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Recommended Citation

Todd C. Peppers, Cancelling Justice? The Case of James Clark McReynolds, 24 Rich. Pub. Int. L. Rev. 59 (2021).

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CANCELLING JUSTICE?

THE CASE OF JAMES CLARK MCREYNOLDS

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ABSTRACT

Over the last several years, there has been a vigorous debate as to whether monuments and memorials of Confederate leaders and controversial historical figures should be purged from the public square. These conversations have included former Supreme Court justices and have led to the removal of multiple statues of former Chief Justice Roger Taney, author of the infamous “Dred Scott” decision. Drawing on the arguments mounted for and against the removal of statues, this article explores the decision of a small liberal arts college to strip the name of former Supreme Court Justice James Clark McReynolds from a campus building. The article concludes that future decisions regarding monuments and memorials to other justices will involve not only consideration of the justices’ jurisprudence but also public and private acts of discrimination and racial animus.

INTRODUCTION

Over the last few years, the United States has witnessed a fierce debate about the presence of monuments and memorials in public spaces and university campuses. While much of the controversy has focused on Confederate war memorials,¹ historical figures such as Christopher Columbus and Woodrow Wilson have also been drawn into the discussion.² And as statues fall and names are removed from public buildings, proponents and opponents of this new movement are deadlocked—accusing each other of celebrating racism on the one hand versus erasing history and creating a “cancel culture” on the other.³

The United States Supreme Court and its justices have remained relatively unscathed in this debate, with the exception of former Chief Justice Roger Brooke Taney.⁴ In March, House Majority Leader, Steny Hoyer introduced

¹ See Erik Ortiz, *These Confederate statues were removed. But where did they go?*, NBC NEWS (Sept. 21, 2020), <https://www.nbcnews.com/news/us-news/these-confederate-statues-were-removed-where-did-they-go-n1240268>.

² See Grace Hauck, *Chicago removes Christopher Columbus statues from parks after protest*, USA TODAY (July 24, 2020), <https://www.usatoday.com/story/news/nation/2020/07/24/chicago-christopher-columbus-statues-taken-down-after-protests/5500429002/>; Office of Communications, *Board of Trustees’ decision on removing Woodrow Wilson’s name from public policy school and residential college*, PRINCETON UNIV. (June 27, 2020), <https://www.princeton.edu/news/2020/06/27/board-trustees-decision-removing-woodrow-wilsons-name-public-policy-school-and>.

³ See generally Ross Douthat, *10 Theses About Cancel Culture*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/07/14/opinion/cancel-culture-.html> (explaining the phrase “cancel culture”).

⁴ See Felicia Sonmez & Paul Kane, *House to vote on removal of bust of Roger B. Taney, segregationist who wrote Supreme Court’s Dred Scott ruling*, WASH. POST (July 1, 2020), <https://www.washingtonpost.com/politics/house-to-vote-to-remove-bust-of-roger-b-taney-segregationist-who-penned->

a bill requiring the removal of the bust of this former chief justice.⁵ The bust is displayed in the Old Senate Chamber at the United States Capitol, which served as the home of the United States Supreme Court from 1860 to 1935.⁶ Also displayed are busts of John Jay, John Rutledge, Oliver Ellsworth and John Marshall – all men who preceded Taney as chief justice.⁷ The bill proposes that a bust of Thurgood Marshall be substituted in place of Taney; while the bill was approved by the House of Representatives on July 22, 2020, it has not been voted on by the United States Senate.⁸

“A bust of Chief Justice Taney should not be displayed in a place of honor in our nation's Capitol,” Congressman Hoyer stated.⁹ “In Maryland we made the decision to remove a statue of Taney from the State House grounds, reflecting his shameful contribution to the evil system of slavery and its defense, and we ought to do the same here.”¹⁰ As Hoyer noted, a large statue of Chief Justice Taney was removed under cover of darkness from outside the Maryland State House in 2017.¹¹ And in the same year, the city of Frederick, Maryland voted to remove a bust of former resident Taney from the outside of their city hall.¹² And even a historical naval vessel has had Taney's name removed from its bow.¹³

The call for the removal of the Taney bust is motivated by the Chief Justice's majority opinion in *Scott v. Sandford* (commonly referred to as the “Dred Scott” case), in which Taney notoriously wrote that African Americans were not citizens of the United States and could not sue in federal court, because of their status as “beings of an inferior order” who were “altogether unfit to associate with the white race” and “had no rights which the white

supreme-courts-dred-scott-ruling/2020/07/01/555a775e-bbb4-11ea-8cf5-9c1b8d7f84c6_story.html.

⁵ *Id.*

⁶ *Id.*; *Building History*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/buildinghistory.aspx> (last visited Jan. 18, 2021).

⁷ *Old Supreme Court Chamber*, ARCHITECT OF THE CAPITOL, <https://www.aoc.gov/explore-capitol-campus/buildings-grounds/capitol-building/senate-wing/old-supreme-court-chamber> (last visited Jan. 18, 2021).

⁸ Rebecca Shabad, *House votes to remove Confederate statues, bust of chief justice from Capitol*, NBC NEWS (July 22, 2020), <https://www.nbcnews.com/politics/congress/house-vote-removing-confederate-statues-bust-chief-justice-capitol-n1234587>.

⁹ Sonmez & Kane, *supra* note 4.

¹⁰ *Id.*

¹¹ Josh Hicks & Ovetta Wiggins, *Justice Taney defended slavery in 1857. Now his statue is gone from Md.'s State House*, WASH. POST (Aug. 18, 2017), https://www.washingtonpost.com/local/md-politics/md-senate-president-slams-hogan-for-fast-vote-to-remove-taney-statue/2017/08/17/41833b12-8390-11e7-ab27-1a21a8e006ab_story.html.

¹² Jessica Anderson, *Taney statue is moved from outside Frederick City Hall*, BALT. SUN (Mar. 18, 2017), <https://www.baltimoresun.com/maryland/bs-md-ci-frederick-statues-20170318-story.html>.

