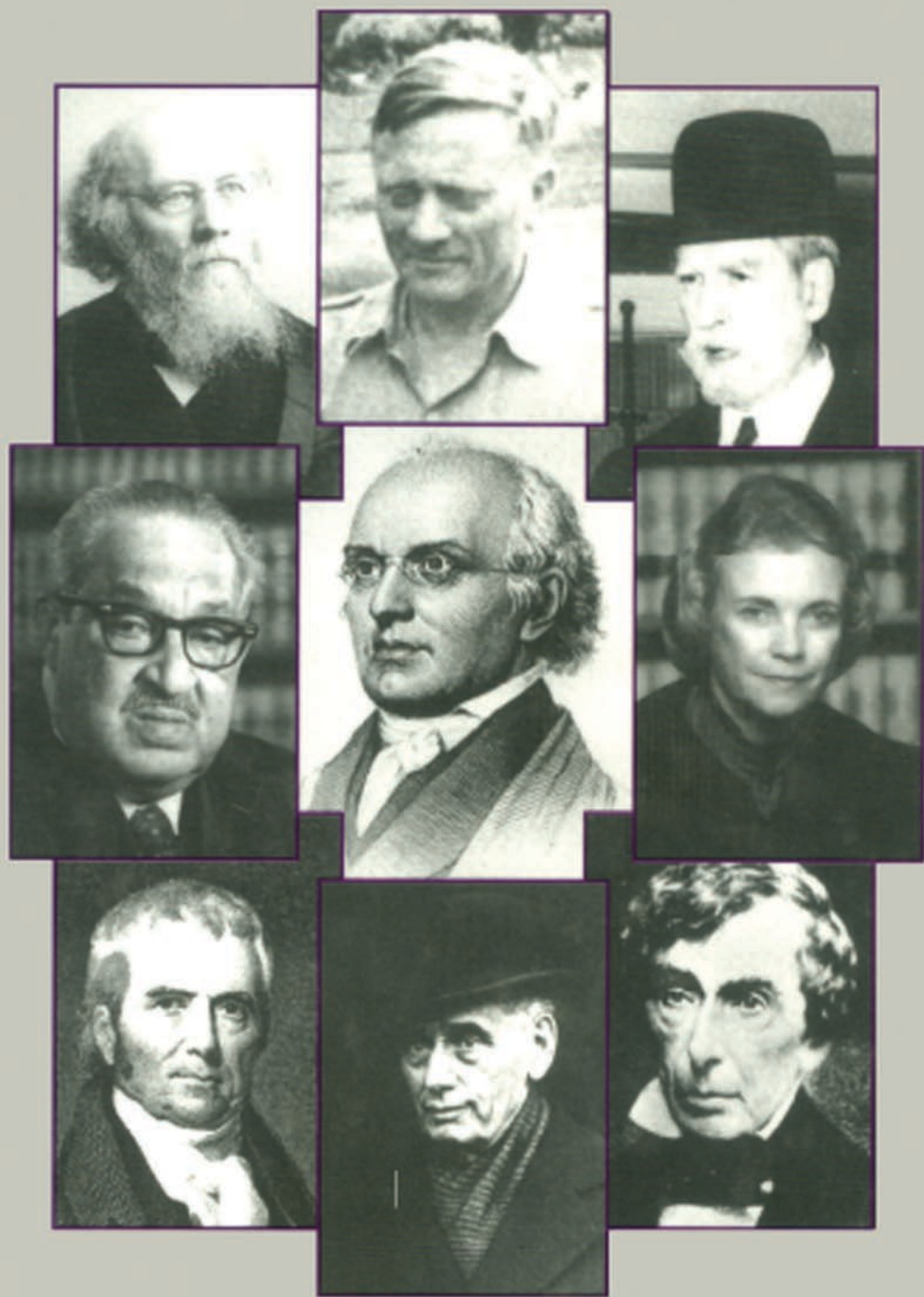


THE
SUPREME COURT JUSTICES
A Biographical Dictionary



Edited by
MELVIN I. UROFSKY

**THE SUPREME
COURT JUSTICES**

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**President Clinton, Ruth Joan Bader Ginsburg,
Martin Ginsburg, and Chief Justice William Hubbs Rehnquist
at the White House, August 10, 1993**

Photograph by Franz Jantzen.

Collection of the Supreme Court of the United States.

THE SUPREME COURT JUSTICES

A Biographical Dictionary

EDITED BY **Melvin I. Urofsky**

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INTRODUCTION

In the two centuries of governance under the Constitution, 105 men and two women have sat as justices on the nation's highest tribunal, the Supreme Court of the United States. Each of them has brought some unique insights or talents to that position; some, like John Marshall or Louis Brandeis, have left an indelible mark on American constitutional development. Others, like John Blair or Samuel Blatchford, are names known, albeit vaguely, only to legal historians.

What the justices bring with them to the bench determines how effective they will be, not only in terms of jurisprudence, but also in terms of how they function within the collegium of the Court. Some have utilized great political skills to put across certain views or to advance what they saw as the best interests of the Court and the country. Others have brought formidable intelligence and learning which they creatively wove into the legal and constitutional fabric of our nation's heritage.

The men and women appointed to the Court all had non-judicial careers before they donned the black robe, and those experiences surely affected their behavior as judges. But the contributors to this volume were asked to concentrate on the *judicial* tenure of their subjects, and to interpret those careers and evaluate their importance. They were asked to deal with the pre-Court years only insofar as those experiences had a major impact on jurisprudence. The Civil War experiences of Oliver Wendell Holmes, the reform efforts of Louis Brandeis, and the political offices held by Earl Warren could not be ignored in efforts to assess their years on the Court. But the primary charge to the contributors was to write an *interpretive* essay on these men and women as justices.

What makes a "great" justice is a theme that runs through many of these articles, and that is no surprise; it is a question that historians and legal scholars have debated for decades. Certainly, a man like Felix Frankfurter appeared to have all the qualifications necessary to become a great member of the Court—high intelligence,

extensive knowledge of the bench and its workings, practical experience in government, and a well-developed philosophy of law and judging. Frankfurter, in fact, exerted significant influence on the Court for the more than two decades that he served, and in a 1970 poll was ranked among the twelve "great" judges to have served on the high court. A similar poll today would surely not yield that result, as Frankfurter's major opinions and ideas are now all but ignored.

Frankfurter's contemporary, Hugo Black, on the other hand, gave little evidence of greatness at the time of his appointment, and many people dismissed his nomination as a shabby political payoff. During his first few terms on the bench, Black made more than his share of mistakes, seeming to confirm the worst predictions of his critics about his qualifications. Yet Black grew into the job, and is today ranked as one of the half-dozen most influential justices to have sat on the Court in the twentieth century.

Not all important contributions to the nation's constitutional development have been made by the "great" justices. Often, important decisions are handed down by obscure members of the Court, who deserve to be remembered for their contributions. The history of the Court is only partially a history of decisions and doctrines; it is above all a history of the men and women who have shaped those doctrines. The articles in this book focus on that aspect of their lives.

I want to thank my colleagues, the men and women who allowed me to cajole them into adding one more task to their already busy schedules, and then doing everything I asked—writing creatively and clearly (always), staying within their word limits, and turning in the pieces on time (almost always).

In addition, a number of people at Garland Publishing worked on this book, and their efforts have made the collected work a far better volume than it would otherwise have been. I want to thank editors Helga McCue and Eunice Petrini, copyeditors Carl Buehler and Carl Sesar; and for the artwork and design, Patti Hefner, Jason Goldfarb,

and Dora Kubek. Above all, I want to thank Leo Balk, who originally agreed to the idea, and who has since become a friend as well as a colleague.

BIBLIOGRAPHY

For those wishing to find further information on the justices, see Leon Friedman and Fred L. Israel, eds., *The Justices of the United States Supreme Court, 1789–1978* (5 vols., 1969–80), and the fascinating compilation by Roger Jacobs, *Memorials of the Justices of the Supreme Court of the United States* (5 vols., 1981). Short

sketches, as well as a host of information about the Court, can be found in Kermit Hall, ed., *The Oxford Companion to the Supreme Court of the United States* (1992). G. Edward White, *The American Judicial Tradition* (rev. ed., 1989), has interpretive essays on the more important justices, as well as a useful bibliography. A general history of American constitutional and legal development is Melvin I. Urofsky, *A March of Liberty* (1987). Recent works may be found by consulting the *Index to Legal Periodicals*, as well as one of several computerized finding aids.

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HENRY BALDWIN

BORN 14 January 1780, New Haven,
Connecticut

NOMINATED to the Court 5 January 1830
by Andrew Jackson

TOOK seat 1 February 1830

DIED 21 April 1844 in Philadelphia,
Pennsylvania

Henry Baldwin was raised in rural Connecticut but returned to New Haven to attend Yale College, from which he graduated in 1797. He moved to Philadelphia to study law in the office of Alexander J. Dallas, a prominent lawyer, and was admitted to the Philadelphia bar. In 1799, he headed west and settled in the bustling town of Pittsburgh. He joined the local bar in 1801 and started a firm with two other young, ambitious lawyers. Baldwin and his partners soon held prominent places in western Pennsylvania legal and political circles, for a time owning a Republican paper, *The Tree of Liberty*.

In 1816, Baldwin won a seat in the United States House of Representatives and was re-elected twice. Representing the manufacturing interests of Pittsburgh, and himself an iron and textile manufacturer, Baldwin favored a protective tariff and courted southern support by opposing conditional admission of Missouri to statehood. He also staunchly defended General Andrew Jackson's prosecution of the war against the Florida Seminoles.

Although Baldwin resigned from the House in 1822 due to illness, he maintained his support of Jackson and corresponded with Jackson adherents about the general's political chances in Pennsylvania. In the 1828 presidential election Baldwin ardently campaigned for Old Hickory. The Jackson victory did not bring an immediate reward to Baldwin, whose candidacy for various federal appointments was opposed by Vice-president John C. Calhoun. But in late 1829, when Justice Bushrod Washington died, Jackson named Baldwin to the high court.

In his early years, Baldwin was noted as an amiable, pleasant, and moderate man; Joseph Story initially found the appointment of this

Democrat "quite satisfactory." But Baldwin became more contentious with the years, apparently suffering a breakdown in 1832 which prevented his attendance at the 1833 term of the Court. This absence relieved his brethren of what had become an unpredictable, argumentative presence. By 1833, Story was complaining to a federal district judge that Baldwin's "distaste for the Supreme Court and especially for [Chief Justice Marshall] is so familiarly known to us that it excites no surprise."

By the mid-1830s, however, Baldwin had mellowed to the extent that his work on the third circuit had produced a volume of well-respected decisions and had raised the prestige of that circuit. He also managed to mend his relationship with the chief justice and was a frequent visitor during Marshall's last illness. According to Story, Baldwin held no one in higher "reverence or respect."

While Baldwin's initial dissatisfaction with service on the Court might be attributed to its Federalist flavor, Democratic appointments of the 1830s should have assuaged his sense of political isolation. But Baldwin's relationship with the new justices was far from harmonious. In addition, he provoked constant arguments with Court Reporter Richard Peters over the presentation of his numerous dissents. In an age when consensus (or at least the appearance of it) was the hallmark of Supreme Court decisions, Baldwin was a misfit.

Baldwin's activity on the bench falls into two major periods: a series of dissents and concurrences in 1831-32, and a second series of concurrences in 1837. In the 1831 term, the new justice dissented seven times—probably a record for a junior justice. In *Ex parte Crane* (1831), Baldwin criticized the majority decision to issue a writ of mandamus as an unwarranted and dangerous extension of federal jurisdiction. His intemperate language no doubt antagonized Marshall, who had written the opinion, as well as other members of the majority.

In *United States v. Arredondo* (1831), Baldwin's majority opinion placed the burden of proof in public land claims on the government and

annoyed President Jackson in the process. The Arredondo claim dated to a vague Spanish land grant in Florida. According to Baldwin, courts must protect even ill-defined land titles predating American possession to assure security of land ownership. The Jackson administration had vigorously opposed the Arredondo claim and now found its recent appointee to the bench issuing a stern lecture on the duties of the government.

In *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832), Baldwin's usual unpredictable attitude appeared more consistent than the majority's. In the first case, Marshall's decision held that the Cherokee had no standing to bring suit under the Court's original jurisdiction since the Cherokee were a "domestic, dependent nation." While Baldwin did not reiterate Marshall's expression of sympathy with the Cherokee's plight, his concurrence with the chief justice's opinion appeared to place him squarely in the Marshall camp. In the subsequent case, Baldwin dissented from the majority view (again written by Marshall) that the Cherokee were a special foreign nation and the Georgia act which violated this status was unconstitutional. According to Baldwin, the Cherokee were not a "nation" and "treaties" with them were merely agreements. Over the course of the two cases, Baldwin's consistency of outlook in the face of the majority's apparent reversal managed to irritate the other members of the Court.

The most remarkable product of Baldwin's tenure was *A General View of the Origin and Nature of the Constitution . . . Together with Opinions in the Cases decided at January Term, 1837*, which he wrote and published in pamphlet form. Baldwin had concurred with the majority

in these cases of the judicial "revolution," particularly *Charles River Bridge v. Warren Bridge*, *New York v. Miln*, and *Briscoe v. Bank of Kentucky*, but had subsequently decided that the Court had not paid sufficient attention to constitutional precepts. To Baldwin, liberal and narrow interpreters of the Constitution continued to err in their judgments, and the 1837 cases were proof of his contention; correct interpretation lay somewhere between these extremes and had been most consistently delivered by "the late venerated Chief Justice" and, of course, Baldwin himself. Since Marshall could no longer speak, Baldwin proceeded to explain the "few and simple" principles which would provide "an easy solution" to all questions regarding the Constitution. In the process, Baldwin again disrupted the appearance of a harmonious and dignified Court. The last seven years of his tenure witnessed recurrent mental instability and very little productive activity.

—ELIZABETH BRAND MONROE

BIBLIOGRAPHY

Baldwin's judicial career has excited little research. The most extensive treatment is Frank Otto Gatell's essay in Leon Friedman and Fred L. Israel (eds.) 1 *The Justices of the United States Supreme Court, 1789-1969* 571 (1969) (hereafter cited as Friedman and Israel, *Justices*). G. Edward White addresses Baldwin's early judicial career in *The Marshall Court and Cultural Change, 1815-1835*, volumes 3-4 of the Holmes Devise *History of the Supreme Court* (1988), and Carl Swisher discusses Baldwin's later career in *The Taney Period, 1836-1864* (1974), volume 5 of the series.

PHILIP PENDLETON BARBOUR

BORN 25 March 1783, Orange County,
Virginia

NOMINATED to the Court 28 December 1835
by Andrew Jackson

TOOK seat March 1836

DIED 25 February 1841 in Washington, D.C.

Although he served less than five years on the Supreme Court, Philip Pendleton Barbour played a more important role in American constitutional history than is generally acknowledged. Prior to his appointment to the Court, Barbour had contributed significantly to the development of a reinvigorated states' rights interpretation of the Constitution that would grow increasingly important between the time of his death in 1841 and the outbreak of the Civil War two decades later.

