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1979 Yearbook

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INTRODUCTION

Judging from the many comments we have received, our YEARBOOK continues to be a journal not only of immense interest to our members, but a publication worthy of reference by future historians.

This year an exciting discovery has been made, and we are pleased to reproduce it in this issue. Lying unobtrusively in the files of the Supreme Court library was found a long and interesting letter from the future Chief Justice John Jay to a friend in England, written in his own hand.

One wonders how many other rare and valuable items may be awaiting discovery, and whether this provides another of the many reasons for our existence and the need for continuing and broadening support of the Society's activities.

Elizabeth Hughes Gossett
President

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Supreme Court Historical Society

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MY UNCLE THE CHIEF JUSTICE, Edward D. White in Personal Retrospect

NEWMAN CARTER

(As Told to Editorial Staff)

(EDITOR'S NOTE: The unique feature of the YEARBOOK—personal reminiscences of children or other descendants of former members of the Court—will eventually run out of descendants or of Chief Justices. In the case of Edward D. White, who had no children in any case, the Editorial staff was fortunate to find the principal author of the present piece, who is a native of Washington and a great-nephew of the Chief Justice and former Associate Justice. Since the jurist had already died before the narrator was born, the personal recollections are essentially through the eyes of Mrs. Leah White, the widow of the Chief Justice, as passed on to Mr. Carter.)

Edward Douglass White was a Democrat, an ex-Confederate and a Roman Catholic. He was appointed Chief Justice by a Republican President who was a Northerner and a Unitarian. Of course, White had come onto the Court as an Associate Justice, nominated by a Democratic President (Grover Cleveland in 1894) seventeen years before he became the first Associate to be elevated to Chief,* but that had been something of an accident—more about that later.

There were other unique features about the career of "Ned" White, as his boyhood associates and family in Louisiana called him. Although Senate majority leader at the time he was nominated for the Court, he maintained close personal relationships with the orthodox Republican President Taft, the "maverick" Republican President Theodore Roosevelt, and the "New Freedom" Democrat, Woodrow Wilson. He was one of the few Justices, for whom such records have come to light, who married after he came onto the bench—Mrs. Leah Montgomery Kent, the great-aunt through whom much of this information has come down.

While he is not the only member of the Court whose childhood home has become a state historic site, the Edward Douglass White State Commemorative Area in Louisiana's Bayou La Fourche is certainly one of the most picturesque. The white frame house of pegged cypress boards, set on high brick foundations with wide porches on front and back, was typical of the homes of prosperous planters of the pre-Civil War era. Among associations of the jurist is his personal carriage, or "tallyho," which is kept on the grounds. Nearby is a giant oak believed to be between five and six centuries in age, and other lush vegetation embellishes the 5.6 acres of the site.

Education and public office were two dominant themes of the three generations of Whites in America, following the migration of James White I from Ireland to Pennsylvania in 1704. His son, James White II, earned a degree of "doctor of physick" from a French university but later abandoned medicine for law. The grandson, the first Edward Douglass White, set an example which his son followed—and surpassed: practicing attorney, jurist, governor of Louisiana and member of Congress. For Edward D. White II, it was thus virtually a family tradition that the best of education—in this case, Mount St. Mary's in Emmetsburg, Md. and Georgetown University Law School—

should be followed by a career in law and politics. Upon the outbreak of the Civil War, "Ned" at the age of sixteen enlisted in the Confederate Army; two years later he was taken prisoner and paroled. He returned home and began reading for the bar under Edward Bermudez, a future chief justice of the state. In 1868, at the age of twenty-three, Edward D. White II was admitted to practice.

The political adventures of the future jurist began soon afterward, in a short quasi-military skirmish over the question of who should be installed as the lawful governor of the state

after the end of Reconstruction. Although the effort to install the Democratic governor-elect by force was repulsed by the Federal troops, White himself was elected to the state senate. In 1879, when the Democrats were fully established in state power, he was appointed to the state supreme court, a position he held only briefly before resuming full-time law practice.

Election to the United States Senate was the turning point in White's public career; henceforth, for the rest of his life, he was to remain in public service. His speedy elevation to the Supreme Court, only four years after his coming to the Senate, was something of a political accident. Grover Cleveland, who had become the only President to be elected for a second term after having been defeated for reelection the first time, had made many enemies within his own New York state political organization on his comeback. Now, when he attempted to fill a Supreme Court vacancy with a New York appointment, he ran into the bitter opposition of Senator David Hill of that state.

Hill relied on the time-honored Senate tradition of "collegial courtesy" to declare the President's nominee, William B. Horn-blower, "personally obnoxious" to him—whereupon his colleagues rejected the nomination. They did the same with Cleveland's next New York candidate, Wheeler B. Peck-ham. Seeing that he would get nowhere with any more nominees from New York, Cleveland then turned the tables on Hill, by nominating a Senate colleague—the Louisiana Confederate, Edward D. White. Now "collegial courtesy" worked the other way, with one party member of the "club" not caring to arouse the resentment of another, or of the now resurgent Democratic organization from the Old South. Hill offered no objection to White's nomination, and it passed unanimously.

Whether or not White became a member of the Supreme Court by political accident, he would remain for a quarter of a century, contributing one of the cardinal principles of construction of the new regulatory legislation which was ushering in the new century. Antitrust legislation had begun with the Sherman Act of 1890, and would later be extended by the amendatory Clayton Act of 1913. "Teddy" Roosevelt, the "Rough Rider," had made much of his "big stick" and his trust-busting policies; but it was actually White's close personal friend, Taft, who completed many of the prosecutions begun in Roosevelt's administration.

Two companion anti-trust cases—United States v. American Tobacco Co. and Standard Oil Co. v. United States—in 1911 and 1912 reached final disposition before the Court after White had become Chief Justice. He wrote the opinion of the Court in both of these cases; in effect, the government's efforts to break the old-fashioned Standard Oil trust was sustained, but White insisted that division of an efficient corporation was preferable to its total dissolution. In a passage which would become a standard of construction of anti-trust law thereafter, the Chief Justice declared that an unqualified, automatic application of the law to destroy combinations of business would be destructive in itself. It was conspiratorial combinations in restraint of trade, not combinations of effective business units in the interests of greater efficiency and productivity, which White's famous "rule of reason"—endorsed by such a monumental judicial intellect as that of Justice Oliver Wendell Holmes—made a rule of twentieth century constitutional law.

Edward Douglass White II was a unique figure on the Supreme Court, a jurist schooled in both the English common law traditions and the French civil law of Louisiana. With Theodore Roosevelt he saw the inevitability of change in the political economy of the new century, but with William Howard Taft he was convinced that change should come slowly. How slowly, White did not have to determine; Taft, who succeeded him as Chief Justice, would have to face that decision in the challenge of the economic collapse of 1929.

ATTORNEY FOR THE PEOPLE

The "Outrageous" Brandeis Nomination

MELVIN I. UROFSKY

On an otherwise slow Friday toward the end of January 1916, city editors around the country perusing the wire service ticker-tapes were suddenly jolted out of their lethargy. Shortly after noon on January 28th, a clerk had delivered a brief message from the White House: "To the Senate of the United States. I nominate Louis D. Brandeis of Massachusetts to be Associate Justice of the Supreme Court of the United States, vice Joseph Rucker Lamar."

Ever since George Washington had sent his first nomination to the Senate seeking its advice and consent, such requests had normally been honored quickly and with a minimum of fuss; this had been especially true of the honor-laden appointments to the nation's highest tribunal. But when Woodrow Wilson named Brandeis to the Court, he precipitated a four-month battle in which nearly every facet of the nominee's life and career were examined in minute detail. Brandeis himself never appeared before the Senate committee weighing his qualifications; this was still the era in which major parties, after their presidential conventions, sent a delegation to the successful candidate to inform him of the decision and secure his assent to run for office.

The Brandeis nomination fight remains a fascinating event for historians to examine. Few episodes in American history shed so much light on their era; in the line-up of supporters and detractors can be found one of the clearest demarcations of those whom we can label as "progressives" and those opposed to the reformist movement. For despite the injection of some religious and social prejudices into the debate, the major issue at all times was whether or not an alleged "radical" should be admitted into the sacrosanct—and conservative—citadel of the law. Historians now recognize that many of the leading progressive reformers were, at heart, deeply conservative, and this judgment is certainly true of Louis Dembitz Brandeis. Born in Louisville in 1856, he grew up in an America undergoing rapid industrialization and suffering from its effects. The simple and seemingly more democratic, egalitarian society of Jefferson, where individual opportunity beckoned to each man, was giving way to a highly structured oligopolistic society, in which wealth and power were increasingly concentrated in the hands of a small group of socially irresponsible men. For Brandeis, this brave new world, despite its material comforts, compared poorly with the idealized notion of what America had been and should be; the reforms he supported essentially aimed at recreating an earlier society, which, in myth at least, approximated the Jeffersonian ideals. One of the ironies of the entire nomination battle is the fact that this essentially conservative man was branded a radical.

There had been little to mark Brandeis as a reformer, much less a radical, in his early years. After a brilliant career at the Harvard Law School, he and Samuel Warren, the scion of a socially prominent and prosperous Massachusetts family, opened a successful law practice in Boston. Brandeis's brilliance soon had clients flocking to the office, and by 1890, at the age of 34, he was earning well over \$50,000 a year when 75 percent of the lawyers in the country made less than \$5,000 annually. He had recognized the need for a lawyer to be more than just an advocate; one had to counsel clients, advising them on business matters and how to avoid expensive litigation. In his office he urged his younger associates to specialize, to cultivate men of affairs, and to study business practices and problems. As the nineteenth century drew to a close, Louis Brandeis gave every indication of becoming just another prosperous corporate lawyer.

But success and wealth for their own sake did not interest him Unlike many other at-

torneys of his day, he had a social conscience. His years at Harvard and in Boston had brought out a latent puritanism, a belief that man must not only live his life by high principles, but was also obligated to help society improve itself. Beginning in the late 1890's Brandeis involved himself in reform work, first in municipal matters, then in Massachusetts affairs, and finally on the national stage. He fought corrupt traction companies in Boston and devised a sliding scale rate system which removed the gas company from politics. In response to the great insurance scandals, he proposed savings bank life insurance, and then organized a citizen lobby to push it through the legislature. He took on the power of the New York banking interests when he opposed the merger of the New Haven and the Boston & Maine railroads. His articles in numerous journals also made him one of the leading muckrakers of the day.

Two incidents brought Brandeis to national attention. In 1907 he defended an Oregon law establishing a ten-hour day for women. The Supreme Court had invalidated a similar New York law in 1905, but had allowed that the police power of the state could be invoked if legitimately warranted. In his brief in *Muller v. Oregon*, Brandeis set out only two pages of legal precedents in support of the statute, and then over 100 pages of sociological and economic data to prove that Oregon had reasonably exercised its powers to meet the problem. Three years later, Brandeis served as counsel for *Collier's* magazine in the Pinchot-Ballinger hearings, and his relentless pursuit of the facts led to the exposure of President Taft's attempt to whitewash his Secretary of the Interior.

By 1912 Brandeis had won a national reputation as a reformer, respected by Theodore Roosevelt and Jane Addams and a close friend of Robert M. LaFollette. When the Wisconsin senator dropped out of the presidential race, Brandeis decided to support New Jersey governor Woodrow Wilson. The "People's Attorney" took to the stump for the Democratic candidate, and his memoranda and articles provided the intellectual basis for the New Freedom's economic proposals. In order to deal with the problem of monopoly, Brandeis and Wilson wanted the government to regulate competition and not, as Roosevelt's New Nationalism urged, regulate and thus legitimize monopolies. After Wilson entered the White House, he wanted to have Brandeis in his Cabinet, but political pressures from within the Democratic Party, which had nothing to do with Brandeis's qualifications, kept the Bostonian out. Without any official status, however, Brandeis remained a trusted advisor of the president, helping to write both the Federal Reserve Act and Clayton Antitrust Law, and devising the Federal Trade Commission. During these years, Brandeis also became the leader of the nascent American Zionist movement.

Ironically, one of the most important aspects of Brandeis's career and one which should have been closely examined by those who sought to evaluate his qualifications as a judge, was his role as an articulate spokesman for the new jurisprudence. From the time he had heard Oliver Wendell Holmes deliver the Lowell Lectures in 1880 on the Common Law, Brandeis had been committed to the concept of a living law. "In all our legislation," he told a congressional committee. "we have got to base what we do on facts and not on theories." He called for the "socialization" of legal training, whereby "lawyers should not merely learn rules of law, but their purposes and effects when applied to the affairs of man." The lawyer who did not study sociology and economics, he warned, "is very apt to become a public enemy."

All of these traits—his reform work, his sage counsel and legal philosophy—recommended Brandeis to Wilson. But there were also political considerations to take into account. Joseph Lamar had been from Georgia, and southerners might insist that his replacement also be drawn from Dixie. Neither Massachusetts senator, the patrician Henry Cabot Lodge nor John W. Weeks, sympathized with Brandeis's reformist beliefs, and if they chose to exercise senatorial prerogative, the entire body might turn Brandeis down in deference to their request.

On the other hand, Wilson had been elected in 1912 by a plurality of only 42 percent, a little over 6.3 million votes out of the 15 million cast. In 1916 it appeared that Theodore Roosevelt would return to the Republican Party, and conceivably could take many of his progressive followers with him, unless Wilson could establish beyond doubt his own credentials

as *the* progressive leader. By naming Brandeis, a man recognized and respected by all reform groups, Wilson could in one grand gesture claim the high ground of reform for himself. To be sure that progressives would support the nomination, the president consulted with two men—his own Attorney General, Thomas W. Gregory of Texas, and Robert M. LaFollette, head of the insurgent wing of the Republican Party and an acknowledged leader of progressive thought. Gregory may have been the first to recommend Brandeis to fill the Supreme Court vacancy, while LaFollette, an old friend and ally of Brandeis, was delighted and promised to do all he could to support the nomination.

Wilson now had to see if Brandeis would accept the call. The Boston attorney's entire life had been one of action rather than

contemplation; would he be willing to leave the arena for the isolation of the Court? After careful consideration, Brandeis accepted. "I am not exactly sure," he wrote his brother, "that I am to be congratulated, but I am glad the President wanted to make the appointment and I am convinced, all things considered, that I ought to accept." Alice Brandeis reflected her husband's ambivalence: "I had some misgivings for Louis has been such a 'free man' all these years but as you suggested—his days of 'knight erranting' must have, in the nature of things, been over before long."

The announcement of January 28th, as Wilson had anticipated, stirred up a rumpus. Progressive reformers were delighted, and showered both the president and his nominee with hundreds of congratulatory messages. The *Boston Post*, the *New York World* and other liberal papers cheered the news. Former Massachusetts governor David I. Walsh called the nomination "admirable in every way. Mr. Brandeis is a real progressive, with a profound knowledge of the law, and is certain to prove one of the great jurists that has ever sat on the Supreme Bench." Numerous Zionist and labor organizations vigorously applauded the appointment both for the honor it brought to Brandeis as well as for the implicit recognition of the justness of their own causes.

The conservatives reacted with shock and horror. The *New York Sun* deplored the appointment of a radical to "the stronghold of sane conservatism, the safeguard of our institutions, the ultimate interpreter of our fundamental law." Ex-president William Taft, who had vainly hoped that Wilson would "rise above politics" to name him to the bench, declared that "it is one of the deepest wounds I have had as an American and a lover of the Constitution and a believer in progressive conservatism, that such a man as Brandeis could be put on the Court." Brandeis, the *New York Times* complained, "is essentially a contender, a striver after change and reforms. The Supreme Court by its very nature is the conservator of our institutions."

There was also a muted note regarding the nominee's religion. For the cruder bigots, the very fact that Brandeis was Jewish was enough reason to bar him from the temple of the law. The *New York Sun*, for its part, complained that Wilson hoped to capture the large Jewish vote in New York through this gross manipulation of patronage. William Taft asserted that he held nothing against Brandeis for being Jewish; rather the Bostonian was an opportunist who had only embraced Judaism and Zionism to further his own political 'ambitions.

On the whole, the religious issue played only a minor role, although there is no doubt that many members of the upper-class, Protestant elite felt uncomfortable about a Jew reaching such an exalted position. As for the charges that Wilson hoped to win the Jewish vote through the appointment, the fact is that most Jews were already in the Democratic camp; if anything, Wilson might have worried about losing the votes of those who feared or hated Jews. Wilson's political designs were surely those of appealing to progressives, and if nothing else, the appointment did make the battle lines clear. For his backers, Brandeis was a liberal and a reformer, a prophet of a humane law, the type of man the Supreme Court desperately needed; to his opponents, Brandeis appeared utterly untrustworthy, radical and a demagogue, who at all costs had to be kept off the nation's highest tribunal.

Both sides quickly set about preparing their cases to present to the Senate subcommittee which had been appointed to investigate Brandeis's qualifications. Former president Taft and his one-time Attorney-General George W. Wickersham began marshalling opposition among the pillars of the American Bar Association. Clarence Barron, publisher of the business-oriented *Wall Street Journal*, unleashed a barrage of charges and innuendoes about Brandeis's supposed chicanery as a lawyer. In Boston the Brahmins determined not to let this viper in their midst enter the hallowed chambers of the Court. Here they counted upon Henry Cabot Lodge, who socially and intellectually detested all that Brandeis stood for, to lead the battle. But Lodge faced a quandary. With the passage of the Seventeenth Amendment, he would no longer be returned to the Senate by a conservative state legislature, but would have to run for the office in 1916. Among the great unwashed who, regrettably, could now vote, Brandeis was a hero, and Lodge had no desire to alienate those whose ballots he would need. To his correspondents Lodge urged that the lawyers in the Senate would gladly listen to their peers; let the bar associations testify to Brandeis's lack of character and his unfitness for the bench. In letter after letter Lodge called upon those who had influence and prestige to gather their forces and make clear that people of quality had no faith in Brandeis's integrity.

"People of quality," especially in Boston, eagerly responded to Lodge's appeal. A. Lawrence Lowell, president of Harvard, reflected the problem that Boston's leaders had in trying to fight the appointment. "Are we," Lowell asked, "to put on our Supreme Bench a man whose reputation for integrity is not unimpeachable? It is difficult—perhaps impossible—to get direct evidence of any act of Brandeis that is, strictly speaking, dishonest; and yet a man who is believed by all the better part of the bar to be unscrupulous ought not to be a member of the highest court of the nation." Lowell's analysis accurately foretold the course of four-month attack on Brandeis: many improprieties were attributed to Brandeis but nothing concrete could be proved; however, if so many "proper" people believed Brandeis to be untrustworthy and dishonest, there must be some truth to the charges; finally, even if Brandeis was totally honest, no man whom so many people mistrusted should be a member of a court which must be above reproach. As Lowell noted, Brandeis's "general reputation, as you know, in the better part of the Suffolk [Boston] bar is not what that of a judge should be."

Those backing the nominee also prepared their case. Publicly Brandeis refused to say anything. When a New York *Sun* reporter asked if he had heard about certain charges against him, Brandeis replied: "No, I have not. I have nothing to say about anything, and that goes for all time and to all newspapers, including both the *Sun* and the moon." Privately, however, Brandeis played a central role in directing his defense. He fired off dozens of letters to Edward F. McClennen, a junior partner in his firm, who moved to Washington during the hearings to provide rebuttal evidence against the opposition charges. In these missives Brandeis responded carefully and minutely to every question raised about the propriety of his actions as a lawyer. They form an *apologia pro vita*, the nearest thing we have to a Brandeisian autobiography.

Aside from the aspersions cast upon his character and career, Brandeis found the episode extremely trying. By nature he was a man used to speaking for and defending himself, but he acceded to Attorney-General Gregory's advice not to appear personally before the subcommittee, and thus give the hearings an atmosphere of a trial, with himself as the defendant. Instead he had to rely on his associates and friends, and frequently they acted, wisely or not, in a more cautious and circumspect manner than Brandeis would have preferred. He wanted to defend his reputation and integrity; they wanted to establish his "judicial" character, and this required a deliberate downplaying of the combatant role. While he chafed in Boston, Brandeis attempted to maintain a casual demeanor. To his brother he wrote: "The Justiceship *ist ein bischen langweilig* [a little boring], but I am leaving the fight to others and we are getting a pretty nice issue built up. . . . Now my feeling is rather 'Go it husband, Go it bear' with myself as 'interested spectator.'

The "interested spectator" nonetheless carefully combed his files for relevant documents,

sent his supporters lists of names of people who could testify as to his ability and character, and kept different allies from inadvertently interfering with each other's work. More than most people, he realized the symbolic as well as the substantive issues involved. That "the fight has come up," he confided, "shows clearly that my instinct that I could not afford to decline was correct. It would have been, in effect, deserting the progressive forces."

The arena of the fight was the ornate Senate Judiciary Committee room in the Capitol, where the five-man subcommittee opened its hearings on February 9. Chairing the group was William E. Chilton, an intensely partisan Democrat from West Virginia not known for any great judicial or intellectual acuity. An equally undistinguished member was Duncan Fletcher of Florida, a man interested primarily in the price of farm products. The third Democrat was Thomas J. Walsh of Montana, at 56 the youngest member of the subcommittee; it was Walsh who eventually assumed the leading role in the hearings, pressing witnesses to be precise and calling for facts rather than rumors. On the Republican side sat the aging Clarence Clark of Wyoming, a Senate veteran of 21 years who would soon be replaced by another colorless Republican stalwart, John D. Weeks of California. The fifth member was also a Republican, but Albert Baird Cummins of Iowa was nationally known as a progressive, and there were some who hoped that he would vote conscience rather than party. But Cummins had his eye on the presidency, and did not care to take a stand which might offend potential conservative supporters.

The first few days of hearings were rather chaotic, with charges and rebuttals flying around the room. The first witness was Clifford Thorne, chairman of the Iowa Board of Railroad Commissioners, a man with a reputation as a reformer. Thorne charged Brandeis with being "guilty of infidelity, breach of faith, and unprofessional conduct in connection with one of the great cases of this generation." In the Five Percent Case of 1913, Thorne had represented midwestern shippers opposed to the railroads' requested rate increases. Brandeis had been invited by the Interstate Commerce Commission to serve as "counsel to the situation," that is, to advise the I.C.C. on matters relating to the fairness of rates to both shippers and roads. Thorne conceded that Brandeis had not been hired by the shippers, but declared that the Boston attorney had "betrayed" the public interest by supporting a larger rate of return than did Thorne's clients. Amazingly, this initial testimony questioning Brandeis's fitness centered on the nominee's alleged tenderness toward business. Brandeis's opponents were hardly enthralled by this turn of events. "If what Thorne had to say against Brandeis is all there is," wrote William Taft, "I should not regard it as a serious matter." Taft waited hopefully for more damning evidence to be introduced.

Over the next few days, serious charges were indeed presented to the committee by men who had tilted with Brandeis in either business or reform matters; it turned out that in nearly every case they had been on the losing side, and now complained of Brandeis's tactics and activities. Finally, on February 16 the opposition moved to coordinate its campaign by bringing in Austen George Fox, a 66-year old Wall Street lawyer well connected with America's business community. As Senator Fletcher explained, Fox had come to Washington "at the request of and under employment by certain of those who oppose the confirmation of Mr. Brandeis. He suggests that he could arrange the testimony in an orderly way and see to the presentation of the facts supporting the opposition to the confirmation."

That same day, Fletcher announced that George W. Anderson, a United States attorney in Boston, had been added to the subcommittee's staff to see "that the other side is presented, to the end that the truth may be determined." Anderson had been an ally of Brandeis in a number of civic campaigns, and although they had parted company on some issues, the two had remained friends. His own knowledge of Brandeis's activities, backed up by Ned McClennen's copious memoranda, would now insure that an adequate rebuttal would be made to all attacks, and that hostile witnesses would no be able to attack Brandeis without substantiating their charges. Yet with the appointment of Fox and Anderson, the subcommittee hearings became just

what Gregory had feared, a trial with the defendant absent from the dock.

The main problem of the opposition was that it could not prove that anything Brandeis had done was illegal; all Fox could establish was that Brandeis's manner of practicing law had been unusual. Frequently Fox's witnesses wound up buttressing the case for Brandeis. For example, Fox called New York lawyer Waddill Catchings to the stand in an effort to show that Brandeis, while acting for one side in the 1907 proxy fight for control of the Illinois Central Railroad, had secretly served as an attorney for the Harriman interests. Catchings at the time had been associated with Sullivan & Cromwell, and had gone to Boston to secure Brandeis's services. As it turned out, this work was unrelated to Illinois Central matters and took place afterwards. Moreover, Catchings said, he had been warned that the Boston firm would not accept the business "unless Mr. Brandeis was convinced of the justness of our position. . . . I accordingly had to lay the situation before Mr. Brandeis, and I may say that the hardest interview I had during the whole campaign was with Mr. Brandeis in convincing him of the justness of our cause, so to speak."

Several other witnesses called by Fox also slipped out of his hands, and their testimony merely confirmed the unorthodoxy of Brandeis's legal career rather than any wrongdoing. Ironically, the problem frequently appeared to be that Brandeis had been called in not as an advocate but as "counsel to the situation." In trying to be fair to both sides, in trying to be *judicious*, he had left some of the participants unsure as to just where he stood. Brandeis's impartiality thus became a reason for barring him from judicial office!

If any one conclusion could be derived from the hundreds of pages of testimony taken in the hearings, it was that Brandeis as a lawyer did not conform to the model deemed acceptable by Boston's State Street establishment and their allies in New York's financial district. Among Boston lawyers, Moorefield Storey declared, Brandeis's reputation was "that of a man who is an able lawyer, very energetic, ruthless in his attainment of his objectives, not scrupulous in the methods he adopts, and not to be trusted." Yet Storey, like the others who echoed this opinion, could not pinpoint a single instance of unethical behavior.

What angered the Brahmins is that Brandeis, a graduate of Harvard Law and a man who had given every indication of becoming a fine—and trusted—corporate lawyer, had broken away to become a reformer, and the targets of his reforms were frequently Boston's social and economic elite. Moreover, the puritanical Brandeis, who had to be convinced of the rightness of a client's case, did not mix easily with this elite. As one witness explained: "I think if Mr. Brandeis had been a different sort of man, not so aloof, not so isolated, with more of the camaraderie of the bar, gave his confidence to more men, and took their confidence..you would not hear the things you have heard in regard to him. But Mr. Brandeis is aloof."

How isolated Brandeis was from Boston society and the legal establishment could be seen from the nature of the opposition outside the committee room. At William Howard Taft's behest, he and six other former presidents of the American Bar Association sent a letter to the subcommittee declaring that "in their opinion taking into view the reputation, character and professional career of Mr. Louis D. Brandeis, he is not a fit person to be a member of the Supreme Court of the United States." In Boston, fifty-five prominent citizens, headed by Harvard's A. Lawrence Lowell, signed a petition opposing confirmation. "We do not believe," they wrote, "that Mr. Brandeis has the judicial temperament and capacity which should be required in a judge of the Supreme Court. His reputation as a lawyer is such that he has not the confidence of the people."

The real nature of the complaint was easily perceived: Proper Boston resented this outsider, this Jew, who adhered more closely to the old Massachusetts principles than they did, who was too successful (i.e. not "gentlemanly") in his profession, and who had defeated them time after time.

J. Butler Studley, a lawyer in Brandeis's office, drew a chart showing how all fifty-five were interconnected through private clubs, corporate directorships, Back Bay residences and

intermarriage. As Walter Lippman (himself a Harvard graduate) editorialized in the *New Republic*, Brandeis had been found guilty of being "a rebellious and troublesome member of the most homogeneous, self-centered, and self-complacent community in the United States....He was untrustworthy because he was troublesome. He was disloyal, if at all, to a group." As Charles Francis Adams had earlier written: "I have tried Boston socially on all sides. I have summered and wintered it, tried it drunk and tried it sober, and drunk or sober there is nothing in it save Boston. . . . It is, so to speak, stationary— a world, a Boston world unto itself, and like all things stationary, it tends to stagnate."

Finally, on March 15, the subcommittee hearings dragged to a close. Fox still wanted to parade several dozen more "character" witnesses before the senators, but even the Republicans had had enough. As the five legislators retired to deliberate, Brandeis's opponents stepped up their campaign, and their actions certainly smacked more of professional misconduct than anything they had alleged against Brandeis.

Austen Fox and his colleague, Kenneth Spence, prepared an official-looking document which on first glance appeared to be the report of the subcommittee. In it, they rehashed all of the allegations presented in the hearings, and came to the obvious conclusion that Brandeis was unfit to hold public office. The attack was mailed broadside to nearly every lawyer in the country, and many of them protested about the mendacious nature of the piece. An even more underhanded attack was the circulation of the totally discredited canard that Brandeis had been a go-between in the so-called "Peck Affair." According to rumors, Woodrow Wilson had written extremely amorous letters to a Mrs. Peck shortly after his first wife's death. When he became engaged to Edith Bolling Galt, the president wanted to retrieve these embarrassing documents, and two Jewish lawyers, Louis Brandeis and Samuel Untermyer of New York, procured them by paying Mrs. Peck \$75,000. Soon afterwards, Wilson named Brandeis to the Supreme Court as his reward.

On April 3, the subcommittee announced its decision. By a three to two vote along party lines, it had approved the Brandeis nomination. Senators Chilton and Fletcher wrote the majority report; Senator Walsh concurred in a separate and more emphatic statement; both Cummins and Works sent in lengthy and strongly-worded condemnations of the nominee. The scene now shifted to the full Senate Judiciary Committee, where the outcome remained very much in doubt.

Responsibility for shepherding the nomination through the committee passed from Chilton to Charles A. Culberson of Texas, an eighteen-year veteran of the Senate now suffering from paralysis-agitans. Culberson could no longer deliver speeches; he could hardly utter two sentences without his affliction causing him to stutter badly. But his mental faculties were still acute, and Culberson recognized that while the eight Republican members would oppose the nomination, not all of the ten Democrats were fully sympathetic. Chilton, Fletcher and Walsh could be counted upon; Culberson would support Brandeis out of deference to the president's wishes; and young Henry Ashhurst of Arizona favored the appointment.

All of the remaining five Democrats had some reason why they might vote in the negative. Lee Overman of North Carolina had once been a railroad president, and Brandeis had been a foe of railroad rate increases. James O'Gorman of New York was at odds with Wilson, and might vote no just to spite the president. Jim Reed of Missouri had his eye on the 1920 Democratic presidential nomination, and he wanted to see which way the political winds were blowing before committing himself. John Knight Shields of Tennessee and Hoke Smith of Georgia were both uncommitted and unpredictable.

