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Judicial Perspective and Mentorship at the Supreme Court: A Review Essay on *In Chambers: Stories of Supreme Court Law Clerks and Their Justices*, Edited by Todd C. Peppers and Artemus Ward

Harvey Gee

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Judicial Perspective and Mentorship at the
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Harvey Gee*

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I. INTRODUCTION

In their recently released book, *In Chambers: Stories of Supreme Court Law Clerks and Their Justices* (“*In Chambers*”),¹ editors Todd Peppers and Artemus Ward offer a collection of previously published articles and new unpublished essays on select justices and their clerks to illuminate how the personal relationships between justices and clerks impact the Court. Contributors include distinguished law professors, judges, academics, and legal correspondents. Peppers and Ward are certainly qualified to talk about the Supreme Court clerkship institution. Six years ago, Peppers released *Courtiers of the Marble Palace: The Rise and*

* Attorney, Federal Defenders of the Middle District of Georgia, Inc.; United States Supreme Court Fellows Program Finalist, 2012. The views expressed herein are not necessarily attributed to any past, present, or future employers. I thank the editors for their hard work and assistance.

1. *IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES* (Todd C. Peppers & Artemus Ward eds., 2012) [hereinafter *IN CHAMBERS*] (University of Virginia Press 2012, PP. 445, \$ 34.95. ISBN: 978-081393265-1).

*Influence of the Supreme Court Law Clerk*² and Ward, along with David L. Weiden, wrote *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*.³ These books, based on archival papers, interviews and surveys with former clerks, offered behind-the-scenes looks at the institutional development of the law clerk institution and how it evolved since its nineteenth-century beginnings. Now, the authors assemble a collection of first-hand accounts of the inter-workings of the justices' chambers from the perspective of former law clerks, and cover the origins of the clerkship institution, the pre-modern clerkship institution, and the modern clerkship institution.

Generally, a judicial clerkship, a prestigious way to begin a legal career, offers new law school graduates an opportunity to work closely with a judge for a one or two-year term, gain unparalleled insight into the judicial process, and get broad exposure to various areas of law. The clerk works closely with the judge to handle the judge's docket by conducting legal research and assisting in the drafting of opinions and bench memoranda. A clerk generally acts as the judge's confidant and as a liaison between the judge and the lawyers and litigants. In the process, clerks observe activities in the courtroom and in chambers, see examples of good and bad lawyering, develop research and writing skills, and learn the nuts and bolts of litigation or the appellate process. The judge's name is listed on an attorney's résumé for life, the affiliation helps to build professional contacts, and judges often serve as mentors to former clerks throughout their careers.

At the top of the hierarchy is the United States Supreme Court clerkship. There has always been great public interest, if not fascination, with Supreme Court clerkships. For recent law school graduates, such a clerkship on the high court is an opportunity of a lifetime because these highly coveted and sought after clerkships offer keys to the doors of power. Clerk alumni regularly move on to serve as law professors in top law schools, serve on Presidential cabinets, and become partners at major law firms or CEOs of Fortune 500 companies. Large law firms collect former Supreme Court clerks like trophies, and offer them handsome signing bo-

2. TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006).

3. ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006).

nuses upwards of \$250,000.⁴ Almost all law clerks are hired primarily on the basis of academic achievement, and are almost always alumni of top-tier law schools, as well as having clerked with a United States Court of Appeals judge who is a personal friend, or sometimes former clerk, of the Supreme Court Justices to which the applicant is applying.⁵ Increasingly, clerkship committees at law schools also push select applicants.⁶ The number of applicants exploded during the Burger and Rehnquist Courts, and the Court Justices typically receive more than a thousand applications annually for just a handful of spots in each chamber.⁷ Now, the Roberts Court probably receives even more applications in this ailing economy.

This review essay is divided into four parts. First, it explains the origins of the mentorship relationships between justices and their clerks, and explores the process in which the justices and clerks rely on personal experiences as reference points in interpreting issues and making decisions. The information provided in *In Chambers* reveals that the identity of a judge and clerk informs his or her interpretation of cases. Next, the essay discusses the first female and African American law clerk at the Supreme Court, and shows how the reliance on personal experience carries special significance when considering gender and race issues. Then it describes the modern Supreme Court clerkship. Finally, the essay focuses on the noticeable lack of Asian Americans on the federal bench, especially on the Court and explains why this has created barriers to justice for Asian Americans. This part also addresses the potential impact of having more Asian Americans on the federal judiciary, and the possibility of an Asian American Justice being nominated to the Supreme Court.

II. THE ORIGINS OF THE MENTORSHIP RELATIONSHIP

Chief Justice Horace Gray was the first U.S. Supreme Court Justice to hire a recent law school graduate as his law clerk in the summer of 1875.⁸ Chief Justice Gray was well known for his apti-

4. See Tony Mauro, *Lower Hiring Bonuses Expected for Supreme Court Clerks*, LAW.COM, (June 15, 2009), <http://www.lawjobs.com/newsandviews/LawArticle.jsp?id=1202431469615&slreturn=2013007095748>.

5. Clare Cushman, *Foreword* to *IN CHAMBERS*, *supra* note 1, at ix, x.

6. See WARD & WEIDEN, *supra* note 3, at 58.

7. *Id.*

8. Cushman, *supra* note 5, at ix.

tude for legal research and demanded as much from his assistants.⁹ Chief Justice Gray initially began hiring Harvard Law School graduates to be his legal secretaries and to handle the increased workload of the Chief Justice position.¹⁰ Justice Gray personally paid the salaries of Thomas Russell, William Schofield, and Henry Eldridge Warner, who were the first Supreme Court law clerks.¹¹ Moving forward in time, Scott Messinger explains that Oliver Wendell Holmes Jr. was a key figure in transforming the nature of law clerking from an administrative institution to an experience that awakens a young lawyer's intellectual curiosities, giving him or her important societal responsibilities.¹² This transformation evolved into the Justice Louis Brandies clerkship model, which has become the precursor for the modern clerkship institution: the Supreme Court law clerk would have graduated from a top law school, possess a strong work ethic, and possess superior legal writing and research skills.¹³ From the 1950s through the 1960s, the law clerk transformed into a full-fledged attorney or law firm associate involved in all aspects of chamber work.¹⁴

Each justice displayed a distinctive approach to tackling the chambers workload and in deciding how much writing the clerk would do. Here, the memoirs are valuable to understanding the judicial thought processes and administrative style of individual justices. Andrew Kaufman writes about Justice Benjamin Cardozo's practice of relegating pre-argument work as the clerk's major responsibility, while retaining opinion writing for himself.¹⁵ Cardozo was as productive as he was efficient, and he often wrote his opinions on a legal pad while pacing.¹⁶ Kaufman explains that he would have a draft on Sunday, and his secretary would type up the draft the next day.¹⁷ But Cardozo was a private person, and he never seemingly had a close relationship with his clerks.¹⁸ Less

9. Todd C. Peppers, *Birth of an Institution: Horace Gray and the Lost Law Clerks*, in IN CHAMBERS, *supra* note 1, at 17, 20.

10. *Id.* at 19.

11. *Id.* at 17.

12. I. Scott Messinger, *The Judge as Mentor: Oliver Wendell Holmes Jr. and His Law Clerks*, in IN CHAMBERS, *supra* note 1, at 42, 42-43.

13. Todd C. Peppers, *Isaiah and His Young Disciples: Justice Brandeis and His Law Clerks*, in IN CHAMBERS, *supra* note 1, at 67, 82.

14. PEPPERS, *supra* note 2, at 145.

15. See Andrew L. Kaufman, *Benjamin Cardozo and His Law Clerks*, in IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES, *supra* note 1, at 88, 92.

16. *Id.*

17. *Id.*

18. *Id.* at 94.

private was Justice Oliver Wendell Holmes, Jr. who mentored his law clerks and utilized these relationships in an effort to enhance his judicial reputation and to inspire other state and federal judges to do the same.¹⁹

Todd Peppers and Beth Driver write that Justice Felix Frankfurter, with his serious demeanor, considered the law clerks to be his junior partners.²⁰ Frankfurter believed that it was not a good use of time to have clerks reviewing certiorari petitions and instead, he wanted his clerks to draft opinions.²¹ With these writing tasks, Frankfurter would tell the law clerks what the case was about, his position, and what he wanted.²² The clerk would then draft the opinion subject to Frankfurter's review and feedback before it went to print.²³ On the other hand, Justice Hugo Black opted to spend his evenings at home and insisted on doing his own work, writing his own opinions, conducting his own legal research, making his own decisions on petitions for *certiorari*, reading the entire record, and preparing for hearing cases on the bench and for conference.²⁴ According to Daniel Meador, who clerked for Black, his boss was a jurist who saw his role as defender of the Constitution and protector of the individual. He remembers the Justice's unique personality and distinct interest in books and particular legal views, which he freely shared with his clerks.²⁵ Interestingly, two thirds of Black's fifty-five clerks (mostly Harvard and Yale graduates) during his thirty-four years on the court (1947-1971) were from the South and many were from his home state of Alabama.²⁶ As for style, Meador relays that Justice Black disliked Latinisms, legal jargon, and abstract legal concepts and was insistent on clarity and brevity in his writing.²⁷

Certainly, clerks witnessed the judicial philosophy of their Justice as applied to significant cases first-hand. Justice Wiley Blount Rutledge, Jr., one of the strongest proponents of civil liberties and civil rights in the Court's history, with Justice Frank

19. See Messinger, *supra* note 12, at 43.

20. See Todd C. Peppers & Beth See Driver, *Half Clerk, Half Son: Justice Felix Frankfurter and His Law Clerks*, in IN CHAMBERS, *supra* note 1, at 141, 146.

21. *Id.* at 147.

22. *Id.*

23. *Id.*

24. Charles A. Reich, *A Passion for Justice: Living with and Clerking for Justice Hugo Black*, in IN CHAMBERS, *supra* note 1, 111, 112.

25. *Id.* at 115.

26. See Daniel J. Meador, *Clerking for Justice Hugo Black*, in IN CHAMBERS, *supra* note 1, at 125, 126.

27. *Id.* at 133.

Murphy, took more expansive views of individual rights than those of two other liberals on the Court in the 1940s.²⁸ Judge John M. Ferren writes about Justice Wiley Blount Rutledge, Jr., who was one of the Court's strongest proponents of civil liberties and civil rights.²⁹ Interestingly, both Justices were on the Court during World War II and heard the Japanese American internment cases. Judge Ferren writes, "During Rutledge's first full term, his impulse for civil liberties applied to the curfew imposed on West Coast Japanese Nationals and Japanese Americans and in the next term, to the evacuation program that resulted in their internment."³⁰ The internment of 120,000 Japanese Americans during World War II is considered one of the twentieth century's most prominent mass trampling of civil liberties.³¹ It has been widely condemned as racist governmental and judicial conduct toward the Japanese and Japanese Americans.³² During a time of war, Rutledge, despite his strong philosophical convictions, deferred to the military's argument that it was necessary for national security, despite his law clerk's suggestion that he might gain knowledge and insight in receiving the FBI analysis and contem-

28. See John M. Ferren, *Wiley Blount Rutledge Jr. and His Law Clerks*, in IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES, *supra* note 1, at 231, 231.

29. *Id.* Justices are heralded by their clerks as exemplars of judicial ethics, craftsmanship decision-making and lifelong career advisers. For example, Rutledge was an exemplar of high personal integrity to his law clerks and maintained a serious business relationship with his clerks while establishing an intellectual partnership with them. See *id.* at 239. This relationship was instilled in Justice John Paul Stevens when he clerked for Rutledge, and there was definitely a lasting influence. Like Rutledge, Stevens chose to express his divergent opinions from the majority in frequent dissents and concurrences. See Laura Krugman Ray, *Clerk and Justice: The Ties That Bind John Paul Stevens and Wiley B. Rutledge*, 41 CONN. L. REV. 211, 211 (2008). Echoes of Rutledge's concern for individual justice also reverberated in Stevens' writing for the majority opinion in *Rasul v. Bush*, 542 U.S. 466 (2004), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739. In *Rasul*, the Court addressed whether the six hundred detainees at the American naval base in Guantanamo Bay, Cuba could challenge the legality of their detention in U.S. courts on the basis that none were enemy combatants or terrorists. See also Joseph T. Thai, *The Law Clerk Who Wrote Rasul v. Bush: John Paul Stevens' Influence from World War II to the War on Terror*, 92 VA. L. REV. 501, 526-28 (2006) (explaining that the *Rasul* opinion, cognizant of the Japanese American internment cases, emphasized the importance of striking a proper balance between the grave harms done to an individual's civil liberties and the dangers to the nation's security and the decision required the government to provide procedures guaranteeing citizen detainees due process of our laws).

