



SUPREME COURT HISTORICAL SOCIETY

P U B L I C A T I O N S

1980 Yearbook

Publication of the *1980 Yearbook* was made possible through a grant from the Charles Evans Hughes Foundation. The Society extends its thanks to the Foundation for its generous support of the project.

OFFICERS

Chief Justice Warren E. Burger, *Honorary Chairman*

Robert T. Stevens, *Chairman*

Elizabeth Hughes Gossett, *President*

EDITOR

William F. Swindler

ASSOCIATE EDITOR

Jeffrey B. Morris

EDITORIAL ASSISTANT

Kathleen Shurtleff

INTRODUCTION

This, our fifth edition of the Yearbook promises to equal if not outdo the four previous volumes, it is a rare collection of scholarly pieces dealing with issues that have confronted the Supreme Court throughout its 200 year history, and illustrates outstanding personalities who sat on the High Court Bench.

I am happy to inform you that during the past year contracts with the American Society of Legal Historians, Organization of American Historians and the American Association of Law Libraries have introduced a new spirit of cooperation with these important organizations. At the same time, our continuing research project, "The Documentary History of the Supreme Court 1790—1800," is progressing well and promises to be a major contribution to legal history.

May I take this opportunity to ask you, our members, to urge your friends to join the Society, and thus promote by their support the important programs initiated by the Society.

EHG

President

YEARBOOK 1980

Supreme Court Historical Society

Chief Justices I have Known, Felix Frankfurter

"Double Revolving Peripatetic Nitpicker," Henry Putzel and Paul R. Baier

Bushrod Washington and the Mount Vernon Slaves, Gerald T. Dunne

Profile of a Public Man, Paul Heffron

PORTFOLIO: Morrison Waite: Reconstruction and After, Text by Jeffrey B. Morris

The Selling of the Constitution, William F. Swindler

A Revolution Runs Wild, Charles Leonard

Populism and the Supreme Court, Alan Westin

The Last of the Jacksonians, Christine Jordan

Judicial Potpourri

Judicial Robes

Toward 1987— Lessons from the Centennial

Law Clerks

Contributors

Acknowledgements

Copyright © 1980, by the Supreme Court Historical Society, 1511 K Street, N.W., Washington, D.C. 20005.

The Supreme Court Historical Society

BOARD OF TRUSTEES

Chief Justice Warren E. Burger *Honorary Chairman*

Robert T. Stevens, *Chairman*

Elizabeth Hughes Gossett, President

Vice-Presidents

Linwood Holton, Whitney North Seymour

Earl W. Kintner, Fred M. Vinson, Jr.

William P. Rogers

Mrs. Hugo L. Black, *Secretary*

Vincent C. Burke, Jr., *Treasurer*

Mrs. David Acheson, Richard A. Moore

Ralph E. Becker, David A. Morse

James J. Bierbower, Alice L. O'Donnell

Herbert Brownell, Melvin M. Payne

Gwendolyn D. Cafritz, Merlo J. Pusey

William T. Coleman, Jr., Harvey T. Reid

Charles T. Duncan, Fred Schwengel

Patricia Collins Dwinnell, Bernard G. Segal

Newell W. Ellison, Margaret Chase Smith

Paul A. Freund, Lauson Stone

Erwin N. Griswold, William F. Swindler

Lita Annenberg Hazen, Obert C. Tanner

Joseph H. Hennage, Hobart Taylor, Jr.

Francis R. Kirkham, Mrs. Earl Warren

David Lloyd Kreeger, J. Albert Woll

Sol M. Linowitz

Betty Crites Dillon, *Executive Director*

From Fuller to Stone

Chief Justices I Have Known

Felix Frankfurter

(Note: In May 1953 -- while Chief Justice Vinson was still in office -- Mr. Justice Frankfurter gave this informal talk to the law students at the University of Virginia. It appeared in the November 1953 issue of the *Virginia Law Review* and is reprinted here, with permission of the board of editors of the journal, in slightly abridged form. -Ed.)

The five Chief Justices of whom I'll speak are Fuller, White, Taft, Hughes, and Stone. But, of course, in order that what I say may have something more than merely episodic significance, a few preliminary remarks ought to be made.

The one judicial figure whom even the least informed knows of in the history of the United States is the great Chief Justice John Marshall, of your commonwealth. It is an interesting fact that although for practical purposes, for essential purposes, the history of our constitutional law almost begins with him, and the history of that Supreme Court of the United States significantly begins with him, he was the fourth Chief Justice. His predecessors—three predecessors—all had very short tenure.

Then came the great John Marshall. I should say the three greatest Chief Justices we've had were John Marshall, Roger Taney, and Charles E. Hughes. It is an interesting thing that the first two of these between them, and in immediate succession, served for almost one half of the 164 years the show has been going. I mention the duration of their service—Marshall's and Taney's; Marshall from 1801 to 1834, thirty-three years; and Taney from '34 to '64 because the length of time during which a Chief Justice presides over the Court has, of course, a great deal to do with his place in history. Time is one of the most important factors in the realization of a man's potentialities.

Coming to the Chief Justices whom I've seen, whom I've seen in action, about whom professionally I may be allowed to have some judgment, let me come down to 1888 when Grover Cleveland appointed a man who was not known generally to the country at all. I suppose Melville Weston Fuller was a man about whom there was nothing in what newspapermen call the morgues of the leading newspapers in the country. He had no record to speak of, except a professional one. His appointment is an illustration, a striking illustration, of the contingencies

of life. And I think he—and I shall speak of others—illustrates the importance of not having a fixed, specific ambition in life. The chances of realizing a specific ambition, the laws of chance, are so much against you, that, if I may say so, I do not think any of you should harbor an ambition to become Chief Justice of the United States. The likelihood that you will realize it — I don't know what the mathematicians, if there be any in this audience, would say—is worth nothing, and the likelihood that you will have an embittered life is very considerable. The thing to do is to have ambition in a certain direction but not to fix it on a point of arrival, an ambition going to purpose in life and not to the particular form in which that purpose is to be attained.

When Chief Justice Waite died, if a poll had been taken among lawyers and judges to determine the choice of a successor, I don't suppose a single vote would have been cast for Melville W. Fuller, certainly outside Chicago. Indeed, he was not Grover Cleveland's first choice. It was widely believed that a man named Edward J. Phelps of Vermont would become Chief Justice. He was a leader of the bar. He was an eminent man. He'd been Minister to Great Britain. But 1888 was a time when the so-called Irish vote mattered more than it has mattered in more recent years. Edward J. Phelps, as has been true of other ministers and ambassadors to Great Britain, made some speeches in England in which he said some nice things, believe it or not, about the British people. Patrick Collins, a Democratic leader, the then mayor of Boston, felt that that wouldn't do. A man who says nice things about the British can't possibly make a good Chief Justice of the United States. And since Patrick Collins was a powerful influence in the Democratic party, he advised President Cleveland that if he sent Phelp's name to the Senate, the chances of confirmation might (not be very bright. Phelps's name was not sent to the Senate.