Because of the uncertainty of the vote, and the approaching party conventions (which kept a number of senators out of Washington), Culberson did not try to rush matters. Throughout April the matter hung in limbo in committee while Brandeis's foes continued to unload barrage after barrage of "evidence" regarding his unfitness. In turn, the nominee's advocates issued rebuttal statements, and at times even went on the offensive regarding the

intentions and scruples of Brandeis's detractors. At the end of April, three months after Wilson had sent in the nomination, the vacancy on the Court remained unfilled, with no sign that either the Judiciary Committee or the Senate would act soon. Then the dam broke, as Wilson, Brandeis and their allies moved from apathy to action, from defense to attack.

From Harvard, Felix Frankfurter and Roscoe Pound rounded up seven of the nine Law School professors to sign a strongly-worded letter testifying to Brandeis's legal ability and integrity. Moreover, they pointed out that if Brandeis's character had been so terrible, why had he been awarded an honorary MA, from Harvard, and continuously appointed to the Law School's Board of Visitors, a committee made up of outstanding men in the legal profession. An even more impressive message came from the venerated Charles W. Eliot, president emeritus of Harvard. "I have known Mr. Brandeis for forty years, and believe that I understand his capacities and his character," Eliot wrote. As a student, Brandeis "possessed by nature a keen intelligence, quick and generous sympathies, a remarkable capacity for labor, and a character in which gentleness, courage and joy in combat were intimately blended. His professional career has exhibited all these qualities, and with them much practical altruism and public spirit." Eliot conceded that on some matters he and Brandeis had disagreed, but these differences had never led him to question Brandeis's ability or integrity. Brandeis's rejection, Eliot concluded, "would be a grave misfortune for the whole legal profession, the court, all American business and the country."

An even more important letter came to Culberson from the White House. Woodrow Wilson finally realized that confirmation, which he had confidently expected to come in due time, was now in jeopardy. Culberson told the president that a number of Democrats would support Brandeis if they believed that Wilson really wanted him confirmed; if it were not a party matter, they might abstain or even vote against the candidate. Wilson had to make clear, to the senators and to the American people, that he did indeed support Louis Brandeis. Wilson asked Attorney-General Gregory to prepare a memorandum, and from it he wrote a letter to Culberson on May 5:

"I have tested [Brandeis] by seeking his advice upon some of the most difficult and perplexing public questions about which it was necessary for me to form a judgment. I have dealt with him in matters where nice questions of honor and fair play, as well as large questions of justice and public benefit, were involved. In every matter in which I have made test of his judgment and point of view I have received from him counsel singularly enlightening, singularly clear-sighted and judicial, and, above all, full of moral stimulation. He is a friend of all just men and a lover of the right; and he knows more than how to talk about' the right—he knows how to set it forward in the face of his enemies. I knew from direct personal knowledge of the man what I was doing when I named him for the highest and most responsible tribunal of the nation."

* * * * *

Two Men For All Seasons

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our

Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Holmes, J., dissenting in *Abrams v U.S.*, 250 US 616, 630 (1918).

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.

Brandeis, J., concurring (with Holmes) in *Whitney v California*, 274 U.S. 357, 377 (1926).

* * * * *

Wilson now sent his Secretary of the Navy, Josephus Daniels, to talk to Hoke Smith of Georgia about Brandeis. And on Sunday evening, May 14, both Smith and Jim Reed dropped in for a drink at the Washington apartment of journalist Norman Hapgood to discover that Louis Brandeis was there. Reed had intended to stay for just a moment, and in fact had left Mrs. Reed waiting in the car. But he lost track of time as he and Brandeis sat on the couch and spoke for more than an hour. By the time he left, Reed had sized up all of the political factors and had been impressed by the nominee; he would vote for Brandeis. A similar conversion took place when Brandeis turned to Hoke Smith after Reed left; two more Democrats had fallen into line.

That Thursday, an unforeseen event took place 3000 miles across the Atlantic. A British court martial passed a sentence of death on Jeremiah Lynch, a naturalized American citizen and New York resident who had returned to his native land to participate in the Irish struggle for independence. Lynch's sentence was to be carried out at midnight, and Senator O'Gorman, the pride of New York's Irish community, suddenly forgot all of his old grievances against Woodrow Wilson and sought his help in preventing Lynch's execution. The next day's papers told the story of how Wilson, at O'Gorman's request, had cabled the American ambassador in London directing him to make every possible effort to save Lynch; the death sentence had been commuted to ten years in prison. O'Gorman was now a hero in New York, and he recognized that he owed a political debt to Wilson; one more vote for confirmation.

Two days later, a tired president sat on a special train carrying him from Washington to Charlotte, North Carolina. Wilson had reluctantly agreed to attend the annual celebration of the Mecklenburg Declaration of 1775 as a favor to Josephus Daniels and the two state senators. As the train approached Salisbury, Lee Overman's home town, the senator pleaded through Daniels for the president to stop for a brief appearance with Overman. Wilson at first declined, but the politically acute Daniels immediately saw the importance of such a gesture. Wilson agreed, and as Overman proudly introduced the President of the United States to his friends and neighbors, Wilson launched into an impromptu talk praising Overman and all those "forward looking men" who supported his programs and his appointments. As the train rolled back to Washington that

evening, Josephus Daniels happily informed Wilson that Overman would vote for confirmation.

The last of the uncommitted Democrats was John Knight Shields. Wilson's son-in-law, Secretary of the Treasury William Gibbs McAdoo, had grown up in Tennessee, and he utilized all of his old contacts to get the message through to Shields that Tennesseans supported the president's nomination. Wilson himself went out of his way to consult Shields on several minor matters. Since Tennessee's other senator, Luke Lea, had been defeated in the Democratic primary, Shields now realized he would be the state's senior senator, and his ability to influence patronage at home would depend upon maintaining good relations with the White House.

The troops had been rallied, and Culberson scheduled the vote on the appointment for Wednesday morning, May 24. By a straight party vote of ten to eight, the full Judiciary Committee recommended that Brandeis be confirmed. Victory was now certain. Because of the party lineups in both the Judiciary Committee and the subcommittee, Democrats in the full Senate could be counted upon to support the president's man as a matter of party discipline.

The end came a few minutes before 5:00 P.M. on June 1, 1916. The Senate galleries were cleared as the solons went into executive session. At 5:30 the doors were thrown open, and Vice President Thomas Marshall announced that Louis D. Brandeis had been confirmed as Associate Justice of the Supreme Court by a vote of 47 to 22. Of the Democrats, only Newlands of Nevada had voted no. On the Republican side, three insurgent progressives, LaFollette of Wisconsin, George Norris of Nebraska and Miles Poindexter of Washington voted for Brandeis, and two others, Clapp of Minnesota and Gronna of North Dakota were absent but paired on the *Aye* side.

While the Senate was still in executive session, Brandeis had left his office and taken the late afternoon train to his summer home in Dedham. As he opened the door, his wife greeted him with "Good evening, Mr. Justice Brandeis." The long fight was over. At the age of sixty, one of America's leading reformers prepared to start a new career. Twenty-three years later, when he retired from the Court, the country was near unanimous in its appraisal that Brandeis had more than fulfilled the high hopes of his supporters and the faith of Woodrow Wilson; he had become one of the towering figures in the history of American constitutional development.

That June night in 1916, however, was one of anticipation as well as triumph. As Louis Brandeis read through the pile of telegrams that flooded into Dedham that evening, one in particular caught his eye. It read WELCOME, and was signed Oliver Wendell Holmes.

The Tribute of the Court

In ceremonies following the death of Justice Brandeis, the new Chief Justice, Harlan F. Stone, responded to various tributes with an address which contained the following passage:

He was emphatic in placing the principles of constitutional decision in a different category from those which are guides to decision in cases where the law may readily be altered by legislative action. He never lost sight of the fact that the Constitution is primarily a great charter of government, and often repeated Marshall's words: "it is a *constitution* we are expounding" "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." Hence, its provisions were to be read not with the narrow literalism of a municipal code or a penal statute, but so that its high purposes should illumine every sentence and phrase of the document and be given effect as a part of a harmonious framework of government. Notwithstanding the doctrine of *stare decisis*, judicial interpretations of the Constitution, since they were beyond legislative correction, could not be taken as the final word. They were open to reconsideration, in the light of new experience and greater knowledge and wisdom. Emphasis of the purposes of the Constitution as a charter of government, and the generality of its restraints under the Due Process Clause, precluded the notion that it had

adopted any particular set of social and economic ideas, to the exclusion of others which fairminded men might hold, however much he might disagree with them. He was the stalwart defender of civil liberty and the rights of minorities. In the specific constitutional guaranties of individual liberty and of freedom of speech and religion, and in the adherence by all who wield the power of government to the principles of the Constitution, he saw the great safeguards of a free and progressive society. (317 U.S. XLVII.)

The Court and the Trail of Tears

RENNARD J. STRICKLAND and WILLIAM M. STRICKLAND

In 1829 when Andrew Jackson delivered his first message on the removal of eastern Indian tribes, the newly elected chief executive promised that "this emigration should be voluntary, for it would be as cruel as unjust to compel the aborigines to abandon the graves of their fathers and seek a home in a distant land."^[1] Ten years later, when Jackson's Indian removal was finally implemented, fifteen thousand Cherokees were driven at gunpoint out of their ancestral homes in Georgia and Tennessee to a distant land west of the Mississippi known as the Indian Territory. Four thousand Cherokees, more than one in four, died as a result of the internment and forced march which they called "the journey where they cried" or "The Trail of Tears."^[2]

The journey took more than six months lasting from October 1838 until March 1839 and the exiles died, tens and twenties, every day. The very old and the very young could not stand the hardships of the brutal winter and even the most able-bodied soon were weakened by relentless blizzards and driving snow. The story of the crossing of the frozen Mississippi was forever etched on the memories of those who suffered the trail.

Background on the Cherokee Cases

How could this have happened? How could four thousand Cherokees—one-fourth of a nation—perish when the President who proposed removal wanted voluntary emigration? When a million or more people had spoken out against Indian removal? When the United States Supreme Court upheld the legal rights of the tribe?

The Cherokee cases and their relation to the Indian Removal question is a topic which continues to interest historians. Aspects of forced migration have received significant attention almost since the time of the Louisiana Purchase when Thomas Jefferson had explored this as a possible way to deal with "the Indian question." Jacksonian politics and policy discussions are rife with such analysis but very little attention has been given to the Indian side of the controversy—the role played by Indian people in their effort to defeat removal.^[3]

To understand the Cherokee cases, one must understand the Indian people who are the Cherokees.^[4] In historic times the Cherokees were the largest Indian tribe on the Southern frontier of English America. Most of the Cherokee homes were situated along small streams in scattered villages throughout the Appalachian Mountains. Through a series of treaties and several bloody wars Cherokee land holdings were reduced until in the late 1820s the major body of the tribe was concentrated in Georgia and Tennessee.

The Cherokees were a settled people of Iroquoian language stock who, in the nineteenth century, adapted remarkably well to new circumstances, established a system of government patterned after the Anglo-American society, developed their own alphabet, and began to follow the so-called "civilized pursuits" of farming, stock-raising, weaving and spinning. Perhaps the best picture of this material progress of the Cherokees is shown in an address by the mixed-blood leader Elias Boudinot given in 1826. The property census for that year, according to Boudinot, showed "22,000 cattle; 7600 horses; 46,000 swine; 2,500 sheep; 2,488 spinning wheels; 172 wagons; 2,943 ploughs; 31 grist-mills; 62 blacksmith shops; and 18 schools and ferries." In 1827 the Cherokees had even adopted a written constitution patterned after the Constitution of the United States.^[5]

Thus the Indians whom Jackson sought to remove by his proposed legislation of 1829 were neither "savage" nomadic wanderers nor naive political amateurs. Soon it became clear

that they were not likely to capitulate and voluntarily emigrate as Jackson hoped. The tribe had made an historic compromise by which they sought to preserve their tribal identity, their political autonomy, and their sovereign status through adaptation of Indian and white institutions. And they were prepared to use those institutions, including the United States courts, to remain in Georgia.

A number of events culminated in the Georgia-Cherokee crisis of 1829. Georgia would not tolerate the establishment, within her geographic boundaries, of a separate political unit such as the Cherokee Nation with a written constitution, a legislative body enacting laws, and a judicial system enforcing Cherokee tribal laws. In addition, gold was discovered in north Georgia on land which was legally the domain of the Cherokee Nation. Furthermore, the election of Andrew Jackson brought a westerner, an ally, to the White House. Therefore, in 1829, the people of Georgia demanded of President Jackson full implementation of the Georgia Compact of 1802, whereby the federal government agreed to extinguish Indian titles within the state boundaries. To assist in bringing pressures for removal the state of Georgia adopted a number of repressive acts depriving Indians of previously recognized rights including the opportunity to testify in court as well as legislation providing for a lottery for distribution to whites of Indian lands historically owned and presently occupied by the Cherokees. These were the measures of the state of Georgia which produced the cases of *Cherokee Nation v. Georgia* and *Worcester v. Georgia*.

The Indian Removal Policy proposed in Jackson's First Annual Message on December 8, 1829, had often been suggested. It offered for "consideration the propriety of setting apart an ample district west of the Mississippi, and without the limit of any State or Territory now formed, to be guaranteed to the Indian tribes as long as they shall occupy it." Another aspect of Jackson's plans would have allowed Indians to remain as private, individual citizens without any tribal or Indian rights subject to state law on an individually allotted piece of non-tribal land east of the Mississippi. Otherwise, all Indian land titles east of the Mississippi were to be extinguished, tribal government abolished, and the Indian tribes transported west. On May 28, 1830, after a bitter debate, an Indian Removal Act was passed which authorized the president to exchange lands in the west for those presently held by native tribes in states and territories in the east. Congress appropriated one-half million dollars for the purpose of negotiating treaties and effectuating the removal effort.[6]

The passage of a Jackson-sponsored removal act did not end the Indian debate but rather intensified the efforts of the Cherokees and their friends. The removal controversy became a major question in Jackson's reelection campaign of 1832 and the source of the famous conflict between President Jackson and Chief Justice John Marshall on the power of the courts.[7] Many Cherokees continued to hold to their hope even while soldiers drove them from their homes into the stockades and onto the Trail of Tears. Some refused to believe that the American people would allow this to happen. Until the very end, the Cherokees spoke out supporting their rights to resist removal and to continue to live in the ancestral homelands.

The Cherokee Cases Before the Supreme Court

The Cherokees after the legislative defeat turned to the Supreme Court for help. They were advised by Daniel Webster, Theodore Frelinghuysen, and Ambrose Spenser to hire eminent counsel; they suggested William Wirt. Wirt had been Attorney General when Jackson took office and was not asked to continue in that position, having run against "Old Hickory" in the 1832 campaign (see article, "The Many-Sided Attorney General," in YEARBOOK 1976).

In preparation for the case, Wirt had three important questions to answer: 1.) What were the Indians' legal rights? 2.) What type of case would get a hearing? 3.) What were the attitudes

of the justices toward the Indian question?

To determine the legal rights of the Indians, Wirt carefully investigated the question. Wirt wrote to Judge Carr: "I took up the question of the right of Georgia to extend her laws over these people, read all the speeches in Congress *pro* and *con*, on the subject, the opinion of the President communicated to the Cherokees through the Secretary of War, in favour of the right of the State, and gave the whole case a thorough examination." [10] After this study, he prepared a lengthy opinion on the question. Wirt examined the Cherokee treaties, Indian court cases, the practice of European nations, United States Law, and the Constitution and came to the conclusion:

That, the law of Georgia which has been placed before me, is unconstitutional and void. 1. Because it is repugnant to the treaties between the United States and the Cherokee nation. 2. Because it is repugnant to a law of the United States in 1802, entitled "an act to regulate trade and intercourse with the Indian tribes, and to preserve trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." 3. Because it is repugnant to the constitution, inasmuch as it impairs the obligation of all the contracts arising under the treaties with the Cherokees: and affects, moreover, to regulate intercourse with an Indian tribe, a power which belongs, exclusively to Congress. [11]

This extensive opinion was to form the basis for all future argumentation before the Supreme Court.

More by a process of elimination than anything else, Wirt would seek original jurisdiction for the Cherokees as a foreign state. However, he did have great doubts as to whether the Court would accept original jurisdiction. [12] He wanted and received legal opinions from a number of prominent lawyers, including Ambrose Spencer, Daniel Webster, Horace Binney, and James Kent, all agreeing that the Cherokees had a right to original jurisdiction. In preparation for the case, Wirt sought the answer to one more question: what were the attitudes of the justices toward the Indian question? He asked Judge Carr to find out Chief Justice Marshall's opinion. Wirt wrote Carr:

...tell him [Marshall] as I wish you to do, that there is no case yet depending, which involves a decision on them; but that, unless the opinions of the Supreme Court, as already pronounced, present it, there may be questions of a delicate and embarrassing nature to the Supreme Court, which may be prevented by a correct understanding of the full scope of the decisions heretofore pronounced. I would speak to him with the confidence of a friend, . . . and leave it to him to say, whether he would or would not be willing to come out with the expression of his opinion, so as to prevent embarrassment and mischief. I cannot discover that there would be any impropriety either in his saying whether the principles I have mentioned are involved in the former decisions; or, what he may at present, think of these questions. [13]

Marshall did not give his legal opinion to Carr, but he did express his opinion on the question. Marshall wrote to Carr: "I have followed the debate in both houses of Congress with profound attention, and with deep interest, and have wished, most sincerely, that both the Executive and Legislative departments had thought differently on the subject. Humanity must bewail the course which is pursued, whatever may be the decision of policy." [14] This was encouragement to Wirt, for "he knew that the legal decisions of the Chief Justice usually followed his sympathies." [15]

The case of *Cherokee National v. Georgia* began on March 5, 1831 with the Cherokees' other lawyer, John Sergeant, asking for an injunction against the State of Georgia.

The injunction was ignored by Georgia.

The emotional nature of the subject was highlighted by the Cherokee delegation. They

attended the trial looking "intelligent and respectable." [16] This deportment added weight to Wirt's argument that they were a foreign nation and not a band of savage Indians. The injustices against the Cherokees that Wirt talked about were made to seem true because of the crying of a member of the delegation, "he shed tears copiously during Mr. Wirt's address." [17] The Cherokee attended and cried at almost every important speech supporting their position; this show of tears was convenient, for it reinforced the plight of the Cherokees.

Wirt's argument discusses one important subject—the danger of non-enforcement of the Court's decision. Wirt wrote of this danger to his friend, Judge Carr: "With regard to the Supreme Court, the Attorney-General is reported to have said, that the State of Georgia would not respect their decision, if against them, but would go on to enforce their rights according to their own opinion of them; and after what has already passed, I should not be surprised if the President should co-operate with them and render the decision abortive, by forbidding the Marshal and people of the country from obeying it. On the other hand it is possible, (though not very probable,) that the President may bow to the decision of the Supreme Court, and cause it to be enforced; and that Georgia may sullenly acquiesce." [18] Wirt could have left this danger alone and waited to see if non-enforcement occurred, but he chose to attack it. He basically made three points, aimed at three different audiences.

1. To the Court he stated: "Shall we be asked (the question has been asked elsewhere) how this court will enforce its injunction, in case it shall be awarded? I answer, it will be time enough to meet that question when it shall arise. At present, the question is whether the court, by its constitution, possesses the jurisdiction to which we appeal. . . ." [19] This was a challenge for the Court to do their duty even if it meant a fight. By bringing this danger out in the open, he turns this disadvantage of a battle into the advantage of meeting a challenge to the integrity and power of the Court.

2. To the President he said: "If he refuses to perform his duty, the Constitution has provided a remedy." [20] Wirt, in effect threatened Jackson with impeachment if he refused to enforce the Court's decision. This declaration before the act would perhaps add weight to any impeachment movement, while making the President think twice before acting.

3. To the people he said: "I believe if the injunction shall be awarded, there is a moral force in the public sentiment of the American community which will, alone, sustain it and constrain obedience. At all events, let us do our duty, and the people of the United States will take care that others do theirs." [21] Wirt effectively sets forth what the people must do in case of nonenforcement—force the President.

Sergeant and Wirt in a balanced presentation clearly stated the Indians' case. Georgia in defense was equally clear. They did not appear. The choice not to speak spoke loudly; the Supreme Court had no jurisdiction over Georgia's internal affairs and Georgia was not bound by any decision. These views were expressed time and time again by her governors and legislature. If Georgia had appeared, it would have contradicted this position, while the failure to speak supported it. Georgia received another advantage by refusing to speak; the significance of the case was reduced. A one-sided debate is of less news value than a two-sided one. This was a continuation of the strategy, used in the congressional debates, to speak only when absolutely necessary. Georgia's aim was to reduce agitation, not to increase it. Georgia lost little by not appearing. The justices were bound to support their own interpretations of the constitution and they might vote in favor of Georgia even if she did not speak. Georgia used this speaking opportunity to a maximum by not speaking.

Of the seven judges who heard *Cherokee Nation v. Georgia* four rejected the Cherokees' arguments (John Marshall, William Johnson, John McLean, and Henry Baldwin), two upheld them (Smith Thompson and Joseph Story), and one was absent (Gabriel Duvall).

The case was decided on the issue Wirt and Sergeant feared most: did the Supreme Court have original jurisdiction? Wirt wrote to his wife shortly before the trial expressing his concern on this question: "I feel rather despondent about my poor Indians— not that I have the slightest

doubt of the justice of these claims on the United States, but that I fear the Supreme Court may differ with me as to the extent of their jurisdiction over the subject. . . ."[22] Most of the argumentation of Wirt and four-fifths of Sergeant's was directed at this point. They had effectively analyzed the case, but there was one weakness in the syllogism which formed the basis for their reasoning. They viewed the Indians as either a state or a foreign nation.

John Marshall in his opinion presented another alternative with which they had not dealt. Marshall believed the Indians to be a "domestic dependent nation." Thus, the major premise of their syllogism was seen as false and the decision, against the Cherokees, was by a court divided four to two. The actual decision might better be described as two-two-two, with Marshall and McLean holding that the Indians did not have original jurisdiction but they were states with rights, Baldwin and Johnson deciding that the Cherokees were not a state and having few rights, and Story and Thompson concluding that the Cherokees had original jurisdiction as a foreign state and supporting their political rights.[23]

Three decisions were read in court on the day the decision was given. Marshall was first, supposedly speaking for the Court. His decision, while against the Indians, was far from discouraging. He spoke of the points won by Wirt and Sergeant: "[Their] argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful." [24] Marshall even went as far as to encourage another case: "The mere question of right might perhaps be decided by this Court in a proper case with proper parties." [25] Marshall in this opinion gave the legal decision he felt compelled to give, but in his explanation he went far to give an opposite view. His opinion supported the Cherokees to such a degree that Justice Baldwin (who voted with the majority) called himself a dissenting judge.[26]

Baldwin's and Johnson's opinions were clear presentations of Georgia's claim to sovereignty over the Indian lands. They did not view the Indians as having any claim to the title of foreign nation. Their arguments were powerful, well supported legal opinions.

Thompson, however, wrote an opinion which was inserted into the proceedings as if it had been delivered. In addition, Thompson had the opportunity to examine the other decisions and then refute them. His opinion followed the exact organization of Sergeant's speech and included many of the same arguments used by Wirt and Sergeant. Richard Peters (court reporter) included this opinion in the official report of the Court. He also printed a separate volume on the case including the legal opinion of James Kent (pro-Cherokee), the treaties with the Cherokees, the Federal Intercourse Act of 1802, the Georgia Indian laws, and the opinions of the justices including Thompson's undelivered opinion.[27] Through these publications and the press, the northern public received a different view than they would have if they had been in court to hear the decisions.

The arrest and conviction of the Cherokee missionary, Samuel A. Worcester, gave Wirt and Sergeant the case in *Worcester v. Georgia* that they hoped would support the Indians' rights.[28] There no longer was a question of jurisdiction because Worcester was a citizen of the United States. The Supreme Court could rule on the merits of this case and not have to be concerned with jurisdiction.

The opening arguments in the case of *Worcester v. Georgia* were heard on February 20, 1832 with Wirt and Sergeant representing the Cherokees and no one representing Georgia. Sergeant and Wirt's main point was: "That the statute of Georgia under which the plaintiffs in error were indicted and convicted, was unconstitutional and void." [29] The Cherokee lawyers argued that the laws were unconstitutional because they violated the Constitution, laws, and treaties of the United States. Although only a summary of these speeches remains, the supporting arguments were probably about the same as in *The Cherokee Nation v. Georgia*. Wirt and Sergeant cited many of the court decisions, laws, treaties used in the first trial. That Sergeant presented a reasoned approach and Wirt a more emotional one can be seen from review of the

case by the *New York Daily Advertiser*:

Sergeant's argument was equally creditable to the soundness of his head and the goodness of his heart. The belief was, when he had resumed his seat, that he had left little or no ground for Mr. Wirt to occupy. Were I to judge from Mr. Wirt's speech today, I should say that the subject is inexhaustible. He spoke until after three o'clock, and was obliged, from fatigue, to ask the Court to adjourn. So interesting was the subject, so ably did he present it to the Court, that in addition to the number of gentlemen and ladies, who attended from curiosity, so many of the members of the House reported to the Courtroom that an adjournment was moved. . . .[30]

Wirt's conclusion was so emotional that Chief Justice Marshall shed tears, something he had not done since the *Dartmouth College* case.[31]

The Court ruled in favor of the missionaries, thus upholding the rights of the Cherokees. Marshall spoke for the five-one majority in what was applauded as of the most brilliant and eloquent decisions ever rendered. Justice Black called it "one of Marshall's most courageous and eloquent opinions." [32] Albert J. Beveridge said it was one of the noblest Marshall ever wrote.[33] It deserves this praise because of the elaborate and extensive explanations and proofs in addition to its eloquent passages. Marshall drew heavily on Wirt's first written argument, the speeches of Wirt and Sergeant, and the opinion of Justice Thompson in the Cherokee case.

Marshall picked from these the best proofs and arguments and culled the rest. He gave a historical review of Indian-white relations from first discovery to the present, showing 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 whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States." [34] Apparently Marshall was giving the decision he wished he could have delivered in the Cherokee case.

Justice McLean also delivered a decision supporting the missionaries. However, he felt the Indians' rights were temporary and thought the best policy might be one of removal. Justice Johnson was absent and would have, no doubt, dissented. Justice Baldwin did dissent, but on the technical grounds that "the record was not properly returned upon the writ of error. . . ." [35] He did not deliver an opinion because he did not want his opinion to "go to the public simultaneously with that of the Court. Lest it might be open to the imputations of having a tendency to impair the weight of the decision and mandate in Georgia." [36] Baldwin's decision not to speak was, in effect, support of the Court and the Indians.

The ultimate pragmatic victory in this case went to Georgia. The arguments which they supported by not speaking proved to be the strongest; they refused to support the decision to free the missionaries. The *Macon Advertiser* on March 13, 1832 fairly well sums up the battle: "They [the missionaries] have been placed where they deserved to be, in the State Prison, and not all the eloquence of a Wirt, or a Sergeant, nor the decision or power of the Supreme Court can take them from it unless the State chooses to give them up, which, at this time is very improbable." [37]

The effect of the failure to enforce the court decisions was disastrous. The missionaries, the most active and vocal group in support of the Cherokees, decided the cause was lost and so advised the Cherokees to remove. The desertion of the American Board of Foreign Mission is typical. "On Christmas Day of 1832," Starkey reports, "the American Board assembled in their rooms on Pemberton Square, Boston. They had a heavy decision to make. They read Worcester's letter [from a Georgian prison asking for advice on a pardon] and reviewed the whole history of the Cherokees versus the state of Georgia; then each gave his opinion. When these were

tabulated they found that they were in agreement on two points: Worcester and Butler might now honorably seek pardon; the Cherokees must be advised that hope had ended; they must remove." [38]

Worcester and Butler had been informed that any time they would stop legal action against Georgia they would be released. After hearing of the Christmas Day decision of the American Board, they applied for pardon. They wrote Governor Lumpkin on January 8, 1833: "We have this day forwarded instructions to our counsel to forbear the intended motion, and to prosecute the case no farther." [39] On January 15, the prisoners headed home to their mission.

Individual desertions were also significant. Both Edward Everett and Senator Frelinghuysen who had spoken so eloquently in the defense came to the conclusion that the Cherokees had to move on westward. Frelinghuysen wrote to a friend, "I think removal is best." [40] The power base of northern money and agitation had crumpled and the Cherokees learned at first-hand the perfidy of their liberal friends. Even the once unified Cherokee resistance to removal had ended by 1833 when such anti-removal leaders as Elias Boudinot, The Ridge, and John Ridge were openly advocating that after the President's failure to enforce the decision in *Worcester v. Georgia* the reality of national power politics had doomed the Cherokee resistance effort.

The tragedy of continued resistance and the prospect of a Trail of Tears was seen by the great Cherokee leader, The Ridge, whose prophecy was ignored. This internal spilt is not the result of disloyalty but traceable to the tragic realization that if the Supreme Court decision in *Worcester v. Georgia* was not to be upheld then there was no protection against the tyranny of the removal forces. Elias Boudinot expressed this attitude in the *Cherokee Phoenix*, July 3, 1830. "We are glad to find the determination of the Cherokees to bring their case before the Supreme Court meets with [approval]. We will merely say that if the highest judicial tribunal in the land will not sustain our rights and treaties we will give up and quite our murmurings." The impending crisis is forecast in another Boudinot *Cherokee Phoenix* editorial of March 5, 1831. "The Cherokees are for justice and they are trying to obtain it in a peaceable manner by a regular course of law. If the last and legitimate tribunal decides against them, as honest men they will submit and 'the agony will be over.' Will Georgia be as honest and submit to her own (U.S.) courts?"

