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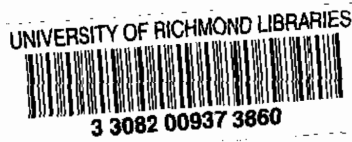

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"I Respectfully Dissent:"
Intellectual Leadership in the Nation's Highest Court

By
Alison M. Smith

Senior Honors Thesis
in
Jepson School of Leadership Studies
University of Richmond, VA

April 29, 2005

Advisor: Dr. Gary L. McDowell

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As the work that you now read can hardly be regarded as the product of a single individual, it seems only right to take this opportunity to extend to my sincerest thanks to those who have contributed to this endeavor. First, I am forever indebted to Dr. Gary L. McDowell, as I could not have asked for an advisor more insightful, available, and genuinely interested in my work than he. In addition to carefully examining and revising countless drafts of this thesis (albeit sometimes illegibly), Dr. McDowell has never ceased to offer constructive criticism, motivation or sage advice when it was desperately needed. My successful completion of this work and my decision to continue to engage in similar scholarship can be almost solely attributed to the knowledge that I have gleaned from Dr. McDowell and his belief in my abilities. I would also like to thank Dean Rodney A. Smolla for serving as a reader on my committee and for offering suggestions which have proved crucial in developing and streamlining my thoughts on judicial dissent. In addition, Dean Kenneth P. Ruscio deserves thanks for serving as a reader and encouraging me to more fully consider dissent as it relates to the functions of deliberative democracy. Special thanks are due to Ms. Colette Connor for leading by example and providing therapy when needed, and my brother James Smith, whose gifts of magnificent artwork and lighthearted conversations have served as a reminder of what is truly important in life. Further, I am grateful to my other "family," Ms. Adrienne Benson, Ms. Amy Terepka, and Ms. Jessica Tibbetts, for allowing me to express my frustrations, triumphs, screams, tears and smiles associated with this work, and ultimately serving as my support system during the many days and sleepless nights when I needed it most. As always, final thanks are due to my parents and sisters, for without their constant encouragement and unconditional love, I would have never had the opportunity to embark upon, let alone complete a project such as this.

INTRODUCTION

In a nation that emerged from the womb of dissent, where progress grew from free thought, from diversity of opinion, from challenge of majority concurrence, conformity that banishes challenge becomes a dead hand that seeks to stay evolution – a dead hand that beckons to oppression and stagnation.[1]

The right of an individual to dissent from the ideas of his or her peers, or even his or her government, has been one of the defining characteristics of American civil society. The United States itself was founded as a result of American colonists' dissenting from the British government, and our Constitution established a governmental system that would not only accommodate, but encourage a process of deliberative democracy in which the views of both the many and the few would be taken into account and considered thoroughly. A system of internal checks and balances between the legislative, judicial and executive branches, the balance of federal and state power, as well as the public accountability of each branch and its members, have ensured a consideration of various values and ideas within all of the institutions of government.[2]

The process of expressing often conflicting ideals within the institutions of government, inevitably producing majority and minority opinions, is perhaps most visible in the judiciary.

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The Supreme Court's legitimacy "depends in part upon the Court reaching its judgments through a deliberative process, just as Congress's legitimacy depends in part on its members enacting legislation through such a process. Given the secrecy of the Court during the formation of its judgments, the practice of dissent is necessary to manifest the deliberative character of the process through which the Court reaches its decisions." Dissent in the Court "takes on the critical role of revealing the Court's consistency with the constitutional commitment to deliberative democracy: Dissenting opinions manifest and constitute the deliberative interaction among judges that produces opinions and decisions of the Court."[3]

The Government's Resident Public Intellectuals

The practice of judicial dissent has implications for, and is representative of the role that justices assume as leaders in American society.[4] Long considered the government's resident public intellectuals, Supreme Court justices play an important role in shaping the American public conscience, by engaging in a process of intellectual and political leadership through their opinions, both majority and dissenting.

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Despite the focus on the chief justice, there is a way in which other justices can make themselves known. The tradition of dissenting opinions in the Supreme Court allows the voices of individual justices to be heard despite the decision of the majority. In addition to allowing justices to express their individual ideas, dissents have been described as "offering some of the most pungent polemical writing ever produced in America."[5] In writing a dissent, each justice has the opportunity to influence not only the current court, but future jurisprudence, and perhaps American public opinion as well. Some have gone so far as to argue that the practice of judicial dissent is "a form of prophecy in the biblical sense of that term" which delivers "an Isaiahlike warning of unhappy consequences" due to what the dissenting justice perceives to be the error of the majority.[6]

In addition to the role all justices assume as leaders, the justice who dissents takes on a position of heightened importance. The dissenting justice contributes to leadership in the truest sense of the word, as it is he who displays the courage necessary to cling to, and to communicate, his convictions despite the differing opinion of a majority of his peers. It is he who calls on both the current and future members of the Court and the American public to follow his philosophy, as it will make right the errors and injustices he believes the current Court to have propounded. In this sense, the dissenting judge, as leader, furthers the philosophical underpinnings of the

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"An Appeal to the Brooding Spirit of the Law"

Perhaps the most interesting aspect of dissenting opinions is that the justices' "prophecies" often come to fruition. This has been made unmistakably apparent by dissents such as that of John Marshall Harlan in *Plessy v. Ferguson*[7], whose claim that "Our Constitution is color-blind and neither knows nor tolerates classes among citizens" would be eventually adopted as the view of the majority in *Brown v. Board of Education* (1954) which overruled the doctrine of separate-but-equal.[8] Similarly, Oliver Wendell Holmes Jr. and Louis D. Brandeis, often referred to as two of "the great dissenters," both dissented repeatedly in order to secure First Amendment rights, dissents that later came to be the rationale of majority opinions.[9] More

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As these cases indicate, a dissenting opinion is a plea to posterity, a hope that current or future generations will eventually heed the message of the dissenting justice, and replace the majority's reasoning with his or her own.[11] This has led some to regard judicial dissent as a duty rather than a mere right.[12] "A dissent in a court of last resort", Charles Evans Hughes wrote, "is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision might possibly correct the error into which the dissenting judge believes the court to have been betrayed."[13] Thus, judicial dissent is a process that gives the judiciary and the American public the opportunity to reflect upon, and to appeal to, the wisdom of minority viewpoints in the future.[14] "We are a free and vital people because we not only allow, we

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The *True* Meaning of the Text

Although it is important that dissents be pungent and even prophetic, the sheer act of writing a dissenting opinion that harkens to future generations is not enough, even when its message is heeded.[16] If, as Hughes wrote, a dissent "is an appeal to the brooding spirit of the law... when a later decision might possibly correct the error into which the dissenting judge believes the court to have been betrayed," it is as important to discern the error that the judge seeks to correct as it is to see the remedy urged in the dissent.[17] Perhaps the unifying aim of the most important dissents is not merely to advocate one policy or another, but to argue in behalf of what that particular justice sees as the meaning of the text of the Constitution.

The justices who attempt to discern the true meaning of the Constitution in the face of a majority that has been led astray are truly worthy of being called great dissenters. Those who seek to bring the Court back to the true meaning of the text when it has, in their view, obviously been misconstrued are those who exert the most formidable kind of intellectual leadership on the

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whose heresy may not stand the rays of established thought or the spectrum of time. Or he may be the prophet whose heresy of today becomes the dogma of tomorrow." Jackson, *Dissent in the Supreme Court*, 3.

[15] William J. Brennan, "In Defense of Dissents," *Hastings Law Journal* 37 (January 1986): 427, 435, 433. Brennan discussed issues direetly concerning, and indirectly surrounding, the judicial right to dissent. "A dissent," according to Brennan, "challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority's reasoning can continue to be evaluated and perhaps, in time, superseded." Brennan briefly traced the origins of Supreme Court dissent; he also spent a great deal of time discussing the role of the repeating dissenter in attempting to promote a judicial perspective on a certain topic. His basic argument explained why judicial dissent in particular is important in furthering "the marketplace of ideas" that we as an American democratic society hold in such high regard. In the lecture, he maintained that dissent has an important and essential role in a pluralistic society, based on social necessity and political origins.

[16] See, for example, Zobell, "Division of Opinion in the Supreme Court," 214.

[17] Hughes, *The Supreme Court of the United States*,68.

Court. Thus, it can be said that the error of the majority that great dissenters seek to correct, though it may vary somewhat from case to case, is that of straying too far from the actual meaning of the Constitution. Perhaps the best explanation of this came from Justice Benjamin R. Curtis in his dissent in *Dred Scott v. Sandford*:

> [w]hen a strict interpretation of the Constitution... is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican government, with limited and defined powers, we have a government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.[18]

In examining the historical basis, political situation, and current applications regarding the tradition of judicial dissent, a framework will emerge by which this practice can be better used to analyze leadership in our nations' highest court. In providing for individual justices' attempts to bring the Court back to the true meaning of the Constitution when the majority has construed it to be something which is not and cannot be found in a reasonable reading of the text, the Court has produced its great leaders. Beyond engaging in judicial leadership by merely writing a dissent, the men and women who attempt to interpret the text properly, and also encourage the Court to correct the error of straying too far, are those that can be viewed as true champions of the law.

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[18] *Dred Scott v. Sandford*, 60 U.S. 393 (1857). He also writes: "To engraft on any instrument a substantive exception not found in it, must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument, and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the Constitution, upon reasons purely politieal, renders its judicial interpretation impossible – because judicial tribunals, as such, cannot decide upon political considerations."

Case Studies in the Judicial Leadership of Dissent

What follows is a historical analysis of the practice and the contemporary importance of Supreme Court dissent. Specifically, this study will focus on the historical, constitutional, and political origins of dissent in the highest court, considering as a case study Justice William Johnson, who has been rightly described as the first influential dissenter on the Supreme Court. In examining Johnson, Chief Justice John Marshall, and their contemporaries, the understanding of the way opinions are issued by the Supreme Court, the practical and philosophical background of dissent, and the political tensions surrounding the establishment of a dissenting tradition in the early court, will identify the historical origin of dissenting opinions as they are currently understood. Further, the way in which Johnson attempted to promote Republican ideology in spite of the Federalist majority under Marshall is the classic example of a justice attempting to bring the Court back to the Constitution as the dissenting justice understands it. A consideration of the origin of judicial dissent will enable us to better understand the role of dissent in the Supreme Court down to the present day.

The focus of Chapter One will be the tensions between Marshall, Jefferson, and Jefferson's appointee, Johnson, as well as the circumstances specifically surrounding the role of dissent, not only in the nation's highest court but in the early nation itself. This analysis will support a right to dissent given the early justices' understanding of opinion issuance in both the British and the early American systems. Most importantly, it will argue that Jefferson and his appointee Johnson best served the Court in establishing the practice of dissent as a means of bringing the Court back to its duty when it seemed to have gone too far a field.

The second chapter will bolster the argument that it is, in fact, the dissenting justice who engages in effective leadership by promoting a constitutional philosophy. In studying Justice

Benjamin Curtis's opinion in *Dred Scott v. Sandford*, the role of dissent in promoting a correct constitutional interpretation with regard to the question of slavery will be examined. This argument will be furthered by an examination of John Marshall Harlan's dissent in *Plessy v. Ferguson* in Chapter Three. Harlan's notion that "our constitution is color-blind," would eventually replace the misguided notion of the majority in *Plessy v. Ferguson* that separate-but-equal institutions for the races were constitutionally legitimate.

Chapter Four will discuss the seminal decision of *Lochner v. New York*, and its criticism in the dissenting opinion of Oliver Wendell Holmes, Jr. In asserting that the Constitution was being severly misinterpreted by the majority to suit their own personal ideologies, Holmes' judicial philosophy concerning the use of substantive due process will be communicated.

The dissenting opinion of Justice Hugo L. Black in *Adamson v. California*, in which he first explicates what he sees as the proper interpretation of the Fourteenth Amendment, is examined in Chapter Five. In this case, Black calls for a complete incorporation of the guarantees of the Bill of Rights under the Due Process Clause of the Fourteenth Amendment; an interpretation of the Constitution that he would tirelessly promote during his tenure on the Court.

Chapter Six will offer a recent example of effective dissent by a member of the current Court in *Planned Parenthood v. Casey*. In analyzing the caustic dissent of Justice Antonin Scalia, a case will be made for the importance of a constitutional interpretation that serves to establish the correct meaning of the Constitution. Further, it will be suggested that similar to Justice Johnson, Justice Scalia was appointed to promote an originalist ideology in spite of the activist majority that existed during the time leading up to his appointment, and has succeeded in doing so thus far.

Finally, the seventh chapter will conclude that the historical role of Johnson and those influential dissenters who have followed in his path, coupled with civil society's commitment to freedom of thought and expression, prove that the historically and philosophically rooted, constitutionally supported, and politically necessary right to dissent has been of the utmost importance in American constitutional history.[19]

[19] In one view the right to "express disagreement to one's colleagues privately; have one's disagreement with the majority's opinion publicly noted; and issue a written dissenting opinion in company with the majority's" is in fact a guaranteed constitutional right under the free speech clause of the First Amendment and the establishment of the court under Article III. Rory K Little, "Reading Justice Brennan: Is There a "Right" to Dissent?," *Hastings Law Journal* 50 (April 1999), 688.

INTRODUCTION

In a nation that emerged from the womb of dissent, where progress grew from free thought, from diversity of opinion, from challenge of majority concurrence, conformity that banishes challenge becomes a dead hand that seeks to stay evolution -- a dead hand that beckons to oppression and stagnation.[1]

The right of an individual to dissent from the ideas of his or her peers, or even his or her government, has been one of the defining characteristics of American civil society. The United States itself was founded as a result of American colonists' dissenting from the British government, and our Constitution established a governmental system that would not only accommodate, but encourage a process of deliberative democracy in which the views of both the many and the few would be taken into account and considered thoroughly. A system of internal checks and balances between the legislative, judicial and executive branches, the balance of federal and state power, as well as the public accountability of each branch and its members, have ensured a consideration of various values and ideas within all of the institutions of government.[2]

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The practice of judicial dissent has implications for, and is representative of the role that justices assume as leaders in American society.[4] Long considered the government's resident public intellectuals, Supreme Court justices play an important role in shaping the American public conscience, by engaging in a process of intellectual and political leadership through their opinions, both majority and dissenting.

Typically, when leadership is examined on the Court, it is the Chief Justice who is looked to as the most influential member. It is most often his method of constitutional interpretation that is said to be representative of the Court, as he is still largely viewed as its leader with regard to both procedure and philosophy. This is best depicted by the fact that eras of the Court are designated by the name of the current chief justice. By referring to an era of the Supreme Court

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The *True* Meaning of the Text

Although it is important that dissents be pungent and even prophetic, the sheer act of writing a dissenting opinion that harkens to future generations is not enough, even when its message is heeded.[16] If, as Hughes wrote, a dissent "is an appeal to the brooding spirit of the law... when a later decision might possibly correct the error into which the dissenting judge believes the court to have been betrayed," it is as important to discern the error that the judge seeks to correct as it is to see the remedy urged in the dissent.[17] Perhaps the unifying aim of the most important dissents is not merely to advocate one policy or another, but to argue in behalf of what that particular justice sees as the meaning of the text of the Constitution.

The justices who attempt to discern the true meaning of the Constitution in the face of a majority that has been led astray are truly worthy of being called great dissenters. Those who seek to bring the Court back to the true meaning of the text when it has, in their view, obviously been misconstrued are those who exert the most formidable kind of intellectual leadership on the

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whose heresy may not stand the rays of established thought or the spectrum of time. Or he may be the prophet whose heresy of today becomes the dogma of tomorrow." Jackson, *Dissent in the Supreme Court*, 3.

[15] William J. Brennan, "In Defense of Dissents," *Hastings Law Journal* 37 (January 1986): 427, 435, 433. Brennan discussed issues directly concerning, and indirectly surrounding, the judicial right to dissent. "A dissent," according to Brennan, "challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority's reasoning can continue to be evaluated and perhaps, in time, superseded." Brennan briefly traced the origins of Supreme Court dissent; he also spent a great deal of time discussing the role of the repeating dissenter in attempting to promote a judicial perspective on a certain topic. His basic argument explained why judicial dissent in particular is important in furthering "the marketplace of ideas" that we as an American democratic society hold in such high regard. In the lecture, he maintained that dissent has an important and essential role in a pluralistic society, based on social necessity and political origins.

[16] See, for example, Zobell, "Division of Opinion in the Supreme Court," 214.

[17] Hughes, *The Supreme Court of the United States*,68.

Court. Thus, it can be said that the error of the majority that great dissenters seek to correct, though it may vary somewhat from case to case, is that of straying too far from the actual meaning of the Constitution. Perhaps the best explanation of this came from Justice Benjamin R. Curtis in his dissent in *Dred Scott v. Sandford*:

> [w]hen a strict interpretation of the Constitution… is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican government, with limited and defined powers, we have a government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.[18]

In examining the historical basis, political situation, and current applications regarding the tradition of judicial dissent, a framework will emerge by which this practice can be better used to analyze leadership in our nations' highest court. In providing for individual justices' attempts to bring the Court back to the true meaning of the Constitution when the majority has construed it to be something which is not and cannot be found in a reasonable reading of the text, the Court has produced its great leaders. Beyond engaging in judicial leadership by merely writing a dissent, the men and women who attempt to interpret the text properly, and also encourage the Court to correct the error of straying too far, are those that can be viewed as true champions of the law.

[18] *Dred Scott v. Sandford*, 60 U.S. 393 (1857). He also writes: "To engraft on any instrument a substantive exception not found in it, must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument, and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible – beeause judicial tribunals, as such, cannot decide upon political considerations."

Case Studies in the Judicial Leadership of Dissent

What follows is a historical analysis of the practice and the contemporary importance of Supreme Court dissent. Specifically, this study will focus on the historical, constitutional, and political origins of dissent in the highest court, considering as a case study Justice William Johnson, who has been rightly described as the first influential dissenter on the Supreme Court. In examining Johnson, Chief Justice John Marshall, and their contemporaries, the understanding of the way opinions are issued by the Supreme Court, the practical and philosophical background of dissent, and the political tensions surrounding the establishment of a dissenting tradition in the early court, will identify the historical origin of dissenting opinions as they are currently understood. Further, the way in which Johnson attempted to promote Republican ideology in spite of the Federalist majority under Marshall is the classic example of a justice attempting to bring the Court back to the Constitution as the dissenting justice understands it. A consideration of the origin of judicial dissent will enable us to better understand the role of dissent in the Supreme Court down to the present day.

The focus of Chapter One will be the tensions between Marshall, Jefferson, and Jefferson's appointee, Johnson, as well as the circumstances specifically surrounding the role of dissent, not only in the nation's highest court but in the early nation itself. This analysis will support a right to dissent given the early justices' understanding of opinion issuance in both the British and the early American systems. Most importantly, it will argue that Jefferson and his appointee Johnson best served the Court in establishing the practice of dissent as a means of bringing the Court back to its duty when it seemed to have gone too far a field.

The second chapter will bolster the argument that it is, in fact, the dissenting justice who engages in effective leadership by promoting a constitutional philosophy. In studying Justice

Benjamin Curtis's opinion in *Dred Scott v. Sandford*, the role of dissent in promoting a correct constitutional interpretation with regard to the question of slavery will be examined. This argument will be furthered by an examination of John Marshall Harlan's dissent in *Plessy v. Ferguson* in Chapter Three. Harlan's notion that "our constitution is color-blind," would eventually replace the misguided notion of the majority in *Plessy v. Ferguson* that separate-but-equal institutions for the races were constitutionally legitimate.

Chapter Four will discuss the seminal decision of *Lochner v. New York*, and its criticism in the dissenting opinion of Oliver Wendell Holmes, Jr. In asserting that the Constitution was being severly misinterpreted by the majority to suit their own personal ideologies, Holmes' judicial philosophy concerning the use of substantive due process will be communicated.

The dissenting opinion of Justice Hugo L. Black in *Adamson v. California*, in which he first explicates what he sees as the proper interpretation of the Fourteenth Amendment, is examined in Chapter Five. In this case, Black calls for a complete incorporation of the guarantees of the Bill of Rights under the Due Process Clause of the Fourteenth Amendment; an interpretation of the Constitution that he would tirelessly promote during his tenure on the Court.

Chapter Six will offer a recent example of effective dissent by a member of the current Court in *Planned Parenthood v. Casey*. In analyzing the caustic dissent of Justice Antonin Scalia, a case will be made for the importance of a constitutional interpretation that serves to establish the correct meaning of the Constitution. Further, it will be suggested that similar to Justice Johnson, Justice Scalia was appointed to promote an originalist ideology in spite of the activist majority that existed during the time leading up to his appointment, and has succeeded in doing so thus far.

Finally, the seventh chapter will conclude that the historical role of Johnson and those influential dissenters who have followed in his path, coupled with civil society's commitment to freedom of thought and expression, prove that the historically and philosophically rooted, constitutionally supported, and politically necessary right to dissent has been of the utmost importance in American constitutional history.[19]

[19] In one view the right to "express disagreement to one's colleagues privately; have one's disagreement with the majority's opinion publicly noted; and issue a written dissenting opinion in company with the majority's" is in fact a guaranteed constitutional right under the free speech clause of the First Amendment and the establishment of the court under Article III. Rory K Little, "Reading Justice Brennan: Is There a "Right" to Dissent?," *Hastings Law Journal* 50 (April 1999), 688.

THE ORIGIN OF JUDICIAL DISSENT

The early Supreme Court was a fledgling institution. For at least ten years after its creation (many say until the appointment of John Marshall in 1801), the highest appellate court in the nation was not taken seriously as an essential governmental or judicial entity, let alone as the court of last resort. Perhaps for this reason, the Court before Marshall is neglected by historians due to what is viewed as its relative unimportance. However, in order to understand fully the origins of the Court and its process of dissent, and also to "correct the impression that the Supreme Court appeared full-blown with Marshall like Athena from the forehead of Zeus," the early Court and the British system that influenced it must be considered.[1]

Many have argued that one of the main reasons the Court was not taken seriously in its formative years was that, most often, politics found a way not only of entering into the decisions and daily affairs of the judiciary, but of taking center stage in each.[2] Both collectively and individually, justices concerned themselves with actively promoting the

[1] Scott Douglas Gerber, *Seriatim: The Supreme Court before John Marshall,* (New York: New York University, 1998), ix-x.

[2] As Meredith Kolsky asserts, "The court's lack of prestige was due, at least in part, to the blatantly political behavior of the early judges. On circuit, Justices generally opened each session with speeches politicking on behalf of Federalist candidates. Almost all judges were Federalists, and most used the bench as a platform from which to praise fellow Federalists." Meredith Kolsky, "Justice William Johnson and the History of the Supreme Court Dissent," *Georgetown Law Journal* 83: 2071. Donald G. Morgan echoes this assertion: "The courts had overridden the laws and the settled policies of several states; they had shown a tendency to decide for themselves to what limits to extend their jurisdiction, notwithstanding the constitutional authority of Congress and the Judiciary Acts passed in consonance with this authority. Their jury charges attacking Republicans and Republican doctrines sounded like campaign oratory." Donald G. Morgan, *Justice William Johnson: The First Dissenter*, (Columbia: University of South Carolina Press, 1954), 43.

politics of their particular parties.[3] Therefore, the fact that all of the members of the early Supreme Court up to 1804 were appointed by Federalist presidents Washington and Adams, and were all highly committed to the Federalist cause, was made more than readily apparent by the Court's behavior. In essence, the early Court seemed to act as little more than a sounding board for Federalist ideas and doctrines, causing it to be viewed as more of a political body than as a disinterested interpreter of law. Another reason that the Court was not held in such high esteem is that there were few occasions on which it was actually called upon to interpret the law. The early Supreme Court decided very few cases, a fact that contributed to the negative perception of the American public regarding the prestige and power of the Court.[4] During the early years of the republic, when the Court was led by Chief Justices John Jay and John Rutledge (1791-1795), it decided only 17 cases, a far cry from the number of decisions it reaches currently.[5]

When it was called upon to decide a case, many methods were employed in delivering the decision of the Court. It is interesting to note that in its early years, the Court did not actually issue written opinions except in important cases; most were given orally.[6] It was not until 1801, after Marshall had assumed his chief justiceship, that William Cranch became the first regular reporter of the Supreme Court of the United States, as the written opinions had become the rule rather than the exception.[7] But when the gravity of the judicial question warranted a written opinion, for the most part, the early Supreme Court engaged in the

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[3] Kolsky, "Justice William Johnson and the History of the Supreme Court Dissent," 2071.

[4] Ibid.

[5] Morgan, *Justice William Johnson: The First Dissenter*, 46. At the end of the October 2003 term, for example, the Court decided 79 cases.

[6] Hughes, *The Supreme Court of the United States*, 52.

[7] Ibid.

practice of issuing opinions *seriatim* as was common under British practice. The seriatim custom, which originated in the "jury-charge practice of the common-law courts," is Latin for "several" or in "series," and involves having each justice issue a separate decision and explicating the rationale used in reaching it.[8] In this way, each judge's understanding of the case, the judicial question being decided, its justification, and its implications were made evident.

The English *Seriatim* Tradition

The way in which the practice of seriatim opinions made its way to the United States Supreme Court is slightly complicated. Since the judiciary in England did not exist independent of its executive and legislative branches, its processes cannot be directly traced to the distinctly independent judiciary of the United States. The Privy Council and the House of Lords most mirrored the Supreme Court with regard to jurisdiction, but delivered one unanimous opinion in which dissent was not allowed "as a consequence of the historical connection of the tribunal with the Executive."[9] The House of Lords sometimes delivered independent opinions, but these were not written, published, or distributed because the branch was partially legislative in nature.[10] It is obvious that although the Privy Council and the House of Lords were the highest appellate tribunals in England, the importance of

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[8] Gerber, *Seriatim,* 20.

[9] Zobell, "Division of Opinion in the Supreme Court: A History of Judicial Disintegration," 192. Also note that "the notion that survived a decision of the Council constituted only advice, or a recommendation to the Crown," 188.

[10] Ibid., 192. The colonists would not likely have known of the methods of the House of Lords because the publication of reports of Parliamentary debates was not authorized in the eighteenth century. "It was thought to be a necessary corollary of this rule (or in view of the concept of identity of judicial and legislative function, simply another application of the same rule) that reports of judicial proceedings in the House of Lords could not be published. It was not, in fact, until about 1848 that the public dissemination of such reports was first authorized," 189.

seriatim opinions were obviously not derived from their methods. Even though the Privy Council and the House of Lords were technically the high appellate tribunals "for all causes arising in the courts of England and its possessions;" most appeals were, in fact, decided in the common law courts such as the Echequer Chamber, the Court of Common Pleas, and King's Bench.[11] It was in the King's Bench that the practice of issuing seriatim opinions was customary in the seventeenth and eighteenth centuries, and the transcription of these individual opinions were the ones to which colonists had most ready access.[12] Therefore, it seems that the Supreme Court likely derived its early method of delivering opinions seriatim from the King's Bench, the English common law court that with which Americans would probably have been most familiar.[13]

When Lord Mansfield became Chief Justice of the King's Bench in 1756, he moved away from seriatim opinions and chose to deliver the decision of the court in a single opinion. This process entailed the justices meeting "secluded from the presence of the public, and [making] what was to be delivered as the opinion of the court."[14] This practice did not last long, however, as "on the retirement of Mansfield [in 1793], Ld Kenyon put an end to the practice, and the judges returned to that of seriatim opinions."[15] Thus, the time during which Mansfield was Chief Justice was regarded by most as an exception to the rule

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[11] William Searle Holdsworth, *A History of English Law* (London: Metheun, 1922-1972) 17 vol., 200-201, 213-217, 244-45.

[12] Zobell, "Division of Opinion in the Supreme Court: A History of Judicial Disintegration," 192.

[13] Ibid.

[14] Jefferson to Johnson, 27 October 1822 in *The Writings of Thomas Jefferson*, ed. Paul L. Ford (New York: G. P. Putnam's Sons, 1892-99), 224.

[15] Ibid., 224.

with regard to opinion issuance; as a trial for a system that was later abandoned due to the advantages of the seriatim system in delivering the opinion of the court.

A situation similar to that of Mansfield and Kenyon on the King's Bench in England was the battle waged between Chief Justices Edmund Pendleton and Spencer Roane in the Virginia Court of Appeals. Pendleton, who was Chief Justice from 1778-1803, "adored Ld Mansfield, & considered him as the greatest luminary of the law that any age had ever produced," and thus favored deliberating decisions in secrecy and then delivering one majority opinion, delivered as "the Oracles of the court, in mass."[16] His successor, Spencer Roane (1803-1822), "broke up the practice, refused to hatch judgments, in Conclave or to let others deliver opinions for him" when he became Chief Justice in 1803. In this way, the same turn of events that had unfolded in England also occurred on the high court of Virginia, and eventually the Supreme Court of the United States.[17]

Even before the Judiciary Act of 1789 formally established the federal courts, opinions in state courts were delivered seriatim, and dissents were often present. Justice Benjamin Rush of the High Court of Errors and Appeals of Pennsylvania wrote a dissent in *Purviance v. Angus* in which he clearly defined the importance of dissent in the judiciary.[18] He opened his opinion by saying, "however disposed to concur with my brethren in this cause, I have not been able to do it. Unanimity of courts of justice, though a very desirable object, ought never to be attained at the expense of sacrificing the judgment."[19] Similarly, the first case reported after the Judiciary Act of 1789 established the court system in the

[16] Jefferson to Johnson, 27 October 1822 in *The Writings of Thomas Jefferson*, 224.

[17] Ibid.

[18] *Purviance v. Angus*, 1 Dall. 180 (Err. App. Pa. 1786).

