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Lives of the Justices: Supreme Court Autobiographies

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Lives of the Justices: Supreme Court Autobiographies

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I. INTRODUCTION

When Clarence Thomas signed a \$1.5 million contract for his memoirs, he joined a select company of Supreme Court Justices who have, for a wide variety of reasons, chosen to record their lives.¹ The magnitude of Thomas's advance, however, signals a new level of interest in the lives of the Justices, who for many years remained largely unknown outside the narrow confines of their legal universe. That interest is partly traceable to the contemporary taste for memoirs, both those by celebrities and those by the non-famous with unusual or poignant or lurid tales to tell. It is traceable as well to an increased public awareness of the powerful role an individual Justice can play, whether as a strong ideological voice or as an unpredictable player whose vote can tip the balance on a narrowly divided Court.

The expanded readership for the Justices' autobiographies is also, however, a reflection of the Court's changing role in American culture. Throughout much of the nineteenth century, the Court, despite the major decisions it handed down under John Marshall's leadership, remained an institution of limited range. Its docket consisted largely of private disputes, and many—at times most—of the cases it decided were “a mass of humdrum litigation” with little impact beyond the individual litigants.² Moreover, the Court had no discretion in the selection of its docket; it was required by law to hear any case that fell within its jurisdiction, and it was thus unable to redirect its energies toward issues of broader import.³ The Justices' sense of their own limited power was underscored by their continuing obligation to ride circuit, a difficult and exhausting process, particularly in the years before the expansion of railroad service.⁴ It is scarcely surprising that, under these circumstances, a seat on the Supreme Court was by no means the undisputed prize that it is today. Prominent lawyers declined appointments to the Court, preferring the less rigorous and more affluent life of private practice, while a number of Justices re-

¹ David D. Kirkpatrick & Linda Greenhouse, *Memoir Deal Reported for Justice Thomas*, N.Y. TIMES, Jan. 10, 2003, at A20.

² Charles Fairman, *Reconstruction and Reunion 1864-88, Part I*, in VI THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 35 (1971). Many of these cases came to the Court under its diversity jurisdiction and raised only issues of state law: “So in large part the Justices spent their days on the law of real property, contracts, commercial transactions, trusts and equitable remedies—the same sort of business that came before the State appellate courts.” *Id.* at 32.

³ See Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.D.R. 81, 81 n.2 (1989) (describing the Court's former obligation to hear all cases that satisfy jurisdictional requirements).

⁴ Several early Justices resigned because of their circuit riding duties, and even those who remained on the Court complained bitterly about “the very great burthen” those duties imposed. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 18-19 (1993).

signed from the high bench in favor of other legal and political occupations including, in the case of Justice Rutledge, the chief justiceship of the South Carolina Court of Common Pleas.⁵ The Justices had little reason to consider themselves figures of great national power whose life stories would fascinate the American public.⁶

By the first quarter of the twentieth century, the job description of the Justices had improved dramatically. Congress had expanded their jurisdictional reach⁷ and freed them from their onerous circuit-riding duties;⁸ finally, in 1925, it gave them substantial discretion to choose their cases under the writ of certiorari.⁹ In the wake of sweeping social and economic changes, two world wars, and the burgeoning civil rights movement, the Court's docket increasingly contained numerous cases of broad national import.¹⁰ By mid-century, the Court's earlier emphasis on cases involving property rights had given way to a growing focus on cases involving indi-

⁵ *Id.* at 16. According to Schwartz, "John Jay, the first Chief Justice, resigned to become Governor of New York, and Alexander Hamilton declined Jay's post, being 'anxious to renew his law practice and political activities in New York.'" *Id.* Other distinguished figures who declined appointments to the Court included General Charles C. Pinckney, HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 81 (3d ed. 1992), who represented South Carolina at the Constitutional Convention, ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 111 (5th ed. 1976); Henry Clay of Kentucky; and Charles Hammond, considered "Ohio's most distinguished lawyer." ABRAHAM, *supra*, at 93-94.

⁶ Commenting on the dearth of biographies of Supreme Court Justices, one historian noted that "[a]part from a few personalities and perhaps the chief justices, the public could not be less concerned about the justices of the Supreme Court." Robert M. Spector, *Judicial Biography and the United States Supreme Court: A Bibliographical Appraisal*, 11 AM. J. LEGAL HIST. 1, 2 (1967).

⁷ According to Felix Frankfurter and James M. Landis, the Removal Act of 1875 "marks a revolution" in the role of the federal courts by dramatically enlarging their jurisdiction well beyond diversity cases, thus enlarging the Supreme Court's appellate jurisdiction as well. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 64 (1928). Writing in 1928, Frankfurter and Landis concluded that "[b]ecause of the tasks which have been entrusted to it during the last fifty years, the federal judiciary has exercised an influence which makes it a far more pervasive institution in the life of our country than it was during the first hundred years." *Id.* at 69.

⁸ The circuit riding ended as a practical matter in the last decades of the nineteenth century. In the Judiciary Act of 1869, Congress created "a separate circuit court judiciary." Kermit L. Hall, *Circuit Riding*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 145 (Kermit L. Hall et al. eds., 1992). Congress created new circuit courts of appeal in 1891, and in 1911 it officially abolished the earlier circuit courts to which the Justices had been assigned. SCHWARTZ, *supra* note 4, at 177. For a detailed history of the Court's circuit riding, see Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1756-1831 (2003).

⁹ The Judges' Bill of 1925, strongly promoted by Chief Justice Taft, gave the Court broad certiorari jurisdiction, rendering much of its docket discretionary. See generally Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1660-1704 (2000) (describing the issue of the Judges' Bill). Congress abolished most of the remaining areas of mandatory jurisdiction in 1988. See generally Boskey & Gressman, *supra* note 3 (describing the Court's broad discretion since 1988).

¹⁰ SCHWARTZ, *supra* note 4, at 276-77.

vidual rights that implicated the daily lives of millions of Americans.¹¹ As the Court's perceived power over economic and social life expanded, so did the scrutiny its Justices received from the public. In the 1930s the conservative Justices voting down New Deal legislation found themselves personally demonized as enemies of the people;¹² in the 1950s billboards throughout the South called for the impeachment of Chief Justice Earl Warren, the author of *Brown v. Board of Education*.¹³ The position of Supreme Court Justice was at once more powerful, more prized, and more exposed to the public gaze than it had ever been before.

Although roughly equivalent numbers of Justices from the nineteenth and twentieth centuries followed a common impulse to record their lives, the autobiographies they produced reflect the changing conditions of their judicial roles.¹⁴ The nineteenth century Justices tended to present themselves as private men whose work on the Court was adequately explained by their published opinions.¹⁵ Instead, these Justices wrote personal memoirs for their families or responded to requests from friends and editors for biographical information;¹⁶ these memoirs were frequently published long after their authors' deaths, when their contemporary fame had given way to a more specialized historical interest.¹⁷ It was only in the twentieth century that Justices—and their publishers—began to view the Supreme Court autobiography as of interest to readers outside the author's family and legal circles. For the first time, Justices began deliberately to write their memoirs for a general audience and, in some instances, succeeded in reaching large readerships.¹⁸ Just as the audience for the Supreme Court autobiog-

¹¹ *Id.*

¹² G. Edward White refers to the "demonization" of the four conservative Justices of the early New Deal Supreme Court: Van Devanter, McReynolds, Sutherland, and Butler. G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 269, 284–85 (2000). For his discussion of the demonizing process, see generally *id.* at 284–98.

¹³ 347 U.S. 483 (1954). See Kermit L. Hall, *The Warren Court: Yesterday, Today, and Tomorrow*, 28 *IND. L. REV.* 309, 326 (1995).

¹⁴ For a brief survey of autobiographies by Supreme Court Justices, see Miriam Ho ching [sic], *Autobiographies and Other Extrajudicial Writings by United States Supreme Court Justices*, 1991 *JURID. REV.* 154. Though incomplete and occasionally inaccurate in identifying Supreme Court autobiographies, the survey is nonetheless a valuable overview of the Justices' autobiographical writings and some of their more general extrajudicial works. Ho ching compares the nineteenth and twentieth century autobiographies, concluding that they "are a useful tool to enlarge the study of an individual Justice beyond his or her case opinions, to witness a Justice's personal dialogue, and to understand past generations' legal customs." *Id.* at 155.

¹⁵ *Id.* at 156.

¹⁶ *Id.*; see, e.g., *infra* note 46 (describing Marshall's response to a request for biographical information).

¹⁷ See, e.g., *infra* text accompanying note 297 (stating Justice Hughes's autobiography was published for the first time a quarter century after his death).

¹⁸ Justice O'Connor's memoir was a *New York Times* best seller. *Best Sellers*, N.Y. TIMES, Mar. 3, 2002, § 7 (Book Reviews), at 18.

raphy expanded from narrow family or legal circles to the general public, its substance evolved as well. The nineteenth century memoir was likely to contain a great deal of family history, which often included detailed accounts of the births, marriages, and deaths of several generations of ancestors.¹⁹ The author might provide a few childhood anecdotes and describe the path of his legal career leading to a Court seat, but he was unlikely to include any information about the workings of the Court itself, his colleagues on the bench, or the cases he heard.²⁰ With a few striking exceptions—Justice Story’s account of his personal tragedies²¹ or Justice Field’s lively tales of adventure during the California gold rush²²—these early memoirs also disclosed little of the author’s emotional life. There were none of the intimate revelations that modern readers of autobiographies have come to expect and, except inadvertently, few glimpses of the author’s private self.

The scope of the Court autobiography expanded significantly in the twentieth century. Justices chose to write book-length memoirs rather than brief essays, and a number of these books were published during their authors’ lifetimes.²³ With more space available, some Justices lingered over their childhood experiences, while others focused instead on their professional careers. Some talked about their time on the Court, taking readers into the conference room or sharing observations, usually favorable, about their colleagues. And some authors discussed the Court’s behind-the-scenes judicial conduct: Chief Justice Hughes defended his Court from charges of politicized decisionmaking in New Deal cases,²⁴ while Chief Justice Warren explained some of his Court’s strategies²⁵ in deciding *Brown v. Board of Education*.²⁶ The most expansive of the twentieth century authors, William O. Douglas, covered all bases in his three volumes of autobiography: a lyrical account of his boyhood in the mountains of the Pacific Northwest,²⁷ a more conventional version of his personal and pro-

¹⁹ See *infra* Part II.

²⁰ See, e.g., *infra* notes 46–48 and accompanying text (describing Justice Marshall’s reluctance to write about his career); *infra* text accompanying notes 71–74 (discussing Justice Story’s exclusion of his judicial work from his memoir).

²¹ See *infra* Part II.B.

²² See *infra* Part II.F.

²³ See, e.g., SANDRA DAY O’CONNOR & H. ALAN DAY, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST* (2002) (exemplifying a modern autobiography published during a Justice’s lifetime).

²⁴ CHARLES EVANS HUGHES, *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 311–12 (David J. Danelski & Joseph S. Tulchin eds., 1973).

²⁵ EARL WARREN, *THE MEMOIRS OF EARL WARREN* 2–3 (1977).

²⁶ 347 U.S. 483 (1954).

²⁷ WILLIAM O. DOUGLAS, *OF MEN AND MOUNTAINS* (1950) [hereinafter *OF MEN AND MOUNTAINS*].

fessional lives before his Court appointment,²⁸ and a heavily anecdotal memoir of his years on the Court.²⁹

The only member of the current Court so far to write a memoir and the author of the first memoir published in the twenty-first century is Justice Sandra Day O'Connor.³⁰ As the first woman named to the Court, O'Connor has long enjoyed a higher level of public recognition than her colleagues.³¹ She was also the first Justice to promote her memoir, an account of her unusual childhood on a remote cattle ranch in the American Southwest, by making the rounds of television interview programs.³² The commercial success of her book, a hardcover bestseller later issued in paperback,³³ confirms that Supreme Court autobiography is no longer a specialized genre of limited appeal. It seems that a Justice with a high public profile, a good story to tell, and a smart marketing plan can now attract a broad readership that would have had little interest in the lives of most earlier Justices. Justice Thomas's publishers apparently expect his memoir to meet these criteria and follow O'Connor's book onto the bestseller charts.

The emergence of the Supreme Court Justice as an autobiographer of wide appeal reflects major changes in both the public's perception of the Court and the Justices' perception of their public role. As the Court took on highly divisive issues that directly touch the lives and values of the American people, the Justices found themselves increasingly recognized as individual figures rather than aspects of a remote and undifferentiated government entity, a recognition accompanied by the modern perception that the personalities and experiences of public figures may well shape their professional conduct. Writing in 1948 to encourage the emerging field of judicial biography, Justice Felix Frankfurter made a case that applies

²⁸ WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* (1974) [hereinafter *GO EAST, YOUNG MAN*].

²⁹ WILLIAM O. DOUGLAS, *THE COURT YEARS 1939-75* (1980) [hereinafter *THE COURT YEARS*].

³⁰ O'CONNOR & DAY, *supra* note 23. Chief Justice William H. Rehnquist has included some autobiographical material in his history of the Supreme Court written for a general audience. WILLIAM H. REHNQUIST, *THE SUPREME COURT* (2001). In his introductory chapter, Rehnquist describes his drive eastward from Wisconsin, through a snowstorm, to assume his responsibilities as law clerk to Justice Robert Jackson in 1952. *Id.* at 3. He mentions his military service, his heaterless blue Studebaker, and the great-aunt providing him with temporary lodging in Washington before he arrives at the Court and shifts his focus to his clerkship. *Id.* at 4-6. Despite these few personal notes, this chapter and his later first-hand account of the steel seizure case decided while he worked at the Court belong to the distinct genre of Supreme Court law clerk reminiscences rather than to the line of Court memoirs. *Id.* at 168-69.

³¹ Jeffrey Rosen, *A Majority of One*, N.Y. TIMES, June 3, 2001, § 6 (Magazine), at 32, 35.

³² See *News Hour with Jim Lehrer Transcript* (Feb. 1, 2002), at http://www.pbs.org/newshour/bb/entertainment/jan-june02/oconnor_2-1.html (television interview with Justice O'Connor) (on file with the Connecticut Law Review).

³³ See *supra* note 18; *New & Noteworthy Paperbacks*, N.Y. TIMES, April 13, 2003, § 7 (Book Reviews), at 28.

equally well to the more specialized but related field of Supreme Court autobiography:

[T]he work of the Supreme Court is the history of relatively few personalities. However much they may have represented or resisted their *Zeitgeist*, symbolized forces outside their own individualities, they were also individuals. The fact that they were “*there*” and that others were not, surely made decisive differences. To understand what manner of men they were is crucial to an understanding of the Court.³⁴

The Supreme Court autobiography is a valuable part of this process of understanding, in Frankfurter’s terms, what manner of men and women sit on our highest court.³⁵ As the private family histories of the nineteenth century have given way to the published memoirs of recent decades, some Justices have willingly abandoned the privacy of their marble palace to assist this process, thereby assuming a more public role—as authors and as individuals—in the popular consciousness.

The texts discussed below are written in a great variety of forms, from brief essays to books several hundred pages in length. I have not, however, included material that seems to me to belong in a separate category, oral histories collected from several Justices as part of Columbia University’s oral history project and similar efforts.³⁶ In making this distinction between works prepared independently by the Justices and their spontaneous responses to questions from an interlocutor, I follow the lead of Harlan B. Phillips, a member of Columbia’s Oral History Research Office who interviewed Justice Felix Frankfurter about his life prior to his Court appointment and later published an edited version of the transcript under the title

³⁴ Felix Frankfurter, *A Note on Judicial Biography*, in *OF LAW AND MEN: PAPERS AND ADDRESSES OF FELIX FRANKFURTER* 107–08 (Philip Elman ed., 1956) [hereinafter *FRANKFURTER, JUDICIAL BIOGRAPHY*]. The passage Frankfurter quoted appeared earlier in his tribute to Justice Louis Brandeis. Felix Frankfurter, *Mr. Justice Brandeis and the Constitution*, in *LAW AND POLITICS* 113 (1939) [hereinafter *FRANKFURTER, LAW AND POLITICS*].

³⁵ *FRANKFURTER, JUDICIAL BIOGRAPHY*, *supra* note 34, at 107.

³⁶ Robert H. Jackson was among several Justices who participated in the Columbia University oral history project. See generally Philip B. Kurland, *Robert H. Jackson*, in 4 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969*, at 2543–71 (Leon Friedman & Fred L. Israel eds., 1969) (providing substantial excerpts from Jackson’s interviews). Felix Frankfurter also participated, and excerpts from his transcripts were later published. *FELIX FRANKFURTER REMINISCES: RECORDED IN TALKS WITH DR. HARLAN B. PHILLIPS* vii (1960) [hereinafter *FELIX FRANKFURTER REMINISCES*]. Stanley F. Reed’s papers include “transcripts of the Stanley F. Reed Oral History Project, carried out by Columbia University in 1958.” ALEXANDRA K. WIGDOR, *THE PERSONAL PAPERS OF SUPREME COURT JUSTICES: A DESCRIPTIVE GUIDE* 172 (1986). The Frank Murphy Oral History Project, 1963–68, at the University of Michigan includes transcripts of oral interviews with the Justice concerning his tenure on the Court. *Id.* at 162. Chief Justice Fred Vinson’s papers at the University of Kentucky also contain an oral history file. *Id.* at 209.

Felix Frankfurter Reminisces.³⁷ In his foreword Phillips explained that Frankfurter "certainly never had any expectation" that his comments would be published and that his judgments on people did not "represent final evaluations."³⁸ I have chosen to include only texts prepared by the Justices themselves, agreeing with Phillips that a record of Frankfurter's conversations, though fascinating and historically valuable, is not comparable to a work shaped by its subject: "In no sense is this to be deemed an autobiography. For the Justice it was just talk."³⁹ For related reasons, I have also excluded the diaries written by some Justices.⁴⁰ Although the diaries are self-generated, their steady focus on daily events results in a narrow and localized perspective. The memoirs discussed below vary greatly in occasion, form, content, and emphasis. Nonetheless, they have in common each author's deliberate effort to generalize from particular experiences and to convey a personal vision of a public life.

II. THE NINETEENTH CENTURY JUSTICES

The autobiographies of the nineteenth century Justices fall primarily into two general categories: the family history and the public record. Justices Story, Bradley, and Harlan addressed their narratives directly to their children;⁴¹ these are personal documents intended for a private audience, and they concentrate on family anecdotes rather than on professional experiences. In contrast, Chief Justices Marshall and Taney and Justices Catron, Miller, and Brown provided factual information about their lives and careers for a less personal audience; they wrote as public men, with the expectation that their accounts, once published, would become part of the historical record.⁴² Justice Field is the exception. He presented his memoir, the story of his adventurous life in the days of the California gold rush, as the response to the request of friends,⁴³ though there is reason to believe that it was motivated instead by political ambition.

These diverse narratives are all valuable sources of social history. Most tell a modern reader where these Justices came from, how they were educated, what career paths led them to the Supreme Court. More importantly, they provide this information from the authors' own perspectives

³⁷ FELIX FRANKFURTER REMINISCES, *supra* note 36.

³⁸ *Id.* at ix.

³⁹ *Id.*

⁴⁰ *E.g.*, SALMON P. CHASE, DIARY AND CORRESPONDENCE OF SALMON P. CHASE (1971).

⁴¹ *See, e.g.*, JOSEPH STORY, THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 1 (William W. Story ed., 1972) (addressing writings to his son) [hereinafter STORY, WRITINGS]; JOSEPH P. BRADLEY, FAMILY NOTES RESPECTING THE BRADLEY FAMILY OF FAIRFIELD (1883) (addressed "For the use of my children"); John Marshall Harlan, *Autobiographical Letter*, 1 Harlan Papers, Library, University of Louisville School of Law (addressing writings to his son) (on file with the Connecticut Law Review).

⁴² *See infra* Parts II.A, II.C, II.D, II.E, II.I.

⁴³ *See infra* Part II.F.

and in their own voices. Although all these works are shaped by occasion and audience, they have in common (again, with the exception of Field) a surprisingly modest approach to their subject matter. Their authors write as successful lawyers reflecting on the course of their lives, not—as their twentieth century successors do—to define their place in American legal history.

A. *John Marshall: The Modest Careerist*

The first Supreme Court autobiography was almost lost to history. In 1827, Chief Justice Marshall, then seventy-two years old, responded to a request from Justice Story, who wanted to include some biographical information in his review of Marshall's *History of the Colonies*.⁴⁴ Marshall's letter was discovered by chance over a century later, in 1932, when the death of the widow of Story's grandson precipitated the sale of family possessions.⁴⁵ The letter was published for the first time in 1937, under the title *An Autobiographical Sketch by John Marshall*,⁴⁶ allowing the Chief Justice to provide his own perspective on the shape of his celebrated career.

Marshall's brief account of his life, barely thirty pages long, alternates between two themes, modesty and prudent ambition. He begins with a disclaimer, insisting that he has been willing to describe his insignificant life story only because "the request is made by a partial and highly valued friend."⁴⁷

The events of my life are too unimportant, and have too little interest for any person not of my immediate family, to render them worth communicating or preserving. I felt there-

⁴⁴ According to a Marshall biographer, Story used Marshall's information in the review, "which appeared in the *North American Review* (January 1828) as 'Chief Justice Marshall's Public Life and Services' and which plugged Marshall more than his history." R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 2, 469 (2001).

⁴⁵ JOHN MARSHALL, *AN AUTOBIOGRAPHICAL SKETCH BY JOHN MARSHALL* xv-xvi (John Stokes Adams ed., 1937) [hereinafter MARSHALL, SKETCH].

⁴⁶ *Id.* Several years earlier Marshall had responded, somewhat reluctantly, to an 1818 request for biographical information and an accompanying portrait. John Marshall, *Autobiography of Chief Justice Marshall, written for Mr. Delaplaine, in AMERICAN HISTORICAL AND LITERARY CURIOSITIES: CONSISTING OF FAC-SIMILES OF ORIGINAL DOCUMENTS RELATING TO THE EVENTS OF THE REVOLUTION*, Plate 6 (J. Jay Smith & John F. Watson eds., 4th ed. 1850). His brief account of his family history and career, less than a single page, was published in an anthology that also included a letter from Thomas Jefferson "declining to write his own life." *Id.* at Plate 6, 9. In his response, Marshall made clear his lack of enthusiasm for publishing even this limited biography while he was still on the bench but nonetheless agreed to provide it:

It is not, however, my wish to appear in your next half volume, nor is it my opinion, that persons who are still in the view of the public, ought to be placed in it. But, I do not pretend to interfere with any mode of conducting your great work, which to yourself shall seem eligible.

Id. at Plate 6.

⁴⁷ MARSHALL, *supra* note 45, at 3.

fore some difficulty in commencing their detail, since the mere act of detailing, exhibits the appearance of attaching consequence to them⁴⁸

This disclaimer is apparently more than formulaic. The editor observes in his introduction that Marshall "clearly did not have the habit of preserving papers, for nowhere is to be found any distinguished collection of Marshall manuscripts."⁴⁹ Marshall's reluctance as an autobiographer is tied to his sense that writing about his life is a form of self-regard that is antithetical to his nature. Responding a few years later to another request, this time for an account of a meeting in which George Washington encouraged him to enter Congress, Marshall again links the idea of a memoir to boasting:

The single difficulty I feel in complying with your request arises from my repugnance to anything which may be construed into an evidence of that paltry vanity which, if I know myself, forms no part of my character. To detail any conversation which might seem to insinuate that General Washington considered my engaging in the political transactions of the United States an object of sufficient consequence to induce him to take an interest in effecting it, may look like boasting that I held a more favorable place in the opinion of that great man than the fact would justify.⁵⁰

Perhaps the greatest evidence of the authenticity of Marshall's modesty is his willingness, rare among authors, to give his editor free rein. Concluding his letter, Marshall encourages Story "to prune, condense, exclude, and vary" the content of his autobiography, which he describes as "more minute and tedious in detail than the occasion required."⁵¹ Marshall expressly disowns any pride of authorship, cautioning Story not to "insert any thing from the suspicion that I may look for it because I have introduced it into my narrative."⁵² This is modesty of a high order: The powerful Chief Justice who tolerated little dissent from his opinions is now, as the Court's first autobiographer, willingly surrendering control over the account of his own life.

Marshall's authorial modesty is, however, in some tension with the

⁴⁸ *Id.* In his letter to Story, Marshall again expresses ambivalence about a record of his life: You will not I am persuaded consider me as affecting diffidence when I express a consciousness that your partial friendship has given an importance to the incidents of my life to which they have no just pretensions, mingled with a fear that many may ascribe to me such an excess of vanity as fully to counterbalance any good qualities I may be allowed to possess.

Id. at 35.

⁴⁹ *Id.* at xii.

⁵⁰ *Id.* at xiii-xiv.

⁵¹ *Id.* at 31.

⁵² *Id.*

theme of ambition that runs through his self-portrait. As a young man, Marshall is determined to build a successful legal career and confident of his abilities.⁵³ When the officers of his Revolutionary War unit are sent home in the winter of 1779-1780 to await new recruits, Marshall makes use of the time to attend “a course of law lectures given by Mr. Wythe, and of lectures of Natural philosophy given by Mr. Madison then President of William and Mary College.”⁵⁴ In 1781, Marshall takes advantage of an excess of officers to resign his commission and focus instead on his private life: “I had formed a strong attachment to the young lady whom I afterwards married; and, as we had more officers than soldiers, thought I might without violating the duty I owed my country, pay some attention to my future prospects in life.”⁵⁵

The theme of modesty resurfaces occasionally—with the help of his military connections he finds his early legal practice “more successful than I had reason to expect”⁵⁶—but more often Marshall sounds the note of prudent careerism. Urged to run for a seat in the first Congress, Marshall is sorely tempted, but “[t]he struggle between the ambition of being engaged in the organization of the government, and the conviction of the injury which would be sustained by my private affairs was at length terminated in the victory of prudence”⁵⁷ When he does subsequently yield to a later invitation to run, it is in part because the courts and the legislature are located in the same building, allowing him “without much inconvenience” to tend to his legal practice and still “take part in any debate in which I felt a particular interest.”⁵⁸ He declines several attractive appointments, including Washington’s offer of the post of Attorney General, not from any concern that he is unequal to the challenge but rather from the concern that these jobs may deflect him from his chosen career path.⁵⁹ He later accepts President Adams’s appointment to a mission to France after performing his customary balance of prudence and ambition:

I felt some confidence in the good dispositions which I should carry with me into the negotiation, and in the temperate firmness with which I should aid in the investigations which would be made. . . . I will confess that the *eclat* which would attend a successful termination of the differences between the two countries had no small influence over a mind in which ambition, though subjected to controul, was not ab-

⁵³ See *id.* at 6–7 (describing Justice Marshall’s legal education and early practice).

⁵⁴ *Id.* at 6.

⁵⁵ *Id.*

⁵⁶ *Id.* at 7.