¹³ *Name of ex-Supreme Court justice taken off historic warship*, WASH. POST (July 1, 2020), https://www.washingtonpost.com/national/name-of-ex-supreme-court-justice-taken-off-historic-warship/2020/07/01/8343e41e-bbed-11ea-97c1-6cf116ffe26c_story.html.

man was bound to respect.”¹⁴ These comments, along with Taney’s repudiation of the Missouri Compromise, are widely considered to have inched the United States closer to the Civil War.¹⁵ The proposed legislation states: “Chief Justice Roger Brooke Taney’s authorship of *Dred Scott v. Sandford* . . . renders a bust of his likeness unsuitable for the honor of display to the many visitors to the United States Capitol.”¹⁶

It is important to note, however, what Taney’s detractors are not alleging. While other historical figures have been excoriated for being slaveholders, these charges have not been leveled against Taney. As a young man, Taney held fairly enlightened views of slavery (he once referred to slavery as a “blot on our national character”) and, as a young adult, he freed his own slaves.¹⁷ And on at least two occasions in his legal career, Taney defended black clients.¹⁸

Nor are Taney’s detractors alleging that Chief Justice’s entire body of jurisprudence is riddled with racism and error. Eminent Supreme Court historian Bernard Schwartz ranks Taney as one of the great justices to sit on the bench: “Taney’s one judicial blunder,” he writes, “should not overshadow his numerous accomplishments on the Court.”¹⁹ After methodically marshaling the evidence to support his assertion of Taney’s greatness, Schwartz ends his assessment with a quotation from Justice Felix Frankfurter:

The devastation of the Civil War for a long time obliterated the truth about Taney. And the blaze of Marshall’s glory will permanently overshadow him. But the intellectual power of his opinions and their enduring contribution to a workable adjustment of the theoretical distribution of authority between two governments for a single people, place Taney second only to Marshall in the constitutional history of our country.²⁰

Modern Supreme Court justices have also praised Taney. Former Chief Justice William H. Rehnquist once remarked that Taney had “a first-rate legal

¹⁴ *Scott v. Sandford*, 60 U.S. 393, 407 (1856).

¹⁵ Melvin I. Urofsky, *Dred Scott decision*, BRITANNICA, <https://www.britannica.com/event/Dred-Scott-decision> (last updated Feb. 27, 2021).

¹⁶ David M. Higgins II, *Hoyer introduces legislation to remove bust of Maryland’s only Chief Justice of SCOTUS from the US Capitol*, S. MD. CHRON. (Mar. 10, 2020), <https://southernmarylandchronicle.com/2020/03/10/hoyer-introduces-legislation-to-remove-bust-of-marylands-only-chief-justice-of-scotus-from-the-us-capitol/>. While the bill was passed by the House of Representatives on July 22, 2020, it has not been voted on by the United States Senate. See Shabad, *supra* note 8.

¹⁷ See *Taney deserves his tribute*, BALT. SUN (Feb. 17, 2016), <https://www.baltimoresun.com/opinion/readers-respond/bs-ed-taney-letter-20160217-story.html>.

¹⁸ Timothy S. Huebner, *Roger B. Taney and the Slavery Issue: Looking beyond – and before – Dred Scott*, 97 J. AM. HIST. 17, 19 (2010).

¹⁹ Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L. REV. 93, 102 (1995).

²⁰ *Id.* at 108.

mind and was a clear, forceful writer,”²¹ and Antonin Scalia lamented the fact that “the luster of [Taney’s] great Chief Justiceship came to be eclipsed by *Dred Scott*.”²²

As America continues its national conversation on racism, and as it reconsiders the monuments to political figures and Confederate leaders, it is instructive to consider the Taney example and ask whether it sets a definite standard for when statues (and other memorials) to Supreme Court justices should be removed. Are only racist judicial opinions to be considered in determining whether a statue of a justice falls? Does service in the Confederate Army or the ownership of slaves dictate the removal of these memorials? Should a justice’s biases, prejudices, and personality be considered? And should monuments to Supreme Court justices be treated differently than statues of presidents, generals, and explorers?

How we answer these questions will have real-world consequences, since statues of Supreme Court justices dot the United States. Chief Justice John Jay stands before the New York college which bears his name.²³ Statues of Chief Justice John Marshall can be found in Washington, DC, Virginia (Richmond, Warrenton, and Williamsburg), West Virginia, New York, Ohio, and Pennsylvania.²⁴ Chief Justice Edward Douglas White is memorialized in bronze in the United States Capitol and formerly in New Orleans, while statues of Chief Justice William Howard Taft can be found at the University of Cincinnati Law School and in Rapid City, South Dakota.²⁵

²¹ William H. Rehnquist, *Remarks of the Chief Justice*, 52 DUKE L.J. 787, 791 (2003).

²² Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 1002 (1992).

²³ Sam Roberts, *John Jay College to Unveil a New Tribute, in Bronze, to Its Namesake*, N.Y. TIMES (Dec. 7, 2014), <https://www.nytimes.com/2014/12/08/nyregion/john-jay-college-to-unveil-a-new-tribute-in-bronze-to-its-namesake.html>.

²⁴ See *John Marshall*, DC MEMORIALIST (May 4, 2017), <https://dcmemorialist.com/john-marshall/>; *A new statue of former Chief Justice John Marshall is installed at the Washington Monument in Richmond, Virginia*, DICKINSON COLL., <http://hd.housedivided.dickinson.edu/node/46432> (last visited Jan. 17, 2021); Heidi Baumstark, *John Marshall, Native Fauquier Son Turned National Icon*, MIDDLEBURG LIFE, <https://www.middleburglife.com/john-marshall-native-fauquier-son-turned-national-icon/> (last visited Jan. 17, 2021); *John Marshall, The Great Chief Justice*, WM. & MARY L. SCH., <https://law.wm.edu/about/ourhistory/John%20Marshall,%20the%20Great%20Chief%20Justice.php> (last visited Jan. 17, 2021); *Statue of U.S. Supreme Court Chief Justice John Marshall in a plaza at Marshall University*, LIBR. OF CONG. (May 7, 2015), <https://www.loc.gov/item/2015631804/>; *Chief Justice John Marshall, 1755-1835, plaster bust statue, facing right*, LIBR. OF CONG., <https://www.loc.gov/item/2005687290/> (last visited Jan. 17, 2021); *Chief Justice John Marshall, 1755-1835, seated bronze statue, facing right, in the Cleveland Court House*, LIBR. OF CONG., <https://www.loc.gov/item/2005687293/> (last visited Jan. 17, 2021); *Chief Justice John Marshall*, ASS’N FOR PUB. ART, <https://www.associationforpublicart.org/artwork/chief-justice-john-marshall/> (last visited Jan. 17, 2021).