[19] Justice Benjamin Rush quoted in Jackson, *Dissent in the Supreme Court: A Chronology*, 20.

United States, *Georgia v. Brailsford*, was also issued seriatim and in fact opened with a dissent.[20] Whether before or after the court system was firmly established, issuing opinions seriatim was the norm. The decisions of the Court prior to 1801, therefore, allowed the justices "a rare freedom in the expression of their views."[21] Given the prevalence of the seriatim style, each justice on the court before Marshall was able to deliver his own opinion in at least one decision per year.[22] Even though some of the decisions did result in unanimity based on the decision which was reached as well as the legal reasoning behind it, each justice had an opportunity to write the majority opinion; that is, the duty was not dominated by whoever was serving as Chief Justice at that particular time. In addition, even when a majority decision was reached, justices were always given the opportunity to share their views by way of a dissenting opinion.[23] This shows that the English common law practice had become the prevalent method in the United States Supreme Court, allowing each individual justice to have his voice heard on matters that were of importance in defining the young nation.

A Practice for the "lazy, the modest & the incompetent"

Given the historical basis of, and freedom associated with issuing separate opinions, some disagreed as to the value of issuing opinions *seriatim*, or in expressing any difference in opinion at all. The many differences in opinion were not only said to be confusing, but also to create "an impossible burden on the Court," whose Justices had to devote an

[20] *Georgia v. Brailsford*, 2 U.S. 402 (1792).

[21] Morgan, *Justice William Johnson: The First Dissenter*, 45.

[22] Ibid.

[23] Ibid.

extraordinary amount of time to the drafting of opinions.[24] Perhaps for this reason, Chief Justice John Marshall "would do for America, what Sir William Murray, Lord Mansfield, had done for common law in England a generation before."[25] However, Marshall believed his contribution to be capable of having a longer-lasting effect than Mansfield's, or even Pendleton's, after whom he had modeled his chief justiceship.[26] Marshall transformed the system by issuing Supreme Court decisions in a single opinion, said to express the views of all of the judges comprising the court. He believed that in speaking with a voice of unanimity the public would be more apt to recognize and agree with the decision of the court, and that a unified front would be conveyed to the public.[27] This in turn would strengthen the role of the judiciary generally and heighten the status of the Supreme Court in particular. When it came to delivering the decision of the court, Marshall strongly believed that "difference of opinion must be sacrificed on the altar of authoritativeness and prestige."[28]

Even though achieving credibility and securing the respect of the public might have been Marshall's stated intentions for delivering single opinions of the Court, others speculate that Marshall used this process to ensure that the Federalist view (or, more specifically, his Federalist view) would almost always be the one adopted. As the Republicans gained control of Congress and the Executive branch during the election of 1800, "the Court was shorn of its close relations with a friendly executive and its political support in Congress, [and] it

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[24] Barth, *Prophets with Honor*, 5.

[25] Gerber, *Seriatim*, 331.

[26] R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University, 2001), 40.

[27] Stack, "The Practice of Dissent in the Supreme Court," 2238-2239.

[28] Morgan, *William Johnson: The First Dissenter*, 176.

would have to look elsewhere for prestige and strength."[29] Marshall himself was appointed Chief Justice by John Adams only a month before Thomas Jefferson was to take presidential office. This gave the Federalists full control of the judiciary, and "accordingly, they took steps to consolidate their position in the one branch of government remaining in their control."[30] The members of the Federalist Party therefore worked to ensure that the judiciary would rise to a level more prestigious and powerful than the other two branches then occupied by their Republican opponents.[31] Thus, did Marshall seek to use the unanimous voice of the Supreme Court to further Federalist aims in light of the newly elected Republican president and majority in Congress.

Marshall all but did away with the process of delivering seriatim opinions, as made clear by the chart below. In addition to eliminating separate opinions, the new Chief Justice also sought most often to be the justice to write the single opinion for the Court. As shown, during the years of 1801-1804, Marshall wrote for the majority on every case on which he sat and "even when decisions were collective in nature, which was often, he always had the last word, so to speak."[32] The practices of the early court stand in stark contrast to the practices adopted under Marshall: [33]

[29] Marshall saw that to gain effectiveness the Court must appear to be united. Whether it truly was united or merely appeared to be did not matter much. What was important was that issuing single opinions "would enhance the Court's authoritativeness of its decrees" and therefore strengthen the Federalist Judiciary given the Republiean control of the other two branches of government. Morgan, *Justice William Johnson: The First Dissenter*, 45.

[30] Ibid., 43.

[31] Ibid.

[32] Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, 399.

[33] Morgan, *William Johnson: The First Dissenter*, 46.

Period and Justice	Total Number of Cases	Seriatim Opinions		Majority Opinions by Chief Justice	
		Number	% of Total	Number	% of Total
1791-1795 – Jay and Rutledge	17	5	29.4	2	11.7
1796-1800 – Ellsworth	46	7	15.2	12	26.1
1801-1804 – Marshall	38	0	0	24	63.2

Although it may be true that Marshall strengthened the court in the eyes of the public by issuing single opinions, the process exacerbated feelings of animosity among the Republicans. Not only did the Federalists maintain their majority on the Court, they also issued decisions that were detrimental to the aims of the Jeffersonian Republicans. As Jefferson himself fumed, "the Federalists have retired into the judiciary as a stronghold... and from that battery all the works of republicanism are to be beaten down and erased."[34] With Marshall as leader of the Federalist judicial army, "the precise and simultaneous firing of Marshall's guns increased the power of the fortress."[35]

Jefferson refused to sit idly by and watch Marshall and the Federalists gain control of, and strengthen, the judiciary through the method of issuing unanimous opinions. However, he faced the not inconsiderable problem of having no opportunity to appoint a justice of his own persuasion. For his first three years in office, Jefferson was left without any nominations to the Court and thus was unable to try to balance or even outweigh Marshall and the Federalists. Fortunately for him and his Republican followers, Jefferson was finally afforded the opportunity of appointing a justice to the Supreme Court when Justice Alfred Moore resigned due to health problems in 1804.[36] Moore had been riding the Sixth Circuit at the

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[34] Quoted in Morgan, *William Johnson: The First Dissenter*, 47.

[35] Ibid.

time of his resignation, and so Jefferson looked to Georgia and South Carolina for his replacement, since it was these states that would lack representation due to Moore's absence.[37]

Soon after receiving various recommendations, Jefferson nominated South Carolina judge William Johnson, Jr. to the post, and he accepted. Johnson was appointed "with the hope that he would dilute Marshall's nationalism and check his authority."[38] Before Johnson's appointment, the only break from the practice of issuing single opinions was a one-line concurring opinion of Justice Samuel Chase in *Head & Armory v. Providence Insurance Company.*[39] This "silent acquiescence" of justices was soon challenged by the constant dissents of Justice Johnson, who during his thirty years on the Marshall Court wrote 21 concurring opinions and 34 dissenting opinions.[40] While on the court, Johnson "rejected the practice of silent opposition and put forth his disagreements with the majority for all his judicial contemporaries and successors to ponder."[41] With regard to both practice and ideology, Jefferson finally had succeeded in challenging the Federalists in their judicial stronghold.

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[36] Morgan, *William Johnson: The First Dissenter*, 49.

[37] Ibid.

[38] Newmyer, *John Marshall and the Heroic Age of the Supreme Court*, 404.

[39] *Head & Armory v. Providence Insurance Company,* 6 U.S. 127 169 (1804).

[40] Donald G. Morgan, "The Origin of Supreme Court Dissent," *The William and Mary Quarterly* 10: 377.

[41] Meredith Kolsky, "Justice William Johnson and the History of the Supreme Court Dissent," 2070.

William Johnson before the Marshall Court

Justice William Johnson, Jr., was born in South Carolina in 1771.[42] His father, the elder William Johnson, was himself fully supportive of the Revolution, and was considered "one of the first to dissent for American independence."[43] Just as his family background laid the foundation for independent expression, Johnson's education gave him the ability to do so in the public sphere. He was the only one of his siblings to attend college in the North when, either in 1786 or 1787 (there are conflicting reports), he was enrolled at the College of New Jersey at Princeton.

After graduating from Princeton with highest honors, Johnson returned to South Carolina where he studied law under Charles Cotesworth Pinckney.[44] Pinckney had himself studied at Oxford under Sir William Blackstone and therefore had a great understanding of British common law in addition to the law of the United States. This knowledge of the British system was undoubtedly passed along to Johnson, who would employ the method of opinion issuance similar to that used in Britain. In addition, it was under Charles Cotesworth Pinckney that Johnson was to become acquainted with Charles Pinckney, the man responsible for making Johnson want to "attach himself warmly to Jefferson's rapidly growing party."[45] It was this identification with the Jeffersonian Republicans that would be directly responsible for furthering Johnson's judicial career in the years to come.

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[42] Jackson, *Dissent in the Supreme Court: A Chronology*, 26.

[43] Morgan, *Justice William Johnson: The First Dissenter*, 22.

[44] Ibid., 21.

[45] Ibid., 29.

On October 15, 1794, Johnson began his governmental career with election to the South Carolina House of Representatives, where he would serve three terms.[46] From this position, he was appointed to serve on the South Carolina Constitutional Court when the lower court system was expanded on December 18, 1799.[47] While on the state court, Johnson was a member of a system that "tolerated a healthy difference of opinion and expression."[48] It was here that he developed "convictions as to the proper construction to be applied to the Federal Constitution."[49] Both of these characteristics were to be of utmost importance in Johnson's later life when he assumed his role a justice of the United States Supreme Court. "At twenty-seven, he had found a career that was to absorb his energies for the remainder of his life. It was as judge that he would acquire his reputation and make his principal contribution."[50]

Before Johnson was nominated by Jefferson, he already had many experiences and formed many views which would greatly influence his time on the Supreme Court. His sole biographer, Donald G. Morgan, specifically identifies four of these crucial influences. First, Johnson's childhood was "close to the struggles of the revolution"; his father had instilled in him the value of public and governmental dissent, and he had also come to realize that the nation and states were inevitably interdependent.[51]

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[46] Morgan, *Justice William Johnson: The First Dissenter*, 26.

[47] Ibid., 36.

[48] Ibid., 37.

[49] Ibid.

[50] Ibid., 36.

[51] Ibid., 39-40.

Second, Johnson's education at Princeton under its President John Witherspoon, gave him a "zest for intellectual inquiry" and "furnished groundwork for a rounded political philosophy."[52] It was during the years that Johnson attended the university that he not only studied classics and political theory, but undoubtedly discussed the timely issue of the framing and adopting of the Constitution then taking place. It is likely that much of his practical and judicial philosophy was shaped during these years.

Third, Charles Coatesworth Pinckney taught him the principles of English jurisprudence which would be the basis of Johnson's knowledge of law in general. Finally, his career in the public arena as representative and judge, during which he served on various committees, gave him the opportunity not only to be an influential member of state government, but also exercise his Republican idealism. Together, these experiences, influences, and characteristics were to give shape to his life as a Justice when Johnson found himself nominated for appointment to the Supreme Court of the United States by Jefferson on April 18, 1804 at the age of thirty-three.

Most contemporary Americans view Supreme Court appointments as a high honor, one that should be automatically accepted. This was not the prevalent attitude in Johnson's time. Johnson's mentor Charles Cotesworth Pinckney had himself turned down a Supreme Court appointment in favor of private practice. Many others understood a career on the high court as being not as prestigious and lucrative as other realms of the law. In addition, Johnson had a specific problem with regard to his appointment. The Supreme Court at the time "remained a citadel of Federalism; to overcome it would be the aim of Jefferson and

[52] Morgan, *Justice William Johnson: The First Dissenter*, 40.

conceivably the duty of any Republican who might accept an assignment to enter it."[53] In other words, it would be Johnson's duty as the sole Republican to further the Republican philosophy while on the court.

Johnson would also likely encounter other problems after his appointment was made a reality. First, at thirty-three, he would be the youngest justice on the bench, with all of the others at least ten years his senior. [54] Second, his "modest origins might be regarded with disdain in Federalist circles."[55] Last, and perhaps most important for this discussion, Marshall's rule of issuing single opinions, "and the virtual monopoly of expression which had drifted into Marshall's hands" would not allow for the freedom of expression Johnson was accustomed to while on the South Carolina bench.[56] Johnson's position would certainly be "unenviable" given the obstacles that awaited him on the Marshall Court.[57]

Even so, Johnson was ready to face the many challenges he would inevitably encounter while serving on the Supreme Court of the United States, and on April 18, 1804 accepted his appointment from Jefferson:

> Sir, I have the honor to acknowledge the receipt of your communications of the 30th & 31 March accompanying a commission constituting me one of the Associate Justices of the United States, together with the President's arrangement of the Circuits. I will trouble you sir to present my acknowledgements to the President for this mark of attention and confidence, & to communicate my willingness to accept the appointment.[58]

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[53] Morgan, *Justice William Johnson: The First Dissenter*, 169.

[54] Ibid., 53. William Cushing was seventy-two, Samuel Chase, sixty-three, William Paterson, fifty-nine, John Marshall, forty-nine, and Bushrod Washington, forty-two.

[55] Ibid., 53.

[56] Ibid.

[57] Ibid.

[58] Records of the Department of State, Miscellaneous Letters (The National Archives), quoted in Morgan, *Justice William Johnson: The First Dissenter*, 51-52.

Jefferson's Influence, Johnson's Response

Thomas Jefferson was to influence Justice William Johnson not only with regard to his adoption of Republican principles, but also on a point of procedure that was important to both men: that of writing judicial opinions. In the words of Percival Jackson, "Jefferson not only was an exponent of the English *seriatim* practice but also was convinced that Marshall's ability to have the Court avoid it resulted in many of the important decisions with which he differed."[59] As is made clear through his various letters, Jefferson was firmly committed to influencing others with regard to the importance of the seriatim system.

In a letter to Thomas Ritchie of December 25, 1810, Jefferson explained that the main problem with the Supreme Court justices is that, due to the practice of issuing a single opinion of the court, they do not believe themselves as being personally accountable for a decision, or likely to be impeached. Regarding impeachment as "a mere scare-crow," justices "consider themselves secure for life; they sculk [sic] from responsibility to public opinion, the only remaining hold on them."[60] He forcefully attacked the practice of Marshall, as well as the willingness of the associate justices to bend to his will, in asserting that by Marshall's practice,

> An opinion is huddled up in a conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning.[61]

Reverting to the practice of seriatim opinions of the British system would be the only remedy; although the creation of "A judiciary independent of a king or executive alone, is a

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[59] Jackson, *Dissent in the Supreme Court: A Chronology*, 23.

[60] Jefferson to Ritchie, 25 December 1810 in *The Writings of Thomas Jefferson*, ed. Paul L. Ford, 171.

[61] Ibid.

good thing" that the American system did not inherit from the British, "but independence from the will of the nation is a solecism, at least in a republican government."[62]

Jefferson communicated similar, yet more concise, sentiments to Archibald Thweat and Judge Spencer Roane in the early months of 1821.[63] At the end of the same year, he would again discuss at length his advocacy of the seriatim system, as well as the dangers that resulted from Marshall's abandoning of it. To James Pleasants he wrote,

> Another most condemnable practice of the supreme court to be corrected is that of cooking up a decision in Caucus & delivering it by one of their members as an opinion of the court, without the possibility of knowing how many, who, and for what reason each member concurred."[64]

After this discussion, Jefferson echoed his discussion concerning avoidance of the accountability and impeachment, and also claimed that were the justices to give their opinions seriatim, they would "endeavor to justify themselves to the world by explaining the reasons which led to their opinion."[65]

Thus, it should have come as no surprise that on October 27, 1822 Jefferson penned a letter to Johnson regarding a subject that "has long weighed on my mind...; the habitual mode of making up and delivering the opinions of the supreme court of the US."[66] In light of Johnson's "candor and devotedness to the Constitution, in its true spirit," Jefferson would

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[62] Jefferson to Ritchie, 25 December 1810 in *The Writings of Thomas Jefferson,* ed. Paul L. Ford, 171.

[63] Jefferson to Thweat, 19 January 1821, and Jefferson to Roane, 9 March 1821 in *The Writings of Thomas Jefferson,* ed. Paul L. Ford,184, 188.

[64] Jefferson to Pleasants, 26 December1821 in *The Writings of Thomas Jefferson,* ed. Paul L. Ford, 199.

[65] Ibid. It is also in this letter that Jefferson discusses the fact that Edmund Randolph proposed an amendment which would ensure the use of the seriatim system by stating that "every judge should give his individual opinion, and reasons in open court." Jefferson also appeals to future generations as he states that there will probably not be much revision of the practice of delivering opinions during his time. In this way, Jefferson himself was invoking the wisdom of future generations, as those dissenters who believed in their freedom and duty to express their judicial philosophies would also eventually come to do as well.

[66] Jefferson to Johnson, 27 October 1822 in *The Writings of Thomas Jefferson,* ed. Paul L. Ford, 223.

give historical background regarding the English practice of delivering opinions *seriatim*, and in doing so indirectly expressed his concerns regarding Marshall's practice:

> You know that from the earliest ages of the English law, from the date of the year-books, at least, to the end of the IId George, the judges of England in all but self-evident cases, delivered their opinions seriatim, with the reasons and authorities which governed their decisions. If they sometimes consulted together, and gave a general opinion, it was so rarely as not to excite either alarm or notice. Besides the light which their separate arguments threw on the subject, and the instruction communicated by their several modes of reasoning, it shewed whether the judges were unanimous or divided, and gave accordingly more or less weight to the judgment as a precedent.[67]

Later in the same letter, Jefferson directly discussed Marshall's practice of issuing single opinions for the Court, as well as the reasons this practice was fatally flawed. According to Jefferson, issuing single opinions, especially those consistently written by the Chief Justice himself, did not heighten public confidence in the court and the judges, but instead produced the opposite effect. Moreover, this process enabled the rest of the judges on Marshall's Court to effectively avoid impeachment, and ensure that the public would have no way to measure their individual reputations; two things that Jefferson saw as inherent in their duty as justices.[68] Impeachment, he said, was impossible: "For nobody knows what opinion any individual member gave in any case, nor even that he who delivers the opinion, concurred in it himself. Be the opinion therefore ever so impeachable, having been done in the dark it can be proved on no one."[69] Personal reputation was also completely done away with due to the fact that all of the justices are shielded from being identified. This practice of single opinion issuance is, as Jefferson so harshly noted, "certainly convenient for the lazy, the modest & the incompetent. It saves them the trouble of developing their own opinion

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[67] Jefferson to Johnson, 27 October 1822 in *The Writings of Thomas Jefferson*, ed. Paul L. Ford, 224.

[68] Ibid.

[69] Ibid.

methodically and even of making up an opinion at all."[70] After identifying the flaws of Marshall's system, Jefferson once again defended seriatim opinions in stating that they publicly ensure that each judge has read and understood the case and formed his own opinion, "instead of pinning it on another's sleeve."[71] In expressing themselves personally, the public would apt to be more confident in their justices, instead of the opposite view that Marshall had expounded.[72]

In a later letter to Johnson, Jefferson could not "lay down my pen without recurring to one of the subjects of my former letter, for in truth there is no danger I apprehend so much as the consolidation of our government by the noiseless, and therefore unalarming, instrumentality of the supreme court."[73] In again aiming to influence his appointee, Jefferson stressed the importance of expressing independent judicial opinions by arguing that each justice must "prove by reasoning that he has read the papers, that he has considered the case, that in the application of the law to it, he uses his own judgment independently and unbiased by party views and personal favor or disfavor."[74] In this way, in every case, it should be judged as more valuable that a judge offers his opinion than hides it behind a majority opinion for unanimity's sake. In writing his own opinion, Jefferson believed each justice would "Throw himself in every case on God and country; both will excuse him for error and value him for his honesty.[75]

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[70] Ibid.

[71] Ibid.

[72] Ibid.

[73] Jefferson to Johnson, 4 March 1823 in *The Writings of Thomas Jefferson*, ed. Paul L. Ford, 248.

[74] Ibid.

[75] Ibid., 249.

Jefferson's letters shed light on the historical origins of dissent in two ways. First, his own extensive knowledge of seriatim opinions as used in Britain would suggest that many of his contemporaries had similar knowledge. Therefore, it can be safely assumed that many of the founders, especially those involved in the drafting of the Constitution and the creation of the judiciary, were aware of British seriatim practice, fully understood it, and believed it to be the common and most effective method of delivering opinions. Second, these letters illustrate clearly that Jefferson's goal was to have Johnson, as well as many others, also realize the value that lay in differences of opinion on the Court. In the case of Johnson, Jefferson was to achieve his goal, as his letter prompted Johnson to respond with a 21 page letter addressing all of Jefferson's concerns.

In his response to Jefferson, Johnson chronicled his effort to express himself on the bench and also offered blunt criticism of Marshall and the other associate justices. This letter gives insight into Johnson's experience on the court:[76]

> While I was on our state-bench I was accustomed to delivering seriatim opinions in our appellate court, and was not a little surprised to find our Chief Justice in the Supreme Court delivering all the opinions in cases in which he sat, even in some instances when contrary to his own judgment and vote. But I remonstrated in vain; the answer was he is willing to take the trouble and it is a mark of respect to him. I soon however found out the real cause. Cushing was incompetent, Chase could not be got to think or write – Paterson was a slow man and willingly declined the Trouble, and the other two (Marshall and Washington) are commonly estimated as one Judge."[77]

This passage tells much of Johnson's struggle and also of his personal views regarding the others with whom he shared the bench. But perhaps the most important text

[76] Morgan, *Justice William Johnson: The First Dissenter*, 182.

[77] Johnson to Jefferson, December 10, 1822 from *Jefferson Papers*, Library of Congress, quoted in Donald G. Morgan, "Mr. Justice William Johnson and the Constitution," 57 Harvard Law Review 328, 334.

specifically related to the establishment of the process of judicial dissent as we know it today, not merely a seriatim approach, was written by Johnson later in the same letter:

> Some case soon occurred in which I differed from my brethren, and I thought it a thing of course to deliver my opinion. But during the rest of the session I heard nothing but lectures on the indecency of judges cutting at each other, and the loss of the reputation which the Virginia appellate court had sustained by pursuing such a course. At length I found that I must either submit to circumstances or become such a cipher in our consultations as to effect no good at all. I therefore bent with the current and persevered until I got them to adopt the course they now pursue, which is to appoint someone to deliver the opinion of the majority, but leave it to the discretion of the rest of the judges to record their opinions or not ad libitum.[78]

Here, Johnson stated himself that it was his constant pursuit of freedom of thought and expression which led to the system we have adopted today: a single majority opinion coupled with concurring opinions and/or dissents when necessary. This was not simply a mere resurgence of the seriatim opinion as Jefferson had so forcefully suggested, but the creation of an entirely new system under which both unanimity and individual expression could exist symbiotically.

Jefferson was so impressed with Johnson's response that he sent his original letter to Johnson along with Johnson's reply to his dear friend and political confidant James Madison for his review. Preceding the letters, Jefferson wrote, "This conveys [Johnson's] views of things and they are so serious and sound, that they are worth your reading."[79] After reading the Jefferson and Johnson's correspondence, Madison responded to Jefferson:

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[78] Ibid.

[79] Jefferson to Madison, 26 January 1823, in *The Writings of Thomas Jefferson*, ed. Paul L. Ford, 245. Jefferson also wrote to Madison following his second letter to Johnson in which he states, "I communicated to you a former part of a correspondence between Judge Johnson of Charleston and myself, chiefly on the practice of caucusing opinions which is that of the Supreme Court of the U.S... I enclose a copy of my letter to the judge becayse if you think of it as I do, I suppose your connection with Judge Todd & your antient intimacy with Judge Duvel might give you an opening to say something on the subject. If Johnson could be backed by them in the practice, the others would be obliged to follow suit and this dangerous engine of consolidn would feel a proper restraint by their being compelled to explain publicly the grounds of their opinions." It is not known whether Madison ever did write to Justice Todd

> Judge Johnson's letter was well entitled to the perusal you recommended. I am glad you have put him in possession of such just views of the course that ought to be pursued in the Court in delivering its opinions... A good work on the side of truth, from his pen will be an apt & effective antidote to that of his Colleague [Marshall] which has been poisoning the public mind, & gaining a passport to posterity.[80]

Johnson had succeeded in providing such an "antidote" to the practice of Marshall. He coupled the seriatim process so favored by Jefferson with the solidarity that the Chief Justice had made to be the norm:

> The outcome of his ventures in strategy are clear: it was the establishment of that procedure for rendering the decrees of the Supreme Court which most harmoniously reconciled authoritativeness with intellectual freedom – the single statement for the majority combined with separate utterances by independents. Then and now, this has proved the mode of expression best adapted to the exigencies of the high tribunal.[81]

Conviction without Sacrificing Unanimity

During the years from 1801 until 1835, the court was dominated by the leadership of Chief Justice John Marshall, who is credited with formally establishing the role of the Court as truly supreme. However, alternative leadership was occurring elsewhere on the court by Justice William Johnson's practice of offering dissenting opinions as we would know them today. Some would assert that it was Jefferson who made the most lasting impression on the Court due to the fact that he was both relentless in his advocacy of the seriatim system and also that it was he who "pushed Johnson to dissent in hopes that this would weaken the court," a practice that, in actuality, made the court stronger."[82] Thus, Jefferson's

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or Duvel regarding the practice, as no record of correspondence with either can be found in his writings after this date in 1823. Jefferson to Madison, 13 June 1823 in *The Writings of Thomas Jefferson*, ed. Paul L. Ford, 260.

[80] Madison to Jefferson, 15 January 1823 in *The Writings of James Madison*, ed. Gaillard Hunt, 114.

[81] Morgan, *Justice William Johnson: The First Dissenter*, 188.

[82] Kolsky, "Justice William Johnson and the History of the Supreme Court Dissent," 2070.

contribution in appointing Johnson, and Johnson's direct influence in shaping the ways opinions were issued is seen today by some to be of equal if, not greater importance than Marshall's own contributions to the court at that time.[83]

The tensions that existed between Marshall, Jefferson and Johnson are not only relevant specifically with regard to the political situation at the time of the Marshall Court, but also with regard to the evolution of judicial dissent in the Supreme Court in later years. The process of dissent as we know it today was firmly established by Johnson as he confronted the firm, single-majority opinion favored by Marshall with the freedom of expression inherent in the seriatim opinions championed by Jefferson. It was Johnson who truly acted as leader not only by holding his convictions in the face of his opponents both on and off the court, but also in creating a judicial practice that would give justices a tool for potentially influencing future generations and public opinion. As Marshall sought to strengthen the court through unanimity, Johnson insisted that right judgment should never be sacrificed in its wake. As Charles Evans Hughes has written,

> When unanimity can be obtained without sacrifice of conviction, it strongly commends the decision to public confidence. But unanimity which is merely formal, which is recorded at the expense of strong conflicting views, is not desirable in a court of last resort, whatever may be the effect upon public opinion at that time. This is so because what must ultimately sustain the court in public confidence is the character and independence of the judges. They are not there simply to decide cases, but rather, to decide them as they think they should be decided, and while it may be regrettable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.[84]

Overall, the right to dissent – historically, politically, and constitutionally – has done more than produce inspirational writing in legal scholarship. It has worked simultaneously

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[83] Kolsky, "Justice William Johnson and the History of the Supreme Court Dissent," 2070.

[84] Hughes, *The Supreme Court of the United States*, 67-68.

to reflect the ideals of our society and further them. The tensions that existed between Marshall, Jefferson and Johnson regarding the role of unanimity and dissent during the Court's formative years, as well as the tensions that currently exist today, are inevitably important in examining how the leaders of our nation's highest court express their judicial philosophies, and also shape the public conscience of the nation. As made clear by the example of Marshall, Jefferson, and Johnson, it was then, as it is now, the great dissenter who makes the Court see the error of its ways who can be said to truly embody judicial leadership.

"WE ARE UNDER THE GOVERNMENT OF INDIVIDUAL MEN"

Just as Jefferson appointed Johnson with the hope of challenging Federalist constitutional interpretation, other dissenters have followed suit by articulating a principled definition of the Constitution despite the majority's judicial philosophy. One of the most important dissenters to do this was Justice Benjamin R. Curtis in *Dred Scott v. Sandford.*[1] While the majority attempted to skew the meaning of the Constitution to justify the institution of slavery, Curtis warned of the path the Court was taking based not only on the facts of the case, but on what he saw as the correct interpretation of the Constitution. He insisted that the Court was committing a grave error not only with regard to the specific situation of Dred Scott, or even with regard to slavery as an institution, but also with regard to the true meaning of the Constitution and the proper role of the judiciary as the interpreter of it.

If the Marshall Court's cause was nationalism, that of the Taney Court was regionalism, and in *Dred Scott v. Sandford* the politics and morality of the justices "combined to produce the worst constitutional decision of the nineteenth century."[2] Just as "Marshall was a great Federalist conservative; Taney was to be the great democratic Jackson liberal. Marshall had been devoted to the Federalist promotion of individual property rights; Taney was to be devoted to the social and economic rights of people under

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[1] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

[2] Robert H. Bork, *The Tempting of America*, (New York: Simon and Schuster, 1990), 28.

the aegis of the police powers of the state."[3] As such, Taney attempted to promote this ideology by issuing a definitive national statement on slavery. "He endeavored to settle by judicial decision what debate in Congress and on the hustings could not settle but only disturb. He tried to avert the revolutionary disruption of a social and economic system. He was playing for high stakes, he played his trump card to maintain the old constitutional arrangements and prevent disunion – and he failed."[4]

The Origins of the Race Question

The question of slavery and the issue of inequality between races did not simply arise in the mid-1800s. Long before the conflict between North and South that degenerated into the American Civil War, the nation was divided ideologically regarding the justification of slavery.[5] "Although not the source of national apoplexy that it eventually became...," differences with respect to slavery, "were a significant cause of friction and uncertainty in 1787."[6] Although it can be said that during the time of the Constitutional Convention the most obvious struggle was between large and small states over their representation in the legislative branch, the Great Compromise resolved this conflict by "establishing proportional representation in one house while retaining state equality in the

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[3] Percieval Jackson, *Dissent in the Supreme Court: A Chronology* (Norman: University of Oklahoma, 1969), 42.