⁵⁷ *Id.* at 11–12.

⁵⁸ *Id.* at 12–13.

⁵⁹ *Id.* at 20.

solutely extinguished. But the consideration which decided me was this. The mission was temporary, and could not be of long duration. I should return after a short absence, to my profession, with no diminution of character, &, I trusted, with no diminution of practice.⁶⁰

Even the offer of appointment as Adams's Secretary of State, a position "for which I had vanity enough to think myself fitted[,]"⁶¹ prompts another dilemma. Marshall reports that he "never felt more doubt"⁶² about a decision, but he accepts the post in part because it will spare him a difficult congressional race and, should the Federalists lose power, "enable me to return once more to the bar in the character of a lawyer having no possible view to politics."⁶³

The only appointment that Marshall accepts without his usual balancing act is that of Supreme Court Chief Justice. He presents the offer in an unusual dramatic vignette that suggests how vivid the moment remains over a quarter of a century later. When Marshall brings President Adams a letter from John Jay declining the post, Adams muses aloud "'Who shall I nominate now?'"⁶⁴ After a brief hesitation, he tells Marshall that "'I believe I must nominate you.'"⁶⁵ For once, Marshall presents himself as "unfeignedly gratified"⁶⁶ and unconflicted in his response: "I was pleased as well as surprized, and bowed in silence."⁶⁷ Finally, Marshall has found the job that satisfies at once his ambition, his prudence, and his choice of a legal career.

Although Marshall's autobiographical sketch records his internal debates over his employment, it otherwise offers very little about his interior life. Marshall describes "an early taste for history and poetry" which he attributes to his father, who is also described as the "only intelligent companion" of his youth.⁶⁸ That literary sensibility expresses itself only rarely, in an occasional metaphor. He notes that an uncertain political time "proved that everything was afloat, and that we had no safe anchorage ground;"⁶⁹ more personally, he refers to himself as "*a rara avis*."⁷⁰ Otherwise, the style of the memoir is crisp and straightforward. It is, however,

⁶⁰ *Id.* at 21-22.

⁶¹ *Id.* at 28-29.

⁶² *Id.* at 28.

⁶³ *Id.* at 29.

⁶⁴ *Id.* at 30.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 4.

⁶⁹ *Id.* at 10.

⁷⁰ *Id.* at 20.

saved from being nothing more than a chronological record by its psychological candor. Marshall provides a step-by-step account of the construction of a successful legal-political career, with the calculations of a shrewd and ambitious young lawyer laid bare. Its details are not, as Marshall modestly suggested, tedious; they are instead the matter that transforms a résumé into an autobiography.

B. *Joseph Story: The Lawyer-Poet*

Midway through his long tenure on the Supreme Court, Joseph Story wrote what he called "a brief memoir of my life"⁷¹ not for an admired colleague but for his twelve year old son, William.⁷² Framed as a letter addressed to "My Dear Son,"⁷³ the memoir blends family and personal matters with occasional detours into Story's professional career. It deliberately excludes, however, his judicial work, which Story sees as "open" to William in the volumes of published Court opinions.⁷⁴ Instead, Story sets out to provide his son, currently "too young now to think much about it[.]"⁷⁵ with a revealing portrait of his father's interior and exterior lives that he may read in the future. The opening paragraph sets out the terms of Story's project:

I shall write, too, very frankly and freely, and in a manner which would not be justifiable, if this were designed for the public, or even for the eyes of a friend. But between a parent and child all forms may be dropped, and we may write as we feel; and if here and there a spice of personal vanity should appear, it would be but as the small talk of the fireside, where mutual confidence allows us to *think* aloud, and tell our honest thoughts as they arise.⁷⁶

The memoir is thus intended to be a private work, with an emotional candor that sets it apart from other nineteenth century Supreme Court autobiographies. It is distinguished in another significant respect that affects both its content and style: Story presents himself as a man of literary sensibilities drawn at different times and for different reasons to both poetry and the law.

The initial axis of the memoir, a conversation between father and son, is reflected in the detailed account it offers of Story's father. In place of an elaborate family genealogy, Story provides a description of his father, a

⁷¹ STORY, WRITINGS, *supra* note 41, at 1.

⁷² JOSEPH STORY: A COLLECTION OF WRITINGS BY AND ABOUT AN EMINENT AMERICAN JURIST 9 (Mortimer D. Schwartz & John G. Hogan eds., 1959).

⁷³ STORY, WRITINGS, *supra* note 41, at 1.

⁷⁴ *Id.* at 35.

⁷⁵ *Id.* at 1.

⁷⁶ *Id.*

physician in Marblehead, Massachusetts, as a sound, decent, and affectionate man.⁷⁷ Elisha Story “was not a man of genius, but of plain, practical sense, a quick insight into the deeds of men.”⁷⁸ What most pleases Story about his father, though, is Elisha’s “domestic character,”⁷⁹ which includes his genial nature, hospitality, religious tolerance, and pleasure in playing with his children.⁸⁰ Story attributes his own charity toward the poor and passionate commitment to religious freedom to his father,⁸¹ perhaps hinting to his son that such common values may link them as well in the future. What Story omits from his account is a tragic episode in his father’s life, his inoculation of his Marblehead patients with an improperly labeled vaccine that caused many smallpox deaths and harmed his professional reputation.⁸² The frankness that Story invokes at the start of his memoir does not, apparently, extend to this painful part of the family history, though the episode may have prompted his extended praise of his father. The second formative influence that Story identifies is his love of learning, especially his love of literature.⁸³ Since Marblehead was a community of “few books” and “few scholars,”⁸⁴ in his early years Story spends much of his time alone, wandering the Massachusetts coast.⁸⁵ His account of his boyhood rambles carries distinct echoes of the Romantic poetry of the late eighteenth and early nineteenth centuries:

My delight was to roam over the narrow and rude territory of my native town; to traverse its secluded beaches and its shallow inlets; to gaze upon the sleepless ocean; to lay myself down on the sunny rocks and listen to the deep tones of the rising and the falling tide; to look abroad, when the foaming waves were driven with terrific force and uproar against the barren cliffs or the rocky promontories, which everywhere opposed their immovable fronts to resist them.⁸⁶

At school he develops his “inextinguishable love”⁸⁷ of English literature and his taste for “private and contemplative reading.”⁸⁸ That taste runs to

⁷⁷ *Id.* at 4.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See id.* at 4–5 (stating that his father taught him temperance and faith).

⁸¹ *See id.*

⁸² David T. Pride, *Joseph Story*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES*, 1789–1995, at 87 (Clare Cushman ed., 2d ed. 1995).

⁸³ STORY, *WRITINGS*, *supra* note 41, at 9.

⁸⁴ *Id.* at 7.

⁸⁵ *Id.* at 8.

⁸⁶ *Id.*

⁸⁷ *Id.* at 9.

⁸⁸ *Id.* at 10.

the gloomy and gothic; he carries Young's *Night Thoughts* with him on his walks and "read[s] with delight" Mrs. Radcliffe's novels.⁸⁹ As a young man in his twenties, Story published a volume of his own poetry, including most prominently a poem called *The Power of Solitude*, but the unsympathetic critical response led him to abandon any hope of a literary career in favor of the law.⁹⁰ As Story describes the transition, "I took a lawyer's farewell of the Muse, and following out the precepts of Blackstone, plunged at once into the dark labrynth of the ancient learning of the law."⁹¹

That plunge was neither easy nor painless. Story describes his near despair at the impenetrable legal works that, in the custom of the time, he was left to read alone in a lawyer's office.⁹² Struggling with a large folio of Coke on Littleton, he "wept bitterly" and stained the pages but kept on.⁹³ Finally, as he finishes the book, he completes the transition to the law: "I felt that I breathed a purer air, and that I had acquired a new power."⁹⁴ Story does not, however, abandon poetry for the law. On the last page of his autobiography he describes his reconciliation of these two sides of his nature: "For though no longer a votary, I delight to visit the haunts of poetry, to listen to the lofty strains of the great masters of the lyre, to gaze on the magnificent structures reared by her worshippers, and to catch a transient inspiration, while roaming abroad through nature."⁹⁵

The lush poetic diction gives way abruptly to the lawyer's clarity and directness:

But to drop metaphor. I still continue to relish poetry and fiction with a warm and vigorous love; not, indeed, in the daily outpourings of modern poets, but in the works of the great Classics of our language, of Milton, and Shakespeare, and Dryden, and Pope, and Thomson, and Gray, and Goldsmith, and others, of that true school of immortal verse.⁹⁶

Story's message is not the abandonment of his love for poetry but its survival as a source of pleasure in the midst of his legal and judicial career, a particularly apt message for a son who became a lawyer only to leave the law for a second career as a sculptor.⁹⁷ Story appends to his autobiography

⁸⁹ *Id.*

⁹⁰ *Id.* at 37.

⁹¹ *Id.* at 37–38.

⁹² *Id.* at 19–20.

⁹³ *Id.* at 20.

⁹⁴ *Id.*

⁹⁵ *Id.* at 38.

⁹⁶ *Id.*

⁹⁷ Joseph Hynes, *The Transparent Shroud: Henry James and William Story*, 46 AM. LITERATURE 506, 506 (1975).

a list of his “literary and professional labors,” their combination reflecting the two strands of his interior and exterior lives.⁹⁸

Story’s autobiography touches briefly on several episodes of his professional career. He describes the disadvantages of being a Republican lawyer in a community of Federalists; his single term in Congress, after which he withdraws for Marshall-like “considerations of prudence in reference to my profession;” and his opposition to President Jefferson’s trade embargo that prompts Jefferson to attack him.⁹⁹ Such matters are, however, “ungracious topics” that he raises out of concern for his son’s future understanding.¹⁰⁰ Perhaps recalling the damage to his own father’s reputation from the smallpox episode, Story is concerned to prepare his son for similarly damaging tales: “You are too young to know the real facts: and when I am dead, you may feel an interest not to have your father’s character sullied by the pen of Mr. Jefferson.”¹⁰¹ The remainder of the memoir consists of family matters, many of them tragic: the death of Story’s first wife and fellow poet after only seven months of marriage and the deaths of his first four children with his second wife, losses that “almost broke our hearts.”¹⁰² Once again, he includes these events in anticipation of his son’s future understanding: “You will one day learn how difficult it is to bury our sorrows, when they have struck deep into our souls.”¹⁰³

If Marshall’s autobiography reveals the eighteenth century man of reason in prudent pursuit of a successful career, Story’s reveals the nineteenth century man of feeling in pursuit of a more complex life. As a lover of literature and a poet manqué, Story identifies three separate strands of experience: his professional work, which he largely relegates to an attached list for his son’s later reading; his literary tastes, which he sees as defining his inner nature; and his family life, which links him to both his admired father and his only surviving son. The autobiography is a personal document, a gift from father to son, that evaluates its author’s life in terms of feeling—both private emotion and literary sensibility—rather than in terms of professional success. The modesty that Marshall articulates is implicit in Story’s memoir with its message that the interior life of feeling is of greater importance than the exterior benchmarks of public achievement.

C. *Roger B. Taney: The Detached Observer*

Roger Taney decided to write his memoir not for friend or family but,

⁹⁸ STORY, WRITINGS, *supra* note 41, at 38 (stating in editor’s note that the “list is so incomplete that it is here omitted”).

⁹⁹ *Id.* at 27–29, 33–34.

¹⁰⁰ *Id.* at 34.

¹⁰¹ *Id.*

¹⁰² *Id.* at 26, 34.

¹⁰³ *Id.* at 35.

more impersonally, for the sake of history. He began the project in September 1854 “without much deliberation,”¹⁰⁴ ten days after receiving a copy of a work containing the lives of the Supreme Court’s Chief Justices, including himself.¹⁰⁵ Since his life was “to form a part of the history of the country,”¹⁰⁶ and since his distinguished career “may naturally create a desire to know more about me” than that volume could satisfy, he determined that it was not only appropriate but also necessary for him to write his own account.¹⁰⁷ That necessity arose from the deaths of all of his early, and most of his later, associates, leaving few if any witnesses to the events of his long life.¹⁰⁸

The theme of old age dominates the start of the memoir, when Taney invokes his precarious situation: “It is late to begin [this memoir], for, if I live until to-morrow, I shall be seventy-seven years and six months old. I may not live to finish it, and, if finished, it may not be thought worthy of publication. Of that, however, my executors must judge.”¹⁰⁹ He could not know that he would in fact defy the odds of his era and live for more than another decade, dying in October 1864 at the extraordinary age of eighty-seven while still serving as Chief Justice.¹¹⁰ In fact, Taney did not use that remaining time to complete his memoir. He wrote less than eighty pages, covering his early life and ending in 1801 with his decision to establish a legal practice in Frederick, Maryland.¹¹¹ The remainder of the lengthy memoir was written by Samuel Tyler, a member of the Maryland bar, and published in 1872.¹¹²

At the time of writing, however, Taney was naturally more inclined to look backward than forward. Reflecting on his long life, he is overwhelmed by his memories, and he writes “in sadness and sorrow” over the loss of his “dear and valued friends who are now in their graves.”¹¹³ Beyond such nostalgia, his old age provides a secondary rationale for the memoir. Even if “the public should be indifferent and careless as to my life and character,” Taney reasons, it may be interested in his account of

¹⁰⁴ Roger Brooke Taney, *Early Life and Education*, in SAMUEL TYLER, MEMOIR OF ROGER BROOKE TANEY 17 (Da Capo Press 1970) (1872) [hereinafter Taney, *Early Life*]. Taney wrote only the first chapter; Tyler wrote the additional six chapters, with the cooperation of Taney’s family. *Id.* at ix–xv.

¹⁰⁵ The work is Van Santwood’s *Lives of the Chief Justices of the United States*. *Id.* at 17.

¹⁰⁶ *Id.* at 17–18.

¹⁰⁷ *Id.* at 18.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 17.

¹¹⁰ SAMUEL TYLER, MEMOIR OF ROGER BROOKE TANEY 485–86 (Da Capo Press 1970) (1872); Clare Cushman, *Roger B. Taney*, in THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789–1995, at 116, 120, 541 (Clare Cushman ed., 2d ed. 1995).

¹¹¹ Taney, *Early Life*, *supra* note 104, at 95.

¹¹² See Taney, *Early Life*, *supra* note 104.

¹¹³ *Id.* at 18.

“men and things as they existed in the generation which has now passed away.”¹¹⁴ He will write, then, as a social historian as well as a great man, recording the “manners, habits, pursuits, and characters” of a past generation.¹¹⁵ His age is linked to yet another rationale for the memoir, his long-standing concerns about his health, which has been weakened by his work at the Court.¹¹⁶ Vacationing with his family at the Virginia coast, Taney worries that “a long-continued state of perfect idleness, without books, cannot be good for the mind or the body.”¹¹⁷ The memoir will be a restorative therapy, distracting him from his health problems during his six week break from Court business.¹¹⁸

Taney, however, recognizes that it is no easy matter to write a memoir as social history rather than personal celebration. He acknowledges the risk that vanity will warp his perspective, though he remains optimistic that he can avoid its worst excesses: “I am sensible of the delicacy of this undertaking. An autobiography is hardly ever impartial, and I cannot hope that I am free from the general infirmity of self-love. But I will try to write my own life as it if were that of a third person.”¹¹⁹ He began the project, in this hopeful mood, three years before his opinion for the Court in *Dred Scott v. Sandford*¹²⁰ made him the target of bitter and sustained attacks. It may be that the notoriety surrounding that opinion discouraged Taney from continuing his memoir. He must have understood that any attempt to explain and justify the opinion would only energize his opponents, while its omission would bring charges of evasion; in any event, the start of the Civil War would certainly have derailed the project. Whatever his subsequent reasons for stopping work on the memoir, Taney apparently wrote his fragment before *Dred Scott* cast its long shadow over his otherwise distinguished career.

Taney’s memoir in many ways succeeds in presenting his life “as if it were that of a third person.” The account of his family life and education is remarkably detached. He devotes several pages to quoting in its entirety a memorandum of his mother’s family, including birth dates and astrological signs, yet spends only a few sentences describing his mother as a gentle presence and his father as an impatient teacher.¹²¹ He gives a detailed account of a local tradition, the “barring-out” of the schoolmaster by his students to start the Christmas holiday several days early, but provides little

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 19.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Taney began his autobiography in 1854. Taney, *Early Life*, *supra* note 104, at 17.

¹²¹ Taney, *Early Life*, *supra* note 104, at 21–28.

information about books read and subjects studied.¹²² Taney observes that he has “not a great deal to say of my college life” and proceeds to devote almost as much time to describing his long journey from home to Dickinson College as he does to recalling the substance of its academic program.¹²³ Along the way there are character sketches and accounts of local customs, but there is very little attention paid to Taney himself and his growth to adulthood.

There are, however, two related personal tendencies that Taney does address with some interest at the close of his college years: his nerves and his ambition. Selected by his classmates to deliver the valedictory address at commencement, Taney is pleased by the honor but terrified by the event: “I was sadly frightened, and trembled in every limb, and my voice was husky and unmanageable. I was sensible of all this, much mortified by it; and my feeling of mortification made matters worse.”¹²⁴ The speech goes well, but Taney continues to be plagued by his nerves. A few years later, facing his first trial, he finds himself unable to take notes during witness testimony because his hand is shaking too much to write: “[W]hen I rose to speak, I was obliged to fold my arms over my breast, pressing them firmly against my body; and my knees trembled under me so much that I was obliged to press my limbs against the table before me to keep me steady on my feet”¹²⁵ Through “a strong effort of the will” Taney manages to make his argument and win his case, but he blames himself for behavior that he considers “to be little better than absolute cowardice.”¹²⁶ The same symptoms, which he attributes to his “delicate health,”¹²⁷ plague him throughout his career: “This morbid sensibility, of which I am speaking, has, upon many occasions throughout my professional life, given me deep pain and mortification. It was the struggle of my life to keep it down; but, long as that professional life was, I was never able entirely to conquer it.”¹²⁸ Looking back from the vantage of his successful career in legal practice, in the Jackson cabinet, and on the Court, Taney nonetheless recalls only that “in many instances I fell far short of what I was capable of performing, had I been perfectly calm and self-possessed.”¹²⁹

Taney’s ambition is the counterweight that drives him to succeed in spite of his nerves. He recognizes in the valedictory award a microcosm of the larger political world: However painful the performance might have

¹²² *Id.* at 28–32.

¹²³ *Id.* at 36–43.

¹²⁴ *Id.* at 53.

¹²⁵ *Id.* at 77–78.

¹²⁶ *Id.* at 78.

¹²⁷ *Id.* at 79.

¹²⁸ *Id.* at 78.

¹²⁹ *Id.* at 79.

been, he understands that he would “have endured much more than I did rather than not have obtained it.”¹³⁰ The same spirit informs his legal ambition. Watching Luther Martin and other luminaries of the Maryland bar in action, Taney wants their success, in spite of the suffering that he knows will follow: “There certainly was about me, at that time, no want of ambition for legal eminence, not so much for the emoluments it would bring, as for the high rank and social position which were in that day attached to it.”¹³¹ When his father proposes helping his son become a candidate for the state’s House of Delegates, Taney finds himself “sufficiently imbued with political ambition to be quite willing to go at once into public life.”¹³² There is no talk of his passion for the law or of an ideological agenda that he is eager to implement or in fact of any substance to his future plans. What Taney recalls is pure ambition, anchored to the profession that his father has chosen for him and that he too believes he prefers.

Taney’s memoir is a curious mixture of social and personal history. He has, as he intended, given the reader an account of the customs and people of an earlier generation, and most of the fragment is written with the detachment of a careful observer of the social scene. Taney becomes engaged in his own narrative only when he describes his nervous tendencies and their intersection with his ambition to succeed. At those moments he ceases to be the chronicler of a past era and becomes instead an elderly man, still very much a figure of great power, who can recall after a half century the mortifying terrors of his first public performances. Whatever Taney’s intentions, his memoir comes to life at the moments when he taps into the emotional energies that fed his rise from schoolboy to Chief Justice.

D. *John Catron: The Candid Pragmatist*

Justice Catron wrote his autobiographical sketch in a letter of response to a request by John Livingston, who was collecting material for an anthology entitled *Portraits of Eminent Americans Now Living*.¹³³ The letter is brief, but its author manages in seven pages to place the clear stamp of his personality on his account of his career and of the legal establishment. Catron’s first reaction is to decline Livingston’s request.¹³⁴ On second thought, he dislikes the idea of a stranger writing about him or, far worse, a friend or colleague, so much that he decides to do the job himself:

[T]hen the idea that a lawyer practising before me, and an in-

¹³⁰ *Id.* at 54.

¹³¹ *Id.* at 65.

¹³² *Id.* at 80–81.

¹³³ John Catron, *Biographical Letter from Justice Catron*, in *PORTRAITS OF AMERICANS NOW LIVING* 73 (John Livingston ed., 1854).

¹³⁴ *Id.* at 79.

imate friend, should sit down and coolly and truly discuss my conduct for thirty years, and my character and capacity, could not be entertained for a moment. Such a memoir could hardly be more reliable than an epitaph, or a eulogy, over the recent dead. I therefore threw off the foregoing slight sketches, which, with my vigorous memory of past incidents, cost me not much trouble, and little time. The matter may be readable, if not instructive; nor will it indicate anything that is not true.¹³⁵

Having decided to prepare his own memoir, Catron also considers whether to write in the first person or adopt the artifice of an impersonal author.¹³⁶ Again, he opts for the direct and truthful approach:

I could quite readily have had these few and trifling materials changed into the form of an ordinary memoir, and put in the third person, presenting an appearance (but nothing more) that some other hand than my own had done the work. This manner, however, is so stale, as to deceive nobody; certainly not my own profession; and therefore, I thought it fairer to write you a letter and risk the charge of egotism, for which I care not much; whereas, I should badly wince at a charge of having resorted to the shabby contrivance, and of an attempt to skulk behind it, if mendacity or boasting was alleged.¹³⁷

Catron's attitude toward Livingston's project is one of casual tolerance. He wants the memoir to be accurate, but he insists that he has not invested much time or energy in achieving that goal.¹³⁸ His stated intention is to produce an account of his life,¹³⁹ even if he appears vain in the process, without undue effort, and it is fair to say that he succeeds in his narrowly defined task.

Catron begins with a breezy recognition of his unlikely rise to the Supreme Court. He calculates his chances as a young man of ever reaching the Court at "a billion to one," based on his rural childhood and his rudimentary education in the limited schools of Western Virginia and Kentucky.¹⁴⁰ Nonetheless, he describes himself as a reader "with a devouring

¹³⁵ *Id.* at 79–80.

¹³⁶ *Id.* at 79.

¹³⁷ *Id.*

¹³⁸ *Id.* at 80.

¹³⁹ *Id.* at 79–80.

¹⁴⁰ *Id.* at 73. Catron is expressly drawing on a formulation used for another legal figure. He cites "what Campbell says of Lord Mansfield—that when he came up from Scotland to Westminster School on a Highland pony, the chances were a billion to one against his ever being Chief Justice." *Id.*

appetite”¹⁴¹ for any available works of history and a taste for eighteenth century literature:

I read history, novels, and poetry; grounded myself well, *as I thought it*, in Virginia politics; that I read everything that came to hand as it came—Fielding, Smollet [sic], Sterne, Goldsmith, and up through Tom Paine, Hume and Gibbon Prester John, Peter the Hermit, Richard and Saladin, Falstaff and Frederick, were all jumbled up together.¹⁴²

A diligent student, he takes copious notes on his reading and even produces a condensed Gibbon that he expects to publish, though he later more realistically uses it “to kindle the office fire” and hides the temptation of his favorite writers—Pope, Shakespeare, and Sterne—from himself.¹⁴³ Catron takes some pains to qualify his lighthearted account of his self-education with a serious footnote that emphasizes the obstacles facing an ambitious young man without academic guidance:

All men of experience must be aware, that the style of banter indulged in here, means more than merely to amuse; that its object is to present an attractive picture of the means employed by a vigorous and ambitious youth to become an intelligent man under circumstances where he had to rely, for his course of reading and study, almost exclusively on his own judgment, unguided by a single man of general reading and matured scholarship. Placed in his circumstances, few would have done better, or judged more wisely, and thousands would have done worse.¹⁴⁴

Yet Catron is also skeptical of the value of the college education he lacks. He notes that young men who return to their homes from Princeton, Yale, and Harvard generally are less successful than their counterparts who stay behind because elite educations fail to provide the most important element for an ambitious man: “a knowledge of men, and the habits of the people among whom he is to live and act”¹⁴⁵

Catron acquires that knowledge as a young attorney when he becomes a state prosecutor and rides the circuit with other members of the bar.¹⁴⁶ He works hard, though he acknowledges his frequent legal blunders and his taste for foppish clothes.¹⁴⁷ Looking back on his experience on the circuit,

¹⁴¹ *Id.* at 74.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 76.

¹⁴⁷ *Id.* at 75–76.

he celebrates the “vigor and practical sense” that it imparts and insists that not even John Marshall or Daniel Webster could “have succeeded much without it.”¹⁴⁸ Extrapolating from his experience, he recommends legal training that emphasizes the practical over the academic:

[D]eep practical knowledge is by far more valuable than deep law learning, necessary as both are to the lawyer. He who knows mere law, but is without common sense to comprehend the facts to which his law may be applied, is a sheer pedant in his profession; and therefore it is, that we so often find a walking index of a lawyer not equal, as a judge, to a vigorous county court magistrate who never read a law-book.¹⁴⁹

He objects to what he calls “the parade of authorities,” whether from a lawyer or a judge, which “reminds one of two grains of wheat smothered under two bushels of chaff.”¹⁵⁰ For Catron, the law is a practical enterprise, and the men who are best qualified to succeed are those who understand the interplay between doctrine and human experience.

Catron’s brief autobiographical sketch provides relatively few details about his career prior to his appointment to the Supreme Court in 1837 and no details about his private life. He includes his expertise in land titles¹⁵¹ and his service as Chief Justice of Tennessee’s Court of Errors and Appeals, but he omits any mention of his military service under Andrew Jackson in the War of 1812 or his subsequent close association with Jackson, who on his last day as president named Catron to the Court.¹⁵² In the few pages he produced for Livingston, Catron prefers instead to focus on the big picture: his limited education, hard work, and practical experience that allowed a country boy of untutored ambition to rise to the Supreme Court.¹⁵³ Catron cheerfully debunks his own youthful pretenses to erudition, but in a similar spirit he debunks as well the notion of legal erudition—of the sort, perhaps, that distinguished his colleague Joseph Story—in favor of the rough and tumble school of legal practice.¹⁵⁴ The memoir is little more than a sketch of the man, but, despite his disclaimers, it is also a serious statement of his pragmatic approach to his roles as lawyer and judge.

¹⁴⁸ *Id.* at 77.

¹⁴⁹ *Id.* at 78.

¹⁵⁰ *Id.* at 79.

¹⁵¹ *Id.* at 77.

