The Journal of Appellate Practice and Process

Volume 11 | Issue 2 Article 2

2015

# The Last Word

Ross E. Davies

Follow this and additional works at: https://lawrepository.ualr.edu/appellatepracticeprocess

 Part of the Judges Commons

## Recommended Citation

Ross E. Davies, *The Last Word*, 11 J. APP. PRAC. & PROCESS 229 (2010).
Available at: https://lawrepository.ualr.edu/appellatepracticeprocess/vol11/iss2/2

This document is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in The Journal of Appellate Practice and Process by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ESSAY

# THE LAST WORD*

Ross E. Davies**

> *Confidence in the competence of the Court has not been won by the presence of an occasional man of genius.*[1]

Once in a great while a member of the Supreme Court of the United States tries to get the last word. "Last word," that is, in an official sense—a late-breaking opinion issued by a justice acting as a justice. Not informal last words such as anonymous

* Copyright 2010 Ross E. Davies.

** Professor of law, George Mason University School of Law; editor-in-chief, the Green Bag. Thanks to Jon Blue, James Blumstein, Mark Brandon, Ofemi Cadmus, Mike Davies, Sarah Duggin, Paul Edelman, Elizabeth Engdahl, Patricia Evans, Eugene Fidell, Jeff Flannery, Stephen Goldman, Arthur Hellman, Rebecca Krauss, Nelson Lund, Ira Brad Matetsky, Thomas R. Murphy, Richard Nagareda, Erin O'Hara, James Oldham, Edward Rubin, Suzanna Sherry, Kevin Stack, Max Stearns, Mark Tushnet, Stephen Wermiel, and Todd Zywicki; to participants in workshops held at the Vanderbilt Law School by the Working Group in Constitutional Law and Theory, at the Catholic University of America Columbus School of Law by the D.C. Area Legal History Roundtable, at the Lillian Goldman Law Library at Yale Law School, and at the George Mason University School of Law by the Robert A. Levy Fellow Program; and to the George Mason Law and Economics Center for its support.

1. Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 187 (Macmillan Co. 1928).

stabs at colleagues via the press,[2] or extemporaneous ejaculations from the bench,[3] or post-retirement disclosure of changes of heart.[4] Official, juridical attempts to get the last word come in two forms:

> 1. *The surprise opinion*, meaning a separate opinion (a concurrence or dissent) issued by a justice without reasonable notice to the other justices, after they have publicly committed themselves to a disposition of the case that does not, of course, account for the late-breaking opinion, and

---

2. *See e.g.* Dennis J. Hutchinson, *The Black-Jackson Feud*, 1988 S. Ct. Rev. 203 (describing the practice); David J. Garrow, *The Supreme Court and the Brethren*, 18 Const. Commentary 303 (2001) (same).

3. *Compare e.g. Caritativo v. Cal.*, 357 U.S. 549 (1958), & *Cooper v. Aaron*, 358 U.S. 1 (1958), *with* Alan C. Kohn, *Supreme Court Law Clerk 1957–1958: A Reminiscence*, 11 J. Sup. Ct. Hist. 40, 49 (1998) (describing Chief Justice Warren's reaction to opinion read from the bench by Justice Frankfurter) & Norman Dorsen, *The Supreme Court and Its Justices Fifty Years Ago*, 2008 Green Bag Alm. 47, 55–56 (same); *see also e.g.* David G. Farrelly, *Justice Harlan's Dissent in the Pollock Case*, 24 S. Cal. L. Rev. 175 (1951) (describing on-the-bench conflict between Justices Harlan and Field); Christopher W. Schmidt and Carolyn Shapiro, *Oral Dissenting on the Supreme Court*, 19 Wm. & Mary Bill Rts. J. 75, 95 (2010) (describing Justice McReynolds's famous oral dissent in the Gold Clause Case, *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935), in which he reportedly said "something to the effect that 'the Constitution has gone!'"); *Constitution Gone, Says M'Reynolds*, 84 N.Y. Times 1 (Feb. 19, 1935) (noting that Justice McReynolds's oral delivery of his dissenting opinion came as a "complete surprise," summarizing the opinion's content, and describing the reactions of "startled spectators" in the courtroom).

4. *See e.g.* Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong*, 13 Natl. L.J. 3 (Nov. 5, 1990) (discussing Justice Powell's October 18, 1990 statement about his vote in *Bowers v. Hardwick*, 478 U.S. 186 (1986): "I probably made a mistake in that one. . . . When I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments."); John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* 530 (Maxwell Macmillan 1994) (same). Pre-retirement confession of error is permitted. *See e.g. Callins v. Collins*, 510 U.S. 1141, 1143–59 (1994) (Blackmun, J., dissenting) (containing, on page 1145, Justice Blackmun's famous statement: "From this day forward, I no longer shall tinker with the machinery of death."); *Flood v. Kuhn*, 407 U.S. 258, 286 n. 1 (1972) (Douglas, J., dissenting) ("While I joined the Court's opinion in *Toolson* . . . , I have lived to regret it; and I would now correct what I believe to be its fundamental error."); *Jones v. Opelika*, 316 U.S. 584, 623 (1942) (Douglas, Black, & Murphy, JJ., dissenting) ("Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided."). For a thoughtful discussion of judicial recantation generally, see Eugene R. Fidell, *Judicial Recantation: Homage to Baron Bradwell*, 71 Judicature 259 (Feb.–Mar. 1988).

2. *The surprise revision*, meaning a justice's significant alteration of an opinion after other justices have publicly committed themselves, presumably at least in part in reliance on the original version.

As a practical matter, justices who want the last word can always get it, because there is no stopping them from opining on whatever they want, whenever they want, even in an official capacity.[5] But as an equally practical matter, countervailing forces inside and outside the Court tend to frustrate efforts to get the last word. A last-word opinion, it turns out, is bad for everyone. It does not achieve the results sought by its author, and it does tend to harm the author. And it usually harms the Court as well. The futility of last-wordism at the Court is reflected in the apparent shyness of past perpetrators: They do not make *second* attempts to get the last word.[6] Part I of this article offers five examples of this last-word dynamic. (As I explain in Part III, there are no very recent examples because the essential evidence will often be in memories that fade and eventually disappear and files that tend to be opened to the public at a time only long (and getting longer) after the event.) Part II points out similarities among those five cases and suggests some conclusions that might be drawn from them, including explanations for the persistence of this sort of behavior. Part III considers measures the Court or Congress

5. Consider, for example, the practice of some justices of arranging for unofficial commercial publication of their opinions in chambers in the years before the Court permitted publication of such opinions in the official *United States Reports*. Ira Brad Matetsky, *The Publication and Location of In-chambers Opinions*, 4 Rapp vi, vi-xv (Pt. 2, 2005); *see also* Cynthia J. Rapp, *In Chambers Opinions by Justices of the Supreme Court*, 5 Green Bag 2d 181 (2002). Then there is the intriguing problem—a problem outside the scope of this article—of the extent to which justices who dissent in one case are bound to treat the law of that case as binding upon them in later cases "when the answer in the second case depends on the Court having already answered the initial question that the baseline dilemma raises." Suzanna Sherry, *Justice O'Connor's Dilemma: The Baseline Question*, 39 Wm. & Mary L. Rev. 865, 870 (1998).

6. "Apparent" is a necessary qualification because my research has not been comprehensive. I doubt it could be. In contrast, first-word maneuvers by presidents can sometimes be quite effective. *See* M. Elizabeth Magill, *The First Word*, 16 Wm. & Mary Bill Rights J. 27 (2007).

might take to prevent these seemingly rare but invariably useless and harmful frolics.

Before getting down to cases, let us be clear about what is and what is not a last-word opinion. The crucial term is surprise —it must be an opinion or revision that comes as a surprise to the other justices. The definition of "surprise" is, however, a moving target. An act that would surprise a justice working in one period of the Court's history (say, for example, the mid-nineteenth century during the chief-justiceship of Roger B. Taney) might not have the same effect on a justice working a century later on a different Court with a different culture. Thus, a mid-nineteenth-century justice would "silently acquiesce" as a matter of routine in an opinion delivered without prior circulation, so long as the general thrust of the opinion was not inconsistent with what that justice had heard during the Court's internal "mooting" of the case and the announcement of the decision in open Court.[7] But that same justice would expect an opportunity to examine and respond to an opinion that was later revised to add "positions and arguments which are not recollected as having been propounded from the bench."[8] In contrast, by the mid-twentieth century, delivery of an opinion without prior circulation had become deeply inconsistent with Court norms.[9] At the same time, however, occasional late-breaking opinions published not only without prior circulation but also without prior announcement from the bench had become acceptable, so long as the justice seeking to produce

7. *See* G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U. Pa. L. Rev. 1463, 1469–85 (2006); Ruth Bader Ginsburg, *Informing the Public About the U.S. Supreme Court's Work*, 29 Loyola U. Chi. L.J. 275, 283 (1998).

8. *Passenger Cases*, 48 U.S. 283, 515 (1849) (Daniel, J., dissenting).

9. *See* White, *supra* n. 7, at 1503–05. For an interesting travelogue of the rise of circulation and the decline of "silent acquiescence," see the docket books in the Morrison Waite papers at the Library of Congress. *Compare e.g. Pace v. Burgess*, no. 170, Docket Book, Chief Justice, October Term, 1875 at 224, in Papers of Morrison Waite, Lib. of Cong., Manuscript Div., Box 30, *with Pace v. Burgess*, 92 U.S. 372 (1876). In this case, an opinion for a unanimous Court originally assigned to Justice Hunt was "disapp[roved]" on April 8, 1876, and then reassigned to Justice Bradley, whose opinion for the Court was "app[roved]" on April 15 and announced on April 17. *See Page v. Burgess* in Docket Book, October Term 1875, *supra* this note.

such an opinion received in advance a one-time license from his colleagues.[10]

In other words, there have always been both conventional constraints and identifiable exceptions in appropriate circumstances. Supreme Court justices have, on the one hand, tended to permit their colleagues some latitude—with just how much and of what sort varying with the times—when it comes to delivering opinions without first sharing every word with the entire Court. But, on the other hand, the justices have never entirely waived the rarely articulated but jealously guarded right to what might be called judicial notice and an opportunity to be heard in concurrence with or dissent from the opinions of their colleagues.[11] An opinion delivered in violation of the justices'

---

10. *See e.g. Stassen for Pres. Citizens Comm. v. Jordan*, 377 U.S. 914 (1964) (Douglas, J., joined by Warren, C.J., & Goldberg, J., dissenting on May 18 from a decision announced April 24, "pursuant to the reservation made at the time" that "[o]pinions may be filed in due course"); *Stassen for Pres. Citizens Comm. v. Jordan*, in J. of the S. Ct. of the U.S. (Apr. 24, 1964) at 289 ("The Chief Justice, Mr. Justice Douglas, and Mr. Justice Goldberg dissent. Opinions may be filed in due course."); *United Steelworkers of Am. v. U.S.*, 361 U.S. 39, 44 (1959) ("Mr. Justice Frankfurter and Mr. Justice Harlan: In joining the Court's opinion we note our intention to file in due course an amplification of our views upon the issues involved which could not be prepared within the time limits imposed by the necessity of a prompt adjudication of this case," and referring to 361 U.S. 39, in which they issued their opinion on December 7, one month later.); *Reconstruction Fin. Corp. v. Denver & R.G.W. R.R.*, 328 U.S. 495, 536 (1946) (Frankfurter, J., dissenting) ("Mr. Justice Frankfurter dissents, and will set forth the detailed grounds for his dissent in an opinion to be filed hereafter."); F.F. [Felix Frankfurter], memorandum to "Dear Brethren," June 3, 1946, in Papers of William O. Douglas, Lib. of Cong., Manuscript Div., Box 123 (requesting the accommodation reported with the *Reconstruction Finance* decision) [hereinafter "Douglas Papers"]; *see also Hirota v. MacArthur*, 338 U.S. 197, 198 (1948 & 1949) (Douglas, J., concurring) (indicating that "Mr. Justice Douglas concurs in the result for reasons to be stated in an opinion.").

This approach has sometimes been followed by the Court as a whole in hurry-up cases such as *Ray v. Blair*, 343 U.S. 154, 155 (1952) (per curiam issued in anticipation of "a full opinion which, when prepared, will be filed with the Clerk") & 343 U.S. 214 (1952) (the full opinion, with a dissent by Jackson, J., in which Douglas, J., joined), and *Ex parte Quirin*, 317 U.S. 1, 20 (1942) ("On July 31, 1942, . . . [b]y per curiam opinion, we announced the decision of the Court, and that the full opinion in the causes would be prepared and filed with the Clerk."). *See also* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 Geo. L.J. 1, 84 n. 708 (1979) (citing *Hirota* and *Denver & R.G.W. R.R.*); Bennett Boskey, *Speed and the Supreme Court*, in Bennett Boskey, *Some Joys of Lawyering* 83–84, 86 (Green Bag Press 2007) (discussing *Quirin* and *Steelworkers*).

11. *See e.g.* Earl Warren, *The Memoirs of Earl Warren* 299 (Doubleday & Co. 1977) (noting that "it was our invariable practice not to announce the decision in any case until all

contemporary understanding of that judicial right would be a surprise—a last-word opinion.[12]

The justices' prickliness on this subject should come as no surprise to even a casual observer of the Supreme Court, or of any court for that matter. After all, as Justice Daniel explained in a "Note" to his opinion in the *Passenger Cases*, converting opinion-writing into a potentially unending game of public judicial ping-pong would undermine not only the capacity of a multi-member court to engage in constructive deliberation, but also the possibility of communicating to the public reliable explanations of decisions by that court:[13]

> In the opinions placed on file by some of the justices constituting the majority in the decision of this case, there appearing to be positions and arguments which are not

---

of our views had been expressed"); *cf. Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974) ("The Court observed that notice and an opportunity to be heard [for parties to a case, not judges] were fundamental requisites of the constitutional guarantee of procedural due process.").

12. There are other kinds of surprises that the justices can and occasionally do spring upon one another. One recurring phenomenon is the circulation very close to the end of a term of draft opinions proposing that the Court either reach a result not anticipated by some of those who had participated in the deliberations or reach an anticipated result but do so on unanticipated grounds. *See e.g.* Felix Frankfurter, *Rowoldt v. Perfetto* (draft opinion circulated June 19, 1957) (bearing handwritten notation: "Passed To be argued in 1957 Term"); T.C.C. [Tom Clark], *Memorandum to the Conference* (June 19, 1957) (indicating that Justice Clark was then considering a motion "that the case be carried over to next Term"); F.F. [Felix Frankfurter], *Memorandum for the Conference* (June 20, 1957) (proposed per curiam attached), all in Papers of Hugo L. Black, Lib. of Cong., Manuscript Div., Box 331 [hereinafter "Black Papers"]; *Rowoldt v. Perfetto*, 355 U.S. 115 (1957) (noting that case was reargued in October 1957); *Rowoldt v. Perfetto*, 354 U.S. 934 (1957) (restoring case to calendar for re-argument); *see also e.g.* F.F. [Felix Frankfurter], *Memorandum for the Conference* (June 12, 1947); Frank Murphy, *Memorandum to the Conference* (June 18, 1947); F.F. [Felix Frankfurter], *Memorandum for the Conference* (June 18, 1947), all relating to the "lateness" of the opinion for the Court in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and all in Douglas Papers, *supra* n. 10, Box 139; *Chenery Corp.*, 332 U.S. at 209 (Jackson, J., dissenting, joined by Frankfurter, J.) (indicating that the Jackson/Frankfurter dissent was issued on October 6, 1947, and that the opinion of the Court was issued on June 23, 1947).

