THE UPSILONIAN

Upsilon-Upsilon Chapter
Phi Alpha Theta
Department of History and Political Science

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The front cover contains a picture of the Bennett Building, home of the Upsilon-Upsilon Chapter of Phi Alpha Theta and the History and Political Science Department of University of the Cumberlands. Built in 1906 as part of Highland College, University of the Cumberlands assumed ownership in 1907. The building underwent extensive renovation in 1986-1987.

Journal of the Upsilon-Upsilon Chapter of Phi Alpha Theta

THE UPSILONIAN

Student Editor

John Baker

Board of Advisors

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COMMENTS FROM THE ADVISOR

As the 2005-2006 academic year comes to a close, I must confess it has been an unusual one. For the first time in the Chapter's history, we have had two sets of officers, Brad, Ashley, and Megan graduated in December and Brooke, Chris, and Jay took over for them during the Spring semester. Both groups presented papers at the National Phi Alpha Theta Conference in Philadelphia. Three presenters at the National Conference is a record for our chapter. We then had four papers given at the Kentucky Regional Conference in April. This was also a first for us. Indeed one student even won a prize. For a small group of members, the chapter did well.

Unfortunately for the Chapter, but not for our individual members, several graduated this year. Many will be in graduate school, law school and/or in a chosen profession. We will miss you as each of you contributed to the success of the chapter. But we wish you the best of everything and urge ***you to remember that you are always a part of Upsilon-Upsilon***.

Eric L. Wake, Ph.D.
Advisor of Upsilon-Upsilon and
Chairman, History and Political Science

COMMENTS FROM THE EDITOR

The Upsilon-Upsilon Chapter of the Phi Alpha Theta History Honor Society has achieved unparalleled excellence during its lifetime. I am very pleased to be involved with this year's Issue, as our Chapter's legacy of greatness is continued within the following pages. Persistence in the hunt for historical knowledge – and more than a little luck – will prove to our successors the *modus operandi* for successfully fulfilling the high expectations placed upon them.

The authors deliver interesting viewpoints on two very different subjects. Both Megan Smith and Veronica Carmical inform us of the irascible Supreme Court Justice James Clark McReynolds, whereas Brooke Hembree discusses the origin and consequences of Anti-Japanese sentiments during the Interwar Period. These works demonstrate the dedication of our Chapter to the scholarly study of history.

My thanks goes firstly to the student authors themselves for graciously accepting my editing suggestions. Dr. Eric Wake deserves ongoing accolade for his putting up with all the brainy students while still heading a flourishing PAT Chapter. Lastly, the faculty and staff of the History and Political Science Department earn my appreciation for guidance and correspondence.

I would like to wish the outgoing Upsilon-Upsilon members my gratitude for having known them and wish them all great triumphs in the future as I know they will achieve.

John Baker**,** Student Editor
Upsilon-Upsilon, 2005-2006

COMMENTS FROM THE PRESIDENT

While searching for inspiration on what to say in this letter, I looked through some back issues of *The Upsilonian* to see what my predecessors wrote. What I found was a record of the changes of the Upsilon-Upsilon chapter of Phi Alpha Theta and evidence of the commitment to excellence that has allowed our chapter to win Best Chapter award for twenty-eight out of the past twenty-nine years.

The publication of the *Upsilonian* marks the end of another successful year for Phi Alpha Theta. As in previous years, this chapter has shown a strong commitment to both academic success, enrichment of the student body, and camaraderie. I believe that the 2005-2006 activities have been incredibly successful, despite our small membership. We hosted four lectures, sponsored two bake and book sales, presented three papers at national convention and four papers at regional convention, and won the Nels A. Clevens award for Best Chapter. Our ability to complete these activities shows the work commitment and leadership of each member of our chapter.

Looking back, I am honored to be part of Phi Alpha Theta. Looking around me, I am proud to have had a chance to work with all the members of this chapter. I am also grateful for the support of Dr. Wake, our faculty sponsor; the faculty of the History and Political Science department; and the students who have worked on *The Upsilonian*.

Brooke Hembree
President of Upsilon-Upsilon
Spring 2006

AUTHORS

Megan Smith graduated in January 2006 with a major in Political Science and a minor in History. The original draft of her paper was written for the Departmental Capstone course.

Veronica Carmical was a 1995 graduate from University of the Cumberlands with majors in English and Mathematics. While doing her undergraduate work, she was active in Upsilon-Upsilon. She received her masters in 1998 in Human Ecology.

Brooke Hembree was a May 2006 graduate with majors in Political Science and English. The original draft of her paper was written for the Departmental Capstone course.

Supreme Court Associate Justice James Clark McReynolds (1862-1946): Principled Defender of the Federal Constitution 1914-1944
By Megan Smith

Supreme Court Associate Justice James Clark McReynolds (1862-1946) has been assailed by many scholars and journalists as the most reactionary,[1] or even, among the worst Supreme Court Justices in United States History.[2] Careful evaluation of McReynolds' life and character reveal that far from being a mere 'reactionary,' McReynolds excelled in the tedious and mundane aspects of the law and possessed a fixed system of values, instilled by his parents and teachers, which produced a distinct, constitutionally-based, laudable, judicial point of view almost universally considered "liberal" until the final six years of his twenty-six and one-third years on the High Court.[3]

Born in the Southwestern Kentucky town of Elkton, seat of Todd County, on February 3, 1862, James was the eldest child of John and Ellen McReynolds, who reared him with a strong sense of morality and iron-honed work ethic. John McReynolds was a wealthy physician and surgeon, renowned in Todd County for his compassion toward the ailing and strict adherence to fundamentalist Christian values. Ellen McReynolds was widely respected for her uncommonly sacrificial charity and strong resolve. The McReynolds demanded a high degree of discipline and effort from young James, or 'Jimmy,' as he was always known in Elkton. In fact, Dr. McReynolds, insisted that all of his children perform physical labor.[4]

McReynolds attended the Green River Academy in Elkton, a private school operated by the austere and severe Major Robert Crumbaugh (formerly of the United States' Regular Army). There, students drilled in both academic fundamentals and strict codes of personal discipline. The ever non-smoking, tee-totaling McReynolds excelled in academics and adherence to discipline, graduating in 1879. Throughout his life, Major Crumbaugh regarded McReynolds as his best pupil.[5]

Next, McReynolds traveled to Nashville, Tennessee, where he enrolled in Vanderbilt University.[6] Sterling Price Gilbert, a classmate of McReynolds at Vanderbilt, remembered the Kentuckian as tall, dignified, and well-mannered. In a short biographical sketch of McReynolds, Gilbert then Chief Justice of the Georgia Supreme Court, recalled that the Todd County native earned the respect and admiration of his peers through hard work and discipline, while consciously avoiding any courting of popularity. Completing of his Bachelor of Science degree in 1882, McReynolds earned his class's highest honors, from both the faculty and the students.[7]

After spending an additional year in advanced studies at Vanderbilt, McReynolds enrolled at the University of Virginia School of Law. As was characteristic, McReynolds excelled at his studies. He came under the tutelage of Professor John B. Minor, who, like Major Crumbaugh, was a man of strict moral principles and one who devotedly taught Sunday Bible classes. Minor constantly railed against "progressive" interpretations of the law, holding that the

Constitution was static document never to be subordinated to the whims of popular sentiment. McReynolds was strongly influenced by Professor Minor, as he had been by his parents and Major Crumbaugh. Minor promoted a world view of two distinctly defined spheres, right and wrong. All questions to Minor and McReynolds' parents were moral in nature. Throughout his long life and career, McReynolds followed the principles advanced by his parents and favorite professors.[8]

McReynolds returned to Nashville after finishing his law degree in July 1884 and began a private legal practice. He later joined the faculty as professor of commercial law at Vanderbilt Law School. A "Gold Standard" Democrat, he unsuccessfully ran for United States House of Representatives in 1896 and eventually worked, from 1903 to 1907 in the Administration of Republican President Theodore Roosevelt as an Assistant Attorney General. He took up the Progressive Era work of "trust busting," working under the authority of the Sherman Anti-Trust Act of 1890 to dismantle corporations inhibiting competition in the market-place. Success in this position against some of the most outstanding corporate lawyers in the United States soon brought McReynolds respect and attention in the highest and most prominent legal circles in the nation.[9]

Following his election to the Presidency in 1912, Democrat Woodrow Wilson (another of Professor Minor's former students) nominated McReynolds for United States' Attorney General.[10] McReynolds' work in dismantling trusts as part of the Theodore Roosevelt Administration had earned him the reputation as an ardent business foe. Wilson apparently thought he had named a known *liberal* when he chose McReynolds for the nomination. As Attorney General, McReynolds continued his previous anti-trust work, often deciding questions in favor of civil liberties and labor unions.[11]