¹⁵² CARL SWISHER, 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 59, 61–63 (1974).

¹⁵³ Catron, *supra* note 133, at 74–75.

¹⁵⁴ *Id.* at 73–75.

E. *Samuel F. Miller: The Impersonal Narrator*

Justice Miller's autobiography is a brief manuscript sketch dictated in 1882 at the request of Caleb Forbes Davis, a lawyer in Keokuk, Iowa, for his collection of similar accounts of figures of local interest, *Keokuk Biographical and Historical*.¹⁵⁵ Surprisingly, the sketch is written in the third person rather than in the first person voice of conventional autobiographies.¹⁵⁶ In his brief cover note, Miller refers to "a short biographical sketch prepared under my dictation," also telling Davis that "I did not have a very clear idea of what you desired."¹⁵⁷ It is possible that Miller thought that Davis wanted a biography rather than an autobiography, though the note does not make that clear. Whatever Miller's reason for choosing it, the third person voice he employed generally matches the detached and impersonal tone of the narration, which is largely a factual account of Miller's medical and legal education, marriages, move from the slave state of Kentucky northward to Iowa, legal practice, and subsequent appointment to the Supreme Court.¹⁵⁸ There are, however, several points in the text where the more personal voice of its author/subject breaks through the façade of the third person narrator.

The first cluster of these points occurs when Miller refers to the personal relationships he forms after his arrival as a stranger in Keokuk. Lodging with his family in a local boardinghouse, he develops an "intimate friendship" with the Clagetts, another family of newcomers, that is "only interrupted by the death of Judge Clagett."¹⁵⁹ More surprisingly, he unexpectedly encounters an old friend in his new home:

Mr. Miller supposed himself unknown to any human being in Keokuk when he landed there one morning in May to find the ground covered with snow. But he shortly found an old schoolmate in William Clark, familiarly known as "Bill Clark," who had been the first mayor of the city of Keokuk.¹⁶⁰

¹⁵⁵ CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890, at vii, 4 n.2 (1939).

¹⁵⁶ Samuel Freeman Miller, Autobiographical Sketch, Caleb Forbes Davis Collection, State Historical Society of Iowa, microfilm, reel 2, book 5 (on file with the Connecticut Law Review).

¹⁵⁷ *Id.* I am indebted to Professor Michael A. Ross, author of *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era*, for his assistance in identifying the sketch. Charles Fairman, author of a 1939 study of Miller, gained access to the unpublished sketch from James C. Davis, Caleb Forbes Davis's son, but Fairman does not comment on Caleb Davis's request or his expectations. FAIRMAN, *supra* note 155, at vii, 4 n.2. At any rate, Fairman describes the third person narrative as "Manuscript autobiographical sketch," *id.*, and Ross cites it as "autobiographical sketch." MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA 259 n.17 (2003).

¹⁵⁸ See generally Miller, *supra* note 156.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

The reference to snow in May, presumably an accurate recollection of the weather, also reflects the loneliness of his life in a community where he finds himself “unknown to any human being.”¹⁶¹ The meeting with Clark transforms Miller’s life in Keokuk, leading quickly to a partnership with a successful local lawyer.¹⁶² That partnership in turn becomes an “unreserved friendship,” evidenced after his partner’s death by a will naming Miller as executor with “a very large discretion in the control of his property for many years of the expected minority of his only child.”¹⁶³ Finally, the relationship indirectly leads to “a marriage of unmixed happiness” when, a few years after his own wife’s death, Miller marries his partner’s widow.¹⁶⁴

Miller’s more personal voice also emerges when he discusses his appointment to the Supreme Court. Instead of the crisply factual summaries that appear elsewhere in the sketch, Miller provides generous details to document the strong support for his appointment to a vacancy created by the establishment of a new circuit west of the Mississippi River.¹⁶⁵ He explains that “Mr. Miller’s name was presented by this new circuit with almost unanimity” and that his nomination was also endorsed by “twenty-eight out of thirty-six senators” and by “[one] hundred and twenty-six members of the House of Representatives, a recommendation to office almost unequalled in this country.”¹⁶⁶ Even more gratifying, he is confirmed by the Senate “in half an hour without reference to a committee, a courtesy usually reserved for persons who have been members of that body.”¹⁶⁷ Perhaps the clearest sign of Miller’s own voice comes in his brief reversion to modesty, which he quickly discards in favor of another tally of his professional support:

Of the subsequent career of Judge Miller as a member of that high tribunal it is probably not appropriate to say much in this place. An opinion may be formed of his standing as an American jurist and his conduct as a judge from the fact that on the death of Chief Justice Chase in 1873 he was recommended with entire unanimity as his successor by the bar of every state in his circuit, the largest one in the Union, and he was manifestly the choice of the legal profession of the United States for that place.¹⁶⁸

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

He nonetheless failed to win the chief justiceship, and his biographer observes that "Miller had not only wanted the honor, but felt convinced that he was justly entitled to it."¹⁶⁹ Almost a decade later the loss apparently still rankles, since he is careful to document his claim to the position without mentioning that President Grant gave it to Morrison R. Waite instead.¹⁷⁰ Miller singles out only one other aspect of his Court tenure for mention, the many constitutional law opinions he has written; he proudly describes himself as "the organ of the court in that class of cases as often as any man who ever sat on that bench."¹⁷¹

Miller's autobiographical sketch is a curiously hybrid document. Written by its subject, the sketch alternates between two voices: the dominant tone of the detached historian and the occasional interruptions of a more personal speaker who recalls his friends with affection and his Court career with pride. The occasion for the sketch may help to explain its two voices. Writing as a distinguished resident of Keokuk, Miller may have wanted to provide an authoritative historical record while also conveying two more personal messages to his neighbors: his appreciation of the warm relationships formed in his adopted home and his extraordinary professional trajectory from a local law practice to a seat on the Supreme Court.

F. *Stephen J. Field: The Adventurer*

Justice Field claimed that he prepared—"wrote" would be inaccurate—his memoir at the request of friends.¹⁷² Although at the time Field was fourteen years into his lengthy term of service on the Court, his friends were apparently uninterested in his judicial career or even in a conventional narrative of his rise to prominence.¹⁷³ Instead, in 1877 Field dictated to a San Francisco stenographer what he called *Personal Reminiscences of Early Days in California*, an account of his freewheeling experiences in the time of the California gold rush.¹⁷⁴ An introductory note explains that the reminiscences "are printed at the request of a few friends, to whom they have an interest which they could not excite in others."¹⁷⁵

That note is apparently somewhat misleading. According to Field scholars, the book was not the accommodation of appreciative friends it claimed to be. Carl Swisher believed that it was probably one of "the preliminary steps" of Field's oblique campaign, conducted from his Court

¹⁶⁹ FAIRMAN, *supra* note 155, at 265, 276.

¹⁷⁰ *See id.* at 250–76 (detailing the prolonged and complicated process that resulted in Waite's appointment).

¹⁷¹ Miller, *supra* note 156.

¹⁷² STEPHEN J. FIELD, *PERSONAL REMINISCENCES OF EARLY DAYS IN CALIFORNIA WITH OTHER SKETCHES* iv (Da Capo reprint ed. 1968) (1893) (citing dedication page).

¹⁷³ *See id.*

¹⁷⁴ *Id.* at iv (dedication page), 3.

¹⁷⁵ *Id.*

seat, for the 1880 presidential nomination of the Democratic Party, a narrative “parts of which had excellent possibilities as a campaign biography” and were made widely available to the public.¹⁷⁶ The introductory note is also far too modest. In fact, *Personal Reminiscences* is an engrossing document that reveals both the improvisational quality of life in California in the hectic days following the discovery of gold and, more valuably, the volatile personality of its author in the years leading up to his Court appointment.

Field is a New York attorney, in practice with his distinguished brother, David Dudley Field, when on an “impulse” he decides in 1849 to head for California in pursuit of “the smack of adventure.”¹⁷⁷ As a young man of thirty-three he is “fascinated with the idea of settling there and growing up with it,” seeking his fortune not in the gold fields but in the practice of law in a new territory.¹⁷⁸ On his first day in San Francisco Field is “cheerful and buoyant,” despite being down literally to his last dollar, and finds it “infectious” that everyone greets him by saying, “‘It is a glorious country.’”¹⁷⁹ California repeatedly rewards his enthusiasm. On a casual stroll he stumbles on the office of a man who owes his brother a substantial sum, and suddenly Field is solvent again.¹⁸⁰ When he ventures north to a new settlement and gives a stirring speech about the future of the community, he finds himself elected “alcalde,” a powerful judicial officer, after only three days of residence.¹⁸¹ His political and legal careers flourish.¹⁸² After serving in the newly created state legislature, where he drafts

¹⁷⁶ CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 285 (1930). In fact, *Reminiscences* was published in April 1880 “in a full page of fine print” in a New York newspaper and also as a pamphlet, “told in the third person instead of the first” and with some of the less flattering portions removed. *Id.* at 286. A later Field scholar, Paul Kens, echoes Swisher, noting that *Reminiscences* “had all the makings of a campaign biography.” PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 177 (1997). According to Kens, Field used his memoir for multiple purposes: to recast some of his judicial decisions in a more favorable light; to call attention to his work as a legislator; “to address several apparent blots on his record of public service;” and generally to present himself as a man of vigor and courage. *Id.* See also Paul Kens, *Introduction*, 29 J. SUP. CT. HIST. 1, 5, 13 (2004) (discussing Field’s effort “to emphasize his judicial record in cases that tested the Radical Republican plan for reconstruction” and “to convince easterners that his decisions were popular in California and westerners that his solution was the best solution to the problems”). Writing about the usefulness of memoirs to judicial biographers, Linda Przybyszewski notes that Swisher also read the memoir skeptically: “Field’s political autobiography *Reminiscences*, on the other hand, is treated with a raised eyebrow.” Linda Przybyszewski, *The Dilemma of Judicial Biography or Who Cares Who is the Great Appellate Judge? Gerald Gunther on Learned Hand*, 21 L. & SOC. INQUIRY 135, 147–48 (1996).

¹⁷⁷ FIELD, *supra* note 172, at 2–3.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 6–7.

¹⁸⁰ *Id.* at 10–11.

¹⁸¹ *Id.* at 16–17.

¹⁸² See *id.* at 72–78 (Field indicates, “my legislative career was not without good results,” and “my business [also] became very large”).

civil and criminal practice acts, he gradually develops a thriving legal practice.¹⁸³ In 1857, less than eight years after arriving in California, he is elected to the state supreme court and two years later becomes its Chief Justice.¹⁸⁴ In 1863, when a new seat is added to the United States Supreme Court, Field is the unanimous preference of the congressional delegations of California and Oregon, and President Lincoln accedes to his appointment.¹⁸⁵

Field does not, however, linger long on the themes of exuberant discovery and professional success. Instead, he is most interested in recounting the stratagems and intrigues of life in a frontier state, including the vicious and unwarranted mistreatment he suffers at the hands of his enemies.¹⁸⁶ The memoir is in large part an occasion for vindication and the settling of old scores. Field energetically relives his past quarrels and abuses, offering evidence that in each instance his own behavior was beyond reproach.¹⁸⁷ The colorful narrative is a thinly veiled justification of its author's life, the work of a feisty Justice who cannot let go of the conflicts that marked his rise to prominence.

In some of these episodes, Field presents himself as the naïve victim of corrupt men. When he runs for the state senate and entrusts his proxies to friends, he is astonished to find that they have sold those proxies for assorted political favors.¹⁸⁸ His response, however, is surprisingly violent:

For the moment I was furious, and hunted up the man who had held my ten proxies, and had been seduced from my support. When I found him in the room of the convention, I seized him and attempted to throw him out the window. I succeeded in getting half his body out, when bystanders pulled me back and separated us.¹⁸⁹

At other times, Field responds to attacks with deliberate calm. When a fellow legislator insults him on the floor of the legislature, he restrains his anger at the assault: "Its very fierceness made me calm, as it is said that a tempest at sea is sometimes so violent as to still the waves."¹⁹⁰ That calm, however, conceals a determination to be avenged, and Field demands an apology or the satisfaction of a duel.¹⁹¹ After some maneuvering, Field's

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 98–99, 102.

¹⁸⁵ *Id.* at 115–16.

¹⁸⁶ *See generally id.* at 56–61 (describing Field's vendetta with Judge Turner).

¹⁸⁷ *See generally id.* (describing Field's reactions to the seemingly erratic and malicious Judge Turner).

¹⁸⁸ *Id.* at 77.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 66.

¹⁹¹ *Id.* at 66–68.

willingness to fight leads his enemy to make a public apology, which Field accepts.¹⁹² He emerges from the episode as both blameless victim and courageous fighter, a hero under both eastern and western codes of conduct. Field embraces the dueling practice common in California and the routine carrying of weapons, which he argues actually helps to preserve the peace: “So, until the Summer of 1854, I carried weapons. And yet they were not such provocatives of difficulty as some of our Eastern friends are accustomed to think. On the contrary, I found that a knowledge that they were worn generally created a wholesome courtesy of manner and language.”¹⁹³ The New York lawyer has adapted to the local custom, which seems to match his own taste for a public code of regulated violence.

These related tendencies in Field’s nature—the taste for both vindication and violence—converge in the central episode of the memoir, his long-running feud with William Turner, a local judge in whose court Field practices.¹⁹⁴ Their first confrontation occurs when Turner fines Field for announcing that he will appeal an adverse ruling.¹⁹⁵ The conflict escalates, with Judge Turner first jailing Field and then expelling him from the bar.¹⁹⁶ Field responds in both eastern and western ways: He successfully appeals Turner’s decisions to the state supreme court, and he takes to carrying a pair of concealed pistols which he can shoot from inside the pockets of his coat.¹⁹⁷ Turner, whose verbal insults and threats continue, becomes a source of danger that Field relishes:

People warned me to look out for him; to beware of being taken at a disadvantage; and I was constantly on my guard. I felt that I was in great danger; but after awhile this sense of danger had a sort of fascination, and I often went to places where he was, to which I would not otherwise have gone.¹⁹⁸

Turner never provokes a physical attack by Field, who gets his revenge in a subtler way: by assisting in the redistricting of courts to assign Turner to a remote location.¹⁹⁹ When Turner appeals a lost judicial election to the state supreme court, Field astonishes his old adversary by recusing himself.²⁰⁰ Field’s highmindedness does not, however, extend to forgiving Turner,

¹⁹² *Id.* at 69.

¹⁹³ *Id.* at 84.

¹⁹⁴ *Id.* at 33.

¹⁹⁵ *Id.* at 34–35.

¹⁹⁶ *Id.* at 36–37.

¹⁹⁷ *Id.* at 41–44.

¹⁹⁸ *Id.* at 45.

¹⁹⁹ *Id.* at 62.

²⁰⁰ *Id.* at 104–05.

who now proclaims himself ready to make amends.²⁰¹ Field, who has enjoyed both the excitement of the pursuit and the moral pleasure of vindication, reflects years later with satisfaction on his handling of the matter:

In thinking over my difficulties with Turner at this distant day, there is nothing in my conduct which I in the least regret. Had I acted differently; had I yielded one inch, I should have lost my self-respect and been for life an abject slave. There was undoubtedly an unnecessary severity of language in two or three passages of my answers to his attacks; . . . My justification in these particulars, if they require any, must be found in the savage ferocity with which I was assailed, . . . I should have been less or more than man had I preserved at all times perfect calmness either in my language or conduct.²⁰²

Even as a Supreme Court Justice, Field continues to apply the frontier code of personal violence as a measure of his successful public life.

At the close of *Reminiscences*, Field suggests that, had he been asked, he could have written “more interesting matter” about California’s history and its important figures.²⁰³ Yet, when he chose to add a supplement to his memoir, he called it *The Annoyances of My Judicial Life* and used it instead to describe the various ways in which he had been unfairly treated or criticized while on the bench.²⁰⁴ The memoir is unique among Supreme Court autobiographies in its steady focus on the author’s adversaries and tribulations rather than on his family and accomplishments. As a dictated work, *Reminiscences* has an emotional energy that distinguishes it from the more formal or personal memoirs of other Justices. As a consequence, this is less an autobiography than an inadvertent character study of a feisty, adventurous personality for whom life on the bench remained a pale, civi-

²⁰¹ *Id.* at 105–06.

²⁰² *Id.* at 107–08.

²⁰³ *Id.* at 108. Field explains to his friends that “you asked me merely for personal reminiscences of occurrences at Marysville and during the days preceding my going there,” and announces his intention of later producing material beyond the scope of that request: “I will, therefore, postpone until another occasion a narrative which I think will be more interesting than anything I have here related.” *Id.* at 109.

²⁰⁴ *Id.* at 119. Field included lengthy accounts of some of his controversial opinions on topics such as land titles in California, *id.* at 121–52; the use of military courts during the Civil War, *id.* at 159–62; and the requirement of test oaths for citizens seeking to hold various offices in former Confederate states, *id.* at 162–69. Field did not consider this material to be part of *Reminiscences*, as he explained in a brief introductory note:

After the narrative of my Personal Reminiscences was completed, I concluded to dictate an account of some strange annoyances to which I had been subjected in the course of my judicial life. The account will have an interest to those of my friends for whom the Reminiscences were printed, and it is intended for their perusal alone.

Id. at 119. The title page of the edition published in 1893 reads: *Personal Reminiscences of Early Days in California with Other Sketches*. *Id.* at ii.

lized version of the robust conflicts of life he relished in his years on the California frontier.

G. *Joseph P. Bradley: The Family Historian*

Justice Joseph Bradley's memoir is more accurately described as a family history, as its elaborate title page indicates: *Family Notes Respecting the Bradley Family of Fairfield and Our Descent Therefrom with Notices of Collateral Ancestors on the Female Side*.²⁰⁵ It was edited and published by Bradley's son Charles in 1894, two years after his father's death.²⁰⁶ Bradley wrote *Family Notes* in 1883, more than a decade after he joined the Court, for a limited audience.²⁰⁷ According to the informative title page, the project was intended "For the Use of My Children," four of whom were living at the time.²⁰⁸ After providing an affectionate account of his great-grandparents, whom he knew, Bradley makes clear the benefit he expects his children to draw from his narrative:

Of course, these are uninteresting particulars to everybody but myself. But I treasure the recollection of them as part of my being, and cannot refrain from noting them down for the perusal of my children, that they may learn to prize "the short and simple annals of the poor," so rich in purifying and healthy moral influences.²⁰⁹

Family Notes is not, as this passage seems to suggest, a personal recollection of beloved relatives or a didactic lesson for the Bradley children. Nor is it the type of genealogical study that strains to uncover aristocratic origins. It is instead a blend of two distinct strands. The dominant strand is a carefully researched family history, beginning in 1660 with Francis Bradley's arrival in the colonies, documented by an assortment of wills, deeds, conveyances, and baptism records;²¹⁰ that history is leavened by the second strand, Bradley's own memories of three generations of his family.²¹¹

As a genealogical record, *Family Notes* aims for accuracy rather than prestige. Bradley makes clear that most of his ancestors were hardworking

²⁰⁵ JOSEPH P. BRADLEY, *FAMILY NOTES RESPECTING THE BRADLEY FAMILY OF FAIRFIELD* (Charles Bradley ed., 1894).

²⁰⁶ *Id.* Bradley died on January 22, 1892. BIOGRAPHICAL DIRECTORY OF THE FEDERAL JUDICIARY 1789-2000, at 390 (Bernan Editorial Staff ed., 1st ed. 2001) [hereinafter BIOGRAPHICAL DIRECTORY].

²⁰⁷ BRADLEY, *supra* note 205, at Title Page. Bradley joined the Court on March 21, 1870. BIOGRAPHICAL DIRECTORY, *supra* note 206, at 390.

²⁰⁸ BRADLEY, *supra* note 205, at Title Page, 58. Three other children had already died, and a fourth died before the work was published. *Id.* at 58.

²⁰⁹ *Id.* at 41.

²¹⁰ *Id.* at 1-7.

²¹¹ *Id.* at 35-57.

farmers who passed their land on to their sons.²¹² He is meticulous in correcting any errors he finds in the records and is wary of speculation. Trying to pin down Francis Bradley's associates, he admits that he is "groping in the dark" and offering only "*scintillas* of light which give some glimpse into that long past."²¹³ Bradley is also skeptical of the "American escutcheons" that some branches of the family claim as their coats of arms, since such emblems "are often borrowed from books, and got up by flattering artists to gratify a little family pride."²¹⁴ Bradley's own family pride focuses on the intellectual interests of his relatives. He remembers solving math problems set by his grandfather, "a fair mathematician and surveyor" who "seemed to have a natural genius for mathematical investigations."²¹⁵ He recalls that his father was "very fond of books, particularly books of history and travel,"²¹⁶ and that he himself spent "delicious Saturday afternoons and Sundays" talking about books with his uncle, the custodian of the town library.²¹⁷ His mother, the family's "jewel,"²¹⁸ is not just sweet natured, charitable, and shrewd; she also has the "higher intellectual gift of keen and discriminating analysis."²¹⁹ Although Bradley never refers to his own legal career and Court position, he implicitly lays claim to a family inheritance of intellectual ability.

These intellectual bonds, though important, are not the only family ties that Bradley reports. As a child he spends winters with his great-grandparents, and he fondly remembers listening to their stories of the Revolutionary War.²²⁰ He reports that he has never "known a more lovely example of connubial harmony and happiness" than his grandparents' marriage.²²¹ And he describes such childhood pleasures as helping his grandfather with the sugar maple kettles and eating delicacies from his great-grandmother's pantry.²²² In later years, after he has left home to attend college and start his career, he returns regularly to visit his elderly relatives until their deaths.²²³ His trips to the scenes of his childhood end only when the family home is sold to strangers and he finds that he has "no heart to visit it."²²⁴

²¹² *Id.* at 4–7, 53.

²¹³ *Id.* at 12.

²¹⁴ *Id.* at 13.

²¹⁵ *Id.* at 53.

²¹⁶ *Id.* at 56.

²¹⁷ *Id.* at 54.

²¹⁸ *Id.*

²¹⁹ *Id.* at 55.

²²⁰ *Id.* at 35.

²²¹ *Id.* at 44.

²²² *Id.* at 35, 46–47.

²²³ *Id.* at 41.

²²⁴ *Id.* at 49.

Unlike Justice Story, who also wrote a memoir expressly for his family,²²⁵ Bradley makes no attempt in *Family Notes* to describe his own education, marriage, or career. Although he quotes from several legal documents, his only allusion to the legal profession appears in a footnote, where he dryly observes that an unrelated Bradley was “very likely an attorney or barrister” because of the “ingenious proceeding” in which he managed to retrieve his property from his former wife after a nasty divorce.²²⁶ In fact, the family history reveals less information about its author than any other Justice’s work, though it does evoke Bradley’s affectionate commitment to three generations of his family. More than a genealogical record and less than a memoir, *Family Notes* meets its author’s stated goal: to tell his children who their ancestors were and, more intimately, how those ancestors appeared to Bradley from the perspective of his own childhood.

H. John Marshall Harlan: The Civil War Narrator

The first Justice Harlan wrote an unpublished autobiographical letter to his son on July 4, 1911, during the Court’s summer recess, to fulfill a promise he had made “many times to commit to paper, for preservation by my family, numerous things that have been told them by me.”²²⁷ The letter, though thirty-two pages in length, was limited in content to two subjects: his father’s relations with the celebrated Whig statesman Henry Clay and his own experiences in the border state of Kentucky during the Civil War.²²⁸ Perhaps if Harlan had anticipated his imminent death, which occurred unexpectedly only three months later,²²⁹ he might have expanded the scope of his narrative to include other periods of his life. Even with its narrow focus, however, the letter manages to suggest something of the temperament and values of the Justice in the context of his brief military career.

The letter begins with Harlan’s account of his father’s loyalty to Clay, even when Clay’s other Kentucky supporters have abandoned him in favor of a rival candidate.²³⁰ Harlan echoes his father’s admiration; he recalls when, as “a mere boy,” he accompanied his father to a speech by Clay and, though puzzled by the event, “was charmed with his magnificent bugle voice.”²³¹ Himself a loyal Whig until the party ceased to exist, Harlan kept a relic of Clay in his Washington office, “a small tin box” containing some

²²⁵ STORY, WRITINGS, *supra* note 41, at 1.

²²⁶ BRADLEY, *supra* note 205, at 10.

²²⁷ Letter from John Marshall Harlan to his son Richard Harlan, 1 (July 4, 1911), Harlan Papers, University of Louisville School of Law (on file with the Connecticut Law Review) [hereinafter Harlan].

²²⁸ *Id.*

²²⁹ LOREN P. BETH, JOHN MARSHALL HARLAN, THE LAST WHIG JUSTICE 274 (1992).

²³⁰ Harlan, *supra* note 227, at 2, 7.

²³¹ *Id.* at 2.

forty letters written to his father by the great man.²³² His father's loyalty to Clay, echoed later in Harlan's life by his own loyalty to his father, emerges as a central political and personal value.

The bulk of the letter is devoted to Harlan's military role in the early part of the Civil War. A committed Unionist in a divided state, Harlan opposes secession and gives public speeches to "educate[] [the public] as to the value of the Union."²³³ He is briefly torn between his personal responsibility to protect his wife and two small children and his public duty to defend the Union, but at his wife's urging he chooses the latter²³⁴ and raises an infantry regiment to serve under his command as colonel.²³⁵ This heroic start to Harlan's military service is somewhat undercut by its subsequent reality. Although his regiment is present several times when battles seem imminent and Harlan even asks that it be placed in the front line to ensure action, he always finds that the enemy has slipped across a river or otherwise disappeared before combat can begin.²³⁶ Harlan nonetheless fulfills his leadership role by protecting his men from harm. Caught in a soaking rainstorm, he forces his way onto a steamboat where his men can find shelter near the ship's boiler.²³⁷ Harlan finds out only the next morning, after he departs, that the ship he has boarded without permission is General Grant's headquarters and that "I was in great peril, and that as I had the night before willfully broken a guard, I was subject, perhaps, to be shot."²³⁸ When he hears nothing further, Harlan concludes that either the

²³² *Id.* Harlan also mentions another memento, a cane owned by Clay and delivered to Harlan's father at Clay's request after his death. *Id.* at 8. Harlan regrets that the family has lost a silver pitcher presented to his father by the Whigs of Kentucky's Ashland District for casting the only vote for Clay at the 1848 National Anti-Democratic Convention in Philadelphia. *Id.* at 7-8.

²³³ *Id.* at 10-11.

²³⁴ *Id.* at 12. Harlan's wife, Malvina Shanklin Harlan, encourages him to join the army: "But 'Mamma' came to my rescue and urged me 'to go to the front', saying that she would care for our little ones." *Id.* at 11-12. In her own memoir, recently published, Malvina Harlan tells the same story from her own perspective:

I knew what his spirit was, and that to feel himself a shirker in the hour of his country's need would make him most unhappy. Therefore, summoning all the courage I could muster, I said, "You must do as you would if you had neither wife nor children. I could not stand between you and your duty to the country and be happy."

