peace churches, those that have a historic aversion to war. Macintosh was not a member of such a group; he simply wanted to assert his personal religious objections to war. "Why did Congress limit its tolerance to members of 'well-recognized religious sects or organizations?' For the very practical reason that by this limitation alone could the masses of weak-kneed intellectual slackers be prevented from sheltering under, and abusing, this privilege."[90]

Typical of the arguments against the decision was the view that an oath is not taken with mental reservation unless there is some likelihood the event at issue will occur. In this case, there was no possibility that the government would call a man in his fifties to serve in the military, even in the event of war. "An oath to support and defend the Constitution and laws should not be construed as a promise to do what cannot be compelled under the Constitution and laws as they now are." Furthermore, to equate the will of the government with the will of God is to create the fiction of government infallibility. The Constitution itself recognizes the limitation of government. The fact that the Founders established courts and formulated a system of checks and balances shows that they recognized the possibility of the abuse of power in the government they had created. Certainly the idea that the government does not have absolute sway over citizens is affirmed by the Ninth Amendment: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."[91]

After *Schwimmer*, efforts began in Congress to modify the Naturalization Act of 1906 to accommodate applicants for citizenship who had conscientious objections to war. After *Bland* and *Macintosh*, those efforts intensified. The proposed language would prohibit the exclusion of those persons who had religious or philosophical objections as to the lawfulness of war for settling international disputes. In spite of the strong support of many members of Congress, intense lobbying by groups both in favor of and against the measure, and extensive hearings by the appropriate congressional committees, none of the bills became law. Indeed, none ever made it out of committee to receive full debate in either chamber.[92] In 1940 Congress made significant changes to the naturalization laws. However, on the point crucial to this story—the wording of the naturalization oath—it made no changes whatsoever. It retained the very language that had been the basis of the Court's decisions in *Schwimmer*, *Bland*, and *Macintosh*.[93] On the congressional front there was thus no opening for Macintosh to become a citizen. Nor was there such an opening in the judicial arena, for the Supreme Court did not address the question again directly until 1946.

That year, the Court heard *Girouard v. United States*.[94] James Louis Girouard was a Canadian who filed his petition for naturalization in 1943. On Question 26 (the former Question 22) of the preliminary form, "If necessary, are you willing to take up arms in defense of this country?" Girouard answered: "No (Non-combatant) Seventh-day Adventist." The District Court admitted him to citizenship. The Court of Appeals for the First Circuit reversed, denying Girouard citizenship. It based its decision, of course, on *Schwimmer*, *Bland*, and *Macintosh*.[95]

The composition of the Court at this time was entirely different from that of the one that had decided *Bland* and *Macintosh*. Only Harlan Fiske Stone remained from that earlier Court. Justice William O. Douglas wrote for a majority of five in finding Girouard eligible for citizenship. In reaching his conclusion he drew heavily on the arguments of Chief Justice Hughes' dissent in *Macintosh*, particularly the parallel between the oath required of office holders and applicants for naturalization. Because it was clear that the United

States had never prevented potential office holders who had religious scruples against war from taking the oath, Douglas argued that such scruples should not prevent applicants for citizenship from doing so, either. The most important single sentence in the opinion was: "We conclude that the *Schwimmer*, *Macintosh*, and *Bland* cases do not state the correct rule of law."[96]

Girouard had his citizenship. What about Professor Macintosh? *The Christian Century* begged him to reapply for citizenship, a request based on the desire to see the wrong to him corrected.[97] However, it was not to be.

On May 3, 1946, a member of John W. Davis's law firm wrote to Macintosh. The letter called his attention to *Girouard* and then said that the way seemed to be open for a reconsideration of his case and for his admission to citizenship, "if you still desire to obtain it." In order to find the best way to pursue that goal, the firm had already asked one of its associates in Washington to inquire of the Clerk of the Supreme Court about procedure. The conclusion was that it would be impossible to request the Court to rehear the case after all these years. The associate had also inquired of the Immigration and Naturalization Commission. The suggestion there was that Macintosh reapply for citizenship at the District Court level, with the assumption that if everything else were acceptable his religious objection to war would not be a barrier, given that the Supreme Court had explicitly vacated his case. That was the recommendation of the Davis firm: that he obtain counsel and file a new application at the U.S. District Court in New Haven, where he still lived.[98]

In Dr. Macintosh's scrapbook about his case, there is a copy of another letter from the Davis firm dated May 9, 1946 and addressed to Mrs. Macintosh. It says that those at the firm were aware that Professor Macintosh had retired, but were not aware that he had had a debilitating stroke. In light of his health problems, only he, of course, could make the decision about pursuing naturalization. However, Mrs. Macintosh had asked in her reply to the first letter if there was any legal reason why a handicapped person could not seek naturalization. The answer was that the law would not make his physical condition an impediment if he were otherwise qualified. This was the last correspondence between the Davis law firm and Mrs. Macintosh.[99]

Roger Baldwin of the ACLU wrote to Professor Macintosh on January 22, 1947. He also raised the possibility of citizenship in the light of *Girouard*. He suggested that a private bill should be introduced in Congress as an alternative to having to reapply and going through the entire process again. "Would you be willing to have your case so handled? Or have you taken other steps?" He wrote again on January 30, this time to Mrs. Macintosh. She had replied to his earlier letter, telling him of her husband's very precarious health. She apparently also said that at this late time in his life, Professor Macintosh still had great affection for Canada.[100] So Baldwin wrote: "I would hardly think it wise in view of his condition and his strong Canadian loyalties for him to apply again. There ought to be an easy way to correct such an injustice in the light of the later wisdom of the court. But unhappily there is not." He wrote in pen at the bottom: "My warm regards to you both."[101] This seems to have been the last correspondence from anyone about the possibility of citizenship.

Professor Macintosh died on July 6, 1948 at his home in New Haven. He was seventy-one. His obituary described him as "one of the great empiricists of religion of the modern day, and his reputation was world-wide." Discussing another dimension of his life, the article also said: "Dr. Macintosh's reputation as a scholar, however, was over-shadowed, in the popular mind, by his unsuccessful two-year battle to gain American citizenship," which it then described in some detail.[102]

But death did not bring an end to Dr. Macintosh's citizenship saga. In 1977 Paul Douglas Macintosh Keane enrolled in Yale

Divinity School. Mr. Keane's parents had been good friends with Professor Macintosh, and had named their son after Macintosh in gratitude for his ministry and friendship to them. Paul Keane had never met his namesake, but he knew much about him because of what his parents had told him. When he got to Yale, it dawned on him that a fitting memorial to Macintosh would be to gain citizenship for him posthumously. He discussed this with Roland Bainton, Professor of Church History Emeritus, who had been friends with Macintosh. John C. Danforth, at the time a United States senator from Missouri, was a former student of Professor Bainton's. Professor Bainton approached Senator Danforth about the possibility of a bill in Congress to award Macintosh honorary citizenship posthumously. His letter mentioned that Macintosh would undoubtedly have pursued citizenship himself after *Girouard*, but was prevented by his frail health. "I trust the attempt will not lapse."[103]

On March 24, 1981, Senator Danforth introduced a resolution, S.J. Res. 55. After several "whereas" clauses that rehearsed Macintosh's military, professional, and legal history, it concluded: "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President is authorized and directed to declare by proclamation that Douglas Clyde Macintosh is an honorary citizen of the United States."[104] The Senate passed the resolution. Senator Danforth wrote to Professor Bainton that he was pleased to be part of the effort to achieve honorary citizenship for Macintosh. The resolution would now go to the House Judiciary Committee. He hoped it would be acted on promptly.[105]

However, it was not. On April 27, 1981, Richard Fairbanks, the Assistant Secretary for Congressional Relations of the State Department, wrote to Peter Rodino, Chair of the House Judiciary Committee, about the Macintosh resolution. The thrust of the letter was that the United States does not grant honorary citizenship. In fact, it had happened only once in U.S. history, when Winston Churchill was granted honorary citizenship in 1963. This was because of his extraordinary service to the world during World War II. The country regards honorary citizenship as the highest honor it can bestow; thus, it must be used sparingly. Only those who have made a contribution to world history and to the well-being of the United States should receive such an honor. Consequently, the State Department opposed the granting of honorary citizenship in this case. It suggested another plan that it did support: posthumous naturalization, for which there was considerable precedent. Given that the plan was to rectify the Court's denial of citizenship,

> [s]pecial legislation to provide posthumous citizenship, rather than honorary citizenship, would specifically rectify that denial, thereby drawing particular attention to its reasons and more clearly accomplishing the purpose of the bill. At the same time, such legislation would avoid extending the status of honorary citizenship and preserve its symbolic nature as this country's ultimate official recognition of extraordinary contributions to the world.[106]

I can find no other correspondence or any other indication that this initiative was ever considered again.

Professor Macintosh never became an American citizen, either before or after his death. However, the way to naturalization was opened for those having religious objections to war. In 1952, Congress modified the law so that the oath could be taken in such a way that one did not have to promise to bear arms in defense of the country. One could promise to fill noncombatant roles in the military, or even to do alternative service outside the military. Now the oath of allegiance is:

> I hereby declare, on oath, that I abso-

> lutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely without any mental reservation or purpose of evasion; so help me God.[107]

However, a careful reading of the new oath and the law behind it reveals that Macintosh would not be admitted under the new language. When Professor Bainton wrote to Senator Danforth, asking his help in getting posthumous honorary citizenship for Macintosh, he said his primary interest was in vindicating the principle of selective conscientious objection. This did not happen. There is no language in the Naturalization Act that would allow one to make a decision about specific wars in which to fight. Put more simply, one cannot pick and choose the wars in which one will fight. Even after *Girouard* and the radical liberalization of the Naturalization Act and oath, Douglas Clyde Macintosh, with his particular style of religious objection to war, still could not become an American citizen.

Note: This is an abridged version of a chapter of a book by Professor Flowers on the Schwimmer, Bland, Macintosh, and Girouard cases and their aftermath, titled* **To Defend the Constitution: Religion, Conscientious Objection, Naturalization, and the Supreme Court, *to be published by Scarecrow Press in 2002.*

ENDNOTES

[1]283 U.S. 605.

[2]*Dred Scott v. Sandford* 60 U.S. (19 How.) 393 (1857).

[3]"An Astounding Decision," *The Christian Century* 48 (June 10, 1931): 766–67.

[4]For an autobiographical intellectual history, *see* Douglas Clyde Macintosh, "Toward a New Untraditional Orthodoxy," in **Contemporary American Theology: Theological Autobiographies**, Vergilius Ferm, ed., vol. 1 (New York: Round Table Press, 1932), 277–319.

[5]Transcript of Record, *United States v. Macintosh*, 5.

[6]34 Stat. 596, c. 3592; 8 U.S.C. §§ 372, 381, 382 (1926).

[7]Transcript of Record, *United States v. Macintosh*, 5.

[8]279 U.S. 644 (1929).

[9]Schwimmer's statement first appeared in correspondesnce between her and her naturalization examiner. See Transcript of Record, United States Circuit Court of Appeals for the Seventh Circuit, *Schwimmer v. United States*, 14–16; *United States v. Schwimmer* 279 U.S. 644 at 648.

[10]*United States* v. *Schwimmer* 279 U.S. 644 at 650 (1929).

[11]"Such persons [conscientious objectors such as and including Schwimmer] are liable to be incapable of the attachment for and devotion to the principles of our Constitution that are required of aliens seeking naturalization." 279 U.S. 644 at 652. *See* Ronald B. Flowers and Nadia M. Lahutsky, "The Naturalization of Rosika Schwimmer," *Journal of Church and State* 32 (Spring 1990): 343–66.

[12]Transcript of Record, *United States v. Macintosh*, 11–12.

[13]Transcript of Record, *United States v. Macintosh*, 12. As a trained theologian and faithful Christian, Macintosh defined the will of God "as what is right and for the highest well-being of all humanity." As much as he loved America, he could not put his loyalty to country higher than his allegiance to the will of God, as he understood it. Douglas Clyde Macintosh, **Social Religion** (New York: Charles Scribner's Sons, 1939), 286.

[14]Transcript of Record, *United States v. Macintosh*, 13.

[15]Transcript of Record, *United States v. Macintosh*, 8–11.

[16]Macintosh, "Toward a New Untraditional Orthodoxy," *supra* note 4 at 307–08.

[17]Macintosh, **Social Religion**, 139, *supra* note 13 at 145–47.

[18]Transcript of Record, *United States v. Macintosh*, 15. The final decree denying citizenship was handed down on January 8, 1930. Transcript of Record, 16.

[19]"Fool Question," *New York World*, June 27, 1929, reprinted in *National Council for Prevention of War News Bulletin*, July 1, 1929, 4. From the Swarthmore College Peace Collection, hereinafter cited as Swarthmore Collection.

[20]"Can a Baptist Minister Be a Good American Citizen?" *Washington Daily News*, January 11, 1930, quoted in "Shall Militarism Determine Citizenship Qualification?", *Liberty* 25 (Second Quarter, 1930): 48. Seventh-day Adventist Historical Society, hereinafter known as SDA Archives. *Liberty* was and is a magazine of religious liberty published by the Seventh-day Adventist Church.

[21]Hickman Powell, "Macintosh Charges Laws Bar True Christian," *New York World*, June 30, 1929. American Civil Liberties Union Archives, Seeley G. Mudd Library, Princeton University, vol. 358, film reel 61. This source will hereinafter be cited as ACLU Archives. Professor Macintosh kept a large scrapbook of items about his naturalization case. It is in the Library of Yale Divinity School, record group 30. Items contained in it will be identified hereinafter as being from the DCM Scrapbook. There is a copy of this article in Macintosh's scrapbook to which is attached a note in his handwriting. He says he granted the interview to Mr. Powell to give the public a more accurate version of his position than they were getting from most of the articles about his case.

[22]"No Christians Need Apply!", *The Christian Century* 46 (July 10, 1929): 888–89; "So Help Me God!", *The Christian Century* 47 (January 22, 1930): 102–04.

[23]William H. Harbaugh says that, within hours of Judge Burrow's ruling, Macintosh's Yale Divinity School colleague Jerome Davis contacted his friend Allen Wardwell, a partner in a prestigious Wall Street law firm, asking the firm to take the case. William H. Harbaugh, **Lawyer's Lawyer: The Life of John W. Davis** (New York: Oxford University Press, 1973; University Press of Virginia, 1990), 286. There is a letter from Allen Wardwell to Macintosh, July 19, 1929, in which he says: "I have given further consideration to the question of your appeal from the decision of the District Court with regard to your naturalization application and we will be very glad to undertake this appeal on your behalf if you wish it." DCM Scrapbook.

[24]There is a bit of behind-the-scenes irony in the selection of counsel. Apparently an overture had been made to the firm of Hughes, Rounds, Schurman, and Dwight. Charles E. Clark wrote to Macintosh saying that he had taken the liberty of writing to John Caskey, of that firm, "thanking him for his interest in the matter and telling him that in view of Mr. Davis's willingness to take the case, we had decided not to trouble Judge Hughes." The "Judge Hughes" of that firm was Charles Evans Hughes. Apparently some effort was made to persuade Hughes to take Macintosh's case. The request would probably have been in vain, given that Charles Evans Hughes, Jr. was Solicitor General at the time and the senior Hughes refused to take any cases against the government. Charles Evans Hughes was confirmed as Chief Justice of the Supreme Court on February 13, 1930 and wrote a strong dissent in Macintosh's case, described in detail below. Charles E. Clark to Macintosh, July 26, 1929. DCM Scrapbook. David J. Danelski and Joseph S. Tulchin, eds., **The Autobiographical Notes of Charles Evans Hughes** (Cambridge: Harvard University Press, 1973), 285; Burnett Anderson, "Charles Evans Hughes," in Clare Cushman, ed., **The Supreme Court Justices: Illustrated Biographies, 1789–1995**, 2d ed. (Washington D.C.: Congressional Quarterly, 1995), 310.

[25]William H. Harbaugh, "John William Davis," in John A. Garraty and Mark C. Carnes, eds., **American National Biography**, vol. 6 (New York: Oxford University Press, 1999), 209–10; "John W. Davis," **The National Cyclopædia of American Biography Being the History of the United States**, vol. 45 (New York: James T. White & Company, 1962), 26–27; Harbaugh, **Lawyer's Lawyer**, *supra* note 23; Irving Stone, **They Also Ran: The Story of the Men Who Were Defeated for the Presidency** (Garden City, NY: Doubleday, Doran and Company, 1943), 321–39.

[26]Harbaugh, "John W. Davis," in **American Biography**, *supra* note 25 at 209.

[27]Harbaugh, **Lawyer's Lawyer**, *supra* note 23 at 271–80, 286–87. Coincidentally, Davis and Macintosh shared a melancholy parallel in their personal lives: both of their first wives died in childbirth. Davis married Julia McDonald on June 20, 1899. She died August 17, 1900; her baby survived. Macintosh married Emily Powell on February 13, 1921. She and her child died November 2, 1922. It so happened that one week after Emily's death, it was Professor Macintosh's turn to lead worship in the Divinity School Chapel. He did not excuse himself, but read as his scripture Habakkuk 3:17–18: "Although the fig tree shall not blossom, neither shall fruit be in the vines; the labor of the olive shall fail, and the fields shall yield no meat; the flock shall be cut off from the fold, and there shall be no herd in the stalls: yet I will rejoice in the Lord, I will joy in the God of my salvation." Harbaugh, **Lawyer's Lawyer**, *supra* note 23 at 33–34; Roland H. Bainton, **Yale and the Ministry: A History of Education for the Christian Ministry at Yale from the Founding in 1701** (New York: Harper & Brothers, 1957), 233.

[28]*Macintosh v. United States* 42 F.2d 845 (1930). For a summary of the oral arguments, *see* "Decision Reserved in M'Intosh [sic] Case." *New York Times*, May 21, 1930: 56.

[29]32 U.S.C.A. §§ 4, 3.

[30]50 U.S.C.A. § 226 note.

[31]All quotes in this paragraph are from *Macintosh v. United States* 42 F.2d 845 at 847–48.

[32]42 F.2d 845 at 848.

[33]42 F.2d 845 at 849, citing *Osborn v. Bank of U.S.* 9 Wheat. (22 U.S.) 738 (1824); *Boyd v. Thayer* 143 U.S. 135 (1892); *Luria v. United States* 231 U.S. 9 (1913); *Tutun v. United States* 270 U.S. 568 (1926).

[34]42 F.2d 845 at 849. *See* "Two Pacifists Win Right to Citizenship," *New York Times*, July 1, 1930: 31.

[35]Transcript of Record, *United States v. Macintosh*, "Brief for the United States," 9. Emphasis added.

[36]Transcript of Record, *United States v. Macintosh*, "Brief for the United States," 10–11. Emphasis added.

[37]Transcript of Record, *United States v. Macintosh*, "Brief for the United States," 15–16.

[38]Transcript of Record, *United States v. Macintosh*, "Brief for the United States," 18–19.

[39]Transcript of Record, *United States v. Macintosh*, "Brief for Respondent," 8–12.

[40]Transcript of Record, *United States v. Macintosh*, "Brief for Respondent," 13–14.

[41]Transcript of Record, *United States v. Macintosh*, "Brief for Respondent," 15–16.

[42]Transcript of Record, *United States v. Macintosh*, "Brief for Respondent," 20–25.

[43]Transcript of Record, *United States v. Macintosh*, "Brief for Respondent," 26. Emphasis added.

[44]98 U.S. 145 (1879).

[45]133 U.S. 333 (1890).

[46]Transcript of Record, *United States v. Macintosh*, "Brief for Respondent," 27–35.

[47]As authority, the brief cites *Osborn v. Bank of the United States* 22 U.S. 738 at 827 (1824) and *Luria v. United States* 231 U.S. 9 at 22 (1913). Transcript of Record, *United States v. Macintosh*, "Brief for Respondent," 40. *See* the U.S. Constitution, Article 2, sec. 1, par. 5.

[48]*Tutun v. United States* is cited as authority. "A court, in passing upon a petition for naturalization, 'exercises judicial judgment' and 'does not confer or withhold a favor.'" 270 U.S. 568 at 578 (1926). Transcript of Record, *United States v. Macintosh*, "Brief for Respondent," 40.

[49]Transcript of Record, *United States v. Macintosh*, "Brief for Respondent," 40–42.

[50]Transcript of Record, *United States v. Macintosh*, "Brief for Respondent," 44–45.

[51]Transcript of Record, *United States v. Macintosh*, "Brief for Respondent," 44–45.

[52]Transcript of Record, *United States v. Macintosh*, "Brief for Respondent," 46–48.

[53]Transcript of Record, *United States v. Macintosh*, "Brief for Respondent," 49–51.

[54]*United States v. Macintosh* 283 U.S. 605 at 615.

[55]283 U.S. 605 at 616–17.

[56]283 U.S. 605 at 617–21.

[57]283 U.S. 605 at 621–23.

[58]283 U.S. 605 at 623.

[59]*See* "Citizenship Denied to Arms Objectors," *New York Times*, May 26, 1931: 1. "In delivering their opinions today before a crowded courtroom, both Justice Sutherland and Chief Justice Hughes were more than ordinarily emphatic. Justice Sutherland especially stressed the duties of the citizen." "Court Denies Citizenship to Macintosh," *New York Herald Tribune*, May 26, 1931. "Justice Sutherland delivered the majority opinion emphatically, raising his voice until it resounded throughout the room, laying stress especially on those portions of the opinion in which he outlined the duties of citizens." "High Court Bars MacIntosh [sic], Yale Professor, as Citizen," *New York Evening Post*, May 26, 1931.

[60]283 U.S. 605 at 624–25. Emphasis in original.

[61]283 U.S. 605 at 625–26.

[62]283 U.S. 605 at 627–30.

[63]283 U.S. 605 at 630–33.

[64]283 U.S. 605 at 633–35.

[65]Boyd Lewis, "MacIntosh [sic] Gives Up Fight for Citizenship," *Hartford Times*, May 26, 1931: 1; "Prof. Macintosh Not to Change Stand on Oath," *Boston Traveler*, May 26, 1931. Versions of this story were widely published.

[66]283 U.S. 636 (1931); *see* Ronald B. Flowers, "In Praise of Conscience: Marie Averil Bland," *Anglican and Episcopal History* 62 (March 1993): 37–57.

[67]"U.S. Won't Deport Professor, Nurse, Denied Citizenship," *Washington Daily News*, May 26, 1931: 3.

[68]Heywood Broun, "It Seems to Me," the New York Telegram Corporation, May 25, 1931.

[69]All three newspaper articles were quoted in Heber H. Votaw, "Some Press Comments on the MacIntosh [sic]-Bland Citizenship Cases," *Liberty* 26 (Fourth Quarter, 1931): 105–06, 119–20. SDA Archives.

[70]"The Macintosh Case," *New York Times*, May 26, 1931: 26. ACLU Archives, vol. 471.