Melville Fuller was a Vermonter by birth, educated in Bowdoin and the Harvard Law School. As a young man, after a little political activity in Augusta, Maine, he tried his luck in the beckoning West. He went to Chicago, where he was very active as a Democrat. In that way it chanced that Grover Cleveland came to know him, and knowing him to respect him. After some maneuvering, Cleveland named Fuller, to the great surprise of the press of the country, and even of the profession. Fuller was confirmed, but with a very large vote in opposition. One of the opponents of confirmation was Senator Hoar of Massachusetts, then on the powerful Judiciary Committee, who afterwards did the handsome thing by saying how wrong he had been, just as in our day Senator Norris, who had opposed the confirmation of Harlan F. Stone, later publicly expressed his regret.

The point about Fuller was, or rather is, that he was a lawyer, and a lawyer only. I need hardly tell this audience that to me being a lawyer, with the full implications of responsibility and opportunity that the word carries, in a society like ours, in a government of laws under a written

Constitution, is a calling second to none. Melville Fuller had held no public office of any kind, unless you call being a member of a constitutional convention public office. He was a practicing lawyer. He was fifty-five years old when he was appointed to the Supreme Court, and he had not only had no judicial experience, he had had, as I have said, no official experience of any kind. I think Fuller was the only man, with the exception of his immediate predecessor, who came to the chief justiceship so wholly without a record in official public life.

At all events, Fuller came to the court as a man who had had wide experience at the bar, and, what is important, wide experience at the bar of the Supreme Court and with the kind of business that came before the Supreme Court in his day. He was a dapper little 'man. I remember vividly—I still remember—seeing him for the first time. I was a student at the Harvard Law School and he was president of the Harvard Alumni Association. He was introducing the speaker of the day, none other than William H. Taft, who had just returned from the Philippines to become Secretary of War. Fuller had silvery locks, more silvery and more—what shall I say—striking, because he was a little man, than the locks of the former Senator from Texas, Tom Connally. He was an extremely cultivated man, which is important. He read the classics. He was a student of history. He had felicity of speech.

Fuller came to a Court which wondered what this little man was going to do. There were titans, giants on the bench. They were powerful men, both in experience and in force of conviction, and powerful in physique, as it happened. For myself, I think all Justices of the Supreme Court should be strong, big, powerful-looking men! Certainly those whom he met there, who welcomed him courteously but not hopefully, were as I've described them. Believe it or not, there's ambition even in the breasts of men who sit on the Supreme Court of the United States. There's a good deal to be said for the proposal of Mr. Justice Roberts that no man should ever be appointed to the Chief Justiceship from the Court.

Fuller met on that Court at least four or five men of great stature. The senior among them was Samuel F. Miller, who had been appointed by Lincoln, and whose career, incidentally, is an exciting story of American life, because Miller started out as a physician, practiced medicine for ten-odd years, twelve-odd years, until he became a lawyer and in very quick order a Justice of the Supreme Court. He had great native ability, and he was a strong man. Fuller, if they had had the expression in those days, might have been called an egghead. He was a blue-blooded intellectual. The contrast was great. Then there was Harlan, a Kentuckian, six feet-three, a tobacco-chewing Kentuckian. You didn't have to come from Kentucky to chew tobacco in those days. They did it in Massachusetts. But Harlan was all Kentuckian. There was a smallish man whom I regard as one of the keenest, profoundest intellects that ever sat on that bench, Joseph

Bradley of Jersey. And then there was Matthews of Ohio, and a six feet five or six inch giant from Massachusetts, Horace Gray. Those were the big men, the powerful men, the self-assured men, over whom Melville Fuller came to preside.

They looked upon him, as I've indicated, with doubt, suspicion, but he soon conquered them. He conquered them and they soon felt that the man who presided over them justly presided over them. He had gentle firmness. He had great courtesy. He had charm. He had lubricating humor. Justice Holmes was fond of telling a story. In his early days, he said, "I'm afraid my temper was a little short." And there could hardly be two men more different than Mr. Justice Holmes who wielded a rapier, and Mr. Justice Harlan, who wielded a battle-axe. A rapier and a battle-axe locked in combat are likely to beget difficulties for innocent bystanders. Justice Harlan, who was oratorical while Justice Holmes was pithy, said something that seemed not ultimate wisdom to Holmes. Justice Holmes said he then did something that isn't done in the conference room of the Supreme Court. Each man speaks in order and there are no interruptions, no cut-ins or cut-ins, whichever the plural is —because if you had that you would soon have a Donnybrook Fair instead of an orderly proceeding. But Holmes said, "I did lose my temper at something that Harlan said and sharply remarked, 'That won't wash. That won't wash.' "Tempers flared and something might have happened. But when Holmes said, "That won't wash," the silvery-haired, gentle, small, Chief Justice said, "Well, I'm scrubbing away. I'm scrubbing away."

He presided with great gentle firmness. You couldn't but catch his own mood of courtesy. Counselors too sometimes lose their tempers, or, in the heat of argument, say things, and there was a subduing effect about Fuller. Soon these men, who looked at him out of the corner of their eyes, felt that they were in the presence of a Chief whom they could greatly respect. I have the authority of Mr. Justice Holmes, who sat under four chief justices in Massachusetts before he came down to Washington, and under three in Washington, that there never was a better presiding officer, or rather, more important in some ways, a better moderator inside the council chamber, than this quiet gentleman from Illinois.

Somehow or other the felicity of his pen, more of his tongue, but also his pen—if you will read a speech he made on the occasion of the centennial of the founding of this country, reported in 132 United States Reports—that charm which he had in occasional writings did not manifest itself, or he did not exert it, in his opinions. You cannot tell the quality or the importance of a man on the Supreme Court solely from his opinions. And so Fuller's opinions will give you nothing of his charming qualities. He's rather diffuse. He quotes too many cases. And generally he's not an opinion writer whom you read for literary enjoyment, though you can profitably read his non-judicial things for that purpose.

Fuller died in 1910, and the appointment of his successor is a most interesting episode in American history, because Fuller died shortly after President Taft had named Governor Hughes of New York as an Associate Justice. As a matter of fact, Hughes had not even taken his place, when, in the summer, shortly after he was named, Fuller died. In offering Governor Hughes the place on the Supreme Court, President Taft—a great admirer, not unnaturally of Hughes, who made the decisive campaign speech for Taft in 1904 at Youngstown, Ohio—Taft, with that charming exuberance, that charming forthrightness of his, indicated that Fuller can't live forever, and that, of course, he, Hughes, would be the natural choice of Taft for the chief justiceship. He indicated, as much as words can indicate, that he would name Hughes to be Chief Justice. Then, having doubtless re-read the letter after he signed it, he scribbled under it a postscript, being fully aware of his delightful and generous indiscretion, "Of course, I do not make this as a firm promise," or words to that effect. I'm not quoting accurately. Governor Hughes, in accepting the position, told the President that of course he was as free as a bird as far as the chief justiceship was concerned.