To say the Cherokees cause was lost because of the desertions is to look to effect and not cause since the reasons for failure are the reasons for the desertions. Jackson's re-election was a major factor in creating the view of the removal fight as a lost cause. Many of the political friends of the Cherokees, seeing the Indian cause as one which did not have significant voter support, stopped their agitation. The re-election of Jackson was even a factor in the decision of missionaries Worcester and Butler to seek release. They wrote *The Missionary Herald* explaining why they accepted a pardon: "There was no longer any hope, by our perseverance, of securing the rights of the Cherokees, or preserving the faith of our country. The Supreme Court had given a decision in our favor, which recognized the rights of the Cherokees; but it still rested with the Executive Government, whether those rights should be protected, and it had become certain that the Executive would not protect them." [41]

Another reason for the lessened interest in the Cherokee cause was the rise of a more important and crucial sectional issue: nullification. In late 1832 the country's attention turned to the danger of disunion as a result of fighting over the tariff question. South Carolina claimed the right to nullify any Federal law with which they disagreed. While Georgia's actions were virtual nullification, the difference in the two cases was how Jackson treated them. Jackson supported Georgia and fought South Carolina. The immediate practical result for the Cherokees was that many of those who supported the Indians on removal abandoned them to join Jackson in his efforts to save the Union. One might clearly see that the Cherokee cause was finally lost when Jackson delivered a toast at a birthday dinner in honor of Thomas Jefferson. Jackson electrified the country when he expressed sentiments echoing the Northern line from many an anti-

removal speech and sounding more like a speech of Daniel Webster's: "Our Federal Union—it must be preserved." [42]

On November 24, 1832, a convention in South Carolina passed the famous Nullification Ordinance. Jackson responded with his Nullification Proclamation expressing a strong nationalistic philosophy, supporting the right of Congress to establish protection, denying the constitution is a compact of sovereign states, and announcing that a state has no right to secede. Many of those most opposed to his Cherokee policy rallied to his support. Daniel Webster, who just a few months before had condemned the President for his support of Georgia, now spoke in favor of Jackson at a meeting in Faneuil Hall, a favorite meeting place for pro-Indian groups. Webster said: "I regard the issuing of this Proclamation by the President as a highly important occurrence. The general principles of the Proclamation are such as I entirely approve. I esteem them to be the true principles of the Constitution." [43] J. T. Austin, another political opponent of Jackson, declared at the same meeting: "laying aside all private feelings, we are ready, in this trial, to rally round the Chief Magistrate of the Union; with one heart and voice, we stand ready to support him, as the Israelite upheld the arm of Moses." [44]

Worcester's decision to seek a pardon was based partially on the danger to the Union from South Carolina. "[Worcester] had discovered that those who urged him to surrender were friends of the Union; nullifiers hoped he would persist, for the effect was to swing the state to the support of South Carolina." [45] Jackson even received the support of Supreme Court Justice Joseph Story. Story had been the strongest supporter of the Cherokees, holding for them even in *The Cherokee Nation vs. Georgia*. Story wrote Richard Peters: "The President's proclamation is excellent and contains the true principles of the Constitution." [46] Story also wrote home that he and Chief Justice Marshall "were to be counted among the president's warmest supporters." [47] He even recounted how, at a state dinner, "President Jackson specially invited me to drink a glass of wine with him. . . . Who would have dreamed of such an occurrence?" [48]

The Cherokees could not believe what was happening. In an editorial the *Cherokee Phoenix* asked: "What do the good people of the United States think of the distressed condition of the Cherokees? Is their attention so completely engrossed in their own private affairs that they cannot even find time to shed a tear at the recollection of such accumulated oppressions heaped upon their fellow creatures? Has the cause of the Indians have been swallowed up in other questions, such as the tariff. . . ." [49] What the Cherokees did not understand was that it was not that their friends did not care about the Indian. When Story, Marshall, and Webster, were presented with the clear choice of supporting Jackson and the Union or opposing Jackson and supporting the Indians, the choice was for the Union.

Endnotes

1. Andrew Jackson, First Annual Message to Congress, December 8, 1829, in Francis Paul Prucha (ed.), *Documents of United States Indian Policy* (Lincoln: University of Nebraska Press, 1975), 47-48.

2. Grant Foreman, *The Five Civilized Tribes* (Norman: University of Oklahoma Press, 1934), 282. For an account of the general removal issue from the viewpoint of a number of tribes see Gloria Jahoda, *The Trail of Tears: The Story of the American Indian Removal, 1813-1855* (New York: Holt, Rinehart, and Winston, 1975).

3. Typical of these studies are the following: Annie Abel, "The History of Events Resulting in Indian Consolidation West of the Mississippi," *Annual Report of the American Historical Association for the Year 1906* (1908), 233-450; Louis Filler and Allen Guttman (eds.), *The Removal of the Cherokee Nation: Manifest Destiny or National Dishonor?* (Boston: D. C. Heath & Co., 1962); Grant Foreman, *Indian Removal* (Normal: University of Oklahoma

Press, 1932); Ronald N. Satz, *American Indian Policy in the Jackson Era* (Lincoln: University of Nebraska Press, 1975); Dale Van Every, *Disinherited: The Last Birthright of the American Indian* (New York: William Morrow and Co., 1966); Thurman Wilkins, *Cherokee Tragedy: The Story of the Ridge Family and the Decimation of a People* (New York: The Macmillan Co., 1970). Special attention is called to the controversial revision in Francis Paul Prucha, "Andrew Jackson's Indiana Policy: A Reassessment," *The Mississippi Valley Historical Review*, 48 (March 1962), 635-55. The national perspective is the focus of an interesting dissertation Philip John McFarland, "The Removal of the Cherokee Indians From the State of Georgia, 1824-1835: An Analysis of Rhetorical Strategies," Ph.D. Dissertation, Stanford University, 1973.

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5. Elias Boudinot, *An Address to the Whites Delivered in the First Presbyterian Church on the 26th of May 1826* (Philadelphia: William F. Geddes, 1826) and Rennard Strickland, "From Clan to Court: Development of Cherokee Law," *Tennessee Historical Quarterly*, 31 (Winter 1972), 316-27.

6. Prucha, Documents, 47-48; Indian Removal Act, May 28, 1830, 4 *United States Statutes-at-Large* 411-412, cited in Prucha, Documents, 52-53. For a collection of speeches from the debates see Jeremia Evarts (ed.), *Speeches on the Passage of the bill for the Removal of the Indians Delivered in Congress of the United States*, April and May, 1830 (Boston: Perkins and Marvin, 1830) and generally *Registry of Debates in Congress* (Washington: Gales and Seaton, 1828-1832) *passim*.

7. See Anton-Hermann Chroust, "Did President Jackson Actually Threaten the Supreme Court with Nonenforcement of its Injunction Against the State of Georgia?" *American Journal of Legal History* 5 (January 1960), 76-78; Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality." *Stan. L. Rev.*, 21 (1969) 500-531; William F. Swindler, "Politics as Law: The Cherokee Cases," *American Indian Law Review*, III (1975), 7-20.

10. Burke, "Cherokee Cases," 508.

11. Letter from Wirt to Carr, in Kennedy, 255.

12. Burke, "Cherokee Cases," 511.

13. Kennedy, 258.

14. Burke, "Cherokee Cases," 510.

15. Joseph Charles Burke, "William Wirt: Attorney General and Constitutional Lawyer" (Ph.D. Dissertation, Indiana University, 1965), 148.

16. *Boston Patriot* (Boston, Mass.) March 23, 1831.

17. *Ibid.*

18. Kennedy, 255.

19. Richard Peters, ed., *The Case of the Cherokee Nation Against the State of Georgia* (Philadelphia: 1831), 153.

20. *Ibid.*, 155.

21. *Ibid.*

22. Letter from Wirt to Mrs. Wirt, February 10, 1831, in Burke, "William Wirt," 251.

23. Burke, "Cherokee Cases," 517.

24. 5 Peters, 15.

25. *Ibid.*, 19.
26. *Ibid.*, 32 and 40.
27. Peters, *Case of the Cherokee Nation*, *passim*.
28. 6 Peters, 515. The case of Elizur Butler, another missionary, was also being heard at the same time.
29. 6 Peters, 534.
30. *New York Daily Advertiser*, February 27, 1832.
31. Burke, "William Wirt," 261.
32. Patricia Behlar, "The Constitutional Status of Indian Tribes: An Essay on the Doctrine of Tribal Sovereignty" (Master's Thesis, Louisiana State University, 1968), 33.
33. Albert J. Beveridge, *The Life of John Marshall*, IV, (Boston: Houghton Mifflin Company, 1919), 549.
34. 6 Peters, 560-61.
35. 6 Peters, 595.
36. *The Georgia Messenger* (Macon, Georgia) April 7, 1832.
37. *Macon Advertiser* (Macon, Georgia) March 13, 1832.
38. Starkey, *Cherokee Nation*, 205.
39. Jack Kilpatrick and Anna Gritts Kilpatrick (eds.), *New Echota Letters* (Dallas: Southern Methodist University Press, 1968), 117.
40. *Cherokee Phoenix* (New Echota), January 4, 1833.
41. Kilpatrick & Kilpatrick, *New Echota Letters*, 215.
42. A. S. Colyar, *Life and Times of Andrew Jackson* (Nashville: Marshall and Bruce Company, 1904), 710.
43. *Boston Patriot*, December 19, 1832.
44. *Ibid.*
45. Starkey, *Cherokee Nation*, 205.
46. Cited in John Dunne, "Joseph Story: The Age of Jackson," *Missouri Law Review* 34 (1969), 326.
47. *Ibid.*
48. *Ibid.*
49. *Cherokee Phoenix* (New Echota), July 7, 1832.

LEGAL EDUCATION BICENTENNIAL

Justices in Academe

WILLIAM F. SWINDLER

Because the year 1979 marks the two hundredth anniversary of the founding of the first academic chair of law in the United States—at the College of William and Mary on December 4, 1779—and because by coincidence or historical accident the great Chief Justice, John Marshall, became one of the first students there, the subject of the education of representative members of the Court becomes particularly timely. Not only where the members of the Court were educated (see table for the period to the end of the Marshall era), but which members were led, either before or after their judicial service, into the groves of academe themselves, is also of some interest.

Marshall's appearance shortly after the chair of law and "police" was established at what had formerly been "Their Majesties' Royall Colledge" in Williamsburg was partly accidental. As a soldier on furlough from Daniel Morgan's redoubtable Rangers, Marshall happened to be stationed in Yorktown, where the Revolutionary War would end just two years later. He had already been pointed toward the law as a career by his father, Thomas Marshall, who was one of the Virginia subscribers to an early Philadelphia printing of William Blackstone's *Commentaries on the Laws of England*. "During a lull in the hostilities," as the future jurist wrote in one of the few autobiographical comments on his career, he decided "to avail myself of some of the lectures" at the College, twelve miles away, including those of George Wythe, one of the most widely known lawyers of the day who had just been installed, a few months before, in the professorship created at the urging of Governor Thomas Jefferson, himself a onetime student under Wythe.

It should be noted, however, that there was another compelling reason for John Marshall to linger in the vicinity of Yorktown. Her name was Mary Willis Ambler, youngest daughter of Jacquelin Ambler, treasurer of the new commonwealth government. Mary would, a few years later, become the wife whom Marshall always referred to as "my dearest Polly." Indeed, there is prima facie evidence that the young law student was thinking more about her than about what Mr. Wythe was saying, when he began putting down his first notes on the law that winter: The first page of those notes (to be edited and published in the spring of 1980, the bicentennial of the date of their composition) contains a couple of incomplete sentences on the subject of "abatement of actions"—but the rest of the sheet is dominated by other notations, to wit: "Mary Willis Ambler" and "Miss Polly Ambler."

If one seeks striking coincidences, there was the very fact that Marshall, a distant cousin of Jefferson and the future Chief Justice with whom the future President was to do battle, should be one of the first students to enroll under the professorship which Jefferson had helped to create. The governor, who was ex officio a member of the college's Board of Visitors, had been intent on making his alma mater a center for studies relevant to the needs of the new state and nation, and this had been his objective in the chair of law and "police"—the latter a term which in the eighteenth century meant the general scheme of organization for a system of government. Jefferson consciously linked together the training of lawyers for the practice of their profession, and the education of young men (Mary did not join William among the student body until 1919) to take over the various functions of government in the new republic. In the spring of 1780, Jefferson wrote with satisfaction to James Madison that the new law program "by throwing from time to time new hands, well principled and well informed, into the legislature will be of infinite value."

This was typically Jeffersonian in its assumption that an educated citizenry was the key to successful representative government. Democratic purists may argue that in his day it was an essentially elitist premise, resting upon the colonial experience with a government drawn from a planter oligarchy. It certainly contrasts with the Jacksonian philosophy of half a century later—and it is perhaps not entirely accidental that the Jacksonian era saw the acceleration of the movement toward elective, rather than life-tenured, jurists in many state court systems, and the revitalizing, for another generation and more, of the tradition of law office study as the most common preparation for the bar. Jefferson's primary concern, however, was to provide a means for Americans to study the "Americanized" common law; just the previous year, a committee created by the commonwealth legislature, of which he and Wythe had been the principal members, had completed a monumental inventory of the whole body of English common and statute law, recommending specific English laws and decisions to be retained, modified or discarded.

Jefferson himself was a law office product, having studied from 1762 to 1766 under Wythe. But Jefferson, whether on his own initiative or with his mentor's general guidance, had filled his own law books with copious criticisms of English law as it was practiced in the colony. His key recommendations in the "Report of the Revisers" to the Virginia legislature in 1778 concerned the abolition of the feudal tenures in the law of property as these had come down from Sir Edward Coke's day on the eve of New World colonization by English authorities. Even more famous was his unswerving constitutional doctrine on the separation of church and state, embodied in Virginia in the abolition of the government support -of the Anglican establishment. Possibly it was the subconscious recognition of the need to teach law from the standpoint of these new American doctrines that led Jefferson to conceive of the law professorship in the 1779 reorganization of the curriculum at William and Mary.

A decade later, when President George Washington undertook to select the first members of the new Supreme Court which the Constitution had established, he would choose, whether or not by design, men of notable educational background. John Jay, the first Chief Justice, was a graduate of King's College (now Columbia University), who had done his law studies in the office of a prominent New York attorney, Benjamin Kissam, John Rutledge, that neurotic but brilliant jurist who was a reluctant Associate Justice under Jay and later the second (although rejected) Chief Justice, had done his law study at the Middle Temple in London, as had John Blair, an honor graduate of William and Mary.

Of the first twenty-four men who served on the Court through the period of Marshall's Chief Justiceship, half attended one or another of the few institutions of higher learning in the colonies or the postwar states—Columbia (then King's College), Harvard, Princeton, Liberty Hall (later Washington and Lee), William and Mary, Yale—while one immigrant from Scotland, James Wilson, had studied at St. Andrew's. William Paterson earned both A.B. and MA. degrees from Princeton. For their legal study, aside from the two Middle Temple men, only Marshall and Robert Trimble had college lectures in law available, at William and Mary and at Transylvania in Kentucky, respectively; but among those who read for the bar under practicing lawyers, several were most fortunate in their choices. Wilson read under the leader of revolutionary and constitutional thought, John Dickinson; and Bushrod Washington later studied under Wilson himself (and eventually succeeded Wilson on the Court). Wilham Johnson studied in the office of Coatesworth Pinckney, Brockholst Livingston under Peter Yates, who was a delegate to the Constitutional Convention of 1787 (although he later withdrew from the sessions in alarm at the direction they were taking). Thomas Todd read under Henry Innes, a leading Virginia lawyer, and Henry Baldwin under Judge Alexander J. Dallas, the first reporter of Supreme Court decisions.

The new Supreme Court, and the new Constitution, prompted some members of the bench to write or lecture about these unfamiliar subjects from one rostrum or another—usually after they had retired from judicial office. In the twentieth century, several academic lawyers,

such as Harlan F. Stone, Felix Frankfurter and Wiley B. Rutledge, came from law schools to the Court itself, while Justice Owen J. Roberts upon retirement became dean of the law school at the University of Pennsylvania. From the beginning, this academic interest of certain Justices contributed a significant dimension to legal education which has heretofore been overlooked.

James Wilson, one of the first appointees to the Court (1789-1798), was the earliest to attempt a flyer in academic life. Like Joseph Story a generation later, Wilson accepted a professorship in law—the second in the history of the young Republic—in the fall of 1790 while remaining on the bench. The College of Philadelphia (later the University of Pennsylvania) offered the Justice the position, assuming that his work with the highest tribunal in the nation would not significantly interfere with his teaching—a reasonable assumption in view of the fact that no cases had even been docketed during the first two sessions of the Court. Wilson, in turn, was expansive in his vision of what might be done with the law lectures; grandiose projects, which never seemed to come off, were a lifelong failing of this Scottish immigrant leading eventually to his professional and financial ruin.

For the lectures in American law, Wilson proposed to cover both constitutional theory and practice, comparing English, Pennsylvania and United States history on the subjects. This in itself was essentially an extension of a well-reasoned pamphlet he had published on the eve of the Revolution, comparing English and colonial constitutional rights. Beyond this, however, Wilson planned to make an exhaustive survey of the "American" version of English common law, and to lead his students into the arcane realms of the law of nature and nations. Although the professorial tour only lasted the one academic year, and although later critics found his published lectures "prolix and uneven," the insight of a Founding Father which they provided in the constitutional area was a valuable complement to the more famous (and better promoted) *Federalist Papers*.

It was Marshall's great colleague, Justice Story, who was in fact the first major academic figure in the history of the Court. A prolific writer both before and after his assumption of the Dane Professorship of Law at Harvard in 1829—many of his judicial opinions were themselves erudite commentaries on the law they were interpreting—Story was to produce no fewer than nine definitive treatises on many different areas of law, while continuing his full duties as Associate Justice. His famous three-volume *Commentaries on the Constitution* in 1833 provided the first definitive treatise on the work of the Marshall Court, and indeed played a fundamental role in cementing the doctrines of that Court into the fabric of American life. The constitutional work went through several American editions, as well as becoming the authoritative statement of constitutional principles translated into several foreign languages and avidly followed by courts and legal educators in European and Latin American experiments in republican government in the mid-nineteenth century.

More than seventy editions of Story's legal writings were published—including, aside from the constitutional volumes, treatises on agency, bailments, bills of exchange, conflict of laws, equity jurisprudence and procedure, partnerships, and promissory notes. The very year in which he accepted the Harvard teaching position, Story edited a new American edition of a leading English work on *Shipping*; and two years earlier he had published a collection of the *Laws of the United States*. It is safe to say that very few professional law teachers, before or since, have produced such a monumental list of reference works, in such varied fields. Story's treatise on conflict of laws, in fact, virtually created this branch of jurisprudence for Anglo-American law, with the work enjoying primacy for several generations in England.

Story's academic career would have been a tough act to follow, under any circumstances; and the nature of the appointments to the Court, and the problems that beset it before and following the Civil War, were not in any case conducive to the objective analysis and exposition of the law. Before he came onto the bench for a brief tenure, made even briefer by his premature death, Lucius Quintus Cincinnatus Lamar had twice taught at the University of Mississippi—first as a lecturer in mathematics, then in 1866 as a professor of law. Lamar's erudition is manifest

enough in his political career, but his accomplishments as a law teacher, as well as his potential as a jurist, have not survived in substantial documented form.

A seminal work which does rank with the great treatises of Story—delivered originally as a series of lectures at Boston's Lowell Institute—was Oliver Wendell Holmes' *The Common Law*, first published in 1883 and still kept in print for today's readership. This work was described by the English legal scholar Sir Frederick Pollock as the best concise summary of the principles underlying Anglo-American law to have been written and published in any language. Thus, twenty years before he came onto the Court, the "magnificent Yankee" made an intellectual contribution to the study of law which has been on every law school dean's recommended reading list to the present. Without ever formally appearing in a law school classroom, Holmes' writing, in this book and in dozens of professional association speeches—which in his case were almost always exhaustively researched original papers, contrary to the all-too-typical bar association speech—enriched the formal study of law throughout the land. (See list of writings in accompanying article.)

A "sleeper" among Justices' contributions to scholarly professional literature is Justice Samuel Freeman Miller's posthumous volume of *Lectures on the Constitution of the United States*. Aside from Story's 1833 *Commentaries*, this is the only instance of a sitting member of the Supreme Court having delivered an exhaustive analysis of the Constitution which he had interpreted as a judge. The volume—edited by J. C. Bancroft Davis, one of the reporters of Supreme Court opinions (see "De Minimis" department in this issue of the **YEARBOOK**)—consists of ten lectures delivered by the Justice in the 1889-90 academic year to law classes of the old National University in the District of Columbia: an 1887 address on "The Supreme Court and the Constitution of the United States," at the University of Michigan; and another address on the centennial of the drafting of the Constitution, delivered in 1887 in Philadelphia.

Davis, himself no mean constitutional scholar, added some background notes to each of Miller's papers and then supplemented the papers with a note on minor passages in the Constitution, and "collated" texts of the Constitution, Articles of Confederation and the early proposals laid before the Philadelphia convention of 1787. The whole comprises a massive, 765-page book which antedated some of the early twentieth-century documentary collections on the Constitution and and at the same time summarized the views of one of the leading members of the Court of the latter part of the nineteenth century.

William Howard Taft, in the decade between his Presidency and his Chief Justice-ship, occupied a special lecturer's chair at Yale Law School, and from this and various other rostra set forth his views on the nature and limits of governmental powers. He was not enthusiastic about the trend of academic thought in the law schools of the period, and especially decried "latitudinarian" views of the Constitution. His first published lectures, in 1913, were revealingly entitled, *Popular Government: Its Essence, Its Principles, Its Perils*. In 1916, looking at the Presidency from the standpoint of a former Chief Executive, he published *Our Chief Magistrate and his Powers*; and in 1921 he set forth his opinions on the legislative process in a series of lectures delivered at New York University and published under the title, *Representative Government in the United States*. Taft the author was prolific throughout his active career; as Governor-General of the Philippines, he prepared and published an exhaustive study of the problems of American colonial administration; as a keen observer of the new intermediate appellate court system, he prepared a critique of its future needs. In speeches before the American Bar Association he spelt out modernizing steps to be taken in the federal judiciary which became the textbooks for professional educators.

The Yale lectureship for Taft was essentially a waiting period for the appointment to the Court which he confidently expected all the while. Four academics of the next two decades, who at the time apparently expected to spend their lives on one campus or another, were to move onto the bench in due course. Harlan F. Stone was dean of Columbia Law School, 1910-23; Felix Frankfurter was a Harvard law professor, 1914-39, and William O. Douglas was virtually fought

over by Columbia and Yale, both institutions considering him the most brilliant young teacher in the early 1930s. In the Midwest, another law school dean, Wiley B. Rutledge of Washington University (St. Louis) and the University of Iowa was quietly and confidently promoted by public leaders impressed with his perception of the changing needs of law in the second quarter of the twentieth century.

Stone's scholarly writing, like that of Holmes and Frankfurter, laid the groundwork for these changes. Although—or perhaps because—Stone's published scholarship was in professional periodicals rather than in books, it had a delayed impact on the bar and the courts which did not manifest its full significance until years later, when he was on the bench himself. His biographer, Alpheus Thomas Mason, wrote of the law dean's publications:

A passion for order and symmetry in law dominated Stone's scholarly writing. It led him to distrust legal fictions, those "white lies" in the law contrived to explain decisions obviously just and in harmony with contemporary social conditions, but inconsistent with the progressive development of the law. With the patience and persistence of a harrier, he traced to its source in old English reports the fiction of "Equitable Conversion by Contract." (13 *Columbia Law Review* 369, 1913.) Cutting away the case-hardened superstructure erected on the fiction, he exposed the ordinary principles of equity operating normally in a false disguise. Again in 1920, he examined minutely the credit laws of New York in "The Equitable Mortgage in New York" (20 *Columbia Law Review* 519, 1920), showing how some of the notions of the agricultural society of medieval England still influenced twentieth-century law in the Empire State. To rid Wall Street and Main Street of "curious inconsistencies and complications" caused by the hangover of feudal rules in a society typified by skyscrapers, he urged comprehensive reform and unification of the credit laws.

Frankfurter was the author of two seminal works in his early career—with an associate, Nathan Greene, in 1930 he published the definitive work on *The Labor Injunction*; while he had collaborated with another colleague, the future New Deal legal light, James M. Landis, in a classic study, *The Business of the Supreme Court*, in 1926. A more comprehensive list of his work appears in the companion article.

Douglas' remarkable list of publications —also illustrated in the companion article — ranged from the specialized studies in law to his many books on nature and society around the world. His *Cases and Materials on the Law of Financing of Business Units*, published in 1930, prepared the way for his appointment, a few years later, to the Federal Securities Administration, while his constitutional lectures in India, twenty years later, remain one of the perceptive comparative constitutional commentaries of this generation. Midway between came such best sellers as *Of Men and Mountains* (1950) and *Strange Lands and Friendly People* (1951).

The activity of Court members in academia continued into most recent times with the appointment of Tom Clark (who had previously lectured at the University of Florida) as the first occupant of the "judges' chair" at the College of William and Mary in 1976. To come back to this institution, where American legal education began two centuries before, has rounded out a cycle of history.

Books by Justices—A Representative List

The subjects chosen by members of the Supreme Court for original writing—books, articles, lectures, etc.—reveal a dimension of their interests, both professional and personal, seldom noted by students of the individuals or the institution. Yet a complete list of these writings would be surprisingly long—too long for the present article, but perhaps warranting a separate bibliographical publication. The present list, which is long enough, supplements the accompanying article on the academic and (presumably) intellectual activity of Justices throughout the Court's history. Both the authors (only books *by*, rather than *about*, the Justices are included) and the titles (taken for the most part from the National Union Catalog bibliography of the Library of Congress) are selective—sixteen Justices, ranging from the first years of the Court in the case of James Wilson to the period just before the present Court in the case of Earl Warren; and in most instances, only some of the list of writings by the author. Within these space-imposed limits, however, perhaps a new perspective of the Court and the people who have made it over the past 190 years may be gained. — ED.

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REPUBLICAN FORM OF GOVERNMENT

The Dorr War and Political Questions

GEORGE M. DENNISON

Promptly at 11:00 o'clock sharp on the morning of 22 January 1848, the Supreme Court of the United States opened as usual for business. A huge audience filled to overflowing the small, vaulted room located directly below the old Senate chamber in the basement of the Capitol Building. Those present had come to witness a stirring event in the affairs of the nation, as the highest tribunal in the land sat to hear what one correspondent described as the case "to settle or overthrow the whole doctrines of the Declaration of Independence." [1]

The two cases before the Court on that day seem simple on the surface. *Martin Luther v. Luther M. Borden et al.* and *Rachel Luther v. Luther M. Borden et al.*, brought by a shoemaker and his mother against the same men, both involved alleged acts of trespass committed by state militiamen seeking to arrest a man accused of treason against the state of Rhode Island. [2] The militiamen claimed exemption from such suits because the legislature had proclaimed martial law over the entire state in the summer of 1842 in order to prevent revolution. Martin Luther responded that the proclamation of martial law had no validity because the government itself had been changed by a vote of the people some six months earlier in January 1842. Therefore, the militiamen had acted solely as individuals who took the law into their own hands, thereby violating the rights of property assured to all by the Constitution of the United States and the laws of Rhode Island derived from the English common law. Rachel Luther urged a much narrower view, that no government under the Constitution could deliberately suspend the civil institutions and allow military force to reign supreme. Thus, in either case, the defendants should be required to pay damages.

However, surface impressions do not suffice to explain the significance of the Luther cases. Much more was at stake. Actually the Luthers and their supporters in and out of Rhode Island hoped to vindicate a particular theory of American government and constitutionalism by carrying these cases to the Supreme Court for judgment. At issue were the definitions of basic principles that many, even most, Americans traced to the founding of the republic. [3] Those who favored the Luthers believed that American government rested firmly on the idea of popular sovereignty, that the majority of the people living under any government could change that government when and how they pleased. In Rhode Island in 1842, a political reform movement claiming the support of the majority of American citizens residing in the state had attempted to implement that specific idea. Their opponents, who controlled the state government, branded the reformers as revolutionaries and imposed martial law to suppress them. These actions produced the Luther cases.

Rhode Island had retained its colonial charter of 1663 in 1776 and after, when most other states adopted new, written constitutions. [4] The reasons for doing so were clear enough, since the charter provided for representative government and allowed the majority in the General Assembly to decide all matters of law and policy. Once the connection with England was severed, most people apparently felt that the causes for change had been eliminated. They were happy enough with the political arrangements within the new state, and remained so for a number of years.

But matters took a dramatic new turn during the two decades after 1820. A range of interrelated but disparate changes complicated the situation and figured importantly in the development of political insurgency in Rhode Island. Much like New England in general, Rhode Island experienced severe dislocations as the modernization process worked its transforming

effect. Industry displaced agriculture and commerce as the dominant form of economic activity, and small towns burgeoned into metropolises integrated by industrial and related bonds. While cities grew, the way of life altered perceptibly, as did the very character of the population. Whereas most people during the earlier years had imbibed a common culture and tradition, new arrivals from Europe and other states—attracted by the bustle of activity and the apparent opportunity for gain—brought with them different ideas, cultures, and beliefs. To compound the problem, native Rhode Islanders left the state in great numbers, responding to the lure of greener pastures elsewhere. Predictably these movements of people exerted powerful pressures subversive of community cohesion and harmony. The country lifestyle fragmented as urban concentrations of strangers proliferated and a new kind of politics brought ethnic concerns to the center of public affairs.

The presence of so many "strangers" naturally exacerbated and raised the tensions within the state to disruptive levels. Most of the newcomers went to the growing industrial areas and worked as day laborers of one sort or another. The wages received barely assured subsistence and rarely if ever provided savings for the purchase of land. Thus, because of the requirement of the ownership of a \$134 freehold to vote, the new arrivals whether American citizens or not were disfranchised.[5] In addition, those who were not "freemen," that is, who did not own a freehold, could not sue in court without the sponsorship of freemen, and could not serve on juries.[6] The number of political eunuchs increased in Rhode Island, as immigration reached flood-tide proportions during the 1830s and 1840s. Moreover, these people already knew or quickly learned about more liberal arrangements in other states and sought to change the restrictive laws in Rhode Island.

Exclusion of large numbers of people from the polls and the courts only partially explained the anti-democratic character of Rhode Island, however. In addition, the apportionment system for the allocation of representatives to the legislature remained fixed as originally established in the seventeenth century by the charter. As a result, the static and declining communities of the south and west, with a minority of the population, controlled the government.[7] The eastern expanding towns had 61,350 people in 1840, whereas the static towns had 28,719 and the declining towns only 18,761. The ratio of people per representative stood at 2,578:1 for the expanding towns; 1,115:1 for the static towns; and 78 1:1 for the declining towns. The state average was 1,512 people per representative. Rateable property in the expanding towns had an estimated value of \$48,072,000, but only \$14,724,000 in static towns and \$7,494,000 in declining towns. By any measure, the political arrangements made a mockery of democratic principles.

