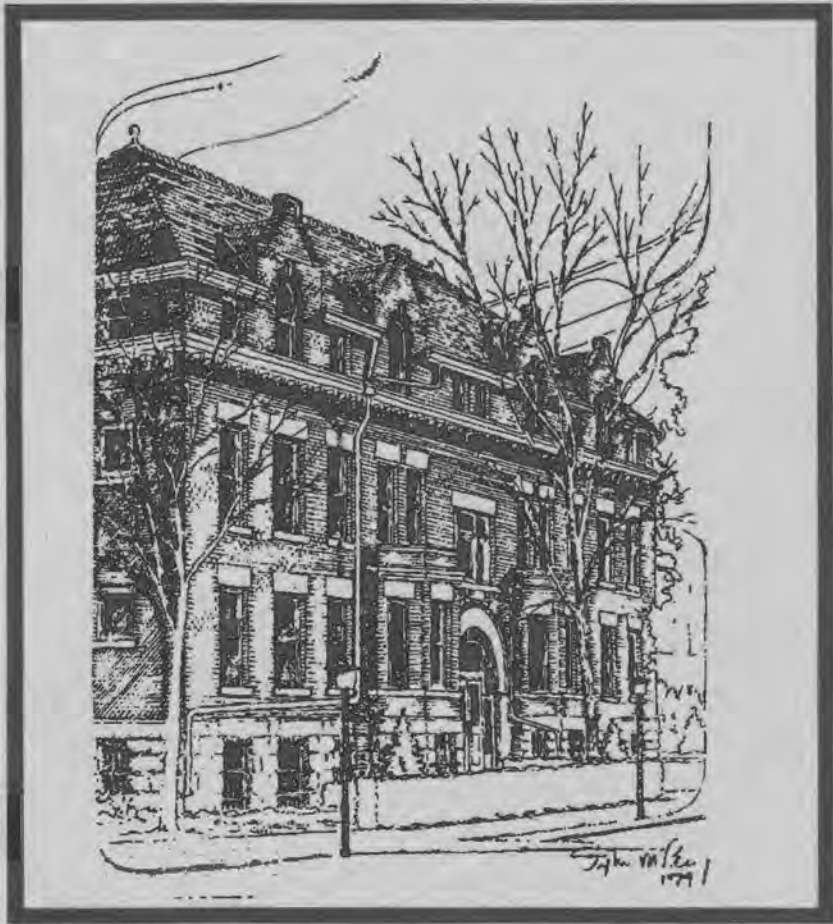


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Editor's Note

This, the second volume of the *Fairmount Folio*, attests to the hard work of its founders, who produced the first issue in 1996. Using their formula has made my task comparatively easier but certainly no less enjoyable. The appearance of this volume marks, hopefully, the beginning of a tradition for WSU history students.

A note about the contents is in order. A call for papers elicited a number of submissions from WSU students. Those papers were reviewed by the faculty and graduate student editorial board, who recommended four for publication. The authors of those papers then revised their submissions as suggested by the reviewers. A final editing readied them to appear here; they comprise the first four of the articles in this volume. The last four papers in this issue are those which this year won the annual prizes for student papers awarded by the Department of History. They are reprinted as submitted, with no editing other than standardization of the notes.

Thanks go to the faculty and staff acknowledged on the title page. I appreciate their enthusiasm and thoroughness in carrying out the jobs of reviewing and editing. Editing this journal has been a superlative learning experience—I have learned more about the publication process than I ever could have done in any coursework.

The Department of History and Dean David Glenn-Lewin deserve special thanks for their assistance in producing this journal. The Department funded publication of the award papers. Dean Glenn-Lewin has provided not only funding, but his personal support as well, both of which are greatly appreciated.

Finally, I wish to acknowledge the contributions of Professor Helen Hundley as supervising faculty. She has cheerfully facilitated the whole publication process with just the right amount of supervision.

Susan deWees

Whom Can We Trust Now? The Portrayal of Benedict Arnold in American History

Julie Courtwright

"Whom can we trust now?" asked General George Washington, commander in chief of the American Revolution, shortly after learning of the treason committed by the most brilliant soldier of the Revolution, Benedict Arnold. Arnold was Washington's friend, his trusted comrade in the fight for independence. He had lent his considerable talents for leadership to the American cause time and time again since the onset of hostilities with Great Britain, making him one of the colonial army's most valuable officers. In fact, the commander in chief frequently commended Arnold for his "enterprising and persevering spirit" and relied on him for advice and support during the conflict.¹ After Arnold defected to the British, however, Washington was hurt and angry at his friend's betrayal. He was not the only one. Patriots across America lashed out in fury in reaction to Arnold's treason. Their trust had been broken, and to the present day, Americans have difficulty seeing beyond the word traitor when Benedict Arnold's name is mentioned. In the years since Arnold's death, many biographies and articles have been written about him. The tone and perspective of these writings have changed as cultures and attitudes of historians have changed. While examining the historiography on Benedict Arnold, the phrase "whom can we trust now" takes on a whole new meaning. To gain an accurate understanding of who Arnold truly was, scholars must not only study his life, but the forces that shaped his interpreters.

Arnold, born January 14, 1741, in Norwich, Connecticut, was a man who sought to control every situation. According to James Kirby Martin, professor of history at the University of Houston, Arnold shared similar

¹Washington quoted in Malcolm Decker, *Ten Days of Infamy* (New York: Arno Press, 1969), 94, and in James Kirby Martin, *Benedict Arnold: Revolutionary Hero* (New York: New York University Press, 1997), 184.

characteristics with other Revolutionary leaders: "His profile was that of an individual ambitious for achievement, with low levels of tolerance toward those who threatened the full realization of his personal aspirations." After the death of their parents, Arnold and his sister, Hannah, moved from their family home to New Haven, Connecticut. Determined to rebuild the reputation of the Arnold name after his father's descent into alcoholism and poverty, the young man soon established a successful mercantile business and quickly became a prominent resident. When British-imposed trade restrictions and taxes began to affect his business ventures, Arnold spoke out against them. He believed complacency regarding the actions of the mother country "would result in the loss of liberties, including so fundamental a right as earning a livelihood."²

Therefore, after the battle at Lexington and Concord in April, 1775, Benedict Arnold began his fated military career. With Ethan Allen, who simultaneously received an identical commission, he led an extremely successful raid on Fort Ticonderoga, a defense built during the French and Indian War, to obtain desperately needed heavy artillery for the colonial forces. Later, Arnold headed a long and laborious trip up the Kennebec River to attack Quebec. The objective was to take the city, thereby eliminating the British access and supply line to the sea. Although the battle failed in this aim, Arnold, who was shot in the leg during the fight, was promoted to brigadier general. In the fall of 1776, the recovered soldier provided a great service to his country by stalling British forces on Lake Champlain before the onset of winter, thereby preventing the recapture of Fort Ticonderoga. The fort, had it fallen into British hands, would have allowed the redcoats to march to Albany, and in the spring, to seize control of the Hudson River Valley, effectively ending the war.

Frustrated and angry over his lack of further promotion, Arnold finally received the rank of Major General after the Battle of Ridgefield in 1777. The battles at Saratoga later that year, however, were the real turning point, not only for the American army in the war, but for Arnold as well. At Saratoga he fought bravely, leading his troops through heavy fire. He was wounded again, in the same leg as at Quebec. To complicate the situation, his horse fell, trapping the injured appendage beneath it. After a long recovery, Arnold, not yet well enough to resume active duty, was posted as military commandant at Philadelphia. It was here that he made his first offer of assistance to the British.

²Martin, *Benedict Arnold*, 39, 45.

While stationed in the city, Arnold met and married Margaret "Peggy" Shippen, who became his partner both in life and in treason. Also, the hero of Saratoga made several financial deals during this time that were perceived as inappropriate. Court-martialed and subsequently reprimanded by George Washington for his actions, Arnold was humiliated and angry. It was this "straw," plus his newly formed belief that America should remain within the British empire, that led Arnold, on May 10, 1779, to make contact with Major John André, an acquaintance of his wife and a leading British officer. The exchange of messages between André and Arnold culminated with an offer by Arnold to deliver to the British the vital post of West Point, which guarded the Hudson Valley.

Appointed commander of West Point by Washington, Arnold arranged to meet with André in person to discuss payment for delivery of the fort. The two soldiers, while deep in discussion, lost track of time, and as daylight dawned, André found himself stranded behind enemy lines. Arnold wrote a pass for the British soldier under the alias "John Anderson." Armed with this and a set of papers containing messages and information about West Point, André began his journey back to British headquarters. Enroute, however, he was captured. The papers were sent to General Washington, and Arnold, exposed as a traitor, made his getaway to a nearby British ship. Although he thus escaped punishment by his former allies, Arnold was powerless to escape his infamous legacy in the minds of patriots, future Americans, and even many historians.

When colonial newspapers published General Nathanael Greene's orders of September 25, 1780, in which he stated that "treason of the blackest dye was . . . discovered,"³ a process of "demonization" and the transformation into "nonpersonhood" began against Benedict Arnold. Demonization occurs when all good characteristics of a villain are erased and that person is personified as completely evil. To demonize a person, every aspect of his or her life must be made deviant, which is accomplished by rearranging and retelling the individual's life so that every event inevitably leads to the villainous act that was committed. In Arnold's case, this occurred by establishing a "traitorous" character, eliminating his pre-treasonous identity, proving an absence of virtue, and understanding his

³Quoted in Lori J. Ducharme and Gary Alan Fine, "The Construction of Nonpersonhood and Demonization: Commemorating the Traitorous Reputation of Benedict Arnold," *Social Forces* 73 (June, 1995), 1320.

personal motivation.⁴ These views of Arnold, established soon after his treason, still affect his reputation today.

To establish a "traitorous" character that supported his defection, Benedict Arnold's life was examined carefully, and even in cases where no evil existed, it was nevertheless found. His background and exploits were interpreted to support a logical path to treason. For example, stories of his childhood were invented or embellished to emphasize his "inherently mischievous, selfish, and traitorous" character. An elementary school textbook stated that Arnold was "early known as a bad boy. From earliest childhood he was disobedient, cruel, reckless, and profane, caring little or nothing for the good will of others." Arnold's family history was rewritten as the kind of genealogy expected of a traitor. The honor of the Arnold family was discarded and its infamous son was said to come from "low birth and vulgar habits." The origins for Arnold's "revised" youth came from sources which included citizens of Arnold's hometown, a disgruntled acquaintance, and Frances M. Caulkins, author of *History of Norwich, Connecticut: From Its Possession by the Indians to the Year 1866*. Caulkins related tales such as Arnold's pretentious challenge to fight a constable and stories of foolhardy bravery that would be retold by historians for many years. In addition, the author charged that the Arnold house in Norwich was full of "supernatural sounds and sights" that drove occupants away. She was also the source of the freely translated version of Benedict Arnold's motto that appeared on his store sign in New Haven. The motto read *Sibi Totique*. In Latin this means "for himself and for all." Caulkins related, however, that "the first part, *for himself*, is pointedly appropriate. The motto has been rendered by a free translation, "Wholly for himself."⁵ The intent of the original Latin and the standard meaning thereafter ascribed to Benedict Arnold are quite different, thereby fostering Arnold's inherently devilish character reputation.

American citizens and soldiers not only searched for evil in every corner of Arnold's life, but they reacted with rage against the traitor, continuing the process of his demonization. In many cities effigies of Arnold were carried through the streets and burned before large crowds. The residents of

⁴Ibid., 1311-19.

⁵Isaac N. Arnold, *The Life of Benedict Arnold* (1880; reprint, New York: Arno Press, 1979), 18; Martin, *Benedict Arnold*, 438-39; Frances Manwaring Caulkins, *History of Norwich, Connecticut: From its Possession by the Indians, to the Year 1866* (Hartford: Published by the author, 1866), 411, 413.

Philadelphia were perhaps the most thorough in their degradation of the former general. There a two-headed figure of Arnold was placed on a horse-drawn cart and led around the city. Next to the Arnold effigy was a figure of the Devil holding a sack of gold to the traitor's ear and poking a pitchfork into his back. Before the effigy was burned one soldier remarked that "it isn't fair to the Devil to join him with a fellow who acted in such a way as to make even the Devil blush." In 1794 a textbook read: "Satan entered into the heart of Benedict. The demons of destruction laugh at thy defection, and enjoy with malicious pleasure the consequences of thy fall."⁶

In the minds of the patriots, all that could be remembered about Benedict Arnold was his treason. Everything else, including his battlefield feats, was neutralized or erased. In Arnold's home state of Connecticut, residents smashed the gravestones of his father and baby brother because the names on their tombstones were the same as that of the traitor. A soldier who had the misfortune of having the last name of Arnold changed his name to something more honorable. Fort Arnold, the main fort at West Point, was quickly renamed Fort Clinton in honor of an American general by that name. To deny that Arnold was ever a member of the Freemason's Lodge in New York, a black line was drawn over his signature in the record book.⁷ In the transformation to nonpersonhood, all reminders of Arnold's name and pre-treasonous existence were deemed unacceptable.

The general's heroic battlefield accomplishments comprised part of this unacceptable pre-treasonous existence. Tradition states that, while commanding a British raid in Virginia, Arnold asked an American prisoner what would happen to him if he were captured by the American army. The prisoner replied that "they would cut off that shortened leg of yours wounded at Quebec and Saratoga, and bury it with all the honors of war; and then hang the rest of you on a gibbet!" In fact, this practice of neutralizing Arnold's battlefield heroics exists today. At the site of the battles at Saratoga there stands a stone marker in the shape of a boot. It is dedicated to "the most brilliant soldier of the Continental army" and lists the part this soldier played in the battles. The name of the soldier, Benedict Arnold, is nowhere on the marker. But perhaps the most significant testament to the neutralization of Arnold's virtue is a second memorial at Saratoga, "an obelisk commemorating the great fighting generals of the Battles of

⁶Martin, *Benedict Arnold*, 8; quoted in Ducharme and Fine, "Construction of Non-personhood," 1329.

⁷Ducharme and Fine, "Construction of Nonpersonhood," 1321.

Saratoga.” There are four niches in the obelisk, three of which contain statues of Generals Philip Schuyler, Horatio Gates, and Daniel Morgan. The fourth niche is empty. The place where Benedict Arnold’s likeness should be is inscribed only with his name. “His likeness . . . is conspicuously absent, while the inscription of his name serves not to revere him, but to instruct visitors of the significance of the empty niche.” In this way, “Arnold is simultaneously present and absent in the monuments.”⁸ His heroic deeds have been neutralized, because in the minds of many, Arnold’s virtue cannot co-exist with his treason.

Another way to “prove” that Arnold’s treason originated from a deep, evil and internal force, was to establish a motive that supported this theory. Arnold stated in his memoirs that his motivation was a combination of his disagreement with the French alliance, his difficulties with Congress, and his desire to end the war. Most early interpreters, however, did not accept these as true motives. They argued that the French alliance disagreement was never mentioned by Arnold until after his treason and was therefore only an excuse. It was also noted that Arnold was not the only soldier who had difficulties with Congress. Although a few of the men who held a grudge turned to the British during the war, most did not, and none of these had as much responsibility nor as high a rank as Arnold. If he had remained loyal, these conflicts with Congress would scarcely have been known. As events occurred, however, the charges, and Arnold’s reaction to them, were used to show the poor morality of a traitor. Most writers concluded that the General’s motives for treason were “based on greed, self-interest, and personal insecurity.” Establishing greed as the motivation for treason completed the transformation of Arnold’s character into the “type” of person who would betray his country. He had all the requisite character traits, a lack of virtue, and a selfish motivation. In the words of one historian, “the traitor has now no advocate, and nothing can be said against him that is not readily believed. In every act of his life is found some lurking treason, and every trait of his character is blackened. This cannot be complained of, it is the just reward of his deeds.”⁹

⁸Malcolm Decker, *Benedict Arnold: Son of the Havens* (1932; reprint, New York: Antiquarian Press, 1961), 418; Brian Richard Boylan, *Benedict Arnold: The Dark Eagle* (New York: Norton, 1973), 25; Ducharme and Fine, “Construction of Nonpersonhood,” 1324.

⁹Ducharme and Fine, “Construction of Nonpersonhood,” 1318-20.

After examining the reaction to Benedict Arnold's treason and the alteration of his reputation, two questions of significance remain. Why did the public react so strongly to Arnold's treason, and how has the perception of Arnold's life compared to the lives of the other figures involved? In their article, "The Construction of Nonpersonhood and Demonization: Commemorating the Traitorous Reputation of Benedict Arnold," Lori J. Ducharme and Gary Alan Fine concluded that the colonists reacted as they did to provide an "outlet for collective moral outrage" and to publicize the "social rules of acceptable behavior." At the time of Arnold's treason, the values upon which the Revolution was based were being threatened and support for the war effort was languishing. Patriots knew that to win independence there would have to be a sacrifice of "safety, ease, and self-interest in order to defend liberty." This was very difficult, however, in times when economic hardship exacerbated the feeling that the war had gone on too long. Therefore, the blackening of Arnold's character and the subsequent demonization by historians was a response to an act seen as cowardly and weak. It was also, however, a way for people to reaffirm support for the cause and to see themselves as true patriots once again. Blame for their own weaknesses was placed on Arnold rather than on themselves. The traitor was condemned not only for his treason but for his rich lifestyle, his need for recognition, his abuse of power, and his questionable business dealings. Because many of Arnold's denouncers had participated in all or some of these same things that were contrary to the war cause, Arnold's greed and motivation had to be magnified so that his crimes would seem more evil than their own.¹⁰

Another component of Arnold's portrayal in history is the view historians have taken of other figures involved with him. The three men who captured John André were portrayed as heroes and saviors of the Revolution. In actuality, they probably intended to rob André, but history has seen them differently because of the focus on Arnold's villainous behavior. General Washington, who might have been blamed for his failure to uncover Arnold's scheme, was instead characterized as another victim of betrayal. In fact, his reputation as a hero with a flawless character and unflinching dedication to the cause was actually enhanced by Arnold's treason. Washington's reputation, as well as that of John André, represented the antithesis of Arnold's. Perhaps it is most surprising that André, of all those involved, would be hailed as a hero, because he was Arnold's enemy contact and facilitated the

¹⁰Ibid., 1310-15; Martin, *Benedict Arnold*, 11; Ducharme and Fine, "Construction of Nonpersonhood," 1315.

treason. André, however, was seen as a soldier following orders and not blamed for his role in the conspiracy. General Washington faced no choice but to hang André, since he was caught behind enemy lines with detailed plans of West Point, but he greatly lamented the task. Historians have regretted that the handsome, brave, and charming officer was hanged instead of Arnold. Everyone, including the Americans, loved André, and the tragic circumstances of his death have grown into mystic legends. In 1881, a historian mentioned the spot where André was buried, saying that it was marked "only by a tree whose fruit never blossomed."¹¹ Benedict Arnold, therefore, is left the sole villain in his story, which has made his deeds seem darker still.

Since the establishment of Benedict Arnold's evil character in the years following his treason, many studies of his life have appeared. In general writings have become more sympathetic to him with each decade. Every author, however, is influenced by his or her environment, and the text that has been written reflects this. The first published biography of Benedict Arnold was written by Jared Sparks in 1835. Sparks, influenced by the anti-Arnold spirit of the time, believed Arnold to be a self-centered madman destined for treason. As a child, Sparks noted, Arnold spent his time "robbing birds' nests . . . to maim and mangle young birds in sight of the old ones, that he might be diverted by their cries." Another alleged pastime of Arnold was scattering broken glass on the walkway so he could watch other children cut their feet on the way to school. These tales of Arnold's youth were obtained by the author from two citizens in Arnold's hometown of Norwich. Although the memories of James Lanman and James Stedman were prolific and, in some cases, were repeated almost verbatim by Sparks, they were less than accurate. The two men were no doubt influenced by the anger and embarrassment the people of Norwich experienced after their once-vaunted general was exposed as a traitor. Perhaps encouraged by the author, who expected to hear nothing less than dastardly accounts of Arnold's youth, Lanman and Stedman did not disappoint, and the stories that Sparks used in his work were repeated by future biographers as well.¹²

¹¹Ducharme and Fine, "Construction of Nonpersonhood," 1322; Erastus Brooks, *Arnold, the American Traitor; André, the British Spy; Washington, the Defender of Constitutional Liberty, the Father of His Country, the Commander in Chief of the American Army* (New York: Burr, 1881), 24.

¹²Ducharme and Fine, "Construction of Nonpersonhood," 1317, 1328; Jared Sparks, *Benedict Arnold*, vol. 3 (New York: Harper and Brothers, 1902), 5-6; Martin, *Benedict Arnold*, 438-39.

The adult Arnold was described by Sparks as “turbulent, impetuous, presuming and unprincipled.” His battlefield accomplishments were portrayed as accidents, achieved in spite of his character flaws. Before Arnold requested a commission to take Fort Ticonderoga, Sparks insisted, he probably got the idea for this project from someone else. The author implied that Arnold could never have thought of this tactic himself. Colonel Arnold was given no credit for leading his troops through the wilderness on the march to Quebec, and the reader is subjected to frequent denunciations of Arnold’s character and references to his vanity. Arnold’s accomplishments at Valcour Island and Saratoga were minimized and soured by mention of possible intoxication and opium addiction to explain his bravery. Although Sparks stated that no proof was found to substantiate these claims, they were nevertheless included in the narrative. In the portion of the biography dedicated to Arnold’s career after his treason, Sparks related a tale of Arnold’s raid on New London, Connecticut, for the British:

It has been said, that Arnold, while New London was in flames, stood in the belfry of a steeple and witnessed the conflagration; thus, like Nero delighted in the ruin he had caused, the distresses he had inflicted, the blood of his slaughtered countrymen, the anguish of the expiring patriot, the widow’s tears and the . . . orphan’s cries which kindle emotions of tenderness in all but hearts of stone.¹³

The first writer who made a significant attempt to change Arnold’s demonic reputation was Isaac N. Arnold, who grudgingly admitted to a distant kinship with his infamous subject. The writer was careful to point out, however, that his grandfather was “a humble soldier in the war of the Revolution, and was *faithful*.” Nevertheless, in his 1880 biography, Isaac stated his intention to show that Benedict Arnold was “not so black as he has been painted.” The author’s motivation stemmed from a desire to correct the injustice paid the former patriot in ignoring his heroic actions. Isaac Arnold wanted to write about the time prior to the treason, or, in his words, “before the clouds which his defection caused had thrown their dark shadows *backward* as well as forward, and darkened his whole life.” In the book, no excuses were made for the traitor. The author agreed that Arnold was guilty of treason but wanted the American people to know the hero, and

¹³Sparks, *Benedict Arnold*, 8-325 passim.

his motives, as well. *The Life of Benedict Arnold* was, however, poorly received by the public and book reviewers. Critics were hostile toward the work and attacked the author for being too sympathetic and writing in pity rather than in truth. One critic stated that "it is just that pity which is dangerous to encourage in this day of lax political morality." In 1881, another historian gave thanks to "Almighty God" for the deliverance of the country from "the blackest traitor named in the records of time." The author noted Arnold's accomplishments but frequently referred to his treason as well. One hundred years after Benedict Arnold's treason, his status as a villain with no redeeming qualities remained the predominant outlook on his life.¹⁴

By 1931, when Oscar Sherwin's *Patriot and Traitor* was published, historians and citizens were more receptive to the idea that something of value might have come from Benedict Arnold's life. As is suggested by the title, the author sought to portray the two sides of the man and, in the process, denounce some of the myths developed by anti-Arnold mania. Sherwin stated that tales about the young Arnold's cruelty to animals and children were invented or exaggerated. The author was not, however, completely convinced of Arnold's lack of cruelty as a boy. He found that none of the stories told about Arnold were "conclusive proofs of total depravity." The use of the word "total" gives the reader a sense that the author was ambivalent in regard to Arnold's character. With regard to the career of General Arnold, however, Sherwin was more forthright. He described the march to Quebec as "bold, rash and brilliant," and gave Arnold credit for inspiring the troops to continue under terrible circumstances by using his "magnetism and power over his men." As one reviewer noted of Sherwin's work: "Everything that can be said in Arnold's favor is said. There is not, however, one page of the 395 that can be set down as 'pro-Arnold.'"¹⁵

In 1941, a decade after Sherwin's biography, Carl Van Doren, the eminent biographer of Franklin, published his *Secret History of the American Revolution*. This work, described as "one of the most significant books on

¹⁴Arnold, *Life of Benedict Arnold*, 3-7; Ducharme and Fine, "Construction of Nonpersonhood," 1325; Brooks, *Arnold, the American Traitor*, 19-20; Ducharme and Fine, "Construction of Nonpersonhood," 1325.

¹⁵Oscar Sherwin, *Benedict Arnold: Patriot and Traitor* (New York: Century, 1931), 5-67 passim; Marion A. Knight and others, eds., *Book Review Digest: 1931* (New York: H. W. Wilson, 1932), 968.

the Revolution which has been written," was extremely important to Arnold scholars because it contained the newly revealed "Clinton papers" from the British Headquarters files. These papers gave historians the correspondence between Arnold and André and included important details of many events. One enthusiastic reviewer even predicted that, because of Van Doren's work, no author would ever again try to justify Arnold's actions. Yet *Secret History* is similar in tone to Sherwin's biography. Van Doren pointed out that Benedict Arnold was not the only traitor sending information to the British, a fact overlooked by many previous historians. The author also recognized Arnold's true strengths and weaknesses in noting that he was "original" and "quick in forming plans. He had a gift for command when the object was clear . . . but in the conflict of instructions and of officers of rank equal or nearly equal with his Arnold was restive and arrogant." Neither Sherwin nor Van Doren made excuses for Arnold's treasonous behavior, but they respected his accomplishments as well. The emotions conveyed to the reader through these works are probably best told through the words of a soldier who was with Arnold at Saratoga: "Arnold was our fighting general and a bloody fellow he was. He didn't care for nothing. He'd ride right in. It was 'Come on boys!' Twasn't 'Go, boys.' He was as brave a man as ever lived. They didn't treat him right. He ought to have had Burgoyne's sword. But he ought to have been true."¹⁶

Traitorous Hero by Willard M. Wallace and *The Traitor and the Spy* by James Thomas Flexner were both published in the 1950s. A later historian noted that they were written "about a traitor in an era when treason had turned America into a nation of neurotics." The era's Communist hearings and the conviction of Julius and Ethel Rosenberg of spying for the Soviets influenced these biographers. This was especially true of Wallace and resulted in a less sympathetic portrayal of Benedict Arnold than that of the 1930s and '40s. For example, Wallace stated of Arnold's childhood: "There are tales of cruelty by him . . . but most children can at times be cruel, whether innocently or mischievously." The author noted that these stories might not be true, but, in essence, the reader is left to conclude that Arnold was the same cruel boy described by his earliest biographers.¹⁷

¹⁶Mertice M. James, ed., *Book Review Digest: 1941* (New York: H. W. Wilson, 1942), 913; see Carl Van Doren, *Secret History of the American Revolution* (New York: Viking, 1941), v; James, *Book Review Digest*, 913; Van Doren, *Secret History*, 146-47, 150; Sherwin, *Benedict Arnold*, 198.

¹⁷Boylan, *Benedict Arnold*, 259; Willard M. Wallace, *Traitorous Hero: The Life and Fortunes of Benedict Arnold* (New York: Harper and Brothers, 1954), 322, 4.