Well, a vacancy in the chief justiceship did occur six weeks after this exchange of letters, and everybody expected Hughes to be made Chief Justice. Hughes took his seat, and it must have been extremely embarrassing for the baby member of the Court to be the heir apparent to the vacant chief justiceship. Some of the older fellows must have had thoughts. In fact, they had more than thoughts. They didn't like the idea. You know, the notion of a freshman runs through life—younger brother, younger sister, freshman at college, freshman on the Supreme Court.

By that time—1910—the Court had completely changed. Of the men whom Fuller found when he went there in 1888 only one survived, and that was Harlan. There were very strong men on the Court in 1910. It would be a pathetic Court indeed if there weren't always at least some strong men on it. By 1910 there were some new strong men. When Hughes joined the court he found there in addition to Mr. Justice Harlan that nice bird-like creature with a beard, Mr. Justice McKenna of California. Holmes by that time was on and had been on for eight years. There was Mr. Justice White. There was a very strong man named Van Devanter. There was Mr. Justice Day, and there was Mr. Justice Lamar.

They didn't like the idea of having this untried New York governor, New York politician, become Chief Justice. They drew up a round robin to present to Taft, who had appointed some of them. They saw President Taft, I believe, and indicated that they didn't like to have their junior member made Chief Justice. Mr. Justice Holmes, with his characteristic high honor, refused to join this kind of protest. He was perfectly ready to have Hughes become Chief Justice.

Taft appointed a member of the Court, a powerful member of the Court, Edward D. White of

Louisiana. President Taft was glad to appoint—we are so much removed from 1910 in some ways—Taft found it appealing to appoint White as Chief Justice because White had been a Confederate. It wasn't until the 'eighties that a Confederate southerner had again been put on the Supreme Court. That was Lucius Quintus Cincinnatus Lamar of Mississippi. But to make a Confederate, an ex-Confederate—are Confederates ever "ex"?—Chief Justice was something that could contribute much, even then, so Taft thought, and I believe rightly, to the cohesion of our national life.

We shall never know what happened, but within twenty-four hours there was a change in the mind of Taft, and it was then that White became Chief Justice. There is the most absurd, and most absurdly contradictory, testimony of people who think they do know what happened. Within a half hour after Taft summoned Hughes, probably to tell him he was going to be Chief Justice, he cancelled the request that Hughes come. During that time something happened.

Anyhow, White was made Chief Justice. At the Saturday conference following the sending of White's name to the Senate, Hughes, the junior member of the Court, made what I am told was one of the most gracious speeches of welcome to the new Chief Justice, Edward D. White.

Now let me tell you about him. He looked the way a Justice of the Supreme Court should look, as I indicated a little while ago. He was tall and powerful. I think a jowl also helps a Justice of the Supreme Court. He had an impressive jowl. He came from Louisiana, as I've said. He was a drummer boy in the Confederacy, which had upon him a very important influence, not only in life, but as a judge—a very profound influence. It is a very interesting thing, but Edward D. White, the Confederate drummer boy, was much more nationalistic, if that phrase carries the meaning I should like it to carry, was far more prone to find State action forbidden as an interference with federal power than was Holmes, the Union soldier, who went to his death with three bullets in his body. White was so impressed with the danger of divisiveness, with the danger of separatism, with the intensification of local interest in the disregard of the common national interest, that again and again and again he found that local action had exceeded the bounds of local authority, because it might weaken and endanger the bonds of national union. One of the most interesting things is the division between him and Holmes in specific instances, where White was, if we may use colloquial, inaccurate terms, for centralization and Holmes was for "States' rights."

By the time White came to be Chief Justice the Federal Government had gone in for regulation more and more. Hughes was on the Court, with great experience, as governor of New York, in regulating business. During White's tenure, Brandeis came on the Court, without any previous judicial experience, but with, I suppose, unparalleled experience in the domain of

practical economics, with an understanding of the relations of business to society. Yet, though White came to the chief justiceship with full knowledge of the Court's business and with a strong hold on his colleagues, if anybody thought that merely because of that there'd be unanimity of opinion, there'd be a want of differences of course he was bound to be mistaken. And indeed, during White's tenure, the divisions became more and not fewer. But he was master of his job. There was something very impressive about him, both in appearance and otherwise. He was an impressive-looking person. He was also a great personality. He was a master of speech, though a master of too abundant speech. I should suppose, on the whole, his opinions, are models of how not to write a legal opinion. He made three words grow, usually, where there was appropriate room only for one.

The Court became more and more divided in opinion during his' period, not because of him, but because the issues became more contentious, the occasions for making broad decisions, broad rulings were fewer and matters became more and more, as Holmes early pointed out and for fifty years continued to point out, matters of degree.

White was Chief Justice only for ten years, and when he died an astonishing thing happened, unique in the history of this country and not likely to recur, at least as far as one can look ahead:—an ex-President of the United States became the Chief Justice of the United States. That was, of course, William H. Taft.

Taft became Chief Justice at the age of sixty-three, having been, as indicated, a notable judge, but having been out of the business of judging and out of touch with the Supreme Court, except for having filled four of its nine places, for twenty years. He was a very rusty lawyer indeed when he came to preside over the Court. He himself said, and he was very happy to say, with that generosity of his which politicians would do well to, but do not often, imitate, that whatever he did as Chief Justice was made possible by his great reliance on him whom he called his "lord chancellor," Mr. Justice Van Devanter. Mr. Justice Van Devanter is a man who plays an important role in the history of the Court, though you can't find it adequately reflected in the opinions written by him, because he wrote so few. But Van Devanter was a man of great experience. He'd been chief justice of Wyoming. He was then made a circuit judge, a United States circuit judge, and became a member of the Supreme Court in 1910. He had a very clear, lucid mind, the mind, should I say, of a great architect. He was a beautiful draftsman and an inventor of legal techniques who did much to bring about the reforms which, of course, were effectively accomplished by Taft as Chief Justice.

Taft's great claim, I think, in history will be as a law reformer. In the characteristic way of this country, various federal judges throughout the country were entirely autonomous; little

independent sovereigns. Every judge had his own little principality. He was the boss within his district, and his own district was his only concern. A judge was a judge where he was, and although he may have had very little business, he couldn't be used in regions where the docket was congested. This, as you know was changed, and the change has been, of course, highly beneficial. An even more important reform for which Taft was effectively responsible was the legislation authorizing the Supreme Court to be master in its own household, which means that the business which comes to the Supreme Court is the business which the Supreme Court allows to come to it. No case can come up without prior permission, as it were, prior leave.