II

When Rhode Islanders responded to the urge for constitutional change, they invoked a set of ideas virtually self-evident to nearly all Americans. Numerous persons contributed to the development of a more or less coherent system of political concepts purporting to explain the American constitutional tradition. In Rhode Island, these ideas attained articulate form during the reform movement of the 1790s, although no one showed much interest in operationalizing them. On the other hand, no one bothered to refute them, and they gradually earned general acceptance or tolerance as reformers invoked them time and again over the years. Hardly original, these ideas nonetheless sparked pride in the minds of Americans because of the apparent claim for the uniqueness of the American political and constitutional tradition.[8]

The first and perhaps most articulate spokesman for this particular constitutional ideology in Rhode Island after the founding period from 1776 to 1787 was George Burrill, who stated the theory succinctly in 1797:

The making of a constitution paramount is no act of government; it always exists; it is the immediate work of God, and a part of nature itself. . . . Neither can the legislature create a constitution; since the legislature itself is the creature of the written constitution, is posterior and subordinate to it. . . . Neither can the legislature judge of the necessity of forming a constitution, or dictate when or how it shall be formed. To the court is referred to pronounce judgment; to the legislature, the enacting of laws,' and to the people, the forming of a constitution.[9]

Burrill relied on the concept of a higher law emanating from God and Nature which established immutable and self-evident principles and relationships in a decent society. His argument presumed the reality of popular or constituent sovereignty, that the people—or a majority of the people—have the inherent right to make and change government as seems to them most suitable to their needs. Of course, he also presumed that the people would never deliberately violate the immutable principles derived from God and Nature. "Rebellion, therefore, . . . is not to be imputed to those who maintain this supreme authority, although they act in opposition to a written constitution. . .

Burrill's formulation drew heavily from the speeches and writings of the leaders of the movement to establish a national constitution in 1787. Most noticeable was his reliance upon the thought of James Wilson of Pennsylvania, who argued that American government rested on a "revolution principle" the consequence of which was "that the people may change the constitutions, whenever and however they please." [9a] This idea served aptly the needs of those who sought to assure a governmental system dependent continuously on popular consent. Once announced in Rhode Island, the idea became common currency. Thus, one reformer wrote in 1818 that the people had the inherent right to act directly to establish a constitution "should the Legislature, as heretofore, disappoint their wishes." [9b]

Regularly invoked and fully associated with the founding of the republic, the ideology of peaceable revolution and popular sovereignty served initially more to legitimate demands for governmental redress of grievances than to guide the conduct of those seeking change. However, as the socio-economic conditions altered, and as ever larger numbers of people felt excluded from civic participation, a tendency to operationalize the theory emerged. The Constitutional Movement of the 1830s vividly demonstrated the ideology's utility to a reform effort. While unsuccessful, the Constitutional Movement added fuel to the rising call for change and prepared the way for the future.

III

Artisans, shopkeepers, mechanics, barbers, carpenters, handcraftsmen, and a varied assortment of tradespeople dominated the Constitutional movement in its early stages, although some freemen participated from the outset.[10] Most of the early adherents were unquestionably newcomers, moved by the prospect of becoming full citizens. Initially a Workingmen's organization, not unlike those that sprang up all throughout the North Atlantic region of the United States during this period, it soon became an adjunct of Whiggery in Rhode Island, and then developed an independent existence. The ideas employed by the Constitutionals sounded familiar themes. The support varied over time, but certainly come in large part from the disfranchised immigrants and laboring groups. In fact, problems plagued the Constitutionals because of the rising nativism in the state. During the height of the movement, one supporter warned Thomas Wilson Dorr, Providence lawyer and scion of an old Rhode Island family who had assumed a leadership role, of the consequences of failure to explain that the reformers had no intention of destroying all suffrage requirements. The supporter noted that "The greater portion hereabouts seem imbued with the belief that our object is to secure unrestricted, unqualified, universal suffrage, and are completely terrorstruck.[11]

Unquestionably he wanted nothing to do with the enfranchisement of everyone, citizen and alien, literate and illiterate, independent and dependent alike. Fear of potential new voters and the threat to existing arrangements induced the landed interest to sabotage the movement.[12]

Actually the conservatism of the Constitutionalists proved their undoing. One spokesman for a more direct approach to governmental change called for peaceable and legal action, but demanded the achievement of reform objectives "peaceably if we can, forcibly if we must." [13] The speaker, Seth Luther, reminded his listeners that under the American system of government the people have "a right to assemble in primary meetings, and appoint Delegates to a convention," which would then exercise the "right to form a Constitution and submit it" to the people for approval as "the law of the land." However, Dorr and other Constitutional leaders insisted that appropriate reform could only be secured through the "slow process of legislation." [14] The result, predictable from the outset given the history of constitutional reform efforts in Rhode Island, was "a complete failure." [15]

Dorr and other leaders of the Constitutional movement turned their attention to new causes when the effort failed in 1838. [16] Nonetheless, the ground had been prepared for further activity when the situation proved auspicious. The presidential election of 1840 provided the inspiration for a new movement much broader and far less conservative in its ideological orientation. Interestingly enough, the men who led the Suffrage movement of the 1840s had also involved themselves earlier in the Constitutional crusade.

IV

The Rhode Island Suffrage Association did not "spring" into action, by any means. Formed initially in early 1840, it remained inactive because of the conclusion of the leaders that they must avoid partisanship. [17] The Association charter outlined a plan of action through which the majority of American citizens residing permanently in Rhode Island would formulate and ratify a written constitution for the state implementing the principle of universal manhood suffrage and establishing the separation of powers as a juridical premise. [18] If the General Assembly rejected petitions for a constitutional convention elected by all the male, adult, American citizens, rather than just the freemen, the Suffragists intended to appeal to Congress or the Supreme Court to interpret the meaning of the Republican Guarantee Clause in Article IV, Section 4 of the national Constitution. [19] The charter concluded with the aphorism which became the motto of the Association: "WE KNOW OUR RIGHTS, AND KNOWING, DARE MAINTAIN THEM."

By February 1841, a petition had been addressed to the legislature requesting a constitutional convention to form a new constitution. [20] The petition also demanded the suspension of the suffrage restrictions for the selection of delegates and the ratification election. When the General Assembly agreed to call a convention, but insisted upon full respect for the suffrage laws, the Suffragists called an independent and unauthorized convention to draft a constitution. Delegates were elected in August, 1841, and the People's Convention met and prepared a model constitution in October. When the legal convention refused to consider the People's Constitution, but proceeded with its own investigation of whether to make any changes, the die was cast. The People's Convention re-convened and made a few changes in the original draft of the People's Constitution before submitting it to the people for approval or rejection in December 1841 and January 1842. Taking note of the approval by a majority of freemen as well as an absolute majority of male American citizens, the People's Convention resolved that the People's Constitution "ought to be, and is, the paramount law and Constitution of Rhode Island and Providence Plantations." [21] The delegates pledged "in behalf of the People whom we

represent" to "establish ... sustain and defend" the new government "by all necessary means." The "new age" would begin in May, 1842.

Efforts to reach an accommodation failed when the General Assembly refused to submit the People's Constitution for ratification in a legal election.[22] Those in power agreed that the events thus far proved the need for reform, but they rejected all suggestions for acceptance of the Suffragists's creations. On the other hand, the Suffragists held firm to the legitimacy of the People's Constitution. By the theory of popular sovereignty and peaceable revolution, the government of the state had been changed because of the vote of the majority of the people. In addition, the Freeholders' Constitution, submitted for ratification in March 1842, retained the discrimination against naturalized citizens, thus raising the nativist hostilities to higher levels.[23] For both theoretical and practical reasons, then, the Suffragists joined incongruously with the hidebound opponents of any change to defeat the Free-holders' Constitution.[24] In doing so, they set the stage for a testing of the validity of the theory of popular sovereignty and peaceable revolution.

By this time, the Suffragists had corrected the lack of a firm theory. Thomas Wilson Dorr, the former Constitutionalist who emerged as the preeminent leader, had outlined the Wilson-Burrill constitutionalism in such detail that few questions remained. As Dorr argued, the issue of the character of government in Rhode Island was "a People's question, properly to be decided at home." [25] Congress had nothing to do with the matter, and "God forbid that any democrat should be ready to concede to any *Court* in this country the final decision of the question, whether the people have the right to change their form of government, or not." The people had decided; a new constitution had been ratified. It was left to the designated leaders to fulfill that mandate.

Both sides held elections in April, and two full complements of elected officials assumed office in early May—one group meeting in Newport, the other in Providence.[26] Meanwhile, the General Assembly had adopted a new treason statute prohibiting anyone from having any dealings with the putative "People's Constitution and Government." [27] The People's Legislature called upon the displaced regime to surrender control of all state offices, properties, and functions to the new government. The charter government issued warrants for the arrest of all persons implicated in the little revolution, and forced those arrested to place peace bonds with the courts in a strategy to immobilize the opposition.[28] In addition, Governor Samuel Ward King appealed to President John Tyler for federal assistance in the effort to enforce the laws of the state.[29] Having been elected People's Governor, Dorr journeyed to Washington himself to discuss the situation and to convince Democratic leaders in Congress to restrain the President.[30] Little came of the appeal to Washington, although President Tyler repeated earlier assurances that he would act to protect the charter government in the event of overt hostilities.[31]

In mid-May, following his return from Washington, Governor Dorr marched his People's Militia against the Province Arsenal and demanded the surrender of weapons and military supplies to the "legitimate" government of Rhode Island.[32] Of course, the officer in command refused. Fortunately for all concerned, Dorr ordered a retreat rather than attack the heavily fortified Arsenal. The decision to march on the Arsenal in the first place caused such disagreement within the ranks of the reformers that Dorr had no choice but to depart the state and adopt a strategy of cautious waiting. He intended to keep up the forms of government until after the Congressional elections later in the year, thus allowing the People's Government to send Representatives and Senators to Washington. Congress would then have to decide the matter of governmental legitimacy by seating one or the other of the rival state delegations.

Unfortunately this strategy also failed. The charter government declared martial law throughout the entire state in June, prevented the meeting of the "People's Legislature" in early July, and arrested all known Suffragists and supporters for trial and punishment. The deliberate act of suspending the civil institutions for the duration of an alleged crisis marked the first

instance of "military sovereignty" in the history of the republic, as one Democratic editor charged.[33] At any rate, by August the crisis had passed, and the General Assembly had authorized a convention to provide a new constitution for the state. Since the Suffragists took no part in this process, because of forced exile and a purposeful policy decision, and since the General Assembly subsequently decreed that a majority of those voting in the election sufficed to ratify the proposed constitution, the effort succeeded and Rhode Island finally entered the modern era before the end of the year. At that point, the Suffragists decided to return to the field, hoping to win the first election under the new instrument. They lost again, however, and then sought to vindicate their political ideas and constitutional theory by appealing to the courts. That decision, as it happened, prepared the way for their final undoing, and it led directly to the initiation of the Luther cases in the federal courts.

V

In deciding to go to court, the Suffragists risked more than they knew. They had founded the movement on the direct action theory of American constitutional politics which premised popular sovereignty and the right of peaceable revolution. In the early stages of political activity, Dorr had specifically repudiated any appeal outside the state, and had denied emphatically that any positive institution could challenge a vote of the people.[34] As the situation approached crisis potential just before the march on the Providence Arsenal, he discovered that courts could play a role in resolving such disputes. As he said in a letter to the Governor of another state friendly to the Suffragist cause, "modes of redress open to every citizen" were available in the courts to those who challenged popularly approved changes in government, "without the intervention of a dictaator [sic] and without a resort to the sword." [35] Of course, the responsibility to make use of those "modes of redress" fell upon those who disputed the legitimacy of the people's choice, not those who enjoyed proven popular support. Dorr himself refused to submit the question of legitimacy to the courts, since the people alone had the power to decide whether to continue or to new-model an existing government.

The position taken by Dorr, White, and most Suffragists concerning a possible judicial settlement of the controversy rested on functional and theoretical considerations of great importance. Democratic theory required that the citizenry decide such matters, either directly or through their representatives, not a few men selected because of their knowledge of the law to sit as impartial arbitors for cases that came before them. In this early period of the history of American constitutionalism, few people anticipated a judiciary armed with the power to settle all questions that came up during the heat of political contests. Moreover, the courts had long since developed a neutral stance to protect them from the political pressures concerning such issues. The doctrine of political questions served to prevent the courts from becoming entangled in matters relating to the political arrangements within the society. Chief Justice John Marshall had stated the rule with precision in 1803: "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive [or legislature] can never be made in this Court." [36] Confident that the majority of Rhode Islanders supported them, and that physical superiority accompanied moral supremacy, the Suffragists discounted the appeal to the judiciary.

When they lost the political struggle, largely they believed because of the state's use of force and the President's commitment to support the charter government, the Suffragists took new thought about a judicial strategy. They still could not see immediately how to overcome the functional and theoretical obstacles. Ultimately they solved the conundrum by redefining the rights at issue. Article IV, Section 4 of the national Constitution stipulates that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on the Application of the Legislature, or of the Exec-

utive (when the Legislature cannot be convened)against domestic Violence." [37] The Suffragists concluded that the rights guaranteed by this constitutional clause accrued to individuals fully as much as the rights to property and liberty, and therefore deserved judicial protection equally with all other individual rights. If basic political rights depended solely upon the willingness of political majorities to respect them, then democracy meant little more than the right to be abused. In their thinking concerning this difficult question, the Suffragists anticipated the future, .for the Supreme Court ruled finally in the second half of the twentieth century that courts could and should protect political rights. [38] Of course, that decision built upon other developments during the intervening years, such as the ratification of an amendment to the Constitution restraining the states from depriving people of the equal protection of the laws. [39]

In 1843, the Suffragists reached the original and innovative conclusion that courts had to enforce the mandates given by the people. In doing so, they restructured the hierarchy of authority and imposed the courts between the people and their governments. They adopted the logic used by Chief Justice Marshall in his assertion in 1803 that "The question whether a right has been vested or not, is, in its nature, judicial, and must be tried by the judicial authority." [40] When courts decided whether or when individual rights had been abused, they were bound to consider that "The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative Acts, and, like other Acts, is alterable when the legislature shall please to alter it." [41] Since all agreed on the paramount nature of the Constitution, and since the judges had the responsibility "to say what the law is," judges had to decide that the Constitution, not an ordinary act, would prevail in the event of conflict between the two. "This is the very essence of judicial duty." [42] Armed with this conclusion, and with the newfound conviction that the judges had to respect popular choices, the Suffragists took their claims to court for final vindication.

VI

Getting the cases to the Supreme Court proved difficult and time-consuming. [43] After six years of delay and jockeying for position, complicated by the search for counsel of sufficient standing and comprehension, the Suffragists finally had their day in Court. On that day in January 1848, they realized full well how much depended on the success of the effort. Politics had failed them utterly, first inside the state and then in Congress during a prolonged struggle to justify their constitutional theory. The reports issued by the Congressional committee which investigated the events of the summer of 1842 left matters just as confused and unsatisfying as before. [44] Benjamin F. Hallett had been well briefed, and his supply of appropriate authorities carefully collected. [45] Over the interim while they waited for a hearing, the Suffragists had also tried to convince the Democratic Party in its 1844 convention to come out in a ringing affirmation of popular sovereignty, but without success. [46] Even as the Court listened to the arguments and then took the case under advisement, Dorr and his cohorts appealed to the Democrats once more. [47] All possible means were explored for their potential utility in bringing Americans to understand the vulnerability of liberty to tyranny.

Hallett opened the argument for the suffragists with the contention that "It is not the question what was the State of Rhode Island." For "The State is permanent and unchangeable. The constitution is the form of government, and may be changed in form, as well as a statute, if rightly done." [48] Justice Nelson asked how courts could possibly provide relief in cases such as this one, since courts merely applied known laws and here the law itself was in question. [49] Hallett replied that the courts had initially to determine what was the law before they could apply it, and they could not substitute form for substance in making that determination. The Republican Guarantee Clause of the national Constitution imposed the responsibility of ascertaining which constitution, or form, of government— in the event of controversy—assured a

republican government. To reach a legitimate conclusion, the courts had to consult the will of the majority within the state, since republican government by definition required majority support or popular consent.

To explain what he had in mind, Hallett quoted extensively from the famous *Commentaries on the Constitution*, published initially in 1833 by former Associate Justice Joseph Story, that popular ratification of a constitution bound "the whole community PROPIO VIGORE."^[50] Since the majority of the people of Rhode Island had ratified the People's Constitution in January 1842, the repudiated charter government had no more authority to resist the establishment of the new form than "the old Congress under the Confederation [in 1789] had . . . to hold over against the new Congress . . . under the Constitution." In neither instance, Hallett argued, had the existing government "given antecedent authority or consent" to its own displacement, yet no one had resisted in 1789.

The Confederation Congress allowed the process of change to proceed as the majority willed, simply deferring all judgment on the issue to the people themselves in conventions assembled. Hallett insisted that the governmental stance in 1787-1789 had created a precedent binding on all other governments in the United States, and he called upon the Court to assure that the people controlled their governments rather than the reverse.

Hallett argued that the Republican Guarantee Clause had to be interpreted in all its sections simultaneously, or the section concerning federal assistance in the event of "domestic Violence" controlled everything else.^[51] If Americans truly possessed the sovereignty, and could alter government at will, then the right of revolution had been transformed into a legal and constitutional right. Hallett believed that the "revolution principle" identified by James Wilson made American government distinctively different and substantially better than all other forms of government known to man. But the other side, even while conceding the sovereignty of the people and recognizing the great American right of revolution, nonetheless insisted that governments had to give prior consent before changes were legitimate. Thus, Hallett concluded, the "moment they have given us the right of revolution, they send the President, at the head of all the troops of the United States, to suppress it."^[52] The consequence rendered "all State institutions subservient . . . to the military power of the President." Only by defeating the combined power of the state and the nation could Americans bring about desired changes if government resisted. Under this interpretation, only victory in war assured the redress of grievances when governments refused to act. Hallett thought this view grossly perverted the American system of popular government by destroying its essence. Moreover, he doubted that Americans would allow such a travesty to prevail. The right of forcible revolution—that is, the chance to succeed if sufficient force could be mustered—meant little to those who believed that they had the inherent and inalienable right to control their institutions. "It fails, and we fall back upon the great conservative right of the people; the American doctrine of popular government, . . . that peaceable changes in government are provided as the substitute of violence and bloodshed." As the final touch, Hallett quoted James Wilson's assertion that "the people possess over our constitutions control in act as well as in right."^[53]

Webster sought to exploit the opening provided by Justice Nelson's question about an effective remedy. He reminded the Court that the highest tribunal in Rhode Island had confirmed the legitimacy of the charter government by convicting Dorr and others of treason and by exonerating the militiamen who had attempted to arrest Martin Luther.^[54] With those decisions, all questions about the applicable law had been settled "above all objection, and after all challenge." In making this argument, Webster ignored the point that Hallett has pressed, that state constitutions and statutes had to be judged against the standards found in the national Constitution. He obviously hoped to win the case by securing a dismissal on jurisdictional grounds, but he offered substantive reasons as well.

In response to Hallett's elaborate analysis of the principle of popular sovereignty and his lengthy explanation of the theory of peaceable revolution, Webster stated bluntly that "The

Constitution does not proceed on the *ground* of revolution; it does not proceed on any *right of* revolution;—but it goes on the idea that within and under the Constitution, no new Constitution can be established without the authority of the existing government." [55] He agreed that sovereignty was "with the people; but," he said, "they cannot exercise it in masses or *per capita*; they can only exercise it by their representatives." Under the American system of government, the suffrage franchise was "every man's part in the exercise of sovereign power; to have a voice in it, if he has the proper qualifications. . . . Suffrage is the delegation of the power of an individual to some agent." The right to delegate power could only be exercised in accordance with law so as to protect against fraud and to assure the representative character of the resultant government. The lawful exercise of prescribed rights formed the bedrock of American constitutional government. Webster denied any legitimacy to the direct action theory of American constitutional practice.

Both counsel added brief concluding comments concerning the use of martial law in Rhode Island. Hallett accepted word for word the arguments developed earlier by Dorr that "martial law is in fact a suspension of all law and a substitution, for a time, of the military vis major." [56] As such, martial law had no legal existence under the Constitution, looking instead to the establishment of a "military despotism." Under Hallett's interpretation, military officers could proclaim martial law during emergencies, but any such proclamation amounted simply to a recognition that the presence of armed forces in a theatre of war prevented the ordinary enforcement of the laws. When martial law existed, it applied only where and when armed forces fought for victory. [57] Thus, the deliberate suspension of the civil institutions in Rhode Island for the duration of the alleged crisis was unconstitutional, and had no legal effect. Hallett urged the Court to award damages to the Luthers at least on this ground, even if the Justices failed to find in their favor on the issue of governmental legitimacy. Americans should have the assurance of civil supremacy at all times, unless conditions of themselves suspended the civil law. Otherwise, as Dorr had concluded, "the will of the people is dependent on the *military*; and . . . whatever government they set up under ... [military] auspices, is valid and rightful; . . . [then] might is the criterion of right, the principle of the despotisms of the old world." [58]

Webster contented himself with the assertion that martial law was "the law of the camp;" or "the law of war, a resort to military authority in cases where the civil law is not sufficient." [59] The only limit to this power, which accrued to all governments, "is to be found in the nature and character of the exigency." Webster's definition differed radically from traditional theory and practice in the United States, introducing instead the prerogative or preventive view of emergency powers of government. [60] In basic terms, he insisted that governments depended in the final analysis on the force they could muster to maintain themselves against challenge. More importantly, he left to the government the authority to decide when conditions required a resort to emergency powers: This line of argument flowed logically from his earlier contention that governments, once established, monopolized sovereign power. Popular consent to the establishment of a government meant that government must consent to all future changes.

These opposing arguments confronted the Court with a difficult and consequential choice. Each side contended for its own definition of the meaning of republican government, one insisting upon majoritarianism as the basic premise, the other holding that only lawful majorities counted under the American system. One side gloried in the revolutionary origins of the American experiment in government, and sought to revitalize the concept of direct popular involvement in governmental change; the other insisted on the idea of divested sovereignty and repudiated any other concept of revolution than the forcible power to prevail. The Court was called upon to decide whether right or might characterized American constitutional government. As Hallett reported to Dorr, "we got the question of the People's Constitution fairly before" the Court. "Now what the Court will do is surmise." [61]

Although the Court held the case under advisement for a year before pronouncing judgment, Dorr and the Suffragists learned of the outcome in February and March 1848. Hallett wrote that the Court would probably hold that the Luther cases involved "a political & local question" not amenable to judicial resolution, particularly by a federal court.[62] The judges would simply refuse to "go behind the existing Govt & the decision of the State Courts." In March, Dorr's close friend and political supporter, Edmund Burke of New Hampshire, learned from Justice Woodbury that the decision "will be adverse to the people." [63] Woodbury would dissent, but only concerning the issue of martial law. He "will take the ground that the US Government has no right to interfere in the political discussions [*sic*] of the people of a State, and that a State Government has no right to declare martial law." These predictions proved remarkably accurate.

On 3 January 1849, after the atmosphere had calmed from the presidential contest of 1848, the Chief Justice of the United States Supreme Court delivered the decision of the Court on the Luther cases.[64] After tersely summarizing the sequence of events which produced the cases, Taney dismissed them for want of jurisdiction. As he said, "Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the Court has been urged to express an opinion. We decline doing so." [65] In a unanimous judgment, the Court ostensibly refused to provide the definitions that both sides had requested.

Taney's statement actually revealed very little about the significance of the cases or the impact of the decision. For in this instance, as Michael A. Conron has observed, "An abrogation of positive action had the effect of positive action." [66] Taney and his peers on the bench assumed the role of "American counterparts of the Italian *Podesta*, the French crown jurists, and English judges from the time of Henry II to that of Blackstone." The Supreme Court, by withholding its hand, confirmed the triumph of the Websterian theory of American constitutional practice and thereby sanctioned the transformation of the old voluntary republic into a modern nation-state. An analysis of the two opinions delivered on that day in 1849 corroborates this thesis.

"No one, we believe," the Chief Justice intoned rhetorically, "has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their pleasure." [67] But when and if the people of a state exercised that power remained for them to decide, not for courts. "It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions ... to prescribe the qualifications of voters . . . nor has it the right to determine what political privileges the citizens of a State are entitled to, unless there is a constitution or law to govern its decisions." Such matters belonged legitimately to the people to decide, within the limits assigned by the national Constitution.

Article VI, Section 4 of the national Constitution, the Republican Guarantee Clause, prescribed the requirement of a republican form of government in every state. But the admission to and continuance of a state in the Union gave notice to all concerned of "the proper constitutional authority . . . of the government" of that state and its "republican character." A decision by Congress to seat the elected Congressmen from the state "is binding on every other department of government, and could not be questioned in a judicial tribunal." Taney agreed that "a military government, established as the permanent government of a State, would not be a republican government," and that "it would be the duty of Congress to overthrow" such an attempted establishment. However, he stopped short of explaining how the Court would know when such an attempt was in progress or how Congress might accomplish its constitutional duty to prevent it. The Court would act when the time came, but no such imperative existed in this case.

If Congress accepted either the form of a state government, or the means used to change an existing government, the Republican Guarantee Clause had no further bearing on the matter. Taney refused to define the guarantee, except in terms of form and the governmental functions associated with it. As he concluded, "It rested with Congress to determine upon the means proper to be adopted to fulfill the guarantee." Congress had done so by adopting the Enforcement Acts of 1792, 1795, and 1807, delegating discretionary authority to the President to act when any state requested assistance from the national government.[68] In the event of conflicts such as the one in Rhode Island, "the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the acts of Congress." Taney ruled that the President's decision to recognize a government was "as effectual as if the militia had been assembled under his orders" to defend it. Nor could the courts question a Presidential decision, for then "the guarantee . . . is . . . of anarchy, and not of order." Courts could not intervene during actual conflicts over the sovereignty, since they lacked the power to quell the disturbances; hence they "cannot, when peace is restored, punish as offenses and crimes the acts which [they were] . . . bound to recognize, as lawful," when instituted. In the view expounded by the Chief Justice, the Republican Guarantee Clause armed the nation to defend existing state institutions against challenges from within and without the state. The conclusion was clear: Change could occur only if the existing government approved it, or if the President supported the new regime.

That the state government had declared martial law altered nothing, in Taney's view. After all, the power "to meet the peril . . . [of] armed resistance to . . . authority," a power "essential to the preservation of order and free institutions," accrued to "the States of this Union as to any other government." Nothing was clearer. "If the government of Rhode Island deemed armed resistance so formidable, and so ramified throughout the State, as to require use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority." Once the state government made that determination, "it was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome unlawful opposition." Taney refused to entertain the suggestion that an existing government could or would engage in "unlawful opposition" to its citizens. By presuming the legitimacy of existing governments, he virtually dismissed all opposition as unlawful. Moreover, his ruling allowed existing governments to destroy political opposition by discovering a crisis and proclaiming martial law for the duration.

Nonetheless, the Chief Justice denied that martial law as used in Rhode Island had any similarity to that practiced by the absolute monarchs by Europe. In Rhode Island, the representative legislature had resorted to military defense of existing institutions; in Europe, absolute monarchs used military power to protect themselves from the people. In Taney's view, the difference was one of kind rather than degree, and he doubted that any government could maintain order and defend liberty without the right to resort to emergency powers. So long as unlawful resistance to government continued, the military commanders who acted under the authority given by the civil government had unlimited power to arrest and deal with persons suspected on "reasonable grounds" of being "engaged in the insurrection." However, the commanders would "undoubtedly be answerable" for "any injury wilfully done to person or property," or for actions taken "for the purposes of oppression." Courts could and would protect against such offences.

Taney's decision placed the national government in the position to defend state institutions against change. Moreover, his entire argument rested on the premise that sovereignty existed in the established institutions of government, and not in people acting directly to exercise it. He never deigned to discuss the right of revolution, since he presumed the legitimacy of existing governments. The Republican Guarantee Clause meant simply that the states could never fall for want of support. Unquestionably, the Chief Justice saw no danger in a strong national guarantee, so long as the national government acted to support existing state

institutions. He failed utterly to take into account, however, that the discretionary power to defend carried with it the equally discretionary power to change.[69] That is, a strengthened national government could intervene to change state institutions when the will to do so existed.

Justice Woodbury concurred in the majority decision insofar as it related to the political issues in abeyance. As he said, "The adjustment of these questions belongs to the people and their political representatives, either in the State or general governments." [70] Groups struggling over these questions "succeed or are defeated by public policy alone, or mere naked power, rather than intrinsic right." He had no authority to discuss these matters, and he agreed that no court should seek to settle them. Therefore, he joined his colleagues in dismissing the arguments presented to the Court. Woodbury's reliance on the doctrine of political questions rang true with his own fervid commitment to the idea of popular sovereignty. He stated his view that Americans possessed the right of revolution if they chose to exercise it, but its successful use depended upon the power to prevail. There was no right of peaceable revolution.

Woodbury abruptly parted company with the other Justices on the question of martial law. In the New Hampshire jurist's view, martial law had no legitimacy under the Constitution. Distinguishing this concept from military law, he held that martial law could only be invoked when conditions were such that the civil institutions could not function at all. And when martial law prevailed, the military forces could only be used to aid and support the civil magistrates in the enforcement of the laws. Any other interpretation of martial law, Woodbury concluded, "would go in practice to render the whole country . . . into a *camp*, and the administration of government a campaign." He identified the usage in Rhode Island with practices in Latin American dictatorships, and invoked precedents to demonstrate that such arbitrary power had been "forbidden for nearly two centuries" in "every country which makes any claim to political or civil liberty." By sanctioning its resurrection, the Court exposed every citizen "to be hung up by a military despot at the next lamp-post, under the sentence of some drumhead court-martial."

On the basis of these conclusions, Woodbury urged the Court to reconsider and remand the cases for further hearings at the circuit court level. Whether the plaintiffs could sustain their claims for damages he did not know. But he entertained no doubt that only the national government had the power to wage war. The government of Rhode Island had unconstitutionally usurped national authority in its attempted declaration of martial law, since it did not possess any rights of war . . . which could justify so extreme a measure as martial law over the whole State as incident to them." Woodbury warned that failure to repudiate this egregious claim of power "will open the door in future domestic dissensions . . . to a series of butchery, rapine, confiscation, plunder, conflagration, and cruelty, unparalleled in the worst contests in history between mere dynasties for supreme power."

VIII

The Luther cases ended in ignominious dismissal for want of jurisdiction. After all the care and planning, the Suffragists found themselves back at the starting point in their search for vindication. However, they had suffered much and lost more in the struggle. For the Court's decision settled at least one question for all time: The right of revolution depended for its exercise upon the ability of those who resorted to it to prevail in a contest of might.[71] In addition, the sanction given to the concept of prerogative or preventive martial law inaugurated the era of the modern nation-state in American history.[72] Finally, the decision paved the way for judicial supremacy in the United States by enhancing the authority of the Court to settle questions concerning the allocation of powers under the Constitution. As happened frequently in the history of the Supreme Court, an apparent abdication of power in actuality manifested an assertion and accession of power.