In contrast, Flexner, who despite the title of his book was less condemning than Wallace, acknowledged that the childhood tales long told about Arnold were not true. He did, however, repeat other established falsifications such as that as a young merchant, Arnold was thrown into debtors' prison. A major focus of *The Traitor and the Spy* was the role of Arnold's wife, Peggy, in his conspiracy. The author even asserted that the initial treasonous suggestion did not come from the general's lips, but from hers. Both Wallace and Flexner gave Arnold credit for his accomplishments, and Wallace admitted that he was "not entirely lost to honor," but both included denunciations of Arnold's character among the praise. Wallace's reviewers, also influenced by the politics of the time, were even less sympathetic than the author concerning America's most famous traitor. One reader, displeased by the title *Traitorous Hero*, protested: "Certainly Mr. Wallace doesn't think Benedict Arnold was a hero," and suggested a less offensive phrase. Flexner added an element of tolerance, expressing regret at the loss of Peggy's innocence and Arnold's nobility. "Pure villainy lies forgotten," he wrote, "while we mourn a broken sword, tarnished honor, the glory that descended."¹⁸

One of Wallace's goals was to develop an understanding of the motivation for treason in the twentieth century by studying Arnold's career. This was accomplished, in part, by comparing Arnold to other actual and suspected traitors in United States history. In *Traitorous Hero*, Arnold was compared to Clement Vallandigham, the Copperhead leader in the Civil War, to Mildred Gillars, who left the United States during the depression to "find love and work in Hitler's Reich," and, of course, to the Rosenbergs. Wallace believed that all traitors' crimes were deplorable, but "Arnold's treachery . . . is harder to forgive He was a general officer in a position of great trust who sought to betray . . . for great mercenary gain."¹⁹

In the late 1960s and '70s, the philosophy of Americans evolved to a more liberal, "make love, not war" mentality. This movement, like any cultural change, influenced historical writers. Brian Richard Boylan, who published *Benedict Arnold: The Dark Eagle* in 1973, was no exception. Early in his book Boylan stated that Arnold was "no saint, but then he was no devil either." In fact, the narrative in Boylan's work leads the reader to believe that, in the author's opinion, he was more the first than the latter. A

¹⁸James Thomas Flexner, *The Traitor and the Spy* (New York: Harcourt, Brace, 1953), 409-10, 11-12, 254; Wallace, *Traitorous Hero*, 253.

¹⁹Wallace, *Traitorous Hero*, 4, 318-23.

reviewer maintained that the first part of the book sounded like a “press release, with Boylan retained by Arnold to make a case for his . . . niche in history.” In discussing Arnold’s treason, Boylan frequently noted the motives that drove the soldier and the false accusations against him. The purpose of *Dark Eagle* was to restore the “romantic, heroic Benedict Arnold” that was “lost in the vilification of the traitor.” The author completed this task in several ways. When Arnold was shot at Saratoga, Boylan wrote, the soldiers who saw the man shoot their general wanted to kill him instantly. Arnold, however, stopped them from doing so because the German mercenary was only doing his duty. Boylan also believed that Arnold was not dishonest in his business dealings but was simply too impatient to take care of his debts as they accrued, a position that greatly differed from the opinions of previous historians. The greatest difference between Boylan and previous writers, however, lay in his comparison of George Washington to Benedict Arnold. He commended Washington for his loyalty to the cause but also noted that “in many ways he was a terrible general. Perhaps wishing that he possessed some of Arnold’s magnetism and enthusiasm, the commander in chief questioned Arnold closely about his achievements.”²⁰ Few, if any, previous historians had taken this view of Washington’s relationship with Arnold.

Although escalating liberalism led some writers to portray Arnold as an increasingly sympathetic character, the treason issue nevertheless remained. Clifford Lindsey Alderman, a writer of juvenile literature, published *The Dark Eagle: The Story of Benedict Arnold* in 1976. Alderman appreciated Arnold’s talents and his invaluable assistance during the war. He could not, however, forgive Arnold his crime. He noted that some historians believed that Arnold’s past should be forgotten. Boylan, also writing in the 1970s, observed that America was entering an era where patriotism and treason would “lose some of their black and white” connotations. One reason for this belief could have been the prevailing attitude toward the war in Vietnam and the growing support of men who chose to leave the country rather than fight in a war they saw as immoral. During World War II, this act would have been considered traitorous, but in a more liberal time some even called it noble.²¹ Although historians of this

²⁰Josephine Samudio, ed., *Book Review Digest: 1973* (New York: H. W. Wilson, 1974), 136; Boylan, *Benedict Arnold*, 17, 32-37, 81-87.

²¹Clifford Lindsey Alderman, *The Dark Eagle: The Story of Benedict Arnold* (New York: Macmillan, 1976), vi; Boylan, *Benedict Arnold*, 254.

period were not ready to call Arnold's treason noble, they were open to new ideas about the forces that shaped his life.

In the last two decades a more conservative, yet nonjudgmental and "politically correct" trend has emerged among Benedict Arnold's interpreters. In an effort similar to that on behalf of the Native Americans, historians have attempted to correct the injustices paid Arnold in past interpretations of his life. They have written with gratitude about the hero of the Revolution and with pity about the traitor. They have also acknowledged Arnold's historical legacy. In his article entitled "Benedict Arnold and the Loyalists," Esmond Wright, a British historian, maintained that Arnold has been considered a traitor only because he chose the losing side in the war. Wright believed Arnold's portrayal was not related to treason or loyalty but to "victory on the field." As an old couplet stated: "Treason doth never prosper--what's the reason? If it doth prosper, none dare call it treason." During the Revolution one in five Americans remained loyal to England. In the eyes of King George III, the loyalists were the only patriots in the colonies. Men such as Washington, Jefferson, and Franklin were traitors to the British. Where Arnold made his mistake, however, was in changing sides in the middle of the war. It was one thing to switch loyalties, but it was another "to continue professing loyalty to one side while secretly working for the other."²² This tactic made Arnold a despised man in one country and a mistrusted man in another.

Willard Sterne Randall, who published *Benedict Arnold: Patriot and Traitor* in 1990, and Clare Brandt, who released *The Man In The Mirror: A Life of Benedict Arnold* in 1994, expressed similar views about Arnold's life. Randall, according to one reviewer, passed "no judgment on Arnold's treason" but deemed it "comprehensible." The author believed that no treason could erase or cancel the good that Arnold did for his country prior to the defection. Brandt was also careful to refrain from judgment. The driving force of Arnold's treasonous behavior, she noted, stemmed from the loss of honor that Arnold felt when his father, an alcoholic, went bankrupt and disgraced the entire family. From that point, Arnold's self-esteem came from outward approval instead of from within. He built a "house of mirrors" around himself "in which the reflected image always outshone the reality."

²²Esmond Wright, "Benedict Arnold and the Loyalists," *History Today* 36, (October, 1986), 29-35; Clare Brandt, *The Man in the Mirror: A Life of Benedict Arnold* (New York: Random House, 1994), 236, 29-35; Edmund S. Morgan, "The Disloyalist," review of *The Man in the Mirror: A Life of Benedict Arnold*, by Clare Brandt, *The New Republic* (February 21, 1994), 35-36.

Like Randall, Brandt never questioned Arnold's military accomplishments. She depicted him as a great hero who made many mistakes that cost him his reputation. The reader of Brandt's biography is left with a feeling of pity for an unfortunate hero, for at the end of his life, after being ignored and snubbed by military men and politicians in the twenty years following his betrayal, Arnold had become "nothing but a man whose papers other men mislaid."²³

Historian James Kirby Martin's book, *Benedict Arnold: Revolutionary Hero*, was published in 1997. The remarkable title of this work testifies to the metamorphosis that has occurred in the more than two hundred years since Arnold's actions. Martin proposed to tell the story of the "warrior hero of the Revolution" and to set aside the tale of the "American villain." Benedict Arnold's most celebrated accomplishments were related with fervor. The author emphasized, for example, Arnold's important role in the battles of Saratoga, which led to formal "military and diplomatic relations with France." He also noted such things as Arnold's financial generosity and his religious belief in a "humane and enlightened God." There is, however, one issue concerning Arnold's life that the author excluded. The events of Arnold's treasonous act at West Point are not included in *Revolutionary Hero*. Martin's narrative began with the hero's childhood and ended in Philadelphia just prior to his initial contact with the British. When the reader leaves Arnold in Martin's book, the general was struggling with feelings of ingratitude and rejection from his former American allies. Convinced that widespread apathy toward the patriot war effort would lead the people to "applaud his boldness in forging the pathway to revived imperial allegiance," Arnold made a decision to lead them. Ironically, the general's actions had the opposite effect, and while inadvertently revitalizing the patriot cause, Martin noted, the hero cast himself into damnation.²⁴ The author's attitude toward Arnold's impending treason and his lack of attention to the actual events of September 25, 1780, must seem foreign to many Arnold scholars, some of whom could not imagine mentioning Benedict Arnold's name without the word "traitor" following it.

²³John Wauck, "Ambiguous Defection," review of *Benedict Arnold: Patriot and Traitor*, by Willard Sterne Randall, *The American Scholar*, (autumn 1991), 621-24; Morgan, "The Disloyalist," 34; Geoffrey C. Ward, "The Great Traitor," review of *The Man in the Mirror: A Life of Benedict Arnold*, by Clare Brandt, *American Heritage* (May/June, 1994), 16.

²⁴Martin, *Benedict Arnold*, 25, 424-431 passim, 6.

"Whom can we trust now?" The numerous biographers of Benedict Arnold have presented various interpretations of the general's life. Historians may never free themselves from temporal influences that shape their attitudes toward his deeds and misdeeds. He has been depicted as a demonic traitor, a misguided hero, and, as has most often been the case, a man whose character lies somewhere between. The traitorous action of Benedict Arnold should not be forgotten, nor should the heroic man be lost. Soon after Arnold's treason was revealed, General Nathanael Greene paralleled Arnold's life to that of Lucifer, the fallen angel of God. The description of Lucifer's fall in the book of Ezekiel, noted historian James Kirby Martin, presents striking similarities to Arnold's plight: "You were . . . full of wisdom and perfect in beauty. You were in Eden, the garden of God; every precious stone adorned you You were anointed as a guardian cherub." Then, "wickedness was found . . . so [God] threw you to the earth," and "all the nations who knew you are appalled at you." Thereafter Lucifer, now as Satan, tormented God's people.²⁵ When Nathanael Greene made his comparison of Lucifer and Benedict Arnold, he did so with intended malice. What he and many of Arnold's subsequent interpreters failed to realize, however, was that even Lucifer was not the devil in the beginning.

²⁵Ibid., 9; Ezekiel 28: 12-17 (New International Version).

Civil Forfeiture and the Constitution: Are Individual Rights Really Less Important Than the War on Drugs?‡

Teresa Day

Democracy creates an often precarious balance between the needs of the individual and the needs of the whole. To shelter individuals from the passions of the day, the Founding Fathers enumerated certain rights and established constitutional protections. As the ultimate interpreter of the Constitution, the Supreme Court of the United States uses these rights and protections as tools to weigh the needs of the individual against the needs of the whole. In the last two decades, however, a war on drugs in the United States has been used to justify infringements upon traditional property rights and due process. The antiquated concept of forfeiture has become one of the primary weapons in this drug war and, as such, is often the device by which individual rights are sacrificed.

With origins dating back to the Old Testament, the concept of forfeiture is not new.¹ Its modern application in the United States developed from the English common law tradition which allowed for three types of forfeiture, all of which were understood to impose punishment. First, under English common law, the word “deodand” was used to describe an object deemed responsible for a death. A cart under which someone was crushed, for example, might have been forfeited as a deodand. The legal term *in rem* was applied to deodand proceedings because the subject of forfeiture in these cases was insentient. The second type of forfeiture allowed under English common law was *in personam*. This meant that the act of forfeiture was taken against a person rather than an insentient object. Under this concept, those convicted of a felony or treason were deprived of their estates. The third and final form of forfeiture allowed

‡Co-winner of award for graduate non-seminar paper.

¹Exodus 21:28.

under English common law was statutory forfeiture. As in the case of deodands, such proceedings were *in rem* and were allowed as a penalty for violations of customs and revenue laws.²

England introduced forfeiture to the New World as a tool to enforce the Navigation Acts in the American colonies. The Navigation Act of 1660, for example, required that English vessels be used to transport most commodities. Violation of these acts resulted in the forfeiture not only of goods, but also the ships in which they were carried. Colonists opposed this use of forfeiture because they resented sending profit to the Crown. They also opposed the law because it allowed the British to try maritime cases without a jury. In one such case involving two now-famous colonists, attorney John Adams defended merchant John Hancock against a charge of evading customs duties. Adams argued that the action against Hancock should be dropped because the forfeiture proceeding denied Hancock his right to a trial by jury.³

After the Revolutionary War, forfeiture law was incorporated into the American legal system. Based on the English concept of statutory forfeiture, the early American version allowed for the seizure of ships and cargos when import duties were not paid and for the seizure of vessels used to deliver slaves.⁴ Lawgivers, believing that property was a natural right and a cornerstone of liberty, drafted the law so as to limit government authority over personal property. For example, *in personam* estate forfeiture was not embraced because it deprived not only convicted felons, but also their families, of property.⁵ The concept of deodands, in which insentient objects were the subject of forfeiture, was

²Alan Nicgorski, "The Continuing Saga of Civil Forfeiture, the 'War on Drugs,' and the Constitution: Determining the Constitutional Excessiveness of Civil Forfeitures," *Northwestern University Law Review* 91 (fall 1996), 379-80; Donald J. Boudreaux and A.C. Pritchard, "Innocence Lost: *Bennis v. Michigan* and the Forfeiture Tradition," *Missouri Law Review* 61 (summer 1996), 600-08; *Austin v. United States*, 113 S.Ct. 2801, 2806-2808, 2815 (1993); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84 (1974).

³*Austin v. United States*, 2807; Boudreaux and Pritchard, "Innocence Lost," 605-08; Nicgorski, "Continuing Saga," 380.

⁴Nicgorski, "Continuing Saga," 381; *Calero-Toledo v. Pearson Yacht*, 683; R. Todd Ingram, "The Crime of Property: *Bennis v. Michigan* and the Excessive Fines Clause," *Denver University Law Review* 74 (1996), 295.

⁵Boudreaux and Pritchard, "Innocence Lost," 604-05.

also never formally incorporated into American jurisprudence. In fact, it was eliminated from English law in 1846 when accidental deaths due to industrialization and urbanization made it increasingly difficult to view forfeiture as a deterrent to negligence.⁶ Well into the nineteenth century, forfeiture proceedings in the United States were generally limited to Admiralty cases. In the early twentieth century, forfeiture was also used for a short time to enforce Prohibition.⁷

Forfeiture as a deterrent against illegal activity resurfaced in the United States in the late twentieth century, shortly after President Richard Nixon's successful law and order campaign of 1968. The Comprehensive Drug Abuse Prevention and Control Act, passed in 1970 as part of the Controlled Substances Act, included forfeiture provisions. The Organized Crime Control Act of 1970 also allowed for forfeiture proceedings. While this use of forfeiture was intended to provide law enforcement with a weapon against illegal drug activity, these new laws fell far short of expectations. In 1980, a Senate judiciary subcommittee on criminal justice conducted hearings on the effectiveness of the 1970 laws and acknowledged that forfeiture was failing in the nation's war on drugs.⁸

By the early 1980s, Congress responded to public concern over the illegal drug trade and focused its efforts on anti-drug legislation. It targeted the traffickers' financial incentive by including civil forfeiture provisions in the Comprehensive Crime Control Act of 1984.⁹ Measured only by the value of seized assets, this law appears to have been effective. In 1985, the government seized \$27.2 million in forfeiture proceedings; by 1994, this amount increased to \$649.7 million. The total value of assets seized by federal agencies since 1990 is estimated to

⁶Ibid., 602; Leonard W. Levy, *A License to Steal: The Forfeiture of Property* (Chapel Hill: University of North Carolina Press, 1996), 17-19.

⁷Nicgorski, "Continuing Saga," 381.

⁸Robert E. Blacher, "Clearing the Smoke from the Battlefield: Understanding Congressional Intent Regarding the Innocent Owner Provision of 21 U.S.C. at 881 (a) (7)," *Journal of Criminal Law and Criminology* 85 (fall 1995), 506; Eric L. Jensen and Jurg Gerber, "The Civil Forfeiture of Assets and the War on Drugs: Expanding Criminal Sanctions While Reducing Due Process Protections," *Crime & Delinquency* 42 (July, 1996), 422; Levy, *License to Steal*, 91.

⁹Blacher, "Clearing the Smoke," 506-08; Jensen and Gerber, "Civil Forfeiture of Assets," 423.

have been approximately \$2.7 billion.¹⁰ The proliferation of forfeiture laws and the value of seized assets, however, are inadequate tools in measuring the success of America's war on drugs. Even statistics on drug trafficking are of little use, since it is impossible to know what impact forfeiture has had on such statistics. More importantly, the value of seized assets and other statistics offer an incomplete picture. A thorough analysis of forfeiture also requires consideration of less tangible issues, such as the possible infringement of individual liberties.

While there is the chance for error in the application of any law, the statistically insignificant potential for such an error is generally deemed less compelling than the potential benefit of the law to society. Civil forfeiture, however, creates the potential for an innocent person to be victimized by allowing the seizure of property without an arrest or conviction. In recent years, media reports have brought the plight of innocent owners victimized by forfeiture to the attention of the American public. Such reports include the case of a Colombian businessman whose \$400,000 Cessna plane was seized in Miami by the Drug Enforcement Agency. Although the owner later proved to be a legitimate businessman who was planning to use the plane in his emerald mining business, it took two years and \$75,000 in legal fees for the plane to be returned.¹¹ In 1992, a sixty-one-year-old California millionaire was shot to death during a raid which had been prompted by a false tip that marijuana was being grown on his ranch. The local district attorney determined that the raid was prompted, at least in part, by a desire to acquire the property for resale.¹² Opponents of forfeiture argue that the law increases the danger for such victimization of innocent persons by providing a financial incentive for law enforcement agencies to be overly aggressive in their application of the law.

Potential revenue streams, which are built into many forfeiture laws, may thus serve as unintentional incentives for abuse by law enforcement agencies. Under federal law, forfeited assets are placed into a fund from

¹⁰Susan Adams, "Forfeiting Rights," *Forbes*, May 20, 1996, 96; Jensen and Gerber, "Civil Forfeiture of Assets," 424; Don Van Natta, Jr., "Make Crime Pay: Get the Goods," *New York Times*, June 30, 1996, sec. 4, p. 16.

¹¹Adams, "Forfeiting Rights," 96.

¹²Robert E. Bauman, "Take it Away," *National Review* XLVII (February 20, 1995), 34; Peter Cassidy, "Without Due Process: In the War on Drugs, You Don't Have To Be Guilty To Pay The Price," *The Progressive* (August, 1994), 32.

which disbursements are made to the Federal Bureau of Prisons and for drug enforcement activities that are part of the national drug control strategy. In addition, any law enforcement agency that participates in the seizure of assets may also request a part of the proceeds. At the state level, forfeited assets may be kept locally or even be put into the state's general fund.¹³ With millions of dollars at stake, this revenue provides a powerful temptation for law enforcement agencies to be overly aggressive in their application of forfeiture law.¹⁴ Because the forfeiture activities of law enforcement personnel are relatively unregulated, it is difficult to identify the extent to which forfeiture may be abused.¹⁵ Given this background it is not surprising that civil forfeiture has become a frequent target of constitutional attacks.

One such constitutional challenge is the claim that forfeiture denies property owners procedural due process. To understand this argument, a distinction must be made between civil and criminal forfeiture. In criminal forfeiture proceedings, a person convicted of a crime may be compelled to forfeit property if it can be linked to the crime for which the property owner is convicted. Because it is a criminal proceeding, the individual is guaranteed procedural due process, meaning that he is guaranteed both notice and an opportunity to be heard. As with any criminal charge, proof beyond a reasonable doubt is required. By contrast, the government need only show probable cause in order to seize property as part of a civil forfeiture proceeding. Hearsay, circumstantial evidence, or facts obtained after the seizure may all be used to demonstrate probable cause; neither an arrest nor a conviction is required. Once property has been seized, the burden of proof shifts to the owner. In order to reclaim the property, the owner must prove by a preponderance of evidence that his seized property was not connected to the illegal activity.¹⁶ The constitutionality of the government's right to take property in civil forfeiture proceedings without the same procedural due process afforded in criminal proceedings was challenged before the

¹³Jensen and Gerber, "Civil Forfeiture of Assets," 424-25.

¹⁴Cassidy, "Without Due Process," 33-34; Bauman, "Take It Away," 34-35.

¹⁵Jensen and Gerber, "Civil Forfeiture of Assets," 425; Bauman, "Take It Away," 34.

¹⁶Jensen and Gerber, "Civil Forfeiture of Assets," 425-27; Nicgorski, "Continuing Saga," 383-84; Blacher, "Clearing the Smoke," 508-09.

Supreme Court of the United States in *Van Oster v. Kansas* (1926).¹⁷ Speaking for the Court, Justice Harlan F. Stone said that “[i]t has long been settled that statutory forfeitures of property intrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the Fifth Amendment.” The Rehnquist Court agreed in *Bennis v. Michigan* (1996), when it ruled that the forfeiture of a car which had been used in the commission of a crime did not violate the owner’s right to procedural due process.¹⁸

Opponents of civil forfeiture have fared somewhat better in Constitutional challenges based upon the Excessive Fines Clause of the Eighth Amendment. Identifying punishment as a determinant for when limits are constitutionally guaranteed by the Excessive Fines Clause, the Court found in *Austin v. United States* (1993) that forfeiture served both a remedial and a punitive function. Speaking for the Court, Justice Harry Blackmun said that since forfeiture represents payment to a sovereign as punishment, it is subject to the Excessive Fines Clause of the Eighth Amendment.¹⁹ The Court thus acknowledged that there is a limit to what may be seized from an individual in a civil forfeiture proceeding.

For the *Austin* ruling to extend any real protection to property owners, a standard must exist with which to measure forfeiture. In *Austin*, however, the Court specifically declined to establish such a test and deferred the question to the lower courts. In a concurring opinion in *Austin*, Justice Antonin Scalia suggested a proportionality test when he said that “the relevant inquiry for an excessive forfeiture . . . is the relationship of the property to the offense: was it close enough to render the property under traditional standards, ‘guilty’ and hence forfeitable?”²⁰

¹⁷*Van Oster v. Kansas*, 272 U.S. 465 (1926).

¹⁸*Bennis v. Michigan*, 116 S.Ct. 994 (1996). For analysis of the *Bennis* decision, see Ingram, “The Crime of Property,” 293-310; Boudreaux and Pritchard, “Innocence Lost,” 593-632; Melissa N. Cupp, “*Bennis v. Michigan*: The Great Forfeiture Debate,” *University of Tulsa Law Journal* 32 (spring 1997), 583-604; Lois Malin, “Too Firmly Fixed to Be Now Displaced: More Than a Century of Forfeiture Law Outweighs Even a Truly Innocent Owner [*Bennis v. Michigan*, 116 S.Ct. 994 (1996)],” *Washburn Law Journal* 36 (fall 1996), 131-51.

¹⁹*Austin v. United States*, 2812.

²⁰*Ibid*, 2815.

Following Justice Scalia's example, some lower courts use such a proportionality test. In doing so, they often rely on *Solem v. Helm* (1983), in which the Court established a principle of proportionality in applying the Eighth Amendment's Cruel and Unusual Punishments Clause. Writing the opinion for a split Court in *Solem*, Justice Lewis Powell concluded that requirement of proportionality between punishment and crime is well-established in American jurisprudence.²¹ However, this reliance on *Solem* is questionable in light of the Court's subsequent decision in *Harmelin v. Michigan* (1991), in which a majority of the Court appeared to either repudiate or limit *Solem*. In *Harmelin*, Justice Scalia, joined by Chief Justice William Rehnquist, found that proportionality of sentence to crime is not a determinant of cruel or unusual punishment. Acknowledging that there were differences between the circumstances of the *Solem* and *Harmelin* cases, Justices Anthony Kennedy, Sandra Day O'Connor, and David Souter said that proportionality is applicable to Eighth Amendment protections only in extreme cases.²² The Supreme Court's inconsistency and its unwillingness to provide a measurement for what constitutes excessive forfeiture allow for confusion in the lower courts and provide the opportunity for further limitations on individual rights.

The distinction between civil and criminal forfeiture proceedings is especially unclear when a person facing the civil forfeiture of property has also been convicted of a crime. In such a case, the issue of double jeopardy must be considered. According to the Fifth Amendment, no person shall "be subject for the same offence to be twice put in jeopardy."²³ This means that a person cannot be tried twice in the same legal jurisdiction or punished twice for the same crime. When forfeiture was incorporated into the American legal system, English common law forfeiture statutes were narrowed to include only *in rem* proceedings. In other words, this treatment of forfeiture allowed for legal action to be taken against property, not person. Although opponents claim that civil forfeiture and criminal sentencing represent double punishment for the same crime and are thus in violation of the Fifth Amendment, the Supreme Court has consistently rejected this contention by relying on the

²¹*Solem v. Helm*, 463 U.S. 277 (1983).

²²*Harmelin v. Michigan*, 501 U.S. 957 (1991).

²³United States Constitution, amendment 5.

antiquated principle that forfeiture is a legal action against property rather than person. As early as 1827, the Court found that the forfeiture proceeding in question was taken against the property and not the owner. In *The Palmyra*, the Court considered the forfeiture of a sailing vessel which had been captured by the United States for privateering and determined that the ship rather than its owner was the offender.²⁴

In recent years, the Court has consistently agreed with nineteenth century rulings in holding that civil forfeiture does not represent double jeopardy. In *United States v. One Assortment of 89 Firearms* (1984), the Court found that the Double Jeopardy Clause does not prohibit forfeiture proceedings against the property of an individual who has been acquitted of a crime to which the property was linked.²⁵ In *United States v. Ursery* (1996), the Court found that civil *in rem* forfeiture did not represent punishment for purposes of the Double Jeopardy Clause. Because the Court's finding in *Ursery* appears to be in direct conflict with its holding in *Austin*, the Court distinguished the way in which punishment is viewed for purposes of the Excessive Fines Clause versus the Double Jeopardy Clause. In fact, the Court specifically said in *Ursery* that nothing in several earlier cases, including *Austin*, modified the long-standing rule that civil forfeiture does not constitute punishment subject to the Double Jeopardy Clause.²⁶

Perhaps the person to whom the most grievous constitutional injury is done is the property owner completely innocent of any crime. Because an arrest and conviction are not required in a civil forfeiture proceeding, there are times in which the owner whose property has been seized is innocent of any wrongdoing. However, the Court has consistently found that the innocence of the owner is not a protection from forfeiture. In *Calero-Toledo v. Pearson Yacht Leasing Co.* (1974), for example, the Court specifically rejected the innocent owner defense.²⁷ The Court subsequently found in *Bennis v. Michigan* (1996) that the Due Process Clause of the Fourteenth Amendment does not offer protection to innocent owners. Speaking for the Court, Chief Justice Rehnquist stated that

²⁴*The Palmyra*, 25 U.S. (12 Wheat) 1 (1827).

²⁵*United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984).

²⁶*United States v. Ursery*, 116 S.Ct. 2135 (1996).

²⁷*Calero-Toledo v. Pearson*, 663.

property could be forfeited even if the owner did not know that it was being used for illegal purposes.²⁸ Because of the Court's unyielding position on this issue, individuals may be subject to the loss of their property through civil forfeiture even though they are unaware of specific criminal activity.

Historical precedent provides many other situations in which individual rights were suppressed because of perceived threats to society. The Confiscation Act of 1862, for example, allowed *in rem* forfeiture as a punishment for rebels who owned property in the North. In 1871, a seven to two majority of the Supreme Court upheld the act, ruling that it was an exercise of war powers. Justice Stephen Field argued in dissent that the act should not have been sustained because it allowed punitive action against persons guilty of treason rather than the enemy, thus making it something other than an exercise of the government's war powers.²⁹ The Court's handling of the Confiscation Act was a situation in which the crisis of war was used to justify the infringement of individual rights. In the same way, Japanese nationals and American citizens of Japanese ancestry were relocated to military camps during the war years of the early 1940s. The Supreme Court allowed this relocation because of a perceived threat to American society. Called "the most serious invasion of individual rights by the federal government in the history of the country," the relocation program was another example of individual rights being sacrificed because of a perceived threat.³⁰ A decade later, the United States found itself in the panic of Cold War and used this threat to again limit individual rights. The fear of Communism gave rise to the House Un-American Activities Committee as well as to Senator Joseph McCarthy's hunt for communists in the government. At issue was a citizen's right to speak out in favor of communist ideology in light of the preferred position of First Amendment rights. In the early 1950s, when anti-communist sentiment was at its apex, the Supreme Court justified limits to free speech because of the perceived threat posed by subversive rhetoric. In *Dennis v. United States* (1951), the Court upheld

²⁸*Bennis v. Michigan*, 994.

²⁹Levy, *A License to Steal*, 51-56 [referring to Page, excr. of *Samuel Miller, v. United States*, 78 U.S. 268 (1871)].