MALVINA SHANKLIN HARLAN, *SOME MEMORIES OF A LONG LIFE 1854-1911*, at 60 (2002). The Justice's version understates the courage of his wife.

²³⁵ Harlan, *supra* note 227, at 12. Harlan's Proclamation, published in the Louisville Journal, urged Kentuckians to join his regiment in heroic language:

"And Now I appeal to my fellow-Kentuckians to come forward and enroll themselves for service. Their invaded State appeals to them. Their foully-wronged and deeply-imperilled country appeals to them. The cause of human liberty and Republican institutions everywhere appeals to them. All that is most glorious in human government is now at stake, and every true man should come to the rescue."

Id.

²³⁶ *Id.* at 15.

²³⁷ *Id.* at 18-19.

²³⁸ *Id.* at 19.

guard failed to report the incident or Grant “had the courage to recognize the extraordinary circumstances of the case and to overlook our lawless acts.”²³⁹

Harlan exhibits his loyalty to his men in a second episode that again drives him to engage in dubious conduct. Leading his regiment through enemy territory, he worries that the seventy-five sick soldiers under his command may be particularly vulnerable to attack by rebel guerillas, especially after he and his men see “much to our regret and horror, two negroes, wearing the Union uniform, hung up at the roadside, dead.”²⁴⁰ Harlan’s stratagem to protect his men is to arrest half a dozen well-dressed civilians he finds in the next town and inform the remaining townspeople of his intentions:

“Now, I warn you that for every soldier absent from my camp this evening, two of these arrested citizens will be shot by my orders.” Of course, I did not really intend that this order should be executed literally. But I suppose the rebel citizens deemed me to be in dead earnest. I then rode off, and moved ahead with my regiment, taking the arrested citizens with me and having them walk with my men in the dust. I adopted this plan at every town through which I passed on my way to Deckard. I heard no more of rebel guerillas after leaving Shelbyville and none of my sick soldiers disappeared or were killed.²⁴¹

Harlan’s pride in his willingness to take bold measures to protect his men is reflected in a final episode, this time one in which he believes that the success of the Union campaign is in jeopardy. After General Buell’s failure to send additional troops to an engagement results in the escape of the Confederate army, several officers call a meeting which Harlan suspects has “some mischievous or dangerous purpose in contemplation.”²⁴² Harlan attends, confident that “whatever was said or done at the meeting, I knew my duty and could take care of myself.”²⁴³ Although he declines to sign a proposed telegram to President Lincoln accusing Buell of treason, Harlan wins support for the modified text he drafts calling for Buell’s replacement on the less inflammatory ground that he has lost the confidence of his troops.²⁴⁴ Delegated to send the telegram to Washington, Harlan decides on his own to withhold it when he learns that the President has already

²³⁹ *Id.*

²⁴⁰ *Id.* at 22.

²⁴¹ *Id.* at 22–23.

²⁴² *Id.* at 27.

²⁴³ *Id.*

²⁴⁴ *Id.* at 28.

replaced Buell.²⁴⁵ This is, like the unreported steamboat escapade, another fortunate turn of events, since Harlan has belatedly realized that the telegram would have gone through Buell's headquarters, exposing its signatories to the General's wrath.²⁴⁶

These military episodes demonstrate Harlan's blend of principle and pragmatism. Although he has no tales of battlefield heroism to tell his son, he offers instead an account of a different variety of military bravery. Meeting his duty to the men directly under his command and to the larger Union military machine, Harlan shows a willingness to take calculated risks to achieve his goals. Through a blend of luck and strategy, he works to safeguard his men and the effectiveness of the Union army without suffering any adverse consequences from his unorthodox methods. Harlan is clearly proud of his resourcefulness in the way that other veterans might be proud of their courage under fire, and his letter insures that these three Civil War episodes will remain part of the family history.

The end of Harlan's military career is informed by a combination of the traits his letter celebrates: loyalty, principle, and pragmatism. Early in 1863, in what Harlan calls "an unspeakable calamity to the family," his father dies, leaving behind "the largest practice of any lawyer in Kentucky" and a family dependent on that practice for its support.²⁴⁷ Harlan immediately concludes that, as a lawyer familiar with his father's work, he is "compelled to return to civil life."²⁴⁸ Although he seems to feel no personal ambivalence, he is careful to mention that his fellow officers, including General James A. Garfield, the future president, support his decision.²⁴⁹ Harlan also reprints in its entirety his letter of resignation, which explains why his loyalty to the Union cause does not require him to remain in the army:

No ordinary considerations would have induced me to depart from this purpose. Even the private interests to which I have alluded would be regarded as nothing, in my estimation, if I felt that my continuance in or retirement from the service would, to any material extent, affect the great struggle through which the country is now passing.²⁵⁰

The principle of loyalty to the Union is balanced against the rival principle of loyalty to his family. Since his presence at home will have significant benefits for the family, while his continued military service will not pro-

²⁴⁵ *Id.* at 29.

²⁴⁶ *Id.* at 28.

²⁴⁷ *Id.* at 30.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 30¼-31.

vide any comparable benefit to the Union, he decides in favor of his family's claims.²⁵¹

This pragmatic streak surfaces again in the final paragraph of the letter, where Harlan touches briefly on the two public positions that follow his departure from the military. As soon as he returns to Kentucky, he is asked to run for the office of state attorney general and accepts for practical reasons: "principally because if elected I would be required to remove to the capital of the State where my father lived at the time of his death, and where I was compelled to be in order to wind up his business and estate."²⁵² Once again, luck and loyalty coincide, and Harlan serves a four year term as attorney general before resuming private practice in Louisville.²⁵³ Even his final position as Supreme Court Justice is subject to his pragmatic perspective. He notes that after his many years of service he "can retire upon full pay, but the subject has never been taken up by me for final consideration."²⁵⁴ Although he refers briefly to reasons both for staying on the Court and for retiring, Harlan lost the opportunity for a final pragmatic assessment of these rival claims when he died suddenly in October 1911, little more than three months after writing his letter.²⁵⁵

Harlan's letter is by design principally a narrowly targeted account of his brief military service. Unlike the personal narrative that Story prepared for the future reading of his young son or the detailed family history that Bradley wrote for his children, the letter aims merely to document familiar anecdotes. In spite of the author's self-imposed limitations, he nonetheless manages to convey a vivid sense of his attitude toward public and private obligations. As a strong Union supporter, Harlan recognizes his duty to do more than merely speak out in favor of his cause; he raises his own regiment, takes it into the field, and devises strategies to protect his men. That public duty, however, is overshadowed by his private duty to assume his father's responsibilities and support the surviving members of his family. Harlan's narrative is an unsentimental account of the ways in which he met his obligations and, even in the final months of his life, continued to examine his life through a rational calculus rather than through the softer lens of personal inclination. The letter itself, the fulfillment of a longstanding promise to his son, is one more manifestation of its theme.

I. *Henry B. Brown: The Complacent Careerist*

After leaving the Supreme Court in 1906, Justice Henry Billings

²⁵¹ *Id.* at 30 (describing how his troops had "no enemy near" and his need to be at home to run his late father's business).

²⁵² *Id.* at 32.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ BETH, *supra* note 229.

Brown wrote his autobiographical sketch to assist Charles Kent, the attorney who planned to write a biography of Brown after his death.²⁵⁶ Brown also obligingly furnished Kent with his diaries, assorted memoranda, and correspondence, though Kent reports that Brown “did not want a long biography.”²⁵⁷ That was a wise stipulation, since Kent himself noted that “[i]t is hardly possible that a life so uniform and so free from striking incidents can be made interesting to the general public.”²⁵⁸ Brown’s autobiography describes a remarkably placid life with no major setbacks and only a few minor disturbances. The author inhabits a world in which social distinctions go unquestioned, benefits come without struggle, and professional advancement is openly attributed to personal contacts. He identifies no strong interests or powerful emotions, and his favorite adjective seems to be “pleasant.”²⁵⁹ Brown’s life may have been fortunate, but it remained entirely unexamined.

Although the opening sentence of the autobiography may shock the modern reader, Brown clearly has no such intention. He is simply recounting his heritage: “I was born of a New England Puritan family in which there has been no admixture of alien blood for two hundred and fifty years.”²⁶⁰ He notes that his Puritan ancestors were “neither bigoted nor intolerant—upon the contrary some were unusually liberal,”²⁶¹ but he has nothing more to say on the topic. Brown accepts his comfortable New England life in the same spirit in which he accepts his heritage. His mother’s diary reports that from his earliest years books were “his source of amusement,”²⁶² and he moves easily through school, even receiving “the fewest and lightest strokes” from his teachers’ rulers.²⁶³ Although his father has a tendency to compensate for that omission, Brown remains “naturally obedient” and accepts without question his father’s choice of a profession for his son:

[W]hen my father said to me one day, “My boy, I want you to become a lawyer,” I felt that my fate was settled, and had no more idea of questioning it than I should have had in impeaching a decree of Divine Providence. It certainly was not a bad idea in my case, as it settled the doubts which boys usually have regarding their future.²⁶⁴

²⁵⁶ CHARLES A. KENT, MEMOIR OF HENRY BILLINGS BROWN vii (1915).

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *See, e.g., id.* at 7, 18, 22.

²⁶⁰ Henry Billings Brown, *Memoranda for Biographical Sketch*, in KENT, *supra* note 256, at 1.

²⁶¹ *Id.*

²⁶² *Id.* at 3.

²⁶³ *Id.* at 5.

²⁶⁴ *Id.*

That same complacency carries Brown through several household moves and several schools.²⁶⁵ After the family leaves Massachusetts for Ellington, Connecticut, Brown is pleased to find that his classmates are socially superior to the factory children he had known before.²⁶⁶ Even the quiet town, “[n]otwithstanding its drawbacks to an active minded man,” wins his admiration for “its quiet beauty.”²⁶⁷ He has a brief period of discomfort when he enters Yale at sixteen and finds himself disadvantaged by being two years younger than the other students, but eventually he changes his room and solves the problem by finding new friends.²⁶⁸ After graduation his father finances a year of travel in Europe.²⁶⁹ Although Brown is highly critical of the countries he visits, he finds the year abroad to be “the most valuable of my life from an educational point of view.”²⁷⁰ After his return he reads law in an Ellington lawyer’s office, briefly attends Yale and Harvard Law Schools, and completes his education in Detroit, his chosen location.²⁷¹

Brown’s legal career proceeds just as smoothly. He makes valuable contacts, gains a useful appointment from a family friend, and finally is named to a temporary state judgeship that ends when he loses the subsequent election but gives him “a taste for judicial life.”²⁷² That taste is satisfied several years later when President Grant appoints him to a federal district court seat.²⁷³ Brown’s reaction to his new position is revealing:

I was glad to take refuge in the comparative repose of the bench, although it involved the loss of two-thirds of my professional income. Since I felt my health was giving way under the uncongenial strifes of the Bar, and the constant fear lest by some mistake of my own the interests of my clients might be sacrificed, I felt quite content to exchange a position where one’s main ambition is to *win*, for one where one’s sole ambition is to do justice.²⁷⁴

The district court is not a professional goal so much as a refuge from the competition of the bar.²⁷⁵ He is pleased to have a job that requires only that he do justice, an occupation which he seems to view as easier than the

²⁶⁵ *Id.* at 6, 7, 9.

²⁶⁶ *Id.* at 6.

²⁶⁷ *Id.* at 8.

²⁶⁸ *Id.* at 10.

²⁶⁹ *Id.* at 13.

²⁷⁰ *Id.* at 13–15.

²⁷¹ *Id.* at 17–19.

²⁷² *Id.* at 19–20.

²⁷³ *Id.* at 21.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

challenges of litigation.²⁷⁶ Looking back on his tenure, Brown makes no mention of his success in doing justice:

The fifteen and a half years I passed as district judge, though characterized by no event of special importance, were full of pleasurable satisfaction and were not overburdened by work. Indeed I found that I could easily dispose of the business in nine months of the year, and that there was always an opportunity for a summer's outing. There are doubtless higher offices, but I know of none in the gift of the government which contributes so much to making life worth the living as a district judgeship of the United States.²⁷⁷

The satisfaction of the job seems to reside in large part in its leisurely pace and limited work load, and Brown may be one of the few Justices who can be believed when they assert, as he does, that they never aspired to the Supreme Court.²⁷⁸

Faced with the unsought promotion, Brown compares the lower court to the higher, finally concluding that the less attractive work of the Supreme Court is outweighed by other considerations:

If the duties of the new office were not so congenial to my taste as those of district judge, it was a position of far more dignity, was better paid and was infinitely more gratifying to one's ambition. Besides, the social attraction of the capital of a great country cannot fail to be superior to those of a purely commercial city, however large and prosperous it may be.²⁷⁹

The Supreme Court position carries with it the worldly benefits that Brown enjoys. This time, there is no mention of doing justice as one of those benefits. In fact, the work of the Court seems to be its greatest drawback, but that drawback is compensated for by dignity, money, social life, and satisfied ambition.²⁸⁰ Brown is equally candid about the appointment process. His appointment comes to him through the efforts of a friend, Circuit Judge Howell Jackson, who served with President Harrison in the Senate and intervenes on Brown's behalf.²⁸¹ When the next Supreme Court vacancy occurs, Brown is pleased to report that he is "instrumental in inducing President Harrison to appoint Mr. Justice Jackson in [Justice Lamar's] place. This was the culmination of a friendship which continued without

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 24.

²⁷⁸ *See id.* at 28.

²⁷⁹ *Id.* at 29–30.

²⁸⁰ *Id.* at 29.

²⁸¹ *Id.* at 27–29.

interruption until his death.”²⁸² Brown presents a seat on the Supreme Court as admission to a higher social circle, one to which he naturally wants to bring his friends. The role of personal intervention in securing a Court appointment is not unusual, but Brown’s openness about the process suggests that he views the judicial branch of the federal government as simply one more arena in which business and social connections are the only relevant currency.

Even Brown’s resignation from the bench reflects his worldly concerns. He resigns on his seventieth birthday, “in pursuance of a resolution I had made thirty-one years before when first appointed to the Bench.”²⁸³

I had always regarded the Act of Congress permitting a retirement upon a full salary as a most beneficent piece of legislation, and have only wondered that more judges have not availed themselves of it. I have noticed that while many, if not most, judges made the age of seventy, very few who remain upon the bench survive another decade. During that decade the work of the Supreme Court tells heavily upon the physique of its members, and sometimes incapacitates them before they are aware of it themselves.²⁸⁴

The decision, then, rests primarily on the self-protective notion that it is sensible to safeguard his health at full salary. Brown does offer a second, more sympathetic reason for his decision, but it appears almost as an afterthought:

In addition to this I had always taken the ground that the country was entitled to the services of judges in the full possession of their faculties, and as my sight had already begun to fail, I took it as a gentle intimation that I ought to give place to another.²⁸⁵

In fact, at the time of his resignation Brown was blind in one eye and losing vision in the other.²⁸⁶ The idea that the country deserves physically capable judges is admirable, and it is remarkable that Brown chose not to rely on it more strongly in explaining his decision.

Justice Brown’s autobiographical sketch is notable both for what it omits and what it includes. Unlike most of the other Supreme Court memoirists, Brown never discusses his youthful reading or intellectual interests.

²⁸² *Id.* at 29.

²⁸³ *Id.* at 32.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ Robert M. Warner, *Henry B. Brown*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES*, 1789-1995, at 260 (Clare Cushman ed., 2d ed. 1995).

He attributes his choice of the legal profession entirely to his father²⁸⁷ and never indicates that he later develops any affinity for his chosen career. He makes only a few oblique references to his wife²⁸⁸ and otherwise makes no mention of his family life. On his own testimony, he prefers an undemanding job with ample leisure time, pleasant social connections, adequate income, and generous retirement benefits.²⁸⁹ He may not be the only lawyer to seek those rewards or to find them on the Supreme Court, but he is assuredly the only Justice to describe his service on the Court exclusively in terms of its worldly benefits.

III. THE TWENTIETH CENTURY JUSTICES

The autobiographies of the twentieth century Justices reflect a sharp turn from the private to the public. Where their predecessors generally wrote either for their families or in response to specific requests, the twentieth century Justices wrote with an eye to publication. Their works—at least the completed ones—are full length books rather than brief sketches or career summaries. These autobiographies vary in focus from Chief Justice Hughes's meticulous account of every aspect of his professional life²⁹⁰ to Justice O'Connor's reminiscences of her childhood on a cattle ranch,²⁹¹ but they have in common their authors' keen awareness of their importance as former or present members of the Supreme Court. Where the earlier autobiographies were primarily factual records and offered readers largely inadvertent glimpses of the personalities of their authors, the second generation autobiographers have a more deliberate goal, to present the public with carefully shaped versions of their lives.

This quality of self-consciousness ties together an otherwise diverse set of books whose authors express a variety of motivations and attitudes. Where Justice Byrnes claims that he writes to urge others to choose a life of public service,²⁹² Chief Justice Warren worries that his book may in fact discourage his readers from following that path.²⁹³ Where Justice Black traces his love of the law to his boyhood,²⁹⁴ Justice Douglas celebrates the diversity of his interests and talents.²⁹⁵ All of these books, however, are informed by their authors' keen awareness that they are writing not just to

²⁸⁷ Brown, *supra* note 260, at 5.

²⁸⁸ See *id.* at 22 ("[W]e found ourselves the favoured recipients of the most refined hospitality."); *id.* at 23 ("[W]e were only too glad to accept.").

²⁸⁹ *Id.* at 29–30, 32.

²⁹⁰ See *infra* Part III.A.

²⁹¹ See *infra* Part III.G.

²⁹² See *infra* note 360 and accompanying text.

²⁹³ See *infra* note 493 and accompanying text..

²⁹⁴ See *infra* Part III.D.

²⁹⁵ See *infra* Part III.F.

provide an accurate record for a limited family and legal circle but to affect the way a broad audience of historians, legal scholars, lawyers, and interested lay people will evaluate their performance in the increasingly public role of Supreme Court Justice.

A. *Charles Evans Hughes: The Dutiful Historian*

Chief Justice Hughes's autobiography, the first by a Justice appointed in the twentieth century, is more contemporary in design than the briefer occasional works by his predecessors. Hughes wrote not in response to a specific request of a friend or editor but instead out of a concern for historical accuracy,²⁹⁶ and consequently his book-length work is methodical, detailed, and filled with documentary sources. Unlike some of the Supreme Court autobiographers who followed him, however, Hughes had no interest in immediate publication. He worked on the project after his retirement from the Court, from November 1941 to the close of 1945, but it was published for the first time in 1973, a quarter century after his death, as *The Autobiographical Notes of Charles Evans Hughes*.²⁹⁷

In a prefatory note written when he began the project, Hughes characteristically laid out his intentions with great clarity:

I shall not attempt an *apologia pro mea vita*. It is my purpose to set down objectively the facts concerning forebears and environment—the circumstances of my lot and the various efforts of professional and public life. The recital may be interesting to my children and grandchildren and possibly may be of assistance to others who may wish accurate data.²⁹⁸

He had earlier demonstrated his interest in compiling a reliable record of his public life by hiring Henry C. Beerits, a Princeton graduate, to draft accounts of the years when Hughes served as legislative investigator, governor of New York, Secretary of State under Presidents Coolidge and Hoover, presidential candidate, and distinguished practitioner.²⁹⁹ He deliberately excluded his two periods of service on the Court—as Associate Justice and later as Chief Justice—from Beerits's project.³⁰⁰ The autobiography thus relied on the earlier research but added fresh material from the author's early years and judicial life. Despite the comprehensive quality of the project, Hughes made clear that his intention was not to produce a pub-

²⁹⁶ HUGHES, *supra* note 24, at 2.

²⁹⁷ *Id.* at xi. According to the editors, "[t]he original title of Hughes's manuscript was 'Biographical Notes.'" *Id.* Although Hughes died in August of 1948, the project was not published until 1973. *See id.* at ix.

²⁹⁸ *Id.* at 2.

²⁹⁹ *See id.* at xi–xii.

³⁰⁰ *See id.* at xi (stating that Beerits wrote memoranda "on various aspects of his life").

lishable text:

While I have no objection to the publishing of anything I may set down, unless the contrary is indicated, I shall write not with a view to the publication of these notes as memoirs but to provide a body of facts for reference. How far I may be able to go in carrying out this project only time will tell.³⁰¹

In fact, Hughes was able to complete his project, which ends with his retirement from the Court in 1941.³⁰² He apparently tinkered with the text at least until April 1947,³⁰³ sixteen months before his death,³⁰⁴ determined to leave behind a record as historically accurate as he could make it.

The early sections of the autobiography describe a childhood composed in equal parts of discipline and freedom. Hughes finds in his parents, a clergyman and his devout wife, a balance of opposing tendencies in which "my father's impetuous spirit was kept in wholesome check by my mother's caution."³⁰⁵ That balance is reflected as well in Hughes himself. A precocious child who read at the age of three, Hughes prepared his own course of study when he was six, persuading his parents that the "Charles E. Hughes Plan of Study" was preferable to the school that he considered an "unnecessary confinement and waste of time."³⁰⁶ Hughes followed his own curriculum diligently, eventually returning to school and graduating at thirteen, too young to attend the College of the City of New York.³⁰⁷ At the same time, his parents gave Hughes, an only child, the freedom to explore New York on his own, an occupation he relished, particularly visits to those neighborhoods "with a bad reputation."³⁰⁸ An ambitious student, he wrote essays on such ponderous topics as "mental culture" and "human limitations," but also enthusiastically read the English novelists, especially Smollett, and "retained a healthy love of play and frolic."³⁰⁹ When he left home at fourteen, his "spirit had begun to flutter in its cage,"³¹⁰ and he was ready for the greater challenges of college life.

Hughes's account of his college education—two years spent at Madison (now Colgate) University and an additional three years after his trans-

³⁰¹ *Id.* at 2.

³⁰² *See id.* at 324.

³⁰³ In his section on family history, Hughes included a 1947 letter to his cousin correcting some errors. *Id.* at 334.

³⁰⁴ *Id.* at ix.

³⁰⁵ *Id.* at 11.

³⁰⁶ *Id.* at 14.

³⁰⁷ *See id.* at 14, 18–19.

³⁰⁸ *Id.* at 20–21.

³⁰⁹ *Id.* at 24, 26.

³¹⁰ *Id.* at 27.

fer to Brown University³¹¹—has more to say about his social activities than about his studies. Although he excels academically, he is more enthusiastic about the texture of the college experience: dormitory life, mild student pranks, and the freedom to read at will.³¹² Liberated from his parents' discipline, he smokes, drinks beer, plays cards, goes to the theater, and gradually drifts away from the formal religious observances of his family, though he retains what he terms "my religious feeling."³¹³ He graduates third in his class at Brown,³¹⁴ unsure of his future profession but fascinated when a friend assumes that Hughes will be a lawyer.³¹⁵ To this point, the *Notes* has been a blend of personal reminiscence and social history that captures the experience of a New York City childhood and college life in the 1870s. Although Hughes demonstrates no flair for introspection, he is diligent in recording not just his experiences but also his reactions to them as the precocious child moves into the adult world. His awareness of the changes he undergoes prevents the detailed narrative from slipping into bland impersonality. If this is not the first modern Supreme Court autobiography, it is at least the first that opens with a deliberately psychological attitude toward the past.

When Hughes leaves behind his childhood and college years for the start of his legal career, the tenor of the *Notes* shifts from an internal to a largely external perspective. In the remainder of the text, Hughes is meticulous in describing the course of his career, the people he encounters, and the cases he handles. He is, however, less inclined to disclose his personal responses to people and events. At times the material resembles an elaborate list of distinguished attorneys and interesting cases—useful for reference purposes but hardly revealing of its author. There are, however, moments when even a straightforward account offers a more personal glimpse. When Hughes, then a young lawyer, walks to his office during the great blizzard of 1888 and is surprised to find no one else there,³¹⁶ the reader has a sense of his diligence and determination shading into an obliviousness to practical circumstances. Another topic that reveals the author behind the narrative is Hughes's account of his marriage to Antoinette Carter, the daughter of his law partner.³¹⁷ Although the language is conventional and even formulaic in invoking the Victorian angel in the house, it nonetheless introduces an emotional note of unquestioned sincerity:

³¹¹ See *id.* at 29, 35–36, 43, 47.

³¹² See *id.* at 30, 32–33.

³¹³ *Id.* at 40.

³¹⁴ See *id.* at 45.

³¹⁵ *Id.* at 49.

³¹⁶ *Id.* at 80.

³¹⁷ See *id.* at 67, 80–81.

My wife was always vigorous, a perfect helpmeet, attending most efficiently to all the demands of the household; an ideal mother, not only loving, but even-tempered, understanding and capable, guiding without friction the development of our children. She was the Queen of our home, which under her gentle sway was ever a place of rest and happiness.³¹⁸

Hughes's occasional references to family matters, such as his trips with his only son³¹⁹ or the death of one of his daughters,³²⁰ manage to suggest, despite their usually reserved tone, his powerful emotional engagement with his domestic life.

One final topic that elicits a more personal note is Hughes's health. He suffers periodically from depression and nervous exhaustion, and some of his career decisions are influenced by his condition. Exhausted after several years of intense legal practice, he accepts a teaching position at Cornell University as "an academic retreat, affording what I thought would be abundant time for study and reading."³²¹ The unexpected burdens of teaching and its limited salary quickly send Hughes back to practice, but his wistful idealization of the academy reveals more effectively than any direct assertion his attraction to the law as an intellectual challenge as well as a lucrative career.³²² In a subsection titled "Diversions, Exercise and Vacations," Hughes explains his subsequent remedy for "the unrequited drudgery"³²³ of much of his practice: walking in the mountains, preferably in Switzerland, where the exercise and scenery provide him "with joyous and uplifting experiences" that restore his energy.³²⁴ The careful subheading, separating his diversions from his work, indicates how important such respite is to his personal equilibrium. Hughes's accounts of his mountain walks lack the Romantic intensity of Justice Douglas's accounts of similar experiences in *Of Men and Mountains*,³²⁵ written less than a decade later, but they reveal a kindred tendency to take refuge from the business of the law in the natural world.

Hughes's need for these temporary refuges—the academy, the family circle, the mountains—underscores the extent of his emotional investment in his professional identity. As a practitioner he describes himself as "always jealous of my independence," determined to resist any ties to business or personal interests that might compromise his ability to assume pub-

³¹⁸ *Id.* at 118.

³¹⁹ *Id.* at 117.

³²⁰ *Id.* at 196.

³²¹ *Id.* at 89.

³²² *See id.* at 96.

³²³ *Id.* at 114–15.

³²⁴ *Id.* at 115.