The theory espoused by the Suffragists never again attracted much attention among

Americans. When the crisis of the Union erupted in 1860, Southerners relied on the concept of state sovereignty to justify their actions, a concept very different from that the Suffragists had invoked. That difference notwithstanding, the Luther decision provided the needed precedent sanctioning the suppression of the Southern challenge to existing national institutions.[73] As for the states, so for the nation, as Chief Justice Taney found to his chagrin. Ironically, he came to understand in 1861 that governments might indeed commit "treason" against the citizens.[74] But the realization came far too late to matter much.

Thomas Wilson Dorr spent the remainder of his life collecting evidence to prove the legitimacy of his actions and the exercise of peaceable revolution in Rhode Island.[75] His papers are filled with warnings and urgings to the American people about the serious damage done to republican government. He agreed with Aaron White, Jr., who wrote that the peaceable exercise of "the hitherto undenied Sovereignty of the People has resulted in a complete Revolution . . . & that Revolution has been effected in our case in precisely the same way in which Revolutions in all former Republics have been accomplished. That is to say by an usurpation of power on the part of those in whose hands power has been entrusted. Since the 25th of June 1842 R.I. has ceased to be a Republic." [76]

But White learned from the experience, while Dorr did not. Whereas Dorr exhorted Americans to return to the principles of the past, White looked to the future and projected new departures. As he explained to Dorr in a prophetic letter, even if the details escaped him: "When President [James M.] Birney [the abolitionist] takes the throne, we will cram Emancipating Constitutions down the throats of the Southern nabobs by the same rule. For if President Tyler under pretence of suppressing domestic violence can interfere in behalf of a minority of a minority to guarantee an Aristocratic Constitution, a fortiori, may President Birney interfere to guarantee a Republican Constitution, recognizing the equal Rights of all men." [77] In 1861-1870, the unintended legacy of the Suffragists was realized.

Endnotes

The author wishes to extend special thanks to Professor Roy Meek for his careful reading of the manuscript and his incisive critique.

1. As quoted in Charles Warren, *The Supreme Court in United States History*, rev. ed. (Boston & Toronto: Little, Brown & Co., 1926), 2:187.
2. *Martin Luther v. Luther M. Borden et al.*, 7 Howard (1849) 1ff.
3. George M. Dennison, "The Dorr War and the Triumph of Institutionalism," *Social Science Journal* 15, no. 2 (April 1978): 39-58.
4. George M. Dennison, *The Dorr War: Republicanism on Trial, 1831-1861* (Lexington: University Press of Kentucky, 1976), ch. 1; Patrick T. Conley *Democracy in Decline: Rhode Island's Constitutional Development, 1776, 1841* (Providence: Rhode Island Historical Society, 1977), ch. 2 -25.
5. Rhode Island Acts . . . (various eds., Providence and Newport: By Order of the General Assembly, 1724-1800); and Chilton Williamson, *American Suffrage: From Property to Democracy, 1760,1860* (Princeton: University Press, 1960), pp. 58, 178-79, 243.
6. *Public Laws of the State of Rhode Island* (Providence: Order of the General Assembly, 1789), pp. 146-50, 180-88, with the provisions remaining unchanged until after 1842.
7. For tabular evidence, Conley, *Democracy in Decline*, pp. 145ff.
8. See citation in note 3 *supra*. See also George M. Dennison, "Congressional Attitudes Toward Popular Sovereignty in the Territories, 1787-1867," *Maryland Historian* 6, no. 1 (Spring 1975): 19-40.
9. See "Extracts from the Oration of George R. Burrill, delivered in Providence in 1797, in favor of a republican constitution, *House Reports*, 447, vol. 111, no. 546, pp. 271-74.

- 9a. See George M. Dennison, "The 'Revolution Principle': Ideology and Constitutionalism in the Thought of James Wilson, *Review of Politics* 39, no. 2 April 1977): 157-91; and Robert G. McCloskey, ed. *Works of James Wilson* (Cambridge: Harvard University Press, 1967), esp. 1:77-9, 2:770-1.
- 9b. As quoted in Conley, *Democracy in Decline*, p. 186.
10. On the Constitutional movement, Conley, *Democracy in Decline*, ch. 10-11; Dennison, *Dorr War*, pp. 14-24; Marvin L. Gettleman and Noel P. Conlon, eds., "Responses to the Rhode Island Workingmen's Reform Agitation of 1833," *Rhode Island History* 28, no. 4 (Oct. 1969): 75-94.
11. Charles Peckham to Thomas W. Dorr, 11 March 1836, Dorr Correspondence, vol. 1, Special Collections, John Hay Library, Brown University (hereafter referred to as DC and vol.).
12. Conley, *Democracy in Decline*, pp. 234-35, 285-89.
13. As quoted in *ibid.*, pp. 238-39.
14. Thomas W. Dorr to William B. Adams, May 28, 1832, DC, vol. 1; and Chilton Williamson, "The Disenchantment of Thomas Wilson Dorr," *Rhode Island History* 17, no. 4 (Oct. 1958): 97-108, esp. 100-01.
15. J. A. Brown to Thomas W. Dorr, November 12, 1835, DC, vol. 1.
16. See Dennison, *Dorr War*, pp. 22-24.
17. See *ibid.*, ch. 2.
18. For quotations from the charter, see Mrs. F. H. (W.) Green (MacDougal) *Might and Right: By a Rhode Islander* (2nd ed.; Providence: A. H. Stillwell, 1844), pp. 70-75.
19. See *infra* for discussion.
20. Dennison, *Dorr War*, pp. 37-8ff.
21. *New Age*, January 14, 1842 (available on microfilm from Rhode Island Historical Society).
22. Dennison, *Dorr War*, pp. 70-78.
23. *Ibid.*, p. 62.
24. *Ibid.*, pp. 62-69.
25. Thomas W. Dorr to William Simons, October 18, 1842, DC, vol. 5; and Thomas W. Dorr to William Simons, accompanied by an address to the people to be published in Simons' *Republican Herald*, November 11-12, 1842, DC, vol. 5.
26. Dennison, *Dorr War*, pp. 70-78.
27. *New Age*, April 9, 1842; *Providence Daily Journal*, April 2 and 4, 1842; Green, *Might and Right*, pp. 177-80; and Dennison, *Dorr War*, pp. 69-70.
28. Dennison, *Dorr War*, p. 77.
29. *Ibid.*, pp. 71-72, 75.
30. *Ibid.*, pp. 76-83.
31. *Ibid.*
32. *Ibid.*, pp. 85-7ff.
33. *Washington Globe*, May 9, 1842.
34. See citations in note 25 *supra*.
35. Thomas W. Dorr to Governor John Fairfield of Maine, May 17, 1842, in *New Age*, June 4, 1842; and Thomas W. Dorr to Governor Chauncy F. Cleveland, of Connecticut, *May 13, 1842, DEC*, vol. 4.
36. *William Marbury v. James Madison, Secretary of State of the United States v. Cranch* 137-190, at 170 (1803), for this important precedent. See also Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New York & Indianapolis: Bobbs-Merrill Co., Inc., 1962); Charles Gordon Post, Jr., *The Supreme Court and Political Questions*, John Hopkins Series in Historical and Political Science, vol. 54, no. 4 (Baltimore: Johns Hopkins Pres, 1936), pp. 419-542; Melville Westin Fuller, "Political Questions," *Harv. L.*

Rev. 38 no. 3 (January 1925): 296-333; and John J. Gibbons, "The Interdependency of Legitimacy: An Introduction to the Meaning of the Separation of Powers" Seton Hall L. Rev. 5, no. 3 (Spring 1974): 435-88.

37. U.S. Const., art. IV, § 4.
38. See *Baker v. Carr*, 369 U.S. 186ff (1962).
39. *Ibid.*
40. *Marbury v. Madison*, at 167.
41. *Ibid.*, at 177.
42. *Ibid.*, at 177-78.
43. On the initiation of the case, See George M. Dennison, "Thomas Wilson Dorr: Counsel of Record in *Luther v. Borden*," St. Louis U. L.J. 15, no. 3 (Spring 1971): 398-428.
44. *House Reports, 28th Congress-1st Session (1844-1845)*, Series no. 447, vol. III, Documents nos. 546 and 581. These reports, known as the Burke and Causin Reports, were prepared in response to a request for a Congressional investigation of events in Rhode Island. On the reports see Dennison, *Dorr War*, ch. 6.
45. See Dennison, "Counsel of Record," pp. 398-428; and Dennison, *Dorr War*, ch. 7.
46. Dennison, *Dorr War*, pp. 137-38.
47. *Ibid.*
48. Unless otherwise noted, all quotations from Benjamin F. Hallett, *The Right of the People to Establish Forms of Government, Mr. Hallett's Argument in the Rhode Island Causes, before the Supreme Court of the United States, January 1848, No. 14, Martin Luther vs. Luther M. Borden and Others. No. 77 Rachel Luther vs. The Same* (Boston: Beals & Greene, 1848), *passim*.
49. See discussion in Dennison, *Dorr War*, pp. 156-57 and 122-24.
50. Hallett quoted Joseph Story, *Commentaries on the Constitution of the United States: With a Preliminary Review of the Colonies and the States, before the Adoption of the Constitution*, 2nd ed. (Boston: Little and Brown, 1851), 1:336-37. This portion of the argument remained unchanged from the original 1833 edition.
51. The clause is quoted in full in the text, *supra*, at note 37.
52. Note 48, *supra*.
53. For the quoted statement, McCloskey, *Works of Wilson*, 2:770.
54. Unless otherwise noted, all quoted from Daniel Webster, "The Rhode Island Government," *Works of Daniel Webster* (5th ed.; reprint ed.; Boston: Little, Brown and Co., 1853), 6:217-42.
55. See esp. *ibid.*, 6:219-22, 23-27, 240.
56. Thomas W. Dorr to Nathan Clifford, December 10, 1847, DC, vol. 11. See also Hallett, *Right of the People*, pp. 65-70.
57. For background, George M. Dennison, "Marital Law: The Development of a Theory of Emergency Powers, 1776-1861," *American Journal of Legal History* 18, no. 1 (January 1974): 52-79.
58. Thomas W. Dorr to Franklin Cooley, *et al.*, February 1, 1843, DC, vol. 6.
59. Webster, "Rhode Island Government," pp. 204-41.
60. See note 57 *supra*.
61. Benjamin F. Hallett to Thomas W. Dorr, February 11, 1848, and Thomas W. Dorr to Benjamin F. Hallett, February 8, 1848, DC, vol. 12.
62. Benjamin F. Hallett to Thomas W. Dorr, February 11, 1848, DC, vol. 12.
63. Edmund Burke to Thomas W. Dorr, March 5, 1848, DC, vol. 12.
64. See Dennison, *Dorr War*, ch. 8.
65. All quotations, unless otherwise indicated, from Taney's opinion *Luther v. Borden*, 7 Howard 41-47.
66. Michael A. Conron, "Law, Politics, and Chief Justice Taney: A Reconsideration of

the *Luther v. Borden* Decision," *American Journal of Legal History* 11, no. 4 (October 1967): 380.

67. See note 65, *supra*.
68. See Dennison, *Dorr War*, pp. 177-78.
69. For the contention that the decision came at an "unguarded moment," see Charles Fairman, *The Law of Marital Rule*, 2nd ed. (Chicago: Callaghan & Co., 1943), p. 118.
70. All quotations, unless otherwise indicated, from Woodbury's opinion, *Luther v. Borden*, 7 Howard 51-8.
71. See Dennison, *Dorr War*, pp. 185-92.
72. See Dennison, "Marital Law," pp. 52-79/
73. *Ibid.*; see also Dennison, *Dorr War*, pp. 197-205.
74. See "Oddments," Roger Brook Taney Papers, Manuscripts Division, Library of Congress.
75. See *Dorr Correspondence and Dorr Manuscripts*, Special Collections, John Hay Library, Brown University.
76. Aaron White, Jr., to Thomas W. Dorr, September 1, 1842, DC, vol. 5.
77. Aaron White, Jr., to Thomas W. Dorr, June 3, 1842, DC, vol. 4.

MATTER OF DELICACY

The Court Copes With Disability

MERLO J. PUSEY

(Over the years, an occasional problem has arisen when failing faculties of a Justice has demanded the concern of his brethren. Early Court historians tended to gloss over the problem; but the present author, a perceptive and widely recognized student of the Court, has dealt with it with grace and frankness.—Ed.)

It is no secret that the Supreme Court has sometimes been concerned about senility on the part of some of its members. Under Article III of the Constitution, "judges, both of the Supreme and inferior courts, . . . hold their offices during good behavior, and receive for their services, a compensation, which shall not be diminished during their continuance in office." The historical record shows that this essential safeguard of judicial independence encouraged some justices to remain on the bench after age had sapped their vitality. For a long time the problem was accentuated by the failure of Congress to provide adequate pensions for retiring justices.

The great Chief Justice John Marshall retained his vigor through thirty-four years on the Supreme Bench until shortly before his death in 1855. Near the end of that momentous era Justice Joseph Story wrote of his colleague: "Chief Justice Marshall still possesses his intellectual powers in very high vigor," although his physical strength was failing. It was also evident that the Court over which he presided was suffering from ravages of time. Marshall's biographer, Albert J. Beveridge, describes the condition of the Court as follows: "Justice (Bushrod) Washington was dead. (William) Johnson was fatally ill, and (Gabriel) Duval, sinking under age and infirmity, was about to resign." [1]

These disabilities in the Court gave Marshall some serious problems. Two important cases were argued extensively before the Court, one involving a Kentucky statute which in effect created a state currency that could be used to pay public or private debts and the other a New York statute authorizing the mayor of New York City to exclude impoverished foreigners whom he deemed undesirable. Both acts were repugnant to the Constitution as interpreted by the Marshall Court, the Kentucky case apparently being controlled by *Craig v. Missouri* and the New York case by *Gibbons v. Ogden*. But only Marshall, Story, Duval and Johnson took that view. Justices Smith Thompson, John McLean and Henry Baldwin wanted to uphold the statutes, and since Johnson was absent because of his serious illness no decision could be handed down. Incidentally, it was this impasse which caused Marshall to announce for the first time the Court's practice not to deliver (except in cases of absolute necessity) "any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court." [2] In the absence of a majority the Kentucky and New York cases were not decided until after Marshall's death, and his constitutional views were then repudiated in both instances.

Marshall's successor, Chief Justice Roger B. Taney, held his post for twenty-nine years by which time he was eighty-seven and no longer able to function effectively. More than two years before his death Taney asked each of his brethren to call on him before leaving Washington for the summer. Having a presentiment of approaching death, he told them he did not expect to see them again. But the following winter he was still clinging on, although he was able to be in court only a few days during the 1863-64 term. His biographer tells us that "his mind continued to function clearly, but his body grew steadily weaker, until his physician remarked on his resemblance to a disembodied spirit." [3] Unable to sit up at times, he spent many hours in bed reading. Taney's condition led Senator Benjamin F. Wade to wisecrack: "No man ever prayed as

I did that Taney might outlive James Buchanan's term, and now I am afraid I have overdone it." [4]

In the spring of 1864 Attorney General Edward Bates remarked that Justices James M. Wayne, John Catron and Robert C. Grier as well as Chief Justice Taney were "obviously failing" and might resign if Congress would provide them with adequate pensions. A bill for this purpose was much discussed, but Congress failed to pass it and there were no resignations. The Court remained under a severe handicap until Taney's death in October, 1864.

The naming of a new Chief Justice, Salmon P. Chase, was only a partial solution. Justice Grier was still on the bench when the momentous *Legal Tender Cases* came before the Court. Grier's physical disability led him to ask both the Chief Justice and the clerk of the Court for permission to live in the Capitol. "If I could have a room in the Capitol on the level of our court room," he wrote to Chase, "so as not to be compelled to 'get up stairs' I could attend to my duty at Washington as usual, if my health continues." [5] No such room was available.

When *Hepburn v. Griswold* was decided three years later Grier's condition had further deteriorated. The *Hepburn* case was discussed in the judicial conference of November 27, 1869, with all the eight justices who then constituted the court participating. The outcome is reported by Charles Fairman in *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* as follows:

When a division was taken, Chase, (Samuel) Nelson, (Nathan) Clifford and (Stephen J.) Field voted to affirm—Grier, (Noah H.) Swayne, (Samuel F.) Miller and (David) Davis to reverse. A question was made whether Grier really meant to vote as he did. He replied that he understood the Kentucky court to have held the legal tender statute unconstitutional, and that he voted to reverse. So *Hepburn v. Griswold* was declared to be affirmed by an equally divided court. An even division would establish no principle.

Then *Broderick's Executor v. Magraw* was considered. Here Justice Grier made some remarks inconsistent with the vote he had just given. This was brought to his attention. He was reminded that in conversation with another member of the Court he had taken a view different from that of any of the other Justices. The upshot was that he changed his vote in the *Hepburn* case, thus making a 5-to-3 decision against the statute as applied to preexisting debts. [6]

With this dubious support, the Court held the Legal Tender Act unconstitutional in respect to contracts made prior to its passage. Before the decision was announced, however, the Justices unanimously urged Grier to resign. With Grier and Nelson particularly in mind, Congress had passed a law allowing any judge to continue on full salary for life if he resigned after reaching the age of seventy and had served for at least ten years. Soon after the new law became effective, Grier sent in his resignation. On January 29, two days before Grier left the bench, Chief Justice Chase presented his opinion in the *Hepburn* case and obtained approval from Justices who stood with him, but the opinion of the dissenters was not ready. So the decision was not actually handed down until February 7, 1870, after Grier had left the bench. Chase concluded his opinion with this statement:

It is proper to say that Mr. Justice Grier, who was a member of the Court when this cause was decided in conference, Nov. 27, 1869, and when this opinion was directed to be read (Jan. 29, 1870), stated his judgment to -be that the legal tender clause, properly construed, has no application to debts contracted prior to its enactment; but that upon the construction given to the Act by the other Judges he concurred in the opinion that the clause, so far as it makes United States notes a legal tender for such debts, is not warranted by the Constitution. [7]

There was a great deal of furor over the case at the time and it has tended to ring down through judicial history. That is not surprising, for the evidence of Grier's wobbling is unmistakable. All the other members of the Court were sufficiently concerned about it at the

time they urged Grier to resign. Yet even after he had done so, the foursome led by Chief Justice Chase took advantage of Grier's dubious vote to invalidate a law that many deemed essential to the nation's survival in times of emergency such as the Civil War. Within a year and a half the Court overturned that decision and declared the Legal Tender Act a valid exercise of the congressional war power. The latter decision was made possible, however, by the presence of two new Justices on the Court, William Strong and Joseph P. Bradley, whose nominations had unfortunately gone to Congress on the very day the *Hepburn* decision had been handed down.

President Ulysses S. Grant denied that he knew anything about the Legal Tender decision when the appointments were made, and history seems to sustain that assertion, but the net result was an impairment of confidence in the Supreme Court. When Charles Evans Hughes wrote about the Court as a member of the bar, before he became Chief Justice, he cited this abrupt overturn of a decision involving a vital constitutional issue as one of the Court's "self-inflicted wounds." [8] But surely the initial cause of this "self-inflicted wound" was the willingness of Chief Justice Chase to hang a momentous decision on the vote of a justice who could no longer properly address himself to the issues involved. The other "wounds" that Hughes singled out for special comment were the *Dred Scott* decision and the Court's invalidation of the income tax by one vote after a member of the Court had changed his vote.

Twenty-eight years after the historic *Hepburn* decision, Justice Field was still on the bench, and his brethren became concerned about his ability to render adequately considered decisions. Justice John M. Harlan was assigned the task of reminding Field that he had been a member of the committee that had waited upon Justice Grier in the hope of inducing him to retire. Perhaps Field would take the hint. Harlan found the aged jurist on a settee in the robing room "apparently oblivious to his surroundings." Arousing him, Harlan talked as tactfully as he could about the work of the Court and then asked if Field could recall how anxious the Court had been with respect to Justice Grier's condition and the feeling of the other justices that, in his own interest and in that of the Court, he should give up his work.

"Do you remember," Harlan asked, "what you said to Justice Grier on that occasion?" As Harlan talked the old man aroused himself until his eyes were blazing. "Yes!" he burst out. "And a dirtier day's work I never did in my life!" [9]

That ended the efforts of the brethren to hasten Field's departure, but he did resign in December, 1897.

After the election of William Howard Taft to the Presidency in 1908 concern over senility on the bench became acute at the White House. Having been a Circuit Court judge himself, Taft manifested a special interest in the administration of justice. On May 22, 1909, he wrote to his old associate, Circuit Judge Horace H. Lurton, in rather intemperate terms:

The condition of the Supreme Court is pitiable, and yet those old fools hold on with a tenacity that is most discouraging. Really the Chief Justice (Melville W. Fuller, then seventy-six) is almost senile; Harlan does no work; (David J.) Brewer is so deaf that he cannot hear and has got beyond the point of the commonest accuracy in writing his opinions; Brewer and Harlan sleep almost through all the arguments. I don't know what can be done. It is most discouraging to the active men on the bench. [10]

When Justice William H. Moody, one of the younger members, became ill and thus threw a heavier burden on the other active judges, Taft wrote to Cabot Lodge that he could scarcely restrain himself from making a statement about the condition of the Court in his annual message to Congress. Taft appears to have been especially irritated by the thought that Chief Justice Fuller was over-staying his time. Had Fuller resigned in 1905, when he should have done, in Taft's view, the great position of Chief Justice which he (Taft) prized above all others would now be his. [11]

When Justice Rufus W. Peckham was incapacitated by a heart ailment, Justice Edward D. White sent word to the White House that the "condition of the court is such that any vacancy

which occurs ought to be filled at the earliest possible moment." [12] Peckham died in October, 1909, and the President, brushing aside his own determination to reinvigorate the bench, chose an old friend and associate, Judge Lurton, to fill the vacancy. Lurton was not far from his seventieth birthday.

Perhaps repenting of this bow to friendship the next time he had an opportunity to rejuvenate the bench, on the death of Justice Brewer in 1910, Taft offered the place to Governor Charles Evans Hughes of New York, then only forty-eight. Indeed, the President wanted to make Hughes Chief Justice if only Fuller would bow to the inevitable. When he wrote Hughes offering the associate justiceship, Taft said that he expected the chief justiceship to be vacant soon and indicated his disposition to offer that place to Hughes whether or not the Governor accepted the post then vacant. In a postscript Taft then added: "Don't misunderstand me as to the Chief Justiceship. I mean that if that office were now open, I should offer it to you and it is probable that if it were to become vacant during my term, I should promote you to it; but, of course, conditions change, so that it would not be right for me to say by way of promise what I would do in the future." [13]

Several months before Hughes took his seat as associate justice in October, 1910, however, Fuller died. Rumors spread through the press and by word of mouth that Hughes was to be the new Chief Justice. Taft's concern about vigor on the Supreme Bench was well known. The President's good friend Justice Lurton intimated to Hughes that he was to be the new Chief, and Justice Oliver Wendell Holmes reported a similar assumption in one of his famous letters to Sir Frederick Pollock. But Taft found it difficult to make up his mind. When he sounded out the other Justices through Attorney General George W. Wicker-sham, he found many of them disgruntled over the idea of making the youngest member of -the Court its presiding officer. This view was also conveyed to members of the Senate Judiciary Committee, and six of them waited on the President to make him see the point. Hughes himself concluded that he would have a terrible time presiding over those old men, whose distaste for youth at the helm had already been painfully manifested in the conferences he had attended.

After five months of procrastination, the White House summoned Hughes for a conference with the President. While he was dressing for the occasion, the telephone rang again and the proposed interview was cancelled. The next day the nomination of Justice White to be Chief Justice went to the Senate. Taft had bowed to experience rather than vigor to the satisfaction of almost everyone, including Hughes himself, despite his irritation over the President's procrastination. The evidence suggests that Taft did not change his mind in the few minutes that elapsed between the telephone calls to Hughes; he was just loath to face Hughes and make an explanation.

It is interesting to note that Taft's bow to experience made possible the realization of his own great ambition. At one time White appeared willing to step down while he was still in good health. That was in 1916 when it appeared that Justice Hughes was about to be drafted as the Republican candidate for President. White, a Democrat, informed Hughes that he was going to resign and that if Hughes remained on the bench President Woodrow Wilson would name him Chief Justice. [14] Hughes scoffed at the suggestion and, after his nomination, conducted a vigorous campaign against Wilson, only to lose by failing to shake the hand of the Progressive Senator Hiram Johnson in California. Whether or not White was resentful toward his own political party over the approach he had been induced to make to Hughes, he told Taft that he would keep the Chief Justiceship open for him by holding on until the Republicans were again in power. [15] He did so even though his sight was gravely impaired and his health was poor in his last years.

When White died in May, 1921, Warren G. Harding was President and speculation in regard to White's successor seemed to center in Taft and Hughes, but the latter was then Secretary of State and had no inclination to gratify the isolationists in the Senate, who were gunning for him, by accepting any other position. Undersecretary Henry Fletcher asked Hughes if the

speculation about him shifting to the Chief Justiceship were true. Hughes replied with characteristic finality.

"No," he said. "If the President should offer me the Chief Justiceship, I would not accept it and I would resign as Secretary of State." [16]

"I'm going to play golf with the President this afternoon," Fletcher replied. "Do you want me to tell him what you have just said?"

"Yes," Hughes replied.

Harding's response to Fletcher was that he was going to appoint "old man Taft" to the Court. Taft was then nearly sixty-four and would be able to hold the position he had wanted more than anything else in life for less than a decade. His vigorous efforts to rejuvenate the Court and to improve the entire judicial system came to an end in December, 1929, when, desperately ill, he sought rest in North Carolina. Still he was reluctant to resign until given assurance, through a series of interviews involving President Herbert Hoover, Attorney General William D. Mitchell and members of the Court, that Hughes would be his successor.

Hughes brought new energy, system and esprit de corps into the Court, but it was soon apparent that one age problem would have to be dealt with. His dear venerated, brilliant friend, Justice Holmes, celebrated his ninetieth birthday in 1931, and Hughes was among many who lauded his achievements. On the bench, however, the grand old man had great difficulty in keeping his head up and his eyes open. He would pile books in front of his face and go to sleep on the bench. Hughes shielded him by giving him only easy opinions to write. In January, 1932, a majority of the brethren urged Hughes to seek Holmes's resignation out of fear that his condition would bring the court into disrepute. The "Chief," as he was generally known in the Court, consulted Justice Louis D. Brandeis and the latter agreed that Holmes ought to go.

Conscious of all the unpleasanties resulting from previous efforts of this kind, Hughes went to visit the Magnificent Yankee one Sunday morning. Using all the diplomacy he could command, he built up to the point that Holmes was carrying too heavy a burden for a man of his years. A great jurist who had given exemplary service to his state and nation for forty-nine years should not continue to overstrain his physical resources. Holmes seemed actually relieved to be thus pushed a little. "Give me the statute book," he requested, pointing to the shelf where it rested, "and I'll write out my resignation right now." [17] There followed a sentimental parting at the Court. Chief Judge Benjamin Cardozo of the New York Court of Appeals was named to take Holmes's place. The Court continued its operations at the very brisk pace that Hughes had set.

The next time that a controversy arose over the age of Justices and alleged inability to carry out the responsibilities of the Supreme Court with dispatch was in 1937. The Court had invalidated some of the recovery measures that President Franklin D. Roosevelt had recommended and Congress had hastily enacted with little thought of their validity under the Constitution. Soon after his sweeping second victory at the polls in 1936, the President sent to Congress his controversial bill to add six new seats to the Supreme Court—an additional Justice for each member who had been on the bench for ten years and had not resigned within six months of reaching the age of seventy. This admittedly drastic measure was defended on the ground that it was essential to relieve the Court of congestion and resulting injustice.

The furor resulting from the bill is now a dramatic chapter in American history. The immediate targets of the bill were Chief Justice Hughes and Associate Justices Brandeis, Willis Van Devanter, James C. McReynolds, George Sutherland and Pierce Butler. The President's call for the replacement of judges of "lowered physical and mental vigor" by an "infusion of new blood" into the judiciary was especially painful to Brandeis, the oldest member of the Hughes Court, a Democrat and an eminent liberal who was still alert and vigorous despite his age. Justice Owen J. Roberts told his colleagues that he would resign if the bill became law even though he would not be personally affected by its terms. Hughes, then a robust seventy-four, decided to fight the bill quietly and to save the Court from humiliation at all cost. "If they want me to preside over a convention," he said "I can do it." [18]

One primary factor in defeat of the bill in the Senate was Hughes's calm, factual letter to Senator Burton K. Wheeler refuting the President's accusations that the Court was behind in its work because of age and disability. The Court was up to date in its disposition of cases. Without venturing into the court-packing aspects of the bill, Hughes said it would impair the efficiency of the Supreme Court by adding "more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide." [19]

The defeat of this bill is an oft-told tale, but it was no victory for senility on the bench. Two members of the court who were ailing had wanted to retire before 1937. They had refrained from doing so because Congress had unreasonably reduced the compensation of Justice Holmes after his retirement. Senator William E. Borah apparently induced Van Devanter to resign while the fight was still going forward, and Justice Butler retired soon after Congress amended the law to permit Justices to step down without loss- of compensation. Brandeis retired gracefully in 1939 at the age of eighty-three after suffering a heart attack, before there could be any reasonable complaint of mental deterioration on his part.

As for Hughes, he was very alert to the danger of clinging to power too long. After ascending the bench a second time he made an arrangement within his family—Mrs. Hughes, his son Charles Evans Hughes, Jr., his daughters and sons in law—that if any one of them felt he was slipping, he or she would come to him in private and say so. No one of them had any such apprehension, but Hughes concluded at the end of the Court's term in 1941 that he would no longer be able to carry the load of the Chief Justiceship without slowing down. So he sent his decision to retire to the White House and became the first Chief Justice to lay down the reins in good health since John Jay resigned in 1795 to become governor of New York. He lived another seven years in quiet retirement.

There has been much talk at various times in the history of the Court about compulsory retirement for Justices, but no satisfactory age limit has ever emerged. Forced retirement at seventy or even seventy-five would have deprived the Court of many brilliant minds still in full vigor. With the precedents for retirement in good season more numerous in recent years, the possibility of a compulsory retirement age seems remote.

Robert H. Jackson, who had been an ardent supporter of the "new-blood"-on-the-bench campaign when he was Assistant Attorney General, told the author of this article that he had changed his mind about one thing after becoming a member of the Supreme Court. "It is great to have some old men on the bench," he said. "They know everything that has been decided in the past which must necessarily influence what we do today." It is reasonable to conclude that the struggle for experience, wisdom and mature judgment in the Supreme Court—without decrepitude—will continue as long as the Court sits. History also suggests that the Court will retain the right and the responsibility of dealing with its own problems of this kind when and if they arise.