I thank Stephen Wermiel for emphasizing this kind of behavior. For a modern example involving Justices William Brennan and Sandra Day O'Connor, and displaying justices' tendency to denounce and resist it within the confines of the Court, see Seth Stern & Stephen Wermiel, *Justice Brennan: Liberal Champion* 534–35 (Houghton Mifflin Harcourt 2010).

13. On top of which there would be the effect on the parties, who might never know for certain the outcome of their dispute, or the reasons for it.

> recollected as having been propounded from the bench, and which are regarded as scarcely reconcilable with the former then examined and replied to by the minority, it becomes an act of justice to the minority that those positions and arguments, now for the first time encountered, should not pass without comment. Such comment is called for, in order to vindicate the dissenting justices, first, from the folly of combating reasonings, and positions, which do not appear upon the record; and, secondly, from the delinquency of seeming to recoil from exigencies, with which, however they may be supposed to have existed, the dissenting justices never were in fact confronted. It is called for by this further and obvious consideration, that, should the modification or retraction of opinions delivered in court obtain in practice, it would result in this palpable irregularity; namely, that opinions, which, as those of the court, should have been premeditated and solemnly pronounced from the bench antecedently to the opinions of the minority, may in reality be nothing more than criticisms on opinions delivered subsequently in the order of business to those of the majority, or they may be mere afterthoughts, changing entirely the true aspect of causes as they stood in the court, and presenting through the published reports what would not be a true history of the causes decided.[14]

And yet the occasional justice has nevertheless sought the last word. Why? And what might be done about it?

## PART I

There was a time when getting in the last word was, at least as a formal matter, an unexceptional prerogative of seniority. In the days of the seriatim opinion at the Supreme Court—1792 to 1800—the justices sometimes delivered individual opinions

14. *Passenger Cases*, 48 U.S. at 515–16 (Daniel, J., dissenting); *see also e.g.* J. Catron to John McLean (May 19, 1837), in Papers of John McLean, Lib. of Cong., Manuscript Div., Box 10/Reel 5 (confessing that "I feel very sure that but one cause is left me, either tamely to follow and permit the man to preside in the Court & decide every cause in his own way, or to act independently of him, with little or no consultation" and expressing a desire for proceedings in which "the presiding judge consults the judge on the bench in all cases, and then delivers the conclusions").

from the bench in reverse order of seniority.[15] Plainly, this gave the last justice to speak (either the Chief Justice or, in his absence, the presiding senior associate justice) the last word.[16] But this was not a problem because it surprised no one. That was simply the way the Court operated, some of the time, and the justices surely accommodated their deliberative and communicative processes to this reality. But seriatim opinions were never the dominant form, and with the arrival of Chief Justice John Marshall in 1801 they all but disappeared. During Marshall's chief-justiceship, consensus—or at least, as Professor White has accurately put it, "silent acquiescence"—was fairly common. And there does not appear to have been any trouble with the timing of separate opinions when there were concurrences or dissents, perhaps because of the widely recognized collegiality of the Marshall Court's deliberations and interpersonal relations.[17]

Marshall's successor, Roger B. Taney—who served as chief justice from 1836 to 1864—was a judge who "conduct[ed] himself with great urbanity and propriety."[18] But he was not in Marshall's league as a strong judicial leader, being "more permissive toward dissent and somewhat less astute as a political statesman."[19] And so, by 1841 Taney found himself writing disapprovingly to Richard Peters (the official Reporter of the Court's decisions) that, "[a] fashion has lately grown up, to examine after Term, opinions delivered in court, and to write

15. *See* Natalie Wexler, *In the Beginning: The First Three Chief Justices*, 154 U. Penn. L. Rev. 1373, 1412–18 (2006).

16. *See* David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888*, at 17 & 17 n. 92 (U. Chicago Press 1985).

17. *See generally e.g.* G. Edward White, *Oliver Wendell Holmes Devise History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815–35* (Macmillan Publ. Co. 1988); Jean Edward Smith, *John Marshall: Definer of a Nation* (Henry Holt & Co., Inc. 1996); R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (La. St. U. Press 2001).

18. Joseph Story to Charles Sumner (Jan. 25, 1837), in William W. Story, *Life and Letters of Joseph Story* vol. II, 266 (Lawbook Exchange Ltd. 2000) (facsimile of 1851 edition).

19. G. Edward White, *The American Judicial Tradition* 154 (3d ed., Oxford U. Press 2007).

answers to them to be published in the reports."[20] It had, in other words, become acceptable in the Taney Court for the back-and-forth of opinion formation and memorialization to continue not only after a decision had been "mooted" among the justices in private, an opinion announced in court, and a written version issued, but also right up until the moment the Reporter sent the collected opinions of the justices for the Term to the printer. While this was not the same as seriatim opinion delivery—it lacked the constraining influences of formality, consistency, and near-simultaneous timing of delivery—it did include one essential: notice, at least of a general sort. That is, the justices knew that after an opinion had been delivered in court and the written version had been turned over to the Reporter for publication, other members of the Court might step in and draft separate opinions. Even Taney himself unashamedly engaged in this practice.[21]

It was in this environment that Justices Henry Baldwin and John McLean overstepped, surprising and annoying their colleagues and outside observers of the Court: Baldwin in 1837 by overextending the later-written comment approach, McLean in 1841 by transferring it to the courtroom itself. Their behavior, in turn, foreshadowed Taney's own destructive effort in 1857 to get the last word in *Dred Scott v. Sanford*.[22]

### *Henry Baldwin (1837)*

President Andrew Jackson appointed Henry Baldwin of Pennsylvania to the Supreme Court in 1830, where he served until his death in 1844.[23] Baldwin was by all accounts an accomplished lawyer, but he proved to be an increasingly erratic

---

20. *See* Carl B. Swisher, *Oliver Wendell Holmes Devise History of the Supreme Court of the United States: The Taney Period, 1836–64* at 302 (Macmillan Publ. Co., Inc. 1974) (quoting Roger B. Taney to Richard Peters (Mar. 22, 1841)).

21. *See e.g.* R.B. Taney to Richard Peters (Mar. 27, 1839), reprinted in Samuel Tyler, *A Memoir of Roger Brooke Taney, LL.D.* 307–08 (John Murphy & Co. 1872).

22. 60 U.S. 393 (1857), *superseded by* U.S. Const. amends. XIII, XIV.

23. *See generally* Frank Otto Gatell, *Henry Baldwin*, in *The Justices of the United States Supreme Court: Their Lives and Major Opinions* vol. 1, 313 (Leon Friedman & Fred L. Israel eds., Chelsea House 1997); Swisher, *supra* n. 20, at 49.

and abrasive colleague during his years on the Court.[24] Just as importantly for present purposes, he was a failure in matters of personal finance. By the early 1830s, he was in serious and deepening financial difficulty as a result of several ill-advised investments in real estate, as well as other fiscal misfortunes.[25]

This unstable combination of unpleasant personal quirkiness and financial stress reached a crescendo of a sort in the spring and summer of 1837, when Baldwin cornered the market for some of his own Supreme Court opinions, publishing them privately, rather than in the Court's official reports (commonly known as *Peters' Reports* during this period, after Peters, the official Reporter). Baldwin distributed his opinions in the four most important cases of the January 1837 Term—*New York v. Miln*,[26] *Poole v. Fleeger*,[27] *Briscoe v. Bank of Kentucky*,[28] and *Charles River Bridge v. Warren Bridge*[29]—in a book titled *A General View of the Origin and Nature of the Constitution and Government of the United States, Deduced from the Political History and Condition of the Colonies and States, from 1774 until 1788, and the Decisions of the Supreme Court of the United States, together with Opinions in the Cases decided at January Term, 1837, arising on the Restraints on the*

---

24. Baldwin's less attractive attributes may have been partly a result of some sort of mental illness. *See* Carl Brent Swisher, *Roger B. Taney* 360 (Macmillan Co. 1935) (describing Baldwin as "at times intellectually unbalanced"); *see also* Swisher, *supra* n. 20, at 218 (quoting Joseph Story to Richard Peters (May 15, 1844)), in Richard Peters Correspondence, Cadwalader Collection, series 1, box 1, HSP Collection #1454, Historical Socy. of Pa., Phila., Pa. ("He had generous impulses, but his mind was unhappily organized for the exercise of the social virtues.")). His quirks and occasional unpleasantnesses did not make him an ogre. He was, for example, the only member of the Court at Chief Justice John Marshall's side when he died on July 6, 1835. Swisher, *supra* n. 20, at 28. *See also* Robert D. Ilisevich, *Henry Baldwin and Andrew Jackson: A Political Relationship in Trust?* 120 Pa. Mag. Hist. & Biog. 37, 52 n. 48 (Historical Socy. of Pa. Jan./Apr. 1996) (summarizing Baldwin's erratic behavior).

25. *See* Swisher, *supra* n. 20, at 50–52; Smith, *supra* n. 17, at 510 & 510 n. * (describing Baldwin's behavior and noting that his "financial difficulties . . . eventually forced him into bankruptcy").

26. 36 U.S. 102 (1837).

27. 36 U.S. 185 (1837).

28. 36 U.S. 257 (1837).

29. 36 U.S. 420 (1837).

*Powers of the States*.[30] In addition to the four opinions, *A General View* contained a lengthy essay by Baldwin on his views of constitutional interpretation.

There is no evidence that Baldwin ever disclosed to his colleagues that he was writing opinions in *Miln*, *Poole*, *Briscoe*, and *Charles River Bridge*, let alone that he was planning to publish and sell them on his own. For some, the news may have come when they first saw the book. Justice Joseph Story seemingly learned about it from his friend Peters the Reporter, well after the end of the January 1837 Term.[31] Writing from Boston on May 12, 1837, in reply to a letter from Peters, Story was "greatly surprized at the course taken by Judge Baldwin."[32]

---

30. (John C. Clark 1837) [hereinafter "*A General View*"]. There are two versions of *A General View*, both dated 1837 and both printed by John C. Clark of Philadelphia. The differences are in the title pages and in the contents. One has this title: "A General View of the Origin and Nature of the Constitution and Government of the United States, Deduced from the Political History and Condition of the Colonies and States, and Their Public Acts in Congresses and Conventions, from 1774 till 1788, Together with Their Exposition by the Supreme Court of the United States, and Rules of Construction in Relation to Such Provisions of the Constitution as Impose Restraints on the Powers of the States." The other has the title spelled out in the text above. There are several differences between the two titles, but the presence of "together with Opinions in the Cases decided at January Term, 1837" in the second title is the only significant one for present purposes. The book with the first title page contains only Baldwin's essay on constitutional interpretation. The book with the second title page—the "together with Opinions" title page—has three additional features: Baldwin's opinions in *Miln*, *Poole*, *Briscoe*, and *Charles River Bridge*, plus an errata page, plus an index. Records of the Clark printing company show an order by "Judge Baldwin" for 500 copies of "Comm. on Constitution & *Opinions on 4 Cases*" on July 15, 1837. Order Book, in Clark & Raser Records, box 2, HSP Collection #1721, Historical Socy. of Pa., Phila., Pa. (emphasis added). Correspondence between Peters and Story indicates that Story had a published copy of *A General View* in hand no later than June 14, 1837. *See* Joseph Story to Richard Peters (June 14, 1837), in *Life and Letters of Story*, *supra* n. 18, at 273. This combination of (1) changes in title page and contents, (2) a July 17 order for a version with "Opinions on 4 Cases," and (3) evidence that a version of *A General View* was in circulation before that order was placed, might be taken to indicate that Baldwin published an essay-only version of *A General View* first and then added his opinions (as well as an index, an errata page, and an updated title page) to a second edition in July.

31. The Court handed down its last decisions of the Term on February 16. *See* Anne Ashmore, *Dates of Supreme Court Decisions and Arguments* 30 (2006), www.supremecourtus.gov/opinions/datesofdecisions.pdf (accessed Feb. 21, 2011; copy on file with Journal of Appellate Practice and Process).

32. Joseph Story to Richard Peters (May 12, 1837), in Richard Peters Correspondence, Cadwalader Collection, series 1, Box 1, HSP Collection #1454, Historical Society of Pa., Phila., Pa [hereinafter "Peters Correspondence"].

Conscious, surely, of the doubts readers (including his colleagues on the Court) would have about his unorthodox approach to the publication of judicial opinions of a member of the Supreme Court, Baldwin did offer an explanation for his new enterprise. In an introductory paragraph to the section of *A General View* containing his opinions in *Miln*, *Poole*, *Briscoe*, and *Charles River Bridge* he wrote:

> It was intended to publish the preceding view [meaning the essay on the Constitution], with the four opinions . . . in an appendix to the eleventh volume of Mr. Peters' Reports [the Court's official reports], which contains the opinions of the Court, and the judges who dissented. But it was found that, by so doing, the publication of the Reports would be delayed beyond the time at which they would otherwise have been before the public. Unwilling to be the cause of such delay, I have adopted this mode of submitting my views and opinions to the profession.[33]

This rationale does not ring true, especially when read in light of contemporary reportorial practice.

At the Supreme Court during the years Baldwin served, a failure to promptly prepare an opinion for publication in the Court's official reports—*Peters' Reports*—was not dealt with via private publication. When promptness was lacking, the delayed opinion or opinions simply appeared in a later volume of *Peters' Reports*. In 1837, when he published *A General View*, Baldwin must have aware of this practice because it had affected most volumes of *Peters' Reports* produced since his arrival on the Court in 1830.

Consider, for example, *United States v. Clarke*[34] and *United States v. Huertas*.[35] They were decided on March 14, 1834, near the end of the Court's January 1834 Term. But opinions in those cases were not published in *8 Peters* (the eighth volume of *Peters' Reports*) with the opinions in other cases decided that Term.[36] Instead the opinions in *Clarke* and

---

33. *A General View*, *supra* n. 30, at 113.

34. 34 U.S. 168 (1835).

35. 34 U.S. 171 (1835).

36. Ashmore, *supra* n. 31, at 34–35 (listing cases in *8 Peters*), 36 (listing cases—including *Clarke* and *Huertas*—in *9 Peters*).