30. Ferren, *supra* note 28, at 236.

31. See ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG & FRANK H. WU, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT, at xxiii (2001).

32. *Id.*

plating the issue further.³³ Justice Murphy, in his famous dissent in *Korematsu v. United States*,³⁴ in which the Court upheld a World War II government exclusion order calling for the evacuation and internment of Japanese Americans,³⁵ rejected the majority's reliance on the government's unsubstantiated finding that Japanese Americans posed a real danger of espionage as he famously wrote:

This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional power" and falls into the ugly abyss of racism.³⁶

Though not discussed in the book, it is worthwhile to recall the empathy that Rutledge and Murphy felt about the racism that Japanese Americans experienced. This was again highlighted in their concurrences in the important case *Oyama v. California*,³⁷ which involved the right of Japanese Americans to own property and defend their property rights against land seizure proceedings. Though the California Supreme Court upheld alien land laws as constitutional,³⁸ these same laws were later struck down by the Court in *Oyama*.³⁹ In an opinion by Chief Justice Fred M. Vinson, the Supreme Court in *Oyama* invalidated an alien land statute as applied, ruling that its implementation violated the constitutional right of Fred Oyama, a Japanese American, to the equal protection of the laws.⁴⁰ *Oyama* involved an application of the California Alien Land Law in the mid-1940s, which prohibited aliens ineligible for American citizenship from acquiring, owning, occupying, leasing, or transferring agricultural land.⁴¹ Under the law, any property acquired in violation of the statute would escheat as of the date of acquisition.⁴² The same result followed any transfer

33. Ferren, *supra* note 28, at 236. *But see* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 186 (2005) (characterizing the Court's decisions as "cowardly and deplorable capitulations to intrusions on liberty that had no justification in national security concerns.").

34. 323 U.S. 214, 233 (1944) (Murphy, J., dissenting).

35. *Id.* at 219.

36. *Id.* at 233.

37. 332 U.S. 633 (1948).

38. *People v. Oyama*, 173 P.2d 794 (Cal. 1946).

39. *Oyama*, 332 U.S. 633.

40. *Id.* at 640.

41. *Id.* at 636.

42. *Id.*

made with the intent to evade or avoid escheat.⁴³ Chief Justice Vinson, in the majority opinion, declared that "[t]he cumulative effect [of the Act], we believe, was clearly to discriminate against Fred Oyama solely . . . [on the] basis . . . that his father was Japanese and not American, Russian, Chinese, or English."⁴⁴ The Court was not persuaded by the state's argument that it was not race-based law but rather, a race-neutral law in both substance and application.⁴⁵ In sharp contrast to the majority opinion, Justices Murphy and Rutledge, in their concurrences, examined the legislative history of the passage of the Alien Land Law, revealing the anti-Japanese animus that motivated its passage and also providing a summary of the history of anti-Japanese sentiment in this country.⁴⁶ Justice Murphy, in powerful *dicta*, discussed the virtues of the Japanese farmers in California and their contributions to the farming industry, as well as their overall earnest efforts to assimilate into this country.⁴⁷ The concurrence also discussed the great racial bigotry that Japanese Americans endured during World War II, and the pervasive images that "relate to the alleged disloyalty, clannishness, inability to assimilate, racial inferiority and racial undesirability of the Japanese, whether citizens or aliens."⁴⁸

Next, the practical knowledge and hands-on experience gained by clerks during the term through the back and forth process of drafting opinions and getting critiques from their co-clerks and the Justice created bonds between Justices and clerks that were indelibly fermented in and out of chambers. For example, Black and his clerks would eat lunch together in the public cafeteria on the ground floor of the Supreme Court Building, and the Justice often displayed his sense of humor while telling tales from his practice, senatorial campaign, and service.⁴⁹ Some Justices invited clerks to their homes, treating the clerks as a part of their extended families. There were also many chances to maintain the Justice-clerk relationship after the clerkship term through reun-

43. *Id.*

44. *Id.* at 644.

45. *Id.* at 644-45.

46. *Id.* at 671 (Murphy, J., concurring).

47. *Id.* at 670.

48. *Id.* at 671.

49. See Meador, *supra* note 26, at 136-37.

ions.⁵⁰ Many of the former Justices held lifelong relationships with their clerks.⁵¹

The discussions of the intimate confines of judicial chambers often showcased the personalities of some of the Justices and their work habits. Some Justices expressed their quirky personalities. Bruce Allen Murphy analyzes the tumultuous relationship between Justice William O. Douglas and his clerks. In his contribution entitled, "Fifty-Two Weeks of Boot Camp," Murphy describes how Douglas expected his staff to work hard and explains why he earned the reputation of being one of the most demanding Justices on the Court.⁵² Douglas often would yell and scold his law clerks.⁵³ "Everyone in the office feared Douglas's predictability and wrath over missteps, both real and perceived."⁵⁴ In his defense, Douglas was a hard worker and expected the same or more from his clerks.⁵⁵ Nonetheless, clerks were so scared to leave before the Justice, who worked around the clock, that they would wait until Douglas left for the day before leaving.⁵⁶ Interestingly, it was Douglas who could be regarded as a pioneer in increasing diversity among clerks at the Court.⁵⁷

III. THE FIRST FEMALE LAW CLERK AND THE FIRST AFRICAN AMERICAN LAW CLERK

Given the contemporary discussions about diversity in the workplace and on university campuses and having the first African American President in the White House about to begin his second term, *In Chambers* includes a timely discussion of gender and racial diversity (or the lack thereof) at the Court. A look at the Court's history tracks the slow change. Lucile Lomen was the first female Supreme Court law clerk.⁵⁸ She started clerking for Douglas in September 1944 amidst a great deal of press coverage.⁵⁹ Lomen was taught to be self-reliant as a child growing up

50. Cushman, *supra* note 5, at xi.

51. *See, e.g.*, Peppers & Driver, *supra* note 20, at 154.

52. *See* Bruce Allen Murphy, *Fifty-Two Weeks of Boot Camp*, in *IN CHAMBERS*, *supra* note 1, at 179, 180.

53. *Id.* at 181.

54. *Id.* at 182.

55. *Id.* at 184.

56. *Id.* at 186.

57. *Id.* at 184.

58. Jennie Berry Chandra, *Lucile Lomen: The First Female United States Supreme Court Law Clerk*, in *IN CHAMBERS*, *supra* note 1, at 198, 198.

59. *Id.*

in Nome, Alaska under the shadow of her grandfather, Gudbrand J. Lomen, who served as a federal judge from 1921 until 1932.⁶⁰ Lomen graduated from Whitman College and the University of Washington Law School.⁶¹ During law school, even while shouldering a heavy course load, Lomen worked thirty hours per week as a secretary for University of Washington Law School Dean Judson F. Falknor. Lomen was vice president of *The Washington Law Review*, where she authored two law review articles that received critical acclaim and were ahead of the legal scholarship of her time.⁶² While Lomen clerked, the role of Supreme Court law clerks expanded, and clerks made substantive contributions in decisions.⁶³

Lomen did just this in *Ex Parte Endo*,⁶⁴ “[o]ne of the most significant political and civil rights cases” of the time, which involved a challenge to Japanese internment camps.⁶⁵ Mitsuye Endo's challenge arose from a habeas corpus petition.⁶⁶ Mitsuye Endo, an American citizen of Japanese ancestry, was initially removed to the Tule Lake War Relocation Center in California and later transferred to the Central Utah Relocation Center.⁶⁷ Endo alleged that she was a loyal and law-abiding American citizen and, as such, was being held unlawfully and against her will because no formal charges were brought against her.⁶⁸ The majority opinion focused on a series of 108 Civilian Exclusion Orders issued by General DeWitt.⁶⁹ The Court in *Endo* also spent considerable time discussing the establishment of the War Relocation Authority.⁷⁰ Agreeing with Justice Douglas's strong critique of the Department of Justice's rationale for its process, the Court ruled that Endo was entitled to relief.⁷¹

Significantly, *Endo* was devoid of any discussion of the persistent underlying constitutional issue: whether it was constitutional to intern Japanese-Americans based on race.⁷² The ruling was

60. *Id.* at 200.

61. *Id.*

62. *Id.* at 202-04.

63. *See id.* 207-08.

64. 323 U.S. 283 (1944).

65. Chandra, *supra* note 58, at 207.

66. *Endo*, 323 U.S. at 285.

67. *Id.* at 284-85.

68. *Id.* at 294.

69. *See id.* at 286-89.

70. *See id.* at 290-93.

71. *See id.* at 294-302.

72. *See id.* at 297-99.

perhaps influenced by Lomen's memoranda, which briefed Justice Douglas on the duty of the Court to construe a statute, if possible, so as to avoid a conclusion that is unconstitutional, including incarcerating an entire race of people.⁷³ At the end of the term, Douglas had such a good experience with Lomen as his clerk that he was more responsive to hiring a female clerk in later years.⁷⁴ After leaving her clerkship, Lomen went on to serve in the Washington State Attorney General's Office and to represent General Electric in a number of legal positions.⁷⁵

Since Lomen's clerkship term, the Court has made some inroads in diversifying the Court. We have seen the influence of Justice Sandra Day O'Connor, the Court's first female Justice, who played a pivotal role in preserving the right to choice and abortion access in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁷⁶ and wrote for the Court in upholding the University of Michigan Law School's race-conscious admission policy in *Grutter v. Bollinger*.⁷⁷ Her life experiences, including being a mother and facing difficulties in securing employment because of her gender yet graduating third in her class at Stanford Law School, may have colored her jurisprudence.⁷⁸ Similarly, Justice Ruth Bader Ginsburg's personal experiences of having to overcome adversity because of her gender and being Jewish, and her legal experiences as an advocate for the advancement of women's rights as a constitutional principle, likely informed her perspective of issues in cases. This was evident in *United States v. Virginia*,⁷⁹ which opened the state-sponsored Virginia Military Institute to women, and in her opinion that Arizona school officials violated the constitutional rights of a 13-year-old girl when they strip-searched her on the suspicion that she might be hiding ibuprofen in her underwear in *Safford Unified School District v. Redding*.⁸⁰

73. See Chandra, *supra* note 58, at 207.

74. *Id.* at 209-10.

75. *Id.* at 210-212.

76. 505 U.S. 833 (1992).

77. 539 U.S. 306 (2003).

78. Andrea Norman, *From the Mud of the Salt*, 45 ARIZ. ATT'Y 36, 40 (Sept. 2003); cf. JOAN BISKUPIC, SANDRA DAY O'CONNOR: HOW THE FIRST WOMAN ON THE SUPREME COURT BECAME ITS MOST INFLUENTIAL JUSTICE 28 (2005); Judith Olans Brown, Wendy E. Parmet & Mary E. O'Connell, *The Rugged Feminism of Sandra Day O'Connor*, 32 IND. L. REV. 1219, 1221 (1999).

79. 518 U.S. 515 (1996).

80. 557 U.S. 364, 381-82 (2009) (Ginsburg, J., concurring in part and dissenting in part).

Four years after Lomen's hiring, the exclusive clerkship doors widened further. Peppers offers his essay about the first African-American Supreme Court law clerk, William Thaddeus Coleman, Jr., who began on September 1, 1948,⁸¹ clerking for Justice Frankfurter. In the fall of 1941, Coleman, a Harvard Law graduate, was only one of four minority law students in his first-year class in an era where there were few minority judges and lawyers.⁸² Coleman was indoctrinated in Frankfurter's clerkship tradition of embracing law clerks as members of the Justice's family and challenging clerks to broaden their intellectual horizons.⁸³ Coleman shared meals at the Frankfurter home and was close with the Justice's wife, Marion Frankfurter, whom he referred to as a "second mother."⁸⁴ Despite having a Supreme Court clerkship under his belt, Coleman faced initial difficulties in his post-clerkship job searches due to the racial prejudices of the time.⁸⁵ Nevertheless, he moved onward to a tremendous career in private practice and government service⁸⁶ that included arguing nineteen cases before the Court. Future Supreme Court Justice Thurgood Marshall also asked him to formulate legal strategy in the litigation leading to *Brown v. Board of Education*.⁸⁷ He also served as Secretary of Transportation to President Gerald Ford, advised seven American presidents, and received the Presidential Medal of Freedom.⁸⁸

Taken together, the essays on Lomen and Coleman remind readers that most Supreme Court law clerks have been white males. In fact, only during the last few decades have Justices hired more women and racial minorities. However, having diversity among clerks remains a challenge at the Court today.