Endnotes

1. Beveridge, Albert J., *The Life of John Marshall*, Vol. IV, pp. 581-82.
2. Beveridge *supra*, p. 583.
3. Swisher, Carl Brent, *Roger B. Taney*, p. 572.
4. Swisher *supra*, p. 573.
5. *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, Vol. VI, part one, p. 83.
6. Holmes Devise *supra*, p. 716.
7. Holmes Devise, *supra*, p. 713.
8. Hughes, Charles Evans, *The Supreme Court of the United States*, p. 50.
9. Hughes *supra*, p. 76.

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 10. Pringle, Henry F., *The Life and Times of William Howard Taft*, Vol. I, pp. 529-
 11. Pringle *supra*, p. 530.
 12. *Ibid.*
 13. Pusey, Merlo J., Charles Evans Hughes, Vol. I, pp. 271-72.
 14. Pusey, *supra*, p. 324.
 15. Pringle *supra*, Note 10, p. 955.
 16. Pusey *supra*, Note 13, Vol. II, pp. 429-30.
 17. Author's interview with Hughes, Jan. 7, 1946.
 18. Pusey *supra*, p. 753.
 19. Pusey *supra*, p. 756.

CONSTITUTIONAL ORATOR

Daniel Webster Packed 'Em In

S. W. FINLEY

"Side by side with the great name of Marshall should be placed -that of Daniel Webster," an admiring biographer once wrote. "The arguments of the one were as necessary as the decisions of the other." The point is well taken; not only do great appellate advocates focus the constitutional issues before the Court, but the "godlike Daniel" was a legend in his own time. Brilliant lawyer, incisive political debater—generations of school boys in an earlier time memorized and recited his famous Reply to Hayne—and something of a ham actor as well, the Massachusetts orator had everything of which stories are made. Stephen Vincent Benet wrote a play around the common saying that Webster could argue the Devil himself out of his due, and there seems to have been at least partial basis in fact for the report that Webster once interrupted oral argument when a bevy of admiring ladies entered the courtroom to listen to him—and began again from the beginning for their benefit.

Webster and Chief Justice Marshall shared the same basic constitutional philosophy, and together with Justice Joseph Story they constituted a fortuitous triumvirate in establishing the fundamentals of American federalism in the first four decades of the nineteenth century. Webster may have gilded the lily with his oft-quoted postscript to his argument in the Dartmouth College Case ("It is, sir, as I have said, a small college—but there are those who love her"); but the abiding fact is that he presented the arguments on which the Court established its famous doctrine on the contract clause.

The fateful combination of great advocates and great jurists in this formative period is reminiscent of the epochal meeting of great minds in the previous generation of Adams, Franklin and Jefferson in the era of independence and constitutional drafting. With William Wirt as Attorney General (see article, "The Many-Sided Attorney General," by Joseph C. Robert in YEARBOOK 1976), Webster's appearance at the Supreme Court bar at this turning-point in history seemed predestined. Three weeks after his 1819 argument in *Dartmouth College v. Woodward*, he was again before the Court in the equally momentous case of *McCulloch v. Maryland*, out of which Marshall drafted the inherent powers and "necessary and proper" doctrines of the Constitution.

Two years later, Webster was retained with Senator James Barbour of Virginia in the case of *Cohens v. Virginia*, which established the reviewability of state criminal cases on constitutional questions. Three years after that, in the famous "steamboat case" of *Gibbons v. Ogden*, Webster again appeared and provided -the basic issues on which Marshall based the commerce clause holding—an opinion which, as Justice James Wayne later put it, freed "every creek and river, lake, bay, and harbor in our country from the interference of monopolies."

By 1824, Webster had emerged as the dean of the Supreme Court bar, appearing with Henry Clay in *Osborn v. Bank of the United States* and *Bank of the United States v. Planter's Bank of Georgia*, two cases dealing with lingering issues from the *McCulloch* decision of 1819. A third case argued in this same memorable term was *Ogden v. Saunders*. Although it did not receive a majority -to permit a decision to be handed down until 1827. It is significant that in this case, on the power of states to legislate on bankruptcy matters, Webster's clients lost— and John Marshall dissented. It was not that Webster consistently won his cases; indeed, the Court historian Charles Warren found from a statistical array of 170 cases in which Webster appeared before the Court between 1814 and 1851, that the great lawyer won slightly less than half. Of the constitutional cases, however, Webster either won the major ones or, like the great dissenting Justices like Oliver Wendell Holmes, Louis D. Brandeis and the first John Marshall Harlan,

forecast the shape of the future even in minority.

Harriet Martineau, that keenly observant English traveler of the second quarter of the nineteenth century, described Webster and the Marshall Court in an 1835 visit and published in her *Retrospect of Western Travel* (1838):

I have watched the assemblage while the Chief Justice was delivering a judgment, the three Judges on either hand gazing at him more like learners than associates; Webster standing firm as a rock, in his large, deep-set eyes wide awake, his lips compressed, and his whole countenance in that intent stillness which easily fixes -the gaze of the stranger. Clay leaning against the desk in an attitude whose grace contrasts strangely with the slovenly make of his dress, his snuff box for the moment unopened in his hand, his small grey eye, and placid half-smile conveying an expression of pleasure, which redeems his face from its usual unaccountable commonness. . . [T]hese men, absorbed in what they were listening to, thinking neither of themselves nor of each other, while they are watched by the groups of idlers and listeners around them; the newspaper corps, the dark Cherokee chiefs, the stragglers from the far West, the gay ladies in -their waving plumes, and the members of either House that have stepped in to listen. . . . There is no tolerable portrait of Judge Story, and there never will be . . . the quick smile, the glistening eye, the gleeful tone, with passing touches of sentiment; the innocent self-complacency, the confiding, devoted affections of the great American lawyer. . . . It was amusing to see how the Court would fill after the entrance of Webster, and empty when he had gone back to the Senate Chamber. The chief interest to me in Webster's pleading, and also in his speaking in the Senate, was from seeing one so dreamy and nonchalant, roused into strong excitement. Webster is a lover of ease and pleasure, and has an air of the most unaffected indolence and careless self-sufficiency. It is something to see him moved with anxiety, and the toil of intellectual conflict; to see his lips tremble, his nostrils expand, the perspiration start upon his brow; to hear his voice vary with emotion.

Justice Story himself was the source of a statement that whenever Webster spoke in the Court, "a large circle of ladies, of the highest fashion, and taste, and intelligence, numerous lawyers, and gentlemen of both houses of Congress, and towards the close, the foreign ministers, or at least some two or three of them," crowded in to listen. Another contemporary English traveler, Dana Hamilton, wrote:

The person, however, who has succeeded in riveting most strongly the attention of the whole Union, is undoubtedly Mr. Webster. From the Gulf of St Lawrence to that of Mexico, from Cape Sable to Lake Superior, his name has become, as it were, a household word. Many disapprove his politics, but none deny his great talents, his unrivalled fertility of argument, or his power, even still more remarkable, of rapid and comprehensive induction. In short, it is universally believed by his countrymen that Mr. Webster is a great man; and Webster . . . is a man of whom any country might well be proud. His knowledge is at once extensive and minute, his intellectual resources very great; and whatever may be the subject of discussion, he is sure to shed on it the light of an active, acute, and powerful mind. . . .

The forehead of Mr. Webster is high, broad, and advancing. The cavity beneath the eyebrow is remarkably large. The eye is deeply set, but full, dark, and penetrating; the nose prominent, and well defined; the mouth marked by that rigid compression of the lips by which the New Englanders are distinguished. When Mr. Webster's countenance is in repose, its expression struck me as cold and forbidding, but in conversation it lightens up; and when he smiles, the whole impression it communicates is at once changed. His voice is clear, sharp, and firm, without much variety of modulation; but when animated, it rings on the ear like a clarion.

. . . In the Supreme Court he delivered several legal arguments which certainly struck me as admirable, both in regard to matter and manner. The latter was neither vehement nor subdued. It was the manner of conscious power, tranquil and self-possessed.

(Men and Manners in America [1833])

On fifteen major constitutional issues, there is a striking juxtaposition between Webster's constitutional argument and the holding of the Court, sometimes for and sometimes against him. With a keen knowledge of American history and what someone has called the logic of that history, the Senator from Massachusetts regularly divided his efforts between Capitol's upper chamber and the advocacy of public causes in the courtroom on the lower floor. (For a photograph of the restored courtroom in the Capitol, where these cases were argued and decided, see YEARBOOK 1976, page 29.) The cases which are described below, with the essence of both Webster's argument and the Court's holding, demonstrate how fundamentally, throughout the half-century before the sectional struggle of the Civil War, Daniel Webster's constitutional thought influenced the course of events.

(Ed. Note: The study of Webster's role in American constitutional history has been the subject of at least two books which both merit study, although published nearly sixty years apart: Everett Pepperrell Wheeler's *Daniel Webster, the Expounder of the Constitution*, published in 1905, and Maurice G. Baxter's *Daniel Webster and the Supreme Court*, published in 1966.)

Dartmouth College v. Woodward (1819)

The equating of a college charter, or the charter of any charitable institution, with a contract protected by the non-impairment clause of the Constitution (Article I, Sec. 10) had many political as well as legal ramifications. (See generally Walker Lewis' article, "Backstage at Dartmouth College," and the companion article, "Another Early College Charter Case," in YEARBOOK 1977.)

Webster's Argument:

It will be contended by the plaintiffs, that these acts are not valid and binding on them, without their assent,—

1. Because they are against common right, and the Constitution of New Hampshire.
2. Because they are repugnant to the Constitution of the United States.

* * *

Individuals have a right to use their own property for purposes of benevolence, either towards the public, or towards other individuals. They have a right to exercise this benevolence in such lawful manner as they may choose; and when the government has induced and excited it, by contracting to give perpetuity to the stipulated manner of exercising it, it is not law, but violence, to rescind this contract, and seize on the property. Whether the State will grant these franchises, and under what conditions it will grant them, it decides for itself. But when once granted, the constitution holds them to be sacred, till forfeited for just cause.

The granting of the corporation is but making the trust perpetual, and does not alter the nature of the charity. The very object sought in obtaining such charter, and in giving property to such a corporation, is to make and keep it private. property, and to clothe it with all the security and inviolability of private property. The intent is, that there shall be a legal private ownership, and that the legal owners shall maintain and protect the property, for the benefit of those for whose use it was designed.

* * *

The plaintiffs - contend, in the second place, that the acts in question are repugnant to the tenth section of the first article of the Constitution of the United States. The material words of that section are: "No State shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."

It has already. been decided in this court, that a grant is a contract, within the meaning of this provision; and that a grant by a State is also a contract, as much as the grant of an individual. (Fletcher v. Peck, 6 Cranch 87)

* * *

And because charters of incorporation are of the nature of contracts, they cannot be altered or varied but by consent of the original parties. If a charter be granted by the king, it may be altered by a new charter granted by the king, and accepted by the corporators. But if the first charter be granted by Parliament, the consent of Parliament must be obtained to any alteration

Court Opinion:

The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us, is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts, than those which respect property, or some object of value, and conized to pass all laws "necessary and proper" to carry into execution the powers conferred on it. These words, "necessary and proper," in such an instrument, are probably to be considered as synonymous. *Necessary* powers must here intend such powers as are *suitable* and *fitted* to the object; such as are *best* and *most useful* in relation to the end proposed. If this be not so, and if Congress could use no means but such as were *absolutely indispensable* to the existence of a granted power; the government would hardly exist; at least, it would be wholly inadequate to the purposes of its formation. A bank is a proper and suitable instrument to assist the operations of the government, in the collection and disbursement of the revenue; in the occasional anticipations of taxes and imposts; and in the regulation of the actual currency, as being a part of the trade and exchange between the States. . . .

2. The second question is, whether, if the bank be constitutionally created, the State governments have power to tax it? The people of the United States have seen fit -to divide sovereignty, and to establish a complex system. They have conferred certain powers on the State Governments, and certain other powers on the National Government. As it was easy to foresee - that questions must arise between these governments thus constituted, it became of great moment to determine upon what principle these questions should be decided, and who should decide them. The constitution, therefore, declares, that the constitution itself, and the laws passed in pursuance of its provisions, shall be the *supreme law of the land*, and shall control all State legislation and State constitutions, which may be incompatible therewith; and it confides to this Court the ultimate power of deciding all questions arising under the constitution and laws of the United States. The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, any thing in the laws of any State to the contrary notwithstanding. . . .

Court Opinion:

The first question made in the cause is, has Congress power to incorporate a bank?

It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

* * *

The government of the Union, then, (whatever may be the influence of this fact on the case,) is emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required -to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. . . .

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is for rights which may be asserted in a court of justice. . . .

According to the theory of the British constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said, that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees, and the crown, (to whose rights and obligations New Hampshire succeeds,) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation.

McCulloch v. Maryland (1819)

The famous case of the Bank of the United States, and the attempt of Maryland and other states to subject its banknotes to a state tax, provided both Webster and Marshall with the opportunity they had long awaited, to establish the proposition that powers vested by the Constitution were supreme powers, not subject to state burdens. Webster understood precisely

what Marshall was seeking to establish as -the rule of law, and prepared the arguments on behalf of the Bank which enabled the Court to accomplish its objective.

Webster's Argument:

Congress, by the constitution, is invested with certain powers; and, as to the objects, and within the scope of these powers, it is sovereign. Even without the aid of the general clause in the constitution, empowering Congress to pass all necessary and proper laws for carrying its powers into execution, the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted. Congress may declare war; it may consequently carry on war, by armies and navies, and other suitable means and methods of warfare. So it has power to raise a revenue, and to apply it in the support of the government; and defence of the country. It may, of course, use all proper and suitable means, not specially prohibited, in the raising and disbursement of the revenue. And if, in the progress of society and the arts, new means arise, either of carrying on war, or of raising revenue, these new means doubtless would be properly considered as within the grant. Steam frigates, for example, were not in the minds of those who framed the constitution, as among the means of naval warfare; but no one doubts the power of Congress to use them, as means to an authorized end. It is not enough to say, that it does not appear that a bank was in the contemplation of the framers of the constitution. It was not their intention, in these cases, to enumerate particulars. The true view of the subject is, that if it be a fit instrument to an authorized purpose, it may be used, not being specially prohibited. Congress is author- the government of all; its powers are delegated by all; it represents all, and acts for all. .

[The "necessary and proper" clause is] made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. .

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "any thing in the constitution or laws of any State to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become -the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . .

We admit, as all must, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to

the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Gibbons v. Ogden (1824)

Once having established the principle of plenary power in the national government, in subject-areas in which the Constitution had vested such power, the Marshall Court, with Webster as the advocate of the concept, now looked to a case in which the implement of such power—the commerce clause—could be unequivocally identified. The opportunity came in the famous "steamboat case" in which the claims of a state to ~exercise exclusive commerce power in navigable water was confronted with the declaration that Congress' power over commerce between states was paramount.

Webster's Argument:

I shall contend that the power of Congress to regulate commerce is complete and entire, and, to a certain extent, necessarily exclusive; that the acts in question are regulations of commerce, in a most important particular, affecting it in those respects in which it is under the exclusive authority of Congress. I state this first proposition guardedly. I do not mean to say, that all regulations which may, in their operation, affect commerce, are exclusively in the power of Congress; but that such power as has been exercised in this case does not remain with the States. Nothing is more complex than commerce; and in such an age as this, no words embrace a wider field than *commercial regulation*. Almost all the business and intercourse of life may be connected incidentally, more or less, with commercial regulations.

I contend, therefore, that the people intended, in establishing the Constitution, to transfer from the several States to a general government those high and important powers over commerce, which, in their exercise, were to maintain a uniform and general system. From the very nature of the case, these powers must be exclusive; that is, the higher branches of commercial regulation must be exclusively committed to a single hand. What is it that is to be regulated? Not the commerce of the several States, respectively, but the commerce of the United States. Henceforth, the commerce of the States was to be a *unit*; and the system by which it was to exist and be governed must necessarily be complete, entire, and uniform. Its character was to be described in the flag which waved over it, E PLURIBUS UNUM. Now, how could individual States assert a right of concurrent legislation, in a case of this sort, without manifest encroachment and confusion? It should be repeated, that the words used in the Constitution, "to regulate commerce," are so very general and extensive, that they may be construed to cover a vast field of legislation, part of which has always been occupied by State laws; and therefore the words must have a reasonable construction, and the power should be considered as exclusively vested in Congress so far, and so far only, as the nature of the power requires. And I insist, that the nature of the case, and of the power, did imperiously require, that such important authority as that of granting monopolies of trade and navigation should not be considered as still retained by the States. . . .

Court's Opinion:

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. . . .

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State. . . .

We are now arrived at the inquiry— What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. . . .

The sum of Daniel Webster's constitutional philosophy—one which Benet liked so well that he incorporated portions of it into the hero's speech in *The Devil and Daniel Webster*—was not given in a courtroom but on the floor of the Senate, perhaps, in the final analysis, Webster's natural arena. In an 1830 debate over an otherwise routine bill, a Senator for South Carolina, Robert Young Hayne, extolled the standard state's rights position of the Old South in a florid speech which ended with a demand that the Massachusetts Senator answer one ultimate question: If the issue of American federalism ever came to a choice between liberty or union, which should it be?

Webster seized the opportunity to make, before packed galleries, an equally florid reply, which nonetheless sincerely expressed his own conviction as forcefully as Chief Justice Marshall ever phrased it:

While the Union lasts, we have high, exciting, gratifying prospects spread out before us, and our children. Beyond that I seek not to penetrate the veil. God grant that in my day at least that curtain may not rise. God grant that on my vision never may be opened what lies behind. When my eyes shall be turned to behold for the last time the sun in heaven, may I not see him shining on the broken and dishonored fragments of a once glorious Union; on States dissevered, discordant, belligerent; on a land rent with civil feuds or drenched, it may be, in fraternal blood. Let their last feeble and lingering glance rather behold' the gorgeous ensign of the republic, now known and honored throughout the earth, still full high advanced, its arms and trophies streaming in their original lustre, not a stripe erased or polluted, nor a single star obscured, bearing for its motto, no such miserable interrogatory as "What is all this worth?" nor those other words of delusion and folly, "Liberty first and Union afterwards"; but everywhere, spread all over in characters of living light, blazing on all its ample folds, as they float over the sea and over the land, and in every wind under the whole heavens, that other sentiment, dear to every true American heart—"Liberty *and* Union, Now and Forever, One and Inseparable."

Welcome Back, Justice Harrison?

Maeva Marcus and Christine Jordan

The conventional wisdom on the order of Justices has been that President Washington's fourth nominee, Robert Hanson Harrison of Maryland, declined the appointment and thus is to be excluded from the list of those who have served on the high bench. New evidence found at the National Archives by the staff of the Documentary History of the Supreme Court of the United States, 1789-1800, reveals that Harrison reconsidered, apparently at the renewed appeal of Washington, and went through enough motion (in classic contract terms, altered his position as a result of the offer) to give his heirs and assigns a claim to the compensation due for his services.

Harrison had been Washington's military personal secretary during - the Revolution, and the relationship had ripened into a close friendship thereafter. After the war, Harrison became chief judge of the General Court of Maryland and was still on that bench when Washington submitted his first nominations for the Supreme Court. The measure of Harrison's closeness to Washington is shown by the fact that he and John Rutledge of South Carolina were the only nominees to whom the President sent personal messages urging their acceptance of the appointment.

Harrison wrestled with his answer to Washington for several weeks. During this time, Harrison was named Chancellor of the state of Maryland. It took him only two days to write to the Governor declining this appointment. But whether to accept the nomination to the Supreme Court of the United States obviously caused him more anguish. When at last he decided to refuse the appointment, Harrison wrote to the President, on October 27, 1789, that he could not take the position, because of personal concerns. The arduous duties of an Associate Justice were incompatible with his poor health and pressing domestic obligations, Harrison wrote. Moreover, Harrison stated that his rejection of the nomination would not be detrimental to the country, since there were others more qualified than he to be Associate Justice. Hence he returned the commission as judge of the Supreme Court of the United States.

Washington, clearly disappointed with Harrison's decision, wrote to his dear friend once again. On November 25, the President sent back the commission with a letter that urged Harrison to reconsider. Not wishing to put too much pressure on him, Washington simply informed Harrison that Congress probably would amend the Judicial Act in order to relieve the Justices of the Supreme Court of some of the onerous tasks assigned them. This would allow Harrison time to attend to his personal affairs. Alexander Hamilton, perhaps with the President's prompting, also wrote to Harrison urging him to accept the appointment.

Although there is no document to prove it, Harrison must have decided to take the position on the Supreme Court bench, for in January, 1790, he began a journey to New York where the Court would hold its inaugural session on the first Monday in February. Only a week after leaving home, however, he became ill and wrote the following letter to Washington.

Bladensburg Jany. 21". 1790.

My dear Sir,

I left Home on the 14th. inst^t. with a view of making a Journey to New York, and after being several days detained at Alexandria by indisposition, came thus far on the way. I now unhappily find myself in such a situation, as not to be able to proceed further. From this unfortunate event and the apprehension that my indisposition may continue, I pray you to

consider that I can not accept the appointment of an Associate Judge, with which I have been honoured. What I do, my dear Sir, is the result of the most painful and distressing necessity.

I intreat that you will receive the warmest returns of my gratitude for the distinguished proofs I have had of your flattering and invaluable esteem & confidence—and that you will believe that I am and shall always remain with the most affectionate attachment

My Dear Sir,

Yr' most obed't & oblig'd fr'd & Sert

Rob: H: Harrison

Harrison returned home, where died on April 2, 1790.

The government apparently considered Harrison an Associate Justice of the Supreme Court, even though he never heard a case. In 1811 Harrison's daughters applied to the Treasury Department for the compensation due an Associate Judge for services from September 28, 1789 (the date of Washington's letter appointing Harrison) until January 21, 1790, when Harrison resigned because of illness. At that time, the government allowed only part of the claim, from November 25 (the date on which Washington urged Harrison to reconsider his declination) to January 21. When, however, the daughters, in 1820, applied for the remainder of Harrison's salary, for the period September 28 through November 25, 1789, the government approved the claim.

Although it is interesting to discover that Harrison's heirs received his salary, this fact should not qualify Harrison to be described as having served on the Supreme Court. The Senate confirmed Harrison's appointment and he eventually accepted the position, but Harrison never performed any duties assigned to a Justice. That he must now be given technical recognition as an official appointee hardly will be greeted with enthusiasm by Court historians who henceforth must account for him at least in a small footnote.

Skeleton in Mr. Jay's Closet?

Until the Supreme Court established an Office of Curator, all sorts of manuscripts and other memorabilia were preserved in unlikely places. One was a letter from the first Chief Justice—although written some seven years before he was named to that position—which is reproduced below. The letter itself has been previously printed, but without the brief paragraph which appears here in italics. The fact that the letter was expurgated for publication is interesting in itself, but more important perhaps is the fact that the unexpurgated original was found in a miscellany of "association items"

in the Court, and now has found its way into a systematic inventory maintained by the Curator's Office.

Peter Van Schaack (or Van Schaick) was a brother lawyer at the colonial bar in New York, and although the Revolution made him and Jay political and ideological opponents, their relationship continued on a high plane of civility. In 1782 the Tory Van Schaack and the Patriot Jay were respectively in London and Paris, with Benjamin Franklin as the emissary between them. By this year, following the American victory at Yorktown and the beginning of peace negotiations, the war was obviously winding down and both men were beginning to think of picking up the threads of their professional careers at home. But for some, there was to be no reconciliation, conspicuously including Jay's brother mentioned in the expurgated paragraph reinstated in the text below.

The brother—Sir James—was, from the cryptic reference in the notorious paragraph, a regenerate, or born again, Loyalist. Up until April of 1782, he had been a zealous promoter of the American cause, although essentially in terms of reconciliation. Having determined that his plans for reunion could only get a hearing in England, he apparently arranged to be "captured"

by British forces in New York and proceeded to London. For John, this amounted to betrayal, and he unburdened himself in the castigating comments in the paragraph in question. (Incidentally, the paragraph itself was quoted in Thomas Jones' *History of New York During the Revolution*, published in 1879.

But William Jay was determined, in the biography of his father published in 1833, to hide the suspected skeleton in the closet, and hence deleted the reference to Sir James in John's letter of September 17—as well as the inferred reference to the brother in Van Schaack's letter of August 11. It was not the last time the future Chief Justice was to be embroiled in a posthumous brouhaha; in the 1860s his grandson John was involved in a three-way battle of editors over the reprinting of the famous *Federalist* papers originally written, in the heated campaign for New York's ratification of the Constitution in 1788, by Jay, Alexander Hamilton and James Madison. Grandson John Jay brought out an edition glorifying his ancestor's role in the essays, rebutting what he considered the exaggerated claims for Hamilton made in another edition prepared by Hamilton's son John. A third tendentiously-edited collection by Thomas Dawson, sniped at the third contributor, Madison, suggesting that rather than being considered the "father of the Constitution" the Virginian should be exposed as the father of the "rebel doctrine of secession."

Sic transit. The story of the rival editions, and rival motivations, of the *Federalist* will be dealt with on another occasion. As for John Jay the Patriot, Peter Van Schaack the Loyalist, and Sir James Jay the man in the middle, the modern reader must make his own judgments. As for the letter, casually coming to light as it has, the Supreme Court Historical Society herewith proceeds to correct William Jay, who left out the mooted paragraph, and Thomas Jones, who quoted it out of context.

Paris 17 Sept. 1782

Dear Sir

Doctor Franklin sent me this morning, your Letter of Aug. 11th last. I thank you for it. Aptitude to change in any thing never made a part of my disposition, and I hope makes no part of my character. In the course of the present troubles I have adhered to certain fixed principles, and faithfully obeyed their dictates without regarding the consequences of such conduct to my friends, my family, or myself: all of whom, however dreadful the thought, I have ever been ready to sacrifice, if necessary, to the public objects in the contest.

Believe me, my heart has nevertheless been, on more than one occasion, afflicted by the execution of what I thought, and still think, was my duty. I felt very sensibly for you, and for others; but as Society can regard only the political propriety of men's conduct, and not the moral propriety of their motives to it, I could only lament your unavoidably becoming classed with many, whose morality was convenience, and whom politics changed with the aspect of public affairs. My regard for 'you as a good old friend, continued notwithstanding. God knows, that inclination never had a share in any proceedings of mine against you—from such thorns no man could expect to gather grapes, and the only consolation that can grow in their unkindly shade, is a consciousness of doing ones duty, and the reflection that as, on the one hand, I have uniformly preferred the public weal to my friends and connections, so on the other, I have never been urged by private resentments to injure a single individual.

Your judgment and consequently your conscience differed from mine on a very important Question; but tho' as an Independent American I considered all who were not for us, and you amongst the rest, as against us, yet be assured, that- John Jay never ceased to be the friend to Peter Van Schaick. No one can serve two masters—Either Britain was right and America was wrong, or America was right and Britain wrong. They who thought Britain right, were bound to support her, and America had a just claim to the services of those who approved her cause.

Hence it became our duty to take one side or the other, and no man is to be blamed for preferring the one which his reason recommended as the most just and virtuous.

Several of our Countrymen indeed left, and took arms against us, not from any *such* principles, but from the most dishonorable of human motives; their conduct has been of a piece with their inducements, for they have far outstripped savages in perfidy and cruelty. Against these men, every American must set his face, and steel his heart!

There are others amongst them tho' not many, who I believe opposed us because they thought they could not conscientiously go with us: to such of these who have behaved with humanity, I wish every species of Prosperity that may consist with the good of my country.

You see how naturally I slide into the habit of writing as freely as I used to speak to you. Ah my friend, if ever I see New York again, I expect to meet with the shade of many a departed joy—my heart bleeds to think of it.

You mention my Brother—If after having made so much Bustle in and for America, he has, as is surmised, improperly made his peace with Britain, I shall endeavor to forget that my father had such a son.

How is your health? How and where are your children? Whenever as a private Friend it may be in my power to do good to either, tell me; while I have a loaf, you and they may freely partake of it. Don't let this idea hurt you. If your circumstances are easy, I rejoice—If not, let me take off some of the rougher edges.

Mrs. Jay is obliged by your remembrance, and presents you her compliments—The health of us both is but delicate—our little girl has been very ill, but is now well. My best wishes always attend you, and be assured that notwithstanding any political changes, I remain, Dear Sir

Your affectionate Friend & Ser.
John Jay

His Honor and the Field of Honor

W.F.S.

The code of honor, so self-consciously adhered to in most of the nineteenth century, affected at least two members of the Supreme Court in the - course of their careers. For Stephen J. Field, toward the end of the century, it was essentially the code of the West, and indirectly involved the honor of a— well—a lady (see Judge Robert H. Kroninger's article, "The Justice and the Lady," YEARBOOK 1977). For Peter V. Daniel of Virginia, it was the *code duello* of the Old South, and although the details have never been confirmed, it apparently involved politics rather than a fair one, although one legend insists that a lady was involved.

Politics was certainly an adequate ground to provoke a challenge—witness the notorious duel between Alexander Hamilton and Aaron Burr, a few years before. Duels were fatal to a high degree—again, witness the soon defunct Hamilton and the unfortunate opponent of Mr. Daniel. Finally, duels were nominally illegal in most states—certainly in New York and Virginia; but the code of honor was held to represent a "higher law," and in any case the principals usually resorted to an adjoining state (New Jersey for Burr-Hamilton, Maryland for Daniel and his challenger, a political opponent not long remembered by history, by the name of John Seddon).

Burr, Hamilton and Daniel were practicing lawyers, sworn to uphold the established laws of their states; yet they did not hesitate to respond to the demands for satisfaction under the "higher law." Since the statutes of Virginia prohibited dueling, the Daniel-Seddon duel would be fought in Maryland. Maryland laws also prohibited dueling, but once the action was over, all parties (and any bodies) would be spirited back to Virginia. Technically, therefore, no crime

would have been committed on Virginia soil; practically, no prosecution would be possible in Maryland, since the parties were not extraditable. (Why not extraditable? Honor, among other things; *noblesse oblige*; Q. E. D.) As for the soon deceased Mr. Seddon, he had assumed the risk, so to speak; and in any case, the only actionable crime would have been violation of the anti-dueling statute, at least in the cavalier states of the old South.

