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Art of Judicial Biography

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REVIEW ESSAY

THE ART OF JUDICIAL BIOGRAPHY

LEARNED HAND: THE MAN AND THE JUDGE. By *Gerald Gunther*. New York: Alfred A. Knopf. 1994. Pp. xxi, 818. \$35.00. Hard Cover.

JUSTICE LEWIS F. POWELL, JR. By *John C. Jeffries, Jr.* New York: Charles Scribner's Sons. 1994. Pp. xii, 690. \$30.00. Hard Cover.

HUGO BLACK: A BIOGRAPHY. By *Roger K. Newman*. New York: Pantheon Books. 1994. Pp. xiv, 741. \$30.00. Hard Cover.

Michael J. Gerhardt[†]

INTRODUCTION

Judicial biographies, like judicial opinions, are easier to criticize than to write. Many complain that judicial biographies oversimplify the judicial function or overemphasize important opinions or the lurid aspects of judges' personal lives. Others condemn judicial biographies for celebrating rather than critically or impartially analyzing judges' deeds and decisions. These concerns lead some to doubt whether judicial biography is a legitimate genre, especially given the absence of any consensus on the criteria for a good judicial biography. Also problematic is the lack of agreement over what makes a judge great or at least sufficiently worthy to be the subject of a biography.

The recent publications of three eagerly anticipated judicial biographies—Gerald Gunther's *Learned Hand: The Man and the Judge*,¹ John Jeffries' *Justice Lewis F. Powell, Jr.*,² and Roger Newman's *Hugo Black: A Biography*³—have focused attention not only on what made

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¹ GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994).

² JOHN C. JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.* (1994).

³ ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* (1994).

each of these judges famous but also on the utility of a judicial biography. Each book is special in its own right as the first comprehensive biography of its formidable subject,⁴ each of whom earned his fame largely (but not exclusively) as a judge. Justice Black, for instance, served with distinction for ten years as a United States senator and for over thirty-four years on the Supreme Court.⁵ Justice Powell was a top-flight corporate lawyer at a law firm he helped to make one of the nation's most prestigious. He was also active in civic and bar-related activities.⁶ For example, he served as President of the American Bar Association⁷ for two years and later was a swing vote on the Supreme Court for over fifteen years.⁸ Learned Hand was an active federal judge for almost five decades.⁹ He is reputedly one of the greatest judges, if not the most distinguished jurist, never appointed to the Supreme Court.

The three books invite comparisons for many other reasons. Although well published in other kinds of legal scholarship, none of the three authors is a professional legal historian, raising a question about the degree to which they each have met the special demands of such projects. The latter challenges become more acute given the close ties between each author and his subject. For instance, Gunther served as a law clerk to Judge Hand¹⁰ and was anointed as Hand's official biographer by Felix Frankfurter, who dissuaded Hand from burning his personal papers by promising that Gunther would chronicle Hand's life.¹¹ Gunther even concedes at the outset of his book that Hand is "my idol still."¹² Similarly, Jeffries clerked for Justice Powell, who entrusted Jeffries with "his files and his memories" for the biography.¹³ Newman admits that Justice Black is one of his heroes. Further, he had the Black family's full support in gaining access to

⁴ Justice Black's life, particularly his tenure on the Supreme Court, is the subject of numerous books and articles. See, e.g., GERALD T. DUNNE, *HUGO BLACK AND THE JUDICIAL REVOLUTION* (1977); JOHN P. FRANK, *MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS* (1949); JAMES J. MAGEE, *MR. JUSTICE BLACK: ABSOLUTIST ON THE COURT* (1980); JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* (1989); William E. Leuchtenburg, *A Klansman Joins the Court: The Appointment of Hugo Lafayette Black*, 41 U. CHI. L. REV. 1 (1973); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963). Newman's biography, however, is the first attempt to cover Black's entire personal and professional life in a single volume.

⁵ NEWMAN, *supra* note 3, at 125-230.

⁶ JEFFRIES, *supra* note 2, at 122-30.

⁷ *Id.* at 194-204.

⁸ *Id.* at 243-81.

⁹ GUNTHER, *supra* note 1, at 143-343.

¹⁰ Lewis F. Powell, *Foreword* to GUNTHER, *supra* note 1, at xiii.

¹¹ See Jeffrey Rosen, *The Craftsman and the Nihilist*, NEW REPUBLIC, July 4, 1994, at 36 (reviewing GUNTHER, *supra* note 1).

¹² GUNTHER, *supra* note 1, at xviii.

¹³ JEFFRIES, *supra* note 2, at ix.

various materials.¹⁴ Hence, one can legitimately wonder about whether any or all three of these authors were especially susceptible to the temptation to write celebratory biographies.

The books' subjects also make interesting comparisons. As three of the most influential American jurists in the twentieth century, they addressed many of the important legal issues decided by federal courts in the last hundred or so years. Their judicial temperaments and philosophies contrast sharply, with Black and Hand at polar opposites in terms of personality and approach to judicial decisionmaking, and Powell falling in between with respect to both. Powell and Black naturally invite a comparison because they were both Southerners and because Powell took Black's seat. Moreover, Black served on the Court during a period when Hand was often thought to be a leading contender for a seat.

This Review Essay suggests, nevertheless, that examining the recent books about these three judges' lives and work sheds light most importantly on the special challenges confronting an author of a judicial biography. Above all else, a judicial biographer must clarify what made his or her subject special as a judge. To achieve this basic objective, Gunther, Jeffries, and Newman had to master and organize extraordinary amounts of material, clarify the special attributes of their subjects' judicial performances, demonstrate the relevance of their subjects' nonjudicial activities, convey the information others need to evaluate the quality of their subjects' judicial performances, and resist the urge to please those with vested interests in the depiction of their subjects.

Each part of this Review Essay focuses on how each author dealt with a different challenge typically complicating the writing of a judicial biography. Part I examines how well each biographer elucidated the most significant influence on a judge—his judicial philosophy, including its roots. A biographer's challenge is to clarify how the subject decided cases and, in particular, to explain the judge's approach to judicial decisionmaking. Gunther, Jeffries, and Newman ably delineate the various influences that shaped their subjects' attitudes toward judging, including each judge's personality, legal training, and public service. All three authors, however, make some questionable choices regarding which cases to cover, and each overemphasizes constitutional law at the expense of a more comprehensive analysis of the similarities and differences in each judge's constitutional, statutory, and common-law opinions.

Part II evaluates each author's coverage of the collegial and institutional influences on his subject's judicial performance. Given that

¹⁴ NEWMAN, *supra* note 3, at 626-32.

Justices Black and Powell and Judge Hand each sat on multi-member courts for substantial periods, a significant question arises as to what kinds of colleagues they were. In this respect, Gunther, Jeffries, and Newman provide excellent descriptions of the personality conflicts with which their respective subjects dealt. Gunther and Jeffries detail the innovations made by Judge Hand and Justice Powell, respectively, to improve their colleagues' deliberations and working conditions. Newman and especially Gunther fail, however, to show how, if at all, Justice Black and Judge Hand were influenced by the other jurists with whom they sat.

Part III considers the extent to which the three authors provide balanced portraits of their subjects. It is not uncommon for a judicial biographer—or any biographer, for that matter—to have such close ties to or reverence for his subject that his impartiality is threatened. Jeffries and Newman surmount this hurdle. Gunther, in some ways, does not.

Part IV addresses the question of judicial greatness. It suggests that judicial biographers need not reach conclusions about whether or not their subjects were great judges, but that they should provide sufficient information to enable others to make the appropriate judgment. This task inevitably requires judicial biographers to consider whether their subjects made the "right" decisions in their most important cases. Since consensus on the correctness of a judge's most important or controversial decisions is not likely, a judicial biographer must at least try to explain his criteria for measuring or depicting the quality of his subject's judicial performance and lasting significance as a judge. Part IV suggests two basic categories of information judicial biographers ought to cover for illuminating their subjects' significance as judges: (1) the quality of a judge's decisionmaking (including its craftsmanship, creativity, and influence) and (2) the nature of a judge's temperament (including the judge's leadership ability, respect for opposing viewpoints, contributions to the collegiality of his court, and the courage of his convictions). Based on these criteria, Part IV concludes that Hand's greatness as a judge is, as Gunther asserts, justifiably based on the craftsmanship of his decisions in a wide range of areas. Justice Black's judicial greatness could similarly be grounded in the clarity, eloquence, and influence of his constitutional decisions; however, as Newman demonstrates, Black's judicial stature is undercut somewhat by his occasional willingness to sacrifice principle for personal aggrandizement. And although Justice Powell's greatness as a judge cannot be based solely on the opinions Jeffries discusses—Powell has renounced most of them—Jeffries demonstrates that Powell's patience and equanimity on the bench are well worth emulating.

Part V examines a topic often taken for granted by judicial biographers and their readers: an analysis of how the subject became a judge, particularly whether the traits for which the judge would later become famous were apparent at the time of, or were the reasons for, his selection as a judge. The purpose of this inquiry is to determine whether the three biographies under review reveal anything about the means of selecting a great or influential judge that could be used to guide future judicial selection. This Part maintains that these biographies only partially shed light on two important aspects of judicial selection—the unpredictability of judicial greatness and the consistent politicization of judicial selection throughout American history.

This Review Essay concludes that a judicial biography poses many special challenges for an author, but none more important than demystifying the judicial function. This task requires a judicial biographer, at the very least, to clarify the most significant influences on, and special attributes of, the subject's judicial performance. Obviously, this task also entails explaining the relationship, assuming there is one worth exploring, between an individual's private life and public career. To clarify these matters, a judicial biographer must be prepared to draw on relevant material from a wide variety of related fields, including history, psychology, law, and politics. Obviously, no judicial biographer can cover all of this material with equal ease, nor does each of these subjects necessarily merit the same amount of attention in every judicial biography. Judicial biographers must make and explain their choices of which cases, related matters, or other events to cover. These choices ultimately reveal, even when they are as reasonable as those made by Gunther, Jeffries, and Newman, as much about the authors' attitudes concerning their subjects as about the subjects themselves.

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ELUCIDATING THE JUDICIAL FUNCTION

At the very least, a judicial biography should clarify how a particular judge decided cases. This challenge requires the biographer to explain the various influences that shaped the subject's judicial performance. One of the most important influences is the judge's philosophy, that is, the judge's general understanding of the judicial function and customary approach to judicial decisionmaking. The more prolific and influential a judge is, the greater the effort the biographer must expend in choosing the cases that best reveal or typify the subject's judicial philosophy. Moreover, space concerns, and the need to keep readers' interests, compel biographers to ensure that the cases discussed reflect the subjects' judicial philosophies and explain the subjects' judicial outputs.

All of these challenges confronted Gunther, Jeffries, and Newman in writing their respective judicial biographies. For instance, they each chose as a subject a judge who had participated in over 3000 opinions, far more than any author could reasonably cover. All three biographers chose to ignore whole classes of cases, significant opinions, or other key material that would have helped readers fully understand their subjects' judicial performances. For example, Newman discusses Black's activities as a senator for ten years, including his craftsmanship of what later became the Fair Labor Standards Act.¹⁵ However, Newman never mentions whether Justice Black developed a philosophy of, or systematic approach to, legislative history or statutory interpretation, nor does he mention whether any of the other justices raised questions about the propriety of Black's deciding cases involving statutes that he had helped to draft.¹⁶ Newman also does not discuss nor describe the methodology of Justice Black, who had been a highly successful personal injury lawyer, for handling torts claims on the Supreme Court.¹⁷

Whereas Newman leaves out some of the significant classes of cases Justice Black decided, Gunther fails, in spite of his attempt to cover a representative cross-section of Judge Hand's opinions, to discuss some of Hand's most memorable decisions. For instance, despite the widespread speculation about why Judge Hand was never appointed to the Supreme Court or how he would have performed as a justice, Gunther fails to mention, much less to discuss, Judge Hand's performance in *Alcoa*¹⁸—the landmark antitrust case in which Judge Hand was part of a special, congressionally authorized panel of the Second Circuit that essentially sat as the Supreme Court when the Court, due to recusals, could not muster a quorum. Nor does Gunther explore three other landmark decisions by Judge Hand—*United States v. Carroll Towing Co.*,¹⁹ in which Hand broke new ground by applying economic reasoning to a negligence case; *The T.J. Hooper*,²⁰ in which Hand declared that compliance with custom is not a defense to a charge of negligence; and *Helvering v. Gregory*,²¹ in which Hand originated the "substance over form" doctrine. Hand was at his most

¹⁵ NEWMAN, *supra* note 3, at 214-19.

¹⁶ One exception is Newman's thorough discussion of *Jewell Ridge Coal Corp. v. Local 6167, UMW*, 325 U.S. 161 (1945), in which Justice Robert Jackson challenged the propriety of Justice Black's hearing a case under the Fair Labor Standards Act argued by his former law partner. NEWMAN, *supra* note 3, at 333-37.

¹⁷ Newman briefly mentions that Black tended to uphold the claims of injured workers but never provides any details of Black's arguments or reasoning in such cases. See NEWMAN, *supra* note 3, at 473.

¹⁸ *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

¹⁹ 159 F.2d 169 (2d Cir. 1947).

²⁰ 60 F.2d 737 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

²¹ 69 F.2d 809 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).

creative and imaginative in these cases, contrasting sharply with his far more restrained approach in constitutional cases—a contrast Gunther never identifies, much less explores.²²

For his part, Jeffries deliberately limited the scope of his coverage of Powell's judicial career to "six areas of commanding interest: desegregation, abortion, Watergate, the death penalty, affirmative action, and sexual equality"²³ because they revealed "the individual beneath the judicial robes. Here the link between the private man and the public figure can be clearly seen, and the surprising impact of one Supreme Court Justice on the nation's history can be correctly gauged."²⁴ Yet, the Powell that emerges in Jeffries's book differs from the Powell that appears in many of the constitutional and statutory cases not explored by Jeffries: the former Powell is moderate and relatively consistent, whereas the latter Powell tends to be more conservative and inconsistent.²⁵ Nor does Jeffries show how nearly forty years in corporate practice shaped Powell's corporate and securities opinions for the Court.²⁶

In fact, each author places an inordinate emphasis on his subject's constitutional law opinions. One obvious reason for this focus is that both Gunther and Jeffries specialize in constitutional law and might have been particularly interested in decisions involving their area of expertise. Similarly, Newman has taught constitutional law at New York University Law School and has long been interested in, and written about, the First Amendment.²⁷ Moreover, Jeffries explicitly acknowledged that the cases he intended to cover were those that "aroused intense passion and debate. Indeed, most of them still do."²⁸ Hence, the authors quite reasonably may have focused on the judges' constitutional law opinions because these opinions have significant social and political ramifications, implicate the judges' politics, and involve many of the most difficult issues with which the judges had to grapple while on the bench. The problem is that this emphasis precluded the authors from comprehensively clarifying the nature of the judicial function and identifying the commonalities or differences among their respective judges' decisions in constitutional, statutory, and common-law cases.

²² See *infra* notes 216-22 and accompanying text.

²³ JEFFRIES, *supra* note 2, at xi.

²⁴ *Id.* at xi-xii.

²⁵ Cf. Henry A. Abraham, *Lewis Franklin Powell, Jr.*, in *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 357, 357-66 (Melvin I. Urofsky ed., 1994) (reviewing a broader range of Powell's decisions in order to capture Powell's essential jurisprudence).

²⁶ See, e.g., *Dirks v. SEC*, 463 U.S. 646 (1983); *Chiarella v. United States*, 445 U.S. 222 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

²⁷ NEWMAN, *supra* note 3, at 742.

²⁸ JEFFRIES, *supra* note 2, at xi.

The authors' focus enabled them, however, to clarify how their subjects performed in some major constitutional disputes. The authors fully describe the different judicial philosophies their subjects developed to resolve the so-called "countermajoritarian difficulty"²⁹—the possibility of unprincipled or self-interested judicial interference with the decisions of the people's duly elected representatives. Moreover, the authors explained how these philosophies were shaped by their subjects' upbringing and training; personality and character; reaction or attraction to certain social, political, and judicial movements; and vision of the judicial role in American society.