At the death of McReynolds' friend and former Vanderbilt Law School colleague, Supreme Court Associate Justice Horace Lurton, in July 12, 1914, President Wilson nominated McReynolds to the Supreme Court. Wilson may have thought he was appointing a liberal, or he may have been trying to replace a Tennessean with another Tennessee resident. McReynolds' most intense opposition came from Senator George Norris of Nebraska.[12] Nonetheless, McReynolds was confirmed by the Senate with a vote of forty-four to six, on August 29, 1914.[13]

Before his appointment to the Supreme Court, while working in the Justice Departments under both Roosevelt and Wilson, McReynolds had earned the wide-spread reputation of being a "trust-busting" *liberal*. McReynolds' deeply-held convictions centering on individual hard work and personal effort were consistent with his actions in working to make the market-place free for honest competition. To McReynolds, free and active competition translated into equal opportunity and success for all who had the initiative to work for it. McReynolds' zealous prosecutions of business corporations under the Sherman Anti-Trust Act were consistent with his belief in a literal adherence to the letter of the law. In the decade of McReynolds' appointment to the Supreme Court and during the

ensuing twenty-one years, his official, written positions caused Supreme Court observers to consider him a *liberal.*[14]

Once on the Court, Democrat McReynolds aligned himself with a group of Associate Justices, eventually dubbed by most journalists, academics, and legal experts the ultra-*conservatives*, the reactionaries, or most notably "the Four Horsemen of the Apocalypse."[15] Justices Willis Van Devanter [b.1859, d.1941; court tenure:1910-1937], George Sutherland [b.1862-d.1942: court tenure:1922-1938], Pierce Butler [b.1866, d.1939; court tenure:1923-1939], and McReynolds combined with each other and one or more of the remaining five High Court jurists to form a voting block enjoying majority status through most (1923-1937) of McReynolds' Supreme Court career and all of Roosevelt's first term .[16]

The landslide election of Democrat Franklin D. Roosevelt to the Presidency in 1932 and huge Democrat congressional wins in 1930, 1932, and 1934 were just the most overt in a series of significant, numerous, and sweeping changes in American government and life. Responding to the Great Depression of 1929, Franklin D. Roosevelt asked and got the heavily Democrat Congress to pass a far reaching series of general government reforms and programs to comprise the "New Deal."[17] The *conservatives* on the Court opposed most of the Roosevelt-sponsored measures, believing them to be unconstitutional.[18] Immediately following his record-setting reelection to a second term in 1936, Roosevelt decided to change the composition of the Supreme Court by altering it so, "…it also may function in accord with modern necessities…,"[19] Incensed by the aged Justices striking down many New Deal statutes, Roosevelt tried, in effect, to add, just two days after McReynolds' seventy-fifth birthday, six Associate Justices to the Supreme Court to give the Roosevelt side a majority of nine to six jurists on the High Court. Roosevelt borrowed from a similar plan put forward by McReynolds, as Attorney General under President Wilson.[20]

The court packing plan was not a great departure from American tradition, since the number of Justices on the Court had been changed several times. Yet the overtly political tone of Roosevelt's proposal coupled with stronger than expected public and political support for judicial independence, resulted in the death of the proposed statute in the Senate.[21] McReynolds remained on the Court for another four years. But the tumult led Justice Van Devanter to retire.[22] Roosevelt replaced him with a more agreeable justice, Senator Hugo Black, an ex-Ku Klux Klansman, resulting in a marked change in the complexion of the Court. The event followed the famed "switch in time," when Republican Associate Justice Owen Roberts [b.1875, d.1955; Court tenure:1930-1945] and Republican Chief Justice Charles Evan Hughes [b.1862, d.1948; Court tenures: Associate Justice, 1910-1916, and Chief Justice, 1930-1941] deviated from immediate past patterns of 1934-1936, to cast liberal votes in important New Deal cases. [23]

McReynolds had penned relatively few minority opinions in his first twenty-three years on the Court, initially regarding such dissenting statements as futile in principle.[24] When, following the failed court-packing scheme and ensuing change in judicial ruling style of Justice Roberts and Chief Justice Hughes from

conservative to pro-New Deal, McReynolds gradually but consistently fell to the dissenting side. He became so inflamed by the actions of the Court that he often ignored his self-imposed principle of abstaining from dissent and began writing fiery rebuttals against the ever-increasing pro-general government rulings, eventually writing a total of 310 dissents as compared to 503 majority opinions.[25]

A definitive judicial interpretation emerged from McReynolds' opinions. Among journalists, politicians, and, subsequently, the general public, McReynolds began to be known as nothing more or less than a *reactionary*, while the federal government with vast, new, judicially-confirmed powers transformed into, what must have appeared to the septuagenarian Justice to be, a veritable Leviathan compared with what it had been, just a decade earlier. But McReynolds' viewpoint had remained constant and consistent throughout his career. He simply lived and articulated those fixed and traditional values instilled in him by Dr. and Mrs. McReynolds and his beloved mentors, after they were deemed outmoded in legal, academic, journalistic, public opinion, and practically all other arenas in the Great Depression and *post*-Great Depression eras.[26]

McReynolds' constitutional and legal opinions represented a tripartite manifesto rooted in an abiding sense of federalism and a literal interpretation of the Federal Constitution. First, individual liberties described in the Constitution took precedence over the powers of any government. Second, personal property rights were constitutionally mandated and were to be regarded as sacrosanct. Third, aside from those powers specifically reserved to the federal level of government, authority fell exclusively under the discretion of state authority. McReynolds' fervent belief that competition should be promoted in the free market-place weaved threadlike through the three key tenants of his thinking, echoing the individualistic sentiments instilled in him during his upbringing.[27]

In those cases involving preference to the rights of the individual over any level of government, McReynolds consistently ruled in favor of the individual. In two such landmark cases regarding educational choice, McReynolds wrote the majority opinion of the Court in favor of the individual over the power of a state government to regulate compulsory education. The 1923 case, *Meyer v. State of Nebraska,* called into question a Nebraska statute against teaching foreign languages to children under the eighth grade. The stated intent of the statute was the promotion of the English language in immigrant communities, and, more broadly, the fostering of more loyal citizens. Writing for the Court's seven to two majority (Associate Justices Oliver Wendell Holmes, Jr. and George Sutherland, dissenting) in *Meyer* Justice McReynolds cited the Due Process Clause of the Fourteenth Amendment in determining that the statute violated the constitutionally-mandated liberties of students and parents.[28]

In *Meyer*, McReynolds asserted that it was the "natural duty" of parents to seek education, as only the parents deemed appropriate, for their children. The Associate Justice further concluded that mere knowledge of German (the specific foreign language in question) could not, in itself, reasonably be declared harmful and that, more strikingly, the Federal Constitution affords rights equally to all

citizens, regardless of spoken language. McReynolds took issue with the idea of crafting a superior race of American citizens, comparing the idea of compulsory socialization with Plato's conception of communal childrearing and the ancient Spartan custom of state indoctrination of the warrior class. McReynolds noted that those practices theoretically provide ample means to any prescribed end, but are overtly void in keeping with the values of the United States Constitution.[29]

In a similar-in-content 1925 case, the landmark *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, McReynolds authored the Court's unanimous ruling, that state governments cannot prohibit children from attending private educational institutions, rather than state operated schools. A 1922 Oregon statute, strongly backed by such nativist organizations as the Ku Klux Klan, mandated that all students (with a few minor exceptions) attend public schools.[30]

Also illustrative of McReynolds' abiding belief in the primacy of the property rights of individuals over powers of the general government or any other government were two high profile New Deal era cases. In each, McReynolds argued on behalf of the citizen in what he perceived to be the presence of an oppressive and overreaching government. Both Professor Minor's "letter of the law" doctrine and the McReynolds' family tendencies toward self-reliant individualism were reflected in his judicial opinions. With the coming of the Great Depression in 1929, and the ensuing New Deal (1933-1939) in the Franklin D. Roosevelt Presidency, McReynolds would find himself more and more in the minority. The Kentuckian did not bend to expediency or the popular will in remaining true to his principles.