[4] Charles W. Smith, Jr., *Roger B. Taney: Jacksonian Jurist* (Chapel Hill: University of North Carolina Press, 1936), 155, 173.

[5] Don E. Fehrenbacher states, "slavery had in fact been an obstacle to American union since the beginning of independence, contributing to the financial weakness of the Articles of Confederation." Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford, 1978), 19.

[6] Donald E. Lively, *Foreshadows of the Law: Supreme Court dissents and Constitutional Development* (Westport: Praeger, 1992), 3.

other."[7] Once the question of representation was settled, the sectional dispute regarding slavery once again became a source of great controversy with regard to the formation and ratification of the new Constitution. As James Madison put it in the Constitutional Convention, sectional disputes stemmed "principally from the effects of...having or not having slaves," and therefore the issue of slavery served as the reason for "forming the great division of interests in the U. States [which] lay between the Northern [and] Southern."[8]

In 1787, each state could decide whether or not to allow slavery within its borders.[9] Only three clauses in the new Constitution directly dealt with the institution of slavery, and none of them mentioned the practice by name. These clauses –the three-fifths clause, the slave trade clause, and the fugitive slave clause – "dealt only with certain peripheral features of the institution" of slavery.[10] The deliberate avoidance of the word "slavery" in each of these clauses should not be readily overlooked, as "the law inheres most essentially in the text of the document"; that is, the absence of this word in the text says much about the intent of the framers with regard to the treatment of this delicate constitutional question.[11] There was a deliberate effort in the drafting of the text relating to slavery in these aforementioned clauses in order to achieve "compromise for the sake of union."[12] "Constitution-making, after all, was a noble

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[7] Fehrenbacher, *The Dred Scott Case*, 20.

[8] James Madison, 30 June 1789 in *The Records of the Federal Convention of 1787*, ed. Max Ferrand, vol. 3 (New Haven: Yale University Press, 1937).

[9] Fehrenbacher, *The Dred Scott Case*, 29.

[10] Ibid., 26. This implies that "to begin with, the Constitution neither authorized nor specifically forbade the abolition of slavery" in and of itself. Further, it is interesting to note that "neither the three-fifths clause nor the slave trade clause offered slavery any positive protection under the Constitution. The fugitive slave clause, on the other hand, became the basis for the most notorious kind of federal intervention in behalf of the institution... Not in what it said, but only in how it was universally understood, did the so-called fugitive-slave clause acknowledge the existence of slavery in America," 24-25.

[11] Ibid., 27.

enterprise, infused with a good deal of political philosophy and moral grandeur. Overt recognition of slavery did not fit well with the solemn discussion of fundamental law, the social compact, and bills of rights."[13]

In essence, the new national government created by the Constitution left the slavery question uniformly unanswered, an action that was necessary at that moment for the union proposed by the new Constitution to be acceptable.[14] "The early assumption and premise for compromise was that free and slave states could co-exist."[15] Thus, "the compromise of Northern and Southern agendas, although leaving significant loose ends, made possible the Constitution's ratification and union's formation."[16]

In addition to allowing for compromise on the slavery issue to create the union, there was a prevalent belief during the time of ratification that slavery would die a natural death and eventually cease to exist due to the prohibition of the slave trade in 1808. This "body of dubious opinion" basically stated that "had the slavery question been permitted to simmer without exploding, ultimately the institution would have decline and disappeared."[17] This view could not have been farther from predicting the reality of the situation regarding slavery or the threat that it would come to pose to the union.

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[12] Fehrenbacher, *The Dred Scott Case*, 26.

[13] Ibid., 28.

[14] Fehrenbacher states that "it might seem that in a nation already plainly becoming half slave and half free in 1789, the new federal government ought to have followed a policy of scrupulous neutrality and detachment, leaving slavery entirely to the responsibility of slaveholding states." But it did not explicate a policy on slavery as such due to the fact that "various influences and circumstances conspired not only to involve the United States government with slavery but to make it in some degree a sponsor and protector of the institution." Fehrenbacher, *The Dred Scott Case*, 36-37.

[15] Lively, *Foreshadows of the Law*, 4.

[16] Ibid., 4.

What the founders did predict, however, were the problems that would result from fugitive slaves entering free states. Most obviously, these "runaway slave problems" were a concern of the Constitutional Convention, which drafted the fugitive slave clause, and also the view of Congress, which passed the Fugitive Slave Act of 1793.[18] The complications that would necessarily ensue from not having a definitive, national rule regarding the practice of slavery were anticipated, but a uniform policy on slavery was not adopted to solve this problem. Instead, the Constitutional Convention and the Congress prolonged the inevitable by allowing both slave and free states to attempt not only to exist, but to respect each others' philosophies.

Although the problems of fugitive slaves were obviously expected by the framers of the Constitution, and even though they believed that slavery would eventually decline on its own, the framers did not foresee one of the most important challenges slavery would create. "Less comprehended in 1787... was the nation's rapid geographical expansion during the eighteenth century and the intense sectional competition it bred to define standards for the nation's growth and governance."[19] It was this geographical expansion that would raise the most exigent questions with regard to slavery and its regulation. As there were a finite number of states that could possibly come into being given the size of the American continent, controversy over the extension or restriction of slavery would be of grave importance for the growing country.

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[17] Bork, *The Tempting of America*, 29. Bork states that "Abraham Lincoln was once of that view, "resting in the hope and belief that [slavery] was in course of ultimate extinction," a view he later abandoned."

[18] Lively, *Foreshadows of the Law*, 8. Lively also later states that, "The Fugitive Slave Act itself became a focal point of review in 1842, after a slave catcher convicted for a violation of a state anti-kidnapping law challenged the enactment's constitutionality. The circumstances resulting in *Prigg v. Pennsylvania* disclosed precisely the abuses that had prompted legislative concern and action in free states." Ibid., 10.

[19] Ibid., 5.

As evidenced when Missouri sought statehood, Congress was faced with the balancing act of reconciling the competing claims of the North and South with regard to the slavery issue.[20] In this particular situation, Missouri was admitted as a slave state, but Maine was admitted as a free state as a counterbalance. In addition, slavery was prohibited in the territory acquired by the Louisiana Purchase north of Missouri's southern border.[21] Dubbed the Missouri Compromise of 1820, this method of allowing states into the union in pairs (one slave to one free) became the rule from this time forward. "Though not satisfactory to the more ardent opponents and defenders of slavery, North and South, this compromise, whatever its morality, had the beneficial political result of allowing the United States to develop with a degree of stability."[22] Still, this stability would not last long, with new territory becoming all the more important to ardent Northerners and Southerners in the race to end or promote slavery, respectively. The Missouri Compromise and the struggle that accompanied it would leave a "bitter memory," as, "slavery remained a haunting presence in national politics, unmentioned much of the time, but inspiring many apprehensive glances over the shoulder."[23] As Thomas Jefferson wrote, "a geographical line,

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[20] Fehrenbacher writes, "Missouri the *incipient* state was belatedly controversial, and doubly so because of its geographical position as a rather northerly sectional borderland. It was, in fact, the only one of the so-called border states to have been part of the territorial system." Fehrenbaeher, *The Dred Scott Case*, 115.

[21] Bork, *The Tempting of America*, 29. Also see Fehrenbacher's discussion of the Missouri Compromise in relation to its historical significance and relation to the Dred Scott case. He writes, "The Missouri crisis, it has been said, "introduced the antislavery issue into American politics." But in fact, the issue was more or less continually present in the consciousness of American political leaders from the very beginning of the Republie, and often enough before 1819 it had broken through the surface of congressional business. Perhaps in part beeausc of Jefferson's overwrought imagery, the Missouri controversy appears in textbook history as a sudden, interruptive event, full of meaning for the future but somewhat anomalous in the context of its own time... Unlike the crisis of 1850, it did not arise inevitably from the consequences of a war recently ended, and it had no inflamed aftermath like northern reaction to the Fugitive Slave Act, nor a spectacular sequel like that of the Kansas Nebraska controversy. Yet the Missouri affair was actually not an isolated eruption but instead the most prominent part of a sequential pattern." Fehrenbacher, *The Dred Scott Case*, 114.

[22] Bork, *The Tempting of America*, 29.

[23] Fehrenbacher, *The Dred Scott Case*, 116-117.

coinciding with a marked principle, moral and political, once conceived and held up to the angry passions of men, will never be obliterated; and every new irritation will mark it deeper and deeper."[24] With regard to the issue of slavery "we have the wolf by the ears, and we can neither hold him, nor safely let him go."

From a National Debate to a Constitutional Question

Since the justification of slavery would eventually have to be defined nationally, "what eventually became central to doctrinal development for or against slavery...was the Constitution itself."[25] In this way, the political battle that had existed over slavery evolved into one of constitutional interpretation.[26]

"The progress of slavery from an issue of political compromise toward one of constitutional resolution injected a new institutional factor into the controversy. As the case for and against slavery acquired increasingly significant constitutional overtones, it became the function of the Supreme Court to say 'what the law is'."[27] Long treated as a political question, pressure on other branches of the government led to an increasing interest in settling the slavery question by way of the judiciary. They had the opportunity to do just this when a man named Dred Scott sued for his freedom, eventually taking his case to the Supreme Court of the United States. It was here that the law regarding slavery would

[24] Jefferson to John Holmes, 22 April 1820 in *The Writings of Thomas Jefferson*, ed. Paul L. Ford, 698.

[25] Lively, *Foreshadows of the Law*, 5.

[26] Ibid., "Fortifying the premises at both poles of the debate were revisionist readings of the Constitution. The more radical abolitionists, typified by William Lloyd Garrison, regarded the Constitution as a pro-slavery document. So defective was it... that the only remedy was disunion of the nation. An equally significant strand of abolitionist thought favored development of the Constitution to defeat slavery... Like the abolitionists, the South also looked to the Constitution for counterargument and vindication. In a Senate speech delivered in 1836, John C. Calhoun referred to slaves and property and an interest thereby protected by the Fifth Amendment guarantee against deprivation without due process of law." Ibid., 6-7.

[27] Ibid.,7.

finally be decided. The constitutional question that came before the Court in the Dred Scott case "was one that divided Republicans from Democrats – namely, whether Congress has the power to prohibit slavery in the territories... and also one that divided northern Democrats from southern Democrats – namely, whether a territorial legislature had the power to prohibit slavery...."[28] But in the end the Court would do even more than create a uniform law regarding slavery and answer a constitutional question. The action of the Court would also "reflect public understanding of the nature of judicial power and the Court's own sense of strategic responsibility in the American constitutional system."[29]

The notion of judicial review, expounded by the Court under John Marshall in the case of *Marbury v. Madison*, gave the Court the express right to determine the constitutionality of the laws and to declare them null and void if at odds with the Constitution itself. However, after establishing this power in *Marbury*, John Marshall and his Court never again invalidated a federal law for the remaining thirty-two years of his chief justiceship. Thus, "the *Marbury* doctrine remained prominently on the record, well-respected, but more or less dormant."[30] Judicial review would not be exercised again after *Marbury* until *Dred Scott.*

The Dred Scott decision "was the Supreme Court's first invalidation of a major federal law."[31] Therefore, the case had importance beyond deciding the slavery question in being "a landmark in the history of judicial review... since it was in 1857 that Americans for the first time had to consider the operational scope and meaning of judicial review in national politics."[32]

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[28] Fehrenbacher, *The Dred Scott Case*, 207.

[29] Ibid., 209.

[30] Ibid., 223.

[31] Ibid.

[32] Fehrenbacher, *The Dred Scott Case*, 4.

Indeed, there was a heightened political situation not only with regard to the existence of slavery as a territorial question, but also with regard to partisanship on the Court that would decide its fate. as the election of 1837 resulted in a Jacksonian Democratic majority in most levels of government.[33] These triumphant Jacksonians were a largely Southern based party that was "proslavery at heart, but quietly so in order to accommodate its robust northern wing."[34] Roger B. Taney, the chief justice at the time of the Dred Scott decision was a member of this majority party. Luckily for Taney, and quite unlike the political situation surrounding the chief justiceship of his predecessor John Marshall, it was his party who held the majority on the Court as well as the other two branches.[35]

Although the chief justiceship of Taney was of a different element with regard to political partisanship, the two men were very alike in two respects. First, Taney believed in the authority of the Court and his being the voice responsible for that authority, as had Marshall. "According to a contemporary [Taney] spoke with 'so much sincerity… that it was next to impossible to believe that he could be wrong.' Taney himself had the same difficulty [when] as chief justice there were times when he reminded men of the Pope, speaking 'ex cathedra, infallibly.'"[36]

Second, as Marshall was not at all reserved about the promotion of his Federalist ideology, Taney was also committed to his Democratic views. Taney was intensely partisan where slavery was concerned, not letting his position as chief justice quell his democratically

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[33] Ibid., 229. "In the perspective of history, the supposed revolution of 1837, like Jefferson's revolution of 1800, became something less definitive and more complex, in which change of considerable significance took place within an elemental flow of continuity."

[34] Ibid., 117.

[35] With regard to the Court, of the fourteen members appointed from 1829-1861, only Benjamin R. Curtis, the great dissenter in the Dred Scott case, was a northern Whig. Timothy S. Huebner, *The Taney Court: Justices, Rulings, and Legacy* (Santa Barbara: ABC-CLIO, 2003), 97.

[36] Fehrenbacher, *The Dred Scott Case*, 227.

influenced statements. In many cases before *Dred Scott*, he ruled pro-slavery and was not hesitant to give political reasons for doing so.[37] Slavery was not the only substantive issue in which Taney showed his political nature, as he once "disqualified himself from a case involving the Bank of the United States but then wrote a long commentary, amounting to a dissenting opinion, and had it printed as an appendix to the official report."[38]

Thus, when the Senate confirmed on March 15, 1836 the nomination of Roger B. Taney as Chief Justice of the United States by a vote of 29 to 15, they were unknowingly setting the stage for a conflict that would later prove to be one of the most pernicious Supreme Court decisions of all time. Ironically, it was during that same spring that an army medical officer from Illinois took his slave with him to his new assignment, an assignment in the federal territory where slavery had been forbidden by the Missouri Compromise. "The historical convergence of these two unrelated but nearly simultaneous events lay twenty years in the future, but to a considerable degree, the forces that would bring them ultimately together were visible."[39]

The "Antithesis of Taney"

Born and raised in Massachusetts, Benjamin Robbins Curtis was in many ways the antithesis of Taney, and therefore something of a parallel to the man who had been the antithesis of Marshall, the great dissenter Justice William Johnson. As Johnson was the lone Republican on an entirely Federalist Court, Curtis was the lone Whig on a court

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[37] Fehrenbacher, *The Dred Scott Case*, 234. This is made apparent by his rulings and dictum in *Prigg v. Pennsylvania* 41 US 539 (1842), *Groves v. Slaughter* 40 U.S. 449 (1841), and *Strader v. Graham* 51 US, 10 Howard, 395 (1851).

[38] Ibid., 233-234.

[39] Ibid., 121.

composed entirely of Democrats.[40] Curtis was the first member of the Court to have graduated from law school, and after completing his study of the law at Harvard under Justice Joseph Story, he became, from 1840 on, a strong supporter of "the fortunes and principles" of Daniel Webster.[41] The appointment of Curtis by Fillmore can be viewed as parallel of Johnson's appointment by Jefferson. Just as Jefferson nominated the young Republican judge after strong party recommendations, when Justice Levi Woodbury's seat on the Court fell vacant in 1851 it was party affiliate Daniel Webster who strongly recommended Curtis to President Millard Fillmore. Just as Jefferson specifically sought to add a Republican to the bench, Fillmore similarly wanted to nominate a young Whig from New England, and therefore appointed Curtis who had little trouble winning confirmation.[42]

As was the case with Johnson on the Marshall Court, Curtis' influence on the Taney Court was almost immediate. Just a few months after his confirmation as Associate Justice, he wrote the majority opinion in one of the most important Commerce Clause cases in United States history, *Cooley v. Board of Wardens*,[43] which "raised the issue of whether or when states could regulate commercial activity – a question that had bedeviled the justices for decades."[44] Writing for five of eight justices, Curtis declared that the power to regulate commerce did not rest exclusively with Congress; his opinion helped the Court to resolve a seemingly intractable problem by establishing a new, pragmatic standard of

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[40] Except for Justice McLean, who associated himself with a variety of political parties over the course of his career. Huebner, *The Taney Court: Justices, Rulings, and Legacy*, 97.

[41] Vincent C. Hopkins, *Dred Scott's Case* (New York: Russell & Russell, 1967), 82.

[42] Huebner, *The Taney Court*, 99.

[43] *Cooley v. Board of Wardens* 53 US 299 (1852).

[44] Huebner, *The Taney Court*, 100.

interpretation.[45] Thus, Curtis had already established himself as a force on the court, and a partisan adversary to Taney, before the battle over the fate of Dred Scott.

The Situation of Dred Scott

Dred Scott was a slave originally owned by Dr. John Emerson, a man who served as a surgeon in the United States army. In 1834, Emerson took Scott from Missouri to the military post at Rock Island, Illinois where they remained until the spring of 1836. From Rock Island, Scott was taken by his master to another military post in the Louisiana Territory which was free until 1838. In 1838, Dr. Emerson brought Scott back to Missouri. Based on these events, Scott alleged that his master had taken him to Illinois and the Louisiana Territory, and that under the Northwest Territory Ordinance of 1787 and the Missouri Compromise of 1820, he had become free. "He sought an adjudication to that effect and also holding that he had remained free though thereafter he had been taken to Missouri, a slave state."[46] Emerson sold Scott to his brother in law, John F.A. Sandford, before Scott sued for his freedom, hence rendering the Supreme Court case *Dred Scott v. Sandford.*

Scott first sued for his freedom in a state court in Missouri. The Missouri Supreme Court held that he was not entitled to his freedom. Scott's attorneys then brought suit for his freedom in the United States Circuit Court, from whence it eventually reached the Supreme Court of the United States.[47] The case was first argued before the Supreme Court in 1856. There was a question of whether or not Dred Scott was eligible to sue in a federal

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[45] Ibid.

[46] Jackson, *Dissent in the Supreme Court*, 56.

[47] Smith, *Roger B. Taney: Jacksonian Jurist* , 159-160.

court, and therefore the case was postponed to the next term. At that time, it was re-argued with the main questions being whether Scott was eligible to sue and whether or not his residence in territories where slavery was prohibited had made him a free man.[48] Thus, as it came before the Supreme Court, the Dred Scott case clearly presented three issues that had been previously debated in many "courtrooms, legislative halls, political meetings, and newspapers throughout the country."[49] These were the question of negro citizenship; the status of slaves who had been brought to free territory; and, perhaps most importantly, the constitutionality of federal legislation which prohibited slavery in these territories. The Court was to rule on all three of these issues, reaching a decision that would live in infamy.

The Dred Scott Decision

The *Dred Scott* case could have been resolved by the Supreme Court "on narrow grounds that the law of a slave state rather than a free state or territory was outcome determinative."[50] They also could have stated that, "because the litigants were not citizens of different states as required for purposes of federal jurisdiction, it could not reach the merits of the dispute."[51] But instead of following a procedural approach in this regard, the Court instead chose to use to the case of *Dred Scott v. Sandford* to expound upon the constitutionality of slavery in its broadest sense.

Originally, the majority decided that the Missouri Compromise "did not liberate Dred Scott under the particular circumstances, and also that it was inoperative to free a

[48] Ibid., 160.

[49] Fehrenbacher, *The Dred Scott Case*, 235.

[50] Lively, *Foreshadows of the Law*, 17.

[51] Ibid.

slave in any case."[52] However, they also agreed that the Court's decision should only refer to the particular case of Dred Scott; that is, they would leave "the question of the constitutionality of the Missouri Compromise provision for the abolition of slavery in the northern Territory...untouched" and simply make a decision regarding the facts of the specific case at hand.[53] The majority opinion was to be written in this vein by Justice Samuel Nelson. But this was to change, and it was Chief Justice Taney who delivered the majority opinion.[54]

Justice John McLean advised the Court that he was going to write "a long dissent giving his opinion and arguments on the Missouri Compromise and the right of a Negro to sue in the federal courts."[55] However, because it was widely known that Justice McLean wanted to be president of the United States, his action in the Dred Scott case is often construed as one that he hoped would give him the Republican nomination. But when Justice Curtis also asserted that he would write a "far-flung dissent", the nature of the decision changed drastically as the Court "decided to embody in it a discussion of all of the questions involved in the case, including the question of the constitutionality of a congressional prohibition of slavery in the Territories."[56] It was then that Chief Justice Taney was assigned the writing of the opinion to himself.

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[52] Smith, *Roger B. Taney: Jacksonian Jurist*, 160.

[53] Ibid.

[54] Ibid.

[55] Ibid., 161.

[56] Ibid.

The Dred Scott decision consisted of nine separate opinions, including two dissents, and taking up 241 pages in the *United States Reports*.[57] Although it was quite apparent that most members of the court believed Scott was to remain a slave, Taney went a step further in "read[ing] into the Constitution the legality of slavery forever."[58] In this way, it can be said that Taney's "majority opinion" was not widely accepted with regard to its judicial philosophy. Taney "resented the arrogance of the North on the slavery issue and most especially resented the principle, insulting to the South, that lay beneath the North's acceptance of the Missouri Compromise: slavery is an evil and must be limited so long as it cannot be ended."[59] In his opinion, therefore, Taney sought not only to articulate a decision based on Scott's particular case, but to justify the institution of slavery on a national level by finding its basis in the Constitution. "The Dred Scott decision was the one occasion when Taney yielded to the temptation, always disastrous, to save the country, and put aside the judicial self-restraint."[60]

First, Taney made the assertion that blacks were not considered citizens of the United States and therefore had no right to bring suit in the federal court.[61] His assertion "that an entire racial class was unqualified for citizenship, possessed no rights and properly was

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[57] *Dred Scott v. Sandford*, 60 U.S. 393, (1857).

[58] Bork, *The Tempting of America*, 29.

[59] Ibid.

[60] Fehrenbacher, *The Dred Scott Case*, 231.

[61] *Dred Scott v. Sandford* 60 U.S. 393 (1857). Specifically, Taney wrote that "The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them," 60 U.S. 393, 404-405 (1857).

relegated to slavery was at best dubious and at worst a perversion of history."[62] But he did not stop at simply nullifying blacks' rights to American citizenship. He would also state that the right of property in slaves was guaranteed by the Constitution. In his opinion he declared that Scott had never been free due to the fact that slaves were personal property; the right guaranteed to masters by the Constitution. He wrote that according to the Due Process Clause of the Fifth Amendment:

> [T]he rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his life, liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[63]

With regard to this premise, he also stated that when the federal government enters into possession of a territory, "It has no power of any kind beyond [the Constitution]; and it cannot...assume discretionary or despotic powers which the Constitution has denied to it."[64] Further, he went on to make an analogy between slavery and other rights guaranteed by the Constitution. Taney wrote, "no one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances. Nor can Congress deny to the people the right to keep and bear arms, nor the

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[62] Lively, *Foreshadows of the Law*, 19.

[63] *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857).

[64] Ibid., 449.

right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding."[65]

This may be very well true, "but there is no similar constitutional provision that can be read with any semblance of plausibility to confer a right to own slaves."[66] Although it may have been more feasible to make the case that the federal government could not free slaves in states where slavery was still permitted without violating the Fifth Amendment's due process requirement with regard to property, it was and is a skewed version of constitutional interpretation that allows for, or requires, the federal government to permit and protect slavery in all of the areas under its control.

Thus, Taney's Fifth Amendment premise "pushed constitutional principle beyond accommodation of slavery to the point of unqualified security for the institution."[67] Regardless of its questionable validity, Taney's opinion became the law of the land, and with his premise regarding the Fifth Amendment also declared the Missouri Compromise of 1820 was unconstitutional, since the Federal Government had no right to prohibit slavery in the new territories. In this way, Taney sanctioned slavery under the terms of the Constitution itself, and basically put into law that slavery could not be outlawed or restricted within the United States.

But even beyond the far-reaching and important implications of Taney's decision regarding the facts of Dred Scott's case, as well as the fate of slavery, there was yet another argument that served to be controversial in Taney's opinion. He also discussed at length the duty of the Court with regard to constitutional interpretation:

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[65] *Dred Scott v. Sandford*, 60 U.S. 393, 449 (1857).

[66] Bork, *The Tempting of America*, 30.

[67] Lively, *Foreshadows of the Law*, 21.

> It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.[68]

It was this statement regarding the original meaning of the Constitution which would move Justice Curtis to write a dissent that would be regarded as almost as influential as the majority opinion.

"We Have No Longer a Constitution; We Are Under the Government of Individual Men"

The dissenting opinions in *Dred Scott v. Sandford* were "two of the three longest" in the case, constituting about 44 per cent of the total judicial wordage."[69] Perhaps more important than what many consider the horrifying assertions of Taney's opinion, were the responses to his opinion in the dissents, especially that of Justice Curtis, whose opinion was generally regarded as "more thorough, scholarly, and polished" than the dissent of Justice McLean.[70] Curtis became "the judicial icon of the antislavery cause with his powerful dissent..." where his, "lengthy opinion took aim at both of Chief Justice Taney's major conclusions: that blacks lacked any claims to citizenship and that Congress had no power over slavery in the territories."[71]

In the opening of his dissent in *Dred Scott*, Curtis "announced that he dissociated himself from the opinion of the Chief Justice and from the judgment of the majority of the

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[68] *Dred Scott v. Sandford* 60 U.S. 393, 405 (1857).

[69] Fehrenbacher, *Slavery, Law, and Politics*, (New York: Oxford, 1981), 221.

[70] Ibid.

[71] Huebner, *The Taney Court*, 100.

Court", a careful distinction that was necessary for his argument.[72] His argument was formed by responding to the assertions of Taney's opinion: first, that blacks were not citizens; and, second, that they were to be regarded as property and thus must be guaranteed to their masters under the Due Process Clause of the Fifth Amendment. In responding to Taney's first claim, Curtis stated that before 1789, "U.S. citizenship was synonymous with state citizenship; the Articles of Confederation prohibited Congress from making any citizenship rules, and the Constitution itself referred to 'citizens at the time of the adoption of the Constitution'."[73] Because "all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens,"[74] and "under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution and laws, is also a citizen of

[72] Hopkins, *Dred Scott's Case*, 82. Fehrenbacher summarizes Curtis' argument as stating the following: "1. According to the Marshall Court formula, nothing in the law of Missouri could deprive Dred Scott of his rights under the diverse-citizenship clause, provided that he was a citizen of the United States and a resident of Missouri at the time of bringing suit. 2. Since his residence had not been controverted, the only question was whether Scott's African ancestry and slave parentage made him ineligible for United States citizenship 3. If *any* person of such background could be a United States citizen, Scott had the right to claim citizenship, since no other reason for excluding him had been advanced in the plea in abatement. 4. United States citizenship antedated the Constitution. This was indicated by the language of Article Two, Section Four, referring to "a citizen of the United States at the time of adoption of the Constitution." 5. The Confederation was a government of severely limited authority and had been delegated no power "to act on any question of citizenship, or to make any rules in respect thereto." The matter was left entirely in the hands of the states, and thus United States citizenship was synonymous with state citizenship in 1789. 6. Under the Confederation government, free Negroes in five states, being recognized as citizens of their respective states, were also citizens of the United States. 7. There was nothing in the Constitution which, *prorio vigore*, deprived any class of persons of citizenship possessed at the time of its adoption. 8. The Constitution in fact neither defined citizenship nor invested Congress with any authority to do so, except in regard to naturalization of aliens... 9. The plea in abatement therefore showed no facts inconsistent with Dred Scott's being a United States citizen or a resident of Missouri, entitled to bring suit in federal court", 223-224.

[73] Huebner, *The Taney Court*, 100.

[74] *Dred Scott v. Sandford* 60 U.S. 393, 410 (1857).

the United States,"[75] blacks had a valid claim to citizenship. In addition, Curtis interpreted the Territories Clause of the Constitution broadly, "so as to grant Congress power to organize and govern territories in whatever way it wished. This included the power to pass legislation pertaining to slavery, as Congress had done with the Northwest Ordinance of 1787."[76]

With regard to Taney's second argument concerning the Due Process Clause, Curtis also offered a strong response. Here, he concluded that it was most

> rational to conclude that they who framed and adopted the Constitution were aware that persons held to service under the laws of a State are property only to the extent and under the conditions fixed by those laws; that they must cease to be available as property, when their owners voluntarily place them permanently within another jurisdiction, where no municipal laws on the subject of slavery exist; and that, being aware of these principles, and having said nothing to interfere with or displace them, or compel Congress to legislate in any particular manner on the subject, and having empowered Congress to make all needful rules and regulations respecting the Territory of the United States, it was their intention to leave to the discretion of Congress what regulations, if any, should be made concerning slavery therein.[77]

[75] *Dred Scott v. Sandford* 60 U.S. 393, 418 (1857).