For instance, Gunther thoroughly traces the origins and nature of Hand's judicial philosophy. Above all else, Gunther conveys Hand's steadfast belief in judicial restraint as an unmitigated virtue in constitutional cases. As Gunther explains, Judge Hand's "decisions were noted not for dramatic overturning of majoritarian sentiments, but rather for superior craftsmanship and for creative performance within the confines set by the executive and legislative branches."³⁰ Yet, Hand's conception of judicial restraint seems odd by today's standards, especially his suggestion during his 1958 lectures at Harvard Law School that no principled basis for judicial review could clearly be found in the Constitution and that the dangers of judicial over-reaching were so great that citizens—and judges—should regard the Constitution and its amendments as a series of admonitory moral principles, rather than as a set of rights to be enforced by judges.³¹ Given such views, it is not surprising that Hand invalidated statutes on constitutional grounds on only two occasions.³²

Because Gunther realized that many of his readers would find this record unusual, he devotes much time to delineating its roots and evolution. First, Gunther describes Hand's favorite teacher at Harvard Law School, James Bradley Thayer, as playing a key role in shaping Hand's attitude toward judging. As Hand recalled, Thayer "was to imbue [his students] with a skepticism about the wisdom of setting up courts as the final arbiters of social conflicts."³³ Throughout the book, Gunther repeats that Hand's unwavering faith in judicial restraint could be attributed to Thayer's teachings. This

²⁹ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986).

³⁰ GUNTHER, *supra* note 1, at xvi.

³¹ *Id.* at 654-64.

³² See *Frew v. Bowers* 12 F.2d 625 (2d Cir.), *cert. denied*, 273 U.S. 682 (1926) (concurring in a judgment to strike down a provision of the 1921 Revenue Act as violating the Fifth Amendment due process clause); *Seelig v. Baldwin*, 7 F. Supp. 776 (S.D.N.Y.), *aff'd*, 293 U.S. 522 (1934) (striking down a New York law that prescribed minimum prices New York dealers could pay milk producers as violating the Fourteenth Amendment due process clause).

³³ GUNTHER, *supra* note 1, at 51 (internal quotation marks omitted).

allegiance led Hand to oppose "the courts' reliance on the vague terms of the due-process clauses of the Fifth and Fourteenth Amendments to block legislative decision making."³⁴

In fact, Hand's upbringing, legal training, law practice, tenure on the district court, and first decade on the Second Circuit coincided with the rise of substantive due process to protect economic interests. Hand, however, was also an early convert to the "progressive" movement which believed that the national government should regulate commerce and industry in the interests of justice.³⁵ Consequently, Hand was outraged by the Court's substantive due process decisions—decisions which tended to thwart progressive policies. He also acted on his political beliefs throughout much of his professional life. For example, he persuaded Theodore Roosevelt, whose acquaintance he had cultivated, to read his friend Herbert Croly's progressive manifesto, *The Promise of American Life*, which became Roosevelt's bible.³⁶ Hand worked with Croly to establish *The New Republic* for which Hand occasionally wrote unsigned articles "about judicial power and social reform, issues central to his involvement with the Progressive party."³⁷ In 1912, Hand, then a federal district judge for three years, joined Roosevelt's Progressive Party, helped draft its platform, and a year later ran unsuccessfully on the Party's ticket for a seat on the New York Court of Appeals.³⁸

Gunther also suggests that Hand's personality was an important factor in his fervent commitment to judicial restraint.³⁹ In the foreword to Gunther's book, Justice Powell echoes that, "[s]een in the context of his private life, Hand's philosophy [of judicial restraint] appears to have been a product of personal self-doubt."⁴⁰ In fact, Hand was driven and haunted throughout his life by self-doubt, cultivated by an "image of paternal perfection"⁴¹ in the figure of a father who had died when Hand was fourteen but whose achievements were

³⁴ *Id.* at 373.

³⁵ *Id.* at 202.

³⁶ *Id.* at 198-99.

³⁷ *Id.* at 246.

³⁸ *Id.* at 226-37. In describing this period of Hand's life, Gunther explains that:

At that time, [Hand] thought it appropriate for a federal judge to offer private advice, as he so frequently did with Theodore Roosevelt, so long as there was no prominent public identification with the cause. This view of acceptable judicial conduct, while not unusual at the time, was less restrictive than today's official view or Hand's later view. By the time he was on the appellate court, Hand consistently avoided political involvements and public identification with causes that could be seen as "agitation."

Id. at 237 (footnotes omitted).

³⁹ *Id.* at xvii.

⁴⁰ Powell, *supra* note 10, at xiii.

⁴¹ GUNTHER, *supra* note 1, at 6.

far more modest than his family maintained.⁴² Hand's penchant for self-doubt was reinforced at Harvard College by two significant events—first, by his exclusion from its elite societies and activities and second, by Hand's attraction to philosophical or moral skepticism.⁴³ Gunther maintains that the latter accounts for Hand's predilection to question everything, including his own judicial decisions, and to doubt the existence of moral absolutes or objectively right answers.⁴⁴ As a judge, Hand's self-doubt is evident in his consistent deference to legislatures and precedent. On the bench, his skepticism often led him not just to decide the case before him but often to look for—even sometimes to question—essential principles of doctrine and to wrestle openly with larger issues relating to the role of the judiciary in a democratic society.⁴⁵ Although Gunther does not say so explicitly, his portrait of Hand leaves the reader with the impression that Hand was more adept at discerning the reasons for courts to refrain from interfering with majoritarian enactments than he was at defending judicial review to protect constitutional guarantees.

One aspect of Hand's thinking that eludes Gunther, however, is the distinction between skepticism and pragmatism. To be sure, Hand often professed his belief that no moral conviction can be objectively true.⁴⁶ This skepticism is apparent in Hand's immigration decisions, in which he made the touchstone of "good moral character"—a statutory prerequisite to naturalization—the moral standards actually prevailing in society, rather than Hand's own standards or those of the nation's ethical leaders.⁴⁷ Hand's moral relativism also may have reinforced his willingness to accept the propriety of almost thirty years of wrenching separations from his wife, who preferred the company of a Dartmouth French teacher.⁴⁸ In this sense, Hand, like his "unblemished idol" Justice Oliver Wendell Holmes,⁴⁹ seemed to

⁴² *Id.* at 6-9, 133.

⁴³ At Harvard College, Hand's favorite teachers were William James, Josiah Royce, and George Santayana. He seriously contemplated becoming a philosopher, but none of his teachers encouraged him to pursue it. Consequently, he went to law school. *Id.* at 35-37.

⁴⁴ *Id.* at 290-91.

⁴⁵ *Id.* at 373.

⁴⁶ See Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 532 (1994) (book review).

⁴⁷ See *Posusta v. United States*, 285 F.2d 533 (2d Cir. 1961); *Schmidt v. United States*, 177 F.2d 450 (2d Cir. 1949); *Repouille v. United States*, 165 F.2d 152 (2d Cir. 1947); *United States v. Francioso*, 164 F.2d 163 (2d Cir. 1947); *United States ex rel. Iorio v. Day*, 34 F.2d 920 (2d Cir. 1929); GUNTHER, *supra* note 1, at 629-38 (discussing Hand's decisions in *Yin-Shing Woo v. United States*, 288 F.2d 434 (2d Cir. 1961)). Hand's colleague Judge Jerome Frank urged his colleagues to adopt the moral standards of the nation's ethical leaders. GUNTHER, *supra* note 1, at 631.

⁴⁸ *Id.* at 183-88.

⁴⁹ *Id.* at 345.

have treated moral values as merely personal preferences or matters of public opinion.⁵⁰

Yet, Hand was not a perfectly consistent philosophical skeptic. As reflected in his ardent support for progressive causes, he had sufficiently strong convictions to take sides on almost all of the burning issues of his day. Moreover, he was not skeptical of his own skepticism, and he apparently did not feel the need to explain how it was that his own views—even as a judge—were privileged. Hand denied metaphysical truth, but he did not deny the possibility of the existence of “the local, practical, always revisable truths of science and of everyday life.”⁵¹ In this sense, Hand was a pragmatist who, at least as a common-law judge, tested the waters ahead for trouble, creatively explored the limits of precedent, tended to move incrementally, and wrote in what Karl Llewellyn called the “Grand” style of opinion-writing.⁵² For most of his life, Hand distrusted courts more than he distrusted legislatures. He seemed to have lost faith in both by the 1950s. A consistent skeptic doubts the existence of all absolutes, but a pragmatic judge, as Hand seemed to have been, resolves cases and accepts fixed standards in the form of a constitutional mandate, a controlling precedent, or a legislative directive.

Comparing Gunther’s portrait of Hand with Newman’s picture of Black reveals that the two judges were quite different in terms of personality and judicial philosophy. Whereas Hand was prone to self-doubt, Black was imbued with “boundless self-confidence.”⁵³ While Hand did not believe in absolutes of truth, and this belief may have led Hand to hesitate in identifying a single, fixed principle embodied in a constitutional guarantee, the cornerstone of Black’s constitutional faith was that “there are ‘absolutes’ in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be ‘absolutes.’”⁵⁴ Justice Black equated the notion of absolutes with bright line tests drawn or applied by the courts to prevent the dilution of individual liberties or the aggrandizement of any branch, beyond its proper realm of author-

⁵⁰ See LEARNED HAND, *A Personal Confession*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 302, 307 (3d ed. 1960) (“Values are incommensurables. You can get a solution only by a compromise, or call it what you will. It must be one that people won’t complain of too much; but you cannot expect any more objective measure.”).

⁵¹ Posner, *supra* note 46, at 530.

⁵² Professor Karl Llewellyn dedicated his book on the common-law tradition to 10 great commercial judges, including Learned Hand, “whose work across the centuries has given living body, toughness and inspiration to the Grand Tradition of the Common Law.” KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* v (1960) (as quoted in the dedication).

⁵³ NEWMAN, *supra* note 3, at 169.

⁵⁴ Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960).

ity.⁵⁵ Justice Black saw the Constitution as a set of commands designed to prevent the recurrence of certain historic evils, and once he had determined the scope of a constitutional mandate through its literal language or the framers' intent, he rigorously applied it, regardless of the consequences or conflicting precedent.⁵⁶ As Newman explains: "Black wanted, above all, principles of individual rights hard and clear so that other persons in power, especially judges, couldn't squirm out of them."⁵⁷

Newman identifies several factors that shaped Justice Black's judicial philosophy. For example, Black's upbringing as a Populist in a small town in Alabama instilled in him a belief that the law should work for the common people.⁵⁸ According to Newman, "The first thing [Black] saw in a case . . . was the human being involved—the human factors, a particular man or woman's hopes and suffering; this became the focus of all his compassion."⁵⁹ Black's experiences as a police court judge and county prosecutor taught him "that crime sprang from poverty, economic injustices and the social diseases and frustrations that were their by-products. Government had to address itself to these problems."⁶⁰ Black's concerns about the law's impact on people and his first-hand experiences with the criminal justice system uniquely qualified him to urge the Court to strictly enforce the constitutional provisions defining the conditions of trial by jury and the availability of counsel and those prohibiting coerced confessions, compulsory self-incrimination, and double jeopardy.⁶¹

⁵⁵ *Id.* at 869-71. For Black, this was an essential feature of a system of checks and balances "designed to prevent any branch . . . from infringing individual liberties safeguarded by the Constitution." *Id.* at 870.

⁵⁶ Yet, Justice Black felt that a judge should not be a captive of his own judicial philosophy. As he once explained to his former law clerk, now Judge Guido Calabresi:

[A] wise judge chooses, among plausible constitutional philosophies, one that will generally allow him to reach results he can believe in—a judge who does not to some extent tailor his judicial philosophy to his beliefs inevitably becomes badly frustrated and angry. . . . A judge who does not decide some cases, from time to time, differently from the way he would wish, because the philosophy he has adopted requires it, is not a judge. But a judge who refuses ever to stray from his judicial philosophy, and be subject to criticism for doing so, no matter how important the issue involved, is a fool.

Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 132 n.169 (1991), quoted in NEWMAN, *supra* note 3, at 435 n.*.

⁵⁷ NEWMAN, *supra* note 3, at 484.

⁵⁸ *Id.* at 1, 6-7.

⁵⁹ *Id.* at 472-73 (internal quotation marks omitted) (quoting CHARLES REICH, *THE SORCERER OF BOLINAS REEF* 24 (1976)).

⁶⁰ NEWMAN, *supra* note 3, at 48-49.

⁶¹ See Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 57-58 (1994) (explaining the relationship between Black's life experiences and his decisions in these areas of constitutional law).

Newman submits further that Black's concerns about making the government work for the common people led him to join the Democratic party at an early age. He remained a fiercely loyal member for the rest of his life.⁶² Like all good liberal Democrats of his era, Black abhorred the Supreme Court's use of substantive due process to strike down progressive economic legislation. For instance, in the Senate, Black voted against the confirmation of Charles Evans Hughes as Chief Justice because he feared Hughes favored substantive due process to protect economic interests.⁶³ Moreover, Senator Black's statements in numerous committee hearings and floor debates foreshadowed much of the philosophy he would later espouse on the Supreme Court, including his belief that Congress had the authority under the Commerce Clause to pass appropriate legislation to deal with any problem that directly or indirectly affected the national economy. Further, he believed federal courts lacked constitutional authority to interfere with such enactments.⁶⁴

Justice Black wasted no time in intensifying his campaign to end substantive due process. He would recall that substantive due process was "why I came on the Court. I was against using due process to force the views of judges on the country."⁶⁵ Newman concedes that:

It is difficult to overstate the centrality of this tenet of his creed, and as long as Black remained on the Court, no state economic regulation was invalidated on the grounds of denial of substantive due process. Reappearance under any form or any name alarmed him, and he remained ever vigilant.⁶⁶

Yet, as Newman explains, President Franklin Roosevelt's Supreme Court appointees, including Black, could not agree on what approach to substitute for substantive due process—other than a very deferential reading of the due process clause in cases involving economic interests—and on how to interpret noneconomic liberty claims, particularly those based on specific constitutional provisions.⁶⁷ For example, Judge Hand's close friend, Justice Felix Frankfurter, proposed extreme judicial deference to legislative judgments across the board.⁶⁸ Justice Black, by contrast, favored constitutional literalism and formalism as a way of eliminating judicial activism in economic

⁶² See NEWMAN, *supra* note 3, at 6-7; see also *id.* at 140-41 (noting that Black was "a yellow-dog Democrat" who adopted Thomas Jefferson's conception of the party).

⁶³ *Id.* at 134-35.

⁶⁴ *Id.* at 157-58, 208-19, 228.

⁶⁵ *Id.* at 277 (internal quotation marks omitted) (quoting Sidney Zion, Interview with Hugo Black for N.Y. TIMES obituary (May 1967)).

⁶⁶ NEWMAN, *supra* note 3, at 373.

⁶⁷ *Id.* at 295; see also GUNTHER, *supra* note 1, at 562-66 (discussing the economic and political dealings between the New Deal Justices).

⁶⁸ GUNTHER, *supra* note 1, at 563.

due process cases. But, Black also advocated bold judicial enforcement of the Constitution's explicit guarantees. Justice Black's textualism represented his attempt to limit judicial discretion and to justify judicial flexibility in enforcing and interpreting the constitutional text.⁶⁹

Despite Justice Black's efforts to remain faithful to the constitutional text and its original meaning, Newman traces the dramatic changes in Justice Black's judicial performance during his last decade on the Court.⁷⁰ In the 1960s, an aging Black, bent on setting the record for the longest tenure for a Supreme Court Justice, suffered from various ailments, including cataracts, which hindered his longstanding practice of researching his opinions thoroughly.⁷¹ He also grew increasingly impatient with what he regarded as a lack of respect for law and order on the part of many civil rights protestors.⁷² Black's opinions grew shorter and often contained an unprecedented note of anger and exasperation. Additionally, Black became more curt with his colleagues.⁷³

Newman's biography of Justice Black, when read together with Jeffries's biography of Justice Powell, demonstrates two things the Justices had in common as Southerners. First, the Justices' Southern manners and gentility helped to ease the often tense atmosphere of the Court.⁷⁴ Second, the Justices, like many liberal Southerners during the first-half of this century, favored the end of state-mandated segregation of the races, but were uncomfortable with court-ordered integration because they feared it would create mayhem in the South.⁷⁵ For example, Justice Black was one of the first Justices to join

⁶⁹ See Michael J. Gerhardt, *Hugo Lafayette Black*, in *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 5, 5-14 (Melvin I. Urofsky ed., 1994); Gerhardt, *supra* note 61, at 56.

⁷⁰ NEWMAN, *supra* note 3, at 568-70.

⁷¹ *Id.* at 562-63.

⁷² *Id.* at 591-95.

⁷³ *Id.* at 588-89; see also Roger K. Newman, *Hugo L. Black*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 121, 122 (Leonard Levy et al. eds., 1986) (recounting that in the 1960s, Black's poor health and his impatience with the excesses of political protest led him to write shorter, angrier opinions and to show less tolerance for dissenting speech than he had shown during his previous 24 years on the Court).

⁷⁴ See JEFFRIES, *supra* note 2, at 507-08, 561; NEWMAN, *supra* note 3, at 336-37.

⁷⁵ Newman calls Black "a 'southern liberal' in the populist tradition." NEWMAN, *supra* note 3, at 127. Jeffries describes Powell as

reluctant to speak out in a way that would impair the influence of the natural ruling class. In short, Powell's silence on desegregation was explained as much as anything by his social and political solidarity with the establishment of segregation. Even when he wanted change, he worked only from within.