The son of Thomas Barbour, a neighbor and an early political sponsor of James Madison who broke with Madison over the issue of Virginia's ratification of the Constitution, Barbour briefly studied law under St. George Tucker at the College of William and Mary. He began his legal career in Kentucky in 1801, but returned to his native Orange County the following year.

He was elected to the Virginia House of Delegates in 1812, and then to Congress in 1814. During his tenure in the House of Representatives (1814–25, 1827–30), Barbour was a leader of the conservative faction of the Republican party. Between 1821 and 1823 he served as Speaker of the House of Representatives. In 1825, he declined an invitation to join the University of Virginia faculty as its first professor of law, but stepped down from Congress to accept a position on the Virginia general court.

In 1827, he returned to Congress where he remained until 1830 when President Andrew Jackson appointed him United States district judge for the eastern district of Virginia. In this capacity, he also served as a member of the fifth circuit court of the United States with his longtime political opponent, Chief Justice John Marshall. Barbour also served as president of both the Vir-

ginia Constitutional Convention of 1829–30 and the 1831 Philadelphia Free Trade Convention.

In Congress, Barbour had opposed the Bonus Bill of 1817, federally funded internal improvements, restrictions on the ability of Missouri to enter the Union as a slave state, the second Bank of the United States, and the protective tariff, and while he opposed the efforts of the South Carolina nullifiers, he accepted the premise that a state had the right to withdraw from the union as a last resort.

In addition to being a principle exponent for the states' rights cause, he also played an important role in developing its central constitutional arguments. He was, for example, the first major political figure to argue that the protective tariff was not just unfair, but also unconstitutional. In this capacity, he helped define the basic tenets of states' rights constitutionalism that would later be endorsed by Supreme Court justices John Catron, Peter Daniel, John Campbell, and, to a limited extent, by Chief Justice Roger Taney. Barbour had been critical of the Marshall Court in the late 1810s, and in his capacity as counsel for the state of Virginia he argued unsuccessfully that the Supreme Court lacked jurisdiction in the landmark case, *Cohens v. Virginia* (1821). As a congressman, he had also sought (unsuccessfully) to require the concurrence of five of the seven justices of the Court in any case involving a constitutional question.

The possibility of Barbour's appointment to the Supreme Court had been rumored since his appointment to the lower federal bench in 1830. In February of 1831, John Quincy Adams predicted that if John Marshall were to retire "some shallow-pated wild-cat like Philip P. Barbour fit for nothing but to tear the Union to rags and tatters, would be appointed in his place." Barbour's chances for appointment improved considerably in 1832 when he withdrew his support for a movement on the part of disgruntled southerners to place his name on the Democratic ticket as the vice-presidential candidate in place of Jackson's own choice, Martin Van Buren. By withdrawing when he did, he not only earned the

gratitude of Jackson, but allowed the president to offer Barbour's appointment as a concession to his southern critics.

The resignation of Gabriel Duvall of Maryland in 1835 and the death of John Marshall later that year created two openings on the Court. Although he had been initially rebuffed in his effort to replace Duvall with Roger Taney, Jackson ultimately submitted the names of Taney and Barbour to the Senate. After much controversy, both were approved on March 15, 1836. Two efforts to delay the vote on Barbour's nomination failed by votes of twenty-five to twenty and twenty-six to sixteen, and he was subsequently confirmed by a vote of thirty to eleven.

During his first term on the Court, he was part of the majority in a trio of cases—*Briscoe v. Bank of Kentucky* (1837), *Proprietors of the Charles River Bridge v. Warren* (1837), and *New York v. Miln* (1837)—that repudiated the nationalistic jurisprudence that had been associated with the Marshall Court. Barbour authored the majority opinion in *Miln*, using it as an opportunity to argue for a narrow definition of the federal commerce power and an expansive definition for the state police power, which he characterized as “unqualified and exclusive.”

Otherwise, Barbour's four years on the Supreme Court were characterized by a near unanimity of opinion. During his tenure, the Court heard 155 cases, all but thirty of which were decided without a dissenting vote. Barbour sided most frequently with his fellow southerners John Catron (97.8 percent of the time) and Chief Justice Taney (97.4 percent), and least frequently with Justices Henry Baldwin (89.6 percent) and Joseph Story (94.1 percent).

Although he only dissented on two occasions, there is evidence that had he lived,

Barbour's states' rights principles would have eventually put him at odds with his more nationalistic colleagues. While only Story dissented from his *Miln* opinion, Smith, Thompson and Henry Baldwin refused to endorse its particulars at the time, and subsequent evidence showed that neither John McLean or James Wayne accepted his comments on the limits of the federal commerce power. Furthermore, in cases in which the Court was called on to interpret the scope of federal authority, Barbour consistently advocated a narrow construction of all delegations of authority to the national government. This was apparent in his dissents in *Kendall v. United States* (1838) and *Pollard's Heirs v. Kibbe* (1840). In cases like *Holmes v. Jennison* (1840) that involved questions of implied restrictions upon state sovereignty, Barbour opposed such limitations. Had he lived, Barbour almost surely would have been as strident a defender of the states' rights position as his successor, fellow Virginian Peter Daniel.

Barbour was apparently well respected by his colleagues, including Joseph Story, who eulogized him as “a very conscientious, upright, and laborious judge, whom we all respected for his talents and virtues, and his high sense of duty.”

—JOSEPH GORDON HYLTON

BIBLIOGRAPHY

There is unfortunately no biography of Barbour. The best sources for information concerning his career are Charles D. Lowery's biography of his brother, *James Barbour: A Jeffersonian Republican* (1984) and Carl B. Swisher's *The Taney Period, 1836–64*, volume 5 of *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (1974).

HUGO LAFAYETTE BLACK

BORN 27 February 1886, Harlan, Alabama

NOMINATED to the Court 12 August 1937

by Franklin D. Roosevelt

TOOK seat 19 August 1937; retired

17 September 1971

DIED 25 September 1971 in Bethesda,

Maryland

Few Supreme Court justices have achieved the exalted status of Hugo Black, who is widely viewed as one of the Court's most influential justices and perhaps its most committed textualist. Yet much of what the public knows about Justice Black consists of the more colorful aspects of his character and judicial performance.

His contemporaries believed, for example, that President Franklin Roosevelt selected Black as his first Supreme Court appointment in 1937 because of the latter's ardent support in the Senate for the New Deal and the president's Court-packing plan. Justice Black's reputation for trying to read the Constitution as literally as possible is memorialized through his practice of carrying a copy of the Constitution in his pocket for ready reference and his persistently unique reading of the First Amendment as absolutely prohibiting any governmental interference with the freedom of speech and press. He is also widely remembered for his capacity for hard work, as reflected in his lifelong habits of reading extensively on his own and researching thoroughly any subject of personal or professional interest to him. Moreover, conservatives and liberals alike have admired Justice Black, with the former commending his steadfast commitment to judicial restraint and opposition to substantive due process, and the latter praising his efforts to secure the constitutional foundations of the New Deal and the incorporation of most of the Bill of Rights. Yet, many people still speculate about whether Justice Black should even have been confirmed in light of his membership, while a young lawyer, in the Ku Klux Klan.

These glimpses into Hugo Black's life and judicial career do not fully reflect the skills he

brought to the Court, his judicial philosophy, and his influence on the development of American constitutional law. Justice Black is a seminal figure in constitutional history, but for more complex reasons than his popular image suggests.

Hugo Black came to the Court far better prepared and with more settled views on constitutional interpretation than is commonly thought. After graduating at the top of his University of Alabama Law School class in spite of having concurrently taken a full liberal arts curriculum, he moved his fledgling law practice from Ashland to Birmingham in 1907. Within his first five years in practice in Birmingham, he served part-time for a year and a half as a municipal court judge and full-time for three years as Jefferson County prosecuting attorney. In these latter two positions, he learned about police misconduct and the need for efficient but equal justice. Perhaps in his most famous case as a prosecutor, he investigated and prosecuted several area police officers for abusing and forcing confessions from black defendants. These personal experiences helped to guide him later as a senator to declare that he would not vote to confirm a former prosecutor as a federal judge if he felt that the latter had abused fair criminal procedures, and as a Supreme Court justice to recognize criminal defendants' constitutional rights.

His private practice included a substantial number of personal injury cases. This work enabled him to sharpen his talents as an eloquent, passionate advocate in countless jury trials and in more than 100 cases in the Alabama appellate courts. His oratorical skills helped him to get elected in 1927 to the United States Senate, where he developed an understanding of the relationship between the federal political process and the Supreme Court. On the floor of the Senate and in committees, he often passionately and eloquently defended New Deal legislation and criticized the activist Court. His skills as an orator were also quite evident in his first public act as an associate justice, when, immediately after his confirmation, he gave a brief but dramatic radio address to verify newspaper reports that he

was once a member of the Ku Klux Klan, but to add that he had resigned many years before, and would comment no further.

Significantly, Black's second term as a senator coincided with the election of President Franklin Roosevelt. Black quickly caught President Roosevelt's attention as a committed New Deal liberal who had sponsored a statute that later became the Fair Labor Standards Act of 1938, supported antitrust and other commercial or economic regulations, and oversaw Senate investigations that exposed the abuses of the private shipping operators, major commercial airlines, and large utility holding companies. In numerous committee hearings and floor debates, Black espoused the beliefs that the Congress had the authority under the Commerce Clause to pass appropriate legislation to deal with any problem that directly or indirectly affected the national economy, and that the federal courts lacked any constitutional authority to interfere with such enactments.

In his unequivocal support for the president's Court-packing plan, he confirmed the power of Congress to change the number of members of the Supreme Court, and declared that, "neither the people who wrote nor the people who approved the Constitution ever contemplated that the Supreme Court should become all powerful." Foreshadowing the philosophy he would later espouse on the Supreme Court, Black suggested that the five conservative justices who dominated the Court made it necessary for the president to take extreme action: "The time has arrived when those who favor fitting laws to modern needs in order to correct and cure social and industrial injustice must face their problems squarely and fairly. Everybody knows that Supreme Court decisions by a bare majority have for years been thrown as impassable barriers in the way of the solemn and well-matured legislative plans supported by the people."

Once on the Court, Black quickly synthesized his views on constitutional interpretation into a coherent judicial philosophy. He declared a jurisprudence of certainty, with clear, precise standards that would limit judicial discretion, protect individual rights, and give government

room to address a significant range of social problems. He saw the Constitution as a set of commands designed to prevent the recurrence of certain historic evils. Once he had determined the scope of a constitutional mandate through its literal language or its framers' intent when its text was unclear, he rigorously applied it, regardless of the consequences or conflicting precedent.

Justice Black gave one of the fullest expressions of his approach to judicial decision making in the inaugural James Madison lecture at New York University Law School in 1960. He denounced the practice of other justices, such as Felix Frankfurter and John Marshall Harlan, to engage in judicial balancing, which "regard[ed] the prohibitions of the Constitution, even its most unequivocal commands, as mere admonitions which Congress need not always observe." Rather, Black recognized that "the whole history and background of our Constitution and Bill of Rights [belie] the assumption or conclusion that our ultimate constitutional freedoms are no more than our English ancestors had when they came to this new land to get new freedoms." He believed that the framers had resolved all of the necessary balancing of constitutional liberties in 1791: "Where conflicting values exist in the field of individual liberties protected by the Constitution, that document settles the conflict."

Despite its clarity, Black's methodology, as well as many of the results it produced, rarely commanded a majority of the Court. For example, he repeatedly argued that the Constitution meant exactly what it said in the First Amendment's command that government could never abridge freedom of speech and press. In his Madison lecture, he explained that "the phrase 'Congress shall make no law' is composed of plain words, easily understood. The language [is] absolute. Of course the decision to provide a constitutional safeguard for [freedom of speech and of the press] involves a balancing of conflicting interests, [which] the Framers [performed] when they wrote [the First Amendment.] Courts have neither the right nor the power to [make] a different evaluation." Nevertheless, a majority of the Court consistently favored a balancing approach over Black's absolutist reading of the First Amendment. Even in



Hugo Lafayette Black
Photograph by Harris and Ewing.
Collection of the Supreme Court of the United States.

the last opinion he ever wrote in *New York Times Co. v. United States* (the Pentagon Papers case) (1971), only William O. Douglas joined Black's reiteration of his view that, even when national security might be at stake, "the history and language of the First Amendment support the view that the press must be left to publish news, whatever the source, without censorship, injunctions, or prior restraints."

Ironically, Black's unique methodology led him to consistently take a far more hospitable stance toward the government in Fourth Amendment cases. He almost always gave the government wide latitude in determining the "reasonableness" of its searches, even those without a warrant. For example, in a heated dissent in *Berger v. New York* (1967), he rejected the majority's invalidation of a conviction based on electronic eavesdropping. Seemingly oblivious to the dangers of wiretapping, he argued that there was nothing in the Fourth Amendment's history to suggest that its framers intended to prohibit governmental use of technological innovations to investigate crimes and to enforce the law.

In spite of the rarity with which a majority of the Court fully endorsed his methodology, but partly as a consequence of his strong reasoning and persistent advocacy during his long tenure on the Court, Hugo Black left his mark on constitutional law in two significant ways. First, he wrote a number of influential opinions that helped to keep critical debates open long enough to allow other justices to change their thinking or to take a position similar to his own but for different reasons. Second, he cast a number of critical votes that helped to shape several areas of constitutional law.

Through his opinions, Black exerted influence in such diverse fields as freedom of speech, incorporation, criminal procedure, and reapportionment. For example, his constant assertion that the First Amendment did not permit the government to regulate obscenity helped to lead the Warren Court eventually to define obscenity in a way that made its regulation more difficult. Similarly, his persistent criticism of the government's investigations of and prosecutions for so-called anti-American activities in the 1950s ultimately helped to guide the Warren

Court to overturn a number of convictions in the McCarthy era based on "subversive activities."

Black also exerted considerable influence in keeping the debate on incorporation open and facilitating the Court's movement to make most of the Bill of Rights applicable to the states. He sought to reconcile the history and seemingly broad language of the Fourteenth Amendment with the basic need for judicial restraint in our constitutional scheme. His solution was to propose total incorporation, i.e., to define the term "liberty" in the Fourteenth Amendment's due process clause as including no more or less than the guarantees specified in the first eight amendments.

He first expressed his views on total incorporation in his dissent in *Adamson v. California* (1947). Joined by Justice Douglas, he laid down the formulation that guided him for the rest of his judicial career: "My study of the historical events that culminated in the Fourteenth Amendment [persuades] me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the States. [I] fear to see the consequences of the Court's practices of substituting its own conceptions of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. [To] hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution." Black sought to restrict judicial discretion by urging the Court to define the term "liberty" in terms of another part of the constitutional text in which the original framers had explicitly defined the basic components of liberty as consisting of the specific guarantees set forth in the first eight amendments.