*Huertas* appeared among the January 1835 Term opinions in *9 Peters*, each accompanied by a footnote explaining that "the opinion was not received by the Reporter until after the publication of the Reports of the term."[37] A third 1834 opinion in *9 Peters* was accompanied by a note stating simply that "This case was decided on the 21st of February 1834."[38] Similarly, during the January 1831 Term the Court decided *Dufau v. Couprey's Heirs*, but the opinion in the case did not appear in *5 Peters* with the opinions in other cases decided that Term. Instead, it came out in 1832, in *6 Peters*.[39] Perhaps most strikingly, during Baldwin's first year as a justice—1830—an appendix to *3 Peters* contained an opinion "prepared by Mr. Justice Story at February term 1819."[40]

Arguments of counsel were treated in much the same way, probably because during Baldwin's time on the Court (and for many years before and after) the Court's official reports routinely bundled the justices' opinions with written transcripts or summaries of the associated arguments of counsel. When a lawyer who had argued before the Court was late submitting to the Reporter the write-up of an argument, that too would sometimes find its way into an appendix or a later volume of the official reports.[41] Indeed, in April 1837, while waiting impatiently for whatever opinions Baldwin might deliver in time

---

37. *Clarke*, 34 U.S. at 168 n. a; *Huertas*, 34 U.S. at 171 n. a.

38. *Field v. U.S.*, 34 U.S. 182, 203 (1835); *see also* Ashmore, *supra* n. 31, at 36 (showing *Field* to have been reported in *9 Peters*, but decided on February 21, 1834).

39. *Dufau v. Couprey's Heirs*, 31 U.S. 170, 170 n. a (1832) (noting that "[t]his case was decided at January Term 1831").

40. *Trustees of the Phila. Baptist Assn. v. Smith*, 28 U.S. 481 (1830) (opinion by Justice Joseph Story in 1819 case, published in an appendix eleven years later); *see also e.g. U.S. v. Todd*, 54 U.S. 52 (1852) ("substance of the decision in Yale Todd's case" on February 17, 1794, inserted as a "Note by the Chief Justice, inserted by order of the Court," fifty-eight years later); *Gordon v. U.S.*, 117 U.S. 697 (1885) (1864 opinion by Chief Justice Roger Taney, published in an appendix twenty-one years later).

41. *See e.g. U.S. v. Clarke*, 33 U.S. 436, 443 n. a, 705 (1834) ("printed argument" of counsel "afterwards laid before the court ... will be found in the appendix to this volume"); *Delassus v. U.S.*, 34 U.S. 117, 127 n. a, 765 (1835) (another belated submission of printed argument of counsel: "The argument of Mr White was not received by the Reporter when the case was put to press. It will be inserted in the Appendix, should it be received before the publication of this volume."); *Strother v. Lucas*, 37 U.S. 410, 427 n. *, 763 (1838) (same, and noting Reporter's "wish and intention" to insert the argument "in the report of the case," but indicating that it appeared in the volume's Appendix instead).

to be included in the 1837 official reports (soon to be *11 Peters*), Reporter Peters was pressing Daniel Webster for a write-up of Webster's argument in the *Charles River Bridge* case.[42]

Thus, the Supreme Court already had a well-established system for dealing with problems like Baldwin's late opinions in *Miln*, *Poole*, *Briscoe*, and *Charles River Bridge*. There was no need for him to hurry up and go into business selling his opinions—certainly not for the benefit of the Court itself (which had its own system for dealing with such things), nor for the readers of the justices' opinions (who were accustomed to the Court's system).[43]

But perhaps this analysis misses the point of Baldwin's enterprise. Perhaps it was not for the Court or for readers of the justices' opinions that Baldwin was hurrying his tardy opinions into print. Perhaps it was for Baldwin himself. Could it be that he was one of those people who simply cannot bear a long wait between writing something down and seeing it in print? After all, none of the late-published opinions discussed above were Baldwin's. If so, then *A General View* might have been nothing more than the first manifestation of a strong personal preference for speedy publication, or of some other, more obscure urge. Alas, this explanation does not hold water either. In fact, Baldwin's behavior before and after the publication of *A General View* demonstrated a remarkable lack of interest in seeing his writing speedily into print, or even in print at all. Throughout the 1830s, Baldwin would occasionally prepare a written opinion and then never deliver it to Peters for publication in the reports, or, apparently, to anyone else for publication

42. Richard Peters to Daniel Webster (Apr. 13, 1837), in Peters Correspondence, *supra* n. 32; *Charles River Bridge*, 36 U.S. at 514 n. a (noting that Peters had been "disappointed" in his "well-founded expectation" of receiving the write-up from Webster); *see also* Swisher, *supra* n. 20, at 84.

43. Generally speaking, the idea that a small delay would generate some sort of reportorial crisis was nonsense. Those impatient for printed versions of Supreme Court opinions were wont to publish their own editions, as the Massachusetts legislature did, for example, with *Charles River Bridge*. *See Life and Letters of Story*, *supra* n. 18, at 272 (reproducing Joseph Story to John McLean (May 10, 1837)).

anywhere else.[44] In addition, after *A General View*, he became a member of the late-opinions-in-the-appendix club.[45]

So, we can add that there was no need for Baldwin to hurry up and go into business selling his opinions for his own benefit, because his own track record showed he had no need for speedy publication. It is, in sum, difficult to believe that Baldwin could have honestly believed (or expected knowledgeable readers of *A General View* to believe) that the necessary or proper course of action for him to take was to leap into business as a reporter of decisions as soon as he was late delivering his opinions in *Miln*, *Poole*, *Briscoe*, and *Charles River Bridge*.

And in the absence of a plausible justification for Baldwin's hurrying his opinions into print, it is difficult to resist the theory advanced by Professor Swisher, who reported in his *Holmes Devise* history of the Taney Court (1836-1864) that Baldwin "published [*A General View*] as a booklet of his own in the hope of adding to his income."[46] Although there is no direct

---

44. *See e.g. Bank of Augusta v. Earle*, 38 U.S. 519, 597 (1839) ("Mr. Justice Baldwin delivered an opinion assenting to the judgment of the Court, on principles which were stated at large in the opinion. This opinion was not delivered to the reporter."); *Crane v. Morris's Lessee*, 31 U.S. 598, 621 (1832) ("Mr Justice Baldwin dissented in writing. The opinion of Mr Justice Baldwin was not delivered to the reporter."); *Kelly v. Jackson*, 31 U.S. 622, 633 (1832) (same); *Lindsey v. Miller's Lessee*, 31 U.S. 666, 679 (1832) (same); *see also e.g. Worcester v. Ga.*, 31 U.S. 515, 596 (1832) ("Mr Justice Baldwin dissented: stating that in his opinion, the record was not properly returned upon the writ of error; and ought to have been returned by the state court, and not by the clerk of that court. As to the merits, he said his opinion remained the same as was expressed by him in the case of the *Cherokee Nation v. The State of Georgia*, at the last term. The opinion of Mr Justice Baldwin was not delivered to the reporter."). Baldwin was also in the habit of announcing his dissent and then not delivering an opinion at all. *See e.g. Wheaton v. Peters*, 33 U.S. 591, 698 (1834) (Baldwin, J., dissenting without opinion); *Hughes v. Town of Clarksville*, 31 U.S. 369, 387 (1832) (same); *Leland v. Wilkinson*, 31 U.S. 317, 322 (1832) (same); *Green v. Neal's Lessee*, 31 U.S. 291, 301 (1832) (same); *Page v. Lloyd*, 31 U.S. 304, 318 (1831); *see also N.J. v. N.Y.*, 30 U.S. 284, 291 (1831) ("Mr Justice Baldwin did not concur in the opinion of the court directing the order made in this cause."); *Socy. for Propagation of Gospel in Foreign Parts v. Town of Pawlet*, 29 U.S. 480, 500 (1830) ("Mr Justice Story delivered the opinion of the Court; Mr Justice Baldwin dissenting on the first point.").

45. *See e.g. Decatur v. Paulding*, 39 U.S. 497, 518 (1840) ("Mr. Justice Baldwin delivered an opinion to the reporter, after the adjournment of the Court; which will be found in the Appendix, No. I."); *Holmes v. Jennison*, 39 U.S. 540, 586 (1840) ("Mr. Justice Baldwin delivered an opinion to the reporter, after the adjournment of the Court; which will be found in the Appendix, No. II."); Appendix No. I & Appendix No. II, 39 U.S. 599 & 614 (opinions of Baldwin, J, in *Decatur* and *Holmes*).

46. *See* Swisher, *supra* n. 20, at 301; *see also id.* at 51.

evidence to support Swisher's conclusion, it is quite plausible given Baldwin's difficult financial situation and his incredible rationale for producing *A General View*.

To the extent that making money was indeed Baldwin's objective, he failed. Sales of *A General View* were disappointing, and there was no sequel, which might be expected if the cash-strapped justice had made out well on his first effort.[47]

And if—implausible as it is—hurrying his opinions into print was Baldwin's objective, he failed there as well. *A General View* seems to have come out at roughly the same time as *11 Peters*. Correspondence between Peters and Story at the time indicates that Story received his printed copies of *11 Peters* and *A General View* at about the same time, in early June of 1837.[48] As a member of the Court, a friend of Peters, and a colleague of Baldwin, Story would have been among the first to receive each volume. Years later, Justice James M. Wayne, who had been on the Court with Baldwin in 1837, recalled that Baldwin's opinion in *Miln* had been "accidentally excluded from [Peters's official] report, without the slightest fault in the then reporter of the court or in the clerk" and had instead appeared "*contemporarily* with the publication of the reports, in his View of the Constitution."[49]

---

47. *Id.* at 51 (citing Henry Baldwin to John Cadwalader (Dec. 19, 1838)), in Cadwalader Papers). In 1836 Baldwin had made what was apparently an equally unsuccessful foray into the commercial publication of his opinions on circuit. *Id.*

48. Joseph Story to Richard Peters (June 14, 1837), in *Life and Letters of Story*, *supra* n. 18, at 273.

49. *Passenger Cases*, 48 U.S. 283, 430, 432 (1849) (Wayne, J., concurring) (emphasis added). Wayne's recollection of *Miln* might be read to excuse the late delivery by Baldwin of a separate opinion in that case on the ground that Baldwin did not realize that the majority opinion or Story's dissent would be objectionable to him in some respects until the last day of the Term. *See id.* at 431–32; *see also* Currie, *supra* n. 16, at 205 n. 19. But accommodating that sort of circumstance was exactly the function of an appendix or subsequent-volume publication in *Peters' Reports*. See text accompanying notes 34–43, *supra*. And in any event the *Miln* story cannot explain Baldwin's late-breaking opinions in the other three cases, which were argued and announced well before the end of the Term, at least by contemporary standards. *Ashmore*, *supra* n. 31, at 38 (showing dates of decision for cases reported in 36 U.S.). Furthermore Baldwin had time to write during the January 1837 Term, because he was not overworked. He had written one short opinion for a unanimous Court, and one dissent. *Ewing v. Burnet*, 36 U.S. 41 (1837); *Livingston' Executrix v. Story*, 36 U.S. 351, 393 (1837) (Baldwin, J., dissenting). His six colleagues had carried the rest of the opinion-writing load. Finally, *Charles River Bridge* had been argued once already in 1831, and had been sitting on the Court's docket awaiting

Baldwin did publish *A General View* with another unspoken but obvious objective. In the introduction, Baldwin goes on at some length about the utility, superiority, and importance of his version of the compact theory of federal constitutional law.[50] This is unexceptional. It is what we expect our judges to do: write to explain why their decisions in cases are correct. There is no need to go deeply into the subject here, however, because *A General View* was a near-perfect failure as a vehicle for promoting Baldwin's jurisprudence.

*A General View*—the essay and the four opinions—was largely ignored by Baldwin's contemporaries on and off the Court,[51] and neither the essay nor any of the opinions has been cited in a Supreme Court opinion since Justice John Catron's "far-fetched" opinion in *Dred Scott v. Sandford* in 1857.[52] At only one other time did the Court pay any attention to *A General View*—in the *Passenger Cases* in 1849. On that occasion the primary subject was not Baldwin's thinking about the Constitution, but, rather, the inability of two members of the Court to agree on the significance of his strange choice to publish his opinions—particularly *Miln*—in *A General View*, rather than in *11 Peters*. In his solo concurrence in the

---

a full Court to reconsider the case ever since. (A divided Court had ordered re-argument.) Baldwin had had half-a-dozen years in which to document his views in *Charles River Bridge*, and thus it is perhaps to be expected that of the four opinions published in *A General View*, the opinion in *Charles River Bridge* is the longest and by far the most replete with copious citations to authorities. *Compare Charles River Bridge v. Warren Bridge* (opinion of Baldwin, J.), in *A General View* at 134-69 (thirty-five pages long, and chock-full of citations to a wide variety authorities), *with Briscoe*, *Poole*, and *Miln* (opinions of Baldwin, J.), in *id.* at 113–34, 170a–181, 181–97 (twenty-one, thirteen, and sixteen pages, respectively, and relatively free of citations to authorities).

50. *A General View*, *supra* n. 30, at 1.

51. Some observers at the time recognized Baldwin's book for what it was—a private production of his judicial opinions in the Supreme Court, *see e.g. Constitutional Jurisprudence*, Am. Jurist & L. Mag. 239, 239–44 (Apr. 1838); *Supreme Court of the United States*, N.Y. Rev. 372 (Apr. 1838), while others simply ignored it, *see e.g. Constitutional Law*, 46 N. Am. Rev. 126 (Jan. 1838) (reviewing *11 Peters*, discussing at length divisions on the Court, and noting Baldwin's dissent in *Livingston v. Story*, but completely ignoring *A General View*); *but see The Supreme Court of the United States: Its Judges and Jurisdiction*, U.S. Mag. & Democratic Rev. 143, 150 n.* (Jan. 1, 1838) (citing approvingly to Baldwin's "very able, but rather angry, tract").

52. 60 U.S. 393, 522, 528 (1857) (Catron, J.); David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836–1864*, 1983 Duke L. J. 695, 734 (noting that "Catron had two far-fetched theses of his own, which nobody else joined").