JEFFRIES, *supra* note 2, at 180. Moreover, Jeffries suggests:

Although [Powell] had opposed massive resistance and interposition, no sane person could have thought him a "liberal integrationist." . . . Powell accepted integration but not busing. . . . [M]any southerners saw the in-

Brown v. Board of Education.⁷⁶ He endorsed the Court's efforts to remove all "the legal impediments to segregation" in the public schools.⁷⁷ However, his concerns about massive resistance to desegregation in the South led him to urge the Court to say as little as possible in ordering a remedy to state-mandated segregation.⁷⁸ Similarly, Justice Powell, who replaced Justice Black on the Court, was concerned about massive Southern resistance to court-ordered busing implemented to integrate the public schools and consequently urged limited use of that particular remedy.⁷⁹

Otherwise, Justice Powell's judicial philosophy fits almost squarely between Justice Black's absolutism and Judge Hand's extreme deference. Interestingly, one source of Powell's jurisprudence Jeffries identifies is a propensity toward self doubt, which Powell shared with Judge Hand.⁸⁰ Jeffries notes that Powell's "long string of achievements were not the fruits of easy confidence, but of ceaseless struggle against self-doubt. Fiercely ambitious, yet ineradicably unsure, Powell always had to prove himself."⁸¹ Once on the Court, Justice Powell, in keeping with his cautious personality, gravitated toward balancing competing interests in constitutional cases. Hence, although Jeffries refers to Powell as a "hard-line moderate,"⁸² he explains that Powell "took [Justice John Harlan] as the model of what a judge should be—a fair-minded arbiter of disputes, carefully adapting past precedents to present realities in a process more pragmatic than ideological."⁸³ Jeffries describes Justice Powell's approach to judging as a "characteristic [search] to narrow conflict, to accommodate opposing views, and, when that was not possible, to disagree without deepening divisions and precluding future rapprochement."⁸⁴ In other words, for Powell, substance and style were inseparable. Even so, Jeffries finds that at the outset of his tenure on the Court, Justice Powell tended to be a strong proponent of judicial restraint, particularly in criminal law and school

creasingly detailed and demanding desegregation decrees of the late 1960s as a second Reconstruction, carried out by judges rather than generals, but scarcely less oppressive.

Id. at 298-99.

⁷⁶ 347 U.S. 483 (1954).

⁷⁷ NEWMAN, *supra* note 3, at 550.

⁷⁸ *Id.* at 439. Indeed, Newman recounts, Black especially regretted agreeing for the sake of unanimity to placing the phrase "with all deliberate speed" in the Court's first decision implementing *Brown*. See *id.* at 440.

⁷⁹ JEFFRIES, *supra* note 2, at 331.

⁸⁰ See *supra* notes 40-43 and accompanying text.

⁸¹ JEFFRIES, *supra* note 2, at 8.

⁸² *Id.* at 131.

⁸³ *Id.* at 263.

⁸⁴ *Id.* at 561.

desegregation cases, but he grew increasingly less afraid of strong judicial enforcement of individual guarantees.⁸⁵

An interesting question is how Justice Powell arrived at a relatively moderate view of the Constitution despite what Jeffries describes as his deeply conservative instincts and background. Jeffries suggests three factors shaped Justice Powell's approach to deciding cases: (1) he cared about the consequences of his decisions; (2) he listened carefully to all sides of a legal dispute; and (3) his cautious personality and sense of fairness led him to look for a middle ground on which to resolve every case.⁸⁶ For example, as Jeffries describes, Justice Powell joined the majority in *Roe v. Wade*⁸⁷ because he could not ignore the sometimes tragic effects of driving abortion underground, an inevitable consequence of an opposite resolution of the case by the Court.⁸⁸ Justice Powell was similarly influenced by the arguments made by civil rights groups and university officials in *Regents of the University of California v. Bakke*⁸⁹ that a complete prohibition of all forms of race consciousness in admissions decisions would virtually destroy the limited but important progress that was being made in integrating higher education, the business world, and the professions.⁹⁰ In addition, Justice Powell's rulings regarding school busing were informed by his concern that middle-class parents would abandon urban public schools for private or suburban alternatives if sprawling attendance zones and long bus rides replaced the neighborhood school.⁹¹ Jeffries also uses *United States v. Nixon*⁹²—the Watergate tapes case—to illustrate Powell's ultimately successful efforts to persuade his colleagues to find a middle ground. In that case, the Court recognized that a President is not above the law but that he is entitled to a qualified privilege to maintain the confidentiality of some communications in the Oval Office. In Justice Powell's view, this standard protected a President from harassment by citizens or the other branches while simultaneously preserving a significant judicial role in protecting individual rights.⁹³

II

CLARIFYING JUDICIAL INTERACTION ON A COLLEGIAL COURT

It is not enough for a biographer of an appellate judge to show how certain philosophical trends and life events influenced the sub-

⁸⁵ *Id.* at 410.

⁸⁶ *Id.* at 560-62.

⁸⁷ 410 U.S. 113 (1973).

⁸⁸ JEFFRIES, *supra* note 2, at 347.

⁸⁹ 438 U.S. 265 (1978).

⁹⁰ *Id.* at 470.

⁹¹ *Id.* at 290-331.

⁹² 418 U.S. 683 (1974).

⁹³ See JEFFRIES, *supra* note 2, at 384-89.

ject's attitudes about judging. An appellate judge cannot resolve a case without the participation of his colleagues. A judge's interaction with the rest of his court—or the absence of such interaction—must therefore receive due consideration from his biographer.

Gunther, Jeffries, and Newman do not indicate, however, whether Judge Hand and Justices Powell and Black were ever influenced by any of their colleagues or law clerks in their decisionmaking. This omission leaves the reader with the impression that, as unlikely as it might have been, these judges were either perfectly independent or unremittingly stubborn.

Of the three authors, Newman most thoroughly discusses his subject's interactions with his colleagues. Newman describes Justice Black as the consummate politician who understood instinctively the importance of maintaining cordial collegial relationships. Justice Black appreciated the fact that civility and friendly relations with his colleagues made persuasion possible. Hence, when Black first arrived on the Court, he wasted no time in trying to befriend all of his colleagues, including the cantankerous James McReynolds.⁹⁴ Over the next few decades, Newman suggests, Black's usually polite demeanor and civility were often put to the test.⁹⁵ Throughout these occasional conflicts, as Justice Douglas noted, Justice Black "was always perfectly proper in his relationships. He never was personally vindictive."⁹⁶

Newman indicates that by 1962 Justice Black had become the Warren Court's "chief philosopher."⁹⁷ This resulted from his skill at forging alliances that allowed him to outmaneuver his chief rival, Justice Frankfurter, for at least two decades. For instance, Newman recounts that when Earl Warren became Chief Justice in 1953, both Justices Black and Frankfurter courted him.⁹⁸ At first, Chief Justice Warren tended to vote with Justice Frankfurter, but Chief Justice Warren soon found Justice Black's easy, straightforward manner more appealing than Justice Frankfurter's more intense intellectualism. The Chief Justice began approaching cases from Justice Black's perspective. As Newman observes, "[i]f the Chief had been asked what had happened, he might have said, 'Felix irritates, Hugo soothes.'"⁹⁹

Yet, according to Newman, Justice Black also understood that Court relations could not always be pleasant. Newman suggests that Black would probably have agreed with Justice Holmes's purported

⁹⁴ NEWMAN, *supra* note 3, at 272-73.

⁹⁵ See *infra* note 101 and accompanying text.

⁹⁶ NEWMAN, *supra* note 3, at 336 (internal quotation marks omitted) (citation omitted in original).

⁹⁷ See *id.* at 537.

⁹⁸ See *id.* at 435-36.

⁹⁹ *Id.* at 470.

description of the Court as "[n]ine scorpions trapped in a bottle."¹⁰⁰ Indeed, Justice Black's stubbornness, his fierce commitment to his ideals, the close working conditions of the Court and some of the other justices' idiosyncracies sometimes undermined Justice Black's relations with certain colleagues. Newman recounts, for example, Justice Black's stormy relationships with Justices Frankfurter and Robert Jackson, both of whom could be petulant.¹⁰¹ Perhaps more tragically, Newman describes how Justice Black's two closest friendships on the Court—with Justices Owen Roberts and William Douglas—failed to stand the test of time. When Justice Black was first appointed to the Court in 1937, he and Justice Roberts became quite close.¹⁰² By 1944, however, Roberts distanced himself from Black for good after Frankfurter had apparently convinced him that Black had been responsible for leaking unflattering reports about Roberts to the press.¹⁰³ For over three decades, Douglas saw Black as his best friend on the Court, but this friendship deteriorated as Black became increasingly disenchanted with what he regarded as Douglas' erratic work habits and dissolute lifestyle.¹⁰⁴

Yet, Newman indicates, Black above all else loved a good fight (especially those he won) and could overlook ideological differences to appreciate a colleague's skills or character. For example, Newman recounts that Black deeply mourned the passing of Chief Justice Hughes and Justices Roberts and Frankfurter, despite the fact that he had often disagreed with each of them.¹⁰⁵ Black was enormously impressed with Chief Justice Hughes's leadership on the Court and was quite surprised and moved (given his opposition to Hughes's nomination as Chief Justice)¹⁰⁶ by Hughes's friendly assistance in acclimating Black to the Court.¹⁰⁷ Upon Hughes's death, Black said, "I felt that I lost one of my best friends ever."¹⁰⁸ Hughes admired Black as well,

¹⁰⁰ *Id.* at 322. Black recognized that "there has never been a time since it was first instituted where there were not sharp differences of opinion among the Justices. . . . [I]t would be bad for [this] institution . . . to have men who constantly profess to be of one mind on all issues. It would indicate either that they have no minds at all, or that they subserviently yield to their own views." *Id.* at 324 (internal quotation marks omitted) (quoting letter from Hugo L. Black to Sterling F. Black (Feb. 25, 1944)).

¹⁰¹ See NEWMAN, *supra* note 3, at 322, 336, 346, 485-86.

¹⁰² *Id.* at 273.

¹⁰³ *Id.* at 322-23.

¹⁰⁴ See *id.* at 382, 532, 599-600.

¹⁰⁵ *Id.* at 287, 323, 519-20.

¹⁰⁶ See *supra* note 63 and accompanying text.

¹⁰⁷ NEWMAN, *supra* note 3, at 269. When Hughes retired from the Court in 1941, Black confessed to Hughes that "I would be untrue to my own impulses if I should fail to tell you that as a result of our association I entertain a genuine personal affection." *Id.* at 287 (internal quotation marks omitted) (quoting Letter from Hugo L. Black to Charles Evan Hughes (June 3, 1941)).

¹⁰⁸ NEWMAN, *supra* note 3, at 287 (internal quotation marks omitted) (citing Interview with Irving Dilliard).

predicting as early as 1941 that "Justice Black will go down in history as one of the greatest Justices of the Supreme Court."¹⁰⁹ Justices Black and Frankfurter often paid homage to the other's keen intellect.¹¹⁰ Moreover, as Justice Douglas recalled, Justice Black had a special fondness for Justice Roberts: "[Black] . . . would put down Roberts as, not the man he admired most, by any means, but the man whose company he enjoyed the most of almost anyone that he had met."¹¹¹

Unlike Justice Black, Justice Powell consciously avoided trying to persuade his colleagues to agree with his views. Jeffries explains:

Powell had no interest in making deals. It seemed to him inappropriate. Powell approached the Court with a kind of reverence. The Supreme Court was the temple of his belief in reason, in moderation, in the worth and progress of the search for a perfect balance of order and liberty. . . . [Building coalitions] would have been somehow unseemly.¹¹²

Hence, Powell's role as the pivotal vote in numerous cases may have been more often the byproduct of happenstance than his own design.

Nevertheless, Jeffries suggests Justice Powell made two important contributions to the Court's collective decisionmaking. First, Powell persuaded his colleagues to adopt the practice known as the "cert pool" in which the Justices share their clerks' memoranda on the thousands of certiorari petitions that flood the Court.¹¹³ Second, Justice Powell's "ingrained courtesy and ability to listen" enabled him to maintain cordial relations with all of his colleagues, even in the midst

¹⁰⁹ NEWMAN, *supra* note 3, at 287 n.* (internal quotation marks omitted) (quoting Letter from James Farley to Virginia Hamilton (July 18, 1969)).

¹¹⁰ NEWMAN, *supra* note 3, at 483. For example, Newman explains that "Hugo genuinely believed Felix was his only worthy rival on the Court." *Id.* He quotes Black's reference to Frankfurter's reaction to one of his opinions as showing "that's why I say Felix is the brightest man on the Court." *Id.* (citing GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982)). Similarly, Newman suggests, "Frankfurter was Black's greatest intellectual admirer." *Id.* For example, Newman relates how Frankfurter told Hand, among others, that Black had "the best brain [on the] Court." *Id.* at 483 (quoting *THE MAKING OF THE NEW DEAL: THE INSIDERS SPEAK* 70 (Katie Loucheim ed., 1983)). Frankfurter also admitted to Chief Justice Warren that "[n]obody on the Court or off it has a better appreciation, I think, than I have of the intellectual powers of Hugo." *Id.* (internal quotation marks omitted) (quoting Felix Frankfurter Papers (Library of Congress)). In a memorial tribute to Justice Frankfurter, Black commented that Frankfurter had been "a formidable adversary who thrived on argument. . . . My initial respect and friendship for Felix survived all differences of opinion, in fact grew with the years." *Id.* at 519 (internal quotation marks omitted) (quoting Hugo L. Black, *Mr. Justice Frankfurter*, 78 HARV. L. REV. 1521 (1965)).

¹¹¹ NEWMAN, *supra* note 3, at 323 (citation omitted in original).

¹¹² JEFFRIES, *supra* note 2, at 304-05.

¹¹³ *Id.* at 270-72. Today the only holdout on the "cert pool" is Justice Stevens. *Id.* at 272.

of the most heated exchanges.¹¹⁴ Powell was not a peacemaker or a broker, but he made life at the Court more pleasant and kept dialogue open on many contentious issues on which, as it turned out, he cast the pivotal vote.

Justice Powell's cautious personality and reserved manner sometimes hindered his communication with some of his colleagues. For example, according to Jeffries, Powell never found a way to bridge the gap that existed between him and Justice Thurgood Marshall in terms of "background and outlook."¹¹⁵ Moreover, as Jeffries explains, Justice White's "patience was occasionally exhausted by Powell's fastidious interest in all sides of every issue. Once White grew so exasperated with Powell's carefulness that he snapped his pencil in Powell's face and said he should make up his damn mind."¹¹⁶ Powell, too, found White difficult, and he "sometimes resented the contentiousness of White's opinions."¹¹⁷ In contrast, the two colleagues with whom Powell had the closest personal relationships and conversed most easily were Justices Potter Stewart¹¹⁸ and Sandra Day O'Connor,¹¹⁹ with whom Powell shared similar backgrounds and outlooks.

Whereas Hand's interaction with other Second Circuit judges did not have Powell's civility or Black's political savvy, Hand made, in Gunther's estimation, at least three significant contributions to his appellate court's collective decisionmaking. First, Hand ensured that the Second Circuit's use of preconference memoranda "achieved its greatest flowering during Hand's years of service" on that court.¹²⁰ These memoranda comprised a unique Second Circuit practice in which a panel delayed holding case conferences after oral argument so that its members could circulate written memoranda on the case. In taking the practice more seriously than any other judge of his era, Hand helped to enhance the quality of his court's dialogue about cases.¹²¹

¹¹⁴ *Id.* at 561.

¹¹⁵ *Id.* at 262.

¹¹⁶ *Id.* at 265.

¹¹⁷ *Id.* Jeffries also relates that, in 1974, when the White clerks took Powell to lunch, one of them said that the invitation was in part an attempt to make amends for the hard feelings that had arisen between the two chambers. Powell "graciously—but pointedly—replied that it would take more than one lunch to do that." *Id.* (internal quotation marks omitted) (citing statement made by Jonathan Varat to author (Aug. 18, 1992)).

¹¹⁸ *See id.* at 262. Jeffries notes that Powell admired Justice Stewart, as many others did, for being "a lawyer's lawyer and a judge's judge." *See id.* Newman indicates Justice Black shared that opinion. *See* NEWMAN, *supra* note 3, at 564.

¹¹⁹ *See* JEFFRIES, *supra* note 2, at 505-08, 535.

¹²⁰ GUNTHER, *supra* note 1, at 287.

¹²¹ *Id.* at 297-98.

Second, when he was a district judge, Hand pioneered the use of law clerks for judges in the Second Circuit and around the nation.¹²² Hand used his clerks primarily as sounding boards to help sharpen his views on a case.¹²³ Although Gunther suggests that the use of law clerks helped foster greater collegiality between the judges on the Second Circuit,¹²⁴ he does not acknowledge that their use also helped to create buffers between judges by allowing them to use their clerks as go-betweens.

