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A Conversation Among Legal Biographers

PART I: Gaining Access

EDITOR (John Paul Ryan): Let's start at the beginning of your biographical journey. What attracted you to your subject? How did you gain access?

JILL NORGRÉN (John Jay College and Graduate Center, The City University of New York/Government): Belva Lockwood (1830–1917), the first woman admitted to the Supreme Court of the United States bar (1879), and the first



woman to run a full campaign for the presidency (1884), was well-known in her lifetime. However, a bit like Alice in Wonderland, in the mid-to-late twentieth century she fell down the rabbit hole and, temporarily, lost her place in U.S. history. Her lost voice, the admiration I felt for her accomplishments, and her willingness to defy the conventions and restrictions

Editor's Note *Eight biographers of leading legal figures exchange views and stories about their subjects—Supreme Court justices Hugo Black, Harry Blackmun, Louis Brandeis, Oliver Wendell Holmes Jr., Robert Jackson, Thurgood Marshall, Sandra Day O'Connor, and Earl Warren and pioneering woman lawyer Belva Lockwood. They discuss gaining access to their subjects, early life experiences, the evolution in political and jurisprudential views, and the key steps, contacts, and friendships en route to professional success. These scholars and legal journalists conclude by assessing how biographies help to shape cultural understandings of key public figures. To view or download copies of this conversation, go to www.abanet.org/publiced/focus/home.html*

of her day all made me determined to write this biography (the first for an adult audience).

As with all projects, this one had elements of good news—no biographer had yet succeeded in the research necessary to produce a serious work—and bad news—no writer had produced a biography because, at the time of her death, many of her papers were apparently given to the Salvation Army to be made into pulp paper. No diaries, no law office logbooks, and no transcripts of interviews with people who knew Lockwood survived her.

In the face of this destruction of documents, several things ultimately permitted me to move forward: the fellowship support provided by CUNY, NEH, and the Woodrow Wilson International Center for Scholars; the kindness and expertise of archivists at the National Archives, the Library of Congress, and several university libraries; the fact that Lockwood, as an attorney, had left footprints that her family could not destroy in the form of docket book entries and case files; that she wrote and published a number of articles; and, finally, the delightful reality that Lockwood was a publicity hound who, in the fashion of the nineteenth century, fed information about her professional and reform activities to newspapers. Lockwood understood the self-promoting concepts behind YouTube and blogging long before their invention.

I would have relished the opportunity to read personal diaries, whether those of Lockwood, her two husbands, or the surviving daughter who lived with Lockwood her entire life. She was one of the first five or six women to practice law in the United States; law office logbooks would have extended my understanding of her contributions as a general law practitioner.

PHILIPPA STRUM (Woodrow Wilson International Center for Scholars): As a



music major at Brandeis University, I would walk past the statue of Louis D. Brandeis (1856–1941) on the campus—a rather awful thing, actually, with Brandeis's

windblown robes making him look like a bird having difficulty taking off—and wonder exactly why he merited having a university named after him. Years later, after I had been teaching and writing about constitutional law, I knew a bit more. I felt it was time to write a biography of a Supreme Court justice and wanted to write about one of the “greats.” By then, I had taught cases such as *Whitney v. California*, *Olmstead v. U.S.*, and *Erie Railroad v. Tompkins*; by making Brandeis my subject, I could answer my undergraduate query.

I'm glad I didn't realize the magnitude of the task, because I probably would have given up the opportunity to spend what turned out to be nine years “writing Louis.” There are some 250,000 documents in the University of Louisville archives alone, and I had to leaf through

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every one. A different kind of challenge was presented by the former president of Brandeis University, who controlled the university's Brandeis archives. He declined to let me see them, stating that only a member of the Brandeis faculty should write a biography of the man. I had to learn about the many causes in which Brandeis was involved as a public interest lawyer—savings bank life insurance, transportation monopolies, trade unionism, conservation, industrial trusts, etc. I used additional archives at Harvard University and the Library of Congress, and I read all of Brandeis's judicial opinions, his non-judicial writings, and books and articles about him.

Brandeis was long since dead by the time I began my research in 1975, but I was fortunate to be able to interview a number of his clerks. They were extremely helpful with information about the justice's work habits and personality. David Riesman was especially charming and forthcoming, even though he turned out to be the only clerk who disliked the justice, claiming that Brandeis was less than understanding when Riesman fell ill. Paul Freund was barely willing to see me, and given his own work on Brandeis, I suspected he was unhappy about not writing a biography himself. But when he did let me in, he gave me a valuable clue that helped me unravel the mystery of why Brandeis became a Zionist.

G. EDWARD WHITE (University of Virginia Law School):



I have done several kinds of biographical projects, including profiles of leading American judges and sketches of the personalities and attitudes of the justices who served on the

Marshall Court. I have also completed two individual biographies of Earl Warren (1891–1974), for whom I clerked, and Oliver Wendell Holmes Jr. (1841–1935).

I began to think about writing on Warren after he died but didn't do that right away. When I began the project in the late 1970s, his wife, Nina Warren, was still alive as were the several Warren children. The Warrens were an extremely private family and very protective of one another. I made a decision not to approach anyone

in the family about private papers or private matters. The title of the book is *Earl Warren: A Public Life*, and I limited myself to a discussion of his public career.

On the other hand, I wanted to make use of archival sources to the extent I could, and fortunately there was an Earl Warren oral history project at the Bancroft Library at the University of California at Berkeley, focusing mainly on Warren's career before he was appointed to the Court. There were also papers at the William and Mary College library pertaining to how he was nominated. I received a great deal of help from both of those collections.

I probably could not have written a book on Warren—certainly not a biography—had I not been his law clerk. That is an intimate relationship, and one learns intangible things about a person. Warren was extremely guarded about his private reactions to public issues, but he was working on his memoirs when I clerked for him, so I learned a lot from discussing past issues with him.

Access in the case of Holmes was quite different. I had intended to write about him for years, but put off doing so until Harvard Law School made his private papers available in a microfilm edition. Mark DeWolfe Howe and Grant Gilmore, authorized biographers, had exclusive access to Holmes's papers until Gilmore's death in the 1980s, and it took a few more years for Holmes's literary executors to decide to make the collection public rather than seek another authorized biographer.

Holmes lived for nearly 94 years, and there was a good deal to cover from his childhood on. By juxtaposing his papers, which contained his writings on all kinds of subjects from before he entered college to the end of his life, against the numerous secondary works written on him and his family and his work as a lawyer, law professor, scholar, and judge, I was able to get into a kind of extended discussion with him and with commentators on him. Unlike Warren, who was more fulfilled as a decision maker and public personage than as a writer, Holmes liked reducing his thoughts, feelings, and intellectual pursuits to writing. Unlike Warren's writings, where I felt I was doing most of the explanatory and analytical work, in Holmes's case I just tried to follow his thoughts and feelings through his writing. Grant Gilmore once told me that he got

sick of the Holmes biography once he started reading Holmes's papers because Holmes wrote "the same damned letter" to so many people. I had just the opposite reaction. Holmes didn't just write the "same damn letter"; he expressed similar thoughts, in slightly different words, to his correspondents. I loved trying to figure out why he chose one form of words rather than another. Unlike Warren, whom I greatly admired but didn't feel I had much in common with, I didn't particularly like Holmes as a person but loved imagining how he was reacting to things. And I never got bored with his prose.

JOAN BISKUPIC (USA TODAY):



I am in the rare position as a biographer of choosing subjects who are still with us, such as Justices Sandra Day O'Connor (1930–) and Antonin Scalia (1936–). That can make a project

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more exciting, but it can also mean more hurdles in terms of access. I remember Chief Justice Rehnquist once saying to me in an interview for my book on Justice O'Connor, "You know, she doesn't like that you're doing this." But then the man who had faced plenty of press scrutiny himself said, "What choice does she have?" My O'Connor biography benefited from a dozen archives, the best being her legislative files in Arizona and Justice Powell's files at Washington and Lee University. Neither had been significantly mined when I got to them. In the former, I developed a picture of Sandra Day O'Connor from her formative political years when she first learned to count votes. I found several gems, including a letter she wrote to President Nixon in 1971 (a full decade before her appointment by Reagan) urging Nixon to choose a woman for the Court. She later said she had forgotten she ever wrote it.

Justice O'Connor was a dear friend of Lewis Powell and penned many notes to him regarding her thoughts on cases and her general feelings, such as when she discovered breast cancer. This correspondence was invaluable to my understanding of her strategizing on the Court and seeing her development in Washington. In terms of personal contacts with Justice O'Connor, she had earlier given me a couple of on-the-record interviews, but once I signed the book contract, she stopped doing that. She said she did not want to appear to be "authorizing" the book. I said no one would think it was "authorized," and we went back and forth for months about how much she would say (she would not sit for any new interviews). On the positive side, she did not stand in the way of family, former clerks, and fellow justices, most of whom talked on the record. Her brother took me around the Lazy B Ranch, and he and her sons endured many interviews. Justice O'Connor is so guarded that, while I regretted not having more access to her personally, I wonder what I might have gotten out of her.

Justice Scalia (about whom I am now writing a biography) has been a different story. He initially said that he did not want to be interviewed for this book. But he changed his mind when he realized all that I was discovering in my research, especially about his immigrant family. Unlike O'Connor, Justice Scalia is spontaneous

and very candid. He also has many more outspoken critics, so I believe he is being well-served by his openness. He is getting a chance to respond to those critics and help refine his conflicted, often-caricatured image. I'm still mining several archives, to illuminate his Nixon and Ford years, for example.

Since writing the first biography, I have remained in touch with Justice O'Connor—I thought she would be intrigued by the fact that I was now focusing on someone who could be considered her judicial rival. But when I told her that I was writing about Justice Scalia, she said, "Can't you just wait until we're dead!"

LINDA GREENHOUSE (*New*



York Times): My biography of Justice Harry Blackmun (1908–1999) was a very unusual project that avoided the pitfalls of access and memory that some other participants have identified. The

book, and the series of newspaper articles that represented my first cut at the project, were based entirely on the voluminous collection of Blackmun papers at the Library of Congress. The collection opened to the public in March 2004, on the fifth anniversary of his death, as specified in his deed of gift. When I received early access from the Blackmun family, I assumed there would be some fascinating case-related, behind-the-scenes revelations. I had no idea, and I don't think the family did either, that the collection would be such a valuable window to his personal story, due to diary entries and other written musings and rich correspondence files.

The real challenge of the project lay in extracting a coherent narrative from the half million documents. Unlike Philippa Strum and her nine years with the Brandeis papers, I didn't look at everything—I had about four months. I followed the obvious threads—abortion, the death penalty, the relationship with his childhood friend, Warren Burger. Serendipity led me to other revelatory documents, such as his correspondence with Hugo Black in the opening months of his Court tenure (Justice Black had circulated a nasty memo to the entire Court, criticizing Blackmun for be-

ing slow with an opinion; Blackmun, who idolized Black, was crushed). One fear I had was proclaiming something I found to be new and revealing, only to learn later that it was already out there in the legal historical literature. To aid this problem, a law professor friend of mine loaned me a third-year law student and gave her independent credit for being not exactly my researcher but someone to whom I could send a memo: "Has this ever been published anywhere?" She would do a quick literature search, and I could then proceed with confidence. The Black-Blackmun exchange, which both exemplifies and explains Blackmun's deep insecurity early in his Court tenure, had not been previously published or alluded to.

JOHN Q. BARRETT (*St. John's University School of Law*):



I was first drawn to Justice Robert H. Jackson (1892–1954) when, as a college student and then law student, I read some of his Supreme Court opinions—he grabbed (stabbed?) me with

his pen. As all agree, Jackson could really write, and I remember noticing not only the quality of his prose, but also his presence in his writing: To read Jackson is, I found, to see him thinking and to hear him talking, and his thinking and talking on paper often draw on the human life experiences that others leave deeper in the backgrounds of their writings or take pains to conceal.

As I learned more of Robert Jackson's life story and experiences, I grew more interested in him. In 1988, while I was working for an independent counsel, I read closely Justice Scalia's dissenting opinion in *Morrison v. Olson* and was struck by—and motivated to learn more about—its extensive quotation from a 1940 speech that Robert Jackson gave as attorney general. Later, while I was working in the Department of Justice, I noticed that I was surrounded by his former offices, official photographs, and portrait.

A few years later, I bought a copy of Eugene Gerhart's 1958 biography of Jackson and started to work on an article about Jackson. He was long gone, of course, but I began with plenty of access to his office papers, which had been in the Library of

Congress since the 1980s. My personal contacts began with his son—someone told me that William E. Jackson was a senior lawyer and the former managing partner at Milbank, Tweed. Bill Jackson graciously agreed to meet with me and started to answer my questions about his father and his work, including particularly the seventeen months when Bill had been his father's executive assistant at Nuremberg. That access, along with papers that Bill Jackson and his family made available, my ever greater interest in Jackson, and my sense that his monumental life deserved significant study, discussion, and attention, led me to start writing his biography, a project that is ongoing.