[76] Huebner, *The Taney Court*, 100. Curtis himself wrote in *Dred Scott v. Sandford*, "That Congress has some power to institute temporary Governments over the territory, I believe all agree; and, if it be admitted that the necessity of some power to govern the territory of the United States could not and did not escape the at tention of the Convention and the people, and that the necessity is so great, that, in the absence of any express grant, it is strong enough to raise an implication of the existence of that power, it would seem to follow that it is also strong enough to afford material aid in construing an express grant of power respecting that territory; and that they who maintain the existence of the power, without finding any words at all in which it is conveyed, should be willing to receive a reasonable interpretation of language of the Constitution, manifestly intended to relate to the territory, and to convey to Congress some authority concerning it," 495. He further states, "There was to be established by the Constitution a frame of government, under which the people of the United States and their posterity were to continue indefinitely. To take one of its provisions, the language of which is broad enough to extend throughout the existence of the Government, and embrace all territory belonging to the United States throughout all time, and the purposes and objects of which apply to all territory of the United States, and narrow it down to territory belonging to the United States when the Constitution was framed, while at the same time it is admitted that the Constitution contemplated and authorized the acquisition, from time to time, of other and foreign territory, seems to me to be an interpretation as inconsistent with the nature and purposes of the instrument, as it is with its language, and I can have no hesitation in rejecting it. I construe this clause, therefore, as if it had read, Congress shall have power to make all needful rules and regulations respecting those tracts of country, out of the limits of the several States, which the United States have acquired, or may hereafter acquire, by cessions, as well of the jurisdiction as of the soil, so far as the soil may be the property of the party making the cession, at the time of making it." *Dred Scott v. Sandford* 60 U.S. 393, 503 (1857) (Curtis, B., dissenting).

[77] *Dred Scott v. Sandford* 60 U.S. 393, 530 (1857).

But what was perhaps Curtis' strongest point was that which suggested that Taney and the majority who joined him had gone too far with regard to their explication of constitutional principle. His words merit full quotation.

> With the weight of either of these considerations, when presented to Congress to influence its action, this court has no concern. One or the other may be justly entitled to guide or control the legislative judgment upon what is a needful regulation. The question here is, whether they are sufficient to authorize this court to insert into this clause of the Constitution an exception of the exclusion or allowance of slavery, not found therein, nor in any other part of that instrument. To engraft on any instrument a substantive exception not found in it, must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument, and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible – because judicial tribunals, as such, cannot decide upon political considerations. *Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.* When such a method of interpretation of the Constitution obtains, in place of a republican government, with limited and defined powers, we have a government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this court.[78]

This "learned, crisp, and well reasoned" argument is what makes Curtis deserving of the name judicial leader.[79] "In his *Dred Scott* dissent… Curtis showed signs of judicial greatness, as he thoroughly outmatched the chief justice."[80] This is not mere speculation, or undeserving praise of Curtis, as Taney himself took the extraordinary step of re-writing

[78] *Dred Scott v. Sandford* 60 U.S. 393, 518-520 (1857). [Emphasis Supplied].

[79] Huebner, *The Taney Court*, 100.

[80] Ibid.

his majority opinion before publishing it in order to respond to Curtis' claims. Soon after the Dred Scott decision was announced from the Bench, Taney's majority opinion "was caught in a crossfire of lavish Democratic praise and Republican denunciation."[81] But what was more interesting than the controversy surrounding the majority opinion was that its contents were not released for publication promptly as the full texts of the dissenting opinions were. All that the public had knowledge of with regard to Taney's opinion was a summary written by an Associated Press reporter and printed in major newspapers.[82]

On April 2, Justice Curtis wrote a letter to William T. Carroll, Clerk of the Supreme Court, asking for a copy of Justice Taney's opinion when it was available for publication. Curtis received a reply from Carroll stating that the Chief Justice had advised him not to circulate any copies of the printed opinion before it was officially published in the reports. Curtis responded that Taney could surely not extend this rule to the other members of the Court, but was again denied a copy of the opinion when Carroll replied that the directive applied to everyone, as was confirmed by the Chief Justice himself.[83]

After receiving Carroll's reply Curtis penned a letter to Taney himself on April 18, asking for an explanation for what seemed to be a strange directive with regard to the majority opinion. In this letter, Curtis stated that, surely, Taney did not mean to keep the opinion from him. Taney responded harshly in saying,

> It would seem from your letter to me that you suppose you are entitled to demand [the opinion] as a right, being one of the members of the tribunal. This would undoubtedly be the case if you wished it to aid you in the discharge of your official duties. But I understood you as not desiring or intending it for that

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[81] Fehrenbacher, *The Dred Scott Case*, 316.

[82] Ibid.

[83] Benjamin R. Curtis, ed. *A Memoir of Benjamin Robbins Curtis, LL.D.* (2 vols; Boston, 1879), I, 212-213, 216.

> purpose. On the contrary, you announced from the Bench that you regarded this opinion as extrajudicial – and not binding upon you or anyone else.[84]

Thus, "Taney made it plain that he resented the content of Curtis' dissenting opinion, as well as its early release for publication."[85] But there would be even more blatant admission by Taney later in the exchange of letters concerning his resentment for Curtis and his dissent, as well as the way he intended to respond to it. After receiving Taney's stinging response, Curtis wrote to the Chief Justice again on May 13, in which he protested Taney's questioning his motives, discussed the particular situation of the restriction and whether or not Taney and two other justices indeed had the authority to impose it. Curtis implied that the directive violated the rules of the Court in withholding an opinion for an extended period of time.[86] The Chief Justice did not reply calmly.

After the official publication of the Dred Scott decision in May, Taney finally responded to Curtis' letter. In an eleven-page missive, Taney answered assertions in Curtis' letter that he believed could not be "passed by without notice." Taney claimed that in writing a dissent without announcing it to the Court served to discredit the authority of the Court's majority opinion, especially when its goal was "impair [the majority opinion's] authority and discredit it as a judicial decision."[87] With regard to the assertion that he had substantively changed his opinion since the time it was pronounced from the bench, Taney stated

> There is not one historical fact, nor one principle of constitutional law, or common law, or chancery law, or statute law in the printed opinion which was not distinctly announced and maintained from the Bench; nor is there any one historical fact, or principle, or point of law, which was affirmed in the opinion from the Bench, omitted or modified, or in any degree altered, in the printed

[84] Ibid., 213-215, 217-230.

[85] Fehrenbacher, *The Dred Scott Case*, 317.

[86] Curtis, *A Memoir of Benjamin Robbins Curtis*, I , 213-216

[87] Ibid.

> opinion...And until the Court heard them denied, it had not though it necessary to refer to proofs and authorities to support them – regarding the historical facts and principles of law which were stated in the opinion as too well established to be open to dispute.[88]

In arguing that there were certain elements of the majority decision that had to be elucidated given the dissents, Taney all but stated outright that his revisions to the opinion were mainly to serve as a rebuttal to the arguments of Curtis in his dissenting opinion.

Curtis compared Taney's published opinion with his memory of what had been given from the Bench. He concluded that at least eighteen pages of additional remarks had been inserted into the opinion, and insisted that "No one [could] read them without perceiving that they are *in reply* to [his] opinion."[89] Unfortunately, Taney's original majority opinion was not preserved or well-documented, but there was a historical analysis by Don E. Fehrenbacher which sought to analyze Curtis' claims about the differences between Taney's two opinions.

Fehrenbacher first points to the fact that "the Chief Justice read his opinion on March 6 in two hours or a little more, but at his measured pace, the published version (containing 23,000 words) would have required at least three hours for reading. If so, the opinion was ultimately expanded 50%, making it some eighteen pages longer, as Curtis calculated."[90] Secondly, and perhaps more conclusively, Fehrenbacher argues that given two different sets of page proofs of the Taney opinion preserved by the National Archives, "handwritten additions to the proofs constitute about eight pages of the version finally published."[91] When the fact that Taney added

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[88] Ibid.

[89] Ibid., 229.

[90] Fehrenbacher, *The Dred Scott Case*, 320.

[91] Ibid. He goes into detail about these additions, and states that the three most lengthy are as follows: 1) Five paragraphs supplementing a passage of three paragraphs in which Taney defended the right of the Court to examine the facts in the case after having upheld the plea in abatement. All eight paragraphs are plainly rebuttal to the assertion of Curtis (and McLean) that much of Taney's opinion was without authority; 2) Fifteen paragraphs in

eight pages after it had been typeset originally, "it is not difficult to believe that he had expanded the original manuscript by as much as ten pages *before* he sent it to the printer", thus substantiating Curtis' claim and underscoring the importance of Curtis' dissent both in the crafting of the majority opinion of the Court on which he sat and in the future of American jurisprudence.

Perhaps the effectiveness of this dissent is best described by the leading historian of the case:

> Curtis's opinion, especially when read head-on against Taney's, is very impressive. One cannot entirely suppress the suspicion that the hostility displayed by the Chief Justice in the aftermath of the decision was partly inspired by the realization that he had been badly beaten in the argument by his much younger colleague from Massachusetts.[92]

A Reliance on Constitutional Principle

The framers who were most concerned with establishing union under the Constitution left the "disruptive slavery question largely open for future resolution."[93] Exactly seventy years later, Taney's response to a question, deliberately left open in 1787, was that the "act of Congress which prohibited a citizen from holding and owning property on this land in the territory of the United States...is not warranted by the Constitution and is therefore void."[94] But this reasoning was not to go unchallenged, as alternate view was offered by Justice Benjamin Curtis, who dissented in *Dred Scott*, and thus "destroyed

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which Taney attempted to reconcile his views on the territory clause with those of John Marshall in *American Insurance Company v. Canter*. This was likewise rebuttal, but primarily to McLean rather than Curtis; 3) Three paragraphs near the end of the opinion denouncing the manner in which the case had been brought before the Supreme Court. This introduced a new question that had not been argued by counsel.

[92] Ibid., 229.

[93] Lively, *Foreshadows of the Law,* 21.

[94] Ibid.

Taney's reasoning, and rested his own conclusions upon the original understanding of those who made the Constitution."[95]

If Curtis's opinion seems more convincing than the opinions of the Court majority, "it is not merely because [he was] by modern standards, on the right side. Curtis... displayed a fundamental agreement on the major issues that contrasted sharply with the heterogeneity of the majority's reasoning."[96] It was his reliance on constitutional principle, and the original meaning of the text that grounded his argument and made him able to articulate the ways in which the Court had been lead astray by the majority's political passions over the slavery question.

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[95] Bork, *The Tempting of America*, 33.

[96] Fehrenbacher, *Slavery, Law and Politics*, 229.

"OUR CONSTITUTION IS COLOR-BLIND"

Dred Scott was not the only infamous case regarding race relations to be decided by the Court.[1] In 1896, it was again faced with the issue of race in *Plessy v. Ferguson*, a case that focused on the constitutionality of segregation. Once again, a great dissenter, John Marshall Harlan, warned that the otherwise unanimous majority was misconstruing the meaning of the Constitution as it pertained to race relations. In what has been referred to as "perhaps the most eloquent and prophetic dissent in the whole history of the United States Supreme Court," Harlan set out to make a plea not only to the Court at that moment, but to the public and to posterity.[2] Although he could not prevent the majority from handing down a decision that would "in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott case," he at least rendered the force of the opinion weak, as it was his "cry in the wilderness" that is perhaps most remembered.[3]

The Remnants of *Dred Scott*

The Dred Scott decision had many repercussions in the years that followed. For those opposed to slavery and its expansion, "the decision meant that America had gone from being a

[1] Harvey Fireside, *Separate and Unequal: Homer Plessy and the Supreme Court Decision that Legalized Racism* (New York: Carroll & Graf, 2004), 7. Fireside writes, "*Plessy v. Ferguson*," was "second only to *Dred Scott v. Sandford* as the most likely candidate for the all-time most shameful chapter in U.S. Supreme Court annals."

[2] Alan Barth, *Prophets with Honor: Great Dissents and Great Dissenters in the Supreme Court* (New York: Alfred A Knopf, 1974), 32.

[3] *Plessy v. Ferguson* 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

nation with slave states to a slave nation."[4] After the decision was handed down, many groups of abolitionists became adamant about demise of slavery, and often turned to violence to promote their aims. Where the slaves themselves were concerned, their earlier hope of escaping to the North was no longer feasible as "there would be no quarter, no hope of freedom, and no place to run."[5] Abraham Lincoln declared *Dred Scott* an erroneous ruling in a speech before the Illinois legislature, also stating the Republican view that the "negro [is] a man; that his bondage is cruelly wrong, and that the field of his oppression ought not to be enlarged."[6] Thus, given its many implications, "*Dred Scott*... probably helped to promote the Civil War, as it certainly required the Civil War to bury its dicta."[7]

When the Civil War came to an end, three new constitutional amendments came into effect based on the new situation of former slaves in the Union. These amendments included the Thirteenth Amendment, which abolished slavery and its remnants everywhere in the Union; the Fourteenth Amendment, which guaranteed (amongst other things) equal protection under the law; and the Fifteenth Amendment which was adopted for the purpose of assuring citizenship and suffrage to the freedmen. Together, these amendments gave new shape to the Constitution and the laws of the nation. Under the newly amended Constitution, it appeared as though slavery and its ideological remnants were finally truly abolished. This, however, was little more than lip service, as the reality of local law in the South regarded the Constitutional amendments as far from being the law of the land.

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[4] Keith Weldon Medley, *We as Freemen: Plessy v. Ferguson* (Gretna, LA: Pelican Pub. Co., 2003), 73.

[5] Ibid., 72.

[6] Abraham Lincoln, Lincoln's Speech on the Dred Scott Decision, 26 June 1857.

[7] Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford, 1993), 120-121.

Even after the adoption of the new constitutional amendments, most southern states passed so-called Black Codes in 1865 and 1866, which "virtually reimpos[ed] the caste divisions of the old slave system."[8] In response, "the United States Supreme Court in the 1870s ushered in a long procession of rulings that limited the scope of the Reconstruction laws and constitutional amendments…," but, "as the Supreme Court overturned or narrowed civil-rights statutes, states enacted more discriminatory laws."[9] This "intransigence" of the southern states in refusing to abide by the new amendments and to proceed to effectively reintroduce slavery enraged congressional radicals and, in turn, caused them to mandate a military occupation of the South.[10]

This occupation was part of the "reconstruction" of the South which was begun by Lincoln at the end of the war. Reconstruction was to play an important role in the formation of local and national law as "the gulf between presidential and congressional plans for Reconstruction widened after Lincoln's death on April 15, 1865."[11] When Andrew Johnson, Lincoln's Democratic vice president, assumed the presidency, it was made clear that this Tennessean who had stayed loyal to the Union after his state's secession may have begun to remember his roots. During his presidency, Johnson attempted to continue Lincoln's Reconstruction policies, "but he lacked his predecessor's intelligence, stature, or powers of persuasion."[12] In addition to these differences between Lincoln and Johnson, President Johnson was a slaveholder himself and had said that the United States was "a country of white men and a

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[8] Fireside, *Separate and Unequal*, 34-35. Specifically, under these Black Codes "several states decreed that Negroes could be employed only as workers in agriculture or domestic service.… Some states forbade Negroes the ownership of weapons or alcohol. They were generally denied the right to vote, were barred from serving on juries, and kept from testifying in cases where whites were the parties." See also C. Vann Woodward, *The Strange Career of Jim Crow* (New York: Oxford University Press, 1974).

[9] Medley, *We as Freemen*, 90.

[10] Fireside, *Separate and Unequal*, 34-35

[11] Ibid., 36.

[12] Ibid.

government of white men."[13] Thus, his attitude toward the Southern states and the laws pertaining to African Americans which they enacted during the time of Reconstruction, was not that they were unconstitutional aberrations, but were instead necessary local laws that should not be regarded as unconstitutional.

President Johnson's southern sympathies and "his refusal to budge on measures to bring badly needed help to the four million freed slaves," were not the only factors in shaping his Reconstruction policies.[14] There was also a partisan issue occurring in Washington at the time. After Lincoln's assassination, a clash between Congress and the President came about due to the "political ambitions of the parties in Washington as well as their different attitudes towards Negroes"[15]. Johnson, who was a staunch Southern Democrat, "was eager to revive his party in the South," just as the Republicans who had control of Congress "wanted to postpone the enfranchisement of former Confederates because their votes might give permanent national control to Democrats in Congress and the White House."[16] In addition, if former slaves and freedmen were given the vote, their Radical Republican votes might serve to ensure long term possession of the government. In this way, "the chief casualty of Reconstruction's failure was, of course, the freedman, the black, who was supposed to be its chief beneficiary. He became, instead, a helpless pawn in a fierce struggle for national political advantage," a struggle which the Democrats won.[17]

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[13] Fireside, *Separate and Unequal*, 34-35. Northern newspapers ridiculed Johnson for being soft on the Confederacy, and his stalemate with Congress over the next year made him increasingly unpopular. Another issue mirroring the rift between the executive and legislative branches was the Reconstruction Act of 1867 which Congress passed over Johnson's veto on March 2, 1867.

[14] Ibid, 45.

[15] Ibid.

[16] Ibid.

"It is crucial to an understanding of the *Plessy* case to fathom the depth of American racism at the time, as lawyers and judges could not help but be affected by it."[18] In the years following the war and Reconstruction, the South "remained imprisoned in its own bitterness," and, feeling their defeat, the southern states and the individuals that comprised them "clung fanatically to [the] primary social principle that the black was an inferior, subordinate creature in relation to whom the white man – any white man – must be considered a master." [19] In the absence of the formal institution of slavery to justify racial superiority, many other explanations were contrived as to why whites would always be superior to those of the Negro race.

Pre-war slaveholders had used biblical references to justify the need for white domination of black laborers "for their own good."[20] Post-war southerners did not only look for biblical justification, but also academic findings from sociologists and other new social sciences which "claimed to provide scientific grounds for old prejudices."[21] The theories were "both illogical and circular," but came to be known as gospel truth with regard to the need for racial discrimination and, "at least, the futility of enacting measures to upgrade the status of freedpeople, who were said to be innately fit only for unskilled labor."[22]

In addition to the biblical, sociological, and scientific justifications used to justify racial discrimination and its manifestation in the law, another factor and perhaps "most direct trigger for the initial wave of Jim Crow legislation" was an increasing "black unwillingness to defer to

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[17] Barth, *Prophets with Honor*, 24-25.

[18] Fireside, *Separate and Unequal*, 49.

[19] Barth, *Prophets with Honor*, 25.

[20] Fireside, *Separate and Unequal*, 49. Of course, the abolitionists and slaves also drew inspiration from scripture, especially the story of the Jewish exodus from Egypt.

[21] Ibid.

[22] Ibid, 49-50.

whites."[23] As a new generation of blacks who had never been subjected to the evils of slavery or its remnants in the black codes came into existence, discrimination and the laws that fostered it were increasingly challenged. "Negro newspapers perceived growing black assertiveness in the face of indignities inflicted by whites; and among the white population, stories of 'uppity' Negroes increased during the 1880s."[24] Obviously, the newfound assertiveness of a new generation of blacks "no more 'caused' Jim Crow legislation than did the other ingredients already surveyed; but it evoked interpretations from the politically dominant race that produced the result."[25] Thus, there was a harsh development with regard to race relations in South "a caste system in which the black became the American untouchable."[26]

The First Jim Crow Law to Come into Being

In 1881, Tennessee became the first Southern state to pass a law segregating railroad cars.[27] It legislatively mandated "the equal-but-separate principle" with regard to transportation. This legislation was based on "a measure passed six years earlier that had abrogated the common-law duty of common carriers, hotels, and places of amusement to serve anyone who is willing and able to pay and is otherwise presentable in appearance and demeanor" which was

[23] Charles A. Lofgren, *The Plessy Case: a Legal-Historical Interpretation* (New York : Oxford University Press, 1987), 25.

[24] Ibid. Lofgren writes, "The immediate context of Alabama's separate car law, significantly, was the threat of a series of black suits directed against the state's railways as a means of improving service. White attitudes made the problem worse, as Texas Governor James S. Hogg candidly admitted when he asked for a stronger Jim Crow law in 1891, stating, 'Insolence on one side, and intolerance on the other, unnecessarily exhibited by the disturbing elements of both races, have borne this fruit.' Even incidents of white violence *against* Negroes could be put to use, as in Georgia where one state representative argued that a separate car law would aid in 'preventing little riots' on railways," 25.

[25] Ibid.

[26] Barth, *Prophets with Honor*, 25.

[27] Medley, *We as Freemen*, 90.

adopted in part as a response to the federal Civil Rights Act of 1875, a law that was "interpreted as banning discrimination in facilities that had common-law duties to serve the public."[28] The law enacted by Tennessee as a response, "in effect legalized the practice of charging blacks first-class railway fares but assigning them to inferior coaches," and led to a complete disregard of the equality for African Americans mandated by the federal government.[29] When this was signed into law by the governor, this became "the first 'Jim Crow' law" to come into being.[30]

Six years after the Separate Car Act became Tennessee law, many other Southern states followed suit, passing mandatory Jim Crow transportation laws. Many of these laws were enacted prior to the case of *Plessy v. Ferguson* in 1896, and "included measures in Florida (1887), Mississippi (1888), Texas (1889 and 1891), Louisiana (1890 and 1894), Alabama (1891), Arkansas (1891 and 1893), Georgia (1891), and Kentucky (1892)."[31]

It was Louisiana's version of the law which would eventually spark the controversy that ended up before the nation's highest court. Introduced as House Bill number 42 by Representative Joseph Saint Amant of Ascension Parish, this law claimed to "promote the comfort of passengers in railway trains."[32] However, what the Separate Car Act really did was deny people of different races the right to travel together.[33] Specifically, the law stated

> that the officers of passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any person insisting on going into a coach or compartment to which by race he

[28] Lofgren, *The Plessy Case*, 21.

[29] Ibid.

[30] Ibid.

[31] Ibid, 22.

[32] Medley, *We as Freemen*, 95.

[33] Ibid., 96. "In the case of interracial couples, the law physically separated husbands, wives, and children.... Like the black codes of old, the law classified people by ancestry. Indeed, for Louisiana legislators of African heritage, the law prohibited them from traveling with their fellow government officials or many of their constituents."

> does not belong, shall be liable to a fine of Twenty Five Dollars or in lieu thereof to imprisonment for a period of not more [than] twenty days in the Parish Prison.[34]

"To those who remembered days before the Civil War, the Separate Car Act was reminiscent of the *Dred Scott* decision and the limiting caste system before the war."[35]

This act however, was not to go unchallenged. In September 1891, black leaders of New Orleans "realized how their rights were being whittled away, year by year, their achievements disparaged by stereotypes of Negroes as constitutionally inferior" and therefore formed the "Citizens' Committee to Test the Constitutionality of the Separate Car Law."[36] They recognized that in order to disprove "the caricatures of themselves in white newspapers and witless malcontents," that they would have to challenge local laws and notions in federal court.[37] Even though it was a possibility, and what turned out to be a reality, that the white race would once again triumph, they believed that it was necessary to at least make sure that their voice was heard.

Under the leadership of Louis Martinet, a New Orleans attorney and physician, the Citizens' Committee to Test the Constitutionality of the Separate Car Law began its work. Martinent called for funds so to "make a case, a test case, and bring it before the Federal Courts on the grounds of the invasion of the right [of] a person to travel through the States unmolested."[38] After lengthy discussions regarding how best to test the constitutionality of the Separate Car Law, Homer A. Plessy, a man who was only one-eighth black and therefore

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[34] The Separate Car Act, Section 2, Act 111, 1890 Louisiana Legislature.

[35] Medley, *We as Freemen*, 96.

[36] Fireside, *Separate and Unequal*, 55.

[37] Ibid.

[38] Quoted in Lofgren, *The Plessy Case*, 29.

appeared to be Caucasian, was entrusted with the task of boarding a white car in a Louisiana train and challenging the constitutionality of the segregationist policies regarding transportation.[39]

"I Have to Tell You, According to Louisiana Law, I am a Colored Man"

On June 7, 1892, Homer Adolph Plessy waited at the Press Street depot in New Orleans for a local train to Covington, a town thirty miles north near the Louisiana-Mississippi border.[40] Plessy was dressed similarly to the other first class passengers, in a suit and hat, and with regard to his outward appearance appeared to be of the white race. But as was mentioned earlier, this outward appearance was not completely accurate as Plessy was "of mixed descent, in the proportion of seven-eighths Caucasian and one-eighth African blood."[41] He purchased a first class ticket, climbed aboard the train, and after taking his seat handed his ticket to J.J. Dowling, a conductor of the East Louisiana Railroad Company. This could have been the beginning of a very dull story of a two- hour train ride based on the facts of the situation thus far. However, this all changed when Plessy uttered a few fateful words. "I have to tell you," he said to the

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[39] Options discussed by Martinet and others for testing constitutionality included having a mulatto woman who was nearly white try to board an all white car, having a black man book a ticket from out of sate, and having a black man try to buy a sleeper ticket and be refused after a white man received one, amongst others. Lofgren, *The Plessy Case*, 30-34.

[40] The facts of the case are stated as such in the opinion: "that on June 7, 1892, he engaged and paid for a first class passage on the East Louisiana Railway from New Orleans to Covington, in the same State, and thereupon entered a passenger train, and took possession of a vacant seat in a coach where passengers of the white race were accommodated; that such railroad company was incorporated by the laws of Louisiana as a common carrier, and was not authorized to distinguish between citizens according to their race. But, notwithstanding this, petitioner was required by the conductor, under penalty of ejection from said train and imprisonment, to vacate said coach and occupy another seat in a coach assigned by said company for persons not of the white race, and for no other reason than that petitioner was of the colored race; that upon petitioner's refusal to comply with such order, he was, with the aid of a police officer, forcibly ejected from said coach and hurried off to and imprisoned in the parish jail of New Orleans, and there held to answer a charge made by such officer to the effect that he was guilty of having criminally violated an act of the General Assembly of the State, approved July 10, 1890, in such case made and provided." *Plessy v. Ferguson* 163 U.S. 537, 539 (1896).

[41] *Plessy v. Ferguson* 163 U.S. 537, 539 (1896). The case also notes, "that the mixture of colored blood was not discernible in him."

conductor of the train, "according to Louisiana law, I am a colored man."[42] As Plessy resembled all of the other passengers with regard to race and outward appearance, the conductor was utterly confused at his statement. But, in admitting to "some obviously remote Negro ancestry, Plessy was by definition of state law, not a white man" and therefore unfit to ride in the first class carriage of the train.[43]

Dowling, the conductor, informed Plessy that according to Louisiana law, he had to move to the "colored" or Jim Crow car. Plessy, "showed outward signs of nervousness," and repeated "that he had properly bought a first-class ticket and was therefore entitled to stay right where he was. He politely but firmly refused the conductor's repeated order to move from his cushioned seat to the wooden benches of the Jim Crow car, which were set aside for Negroes, drunks, and derelicts."[44] Due to Plessy's insistence and the fact that many of the other passengers were becoming impatient, Dowling called out for police assistance.

Soon after Dowling's request, Chris C. Cain identified himself as a private detective, and quickly came to the conductor's aid. Dowling explained the situation to the officer, and Plessy was asked to leave the train. "Without offering any form of argument or resistance, Plessy was taken by Officer Cain to the Fifth Precinct police station... where he was booked for violating the 1890 Separate Car Act, and then jailed for the remainder of the night."[45]

Plessy was released on bail from a bondsman he had hired before the event took place. Soon after, his trial was scheduled for nearly five months later on October 28 before Judge John

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[42] Fireside, *Separate and Unequal,* 1, and Barth, *Prophets with Honor,* 31, recount similar versions of the facts of the case.

[43] Fireside, *Separate and Unequal,* 1-2.

[44] Barth, *Prophets with Honor,* 31; Fireside, *Separate and Unequal,* 2.

[45] Ibid.

H. Ferguson of the state criminal district court.[46] James C. Walker served as Plessy's attorney, and filed a brief on October 14 stating his major argument in Plessy's defense. His argument was as follows:

> that the Louisiana law clashed with the United States Constitution, specifically, the Thirteenth and Fourteenth Amendments that had been ratified at the end of the Civil War. In short, Walker said, the state had undermined Plessy's rights as an American citizen. Although slavery had been abolished in 1865 by the Thirteenth Amendment, Louisiana had attached to Plessy a 'badge of slavery' by confining him to a segregated 'colored car'. Louisiana's official excuse – that its action was promoting the comfort of passengers – was not a good enough reason for enforcing a law that treated Plessy as a second class citizen, thereby flying in the face of the Fourteenth Amendment's prohibition against any state's abridging the "privileges and immunities of citizens of the United States."[47]

This argument would be denied by Judge Ferguson, and later taken to the Supreme Court of the United States.

An Unfriendly Reception from the Supreme Court Justices

Plessy had a broad base of support in New Orleans and a new defense lawyer, Albion Tourgée, by the time his appeal reached the Supreme Court. The only question that remained was how the justices would rule. In "sizing up their chances with the Supreme Court after their preliminary loss in the Louisiana courts," Plessy and his supporters did not find the "receptive forum [they] had anticipated."[48] In October 1893, Tourgée, wrote to Louis Martinet who had organized Plessy's act of civil disobedience in New Orleans, and informed him "that their appeal faced an unfriendly reception from the Supreme Court justices."[49] Five of them, Tourgée stated, were "against us," and, "four of their number would probably stay that way until Gabriel blows

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[46] Fireside, *Separate and Unequal*, 3.

[47] Quoted in Fireside, *Separate and Unequal*, 4.

[48] Fireside, *Separate and Unequal*, 176.