Third, Judge Hand, as the Chief Judge of the Second Circuit, at times attempted to mediate, with limited success, the sharp personal and ideological differences between his colleagues Judges Charles Clark and Jerome Frank.¹²⁵ According to Gunther, Hand assured them "that tough, argumentative opinions were entirely appropriate and he did not take them as personal insults."¹²⁶

It is unclear from Gunther's discussion, however, how well Hand made the transition from being a district judge for fifteen years to sitting on a multi-membered court. Gunther never discusses how the shift influenced Hand's attitude about judging. Yet, many district judges do not have the temperament to be part of a collegial body; they prefer to be solely in charge of their own courtrooms. Indeed, Gunther first mentions Hand's penchant for temper tantrums on the bench only after his arrival on the Second Circuit. Gunther recounts how Hand often lost his temper with incompetent counsel or even prominent lawyers he found unhelpful,¹²⁷ satirized various colleagues behind their backs,¹²⁸ turned his back during oral arguments to express his contempt for a poor argument,¹²⁹ and ridiculed lawyers and incompetent district court judges in his preconference memoranda.¹³⁰ We also know that during Gunther's clerkship with Hand in the 1950s, Hand once threw a paperweight at Gunther and scolded him for continuing to criticize the judge's draft opinions in a difficult espionage case.¹³¹

¹²² *Id.* at 140, 288.

¹²³ *Id.* at 289-91.

¹²⁴ *Id.* at 288.

¹²⁵ *Id.* at 532.

¹²⁶ *Id.* He even added, in an aside to Judge Frank, that he too liked to have his dissents hit hard. *Id.*

¹²⁷ *Id.* at 301. One such target was Justice John Harlan, who once reminded Hand how the latter had ruled in Harlan's favor but not before throwing Harlan's brief back at him in oral argument "with the statement that [Hand] would not read it." In Commemoration of Fifty Years of Federal Judicial Service, 264 F.2d 1, 24 (Apr. 10, 1959) (remarks of Justice John M. Harlan).

¹²⁸ See GUNTHER, *supra* note 1, at 300-01.

¹²⁹ See *id.* at 301.

¹³⁰ See *id.* at 301-02.

¹³¹ See *id.* at 620.

Gunther, however, fails to provide other pertinent data about Hand's tirades, including his colleagues' perceptions of or reactions to them and the degree to which the outbursts impeded oral arguments.¹³² Perhaps most importantly, Gunther fails to identify the specific causes of Hand's judicial outbursts, such as the particular problems in an oral argument, brief, or lower court opinion that set Hand off, or the degree to which the outbursts might have been caused by Hand's own feelings of insecurity or inadequacy. Gunther's failure to address such issues leaves his readers with an incomplete image of how Hand oversaw oral arguments and trials. Others give a somewhat bleaker portrait of Hand's judicial demeanor from that provided by Gunther.¹³³ For instance, John Frank, a former Yale Law School professor and law clerk to Justice Black, once suggested that Hand "has a reputation as the most irritable man on the [Second Circuit]."¹³⁴ Similarly, Judge Clark, for whom Gunther suggests Hand "never developed affection,"¹³⁵ once confided to Justice Frankfurter, "I have cringed at times to see him ride lawyers. Some years since, Virginia Howland appealed to me to try to stop Learned from being so harsh on counsel; but who was I to beard or tame a lion."¹³⁶ Though Gunther never concedes the possibility, it would have been interesting to determine whether or to what extent Hand's notorious temper erupted during exchanges with fellow judges and whether these interactions tainted Hand's relations with them.

It is important for a biographer to provide an "objective" description of a judge's colleagues in order to fully understand the relationship between the judge and those colleagues. Unlike Gunther, both Newman and Jeffries avoid the temptation of accepting their subjects' attitudes about their colleagues as truth. Newman, for example, generally provides detailed, balanced portraits of the other justices with

¹³² Nor does Gunther reveal whether Hand ever lost his temper with his colleagues or whether they shared his perceptions of the lawyers appearing before him. Gunther does, however, describe Hand's disappointment with the quality of the lawyers practicing before him and his modest but unsuccessful efforts to exhort the bar to improve, *see id.* at 145-47. But Gunther fails to explore how Hand's own meager practice experience hampered his efforts to improve the quality of the advocacy in his court. In addition, Gunther fails to indicate whether Hand's colleagues knew about or suspected his disdain for them and how, if at all, they reacted. We are not told, for instance, whether or in what way Hand made efforts to help those colleagues whom he regarded as incompetent to improve their judicial performances. Gunther also neglects to describe how Hand himself performed in oral argument, including the kinds of questions he asked.

¹³³ *See, e.g.,* Learned Hand, *Fifty Years of Federal Judicial Service*, in *HANDBOOK FOR JUDGES* 97 (Donald K. Carroll ed., 1961).

¹³⁴ MARVIN SCHICK, *LEARNED HAND'S COURT* 15 (1971) (internal quotation marks omitted) (quoting John P. Frank, *The Top U.S. Commercial Court*, *FORTUNE*, Jan. 1951, at 92, 95)).

¹³⁵ GUNTHER, *supra* note 1, at 524.

¹³⁶ SCHICK, *supra* note 134, at 92 n.50 (internal quotation marks omitted) (quoting Letter from Jerome Clark to Felix Frankfurter (Sept. 29, 1954)).

whom Black sat during his tenure on the Court. Newman, however, tends to skimp in discussing Justice Brennan, who by the 1960s emerged seemingly from the sidelines to become the Warren Court's "most influential justice";¹³⁷ Black regarded Brennan as an apostate.¹³⁸ Jeffries likewise gives his readers an admirably independent, impartial portrait of the other justices with whom Powell sat.¹³⁹ Although depicting a judge's colleagues from the judge's perspective helps to explain some of the judge's actions, a balanced judicial biography needs both to provide some insight into how the judge's co-workers perceived the judge and to convey a sense of the reliability of a subject's judgments about his colleagues. Hopefully, this effort casts some light on the credibility of the judge's opinions on other matters. The next Part considers whether Gunther, Jeffries, and Newman present balanced portraits of their respective subjects.

III

MAINTAINING IMPARTIALITY IN A JUDICIAL BIOGRAPHY

It is a perennial challenge for a biographer to be impartial. Judicial biographers are not immune to this challenge in part because many of them have had unusually close ties with their subjects, including having worked for them as law clerks. The critical question is whether there is anything special about judging that lends itself to impartial or objective analysis or whether a writer is able, in spite of his close ties to or reverence for his subject, to write about the latter's life and work and credibly call it a "biography." Surely, we would not be naive enough to expect George Stephanapolous to write a fairly objective biography of President Clinton. We recognize the personal, political, and ideological dimensions of the Clinton-Stephanapolous relationship that would in all likelihood permeate such a project. The general public, if not academics, lawyers, and even other judges, is sometimes less quick to recognize that some people might well have a vested interest in how the judge is remembered or how certain opinions or conflicts should be depicted or understood. Hence, the issue is the extent to which Gunther, Jeffries, and Newman, in spite of their special kinship with their subjects, have put together balanced, even-handed portraits of their subjects.

While Jeffries and Newman rise to this challenge, Gunther falls short. For instance, Newman's portrait of Justice Black is remarkably candid. He fully relates the details of Black's associating with the Ku Klux Klan. Black had been an active, card-carrying member of the

137 NEWMAN, *supra* note 3, at 563.

138 *Id.* at 564.

139 See JEFFRIES, *supra* note 2, at 246-65, 504-08 (O'Connor), 534-35 (Scalia).

Klan from September 1923¹⁴⁰ until 1925 when, at the suggestion of Grand Dragon Jim Esdale, he submitted a letter of resignation to be kept in Esdale's "safe against the day when [Black would] need to say [he was] not a Klan member."¹⁴¹ In fact, the Klan's support had been crucial to Black's 1926 Senate election. Newman acknowledges, "[t]he Klan was [Black's] source of strength. Without it he would have been a very minor candidate indeed, with negligible publicity."¹⁴² Indeed, after Black won the Democratic primary, the *Montgomery Advertiser* reported that "above all [Black] is the darling of the Ku Klux Klan."¹⁴³

Newman shows that Black often said or did whatever he had to in order to succeed, that Black regularly used the word "nigger,"¹⁴⁴ and that Black was decidedly anti-Catholic and xenophobic even for the 1920s.¹⁴⁵ As an Alabama senator, Black "twice proposed that all immigration be suspended for five years,"¹⁴⁶ twice voted against federal funding of Howard University,¹⁴⁷ and in chairing Senate investigative committees, regularly "trample[d] over witness's [constitutional] rights" to get the information he wanted.¹⁴⁸

Moreover, during his confirmation hearings, Black maintained a calculated silence about his Klan membership,¹⁴⁹ breaking it only once in an exchange on the Senate floor with the truthful, but somewhat disingenuous, response "that he was not now a Klansman."¹⁵⁰ In the postconfirmation firestorm over his Klan membership, Black knowingly dissembled his Klan affiliation (by publicly confessing he had joined but "later resigned" from the Klan) in order to stifle the widespread demands for his resignation or removal.¹⁵¹ Even years later, Black would not fully confess the extent and ignominiousness of his association with the Klan. His explanations for joining the Klan changed over time,¹⁵² and Black remained bitter at the newspapers who had attacked him for his Klan membership.¹⁵³ Newman con-

¹⁴⁰ NEWMAN, *supra* note 3, at 91-93.

¹⁴¹ *Id.* at 103 (internal quotation marks omitted) (quoting the Virginia Hamilton Papers).

¹⁴² *Id.* at 114. Newman explains further that in Black's first Senate election, Esdale was his campaign manager "in everything but name." *Id.* at 104.

¹⁴³ *Id.* at 115 (internal quotation marks omitted) (citation omitted).

¹⁴⁴ See David Garrow, *Doing Justice*, THE NATION, Feb. 27, 1995, at 280 (citations omitted in original) (reviewing GUNTHER, *supra* note 1 and NEWMAN, *supra* note 3).

¹⁴⁵ See NEWMAN, *supra* note 3, at 87, 104, 108, 137 n.*.

¹⁴⁶ *Id.* at 128.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 193.

¹⁴⁹ *Id.* at 239-42.

¹⁵⁰ *Id.* at 241 (citation omitted in original).

¹⁵¹ *Id.* at 257-58; see also *id.* at 241 n.*.

¹⁵² *Id.* at 96-100.

¹⁵³ *Id.* at 261.

cedes that Black "never really grasped, or could admit, the genuine outrage that the Klan caused."¹⁵⁴

In addition, Newman recounts Black's stubborn attempts to defend his disastrous majority opinion in *Korematsu v. United States*,¹⁵⁵ upholding the constitutionality of the federal internment of Japanese-Americans in World War II. Although historians subsequently established that the military had no reliable evidence to substantiate its claims that Japanese Americans on the West Coast posed a threat to national security, Black never expressed any regret over the *Korematsu* decision. As criticism of *Korematsu* mounted in later years, Black boldly defended it, stating: "There's a difference between peace and war. You can't fight a war with the courts in control."¹⁵⁶ Black added that all people of Japanese ancestry

look alike to a person not a Jap. Had they [the Japanese] attacked our shores you'd have a large number fighting with the Japanese troops. And a lot of innocent Japanese Americans would have been shot in the panic. Under these circumstances I saw nothing wrong in moving them away from the danger area.¹⁵⁷

Black "stood by the opinion until his death."¹⁵⁸ Several other Justices, by contrast, subsequently expressed their regret over their responsibility for the internment. These included Earl Warren¹⁵⁹ (who had backed the internment as Attorney General of California), Justice Douglas (who had joined *Korematsu*), and Justice Tom Clark (who had coordinated the evacuation program in the early years of the war).¹⁶⁰

Jeffries provides an equally balanced albeit somewhat less detailed portrait of Justice Powell. Jeffries addresses three of Powell's most serious shortcomings. First, Jeffries is especially critical of Powell's performance in *Bowers v. Hardwick*,¹⁶¹ in which Powell cast the decisive fifth vote upholding a state's ability to criminalize private consensual homosexual sodomy.¹⁶² According to Jeffries, *Bowers* is a clear case in which Powell's personal failings dictated his vote. As Jeffries explains, Powell ultimately failed to find a "middle ground" in *Bowers* because he was unable to comprehend the nature of homosexuality (despite numerous conversations about the subject with one of his law

¹⁵⁴ *Id.* at 260.

¹⁵⁵ 323 U.S. 214 (1944).

¹⁵⁶ Gerhardt, *supra* note 69, at 12.

¹⁵⁷ NEWMAN, *supra* note 3, at 318 (alteration in original) (citing N.Y. TIMES, Sept. 26, 1971).

¹⁵⁸ *Id.* at 319. Indeed, in 1967, Black defiantly told a questioner, "I would do precisely the same thing today." *Id.* at 318 (citing N.Y. TIMES, Sept. 26, 1971).

¹⁵⁹ *Id.* at 319 n.*.

¹⁶⁰ *Id.*

¹⁶¹ 478 U.S. 186 (1986).

¹⁶² JEFFRIES, *supra* note 2, at 524-30.

clerks, whom Powell did not know was gay).¹⁶³ Jeffries attributes Powell's lack of comprehension to his willful blindness to the existence of homosexuality: "Powell had never known a homosexual because he did not want to. In his world of accomplishment and merit, homosexuality did not fit, and Powell therefore did not see it."¹⁶⁴ Powell's blindness precluded him from connecting with the case in some personal way that would have helped him to find a more equitable resolution.

Second, Jeffries notes that post-retirement, Powell has renounced several of his major but more controversial decisions. For instance, in 1990, Powell called his concurrence in *Bowers* "a mistake . . . I do think it was inconsistent in a general way with *Roe*. When I had the opportunity to reread the opinions a few months later, I thought the dissent had the better of the arguments."¹⁶⁵ Powell also has admitted that "the abortion opinions were 'the worst opinions I ever joined.'"¹⁶⁶ In addition, despite having helped to secure the constitutionality of the death penalty while he was on the Court, Powell confessed after his retirement that he would now vote to strike down the death penalty because it no longer served a useful purpose and "could not be fairly and expeditiously enforced."¹⁶⁷ Such second-guessing reflects Powell's penchant for self-doubt in full bloom.

In addition, Jeffries harshly scrutinizes Powell's conservative, segregationist behavior as Chairman of the Richmond School Board (1952-61)¹⁶⁸ and as a member of the Virginia State Board of Education (1961-68).¹⁶⁹ Throughout his tenure on both boards—a period that spanned the Court's decision in *Brown v. Board of Education*¹⁷⁰ and

¹⁶³ *Id.* at 521.

¹⁶⁴ *Id.* at 529.

¹⁶⁵ *Id.* at 530 (internal quotation marks omitted) (quoting Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong*, NAT'L L.J., Nov. 5, 1990, at 3). Although Jeffries plainly considers Powell's concurrence in *Bowers* to have been a mistake, Jeffries's analysis of *Bowers* never suggests a credible constitutional ground on which the case could have been decided. This silence is puzzling because Jeffries criticizes *Roe* and Powell's decision to join it for lacking a sound constitutional foundation. *Id.* at 340-41, 355-70. One can surmise, however, that Jeffries is probably persuaded that the equal protection clause provides a sensible basis on which the Court could have resolved *Roe* and *Bowers* and thus strike down both anti-abortion and anti-sodomy laws. Otherwise, Jeffries leaves unclear how his criticism of *Roe* can be reconciled with his apparent sympathy for the fundamental rights claim in *Bowers*.

¹⁶⁶ *Id.* at 341 (citation omitted in original). The apparent reason for Powell's disappointment is that, at the very least, he did not accurately predict how the public would react to those decisions.

¹⁶⁷ *Id.* at 451-52.

¹⁶⁸ *Id.* at 139-68.

¹⁶⁹ *Id.* at 168-78.

¹⁷⁰ 347 U.S. 483 (1954).

Virginia's massive resistance to integration¹⁷¹—Powell maintained a calculated silence on the issue of segregation. As Jeffries observes:

In his two terms on the state board, Powell never did any more than was necessary to facilitate desegregation. He never took a leading role. He never spoke out against foot-dragging and gradualism. He never really identified himself with the needs and aspirations of Virginia's black schoolchildren. . . . He complied with the law, but "found it diplomatically sound not to do any more than absolutely required."¹⁷²

Unlike Jeffries and Newman, Gunther tends to rationalize or minimize his subject's foibles. His tone is uniformly laudatory. Three examples illustrate Gunther's failure to maintain the basic impartiality one expects in a balanced biography.