³⁰Melvin Urofsky, *A March of Liberty: A Constitutional History of the United States* (New York: McGraw-Hill, 1988), 724-26.

the government's right to restrict citizens from advocating not only the overthrow of the government but also the advocacy of a conspiracy to do so.³¹ Justice William O. Douglas acknowledged the impact of public opinion on the Court. Referring to the Court's refusal in 1953 to hear the appeal of Ethel and Julius Rosenberg, who were charged with conspiracy to commit treason, Justice Douglas acknowledged that "perhaps the Justices did not feel any immediate threat of Communism, but they certainly were aware of the hysteria that beset our people, and that hysteria touched off the Justices also. I have no other way of explaining why they ran pell-mell with the mob in the Rosenberg case."³²

In their interpretation of the Constitution, justices of the Supreme Court of the United States must strike a balance between the needs of society and the needs of individuals so that both may be best served. While this requires flexibility in interpretation, it can also result in the scales being tipped so far in favor of public needs and passions that individual rights can be crushed. While there are certainly situations in which individual liberties must give way to the greater public good, it is unclear whether the war on drugs appropriately justifies the constitutional infringements caused by forfeiture. This is particularly true when the effectiveness of forfeiture in combating illegal drug activity is a virtual unknown. Although the United States was not at war or threatened by a foreign power when forfeiture laws were revitalized in the 1980s, a domestic war on illegal drug activity was being waged. This was the conservative era of the Reagan administration, during which public sentiment supported an aggressive attack on illegal drug activity. By enacting forfeiture legislation, Congress heeded cries from the administration as well as the public and offered what it felt was a deterrent to crime and drug trafficking. In the 1990s, the conservative Rehnquist Court has been obliged to weigh the potential benefit of this deterrent against the risk to individual liberties and has generally broadened the scope of forfeiture while limiting individual rights.

With considerable justification, public passions are now inflamed by the perceived prevalence of street crime and its relation to drug use. As the historical accounts discussed above demonstrate, the Supreme Court is never totally unaffected by the passions of the day. While

³¹*Dennis v. United States*, 71 S. Ct. 857 (1951).

³²William O. Douglas, *The Court Years, 1939-1975* (New York: Random House, 1980), 83.

constitutional jurisprudence must be flexible enough to permit an effective response in times of crisis, it must not allow the tradition of procedural due process to be worn down by public passions. One of the primary motivations behind the Bill of Rights was to protect the individual from just such influence. According to James Madison, author of the Bill of Rights:

the prescriptions in favor of liberty ought to be leveled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of Government, but in the body of the people, operating by the majority against the minority. It may be thought that all paper barriers against the power of the community are too weak to be worthy of attention; . . . yet as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might be otherwise inclined.³³

In times of perceived national crisis the Supreme Court should thus be more vigilant, not less, in ensuring that all citizens receive the benefits of the protections contained in the Bill of Rights.

³³Quoted in Ralph Ketcham, *James Madison: A Biography* (Charlottesville: University Press of Virginia, 1990), 290.

The Big Ditch: The Wichita-Valley Center Flood Control Project

David Guilliams

The Wichita-Valley Center Flood Control Project, commonly referred to as the "Big Ditch," protects Wichita from flooding by the Arkansas River, the Little Arkansas River, and Chisholm Creek. The name "Big Ditch" was originally derisive and started with farmers opposed to the project. The farmers, some of whom were losing their land to the federal project, saw the floodway as an example of federal Big Brother-style interference with local affairs. Years passed and the opposition faded, but the name outlived the controversy. The Big Ditch is eighteen miles long and has fifty miles of connecting channels, one hundred miles of levees, and one hundred fifty control structures, making it one of the largest water diversion projects in the United States. The Army Corps of Engineers constructed the floodway between 1950 and 1959 at a cost of \$20 million. By 1975, the total amount of flood damage prevented by the project was estimated at over \$33 million. While the Wichita-Valley Center Flood Control Project originally faced opposition, the results have proven that the money spent on the project was justified.¹

Before looking at the construction of the Big Ditch, it is necessary to examine the reasons for its construction. Because Wichita is situated at the confluence of the Arkansas River and the Little Arkansas River, there has always been a problem with flooding. In 1877, the rivers flooded the downtown area, with water "flowing southeast across Main and Second, to the corner of Douglas and Topeka, to Kellogg and St. Francis then southwest to the Big River south of town but north of the present site of the John Mack Bridge." The city's response to the flood was to institute a city

¹"'Big Ditch' Mitch," *Wichita Eagle*, May 12, 1993; Leonard J. Hollie, "The Big Ditch Has Done Job For 26 Years," *Wichita Eagle*, June 18, 1985; Kansas Water Resource Board, *State Water Plan Studies: Little Arkansas River Basin* (Topeka: Kansas State Resource Board, 1975), 79.

tax to finance street bonds to grade the streets in an attempt to prevent another flood. The next great flood took place in 1904. This flood, while not as bad as the one of 1877, still inundated the downtown area. Chisholm Creek also overflowed, causing the worst of the flooding to occur in the area of Douglas and Hydraulic Streets. With the river already above high water mark, another four inches of rain fell on the city in one night, causing over \$200,000 in damage. This led the city to consider taking some measure to prevent future flooding, but no major project came of the debate. On June 8, 1923, over seven inches of rain fell on the city in twenty-five hours. This caused another major flood, the worst of which took place in southeast Wichita west of Chisholm Creek. Again there was much talk of the need for some kind of flood control, but once the weather cleared and the water receded, the city leaders ignored the problem.²

Another twenty years passed, and then Wichita was hit by two floods in rapid succession. In 1944, almost all of Wichita north of Twenty-First Street was inundated, along with Riverside east of Payne, and vast areas between Central and Twenty-first Street east of the river. The very next year the Little Arkansas River overflowed its banks again. The Arkansas River was so full it backed up into the Little Arkansas and started it flowing in the opposite direction. Over two hundred families were evacuated and eight schools closed by the flood, including North High School. Woodland, North Riverside and the district between North High and the city limits as far east as Broadway received most of the flood. Downtown had standing water south of Broadway and Third Street, east to Emporia and Topeka Avenues.³

After the 1904 flood Wichitans tried to develop a plan to prevent future flooding. One proposal was to divert the river into the Big Slough, a depression that ran around the west side of the city and already collected water in times of heavy rainfall; this plan was eventually adopted with the building of the Big Ditch. But in 1904, the solution was to clean out Chisholm Creek. Prior to 1912, the city replaced the northern part of the creek with a drainage canal which originally ran only from the river to Park Street. In 1912 the canal was extended to Twenty-first Street. After the flood of 1923 the *Eagle* ran an editorial urging city leaders to take action on

²Victor Murdock, "Three Floods in Wichita Which Occupy a Place in the Town's History," *Wichita Evening Eagle*, May 31, 1935; H. Craig Miner, *Wichita: The Magic City* (Wichita: Wichita-Sedgwick County Historical Museum Association, 1988), 138.

³"Little River Goes Down Slowly," *Wichita Eagle*, April 17, 1945.

flood control while the memory of the latest flood was still fresh. One concern for the editors was Ackerman Island. They questioned the impact on the most recent flood of the island and the improvements to it made by the Wichita Park Board. A plan was implemented in 1926 that included construction of an extension of the drainage ditch to a point two miles north of the city, straightening and deepening Chisholm Creek, clearing the channel, and constructing dikes along the banks of the Little Arkansas River. This plan was completed in 1928 at a final cost of \$1,250,000. When the Army engineers examined these improvements in 1935, they found several problems with the project. The levees between Douglas and Central Avenues had been removed, "destroying the value of the levees as a means of preventing overflow." Another problem was the height of the bridges: the lack of clearance by the bridges caused them to act as dams during periods of high water.⁴

When the Army Corps of Engineers surveyed the Arkansas River, it determined that the flooding problem in Wichita was caused by the "frequent and at times rather destructive overflows from Chisholm Creek and its branches, frequently augmented by simultaneous overflows from the Little Arkansas River." The Army Corps divided the problem into three areas: the Little Arkansas River, Chisholm Creek, and the Arkansas River.⁵

One method for controlling the overflow of the Little Arkansas River was to build levees along its bank, but the Corps rejected this method as too expensive because of the meandering character of the river and the cost of buying the necessary rights of way through the middle of the city. The Corps subsequently devised two plans to prevent future flooding. Plan A was to construct a floodway beginning above Sedgwick, Kansas, southward for about eight and one-half miles to a point on the Arkansas River approximately ten miles above Wichita, where a control structure placed at the end of the diversion would allow for the flow of water down the Little Arkansas River for "park purposes." Plan B called for a shorter diversion from just northwest of Valley Center flowing south to about the same point on the Arkansas River as Plan A. Plan A would have protected the city of

⁴Miner, *Wichita*, 138; House, *Arkansas River and Tributaries*, 74th Cong., first ses., 1935, H. Doc. 308, 1661; Editorial, *Wichita Eagle*, June 12, 1923; "Ready to Begin Drainage Work," *Wichita Eagle*, December 13, 1926; "Finish \$1,250,000 Flood Prevention Project in Month," *Wichita Eagle*, February 10, 1928; House, *Arkansas River*, 1661-62.

⁵House, *Arkansas River*, 1672-75.

Sedgwick, but at the cost of an additional half million dollars. The Corps estimated the average yearly flood loss to the city of Sedgwick to be \$136.⁶

Any attempt to control flooding in Wichita had to consider Chisholm Creek. Army engineers estimated that the river would cause major flooding every ten years, moderate flooding about every three years, and some flooding every year. The area affected by the flooding included residential and industrial properties. The plan recommended by the engineers diverted the west and middle branches of the creek through a low depression in a southwesterly direction into the Little Arkansas River, a little over two miles above Wichita. The remaining fork of the Chisholm would be diverted into the drainage canal. The engineers rejected as too expensive another plan that would have channeled all the water from Chisholm Creek into the drainage canal. This alternate plan involved building a levee between Valley Center and Wichita and enlarging the drainage canal to handle the increased water flow. The effectiveness of the recommended plan depended upon the diversion of the Little Arkansas River to allow for the increased flow caused by shifting Chisholm Creek into the river.⁷

For the Arkansas River, the Army Corps of Engineers proposed diverting overflow into the Big Slough. Merely increasing the height of the levees along the banks of the river would have presented several problems. One was that increasing the flow line of the flood waters increased the amount of flood damage if the levees were breached. A more expensive challenge was that increasing the flow line necessitated elevating and enlarging all the bridges across the river. Other difficulties included the need to increase the size of the levees along the Little Arkansas River and the drainage canal, overhauling the storm sewer system in Wichita, and purchasing valuable land for the right of way. The Corps also examined the possibility of dredging a deeper channel in the river. The problem with this approach was that resiltting of the channel would decrease the plan's efficacy in a flood. The Big Slough Plan called for the diversion of most of the excess flow through a floodway starting near Maize and following the Big Slough valley for approximately 19.6 miles to a point ten miles south of Wichita. According to the engineers' report, this diversion promised "complete protection to that portion of the city of Wichita within the present flood plain." The report

⁶Ibid., 1672-75.

⁷Ibid., 1672-75.

continued that "the construction of Big Slough floodway is practically a necessity for the ultimate protection of Wichita."⁸

The Army's final report concluded that flood control was not economically feasible in the Wichita area. Some of their reasons for this conclusion were: controlling this section of the Arkansas River would have little effect on any future floods on the Mississippi River; neither navigation nor water power were justified upon the river; there was no need for irrigation from the river; and the Arkansas River caused serious erosion problems. These factors resulted in the Division Engineer determining that there was no federal interest in the river. The recommendation in 1935 was that there be no participation by the United States in the control of floods in this part of the Arkansas River Basin.⁹

The Corps of Engineers' mission, however, changed with the Flood Control Act of 1936. This legislation made flood control a federal responsibility, gave the Corps implementation authority, and authorized over \$2 million for levee work and channel clearing in the Wichita area. By 1936, though, enough time had passed since the last major flood (in 1923) that when hearings were held in Wichita on December 9, "local interests stated that there was no interest in the construction of the authorized project and that the assurances of local cooperation could not be furnished." Because of the lack of local support, the Army Engineers declared in 1944 that federal flood control in the Wichita area should be given no further consideration.¹⁰

The project finally got the local support it needed to go forward after the flood of 1944. The Chamber of Commerce formed a committee to promote the construction of the Big Slough Floodway that had been recommended in the earlier report by the Army Corps of Engineers. The committee filed for federal emergency aid to help repair dikes damaged by the flood. They also requested that the Army consider implementing the plan recommended for the flood diversion channel. The city council endorsed this plan as the best way to protect the city from future floods, but the county commission opposed taking so much farm land for flood control purposes. It recommended instead the adoption of a plan that would have followed the

⁸Ibid., 1677-79.

⁹Ibid., 1610-11.

¹⁰House, *Arkansas River, Kansas, Oklahoma, and Arkansas*, 78th Cong., second ses., 1944, H. Doc. 447, 112-13.

present channel of the Arkansas River. This proposal cost almost half a million dollars more than the Big Slough project and nearly doubled the cost to local governments, which were responsible for buying all rights of way and building necessary bridges. The increased width of the river channel would take all of McLean Boulevard and much of the Midland Valley Railroad's right of way. The Army rejected this plan as not feasible, since there was not normally enough water in the river to keep the channel clear.¹¹ Another plan promoted but quickly dropped was the construction of storage dams for the excess water. The Corps rejected this because suitable sites were lacking for such dams and rapid silting would soon occur. All the controversy hurt the plan when it was brought before Congress. The proposal was thus dropped from the 1945 flood control bill passed by the House of Representatives. Through heavy lobbying, the Chamber of Commerce induced the Senate to reinstate the plan, and it was subsequently authorized along with the rest of the flood control projects. Although Congress allocated only \$1,000,000 of the \$6,650,000 required from the federal government, Hobert Brady, president of the Wichita Chamber of Commerce, was pleased, saying,

a substantial part of the work can be undertaken by the Army Engineers within the coming year, and later appropriations would be forthcoming to finish the project, because Congress has established the policy of providing necessary funds to finish any flood control project handled by the Army Engineers, once an appropriation has been made and work begun.

In 1947, the county finally agreed to back the plan for using the Big Slough's path. One of the factors catalyzing the agreement between the city and the county was the threat of Congress withdrawing its approval. The project would have to go through the entire authorization process again if agreement were not reached.¹²

Even though the two governmental bodies agreed on the plan, there was still some local opposition. Failing to prevent the plan in the County Council, opponents petitioned their local governments to hold a referendum on the

¹¹"Give Plan For Big Arkansas," *Wichita Evening Eagle*, May 25, 1945; "Army Flood Plan Seen as Only Solution," *Wichita Beacon*, May 2, 1945.

¹²Minutes of the Wichita Chamber of Commerce Board of Directors, April 16, 1946; "County Board Indorses Army Flood Plan," *Wichita Magazine*, May 8, 1947, 1.

matter before proceeding with the project. These opponents included not only farmers, but also people opposed to spending city and county tax dollars to benefit only a portion of the residents of the area, those who lived and worked in the flood plain. Opponents to the project inflated the total local cost from just over \$2 million to \$8 million and argued against the enormity of the project. As the ditch stretched nineteen miles long and nine hundred feet wide and occupied nearly sixty-six hundred acres of prime farmland, opponents objected to taking so much land "out of production every day of the year to protect against a few days flood." The plan was unnecessary, they believed, because the cleaning and widening of the canal and the rivers was thought to be sufficient to save the city from future flooding. When the case reached the Kansas Supreme Court, the court ruled that the enabling ordinance, which provided for the selling of bonds to pay for the improvements, was administrative instead of legislative and so was not subject to a referendum.¹³

The first contract was finally let in January, 1950, with work beginning in May. Implementation of the project commenced on the East Branch of Chisholm Creek. Work on this part of the plan followed the drainage canal south to where it emptied into the river near the city's sewage disposal plant. This work involved cleaning out the channel and correcting any problems with the existing canal or low levees. The channel of the east branch was intercepted about a mile north of the city and routed one and a half miles to the head of the drainage canal. The maximum width of this channel was 30 feet, with an average depth of 19.4 feet. The canal itself was 6.2 miles long with an average width of 50 feet.¹⁴

Work on the Big Slough, the main channel for the floodway, started at the southern end. The first section stretched from where the ditch intersected the Arkansas River just north of Derby, five miles south of Wichita, to Oatville, near MacArthur and West Street. The engineers began working at the southern end of the project to prevent the river from prematurely entering the floodway. The floodway ranged in width from 900 feet to 500 feet at the bridges, with a pilot channel from 60 to 100 feet wide running along its center at a depth of between 6 and 11 feet. At the bridges this pilot channel widened to 260 feet so that, although the overall width of the floodway narrowed, the carrying capacity remained the same. The width of

¹³"Ditch the Big Ditch," *Wichita Morning Eagle*, March 10, 1949; "Flood Election Not Necessary," *Wichita Eagle*, July 9, 1949.

¹⁴"Flood Control Construction May Start in September," *Wichita Eagle*, April 17, 1949.

the Big Ditch lessened the turbulence of the flood waters. The 34 miles of levees averaged 12 feet in height. The ditch was 18 miles long and capable of carrying twice as much water as the Arkansas River. In addition to acting as a relief valve for the Arkansas Rivers and Chisholm Creek, the ditch drained surrounding areas. This drainage entered the floodway through pipes in the levees, and pressure gates prevented the flood waters from from spilling through them into the surrounding neighborhoods. The gates were designed so that the weight of the flood waters would keep them shut during periods when water in the ditch was above the pipes.¹⁵

The Little Arkansas River was linked to the larger one at two places north of Wichita. The first was just west of Valley Center. Here the Little Arkansas Floodway was capable of handling 55,000 cubic feet of water--the rough equivalent of 400,000 gallons--per second. A control structure on the Little Arkansas permitted passage of 4,000 cubic feet of water per second, allowing the river to continue to be used for recreational purposes in the city. The second place the Little Arkansas was linked to the big river was through the Chisholm Creek Diversion.¹⁶

The Chisholm Creek Diversion was the last major part of the project constructed. The middle and the west branches of Chisholm Creek were connected to the Little Arkansas River through diversion canals near Thirty-seventh Street, then all three were connected to the Big River and the floodway near Twenty-first and West Streets. The Little Arkansas River and Chisholm Creek had caused most of the flooding in Wichita: the Little Arkansas flooded the Riverside and downtown areas; and Chisholm Creek often flooded the stockyards prior to the floodway's construction. Because of this, the Little Arkansas Floodway and the Chisholm Creek Diversion formed important links in the flood control project.¹⁷

The project required construction of two other earthen works. One was a system of levees along the Arkansas River from the John Mack Bridge on Broadway, just south of Pawnee, to the juncture of the river with the floodway near Derby. The second was a set of "training" levees along the

¹⁵Elwood Landis, "'Unplugging' of Diversion Channel Will Give Partial Protection to Big Region," *Wichita Morning Eagle*, November 28, 1954.

¹⁶Ibid.; United States Army Corps of Engineers, "Tulsa District Wichita and Valley Center Local Protection Project," [electronic document] available at http://www.swt.usace.army.mil/pertdata/wich_val.htm, Internet, accessed April 9, 1997.

¹⁷Landis, "'Unplugging' of Diversion Channel."

Arkansas River to keep it within its banks. These twenty-seven miles of levees were not begun until 1955.¹⁸

Originally it was estimated that the project would take two to three years to complete, but as of 1955 neither the levees nor the links between the Little Arkansas River and the bigger one had been started. Various factors contributed to this delay, including a work stoppage caused by the Korean War. The construction of bridges over the floodway took even longer. Foes of the project also delayed it on several occasions by forcing the city to defend its legality before the Kansas Supreme Court. Opponents claimed that the city did not have the authority to sell bonds to finance the project. When the court ruled in favor of the city, this group took the fight to Washington, where they convinced Senator Schoeppel to sponsor a bill compelling the city to hold a referendum prior to financing the floodway. The city persuaded the senator to weaken the amendment by changing the clause which required the city to hold an election prior to any work being started to one that required a referendum only if the project exceeded the enabling legislation passed by the Kansas legislature. The project was finally finished in March, 1959.¹⁹

The venture cost a total of \$20 million. The federal government paid \$13 million for the designs and the actual construction; it also paid to move the railroads. The city and the county each contributed \$3 million to purchase the rights of way and to relocate utility lines. The state, additionally, gave \$1 million to the project. It is estimated that the project has saved over \$280 million in damages. However, the \$6 million contribution by the city and county was not their only expense related to the floodway. They also were responsible for maintenance of the ditch. In 1994 it was discovered that the ditch needed nearly \$6 million worth of work. The city and the county both pledged \$1 million to fund the most pressing repairs.²⁰

No study was considered of the effect the ditch would have on wildlife during and after its construction. However, when it came time to make the needed repairs, the Environmental Protection Agency, the Kansas Department of Fish and Wildlife, and state water resource officials needed to approve the plans. County commissioners voiced concerns about the

¹⁸Ibid.

¹⁹Ibid.; "Schoeppel Firm on Bond Issue," *Wichita Morning Eagle*, March 18, 1950.

²⁰Bill Barbel, "Big Ditch Repairs Hit Regulatory Hurdle," *Wichita Eagle*, June 22, 1995.

possible delays caused by getting these authorizations. Commission Chairman Mark Schroeder stated that "there's nobody in this community that is going to stop us from making repairs, it's beyond me that some people would think a skunk or an owl is more important than people's lives." Commissioner Bill Hancock said, "it's a tool, it isn't a greenway, it isn't a wildlife refuge, it isn't a wetland. And if it is those things, it's because we made it that way."²¹

Since the inception of the project, additional uses for the land condemned for flood control have been suggested. In 1949 the beautification commission of the Chamber of Commerce recommended planting forests along the flood control project on areas that were bought as rights of way but would not be part of the floodway. Although proponents of the plan said it could be implemented without too much trouble, nothing was ever done.²² In 1970 the Wichita-Sedgwick County Planning Department sought ways to beautify the city by identifying visual resources, developing plans for better utilization of these resources, and analyzing repercussions that might arise from such actions. Flood control projects figured prominently in this plan, which described the floodway as "a twenty mile long, open space corridor which gives physical definition to residential development in the west part of City. Water carrying capacity must be retained, but this should not preclude its being developed for recreational purposes if additional land rights can be acquired." The report stated further that the Wichita-Valley Center Floodway "has potential as a scenic and recreational area with water sports, hiking and bicycle trails, and other outdoor pleasures." The plan proposed that the floodway "become a linear unifying element providing scenic beauty and recreation for Sedgwick County residents as well as being an impressive feature for visitors to the City." Aspects of this plan included a dam and fishing pond at Twenty-first Street that would "not only provide convenient and safe recreation but would also add interest to the Interstate (I-235) view corridor," a semi-regional recreational area in the area of I-235 and K-42, a naturalistic regional park at the juncture of the river and the floodway that would be developed as a nature center, and several deflatable dams. The nature center was intended to have "educational, conservational, cultural as well as recreational and aesthetical value." The plants and animals of the region

²¹Ibid.

²²"Public Forests Along Floodway Are Discussed," *Wichita Magazine*, January 22, 1948, 19.

could be preserved at the park to allow for formal and informal study of the ecology of the region. Other uses for the park could be hiking, fishing, bird watching, picnicking, camping, and boating, along with other nature-oriented activities. The dams would be placed at several places along the Big Arkansas River and the floodway to form a series of linear lakes of "immense esthetics and recreational value." Some of the recommended sites for the dams were along the floodway at Maple, Forty-seventh Street, and east of the Turnpike. Along the river the suggested placements were at Seneca, Lincoln, and Broadway Avenues just below the John Mack Bridge. Another use planned for these lakes was water-skiing. The deflatable dams would keep water at a level high enough for recreational uses but could be deflated during floods to prevent any blockage of the flood waters.²³

Neither this plan nor another set out in 1976 has been adopted. The Park and Open Space Plan again recommended that "the utility of the Wichita-Valley Center Floodway be expanded to include recreation. Extensive development is not desired; rather, natural areas set aside for hiking, biking, and perhaps horseback riding are preferred." This plan also recommended "that reasonable amounts of land adjacent to the floodway be acquired in order to provide additional open space opportunities for the local cities and county." One problem anticipated by the plan was that because the original condemnation was done solely for flood control, any other use would require recondemnation of the land.²⁴

Officially the floodway is to be used only for flood protection, but the land is currently being used for many unofficial purposes. Some of these are relatively harmless to the ditch--fishing and bird watching, for instance; however, due to the lack of regulation the Big Ditch has also been the scene of motorcycle riding and gun shooting. The Park Department has tried to expand the uses of the ditch to include recreational functions, but the Flood Control Department prefers to focus on its primary purpose.²⁵

²³Wichita-Sedgwick County Metropolitan Planning Department, *Toward a More Livable City: An Urban Beautification Plan for Wichita, Kansas* (Wichita: Wichita-Sedgwick County Metropolitan Planning Department, 1970).

²⁴Wichita-Sedgwick County Metropolitan Planning Department, *Wichita-Sedgwick County Park and Open Space Plan* (Wichita: Wichita-Sedgwick County Metropolitan Planning Department, 1976), V-18.

²⁵Bob Stratton, "Opinions Differ on Possibly Developing the Big Ditch," *Wichita Eagle*, September 1, 1988.

localized rains that overtaxed the storm sewer system. The Big Ditch has become a haven for birds and other wild animals. Various proposals for other uses of the floodway have been made, but these have never been adopted, in part because of fear that they will interfere with the project's primary purpose. Today people are still interested in the ditch, and some advocate other uses for the greenbelt when it is not flooded. The debate has changed. No longer do people argue whether or not the floodway is needed or even whether or not it does the job it was designed to do; these are taken for granted. Now the argument is whether other uses can be found for the area in addition to its primary function of flood control. By saving the city from major floods since its completion in 1959, the Big Ditch, named in derision, has become an important part of Wichita.

The Two-Edged Sword: Slavery and the Commerce Clause, 1837-1852

Kirk Scott

Between 1837 and 1852, the Supreme Court under Chief Justice Roger B. Taney was severely divided over the scope of national authority to regulate interstate commerce. Although the Taney Court decided only one case that directly involved the question of slavery and interstate commerce (*Groves v. Slaughter*), the purpose of this paper is to explore the Court's treatment of interstate commerce during this period and the influence of the growing slavery controversy on that treatment. The potential nationalizing power of the commerce clause--power that could restrict, prevent, or promote the interstate slave trade and transform slavery into a national, constitutional issue--was an important factor in the Taney Court's disjointed, divided treatment of interstate commerce during this period, when the issue of national authority was rendered politically dangerous by the slavery controversy. National uniformity through the congressional commerce power had the potential to both restrict and expand the "peculiar institution."

The commerce clause may have been the most effective constitutional instrument the Court had for allocating power between the states and the nation.¹ Three essential questions that arose over interstate commerce and slavery were: (1) Was federal authority exclusive? (2) Did commerce include transportation of persons? (3) Were slaves persons or property? The first two questions emerged in the Marshall-era commerce clause cases. The philosophy of commercial nationalism was victorious, if cautious, during these years, but new conditions, political and physical, were to bring this nationalism into question in the years ahead.

The latent power of national authority over interstate commerce was recognized and expressed by Chief Justice John Marshall in *Gibbons v. Ogden* (1824) and accorded an even greater scope of national exclusivity

¹R. Kent Newmyer, *The Supreme Court under Marshall and Taney* (Arlington Heights: Harlan Davidson, 1968), 101.

in *Brown v. Maryland* (1828). In *Gibbons*, Marshall avoided the question of congressional exclusivity over commerce by pointing to existing federal legislation (the Coastal License Act) that conflicted with a state-granted monopoly. In the opinion, however, Marshall implied that the “commerce power might have been sufficient to void the state act even without an actual conflict.” Marshall also defined commerce as “every species of commercial intercourse [sic],” thereby potentially extending commerce beyond the mere exchange of goods. Four years later, in *Brown*, involving state licensing of importers of out-of-state goods, Marshall voided the state license tax in the absence of concurrent federal legislation, stating that “the commerce power was foreclosed to the states just because it had been given to Congress.”²

Looming in the background of *Gibbons*, however, was a case that sprang from the Denmark Vesey slave revolt conspiracy of 1817. Following the Vesey incident, South Carolina passed an act that, among other things, required the incarceration of free black seamen arriving in port from another state or foreign nation. This act also required the ship’s master to pay the cost of incarceration. In *Elkison v. Deliesseline* (1823), decided in federal circuit court in South Carolina, Justice William Johnson declared the Negro Seamen’s Act an unconstitutional interference with the commerce clause and the federal treaty-making powers. Johnson’s opinion was published as a pamphlet and in the *National Intelligencer*, causing a states’ rights backlash. As a result, Johnson became a “pariah in his home state” of South Carolina. Marshall discussed the violent reaction to Johnson’s opinion with Justice Story in correspondence dated September 26, 1823. Marshall, despite his broad interpretation of the commerce power in *Gibbons* and *Brown*, had “avoided the constitutional issue (*The Brig Wilson v. United States*, 1820)” involving a similar Virginia law, by excluding passengers and crew from his definition of commerce. According to Marshall, “a crew member does not fall within its [the commerce clause] terms.” Regarding the potential controversy that would be engendered by confronting the transportation of persons with the commerce clause, Marshall wrote Story that he was “not fond of butting against a wall in sport.”³ This statement stands as an early example of the Court being politicized by the issue of slavery.