²⁵ *Edward Douglass White*, ARCHITECT OF THE CAPITOL, <https://www.aoc.gov/explore-capitol-campus/art/edward-douglass-white> (last visited Jan. 17, 2021); Kevin Grace, *Looking East: William Howard Taft and the 1905 U.S. Diplomatic Mission to Asia*, UNIV. OF CINCINNATI, <https://libapps.libraries.uc.edu/sites/lookingeast/taft-and-uc/> (last visited Jan. 17, 2021); Michele Herrmann, *Sculpting Rapid*

Shortly before this article was published, the Kennebec County Board of Commissioners voted to remove the statue of Chief Justice Melville Weston Fuller from the front of the Kennebec County Courthouse in Augusta, Maine. The statue of native son Fuller was only erected in 2013, but less than ten years later the county board concluded that it should be relocated because of Fuller's link to the *Plessy v. Ferguson* decision.²⁶ Fuller did not write the majority decision which created the doctrine of "separate but equal," but he did vote with the majority. In the eyes of the county board, that was enough to tarnish his legacy.²⁷

The associate justices have also been memorialized in bronze and stone. They include Justices Joseph Story, L.Q.C. Lamar, Oliver Wendell Holmes, Jr., Louis D. Brandeis, Robert H. Jackson, William O. Douglas, Thurgood Marshall, William J. Brennan, Jr., and Sandra Day O'Connor.²⁸ This list does not include schools named after the justices, scholarships, and competitions established in their names, or historical markers at their places of birth and former residences.

When I first began researching this issue, I thought (incorrectly) that Roger Taney was the only justice whose monuments had been subject to a public debate. Quite by accident, however, I came across a short newspaper article about the removal of Justice James McReynolds' name from a small building

City's City of Presidents, FORBES (Aug. 6, 2019), <https://www.forbes.com/sites/mich-eleherrmann/2019/08/06/sculpting-rapid-citys-city-of-presidents/?sh=4ac2c94a1837>; Bryn Stole, *Edward Douglas White statue removed from steps of Louisiana Supreme Court*, NEW ORLEANS ADVOC. (Dec. 23, 2020), https://www.nola.com/news/courts/article_486698fc-456b-11eb-b7c8-57bde572d9f2.html.

²⁶ *Plessy v. Ferguson*, 163 U.S. 537, 540, 551 (1896).

²⁷ Hannah Dineen, *Statue of Justice Melville Fuller to be moved from front of Kennebec County Courthouse*, NEWS CENTER MAINE (Feb. 16, 2021), <https://www.newscentermaine.com/article/news/local/statue-of-justice-melville-fuller-to-be-moved-from-front-of-kennebec-county-courthouse/97-e061ba40-e0b4-47a3-96bb-652a4d14525f>.

²⁸ See *Bronx Public Art Inventory*, LEHMAN COLL., <http://www.lehman.edu/vpadvance/artgallery/publicart/inventory/index.html> (last visited Jan. 17, 2021); Julian Cardillo, *Louis Brandeis statue enlivens campus*, BRANDEIS NOW (Apr. 28, 2016), <https://www.brandeis.edu/now/2016/april/louis-brandeis-statue-tbt.html>; Corydon Ireland, *Evidence of Greatness: HLS Showcases Life and Work of Joseph Story*, HARV. L. TODAY (Nov. 19, 2012), <https://today.law.harvard.edu/evidence-of-greatness-hls-showcases-life-and-work-of-joseph-story/>; *Justice O'Connor statue unveiled at courthouse*, DESERET NEWS (Sept. 5, 2002), <https://www.deseret.com/2002/9/5/19675706/justice-o-connor-statue-unveiled-at-courthouse>; Nancy Jo Maples, *L.Q.C. Lamar house exhibits explore Mississippi's Civil War era*, TODAY IN MISS., http://www.todayinmississippi.com/special_feature/article/5640 (last visited Jan. 17, 2021); *Robert H. Jackson Statue Receives Upkeep from Its Creator Prior To Rededication*, POST-JOURNAL (Sept. 27, 2016), <https://www.post-journal.com/news/page-one/2016/09/robert-h-jackson-statue-receives-upkeep-from-its-creator-prior-to-rededication/>; *The Thurgood Marshall Memorial*, MD. STATE ARCHIVES (June 21, 2006), <https://msa.maryland.gov/msa/stagser/s1259/121/6259/html/0001.html>; Victoria St. Martin, *Newark honors one of its own with statue of U.S. Supreme Court Justice Brennan*, STAR-LEDGER (Apr. 1, 2019), https://www.nj.com/news/2010/06/us_supreme_court_justice_brenn.html; *60 Years Ago, Hike by Justice Douglas Saved the C&O Canal*, GEORGETOWNER (Apr. 21, 2014), <https://georgetowner.com/articles/2014/04/21/60-years-ago-hike-justice-douglas-saved-co-canal/>.

on the Centre College campus. The controversy over McReynolds Hall offers a new case study of the modern debate over the memorialization of Supreme Court justices, only in this instance the debate had nothing to do with Justice McReynolds' Supreme Court opinions.

I. Justice James Clark McReynolds: The “Ebenezer Scrooge” of the Court

James Clark McReynolds was born in Elkton, Kentucky on February 3, 1862.²⁹ His father, John Oliver McReynolds, was a plantation owner and doctor who owned twenty-four slaves in 1860.³⁰ Dr. McReynolds supported secession from the Union and served as a military doctor in the Confederate Army.³¹ While McReynolds was too young to recall his family owning slaves, it is likely that female “house slaves” tended to the new infant. McReynolds studied at Vanderbilt University and the University of Virginia School of Law before briefly servicing as a private secretary to Senator Howell E. Jackson; McReynolds subsequently practiced law for almost twenty years in Nashville, Tennessee.³² He was an assistant attorney general in the Roosevelt Administration, practiced law in New York, and served briefly as President Woodrow Wilson's attorney general, before being elevated to the Supreme Court in 1914.³³ McReynolds sat on the bench until his retirement in 1941.³⁴

McReynolds was unquestionably the most unpleasant individual to sit on the Supreme Court bench. The list of adjectives that could be used to describe McReynolds includes racist, anti-Semite, misogynist, imperious, lazy, miserly and curmudgeon. Those who regularly interacted with McReynolds – his fellow justices, his long-time messenger, his domestic staff, his law clerks, and even members of his country club – were targets of his snobbery and vitriol. Chief Justice William Howard Taft himself once described McReynolds as a “continual grouch” and “selfish to the last degree...fuller of prejudice than any man I have ever known...one who delights in making others uncomfortable. He has no sense of duty... [and] really seems to have less of a loyal spirit to the Court than anybody.”³⁵

²⁹ REBECCA S. SHOEMAKER, *THE WHITE COURT: JUSTICES, RULINGS, AND LEGACY* 86 (2004).

³⁰ See John Oliver McReynolds, CIV. WAR GOVERNORS OF KY., <http://discovery.civilwargovernors.org/document/N00000321> (last visited Jan. 12, 2021).

³¹ SHOEMAKER, *supra* note 29, at 86.

³² See *id.*

³³ *Attorney General: James Clark McReynolds*, U.S. DEP'T OF JUST. (June 29, 2017), <https://www.justice.gov/ag/bio/mcreynolds-james-clark>.

³⁴ *Id.*

³⁵ Albert Lawrence, *Biased Justice: James C. McReynolds of the Supreme Court of the United States*, 30 J. SUP. CT. HIST. 244, 248 (2005).