Given the lack of racial diversity in the Court law clerk pool, according to Artemus Ward, increased diversity could allow the consideration of different viewpoints that could influence the decision-making and opinion-writing processes.⁸⁹ To illustrate his point, Ward cited to a study showing that from 1986 to 2004,

81. See Todd C. Peppers, *William Thaddeus Coleman Jr.: Breaking the Color Barrier at the United States Supreme Court*, in IN CHAMBERS, *supra* note 1, at 161, 161.

82. *Id.* at 163, 169.

83. *Id.* at 169.

84. *Id.*

85. *Id.* at 171-2.

86. *Id.*

87. 345 U.S. 972 (1953); see Peppers, *supra* note 81, at 173.

88. Peppers, *supra* note 81, at 173.

89. See Artemus Ward, *Making Work for Idle Hands: William H. Rehnquist and His Law Clerks*, in IN CHAMBERS, *supra* note 1, at 350, 363.

Asian Americans constituted seven percent of all Supreme Court law clerks, African Americans were three percent, and Hispanics, two percent.⁹⁰ There are some explanations for this. The dearth of minority law clerks is probably a byproduct of the small number in the Supreme Court law clerk pipeline.⁹¹ Notably, unless more minority law clerks work for court of appeals judges (feeder judges), who often recommend their clerks to the Justices, the number of minority law clerks is unlikely to increase soon.⁹²

As an aside, the Court is not unique in its need to diversify its law clerk ranks. On a broader level, according to the Administrative Office of the Court, a decline in the number of minority federal judicial law clerks continued between the fiscal years 2006 and 2010.⁹³ More minority law clerks would be a good thing. The law clerk could help the Justice think through difficult decisions involving race, including conferring with the Justice to discuss the issues and the proper outcome. Beyond race, having law clerks from diverse backgrounds (gender, sexual orientation, socioeconomic, and work/life experience) would encourage robust and varying discussions between Justices and clerks. On this topic, law professor and former clerk to Justice Marshall, Sheryll Cashin, thinks that diversity among clerks would improve the quality of judging among the Justices, allow a broader array of people to have a tremendous credential, and create confidence in the institution.⁹⁴ Neal Katyal, former clerk to Justice Stephen Breyer and former interim Acting Solicitor General, explained that his own personal experiences made a difference for him in working on cases when he said, "I'm not saying it had an influence on the decision, but if I got an immigration case, for example, I thought about my parents, I thought about them as immigrants."⁹⁵

Importantly, while discussions about the need for diversity amongst the law clerk ranks at the Court have mentioned African Americans and Hispanics, lesser attention has been paid to Asian

90. *Id.*

91. *Id.* at 363.

92. See Introduction to IN CHAMBERS, *supra* note 1, at 1, 6.

93. See Todd Ruger, *Statistics Show No Progress in Federal Court Law Clerk Diversity*, NATIONAL L.J. (May 2, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202551008298&Statistics_show_no_progress_in_federal_court_law_clerk_diversity&slreturn=20120913002730.

94. See *PBS Newshour: Color-Blind Court?* (PBS television broadcast July 23, 1998) (transcript available at http://www.pbs.org/newshour/bb/social_issues/july-dec98/clerks_7-23.html).

95. See *id.*

American Supreme Court law clerk candidates. Of the approximately 1,800 law clerks who have worked at the Supreme Court,⁹⁶ there have been less than forty Asian American law clerks.⁹⁷ Today, even though Asian Americans have fared better than other minority groups in securing clerkships, the lack of a meaningful Asian American presence at One Front Street mirrors the relatively few Asian American law firm partners, judges, senior government officials, general counsel, or tenured law professors who have managed to break through “the glass ceiling.”⁹⁸

Sometimes a Supreme Court clerkship will make the biggest difference in being able to have a high-level career or not. Certain career paths that would be almost impossible without a Supreme Court Clerkship. As reflected by the book’s contributors who are law professors, the law teaching market is an example of this notion, and a Supreme Court clerkship will open doors for someone who wants to become a law professor. There are few Asian American law professors, and even fewer female Asian American law professors.⁹⁹ Asian Americans are also less actively recruited by law school faculties compared to African Americans and Hispanics.¹⁰⁰ But when Asian Americans are appointed to the legal academy, they have an opportunity to write about issues impacting Asian Americans, which have been largely ignored by mainstream academics and courts.¹⁰¹ In short, having a Supreme Court clerkship matters.

96. Cf. Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51, 60 (2008).

97. See List of Law Clerks of the Supreme Court of the United States, available at http://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States (last visited: June 24, 2012).

98. Cf. Vikram David Amar & Kevin R. Johnson, *Why U.S. News and World Report Should Include a Faculty Diversity Index in its Ranking of Law Schools*, FINDLAW’S WRIT (Apr. 9, 2010), http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/amar/20100409.html (“Some have also claimed that law faculties have relied on stereotypes of the ‘passive’ Asian to argue that Asian-American faculty candidates whose scholarship was strong nevertheless would not do well in the classroom, and thus to decline to hire them.”)

99. See Pat K. Chew, *Asian Americans in the Legal Academy: An Empirical and Narrative Profile*, 3 ASIAN L.J. 7, 8, 37 (1996); Shawn Ho, *Co-Synthesis of Dynamics Behind the Dearth of Asian American Law Professors: A Unique Narrative*, 18 ASIAN AM. L.J. 57, 57 (2011).

100. See Alfred C. Yen, *A Statistical Analysis of Asian Americans and the Affirmative Action Hiring of Law Faculty*, 3 ASIAN L.J. 39, 41 (1996); see also Amar & Johnson, *supra* note 98 (“Asian Americans may face the stereotype that they are too passive or lack strong social skills to do well in the classroom.”)

101. See generally Neil Gotanda, *New Directions in Asian American Jurisprudence*, 17 ASIAN AM. L.J. 5 (2010). For example, in regard to the internment, Asian American scholars have argued that over the years, *Korematsu v. United States* has been taken for granted

IV. THE MODERN SUPREME COURT CLERKSHIP

The second half of *In Chambers* demonstrates how the Warren Court changed the institutional rules for law clerks. Here, Jessee Chopper writes an illuminating essay about Chief Justice Earl Warren, for whom he clerked in 1960.¹⁰² Chopper remembered the Chief as a kind, thoughtful, and generous person, who was often-times humorously self-deprecating.¹⁰³ This essay proceeded to detail the duties of the Warren clerks, planning clerk reunions, and honoring Warren after his death.¹⁰⁴ Interestingly, while Chopper spent several sections detailing Warren's adherence to the principles of fairness, he spent less time in explaining Warren's thoughts and opinions as to why he supported the internment of Japanese Americans during World War II when he was Attorney General in California, other than to say that Warren later wrote that he "deeply regretted" the action as "not in keeping with our American concept of freedom."¹⁰⁵ Chopper recalls that during lunches, when Warren spoke about his experiences in California before being selected for the Court, the Chief also talked at length about the Japanese Exclusion Order.¹⁰⁶ Although he was not without reservations about this support for the internment as Attorney General, Warren still defended the relocation at these lunches.¹⁰⁷ For readers without a legal background, Warren's position may be a surprise given his reputation for protecting civil rights and liberties.

by mainstream legal commentators as the obligatory citation for the origin of the Supreme Court's strict scrutiny standard of review. 323 U.S. 214 (1944). However, contrary to the popular perception that the Court addressed the constitutionality of the internment, it did not. See Frank H. Wu, *Profiling in the Wake of September 11: The Precedent of the Japanese American Internment*, 17 CRIM. JUST. 52, 55 (2002) ("Strangely, the internment cases appear to have evaded the most basic question. That question is whether it is constitutional to order the mass incarceration of persons as to whom no individual showing of guilt has been made, ostensibly because of national security, though also with the use of racial classifications.") *Korematsu* only discussed the constitutionality of the exclusion order. Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 949-52 (2004).

102. See Jessee H. Chopper, *Clerking for Chief Justice Earl Warren*, in *IN CHAMBERS*, *supra* note 1, at 263.

103. *Id.* at 272.

104. *Id.* at 279.

105. *Id.* at 274; see also Eric L. Muller, *All the Themes But One*, 66 U. CHICAGO L. REV. 1395, 1410 (1999) (reviewing WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998)).

106. *Id.* at 273-74.

107. *Id.* at 274.

Equally insightful is Robert O' Neil's essay about his clerkship experience with Justice William J. Brennan.¹⁰⁸ Brennan was Justice Thurgood Marshall's closest friend and ally on the Court. Brennan and Marshall shared similar views on race and social policy, even though their backgrounds were as different as their skin colors.¹⁰⁹ Brennan grew up in Newark, New Jersey, the son of labor organizer, William Joseph Brennan, Sr., and Agnes Brennan, both immigrants to this country from Ireland.¹¹⁰ Brennan's childhood and youth were undistinguished. He attended the University of Pennsylvania and eventually graduated from Harvard Law School.¹¹¹ After graduation, Brennan began working for a labor defense law firm in Newark, representing clients that his father had fought against as a labor organizer.¹¹² In 1949, Brennan accepted a seat on the New Jersey Superior Court as a trial judge and only one year after that, in 1950, he was appointed to the New Jersey Court of Appeals.¹¹³ Just two years later, he was

108. See Robert M. O'Neil, *Charting Civil Liberties and Protecting Free Expression: Learning from and Working with Justice William J. Brennan*, in IN CHAMBERS, *supra* note 1, at 284, 291.

109. See HOWARD BALL, *A DEFIANT LIFE: THURGOOD MARSHALL & THE PERSISTENCE OF RACISM IN AMERICA* 211 (1998) ("Brennan could almost count on Marshall's vote. Clearly, in civil liberties, criminal justice, and civil rights cases, these two men voted as one."); see also SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 295 (2010); JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* 360 (1998).

110. See CLARE CUSHMAN, *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1879-1995* 446 (2d ed. 1995).

111. See Hunter R. Clark, *The Pulse of Life in Justice Brennan's Jurisprudence*, 46 *DRAKE L. REV.* 1 (1997) ("[Brennan] worked his way through the University of Pennsylvania's undergraduate Wharton School of Finance and Commerce. With the support of his first wife, the former Marjorie Leonard, he graduated from Harvard Law School in 1931.").

112. See CUSHMAN, *supra* note 110, at 447 ("After law school, Brennan returned to New Jersey and joined Pitney, Hardin, and Skinner, a prominent Newark firm with a corporate practice. He developed a reputation as a quick thinker and a tireless worker, helping with major clients by handling labor relations disputes. It was strange for Brennan to find himself representing management in labor disputes, but he worked hard at being fair and commanded the respect of the unions, due in part to his father's background. By 1938, settled in a house he bought in South Orange, Brennan became a partner in the firm."); see also MORTON J. HOROWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 13 (1998) ("Of the seven liberal justices who served on the Court during 1953-69 . . . [o]nly Brennan had an arguably middle-class background, at least after his father had risen from coal shoveler to prominent labor leader and municipal official."); Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 *WM. & MARY BILL RTS. J.* 223 (1998) (reporting that Brennan's father rose through the labor ranks to become a labor leader, and that his father's personal experiences serve as an explanation for the origins of Brennan's concern with individual dignity).

113. See CUSHMAN, *supra* note 110, at 448 ("Brennan became involved in a successful reform of the New Jersey court system to eliminate delays, inefficiency, and corruption. In 1949, Republican governor Alfred Driscoll appointed Brennan, a Democrat, as judge on the newly reorganized Superior Court. Brennan quickly became a trusted lieutenant to New

appointed to the New Jersey Supreme Court. After President Dwight D. Eisenhower appointed Justice Brennan in 1956, he “was to become the most important intellectual influence on the Warren Court, [and] would also rank as one of the greatest Justices in the nation's history.”¹¹⁴ Like many Justices, Brennan relied on former law school classmates turned law professors to select his clerks.¹¹⁵ O’Neil notes that Brennan’s clerks’ experiences in the drafting of opinions were not consistent.¹¹⁶ Just like Marshall, Brennan supervised his clerks much less, and relied on their memoranda much more during the later years of his tenure.¹¹⁷ Still, the collegiality of the Brennan chambers was consistent, O’Neil remembers.¹¹⁸ Judge Richard A. Posner, who was then O’Neil’s co-clerk, remembers Brennan as a “gracious, considerate, outgoing, unpretentious, genial, and undemanding boss”¹¹⁹ who utilized his strong ability to compromise with other Justices.¹²⁰ “This made it easier for him to get a majority than it would have been for more ‘principled’ justices.”¹²¹ These former clerks recall Brennan’s commitment to the principles of racial equality, free expression, and religious liberty.¹²² In a clerkship that taught caution and humility, Brennan “encouraged his clerks to get to know (and respect) the other justices.”¹²³ O’Neil recalls the time that he was used judiciously by Brennan in *Wong Sun v. United States*,¹²⁴ a key Supreme Court opinion that applied the “independent source” exception to the exclusionary rule.¹²⁵ *Wong Sun* centered on a series of warrantless drug busts in San Francisco’s Tenderloin and Richmond districts, involving Chinese American

Jersey’s Chief Justice, Arthur Vanderbilt. In 1950, Brennan was elevated to the Appellate Division of the Superior Court.”)