In the 1934 case, *Nebbia v. People of the State of New York,* McReynolds penned a dissent to the majority 5-4 opinion articulated by Associate Justice Owen Roberts. The case centered on the authority of the New York State Milk Control Board to determine the minimum retail price for milk. The appellant, a small-scale grocer who was convicted for selling milk below the set price, argued that the state statute establishing the authority of the Board to control prices constituted a violation of the Fourteenth Amendment. Justice Roberts' majority opinion centered two ideas: (1) the Fourteenth Amendment was not applicable to property; and (2) when the public good and individual property rights come into conflict, the public good should overrule the property rights of the individual.[31]

Strongly dissenting in *Nebbia*, McReynolds affirmed the protection of the Fourteenth Amendment in property cases. The Associate Justice saw that the ruling in favor of regulation was based on two divergent lines of reasoning: (1) a milk "emergency"; and (2) the authority of the state to regulate sales and production of a product necessary to the public welfare. McReynolds cited the Second District Appeals Court ruling (the appealed progenitor of the present case) stating that private commerce could be regulated only in a state of emergency, contrary to the power Roberts afforded in his majority opinion.[32]

McReynolds noted that the alleged milk "emergency" was merely the result of supply surpassing demand. The purchasing power of consumers had declined, following the Great Depression of 1929, resulting in fewer milk

purchases. McReynolds cited several prior related cases in arguing that an emergency did not comprise justification for the abrogation of rights under the Constitution. The Associate Justice first noted the 1866 case, *Ex parte Milligan,* which established the principle that the Constitution was valid to all people and to the government at all times, even during national emergencies. McReynolds affirmed that, "If now liberty and property may be struck down because of difficult circumstances, we must expect that hereafter every right must yield to the voice of an impatient majority stirred by distressful exigency.[33]

McReynolds then observed that, in fixing milk prices, farmers were encouraged to overproduce, resulting in waste of milk and artificially high prices for consumers. In that the decreased purchasing power of grocery shoppers was the cause of the so-called "emergency," McReynolds found price-fixing counterproductive for any real solution to the problem and, actually, contrary to the interests of money-strapped consumers. Accordingly, the second line of reason for the affirming side, that milk was necessary to the welfare of the public and could therefore be regulated, was, to McReynolds invalidated in that regulation was detrimental to the welfare of the people.[34]

Former trust-buster McReynolds concluded that regulation was within the legislative powers of the state, but fixing prices to improve the condition of one party in a certain market amounted to control, which certainly was not within the state's purview. McReynolds ended his dissent, in the essence of Professor Minor, by avowing that the best means of furthering the interests of farmers, and everyone else, was literal adherence to the Constitution.[35]

McReynolds' dissent in *Nebbia* demonstrated his commitment to limited government, inspired by his childhood indoctrination in individualism. His refusal to affirm the validity of setting prices, which benefited farmers, did not imply his indifference to the plight of the husband. Rather, McReynolds held the solemn belief that any government interference in the market exacerbated farmers' problems, in addition to worsening conditions for consumers. More importantly, McReynolds observed that, in the creation of an emergency from every disparity in supply and demand, a scenario unfolds in which the government takes police action, becomes involved in the control of markets, disregards property rights of individuals, and advances a heinous dictatorship of disparaged majorities to take control of American life.

To McReynolds and like-minded others, things got worse. In the 1935 case, *Ashwander v. Tennessee Valley Authority,* the Court affirmed the power of the federal government to make, sell and distribute electrical power, under the war and commerce powers enumerated to Congress in Article One, Section Eight of the Constitution. McReynolds was the lone dissenter, arguing that the federal government lacked constitutionally granted authority to take such actions. The plaintiffs in the case were stockholders in a small company, Alabama Power. The company had recently entered into a contract with the Tennessee Valley Authority (TVA) providing for the exchange of property, use of infrastructure, and restrictions on areas to be served by the separate companies.[36]

Dissenting alone in *Ashwander*, McReynolds acknowledged that the Wilson Dam, the center of the TVA endeavor, was the legitimate property of the United States and was lawfully constructed under the war and commerce powers afforded to the Congress by the Constitution. He acknowledged that the government, with honest intentions, could legally dispose of power produced by the dam. McReynolds took issue with the intent of the federal government.[37] McReynolds also noted that the Congress had appropriated the TVA fifty million dollars to carry out its plan, far more than what would be needed to dispense with the electricity produced by Wilson Dam. Asserting that all contracts must be viewed totally in entirety in light of the surrounding circumstances, McReynolds contended that the true intent of the TVA was to dominate the power industry in the region.[38]

McReynolds concluded his dissent in usual fashion, warning that, if the general government were permitted to exceed the perimeters set by the Federal Constitution, it would be considerably more able to destroy protections against aggression toward citizens. The dissent clearly echoes McReynolds' views on private enterprise. Capitalism, McReynolds believed, should be preserved through protection of competition within free markets. McReynolds' work dismantling trusts during his tenure as Attorney General was and is consistent with this idea. In McReynolds' view, the promise of America, as endeared to him in his rustic hometown, Elkton, was manifest in equal opportunity to succeed, not encumbered by encroachments of excessively large business trusts or an excessively large government.

In justifying the third element of his judicial viewpoint, the preponderance of the state governments over the federal government, McReynolds took seriously the Tenth Amendment provision that all powers not literally ascribed to the federal government nor forbidden to any state government in the Constitution should be preserved by and for the states. Consistent with his particularly virulent incarnation of federalism inspired by his father (a former Confederate),[39] McReynolds believed the commerce clause gave the federal government the authority to regulate commerce between and among the states, defined as "intercourse for the purposes of trade."[40]

The National Labor Relations Board cases of 1937 centered on the question of whether the federal government could interfere in manufacturing-related employee/employer relationships, even when the manufacturing operation was contained to a single state. Two separate cases regarding the same issue, *National Labor Board v. Friedman-Harry Marks Clothing Company* and *National Labor Relations Board v. Fruehauf Trailer Company,* were heard by the High Court. Separate, yet concurrent, majority opinions developed for each case, while McReynolds' dissent applied in both cases. In the Friedman-Harry Marks Clothing Company matter, the Court's majority ruled that the National Labor Relations Board had the authority to interfere in relations between and among employers and employees within companies which operated or sold goods across state lines, even if the manufacturing operations were confined to a single state.

Beyond that, the federal government could take necessary steps to avoid labor strikes, as they disrupt the "flow of commerce." The Court's decision overturned a ruling made by the lower court.[41]

In dissent, McReynolds charged for the three other "Horsemen" also dissenting, that the Commerce Clause of the federal Constitution did not give the National Labor Relations Board the authority to dictate interchange between and among employers and employees engaged in manufacturing. McReynolds reasoned that manufacturing is patently different than commerce and not within the purview of the Commerce Clause; furthermore, production occurring within a singular state was not within the jurisdiction of the federal government.[42] Refuting the "flow of commerce" justification, McReynolds maintained that no such unrest resulted from the actions taken by the companies in question and suggested a variety of ludicrous contingencies that could be termed obstructions to the flow of commerce by the reasoning of the Board. Almost anything, McReynolds reasoned, could be contrived an obstruction to the stream of commerce.[43]

McReynolds' dissent in the National Labor Relations Board cases exemplified his highly principled view respecting the relationship between and among the general government and individuals as well as the relationship between the federal government and the states. He continued to believe that state jurisdiction should supersede the federal government in *state issues*. The Associate Justice, taking a narrow and literal view of the Commerce Clause, observed that the Court's *liberal* majority was attempting to misconstrue the Federal Constitution in order to grant more power to the general government.

McReynolds, true to the teachings of Professor Minor, maintained adherence to rigid, literal Constitutional principles, even when the facts of particular cases seemingly ran counter to his personal sense of morality, exemplified in his dissent in *Carroll v. U.S.* (1925) and his majority opinion in *Dysart v. United States* (1926). The first placed McReynolds on the side of alleged bootleggers, and the second on the side of an organization for unwed mothers.

In *Carroll,* Chief Justice William Howard Taft [b.1857, d.1930;Court tenure: Chief Justice, 1921-1930] delivered the opinion of the Court, that plaintiffs of the case could legitimately undergo a vehicle search and be prosecuted for illicit spirits found. McReynolds began his dissent with the charge that "The damnable character of the 'bootlegger's' business should not close our eyes to the mischief that will surely follow any attempt to destroy it by unwarranted methods." He argued that, because no warrant was produced and because the police who searched the plaintiffs' vehicle did not have probable cause to suspect the committing of a felony, the search was illegal and non-punitive.[44] McReynolds' use of a technicality to circumvent law and order is apparently contradictory to his "letter of the law" approach, but is clearly indicative of the principle he reiterated in nearly every opinion he penned. The

circumstances of the moment *never supersede* the tenets of the Federal Constitution and the liberties provided therein.