First, Gunther routinely uses superlatives to describe Hand¹⁷³ and his allies and friends.¹⁷⁴ Sometimes Gunther carries this practice to such an extent that he misses the inconsistencies in his descriptions of Hand's record. For instance, Gunther claims that "[u]ntil the very end of his career, Learned Hand had no occasion to deviate from his usual reluctance to interfere in judicial appointments."¹⁷⁵ Yet, Gunther recounts how both before and after this period Hand almost routinely interfered with judicial selection.¹⁷⁶ Moreover, in contrast to the laudatory language that Gunther invariably uses in describing

¹⁷¹ JEFFRIES, *supra* note 2, at 139-72.

¹⁷² *Id.* at 172 (quoting *Bradley v. School Bd. of Richmond*, 338 F. Supp. 67, 153 (E.D. Va. 1972)).

¹⁷³ For a small sampling, see, for example, GUNTHER, *supra* note 1, at 291 (describing "the sheer joyful thoroughness with which [Hand] tackled each case"); *id.* at 314 (referring to "the characteristically lucid, elegant language [Hand] produced when he wrote for the printed reports"); *id.* at 352 (noting that "[o]ff the bench as well as on, [Hand] retained the capacity truly to listen to the other side's arguments and agonizingly to reexamine his own premises"); *id.* at 435 (suggesting that Hand's "changing evaluation of Franklin Delano Roosevelt illustrates his lack of dogmatism and his capacity for growth"); *id.* at 471 (referring to "Hand's remarkable perceptiveness in approaching statutory interpretation"); *id.* at 638 (observing with reference to the 1950s that "Hand's wisdom illuminated a dark decade"). For references to Hand's "eloquence" and "brilliance," see *passim*.

¹⁷⁴ See, e.g., *id.* at 143 (describing Charles M. Hough as "Hand's only early colleague in his own intellectual league, and the only one who became a close friend").

¹⁷⁵ *Id.* at 647.

¹⁷⁶ See, e.g., *id.* at 647 (writing to President Eisenhower to urge Justice Harlan's appointment to the Supreme Court); *id.* at 648 (pressing for Henry J. Friendly's appointment to the Second Circuit in 1957); *id.* at 649-50 (supporting Friendly's and impeding Irving Kaufman's appointment to the Second Circuit in 1958); *id.* at 652 (supporting Kaufman's nomination to the Second Circuit in 1961 after twice helping to bar his elevation from the District Court); *id.* at 283 ("Hand was the leading promoter of [Thomas] Swan's appointment to the Second Circuit" in 1926); *id.* at 284 (urging the appointment of his cousin Gus Hand to the Second Circuit in 1929); *id.* at 286 (pressing unsuccessfully to have President Coolidge name District Judge Thomas Thacher to the Second Circuit in 1929); *id.* at 144 (describing Martin Manton as "a Democratic clubhouse politician whose promotion to the Second Circuit in 1918 Hand unsuccessfully opposed").

Hand, he employs demeaning or derogatory references to characterize those with whom Hand disagreed or for whom Hand had little respect (the two were essentially the same in Hand's mind).¹⁷⁷ Gunther should have confirmed Hand's stature through a more serious, sustained effort to compare Hand's arguments with the reasoning of the judges who disagreed with him.

A second example of Gunther's lack of impartiality is his discussion of the Holmes Lectures delivered in 1958 by Hand, then eighty-seven. In the lectures, Judge Hand seriously questioned the justifications for judicial review, even in cases involving constitutional violations.¹⁷⁸ In fact, Hand went so far in his lectures as to criticize *Brown v. Board of Education*¹⁷⁹ as an example of unacceptable judicial activism, suggesting that the Supreme Court had acted as "a third legislative chamber" by imposing its views and values on the southern states.¹⁸⁰

Undoubtedly realizing the unpopularity of Hand's version of judicial restraint and his criticisms of *Brown*, Gunther goes to great lengths to cast the lectures in a favorable light. According to Gunther, Hand would have accepted *Brown* if the Court had announced that racial segregation was unconstitutional under the equal protection clause in all contexts.¹⁸¹ According to Gunther, Hand would have accepted that the Court had not merely imposed its own values if the matter were an issue of constitutional absolutes.¹⁸² Gunther suggests, however, that Hand was misled by Justice Frankfurter into believing

¹⁷⁷ See, e.g., *id.* at 143 (describing fellow District Judge George C. Holt as "a workman-like judge but mediocre at best"); *id.* at 278 (describing Martin Manton as "a loner, preoccupied with his political cronies and incapable of turning out memoranda and opinions that could earn him respect from the bar or bench"); *id.* (describing Judge Henry Wade Rogers as "intellectually not much better" than Manton and as "periodically ill and, even when able to work, contributed little of quality"); *id.* (describing Judge Chase as "taciturn" and as not "an intellectual or a penetrating student of the law"); *id.* at 522-23 (describing Judge Charles Clark's "rigidity and tenacity, his proclivity for separate opinions, and his self-righteousness").

¹⁷⁸ Hand expressed this view in the first of the Holmes Lectures entitled "When a Court Should Intervene." This lecture provoked one of the most famous rebuttals in modern legal history in the form of Professor Herbert Wechsler's Holmes Lectures delivered the very next year. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Wechsler not only criticized Hand's textual and historical claims but also Hand's suggestion that the need to avoid political turmoil and anarchy, rather than constitutional logic, might justify the invalidation of laws in rare cases. Rejecting Hand's magisterial notion that judges should strike down laws as a matter of prudence only when the constitutional system was in danger of "collapse," Wechsler called on the Warren Court to justify its decisions with "neutral principles"—principles that transcend any immediate result or danger presented by a particular case. *Id.* at 17.

¹⁷⁹ 347 U.S. 483 (1954).

¹⁸⁰ GUNTHER, *supra* note 1, at 654, 671.

¹⁸¹ See *id.* at 666.

¹⁸² See *id.*

that the Court was simply imposing its own judgment on the relative values at stake.¹⁸³

The problem with this explanation is that, by the time of Hand's Holmes Lectures, the Supreme Court had applied *Brown* in a series of decisions (many of them per curiam) outlawing racial discrimination or segregation in public beaches, parks, golf courses, buses, airports, restaurants, and courtrooms.¹⁸⁴ In other words, the Court was treating *Brown's* prohibition of racial discrimination as an absolute; it was not simply second-guessing the values of the state legislatures. Hand never acknowledged, much less explained, whether these decisions indicated that the Court had come around to his way of thinking or perhaps had agreed in effect with his reasoning all along.

Gunther's defense of Hand's Holmes Lectures fails for other reasons. First, Gunther maintains that "Hand was no doubt . . . vulnerable to Frankfurter's ceaseless advocacy because he was suffering from fatigue about the lectures."¹⁸⁵ However, Hand had spent seven years working on and agonizing over the lectures.¹⁸⁶ Even if he was suffering from fatigue, it is odd for Hand to have worked so hard to craft the lectures without taking the time to confirm that the state of the law was as he described it.

Gunther further attributes the mistakes in Hand's lectures to Frankfurter's artifice on the ground that "Frankfurter never told Hand, and Hand was not a sufficiently careful follower of Supreme Court rulings to know, that the Supreme Court had in fact extended *Brown* very quickly and forcefully to areas well beyond the educational environment."¹⁸⁷ If true, this is a particularly shameful lapse for Hand, given that we would expect any good circuit judge, much less a great one, to follow the Court's docket (or at least to have had his law clerk—at that time, Ronald Dworkin—track it for him)¹⁸⁸ to ensure that his opinions were consistent with it.¹⁸⁹

183 See *id.* at 665-72.

184 See *id.* at 670.

185 *Id.* at 671.

186 *Id.*

187 *Id.* at 670.

188 See *id.* at 671 n.*.

189 Moreover, Hand, as depicted by Gunther, does not seem to have fully appreciated the fact that private law and constitutional law call for very different styles of adjudication. An especially revealing statement in the Holmes Lectures is Hand's suggestion that vigorous judicial review of constitutional questions is "apt to interfere with [the] proper discharge' of the judges' vital . . . duties, especially the interpretation of statutes." *Id.* at 658 (quoting LEARNED HAND, THE BILL OF RIGHTS 70-71 (1958)) (alteration in original). Hand, in other words, saw constitutional interpretation as less important than statutory interpretation, and he counseled judges to conserve their energy for this higher task. *Id.* But he based this peculiar conclusion not on the text or structure of the Constitution (which establishes the opposite hierarchy between constitutional and statutory law), but on his own exalted conception of a judge's role. *Id.* at 658-59.

Another example of Gunther's tendency to depict Hand in an overly positive light is Gunther's exaggeration of the influence of Hand on modern freedom of speech law following his district court opinion in *Masses Publishing Co. v. Patten*¹⁹⁰ on modern freedom of speech law. In 1917, Congress, in the midst of the fervor over World War I, adopted the Espionage Act, which made statements critical of the war a crime and allowed the postmaster general to exclude from the mails periodicals containing antiwar statements. Under that authority, the post office banned an issue of *The Masses*, a journal containing several cartoons and articles depicting the war as a weapon of big business against the interests of workers. The case came before Hand, who knew he would damage his chances for promotion if he lifted the ban.¹⁹¹ Nonetheless he did so, in a controversial decision that remains his boldest defense of freedom of speech. Hand said that the First Amendment's guarantee means that even dangerous speech must not be prohibited or punished unless what is said constitutes a direct incitement to crime, and that the Espionage Act should be interpreted subject to that limitation.¹⁹² Hand was promptly overruled,¹⁹³ and his reputation suffered.¹⁹⁴ When he failed to convert Holmes to his view,¹⁹⁵ Hand abandoned it, calling it a toy boat that had not sailed far and must be taken out of the water.¹⁹⁶ Nevertheless, Gunther maintains that four decades later in *Brandenburg v. Ohio*,¹⁹⁷ "the Supreme Court announced its most speech-protective standard ever. And that standard is essentially an embracing of Hand's *Masses* approach."¹⁹⁸

Gunther's assessment is unfounded for several reasons, besides *Masses*'s prompt reversal. For one thing, Hand regarded his reasoning in *Masses* as flatly inconsistent with a long line of Supreme Court precedents, so he took a far less speech-protective approach in 1951 in deciding *United States v. Dennis*.¹⁹⁹ In *Dennis*, Hand ironically felt himself bound to use Holmes's "clear and present danger" test²⁰⁰ in reviewing the conviction of Communist Party leaders, under the Smith Act, for conspiracy to advocate overthrowing the United States government by force or violence.²⁰¹ Hand said that Congress might well

¹⁹⁰ 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

¹⁹¹ See GUNTHER, *supra* note 1, at 152.

¹⁹² See *id.* at 157-60.

¹⁹³ See *Masses Publishing Co. v. Patten*, 246 F. 24 (2d Cir. 1917).

¹⁹⁴ See GUNTHER, *supra* note 1, at 152.

¹⁹⁵ *Id.* at 161-67.

¹⁹⁶ *Id.* at 600.

¹⁹⁷ 395 U.S. 444 (1969) (per curiam).

¹⁹⁸ GUNTHER, *supra* note 1, at 152.

¹⁹⁹ 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

²⁰⁰ See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

²⁰¹ See GUNTHER, *supra* note 1, at 599-600.

think, in the midst of the cold war, that the threat of Communist violence did present a clear and present danger. Therefore, he upheld the conviction in language. The Supreme Court adopted Hand's language—with Justice Black vigorously dissenting—when it affirmed the decision.²⁰² Though Gunther defends Hand's decision as that of a good lower court judge following Supreme Court precedent,²⁰³ the decision is explained better as reflecting Hand's increasingly strong view that judges should not overrule political or moral judgments that other institutions have made. Indeed, Gunther suggested as much in a 1975 article:

Perhaps most basic of all were Hand's growing doubts that courts could truly aid in preserving freedom of expression in times of crisis. That skepticism was far deeper in his later years than it had been during World War I. By the time of his Holmes Lectures in 1958, he had come to view the first amendment as one of a set of moral abjurations, not as a judicially enforceable norm.²⁰⁴

In any event, none of the three *Brandenburg* opinions cites Hand's opinion, nor did any of the briefs filed in the case. It is thus unlikely that any of the justices were actually aware of or persuaded by *Masses* in deciding *Brandenburg*.²⁰⁵

IV

THE QUESTION OF JUDICIAL GREATNESS

Judicial greatness is often in the eye of the beholder. Many of the standards adopted for determining the greatness of a judge are designed to ensure the selection of particular judges or to favor judges who reach certain substantive outcomes.²⁰⁶ The challenge for a judi-

²⁰² *Dennis v. United States*, 341 U.S. 494, 510 (1951).

²⁰³ GUNTHER, *supra* note 1, at 600.

²⁰⁴ Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 752 (1975) (citations omitted). Moreover, *Brandenburg* does not adopt the two most distinctive features of Hand's approach in *Masses*: (1) that consequences are irrelevant and (2) that speech to be punishable must explicitly advocate a violation of the law. See *Masses Publishing Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917); see also GUNTHER, *supra* note 1, at 160 n.*.

²⁰⁵ In addition, one might expect that, because of his presence on the Supreme Court and his zeal for protecting the freedom of speech, Justice Black, not Judge Hand, should be regarded as the intellectual progenitor of *Brandenburg*. Although Newman discusses Justice Black's First Amendment jurisprudence at great length, he does not mention what, if anything, Black contributed to the Court's landmark decision in *Brandenburg*. The reason for this omission is that by the time the Court decided *Brandenburg*, Justice Brennan had taken over the intellectual reins of the Court, see *supra* note 137 and accompanying text, and Black's physical deterioration had become so acute that he played no role in the case except to write a paragraph-length concurring opinion. See *supra* notes 71-73 and accompanying text.

²⁰⁶ For example, in suggesting creativity, intelligence, and frequency of citation as plausible yardsticks for measuring judicial greatness, see Posner, *supra* note 46, at 523-28, Judge Richard Posner has largely settled on standards that reflect best on himself. His

cial biographer interested in illuminating the significance of a subject's judicial performance is to explain the criteria for measuring the quality of the subject's performance in his most difficult or prominent cases. Either set of cases could be relevant for purposes of measuring the greatness of a judge.

In the next two sections, I evaluate Gunther's, Jeffries's, and Newman's depictions of their subjects' judicial performances in terms of two general criteria—the quality of a judge's decisions and the nature of a judge's temperament. It is fair to evaluate how well Gunther and Newman address the question of judicial greatness because they both present their subjects as unconditionally great jurists.²⁰⁷ Although Jeffries studiously avoids labeling Powell as a great justice, he nonetheless suggests that Powell deserves special attention because he was an especially influential member of the Court during his tenure there.²⁰⁸ Hence, a reasonable inquiry is whether Jeffries successfully establishes this fact.

A. The Quality of a Judge's Decisions

One major criterion for measuring the greatness of a judge is the quality of his or her decisions. This standard encompasses various factors, including not just the correctness of a decision but also the relative craftsmanship, creativity, influence, and durability of a judge's opinions. In short, this criterion requires a comprehensive examination of how well a judge performed the task of deciding cases.

One must undertake this inquiry, however, with sensitivity to the fact that judges are confined by what comes before them, particularly the timing or nature of the cases that they must decide. Lower court judges have the least control over their dockets; they must grapple

application of economic reasoning to a wide variety of legal areas is certainly innovative; his intelligence is unquestioned; and his productivity is so vast that his cites to himself alone would place his frequency of citation ahead of many other judges. To be sure, within a limited range, Posner's three factors do reflect the quality of a judge's performance. So long as a judge remains sensitive to the need for stability, predictability, and continuity in the law, his or her creativity can lead to novel insights that bridge areas of the law previously considered separate or that clarify doctrine in some new way. Intelligence helps a judge master complex, technical areas of the law. Finally, frequency of citation, except citations of particularly controversial or universally condemned opinions, can show how seriously other members of the bench regard a particular judge's decisions.

²⁰⁷ See, e.g., GUNTHER, *supra* note 1, at xv (describing Hand as being "numbered among a small group of truly great American judges of the twentieth century"); Newman, *supra* note 3, at xiv (recounting many of the accolades bestowed on Black at the end of his life and concluding with the judgment that Black was a "great man—whose accomplishments ranked him with Franklin D. Roosevelt and Martin Luther King, Jr., among contemporaries, and on the bench with 'the great Chief Justice' John Marshall in the nineteenth century and, in the early twentieth, Oliver Wendell Holmes, Jr., and Louis D. Brandeis").