[71]"Five Noble Judges," Reading [PA] *Labor Advocate*, June 5, 1931. ACLU Archives, vol. 471.

[72]"Supreme Court Upholds Duties of Citizenship," *Ann Arbor News*, May 28, 1931. ACLU Archives, vol. 471.

[73]"Duty of Citizenship," *Pontiac* [MI] *Press*, May 29, 1931. ACLU Archives, vol. 471.

[74]"The Decision Barring Aliens Asking Special Privilege as Citizens," *Philadelphia Record*, May 28, 1931. *See also* "No Citizenship with Reservations," *Shepherd* [MI] *Republic*, June 19, 1931. ACLU Archives, vol. 471.

[75]"Preachers Assail Citizenship Ruling," *New York Times*, June 1, 1931: 19.

[76]"Supreme Court Decision on Macintosh Criticized," *New York Herald Tribune*, June 8, 1931. ACLU Archives, vol. 471.

[77]The Presbyterian General Assembly (June 30, 1930), the Seventh Day Baptist General Convention (August 23, 1931), the Connecticut Baptist Convention (November 6, 1931) and the Texas Baptist Convention (November 13, 1931). DCM Scrapbook. The South Carolina Baptists re-

jected the right of governments to pass judgment on any individual's conscience "whose religious convictions forbid him to sanction war." "Carolina Baptists Uphold Rights of Conscience," *The Christian Century*, 49 (March 23, 1932): 388. In addition, the Federal Council of Churches passed a resolution in support of Macintosh. "Citizenship Bar on Peace Plea Called Unwise," *The Christian Science Monitor*, December 7, 1929. So did the Quakers. "Conscience and Citizenship: A Statement by the Religious Society of Friends (Quakers)," *Friends Intelligencer*, Second Month 22, 1930, 146; "Denial of American Citizenship in Case of Macintosh Reviewed," *The Christian Science Monitor*, July 15, 1931. All in Swarthmore Collection.

[78]"A Resolution Protesting the Recent Supreme Court Decision in the Macintosh Case," Texas Baptist Convention, November 13, 1931. DCM Scrapbook.

[79]All four of these articles were quoted in Hebet H. Votaw, "The Religious Press on the MacIntosh [sic] Case," *Liberty* 27 (First Quarter, 1932): 6–7, 22–23.

[80]"So Help Me God!" *The Christian Century* 47 (January 22, 1930): 102–04. *See also* "Theirs Not To Reason Why" 46 (July 3, 1929): 859–60; "Only Killers Need Apply!" 46 (December 4, 1929): 1493–94.

[81]William Lyon Phelps, "Christianity and Nationalism," *The Christian Century* 47 (August 6, 1930): 961–63. Notice that this was written before the Supreme Court decision. The problem was even more sharply focused after Justice Sutherland's *dicta*.

[82]Quotes in this and the preceding two paragraphs taken from the following articles in *The Christian Century*: "An Astounding Decision," 48 (June 10, 1931): 766–67; "Christianity at a Crisis," 48 (June 24, 1931): 832–33; "Dr. Macintosh Asks a Rehearing," 48 (July 22, 1931): 942–43; "Re-open the Macintosh Case," 48 (September 30, 1931): 1199–1201; "The Office Notebook," 49 (January 20, 1932): 76. The magazine felt so passionately about this that it occasionally resorted to hyperbole. For example, in the last-named source it said: "The dissenting opinion of Chief Justice Hughes . . . may in time come to be regarded as a charter of liberty for the individual conscience comparable in importance to the Mayflower pact, the Virginia bill of rights, or the first ten amendments to the federal constitution."

[83]"Conscience vs. Congress," *Liberty* 27 (Second Quarter, 1932): 49.

[84]"Declaration of an American Citizen," *The Christian Century* 49 (January 20, 1932): 75. *See also* "A Call to Patriots," 49 (January 20, 1932): 80–81; "Conscience and the Law," 49 (February 17, 1932): 214–15; "Macintosh Oath Ruling Flouted in Church Press," *New York Herald Tribune*, February 21, 1932; "Declaration of an American Citizen," *The Baptist*, January 16, 1932, 76; "A Revolt of Conscience," *The Baptist*, January 30, 1932, 140.

[85]"Churchmen Ask Action to Annul Macintosh Bar," *New York Times*, September 24, 1931.

[86]Heber H. Votaw, "Rehearing for Dr. MacIntosh [sic] Denied," *Liberty* 27 (First Quarter, 1932): 11.

[87]M. Polasky, student at Miami Military Institute, Germantown, Ohio, to Macintosh, October 17, 1931. DCM Scrapbook. Actually, the line referred to is in the fourth stanza of the "Star-Spangled Banner." Congress had made the song the national anthem on March 3, 1931 (46 Stat. 1508, ch. 436; 36 U.S.C. § 301(a)), slightly less than three months before Macintosh was denied citizenship.

[88]Eugene Wambaugh, "The Oath Required for Naturalization—The Macintosh Case," *Tulane Law Review* 6 (1931–32): 132–35; S.S., "The Macintosh Case," *University of Pennsylvania Law Review* 80 (December 1931): 275–81.

[89]John B. Hennessy, "Aliens—Naturalization—Duty to Bear Arms," *Dakota Law Review* 3 (December 1931): 429–30; Morris Melnick, "Aliens—Right of Naturalization—Oath of Allegiance with Qualification," *Boston University Law Review* 11 (November 1931): 532–37; John S. Tennant, "Aliens—Naturalization—The Promise to Bear Arms," *Michigan Law Review* 30 (November 1931): 133–37.

[90]All quotes in this paragraph are from John H. Wigmore, "United States vs. Macintosh—A Symposium," *Illinois Law Review* 26 (December 1931): 375–82.

[91]All quotes in this paragraph are from Frederick Green, "United States vs. Macintosh—A Symposium," *Illinois Law Review* 26 (December 1931): 386–96.

[92]*See* the dissent of Chief Justice Harlan Fiske Stone in *Girouard v. United States* 328 U.S. 61 at 73–74 (1946). The various bills were: H.R. 3547, 71st Congress, 1st Session (1929); H.R. 297 and H.R. 298, 72d Congress, 1st Session (1931); S. 3275, 72d Congress, 1st Session (1931); H.R. 1528, 73d Congress, 1st Session (1933); H.R. 5170, 74th Congress, 1st Session (1935); H.R. 8259, 75th Congress, 1st Session (1937); S. 165, 76th Congress, 1st Session (1939).

[93]*Girouard v. United States* 328 U.S. 61 at 76–77. For the pertinent parts of the Nationality Act of 1940, *see* 54 Stat. 1142 (§ 307) and 1157 (§ 335).

[94]328 U.S. 61 (1946).

[95]*United States v. Girouard* 149 F.2d 760 (1945).

[96]328 U.S. 61 at 69.

[97]"Dr. Macintosh—Apply Again!", *The Christian Century*, 63 (May 8, 1946): 583–84.

[98]Porter R. Chandler to Macintosh, May 3, 1946. DCM Scrapbook. By this time, the firm was known as Davis, Polk, Wardwell, Sunderland, and Kiendl.

[99]Chandler to Mrs. Douglas C. Macintosh, May 9, 1946. DCM Scrapbook. Mrs. Macintosh had a habit of writing on a letter the date she answered it. There is no such notation on the letter of May 9.

[100]Macintosh wrote in 1939: "I was destined to be to the

end 'a stranger within thy gates.' I was to be *in* this American world, but not quite *of* it. But there is, perhaps, a bright side to the picture. I was to have two countries, the land of my birth and the land of my adoption. I can sing 'My country, 'tis of thee,' and mean part of it for Canada and part of it for the United States. These are my two countries, and I love them both." **Social Religion**, *supra* note 13 at xi. Emphasis in original

Sometime along the way, however, his affection for Canada began to intensify, so that by the time *Girouard* made citizenship possible, he was not interested. Mrs. Macintosh wrote to the Davis law firm: "Mr. Macintosh had stood for freedom of conscience no doubt since his boyhood . . . but with all he was a Canadian and a Britisher. . . . He was deeply disappointed with the Supreme Court decision, but in the depths there was profound compensation. The ancient loyalties could prevail." Harbaugh, **Lawyer's Lawyer**, *supra* note 23 at 297–98.

[101]Roger Baldwin to Macintosh, January 22, 1947; Baldwin to Mrs. Douglas C. Macintosh, January 30, 1947. DCM Scrapbook.

[102]"Dr. Macintosh, Yale Theology Professor, Dies," *New York Herald Tribune*, July 7, 1948: 18.

[103]Telephone conversation, Ronald B. Flowers and Paul Douglas Macintosh Keane, December 4, 1999; Keane to Flowers, December 6, 1999; Bainton to Danforth, February 19, 1981, Roland Bainton papers, Yale Divinity School Library, manuscript group 75.

[104]127 *Congressional Record* 5046–7 (1981). Emphasis in original. In addition to Senator Danforth, this bill was cosponsored by Senator Gary Hart, also a former Yale Divinity School student, and the two Senators from Connecticut, Christopher Dodd and Lowell Weicker.

[105]Danforth to Bainton, March 27, 1981; 127 *Congressional Record* D146 (1981), Yale Divinity School Library, Bainton Papers, manuscript group 75.

[106]Richard Fairbanks to Peter Rodino, April 27, 1981; Lawrence J. DeNardis to Fairbanks, May 12, 1981; Danforth to Fairbanks, May 27, 1981; Fairbanks to DeNardis, undated. All obtained from the United States Department of State under the Freedom of Information Act request # 9404254

This story is confirmed by Christopher R. Brewster, who was on Senator Danforth's staff at the time and was the one who drafted the language for S.J. Res. 55. He said that the House Judiciary Committee shared the State Department's misgivings about awarding citizenship through legislation, Rep. DeNardis's letter notwithstanding. This may explain why Peter Rodino, the Chair of the Judiciary Committee, did not respond to the judgment of the State Department. Mr. Brewster recalls that no one opposed the bill on the basis that Macintosh had been a conscientious objector, or that he was in any way unworthy of citizenship. It was just the question of whether Congress should grant citizenship. The consensus was "No." Christopher R. Brewster to Ronald B. Flowers, March 4, 1994.

[107]*See* the Immigration and Nationality Act of 1952, 66 Stat. 258, § 337; 8 U.S.C. § 1448 (a).

Calvin Coolidge and the Supreme Court

RUSSELL FOWLER

When any presidency is studied, an understandable emphasis is placed on the President's relationship with Congress, for the Constitution compels these overtly political branches to continually interact. The success of a presidency can depend on this relationship. In contrast, interaction is intermittent between the chief executive and the third branch, the judiciary. Therefore, this relationship is often overlooked unless a dramatic conflict arises—such as Franklin D. Roosevelt's ill-fated Court-packing plan—or, more commonly, a Supreme Court decision impacts presidential actions.

Due to their separate duties and daily functions, and the Supreme Court's traditional and constitutional isolation, the dealings between the President and the Court are seldom characterized by active cooperation in pursuit of common goals. As Alexander Hamilton explained, this is because the Court has no "will," only "judgment."[1] Nevertheless, because of the interest and efforts of President Calvin Coolidge, one of the most unusual yet productive periods of interaction between the two branches occurred during his presidency from 1923 to 1929.

The study of this phenomenon also serves to refute the myth that Coolidge was a "do-nothing" President who snoozed away his tenure in the White House, only occasionally waking to proclaim that "[t]he business of America is business." First, these famous words—often all too conveniently used to summarize the man, his presidency, and his times—are misquoted and taken out of context. Coolidge really said, "After all, the chief business of the American people is business"[2] at the beginning of an address asserting a higher idealism characterizing America. He went on to say, "Of course the accumulation of wealth cannot be justified as the chief end of existence,"[3] and he added:

> We make no concealment of the fact that we want wealth, but there are many other things that we want

> much more. We want peace and honor, and that charity which is so strong an element of all civilization. The chief ideal of the American people is idealism. I cannot repeat too often that America is a nation of idealists. That is the only motive to which they ever give any strong and lasting reaction.[4]

More importantly, Coolidge was an able and active administrator uniquely interested in the development of law, individual liberty, racial and religious tolerance, and the challenges confronting the courts. And important challenges they were. During Coolidge's presidency, American law was experiencing tension and change—philosophical, structural, and political—rarely witnessed since the nation's founding. Compounding the urgency, the Supreme Court was undergoing unprecedented attacks and reforms. During this critical period, Coolidge unexpectedly became the Court's greatest champion.

Finally, the study of this facet of the Coolidge presidency takes another step toward answering a general lack of scholarship on the administrations of the 1920s. Although the recent works on Coolidge by Robert H. Ferrell and Robert Sobel have made significant contributions,[5] there is still much to be done. As has been said, "[w]e know more about the Socialists and Communists in the 1920s than we do about the Republicans."[6]

Coolidge and the Law

As a lawyer, it was only natural that the law and the administration of justice fascinated Coolidge. In fact, he originally entered politics only to further the development of his law practice.[7] As he said of his days of learning "the highest profession"[8] in Northampton, Massachusetts,

> I was devoted to the law, its reasonableness appealed to my mind as the best method of securing justice between man and man. I fully expected to become the kind of country lawyer I saw all about me, spending life in the profession, with perhaps a final place on the Bench.[9]

Although Coolidge's career did not end with a place on the Bench but with one in the White House, his interest in law never diminished. Admitted to the Massachusetts bar in 1897,[10] he developed a "sincere love for the profession,"[11] grounded in a well-developed philosophy: the jurisprudence, eloquently expressed in speeches and writings, of the so-called formal or declarative theory. According to Coolidge, this traditional theory, which was the dominant theory of the nineteenth century, goes to the very root of human existence individually and as a community. As he said at Amherst in 1920,

> The process of civilization consists of the discovery by men of the laws of the universe, and of living in harmony with those laws. The most important of them to men are the laws of their own nature.[12]

Coolidge explained that "[m]en do not make laws. They do but discover them . . . That the state is most fortunate in its form of government which has the aptest instruments for the discovery of laws."[13] He believed the American people had found the "aptest instruments" in their state and federal constitutions.

Through the means of a constitutional system of checks and balances, Coolidge and other traditionalists contended, it is the original province of the legislature, reflecting the wisdom and will of the people, to find "natural laws."[14] These laws are then reflected in man's statutes, what Coolidge described as "supplement[al] artificial laws."[15] These supplemental, artificial standards are indispensable, eternal, and even sacred, for they are a reflection of higher universal truths. As Coolidge stated:

> The law represents the voice of the people. Behind it, and supporting it, is a divine sanction. Enforcement of law and obedience to law, by the very nature of our institutions, are not matters of choice in this republic, but the expression of a moral requirement of living in accordance with the truth.[16]

In the context of courts, the declarative theory is that law is composed of preexisting principles found and logically and impartially applied by the judge to the question at hand. These principles are found through legal reasoning guided by constitutionally derived statutes, precedent, and the development of the common law. It is never appropriate for the judge to "make law" or seek a result seen as desirable in accordance with the jurist's values. To do otherwise will sometimes produce a just result and often an unjust, but will always subject society to the unbridled and unelected will and prejudices of the person presiding at the moment. Thus, declarative judicial reasoning—strictly confined and channeled by legal, ethical, and constitutional constraints—is envisioned as a process calculated to reach the just conclusion objectively discovered by the judge, a judge divorced from the subjective political and policymaking process. In other words, the judge is not a lawmaker, but an unbiased and even mechanical spokesman of the law who does not form or even—in the most extreme application—facilitate implied policy. This classical theory was seen by Coolidge and others as supportive of separation of powers and a measure of predictability and finality.[17] It also had the weight of history on its side, for it was the approach expounded by giants of Anglo-American jurisprudence such as William Blackstone, James Kent, and Joseph Story.

Notwithstanding the deference accorded to legislation by those adhering to declarative theory, there were limits. With the progressive movement came all sorts of regulatory legislation affecting social, economic, labor, and business activity like never before. Conservatives viewed the wave of regulation as a dangerous intrusion into individual and property rights.[18] By the 1920s, Chief Justice William Howard Taft warned that the world would not be saved by this "overwhelming mass of ill-digested legislation."[19] In the same vein, then–Vice President Coolidge concluded that "[b]ehind very many of these enlarging activities lies the untenable theory that there is some short cut to perfection."[20]

Coolidge had been rather progressive while a member of the Massachusetts legislature,[21] having earnestly supported women's suffrage[22] and bills helping workers and the poor.[23] Yet by the early 1920s his growing concern about the direction of the law was apparent—a direction he viewed as not just invading property rights but also perilously striving to regulate morals and personal conduct. As Vice President he expressed his misgivings in a speech entitled "The Limitations of the Law," delivered before the American Bar Association convention at San Francisco on August 10, 1922. After praising earlier measures and motives, he warned of excesses:

> But there is another part of the great accumulating body of our laws that has been rapidly increasing of late, which is the result of other motives. Broadly speaking, it is the attempt to raise the moral standard of society by legislation.
>
> The spirit of reform is altogether encouraging. The organized effort and insistent desires for an equitable distribution of the rewards of industry, for a wider justice, for a more consistent righteousness in human affairs, is one of the most stimulating and hopeful signs of the present era. There ought to be a militant public demand for progress in this direction. The society which is satisfied is lost. But in the accomplishment of

these ends there needs to be a better understanding of the province of legislative and judicial action. There is danger of disappointment and disaster unless there be a wider comprehension of the limitations of the law.

The attempt to regulate, control, and prescribe all manner of conduct and social relations is very old. It was always the practice of primitive peoples. Such governments assumed jurisdiction over the action, property, life, and even religious convictions of their citizens down to the minutest detail. A large part of the history of free institutions is the history of the people struggling to emancipate themselves from all this bondage.[24]

The law, changed and changeable on slight provocation, loses its sanctity and authority. A continuation of this condition opens the road to chaos.

These dangers must be recognized. These limits must be observed . . . It is time to supplement the appeal to law, which is limited, with an appeal to the spirit of the people, which is unlimited.[25]

In the 1920s, with Coolidge's approval, a conservative Supreme Court struck down much regulation using a newly aggressive version of the declarative theory, chiefly to find prolabor legislation—such as statutes concerning minimum wage and work conditions—unconstitutional. By the end of the decade, Harvard Law Professor Felix Frankfurter observed that "[s]ince 1920 the Court has invalidated more legislation than in fifty years preceding."[26] Taft reasoned that "the Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual."[27]

The primary method of preventing this experimentation was a refined interpretation of due process and equal protection in order to encompass property and "liberty of contact" rights. In reviewing the constitutionality of statutes, the meaning of the Constitution was only to be directly found in the words of the document and, if necessary, from the original understanding of the Framers. It was argued that to do otherwise endangered the stability and purpose of the Constitution. If the Constitution, so strictly construed, did not specifically grant government the power to impose the restraint on contract and property rights, the restraint must fall. Hence many regulatory enactments were required to yield to the higher law of a timeless, changeless Constitution, unmodified and never reinterpreted to serve or conform to social conventions or public policy of the moment.[28] In a defense of the Court's actions, Coolidge stated in May of 1923:

> The authority of the law here is not something which is imposed upon the people; it is the will of the people themselves. The decision of the court here is not something which is apart from the people; it is the judgment of the people themselves. The right of the ownership of property here is not something withheld from the people; it is the privilege of the people themselves. Their sovereignty is absolute and complete.[29]

Like Coolidge, most conservatives saw nothing truly new in the Court's jurisprudence. It was the legislative power, not the judicial one, which had overreached its domain. The Court's application of declarative theory was seen as the only legitimate means of deciding cases. And it had been made all the more relevant and appealing, with its comforting links to the past and stability, by all the unsettling changes America was experiencing. Still, many pronounced declarative jurisprudence a fiction and claimed that the Court was simply protecting the existing political and economic order, and even making policy choices of its own, under the guise of an im-

partial methodology. Early on, Justice Oliver Wendell Holmes, Jr. alleged that the Court was really legislating by reading laissez-faire economic philosophy into the Constitution.[30] It was charged that the Court was negating social policy that should be allowed expression in legislation.

In the ultimate rejection of declarative theory, many began to espouse sociological jurisprudence, which contended that judges *make* law as opposed to simply *finding* it. This new reform-minded jurisprudence openly encouraged judges to craft decisional law in response to social pressures. It saw the law as developing through experience, not logic or reasoned historical development, and maintained that at the core of adjudication there should be a consideration of expediency rather than any romantic pretense of an objective, timeless justice or constitutional will. Instead of being bound to what were perceived as the intentions of dead Framers and petrified definitions, judicial progressives argued that courts should continually reinterpret the Constitution to keep pace with current societal needs and customs.[31] Thus judicial conservatives viewed the Constitution as a rock of social stability, while liberals viewed it as an evolutionary organ of social progress and even experimentation.

The battle lines were drawn. With his unexpected elevation to the presidency in August of 1923, Calvin Coolidge was placed at the center of the storm, for he would be appointing the judges who would in turn decide which method of interpretation prevailed. As the first lawyer President since Taft, he understood the stakes as well as anyone, but he had even higher priorities.

Coolidge, Taft, and the Judiciary

Leading the conservative cause on the Supreme Court was Chief Justice Taft.[32] He found his way on the Bench as a result of the victory of the Harding-Coolidge ticket in 1920. Warren Harding met Taft shortly after that election and offered him the first available seat. Taft—who always wanted to be Chief Justice more than President—declined, reasoning that only the top position befitted a former chief executive. He could not tolerate equality with Woodrow Wilson's appointees, such as Louis D. Brandeis, a Justice he had publicly criticized.[33] Besides, he had been planning to be Chief Justice for years. As president, Taft had appointed Chief Justice Edward Douglass White in 1910, partly because White's advanced age increased the odds that the position would become available in the near future.[34] With White's timely death, Taft won his prize in 1921.