For the next twenty years, Black called on his fellow justices in numerous cases to apply the first eight amendments to the states. During that period, he often came into conflict with Felix Frankfurter, who rejected total incorporation and argued vigorously instead that the Fourteenth Amendment applied certain guarantees to the states as a matter of fundamental fairness. While the Court never endorsed total incorporation, it

inexorably moved away from the Frankfurter position it had initially adopted in *Wolf v. Colorado* (1949) in the direction of incorporating most of the Bill of Rights. For example, in *Mapp v. Ohio* (1961), Justice Black concurred with the majority's declaration that the states must uphold the guarantees of the Fourth Amendment as incorporated through the Fourteenth Amendment. With this announcement, the Court overruled *Wolf*, which had applied the established constitutional theory that the Fourteenth Amendment's due process clause contained all the authority necessary to strike down state conduct that was fundamentally unfair.

By the time Black retired from the Court in 1971, the incorporation debate had ended. His persistent advocacy had facilitated the Court's move to incorporate all of the Bill of Rights, with the exceptions of the Second and Third Amendments, the Fifth Amendment's requirement of grand jury indictment, and the Seventh Amendment.

His success in the incorporation debate helped to set the stage for the nationalization and reformation of state criminal procedures. In contrast to his narrow reading of the Fourth Amendment, he read the Fifth and Sixth Amendments expansively. Drawing on his experiences as a police court judge and county prosecutor, he constantly tried to lead the Court to strictly enforce the Constitution's provisions defining the conditions of trial by jury and availability of counsel and prohibiting coerced confessions, compulsory self-incrimination, and double jeopardy. Indeed, one of the first Court opinions he wrote, *Johnson v. Zerbst* (1938), held that in a federal prosecution counsel must be appointed to represent a defendant who cannot afford to hire an attorney. He also wrote the Court's unanimous opinion in *Chambers v. Florida* (1940), which held that the confessions obtained by Florida authorities to condemn four black defendants to death were clearly coerced and, therefore, a violation of the Fourteenth Amendment due process clause. In language to which he and other justices often turned in subsequent criminal procedure cases, he explained that "Under our constitutional system courts stand against any winds that blow as havens or refuge for those who

might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed [in this case] shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being to our Constitution—of whatever race, creed, or persuasion."

But when the Court refused to make assistance of counsel mandatory in state felony trials in *Betts v. Brady* (1942), he vigorously dissented. Even though he had not yet fully developed his incorporation theory, and the Court had not yet agreed to apply the Sixth Amendment to the states, Black argued in *Betts* that a state's failure to provide counsel for defendants in state felony trials clearly violated the majority's own "[standard] that due process of law is denied if a trial is conducted in such a manner that it is 'shocking to the universal sense of justice' or 'offensive to the common and fundamental ideas of fairness and right.'" Eventually, Justice Black's persistence paid off in his opinion for a unanimous Court in *Gideon v. Wainwright* (1963), which overruled *Betts*. He declared that "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him."

Justice Black also helped to shape the Court's establishment clause doctrine. He wrote the Court's opinion in *Everson v. Board of Education* (1947), which was the first case to declare that the clause applied to the states. While the *Everson* Court ultimately concluded that the state's payment of the bus fares of all pupils, in-

cluding those in parochial schools, served a secular purpose, and therefore did not violate the establishment clause, Black expressly agreed with Thomas Jefferson that the clause was intended to erect "a wall of separation between Church and State" and noted that government cannot "contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." In *McCullum v. Board of Education* (1948), the Court, in yet another Black opinion, held unconstitutional a released time program in which religious instruction took place in public school. Fourteen years later, Justice Black wrote perhaps his most controversial opinion on the separation of church and state in *Engel v. Vitale* (1962), which held that a state-sponsored "non-denominational prayer" was "wholly inconsistent" with the establishment clause. In his view, that clause prohibited any laws that "establish an official religion whether [they] operate directly to coerce non-observing individuals or not." He explained that "Religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."

Moreover, Black helped to lead the Warren Court to strike down enactments permitting disproportionate legislative representation at the state and federal levels. Indeed, he supported the equal protection claim in every reapportionment case that came before the Court during his tenure. He argued that Article I conferred on qualified voters the rights to vote and to have their votes counted on an equal basis in congressional elections. Yet, over his dissent, the Court declared in *Colegrove v. Green* (1946) that such matters were "political questions" whose merits the Court could not reach. Justice Frankfurter explained that the political business of reapportionment was for the politicians. By entering the "political thicket," Frankfurter warned, the Court risked political reprisals that could ultimately undercut its institutional authority. Black's dissent denounced the Court's preoccupation with political considerations rather than its paramount responsibility of determining whether legislative reapportionment violated the Constitution. He explained that both Article I and the equal protection clause required that congressional district lines be drawn "to give approximately equal

weight to each vote cast." Eventually, four other justices adopted Black's views on the justiciability of apportionment in *Baker v. Carr* (1962). Within a year, Black delivered the Court's opinion in *Wesberry v. Sanders* (1963), which formally overturned *Colegrove*. He explained that "[t]he right to vote is too important in our society to be stripped of judicial protection by such an interpretation."

Justice Black made a second significant impact on constitutional law, not through his opinions, but rather his votes in a number of pivotal cases. In this way, he influenced the Court's approaches to the commerce power, criminal procedure, school desegregation, reapportionment, and freedom of religion.

For example, Black consistently supported the Court's abandonment of its substantive due process review of economic regulations and the rise of a more deferential judicial reading of the commerce clause. Within his first five years on the Court, he joined unanimous decisions rejecting a substantive due process challenge to the provisions of the Fair Labor Standards Act in *United States v. Darby* (1941) and sustaining, in *Olsen v. Nebraska* (1941), a state statute fixing the maximum fee that an employment agency could collect from employees. In explaining the Court's unanimous decision upholding a state right-to-work law that prohibited closed shops in *Lincoln Federal Union v. Northwestern Iron & Metal Co.* (1949), Black declared that the Court had abandoned substantive due process in economic cases and returned "to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition." In fact, during Justice Black's thirty-four-year tenure, the Court never struck down a federal law for violating the commerce clause. For his part, Black consistently voted in the 1960s to uphold the constitutionality of congressional enactments premised on the commerce clause and the fifth section of the Fourteenth Amendment for the purpose of remedying racial discrimination in private accommodations and voting practices.

In addition, Justice Black consistently joined the Court's opinions aimed at ending segregation in the United States. For example, when *Brown v. Board of Education* (1954) was first argued and the Court under Chief Justice Vinson was first considering whether to overrule *Plessy v. Ferguson* (1896), Black was one of only four justices who voted to overturn *Plessy* and to order the end of segregation in public schools. When *Brown* was reargued after Vinson's death and the appointment of Earl Warren, Black was one of the first to join the new chief justice's subsequently unanimous opinion in *Brown*.

In *Griffin v. County School Board* (1964), Black strengthened *Brown* by writing the Court's opinion holding illegal the action of a county school board which had closed its public schools to resist integration and thereby contributed to the support of private segregated schools. He explained that "[t]he time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia." Thus, he clarified that the trial court could, if necessary, close all the schools of the state of Virginia if the public schools were not reopened in the affected county. Justice Black also joined another important, unanimous school desegregation decision in *Green v. County School Board* (1968), which struck down a "freedom of choice" plan that failed to satisfy a district's obligation to develop a scheme to end its segregated school system immediately.

Besides delivering some important criminal procedure opinions, Black also cast critical votes in several others. For example, he was one of the five justices who formed the slim majorities in two seminal criminal procedure cases. He cast a pivotal fifth vote in *Escobedo v. Illinois* (1964), which invalidated a conviction based on statements obtained from a criminal defendant who had been interrogated by the police, but not granted any of his requests to consult his counsel or to have his counsel present. He was also one of the five justices who formed the majority in *Miranda v. Arizona* (1966), which established one of the Warren Court's most lasting but

controversial principles—that a criminal defendant's Fifth Amendment right against self-incrimination and Sixth Amendment right to assistance of counsel require the police to observe or comply with certain procedural safeguards for any individual who has been "taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning."

Ironically, for all of the influence Hugo Black wielded, his failures often proved as notable as his successes on the Court. First, he strongly opposed but failed to prevent the Court's recognizing a constitutionally protected right of privacy. In his 1965 dissent in *Griswold v. Connecticut* (1965), he harshly criticized the majority's striking down a Connecticut law prohibiting the sale of contraceptives to married couples on the basis of a right of privacy implicitly protected by the "penumbras" of the Bill of Rights, the liberty component of the Fourteenth Amendment due process clause, or the Ninth Amendment. He argued that the original framers had already made a decision in the Bill of Rights as to which aspects of a person's privacy to give constitutional protection and which aspects to leave to the majoritarian process for protection or regulation. He viewed the Court's recognition of any implied fundamental right (such as a general marital right of privacy), other than those applied to the states by virtue of total incorporation, as the revival of substantive due process. Thus, he argued that the "[u]se of any such broad, unbounded judicial authority would make of the Court's members a day-to-day constitutional convention." Two years later, in his dissent in *Berger v. New York* (1967), he similarly lamented that a right of privacy was nothing more than a "vague judge-made goal" and "like a chameleon, has a different color for every turning."

A second notable failure occurred in cases involving equal protection/fundamental rights, which were interests found by the Warren Court to be of such importance that distinctions made on the basis of their exercise required compelling justifications. Black maintained that the Fourteenth Amendment equal protection clause had been designed primarily to end racial dis-

crimination, and insisted that the Court should apply no more than a rational basis test to review any equal protection claim other than those involving racial discrimination. Hence, he dissented to the Court's uses of strict scrutiny under the equal protection clause to strike down laws that made it more difficult for people to exercise their right to travel in *Shapiro v. Thompson* (1969) and to exercise their right to vote in *Harper v. Virginia State Board of Elections* (1966) and *Kramer v. Union Free School District* (1969).

Yet Black also failed to oppose uniformly the Warren Court's equal protection/fundamental rights decisions. Despite his qualms about expanding the equal protection clause to strike laws down on the basis of something other than racial discrimination, his recognition of the needs for equal justice and fair criminal procedures led him to write the plurality opinion in *Griffin v. Illinois* (1956), in which the Court held that a state must furnish an indigent criminal defendant with a free trial transcript if such a transcript is necessary "for adequate and effective appellate review" of his conviction. Black explained that "[Our] constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. [In] criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial. [It] is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. [But] that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." Similarly, he joined *Douglas v. California* (1963), in which the Court struck down a state law requiring state appellate courts, on the request of an indigent criminal defendant for counsel on appeal, to make "an independent investigation of the record" and "to appoint counsel [only] if in their opinion it would be helpful to the defendant or the court." Nevertheless, when the

Burger Court in *Boddie v. Connecticut* (1971) struck down a state law that required individuals to pay court fees and costs of about sixty dollars in order to sue for divorce, Justice Black dissented on the ground that neither the due process nor the equal protection clause permitted "judges [to] hold laws constitutional or not on the basis of a judge's sense of fairness."

Another failure involved Black's misapplication of an equal protection standard he initially had helped to define. In his controversial majority opinion in *Korematsu v. United States* (1944), he made the first reference in the Court's history to race as a suspect classification, which, he explained, must be subjected to the "most rigid scrutiny." Under this standard, he then upheld, over the heated dissents of Justices Murphy, Jackson, Roberts, and Rutledge, the constitutionality of the internment of Japanese Americans during World War II. Even though historians have subsequently established that the military in fact had no reliable evidence to substantiate its claims that Japanese Americans on the West Coast posed a threat to the national security of the United States, Black never expressed any regret over the *Korematsu* decision. Rather, as criticism of *Korematsu* mounted in subsequent years, he boldly defended it: "There's a difference between peace and war. You can't fight a war with the courts in control." He even added that all people of Japanese ancestry "look alike to a person not a Jap. [Had] they attacked our shores you'd have a large number fighting with the Japanese troops. And a lot of innocent Japanese-Americans would have been shot in the panic. Under these circumstances I saw nothing wrong in moving them away from the danger area."

A fifth, and particularly significant, failure involved Black's inability during his last decade or so on the Court to build coalitions, maintain consistency in his votes and opinions, and exhibit the tolerance he had demonstrated in the previous twenty-five years. It is hard to determine whether these changes in the style and substance of his constitutional decision making were attributable to his failing health, a changing world, or some combination of the two. In the 1960s, while new issues confronted the Court, Justice Black fought old age, particularly

cataracts which interfered with his practice of researching his opinions thoroughly. During this period, his opinions grew shorter and often contained an unprecedented note of anger and exasperation. He also became more curt with his colleagues and his law clerks.

For example, despite his support for *Brown* and opposition to racial discrimination and the abridgement of freedom of speech, Black resisted extending the Constitution's protection to civil rights protesters' demonstrations on private property. Even though he had earlier written the majority opinion in *Marsh v. Alabama* (1946), in which the Court applied the First Amendment to a privately owned company town, Black later dissented in another case on the ground that the trespass convictions of civil rights demonstrators attempting to coerce a private restaurant to serve them should have been sustained. He contended that "none of our prior cases has held that a person's right to freedom of expression carries with it a right to force a private property owner to furnish his property as a platform to criticize the property owner's use of that property." He argued that a property owner, governmental or private, was under no obligation to provide a forum for speech; if owners could not control their property, Black feared, the result would be mob violence. In his view, the rule of law should take precedence over encouraging public discourse and protest. Focusing on maintaining "tranquility and order" in cases like *Gregory v. Chicago* (1969), Black criticized protestors who "think they have been mistreated or [have] actually been mistreated," and their supporters who "do no service [to] their cause, or their country." These statements contrast sharply with his prior respect for dissenters, toleration of the unorthodox, and receptivity to new ideas.

Black also failed during his last decade on the Court to persuade a majority of justices to accept fully his distinction between freedom of speech and expressive conduct. He argued that the First Amendment's guarantee of freedom of speech did not include expressive conduct. Yet, he failed to persuade the Court to accept his arguments that such activities as flag burning or wearing a jacket with a profane epithet about the draft were not insulated by the First Amendment from criminal sanction. Indeed, he joined Justice

Blackmun's dissent in *Cohen v. California* (1971), characterizing the latter as conduct and not freedom of speech in the same year he reexpressed his commitment to protecting freedom of the press in the Pentagon Papers case. Black defended the former position as necessary line-drawing, but it does not comfortably coexist with his position in other cases to grant First Amendment protection to some expressive conduct, such as movies.

Black also assumed an ambivalent posture with respect to First Amendment protection for picketing. In *Giboney v. Empire Storage and Ice Company* (1949), he wrote that legislatures could regulate picketing, but in *Barenblatt v. United States* (1959) he noted that they could not abridge "views peacefully expressed in a place where the speaker had a right to be." Yet, in *Cox v. Louisiana* (1965), he wrote that "[p]icketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment." This position contrasts with his statement in *Feiner v. New York* (1951), in which he had labeled the Court's decision sanctioning police action to silence a speaker as "a long step toward totalitarian authority."

Lastly, Black never succeeded in persuading any other justices to join his views on *stare decisis*. He often argued that any erroneously reasoned precedent should be overruled, but throughout his tenure his colleagues refused to endorse his standard, which they believed would have introduced greater instability into constitutional adjudication.

By the time Hugo Black left the Court in 1971, more had changed than just his health, tone, and substantive views on many constitutional issues. He had succeeded in moving from being perceived at the time of his appointment as a Roosevelt loyalist to being regarded as a fiercely independent justice. Part of the explanation for this change in perception may be the fact that many of the issues presented to the Court during his tenure were unforeseen at the time of his appointment.