Taft was followed, of course, by Hughes. Now the last thing that Hughes ever expected to be after he left the Court in 1916 to run for the Presidency—I have ventured to say in print that I believe this was the one act of his life which he regretted—then became Secretary of State, then became a member of the World Court, and finally returned to the bar to, I suppose, as vast a practice as that of any man at the bar in our time, or at any time in the history of this country—the last thing Hughes expected to become was Chief Justice. He was, of course, to Hoover's great surprise, subject to severe attack when his name was sent in. He finally was confirmed though it was a nip and tuck business. He took his seat at the center of the Court, with a mastery, I suspect, unparalleled in the history of the Court, a mastery that derived from his experience, as diversified, as intense, as extensive, as any man ever brought to a seat on the Court, combined with a very powerful and acute mind that could mobilize these vast resources in the conduct of the business of the Court. There must be in this room lawyers who came before the Court when Chief Justice Hughes presided. To see him preside was like witnessing Toscanini lead an orchestra.

Aside from the power to assign the writing of opinions, which is his by custom and of which I shall speak, a Chief Justice has no authority that any other member of the Court hasn't. That really is an institution in which every man is his own sovereign. The Chief Justice is *primus inter pares*. He presides. Somebody has to preside at a sitting of nine people, and he presides in Court and at conference. But Chief Justice Hughes radiated authority, not through any other quality than the intrinsic moral power which was his. He was master of the business. He could disembowel a brief and a record. He had an extraordinary memory and vast experience in the conduct of litigation, and of course he had been on the Court six years, from '10 to '16. And, he had intimate and warm relations with some of the men he found on the Court. He was a great admirer of that greatest mentality of all, that greatest intellect, in my judgment, who ever sat on the Court—I say intellect—Mr. Justice Holmes. He was an old friend at the bar of Mr. Justice Brandeis. He'd been one year in the Cabinet with Stone. So he not only felt at home in the

courtroom, he felt at home with his colleagues.

I've often used a word which for me best expresses the atmosphere that Hughes generated; it was taut. Everything was taut. He infected and affected counsel that way. Everybody was better because of Toscanini Hughes, the leader of the orchestra. That was true of Cardozo, when he was chief judge of the New York Court of Appeals. One is told that the same men were somehow or other better when he was chief judge than they were the next day, after he had ceased to be chief judge. That's a common experience in life. One man is able to bring things out of you that are there, if they're evoked, if they're sufficiently stimulated, sufficiently directed. Chief Justice Hughes had that very great quality.

Chief Justice Stone is, of course, the antithesis, in the fate that was allotted to him, to Marshall and Taney and Fuller. If you're only Chief Justice for five years, as Stone was, even though you come to the chief justiceship after having been an Associate, the opportunities to capitalize on the moral opportunities that place gives you are necessarily very limited. Time plays a very important part. Stone came to the Court in '41. He'd been an Associate Justice since '25, been on the Court sixteen years. Before that he had been Attorney General, been a professor of law and dean of a law school, and an extensive practitioner in New York. He was familiar with the business of the Court. He was a very different personality from Hughes. Hughes was dynamic and efficient. That's a bad word to apply to Hughes, because it implies regimentation. It implies something disagreeable, at least to me. I don't like to have a man who is too efficient. He's likely to be not human enough. That wasn't true of Hughes. He simply was effective—not efficient, but effective. Stone was much more easy-going. The conference was more leisurely. The atmosphere was less taut, both in the courtroom and the conference room. It has been said that there wasn't free and easy talk in Hughes' day in the conference room. Nothing could be further from the truth. There was less wasteful talk. There was less repetitious talk. There was less foolish talk. You just didn't like to talk unless you were dead sure of your ground, because that gimlet mind of his was there ahead of you.

Stone was an "easy boss," as it were. Boss is the worst word to use with reference to the Chief Justice of the United States, because that's precisely what he isn't. Anybody who tried it wouldn't try it long. There is one function, however, that the Chief Justice has by virtue of being Chief Justice, other than being the administrator, presiding in open court and presiding at the conference and being the first man to lay open the problems before us—the cases that have been argued and the cases in which petitions have been filed. That other function is, I believe, the most important of all that pertains to the office of Chief Justice.

From Marshall's time in the Supreme Court the Chief Justice has designated the member of the Court who writes the opinion of the Court. As most of you know, we hear argument five days a week and on Saturday there's a conference. After everybody has had his say, beginning with the Chief Justice and following in order of seniority there is a formal vote. In order that the junior shouldn't be influenced, everybody having already expressed his view, the formal voting begins with the junior. How careful we are not to coerce anybody! After conference, in cases in which the Chief Justice is with the majority, as he is in most instances, he designates the member of the Court who is to write the opinion. If he is in the minority, then the next senior Justice does the assigning. So that in most of the cases the Chief Justice decides who is to speak for the Court. Of course, as for dissents and concurrences—that's for each member to choose for himself.

You can see the important function that rests with the Chief Justice in determining who should be the spokesman of the Court in expressing the decision reached, because the manner in which a case is stated, the grounds on which a decision is rested—one ground rather than another, or one ground rather than two grounds—how much is said and how it is said, what kind of phrasing will give least trouble in the future in a system of law in which as far as possible you are to decide the concrete issue and not embarrass the future too much—all these things matter a great deal. The deployment of his judicial force by the Chief Justice is his single most influential function. Some do that with ease. Some do it with great anguish. Some do it with great wisdom. Some have done it with less than great wisdom.

No Chief Justice, I believe, equaled Chief Justice Hughes in the skill and the wisdom and the disinterestedness with which he made his assignments. Some cases are more interesting than others, and it is the prerogative of the Chief Justice not only to be kindly and fair and generous in the distribution of cases, but also to appear to be so. The task calls for qualities of tact, of understanding, and for skill in the effective utilization of the particular qualities that are available. Should one man become a specialist in a subject? Or is it important not to place too much reliance on one man because he's a great authority in the field? Should you pick the man who will write in the narrowest possible way? Or should you take the chance of putting a few seeds in the earth for future flowering? Those are all very difficult, very delicate, very responsible questions.

What is essential for the discharge of functions that are almost too much, I think, for any nine mortal men, but have to be discharged by nine fallible creatures, what is essential is that you get men who bring to their task, first and foremost, humility and an understanding of the range of the problems and of their own inadequacy in dealing with them; disinterestedness, allegiance to

nothing except search, amid tangled words, amid limited insights, loyalty and allegiance to nothing except the effort to find their path through precedent, through policy, through history, through their own gifts of insight to the best judgement that poor fallible creatures can arrive at in that most difficult of all tasks, the adjudication between man and man, between man and state, through reason called law.