I am proceeding in Philippa Strum's tradition: I am interested in Jackson paper and in Jackson and Jackson-era people. Luckily, the Jackson paper trail is vast—he did a lot of his thinking by writing; he was a great (candid, not self-censoring) letter writer; he often was away from his confidantes and kept them informed of his thoughts and key activities; he gave an extensive oral history interview to a skilled questioner (historian Harlan B. Phillips of Columbia University's Oral History Project); and he was a subject of great press attention for much of his life.

I would like to have an hour—actually, many hours—to talk with Bob Jackson. I wish I had known, or at least had some chance to interview, his wife Irene, his daughter Mary, Franklin D. Roosevelt, and other central figures in Jackson's life. I have had, however, many hours and interviews with Jackson family, friends, and colleagues who knew him well. Although he has been gone almost 54 years, he died young and left behind many who had better luck with health and longevity; fortunately, I began this project in time to meet and learn from them. I also am surrounded by Jackson's written words, which are his voice and a fair amount of his autobiography.

JUAN WILLIAMS (National Public



Radio): Justice Thurgood Marshall (1908–1993) was notoriously averse to news reporters, and he had an even sharper distaste for authors. The roots of his aversion go back to the 1979 publica-

tion of *The Brethren* by Bob Woodward and Scott Armstrong. Justice Marshall felt he was portrayed as a buffoon in the book—a token appointment lacking in sufficient intellect or work ethic to serve effectively on the Court.

Justice Marshall was hurt by this portrayal and later confided that he feared other members of the Court used the book to criticize him unfairly. Equally stinging was the suggestion at about the same time by President Carter (to his aides) that it was time for Justice Marshall to step down and allow him to appoint another black man to the Court before a possible Republican victory in the 1980 election. Justice Marshall felt under siege from hostile politicians and writers alike.

Marshall was a world-class interview with great stories to tell.

[JUAN WILLIAMS]

In the mid-1980s, while working as a national political reporter for *The Washington Post*, I began work on a book about the history of the U. S. civil rights movement—*Eyes on the Prize: America's Civil Rights Years, 1954–1965*. I wanted to start the book with an account of the 1954 *Brown v. Board of Education* case. Obviously, I wanted to interview the lead lawyer in the case, Thurgood Marshall, who was then head of the NAACP Legal Defense and Educational Fund.

Despite a written request and several phone calls, I got no response from Justice Marshall. I relied on other sources to tell the story of the *Brown* case but also came to have a greater appreciation of Thurgood Marshall's place in history as a lawyer. He had argued key cases to end the use of all-white primaries, protect the rights of blacks to serve on juries, and defend the rights of blacks in the military. Now, I wanted to do a biography. But Justice Marshall was no more responsive, as I wrote more letters and made more calls to his chambers.

Then, I heard that he signed a contract to do a book with the columnist Carl

Rowan. Rowan had served in the Johnson administration as an ambassador while Marshall was Solicitor General, and the two high-ranking black men had a long personal and friendly relationship. I thought that was the end of my plan to do the biography. But within a few months, a prickly Justice Marshall broke the deal, apparently unhappy with Rowan's vision—a dramatic book beginning with a focus on cases Justice Marshall lost as a lawyer. Always persistent, I wrote and called Justice Marshall repeatedly but seemed to be getting nowhere. Without any hint of a change in attitude, Justice Marshall invited me to come to see him at the Court. When I asked if this was to be a formal interview, he grumbled and ended the call.

Some of his former clerks and family later told me that several people had made the case to him that he should tell his story in his own words or risk giving writers free rein to tell his story as they pleased. Our initial interviews were for a *Washington Post* magazine article that was published in 1990. The weekly interviews lasted for nearly six months. Even before the article was published, I told him that there was more than enough information for a book.

But Justice Marshall said he did not want to get involved with a potentially controversial book because he had some negative opinions on people ranging from fellow members of the Court to civil rights leaders and presidents. His wife also opposed the book, apparently fearing that I might focus on Justice Marshall's personal quirks, from drinking to his sense of humor, in order to sensationalize the story and sell books.

But the Justice continued to talk with me. After much debate he agreed not to burn his personal papers, which he sent to the Library of Congress. He directed me to people for interviews and gave me written permission to see an oral history interview housed at Columbia University. FBI files on Marshall, the papers of other members of the Court, and papers relating to Marshall at presidential libraries all helped to fill out the story. It took years to get the FBI files opened. I had a very rough but eventually successful fight with the NAACP Legal Defense and Educational Fund over access to their files, although Justice Marshall supported my request.

Justice Marshall died in 1993, just as I was getting started on the book. Lawyers who had worked with and against him, schoolmates, clerks, friends, other members of the Court, and politicians made themselves available to me for interviews. The best source of all, of course, was Justice Marshall. For all his caution with the press, Marshall was a world-class interview with great stories to tell.

ROGER NEWMAN (Columbia University School of Journalism):



I gained access to Hugo Black (1886–1971) in a very simple way—I wrote him. This was in 1970, while he was still on the Court. I had become interested in Black in a college course on civil liberties three years earlier, trying to figure out how such an ar-

dent civil libertarian had also been a member of the Ku Klux Klan. As important as what he told me during the several hours I spent with him was the insight I gained into his manner. Black died the next year, and I spent the following summer in his native Alabama, having become friendly with his widow and sons, several of his clerks and friends, and especially his daughter. I am happy today to count some of them among my best friends.

After spending several months going through Black's (and other) papers in the Library of Congress in the mid-1980s, the culmination of years of work there, I took the most important of his Court papers with me on a trip around the country for nearly a year and a half, including seven months in Alabama. I knew this would be a once-in-a-lifetime opportunity and spoke with almost anyone I could find who had some connection with Black or another justice. Throughout, I continued to look at manuscript collections. In all, I looked

at hundreds of collections in about thirty states. It helped that I was not on a strict timetable.

Black had been in public life since 1911 and gave many interviews, but he was allergic to formal interview projects and disliked taped interviews. Thus, he rejected an offer from the Columbia Oral History Project, and his interview with the Lyndon Baines Johnson Library, although not without useful information, was more chatty than revealing.

Although written sources were the spine of the book, interviews were of equal importance. I spoke with 1,500 to 2,000 people in all—well over 1,000 were face-to-face; the rest were by phone. I spoke with many law clerks of other justices, for example. Almost everyone was forthcoming. Perhaps a dozen were not, and even with these I gained something from the experience, usually why they were not helpful. I said to one clerk of another justice that the two justices had a

Oral History, Interviews & Their Value

While discussing access, contributors engaged in an interesting sidebar on the value and reliability of oral interviews. Here are some excerpts.

G. EDWARD WHITE: I want to disclose some prejudices about oral history sources. I could have interviewed several of Warren's clerks whom I knew quite well. I chose not to interview any, but I consulted written reminiscences or comments about Warren by his clerks or fellow justices. Why? First, in order to have an effective oral history interview, one needs to know as much or more about the matters one discusses with a subject than the subject does. That means such interviews need to take place late in the process of a biography, when one may no longer need the interview. Second, oral interviewing is very inefficient. Subjects tend to talk about themselves rather than the person whose life is being written about. Also, subjects often have different versions of events from others, and there is really no way to check their credibility on the spot (short of being rude). Unless an oral interview is the only way to get information about the subject of a biography, I don't do them.

ROGER NEWMAN: I believe interviewing is necessary to convey a subject's personality. What we are told can usually be checked for accuracy according to traditional methods, or we can note it is conjecture. Table talk and the offhand remark help to make the whole of a person, even if the lofty thoughts and actions are why we write about him or her. I realize this is a matter of temperament and personality, but I think it is essential for biography to try to capture spontaneity beyond the written record—for this I find interviews essential.

LINDA GREENHOUSE: I was delighted to be able to let the documents speak for themselves. The Blackmun collection includes the transcript of an extensive oral history that Harold Koh (a former Blackmun clerk and now dean of the Yale Law School) did with the justice shortly after his retirement. The oral history certainly brought Blackmun to life, but some of the justice's observations are contradicted by the documentary record. In old age, Blackmun was in a sentimental and rather forgiving mood—the sharp edges of past incidents softened by time and generosity of spirit.

JOAN BISKUPIC: My experience—when interviewing former law clerks, at least—is that there is a wide range of reliability here. Memories fail; competing agendas emerge. Despite my interest in interviewing as many law clerks as possible, I'll take documents any day.

JOHN Q. BARRETT: I find that Jackson's own statements tend very regularly to "check out," and that the many whom I have interviewed also try—and can be led by me to try—to be careful about distinguishing memory from assumption from affectionate invention.

PHILIPPA STRUM: Oral history can be an invaluable addition to the biographer's toolbox if it is used wisely; it frequently gives us a sense of the human being that papers and judicial opinions do not. When we use articles written by former law clerks or colleagues, or even the justices' conference notes, why should we assume those are more reliable than interviews? In all cases, we need verification. When we have six different people quite separately remembering Brandeis's asceticism, for example, I think we can take that trait as a given.

poor relationship. “Yes,” came the response along with a blank face. But when I asked one of Black’s clerks how he would describe Black’s relationship with Justice Felix Frankfurter, the response was an audible sigh and then, “difficult.” I had hit pay dirt, and the words streamed out. Black’s clerks were most forthcoming, as was his whole family (with one exception) and indeed just about all who knew him. I spoke with the children of his friends; with one of these, in rural Alabama, I searched, to no avail, for a rolled up, 60-year-old picture of his father and Black in Klan regalia.

Black did not destroy his papers, but some important subjects were missing; these, I can only imagine, he did destroy. Among them were the school desegregation cases and the Court’s decision that enabled Lyndon Johnson to gain the Democratic nomination for the Senate in 1948. On his deathbed, Black ordered his son to destroy his conference notes. I was never too unhappy about this. I would have had to look at and copy some 600 loose-leaf notebooks, and using them more than a minimal amount would have changed the structure of the book.

I also looked at many collections and documents privately held in and out of family hands. There still are a few collections that I have not seen but will eventually. I don’t think they would have made much difference in my portrait of Black. One of the major conclusions I reached regarding access, once a level of ability is reached, is the importance of doggedness and persistence, just not going away.

PART II: The Early Years and Their Influence

EDITOR: Which early life experiences were particularly distinctive or formative for your subject? How did these experiences (as a youth, teen, young adult, or young professional) help shape the decisions, judgments, and professional successes of your subject?

JILL NORGRÉN: Societal attitudes toward women and one key event caused Belva Lockwood to become a change agent, a reformer intent upon making equality of opportunity a reality for American women. As a teenager, Lockwood expressed a strong interest in continuing in

school. It was a familiar story: her father did not believe that young women needed much education. As a result, at the age of 14, she began working as a rural schoolteacher. Lockwood quickly discovered that she was being paid less than male teachers of a similar age. She complained to the wife of a local minister and was told “that is the way of the world.” This early experience of gender discrimination, followed by others, made her a lifelong champion of equal pay for equal work. In the late 1860s, after she moved from upstate New York to Washington, D.C., one of her first lobbying efforts focused on legislation to end the pay and promotion discrimination experienced by female government clerks.

In speeches throughout her life, Lockwood urged the equal education of young women. She insisted that education was the path to self-sufficiency. This reflected her early life desire for higher education, as well as the fact that she was widowed at the age of 22 (and left with a three-year-old daughter to care for). Her experience as a widow with modest skills led her to have even stronger faith in the power and necessity of education. The tragedy of being widowed was a double-edged sword. It beat down her spirit (for a while) but, at the same time, freed her from the conventional expectations placed on a mid-nineteenth century wife. As a widow, she was independent. She could, and did, chart a new life plan for herself. She went to Genesee College (one of the first to accept female students), taught school, and shaped the radical dream of being an attorney—radical because in the late 1850s there was not a single woman lawyer in the United States.

A spunky personality coupled with her fight for education and against prevailing societal attitudes led Lockwood to take the actions that made her one of America’s first women attorneys, a respected reformer, and a presidential candidate. Whether she could, or would, have moved along the same path had she not been widowed is a question that I cannot answer. I suspect, though, she would have found a way.

G. EDWARD WHITE: The issue of formative early life experiences seems to me a central one for the biographer to work through, and it is treacherous. The problem is akin to the larger problem of writing history in the present: there is a ten-

dency to shape material from the past in a way that resonates with current concerns and in the process to lose sight of the different concerns that may have motivated historical actors. With formative experiences, there is a tendency to reason backward from the fact of adult prominence. In most cases one chooses to write on a subject because that subject is famous in one respect or another, and there seems to be an implicit burden to search for the youthful origins of that fame.