[49] Ibid., 169.

his horn."[50] Only one justice, clearly Justice John Marshall Harlan who had been the lone dissenter in the *Civil Rights Cases*, was "known to favor the view we must stand upon."[51]

The Chief Justice at that time was Melville W. Fuller, who had been appointed by President Grover Cleveland in March 1888 to succeed Chief Justice Morrison Waite.[52] Fuller, who was known to share President Cleveland's views, was a man who came from an old New England family and had briefly attended Harvard Law School[53]; but he was not the Chief Justice for whom Plessy had hoped. Fuller "had supported Stephen Douglas against Abraham Lincoln and later expressed sympathy for the South during the Civil War."[54] Even more detrimental to Plessy's case, "Fuller also announced his belief that the Fourteenth Amendment had produced 'no revolutionary change,' hence there was little use to Negro victims of discrimination."[55] Finally, Fuller "became known for dubious opinions" during his tenure: "invalidating the federal income tax (though the result was overturned by the Sixteenth Amendment), and finding the Sherman Antitrust Act not applicable to the Sugar Trust because manufacture for sale was not deemed 'commerce'."[56]

One of the other justices who would prove to be integral to Plessy's case was Henry Billings Brown, who would draft the *Plessy* decision. A graduate of Yale University, Brown's contacts brought him to the notice of President Benjamin Harrison, who appointed him to the

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[50] Fireside, *Separate and Unequal*, 176.

[51] Ibid.

[52] He specifically favored his views on sound currency and protective tariffs.

[53] This made Fuller the first chief justice with academic legal training. Curtis, as discussed in Chapter 2, was the first associate justice to be trained at a law school.

[54] Fireside, *Separate and Unequal*, 178.

[55] Ibid.

[56] Ibid.

Supreme Court in 1890.[57] While on the Court, Brown was "protective of business and property rights," and, "generally wrote opinions that legitimated social conditions and precedents of the day"; this made him a logical choice as author of the *Plessy* decision.[58] But what was most troubling about the man who would effectively decide Homer Plessy's fate was that Brown was a firm believer in the fact that "respect for the law is inherent in the Anglo-Saxon race."[59] As was perhaps best stated by his biographer, Brown was "a privileged son of a the Yankee merchant class… a reflexive social elitist whose opinions of women, African Americans, Jews, and immigrants now seem odious even if they were unexceptional for their time."[60]

The man who would eventually challenge this view was John Marshall Harlan, an often lone dissenter on the Court with regard to race relations and other important notions of the time.[61] According to a memoir written by his wife, Harlan "never forgot an incident that occurred when he was a small boy accompanying his father, James Harlan, to a Sunday church service in his hometown of Frankfort, Kentucky."[62] On this day, Harlan the elder and his soon passed a group of slaves being taken to a slave market in a neighboring town. "The able-bodied men and women were chained together, four abreast, proceeded [sic.] by the old ones and the little 'pickaninnies,' who walked unbound."[63] In witnessing the situation, James Harlan "walked up to the slave-driver and, shaking a forefinger in his face, said, 'You are a damned scoundrel.

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[57] Ibid., 183.

[58] Ibid.

[59] Ibid.

[60] Ibid.

[61] Harlan had already dissented from the majority regarding racial issues in the famed *Civil Rights Cases*, 109 U.S. 3 (1883), where in five separate cases, a black person was denied the same accommodations as a white person in violation of the Civil Rights Act of 1875.

[62] Fireside, *Separate and Unequal*, 178.

[63] Ibid.

Good morning, sir," and then father and son continued on to church. Young John always remembered that his father, "like some Old Testament prophet seemed to be calling Heaven's maledictions upon the whole institution of Slavery."[64] Yet it would be the younger Harlan that would truly come to be remembered as a prophet who did just that with regard to the remnants of slavery in Jim Crow laws and segregation. It was he who was Plessy's only hope.

"Separate but Equal" Becomes the Law of the Land

On May 18, 1896, the United States Supreme Court handed down its decision in *Plessy v. Ferguson*, a decision that would, "in time, prove to be quite as pernicious as the decision... in the *Dred Scott* case."[65] In the opinion written by Justice Billings Brown, the argument that Louisiana's Separate Car Act of 1890 was unconstitutional due to the fact that it violated the Thirteenth and Fourteenth amendments was dismissed as sheer absurdity. Brown, speaking for a majority of seven wrote that the fact that the separate car act "[did] not conflict with the Thirteenth Amendment... [was] too clear for argument." The reason he insisted, was that "slavery implie[d] involuntary servitude -- a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services."[66] He claimed that the act in question merely implied "a legal distinction between the white and colored races -- a distinction which is founded in the color of the two races, and which must

[64] Fireside, *Separate and Unequal*, 178.

[65] *Plessy v. Ferguson* 163 U.S. 537, 559 (1896).

[66] *Plessy v. Ferguson* 163 U.S. 537, 542 (1896) (Harlan J., dissenting).

always exist so long as white men are distinguished from the other race by color."[67] Perhaps most troubling, was that he claimed that making this distinction, even in the law, had "no tendency to destroy the legal equality of the two races."[68] History would prove him wrong.

With regard to Plessy's argument pertaining to violation of the Fourteenth Amendment, Justice Brown made what today would be regarded as an absurd statement regarding the protection of life, liberty and property of all races. He wrote that, although "the object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law," it could not and must not, "have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[69] He claimed that laws which enforced segregation did not imply that blacks were inferior to whites but instead that such laws were merely a legitimate exercise of state police power.[70]

Brown further argued that had Plessy been a white man according the laws of Louisiana, and made had been made to move into the colored car, he then would have had a valid claim before the law of being deprived of his property. But being that Plessy was, "a colored man and

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[67] Ibid., 543. He further made the distinction that according to Mr. Justice Bradley, "it would be running the slavery argument into the ground… to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business."

[68] Ibid., 543.

[69] Ibid., 544.

[70] Ibid., 546. In giving an example, Brown offered the situation of segregated schools and interracial marriages. He wrote, "the most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced," and that, "Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State."

was so assigned," that he had, "been deprived of no property, since he [was] not lawfully entitled to the reputation of being a white man."[71]

A final argument made by Plessy's attorney suggested that the same rationale behind the Separate Car Act and other Jim Crow laws could in turn be used to require the separation of

> people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color.[72]

Although a seemingly logical argument, Justice Brown stated that the above discussed situations would never be made a reality due to the fact that "every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class."[73] On a general level, the fact that the exercise of police power must be reasonable and in the interest of the public good is basically a truism. However, stating that the practices of segregation were enacted for the "the public good" and did not result in "the annoyance or oppression of a particular class" was completely untrue and was an inaccurate assessment of the situation of the South.

Perhaps the fact that such discrimination was construed as reasonable shows the flaws in the social climate of the time as much as in Brown's opinion. According to Brown, in "determining the question of reasonableness," the legislature, "is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion

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[71] *Plessy v. Ferguson* 163 U.S. 537, 550 (1896).

[72] Ibid, 449-550.

[73] Ibid, 550.

of their comfort, and the preservation of the public peace and good order."[74] Based on this fact, laws that authorize or even require the separation of two races are not "more unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned."[75] Thus, the fact that the constitutionality of school segregation was not questioned led to the conclusion that the constitutionality of segregation on railways must also not be questioned. What is lacking is an examination of the constitutional principles which would, in the end, lead to the right finding that both of these measures were not in keeping with the amended Constitution.

Justice Brown closed his opinion by identifying what he called "the underlying fallacy of the plaintiff's argument," which he saw as, "the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority."[76] He claimed that this "fallacy" was not perpetuated by the law itself, but by the fact that the colored race had construed it as such. In a final argument that truly revealed Brown's misinterpretation of the Constitution and the law in general, he wrote that "legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."[77] In claiming that the Constitution ensured equality to the civil and political rights of individuals and

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[74] *Plessy v. Ferguson* 163 U.S. 537, 550 (1896).

[75] Ibid.

[76] Ibid, 551.

[77] Ibid, 551-552.

races in general, but did not at all regulate social rights, coupled with the misconception that the three types of rights were not inherently interrelated, the majority opinion led to a dangerous misconstruction of the meaning of the Constitution of the United States.

In essence, Brown's majority opinion was characterized by "a compound of bad logic, bad history, bad sociology, and bad constitutional law."[78] In writing particularly that, "legislation is powerless to eradicate racial instincts," Brown was responsible for committing to posterity, "one of those phrases that live in constitutional history largely because of their inaccuracy."[79] Luckily, the "bad logic... history... sociology... and constitutional law" of Brown was not to go unchallenged, as his opinion was issued "over the ringing protest of John Harlan."[80]

"Our Constitution is Color-Blind"

John Marshall Harlan's dissent in the case of *Plessy v. Ferguson* has been called "the greatest of his many dissents, and... one of the most majestic utterances in American law."[81] Enraged with the decision of the majority, Harlan wrote that he could not believe that "such state legislation, although conceived in hostility to, and enacted for the purpose of humiliating citizens of the United States of a particular race, would be held to be consistent with the Constitution."[82] "We boast of the freedom enjoyed by our people above all other peoples," Harlan stated. "But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of

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[78] Robert J. Harris, *The Quest for Equality: The Constitution, Congress, and the Supreme Court* (Baton Rouge: LSU Press, 1960), 101.

[79] Ibid.

[80] Paul Oberst, "The Supreme Court and States' Rights," 48 *Kentucky Law Journal* (1959), 78.

[81] Benno C. Schmidt Jr., "Principle and Prejudice: The Supreme Court and Race in the Progressive Era; Part I; The Heyday of Jim Crow," 82 *Columbia Law Review* (1982), 467. As another scholar as written, "The truest function of dissent in a court of last resort was served by the emotional as well as intellectual content of this extraordinary opinion," Barth, *Prophets with Honor*, 34.

[82] *Plessy v. Ferguson* 163 U.S. 537, 563 (1896) (Harlan, J., dissenting).

servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin guise of 'equal accommodations,'' he declared, "will not mislead anyone, nor atone the wrong this day done."[83] The majority opinion may have misled many of his contemporaries, but, as Harlan suggested, the day the *Plessy* decision was handed down would indeed live in infamy for years to come.

Harlan's dissent "demolished the majority's rationale on every front."[84] Just as Justice Brown had articulated what he saw as the "underlying fallacy" of Plessy's reasoning, Harlan, too, responded to what he saw as the "underlying fallacy" in the majority's stance: "its failure to grasp the central purpose of the Civil War, the constitutional revolution the war had spawned, or the harsh realities of quasi-slavery in the post-Reconstruction era" resulting in the post-war amendments.[85] These amendments, Harlan declared, "had eliminated race as a legitimate basis for legislation or judicial decisions affecting civil rights."[86]

Claiming that, "the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States," Harlan proceeded to discuss the true meaning of the newly amended Constitution with regard to racial equality.[87] In specifically discussing the Thirteenth and

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[83] *Plessy v. Ferguson* 163 U.S. 537, 561 (1896).

[84] Tinsley E. Yarbrough, *Judicial Enigma: The First Justice Harlan* (New York : Oxford University Press, 1995), 160.

[85] *Plessy v. Ferguson* 163 U.S. 537, 551 (1896) (Harlan, J., dissenting); Yarbrough, *Judicial Enigma* , 157.

[86] Ibid.

[87] *Plessy v. Ferguson* 163 U.S. 537, 563 (1896). Harlan was not trying to legislate morality or interpret the Constitution loosely. With regard to the Separate Car Act and the facts of the case he wrote: "By the Louisiana statute, the validity of which is here involved, all railway companies (other than street railroad companies) carrying passengers in that State are required to have separate but equal accommodations for white and colored persons, "by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations." Under this statute, no colored person is permitted to occupy a seat in a coach assigned to white persons; nor any white person, to occupy a seat in a coach assigned to colored

Fourteenth amendments, he asserted that "if enforced according to their true intent and meaning," the combination of these two amendments would, "protect all the civil rights that pertain to freedom and citizenship" and also remove "the race line from our governmental system."[88] Described as being "welcomed by friends of liberty throughout the world," it was more than apparent that these amendments were put in place precisely to ensure the unconstitutionality of laws that attempted to promote racial discrimination.

Even though "It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens," Harlan argued, "every one [knew] that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons." Moreover, "no one would be so wanting in candor as to assert the contrary."[89]

One of the most eloquent and reasoned passages in Harlan's dissent was the one which responded to Brown's assertion that it would be unreasonable for certain distinctions to be made under the law, but perfectly reasonable for segregation to be enforced by legislatures. According to Harlan, forming the question of whether or not a statute is considered "reasonable" is to overstep the boundaries of the Court as defined by the Constitution. With regard to the specifics of the case, Harlan wrote that "it is one thing for railroad carriers to furnish, or to be required by

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persons. The managers of the railroad are not allowed to exereise any discretion in the premises, but are required to assign each passenger to some coach or compartment set apart for the exclusive use of his race. If a passenger insists upon going into a coach or compartment not set apart for persons of his race, he is subject to be fined, or to be imprisoned in the parish jail. Penalties are prescribed for the refusal or neglect of the officers, directors, conductors and employees of railroad companies to comply with the provisions of the act. However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States." Ibid., 552-553.

[88] Ibid., 555.

[89] Ibid., 556-557.

law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from travelling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach."[90] Continuing with this line of argument,

> if a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road of street? Why may it not require sheriffs to assign whites to one side of a court-room and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the considerations of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?[91]

These questions were not all rhetorical, as Harlan stated that the answer to all of them would inevitably be that regulations such as these are completely "unreasonable, and could not, therefore, stand before the law."[92] Based on this answer, would it necessarily follow that "the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration?" Harlan wrote that "a statute may be unreasonable merely because a sound public policy forbade its enactment. *But I do not understand that the courts have anything to do with the policy or expediency of legislation.*"[93] To further drive home his

[90] *Plessy v. Ferguson* 163 U.S. 531, 556 (1896) (Harlan, J., dissenting).

[91] Ibid.

[92] Ibid.

[93] Ibid.

point, Harlan offered the following eloquent argument regarding what he views to be the "dangerous tendency" of the current Court:

> A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable. Mr. Sedgwick correctly states the rule when he says that the legislative intention being clearly ascertained, "the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment." There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are coordinate and separate. Each must keep within the limits defined by the Constitution. And the courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives. Statutes must always have a reasonable construction. Sometimes they are to be construed strictly; sometimes, liberally, in order to carry out the legislative will. But however construed, the intent of the legislature is to be respected, if the particular statute in question is valid, although the courts, looking at the public interests, may conceive the statute to be both unreasonable and impolitic. If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void, because unreasonable, are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.[94]

The last point in Harlan's dissent is not only important in extracting the true meaning of the Constitution, but also is chillingly prophetic. With regard to race relations and their proper construction under the Constitution, Harlan wrote that the white race "deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power;" further, he argued, "it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty."[95] But even given this harsh reality, the fact remains that the text of the Constitution states that all are equal under the law, and the decision in *Plessy* would achieve nothing but a misconception of the Constitution and a

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[94] *Plessy v. Ferguson* 163 U.S. 531, 557-559 (1896).

[95] Ibid., 559.

further aggravation of the conflict between the races. Harlan powerfully discussed the true meaning of the Constitution with regard to race relations and the implications that the "pernicious" majority decision would bring into reality. With regard to constitutional interpretation, Harlan asserted that,

> in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race...

Specifically, he continued,

> it was adjudged... that the descendants of Africans who were imported into this country and sold as slaves were not included nor intended to be included under the word "citizens" in the Constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that at the time of the adoption of the Constitution they were 'considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.'"

Even given this argument, Harlan wrote that the recent amendments of the Constitution, were supposed to "eradicate these principles from our institutions." Unfortunately, they may not have achieved their goal as "it seems that we have yet, in some of the States, a dominant race – a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race."[96]

In discussing the implications of the *Plessy* decision for so harshly misconstruing the meaning of the post-war amendments, Harlan acted as a prophet, seemingly peering

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[96] Ibid., 559-560.

into the future and rightly describing future events as they would inevitably unfold. He wrote,

> The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana… a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.

Following the delivery of the majority's decision as well as Harlan's dissent, Chief Justice Fuller's former law partner, Henry M. Shepard, "wrote to Harlan from Chicago to express his gratification at what the justice had written. 'It will stand,' Shepard predicted, 'when the majority opinion will be forgotten.'"[97]

A Morally Correct Response, A Constitutionally Correct Opinion

One of the most esteemed historians to research the *Plessy* decision stated that, "[i]t should need no belaboring: Harlan's indignation was the morally correct response in a republic founded on the truth that 'all men are created equal.'"[98] But even more than issuing a morally

[97] Yarbrough, *Judicial Enigma*, 162.

[98] Lofgren, *The Plessy Case*, 4.

correct response, Harlan issued a constitutionally correct opinion in the face of an obviously misguided majority. It would take half of a century for the Court and the American public to "come around to a recognition of Justice Harlan's realism and moral indignation – and even longer to undo the dreadful consequences that he foresaw of "its blindness and torpor."[99] But the fact that it eventually did so may be a direct consequence of Harlan's writing a dissenting opinion and putting forth a correct interpretation of the Constitution with regard to race and the post-war amendments.

[99] Barth, *Prophets with Honor*, 34.

"A WARFARE NOT WAGED WITH MEN BUT WITH IDEAS"

Along with *Dred Scott v. Sandford* and *Plessy v. Ferguson*, *Lochner v. New York* has come to be known as one of "the most reviled Supreme Court cases of all time."[1] Long regarded as "the quintessential due process decision, at least with respect to economic rights doctrine," *Lochner v. New York* established the liberty to enter into contract as a constitutional right that must take priority to the state's power to regulate employment conditions. From *Lochner* "evolved three decades of judicially developed rights and liberties that negated a multitude of social and economic initiatives by the political process."[2]

In *Lochner v. New York*, the Court claimed that a New York law mandating a ten-hour work day for bakers was in fact unconstitutional, and in doing so ushered in the so-called "*Lochner* era."[3] In being named a member of the "anti-canon," that is, the group of wrongly decided cases that have helped to identify what a proper interpretation of the Constitution should be, the dissenting opinion of Oliver Wendell Holmes in *Lochner* has shed light on the true meaning of the Constitution by pointing out a flaw which still pervades constitutional

[1] David E. Bernstein, "The Story of *Lochner v. New York*: Impediment to the Growth of the Regulatory State," in *Constitutional Law Stories*, ed. Michael C. Dorf, (New York: Foundation Press, 2004), 327.

[2] Donald E. Lively, *Foreshadows of the Law: Supreme Court Dissents and Constitutional Development* (Westport: Praeger, 1992, 66.

[3] Bernstein, "The Story of *Lochner v. New York*," 325. The Lochner era is said to have lasted from approximately 1905 to 1937. In addition, Donald E. Lively states, "So profound was the Court's commitment to economie rights during the *Lochner* era that one of the few deviations from the separate but equal doctrine, which limited constitutional attention to claims of racial discrimination, was grounded in the interest of protecting economic liberty." Lively, *Foreshadows of the Law*, 67.

interpretation to this day.[4] Holmes asserted that the "Constitution is not intended to embody a particular economic theory… It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States," was one that would be remembered.[5] Even today, one hundred years after it was decided, "avoiding *Lochner's* error remains the central obsession… of contemporary constitutional law."[6] Supreme Court Justices are at pains to deny that their opinions declaring laws unconstitutional have anything to do with *Lochner*, while dissenting justices use *Lochner* as an epithet to criticize their colleagues.[7]

The Rise of the Ten-Hour Work Day

The story of the Supreme Court case that would usher in the era of substantive due process begins in the late 1800s. During this time, unionized New York bread bakers sought to limit their working hours to ten hours per day and sixty hours per week.[8] This demand increased over the years, as many bakers found it difficult to find work due to economic hardships. Of course, these economic hardships were fuelled by the fact that many bakers worked incredibly

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[4] Ibid.

[5] *Lochner v. New York* 198 U.S. 45, 76 (1905) (Holmes, O., dissenting).

[6] Gary D. Rowe, "Loehner Revisionism Revisited," 24 Low & Soc. Inquiry (1999), 221, 223.

[7] Bernstein, "The Story of *Lochner v. New York*," 326-327. For example, Justice William O. Douglas states the following in *Griswold v. Connecticut*: "Overtones of some arguments suggest that Lochner v. New York should be our guide. But we decline that invitation… We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." 381 U.S. 479, 482 (1965).

[8] Bernstein notes that "[b]akers favored shorter hours because they wanted more leisure time, and because they were typically paid by the day. If bakers were paid two dollars a day for ten hours of work, they expected to get paid the same two dollars for ten hours a day of work (although employers would obviously try to switch to hourly pay schedules). Also, many bakers apparently believed that shorter hours would eventually lead to *higher* wages, though it is not clear by what mechanism they thought this would occur." Bernstein, "The Story of *Lochner v. New York*," 328.

long hours, and thus limited the number of jobs that were available for others in their field. It was therefore thought that by limiting the hours that bakers were allowed to work, jobs would be more evenly spread among bakers, and even more would be able to find jobs. Overall, this would serve to reduce unemployment, and would also create better working conditions for those who were employed.[9]

It is interesting to note that this push for a ten-hour work day, and the eventual legislation that would mandate it, stemmed from a division in the baking industry. At this time, larger bakeries were staffed by German immigrants and ultimately came to comprise the majority of the Bakery and Confectionary Workers International Union, which was later referred to simply as "the bakers' union." These bakers typically worked fewer than ten hours a day and sixty hours a week, but they were concerned that this luxury might not last due to competition from smaller bakeries. These smaller "basement" bakeries were typically populated by many other immigrant groups (primarily the French, Italians, Jews, and a smaller number of Germans), who were usually divided by bakery, as bakers of a certain nationality typically worked for employers of the same ethnic group. For the most part, these bakers were not unionized, especially among the non-Germans, and regularly worked far more than ten hours per day. These smaller bakeries were perceived to be lowering unionized bakers' wages, and, thus, members of the bakers union thought that the establishment of a ten-hour work day would end competition from these bakers and also serve to bring about better working conditions for everyone involved.[10]

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[9] Baking was considered by many to be a thoroughly unhealthful profession. Even though bakers did not face the threat of sudden death or injury, they were constantly in contact with flour dust, fumes, dampness, and extreme temperatures that they characterized as daily threats to their overall health. The main concern noted by bakers was consumption, which was thought to give shape to many lung diseases including tuberculosis. Paul Kens, *Judicial Power and Reform Politics: The Anatomy of Lochner v. New York* (Lawrence: University Press of Kansas, 1990), 9-11.

[10] *Now for the Ten Hour Day*, Baker's Journal, April 20, 1895.

As the bakers' union began focusing on the establishment of law mandating a ten hour work day, others were becoming concerned with the unhealthy working conditions were in the smaller, basement bakeries. One story of a dying Jewish baker being carried from a cellar bakery on the Lower East Side of Manhattan was publicized by the president of the bakers' union at that time, Henry Weismann. Beyond making the situation of this man public, Weissman demanded an investigation into many of the cellar bakeries in Brooklyn and Manhattan to determine whether or the conditions there were unhealthy. The result of this investigation was an article by muckraking reporter Edward Marshall, which detailed "the poor and unhealthful conditions of basement bakeries, and also called for legislative intervention" in regulating these conditions.[11]

Soon after the publication of Marshall's article, a bakery reform law was proposed to the state legislature. The Bakeshop Act, as it came to be known, consisted of a series of sanitary reforms for "biscuit, bread, and cake factories" and was modeled on England's Bakeshop Regulation Act of 1863.[12] But the New York law included one provision that the English law did not – a maximum hours provision – that served to limit biscuit, cake, and bread bakers' hours to ten per day and sixty per week.[13] The hours provision – included in the bill at the urging of the bakers' union – received an important endorsement from the state Health Commissioner, Cyrus Edson, who construed the maximum hours provision as being incredibly important "from a sanitary standpoint", as "there is unmistakable evidence that these men are overworked, and that, in consequence of this, they are sickly and unfit to handle an article of food."[14] The first

[11] Kens, *Judicial Power and Reform Politics*, 47.

[12] Bernstein, "The Story of *Lochner v. New York*," 333.

[13] Ibid. See also, Kens, *Judicial Power and Reform Politics*, 44-59.

section of the Bakeshop Act contained the hours provision, while the following sections contained various sanitary regulations, "such as prohibiting domestic animals in bakeries and prohibiting workers from sleeping in a bake room," and providing for "enforcement by the state factory inspector." The Bakeshop Act passed unanimously in both houses of the legislature.[15]

The Road from Utica

In April 1902, Utica bakery owner Joseph Lochner was arrested for violating the hours provision of the Bakeshop Act. Allegedly, Lochner had employed a baker named Aman Schmitter for more than sixty hours in one week, and was thus found in violation of the law. Behind the scenes, it was known that Lochner had a longstanding dispute with the bakers' union, and it has been suggested that the union persuaded the factory inspectors to file a complaint against him, thus leading to his case.

The 1902 arrest was Lochner's second for violating the hours provision of the Bakeshop Act. The first time he was arrested, he was convicted and fined twenty-five dollars for his crime. This time around, a grand jury indicted Lochner and at his trial in February 1903, he "refused to plead guilt or innocence, and offered no defense."[16] The fact that Lochner offered no defense suggests that the New York Association of Master Bakers had persuaded Lochner to allow this prosecution to become a test case regarding the constitutionality of the hours provision of the

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[14]*The Bakers' Bill Progressing*, Bakers' Journal, Mar 30, 1895, 1. In addition to the rationale of Edson, the bakers' union's official rationale for supporting the Bakeshop Act was that it was "a sanitary measure solely" and therefore "will stand the closest scrutiny of constitutional lawyers and the courts." Bernstein, "The Story of *Lochner v. New York*," 333.

[15] At the last minute, the bill was amended to prohibit only employees from working more than ten hours a day; employers were permitted to work as many hours as they saw fit. Bernstein, "The Story of *Lochner v. New York*,"333-334.

[16] Kens, *Judicial Power and Reform Politics*, 80-81.

Bakeshop Act.[17] In the end, the court found Lochner guilty, and he was sentenced to pay a fifty dollar fine or spend fifty-days in jail.

Unsatisfied, Lochner appealed the decision. He lost again, this time in a 4-3 decision. However, his case had not gone unnoticed, as "The New York Association of Master Bakers met in February 1904 and decided to levy an assessment of one dollar on each member to pay for an appeal of the case to the Supreme Court."[18] And so with the support of this organization, Lochner appealed his case to the nation's highest court.

Lochner's attorneys, Frank Harvey Field and Henry Weismann (the previous president of the Bakers' Union), decided that their strongest argument in the case was that the hours provision was "illicit class legislation;" this was a fact that they focused heavily on in their brief. First, they argued that the hours provision was class legislation because it applied to some bakers and not to others.[19] Second, they argued that the hours law was "not within the police power because there was no reason to single out bakers for special regulation." Unlike mining…, baking was a generally healthful occupation, and allowing baking to be subject to police power "would mean that all trades will eventually be held within the police power."[20]

The opposing side made three points: "first, that the burden was on Lochner to show that the law was unconstitutional; second, that the Bakeshop Act's purpose was to safeguard both the

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[17] Bernstein, "The Story of *Lochner v. New York*," 335.

[18] Ibid., 337, 339. Quoted from *Down with the Ten Hour Law! Is the War Cry of the Boss Bakers*, Bakers' Journal, Feb. 27, 1904, 1.

[19]According to Lochner's brief, the hours provision did not cover at least one-third to one-half of people in the baking business because they worked not in the biscuit, bread, or cake bakeries covered by the law, but in pie bakeries, hotels, etc. Brief for Plaintiff in Error at 7-8, *Lochner v. New York*, 198 US 145 (1905) (No. 292), reprinted in Bernstein, "The Story of *Lochner v. New York*," 341.

[20] Bernstein, "The Story of *Lochner v. New York*," 341.

public health and the health of bakers; and third, that the law was within the police power because it was a health law."[21]

It was these two arguments which found themselves pitted directly against each other when Lochner's case came to the Supreme Court. In the end, however, it would be another argument that would be most important in deciding the fate of Lochner and many others in similar situations; an argument with regard to constitutional interpretation that was slowly but surely forming in the minds of the current court.

A Heavy Dose of Liberalism

The *Lochner* Court was heavily shaped by the appointments of late nineteenth and early twentieth-century presidents, "who selected nominees based in significant part upon their commitment to preserving economic liberty."[22] It was thought by some that these Supreme Court justices, "influenced by pernicious Social Darwinist ideology, sought to import their laissez-faire views on the American polity through a tendentious interpretation of the Due Process Clause of the Fourteenth Amendment."[23] "Infected with class bias," it was argued that the justices "knew that their decisions favored large corporations and harmed workers," and that their "survival of the fittest" mentality implied that this was exactly what they intended.[24]

Perhaps for this reason, the Supreme Court would be most influential in furthering or restricting the reform policies of the day.[25] Unlike the President and Congress, who were more

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[21] Ibid., 343.

[22] Lively, *Foreshadows of the Law*, 68.

[23] Bernstein, "The Story of *Lochner v. New York*," 325.

[24] Ibid.

[25] David H. Burton, *Oliver Wendell Holmes, Jr.* (Boston: Twayne, 1980), 98.

apt to see the good in reform laws, the Court was "long suspicious of laws tampering with the status quo and quick to invoke the Fourteenth Amendment to stem the tide of change and preserve the rights of property."[26] Chief Justice Melville Fuller, along with Justice Brewer and Justice Shiras, held tight to their defense of property rights. The other justices whocomprised the Court, although sometimes known to support certain reform measures (for example the income tax law), they too erred on the side of conservativism with regard to property rights and reform law. Thus it was often thought that, based on the Court at the time, progress in this area would be at a stalemate unless there was a heavy dose of liberalism injected onto the bench.