Some criticism of McReynolds, however, seems remarkably petty. Biographers and journalists sniped at McReynolds for being a mediocre golfer whose slow play held up foursomes behind him.³⁶ He hated tobacco and would ask smokers to extinguish their cigarettes and cigars, was a dangerous driver, and may have had an affair with a married woman.³⁷ Even his physical appearance was fair game: “McReynolds is a bachelor, tall, slender and has a face with such a Satanic look that in it there is a certain charm.”³⁸

Like many controversial figures, however, the stories about McReynolds’ nasty personality have taken on a life of their own and the line between fact and fiction has been blurred. In a recent article, Supreme Court historian Franz Jantzen debunks two popular rumors related to McReynolds’ antisemitism: (1) that McReynolds refused to have his official portrait taken because he did not want to sit next to Louis Brandeis (the first Jewish justice), and (2) that McReynolds refused to attend the swearing-in ceremony of Felix Frankfurter (the third Jewish justice).³⁹ While conceding that McReynolds had racist and religious prejudices, Jantzen ends with an important warning: “We can only truly take the measure of the man by using those things that he actually said and did... not by using myth and innuendo.”⁴⁰

Nor can you take the full measure of the man without discussing all of his attributes – positive and negative. In a 1939 *Time* article, the magazine raised a familiar set of charges against the Justice: he was a man “intolerably rude, antiSemitic [sic], savagely sarcastic, incredibly reactionary, Puritanical, prejudiced.”⁴¹ The same article, however, observed that the McReynolds “legend” (an important choice of words) “had little to say about his tenderness to his narrow circle of friends, his unfailing generosity, his clear legal perception, his unerring eye and ear for the false, the unessential.”⁴²

One of those friends was McReynolds’ roommate at Vanderbilt University, Price Gilbert. Almost seventy years after they first met, Gilbert still remembered how the two men first met and McReynolds helped him overcome his homesickness: after graduation, the former roommates – living in

³⁶ *See id.* at 250.

³⁷ John Fox, *Biographies of the Robes: James Clark McReynolds*, PBS (Dec. 2006), https://www.thirteen.org/wnet/supremecourt/capitalism/robes_mcreynolds.html; *see also* Barry Cushman, *Clerking for Scrooge*, 70 U. CHI. L. REV. 721, 728 (2003); Lawrence, *supra* note 35, at 245, 249.

³⁸ DREW PEARSON & ROBERT S. ALLEN, *THE NINE OLD MEN* 231 (1936).

³⁹ Franz Jantzen, *From the Urban Legend Department: McReynolds, Brandeis and the Myth of the 1924 Group Photograph* 40 J. SUP. CT. HIST. 325, 327 (2015).

⁴⁰ *Id.* at 331.

⁴¹ *Judiciary: Alone*, TIME (Dec. 4, 1939), <http://content.time.com/time/magazine/article/0,9171,762929,00.html>.

⁴² *Id.*

different states – made a point of seeing each other at least once a year.⁴³ While acknowledging that McReynolds was not a patient man, Gilbert stated that his long-time friend was “as tender and kind and brilliant and just as any man I will ever know.”⁴⁴

Others have also acknowledged that McReynolds was not a one-dimensional, black-hearted monster. While newspaper reporters Drew Pearson and Robert S. Allen were hardly fans of McReynolds, they conceded that “[t]here is another side of Justice McReynolds which few people have glimpsed, but those who have say it is human and kindly beyond belief” (sarcastically adding “[p]erhaps it gleams more beautifully because it is so rare and hard to penetrate”).⁴⁵ They add that “[t]hose who really know him – and they can be counted on the fingers of the hand – refer to him as ‘Old Mac’ and say his sardonic bluster is chiefly for effect.”⁴⁶ And the newspaper reporters gave a nod to his “moments of mellowness,” citing his visits to the aging Justice Oliver Wendell Holmes, Jr. and the fact that McReynolds “broke down and wept” at the funeral of Fanny Holmes.⁴⁷

Finally, the grudging praise for McReynolds glosses over his consistent acts of charity, the most significant being the Justice’s decision to financially support thirty-three English children orphaned during bombing raids by German forces.⁴⁸ “I have always loved children,” McReynolds explained to a *Washington Post* reporter:

During the last war, I adopted some French babies. When they grew older they wrote to me, and I have kept a number of their letters. I know little about my new family except that they are the unfortunate little sufferers of a cruel war which, despite our supposed civilization, now threatens the entire world.⁴⁹

McReynolds’ friends spoke of his quiet acts of charity. “There’s no way to tell how many persons Justice McReynolds aided financially,” commented a former classmate and long-time acquaintance: “[h]e did this frequently and no one but the but the person he aided ever knew about his

⁴³ Daniel Bailey, *Atlanta Friend Praises McReynolds’ Qualities*, ATLANTA CONST., Aug. 26, 1946, at 4, Newspapers.com, Image No. 398017348.

⁴⁴ *Id.* (noting that Price Gilbert also enjoyed a prestigious legal career, serving twenty years as a justice on the Georgia Supreme Court).

⁴⁵ PEARSON & ALLEN, *supra* note 38, at 226.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *M’REYNOLDS CARES FOR 33 CHILDREN; Jurist Also Offers to Be the First of Thousand Donors of \$10,000 for Young Britons ADOPTEES’ AGED 1 TO 14 Some Dunkerque Orphans -- Save the Children Chairman Will Fly to England*, N.Y. TIMES (July 17, 1941), <https://www.nytimes.com/1941/07/17/archives/mreynolds-cares-for-33-children-jurist-also-offers-to-be-the-first.html>.

⁴⁹ S.J. Woolf, *McReynolds Adopts War Orphans, Hunts Ducks*, WASH. POST, Aug. 3, 1941, at B5, ProQuest, Doc. No. 151351213.

deeds.”⁵⁰ Many of McReynolds’ lesser-known charity acts extended to the poor in his hometown of Elkton, Kentucky. Despite his reputation of being a racist, McReynolds repeatedly provided financial support for the Todd County Training School (a school for black students in his hometown of Elkton, Kentucky)—including donating \$250 for a new playground.⁵¹ And on one occasion, McReynolds invited the 185 students who attended the school to an informal reception at his Elkton home: “[h]e has shown [himself to be] a true friend of the children,” the school principal explained to a local reporter.⁵²

McReynolds’ generosity extended to the poor in the District of Columbia. Talking to newspaper reporters after the Justice’s death, another former Vanderbilt classmate recalled a story told by a mutual friend about his visit to Washington:

[A]fter dining with him McReynolds had suggested a short drive about the city. [John Bell] Keeble said that the car turned into a slum district and soon the car was surrounded by a group of children yelling, “Here’s the Judge.” It seems that the residents of the area had been beneficiaries of McReynolds at Christmas and on other occasions, and his visits to the area were always greeted by enthusiastic demonstrations on the part of the children as soon as he was recognized.⁵³

The 1939 *Time* article also acknowledged that McReynolds’ critics seldom considered his voting record: “[l]east-recognized was his long-time alertness for the preservation of civil liberties.”⁵⁴ McReynolds wrote two important majority opinions: *Meyer v. Nebraska*⁵⁵ and *Pierce v. Society of Sisters*.⁵⁶ In the *Meyer* case, McReynolds drafted an opinion which overturned a Nebraska law outlawing the teaching of German in public schools;⁵⁷ in *Pierce*, McReynolds—writing for a unanimous court—found that a law requiring children to attend public schools violated their parents’ liberty interests in

⁵⁰ Leslie T. Hart, *Friends Here Pay Tribute to Noted Jurist*, NASHVILLE BANNER, Aug. 26, 1946, at 1, Newspapers.com, Image No. 603268393.

⁵¹ Stanley Cower, *The Welcome Mat is Out for Elkton’s Famed Son, ‘Mr. Justice’ McReynolds*, COURIER-J., Jan. 26, 1941, at 38, Newspapers.com, Image No. 107128077 (noting the Justice McReynolds has given “several hundred dollars” to the school and bought it a playground); *Gift to School: Justice McReynolds Sends \$250 for Elkton Negro Playground*, NASHVILLE TENNESSEAN, Nov. 9, 1939, at 8, Newspapers.com, Image No. 161002925; *McReynolds Expected to Reside in Elkton*, NASHVILLE BANNER, Jan. 22, 1941, at 8, Newspapers.com, Image No. 602792372 (noting a monetary gift from Justice McReynolds to Todd County Training School).

⁵² A. Brown Ransdell, *McReynolds Retires to Quiet of Elkton in Keeping with his Career—Without Fanfare*, COURIER-J., Mar. 10, 1941, at 9, Newspapers.com, Image No. 107792308.

⁵³ Nashville Banner, *McReynolds’ Fierce Honesty, Integrity Praised by Dr. Cullom Aug. 28, 1946*, NEWSPAPERS (Mar. 30, 2021) (recounting a story of McReynolds from John Bell Keeble, dean of Vanderbilt Law School from 1915 to 1929).

⁵⁴ *Judiciary: Alone*, *supra* note 41.

⁵⁵ *Meyer v. Nebraska*, 262 U.S. 390, 396 (1923).

⁵⁶ *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 529 (1925).

⁵⁷ *Meyer*, 262 U.S. at 402–03.

deciding how their children would be educated.⁵⁸ Modern courts have drawn upon McReynolds' reasoning in these cases, including cases involving reproductive freedom.⁵⁹

During his tenure, McReynolds earned a reputation of an economic conservative who consistently voted to strike down President Franklin Roosevelt's New Deal legislation, and McReynolds admittedly held Roosevelt in contempt.⁶⁰ McReynolds' constitutional objections to the New Deal programs, however, were shared with at least three other Supreme Court justices and his economic jurisprudence is hardly scandalous.⁶¹ Overall, McReynolds wrote over 500 majority opinions and approximately 150 dissenting opinions—none of which have been attacked as being grounded on racial, antisemitic, or misogynistic views.

So what is the final picture of McReynolds? What emerges is a flawed, angry man who did have racist and antisemitic beliefs. While several of his fellow justices were targets of McReynolds' scorn, clearly the Jewish justices who sat with McReynolds—Louis Brandeis, Benjamin Cardozo, and Felix Frankfurter—were singled out. McReynolds was a lazy justice, who often put his own desires and whims (duck hunting, golf, vacations) ahead of Court business. McReynolds fired several of his law clerks for minor infractions (such as smoking) and threatened to fire others.⁶² And his opinions, while serviceable, do not distinguish him as a jurist. But McReynolds was not without positive attributes as well. He had a sense of humor (seldom used) and a loyal circle of friends.⁶³ And in his later years, McReynolds was

⁵⁸ *Pierce*, 268 U.S. at 534–35.

⁵⁹ See e.g., *Griswold v. Connecticut*, 381 U.S. 479, 481–83 (1965) (reaffirming *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923)) (holding that married couples are entitled to birth control in part due to First Amendment considerations); *Planned Parenthood Ariz., Inc. v. Brnovich*, 172 F. Supp. 3d 1075, 1092 (D.C. Ariz. 2016) (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)) (allowing abortion clinics to assert rights on behalf of clients); *Hodes & Nauser v. Schmidt*, 440 P.3d 461, 483 (Kan. 2019) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)) (upholding freedom to choose to bear a child without government interference).

⁶⁰ See R.V. Fletcher, *Mr. Justice McReynolds--An Appreciation*, 2 VAND. L. REV. 35, 35, 45–46 (1948); William E. Leuchtenburg, *When Franklin Roosevelt Clashed With the Supreme Court—and Lost*, SMITHSONIAN MAG. (May 2005), <https://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/>.

⁶¹ Collectively, these four justices were known as the “Four Horsemen” of the New Deal era court. See Leuchtenburg, *supra* note 60.

⁶² See Linda Blackford, *Centre College removes name of bigoted U.S. Supreme Court justice from building*, LEXINGTON HERALD LEADER (Feb. 8, 2017), <https://www.kentucky.com/news/local/education/article131265484.html> (describing McReynolds' racism, antisemitism, and work ethic). Fire-able offenses for McReynolds' clerks included taking one's suit jacket off, smoking, drinking, and studying for the bar exam. See, e.g., Cushman, *supra* note 37, at 728, 747 n. 81.