²Marshall quoted in Newmyer, *Marshall and Taney*, 50-52.

³Paul Finkelman, *Slavery in the Courtroom: An Annotated Bibliography of Cases* (Washington, D.C.: Library of Congress, 1985), 257; Irwin Rhodes, ed., *The Papers of John Marshall: A Descriptive Calendar*, vol. 2 (Norman: University of Oklahoma Press, 1969), 218, 179; quoted in R. Kent Newmyer, *Supreme Court Justice Joseph Story* (Chapel Hill: University of North Carolina Press, 1985), 205.

The political conflict that surrounded cases such as those prompted by the Negro Seamen's Act produced a certain caution in even the most nationalistic Marshall Court commerce clause decisions. As noted above, Marshall avoided pronouncing outright federal exclusivity in *Gibbons* and avoided making broad pronouncements in *Brown*. In *Wilson v. Black Bird Creek Marsh Co.* (1829), Marshall stepped back from the *Brown* decision and allowed for concurrent state regulations in certain instances.

Between 1829 and 1837, President Andrew Jackson appointed seven new justices: John McClean (1829); Henry Baldwin (1830); James Wayne (1835); John Catron and John McKinley (both 1837); and Roger Taney as Chief Justice after John Marshall's death in 1835. President Jackson's democratic, states' rights, anti-national bank philosophy was in its ascendancy. John C. Calhoun had anonymously published the *South Carolina Exposition and Protest* in 1828, and 1832 saw the Nullification Crisis come to a climax. There was, as well, a renewal of the antislavery movement; publication of William Lloyd Garrison's *The Liberator* began in January, 1831, and the American Anti-Slavery Society was established in 1833. In this new atmosphere a delicate interpretation of the commerce power was needed, one which would please both North and South and, at the same time, would encourage national commerce.⁴

The first commerce clause case decided by the Court under Chief Justice Taney was *New York v. Miln* (1837). The case involved a New York law requiring ships' captains, upon arrival in a New York harbor, to supply personal information on all incoming passengers and pay the cost of caring for those sick and indigent. The question before the Court was whether this law involved a regulation of foreign and interstate commerce by the state of New York. The opinion of the Court, written by Justice Philip Barbour, took a radical states' rights position that avoided the commerce clause question. According to the Court, the New York law was intended as a police measure to control the influx of indigent and otherwise undesirable persons into New York. Going deeply into the realm of states' rights, Barbour asserted that "a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation where that jurisdiction is not surrendered or restrained by the Constitution of the United States." A state's police power was seen by Barbour as "unlimited."⁵ According to constitutional historian Martin Siegel, "Philip Barbour moved in

⁴Newmyer, *Marshall and Taney*, 102.

⁵*New York v. Miln*, 11 Peters, 662.

the Virginia orbits of Judge Spencer Roane and . . . John Taylor." Barbour further possessed an "almost obsessive states rights doctrine" and was "able to align himself with conservative Eastern slave holders."⁶

The two remaining justices from the Marshall Court, Joseph Story and Smith Thompson, felt obliged to take up the commerce clause question. Justice Thompson's concurring opinion suggested that states had a concurrent power "until Congress asserts the exercise of the power." Justice Story dissented from the majority and upheld the old Marshallian exclusivity of national commerce powers. Story held that "if the regulation of passenger ships be in truth a regulation of commerce . . . the act in controversy is . . . an act which assumes to regulate trade and commerce."⁷ The question of the status of passengers under the definition of "commerce" was, however, to remain open. Furthermore, Justice Barbour's "undeniable and unlimited jurisdiction" opinion created a controversy of its own in later cases.

The three essential questions--Was the power of Congress to regulate commerce exclusive? Did commerce include the movement of persons? Were slaves persons or property?--are all found in *Groves v. Slaughter* (1841). This case involved nonpayment of debt for slaves and the validity of the contract for payment. The conflict arose from Section 2d of the Mississippi Constitution, which read as follows: "The introduction of slaves into this state, as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833."⁸ The attorney for Slaughter, Mr. Gilpin, argued that the amendment required enabling legislation, legislation that was never enacted. Therefore, the amendment had no force; the contract was legitimate, and Slaughter was entitled to payment.

Supporting Slaughter were Henry Clay and Daniel Webster. Clay argued that the regulation of commerce implied preservation and not annihilation; to prohibit the introduction of slaves as merchandise was to interfere with the Constitution of the United States. Webster, taking a traditional nationalistic tone, held that the Constitution recognized slaves as property, and as such they fell under the commerce clause. There was no ground, Webster insisted, for applying a different rule to property in slaves than to other

⁶Martin Siegel, *The Taney Court: 1836-1864*, vol. 3, *The Supreme Court in American Life*, ed. George J. Lankevich (Millwood, NY: Associated Faculty Press, 1987), 265-66.

⁷*New York v. Miln*, 668-70.

⁸*Groves v. Slaughter*, 15 Peters, 800.

property,⁹ citing the nationalism of *Gibbons v. Ogden* to support his contention. Slaughter's defense thus came from quite different commerce clause interpretations and regional outlooks.

The attorney for Groves, Robert J. Walker, presented an argument of such length that it could not be included in the Court's report. Walker explicitly acknowledged the exclusive nature of Congressional power over interstate commerce. He then turned this argument on its head by making it a potential threat to free states should the doctrine be applied to slavery. After dismissing the "enabling legislation" argument, Walker argued that

the history of the [C]onstitution of the Union shows that the wont of uniformity, as regards regulation of commerce, was the greater motive leading to the formation of that instrument The power to regulate commerce among the states is 'supreme and exclusive,' it is vested in [C]ongress alone; and if under it, [C]ongress may forbid or authorize the transportation of slaves from state to state, in defiance of state authority, then indeed, we shall have reached a crisis in the abolition controversy, most alarming and most momentous.¹⁰

While stating the case for constitutional nationalism and commercial uniformity, Walker showed that slavery could not, in fact, fall under the authority of this regulating power. He continued:

But Massachusetts, it is said, may exempt herself from the operation of this power of [C]ongress, by declaring slaves not to be property within her limits; and if so, may not Mississippi exempt herself in a similar manner, by declaring, as she has done, that the slaves of other states shall not be merchandise within her limits.¹¹

⁹Charles Grove Haines and Foster H. Sherwood, *The Role of the Supreme Court in American Government and Politics, 1835-1864* (Berkeley: University of California Press, 1957), 112.

¹⁰Robert J. Walker, "Argument of Robert J. Walker Before the Supreme Court of the United States on the Mississippi Slave Question," in *Southern Slaves in Free State Courts: The Pamphlet Literature*, series 1, vol. 2 of *Slavery, Race and the American Legal System, 1700-1872*, ed. Paul Finkelman (New York: Garland, 1988), 123.

¹¹*Ibid.*, 123-24.

Further, he questioned, "if [C]ongress possess [sic] the power to increase slavery in a state, why not also the power to decrease it?"¹²

Referring to Article I, Section 9, sixth clause of the Constitution ("No preference shall be given by any regulation of commerce . . . to the ports of one state over those of another"), Walker argued that a Mississippi law restricting slavery must have equal force to a Massachusetts law prohibiting the introduction of slaves, or "preference" is given to Massachusetts.¹³ Implicit in this argument was the "two-edged sword": if Mississippi could not prohibit the introduction of slaves as merchandise, then, based on commercial uniformity and congressional exclusivity, neither could Massachusetts prohibit the introduction of slaves as merchandise. The only way around this potential conflict, according to Walker, was to conclude that slavery was outside the realm of interstate commerce.

As to why slavery was outside the reach of congressional regulation (already accepted in the argument as an exclusive power), Walker reasoned that the Constitution referred to slaves as "persons held to service." As such, slaves were not merchandise to be regulated, and "how far they shall be so bound [was] exclusively a question of state authority."¹⁴

In looking to the *Federalist Papers* for an interpretation of the constitutional status of slaves, as persons or as property, we find nothing definitive. Indeed, in "Federalist No. 54," James Madison wrote that

the true state of the case is that they partake of both these qualities; being considered by our laws, in some respects, as persons, and in other respects, as property . . . The Federal Constitution therefore, decides with great propriety on the case of our slaves, when it views them in the mixt character of persons and of property. This is in fact their true character.¹⁵

Madison therefore denied Walker's contention that slaves were viewed as persons by the Constitution and as property by the states. Madison showed that the Constitution's ambivalent view of the nature of slaves

¹²Ibid., 125.

¹³Ibid., 127.

¹⁴Ibid., 130.

¹⁵James Madison, "Federalist No. 54," in *The Federalist Papers* (1788; reprint, New York: Bantam, 1982), 276.

(embodied in Article I, Section 2, the “three-fifths” clause) was only an appropriate acknowledgment of the ambivalence of state laws. Madison’s vaguely defined “mixt character” offered much leeway in defining a slave’s status in specific situations.

Walker continued his argument by excluding persons from the reach of commercial regulation and taking an ironic shot at the abolitionists. He asserted that “it is the abolitionists who must wholly deprive the slaves of the character of persons, and reduce them in all respects to the level of merchandise, before they can apply to them the power of [C]ongress to regulate commerce among the states.” Walker concluded his lengthy argument with another shot at the abolitionists: “when . . . all shall now be informed, that over the subject of slavery, [C]ongress possess [sic] no jurisdiction; the power of agitators will expire.”¹⁶

The decision of the Court in *Groves* sidestepped the commerce clause question altogether by deciding, in an opinion written by Justice Thompson, that the Mississippi constitutional amendment prohibiting the introduction of slaves as merchandise required enabling legislation in order to have force. Slaughter was to be paid his due. Thus the overarching question raised by the case was reduced to a more specific and manageable subject. The justices were, however, unwilling to let the question of commercial regulation go unaddressed.

Abolitionist and perennial presidential aspirant Justice John McClean held forth on the commerce question even though, as he admitted, it is “not necessary to a decision of the case . . . yet, it is so intimately connected with it . . . I deem it fit and proper to express my opinion on it.” McClean offered straightforward economic nationalism and held that “unless the power [over interstate commerce] be not only paramount, but exclusive, the Constitution must fail to attain one of the principal objects of its formation.” Then, echoing Walker’s argument, McClean asserted that if “a State may admit or prohibit slaves at its discretion, this power must be in the state and not in the Congress . . . By the laws of certain States, slaves are treated as property . . . [however] the Constitution treats them as persons.”¹⁷

Thus we see the arguments of Robert Walker defending a slave state’s constitution and paving the way for a defense of slavery against federal interference confirmed by an abolitionist justice’s *obiter dicta*, in an apparent attempt to lay the groundwork to protect free states from slave

¹⁶Walker, “Argument of Robert J. Walker,” 130, 162.

¹⁷*Groves v. Slaughter*, 821.

incursions.¹⁸ Both Walker and McClean recognized the implications of national commercial uniformity as it applied to slavery.

The *obiter dicta* continued with Chief Justice Taney writing that “in my judgment the power over this subject [slavery] is exclusively with the several States.” Taney did not offer a justification for this opinion. He instead revealed his political motivations for offering it: “I do not, however, mean to argue this question; and I state my opinion upon it, on account of the interest which a large portion of the union naturally feel in this matter . . . and from an apprehension that my silence . . . might be misconstrued.”¹⁹

A third justice weighed in with a concurring opinion, “reluctant,” but again feeling compelled to comment on the technically irrelevant commerce clause question. Justice Henry Baldwin, at once both a states’ rights advocate and national tariff supporter, began with a bold statement of economic nationalism. He asserted that “the power of Congress to regulate commerce . . . is exclusive,” but followed this with the statements that “I feel bound to consider slaves property,” and “the Constitution recognizes and protects it [the right of property in slaves] from violation.” The opinion of Justice Baldwin seems to be a prefiguring of the “substantive due process” of *Dred Scott v. Sanford* (1857).²⁰ Baldwin used national exclusivity and commercial uniformity as an argument for the constitutional protection of property in slaves.

Groves commands attention as the single case taken up by the Court during this period that directly involved both slavery and interstate commerce. In this case an abolitionist justice defended state power over slavery, a states’ rights justice defended national exclusivity, and the Chief Justice made an unsupported, bald statement claiming exclusive state authority over slavery for fear of the potential political ramifications of his silence on the issue, all in a case where the majority opinion avoided the commerce clause/slavery question altogether. Divisions in the Court and the political dangers of a philosophy of economic nationalism—a philosophy that could cut both ways on the questions of slavery—that were revealed in *Groves*

¹⁸Finkelman, *Slavery in the Courtroom*, 35; an *obiter dicta* is an opinion offered, frequently for political reasons, which has no direct bearing on the substance of a case.

¹⁹*Groves v. Slaughter*, 822.

²⁰*Ibid.*, 824. “Substantive due process,” as opposed to “procedural due process,” is the doctrine that holds certain matters, particularly those concerning use of private property, to be outside the competence of legislative regulation regardless of the propriety of the procedures used to enact the legislation.

surfaced again in later commerce clause cases that did not relate directly to slavery.

The next major challenge involving interstate commerce to come before the Court was actually a combination of three cases (*Thurlow v. Massachusetts*, *Fletcher v. Rhode Island*, and *Peirce v. New Hampshire*), known collectively as *The License Cases* (1847). All three involved state attempts to license retailers of alcoholic beverages and the question of whether this involved state protection of public welfare or an interference with interstate commerce. The New Hampshire law was particularly questionable, in that it affected sellers of bulk liquor and violated John Marshall's "original package" rule in *Brown*. Cases involving licensing of liquor sales would seem an unlikely place to find arguments over slavery. But in an atmosphere where the critical question was whether, and to what extent, congressional power over commerce embraced persons,²¹ the slavery question found its way into any case involving national authority over commerce.

As these cases involved the issues of state police powers and reform legislation versus national commerce power, lawyers for the plaintiff in *Fletcher v. Rhode Island* referred to the relevant opinion in *New York v. Miln*. Ames and Whipple, attorneys for Joel Fletcher, argued that the licenses, as police power, were unconstitutional. Referring to Justice Barbour's extreme states' rights opinion in *New York v. Miln*, the attorneys asserted that "a supremacy over the Constitution . . . was claimed for every, even the most petty, police law of a state or even a town or city." At this point, Justice James Moore Wayne declared that "he had no recollection that such language was in the opinion of the [C]ourt in that case at the time it received his concurrence." Indeed, it appeared that Justice Barbour added the more extreme states' rights language to the majority opinion after it was received by the other justices. Justice Wayne, a southern slave holder and Jackson appointee, was nonetheless (as an associate of John Marshall) "the most high-toned Federalist on the Bench."²² Wayne opposed Barbour's *New York v. Miln* opinion as it stood and raised the issue of Barbour's subterfuge again in *The Passenger Cases* (1849).

Ames and Whipple continued their attack on the Barbour opinion in language that revealed the underlying current of hostility over the slavery issue:

²¹Newmyer, *Marshall and Taney*, 123.

²²*Fletcher v. the State of Rhode Island*, 5 Howard, 274; Siegel, *The Taney Court*, 261.

[I]f any persons really held the doctrine in question upon the supposition that it was necessary for some of the States, which, though guaranteed by the Constitution, were at war with its whole spirit as well as with the principles of the Declaration of Independence, which the Constitution carried out as far as it could consistently with the existing condition of the country, they were guilty of a 'blunder.'²³

The attorneys here attributed the state police power doctrine of the Taney Court to a proslavery avoidance of the commerce power in order to protect the peculiar institution. Chief Justice Taney stepped back from the heated attack by Ames, Whipple, and Justice Wayne on the Barbour opinion, saying only that "no opinion was expressed upon it [the commerce clause] by the Court because the case [*New York v. Miln*] did not necessarily involve it."²⁴ The opinion of the Court in *The License Cases* upheld the state license laws as a proper exercise of police powers. The Court, however, remained divided on the scope of the commerce power, and its position on police powers drew fire as a proslavery ruse.

In the cases known collectively as *The Passenger Cases* (*Norris v. the City of Boston* and *Smith v. Turner*, 1849), the controversy over the scope of the commerce power reached an apparent climax. The individual cases involved Massachusetts and New York laws taxing immigrants arriving at their ports, but the questions of authority over slavery and the movement of free blacks and fugitive slaves were addressed in a larger sense. Southerners were concerned over the fate of these laws, as they were analogous to southern laws for inspecting vessels and checking the immigration of free blacks.²⁵ These laws involved the taxing of ships' masters for the support of the ships' indigent and sick, making the case similar to *New York v. Miln*. Antislavery forces supported state police power as a weapon against fugitive slave laws. Southern states opposed the northern use of a police powers doctrine against slavery but supported police powers to uphold their own laws against the immigration of free blacks into slave states.

Attorney John Davis appeared for the city of Boston in the first of *The Passenger Cases*. He argued that the law did not serve to regulate

²³*Fletcher v. the State of Rhode Island*, 274.

²⁴*Ibid.*, 277.

²⁶*Newmyer, Marshall and Taney*, 104.

commerce, as “goods are the subject of commerce; persons are not, nor do they belong to commerce.” Furthermore, he denied that the Massachusetts law conflicted with any federal legislation. Davis then introduced the subject of state laws prohibiting the importation of slaves: “Nearly all slave states have laws upon this subject, forbidding the introduction of slaves as merchandise under penalties. The free states go farther, and so do some of the slave states, and emancipate the slaves thus brought in, in violation of law.”²⁶ Davis asserted that if states could regulate and prohibit the introduction of slaves, then surely states had the authority to regulate the immigration of the diseased, the indigent, and the insane. By using this analogy, he introduced the northern states’ rights position regarding fugitive slaves and tied it to southern laws prohibiting the importation of slaves as merchandise.

Arguing for the plaintiff, Prescott Hall contended that a state had the right to police but not to tax foreign or interstate commerce. Even more pertinent for the issues of slavery and the commerce clause was Daniel Webster’s argument for the unconstitutionality of the Massachusetts law. It was not published in the Court Reports since the trial grew too lengthy, with court reporter Howard noting that “it is impossible to report all these arguments. If it were done these cases alone would require a volume.” Indeed, just the reported arguments, when combined with the five concurring and four dissenting opinions, took roughly one hundred and twenty pages of the Supreme Court Reports. But the substance of Webster’s argument was published in the *Baltimore American*: “Mr. Webster spoke powerfully of the sanctity of the decisions of the Supreme Court, in reply to a remark of the opposite council [sic] that the people were beginning to forget the life tenure of the Judges, in consequence of the infusion of popular sentiment into the decisions of the courts.” Webster was apparently commenting on a popular perception (one that may have been accurate if Chief Justice Taney’s comments in *Groves* are any indication) that the Court had become politicized. Thus he deemed it necessary to defend the dignity of the Supreme Court:

Authorities were quoted to show that commerce extended to persons as well as to things Mr. Webster incidentally alluded to the question of domestic slavery, which had been made prominent by counsel upon the other side. It was, he

²⁶*Norris v. the City of Boston*, 7 Howard, 720.

said, a peculiar institution, the existence of which was recognized by the Constitution . . . There it was placed by those who framed its existence, and he did not wish to disturb it, nor should he lift his finger to do so. It belonged not to him, but to those alone who had power over it.²⁷

Webster, having made a strong stand for commercial nationalism that extended to persons as well as goods, then exempted domestic slavery from this system and declared it a "peculiar institution" purely under state authority. This argument presaged Webster's refusal, as expressed in a later speech of March, 1850, to acknowledge the legitimacy of, or participate in, the perceived sectional crisis. It contradicted, however, his argument eight years earlier in *Groves* that there were no grounds for separating slaves from other persons under the Constitution. This shift reflected the heightened tensions and the need for compromise in the years leading up to the Compromise of 1850.

The decision of the Court in *Norris*, written by Justice McClean, was powerfully nationalistic: "A concurrent power in the States to regulate commerce is an anomaly not found in the Constitution." McClean, in an apparent response to Davis's contention that the Massachusetts law did not conflict with any federal law, gave an interesting interpretation of Marshall's *Wilson v. Black Bird Creek Marsh Co.* decision of 1829, asserting that while the absence of relevant federal regulation was necessary for a state law to be constitutional, it did not guarantee constitutionality; a state law might still violate the Constitution in such circumstances.²⁸

Justice Wayne, in a concurring opinion, again took the opportunity to blast Justice Barbour's police power decision in *New York* and to claim, as he did in *The License Cases*, that the more radical states' rights language of the opinion had been added after his concurrence. Justice McKinley, whose views were those of popular southern orthodoxy,²⁹ also concurred with the nationalist opinion, but insisted that slaves were excluded from the commerce power.

In dissent, Chief Justice Taney felt it necessary to comment on what he thought to be the logical result of extending exclusive national authority over

²⁷ *Baltimore American* quoted in Haines and Sherwood, *Supreme Court*, 154-56.

²⁸ *The Passenger Cases*, 7 Howard, 749-50.

²⁹ Siegel, *The Taney Court*, 272.

immigration of persons. He asserted that “if the States have granted this great power in one case [immigration], they have granted it in the other; and every state may be compelled to receive a cargo of slaves from Africa, whatever danger it may bring upon the State and however earnestly it may desire to prevent it.” This was obviously hyperbole, as the foreign slave trade had been banned by act of Congress in 1808 as authorized by the Constitution. It appears that Taney made this comment for political intention--that of the extension of slavery in the territories. Justice Peter Daniel, known for his eccentric and anachronistic dissents and predictable proslavery, sectional opinions,³⁰ concurred with Taney’s dissent.

Although a New Englander, Justice Levi Woodbury demonstrated a dedication to strict construction of the Constitution and state sovereignty that made southerners feel they had a friend on the high court.³¹ Indeed, it was Justice Woodbury who offered the most inflammatory and threatening comments in his concurrence with Taney’s dissent. As in Justice Baldwin’s comments in *Groves*, we again find a prefiguring of the *Dred Scott* substantive due process opinion. Justice Woodbury, commenting on the consequences of national authority over the movement of passengers, boldly held that national exclusivity and commercial uniformity cut both ways in regard to slavery:

If Congress, with or without a coordinate or concurrent power in the state, can prohibit other persons as well as slaves from coming into states, they can of course allow it, and hence can permit and demand the admission of slaves as well as any kind of free persons . . . and enforce the demand . . . however obnoxious to the habits and wishes of the people of a particular state.³²

It is difficult to say whether Justice Woodbury was attempting to defend New England’s states’ rights antislavery position or southern rights to protect property in slaves, or to maintain the status quo by protecting both positions. In any event, the mutual danger to both positions of a strong, consistent, commercial nationalism took on the quality of mutually assured

³⁰*The Passenger Cases*, 782; Siegel, *The Taney Court*, 275.

³¹Siegel, *The Taney Court*, 281.

³²*The Passenger Cases*, 811.

destruction and continued to render the Court incapable of offering a clear application of congressional commerce powers.

When Justice Woodbury died in 1851, President Fillmore appointed Massachusetts Whig Benjamin Curtis to the Court. The next year, Curtis wrote a consensus-building opinion in *Cooley v. Board of Wardens of the Port of Philadelphia, et al.* In what became known as the “Cooley rule,” Justice Curtis presented the view that exclusivity “must be intended to refer to the subjects of that power and to say they are such a nature as to require exclusive legislation by Congress.” He further contended that “either to affirm, or deny, that the nature of this power requires exclusive legislation by Congress is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part.”³³

To this Justice McClean dissented, upholding national exclusivity. Justice Daniel concurred but, true to form, wrote that state power was “original and inherent” and not merely to be “tolerated or held to the sanction of the federal government.”³⁴ With only one dissent and one concurring opinion, the flexible pragmatism of Justice Curtis brought about a distinct improvement over the fractured, argumentive atmosphere of *The Passenger Cases*. The Court now had a non-doctrinaire “doctrine” to apply to the commerce clause. Although the Cooley rule could not define what was to be subject to national authority and what was to be subject to state authority, it did allow for the flexibility needed in the heated atmosphere of the times. The rule changed the focus from the nature of the commerce power to the nature of the subjects of the commerce power and thus diffused the conflict over congressional exclusivity for a time.

Cooley v. Board of Wardens ends this survey of the Taney Court’s tempestuous battle over the commerce clause. Between 1837 and 1852, conflicting interests and opinions regarding slavery and the status of slaves under the Constitution are found in the arguments of lawyers and in the opinions of justices, often in cases that touched upon slavery only in the most tangential way. The hostile and politicized exchanges found in the Court Reports of the cases involving the commerce clause appear to support the interpretation that there was not a single important case after 1819 in which the deployment of power in the federal system was at issue where slavery did not silently influence the deliberation of the

³³*Cooley v. Board of Wardens of the Port of Philadelphia et al*, 12 Howard, 1005.

³⁴*Ibid.*, 1008.

justices.³⁵ It should be added, based on the material in the Taney Court commerce cases, that the influence of slavery was often more than silent.

Obviously there were issues other than slavery that complicated the Court's treatment of interstate commerce. The need to protect local interests from national business interests in a growing economy was an important factor. But the sources clearly show that the constitutionally vague definition of the status of slaves, the conflict between national uniformity and local interests, and the uncertainty over whether "commerce" extended to persons contributed to the political problems faced by the Court.

As the slavery question percolated upward from local to national politics and finally to the national judiciary, it became an increasingly difficult subject to manage. As the introduction of the slavery issue into all cases involving national authority over commerce indicates, the Constitution, because of the vague nature of the compromise over "persons held to service," was in fact unable to manage the slavery question, and the Court itself became increasingly politicized.

Much of the rhetoric about how commercial uniformity might alternately destroy or extend slavery was probably just that--rhetoric, for political purposes. The conflicting constitutional interpretations of the nature of slavery and the resulting politicization of the Court, however, represented the very real dilemma that slavery presented to a nation which saw commercial uniformity as, in some sense, essential to nationhood. The commerce clause, the "effective instrument" of national uniformity, was only effective to the extent that national uniformity could realistically exist. On the question of slavery, national uniformity could be seen as a "two-edged sword"; after *Dred Scott*, that sword divided the Union.

³⁵Newmyer, *Justice Joseph Story*, 367.

Douglas Bendell Award

**Roosevelt's Great Defeat:
The Court Packing Fight of 1937**

Amy Trujillo

Throughout the history of the United States, the president has often quarreled with the Supreme Court over matters of policy and the Constitution, but rarely has a president tried to overhaul the Court to accomplish his goals. At the start of Franklin Delano Roosevelt's second administration in 1937, the nation faced a crisis as the President attempted to change the Court that had obstructed his attempts to alleviate the effects of the Great Depression. While Roosevelt was understandably frustrated with the Supreme Court's thwarting of his policies, the actions he took were too drastic to be tolerated by the majority of the population. While many felt that the Supreme Court was getting in the way of New Deal legislation, few felt that the President had the right to attempt to change it. Opposition to this plan extended from Washington, D.C., to the rural United States as people realized its implications. The fact that Roosevelt was popular and had just won a huge victory in the 1936 presidential election did not necessarily mean that he had the support of the public in such an unprecedented move as to pack the United States Supreme Court. As Roosevelt stubbornly pursued his plan, the reactions of the people and changes in the policy of the Court made it almost impossible for Roosevelt to win. The events of 1937 eventually handed Roosevelt the greatest defeat he had as President.