114. HOROWITZ, *supra* note 112, at 8 (1998); *see also* Scott Goldstein, *Guardian at the Gate: Brennan Immortalized at Supreme Court Entry*, N.Y. LAWYER, Feb. 5, 2001, at 4 (“[Brennan] wrote 1,360 opinions in his 34 years on the court, including *New York Times v. Sullivan* in support of freedom of the press and *Baker v. Carr* embracing the one-person, one-vote concept.”).

115. *See* O’Neil, *supra* note 108, at 286-87.

116. *Id.* at 290.

117. *Id.*

118. *Id.*

119. Richard A. Posner, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 9, 9 (1997).

120. *See* Eric J. Segall, *The Court: A Talk with Judge Richard Posner*, THE N.Y. REVIEW, Sept. 29, 2011, at 47.

121. *Id.*

122. *See* O’Neil, *supra* note 8, at 291; Posner, *supra* note 119, at 12.

123. O’Neil, *supra* note 8, at 291-92.

124. 371 U.S. 471 (1963).

125. *Id.* at 487.

defendants and a Chinese American narcotics agent working undercover.¹²⁶ O'Neil recalls a question that Brennan had about the location of the laundry in San Francisco and how, fortuitously, he had a map handy of the city since he taught there before his clerkship.¹²⁷ At Brennan's suggestion, O'Neil brought the map to Justice Tom Clark, who wrote the dissenting opinion, to demonstrate the location of the laundry was not actually in Chinatown as Justice Clark had so strongly advocated.¹²⁸ In fact, Clark wrote in his initial draft of his dissent that the laundry should have been easy to find.¹²⁹ But the map that O'Neil carried showed that the laundry that was initially searched in the case was actually a measurable distance from Chinatown--in Russian Hill.¹³⁰ In having O'Neil serve as the messenger, Brennan indirectly accomplished his goal -- to correct a fellow justice.¹³¹

In this modern era, one of the most prominent and lasting examples of the Justice and clerk mentorship was the relationship

126. *Id.* at 472-76.

127. O'Neil, *supra* note 8, at 293.

128. *Id.*

129. *Id.*

130. *Id.*

131. As an author of legal writings about Asian Americans and the law, I see benefits of having an Asian-American law clerk. As an example, I could not help but imagine if there had been an Asian American clerking in the chambers of Justice Brennan and Clark at that the time *Wong Sun* was on the Court's docket. Working with Robert O'Neil, the clerk could have been able to provide additional information beyond ushering a map down the hallway. This hypothetical law clerk may have also been a native San Franciscan with first-hand knowledge of not only the City, but also the Chinese culture, and could have provided insight and context to the record (which is often missing) to contribute to conversations about crime policy during that era. *Wong Sun* was decided during an eventful decade for America, and the crimes committed then reflected the times. While little is known about the role Chinese dealers played in the drug trade in San Francisco in the decades leading up to the carefree sixties, some criminologists have asserted that during that time, Chinese sailors began to supply drug dealers in Chinatown who then sold to other ethnic groups. See Sheldon Zhang & Ko-lin Chin, *The Declining Significance of Triad Societies in Transnational Illegal Activities*, 45 BRIT. J. CRIMINOLOGY 469, 473 (2003); see also Angela Saurine, *Grassy Knoll Where Flower Power Blooms*, SUNDAY MAIL, May 9, 2010, at 1 ("San Francisco was the centre of hippie culture in the 1960s . . . embracing psychedelic rock music, the sexual revolution, communal living and the use of drugs such as marijuana and LSD to explore alternative states of consciousness."). It was a time when Chinese youth gangs were slowly forming in Chinatown and outlying areas. See Calvin Wah Toy, *A Short History of Asian Gangs in San Francisco*, 9 JUST. Q. 647, 653 (1992). It was common practice for Chinese American federal agents to go undercover and conduct narcotics investigations in Chinatown. These agents often used informants to facilitate drug busts. See, e.g., *Ng Pui Yu v. United States*, 352 F.2d 626, 628-29 (9th Cir. 1965); *Elkanich v. United States*, 327 F.2d 417, 419 (9th Cir. 1964); *Chin Kay v. United States*, 311 F.2d 317, 319 (9th Cir. 1963); *Ong Way Jong v. United States*, 245 F.2d 392 (9th Cir. 1957); *Sun B. Lee v. United States*, 245 F.2d 322, 324 (9th Cir. 1957); *People v. Castedy*, 15 Cal. Rptr. 413, 414 (Cal. Ct. App. 1961).

forged between Fourth Circuit Judge Harvie Wilkinson III and Justice Lewis F. Powell, Jr. Judge Wilkinson's father and Powell were best friends.¹³² To Wilkinson, Powell was a second father and a constant school master during childhood.¹³³ Wilkinson characterizes his clerkship as a happy time.¹³⁴ He drove Justice Powell to and from the Court.¹³⁵ Wilkinson states that judging was never "quick or easy for him."¹³⁶ He would sometimes have dinner at Justice Powell's apartment where occasionally, "Mrs. Powell would read a mystery or even certiorari petitions to [the Justice] in the living room."¹³⁷ According to Wilkinson, Powell did not hire clerks ideologically and always held high standards.¹³⁸ To him, political leaning was not an issue, nor was gender.¹³⁹ Powell's focus was on academic merit and likeability.¹⁴⁰ Powell served on the Court for fifteen years and for eight years on the Fourth Circuit after his retirement.¹⁴¹ In his retirement, while serving on the Circuit, Wilkinson and Powell were colleagues.¹⁴²

More insight is provided in Artemus Ward's contribution about Justice William H. Rehnquist and his law clerks.¹⁴³ A sense of collegiality was also found in Rehnquist's chambers, which functioned much like the chambers of his colleagues.¹⁴⁴ In the 1972 term, Rehnquist founded the cert pool, which clerks used to divide up the voluminous certiorari petitions filed with the Court.¹⁴⁵ From an efficiency standpoint, Rehnquist looked favorably upon the cert pool because it required only one clerk from the pool to review certiorari petitions, which freed up his clerks to review and write memoranda for each petition.¹⁴⁶ While this could give the clerks unwieldy influence as gatekeepers, Ward explains that

132. See J. Harvie Wilkinson III, *Justice Lewis F. Powell, Jr.: A Personal View by a Former Clerk*, in IN CHAMBERS, *supra* note 1, at 342, 342.

133. *Id.* at 342.

134. *Id.* at 344.

135. *Id.*

136. *Id.* at 345.

137. *Id.*

138. *Id.* at 344, 346.

139. *Id.* at 346.

140. *Id.*

141. *Id.* at 344.

142. *Id.* at 342.

143. See Ward, *supra* note 89, at 352.

144. *Id.* at 356.

145. *Id.* at 365.

146. *Id.*

there are intentional checks in place that would prevent law clerks from acting improperly in such an important role.¹⁴⁷

Notably, in Ward's earlier book, he warned that ambitious and passionate law clerks could lead to self-serving partisanship in attempting to set the agenda through the cert. pool if the Justices delegated too much authority in the opinion writing process.¹⁴⁸ But with Ginsburg's chambers, clerks have little influence on crafting constitutional law.¹⁴⁹ Similarly, Stevens writes his first drafts himself, and only relies on his clerks for comments on content and style.¹⁵⁰ Peppers explores this issue of judicial influence more fully in his earlier book, which refers to a former Brennan law clerk who was asked "whether Brennan's law clerks wielded any influence over the justice's decision-making."¹⁵¹ The former clerk replied that "law clerks did have some influence" with their Justice, but that it was "an influence that involved exposing the justice to salient facts in the record rather than an influence that changed the justice's mind once all the facts were before him."¹⁵²

In an essay about Justice Harry Blackmun and his clerks, Harold Koh is quoted as saying that Blackmun set the tone and provided the intellect for his opinions and it was his law clerks who largely typed the words under his ultimate guidance.¹⁵³ Each law clerk understood that their job was to assist the Justice with his opinion-writing and not to make decisions.¹⁵⁴ Clerks will speak up when they have something to say, and sometimes play devil's advocate.¹⁵⁵ The Justice was nominated by the President, and confirmed by the Senate, while the law clerk was not, but this deliberation process is not a new one. Bennett Boskey writes that, with respect to judicial decision-making, Justice Harlan Stone was always open to discussing how he would cast his vote at conference with his law clerks.¹⁵⁶ While he was usually clear on how he

147. *Id.*

148. WARD & WEIDEN, *supra* note 3, at 133.

149. See Todd C. Peppers, *The Modern Clerkship: Justice Ruth Bader Ginsburg and Her Law Clerks*, in IN CHAMBERS, *supra* note 1, at 391, 398.

150. See Laura Krugman Ray, *Clerk and Justice: The Ties That Bind John Paul Stevens and Wiley B. Rutledge*, 41 CONN. L. REV. 211, 241 (2008).

151. PEPPERS, *supra* note 2, at 158.

152. *Id.*

153. See Randall P. Bezanson, *Good Old Number Three: Harry Blackmun and His Clerks*, in IN CHAMBERS, *supra* note 2, at 326, 333-34.

154. *Id.*

155. *Id.* at 334-35.

156. See Bennett Boskey, *The Family of Stone Law Clerks*, in IN CHAMBERS, *supra* note 1, at 98, 102.

would vote after oral argument, he would still listen to comments offered by law clerks, even if he was not persuaded to change his vote.¹⁵⁷

Just like many newly appointed Justices before him had done, Rehnquist initially drafted a number of his own opinions when he joined the Court then began delegating the opinion-writing to his clerks.¹⁵⁸ As with the other Justices discussed in this review, there was also a human side to the Justice. Rehnquist was responsible for organizing many of the social events for clerks, including the orientation gathering and annual Christmas party gathering.¹⁵⁹ He also regularly played tennis with his clerks.¹⁶⁰ Chief Justice John Roberts, a former Rehnquist clerk, recalled Rehnquist's practice of establishing betting pools on just about everything including presidential elections and sporting events.¹⁶¹ Roberts also recalled Rehnquist's unassuming demeanor and his habit of taking walks with clerks to discuss cases and using them as sounding boards.¹⁶²

In the closing chapter, Peppers suggests that a representative example of the modern Supreme Court clerkship can be found in Ginsburg's chambers, where she carefully supervises her clerks and holds exacting analytical standards.¹⁶³ In selecting clerks, Ginsburg initially relies on the recommendations of Columbia Law School Dean David Schizer, and appraisals of certain Court of Appeals judges.¹⁶⁴ To Ginsburg, clerks must also show respect for her secretaries and be able to have certain judgment and common sense.¹⁶⁵ According to Peppers, Ginsburg promotes a healthy balance between the clerk's work obligations and personal lives.¹⁶⁶ She states that clerks work on the weekends when necessary and the work schedule is flexible to allow clerks to leave for weddings and religious holidays.¹⁶⁷ Her former law clerks describe her as having a warm and kind personality and a wonderful sense of humor.¹⁶⁸ Consistent with her pre-judicial career as an advocate

157. *Id.*

158. Ward, *supra* note 89, at 371.

159. *Id.*

160. *Id.* at 374-75.

161. *Id.* at 377.

162. *Id.*

163. Peppers, *supra* note 149, at 391.

164. *See id.* at 393.

165. *Id.* at 398-99.

166. *Id.* at 395.

167. *Id.* at 399.

168. *Id.* at 399.

for the advancement of women's rights as a constitutional principle, Peppers writes that Ginsburg hires more female and minority candidates than other Justices.¹⁶⁹ The clerks are from a handful of elite law schools: Columbia, Yale, or Harvard.¹⁷⁰ And continuing a tradition from the Frankfurter era, Ginsburg treats her clerks as members of her family and holds reunions every five years.¹⁷¹

V. THE INCREASE OF ASIAN AMERICAN JURISTS ON THE FEDERAL BENCH AND THE POSSIBLE NOMINATION OF AN ASIAN AMERICAN TO THE U.S. SUPREME COURT

After reading *In Chambers*, and with the passing references to the Japanese American internment and discussions of diversity in mind, I thought about the potential appointment of an Asian American Justice to the Court. This was not the first time. This notion was perhaps originally encouraged by the appointment of Justice Sonia Sotomayor, the first Latina/o Justice on the Court,¹⁷² and before President Barack Obama nominated Elena Kagen to replace retiring Justice John Paul Stevens on the Court, Harold Koh, Deputy Secretary of State, was also considered in legal circles to be a potential candidate for that same seat.¹⁷³ Koh, the son of immigrants from Korea and an international law expert, was a former dean of Yale Law School and served as Assistant Secretary of State of Democracy, Human Rights and Labor in the Clinton Administration.¹⁷⁴

At the dawn of a second term, I would suggest that this possibility is increased based by President Obama's previous judicial appointment record and the possibility that one or two justices may

169. *See id.* at 393.