Oliver Wendell Holmes had a varied career as a practitioner, scholar and state supreme court justice.[27] Although not a Progressive, he had "gained the reputation as a reformer while on the Massachusetts bench," and it was for this reason that President Theodore Roosevelt, a staunch Progressive, sought him out for appointment to the Supreme Court in 1902. As in the case of the other dissenters examined thus far, Holmes was specifically appointed by Roosevelt based on his record in being a friend of the Progressives, and the fact that he was strongly recommended by Massachusetts Senator Henry Cabot Lodge.[28] It was hoped that his appointment would be the dose of liberalism that the Court so desperately needed, as when Holmes was appointed, "only Justice Harlan was prepared to move in the direction of liberal nationalism."[29]

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[26] Ibid. For this reason, Burton states the Court "deserved its reputation as a conservative bastion."

[27] Lively, *Foreshadows of the Law*, 68.

[28] This, however, was not to say that Holmes was merely a Progressive addition to a wholly conservative bench. "The distinction between Holmes' outlook and that of the Progressives," as is noted by Burton, is that they differ in their intent. Holmes, therefore, "did not consciously seek to hand down Progressive opinions," and even though, "many of his decisions coincided with Progressive preferences in the law and the Constitution, it can not be assumed from that fact that Holmes was a reformer. Coincidence is not causality." Burton, *Oliver Wendell Holmes, Jr.*, 92-93.

Holmes took his duty of interpreting the Constitution of the United States very seriously, and as many have written, with the care of a scholar. During the Progressive Era in which he sat, Holmes was faced not only with a Court filled by justices who differed in their political affiliation, but also in their approaches to interpreting the Constitution. For Holmes, the Constitution's meaning must read simply, but must also not be perverted; it must be extracted with care. As he famously stated in *Gompers v. United States*: "The provisions of the Constitution are not mathematical formulas, having their form, [but instead] organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."[30] Holmes' opinions were, in this sense, rooted less in Progressivism and more in a principled, and carefully articulated method of interpreting the Constitution.

When Lochner's case reached the Supreme Court, it was met by a "conservative bastion," tempered by Justice John Marshall Harlan and the newly appointed Justice Holmes.[31] The nation would soon find out whether the dose of progressivism that Roosevelt sought to inject the conservative Court with would have any effect on the majority.

An Economic Philosophy Professed

The Supreme Court issued its ruling in *Lochner v. New York* on April 17, 1905. In a 5-4 decision, the Court declared Lochner victorious, a decision that came as a surprise to almost everyone at the time. As was expected, Justices David Brewer and Rufus Peckham voted in

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[29] Burton, *Oliver Wendell Holmes, Jr.*, 98.

[30] *Gompers v. United States* 233 U.S. 604 (1914), 610.

[31] Burton, *Oliver Wendell Holmes, Jr.*, 98.

Lochner's favor.[32] Chief Justice Melville Fuller also joined the majority, as he had dissented with Brewer and Peckham in the Court's most recent case upholding labor regulation. The two justices rounding out the majority were Henry Brown and Joseph McKenna, "neither of whom had previously voted to invalidate a state labor regulation for infringing on Fourteenth Amendment rights."[33]

As is evidenced by the 5-4 decision, Lochner's victory was a very close call. However, this was not the only evidence of just how close. It has been suggested that the majority opinion by Justice Peckham was originally written as a dissent, and that Justice Harlan's dissenting opinion was originally the opinion of the Court.[34] Many reasons have been given for this account, including the fact that Harlan's son stated that his father told him that he was writing what was to be the majority opinion. And Justice Harlan's opinion, in fact, is arguably written more like a majority opinion than a dissent. Although we many never know exactly what occurred with regard to who was chosen to write the majority opinion and the principles the majority would then have embodied, we do know that the majority opinion was written in such a way as to justify the defendant's case through a logic completely separate from that in the brief presented by his lawyers.

Thus, even though Lochner's brief focused heavily on class legislation, Peckham's majority opinion did not discuss that issue at all. Instead, the opinion of the majority was based solely on an argument for fundamental rights and the application of due process. Peckham began

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[32] It has been suggested that Brewer and Peckham "rarely saw a labor law they thought was constitutional." Bernstein, "The Story of *Lochner v. New York*," 343.

[33] Ibid. "As for the unusual votes of Brown and McKenna, they can most plausibly be attributed to the creativity of Lochner's brief in presenting a statistics filled appendix showing that baking was not an especially unhealthful profession, combined with the singularly ineffective brief filed by New York."

[34] See Charles Henry Butler, *A Century at the Bar of the Supreme Court of the United States* (New York: G.P. Putnam's Sons, 1942), 172; and John E. Semonche, *Charting the Future: The Supreme Court Responds to a Changing Society 1890-1920* (Westport: Greenwood Press, 1978), 181-182.

by stating that the hours provision "necessarily interferes with the right of contract between the employer and employees," as "the general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."[35] Peckham claimed that the question of whether or not the hours provision was a valid labor law "may be dismissed in a few words" based on the fact that, "[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker," indeed, he wrote, "we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act." The majority ruled that the law did not at all affect the health or welfare of the population, as "[c]lean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week."[36]

With regard to the issue of the health of the baker as opposed to the health of the public, Peckam wrote that "there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee." Further , he noted that "in looking through statistics regarding all trades and occupations, it... might be safely affirmed that almost all occupations more or less affect the health... no trade, no occupation, no mode of earning one's living, could escape this all-pervading power." Therefore, "upon the assumption of the validity of this act under review... it

[35] *Lochner v. New York* 198 U.S. 45, 53 (1905). This "liberty" guaranteed by the Due Process Clause of the Fourteenth Amendment was a right the Court had first recognized in *Allgeyer v. Louisiana* , 165 U.S. 578 (1897).

[36] Ibid. This was due to the fact there according to Peckham, "There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State."

might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk in such offices is therefore unhealthy."[37] In making an easily discernable slippery slope argument, it is not difficult to see the extremes to which Peckham resorted to prove this point.

In concluding his opinion, Peckham noted that it would be impossible for the members of the Court to "shut [their] eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives."[38] According the majority, the hour provision had

> no such direct relation to and no such substantial effect upon the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.[39]

With this opinion, the Court ushered in the era of substantive due process.

[37] *Lochner v. New York* 198 U.S. 45, 59 (1905).

[38] Ibid., 64.

[39] Ibid.

"A Constitution is Not Intended to Embody a Particular Economic Theory"

Justice Oliver Wendell Holmes, Jr. filed his own opinion in *Lochner v. New York*, which has been referred to as "one of the most celebrated dissenting opinions in American constitutional history."[40] In his dissent, Holmes argued that the majority's opinion was inherently flawed, and responded by offering very pointed criticisms as to their ruling in the case at hand, as well as their more general interpretation of the Fourteenth Amendment.[41]

First, Holmes claimed that the case was "decided upon an economic theory which a large part of the country does not entertain."[42] According to Holmes, "[t]he liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not."[43] From this stemmed his pointed critique of the majority that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics."[44]

In addition, Holmes asserted that "the word liberty" as it is meant to be read in the Fourteenth Amendment is "perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[45] This rational and fair man, according to Holmes, would

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[40] Bernstein, "The Story of *Lochner v. New York*," 346.

[41] Burton, *Oliver Wendell Holmes, Jr.*, 103.

[42] *Lochner v. New York* 198 U.S. 45, 75 (1905) (Holmes, O., dissenting).

[43] Ibid.

[44] Ibid.

[45] Ibid., 76.

"think it [the hours provision] a proper measure on the score of health...; as a first installment of a general regulation of the hours of work." However, the response of these reasonable men when asked whether or not the law created an inequality or a denial of liberty, Holmes thought it "unnecessary to discuss."[46]

Thus, Holmes implied that the Court might go so far as to completely reverse the political process, construing almost all laws passed by the legislature as obstructions to the liberty ensured by the Fourteenth Amendment. Holmes did not, in the end, suggest that protecting the liberty and interest of the individual was wrong, but instead that "but that the *Lochner* Court had identified the wrong interests."[47] Justice Holmes' dissent "criticized an idea that he thought to be nothing more than 'a mere ideological fabrication.'"[48] For this reason, this dissenting opinion, containing as it did so much of the essence of Holmes' judicial thinking, has become a classic example of his legal philosophy.[49]

The *Lochner* era of substantive due process "persisted into the 1930s over Holmes' almost unrelenting protest. His criticism evolved to the point that it indicated nearly zero tolerance for development of fundamental rights not specified by the Constitution itself."[50] Throughout this time, Holmes "consistently opposed the majority's expounding of principles that cramped legislative processes of innovation and reckoning."[51] In *Truax v. Corrigan*, Holmes stated that he "must add one general consideration," to his dissent which read as follows: "There

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[46] Ibid.

[47] Lively, *Foreshadows of the Law*, 70.

[48] Ibid., 68.

[49] Ibid.

[50] Ibid., 70.

[51] Ibid., 69.

is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."[52] Even twenty years after Lochner in *Tyson & Brother v. Bantom*, Holmes once again stated that he thought "the proper course" was to "recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."[53] Thus, Holmes' view that the Constitution must not lead to "judicially induced principle that negated or narrowed legislative power… [as] an extension of personally favored ideology," remained at the forefront of his judicial philosophy throughout his years on the Court.[54]

Regardless of his differing viewpoint, Holmes was highly respected by his peers. In taking a scholar's approach to the law, Holmes had "displayed a penetrating knowledge of the law, erudite yet in touch with social reality."[55] He felt free to side with conservatives or liberals,

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[52] *Truax v. Corrigan* 257 U.S. 312, 344 (1921).

[53] *Tyson & Brother v. Bantom* 273 U.S. 418, 433-434 (1927).

[54] Lively, 69. In years to come, the Court reached a decision in *United States v. Carolene Products* 304 U.S. 144 (1938) where it "abandoned its role as guardian of economic policy. Although reserving the possibility of stricter review when constitutionality enumerated rights were implicated or when 'prejudice against discrete and insular minorities' distorted the political process, the Court downgraded the due process clause as a departure point for the second-guessing legislative judgment." Ibid., 73.

[55] His place became known as the scholar's seat, afterwards to be occupied by Cardozo and Frankfurter.

depending on the facts of the case, the law, or the constitutional provision at issue.[56] This was due to the fact that for Holmes,

> the Constitution was not a literary document but an instrument of government. As such it was to be regarded not as an occasion for juggling with words but as a means for ordering the life of a people... This conception of the Constitution was the background against which he projected every inquiry into the scope of a specific power or specific limitation. That the Constitution is a framework of great governmental powers to be exercised for great public ends was for him not a pale intellectual concept. It dominated his process of constitutional adjudication. His opinions, composed in harmony with his dominating attitude toward the Constitution, recognized an organism within which the dynamic life of a free society can unfold and flourish. From his constitutional opinions there emerges the conception of a nation adequate to its national and international tasks, whose federated states, though subordinate to central authority for national purposes, have ample power for their divers local needs.[57]

Thus, although he dissented often, his "reputation as 'the great dissenter' was not a particular badge of honor for Holmes."[58] He did not enjoy dissenting from the opinion of his colleagues, but instead found it necessary based on his strong feelings regarding the proper interpretation of the Constitution.

"Holmes' warfare was not waged with men but with ideas,"[59] and it was "only at the points where Holmes' philosophy of life and of the law has clashed sharply with that of the majority of his colleagues that he... found it necessary again and again, in many different aspects, in winged words, to expound and justify that philosophy. It is true that these utterances were not intended for us, the readers of the printed word, but for his colleagues and for the

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[56] Such an assessment is consistent with the notion of Holmes as the creator of a "new jurisprudence based on assumption which flatly contradicted some of the basic assumptions of time-honored jurisprudence." Burton, *Oliver Wendell Holmes*, 115.

[57] Frankfurter, *Mr. Justice Holmes and the Supreme Court* (New York, Atheneum, 1961), 23.

[58] Lively, *Foreshadows of the Law*, 68.

[59] Oliver Wendell Holmes, *The Dissenting Opinions of Mr. Justice Holmes*, arranged, with introductory notes by Alfred Lief (New York: Vanguard Press, 1929), x.

members of his profession, but they have only to be read to become the priceless possession of the wider community whose spokesman he was."[60]

A Fighting Philosophy

It is true that Justice Holmes has "given varied and eloquent expression to his philosophy of life and of the law in many public addresses and legal papers, and a compilation of elegant extracts from those utterances would give the reader a satisfying picture of a rich and finely-tempered mind."[61] However, it is in his dissenting opinions that Holmes tends to shine. "After all," as Holmes himself stated, "the place for a man who is complete in all his powers is in the fight. This is not only because we find ourselves caught up in the joy of battle with him, but for another, if not a better, reason, namely that we see the philosophy as well as the mettle of the man tried out in the only arena in which they can be tested."[62]

Holmes' principled interpretation of the Constitution is not one that he keeps to himself. Instead, "his is a fighting philosophy, at war with many of the conceptions which have dominated and which still largely dominate legal policy." Although his view differed substantially from that of the majority, he never ceased to express it in hopes that one day the Court and the American public would realize where it went wrong.[63] As Holmes stated himself, "every opinion tends to become a law," an idea which has been manifested many times during the history of the Supreme Court and which will continue in the years to come. Therefore, "it is

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[60] Ibid., x-xi.

[61] Holmes, *The Dissenting Opinions of Mr. Justice Holmes*, ix.

[62] Ibid.

[63] Ibid.

to the years to come that we must look for the complete vindication of [Holmes'] role as dissenter, to the younger members of the bar, the judges of the future, who have found and will still find inspiration in his example and leadership in his principles of judicial action."[64]

[64] Ibid.

"THE ORIGINAL PURPOSE OF THE FOURTEENTH AMENDMENT"

Constitutional questions regarding due process of law and the role of the Fourteenth Amendment were not quick to disappear after *Lochner v. New York.* The economic manifestation of substantive due process would be a point of controversy for years to come. In addition, questions of due process involving other liberties were beginning to arise, especially as to whether the Fourteenth Amendment extended the Bill of Rights to the states. Thus, by the time that *Adamson v. California* was heard by the Supreme Court in 1947, the judiciary and the public were looking for a definitive interpretation of the Constitution regarding the idea of incorporation of the first ten amendments into the Fourteenth Amendment. When the Court handed down the *Adamson* decision purporting this definitive interpretation, it would give yet another great dissenter the opportunity to profess his constitutional view to a Court which had, from his perspective, severely misinterpreted the Constitution: Justice Hugo Black.

The majority in *Adamson* ruled that the Due Process Clause of the Fourteenth Amendment did not protect a defendant from compulsory testimony in state trials, basically, holding that the Fifth Amendment right against self-incrimination, like other rights and privileges guaranteed by the Bill of Rights, did not extend to state courts. Black's dissent called for a complete incorporation of the Bill of Rights to the states based on the Due Process Clause of the Fourteenth Amendment. Using extensive historical research regarding the adoption of the Fourteenth Amendment to justify his dissent, Black argued that the framers of that amendment had intended for it to be used in such a way. This adherence to the intent of the framers of the

Amendment, and the Constitution as a whole, would be the constitutional approach that characterized Black's career on the Court; it would also he the basis of his disdain for the misguided decisions of the Court that denied it.

The Bill of Rights' Complicated Relationship with the States

The question of whether the Bill of Rights applies to the states was debated long before *Adamson v. California.* As early as 1833, the Court heard a case in which an owner of a Baltimore wharf named John Barron sued the city for depriving him of the waters necessary to conduct his business.[1] It was their overdevelopment, he said, that had caused him to suffer financial losses. As the Fifth Amendment protects against the national government's taking of personal property without compensation, the question raised in *Barron v. Baltimore* was whether or not this right also extended to the states. Without even hearing arguments on behalf of Baltimore, the unanimous majority under Chief Justice John Marshall said that it did not.[2] Since the framers had intended the Bill of Rights to be a check on the national government, Marshall stated that the Court had no jurisdiction in this case based on the fact that the Fifth Amendment was not applicable to the states.[3]

A century later, the Court would hear a similar case in which the application of First Amendment rights to the states was questioned. In the 1923 case of *Gitlow v. New York,* Benjamin Gitlow was arrested for distributing socialist literature that advocated class action to establish socialism.[4] Claiming that he advocated overthrowing the government, Gitlow was

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[1] *Barron v. Mayor and City Council of Baltimore,* 32 U.S. 243 (1833).

[2] Ibid.

[3] Ibid.

arrested and convicted under a New York state criminal anarchy law. The question that then arose was whether his right to distribute his pamphlets, and thus his First Amendment right of free speech, was violated by the New York law.

If the Court had strictly adhered to the precedent of *Barron*, the answer to Gitlow's question would have been an obvious no. However, in the years since *Barron* was decided an important event had occurred: the passage of the Fourteenth Amendment. Thus, based on the Due Process Clause of the Fourteenth Amendment, the Court held that liberties such as freedom of speech must be protected on the state level.[5] The only time in which a state may prohibit speech or publications is if they have a "dangerous tendency," which Gitlow's literature did.[6] Therefore, although Gitlow's conviction was affirmed, the establishment of the incorporation of a First Amendment right to free speech under the Due Process Clause of the Fourteenth Amendment would prove to be an important holding for many years to come.

In addition to the historical importance of the previous cases, there were two cases prior to *Adamson v. California* were especially influential in the eventual arguments for and against the incorporation of the Bill of Rights into the Due Process Clause. The first of these was the case of *Twining v. New Jersey*, decided in 1908.[7] In this case, Albert C. Twining and David C. Cornell, both bank directors, were charged with the misdemeanor of deceiving bank examiner Larue Vreedenberg by submission of a false paper. When the case came to trial, both defendants declined to testify, and, as was permissible under New Jersey law, the prosecutor commented that their refusal to testify implied that they had something to hide. Both men were therefore

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[4] *Gitlow v. New York*, 268 U.S. 652 (1925).

[5] Ibid.

[6] Ibid.

[7] *Twining v. New Jersey*, 211 U.S. 78 (1908).

convicted of the misdemeanor. They then appealed their case, arguing that the prosecutor's comments violated their Fourteenth Amendment rights.

The majority opinion, written by Justice William H. Moody, held that neither the Privileges and Immunities Clause nor the Due Process Clause of the Fourteenth Amendment embraced the self-incrimination clause in the Fifth Amendment. The rationale for such a decision was mainly historical, which determined that the right against self-incrimination was not fundamental and therefore was not able to be incorporated under the Fourteenth Amendment.

A second influential case with regard to the incorporation power of the Fourteenth Amendment was that of *Palko v. Connecticut.*[8] The defendant in this case, Frank Palko, had been charged with first-degree murder, and was convicted instead of second-degree murder and sentenced to life imprisonment. The state of Connecticut appealed this decision and won a new trial. This time, the court found Palko guilty of first-degree murder as he was first charged and sentenced him to death. The question that presented itself to the Court was whether Palko's second conviction violated the protection against double jeopardy guaranteed by the Fifth Amendment.

Justice Benjamin Cardozo, writing for the majority, created principles in his opinion that would have many implications for the Court's actions in the years to come. In upholding Palko's second conviction, Cardozo stated that some guarantees in the Bill of Rights (such as freedom of thought and speech) are to be considered rights which are fundamental, and therefore applicable to the states via their absorption by the Fourteenth Amendment's due process clause.[9] According

[8] *Palko v. Connecticut* , 302 U.S. 319 (1937).

[9] This validates Berger's assumption that "absorption of one or another portion of the Bill of Rights – free speech for example – antedated *Adamson*, but this was on a selective basis, under cover of due process." Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, MA: Harvard University Press, 1977), 137-138.

to Cardozo, "the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress, or the like freedom of the press, or the free exercise of religion, or the right of peaceable assembly," and thus these situations and those similar to them "are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states."[10] In *Palko*, Justice Cardozo discussed "a rationalizing principle which gives to discrete instances a proper order and coherence," and in which certain rights are identified as "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[11]

Protection against double jeopardy, however, was not identified as a fundamental right, and the Connecticut Court's second conviction of Palko held. But what was more important than the fact that double jeopardy was not regarded as a fundamental right by Cardozo was that other guarantees of the Bill of Rights *were* considered fundamental, and therefore could reasonably be applied to the states based on due process.

The test for whether or not such a privilege was fundamental was identified as "a rationalizing principle which gives to discrete instances a proper order and coherence."[12] Asking questions such as whether or not an action of the state subjects a defendant to "a hardship so acute and shocking that our policy will not endure it," or whether it violates "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,"

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[10] *Palko v. Connecticut*, 302 U.S. 319, 324-325 (1937).

[11] Ibid.

[12] Ibid.

will be the determining factors as to whether or not the privileges present in the Bill of Rights may be construed as so fundamental that they apply to the states based on due process.

The Right Against Self-Incrimination in the States

Admiral Dewey Adamson, was tried for first degree murder in Los Angeles. [13] This, however, was not Adamson's first conviction, as he was previously charged with, and convicted of burglary, larceny and robbery. Previous to his murder trial, Adamson answered that he was in fact convicted of such crimes, and under California law, "this answer barred allusion to these charges of convictions on the trial."[14] However, even after answering affirmatively to charges alleging prior convictions, if Adamson were to take the witness stand to deny or explain other evidence that had been introduced, "the commission of these crimes could have been revealed to the jury on cross-examination to impeach his testimony."[15] Adamson was faced with quite a conundrum: "to choose between the risk of having his prior offenses disclosed to the jury or of having it draw harmful inferences from uncontradicted evidence that can only be denied or explained by the defendant."[16] Based on this idea, Adamson did not take the stand in his own defense, and was therefore unable to discuss the evidence and testimony offered against him.

For this reason, the prosecutor and judge were able to argue that under California law, Adamson's failure to refute the evidence against him logically implied guilt. He was convicted of murder and sentenced to death, a conviction which he appealed to the Supreme Court, arguing that "the Due Process Clause's guarantee against compulsory self-incrimination allowed him to

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[13] Newman is careful to note that Adamson was not to be confused with an Admiral in the navy, but that Admiral was in fact his first name. Roger K. Newman, *Hugo Black: A Biography* (New York: Pantheon Books, 1994).

[14] *Adamson v. California* 332 U.S. 46 49 (1947). The California laws that allowed for this are cited as: 5 Under California's interpretation of 1025 of the Penal Code and 2051 of the Code of Civil Procedure.
[15] *People v. Adamson*, 27 Cal.2d 478, 494, 165 P.2d 3, 11; *People v. Braun*, 14 Cal.2d 1, 6, 92 P.2d 402.

[16] *Adamson v. California* 332 U.S. 46 (1947).

remain silent and that the judge's comments, and those of the prosecutor, about Adamson's silence violated the Clause."[17] Thus, Adamson's case raised the question of whether "evidence used in a state trial resulting in a murder conviction was admissible in light of the Fifth Amendment's privilege against self-incrimination."[18] In raising such a question, Adamson was not only asking the Court to rule on the traditional due process standard but instead the Fifth Amendment's right of self-incrimination incorporated by the Fourteenth Amendment.

Incorporation is Denied

The majority held that the procedure in Adamson's trial did not in fact violate the Due Process Clause of the Fourteenth Amendment. This was based on two premises: first, that the due process clause does not "draw all the rights of the federal Bill of Rights under its protection;" and second, that the California law used in this trial did not, on its own, "violate the protection against state action that the due process clause does grant to an accused."

Justice Stanley Reed, writing for the majority, stated that the Court "reaffirm[ed] the conclusion of the *Twining* and *Palko* cases that protection against self-incrimination is not a privilege or immunity of national citizenship." Specifically, Reed wrote that it was "settled law" that the self-incrimination clause of the Fifth Amendment

> is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights.[19]

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[17] Howard Ball, *The Vision and the Dream of Justice Hugo L. Black: An examination of a Judicial Philosophy* (University, AL: University of Alabama Press, 1975), 90.

[18] Tony Allan Freyer, *Hugo L. Black and the Dilemma of American Liberalism* (Glenview, IL: Scott, Foresman/Little, Brown Higher Education, 1990), 118.

[19] *Adamson v. California* 332 U.S. 46, 50-51 (1947).

The Due Process Clause of the Fourteenth Amendment did not "draw all the rights of the federal Bill of Rights under its protection," as "[n]othing ha[d] been called to [the Court's] attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution."[20] Further, although the Court had held in *Palko v. Connecticut* that certain provisions of the Bill of Rights were "implicit in the concept of ordered liberty," and thus, "became secure from state interference by the clause," it held nothing more.[21] According to the majority, the "mere existence" of the due process clause did not necessitate all rights granted by the first ten Amendments to the Constitution be absorbed into it, and Adamson's right against self-incrimination under the Fifth Amendment was not one of the fundamental rights that would allow for such an absorption to be recognized in his case.[22]

Implicit in this argument was not only the denial of incorporation of this guarantee of the Bill of the Rights, but also the idea that a state's requirement of testimony by the accused "is not necessarily a breach of a state's obligation to give a fair trial" in the most basic sense of due process. The only idea left to be examined was whether or not the California law allowing comments by the prosecutor and the judge regarding the defendant's failure to testify, "violate[d] the protection against state action that the due process clause *does* grant to an accused."[23] With regard to this idea, the Court ruled that the law did not in fact violate this protection. According to the majority, as "[t]he purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction," it would logically follow that is not "unfair to

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[20] Ibid.

[21] Ibid.

[22] Ibid.

[23] Ibid., [Emphasis supplied]

require [a defendant] to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes."[24]

The due process clause did not make effective state action such as that identified in *Adamson* based on two facts: the Fourteenth Amendment did not necessarily incorporate the Fifth Amendment or the Bill of Rights, and the California law did not violate due process narrowly understood without the incorporation of the rights and privileges ensured by other Amendments.

"The Original Purpose of the Fourteenth Amendment"

In conference after oral arguments, Justice Hugo Black did not vote, "saying he was uncertain whether allowing comment on a defendant's failure to testify infringed the Fifth Amendment."[25] However, soon after hearing the opinion of the majority, Black "swallowed his doubts" and began drafting the one of his most influential dissents regarding what he saw as the proper understanding of the Constitution.[26]

In his *Adamson* dissent, Black denied the judgment of the Court and "in so doing formulated his alternative interpretation of due process of law."[27] This interpretation went beyond the standard adopted by Justice Cardozo in the *Palko* case, and advocated the incorporation of *all procedural guarantees* of the Bill of Rights completely into the Due Process

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[24] Ibid., 57-58. Reed characterizes this dilemma as one "with which any defendant may be faced. If facts, adverse to the defendant, are proven by the prosecution, there may be no way to explain them favorably to the accused except by a witness who may be vulnerable to impeachment on cross-examination. The defendant must then decide whether or not to use such a witness. The fact that the witness may also be the defendant makes the choice more difficult but a denial of due process does not emerge from the circumstances."

[25] Newman, *Hugo Black: A Biography*, 352.

[26] Ibid.

[27] Ball, *The Vision and the Dream of Justice Hugo L. Black*, 92.

Clause of the Fourteenth Amendment. He viewed this idea of total incorporation as being the only correct interpretation of the Fourteenth Amendment and therefore, of the Constitution as a whole.

Black first responded to the constitutional theory used in deciding *Adamson*, a theory that had been originally adopted in *Twining* v. *New Jersey*. The constitutional theory expounded by the majority, as described by Black, is one that believes the "Court is endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes civilized decency' and 'fundamental liberty and justice.'"[28] This "natural law" theory serves to do nothing more than "degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise."[29] As made obviously apparent by these two statements, Black's dissent was not simply based on isolated incidents and small offenses of the Court. He sincerely believed that their overarching philosophy regarding the Fourteenth Amendment and its power of incorporation was being misinterpreted so as to allow for the authority of the persons on the Court to trump the proper authority of the Constitution. Based on this strong belief that natural law theory misperceives the power of the Court as granted by the Constitution, he set out to specifically to negate the original *Twining* and *Palko* decisions as well as the reappearance of their theory in *Adamson* "by reference to the constitutional, judicial, and general history that preceded and followed the case."[30]

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[28] *Adamson v. California* 332 U.S. 46, 69 (1947) (Black, H., dissenting).

[29] Ibid., 70.

[30] Ibid. Black stated "[t] hat reference must be abbreviated far more than is justified but for the necessary limitations of opinion-writing."

In first giving background, Black discussed the fact that before the adoption of the Fourteenth Amendment, the guarantees created by the Bill of Rights were definitely not seen as extending to state governments.[31] However, this was not the case for long, as Black asserted that his "study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage," necessarily state 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."[32] As this historical purpose of the Fourteenth Amendment was never identified or fully considered by the Court, Black sought to explicate the reasons why the framers of the Fourteenth Amendment unequivocally intended for the Bill of Rights to be embraced by the states.[33]

According to Black's examination of the passage of the Fourteenth Amendment in the 39th Congress, the first section of the Fourteenth Amendment "was intended to make the Bill of

[31]Specifically, he writes that the Bill of Rights was originally proposed and eventually adopted so as to curb the interference of federal government with individual liberties. "The people wanted and demanded a Bill of Rights written into their Constitution... to curb all branches of the Federal Government in the fields touched by the amendments -- Legislative, Executive, and Judicial. The Fifth, Sixth, and Eighth Amendments were pointedly aimed at confining exercise of power by courts and judges within precise boundaries, particularly in the procedure used for the trial of criminal cases. Past history provided strong reasons for the apprehensions which brought these procedural amendments into being and attest the wisdom of their adoption." This aim of protecting individual liberty, however, was not extended to state governments and courts as in 1833, *Barron* v. *Baltimore,* "specifically held inapplicable to the states that provision of the Fifth Amendment which declares: 'nor shall private property be taken for public use, without just compensation.' In deciding the particular point raised, the Court there said that it could not hold that the first eight amendments applied to the states. This was the controlling constitutional rule when the Fourteenth Amendment was proposed in 1866." Ibid., 70-71.