The family of Oliver Wendell Holmes Jr. was very prominent, including ancestors who fought in the Revolution; two great-grandmothers who were socially prominent, one of whom was the poet Anne Bradstreet; a grandfather, Abiel Holmes, who was a well-known author and another, Samuel Jackson, who was a justice of the Supreme Judicial Court of Massachusetts; and his father, Oliver Wendell Holmes Sr., a household word in mid-nineteenth century America for his editorship of the *Atlantic Monthly*, his novels, and his career as a lecturer and a professor at the Harvard Medical School. The Holmeses were not wealthy during his youth, but they were exceptionally well connected, and Holmes went to private schools and Harvard College as a matter of course.

Holmes did not graduate high in his Harvard College class, but his ranking was affected by disciplinary points related to his leaving college to join a volunteer Massachusetts regiment after the Civil War broke out in April 1861. A member of several clubs and a literary society during his college years, Holmes found that the course of his young life was forever changed by his decision to enlist in the Civil War and to remain a soldier until 1864 when, having been wounded three times and recognizing that he was unsuited for military service, he declined to reenlist.

Holmes entered Harvard Law School, where he occupied himself with reading, conversing about philosophy, and writing. Though he stopped attending lectures after one year, he passed the Massachusetts bar after an oral examination by a lawyer he had gotten to know and joined a law firm, uncertain about what he would do with himself.

Nothing like fame came for Holmes until he was nearly 40, when, after 15 years of practicing law and writing scholarly articles, he delivered a series of lectures to write *The Common Law*. The book gave ev-

idence of his remarkable talent as a writer and also illustrated his ability to analyze legal issues with a deep sense of their philosophical and historical dimensions. It launched Holmes's career because it led to an offer to teach at Harvard Law School and to his acquiring a sufficient reputation among elite members of the Boston bar for the governor of Massachusetts to consider him for a judgeship.

Even though he became a judge at 41 and would eventually become chief justice of the Supreme Judicial Court of Massachusetts, Holmes was not ideally suited to be a state supreme court judge. He was impatient with the collegial process by which opinions were produced, which placed a heavy emphasis on unanimous opinions. Opinion assignments were rotated evenly within the court, which meant that Holmes got fewer opportunities to put his legal theories into practice in the form of opinions, something he had coveted on becoming a judge. Most of his cases were on comparatively routine legal issues. At the age of 60, in 1901, he had reconciled himself to a professional life of comparative obscurity and found that situation frustrating, given his ambitions to be known as a legal thinker of significance.

Had Holmes not been appointed to the U.S. Supreme Court at the comparatively old age of 61, and had he not lived long enough to serve for 30 years as a Supreme Court justice, it is extremely unlikely he would have become one of the central figures in American legal history. He needed a large stage to demonstrate his literary and philosophical gifts and found one on the early twentieth-century Court.

Looking back, that path does not at all seem an inevitable product of his privileged childhood, his Civil War experience, or his struggles to find the legal profession fulfilling. But for William McKinley's being assassinated after having selected another candidate from Massachusetts to replace Horace Gray on the Supreme Court, and Theodore Roosevelt, his unexpected successor, not feeling bound to honor that commitment, and Henry Cabot Lodge (the junior senator from Massachusetts), Roosevelt, and Holmes all being Harvard College graduates, and Roosevelt having been attracted to a speech Holmes delivered in 1895, and Roosevelt making the linchpin of appointing Holmes the latter's position on whether the constitutional rights of American citizens extended to all the residents

of U.S. territories abroad (neither Roosevelt nor Holmes believed that they did), Holmes would not have been appointed to the Court. Holmes remained on the Court well past the age where he could have retired with a full pension and became lionized by a younger generation of progressive intellectuals who thought him a philosophical modern (which he was) and an early twentieth-century social reformer, which he distinctly was not.

How much of this could have been foreseen when Holmes was being agitated by moral philosophy classes at Harvard College or learning that believing in the abolition of slavery had very little to do with marching through swamps and ducking musket fire in war, or resolving to attach

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[G. EDWARD WHITE]

himself to a Boston law firm rather than continue to attend lectures at Harvard Law School, seems difficult to say: my instinct is, not much. Holmes's youthful contemporaries regarded him as a person with considerable gifts, but it took many years for his talents to match up with his professional opportunities.

In sum, I doubt that judges and other legal figures are like musicians, artists, or perhaps scientists, displaying virtuosity at young ages. Temperament and personality surely matter in determining eminence, but so much of it seems to be located in a felicitous interaction between those factors and professional opportunities and roles.

PHILIPPA STRUM: Brandeis grew up in a family that had fled the aftermath of the 1848 revolution in the Austro-Hungarian empire. The Brandeises and the families that emigrated with them were idealistic and cultured—the immigrants brought cases of books and family pianos along with more prosaic luggage. Patriotic and politically aware, they believed passionately in liberty, democracy, and the American dream. His father was a successful small

merchant, and Brandeis would go through life considering small businessmen the ideal citizens of a democracy—an urbanized version of Jeffersonianism. Brandeis's mother taught her children that good people had a moral duty to others. Her idealism was echoed by Brandeis's role model, his uncle Lewis Dembitz, a lawyer, linguist, mathematician, and astronomer who was also a delegate to the convention that nominated Lincoln for president in 1860. Brandeis's original name was Louis David Brandeis, but he changed "David" to "Dembitz" as a teenager in homage to the uncle whom he described as "a living university" whose "life was unending intellectual ferment." Brandeis later said that he decided to study law because "My uncle, the abolitionist, was a lawyer, and to me nothing else seemed really worthwhile." The combination of his own home and his uncle's example, in other words, imbued Brandeis with the intellectual habits that would serve him so well as an adult.

Brandeis was 18 when he enrolled in Harvard Law School. Three experiences there helped shape him. One was his encounter with Christopher Langdell's then-radical approach to law, which emphasized knowledge of cases and the facts at issue in cases rather than legal treatises. Brandeis's subsequent career as an attorney and jurist was distinguished by his emphasis on facts, as reflected in the Brandeis brief. Harvard, Brandeis said later, was where he fell in love with the law. The approach to the law that delighted him clearly was "sociological jurisprudence," before that term was coined.

The second important Harvard experience was the result of Brandeis's intensive reading of his law books by gaslight. His eyes gave out completely after his first year, and he was advised by two doctors that he had to give up the law. Refusing to accept that advice, he went to a third doctor who counseled him to think more and read less. Brandeis thereupon arranged for his law school friends to read to him, and the experience developed an already-good memory into an astonishing one. The disability did not hinder him; he graduated with the highest grades ever received by a Harvard Law student. His memory later made him a devastating litigator and negotiator.

Finally, Brandeis was influenced by the Boston Brahmins who welcomed the young law student into their social circles.

Their strong sense of noblesse oblige dovetailed with his family's moral teachings, and their emphasis on the world of ideas (he was soon reading—or having read to him—authors such as Emerson, Longfellow, Lowell, Milton, and Tennyson) reinforced the love of learning that he drew from his family.

ROGER NEWMAN: Lives are lived chronologically. We see patterns only in retrospect.

From the hill country in which he was born, Hugo Black took populism in its original raw form. Clay County was both his birthplace and the birthplace of populism in Alabama. Race relations there were ordinarily placid, and Black's parents, especially his father, insisted that all people be treated equally. Hugo also experienced the alcoholism of his father, who died when he was 14. From this he took a hatred of drinking, which was central to his political career. I thought about writing about him as a child of an alcoholic but decided not to interrupt the flow of the narrative. He did not really talk about his father until his later years, and then only slightly. He never gave his father credit for his free thinking and basic decency, traits which Black took from him as opposed to his mother (whom he revered his whole life) and her rather severe religiosity. Being robbed of a normal home life, he took as a substitute father Herman Beck, a Jewish merchant in Birmingham, where he moved when he was 21. Black also had numerous mentors in both law and politics.

Another influence was Black's discovery of Thomas Jefferson. While auditing a political economy class in law school, he started reading Jefferson's work for the first of several times. Jefferson gave an outlet to Black's idealism and developing political views. He read extensively in history, poetry, and the classics. Law, and then politics, was his vocation; reading, constant reading, was his avocation. If conditions and circumstance provided the initial impetus for his views, reading truly formed them. His reading on the French Revolution, for example, is widely believed to have influenced some of his later jurisprudential views.

Black never attended college; indeed, he was a high school dropout. But at the age of 17, he finished two years of medical school in one. He then graduated from

law school with highest honors. Over the next 25 years of law practice, he lost no more than approximately two dozen of about 2,000 cases he tried. He had total faith in his own ability, in whatever he was persuading at any particular time, and in his ability to persuade anyone of the rightness of his position. This was something to which all who served in the Senate and on the Court with him, indeed anyone who knew him, could attest.

Then, there was the Ku Klux Klan. Black never gave a single answer as to why he joined the Klan in 1923. He could not, for the answer was politics—which he could not admit once he got on the Supreme Court. The Klan was a steadily decreasing shadow for him throughout his lifetime, however. Its supposed importance upon his views of the First Amendment and, in particular, the religion clauses, has been wrongly resurrected over the past 10 years, in my opinion.

Finally, there was the influence of William E. Fort, a former Birmingham judge and Black's law partner for a while—a man with whom he shared many thoughts that he did not share with others. In December 1932, Fort wrote Black that he was happy to hear that Hugo had decided to become a leader in the Senate and throw political caution to the winds, so as to help alleviate the suffering of people all around him (the Great Depression). I have always been wary of sudden conversions, but apparently this one was real. Afterward, Black became the New Dealer and the justice we know.

JOHN Q. BARRETT: Robert Jackson was, like each of our subjects, affected by many people and experiences. One thing that formed him fundamentally was his native region. He grew up on farms and in the woods, villages, and small cities of northwestern Pennsylvania and southwestern New York State. As results, he knew hard work (individual and communal) and valued common sense, effort, achievement, freedom, individuality, and tolerant coexistence. These experiences and qualities, and, frankly, a taste for such people, stayed with him throughout his life and career—they show up again and again, including in his judicial writings.

Jackson was shaped significantly by his family, of course. It included readers, thinkers, iconoclasts, non-churchgoers, hard workers, and practical types. His

family also included, in Jackson's father, a horseman and adventurer who also was a bit of a schemer and too much of a drinker—he died young and became, for his son, a model of good qualities and, in his weaknesses, a type consciously not to emulate.

Robert Jackson had a few teachers who were enormously positive influences. After graduating from a small town (Frewsburg, New York) high school at age 17, Jackson spent the next year commuting by trolley to the nearby city, Jamestown, and attending its high school as a post-graduate student (he never went to a day of college). His English teacher at Jamestown High School, Miss Mary Willard, taught him poetry and literature. She gave him books and invited him into the home that she shared with her sister, also a teacher. Late into many evenings, in front of a fireplace hearth, the Willard sisters and Robert read great works, including Shakespeare, aloud. The Willards nurtured Jackson's love of words and great expression. Thirty years later, the Willards were long gone but also still very much with Jackson as he drafted, in front of a Nuremberg hearth, his closing argument in the trial of the principal Nazi war criminals, including from memory its closing lines from Shakespeare's *Richard III*.

Jackson's law practice, during 20 plus years in Jamestown, Buffalo, and western New York State, shaped him greatly. He apprenticed for lawyers (surrogate fathers) who included, in classic combination, one who was a great talker, courtroom advocate, and public performer and another who was a serious intellectual and skilled brief writer. Jackson watched and worked closely with each, and he became a lawyer who could do all of the above quite well.

Jackson also had political influences that became significant in his life. His forebears were Democrats in a strongly Republican region, and Robert followed their lead. Frank Mott, the lawyer-mentor who was the talker, was an active Democrat, and he gave Jackson that training too. On one trip from Jamestown to Albany in 1911, Mott introduced Jackson (then age 18) to freshman New York State Senator Franklin Roosevelt (age 28 or 29). In time, their handshake became an acquaintance and then a working relationship and friendship—for Jackson's career, a very significant friendship.

Finally, jumping over many other influences, Jackson uniquely had Nuremberg. He spent 17 months right after World War II in its European wreckage, in its facts on the ground, in the dawning knowledge of how Hitler and the Nazi Party had come to power in Germany, crushed democracy, oppressed persons, waged war, killed, and exterminated. Jackson also did his Nuremberg trial constructing and prosecuting in alliance with, and in close and educational proximity to, Soviet lawyers, other personnel, and totalitarians. Jackson turned 54 at Nuremberg—much of his formation and living had occurred already. After returning to the Court in 1946, he lived for just eight more years. But of course Nuremberg, in all of its dimensions, affected him. To his credit, he often wrestled with that, visibly, in his judicial opinions and in his extrajudicial speeches and writings.

Ted White makes excellent points about the biographer's tendency to work backwards from adult greatness to search, in motivated and selective ways, for early glimpses of that greatness. I appreciate the caution, because it's interesting and because I sometimes find myself doing exactly what Ted describes. Still, sometimes a great life path does begin way back in the woods of youth—I think Jackson's was, to some extent, one such path.