Roosevelt's conflict with the Supreme Court cannot be understood without a look at the events that led up to his decision to pack the Court. When Roosevelt became president in 1933, he promised the people of the United States that he would turn the country around and lead them into the future. He proposed a number of governmental and social reforms which he called the New Deal. While many of these reforms were necessary, many people felt that the President was becoming too powerful. The

reforms were attempts to centralize the government under the authority of the executive branch, while at the same time limiting the role of Congress. The keys to all of these reforms were the agencies that Roosevelt created to act on the new laws. New Deal agencies such as the Interstate Commerce Commission (ICC) and the National Recovery Administration (NRA) were responsible for implementing the laws under the authority of the president.¹

Roosevelt, unlike his predecessor, had no problem exercising national influence in the affairs of the state governments during the Depression. He believed that the national government had to take a stand to aid those who were in need. Many of his early programs were designed to give immediate monetary aid to the people who needed it the most. Roosevelt approved federal aid that would supply millions of dollars to the poor. By the end of his first year, over five million people had received assistance from the federal government. At the same time, he realized that there would have to be programs that benefitted people in the long run, establishing work programs and long term employment.²

One of Roosevelt's most controversial reform projects was the National Recovery Administration (NRA). The NRA attempted to facilitate economic growth by controlling the industrial powers in the nation. While this would attempt to create work for the people, its purpose was to regulate and reform the factory system in the United States. Reforms, such as the recognition of labor unions and the elimination of child and sweatshop labor, were the concern of many who passed this bill, despite the constitutional questions that it raised. The NRA's constitutionality was questioned even before it passed through Congress. Many people doubted the constitutionality of the clause that gave the president the ability to create legal codes for factories. Still others questioned the role the NRA would have in regulating intrastate commerce. Despite this, Roosevelt went ahead and signed the legislation, believing the factories had to function and produce goods in order for the economy to improve. Similarly, the people had to work in order to be able to purchase products. It was hoped that this administration would accomplish both of these goals.³

¹Arthur M. Schlesinger, *The New Deal In Action, 1933-1939* (New York: Macmillan, 1940), 2-3.

²*Ibid.*, 5-6.

³Joseph P. Lash, *Dealers and Dreamers: A New Look at the New Deal* (New York: Doubleday, 1988), 122-25.

The unanswered constitutional questions brought about the NRA's downfall when it came before the Supreme Court. While the NRA had been created with good intentions, it had overreached the boundaries that many believed were acceptable for a national administration. From the very beginning, people had questioned the ability of Congress to create any law giving the President the power to make programs that did not have to go through Congress first. When the NRA finally came before the Supreme Court, the unanimous decision struck it down, because it gave the president powers that he could not constitutionally have. Even without the question of presidential interference, the NRA would have been destroyed because of the role that it had been assigned in the regulation of intrastate commerce. The Supreme Court restated the established doctrine that Congress had no right to regulate intrastate commerce; the NRA was thus unconstitutional because of this attempt. It was at this point that the first real split between the President and the Supreme Court could be seen. While Roosevelt had some reservations about the monopolistic qualities in the NRA, he had backed it as being for the good of the nation. When the Supreme Court ruled that the NRA was unconstitutional, Roosevelt saw it as an attack on himself and his attempt to help the nation.⁴

Even before the defeat of the National Recovery Administration, the Supreme Court had struck several blows at New Deal Legislation that angered the President and dismayed the people. To give pensions to retired railroad workers, Congress created the Railroad Retirement Act in 1934. When this case came before the Supreme Court, a small majority of the justices ruled the entire law was unconstitutional. This made it impossible for Congress to go back and make the Railroad Retirement Act acceptable. While the majority prevailed in this case, the minority was vocal in its criticism of the decision. Unlike the later NRA case, the minority number of justices did not see this as infringing on the intrastate commerce powers of the state. In 1934, in the *Fraizer-Lemke Act* decision, the Court eliminated the aid farmers had been receiving on their mortgages. For the first time, many saw how the Supreme Court could affect the nation, and many felt that the President was justified in his anger at the justices.⁵

Roosevelt soon found that he had support for his Supreme Court plan. Due to actions taken by the lower courts, Congress now felt that it had

⁴Schlesinger, *The New Deal in Action*, 18-19.

⁵Robert Jackson, *The Struggle for Judicial Supremacy* (New York: Vintage, 1941), 104-07.

justification to attack the courts. From the beginning of New Deal legislation, many of the lower courts had attempted to stop or limit the authority of the administrations. In a number of cases, these were conservative justices that were acting with the approval and support of the businesses that the legislation was attempting to change. Many of the lower courts were hostile to the attempts that Congress and the President were making to grasp more power. While the Supreme Court did not uphold the decisions of the lower courts in some of these cases, enough laws were found unconstitutional for the entire judiciary to come under scrutiny. It did not help matters that even when the lower courts did decide in favor of an act, such as the Tennessee Valley Authority (TVA) in 1936, other judges often ignored the decision and attempted to restrict the power of the laws. From the view of an outsider, it would seem that the judiciary was at war with itself, as well as the other two branches of the government.⁶

For many, the last straw occurred in 1936, when the Supreme Court ruled that the Agricultural Adjustment Administration (AAA) was unconstitutional. The AAA had been created as a form of relief for the farmers of the nation. The administration tried to curb overproduction by paying farmers to plow under their crops and limiting the number of acres they planted. The AAA made millions of contracts with farmers that guaranteed prices for their crops and attempted to regulate how much of a certain crop would be produced in a year. By the end of 1934, the result was higher prices, but much of this could be attributed to the drought that limited the production of many crops. While the AAA helped the farmers, it hurt the people living in the cities who now had to pay higher prices.⁷ When the Supreme Court ruled that the AAA was unconstitutional, all the good it had done came to an end. The Supreme Court decision stated that Congress had attempted to take over the state power of controlling agriculture and production within its boundaries. The taxes that the federal government had created to make crop payments to the farmers were also unconstitutional. The Supreme Court allowed the AAA to continue to exist, but without the money for payments or the ability to regulate the amount of a crop produced, its main function had been destroyed. The peoples' reaction to this was one of shock. While this program had its detractors, no one could doubt that it had been successful in increasing farm prices and supporting the farms.⁸

⁶Ibid., 115-121.

⁷Schlesinger, *The New Deal in Action*, 21-22.

⁸Ibid., 23.

Roosevelt was unable to act immediately upon his growing animosity toward the Court. He had to turn his attention to winning the presidential election of 1936. Roosevelt was at the height of his popularity. When the results were counted, he had won an unprecedented majority of the electoral votes, carrying every state except Maine and Vermont. With this victory, Roosevelt brought the Democratic party to its most powerful majority in recent memory. Both houses of Congress were controlled by the Democratic party and could be counted on to vote the way the President wanted. The only branch of the government that remained outside Roosevelt's grasp was the Judiciary, which continued to frustrate him at every opportunity.⁹

With his overwhelming victory in the presidential elections, Roosevelt became convinced that any action he took would have the blessing of the people. With the obvious support he had, Roosevelt felt that he had been given a mandate from the people to ensure the security of the nation's well-being. To the President, this meant that any and all actions that would ensure swift and permanent solutions to the problems the nation faced would be implemented.¹⁰ With the support of the nation, Roosevelt announced his plans to overhaul the federal judiciary. Despite his popularity, this proposal immediately brought about a rash of criticism, as well as a split in the Democratic Party. Some felt that the judicial branch should not be tampered with, and they were willing to fight the President to ensure the future security of the nation.

Roosevelt's plan to change the Supreme Court was simple and straightforward. When his proposed legislation passed, he would add another six justices to the Court. These would eventually replace the six on the bench currently over seventy years of age. As old justices retired, the appointees would take over until the number of justices was once again nine. With this proposal, the President felt he could finally get the Court on his side by appointing justices that would be loyal only to him. His attack on the older justices was based on his belief that people over seventy could not perform all the duties the office required. The new, younger justices were necessary to keep the Court moving smoothly, as well as bringing it into the future.¹¹

⁹William E. Leuchentburg, "Franklin D. Roosevelt's Supreme Court 'Packing Plan,'" in *Essays on the New Deal*, ed. Harold M. Hollingsworth and William F. Holmes (Austin: University of Texas Press, 1969), 69.

¹⁰Leonard Baker, *Back to Back: The Duel Between FDR and the Supreme Court* (New York: Macmillan, 1967), 4.

¹¹*Ibid.*, 8-9.

This court packing plan was not the only possible solution toward the problem that Roosevelt was having with the Supreme Court. Before Roosevelt announced this plan, he had considered several other solutions but abandoned them as too time consuming. The most talked-about solution was a constitutional amendment that would have allowed Congress to overrule split decisions. This would have been possible with a two thirds vote, similar to the way that Congress could override a presidential veto. While these plans may have been accepted by the public as emergency measures, the impatient President felt they would take too long. He was not sure that he could force a constitutional amendment the way he could force a bill through Congress. He was unwilling to take that chance. More importantly, Roosevelt felt that the Constitution did not need to be changed. The Court was the only entity in need of change. Even with an amendment, the actions of Congress could be destroyed by a hostile Court.¹²

The court packing proposal came as a shock to those who were the president's greatest supporters. While everyone agreed that the Court was in need of some reform, most within Roosevelt's circle believed that trying to enlarge the Supreme Court was an overly drastic measure. By attempting to pack the Court, the President would run the risk of looking like a tyrant or a bully. Most believed that the balance of power had to be maintained, and Roosevelt's plan would tip the balance too far in favor of the executive branch. Even if the Court did not become subservient to the president, the idea that the president could change the Court at will would have been established. Most of the people in Roosevelt's circle of friends were shocked by his radical plan. They had never seen this radical side of Roosevelt before this time. It made many wonder if his overwhelming victory had given him a sense of invulnerability in the face of what would surely be great opposition.¹³

While Roosevelt had some loyal supporters, he soon found himself opposed by those he had considered to be his allies. The most surprising of these was the split between the President and Senator Burton K. Wheeler of Montana. Wheeler disliked the secrecy in which the bill had been created. No one but Roosevelt's attorney general had any idea that the President was planning such a drastic measure. Wheeler was the first significant Democrat to break with Roosevelt over this plan. Wheeler feared

¹²Leuchentburg, "Roosevelt's Supreme Court 'Packing Plan,'" 73-74.

¹³Kenneth S. Davis, *Into the Storm, 1937-1940: A History* (New York; Macmillian, 1967), 55.

this scheme would put too much power in the hands of the President, destroying the Constitution in the process. To Wheeler, the President's plan was an attempt to demolish the Supreme Court with an arrogant and unconstitutional attack. The President's plan would destroy the independence of the judiciary and upset the balance of powers the founders of the Constitution had established. Wheeler feared that if this plan were allowed, Roosevelt would continue to gain power until the U.S. became a dictatorship, and it quickly became his mission to oppose the court packing plan.¹⁴

After Wheeler split publicly with the President, Roosevelt tried to get him back into his corner, but Wheeler was intent on opposing the President's plan. Charley Michelson, publicity director of the Democratic National Committee, tried to persuade Wheeler to support the President. Wheeler bluntly told him to try to get "some of those weak-kneed boys and go after them because he can't do anything with me."¹⁵ While Wheeler did not agree with most of the Court's recent decisions, he was unwilling to allow the President to have his way with the court, and he would not back down.

The President's primary argument for restructuring the Supreme Court rested on the age of the majority of the justices. He stated that with greater age came less stamina, and the system bogged down as the justices grew unable to perform their duties. Roosevelt's attempt to gain control of the Court was carefully hidden amidst the idea of placing younger justices on the bench. The main problem was that while this "new blood" would assume the bench, the bill did not eliminate the older justices. The problem with this idea was that it relied entirely upon the old judges. If a judge retired, the President could appoint whomever he wanted. The only way that another judge would be added to the Court was if one of the current justices refused to retire. If a judge would not retire, the legislation gave the president the right to appoint another judge to the Court. The new judge would not take over for the one already on the bench, he would simply be adding his opinion to the decisions. This would not increase the efficiency of the Court; it would make the Court's decisions even more divided as the new judge's opinion countered the decision of the old judge.¹⁶

¹⁴Marian C. McKenna, "Prelude to Tyranny: Wheeler, F.D.R., and the 1937 Court Fight," *Pacific Historical Review* 62 (November 1993), 414-415.

¹⁵Burton K. Wheeler and Paul F. Heaty, *Yankee From the West* (Garden City, NY: Doubleday, 1962), 321-22.

¹⁶Senate, Committee on the Judiciary, *Reorganization of the Federal Judiciary*, 75th Cong., 1st ses., 1937, Senate Report 711, 4.

While it was true that most of the justices on the Supreme Court were over seventy, this did not mean they were incompetent nor out of touch with the needs of the nation. Senate Judiciary Committee investigations revealed that not only were the judges over seventy competent, they were often the judges who were the most effective. This created serious doubts to the President's claim that the older judges received fewer cases and in many cases were in need of replacement.¹⁷

Roosevelt may have wanted to eliminate the older justices on the Supreme Court, but, in attempting to do this, he would be taking away some of his strongest supporters. Three of these justices, most notably Louis Brandeis, age seventy-six, were staunch liberals who had voted in favor of the majority of New Deal legislation that had come before them. In reality, the President's mission was to eliminate the four conservative justices that were blocking all of his attempts at reform. Roosevelt was soon forced to abandon this line of attack. He could find no real evidence of incompetence. More to the point, many of the President's backers in the Democratic Party were over seventy, and they did not appreciate the notion that anyone over seventy was incompetent.¹⁸

The main problem with the court packing bill was that it did not accomplish the goal of making the judiciary more efficient and modern. The bill's plan, as originally stated, was meant to increase the speed with which cases were read, as well as the number of cases, and to give the courts a more modern outlook. Roosevelt felt that this was necessary in a time when the decisions of the Court affected a nation already reeling from the effects of the depression. These objectives would have been laudable if the bill presented to Congress had done anything to actually give the judicial branch these powers. As the bill was stated, the only thing that it could do in the case of a judge that had been on the bench too long was to place a new judge on the bench beside the one that already existed. In many instances, the district that the old judge lived in did not have the backlog of cases that would warrant creating a new position. The real reason to make this law was to deal with the age of the original judge, and most agreed that this was not sufficient reason to create a new judgeship. The bill's solution to this problem was the idea of a roving judge that would go where there was a backlog of cases. It was customary for a judge to live in his district so that he would know the area. With a roving judge this would be

¹⁷Ibid., 4.

¹⁸Leuchentburg, "Roosevelt's Supreme Court 'Packing Plan,'" 85-86. .

impossible. This was a dangerous idea: a judge could be moved and put in place to deliver verdicts that would favor the party in power over others. The idea of a roving judge was hazardous, not only for the judiciary, but for the nation as a whole.¹⁹

The biggest problem was that Roosevelt's plan did not accomplish the goal of revitalizing the Court because it did not remove the old justices. It did not give a base for retirement, and it did not eliminate the problem of old judges. The bill that Roosevelt endorsed said nothing about the retirement of judges, except that they should retire after they were seventy and had served for ten years. This did not mean that the President would not be able to appoint older judges. It just meant that the judges could serve for ten years and then retire or have another judge come to the Court. There is also the fact that the amount of new blood allowed into the Supreme Court was limited. If there were fifteen justices on the Court, as the bill allowed, the President could not put any more judges on the bench without more legislative action.²⁰

The problem with the court packing bill as stated was that it would have given the Congress and the President more power over the Supreme Court. If the justices did not find in favor of popular legislation, it would be possible for the President to appoint a new justice that might change the decision. If the court packing plan passed then the Supreme Court, indeed the entire judicial branch of the government, was open to tampering whenever a conflict arose. This would have set a dangerous precedent. It would have limited the freedom of the judiciary branch guaranteed in the Constitution. The founders of the Constitution realized that there had to be a section of the government that would not be bound up in the petty disputes of politicians.²¹

The method of court reform that Roosevelt attempted was doomed almost from the start. What the bill failed to anticipate was the retirement of justices after the new justices had been appointed. If there was a full court of fifteen justices, then the President could not appoint another even if they all became too old. If there were fifteen justices and one retired, the Court would be left with fourteen justices, making a tie possible. If the Court was put in a position where a tie was possible, then it would become completely

¹⁹Senate, *Reorganization of the Federal Judiciary*, 4-5.

²⁰*Ibid.*, 7.

²¹Alfred Haines Cope and Fred Krinsky, eds., *Franklin D. Roosevelt and the Supreme Court* (Boston: Heath, 1952), 76-77.

ineffective. The power of the Supreme Court would be destroyed and any good it would have done would cease to exist. The whole point of being able to appoint new judges would be lost as the Court turned inward and the justices, out of frustration, fought among themselves, in the process becoming dependent on the retirement of one or two judges.²²

While the President was confident that his plan would pass, opposition arose immediately after he announced his intentions to change the judicial system. While many in the Democratic Party would follow Roosevelt's lead, he remained concerned about the reaction of the liberal Supreme Court justices when they learned of his plan. It goes without question that one of the biggest drawbacks to his plan was the opposition of the liberal justices in the Court. Before the President formally announced his plan, he wanted to warn the more liberal justices, specifically Louis Brandeis, that this plan was not meant as an attack on them. When Brandeis heard Roosevelt's proposal, his reaction was similar to that of many others in the nation. He stated that he opposed the plan and that he would do what he could to ensure that it failed, because it was a serious blunder. While the popularity of the President made most believe that the bill would pass, the reaction of Brandeis, one of the most liberal justices, was a severe blow to the legitimacy of the court packing plan.²³

Roosevelt's fight soon extended past the judicial branch. Members of his own party felt that he was in error and soon opposed him. There were those who believed that the President was attempting to overthrow the American system of government, and they would do anything to see that this did not happen. Some of the people who became Roosevelt's opponents surprised even him. Along with the disastrous defection of Montana Senator Burton K. Wheeler, many other influential people soon found reason to oppose the President's plan. Previously strong supporters such as the powerful liberal Senator George Norris of Nebraska and Senator Hatton Sumners of Texas, chairman of the Senate Judiciary Committee, turned against Roosevelt and began to campaign against his program. Sumners's change of heart, in particular, should have warned the President that his plan would not have smooth sailing. Sumners's position on the Senate Judiciary Committee assured that as long as he was against the plan, it was unlikely to get a favorable review.²⁴

²²Senate, *Reorganization of the Federal Judiciary*, 10-11.

²³Lash, *New Look at the New Deal*, 295.

²⁴Davis, *Into the Storm, 1937-1940*, 65.

Those who stayed loyal to the President through the end were those who were dependent on Roosevelt and the few who believed that he was truly doing the right thing. Many members of the House and Senate that were set to vote on this bill had been elected by running on the President's ticket that past November. They had chosen to run with Roosevelt, and they often had received his endorsement for the election. While many of these people sided with Roosevelt out of party loyalty, many of them had serious doubts about the legality and the ethics of the proposed bill. Many of the freshmen senators and representatives felt that they had no choice but to go along with the President's plan. If they did not, they could lose Roosevelt's patronage and basically kill their political career. These people often looked for a way to oppose the bill, but most were unwilling to risk the political backlash if they failed. While this may have shown their loyalty to the President, it did not say much about their faith in the legislation. Other members of the Democratic party were bullied by Roosevelt, or by Majority Leader Joe Robinson, into voting for the plan. It was not until widespread animosity toward the bill grew that most felt that it was safe to go against the President.²⁵

This should have been the time when Roosevelt was at his greatest power. Instead, he found himself locked in a bitter struggle, with his power and prestige being called into question by the people who had just elected him. Roosevelt's assumption that the people would go along with anything was quickly proven faulty as many came to the defense of the Supreme Court. Almost immediately after the President announced his intentions, newspapers and magazines around the country began to print editorials that blasted the President for attempting to alter the federal judiciary. Roosevelt tried to discredit his opponents in the press by saying that they were all conservatives. The truth was that the more people learned about the bill, the more they disliked it. Through editorials and letters to the editor, some of the opinions of the American people were shown. Editorials printed at this time called the court packing plan an attempt to make a "paper shell of the American Constitution."²⁶ As opposition mounted, the decision of the Senate Judiciary Committee would decide the fate of the bill.

When the Senate Judiciary Committee's decision against the court packing plan came out, it was obvious that the Supreme Court had a hand in the decision. The committee had decided that the bill did not meet its

²⁵Leuchentburg, "Roosevelt's Supreme Court 'Packing Plan,'" 88-89.

²⁶Cope and Krinsky, *Roosevelt and the Supreme Court*, 27.

stated objective and was therefore unnecessary. The most persuasive argument against the bill came from the Supreme Court itself. While the justices had decided that they could not ethically defend themselves to the public, they did feel that it was necessary to state their opinions and arguments against the bill. These arguments came through a letter that Chief Justice Charles Evans Hughes had written for the Judiciary Committee's hearings. The letter was read by Senator Wheeler, who happened to be a good friend of Justice Brandeis. In it, Hughes countered every argument that the President had made for the bill. He stated that the court had kept up with its business and that it had not allowed any case to linger that deserved to be heard. As to the number of justices on the Court, he stated:

An increase in the number of Justices of the Supreme Court . . . would not promote the efficiency of the Court. It is believed that it would impair that efficiency so long as the Court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to convince and to decide. The present number of justices is thought to be large enough so far as the prompt, adequate, and efficient conduct of work of the Court is concerned.²⁷

With this letter Hughes managed to counter every argument that the President had raised for his bill. The logic behind the argument Hughes made was nearly irrefutable; the Court had been doing its job. It just had not been doing its job in the way that Roosevelt had wanted it to function.

Even with the Senate committee's decision, Chief Justice Hughes's convincing argument, and the majority of the public opinion against the court packing bill, Roosevelt refused to abandon the legislation. He still wielded great influence in Congress and believed that the bill could still be passed. It is here that Roosevelt let his emotional ties to the bill and its mission get in the way of his logic. He had several chances to compromise. He refused any and all attempts to alter his bill. The Court damaged his New Deal policies and, as far as he could see, it showed no signs of changing; therefore, it had to be altered. With the support of Majority Leader Joe Robinson, the dependent freshmen senators, and the New Deal loyalists,

²⁷Charles Evans Hughes, *The Autobiographical Notes of Charles Evans Hughes*, ed. David J. Daneiski and Joseph S. Tulchin (Cambridge, Mass.: Harvard University Press, 1973), 305-06.

the President believed he could still force his bill through the Senate. Subsequent events rapidly proved him wrong.²⁸

The first key to Roosevelt's strategy to go wrong was the sudden reversal of the Court in its decisions on New Deal legislation. Previously the Court had rejected almost every important piece of legislation that came before it. Suddenly, it was reversing itself for no apparent reason. Some speculated this was in reaction to the President's actions, but the real reason was the unexpected switch of Justice Roberts. Previously, Roberts had sided with the more conservative members of the Court. Now he switched sides, voting with the liberal justices on the legislation presented to them. Roberts was most likely reacting to the court packing threat when he made his change in policy. Because of this, it is seen as a clear attempt to destroy the President's plan. It began on March 29, 1937, when Roberts decided in favor of a minimum wage bill from the state of Washington. This took everyone off guard, including the President, as this bill was similar to one presented by New York that had been struck down by the Court. The decision came as a complete surprise--no one had expected the Court to change its opinion. This decision was followed by two other equally shocking changes in the Court's established opinions. The Court decided in favor of the National Labor Relations Act and the new Social Security law in narrow majorities made possible only by Robert's defection to the other side. With these judgments, the Court changed national policy and began to allow the state and federal government to have more power in governing the nation.²⁹

Another blow to Roosevelt's plan occurred when Justice Van Devanter suddenly announced his intention to retire. Previously, Roosevelt had been angered by his inability to appoint a judge to the Court, and now one was being handed to him. Since Van Devanter was one of the most conservative justices on the Supreme Court, his retirement affected the entire makeup of the Court's philosophy. This retirement may have pleased Roosevelt on one level, but it created serious problems for his court plan. The greatest reason for the creation of the court packing scheme had just been eliminated. With the ability to appoint a justice to the Supreme Court, Roosevelt could be sure that his views would have more impact.³⁰

²⁸Leuchtenburg, "Roosevelt's Supreme Court 'Packing Plan,'" 91-93.

²⁹Ibid., 94-96.

³⁰Schlesinger, *The New Deal in Action*, 47.

While the court packing legislation was in jeopardy, the President believed that powerful Majority Leader Joe Robinson could force the bill through the Senate. The truth about the President's beliefs will never be known, for on July 14, just a few days before the bill was going to be voted on, Senator Robinson died. Robinson had been the driving force for Roosevelt in the Senate. He had kept order and loyalty to the President despite all of the criticism. Without Robinson to keep the Democrats together, those with doubts about the bill found more freedom to express their real views. Robinson's sudden death threw the balance of power to the opposition as many senators switched sides. The bill went down in defeat.³¹

With all of the rapid changes, it seemed that this ill-fated bill would finally be put to rest, but Roosevelt was unwilling to give up. Roosevelt attempted to get several compromise versions of the bill passed, but the opposition resisted all of these attempts. When the bill was voted on, the original reason for its existence, altering the Supreme Court, had been removed. By this time, the bill was so unpopular that this meaningless version went down in flames, being defeated seventy to twenty in the Senate.³²

From the very beginning, the court packing bill had been in trouble and the events of the last few months before its vote proved how unnecessary the bill really was. The slightest change in the position of the Court had almost completely discredited the President's assertion that the Court needed to be reformed. While the Court had not voted the way the President wanted, its members had decided as they saw fit. The testimony of the justices and the statistics behind their work proved that they were doing their jobs and keeping to a proper schedule. The age question had been answered early on and was generally the weakest argument of the President's bill. The older judges worked as well as, if not better than, the younger judges. The fact that the Court was the only branch of the government not voting his way was not enough of a reason for Roosevelt to attempt to change it.

The fact that Roosevelt even attempted such a scheme suggests the tremendous political influence he commanded as he began his second term of office. In Roosevelt's assessment of this action, he had no doubt that he would be victorious. Despite his popularity, Roosevelt discovered that he was not invincible, as the opposition grew in strength. His stubbornness might have been laudable in a different situation, but attempting to subvert

³¹Wheeler and Healy, *Yankee from the West*, 338.

³²*Ibid.*, 339.

the Constitution went beyond a political argument. Once all was said and done, the opposition had the power to defeat Roosevelt's court packing bill and hand the President his greatest defeat at the height of his popularity.

John Lowell Rydjord Award

**The Philadelphia Ladies' Association
and Women's Collective Political Participation
in the American Revolution**

Susan deWees

Women of the late colonial period in America regularly engaged in what might be termed "prepolitical" activities, and the Revolutionary War presented occasions for extending those. The relatively autonomous status of women within religious groups such as the Quakers and some Baptist sects, and the use of petition as a means of legal redress had previously marked the boundaries of the political world for women. As the war neared, women employed other, more public modes of expression imbued with political meaning and implications, expression by which they demonstrated subscription to the ideology of the Revolution, even while denied access to its political privileges.¹

The subtlety of the process perhaps predisposes to its being overlooked by the observer accustomed to equating political participation with suffrage. The Philadelphia Ladies' Association is one example of this phenomenon: although it bestowed female benevolence on Continental soldiers, its rhetoric clearly reveals political intentions. By politicizing activities traditionally relegated to the domestic sphere, this group offered female patriots an opportunity to circulate in a modestly larger political arena. Expanded participation of women, combined with changes in intellectual thought, revised the ideology pertaining to women's roles during the early Republic.

¹Paula Baker, "The Domestication of Politics: Women and American Political Society, 1780-1920," *American Historical Review* 89 (June, 1984), 624; George C. Chalou, "Women in the American Revolution: Vignettes or Profiles?," in *Clio Was a Woman: Studies in the History of American Women*, ed. Mabel Deutch and Virginia C. Purdy (Washington, D.C.: Howard University Press, 1980), 227.

The ultimate effects of such participation on gendered history are, however, debatable.