In *Dysart v. United States,* McReynolds wrote the majority opinion that the Queen Ann Private Home (for unmarried pregnant women) was not in violation of a Texas law prohibiting the mailing of lewd, obscene, or lascivious materials in disbursing materials advertising the home.[45] The Justice was renowned for his gallantry but severely disapproved of such trivial female infractions as the wearing of red fingernail polish.[46] At the conclusion of his opinion, McReynolds called the sending of the advertisement to refined women, "inexcusable." The Justice reasoned, however, that the spirit of the law, the prevention of moral corruption, had not been violated.[47]

More personal accounts of McReynolds reveal a charitable and social person, loved by those who knew him best. The Justice entertained often and enjoyed the company of lively, attractive women. He made frequent visits to his hometown where he was known simply as "Jim Mack."[48] McReynolds' love for children led him to load carriages full of toys at Christmas, and distribute them to the poorest neighborhoods in Washington, D.C.[49] and to "adopt" thirty-three orphans from the Battle of Britain.[50]

McReynolds announced his retirement on January 2, 1941, ending a twenty-six and one-third years career just days before his seventy-ninth birthday. The *New York Times* printed the news of his resignation, dubbing him a *reactionary*.[51] Clearly the revisionist history writing had already begun. In modern scholarly books and journals, McReynolds is portrayed as a vile and negative personality, bent on preserving the wealth of the fortunate and keeping the oppressed in servitude, rasping and nasty in nature.[52] Historian Ronald F. Howard described McReynolds as adverse to progress[53] and eminent New Deal-era historian Barry Cushman called him a clandestine *liberal* bent on preserving social stature in *conservative* circles.[54]

Negative pronouncements at the end of McReynolds' career are insufficient in explaining how a man of unwavering conviction, not to mention considerable accomplishment in the mundane and tedious aspects of the law, can be regarded as "the worst Supreme Court Justice." His antipathy toward Hebrews, drinkers, African Americans, career women, smokers, and married or engaged law clerks, is often reported and helps to explain the historical enigma.[55] Yet, it is not clear the Justice actually held those positions.[56] It is the modern standard of leftist historiography that most colors the images presented about McReynolds. Since the 1960's the neo-leftist school of historical thought has been dominant in American historiography and generally casts a negative light on Constitutionalists such as McReynolds.[57]

Despite his faults, the mainstream appraisal of Justice James McReynolds' jurisprudence and character is grossly inaccurate. Rather than working to preserve the privileges of a few, McReynolds, through the employment of his tripartite judicial philosophy, worked to assure that the constitutional liberties be enjoyed by all Americans. McReynolds believed the preservation of competition in the

market place was the best means to secure an equal opportunity for success to everyone. This and his other beliefs were grounded in a deep respect for individualism and constitutional literalism, instilled in him by his parents and his mentors. He strictly adhered to these values, both in his professional and personal life. If for nothing else, James McReynolds should be lauded for his strength of character.

At the death of Justice McReynolds, on 24 August 1946, more than five years after he chose to retire from the High Court, the New York *Sun* printed a eulogy, "The Passing of a Great Judge." The following statement was printed as part of the passage: "…a day surely would come when Americans would clean house of the then-current crop of false gods and return to their ancient faith; that on that happy day great honor would be paid to the memory of James McReynolds."[58] The awaited day is yet to come. But, Americans revering the visions America's forefathers established in the United States Constitution-of limited government, and power reserved in the individual rather than majorities-eagerly anticipate the dawning of that bright day.

ENDNOTES

[1]Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law.* Revised Ed. (Lanham, Maryland: Little Field Adams, 1994), 420-421.

[2]G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (New York: Oxford University Press, 1976), 178.

[3]G. Edward White, *The Constitution and the New Deal* (Cambridge, MA: Harvard University Press, 2000), 296-298

[4]James E. Bond, *I Dissent: The Legacy of Chief Justice James McReynolds* (Fairfax, VA: George Mason University Press, 1992), 1-3. Reynolds was never a chief justice.

[5]Ibid.

[6]Ibid., 12.

[7]Stirling Price Gilbert, *James Clark McReynolds (1862-1946): Justice of the Supreme Court of the United States*. (*privately printed by the author,* 1946), 1-10.

[8]Barbara Barlin Schimmel, "The Judicial Policy of Mr. Justice McReynolds," (Ph.D. diss. Yale University, 1964), 10-12

[9]Gilbert, *James Clark McReynolds*, 7.

[10]Calvin P. Jones, "Kentucky's Irascible Conservative: Supreme Court Justice James Clark McReynolds," *The Filson Club History Quarterly* 57, 1 (January 1983):23.

[11]Bond, *I Dissent*, 29-49.

[12]Philip A. Dynia, "Senate Rejection of Supreme Court Nominees: Factors Affecting Rejection, 1795-1972," (Ph.D. diss., Georgetown University, 1973), 215-218.

[13]*New York Times*, 29 August 1914.

[14]Dynia, "Senate Rejection of Supreme Court Nominees, 23.

[15]Barry Cushman, "The Secret Lives of the Four Horsemen." *Virginia Law Review* 83 (April 1997): 559.

[16]John C. McGraw, "Justice McReynolds and the Supreme Court: 1914-1941," (Ph.D. diss. University of Texas, 1949), 125.

[17]William E. Leuchtenburg, "Franklin D. Roosevelt and the New Deal, 1932-1940, *The New American Nation Series*, Eds. Henry Steele Commager and Richard B. Morris (New York: Harper and Row, 1963), 143-144.

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[20]William E. Leuchtenburg, "F.D.R.'s 'Court-Packing" Plan, *Supreme Court Review*, (1966), 347-400.

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[22]Gregory A. Caldeira, "Public Opinion and The U.S. Supreme Court: F.D.R.'s Court Packing Plan." *The American Political Science Review* 81 (December 1987): 1142.

[23]Leuchtenburg, "FDR's Court-Packing Plan: A Second Life, a Second Death," *Duke Law Journal* (June 1985), 673.

[24] Robert Mayer, *The Court and the American Crisis, 1930-1952*, Vol. 7, *The Supreme Court in American Life*. George J. Lankevich, ed. (New York: Associated Faculty Press, 1987), 210-211.

[25]"James C. McReynolds," *The Kentucky Encyclopedia,* eds. Thomas D. Clark. Lowell H. Harrison, and James Klotter (Lexington, KY: University of Kentucky Press, 1992), 600.

[26]Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), 241.

[27]Schimmel, *The Judicial Policy of McReynolds*, 124-125.

[28]M*eyer* v. *State of Nebraska*, 262 U.S. 390 (1923).

[29]Ibid.

[30]*Pierce* v. *Society of Sisters of the Holy Names of Jesus and Mary* 268 U.S. 510 (1925).

[31]*Nebbia* v. *the People of State of New York* 291 U.S.502 (1934).

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[33]Ibid.

[34]Ibid.

[35]Ibid.

[36]*Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936).

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[38]Ibid.

[39]Schimmel, *The Judicial Policy of McReynolds*, 37.

[40]*National Labor Relations Board v. Friedman-Harry Marks Clothing Company* 301 U.S. 58 (1937).

[41]Ibid.

[42]Ibid.

[43]Ibid.

[44]*Carroll* v. *U.S.* 276 U.S. 132 (1925).

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[47]*Dyasrt* v. *United State* 272 U.S. 655 (1926).

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[50]*New York Times* 17 July 1941.

[51]Ibid., 27 January 1941.

[52]Mayer, *The Court and the American Crisis*,11-12.

[53]Ronald F. Howell, "The Judicial Conservatives Three Decades Ago: Aristocratic Guardians of the Prerogatives of Property and the Judiciary." *Virginia Law Review* 49, 5 (December 1963), 1471.

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[55]Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* New and Revised ed. (New York: Rowman & Littlefield Publishers, 1999),134.

[56] Stephen T. Early, "James Clark McReynolds and the Judicial Process,"(Ph. D. diss., University of Virginia, 1954), 88.

[57]Bruce J. Schulman, "Out of the Streets and into the Classroom? The New Left and the Counterculture in United States History Textbooks," *Journal of American History* 85 (March 1999): 1527-1528.

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Federal Supreme Court Education Decisions By Associate Justice James Clark McReynolds: Unlikely Hero for American Schoolchildren
By Veronica Carmical

Ironically, the contributions of no other Justice of the United States' Supreme Court have had as much impact on defining personal freedoms for individuals than the unanimous and near unanimous rulings of Associate Justice James Clark McReynolds (b. 1862-d.1946), originally from Elkton in Todd County, Kentucky, and, arguably, the most arrogant, elitist, anti-social, racist, reactionary, homophobic, sexist, and cantankerous jurist in American history.[1] A former Assistant Attorney General under Theodore Roosevelt (1903-1907) and Attorney General (1913-1914) under Woodrow Wilson, McReynolds served as a United States' Supreme Court Associate Justice from 1914 to 1941. Among McReynolds' written 501 majority opinions (401 of which were unanimous), but four focused solely and directly on public education issues, and the effect of two among these, *Meyer v. Nebraska* 262 U.S. 390 (1931) and *Pierce v. the Society of Sisters in Holy Name of Jesus and Mary* 268 U.S. 510 (1925), impacted more areas of non-education law than any other case - and certainly more than any two cases – in American constitutional and legal history.[2]