170. *Id.* at 394.

171. *See id.* at 399.

172. *See* Kevin R. Johnson, *An Essay on the Nomination and Confirmation of the First Latina Justice on the U.S. Supreme Court: The Assimilation Demand at Work*, 30 CHICANO-LATINO L. REV. 97, 98 (2011); *cf.* Edward M. Chen, *The Judiciary, Diversity, and Justice For All*, 91 CALIF. L. REV. 1109, 1113 (2003) ("The current lack of diversity within the judiciary is due to a number of factors such as the pool of experienced attorneys, political ties, access to networking, and career opportunities.").

173. *See* Danny Serna, *In Supreme Court Speculation*, Koh v. Kagan, YALE DAILY NEWS (Apr. 21, 2010), <http://www.yaledailynews.com/news/2010/apr/21/in-supreme-court-speculation-koh-v-kagan/> (discussing Koh as international law expert and liberal lion who is a potential pick for the Supreme Court and describing him as one of the "most brilliant" legal minds of our era).

174. *See* Frank Chi, *Why Harold Koh Should Be the Next Supreme Court Justice*, HUFFINGTON POST (Apr. 20, 2010, 7:09 PM), http://www.huffingtonpost.com/frank-chi/why-harold=koh-should-be_b_545298.html?view.

retire. Given the number of appointments of Asian Americans to the federal bench by President Obama, the most in the history of the federal judiciary, it may be just a matter of time.¹⁷⁵ At a time that Asian Americans are largely missing on the federal bench, President Obama has nominated a record number of Asian Americans to the federal judiciary, including historical appointments to the federal bench: Dolly Gee, the first Chinese American woman, Jackie Nguyen, the first Vietnamese American, and Lucy Koh, the first Korean American.¹⁷⁶ He has elevated Magistrate Judge Edward Chen to Article III status and nominated District Judge Denny Chin to sit on the Second Circuit.¹⁷⁷ President Obama also nominated Goodwin Liu to the Ninth Circuit, but Liu withdrew his nomination in response to strong Republican opposition in the Senate. He was later appointed by Governor Jerry Brown to a seat on the California Supreme Court.¹⁷⁸

There is a potential beneficial impact of the appointment of a qualified Asian American to the Court. I think that having an Asian American on the Court could have a significant and positive impact on American jurisprudence. If anyone thinks that the racial background of a law clerk or Justice does not make a difference, he or she should reflect on the experiences of Justice Thurgood Marshall. Deborah Rhodes who clerked for Thurgood Marshall during the October term of 1978 wrote that Marshall was the only member of the Court who did not come from a privileged background.¹⁷⁹ In fact, Marshall was the grandson of slaves.¹⁸⁰

175. See Jesse J. Holland, *Obama Increases of Female, Minority Judges*, YAHOO NEWS (Sept. 13, 2011), <http://news.yahoo.com/obama-increases-number-female-minority-judges-154714372.html> ("Nearly three of every four people [President Obama] has gotten confirmed to the federal bench are women or minorities.")

176. See Pat K. Chew & Luke T. Kelley-Chew, *The Missing Minority Judges*, 14 J. GENDER RACE & JUST. 179, 180-81 (2010) (reporting that there are only twelve Asian-American sitting judges, less than one percent of the 1289 sitting federal judges); Jonathan Jew-Lim, *A Brief Overview of President Obama's Asian American Judicial Nominee in 2010*, 17 ASIAN AM. L.J. 227, 227 (2010).

177. See Maura Dolan, *Goodwin Liu has blended in easily on California's Supreme Court*, L.A. TIMES (Oct. 12, 2012), <http://articles.latimes.com/2012/oct/22/local/la-me-justice-liu-20121023>.

178. See Bob Egelko, *New Hope for Stalled Nomination of Lawyer to S.F. Federal Court*, S.F. CHRON., (Mar. 18, 2011), at C2; James Oliphant, *GOP Blocks Judicial Appointment*, L.A. TIMES, (May 20, 2011), at 1, available at 2011 WLNR 10071754; Press Release, Alliance for Justice, *Alliance for Justice Says 400 Days of Obstruction Are Enough Calls For Confirmation of Goodwin Liu to the Ninth Circuit Court of Appeals*, (May 17, 2011), available at 5/17/11 States News Serv. 00:000:00.

179. See Deborah L. Rhode, *Thurgood Marshall and His Clerks*, in IN CHAMBERS, *supra* note 1, at 314.

180. *Id.*

This fact, and his experiences in seeing racism, made him always cognizant of racism.¹⁸¹ Marshall first applied to the University of Maryland Law School; however, the school did not admit African Americans.¹⁸² Undaunted, Marshall applied to Howard University, where Dean Charles Hamilton Houston, Harvard's top African American graduate, was implementing a course of study that would prepare young African American lawyers to wage a battle against discrimination.¹⁸³ Marshall accepted admission and became the top student in his first year class.¹⁸⁴ After graduation, segregation limited Marshall's job opportunities,¹⁸⁵ and although offered the chance to earn an advanced law degree at Harvard, he opened up his own practice.¹⁸⁶ He also worked alongside his former teacher and dean, Houston, helping Houston prepare reports for the NAACP.¹⁸⁷ With the NAACP, Marshall observed the quality of schools available to African American children in contemplation of a legal challenge to public school segregation.¹⁸⁸ His fight against discriminatory practices as an NAACP civil rights attorney chipped away at the separate-but-equal doctrine of *Plessy v. Ferguson*.¹⁸⁹

The fight for equality waged by the NAACP culminated in Marshall's greatest victory ten years later with *Brown v. Board of Education*,¹⁹⁰ arguably the most important legal case of the century. In that case, he argued that segregation in the public schools humiliated black children and deprived them of equal status.¹⁹¹ Marshall's victory in *Brown* ended the legal separation of black and white children in public schools.¹⁹² In 1961, several years after Marshall's success in *Brown*, President John F. Kennedy appointed him to serve on the 2nd U.S. Circuit Court of Appeals.¹⁹³ In 1965, President Lyndon Johnson appointed Marshall to the po-

181. *Id.*; see also BALL, *supra* note 109, at 17-18 (describing Marshall's early experiences with racism while growing up in Baltimore).

182. See WILLIAMS, *supra* note 109, at 52-54.

183. See *id.*

184. See *id.* at 53-56.

185. See *id.* at 59 (noting that there were no firm positions for Howard's graduates because white Baltimore firms refused to hire black lawyers).

186. *Id.* at 61-62.

187. See *id.* at 59-63.

188. *Id.* at 57-58.

189. 163 U.S. 537 (1896).

190. 347 U.S. 483 (1953).

191. See BALL, *supra* note 109, at 5-6.

192. *Brown*, 347 U.S. 483.

193. See BALL, *supra* note 109, at 175.

sition of Solicitor General.¹⁹⁴ In that role, Marshall advocated strict enforcement of the new civil rights acts of 1957, 1960,¹⁹⁵ and 1964.¹⁹⁶

As the first African American to be appointed to the Court, Marshall's activist jurisprudence was apparent when he relentlessly promoted affirmative action and race-conscious policies as remedies for the damage resulting from the nation's history of slavery and racial bias.¹⁹⁷ Given his experiences and cognizance of race matters, he was never reserved in telling his clerks stories. As Rhodes noted, Marshall delighted in telling clerks that he was sometimes mistaken for a messenger or elevator operator even at the Court.¹⁹⁸ The Justice's perspective was reverberated in criminal cases and offered a window into a different world, one in which individuals having less or having a different skin color suffer adversely in everyday life.¹⁹⁹ Without doubt, Marshall was steadfast against capital punishment and always instructed his clerks to grant stays of execution, demanding that clerks call him no matter what time of night when requests were filed.²⁰⁰ Marshall was a great humanitarian and stressed the importance of volunteering for pro bono cases, public service, and lawyers' obligation of service to his clients.²⁰¹

Interestingly, Justice Clarence Thomas, who succeeded Marshall upon his retirement, has also often reflected on the role his personal experience and background played in shaping his understanding of the issues in cases. For instance, Thomas, who rarely asks any questions during oral argument, once had a dialogue with a petitioner's attorney about the history of lynching and Klu Klux Klan activities in the American South with regard to an argument about his understanding of a burning cross as a tool to inflict fear and intimidation on blacks in *Virginia v. Black*, where the Court considered a First Amendment challenge to an ordinance which made it a criminal offense to burn a cross to intimidate anyone for any reason.²⁰² Significantly, Thomas's diatribe altered the course of the debate and enhanced the analysis in the

194. *Id.* at 183, 188-190.

195. *See id.* at 188-92.

196. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000e (1994)).

197. *See BALL, supra* note 109, at 104-106; WILLIAMS, *supra* note 109, at 31-32.

198. *See Rhode, supra* note 179, at 315.

199. *Id.* at 320.

200. *Id.* at 321-22.

201. *Id.* at 323.

202. 538 U.S. 343, 348 (2003).

case in a way that any of the other sitting justices probably could not have. Justice Thomas, relying on his experiences as a college student at Holy Cross and law student at Yale Law School, again compelled his peers to view a case from a different angle. This was apparent in affirmative action cases where he has argued against affirmative action programs for a number of reasons including what he perceives to be the stigmatizing effects of any race-based remedial program.²⁰³ Accordingly, as we saw with the appointments of Marshall and Thomas to the Court and the legacy they created, an Asian American justice could influence Court decisions and the decision-making process too.

An Asian American would bring new perspectives to the Court.²⁰⁴ For example, looking back at the internment of Japanese Americans during World War II, one has to speculate whether an Asian American justice on the Court at that time would have made a difference in the rulings. Life experience informs and educates judges. The late Federal District Judge Robert Takasugi and Court of Appeals Judge Wallace Tashima, both Japanese Americans, experienced Japanese internment first hand when they were forced to evaluate their homes and made to feel like foreigners in their own land.²⁰⁵ Ninth Circuit Judge Wallace Tashima has recalled his own experiences as an internee in a War Relocation Authority (“WRA”) internment camp during World War II and drew similarities between government overreaching at that time and recent detainments and intrusive investigations under the umbrella of the Patriot Act after the September 11th attacks.²⁰⁶

Arguably, an Asian American justice may also have empathy for immigrants based on their humble backgrounds and their awareness of Asian American history. Denny Chin, Judge on the U.S. Court of Appeals for the Second Circuit, is the son of Chinese immigrants.²⁰⁷ Both of his parents worked in New York’s Chinatown, his father was as a cook while his mother was a seam-

203. See *Grutter v. Bollinger*, 539 U.S. 306, 350-51 (2003) (Thomas, J., concurring in part and dissenting in part); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring).

204. See Jill D. Weinberg & Laura Beth Nielson, *Examining Experience, and Judicial Decision Making*, 85 S. CAL. L. REV. 313, 351 (2012) (arguing that “minority judges tend to assess discrimination claims differently than white judges”).

205. Josh Hsu, *Asian American Judges: Identity, Their Narratives, & Diversity on the Bench*, 11 ASIAN PAC. AM. L.J. 92, 98 (2006).

206. A. Wallace Tashima, *Play It Again, Uncle Sam*, 68 LAW & CONTEMP. PROBS. 7, 7-11 (2005).

207. Denny Chin, *Representation for Immigrants: A Judge’s Personal Perspective*, 78 FORDHAM L. REV. 636, 637 (2009).

stress.²⁰⁸ California Supreme Court Justice Ming Chin's parents came to this country with little money and worked as potato farmers.²⁰⁹ Federal Judge Edward Chen has also commented on the effect of his life experiences on his judicial disposition.²¹⁰ Facing discrimination infused him with skepticism towards law enforcement, as well as receptiveness to the climate of discrimination.²¹¹ Judge Chen acknowledges that, "I find that my own life experiences inform my understanding and perceptions of the world as a judge, whether I am evaluating evidence and arguments on the bench or communicating with disputants as a settlement judge."²¹² Taken together, their background stories provide some contextual evidence that "Asian Americans may have more sympathy for immigrants because of their exposure to racism and xenophobia."²¹³ The unique perspectives of these Asian American judges are analogous to the reason that President Obama nominated Justice Sotomayor. President Obama was looking for empathy and found it in Sotomayor's personal background. She is the daughter of Puerto Rican immigrants who grew up in the housing projects of the South Bronx, and excelled academically at Princeton and Yale Law School.²¹⁴

An Asian American justice might bring a unique perspective in immigration cases and issues about bilingual education and bilingual ballots that may have an adverse impact on the Asian American community, as well as other immigrant communities.²¹⁵ The justice will be cognizant of the long legacy of discrimination against Asian Americans that has existed on many fronts, including immigration,²¹⁶ business,²¹⁷ education, and on social and politi-

208. *Id.* at 638.