[32] With full knowledge of the import of the *Barron* decision, the framers and backers of the Fourteenth Amendment proelaimed its purpose to be to overturn the constitutional rule that case had announced. Ibid., 71-72. In addition, Black cites Flack, The Adoption of the Fourteenth Amendment (1908), who concludes that "Congress, the House and the Senate, had the following objects and motives in view for submitting the first section of the Fourteenth Amendment to the States for ratification: 1. To make the Bill of Rights (the first eight Amendments) binding upon, or applicable to, the States; 2. To give validity to the Civil Rights Bill; 3. To declare who were citizens of the United States," Quoted in 332 U.S. 46 (1947) (Black, H., dissenting), 72 n5.

[33] Black writes that, "Neither the briefs nor opinions in any of these cases, except *Maxwell* v. *Dow,* (176 U.S. 581), make reference to the legislative and contemporary history for the purpose of demonstrating that those who conceived, shaped, and brought about the adoption of the Fourteenth Amendment intended it to nullify this Court's decision in *Barron* v. *Baltimore, supra,* and thereby to make the Bill of Rights applicable to the States," Ibid., 73.

Rights applicable to the states."[34] Specifically, he cited "the original purpose of the Fourteenth Amendment," as disclosed by the statements of Congressman Bingham and Senator Howard.[35] After analyzing speeches delivered by these two men, Black makes the assertion that it was obvious that their intention was to have the guarantees of the Bill of Rights apply to the states. For this reason, he included with his dissent an appendix chronicling the history of the Fourteenth Amendment, which would "conclusively demonstrate that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights."[36] Further, he wrote that the "natural law" theory invoked by the majority should be abandoned as an "incongruous excrescence" on the Constitution. Black believed "that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power."[37]

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[34] Ibid., Black "concluded that its framers meant to apply the Bill of Rights to the states," and said in 1967 himself that "If I didn't find that this was their view, my career on the Court would have been entirely different... I would not have gone with due process and I'd be considered the most reactionary judge on the Court." According to author Roger K. Newman, "History as he read it was his means of limiting judicial discretion and maximizing individual freedom under the Constitution. Black worked long hours with his clerk, culling from the he collection of notes, phrases and jottings he had compiled, organizing and writing anew." Newman, *Hugo Black: A Biography*, 352-353.

[35] Berger, *Government by Judiciary*, 139.

[36] *Adamson v. California* 332 U.S. 46, 74 (1947) (Black, H. dissenting). Specifically, Black refers to the speeches of Congressman Bingham in the framing and adoption of the first section of the Fourteenth Amendment. He even goes so far to say that "Bingham may, without extravagance, be called the Madison of the first section of the Fourteenth Amendment." He also stated that "in the *Twining* opinion, the Court explieitly declined to give weight to the historical demonstration that the first section of the Amendment was intended to apply to the states the several protections of the Bill of Rights," and further that none of the cases used as precedent in Adamson "today made such an analysis." Ibid., 74-75.

[37] Ibid., Black wrote that he was not alone in his belief regarding natural law theory, as his "belief seems to be in accord with the views expressed by this Court, at least for the first two decades after the Fourteenth Amendment was adopted." Ibid., 74-75.

After denying natural law theory as a whole, he turned specifically to the cases of *Twining* and *Palko*, the most cited precedents relied upon by the majority. With regard to *Twining* he wrote that "[a]t the same time that the *Twining* decision held that the states need not conform to the specific provisions of the Bill of Rights, it consolidated the power that the Court had assumed under the due process clause by laying even broader foundations for the Court to invalidate state and even federal regulatory legislation," and therefore expanded the power of judiciary in attempting to control the power of the federal government. "Under the *Twining* formula (which includes non-regard for the first eight amendments)," Black asserted what are determined to be, "fundamental rights' and in accord with 'canons of decency,' as the Court said in *Twining*, and today reaffirms, is to be independently 'ascertained from time to time by judicial action' . . . ." This obviously implies that just as the Court denies the expansion of the Bill of Rights into the sphere of the state, it extends its own sphere by determining which guarantees can and cannot be incorporated.

In *Palko* v. *Connecticut,* the Court "answered a contention that all eight [amendments] applied [to the notion of due process] with the more guarded statement... that 'there is no such general rule.' Implicit in this statement, and in the cases decided in the interim between *Twining* and *Palko* and since, is the understanding that some of the eight amendments do apply by their very terms."[38] This, although not the full incorporation that Black advocated, was at least a step in the right direction, albeit a limited and theoretically unsound step in his perspective.

After discussing the opinion of the majority and the precedents on which it was founded, Black wrote that he feared

> to see the consequences of the Court's practice of substituting its own concepts 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. If the choice must be

[38] *Adamson v. California* 332 U.S. 46, 85 (1947) (Black, H., dissenting).

> between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process. But rather than accept either of these choices, I would follow what I believe was the original purpose of the Fourteenth Amendment -- to extend to all the people of the nation the complete protection of the 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.[39]

In closing, Black restated his two strongest arguments. First, he wrote that he could not "consider the Bill of Rights to be an outworn 18th Century 'strait jacket' as the *Twining* opinion did."[40] "Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes."

As a second point, Black once again attacked "the natural-law-due-process formula," which was reaffirmed by the Court as having "been interpreted to limit substantially this Court's power to prevent state violations of the individual civil liberties guaranteed by the Bill of Rights," but also having "been used in the past, and can be used in the future, to license this Court... to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government."[41] Just as abhorrent as was the "straight jacket" of *Twining* was regarding the Bill of Rights, the natural

[39] Ibid., 89.

[40] Ibid.

[41] Ibid., 91.

law standards employed by the majority that served to overextend the power of the judiciary as defined by the Constitution were equally so.

Black regarded *Adamson* as his most important opinion, saying "I think it really is, no question about it… there I laid it all out. It culminated years of research and reflection."[42] This dissent would serve as the basis for his method of constitutional interpretation for years to come.

Responses to Incorporation Theory

After the draft of his *Adamson* dissent was completed, Black had his clerk, Louis Oberdorfer, deliver it to Justice Felix Frankfurter by hand. The clerk stood nearby and patiently waited while Frankfurter read the opinion. When he was finished, Frankfurter promptly flung the dissent across the desk and said, "At Yale they call this scholarship?"[43] Oberdorfer, a recent Yale Law School graduate collected the pages of the dissent from the floor of the justice's office and then excused himself. Justice Frankfurter promptly told his clerk that "Hugo is trying to change the world and misreading history in the attempt, just making things up out of whole cloth," and began at once expanding his "earlier, brief concurrence just to counter Black's opinion."[44] It would be his concurrence, and not the opinion of the majority which can be read as a direct counter to Black's theory of incorporation.

Thus, as Black knew it would be, the first and most obvious challenge to his dissent was the concurring opinion written by Justice Frankfurter. In an attempt by to refute "the total incorporation" argument presented by Black, Frankfurter stated that

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[42] Newman, *Hugo Black: A Biography*, 352.

[43] Quoted in Newman, *Hugo Black: A Biography*, 354.

[44] Ibid.

> [b]etween the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court - a period of seventy years - the scope of that Amendment was passed upon by forty-three judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States."[45]

After the obvious mention of the "eccentric exception" of Justice Black, Frankfurter went on to say that "those reading the English language with the meaning which it ordinarily conveys, those conversant with the political and legal history of the concept of due process, those sensitive to the relations of the States to the central government as well as the relation of some of the provisions of the Bill of Rights to the process of justice, would hardly recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight Amendments."[46]

In applying the Due Process Clause of the Fourteenth Amendment, what is necessary is that the Court determine "whether [violations of certain rights] offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."[47] Standards of justice such as these "are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia," but their interpretation also does not imply that "judges are wholly at large," as "the judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment." Thus, according to Frankfurter, the due process clause had "an independent potency which neither comprehends the specific prohibitions (provisions) by which the founders deemed it appropriate

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[45] *Adamson v. California* 332 U.S. 46, 61 (1947) (Frankfurter, F., concurring).

[46] Ibid

[47] Ibid., 67-68. He writes also that, "[t] his guidance bids us to be duly mindful of the heritage of the past, with its great lessons of how liberties are won and how they are lost." Ibid., 65-66.

to restrict the federal government nor is it confined to them."[48] This view of due process of law was one that "placed a tremendous burden on the shoulders of the judges. They had to be extremely qualified men in order to function fairly and consistently, for their view called for men who were dispassionate, scholarly, objective, scientific, and omniscient."[49]

Thus, Justice Frankfurter "met Black head-on on the historical grounds," but his concurring opinion merely gave Black more ammunition for the second thrust of his attack. Frankfurter's philosophy, Black argued "was simply 'judicial mutilation' of the Constitution."[50] "He was appalled at the vague contours of the reasonableness which Justice Frankfurter said would guide judges in such cases: 'civilized decency,' 'fundamental liberty and justice,' 'canons of decency and fairness,' 'expressions of justice of English speaking peoples.'"[51] Allowing a judge the power of making law in this sense was too great a task for human beings, which the judges undoubtedly were, and also gave judges the opportunity "to indulge his own subjective preferences instead of trying to read the language of the Constitution."[52] Black argued against qualifications such as the ones identified in *Adamson*:

> Courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision, thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of "natural law" deemed to be above and undefined by the Constitution is another. "In the one instance, courts

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[48] Ball, *The Vision and the Dream of Justice Hugo L. Black*, 91.

[49] Ibid., 134.

[50] Black in *Katz v. US* 389 US 347, 364 (1967). Quoted in Ball, *The Vision and the Dream of Justice Hugo L. Black*, 134.

[51] Stephen Parks Strickland ed., *Hugo Black and the Supreme Court; A Symposium* (Indianapolis: Bobbs-Merrill, 1967), 256.

[52] Ball, *The Vision and the Dream of Justice Hugo L. Black*, 134.

> proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people."[53]

Frankfurter was not the only person to challenge Black's theory of incorporation. Extensive criticism of his position would come not from another member of the Court, but from Stanford law professor Charles Fairman, whose article in the *Stanford Law Review* served as a criticism of this perspective regarding the Fourteenth Amendment. According to Fairman, Black's historical argument for the incorporation of the Bill of Rights by the Fourteenth Amendment finds "the record of history overwhelmingly against him."[54] With regard to the reasons for this statement, Fairman wrote that Justice Black's interpretation of Flack's *The Adoption of the Fourteenth Amendment* warranted three comments: First, Fairman states that "Flack was writing generally about the adoption of the Amendment; but for Justice Black's purpose the only point that is material is Howard's statement about the Bill of Rights... Flack does not even assert that statement was published so much as once." Second, Fairman asks the question, "how can Justice Black assert that Howard's speech (with or without the statement about the Bill of Rights) was published widely?" and answers this question negatively. Lastly, Flack writes that there does not seem to have been published any statement about whether the first eight amendments were applicable to the states or not. Professor Fairman denies Justice Black's historical basis for the incorporation theory based on these three assertions, and the fact that within his dissent Black makes many "confused and conflicting" statements such as regarding Bingham as the Madison of the Fourteenth Amendment. Fairman makes it quite clear

[53] Black as quoted in Strickland, *Hugo Black and the Supreme Court; A Symposium*, 256-257.

[54] Charles Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," 2 Stanford Law Review (1949), 5-139, reprinted in *The Fourteenth amendment and the Bill of Rights: The Incorporation Theory* (New York: Da Capo Press, 1970), 171.

that far from creating an accurate historical account of the adoption of the Fourteenth Amendment, Black lacks of true understanding of the historical situation.

After first reading Professor Fairman's article, Black wrote John Frank. "I must confess," he wrote, "a very great disappointment in Fairman's article. I had supposed he was more of a detached historian."[55] Black was convinced that Frankfurter 'got' Fairman to write the article and that Fairman did it 'to get a job at Harvard.'"[56] His extensive comment on Professor Fairman's article merits lengthy quotation:

> I would thoroughly enjoy engaging in this debate with Mr. Fairman and his associates were I free to do so. I must say that Mr. Fairman's article reminds me of those advocates who come into court with the belief that strained inferences conclusively settle a matter. Even if Bingham were as corrupt in his lifetime as this article implies, and if Howard were the muddleheaded individual that Mr. Fairman seems to think he was, I should still think that there might be an opportunity for rebuttal. This is true in spite of the fact that by my agreeing with the conclusions of Flack in his nearly 300 page argument, it appears that I have committed an unpardonable sin. What governors did not say about the 14th Amendment appears to have much more weight with Mr. Fairman than what the sponsors of the Amendment said themselves. And he seems to think there is no weight to be given any statement of the *general* purposes of the Amendment. Only those who enumerated in detail its specific purposes said anything that would influence Mr. Fairman and he of course is not influenced by them because he thinks they were either crooked or stupid. Naturally, I am not interested in his charges that I misquoted Flack. Anyone who reads Flack will know that is not true. Besides, I would suppose that a *historian* trying to find out what actually occurred would not be interested in whether one person writing about a historical event may have misinterpreted the full effect of what another historian said. At any rate, I now think of Mr. Fairman as an advocate, not a historian, and I would not rank him at the top of the advocates of the world.[57]

But more important than his response to the article itself was the fact that for Justice Black "neither [Fairman's] arguments nor his vigorous reflections upon my accuracy shook my own

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[55] Quoted in Newman, *Hugo Black: A Biography*, 355.

[56] Ibid., 356-357.

[57] Hugo L. Black to John Frank, January 10, 1950. Quoted in Newman, *Hugo Black: A Biography*, 355-356.

belief in the interpretation of the Fourteenth Amendment I expressed in *Adamson*."[58] Justice Black remained true to his theory, even in the face of staunch criticism on the bench and off.

A Tradition of Principled Dissent

Long after the *Adamson* decision and the ensuing battles with Frankfurter and Fairman, Justice Black continued to hold to his incorporation theory, and also to communicate his disdain for the nebulous standards employed by his opponents, any time he thought the Court was again moving in the direction of "natural law" theory.[59] For example, shortly after *Adamson* in the case of *Foster v. Illinois*, Black once again dissented, saying that "this decision is another example of the consequences which can be produced by substitution of this court's day-to-day opinion of what kind of trial is fair and decent for the kind of trial which the Bill of Rights guarantees This time it is the right of counsel. We cannot know what Bill of Rights provision will next be attenuated by the Court."[60]

In 1958, Black once again dissented in the case of *Bartkus v. Illinois*.[61] Responding to a majority opinion written by Frankfurter in which the right against double jeopardy was not regarded as "fundamental" and therefore not protected in the states, Black claimed that to deny the fact that trying someone twice for the same crime is a violation of that person's rights is to take down the procedural "fence against governmental wrongs" that exists in the Constitution.[62]

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[58] Hugo L. Black to Charles P. Curtis, April 6, 1959.

[59] Ball, The Vision and the Dream of Justice Hugo L. Black, 96. See, for instance, *Foster v. Illinois, Bartkus v. Illinois, In Re Winship, Williams v. Florida, Coleman v. Alabama, McGautha v. California.*

[60] *Foster v. Illinois,* 332 U.S. 134, 140. (1946)

[61] *Bartkus v. Illinois*, 359 U.S. 151 (1958).

[62] Ibid.

In a later case regarding the nature of juvenile justice Black once again put forth his constitutional ideology in favor of the incorporation theory.[63] Dissenting in *In Re Winship*, Black wrote that "the only correct meaning of due process of law is that our government must proceed according to the 'law of the land' that is, according to written constitutional and statutory provisions as interpreted by Court decisions.... [the Due Process Clause does not create] blanket authority [to judge] according the to views of at least five members of this institution."[64] In a passage strikingly similar to that of Justice Curtis in *Dred Scott*, Black explicated his warning to the Court yet again in stating: "when this Court assumes for itself the power to declare any law – state or federal – unconstitutional because it offends the majority's own views of what is fundamental, our nation ceases to be governed according to the 'law of the land' and instead becomes one governed by the 'law of judges.'"[65]

These arguments continue to this day. Many have been sympathetic to Black's view at different times, but a majority of the Court has never accepted Black it. history of the Fourteenth Amendment... [66] Regardless of who was supporting him or criticizing him at any given moment, Black never swayed from his commitment to this theory.

During the oral arguments of *Gideon v. Wainwright*,

> Justice Stewart asked whether he was right in his impression that Abe Fortas was not arguing the old proposition that the Fourteenth Amendment incorporated the Sixth Amendment as such. Fortas agreed – he was not.... Justice Black asked in a puzzled way why Fortas was laying aside that argument.

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[63] *In Re Winship*, 397 U.S. 398 (1969).

[64] Ibid., 384.

[65] Ibid.

[66]Strickland, *Black and the Supreme Court; A Symposium*, 258. "It is true that, as Justice Douglas points out, ten Justices who have sat on the Court in the last twenty five years have agreed with Black and him on the total applicability question; but the problem is that no five of them have sat at the same time."

> 'Mr. Justice Black,' Fortas replied, 'I like that argument that you make so eloquently. But I cannot as an advocate make that argument because the Court has rejected it so many times. I hope you never cease making it.' Justice Black joined in the general laughter.[67]

Joking aside, Black never did cease making such an eloquent argument. He believed that the Constitution should be interpreted based on the way in which its framers' intended it to be. "He searched for the 'original understanding' of a constitutional clause and with rare exceptions felt it bound him."[68] This does not mean that he subscribed to a theory of the Constitution which was strictly textual. On the contrary, "Black did not believe in dead letters, lest they fetter us. He strove to find what animated them and their framers. This meant going to the original sources, without the intervention of interpreters, the historians."[69]

Regardless of the fact that Justice Black's view has never become that of the far reaching majority, "the *effects* of Black's position on the Bill of Rights have become law without a full-fledged acceptance of the per se applicability of all the Amendments to the states... In short, though Black's reasoning on the basis of history has not gained acceptance, his philosophy of what due process has become, to use Senator Sam J. Ervin's phrase, "the best to guide to what the law is."[70]

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[67] Anthony Lewis, *Gideon's Trumpet* (New York: Random House, 1964), 174.

[68] Newman, *Hugo Black: A Biography*, 360.

[69] Ibid.

[70] Strickland, *Black and the Supreme Court; A Symposium,* 259

"I DEFEND A DEAD CONSTITUTION"

Important dissenters are not simply matters of historical curiosity; indeed, many have continued to emerge from among the justices on more recent Courts. Given the important cases of our time regarding issues such as abortion, the death penalty, and religion in the public sphere, differing views have inevitably led to many significant dissents being written over the past twenty years. One justice in particular, however, has surpassed most others in the writing of singularly significant dissents.

Since his appointment to the Supreme Court of the United States in 1986, Justice Antonin Scalia has essentially defined his career by dissenting on the basis of his standard of what originalist constitutional interpretation requires. Although Scalia frequently asserts his beliefs regarding proper constitutional interpretation, he has written certain dissenting opinions which display his commitment in its clearest and most compelling form. One such opinion was brought about by *Planned Parenthood of Southeastern Pennsylvania v. Casey*; a 1992 case regarding abortion.[1] In *Casey*, Scalia responded to the majority opinion, which upheld the "central holding" of *Roe v. Wade,* with what has been described as "one of the most caustic opinions ever written by a Justice of the Supreme Court."[2] The justice insisted that the Court had perpetuated the bad logic originally present in *Roe,* and, more important, had delivered a decision completely unfounded on any actual constitutional principle. Scalia rejected the majority's reliance on

[1] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

[2] Kevin A. Ring, *Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice* (Washington DC: Regnery, 2004), 113.

notions of public necessity and *stare decisis* on the basis that, in his view, the Constitution was silent on the issue of abortion, thus leaving it to the states as a matter of policy. This was what was demanded by the Constitution's text and its original meaning. This expression of faith in the textual Constitution was not unique to his *Casey* dissent, but has characterized his career on the Court. Indeed, Scalia sees one of his most important obligations as a justice as espousing an original understanding of the Constitution in an effort to save the Court from itself.

The Judicially Created Right to Privacy

The relatively long series of cases regarding the issue of abortion has its roots in the case of *Griswold v. Connecticut.*[3] The *Griswold* case was largely contrived by Yale law professors to test the constitutionality of contraceptives and other sexual issues.[4] Participating in such a test case, Estelle Griswold, the Executive Director of the Planned Parenthood League of Connecticut, and Lee Buxton, the Medical Director the same organization, gave information, instruction, and medical advice regarding birth control to married couples. Under Connecticut law, any counseling and treatment of married couples for purposes of birth control were illegal, and for this reason, Griswold and Buxton were tried and convicted. In 1965, the Supreme Court heard Griswold's case and ruled in her favor.[5] The majority opinion of *Griswold* relied on the First, Third, Fourth, and Fifth Amendments as well as the the Ninth Amendment to combine them all. According to Justice William O. Douglas's majority opinion, "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life

[3] *Griswold v. Connecticut,* 381 U.S. 479 (1965).

[4] Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon and Schuster, 1990), 95-96.

[5] The Court earlier in *Poe v. Ullman,* 367 U.S. 497 (1961), had refused to hear what was essentially the same issue.

and substance", and the right of association, right against self incrimination, quartering of troops, searches and seizures, and so forth contained in the specific provisions of the Bill of Rights created zones of privacy to which every individual should be entitled.[6] A concurrence by Justice Goldberg also cited the Due Process Clause of the Fourteenth Amendment as integral in the right to privacy in marriage, but emphasized the importance of the Ninth Amendment.

This right to privacy was extended in 1973 to encompass the right of abortion by the holding of *Roe v. Wade.*[7] "Jane Roe" was a Texan who had sought to terminate her pregnancy by means of an abortion. Texas law prohibited abortions except in cases where it was necessary to save the pregnant woman's life, a stipulation that did not apply to Roe. The Court twice heard arguments regarding whether or not the Constitution generally embraces a woman's right to terminate her pregnancy by means of abortion, and after the second round of arguments handed down its decision. The famous majority opinion, written by Justice Harry Blackmun, stated that the abortion laws in question were "violative of the Due Process Clause of the Fourteenth Amendment," and that a woman carrying a child could choose to have an abortion during the first trimester of her pregnancy in consultation with a physician; there was not, he insisted, any compelling state interest in her decision in the first weeks of the pregnancy. Forty-six states' laws regarding the issue of abortion were affected by this decision.

After the Court's decision in *Roe*, the issue of abortion and its justification via an extra-textual right to privacy became anything but a settled matter. In addition to the public debate surrounding the issue, the Court was subsequently plagued with cases attempting to re-affirm,

[6] Ibid., See also David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (New York : Macmillan, 1994), 253.

[7] *Roe v. Wade*, 410 U.S. 113 (1973).

overturn, or further clarify the decision in *Roe v. Wade*.[8] The most important, among all the others, reached the Court in *Casey*, and once again the justices were forced to revisit the legitimacy of the holding of *Roe* and the cases that had followed in its wake.

A Challenge to *Roe*

Planned Parenthood v. Casey was a challenge to Pennsylvania's Abortion Control Act, which the Pennsylvania legislature had amended in 1988 and 1989 to include five new provisions. The 1989 Act required the following: first, that a woman seeking an abortion must give her informed consent prior to the procedure and be given state-provided information concerning her decision 24 hours before the abortion is performed; second, that a minor seeking an abortion was required to obtain the informed consent of one parent or guardian, but had an option of judicial bypass; third, that a married woman was required to sign a statement indicating that she notified her husband of her intended abortion; fourth, that exemptions could be made in the event of a medical emergency; and fifth, that facilities providing abortion services were required to keep records of the events occurring there.[9] These provisions reinstated Pennsylvania restrictions that were previously ruled unconstitutional in *Thornburgh v. American College of Obstetricians and Gynecologists*[10] and were challenged by abortion clinics and physicians in Pennsylvania, including the Planned Parenthood of Southeastern Pennsylvania. The

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[8] See, for example, *Bigelow v. Virginia* 421 U.S. 809 (1975); *Beal v. Doe* 432 U.S. 438 (1977); *Maher v. Doe* 432 U.S. 464 (1977); *Poelker v. Doe* 432 U.S. 519 (1977); *Bellotti v. Baird et al* 443 U.S. 622 (1979); *Akron v. Akron Center for Reproductive Health* 462 U.S. 416 (1983); *Thornburgh v. Amer. Coll. Of Obst. & Gyn* 476 U.S. 747 (1986); *Webster v. Reproductive Health Services* 492 U.S. 490 (1989); *Rust v. Sullivan* 500 U.S. 173 (1991).

[9] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

[10] *Thornburgh v. Amer. Coll. Of Obst. & Gyn* 476 U.S. 747 (1986). In this case, the Court held that 1) "informed consent" and printed materials provisions unduly intruded upon the privacy of patients and physicians; 2) reporting and viability determination provisions were designed to identify and deter women from having abortions through the threat of harassment; and 3) post-viability care and second physician provisions unconstitutionally interfered with the health of the mother by increasing delays and medical risks.

Third Circuit Court of Appeals upheld all the provisions except the husband notification requirement.

A New Justice Johnson?

The composition of the Court during the time that it would hear *Casey* was particularly important. Since the time when *Roe* was originally decided in 1973, the Court had changed greatly. Chief Justice Warren Burger had been succeeded by William H. Rehnquist, who dissented in *Roe*. Second, the appointments of both Ronald Reagan and George H.W. Bush had created a conservative Court that might consider overturning the decision. Since the last opportunity the Court had to overrule *Roe, Webster v. Reproduction Health Services,* Justices William Brennan and Thurgood Marshall had been replaced by Justices David Souter and Clarence Thomas, respectively. For these reasons especially, all eyes were on the Court.[11]

Ronald Reagan especially had sought to carefully nominate justices who would influence the Court by espousing the method of constitutional interpretation that he viewed as correct. Arguably the first president since Jefferson to focus on larger standards of constitutional interpretation rather than stances on policy issues or party lines in selecting members of the Supreme Court, "Reagan took office with the stated intention of selecting Justices who shared his judicial philosophy."[12] On May 5, 1980, Reagan told the *Wall Street Journal*: "I think for a long time we've had a number of Supreme Court Justices who, given any change, invade the prerogative of the legislature; they legislate rather than make judgments, and some try to rewrite the Constitution instead of interpreting it. I would want a constitutionalist."[13] During his 1980

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[11] Eugene W. Hickok and Gary L. McDowell, *Justice v. Law: Courts and Politics in American Society* (New York: The Free Press, 1993), 173.

[12] Terry Eastland, *Energy in the Executive: The Case for the Strong Presidency* (New York: Free Press, 1992), 236.

[13] Quoted in Eastland, *Energy in the Executive*, 236.

presidential campaign Reagan had said he wanted judges who "would interpret the laws, not make them," and he deliberately articulated his view concerning how Justices should interpret and apply the Constitution, an idea that would be the force behind his selecting Supreme Court justices when he was given the opportunity to do so shortly after his election to the presidency.

Reagan's judicial philosophy was directly related to, or possibly even stemmed from, his general governmental philosophy. Thus, when he stated during his inaugural that "government is the problem," his assertion could fairly be interpreted as directly applying to the judiciary just as easily as the other two branches of government.[14] With regard to the third branch of government, Reagan's critique was a response to the broad activism the Court had obtained under Chief Justice Earl Warren.[15] During the years in which Warren was chief justice, the Court not only "proscribe[d], without clear constitutional warrant, numerous legislative acts," but also seemed to prescribe what various governmental bodies should do.[16] For these reasons, the Supreme Court had been thrust into the eye of the public like never before, and thus "provoked a strong popular reaction."[17]

When Chief Justice Earl Warren's retired in 1969, Richard Nixon appointed federal appeals court judge Warren Burger to take Earl Warren's place, hoping to alter the ways of the largely activist Warren Court by adding "a strict constructionist" into the mix. In addition to Burger's appointment as chief justice, Nixon also appointed Justice Harry Blackmun, a decision that he said reflected his commitment to selecting a justice who would not be "super-legislator with a free hand to impose social and political viewpoints upon the American people." He

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[14] Ibid.

[15] Eastland writes that "few students deny that the Warren Court had an expansive view of judicial power." Eastland, *Energy in the Executive*, 237.

[16] Ibid.

[17] Ibid.

would also name Lewis Powell and William H. Rehnquist to the highest bench. It was Nixon's goal to curb the Court's expansive power by causing it to return to an originalist view. However, Burger and the three other justices appointed by Nixon did not change the Court in the way that he would have liked (although Rehnquist, especially, continually tried). Instead of restricting judicial power, the Burger "continued many of the Warren Court innovations and broke startling new ground," in using the right to privacy created by the Warren Court in *Griswold* to create a woman's right to an abortion in *Roe v. Wade*.[18] Beyond Burger's influence in *Roe*, it was Justice Blackmun, appointed to be the anti-thesis of the super-legislator, who wrote the "super-legislating" opinion of the Court in *Roe*.[19] Based largely on Nixon's failure to change the direction of the Court, and Reagan's disdain for decisions such as *Roe* that were not based on a strict interpretation of the written Constitution, one of the main efforts of Reagan would undoubtedly be to curb the "excessive exercise of judicial power."[20] Citing the example of the Founders, Reagan wrote:

> They understood that, in the words of James Madison, if 'the sense in which the Constitution was accepted and ratified by the nation is not to guide the expounding of it, there can be no security for the faithful exercise of its powers'.... For them, the question involved in judicial restraint was not – and it is not – will we have a liberal or conservative court'... The question was, and is, will we have government by the people? And this is why the principle of judicial restraint has had an honored place in our tradition.[21]

Upon being given the opportunity to appoint a justice to the Supreme Court, Reagan first selected Sandra Day O'Connor, fulfilling a campaign promise to appoint the first woman to the High Court. It would be the only appointment he made to the Court during his first term, and

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[18] Ibid., 236-237.

[19] Ibid., 238.

[20] Ibid.