A Report on the Reporter

"Double Revolving Peripatetic Nitpicker"

Paul R. Baier

(Editor's Note: Professor Paul R. Baier of Louisiana State University Law Center, who served as Judicial Fellow at the Supreme Court in 1975-76, conducted a television interview with Henry Putzel, jr., who retired in February, 1979 as the thirteenth Reporter of Decisions of the Supreme Court. At the time of Mr. Putzel's retirement, Chief Justice Warren E. Burger said in open court:

The work of the Reporter of Decisions is not known to the public but is of great importance to the courts, the legal profession and to the public. Mr. Putzel has performed the exacting duties of that important office with great distinction and in keeping with the tradition of the twelve men who preceded him in that position. The Court wishes to pay tribute to him and wish him well for the years ahead. (99 S.Ct. CLIV)

(For previous treatment of the work of the Reporter of Decisions, see Gerald T. Dunne's article, "Early Court Reporters," in *Yearbook* 1976 and the description of the office in Barrett McGurn's review of the officers of the Court in *Yearbook* 1979. The present article not only complements these earlier articles but advances two objectives of the Supreme Court Historical Society: informing the general reader, through the *Yearbook* and other SCHS publications, of little-known activities within the Supreme Court; and encouraging oral history recordings of such activities through interviews with persons responsible for them.

(The main title for this article comes from a description that Mr. Putzel himself gave, during the course of the interview, of the qualifications for and duties of the job he held for fifteen years. More sedately, the original video tape interview is entitled, "A Conversation with Mr. Henry Putzel, jr." It should go without saying that the printed version of an interview of this sort cannot project the important nuances of the spoken word and cannot, without losing the important off-the-cuff flavor, achieve the standards of grammar and accuracy that a Reporter would insist upon in a more formal context. The video tape and the transcript are copyrighted by Messrs. Baier and Putzel, and the following is reproduced by permission of the copyright owners. —W. F. S.)

Intro:

He labors unnoticed inside the world's loftiest judicial tribunal, the Supreme Court of the United States. Above his desk, as if to remind him of his celebrated lineage, hangs a portrait of William Cranch, John Marshall's Reporter of Decisions. His job is to catch errors in the Justices' opinions, to keep the United States Reports letter-perfect, and to write the syllabi in all of the Court's opinions. Volume 426 of the United States Reports is the fiftieth volume of official reports published under his painstaking care.

He is Mr. Henry Putzel, jr., thirteenth Reporter of Decisions of the Supreme Court of the United States.

Mr. Baier:

Mr. Putzel, I suppose it's true that most people would have no idea who you are, where you work, what you do, have any idea of who is Mr. Henry Putzel. Now, first, would you tell us what the Reporter of Decisions is?

Mr. Putzel:

Surely. But on your first question—I sometimes wonder, too, about my identity.

However, I think that perhaps I can clarify a little bit by reporting on the Reporter. I, as you indicated, am thirteenth Reporter of Decisions and it may be of interest to know that in the history of the Court, there have been 15 Chief Justices, but there have been only 13 Reporters of Decisions. If you get out your computer, I suppose this means great longevity. Now, I am not out to set any world records, by the way, but I have some illustrious predecessors and our function has changed over the years quite a bit.

In the early days the Reporters were in the courtroom and took down as best they could what the Court was handing down and gradually that changed somewhat.[1] The Reporters now have a more limited function, one that is, I think, no less important, but it's not quite the same as it used to be. And, primarily, we have the two functions of writing the syllabi or headnotes and making editorial changes—suggestions rather—to the Court.

Mr. Baier:

You have nothing to do with newspaper reporting?

Mr. Putzel:

No indeed. It's rather amusing. I have a letter, maybe I can just read you an excerpt from it here, that my predecessor Waiter Wyatt,[2] who was a very distinguished man—he used to be the General Counsel of the Federal Reserve Board and served as Reporter of Decisions for, I think, about 20 years, and he got irked at this confusion in the meaning of the word Reporter and he wrote this letter to the Chief Justice, who was then Fred M. Vinson. This was January 21, 1953. He said: "In order to avoid confusion and some embarrassment it is respectfully requested that in the United States Reports, the Congressional Directory and other official publications, I be permitted to list my title as Reporter of Decisions instead of merely as Reporter. From time to time I am plagued by letters and personal calls from people who think I am a stenographic court reporter or who desire either stenographic employment on my staff or to obtain transcripts of oral arguments. I have recently been informed"—I think this is what sparked the whole thing—"that a similar misunderstanding on the part of those charged with making the seating arrangements for the inauguration of President Eisenhower may have been partly responsible for the difficulties incurred in obtaining proper seating arrangements for the Reporter since one of them told the Marshal that he thought the Reporter was *just* a stenographer!" So that's how it came to be changed from Reporter to Reporter of Decisions.

Mr. Baier:

When you speak of the syllabi and the head-notes, they are attached to what? What are you synopsisizing when you do your work?

Mr. Putzel:

Well, we're summarizing the opinions of the Court, which now we get in advance. Starting with the 1970 term of Court, the Court authorized that opinions be headnoted in advance. The purpose of this was to aid the press and I think it has performed that function rather admirably and we now see the opinions before they come down and the head-notes are written, submitted, and published when the opinion is issued in Court.

Mr. Baier:

Are they hard to write?[3]

Mr. Putzel:

Ha! Well, they vary considerably, and some of them are fiendishly hard to write and some of

them are not so difficult. Some seem to fall into place very logically and easily. It's hard to generalize because even if you've looked at what looks like a simple headnote it doesn't mean that, the Reporter or his assistant—by the way, the Assistant Reporter[4] also helps with the headnotes and we divide them up. Both the Reporter and the Assistant have to be lawyers, of course.

Mr. Baier:

Felix Frankfurter has an essay entitled "Chief Justices I Have Known." [5] Well, you have known plenty of headnotes. Do you recall any in particular that were excruciatingly difficult to write?

Mr. Putzel:

Oh! I wish I'd had more time to prepare myself for that question because I'm sure if I had a chance to go back over the books I could find plenty of good illustrations. I remember the *New Haven Inclusion Cases* [6] as being one where factually there was great difficulty in trying to present the complicated railroad reorganization situation concisely. I believe it was in that one, it may have been another one of the railroad cases that took 6 pages of 9 point type to write the syllabus, but of course we try to make them as brief as we can [7] and the question is always one of judgment: What point is at the nub of the case, and you would have to assume certain things that are not—they may be quite important—but they are not what the case is primarily about. For example, a Justice might start off an opinion by referring to the fact that on a motion to dismiss the complaint the facts are taken as stated. Well, if that is just incidentally mentioned, it would not be headnoted, although it could become part of the headnote if it were the central or focal part of the case. [8]

Mr. Baier:

Does the headnote have a physical structure?