The two cases stemmed from post–World War I American domestic fears of foreigners and foreign influences. The first two of the four education cases for which McReynolds wrote the majority decision, stemming from xenophobia, were *Bartels v. State of Iowa* 262 U.S. 404 (1923) and *Meyer*. In both cases, individuals violated a state law which made illegal the teaching of a non-English language to children who had not completed the eighth grade. For example, regarding a Nebraska statute, the United States' Supreme Court found, 7-2, on two grounds, in *Meyer*, that there could be no law prohibiting such language instruction.[3] First, learning language does not necessarily entail learning a particular political philosophy; the language itself presents no threat to the country. Second, such a law prohibits the language decided in progression, rather than simultaneously.[4]

The most famous and influential of these education-related cases is the landmark *Pierce v. The Society of Sisters of the Holy Names of Jesus and Mary* (1925). This was his third, but most influential, of the four education cases. Briefly, its background was: in 1922, the state government officials of Oregon conspired with the Ku Klux Klan and the Scottish Rite Masons to enact, pass, and promulgate a law requiring children, ages eight to sixteen, to attend only public schools.[5] Writing for a unanimous Supreme Court, McReynolds struck down the statute, whose obvious intent was to destroy parochial school, mirroring the moods among certain xenophobes around the country.[6]

The fourth and last case involving education issues, decided unanimously and authored by Justice McReynolds, was *Farrington v. T. Tokushige*. *Farrington* involved the teaching of non-English languages in the federal territory of Hawaii at special schools. Almost all of the pupils of these schools also attended public

schools. Therefore, these schools were focused narrowly on the language and culture these children were studying. The federal appeals' court ruled the law preventing such instruction unconstitutional. McReynolds' decision merely sustained the federal intermediary ruling.[7]

To comprehend the magnitude of McReynolds' rulings, one must first understand the man. James Clark McReynolds was born in Elkton, Todd County, Kentucky, to a prominent, wealthy doctor/surgeon and his socially active wife. Young James was not solely educated in scholarly works. His father, a former Confederate Army surgeon, strongly believed in being able to provide for one's self, regardless of education. His personal value of trade vocation was evident in his requiring young James to apprentice himself during his teen years to a carpenter. Later, McReynolds graduated as valedictorian from Vanderbilt University in 1882. Just two short years later, McReynolds earned a law degree, with highest honors, from the University of Virginia.[8]

McReynolds worked in various realms before coming to the highest judicial bench. He served as a secretary and clerk to future Supreme Court Justice Howell E. Jackson, practiced private law in Tennessee and New York, taught courses in commercial law at Vanderbilt, and was an unsuccessful candidate for the United States' House of Representatives as a "Gold Democrat" in 1896. He was better known for the times he spent as a federal prosecutor, 1903-1907 and 1913-1914. There, under both Presidents Theodore Roosevelt and Woodrow Wilson, McReynolds' primary role was to break up large trusts, under the auspices of the Sherman Anti-Trust Act of 1890. In this capacity, he developed a reputation as a liberal. For that day, anyone who made efforts to stop someone else from making as much money as possible was generally regarded as un-American, even socialist or communist. Such observers assumed too much in their views of McReynolds. No person can be easily categorized just because of one area in his life that revolves around one issue or set of issues.[9]

McReynolds was deeply devoted to the principles of the Federal Constitution and to the ideas he believed were behind its inception. In fact, as a Supreme Court Associate Justice, he would permit as legal evidence only statutes, legal rulings, and documents directly pertinent to the Constitution itself. He infuriated many attorneys and their clients who based their cases on points outside the law, such as history, sociology, and psychology. One truism about which most, if not all, McReynolds' scholars would agree was the Kentucky-born Associate Justice was not a man easily to be swayed or persuaded; in short, he absolutely refused to suffer fools gladly.

McReynolds' penchant for decisiveness earned him few friends in Washington. He possessed zero aptitude for applying ideas of the law toward any political affiliation. Those who disagreed with him were not likely soon to forget one of his infamous tongue lashings.[10]

In 1914, President Woodrow Wilson appointed McReynolds to the United States' Supreme Court, believing it would solidify a Democrat majority on the Court and rid his Cabinet of the cantankerous Kentuckian. McReynolds had a

way of irritating everyone around him, whether they agreed with him or not.[11] For a time, McReyonlds' appointment did solidify the Court.[12] Over time, however, the Court and America changed; the stubborn Kentuckian did not. In fact, he remained as he had always been. His demeanor and outlook were those of a courtly gentleman one hundred years past. The once seemingly forward-thinking liberal during his early judicial period of the 1910s and 1920s soon became known as staunchly conservative, even reactionary, by the 1930s. In this period of near radical change, the fixed Justice McReynolds, the "irreparable conservative," applied his regular conservative stance in an unprecedented but predictable manner.[13]

Events surrounding the *Pierce* case clearly reveal McReynolds' consistency. In 1922, the legislature of Oregon passed the Compulsory Education Act. The act required all Oregon children between eight and sixteen years of age to attend only public school. The legislative history of this statute shows the clear intent of the law was to destroy parochial schools in Oregon. The Society of Sisters in the Name of Jesus and Mary and Hill Military Academy filed suit against the Oregon Governor Pierce. The Society sued, not under religious freedom, but as a corporation asserting its right to make money. Further, if the parents of parochial school students could not choose to send their children to private schools, these schools would have been forced to close, due to insufficiency of pupils.[14]

When *Pierce* arrived at the Supreme Court, Justice McReynolds wrote the unanimous majority opinion for the tribunal. Justice McReynolds' primary and usual responsibilities in Court opinion writing were maritime law, insurance law, and contract law, notoriously complicated fields of jurisprudence, which kept the Kentuckian busy during his twenty-six and one-third years' tenure on the High Court. The primary issue in *Pierce* of a corporation's right to make money, however, linked directly with McReynolds' specialties.

The decision contained two main points. First, the parochial schools' primary income was from educating youth. Ergo, and passing a law requiring students to attend only public schools prevented the corporation from making money and those who worked for it from practicing their trade. The law violated the property rights of these institutions.[15] Accordingly McReynolds found the situation created by the Oregon statute as limiting the fundamental rights of parents/guardians to make decisions in the upbringing of children in their care. Both of these assertions were unique and important, not for the decision, but for the ideas and principles addressed. Furthermore, the case alluded also to the modern idea of due process.[16] And, McReynolds treated the school and each individual as a "person" under law.[17] Thus, the government cannot arbitrarily take away or prohibit a source of income. Finally, to prohibit a religious school from operating is the same as controlling religion, which violates the principle of a separation of church and state.[18] Perhaps most importantly, McReynolds ruled an unrelated verdict not specified for the case. He established the notion of a directed verdict, or a ruling on a point of law without request: in other words, a declaratory

judgment. When he commented that parents or guardians have certain fundamental rights in the major decisions in rearing their children, he established a new option open to judges. This latter had never previously been addressed. McReynolds arrived at this conclusion under the Fifth Amendment.

McReynolds was a staunch advocate of personal freedom, as well as a literal interpreter of the Constitution. This is evident from his address to the 42nd Annual Meeting of the Bar of Tennessee in 1923:

> We ought always remember that we are living in the only country in the world, probably, that is fit to live in...Our American uniqueness results from the work of a little band who worked behind closed doors in Philadelphia and prepared us a heritage more to be desired than gold...[Protecting the heritage he warned the audience]...you must fight against the rising tide which, if left unchecked, would sweep us into anarchy.[19]

Comments from his speech also allude to the then - current state of Soviet Russia in the 1920s as the prime example of the evils that can happen when government, small interest or political groups, or individual desires were not curbed appropriately. The predominant view in academic circles would be viewed as a ***laissez-faire*** attitude toward individual freedom, in McReynolds' eyes.[20] By understanding the personal and legal views of McReynolds, one can easily comprehend why he would write such bold decisions in these cases. Apparently, McReynolds was not alone in his beliefs. In fact, *Pierce* has been cited for support in hundreds of Supreme Court cases since that time.[21] Arguably, it is one of a few cases that helped define personal freedom.

The other three education cases further confirm McReynolds and his fellow Justices resolve in protecting the individual from government control of personal lives. Perhaps the revered Court of Appeals' judge Learned Hand put it best in commenting on the *Meyers* case's dissenters. The dissenters claimed they could see nothing wrong with the experiment. However, Judge Hand believed that the freedom to acquire "...useful knowledge, to many, with other privileges long recognized as essential to the orderly pursuit of happiness by free men."[22]

McReynolds has been "demonized" by middle- and late-twentieth century scholars as a mere reactionary who cared only for the law, not the individual. His post-judicial life saw him return to the only place he called home, his birthplace, Todd County, Kentucky. More surprising to those who only casually knew him was his love of children. He was renowned for hosting parties for various children. While he kept the momentary xenophobic insanity from the schools, McReynolds also fought for the welfare of schoolchildren, both professionally and privately. His private records show vast sums contributed to children's causes. Most remarkable though was his adoption of thirty-three orphans victimized by war in Europe during World War II. Each child shared equally in

his estate upon his death. Indeed, Justice James Clark McReynolds was and is a fine example of a cantankerous Kentuckian.[23]

TABLE OF CASES CITED

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Meyer v. Nebraska 262 U.S. 390 (1923).