*Passenger Cases*, Justice Wayne invoked Baldwin's decision to publish an opinion on *Miln* in *A General View* as evidence of Baldwin's hostility to the *Miln* majority's relatively broad (for the time) definition of commerce subject to congressional regulation,[53] while Chief Justice Taney in his solo dissent preferred to rely on Baldwin's officially reported concurrence in *Groves v. Slaughter*:

> And I have the strongest reason to suppose that Mr. Justice Baldwin had become satisfied, because, in his opinion in Groves *v.* Slaughter, he quotes the case of New York *v.* Miln with approbation, when speaking in that case of the difference between commercial and police power. The passage is in 15 Pet. 511, where he uses the following language:—"The opinion of this court in the case of Miln *v.* New York, 11 Pet. 130, &c., draws the true line between the two classes of regulations, and gives an easy solution to any doubt which may arise on the clause of the constitution of Mississippi which has been under consideration." I quote his words as judicially spoken, and forming a part of the official report.[54]

The third edition of *11 Peters*, published in 1882, included Baldwin's four opinions, inserted in the appropriate places next to the majority and dissenting opinions in *Miln*, *Poole*, *Briscoe*, and *Charles River Bridge*. And in 1883 the Lawyers Co-operative Publishing Company reprinted *A General View* in its entirety in Book 9 of the *Lawyers Edition* case reports. Neither development did anything to enhance the nonexistent influence of *A General View*. It was dead to history in general and the Court in particular. Even the Library of Congress, which held three copies of Baldwin's Third Circuit reports, held just one copy of *A General View*.[55] Thereafter, Baldwin's opinions in *A General View* escaped reported citation by any court for almost 150 years.[56] *A General View* was and remains a neutrino of

53. *Passenger Cases*, 48 U.S. 283, 430, 432 (1849) (Wayne, J., concurring).

54. *Id.* at 489–90 (Taney, C.J., dissenting).

55. *See Catalogue of the Library of Congress* 649–51, 872 (Lemuel Towers 1861) (showing three copies of the Circuit reports among listings for "American Reports," and one copy of *A General View* among listings for "Government").

56. *See Ontario Power Generation, Inc. v. U.S.*, 54 Fed. Cl. 630, 633 n. 5 (2002); *see also* David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. Chi. L.

constitutional jurisprudence, passing through scores of years and hundreds of volumes of judicial opinions without leaving a notable trace.

And what of the impact of *A General View* within the Supreme Court itself?

Having failed to save time, turn a buck, or advance his vision of constitutional law, Baldwin did achieve one thing: He managed to sabotage his relationship with Story, by consensus one of the finest minds and kindest people ever to sit on the Court. *A General View* was in substantial part a rather harshly worded attack on the constitutional jurisprudence developed by Story and Marshall during the first third of the nineteenth century. And Baldwin explicitly and repeatedly targeted Story's *Commentaries on the Constitution of the United States*.[57] Story was resigned (and somewhat bitterly so) to his own declining influence on the Court and to the rise of Taney and the other Jacksonians, but he nevertheless managed to maintain good, even generally friendly and constructive relations with his newer colleagues.[58] But he was clearly hurt and angered by the intensity and tone of Baldwin's hostility in *A General View*. The normally forgiving Story wrote to Peters in May of 1837 that

> [a]s a Judge, and as a Man, I should think his course in regard to the court, & a fortiori in regard to myself personally as not only indefensible, but without excuse. . . . His animadversions upon my commentaries on the Constitution in a distinct & independent work offered matter for very different consideration. I neither court nor

---

Rev. 466, 480 (1983) (mentioning Baldwin, but not *A General View*). *A General View* even escaped inclusion in several of the leading summaries of the work of Supreme Court reporters during the intervening years. *See e.g.* Hermann Henry Bernard Meyer, *List of Works Relating to the Supreme Court of the United States* (Govt. Printing Off. 1909); John William Wallace, *The Reporters, Arranged and Characterized, with Incidental Remarks* (4th ed. Soule and Bugbee 1882); *but see* Charles C. Soule, *The Lawyer's Reference Manual of Law Books and Citations* 4 n. 7 (Soule and Bugbee 1883) (correcting a reference in the New York Law Institute Library to *A General Review* as "Baldwin's Appendix to 11 Peters," noting that "[t]his title, while substantially correct, is misleading"); *cf.* Bennett Boskey, *Dissenting Opinions: An Addendum to Justice Scalia's Observations*, in Boskey, *Joys of Lawyering*, *supra* n. 10, at 52–54 (describing a salute to Baldwin by Chief Justice Harlan Fiske Stone).

57. *See e.g. A General View* at 108–12; *see also* R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* 219, 311 (U.N.C. Press 1985).

58. *See* Newmyer, *supra n.* 57, at 306–16.

> fear those animadversions, whatever they may be. He must settle with himself the question of the decorum & propriety of them, situated as we are, on the same Bench, as a volunteer critic. When the proper time shall arrive I shall consider what is the just course for me to pursue in reply "without fear, favor, or hope of reward, & without envy, hatred or malice", like a grandjuryman. I promise nothing and restrain myself as to nothing.[59]

In June, Story was still upset, although his expression of it was more restrained. He told Peters he had read "the pamphlet of Baldwin . . . without surprise, and without any unsuitable emotion," leaving the reader to guess at what emotion might be suitable, but providing a clue in the next line:

> I have no reply to make to it. I have no desire to make any; and I shall not trust myself to make but a single comment on it. Our late friend, Mr. Chief Justice Marshall, approved all the doctrines in the Commentaries on the Constitution. Under such circumstances, I am quite consoled, although another Judge disapproves them.[60]

Coming from Story, even those were strong words.[61] Thus, it seems likely that Baldwin undermined his relationship with Story, and perhaps other colleagues as well, with his publication of *A General View*.[62]

Assessing the impact of *A General View* on the Court as an institution is impossible, because the book has been all but invisible there. To the extent that *A General View* garbled the precedential value of the Court's decisions in any of the four

---

59. Joseph Story to Richard Peters, *supra* n. 32.

60. *Life and Letters of Story*, *supra* n. 18 (reproducing Joseph Story to Richard Peters (June 14, 1837)); *see also* Gerald T. Dunne, *Joseph Story and the Rise of the Supreme Court* 364–65 (Simon and Schuster 1970).

61. In his *Life and Letters of Joseph Story*, *supra* n. 18, Story's son reports that, "[t]he only circumstances which at all threatened to interrupt the agreeable personal relations of all the Judges, was a publication [*A General View*], by Mr. Justice Baldwin, in which some severe strictures were made upon the Commentaries on the Constitution. My father, however, took no notice of it." *Id.* at 273. While the June 14 letter to Peters might plausibly be characterized as Story père nobly holding himself above the fray, the same cannot be said for the heated May 12 letter. How does Story fils deal with this? By leaving the May 12 letter, and any mention of it, out of the *Life and Letters of Joseph Story*. Perhaps a less partial collection of Joseph Story's letters is in order.

62. *See e.g.* Newmyer, *supra* n. 57, at 219.

cases—as it appeared to do with *Miln* when Taney and Wayne wrangled over it in the *Passenger Cases*—it was harmful to some limited extent. And to the extent that it offered some small increment of intellectual aid and comfort to pro-slavery forces on and off the Court—as it appeared to do for Catron in *Dred Scott*—it was at least a small evil. It may also have contributed to the gradual breakdown of collegiality on the Taney Court that led in turn to the last-word stunts executed by McLean in *Groves v. Slaughter* in 1841 and Taney in *Dred Scott v. Sandford* in 1857.

### *John McLean (1841)*

Unlike Justice Baldwin, Justice John McLean did not want to turn the last word into cash. He seems to have wanted to turn it into power. Another Jackson appointee, McLean served on the Court from 1830 to 1861.[63] Although he was a steady contributor to the work of the Court, he was perennially and obviously interested in the Presidency, earning himself the uncomplimentary sobriquet, "The Politician on the Supreme Court."[64] It was in this mode that he made a scene in court with an opinion he had concealed from his colleagues until he was ready for a dramatic delivery. While there is no direct evidence of McLean's purpose, the context suggests that his surprise oral delivery of an opinion in *Groves v. Slaughter*[65] was, in effect and in intent, a campaign speech.

*Groves* involved a dispute over a provision of the Mississippi constitution that prohibited the importation of slaves for sale.[66] The parties imagined that the Court would enter the heated nationwide debate over the relative constitutional powers

63. *See generally* Francis P. Weisenburger, *The Life of John McLean: A Politician on the United States Supreme Court* chs. XI-XIV (Da Capo Press 1971) (reprint of 1937 edition); *see also* Frank Otto Gatell, *John McLean*, in *The Justices of the United States Supreme Court: Their Lives and Major Opinions*, *supra* n. 23, at 300–12.

64. *See e.g.* Allen Sharp, *Justices Seeking the Presidency*, 29 J. S. Ct. Hist. 286, 288–92 (2004); *see also* Alan F. Westin, *Out-of-Court Commentary by United States Supreme Court Justices, 1790-1962: Of Free Speech and Judicial Lockjaw*, 62 Colum. L. Rev. 633, 638–40 (1962).

65. 40 U.S. 449 (1841).

66. *Id.* at 450–51.

of the states and the federal government to regulate slavery, and presented their cases accordingly.[67] Oral arguments in *Groves* extended over seven days in February 1841, and were immediately followed by six days of argument in the famous *Amistad* case.[68] The two cases attracted a great deal of public attention.[69]

On March 9 Justice Story announced the decision and opinion of the Court in the *Amistad* case (Justice Baldwin dissenting without delivering an opinion), and on March 10 Chief Justice Taney[70] did the same in *Groves*. Taney—and all of his colleagues save McLean—apparently believed that Taney's opinion for the Court was the only one that would be delivered that day, and that the dissenters (Justices Story and John McKinley) would follow the same course that Baldwin had in *Amistad*.[71] The Court had decided *Groves* narrowly, on state-law grounds not directly related to the slavery issue, and the case appeared to be heading to an anticlimactic conclusion.[72] But when Taney had finished reading the opinion of the Court, "Judge McLean took from his pocket and read a counter-opinion, unexpectedly to the other Judges, to which Judges Thompson, Baldwin, and McKinley severally replied, each differing from all the others."[73]

---

67. *Id.* at 452–96.

68. *U.S. v. Libellants of Schooner Amistad*, 40 U.S. 518 (1841); Ashmore, *supra* n. 31, at 43.

69. *See e.g. The Diary of Philip Hone 1828–1851* vol. 2, 61–62 (Bayard Tuckerman, ed. Dodd, Mead and Co. 1889) (mentioning *Amistad*); Charles Warren, *The Supreme Court in United States History: Volume Two 1836-1918* at 68–70 (Little, Brown, & Co. 1926) (describing audience for *Groves* argument).

70. Or perhaps Justice Smith Thompson— the record is not entirely clear on this point. *See* Swisher, *supra n.* 20, at 368.

71. Story was not even in Court on March 10. His correspondence about the case and McKinley's behavior described in the text above suggest that neither justice had planned to deliver an opinion of any sort, orally or in writing. *See* Swisher, *supra* n. 20, at 367–68 (quoting Joseph Story to R.J. Walker (May 22, 1841)).

72. 40 U.S. at 503.

73. Swisher, *supra n.* 20, at 51 (quoting 10 *Memoirs of John Quincy Adams* 442 (1874–77) (Charles F. Adams, ed.)); *see also* David L. Lightner, *The Supreme Court and the Interstate Slave Trade: A Study in Evasion, Anarchy, and Extremism*, 29 J. S. Ct. Hist. 229, 240–42 (2004) (noting among other things that the justices' "views were so diverse as to make agreement impossible," and characterizing as "evident" the other justices' surprise at McLean's announcing his opinion).

One can only imagine the heat and turmoil of the judicial exchange, with Thompson, Baldwin, and McKinley—all unprepared for McLean's surprise opinion—chiming in extemporaneously, in open court. Ripples appear clearly in the published opinions of Taney and Baldwin, and to a lesser extent in the final version of the opinion of the Court, published under Justice Smith Thompson's name.[74]

Like Baldwin in *A General View*, McLean in *Groves v. Slaughter* had given his colleagues something they apparently had never seen before—in this case an opinion delivered in court (rather than in print) without fair warning. Unlike Baldwin, however, McLean was not trying to corner the market on his opinions for pecuniary gain. Rather, McLean appeared to be seeking maximum public attention for his views on an important issue of the day—slavery—even though those views were, as McLean freely conceded, "not necessary to a decision of the case."[75] Publishing those views in an end-of-term pamphlet would not generate the same attention as would declaiming them in a courtroom crowded with Washington luminaries and politicos.[76] As McLean went on to explain, "under existing circumstances, I deem it fit and proper to express my opinion" on the power of states to regulate slavery within their borders.[77]

At a very general level, the "circumstances" to which McLean was referring might be supposed to have been the very existence of slavery in the United States, to which he was sincerely opposed, and which all today would agree deserved to be resisted at every turn. But although McLean had been active in public life since 1812 and had during that time made many statements against slavery in speeches, editorials, and public correspondence, he had never before done so from the bench in this manner, despite having heard many slavery-related cases.[78] Why now? Because the "circumstances" must have had a narrower meaning, and there was just one obvious candidate: At

74. 40 U.S. at 508 (Taney, C.J.); *id.* at 510; *id.* at 503 (Thompson, J.). McKinley's opinion was not published.

75. 40 U.S. at 504 (McLean, J.).

76. Baldwin's experience four years earlier had surely demonstrated that!

77. 40 U.S. at 504 (McLean, J.).

78. *See generally* Weisenburger, *supra* n. 63.

the time, McLean was engaged in early maneuvering to succeed President William Henry Harrison, the newly elected but aged President who was not expected to run for a second term.[79] McLean's political base was in Ohio, and despite the fact that *Groves* was a case about a provision of the Mississippi state constitution, McLean's opinion dwelt on the enlightened laws and prudent exercise of state sovereignty by the good people of Ohio.[80] Moreover, while his opinion in *Groves*—the gist of which was that slavery was purely a creature of state law—enthusiastically stroked the voters of Ohio (where there was strong sentiment for state power to exclude slavery), it was written in a way that also made it appealing to many pro-slavery southerners who could read it as a vindication of their states' rights approach to protecting slavery within their own states' borders.[81] McLean's opinion was, in other words, not a strong statement of noble abolitionist views, but rather the constitutional trimming of a politician seeking to please both the northern and southern sections of an increasingly divided polity.

McLean would later say that his purpose and achievement in *Groves* was to settle the question of state versus federal power over slavery, but the emptiness of this claim was obvious to both his enemies and his friends.[82] No justice had joined his opinion in *Groves* (after such an obnoxious delivery, even a colleague who agreed with every word of it would have been inclined and well-advised to concur separately), and the constitutional issues it raised were not resolved until the ratification of the thirteenth amendment to the Constitution. And the opinion and its unorthodox delivery did not contribute to a presidential nomination, which never came.

The *Groves* incident had negative effects as well, for McLean and for the Court. McLean's concession that he was reaching beyond matters "necessary to a decision of the case" provided ammunition to political opponents in presidential

79. Harrison would die just a few days after *Groves* was decided, to be succeeded by John Tyler.

80. 40 U.S. at 507–08 (McLean, J.).

81. *See* Warren, *supra* n. 69, at 72.