Mr. Putzel:

Surely it does and it is a format that I inherited; it's been in existence for a long time and it has certain set unwritten rules. The factual part is stated in one paragraph and the purpose of that is again not to get too discursive in the headnote, not to break it up; and even in a very long case where paragraphing ordinarily would be used, this holds the Reporter down as much as possible to limits and also you don't want—physically—you don't want to spread over more

territory than you have to.[9]

The legal part—if there's one holding—will be stated right after the word "held" and then you will have subdivisions, perhaps (a), (b), and (c). If there are several holdings you will have an arabic numeral: Held 1, Held 2, and so on, and perhaps some letter designations under those. But we don't go beyond that. We don't have sub-divisions, again to keep the thing within bounds.

Mr. Baier:

Is your headnoting subject to the approval of the Justice—the author of the opinion?

Mr. Putzel:

It is and it isn't.[10] Sometimes Justices when they return the headnote to me make so-called "suggestions." [11] Of course, the Reporter is going to abide by the suggestions," but we emphasize, the Court emphasizes, that headnotes or syllabi are the work of the Reporter and not the official body of law. In Ohio, for example, the headnote is the law and not the opinion.[12] And perhaps there are some other states, I think, maybe, is it Kansas? or perhaps Kentucky, I'm not sure what the others are.[13]

Mr. Baier:

Ever have a case where a lawyer relied on one of your headnotes in his argument?

Mr. Putzel:

Ha! No, but this happened many years ago in a case, I think, in, oh yes, it's *United States v. Detroit Lumber Co.*, in 200 U.S. 321; and at 337 of that old case, the Court mentions in its opinion that the headnote is the work of the Reporter not the Court. It has nothing official to it, but in that case the lawyer tried to argue that the headnote had some legal significance.[14]

Mr. Baier:

And got nowhere.

Mr. Putzel:

Got nowhere.

Mr. Baier:

Would you tell us what the requirements to become a Reporter of Decisions are?

Mr. Putzel:

Well, first of all, he has to be a lawyer. And I'd say he should be a word nut. And in the third place, I think he, well I think he should be a double revolving peripatetic nit-picker. We look over somebody's shoulders and we're always—

Mr. Baier:

What was that again?—"a double revolving—

Mr. Putzel:

Nit-picker!

Mr. Baier:

peripatetic nit-picker."

Mr. Putzel:

That's right.

Mr. Baier:

Mr. Putzel, how did you come to be the Reporter of Decisions?

Mr. Putzel:

Well, my name was brought to the attention—I had been the head of the Elections Section in the Civil Rights Division in the Justice Department, and I had for a long time been interested in both law and words and this combination, I think, was brought to the attention of Chief Justice Warren and my dossier seemed to fill the bill. I'll never forget an interview I had with him when he said in effect that he would not take this job on a bet. Well, he didn't, as most people don't, like dotting i's and crossing t's so much; and, naturally, it wouldn't appeal to him; but it did appeal to me and I have no regrets—in fact quite the contrary. I've loved what I have done. I'm certainly not going to do it forever, but I've been doing it for almost 15 years; that's probably almost long enough.

Mr. Baier:

Are you a word nut?

Mr. Putzel:

Yes I am, and maybe that's one of the reasons that I was recommended to Chief Justice Warren. I had as a hobby for a long time, words. I have quite a collection of them; and they are a lot of fun. I think that one of the big mistakes that English teachers make, perhaps at the grammar school level, is not to let their students in on the fun of words. After all, life is pretty much a matter of communication, isn't it?

Mr. Baier:

Yes.

Mr. Putzel:

We are always trying to persuade somebody or to convey emotions and that sort of thing. The only way we do it—well, it's not the only way—but our chief way of doing it is through words.

Mr. Baier:

You can smile, too, and you caught yourself.

Mr. Putzel:

Well, you know, we get into situations in the Court; it is rather amusing sometimes. The Court, like the rest of us, will use mod words and this, I think, has the effect sometimes of cheapening the currency of language. You use a word just because it is in fashion and it may not have anything to do with its real significance in the dictionary sense; and those are values that I think are worth preserving, at least as long as we can. Sometimes the fashionable, a merely fashionable word, will become good currency. But, take a word like "parameter." If you look at that word in the dictionary, I defy you to come up with a—well, to retain a definition in your mind as to what the word parameter really means.

Mr. Baier:

Have you fought with any of the Justices in an attempt to keep that word out of opinions?[15]

Mr. Putzel:

Well, I have. For a while I gave up, and then I found a great ally in Justice Blackmun, who jokingly told me one day that he had read the riot act to his colleagues and said he would not vote with them in any case where they used the word parameter. Well, parameter is supposed to mean,—and the reason it's used, I think the Pentagon probably started this, they use the word in the sense of perimeter or boundary. Well perimeter is a good word; so is boundary. Why not use them?

Mr. Baier:

You mentioned Justice Blackmun, and recently the sharp-eyed LSU Law Faculty—I'm putting in a plug for the school, Mr. Putzel,—caught a mistake, a mistake that involved the question whether an accused could be tried by a jury of less than six; and Justice Blackmun's opinion—it was not for the Court, but it was his opinion—made the point that in only three states could a jury of less than six convict, and he then enumerated the states, including, of all things we thought here, in this fine jurisdiction, Louisiana.[16] So whereupon we wrote a note and he responded very kindly that we had caught a mistake.

Now my question to you is, why didn't you catch the mistake?

Mr. Putzel:

Ah, well! I think—this may sound a little like confession and avoidance, or perhaps you'll say it's a frolic and detour, I don't know—but that case, as I recall, came down late in the term. I believe it was—

Mr. Baier:

March 21, 1978.

Mr. Putzel:

Well, not as late as I thought— Mr. Baier:

That's late enough though—

Mr. Putzel:

But it was late enough, and we have a sort of pecking order for opinions and we work on them as they come down. We have a staff of three who carefully go over the opinions to check all

citations and quotations. That sort of thing almost certainly would have been caught, and the only thing I could say is that we had not gotten around to it yet by the time you had. This is not to say that we don't make our own bloopers. We do. And you may recall at the top of each preliminary print—let me just read you what it says here, and the same thing appears, well it appears at the top of the slip opinion and at the bottom of the preliminary print—it says that: "This preliminary print is subject to formal revision before the bound volume is published. Users are requested to notify the Reporter of Decisions"—with the address—"of any typographical or other formal errors in order that corrections may be made before the bound volume goes to press." Now we get a good deal of help from the public, from lay people, as well as from professional people. I remember once I received a letter from a convict in a southern penitentiary—as you know, some of them are great jailhouse lawyers—pointing out a mistake that no one else had caught.

Mr. Baier:

Did you respond?

Mr. Putzel:

Oh indeed, I did. I thanked him very much. And we had a—there was a law student at Yale who used to write me a three-page, single-spaced letter, after a preliminary print came out, pointing out all the errors in the opinions, and I encouraged this and it invariably happened that—I think he kept this preliminary print by his bedside and read it before he went to sleep. I can think that that would be a pretty good way of going to sleep sometimes!