²⁰⁸ See, e.g., JEFFRIES, *supra* note 2, at 12 (suggesting that the Burger Court's "most characteristic voice, the one that proved most often decisive, was that of its most reluctant member," Justice Powell).

with a wide range of cases of varying complexity and social importance. Some judges also confront cases with significant social and political ramifications that may overshadow everything else the judge did. In trying to measure judicial quality in some neutral fashion, evaluators need to appreciate that the candidates for judicial greatness have rarely had to make the same decisions under the same conditions, nor have they faced identical challenges. A judicial biographer needs to present a representative cross section of the subject's decisions and the relative circumstances in which that judge toiled if the aim is to arrive at an understanding of the quality of a judge throughout his or her lifetime on the bench. If, however, the aim is to cultivate appreciation for the quality of a judge's performance in his or her most difficult or prominent cases, then a judicial biographer must explain the lasting significance of the judge's contributions to those cases and the criteria for making these evaluations.

A judicial biographer also needs to understand how the subject transcended, was defined by, or failed to move with the times. For instance, Sheldon Novick—but not Gunther—reports Justice Ruth Bader Ginsburg's recollection "that when she graduated from law school with distinguished honors, Hand said he could not hire her because his language was too 'salty' for a woman."²⁰⁹ David Garrow adds, however, that Hand's politics could sometimes be quite progressive for his era, noting that "[w]hile Gunther does not mention that Hand was an extremely early supporter of a woman's legal right to choose abortion, he does detail how . . . Hand had publicly opined that homosexuality 'is not a matter that people should be put in prison about.'"²¹⁰ Hand, like any prominent historical figure, must be understood within the context of his times and yet stand ready as a person and judge to be measured by contemporary or more enlightened standards.

Measured against such standards, Gunther conveys Hand as the consummate judicial craftsman, if judicial craftsmanship is understood as the ability to construct eloquent, persuasive legal arguments, to draw meaningful and imaginative analogies from related fields of law or human endeavor, to clarify muddled legal doctrines, to give

²⁰⁹ Sheldon M. Novick, *Judged by History: What Makes a Great Judge—His Reasoning or His Vision?*, L.A. TIMES, May 22, 1994, at 2 (book review). To be sure, Hand's law clerks have proven to be a distinguished lot, even though Gunther mentions only a few—namely, himself, see GUNTHER, *supra* note 1, at 620-21; Paul Bender (now Deputy Solicitor General in the Clinton administration); see *id.* at 676; Ronald Dworkin (now professor of law at New York and Oxford Universities); see *id.* at 671 n.*; Elliot Richardson (the person who has thus far headed more different departments in the federal government than any other individual); see *id.* at 604; and Louis Henkin (distinguished international and constitutional law scholar at Columbia Law School); see *id.* at 535.

²¹⁰ David J. Garrow, *Doing Justice*, THE NATION, Feb. 27, 1995, at 278, 278-79 (citation omitted in the original).

scrupulous attention to the facts, and to master the technical aspects of a case. Judge Hand's longevity enabled him to display his skills as a district and appellate judge in an amazingly wide range of subject matters, including antitrust, bankruptcy, maritime law, patent and copyright law, obscenity, immigration, criminal law and procedure, civil procedure, trademark, unfair competition, freedom of speech, conflicts of laws, tax, negligence, and contracts. Gunther does not cover Hand's opinions in all of these fields, but he covers enough of them to confirm Judge Henry Friendly's apt assessment (quoted twice by Gunther) that "[Hand's] stature as a judge stemmed not so much from the few great cases that inevitably came to him over the years . . . as from the great way in which he dealt with a multitude of little cases, covering almost every subject in the legal lexicon."²¹¹

Not infrequently, though, Hand would go beyond the issues strictly raised in a case, pepper an opinion with dicta, and meander far too much in his reasoning. For example, Hand's all-important *Alcoa*²¹² opinion arguably displays some of those shortcomings. Indeed, Hand's own Second Circuit Court of Appeals ultimately rejected *Alcoa* in an opinion by Judge Irving Kaufman (whose appointment to that court Hand twice blocked).²¹³ According to Judge Kaufman, *Alcoa* was "a litigant's wishing well, into which, it sometimes seems, one may peer and find nearly anything he wishes."²¹⁴

Yet, on balance, Judge Hand's opinions, even when they are as pedantic as *Alcoa*, reflect his meticulous craftsmanship. As Gunther explains, "[d]uring most of his years on the bench, Hand confronted a body of law that ranged from useless generalizations to annoying technicalities. Much of his reputation was gained by his skill in laying bare in intelligible language what was truly at stake, and in castigating obscuring platitudes."²¹⁵ *Alcoa* itself remains impressive because of Hand's scrupulousness in disclosing the thought processes of an intelligent judge at work. One sees him considering all sides of the issue of when a monopoly's exercise of market power violates the antitrust

²¹¹ GUNTHER, *supra* note 1, at 145, 292 (alteration in original) (quoting Henry J. Friendly, *Learned Hand: An Expression from the Second Circuit*, 29 BROOK. L. REV. 6, 13 (1962)). To be sure, Judge Hand's prominence is also to some extent a function of the timing and circumstances of his rise to judicial prominence. Learned Hand became a district judge and later a circuit judge in New York City just as it became the center of the legal and commercial world. Moreover, as one of the first high-ranking Harvard graduates on the federal bench in this century, Judge Hand joined an elite fraternity that included during his tenure Justices Brandeis, Holmes and Frankfurter. These judges helped to cultivate each other's work and image.

²¹² *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

²¹³ GUNTHER, *supra* note 1, at 648-52.

²¹⁴ *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

²¹⁵ GUNTHER, *supra* note 1, at 313.

laws, weighing the arguments frankly and defending his conclusions in a reasoned manner.

Gunther attempts to ground Hand's greatness as a judge in how he handled several important constitutional law opinions and numerous other matters across a wide spectrum of substantive areas. The problem, though not fatal by any means to Gunther's quest, is that Gunther does not account for all of Hand's landmark opinions. Indeed, Gunther fails to reconcile Hand's apparent preference for judicial deference as expressed in his Holmes Lectures with the judicial activism evident in many of Hand's most famous common law and statutory opinions. The latter cases, exemplified by *Carroll Towing*²¹⁶ and *The T.J. Hooper*,²¹⁷ do not fit neatly into Gunther's central thesis that Hand was a paragon of judicial restraint and that he never engaged in judicial activism or imposed his own social or economic principles.

For instance, in *Carroll Towing*, Hand considered the commercial and private circumstances of a maritime barge accident and concluded that it was fair to require barge owners to have someone aboard to sound a warning in case of trouble.²¹⁸ Thus, he reduced the damages to which the barge owners would have otherwise been entitled. In taking the position that economic practicality drove legal duty, Hand laid the groundwork for understanding negligence in terms of economic reasoning.²¹⁹

Moreover, Hand's opinion in *The T.J. Hooper* also conflicts with Gunther's image of Hand. As Professor Morton Horwitz has claimed, the case represents a revolution in judicial attitudes toward the sanctity of private business decisions, for in it "Hand decided that he could ignore the almost universal custom of tug boat owners not to use radios and hold therefore that such a failure constituted negligence."²²⁰

Although *The T.J. Hooper* and *Carroll Towing* displayed an activist and innovative Judge Hand, this is not to say that Gunther's Hand and the Hand of these two cases are irreconcilable. When Hand employed economic theory in the service of judicial activism, he was arguably

²¹⁶ *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

²¹⁷ *The T.J. Hooper*, 60 F.2d 737 (2d Cir.), *cert. denied*, 287 U.S. 662 (1932).

²¹⁸ *Carroll Towing*, 159 F.2d at 174.

²¹⁹ As Professor (and now Circuit Judge) Richard Posner explained, "Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence. . . . If the cost of safety measures or of curtailment—whichever cost is lower—exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forego accident prevention. . . . If, on the other hand, the benefits of accident avoidance exceed the costs of prevention, society is better off if those costs are incurred and the accident averted." Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32-33 (1972).

²²⁰ RICHARD A. EPSTEIN ET AL., *CASES AND MATERIALS ON TORTS* 171 (4th ed. 1984) (internal quotation marks omitted) (quoting unpublished lecture of Professor Horwitz).

deviating from or perhaps improving on legal precedents. He was not invalidating statutes, as he had so often criticized the Supreme Court for doing. Moreover, Hand may have thought that the sort of creativity he exercised in cases like *The T.J. Hooper* and *Carroll Towing* were off limits in constitutional cases, since legislatures could not correct overzealous judges in constitutional law. But Gunther does not attempt any such reconciliation. Nor does he suggest that Hand's judicial decisionmaking might have been more complicated or less consistent than it sometimes appeared.

In any event, the frequency with which other judges have cited Hand—a criterion recommended by Judge Posner as one measure of judicial greatness—reflects the respect other judges have for the quality and thoughtfulness of his opinions.²²¹ As Judge Posner shows, the frequency with which judges in Hand's day and even now rely on his reasoning in the varied, often mundane areas of the law that make up the bulk of lower federal courts' dockets confirm Hand's stature. It is extraordinary for a lower federal court judge to be cited with such deference more than thirty years after his death.²²²

Despite his ideological differences with Judge Hand, Justice Black should also be commended for his judicial craftsmanship. Whereas Judge Hand's opinions are grandiloquent, Justice Black's opinions are unusually clear, succinct, and passionate. Black deliberately wrote for public consumption.²²³ As he once explained, he wrote his opinions so that "my uncle down on the farm plowing the fields can read them."²²⁴ Black's study of Supreme Court history and his keen political instincts convinced him that he should make his opinions accessible to the common people whom he saw as the ultimate beneficiary of the Court's work.²²⁵

Justice Black's greatest legacy as a jurist can be found in his distinguished constitutional law decisions. On a nine-member court in

²²¹ See Posner, *supra* note 46, at 536-40. For a similar appraisal, see John P. Frank, *The Great Judge*, 108 HARV. L. REV. 931, 945 (1995) (book review).

²²² Even Justice Black, who did not agree with Judge Hand's views on judicial restraint, addressed Judge Hand's constitutional arguments whenever possible, see NEWMAN, *supra* note 3, at 487, 495, acknowledged Judge Hand as having "few superiors in eloquent graphic expressions," *id.* at 495 (quoting Letter from Hugo L. Black to Milton Handler (May 13, 1963)), and quoted him when it suited Black's purposes. See *id.* at 558.

²²³ See *id.* at 276.

²²⁴ *Id.* at 292 (internal quotation marks omitted) (quoting Newman's Interview with Hugo L. Black); see also *id.* at 325 (discussing Black's clear writing style).

²²⁵ See *id.* at 292. Hence, Black was one of the first Justices to have been widely covered by the press, and that coverage, in turn, increased his notoriety with the populace. See *id.* at 276 (quoting from an interview with Judge Calabresi who claims that Heywood Broun once remarked that "Black is certainly popular with the newspaper men . . . because he recently wrote a dissent in English as plain and simple and clear as a good running story on the first page. And, naturally, reporters take to those who speak their own language. And it is a finer tongue than that invented by Mr. Blackstone'").

which it is sometimes difficult to assess individual contributions, it is clear that Justice Black, through a mixture of longevity, forceful reasoning, persistent advocacy, and strikingly clear prose, wrote or engineered some of the most significant constitutional decisions of this century. He helped to secure the constitutional foundations of the New Deal and the incorporation of most of the Bill of Rights against the states through the Fourteenth Amendment. He also set the Court on its current paths in the areas of criminal procedure, school desegregation, voting rights, freedom of speech, the commerce clause, and freedom of religion. Even at his worst, Justice Black left an indelible imprint on constitutional law, as reflected by his catastrophic opinion in *Korematsu*,²²⁶ in which he recognized that any classification based on race was "suspect" and therefore must be subjected to the "most rigid scrutiny" and upheld only if justified by a "public necessity."²²⁷ His arguments against substantive due process are among the most forceful yet made, and he kept the Court honest by repeatedly insisting on the need to square any constitutional decision with the text of the Constitution.²²⁸

Unlike Newman and Gunther, Jeffries, for good reason, says little about the quality of Powell's craftsmanship, except to emphasize that Justice Powell often crafted his opinions in such a way as to secure his occupancy of the middle ground.²²⁹ To be sure, at their best, Justice Powell's opinions reflect his thoughtful, cautious, and intelligent identification and weighing of the competing interests at stake. Nevertheless, many of Powell's more important or prominent swing votes turned on his identification of a nebulous point as a middle ground that later failed to please almost all of the constituencies interested in his opinion or left lower courts or legislatures without clear guidance on how to sufficiently proceed.²³⁰

²²⁶ *Korematsu v. United States*, 323 U.S. 214 (1944).

²²⁷ *Id.* at 216.

²²⁸ Of course, some scholars have criticized Justice Black's constitutional jurisprudence. For example, Professor G. Edward White has characterized Black as "idiosyncratic to the point of eccentricity", with a 'theory of constitutional interpretation that was both bizarrely rigid . . . and mysteriously flexible.' Garrow, *supra* note 144, at 280 (citation omitted in original). Professor Michael Klarman has identified "the many glaring inconsistencies in Justice Black's constitutional jurisprudence." Michael Klarman, Book Review, 12 *LAW & HIST. REV.* 399, 405 (1994) (reviewing HOWARD BALL & PHILLIP J. COOPER, *OF POWER AND RIGHT: HUGO L. BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION* (1992); MELVIN I. UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* (1991); and TINSLEY E. YARBROUGH, *JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT* (1992)). Moreover, Klarman has claimed that Black's voting record during his final six years on the Court "can only be described as reactionary." *Id.* at 401.

²²⁹ JEFFRIES, *supra* note 2, at 561.

²³⁰ This aspect of Powell's decisionmaking is reflected in a quote from Justice Powell's first law clerk, now Judge J. Harvie Wilkinson, with which Jeffries ends Powell's biography:

Moreover, Justice Powell's contributions to the six areas of law evaluated in Jeffries's book²³¹ do not firmly establish the lasting significance of his opinions. As previously noted,²³² Jeffries recounts that Justice Powell has renounced or condemned his decisions in three of the six areas (sexual equality, the death penalty, and abortion) Jeffries chooses as his focus. Further, Justice Powell did not write at all in the fourth (Watergate)—the Court's sole opinion in *Nixon*.²³³

In the two remaining areas—desegregation and affirmative action—Powell's contributions in the form of written opinions needs to be put in perspective. His reasoning either did not command a majority, as in *Regents of the University of California v. Bakke*,²³⁴ and thus had awkward precedential value; he did not write at all;²³⁵ or he wrote inconsequential dissents.²³⁶ Even if Jeffries is right in claiming that the chief virtue of Powell's *Bakke* opinion is that it helped to preserve some form of affirmative action,²³⁷ he can, as Jeffries implies, still be criticized for reaching out to decide the constitutional issue when he could have decided the case on statutory grounds and thus followed the basic rule of avoiding constitutional issues whenever a narrower alternative is available.²³⁸ Justice Powell's performances in these cases also reflect his lifelong ambivalence about how much courts could meaningfully do to achieve racial justice. This ambivalence remains,

Some of his votes are not easy to reconcile. Some of his theory is not seamlessly consistent. . . . For those who seek a comprehensive vision of constitutional law, Justice Powell will not have provided it. [But, for] those who seek a perspective grounded in realism and leavened by decency, conscientious in detail and magnanimous in spirit, solicitous of personal dignity and protective of the public trust, there will never be a better Justice.

J. Harvie Wilkinson III, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 417, 420 (1987), quoted in JEFFRIES, *supra* note 2, at 562.

²³¹ See *supra* note 23 and accompanying text.

²³² See *supra* notes 165-67 and accompanying text.

²³³ *United States v. Nixon*, 418 U.S. 683 (1974). See JEFFRIES, *supra* note 2, at 381-89.

²³⁴ 438 U.S. 265 (1978).

²³⁵ See JEFFRIES, *supra* note 2, at 312-17.

²³⁶ See *id.* at 308, 329.

²³⁷ See *id.* at 500.

²³⁸ Jeffries notes that during a five-month period in which the rest of the Court waited for Justice Blackmun to make up his mind about which approach to endorse in *Bakke*, Chief Justice Warren Burger proposed that:

[Powell] join a narrow opinion striking down the Davis program[, which had set up a quota for minority admissions to its medical school,] and leave it at that. After all, it was customary to decide one case at a time. There was no reason Powell had to go beyond these facts. And the opinion could hint broadly, as Burger himself believed, that milder preferences of the sort practiced at Harvard would eventually be permitted.