The new Chief moved to alter the liberal direction of the law, and—as he saw it—"preserve the form of government prescribed by our fathers."[35] Reflecting his humor and passion, he said that his mission was "to prevent the Bolsheviki from getting control" of the Court.[36] On convening his first conference of the Justices, Taft later recalled how he announced that he "had been appointed to reverse a few decisions," and with his engaging chuckle said, "I looked right at old man Holmes when I said it."[37] With Harding's three subsequent appointments, on which Taft exerted great influence, an invincible conservative majority set about what Taft called ending "socialistic raids on property rights."[38]

Prior to becoming President, Coolidge hardly knew the Chief Justice, but had been a strong supporter of Taft's doomed 1912 re-election bid.[39] Upon Coolidge's elevation to the presidency, Taft moved swiftly to establish a relationship and influence, even being so bold as to approach him on Harding's funeral train to influence a lower court appointment.[40] He found the new President "very self-contained, very simple, very direct, and very shrewd in his observations"; he was pleased to conclude that Coolidge would defend "the institutions of the country against wild radicals," and was "very much pleased with his views of things and his attitudes."[41]

As evidence of Coolidge's interest, Taft

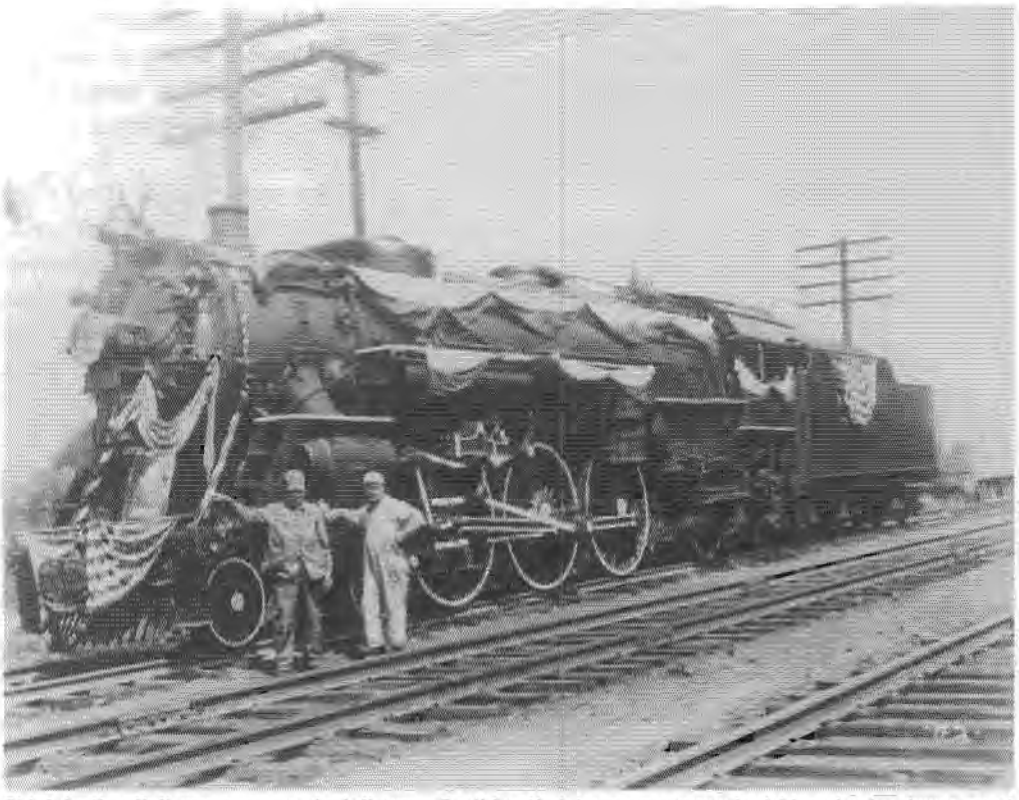
Former President and now Chief Justice William H. Taft (in judicial robe at left) swore in President Calvin Coolidge (right) at his inauguration in 1925. Taft was aggressive in advocating judicial appointments, but Coolidge soon grew tired of his interference and proved sufficiently self-assured and competent to choose able judges on his own.

soon obtained the President's assistance in "suppressing" a bill that would limit federal judges' latitude in charging juries, but found the frugal Coolidge less receptive to a measure increasing judges' salaries. However, Taft did succeed in securing White House neutrality and agreement not to veto the increase, which was enough to achieve passage.[42]

Of greater importance, Coolidge's "direct invitation to Congress" on behalf of the "Judges' Bill" in 1925 proved indispensable.[43] As the President stated to Congress in a formal message of December 3, 1924:

> The docket of the Supreme Court is becoming congested. At the opening term last year it had 592 cases, while this year it had 687 cases. Justice long delayed is justice refused. Unless the court be given power by preliminary and summary consideration to determine the importance of cases, and by disposing of those which are not of public moment reserve its time for the more extended consideration of the remainder, the congestion of the docket is likely to increase. It is also desirable that the Supreme Court should have power to improve and reform procedure in suits at law in the Federal courts through the adoption of appropriate rules.[44]

Along with other major procedural and jurisdictional reforms making the system more efficient and fair, this monumental act granted the Supreme Court wide discretion regarding the cases it accepted for review. As Coolidge had explained, freed from the bur-



Chief Justice Taft was so eager to influence Coolidge that he even approached him about a lower court appointment on former President Warren Harding's funeral train (pictured).

den of routine appeals, justices could concentrate on important constitutional and federal law questions. Recognizing that greater efficiency throughout the judiciary afforded by the reforms did not just benefit judges and lawyers, Taft argued that "[a] rich man can stand the delay . . . but the poor man always suffers."[45] Crafted and tirelessly pushed by Taft, this modernization effort won him recognition as a master architect of judicial administration, but the proposals could not have overcome congressional objections without Coolidge's intervention.

As demonstrated by his lobbying on the funeral train, Taft was particularly aggressive in advocating judicial appointments, but sadly confessed that "I don't know that Coolidge will follow my advice."[46] Although he was concerned about judicial competence, Taft's chief aim was political. He saw his unprecedented lobbying as part of his mission to reverse "radical" currents. He claimed to be removing politics from the appointment process, particularly senatorial influence, but what he was doing was replacing it with his own. Historian Robert Ferrell has reasoned that the Chief Justice really wanted to circumvent the traditional political process and its compromising ways because those produced by it might compromise with labor.[47] With Harding's lack of interest or Taft's intimidation of Harding,[48] Taft had simply conveyed his choices to Attorney General Harry M. Daugherty, and those choices were accepted without hesitation. Hoping to maintain this influence, Taft wrote Coolidge:

> I hope you will permit me to write you on questions of this sort, where I have any means of information, because of my intense interest in securing a good judiciary, and my earnest

> desire to help you in your manifold labors where I think I can be of assistance in a field like this one.[49]

Coolidge did not follow Taft's advice on this first appointment, but gave assurances that "he was prepared to draw a rigid line on some subjects and ignore political considerations in matters like judicial appointments," and he "did not expect to be embarrassed by the attitude of Senators on the subject of judgeships."[50] For the first six months of Coolidge's presidency, Taft maintained significant influence on appointments.[51] The President, however, soon proved to be less malleable than Harding and Daughtery, probably because he grew tired of Taft's interference, was never intimidated, and felt quite capable of handling the task without assistance.

Unlike Harding and most other Presidents, Coolidge was greatly interested in appointments at all levels and spent an extraordinary amount of time evaluating potential judicial nominees. As he stated in his autobiography, "One of the most perplexing and at the same time most important functions of the President is the making of appointments."[52] Reflecting the seriousness he gave such appointments, he was very secretive, not even discussing them with his closest advisors.[53] His method was to consider views slowly and carefully, particularly those of bar and political leaders in the jurisdiction of the vacancy, and then make the decision himself.[54] As Taft's influence faded, however, Taft lamented that Coolidge was considering Senators' wishes:

> The President has not consulted me so much about the judges as he did. I think my constant interest and my attitude of opposition to Senators have tired the appointing power. [The President] is a singularly unsatisfactory person with whom to deal in respect to judges. He will remember the recommendations of the Senators, because there is a political bond there, but I doubt if he has in mind anything that I tell him, unless I make it almost a personal matter.[55]

Although thrilled with Learned Hand's appointment to the circuit court, Taft wrote Hand a message reflecting his frustration: "[I]n our criticism of the selection of judges we must bear in mind that we have succeeded in getting some good ones from Calvin after a while."[56] More negatively, Taft later complained that "[i]t seems now that we have got to rejoice if we don't have a bad appointment. We can't aspire to good ones."[57]

This criticism was unfair. On a number of occasions Coolidge resisted heavy political pressure, and he never adhered to the tradition and deference of senatorial courtesy.[58] One historian has noted that "[f]ew Presidents have set for themselves higher standards for appointees or acted more independently of solicitors"[59] and concluded that "[i]n choosing men for important positions, Coolidge seldom played politics, but tried honestly to select the best available candidate. A careful study of his appointments will show that he was seldom influenced by partisan motives, party man though he was."[60] As far back as his famous "Have Faith in Massachusetts" speech of 1914, given on his election as President of the Massachusetts Senate, Coolidge extolled the virtues of courts free of politics:

> Courts are established, not to determine the popularity of a cause, but to adjudicate and enforce rights. No litigant should be required to submit his case to the hazard and expense of a political campaign. No judge should be required to seek or receive political rewards. The courts of Massachusetts are known and honored wherever men love justice. Let their glory suffer no diminution at our hands. The electorate and the judiciary cannot combine. A hearing

Unlike Harding (standing between Taft and Robert Todd Lincoln), his predecessor Coolidge was interested in appointments at all levels and spent an extraordinary amount of time evaluating potential nominees.

> means a hearing. When trial of causes goes outside the courtroom, Anglo-Saxon constitutional government ends.[61]

Coolidge's convictions resulted in high-quality appointees, with legal qualifications overriding political pull or ideological purity. For example, Coolidge's circuit court judges included legal giants such as Thomas W. Swan (formerly dean of Yale Law School), John J. Parker, and Learned and Augustus Hand.[62] As Coolidge said, "The public service would be improved if all vacancies were filled by simply appointing the best ability and character that can be found. That is what is done in private business. The adoption of any other course handicaps the government in all its operations."[63] Concerning Coolidge's method of governance, Court historian Henry J. Abraham wrote:

> Shy and retiring yet stubborn and occasionally mercurial in temper, the hard-working, scrupulously honest, colorless, and moral President, known affectionately as "Silent Cal," was astonishingly popular. The times were tailor-made for his conservative businessman's approach to government.[64]

In contrast to Franklin D. Roosevelt, who used district court judgeships to reward local politicians, Coolidge's selections were lawyers of merit. Tellingly, New Deal agency lawyers confessed that they preferred Coolidge's judges to FDR's: as a legal historian observed, "[t]he former might be politically

conservative, but more of a true lawyer, and hence more willing to accept a reasoned argument and enforce the law."[65]

Accordingly, it was Coolidge, not Taft, who made the greatest headway in removing politics from the appointment process. What upset Taft was that by 1925 his political influence regarding appointments was all but nonexistent. By the end of Coolidge's presidency, Taft sighed that "[t]hey pay no attention to me at the White House."[66] However, as Robert H. Ferrell has pointed out, Taft should have consoled himself with the knowledge that Coolidge's appointees were mostly judicial conservatives.[67] They were also 94.1 percent Republican.[68] These appointees would permeate the federal judicial system for decades; more importantly, they staffed the Bench with competence and fairness.

It should not be assumed from Taft's dejection that he disliked Coolidge. Indeed, he liked him very much. Ironically, it was the Coolidge traits Taft most liked which prevented Taft's domination: self-confidence, sureness of purpose, and political savvy. As Taft confessed, "He is nearly as good a politician as Lincoln."[69]

Coolidge, the Court, and the Election of 1924

Coolidge's immense popularity and political shrewdness became apparent to most observers in 1924. Between becoming President and the time of the Republican National Convention, he purged from the government the remnants of the discredited Harding regime, disassociated the GOP from the scandals, and assumed complete control of the party apparatus. The party happily surrendered to Coolidge's dominance, for he was all that stood between it and oblivion. In an odd way, his accessibility and skillful use of the press—through such means as regular press conferences, colorful photo opportunities, and radio addresses—made him the first media President. Not only did he contain the damage from Teapot Dome, he also swiftly managed his policies, pronouncements, and public image in such a way as to become the political personification of integrity and prosperity. In his taciturnity, he seemed to hover above the hubbub of petty politics; the less he said, the more authoritative were his words. Taft, who secretly helped to draft the Republican platform,[70] frantically urged as many people as he could to support Coolidge.[71] He wrote Andrew Mellon "that the welfare of the country is critically dependent upon the success of President Coolidge. The Republican Party has no chance without him. I don't remember a case in which a party is so dependent on a man."[72]

Even Democratic leaders, such as Alfred E. Smith, Franklin D. Roosevelt, and presidential nominee John W. Davis, prefaced criticism with praise. In fact, the conservative Davis—a stellar lawyer but a disappointing politician—was nominated in an attempt to out-Coolidge Coolidge. However, as Roosevelt admitted of the task confronting Davis, "[t]o rise superior to Coolidge will be a hard thing . . ."[73] The Democratic nominee proved unable to meet the challenge and became irrelevant as the President, press, and public ignored him. By the summer of 1924, "the Quiet President" could survey the American political landscape and see no real threats to his Republican order. The same was not true for Taft and his Court.

The aging and ailing Senator Robert "Fighting Bob" La Follette of Wisconsin accepted the Progressive nomination and summoned the energy to wage an energetic campaign. Although La Follette attacked administration farm and labor policies, and even called for the nationalization of railroads, his most radical proposals concerned the judiciary, a crusade that had become an obsession. Enraged over injunctions against strikers and Supreme Court rulings finding prolabor laws unconstitutional, La Follette called for the election of federal judges,[74] the prohibition of inferior federal courts from de-

Progressive Senator Robert La Follette (right) called for the election of federal judges, the prohibition of inferior courts from declaring acts of Congress unconstitutional, and the empowerment of Congress to overturn decisions by the Supreme Court. These radical proposals stemmed from La Follette's rage over injunctions against strikers and over Supreme Court rulings holding prolabor laws unconstitutional.

claring acts of Congress unconstitutional, and the empowering of Congress to overturn decisions of the Supreme Court,[75] or what he called "the Supreme rulers."[76] As La Follette decried:

> Thus property rights are made supreme over human rights. Thus capital is exalted over labor. I offer this challenge to all those who regard judges as the sole defenders of our liberties: Show me one case in which the courts have protected human rights and I will show you twenty in which they have disregarded human rights to protect property.[77]

Described by Elliott Roosevelt as politically "cool [and] cunning,"[78] Coolidge instinctively wanted to ignore not only Davis but also La Follette. Furthermore, he did little campaigning, partly due both to the inevitability of his victory and to the death of his son. Nevertheless, Taft and Vice President Charles G. Dawes sought to make the defense of the judiciary the chief issue of the campaign,[79] the more so after the suggestions for amending the Constitution seemed to catch the imagination of liberal reformers and labor activists. Coolidge finally determined that responding to La Follette was politically expedient, especially considering the conservative temper of the times. In addition, riding to the defense of the Constitution and the Court, with the odds weighted so heavily in his favor, appealed to his mischievousness. Also certainly important in Coolidge's calculations was his reverence for the Court and his sincere belief that it was acting properly. In any event, to Taft's glee, two corresponding themes of Coolidge's low-key campaign were unveiled: the rule of law and the sanctity of the judiciary.

Both Coolidge and Taft shared profound

concerns about what they felt was a general lack of respect for the law,[80] but Coolidge's interest in the subject was much deeper and broader. "He thought the essence of the republic was not so much democracy itself as the rule of law," observed British historian Paul Johnson, "and that the prime function of government was to uphold and enforce it."[81] As Coolidge himself said, "But in resisting all attacks upon our liberty, you will always remember that the sole guarantee of liberty is obedience to law under the forms of ordered government."[82] Or, as he stated in his 1925 inaugural address, "In a republic the first rule for the guidance of the citizen is obedience to law."[83] He believed this to be the key principle distinguishing America from the "forces of darkness."[84] Yet Coolidge's rule of law theme was more than patriotic platitudes: it included his longstanding concern for the civil and economic rights of African Americans. As Robert Sobel has noted, " . . . few presidents were as outspoken on the need to protect the civil rights of black Americans as Calvin Coolidge."[85]

There was nothing new about Coolidge's interest in human rights and his intertwining of those rights with the rule of law and democracy. As early as 1914, he urged the Massachusetts Senate to "[r]ecognize the immortal worth and dignity of man . . . Such is the path to equality before the law. Such is the foundation of liberty under the law. Such is the sublime revelation of man's relation to man—Democracy."[86] During his vice presidency, he warned that "[w]e need to learn and exemplify the principle of toleration. We are a nation of many races and of many beliefs."[87] In his first message to Congress, in December of 1923, he stated:

> Numbered among our population are some twelve million colored people. Under our Constitution their rights are just as sacred as those of any other citizen. It is both a public and private duty to protect those rights. The Congress ought to exercise all its powers of prevention and punishment against the hideous crime of lynching . . . "[88]

During the 1924 campaign Coolidge spoke at Howard University and, in obvious criticism of the Ku Klux Klan, denounced "the propaganda of prejudice and hatred" and praised the contributions of black Americans in the recent war effort.[89] As in his first message to Congress, he called for tough federal antilynching laws in the GOP platform so that "the full influence of the federal government may be wielded to exterminate this hideous crime."[90] The platform went on to state his wish that a federal commission be created to investigate the "social and economic conditions" of African Americans and promote "mutual understanding and confidence."[91]

Coolidge personally urged black Republicans to run for public office, provided extensive party patronage to their political organizations and leaders in the South (such as Robert Church, Jr.'s Lincoln League in Memphis),[92] and repeatedly called for federal funding of medical school scholarships for black students.[93] He was "much troubled by insistent discrimination" against black Justice Department employees, calling it "a terrible thing," and pointedly instructed Attorney General John G. Sargent at a cabinet meeting "to find a way to give them an even chance."[94] Although these stands may have been "politically imprudent"[95] considering the times, he never wavered in his commitment to civil rights and used the 1924 campaign to advance this cause.

On Saturday, September 6, 1924, at the dedication of a monument to Lafayette at Baltimore, Coolidge—the last President not to use a speechwriter—launched the other legal theme of his campaign, a passionate defense of the Supreme Court from La Follette's attacks. Coolidge declared that

> [o]ne of the greatest contributions which America made to the science

of government was the establishment of an independent judiciary department under which this authority resides in the Supreme Court. That tribunal has been made as independent and impartial as human nature could devise. This action was taken with the sole purpose of protecting the freedom of the individual, of guarding his earnings, his home, his life.

It is frequently charged that this tribunal is tyrannical. If the Constitution of the United States be tyranny; if the rule that no one shall be convicted of a crime save by a jury of his peers; that no orders of nobility shall be granted; that slavery shall not be permitted to exist in any state or territory; that no one shall be deprived of life, liberty or property without due process of law; if these and many other provisions made by the people be tyranny, then the Supreme Court when it makes decisions in accordance with these principles of our fundamental law is tyrannical. Otherwise it is exercising the power of government for the preservation of liberty. The fact is that the Constitution is the source of our freedom. Maintaining it, interpreting it, and declaring it are the only methods by which the Constitution can be preserved and our liberties guaranteed.[96]

Coolidge went on to explain why judicial power should not be "transferred in whole or in part to the Congress" because of its acquiescence to "popular demand" and "partisan advantage."[97] He concluded that these influences would endanger minority rights:

> Some people do not seem to understand fully the purpose of our constitutional restraints. They are not for protecting the majority, either in or out of the Congress. They can protect themselves with their votes. We have adopted a written constitution in order that the minority, even down to the most insignificant individual, might have their rights protected. So long as our Constitution remains in force, no majority, no matter how large, can deprive the individual of the right of life, liberty or property, or prohibit the free exercise of religion or the freedom of speech or of the press. If the authority now vested in the Supreme Court were transferred to the Congress, any majority no matter what their motive could vote away any of these most precious rights.[98]

The President returned to Baltimore the following month and defended the Court with even stronger language at a Chamber of Commerce gathering:

> It is not necessary to prove that the Supreme Court never made a mistake. But if this power is taken away from them, it is necessary to prove that those who are to exercise it would be likely to make fewer mistakes.
>
> It is proposed to place this power, which it must be remembered is that of life and death, in the hands of the Congress. That would give to that body power to violate all the rights which I have just mentioned, the power to destroy the states, abolish the Presidential office, close the courts, and make the will of the Congress absolute. Is it supposed that in the exercise of this power they would be more impartial, more independent than the judges of the Supreme Court? It seems to me that this would be a device more nearly calculated to take away the rights of the people and leave them subject to all the influences which might be exerted on

> the Congress by the power and wealth of vested interests on one day and the passing whim of popular passion on another day. The poor and the weak would be trampled under foot. Under such a condition, life, liberty, and property, and the freedom of religion, speech, and the press, would have very little security. In time of national peril our Government would have no balance wheel. If this system should be adopted and put into effect, the historian would close the chapter with the comment that the people had shown they were incapable of self-government and the American Republic had proved a failure. If we are unable to maintain the guarantees of freedom in this land, where on earth can they be maintained?[99]

In the wake of the Red Scare of 1919 and 1920, Republican functionaries had little difficulty in making La Follette seem like the advance guard of communism, while the editorial pages and cartoons portrayed Coolidge as the selfless champion of constitutionalism. On election day, the size of the President's landslide stunned even his most ardent supporters. Attorney General Harlan Fiske Stone proclaimed it "a triumph of decency and straightforwardness."[100] Taft jubilantly wrote, "It was a famous victory and one most useful in the lessons to be drawn from it, one of which is that this country is no country for radicalism. I think it is really the most conservative country in the world."[101]

Coolidge's Justice

Between the election and the inaugural, Coolidge was presented with his only opportunity to name a Supreme Court Justice. The doddering Joseph McKenna of California, a McKinley appointee, had finally been persuaded to retire by Taft, Holmes, and other members of the Court.[102] On January 25, 1925, brushing aside expectations that another Westerner would be chosen as a replacement[103] and emphasizing lawyering skills over political considerations (as with lower court appointments), Coolidge nominated Attorney General Harlan Fiske Stone, a former dean of Columbia Law School and Wall Street lawyer.

Chiefly known in the worlds of law and education, the robust Stone had been appointed Attorney General in 1924 to replace the scandal-plagued Harry Daugherty, who had been forced from office by Coolidge as part of his government house-cleaning. Congressman and Amherst alumnus Bertrand Snell originally recommended Stone to Coolidge.[104] Naturally, many believed that Stone was selected because he attended Amherst with Coolidge, but, as Stone explained, "We were not of the same class and therefore were not intimates, although I doubt if many were intimate with him. His extreme reticence made that difficult."[105] Once installed at the Justice Department, Stone rebuilt morale[106] and became a vital part of Coolidge's mission to restore trust in government, soon proving to be one of the nation's greatest Attorneys General. Nevertheless, his investigations of certain business activities and trust-busting disturbed some in conservative circles, causing the suggestion that he was being promoted to put an end to his antitrust efforts.[107] Yet his dedication and directness impressed many, most importantly the President. He was also loyal to Coolidge, campaigning vigorously for him in 1924[108] and joining in the denunciation of La Follette's proposals regarding the Court.[109] Taft, who had grown to admire Stone—albeit temporarily—wrote that "[t]he President was loath to let him go, because he knew his worth as Attorney General."[110]

Despite his qualifications and support, Stone's nomination encountered a small but determined opposition campaign in the Senate. The most vocal objections came from Senator Burton K. Wheeler of Montana and Senator George W. Norris of Nebraska.

Coolidge appointed Harlan Fiske Stone Attorney General in 1924 to replace the scandal-plagued Harry Daugherty (above right, with President Harding at left). Some surmised that Stone was selected because he had attended Amherst College with Coolidge, but Stone (pictured at left in 1893 while a junior in college) demurred that they had not been in the same class and were not intimates.