Moreover, social and political conditions have changed to such an extent that today, the justice who comes closest to carrying on the legacy of Hugo Black, a New Deal liberal, is

Antonin Scalia, an ardent conservative. Justice Scalia seems to share Black's widespread deference to majoritarian decisions (particularly on noneconomic matters), strict adherence to the literal or plain reading of the Constitution, and preferences to overrule wrongly decided cases and to adopt bright-line tests. Scalia has gone even further than Black as a textualist to include expressive conduct within the ambit of First Amendment protection and to argue that the Sixth Amendment confrontation clause must be read literally to mean that every criminal defendant has a right to confront his or her accusers face-to-face in the courtroom.

Of course, Black's legacy goes further than the areas in which he and Justice Scalia might have concurred. Besides having helped to secure the incorporation of most of the Bill of Rights and the foundations of the New Deal, to enliven legal and judicial debates over substantive due process and equal protection fundamental rights, and to shape First Amendment and criminal procedure principles that persist, Hugo Black exhibited an independence, integrity, and consistency against which all subsequent justices have measured themselves. Ironically, no one would have been more disappointed than Justice Black that even he could not always meet his own high standards.

—MICHAEL J. GERHARDT

BIBLIOGRAPHY

There is a small body of Hugo Black papers in the Library of Congress. Black expressed his own constitutional views not only in his opinions, but also in *A Constitutional Faith* (1968), and in the famous Madison lecture, "The Bill of Rights," 35 *New York Univ. Law Review* (1960). Both personal and professional insights can be found in Hugo L. Black, Jr., *My Father: A Remembrance* (1975).

There is a great deal of secondary literature on Black the man and the justice. See especially William Leuchtenburg, "A Klansman Joins the Court: The Appointment of Hugo Lafayette Black," 41 *Univ. of Chicago Law Review* 1 (1973); Charles Reich, "Mr. Justice Black and the Living Constitution," 76 *Harvard Law Review* 673 (1963); and the profiles by John P. Frank in Friedman and Israel, 3 *Justices* 2321, and by G. Edward White in Chapter 14 of his *The American Judicial Tradition: Profiles of Leading American Judges* (exp. ed., 1988).

For fuller biographies, see John P. Frank, *Mr. Justice Black: The Man and His Opinions* (1949); Gerald T. Dunne, *Hugo Black and the Judicial Revolution* (1977); and James J. Magee, *Mr. Justice Black: Absolutist on the Court* (1980). A unique dual biography is James F. Simon, *The Antagonists: Hugo Black, Felix Frankfurter, and Civil Liberties in Modern America* (1989).

HARRY ANDREW BLACKMUN

BORN 12 November 1908, Nashville, Illinois

NOMINATED to the Court 14 April 1970

by Richard M. Nixon

TOOK seat 9 June 1970; retired

"I suppose I'll carry Roe to my grave," Blackmun told a reporter, referring to the famous case in which he enunciated the constitutional right to abortion, *Roe v. Wade* (1973). He received thousands of letters in the following years: "Think of any name; I've been called it in these letters." Conversely, he was lauded by women's groups as a hero. It was an odd position for someone who, when nominated for the Court, was called a "strict constructionist" by conservative Senator Strom Thurmond, and who had said, "I'd like to regard myself as being a member of the center of the Court." But *Roe* signaled a major change of emphasis in Blackmun's opinions, from a deference to governmental institutions to marked empathy for those disadvantaged by society.

Blackmun was nominated by President Nixon after the Senate rejected two other nominees whom Nixon had counted on to be "tough on criminals" and supportive of governmental policies. Blackmun's decisions for the eighth circuit court of appeals fit that description. His modesty, innate decency, and intelligence nonetheless impressed dubious senators, and he was confirmed unanimously within a month.

Born in Illinois, Blackmun grew up in St. Paul, Minnesota, where his father opened a grocery and hardware store. Blackmun was educated in St. Paul and went to Harvard University on a scholarship presented by the Harvard Club of Minnesota. He supplemented it by working as a janitor, milkman, paper grader, and handball court painter. He would take his memories of poverty to the Court with him, telling an interviewer, "Maybe I'm oversensitive, but these are very personal cases. We're dealing with *people*—the life, liberty and property of *people*. And because I grew up in poor surroundings, I know there's another world out there that we

sometimes forget." He majored in mathematics, graduated summa cum laude (1929) and Phi Beta Kappa, and went on to receive his law degree at Harvard (1932). His impressive record earned him a clerkship with the Eighth Circuit Court of Appeals (1932–33).

A year later, Blackmun joined a Minneapolis firm, and by 1949, had risen from associate to junior partner and then general partner, specializing in estates, taxation, and general civil litigation. He also taught an occasional course at the St. Paul College of Law and the University of Minnesota Law School.

Blackmun had wavered between medicine and law after graduating from college. In 1950, delighted at the opportunity "to have a foot in both camps," he became resident counsel for the Mayo Clinic in Rochester, Minnesota. The job ended in 1959, when President Dwight Eisenhower appointed him to the appeals court for which he had clerked.

Blackmun wrote more than 200 signed opinions while on the Eighth Circuit court. He tended to defer to the federal and state legislatures and to the Supreme Court; to decide disputes between the government and individuals in favor of the government, particularly in criminal justice cases; and to uphold civil rights. He personally opposed capital punishment, for example, but ruled on the basis of what he considered the state's right to impose it (*Maxwell v. Bishop*, 1968). Believing that prior Supreme Court decisions gave a white homeowner the right to refuse to sell to a black would-be purchaser, he suggested that the Court alter its doctrine—which it subsequently did in *Jones v. Alfred H. Mayer Co.* (1967, 1968). He upheld the convictions of religious protesters against the Vietnamese War who demonstrated on a military reservation (*Holdrige v. United States*, 1960) and the suspension of college students also protesting the war, chiding them for not acting more maturely (*Esteban v. Central Missouri State*, 1965). He saw no violation of double jeopardy when a person was subjected to two successive trials for the robbery of two victims playing in

one card game (*Ashe v. Swenson*, 1968), and almost invariably turned down appeals based on Fourth or Fifth Amendment grounds (e.g., *Cox v. United States*, 1967; *Jarrett v. United States*, 1970). He wrote opinions forbidding the perpetuation of de facto segregated schools (*Kemp v. Beasley*, 1970), ordering the rehiring of black faculty members after an all-black school was closed pursuant to a desegregation order (*Smith v. Board of Education*, 1966), and striking down racial discrimination on juries (*Bailey v. Henslee*, 1961). His fellow judges remembered him as “the most studious member of the court,” “deliberate, courageous and moderate.”

Blackmun continued to defer to governmental bodies and precedent in his early years on the Supreme Court. In his first opinion, a dissent from a *per curiam* decision overturning a Minnesota obscenity conviction (*Hoyt v. Minnesota*, 1970), he protested against treating state courts as “so obviously misguided” that they could be summarily reversed. The first opinion he wrote for the Court also upheld state action (*Wyman v. James*, 1971). Accepting New York’s argument that home visits by caseworkers did not abridge a welfare recipient’s right against unreasonable searches, he noted that seventeen additional states believed that the visits were “rehabilitative” and in the best interests of the child. Agreeing in another case that the death penalty was constitutional, he declared, “I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty,” but added, “We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decisions such as these” (*Furman v. Georgia*, 1972).

Gradually, he adjusted to the wide-ranging implications of many of the cases handled by the Supreme Court and the exciting and sobering realization that each case affected not merely one plaintiff or defendant, but the entire country. He suggested in interviews that he was also affected by the change of justices and the Court’s concomitant shift to the right, viewing his obligation as maintaining the Court’s center. Whatever the explanation, his opinions became more reflective of his views and more empathetic to

individuals. He had no less respect for institutions, but insisted that they be held accountable, particularly by the Court. He began using the phrases “real life” and “real world,” resembling an equity judge in his reliance on balancing tests to decide most cases, trying to ascertain where fairness and justice lay.

His sense of the “real world” was apparent in *Roe v. Wade* (1973) which, with its companion case *Doe v. Bolton*, struck down a Texas abortion law that permitted abortion only to save the life of the mother and a Georgia statute requiring that a doctor’s decision to abort be approved by two additional physicians and a hospital committee. Drawing on the right of privacy implied by the Fourteenth Amendment and the Court’s decisions in *Griswold v. Connecticut* (1965) and *Eisenstadt v. Baird* (1972), Blackmun suggested a legal rule based on the medically-recognized stages of pregnancy: no state health interest, and therefore no permissible interference by the state, during the first trimester, during which medicine had made abortions at least as safe as childbirth and any decision about abortion was to be made by the woman and her physician; a state interest in protecting the woman’s health during the second trimester, when regulations concerning the qualifications of persons performing abortions and the facilities in which abortions were performed were legitimate; state power to prohibit abortions during the third trimester (except those necessary for the woman’s life or health), when the fetus had reached “viability” and could live outside the womb. Blackmun read the constitutional reference to “person” as applying postnatally and declined to be drawn into a theological argument about whether personhood began before birth.

Justices White and Rehnquist, dissenting, questioned the Court’s favoring “the convenience of the pregnant mother” over the fetus. In fact, the person Blackmun focused on was the physician, not the pregnant woman. In *United States v. Vuitch* (1971), involving a statute prohibiting physicians from performing any abortion not necessary to save the woman’s life, the Court had found no constitutional right to abortion. Justice Douglas criticized the relevant statute as overly vague, giving neither the physician



Harry Andrew Blackmun
Collection of the Supreme Court of the United States.

nor a possible jury guidelines for deciding whether an abortion was necessary. During oral argument in *Roe*, Blackmun followed Douglas's *Vuitch* approach and emphasized physician's rights. The justices' conference reportedly centered on that issue, and Blackmun, after two weeks' intensive research in the Mayo Clinic library, wrote a decision that ensured women's access to abortion, but couched largely in language protective of the physicians' right to exercise professional judgment. It was only in subsequent cases that Blackmun's opinions centered on a woman's right to reproductive privacy rather than physicians' professionalism.

In the years following *Roe*, Blackmun wrote the opinion of the Court or concurred whenever the Court extended the right to abortion by striking down, e.g., spousal or parental consent requirements and waiting periods, and dissented from decisions limiting the right (*Planned Parenthood v. Danforth*, 1976; *Bellotti v. Baird*, 1979; *H.L. v. Metheson*, 1981; *Akron v. Akron*, 1983; *Planned Parenthood v. Ashcroft*, 1983). When the Court legitimized bans on government funding of abortions (*Beal v. Doe*, 1977; *Maher v. Roe*, 1977; *Harris v. McRae*, 1980), Blackmun dissented, going beyond his earlier medical concerns to condemn the hardships wrought on indigent women thereby deprived of their rights. In a First Amendment case with major implications for abortion rights, he dissented from the Court's finding of no constitutional violation in the federal government's making health care facilities' receipt of federal funds for family planning contingent on their avoiding any mention of abortion (*Rust v. Sullivan*, 1991).

In 1989, the Court upheld Missouri's prohibition on the performance of abortions by public employees or in public facilities unless they were to save the life of the mother, and legitimated the state's requirement that women seeking an abortion be counseled about alternatives, declaring that "the rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms" (*Webster v. Reproductive Health Services*, 1989). Blackmun accused the majority of "turn[ing] a stone face" to the right of reproductive freedom. "I fear for the future," he lamented. "I fear for the liberty and equality

of . . . millions of women." The majority had not overturned *Roe*, but "the signs are evident and very ominous, and a chill wind blows." It blew even colder in *Planned Parenthood v. Casey* (1992), in which a three-justice plurality reiterated the right enunciated in *Roe*. In permitting limitations on the right to abortion such as consent and "information" requirements, however, the Court substituted for the *Roe* trimester formula a state power to regulate abortions, at any stage of pregnancy, as long as the regulations did not place an "undue burden" on the right. A separate four-justice bloc would have overturned *Roe*. That left only the plurality and two others justices, including Blackmun, adhering to the shreds of *Roe*. "The distance is but a single vote," Blackmun warned in dissent. "I am 83 years old. I cannot remain on this Court forever."

After *Roe*, Blackmun evinced increasing concern both for "the right to be let alone" and women's rights. As the right to bodily privacy that he had emphasized began to influence lower court decisions (see, e.g., *In re Quinlan*, 1976; *Belchertown v. Saikewicz*, 1977), Blackmun attempted to extend it. Dissenting from the Court's endorsement of a Georgia sodomy statute and its implicit condemnation of homosexuality, Blackmun argued, "in a Nation as diverse as ours . . . there may be many 'right' ways of conducting . . . relationships" (*Bowers v. Hardwick*, 1986). He came to view *Roe* as a women's rights case, telling a colloquium that he believed the abortion decisions "broke some of the statutorily imposed fetters on women's freedom traceable in our country to Victorian times." He wrote decisions striking down a state law ending parental obligation for support payments sooner for female than for male children (*Stanton v. Stanton*, 1975), and a federal statute providing aid to families with dependent children only where the mother rather than the father was unemployed (*Califano v. Westcott*, 1979).

His dissent in *Ford Motor Company v. Equal Employment Opportunity Commission* (1982) reflected his disquiet at society's treatment of women, particularly poor women. The EEOC had sued Ford under Title VII of the 1964 Civil Rights Act for refusing to hire specific women at one of its warehouses that had never employed any

woman, and the trial court had awarded the women back pay. Justice O'Connor wrote for the Court that because Ford had offered to hire the women when the suit was filed and they had turned down the job, Ford's back pay liability had halted. Blackmun, dissenting, drew from the "real-life concerns of the parties." Rejected by Ford, the women had gone to work for General Motors and had accumulated seniority by the time Ford offered them jobs without it. Had they moved to Ford, Blackmun noted, they would have faced lesser benefits, "lower wages, less eligibility for promotion and transfer, and greater vulnerability to layoffs than persons hired after they were unlawfully refused employment." He quoted from one employee's trial testimony: "I was just wanting that job so bad because you can't, a woman, when you've got three children, I needed the money, and I was wanting the job so bad. I worked so hard. . . . It broke my heart because I knew I had worked so hard." That, said Blackmun, showed how much job security meant and how irrationally the Court had decided.

Blackmun gradually emerged as protective of the rights of those he considered disadvantaged—not only women, but racial minorities, consumers, aliens, and the elderly. He described the Court as "the resort of . . . 'discrete and insular minorit[ies]," and argued that justice required viewing the world from the perspectives of different people. He wrote opinions validating statutory employment preferences for Native Americans in the Bureau of Indian Affairs (*Morton v. Mancari*, 1974) and school desegregation (*Columbus v. Penick*, 1979; *Dayton v. Brinkman*, 1979; *Washington v. Seattle*, 1982), and voted consistently to uphold affirmative action plans. Reacting to a series of 1989 Court decisions that increased the difficulty of proving or acting on discrimination against racial minorities and women, Blackmun wondered "whether the majority still believes that discrimination . . . is a problem in our society, or even remembers that it ever was" (*Ward's Cove v. Atonio*, 1989).