[21] Edwin Meese III, *With Reagan: The Inside Story* (Washington, DC: Regnery Gateway, 1992), 318.

although largely successful as a benchmark for women, the appointment of Day O'Connor was not as successful in the promotion of the originalist ideology that Reagan viewed as necessary.

For this reason, in 1985, just after his re-election, and well before there were rumors that a vacancy might occur on the High Court, Attorney General Edwin Meese III asked Assistant Attorney General William Bradford Reynolds compile a list of men who were committed to Reagan's judicial philosophy. Reacting to what he viewed as the immense power of the Court that had been created under Warren and to the failure of Nixon's appointments to counteract it, Reagan wanted to be sure that his next appointee would adequately reflect his judicial and governmental philosophy and also affect the Court by judging accordingly. Reynolds, along with a group of Justice Department officials, carefully reviewed nearly everything known about the twenty candidates for the position.[22] Focusing specifically on each man's judicial philosophy, "the published writings, judicial opinions, and speeches of each candidate were collected and placed in notebooks, and then read and assessed by three-person units assigned by Reynolds."[23] The result of this labor was the recommendation of "the best available, most well-qualified exponents of Reagan's judicial philosophy," two men who "were seen as giants in the law [and who might] someday rank among the few greats who have served on the Court": Judge Robert H. Bork and Justice Antonin Scalia.[24]

When Warren Burger announced that he would resign as chief justice in 1986, Reagan relied heavily on the information already compiled by Meese and Reynolds to ensure that his next appointee to the Court would be the voice of the constitutionalism he so desired. At

[22] Eastland, *Energy in the Executive,* 240. Most of the candidates were sitting federal judges, and many were appointed by Reagan.

[23] Ibid., 239.

[24] Ibid.

Meese's recommendation, Reagan would "pick Bork or Scalia as part of a two-step approach in which Rehnquist would be named to take Burger's place, with Scalia or Bork simultaneously named to replace him."[25] After interviewing both Scalia and Bork, Reagan chose Scalia.[26] Confident that Scalia both shared his judicial philosophy and was capable of "potential contribution to the Court [that] seemed enormous," Reagan appointed Scalia with the hope that he would have a similar effect on the activist Court that Justice Johnson had on the Federalist Court.[27] Reagan had found his originalist equivalent of the Jeffersonian dissenter Justice Johnson in Antonin Scalia.[28]

The similarities between Reagan's appointment of Justice Antonin Scalia and Thomas Jefferson's appointment of Justice William Johnson are readily apparent. Consciously selecting their appointees based what they perceived to be a commitment to the Constitution, both Jefferson and Reagan sought to alter the direction of the Court for what each saw as the better way. The question remained, would Scalia prove to be an equally powerful dissenter? As is evidenced by his dissenting opinion in *Planned Parenthood v. Casey*, the answer to this question was a resounding yes.

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[25] Ibid. 240.

[26] Ibid., 239-240. Some say Reagan chose Scalia over Bork in part because of age; Scalia, at fifty, was nine years Bork's junior. Others assert that it was Scalia's Italian ancestry that played an important role in his being nominated.

[27] Ibid., 240.

[28] Edwin Meese, 318. Not everyone saw Scalia's appointment in the positive light that Reagan did. "Critics of Reagan have alleged that his search for judges committees to a philosophy of judicial restraint was an effort to "politicize" the courts, since it posed "litmus test" questions to potential nominees. The truth was just the opposite. The President was seeking to depoliticize the courts, to ensure that they played a truly judicial role, rather than usurping the authority of the elected branches of our constitutional system."

The Unique Opinion of the Majority

Justices O'Connor, Kennedy and Souter wrote an unusual joint opinion in *Casey* in which they again reaffirmed *Roe v. Wade*, but in which they also upheld most of the provisions of the Pennsylvania law. Specifically, the justices claimed to reaffirm *Roe's* "central holding" which was described as having three parts: "a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State"; "a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health; and "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."[29] In citing their reasons for upholding these principles, the Court claimed that its original creation of a constitutional right to abortion had established a rule of law that was now accepted by most Americans; individual liberty in this respect must continue to be guaranteed. "The inescapable fact," O'Connor, Kennedy, and Souter claimed, "is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office."[30] In lofty prose, the justices asserted that matters such abortion,

> matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes

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[29] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992).

[30] Ibid., 849.

of personhood were they formed under compulsion of the State.[31]

Further, according to the joint opinion, the Court's legitimacy was at stake and any decision to overturn *Roe* would be perceived as succumbing to political pressure.[32] As the authors of the opinion admitted, there would have been disastrous consequences for the Court and the country if it had not overruled certain pernicious decisions over the course of its history, such as *Adkins v. Children's Hospital*[33] by *West Coast Hotel Co. v. Parrish*[34] and *Plessy v. Ferguson*[35] by *Brown v. Board of Education.*[36] However, with regard to *Roe* they asserted that "the terrible price would be paid for overruling," an action that would "not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."[37]

But the Court went beyond simply upholding the central holding of *Roe*. In addition, the Court upheld four out of the five Pennsylvania provisions in question based on a new standard for evaluating restrictive laws on abortion. Instead of simply basing their decision on a trimester-bound framework, this new standard would ask whether a state abortion regulation has the purpose or effect of imposing an "undue burden," on the woman.[38] Their reasons for having this standard replace that of the trimester framework of the previous decisions were as follows:

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[31] Ibid., 851.

[32] Ring, *Scalia* Dissents, 113.

[33] *Adkins v. Children's Hospital*, 261 U.S. 525 (1923)

[34] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

[35] *Plessy v. Ferguson* 163 U.S. 537 (1896).

[36] *Brown v. Board of Education* 347 U.S. 483 (1954).

[37] *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992).

[38] Ibid., 874.

> The very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.[39]

Put into practice, this undue burden standard, which is defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability,"[40] was used to evaluate each of the provisions of the Pennsylvania law; only the provision demanding the husband notification requirement failed to pass this test.

After upholding both *Roe* and most provisions of the Pennsylvania state law, the majority closed their opinion this way:

> Our Constitution is a covenant running from the first generation of Americans to us and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.[41]

The joint majority opinion, which has been described as "long on lofty rhetoric about things such as the 'mystery of human life' and 'the promise of liberty' and short on traditional constitutional interpretation" provoked Justice Scalia to pen one of his most biting dissents in response.[42]

"We Should Get Out of This Area, Where We Have No Right To Be"

Since his appointment, Justice Antonin Scalia has passionately and persistently criticized the view that "the Constitution contains a right to end the natural development of an unborn

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[39] Ibid., 876.

[40] Ibid., 877.

[41] Ibid., 901.

[42] Ibid., 989.

child."[43] In a 1990 case involving Minnesota's law requiring minors to obtain parental consent before having an abortion, Justice Scalia concluded, "The random and unpredictable results of our consequently unchanneled individual views make it increasingly evident, term after term, that the tools for this job are not to be found in the lawyer's – and hence not in the judge's – work-box. I continue to dissent from this enterprise of devising an Abortion Code, and from the illusion that we have the authority to do so."[44] His dissent in *Casey* offered this same substantive critique, communicated heavily by withering comments meant to show his utter contempt for the judicial philosophy embraced by the majority opinion.

In opening his dissent, Scalia wrote that his views on abortion, unlike those of the Court, were not malleable and have not changed. Articulating his view, Scalia claimed that "[t]he States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting. As the Court acknowledges, 'where reasonable people disagree the government can adopt one position or the other.'"[45] Thus, according to Scalia the practice of abortion should not raise a question of constitutionality at all; it is an issue on which the Constitution of the United States is silent. Further, Scalia insisted, the issue in this case and in others regarding abortion is,

> not whether the power of a woman to abort her unborn child is a 'liberty' in the absolute sense; or even whether it is a liberty of great importance to many women. Of course it is both. The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not.[46]

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[43] Ring, *Scalia Dissents,* 104.

[44] Ibid.

[45] *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, A. dissenting).

[46] Ibid.

The way that Scalia recognizes this is, as he claimed, "not because of anything so exalted as my views concerning the 'concept of existence, of meaning, of the universe, and of the mystery of human life,'" but instead due to two simple facts: "(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed."[47] The question of abortion is therefore a question outside the realm of proper judicial inquiry, a fact that the Court has not recognized but instead has moved toward "systematically eliminating checks upon its power."[48]

After offering this "brief summary" regarding his position on the specific issue of abortion, Scalia concerned himself with responding to "a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered."[49] The first of the "outrageous arguments" of the majority to which he responded was that which claimed "adjudication of substantive due process claims" requires the members of the Court to exercise "reasoned judgment."[50] In Scalia's view, "reasoned judgment" certainly was not employed in originally arriving at the decision of *Roe v. Wade*, and a more disturbing neglect on the part of the majority with regard to adherence to the text was also apparent. To Scalia, "*Roe* was plainly wrong – even on the Court's methodology of 'reasoned judgment,' and even more so (of course) if the proper criteria of text and tradition are applied."[51] To this day, he fumed, the "best the Court can do to explain how it is that the word liberty *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value

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[47] Ibid.

[48] Ibid., 981.

[49] Ibid.

[50] Ibid., 849.

[51] Ibid., 983.

judgment and conceal a political choice;" their decision is not based on textual analysis or even the 'reasoned judgment' that they claim, but, on "only personal predilection."[52]

But Scalia did not end his blistering critique of the majority there. He went on to criticize a second argument made by the majority, that "Liberty finds no refuge in a jurisprudence of doubt." According to the dissenting justice, one thing that the *Roe* decision did not lack (although he is clear that it lacked many other things, including principle) was clarity. The standard that *Roe* created with regard to regulating abortion was that all measures restricting abortions in any trimester except the third were invalid. However, the "undue burden" standard created by the majority to take its place would be anything but clear; in fact, punning the phrase that they coined for such a standard, Scalia wrote that "to come across such a phrase [as that stated above] in the joint opinion... is really more than one should have to bear."[53] In his view, this standard will never be effective because it is "inherently manipulable" and will also prove to be "hopelessly unworkable in practice."[54]

In addition to the practical problems with the new standard, Scalia reaffirmed the Chief Justice's concern that the "undue burden" test does not have a legal basis, and went a step further in stating that it is not possible for it to embody the "generally applicable" quality explicated by the joint opinion. Instead, it is "a unique concept created specifically for this case," and it's almost sole purpose can be construed as preserving "some judicial foothold in this ill-gotten territory."[55] After an extended discussion of the ways in which the undue burden standard

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[52] Ibid., 984. Quoting Justice Curtis in *Dred Scott,* Scalia once again brings to bear the idea that when strict interpretation is abandoned and individual opinion enters into law "we no longer have a Constitution; we are under the government of individual men."

[53] *Planned Parenthood v. Casey*, 505 U.S. 833, 985 (1992) (Scalia, A. dissenting).

[54] Ibid., 986.

[55] Ibid., 988.

evolved from more "narrow formulations," Scalia articulated the problem with making these standards less stringent and more ambiguous: "it is difficult to maintain the illusion that we are interpreting a Constitution rather than inventing one when we amend its provisions so breezily."[56]

The application of the "undue burden" standard to the Pennsylvania law in question proved just as problematic for Scalia as the creation of the standard itself. In relying on the factual findings of the District Court, as well as the particular record of the case, it becomes difficult to discern if the facts lead necessarily to the conclusion of the joint authors, or if "on a better record" a different preference or undue burden would be recognized. Scalia closes this section with biting ridicule, noting that "reason finds no refuge in this jurisprudence of confusion."[57]

Scalia also took issue with the majority's suggestion that even though they had reservations about reaffirming *Roe*, they felt obligated to do so based on the Court's commitment to individual liberty and *stare decisis*.[58] Scalia regarded their use of *stare decisis* as contrived, at best, due to the fact that they retained only certain parts of the *Roe* decision and chose to simply dismiss the rest. Scalia was quick to point out that the majority's picking and choosing sections of the holding was a perverted use of the traditional doctrine of precedent. "It seems to me," he argued, "that *stare decisis* ought to be applied even to the doctrine of *stare decisis*, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version."[59]

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[56] Ibid., 989-990.

[57] Ibid., 993.

[58] Ibid., 853.

[59] Ibid., 993. In this section of his dissent, Scalia also explicates the portions of the *Roe* decision that are not saved by *Planned Parenthood v. Casey*, namely: "Under *Roe*, requiring that a woman seeking an abortion be provided truthful information about abortion before giving informed written consent is unconstitutional, if the information is

Scalia next counteracted the majority's assertion that, "[w]here, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* . . ., its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."[60] Of course, Scalia completely disagreed with the majority in this regard. "Not only did *Roe* not, as the Court suggests, *resolve* the deeply divisive issue of abortion," Scalia wrote, "it did more than anything else to nourish it, by elevating it to the national level where it is infinitely more difficult to resolve."[61] As more attention was given to the issue of abortion, the more conflict and disagreement arose in the public sphere. Further, the issue was not dealt with politically at the state level as it should have been because the Court intervened in this extraconstitutional question. This resulted in "*Roe's* mandate for abortion on demand destroy[ing] the compromises of the past, render[ing] compromise impossible for the future, and requir [ing] the entire issue to be resolved uniformly, at the national level."[62] Scalia was blunt: "To portray *Roe* as the statesmanlike 'settlement' of a

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designed to influence her choice. Under the joint opinion's "undue burden" regime (as applied today, at least) such a requirement is constitutional; Under *Roe*, requiring that information be provided by a doctor, rather than by nonphysician counselors, is unconstitutional. Under the "undue burden" regime (as applied today, at least) it is not; Under *Roe*, requiring a 24-hour waiting period between the time the woman gives her informed consent and the time of the abortion is unconstitutional. Under the "undue burden" regime (as applied today, at least) it is not; Under *Roe*, requiring detailed reports that include demographic data about each woman who seeks an abortion and various information about each abortion is unconstitutional. Under the "undue burden" regime (as applied today, at least) it generally is not," 994.

[60] Ibid., 994-995.

[61] Ibid., Scalia also writes that "[n]ational politics were not plagued by abortion protests, national abortion lobbying, or abortion marches on Congress before *Roe v. Wade* was decided."

[62] Ibid.

divisive issue, a jurisprudential Peace of Westphalia that is worth preserving is nothing less than Orwellian."[63]

In addition to the problems that deciding a case such as *Roe* posed to deliberative democracy and the ideological division of the nation, the judiciary itself was directly affected by the Court attempting to "end national division by accepting a common mandate." [64] The process of nominating and appointing Supreme Court justices was itself marred as judges began to be selected not based on their record and judicial philosophy, but instead based on their views on abortion and other such policy issues. By keeping the Court "in the abortion-umpiring business," Scalia asserted, "it is the perpetuation of that disruption, rather than of any *Pax Roeana*, that the Court's new majority decrees." Scalia made it quite clear that the majority had erred in their assessment of the national situation in making the claim that they had singlehandedly eliminated the nation's divisiveness with regard to this issue.

Finally, Scalia took exception to the assertion of the majority that "to overrule under fire... would subvert the Court's legitimacy," and argued that their resolution to "remain steadfast" and rely on "the promise of constancy... as long as the power to stand by the decision survives," was nothing less than "appalling." In perhaps the strongest argument made in his dissent, Scalia wrote, that he could not agree with

> the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced – *against* overruling, no less – by the substantial and continuing public opposition the decision has generated. The Court's judgment that any other course would 'subvert the Court's legitimacy' must be another consequence of reading the error-filled history book that described the deeply divided country brought together by *Roe*.[65]

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[63] Ibid.

[64] Ibid.

[65] Ibid., 998.

He was deeply troubled by the majority's claim that overturning *Roe* would "subvert the Court's legitimacy," and therefore cause it to "decide a case differently from the way [they] otherwise would have in order to show that we can stand firm against public disapproval."[66] Although deciding cases in this way is a bad idea at all times, Scalia asserts that it becomes increasingly problematic in a system where the "Court believes the Constitution has an evolving meaning," and in such a situation communicates an "almost czarist arrogance."[67]

Scalia did not deny that there is a great deal of political pressure surrounding the Court during this case, or during any case concerning the issue of abortion for that matter. However, the fact that it is under such a pressure does not excuse the fact that the Justices should have determined what is "*legally* right by asking two questions: (1) Was *Roe* correctly decided? and (2) Has *Roe* succeeded in producing a settled body of law?" If the answers to both of these questions were no, as Scalia believed they were, then *Roe* should "undoubtedly be overruled." With regard to dealing with the political pressure, Scalia told the Court to pay "less attention to the *fact* of this distressing phenomenon, and more attention to the *cause* of it:... a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls 'reasoned judgment,' which turns out to be nothing but philosophical predilection and moral intuition."[68] Scalia reiterated the importance of an originalist interpretation, and the inherent danger in relying upon any other standard of constitutional interpretation.

In the end, Scalia made the observation that the "American people love democracy and the American people are not fools." During the time that the Court was doing their job as it was

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[66] Ibid.

[67] Ibid., 998-999.

[68] Ibid.

intended by reading, interpreting and staying true to the text of the Constitution, the American people "pretty much left [them] alone."[69] However, as soon as the Court begins to stray from the work of interpreting the text of the Constitution and begins issuing "value judgments" instead, the attitude of "a free and intelligent people" towards the Court "can be expected to be (*ought* to be) quite different."[70] In essence, the political pressure of the American people that was currently felt by the Court stemmed not from the gravity of the issue of abortion, but instead from the fact that the Court had taken the power away from the people and the democratic process of choosing their own fates with regard to issues such as these. On this, Scalia commented

> If, indeed, the 'liberties' protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*. Not only that, but confirmation hearings for new Justices *should* deteriorate into question-and-answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.[71]

Thus, the issue of abortion is not a question on which the Court should be ruling. As a result, Scalia closed his dissent with a warning to the current and future Court: "We should get out of this area, where we have no right to be, and where we do neither ourselves nor the country any good by remaining."[72]

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[69] Ibid., 1000.

[70] Ibid., 1001.

[71] Ibid., 1001.

[72] Ibid.

A "Dead" Constitution

Justice Scalia's dissent was deeper than simply communicating his disdain for the majority's opinion in *Casey*. Going beyond considering abortion as the issue at hand, the essence of Scalia's argument was the importance of his particular method of interpreting the Constitution, textualism. In this sense, Scalia "believes laws – and especially that supreme law known as the Constitution of the United States – say what they mean and mean what they say."[73] In *A Matter of Interpretation*, Scalia writes,

> The text is the law, and it is the text that must be observed. I agree with Justice Holmes's remark, quoted approvingly by Justice Frankfurter in his article on the construction of statutes: "Only a day or two ago – when counsel talked of the intention of a legislature, I was indiscreet enough to say that I don't care what their intention was. I only want to know what the words mean." And I agree with Holmes's other remark, quoted approvingly by Justice Jackson: "We do not inquire what the legislature meant; we ask only what the statute means."[74]

As obvious a choice that this method of constitutional interpretation is for Scalia, many have criticized his approach for various reasons. Some claim that textualism is "simpleminded – 'wooden,' 'unimaginative,' 'pedestrian.'" Scalia responds that it is none of these things, as being a good textualist requires perceiving "the broader social purposes that a statute is designed, or could be designed, to serve," and also realizing that "new times require new laws."[75] However, being a textualist also requires believing that "judges have no authority to pursue those broader purposes or write those new laws."[76]

Other critics of Scalia's approach claim that his textualism degenerates into strict constructionism. Scalia insists this is not the case, as textualism dictates that "a text should not

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[73] Ring, *Scalia Dissents*, 1.

[74] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997), 23.

[75] Ibid.

[76] Ibid.

be construed strictly, and it must not be construed leniently; it should be construed reasonably, to contain all that it fairly means."[77] In an analogy that communicates the difference between textualism and strict constructionism so well, Scalia writes "when you ask someone, 'Do you use a cane?' you are not inquiring whether he has hung his grandfather's antique cane as a decoration in the hallway."[78] This reliance on reasonableness in the meaning of the words is absolutely necessary to make this distinction, and further define textualism itself.

Yet another criticism of textualism claims it to be formalistic. Scalia regards this critique as the "most mindless" of them all.[79] He answers this critique by declaring, "*of course its formalistic!* The rule of law is *about* form." According to Scalia and his mode of constitutional interpretation, it is the interpretation of the law by the discerning the truest sense its words' meaning that is necessary to decide cases properly. Without its formalism, law is nothing but the exercise of the personal preferences of the men who hold power; for Scalia that is a troubling notion indeed. "Long live formalism," he states adamantly: "it is what makes a government a government of laws and not of men."[80]

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[77] Ibid., 24.

[78]Ibid. Even though textualists are not to interpret the text strictly, they also must not go beyond the range of meaning that is "permissible." Scalia's self-proclaimed favorite example of a departure from the text of this sort is a topic studied at length elsewhere in this work – the incorporation of the Due Process Clause. He writes, "My favorite example of departure from the text – and certainly the departure that has enabled judges to do more freewheeling lawmaking than any other – pertains to the Due Process Clause found in the Fifth and Fourteenth Amendments… It has been interpreted to prevent the government from taking away certain liberties *beyond* those such as freedom of speech and of religion, that are specifically named in the Constitution. Well, it may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation. By its inescapable terms, it guarantees only process. Property can be taken by the state; liberty can be taken; even life can be taken; but not without the *process* that our traditions require – notable a validly enacted law and a fair trial. To say otherwise is to abandon textualism, and to render democratically adopted texts mere springboards for judicial lawmaking."

[79] Ibid., 25.

[80] Ibid.

Of course, simply explicating his textualist view is not the sole purpose of Scalia's many opinions, dissents, and other writings. Implicit in his argument is the fact that the Court has been led very far astray by attempting to construe the Constitution as a so called "living document." Countering the view that the Constitution is living document, Scalia humorously asserts that he likes his Constitution "dead."[81] This "dead" Constitution is preferable to that of the living document as it is only by way of considering the text as fixed that true interpretation can be achieved. When the Court evaluates the Constitution as though it were living, the personal values, policy judgments, and prejudices of the justices inevitably find their way into the opinions they write. As Scalia constantly warns in his many dissents, the Court must change its ways if it wants to remain a neutral arbiter of the law. As sees it, "By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all."[82]

In always remaining true to the standard of textualism, Scalia has become the influential dissenter that Reagan believed he would be. Reagan's commitment to appointing justices who would look at the Constitution and statute law and expound their evident meaning, rather than using loopholes or convoluted logic to reach some preconceived conclusion, is still present in the Court in the opinions of Scalia. Reagan made an important contribution to the present state of American constitutional law in appointing Scalia and thus challenging the dangerous tendencies of an overactivist majority inclined to embrace the ideology of the "living Constitution."

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[81] Antonin Scalia, "The Rule of Law as a Law of Rules," 56 *University of Chicago Law Review* (Fall 1989), 1184.

[82] Scalia, *A Matter of Interpretation*, 47.

CONCLUSION

The tradition of historically categorizing the Supreme Court of the United States by the name of the chief justice of the moment (the Marshall Court, Warren Court, and so forth), can give the misleading impression that it is the Chief Justice who is traditionally identified as providing the leadership that defines the Court that bears his name. Yet often, it is not the chief justice, but rather one of the associate justices who has the greatest influence. It is in this sense that the dissenting justice can be said to exert intellectual and judicial leadership in its truest sense. As is seen in the many decisions discussed throughout this work it is the justice that articulates a principled dissent that is often most deserving of the title intellectual leader. Whether conservative or liberal, restrained or activist, originalist or proponent of the living Constitution, each dissenter effectively exerts intellectual leadership in communicating what he or she believes to be the true interpretation of the Constitution. They merit what they believe to be a sound interpretation of the basic law and hope that in time the Court will come to see the wisdom of their view.

Although many might like to think themselves as such, Supreme Court justices are not divine. They are mere human beings, and whenever a group of men assembles, there is always the possibility that personal preference will influence decision making and that error will undoubtedly occur. The Court is no exception to this rule, and for this reason, dissenters often are necessary to communicate something higher to a Supreme Court who they believe has strayed from the Constitution.

The deeper and more abiding aim of principled dissent is more merely than speak to current policy decisions or value judgments. It seeks to speak to the true duty of the Supreme Court, the obligation to accurately interpret the fundamental law of the United States. If it fails

to do this properly and effectively, the Court is no longer serving its purpose as intended by the Founders, and ceases to provide the intellectual leadership to the nation with which it is entrusted. In order to guard against the inherent dangers of misinterpretation, the principled dissenting justice does more than merely explicate his particular views on constitutional interpretation. In effect, he seeks to deliver a warning that in order to retain its institutional legitimacy, the Court must reconsider its decision and follow his vision in its stead. It is in this sense that the dissenting justice acts as judicial leader.

A Sampling of Judicial Leadership

All of the men discussed in the previous chapters are have been intellectual leaders, in that each of them sought to explicate what they understood to be the true meaning of the Constitution in the face of a majority who had decided otherwise. Transcending basic policy, party, and issue-based opinions, each expressed something deeper and more fundamental about American constitutional law; they all argued that without employing the correct constitutional interpretation, the Court had effectively cease to exert the proper guidance to the nation. In this way, regardless of whether Justices Black and Scalia would agree as to what the proper interpretation of the Fourteenth Amendment might be, what is important is that each of them worked tirelessly (and, in Scalia's case, continues to work tirelessly) to try to persuade the Court to adopt, or at least become aware of, the interpretation that they viewed as being solely legitimate.

Each of the dissenting justices examined in this work can be said to follow in the tradition set by the original dissenter, Justice Johnson, in a particularly important way. Beyond merely following in his footsteps by dissenting from the opinion of the Court in its broadest sense, each

justice challenged the majority in specifically the same way that Johnson did, albeit with different principles. Just as Justice Johnson was appointed by Thomas Jefferson to infiltrate the judicial stronghold of the Federalists and challenge the constitutional interpretation of Chief Justice John Marshall, Justices Curtis, Harlan, Holmes, Black and Scalia were similarly charged with communicating a particular interpretation of the Constitution in the face of an opposing majority.

Justice Benjamin Curtis, the sole Whig on a Court composed entirely of Jacksonian Democrats, was the lone voice who asserted that according to a correct interpretation of the Constitution, blacks could and should be American citizens, Congress did have power to regulate slavery in new territories, and that the creation of rights such as Substantive Due Process and the striking down of laws such as the Missouri Compromise severely distort the power given to the Courts by the Constitution.

Similarly, Justice John Marshall Harlan, the only justice who was receptive to racial issues on a Court full of "status-quo" sympathizers, boldly asserted that the text of the Constitution plainly states that all are equal under the law regardless of race or class, and, further, that the majority decision which stated that regulation of the enjoyment of civil rights based on race was constitutionally permitted, was in fact fatally flawed.

Justice Oliver Wendell Holmes, Jr. one of the two "great dissenters" and liberal on a Court described as a conservative bastion, forcefully claimed that the word liberty in the Fourteenth Amendment is perverted when it is used to perpetuate a certain economic theory or political interest of the majority of the Court in deciding the case.

Justice Black, the former Southern Senator, used extensive historical research to substantiate his claim that, as it was intended by its framers, the Fourteenth Amendment

incorporates the guarantees of the Bill of Rights and extends the protections to the States. This former member of the Ku Klux Klan is remembered as a great fighter for individual liberties.

Finally, Justice Antonin Scalia, a current member of the conservative Court majority and a committed textualist, was appointed by Ronald Reagan in an effort to infiltrate the previously activist Court with a conservative originalist. Reagan got what he intended. Scalia has constantly argued that the Court should not concern itself with issues on which the Constitution is silent, such as abortion and homosexual sodomy. Issues such as these are best left to the people of the fifty states to be debated and adopted as policy or not.

Each of these justices, in his own way tirelessly promoted a particular interpretation of the Constitution during their time on the Court. Some succeeded in changing the its direction; some did not. What is more important than whether the claims of each dissenter came to fruition is the fact that they all displayed the intellect, integrity, will, resolve, steadfastness, and what some might see as sheer stubbornness, that are necessary characteristics for true judicial leadership. In the end, the effect of the dissent may not matter as much as its intrinsic constitutional value.

The Many Faces of Dissent

At varied times during this work, a dissenting opinion has been described as function of deliberative democracy, an explication of judicial philosophy, a prophetic work of lofty prose, a cry in the wilderness, a caustic retort, or simply a grumbling form of judicial opinion. Although it is impossible to know whether some two hundred years ago Justice William Johnson could have perceived just how varied and far reaching his contribution to the Supreme Court of the United States would be, one can say with certainty that the evolution of American constitutional

law would likely be much different had the practice of judicial dissent not been instituted and made routine.

Without the intellectual contributions of dissenters such as those described above, our ideas regarding history, philosophy, law, and the American nation would be fundamentally different. Moreover, without the conversation between the members of the majority and the dissenters recorded by the *United States Reports*, cases would lack the intellectual depth and deliberative quality that characterize them today. How differently would the majority's decision in *Casey* be remembered without the scalding remarks of Antonin Scalia? Would *Brown v. Board of Education* exist had the view espoused by John Marshall Harlan in *Plessy* never been uttered? Would each chief justice be fated to exert less memorable versions of the leadership of John Marshall?

Fortunately, we will never know the answers to these questions, as the establishment of dissent by Justice Johnson and its manifestations throughout history have allowed for much more than mere plurality in the opinions of the Court. Dissent has created singularly memorable opinions. It has overturned precedent. It has explicated the meaning of the Constitution. But perhaps most important, it has replaced what might have been a hollow form of institutional leadership by an all powerful chief justice with a distinctive form of intellectual leadership that is available to all members of the Court who wish to exert it. One can only hope that there will always be justices, such as those chronicled in this work, who wish to do so. The future of American constitutional law largely depends on such leaders, for truly, the greatest dissents echo in our history.

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