Wheeler was angry over the Attorney General's refusal to end a prosecution against him brought by Daugherty. Norris incorrectly feared that Stone was a puppet of big business due to his Wall Street connections. Together with a handful of "insurgent" Republicans, they presented real problems for the White House. However, Coolidge fought back. After flatly rejecting suggestions that he withdraw the nomination, he applied maximum pressure on the Senate. Stone aided the effort when he broke precedent by being the first Supreme Court nominee to appear before the Judiciary Committee. After undergoing grueling questioning with dignity, he was recommended by the committee and confirmed by the Senate on February 5 by a vote of seventy-one to six.[11]

Sixteen years later, Senator Norris would

take the Senate floor to express regret for his opposition.[112] The reason for Norris's change of heart soon became apparent. With his invincible conservative majority, Taft thought his struggle for control of the heart and soul of the Court was won, and all he had to do was await the march of time to silence the dissenting but aging voices of Holmes and Brandeis.[113] He saw Stone as simply a safe and necessary replacement in his conservative line. However, within a year of Stone's arrival on the Bench, the new Justice was increasingly found in the dissident camp, especially in civil rights and liberties cases.[114]

Stone's separation from Taft's majority arose from his ideals of tolerance and belief in the dignity of man. This spurred him to strike down perceived threats to individual liberty. Furthermore, his belief in self-government and the doctrine of judicial restraint compelled him to defer to legislative power, even when personally disagreeing with the policy goals.[115] This is similar to Coolidge's reasoning on prohibition: while enforcing it vigorously as the law of the land, he thought it an impractical policy and an improper intrusion into private lives.[116] Perhaps Stone's jurisprudence is best described as simply an honest, nonpolitical application of declarative theory. In any event, he subsequently ruled to uphold New Deal legislation and was appointed Chief Justice by Franklin D. Roosevelt in 1941.

Some historians, such as Henry J. Abraham, have surmised that Coolidge's death in January of 1933 spared him the "disappointment" of witnessing Stone's liberal judicial career.[117] However, Stone's tendency to side with the dissenters was clear long before the New Deal, and there is no evidence that Coolidge was dismayed by it. It is probably a safe guess that Coolidge would have opposed New Deal regulation and government growth. He did live to see the Great Depression, the election of Roosevelt, and the call for expanded government intervention. Evidencing his despair at the turn of events, he confessed to a friend, "I feel I no longer fit in with these times."[118] However, the fact that his conservatism included a libertarian or "live and let live" streak and a sincere belief in civil rights and liberties is often overlooked. He was an idealist, not an ideologue.

Although in different classes at Amherst, Coolidge and Stone shared and often acknowledged a great influence on their social and legal philosophies: both were devoted students of the renowned Charles Edward Garman, who taught philosophy there.[119] It was often said "that if you scratch an Amherst man who graduated just before or after the turn of the century, you will find the quickening spirit of Garman."[120] Coolidge called Garman "one of the most remarkable men with whom I ever came in contact."[121] Chief among the values Garman explored, extolled, and instilled through the Socratic method were independence of thought, skepticism of authority, rejection of materialism and inequality, economic justice, tolerance, human progress, spiritualism, and "stewardship" or service to society and man. Coolidge remembered that:

> Above all we were taught to follow the truth whithersoever it might lead. We were warned that this would oftentimes be very difficult and result in much opposition, for there would be many who were not going that way, but if we pressed on steadfastly it was sure to yield the peaceable fruits of the mind. It does.[122]

> In ethics he taught us that there is a standard of righteousness, that might does not make right, that the end does not justify the means and that expediency as a working principle is bound to fail. The only hope of perfecting human relationship is in accordance with the law of service under which men are not so solicitous about what they shall get as they are about what they shall give. Yet

> people are entitled to the rewards of their industry. What they earn is theirs, no matter how small or how great. But the possession of property carries the obligation to use it in a larger service. For a man not to recognize the truth, not to be obedient to law, not to render allegiance to the State, is for him to be at war with his own nature, to commit suicide.[123]

Garman's philosophy permeated Coolidge's pronouncements and policies.[124] Alpheus Thomas Mason, Stone's principal biographer, has noted that, "Stone's motivating philosophy in mature years reflected Garman's teachings."[125] The professor's notoriety derived not so much from his theories as from his teaching methods.[126] Stone said:

> The student's critical faculties were stimulated; he was required to weigh evidence, to draw his own conclusions and defend them. This method was, I think, the ultimate secret of Garman's profound influence with his students. For the first time in their daily lives they were made to realize that they possessed a thinking apparatus of their own. It was only by the use of it that they could become masters of their own moral and intellectual destiny.[127]

Coolidge similarly recalled Garman's teaching:

> Our investigation revealed that man is endowed with reason, that the human mind has the power to weigh evidence, to distinguish between right and wrong and to know the truth. I should call this the central theme of his philosophy. While the quantity of the truth we know may be small it is the quality that is important. If we really know one truth the quality of our knowledge could not be surpassed by the Infinite.[128]

Considering the men, Coolidge and Stone each gave Garman their highest praise. Coolidge said, "We looked upon Garman as a man who walked with God."[129] Stone said, "What a lawyer Garman would make!"[130] With their common belief in the teachings of Charles Garman, perhaps Coolidge and Stone agreed more than they disagreed. Their approach to the world and their view of personal duty were in tandem. Speculations as to disagreement and disappointment aside, most would agree with Henry Abraham that in Stone Coolidge gave America one of its greatest Justices.[131]

Coolidge, the Court, and Presidential Prerogatives

Many Presidents have encountered the Supreme Court through litigation. Coolidge was no exception. What *is* exceptional is the ways in which the cases touching the Coolidge presidency show extraordinary resourcefulness in protecting and expanding presidential prerogatives against both coordinate branches of government.

Coolidge was creative at using his pardon power. On a number of occasions, he declined to issue a full pardon but "remitted" or "commuted" sentences under this power.[132] In this way, he slyly sought to foreclose any argument, since refuted by the Court in 1927,[133] that a pardon must be accepted to be effectual. He regularly took this course for a couple of reasons. Sometimes he simply wanted to save the cost of jailing a prisoner who presented no threat to society, such as in criminal contempt of court matters, or for punitive purposes.[134] For example, in 1925 Coolidge commuted the sentence of the notorious criminal and poet Gerald Chapman to time served. This opened the door for Connecticut to try and execute Chapman on state murder charges. Predictably, the defense argued that the federal prisoner could not be turned over to state authorities on the grounds that the commutation was a pardon and thus not effective since it was

not accepted. Coolidge's strategy worked: the federal court rejected Chapman's argument and found no "right to incarceration," and the Supreme Court rejected his appeal.[135]

However, Coolidge's use of the power in connection with contempt of court sentences drew the Court's attention in 1925. A persistent Chicago liquor dealer, Philip Grossman, was held in criminal contempt due to his violation of a district court restraining order issued in an effort to enforce the Volstead Act. President Harding twice rejected applications for pardon. When a third application reached Coolidge in December of 1923, he wrote across the bottom, "I do not wish pardon. Fine should be paid and sentence commuted."[136] Grossman promptly paid the fine.[137] The district court and prosecutors took umbrage at Coolidge's actions, pronouncing it an invalid breach of the principle of separation of powers on the basis that the Constitution only grants the President power to pardon "offenses against the United States," meaning violations of criminal statues, and contempt of court is not such an offense. It was further asserted that contempt is in the inherent jurisdiction of courts to uphold their orders and dignity, and thus the extension of pardons to contempt citations would devolve supreme judicial power onto the executive and undermine the ability of courts to function.[138] Therefore, despite Coolidge's pardon, Grossman was incarcerated[139] and in December of 1924 his cause reached the Supreme Court.

Attorney General Stone appeared for the President and argued against his own prosecutors. Writing for the Court the following year,

After President Harding had twice rejected the applications for pardons of Philip Grossman (right), a Chicago liquor dealer held in criminal contempt due to his violation of a district court restraining order, Coolidge, in a creative use of his pardon power, wrote on a third pardon application in 1923: "I do not wish pardon. Fine should be paid and sentence commuted." Grossman paid the fine but was incarcerated nonetheless when the district court challenged Coolidge's pardon as a breach of separation of powers. Grossman's case went to the Supreme Court.

Chief Justice Taft accepted Stone's arguments that Coolidge's commutation did not violate separation of powers but was a permissible implementation of checks and balances, a presidential check on the judicial branch.[140] After discussing the wide scope of the pardoning power back to English common law and the deliberations of the founders, Taft discounted the dangers foretold by the lower court:

> Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it. An abuse in pardoning contempts would certainly embarrass courts, but it is questionable how much more it would lessen their effectiveness than a wholesale pardon of other offenses. If we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery?[141]

With this case, Coolidge successfully expanded presidential power as a check on the judiciary. The case also demonstrates the Taft Court's willingness to assist in the assertion of presidential authority, even at the expense of the judicial branch. The Court proved equally decisive in supporting the President in defending his authority against legislative encroachment. This was particularly important since, unlike his relationship with the Court, Coolidge's relationship with Congress was troubled. His vetoes and the Senate's rejection of his nominee to replace Stone as Attorney General evidences this hostility.

A confrontation that did not go unnoticed by the Court took place in 1924. The Senate passed a resolution that it was the sense of the chamber that the President should request the resignation of the Secretary of the Navy. Coolidge fired back a formal reply stating:

> No official recognition can be given to the passage of the Senate resolution relative to their opinion concerning members of the Cabinet or other officers under Executive control . . . The dismissal of an officer of the government, such as is involved in this case, other than by impeachment, is exclusively an Executive function. I regard this as a vital principle of our Government.[142]

With this statement the President threw down the gauntlet regarding removal power, and he proved rather devious in efforts to circumvent statutory constraints on the power to remove officials without congressional approval. On two known occasions, he unsuccessfully tried to get prospective appointees to sign undated letters of resignation taking effect on the President's acceptance.[143]

In 1926, with Coolidge's certain approval and with Justice Stone's drafting assistance,[144] Taft waded in on behalf of the President with characteristic enthusiasm. In the case of *Myers v. United States*,[145] arising from President Wilson's removal of a Portland postmaster, the Court addressed the removal of executive branch officers without Senate consent, even when law required advice and consent to appoint and remove. As in *Grossman*, Taft exhaustively traced the history of the executive prerogative and the views of the Framers. He even approvingly included reference to Coolidge's denunciation of the Senate's request that the Secretary of the Navy be discharged.[146] In the sweeping six to three decision, the Court upheld the President's removal power and declared the restrictions unconstitutional. Taft later confessed, "I never wrote an opinion that I felt to be so important in its effect."[147]

Conclusion of the Coolidge Era

William Howard Taft served as Chief Justice until his death in 1930. True to form, he used the opportunity of President Hoover's visit to his deathbed to urge the appointment of for-

mer Associate Justice and Secretary of State Charles Evans Hughes as his successor and hopefully to forestall the elevation of Stone, a close Hoover friend.[148] Convinced that Hughes would decline the offer, Hoover decided to make the gesture and called Hughes on the telephone. As an aide watched, he saw the expression on the President's face turn to one of horror. When the conversation ended, a devastated Hoover exclaimed, "Well, I'll be damned, he accepted."[149] Taft had won his last lobbying campaign.

Interestingly, in his deliberations, Hoover considered offering a future Court seat to Coolidge but was dissuaded by Stone.[150] Once when rumors reached Taft of Coolidge's possible future appointment, he wrote, "There is one difficulty about it, and that is that there is no vacancy on the Bench, and the second is I don't think he would regard himself as quite prepared for that place, though he certainly would make as good a Judge as some he has appointed."[151] If offered the position, Coolidge certainly would have declined it: why would he accept a final place on the Bench after declining certain re-election as President?

It looked safe for Taft to depart. He could not have predicted that his conservative block would crumble in 1937 following a titanic struggle with Franklin D. Roosevelt, in vivid contrast to the cooperation of the Coolidge years. Perhaps it is fortunate that Taft died before the Court's confrontation with FDR. Compromise with the New Deal would not have been an option.

Declarative jurisprudence, classical and conservative, would also be a casualty, eclipsed by the methods of liberal judges who honestly admitted that they made law or—like the conservatives—used the terminology of tradition, the mystery of legalese, and pretensions of scientific objectivity to cloak their lawmaking and make it more acceptable. Result-oriented jurisprudence did not die; it just changed its name and party. The succumbing to temptation by the right and left not only achieved imposition of political agendas, it also discredited true declarative adjudication as practiced for ages and the value in at least the attempt to "find law" or the goal of neutrality.

Taft's procedural improvements were permanent and just, but his restructuring of the judiciary ironically aided access to the system by the liberal causes he worked so hard to hinder.[152] In succeeding decades, litigation rather than legislation became the avenue of choice for those seeking social change, and their cases provided the forum for the destruction of many of the precedents and policies of Taft's Court. This reversal of outlook even extended to precedents unrelated to social conditions, such as major backtracking in 1935 on the scope of removal power established in *Myers v. United States*.[153] As argued by Stanley I. Kutler, Taft's rulings "ultimately—and decisively—helped weigh the balance toward national power and supremacy" to the benefit of the movements his rulings sought to inhibit when the national government began to surpass the states in social experimentation.[154]

Coolidge left office amid overwhelming popularity. On his last day in office, he told Justice Stone that "It is a pretty good idea to get out when they still want you."[155] The former President did not live to witness the conflict between the Court and the New Deal, but he experienced the vanquishing of the party he had done so much to save and the prosperity he had come so much to represent. His usual optimism gone, he sadly commented, "In other periods of depression, it has always been possible to see some things which were solid and upon which you could base hope, but as I look about me I see nothing to give ground for hope—nothing of man."[156] As the Depression deepened and Republican fortunes fell, Coolidge's popularity never diminished as many nostalgically longed for a return to the days of the Coolidge prosperity. There was even talk of drafting him for the Republican nomination in 1936,[157] as if retrieving its symbol could revive an era.

President Coolidge (with hat on heart at his inauguration in 1925) emphasized qualifications over politics in the judicial appointment process and selected judges of impartiality and ability.

The passage of time and its towering events have obscured President Coolidge's legal legacy. His defenses of a philosophy of law, the rule of law, and a Supreme Court that implemented these values still contain wisdom worth retrieving. His emphasis on qualifications over politics in the appointment process had beneficial effects for decades. The impartiality and ability of his judges, including Justice Stone, modernized and opened the courts as much as did the structural innovations he supported. His process of selection seemed only natural to him, but unfortunately it was an anomaly. This practical example can and should be emulated.

Coolidge's judicial appointments, his upholding of the judiciary, and the Supreme Court decisions in favor of executive prerogatives are examples of how cooperation between branches of government can be impor-

tant in assisting the system as a whole. This is the positive side of Madisonian checks and balances, and the good will that is as essential to democracy as the institutionalized circumspection of men and motives. Considering the rewards to society, cooperation by leaders is possibly as admirable, if not as colorful, as the acts of defiance that are often cited as the signs of strong leadership.

Franklin D. Roosevelt, an excellent judge of politicians, attested to the political dexterity of Coolidge, his former rival for the vice presidency, saying, "To stick a knife into ghosts is always hard."[158] In the same way, Coolidge's legacy has proven difficult to capture. Although recognized by the people of his time, why have his contributions in so many areas escaped notice today? Perhaps his agenda, marbled with traditional ideals of governance, institutions, and law, is not compatible with the agenda of many historians. And perhaps Coolidge himself is partly to blame. He made his evaluation too simple. He forged his image too well. His genuine personality and managed persona have hidden more important truths.

Coolidge was quiet yet eloquent, remote yet accessible, idealistic yet practical, a symbol of rural simplicity yet intellectual, the paragon of the private sector yet the consummate politician who held more public offices than any other President. Admittedly, he was a combination of contradictions—but perhaps greatness demands the depth of contradictions. Historians view the backdrop of great events—wars and revolutions—as a prerequisite for affixing greatness, and Coolidge's presidency, a respite of peace and plenty, fell between the dramas of world war and depression. His mission, for which no one was better suited, was of restoration and respectability, and his vision of the law and its administration was an important part of that mission. Maybe there are times when healing is as great a virtue as reform. Maybe providing a nation with tranquilly and trust in the wake of war, corruption, and change is an ingredient of greatness.

ENDNOTES

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[5]The two most recent works on Coolidge are Robert H. Ferrell, **The Presidency of Calvin Coolidge** (Lawrence, KS: University Press of Kansas, 1998) and Robert Sobel, **Coolidge: An American Enigma** (Washington D.C.: Regnery, 1998).

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[7]Calvin Coolidge, **The Autobiography of Calvin Coolidge** 96 (1929).

[8]*Id.* at 84.

[9]*Id.* at 79.

[10]*Id.* at 78.

[11]*Id.* at 83.

[12]Calvin Coolidge, address, "The Supports of Civilization." Given at the Amherst College Alumni Dinner, New York City, November 27, 1920. In Calvin Coolidge, **The Price of Freedom: Speeches and Addresses** 3 (1924).

[13]Calvin Coolidge, address, "Have Faith in Massachusetts." Given before the Senate of Massachusetts on being elected its president, Boston, January 7, 1914. In Calvin Coolidge, **Have Faith in Massachusetts: A Collection of Speeches and Messages** 4 (1919).

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[17]*See, e.g.*, Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, **The American Constitution: Its Origins and Development** 465–466 (6th ed., 1983); *see also* Gilmore, *supra* note 14 at 14–15.

[18]*See, e.g., id.* at 457–463.

[19]William F. Swindler, **Court and Constitution in the Twentieth Century: The Old Legality, 1889–1932** 225 (1969).

[20]Calvin Coolidge, address, "The Limitations of the Law." Given before the American Bar Association, San Francisco, August 10, 1922. In Coolidge, **The Price of Freedom**, *supra* note 12 at 206.

[21]*E.g.*, Sobel, *supra* note 5 at 62.

[22]*E.g., id.*

[23]*E.g., id.* at 68.

[24]Coolidge, "The Limitations of the Law" in Coolidge, **The Price of Freedom**, *supra* note 12 at 196.

[25]*Id.* at 207–208.

[26]Mary Ann Harrell and Burnett Anderson, **Equal Justice Under Law: The Supreme Court in American Life** 79 (6th ed., 1994).

[27]*Truax v. Corrigan* 257 U.S. 312, 338 (1921).

[28]*See, e.g.*, Swindler, *supra* note 19 at 234.

[29]Calvin Coolidge, address, "The Destiny of America." Given at Memorial Day Services, Northampton, MA, May 30, 1923. In Coolidge, **The Price of Freedom**, *supra* note 12 at 333.

[30]*Lochner v. New York*, 198 U.S. 45, 75 (1905).

[31]*See, e.g.* Kelly, *et al.*, *supra* note 17 at 467–468.

[32]The members of the Supreme Court at the beginning of Coolidge's presidency were Chief Justice William Howard Taft of Ohio (appointed by Warren G. Harding in 1921), Joseph McKenna of California (appointed by William McKinley in 1898), Oliver Wendell Holmes of Massachusetts (appointed by Theodore Roosevelt in 1902), Willis Van Devanter of Wyoming (appointed by William Howard Taft in 1911), James Clark McReynolds of Tennessee (appointed by Woodrow Wilson in 1914), Louis D. Brandeis of Massachusetts (appointed by Wilson in 1916), George Sutherland of Utah (appointed by Harding in 1922), Pierce Butler of Minnesota (appointed by Harding in 1923), and Edward T. Sanford of Tennessee (appointed by Harding in 1923).

[33]Alpheus T. Mason, "William Howard Taft: President by Chance, Chief Justice by Choice," in **The Supreme Court and Its Justices** 90–92 (1987).

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[36]Peter Irons, **A People's History of the Supreme Court** 286 (1999).

[37]Mason, "William Howard Taft: President by Chance, Chief Justice by Choice," *supra* note 33 at 93.

[38]*Id. See also* G. Edward White, **The American Judicial Tradition: Profiles of Leading American Judges** 184–185 (1976).

[39]Donald R. McCoy, **Calvin Coolidge: The Quiet President** 46 (1967).

[40]Alpheus T. Mason, **William Howard Taft: Chief Justice** 185 (1964).

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[42]*Id.* at 143.

[43]*Id.* at 113; Bill Severn, **William Howard Taft: The President Who Became Chief Justice** 178 (1970).

[44]Coolidge, **The Mind of the President**, *supra* note 16 at 84.

[45]Harrell and Anderson, *supra* note 26 at 77.

[46]Mason, **William Howard Taft: Chief Justice**, *supra* note 40 at 186.

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[48]Henry J. Abraham, **Justices and President: A Political History of Appointments to the Supreme Court** 21 (1974).

[49]Mason, **William Howard Taft: Chief Justice**, *supra* note 40 at 186.

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[52]Coolidge, **The Autobiography of Calvin Coolidge**, *supra* note 7 at 225.

[53]Claude M. Fuess, **Calvin Coolidge: The Man from Vermont** 366 (1940).

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[55]Mason, **William Howard Taft: Chief Justice**, *supra* note 40 at 187.

[56]*Id.*

[57]*Id.* at 187–188.

[58]McCoy, *supra* note 39 at 173.

[59]Fuess, *supra* note 53 at 366.

[60]*Id.*

[61]Coolidge, "Have Faith in Massachusetts." In Coolidge, **Have Faith in Massachusetts**, *supra* note 13 at 4–5.

[62]McCoy, *supra* note 39 at 174.

[63]Coolidge, **The Autobiography of Calvin Coolidge**, *supra* note 7 at 227.

[64]Abraham, *supra* note 48 at 181.

[65]Charles Rembar, **The Law of the Land: The Evolution of Our Legal System** 254 (1980).

[66]Mason, **William Howard Taft: Chief Justice**, *supra* note 40 at 187.

[67]Ferrell, *supra* note 5 at 79.

[68]Abraham, *supra* note 48 at 60.

[69]Fuess, *supra* note 53 at 481.

[70]David M. O'Brien, **Storm Center: The Supreme Court in American Politics** 86 (1986).

[71]McCoy, *supra* note 39 at 238.

[72]*Id.* at 243.

[73]Elliott Roosevelt and James Brough, **The Roosevelts of Hyde Park: An Untold Story** 211 (1973).

[74]McCoy, *supra* note 39 at 255.

[75]Kirk H. Porter, *et al.*, eds., **National Party Platforms: 1840–1972** 254 (1973).

[76]Mason, **William Howard Taft: Chief Justice**, *supra* note 40 at 92.

[77]Robert S. Maxwell, **La Follette** 82 (1969).

[78]Roosevelt and Brough, *supra* note 73 at 126.

[79]McCoy, *supra* note 39 at 255.

[80]Swindler, *supra* note 19 at 225.

[81]Paul Johnson, **A History of the American People** 713 (1997).

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[86]Coolidge, "Have Faith in Massachusetts." In Coolidge, **Have Faith in Massachusetts**, *supra* note 13 at 9.