Blackmun played a central role in bringing aliens under the protection of the Fourteenth Amendment. Writing for the Court that states could not condition welfare payments to aliens on a durational residency requirement, he de-

clared that classifications based on alienage are suspect and subject to strict scrutiny (*Graham v. Richardson*, 1971). Aliens needed the protection accorded to a "discrete and insular minority" because communities could exclude them from the political process. States, therefore, could not prohibit aliens from employment in the civil service (*Sugarman v. Dougall*, 1973) or the public schools (*Ambach v. Norwick*, 1979), although they could be barred from the state police (*Foley v. Connelie*, 1978). While he agreed with the Court in *San Antonio v. Rodriguez* (1973) that there was no constitutional right to education, Blackmun argued ten years later that it was such a basic right that a state could not exclude the children of illegal aliens from public schools (*Plyler v. Doe*, 1982). He dissented when the Court upheld an Immigration and Naturalization Service decision denying asylum to a Guatemalan whom a guerrilla organization had attempted to coerce into joining its army (*INS v. Elias-Zacarias*, 1992); when it decided that the government could kidnap a Mexican citizen and bring him to the United States for trial (*United States v. Alvarez-Machain*, 1992); when it held that the INS could detain children, pending deportation proceedings, even when an unrelated adult was willing to house them (*Reno v. Flores*, 1993). When eight justices held in 1993 that neither international nor domestic law prohibited the United States from intercepting Haitian refugees at sea and returning them to Haiti, Blackmun entered an impassioned dissent. He lambasted the "land of refugees and guardian of freedom" for forcing the refugees "back to detention, abuse, and death," and castigated the Court for "strain[ing] to sanction that conduct" (*Sale v. Haitian Centers Council*, 1993).

He remained deferential to criminal justice officials, voting to limit the exclusionary rule (*United States v. Janis*, 1976), seeing no cause of action for a plaintiff whose home had been entered illegally by federal agents and who had been subjected to unreasonable force and a strip search (*Bivens v. Six Unknown Federal Narcotics Agents*, 1971), and holding that there is no due process requirement of juries in juvenile delinquency proceedings (*McKeiver v. Pennsylvania*, 1971). He dissented when the Court upheld use

of evidence gathered by a warrantless overflight of a suspect's home by a police helicopter, but did so on the limited ground that the frequency of police overflights for non-search purposes, and therefore the extent to which a reasonable expectation of privacy against such flights existed, had not been established (*Florida v. Riley*, 1989).

His pragmatic, case-by-case approach emphasized facts. Thus he rarely disagreed with criminal justice verdicts. Blackmun, in dissenting from the punishing of an escaped prisoner who presented evidence of continued brutality by guards, declared that the prisoner had fled to "extricate" himself from "hell," and emphasized the "beatings, fires, lack of essential medical care, and sexual attacks" suffered by prisoners (*U.S. v. Bailey*, 1980). He was unenthusiastic about overturning convictions on procedural grounds, urging instead that greater use be made of Section 1983 of Title 42 of the United States Code, which criminalizes deprivation of civil rights. Disagreeing with a decision that denied injunctive relief for Philadelphia citizens alleging police brutality (*Rizzo v. Goode*, 1976), for example, he argued that the police behavior constituted a pervasive pattern under Section 1983. He also advocated use of Section 1983 to challenge illegal searches (*Allen v. McCurry*, 1980), to act against ineffective public defenders (*Polk v. Dodson*, 1981), and to punish police officers committing perjury (*Briscoe v. LaHue*, 1983).

His factual approach resulted in the gradual alteration of his view of the death penalty's constitutionality. Statistical evidence persuaded him to vote against Georgia's capital sentencing process as radically discriminatory (*McCleskey v. Kemp*, 1987). While he agreed that a mentally retarded person found competent to stand trial could be executed (*Penry v. Lynaugh*, 1989), he dissented from the Court's holding that subjecting minors to execution did not constitute cruel and unusual punishment (*Stanford v. Kentucky*, 1989). Eventually he concluded that the death penalty as applied on the basis of *Furman v. Georgia* (1972) violated the Eighth Amendment, because twenty years' experience had demonstrated that attempts made after *Furman* to satisfy the "constitutional goal of eliminating arbitrariness and discrimination" in sentencing a convicted criminal to death "can never be

achieved without compromising an equally essential component of fundamental fairness—individualized sentencing" (*Collins v. Collins*, 1994). In an emotional dissent from a denial of certiorari sought by a defendant sentenced to death, Blackmun added that capital punishment was used disproportionately in cases involving members of racial minorities, thereby violating the Equal Protection clause as well, and declared, "From this day forward, I no longer shall tinker with the machinery of death."

The American Society of Law and Medicine gave Blackmun its first Presidents' Award for outstanding contributions to law and medicine (1987), mentioning, among other cases, *Barefoot v. Estelle* (1983). There, explaining that the American Psychiatric Association had declared that subsequent dangerousness was not predictable, he voted against the imposition of capital punishment on the basis of a prediction of future dangerousness by psychiatrists who had not even examined the defendant. With Blackmun goading it, the Court continued to overturn the careless use of psychiatry in capital trials (*Ake v. Oklahoma*, 1985; *Ford v. Wainwright*, 1986). Blackmun also argued, unsuccessfully, that the equal protection clause mandated heightened scrutiny in examining state action that discriminated against the mentally retarded (*Cleburne v. Cleburne*, 1985). He held that someone declared incompetent to stand trial could be placed only in a facility that offered appropriate treatment or training (*Jackson v. Indiana*, 1972). The Court later backed away from this standard, however (see, e.g., *Jones v. United States*, 1983); Blackmun was in dissent.

While placing a high value on speech, Blackmun considered it as subject to a balancing test as any other part of the Constitution. He dissented in *New York Times Co. v. United States* (1971) because the right of the press had not been weighed against possible national security interests. He voted against giving First Amendment protection both to what he labeled the "absurd and immature antic" of a young protester who walked into a courtroom wearing a jacket with the words "Fuck the Draft" (*Cohen v. California*, 1971) and to another young man who "harm[ed] the physical integrity of the flag by wearing it affixed to the seat of his pants" (*Smith*

v. Goguen, 1974). While he concurred with the Court in remanding for trial the allegations of students that a school board's decision to remove from their libraries books it labeled "anti-American, anti-Christian, anti-Semitic, and just plain filthy" violated their First Amendment rights, Blackmun emphasized that the case involved "two competing principles of constitutional stature," one being speech and the other, the "properly inculcative purpose" of public education to "promote civic virtues" (*Island Trees v. Pico*, 1982). There was no absolute student right to receive ideas, but "certain forms of state discrimination between ideas are improper" and state discrimination against ideas because of their political content was particularly impermissible. For that reason, he joined the Court in striking down a flag desecration statute (*Texas v. Johnson*, 1989). He dissented on First Amendment grounds when the Court said a public indecency statute could be applied to nude dancing in a commercial establishment, because the state had not proved a sufficient interest to balance the right of expression (*Barnes v. Glen Theatre*, 1991). Although he disagreed with the Court's approach in the "hate speech" case of *R.A.V. v. St. Paul* (1992), he concurred in overturning the statute as overly broad.

Blackmun made a major contribution to the law of commercial speech by treating it as subject to the same balancing test. His first commercial speech opinion for the Court overturned the convictions of a Virginia newspaper's director and managing editor, who published a New York City organization's advertisements for low-cost abortions in accredited facilities (*Bigelow v. Virginia*, 1975). The Court had held in *Valentine v. Chrestensen* (1942) that the First Amendment did not apply to commercial speech. In the incremental manner most likely to secure agreement among the justices, Blackmun narrowed the holding in *Chrestensen* instead of overruling it, saying that the state limitations on the distribution of handbills at issue in *Chrestensen* were a "reasonable regulation." But the reasonableness of regulation of commercial speech depended on the nature of the speech involved, Blackmun continued, suggesting that the Court adopt a test balancing the right of the speaker against that of the state. As there was nothing fraudulent about

the speech in *Bigelow*, it was unreasonable for the state to punish it.

The following year, in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, Blackmun overturned a statute prohibiting pharmacists from advertising the prices of prescription drugs. In finding for the consumers who had brought the case, the district court had adopted Blackmun's suggested balancing test and declared that the First Amendment interest in free flow of price information outweighed any state interest. Blackmun's opinion for the Court illuminated both his attitude toward the role of speech in a democratic society and his awareness of those less favored by it. Calling advertising "dissemination of information," he asserted that such information was necessary to enlightened public decision making. The area of democratic decision making was up to the individual: "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Financial decisions also might be linked to political choices: "the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system . . . [and] to the formation of intelligent opinions as to how that system ought to be regulated or altered." The only interest of the state was the limited one of maintaining professionalism; anything else was "highly paternalistic." Blackmun, unlike the state, assumed "that this information is not in itself harmful, that people will perceive their own best interests only if they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." Describing the elderly as the group least physically fit to comparison shop and equally likely to have only "diminished resources," Blackmun added that "those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. . . . They are the least able to learn . . . where their scarce dollars are best spent. . . . Information as to who is charging what . . . could mean the alleviation of physical pain or the enjoyment of basic necessities."

Striking down a ban on advertising by lawyers in *Bates v. State Bar* (1977), Blackmun again questioned the state's view of the public

as “not sophisticated enough to realize the limitations of advertising.” “We view as dubious any justification that is based on the benefits of public ignorance,” he wrote, adding that the ban “likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable.” There was, however, a difference between commercial and noncommercial speech. Blackmun recognized the validity of state regulation aimed at commercial speech that did not “serve individual and societal interests in assuring informed and reliable decision-making.” Specifically, this meant the state could ban commercial speech that was basically false, deceptive or misleading; proposed illegal activities; established time, place, and manner limitations; or depended on coercive in-person solicitation.

Three years later, the Court edged away from its protection of commercial speech by holding it entitled to no more than an intermediate level of constitutional protection and developing a four-part test by which to judge the legitimacy of governmental regulation (*Central Hudson v. Public Service Commission*, 1980). Blackmun concurred only because the Court overturned the restriction on the speech at issue. He applauded when the Court refused to allow Cincinnati to ban freestanding newsracks that held “commercial handbills” while permitting such newsracks for newspapers (*City of Cincinnati v. Discovery Network*, 1993). The Court held that the differentiation between newspapers and commercial speech was neither neutral nor a reasonable way to reach Cincinnati’s stated goals of reducing litter and street obstructions and that it “seriously underestimate[d] the value of commercial speech,” suggesting that Cincinnati had misread earlier Court decisions. Blackmun, concerned about the listener rather than the speaker, added that the commercial speech here was listings of homes for sale and of adult education courses, which was information of major value to individuals.

In another First Amendment area, Blackmun’s position on church and state reflected an adherence to “Madison’s view that both religion and government function best if each remains independent.” School districts should not lend in-

structional materials and equipment to private schools because of the difficulty of distinguishing the sectarian and secular functions (*Walman v. Walter*, 1977); parochial schools should not be reimbursed for state-mandated testing and reporting services that are “an essential part of the sectarian schools’ activities” (*Committee for Public Education v. Regan*, 1980). In a somewhat confusing sequence of cases, he criticized the Court’s decision to treat Christmas symbols as neutral holiday decorations as a denial of the symbols’ religious meaning (*Lynch v. Donnelly*, 1984) but argued that while a crèche on public property was unconstitutional, a menorah combined with a Christmas tree and a sign saluting liberty was not (*Allegheny v. ACLU*, 1989). He considered the Court wrong to endorse the air force’s refusal to allow an Orthodox Jew to wear a yarmulke on duty (*Goldman v. Weinberger*, 1986). In 1987, he expressed concern that the wall between church and state “has been crumbling a little of late . . . particularly at the Supreme Court level.” He repeated his concern when the Court validated a state’s hiring a translator for a deaf student in a parochial school, arguing both that the Court should have decided the case on statutory rather than constitutional grounds, and that the translator inevitably was propagating religious doctrine (*Zobrest v. Catalina Foothills School District*, 1993).

Blackmun described his approach to judging when he told a law school audience in 1988 that “The Court moves first in one direction and then it shifts to another as it probes new facts, new legislation, and new theories and the issues that emerge from them.” His own change of position enabled the Court to shift precisely in that manner in cases concerning federalism.

In 1968, before Blackmun joined the Court, the justices handed down a decision consistent with the post-1936 practice of upholding federal regulatory statutes based on Congressional power over interstate commerce (*Maryland v. Wirtz*). It permitted the federal government to extend the Fair Labor Standards Act (FLSA) to public hospitals, nursing homes, and educational institutions, and, by doing so, to impose federal maximum hour and overtime pay standards on those institutions. In 1976, however, with

Blackmun in the majority, a 5–4 Court reversed *Wirtz* in *National League of Cities v. Usery*.

Amendments to FLSA had extended federal wage and hour regulations to almost all employees of state and local governments. In striking them down, Justice Rehnquist said that Congress could not tell the states how to make “essential decisions” about “integral governmental functions.” “Integral” was not defined, but was described as including functions “essential to [the] separate and independent existence of the states” and “within the area of traditional operations of state and local governments.” Blackmun’s unhappy concurrence reflected his fear that the decision might have a negative impact on environmental protection, traditionally within the less than zealous jurisdiction of the states. Focusing on “balancing,” however, he concluded that the *Usery* doctrine struck the appropriate balance between federal regulatory power and state autonomy.

In 1982, Blackmun joined and wrote for the four *Usery* dissenters in upholding a part of President Jimmy Carter’s energy program that limited the autonomy of state utility regulatory commissions (*Federal Energy Regulatory Commission v. Mississippi*). Blackmun asserted that here the federal government was merely utilizing its commerce clause power to preempt conflicting state regulations when in fact it could have preempted the entire field of energy policy. Justice O’Connor, in a dissent Blackmun called “rather loud,” attacked the result as inconsistent with *Usery*, “antithetical to the values of federalism, and inconsistent with our constitutional history.” Blackmun, unmoved, voted again with the *Usery* dissenters in a case extending the congressional commerce power to regulation of the mandatory retirement ages of state employees, a step designed to avoid discrimination against the elderly (*EEOC v. Wyoming*, 1983). Finally, in *San Antonio v. Garcia* (1985), the Court effectively overruled *Usery*, with Blackmun writing for the five-justice majority.

Garcia involved federal power to set guidelines under FLSA for overtime wages paid by a metropolitan transit authority. Explaining his vote, Blackmun said, “In the years that intervened between the two cases . . . I had become

convinced that the ‘traditional governmental function’ test was unworkable. A little reflection demonstrated that mass transportation was not such a function. Indeed, nearly all transportation systems originally were privately owned.” “We find it difficult, if not impossible,” he continued, “to identify an organizing principle that places each of the cases in the first group on one side of a line and each of the cases in the second group on the other side.” Lower courts attempting “to draw guidance from this model [*Usery*] have proved it both impracticable and doctrinally barren,” issuing contradictory holdings. What was shown by *Usery* and *Garcia*, Blackmun later commented, was “how the Court veers from one side to the other or, if one will, takes two steps ahead and one back or one step ahead and two back, depending on the point of view. If the issues were to arise again today, even with facts identical to those of *Garcia*, would the result be the same with the Court as presently constituted?” In other words, the Constitution was not a static entity, the justices were fallible people limited by their own viewpoints but trying to learn from experience and societal needs, and the Court’s doctrines inevitably would change again. He announced himself “mildly surprised,” and presumably pleased, when *Garcia* was explicitly reaffirmed in *South Carolina v. Baker* (1988).