Although women's politicized demonstrations, such as boycotts of British imports and public displays of textile production intended to supplant British cloth, antedated those of the Philadelphia Ladies' Association by several years, the Association was the first patriotic group organized and managed exclusively by women. Congregational ministers had sponsored spinning bees by "daughters of Liberty" in 1769 and, by widely publishing them, had promoted a form of political resistance based on sacrifice, self-discipline, and personal piety. The fifty-one women who signed the Nonimportation Association Resolves which circulated in seaport towns in 1774 did so within a framework such as that advocated by political pamphleteer Christopher Gadsden, as wives strengthening resistance via their household economies. While the potential impact of such moves on the eve of the Revolution was substantial--annual imports of British cloth alone amounted to £800,000--and while those acts politicized the household economy and initiated a political language that explicitly included women, women's inclusion was nevertheless shaped by relationships to males.² The attention given the boycotts, plus the fact that the American Revolution was a civil war, in which citizens were called upon to manifest their allegiances, virtually ensured that women would step from their traditional domain into the public world and into making political decisions. The Philadelphia Ladies' Association made that step.

Prominent women organized the group in 1780 as a response to adverse military and social developments. The Continental Army was ill-provisioned and demoralized as a result of defeats and of the economic disaster imposed by the conflict; civilians suffered equally from shortages and inflation. Worse, as noted by Mercy Otis Warren, who drew on her family's political connections and her own keen observations to write one of the first histories of the war, a general "declension of morals was equally rapid with the depreciation of [the] currency." Philadelphia women had consorted scandalously with the British during the occupation of the city eighteen months previously. The final impetus for action came with the fall of Charleston, South Carolina, on May 12. It was not by chance that the

²Christopher Gadsden, *The Writings of Christopher Gadsden*, ed. Robert Walsh (Columbia: University of South Carolina Press, 1966), 83; James A. Henretta, "The War for Independence and American Economic Development," in *The Economy of Early America: The Revolutionary Period, 1763-1790*, ed. Ronald Hoffman, et al (Charlottesville: University Press of Virginia, 1988), 58.

Association arose in Philadelphia, a city with a long tradition of both privatism and political activism: the Continental Congress sat there; during the war, the populace split not along lines of class or occupation, but of politics.³ The leaders of the Association belonged to Pennsylvania's foremost political families: Esther deBerdt Reed, wife of the president of Pennsylvania; Sarah Franklin Bache; Mary Morris; Sarah Armitage Keane; Julia Stockton Rush. They were acutely aware that the war effort was faltering, among not just the army but the citizenry as well.

The women carefully crafted a strategy to demonstrate their support of the Continental Army, publishing it as "The Sentiments of an American Woman" in the *Pennsylvania Gazette* on June 21, 1780. An appendix detailed their systematic plan of action. The appeal, likely written by Reed, exhorted all women to contribute funds for the army, to compensate for past indiscretions or inaction, and to show their patriotism. As outlined in the published plans, the members, who eventually numbered 1600, split the city into districts and, in pairs, canvassed door-to-door for cash contributions. They collected \$300,000 in depreciated currency, the equivalent of about \$7500 in scarce specie. Reed's son later proudly noted that in the same year, Philadelphia merchants opened a bank with a sum only slightly larger. On July 4, Reed notified General George Washington of their work, conveying the desire to give each Continental soldier \$2 in specie as an expression of the Association's sentiments and support. Washington demurred, citing problems a gift of specie might cause his men, who were paid in nearly valueless scrip and prone to drinking away their pay, and suggested that the women deposit their money in the national bank, where the army could withdraw it as needed. Politely insistent on giving a tangible offering uniquely their own and determined to contribute something beyond what the men had a right to expect from their states or Congress, the Association acceded to Washington's alternate suggestion and settled on linen shirts.⁴ These they sewed themselves, tagging each with the name of its maker. When Reed died of dysentery in September, Bache took charge and delivered 2200 shirts to the Continental Army in December of 1780.

³Mercy Otis Warren, *History of the Rise, Progress and Termination of the American Revolution* (1805; reprint, New York: AMS, 1970), 238; Sam Bass Warner, Jr., *The Private City: Philadelphia in Three Periods of its Growth* (Philadelphia: University of Pennsylvania Press, 1987), 23.

⁴William B. Reed, *The Life of Esther deBerdt, Afterwards Esther Reed* (1853; reprint, Philadelphia: Microsurance, 1968), 317.

The nature of this gift, on first consideration, might imply that the women's aims were benevolent. Reed's broadside, for instance, referred twice to "relief" for the soldiery, and her letter of July 4, 1780, to Washington referred to the Association's "esteem and gratitude." Elizabeth Ellet, the mid-nineteenth century biographer of women of the Revolutionary War, documented their activism as "charity in its genuine form, by which the Association, "seeing the necessity that asked interposition, relieved it." Philadelphia's Quaker women, furthermore, had a tradition of benevolence extending back several decades, and on the heels of the war female charitable societies supporting a variety of causes sprang into existence.⁵ In this context, then, the Association might be construed as a benevolent organization.

Examination of the women's rhetoric, both individual and collective, private and public, suggests otherwise, that their primary goal was political. Writing to her brother in September of 1779, Reed reported that "every part of our life is so entwined with politics." In "The Sentiments of an American Woman," she invoked examples of Biblical and classical heroines, as well as that of Joan of Arc, who helped deliver France from the British, those whose "odious yoke we have just shaken off; and whom it is necessary that we drive from this continent." Anticipating the need to deflect criticism of the women's unprecedented actions, Reed asserted that a good citizen would "applaud our efforts." In a similarly bold stroke, she associated her compatriots, "born for liberty, disdaining to bear the irons of a tyrannic government," with female rulers who had "extended the empire of liberty." One anonymous canvasser valued the symbolic significance of her own efforts--she believed the subscription would "produce the happy effect of destroying intestine discords, even to the very last seeds." Such

⁵Esther Reed's letter to Washington found in Reed, *Life of Esther deBerdt*, 318; Elizabeth F. Ellet, *The Women of the American Revolution* (1850; reprint, New York: Haskell, 1969), 53. See Sydney V. James, *A People Among Peoples: Quaker Benevolence in Eighteenth-Century America* (Cambridge: Harvard University Press, 1963) for a history of that sect's charity. Lori D. Ginzberg's *Women and the Work of Benevolence: Morality, Politics, and Class in the Nineteenth-Century United States* (New Haven, CT: Yale University Press, 1990) is a landmark theoretical work on the evolution of women's benevolent societies from the 1790s through the end of the following century.

expressions came from traditions of both Protestant and classical republican rhetoric familiar to many of the women to whom she appealed.⁶

Some observers approved of the women's ideology and behavior; others did not. The broadside was widely reprinted. The relatively liberal physician Benjamin Rush, whose wife belonged to the Association, ebulliently proclaimed that "the Women of America have at last become principals in the Glorious American controversy." Women in Maryland, New Jersey, Virginia, and Rhode Island emulated the endeavor at the urging of the Philadelphia organization, although, due to different economic and military circumstances, they achieved less munificent results. The laudatory editor of the *Pennsylvania Packet* predicted that "the women will reinspire the war; and ensure, finally, victory and peace," and announced that "the women of every part of the globe are under obligations to those of America, for having shown that females are capable of the highest political virtue."⁷ This praise in particular demonstrates how the intentions and implications of the group's activities were then interpreted: in classical and early modern republican terminology, political 'virtue' referred not to morality but to (implicitly male) civic spirit or action. Mercy Otis Warren, however, omitted mention of the Association in her three-volume history of the war, and Anna Rawle, a Quaker with a loyalist stepfather, criticized its actions as "importunate." Washington deflected the women's acts into the domestic sphere by granting them "an equal place with any, who have preceded them in the walk of female patriotism. It embellishes the American character with a new trait;

⁶Letter from Reed to her brother found in Reed, *Esther deBerdt*, 297; "The Sentiments of an American Woman," *Pennsylvania Gazette*, June 21, 1780 (reprint, Philadelphia: Microsurance, 1968), 307; anonymous woman quoted in Mary Beth Norton, "The Philadelphia Ladies' Association," *American Heritage* 31 (April/May, 1980), 104. Laurel Thatcher Ulrich is one of the few historians to address the impact of religious belief on eighteenth-century women's public discourse; see "Daughters of Liberty: Religious Women in Revolutionary New England," in *Women in the Age of the American Revolution*, ed. Ronald Hoffman and Peter Albert (Charlottesville: University Press of Virginia, 1989).

⁷Benjamin Rush, *Letters of Benjamin Rush, Volume 1, 1761-1792*, ed. L. H. Butterfield (Princeton, N.J.: Princeton University Press, 1951), 253; editor of the *Pennsylvania Packet* quoted in Norton, "The Philadelphia Ladies' Association," 104-5. For discussion of semantics, particularly the use of the term 'virtue' and its transformation throughout the late colonial and early federal period, see Ruth H. Bloch, "The Gendered Meanings of Virtue in Revolutionary America," *Signs* 13 (autumn 1987) and Robert E. Shalhope, "Republicanism and Early American Historiography," *William and Mary-Quarterly* 39 (April, 1982).

by proving that the love of country is blended with those softer domestic virtues, which have always been allowed to be more peculiarly [their] own."⁸ Contemporary interpretations thus differed widely.

Historical interpretations of the significance of women's Revolutionary roles differ substantially as well. Linda Kerber regards the Philadelphia Ladies' Association as the earliest extended American attempt to position women in the larger political community. Using active patriotism as a means of bringing politics into the domestic circle, the organization devised ways to make politics relevant to conditions of daily living. The women's benevolence and reform associations which grew out of the model of the Philadelphia Ladies' Association represent for Kerber a significant stage in women's political education: they provided a milieu for female collective behavior and enlarged women's political horizons, if only in a limited fashion. This theoretical position places women's abolitionist petitions as "lineal descendants" of Reed's broadside.⁹ Mary Beth Norton discerns in the Revolutionary era the initiation in America of public dialogue on the subject of women and their proper role; their war efforts discredited the notion that women had no connection to the public sphere, and their "low level" political participation during the war helped to increase women's postwar autonomy. Joan Gundersen contends that women's roles were restructured by the Revolutionary generation, although not necessarily in a positive way, nor for all classes and races. Trends not directly attributable to the war (such as increased literacy, changes in attitudes toward love and marriage, and religious movements) altered expectations for and about women. Revolutionary rhetoric merely highlighted their dependence.¹⁰ As memories of the war faded, so did images of women's public wartime competencies. Anne

⁸George Washington, *The Writings of George Washington*, vol VII, ed. Jared Sparks (Boston: Russell, Odiome, & Metcalf, 1835), 409; Anna Rawle quoted in Linda K. Kerber, "The Republican Mother: Women and the Enlightenment--An American Perspective," *American Quarterly* 28 (summer 1976), 199.

⁹Linda K. Kerber, *Toward an Intellectual History of Women* (Chapel Hill: University of North Carolina Press, 1997), 91; idem, *Women of the Republic: Intellect and Ideology in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1980), 110.

¹⁰Mary Beth Norton, "The Evolution of White Women's Experience in Early America," *American Historical Review* 89 (June, 1984), 615-16; idem, *Liberty's Daughters: The Revolutionary Experience of American Women, 1750-1800* (Boston: Little, Brown, 1980), passim; Joan R. Gundersen, *To Be Useful to the World: Women in Revolutionary America, 1740-1790* (New York: Twayne, 1996), 148-68.

Boylan and Nancy Cott ascribe little progressive effect to women's societies of the late eighteenth and early nineteenth centuries, in that such groups reinforced a secondary status on the basis of domestic or religious roles. Boylan observes the holdover of earlier "deferential modes" of politics in benevolent societies.¹¹ James Henretta analyzes the significant contribution of women during and after the war as economic, in the form of expanded production from the farm and workshop and a broadened scope of work. Finally, Joan Hoff Wilson finds no benefits accruing to American women from the Revolution as, in her assessment, women were incapable of informed participation. She argues that the members of the Philadelphia Ladies' Association did not understand their overtly political activities and, further, that the different experiential level of women, plus the intellectually and psychologically limiting impact on women of the Great Awakening and the Enlightenment, made it impossible for even the best educated females to understand the political intent or principles behind the rhetoric of the Revolutionary Era.¹² Historical interpretation of this issue clearly runs a very broad gamut, with attainment of no theoretic consensus.

Regardless of the disparate theoretical interpretations of the impact of women's wartime politicization, it is clear that the Revolution engendered a change in roles. The focus on the rights and responsibilities of (male) citizens highlighted female dependence. Conceptions about gender difference in social roles underlay some of the most basic premises of the Revolution; modified by earlier intellectual developments and by the experiences of the war, including the Philadelphia Ladies' Association's model of political action by sacrifice, those conceptions shaped ideological changes in the early Republic. Essential transformations occurred: the association of women with nature and men with culture was reversed; feminine morality was given a political significance it previously lacked; and women were assigned the production and maintenance of domestic morality

¹¹Anne M. Boylan, "Women in Groups: An Analysis of Women's Benevolent Organizations in New York and Boston, 1797-1840," *Journal of American History* 71 (December, 1984), 498-502; Nancy F. Cott, *The Bonds of Womanhood: Woman's Sphere in New England, 1780-1835* (New Haven, CT: Yale University Press, 1977), passim; Anne M. Boylan, "Women and Politics in the Era before Seneca Falls," *Journal of the Early Republic* 10 (fall 1990), 363-82.

¹²Henretta, "American Economic Development," 72-73; Joan Hoff Wilson, "The Illusion of Change: Women and the American Revolution," in *The American Revolution: Explorations in the History of American Radicalism*, ed. Alfred P. Young (DeKalb: Northern Illinois University Press, 1976), 387, 419-21.

and civic virtue.¹³ The resulting synthesis of domestic and private with political and public roles became the ideological basis of women's participation in the polity for decades--in some instances, into the twentieth century.¹⁴

The Revolutionary conflict marked a turning point of sorts for women generally. It offered the chance to expand extremely limited opportunities for political participation, if only for the duration of the war, when traditional patterns of life were disrupted. Concepts of legal equality or suffrage were untenable, and evidence does not suggest that such concepts circulated among American women. Revolutionary rhetoric, in fact, spotlighted and reinforced their dependent status. The war did prompt some women, however, to seek an independent voice and relationship to the polity, and the Philadelphia Ladies' Association is an example of this. Located in perhaps the most highly politically charged city in the nation, organized by women with acute awareness and knowledge of political process, the Association was the first instance of collective political activism exclusively by women. Employing rhetoric that came from Protestant and classical republican traditions, its members shaped for themselves a new, if temporary, public role. If that role was based on sacrifice, rather than on concepts of citizenship or rights, it nevertheless served the times. Contemporary observers divided opinion over the propriety and place of such activism. Historic interpretation, additionally, is split over the lasting consequences of the ideology espoused by the Association, consequences viewed variously from almost totally positive to openly detrimental to the status of women. It is clear, however, that the American Revolution helped force discourse on women's role. The exigencies of the war and its attendant rhetoric produced a new model which conflated traditional domesticity with private and public virtue. This model adapted to the needs of the young Republic but left women with virtually no new rights. It would be left to their granddaughters, and to those women's granddaughters in turn, to define and pursue the more nearly equal status at which the Revolution had hinted.

¹³Kerber, "Republican Mother," 201; Bloch, "Gendered Meanings of Virtue," 39, 46-58.

¹⁴Kerber, "The Limits of Politicization: American Women and the American Revolution," in *The American and European Revolutions, 1776-1848: Sociopolitical and Ideological Aspects*, ed. Jaroslaw Pelenski (Iowa City: University of Iowa Press, 1980), 71.

Graduate Non-seminar Paper Award

**The Kansas Governor's Commission
on the Status of Women, 1968-1970**

Julie Courtwright

The feminist movement in the United States began with a refusal by women to allow their traditional secondary status to remain acceptable. Eleanor Roosevelt, First Lady of the United States, once admonished that "no one can make you feel inferior without your consent."¹ In most cultures around the world, including the United States, women have consented to inferiority throughout much of their history. But no longer. The women's rights movement has led to "enormous and mundane, subtle and not-so-subtle, delightful, painful, immediate, far-reaching, paradoxical, inexorable and probably irreversible changes in women's lives, and men's."²

These changes did not come easily. Pioneer feminists such as Lucretia Mott, Elizabeth Cady Stanton, Lucy Stone, Susan B. Anthony, and Carrie Chapman Catt, dedicated their lives to eradicating gender discrimination.³ Progress was slow and laborious but ultimately led to the triumph of the nineteenth amendment, which gave women the right to vote in 1920. These women, and others like them, "wore out their lives" picketing, protesting, marching, and spending time in jail for their cause. Yet, after the goal was obtained, the women's movement ended, leaving men in all the positions of authority.⁴

¹Lawrence J. Peter, ed., *Peter's Quotations: Ideas For Our Time* (New York: Morrow, 1977), 358.

²Betty Friedan, *The Feminine Mystique* (New York: Norton, 1983), ix.

³Constance Buel Burnett, *Five For Freedom* (New York: Greenwood, 1953), 8.

⁴William L. O'Neill, *Feminism in America: a History* (1969; reprint, New Brunswick, NJ: Transaction Publishers, 1989), xxi.

"Housewives," as one 1953 text described all women, had the right to choose lawmakers and laws but were still subjected to discrimination and relegated to the lowest paid jobs with no hope for advancement.⁵ This began to change, however, with a rebirth of the women's movement in the United States during the 1960s and early 1970s. In 1963 Betty Friedan published a stinging attack on inequality in her best-selling book entitled *The Feminine Mystique*. Three years later she helped organize and became president of the National Organization for Women (NOW), which staged the nationwide Women's Strike for Equality on August 26, 1970. The demonstration was the largest ever held in support of women's rights.

Although NOW was a significant addition to the proponents for equality, it was not the first group formed to fight for women. Fueled by the simultaneous push for African-American equal rights, the cause of women was given a boost on December 14, 1961, when President John F. Kennedy created the President's Commission on the Status of Women.⁶ This group recognized that responsibilities accompanied equal rights. Women had an obligation to make use of new opportunities, to vote and run for office, and to be educated. One challenge was to change the attitudes of the majority of men and even some women concerning the female role in society. The goal of the Commission was for women to strive for excellence in "education, family life, community participation, and employment."⁷ It was the first official group to study the issue and led to the formation of many state groups, including the Kansas Governor's Commission on the Status of Women, which was instigated on November 24, 1964.⁸ The group quickly became an influential force for women's causes in Kansas and aided in focusing attention on a subject which had, for too long, been virtually ignored.

⁵Burnett, *Five for Freedom*, 7; O'Neill, *Feminism in America*, xxi.

⁶O'Neill, *Feminism in America*, x.

⁷Governors' Commissions on the Status of Women, "Progress and Prospects: The Report of the Second National Conference" (Washington, D.C., 1965), 2-3.

⁸Governor John Anderson, Jr., "To whom it may concern," December 15, 1964, Papers of the Kansas Governor's Commission on the Status of Women (hereafter cited as KS GCSW), Box Ac. 82-8, Commission Membership File, Special Collections (hereafter cited as SC), Ablah Library (hereafter cited as AL), Wichita State University (hereafter cited as WSU), Wichita, Kansas.

The Kansas branch of the Status Commission was dedicated to the realization of the national goals and, in the words of one committee member, wanted to "obtain constructive results toward making women equal partners with men."⁹ Governor Robert B. Docking believed that women should have a more outspoken and critical role in government. Therefore, he challenged the state Commission with "investigating and making recommendations in regard to women's wages, political rights and established services involving educational counseling, training and home services."¹⁰ The group was divided into several committees which were supervised by one commission chairperson. Committees dealt with such topics as civil and political rights, education, private and state government employment, home and community, highway safety, and poverty.¹¹

Harriet Graham, chair of the Status Commission from 1968 to 1971, was involved with a variety of these issues. Graham, a Democrat from Wichita, served two terms as a state representative from 1965 to 1968.¹² She also served as clerk of the District Court in Sedgwick County for four years before being elected to the legislature.¹³ Appointed to the Commission on July 19, 1965, Graham worked as chairman of the sub-committee on state government and private employment.¹⁴ A little over two years later, on January 18, 1968, she was appointed chairman of the fifty-member Status Commission by Governor Docking.¹⁵

⁹*Wichita Eagle* clipping, "Meet Your Eagle and Beacon Writers," KS GCSW, Box Ac. 82-8, General Articles and Editorials file, SC, AL, WSU, Wichita, Kansas.

¹⁰*Ibid.*, "Graham: Leading Commission's Work."

¹¹"Committee Membership List," KS GCSW, Box Ac. 82-8, Commission Membership file, SC, AL, WSU, Wichita, Kansas.

¹²Paul R. Shanahan, ed., *Kansas Directory* (Topeka: State Printer, 1965 and 1967), 40, 38.

¹³*Wichita Beacon* clipping, "Rep. Graham to Head New State Commission On Policies for Women," January 18, 1968, KS GCSW, Box Ac. 82-8, Commission Membership file, SC, AL, WSU, Wichita, Kansas.

¹⁴Governor William H. Avery to Harriet Graham, July 19, 1965, KS GCSW, Box Ac. 82-8, Commission Membership file, SC, AL, WSU, Wichita, Kansas.

¹⁵"Rep. Graham to Head New State Commission On Policies for Women."

Under Graham's leadership the Commission dealt with a number of important issues concerning women. In 1970 they hosted a statewide conference on daycare.¹⁶ Another important issue was discrimination in jury service. Men were more frequently chosen for juries because names were selected off property tax rolls. If a woman and her husband were joint owners of a car, the man's name would be taken as a potential juror instead of his wife's. Also, a woman could be released from jury duty simply by stating that she was female.¹⁷ Protesting against discriminatory practices such as in jury selection was an important part of the Status Commission's responsibilities. Equally important was the distribution of information concerning women's rights and services available to women. The Commission conducted surveys to become aware of potential areas for action, established a public information program, and made reports available to libraries in Kansas.¹⁸ However, the issue that created the most publicity and was of greatest concern to the Commission and its chairperson was discrimination against women at work.

The need for employment reform was great. Across Kansas women were being treated unequally with men in their workplace. One example of this practice is evident from a letter received by Harriet Graham in 1966 when she was chairman of the sub-committee on employment. Although laws such as the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 had been passed by the federal government to protect women against discrimination, these laws did not encompass every employee of the state.¹⁹ Anti-discrimination laws were needed in Kansas as well. Helen M. Puffer, a longtime Cessna Aircraft employee, wrote:

As I sit here in my 4x4 stall . . . I stop and reminisce about the 29 years . . . I have worked side by side with men and have been required to produce twice the work for half the

¹⁶"Comprehensive Day Care Services for Kansas," February 6, 1970, KS GCSW, Box Ac. 82-8, Day Care Conference file, SC, AL, WSU, Wichita, Kansas.

¹⁷"Minutes of Commission Meeting, September 17, 1969," KS GCSW, Box Ac. 82-8, Commission Meeting of September 17, 1969, file, SC, AL, WSU, Wichita, Kansas.

¹⁸"Graham: Leading Commission's Work."

¹⁹U.S. Department of Labor, Employment Standards Administration, Women's Bureau, "Brief Highlights of Major Federal Laws and Order on Sex Discrimination in Employment" (February, 1977), 1-3.

money, and have been obliged to remain at the same work level while the men are advanced--some after I have shown them the way Not one woman could have been happier than I was to see the women included in the civil rights bill However, if anything the requirements of the new law have made the work equality worse than ever in this location.

Puffer went on to note a case that she was aware of in which a written protest was thrown out for lack of grounds. The woman who filed the report remained unemployed and was told she would not be employed again. Many women were too afraid of being "blackballed" from the aircraft industry to protest even the most severe forms of discrimination. When Puffer requested a federal investigation of Beech, Boeing, Cessna, and Lear because of their refusal to hire women as factory workers or inspectors, she was denied this action, and, in addition, was told that she would be fired and would never work in her area again if she chose to file a complaint. She therefore remained in her current position, "working in an office at approximately \$100 a month less money just because I am female."²⁰

The problems encountered by this one Cessna employee and countless other women workers across the state led the Governor's Commission on the Status of Women to set three goals for employment improvement. These were: 1) passage of equal pay for equal work legislation; 2) passage of a minimum wage law; and 3) elimination of sexual discrimination in employment.²¹ The Commission maintained that the need for these laws was obvious. In a survey of one governmental department in Kansas during the late 1960s, an average college-educated woman with 10.5 years of experience earned \$480 per month. An average college-educated man with 9.3 years of experience earned \$724 per month. Thus, with slightly less experience, the man earned a considerable sum more than his female co-worker. Partially as a result of this difference in wages, many female workers were struggling to

²⁰Helen M. Puffer to Harriet Graham, February 9, 1966, KS GCSW, Box Ac. 82-8, Miscellaneous Material on Equal Pay for Equal Work file, SC, AL, WSU, Wichita, Kansas.

²¹Dr. Emily Taylor to concerned Kansas women, November 7, 1969, KS GCSW, Box AC. 82-8, Miscellaneous Material on Equal Pay for Equal Work file, SC, AL, WSU, Wichita, Kansas.

maintain a decent standard of living. A minimum wage law would help alleviate this problem and should be passed, according to the Status Commission, because of the need to raise full-time men and women employees above the poverty level. In an effort to do this, all except fourteen states had already passed a minimum wage law. Similarly, all except nineteen states had legislated anti-discrimination laws. They recognized that sexual discrimination was equal to discrimination based on religion, race, or national origin.

The Commission noted that the advantages to these proposed laws were threefold. First, workers would increase their self-esteem and be able to support themselves instead of relying on welfare. Second, employers would gain respect and loyalty from employees and would have an increase in business. Third, taxpayers would have more people to "share the tax burden" and would benefit from a healthy economy.²² Lawmakers and employers, however, did not always agree with the views of the Status Commission, and considerable effort was required to turn these hopes into reality.

During Harriet Graham's tenure as Status Commission Chairperson, several bills were introduced to the Kansas legislature regarding equal pay and minimum wage. Despite the Commission's best efforts to get these bills passed, they were repeatedly struck down by committees. In August of 1968 the Status Commission passed a resolution supporting both goals and asked that the major political parties add the resolution to their platforms. This needed to be done, stated Graham, because the working women population in Kansas was growing, along with the pay gap between men and women. "Equal pay legislation offers equal protection for all," Graham wrote in a letter to the *Wichita Eagle*. "Men will not be replaced for cheap female labor." The Democratic party decided to include the resolution in their platform. The Republicans, however, refused.²³ House Bill 1330 calling for a minimum wage of

²²"Kansas Commission on the Status of Women Beliefs," KS GCSW, Box Ac. 82-8, Miscellaneous Material on Equal Pay for Equal Work file, SC, AL, WSU, Wichita, Kansas.

²³*Wichita Eagle* clipping, "Letters to the Public Forum," September 13, 1968, KS GCSW, Box Ac. 82-8, Miscellaneous Material on Equal Pay for Equal Work file, SC, AL, WSU, Wichita, Kansas.

\$1.50 and equal pay for women was killed by committee in the 1969 session.²⁴

Setbacks were common in the quest for women's rights. In a search for helpful information, Commission members and all concerned women in Kansas were urged to contact their representatives and become acquainted with his/her beliefs on various subjects. An editorial in the November 27, 1969, issue of the *Wichita Eagle* praised the efforts of women who were trying to "stir up a little enthusiasm for legislation." Twenty-five representatives had been invited to meet with a group of interested women. Only eight lawmakers actually came. Still, the event was a step forward. In the past, the editor wrote, women had not lobbied hard enough for equal pay and equal opportunities. They had been "content to sit back--not only a silent but also an almost invisible majority--and let the male legislators laugh and pass witticisms every time bills affecting women came up." This trend had to change if women were to progress to political and social freedom. Women must not ask for the attention of the legislature, but demand it.²⁵

Unfortunately, the kind of attention gained was not always what was desired. Prejudices and misconceptions about women and their role in the workplace were common. For example, in early 1970 members of the Scott City, Kansas, Business and Professional Women's Club wrote to a senator from the twenty-seventh district and asked about his feelings toward equal pay for equal work, the minimum wage law, and anti-discrimination legislation. The senator, Don Christy, replied in a letter dated January 6, 1970. Regarding equal pay, the senator agreed that this would be fine if the work was piece work, or work paid for according to the number of products turned out, and "no other factors [were] involved." Christy went on to say that not every person has the same potential, but under the equal pay for equal work law everyone would get the same reward. Through these comments the senator implied that women were not capable of doing equal work with men, especially in upper level jobs where there was potential for advancement. Similarly, the congressman struck down the minimum wage law by stating that people with a "limited capability for work . . . cannot be afforded" under such a plan.

²⁴"Minutes of Commission Meeting, September 17, 1969."