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[89]*Id.* at 283.

[90]Porter, *et al.*, **National Party Platforms: 1840–1972**, *supra* note 75 at 265.

[91]*Id.*

[92]*See* Carroll Van West, ed., **The Tennessee Encyclopedia of History & Culture** 160 (1998); Charles W. Crawford, **Yesterday's Memphis** 118 (1976).

[93]Sobel, *supra* note 5 at 250, 282–283.

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[106]Swindler, *supra* note 19 at 232.

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[112]Abraham, *supra* note 48 at 184.

[113]Swindler, *supra* note 19 at 250.

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[115]*See* Abraham, *supra* note 48 at 184–185.

[116]*See* Sobel, *supra* note 5 at 4, 254–255, 280.

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[123]*Id.* at 67–68.

[124]Sobel, *supra* note 5 at 39.

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[134]Corwin, *supra* note 132 at 184–185.

[135]*Id.* at 183.

[136]Mason, **Harlan Fiske Stone**, *supra* note 100 at 167. *See also* Corwin, *supra* note 132 at 184.

[137]*Id.*

[138]*United States v. Grossman*, 1 F.2d 941 (N.D. Ill. May 15, 1924).

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[140]Mason, **Harlan Fiske Stone**, *supra* note 100 at 167–168.

[141]*Ex parte Grossman*, *supra* note 139 at 121.

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[146]*Id.* at 170.

[147]Mason, **Harlan Fiske Stone**, *supra* note 100 at 222.

[148]Irons, *supra* note 36 at 295.

[149]Mason, **William Howard Taft: Chief Justice**, *supra* note 40 at 297.

[150]*Id.* at 298.

[151]Fuess, *supra* note 53 at 441.

[152]Mason, **William Howard Taft: Chief Justice**, *supra* note 40 at 16.

[153]*Humphrey v. United States*, 295 U.S. 602 (1935).

[154]Carter, *supra* note 6 at 42

[155]Mason, **Harlan Fiske Stone**, *supra* note 100 at 263.

[156]Lathem, ed., **Meet Calvin Coolidge**, *supra* note 118 at 216; Geoffrey C. Ward, **Before the Trumpet** 5 (1985).

[157]Lathem, ed., **Meet Calvin Coolidge**, *supra* note 118 at 214; Sobel, *supra* note 5 at 411.

[158]Roosevelt and Brough, *supra* note 73 at 211.

The Tenth Justice: The Retirement of William O. Douglas

ARTEMUS WARD

Twenty-five years have passed since the retirement of Justice William O. Douglas.[1] Much was written at the time regarding his illness and its effect on the Supreme Court, but only recently has the full story come to light. The following analysis of Douglas's departure not only provides a striking example of how a Justice approaches this important decision, but also sheds new light on the behavior of the Court when a Justice becomes ill. Douglas's struggle to participate in the Court's work during his illness, and his attempts to rejoin the Court after his official retirement, were unprecedented in the Court's history. While he was still active, his power was stripped by a Court majority, and as a result important constitutional questions were left unanswered by the internal decision-making of his colleagues. Was the Court's action constitutional? Should Douglas have retired sooner? Did the Douglas affair have a lasting impact on those who served with him?

Based on the following historical analysis, I contend that Douglas stayed on the Court after his health no longer permitted him to be a productive member. I argue that the Court's action in effectively taking away his power was constitutional. I also suggest that Douglas's departure had a lasting impact on his colleagues, as every Justice who served with him has voluntarily stepped down.

The Early Court Years

During the two decades after he was appointed to the Court, William O. Douglas was perennially mentioned for a spot on the Democratic presidential ticket. Though he privately said that he never had any desire to leave the Court, he never made any statement publicly on the matter, which led many to believe he was available. In 1940, Douglas wrote Justice Frankfurter:

> There is considerable talk in Washington about putting me on the

President Harry S Truman was continually after William O. Douglas to resign from the Court and join his administration. "My sole desire," Douglas told friends, "is to remain on the Court until I reach retirement."

> ticket. I discount it very much. I do not really think it will come to anything. But it is sufficiently active to be disturbing. It is disturbing because I want none of it. I want to stay where I am.[2]

In 1941, President Franklin D. Roosevelt wanted Douglas to head the Defense Department. Members of the administration hinted that it might lead to the 1944 presidential nomination. Douglas wrote to Black, "I can think of nothing less attractive."[3] Black knew it would be difficult for Douglas to resist a call from FDR and quickly replied in a lengthy handwritten letter, urging Douglas to remain on the Court:

> The prospect that you might leave the Court disturbs me greatly . . . While I am compelled to admit that my desire to have you with me on the Court may be of great weight with me . . . I believe my judgment would be the same under wholly different conditions . . . I am firmly persuaded however that it is not to the best interests of the United States for you to follow the course which has been planned. I must say that I entertain very grave doubts as to your success should you enter the defense picture at this stage . . . I hope you remain on the Court.[4]

In 1944, Douglas's name was once again mentioned as a possible vice presidential candidate, and President Harry S Truman was continually after Douglas to resign from the Court and join his administration.[5] Douglas told friends "my sole desire is to remain on the Court until I reach retirement."[6]

Nonetheless, Douglas was vacillating. He may not have wanted to join the Truman ad-

Thrown from his horse while riding in the Cascade Mountains in 1949, Douglas suffered a punctured lung and numerous broken ribs when his horse fell on top of him. If he had not been in such excellent physical condition, Douglas might not have survived the crushing weight.

ministration, but his gloom over Murphy's death led him to seriously contemplate stepping down. On August 15, as the new Term neared, he wrote Black, "The matter I wrote you about has been gnawing away at me. It is really a dreadful thing. I have thought that perhaps the best thing that could happen would be for you + me to resign. I have been seriously considering it."[7]

In the fall of 1949, one day before the Court's new Term was scheduled to begin, Douglas was thrown off his horse in the Cascade Mountains of his home state of Washington. He landed partly down a mountain on a ledge and was nearly crushed to death when his horse fell on top of him. Douglas had a punctured lung, broke all but one of his ribs and was absent from the Court for months. His riding companion remarked, "He just lived because he wanted to live."[8] During his recovery, Douglas wrote Black, "I am lucky to be alive. I was in excellent physical condition or I would not be."[9]

As the 1952 presidential election approached, a number of Douglas's friends and supporters urged him to run. As in the past, he declined, saying that "my place in public life is on the Court."[10] He was once again thought of by many in 1956 as a possible nominee but, as always, demurred.

Retirement Eligible

As Douglas's sixty-fifth birthday approached and he neared retirement eligibility, the inevitable rumors began circulating that he would retire. Hugo L. Black, Jr. wrote him, "I have read in a couple of newspapers that you plan to retire upon reaching the age of 65. I hope this is not so."[11] Douglas wrote back, "There is absolutely nothing to the rumor that I plan to retire this year. Perhaps it all comes from

the fact that I will be eligible on my next birthday, but I have had no thought of retiring."[12] Though he had no intention of departing, Douglas was plainly aware that he was now eligible for retirement.

By the 1967–68 Term, Douglas had served on the Court for nearly thirty years and was slowing down noticeably. On June 5, 1968, while sitting on the Bench for oral argument, Douglas collapsed and was carried to his chambers. He came to, began pacing the room, and collapsed again. Douglas suffered a heart attack and had to have a pacemaker installed to keep his heart beating at a normal rate. He made a full recovery and returned to the Court for the October 1968 Term. When Chief Justice Earl Warren decided to step down, Douglas thought that he too should retire. Douglas recalled:

> In the spring of 1969 I had talked with Earl Warren, the then Chief Justice, just before his retirement in June. I told him I too wanted to retire because it was my thirtieth anniversary on the Court. So he made arrangements to reserve a suite of offices for himself and another suite for me as a retired Justice. But as early as May and June of 1969 the hound dogs, having got Justice Fortas to resign, had started baying at me. I felt that if I did retire under those circumstances, it would be an indication that somewhere, somehow, there had been some deep dark sin committed and that I was seeking to escape its exposure. So I changed my mind about retiring and decided to stay on indefinitely until the last hound dog had stopped snapping at my heels—and that promised to be a long time, as Nixon naturally wanted to have my seat on the Court.[13]

Following their ouster of Abe Fortas, the "hound dogs" set their sights on Douglas. A group of House Republicans, led by Gerald Ford, started a formal attempt to impeach the liberal Justice. This was not the first attempt made by Douglas's political enemies to remove him from office. Douglas had twice survived moves for impeachment in 1966, one deriving from his alleged "immoral character"—he had just been married for the fourth time—and the other stemming from his financial ties to a foundation. The latter charge was resurrected anew following the Fortas situation.[14] On April 30, 1970, Douglas returned from a physical checkup and took the Bench for oral argument. He passed a note to his long-time colleague Justice Black: "My blood pressure is 140 over 70—which indicates that the Bastards have not got me down." Black responded:

> Fine! Keep your smile! Mr. Ford and his crowd cannot get you. I am delighted to know of the results of your medical examination. After my appointment to the Court when my opponents were after me most viciously, I told my wife we needed an inscription on our bed reading as follows, "This too will pass away." And it did. So will the flurry and the noise about you. Of course you know I am on your side. Keep up your smile and health and read the 13th chapter of 1st Corinthians now and then.[15]

As they had done with Fortas, the Republicans attacked Douglas's extrajudicial connections and writings. However, unlike the situation with Fortas, the Republicans failed to force Douglas's resignation. Justice Harlan wrote him, "I shall be on deck next Term, as . . . I know you will be," and assured him that the "miserable business" in the House "of course, can only have one ending."[16] Just as Black and Harlan predicted, a House subcommittee eventually cleared him of any wrongdoing.

On October 29, 1973, Douglas became the longest-serving Justice in Supreme Court history, surpassing Stephen J. Field's mark of

thirty-four years, 195 days. On November 3, the Douglas Anniversary Convocation was held. Organized by a group of Douglas's former clerks, the black tie affair was attended by the other Justices and Douglas's family and friends. In his speech, Douglas was discussing committees when he playfully brought up the subject of retirement:

> I do, however, think that the committee can serve a useful purpose. Retirement of Justices on the Court has raised problems. Greer [sic], Field, and Holmes were each waited on by a committee suggesting he retire. Hughes was indeed the committee of one who called on Holmes . . . When Chief Justice Hughes retired, he called a special conference at the end of a Term and announced that he had that day sent notice of his retirement to the President. He said he felt quite adequate for the job and knew he could continue for awhile. But with tears in his eyes he added, "I have always been fearful of continuing in office under the delusion of adequacy."
>
> So advisory committees can serve a long range need . . . At times I thought I should retire to do some things I always wanted to do but never had the time to do . . . [17]

Decline and Dissent

On New Year's Day 1974, Douglas suffered a severe stroke.[18] He was placed in intensive care. When Abe Fortas came to visit, he told the press that Douglas would be back at the Court in three or four weeks. However, Fortas knew that Douglas's condition was much more severe than this would indicate. Douglas had trouble speaking, lost concentration easily, and had difficulty moving his left arm and leg. Though he made it clear that he intended to return to work, his friends were not so sure. On January 13, Douglas's close friend Clark Clifford had a memorandum written that sketched the absences of Justices due to incapacity and sent a copy to Douglas.[19] The Justices were also skeptical of Douglas's capacity to work. They decided to put off oral argument in a number of cases where Douglas was likely to be the deciding vote.[20]

When Douglas returned to the Court, he decided to hold a press conference.[21] He thought that he would show the press that he was fully capable of doing his job and answer any doubts they might have. Instead, the press conference had the opposite effect. It was clear to everyone in the room that Douglas could no longer effectively do his job. He struggled to tear pages from a legal pad, spoke disjointedly and slurred his words. He informed them that he had no intention of stepping down and invited them all on a fifteen-mile hike in April. Rather than put to rest speculation of his departure, the press conference only added fuel to the fire. It was suggested that partisanship played a role in Douglas delaying his retirement. It was reported that he did not want to leave the Court under President Ford, who as House Minority Leader had led the fight to impeach Douglas in 1970. Eight months later it was reported that he told a friend, "I won't resign while there's a breath in my body, until we get a Democratic president."[22]

On March 31, Chief Justice Burger sent around the opinion assignment list. Every Justice was assigned two or three cases, except Douglas, who was not assigned any. Burger attached a letter of explanation:

> The subject of opinion assignments came up at the Conference and everyone expressed the view that I should not risk retarding your progress by assigning opinions to you until the April sitting. You are making progress but there will be a heavy load getting through the petitions and jurisdictional statements for the

In 1968, Douglas suffered a heart attack and had a pacemaker installed. His capacity to work deteriorated to the extent that the other Justices decided to strip him of his power. Cases that were split four to four, excluding Douglas's vote, were held over to the next Term.

> Friday Conference April 11 and preparing for a dozen hard cases set for argument beginning April 14.[23]

Meanwhile, Douglas's mental capacity began to deteriorate. He called people by the wrong name, and often mumbled or did not speak at all. Once he refused to be wheeled into his own office claiming it was the Chambers of the Chief Justice. Douglas underwent physical therapy and tried different medications to help his condition, but nothing worked. He remained optimistic, however, even believing that he would some day walk again. He told his secretary, "It could be worse. At least I can read and write."[24]

As the Term ended, Douglas and his wife flew back to the state of Washington. Longtime friends were shocked by the Justice's decline, and urged a family friend, Charles Reich, to persuade Douglas to step down. Reich noted, "He was in much, much worse shape than he or the public realized."[25] Over three days Reich tried his best to convince Douglas that it was time to call it quits. He appealed on all fronts, asking Douglas to consider his fragile health, and even the damage he might cause to his judicial reputation. Douglas protested that he had to return to the Court to defend the underprivileged. "There will be no one on the Court who cares for blacks, Chicanos, defendants, and the environment."[26] He continued, "Even if I'm only half alive, I can still cast a liberal vote. I'm going back to Washington and try it . . . I have to decide for myself."[27] When Reich asked

whether he was hanging on for a Democratic President to appoint his successor, Douglas said that it did not matter who was President and that whoever was appointed would not care for the disadvantaged. "The Court is my life," he told Reich, "What will I do if I leave? I will be committing suicide. I'm not quite ready to commit suicide."[28]

When Douglas returned from the summer recess intending to fully participate in the work of the Court, it was obvious that his condition had not improved. In the middle of oral argument on October 6, Douglas asked to be wheeled from the Bench and taken home.[29] His handwriting was barely legible and he was becoming increasingly confused.[30] His colleagues felt compelled to make an unprecedented decision. On October 17, 1975, with Douglas absent, the eight Justices met in conference and decided to effectively strip Douglas of his power. Cases that were split four to four, excluding Douglas's vote, would be held over to the next Term. Four Justices, again excluding Douglas, were now needed in order to agree to hear a case. One of the Justices explained:

> Bill's votes were inconsistent with his prior positions. For example, he would vote to deny cert in cases where the issues were similar to earlier cases in which he had consistently voted to grant cert. So the purpose of the agreement was to protect Bill as well as the integrity of the Court.[31]

This unprecedented decision, however, was not unanimous. Justice Byron R. White was the lone dissenter. After the conference, White wrote a letter of protest to Chief Justice Burger and hand-delivered copies to the other Justices (see Appendix A). White felt the matter so sensitive that he did not even show the memo to his own clerks. White argued:

> [The Constitution] nowhere provides that a Justice's colleagues may deprive him of his office by refusing to permit him to function as a Justice.
>
> [The only remedy is to] invite Congress to take appropriate action. If it is an impeachable offense for an incompetent Justice to purport to sit as a judge, is it not the task of Congress, rather than this Court, to undertake proceedings to determine the issue of competence? If it is not an impeachable offense, may the Court nevertheless conclude that a Justice is incompetent and forbid him to perform his duties?
>
> [This decision is] plainly a matter of great importance. I do hope the majority is prepared to make formal disclosure of the action that it has taken.
>
> [H]istory teaches that nothing can more readily bring the Court and its constitutional functions into disrepute than the Court's failure to recognize the limits of its own powers.[32]

Of course no public announcement of this unprecedented action was made. In the end, no case was affected due to Douglas's decisive vote. Though White was concerned about the constitutionality of his colleagues' action, it was in keeping with the Court's regular procedure for deciding cases. As Justice Brennan frequently remarked, five votes can do anything at the Court, and in the case of denying cert., six votes can do anything. So technically, Douglas's vote would never be decisive as long as five of his colleagues voted to hold a case over for reargument or six voted not to grant cert. The Court does not have to reveal the justification for its votes. So it is possible for five, six, or more of the Justices to get together and informally decide to effectively ignore one or more of their colleagues if they chose. This may have been what happened in the case of Justice Charles Evans Whittaker and probably has happened before in the

Justice Byron R. White (fourth from right) dissented from his Brethrens' decision to deprive an ailing Douglas (third from right) of his power. He wrote a letter of protest to Chief Justice Burger (second from right) asking him to invite Congress, not the Court, to take appropriate action.

Court's earlier years, when infirmities were more common.[33] With Douglas, the decision was taken more formally.

As the new Term began, Douglas once again took his place on the Bench. It was obvious that his condition had not improved over the summer, as he often had to leave his colleagues during oral argument or in conference when his physical pain became unbearable. When it came time to assign the first batch of opinions for the new Term, Burger did not assign any to Douglas. And in those

cases where Douglas, as senior Associate Justice, was technically supposed to assign the opinions, Justice Brennan instead consulted with the Chief on the assignments, with Brennan, Marshall, and White taking one each. Douglas again had nothing to write and his colleagues had given him their first undeniable hint that he ought to step down.

In October, doctors informed Douglas that he would never walk again and would remain in constant pain due to his condition. He wrote a friend:

> [T]he top therapy man says that my chances of improvement—arm and leg are nil. That is a bleak and dreary outlook . . . The pain persists as strong as ever. It is the only reason I should ever retire. Cathy, however, is pounding on me to resign . . . My son is aligned with her in that cause.[34]

Refusing to give up, on November 5th Douglas returned to the Bench for oral argument. Finding the pain unbearable, he quickly returned to his Chambers, and Chief Justice Burger postponed the proceedings until later in the day. After lunch, Douglas again attempted to sit for oral argument. He instructed a messenger to get the volume of the federal statutes dealing with the retirement of federal judges. Once more, however, he had to be taken back to his chambers. Douglas wanted a

Justice Douglas (seated in wheelchair, with Elizabeth Hughes Gossett standing behind him) retired in 1975 after thirty-six years on the Bench, the longest tenure in the Court's history. After stepping down he insisted on writing an opinion in *Buckley v. Valeo* (1976) on the ground that he had been an active member of the Court when certiorari was granted in the case. Chief Justice Burger (right) refused to let Douglas's opinion be circulated to the press.

second opinion on his condition. The prognosis was similar to the first, but Douglas was told that if he rested, his condition might improve. Douglas returned to the Court for conference on Friday, but was again unable to participate because of excruciating pain and he returned to his chambers.

The following Monday, Douglas finally decided that he could not continue. He called on his old friends Abe Fortas and Clark Clifford to help draft his retirement letter to President Ford:

> It was my hope, when I returned to Washington in September, that I would be able to continue to participate in the work of the Supreme Court.
>
> I have learned, however, after these last two months, that it would be inadvisable for me to attempt to carry on the duties required of a member of the Court. I have been bothered with incessant and demanding pain which depletes my energy to the extent that I have been unable to shoulder my full share of the burden . . .
>
> During the hours of oral argument last week pain made it necessary for me to leave the Bench several times. I have had to leave several times this week also. I shall continue to seek relief from this unabated pain but there is no bright prospect in view . . .
>
> I shall miss [my colleagues] sorely, but I know this is the right decision.[35]

On November 12, 1975, Douglas formally retired after thirty-six years, the longest tenure in the Court's history. That morning, he informed Chief Justice Burger of his decision. The Justices met for lunch that afternoon in their private dining room to celebrate Justice Harry A. Blackmun's birthday. After the Brethren sang Happy Birthday, Douglas sat silently as Burger announced, "Bill wants me to tell you he's written a letter to the President."[36]

A Restless Retirement

The trouble, however, began almost immediately. After receiving a copy of Douglas's retirement letter, Burger hastily sent a handwritten reply which said in part, "At your convenience—and if it is agreeable, I will assign you the Chambers heretofore occupied by Chief Justice Warren. It is a commodious suite, considerably larger than what you now occupy."[37] Douglas replied:

> Thanks for the suggestion that I might want the more commodious quarters which Earl Warren last used here, but the smaller quarters I have have suited me for many years and I am inclined to stay where I am.
>
> Whoever is named to take my place might want the more commodious space that is available. In fairness to the other Brethren . . . you might consider giving them the opportunity to give up what they have now for the more commodious space available.[38]

That rebuff was but a portent of the difficulties to come.

On November 16, Douglas left the Court and flew to Portland, Oregon for treatment. As is customary, his clerks were reassigned to other chambers and Justice Brennan formally took over the role of senior Associate Justice. At the end of November, Douglas returned to his office to find his clerks gone. He wrote the Conference and explained why he still needed two law clerks, two secretaries, and a messenger. He promised to write a 200-year history of the Court in order "to untangle many of the cobwebs which have been spun" in the recent publication of the Frankfurter Conference notes. He also pointed out that he needed help with the "huge amount of correspondence and

the like" which he had accumulated over his years at the Court.[39] The next day, Justice Brennan had a clerk write him a memorandum on the statutes and authority over the quarters and services of retired Justices.[40] The memorandum said that the Court had ultimate authority over the quarters and staff of retired Justices. The Supreme Court Librarian also looked into the matter, inquiring with the Administrative Office of the United States Courts, whose general counsel basically confirmed the information in the Brennan memo.[41] Douglas saw both documents, copies of which are contained in his papers.