Implicit in Blackmun’s view of the Court is the “constant development of the concepts of Justice” and the continual learning process undergone by the justices. “The Court,” he has noted, “is a very special place from which to observe, for one has a view there of what is happening in the courtrooms of America. One sees what people are litigating about. . . . One gets a sense of their desires and of their frustrations, of their hopes and of their great disappointments, of their profound personal concerns, and of what they regard as important and as crucial.”

This view of the “real world” appears to have affected Blackmun’s evolution as a justice. He has told interviewers that his ideas have not changed. If his fervor for individual rights as against governmental institutions was as great when he joined the Court as in later years, however, that was not apparent either in the way he voted or in his language. In *United States v. Kras* (1973), uphold-

ing the constitutionality of bankruptcy filing fees for indigents, he commented that the filing fee—for someone without resources—was “less than the price of a movie and little more than the cost of a pack or two of cigarettes.” It is difficult not to see the difference between that language and the empathy he displayed in *Ford v. EEOC* (1982), or *Webster v. Reproductive Health Services* (1989) as reflecting the view from the Court’s special window on society. His own description of the alteration of his thinking between *Usery* and *Garcia* suggests the openness to the “real world”—whether of social realities or the gradually unfolding impact of Supreme Court doctrine on lower court decisions—that he has urged on his colleagues and that logically would result in growth and change in any justice’s ideas, because the real world is not static.

A justice who is doctrinaire is unlikely to find cases difficult to resolve. Blackmun, however, does. “I probably agonize over cases more than I should,” he told an interviewer. He also has referred to the justices as being “locked in combat” over the outcome of cases, “struggling for the fifth vote.” Whether it was the need to secure a majority that was responsible for the difference between *Roe*, with its emphasis on physicians’ rights, and *Webster*, with its understanding of the agonizing decisions faced by an unhappily pregnant woman, is unclear; the decisive factor could as easily have been the concern that Blackmun has articulated about maintaining a strong center as the Court’s makeup has changed, or what he has referred to as the “educational process” that takes place on the Court. Whatever the reason, the difference expressed in his opinions during his first years on the Court and in those that followed is notable.

The one thing that did not change was the need to maintain integrity. “I hope you will always be yourself,” he told the Mayo Medical School’s 1980 graduating class, defining “yourself” as “human, a little sentimental, possessed of a sense of humor and a sense of humility, not possessed of a pride of authorship or accomplishment.” The lack of pride was important. Blackmun may have been thinking of *Roe* when he added, “The Bench

... is no place to grow rich, and it certainly is no place to become popular.”

Blackmun announced his retirement on April 6, 1994.

—PHILIPPA STRUM

BIBLIOGRAPHY

Blackmun’s most important article, “Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?” is in *60 New York University Law Review* (1985). The Harvard Law School Library collection in the Harvard Law School Library contains a transcript of Blackmun’s “Remarks” at the Franco-American Colloquium on Human Rights (1979). Many of his speeches, reflecting his views of the Court, the problems facing society, and specific areas of the law, have been published in law reviews. Among them are “The First Amendment and Its Religion Clauses,” *14 Nova Law Review* (1989); “Thoughts About Ethics,” *24 Emory Law Journal* (1974); “Some Goals for Legal Education,” *1 Ohio Northern Law Review* (1974); and “Movement and Counter-movement,” *38 Drake Law Review* (1989).

A number of journals have published editions containing collections of articles about various facets of Blackmun’s work on the Court, particularly in the areas of commercial speech, federalism, aliens, the taxing power, reproductive freedom, and medicine. Two of the more significant are *8 Hamline Law Review* (1985), and *13 American Journal of Law & Medicine* (1987). Stephen L. Wasby, “Justice Harry A. Blackmun in the Burger Court,” *11 Hamline Law Review* (1981) is a good if somewhat dated overview of Blackmun’s opinions, as is Michael Pollett, “Harry A. Blackmun,” in the supplemental volume of Friedman and Israel *6 Justices* (1978). Burt Neuborne, “Blackmun: Intellectual Openness Elicits Needed Respect for the Judicial Process,” *National Law Journal* (18 Feb. 1980), and Norman Dorsen, “A Change in Judicial Philosophy?” *National Law Journal* (18 Feb. 1985), reflect the debate about whether Blackmun’s ideas have altered during his years on the Court.

JOHN BLAIR, JR.

BORN 1732, probably Williamsburg, Virginia

NOMINATED to the Court 24 September 1789
by George Washington

TOOK seat 2 February 1790; resigned
25 October 1795

DIED 31 August 1800 in Williamsburg,
Virginia

When John Blair, Jr., joined the Supreme Court at the time of its creation by the Judiciary Act of 1789, he brought with him extensive experience on the courts of his native state. Blair, who studied at the Middle Temple in the mid-1750s, entered practice before the general court of the colony of Virginia and also became a legislator. Active in the Revolutionary movement, he was a member of the Virginia convention of May 1776, serving on the committee that framed a new state constitution and declaration of rights. With the establishment of a system of state courts, he sat between 1777 and 1789 at one time or another on the general court, the high court of chancery, and the supreme court of appeals. He also became a Virginia delegate to the federal Constitutional Convention of 1787—one of three, including George Washington and James Madison, who approved the final document—and a Federalist delegate to the Virginia ratifying convention of 1788.

Blair's Virginia experience had already associated him with an early precedent for judicial review. In *Commonwealth v. Caton* (1782) the Virginia court of appeals claimed the right to declare an act of the legislature void if it contradicted the Constitution. In the case under consideration, which concerned the legality of a pardon granted by the lower house of the legislature to convicted Loyalists in alleged violation of the Virginia Treason Act of 1776, the justices concluded, however, that the law was valid and had been violated by the legislators themselves. Blair's opinion avoided a forceful affirmation of the court's right to decide constitutionality that other justices advanced, although he did not explicitly deny it. Rather, in upholding the legal-

ity of the statute, he "waved the question" of constitutionality. He was also a signer of a "Remonstrance" by the judges of the court of appeals in 1788 protesting new legislation that added significantly to their duties, including riding circuit. The justices called the law a violation of the independence of the judiciary guaranteed by the state constitution. That experience must have influenced him, as he joined his fellow Supreme Court justices in attempting to alleviate the heavy burden of their service on the federal circuit courts.

Blair was hardly among the more outspoken justices of the Court, being more likely to base his opinions on a close reading of the laws or the Constitution than on sweeping principle. Yet he seems generally to have sided with the early efforts of the Court to establish its independence and the right of judicial review. On April 10, 1792, while sitting on the circuit for the Philadelphia district, he joined in a letter to President Washington protesting the terms of the Pension Act of 1792 requiring circuit judges to certify veterans' pension claims to the secretary of war, who could in turn overrule them. The justices objected to the non-judicial character of the duty and also to the power of an officer of the executive branch to override a judge. Whereas some circuit judges agreed to review the claims as commissioners rather than judges, Blair and his colleagues refused to consider the claim of William Hayburn, who thereupon appealed to Congress. In *Hayburn's Case* (1792), Attorney General Edmund Randolph then sought from the Supreme Court a mandamus commanding the circuit court to proceed on Hayburn's petition. The Supreme Court divided three to three on the motion, with Blair voting in support of Randolph. Although a subsequent revision of the Pension Act ended the necessity of deciding the case, the judges thus gave an early demonstration of their refusal to enforce legislation they regarded as unconstitutional.

The most significant case to come before the Court during Blair's tenure was unquestionably *Chisholm v. Georgia* (1793), in which the



John Blair, Jr.

Artwork by Albert Rosenthal.

Collection of the Supreme Court of the United States.

justices ruled by a vote of 4–1 on a debt claim by the executors of an estate of a citizen of South Carolina against the state of Georgia that a state could be sued in the federal courts by a citizen of another state. The core issue was whether the Constitution extended federal judicial power to suits in all cases, or only if the state was the plaintiff, but ultimately, the issue was that of state sovereignty. The justices wrote their opinions *seriatim*, and while Blair voted with the majority, he avoided the broad claims to the force of popular sovereignty advanced by two of his colleagues and rested his decision on a close reading of the language in Article III, Section 2 of the Constitution. The bold decision stirred strong political opposition and was overturned by the adoption of the Eleventh Amendment, the first instance of such a reversal.

Blair also sat near the end of his service on the Court on *Penhallow v. Doane's Administrators* (1795), a suit for damages that tested the right of the federal courts to assume jurisdiction over the objection of the state of New Hampshire in a case that had originally been decided on

appeal in the defunct court of appeals under the Articles of Confederation. In ruling against New Hampshire, the Court again advanced its strongly nationalist views, and Blair again agreed, while remaining far less explicit than his colleague, William Patterson.

Blair's health was by now declining—he had complained on one occasion of “a rattling distracting noise in my head”—and he soon retired to his home in Williamsburg, where he lived until his death.

—THAD W. TATE

BIBLIOGRAPHY

For Blair's court decisions, Julius Goebel, Jr., *History of the Supreme Court of the United States, Antecedents and Beginnings to 1801* (1971), is the fullest account. Frederick Horner, *The History of the Blair, Banister, and Braxton Families Before and After the Revolution* (1898), reprints several personal letters of Blair, some of them documenting the onset of the illness that led to his retirement.

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SAMUEL M. BLATCHFORD

BORN 9 March 1820, New York City

NOMINATED to the Court 13 March 1882
by Chester A. Arthur

TOOK seat 3 April 1882

DIED 7 July 1893 in Newport, Rhode Island

Born into a wealthy New York family with strong connections to the state's financial community, Samuel Blatchford entered Columbia College at age thirteen, graduated in 1837, and gained admission to the bar in 1842. As a lawyer, Blatchford achieved a reputation as a specialist in admiralty law and, after 1852, as a reporter of federal court decisions. His tireless efforts in compiling federal case law, combined with his loyalty to the Republican party, earned Blatchford a place on the federal bench after the Civil War. He served first as a judge of the southern district of New York (1867–1872), and later as a judge on the court of appeals for the second circuit (1872–1882). With fifteen years of federal judicial experience, the moderate and noncontroversial Blatchford was a logical choice for the Supreme Court vacancy created by the resignation of Ward Hunt. The Senate approved his nomination on a voice vote.

Although the author of more than his share of opinions, Blatchford received little attention for most of his work on the Court. In the early part of his tenure, many of his decisions involved admiralty, patents, bankruptcy, and copyrights—not the stuff of landmark cases. Nevertheless, his achievements were notable, particularly in admiralty and patent law. In *Ex parte Boyer* (1884), for example, Blatchford extended the admiralty jurisdiction to canals. Meanwhile, his decisions in *Dobson v. Hartford Carpet Co.* (1884), and *Dobson v. Dornan* (1886), both of which involved patents for carpet design granted to Dobson, established rules for the infringement of design. After the second *Dobson* case, Congress passed legislation in this area, adopting many of the principles laid down by Blatchford.

As a member of the Court during the 1880s, Blatchford also took part in a number of cases

involving the civil rights of African Americans and Chinese immigrants. Both groups were the subject of important federal legislation during the late nineteenth century, and Blatchford's record on such matters—like that of the Court's—was a mixed one. On the one hand, in the *Civil Rights Cases* (1883), Blatchford voted with the eight-person majority in striking down the Civil Rights Act of 1875 as an unconstitutional attempt to outlaw discrimination in privately-owned public accommodations. Moreover, in a case involving a group of Chinese aliens, *Baldwin v. Franks* (1887), Blatchford was part of a seven-justice majority that refused to interpret a treaty between the United States and China so as to protect foreign nationals from violence.

On the other hand, Blatchford supported black voting rights when, as part of a unanimous Court in *Ex parte Yarbrough* (1884), he voted to uphold Congressional measures penalizing those who conspired to prevent African Americans from exercising the franchise. Blatchford similarly stood for the protection of civil rights in *Yick Wo v. Hopkins* (1886), where he joined the rest of the justices in applying the Fourteenth Amendment's equal protection clause to a group of Chinese laundry owners, and in *United States v. Jung Ah Lung* (1888), where he wrote the majority opinion granting the release of an illegally detained Chinese immigrant.

Like his stands on civil rights issues, Blatchford's opinions in cases involving the Bill of Rights were also uneven. In *Auffmordt v. Hedden* (1890) he refused to extend the Seventh Amendment's guarantee of trial by jury to decisions of customs appraisers regarding the value of imports, and in *O'Neil v. Vermont* (1892), he held that the Eighth Amendment's ban on cruel and unusual punishment did not apply to the states.

Nevertheless, his most notable opinion regarding the Bill of Rights, *Counselman v. Hitchcock* (1892), granted extensive protection to individuals under the Fifth Amendment's self-incrimination proviso. Counselman, a grain commission dealer called to testify concerning vio-

lations of the Interstate Commerce Act, had refused to answer questions involving illegal rates he may have received for grain shipments. Although an act of Congress provided that no testimony by an individual could be used against that person in such a proceeding, Counselman thought the statute an insufficient protection against self-incrimination and refused to testify. After lower federal courts held him in contempt, Counselman appealed to the Supreme Court. Writing for the Court, Blatchford accepted Counselman's claim and broadly construed the self-incrimination clause. Rejecting the opposition's argument that the Fifth Amendment applied only to cases in which the witness himself was on trial—and thus, not to Counselman's case—Blatchford held that the amendment extended to all criminal proceedings. Moreover, he also believed that the congressional self-incrimination statute offered inadequate protection of Counselman's rights. "It is quite clear that legislation cannot abridge a constitutional privilege," Blatchford wrote, "and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect." In *Counselman*, Blatchford stood for an expansive interpretation of individual rights under the Fifth Amendment.

More significant than Blatchford's interpretation of the Bill of Rights, however, was his view of economic liberty. After the Reconstruction period, state and federal courts throughout the nation gradually began to interpret the due process clause of the Fourteenth Amendment as a guarantee of certain fundamental rights, often associated with an individual's use and pursuit of property. "Substantive due process," as it came to be called, became the means by which courts struck down regulatory measures designed to adjust the operation of the marketplace in the public interest. Blatchford's opinion in *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota* (1890) was the first instance in which the Supreme Court used the due process clause to invalidate a state railroad regulation.

The case involved the Minnesota legislature's establishment of a commission charged with setting equal and reasonable rates for railroad transportation within the state. Under the

law, rates established by the commission were "final and conclusive," and not subject to judicial inquiry. The Chicago, Milwaukee & St. Paul Railway Company's refusal to comply with the commission's rates launched a dispute over the Minnesota law's constitutionality that ended up in the Supreme Court. Attorneys for the railway contended that the regulation of rates violated fundamental rights, including the right to obtain the benefits from the use of one's property. Counsel for Minnesota, on the other hand, emphasized a line of precedents, including the Supreme Court's decision in *Munn v. Illinois* (1877), that sustained state legislatures' power to establish reasonable rates for transportation.