⁶³ See James W. Douthat, *Testimony Is Conflicting On McReynolds' Temper*, COURIER-J., Jan. 26, 1941, at 8, Newspapers.com, Image No. 107128077.

repeatedly moved to large and small acts of charity—many of which were kept private at the Justice’s direction.⁶⁴

Having briefly discussed McReynolds the man and the Justice, let us turn to the story of how a small group of college students found themselves debating the Justice’s legacy. In the early 1940s, McReynolds began visiting Centre College—a small liberal arts college located in Danville, Kentucky.⁶⁵ McReynolds’ interest in the college was sparked by his friendship with Centre College alumnus, (and fellow Kentuckian) William Jennings Price - a member of the class of 1892, a lawyer, and law professor who President Woodrow Wilson selected to serve as ambassador to Panama.⁶⁶ After Price left the diplomatic corps in the early 1920s, he served as dean of Georgetown Law School and then as counsel for the Federal Deposit Insurance Corporation.⁶⁷

It is unknown how the two native sons of Kentucky met, but they regularly socialized when they lived in Washington: “The Prices and the Justice are exceedingly warm friends and they ‘break bread’ with each other every few days, never in fact, missing a week,” reported the *Advocate-Messenger*.⁶⁸ “This friendship is of long and most pleasant duration and will go on to the very end.”⁶⁹

It appears that McReynolds first visited Centre College in August of 1940, when Price accompanied him on a trip from Washington to Danville. McReynolds was feted by the local bar association and presented with a three-year-old Kentucky ham before traveling to Centre College to pay homage to one of its most famous graduates, former Supreme Court Justice John Marshall Harlan.⁷⁰ Danville’s local newspaper was thrilled by McReynolds’ visit: “we here in this ‘Athens of the South’ do know and do appreciate a gentleman of the culture and refinement of our guest,” gushed the *Advocate-Messenger*.⁷¹ “Our hope is that he will be so impressed with this lovely environment that he will place Danville as his stopping place annually to and

⁶⁴ See, e.g., *McReynolds Endows Centre College, Ky.*, BRISTOL NEWS BULL., Aug. 28, 1946, at 8 (noting McReynolds’ will left \$183,000 to schools, hospitals, churches and individuals); Woolf, *supra* note 49, at B5 (regarding McReynolds’ adoption of 33 children of war).

⁶⁵ See Vernon Richardson, *True Philanthropy*, ADVOC.-MESSENGER, Aug. 18, 1942, at 4, Newspapers.com, Image No. 143195326.

⁶⁶ *Id.*

⁶⁷ *See id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Vernon Richardson, *Bar Association Members Greet Jurist at Farm Inn*, ADVOC.-MESSENGER, Aug. 9, 1940, at 1, Newspapers.com, Image No. 142922767.

⁷¹ Vernon Richardson, *Danville is Honored Today*, ADVOC.-MESSENGER, Aug. 9, 1940, at 4, Newspapers.com, Image No. 142922793.

from his birthplace in the years to come. Mr. Justice McReynolds, we gladly salute you with a deep bow.”⁷²

McReynolds returned to Centre College in June of 1941 to be celebrated by the Board of Trustees at a luncheon before receiving an honorary doctor of laws degree.⁷³ Described by the *Advocate-Messenger* as “the great jurist” and the “stalwart opponent of the New Deal,” the newspaper spoke of the conferring of the honorary degree in awe-struck terms: “So the great man came and he seemed to tower in stature far above all around him, as he strode across the rostrum of the Second Presbyterian Church to receive the merited honor.”⁷⁴ Based on the bonds of friendship which existed between McReynolds and the residents of Danville, the *Advocate-Messenger* concluded that Centre College “made no mistake in conferring the above honor” to the “grand old man” of Elkton, Kentucky.⁷⁵

During a visit to the college campus in 1942, McReynolds announced that he was giving \$10,000 to Centre College to be used “to promote instruction of girls in domestic affairs.”⁷⁶ “He said at that time that housekeepers of the future would have to do more of their own work and depend less upon domestic servants,” reported the *Courier-Journal*.⁷⁷ At the time of the announced gift, Centre College president Robert L. McLeod, Jr. informed reporters of the pressing need for home economics courses: “Centre College...is taking a realistic view of the future,” said McLeod.⁷⁸ “Young men returning from the present war will expect more of their wives than men have before. That is an inevitable result of the hardship and exacting responsibilities of their war experiences.”⁷⁹ McLeod added that such courses would also prepare its female students for “happiness and success in life.”⁸⁰

Around this time, the College also started awarding the “Justice McReynolds Prize,” which came with cash awards for the best essays on American

⁷² *Id.*

⁷³ *Centre College Pays Honor to Admiral H.E. Kimmel, Retired Justice McReynolds*, CINCINNATI ENQUIRER, June 3, 1941, at 10, Newspapers.com, Image No. 102714897.

⁷⁴ *Former Justice McReynolds Rises Higher in Hearts of All*, ADVOC.-MESSENGER, July 14, 1941, at 4, Newspapers.com, Image No. 142921633.

⁷⁵ *Id.*

⁷⁶ *Centre College Bequest Estimated At \$50,000*, COURIER-J., Sept. 22, 1946, at 14, Newspapers.com, Image No. 108405076.

⁷⁷ *Id.*

⁷⁸ *McReynolds Donates \$10,000 to Centre*, COURIER-J., Aug. 15, 1942, at 11, Newspapers.com, Image No. 107271219.

⁷⁹ *Id.*

⁸⁰ *Id.*

citizenship.⁸¹ Centre College would also create a Justice McReynolds prize for its top home economics students.⁸²

After his death in 1946, the childless McReynolds bequeathed his large estate to a number of different individuals and organizations. His largesse included one hundred-thousand-dollar gifts to Vanderbilt University, the University of Virginia, the District of Columbia Children's Hospital, the Kentucky Female Orphans Homes, and Centre College.⁸³ As with his earlier gift, McReynolds' will stipulated that the money be used to support Centre College's home economics program.⁸⁴

Found in the Centre College Board of Trustee Minutes is the acknowledgment of McReynolds' gift. The November 15, 1946, minutes read as follows:

Report was made this day to the Board of Trustees of Centre College that Supreme Court Justice James C. McReynolds by his will has given to Centre a specific legacy of \$10,000 and also has made Centre one of the three residuary legatees of his estate, and that the total gift from the estate of Justice McReynolds may amount to \$59,000. This Board wishes to express its gratification that Centre was selected by such an illustrious American as worthy of his benefaction.⁸⁵

To be fair, Centre College was not the only academic institution that lauded McReynolds upon his death. Vanderbilt University also benefited from McReynolds' financial gifts, both before and after the Justice's death, and publicly commented that the university was "deeply grieved over the passing of Justice McReynolds" and had "lost a valuable friend, and the country a great citizen."⁸⁶

The Centre College Board of Trustees also acknowledged the role of William Price in bringing McReynolds into the bosom of the college. "We wish further to express to William J. Price '92 our appreciation of the fact that it was he who first brought Justice McReynolds into the warm fellowship of Centre College."⁸⁷ In honor of McReynolds' gift, Centre College renamed a recently constructed building in his honor; the newly christened McReynolds Hall housed both the campus cafeteria on its first floor and the men's dormitory on its second.⁸⁸ In subsequent decades, the first floor served

⁸¹ See *Justice McReynolds Prize*, ADVOC.-MESSENGER, June 3, 1942, at 4.

⁸² *Scholarships Given*, ADVOC.-MESSENGER, June 13, 1949, at 3.

⁸³ See David Burner, *James C. McReynolds*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1978, at 2033 (Leon Friedman & Fred L. Israel eds., 1980).