Swierkiewicz v. Sorema N. A (decided February 26, 2002, Justice Clarence Thomas for the unanimous Court).

ENDNOTES

[1] Marquette University's esteemed political scientist Christopher Wolfe writes that McReynolds was "...probably the most reactionary [Supreme] Court member of the twentieth century..." Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law*, rev. ed. (Lanham, Maryland: Rowman and Littlefield Publishers, 1994), 420-421 n.116. Wolfe's depiction of McReynolds is typical for modern political scientists, legal scholars, and historians, who have only cursorily studied the most outspoken judicial nemesis of Franklin Roosevelt, the New Deal, and modern liberalism. Other notable, liberal-minded scholars of the era during which McReynolds served on the High Court sharing Wolfe's views include University of Virginia political scientists Henry J. Abraham [*Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Clinton*, rev. ed. (Lanham, Maryland: Rowman and Littlefield Publishers, 1999), 134] and David M. O'Brien [*Storm Center: The Supreme Court in American Politics*, 5th ed. (New York: W. W. Norton and Company, 2000), 59, 99, 130, 287-288], University of California-San Diego historian Peter Irons, [*A People's History of the Supreme Court* (New York: Penguin Books, 1999), 261-262, 322-323] and the famed, standard pro-Roosevelt, pro-New Deal scholars: Williams College's James MacGregor Burns [*Roosevelt: The Lion and the Fox* (New York: Harcourt Brace, 1956)], Kenneth S. Davis [*F.D.R.: The New Deal Years, 1933-1937* (New York: Random House, 1986)], Harvard University's-University of Washington's Frank Freidel [*Franklin D. Roosevelt: A Rendezvous with Destiny* (Boston: Little, Brown and Company, 1990)], University of Oklahoma's Richard Lowitt ["Only God Can Change the Supreme Court," *Capitol Studies* 5 (Spring 1977): 9-27], and City University of New York's Arthur M. Schlesinger, Jr. [*The Coming of the New Deal* (Boston: Houghton Mifflin, 1958)]. Two recent studies by leftist revisionist perpetuates the anti-McReynolds bias: Roy Lucas, "The Forgotten Justice: James Clark McReynolds & Neglected First, Second, & Fourteenth Amendments" Hhttp://www.armsndthelaw .com/archives/forgotten%20justice…[2003]; and Albert Lawrence, "Biased Justice: James C. McReynolds of the Supreme Court of the United States," *Journal of Supreme Court History* 30, 3 (November 2005): 244-270.

Regardless of their positions on the New Deal, those who have more closely studied McReynolds are highly favorable to their subject. Even Stephen Tyree Early, Jr., son of Franklin D. Roosevelt's Press Secretary, has written a favorable dissertation on McReynolds: "James Clark McReynolds and the Judicial Process" (Ph.D. dissertation, University of Virginia, 1954), concluding at page 415, "It [the Federal Constitution] was for him [McReynolds] a document whose principles possessed fixed meaning." Other book-length and highly favorable studies of McReynolds are: John B. McGraw, "James Clark McReynolds and the Supreme Court 1914-1941" (Ph.D. dissertation, University of Texas, 1951); Doris A. Blaisdell, "The Constitutional Law of Mr. Justice McReynolds" (Ph.D. dissertation, University of Wisconsin, 1952); Barbara Barlin Schimmel, "The Judicial Policy of Mr. Justice McReynolds" (Ph. D. dissertation, Yale University, 1964); James E. Bond, *I Dissent: The Legacy of Justice James Clark McReynolds* (Fairfax, Virginia: George Mason University Press, 1992); and G. Edward White, *The Constitution and the New Deal* (Cambridge, Massachusetts: Harvard University Press, 2000), especially 284-288-289, 292-293, 294, and 295-298, a seminal work by the holder of endowed chairs both in law and history at the University of Virginia, as well as a former law clerk to Earl Warren, the most liberal Supreme Court Chief Justice in American history, showing how pro-New Deal scholars have deliberately "demonized" McReynolds, while "canonizing" his opposites. Even the most shrill and extreme of

major "New Left" (Neo-Marxist) historians, Gabriel Kolko, in the first "New Left" monograph ever published, *The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916* (Chicago: Quadrangle Books, 1963), 126-127, 169, 256, 258-259 lauds McReynolds for his trust-busting work as an Assistant Attorney General during the Theodore Roosevelt and William Howard Taft Presidencies and as Attorney General under Woodrow Wilson.

[2]Most recently cited by Associate Justice Clarence Thomas for a unanimous Court in *Swierkiewicz v. Sorema N. A.* (February 26, 2002). See also William M. Wiecek, *Liberty under Law: The Supreme Court in American Life*, The American Moment, ed. Stanley I. Kutler (Baltimore: The Johns Hopkins University Press, 1988), 178-179.

[3]Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon and Schuster, 1990), 47-48.

[4]262 U.S. 390; 262 U.S. 404.

[5]David Tyack, "The Perils of Pluralism: The Background of the *Pierce* Case," *The American Historical Review* 74, 1 (October 1968): 74-98.

[6]Clement E. Vose, *Constitutional Change: Amendment Politics and Supreme Court Litigation since 1900* (Lexington, Massachusetts: Lexington Books, 1972), 157-160; Leo Pfeffer, *The Honorable Court: A History of the United States Supreme Court* (Boston: Beacon Press, 1965), 283.

[7]*Farrington v. T. Tokushige* 273 U.S. 284 (1927).

[8]Schimmel, "The Judicial Policy of Mr. Justice McReynolds," 11.

[9]Ibid., 1-122.

[10]Calvin P. Jones, "Kentucky's Irascible Conservative: Supreme Court Justice James Clark McReynolds," *The Filson Club History Quarterly* 57, 1 (January 1983):27. For a fascinating account of McReynolds' personal habits and activities from June 1936 until June 1937, see the one-of-a-kind posthumously published, volume-length reminisce by the Justice's former clerk: John Knox, *The Forgotten Memoir of John Knox: A Year in the Life of a Supreme Court Clerk in FDR's Washington*, eds., with forward and afterward, Dennis J. Hutchinson and David J. Garrow (Chicago: University of Chicago Press, 2002).

[11]Ibid., 23-25.

[12]"James C. McReynolds," OYEZ: Supreme Court Multimedia www.oyez.org November 3, 2005.

[13]Jones, "Kentucky's Irascible Conservative," 20.

[14]*Pierce v. Society of Sisters of the Holy Name of Jesus and Mary* 268 U.S. 510 (1925)

[15]Robert J. Steamer, *The Supreme Court in Crisis: A History of Conflict* (Amherst: University of Massachusetts Press, 1971) 186.

[16]Pfeffer, *Honorable Court* , 283.

[17]Milton Konvitz, *Expanding Literatures: The Emergence of New Civil Liberties and Civil Rights in Postwar America* (New York: The Viking Press, 1967), 56.

[18]Irving Brant, *The Bill of Rights: Its Origin and Meaning* (New York: Mentor Books, 1965), 403.

[19]Schimmel, "The Judicial Policy of Mr. Justice McReynolds," 164.

[20]Alfred H. Kelly, Winfred A. Harbison, and Herman Belz. The American Constitution: Its Origins and Development. 7th ed. (New York: W. W. Norton and Company, Inc., 1991), 516.

[21]"Other Cases Citing This Case," *Pierce v. Society of Sisters in the Holy Name of Jesus and Mary* 268 U.S. 510 *Findlaw.com*

[22]Gerald Gunther, *Learned Hand: The Man and the Judge*. Cambridge, Massachusetts: Harvard University Press, 1994, 376-7.

[23]Jones, "Kentucky's Irascible Conservative," 25; Charles R. Lee, Jr. "James Clark McReynolds," *The Kentucky Encyclopedia*, eds. John E. Kleber et al. (Lexington: University Press of Kentucky, 1992), 600.

Anti-Japanese Agitation in the 1920's
By Brooke Hembree

On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066, resulting in the removal of thousands of people of Japanese ancestry, many of them American citizens, from their homes to internment camps.[1] This movement to internment camps in the United States was the culmination of decades of anti-Japanese agitation by a small segment of the population. While racial prejudice was undoubtedly present among the people of the United States, the situation was made worse because many politicians and labor leaders attacked the Japanese living in the U.S. for personal gain.

Before exploring the causes of the anti-Japanese sentiment, it is important to consider the circumstances surrounding emigration from Japan to the United States. The period following the Meiji Revolution in Japan was one of great political and economic turmoil. The attempts of the Meiji government to modernize Japan's economy through restructuring resulted in the financial ruin of many farmers.[2] At this same time, as a result of the Chinese Exclusion Act, the Hawaiian sugarcane industry was searching for a new source of labor to replace the decimated native population.[3] This created a vacuum that many Japanese, primed for change by fluctuations in their homeland, would fill.