Writing for a 6–3 majority, Blatchford concluded that the Minnesota statute, because it offered no check on the commission's rate-setting authority, conflicted with the Constitution. "Although the railroad company is forbidden to establish rates that are not equal and reasonable," he wrote, "there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable." Lacking provisions for judicial investigation into the reasonableness of rates, the statute creating the commission stripped railway companies of their property without due process of law. "[The law] deprives the company of its right to a judicial investigation, by due process of law . . .," Blatchford wrote, "and substitutes . . . the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions." The question of reasonableness, Blatchford believed, was a judicial one, and, by granting the authority to establish rates to a commission without judicial investigation, the Minnesota statute failed to pass constitutional muster.

To contemporary observers, Blatchford's opinion in *Chicago, Milwaukee & St. Paul* seemed to overrule *Munn v. Illinois*, where the Court had upheld an Illinois law regulating rates for grain elevators, and appeared to signal the Court's willingness to protect property from interference by state legislatures. However, just two years after he held that the due process clause could be used against state regulation, the

enigmatic Blatchford, in *Budd v. New York* (1892), steered the Court back toward an acceptance of regulatory measures. The New York statute at issue in *Budd*, like the law in *Munn*, provided for maximum rates for grain elevators. Although counsel urged that the New York legislature's establishment of reasonable rates violated the principles enunciated in *Chicago, Milwaukee & St. Paul*, Blatchford held otherwise. Following the *Munn* precedent, he concluded that the New York law did not constitute a violation of due process. Blatchford explained the apparent contradiction between his opinions in *Chicago, Milwaukee & St. Paul* and *Budd* by making a factual distinction between the two cases: in *Budd* the legislature itself determined reasonable rates, whereas in *Chicago, Milwaukee & St. Paul* a legislatively created commission had done so. "What was said in the opinion in [*Chicago, Milwaukee & St. Paul*] as to the question of the reasonableness of the rate of charge being one for judicial investigation," he concluded, "had no reference to a case where the rates are prescribed directly by the legislature."

Blatchford's murky explanation of his behavior in *Budd* and his generally incongruous record should not detract from the contributions

he made as a member of the Court. Among the most steady and dependable of justices, Blatchford wrote 430 majority opinions in a mere eleven years on the Court. He wrote only two dissents, a fact that earned him a reputation as a consensus-builder. Overall, Blatchford served admirably in a particularly crucial period of the Court's history, when the justices were only beginning to come to grips with the massive social changes wrought by the nation's transition to industrial capitalism. Blatchford did not live long enough to witness the Court's continuing struggle to adapt the Constitution to modern American society.

—TIMOTHY S. HUEBNER

BIBLIOGRAPHY

There is no biography of Blatchford, only brief sketches of his life in scattered reference volumes. The best such sketch is by Arnold Paul in Friedman and Israel, *2 Justices* 1401. The most useful discussion of Blatchford's most famous opinion is James W. Ely, Jr., "The Railroad Question Revisited: *Chicago, Milwaukee & St. Paul Railway v. Minnesota* and Constitutional Limits on State Regulations," *12 Great Plains Quarterly* 121 (1992).



Joseph Bradley

*Photograph by Matthew Brady.
Collection of the Supreme Court of the United States.*

JOSEPH BRADLEY

BORN 14 March 1813, Berne, New York

NOMINATED to the Court 7 February 1870
by Ulysses S. Grant; confirmed 21

TOOK seat March 1870

DIED 22 January 1892 in Washington, D.C.

The oldest of twelve children, Joseph Bradley was enrolled at Rutgers College in 1833 through the intervention of a former teacher. He graduated in three years, and was later described by one scholar as “a desperately serious young man.” Shortly after graduation, he undertook to study law—largely with himself as the instructor. Bradley appears to have been rigorous in his preparation. One entry in his notes cites five different sources: one in Latin, two in French, and two in English. Admitted to the New Jersey Bar in 1839, for the next thirty years Bradley centered his life and legal career around Newark, New Jersey. By the Civil War era, he had become a prominent attorney, well-known among the leaders of Newark’s business and legal community.

In 1862, Bradley agreed to run for Congress as a conservative Republican. He lost, but given some of his later opinions as a Supreme Court justice, his position on racial integration as a candidate is of interest. Like many Republicans, including Lincoln, Bradley had no difficulty supporting the end of slavery while at the same time foreseeing little change in racial attitudes toward blacks. It was perfectly consistent to be pro-Union, anti-slavery, and anti-black—all at the same time. Candidate Bradley’s views would be echoed by Justice Bradley’s decision in the *Civil Rights Cases* twenty-one years later. A strong supporter of Ulysses Grant in the 1868 presidential election—indeed, he was a presidential elector pledged to Grant—Bradley was nominated to the Supreme Court in 1870, and served on that bench for almost twenty-two years.

Although this essay focuses on Bradley’s judicial career, brief attention should be given to the most controversial non-judicial episode dur-

ing his tenure on the Court—his role as a member of the electoral commission in the disputed 1876 presidential election. With Congress deadlocked over the counting of the electoral votes, the solution appeared to be a fifteen-member commission to consist of five members apiece from the House, the Senate, and the Supreme Court. With fourteen commissioners divided equally between the two parties, it was widely assumed that Bradley would cast the deciding vote, and indeed he did. Bradley voted with his fellow Republicans on every question before them, giving Rutherford Hayes sufficient votes to become president.

Possibly because Bradley’s views on racial relations were virtually identical with those of the southern Democrats (all the Democratic senators who voted on his confirmation had supported him), these party members may have assumed that he would vote with them. Instead, he did what every other member of the commission did: voted along usual party lines. In so doing, however, he may have switched his vote after two old friends, both Republicans and strong supporters of his judicial selection, allegedly visited him the evening before the important vote was to be taken. Whatever actually happened will probably never be known, but in the face of Democratic denunciation, Bradley maintained a blend of olympian aloofness, self-righteousness, and self-pity; his dignity, if not his integrity, remained substantially intact.

Bradley’s generation fought the Civil War, his party framed the Fourteenth Amendment, and his Court formulated the new enactment’s first judicial interpretation. It took the form of a major decision handed down in 1873. The *Slaughterhouse Cases* involved a group of New Orleans butchers challenging a state statute that confined all New Orleans butchering to a specific area, and mandated further that it be done on the premises of a particular meat-packing corporation. Disgruntled if not destitute, the butchers invoked the Fourteenth Amendment, claiming that the statute denied them their right to pursue a lawful calling and thus deprived them of their lib-

erty and property in contravention of the new provision. Speaking for a bare majority, Justice Samuel Miller rejected this contention, insisting that the butchers had to seek relief from either state court or state legislature; the Fourteenth Amendment had been intended to deal with the ex-slave, not the general population. It did not, in other words, apply to their case.

Bradley strongly disagreed. The statute restricting butchering to the premises of a favored company was "onerous, unreasonable, arbitrary, and unjust." The butchers were indeed deprived of their liberty as well as property, without due process of law. "Their right of choice is a portion of their liberty; their occupation is their property." Moreover, although ex-slaves may have been the primary cause of the Amendment, "its language [was] general, embracing all citizens, and . . . was purposely so expressed." Bradley reiterated these views in two later decisions, *Bartemeyer v. Iowa* (1873), and *Butchers' Union Slaughter-House et al. v. Crescent City Live-Stock Landing and Slaughter-House Co.* (1884). In spite of his repeated emphasis on the Fourteenth Amendment's scope, however, he seems to have been somewhat selective in the callings to which he attached the amendment's protection.

In the case of *Bradwell v. Illinois* (1872), Bradley's Court considered the efforts of a woman, Myra Bradwell, to gain admittance to the Illinois Bar so that she could practice law. She argued, not unreasonably, that the Fourteenth Amendment prevented Illinois from abridging her "privileges and immunities," one of which was surely her right to practice her chosen calling. The Court, Bradley included, disagreed. Since Bradley had vigorously emphasized the contrary in the *Slaughterhouse Cases*, the question of his inconsistency arises. If a group of butchers had a constitutionally protected right to practice their profession, why did not a woman qualified to practice law have a similar privilege?

In a concurring opinion, Bradley conceded no inconsistency whatsoever. Law had to reflect nature, and in the "nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position." One

needed to consider "the peculiar characteristics, destiny, and mission of woman." After all, he intoned, the chief purpose of woman was "to fulfill the noble and benign offices of wife and mother. This is the law of the creator, and the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases." Perhaps the best assessment of Bradley's concurrence in *Bradwell* came from a writer in the Boston *Daily Advertiser*, who observed that "Judge Bradley's opinion seemed to cause no little amusement upon the bench and on the Bar."

In terms of civil rights, Bradley appears to have placed certain categories of rights higher than others. Indeed, perhaps he can be accused of suffering from a hardening of the categories, as well. In 1872, he dissented from the decision in *Blyew v. United States*, a case involving a brutal murder of an elderly, blind black woman whose death had been witnessed by several of her relatives. Kentucky law, however, forbade a black to testify at the trial of a white defendant. Federal authorities sought, therefore, to move the case into federal court. In an opinion that seems less than persuasive, Justice William Strong blocked the transfer, arguing that the federal law applied only to persons "affected by the cause," and this limitation did not include witnesses. Bradley dissented, and denounced Strong's reasoning. The result of the decision for potential witnesses "is to brand them with a badge of slavery . . . to expose them to wanton insults and fiendish assaults . . . to leave their lives, their families, and their property unprotected by law."

Passage of the 1875 Civil Rights Act only three years later inspired a very different response from Bradley. The new statute mandated integration in certain public establishments such as restaurants and theaters. The right to expect the law to protect one's ability to testify as a witness was very different and far more important, according to Bradley, than a desire on the part of blacks to sit next to whites while dining or at a theater. The former was a vital component of one's privileges as a citizen, the other merely a matter of social preference. In his copybook, Bradley wrote of the new law that

“surely Congress cannot guarantee to the colored people admission to every place of gathering and amusement. To deprive white people of the right of choosing their own company would be to introduce another kind of slavery.” Blacks were entitled to “freedom and all legal and essential privileges. . . . [But] the antipathy of race cannot be crushed and annihilated by legal enactment.”

Given these views, one should not be surprised to read Bradley’s opinion for the Court in the *Civil Rights Cases* (1883), in which he merely reiterated sentiments he had long held. The Fourteenth Amendment, he insisted, applied only to state action; private discrimination seemed perfectly appropriate to him. Here, Justice Bradley echoed in 1883 what congressional candidate Bradley had asserted in 1862. Moreover, every member of the Court who had participated in *Slaughterhouse* ten years before agreed with him.

Conceding that *Bradwell* and the *Civil Rights Cases* are certainly no tribute to Bradley as a civil libertarian, one of his later decisions is of much greater positive significance. In the landmark case of *Boyd v. United States* (1886), Bradley explored the scope of the Fourth Amendment and its relationship to self-incrimination. He rejected the argument “that the seizure of a man’s private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.” Anticipating later constitutional doctrine, he claimed that “a compulsory production of the private books and papers of the owner . . . compel[s] him to be a witness against himself, within the meaning of the Fifth Amendment . . . and is the equivalent of a search and seizure—within the meaning of the Fourth Amendment.” Moreover, the scope and motive for the search was irrelevant.

If Bradley seemed bound to his times in matters of race and gender, he demonstrated flexibility and creativity in the areas of railroad regulation and interpretation of the commerce clause. Although he had been a very successful railroad lawyer representing the Camden and Amboy Railroad, widely regarded as one of the most notorious contributors to “political pressure and

bribery,” as a judge, his independent attitude toward these common carriers was noteworthy. Bradley strongly supported the Court’s refusal to use the Fourteenth Amendment to block state regulation of private corporations—such as railroads or grain elevators—in the public interest. The economic clout of railroad corporations, he insisted, should not permit them to “abdicate their essential duties.”

Writing a private note to Chief Justice Morrison Waite concerning the forthcoming decision in *Munn v. Illinois* (1876), one that went against the proprietor of a grain elevator objecting to state regulation, Bradley denounced the railroads in language that seems unusually harsh. Perhaps he had in mind his long experience as director and counsel for the Camden and Amboy. Bradley persuaded his chief to hold that when such a corporation “becomes a matter of public consequence so as to affect the whole public and to become a common charge, it is subject to legislative regulation and control.” He insisted that there are “in this country no more absolute monopolies of public service than [the railroads] are. The public stands on no equality with them. . . . They have every thing in their own hands. . . . They impose a common charge of greater value to themselves and burden to the public than any other which exists in the present age.”

When interpreting the scope of the commerce clause, Bradley demonstrated impressive sensitivity toward the need of an effective federalism. He explored with skill and insight the controversial boundaries between federal regulation of interstate commerce and the state taxing power, frequently upholding the former at the expense of the latter. In *Robbins v. Shelby County Taxing District* (1887), for example, he stated for the Court that “the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems. . . . It seems to be forgotten that the people of this country are citizens of the United States, as well as of the individual states, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them.”

Of Grant's four appointments, Bradley was undoubtedly the strongest in intellect and learning. Familiar with the American, English, and Continental legal systems, he brought added insights to his decisions through practical experience in the business world, as well as a familiarity with other fields, including mathematics, philosophy, and natural sciences. Thus Bradley was equally at home when expounding on the appropriate, if not invariably complex, methods for calculating the earnings of a railroad, or discussing the intricacies of patent litigation. He reveled in tracking legal doctrines back through a variety of sources, and sometimes his decisions became vehicles for extended research. In an 1890 opinion, for example, Bradley traced an obscure legal doctrine back to the Pandects of Justinian and cited Latin, French, and Spanish sources, including a footnote in French!

In company with other tough-minded and able judges such as Samuel Miller or Stephen Field, Bradley more than held his own. Miller recalled of Bradley that "if there is a principle on which a case can be decided that no one else has thought of, it has for that reason a charm for him." Nevertheless, Miller believed that given "some allowance for eccentricity, he is a useful and valuable man on the bench." A Rutgers classmate noted that as with "most men who resemble him in the possession of logical power and habit, he had little or no deference for the mere opinion of others." Bradley, he added, had a compulsion "not only to be, but to know."

Bradley, wrote one contemporary, "was amusingly petulant—naturally eccentric; and he had stimulated eccentricity by its indulgence throughout his life." In 1890, an observer described Justice Bradley as "a little dried-up anatomy of a man. . . . His skin hangs in wrinkles and all of his fat has long since gone to figures and judicial decisions. He is seventy-seven years old, but there is a fair chance for his lasting at least twenty-three years longer. There is not much of him to die, and when his soul is disembodied it will not be much freer than it is now."

How can one assess his twenty-two years as a Supreme Court justice? Each generation

determines for itself judicial greatness, but there is no doubt that Bradley had superb legal qualifications and was an outstanding technician of the law. Self-taught, he brought to his decisions a seasoned practicality in business affairs. Indeed, his greatest opinions in terms of influence appear to have been in the field of commercial regulation. Further, his writings indicate that Bradley passionately believed both in progress and the perfectibility of man.