82. *See* Weisenburger, *supra n.* 63, at 140–41.

politics and to critics of his performance as a justice.[83] It also offended, at the very least, four members of the Court, and triggered the publication of a confusion of opinions. And it probably contributed to the paranoid strain in Taney's dealings with the Court in the *Dred Scott* case (described in the next section of this article). After all, it was in response to McLean's surprise opinion in *Groves* that Taney determined to delay until the last minute delivery to Peters of the final written version of his own opinion in the *Dred Scott* case, in order to prevent any other member of the Court from reading and commenting on it in yet another surprise opinion.[84]

Like Baldwin, McLean apparently learned his lesson. Despite serving for two more decades on the Court, during which his personal campaign for a presidential nomination never ended and the opportunities to deliver additional surprise opinions were numerous, McLean never again treated the bench as a stump.

### *Roger B. Taney (1857)*

Roger Taney, yet another Jackson appointee, served as Chief Justice of the United States from 1836 to 1864.[85] He sought the last word in the infamous *Dred Scott* case not for money or power, but, rather, to prevail over Justice Curtis.

Taney delivered his "opinion of the court" in *Dred Scott* on March 5, 1857,[86] and Curtis delivered a devastating dissent the next day. By seeking to rewrite his "opinion of the court" without giving Curtis a chance to revise his dissent, Taney implicitly acknowledged both the depth of his desire to win the battle of legal reasoning in *Dred Scott* and the power of Curtis's opinion. The sequence of events that followed reveals the lengths to which Taney was willing to go in order to get the last

83. *See id.*

84. *See* Swisher, *supra* n. 20, at 302 (citing Roger B. Taney to Richard Peters (Mar. 22, 1841)).

85. *See generally* Swisher, *supra* n. 20.

86. The tangle of arguments in the opinions of the justices who supported the outcome in the case (the holding that Dred Scott was a slave) makes debatable the number of justices who joined in many of parts of Taney's opinion, as well as the opinions of Justices Campbell, Catron, Daniel, Grier, and Nelson. *See* Currie, *supra* n. 16, at 267–73.

word:[87]

> March 5—Taney delivers his "opinion of the court."
>
> March 6—Curtis delivers his dissent.
>
> March 14—Having learned that Taney is revising his "opinion of the court," Curtis notifies Clerk of the Court William T. Carroll that his dissent should not be submitted for official publication until he has a chance to review the revised opinion.
>
> April 2—Curtis requests from Carroll a copy of Taney's revised opinion.
>
> April 6—Taney, with the support of Justices Wayne and Daniel, issues an order to Carroll to "give no copy of this [Taney's] opinion to *any* one, until the reporter has printed it." Carroll notifies Curtis of the order and suggests that Curtis request a copy of Taney's opinion from the author.
>
> April 9—Curtis suggests to Carroll that the Taney-Wayne-Daniel order could not apply to a member of the Court, and that Carroll should consult with Taney.
>
> April 14—Carroll replies to Curtis that he did consult with Taney after sending the April 6 letter to Curtis, and that Taney approved of withholding the "opinion of the court" from Curtis.
>
> April 18—Curtis writes to Taney, asking him to instruct Carroll to send Curtis a copy of the "opinion of the court."
>
> April 28—Taney refuses to do so.
>
> May 13—Curtis replies to Taney expressing, among other things, concerns about the relationship between Taney's revised "opinion of the court" and Curtis's original dissent that echo Daniel's "Note" in the *Passenger Cases*:[88]
>
> > In my judgment, and I cannot doubt you will agree with me, a judge who dissents from an opinion of a majority of the court upon questions of constitutional

87. All of the documents quoted in this timeline are reprinted in George Ticknor Curtis, *The Dred Scott Case, as Remembered by Justice Curtis's Family*, 10 Green Bag 2d 213, 225–38 (2007) (including an explanation that the text is "[a]n Abridged and Illustrated Excerpt from a Memoir of Benjamin Robbins Curtis, LL.D. (1879)").

88. Which might inspire some wonder as to whether Daniel appreciated the irony of his signature on the order withholding Taney's "opinion for the court." *See supra* n. 13 and accompanying text.

> law which deeply affect the country, discharges an official duty when he lays before the country the grounds and reasons of his dissent. This opinion of the court was read in conference of all the judges. I shaped my dissent from that opinion accordingly. After I returned home, I was informed that this opinion had been revised and materially altered. I did not know whether the information was true or false. I thought I had a right to know, before my own opinion should be published by the reporter in a permanent form, whether any alterations material to my dissent had been made after its promulgation from the bench.

Late May—The official report of *Dred Scott v. Sandford* is published in *19 Howard.*

June 11—Taney replies to Curtis denying, among other things, that he has revised his "opinion of the court," but only by taking the laughably warped position that support for conclusions reached in an opinion do not count as revisions:

> There is not one historical fact, nor one principle of constitutional law, or common law, or chancery law, or statute law, in the printed opinion, which was not distinctly announced and maintained from the bench; nor is there any one historical fact, or principle, or point of law, which was affirmed in the opinion from the bench, omitted or modified, or in any degree altered, in the printed opinion. You will find in it proofs and authorities to maintain the truth of the historical facts and principles of law asserted by the court in the opinion delivered from the bench, but which were denied in the dissenting opinions. And until the court heard them denied, it had not thought it necessary to refer to proofs and authorities to support them; regarding the historical facts and principles of law which were stated in the opinion as too well established to be open to dispute. But you will find nothing altered, nothing in addition but proofs to maintain the truth of what was announced and affirmed in the opinion delivered.

June 16 and 20—Curtis and Taney close their correspondence with a chilly final exchange of letters.

Curtis never did get to see a copy of Taney's revised opinion before it appeared in *19 Howard*, and he later complained that Taney's revisions "amount[ed] to upwards of eighteen pages. No one can read them without perceiving that they are in reply to my opinion."[89] In his thorough study of the *Dred Scott* case, Professor Fehrenbacher concludes that Curtis's complaint was well-founded. Taney expanded his opinion by at least twenty-five percent, and probably more like fifty percent, in response to Curtis's dissent (and, to a lesser extent, in response to a dissent by Justice McLean). Thus, "Taney's denial of having made any significant changes, though perhaps not untruthful according to his own peculiar lights, must be labeled inaccurate."[90]

According to Taney, this exercise in secret revision and publication without rebuttal was necessary in order to achieve two ends. First, to add "proofs and authorities . . . regarding the historical facts and principles of law which were stated in the opinion as too well established to be open to dispute," but which Curtis had contested and which Taney speaking for the Court must therefore settle by spelling out the obvious.[91] Second, that

> justice to [the Court] itself required that the opinion in this case should be reported and brought before the public under the usual supervision and responsibility of the officer appointed by the court to perform that duty; and that it ought not to be separated from all of the other opinions delivered by the court during the term, and hurried before the public in an unusual manner, by irresponsible reporters, through political and partisan newspapers, for political and partisan purposes."[92]

Taney surely failed in his first objective. He did not specify the obviousnesses for which he was adding authorities, but the constitutional status of slavery obviously remained "open to dispute" after the eventual appearance of Taney's "opinion of the court," even with its additional proofs and authorities. In addition, even if one were to take at face value Taney's claim

89. Curtis, *supra* n. 87, at 237.

90. Don E. Fehrenbacher, *The Dred Scott Case* 320 (Oxford U. Press 1978).

91. Curtis, *supra* n. 87, at 232.

92. *Id.* at 227.

that his additional proofs and authorities overcame Curtis's points in dissent, Taney failed to even try to rebut some arguments in Curtis's opinion.[93]

He failed in his second objective as well. First, because his decision to withhold his "opinion of the court" did nothing to improve the accuracy of reporting on the opinion—in fact it did the opposite, because for several weeks the only available version of the opinion was drawn from the notes of an Associated Press reporter who was in court when Taney had read his original opinion. Second, because hurrying before the public the opinion of the court and any separate opinions by individual justices was a matter of tradition and routine in high-profile cases. Thus, for example, Taney had made no objection when his opinion in the *Charles River Bridge* case was printed in pamphlet form before the official reporter was available, even though it was for the use of a hostile Massachusetts legislature.[94] In fact, by the time the official report of the *Dred Scott* opinions appeared in volume 19 of *Howard's Reports*, several of the opinions in the case—including the separate opinion of Justice Daniel, who had signed Taney's April 6 sequestration order—were already in print.[95]

The bottom line for Taney in *Dred Scott* was that withholding his opinion from Curtis and the rest of the world while he tried to revise it in answer to Curtis's dissent did not work, either as a substantive matter or as a matter of public relations. And, like the earlier last-word efforts of Baldwin and McLean, Taney's maneuvering harmed him and harmed the Court. It was, in Chief Justice Charles Evans Hughes's famous characterization, a "self-inflicted wound" to the institution of the Court, and to Taney.[96] It had other and immediate negative effects. After their acrimonious exchange of letters, Curtis resigned from the Court. Curtis claimed he was motivated by the need to earn more money to provide for his family, but few

93. *See e.g.* Currie, *supra* n. 16, at 272 (discussing Curtis's treatment of Taney's due process argument).

94. *See supra* n. 43.

95. *See* Swisher, *supra* n. 20, at 640–41.

96. Charles Evans Hughes, *The Supreme Court of the United States* 50 (Columbia U. Press 1928).

believed that rationale at the time, or do today, and he made clear in his correspondence thereafter that his departure was the contemporary judicial equivalent of a modern noisy withdrawal.[97] One of the finest lawyers of the nineteenth century, Curtis was a major contributor to the work of the Court even as a junior justice who served for a mere six years.[98] He was replaced by one of the weakest justices of the time, Nathan Clifford.[99] Surely that change did the Court no good.

For Taney, the struggle for the last word did not end with the publication of opinions in *19 Howard*. He continued to agonize over the case, the opinions, and the public reaction to them. In September of 1858, more than a year after he had sanctimoniously lectured Curtis about the impropriety of untimely, staggered release of opinions in *Dred Scott*, Taney wrote a thirty-page supplement to his opinion in the case and sought to have it published in the official reports.[100] This was too much even for the justices who had supported his initial last-word maneuvering against Curtis. The Court rejected Taney's *Dred Scott II* opinion,[101] and he was left to appeal to his heirs to publish it in some other way.[102] Even if Taney was blind to the lessons of his effort to get the last word, his colleagues were not.

---

97. *See* Stuart Streichler, *Justice Curtis in the Civil War Era: At the Crossroads of American Constitutionalism* 148–49 (University of Va. Press 2005). Quitting was, of course, not Curtis's only option, even if he was disgusted with the handiwork of the Chief Justice and a majority of his colleagues. Curtis might have better served the country, as well as the rule of law in which he fervently believed, by carrying on. *Cf.* Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* 177 (Doubleday 2007) (offering an unsupported—and apparently unverifiable, as Toobin cites no authority—report that in the wake of the *Bush v. Gore* case, Justice David Souter "seriously considered resigning").

98. *See* Currie, *supra* n. 52, at 728–38, 744–45; David P. Currie, *The Constitution in the Supreme Court: Contracts and Commerce, 1836–1864*, 1983 Duke L. J. 471, 506–13.

99. *See* Currie, *supra* n. 16, at 356, 452, 452 n. 13 (describing Clifford as one of "the poorest opinion-writers ever to sit on the Court," noting that his opinions were "below standard," and pointing out that its Reporter thought the Court likely to be "better off" without him).

100. *See* Tyler, *supra* n. 21, at 578–608 (reprinting the supplement).

101. *See* Samuel Tyler to F.M. Etting (Nov. 18, 1870), in Howard Papers, Maryland Historical Society, Box 10 (showing that Tyler was "much gratified to learn . . . that the Circuit Decisions of Ch. J. Taney [were] about to be published")); *see also* Swisher, *supra* n. 20, at 651–52 (citing R.B. Taney to J. Mason Campbell (Feb. 18, 1861)).

102. R.B. Taney to J. Mason Campbell (Feb. 18, 1861), in Howard Papers, *supra* n. 101; *see also* Swisher, *supra* n. 20, at 651–52.

*Briefly Back to the Court*

There were probably other last-word episodes on the Supreme Court in the decades before and after the three imbroglios described above. Justice Miller's embarrassing attempt to compete with the Court's official reporter of decisions in the early 1880s might qualify,[103] and it may be that Baldwin's experience with the 1832 case of *Ex parte Bradstreet* (in which he was kept in the dark about an order of the Court to which he had objected)[104] was at the root of the fast one he pulled on his colleagues with *A General View*. A thorough sifting of the Court's history, with last words in mind (a task of lifetimes), might well turn up more.[105]

But it may also be the case that decades passed during which conditions were not right for last-word escapades. For example, a lull might plausibly be explained by Court culture and leadership. For most of the Court's existence before the publication of *A General View* in 1837, it was led by Chief Justice Marshall. Maybe his famous success at keeping a lid on dissenting opinions[106] extended to keeping a lid on the occasional last-word opinion. And the advent of several decades of relatively effective administrative leadership (but not

---

103. *See The United States Supreme Court Reporter*, Ohio L. J. 527 (June 1, 1882) (indicating that Justice Miller was in his separately published reports inclined to "make use of his editorial pen to belabor his fellow judges, and give expression to his chagrin and ill humor").

104. *See* Henry Baldwin to Richard Peters (July 21, 1832), reprinted in *Ex parte Bradstreet*, 31 U.S. 774, 774 (1832) (Baldwin, J., dissenting).

105. Another possibility is Chief Justice Salmon Chase's maneuvering in the *Legal Tender Cases*. *Compare* J.W. Schuckers, *The Life and Public Services of Salmon Portland Chase* 258–273 (Da Capo Press 1970) (reprint of 1874 edition), *with* William Draper Lewis, *The Legal Tender Cases in 1870*, in *Miscellaneous Writings of the Late Hon. Joseph P. Bradley* 45, 61–74 (L. J. Hardham 1902) (including "A statement of facts relating to the order of the Supreme Court of the United States for a re-argument of the Legal Tender Question, in April, 1870" signed by a majority of the Court sitting in 1870 and filed in response to "a paper filed by the Chief Justice [Salmon Chase] on behalf of himself and Justices NELSON, CLIFFORD and FIELD. That paper has been withdrawn by them from the files of the Court, and this is, therefore, not filed."); *see also* Charles Warren, *The Supreme Court in United States History, Volume Three: 1856-1918* at 244–45 (Little, Brown, and Co. 1922).

106. *See* G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 Va. L. Rev. 1, 30–47 (1984).

necessarily jurisprudential leadership) in the late nineteenth and early twentieth centuries might have made last-word maneuvers less attractive and more difficult to execute during that period. The succession of chief justices who headed the Court from 1888 to 1941—Melville W. Fuller, Edward D. White, William Howard Taft, and Charles Evans Hughes—received generally high marks from their colleagues (as they have from historians) for administrative leadership, including the forestalling and defusing of internal conflicts and crises.[107] Another possibility involves workload. The apparent lapse in last-word antics began (in the 1880s) at about the same time that rising caseloads at the Court and on circuit became an unmanageably large problem, and it ended not long after Congress wrapped up several decades of incremental legislation, leading to a docket over which the Court exercised almost complete control.[108] Docket control, combined with an infusion of assistants (clerks) to help with the workload,[109] might have liberated some justices to include among their extracurricular activities the production of last-word opinions, including the two described below.