³²⁵ *See infra* text accompanying notes 542–69.

lic responsibilities.³²⁶ It is not surprising, therefore, to find that Hughes uses the *Notes* to rebut any hint that his conduct, especially in the public sector, has ever been influenced by anything other than law and principle. The most resonant of these rebuttals concerns a speech given by Hughes as governor proposing increased regulatory authority for the Public Service Commission.³²⁷ In the course of his speech, Hughes observed that “the Constitution is what the judges say it is,” language that was widely interpreted to mean that he “was picturing constitutional interpretation by the courts as a matter of judicial caprice.”³²⁸ That interpretation is of course even more damaging to the reputation of a Justice than of a governor, and Hughes is at some pains to insist that any such implication was “farthest from my thought.”³²⁹ Instead, he meant only to emphasize the wisdom of protecting judges from unnecessary criticism by assigning frontline administrative decisions to agency officials.³³⁰ In support of his argument, Hughes provides the context for his remark by quoting several paragraphs from the original speech.³³¹ The careful documentation, typical of the *Notes*, is included both for its substance and for its suggestion that the methodical Hughes would be the Justice least likely to favor the unlimited judicial discretion he is accused of endorsing.

Hughes also wants to set the record straight with regard to the shape of his career, which he emphatically denies has been driven by ambition.³³² Preferment for high positions seems usually to take him by surprise. Thus, he returns from Europe, where he has been resting after his rigorous investigations of the gas and insurance industries, to discover “a strong movement” to nominate him as the Republican candidate for governor of New York, an office he wins.³³³ After his first term, he is “disinclined” to run again because “I had been living on my reserves and I was nervously worn[.]”³³⁴ but he feels it his duty not to abandon the party that has supported him.³³⁵ When supporters attempt to secure the 1908 Republican presidential nomination for Hughes, he finds that he has “no ambition to be President. . . . I had been close enough to pomp and power to be without illusions.”³³⁶ Even President Taft’s proffered nomination to the Supreme

³²⁶ HUGHES, *supra* note 24, at 112.

³²⁷ *Id.* at 141–42.

³²⁸ *Id.* at 143.

³²⁹ *Id.*

³³⁰ *Id.* at 143–44.

³³¹ *Id.* at 144.

³³² *See id.* at 128, 146.

³³³ *See id.* at 119, 128, 132.

³³⁴ *Id.* at 148.

³³⁵ *Id.* at 149.

³³⁶ *Id.* at 146. Hughes subsequently declined Taft’s offer of the vice presidential slot on his ticket. *Id.* at 148.

Court, a position that meets his “personal inclinations”³³⁷ for judicial work, elicits a qualified letter of acceptance: “I trust that I should be able, however, to withstand any personal inclination and not permit it to control my decision, if it were opposed to the obligations of public duty.”³³⁸ Fortunately for Hughes, inclination and duty coincide in this instance, and so he is free to accept the position.³³⁹ The same forces conflict, however, when Hughes is asked to leave the Court and run for President in 1916: “I was torn between two profound desires, one to keep the judicial ermine unsullied, and the other not to fail in meeting what might be a duty to the country.”³⁴⁰ Persuaded that only he can unite the fragmented Republican Party, Hughes reluctantly resigns from the Court to lead an unsuccessful campaign.³⁴¹ At each stage of his career, it seems necessary for Hughes to insist—and to believe—that his progress from one high office to another is driven by the humbling force of duty rather than the more common spurs of ambition and personal preference.

The most dramatic example of this tendency concerns Hughes’s return to the Court as Chief Justice in 1930. He is painfully aware of the story, circulated widely in the bestseller *The Nine Old Men* by Washington journalists Drew Pearson and Robert Allen, that President Hoover offered the post to Hughes in the expectation that he would turn it down and make way for the selection of Justice Stone instead.³⁴² To refute the story, Hughes marshals his evidence: that the offer came not by telephone, as the book reports, but in a White House conversation; that he at first declined on the grounds of age but was “strongly urged”³⁴³ by Hoover to accept; and that the President himself had written a letter refuting the published account.³⁴⁴ Hughes then reprints that letter, his reply to Hoover asking permission to quote from the letter, Hoover’s detailed response, and Hughes’s final reply.³⁴⁵ Hughes is scrupulous in presenting the letters unedited, although they raise a point of disagreement as to whether Hughes accepted on the spot, as he recalls, or gave his acceptance in a subsequent message to the

³³⁷ *Id.* at 160.

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.* at 180.

³⁴¹ *Id.* at 180–82.

³⁴² DREW PEARSON & ROBERT S. ALLEN, *THE NINE OLD MEN* 74–75 (1936). In their version of the appointment, Pearson and Allen claim that, after Chief Justice Taft’s death, President Hoover “wanted to elevate his old friend Justice Stone to that office, but considered himself under obligation to Charles Evans Hughes, who had campaigned most effectively in his behalf, and who, he felt, carried great prestige throughout the nation.” *Id.* at 74. Hoover expected Hughes to decline because his son was Solicitor General at the time and would be compelled to resign if his father became Chief Justice. Instead, Hughes accepts “[w]ithout a moment’s hesitation.” *Id.* at 74–75.

³⁴³ HUGHES, *supra* note 24, at 291.

³⁴⁴ *Id.* at 292.

³⁴⁵ *Id.* at 292–93.

President. The post of Chief Justice is the capstone of Hughes's extraordinary career, but he feels compelled to insist once again that it is one he never wanted or expected.³⁴⁶ More importantly, he uses all the documentary evidence at his disposal to demonstrate that the presidential offer was sincere and that he was not the ignorant pawn in a political maneuver.

Most of Hughes's corrections to the historical record involve the ways in which he secured his various positions of power. There are, however, two instances in which he is concerned instead with the process of Supreme Court decisionmaking during the New Deal confrontation between the Court and President Roosevelt, and correction of the record requires confidential Court information rather than personal recollection.³⁴⁷ Ordinarily the most circumspect of Justices, Hughes is willing to breach security in order to protect not just his own reputation but also that of his colleagues and of the Court itself. He concedes that "what I am about to say would ordinarily be held in confidence," but insists that he is "justified in revealing it in defense of the Court's integrity" from charges that some of the Justices cast their votes with an eye to defeating Roosevelt's Court-packing plan.³⁴⁸ In the first case, he reveals that the four Justices (himself included) who voted in *West Coast Hotel Co. v. Parrish*³⁴⁹ to reverse a precedent striking down state minimum wage legislation did so before the President announced his Court-packing plan; the release of the case was delayed by Justice Stone's illness and thus erroneously appeared to be the result of political pressure.³⁵⁰ Hughes played a more personal role in the second case, *NLRB v. Jones & Laughlin Steel Corp.*, where he wrote for the Court to enlarge the scope of Congress's Commerce Clause powers.³⁵¹ Here the issue is Hughes's doctrinal consistency, and he insists that his opinion was "in no sense a departure from the views I had long held and expressed."³⁵² He cites comments by two Attorneys General, Jackson and Biddle, to support his record on the issue and to vindicate himself and his Court from charges of trimming doctrine out of political expediency.³⁵³ Both episodes are variations on Hughes's repeated theme that, throughout his career as practitioner and public figure, "I was always jealous of my

³⁴⁶ According to Hughes, "[f]rom the time of my resignation as Associate Justice in 1916, I had no desire to return to the Bench. I should certainly have refused an offer of an Associate Justiceship, and I did not for a moment contemplate being chosen as Chief Justice." *Id.* at 291.

³⁴⁷ *Id.* at 311–12.

³⁴⁸ *Id.*

³⁴⁹ 300 U.S. 379 (1937). Justices Brandeis, Roberts, and Cardozo voted with Hughes to uphold the state statute; after he returned from his convalescence, Justice Stone provided the necessary fifth vote. HUGHES, *supra* note 24, at 312.

³⁵⁰ HUGHES, *supra* note 24, at 312.

³⁵¹ 301 U.S. 1, 37 (1937).

³⁵² HUGHES, *supra* note 24, at 312.

³⁵³ *See id.* at 312–13.

independence.”³⁵⁴

It is curious that Hughes feels the need to defend his use of confidential Court information in connection with the New Deal cases but elsewhere in the *Notes* provides surprisingly candid comments about his colleagues without hesitation. He tells us that “Justice Harlan and Justice White did not like each other;” that “Justice Harlan was antipathetic to Justice Holmes, and Holmes to Harlan;” and that Justice White was “offish” and “out of sorts” while waiting to see if President Taft would choose him as Chief Justice.³⁵⁵ These morsels of gossip are precisely the kind of personal revelations that most subsequent Justices have steadfastly refused to disclose, at least in print. Hughes also has more pleasant things to say about the other Justices, particularly Holmes, whom he considers “the most fascinating personality”³⁵⁶ on the Court. Hughes cites a number of witty comments written by Holmes on Hughes’s draft opinions, another area of Court business usually kept confidential, and even quotes Holmes’s good-humored rejoinder to his colleagues at conference when he has agreed to delete some language, “that the ‘fizz’ had been taken out of his opinion.”³⁵⁷ These insider touches, though infrequent, have the effect of briefly transforming a historical record into a reflection of its author’s personal experience on the Court.

Hughes’s *Notes*, though not quite an autobiography in the contemporary sense, provides a transition between the fragmentary memoirs of his predecessors and the more personal disclosures of some of his successors. The early chapters on his childhood and education capture Hughes’s growth from a sheltered, precocious child into a confident young man in search of a satisfying career; these are presumably the sections he thought would interest his children and grandchildren. The remainder of the *Notes*, his methodical, documented account of his public career, only occasionally makes the leap from dry record to human narrative; it is a valuable resource for biographers and historians—Hughes’s biographer, Merlo Pusey, drew heavily on it³⁵⁸—but not the personally illuminating account of a great Justice’s life that many of Hughes’s readers would hope to find.

B. *James F. Byrnes: The Public Servant*

James Byrnes resembles Hughes in one important respect: Both men enjoyed lengthy public careers consisting of numerous positions of authority and influence. They differ in many respects, but perhaps most notably

³⁵⁴ *Id.* at 112.

³⁵⁵ *Id.* at 168.

³⁵⁶ *Id.* at 171.

³⁵⁷ *Id.* at 173.

³⁵⁸ According to Hughes’s editors, the memoir “was first used by Merlo J. Pusey, whose prize-winning biography of Hughes was published in 1951.” *Id.* at xi. See MERLO J. PUSEY, CHARLES EVANS HUGHES (2 vols., 1951).

in the shapes of those careers. For Hughes, his seventeen years on the Court, as Associate Justice and later as Chief Justice, were the pinnacle of his professional life. For Byrnes, his single term on the Court was a brief interlude between positions of great political power. Their autobiographies reflect as well their differing attitudes toward the task of describing their careers. Where Hughes defined his purposes as family interest and historical accuracy,³⁵⁹ Byrnes defined his as persuading others to choose, as he did, “a life of public service.”³⁶⁰

The title of Byrnes’s 1958 memoir, *All in One Lifetime*,³⁶¹ celebrates the breadth of his public life. Aside from a few periods of private practice, Byrnes’s life was a sequence of elected and appointed government posts. He represented South Carolina for fourteen years in the House³⁶² and ten years in the Senate;³⁶³ he sat on the Court from 1941 to 1942, resigning to serve President Roosevelt in high ranking administrative posts, where he was known as the “assistant president” in charge of the domestic side of the national war effort;³⁶⁴ he became President Truman’s Secretary of State;³⁶⁵ and he subsequently served two terms as the governor of South Carolina.³⁶⁶ The memoir devotes a scant twenty-two pages to his time on the Court, and half of that describes what he calls his “extracurricular activities”³⁶⁷ for Roosevelt following Pearl Harbor.

The theme of the memoir, set out in its first paragraph, is the great satisfaction to be derived from such a life:

In this book I want to record something of what I learned, what I saw, what I experienced during those fifty years, partly for my own pleasure, I admit, but also in the hope that some who read may be persuaded by my experience of the high satisfaction to be found in a life of public service.³⁶⁸

Most of that satisfaction comes from Byrnes’s time in the political arena, where making decisions on important “political, social and economic issues. . . . may lose you friends—but you may favorably influence history.”³⁶⁹ This is the perspective of a politician rather than a judge, and the memoir indirectly suggests what Byrnes never quite says out loud, that he

³⁵⁹ *Id.* at xi.

³⁶⁰ JAMES F. BYRNES, *ALL IN ONE LIFETIME* 3 (1958) [hereinafter *ONE LIFETIME*].

³⁶¹ *Id.* at iii.

³⁶² *Id.* at 22.

³⁶³ *Id.* at 59, 132.

³⁶⁴ *Id.* at 132, 155, 186.

³⁶⁵ *Id.* at 280.

³⁶⁶ *Id.* at 405–06.

³⁶⁷ *Id.* at ix, 147.

³⁶⁸ *Id.* at 3.

³⁶⁹ *Id.* at 11.

was more at home in the rough and tumble of political life than in the sequestered world of the Court.

The political perspective of the memoir is clear from the outset. Byrnes has little to say about his childhood—he covers his first fourteen years in a single paragraph³⁷⁰—except that his father died before he was born and that he left school at fourteen to help support his mother and sister.³⁷¹ His life begins in earnest in 1910, when he runs for Congress for the first time and officially becomes a political figure.³⁷² From then on, he leaves politics voluntarily only in 1941, the date of his appointment to the Court,³⁷³ and even then the separation is less than complete. As Byrnes's account makes clear, his judicial nomination is largely shaped by politics. Two of his influential Senate colleagues tell him that they are planning to ask the President to name him to the seat being vacated by Justice McReynolds, a fierce New Deal opponent.³⁷⁴ Byrnes's supporters in turn describe Roosevelt's response as shaped by politics:

Carter said that when he made the request, the President answered, "Of course, I will appoint him," adding, "He is just as much my friend as yours—I wanted him to be my running mate in 1940." He continued, "My only regret in appointing him is that I need him so much in the Senate."³⁷⁵

Roosevelt also needs Byrnes on the Court as a reliable vote, and the President's reported response omits any mention of conventional judicial qualifications.³⁷⁶ Like the selection process, the confirmation process is also overtly political. As a courtesy to one of its own, the Senate confirms Byrnes unanimously, without referring the nomination to committee, on the same day that Roosevelt announces his choice.³⁷⁷

Once confirmed, Byrnes adapts easily to his new job, finding life on the Court remarkably similar to life in the Senate. In his view, both depend on knowing one's colleagues and being open to compromise:

I had known all the members of the Court before my appointment; most of them I knew intimately, and they quickly made me feel at home. I was agreeably surprised that it was not very difficult for me to adjust my thinking to this new field. In the Senate I had enjoyed the friendship of senators

³⁷⁰ *Id.* at 13.

³⁷¹ *Id.* at 13–14.

³⁷² *Id.* at 12, 21.

³⁷³ *Id.* at 132.

³⁷⁴ *Id.* at 130.

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 130–31.

on the Republican side because they knew I had no violent prejudices. The truth is, I had schooled myself to consider the point of view of the other man.³⁷⁸

Byrnes sees “a willingness to make concessions” as “essential” in all areas of life, including “the administration of justice,”³⁷⁹ an attitude that also explains his distaste for dissenting opinions.³⁸⁰ He applies his Senate experience to the work of statutory interpretation, adopting deference to Congress as his guiding principle and reading statutes in light of his first-hand knowledge of the circumstances of their passage.³⁸¹ Extrapolating from his own career, he believes that the Court should always include one or two former members of Congress to persuade their colleagues to defer to the legislative will.³⁸² Chosen for the Court based on his political performance, Byrnes sees his judicial work as an extension of his Senate role.

The link between the Justice and the political world becomes stronger following Pearl Harbor, when Roosevelt asks Byrnes to review all defense legislation and supervise its progress through Congress.³⁸³ Aware that such involvement of a Justice in executive branch matters is unprecedented, Byrnes and Roosevelt decide “that it was better for me to say nothing—and simply act.”³⁸⁴ Byrnes’s preference for action leads him to accept Roosevelt’s offer of a powerful new position, Director of Economic Stabilization, in which, Roosevelt tells him, “[f]or all practical purposes you will be assistant President.”³⁸⁵ Although Roosevelt suggests only a leave of absence from the Court, Byrnes decides to resign instead.³⁸⁶ His expression of regret rings somewhat hollow: “It was not easy to leave the Court, with its opportunity for service, its prestige and security—the work I liked and the associates for whom I had a genuine affection. But in time of war my duty was plain.”³⁸⁷ It seems far likelier that he is relieved to find such a noble rationale for a return to the political arena he relishes. When, toward the end of the war, Roosevelt offers to appoint him to an anticipated vacancy

³⁷⁸ *Id.* at 140.

³⁷⁹ *Id.* at 5.

³⁸⁰ *Id.* at 141–42.

³⁸¹ Byrnes notes, in regard to one of his opinions, that “Justice Black and I had been members of the Senate at the time the Anti-Racketeering Act was passed, and we knew the act was not intended to apply to the facts of the case.” *Id.* at 143.

³⁸² *Id.* at 136–37.

³⁸³ *Id.* at 147–48.

³⁸⁴ *Id.* at 148.

³⁸⁵ *Id.* at 155. In an earlier memoir, Byrnes also described the events leading up to his decision to leave the Supreme Court for an important wartime post in the executive branch. JAMES F. BYRNES, *SPEAKING FRANKLY* 12–18 (1947). The remainder of the memoir is devoted to Byrnes’s experiences in international affairs, including his service as President Truman’s Secretary of State. *Id.* at 49, 65–66.

³⁸⁶ *ONE LIFETIME*, *supra* note 360, at 155.

³⁸⁷ *Id.*

on the Court, Byrnes declines, citing his political instincts that tell him "it would be stated in unfriendly quarters that we had had a secret understanding that this would be done."³⁸⁸ After he resigns from the executive branch, Byrnes is surprised by the "unselfishness" of a letter from his successor, Wiley Rutledge, who—with some ambiguity—seems to offer to resign in his favor, but Byrnes expresses no interest in the idea of a return to the Court.³⁸⁹

The memoir indirectly makes clear that what does interest Byrnes is the prospect of rising from "assistant President" to the presidency itself. He repeatedly describes the closeness of his relationship to Roosevelt: their intimate chats in the President's bedroom and bathroom, the stack of presidential letterhead with which he is entrusted when Roosevelt leaves the country, the advice on countless issues accepted by the President.³⁹⁰ Byrnes reports that he declined Roosevelt's offer of the vice presidential slot in the 1940 election, but he believes that he is the President's choice for that slot in 1944 and uses his formidable political wiles to line up delegates for the convention vote.³⁹¹ He is, uncharacteristically, blindsided by the discovery that Roosevelt has written a letter approving instead either Harry Truman or William O. Douglas as his running mate.³⁹² Byrnes acknowledges defeat and withdraws, but his bitterness is palpable.³⁹³ He resigns from the administration, against Roosevelt's wishes, before the official end of the war,³⁹⁴ and his cursory account of the President's funeral contains no expression of sorrow or affection.³⁹⁵ Instead, Byrnes turns his attention to Truman, who on the day after the funeral asks him to serve as Secretary of State.³⁹⁶ Byrnes's assessment of Roosevelt combines respect for a political master with the unmistakable undertones of a betrayed subordinate:

He loved people and he knew how to play upon their weaknesses, vanities and prejudices. To him men were so many tools to be used for the accomplishment of what he believed

³⁸⁸ *Id.* at 272.

³⁸⁹ *Id.* at 279. The letter, as quoted by Byrnes, reads as follows:

"When I first learned of your retirement, I considered, frankly, whether I should not come to you and ask your permission to discuss with the President my own possible resignation and your reappointment here. . . . If it is your desire to return to the court at a future time, I for one, would be delighted if it should work out that way."

Id. The ellipsis makes it unclear whether Rutledge is actively proposing a future resignation upon request or simply endorsing the prospect of Byrnes's return.

³⁹⁰ *Id.* at 154, 239.

³⁹¹ *Id.* at 219, 221, 226–27.

³⁹² *Id.* at 230.

³⁹³ *Id.*

³⁹⁴ *Id.* at 271, 273.

³⁹⁵ *See id.* at 280.

³⁹⁶ *Id.* at 280.

to be a good purpose. The plaudits of people stimulated and inspired his imagination and energies. I forgot his weaknesses and thought only of the remarkable qualities that had enabled him to inspire the free peoples of the world to unite in defense of freedom, and to mold the energies of America so that its might brought victory to the allied cause.³⁹⁷

Byrnes's relationship with Truman also ends unhappily, when Truman criticizes a speech he delivers in support of states' rights, and Byrnes seems relieved to leave Washington for the more welcoming terrain of South Carolina.³⁹⁸ His political career has brought Byrnes close to the center of national power, but the final prize, in Roosevelt's gift, eludes him.

All in One Lifetime is that rare thing, a Supreme Court memoir that seems to undervalue the Court. In its opening pages Byrnes describes an encounter with an intoxicated sailor who, asked if he would like to be a member of the highest court, says no, because there would be "no chance for promotion."³⁹⁹ In that anecdote Byrnes captures, perhaps unwittingly, the subtext of his book. A consummate politician who admits that his favorite role was senator, he enjoys the maneuvers and compromises of the legislative process where "the issues were usually matters of policy, not principle."⁴⁰⁰ Applying a similar approach to his work on the Court, he must have discovered that the sailor was right, that there was no promotion, no possibility of rising to a position, even that of Chief Justice, from which he could confidently guide the policy choices of an institution resistant to his political perspective. Byrnes is more comfortable criticizing the internal procedures of the Court—he disapproves of its discarded custom of voting by reverse seniority⁴⁰¹—than acknowledging the norm of principled decisionmaking. His brief interlude on the Court is a detour on his otherwise direct path to political power, and the memoir makes clear that it was not a destination he had any interest in revisiting.

C. *Robert H. Jackson: The Witness to History*

It is ironic—and unfortunate—that one of the most gifted writers ever to sit on the Supreme Court, Robert Jackson, never completed or published

³⁹⁷ *Id.* at 282.

³⁹⁸ *Id.* at 399–400, 405.

³⁹⁹ *Id.* at 3–4.

⁴⁰⁰ *Id.* at 5.

⁴⁰¹ As Byrnes describes, at the time of his service the Justices discussed cases in order of descending seniority and then voted in the reverse order. *Id.* at 137–38. He raises a sensible objection to the bifurcated process: "It has been said that this arrangement was adopted to avoid any question of senior members influencing their juniors. This explanation did not impress me, for surely any justice, having already expressed his views, would ordinarily vote in harmony with them." *Id.* at 138.

the autobiography that he undertook in 1944,⁴⁰² three years after becoming a Justice. Jackson's apparent plan was to organize his book according to the positions he held in the Roosevelt administration, starting with his first appointment as General Counsel of the Bureau of Internal Revenue in 1934.⁴⁰³ There is an introductory chapter providing a broad sociological context for Jackson's life,⁴⁰⁴ but he wrote nothing about his family history, childhood, education, or two decades of private practice. By the evidence of the draft, the period of his life worth reporting began with his entry into government service. The final chapter treats his tenure as Solicitor General; notes in his files reveal that at some point he intended to add chapters covering his service as Attorney General and as Supreme Court Justice.⁴⁰⁵ Jackson's reticence about his early years and private life may be related to his ambivalence about the whole autobiographical enterprise. The introductory chapter begins with a modest disclaimer: "There are many excuses but only one reason for writing one's story: that is to gratify the author's egotism. But to get it read requires something more, and it may be a rash presumptuousness to think my story would have general interest."⁴⁰⁶ Jackson goes on to offer two distinct reasons for presuming to write his story. The first is the general claim of history. Other authors have written about Jackson, and he insists that "[i]n a decade of public life at a heated time in our history I have seen amazing accounts of myself in print. The most friendly often were the least accurate."⁴⁰⁷ The second reason is specifically linked to the Court, which Jackson describes "as the most independent and detached and philosophical body in American public life" with "influence out of proportion to its actual power."⁴⁰⁸ Scholars engaged in understanding its decisions have worked to interpret the Justices' positions "by reference to their backgrounds and lives," but only after their deaths

⁴⁰² The 235 page typed manuscript of Jackson's draft autobiography, included among his papers in the Manuscript Division of the Library of Congress, carries the date June 8, 1944 on the top of almost every page. Robert H. Jackson, *Draft Autobiography* (June 8, 1944) (unpublished manuscript, on file with the Connecticut Law Review) [hereinafter *Draft Autobiography*]. John Q. Barrett, editor of Jackson's memoir of President Roosevelt and author of a Jackson biography currently in process, speculates that Jackson may have started his autobiography "for publication in the event he decided to leave the Supreme Court and run for political office." John Q. Barrett, *Introduction* to ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* xxv-xxvi (John Q. Barrett ed., 2003) [hereinafter *THAT MAN*].

⁴⁰³ *Draft Autobiography*, *supra* note 402, "Treasury Counsel" at 3.

⁴⁰⁴ *Id.*, "Introduction" at 3.

⁴⁰⁵ Robert H. Jackson, *Notes* (unpublished manuscript, on file with the Connecticut Law Review) [hereinafter *Jackson Notes*]. The *Notes* are included among Jackson's papers in the Manuscript Division of the Library of Congress.

⁴⁰⁶ *Draft autobiography*, *supra* note 402, "Introduction" at 1.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

have cut off first hand sources of enlightenment.⁴⁰⁹ Jackson justifies his autobiography as a valuable research tool for students of the Court: “I am persuaded it will lighten the labors of critics if I tell the story as well as I may.”⁴¹⁰ Jackson remains, however, characteristically skeptical about his capacity for scholarly detachment, conceding that “[o]ne never can be entrusted to judge the significance of his own work in such an office.”⁴¹¹

Jackson’s ambivalence about the project is reflected as well in his repeated efforts to find an acceptable rationale. In handwritten notes, he offered a third variant of the historical argument: “Only excuse own life is touched events & personalities greater than self.”⁴¹² Jackson refined this variant and used it to open his memoir of President Roosevelt, written in 1953 and published for the first time a half century later as *That Man*.⁴¹³ Once again, Jackson resolves the tension between vanity and history in favor of the latter: “The conceit of writing recollections may be forgiven only if the author has accomplished something memorable himself or has witnessed episodes of enduring importance. I invoke the latter excuse.”⁴¹⁴ The fact that he never completed his autobiography suggests that, with regard to his own career, he was unable to resolve that tension in his own favor.

Jackson underscores his ambivalent attitude toward his personal experience by locating it within a broad sociological context hostile to self-importance. He grew up near Jamestown, New York “in a time and an environment that was truly and deeply democratic.”⁴¹⁵ The community consisted of small farms whose owners were largely self-sufficient, growing their own food and providing their own labor; they “were labor and capital in a unit,”⁴¹⁶ with no class divisions or frictions. The culture produced what Jackson calls “true rugged individualists,”⁴¹⁷ tough men who valued self-reliance and hard work above intangible values and interdependence. Jackson laments the passing of this “socially classless society”⁴¹⁸ that produced a second generation, Jackson’s own, of lawyers and statesmen who respected both labor and property rather than choosing between them, as the next generation did, with bitter partisanship; he even

⁴⁰⁹ *Id.* at 1–2.