Yet Bradley could not translate his broad faith in this perfectibility of man into sound judicial doctrine that went beyond gender and race. In other fields of the law that later generations have considered more important than interstate commerce, he seems to have been unable to transcend the limits of his own time. The truly great judge is somehow able to do that, by "nudging" the future rule of law into some sort of shape that goes beyond the current role of law—through decisions which have retained validity, vitality, and significance for our own time, holdings that continue to influence American constitutionalism.

Bradley, according to Leon Friedman, "had little of the skepticism and tolerance of a Holmes, and came to a conclusion about a law or legal rule because it was the *right* law or rule under the circumstances, and not because imperfect men should be allowed to bungle their way freely within broad limits of government." More than one hundred years have passed since Bradley's death. Yet, the assessment of his life and career offered by the *Washington Post* in 1892 remains valid and accurate. He was "a man of profound and varied learning, legal acumen, and moral rectitude." Beyond this, deponent sayeth not.

—JONATHAN LURIE

BIBLIOGRAPHY

Bradley's papers are housed in the New Jersey Historical Society. While there are some court-related materials among them, the entire collection appears to have been "edited" by his son before donation to the society. There is no extant scholarly biographical study of Bradley, but Charles Fairman contributed three articles

which, when taken together, may make such a biography unnecessary. See "Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases," parts 1 and 2, 54 *Harvard Law Review* 977, 1128 (1941); "The Education of a Justice: Justice Bradley and Some of His Colleagues," 1 *Stanford Law Review* 217 (1949); and "What Makes a Great Justice? Mr.

Justice Bradley and the Supreme Court, 1870–1892," 30 *Boston University Law Review* 46 (1950). See also Leon Friedman, "Joseph Bradley," in Friedman and Israel, 2 *Justices* 1181. An attempt to integrate much of the existing scholarship on Bradley may be seen in Jonathan Lurie, "Mr. Justice Bradley: A Reassessment," 16 *Seton Hall Law Review* 343 (1986).



Louis Dembitz Brandeis
Photograph by Harris and Ewing.
Collection of the Supreme Court of the United States.

LOUIS DEMBITZ BRANDEIS

BORN 13 November 1856, Louisville,
Kentucky

NOMINATED to the Court 28 January 1916
by Woodrow Wilson

TOOK seat 5 June 1916; retired 13 February
1939

DIED 5 October 1941 in Washington, D.C.

When Louis Brandeis was nominated to the Supreme Court in 1916, his wife wrote to his brother, "I tell Louis, if he is going to retire, he is certainly doing it with a burst of fireworks." Although Brandeis would become the first Jew to sit on the Court, the fireworks resulted less from his religion than from the political philosophy and the approach to law for which he had already become famous. Both the philosophy and the approach were considered unacceptably radical by influential elements of the business and legal communities. From their point of view, Brandeis's opponents were correct: when Brandeis took his seat on the Court after a fierce and bitter confirmation process, he quickly demonstrated that his ideology and jurisprudence would illuminate his decisions as a justice. In doing so, they also permanently altered American constitutional jurisprudence.

Brandeis graduated at the top of his class (1877) at Harvard Law School, where Christopher Columbus Langdell had introduced the case method and taught that law was a dynamic entity based on social realities. When Brandeis went on to practice law in Boston, he insisted on understanding not only his clients' immediate problems but the economic and, occasionally, the political context in which they arose. He did so, he told a young associate, because "knowledge of the decided cases and of the rules of logic cannot alone make a great lawyer. . . . The controlling force is the deep knowledge of human necessities. . . . The duty of a lawyer today is not that of a solver of legal conundrums: he is indeed a counsellor at law." He noted in a memorandum on "The Practice of The Law" that a lawyer was "far more likely to impress clients

by knowledge of facts than by knowledge of law."

By 1916, Brandeis had impressed enough clients to support a highly lucrative law firm. He had also made an impact on a variety of leaders in public life and on the public itself. The media referred to him as the "People's Attorney" because of his involvement in movements for social justice: legalization of unions, women's suffrage, maximum hours and minimum wage legislation, and use of natural resources for the public rather than the private good. He had fought with some success against the trusts that controlled much of America's economy. His investigation of the insurance industry resulted in his invention of savings bank life insurance. He earned a reputation for integrity by engaging in most of his battles without pay, and through his continual criticism of government and corporate corruption. He campaigned vigorously for Woodrow Wilson in the 1912 presidential election; in fact, Arthur Link, Wilson's chief biographer, has attributed Wilson's New Freedom platform to Brandeis's economic thought. Such pre-Court battles both reflected and shaped Brandeis's political ideas, which in turn underlay his judicial opinions. As Paul Freund, one of his law clerks, commented, "It is hardly likely that anyone came to the Supreme Court with a more closely articulated set of convictions than those which Brandeis held."

The opinions he wrote as a justice were logical extensions of Brandeis's ideas about the nature of the democratic state and the role of the individual within it. In the ideal society, government enabled individuals to reach their full potential as self-fulfilled members of a just community, and individuals willingly assumed their civic responsibilities. Development of human potential required that each individual have access to ideas, a concept given concrete form in the legal doctrine of freedom of speech and press. Human development also depended on the leisure to learn about potential public policies and associate with others for discussion of public matters, and in the opportunity to participate

in the processes through which the policies were determined. A democratic state responsive to the electorate was one in which neither economic nor political institutions were large enough to make individual beliefs irrelevant or to stultify experimentation. To Brandeis, federalism was more than a historically useful system that had enabled thirteen colonies to unite as a nation; it was a productive mechanism for experimentation with new governmental policies. He insisted on each citizen's civic responsibility and was adamant about education, which continued in one way or another throughout life, as a precondition for a democratic electorate.

Brandeis's sociological jurisprudence followed logically from his democratic philosophy. Law represented the will of the people, which in turn reflected their perception of society's needs. As the needs changed, so should the laws; this included the Constitution, which judges had an obligation to read according to current societal necessities. Societal needs could be ascertained only by examining facts, either in legislative hearings or by evaluating data accumulated during societal experimentation. He scorned the late nineteenth- and early twentieth-century attorneys who made themselves servants of corporations, telling the Harvard Ethical Society in 1905 that his vision of the ideal lawyer was drawn from the early United States, when "nearly every great lawyer was . . . a statesman; and nearly every statesman, great or small, was a lawyer," holding "a position of independence, between the wealthy and the people, prepared to curb the excesses of either." The role of lawyers in a democratic polity was to defend legislative social experiments by providing judges with sufficient factual material for a determination that the experiments constituted reasonable responses to societal problems.

Brandeis had done precisely that in the innovative and almost immediately famous "Brandeis brief" he and his sister-in-law, Josephine Goldmark, prepared for the 1908 case of *Muller v. Oregon*. Faced with a challenge to an Oregon statute limiting the maximum number of hours women could work for pay, Brandeis and Goldmark presented the Supreme Court with two pages of traditional legal argumentation and more than 100 pages of factual

data demonstrating the deleterious effect of overly long hours on women's health and the well-being of their families. After winning the case, Brandeis and Goldmark went on to use similar and equally successful arguments to defend other statutes establishing maximum hours and minimum wages for women. Brandeis realized that although it would negate his gender-based argument in *Muller*, the same approach should be taken toward hours and wage legislation for men, and he therefore helped secure publication of Goldmark's careful collections of data supporting that argument. In 1916, they labored for six months on a brief defending an Oregon law setting maximum hours for men, a case that was turned over to Felix Frankfurter when Brandeis was appointed to the Supreme Court (*Bunting v. Oregon*, 1917).

Brandeis is perhaps best known for his judicial opinions in the areas of social experimentation, the size of economic and political institutions, and civil liberties, but his reputation also lies in part on his advocacy of limited judicial intervention in policy making. He did not ignore the judicial proprieties in pursuit of his goals for the country. Judicial restraint was a key element of his sociological jurisprudence. It was as undemocratic and unwise for judges to make social policy as it was for them to jump into cases when matters were not ripe for decision. When Arizona sued to prevent the construction of Boulder Dam and the possible diversion of water to California, for example, Brandeis pointed out that construction of the dam had not yet begun and so there was no need for the Court to decide whether waters that might never be taken from Arizona could legitimately be diverted (*Arizona v. California*, 1931). If a party based its case on a right new to American law, as happened when the Associated Press claimed that it had a property right in its dispatches, Brandeis, in dissent, objected to the Court's usurpation of the legislative function by creating and legitimizing a largely undefined right (*International News Service v. Associated Press*, 1918). Similarly, he dissented from the Court's declaration that stock dividends were a category of untaxable property; that was up to a legislature to decide (*Eisner v. Macomber*, 1920).

His most explicit statement about the limits of judicial review came in *Ashwander v. TVA* (1936), where the power of the Tennessee Valley Authority to construct the Wheeler Dam was challenged by a stockholder's suit. Although Brandeis concurred in the Court's holding that the project was constitutionally valid, he stated that he would not have reached the constitutional issue because the plaintiffs had no real standing to sue. He drew on earlier Court decisions to list the restrictive guidelines he believed the Court ought to follow in dealing with constitutional questions: declining to hear "a friendly, non-adversary, proceeding," a case where the complainant has suffered no real injury, or one in which a complainant challenged a statute from which he had benefited; making no decision on constitutional grounds if others were available; and issuing rules of constitutional law that were as narrow as possible.

As a lawyer, he had fulminated against the courts' interpretation of the Fourteenth Amendment's due process clause to promulgate what he considered judge-made doctrines such as liberty of contract in order to strike down social policy enacted by state legislatures. As a judge, he maintained his insistence on judicial restraint, even when he disagreed with the legislative experiment at issue. In 1932, the Court struck down an Oklahoma law forbidding any new ice company to open without first acquiring a certificate of public convenience and necessity from the state (*New State Ice Co. v. Liebmann*). The rationale was that licensing would minimize the higher consumer costs caused by wasteful duplication of plants and delivery service. Justice Sutherland, however, speaking for the Court, said that the ice business was not "affected with a public interest" and that all the Oklahoma statute did was create the possibility of monopoly.

Brandeis had fought against monopoly and the suppression of competition as a lawyer. He nonetheless dissented from the Court's decision in the Oklahoma case and wrote fourteen heavily footnoted pages to show that social conditions in Oklahoma might well have led the legislature to believe that excessive competition had added to the impact of the Depression on unemploy-

ment and low prices. He indicated that he disliked the law, asserting that most people "realize that failure to distribute widely the profits of industry has been a prime cause of our present plight." But his own view, or that of "most" people, was irrelevant to him as a justice; Oklahoma's experiment was rational, and the Court ought to permit it to continue.

Felix Frankfurter commented that Brandeis believed that the Constitution "provided for the future partly by not forecasting it and partly by the generality of its language." The Constitution, in Brandeis's eyes, was designed to be flexible. It was as amenable to legislative experimentation as to judicial imagination, and Brandeis frequently reminded his colleagues of John Marshall's statement in *McCulloch v. Maryland* (1819) that "We must never forget that it is a constitution we are expounding." He wrote in *New State Ice*: "There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. To stay experimentation in things social and economic is a grave responsibility [which might be] fraught with serious consequences to the nation." He noted his belief that federalism enabled states to serve as laboratories for social change, and urged the Court not to hinder federalism by "erect[ing] our prejudices into legal principles." "If we would guide by the light of reason," he declared, "we must let our minds be bold."

One of Brandeis's bêtes noires was the Court's 1842 decision in *Swift v. Tyson* that federal courts were not bound by state common law, but could follow their own doctrines. Brandeis had joined fellow justice Oliver Wendell Holmes's campaign to overrule the decision, which enabled businesses to circumvent local law by litigating in federal rather than state courts. *Swift* violated Brandeis's belief in federalism, accountability of economic power, and state experimentation with controlling economic institutions. At the successful conclusion of a lengthy campaign, Brandeis was able to write the Court's opinion in *Erie Railroad Company v. Tompkins* (1938), negating *Swift* by declaring that whenever a state's laws were at issue, fed-

eral courts hearing cases in the state would be bound by the decisional rules of the state's highest court. On the same day, he wrote for the Court in *Hinderliter v. LaPlata Water Co.* (1938), a case concerning an interstate compact, that when cases involved only federal issues and state decisional rules would be inappropriate, decisions were to be made under federal common law. He thus protected federal supremacy while retaining an emphasis on federalism and state power for experimentation.

These themes, linked closely to his distaste for bigness, ran through many of his opinions. His first dissent, in *New York Central Railroad v. Winfield* (1917), rejected the Court's declaration that the Federal Employers Liability Act filled the field of compensation for injuries to interstate railroad employees. Brandeis refused to read the act as reflecting congressional intent to preclude state protection for workers, because "it is the state which is both primarily and ultimately concerned with the care of the injured. . . . Upon the state falls the financial burden of dependency, if provision be not otherwise made. . . . Upon the state also rests, under our dual system of government, the duty owed to the individual, to avert misery and promote happiness so far as possible." Clearly, he perceived the state as a positive institution that could increase individual happiness by alleviating economic injustices.

In *Winfield*, he signaled the way he would approach cases, discussing "world experience in dealing with industrial accidents" and relying on facts to bolster his argument that it was reasonable to believe that further compensation was necessary. When the Court overturned a state statute prohibiting employment agencies from charging workers for whom they found jobs, Brandeis dissented again, writing at length about the abusive practices of employment agencies that were the target of the legislation and reiterating his contention that courts lacked authority to strike down social legislation unless examination of the facts demonstrated that it was unreasonable (*Adams v. Tanner*, 1917).

Brandeis quickly realized that many attorneys appearing before the Court failed to prepare the kind of fact-laden argument he had used in

Muller. Undaunted, he decided that if attorneys did not perform that function, the justices would have to do it for themselves. In 1924, examining the constitutionality of a Nebraska consumer-protection law that set weight standards, including maximum weight limits, for commercially sold loaves of bread, the Court's majority held that the law took bakers' and dealers' property without due process of law (*Jay Burns Baking Co. v. Bryan*). Brandeis disagreed and chastised his brethren for not examining the relevant facts. The justices, he said somewhat ingenuously, had "merely to acquaint ourselves with the art of breadmaking and the usages of the trade; with the devices by which buyers of bread are imposed upon and honest bakers or dealers are subjected by their dishonest fellows to unfair competition; with the problems which have confronted public officials charged with the enforcement of the laws prohibiting short weights, and with their experience in administering those laws." Brandeis fulfilled this "mere" task by presenting the Court with fifteen pages of information about the baking industry, most of it in lengthy and forbidding footnotes.

Brandeis's penchant for upholding state experimentation continued throughout his years on the Court. In 1933, the Court overturned a Florida law that, seeking to discourage chain stores, imposed heavier license fees on stores that were part of multicounty chains than on independent shops. The Court declared that Florida's classification of stores lacked a rational basis (*Liggett v. Lee*). Brandeis disagreed and wrote a long essay on the evils of economic bigness, and particularly of the corporations he believed had grown so large that they were a menace to American democracy. They were able to dominate states and citizens, he warned the Court: "the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men." The United States was in the grip of "the rule of a plutocracy." Five of the twelve plaintiff corporations in the case had assets of more than \$90 million each; among them, they controlled more than 19,718 stores throughout the country. Florida might well have believed