The majority of Isei[4] were laborers, though the actual numbers vary. The Isei generally had a higher literacy rate and more money than their European counterparts. According to Immigration Commission records, 22.6% of Isei were under the age of 20 years and 53% were less than 25 years old. The eldest son was slightly more likely to come to the U.S. than the younger sons and most Isei maintained contact with their families in Japan.[5] Once in the U.S., Isei performed various jobs, including railroad work, farming, salmon canning, mining, and working for sawmills, and steel and lumber companies.[6]

The Japanese government initially feared that sending laborers abroad would lower its prestige as a nation. The first group of laborers who went to Hawaii in 1868 left without the approval of the Japanese government and, as a result, the Japanese government refused to allow further labor emigration until 1886.[7] Even after the restrictions were lifted, it was still difficult to obtain a passport because of the government's belief that the citizens of other nations would view Japanese emigrants as representative of the entire population. Emigrants were required to prove that they would be able to return to Japan if they became sick and, for those lacking the financial resources to satisfy this requirement, a guarantor, who owned a certain amount of land or could prove that he had paid a certain amount of taxes, was required. Because of the strong demand for labor, the laws did not stop emigration. The complexity of these laws, however, created a thriving emigration business. Emigration companies, or *imin toriatsukainin,* emerged to help with the application process, arrange passage, find work for the client, and post money for the return trip. In return, the companies received commissions from the shipping companies and fees from

employers for providing labor. Some emigration companies also provided their clients with Western clothes and coached them on what to say to immigration officials. At best, a multitude of similarly dressed immigrants providing the same answers to questions might have made officials suspect a contractual system and, at worst, given credence to the theory that an army of Japanese was invading the U.S. disguised as laborers.[8]

The majority of American opposition to Japanese immigration came from economic concerns. Some claimed that, because the Isei worked for lower wages and paid more for property and rents, Americans could not compete with the Isei without drastically changing their lives.[9] In Hawaii, Isei were chiefly laborers on the sugarcane plantations and much of the conflict resulted from workers fighting for better working conditions. Both Hawaii and California questioned the loyalty of the Isei. A report from the Hawaiian Labor Commission, appointed by President Warren Harding on November 9, 1922, noted that the Japanese residential districts were adjacent to forts and expressed concern that the Isei controlled "essential services" and possessed sampans that could transport thousands of men for up to 500 miles.[10] Secretary of State Charles Hughes expressed concern over the entire report, stating that it implied that Hawaiian-born Nisei were Japanese, not American, that wanted to "secure the islands for the purpose of furthering the cause of Imperial Japan."[11]

Two important figures in the development of anti-Japanese sentiment were James D. Phelan and V.S. McClatchy. Phelan began his anti-Japanese campaign in 1896, using this platform to gain support from labor unions.[12] He was successful, serving as mayor of San Francisco for three two year terms starting in 1897, as well as being elected U.S. Senator in 1913. In a 1921 article, he called for Congress to take action against the Japanese, claiming that "great numbers of Japanese, men and women, are in California, and are acquiring large tracks of agricultural land," that the Japanese drove out the white farmers due to their lower standard of living, and that it was a matter of self-preservation for California to prevent the Japanese from "absorbing the soil."[13] McClatchy, publisher of the *Sacramento Bee,* was even more forceful. He warned against the Isei's "unusually large birthrate per thousand population, shown to be three times that of whites."[14] According to McClatchy, the Japanese could never make good citizens because of "racial characteristics, heredity, and religion."[15] He also cautioned that the Japanese government claimed anyone of Japanese descent as citizens and that the Japanese had shown no inclination to become U.S. citizens.[16] To support this, he criticized the Japanese language schools attended by Nisei, where

> Japanese children...are taught the language, the ideals, and the religion of Japan, with its basis of Mikado worship. Here they are taught by Japanese teachers, usually Buddhist priests, who frequently speak no English, and who almost invariably know nothing of American citizenship. The textbooks used are the Mombusho series, issued under the Department of Education at Tokio [Tokyo].[17]

He also warned that the Nisei who went to Japan to study were being even more thoroughly indoctrinated as Japanese citizens.[18]

McClatchy's claims were based on outdated information. Prior to 1916, the Japanese government also had an interest in all Nisei. Under Japanese law, the child of a male Japanese citizen was considered a Japanese citizen. All men between seventeen and forty could be conscripted into the Japanese army, and the Japanese government theoretically kept detailed records of Japanese children born in other nations. Japanese citizens living abroad were required to register a child's birth with the Japanese consulate. The government then forwarded the information to the parents' native district and, at the age of seventeen, the man would be placed on the military register. In practice, Isei frequently failed to register a child's birth with the consulate and it is doubtful that the Japanese government would be able to force an American citizen to leave his native country to serve in the Japanese military. More important, after the Expatriation Act of 1916, a Japanese citizen could renounce his or her citizenship, with the consent of the Minister of Home Affairs.[19]

Some Nisei were educated in Japan, usually at the encouragement of their parents. By 1937, the Japanese government began trying to lure Nisei to visit Japan by offering special tourist rates and other inducements. Since Americans now viewed Japan with suspicion, it was to be expected that the loyalty of the Kibei[20] also came under question, but some of the Nisei who most strongly opposed Japan were actually Kibei who spent time in Japan prior to 1937. Most Nisei were not assimilated into Japanese culture. Not only were they "critical of the school system, of the customs, of the dominant ideas, of the food, and of the mode of living,"[21] but they were considered American by the Japanese and were met with suspicion and resentment. In fact, the same government that actively encouraged Nisei to return to their ancestral homeland also kept many under close surveillance. A Tokyo professor who educated the Kibei noted that that they viewed the Sino-Japanese conflict from an American perspective.[22] As a result of this attitude, most Nisei had little interest in the country of their parents.

Anti-Japanese agitators frequently criticized Japan for violations of the Gentlemen's Agreement. In 1907, Congress passed a law that allowed the president to deny entry to foreign nationals who tried to enter the U.S. through a third country. Soon after, President Theodore Roosevelt issued a proclamation barring Japanese from entering the U.S. through Canada, Mexico, or Hawaii. In the same year, Japan and the U.S. entered into a Gentlemen's Agreement where Japan would voluntarily restrict labor emigration. In return, the United States government promised not to enact legislation that discriminated against Japanese living in the country.[23]

In the years to follow, exclusionists accused Japan of violating this agreement. Under the terms outlined in an April 10, 1924 letter from Ambassador Hanihara to Secretary Hughes, the Japanese government agreed not to issue passports to laborers unless they had previously lived in the United States or "parents, wives, or children less than twenty years of age of such persons."[24] The

interpretation of this phrase led to arguments over "picture brides." By the time the Gentlemen's Agreement went into effect, Isei men outnumbered Isei women 6-to-1. Prosperous men could return to Japan to marry, but those without means to return home often relied on matches arranged by family in Japan. A potential match would be suggested and photographs would be exchanged by both parties. If both sides approved, the pair married and the woman came to the United States.[25] Exclusionists attacked this practice because these women frequently worked as field hands.[26] They viewed this as an intentional violation of the Gentlemen's Agreement on the part of Japan. However, Japanese law did not require a ceremony for the marriage to be valid. Once the wife's name was added to the husband's family record, the marriage was legal and allowing a woman to join her husband was not a violation of the agreement.[27] More importantly, Japan stopped issuing passports to these women in 1920, but exclusionists continued to cite picture brides as an example of Japan's violations of the Gentlemen's Agreement in an effort to achieve total Japanese exclusion.

American compliance with the Gentlemen's Agreement can also be questioned. Until 1922, there was a question of the Isei's eligibility for citizenship. Congress never passed a law that prohibited the naturalization of Japanese immigrants. Various courts ruled that Isei were ineligible for citizenship, but the Isei countered that the Revised Statutes of the United States never mentioned "free white persons."[28] As a result, Isei should be eligible for citizenship. Other Isei appealed on the grounds that the Japanese were Caucasian, not Mongoloid, that the term "free white person" was a catch-all phrase, and that the military service of Isei made them eligible for citizenship. These arguments were countered in various rulings. Federal Courts ruled that section 2169 of title XXX, which stated that people of African descent were eligible for citizenship, was a restrictive clause and "free white person" meant a person of European descent. Finally, the Supreme Court heard *Osawa v United States* (1922) and ruled that the Isei were ineligible for citizenship.[29]

The status of the Isei as "aliens ineligible for citizenship" was important in the alien land laws. As of 1923, twenty states had laws limiting the land ownership of resident aliens and California, Washington, and Arizona had laws that were aimed specifically at the Japanese. The legality of such laws was challenged, with some arguing that the laws violated the Fourteenth Amendment by discriminating against "aliens ineligible for citizenship." The courts ruled that, while the State cannot arbitrarily discriminate between classes of persons, it can make reasonable classifications such as "aliens ineligible for citizenship."