⁴¹⁰ *Id.* at 2.

⁴¹¹ *Id.*

⁴¹² Jackson Notes, *supra* note 405.

⁴¹³ *THAT MAN*, *supra* note 402, at xxii, xxiv.

⁴¹⁴ *Id.* at 1.

⁴¹⁵ *THAT MAN*, *supra* note 402, at xiii, xiv; Draft Autobiography, *supra* note 402, “Introduction” at 2.

⁴¹⁶ Draft Autobiography, *supra* note 402, “Introduction” at 3.

⁴¹⁷ *Id.* at 14.

⁴¹⁸ *Id.* at 18.

wonders whether true democracy can survive this social transformation.⁴¹⁹ For a product of this farm culture, the story of his successful Washington career has little intrinsic importance except as it illustrates this shift in values. Jackson makes clear his preference for this larger theme: "Well, this is my sermon. This viewpoint is my excuse for writing this story. All else is illustrative and personal."⁴²⁰

With such an introduction, the reader would naturally expect to learn more about Jackson's Jamestown life: his family, his education, and his experience as what he proudly called "a country lawyer."⁴²¹ Instead, Jackson shifts immediately from this broad perspective to focus instead on the particulars of his work in the Roosevelt administration.⁴²² From this point on, the autobiography provides a largely conventional account of his positions as Treasury Counsel in the Bureau of Internal Revenue, as Assistant Attorney General first for the Tax Division and then for the Antitrust Division of the Department of Justice, and finally as Solicitor General.⁴²³ The draft ends with Jackson's appointment as Attorney General in 1940, though his files contain detailed outlines for two additional chapters, one headed "Attorney General" and the other "Mr. Justice."⁴²⁴ According to his notes, the Court chapter would have included material on Jackson's failure to be named Chief Justice, a position he was widely believed to covet.⁴²⁵ The heading "Glad not C.J. and why"⁴²⁶ and notes suggest that Jackson planned to cite the deep divisions among the Justices as one of several reasons for preferring to remain as an Associate Justice.⁴²⁷ Had it been written, this would have been a remarkably candid treatment of Court politics by a sitting Justice, and it is possible that Jackson thought better of including such material.

Jackson describes his entry into government service as an almost inad-

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 17. In his notes, Jackson places his professional life within this context more precisely than he does in the draft:

Real significance is (if man may appraise his own) one of a vanishing tribe of farm bred, rural raised non college trained, self-educated lawyers . . . For better or for worse, and only time will tell which[,] I am that thing a country lawyer—attached in non complimentary sense—took it as a medal.

Jackson Notes, *supra* note 405.

⁴²¹ See, e.g., Robert Jackson, *Tribute to Country Lawyers: A Review*, 30 A.B.A. J., 138, 138 (1944). For a discussion of Jackson as a country lawyer, see Laura K. Ray, *A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert Jackson*, 29 IND. L. REV. 535, 536–38 (1996).

⁴²² Draft Autobiography, *supra* note 402.

⁴²³ *Id.* at "Treasury Counsel" at 1; "Antitrust Division" at 112; "Solicitor General" at 148.

⁴²⁴ Jackson Notes, *supra* note 405.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ The outline also cites "Work of C. J.," "Tired & fagged out," "Experience," and "Acceptance by bar better" as additional reasons. *Id.*

vertent step. In retrospect he finds it difficult “to assign a reason”⁴²⁸ for his decision to accept the position of Treasury Counsel, though he acknowledges that with Roosevelt’s election “the pull to Washington became increasingly strong.”⁴²⁹ He is, however, unaware that acceptance of the job will ultimately mean “an abandonment” of his Jamestown legal practice.⁴³⁰ A recurrent theme of the draft is the pleasure he takes in the practice of law and his distaste for the legislative and political arenas into which he finds himself drawn as a member of the Roosevelt Administration. He decides to handle personally the government’s high profile fraud prosecution of former Treasury Secretary Andrew Mellon since “[t]rial of a fighting lawsuit always appealed to me,”⁴³¹ and he clearly relishes his cross-examination of Mellon in which Jackson allows the self-assured witness to supply the prosecution with a great deal of valuable information, much to the despair of defense counsel.⁴³² As a government lawyer, Jackson continues to prefer trial work to office administration, and he welcomes an appointment as Assistant Attorney General of the Tax Division because the Justice Department is “the lawyer’s department.”⁴³³ Later, as Assistant Attorney General for the Antitrust Division, he considers resigning to return to private practice because he finds himself “becoming more deeply involved in politics and in legislative matters and in matters of policy” and drawn away “from strictly legal work.”⁴³⁴ He agrees to remain for the moment when Roosevelt hints of imminent changes in the Justice Department, and shortly thereafter Jackson is appointed Solicitor General, the position he “had always wanted”⁴³⁵ and the one that “proved the happiest and most satisfying of my public offices in the Executive Department.”⁴³⁶ Less than two years later Jackson left that comfortable position to become Attorney General, a move that he did not see, at least in retrospect, as a promotion: “Thus I stepped out of the office in the executive branch of the government that I had enjoyed most and into a sea of troubles.”⁴³⁷

Jackson’s portrait of himself as a lawyer who asks nothing more than the chance to perform the government’s legal business is somewhat tempered by a second strain in the autobiography, its account of his close relationship with President Roosevelt. After joining the Administration, Jackson rapidly became a member of Roosevelt’s inner circle, as both trusted

⁴²⁸ Draft Autobiography, *supra* note 402, “Treasury Counsel” at 1.

⁴²⁹ *Id.* at 2.

⁴³⁰ *Id.* at 1.

⁴³¹ *Id.* at 18.

⁴³² *Id.* at 25–26.

⁴³³ *Id.*, “Tax Division” at 49–50.

⁴³⁴ *Id.*, “Antitrust Division” at 125.

⁴³⁵ *Id.* at 128, 141–42.

⁴³⁶ *Id.*, “Solicitor General” at 148.

⁴³⁷ *Id.* at 230, 235.

advisor and social companion. He advised the President not just on legal matters within his sphere of authority but also on appointments⁴³⁸ and on such major policy decisions as the content of the neutrality proclamation issued after England's declaration of war on Germany.⁴³⁹ Jackson was also a member of Roosevelt's regular White House poker game and a guest on fishing trips aboard the presidential yacht; he includes in the autobiography a lengthy account of a nine day cruise on which Roosevelt relaxes with a small circle of intimates.⁴⁴⁰ Jackson is at some pains to demonstrate his independence from the President—he declines his first invitation to a cruise, much to his secretary's dismay, because it conflicts with his son's graduation,⁴⁴¹ and he refuses to take on what he considers inappropriate assignments.⁴⁴² At the same time, he seems interested in Roosevelt's plan to promote him as the Democratic candidate for governor of New York,⁴⁴³ an elected office that would have positioned Jackson as a potential successor if Roosevelt had, as originally expected, decided not to seek a third term.

Jackson's blend of detached lawyer and political insider is also evident when he reveals himself as a wily strategist, both on Roosevelt's behalf and on his own. Meeting with Roosevelt to map out Jackson's Senate testimony in support of the controversial Court-packing plan, Jackson declines to criticize the Court for its handling of certiorari petitions ("in my opinion the Court was doing a substantially satisfactory task in that respect")⁴⁴⁴ or for the advanced age of its Justices ("particularly in view of the fact that Brandeis was one of its oldest members and also one whom he

⁴³⁸ Jackson tells Roosevelt that Frank Murphy is ill-suited to a seat on the Supreme Court because "he was not interested in legal problems nor in the law as a philosophy and was not of studious habit." *Id.* at 224–25.

⁴³⁹ It is Jackson who cautions the President against including Canada in the neutrality proclamation at a time when Canada had not itself declared war on Germany. *See id.* at 215–17.

⁴⁴⁰ *Id.*, "Antitrust Division," insert, Memorandum of a fishing trip with President Roosevelt leaving Washington, D.C. on Saturday, November 27, 1937 and returning on Monday, December 6, 1937.

⁴⁴¹ *Id.*, "Antitrust Division" at 106. Jackson's secretary, who listens in on the telephone call, insists that a presidential invitation is "a command." *Id.* Roosevelt delays the start of the cruise to accommodate Jackson and his wife, a courtesy that does not surprise Jackson: "All of which is about what I would have expected of him, for a more considerate man was never President nor one [sic] was less inclined to stand on the prestige of his office, particularly as against the little things that mean a good deal to other people." *Id.* at 106–07.

⁴⁴² Jackson refuses to conduct congressional hearings on tax evasion by large taxpayers, concluding that his participation would only create additional problems for the Administration: "It was a case were [sic] excessive zeal had gotten the President in a hole. I could not have gotten him out. The most that I could have done would have been to get into the hole with him. Nothing about me would have made that very consoling to him." *Id.* at 107–08.

⁴⁴³ *Id.* at 126–28.

⁴⁴⁴ *Id.* at 115. Jackson also cautions against using the certiorari argument because "most of the people who would support the President did not know what a certiorari was." *Id.*

would be the last to say needed an alternate”).⁴⁴⁵ He advises instead a direct attack on the Court’s anti-New Deal decisions, and Roosevelt agrees;⁴⁴⁶ Jackson’s Senate testimony is generally considered to be the strongest defense of the Court-packing plan.⁴⁴⁷ When Roosevelt nominates Attorney General Frank Murphy to the Supreme Court and Jackson to take Murphy’s position,⁴⁴⁸ Jackson carefully defends his turf against his departing superior. He rejects Murphy’s announced plan to remain in the Justice Department for at least a month after his Court appointment to resolve cases and fill positions.⁴⁴⁹ When Murphy subsequently claims publicly that he has been sent to the Court in order to end his pending prosecutions of two political bosses, Jackson, who knows that no such cases exist, demands that Murphy reveal in writing the supposed prosecutions.⁴⁵⁰ Murphy then backs down, thus preventing any later assertions that Jackson as the new Attorney General had quashed the prosecutions.⁴⁵¹ With surprising candor, Jackson paints Murphy as an ambitious, grandstanding politician who does not belong in the consummate lawyer’s position of Supreme Court Justice.⁴⁵² For once, however, Jackson is unable to persuade Roosevelt to follow his advice and thus to keep Murphy off the bench.⁴⁵³

Perhaps the most surprising aspect of Jackson’s draft autobiography is its choice of extremes: a broad, sociological introduction followed by largely anecdotal accounts of his government service. The material in Jackson’s related files indicates that he had considered, and possibly was still considering, other more personal approaches to the project. A single, hand-written sheet describes the day of his birth from his own perspective and illustrates the ironic charm of his writing style. The fragment opens with the observation that “[t]he 13th of February 1892 is a day I recall but vaguely despite its significance.”⁴⁵⁴ After recounting his father’s trip through the snow to summon the doctor, Jackson turns to the happy result:

Finally—it seemed ages to mother and me—Doctor Christy drove into the barnyard his bay horses steaming in the frosty air, threw down the reins, warmed his fingers over the kitchen wood stove and came upstairs to my mother. De-

⁴⁴⁵ *Id.* at 116.

⁴⁴⁶ *Id.*

⁴⁴⁷ Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 220 (1994) (describing Jackson as “one of the administration’s key witnesses during the Senate hearings” on the Court-packing plan).

⁴⁴⁸ Draft Autobiography, *supra* note 402, “Solicitor General” at 230.

⁴⁴⁹ *Id.* at 230–32.

⁴⁵⁰ *Id.* at 233.

⁴⁵¹ *Id.*

⁴⁵² *Id.* at 193.

⁴⁵³ *Id.* at 234

⁴⁵⁴ Jackson Notes, *supra* note 405.

tails don't matter—eventually it was all over and I was safely born. I let out a cry of relief. It was over and I would never have that to go through again.⁴⁵⁵

The passage, evocative of the opening of a nineteenth century novel, suggests that Jackson could have written a more personal and literary autobiography had he chosen to follow that course.

Another fragment, containing reflections on Jackson's attitude toward religion, suggests that he was capable of great candor on sensitive subjects:

After my son was in the Choir of St. Lukes [sic] Episcopal Church and about to be confirmed. He thought it strange he should be confirmed if I never had been and I was confirmed in that church. But I can not say I have not be [sic] negligent of the ordinances even of that comfortable discipline and have never felt intellectually satisfied by its creed. The older I grow the more I tend to lapse into what I think was the attitude of my recent forbears [sic]. And I may note that in spite of "sending" our children to Sunday School and educating them in Church schools they too seem allergic to religious enthusiasm.⁴⁵⁶

This level of self-exposure, midway between the abstract sociological analysis of his introduction and the verbatim conversations of his other chapters, is unfortunately absent from the draft. Jackson's notes indicate that, had he completed the project, he might at least have included details of his family history, his education, and his legal practice.⁴⁵⁷ A more precise outline of a projected chapter on his role as Justice indicates as well that at one time he may have considered bringing his autobiography up to date. His notes address the most controversial part of his career, his failure to become Chief Justice, including his perception of the negative consequences of his service as chief prosecutor at the Nuremberg war crimes trials for his elevation.⁴⁵⁸ These papers suggest that Jackson may never have finally abandoned his incomplete autobiography and may have continued to tinker with the project in the period between the 1944 draft and his death a decade later.

Jackson was ideally situated to write an extraordinary autobiography. A master stylist, he could have brought to the project his wit, charm, and literary sensibility. As a reflective man, he was interested in the larger

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *See id.*

⁴⁵⁸ Jackson's notes indicate that he did not regret any professional harm caused by his absence at Nuremberg. The notes read: "Nuremberg cost it Well worth the price . . . few do much be remembered for—Nuremberg alone—pioneering—monumental achievement." *Id.*

questions of social change and political philosophy. As a member of the Roosevelt inner circle, he was both participant in and witness to the course of the New Deal and the coming of war. And as Supreme Court Justice, he wrote some of the Court's most eloquent opinions on issues of government power and individual rights. The existing draft is a valuable piece of New Deal history and a remarkable look at the intersections of law and politics from the perspective of a sophisticated country lawyer who unexpectedly found himself working at the highest levels of government. We may regret the book that Jackson never wrote, but we should also be grateful for the unfinished, unpublished draft he left us.

D. *Hugo L. Black: The Practitioner*

When Justice Black started his memoir, he was an elderly man but he was also a sitting Justice free to write only because he had completed his work for the term.⁴⁵⁹ Unlike some Supreme Court autobiographers, he was recalling the past not from the vantage of a completed career but from the last years of an active judicial life. The opening of the memoir makes clear both his interest in the past and his pride in his continued performance of his judicial responsibilities:

This is May 27, 1968. Born February 27, 1886, in the middle of Grover Cleveland's first term as President of the United States, I am today eighty-two years and three months old. I have now been an Associate Justice of the Supreme Court of the United States for thirty years and nine months. Unless something unexpected happens, the Court has finished its argued cases for this term Personally all opinions assigned to me have already been written, together with all dissents I now expect to write. . . . In this situation I have decided to begin my memoirs.⁴⁶⁰

The precise numbers announce an author whose mind is sharp and clear, though he concedes that he is unlikely to have total recall: "While, doubtless, very many of the detailed events of my life have been forgotten, I must say that memories of my past seem very vivid to me."⁴⁶¹ The memoir, Black indicates, will present a detailed and accurate account of the past

⁴⁵⁹ See HUGO L. BLACK & ELIZABETH BLACK, MR. JUSTICE AND MRS. BLACK: THE MEMOIRS OF HUGO L. BLACK AND ELIZABETH BLACK xiii, 3 (Paul Baier ed., 1986) (1968) [hereinafter BLACK, MEMOIRS].

⁴⁶⁰ *Id.* at 3. Black had written a brief memoir a few years earlier when the editors of the Alabama Law Review asked him for an article and he decided instead to "jot down some personal reminiscences of the times when I attended law school in Alabama." Hugo L. Black, *Reminiscences*, 18 ALA. L. REV. 3 (1965). The nine page memoir deals only with Black's education and is uniformly positive about his experiences. *Id.*

⁴⁶¹ BLACK, MEMOIRS, *supra* note 459, at 3.

by an author whose credibility is bolstered rather than compromised by his age and whose time is limited not by the imminence of death but by the Court calendar.⁴⁶² Thus, he announces that "I now intend to spend most of the next few months jotting down those memories from their beginnings. If interesting to no one else, they should be significant to my family."⁴⁶³

In fact, Black intended to publish his memoir for a much wider audience than the family members who had encouraged him to write, though he failed to complete it.⁴⁶⁴ He worked on the project for three years, until his death in 1971, and covered only the years from his birth in 1886 to 1921 when, as a practicing lawyer, he married his first wife, Josephine Foster.⁴⁶⁵ The sixty page fragment he completed covers his early legal career in Alabama,⁴⁶⁶ his brief stint as a police court judge,⁴⁶⁷ his first elective office as county prosecutor,⁴⁶⁸ and his military service—all of it in this country—during World War I.⁴⁶⁹ After the opening invocations of his position as Justice, there is no discussion of the Court or of his years in the Senate that preceded his judicial appointment. This is an Alabama narrative, and its considerable charm lies in its picture of an ambitious young man determined to shape a successful legal career in the particular world into which he has been born.

Black regards himself as "an unadulterated product of the South, a fact that I recall with pride."⁴⁷⁰ Born in Clay County, Alabama, the youngest of a family of eight of modest means, he is nonetheless not without some links to the legal world: He notes that the doctor who attended his birth, his cousin Dr. John Harlan, also "regularly went to the Harlan family reunions

⁴⁶² See *id.* (discussing Black's ability to recall details and Court schedule).

⁴⁶³ *Id.*

⁴⁶⁴ According to his biographer, Roger K. Newman, Black had considered writing a memoir for many years:

"I still sometimes have fleeting ideas about writing my memoirs," Black told Alfred Knopf in 1956. "I lose my enthusiasm about it however when I read some of the prejudiced memoirs that are written. Perhaps it will be impossible for me to write anything without being as prejudiced as all the others."

ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 608 (1994). Black apparently overcame his reservations at the urging of his son, Hugo, Jr., and his second wife, Elizabeth. *Id.* The project was an emotional one, since Black was "crying as he completed the preface," *id.*, by observing that his journey from "country boy to the Supreme Court of the United States [was] a circumstance not likely to have been foreseen by any of my Clay County friends or relatives—unless it was my mother." BLACK, MEMOIRS, *supra* note 459, at 5. Newman concludes that Black's "memoirs remain charming reading, full of details available nowhere else, but without revealing insights or any self-examination and in places purposely dissembling." NEWMAN, *supra*, at 609.

⁴⁶⁵ BLACK, MEMOIRS, *supra* note 459, at xii, 62–63.

⁴⁶⁶ *Id.* at 31.

⁴⁶⁷ *Id.* at 36.

⁴⁶⁸ *Id.* at 38.

⁴⁶⁹ *Id.* at 48–56.

⁴⁷⁰ *Id.* at 4.

at the time when they were also attended by Associate Justice John Marshall Harlan of the Supreme Court.”⁴⁷¹ Black does not, however, mention that he himself later served on the Court with the grandson of that Justice Harlan for sixteen years.⁴⁷² Instead, his focus is on the surprising career that “brought this country boy to the Supreme Court of the United States, a circumstance not likely to have been foreseen by any of my Clay County friends or relatives—unless it was my mother.”⁴⁷³

The memoir sheds some light on the sources of Black’s unanticipated success. The initial source is his powerful early attraction to the law. He finds it “hard . . . to remember when I did not want to be a lawyer,” recalling the hours he spent as a child in the local courtroom observing lawyers at work.⁴⁷⁴ That early ambition combines with two more practical tendencies. The first is his determination to educate himself, and the second his ability to make—and keep—friends. Although Black enters law school at the University of Alabama without an undergraduate degree, he continues his general education on his own.⁴⁷⁵ Along with the legal curriculum, he takes courses in English and political economy.⁴⁷⁶ When he hangs out his shingle and has few clients to keep him occupied, Black follows a careful plan of reading “textbooks on grammar, rhetoric, writing and history” to cover the subjects he “had missed by taking no academic course in college,” while also practicing public speaking in the woods.⁴⁷⁷ The same planning and discipline inform his efforts to advance his career. He believes that “the only ethical way” to build a practice in the unfamiliar city of Birmingham is “to meet as many people and make as many friends as possible,”⁴⁷⁸ and he proceeds to do so. Later, when he runs his first political campaign, for the office of county solicitor, he applies the same strategy:

Day and night I went where I could see people, to lodges, picnics, basket suppers, stores, baseball games. I recall spending one entire afternoon pitching horseshoes in a county precinct in West Jefferson County, and unless my memory is wrong I got every vote but ten in that precinct when the votes came in—a consequence that spoke well, I should say, for my Clay County skill as a player of horseshoes.⁴⁷⁹

⁴⁷¹ *Id.* at 3.

⁴⁷² *See* NEWMAN, *supra* note 464, at 439, 623.

⁴⁷³ BLACK, MEMOIRS, *supra* note 459, at 5.

⁴⁷⁴ *Id.* at 15.

⁴⁷⁵ *See id.* at 15–16.

⁴⁷⁶ *Id.* at 17.

⁴⁷⁷ *Id.* at 22.

⁴⁷⁸ *Id.* at 31.

⁴⁷⁹ *Id.* at 40.

It also speaks well for his political skills, since he succeeds in his first run for office.⁴⁸⁰

Friendship is a central theme of the memoir. Black remains loyal to the friends who advance his career,⁴⁸¹ and he candidly describes the federal positions he secures for some of his early supporters after he moves on to the Senate.⁴⁸² (That loyalty was not reciprocated after Black voted with the Court in *Brown v. Board of Education*,⁴⁸³ and for many years he was abused and ostracized by his former friends.)⁴⁸⁴ Despite acknowledging his patronage appointments for his friends, Black insists that it is possible for a politician to be both successful and honorable.⁴⁸⁵ He admits to engaging in some shrewd campaign maneuvers, but he is proud that he relies on hard work and never buys a vote or otherwise knowingly bends the law, though his friends may at times be excessively energetic on his behalf.⁴⁸⁶ As a prosecutor he insists on neutrality, instructing his assistants "never to try to convict a defendant if there existed in the assistant's mind a reasonable doubt of guilt."⁴⁸⁷ Black describes personally prosecuting a white man for the murder of a black man, an unpopular and difficult choice.⁴⁸⁸ Even in a racially charged case, his policy is "to do our best to convict people of whose guilt we were confident."⁴⁸⁹ Though he enjoys telling stories about his numerous Alabama friends and allies, Black is careful to acknowledge the limits of friendship in a public career.

⁴⁸⁰ *Id.* at 42.

⁴⁸¹ *See id.* at 43.

⁴⁸² *Id.* at 26.

⁴⁸³ 347 U.S. 483 (1954).

⁴⁸⁴ According to Newman, Black became an outcast in Alabama:

Black's old constituents reviled him for doing what the Constitution demanded and his conscience dictated. By the hundreds they wrote their former senator. These letters hurt more than he could admit. He was called a betrayer and a scalawag, Judas Iscariot, a "renegade" who lacked the courage "to stand up for the things he learned at his mother's knee," the "Benedict Arnold of Alabama" whose "name is Black in Washington, but [is] a damn sight blacker in Alabama." Public appearances there were out of the question for the foreseeable future. Even trips to see Hugo, Jr., and his family grew infrequent. He did not want to lower the dignity of the Court by exposing himself to personal attack. When he did go to Birmingham and walked down Twentieth Street, to see friends at the few law firms where he was still welcome, he often wore a chest protector provided by the Secret Service.

NEWMAN, *supra* note 464, at 440-41.

⁴⁸⁵ *See* BLACK, MEMOIRS, *supra* note 459, at 41-42.

⁴⁸⁶ *See id.* at 41 (showing that Black, when facing the incumbent Heflin and two other challengers, separates himself from his opponents by passing out cards that read "Black or Heflin. Which?"). He insists that never in any of his campaigns "did I . . . buy a vote or spend more than the law prescribed. And while I later found that some of my friends had accepted small sums for my campaign, I never spent money supplied by anyone other than myself." *Id.* at 42.

⁴⁸⁷ *Id.* at 45.

⁴⁸⁸ *See id.* After two mistrials with divided juries, Black joins the army and his successor moves "for a *nolle pros.*" *Id.*

⁴⁸⁹ *Id.*

The memoir ends when Black is only thirty-five, a lawyer with a lucrative practice, influential friends, and a socially prominent wife, and it offers little beyond stories of his ambition and political skill to explain how he achieves that early success.⁴⁹⁰ More disappointing for students of Black's Supreme Court years, it never reaches the final phase of his career, when the successful practitioner became the celebrated champion of individual rights under the Constitution. Despite these substantial limitations, the memoir is not without its rewards. Black's plainspoken narrative voice, his strong affection for the places and the people of his home state, and his interest in the evenhanded administration of justice all anticipate his years as a populist senator. More indirectly, they also foreshadow his jurisprudential perspective, which placed the rights of the individual, friend or not, at the center of the legal system.

E. *Earl Warren: The Independent Pragmatist*

Earl Warren began writing his memoirs early in 1970, shortly after he retired from the Supreme Court, but died before completing the project.⁴⁹¹ *The Memoirs of Earl Warren* was published in 1977, three years after his death, and reissued in paperback form almost a quarter of a century later.⁴⁹² Warren might well be surprised at its return, since he makes only modest claims for its value to his readers. Unlike Byrnes, he does not write in the hope of inspiring others to pursue a career in public service. Instead, he candidly suggests that his memoir is equally likely to discourage readers from following his example:

Because the experience of one man who has spent almost his entire adult life in public service might be of interest to others for avoidance of or for learning from such a career, and to still others who might be interested merely in knowing what makes such an individual tick, I propose to record in the following pages a narrative of my life from my earliest days in California, in a little railroad and Wild West oil town, to the time of my retirement as Chief Justice of the United States.⁴⁹³

That self-deprecatory assessment sets the tone for the memoir, which is less a celebration of a distinguished career than a candid account of the role played by circumstance as well as merit in shaping a public life.

Warren ties his second suggestion, that readers might simply be inter-

⁴⁹⁰ See *id.* at 62–63.

⁴⁹¹ See EARL WARREN, *THE MEMOIRS OF EARL WARREN* xii (1977).

⁴⁹² See *id.* at iv, xii.

⁴⁹³ *Id.* at 8.

ested in what makes him tick, to the larger question of the judicial role.⁴⁹⁴ He rejects as impossible the demand that judges free themselves from the bounds of their own natures when they decide cases:

This I do not believe is the true function of a judge. It is literally impossible for a person to eliminate from his reasoning process his experiences in life up to that point. I am certain that my lifetime experiences, even some of the earliest ones, have had an effect on the decisions I have rendered—not deliberately, but because human nature compels it. A jurist's mind cannot operate in a vacuum.⁴⁹⁵

Warren's memoir, then, is neither an inspirational example nor a family document. It is instead an explanation of his jurisprudence, which draws its direction from the particularities of his life. Warren is the first Justice to assert that connection as the basis for an autobiography and to help the reader to see the links between the author's personal experience and his constitutional jurisprudence.