For present purposes, it is the persistence of last-word episodes, not their frequency, that matters most. "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad," [110] if manifestations of the urge for the last word ever did in fact lapse, they also did eventually return.

### *Felix Frankfurter (1958)*

Felix Frankfurter was appointed to the Court by President Franklin D. Roosevelt in 1939 and served until 1962. He got the

---

107. *Cf.* Westin, *supra* n. 64, at 655 ("Why the [general out-of-Court] commentary fell off so strikingly between 1865 and 1885 and again between 1920 and 1940 is difficult to explain.").

108. *See generally* Frankfurter & Landis, *supra* n. 1, chs. 2–3, 5–7.

109. *See* J. Daniel Mahoney, *Law Clerks: For Better or for Worse?* 54 Brook. L. Rev. 321, 322–26 (1988); *see generally* Todd C. Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* chs. 3–6 (Stanford U. Press 2006).

110. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia & Thomas, JJ., dissenting).

last word in *Cooper v. Aaron*,[111] the Little Rock school desegregation case. Chief Justice Warren announced the opinion of the Court on September 29. Frankfurter's concurrence appeared a week later, on October 6. As Frankfurter explained in a letter written to a friend later that autumn, he concurred because he felt there were some people—namely "the lawyers and the law professors of the South"—whom he "was in a peculiarly qualified position to address in view of my rather extensive association, by virtue of my twenty-five years at the Harvard Law School, with a good many Southern lawyers and law professors."[112] In other words, Frankfurter thought that there were lawyers in the South who would follow his lead even if they wouldn't follow the lead of the Supreme Court.

Frankfurter seems to have been mistaken. There is no evidence that his concurrence moved any lawyers in the South to do anything to combat race discrimination that they would not have done anyway.[113] Moreover, the only court to cite his *Cooper* concurrence at the time did so to buttress its approval of a go-slow approach to desegregation in Nashville, Tennessee:

> The complaint of appellants is that the plan does not conform to the mandate that desegregation take place with all deliberate speed. As Mr. Justice Frankfurter said in his concurring opinion in *Cooper v. Aaron* . . . : "Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms."[114]

The only reported case in which his concurrence was cited to support vigorous desegregation in the decade after *Cooper* was in the North.[115] The concurrence has been cited just once in the

---

111. 358 U.S. 1 (1958); *see generally* Tony A. Freyer, Cooper v. Aaron *(1958): A Hidden Story of Unanimity and Division*, 33 J. Sup. Ct. Hist. 89 (March 2008).

112. Hutchinson, *supra n.*10, at 84.

113. In this light consider Professor Urofsky's claim that "[i]n fact, Frankfurter knew very few southern lawyers and had very little correspondence with lawyers practicing below the Mason-Dixon line," Melvin I. Urofsky, *Felix Frankfurter: Judicial Restraint and Civil Liberties* 140 (Twayne Publishers 1991).

114. *Kelley v. Bd. of Educ. of Nashville*, 270 F.2d 209, 227 (6th Cir. 1959). Judge Walter Gewin later cited Frankfurter's concurrence in the course of a critique of an aggressive desegregation injunction ordered by Judges Richard Rives and Elbert Tuttle. *Armstrong v. Bd. of Educ. of the City of Birmingham*, 323 F.2d 333, 362 (5th Cir. 1963) (Gewin, J.)

115. *Taylor v. Bd. of Educ. of New Rochelle*, 191 F. Supp. 181, 197 (S.D.N.Y. 1961).

Supreme Court, as a closing rhetorical flourish to a dissent written by Justice Brennan in 1990.[116]

Frankfurter's attempt to build bridges to Southern lawyers burned or damaged a few bridges closer to home. Several of his colleagues viewed the concurrence as a betrayal of the Court's practice of speaking with one voice in desegregation cases.[117] Frankfurter was a strong believer in equal rights for African-Americans, and within the Supreme Court he had played a prominent role in decisionmaking in that area during the 1940s and '50s.[118] He was also an energetic and effective supporter of the Court's strategy of issuing unanimous opinions unqualified by separate writings, in *Brown v. Board of Education* and the desegregation cases that followed it.[119] This unanimity, widely regarded at the time and ever since as "both important and remarkable,"[120] was on Frankfurter's mind again when the Court was dealing with *Cooper*, in the summer of 1958. On September 19, Frankfurter proposed to his colleagues an even more emphatic show of solidarity. As Chief Justice Warren recalled,

> Mr. Justice Frankfurter called our attention to the fact that there had been a number of changes in our membership since *Brown v. Board of Education.* He suggested that in order to show we were all in favor of the decision, we should also say so in the Little Rock case, not in a *per curiam* or in an opinion signed by only one Justice, but by an opinion signed by the entire Court.[121]

The other justices agreed, and the September 29 opinion of the

---

116. *Spallone v. U.S.*, 493 U.S. 265, 306 (1990) (Brennan, J., dissenting). And perhaps an ironic flourish at that, given Justice Brennan's opposition to the filing of the Frankfurter concurrence in the first place. *See* notes 118–25, *infra*, and accompanying text.

117. *See e.g.* James F. Simon, *The Antagonists: Hugo Black, Felix Frankfurter, and Civil Liberties in Modern America* 232–33 (Simon and Schuster 1989); Roger K. Newman, *Hugo Black: A Biography* 474–76 (Pantheon Books 1994).

118. *See* Urofsky, *supra* n. 113, at 128–47.

119. *Id.* at 136–37, 142–46; Hutchinson, *supra* n. 10, at 84.

120. Hutchinson, *supra* n. 10, at 2.

121. Warren, *supra* n. 11, at 298. Justice Douglas had a different recollection. In what appears to be an after-the-fact memo to the file Douglas attributes the idea to Justice John Marshall Harlan. *See* William O. Douglas, No. 1—August Special Term, 1958—*William O. Cooper, et al.* v. *John Aaron, et al.*, Oct. 8, 1958, at 1, in Douglas Papers, *supra* n. 10, Box 1199; *see also* Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court* 299–300 (N.Y.U. Press 1983).

Court in *Cooper* was issued under the names of all nine members of the Court.

It was also on September 29 that at least some members of the Court learned that Frankfurter of all people was planning to write separately.[122] The justices opted to proceed with announcement of the opinion of the Court. There was a sense of urgency. The school year had begun, Justice Harold Burton's retirement was pending, and the case arose in an atmosphere of conflict and crisis. And, although they had failed to dissuade him during their meeting on the 29th, Frankfurter's colleagues may have thought they could bring him around. After all, he was a true believer in the desegregation unanimity policy. He was also wont to think out loud on paper within the confines of the Court, especially in controversial cases, without taking the final step of turning those writings into published opinions.[123] Surely that would be the case in *Cooper*. Justice Harlan spoke with Frankfurter privately about the matter. According to Justice Douglas, during a meeting on Friday, October 3, "[t]he Chief Justice and Justice Black spoke very strongly, their feeling being that his opinion would do damage."[124] When Frankfurter persisted, Black and Brennan went so far as to propose a separate opinion, distancing themselves from Frankfurter's. They were dissuaded by some combination of a negative vote by the other justices and a tongue-in-cheek counter-counter opinion proposed by Harlan.[125]

Frankfurter released his opinion without fanfare and to little acclaim other than some fan mail.[126] Nevertheless, Warren would later recall that it "caused quite a sensation on the Court,

---

122. Hutchinson, *supra* n. 10, at 82 & 82 n. 702 (quoting Burton, J., Diary, Sept. 29, 1958, Box 4, Harold H. Burton Papers, Lib. of Cong., Manuscript Div.).

123. *See e.g.* Felix Frankfurter, *F.F.'s Soliloquy*, 5 Green Bag 2d 438 (2002) (memorandum to the Conference circulated by Frankfurter, on October 23, 1942, six days before announcement of the opinion of the Court in *Ex parte Quirin*, 317 U.S. 1 (1942), the Nazi saboteurs case); Urofsky, *supra* n. 113, at 130–31 (describing similar episode in the case of *Smith v. Allwright*, 321 U.S. 649 (1944)).

124. *See* Douglas Papers, *supra* n. 10, at Box 1199.

125. See Appendix I, *infra*, for both the Black–Brennan proposal and the Harlan proposal.

126. *See e.g.* Kim Isaac Eisler, *A Justice for All: William J. Brennan, Jr., and the Decisions that Transformed America* 155 (Simon & Schuster 1993).

because it was our invariable practice not to announce the decision in any case until all of our views had been expressed."[127] Professor Schwartz reports that Frankfurter's play for a last word in *Cooper* marked the end of Warren's confidence in Frankfurter, a development which harmed not only their personal relations, but also their capacity to collaborate on opinions.[128] The Warren–Frankfurter relationship, personal and professional, had been on the decline for several years, but the *Cooper* imbroglio appears to have been the last straw.

In sum, Frankfurter's play for the last word in *Cooper* netted at least two costs—a little bit of aid and comfort for some opponents of speedy desegregation (recall Baldwin), and an end to (or at least a decline in) constructive work between two members of the Supreme Court (recall Taney and Curtis)—and no benefits.

### *William O. Douglas (1973)*

William O. Douglas also was appointed to the Court by Roosevelt in 1939. He retired in 1975. As Professor Murphy has shown in compelling detail, Douglas invoked "independence" throughout his thirty-six-year tenure not only as the basis for his distinctive approach to his work as a judge, but also as an excuse for his distinctively rude and occasionally dishonest dealings with his colleagues.[129] Douglas's sense of independence was on display in his opposition to United States military involvement in Southeast Asia throughout the late 1960s and early 1970s, when he did everything in his power as a judge to slow or stop the Vietnam War—including repeated attempts to coax his colleagues on the Court into ruling on the lawfulness of various

127. Warren, *supra* n. 11, at 298–99; *see also* Simon, *supra* n. 117, at 232.

128. Schwartz, *supra* n. 121, at 305; *see also* Urofsky, *supra* n. 113, at 146–47 (reporting that after a period of "pariah" status, in the words of Brennan, most of the justices "made their peace" with Frankfurter, "but not Earl Warren").

129. *See e.g.* Bruce Allen Murphy, *Wild Bill* 353–54, 471–72 (Random House 2003).

aspects of the conflict.[130] All to little avail, but to considerable public controversy.[131]

Finally, in early August 1973, Douglas saw an opportunity to stop the war all by himself.

In July 1973, Elizabeth Holtzman (a Member of the House of Representatives) and several Air Force officers filed suit in a New York federal district court seeking a permanent injunction against United States air operations in Cambodia. The district court gave them their remedy, but postponed it for a few days to give the government time to seek review (or at least a stay of the injunction pending review) in the Second Circuit. The Second Circuit granted the government's request for a stay, and set the case for prompt argument. Holtzman et al. applied to Justice Thurgood Marshall in his capacity as Circuit Justice for the Second Circuit, seeking an order vacating the appellate court's stay and thus triggering the district court's injunction. On August 1, Marshall denied the application.[132] On August 3, Douglas, to whom Holtzman's attorneys had applied after being denied by Marshall,[133] held a public hearing on the application at the Yakima (Washington) County Courthouse, and then vacated the Second Circuit's stay and restored the district court's injunction.[134]

But as Douglas knew, his colleagues on the Court had resolutely avoided deep entanglement in policy issues related to the war.[135] On August 4, Douglas issued an opinion to accompany his August 3 order, even as the Solicitor General

130. *See e.g. id.* at 415–19.

131. *See id.* chs. 33, 35, 36; *see also* H.R. Spec. Subcomm. on H. Res. 920, *Final Report*, 91st Cong. 61–65 (1970) (containing copies of letters written by Representative F. Edward Hébert in August 1969 to Chief Justice Burger and Solicitor General Erwin Griswold asking that Douglas be disqualified in cases relating to the Vietnam War, and Burger and Griswold's replies).

132. *See Holtzman v. Schlesinger*, 414 U.S. 1304 (1973) (Marshall, J., in chambers); *see also* John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* 34–35, 40–43 (Princeton U. Press 1993).

133. *See* Burt Neuborne to William O. Douglas, Aug. 1, 1973, in Douglas Papers, *supra* n. 10, Box 1639.

134. *See* Order, A-150 *Holtzman v. Schlesinger* (Aug. 3, 1973) (Douglas, J., in chambers), in Papers of Harry A. Blackmun, Lib. of Cong., Manuscript Div., Box 172 [hereinafter "Blackmun Papers"]; Murphy, *supra* n. 129, at 461–62.

135. *See e.g. Drifka v. Brainard*, 2 Rapp 416 (1968) (Douglas, J., in chambers).

was presenting Marshall with an application to stay the order of the district court that Douglas had just restored. Marshall granted the stay, thus frustrating Douglas's effort to halt the war.[136] But Marshall went further. He concluded his stay by communicating the entire Court's disapproval of Douglas's decision:

> I have been in communication with the other Members of the Court, and The Chief Justice, Mr. Justice Brennan, Mr. Justice Stewart, Mr. Justice White, Mr. Justice Blackmun, Mr. Justice Powell, and Mr. Justice Rehnquist agree with this action.[137]

It was this last passage that really disappointed Douglas. Professor Murphy reports: "'I expected to be overturned,' Douglas told [his secretary Marty] Bagby cheerfully, 'but I didn't think it would happen so fast. I really wanted a full hearing, but at least I got my say.'" [138]

In print, though, Douglas responded angrily to Marshall and the other members of the Court who had sided with him. Douglas issued a "dissent" to Marshall's opinion, even though Marshall was writing "in chambers," meaning that his opinion expressed only his decision and opinion as an individual Circuit justice, not as an associate justice writing an opinion of the Court. Douglas complained, first, that Marshall lacked the power as Circuit justice to deny Douglas the last word, and, second, that the Court lacked the power to deny him the last word when they conferred by telephone (a measure taken by Marshall to reach justices who were not able to meet in Washington during the Court's summer recess[139]) rather than in

---

136. *See Schlesinger v. Holtzman*, 414 U.S. 1321 (1973) (Marshall, J., in chambers).

137. *Id.* at 1322.

138. Murphy, *supra* n. 129, at 464. Of course, as a Supreme Court justice, he could have his say any time he wanted to, and had in fact done so on several occasions. *See e.g. Winters v. U.S.*, 2 Rapp 410 (1968) (Douglas, J., in chambers); *Drifka v. Brainard*, 2 Rapp 416 (1968) (Douglas, J., in chambers); *Noyd v. Bond*, 2 Rapp 418 (1968) (Douglas, J., in chambers).