G. EDWARD WHITE: Earl Warren grew up in Bakersfield, California, in a household without many resources or much education. During his youth, his father was a brakeman for the Southern Pacific Railroad. Warren was not an accomplished student in high school. He went to the University of California at Berkeley because graduates of California high schools were routinely admitted if they could get themselves to Berkeley and pay the quite low tuition. Warren was not an accomplished student in college, either. He went to law school because he had become attracted to Hiram Johnson's Progressive Movement and was a gregarious person who thought he might enjoy some form of politics. The admission requirements to Boalt Hall were also not demanding, and by that time Warren had managed to find some part-time work to help pay tuition. He was reprimanded by the Dean of the law school for having a part-time job and not speaking in class.

When Warren graduated from law school, where he also did not have a dis-

tinguished record, he was admitted to the California bar on a motion from one of his professors: there was no bar exam. His first job was with the law department of a San Francisco oil company, and it was so unrewarding that he left after a year. As late as 1920, when Warren was 29, he was working as a temporary clerk for the Judiciary Committee of the California state legislature. About all one could say about Warren's formative years was that he exhibited a certain doggedness in seeking to advance himself from his childhood origins, an interest in social relationships and politics, and an ability to meet the minimum standards of educational institutions. His fame would begin when he turned out to be a remarkably successful manager of offices that combined public activism and elective politics—first as district attorney of Alameda County and then as attorney general and governor of California.

JUAN WILLIAMS: Thurgood Marshall's lifelong focus on the power of the law began as a child. First, he argued long and hard with his father at the dinner table. These arguments with his dad, a heavy drinker, became famous because they sometimes argued so loudly that neighbors called the police. But unlike his brother, young Marshall was not intimidated by the bellowing old man. To the contrary, he enjoyed the intellectual gamesmanship. And his dad, William C. Marshall, enjoyed taking young Thurgood to Baltimore City Court to watch lawyers argue their cases and then replaying the arguments over dinner.

In his West Baltimore neighborhood, at the Colored High and Training School, Marshall also liked to argue with other students as well as teachers. His love of a good argument led him to become captain of the high school debating team. His inclination to argue with adults led him to become a regular in the school's detention room. And it led the principal to punish him with the added homework of memorizing the U.S. Constitution. By the time he applied to Lincoln University, 16-year-old Marshall was bold enough to write that his career goal was "lawyer."

Baltimore's history and geographic location also added to young Marshall's vision of right and wrong on the issue of race. South of the Mason-Dixon line but north of Washington, D.C., Maryland

was often referred to by historians as the "middle ground." Its southern counties held large slave populations that worked on tobacco farms. But the city of Baltimore had the largest population of free black people in the United States at the time of the Civil War. And those free blacks organized politically, established black-owned businesses, and opened private schools for black children. In West Baltimore, where Marshall grew up, immigrants from Germany, Italy, and Russia lived alongside the mostly black population. His first job was as a helper in a corner store owned by a Jewish merchant, whose son became Thurgood's best boyhood friend.

The reality of racial integration was all around young Marshall. If he had been born farther to the South, he could not have experienced a politically strong black community with economic power. If he had been living in the North, his family's experience early in the twentieth century would have been as tokens in a segregated society where blacks lived in ghettos.

When he went off to Pennsylvania's Lincoln University, Marshall was still the prankster who loved to argue. He was on the celebrated debate team and a leader in fraternity life. He began to get serious about using the power of argument to create social change after being challenged by a fellow student, the poet Langston Hughes. The older Hughes wanted to know why Marshall never raised his voice against a school policy that prohibited blacks from serving on the faculty of the all-black school. Marshall initially resisted the fight, arguing with Hughes that the presence of black professors might damage the school's lofty reputation. But faced with a persistent Hughes and challenged by some of his white professors, Marshall began to organize the fraternities to support allowing blacks to join the faculty. The effort succeeded during Marshall's senior year, and the next year the first black professor came to Lincoln. The experience brought together Marshall's love of debate with political awareness of the depth of racism—even on a campus full of black students. It inspired in him the idea that the arguments against racism could win the day. It also led him to the idea of using the Constitution—the law—to insist on equal rights for all in an integrated society such as the one he knew from West Baltimore.

LINDA GREENHOUSE: I can think of three aspects of Harry Blackmun's young life that helped shape his future. The first was the family dynamic during his childhood. His father was not a success in business and was an uncertain provider. The family's hold on the middle class was quite tenuous, and money was a constant worry, as reflected in entries in the diary he kept throughout childhood and young adulthood. The young Harry determined that he would enter a profession that would give him financial stability and social respectability (he was actually more attracted to medicine than to law, but he would have had to take additional undergraduate courses for admission to medical school, and he didn't want to spend the time or the money).

The second influence was his experience at Harvard Law School. The young Harry Blackmun had breezed through his earlier education, including Harvard College, from which he graduated *summa cum laude* in mathematics, without having to work very hard. Law school was quite a shock. Despite his best efforts, he was in the middle of the class and felt like a failure. His diary entries during that period were bleak: "It is the first real time I have overestimated myself, and I do not know when anything has quite so completely taken the wind out of my sail," he wrote. In a way, I think he never quite got over that feeling of inadequacy. He had been a sensitive child but one with a love of adventure. Law school seems to have knocked the adventurousness out of him and left him quite risk-averse for the rest of his life.

The third influence was a more conventional one—a significant mentor, Judge John Sanborn of the 8th Circuit, for whom Blackmun clerked. Sanborn became his surrogate father, and years later he offered to retire from the circuit only on the condition that Blackmun be named to succeed him, which is how Harry Blackmun's judicial career began.

JOAN BISKUPIC: Sandra Day O'Connor was very much influenced by her father. Harry Day was demanding in the best and worst ways. He challenged her to do her absolute best. But he was quick to anger and difficult to satisfy. She told the story of how dismissive he was when she, as a young teenager, was late getting lunch to the ranch crew. Her Jeep had broken

down, and she had to change the tire. Rather than praise, she only heard complaints for being tardy. In going through family correspondence in Arizona, I discovered many instances of the unyielding paternal nature she had to navigate as a child. Clearly, her dealings with this very tough man (whom she deeply loved) steeled her for life in a male-dominated profession.

Another formative experience was her schooling in El Paso. It was very hard for her to be sent away from the Lazy B Ranch. I found a picture of her when she was about 10 years old. In it, she stands with her prettily dressed, smiling classmates of the boarding school in El Paso. The homesick ranch girl looks so sullen.

*O'Connor's
father steeled
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profession.*

[JOAN BISKUPIC]

Yet, because of this experience, when she went to Stanford University at the young age of 16, she was readier than most girls would have been. She had learned to mask her insecurities and plow ahead.

Her mother, Ada Mae, was a strong influence, in that she accepted her fate on the Lazy B and made "a hard life look easy." She was hostess extraordinaire and passed down to her daughter the first-rate social skills that define her still. O'Connor had a younger sister and brother who told me that they were more rebellious toward their father. They protested so much when they were sent away for school that they were allowed to return home and take local classes. Sandra, they said, put up with whatever was thrown her way. "She just handled it," her sister Ann insisted. The future justice took root on that dusty ranch where little else could.

PART III: The Paths to the Supreme Court

EDITOR: Most of your subjects eventually became U.S. Supreme Court justices. What were some of the key

professional steps, contacts, and friendships that led them to the Court? How did your subjects become visible to the president who nominated them? To the president's cabinet, advisers, or staff who identified them?

LINDA GREENHOUSE: Harry Blackmun's childhood pal, Warren Burger, by then the chief justice, pushed him for the Court within the Nixon administration. Burger was almost certainly responsible for the choice of Blackmun in early 1970 after the failure of the Haynsworth and Carswell nominations. Burger had been in Washington since 1953, when he joined the Eisenhower administration as an assistant attorney general and had been eager to get his friend Harry to join him. He had played a role in Blackmun's appointment to the 8th Circuit and did his best to get Blackmun's name in circulation in the opening months of the Nixon administration. Given Blackmun's relative obscurity on the federal bench, Burger was surprisingly successful. Shortly after Abe Fortas resigned from the Court in May 1969, a story in the *Washington Star* named Blackmun as one of the top contenders for the vacancy. Burger clipped the article and sent it to Blackmun back in Minnesota with the notation: "Seeds need time to grow but they need planting! More later." Blackmun himself remained deeply ambivalent—before, during, and after.

There are a couple of ironies in this saga. One is Attorney General John Mitchell's tasking of a young lawyer at the Department of Justice with checking out Blackmun's record on the 8th Circuit. Completing that assignment, William H. Rehnquist pronounced Blackmun well qualified and sufficiently conservative. The other irony, of course, is that the experience of serving on the Court together soon strained, and eventually broke, the lifelong friendship between Harry Blackmun and Warren Burger.

JOAN BISKUPIC: Sandra Day O'Connor was an unlikely choice for the Supreme Court, even for a president looking for the first woman appointee. When she was selected, she was serving on an intermediate state court and had spent virtually all of her professional life in Phoenix. But she had several things going for her as Reagan's men scouted out the potential

first woman justice. She had built an amazing network of friends in California (mostly through her time at Stanford University) and in Arizona. She had served as co-chair of Nixon's reelection campaign in Arizona in 1972. She had society friends in the circles of Nancy Reagan and Reagan cabinet members. The luckiest stroke was a vacation she had spent with Warren Burger in 1979. O'Connor was close to John Driggs, a former Phoenix mayor and brother-in-law of Burger's administrative assistant, Mark Cannon. Burger and Cannon were going to Flagstaff for a judicial conference, and Driggs arranged for them to cap off the trip with a vacation on nearby Lake Powell. Driggs invited Sandra and John O'Connor along. During the day, they all swam and water-skied. In the evenings, Chief Justice Burger regaled them with stories of his Minnesota childhood and early days as a lawyer. O'Connor stayed up late listening and was "just fascinated."

Impressed by O'Connor, Burger then worked hard to get her invited to national legal conferences. At the right time, Burger passed her name to White House counsel Fred Fielding. Separately, Stuart Spencer, a California politico who had urged Reagan to publicly make the promise of a woman justice during the 1980 campaign, told me that he had been given O'Connor's name during the campaign. He said he thought it came from someone in California and was certain it did not come from the Burger connection. Also, an old friend of William French Smith (Reagan's first attorney general) told me Smith early on had O'Connor's name—again, independent of the Burger connection. He believed her name had been written in Reagan's own hand on a slip of paper. Although Sandra Day O'Connor was certainly lucky to have connected with Burger, I believe she also benefited from longstanding California-Arizona political connections.

When Reagan's lawyers were screening potential nominees in 1981 (after Potter Stewart quietly revealed his intention to retire), they looked mainly at female federal judges. But aides Ken Starr and Jon Rose were asked to interview then-Arizona Appeals Court Judge O'Connor at her

Phoenix home. Starr told me that he was surprised that O'Connor was in the mix at all. She was not from a key state or on an important court. When they interviewed her at her house, however, she was ready for them, and Starr was awed. She carefully answered all of their questions on constitutional law (and served them a lunch of salmon mousse salad she had made the night before). She similarly impressed President Reagan, who was intrigued by her pioneering family story and years in the Arizona legislature. After he met with O'Connor, he decided not to see anyone else.

JUAN WILLIAMS: Thurgood Marshall relied on friends as he took a roundabout



Thurgood Marshall calls his wife on the Oval Office telephone to let her know of his nomination to the U.S. Supreme Court, while President Lyndon Johnson looks on, June 13, 1967.

path to the Supreme Court. He got to know President Johnson, the man who nominated him to the Court, only after the Texan became president. Marshall's first substantial conversation with the president took place after Johnson asked Marshall to serve as the nation's first black solicitor general.

A former Senate majority leader and vice president under John F. Kennedy, Johnson knew of Marshall for his leadership of the NAACP Legal Defense and Educational Fund and especially for his legal victory in *Brown v. Board of Education*. Marshall had been on the cover of *Time* magazine and voted the most important civil rights leader in the country, even after Martin Luther King Jr. led the Montgomery bus boycott. But Johnson had no personal contact with Marshall.

Marshall, however, had strong ties and friendships with many of the president's

top aides. Deputy Attorney General Ramsey Clark, a fellow Texan and the son of Justice Tom Clark, knew Marshall as the nation's most prominent black lawyer and only the second black federal judge (appointed by Kennedy). After hearing Marshall give a speech calling for an end to the riots then tearing at big cities across the nation, Clark saw Marshall as a powerful counter symbol to black militants. Several weeks later on a boat ride with Johnson, it was Clark who first mentioned Marshall as a prime candidate for the solicitor general's job. According to Clark, Johnson's immediate response was "Ah, ha, he's going on the Supreme Court."

Several years later when President Johnson was considering Marshall for a Supreme Court nomination, it was Clark again who kept mentioning Marshall's name despite the president's reservations. Johnson was concerned that Marshall had lost 5 of 14 cases as solicitor general and might be vulnerable to southern segregationists on the Senate Judiciary Committee who wanted to defeat his nomination. And Johnson was also concerned that the addition of Marshall to a Court with William Douglas, Hugo Black, and Earl Warren would be too liberal. Clark countered that Marshall was a man committed to law and order and willing to go to battle against black militants who did not respect the law.