Warren devotes only one chapter to his childhood as the son of Scandinavian immigrants in the railroad town of Bakersfield, California.⁴⁹⁶ Some of his memories, like those of his pet burro and of Spanish fiestas, sound idyllic.⁴⁹⁷ Other memories, like a railroad workers' protest and his father's dismissal for joining a railroad strike, sound like an early education in harsh labor relations.⁴⁹⁸ Warren recalls that the angry protest left him with a lifelong "horror of mob action,"⁴⁹⁹ while his own boyhood jobs for the railroad taught him about the power of "a gigantic corporation that dominated the economic and political life of the community."⁵⁰⁰ Although Warren works from the age of nine, he later rejects the efforts of his political supporters to mythologize him as helping to support his impoverished family.⁵⁰¹ The truth, Warren insists, is that his father paid all of the family expenses, including books and music lessons for both children, and never took a penny of his son's earnings.⁵⁰² Warren is equally candid about his academic performance: "I must admit that I was not a serious student. I was more concerned with adequacy than profundity."⁵⁰³ He decides to be a

⁴⁹⁴ See *id.* at 7 (indicating that his lifetime experiences impacted the judicial decisions he made).

⁴⁹⁵ *Id.* at 7–8.

⁴⁹⁶ *Id.* at 9–32.

⁴⁹⁷ *Id.* at 11, 23.

⁴⁹⁸ *Id.* at 12–13.

⁴⁹⁹ *Id.* at 13.

⁵⁰⁰ *Id.* at 30.

⁵⁰¹ *Id.* at 19, 23.

⁵⁰² See *id.* at 23 (noting that money was always available for educational expenses).

⁵⁰³ *Id.* at 36.

lawyer “without any well-considered reasons,”⁵⁰⁴ and in law school at Berkeley he finds the casebook method of instruction so impractical that he seeks out hands-on experience in a local law office.⁵⁰⁵ He is drawn to government work only after a brief stint in a law firm and his army service in World War I convince him that he no longer wants to work in a “subordinate position.”⁵⁰⁶ This is scarcely the usual prelude for a stellar career in government, and Warren’s plain writing style makes no effort to enhance the modest achievements of his early years.

The qualities that Warren does value in himself and that contribute to his professional success are discipline, independence, and an insistence on fairness. When he joins the district attorney’s office, he first experiences “a sense of liberation” at the opportunity to learn his craft and only gradually finds himself attracted to public service.⁵⁰⁷ The perfunctory student becomes a disciplined attorney, working long hours on his own cases and willingly assisting his colleagues with theirs,⁵⁰⁸ but Warren also recognizes the need for a broader “personal discipline” in public office.⁵⁰⁹ He describes the agreement he and his wife Nina reach as he plans his unexpected career:

We determined that as long as I remained in the public service, I would have no business connections that could possibly interfere. If, in achieving our ambition to have a family of six children, it was impossible to live on the salary of the office, we decided that I would leave public service and seek more remunerative employment.⁵¹⁰

The Warrens manage to support their family on his government salary, and in his early campaigns he accepts virtually no contributions.⁵¹¹ By thus retaining his independence, the quality that he “most cherished,”⁵¹² Warren is able to take what he calls a “non-partisan approach to the Attorney General’s Office.”⁵¹³ Even in his gubernatorial campaigns, he rejects the funds

⁵⁰⁴ *Id.* at 34.

⁵⁰⁵ *Id.* at 42–43.

⁵⁰⁶ *Id.* at 45, 47, 52.

⁵⁰⁷ *Id.* at 61.

⁵⁰⁸ *Id.* at 61–62.

⁵⁰⁹ *Id.* at 104.

⁵¹⁰ *Id.* at 104–05.

⁵¹¹ Warren describes his method of funding his campaign:

My wife and I discussed the matter and decided that instead of buying the home we desired, I would invest one year’s salary in my campaign and refuse *all* contributions. This I did, and with the exception of \$150 donated by each of my top three assistants, this constituted my campaign fund.

Id. at 105.

⁵¹² *Id.* at 172.

⁵¹³ *Id.* at 155.

proffered by the usual Republican financial sources, thus freeing himself from obligations concerning his appointments and policies.⁵¹⁴ When Warren accepts the 1948 vice-presidential nomination, his wife wonders how he will manage to work under the control of Thomas Dewey, the presidential candidate; Harry Truman's victory keeps Warren from finding out.⁵¹⁵

Warren's political independence allows him to implement his sense of fairness without worrying about the reactions or pressures of powerful supporters. He describes a number of issues that he pursues successfully as attorney general and as governor out of his belief that powerless people are being treated unfairly: reform of prisons⁵¹⁶ and mental hospitals;⁵¹⁷ executive clemency for defendants with convictions tainted by racial discrimination;⁵¹⁸ revival of a long dormant suit on behalf of California Indians denied their treaty rights;⁵¹⁹ and prosecutions of organized crime figures victimizing Californians.⁵²⁰ Warren is also willing to acknowledge errors in his career, most notably his support for the internment of Japanese-Americans during World War II: "I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens."⁵²¹ Warren's administrative methods, particularly as governor, reflect a similar taste for simple fairness. He holds "town hall" meetings⁵²² to stay in touch with his constituents and frequently resolves conflicts by inviting opponents to speak candidly with him in his office.⁵²³ A self-styled "pragmatist,"⁵²⁴ he prefers effectiveness to ideological purity, and his decisions are generally informed by an acute assessment of how much the "social tides"⁵²⁵ of the moment are prepared to accept.

Although Warren's account of his life as a public figure of disciplined independence and administrative fairness sounds like an ideal preparation for the center seat on the Supreme Court, he admits that he finds the day of his swearing-in "at once the most awesome and the loneliest day of my

⁵¹⁴ See *id.* at 157.

⁵¹⁵ See *id.* at 241, 245.

⁵¹⁶ *Id.* at 195.

⁵¹⁷ *Id.* at 177.

⁵¹⁸ See *id.* at 197 (recommending the Prisoners' Rehabilitation Act allowing former inmates to restore their civil rights and receive pardons).

⁵¹⁹ *Id.* at 154.

⁵²⁰ See *id.* at 143.

⁵²¹ *Id.* at 149.

⁵²² *Id.* at 206.

⁵²³ *Id.* at 203.

⁵²⁴ *Id.* at 164.

⁵²⁵ See *id.* at 121 (noting his desire to develop alternative forms of incarceration was limited because of public opinion).

public career.”⁵²⁶ His introduction is scarcely auspicious—he trips on the hem of his borrowed robe and “literally stumble[s] onto the bench,”⁵²⁷—but he rapidly finds his footing. Warren has little to say about the internal life of the Court, turning instead to the challenges of the monumental case that awaits the new Chief Justice, *Brown v. Board of Education*.⁵²⁸ Court scholars have written widely about Warren’s crucial leadership role in securing a unanimous Court for *Brown*, but his own account is a more modest version; when he describes the unusual procedures adopted during the Court’s deliberations, he uses “we” rather than “I,” crediting the strategy to the collective body.⁵²⁹ Warren focuses on his own role in *Brown* in other ways. The memoir’s opening chapter, entitled “A Case of Emotional Impact,” describes the scene on the morning when *Brown* is announced and “a wave of emotion” sweeps through the courtroom as Warren indicates that the decision is unanimous.⁵³⁰ Warren is also, however, interested in making clear how little support the Court receives from President Eisenhower in the wake of *Brown* and how quickly his own relations with the President deteriorate as a result.⁵³¹ Writing almost twenty years later, Warren has two major points to make about *Brown*: that racial equality was clearly guaranteed under the Constitution and that Eisenhower was in part responsible for prolonging resistance to the Court’s decision.⁵³²

These two threads, the rightness of the Warren Court’s major decisions and the irresponsible failure of powerful forces to support them, permeate Warren’s account of his judicial career. Although Warren accepts criticism of the Court—even the post-*Brown* calls by the John Birch Society for his impeachment—as part of his job,⁵³³ he reserves his harshest criticism for his treatment by the American Bar Association (“ABA”). Invited to speak at the ABA’s London meeting in 1957, Warren is astonished and offended to discover that what he calls the “theme of the convention” is a sustained attack on the Court’s recent decisions protecting the rights of suspected Communist subversives.⁵³⁴ Warren responds by resigning his ABA membership; association officials subsequently announce that he has been expelled for “non-payment of dues.”⁵³⁵ Over a decade later Warren remains furious at this slur on his personal reputation and, more importantly, at the willingness of the ABA to use its meeting as the platform for a one-sided

⁵²⁶ *Id.* at 275.

⁵²⁷ *Id.* at 279.

⁵²⁸ 347 U.S. 483 (1954).

⁵²⁹ WARREN, *supra* note 491, at 285.

⁵³⁰ *Id.* at 3.

⁵³¹ *Id.* at 291–92.

⁵³² *See id.* at 291.

⁵³³ *See id.* at 305.

⁵³⁴ *Id.* at 323.

⁵³⁵ *Id.* at 326, 328–29.

assault on the Court's institutional integrity.⁵³⁶ Warren, like Hughes before him, is using his memoir to correct the historical record of this episode. He is also, however, voicing his outrage at a violation of basic principles of fairness, this time by an organization of lawyers who, in his view, should know better.

Warren's editors note that his unfinished and unpolished memoir relies heavily on the first person pronoun, a style they think may give readers a false sense of the author's excessive pride in his accomplishments.⁵³⁷ The effect is quite the reverse of what the editors fear. The narrative voice, though neither artful nor subtle, successfully conveys the directness of Warren's nature. In recalling his career, especially his Court years, Warren shows no interest in legal ambiguities or doctrinal niceties. As prosecutor and Justice, he keeps his eye on the broad outlines of the law, a quality long noted by admirers and critics of his *Brown* opinion. Warren's bluntness—his tendency to identify the basic point and omit its refinements—was both his strength and his weakness. The unedited memoir is a perfect reflection of that tendency. If it seems at times to become a dry account of obstacles overcome and cases won,⁵³⁸ the memoir repeatedly redeems itself by expressing Warren's vision of his public career as the diligent pursuit of the simplest but most important constitutional values of equality and fairness.

F. *William O. Douglas: The Mythmaker*

William O. Douglas's memoirs represent a significant new strain in Supreme Court autobiography. Douglas wrote not just one memoir but three, devoting as much time to his early years as to his professional life. And he wrote not just about the external shape of his career, as his predecessors had done, but also about his interior life. Douglas wrote with confidence that his personal story would interest readers with little knowledge of the Court or the law, and to some degree he was right; his books sold not just to lawyers but to a wider general audience as well. Of course, Douglas was one of a handful of twentieth century Justices—Hughes was another—who were recognized by the public based on non-judicial conduct. Hughes had been a two-term governor of New York and an unsuccessful presidential candidate.⁵³⁹ Douglas's presidential ambitions were not widely known, but his activities as outdoorsman, world traveler, lecturer, author, and po-

⁵³⁶ *Id.* at 330.

⁵³⁷ *Id.* at xii.

⁵³⁸ One of his post-retirement law clerks observed that Warren was more interested in setting out the facts of his public career than in revealing his private emotions: "'I didn't sense much desire to write a real autobiography, which means coming to grips with your feelings and doing something besides writing the official record,' said John Kecker." ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 516 (1997).

⁵³⁹ See *supra* Part III.A (noting Hughes's political positions).

litical gadfly brought him a degree of general attention that most Justices prefer to avoid. His private life, which included three divorces and subsequent marriages to considerably younger women, brought him a less positive form of attention.⁵⁴⁰ Douglas's high public profile, combined with his sizeable ego, writing ability, and constant need for additional income, made him a determined and viable author.⁵⁴¹ Of equal importance, Douglas had a compelling story to tell, one he was not above embellishing and recasting in a variety of forms. He was, in short, the first Justice to write an autobiography for reasons of public attention and personal gain and to publish it while he was still on the bench.

His first memoir, *Of Men and Mountains*,⁵⁴² was published in 1950 after Douglas had been on the Court for over a decade.⁵⁴³ As the title indicates, this was not a conventional narrative of the author's life. In his foreword, Douglas explained that his true subject was the mountains of the Pacific Northwest,⁵⁴⁴ where he grew up, and their effect on the people who frequent them: "Here man can find deep solitude, and under conditions of grandeur that are startling he can come to know both himself and God. This book is about such discoveries. In this case they are discoveries that I made; so in a limited sense the book is autobiographical."⁵⁴⁵ That limited sense includes an account of Douglas's boyhood in the shadow of the Cascade Mountains, where he spends a great deal of time, both alone and with companions, testing himself against the rigors of the stern landscape.⁵⁴⁶ Large chunks of the book, however, have little or nothing to do with Douglas himself. Instead, they contain detailed descriptions of the mountains, catalogues of wild flowers, woodlore gleaned from experienced outdoorsmen, and character sketches of people whose lives reflect the values of the landscape they have chosen to inhabit.⁵⁴⁷ Despite this divided focus, *Of Men and Mountains* is a remarkably personal book that reveals a great deal about Douglas, both as he was and as he wanted to be perceived.

Douglas describes the topic of the memoir as the significance of adventure in providing "the richness of life" by "develop[ing] self-reliance and independence,"⁵⁴⁸ two qualities he prized highly throughout his life. The memoir also, however, contains a distinctly Romantic theme, the role of

⁵⁴⁰ See BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 399–400 (2003).

⁵⁴¹ See *id.* at 285.

⁵⁴² *OF MEN AND MOUNTAINS*, *supra* note 27.

⁵⁴³ GO EAST, *YOUNG MAN*, *supra* note 28, at 466.

⁵⁴⁴ See *OF MEN AND MOUNTAINS*, *supra* note 27, at xi.

⁵⁴⁵ *Id.* at ix.

⁵⁴⁶ See *id.* at 30.

⁵⁴⁷ See, e.g., *id.* at x–xi (hoping the book will initiate the reader into the flora, fauna, geology, and interesting characters of the high alpine basins in the Pacific Northwest).

⁵⁴⁸ *Id.* at x.

nature as a teacher whose lessons carry “spiritual significance”⁵⁴⁹ as well as practical benefits. Echoing William Wordsworth, the preeminent nature poet, Douglas reflects that “[t]he boy makes a deep imprint on the man. My young experiences in the high Cascades have placed the heavy mark of the mountains on me.”⁵⁵⁰ That mark appears in the best known episode in the memoir, Douglas’s use of mountain hikes to strengthen his leg muscles weakened by childhood polio; the mountains help him to overcome his fear of spending his life as a “weakling”⁵⁵¹ and prepare him for the challenges of his future. This episode encapsulates the central myth of Douglas’s autobiographical vision, one he repeated in his more conventional account of his early years, *Go East, Young Man*: the impoverished, fatherless boy who drew strength from the natural world to overcome his physical weakness and rise to national prominence as a legal academic, New Deal administrator, and Supreme Court Justice.⁵⁵²

According to Bruce Murphy’s recent biography of Douglas, however, this central myth was as much invention as memory.⁵⁵³ Douglas’s childhood illness was an intestinal colic, not polio, and the episode that defined Douglas in the public imagination was a deliberate transformation of a much less resonant reality, a revision drafted in response to a publisher’s lack of enthusiasm for his original manuscript.⁵⁵⁴ Douglas may well have strengthened his legs through his frequent mountain hikes,⁵⁵⁵ as he describes, but the dramatic account of his life-threatening bout of polio and of his mother heroically massaging his legs with salt water every two hours for many weeks⁵⁵⁶ is apparently a fabrication.⁵⁵⁷ That fabrication was effective in several ways. It allowed Douglas to play at once the roles of grateful son and self-reliant youth, attributing his successful life to both his devoted mother and his own disciplined recovery plan. And, as a bonus, polio linked Douglas to Franklin Roosevelt, the president whose own crippling bout of polio was part of another well known and powerful political

⁵⁴⁹ *Id.* at xi.

⁵⁵⁰ *Id.* Douglas echoes Wordsworth’s famous poetic statement that “[t]he Child is Father of the Man.” William Wordsworth, *My Heart Leaps Up When I Behold*, in WILLIAM WORDSWORTH 246 (Stephen Gill ed., 1984). For an examination of the Romantic themes in *Of Men and Mountains*, see Laura Krugman Ray, *Autobiography and Opinion: The Romantic Jurisprudence of Justice William O. Douglas*, 60 U. PITT. L. REV. 707, 711–18 (1999) [hereinafter Ray, *Autobiography and Opinion*].

⁵⁵¹ *OF MEN AND MOUNTAINS*, *supra* note 27, at 33, 35.

⁵⁵² *GO EAST, YOUNG MAN*, *supra* note 28, at 31–35.

⁵⁵³ See MURPHY, *supra* note 540.

⁵⁵⁴ *Id.* at 281–86. According to Murphy, the publisher who reviewed Douglas’s original manuscript thought that it “was too long and too repetitious, . . . and it lacked anything that would capture the attention of the reader.” *Id.* at 282. He suggested that if Douglas “put more of himself in the manuscript there would be more interest for the general reader and for the publisher.” *Id.*

⁵⁵⁵ *OF MEN AND MOUNTAINS*, *supra* note 27, at 35.

⁵⁵⁶ *Id.* at 31.

⁵⁵⁷ MURPHY, *supra* note 540, at 285.

myth.⁵⁵⁸

The mythmaking quality of Douglas's work suggests a new reason for writing a Supreme Court memoir. For the first time, a Justice shaped his autobiography not to provide an accurate historical record but instead to create a more appealing and potentially useful version of events. Murphy, who spent almost fifteen years researching his Douglas biography, finally concluded that all of Douglas's memoirs are generally inherently "suspect."⁵⁵⁹ And a skeptical reading of *Of Men and Mountains* supports the view that Douglas's various misrepresentations and distortions were a deliberate strategy rather than merely a matter of casual exaggeration. At least one other major episode, his dramatic journey east from Washington to attend Columbia Law School in New York,⁵⁶⁰ illustrates the point. In Douglas's version, he rides the rails from Minnesota to Chicago, where he finally jumps from the train after refusing to pay any more bribes to the train crew.⁵⁶¹ A sympathetic hobo materializes in the freight yard and advises the young man to return west, to the physical and spiritual comfort of the mountains.⁵⁶² Faced with a crucial choice about his future, Douglas resists the lure of home and instead accepts the challenge of a legal career in the east, catching a freight train to complete his journey.⁵⁶³ He characterizes his choice as "spiritual," a determination "to reach for unknown stars, to seek adventure,"⁵⁶⁴ thus linking his professional ambitions to the values of the natural world. Douglas actually took a more mundane route to New York, working as a shepherd on a sheep train to Chicago and then wiring his brother to borrow the cost of his ticket from Chicago to New York.⁵⁶⁵ Once again, he stretches the truth to serve the myth, this time of the poor but self-reliant young man carrying the spiritual values of the mountains with him on his adventurous journey eastward to his future in the law.

Of Men and Mountains was a national bestseller, earning Douglas a tidy sum.⁵⁶⁶ It also lay the foundation for a series of travel books that he wrote, after securing advances from his publishers, to subsidize his summer trips abroad for many years.⁵⁶⁷ In addition to these concrete benefits, his

⁵⁵⁸ *Id.* at 284.

⁵⁵⁹ *Id.* at 513, 572 n.132.

⁵⁶⁰ *OF MEN AND MOUNTAINS*, *supra* note 27, at 15.

⁵⁶¹ *Id.* at 10–12.

⁵⁶² In Douglas's account, the man quotes scripture: "I will lift up mine eyes unto the hills from whence cometh my help." *Id.* at 13 (quoting *Psalms* 121:1 (King James)).

⁵⁶³ *OF MEN AND MOUNTAINS*, *supra* note 27, at 15.

⁵⁶⁴ *Id.*

⁵⁶⁵ MURPHY, *supra* note 540, at 41. See also JAMES F. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* 62–63 (1980).

⁵⁶⁶ See MURPHY, *supra* note 540, at 285 (Douglas earned \$32,900 from sales of the book).

⁵⁶⁷ *Id.* at 289.

first memoir also cemented his image in the public imagination as an intrepid outdoorsman and early environmentalist whose personal values, absorbed from the natural world, made him a principled champion of the common people against the powerful eastern Establishment. Douglas cultivated and celebrated the role of the independent outsider for the rest of his career, a role that helped him to resist the limitations that most of his colleagues saw as the price of a seat on the Court. Instead, he continued to write his books, to travel widely, to speak on public issues of interest to him, and to maintain a visible presence outside the Court.⁵⁶⁸ Despite a number of controversies, both personal and professional, that surrounded him in later years, Douglas retained much of the aura that he crafted for himself in *Of Men and Mountains*. Although he wrote two subsequent volumes of autobiography,⁵⁶⁹ his first memoir was the most innovative—and the most effective—in shaping the public image of a Supreme Court Justice.

Douglas's second autobiographical work, *Go East, Young Man*, appeared twenty-four years later, close to the end of his Court career, though it ends with his judicial appointment.⁵⁷⁰ According to Douglas, the book "was written in my spare time over the last ten or twelve years,"⁵⁷¹ and that prolonged mode of composition may help to explain its devolution from a thoughtful revisiting of his early life to a series of political recollections of his Washington years as a member of the Securities and Exchange Commission⁵⁷² ("SEC") and of President Roosevelt's inner circle.⁵⁷³ The final text was carved out of "a large, disorganized, stack of manuscript papers" turned over to Dagmar Hamilton, Douglas's assistant, in 1969 and eventually reshaped as the second and third volumes of his autobiography.⁵⁷⁴ *Go East, Young Man* proved to be even less accurate than its predecessor. Douglas continued to reshape the people and events of his life to produce the story he wanted; he altered the facts about his family, his law school performance, his legal career, even his military experience in World War I.⁵⁷⁵ The finished product, although not commercially successful, was nonetheless successful in another valuable respect.⁵⁷⁶ It became, in Bruce Murphy's words, "the foundation for virtually every subsequent journalis-

⁵⁶⁸ *Id.* at 284, 306–08.

⁵⁶⁹ See *GO EAST, YOUNG MAN*, *supra* note 28; *THE COURT YEARS*, *supra* note 29.

⁵⁷⁰ *GO EAST, YOUNG MAN*, *supra* note 28, at 455.

⁵⁷¹ *Id.* at xi.

⁵⁷² See generally *id.* at 257–315.

⁵⁷³ See generally *id.* at 317–42.

⁵⁷⁴ MURPHY, *supra* note 540, at 426.

⁵⁷⁵ Murphy has detailed Douglas's numerous distortions. *Id.* at 475–80.

⁵⁷⁶ Although *Go East, Young Man* was favorably reviewed, its publisher lost "\$166,000 in unrecovered advances" from the book's weak sales. *Id.* at 499.

tic and academic portrait of Douglas's life and work,"⁵⁷⁷ elaborating and solidifying the mythic tendencies that first emerged in *Of Men and Mountains*.

The early chapters of *Go East, Young Man* closely track the material in *Of Men and Mountains*, repeating some episodes verbatim where Douglas "found that the original mood and feeling were lost in a rewriting."⁵⁷⁸ Even those episodes, however, have a noticeably different focus in the new book. Although Douglas continues to invoke his love of the wilderness and its effect on his character, he is also interested in connecting his early experiences to his later political perspective. The boy is still the source of Douglas the nature lover and outdoorsman, but he is also the source of Douglas the opponent of Wall Street's economic power, supporter of individual rights under the Bill of Rights, and champion of society's outcasts.

In *Go East, Young Man*, Douglas provides a sociological context for his boyhood adventures that ties them to his political future. Earning money by picking fruit alongside migrant workers, Douglas tears his only shirt.⁵⁷⁹ His co-worker, a member of the International Workers of the World considered a dangerous radical by polite society, gives Douglas his own shirt, "a gift from the heart"⁵⁸⁰ that raises the boy's political consciousness: "That act of generosity built the first bond between me and the men who rode the rods and camped under railroad bridges, a tie that deepened and has lasted through my life."⁵⁸¹ Douglas contrasts that generosity with the hypocrisy of the respectable middle class when a pillar of the community hires him to entrap prostitutes into soliciting him and bootleggers into selling him liquor.⁵⁸² The job, which he finally quits, brings him closer to his targets than to his employer:

Never did I have such a shabby feeling, and in the end, never did I feel sorrier for people than I did for those I was supposed to entrap. . . . In time I came to feel a warmth for all these miserable people, something I never felt for the high churchman who hired me.⁵⁸³

Even the account of his journey east to law school is reworked to underscore Douglas's affinity with society's have-nots. Arriving virtually penniless and bedraggled in New York, he sees that no one will even stop to give him directions.⁵⁸⁴ Eventually he finds that he is "on the same wave length"

⁵⁷⁷ *Id.* at 475.

⁵⁷⁸ *GO EAST, YOUNG MAN*, *supra* note 28, at xi.

⁵⁷⁹ *Id.* at 75–76.

⁵⁸⁰ *Id.* at 76.

⁵⁸¹ *Id.*

⁵⁸² *See id.* at 60–61.

⁵⁸³ *Id.* at 61.

⁵⁸⁴ *Id.* at 134.

with the people who, like him, are eating cheap meals at the automat⁵⁸⁵ rather than with the successful Wall Street lawyers who later employ him, men who “couldn’t climb a mountain, couldn’t tie a dry fly; they knew nothing about the world that was closest to me, the real world, the natural world.”⁵⁸⁶ Where *Of Men and Mountains* is concerned principally to describe Douglas’s ties to that world, its sequel presents those ties as the source of a humanist political philosophy that rejects the coldness and hypocrisy of the Establishment.

This revised version of Douglas’s personal myth also links self-reliance to political independence. He describes himself as an introspective “loner,” someone who even prefers to lunch alone⁵⁸⁷ and feels no need to ingratiate himself with the Establishment. Interviewed by John Foster Dulles for a position at his prestigious Wall Street law firm, Douglas reports that he cheekily gives the “pontifical” Dulles a quarter tip for helping him on with his coat.⁵⁸⁸ Douglas carries this attitude with him to Washington, where he relishes his work at the SEC, uncovering corruption at the New York Stock Exchange and imposing a new regulatory framework on the indignant investment banking community.⁵⁸⁹ He is the perfect outsider, a man of principle and energy who seeks no favors from insiders and is therefore free to act only for the public good. This account of his Washington position is in some tension with another strand of the autobiography, its account of Douglas’s close relationship with President Roosevelt. Douglas is a frequent visitor at the White House, at the President’s country retreat, and on the presidential yacht, advising the President on matters of policy and political strategy.⁵⁹⁰ He is also a member of Roosevelt’s regular poker game, where a select circle provides the President with a brief respite from the burdens of his office.⁵⁹¹ In a remarkable passage, Douglas attempts to reconcile his dual outsider/insider status:

On those weekends I got a new insight into Washington, D.C., life and politics. Men hungry for power, position, and publicity ate out their hearts to get a blessing, an approval, an assignment from FDR. Their happiness turned on his smile, his nod, his handshake. I came to realize . . . how immune my life had been to such influences, how lonely had been the

⁵⁸⁵ *Id.* at 138.