139. At least a few of the justices met in conference at the Supreme Court building. *See* 1973 Datebook, in Blackmun Papers, *supra* n. 134, Box 60 (Saturday, Aug. 4, entry: "Conf in S re Cambodia papers").

person.[140] He then went on to explain his objection, in language reminiscent of Justice Daniel's and Justice Curtis's:

> A Conference brings us all together; views are exchanged; briefs are studied; oral argument by counsel for each side is customarily required. But even without participation the Court always acts in Conference and therefore responsibly. . . .
>
> I have participated for enough years in Conferences to realize that profound changes are made among the Brethren once their minds are allowed to explore a problem in depth. . . .
>
> Whatever may be said on the merits, I am firmly convinced that the telephonic disposition of this grave and crucial constitutional issue is not permissible. I do not speak of social propriety. It is a matter of law and order involving high principles. The principles are that the Court is a deliberative body that acts only on reasoned bases after full consideration, and that it is as much bound by the law of the land as is he who lives in the ghetto or in the big white house on the hill. With all respect I think the Court has slighted that law. The short-cut it has taken today surely flouts an Act of Congress providing for a necessary quorum.[141]

Douglas's defense of the Court's deliberative processes rings true. But as the catalytic agent for Marshall's quickie orchestration of a firm end to his attempt to have the last word on the Cambodian bombing campaign, Douglas was not well-positioned with respect to the judicial high ground.[142]

In other words, Douglas's decision to vacate the Second Circuit's stay even though he "expected to be overturned" may well have been viewed by his colleagues as a lawless act—especially if they knew of his expectation—because, as Marshall

---

140. *Schlesinger v. Holtzman*, 414 U.S. at 1322–24 (Douglas, J., in chambers, "dissenting").

141. *Id.* at 1323–24.

142. *See* Murphy, *supra* n. 129, at 464–65. In addition, Douglas was uniquely experienced in the hazards of procedural brinksmanship at the Supreme Court, having played a central role in 1953 in the most famous modern episode involving that sort of behavior. *See* Brad Snyder, *Taking Great Cases: Lessons from the Rosenberg Case*, 63 Vand. L. Rev. 885, 913–20 (2010).

said in his first *Holtzman* opinion,

> [a] Circuit Justice . . . bears a heavy responsibility to conscientiously reflect the views of his Brethren as best he perceives them, cf. *Meridith* [*sic*] v. *Fair*, 83 S. Ct. 10, 11 (1962) (Black, J., Circuit Justice), and this responsibility is particularly pressing when, as now, the Court is not in session.[143]

But Douglas seemingly knew, or at least believed, he was flouting the views of his colleagues, and had instead used *Holtzman* as a personal vehicle through which to "have my say" in a case even he, perhaps the strongest supporter on the Court of congressional and judicial power to restrain the president in this context, expected Holtzman to lose. (Indeed, Marshall seems to have paid more attention to Holtzman's arguments, and to have been more sanguine about her prospects for success on the merits, than Douglas did or was.) Which was the more dangerous precedent, Marshall and the other Justices might have been asking themselves: (a) to bow to one Circuit Justice (Douglas) who uses the stay power as a means of self-expression without regard to the views or interests of other members of the Court, thus setting a dangerous precedent for future rogue decisions, or (b) to permit one Circuit Justice (Marshall) to re-impose a stay vacated by another Circuit Justice (Douglas) rather than honoring the decision to vacate pending a hearing by the full Court, thus setting a dangerous precedent for future dueling vacations and stays? Reasonable minds could differ. Those of Marshall, Burger, Brennan, Stewart, White, Blackmun, Powell, and Rehnquist seemingly did not. All opted for (b).

At first blush, this latest last-word episode appears to be a relatively low-cost incident, at least compared to some of the others described in this article. There was no upside for Douglas. He did not get what he said he wanted: a hearing. But there was no immediate harm done—Douglas was just being the same old obnoxious independent, and the procedurally slippery maneuver Marshall had used did not have any noticeable impact on the Court's jurisprudence or on inter-branch relations.

---

143. *Holtzman v. Schlesinger*, 414 U.S. at 1313 (Marshall, J., in chambers).

But there may have been longer-term costs for Douglas, and for the Court. Having once prompted the other eight members of the Court to confer outside his presence (telephonically or otherwise) in order to prevent his independence from frustrating the work of the Court, Douglas had set a precedent, or at least marked the channel, for those eight to meet again when next he stepped beyond the pale. And that next time would come in October 1975, when the other eight justices would vote in secret to deny him a vote in five-to-four decisions by the Court[144]—a far more serious challenge to the Court's tradition of "always act[ing] in Conference and therefore responsibly."[145]

Finally, even the independent Justice Douglas never again tried to get the last word on Vietnam, or anything else, at the expense of his fellow justices. He probably would have been irritated to learn that his *Holtzman* opinion has been cited just once in a case involving the military. It was in a concurrence to a decision denying members of Congress standing to seek a declaration that a president had violated the war powers clause of the Constitution, for the proposition that "[a]ppellants cannot point to any constitutional test for what is war."[146]

### *Back—Again Briefly—to the Court*

There could be more recent last-word cases. For example, it has been suggested that not all of the justices saw all of the opinions in *Bush v. Gore* before they were issued.[147] But it will be many years before we can check. Indeed, the sample set of last-word opinions will probably always be stale, because the clues will often be in memories that fade and eventually disappear and files that tend to be opened to the public at a time only long (and getting longer) after the event.[148] Alas, it is

144. *See* Ross E. Davies, *The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 Green Bag 2d 79, 88–89 (2006).

145. *Schlesinger v. Holtzman*, 414 U.S. at 1323 (Douglas, J. "dissenting").

146. *Campbell v. Clinton*, 203 F.3d 19, 25 (D.C. Cir. 2000) (Silberman, J., concurring).

147. *See* White, *supra* n. 7, at 1504 n. 159.

148. *See e.g.* Tony Mauro, *Souter Blocks Access to His Papers for 50 Years*, 240 Leg. Intelligencer 4 (Aug. 28, 2009).

impossible to learn the lessons of history when the history is secret.

## PART II

### *A. Why So Few Last Words?*

The reasons why individual justices do not return to the well of last words are probably pretty obvious by now. There are two of them. First, the last word does not work. From Baldwin's attempt to turn a buck to McLean's attempt to pump up his presidential prospects to Taney's attempt to make America safe for slavery to Frankfurter's attempt to make his Harvard acolytes make the South safe for desegregation to Douglas's attempt to end the Vietnam War, every last-word justice was reminded that the justices' great public power comes from their membership in a respected institution, not from any personal genius or influence. And when a justice, even a chief justice, attempts to convert the Court into a vehicle of self-expression, the other members of the Court tend to band together in opposition, regardless of how divided they may be on the underlying legal issues. Second, the last word is costly, in individual and (at least some of the time) institutional terms. Members of the Court and, at times, outsiders, are not afraid to sanction justices who attempt to grab more than their share of supreme judicial power. And both the grab itself and the collegial sanctions that follow can harm the Court as an institution.

Why, then have justices continued—albeit only very occasionally—to attempt to draw from an illusory well of authority that has so consistently disserved their predecessors? Any plausible answer must begin with an understanding of the intentions of the justices involved. With the possible exception of Baldwin—whose intentions are the most obscure and whose distance from modern judicial mores is the greatest—they have sought to serve the public by their "own peculiar lights," and have fouled it up. Consider the following possibilities:

*1. Perhaps They Are Ignorant of History.*

All Supreme Court justices are, to some extent, students of the history of the Court in general, and of their predecessors in particular.[149] Professional responsibility calls for it, even if native curiosity doesn't do the job. But that does not mean that they know about these rare, unhappy, and understandably under-celebrated events. Lacking awareness of how ineffectual and harmful past efforts to get the last word have been, they cannot weigh those experiences when choosing their own courses of action. They are doomed.[150] In some cases, at least, this rationale is probably unduly charitable. McLean, Taney, and Douglas, for example, had while serving on the Court witnessed last-word frolics by at least one colleague before they engaged in similar acts themselves.

*2. Perhaps They Feel a Sense of National Crisis.*

Theirs are cases of special importance, arising at

---

149. *See e.g.* William H. Rehnquist, *The Supreme Court: How It Was, How It Is* (William Morrow & Co., Inc. 1987); Harry A. Blackmun, *The Story–Holmes Seat*, 2 J. Sup. Ct. Hist. 11 (1996); *but see* Josiah M. Daniel, III, *Historians as Justices of the Supreme Court*, posted to American Society for Legal History, *H-Net and HSLH Legal History Discussion List*, http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=H-Law&month=1102&week=b&msg=J2/CVdEm8yajTejBB45GFQ&user=&pw= (Feb. 11, 2011) (accessed Apr. 1, 2011; copy on file with Journal of Appellate Practice and Process):

> I have two small anecdotes germane to the topic of "historians as Supreme Court justices," or rather to the interest of two justices in history. Both occurred during my law school days at the University of Texas.
>
> First, in the fall of 1975, William Rehnquist, then on the bench for four years, visited the law school and at a reception in the Tom Clark Lounge, I asked him whether, since he took the bench, he was reading U.S. history, in particular the AHR or the Journal of American History, and he answered "I regret that I no longer have time to do so." He did have two M.A.s in poli sci and government, which, as is noted from time to time on this list, is a sort of a distant cousin to legal history.
>
> Second, in the spring of 1978, I had the opportunity to spend an hour with Tom Clark in the Faculty Lounge at the law school. Back then I was a maestro of Supreme Court trivia, and I tried out every trivia question I could muster and Clark knew them all. He said he had put a lot of time into learning about the history of the Court after he stepped down ten years earlier.

150. George Santayana, *The Life of Reason* vol. 1 (titled *Introduction and Reason in Common Sense*) at 284 (Charles Scribner's Sons 1920) ("Those who cannot remember the past are condemned to repeat it.").

extraordinary times. Past last-word cases have involved some of the most important and controversial issues of their respective days. Baldwin was addressing federal versus state power as the nation was making the transition to a Jacksonian democracy. McLean and Taney were addressing slavery, Frankfurter segregation, and Douglas Vietnam. Some justices do appear to have believed that notwithstanding the importance of consistent application in the courts of general rules—to justice, the rule of law, the efficiency of social relations, the reputation of the judiciary, and so on—some circumstances call for judicial action that Justice Owen Roberts once contemptuously described as being of "the same class as a restricted railroad ticket, good for this day and train only."[151] Even a Taney or Douglas who had witnessed the consequences of the pursuit of the last word—and thus for whom ignorance of history could be no excuse—might choose to act arbitrarily if the stakes were high enough. That justice could cite Abraham Lincoln and William Rehnquist, among others, for support.[152]

*3. Or Perhaps It Is More a Sense of Institutional Crisis.*

Baldwin and McLean acted during the difficult early years of the Taney Court, when the institution was working its way out of the shadow of John Marshall. Taney, Frankfurter, and Douglas shared a different relationship to the institution of the Court: They found themselves seeking the last word toward the ends of long and distinguished careers. Some of the most eminent members of the Court, as well as lesser lights, have

151. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting); *see also Wash. Co. v. Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting) (citing Roberts dissent in *Smith*); *Sorchini v. City of Covina*, 250 F.3d 706, 708 n. 2 (9th Cir. 2001) (per curiam) ("This excuse is valid only in this case. *See Bush v. Gore*, 531 U.S. 98 . . . (2000).").

152. Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), in *The Collected Works of Abraham Lincoln* vol. 4 at 421, 430 (Roy P. Basler ed. Abraham Lincoln Assn. 1953) (addressing suspension of habeas corpus in times of rebellion or invasion); William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* 165, 218 (Alfred A. Knopf 1998) (pointing out that "[w]ithout question the government's authority to engage in conduct that infringes civil liberty is greatest in time of declared war" and that "insurrection could be treated by the government as the equivalent of a declared war").

shown a tendency toward personal judicial apocalypsism in their old age. Chief Justice William Howard Taft, for example, wrote to his brother that, "I must stay on the court in order to prevent the Bolsheviki from getting control."[153] In his waning days even John Marshall succumbed to the sense that the younger generation lacked the strength and judgment of their forebears.[154] More recently, Justices Douglas and Blackmun expressed similar concerns.[155] Saving the Court might not be quite the same as saving the nation, but it would still count as a high calling justifying, perhaps, extraordinary measures.

*4. Which Leads to the Fourth Possibility: Perhaps They Feel a Sense of Personal Mission.*

Perhaps there are special justices endowed with capabilities or characteristics that make their voices more powerful or useful than the institutional voice of the Court—or at least justices who think they are so blessed and burdened. This possibility seems closest to the surface in the most recent cases. Frankfurter, with his strangely self-absorbed and self-important belief that a prominent Harvard man such as himself could speak—over the heads of less influential justices—to his fellow sophisticates of good will in the South and bring about a massive social change that had exceeded the grasp of lesser Americans. Perhaps his

153. William Howard Taft to Horace D. Taft, Nov. 14, 1929, quoted in Henry F. Pringle, *The Life and Times of William Howard Taft* vol. 2 at 967 (Farrar & Rinehart 1939). According to Professor Wiecek, "[t]he Bolsheviks he had in mind were Justices Oliver Wendell Holmes, Louis D. Brandeis, and Harlan Fiske Stone." William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 Sup. Ct. Rev. 375, 393. *See also* Alpheus Thomas Mason, *William Howard Taft: Chief Justice* 295 (Simon and Schuster 1965); Ross E. Davies, *A Certain Mongrel Court: Congress's Past Power and Present Potential to Reinforce the Supreme Court*, 90 Minn. L. Rev. 678, 712 (2006) (pointing out that some members of the Court have seemed to "find it difficult to imagine justice prevailing in their absence, thereby making it their duty to remain on the Court as long as physically possible").

154. John Marshall to Joseph Story (Sept. 22, 1832), quoted in Albert J. Beveridge, *The Life of John Marshall* vol. 4, at 559 (Standard Library 1919); *see also* Herbert A. Johnson, *The Chief Justiceship of John Marshall, 1801–1835* at 261 (U. of S.C. Press 1997).

155. *See e.g. Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 922–23, 943 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); Murphy, *supra* n. 129, at 481–95; James F. Simon, *Independent Journey: The Life of William O. Douglas* 447–54 (Harper & Row 1980).

long service on the Court had fostered an illusion that people hung on his every word because they were Justice *Frankfurter*'s words, when in fact it was because they were *Justice* Frankfurter's words. Were it otherwise, an inspirational essay on desegregation by any respected and long-serving member of the Harvard Law faculty would have served as well. And Douglas, with his no-holds-barred, judicio-guerrilla warfare with the executive branch over the Vietnam War, believing perhaps that only a truly independent man—a Supreme Court Rambo—could lead the country and the world to freedom from the aggressions and machinations of an evil, imperial President and his henchmen. (Cue Darth Vader theme music.)