At the White House, Marshall also had a friend and advocate in Clifford Alexander, the first black president of the Harvard student body who met Marshall in 1954 when he asked the winning lawyer in the *Brown* case to give a speech at Harvard. By 1967, Alexander had become a lawyer in the Johnson White House and the president's top aide on hiring blacks. He, too, recommended that Johnson should nominate Marshall to the Court.

Louis Martin, the deputy chair of the Democratic National Committee and the former publisher of several black newspapers, also lobbied Johnson to put Marshall on the Court. He assured the president that Marshall's appointment to the Supreme Court was a key to keeping the political support of white liberals and blacks for a possible second term for the Johnson administration.

When President Johnson decided to nominate Marshall to the Court, he first called Clark and then asked Alexander and Martin to join him in the Oval Office. It was Clark who told Marshall that the president wanted to see him. And after Johnson made the historic offer, it was Alexander and Martin who were the first to congratulate Marshall.

JOHN Q. BARRETT: Robert Jackson's path to the Supreme Court centered entirely on his relationship with and work for Franklin D. Roosevelt. As Jackson detailed in his book *That Man*, a previously "lost" memoir of FDR that I discovered and assembled for publication, he knew FDR for 30 years before he nominated Jackson to the Court in 1941. From 1934 forward, Jackson worked closely with FDR on increasingly high stakes and high profile, legal projects. FDR thus knew Jackson well, not only personally but also as a legal thinker and worker who was very talented, sensible, and effective.

Visibly at FDR's side, Jackson was widely known, early on, to be a "short list" Supreme Court prospect. Press mentions of "Jackson to the Court" began during FDR's first term, after Jackson had been in national government for little more than a year. In the ensuing years before his Court appointment, Jackson served as FDR's solicitor general, where he argued and won dozens of Supreme Court cases and earned widespread admiration among the justices.

In 1941, FDR contemplated appointing Jackson (by then, attorney general) to succeed an aging and ill Chief Justice Hughes. Ultimately, FDR made the bipartisan decision to elevate Justice Harlan Fiske Stone, the only Republican presidential appointee then serving on the Court, to be chief justice and appointed Jackson (age 49) to succeed Stone as associate justice. If Chief Justice Stone had retired when he turned 70 in 1942 or at the end of the Court's Term the next summer, or if FDR had outlived Stone, Roosevelt likely would have elevated Jackson to be chief justice.

G. EDWARD WHITE: The story of Earl Warren's nomination has been regularly told. I relied heavily on a memoir of Herbert Brownell in the Bancroft Library's Warren Oral History Collection and *The Memoirs of Earl Warren*, published posthu-

mously in 1977. Eisenhower's attorney general, Herbert Brownell, had been delegated the task of assembling candidates for future Supreme Court vacancies. Warren was on that list because Eisenhower felt somewhat indebted to him for his help in the 1952 presidential campaign. Warren made some speeches for the Eisenhower ticket and was approached after the election about a cabinet post. Instead, Warren asked to be considered for the Supreme Court, and he agreed that he would not seek a fourth term as governor of California in order to become solicitor general while waiting for a vacancy to arise.

When Chief Justice Fred Vinson died suddenly of a heart attack, Brownell and Eisenhower found the vacancy "totally

*Brandeis
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Wilson and
tutored him on
economic issues.*

[PHILIPPA STRUM]

unexpected" and were not inclined to offer the chief justiceship to Warren. In previous discussions with Warren about the Court, Eisenhower had signaled that Warren would be appointed to the "first vacancy," but neither he nor Brownell had anticipated that it would be the chief justiceship. Eisenhower apparently went so far as to ask John Foster Dulles, his secretary of state, to consider taking the position (Dulles declined). Eventually, Eisenhower came around to the view that he wanted someone with "broad administrative experience" as chief justice, and that Warren remained a candidate.

Eisenhower dispatched Brownell to talk to Warren. Contrary to other accounts and rumors, Brownell did not try to talk Warren out of taking the chief justiceship, and Warren did not insist that "it was the chief justiceship or nothing." Brownell simply relayed Eisenhower's request that Warren signal whether he wanted to go on the Court right away or not, and whether Warren was "generally sympathetic with the ideology of the Eisenhower administration." Warren said that he was prepared to go on the Court right away, had a com-

mitment from Eisenhower for the "first vacancy" (which happened to be the chief justiceship), and "had followed Eisenhower's presidency and was in agreement with his policies and program."

When Brownell reported the conversation, Eisenhower decided to float the news that Warren might be appointed to gauge public reaction. Brownell held an informal news conference with a few reporters to suggest Eisenhower was "thinking" about appointing Warren to be chief justice. Brownell was apparently not guarded enough in his comments, because the reporters wrote stories that Warren was to be nominated. This forced Eisenhower's hand—he told Brownell to call Warren to confirm the appointment. Warren learned of his appointment on September 30, 1953, and he was in Washington the next week to open the Court's term, which would feature the re-argument of *Brown v. Board of Education*.

PHILIPPA STRUM: By the time Woodrow Wilson ran for president in 1912, Louis Brandeis had a national reputation as "The People's Attorney." His belief in the responsibilities of citizenship had led him to become the nation's foremost and very high-profile *pro bono* attorney in an age when that job category barely existed. Most of his *pro bono* work was devoted to causes rather than individuals, and he had made himself an expert on the economy in the industrial era. The Democratic convention that nominated Wilson adopted a resolution renouncing "the privilege-hunting and favor-seeking class." Brandeis, who had been battling the trusts for years, found that encouraging. He then wrote to Wilson complimenting him on his proposal to lower tariffs. Wilson soon asked Brandeis to visit him and, in the correspondence and many meetings that followed, Brandeis tutored Wilson on issues such as regulating industries and conservation. Brandeis was responsible for much of Wilson's economic platform.

Brandeis followed up by urging his friends to support Wilson and by undertaking a tour of U.S. cities, speaking in such venues as economic clubs and local chambers of commerce about Wilson's program for the regulation of the trusts. When Wilson was elected, there was speculation that he would nominate Brandeis as attorney general or to another cabinet seat. It is likely that Wilson would have

appointed him had Brandeis fought for such a position, but—ambivalent about a government position—Brandeis chose not to do so, and no nomination was forthcoming.

Nevertheless, Brandeis went to Washington repeatedly to suggest policies and personnel to many members of the Wilson administration and, on occasion, to push Wilson in the direction of policies such as creation of the Federal Reserve system and the Federal Trade Commission. The two men remained friends and, when Justice Joseph Lamar died in 1916, Wilson nominated Brandeis to the Supreme Court.

The nomination was highly controversial; opposition came primarily from big business interests and old line Bostonian Brahmins who considered Brandeis a flaming radical. People who knew Brandeis from his public interest work and his involvement in Wilsonian politics (such as former Harvard president Charles Eliot, Roscoe Pound, Frances Perkins, Walter Lippmann, Florence Kelley, and Robert La Follette, among others) rallied to his defense. Brandeis eschewed any public part in the battle but managed it, with obvious success, from behind the scenes.

ROGER NEWMAN: Hugo Black was one of the leading New Deal advocates in the Senate. FDR “admired him no end for his steadfast helping,” said Tom Corcoran, his close adviser. FDR thought Black was “a fighter for principle and liked his aggressive leadership of the liberal bloc,” and he often said that the New Deal would not have been the same without Hugo Black. Not surprisingly, Black was one of the most prominent names mentioned for a Court opening after the death of Senate majority leader Joseph Robinson, to whom FDR had promised a seat after the 1937 court-packing battle. The finalists for the post, in addition to Black, were Solicitor General Stanley Reed and third-year senator Sherman Minton (both eventually appointed to the Court by Truman). And University of Wisconsin law school dean Lloyd Garrison was next in line, according to Attorney General Homer Cummings, the only person whom FDR truly took into his confidence in the matter.

FDR’s anger at the Senate at the time cannot be underestimated. He was hopping-mad, James Roosevelt told me, and

FDR wanted revenge. Cummings asked Minton if he wanted to go to the Court. But Minton did not want to join a Court whose justices he had attacked personally in Senate debate and, instead, urged Black’s appointment. FDR told Cummings that he was reluctant to lose Hugo from the Senate, but on balance Black was the perfect vehicle for FDR’s retaliation. He could kick the senators in the face with their own feet, as one anti-New Deal senator later said.

Black told Minton that his wife, Josephine, had been after him for a while to return to his Birmingham law practice and said that he must talk with her. She took the next train from Alabama, and they talked at length. Black wanted to be

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to be president.*

[ROGER NEWMAN]

president, hoping to succeed newly-elected majority leader Alben Barkley and then run when Roosevelt stepped down. This was his dream since childhood, whereas he thought life on the Court, as he once told a friend, would be dull. But Josephine thought the Court would be good for Black, and she built up his confidence as no one else ever could, noting how it would appeal to his scholarly side and viewing it as the refuge from political life for which she longed. Black told Minton he would accept the appointment if it were offered. The reason, as his son Sterling said, was that Josephine wanted him to do it. The appointment was announced the next day, and Senate confirmation came four days later.

How simple in retrospect, even if the revelation of Black’s Klan ties came later. Roosevelt would not have nominated Black nor would the Senate have confirmed him, if his Klan membership were known. The only indication I have seen that Roosevelt knew about the Klan came in a memorandum Black dictated for posterity in 1968. Don’t worry about it, Black said that FDR told him. In the Senate two

senators tried to raise the matter on the floor but they lacked proof; when other senators questioned him about the Klan, Black was equivocal at best.

G. EDWARD WHITE: Oliver Wendell Holmes Jr.’s path to the Court was far from easy. Although Holmes was the first choice of Massachusetts senator Henry Cabot Lodge for the vacancy confronting Theodore Roosevelt in 1902, he was distinctly not the choice of Massachusetts’s senior senator, George Frisbie Hoar. As early as 1878, Holmes had been considered for a federal district judgeship, and Hoar had objected. Hoar believed that Holmes was unpredictable in his views, an intellectual dilettante, and not the “sound” sort of judge that members of the business community preferred. Lodge and Roosevelt were aware of Hoar’s views on Holmes, and once Lodge convinced Roosevelt to give strong consideration to him, they decided to bypass Hoar in the nomination process. The public response to Holmes’s nomination reported in newspapers was quite favorable, but Hoar grumbled anyway, writing Lodge that Holmes’s accomplishments were “literary and social...not judicial,” that he had “never heard anyone speak of Judge Holmes as an able judge.”

JILL NORGREN: Belva Lockwood, of course, did not become a U.S. Supreme Court justice. She did, however, lead a successful (five-year-long) crusade to open the federal bar to qualified women attorneys. After Congress passed anti-discrimination legislation suggested by her in 1879, she was admitted to the U.S. Supreme Court bar (March 3, 1879) and, in 1880, became the first woman attorney to argue a case before the Court. Lockwood’s early life experience of being paid less than male teachers for the same work as well as her struggle to find a law school that would admit a woman made her a nineteenth-century champion of the cause of economic and professional rights for women. She knew the importance of contacts and friendships that would further her career as an attorney. She allied herself quite successfully, for example, with male members of Congress and male members of the D.C. bar who supported the cause of women’s rights.

Fewer opportunities were open to Lockwood and the women she mentored be-

cause of sex discrimination. Her professional struggles were, therefore, different from those of Holmes, Brandeis, Warren, and others, although it is fair to say that she would have been delighted to become a federal judge. Indeed, when a group of women proposed (circa 1911) that a woman be nominated to the U.S. Supreme Court, her name was on the list of qualified women lawyers to fill a vacancy.

For most of the nineteenth century, however, Lockwood had to concern herself with creating the “entering wedge” for women attorneys. In addition to breaking law school and bar restrictions, she worked to further the legal and judicial opportunities available to her sisters in law by helping to lift the restrictions in the appointment of notaries and chancery examiners. These were small steps in a long struggle—Florence Allen did not come onto the U.S. Court of Appeals until 1934, Burnita Shelton Matthews followed in 1949 at the U.S. District Court for the District of Columbia, and, of course, Justice Sandra Day O’Connor did not come onto the Supreme Court until 1981.

EDITOR: It is interesting to see how presidents in earlier times were much more likely to personally know (some of) the candidates they eventually nominated to the Supreme Court—certainly in the cases of Brandeis, Black, Jackson, Warren, and perhaps to a lesser extent, Holmes and Marshall. Sometimes, for example, presidents had already appointed them to important posts, such as attorney general or solicitor general. By contrast, more recent presidents seem to have relied upon key aides to conduct a more bureaucratized search of potential candidates. Yet in this modern framework, consider how a sitting chief justice (Burger) twice played a significant, behind-the-scenes role in a nomination—first for Blackmun, then for O’Connor.

PART IV: Change and Constancy During Careers

EDITOR: I found quite intriguing in many of your biographies the amount of change in your subject’s views from early in his or her professional career to later in life. How did the political or jurisprudential views (or practices) of your subject change or evolve over time? What accounted for these

changes? Or, did your subject’s views remain steadfast over time?