Peter Vivian Daniel had been born of good Virginia stock, which is to say that he was predestined to live by the code of honor. He followed the traditional Virginia course for getting ahead in the world, reading law under one of the leaders of the bar, in this case, Edmund Randolph, who had been the first Attorney General of the United States. He consolidated this position, shortly thereafter, by marrying Randolph's youngest daughter, Lucy. There remained the standard final step into an established career—politics. This was the exciting world of the Jeffersonian (and anti-Jeffersonian) age, and by temperament the 24-year-old attorney became a Jeffersonian. Self-confident, aggressive to the point of bellicosity, this young lion moved to Stafford County—and into immediate conflict with a Fredericksburg business man, John Seddon.

Whatever political issue actually provoked the challenge, it had more root in fact than the suggestion that 15-year-old Lucy begged Daniel not to fight the duel. No Randolph, male or female, walked away from challenges, nor did Peter V. Moreover, Daniel was, by all accounts, a cool one indeed. Numerous stories after the fact described the young lawyer as devoting much of the two weeks before the encounter, practicing shooting at his own walking stick, stuck into the ground ten to fifteen paces away. Since Mr. Seddon, from what may be inferred from a later description, was decidedly broader than the walking stick, both Lucy and Peter could be reasonably sanguine as to the outcome.

Indeed, the portly Seddon went out of his way to present a good target. He showed up at the dueling ground resplendent in black pantaloons and a white waistcoat. The waistcoat was where the future Justice's ball pierced him—grievously enough that, soon after Seddon had been carried back to old Virginia, he was gathered unto his fathers. That was in 1808; two years later, with his law practice advancing, Peter married Lucy; and ten years later President James Madison nominated Daniel to be a judge of the United States District Court.

For the most part, dueling presented no embarrassment to a professional or a political career; by-gones were allowed to be by-gones. And yet—not quite, in the case of Justice Daniel. Almost from the outset, diehard political opponents began to spread rumors suggesting that Daniel had not lived up to the strict letter of the code of honor. The code required that both principals maintain total, formally polite, silence, and the story that got out through Richmond and Fredericksburg papers had Daniel commenting on the nice white line presented by Seddon's waistcoat. In a somewhat extraordinary action, both of the seconds to the duel denied the story.

When, in 1841, Daniel's nomination to the Supreme Court came before the Senate, someone may have fed the story of Daniel's by-then-established reputation for bellicosity to the opposition. Senator Samuel Southard of New Jersey, who had been a Princeton classmate of the nominee, called him unsuited by temperament for high judicial office because he was known to pursue his partisan controversies "to blood." This appears to have been nothing more than a shot in the dark (not to pun), and in due course the nomination was confirmed. Since the fatal encounter with John Seddon in 1808, Daniel had not provoked any more duels. But John Frank, his biographer (*Justice Daniel Dissenting*, Cambridge, Mass., 1964), notes that a decade later, in 1852, the Justice followed with sympathetic interest the dueling prowess of a nephew. Even by that date, the code of honor still prevailed.

Mr. Dooley Discovers a Unanimous Dissent

James M. Marsh

(The following gentle satire, with apologies to the late Finley Peter Dunne, first appeared twenty years ago in *The Shingle* of the Philadelphia Bar Association, and has been reprinted in various other journals and finally in the well-known book, *A Second Miscellany-at-Law* (London, 1973) edited by Sir Robert Megarry. The author, a former law clerk to Justice Robert H. Jackson, is presently a member of the Philadelphia firm of Labrum and Doak.—Ed.)

"Every one of them dissented" said Mr. Dooley. "It was unanimous."

"They's nine jedges on that coort, and, everyone of them dissented— includin' me brother Brennan, who wrote the opinion they're all dissentin' from."

"That don't make sinse", said Mr. Hennessy, "You can't have all the jedges dissentin'—it's impossible."

"Well, it may be impossible, but it happened anyhow," said Mr. Dooley, "And it's printed right here in the Coort's own Joornal of its Proceedings for February 25th."

"Read it for yourself:

"No. 28. James C. Rogers, petitioner, v. Missouri Pacific Railroad Company, a Corporation. On writ of certiorari to the Supreme Court of Missouri.

"Judgment reversed with costs and case remanded to the Supreme Court of Missouri for proceedings not inconsistent with the opinion of this Court.

"Opinion by Mr. Justice Brennan.

"Mr. Justice Burton concurs in the result.

"Mr. Justice Reed would affirm the judgment of the Supreme Court of Missouri.

"Mr. Justice Harlan, dissenting in Nos. 28, 42, and 59 and concurring in No. 46, filed a separate opinion.

"Mr. Justice Burton concurred in Part I of Mr. Justice Harlan's opinion.

"Mr. Chief Justice Warren, Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Clark, and Mr. Justice Brennan concurred in Part I of Mr. Justice Harlan's opinion except insofar as it disapproves the grant of the writ of certiorari.

"Mr. Justice Frankfurter filed a separate dissenting opinion for Nos. 28, 42, 46, and 50."

"See what I mean", said Mr. Dooley. "Each and ivery one of them dissented in this No. 28, called Rogers varsus the Missouri Pacific. Even Brennan, J., who wrote the opinion for the Court. He signed Harlan's dissent. Me old friend Holmes would've sooner been caught with a split writ than to show up on both sides of a case like that."

"But Brennan only signed Part I, and he says 'except insofar as,' " said Mr. Hennessy, "don't that mean anything?"

"Sure it does," said Mr. Dooley. "It means Brennan dissents from Harlan, too. I guess he figgers one good dissent deserves another."

"Where was me friend Burton?" asked Mr. Hennessy.

"He's all over the place," said Mr. Dooley. "As they say, he concurs in the result— which means he likes the answer but he can't stand Brennan's opinion. Thin he concurs in wan part of Harlan, J., but he can't stand the rest of him either."

"How could they git in such a mess?" asked Mr. Hennessy.

"That's what Felix says—in twinty thousand words," said Mr. Dooley.

"Felix who?" asked Mr. Hennessy.

"Frankfurter," said Mr. Dooley. "He's a Havvard, and a perfesser at that; he gave the rest of them a free lecture in this case— and that ain't like most of them Havvards, they come pretty dear."

"Well, what happened to this fellow Rogers anyhow?" asked Mr. Hennessy, "and the Missouri Pacific?"

"Plenty," said Mr. Dooley. "Rogers gits his money, wich the supreme coort of Missouri said he couldn't have; and the Missouri Pacific gits to pay it, wich they would probably just as soon not do."

* * * * *

Sp. Ct. Brand...

Viewers of the documentary films, "Equal Justice Under Law," described in YEARBOOK 1978, have commented on the fine wine enjoyed by Chief Justice Marshall and his colleagues—some writing critically but most curiously. Did the Justices really live that well, and more particularly, what did they actually drink? Since the film makers and their consultants were at pains to authenticate all possible details, the public is assured that the gourmet selections were taken from life.

Ben Perley Poore, a voluminous Washington reporter for much of the nineteenth century, wrote as follows in his *Reminiscences*, published in 1886 but describing what was a long-established practice in 1837: "The best Madeira was that labelled, 'The Supreme Court,' as their Honors, the Justices, used to make a direct importation every year, and sip it as they consulted over the cases before them, every day after dinner, when the cloth had been removed."

* * * * *

"How's come?" asked Mr. Hennessy.

"Well, pinitratin' all the joodicial gobbledook, it's like this: Rogers was workin' on the tracks of the Missouri Pacific and he fell off a culvert; the jury gave him damages but the Supreme Coort of Missouri took them away."

"Then the Supreme Coort of the United States listened to the loiyers' argyments and gave Rogers his money back again. Me brother Brennan is supposed to tell the reasons why—at three hunderd fifty two U. S. five hunderd, which sounds like the odds against anyone but a Philadelphia lawyer understandin' the case.

"But Felix says 'Brennan, me boy, we shoodn't have took this case in the first place, we shoodn't have decided it in the second, and we shoodn't be ladlin' out the railroad's money anyway—it ain't becomin' to this high coort' . . .

"Then Harlan, J., says 'Ye're half right, Felix, but ye're wrong there where ye say we shoodn't decide the case; but I dissent from me brother Brennan givin' him the money, too.'

"And thin Brennan says 'Ye're half right, too, Harlan, and I agree with your Part I "except insofar as"

"And so Brennan signed Harlan's dissent from Brennan's own opinion, and so did Warren, Black, Douglas and Clark, JJ., the same ones who signed Brennan's opinion in the first place."

"I tell ye, Hennessy, it's a demoralizin' situation. Here's the highest coort in the land, and they're all half right but none of them are all right, and they're tellin' on each other at that." -

"But what about me friend Stanley Reed?" asked Mr. Hennessy, "He didn't sign anybody else's opinion, did he?"

"No, he was the smart wan" said Mr. Dooley, "He quit."

"He *quit*?" said Mr. Hennessy, "Just like *that*?"

"Just like that" said Mr. Dooley, "He voted loud and clear to back up the Supreme Court of Missouri—and then he quit."

"On February 25th he did it, right after they handed down this Rogers case. He walked out of that court that same day and he hasn't been back since."

"Well," said Mr. Hennessy, "I don't blame him, I'd quit too."

"That's the trouble with thim judges, though," said Mr. Dooley.

"What's that?" asked Mr. Hennessy.

"They don't quit often enough," said Mr. Dooley.

The Court's Officers

Barrett McGurn

The Supreme Court is often described as the one place in Washington where the official signing his work has actually performed it. The nine Justices screen the 4,000 cases which come in each year, choose 150 or so to be decided on the merits, listen to the litigating lawyers, argue the matters among themselves and then decide and write Opinions. Even so, a staff of 300 provides essential support and most notable among them are the Court Officers.

Most ancient of the Court Offices is that of the Clerk. It is only 48 hours younger than the Court itself. February 1, 1790, was the Court's first day of existence, a quiet one. Only four of the six Justices appeared, one less than a quorum, so all business on hand such as it was, was put over to the following day when the letters patent of the five sitting Justices were read and Richard Wenman was taken on as Crier. Next day John Tucker of Boston took the oath as Clerk. He or his associates must have been excited for the minutes were dated February 3rd, 1789. Only later someone thought to pen in the correct "1790" but, even then, he forgot to scratch out 1789.

Mr. Tucker served only a year, but the average period of employment among his fifteen successors has been well over a decade. Among those with especially long tenures have been Elias B. Caldwell (1800-1825), William T. Carroll (1827-1863) and C. Elmore Cropley (1927-1952).

The Clerk serves as the channel through whom lawyers reach the Justices but through the years a myriad of other duties have devolved upon the incumbent of the Office. When James R. Browning, now chief judge of the Ninth Circuit Court of Appeals (San Francisco), was Clerk of the Supreme Court, he combed the files for clues to the role of his predecessors and came on the following, dated September 8, 1863, and addressed to Daniel Wesley Middleton (Clerk from 1863 to 1880):

"I have just received a letter from Mr. Morrison informing me that I have been ejected from my rooms in his house.

"I was one of the first that took rooms in his house, and did not expect to be turned out first to accommodate a speculating greedy Yankee woman. But such appears to be the fact.

"As I must stay somewhere I wish you would do me the favor to make the best arrangement for me you can.

"I am very weak in the legs and do not like the notion of getting up to the third story, if possible to avoid it. If I cannot do better, I suppose I must climb."

The letter made clear that the Justice hoped either that Clerk Middleton could serve effectively as an advocate with Landlord Morrison or else as an adept apartment hunter (ground floor flats much preferred). It did not explain the Pennsylvania Justice's animus toward Yankees, however, nor was there a hint of how the house hunting finally worked out. Some solution inside the always lively Washington residential market must have been found, however, for the 69-year-old Justice Grier served additional seven years.

With scores of thousands of lawyers currently members of the Supreme Court Bar, a Clerk's full reservoir of tact often is called upon as he deals with the tense nerves of opposing counselors. It must always have been thus, as Clerk Browning's research turned up at another point. He found a letter of 1897 to Chief Justice Morrison R. Waite asking for access to documentation which Clerk J. H. McKenney, for some reason, had withheld. In a letter drenched in irony the Chief Justice was told:

"I would respectfully request permission to examine in the presence of your Clerk, the Court record in . . . I do not desire even to touch the paper, but merely to look at it as Mr. McKenney turns the pages over for me....

Mr. McKenney survived the storm. He was Clerk from 1880 to 1913.

On many occasions through the decades Clerks have held the Bible as a Chief Justice has sworn in a new Chief Executive for the country. Traditions are respected. As the Washington Post noted in 1958, the office of Clerk of the Supreme Court is rare in the nation's capital as "one of the few remaining (positions) . . . which require a swallowtail coat." The Clerk is always clad formally when he takes his place at the left end of the Bench.

Among Clerks of recent years have been:

C. Elmore Cropley. A lifelong Washingtonian, born here in 1894, he joined the Court staff at thirteen as a pageboy and, except for two mid-career years at the nearby Library of Congress and the Smithsonian Institution, never worked anywhere else. He was Clerk for a quarter of a century until his death in 1952.

Harold B. Willey, Clerk from 1952 to 1956. He served the Court for thirty-two years, first as an Assistant Clerk in 1924, then as Deputy Clerk, starting in 1941. There was a parenthesis just after World War II when he performed as American secretary of the Nazi war crime trials.

John T. Fey (1956-1958). Mr. Fey (pronounced Fie) came to the Court from the deanship of George Washington Law School. He left for the presidency of the University of Vermont.

John F. Davis (1961-1970). A Maine native and a *cum laude* graduate of Harvard Law School, he argued fifty cases before the Court. He was second assistant to the Solicitor General.

F. Robert Seaver (1970-1972). He came to the Clerkship from his position as a hearing examiner for the Civil Aeronautics Board; he returned to the same post. At other points in his career he was general counsel for the United States Maritime Administration and the Federal Maritime Board.

Michael Rodak, Jr. He has been Clerk since 1972, and has been in the Office of the Clerk, starting as Assistant Clerk, since 1956. Mr. Rodak saw service as a sergeant major in the United States Air Force in Europe during World War II, is a *cum laude* graduate in economics from the College of Steubenville and has law degrees from Georgetown.

Reporter of Decisions

If the Clerk entered the Court through the front door, the Reporter of Decisions made use of a side entrance. The Justices in 1790 knew that they needed a Crier and a Clerk but it was left to a self-starting free-lance, Alexander James Dallas (father of the man who gave his name to the Texas metropolis), to figure out that the Court also needed someone to transmit the Opinions to the reading public. Mr. Dallas was an immigrant from Bermuda and a naturalized citizen. He published a volume of Pennsylvania court decisions. When, in its second year, the Supreme Court moved from lower Manhattan to Philadelphia, Mr. Dallas published a second volume of his court reports, this time including both Pennsylvania and United States Supreme Court actions. Thus were born the United States Reports, a series of books filling much of a library wall and now well over the 400-volume mark.

(See the article, "Early Court Reporters," by Gerold T. Dunne in **Yearbook** 1976, for more detailed biographies of the first holders of this position.)

The inventive Mr. Dallas had further fish to fry as the young republic moved forward toward its destiny. He became Secretary of the Treasury and Secretary of War. His court-reporting shoes were filled next by William Cranch, a nephew of President John Quincy Adams. Mr. Cranch became the first to report Supreme Court decisions on a regular basis without the addition of extraneous materials. Mr. Cranch was Reporter of Decisions from 1801 to 1815. His first months were difficult. Justices would speak their Opinions from the Bench and let it go at that. Mr. Cranch complained that he was laboring with "much anxiety as well as responsibility," trying to get the correct nuances into what he passed on. In the later Cranch years Justices, to Mr. Cranch's relief, began supplementing spoken words with written texts in all cases considered difficult or important. Thus began a tradition followed now in every case. Henry Putzel Jr., who has been Reporter of Decisions since 1964, receives carefully drafted written texts on every Court Decision and on each concurring and dissenting opinion. Justices share each draft as Court Opinions and dissents go through one writing after another, sometimes as many as fifteen of them. No longer do a few words spoken from the Bench settle a case.

Mr. Cranch whose career included 54 years as chief judge of the District of Columbia was the last of the free-lance Reporters of Decisions. He was followed by a paid Court officer, Henry Wheaton (1816-1827). Mr. Wheaton accompanied Decisions with head-notes, an aid to lawyers, and, during the past half decade, a boon to news wire reporters who cover the Supreme Court. Until the 1970's the headnotes showed up only in the bound volumes but Chief Justice Warren E. Burger asked Mr. Putzel and his assistant, Henry Lind, to speed up the drafting of these summaries so that they could accompany Decisions at the moment when judgment is rendered. The often heavy extra pressures on Mr. Putzel and Mr. Lind have proved a godsend for reporters trying to extract the essence of a fifty-page packet for a news wire bulletin three or four minutes after a Decision's release.

Mr. Wheaton's pay as Reporter of Decisions \$1,000 a year at the outset was not enough to keep him from moon-lighting for extra income. He gave up the job after eleven years to become Minister to Denmark. His successor, Richard Peters, also wound up in the diplomatic corps (minister to the Kingdom of Prussia). Several Reporters of Decisions later, what might be called the modern era for the office, began; in 1874 Congress recognized that proper financing was needed. Hand to mouth deals made by Reporters of Decisions with publishers to produce the volumes of Court actions came to an end; with an initial appropriation of \$25,000 Congress shouldered the burden of financing the issuance of the United States Reports. That terminated a quaint tradition of naming each volume of Court Decisions after that era's Reporter of Decisions (Dallas 1 to 4, Cranch 1 to 15, Wheaton 1 to 12, Peters 1 to 16, Benjamin Chew Howard 1 to 24, Jeremiah Sullivan Black 1 and 2 and John William Wallace 1 to 23. To this day Mrs. Henry Putzel mourns (not that bitterly) that lawyers do not cite volumes 376 of the United States Reports to the present as "Putzel one through 62.")

Mr. Putzel is thirteenth in the line going back to Alexander James Dallas. A Denver native and a former resident of St. Louis and of New Rochelle, N.Y., he is a graduate of Yale College and of Yale Law School. He began in Washington as an attorney for the Office of Price Administration. From 1945 to 1964 he was on the staff at the Department of Justice, serving after 1957 as chief of the Voting and Elections section of the Civil Rights Division.

The Reporter of Decisions nowadays checks references, goes over Opinions for style and, where need be, serves as Court grammarian. Mr. Putzel has framed on his wall a note Mr. Justice Oliver Wendell Holmes sent to one of his predecessors when a couple of questions of correct spelling came up. The Justice wrote:

'Principle,' of course, was a printer's error that I blush to have overlooked. 'Capitol' was deliberate ignorance—but I see from the

Century and my old stand-by, Worcester, that it should be 'Capital' which I never knew before and do a double blush. This is one of the few occasions on which I defer to the dictionaries."

The Marshal

Order in the courtroom was preserved in early years by United States marshals but, since 1867, the Court has had a marshal of its own as one of its officers. He sits at the right side of the bench during oral arguments. A wide share of the non-clerical functions of the Court—maintenance of the building, protocol duties, purchasing, and financial matters including even the signing of the Justices' salary checks—gravitate to him.

First of the court's own marshals was Colonel Richard Parsons who served five years. The current marshal, eighth in the line, is Alfred Wong, a 25-year veteran of the Secret Service whose duties used to include protection of the White House and of the Executive Office Building. Mr. Wong is in his third year in his present office. As in the case of the Clerks, various of the future marshals began their Court careers at the earliest moment, as pages. Frank Green, marshal from 1915 to 1918, started at the Court at the age of fourteen in the page corps. He became librarian in 1915. The present era of high professionalism in the library had not dawned. A pride of Mr. Green's family was that Uriah Forrest, a great grandfather, was an officer on the staff of George Washington. Another who came first to the Court as a page was Thomas Waggaman, marshal from 1938 to 1952. He was taken on as a page in 1911 and took his law degree from Georgetown in 1922. Mr. Waggaman had a spell also as the Crier.

Librarian

If Congress was slow to perceive the Justices' need for a properly financed Office of Reporter of Decisions, it was even less alert to the requirement of a good and adequately supervised law library. Chief Justice Earl Warren remarked in 1965 that a law library is as important to a court as a book collection is to a university, adding that "someone once noted that the library is the (very) heart of the university." In the Court's first decades Congress seemed to conceive otherwise.

No real provisions for a library were made for the Court during its first twenty-two years in New York, Philadelphia and Washington. In the Court's twelfth year, 1801, Congress considered whether the Justices should have access to the year-old Library of Congress. Not only was the decision negative but one Justice, as former Court Librarian Edward G. Hudon has related, went so far as to hope that "the Congressional Library would *never* be subjected to the abuse books in courts of justice (are) liable to."

Eleven years later the Congressmen relented. The Justices were allowed into the Library of Congress. What they found was not comforting. Much of the law section consisted of volumes of English law. That was not, of course, surprising, for the publishing of American court reports had begun in Connecticut only in 1789, the year before the United States Supreme Court first met. Two years later when the British burned the Capitol a good share even of the slim law section of the Library of Congress went up in flames, setting the Justices far back once again. Congress understood something of the problem but in 1816, 1826 and 1830 debates on whether to give the Justices their own law books ended in a refusal. It was only in 1832 that the then 42-year-old Supreme Court was assigned supervision of the Library of Congress' 2,011 law books, a condition being that any Congressman wanting to consult the volumes should be free to do so.

Chief Justice John Marshall must have been exultant for he got off a letter on August 2, 1832, to Mr. Justice Joseph Story, vacationing at home in Massachusetts, asking that son of Harvard what books ought to be included. The Librarian of Congress by that time must not have been doing a bad job for a follow up note from the Chief Justice to Mr. Justice Story on

September 22 included information that most of Story's list already was to be found in the collection the Court was supervising.

The job of looking after the books was assigned at first to the Clerk. He allowed members of the Supreme Court Bar to borrow three books at a time, but he imposed a \$1 a day fine for volumes retained beyond a "reasonable" period. Lost books were charged at the rate of double their estimated value. Congress gave \$1,000 to \$2,000 a year to add books. By 1860, there were 15,939 volumes in the collection, a handsome improvement. At that time a game of musical chairs was played with rooms in the Senate wing of the Capitol. The Senate moved into a new meeting hall and the Court took over the old Senate chamber, occupying it until the present building, the first of its own the Court has had, became available in 1935. The earlier Court chamber became the Court library. That too remained unchanged for 75 years.

Starting in 1845 the law books of the Library of Congress, all of them under Supreme Court control, were divided: some going to the homes of Justices where Opinions were written (the Justices having no other chambers), some kept for quick reference in the Justices' Senate conference room. By 1884 the Clerk must have found the Library chore a burden; it was handed over to the Marshal. Three years later, Henry DeForest Clarke, an employee of the Marshal, was assigned as the first in the chain of Court Librarians. Mr. Clarke had started at the Court as a porter. He remained as Librarian until his death in 1900. After a fifteen-year hiatus during which Frank Key Green (a former Court page) was Librarian, Mr. Clarke's son, Oscar DeForest Clarke, reinstated a Clarke family dynasty among the court books. The second Librarian Clarke served thirty-two years, into the late 1940's.

During the first Clarke period in the joint Congressional and Court library the number of books rose to 101,868. At that time, at the turn of the century, the present building of the Library of Congress was completed. All but 34,860 of the books were taken from Mr. Clarke's control to become the heart of the Library of Congress' present collection of 2 million law books, a collection available to be drawn upon by the Justices as situations arise. The Justices' conference room collection remained behind as the core of what has become the Court's own current second- and third -floor collection of 230,000 volumes.

The second Librarian Clarke took over during World War I with a staff of two. By the time of the move to the present building in 1935 the Library team had grown to ten. Thirteen years later, in 1948, with Helen C. Newman overseeing the Court's store of books, Congress elevated the Court Librarian to the present dignity as fourth of the Officers, taking a place beside the Clerk, the Reporter of Decisions and the Marshal. When Librarian Newman died at the age of sixty-one Chief Justice Warren paid her a tribute from the Bench and the Court flag flew for three days at half mast.

Henry Charles Hallam Jr., a former page, was the fifth Librarian. His whole life work until his retirement in 1972 was at the Court. The sixth Librarian, Edward Hudon, formerly was Assistant United States Attorney for Maine, and is now Associate Professor of Law at Laval University in Quebec. Current Librarian, the seventh, is Roger F. Jacobs, former law librarian at the University of Detroit, and Professor of Law at the Universities of Windsor (Ontario) and Southern Illinois.

Administrative Assistant to the Chief Justice

Another official providing major support at the court is the Administrative Assistant to the Chief Justice. So far there has been only one, Mark W. Cannon, a holder of three graduate degrees from Harvard, who came as Administrative Assistant to Chief Justice Burger in 1972.

The need for an A.A. was clear at least from the time when former Governor Earl Warren of California succeeded Chief Justice Frederick Moore Vinson in 1953. The new Chief Justice found that he had two secretaries, three law clerks and two messengers. Accustomed as he had

been in Sacramento to "layers of staff and line specialists," Chief Justice Warren was astonished. "That was my staff, that's all there was!", he marvelled as he told of it later.

The Chief Justice of the United States wears many hats. He chairs the Court, presides at oral arguments, leads the discussion of cases in the Justices' closed conference, and oversees the staff of 300. But beyond that he also chairs the Judicial Conference of the United States which looks after the affairs of the 100 federal courts, he supervises the Administrative Office of the United States Courts (the business manager of the federal court system), looks after the Federal Judicial Center (the federal court think tank and school), and serves as chancellor of the Smithsonian Institution (the world's largest museum complex). To do all that, Mark Cannon noted, the Chief Justice had the help of "a personal staff smaller than that of a freshman Congressman."

Congress in 1971 created a new position in the federal judiciary, the circuit executive. Seven hundred candidates applied and fifty-two were certified as eligible. Prominent among the fifty-two was Dr. Cannon, then director of the New York Institute of Public Administration, the nation's oldest center for research and training in the area of public affairs. Chief Justice Burger invited Dr. Cannon to go over with him the list of duties he and an A.A. would have to handle. It took most of a Saturday to go through the list. Dr. Cannon agreed that the Chief Justice needed someone to aid him; in fact he estimated the requirement at "about twenty professionals of varied skills and disciplines." He agreed to take the job and has been tirelessly busy at it ever since.

Thus far, with the A.A.'s help, a Judicial Fellows program has been added at the Court. Two or three Ph.D.'s and college professors, supported by foundation grants, pass a year in Court service, studying judicial practice and sharing current thought from a variety of academic research areas. Supplementing them are a group of interns, college students who receive no payment but generally are granted college credit for the months of Court work. Research is done on subjects covered in speeches of the Chief Justice. Help is given on such projects as the 1976 Pound Conference in St. Paul, an effort of judges and lawyers to foresee problems and solutions for American justice into the next century. The Court's first historical society has been created. Modernization including the first computer has been brought to the Court. The improvements made possible by creation of the position of A.A. to the Chief Justice go on and on.

The names of the 101 Justices of American history are writ large on the pages of the national story, but it seems only meet that some of these others who work behind and at the elbows of the Justices should be noted too.

CURRENT LITERATURE

PUBLICATIONS, July 19 77—June 1978

PATRICIA R. EVANS and ROGER F. JACOBS

This year's survey, reporting on the publication of eighteen titles, shows a reverse, albeit slightly, of the downward trend in the production of books about the Court noted in the 1978 YEARBOOK. It is somewhat difficult to establish a meaningful subject matter dichotomy for the eighteen titles published during this period. For example, although six titles relate to the biography or judicial philosophy of one or more justices the Jacobsohn book, concerning itself with the theory of Supreme Court decision-making generally, still contains a significant enough treatment of Justice Frankfurter's philosophy to class the title as biographical. *The First Hundred Justices* is also unique in its compendium of statistics about the justices. Five titles are studies of individual or collective cases. These range from the comprehensive treatment of the steel seizure case by Marcus to the long polemic essay on the abortion cases by Melvin. The Wasby book might be characterized as a case study but it is in truth much more. Thus it would be classed with a group of four books which concern themselves with either the appropriate Constitutional role for the Court or how in fact the Court's decisions impact upon various groups. Finally, three titles, because of the rudimentary approach to their subject, would be placed in a class of books attempting to meet the needs of students unfamiliar with basic court history, organization or practice. Because this classification is so unimpressive and arbitrary, and because so few titles were published, a strict alphabetical order arrangement was chosen for this survey.

Arnold, Otto Carrol. *Religious Freedom on Trial*. Valley Forge, Pa.: Judson Press. 1978. 112 pages.

Examining Supreme Court decisions in the areas of church-state relationships, this book attempts to review the pertinent decisions, place them in historical perspective and examine the problem of evaluating issues affecting individual consciences.

Berger, Raoul. *Government by Judiciary: the Transformation of the Fourteenth Amendment* Cambridge, Mass.: Harvard University Press. 1977. 483 pages.

Arguing that the Court is to police the boundaries of the Constitution and not serve as a non-elected legislative body, Berger's work has attracted no small amount of attention. The book takes the position that the Court is bound by the original intention of the Constitution's Framers, because the greatest security for a consistent and stable government is the faithful exercise of its powers. After analyzing relevant historical records Berger concludes that the Framers of the Fourteenth Amendment did not intend that it reach either suffrage or segregation and for the Court to interpret otherwise is to rewrite the Constitution. In his view, however, the Court has done just that and in rewriting it has acted outside its grant of power. He urges that the Court should either desist from these practices or the people should expressly approve of "government by the judiciary."

Berkson, Larry Charles. *The Supreme Court and its Publics: the Communication of Policy Decisions*. Lexington, Mass.: Lexington Books. 1978. 145 pages.

This book is a study of communications theory as applied to the process of Supreme Court decision-making specifically as the opinions of the Court are communicated to the public. Limiting itself to Florida, the study uses questionnaires to survey ten groups directly affected by Supreme Court decisions. Among these groups are policemen, school teachers, moviehouse operators, etc. Berkson collects data on the sources from which these various groups obtain what they consider to be reliable information about decisions of the Court. A final recommendation of the study is that the Supreme Court Public Information office expand its services to the publics which are not adequately served by the present communication system.

Berry, Mary Frances. *Stability, Security, and Continuity: Mr. Justice Burton and Decision-making in the Supreme Court, 1945-1958*. Westport, Conn.: Greenwood Press. 1978. 286 pages.

Presenting a chronological treatment of Justice Burton's years on the Court, this book portrays him as "a quiet, unassuming, competent, Although many contemporaries and historians have assessed Burton as mediocre, Berry portrays him as "a quiet, unassuming, competent, lawyers judge." The study relies heavily on the Burton papers.

Blaustein, Albert P. and Roy M. Mersky. *The First One Hundred Justices Statistical Studies on the Supreme Court of the United States*. Hamden, Conn.: Archon Books. 1978. 210 pages.