Mr. Baler:

A good man, however, to have in the Reporter's office.

Mr. Putzel:

A good man, indeed he was, and again in-variably at least three or four times out of all those lines in his letter pointing out errors there would be something we had missed. We have a very small staff. There are only 10 in the whole office, including my secretary, a messenger, and various others. But there are only a few of us who bear down on these technical questions, so that it is very helpful to have people write in and tell us about errors in the opinions.

Mr. Baler:

Can you recall a few egregious errors that have been caught?

Mr. Putzel:

Again, that's the sort of thing where it would be nice if I had a chance to go through my files before trying to answer that. At the moment, I'm afraid I would just have to make a general reply and say that there have been several instances in which we have caught egregious errors and I have several letters in my files from Justices thanking us for keeping our noses to the grindstone.

Mr. Baler:

What kind of errors? Would they be errors per-mining to grammar, or spelling, or indeed the substance of the law?

Mr. Putzel:

It could be all of those, not so much substantive questions, although there is a grey area where sometimes you get into a substantive question.

Mr. Baler:

Do you correct the Justices' grammar?

Mr. Putzel:

Oh, indeed! There are occasions when we do this and even their spelling.[17] You're familiar, or maybe you aren't, with the correspondence that Holmes had with my predecessor's predecessor?

Mr. Baler:

Tell us about that.

Mr. Putzel:

Well, I was rummaging around some papers in my office, and just by a matter of serendipity—good word that—I came across a letter that Oliver Wendell Holmes had written to Mr. Knaebel,[18] who had corrected the spelling of the word "capital" and the spelling of the word "principle" in Holmes's opinion, and Holmes very amusingly in his own handwriting, which it

took me quite a while to decipher, by the way, thanked the Reporter for having made these corrections and calling them to the Justice's attention. Here's the letter that I found. As I mentioned it took me a long time to decipher: "Dear Mr. Reporter," Holmes wrote, " 'Principle' of course was a printer's error that I blush to have overlooked."—that's spelled "ple"—" 'Capitol' "—spelled with an
"was deliberate ignorance—but I see from the Century and my old stand-by Worcester"—our Librarian told us the Worcester was a very, very popular dictionary at the turn of the century; I hadn't heard of it before—"and my old stand-by Worcester that it should be Capital, which I never knew before and do a double blush. This is one of the few occasions," Holmes concluded, "on which I defer to the dictionaries." Isn't that nice?

Mr. Baier:

Yes.

Mr. Putzel:

Well, I had it framed, as a matter of fact, and it's in my office now; and we did a little detective work, we had to find out,—fortunately the letter is dated—and it wasn't too long before that that Holmes had written an opinion and we tracked it down. It was the case of *Wear v. Kansas*,^[19] and we were able to find it in an old slip opinion where somebody, presumably the Reporter himself, had made the corrections in the printed version. So, in answer to your question, of course we do have quite a lot of spelling corrections and a good many grammar corrections. Our batting average on some of these things, some of my own, I guess, pet peeves, is sometimes good, sometimes isn't. There are certain words—now parameter, with the aid I have from the Justice, is very rarely used anymore.

Mr. Baier:

How about restrictive and non-restrictive clauses?

Mr. Putzel:

Oh Yes! Well I tried that, many years ago. The good writers maintain a distinction between "that" and "which"; "that" is restrictive, and "which" isn't. But even a good many of the very impressive writers do a little backsliding and don't observe that. I tried some years ago to get the Court to maintain this distinction in its opinions.^[20] I remember Justice White, after I had put

this campaign on, asked me one day, "What is the difference between 'that' and 'which' "—in effect saying "why are you being so fussy about this?" I tried to explain what the difference was; and, I think maybe I got the point across, but I found that later on none of the Justices really paid any attention to the distinction. As I say, most writers, however much they honor it in word, they don't in deed. And I finally just threw in the sponge.

Mr. Baier:

You mentioned Justice White. Does he communicate often with you about usage and grammar?

Mr. Putzel:

No, not really. I just happened to mention his name. He wrote me a note from the bench—I have to mention in a moment something about this practice of writing notes from the bench—and one day I was sitting in my office, and I got a note delivered by one of the messengers in which Justice White asked me what the word "suppletive" meant, as used in an opinion of Justice Harlan's. Well I looked in my records. I have a copy of my reply here. This whole thing really amused me because we had written to Justice Harlan at the time he used that word, as we do sometimes when we aren't sure whether perhaps a secretary hearing dictation hasn't misspelled something or somewhere along in the shuffle a word gets into print that shouldn't be, and we ask the Justice is this word intended. Well we had done that. In my letter to Justice 'White I said, "After receiving your note from the bench on December 7th"—this was 1976—"asking for the definition of 'suppletive' as used in *Labine v. Vincent*[21] certain smoldering memories were sparked and I took a look at the original copy of the opinion with our editorial suggestions to Mr. Justice Harlan. We had circled the word 'suppletive' and asked is this the word in-tended? The definitions in neither Webster's nor the O.E.D."—that's the Unabridged Oxford Dictionary—"seemed to fit. The reply was 'stet'—leave it as it is. After all these years our same observation holds. The definition in Webster's II is this: 'Characterized or constituting an instance of "suppletion" 'and 'suppletion' is defined as 'the occurrence of phonemically unrelated alimorphs of the same morpheme whether the morpheme is a base or an affix.' Please tell me what that means!"

Mr. Baier:

It's foreign to me, too, Mr. Putzel.

Mr. Putzel:

Well, I was amused at that because it was one instance in which we had singled out the word, couldn't find out what it meant and either Justice Harlan or his law clerk was satisfied that he knew what it meant, so there it was. Now it may turn out to be a—although I think I must have looked it up in *Black's Law Dictionary*, too, but I'm not sure—but it may be a civil law term or something of that sort. I couldn't find out.

Mr. Baier:

I assure you, we'll find out.

Mr. Putzel:

Good. This is the place to ask that.

Mr. Baier:

Do you enjoy being the reporter of Decisions?

Mr. Putzel:

Oh, indeed I do. I've done it now for almost 15 years. It has brought me into contact with some marvelous people. It gives an outlet for that idiosyncrasy I referred to when I said I was a word nut, and I've found it very, very rewarding. It's had its moments of trial as any calling does, particularly, I think, when we are asked to headnote a case at the eleventh hour, especially if it's a complicated case, it becomes a little trying, and I ask myself what am I doing here? Why do I have to go through this kind of pressure? And there are other times when going over the same material time and time again I've become a little impatient if not exhausted. We go through quite a refining process. We get the bench copy, the slip opinion, and we go through that very carefully when we've already read the opinion probably several times for the purpose of headnoting it, and then we make editorial suggestions after the slip copy is issued, and then after that, we go over everything again. We read the preliminary prints very carefully and still make additional suggestions for editorial change.