To the surprise and sadness of the other members of the Court, it soon became clear that Douglas intended to continue, in an unprecedented way, as the Court's tenth Justice. Douglas felt that he should be able to legitimately participate in all cases in which cert. had been granted or jurisdiction noted while he was still an active member of the Court, prior to his November 12 retirement.[42]

Douglas announced that he would write an opinion in the case of *Buckley v. Valeo*, which involved the Federal Election Campaign Act of 1974.[43] After writing his opinion, Douglas had it printed and expected it to be circulated to his colleagues. When it was not, he wrote a thirteen-page memorandum to his colleagues saying that the Court's attempt to exclude him from their deliberations was "much more mischievous [*sic*] than the Roosevelt [Court packing] plan. It tends to denigrate Associate Justices who 'retire.' Beyond that is the mischief in selecting the occasion when a Justice will be allowed to hear and decide cases." He called his exclusion "a practice in politics," and added, "The Court is the last place for political maneuvering."[44]

The Justices had had enough of Douglas's antics. On December 22, in conference, they decided to draft a reply that would make very clear to Douglas that his tenure at the Court was through. Burger drafted the three-page response. After minor changes by Justices Brennan and Potter Stewart,[45] Burger brought the letter to each Justice to sign (see Appendix B). The memorandum explained that, as a retired Justice, Douglas could not participate in oral argument, attend conference, vote in cases, or write opinions:

> It seems clear beyond doubt that your retirement . . . operated to terminate all judicial powers except such as would arise from assignment to one of the Federal courts other than the Supreme Court. The statutes seem very clear that a retired Justice cannot be assigned any duties of a Supreme Court Justice as such. This would apply to all cases submitted but not decided before you retired and to any case decided while you were a member of the Court on which rehearing is thereafter granted . . .
>
> The formal conferences of the Court are limited, as you know, to Justices empowered to act on pending matters and do not include retired Justices . . .
>
> [Y]ou should be allowed to take your choice and have two secretaries rather than one secretary and one law clerk. It was agreed that your messenger could be continued so that you would have someone to drive your car . . . you should have your present Chambers as you requested . . .
>
> No member of the Conference could recall any instance of a retired Justice participating in any matter before the Court and it was unanimously agreed that the relevant statutes do not allow for such participation.[46]

As a consequence of his colleagues' rebuff, Douglas eventually ended his attempts to take part in the work of the Court. He retreated to his memoirs, having failed in his bid to alter the parameters of a retired Justice's

duties. Two months later, he wrote a friend and explained why he had stepped down:

> I retired from the Court because of the pain that seemed to get no better. It was impossible to sit on the Bench for longer than an hour or so and follow the arguments. Intense mental concentration and intense pain are not compatible.
>
> I've about given up all hope. I'm very depressed and while the pain is somewhat alleviated it still keeps me far below par. I have no plans for the future.[47]

Douglas's departure was still remembered by his former colleagues as late as 1994. In his farewell remarks from the Bench, Justice Blackmun said, "As an old canoeist myself, I share Bill Douglas's vivid and eloquent description of our work together, the occasional long and strenuous portages, and the last night's and the last morning's campfires, as he set it forth in his retirement letter."[48]

As Blackmun's remarks suggest, Douglas's departure had an important effect on his colleagues. Of the eight Justices who served with Douglas during his decline, all but Chief Justice William H. Rehnquist—the Court's youngest member at the time—have retired. Though it can be argued that some have lingered a bit too long, none burdened and embarrassed the Court to the extent that Douglas's departure did. Indeed, some Justices may have left prematurely, due in part to the Douglas experience.

Appendix A

Letter From Byron White to Warren Burger, October 20, 1975

Dear Mr. Chief Justice:

I should like to register my protest against the decision of the Court not to assign the writing of any opinions to Mr. Justice Douglas. As I understand it from deliberations in conference, there are one or more Justices who are doubtful about the competence of Mr. Justice Douglas that they would not join any opinion purportedly authored by him. At the very least, they would not hand down any judgment arrived at by a 5–4 vote where Mr. Justice Douglas is in the majority. There may be various shadings of opinion among the seven Justices but the ultimate action was not to make any assignments of opinions to Mr. Justice Douglas. That decision, made in the absence of Mr. Justice Douglas, was supported by seven Justices. It is clear that the ground for the action was the assumed incompetence of the Justice.

On the assumption that there have been no developments since last Friday to make this unnecessary, I shall state briefly why I disagreed and still disagree with the Court's action. Prior to this time, on every occasion in which I have dissented from action taken by the Court's majority, I have thought the decision being made, although wrong in my view, was within the powers assigned to the Court by the Constitution. In this instance, the action voted by the Court exceeds its powers and perverts the constitutional design.

The Constitution provides that federal judges, including Supreme Court Justices, "shall hold their Offices during good behaviour." That document—our basic charter binding us all—allows the impeachment of judges by Congress; but it nowhere provides that a Justice's colleagues may deprive him of his office by refusing to permit him to function as a Justice.

If there is sufficient doubt about Justice Douglas's mental abilities that he should have no assignments of opinions and if his vote should not be counted in 5–4 cases when he is one of the five, I fail to see how his vote should be counted or considered in any case or why we should listen to him in conference at all. In any event, the decision of the Court precludes the effective performance of his ju-

dicial functions by Mr. Justice Douglas and the Court's majority has wrongfully assumed that it has the power to do so.

If Congress were to provide by statute that Supreme Court Justices could be removed from office whenever an official commission, acting on medical advice, concluded that a Justice is no longer capable of carrying on his duties, surely there would be substantial questions about the constitutionality of such legislation. But Congress has taken no such action; nor has it purported to vest power in the Court to unseat a Justice for any reason. The Court nevertheless asserts the right to disregard Justice Douglas in any case vote where it will determine the outcome. How does the Court plan to answer the petitioner who would otherwise have a judgment in his favor, who claims that the vote of each sitting Justice should be counted until and unless he is impeached by proper authorities and who inquires where the Court derived the power to reduce its size to eight Justices?

Even if the Court had the authority to do what seven Justices now purport to do, it did not, as far as I know, discuss the matter with Mr. Justice Douglas prior to voting to relieve him of a major part of his judicial duties, did not seek his views about his own health or attempt to obtain from him current medical opinions on that subject.

Mr. Justice Douglas undoubtedly has severe ailments. I do not discount the difficulties that his condition presents for his colleagues. It would be better for everyone, including Mr. Justice Douglas, if he would now retire. Although he has made some noble efforts—very likely far more than others would have made—there remain serious problems that would best be resolved by his early retirement. But Mr. Justice Douglas has a different view. He listens to oral arguments, appears in conference and casts his vote on argued cases. He thus not only asserts his own competence to sit but has not suggested that he is planning to retire.

Based on my own observations and assuming that we have the power to pass on the competence of a fellow Justices, I am not convinced, as each of my seven colleagues seems to be, that there is such doubt about the condition of Mr. Justice Douglas that I should refuse to join any opinion that he might write. And, as I have said, as long as he insists on acting as a Justice and participating in our deliberations, I cannot discover the constitutional power to treat him other than as a Justice, as I have for more than thirteen years.

The Constitution opted for the independence of each federal judge, including his freedom from removal by his colleagues. I am convinced that it would have been better had retirement been required at a specified age and that a constitutional amendment to that effect should be proposed and adopted. But so far the Constitution has struck a different balance, and I will not presume to depart from it in this instance.

If the Court is convinced that Justice Douglas should not continue to function as a Justice, the Court should say so publicly and invite Congress to take appropriate action. If it is an impeachable offense for an incompetent Justice to purport to sit as a judge, is it not the task of Congress, rather than this Court, to undertake proceedings to determine the issue of competence? If it is not an impeachable offense, may the Court nevertheless conclude that a Justice is incompetent and forbid him to perform his duties?

This leads to a final point. The Court's action is plainly a matter of great importance to the functioning of the Court in the immediate future. It is a matter of substantial significance to both litigants and the public. The decision should be publicly announced; and I do hope the majority is prepared to make formal disclosure of the action it has taken.

Knowing that my seven colleagues, for whom I have the highest regard, hold different views, I speak with great deference. Yet history teaches that nothing can more readily bring the Court and its constitutional functions into disrepute than the Court's failure to

recognize the limits of its own powers. I therefore hasten to repeat in writing the views that I orally stated at our latest conference.

Sincerely,
Byron
The Chief Justice

Copies to: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

Appendix B

Letter from Warren E. Burger, William J. Brennan Jr., Potter Stewart, Byron R. White, Thurgood Marshall, Harry A. Blackmun, Lewis F. Powell, and William H. Rehnquist to William O. Douglas, December 22, 1975

Dear Bill:

Your memos of November 15 and December 17 tend to have a connection with one another and to the problems you raised in your letter to the Chief Justice with copies to the Conference dated December 20. The Chief Justice advised you on December 19 that these matters would be taken up in Conference. The Conference met today and considered all of these points.

For clarification of discussion these matters were divided into their separate categories. The Conference considered each of these matters separately and after discussion reached the following conclusions:

(1) Participation in pending argued cases: It seems clear beyond doubt that your retirement by letter dated November 12 operated to terminate all judicial powers except such as would arise from assignment to one of the Federal courts other than the Supreme Court. The statutes seem very clear that a retired Justice cannot be assigned any duties of a Supreme Court Justice as such. This would apply to all cases submitted but not decided before you retired and to any case decided while you were a member of the Court on which rehearing is thereafter granted. Specifically this would apply to *Williams & Williams v. United States*, the copyright case you mentioned in your memorandum of December 20, and, of course, it would apply to all other cases which reargument has been granted including the death penalty cases.

(2) Passing on certiorari petitions and on appeals presented by jurisdictional statements: Here, too, your retirement on November 12 terminates any power to participate in Conference actions granting or denying certiorari, actions on jurisdictional statements, motions, etc.

(3) Attendance at Conferences: Resolution of the two foregoing questions bears on the question of attendance at conferences. The formal conferences of the Court are limited, as you know, to Justices empowered to act on pending matters and do not include retired Justices.

(4) Staff and Chambers: The Chief Justice invited you to occupy the Chambers reserved for retired Chief Justices which Earl Warren had occupied during his lifetime after retirement. You indicated you preferred to remain in your present quarters. In your letter of November 15, you may recall, you stated, "Whoever is named to take my place might want the more commodious [retired Chief Justice] space that is available."

In that same letter you confirmed earlier discussions about future staff with your statement: "I assume that my messenger will continue on as well as my two secretaries." Ordinarily a retired Justice has been allowed only one secretary, and, if he performed authorized judicial duties, he was allowed a law clerk. The Conference decision was that for the time being you should be allowed to take your

choice and have two secretaries rather than one secretary and one law clerk. It was agreed that your messenger could be continued so that you would have someone to drive your car. There are no statutes expressly providing for the staff of a retired Justice but it is a matter of tradition, and the tradition is quite definite as to the extent of staff. Earl Warren, after his retirement, had one secretary, one messenger who doubled as his driver, and for at least part of the time, one law clerk.

For clarification, the unanimous Conference decision is that you should have your present Chambers as you requested and also, as you requested, your messenger and two secretaries. There is no provision in the budget for a staff exceeding three persons for a retired Justice.

No member of the Conference could recall any instance of a retired Justice participating in any matter before the Court and it was unanimously agreed that the relevant statutes do not allow for such participation.

We hope this will clarify the situation.

Best wishes,
Warren E. Burger
Thurgood Marshall
William J. Brennan Jr.
Harry A. Blackmun
Potter Stewart
Lewis F. Powell
Byron R. White
William H. Rehnquist

ENDNOTES

[1]On November 12, 1975, Douglas formally retired after thirty-six years, the longest tenure in the Court's history.

[2]William O. Douglas to Felix Frankfurter, July 2, 1940, Melvin I. Urofsky, **The Douglas Letters: Selections from the Private Papers of Justice William O. Douglas** (Bethesda, MD: Adler & Adler, 1987), 215.

[3]William O. Douglas to Hugo Black, September 8, 1941, *ibid.*, 109.

[4]Hugo Black to William O. Douglas, September 15, 1941, Box 309, Douglas Papers.

[5]In 1946, Truman offered Douglas the post of Interior Secretary and the Justice declined. In 1948, forces were once again at work to nominate Douglas for either the first or second spot on the Democratic ticket. He wrote one of his supporters, "I have not been and am not now a candidate for either office. I have done all in my power to stop individuals or groups from promoting me for either office. The rumors, however, persist that I am available and will allow my name to go before the convention, and that I will actively or passively seek one of the nominations.

"These are not the facts. I am not available. No one is authorized to promote my candidacy. I have but one ambition and that is to stay on the Court and serve my country there to the best of my ability. And I am convinced that it would be a great disservice to the Court for one of its members to seek political office while he remains on it. It was that reason which caused me to keep my name from being presented to the Convention in 1944. It is the same reason why I am taking the same step through you at this time." William O. Douglas to Leland F. Hess, July 3, 1948, Urofsky, **The Douglas Letters**, 218–19.

After Truman won the nomination, he offered Douglas the vice presidential spot. Douglas once again declined to leave the Court, writing the President, "My decision was not an easy one. Basic in my whole thinking was the thought that politics had never been my profession and that I could serve my country best where I am." William O. Douglas to Harry S Truman, July 31, 1948, *ibid.*, 219. A year later, Douglas and Black's close friend Justice Frank Murphy died suddenly of a heart attack on July 19, 1949. The liberal Justices were shaken and hinted that they might step down. On July 23, 1949, Truman once again pressed Douglas to take on a "more active" job. Douglas wrote Justice Black, "I do not want to leave the Court. I desire to stay just where I am. I hate even to consider the prospect of leaving. I am very happy right there, and I want nothing but the opportunity to slug away alongside of you for the next 30 years.

"Right now I cannot think of anything which would lead me to resign. If the country was in complete chaos or on the brink of a major disaster & I felt I could help, I would gladly do so. But it is not, so far as I know. And there are many able men who would do all that he possibly has in mind." William O. Douglas to Hugo Black, July 23, 1949, *ibid.*, 110.

[6]William O. Douglas to Francis T. Maloney, January 14, 1944, *ibid.*, 216.

[7]William O. Douglas to Hugo Black, August 15, 1949, Box 309, Douglas Papers.

[8]Elon Gilbert, quoted in James F. Simon, **Independent**

Journey: The Life of William O. Douglas (New York: Harper and Row, 1980), 281.

[9]William O. Douglas to Hugo Black, November 3, 1949, Urofsky, **The Douglas Letters**, 111.

[10]William O. Douglas to James Paul Warburg, January 21, 1952, *ibid.*, 220.

[11]Hugo Black, Jr. to William O. Douglas, June 7, 1963, Box 309, Douglas Papers.

[12]William O. Douglas to Hugo Black, Jr., June 10, 1963, *ibid.*

[13]William O. Douglas, **The Court Years 1939–1975** (New York, NY: Random House, 1980), 376–77.

[14]Simon, **Independent Journey**, 391–400.

[15]Douglas, **The Court Years 1939–1975**, 371–72.

[16]John Marshall Harlan II to William O. Douglas, June 29, 1970, Box 337, Douglas Papers.

[17]Speech by William O. Douglas at the Douglas Anniversary Convocation, November 3, 1973, Box 1759, Douglas Papers.

[18]Douglas was in the Bahamas vacationing with his wife Cathy when he was stricken. President Ford had Douglas's personal physician flown to Nassau and he immediately recommended that the Justice be flown back to Washington.

[19]Terence J. Fortune to Clark Clifford, January 13, 1975, Box 316, Douglas Papers. It is not clear what prompted this memorandum and why a copy is contained in Douglas's papers.

[20]Justice Brennan wanted to keep Douglas abreast of the Court's work while he was in the hospital. Following the first conference without Douglas, Brennan drafted a two-page memorandum providing a brief overview of what took place. Brennan added, "You were missed very much at today's conference. I am sure that without you we made several mistakes." William J. Brennan, Jr. to William O. Douglas, January 10, 1975, Box 1780, Douglas Papers.

[21]Prior to his return, Douglas wanted the Court to issue a statement referring to his "fall." Chief Justice Burger instructed the public information officer to make the statement in Douglas's name and not the Court's. Burger also quietly made arrangements for the Court's carpenter to construct a ramp so that Douglas's wheelchair could be pushed up to his place on the Bench when he returned. On March 24, 1975, Douglas returned to the Court and took his place on the Bench. As the Court neared its lunch recess, Burger leaned over and asked Douglas if he would like to be wheeled out a few minutes early. Douglas declined, and when the proceedings ended, his colleagues all stood up and disappeared behind the velvet curtain, leaving him sitting in his place. Two Court policemen then wheeled Douglas down the new ramp and out of the view of the stunned onlookers. Warren Burger to William O. Douglas, March 24, 1975, Box 1781, Douglas Papers.

[22]"Douglas Finally Leaves the Bench," *Time*, November 24, 1975, p. 69.

[23]Warren Burger to William O. Douglas, March 31, 1975, Box 1781, Douglas Papers.

[24]Simon, **Independent Journey**, 449.

[25]Simon, **Independent Journey**, 450.

[26]Bob Woodward and Scott Armstrong, **The Brethren: Inside the Supreme Court** (New York: Simon & Schuster, 1979), 390.

[27]Simon, **Independent Journey**, 451.

[28]Woodward and Armstrong, **The Brethren**, 391.

[29]Notes between Douglas and staff, October 6, 1975, Box 1131, Douglas Papers

[30]He wrote a note to his secretary, "Can you get the Court car for the Brennan dinner?" She replied, "Yes, you told me to do this at the beginning of the week already." William O. Douglas to his secretary, October 1975, *ibid.*

[31]Simon, **Independent Journey**, 449.

[32]Byron White to Warren Burger, October 20, 1975, Dennis J. Hutchinson, **The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White** (New York, NY: The Free Press, 1998), 463. Copies are absent from the Douglas, Brennan, and Marshall Papers held at the Library of Congress. A copy is located in the Powell Papers at Washington & Lee University, Lexington, VA.

[33]*See*, generally, Artemus Ward, "Deciding To Leave: The Politics of Departure on the U.S. Supreme Court from John Rutledge to Harry Blackmun," Ph.D. Dissertation, Syracuse University, 1999.

[34]William O. Douglas to Joseph Freeman Paquet, October 14, 1975, Urofsky, **The Douglas Letters**, 416.

[35]William O. Douglas to Gerald Rudolph Ford, November, 12, 1975, *ibid.*, 416–17.

[36]"Final Judgment," *Newsweek*, November 24, 1975, p. 45; Simon, **Independent Journey**, 452. Some of the Justices met the news with tears and others with relief as they each shook Douglas's hand. Justice Harry Blackmun returned to his Chambers in tears, clutching a copy of the retirement letter, where he penned a tribute to his departing colleague. It said, in part, "His like probably will not appear again for a long, long while." Woodward and Armstrong, **The Brethren**, 394.

[37]Warren Burger to William O. Douglas, November 12, 1975, Box 1781, Douglas Papers.

[38]William O. Douglas to Warren Burger, November 15, 1975, Box 1701, Douglas Papers.

[39]William O. Douglas to the Conference, December 17, 1975, Box 1701, Douglas Papers.

[40]James B. Ginty to William J. Brennan, December 18, 1975, Box 1133, Douglas Papers.

[41]Carl H. Imlay to Edward Hudon, December 19, 1975, *ibid.*

[42]Nina Totenberg said that Justice Brennan was chosen at some point by the other Justices to inform Douglas that he

was too ill to continue on the Court. Nina Totenberg, "A Tribute to Justice William J. Brennan, Jr.," in Roger Goldman and David Gallen, eds., **Justice William J. Brennan, Jr.: Freedom First** (New York: Carroll & Graf, 1994), 51.

[43]424 U.S. 1 (1976).

[44]He argued that his participation in the case was in keeping with Court procedure: "The break with tradition would come if for some reason, best known to a conference, a Justice who had participated in bringing a case here and had done all the work on the case, including hearing oral argument, could be eased out of a final and ultimate action on the case." Douglas then proceeded to set out his views on the case. William O. Douglas to Warren Burger, December 20, 1975, Woodward and Armstrong, **The Brethren**, 398. No copy exists in the Douglas or Marshall Papers.

[45]William J. Brennan, Jr. to Warren Burger, December 22, 1975; Potter Stewart to Warren Burger, December 23, 1975, Box 156, Marshall Papers.

[46]Warren E. Burger, William J. Brennan, Jr., Potter Stewart, Byron R. White, Thurgood Marshall, Harry A. Blackmun, Lewis F. Powell, and William H. Rehnquist to William O. Douglas, December 22, 1975, Box 1133, Douglas Papers.

[47]William O. Douglas to Elizabeth Cuthbert, February 6, 1976, Urofsky, **The Douglas Letters**, 421.

[48]Douglas's retirement letter of Nov. 14, 1975 is at 423 U.S. ix. Blackmun's is at 512 U.S. ix.

Judicial Bookshelf

D. GRIER STEPHENSON, JR.

The U.S. Supreme Court has compiled a record that now exceeds 210 years and that reflects the handiwork of the 108 individuals who have sat to date. Yet, just as some of those individuals remain far better known today than their colleagues, so do certain periods of the Court's history stand out more prominently than others. A glance at the literature suggests an imbalance. If one defines a Court period by its Chief Justice, as is commonly done (the Stone Court, the Vinson Court, and so on), it becomes plain that all judicial eras have not been created equal. Some have attracted more scholarly attention because of the legal and political impact the Court had on the America of that day. Alternatively, scholars have been drawn to some judicial eras more than others because of the relevance of the Court's decisions for a later day. The interest derives not so much from the Justices' impact on their own times as from the perceived utility of their handiwork for the present day, when the Court emerges as an ally (or adversary) in some current constitutional controversy. Still, there is evidence in the literature that some judicial periods have been unreasonably neglected,[1] underappreciated,[2] or improperly understood.[3]

One such period may be the years during which Edward Douglass White served as Associate Justice and then as Chief Justice. Several recent books go far toward rectifying whatever imbalance might exist. One of these is **The Supreme Court under Edward Douglass White, 1910–1921** by Walter F. Pratt, Jr.[4] It is the fifth volume to appear in the series entitled "Chief Justiceships of the United States Supreme Court" under the general editorship of Herbert A. Johnson. Previous volumes treat the pre-Marshall,[5] Marshall,[6] Fuller,[7] and Stone/Vinson eras.[8] Far briefer than any of the installments in the Holmes Devise History, books in the Johnson series will enjoy a wider audience and may prove nearly as useful. Pratt's volume sets a solid standard for those to follow.

A study of the White Court presents both a challenge and an opportunity to an author, because the years 1910–1921 as a discrete block of Supreme Court history routinely rank among the less familiar. This seems so for several reasons.

White's Court is usually not perceived as synonymous with particular policies or doctrines (as is the case with the Marshall Court, 1801–1835, or the Warren Court, 1953–1969) or seismic events (as is the case with the Hughes Court, 1930–1941). Much of the Court's work during White's time either has fallen from or was never part of the political science/law school canon in constitutional law. A search of several current casebooks turns up no more than a small handful of decisions rendered while White was in the center chair. Alternatively, the White years are sometimes lumped together with those of its predecessor (the Fuller Court, 1888–1910) and of its successors (the Taft Court, 1921–1930, and the first six years of the Hughes Court) to depict the influence of laissez-faire economics and social Darwinism on judicial decisions. That is easy to do because there appear to have been more doctrinal continuities than defining breaks as one Chief Justice replaced another.

Moreover, if length of tenure provides opportunity for a Chief Justice to influence the law and the Court, recall that White was not among the longest-serving chiefs. Named Associate Justice in 1894 in President Grover Cleveland's second administration, White owed his distinction as the first Chief Justice selected from the ranks of sitting Associate Justices to President William Howard Taft. His ten and a half years (1910–1921) holding the position that Taft coveted place the ninth Chief exactly ninth in length of service among the sixteen who have occupied the center chair. Moreover, White may be more closely linked, not with being Chief Justice, but with the opinions he authored as Associate Justice in *Downes v. Bidwell*,[9] one of the Insular Cases, and *McCray v. United States* (1904),[10] the oleomargarine tax case that came close to making the extent of Congress's taxing power a "political question." Even the "rule of reason" that White first enunciated in a majority opinion in the Standard Oil and American Tobacco antitrust cases[11] came shortly after his appointment as Chief.