⁵⁸⁶ *Id.* at 156.

⁵⁸⁷ *Id.* at 34.

⁵⁸⁸ See *id.* at 149–50. Dulles later denied the story of the tip. SIMON, *supra* note 565, at 80. According to Murphy, Douglas was not offered a position at Sullivan and Cromwell, Dulles’s firm. MURPHY, *supra* note 540, at 54.

⁵⁸⁹ See GO EAST, YOUNG MAN, *supra* note 28, at 269, 290.

⁵⁹⁰ See *id.* at 333.

⁵⁹¹ See THE COURT YEARS, *supra* note 29, at 268.

trail I walked. I wanted nothing from any man. I had my own dreams; and they were dependent solely on me, not on the whim or caprice of another.⁵⁹²

Douglas locates himself as an insider well positioned to observe Washington's power relationships and to enjoy the President's confidence, while at the same time insisting that he has managed to preserve an undamaged professional independence.

This balancing act is rendered more precarious by Roosevelt's appointment of Douglas to the Supreme Court at the age of forty: Only Justice Story was younger when named.⁵⁹³ Douglas is at great pains to counter any suggestion that he used his insider status to engineer the appointment. His strategy takes the form of a steady disclaimer of any interest in a Court seat. He asserts that he "had not the slightest idea I would ever be on the Court,"⁵⁹⁴ that he "never even dreamed of being there,"⁵⁹⁵ that he "came to the Court without personal ambition ever playing a part."⁵⁹⁶ He insists that the appointment was "an empty achievement" for a man who was "too young" and "had too much excess energy" for a Justice's restricted life.⁵⁹⁷ Once again, his biographers offer a different picture, detailing Douglas's behind-the-scenes efforts to secure the nomination. He allowed New York Times journalist Arthur Krock and several administration figures to promote his candidacy, staked out a strong regulatory position at the SEC to quiet concerns that he was insufficiently liberal to sustain Roosevelt's policies, and worked with supporters to demonstrate that, despite his many years living in the east, he should still qualify as a westerner in the eyes of key western senators.⁵⁹⁸ Douglas's version of events is further contradicted by his own diary entry for March 19, 1939, the date of Roosevelt's offer of the Court seat: "I was quite overcome—dazed, to be more accurate. That had always been my ambition, as I suppose it is with most lawyers."⁵⁹⁹ That ambition, as Douglas says, is perfectly natural, especially for a bril-

⁵⁹² GO EAST, YOUNG MAN, *supra* note 28, at 334.

⁵⁹³ SIMON, *supra* note 565, at 191.

⁵⁹⁴ GO EAST, YOUNG MAN, *supra* note 28, at 441.

⁵⁹⁵ *Id.* at 455.

⁵⁹⁶ *Id.* at 465.

⁵⁹⁷ *Id.*

⁵⁹⁸ See MURPHY, *supra* note 540, at 165–72 (discussing New York Times journalist Arthur Krock's involvement in promoting Douglas as a candidate for Supreme Court Justice and Douglas's strong decisions as SEC chairman); see also SIMON, *supra* note 565, at 190–94 (discussing the political positioning of Douglas as a Westerner and controversial SEC decisions related to the New York Stock Exchange).

⁵⁹⁹ William O. Douglas, *The Court Diary of Justice William O. Douglas*, 1995 J. OF SUP. CT. HIST. 80 (Philip E. Urofsky ed., 1995) (internal citation omitted) [hereinafter Douglas, *Court Diary*]; Sheldon S. Cohen, *Preface to The Court Diary of Justice William O. Douglas*, 1995 J. OF SUP. CT. HIST. 77 (1995).

liant New Deal lawyer with close ties to the President.⁶⁰⁰ It does not, however, comport with Douglas's carefully constructed outsider myth of self-sufficiency and independence, and so instead his autobiography reports that he is "dumfounded" by the appointment.⁶⁰¹ *Go East, Young Man* ends with Douglas's ascension to the Court⁶⁰² and the prospect of a youthful Justice, owing no favors to anyone, prepared once again to take on the Establishment on behalf of ordinary Americans.

The final volume of Douglas's autobiography, *The Court Years*,⁶⁰³ appeared in 1980, shortly after his death. Although Douglas had written most of the book by 1973, he continued to work on it almost until the end of his life.⁶⁰⁴ Focusing as it does on Douglas's thirty-six year tenure on the Court—the longest of any Justice⁶⁰⁵—*The Court Years* could reasonably be expected to pursue the themes of his two earlier books within the context of his judicial career. The reality, however, is somewhat different. Douglas provides very little narrative about his professional life and even less reflection on its relation to the values of the natural world. Instead, he combines detailed discussions of major legal issues that arose during his years on the Court—something earlier Justices deliberately omitted from their memoirs—with a Washington insider's personal reminiscences. Douglas returns only occasionally to his earlier themes of independence and self-reliance; more often, he seems determined to demonstrate that, far from being an outsider, he occupied a comfortable position close to the center of Washington power.

As a Washington insider who served during the administrations of seven Presidents,⁶⁰⁶ Douglas seems often to find himself on the scene when fateful decisions are being made. He serves as "a sounding board" for Roosevelt as the President weighs policy choices before Pearl Harbor,⁶⁰⁷ advises Truman to recognize Red China,⁶⁰⁸ carries Johnson's offer of a seat on the Court to Abe Fortas,⁶⁰⁹ and advises Kennedy on Court appointments

⁶⁰⁰ See Douglas, *Court Diary*, *supra* note 599, at 80.

⁶⁰¹ *GO EAST, YOUNG MAN*, *supra* note 28, at 463.

⁶⁰² See *id.* at 466.

⁶⁰³ *THE COURT YEARS*, *supra* note 29.

⁶⁰⁴ *Id.* at ix–x.

⁶⁰⁵ Jerry Goldman, *William O. Douglas: Biography*, Oyez: US Supreme Court Multimedia, at http://www.oyez.org/oyez/resource/legal_entity/79/biography (Sept. 3, 2004) (on file with the Connecticut Law Review).

⁶⁰⁶ Justice Douglas sat on the Court for thirty-six years, see *id.*, spanning the administrations of seven Presidents, from Roosevelt to Ford. *The Presidents of the United States*, The White House: George W. Bush, at <http://www.whitehouse.gov/history/presidents> (Sept. 2, 2004) (on file with the Connecticut Law Review).

⁶⁰⁷ *THE COURT YEARS*, *supra* note 29, at 273.

⁶⁰⁸ *Id.* at 248.

⁶⁰⁹ *Id.* at 318.

and on the situation in Iran.⁶¹⁰ Douglas also fends off various presidential overtures to leave the Court for executive branch appointments and even declines Truman's offer of the 1948 vice presidential nomination.⁶¹¹ The only position that Douglas seems to regret is one that he was considered for but not offered: that of Roosevelt's running mate in 1944, when the President's failing health made the Vice President's succession a strong possibility. Although Douglas echoes the disclaimers of *Go East, Young Man* by insisting in the first paragraph of his first chapter that he "never wanted to run for office,"⁶¹² his account of the political skirmish surrounding the eventual selection of Truman over Douglas leaves little doubt that the loss of his chance for the presidency still rankles.⁶¹³

Although these anecdotes of political influence are in clear tension with the persona of his earlier memoirs, the independent outsider, Douglas continues to stake his claim to that role as well. He provides two epigraphs that celebrate the nonconformist: Thoreau's invocation of the man who "hears a different drummer"⁶¹⁴ and Holmes's celebration of the solitary thinker's "prophetic vision."⁶¹⁵ In his account of the Court's treatment of political nonconformists, Douglas denounces Truman's loyalty-security program and allies himself with its victims—"[t]he unpopular person, the offbeat, the nonconformist"⁶¹⁶—who suffer at the hands of the majority as a result of their unorthodox views. Douglas presents himself as one of these victims when he stays the execution of accused atomic spies Julius and Ethel Rosenberg, only to find himself immediately reversed by all of the other Justices, whom he accuses of being swept up by the national anti-Communist "hysteria" and running "pell-mell with the mob."⁶¹⁷ When he finds himself "temporarily a leper whom people avoided," he finds solace in the natural world, "conversing with an old barred owl on a cold crisp morning, or walking the old C&O Canal towpath at night in a thickening

⁶¹⁰ *Id.* at 303.

⁶¹¹ *See id.* at 289–90.

⁶¹² *Id.* at 3.

⁶¹³ *Id.* at 281–83.

⁶¹⁴ Thoreau wrote, in *Walden*: "If a man does not keep pace with his companions, perhaps it is because he hears a different drummer. Let him step to the music which he hears, however measured or far away." *Id.* at vii.

⁶¹⁵ Holmes stated:

Only when you have worked alone . . . then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought—the subtle rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army.

Id.

⁶¹⁶ *Id.* at 57.

⁶¹⁷ *Id.* at 83.

fog when the Virginia deer were on the move.”⁶¹⁸ This is one of only a handful of references to nature in the book, and Douglas uses it here to link his nonconformist stance to the moral values of the natural world invoked so strongly in *Of Men and Mountains*.

More dramatically, Douglas describes at length the attempt by the Nixon administration, led by House Minority Leader Gerald Ford, to impeach him for alleged financial irregularities.⁶¹⁹ For Douglas, the failed impeachment effort is a vindication of his unorthodox judicial style, which includes personal involvement in international affairs, strong support for individual rights, and a high public profile.⁶²⁰ In his own characterization, “a Justice, like a priest, may be fiery and courageous, and yet ethical,”⁶²¹ and persecution by the Establishment is thus a badge of honor. To reinforce the point, he quotes Earl Warren’s last words to him, spoken after Douglas has confided to the dying Warren the Court’s decision ordering President Nixon to release the Watergate tapes: “‘As to you, Bill Douglas, if you are not perfectly satisfied with what is written, speak up. They are afraid of you because you are the conscience. Speak up. Do not fail. Then all will be well.’”⁶²² With Warren’s imprimatur in place, Douglas claims the role of the Court’s conscience, at once the powerful insider and the independent outsider who keeps his colleagues honest.

Douglas assumes another role as well, that of Court gossip; he is the only Justice other than Hughes to offer the reading public glimpses of the private inner world of the Court. Where Hughes, however, provides only a handful of anecdotes, generally affectionate in tone and favorable to his colleagues, Douglas relishes stories that set his own virtues against the frailties of some of the other Justices. In his chapter on the Court’s law clerks, Douglas criticizes his colleagues in general for allowing their clerks to draft opinions and Frankfurter in particular for “us[ing] his law clerks as flying squadrons against the law clerks of other Justices and even against the Justices themselves” in his effort to win votes for his opinions.⁶²³ Douglas, in contrast, insists that his opinions for the Court “were always my own creation,” though he admits to occasionally allowing his clerks to

⁶¹⁸ *Id.* at 85.

⁶¹⁹ *See id.* at 355–59 (discussing details of the attempt to impeach Justice Douglas).

⁶²⁰ Douglas reworked the story of the failed impeachment in another form as well, an unpublished play entitled *The Couch* in which a visionary psychiatrist, the nation’s first Secretary of Mental Health, faces impeachment for his unorthodox views. For an analysis of *The Couch*, see generally Ray, *Autobiography and Opinion*, *supra* note 550, at 731–35 (discussing corollaries between Douglas’s life and *The Couch*).

⁶²¹ *THE COURT YEARS*, *supra* note 29, at 311.

⁶²² *Id.* at 238 (quoting Earl Warren).

⁶²³ *Id.* at 173.

draft dissents and concurrences.⁶²⁴ Douglas also presents some of the Justices at their worst: Chief Justice Vinson, taunted beyond his patience by Justice Frankfurter at conference, “rais[ing] his clenched fist” as he “started around the room at Frankfurter,”⁶²⁵ Justice Murphy having his request for a direct telephone line from his chambers to the Roosevelt White House refused;⁶²⁶ Chief Justice Burger insisting on voting for reargument of a politically charged case decided before his appointment, in violation of Court practice.⁶²⁷ Douglas uses the final volume of his autobiography not only to extend his personal myth but also to settle old scores with some of his longstanding Court adversaries.⁶²⁸

In his three volumes of autobiography, Douglas does what no earlier Supreme Court Justice had ever attempted. He seizes the initiative from his critics and his future biographers, offering the reading public as well as the legal community his own perspective on his life and work. The strategy was a bold one, a pre-emptive strike calculated to disarm negative assessments by positioning himself as the courageous visionary who overcame personal obstacles and professional attacks to serve as the principled defender of ordinary Americans’ constitutional rights. In executing that strategy, Douglas was not above manipulating his material, omitting such unpalatable subjects as his multiple marriages, and improving on reality; his biographers have identified those distortions, providing a more accurate account of the man and the career. Nonetheless, Douglas’s autobiographical works remain a remarkable achievement: the first attempt by a Justice

⁶²⁴ *Id.* at 172. Douglas presents a remarkably benign version of his relations with his law clerks, noting that “I always welcomed criticism of what I wrote.” *Id.* For a much harsher account of Douglas’s dealings with his clerks, including their side of the story, see Melvin I. Urofsky, *William O. Douglas and His Clerks*, 3 W. LEGAL. HIST. 1, 5 (1990) (noting that “[one] clerk claims that the justice put all the clerks through a month of sheer hell, which [some] compared to boot camp”).

⁶²⁵ THE COURT YEARS, *supra* note 29, at 226. Douglas seems to have liked Vinson, whom he calls “warm-hearted and easygoing,” and the anecdote is aimed mainly at Frankfurter, who was Douglas’s principal opponent on the Roosevelt Court. *Id.* at 227. Frankfurter is described as provoking Vinson’s explosion by repeatedly “baiting Vinson with barbed taunts.” *Id.* at 226. Vinson ultimately behaves properly: “Before the day was done, Vinson of course apologized.” *Id.* Douglas provides no comparable amelioration for Frankfurter.

⁶²⁶ *Id.* at 227.

⁶²⁷ *Id.* at 233. The *El Paso Natural Gas Co.* case had been argued several times before the Court, which, in a final opinion by the retiring Chief Justice Warren, rejected El Paso’s merger with another gas company and ordered divestiture. *Id.* Douglas noted that “Richard Nixon’s former law firm had been heavily involved in the case” and that El Paso’s lobbyist had attempted to present the case privately to Justice Brennan in chambers, causing Brennan to recuse himself. *Id.*

⁶²⁸ MURPHY, *supra* note 540, at 499. Frankfurter and Burger were probably Douglas’s major Court adversaries. Frankfurter died in 1962, well before Douglas’s final revisions on *The Court Years*, but Burger was apparently able to soften his portrait by subsequent acts of kindness to Douglas in his last years: “One of [Douglas’s] main preoccupations was his literary portrait of his nemesis, Chief Justice Burger, who never realized that every time he stopped by to chat, often bringing a favorite wine or a jar of homemade preserves, Douglas would remove another negative comment from his literary portrait.” *Id.*

to transform the raw material of his life into a resonant American myth of personal and professional transcendence.

G. *Sandra Day O'Connor: The "Ranch Girl"*

Although Douglas invented a new variety of Supreme Court autobiography, it took more than a half century for another Justice to follow in his footsteps. It is no coincidence that this successor was a fellow westerner, Sandra Day O'Connor. As the first woman to join the Court, she was the focus of strong public interest from the moment that President Reagan nominated her in 1981⁶²⁹ and thus could anticipate a broader readership than any of her colleagues. O'Connor's memoir, *Lazy B: Growing Up on a Cattle Ranch in the American Southwest*,⁶³⁰ co-authored with her brother H. Alan Day in 2002, resembles *Of Men and Mountains* in several respects, including its commercial success as a bestseller that made the transition from hardcover to paperback.⁶³¹ Like Douglas's first memoir, *Lazy B* focuses almost exclusively on O'Connor's childhood. *Lazy B* also echoes Douglas's memoir in its emphasis on the relationship of the child to her landscape. And O'Connor, like Douglas, writes from the perspective of a westerner who celebrates the distinctive values of her region. But O'Connor's experience differs significantly from Douglas's account of the spiritual enlightenment he finds in mountains of the Pacific Northwest. Where Douglas finds a Romantic union of man with nature, O'Connor finds more pragmatic lessons of effort, endurance, and community.

One source of these differences is the nature of the landscape that O'Connor inhabits. The Lazy B cattle ranch occupies a huge tract of high desert on the Arizona-New Mexico border.⁶³² This is an isolated and inhospitable terrain, as O'Connor makes clear in her opening description: "It was no country for sissies, then or now. Making a living there takes a great deal of hard work and considerable luck. Our family stayed there for 113 years."⁶³³ In place of dramatic mountain peaks and lush wild flowers, the Lazy B offers volcanic rock and arid soil.⁶³⁴ The economic survival of the ranch depends on the vagaries of the weather; without sufficient rain to produce grass for its herds of cattle, the Lazy B cannot support its small

⁶²⁹ O'CONNOR & DAY, *supra* note 23, at 299; Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 WAKE FOREST L. REV. 513, 517-18 n.26 (2003).

⁶³⁰ O'CONNOR & DAY, *supra* note 23.

⁶³¹ *Extended Paperback Nonfiction*, Book Sense: American Booksellers Association, at <http://www.bookweb.org/booksense/bestsellers/6310.html> (Sept. 14, 2004) (listing *Lazy B* as #44 on an extended paperback bestsellers list for the week of July 13, 2003) (on file with the Connecticut Law Review).

⁶³² See O'CONNOR & DAY, *supra* note 23, at 6.

⁶³³ *Id.* at viii.

⁶³⁴ *Id.* at vii.

community of family and cowboys.⁶³⁵ The Wallace Stegner epigraph that O'Connor chooses for her preface captures the difficult but illuminating relationship of its inhabitants to the harsh landscape: "there is something about exposure to that big country that not only tells an individual how small he is, but steadily tells him *who* he is."⁶³⁶ Growing up on the ranch, O'Connor reads the same message in the desert sky: "[t]he universe appeared overhead, and we were bit players indeed—small specks of life on a small planet circling the sun. Our concerns seemed less important somehow."⁶³⁷ The first lesson of the Lazy B is perspective; this is not a landscape that encourages either self-delusion or self-importance.

The human relationships within the ranch community also reflect the rigors of its setting. The central figure in O'Connor's childhood is her father, DA Day, a stern patriarch who exercises unquestioned authority over all aspects of ranch life. He demands from his children the same discipline and competence that he brings to his own work, sometimes with unsettling results. When O'Connor volunteers to paint the ranch house's peeling screen door, DA supervises the job, making her redo her first imperfect effort.⁶³⁸ His reaction to the final product is less than appreciative. Hearing that she has put away her tools, his only comment is "[t]hat's all right then,"⁶³⁹ a reaction O'Connor accepts with equanimity: "[a]nd that was all the thanks I received, but somehow I knew DA thought the job was done properly, and that was what counted."⁶⁴⁰ She also knows, with some discomfort, when she has failed to meet his standards. Delivering lunch to her father and the cowboys at a remote part of the ranch, O'Connor has a flat tire and struggles, with some ingenuity, to change it herself.⁶⁴¹ When she arrives late, DA rejects her explanation; she should, he tells her, have left home earlier, since "[y]ou need to expect anything out here."⁶⁴² Again, O'Connor validates his response: "I had expected a word of praise for changing the tire. But, to the contrary, I realized that only one thing was expected: an on-time lunch. No excuses accepted."⁶⁴³ O'Connor learns similar lessons from the cowboys: "the contentment of doing the best you can with what you have"⁶⁴⁴ and the fact that, in the shared labor of keeping the ranch afloat, "there were no excuses, only results."⁶⁴⁵

⁶³⁵ See *id.* at 7.

⁶³⁶ *Id.* at vii. The passage is from Wallace Stegner's "Finding the Place: A Migrant Childhood."

⁶³⁷ *Id.* at 234.

⁶³⁸ *Id.* at 33–34.

⁶³⁹ *Id.* at 34.

⁶⁴⁰ *Id.*

⁶⁴¹ *Id.* at 240–41.

⁶⁴² *Id.* at 243.

⁶⁴³ *Id.*

⁶⁴⁴ *Id.* at 59.

⁶⁴⁵ *Id.* at 65.

O'Connor's uncritical acceptance of her father's stern attitude is rooted in the culture of the Lazy B, where family members and cowboys alike are expected to place the needs of the ranch ahead of their personal preferences, and the arbiter of those needs is always DA.⁶⁴⁶ In the unforgiving desert terrain, everyone recognizes the constant need to keep the pumps that deliver water from the ranch's wells in working order.⁶⁴⁷ As a small child O'Connor learns to do what little she can, handing her father his tools as he repairs broken machinery and waiting patiently for the promised card game that comes only when work is completed.⁶⁴⁸ The "biggest milestone" for a ranch child, one her brother Alan reaches at the age of five, is participating in the roundup, "solving problems rather than causing them," by helping to herd the cattle for branding and market.⁶⁴⁹ Alan is left alone, on horseback, to keep the cattle from heading back up a canyon.⁶⁵⁰ He waits for hours, unable to dismount because he is too small to get back on his horse unassisted, and starts to wonder if he is going "crazy" when the cowboys are slow in returning.⁶⁵¹ As with his sister, there is no praise or appreciation for his role, only the satisfaction that he "had made a hand" and was now a full-fledged member of the working ranch community.⁶⁵² It seems appropriate that *Lazy B* is co-authored by Alan Day, even though most of the text is written in his sister's first-person voice. The remembrance of ranch life, like its daily texture, is a shared experience.

Although O'Connor gains some distance from the Lazy B at an early age—she is sent to El Paso to attend school at the age of six—she continues to miss the ranch when she is absent and to regard it as "a never-changing anchor in a world of uncertainties."⁶⁵³ The memoir touches only briefly on her appointment to the Court, principally to describe the family's trip to Washington for her swearing-in ceremony.⁶⁵⁴ O'Connor's reaction to her elevation is, in keeping with the ranch ethos, limited to a single sentence that defines her in terms of her childhood experience: "[i]t did not seem possible that a ranch girl would grow up to serve on our nation's highest court."⁶⁵⁵ Unlike Douglas, O'Connor makes no serious attempt to link her adult self or her judicial philosophy to the childhood she remem-

⁶⁴⁶ See *id.* at 23.

⁶⁴⁷ See *id.* at 7.

⁶⁴⁸ See *id.* at 8.

⁶⁴⁹ *Id.* at 123.

⁶⁵⁰ See *id.* at 126.

⁶⁵¹ *Id.* at 127.

⁶⁵² *Id.* at 123, 127.

⁶⁵³ *Id.* at 123, 297–98.

⁶⁵⁴ See *id.* at 299.

⁶⁵⁵ *Id.*

bers.⁶⁵⁶ She does, however, reflect on the “value system” that shaped her character, one that emphasized an understanding of the physical world, together with “honesty, dependability, competence, and good humor.”⁶⁵⁷ In its plainspoken narrative, its affectionate reminiscences of an interdependent community, and its determined lack of introspection, *Lazy B* resists any impulse to mythologize the experience it describes.

Douglas and O'Connor, both westerners who see their lives as shaped by the vivid landscapes in which they grew up, nonetheless take the Supreme Court autobiography in very different directions. For Douglas, childhood is significant as the source of his spiritual and political values, which in turn underlie his jurisprudence. Although his three volumes of autobiography descend from the lyrical to the anecdotal, he insists on the continuity of his persona as the independent outsider who draws strength and courage from his early engagement with the grandeur of the mountains. Douglas is also the supreme individualist among Supreme Court autobiographers. Despite his tales of Washington life, Douglas celebrates his own experience rather than his ties to family, friends, or colleagues. Like Walt Whitman, a poet he cites approvingly in both his books and his Court opinions,⁶⁵⁸ Douglas sings of himself, the confident song of a man who values his individual life. O'Connor is much more pragmatic and communal in her approach, even sharing authorial credit with her brother. She is content to describe her childhood without exploring in any detail its implications for her future self or her role on the Court. And she has little interest in exalting the self above the community she inhabits. The crucial lesson of her ranch life is interdependence, the willingness of each individual to subordinate when necessary her individual will for the good of the community. Her memoir is a carefully crafted, straightforward account of an unusual childhood, lacking any of the introspective or self-aggrandizing tendencies of Douglas's books. It seems to be, like its co-author, very much a product of the austere world of the *Lazy B*.

⁶⁵⁶ For the suggestion that O'Connor's ranch childhood is linked to her roles as “a practical Justice more interested in outcomes than in legal theories” and as a “swing Justice, preferring to go her own way rather than to maintain durable ideological alliances,” see Laura Krugman Ray, *Justices At Home: Three Supreme Court Memoirs*, 101 MICH. L. REV. 2103, 2108 (2003).

⁶⁵⁷ O'CONNOR & DAY, *supra* note 23, at 315.

⁶⁵⁸ In *Go East, Young Man*, Douglas compares a kindly shepherd who offers wise counsel about the future impact of World War I to Whitman. GO EAST, YOUNG MAN, *supra* note 28, at 88. In *The Court Years*, he describes an admirable Texas academic as “a free spirit like Walt Whitman.” THE COURT YEARS, *supra* note 29, at 89. Douglas also invokes Whitman in several opinions. See *Wainwright v. City of New Orleans*, 392 U.S. 598, 614 (1968) (Douglas, J., dissenting) (asserting that the “philosophy of Walt Whitman, Vachel Lindsay, and Carl Sandburg . . . was faithfully reflected in our law”); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 775 (1961) (Douglas, J., concurring) (observing that “[o]ne who of necessity rides busses and street cars does not have the freedom that John Muir and Walt Whitman extolled”).

IV. CONCLUSION

Over almost two centuries the Supreme Court autobiography has evolved from brief narratives to full-length books. Its substance has also evolved from recollections of family and pre-Court careers to elaborate childhood narratives and insider accounts of the Court at work. And its audience has evolved as well, from the narrow readership of family and legal circles to the expansive territory of the bestseller list. As its scope has grown, so have the motivations of its authors. Where the nineteenth century Justices wrote primarily to preserve accurate information for the domestic and historical records, their twentieth century successors have found new uses for the autobiographical form as a means of defending their judicial performance and shaping their public image.

This evolution reflects a similar development in the public perception of the Court and its Justices. Although the Supreme Court has long been the most sheltered of the three branches of the federal government, doing most of its work in the privacy of the Justices' conference room and chambers, twentieth century Americans came to appreciate the powerful impact of its decisions on their lives. That understanding has been accompanied by another twentieth century perception, the belief that the legal decisions of the Justices are strongly influenced by the nature of the men and women who make them. It remains to be seen whether other members of the current Court will follow Justices O'Connor and Thomas into print, but it seems a safe prediction that the public appetite for glimpses into the lives of the Justices has not yet been satisfied.