G. EDWARD WHITE: The question of “change” is often a central one in a biography. It raises a further question—what does one mean by change? This may particularly be true for judges, since all judges have had previous careers in law and, sometimes, politics. All judges face the issue of a changed professional role, since nothing else in the legal profession, or other areas of government, is like being an appellate judge—the role, with its expectations of impartiality, nonpartisanship, and fidelity to law, is not one typically played by other actors in American society. All judges thus change because they are occu-

*Blackmun’s
shift [to the
left] was
more dramatic
than most.*

[LINDA GREENHOUSE]

pying a different role with different requirements.

Warren once wrote that judging was different from politics because in politics “half a loaf” was always a possible option, but as a judge there was no such thing as half a legal principle. Although constitutional history is full of Supreme Court decisions that are compromises between competing principles, Warren’s statement captures the idea that judicial constituencies are not the same as political constituencies, and there is certainly less at stake for judges who change their minds on issues.

The question for me is not whether a judge changed views, but whether the change was a “deep” one or not. Did the change represent a fundamental shift in the judge’s world view? Contrary to the statements of many commentators, I believe Warren did not fundamentally change his views when he left California government and politics to become chief justice—even though as governor, attorney general, or county prosecutor, Warren opposed reapportionment, interrogated criminals without affording them custodi-

al rights, was a militant anti-Communist, supported loyalty oaths for University of California professors, and was one of the architects of the Japanese-American incarceration policy. When cases raising those issues came to him on the Court, he voted the other way. But I saw none of those votes reflecting fundamental changes in Warren’s world view. His earlier positions had simply been supportive of the governmental position he occupied at the time. He was an elected public official, well aware of the mainstream character of those positions. When he was on the Court, his constituency was different, and he saw the issues differently.

Only with respect to the incarceration of Japanese-Americans did Warren have trouble reconciling earlier and later positions. Eventually, he concluded that he had been wrong in advocating the incarceration. Here, he really had undergone a “deep” change, recognizing that his earlier position had been based on racist stereotypes. He did not publicly concede that, and his account of his change of heart in his memoirs was somewhat defensive. But he had “gotten the message” of *Brown* and understood his role in the Japanese-American incarceration program differently. Overall, though, Warren was a person of deeply consistent moral views who happened to have occupied quite different professional roles.

LINDA GREENHOUSE: Harry Blackmun, of course, is the paradigmatic justice who evolved from “Minnesota twin” with Warren Burger early in his Supreme Court career to arguably the most liberal member of the Court by the time he retired 24 years later. There is no doubt about the facts of this change—whether on the death penalty, the rights of women, the interests of the poor, or almost anything else (with the general exception of criminal law and procedure).

I should note that “leftward drift” by a Republican-appointed justice is not unusual. Scholars including Lee Epstein, Jeffrey Segal, and Michael Dorf have done interesting work on the “preference change” phenomenon. To oversimplify: Republican justices from outside the Beltway who lack prior executive branch experience are, statistically speaking, highly likely to move leftward during their Supreme Court careers for a variety of reasons.

But Blackmun's shift was certainly more dramatic than most—all the more remarkable in that he came to the Court at the relatively advanced age of 61. What happened? Certainly, there were many factors at work, but it's my thesis that what set him on the road to change was the fortuity of having been assigned by Chief Justice Burger to write for the majority in *Roe v. Wade* near the very start of his tenure. The experience of being demonized on the one hand, lionized on the other, and of assuming the role of *Roe*'s last true defender was both a shattering and mind-expanding experience. I would argue that it had the effect of opening him to new perceptions and influences. His dissent in the later (1976) abortion funding cases (“there is another world out there”), in which the *Roe* majority failed to sustain the right of poor women to government-funded abortions, showed a new sensitivity to the rights of the poor. Contrast this with his dismissive 1973 opinion for the Court in *U.S. v. Kras*, rejecting a due-process challenge to the \$50 bankruptcy filing fee in a case involving a man who said he was too poor to pay. Blackmun came to be seen as the justice who spoke for the “little people,” but he didn't start out that way.

JILL NORGRÉN: Linda, would it be fair to say that even *Roe* shows a justice caught between more conservative, or cautious, views and an inclination to shift toward the liberal? I am thinking, specifically, about how Blackmun shaped *Roe* as a medical model and gave great deference to the authority of doctors (in the early 1970s, of course, overwhelmingly male) with respect to their first trimester counseling/decision making. Should we see Blackmun's *Roe* opinion as yielding a liberal outcome (decriminalization) using a conservative framework?

LINDA GREENHOUSE: Interesting question, Jill. There are many ways to look at the *Roe* saga, and I wouldn't claim that mine is the only way. But I actually think it's anachronistic to look at *Roe* in its time and place as presenting the justices with a liberal versus conservative choice—that is not how they saw it. Certainly, Warren Burger, Lewis Powell, and Potter

Stewart, all members of Blackmun's *Roe* majority, didn't see it that way and weren't looking to hide a liberal outcome within a conservative framework. In its medicalized discourse, *Roe* was really reflecting the evolving opinion of the elites of the time. Blackmun and the rest of the justices had an almost comically poor understanding of what they were launching. And the dissenters—White and Rehnquist—weren't any smarter; their beef with *Roe* was with what they saw as judicial activism, not with its substantive outcome.

JOAN BISKUPIC: In O'Connor's early tenure on the Burger Court, she aligned herself with the chief justice and with Justice William Rehnquist, her old friend



President Richard Nixon talks with newly sworn-in Associate Justice Harry Blackmun and Chief Justice Warren Burger, June 9, 1970.

from Stanford and Phoenix. She resisted overtures from liberal Justice William Brennan. In fact, the more he tried to persuade her, the more she stuck with the conservative justices. The notable exception to this early pattern was *Mississippi University for Women v. Hogan* (1982), in which she joined with Brennan and the other liberal justices to strike down the women-only nursing school policy. She began to move more to the middle of the bench with the addition of Justice Antonin Scalia in 1986 and then the retirement of Brennan in 1990. O'Connor resisted doctrinaire positions and tended to react to (push away) justices who were working from the extremes. Her views on abortion rights, particularly, changed as more conservative justices joined the Court. She switched from harsh criticism of *Roe v. Wade* in 1983 (the *Akron* case) to general acceptance of it in 1992 (*Casey*).

Justice O'Connor's pattern of moderation continued through the 1990s, and she

then moved to the relative left in her final years on the Court. This leftward move came after the 2000 *Bush v. Gore* decision and public complaint against the five justices who voted to stop the Florida recount. In 2001, she voted for the first time to uphold the drawing of a heavily black congressional district (in North Carolina) that was intended to boost the political power of minorities. She became more open to other race-conscious policies, as in the 2003 University of Michigan affirmative action case (*Grutter v. Bollinger*). She undercut her vote in *Bowers* with her support for the majority in the 2003 gay rights case, *Lawrence v. Texas*. She became more concerned about competent counsel in death penalty cases and was the fifth vote (with the more liberal justices) in a series of decisions finding defense counsel inadequate and voiding death sentences. Justice O'Connor's evolution to the left, of course, occurred as the Court collectively moved sharply to the right.

PHILIPPA STRUM: Brandeis did not change nearly as significantly as, say, Blackmun when he was on the Court. His views of the role of law, federalism, privacy, and “the curse of bigness” in both government and industry were set much earlier, but the alterations in his views *before* he joined the Court were quite dramatic.

Like most men of his era, the Brandeis of the late nineteenth century opposed woman suffrage. “Spoke against ‘Woman Suffrage’ before the Legislative Committee yesterday,” he wrote to his brother in 1884, referring to an appearance before the Massachusetts legislature. The professional world of Boston consisted of men—white men, of course—and they and their concerns initially set the boundaries of the young attorney's world. Within a few years, however, his work in a host of public causes had brought him into contact with talented and public-spirited women. Mary Kenney, a labor organizer, alerted him to the slaughter that ensued when armed Pinkerton guards were hired by Henry Clay Frick in 1892 to protect the Carnegie steel works from striking workers. It was Florence Kelley of the National Consumers' League and Josephine Goldmark, Brandeis's sister-in-law and Kelley's associate, who asked him to take on the

case of *Muller v. Oregon*. He gave Goldmark much of the task of pulling together the extraordinary mass of factual material that he fashioned into the first “Brandeis brief.” One of his secretaries was so capable that she became the Commissioner for the savings bank life insurance plan he invented. In 1912 he said, “I learned much from them [women] in my work”—he was convinced that they were crucial to creation of the kind of American society he wanted. He soon joined his older daughter in speaking to Boston audiences about the need for woman suffrage.

The Homestead strike led Brandeis to question his assumption, derived from his childhood with a father who was a highly successful small merchant, that employer-employee relations in the industrial age could be viewed as contracts between equals. “It took the shock of that battle [Homestead] to turn my mind definitely toward a searching study of the relations of labor to industry,” he said later, and his “searching study” would lead him first to advocate regularity of employment and legal recognition of labor unions, and then to champion employee participation in management, minimum wages and maximum hours, and profit-sharing.

The one area in which there was a difference in Brandeis’s thinking *after* he became a justice was speech—a subject that he had never dealt with as a lawyer. He joined the Court in 1916, when wartime speech prosecutions were being appealed. Brandeis signed onto the opinion in *Schenck v. United States* (1919), where Holmes first enunciated the “clear and present danger” doctrine. As he encountered subsequent speech cases, however, Brandeis became increasingly uneasy about the leeway the *Schenck* doctrine gave to the government to define “clear,” “present,” and “danger,” and to *Schenck*’s differentiation of the right of speech in peace versus wartime. When the case was decided, he later told Felix Frankfurter, “I had not then thought the issues of freedom of speech out; I thought that the subject, not through it.” He continued to think, however, and began writing dissents in cases involving prosecutions for speech. In them, he emphasized the facts of the cases and his own skepticism about the ability of isolated speech to have a criminal effect on the war effort or the security of the country. Eventually, his reexamination of the speech issue resulted in his soaring 1927 opinion in *Whitney v. California*, which

placed almost entirely unbridled speech at the heart of a democratic polity.

G. EDWARD WHITE: Holmes exemplifies the “deep” consistency to which I previously alluded. He was a judge for 50 years. He was rarely given the opportunity to revisit on the Court one of the issues he had decided as a Massachusetts judge; when he did, he endorsed the position he had previously taken. There has been a good deal of work on Holmes’s jurisprudential perspective, tracing his conceptions of law and the relationship between law and its social and philosophical contexts, and I am among the group of people who believed that it changed over time. But I would not call that sort of change fundamental: in my view Holmes simply rendered in different ways, at different times, his conviction that law was fundamentally the product of the wishes of people who held power at any given moment.

On one issue Holmes changed his views—like Brandeis, it was free speech—and the change occurred in the same time frame as that of Brandeis. Holmes had previously taken the position that the First Amendment’s protection for speech only applied to “prior restraints.” Subsequent punishment for subversive or otherwise offensive views could be imposed by Congress (or state legislatures) with impunity. When Congress passed two statutes criminalizing “seditious” speech in the wake of World War I, Holmes did not think there was any difficulty with that legislation. He did, however, abandon his view that the First Amendment only applied to prior restraints in an opinion for the Court, declaring one of the statutes constitutional as applied to literature urging soldiers to resist the draft. And then, in a case decided less than a year later, he dissented from a decision applying the other statute to leaflets urging workers at a munitions factory, which was supplying material to a campaign against the Bolsheviks in Russia, to strike. The cases were relatively similar, and in the latter Holmes wrote a dissent which launched the first modern rationale for protecting unpopular speech.

A comparison of Holmes’s majority opinion in *Schenck v. United States* (1919), the first of the cases, with his dissent in *Abrams v. United States* (1919), reveals that his conceptualization of the free speech issue changed. It is interesting to note that

two young “progressive” admirers of Holmes—Harvard faculty members Zechariah Chafee Jr. and Harold Laski—had tea with Holmes in the interval between the two cases and strenuously argued for a more speech-protective approach to First Amendment cases. Also in between these two cases, the U.S. post office told Holmes that a series of bombs, timed to be delivered to various prominent persons on May 1, the anniversary of the Bolshevik Revolution, had been intercepted at a main post office in Washington D.C., and that Holmes was among the persons to whom the bombs had been addressed. That act, like the pressure that friends of Sacco and Vanzetti put on Holmes to stay their convictions, was the sort that typically caused Holmes to reaffirm his commitment to excluding all such efforts to influence him.