⁸⁴ See OKLA. CITY STAR, Oct. 13, 1946, at 43, Newspapers.com.

⁸⁵ E-mail from Beth Morgan, Technical Services, Centre College Grace Doherty Library, to Todd Peppers (on file with author).

⁸⁶ Hart, *supra* note 50, at 1, 6.

⁸⁷ E-mail from Beth Morgan, *supra* note 85.

⁸⁸ *McReynolds Hall*, CENTRE COLL. CENTRECYCLOPEDIA, <https://sc.centre.edu/ency/m/mcreynolds.html> (last visited Jan. 23, 2021); Scott Jaschik, *Centre Removes Name of Bigot From Building*, INSIDE HIGHER

as the student health center and the home to the college's information technology department.

The story of Justice McReynolds and Centre College jumps to the spring of 2016, when three Centre College sophomores—Drew Howard, Jake McGuirk, and Will Schein—become interested in the history of McReynolds Hall and started doing research on the late Justice. They consulted a small number of biographical materials, including a chapter on McReynolds contained in *The Justices of the United States Supreme Court*⁸⁹ and the aforementioned 1939 *Time* article.⁹⁰ The students were dismayed at the picture that emerged. “I would say [that] the overwhelming reaction was to almost laugh at the absurdity of his character,” recalled Howard.⁹¹ “[H]e seemed to be this exaggerated stereotype of a person; a cartoonish caricature of this lonely old misogynistic anti-Semite.”⁹²

In the fall of 2017, the three students shared their research with Centre College administrators and pushed for the Justice's name to be stripped from McReynolds Hall. The students, however, wanted more than the name removed: “[t]he question was how to not just remove the name, but how to engage students and how to fit this into the context of Centre [College],” explained Drew Howard.⁹³

The “teachable moment” that the students wanted did not materialize. After concluding that the administration was not going to recommend a name change to the Board of Trustees, the three young men were shocked when the campus community received a February 1, 2017 email from college president John Rauch. The email read as follows:

I write today to share with you an announcement from our recent Board of Trustees meeting....In response to a request from students to remove the name of James C. McReynolds from McReynolds Hall (which is both a residence hall and the location of our Information Technology Services), the Trustees, at their meeting on Saturday, January 28, decided to remove the name. The name will be removed from the building and we will cease using the name as a reference in our literature, Website, and other places. Going forward, we plan to refer to the building by its address, 762 West Main.

The request from students grew out of their research uncovering that James C. McReynolds, who had served the nation as Attorney General (1913-1914)

ED (Feb. 7, 2017), <https://insidehighered.com/quicktakes/2017/02/07/centre-removes-name-bigot-building>.

⁸⁹ Burner, *supra* note 83, at 2023.

⁹⁰ *Judiciary: Alone*, *supra* note 41.

⁹¹ E-mail from Drew Howard to Todd Peppers (July 10, 2020, 11:57 EST) (on file with author).

⁹² *Id.*

⁹³ Telephone Interview with Drew Howard (July 9, 2020).

and, then, as Associate Justice of the U. S. Supreme Court (1914-1941), was a man with strident opinions, expressed publicly, that were discriminatory against Jewish people, women, African Americans, and others. This was captured in news articles about him in the 1930s and 1940s and in biographical sketches about him. In fact, the majority of accounts of his career focus on his discriminatory views, rather than his legal opinions or other work.

You should know that there were more virtuous aspects to his life, too, including some rather generous acts of charity in his lifetime and through his estate. McReynolds adopted 33 war orphans from Europe during World War II, and brought them to America under his support. He left the bulk of his estate to a number of charities; Centre received an unrestricted gift of \$59,000 (equal today to over \$730,000). It was this benevolence toward Centre and his high stature in public service that inspired the College's Board of Trustees, upon his death in 1946, to choose to name what was then a men's dormitory and dining hall in his honor. McReynolds was not a Centre graduate and had no direct relationship with the College otherwise.

The Board of Trustees took this action at its recent meeting to remove the name because the views for which McReynolds became most closely identified are completely inconsistent with the values fully embraced today by the College, those of inclusion, diversity, and tolerance. A key factor for the Board was that the values McReynolds publicly expressed were not generally accepted in his own time. The Board did not take this step lightly or without deep discussion, but did so resolutely to uphold the College's values.⁹⁴

At least one of the students who spearheaded the McReynolds discussion was disappointed in the email. "I wish that the College had gone farther and made it a statement about the college and its values," said Howard. "It seemed like the College was tip-toeing around."⁹⁵

The email to the campus community contained several odd statements. While it is true that "McReynolds was not a Centre graduate and had no direct relationship with the College," the email did not acknowledge that McReynolds was cultivated by the College; honorary degrees are a time-honored method of getting potential donors to write large checks to an academic institution. Moreover, the email did not acknowledge that the College awarded McReynolds an honorary degree and named two academic awards after him. Finally, there was no indication that the College considered returning Reynolds' financial gift.

The strangest statement, however, came at the end of the email. A key factor for the Board was "values McReynolds publicly expressed were not

⁹⁴ E-mail from John A. Roush, President, Centre C., to Centre C. Students and Staff (Feb. 1, 2017, 5:25 EST) (on file with author).

⁹⁵ Interview with Drew Howard, Student, Centre C. (July 10, 2020).

generally accepted in his own time.”⁹⁶ The question which immediately arises – not generally accepted by whom? Any student of history knows that many Americans shared McReynolds’ views towards minorities and Jews during the time period, especially in the Jim Crow South. Not only were McReynolds’ values shared by a significant portion of the population, they were seemingly shared by the same Centre College Board of Trustees that voted to give McReynolds an honorary degree and referred to McReynolds in 1946 as an “illustrious American.”⁹⁷

To be fair, Centre College was not the only academic institution that sought to associate itself with McReynolds. Justice McReynolds had long-standing ties with Vanderbilt University, teaching at the law school from 1899 to 1903, serving on its Board of Trust from 1907 to 1946, contributing “substantially” to the law school endowment, creating prizes for undergraduate student essay competitions, serving as a commencement speaker on two occasions, and routinely participating in university commencement exercises.⁹⁸ The *Nashville Banner* referred to McReynolds as “one of Vanderbilt’s most conspicuous alumni.”⁹⁹ In recognition of this special relationship, McReynolds’ executor donated the late Justice’s judicial robe to the Vanderbilt Law School.¹⁰⁰

CONCLUSION

So what should be taken from the Taney and McReynolds’ case studies? It is difficult to extrapolate from them because the two cases involve such extremes – the most notorious case in Supreme Court history (Taney) and the most obnoxious personality to ever sit on the Supreme Court bench (McReynolds). Moreover, the two cases involve different motivations for memorializing the two men; while Taney’s statues and busts were arguably an endorsement of his racial attitudes, Centre College honored McReynolds because of his financial contributions to the institution. There is no evidence

⁹⁶ Stewart Coard, *McReynolds Hall is Renamed Amid Revelations*, CEN TO (Mar. 9, 2017), <https://cento.centre.edu/2017/03/09/mcreynolds-hall-is-renamed-amid-revelations/> (quoting an email sent by the President of the University).