²⁵"It's Time To Listen," *Wichita Eagle*, November 27, 1969, 10F.

In regard to the anti-discrimination proposal, Senator Christy was concerned about the "adverse" effects of the law. If, he asked, women wanted "half the people who work cattle . . . [and] do heavy farm work to be women," and "half the secretaries, nurses, and teachers be men," then how would this affect the job market of the country? The anti-discrimination philosophy, Christy argued, might lead to "offering jobs on the basis of bids for jobs." The senator apparently believed that, instead of desiring only equal opportunity, women wanted every type of position to be composed of half men and half women. If this occurred, then hiring would be done on the basis of gender rather than on qualifications. Also, if enough women chose not to seek employment than there would be a shortage of workers while qualified men were unemployed. Christy continued: "In our economy the law of supply and demand tends to regulate the market. If we destroy this fundamental does this mean tyranny?"²⁶ The senator seemed so anxious to discredit the idea of employment equality, that, in the space of a few short sentences, he illogically brought the United States to the brink of tyranny as a result of offering equal choices to women and men alike. Prejudices of this magnitude had to be controlled before women's rights legislation could be achieved.

The Status Commission's fight against discrimination did not solely take place in the legislature. A situation that occurred in 1969 illustrated this fact and brought public attention to the subject of women's rights. A *Wichita Eagle* article entitled "Could Women Officers Fill Police Manpower Gap" attracted the attention of Harriet Graham. The article, written by staff writer Sharon McEachern, dealt with a twenty-five officer shortage on the Wichita, Kansas, police force and how women could help. Although there was no regulation prohibiting the employment of women as police officers, the head of the Police Academy stated that "we have no openings for women." In fact, very few women were being used on the force at all. Of the 330 commissioned officers that were employed in Wichita, only twelve were women, and they were limited to dealing with female criminals and juveniles because of their "limited" strength. Females filled 3.5% of the police positions. This statistic contrasted sharply with the 47% of women who were employed in the work force overall. When city officials were asked, however, if discrimination

²⁶Senator Don Christy to Scott City, Kansas, Business and Professional Women's Club, January 6, 1970, KS GCSW, Box Ac. 82-8, Miscellaneous Material on Equal Pay for Equal Work file, SC, AL, WSU, Wichita, Kansas.

existed, they were adamant that it did not. One city commissioner stated:

Now I have no objection towards a person just because she happens to be female in the fields of law enforcement. Just because they happen to be females is no reason to say they have no place in our police department . . . I just don't think a woman ought to go out on the streets on a motorcycle or riding in a patrol car with a pistol strapped around her waist.

Dale Richmond, city personnel manager, maintained that "there is nothing that says police officers have to be male only. You know it's a law that we can't discriminate due to sex."

Officials saw no problem, however, with limiting a policewoman's responsibilities. Frequently, stated the head of the police staff division, a woman officer would have to be accompanied on a case by a man to assure her safety, unless it was a very simple situation. Even giving a traffic ticket was deemed too dangerous for policewomen. "You don't know who you're stopping," argued Major R. C. Jones, head of police and community relations. "The guy could poke a woman in the nose and just take off."²⁷ Also, traffic officers frequently had to deal with accident investigations and intoxicated drivers. Women were not prepared to handle these situations, stated Police Chief Merrell Kirkpatrick.

Shortly after the newspaper article was printed, Harriet Graham took action and attempted to improve the standing of women in the Wichita Police Department. On September 2, 1969, Graham wrote to Thomas Regan of the Governor's Committee on Criminal Administration. She asked him to provide her with a ruling on the availability of police grants if a "formal complaint of anti-discrimination under the Title VII of the 1964 Civil Rights Act is filed" against the department.²⁹ The request was not intended as a threat, Graham insisted, but was simply an

²⁷*Wichita Eagle* clipping, "Could Women Officers Fill Police Manpower Gap?," August 19, 1969, KS GCSW, Box Ac. 82-8, Hiring Women on the Wichita Police Force file, SC, AL, WSU, Wichita, Kansas.

²⁸"Police Department May Employ Women," *Wichita Beacon*, October 10, 1969, pg. 12D.

²⁹Harriet Graham to Tom Regan, September 2, 1969, KS GCSW, Box Ac. 82-8, Hiring Women on the Wichita Police Force file, SC, AL, WSU, Wichita, Kansas.

inquiry.³⁰ Regan responded by stating that his agency was "committed to the enforcement of the Civil Rights Act, as it relates to our grants. Upon proof of discrimination practices by any of our sub-grantees, the Committee will take appropriate action."³¹

The same day this letter was sent to Regan, Graham requested that she be allowed to address the City Commission so that the role of women in the Wichita Police Department could be discussed.³² Her request was granted, and at the meeting she asked that a study be conducted to assess the future for female police in the department.³³ "Wichita is entitled to a topnotch police department," stated Graham. "You can help make it that way and women are certainly ready to help."³⁴ Public reaction to the possibility of increased use of female officers was mixed. Although some traditionalists still insisted that a woman belonged in the home, many who expressed their opinions were open to change.³⁵ "The Police Department may be cheating itself and the city of some good officers Women could fill [the positions] if Americans ever got away from the secretary-clerk-schoolteacher thinking about women's jobs," stated one editorial.³⁶ A man from Halstead, Kansas, wrote that the refusal of police to hire women was

³⁰*Topeka Daily Capital* clipping, "Police Urged to Hire Girls," September 6, 1969, KS GCSW, Box Ac. 82-8, Hiring Women on the Wichita Police Force file, SC, AL, WSU, Wichita, Kansas.

³¹Thomas W. Regan to Harriet Graham, September 3, 1969, KS GCSW, Box Ac. 82-8, Hiring Women on the Wichita Police Force file, SC, AL, WSU, Wichita, Kansas.

³²Harriet Graham to Ralph Wultz, September 2, 1969, KS GCSW, Box Ac. 82-8, Hiring Women on the Wichita Police Force file, SC, AL, WSU, Wichita, Kansas.

³³"Commission Proceedings," September 9, 1969, KS GCSW, Box Ac. 82-8, Hiring Women on the Wichita Police Force file, SC, AL, WSU, Wichita, Kansas.

³⁴*Wichita Beacon* clipping, "Women Win Study on Jobs With Police," September 9, 1969, KS GCSW, Box Ac. 82-8, Hiring Women on the Wichita Police Force file, SC, AL, WSU, Wichita, Kansas.

³⁵*Wichita Eagle* clipping, "Opinion Survey, Do You Think City Should Hire More Policewomen?" August 25, 1969, KS GCSW, Box Ac. 82-8, Hiring Women on the Wichita Police Force file, SC, AL, WSU, Wichita, Kansas.

³⁶*Ibid.*, "Women's Place Is On The Job As Well As In The Home."

merely another guise to further condition women into believing that her place is in the home Certainly a woman is physically handicapped in comparison to her male counterpart but not nearly as much as he would like her to believe. And certainly law enforcement involves risk but doesn't everything, including childbirth? But neither requires physical giants.³⁷

On September 12, 1969, the Chief of Police, Merrell Kirkpatrick, submitted a plan to the city that outlined methods of using more women as police officers. Each section of the department was examined to see where females could help alleviate the personnel shortage. Two women, Kirkpatrick said, could be added to the patrol section where they would handle routine complaint calls and work in the accident prevention bureau. The vice section could employ one woman, who would relieve a male vice detective for outside assignments. Also, two women could be assigned to "pawn shop detail and check detail to replace male detectives." Finally, the police and community relations section would be able to use one female officer.³⁸

Harriet Graham and her Commission were pleased with the outcome of their challenge to the Wichita police. In a letter to Governor Docking dated October 20, 1969, Graham expressed her feelings concerning the event:

Although it may at first [have] appeared ridiculous for the commission to make an issue of 'police-employment' for women, it appeared to us that a more receptive attitude toward employing women in all fields could be obtained by challenging the bigoted statements contained in the article, 'Could Women Officers Fill the Police Manpower Gap?' in a positive way. The support of Tom Regan in your administration was the factor which gave the

³⁷Ibid., "Letters to the Public."

³⁸M. R. Kirkpatrick to Ralph Wulz, "Report Concerning the Hiring of Women," September 12, 1969, KS GCSW, Box Ac. 82-8, Hiring Women on the Wichita Police Force file, SC, AL, WSU, Wichita, Kansas.

women a 'moral' victory with hope for a substantial increase in job opportunities in this department.³⁹

The "moral victory" that the Status Commission won against the police department was significant by 1969 standards. At that time prejudice was so pervasive against policewomen that any female addition to the roster was an accomplishment. It cannot be overlooked, however, that after the issue was settled, discrimination still existed. Women were not allowed the same job responsibilities as men and many times were hired solely to relieve men for more "important" duties. Nevertheless, progress had been made. Over the next ten years the percentage of women hired for protective service in Wichita grew, and by 1979, ten years after Graham had made her challenge to the police department, 8.9% of Wichitans in protective service were female.⁴⁰ This was a significant increase, especially when compared to national statistics. In 1980 only 4% of those in protective service nationwide were female.⁴¹

The year following the police department controversy, the Governor's Commission on the Status of Women achieved a long-awaited goal. House Bill 1916, which prohibited discrimination in employment and provided for equal pay for equal work, was finally passed in Kansas. Harriet Graham, along with several other Kansas women, testified at committee hearings about the need for the bill.⁴² On the *Wichita Eagle* editorial page the proposed law was said to be "of great importance to all of Kansas This is not really a women's bill. It is a bill which would benefit all of society Kansas has dragged its feet too long in this

³⁹Harriet Graham to Honorable Robert Docking, October 20, 1969, KS GCSW, Box Ac. 82-8, Hiring Women on the Wichita Police Force file, SC, AL, WSU, Wichita, Kansas.

⁴⁰Wichita Commission on the Status of Women, "City Employment Practices Toward Women," April, 1979, AL, WSU, Wichita, Kansas, 17.

⁴¹Teresa L. Amott and Julie A. Matthaei, *Race, Gender, and Work* (Boston: South End Press, 1991), 327.

⁴²*Topeka Capital Journal* clipping, "Women's Rights Fight to Solons," February 12, 1970, KS GCSW, Box Ac. 82-8, Anti-Discrimination State Legislation file, SC, AL, WSU, Wichita, Kansas.

area."⁴³ The law, passed in 1970 by the Kansas legislature, finally went into effect on July 1, 1973.⁴⁴

Harriet Graham resigned from her position as Chairperson of the Governor's Status Commission on March 30, 1971.⁴⁵ The work involving women's rights, however, was not complete. The Equal Rights Amendment, which had been introduced in every Congress since 1923, continued to be an important and ongoing national issue for women.⁴⁶ Discrimination in the late 1970s was, based on the studies of one commission, "more subtle . . . than in past years. It is harder to detect and to prove, but frequently more pervasive and debilitating because it is so difficult to fight."⁴⁷ Today's major issues in women's rights are the recent onslaught of sexual harassment suits and the controversy over women in combat. Just thirty years ago society questioned the practicality of women police officers; today they play a significant role in protective services nationwide. Just thirty years from now will society be as accepting of women generals or presidents? The story of women's rights is not, in the words of feminist Betty Friedan, finished. It is "to be continued."

⁴³"Let's Not Discriminate Against Women Either," *Wichita Eagle*, February 11, 1970, 4A.

⁴⁴Kent Frizzell to Harriet Graham, May 22, 1970, KS GCSW, Box Ac. 82-8, Anti-Discrimination State Legislation file, SC, AL, WSU, Wichita, Kansas.

⁴⁵Governor Robert Docking to Harriet Graham, March 30, 1971, KS GCSW, Box Ac. 82-8, Commission Membership file, SC, AL, WSU, Wichita, Kansas.

⁴⁶Citizens' Advisory Council on the Status of Women, "The Proposed Equal Rights Amendment to the United States Constitution" (March, 1970), 2.

⁴⁷"City Employment Practices Towards Women," 20.

Graduate Seminar Paper Award

**Cheyenne Bottoms Wildlife Area:
A Historical Perspective**

Douglas S. Harvey

From the point of view of the great flocks of migratory waterfowl which traverse North and South America every year, the Cheyenne Bottoms ecosystem is an essential stopover. For some, it is a wintering ground. Since the late Pliocene Era, Cheyenne Bottoms has provided refuge for the many species of ducks, geese, cranes, and terns; as well as mammals and reptiles who live off of large populations of migratory waterfowl. The prehistory of Cheyenne Bottoms provides insight into the geological development of the Central Plains region. The story of Cheyenne Bottoms since the arrival of Euro-Americans reflects the attitudes of those who have partaken of its bounty, worked for the perpetuation of a dependable waterfowl habitat, as well as those who have worked toward its destruction.

Cheyenne Bottoms is a wetland created by a two hundred and thirty-five square mile drainage area. Surrounded by Cretaceous rocks rising up to one hundred feet above it, the basin itself is approximately sixty-four square miles or forty-one thousand acres. The twenty thousand acres in the southeast corner of this drainage area, which has historically been too wet to farm, is now managed by the Kansas Department of Wildlife and Parks as a game refuge. This "wildlife area" is centrally located on the network of migratory waterfowl routes, and while each species has its own pattern and timing of migration, there are two main groups. Semiannual migrants are those which use the bottoms every spring and fall, some of these breeding as far north as the Arctic Circle in the summer, returning to their wintering quarters near the equator. Loop migrants use one of the other flyways for

one leg of their semiannual journey, either the Pacific or Atlantic coastal routes.¹

A number of theories have been put forth by natural scientists to explain the origin of Cheyenne Bottoms. In 1897, Erasmus Haworth argued that stream erosion was the primary cause of the Bottoms. W. D. Johnson posited in 1901 that subsidence due to the dissolution of underground salt was the main factor in its formation. N. W. Bass in 1926 and Bruce Latta in 1950 both showed evidence for a combination of these two factors. Charles K. Bayne however, published a paper attempting to resolve disagreement over the origins of the Bottoms. Drawing upon the geological records created by oil drilling activities in the area, Bayne provides the best explanation to date for the origins of this great sink. Cheyenne Bottoms had been alternatively elevated and submerged beneath the great inland sea which covered most of the Great Plains up through the Cretaceous era. Sometime between late Cretaceous time to the latest of the Pliocene times, some disturbance in the Pre-cambrian bedrock created a shallow depression in this formation. Over the eons, hundreds of feet of marine deposits and silt covered the rock. During Tertiary and Pleistocene times, the Ice Ages of the last several hundred thousand years or so, much of the surface topography was formed. This topography reflects the disturbance which caused the bedrock to sink millions of years ago.

The most recent major event in this process, it is believed, was the diversion of the waters of the Smoky Hill river drainage away from Cheyenne Bottoms. This was caused by an extended dry period in which waters ceased to flow abundantly enough to continue cutting stream channels. These channels then became clogged, forcing the water to find another route, which it did, several miles to the north. Cow Creek, to the southeast of Cheyenne Bottoms, and Blood and Deception Creeks to the northwest and north, are the remnants of that ancient streambed.²

Historical accounts of Cheyenne Bottoms are relatively scarce during the nineteenth century. The earliest reference to it is in the journals of Captain Zebulon Pike, U.S. Army, which he kept while conducting a reconnaissance of the Great Plains region. In 1806, Pike and his men were marching in a steady drizzle, searching for the Indian trace which followed the Arkansas

¹John Zimmerman, *Cheyenne Bottoms: Wetland in Jeopardy* (Topeka: University of Kansas Press, 1990), 99.

²Charles K. Bayne, "Geology and Structure of Cheyenne Bottoms Barton County, Kansas," *Kansas Geological Survey Bulletin* 211, part 2 (1977), 1-2, 4.

River. They came across an area "[b]etween Kansas and Arkansas Rivers . . . crossed the low prairie which was nearly all covered with ponds."³ A bit later in his journal Pike again refers to the "swampy low prairie" which was north of the Great Bend of the Arkansas.⁴

Legend has it that in 1825 there was a great battle fought near Cheyenne Bottoms between the Cheyenne Indians and either the Pawnee or the Kiowa. This battle, allegedly for territorial rights to the area, resulted in the naming of Blood Creek, the site where it was said to have been fought.⁵ Indian annuities were often brought down the Santa Fe trail, and in 1867 these payments for Indian lands were delivered to Indians camped at Cheyenne Bottoms.⁶

The journal of the German explorer Dr. Frederick Wislizenus is the next written reference to Cheyenne Bottoms. In October of 1839, Dr. Wislizenus was travelling in the area and became lost in foggy weather. He found himself wading through a great swamp, abounding with birds, "Never have I seen together such quantities of swans, cranes, pelicans, geese, and ducks as were here." As he waded across the Bottoms, he found that the water did not reach higher than his chest.⁷

In 1856, surveyors in the area remarked at the extent of the muck and mire. The field notes show that they believed the area was too wet for plowing, but it had good grass. They also noticed that there was no outlet to the east. "A lake or swamp with about 2" to 3" of water and mud bears NE and SW."⁸

The American Coursing Club, a nationwide greyhound racing-group, held its first Cheyenne Bottoms meet in 1886. The ACC was active throughout

³Francis Coues, ed., *The Expeditions of Zebulon Montgomery Pike*, vol. II (New York: Harper, 1895), 424.

⁴*Ibid.*, 517.

⁵*Great Bend (Kans.) Tribune* Special Edition, August 12, 1936, 179-80.

⁶Marvin Schwilling, "Cheyenne Bottoms," *The Kansas School Naturalist* (December, 1985), 4.

⁷*Ibid.*

⁸*Surveyor's Field Notes*, vol. 63m T.11-20S/R9-16W (Washington, D.C.: Government Land Office, 1856), 111, 115. Cheyenne Bottoms was typically found in different states of wetness and abundance by people at different times. Attempting to mediate between the extremes is the basis for development at Cheyenne Bottoms.

the U.S. and apparently represented a major influx of "civilized" culture to the region when the club arrived to hold their race in October of that year. People and dogs from all over the country were present for two meets, one a "free for all," which meant any age class could enter. The Grand Prize of a cup and one hundred dollars in cash was won by "Midnight" for his owner, a Colonel Taylor of Emporia.⁹

The 1880s was a boom period in Kansas history. Rainfall was good, markets were good, people were forming towns throughout western Kansas, believing they were possibly building the next St. Louis, Memphis, or Omaha. The Preemption, Homestead and Timber Claim Acts had renewed the westward migration after the Civil War. The Indian Wars were won by the advancing Anglo-Americans, and the feeling that one could achieve great things in this new land filled the air. Land grant companies forced the railroads to put their lands on the market, so with a very small amount of capital, anyone from back east or even Europe could find a new start on the Great Plains.¹⁰ This unflagging optimism was confronted by the realities of Plains weather in the 1890s. In what has been described as the mini-Dust Bowl, the rains deserted the farmers' fields which had been left open and susceptible to the omnipresent Plains wind with the practice of "dust-mulching." As a result, soil and seed were carried off along with the hopes of many of the new settlers.

During this time, a group of farmers got together and decided to try to irrigate using Cheyenne Bottoms as a reservoir to store water brought from the Arkansas River. To dig the canal necessary to bring the water, they hired F.B. Koen, who had achieved some fame and notoriety digging irrigation canals in southwest Kansas and southeast Colorado. The Grand Lake Reservoir Company was formed, and the purchase of easement rights for the canal was begun. After its completion in 1898, a significant rainfall, which also washed out the new diversion dam on the Arkansas River, filled the canal and flowed into the southwest corner of the basin in a thirty-foot waterfall. Cheyenne Bottoms was now filled with water, and the optimism characteristic of plains settlement returned, albeit a bit contrived. Kansas City businessmen became interested in investing in the area, Koen and his backers formed the Lake Koen Navigation, Reservoir, and Irrigation Company, and individuals were sought to buy stock in the company. The

⁹"Cheyenne Bottoms Site of Early Day Greyhound Racing," Barton County Clippings, vol. 2, 161, Kansas State Historical Society, Topeka.

¹⁰James C. Malin, "The Kinsley Boom of the Late Eighties," *Kansas Historical Quarterly* (February, 1935), 23.

company's prospectus showed hotels surrounding a grand lake with sailboats and swimming beaches. Oral history, via old newspaper interviews, indicates that the sale of stock was the primary concern of the principles, not development. Problems began to arise. Farmers unhappy with the original easement agreements and settlements sought redress in the courts. The canal had leaked badly in a number of locations, inundating farmers' fields as well as the Bottoms, leading to more litigation. Finally, in 1904 the company folded.¹¹

During the period from the 1880s through the early years of the twentieth century, commercial duck hunting was routinely practiced at the Bottoms. The game was salted, put on refrigerated rail cars, and taken to the East for sale. Prices ranged from eight dollars per dozen for canvasbacks, six dollars for redheads, three for mallards, and one and a half dollars for a dozen "mixed ducks."¹² Concerns about declining duck populations led the Kansas State Legislature to enact laws attempting to regulate this practice. Prior to 1897, the only law regulating hunting of any kind in Kansas dealt with obtaining permission to hunt on private property. In that year, however, an act was passed "providing at what seasons birds may be shot, to prohibit the sale and shipment of birds, [and] prescribing a punishment" for violation of the new law.¹³ This law was amended in 1901, 1903, and again in 1905. The 1905 act followed a particularly brutal year for the duck population at Cheyenne Bottoms. Culminating in 1904, the traditional practice had been for suppliers to come out to the hunting camps, sell ammunition and buy ducks. The new act of 1905 gave the warden unprecedented powers to inspect the area where the game was being sold and placed a bag limit on game birds. The limit on grouse was fifteen birds, likewise with prairie chickens. Quail, plovers, and ducks taken were limited to twenty each; the limit on geese and wild brant was ten. For all practical purposes, this brought an end to commercial hunting at Cheyenne Bottoms.¹⁴

Marvin Schwilling, in his brief history of Cheyenne Bottoms, points out other factors that were detrimental to duck populations in the Bottoms.

¹¹Schwilling, "Cheyenne Bottoms," 4-5; "Cheyenne Bottoms is Biggest Game Refuge in Country," *Great Bend (Kans.) Daily Tribune 75th Anniversary Edition*, August 10, 1951, 9.

¹² Schwilling, "Cheyenne Bottoms," 6.

¹³State of Kansas, *Session Laws*, 1897 (Topeka: State Printing, 1897), 293.

¹⁴State of Kansas, *Session Laws*, 1905 (Topeka: State Printer, 1905), 416-18.

These include periodic drying, use of pesticides, and a die off in 1916 which he mentions must have been due to fowl cholera. Another event in this same year which negatively impacted duck habitat was the advent of the search for oil. Sooeey #1, drilled in the heart of Cheyenne Bottoms, made a modest strike, but not significant enough to be developed. Again in February of 1923, oil was struck in the area, and for a short time it seemed as if Cheyenne Bottoms might become the first oilfield in Kansas west of Butler County. But the hole was "a bad job," and the lack of funds prevented oil production in the area, most likely because of more accessible oil elsewhere.¹⁵ Also, high demand for oil dictated high-production wells, which led to market saturation and depressed prices. The resulting narrow profit margins had to be made up in volume.¹⁶

Another source of stress for migrating and wintering waterfowl were farmers' efforts to drain the Bottoms in order to put the land into production. Early efforts to drain the area began in 1899 and continued up through the 1930s when the battle to create a game refuge was finally won, which will be addressed below. The legal course of action for draining swampland was outlined by the Kansas legislature in 1879 in "An Act providing for the drainage of swamp, bottom, or other low lands."¹⁷ This type of legislation was common in the U.S. in the late nineteenth century. Increased population, improved market accessibility due to the railroads, and increased prices as a result of booming metropolitan areas led many state legislatures to create a legal mechanism for the formation of drainage districts.¹⁸

According to the legislation, a petition must be filed, a bond paid, notice given to affected land owners, and costs dispersed equitably among the beneficiaries.¹⁹ It included a process by which aggrieved persons could

¹⁵*Hoisington (Kans.) Dispatch*, August 13, 1936.

¹⁶Michael P. Malone and Richard W. Etulain, *The American West: A Twentieth Century History* (Lincoln: University of Nebraska Press, 1989), 35-36. The Midcontinental field, which included Butler, Montgomery, and Wilson Counties in Kansas, produced much shallower and richer oil strikes. The increased demand on oil from burgeoning automobile use created a response in production much greater than the market could absorb. Malone and Etulain lament the waste of oil, which sold barely over cost during this period.

¹⁷State of Kansas, *Session Laws of 1879* (Topeka: Kansas Publishing, 1879), 197.

¹⁸Mary R. McCorvie and Christopher L. Lant, "Drainage District Formation and the Loss of Midwestern Wetlands, 1850-1930," *Agriculture History* 4 (1993), 25.

¹⁹*Session Laws of 1879*, 197.

appeal to probate court. Disputes would be settled by a jury of six "disinterested freeholders."²⁰ Drainage districts were defined as organized efforts to drain five hundred or more acres. The formation of these districts was prompted by the inability of individuals to provide the needed capital, and to facilitate professional construction of drainage canals. Common law was considered to be an insufficient legal power to drain swamplands, hence the passage of the act. There were three considerations which defined the legal basis for the districts: 1) the premise of natural flow of the waters, which usually restricted the powers of the districts; 2) the common enemy principle, which gave drainage districts fairly broad leeway; and, 3) the reasonable use principle, which fell between the first two in the amount of power drainage districts had in altering water flow.²¹

In the late 1920s, when heavy rains filled Cheyenne Bottoms to overflowing, some area farmers formed a drainage district to build a canal to the Arkansas River east of Ellinwood. Other farmers opposing the attempt hired Frank Robl, a long time Bottoms advocate and duck-bander, to raise funds to fight the drainage district. When the citizens of Hutchinson, Kansas, got wind of the plan to drain the Bottoms, they opposed drainage on the grounds that it created an unnecessary flood hazard for their city, which it did.²² Regardless of this opposition, bonds were organized to be sold by the drainage district, and when the money was raised a contract would be let and construction of a drainage canal would begin. Most people had given up on saving the Bottoms. However, a group of attorneys, including Coe Russell, Messrs. Tinchler and Malloy of Hutchinson "collaborated in concocting some sort of legal brew of such potency that the district court at Barton County granted a temporary restraining order" against the drainage district.²³ This gave pro-refuge forces time to secure funding from Washington, thus rescuing the future preserve from destruction.

²⁰Ibid., 199.

²¹McCorvie and Lant, "Drainage District Formation," 34.

²²Frank W. Robl, "The Story of Cheyenne Bottoms," in *The Duck Man Writes about Cheyenne Bottoms* (n.p., n.d.). This document also includes research data partially provided by Robl as well as minutes of an April, 1928, meeting of the local Izaak Walton League.

²³State of Kansas, *Third Biennial Report of the Forestry, Fish and Game Commission* (Topeka: Kansas State Printing, 1930).

The momentum to preserve and perpetuate Cheyenne Bottoms as an annually dependable stopover for migratory fowl began picking up, albeit quietly, with the activities of Frank Robl of rural Ellinwood. In 1923, Robl began banding ducks and geese as a hobby in his spare time. Robl's hobby became the primary source of information on the habits of the migrating birds who used the Bottoms. The return of Robl's bands from nineteen states, Alaska, four Canadian provinces, and Mexico helped ornithologists to establish that Cheyenne Bottoms lay on the Central Flyway, one of the four major waterfowl migration corridors in the western hemisphere.²⁴ As Robl was banding his ducks through the 1920s, the Kansas legislature was turning its attention to conservation activities, as well.

The mood in the country at this time was one of rising concern over maintaining natural resources for future generations. The conservation movement, which had accompanied the Progressive movement into national prominence, still found advocates in such organizations as the Izaak Walton League and the Sierra Club. While Kansas scenery was not deemed dramatic enough for the attention of groups like the Sierra Club, hunter groups like the IWL knew of the game that existed on the Plains but was in need of assistance after a half-century of intense hunting. Responding to this need, the Kansas legislature created the Kansas Forestry, Fish and Game Department in 1927.