Id. at 489. Jeffries suggests that Powell declined to agree because Powell thought the Court should "speak out clearly and unambiguously" on the constitutional issue in the case. *Id.* (citation omitted in original). For a classic statement of the general rule regarding judicial avoidance of constitutional questions when other grounds for decisions exist, see *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

as much as anything else, a distinguishing feature of Justice Powell's sixteen years on the Court.²³⁹

²³⁹ In the areas not covered by Jeffries, Justice Powell often cast seemingly inconsistent votes, which reflect a more conservative, perhaps even reactionary Powell than the Powell depicted by Jeffries. Powell's votes in several establishment clause cases, for example, are either hard to reconcile or turn on subtle distinctions that did not persuade other Justices. In *Mueller v. Allen*, 463 U.S. 388 (1983), Powell joined the majority in upholding the constitutionality of a Minnesota statute that provided a tax deduction for parents whose children attended public or private schools. The Court treated the statute as secular in purpose and neutral in effect. However, in *Aguilar v. Felton*, 473 U.S. 402 (1985), the Court struck down a joint federal-state program that provided funds to public and private (including sectarian) schools to pay the salaries of public school teachers who provided supplemental and remedial instruction to economically disadvantaged students. Powell's concurrence emphasized that the program was an impermissible subsidy and that although the subsidy provided only indirect support to parochial schools, the program would cause a great deal of political friction in a state like New York with diverse religious populations. *Id.* at 416 (Powell, J., concurring). But Powell joined the majority in *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481 (1986), in which the Court upheld a statute that provided vocational rehabilitation assistance to a blind person pursuing a bible studies degree at a Christian college in preparation for a career as a minister. While the majority opinion stressed the indirect nature of the subsidy, *see id.* at 487, Powell interpreted *Mueller v. Allen* to mean that "state programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate" the establishment clause. *Id.* at 490-91 (Powell, J., concurring). If, however, Powell's statement in *Witters* reflects the standard Powell applied in establishment clause cases, it is unclear how either the statute in *Felton* satisfied this standard or how Powell's focus on political friction in *Felton* was consistent with it.

Powell's conservatism was especially apparent in federal habeas cases, which clearly fall within Jeffries's expertise, and yet are conspicuously absent from his biography of Powell. Beginning with his concurring opinion in *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973), Powell led the Court in restricting the scope of issues cognizable on federal habeas review to those strictly impacting on a defendant's innocence or guilt. For example, in his majority opinion in *Stone v. Powell*, 428 U.S. 465 (1976), Powell emphasized a lack of deterrent effect on police behavior as one reason for not finding Fourth Amendment exclusionary rule claims cognizable on federal habeas review absent a showing that the trial court denied the defendant a full and fair opportunity to adjudicate those claims. *Id.* at 494-95. Powell's *Schneekloth* opinion and his concurrence in *Rose v. Mitchell*, 443 U.S. 545 (1979)—in which Powell argued that racial discrimination in grand jury selection should not be cognizable on federal habeas review—stressed the lack of impact habeas claims have on the reliability of the results (the defendant's guilt or innocence) reached at trial. *Id.* at 586-87. Justice Powell's suggestions that "innocence" should be a significant factor relevant to the scope of habeas review resurfaced in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), in the context of a habeas application by a state prisoner who had raised the identical issue in a previous habeas petition. Powell's habeas opinions reflect his desire to restrict federal jurisdiction in order to lighten federal court dockets, to reduce a criminal defendant's chances to elude punishment for his or her crimes, and to protect the autonomy of state courts. Powell's concerns about protecting state governments from federal encroachment also led him to cast the pivotal vote in the Court's first opinion in over 40 years to strike down a congressional enactment under the commerce clause. *See National League of Cities v. Usery*, 426 U.S. 833 (1976). Powell later dissented in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), which overruled *National League of Cities*.

Finally, Powell's corporate opinions raised as many questions as they answered. His opinion in *Chiarella v. United States*, 445 U.S. 222 (1980), for instance, left unresolved the issue of whether a noninsider tippee (like a securities analyst) who received information from an internal corporate source could be liable for insider trading. Powell's next major corporate opinion, *Dirks v. SEC*, 463 U.S. 646 (1983), left additional questions unresolved,

B. Judicial Temperament

Another criterion for determining judicial greatness is the nature of a judge's temperament, including the quality of a judge's interaction with colleagues and his or her open-mindedness, patience, even-handedness, disposition to listen to all sides of an issue, leadership, personality, and character. Character is an especially important source of a judge's moral or political judgments about the role of the judiciary in American society.²⁴⁰ Judicial temperament also requires that a judge have the courage of his or her convictions; ideally, a judge should be sufficiently independent to withstand public pressure to reach unpopular decisions.

Judge Hand's temperament, for instance, was a mixed bag. He had a lifelong interest in legal reform, as evidenced by his support for the American Law Institute, of which he was a founder.²⁴¹ Moreover, Hand's self-doubt seems to have driven him to work harder and more carefully than any other judge and, combined with his skepticism, to rethink every case from the ground up. In the estimation of a former clerk, Professor Ronald Dworkin, Judge Hand "worked in the same laborious way until he died, as if each case, no matter how complex or trivial, exciting or mundane, was the most important a judge might ever confront."²⁴²

Yet, Judge Hand's irritability has led no less a judge than Frank Coffin of the First Circuit to observe that "[t]he very fact that robe and bench vest a judge with near absolute power over counsel ought to compel a restrained, relaxed, and civil demeanor. Learned Hand, a role model in so many ways, can stand not being emulated in this sole respect."²⁴³ Moreover, Hand can be faulted for having lacked the courage of his convictions on the one significant occasion he had as a judge to thwart the rise of McCarthyism in *Dennis*.²⁴⁴ In spite of the outrage and concern he had expressed about McCarthyism in pri-

such as what mental element is required to impose insider trading liability on a noninsider tippee. Many wonder whether it is sufficient that the tippee knew or should have known of the tipper's breach of fiduciary duty, as Powell suggested, *id.* at 660, or whether intent to deceive or defraud the investor is necessary, as Powell indicated, *id.* at 663 n.23. In attempting to reconcile the two, Powell suggested that scienter is irrelevant to the questions of whether and when a tippee acquires a duty to either disclose information he or she has acquired or abstain from trading. *Id.* While Powell's suggestion may make sense, his opinion also notes that there can be no 10b-5 liability without scienter, *see id.*, indicating that negligence may not be enough for tippee liability.

²⁴⁰ See STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 151-55 (1994); Gerhardt, *supra* note 61, at 55-63.

²⁴¹ GUNTHER, *supra* note 1, at 410-14.

²⁴² Ronald Dworkin, *Mr. Liberty*, N.Y. TIMES, Aug. 11, 1994, at 17, 18 (book review).

²⁴³ Frank M. Coffin, *Reclaiming a Great Judge's Legacy*, 46 ME. L. REV. 377, 391 (1994) (reviewing GUNTHER, *supra* note 1).

²⁴⁴ *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).

vate,²⁴⁵ Hand upheld the criminal convictions of Communist Party leaders for advocating the overthrow of the government by force or violence.²⁴⁶ Yet, Hand himself thought, as he said in a letter to Bernard Berenson shortly after deciding *Dennis*, that the prosecution was a tactical mistake.²⁴⁷ This statement is hardly consistent with Hand's claim that the threat was clear and present. If there was a clear and present danger posed by the defendants' speech, it is not likely to have left much room for prosecutors to exercise discretion on whether to initiate a prosecution.

Judge Hand's *Dennis* opinion also stands in marked contrast to Justice Black's powerful dissent to the Court's decision to affirm Hand.²⁴⁸ Newman shows that Black's greatest virtue was also his greatest flaw: he rarely compromised his principles, which included, *inter alia*, his own "political survival."²⁴⁹ As Justice Frankfurter once noted, Justice Black "could have done much more, gotten more majorities, but . . . he didn't because he wanted more to move the Court than to moderate his position."²⁵⁰ In Newman's estimation, Black's "character" and tenacity explain his accomplishments.²⁵¹ These attributes combined with his longevity, account as much as anything for his success at seeing more of his dissents turn into doctrine than those of any other Justice in this century.²⁵² These qualities are captured in Justice Arthur Goldberg's recollection of Justice Black: "When Hugo was in agreement, he was a sober brother. . . . When he was in disagreement, he was a terrible and vigorous adversary. He was a gut fighter. It took much independence to stand up to him."²⁵³

²⁴⁵ GUNTHER, *supra* note 1, at 578-92.

²⁴⁶ *Dennis*, 183 F.2d at 234.

²⁴⁷ See GUNTHER, *supra* note 1, at 603.

²⁴⁸ See NEWMAN, *supra* note 3, at 402-04.

²⁴⁹ *Id.* at 128.

²⁵⁰ *Id.* at 519 (Interview with David Ginsburg in which Ginsburg recalled these words attributed to Frankfurter).

²⁵¹ *Id.* at xiv.

²⁵² See *id.* at 537; see also Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 251.

²⁵³ NEWMAN, *supra* note 3, at 546 (citation omitted in the original). On the Goldberg-Black relationship, Newman relates that:

Black was perfectly friendly with Arthur Goldberg without fancying him at all. His aggressiveness, personally and intellectually, put Hugo off somewhat; he found Goldberg abrasive and arrogant. . . . Black regarded Goldberg, and to some extent Brennan, as apostates, and that upset him, for he liked apostles: Brennan and Goldberg, he felt, would not stop until they achieved their social goals. [Moreover,] Goldberg resembled northern liberals whom Black had always distrusted; the cultural gulf between them and him was too large to be bridged.

Id. at 564.

Yet, Black said and did things that, as Chief Justice Warren once remarked, failed to "represent the better part of his nature."²⁵⁴ This dark side mars Black's claim to judicial greatness. For example, Newman notes that "the aftermath of *Brown*²⁵⁵ saw a rampant lawlessness . . . sweeping the South" and that "in the [sit-in] cases Black was responding to the imperative of the return to legal processes."²⁵⁶ Of course, it is important to remember that white segregationists almost exclusively created the atmosphere of "rampant lawlessness" that was sweeping the South, while Black focused his judicial antipathy largely upon the nonviolent blacks. Newman also relates many of Black's intolerant comments: that "[t]hese street parades should be stopped,"²⁵⁷ that "it was time to clamp down on the Negroes,"²⁵⁸ that it was "high-time the Court handed down a decision against the Negroes,"²⁵⁹ and that "I think it is an indicia of slavery to make me associate with people I do not want to associate with."²⁶⁰ As Newman further concedes, "[f]ormerly [Black] had treated dissenters as heroes indispensable to progress, who helped the country live up to its highest aspirations. Now he disparaged protest groups and their leaders: he considered them ambitious, misinformed, dangerous agitators."²⁶¹ These disparaging comments were made by the same person who, forty years earlier, had talked about "niggers," joined the Klan, and denounced immigration.²⁶²

Whereas Justice Black and especially Judge Hand could be irritable on the bench, Justice Powell was a model of judicial civility. Powell's grace under fire, equanimity, "respectful attention to the views" of his colleagues,²⁶³ and patience in listening to all sides of an issue distinguish his judicial tenure. Justice Powell's decision to leave the Court once he was aware of "his own diminishing strength"²⁶⁴ demonstrates extraordinary public spiritedness and uncommon awareness of his personal limitations. This mind-set stands in marked contrast to Justice Black's and Judge Hand's insistence to remain on the bench long after their best days.²⁶⁵

²⁵⁴ *Id.* at 549.

²⁵⁵ *Brown v. Board of Education*, 347 U.S. 483 (1954).

²⁵⁶ NEWMAN, *supra* note 3, at 550-51.

²⁵⁷ *Id.* at 542 (according to Justice Douglas, Black made this statement during a conference over *Salter v. City of Jackson*, 374 U.S. 818 (1963). See WILLIAM O. DOUGLAS, *THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS* 169-71 (Melvin I. Urofsky ed., 1987).

²⁵⁸ NEWMAN, *supra* note 3, at 542 (citations omitted in original).

²⁵⁹ *Id.* (citations omitted in original).

²⁶⁰ *Id.* at 544 (citation omitted in original).

²⁶¹ *Id.* at 551.

²⁶² See *supra* notes 140-54 and accompanying text.

²⁶³ JEFFRIES, *supra* note 2, at 561.

²⁶⁴ *Id.* at 543.

²⁶⁵ See Frank, *supra* note 221, at 945.

These traits, however, must be weighed against Powell's deliberate decision not to influence the outcome of decisions by trying to persuade his colleagues to change positions. After all, appellate courts, especially the Supreme Court, are supposed to function to a significant degree as collegial decisionmakers rather than collections of individual judges writing separate opinions. Powell's choice, though grounded in his honest belief that a judge must not be pressured to compromise his convictions,²⁶⁶ cost him the chance to exercise greater leadership in directing the Court's deliberations. In Jeffries's opinion, this decision more than anything else explains Powell's "surprising ineffectiveness as a Court politician."²⁶⁷ However, Powell's choice might also have reflected his lack of confidence in the steadfastness of his convictions—a view reinforced by Powell's public renouncements of several key votes after his retirement.²⁶⁸ His decision seems to have been a characteristically overly cautious attempt to protect his integrity. However, Powell failed to realize that having the courage of one's convictions includes testing them against others' beliefs to determine their relative strength.

VI

ILLUMINATING JUDICIAL SELECTION

Judicial biographies tend to presume a subject whose judicial appointment seems, at least in retrospect, to have been a foregone conclusion. The process by which the subject became a judge seems secondary to the general point of a judicial biography. Yet, judicial biographies can shed light on the natures of judicial decisionmaking and judicial selection.

In fact, judicial selection is akin to trying to write a judicial biography in reverse: it requires figuring out beforehand how someone will perform as a judge. Hence, the final challenge for a judicial biographer is to explain how and why the subject was selected to serve as a judge. Judicial biographers should consider whether the trait(s) for which their subjects would later become famous were apparent at the time of, or were the reasons for, the subjects' nominations. A related issue is whether the means used to select Justices Black and Powell and Judge Hand reveal a model for choosing judges or predicting judicial behavior. The first section below examines Gunther's, Jeffries's, and Newman's descriptions of the selection processes that led to the appointments of their respective subjects. The second section consid-

²⁶⁶ See *supra* text accompanying note 112.

²⁶⁷ JEFFRIES, *supra* note 2, at 303 (describing Powell's repeated failure to persuade a majority of Justices to abandon the Court's distinction between *de jure* and *de facto* segregation).

²⁶⁸ See *supra* notes 165-67 and accompanying text.

ers the lessons these biographies teach for selecting judges in the future.

A. The Appointments of Justices Black and Powell and Judge Hand

Newman, Jeffries, and Gunther fully explain the reasons their respective subjects were chosen as judges. Newman and Jeffries reveal that the selection processes for Black's and Powell's appointments as Justices were far more thorough than for Hand's appointments as a district and circuit court judge. The obvious reason for the disparate treatment is that a Supreme Court Justice has greater authority. Indeed, Gunther explains that when Hand was being considered for the Supreme Court, he became subject to the vagaries of the more complex selection process.²⁶⁹

These biographies also reveal that Justices Black and Powell had different attitudes about being appointed to the Supreme Court than did Judge Hand. Interestingly, neither Black nor Powell lusted for the Court. Newman suggests, for instance, that Justice Black's real ambition was to become President of the United States.²⁷⁰ Black initially resisted being nominated to the Court because he thought it would impede realization of this desire;²⁷¹ he even continued to consider running for the presidency after having been appointed to the Court.²⁷² For his part, Powell resisted a Court appointment until the last moment. In Jeffries's opinion, Powell was not sure he could succeed there, and in any event, was quite content with his station in life.²⁷³ Hand, by contrast, lusted for his judicial appointments: Hand sought a district court judgeship to escape the boredom of private practice,²⁷⁴ then sought an appointment to the Second Circuit to avoid the tedium of being a trial judge.²⁷⁵ He later sought a Supreme Court appointment in vain to give him the recognition that he and his friends thought he deserved.²⁷⁶

All three biographers provide fascinating details on the historical and political circumstances under which their subjects became judges. For example, Newman notes that President Roosevelt settled on Black as his initial Supreme Court appointment only after his first choice, Senate Majority Leader Joseph Robinson, had died.²⁷⁷ Roosevelt

²⁶⁹ GUNTHER, *supra* note 1, at 418-21, 553-70.

²⁷⁰ NEWMAN, *supra* note 3, at 306-07, 309 n.*.

²⁷¹ *Id.* at 235.

²⁷² *Id.* at 306.

²⁷³ JEFFRIES, *supra* note 2, at 1-9.

²⁷⁴ GUNTHER, *supra* note 1, at 107.

²⁷⁵ *Id.* at 257-61.

²⁷⁶ *Id.* at 425-28, 559, 566-67.