These laws did not prevent the Isei from using the land. The California Alien Land Act prevented aliens ineligible for citizenship from owning land or from leasing land for more than three years. However, if the lease was renewed regularly, an Isei could use a piece of land indefinitely. To further complicate matters, although Isei were ineligible for citizenship, children of Japanese descent born in the United States were citizens. Under law, land could be purchased in the name of a Nisei child and used by the Isei parents acting as guardians of the

estate. In 1920, California passed a law preventing Isei from acting as guardians of a minor's estate if the guardian could not actually hold land. The California Supreme Court struck this down. In the end, the Land Acts did not significantly restrict the right of the Isei to use land, but it did have a negative impact on United States-Japanese relations.[30]

Other measures were taken against the Isei and Nisei in America. Both Hawaii and California launched attacks against the Japanese language schools. Language schools were common among many groups of immigrants. Immigrant children attended these schools after their regular classes. By 1920, 20,000 Hawaiian children of Japanese descent attended these language schools, making Japanese language schools the largest in the territory. The opponents of these schools claimed that they interfered with good American citizenship by promoting Japanese nationalism and preventing children from learning English. The supporters claimed that the language schools actually promoted good American citizenship by teaching *shushin*, Japanese moral values, which were compatible with American values. They also claimed that learning Japanese increased job opportunities and promoted family harmony, especially since few Isei spoke English.

Starting in 1920, the Hawaii State Legislature and the Department of Education began trying to close these schools. In response, Isei parents and community leaders went to court. The laws and regulations placed on the schools were declared unconstitutional by the Ninth Circuit Court of Appeals in 1926 and upheld by the United States Supreme Court in 1927.[31] In 1921, California also passed legislation to control the language schools, requiring all language schools to obtain a permit from the superintendent of public schools. Those applying for a permit must understand American history and speak English. Applicants must also file an affidavit promising to make students good citizens. Private school sessions could not take place before or during public school hours and the superintendent also had control over the curriculum.[32] In reality, these measures were probably unnecessary because most Nisei had little interest in learning Japanese and, though they might speak Japanese, few were proficient in reading or writing the language.[33]

The anti-Japanese agitators had a larger goal in mind. In the spring of 1921, California Senator Hiram Johnson began laying the groundwork for a Japanese exclusion bill. He invited V.S. McClatchy to address the California delegation so that they would present a united front. They organized the Executive Committee of Western States, a steering committee consisting of one senator and one representative from eleven states. When the movement encountered financial problems, Phelan (now a private citizen) and McClatchy agreed to finance it. The group expected little resistance from the House of Representatives, but the reaction of the Senate was uncertain. In March 1924, McClatchy, Phelan, and Ulysses S. Webb, Attorney General of California, arrived in Washington to lobby for a Japanese exclusion bill. McClatchy attacked Japan for violations of the Gentlemen's Agreement including picture brides and

expressed concern over the high birthrate of the Isei, their expansive landholdings, and their loyalty to Japan. The Senate introduced a bill that would impose a quota, but let the Gentleman's Agreement stand for diplomatic purposes.[34] At the same time, the Japanese government offered to modify the Gentlemen's Agreement to the satisfaction of the United States.[35] Secretary of State Charles Hughes supported this position, but his actions may have helped push through the Exclusion Act. Several Congressmen complained that the Gentlemen's Agreement was a secret document. Rather than addressing their concerns himself, Hughes contacted Masanao Hanihara, the Japanese Ambassador. At the suggestions of Hughes, Masanao wrote a letter to Hughes outlining the terms of the agreement. Hughes then shared this letter with the Senate. Henry Cabot Lodge, after reading the letter, pointed out that Hanihara said that there would be "grave consequence" if the Exclusion Act was passed. He declared that the statement was a threat against the United States and that the only option was for the Senate to pass the Exclusion Act. It passed in the Senate 76 to 2.[36]

The passage of the Japanese Exclusion Act caused problems in the relationship between the United States and Japan. On July 1, 1924, the day the Exclusion Act went into effect was observed in Japan as a "day of humiliation."[37] Posters in Tokyo said "Hate Everything American" and sixteen protest meetings were held. The largest lasted nine hours and the audience varied between 5,000 and 12,000. The American government had rebuffed the efforts of the Japanese government to come to an agreement that would preserve its dignity and Japan felt that it had not received the treatment it deserved from the U.S. as an equal, friendly nation.[38]

The anti-Japanese movement played a strong role in the 1920s and 1930s, both domestically and internationally. The agitation of a few people over the Japanese immigrants living on the Pacific Coast caused problems for the relations between the United States and Japan. The Japanese government and people felt that they, and Japanese living in the U.S., had not been treated with the respect they deserved. The activities of these agitators also laid the groundwork for people of Japanese ancestry to be placed in internment camps when the United States entered into World War II. Men such as Phelan used an anti-Japanese platform to gain political power. The anti-Japanese agitators relied on outdated information and cultural misunderstandings. They created, and then exploited, the fear that the Japanese who came to America were part of an economic and military conspiracy.

ENDNOTES

[1]Bill Hosokawa, *Nisei: The Quiet Americans* (New York: William Morrow and Company, Inc, 1969), 238.

[2]Eileen H. Tamura, "The English-Only Effort, the Anti-Japanese Campaign and Language Acquisition In the Education of Japanese Americans in Hawaii, 1915-1940," *History of Education Quarterly* 30, no 1 (1993): 37-58.

[3]Hosokawa, *Nisei*, 35.

[4]Japanese immigrants were ineligible for citizenship and therefore cannot be referred to as Japanese-American. Therefore, first-generation immigrants will be referred to as Isei, while the children of Isei, who were eligible for citizenship, are referred to as Nisei.

[5]Ibid., 55-56.

[6]Ibid., 68-74

[7]Hosokawa, *Nisei,* 34-36.

[8]Ibid., 46-47

[9]Elwood Mead, "The Japanese Land Problem in California," *Annals of the Academy of Political Science* 93 (January 1921): 5.

[10]Gary Y. Okihiro. *Cane Fires: The Anti-Japanese Movement in Hawaii, 1865-1945* (Philidelphia: Temple University Press, 1991), 96.

[11]Ibid., 97.

[12]Fred H. Matthews, "White Community and 'Yellow Peril,'" *The Mississippi Valley Historical Review* 50, no. 4 (1964): 613-615.

[13]James D. Phelan, "Why California Objects to the Japanese Invasion," *Annals of the Academy of Political Science* 93 (January 1921):16-17.

[14]Valentine S. McClatchy, "Japanese in the Melting-Pot: Can They Assimilate and Make Good Citizens?" *Annals of the Academy of Political Science* 93 (January 1921): 29.

[15]Ibid.

[16]Ibid.

[17]Ibid., 31-32.

[18]Ibid., 32-33.

[19]Raymond Leslie Buell, "Some Legal Aspects of the Japanese Question," *The American Journal of International Law* 17, no. 1 (1923):33-34.

[20]Kibei refers to Nisei who received their education in Japan.

[21]Carey McWilliams, "The Nisei in Japan," *Far Eastern Survey* 13, no. 8 (1944): 70.

[22]Ibid., 71-73.

[23]Kiyo Sue Inui, "The Gentlemen's Agreement. How It Has Functioned," *Annals of the American Academy of Political and Social Science* 122: (November 1925):189-192.

[24]Masanao Hanihara to Charles Evans Hughes, 10 April 1924. Quoted in Kiyo Sue Inui, "The Gentlemen's Agreement. How It Has Functioned," *Annals of the American Academy of Political and Social Science* 122: (November 1925): 190.

[25]Hosokawa, *Nisei,* 92.

[26]Inui, "The Gentlemen's Agreement," 190.

[27]Hosokawa, *Nisei,* 92.

[28]According Buell, this phrase first occurred in the first naturalization statute, approved March 26, 1790.

[29]Buell, "Some Legal Aspects," 20-32.

[30]Ibid., 35-45.

[31]Tamura, "The English-Only Effort," 36-43.

[32]Buell, "Some Legal Aspects," 48.

[33]Tamura, "The English-Only Effort," 46-47.

[34]Roger Daniels, *The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion* (Berkeley, California: University of California Press, 1977), 96-100.

[35]Sidney L. Gulick, "American-Japanese Relations: The Logic of the Exclusionists," *Annals of the Academy of Political Science* 122 (November 1925): 183.

[36]Daniels, *The Politics of Prejudice,* 100-103.

[37]Gulick, "American-Japanese Relations," 181.

[38]Ibid., 181-183.