In fact, a commission of forestry, fish and game had been set up in 1925 consisting of the governor, the fish and game warden (an office created in the hunting act of 1905), and three others to be appointed by the governor and the state senate. This commission had no authoritative power in the field, but could use fish and game funds to secure title to lands deemed suitable for state parks. Surplus funds from hunting licenses as well as an expected increase in the number of state parks were fundamental in the decision by the legislature to establish a broader Forestry, Fish and Game Department two years later.²⁵

The year 1927 was a fateful one for Cheyenne Bottoms. Not only was there now an official organ in government with a vested interest in preserving game and fish habitat, but in August of that year, over fourteen inches of rain fell in a matter of hours to the west and northwest of the

²⁴Robl, "The Story of Cheyenne Bottoms," 1-2; Schwillig, "Cheyenne Bottoms," 7; Frederick C. Lincoln, "Banded Birds," *Literary Digest*, November 28, 1931, 46.

²⁵Edwin O. Stene, *The Development of Wildlife Conservation Policies in Kansas* (Topeka: State Printer, 1946), 27-28.

Bottoms. For the first time in living memory, water was flowing out of the Bottoms through Little Cheyenne Creek. A lake with sixty-four square miles of surface area had been created overnight.²⁶ This event set the stage for what would be last major hurdle in establishing a game refuge at the new "Lake Cheyenne."

Burt Doze, the State Game Warden, was not shy about his advocacy of the bottoms. Invoking biblical references, Doze reminded everyone that "it is possible to create and maintain a sea 64 miles in area, exactly the size of the Sea of Galilee."²⁷ Those who came together to oppose drainage and to lobby for perpetuation included area farmers who enjoyed duck and geese hunting at the Bottoms; 7th District Congressman Clifford Hope; Senator Charles Curtis, soon to become Herbert Hoover's Vice-President; Henry Allen, who replaced Curtis as Senator; former governor Arthur Capper; the area Izaak Walton League locals; and the new Kansas Forestry, Fish and Game Department. Economically, the Bottoms was a good idea. Barton County merchants knew that hunters at the Bottoms brought more into the local economy than could another eighteen thousand acres of wheat. This brought the backing of the Great Bend and Hoisington Chambers of Commerce.²⁸

Responding to pressure from the activities of the drainage district, the Forestry, Fish and Game Commission requested that the U.S. Bureau of Biological Survey come to Barton County to see the new lake and recommend what actions could be taken to get federal funding for its perpetuation. It should be recalled that this was during the era of big water projects in the American West. Hoover Dam construction was underway, and major irrigation projects had been constructed in California, Arizona, Wyoming and elsewhere. Utilitarian conservation, as popularized by Gifford Pinchot in the early years of the twentieth century, advocated land use and hunting was considered land use.²⁹ In addition, the Bear River Marsh in

²⁶State of Kansas, *Second Biennial Report of Kansas Forestry, Fish and Game Department* (Topeka: State Printing, 1928), 32-35; Schwillig, "Cheyenne Bottoms," 5; "Cheyenne Bottoms is Biggest Game Refuge in Country," 9.

²⁷"Cheyenne Bottoms is Biggest Game Refuge in Country," 9.

²⁸Ibid.; "Cheyenne Lake Inspected," *Topeka Journal*, October 28, 1927, Kansas Fish and Game clippings files, vol. 1, 77, Kansas State Historical Society, Topeka.

²⁹Joseph E. Stevens, *Hoover Dam: An American Adventure* (Norman: University of Oklahoma Press, 1988), 27; Robert Gottlieb, *Forcing the Spring: The Transformation of the American Environmental Movement* (Washington, D.C.: Island Press, 1993), 22.

Utah was applying for funding for similar reasons, giving the federal government incentive to establish funding guidelines for game preserves. In many ways, this was the ideal time to seek federal funding.³⁰

The Biological Survey sent Orin Steele to investigate the situation, and when Steele saw the lake supporting a mass of waterfowl arriving on their fall trek south, he reported favorably to his superiors at the Bureau. At that point, Survey attorney Talbot Dalmead and Izaak Walton League executive director Seth E. Gordon came to the Bottoms to do a follow-up inspection of the lake. On a very windy day in April, they were escorted to the Bottoms, where incredible numbers of migrating birds were on the water. They recommended persistently urging the federal government for legislation. The ball was in the Fish and Game's court, and it was time to mobilize.³¹

At this point, the FF&G sent Giles Atherton, Lee Larabee, and Warden Doze to New York to seek support from the American Game Protection Association. Back in central Kansas, area Izaak Walton League members wrote the central office asking for advocacy in their lobbying efforts. After their appeals in New York, the warden's entourage went to Washington to consult with the Kansas delegation. Rep. Hope and Sen. Curtis had introduced funding measures into the House and Senate, respectively. The FF&G gathered further data on "Lake Cheyenne," which included an engineering study, and prepared to testify before the House Agriculture Committee. R. C. Russell, a Great Bend engineer, and Warden Doze argued for funding before the committee, as did Kansas Congressman Homer Hoch of Marion and W. A. Ayers of Wichita. Also testifying before the committee was Paul G. Redington, Chief of the Bureau of Biological Survey, Survey lawyer Mr. Denmead, and John B. Burnham of the American Game Protection Association. The Kansas delegation was asking for \$350,000, but no action was taken on appropriations for the proposed game reserve. The committee offered to recommend \$250,000, but this total was deemed inadequate. Congress subsequently adjourned, the recommendations of the Agriculture Committee did not go to the Director of the Budget, but the Kansans left Washington optimistic. After all, an almost identical appropriation had recently been approved for the Utah reserve, thus establishing a precedent. The Secretary of Agriculture approved of wildlife refuges and was in favor of developing the Bottoms. Another bill in

³⁰State of Kansas, *Second Biennial Report*, 34.

³¹*Ibid.*, 33.

Congress, the Game Refuge and Marsh Land Act, would provide an annual appropriation of \$1,000,000 for projects like Cheyenne Bottoms. The Senate had already passed this bill, and all the major conservation organizations in the country supported it. The perpetuation of Lake Cheyenne seemed certain, especially since it appeared that flood hazards would foil the drainage district's efforts. The Department of Agriculture acknowledged that the land was much more valuable as a wildlife refuge than farmland; the "nation will be enriched through creation of an inland sea and a magnificent refuge for water fowl."³²

The Kansas Forestry, Fish and Game Department's optimism was premature. The wheels of government slowed to a crawl from FF&G's perspective during this time. In 1930, about the time the temporary restraining order was granted against the drainage district, the Commission gave \$1,000 to its Secretary Alva Clapp to take a delegation to Washington and resume lobbying efforts. Clapp and ex-Congressman J. N. Timber of Hutchinson went on the grant money; Will Townsly of Great Bend paid his own way, and Seth Gordon, one of the Executive Directors of the Izaak Walton League, made a special trip from Chicago. Special hearings were arranged by Congressman Hope and Senator Allen before the Director of the Budget and the Senate Agriculture Committee. The Norbeck-Andreson Bill, synonymous with the Game Refuge and Marshland Act, had not been passed and legal action was needed to prevent the efforts of the drainage district. Special legislation would be required to save "Cheyenne Lake." Finally, what was now called the Hope-Allen bill was signed by President Herbert Hoover on June 6, 1930, allocating special funds for the perpetuation of Cheyenne Bottoms. The Kansas legislature also passed a bill allowing a federally established game refuge when the Norbeck-Andreson bill would finally be passed. But the actual appropriations were still elusive: while Kansas was the first state to adopt a law permitting a federal game preserve within its borders, the funding needed to fully develop the Bottoms was still not forthcoming.³³

Much of this ambiguity can be attributed to the conflicting interests assailing Congress. One lobby group represented support for game preserves, But others were working hard in opposition to this concept.

³²Ibid., 34.

³³State of Kansas, *Third Biennial Report*, 11-12; "A Cheyenne Bottoms Survey," *Kansas City Times*, June 27, 1935, in Kansas Fish and Game Clippings file, vol. 1, 108, Kansas State Historical Society, Topeka.

These included commercial hunting interests, still active on the eastern flyway, the gun lobby, and the farm lobby, the former for open hunting and the latter for wetland drainage. The push and pull of these groups combined with the deepening depression to delay funding for Cheyenne Bottoms and other areas like it.³⁴

Though the early years of the Great Depression had significantly tightened the federal government's purse strings, \$50,000 eventually was secured from Congress for the study of the Cheyenne Bottoms and surrounding drainage to determine what was needed to perpetuate the lake. Nature was in her now well-known if ill-understood Great Plains fickleness in 1930 with the beginnings of the drought that helped create the notorious "Dirty Thirties" in the central and southern Plains. At Cheyenne Bottoms, the rainy years had brought a proliferation of catfish and carp in the brimming wetland. However, one of the disadvantages of a shallow lake on extremely flat terrain is the percentage of water that can evaporate in even a single day in the hot, dry Plains summers. The consequences of these circumstances were predictable enough, and a fish kill of unprecedented proportions struck the Bottoms in 1930.³⁵ By 1931, Cheyenne bottoms had virtually dried up. This may have helped motivate the game preserve forces to still further action. Rudolph Diffenbach, in charge of land acquisition at the Biological Survey, wrote the secretary of the Izaak Walton league that they still intended to pursue a refuge at Cheyenne Bottoms.³⁶ The study went ahead in 1933 under the supervision of George Knapp, Chief Engineer of the Division of Water Resources, and veteran of the battles with Colorado over Arkansas River water.³⁷ The goals of the study were to determine the amount of water needed to maintain a lake at Cheyenne Bottoms, what tolerances could be permitted in area and capacity of the lake, and the

³⁴ Jay N. Darling, "The Story of the Wildlife Refuge Program," *National Parks Magazine* 28 (January-March, 1954), 6. In this article, Darling, a well-known cartoonist and former Chief of the U.S. Biological Survey, tells the story of how the absence of Senator Peter Norbeck's false teeth rendered inarticulate his appeal on the Senate floor to attach a rider worth \$6 million in game preserve-bound funds to the Duck Stamp Act. The fact that no one knew what he was attaching to the bill led directly to its passage and to the first funds allocated for game preserves.

³⁵ *Hoisington (Kans.) Dispatch*, August 13, 1936, in Barton County Clippings, vol 2., 163, Kansas State Historical Society, Topeka.

³⁷ Kansas Engineering Society, *Yearbook* (Manhattan: Kansas Engineering Society, 1935), 18; James Earl Sherow, *Watering the Valley: Development along the High Plains Arkansas River, 1870-1950* (Lawrence: University Press of Kansas, 1990), passim.

frequency of water replenishment needed to prevent salinization. The only records at his disposal were rainfall and stream flow measurements from 1922 up to the time of the study. Most of these years had been wet years, and as is widely understood now, any study done over a twelve-year period on the Great Plains is woefully inadequate for long range planning. Indeed, it could be argued that one hundred years is insufficient. At any rate, Knapp had to use the information available.

The obvious sources of a supplemental water supply were an Arkansas River diversion, as had been done by Koen and company. Knapp added to this the possibility of a Walnut Creek diversion, which represented another 1900 square mile drainage area. Water losses were expected to come from evaporation in the canals, overflow in wet weather, evaporation in the lake, and seepage into the groundwater. Among the problems Knapp faced beyond an inadequate timespan of record-keeping was the fact that the Arkansas River gauge was at Larned above the mouth of Pawnee Creek. Pawnee Creek added a watershed two-thirds the size of the Walnut, yet it had gone unrecorded. The problem of determining the flow of Pawnee Creek was remedied by calculating water volume using data from the Walnut Creek gauge and multiplying by 0.67. Also, the gauge on Walnut Creek had only been read in the summer months of April to September. Knapp opted to plot a curve using these records and then extrapolate the winter data by simply extending the curve from September to April. The end result of the study was that a canal from the Arkansas River with a 200 cfs capacity, and one from Walnut Creek with a 500 cfs capacity would be necessary to sustain the desired water level at the Bottoms. In addition, Knapp calculated that during a twelve-year period the water in the Bottoms would have been replenished five times with the proposed canal set up.³⁸

The problem with funding proved to be more elusive than anyone expected. It was not until the Pittman-Robertson Act was signed into law in 1937 that a reliable source of federal funding became available.³⁹ And even then, the prolonged depression of the 1930s delayed action until 1942. It was on October 8 of that year that the Kansas Forestry, Fish and Game Department began to purchase land; 6800 acres were acquired for \$54,000. Over the next fourteen years, FF&G bought up property in the bottoms until

³⁸Kansas Engineering Society, *Yearbook*, passim.

³⁹"The Jewel of the Prairie," *Kansas Wildlife and Parks* 45 (July/August, 1988), 35.

they reached their goal of 19,840 acres (including inlet and outlet canals) in 1956.⁴⁰

In October of 1948, Wilson and Company Engineers proposed a development and operation plan for the Bottoms.⁴¹ In April of 1950, the FF&G reported that the inlet canal from Walnut Creek and the bridges over it were almost completed. The next step was to be the outlet canal.⁴² In 1956, Fish and Game reported on the details of the inlet canals and the particulars of the diversion dams on the Arkansas River and the Wet and Dry Walnut Creeks. The bulk of canal construction was from Dundee Diversion Dam on the Arkansas to the north fork of Dry Walnut Creek, a seven mile run. The water would then flow through Dry Walnut to another diversion dam sending it into a canal and down to Wet Walnut Creek. Another diversion dam and another canal would bring the water to the Bottoms. Fourteen thousand feet of the canals were to be open ditch; concrete conduit pipe varying from sixty to seventy-two inches would run for twenty-five thousand feet; the usually dry creek beds would be used for ten thousand feet. Dundee Diversion Dam, the biggest of the three diversion dams would be two hundred and seventy feet long with six radial gates. Canal capacity was estimated at eighty cubic feet per second; enough to cover twenty thousand acre feet per year. The added diversion from the Arkansas River would supplement the Walnut Creek water, which was thought to be adequate but for evaporation.⁴³

The total cost of the project was estimated at this time to be \$3,000,000. Three-fourths of this total was paid for by the Pittman-Robertson Federal Aid-to-Wildlife Act, funds of which were derived from an 11% excise tax on firearms and ammunition. One-fourth would come from State Fish and Game funds.⁴⁴

By 1956, development was approaching completion. The work included: dike-roadways which formed the five lakes of the Bottoms, structures to control water in all areas, duck blinds in two public shooting area, the headquarters building and manager's house, an outlet canal, the Wet

⁴⁰Schwillig, "Cheyenne Bottoms," 7.

⁴¹Ibid.

⁴²"The Cheyenne Bottoms," *Kansas Fish and Game* 7 (April, 1950), 1.

⁴³"Water from Arkansas River Will be Diverted into Cheyenne Bottoms," *Kansas Fish and Game* 12 (January, 1955), 18.

⁴⁴Ibid., 19.

Walnut diversion dam and canal into the bottoms.⁴⁵ Still to be constructed were the Dundee Diversion Dam and twelve bridges over Wet Walnut Creek.

In the fall of 1957, thirty years nearly to the day since Talbot Denmead and Seth Gordon had recommended pursuing federal assistance, Cheyenne Bottoms Game Preserve was ready to be dedicated. On October 13, the multitude assembled together with Gov. George Docking, Lt. Governor Joseph Hunkle, Senator Frank Carlson, and a number of former governors including Edward Arn and Arnold Kapper. Robert Rutherford of the Department of the Interior gave the dedication speech. The completed Cheyenne Bottoms was now "one of the foremost game refuges on the waterfowl migratory route between the Canadian border and the Gulf area."⁴⁶

Unfortunately, problems developed almost immediately. As is well-known now in the central plains, water is a feast or famine proposition. The design of the new, highly-managed Cheyenne Bottoms included five pools, of which Pool #1 was the main water storage area. This pool represented 3300 acres of water four to five feet deep. The Kansas wind caused the turbidity in the pool to reach such proportions that the water would no longer sustain vegetation or invertebrates essential to the waterfowl to which the Bottoms was supposed to cater. Fluctuation of water levels throughout the various pools need relatively clear water to succeed. Various studies were done in the 1960s to try and find ways to reduce turbidity and the increasing problem of wave erosion on the dikes. The drawdown of the water in the outer pools in the spring followed by aerial seeding of millet was found to be a sufficient stop-gap measure, which also provided food for local invertebrates as well as the migratory fowl population. In good years, the arrival of migrating waterfowl testified to an environment of "astounding abundance."⁴⁷

No significant changes were made until the 1980s, when the Kansas Department of Wildlife and Parks contracted with engineering firms and other agencies to develop a renovation plan for the Bottoms. A plan was developed which would take approximately ten years to implement at a cost

⁴⁵"Canal to Cheyenne Bottoms Takes Shape," *Kansas Fish and Game* 13 (January, 1956), 1.

⁴⁶"Cheyenne Bottoms Dedicated," *Kansas Fish and Game* 15 (January, 1958), 6.

⁴⁷Schwillig, "Cheyenne Bottoms," 8.

of \$16-18 million. Divided into four stages, the first stage called for a new hydrology study and general evaluation of the situation at the Bottoms. This was undertaken by Thomas McClain and others for the Kansas Geological Survey.⁴⁸ The pipeline part of the canal was expanded to reduce blockage problems which sometimes caused inlet water to flood farmers' fields and never make it to the Bottoms, the same kind of problem the Koen ditch had suffered. Construction of floodwater distribution systems and a flow gauging station at the inlet and outlet canals rounded out the second stage of the plan. Stages three and four called for dividing pool 1 into 1A and 1B. This would reduce turbidity and allow fresh water to be maintained with a smaller inlet requirement. Rip rap on the new dike in pool 1 would greatly reduce erosion due to wave action. The last part of the plan would be to construct a mitigation marsh to replace the area lost to the new dike.⁴⁹

Now, in the spring of 1997, the project is virtually complete. In a recent interview with the manager of the Bottoms, Karl Grover, he expressed satisfaction at having the renovation project finally coming to an end. His reservations however, are the reservations of everyone who lives in this part of the country: will there be enough water? This question will exist on the Great Plains as long as people are here and the Rocky Mountains continue to act as a rain shadow over the region.⁵⁰

⁴⁸Thomas McClain, J. P. Allen MacFarlane, and Munir A. Butt, *Surface Water Supplies Available for Cheyenne Bottoms Wildlife Area* (Lawrence: Kansas Geological Survey, 1981), passim.

⁴⁹"Cheyenne Bottoms Renovation," *Kansas Wildlife and Parks* 49 (March/April, 1992), passim.

⁵⁰Karl Grover, Manager, Cheyenne Bottoms Wildlife Area, interview with author, April 22, 1997.

The Last Days of Innocence: America at War, 1917-1918, by Meirion and Susie Harries. (New York: Random House, 1997. 1997. Pp. 573. \$32.50)

Leave it to the Brits to celebrate the eightieth anniversary of America's entry into the Great War. British authors Meirion and Susan Harries have combined their talents to bring forth a new perspective on America during World War I. Although not historians by training, they come prepared with both research and writing skills: Meirion is an attorney, and Susie is a classical scholar and review for the *London Times Literary Supplement*. *The Last Days of Innocence* is their fourth writing collaboration on military history. Through their research, they dispel many myths and misconceptions surrounding the U.S. government, Army, and civilian population. Delving deeply into American social structure, they reveal a dark side that belies the patriotic film footage of flag-waving, cheering crowds. The results of their investigation? A book which communicates the ugliness, unrest, rampant capitalism, censorship, and violation of civil liberties that the U.S. government condoned and allowed to run amok during these turbulent years. They pose a troubling question: Why does this particular time and war continue to go unnoticed by Americans? *The Last Days of Innocence* presents the Harries' rationale both for this lack of concern and for the overall sense of lost innocence which resulted from America's involvement in World War I.

As in most histories of the Great War, an explanation of the years preceding entry into the war is required. For the authors, this seemed a logical starting spot, and they point out that America was rife with problems prior to the war, regardless of the serene pictorial images that present a different view: "The social problems--poverty, foul working conditions and swelling labor unrest, ecological damage, corruption in municipal government, alcohol, drugs, vice, discrimination against blacks and women--troubled Americans from all walks of life" (p. 21). Although the U.S. was beset with social unrest, these problems did not cease to exist once war was declared. If anything, these problems were magnified to a degree that brought harsh action by the government.

The Harries' accomplishment lies in the airing of America's dirty laundry for all to witness. With every patriotic reference, a juxtaposed rebuttal

follows on its heels. The whole U.S. Army organization comes under critical fire. Considering its inadequate facilities, training of enlisted men and offices, logistical and supply system nightmare, and mobilization, it's amazing that the U.S. Army accomplished anything at this time. Its behavior after arrival in France--despite the cheering crowds and parades--is examined and ugly incidents brought to light.

What better way to show one's support for the war than to buy a Liberty bond? Unfortunately, even Liberty Bonds come under attack as an example of a good idea that went awry. Liberty Bonds, "loans" supporting the war effort, were masterminded by the Secretary of the Treasury, William McAdoo. He aimed at mass appeal, but according to the authors, the common man required a higher return than 3.5 percent on the bonds. For the more affluent crowd, the bonds proved to be a great tax exemption: "Inadvertently, the first loan had created a class of rich nontaxpayers, and from then on Liberty Loans were aimed more obviously at the better off or at financial institutions" (p. 177).

The Harries's seem to cover all issues regarding American society during this time. They spend a significant amount of time on the racial issue, from the migration of blacks from the South to northern industrial areas, to the discrimination issue within the U.S. Army. Labor unrest and fear of the Industrial Workers of the World instilling their radical message to undermine capitalism would seem absurd, except for the brutal means of controlling the labor problems and agitators. Along with labor unrest, the plight of poor immigrant workers, exploited by the industrial giants, is exposed.

Perhaps most chilling is the violation of civil rights of the American people. During this period, the federal government employed censorship, promoted intolerance, and engaged in the civilian "policing" of behavior "inappropriate towards the government," all activities which made the war even more disturbing. As the Harries's observe, "in the quest to maximize production, the old traditions of tolerance and individual freedom were meeting their sternest test--and in the white heat of mobilization, American democracy was showing signs of melting away" (p. 177).

Throughout the book, the authors give ample credit where due in the notes and chapter sections from their use of archives, personal papers, and memoirs to supplement their findings. While their book may not be geared toward scholars, for the layman at least it's a good starting point for exploring other issues and areas within the U.S. framework during World War I.

The Harries's are correct in saying that Americans lost their innocence with this war, as did their British allies. "Americans could not recapture the

innocent optimism and self-confidence of the prewar days," they write. "Wide rents had appeared in the social fabric of America, and the experiment of the melting pot appeared to be over. Rudely, the war had thrust Americans into the uncertain future of the twentieth century: its consequences are our legacy today" (p. 9). With all of the turmoil associated with this war, especially during its final days, Americans were ripe for the disillusionment and cynicism which set in, altering their lives and sense of security for the rest of the century.

This book does more than defeat old myths: it enlightens Americans to a time glossed over by (obviously) censored communications. No wonder the "real" picture of American during this era has been ignored--the "real" picture has never been available for viewing.

Sandra Reddish

A Midwife's Tale, produced by Laurie Kahn-Leavitt and directed by Richard Rogers. (A Blueberry Hill film, 1997, 80 minutes)

A Midwife's Tale, which aired on PBS in January, 1997, as part of the "American Experience" collection, is the documentary based on the Pulitzer Prize-winning narrative of the same name written by historian Laurel Thatcher Ulrich. The book, based on the diary of Martha Ballard, details her life beginning in 1785, when she was 50, and ending with her death in 1812. Ballard's diary records her work as a midwife and her home life in the Kennebec River region of Maine, and the book contains selections from Ballard's diary followed by explanations and details by Ulrich. The film, directed by Richard P. Rogers and written and produced by Laurie Kahn-Leavitt, follows much the same pattern.

The documentary opens with scenery of the Kennebec River and is overlaid with a voice, representing Martha Ballard, reading diary entries. The voice narrates the scene developing of a woman in labor and Ballard (played by actress Kaiulani Lee) overseeing the birth. Ulrich reflects on not knowing even what Ballard looked like and proceeds with discussion about the diary. This is how the film develops: scenes taken from the diary alternating with clips of Ulrich discussing the diary and researching it.

During the film, Ulrich addresses the difficulties of unraveling a diary of this magnitude. She demonstrates some of the techniques she used to fit the diary into a logical framework for historical research, dwelling on the complexity involved in the people and relationships, saying, "A diary like this is just filled with names. Kind of like walking into a room and seeing a bunch of strangers; you don't know who they are." Ulrich also discusses the difficulty of finding other information on Ballard, a problem historians often face when doing research into women's history of the early Federal period.

A Midwife's Tale achieves an interesting and, at times, dramatic account of Martha Ballard's life and the late eighteenth century, but one point in the film could have been improved: some events were introduced but not concluded. The most obvious example is the deaths by of Ballard's neighbors, the Purrinton family. The murders are dramatized but not explained in terms of the details or motivation for them, nor even

how they affected Ballard. The book does all of this, but for those who have not read it, and even for those who have, there is a lack of closure. In these instances one feels that the film's makers are using the film to advertise the book, rather than creating a historical account of Martha Ballard or acknowledging the time and dedication required of Ulrich to interpret the diary.

All in all, though, it is a good film, portraying Martha's life in context with documented historical events of the period. The documentary vividly brings diary entries to life. The reenactments of the time period are well conceived, portraying everything from women in labor (or as Ballard calls it, "travail") to the hypothetical morning rituals of the Ballard family members, all with great attention to detail. Many of the day-to-day activities portrayed are purely supposition by Ulrich and Kahn-Leavitt. But the little details, like the intricacies of dressing and the processes of weaving, mixing ink and making soap, help to animate the atmosphere of eighteenth-century Maine, especially in regards to the lives of women.

For those who have read the book, the documentary will help bring the people and events to life and show Ulrich's determination in organizing the information in the diary into a coherent historical work. Even the viewer who meets Martha Ballard for the first time in this film will still get an interesting look at American domestic life in the late eighteenth century. Watching the documentary will probably inspire a reading of the book for additional details.

Kember Stagner

Whittaker Chambers: A Biography, by Sam Tanenhaus. (New York: Random House, 1997. Pp. 638. \$35.00)

Free-lance writer Sam Tanenhaus has made an extraordinary contribution to twentieth-century American history in his stunning new biography of Whittaker Chambers. Tanenhaus combines scholastic rigidity with his eminently readable style to create a work of the highest standard of historical biography. Whittaker Chambers emerges as a complex, enigmatic figure, misunderstood by most in his own time and by his liberal critics yet today. The author is successful in understanding and intimating the complex forces that drew Chambers to, and ultimately from, communism, and eventually toward his confrontation with Alger Hiss.

Whittaker Chambers will be forever tied to the events surrounding his accusations against Hiss, but Tanenhaus gives a much fuller picture of the man than has ever been seen before. We first see Chambers in his childhood, amidst an eccentric family always at the fringe of society. We follow him to Columbia University, where he was something of a phenomenon before deciding to leave school after his literary radicalism upset the university administration. Chambers ended up in the Communist Party, where he began to establish a reputation as a writer before dropping out of sight to do the "special" work that ultimately brought him into contact with Alger Hiss as courier and a link to the Soviet intelligence apparatus. After leaving the Communist Party, he became a powerful editor at *Time* and after the Hiss case remained an icon in the conservative movement until his death in 1961. Tanenhaus cogently presents the reader with the complete picture of Chambers, and it is an intimate portrait that would fascinate even if the Hiss case had never occurred. The author suggests that Chambers was a mis-understood genius, and it seems that he would likely have had a successful literary career had he not become involved with radical politics. Tanenhaus also superbly represents the shifting ideological persuasions of this troubled figure, explaining the reasons behind his various conversions.

Tanenhaus at times may seem too close to his subject, yet he does make it clear that Chambers was no saint. He was a man of near-slovenly personal appearance who did little to take care of himself. He was, furthermore, an uncompromising man who often went to extremes: some

of his accusations made contemporaneously with the Hiss case can only be described as far off the mark, and they contributed to the McCarthyism that soon followed Hiss's conviction of perjury.

This biography is extremely well-researched, taking advantage of recently-released documents from both behind the Iron Curtain as well as from the U.S. government. The endnotes are amply complete, and the index is quite thorough, though Tanenhaus's bibliography is dispensable, as many of the works he cites there appear in the text as well. The six-page appendix puts to rest any lingering doubts about the guilt of Alger Hiss.

Fellow ex-Communist Arthur Koestler called Whittaker Chambers "the most misunderstood person of our time" (p. 514), and the reader leaves the book convinced of this fact. Tanenhaus has produced an outstanding work which will greatly influence how historians will view Chambers in the future, yet doing so in a way that makes the book worthwhile even for lay readers to understand this episode of America's history.

Eric Owens