Neither was White's Court an especially star-studded Bench, at least not at that time. White himself remains the sole subject of only two book-length biographies.[12] Pratt writes that "the lassitude within the Supreme Court itself" was almost as remarkable as the societal changes at work as the White Court began.[13] True, of the twelve Justices who served with Chief Justice White, Harlan I, Holmes, Hughes, and Brandeis have been accorded "great" or "near-great" status in surveys of scholars. Yet, of these four, Harlan overlapped White as chief by less than a year, and Hughes and Brandeis served a clear minority of their Court years with White. Only Holmes was with White throughout his entire tenure as Chief. Some of the remaining eight at this distance seem either to have left fuzzy impressions (such as Justices Day, Joseph R. Lamar, McKenna, and Pitney) or to have been deemed "failures" (Justices Van Devanter and McReynolds).[14]

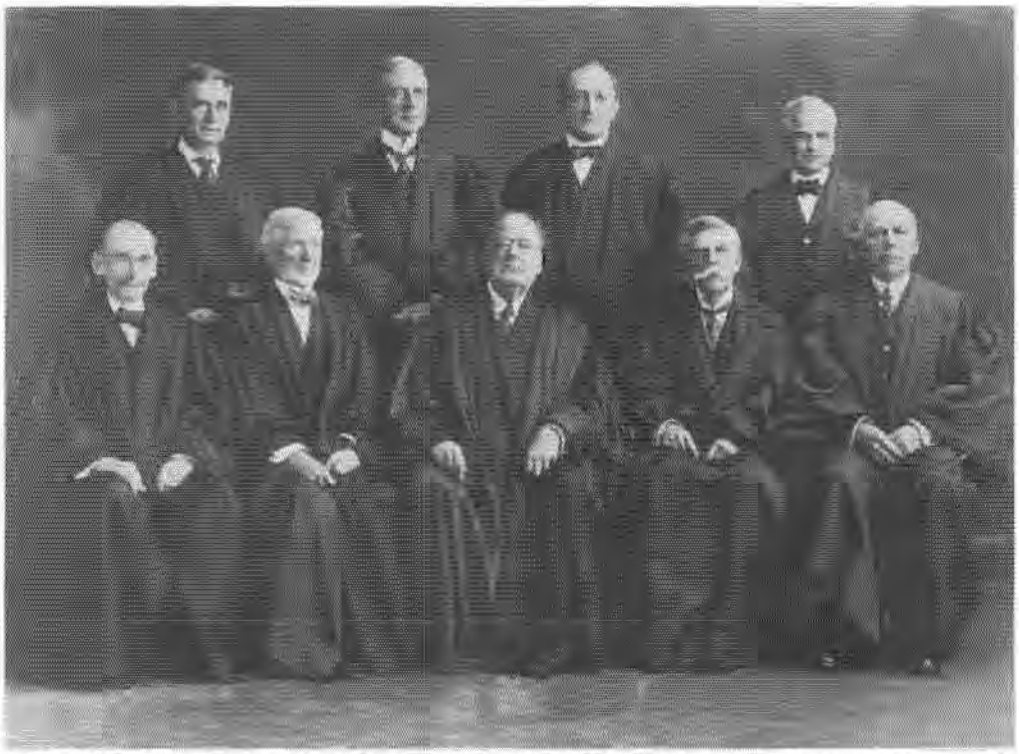
The White Court may not stand out as a prominent entity for a final reason as well: the second decade of the twentieth century was eventful in ways that had little initially and directly to do with the Supreme Court. So much of vast importance happened outside the Court. The first half of White's tenure witnessed major effects of the Progressive movement on institutions, policies, and processes that included the Sixteenth and Seventeenth Amendments to the Constitution, the launch of President Woodrow Wilson's "New Freedom," and an accelerated nationalization of issues. The second half of White's tenure witnessed American participation in the First World War, the aftermath of demobilization, and ratification of the Eighteenth and Nineteenth Amendments. Pratt thus sees "two

White Courts, not one." In the first five years, "the justices dealt with few cases that caused them genuine discomfort. . . ." In the next five years, "the justices saw more and more new issues. Their fumbling attempts to deal with those issues showed how new they were and set the stage for other developments in subsequent decades."[15]

Pratt attributes the Court's partial distance from national and international turmoil to the fact that the Justices lacked command of their agenda. Not only did White "fail [] to use his position to promote change" in the Court's jurisdiction, but "the Court had not been fully included in the Progressives' nationalization of American politics." The result was a large number of "insufferably insignificant cases" each Term and a Bench that "had neither the time nor the inclination to provide careful analysis of fundamental constitutional issues."[16] The creation of the courts of appeals in 1891 had brought some relief, as did enlargement of certiorari jurisdiction on a few matters that became effective in 1917, but it would not be until 1925 and the labors of White's successor Taft that the Supreme Court could truly become a public law court, focusing mainly on matters of its own choosing. This reviewer, however, could locate no mention in Pratt's account of the Act of December 23, 1914. This Progressive era legislation allowed appeal for the first time to the U.S. Supreme Court from the highest court of a state when the state court had ruled in favor of the federal claim.[17]

The Supreme Court under Edward Douglass White does not radically alter prevailing perceptions of the White years; rather, it refines, refocuses, and illuminates them. For instance, Pratt includes sufficient material to lend new appreciation to the judicial contributions of lesser-known figures such as Day, Lamar, Lurton, McKenna, Pitney, and Van Devanter—enough, indeed, to question the conventional wisdom that Van Devanter was a "failure." There is also ample evidence that White was a reasonably effective, if not a great, Court leader. Pratt applies the standard reference points on Court leadership,[18] and gives White high marks as a social leader. He was amiable and attuned to the feelings and needs of his colleagues. With Holmes he had an especially warm relationship, which may have impressed others because the two had fought on opposite sides in the Civil War. White had that valuable and enviable quality of personality—whether in politics, business, or academe—that made it difficult for others to dislike him. Colleagues might disagree with him, but only with great effort could they hold him in disdain.

It may be that in White's case the other standard reference point—task leadership—breaks down. As suggested some years ago,[19] task leadership in the context of the Supreme Court seems to consist of at least two components: managerial leadership and intellectual leadership. The first encompasses all that the Chief Justice does to keep the Court abreast of its docket and functioning smoothly as an institution. The second points to one or more individuals on the Court as sources of ideas and strategy who can shape doctrinal development. Pratt's account gives little indication that White excelled in intellectual leadership; that duty may have been picked up by others. With respect to managerial leadership, the estimate seems mixed. He did well in managing day-to-day business. He strove gallantly to keep the Court moving through its docket even though the volume of business was such that the Court usually appeared to be playing a game of judicial catch-up. Until his health began to fade, White set an example of being one of the most prolific Justices (usually in a race with Holmes) in terms of generating opinions of the Court. His style also reflected a continuing desire "to stop 'this dissenting business'" not only as a way of presenting a more unified Bench but as a way of avoiding impediments to the disposition of cases.[20] Only in the 1919–1920 Term, when his eyesight and hearing had deteriorated badly, did the percentage of unanimous decisions drop to as low as 66



In *The Supreme Court under Edward Douglass White, 1910–1921*, Walter F. Pratt, Jr., concludes that while White (first row, center) may not have excelled at intellectual leadership, he was reasonably effective as Chief Justice and maintained good relationships with his Brethren.

percent.[21] Yet with respect to the broader problem of jurisdiction and the Court's place in the political system, White lacked vision or initiative or both. "[H]e left . . . without having shown an inclination to use the office of chief justice to lobby Congress or otherwise seek benefit for the Court."[22]

The book's development proceeds chronologically, not topically, thus departing from the format found in other volumes in the Johnson series. Sandwiched between an introduction and a conclusion[23] are eleven chapters that begin with "The First Term" and "The 1911–1912 Term" and conclude with "The 1919–1920 Term" and "The Final Term." The advantage of this format is obvious: the reader witnesses the work of the Court as it occurs. This is not to say that each chapter, focused as it is on a particular Term, unfolds chronologically, but that in a given Term the reader senses the variety of issues that the Justices confronted and how they resolved them. Typically a chapter begins with a discussion of membership changes and a managerial overview of the docket, before turning to the Term's decisions. By this reviewer's count, the shortest of the Term chapters (IV, on the 1913–1914 Term) reviews 23 individually or collectively decided cases in its 15 pages. The longest of the Term chapters (VII, on the 1916–1917 Term) reviews 37 such cases in its 30 pages. The result is a clearer sense of the differences of substance and pace between Terms. And most readers will appreciate the generous presence of what has become a rare luxury in book publishing: all citations and explanatory notes appear at the bottom of the page.

Likewise, the disadvantage of a Term by Term format should be obvious: anyone opening this volume to see what the White Court did with respect to, say, civil rights or federalism

(neither of which appears as an entry in the meagerly notated index) or other topics may face an uphill climb. Trade-offs may be necessary at times, but an index[24] that contains no case names is hardly offset by a "Table of Cases" appendix[25] that contains no page references to the book. Thus, suppose one wants to locate Pratt's analysis of *Weeks v. United States*,[26] an early statement of what has become the much discussed, much praised, and much maligned exclusionary rule. A citation to *Weeks* appears in the Table of Cases, but without page references to the book. A look in the index under "exclusionary rule" points the reader to pages 255–257, where the only mention of *Weeks* occurs in footnote 39 as a citation. On the chance that the index inadvertently omitted the page or pages where *Weeks* was discussed, this reviewer returned to the chapters surveying the 1913–1914 and the 1914–1915 Terms but, alas, could find no mention of the case. So apparently the book contains no discussion of this important Fourth Amendment holding. That may be an understandable omission that is surely the author's call, but finding that it is an omission consumes unnecessary time that could have been saved by a functional Table of Cases. Each of the other volumes in this series displays a table of cases with page references; otherwise, the table is useless. Correction in an additional printing or in a revised edition of what must be an oversight would make the volume considerably more useful as a reference.

Nonetheless, Pratt's book is a useful addition to the shelves of Supreme Court history. It demonstrates how the Court "tested old doctrines for suitability in new circumstances." And, when it found various doctrinal categories inappropriate for a changing day, the Justices "began to test newer categories as [they] followed the rest of the nation into a modern world."[27] The operative word in that sentence may be "followed," a word that may best fit the era of judicial history called the White Court, and that may not be a bad epithet for any court.

Indeed, that epithet is one that the contributors to **Sober As a Judge** might well approve.[28] Edited by Richard G. Stevens and Matthew J. Franck, the volume consists of contributions by seven authors: essays on five Justices (Nathan P. Clifford, Stanley Matthews, Edward Douglass White, Fred M. Vinson, and Antonin Scalia), a fourteen-page foreword, and an article-length introduction and epilogue.[29] The book has two levels: advocacy (or statement of a theme) and analysis. Each is related to the other, although each can just as easily stand on its own. A reader does not have to accept the former to benefit from the latter.

The first level is captured by the title, in which the key word is "sober." Overall the volume is an argument for a theory or style of judging and constitutional interpretation—as well as a Congress that demands it and Supreme Court Justices who adhere to it—that the editors call judicial "sobriety."[30] In language of the contemporary debate over methods of constitutional interpretation, the sober judge turns to text and intent, not evolutionary doctrine. As such the Constitution is not "living" but "limiting."[31] As the book's subtitle ("The Supreme Court and Republican Liberty") suggests, preservation of liberty depends upon a larger role for the people and the legislative branch and a smaller role for the judiciary. "We believe that there have been some good justices, some 'sober justices' who did not think it their prerogative to make the Constitution. Their opinions may very well be the better ones—better precisely because they are not exciting, because they don't 'go' anywhere, because they rightly regard constitutional law as the creature of the Constitution, not the Constitution as the creature of constitutional law. The sober justices have minded their own judicial business rather than usurping first the place of the Congress and then the place of the Framers."[32]

Suggesting "with some confidence that no justice of the Supreme Court prior to the Civil War had a *theory* of constitutional inter-

pretation,"[33] the book dates the onset of judicial insobriety from the post–Civil War period. Prior to 1865, constitutional fault lines were determined by opposing interests such as slavery and tariffs. Encouraged by the apparent latitude of the Fourteenth Amendment and the emergence of new ways of thinking about jurisprudence, those divisions were supplanted by ideology and doctrine that have allowed Justices to fall off the wagon. "Hence, it is not until there is judicial tippling that judicial sobriety is specially noteworthy." The result has been a Court that has been "drunk on doctrine" and in great need of "sobering up."[34]

The second level—analysis of five judicial careers—makes the volume more than yet another addition to the lively ongoing debate over the role of the Court. That is because, Justice Scalia aside, the Justices described here as sober may have been influential in their day but have only occasionally been the subject of scholarly inquiry. Thus, **Sober As a Judge** qualifies as a unique source of thought-provoking and perceptive essays for anyone interested in the judicial careers of Justices Clifford, Matthews, E. D. White, and Vinson.

For example, Dennis G. Stevens' chapter on White reinforces the portrayal offered more than sixty years ago by Lewis Cassidy, who found in the Chief Justice an attitude of "'noble unconsciousness,' for he 'had no suspicion . . . of being particularly anything.' One may search in vain for the terse in his opinions, while that pleasing faculty was habitual with Holmes."[35] For Stevens, those characteristics nonetheless had value. "Felix Frankfurter says that White's opinions are 'models of what judicial opinions ought not to be.' . . . His opinions were considered dense, if not obscure . . . It could be said that his weaknesses were also his strengths, especially if it is the business of a judge to interpret the law in a quiet, objective manner."[36] Probing White's views on the commerce power (including his view of the Sherman Anti-Trust Act as embodying a "rule of reason" that determined which restraints of trade were actually forbidden) and on the taxing power (including his dissent in the Income Tax Case[37]), Stevens concludes that his respect for the law precluded White from a role as judicial "innovator."[38] It "imposes upon him a kind of judicial restraint that is not actually demanded by his understanding of the Constitution. He reads the Constitution in the way that a pious person might read the Bible. Piety itself does not preclude error in interpretation, but it does restrain such a reader from knowingly suggesting interpretations that are inconsistent with the dignity and authority of the text . . . Justice White's respect for the Constituton . . . ensures sobriety if not wisdom."[39]

The Chief Justice's jurisprudence derived from "the view that people can reason about the law and that reason can help us transcend the personal. This view places him in the tradition established by John Marshall . . . "[40] Yet the problem with White's rule of reason was the absence of "clear judicial standards for what is reasonable."[41] His assumption was that "the law is reasonable in the way that he is reasonable. One could say that White is right more often than his principles should allow."[42] Perhaps, but is the explanation more complex? For example, the essay does not mention White's votes, only a year apart, on opposite sides in two Commerce Clause cases, *Wilson v. New* and *Hammer v. Dagenhart*.[43] In the first the Chief Justice wrote the opinion upholding a federal hours and wage statute for interstate railways,[44] but in the second joined Justice Day's opinion striking down the Child Labor Act.

Further insight into White may be gleaned from William D. Reeves' **Paths to Distinction**.[45] The book depicts the lives, not only of White (in two chapters), but of his father (E. D. White, in one chapter), his mother (Catherine Sidney Lee Ringgold White Brousseau,[46] in one chapter), and a grandfather (James White, in two chapters). With a

preface by David D. Plater, **Paths to Distinction** reveals both a remarkable heritage and an uncommon upbringing for the future Chief Justice.

James White was certainly no one's typical grandfather. Educated as a physician in Philadelphia and a member of St. Mary's Catholic parish in that city, he was a "charming and personable Irishman, alternatively impressing the masses and the classes" before deciding "to sell out and move on."[47] Moving on entailed a series of adventures that carried him from Pennsylvania to North Carolina and into the present-day states of Tennessee, Mississippi, and Louisiana. While on a mission to deliver messages from the South to the Congress in 1794 requesting aid from the Indians (he was the first territorial delegate to the House of Representatives) James literally abducted a young woman named Sukey as his wife, who shortly gave birth to Edward Douglas White.[48] In the author's view, what was unusual was not a life that stretched between Philadelphia and St. Martinville, Louisiana, but a "systematic step-by-step progress ever deeper into the forest, ever away from the crowds. . . . [O]nly inevitable death kept him from marching with Sam Houston into Texas."[49]

His son distinguished himself in Louisiana politics, serving in the U.S. House of Representatives and as governor of the state before returning to Congress again. Following E. D. White's death in 1847, his wife Sidney managed the plantation near Thibodaux, remarried, and directed the education and rearing of her children in increasingly turbulent times. "Sidney Ringgold was one of those formidable nineteenth-century women who survived and succeeded. As a woman, she had to survive repeated childbirths [and] also had to survive yellow fever, cholera, and swamp fever, diseases that swept Louisiana regularly for most of the century . . . .She was an anchor in that vibrant Esplanade Avenue society so fascinatingly described by Kate Chopin in **The Awakening**."[50]

Her son "Ned" entered the Confederate Army as a teenager. He was taken prisoner after the fall of Port Hudson (located eighteen miles above Baton Rouge on the Mississippi River) in 1863, was paroled, and then limped home to Thibodaux with malaria. As a young lawyer White was elected to the state senate in 1874 and then appointed to the state supreme court in 1879. When a rival faction of the Democratic party took control, however, the Constitution of 1880 reset the minimum age for justices at thirty-five, a requirement White (barely) did not meet.[51] Among Supreme Court Justices, White has the distinction of probably being among a very few who were ever "ratified" out of a judicial post. White made the most of this apparent misfortune. The successful legal career that ensued led to his election to the United States Senate where he served from 1891 until 1894, when he was President Grover Cleveland's third choice, following Senate rejection of the first two, to replace Justice Samuel Blatchford.

The stories and episodes the book relates could easily have been the makings for one of the James Michener sagas. The book is thus less about Chief Justice White and more about those who guided and provided for him initially. However, lineage should not be overlooked. What one becomes is influenced by the family, times, and circumstances into which one is born. "Solomon's justice," Mark Twain advised, "depends upon how Solomon is raised."[52]

And it is also a book about the White home six miles from Thibodaux, along Bayou Lafourche, where Ned White spent his early years. A neighboring plantation belonged to Episcopal Bishop Leonidas Polk, who was later a Confederate general killed in action at Pine Mountain, Georgia. Indeed the house is literally at the center of the book: a double page fold-out following page 86 shows the location of the probable furnishings on the first floor in 1847, soon after White's birth.[53] The house was constructed at the edge of a sugarcane plantation in the 1820s in the style of an

White resided at 1717 Rhode Island Avenue (above) when he lived in Washington, but his family's sugar plantation in Louisiana (opposite page), a few miles north of Thibodaux, was his home.

Acadian cottage, with the first floor raised one floor from the ground. The dining area was on the ground level, with the principal living area on the first floor. Dormer windows opening into a partial second floor were added in 1848. Alongside imposing classical revival plantation houses constructed in the 1840s and 1850s, the White home appears more functional and simple. It stands today on the original site and is being restored.

Twenty cases decided while White was Chief Justice are among the 537 cases, almost entirely on constitutional law, selected for summary and analysis in **The Oxford Guide to United States Supreme Court Decisions**, edited by Kermit L. Hall.[54] The chief criterion

for inclusion in this encyclopedia of cases is the editor's judgment on those that have been "the . . . most important."[55] The selection process seems to have worked well: it is difficult to think of a case meriting inclusion that did not make the cut. Current through June 1998, the 537 essays[56] range in length from barely half a column to four or more columns[57] and are helpfully arranged alphabetically by case, not chronologically. Contributors, including legal scholars, historians, and political scientists, number 152. Each entry "not only sheds light on the evolution of constitutional law but also maps the nation's underlying social, cultural, and political dynamics, a map traced in the actions of litigants and the justices who responded to them."[58]

Just as **The Oxford Guide** allots cases varying amounts of space, so also do the cases fall unequally across Court periods, as Table 1 illustrates. The volume's emphasis is decidedly contemporary, with slightly more than half the cases selected for inclusion having come down since 1953. Supplementing the analyses are a glossary, four tables on the appointment and succession of Justices, and thorough case and topical indexes. Novices and experts alike will find **The Oxford Guide** a convenient reference work that nicely complements, and updates in part, the same editor's more substantial volume on the Supreme Court, produced by the same publisher in 1992.[59]

Three cases not mentioned in **The Oxford Guide** were decided in 1906 and 1909 while White was still an Associate Justice.[60] They involved an episode in Supreme Court history that has largely fallen out of sight: the contempt trial and conviction of Sheriff John F. Shipp and others. Even Charles Warren's monumental work,[61] written little more than a decade later, made no mentioned of the affair. To their credit, Mark Curriden and Leroy Phillips, Jr.—a Dallas journalist and a Chattanooga trial attorney respectively—have rescued the episode from obscurity in **Contempt of Court**.[62]

Events unfold in a fast-moving and riveting narrative that, once begun, is hard to put down. On January 23, 1906, a black man

TABLE 1: Distribution of Cases in *The Oxford Guide*

Court Period	Cases Included	Average per Year
Pre-Marshall	5	0.45
Marshall	26	0.76
Taney	25	0.89
Chase	14	1.6
Waite	26	1.9
Fuller	35	1.6
White	20	1.8
Taft	21	2.3
Hughes	43	3.9
Stone	13	2.6
Vinson	28	4.0
Warren	79	4.9
Burger	103	6.0
Rehnquist (through June 1998)	99	8.2

named Ed Johnson was arrested in Chattanooga, Tennessee, for the rape of a white woman named Nevada Taylor. Prior to the trial, a mob wrecked the county jail in an unsuccessful attempt to lynch Johnson (who had been whisked out of town four hours earlier). Sheriff Shipp, facing reelection, declined to seek prosecution of any of the vigilantes. In February, less than three weeks after commission of the crime, the jury returned a verdict of guilty and the trial judge sentenced Johnson to death. Court-appointed counsel collectively declined to ask for a new trial or appeal, whereupon two black attorneys named Styles Hutchins and Noah Parden took the highly unusual step for that day of turning to the United States Circuit Court for habeas corpus relief. Circuit Judge Charles Clark doubted both the applicability of federal constitutional provisions to state criminal justice and his authority to intervene in a state criminal case, even if the allegations of trial irregularities advanced by Johnson's new attorneys were true. However, he issued a short stay of execution to allow appeal to the U.S. Supreme Court.

Aided by Emanuel D. Molyneaux Hewlett, a black attorney in Washington who was a member of the Supreme Court bar, Parden traveled to Washington to appeal the lower court's ruling before Justice John Marshall Harlan, who, as Circuit Justice, had oversight of the Sixth Circuit that included Tennessee. Harlan consulted with the full Court at Chief Justice Fuller's home on Sunday morning, March 18, before allowing the appeal and further staying the execution. By Monday evening, word of the Court's action had spread through Chattanooga. At nightfall a mob gathered at the jail, laid siege, and before midnight broke through the remaining barriers and seized Johnson from his cell. Insisting on his innocence to the end, he was promptly hanged from a bridge spanning the Tennessee River. A note attached to his body condemned the Supreme Court for intervening into a local matter.