JOHN Q. BARRETT: Robert Jackson acquired new knowledge and developed new opinions at various points during his lifetime—in his judicial opinions, which he wrote for himself in a quite personal and revelatory style, he often made that clear. In terms of legal doctrine, some examples of Justice Jackson moving over time include: (1) his developing discomfort with judges’ subjective interpretations of “due process,” including the arguments for total incorporation and for selective incorporations of various provisions of the Bill of Rights; (2) his retreat from the position that speech (or anything else) was preferred and thus to be protected more vigorously than other constitutional rights; and (3) his sober—some would, at least in hindsight, say his overly fearful—views in the years following his work as the chief prosecutor of the Nazis at Nuremberg, about the threat posed by, and thus the constitutional powers of government to respond to, communism in the United States.

In Jackson’s case, however, I am not sure that this means he changed very much as a judge. Jackson believed and wrote quite consistently across his life against judicial supremacy. Jackson was a democrat with faith in the political branches and the people. He believed that the Constitution makes those branches primary. He thus was restrained in concluding that it was within the Supreme Court’s power and proper for it to overrule the other branches very often.

Justice Jackson employed a method of judging that was pragmatic, one-case-at-a-time, and non-doctrinaire. New cases were, in his view, new occasions to figure out a proper decision, and he was candid in his writing about learning on the job, even if that involved changing his mind. In *McGrath v. Kristensen* (1950), for example, Jackson retreated from a legal opinion he had written as attorney general (which itself was at odds with a position that Jackson had argued to the Court without success as solicitor general). In his concurring opinion, he quite charmingly invoked numerous human precedents for changing one's mind, concluding "if there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all."

One can and should debate whether judicial unpredictability—the quality of being “hard to pigeonhole” as a vote going into a case, and in terms of overall jurisprudence—is a good thing or a failing. Edward Levi, a Jackson acquaintance, was privately critical of him in this respect; he once said that reading Jackson opinions was something akin to listening to the words of a guy talking as he sat on a barrel in a country store. Felix Frankfurter, Jackson's colleague, friend, and frequent ally in votes and judicial opinions on the Court, perhaps did not disagree much. Reflecting on Jackson's western New York roots, he described Jackson's approach as “Jamestown jurisprudence.”

ROGER NEWMAN: Through most of his life (until perhaps his last decade on the Court), there was very little change in Black's views. They evolved over time, of course, and in response to changing circumstances. He made mistakes that he later regretted, but it is hard to tell what they were, for he had a hard time admitting he made any. He did, however, change his mind on a few things: on his harshness toward a witness in his Senate investigations (he said if he saw him, even 25 years later, he would apologize for his behavior); on the manner of Congress's power to investigate; on the first flag salute case in 1940 (*Gobitis*), which he acknowledged publicly one year later; and in the 1968 *Logan Valley* case, where he dissented from the Court's extension of a position he had taken in 1945 in *Marsh v. Alabama*. When this was pointed out in conference, he said that he did not remember taking that position

and, if he had, he would now overrule it. This happened just as he was having a series of ministrokes.

Felix Frankfurter's retirement in 1962 took something out of Black—a necessary competitive foil, perhaps. With Arthur Goldberg replacing Frankfurter, Black now had the fifth vote to ensure a majority for so many of the ideas he had propounded in dissent for a generation. At the same time, however, Black had a heart scare and wrote fewer opinions than he had in 20 years. Thereafter, the structure of his opinions changed—no longer, in major cases at any rate, did he write his characteristic historical-policy opinions.

Meanwhile, cases involving the sit-in demonstrations and other direct action protests of segregated accommodations in the South began to come before the Court, challenging Black's long-held views of free speech under the First Amendment. From the first case in 1960, he knew he would take the side of property—while fearing what the Court would do. The Court considered the most important of these cases after the March on Washington in August 1963, a march that scared Black—he feared violence. But what about his newly strong feeling on property rights—his saying, for example, that his pappy could serve, or not serve, anyone of his choosing in his general store? If Black had felt that way earlier, he had so submerged his feelings that hardly anyone could see them. It was one of the great changes or conversions in American judicial history. He gave greater protection to private property, even tightened his First Amendment categories, and overall his views hardened, all the while trying to keep his essential constitutional structure intact. The change accelerated by 1966–67. Whether this was simply due to aging, or something deeper, I had to consider at some length. I often thought about Richard Hofstadter's observations on old populists and conservatism. But like so many other things, this did not exactly fit Black. In later drafts of my book, I shortened discussion of these changes to keep intact the general arc of his career. It seemed to work, but many questions linger; some, I fear, are unanswerable. This is both the joy and the frustration of the biographical enterprise.

JILL NORGREN: Always pragmatic, Belva Lockwood came to a set of political and

legal attitudes early in life and did not change her position on most of them. Was she an ideologue? I suspect that the men of her generation thought so. Using today's vocabulary, she subscribed to the idea of liberal democracy and was consistent in judging her society, policy, and the law through the lens that liberalism provided.

Lockwood's sense of self-worth and early life experiences with sex discrimination shaped her thinking on the need to end sex discrimination. She committed herself to changing social attitudes and to changing the law. As a teenager, she complained about unequal pay for similar work. Soon after moving to Washington, D.C., she lobbied for a bill that would require equal pay and job opportunities for female government employees. In speeches and articles, Lockwood called upon Americans to extend equal educational opportunity to girls and young women. She lobbied for equal professional opportunities for women attorneys, most notably in the legislation that led to opening the whole of the federal bar to qualified women lawyers. At the same time, however, I did find one or two cases from the early years of her career in which she introduced the law and tradition of coverture in support of her (woman) client's case. She supported equal rights for married woman, and I like to imagine (but can't be certain) that she winced when using coverture in this way. I see a small degree of change in how Lockwood argued the question of woman suffrage. In the early 1870s she relied upon ideas of natural rights and fundamental fairness. Later, she occasionally added a dollop of essentialism.

Lockwood's pragmatic side appears in her willingness to support either a constitutional amendment or state-by-state enfranchisement to win woman suffrage. Some reformers believed in one but not the other. Lockwood preferred the constitutional route, but she accepted the incremental method of state-by-state change or even, late in her life, congressional legislation granting all women the right to vote in elections for the House of Representatives (obviously, at a time when senators were not directly elected).

As a noted member of the international peace movement, Lockwood spoke regularly and consistently about the important role that arbitration could play in diminishing war. She condemned militarism and lobbied against congressional appropri-

tions for an enlarged navy. Years before talk of international courts was common, she introduced the idea in speeches and articles. Unlike some peace movement women, she did not abandon her commitment to the international peace movement when World War I began in Europe.

JUAN WILLIAMS: Thurgood Marshall's belief in the power of the law to deal with racial injustice never changed. But all around him the civil rights movement he helped to set in motion did change; it became insistent, passionate, and even violent. The growing lack of patience with the deliberate pace of legal argument and spoty enforcement of court rulings changed Marshall's identity in the public eye. He was transformed from rebel to an advocate for the legal system, an establishment icon on the Supreme Court.

Marshall's belief in the Constitution was the steady center to his legal approach to dealing with segregation sanctioned by the Court in *Plessy*. In the 1930s, during the earliest phase of his career as a lawyer, Marshall and his mentor, Charles Hamilton Houston, pioneered the theory that the law of "separate but equal" was being violated because there was no equality of facilities or protection of rights for blacks. Their success in getting courts to end segregation in graduate and professional schools made them national civil rights heroes. These cases attracted daily front page coverage in both black and white newspapers. The NAACP's court victories made Marshall a celebrity and placed him at the top rank of polls conducted to identify the nation's civil rights leaders.

Marshall's efforts constituted the leading edge of the national fight against segregation during the 1940s and much of the 1950s. What once seemed so speedy appeared slow, however, when compared with the urgency of bus boycotts, civil rights marches that drew hundreds of thousands, and protests that faced down dogs, fire hoses, and brutal cops. The young, more militant generation that came to the forefront in the 1960s viewed Marshall as a man defined by the courts and limited by the authority of the courts, even as they dared to go into the streets to challenge authority, including courts and the law.

Marshall never veered from his belief in the power of the law. He counseled that protest marches put people in unnecessary

danger by leading them into jail cells controlled by southern white sheriffs. He did not even attend the 1963 March on Washington; he believed it endangered civil rights legislation with its threat of race riots that would antagonize Congress and the federal courts. For Marshall, even the largest crowd listening to the most passionate speech by the most eloquent speaker, Dr. Martin Luther King Jr. did not create permanent change in civil rights—only favorable rulings by the courts and enforcement of the law could bring about lasting change.

By the end of his life, the young lawyer who was a star speaker at banquets and a cover boy for *Time* and *Jet* had become a reclusive, grumpy old man who felt unappreciated by the younger generation of civil rights activists.

*Jackson remains
important because
of Nuremberg,
the issues, and
his eloquent words.*

[JOHN Q. BARRETT]

PART V: The Biographer's Impact

EDITOR: In your view, to what extent do biographies influence historical understandings of public figures? What has been (or might be) the impact of your own biography on such understandings? What was your subject's view of his or her own impact/importance?

JOHN Q. BARRETT: As one who consumes and learns much from biographies, I am confident they influence general historical understandings of lives. Biographies revive early, often completed lives and bring those past people back in ways that matter to us. This is particularly true of "big" biographies—they unfold and analyze past lives in ways that allow us to understand and assess them better exactly because those lives have considerable meaning in ours.

While my work on Justice Robert H. Jackson—whom I see as not only, or even primarily, a judicial figure—is ongoing, his significance is increasingly being recognized by historians and by a much broader general public. Jackson was enormously important in his times and places. He remains important now because of the timeless trajectory of his autonomous life (from farm obscurity to world stage, rising and succeeding while also sometimes failing based most of the time on his solo endeavors); the permanent significance of the issues he grappled with impressively and wisely in his public life; and the authentic, revealing, and sparkingly eloquent written and spoken words that he left behind.

Justice Jackson was sincerely modest about his own importance in history, with the exception of one topic—Nuremberg. He did not claim his own importance there, but that was obvious, including to him, in his roles as architect, leader, and chief prosecutor of the principal Nazi war criminals. Jackson believed that Nuremberg itself—the trial story, the evidentiary record, and the legal precedent—was a high point in human achievement—one that would come to be either a foundation of later progress or an opportunity that the future was squandering. Regarding that course, Jackson took the long view—he knew that Nuremberg would have meaning over many more years than his own lifespan. That Bob Jackson was all of those things, including Nuremberg, and that these issues remain very much alive, make Jackson quite a contemporary life.

ROGER NEWMAN: Biography represents the values and mores of its times. But if our duty to the past is always to rewrite it, biography is somewhat different. We ask different questions of our subjects, but the facts of a life are not as malleable or open to interpretation as the facts of history (as it is written).

Cases change, and times change. I don't think that my book on Hugo Black would have been too much different if it had appeared in the late 1970s or the early 1980s, rather than in 1994. The material shaped the book much more than I did. I would have likely shaped it somewhat differently and asked different questions, but that would have been due to changes in me as biographer.

What would have been more different was the reception. The book appeared a generation after Black's death. In itself this was a problem in our age of ever-shortened historical perspective. His legacy was known and at its highest when he died; its largest areas were integral parts of the very fabric of American constitutional law. As happy as I was with the book's reception, it would have been larger if the book came out a decade earlier, not necessarily because of Black and his deeds, but because of the reigning ideology. By this, I do not mean liberalism or conservatism but rather the prevailing jurisprudential philosophy of originalism—original intent, as its purposely overlooked founder, Black, put it. I say overlooked because liberals did not know how to deal with him in light of his denial of a constitutional right of privacy, and conservatives did not want to deal with him because of his general view of law and politics. Hugo Black was left in an historical no man's land.

What would also have been different, if my book had come out in the 1970s, is that it would not have become the fountainhead of political attacks by religiously oriented critics of Black's opinion for the Court in *Everson v. Board of Education* (1947). This always comes back to Black's alleged anti-Catholicism because of his membership in the Ku Klux Klan. He went to his grave not knowing how to deal with the Klan, because his joining was solely politically inspired. I supplied the ammunition to his critics—that was part of my job as biographer. But not even in my wildest biographical dreams could I imagine that the book would be used in this way.

Black was a man of vaulting ambition, but he was more concerned with influencing the present than with how history would deal with him. He wanted history to be fair and helped prospective biographers to a point: he had an old-fashioned sense of rectitude and privacy, which limited the materials he would make available. This made my job more difficult, but it also enabled me to insert myself silently into the book, to mold and sculpt it in ways that I would not have otherwise done if, for example, Black had not burned his notes of the Court's conferences on his deathbed. In an odd way I am (almost) grateful for that.

The day has almost certainly passed when we will have a book like Mason's bi-

ography of Brandeis on the best-seller list for several months, selling upwards of 75,000 copies exclusive of book clubs. Readers of books on judges and courts are not looking for a nirvana or a supposedly golden age. They are looking for enlightenment, information, or perhaps confirmation of their beliefs, and we try to provide them. To do that, we must be faithful to the past on its terms while providing it on our readers' inevitably different terms. This, to me, is the essence and perpetual difficulty of the biographical art.