209. See Ming W. Chin, *My Journey As An Asian American*, 8 ASIAN PAC. AM. L.J. 150, 150-51 (2009).

210. Chen, *supra* note 172, at 1120.

211. *Id.*

212. *Id.*

213. Hsu, *supra* note 205, at 112.

214. Johnson, *supra* note 172, at 100-01; Sheryl Gay Stolberg, *A Trailblazer and a Dreamer*, N.Y. TIMES, May 29, 2009, at A1.

215. See Raymond Tatalovich, *Official English as Nativist Backlash*, in *Immigrants Out! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 78, 78-102 (Juan F. Perea ed., 1997); Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 611 (2012).

216. See *Ozawa v. United States*, 260 U.S. 178, 198 (1922) (upholding the denial of citizenship to Japanese); *Fong Yue Ting v. United States*, 149 U.S. 698, 725 (1889) (upholding Chinese Exclusion Act); *Chae Chan Ping v. United States*, 130 U.S. 581, 610-11 (1889) (limiting ethnic Chinese from returning to United States after leaving the country); *Besho v. United States*, 178 F. 245, 248 (4th Cir. 1910) (upholding an immigration act limiting

cal levels.²¹⁸ As Harold Koh wrote twenty years ago in a preface for *Asian Americans and the Supreme Court: A Documentary History*,

The history of Asian Americans and the Supreme Court . . . is a tale of almost unbroken sadness; not of victors and justice, but of victims and injustice. It is a story of a people who have largely been objects, not shapers, of a legal system they do not fully understand, a language they do not fluently speak, a melting pot into which they have not been allowed to assimilate. It is an account of Americans who have been treated as unwanted foreigners²¹⁹

This historical resentment toward Asian Americans reverberated in the laws that barred them from meaningful participation in American society.²²⁰ Some Supreme Court justices even encouraged this. For example, while John Marshall Harlan is remembered as a defender of African-American civil rights, he is less known for his frequent votes against Asian litigants in important immigration cases, which were consistent with his belief that the Chinese were racially unsuited to live in the United States.²²¹ Justice Stephen J. Field also expressed sentiments of xenophobia in finding ways to exclude the Chinese in his opinions.²²²

privileges of naturalization of Japanese); *In re Ah Yup*, 1 F. Cas. 223, 224 (C.D. Cal. 1878) (holding that a Chinese immigrant was ineligible for naturalization).

217. See *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (invalidating racially motivated laundry ordinances); Charles J. McClain & Laurene Wu McClain, *The Chinese Contribution to the Development of Americans*, in ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943, 12 (Sucheng Cheng, ed., 1993) (noting that 240 of 320 laundries in San Francisco were Chinese-owned). These laundries were symbols of Chinese success, and were often targets of attack. *Id.*

218. See RONALD TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 200-02 (1993) (describing hostile political climate toward Chinese immigrants); Esther Ngan-Ling Chow, *The Feminist Movement: Where Are All the Asian American Women?*, in FROM DIFFERENT SHORES: PERSPECTIVES ON RACE AND ETHNICITY IN AMERICA, 187-88 (Ronald Takaki, ed., 1994) (discussing early nineteenth century legislation excluding Chinese immigrants from being lawful members of society).

219. Harold Koh, *Foreword to ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY* ix (Hyung-Chan Kim, ed. 1992).

220. See, e.g., HYUNG-CHAN KIM, AMERICAN NATURALIZATION AND IMMIGRATION POLICY: ASIAN AMERICAN PERSPECTIVE IN ASIÁN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY 2 (1996) (describing unjust policies in early United States history against persons of Asian history); McClain & McClain, *supra* note 217, at 4.

221. See Gabriel J. Chin, *The First Justice Harlan By the Numbers: Just How Great Was "The Great Dissenter?"* 32 AKRON L. REV. 629, 633 (1999).

222. See Richard P. Cole & Gabriel J. Chin, *Emerging From the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 LAW AND HISTORY REV. 325, 358 (1999).

More to the point, the Justice will be aware that Supreme Court jurisprudence has shown that the racialization of whites, blacks, and Asians are different. The racialization of Asians, as depicted in significant Supreme Court cases is reflected in American law. First, in *Ozawa v. United States*,²²³ and *United States v. Thind*,²²⁴ Justice George Sutherland struggled with definitions of "white" and "race." In testing the meaning of the Naturalization Act of 1790, in *Ozawa*, Justice Sutherland ruled that only "whites" and persons of African nativity could become naturalized citizens and that Asians were excluded because they were obviously neither.²²⁵ In 1922, the *Ozawa* Court held that the term "white person" included "only a person of what is popularly known as the Caucasian race" and that a Japanese person was not white.²²⁶

Second, in *Thind*, the litigant also claimed that he was "white" according to the definition in *Ozawa*.²²⁷ Bhagat Thind was a full-blooded Indian and a high caste Hindu, but argued that he was racially "Caucasian."²²⁸ Sutherland opined that the majority of white Americans would reject Asians, such as *Ozawa* and *Thind*, as full members, either individually or through their democratic instructions.²²⁹ The Court decided that *Thind* could not be a naturalized citizen of the United States because he was not a "white person."²³⁰ Third, in *Lum v. Rice*,²³¹ the Court held that the exclusion on account of race of a child of Chinese ancestry from a state high school did not violate the Fourteenth Amendment to the United States Constitution and concurrently, minority children were excluded from attending schools reserved for whites. Fourth, as discussed throughout this Review and *In Chambers*, the internment of Japanese Americans was the perhaps the most egregious case reflecting an anti-Asian animus in the twentieth century.

Modernly, and looking prospectively with regard to affirmative action cases including *Texas v. Fisher*,²³² an Asian American jus-

223. *Ozawa v. United States*, 260 U.S. 178 (1922).

224. *United States v. Thind*, 261 U.S. 204 (1923).

225. *Ozawa*, 260 U.S. at 198-99.

226. *Id.* at 197.

227. *Thind*, 261 U.S. 204.

228. *Id.*

229. *Id.* at 209-10.

230. *Id.* at 215.

231. *Lum v. Rice*, 275 U.S. 78 (1927).

232. See *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011) *cert. granted*, 132 S. Ct. 1536 (2012).

tice may be better able to notice the nuances of the debate and not the unique situations that Asian Americans find themselves in when they are included in affirmative action programs and when they have not been.²³³ At the core of the *Fisher* litigation is the University of Texas admissions policy which *inter alia* allows whites and Asians to benefit from the University's efforts to achieve the educational benefits of diversity.²³⁴ Until *Grutter v. Bollinger*²³⁵ and *Fisher*, there was a tendency to frame affirmative action in black and white terms, which diminishes the significance of Asian-American under-representation and invites misconceptions colored by the model minority myth: the stereotype that all Asian Americans are succeeding in business and academics because of their hard work and do not need any governmental assistance.²³⁶ The model minority myth has created a stereotype of Asian Americans as one monolithic ethnic group that has achieved success through education and hard work without the assistance of governmental benefits.²³⁷ Certain Asian American groups still need some type of assistance.²³⁸ For example, Filipinos and Southeast Asians, such as the Indochinese, tend to rely on financial and educational assistance.²³⁹ These groups could directly

233. See generally, Brief of Asian American Justice Center, Asian American Institute, Asian American Law Caucus, et al. as Amici Curiae, Supporting Respondents, *Ricci v. DeStefano*, 557 U.S. 557 (2009) (Nos. 07-1428, 08-328.); Brief of the Asian American Legal Defense and Education Fund, Chinese for Affirmative Action, et al. as Amici Curiae, supporting Respondents, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (Nos. 05-908, 05-915).

234. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 597 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011), *cert granted*, 132 S. Ct. 1536 (2012).

235. 539 U.S. 306 (2003).

236. See Harvey Gee, *The Need for Asian Americans to be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621, 623 (1997).

237. See, e.g., FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 44 (2002) (describing the misconception that Asian Americans vindicate the American Dream); Gabriel J. Chin, Sumi Cho, Jerry Kang & Frank Wu, *Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action*, 4 ASIAN PAC. AM. L.J. 129, 148 (1996) (finding that the myth emphasizes the success of Asian Americans, especially as compared to other people of color); Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 185 (1997) (noting that the myth paints a misleading portrait of group-wide economic, educational, and professional success).

238. See Gale Holland, "Model Minority" Myth Hides Reality, L.A. Times, June 10, 2008, at 3 (reporting that more than half of Asian-American students attend community colleges or minimally selective four-year colleges and are likely to come from low-income families with limited English skills).

239. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 81-82 (2001).

benefit from affirmative action.²⁴⁰ The myth is so prevalent that even Supreme Court Justices seem to believe it. Justice Thomas has portrayed Asian Americans as a minority group whose accomplishments justify opposition to affirmative action.²⁴¹ Specifically, Justice Thomas has asserted that because Asian Pacific Americans have substantially greater family incomes than whites, they have “transcended the ravages caused even by harsh legal and social discrimination.”²⁴² Justice Thomas has also stated that Asian Americans should not be the beneficiaries of affirmative action, because they are “overrepresented in key institutions.”²⁴³ Justice Thomas' sentiments were echoed by Justice Stevens, who spoke to a group of Chicago lawyers at a luncheon a few years ago and compared current affirmative action for African Americans to past affirmative action for Asian Americans.²⁴⁴ Justice Stevens noted that Asian Americans have made great progress in the past few decades, and opined that Asian Americans no longer need to be considered as beneficiaries of any racial preferences.²⁴⁵ Apparently, the Court is beginning to see beyond the myth. This term, Justice Samuel Alito at oral argument in *Fisher* when he voiced skepticism when he asked university counsel Gregory Garre about whether the Texas plan appropriately accounts for determining the admission rates for Filipino American and Cambodian Americans.²⁴⁶

In a criminal context, an Asian American justice may also be cognizant that Asian Americans are often overlooked in the criminal law literature despite their contribution to legal history and contemporary conversations about crime policy. Even though much of the focus about the implications of race on the American

240. See, e.g., WU, *supra* note 237, at 51 (explaining that while Asian Americans have done well educationally, they remain underrepresented in higher education at all levels beyond student and entry-level positions); William C. Kidder, *Negative Action Versus Affirmative Action: Asian Pacific Americans Are Still Caught in the Crossfire*, 11 MICH. J. RACE & L. 605, 623-24 (2006) (finding that some underrepresented Asian Pacific American groups such as Filipinos, Southeast Asians, and Pacific Islanders can directly benefit from affirmative action in higher education).

241. See ROSALIND S. CHOU & JOE R. FEAGIN, *THE MYTH OF THE MODEL MINORITY: ASIAN AMERICANS FACING RACISM* 14 (2008).

242. *Id.* at 14.

243. *Id.*

244. Charles Lane, *Stevens Gives Rare Glimpse of High Court's 'Conference'; Justice Details His Thoughts on Affirmative Action Case in Michigan*, WASH. POST, Oct. 19, 2003, at A3.

245. *Id.*

246. *Fisher v. Univ. of Tex. at Austin*, Supreme Court cause 11-345, Appellant's original argument, transcript, page 52, lines 4-20.

justice system has been placed on African Americans and Hispanics, an Asian American justice may be more attentive to the patterns of federal sentencing handed out to Asian Americans who are less likely to be incarcerated when compared with African Americans and Hispanics.²⁴⁷ Asian Americans experience sentencing leniency for fraud crimes and drug crimes where African Americans and Hispanics are punished more severely.²⁴⁸ Asian Americans are also punished similarly to white criminals for most offenses, aside from immigration.²⁴⁹ Finally, an Asian American justice may be more culturally competent in understanding the legal representation of Asian Americans in criminal matters requiring knowledge of their culture, which may be perceived as foreign or mysterious to non-Asians. The knowledge and insights that they could bring to bear could help fulfill the guarantee of due process of law and promote increased public confidence in the United States criminal justice system.²⁵⁰

VI. CONCLUSION

In the end, Peppers and Ward's compilation of engaging firsthand stories and is a welcome contribution to the ongoing literature about the Court. *In Chambers* is illuminating since it reveals insights into the nuts and bolts of serving as a Supreme Court law clerk, and also by providing a peek into the relationships between Justice and clerk. Even regular Court watchers may be surprised by the nuggets offered into this exclusive world. The ideas and themes found in the book and the implications

247. See Brian D. Johnson & Sara Betsinger, *Punishing the "Model Minority": Asian-American Criminal Sentencing Outcomes in Federal District Courts*, 47 *CRIMINOLOGY* 1045, 1064 (2009).