²⁷⁷ NEWMAN, *supra* note 3, at 219.

chose Black in part because he wanted to get back at the Senate for opposing his Court-packing plan and New Deal legislation,²⁷⁸ both of which Black zealously supported as a senator.²⁷⁹ Roosevelt admired Black's loyalty and concluded that the Senate would ultimately confirm him because of its "sense of collegiality."²⁸⁰ Newman describes how newspaper reports that Black had been a Ku Klux Klan member stalled his nomination.²⁸¹ Nevertheless, Roosevelt stood by the nomination, Black did not testify, and the Senate confirmed him by a wide margin.²⁸² Later, in 1941, Roosevelt did not seriously consider Black for Chief Justice out of fear that it "would revive the Klan issue."²⁸³ In 1946, Truman abandoned any thought of appointing Black (with whom he had served in the Senate) as Chief Justice because he felt it would magnify the rift on the Court due to the intense feud between Justices Black and Jackson.²⁸⁴

Jeffries suggests that President Nixon and his Attorney General, John Mitchell, nominated Justice Powell for several reasons. First, Powell's distinguished record as a corporate lawyer and in civic affairs ensured his nomination would run cover for the concurrent, but more controversial, nomination of William Rehnquist.²⁸⁵ Second, Powell's personal background and public stands as President of the ABA in favor of toughening criminal sanctions reflected conservative political biases.²⁸⁶ Third, Powell was born and bred in Virginia. Nixon and Mitchell wanted a Southerner because the South had supported Nixon, and Justice Black's retirement left the Court without a Southerner.²⁸⁷ Finally, Powell lacked a significant paper trail (in the form of opinions or political activities) or personal problems that had torpedoed two of Nixon's previous nominees, circuit judges Clement Haynesworth and Harold Carswell.²⁸⁸ The only stumbling block to Powell's confirmation was his alleged failure to do more to facilitate desegregation. Powell overcame the allegations, however, through the endorsements of various civil rights leaders.²⁸⁹

Even though Hand's judicial nominations were subjected to less scrutiny than those of Justices Black and Powell, Gunther shows that Hand did not have an easy time securing a judicial appointment.

278 *Id.* at 236, 239.

279 *Id.* at 210-13.

280 *Id.* at 239.

281 *Id.* at 239-41.

282 *Id.* at 242.

283 *Id.* at 307.

284 *Id.* at 343-44.

285 JEFFRIES, *supra* note 2, at 9-10, 232-33.

286 *Id.* at 1-2, 210.

287 *Id.* at 1.

288 *Id.* at 229.

289 *Id.* at 235.

Hand failed in his first effort to obtain a district court appointment in 1907, when Congress failed to create a new district court judgeship for the Southern District of New York.²⁹⁰ Two years later, Congress authorized a new judgeship, which Hand sought and received.²⁹¹ As Gunther explains, the key to Hand's appointment was that he knew a number of influential lawyers in the New York bar, particularly the well-connected Charles C. Burlingham, who convinced President Taft's Attorney General, George Wickersham, to push Hand's nomination through the administration and the Senate.²⁹² Because Hand's initial judicial appointment was to the district court, those who supported his nomination but did not know him had low expectations for his likely performance. The lowered expectations helped Hand, who claimed, "I was never any good as a lawyer. I didn't have any success, at all."²⁹³ Ironically, President Taft, who became a staunch proponent of substantive due process, did not worry much at the time about Hand's likely judicial ideology, despite Hand's opposition to substantive due process as expressed in an essay published one year earlier in the *Harvard Law Review*.²⁹⁴

The question most often asked about Hand is why he was never appointed to the Supreme Court. Gunther answers this question fully. According to Gunther, a key factor was that Judge Hand alienated Taft by publicly supporting Teddy Roosevelt, instead of Taft, for President in 1912 and by criticizing Taft's and others' support for substantive due process.²⁹⁵ Although Taft became Chief Justice in 1921, he remained the major voice on Republican nominations to the Supreme Court until 1930. Hence, Hand stood no chance of being appointed to the Court during that period. In 1922, for instance, Chief Justice Taft wrote to President Warren Harding requesting that he block any consideration of Hand to fill a vacancy.²⁹⁶ Taft decided in 1924 not to oppose President Calvin Coolidge's nomination of Hand to the Second Circuit because Taft believed that Hand did not pose any threat to him nor to substantive due process as an appellate judge.²⁹⁷ When Taft retired from the Court in 1930, President Herbert Hoover caved in to conservative pressure and appointed Hughes

²⁹⁰ GUNTHER, *supra* note 1, at 128.

²⁹¹ *Id.* at 133.

²⁹² *Id.* at 130-33.

²⁹³ *Id.* at 107 (quoting Hand's remarks at a dinner of the New York Legal Aid Society in 1951).

²⁹⁴ *Id.* at 121-22 (describing Hand's essay, *Learned Hand, Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908), which attacked the Court's trend to view due process as going beyond procedural proprieties and involving the substantive merits of the law).

²⁹⁵ See, e.g., GUNTHER, *supra* note 1, at 274.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 275.

as Chief Justice rather than nominate then-Justice Stone to replace Taft and Hand to replace Stone. Hoover ultimately opted to appoint Hughes because of concerns raised by Taft that Stone and Hand would not have been sufficiently sympathetic to property rights.²⁹⁸

Gunther explains that Hand's last chance for appointment to the Court came in 1942, when Justice Frankfurter urged President Roosevelt to nominate Hand, then seventy years old, to replace Jimmy Byrnes. Gunther suggests three reasons for President Roosevelt's refusal to nominate Hand: (1) Roosevelt was trapped by his "own 1937 Court-packing plan, in which he had opposed septuagenarians;"²⁹⁹ (2) Roosevelt's patience with Frankfurter had grown thin;³⁰⁰ and (3) Roosevelt did not want to strengthen Frankfurter's wing of the Court, which was resistant to judicial enforcement of noneconomic liberty claims.³⁰¹ Gunther implies another reason why Roosevelt did not nominate Hand: Roosevelt routinely named justices who had been loyal to him; Hand had no such record and in fact had publicly opposed Roosevelt's Court-packing plan.³⁰²

B. The Biographies' Lasting Lessons for Judicial Selection

This section considers whether these three biographies provide any useful guidance for future judicial selection. The three biographies shed light on two important aspects of judicial selection, particularly the nomination of Supreme Court justices: the unpredictability of judicial greatness and the politicization of judicial selection.

The first issue is whether these biographies reveal anything about how Justices Black and Powell and Judge Hand were chosen that will help to forecast which judicial nominees are likely to become great or influential judges. The books gloss over several factors that may hinder an accurate prediction of a judicial nominee's potential for greatness. These factors include a judge's lifespan, the kinds of cases a judge must decide and how he or she decides them,³⁰³ and the nature

²⁹⁸ *Id.* at 418-28. Gunther also tries to explain why President Hoover, who had considered Hand in 1930 when Chief Justice William Howard Taft retired, did not seriously consider him just two years later to replace Justice Holmes. Gunther notes that Hoover nominated Justice Cardozo because Hoover wanted a common-law judge. The full explanation is that President Hoover had even less control over this nomination than he had over the earlier one. In fact, the Senate strong-armed Hoover into naming Cardozo. It had concluded that the successor to Holmes, who had been a great common-law judge, should have a similar background. *Id.* at 428.

²⁹⁹ *Id.* at 559.

³⁰⁰ *Id.* at 561-62.

³⁰¹ *Id.* at 562-66.

³⁰² *Id.* at 458-60.

³⁰³ For example, although Jeffries praises Justice Powell for helping to preserve affirmative action, he neglects to note that this claim is clouded by the absence of a single majority opinion on the constitutionality of affirmative action while Justice Powell was on the Court. See generally G. STONE ET AL., CONSTITUTIONAL LAW 617-49 (2d ed. 1991).

of a judge's interaction with his or her colleagues. For instance, one reason President Roosevelt replaced Justice Byrnes with Wiley Rutledge,³⁰⁴ rather than Hand, was that Rutledge was forty-eight, while Hand was seventy. Ironically, Rutledge died six years after his appointment, and Hand outlived him by twelve years.³⁰⁵ The longer a judge lives, the more likely he or she will have the chance to shine or falter in major cases, as was true for Black, Powell, and Hand.

It is also difficult to predict precisely how quickly the traits on which one bases judicial greatness will manifest themselves. Interestingly, Black, Powell, and Hand each got off to relatively slow starts as judges.³⁰⁶

Familiarity, notoriety, and public image also play key roles in predicting judicial greatness. For instance, at the time of his appointment to the Court, Black was generally regarded as an ardent New Deal liberal and Democrat;³⁰⁷ but no one—not even Roosevelt—gave much, if any, thought to how his populist upbringing, uncommon drive and intellect, and experiences as a county prosecutor, police court judge, highly successful trial and appellate lawyer, and senator (who had from 1928-1936 been an active member of the Senate Judiciary Committee)³⁰⁸ would shape his performance on the Supreme Court. No one involved with his appointment predicted that Justice Black would have the most significant and lasting impact on constitutional law of President Roosevelt's nine Supreme Court appointees. Part of the skepticism, no doubt, was attributable to the doubts Black's Klan membership raised about his commitment to civil rights.³⁰⁹ Moreover, Black's contemporaries, such as Frankfurter, initially thought he lacked the requisite degree of "technical jurisdictional learning" to perform adequately on the Supreme Court.³¹⁰

Another critical lesson these biographies teach is that the role of politics in judicial selection—both in its grand sense of pursuing noble and principled conceptions of the public good and civic duty³¹¹ or in its petty sense of partisan payback or maneuvering—is not a new

³⁰⁴ See GUNTHER, *supra* note 1, at 568.

³⁰⁵ *Id.* at 560-61.

³⁰⁶ See *id.* at 135-39 (referring to Hand's letters to his mother confessing, *inter alia*, his anxieties about being a federal district judge); JEFFRIES, *supra* note 2, at 334-35 (quoting Powell's acknowledgement upon first arriving on the Court that he was "woefully unprepared" for the post); NEWMAN, *supra* note 3, at 272-74 (describing Black's adjustment to the Court and Justice Stone's initial concerns that he was too brash).

³⁰⁷ See NEWMAN, *supra* note 3, at 239.

³⁰⁸ *Id.* at xiv.

³⁰⁹ See *id.* at 240-41.

³¹⁰ *Id.* at 234 (citing JOSEPH P. LASH, *DEALERS AND DREAMERS: A NEW LOOK AT THE NEW DEAL* 311 (1988)).

³¹¹ See JEFFRIES, *supra* note 2, at 554 (discussing Powell's reaction to the politization of Bork's nomination).

phenomenon. Presidents Roosevelt and Nixon used a nominee's political record as a proxy for forecasting the nominee's predisposition and likely performance on the bench. Taft's and Roosevelt's focus on a nominee's judicial ideology as a potential disqualifying factor for Supreme Court appointment also reflects the rich heritage of such concerns in judicial selection.

Indeed, nothing about the fates of Justices Black and Powell and Judge Hand in the judicial selection process is incompatible with a more sophisticated understanding of the political dynamics of the system. For example, President Roosevelt nominated Black because Black had been a staunch political ally. At that time, Roosevelt failed to foresee that his Supreme Court appointees would eventually differ over the degree of deference that should be accorded governmental actions interfering with noneconomic liberty interests. By 1942, Roosevelt understood the nature of this division on the Court, and concluded that Hand's nomination would bolster the wrong ideological wing of the Court.³¹² Roosevelt's decision was partisan in the sense that it comported with his desire not to reward Hand for opposing his Court-packing plan, but it also reflected his broader vision of the direction in which he wanted the Court to move and his belief that a younger nominee would ensure that this movement would last for some time. Hand's failure to be appointed to the Supreme Court did not result from a flaw in the judicial selection system. Instead, his failure to secure a nomination was a result of bad timing and Hand's own political actions. Moreover, while Taft and Hand remained true to their respective visions of the role of the judiciary in our society, Hand was the victim of the collision between the two men's convictions.

Nevertheless, the change in the kind of people nominated to judgeships, particularly to the Supreme Court, is striking. These judicial biographies remind us that we have dramatically moved away from the practice of Presidents Roosevelt and Truman, who together appointed thirteen justices, all but three of whom came to the Court directly from elected or appointed federal offices. Of the remaining three justices, Sherman Minton came from the Seventh Circuit, to which he had been appointed by President Roosevelt in 1940 shortly after losing his bid for reelection to the Senate.³¹³ Minton, who was appointed in 1949, was the last U.S. Senator to serve on the Court.³¹⁴ Earl Warren, nominated by President Eisenhower in 1953, was the last

³¹² See GUNTHER, *supra* note 1, at 562-68.

³¹³ See NEWMAN, *supra* note 3, at 398.

³¹⁴ Minton was not the first choice for the position he eventually filled on the Court. Roosevelt had intended to nominate Judge Goodrich, but Roosevelt's death gave Truman the chance to name someone else. See *id.* at 338.

governor appointed to the bench.³¹⁵ Since then, the only elected official appointed to the Court has been Justice O'Connor, who served five years in the Arizona state senate.³¹⁶

Presidents Roosevelt and Truman regarded a Supreme Court nomination as the culmination of a life in public service. They believed that the more diverse experiences a nominee had with the law, the greater the nominee's insight into the Court's role in the constitutional order. Roosevelt and Truman hoped that their Court appointees would, like Black, have a deep appreciation for the federal legislative process, separation of powers, and federalism. Roosevelt and Truman also believed—sometimes wrongly—that the Justices whom they appointed would appreciate the importance of collegiality, particularly when working with people of different viewpoints.³¹⁷ Roosevelt and Truman, however, did not fail to appreciate the difference between judging and legislating. They did not seek crass politicians adept at compromise, skilled in vote trading, or bent on legislating from the bench. In fact, as Gunther reminds us, the New Deal liberals overwhelmingly favored judicial deference to federal and state policymaking on economic issues.³¹⁸ Moreover, Truman's appointees—Vinson, Clark, Burton, and Minton—favored judicial restraint, adhered to precedent, and believed that the Court's function was to determine whether the Constitution granted the political branches the power to take certain actions or to adopt certain policies, not to judge the wisdom of these acts.³¹⁹

The increasing concern about the Court's activism has culminated in a higher level of public and Senate scrutiny of prospective Supreme Court nominees. Hence, it has become more difficult for a nominee to hide, as Black did, embarrassing personal information. The price we pay for this closer scrutiny is that an outspoken judge, such as Learned Hand or Robert Bork, or a veteran politician, such as Bruce Babbitt or Mario Cuomo, is not likely to be nominated to the Court. During their careers, such individuals are likely to have made political enemies who will use the confirmation hearing as a chance to get even. In addition, the more things we expect a presi-

³¹⁵ See *id.* at 426-27, 434.

³¹⁶ See JEFFRIES, *supra* note 2, at 505.

³¹⁷ The biggest disappointment apparently was Frankfurter, whom both Gunther and Newman generally depict as having failed to realize his potential as a Justice because his arrogance, petulance, and pettiness alienated virtually all of his colleagues. See GUNTHER, *supra* note 1, at 566; NEWMAN, *supra* note 3, at 470.

³¹⁸ See GUNTHER, *supra* note 1, at 562-66.

³¹⁹ See NEWMAN, *supra* note 3, at 338-39, 341-44, 345, 347-48, 397. To be sure, Truman's appointees were not the best qualified. Even though Black had been close friends with Burton and Minton and had interceded more than once on behalf of Minton's appointment, see *id.* at 338-39, 398, Black later confessed that he was disappointed by them, see *id.* at 419.

dent to do while in office, the more difficult it is for him or her to risk political capital on a Supreme Court nominee. Consequently, it is more likely that the President will opt for the path of least resistance by naming a person with relatively few political foes.

CONCLUSION

The ideal judicial biographer should have many skills: he or she should possess a legal scholar's mastery of the fields in which the subject gained distinction; a historian's persistence and talent for finding, organizing, and elucidating facts; a psychologist's appreciation for personality development; and a biographer's empathy and even-handedness. Gunther, Jeffries, and Newman all demonstrate more than one of these attributes. Gunther thoroughly canvasses Learned Hand's penchant for self-doubt and deftly describes the historical periods in which Hand lived and worked as a judge. Jeffries clearly depicts the personality conflicts and the exchanges that occurred between the Justices in many important cases in which Lewis Powell participated. Newman draws an extraordinarily well-balanced and documented portrait of Hugo Black as politician and judge.

More than anything else, though, Gunther, Newman, and Jeffries personalize judicial decisionmaking in a way that conventional legal scholarship never could. In pulling the curtain back to expose these judges at work, they remind us that judges are first and foremost people and that personality and background shape judicial outlook and achievements. They show further that judicial greatness is not predictable and depends a great deal on character, experience, colleagues, docket, and lifespan. They reveal that public service can shape judicial insight and performance, and that a judge's political instincts help to provide the foundations for his or her judicial philosophy. Moreover, they remind us that judicial service is a noble calling and that by constitutional design judicial selection is a sophisticated political process. A president's choice of a judicial nominee, especially to the Supreme Court, is based on a complex balancing of various factors, including the President's popularity and relationship with the Senate and his or her appreciation of the nominee's political activities and an estimation of a nominee's likely impact on the Constitution, balance of powers, and federalism. These scholars remind us further that writing a judicial biography can reveal as much about the writer's attitude about the subject as it does about the subject. More importantly, they demonstrate just how inspiring, demanding, and special both living and copiously describing a distinguished judicial life can be.