*5. Perhaps They Are Not Calculating the Costs and Benefits in the Way This Article Suggests They Should.*

The fact that the benefits of pursuing the last word are illusory or at least highly improbable might be of little moment to a justice for whom the costs are extremely low. A Baldwin or Douglas, for example—whose relations with colleagues were already generally poor, and whose public behavior suggested that they either did not see or did not care about the possibility that their behavior as individuals might harm the institution of which they were a part—might conclude that the costs of getting the last word are vanishingly close to zero. They might be mistaken, as in the case of Douglas, where his eight adversaries banded together again a couple of years later, but that sort of development would be even harder to anticipate and evaluate. Under those circumstances, the likely ineffectuality of the last word would appear to such a justice to merely mean a near-zero benefit on the other side of the equation from what to them would appear to be a certainly-zero cost.

*6. Closely Entwined with the Preceding Is the Possibility of a Judicial End-Period Problem.*

Recall that three of the five justices whose last-word efforts we have reviewed were near the end of long and prominent careers on the Court. A justice imbued with a sense of crisis (the second and third possibilities above) or self-importance (the

fourth possibility) might well decide to fall on his or her sword: I am going to retire or die soon, so the costs to me (and perhaps also to the institution, to the extent I can attract the costs to myself) will be low, and while the benefits are both speculative and improbable, there is no (or at least very little) harm in trying, especially in light of the gravity of the situation. Noblesse oblige. A sense of devil-may-care (the fifth possibility) would only further ease the way down the path of this rationale.

### *B. And What of Last Words Anyway?*

Whatever a justice's motives for getting the last word may be in a particular instance—and surely there are other possibilities not covered here[156]—the question of what to do about them remains. There is no obvious predictor. For each of the possibilities offered above, there are, obviously, many more examples of justices who did *not* respond by seeking the last word than there are of justices who did.

## PART III

There is no last-word crisis. Last-word opinions are wasteful and potentially worse, but at least in their historical forms they do not pose a profound or pressing threat to truth, justice, or the American way. In fact, the most striking implication of this essay may be that justices engage in this sort of behavior only rarely. Why are they so well-behaved? The answer is beyond the scope of this article, but it is comforting to have such a long history of temptation so very nearly consistently resisted. Thus, talk of constitutional amendments, impeachments, inspectors general, and the like would be out of place. Besides, there are plenty of other things that need fixing too. So, the focus here is on relatively cheap and easy solutions to a small but interesting and potentially fixable problem.

Before turning to solutions, though, recall the experiences of past last-word justices. Those experiences can be seen as

156. For example, one thoughtful reader of an earlier draft pointed out that pride might be a factor: "Hubris. . . . Some Justices are simply blinded by ego."

having two aspects: market-feedback, and tit-for-tat. The relevant markets—in book sales, political support, desirable citations, and so on—have valued last-word opinions at zero, or less. And justices who invade institutional or individual prerogatives at the Court when seeking the last word have been apt to experience retaliation sufficiently sharp to deter a second intrusion. The effectiveness of these forces seems satisfactory. No one has tried for a second last word.

Thus, the only problem that needs solving is the first act. Such acts can be costly—the loss of a great talent such as Justice Curtis, or the unintended provision of justifications for prolonging racial segregation, and so on—but unpredictably so. And as explained in Part II above, the obvious explanations for last-word outbreaks are not useful predictors of future events.

What is needed, then, is a low-cost general deterrent or prophylactic. But how to deter or neuter a Supreme Court justice?

Article III of the Constitution is a powerfully liberating law. Federal judges holding office under that provision of the Constitution are free to do as they please, subject only to never-enforced requirements of "good Behaviour" in office[157] and adherence to an "Oath or Affirmation" to support the Constitution,[158] and "remov[al] from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[159] Acting directly against justices seeking the last word seems to be out of the question. They are essentially free, under Article III, to do as they please.

Consider first the possibility of some limited action against the justices themselves:

### *A. The Justices Could Adopt a Rule Forbidding Last-Word Opinions.*

Perhaps something modeled on Federal Rule of Criminal Procedure 29.1, under which the prosecutor, who has the burden

157. U.S. Const., art. III, § 1.

158. U.S. Const., art. VI.

159. U.S. Const., art. II, § 4.

of proof, gets the last word. After all, they routinely permit themselves to be subject to other constraints. But they are the constraints of tyrants. Thus, for example, Supreme Court Rule 42 (which in 1857 provided that "all opinions hereafter delivered by the court shall immediately upon the delivery thereof be . . . delivered over to the clerk to be recorded") failed to constrain Taney. Admonitions and even threats by his colleagues failed to sway Frankfurter. Douglas flouted established Supreme Court practice. By the same token, acting directly against the last-word actions of justices seeking the last word also seems to be out of the question. They can be nullified—as, for example, Douglas's were in the *Holtzman* litigation—but they cannot be stopped.

### *B. They Could Establish a Practice, Like the Rule of Four for Granting Petitions for Certiorari, Barring Last-Word Opinions without Permission from, Say, a Majority of Justices.*

This approach has the appeal of precedent. Recall that it was used, at least informally, on a few occasions in the 1940s.[160] More recent experience suggests, however, that a practice of this sort would be no more effective than a rule of the sort described in subsection A above. It runs the risk of triggering destructive game-playing under precisely the kinds of stressful circumstances that it might be adopted to address.[161]

Then there is the possibility of action not against last-word justices, but against their words. The decisions and opinions of the Court belong to the Court as an institution, as do the official reports of those decisions. Consider the following:

### *C. They Could Adopt an Interpretive Rule Nullifying Last-Word Opinions.*

There are a variety of ways the Court might achieve this end. Perhaps the most straightforward would be to extend the

160. *See supra* n. 10.

161. *See e.g.* Edward Lazarus, *Closed Chambers* 157–65 (Random House 1998) (describing the institutional stresses triggered by conflicts among the justices involving various internal three-, four-, and five-vote rules).

Court's holding in *Nguyen v. United States*[162] that an opinion issued by an "improperly constituted" federal court of appeals is a nullity.[163] The majority in *Nguyen* emphasized the "strong policy concerning the proper administration of judicial business" embodied in the statute defining membership on a panel of the court of appeals.[164] The same argument could be made—as Justice Douglas said in *Holtzman*—that the quorum requirement for the Court precludes any one justice from purporting to speak as a member of the Court without first deliberating in the company of at least a quorum-minus-one of her or his colleagues. After all, by long practice at the very least, no one—not even a freelancing justice—can bar a justice from participating in the work of the Court.[165] In addition, there is precedent from the Supreme Court itself for ignoring late-breaking opinions.[166] On this reasoning, a last-word opinion might be the work of a person whose day job is being an associate or chief justice serving on the Supreme Court of the United States, but that piece of writing would not be written in her or his capacity as a member of the Court unless it had been timely circulated to at least a quorum-minus-one of the Court. The problem here, of course, is that clever gymnastics with precedents established for other purposes—in the case of *Nguyen*, the supervision of inferior courts by the Supreme Court—can open a Pandora's Box. In this case, the potential for destructive game-playing under a *Nguyen*-based rule would be much the same as the potential under the kind of rule or practice

---

162. 539 U.S. 69 (2003).

163. *Id.* at 82.

164. *Id.* at 78 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)).

165. *See e.g.* William H. Rehnquist, C.J. of the U.S., to Patrick Leahy, U.S. Sen. (Jan. 26, 2004), reprinted in *Irrecusable & Unconfirmable*, 7 Green Bag 2d 277, 280 (2004) (pointing out that "[a] Justice must examine the question of recusal on his own"); *see also supra* n. 131.

166. *See e.g. U.S. v. King*, 48 U.S. 833, 846 (1849):

> In this case, there is a statement by the judge who decided the case, containing his opinion both on the facts and the law, and which is attached to the record, and has been sent up with it. But this opinion appears to have been filed, not only after the suit had been ended by a final judgment, but after a writ of error had been served removing the case to this court. This statement of the judge cannot, therefore, be regarded as part of the record of the proceedings in the Circuit Court, which the writ of error brings up, and cannot therefore be resorted to as a statement of the case.

described in subsections A and B above. On the other hand, a *Nguyen*-based rule would generally postpone final determination of the status of a last-word opinion until the question of its status and authority arose in a later case. By then, the crisis under which the last-word opinion appeared might well have passed, and cooler reflection from a distance might present a solution.

### *D. Or Congress Could Step in, and Somehow Neutralize Last-Word Opinions.*

Congress might, for example, enact a law denying precedential effect to any opinion in a case issued after the opinion of the Court in that case. With, of course, room for technical and typographical corrections.[167] Professor Paulsen has made a widely noted proposal for legislative abolition of judicial stare decisis in constitutional cases.[168] Aside from the larger questions of the constitutionality of such an approach, there is the more straightforward question: Would such a dramatic and potentially damaging approach be worth the benefits of avoiding a few last-word dust-ups? Better, perhaps, to have a few last-word opinions out there than a world in which Congress is treating every American as it treated Terri Schiavo.

---

167. See, for example, the cover of any preliminary print of the *United State Reports*, all of which feature these words on the front cover:

> Users are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the bound volume goes to press.

*See also e.g.* Tony Mauro, *Breyer's "I" Scream*, 22 Leg. Times 1 (Apr. 26, 1999) (noting that Justice Breyer once used "I" when announcing a decision of the Court). Justice Breyer should take some consolation from the very good company in which this incident puts him. *See e.g. Talbot v. Seeman*, 5 U.S. 1, 31, 32 (1801) (Marshall, C.J.); *U.S. v. Schooner Peggy*, 5 U.S. 103, 110 (1801) (Marshall, C.J.).

168. *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute*, 109 Yale L.J. 1535 (2000); *De-precedenting* Roe, 3 Green Bag 2d 347 (2000); *but see* Richard H. Fallon, Jr., *Stare Decisis and the Constitution*, 76 N.Y.U. L. Rev. 570 (2001); *see also* Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 Mercer L. Rev. 697 (1995).

### *E. And, Finally, a Narrow Solution that the Court Could Adopt without the Spillover Problems of Proposals C and D or the Game-Playing Risks of Proposals A and B.*

The Court could, by rule or practice, treat writings of justices issued in a case after the date on which the opinion of the Court in that case is announced as the work of an individual judge rather than the Court, unless notice of those forthcoming words is included in the opinion of the Court. They could be published in the back of the *United States Reports*, in the section currently reserved for in-chambers opinions of individual justices sitting as Circuit justices.

This is not as odd as it might sound. There is some institutional precedent. The Court did not routinely publish the in-chambers opinions of the justices sitting as Circuit justices until recently. Before the late 1960s, justices interested in seeing their in-chambers opinions in print made their own arrangements with journalists or commercial case reporters. The implicit assumption was that the *United States Reports* were reserved for the work of the justices sitting, as Douglas said in *Holtzman*, as a "deliberative body."[169] Frankfurter and Douglas campaigned on and off throughout the 1950s and '60s for the inclusion of in-chambers opinions in the *United States Reports*, but without success. Chief Justices Fred Vinson and Earl Warren did not act, and on at least one occasion the Court informally rejected the idea. It was not until Chief Justice Warren Burger came along that they made it in.[170] In-chambers opinions have been treated by the justices as persuasive authority in the past, and there is no reason why they could not do the same for last-word opinions. It would put last words in their proper place.[171] It would be very nearly cost-free, and it might work.

---

169. *Schlesinger v. Holtzman*, 414 U.S. at 1323-24 (Douglas, J., in chambers, "dissenting").

170. *See* Matetsky, *supra* n. 5, at x-xv.

171. The Court could also signal its adoption of such a rule by retrospectively applying it to, at least, Baldwin's *A General View*, which did not appear in the official reports until the third edition in 1882. *See* text accompanying n. 55, *supra*.

## CONCLUSION

Justice Robert Jackson famously observed in *Brown v. Allen* that, "We are not final because we are infallible, but we are infallible only because we are final."[172] A justice seeking the last word undermines that finality, and therefore also the Court's legal infallibility. Is there really majority support for the reasoning as well as the result in a case decided five to four, or might some belated fit of self-expression—the spirit of Baldwin and McLean and Frankfurter—take hold of one of the five in the majority? If it does, what then is the law of that case?[173] Is the majority opinion in a case really a majority opinion, or might its author (with the support of enough colleagues) re-write it at a later date, as Taney did once and tried to do twice in *Dred Scott*? And when (and to what effect) will a justice frustrated by the timidity of his colleagues—and following in the footsteps of Douglas—settle on equitable relief issued in chambers as the only path to an outcome he or she deeply desires? And so on.

In a last-word world we can never know the answers to these questions, and so also can never know for certain what the law is. Justice Daniel recognized this problem more than 150 years ago in the *Passenger Cases*.[174] Occasionally and unfortunately, a few of his predecessors, colleagues, and successors were not privy to his insight, or perhaps they forgot about it in their moments of urgency. And then there are all the other costs described ad nauseam above.

The Supreme Court and those governed by its judgments do not need this sort of trouble, not even once in a very great while. It would be nice if the Court, with or without the help of Congress, did something about it.

---

172. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J. concurring).

173. To get a sense of the impact such an opinion might have, consider Justice Powell's opinion in *Regents of U. of Cal. v. Bakke*, 438 U.S. 265, 269 (1978). *See e.g. Grutter v. Bollinger*, 539 U.S. 306, 321–23 (2003) ("Since this Court's splintered decision in *Bakke*, Justice Powell's opinion announcing the judgment of the Court has served as the touchstone for constitutional analysis of race-conscious admissions policies.").

174. 48 U.S. at 515–16 (Daniel, J., dissenting).

## APPENDIX 1

No 1

believe that the joint opinion of all the Justices handed down on September 29, 1958 adequately expresses the views of this Court, and they stand by that opinion as delivered. They desire that it be fully understood that the concurring opinion filed this day by Mr. Justice Frankfurter must not be accepted as any dilution or interpretation of the views expressed in the Court's joint opinion.

Wm Brennan J.
Oct 6, 1958

# SUPREME COURT OF THE UNITED STATES

No. 1.—AUGUST SPECIAL TERM, 1958.

| | |
|---|---|
| William G. Cooper, et al., Members of the Board of Directors of the Little Rock, Arkansas Independent School District, and Virgil T. Blossom, Superintendent of Schools, Petitioners, *v.* John Aaron, et al. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. |

[October 6, 1958.]

MR. JUSTICE HARLAN concurring in part, expressing a *dubitante* in part, and dissenting in part.

I concur in the Court's opinion, filed September 29, 1958, in which I have already concurred. I doubt the wisdom of my Brother FRANKFURTER filing his separate opinion, but since I am unable to find any material difference between that opinion and the Court's opinion—and am confirmed in my reading of the former by my Brother FRANKFURTER's express reaffirmation of the latter—I am content to leave his course of action to his own good judgment. I dissent from the action of my other Brethren in filing their separate opinion, believing that it is always a mistake to make a mountain out of a molehill. *Requiescat in pace.*