LINDA GREENHOUSE: The reason I think we still have an appetite for the seemingly endless stream of new biographies of John Adams, Jefferson, Lincoln, etc., is that there really is no such thing as a definitive biography. Each biography is

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[LINDA GREENHOUSE]

produced and received within the culture of the times. That may be particularly true for judicial biography, because the subject's judicial work can only be conveyed and understood within the context of cases and decisions—which with the passage of time may have taken on a different, possibly quite diminished, significance. I think that is particularly true for a subject such as Harry Blackmun, who certainly never would have interested a biographer had he not become a Supreme Court justice—in contrast to figures such as Hugo Black or Thurgood Marshall, whose pre-Court lives made them figures of historic interest, whether or not their last act included service on the Court.

I certainly did not intend or expect my Blackmun biography, which was published just a year after his papers opened to the public, to be definitive but rather to offer a first cut at the man and how he saw himself. (But neither, I might add, did I expect it to be treated so dismissively by Tinsley Yarbrough, who in his recent

Blackmun biography describes my book as basically a Blackmun family vanity product—his problem, not mine!). I think people will turn to my book in the future to see what made Blackmun the man he was and how he understood his own life. Analysis of what it all amounted to will come later. Toward the end of his life, he described himself as a cork bobbing on a fast-moving stream—in other words, as a passive traveler through life, propelled by events. There was some truth but perhaps also a bit of coyness in that self-description. As gamblers know, you make your own luck. He was presented with unasked-for opportunities, took them, and did the best he could.

PHILIPPA STRUM: Linda is right on target. Biographies reflect not only the values of the biographer but also the interests and values of the period during which the biography was written.

There were a few Brandeis tomes in existence when I began work on my biography. Alpheus Mason, in particular, had produced four different volumes about the justice. But because he wrote in the 1930s and 1940s, he could not, for example, parse how the “Brandeis brief” would influence cases such as *Brown v. Board of Education*. Alden Todd wrote a solid study of the Brandeis confirmation controversy. But these books didn't answer many of my questions, and here the historical moment and interests of the biographer come into play. A very secular Jew, I was struck by the question of why Brandeis, who for most of his life was quite uninterested in Judaism, suddenly plunged into and became a leader of the Zionist cause in 1914. The claim that Brandeis was beset by anti-Semitism was clearly wrong. Brandeis's former clerk, Paul Freund, who might have been less willing to discuss Brandeis with Mason while Brandeis was still alive, unknowingly gave me a clue by telling me about Brandeis's interest in Alfred Zimmern's *The Greek Commonwealth*. I was able to go through the Brandeis papers, which included bills from bookstores as well as letters written by Brandeis to family members and friends indicating that Brandeis distributed numerous copies of Zimmern's book. A colleague in Israel generously searched archives there to demonstrate that Brandeis had chosen Zimmern to accompany him on his one trip to Palestine.

Finally, a trip to the Bodleian Library at Oxford enabled me to find the letter from Brandeis that credited Zimmern with his Zionism, because Zimmern's description of Periclean Athens became Brandeis's dream for a Jewish entity in Palestine.

Similarly, as I read through Brandeis on workers' rights, I was intrigued by what seemed to be his advocacy of worker participation in management—something that none of the other biographies mentioned. As a member of the ACLU Board of Directors, I had access to Roger Baldwin, who had turned to Brandeis for career advice when Baldwin was a young Harvard graduate and kept in touch with him. I asked Baldwin if he thought there was any truth to my reading of Brandeis. "Worker management," the 90-plus-year-old Baldwin bellowed. "Of course, he was interested in worker management!" That gave me the courage to follow my hypothesis, which helped make sense of the outrage of conservative business leaders who depicted Brandeis as a flaming radical when he was nominated to the Court.

Finally, as a free speech proponent, I was particularly interested in the assumption that Holmes defined modern speech jurisprudence and Brandeis followed along behind him. I had the benefit of Felix Frankfurter's notes on conversations with Brandeis, which showed Brandeis regretting his agreement with Holmes's enunciation of the "clear and present danger" doctrine in *Schenck*. That led me to parse Brandeis's speech opinions more carefully and to detail the extent of his disagreement with Holmes. Brandeis's speech jurisprudence turned out to be much more radical than depicted in other treatments.

Brandeis was a supremely self-confident man who believed throughout his career that he could make a difference. We have no indication of what place in history he thought that would produce, but scholars certainly credit him with a major impact on the law. Earlier biographies presented one version of the justice, I presented another, and future biographers will no doubt add to or subtract from the picture.

JILL NORGREN: Belva Lockwood enjoyed a small reputation in legal history circles. But until the publication of my biography, she was little known in the larger world of American political and social history (or, curiously, women's studies).

History texts taking up the nineteenth-century women's movement gravitated to the safe and known women: Lucretia Mott, Elizabeth Cady Stanton, Susan B. Anthony, or Lucy Stone. In legal circles, Myra Bradwell satisfied the need to mention a woman. Without biography, a non-iconic public figure such as Lockwood remains unknown or, at best, becomes a cardboard cutout—a token name, a photo, a parenthesis in some text.

Biography is very time-consuming. The slow production of new studies constrains historians who want to break out of recycled data and explore or present new theories and analyses. It is certainly my view that biographies not only influence histor-

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ical understandings of public figures; in many instances, they create the fundamental understanding and the "revisions" in historical studies that are subsequently possible.

This biography of Lockwood will have an impact (I hope) on our understanding of the profession of law and women in partisan politics. It will also push us forward with respect to a far more nuanced understanding of the nineteenth-century women's movement. I would suggest that, along with the work of Barbara Babcock (on Clara Foltz), Jane Friedman (on Myra Bradwell), and Virginia Drachman (editor of the letters of the women lawyers' Equity Club), we now have the foundation that permits greater understanding of this "first generation" of women professionals—that is, their theories of the role of law in society and the way they used the profession of law both as a means of earning a living and for cause lawyering and lobbying. All this, "the first generation," is the subject of my next book.

Historians held my feet to the fire, as I sorted through the ways that Lockwood ought to be understood. I have been enormously grateful for their queries and cri-

tiques. With a book that is only a year old, I do not feel as if I know exactly what historians think and whether Lockwood will remain a footnote, or whether the biography will alter the contemplation of this corner of social, legal, and political history. I did appreciate when historian Christine Stansell wrote that it was discerning to see Lockwood's life as "large and anticipatory rather than eccentric and half-realized" (*New Republic*, April 2, 2007).

JUAN WILLIAMS: Thurgood Marshall's first experience with biography blew up when the writer decided to begin the book with stories of cases he had lost as a practicing attorney. That came after a best-selling book on the Court portrayed Marshall as a token racial appointment. Marshall's raw, angry, emotional reaction to both attempts to tell his story suggests that he understood the impact of biographies on the historical understanding of a Supreme Court justice. While members of the Court are known to the public, their work takes place out of the sight of television cameras—their conferences, deal making, and opinions are private. Public understanding of the justices' contributions to the Court is almost certainly the result of research and interpretation from the hand of the historian, especially the biographer.

In Marshall's case, his time on the Court is but one phase of his legal career. He won many important cases, which led to his victory as lead counsel in *Brown v. Board of Education*, arguably the most important Supreme Court decision of the twentieth century. Marshall was a man who liked to drink and tell bawdy jokes, and he liked women. He went to college with the writer Langston Hughes; his office at the NAACP's headquarters in New York was next to renowned activist and critic W. E. B. Du Bois. He butted heads with Attorney General Robert Kennedy, and served as solicitor general under, and drank bourbon with, President Johnson. He also argued with Malcolm X and did not think all that much of Dr. Martin Luther King Jr. And he did all of this before he was appointed to the Court.

Marshall feared being misunderstood and undervalued by writers. But his biggest fear was being forgotten. At a party to celebrate the history of the Office of the Solicitor General, he once caused a scene because he felt he was being ignored. It turned out that he was being

saved for last as the capstone example of a solicitor general who went on to become an associate justice of the Court. By then, however, Marshall had exited the party, making a show of his disgust with his omission from the historical account.

Marshall also struggled with the fact that young people in the 1960s readily chose Dr. King and Malcolm X as their heroes, while appearing to forget him and his contributions to history. He could not understand why Dr. King and Malcolm X became so celebrated for their civil rights work while, in his mind, he was overlooked. Dr. King and Malcolm X, of course, lived as public figures, and their speeches drew large crowds. Marshall lived well into his 80s, but for the last 30 years of his life he rarely made public appearances, much less speeches. The writers looking for the blood and drama of civil rights found prime subjects in King and Malcolm X; writers looking for the story of his years on the Court found him inaccessible, moody, and altogether a difficult subject.

Marshall's story is central to American history in the twentieth century and still relevant to the legal and racial issues now challenging our nation. I think future historians will view Marshall to be far more significant to the Court and the nation than today's writers.

JOAN BISKUPIC: In writing the O'Connor biography, I believed from the start that her final legacy would be understood only with time. I intended to look at her life through a particular lens. I emphasized the politician who came to Washington knowing how to count votes and who greatly influenced the law through an ability to work the (ideological) middle. I was interested in showing how this first woman justice bested the men behind the scenes, all the while presenting herself more in the mode of the Junior League president she once was. With Justice Scalia, I am similarly examining him in a certain context, this one more political and tied to the jurisprudential counterrevolution. That is not to say that I did not dig deeply into Justice O'Connor's life story and legal approach, as I am doing with Scalia. But I consider these books more thematic than comprehensively biographical.

Historians' ultimate views of any justice will be determined by time and the authors' vantage points. Certainly, assess-

ments of a polarizing figure such as Justice Scalia will vary. For my part, I have tried to find out as much as I can about the early influences on my subjects, to build a record of how they operated behind the scenes, and to follow the trajectory of their lives in our times. As much as I have been interested in making my subjects more understandable and relevant now, I have tried to develop enough background to contribute meaningfully to the historical record and the biographers who come after me.

G. EDWARD WHITE: I suspect that anyone who writes on public figures, especially those that have been the subject of several studies over the years, struggles with the issues raised here. Competent biographical treatments of a public figure surely prolong that subject's visibility. They can even create a reputation for the subject when obscurity was imminent.

I like to paraphrase Holmes's aphorism that all ideas are dead in 25 years. I think he is saying that an important part of the power of ideas is their cultural resonance; and as a culture changes, contemporary actors see historical issues and actors differently. This not only produces revisionist history, it also affects the reputations of visible subjects. Thus, a great deal seems to turn on the particular fit between an historical actor and persons living in a different age who are tempted to write about that actor. Sometimes, the fit seems to be particularly felicitous, as when Albert Beveridge, in the process of retiring from the Senate, resolved to write a major biography of Chief Justice John Marshall. Beveridge, a "progressive" politician with conservative social instincts, rediscovered Marshall just at the time when progressive historiography was beginning to enter the American academy. Although Beveridge's treatment of Marshall (published during World War I) was uncritical to a fault, it was sufficiently thorough and absorbing to forestall other biographies for generations. The result was that a progressive caricature of Marshall—the arch-defender of vested rights, the Federalist Party, and conservative nationalism—was absorbed and partially obliterated by Beveridge, forestalling other book-length studies of Marshall until the 1960s, when more nuanced treatments began to appear. In fact, it took the emergence of revisionist treatments of the founding era by Bernard Bailyn and Gordon Wood to stimulate histo-

rians, and eventually biographers (such as Kent Newmyer) to take another searching look at John Marshall.

The biographer and his or her perspective can play a very important role in shaping the historical image of a subject. But over time, certain subjects will transcend the historically confined concerns of biographers. I could not have written on Warren in the early 1970s in the same way I did in the early 1980s. When I decided to write on Holmes in the late 1980s, the human dimensions of a judicial life were coming to be considered a relevant part of a portrait of judge, whereas previously most judicial biographies had not focused much on judges' private lives. (One might compare Mark DeWolfe Howe's two volumes on Holmes, published in 1957 and 1962, in which he alludes to some personal issues only in the most subtle and tentative fashion, with Sheldon Novick's and Liva Baker's biographies of the early 1990s that spend more time on Holmes's personal life than on his judicial career). Thus, it is not only what a historical subject brings to the biographer—how interesting and multidimensional the subject's life was—but what the biographer chooses to emphasize. And that choice is not entirely voluntary—it is the product of the biographer's culture.

Our interpretations of the lives of our subjects will diminish in influence over time, as the cultural factors that made us choose to emphasize particular themes of a subject's life will cease to become resonant. Still, sometimes there is so happy a fit between a subject's life and the temperament or inclinations of a biographer that the latter manages to crawl inside the former in a fashion that produces a memorable, enduring portrait. I have written on the lives of some judges because I felt I should, and on others because I wanted to for some compelling reason. I suspect the latter group of sketches may hold up better. But in the end, "fame" in a historical actor and "scholarly influence" for a biographical work confront the same obscuring forces in the flow of time. Thus, it is a sort of ironically delicious conundrum to confront in choosing to do biography. Is one resurrecting and helping perpetuate the reputation of a historical figure, or only participating in a larger process in which that figure's reputation is consigned to oblivion? ■

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