248. *Id.* at 1075.

249. *Id.* at 1049.

250. Asian American judges may have a different perspective in many stages of litigation including pre-trial conference, settlement conference and at jury selection, trial, and criminal sentencing. They may also interpret the issues differently in cases involving racial discrimination and criminal cases involving a cross-cultural defense strategy advanced by a defendant. This awareness could provide insights about the nexus between mitigation and crime, which could ultimately influence juror opinions and judicial rulings. Cultural competency challenges the assumptions the court and prosecution have about defendants and provides a cultural context that rejects the wholesale stereotyping of persons who share the same cultural background. Asian-American judges may be better able to move beyond stereotypes to understand that Asian Americans are not one monolithic group, but are a population consisting of diverse cultures with differing beliefs, values, customs, patterns, norms and behavior. See Harvey Gee, *Presenting Stories from Different Shores: Asian Americans and Cross-Cultural Competency in Capital Litigation*, 5 *NW. INTERDISCIPLINARY L. REV.* 247, 249 (2012).

made in this essay about encouraging more diversity at the Court will hopefully encourage other scholars to further mine the archives and to embark on writing projects that not only shed further light on the Court and its interworkings, but present new ideas for justices.

The Establishment Clause and the Making of a New
Secularism: A Review Essay on *Church, State and
the Crisis in American Secularism* by Bruce
Ledewitz

*Patrick M. Garry**
*and John P. Garry***

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I. INTRODUCTION

Reading a book with which one agrees on the basic assumptions and goals can be a reaffirming and educational experience. However, reading a book with which one disagrees about some of its basic assumptions and goals can be a stimulating and even enlightening experience, particularly if the book presents a logical argument, a compelling and laudable vision, and an openness to opposing views. For this reviewer, Professor Bruce Ledewitz has written just such a book.¹

There are many conclusions and arguments in Ledewitz's book with which I disagree. Our respective books on the Establishment Clause arise from, and arrive at, two very opposite ends of the

* Professor of Law, University of South Dakota School of Law, and Director of the Hagemann Center for Legal and Public Policy Research.

** Researcher for the Hagemann Center for Legal and Public Policy Research, University of South Dakota School of Law.

1. Bruce Ledewitz, *Church, State and the Crisis in American Secularism* (2011) (Indiana University Press 2011, PP. 312, \$29.95. ISBN: 978-0-253-35634-5). Bruce Ledewitz is a professor at Duquesne University School of Law.

constitutional and philosophical spectrums.² And for this reason, some criticisms articulated in this review may seem somewhat biased or distorted, at least in the eyes of the author. However, addressing an almost completely opposite ideological viewpoint from that of the author may also allow a reviewer to see the book in a way that more ideologically compatible readers might not.

In *Church, State and the Crisis in American Secularism*, Ledewitz sets ambitious goals. He pursues a constitutional doctrine or model that tries to resolve all the inconsistencies and contradictions in the Court's confused and erratic Establishment Clause jurisprudence that has evolved over the last half century. Ledewitz's resolution strives to find common ground between religious believers and traditionalists, secularists and atheists. Furthermore, Ledewitz tackles what is probably the most divisive and controversial issue in the Establishment Clause area—namely, the issue of religious expression or displays on public property.

The focus of this book is secularism. Ledewitz believes that secularism is the future of America. But to survive and prosper, secularism cannot operate the way it traditionally has, with such a prominent anti-religion focus. The new secularism, according to Ledewitz, needs to recognize the presence of religion in American society. Furthermore, the new secularism cannot be defined by moral relativism. It has to recognize the existence and influence of objective ideals and values—or, in other words, a higher law. According to Ledewitz, secularists must make peace with religion and with various objective values that in the past have often been associated with religion, since such values have relevance to all of society, despite the fact that religion may have seemingly commandeered them long ago.

Ledewitz argues that, under the government speech doctrine, government should be able to speak of and advocate for a higher law. This higher law can be likened to natural law or the historical tenants of western civilization. Just because religion might believe in the same values, and just because religion has previously used those values to promote religious exercise, Ledewitz does not think those values should become off-limits to government speech. As long as government bases its speech on nonreligious motives, it can promote this higher law. Thus, if certain religious imagery or displays promote values such as justice and compas-

2. See PATRICK M. GARRY, *WRESTLING WITH GOD: THE COURTS' TORTUOUS TREATMENT OF RELIGION* (2006).

sion, government should not be precluded from advocating such values.

II. THE ESTABLISHMENT CLAUSE CRISIS

Because of very sharp and basic differences between the justices, the United States Supreme Court has been inconsistent and confusing in its Establishment Clause doctrine.³ But, as Ledewitz argues, strict separationism is the best policy and the best means by which to satisfy the constitutional doctrine of neutrality.⁴ To Ledewitz, the Establishment Clause crisis comprises all the ways in which the Court has departed from the rule of neutrality. Contrary to a strict rule of neutrality, for instance, the Supreme Court has viewed certain accommodations of religion as constitutionally permissible.⁵ But if accommodation is constitutionally acceptable, then is neutrality *the* constitutionally required doctrine?⁶

Ledewitz acknowledges that even when the Supreme Court has followed the neutrality approach, its decisions have not been able to resolve the Establishment Clause crisis. This acknowledgment, however, creates further questions as to whether, in fact, neutrality is the most appropriate doctrine for the Court to follow. Furthermore, while citing *Everson v. Board of Education* and *Lemon v. Kurtzman*—cases in which the Court discusses the Establishment Clause as erecting a high and impregnable wall of separation between church and state—Ledewitz admits that those deci-

3. Ledewitz is one of many scholars to have commented on the confusing state of Establishment Clause jurisprudence. See, e.g., Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Test" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 323 (1995); Roxanne L. Houtman, *Rebuilding the Wall Between Church and State*, 55 SYRACUSE L. REV. 395, 397, 403-04 (2005); William P. Marshall, *What Is the Matter With Equality?*, 75 IND. L.J. 193, 194 (2000); Russell L. Weaver, *Like a Ghoul in a Late Night Horror Movie*, 41 BRANDEIS L.J. 587, 590 (2003); Keith Werhan, *Navigating the New Neutrality: School Vouchers, the Pledge, and the Limits of a Purposive Establishment Clause*, 41 BRANDEIS L.J. 603, 610 (2003).

4. LEDEWITZ, *supra* note 2, at 14; see, e.g., Michael McConnell, *Accommodation of Religion*, 60 GEO. WASH. L. REV. 685 (1992).

5. LEDEWITZ, *supra* note 2, at 18-20.

6. For a criticism of the neutrality approach, see Patrick M. Garry, *Religious Freedom Deserves More Than Neutrality*, 57 FLA. L. REV. 1, 8, 37 (2005). Ledewitz repeatedly cites the Supreme Court's attempt to recognize and accommodate religion. But this leads the reader to question whether neutrality is indeed the proper or intended focus of the Establishment Clause doctrine. Indeed, there is much historical evidence that the constitutional framers highly valued religion and its contribution to a constitutional democracy. See Patrick M. Garry, *The Democratic Aspect of the Establishment Clause*, 59 MERCER L. REV. 595, 611 (2008). Not only did the framing generation want to ensure a continued and strong presence of religion in society, but it wanted to make sure that nothing in the Constitution inhibited such a vibrant presence in civil society. *Id.* at 611-17.

sions failed to provide any consistent or coherent Establishment Clause doctrine because they were out of step with public sentiments.⁷ But if this be the case, then any judicial approach consistent with the strict separationist approach will be unsuccessful in resolving the Establishment Clause crisis, unless public attitudes undergo a significant change.⁸

On one hand, if neutrality and strict separationism are the best constitutional approaches, then why has the Court never consistently followed them? On the other hand, even when the Court has followed a separationism and neutrality approach, it has “led us down a path of culture war and constant litigation.”⁹ And yet, although Ledewitz argues that these principles are incorporated into the Establishment Clause, the Court’s obligation is to present to the American people a vision of the proper relationship of religion to public life that the people can understand and accept.¹⁰ This

7. LEDEWITZ, *supra* note 2, at 65; see *Lemon v. Kurtzman*, 411 U.S. 192 (1973); *Everson v. Board of Education*, 330 U.S. 1 (1947).

8. Indeed, one could argue that the confusing and contradictory course of Establishment Clause jurisprudence began with the Court’s decision in *Everson*. See Patrick M. Garry, *The Institutional Side of Religious Liberty*, 2004 UTAH L. REV. 1155, 1174-75 (2004). The “wall of separation” metaphor articulated in *Everson* led to the *Lemon* test in 1971, which in turn has been used to express a kind of constitutional hostility to religion. *Id.* at 1176. As I have previously analyzed the wall of separation metaphor:

The “wall of separation” metaphor uses the Establishment Clause to negate the thrust of the Free Exercise Clause. It mutes the pro-religion message of the First Amendment. But the metaphor is appropriate only if one believes that there should be a limit on the public presence of religion, and that religion should be primarily a private matter, existing outside of the public square. Through this separationist approach, the courts have communicated to the American public a “categorical opposition to the intermingling of the realms of religion and politics.” Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 676 (2003). But the *Everson* legacy has distorted the constitutional meaning of separation. To the extent that the First Amendment requires separation, it does so as a matter of protecting “religion from government intrusion on personal and institutional religious autonomy.” Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 798 (1993). The constitutional intention of a “wall of separation” was a means of protecting religion, not the secular state. Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 307 (2002). The framers never intended “to use the idea of separation to authorize discrimination against religion within the public sphere.” Paulsen, *Lemon*, at 810.

Not only does the “wall of separation” metaphor contradict the spirit and purpose of the First Amendment, it provides a completely inappropriate constitutional precedent or doctrine. As Justice Reed pointed out, “[a] rule of law should not be drawn from a figure of speech.” *McCullum v. Bd. of Educ.*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting).

Id. at 1177-78.

9. LEDEWITZ, *supra* note 2, at 44.

10. *Id.* at 71.

raises the question: Is the Court to provide rules that are publicly acceptable or ones required by an objective reading of the Constitution?

III. THE POPULAR OPINION TEST FOR CONSTITUTIONAL DOCTRINE

In connection with the Establishment Clause crisis, the book undertakes a historical and intellectual analysis of secularism, focusing on what secularism needs to do to prosper in the future. Ledewitz argues that secularism cannot be antireligious, that it should not be wedded to moral relativism, and that it should welcome and recognize religion's role in the public square.¹¹ Ledewitz also argues that a rejection of America's religious heritage may lead to an unhealthy secularism.¹² He claims that the state should support a deep and enriching spiritual life. But this claim is similar to an Establishment Clause model that is ardently opposed by secularists—accommodation.

Ledewitz argues that history has little value in helping to interpret the Establishment Clause, since the use of history has been indecisive and indeterminate.¹³ Here again, Ledewitz resorts to the argument that it is not the original meaning or historical basis of the Constitution that should determine constitutional doctrine, but rather the people themselves.¹⁴ This is a much debated topic among legal scholars—a wide-ranging debate between originalists and “living” or “popular” constitutionalists.

Believing as he does in the Wall-of-Separation metaphor, Ledewitz poses the question: “Why did such a determined beginning in *Everson* yield so little change?”¹⁵ Perhaps the reason is that *Everson* never did mark the defining constitutional point that Ledewitz claims it did. He rightly acknowledges that public understanding about the relationship of church and state is not government neutrality toward religion, and clearly not the Wall-of-Separation metaphor. As Ledewitz recognizes, the Supreme Court is not the kind of institution that can, by itself, change the fundamental nature of national life. But this statement seems to contradict earlier ones in which he expresses surprise that the Court in fact has not been able to do so.

11. *Id.* at xxii-xxiii.

12. *Id.* at xxii.

13. *Id.* at 48, 53.

14. *Id.* at 63.

15. *Id.* at 66.