This title offers a statistical compendium of materials relating to the first one hundred justices and those nominated but who did not serve. Part one contains interesting statistics such as the geographical distribution, religion, and length of service of the Justices. Part two reports the findings of a survey of academics as to their view of the quality of the first one hundred Justices. Part three considers factors in the selection of capable justices. Part four is a discussion of those nominated but who never served and part five counts the opinions of the Court and reports on the relative productivity of selected justices. The appendix consists of eleven tables of varying utility, but in this age of quantification, surely someone will find a use for each one. This is a useful research tool of interest to the serious Supreme Court scholar.

Galloway, John. ed. *Criminal Justice and the Burger Court*. New York: Facts on File. 1978. 231 pages.

This is a survey of the Burger Court and criminal justice prepared in the same manner as the earlier study of the Warren Court and criminal law. The cases selected for inclusion here illustrate how the Burger Court has held the line or retreated from the decisions of the Warren Court in the area of criminal law. Particular attention is given to the Burger pre-trial identification procedures and the use in court of illegally seized evidence. The summary discussion of the Court's major concerns and the inclusions of abridged opinions suggest a work aimed at providing the uninitiated with an overview of the Burger Court's attitude toward criminal law.

Cullen, Charles T. and Herbert A. Johnson, editors. *The Papers of John Marshall, Vol. II*. Chapel Hill, N.C.: University of North Carolina Press. 1977. 547 pages.

Vol. II of the papers of John Marshall covers the years 1788-1795, a period of Marshall's life dominated by a concern with the practice of law. Every document written or signed by Marshall between July 1788 and 1795 is either printed, summarized in a calendar entry, or listed in this volume. According to the editor, more than 90 percent of the documents presented here

have never appeared in print. During these seven and half years, Marshall declined offers of federal office in order to limit his activities to the Richmond area and maintain his legal practice before the state courts. Because of his involvement in Virginia, the papers, correspondence and account book presented here offer, in addition to insight to Marshall as a lawyer, a source for new information on the practice of law in Virginia and the legal system of the period.

Earyl, Stephen Tyree. Constitutional Courts of the United States: The Formal and Informal Relationships Between the District Courts, the Courts of Appeals, and the Supreme Court of the U.S. Totowa, N.J.: Littlefield, Adams. 1977. 184 pages.

Constitutional Courts of the U.S. provides an overview of the U.S. Federal Court system with attention given to actual operation of the District Court, Court of Appeals and Supreme Court. Early examines the ways in which the national court system works as a system and also as autonomous units. Each of the various components has an institutional and a human dimension which in turn affects the formal and informal aspects of judicial operation. The author is frustrated by the grand silence of the national judiciary and is forced to rely on biographies and studies of judicial process. Discussion of intercourt relationships, with particular emphasis on inferior courts, is the major coverage of this non-technical book written from a political science perspective.

Ginger, Ann Fogan. *The Law, the Supreme Court and People's Rights.* Completely Revised. Woodbury, N.Y.: Barron's 1977. 716 -pages.

Although this work is not original this year the assertion that it is completely revised as well as the fact that the 1974 edition was not cited in earlier *Yearbooks* prompts this mention. Ginger provides a description of human rights cases which reached the Court while Earl Warren was Chief Justice. She groups her cases around the First, Fifth and Fourteenth Amendments. Her writing is not aimed at the knowledgeable lawyer or scholar but rather at a readership which is more interested in the factual backgrounds of the cases than the complete decisions of the Court.

Hamilton, Virginia Van Der Veer. ed. *Hugo Black and the Bill of Rights: Proceedings of the First Hugo Black Symposium in American History on "The Bill of Rights and American Democracy."* Alabama: University of Alabama Press. 1978. 104 pages.

This is the publication of the proceedings of the First Hugo Black Symposium in American history. Included are an introduction discussing Justice Black's ties to Alabama, a dedicatory address by Chief Justice Warren Burger, and papers by Leonard Levy on the Fifth Amendment, Donald Meiklejohn on Freedom of Speech, Paul Freund on Freedom of Religion and remarks by Max Lerner upon the dedication of the site of the future Hugo Black Library in the Justice's home town of Ashland, Alabama.

Jacobsohn, Gary J. *Pragmatism, Statesmanship, and the Supreme Court.* Ithaca, N.Y.: Cornell University Press. 1977. 214 pages.

This book is an attempt to illuminate "statesmanship" in the judicial context by inquiring into the pragmatic school of jurisprudential thought. Jacobsohn proposes that when faced with the dual tension of the power of the Court resting upon public opinion as set against the idea of complete independence of the courts, the statesmanlike judge adapts the constitution to the changing social situations while leaving the document unaltered. The author argues that the pragmatic movement in American jurisprudence has attempted to balance the law and the needs

of a society in rapid transition. To illustrate the application of pragmatic principles to constitutional interpretation, one chapter is devoted to an analysis of the "pragmatic" and "statesmanlike" qualities of the opinions in the reapportionment controversy. Several chapters examine Justice Frankfurter's judicial philosophy concluding with the view that contrary to the standard interpretations, Frankfurter should not be classed as a judicial pragmatist.

Marcus, Maeva. *Truman and the Steel Seizure Case; The Limits of Presidential Power*. New York: Columbia University Press. 1977. 390 pages.

This study examines the history and significance of the events and litigation leading up to the Supreme Court decision in *Youngstown Sheet & Tube Co. v. Sawyer* which invalidated Truman's seizure of the steel mills in 1952. By closely examining the individual opinions of the justices, as well as other factors related to the President, the parties and the public, Marcus concludes that although the broad language of the courts opinion suggests that the holding was simple and sweeping, this was not the case. This work also analyzes the steel seizure case as it influences the doctrine of separation of powers and the theory and practice of presidential power. Extensive notes and bibliography.

Marquardt, Dorothy A. *A Guide to the Supreme Court*. Indianapolis: Bobbs-Merrill. 1977. 132 pages.

This is a short general treatment of the function and history of the Supreme Court directed to the young reader. The largest sections are devoted to short biographies of the Chief Justices, the briefest summaries of landmark decisions (no citations) and appendices which reprint the constitution and a table of the associate justices.

Mason, Ed. *Chief Justices of the United States*. Columbus, Ohio: Dispatch Printing Co. 1977. 178 pages.

This book, written in a style appropriate for student use, is part of a series endorsed by educators in fifty-five different school systems. Basic information about the Court, its history and operation is provided. Biographical sketches of the Chief Justices as well as summaries of selected leading cases are also offered. It lacks both a table of contents and an index.

Melvin, Edward J. *The Legal Principles of the Founding Fathers and the Supreme Court*. Jenkintown, Pa.: Pro Life Coalition of Pennsylvania. 1977. 36 pages.

This polemic essay offers a survey of the historical background of the pro-abortion decisions handed down by the Court in 1973 and 1976. Includes notes but no index.

Shriver, Harry Clair. *What Justice Holmes Wrote; and What has been Written about Him: A Bibliography, 1866—1976*. Potomac, Maryland: Fox Mills Press. 1978. 67 pages.

This bibliography covers the period 1866-1976. Entries are confined to Holmes' own writings and those relating directly to him. The arrangement is by form with books and imprints of Holmes' writings in the first section and periodical literature in the second. The publication is limited to 400 copies making general availability questionable.

Tarr, George Alan. *Judicial Impact and State Supreme Courts*. Lexington, Mass.: Lexington Books. 1977. 184 pages.

This political science study looks at the variation in response of state Supreme Court judges to U.S. Supreme Court decisions concerning the establishment of religion. Although the author asserts that a substantial body of literature has studied the general import of these decisions his work here is the first to focus on comparative judicial responses.

Wasby, Stephen L., Anthony D'Amato and Rosemary Metrailler: *Desegregation from Brown to Alexander: An Exploration of Supreme Court Strategies*. Carbondale: Southern Illinois University Press. 1977. 489 pages.

Desegregation from Brown to Alexander is a study of the use of strategy by the Supreme Court in its policy making role. The authors, representing the fields of law and political science, use the racial desegregation decisions to examine among others, the judicial techniques of case selection, delay, summary disposition, and percurium rulings. The study makes good use of the often overlooked oral arguments as a resource for research on the Court and relates the content of argument to the resulting decision of the case. From this analysis cases are seen as products of the systematic development from briefs to oral argument to decision rather than as isolated documents reflecting judicial policy-making.

PERIODICALS

The list of periodical articles about the Court that follows is selective. The compilers are conscious that the bibliographic tools used in preparing this survey may list case notes and other articles under the specific subject of the article and not under the major heading "Supreme Court". Investigating every possible subject for Court related articles would require more time than is presently available. Moreover, many news stories and one page essay articles were omitted purposefully. Consequently this survey is not comprehensive in nature. Notwithstanding this limitation, this list, it is hoped, is suggestive of the quantity and range of periodical articles about the Court.

Supreme Court and the Constitution

Bills of attainder: a study of amendment by the Court. R. Berger, *Cornell Law Review*. 63: 355-404. March, 1978.

Constitutional review: Supreme Court. 1976-77 term. M. Lehmann. *Hastings Constitutional Law Quarterly*. 5: 61-419. Winter, 1978.

Delimiting religion in the Constitution: a classification problem. A. Bowser. *Valparaiso University Law Review*. II: 163-226. Winter, 1977.

Has the Supreme Court abandoned the Constitution? L. McDonald. *Saturday Review*. 4:10-12±. May 28, 1977.

In defense of justice: some thoughts on reading Professor Mendelson's "Mr. Justice Douglas and government by the judiciary." S. Goldman. *Journal of Politics*. 39: 148-65. February, 1977.

Reason and the fourth amendment—the Burger court and the exclusionary rule. *Fordham Law Review*. 46: 139-75. October, 1977.

Supreme Court and the constitutional rights of prisoners: a reappraisal. F. Calhoun. *Hastings Constitutional Law Quarterly*. 4: 219-47. Spring, 1977.

The new judicial federalism. L. Weinberg. *Stanford Law Review*. 29: 1191-1244. July, 1977.

The Burger Court

Access to the federal courts: a symposium. Rights without remedies: the Burger court takes the federal courts out of the business of protecting federal rights. A. Morrison; Standing and the Burger court: an analysis and some proposals for legislative reform. R. Sedler; Equal protection and the poor. A. House-man. *Rutgers Law Review*. 30: 841-906. Summer, 1977.

Blacks and the Burger Court: the case of the narrowing path to justice. R. C. Maynard. *Black Enterprise*. 8: 31-2+. March, 1978.

Burger court and searches incident to a lawful arrest: the current perspective. P. W. Lewis. H. W. Mannle. H. F. Allen. *Capital University Law Review*. 7:1-23. 1977

Burger's Court feathers its nest. R. Sherrill. *Nation*. 226: 750-3. June 24, 1978.

Certain conservatism or mixed surprise? Civil liberties in the Burger Court, 1976-1977. S. L. Wasby. *Civil Liberties Review*. 4:33-51 November/ December, 1977.

Growing enigma of the Burger Court. D. F. Pike. *U.S. News*. 85: 23-4. July 17, 1978.

The Nixon Court: a study of leadership. C. LeVar. *Western Political Quarterly*. 30: 484-92. December, 1977.

Optimism is not warranted: the fate of minorities and the economically poor before the Burger Court. I. Reid. *Howard Law Journal*. 20: 346-73. 1977.

Poverty of justice: the Burger Court and the poor. J. Bolner. C. L. Eubanks. *Capital University Law Review*. 7: 35 1-83. 1978.

The Justices

Great Presidents, Great Justices? R. Funston. *Presidential Studies Quarterly*. 7: 19 1-99. Fall, 1977.

The logic of experience: Oliver Wendell Holmes on the Supreme Judicial Court. M. Tushnet. *Virginia Law Review*. 63: 975-1052. October, 1977.

Supreme Court in retreat: wealth discrimination and Mr. Justice Marshall. M. L. Levy. *Texas Southern University Law Review*.

4: 209-42. 1977.

Tom C. Clark: the Justice as administrator. D. Dorm. *Judicature*. 61: 271-77. January, 1978.

The Operations of the Court

Appellate jurisdiction of the Supreme Court: reflections on the law and the logistics of direct review. H. Wechsler. *Washington & Lee Law Review*. 34: 1043-64. Fall, 1977.

Caseload of the Supreme Court: 1975 and 1976 terms. G. Casper, R. A. Posner. *Supreme Court Review*. 1977: 87-98. 1977.

Clerking for the Supremes. S. Kaplan. *New Republic*. 177: 25-6. October 15, 1977.

The hidden face of the Supreme Court. G. Elsasser. *Chicago Tribune Magazine*. 18-19+. April 23, 1978.

Intermediate National appellate court: solution or diversion? *Villanova Law Review*. 22: 1022-41. August, 1977.

National court of appeals. C. Wiggins. *Trial*. 13: 36-9. November, 1977.

Role and the experiences of Supreme Court law clerks: an annotated bibliography. *Law Library Journal*. 70: 338-42. August, 1977.

Rolling back the top on Chief Justice Burger's opinion assignment desk. D. Haines. *University of Pittsburgh Law Review*. 38: 63 1-95. Summer, 1977.

Thinning the judicial thicket: further possible steps to meet the continuing caseload problem. K. W. Patterson, *Federal Rules Decisions*. 74: 477-96. August, 1977.

Decisions of the Court

Changing trends in antitrust doctrines: an unprecedented Supreme Court term—1977. M. Handler. *Columbia Law Review*. 77: 979- 1028. November, 1977.

Cold war justice: the Supreme Court and the Rosenbergs. M. E. Parrish. *American Historical Review*. 82: 805-42. October, 1977.

Coming of age of the Burger court: labor law decisions of the Supreme Court during the 1976 term. H. T. Edwards. *Boston College Law Review*. 19: 1-99. November, 1977.

The commerce clause since National league of cities. D. Whitman. *Business Law Review*. 10: 46-53. Fall, 1977.

Confusion worse confounded: -the Supreme Court and obscenity law. *New York University Law Review*. 52: 820-59. October, 1977.

The constitutional status of capital punishment: an analysis of Gregg, Jurek, Roberts, and Woodson. L. S. Tao. *Journal Urban Law*. 54: 345-66. Winter, 1977.

Contemporary Supreme Court directions in civil liberties. R. I. Steamer. *Political Science Quarterly*. 92: 425-42. Fall, 1977.

Criminal waiver, procedural default and the Burger court. R. S. Spritzer. *University of Pennsylvania Law Review*. 126: 473-514. January, 1978.

Finality rule for Supreme Court review of state court orders. *Harvard Law Review*. 91: 1004-32. March, 1978.

An independent right to freedom of association. R. Raggi. *Harvard Civil Rights—Civil Liberties Law Review*. 12: 1-30. Winter, 1977.

Inside the great campaign finances case of 1976: a conversation with Ira Glasser. *Civil Liberties Review*. 4: 8-19. September/October, 1977.

Legitimizing segregation: the Supreme Court's recent school desegregation decisions. I. Bannon. *Civil Rights Digest*. 9: 12-17. Summer, 1977.

Of lines and men: the Supreme Court, obscenity, and the issue of the avertable eye. N. W. Proviser. *Tulsa Law Review*. 13: 52-81. 1977.

Litigant access doctrine and the Burger court. T. E. Yarbrough. *Vanderbilt Law Review*. 31: 33-70. January, 1978.

Mandatory jurisdiction of the Supreme Court— some recent developments. M. Tushnet. *University of Cincinnati Law Review*. 46: 347-71. 1977.

Miranda doctrine in -the Burger court. G. R. Stone. *Supreme Court Review*. 1977: 99-169. 1977.

Precedential effect of summary affirmances and dismissals for want of a substantial federal question by the Supreme Court after Hicks v. Miranda and Mandel v. Bradley. *Virginia Law Review*. 64: 117-43. February, 1978.

Pronouncements of the Supreme Court of the United States in the criminal law field during the 1976-1977 term. W. H. Erickson. *National Journal of Criminal Defense*. 3: 1-84. Spring, 1977.

A search for sanity in antitrust. W. Guzzardi *Fortune*. 97: 72-5+. January 30, 1978.

Schwinn's swan song. M. Metzger. *Business Horizons*. 21: 52-6. April, 1978.

Standing to sue to challenge violations of the Williams act. E. Aranow, and others. *Business Lawyer*. 32: 1755-69. July, 1977.

State constitutional guarantees and Supreme Court review: Justice Marshall's proposal in Oregon v. Hass. P. J. Galie, L. P. Galie. *Dickinson Law Review*. 82: 273-93. Winter, 1978.

Supreme Court and illegitimacy: 1968-1977. R. L. Stenger. *Family Law Quarterly*. 11: 365-405. Winter, 1978.

Supreme Court on privacy and the press. W. E. Lee. *Georgia Law Review*. 12: 215-47. Winter, 1978.

The Supreme Court 1976 term; foreword: Equal citizenship under the Fourteenth amendment. K. L. Karst. *Harvard Law Review*. 91: 1-301. November, 1977.

Supreme Court review, 1977. Foreword—doctrinal doldrums: the Supreme Court 1976 term criminal law decisions. B. J. George. *Journal of Criminal Law* 68: 469-642. December, 1977.

Supreme Court's trimming of the section 10 (b) tree: the cultivation of a new securities law perspective. *Journal of Corporation Law*. 3: 112-46. Fall, 1977.

Title VII, seniority, -and the Supreme Court: clarification or retreat? J. E. Jones. *Kansas Law Review*. 26: 1-60. Fall, 1977.

United States Supreme Court decisions affecting State and Local governments [1976]. *Popular Government*. 42: 1-56. Winter, 1977.

Women, equtlity, and the Bakke case. R. Ginsburg. *Civil Liberties Review*. 4: 8-16. November/December, 1977.

Workers' Sabbath: religious belief and employment. L. Pfeffer. *Civil Liberties Review*. 4: 52-6. November/December, 1977.

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Are we ready for the truth in judging. W. Forrester. *American Bar Association Journal*. 63: 1212-16. September, 1977.

Capital punishment in the states: prospects for the future. Knight. *Virginia Social Science Journal*. 12: 6-13. November, 1977.

Children's images of the Supreme Court: a preliminary -mapping. G. A. Caldeira. *Law & Society Review*. 11: 851-71. Summer, 1977.

Equal justice under law. W. Swindler. *American Bar Association Journal*. 63: 1099-1104. August, 1977.

Fate of arbitration in the Supreme Court: an examination. G. W. Moss. *Loyola University Law Journal*. 9: 369-95. Winter, 1978

Judges judge the Supreme Court. G. A. Caldeira. *Judicature*. 61: 208-19. November, 1977.

Longitudinal look at court structure 1916-1969.

R. Handberg. *Capital University Law Review*. 7: 385-96. 1978.

NAACP and the Supreme Court: Walter F. White and the defeat of Judge John J. Parker, 1930. D. C. Hine. *Negro Historical Bulletin*. 40: 753-7. September, 1977.

Trends in the United States Supreme Court's use of the ripeness doctrine in free speech and association cases: a comparison with Canadian trends. B. Child. *Case Western Reserve Journal of International Law*. 10: 415-68. Spring, 1978.

The Supreme Court and the electoral process. V. Earle and C. Earle. *World Affairs*. 140: 25-40. Summer, 1977.

The Supreme Court of the United States: a bibliographical essay. A. Miller. *American Studies International*. 16: 5-14. Winter, 1977.

Supreme Court's bronze doors. D. Mason. *American Bar Association Journal*. 63: 1395-9. October, 1977.

RES GESTAE

Supreme Court Historical Society

ANNUAL REPORT BY WILLIAM H. PRESS

During its third year of operations, which ended on June 30, 1978, the Supreme Court Historical Society enlarged its membership, expanded its activities and made significant progress toward its basic mission of better informing the general public about the judicial branch of the United States Government, and especially, about the Supreme Court of the United States.

Members were informed of this progress at the Third Annual Meeting held on May 18, 1978.

The first annual Symposium of the Society initiated at that meeting was a most interesting and inspiring session held in the recently restored Supreme Court Chamber on the ground floor of the U.S. Capitol. Dr. Richard B. Morris, Professor Emeritus of History at Columbia University and Editor of the Jay Papers, presented a paper on the Supreme Court during the Chief Justiceship of John Jay, 1789-1795. Future lectures are planned at least annually, and the papers will be printed and distributed.

Later in the day in the Supreme Court Room, President Gossett presided over the General Membership Meeting and made her Annual Report. Trustees whose terms expired on June 30, 1978 were re-elected to three year terms ending June 30, 1981. They are: Elizabeth S. Black, Vincent C. Burke, Jr., Charles T. Duncan, Elizabeth Hughes Gossett, Lila Annenberg Hazen, Linwood Holton, Earl W. Kintner, Sol M. Linowitz, William P. Rogers, Robert T. Stevens, William F. Swindler, Lauson H. Stone and Fred M. Vinson, Jr.

The death of General Rowland F. Kirks in November, 1977 was recorded and mourned. Kirks was an incorporator of SCHS, a trustee, Executive Committee member and a loyal and enthusiastic supporter.

There followed a brief meeting of the Board of Trustees which was chaired by Robert T. Stevens, Chairman of the Board. All SCHS officers were re-elected for three year terms, ending June 30, 1978:

Chief Justice Warren E. Burger, Honorary Chairman
Robert T. Stevens, Chairman
Elizabeth Hughes Gossett, President
Earl W. Kintner, Vice-President
William P. Rogers, Vice-President
Whitney North Seymour, Vice-President
Fred M. Vinson, Jr., Vice-President
Mrs. Hugo L. Black, Secretary
Vincent C. Burke, Treasurer
Mary Beth O'Brien, Assistant Secretary
Richard B. Pilkinton Press, and William H. Ass't Treasurers

The Chief Justice was the featured speaker at the Third Annual Dinner before a capacity audience in the Great Hall of the Supreme Court Building—a grand finale to the events of the Annual Meeting. The Chief Justice spoke about the relationship of Chief Justice John Marshall to his contemporaries Aaron Burr and Thomas Jefferson.

From July 1, 1977 until June 30, 1978, SCHS gained 877 new members, bringing the total membership to over 2,200. The Society concentrated its membership activities mainly on

Supreme Court Bar members. Mailings were also made to the members of the General Practice Section of the American Bar Association and selected groups of state and local bar members and academicians. Support from present members of SCHS was particularly gratifying, with about 85% renewing their dues for the coming year.

Financial records for the last fiscal year, July 1, 1977-June 30, 1978 have been fully audited by Matthews, Carter and Boyce, certified public accountants. During the year, total general revenues were \$187,950 against total expenses of \$201,273. There were no exceptions concerning the handling of funds which totalled \$257,905.

This past year, the Society presented to the Court oil portraits, of Associate Justices Henry B. Livingston and William H. Moody. Funds for the paintings were provided by contributions from the New York and Massachusetts Bar Foundations and members of the General Practice Section of the American Bar Association. With the addition of these paintings, the Society has now completed its goal of providing portraits of all former United States Supreme Court Justices for display in the Supreme Court Building.

Several unique and valuable items have been added to the Society's collection of historic memorabilia and early American furnishings this year. A damask-covered Clearfield style sofa was the gift of Mr. and Mrs. Charles A. Hobbs. The Society received a small, leather-covered travelling box which was used to carry personal papers by Chief Justice John Marshall,- the gift of Thomas Marshall Forsythe, Jr., the great-great grandson of Marshall. SCHS trustee David A. Morse made a gift of a rare legal affidavit written entirely in the hand of Abraham Lincoln. A 1664 edition of "Justinian's Code" was presented to the Society by Huntington Cairns. The small leather-bound book was at one time owned by Supreme Court reporter Richard Peters and contains plentiful annotations and marginal notes.

President Gossett continued to add to the Society's acquisitions of memorabilia of her father, Chief Justice Charles Evans Hughes. Among her latest presentations were Hughes' gold watch, Phi Beta Kappa key, travelling clock and rare personal photographs and letters.

The Society's major research project, "The Documentary History of the Supreme Court, 1789-1800," continued at a rapid pace in its second year. The total number of documents which the staff anticipates collecting has soared from 3000 to 6000. The Documentary History Staff searched for and reproduced many of these documents necessary for the five-year editorial work, and projects that the first volume will be ready for publication in 1979. Early in 1978 the Society received its second annual \$25,000 matching grant from the National Historical Publications and Records Commission for the project. In June, a supplemental grant of \$3525 was awarded by the Commission to help offset the escalating expenses of the project. A contribution of \$26,000 was received in April from Mr. William T. Gossett to cover the Society's share of expenses for the first year of the Documentary History, and \$5,000 was awarded by the M. L. Annenberg Foundation toward the 1978 expenses. The Annenberg Foundation has pledged similar amounts for 1979 and 1980. The Society is actively seeking funding for the balance of the 1978 share and for the remaining three years of the project.

Knowledge and materials about the Courts are obviously required by scholars and historians. But they must also be widely circulated to the public to provide a clearer understanding of the federal judicial process, particularly Supreme Court functions and operations. Through its retail activities, revenues from publications and gift items sold at the SCHS kiosk located inside the Supreme Court Building and through the mail were increased by three times over last year's sales. Several new and attractive items were added to the inventory, and a colorful mail-order brochure was sent to all SCHS members during the pre-Christmas season. Recently the U.S. Mint announced the completion of two additions to its Commemorative Bronze Medallion series honoring the Chief Justices of the United States. The new medallions, of John Rutledge and Earl Warren, bring the total of completed medallions to four. They may be purchased from the Society's kiosk or through the mail.

The net profit realized from the Society's retail activities in fiscal year 1977-1978 was \$11,585, which will provide some assistance for general operations and research projects.

A comprehensive review of SCHS activities was completed in January, 1978. It was concluded that additional grants and contributions were essential to defray the costs of current and proposed projects. SCHS trustees have been queried for their suggestions and cooperation in identifying and approaching grantors. The staff has prepared grant proposals to send to a carefully selected list of foundations for this fund raising endeavor. Each proposal was presented by an officer or trustee. Thus far, two grants have been received for the Documentary History, as was previously reported. Several of the foundations approached have denied our request, but a number of others have yet to be heard from. The SCHS development program has been divided into seven specific areas for which funding is being sought:

1. Acquisitions
2. Calendar of Opinions
3. Documentary History
4. Exhibits
5. Membership Development
6. Oral History
7. Student Memberships

Currently, studies are being made to determine which of the unresponsive foundations should be reapproached to take favorable action and the identity of additional potential foundations and contributors.

The Committees of the Supreme Court Historical Society have discharged their assigned responsibilities commendably. Chairpersons of the standing committees are as follows:

Annual Meeting	Ralph Becker
Art	David Kreeger
Acquisitions	Joseph Hennage
Constitutional Bicentennial	Richard Morris
Documentary Advisory	
History	Patricia Acheson
Exhibits	Robert T. Stevens
Kiosk	Melvin M. Payne
Membership	Fred Vinson
Nominating	Elizabeth Black
Publications	William Swindler
Yearbook Advisory	Merlo Pusey

Members having an interest in participating in any of the committees are requested to communicate with President Gossett or the selected chairperson at the SCHS headquarters office.

In anticipation of the 1987 bicentennial of the signing of the United States Constitution, historical and professional societies, scholars and students across the country are seeking to provide significant ways to commemorate the anniversary of our republican form of government. Locally, plans for the constitutional bicentennial are being formulated jointly by the Supreme Court, U.S. Capitol, Washington Monument and White House Historical Societies. President Gossett has appointed a planning committee, headed by Dr. Richard B. Morris, to advise on the Society's involvement in bicentennial activities.

Arrangements have been approved for the Supreme Court Historical Society and the American Society for Legal History to co-sponsor a major session at the annual meeting of the

American Historical Association in December of 1978. Approval of the Society's participation in this important academic convention marks the recognition of SCHS as an established and noteworthy historical organization.

The Supreme Court Historical Society was founded by judicial and bar leaders and enthusiastic private citizens who value our country's proud legal heritage. There are now SCHS members in every state of the nation. Student chapters are being chartered in law schools. But SCHS needs many more members who will do what they can to assure the restoration and survival of significant historic records, memorabilia and furnishings. The Society will continue to vigorously enlist new memberships in the coming year. Current members are encouraged to increase dues levels, make additional tax-deductible contributions and submit the names of friends and associates as potential members.

CLASSES OF MEMBERSHIP

Individual Annual Membership

\$5 STUDENT—for students only—nonvoting membership

\$25 INDIVIDUAL—minimum full voting membership

\$50 ASSOCIATE—for individuals wishing to pay something more than the minimum

Annual Memberships for Individuals, Firms, Foundations and Organizations

\$100 CONTRIBUTING

\$1000 SUSTAINING

\$2500 PATRON

Life Memberships for Individuals, Firms, Foundations and Organizations

Life membership may be paid at once, or over a period of not more than 10 years. Life status will be reached after full payment has been made.

\$5,000 SPONSOR

\$10,000 MAJOR SPONSOR

\$50,000 BENEFACTOR

Non-member readers of the Yearbook are invited to join the Supreme Court Historical Society in any of the above classes for which they qualify by writing the Chairman, Membership Committee, Supreme Court Historical Society, 1511 K Street, N.W., Washington, D.C. 20005. The Society's telephone number is (202) 347-9888.

CONTRIBUTORS

Newman Carter is a district of Columbia businessman and great-nephew of Justice Edward D. White.

Melvin I. Urofsky is professor of history at Virginia Commonwealth University and editor of the *Letters of Justice Brandeis*.

Rennard J. Strickland is Shleppey Research Professor of Law and History at the University of Tulsa, and author of several books on Indian law and culture.

William R. Strickland is a member of the history faculty of the University of Tennessee.

William F. Swindler is editor of the *Yearbook* and editor-in-chief of *William and Mary's Studies on the Bicentennial of American Legal Education*.

George M. Dennison is professor of history and associate dean of liberal arts at Colorado State University.

Merlo J. Pusey, former editorial writer for the *Washington Post*, is author of the Pulitzer Prize winning biography of Charles Evans Hughes.

S. W. Finley is a *nom de plume* for a constitutional historian who asked to remain otherwise anonymous.

Maeva Marcus is editor-in-chief of the Society's *Documentary History of the Supreme Court, 1789–1801*, and author of the recently published *President Truman and the Steel Seizure Case*.

Christine Jordan is a member of the editorial staff of the *Documentary History of the Supreme Court, 1789–1801*.

Barrett McGurn is Information Officer for the Supreme Court and was formerly on the staff of the New York *Herald-Tribune* Paris edition.

James M. Marsh is a practicing attorney in Philadelphia, and former law clerk to Justice Robert M. Jackson.

Patricia Evans is Research Librarian, and Roger Jacobs Librarian, in the Law Library of the Supreme Court.

William H. Press is Executive Director of the Supreme Court Historical Society.

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