An investigation by federal authorities led to the filing of contempt charges against Sheriff Shipp and eight others and a trial for contempt before the Supreme Court. In the spring of 1909 the Court found Shipp and five of the others guilty of contempt, apparently the only such incident in which the "Court enforced its own ruling."[63] Justices Rufus Peckham, White, and Joseph McKenna judged the record lacking sufficient evidence and dissented. Justice William Moody[64] did not participate. The Court then dismissed Johnson's appeal, now "abated by death of appellant."[65] One can imagine the landmark

When President Nixon (right) had the opportunity to name Chief Justice Earl Warren's successor in 1969, Attorney General John Mitchell (left) and Deputy Attorney General Kleindienst generated a list of 150 candidates, which the President then pared down to ten names. In addition to the eventual nominee, Warren E. Burger, future nominees Harry A. Blackmun, Lewis F. Powell, Jr., and Clement Haynsworth also made the cut.

status the case would have instantly acquired had lynch law not prevailed and had the High Court ordered a new trial for Johnson.

The account Curriden and Phillips provide succeeds on all counts but one. The tragedy may be "The Turn-of-the-Century Lynching That Launched a Hundred Years of Federalism," as the subtitle of the book proclaims, but that remains to be shown. Discussion of the wider impact of the episode is relegated to a sixteen-page epilogue.[66] Among the claims made there are that the Court's actions were responsible for (1) a decline in the number of lynchings nationally in 1909 from ninety-seven to eighty-two,[67] (2) an increase in the number of persons saved from lynchings from only six in 1906 to nineteen in 1910, and (3) a continuation of those trends during the decade that followed.[68] Moreover, the authors point out that "[n]early every single federal constitutional issue raised by Noah Parden and Styles Hutchins in their appeal . . . became legal precedent in the decades that followed. . . . In decision after decision spread out over fifty years, the justices have endorsed and implemented Parden's original arguments into the law of the land."[69] The data on lynchings are undoubtedly correct, as is their characterization of Supreme Court decisions from the 1920s and 1930s through the 1960s and 1970s. What remains undocumented is the connection between the Johnson/Shipp affair on the one hand and the data and the Court's record on the other. A more modest yet still significant claim would have been to assert that the affair vividly demonstrated the shortcomings of the constitutional order in place in 1906 with regard to protecting individual rights.

The White Court ended almost exactly twenty-four years before the presidency of Harry S Truman began. And the Truman years mark the starting point for David Alistair Yalof's **Pursuit of Justices**,[70] a consequential and aptly titled study on staffing the Supreme Court. Given the number of controversial nominations, successful and unsuccessful, to the Supreme Bench since 1965, practically a whole new subfield on judicial appointments

When the retirement of Justice Charles E. Whittaker in 1962 left President John F. Kennedy with a vacancy on the Supreme Court, he directed his brother, Attorney General Robert F. Kennedy (left) to supervise the search for candidates. Kennedy in turn delegated the assignment to Deputy Attorney General Byron R. White and to assistant attorneys general Nicholas Katzenbach (right) and Joseph Dolan (opposite page). White was selected as the nominee when he was on a trip to Denver.

has emerged within political science.[71] Much of the research has focused on the politics of confirmation in the Senate, including the role of interest groups and often the deftness or ineptitude of presidential management once a nomination has been announced. What makes Yalof's contribution unique as far as the Supreme Court is concerned[72] is his nearly exclusive focus on the *selection* of a nominee: that is, the events, forces, and personalities in play prior to the moment that the president submits someone's name to the Senate. What happens in this prenomination stage is significant because, despite the number of contentious nominations in the past forty-five years, the overwhelming majority have been confirmed.

"[W]hy were these particular candidates chosen over others possessing similar—and in some cases superior—qualifications?" Yalof asks. He rejects as being "oversimplified" the "classic 'textbook' portrayal of the Supreme Court nomination process" in which Presidents choose Justices "more for their judicial politics than for their judicial talents." That view "usually ignores the more complex political environment in which modern presidents must act, including the various intricacies and nuances of executive branch politics. . . . Modern presidents are often forced to arbitrate among factions within their own administrations, each pursuing its own interests and agendas. . . . In recent administrations the final choice of a nominee has usually reflected one advisor's hard-won victory over his rivals, without necessarily accounting for the president's other political interests."[73]

This conclusion arises from the author's reliance on presidential papers, other manuscript collections, oral histories, and interviews with participants such as former staff members at the White House and Department of Justice, as well as more conventional sources. Because many such sources from the presidencies of George H. W. Bush and Bill Clinton remained either sparse or entirely unavailable to Yalof, **Pursuit of Justices** for-

mally extends only through the Reagan presidency. Otherwise systematic analysis across administrations would have been impossible. Nonetheless, for readers with an overweening desire for currency, a final chapter offers "initial observations" on the selection practices of the two most recent presidents.[74]

The comparative analysis draws on three sets of factors, which Yalof lays out in the introduction. The first set highlights variables in the immediate political context, including the "timing" of a vacancy, the partisan and ideological composition of the Senate, the president's public approval ratings, attributes of the departing Justice, and the "realistic pool" of available candidates.[75] The second set of factors consists of different decisional frameworks that Presidents since 1945 have tended to employ: (1) an "open selection" framework in which all important decisions about a nominee are made after the President learns of a vacancy; (2) a "single-candidate focused" framework in which the probable nominee has been chosen in advance of any vacancy; and (3) a "criteria-driven" framework where, prior to a vacancy, the President has decided upon specific criteria any nominee will have to meet.[76] Regardless of which framework is in operation, administrations vary in how they structure the selection process. "On one end of a continuum lies a strictly personal approach . . . in which the president primarily keeps his own counsel. . . . On the other end lies a more bureaucratic approach, in which . . . advisors and subordinates make many critical selection decisions . . . on behalf of the president."[77] The third set of factors includes ten variables that the author finds most decisive in shaping Court staffing since 1945. They encompass developments such as the growth and bureaucratization of both the White House and the Justice Department, split party control between the White House and the Senate, and an increasingly public and media-driven confirmation process.[78]

The book is filled with insight and detail that will be new information to many students of the Supreme Court. When President Nixon

Harvard legal scholar Paul Freund (above) was also on the shortlist for the 1962 nomination, but Robert Kennedy opposed his selection because Freund had earlier turned down the President-elect's request to be Solicitor General, a rejection Kennedy took personally.

had the opportunity to name Chief Justice Earl Warren's successor in 1969, Attorney General John Mitchell and Deputy Attorney General Richard Kleindienst generated a list of 150 possible candidates. "Mitchell then hand-carried the list over to the White House, where he and the president pared it down to ten names."[79] That short list included not only the eventual nominee, Warren E. Burger, but also Harry Blackmun,[80] Lewis Powell, and Clement Haynsworth, all of whom would soon be nominated to the Supreme Court.

President Kennedy's nomination of Byron White in 1962 was even more involved and revealed considerable tension among the president's closest advisers. According to the author, even before Justice Charles Whittaker's departure became known, Kennedy had promised a seat on the Court to Arthur Goldberg, then serving as his Secretary of Labor.[81] However, when faced with the vacancy, the consensus was that Goldberg was needed where he was. Robert Kennedy, the Attorney General and the President's brother, directed Deputy Attorney General White to head the search for candidates. White was preparing to travel to Denver for a meeting and delegated the task to assistants Joseph Dolan and Nicholas Katzenbach with instructions to report their findings to the Attorney General. In the meantime, White House adviser Theodore Sorenson prepared his own list for the President's consideration. He preferred Harvard legal scholar Paul Freund above all other candidates, and others close to the President such as McGeorge Bundy campaigned for Freund as well. Sorenson recommended saving Goldberg for the Chief Justiceship when that became available. Among the top names on the Dolan-Katzenbach list were Freund and—thanks to Dolan—White himself. Robert Kennedy preferred Court of Appeals Judge William Hastie,[82] but "[t]he attorney general's top priority, however, was to blunt any possible interest in Freund." A Kennedy supporter dur-

ing the 1950s, Freund had turned down the President-elect's request to be Solicitor General. "Robert Kennedy took the rejection personally; he perceived—perhaps accurately—that Freund did not want to work under his command. . . . Learning of Sorenson and Katzenbach's support for Freund, Robert Kennedy now aggressively lobbied his brother against such a nomination."[83]

In a meeting on March 29, Robert Kennedy invited Dolan and Katzenbach to the White House to discuss names. "Dolan strenuously objected to Hastie's nomination, fearing it would 'blow everything we've got going on the Hill.' Katzenbach favored Freund, though he noted that appointment of 'another Harvard professor' might be a problem. Both Dolan and Katzenbach then spoke enthusiastically of Byron White. . . . Afterwards, Katzenbach and Dolan tried to use the Attorney General's own vanity to benefit White's cause: Katzenbach's suggestion that the Justice Department might suffer substantially in White's absence may have helped move Robert Kennedy over to White's camp." Thus the Attorney General's "steadfast efforts buried Freund's candidacy even while it enjoyed the support of at least four other high-level advisors." Once White's advantages became clear, his nomination on March 30 "became all but inevitable."[84]

Four years after the first Justice named White became Chief Justice of the United States, he responded in uncharacteristic eloquence to a toast at the annual banquet of the American Bar Association. He pointed to the American flag. "I can recollect the day when to me it was but the emblem of darkness, of misery, of suffering, of despair and despotism," he declared. "But ah! In the clarified vision in which it is now given me to see it, as I look upon its azure field it is glorious not only with the north star's steady light, but is resplendent with the luster of the southern cross; and as I contemplate its stripes, they serve to mark the broad way for the advance of a mighty people blessed with that plenitude of liberty tempered with justice and self-restraint essential to the protection of the rights of all."[85] The Supreme Court, he insisted, had a central role in protecting that constitutional order. Not quite nine decades later, the books surveyed here bear out the poignancy of Chief Justice White's claim.

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THE BOOKS SURVEYED IN THIS ARTICLE ARE LISTED ALPHABETICALLY BY AUTHOR BELOW

Curriden, Mark, and Leroy Phillips, Jr. **Contempt of Court: The Turn-of-the-Century Lynching That Launched a Hundred Years of Federalism** (New York: Faber and Faber, Inc., 1999). Pp. xvii, 394. ISBN: 0-571-19952-6 (cloth).

Hall, Kermit L., ed. **The Oxford Guide to United States Supreme Court Decisions** (New York: Oxford University Press, 1999). Pp. xvii, 428. ISBN: 0-19-511883-9 (cloth).

Pratt, Walter F., Jr. **The Supreme Court under Edward Douglass White, 1910–1921** (Columbia: University of South Carolina Press, 1999). Pp. xx, 296. ISBN: 1-57003-309-9 (cloth).

Reeves, William D. **Paths to Distinction: Dr. James White, Governor E. D. White and Chief Justice Edward Douglass White of Louisiana** (Thibodaux, LA: The Friends of the Edward Douglass White Historic Site, 1999; distributed by the Center for Louisiana Studies, University of Louisiana at Lafayette). Pp. xiii, 189. ISBN: 1-887366-33-4 (cloth).

Stevens, Richard G., and Matthew J. Franck, eds. **Sober As a Judge: The Supreme Court and Republican Liberty** (Lanham, MD: Lexington Books, 1999). Pp. xxiv, 318. ISBN: 0-7391-0037-8 (cloth).

YALOF, DAVID ALISTAIR. **Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees** (Chicago: University of Chicago Press, 1999). Pp. x, 296. ISBN: 0-226-94545-6 (cloth).

ENDNOTES

[1]Scott Douglas Gerber, ed., **Seriatim: The Supreme Court Before John Marshall** (1998).

[2]Carl Brent Swisher, **Roger B. Taney** (1935).

[3]Howard Gillman, **The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence** (1993).

[4]Walter F. Pratt, Jr., **The Supreme Court under Edward Douglass White, 1910–1921** (1999), hereafter cited as Pratt.

[5]William R. Casto, **The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth** (1995).

[6]Herbert A. Johnson, **The Chief Justiceship of John Marshall, 1801–1835** (1997).

[7]James W. Ely, Jr., **The Chief Justiceship of Melville W. Fuller, 1888–1910** (1995).

[8]Melvin I. Urofsky, **Division and Discord: The Supreme Court under Stone and Vinson, 1941–1953** (1997).

[9]182 U.S. 244 (1901).

[10]195 U.S. 27 (1904).

[11]*Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

[12]Sister Marie Carolyn Klinkhamer, O.P., **Edward Douglas White: Chief Justice of the United States** (1943); Robert B. Highsaw, **Edward Douglass White: Defender of the Conservative Faith** (1981).

[13]Pratt, 5.

[14]Henry J. Abraham, **Justices and Presidents: A Political History of Appointments to the Supreme Court** 412–413 (3rd ed., 1992).

[15]Pratt, xviii.

[16]*Id.*, 7.

[17]Felix Frankfurter and James M. Landis, **The Business of the Supreme Court: A Study in the Federal Judicial System** 198, 203 (1928). The legislation was deemed "progressive" because it provided an avenue of appeal to the Supreme Court in instances when a state court had struck down social legislation on, say, Fourteenth Amendment due process grounds.

[18]David J. Danelski, "The Influence of the Chief Justice in the Decisional Process," in Walter F. Murphy and C. Herman Pritchett, eds., **Courts, Judges, and Politics** (2d ed., 1974).

[19]Robert G. Seddig, "John Marshall and the Origins of Supreme Court Leadership," *Journal of Supreme Court History* 63 (1991); D. Grier Stephenson, Jr., "The Chief Justice as Leader: The Case of Morrison Remick Waite," 14 *William and Mary Law Review* 899 (1973).

[20]Pratt, 229.

[21]*Id.*, 227.

[22]*Id.*, 263.

[23]*Id.*, 1–24, 263–264.

[24]*Id.*, 291–296.

[25]*Id.*, 265–277.

[26]232 U.S. 383 (1914).

[27]Pratt, 263–264.

[28]Richard G. Stevens and Matthew J. Franck, eds., **Sober As a Judge: The Supreme Court and Republican Liberty** (1999), hereafter cited as Stevens.

[29]Editor Stevens authored the introduction and the essay on Justice Matthews; editor Franck authored the epilogue and the essay on Chief Justice Vinson. The other contributors include Thomas L. Jipping (foreword), Robert Lowry Clinton and Kevin Walsh (on Justice Clifford), Dennis G. Stevens (on Chief Justice White), and Lane V. Sunderland (on Justice Scalia).

[30]Stevens, xxii, 234.

[31]*Id.*, 2, 21.

[32]*Id.*, 20.

[33]*Id.*, 228 (emphasis in the original).

[34]*Id.*, 20, 21.

[35]Lewis C. Cassidy, "An Evaluation of Chief Justice White," 10 *Mississippi Law Journal* 136, 136 (1938). Cassidy drew upon Thomas Carlyle's phrasing from the latter's **On Heroes, Hero-Worship and the Heroic in History** 208 (1841). It is not clear whether Stevens is familiar with the Cassidy essay. No citation to it appears in the notes. Stevens, 264–267.

[36]Stevens, 99.

[37]*Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895) (rehearing).

[38]Stevens, 114.

[39]*Id.*, 113–114.

[40]*Id.*, 114.

[41]*Id.*, 117.

[42]*Id.*, 118.

[43]243 U.S. 332 (1917); 247 U.S. 251 (1918).

[44]The railway case was decided March 19, 1917, within a month of the nation's entry into war in Europe.

[45]William D. Reeves, **Paths to Distinction: Dr. James White, Governor E. D. White and Chief Justice Edward Douglass White of Louisiana** (1999), hereafter cited as Reeves.

[46]Sidney's father was Tench Ringgold (1776-1844), who owned a tannery and lived in Washington, D.C. He constructed a large house on F Street in the 1820s and took in

boarders, one of whom was Chief Justice John Marshall. In 1829 President-elect Andrew Jackson invited Ringgold to join him in the walk to the Capitol for the inauguration. *Id.*, 74–75. Jean Edward Smith's **John Marshall: Definer of a Nation** (1996) refers to a letter Marshall wrote Justice Joseph Story in November 1831, indicating that he had made arrangements for himself, Story, and Justices Duvall, Thompson, and Baldwin to board at the "Ringold" house, about two miles from the Capitol. *Id.*, 514.

[47]Reeves, 31.

[48]The Chief Justice's father spelled "Douglas" with one "s," and his son with two.

[49]*Id.*, 41.

[50]*Id.*, 72. Kate Chopin lived from 1850 until 1904. *See* Margo Culley, ed., **The Awakening** (1994).

[51]Reading rumors of his retirement in the newspapers, Chief Justice Melville Fuller later complained that he would not be "paragraphed out of my place." Justice Holmes quoting Chief Justice Fuller, in Mark DeWolfe Howe, ed., 2 **Holmes-Pollock Letters** 161 (1941).

[52]Quoted in Charles Grove Haines, **The American Doctrine of Judicial Supremacy** 478 (1932).

[53]In two places the book reports the date of White's birth as November 3, 1844; Reeves, 80, 96. Other sources commonly report the birth year as 1845. For example, *see* James F. Watts, Jr., "Edward Douglas [*sic*] White," in Leon Friedman and Fred L. Israel, 3 **The Justices of the United States Supreme Court 1789–1969** 1635 (1969); Judith A. Baer, "Edward Douglass White," in Melvin I. Urofsky, ed., **The Supreme Court Justices: A Biographical Dictionary** 525 (1994); Clare Cushman, "Edward Douglass White," in Cushman, ed., **The Supreme Court Justices: Illustrated Biographies, 1789–1993** 271 (1993).

[54]Kermit L. Hall, **The Oxford Guide to United States Supreme Court Decisions** (1999), hereafter cited as Hall. The figure of 537 represents this reviewer's count, and excludes cross-referenced cases. In the introduction, the editor reports a count of 440. *Id.*, vii.

[55]*Id.*, vii.

[56]There are 537 case essays but a total of 538 essays. Stephen L. Wasby's essay on "Test Cases" deals not with a particular case but with a type of litigation. Hall, 303–304.

[57]All case essays are printed in a double-column format. William M. Wiecek's essay on Hayburn's Case, 2 U.S. (2 Dallas) 409 (1792), consumes about half a column (Hall, 125), and Michael W. McCann's on *Griswold v. Connecticut*, 381 U.S. 479 (1965), extends across five columns (Hall, 115–118).

[58]Hall, vii.

[59]Kermit L. Hall, ed., **The Oxford Companion to the Supreme Court of the United States** (1992). See Stephenson, "The Judicial Bookshelf," *Journal of Supreme Court History* 97–98 (1993). Many of the case analyses in the **Companion** seem to have been carried over into the **Guide** without change. William M. Wiecek's essay on *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813), appears on page 274 in the former and on page 89 in the latter; Elliot E. Slotnick's on *NAACP v. Alabama*, 357 U.S. 449 (1958), appears on page 572 in the former and on page 208 in the latter.

[60]*United States v. Shipp*, 203 U.S. 563 (1906); *United States v. Shipp*, 214 U.S. 386 (1909); *Johnson v. Tennessee*, 214 U.S. 485 (1909).

[61]Charles Warren, **The Supreme Court in United States History**, 3 vols. (1922). A revised edition in two volumes was published in 1926.

[62]Mark Curriden and Leroy Phillips, Jr., **Contempt of Court: The Turn-of-the-Century Lynching That Launched a Hundred Years of Federalism** (1999), hereafter cited as Curriden.

[63]Curriden, 345, quoting Professor Thomas Baker.

[64]Moody had been Attorney General at the time of Johnson's lynching.

[65]214 U.S. 485 (1909).

[66]Curriden, 337–351.

[67]Appendix 1 usefully provides data on lynchings by state between 1882 and 1944, as well as data on the alleged offenses of the lynching victims during the same period. *Id.*, 353–356.

[68]*Id.*, 339.

[69]*Id.*, 343.

[70]David Alistair Yalof, **Pursuit of Justices** (1999), hereafter cited as Yalof.

[71]For example, *see* Ethan Bronner, **Battle for Justice: How the Bork Nomination Shook America** (1989); Stephen L. Carter, **The Confirmation Mess** (1994); John A. Maltese, **The Selling of Supreme Court Nominees** (1995); John Massaro, **Supremely Political: The Role of Ideology and Presidential Management in Unsuccessful Supreme Court Nominations** (1990); Mark Silverstein, **Judicious Choices: The New Politics of Supreme Court Confirmations** (1994); and George L. Watson and John A. Stookey, **Shaping America: The Politics of Supreme Court Appointments** (1995).

[72]Yalof does for the Supreme Court what Sheldon Goldman has done for the lower federal courts. See the latter's **Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan** (1997).

[73]Yalof, 3.

[74]*Id.*, 188–207. Yalof concludes that "neither of these two presidents took the lessons of past chief executives enough to heart. Bush's selection process was a creature of rigid and unyielding criteria . . . Additionally, Bush seized upon the same 'three-person committee' format that had led to internal strife and factionalism during the latter part of the Reagan administration. . . . At the oppo-

site extreme, Clinton was barely willing to delegate any significant decision-making power to subordinates. . . . Without a manager entrusted with sufficient authority over the selection process, a myriad of candidacies fell in and out of favor in accordance with the president's shifting sense of moods. Both presidents clearly suffered from a case of 'confirmability myopia.' . . . For better or worse, the ill-fated 1987 nomination of Robert Bork had continued to cast its long and influential shadow over all court nominations in its wake." *Id.*, 206–207.

[75]*Id.*, 4–5 (italics omitted).

[76]*Id.*, 6.

[77]*Id.*, 7.

[78]*Id.*, 12–19 (italics omitted).

[79]*Id.*, 100–101.

[80]Not "Harold" Blackmun, as printed in the index. *Id.*, 282.

[81]*Id.*, 72.

[82]Hastie was the first African American to hold an Article III judgeship, having been appointed by Truman to the Third Circuit Court of Appeals in 1948. Dennis J. Hutchinson, **The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White** 301, 313 (1998)

[83]Yalof, 77.

[84]*Id.*, 79. Yalof's account of White's nomination differs from the one offered by White's biographer. *See* Hutchinson, **The Man Who Once Was Whizzer White** 310–322. According to Hutchinson, once it became known that Whittaker was leaving the Bench, there was never any suspense in President Kennedy's mind as to his first choice. Hutchinson accepts the judgment of deputy counsel to the president Myer Feldman that "'the president had one name in mind from day one.'" *Id.*, 311. *See also id.*, 316.

[85]Edward Douglass White, "The Supreme Court of the United States," 7 *American Bar Association Journal* 341, 342 (1921).

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