The book cites the *Lochner* era to illustrate another point in time when the Court was dramatically out of step with American attitudes and beliefs.¹⁶ Ledewitz uses the *Lochner* example to argue, with respect to the Establishment Clause crisis, that the obligation of the Court is to present to the American people a principle of church and state that they can accept.¹⁷

IV. A HIGHER LAW THEORY OF THE ESTABLISHMENT CLAUSE

Concluding that none of the existing Establishment Clause models can bring social peace in this area, Ledewitz suggests that the higher law model is the only one left to do the job.¹⁸ Ledewitz argues that because the higher law position is not uniquely religious, government should be able to express it through the use of religious symbols.¹⁹ In other words, religious symbols and expression have historically been used as a kind of shorthand for the higher law tradition. As Ledewitz argues, “[u]sing the word ‘God’ strengthens the case for higher law among a significant portion of the citizenry.”²⁰ However, this connection is just what the secularists and separationists seek to avoid, arguing that the government’s use of religious symbols to express higher law constitutes the advancement of religion through government action. Nonetheless, Ledewitz argues that the model will allow religious believers to receive and entertain what they believe to be religious truths, while nonbelievers will hear the same message and yet only see the secular, objective messages that exist independently of any religious message.

This higher law theory represents a genuine and serious attempt to find an Establishment Clause model that can bridge the gap between all of the various interests and beliefs. But as with any new and far-reaching model, this one has its questionable points. One issue, for instance, is whether government can establish higher law in the public square, and whether it can do so through the government speech doctrine, resorting to the higher law tradition.²¹

16. *Id.* at 67-69; see *Lochner v. New York*, 198 U.S. 45 (1905).

17. LEDEWITZ, *supra* note 2, at 44, 69-70.

18. *Id.* at 129.

19. *Id.* at 130.

20. *Id.*

21. *Id.* at 99, 109; see *id.* at 200-06 (further discussing the government speech doctrine).

In connection with the higher law tradition, Ledewitz addresses the issues of moral relativism and the existence of objective truth or values. Although the higher law tradition is a complex subject that can warrant an entire book in itself, the breadth of Ledewitz's knowledge and his willingness to incorporate such diverse and complex subjects into the book is indeed impressive.

The book tries to examine objective truth or values apart from any strictly religious identity. For instance, Ledewitz analyzes statements made by Pope Benedict for any transreligious meanings—namely, whether those statements can be understood apart from any religious message and in connection with the higher law tradition.²² But this is where real difficulty can occur. There are many who are not going to accept this separation. If aspects of the higher law tradition have been historically associated with religion, there are secularists or atheists who may not be willing to accept those “truths” apart from that historic religious association. On the other hand, to those religious believers who may have become alienated by secularists fervently denying the value or even legitimacy of religious beliefs, there is something quite refreshing about Ledewitz, who quotes sources ranging from the Pope, to G. K. Chesterton, and the Gospel of St. John. In his book, Ledewitz, as a committed and proclaimed secularist, makes a truly genuine and determined effort to recognize and respect America's religious identity and heritage.

As Ledewitz interestingly argues, truth is not subject to an Establishment Clause challenge, but God is. And yet, if this truth is something that historically has been espoused as coming from God, it is difficult to see how secularists and atheists will now accept it as truth standing on its own, apart from any association with God, but Ledewitz earnestly tries to convince them to do so. Moreover, many secularists and atheists argue that there is no essential truth or objectivity—that without God, the human realm is the ultimate authority; and since no individual is superior to another, moral relativism must ensue.

Ledewitz acknowledges the obvious secular position that the government's use of religious symbols is different than a simple government endorsement of higher law.²³ The question is whether the use of religious language, such as the word “God,” is constitutional if used to endorse higher law, or whether government

22. *Id.* at 108, 130.

23. *Id.* at 120.

should be permitted to use religious symbols for nonreligious purposes. In this way, the higher law model might offer a new, more simplified and more acceptable Establishment Clause test. Ultimately, however, this model may end up operating much like the current endorsement test if the courts hinge it on the perceptions and understandings of the reasonable observer—e.g., what impressions will a reasonable observer have of government's portrayal of religious imagery or expressions?

Ledewitz's proposed test for judging public religious expressions is whether it is plausible to view the government's use of religious language or symbols as endorsing the principle of higher law or other related nonreligious themes.²⁴ This test gives the benefit of the doubt to government's use of religious imagery and to a secular purpose underlying such use. However, throughout the history of Establishment Clause jurisprudence, secularists, separationists, and atheists have opposed any presumption of constitutionality.

An impetus for the higher law theory comes from the recognition that there is a strong religious heritage in America.²⁵ But this recognition also seems to contradict so much of the argument for separationism. If there is such a strong religious heritage in America, then why shouldn't government be allowed to directly accommodate that heritage? And yet, even though Ledewitz rejects an accommodationist approach, the higher law model may essentially work toward the same goal. In other words, under the plausibility test, government may be able to use religious imagery as long as government officials give a plausible explanation that the uses of that symbolism are for secular purposes. But government officials have been arguing so for decades in Establishment Clause cases. For instance, with respect to the Ten Commandments displays that have been struck down as violative of the Establishment Clause, government officials have argued that those displays were being used only for their secular purposes; yet secularists and separationists never accepted that argument, and it is difficult to see how they would now begin doing so. Despite these doubts, however, Ledewitz's book is a groundbreaking effort to build an Establishment Clause bridge between accommodationists and separationists, religious believers and secularists.

24. *Id.* at 134-35.

25. This heritage of the connection between religion and government in American history is discussed in Garry, *Religious Freedom*, *supra* note 6, at 15-24.

Ledewitz agrees with the Court that Bible-reading in public schools is unconstitutional, but then admits that something important was lost when we stopped reading the Bible in school.²⁶ Ledewitz also states that Ten Commandments displays should not occur in public school classrooms, even though arguing that they may belong outside courthouses and law schools.²⁷ He also goes on to say that prayer would be a favored activity under the higher law model, since the spiritual depth it promotes goes beyond any one religious tradition.²⁸ But this sounds a lot like the nonpreferentialism model.²⁹ Ledewitz admits that it is possible to think of prayer as not necessarily religious at all but as a form of meditation, and that the government is rightly concerned about the spiritual condition of its citizens. However, if this is so, then one might ask why the moment of silence policy in public schools could not be upheld.

V. SECULARISM AND THE BUILDING OF A NEW PROGRESSIVE COALITION

Chapter Eight begins a new and fascinating discussion relating to prescriptions for saving secularism. It opens with a discussion of how secularism has failed under the “New Atheism.”³⁰ Again, this may be a book in itself, but Ledewitz is to be admired for incorporating this kind of philosophical and sociological material. Nonetheless, this material suggests that the ultimate purpose of this book is not so much to find some objective, enduring meaning to the Establishment Clause, but to find a model which will save secularism from itself and allow it to prosper.

In the following chapter, Ledewitz describes the “new new secularism” and its distinction from the “New Atheism.” According to Ledewitz, the former does not reject religion as such and recognizes the need for some kind of higher meaning that transcends the

26. LEDEWITZ, *supra* note 2, at 150.

27. *Id.* at 151.

28. *Id.* at 152, 154.

29. For a discussion of nonpreferentialism, see Garry, *Religious Freedom*, *supra* note 6, at 39.

30. Ledewitz criticizes the reflexive anti-religious attitude of the New Atheists. LEDEWITZ, *supra* note 2, at 188-89. He also recognizes that the New Atheists would certainly object to his proposal for government use of religious imagery to illustrate higher law. *Id.* at 188. Given the secularist's views on the potential political and social divisiveness of religion, it is difficult to see how they would allow any intermingling of government and religion. For these views on the divisiveness of religion, see Garry, *Democratic Aspect*, *supra* note 6, at 608-10.

individual. He wants to explore how the use by government of religious imagery in the public square under the rubric of higher law might actually strengthen secularism.

According to Ledewitz, the challenge to secularism is to be able to support strong social structures and spiritual refreshment, and he argues that the higher law model and the doctrine of government speech are needed to help counter the extreme individualism that has come to characterize secularism.³¹ He examines how the use in government speech of religious symbols to express shared meaning or substantive truth can combat this extreme individualism. In his book, Ledewitz tries to move secularism to a greater recognition of America's shared values and common culture.

Ledewitz goes a long way in reaching his Establishment Clause model out to those who adhere to the accommodationist model.³² He believes in objective values and that the promotion of such values is necessary for the survival of secularism. He also argues that these objective values and the notion of truth they express is something that the "new new secularism" can share with organized religion. But the question is, as Ledewitz recognizes, to what extent can secularism be open to this kind of sharing of social space with religion—or will it simply follow a kind of reflexive antireligious policy?

As Ledewitz explains, the "New Atheists" want to see the Establishment Clause crisis resolved not by any grand compromise or the finding of common ground, but "by a rededication to the strict separation of church and state and either the removal of religiously oriented symbols from the public square or, at least, a ban on any further such expressions in the future."³³ To Ledewitz, such a secular insistence would prevent the formation of a new progressive political coalition along the lines of the New Deal coalition.³⁴ And this is Ledewitz's goal—the formation of a new progressive political coalition. But such a coalition depends, in Ledewitz's opinion, on the acceptance of a higher law secularism in the public square, even though it is expressed in part through religious imagery.

Without a higher law model, secularism could descend into a narrow and selfish quest to satisfy one's present desires, since it

31. LEDEWITZ, *supra* note 2, at 204.

32. For a discussion of the accommodation doctrine, see Garry, *Religious Freedom*, *supra* note 6, at 39-50.

33. LEDEWITZ, *supra* note 2, at 209.

34. *Id.* at 229.

lacks an afterlife or belief system that transcends an individual human life. The argument is that higher law secularism is open to the values and truths that the current brand of secularism is not, that higher secularism can transcend individualism in a way that the current secularism cannot. Thus, higher law secularism promises a kind of hopefulness and positive spirit that will appeal to the public in a way that secularism never has. For this argument alone, and especially for secularists of all stripes, Ledewitz's book deserves to be read and debated.

VI. CONCLUSION

Bruce Ledewitz has written an ambitious book that spans a wide spectrum of subjects, from constitutional law, to judicial review, to higher law philosophy, to the history of secularism. As with all ambitious books, there are inevitable shortcomings and deficiencies; but the first rule of writing holds that the more ambitious the work, the more shortcomings it is bound to have. Not only is Professor Ledewitz's book ambitious, but it is also creative and constructive. It tries to find a creative solution to both a constitutional and cultural problem that has long vexed an increasingly divided society. Indeed, the book seeks to lay the foundation for a revived common culture and shared identity in America.³⁵

For decades, there have been sharply divided views on the meaning and application of the Establishment Clause and on the very basic relationship between religion and civil society. The one point of agreement on the part of all constitutional scholars is that the current Establishment Clause jurisprudence is in a state of great disarray and confusion. It is into this arena that Ledewitz boldly steps with his intriguing and inviting new book, trying to find some common constitutional and cultural ground.

One might criticize Ledewitz for leaving out certain bodies of legal scholarship. For instance, although he discusses the concept of strict separationism, he does not cite the extensive body of scholarship that questions the reliability of Thomas Jefferson's "wall of separation" metaphor.³⁶ At times, he engages in a somewhat free-

35. *Id.* at 206.

36. In *Thomas Jefferson and the Wall of Separation Between Church and State*, Daniel Dreisbach argues that the traditional interpretation of Jefferson's "wall of separation" metaphor is flawed because Jefferson was simply trying to express the idea that there was a wall of separation between the federal government and religion, not between the various state governments and religion. DANIEL L. DREISBACH, *THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* 68 (2002). Dreisbach also argues that Jeffer-

flowing critique of the current Establishment Clause jurisprudence, instead of a point-by-point analysis of each existing Establishment Clause model. However, an exhaustive analysis of Establishment Clause caselaw and doctrines does not appear to be the final purpose of this book. The ultimate goal of the book seems to be how the new secularism can help bring about and inspire a new progressive political movement.

In pursuing his laudable goal of attempting to find some resolution to the Establishment Clause crisis, Ledewitz addresses the concerns of secularists and separationists, trying to bring them into some common ground with religious believers and accommodationists. This attempt, as has already been described, gives this book real and lasting value, as does Ledewitz's prescriptions for the future direction of secularism. Ledewitz's incorporation of the intellectual history of and current challenges facing secularism is a valuable and unique contribution to the Establishment Clause literature.

son's wall of separation metaphor differs significantly from the way that metaphor was used in the *Everson* decision. According to Dreisbach, Jefferson's notion of a wall of separation focused on separating the institutions of church and state, whereas the wall of separation metaphor in *Everson* sought to more expansively separate religion and all civil government. *Id.* at 125. For other works examining the historical origins of the wall of separation metaphor, see generally, PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002) and JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* (2000). As Professor McConnell has demonstrated, in the years leading up to adoption of the First Amendment, the colony states and Continental Congress frequently enacted legislative accommodations to religion and that there was no significant or expressed opposition to these practices. McConnell, *supra* note 4, at 693.