⁹⁷ E-mail from Beth Morgan, *supra* note 85.

⁹⁸ *Alumni Dinner to Honor Justice McReynolds*, NASHVILLE TENNESSEAN, June 7, 1937, at 1, Newspapers.com, Image No. 160966625; *Alumni Speakers Urge Fuller Aid to Alma Mater*, TENNESSEAN, June 13, 1922, at 1, Newspapers.com, Image No. 119019584; *Distinguished Visitors*, NASHVILLE BANNER, June 1, 1937, at 4, Newspapers.com, Image No. 605276180; *Ex-Justice McReynolds, Vanderbilt Graduate, Dies in Capital Hospital*, NASHVILLE TENNESSEAN, Aug. 26, 1946, at 1, Newspapers.com, Image No. 143559923; *McReynolds in Elkton for Annual Two-Week Visit: May Come to Nashville for Vanderbilt Exercises*, NASHVILLE TENNESSEAN, May 30, 1938, at 3, Newspapers.com, Image No. 160986388.

⁹⁹ *Distinguished Visitors*, *supra* note 98.

¹⁰⁰ *McReynolds’ Robe Presented to Vanderbilt Law School*, NASHVILLE BANNER, Jan. 11, 1946, at 4.

to suggest that McReynolds Hall was so named because Centre College wanted to celebrate the Justice's racist views and grumpy demeanor. To a modern generation of college students, however, McReynolds Hall became a symbol of all that was ugly about the Justice.

If, however, a justice's jurisprudence and personality are relevant considerations, what other factors should be weighed? A few examples will show how complex this question is. Chief Justice John Marshall is considered by most legal historians to be the greatest chief justice in the history of the Supreme Court; the author of such seminal decisions as *Marbury v. Madison*¹⁰¹ and *McCulloch v. Maryland*¹⁰² was highly respected, if not loved, by his colleagues.¹⁰³ Yet, he also owned over two hundred slaves.¹⁰⁴

Hugo Black wrote many important Supreme Court opinions involving the First Amendment,¹⁰⁵ but he was also a former member of the Klu Klux Klan and penned the majority opinion in *Korematsu v. United States*¹⁰⁶ (the Japanese internment camp case).¹⁰⁷ William O. Douglas also wrote several important civil liberties opinions, but he was a gruff and impatient individual whose multiple marriages drew the ire of political conservatives.¹⁰⁸ Oliver Wendell Holmes, Jr. was one of the greatest justices to sit on the Supreme Court bench, but his jurisprudential legacy includes a majority opinion¹⁰⁹ that upheld Virginia's compulsory sterilization laws. Should their statues be destroyed, paintings removed, and names stripped off buildings and scholarships?

Finally, should the same standards be applied to justices, politicians, and generals? The answer will turn on how we believe that judges decide cases. The traditional legal model holds that judges find, not make law. Judges are not policy makers and do not have discretion to decide what the law should be. Instead, judges take the law (a law fashioned by legislators) and apply it to the facts of the case to reach an outcome. To do otherwise would violate the role that judges play in a governmental structure which divides powers

¹⁰¹ *Marbury v. Madison*, 5 U.S. 137, 152 (1803).

¹⁰² *McCulloch v. Maryland*, 17 U.S. 316, 400 (1819).

¹⁰³ See R. Kent Newmyer, *John Marshall as an American Original: Some Thoughts on Personality and Judicial Statesmanship*, 71 U. COLO. L. REV. 1365, 1378 (2000).

¹⁰⁴ See *id.* at 1371.

¹⁰⁵ See Nicandro Iannacci, *Hugo Black, unabashed partisan for the Constitution*, CONST. DAILY (Aug. 12, 2019), <https://constitutioncenter.org/blog/hugo-black-unabashed-partisan-for-the-constitution>.

¹⁰⁶ *Korematsu v. United States*, 323 U.S. 214, 215 (1944).

¹⁰⁷ See Iannacci, *supra* note 105.

¹⁰⁸ Spencer Rich, *William O. Douglas Dies at 81*, WASH. POST (Jan. 20, 1980), <https://www.washingtonpost.com/archive/politics/1980/01/20/william-o-douglas-dies-at-81/75701707-7e27-4414-95ee-220ec5f77d8e/>.

¹⁰⁹ *Buck v. Bell*, 274 U.S. 200, 205, 207 (1927).

and responsibilities between the executive, legislative and judicial branches.

Another competing theory of judicial decision-making, however, rejects the explanatory force of the traditional legal model. The attitudinal model posits that judges have discretion to say what the law is.¹¹⁰ At least at the level of the United States Supreme Court, the proponents of this model argue that the law is unclear (such in “cases of first impression) and that justices interpret the law based on their own political preferences.¹¹¹ Accordingly, justices are no different than politicians or military leaders – they have the power and desire to reach certain preferred outcomes.

So, assume that a long-dead justice wrote a judicial opinion that the current generation finds to be repugnant. This justice also has a fancy bronze statue outside of her hometown courthouse. In deciding whether the statue should be removed, shouldn't protesters and supporters of the justice consider the above theories of decision-making? If one believes that the justice faithfully applied the law, then does the justice warrant censure for doing what she was supposed to do, namely, apply the law as written? And if we discover that the justice was homophobic or racist, do we take down the statue regardless of how we think justices decide cases?

This article will not offer a definitive list of criteria that should be applied to when weighing the historical legacy of Supreme Court justices. Nor will it provide suggestions as to what action to take if we find a justice wanting. It will end, however, with a modest suggestion. The question of how to measure the legacy of Supreme Court justices, and the related issue of how to deal with their marble busts and ornate paintings, is a complicated one. Accordingly, decisions to remove such memorials should be done slowly, methodically, and thoughtfully.

¹¹⁰ See Jeff Yates & Elizabeth Coggins, *The Intersection of Judicial Attitudes and Litigant Selection Theories: Explaining U.S. Supreme Court Decision-Making*, 29 WASH. U. J. L. & POL'Y 263, 264 (2009).

¹¹¹ See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (Cambridge Univ. Press, 1993). The “attitudinal model” is a classic example of a “extra-legal” theory of judicial decision-making. John R. Quinn, “Attitudinal” *Decision Making in the Federal Courts: A Study of Constitutional Self-Representation Claims*, 33 SAN DIEGO L. REV. 701, 711 (1996).