Mr. Baier:

And ultimately it comes to the official United States Reports.

Mr. Putzel:

Ultimately it comes into the bound volume and even there the final word isn't on the printed page in immutable form always. We hope it is, but once in a long time an error has to be corrected and we have to get out an erratum notice. I remember when I was—I hadn't been Reporter very long—and I got a telephone call from the Solicitor of the Interior Department and he said, "Mr. Putzel, I wish to point out an error in the United States Reports!" My heart sank. Well, I knew this moment was going to come sooner or later. And here it was. What had I done wrong? Well, fortunately, my equanimity was restored when he said, well this opinion occurred in, and then he gave me the volume of the U. S. Reports, it was well over 100 years before, so I felt a little better. But since that time, I must confess there are plenty of bloopers that I have made myself.

Mr. Baier:

Plenty of errata in the Putzel volumes of the United States Reports. Would you prefer that the volume show your name? I suppose that's a question the answer to which is obvious.

Mr. Putzel:

I suppose vanity would say "Wouldn't that be nice." I know my wife thinks that would be a splendid idea. But I am afraid that the custom is now too well established to permit that. Starting with Mr. Otto, the Reports, following the language of an act of Congress, are called "United States Reports" and they are cited _____ U.S. _____ and not by the Reporters' names.[23] But we do adhere to the tradition of citing reports before Otto, that is ending with Wallace, with the name of the Reporter, either in its full spelling or abbreviated.[24] The Reports start with, curiously enough, 2 Dallas—it would be 2 U.S. if we cited it that way. I say "curiously" because the first volume of Dallas has no reports of opinions of the United States Supreme Court.

Mr. Baier:

Do you listen to the oral arguments?

Mr. Putzel:

I do on occasion. Unfortunately the job of being Reporter of Decisions is a demanding one and I have to stick pretty close to my knitting. But if a big argument comes along, one with a renowned advocate, or the issues in a case are of commanding importance I do slip off and go to the courtroom. I have a place reserved there for me, so it's always there when I want to use it.

And I enjoy listening to arguments. I remember hearing Justice Harlan once discuss a question that was asked of him, how valuable oral arguments are. He said they were helpful to him.[25] I've read, I can't recall who the Justice was who said that he didn't really pay much attention to oral arguments. The briefs were there and not much was added. I think some indication that something is added comes from the transcript of oral argument which is available after any case is argued, because from that transcript you will see a Justice quoting—now it may be true that he is just embellishing a point that he would have reached anyhow—but from that it does appear that oral argument in certain instances helps a Justice.

Mr. Baier:

Do you recall any memorable oral arguments that you have heard in your fourteen years' experience?

Mr. Putzel:

Well, I've heard many that were memorable. Curiously, in some of the great cases, like the *Nixon* tapes case, for example, or even the *Bakke* case, sometimes the touted cases, the ones you read about in the press so much, are not the ones that are best argued. Sometimes fortunately they are. But, for example, in the *Nixon* tapes case I thought, and this is my view only, that the young lawyer, Phillip Lacovara, of all the eminent people who were arguing that case, made the most persuasive and eloquent argument. He was not many years out of law school, or out of the Solicitor General's office. One of my favorite advocates is Archibald Cox. It's always a delight to listen to him argue a case before the Court. And, of course, he argued the *Bakke* case. It's a great art, it's one that I certainly don't have and very few people do. One very good Supreme Court advocate I know of is Frederick Bernays Wiener, who used to be in the Solicitor General's office and he wrote a book on how to present an appeal in the Supreme Court—a very good book,[26] by the way, and he was a master advocate and to this day if he argues a case before the court he wears the cutaway that was *de rigueur* and still is used by the people in the Solicitor General's office. I have a cutaway too—my predecessor wore his all the time in the courtroom. When I go to the courtroom I wear it for a very ceremonial occasion, or memorial service, or if I go to listen as I do with the Court to the State of the Union message in the House of Representatives, I wear the cutaway then or perhaps to a funeral or a memorial service. But some of the old timers still use it when they are arguing cases before the Court.

Mr. Baier:

Do you have a few favorite writers, either past or present, on the Supreme Court?

Mr. Putzel:

I'm glad that you included past as well as present because it's much easier to answer that question.

Yes, Oliver Wendell Holmes, particularly in his brief dissenting opinions, wrote some real jewels and usually did it in the space of maybe two pages; and he was a very incisive writer.[27] Another writer I find very appealing, though very often I disagreed with his opinions, was Jackson. And Jackson had a very, very nice touch. He expressed himself concisely and sometimes in a way that is difficult to forget. He once remarked in, I think it was *Brown v. Allen*,[28] that the Supreme Court wasn't final because it was infallible, but was in-fallible because it was final. And -if you stop to think about that, that says quite a lot.

Mr. Baier:

How many years were you on the Court as Reporter with Chief Justice Earl Warren?

Mr. Putzel:

Well, a little less than half the time I've been there and I must, now that you mentioned him— maybe this is a little off the beaten path—but the practice of note-writing from the bench has intrigued visitors. They see pages go to a Justice and hand a note to somebody, often in the wives' box or maybe it's an incoming note to a Justice. But during the period when Warren was the Chief Justice, it was almost this time of year, many years ago, it was in October, somebody happened to notice that a great many notes were coming at almost regular intervals to the Chief Justice and the messenger would come from behind the velvet curtains and hand the notes to the Chief Justice. He would smile or frown or show no emotion and then another note would come and people began to wonder what these notes could be about. Well, it wasn't until some years later that I found out that the world series was going on. He was a great baseball fan, great sports fan of all kinds, and at the end of each inning the messenger was delivering to the bench the box score at the end of the inning.

Mr. Baier:

Let's hope the final note produced a smile.

Mr. Putzel:

I hope so.

Mr. Bair:

What kind of man was Earl Warren?

Mr. Putzel:

Oh, he was a marvelous person. I have a curious feeling: the other night I saw a video tape of an interview by Abram Sachar, the President of Brandeis University, or Chancellor, whatever he is called, interviewed Warren in a very rare interview that—I don't think Warren had ever given an interview like that before, or quite like that—and it evoked a good many memories. He was at that point, it was about two years before he died, and he had long since retired, but certain sparks were repeated in my memory of the Chief Justice as he used to be, and he was a marvelous person. And it's interesting to see how video tape can perpetuate a memory by evoking recollections from the tone of voice and facial expressions of people who have, passed on. And so I have mixed feelings. I think mostly feelings though of the privilege I felt in having known him.

Mr. Baier:

Is it a privilege to work inside the Court, day to day?

Mr. Putzel:

Oh, it is. There's no question about it. People can be cynical but I think the feeling of both exhilaration and pride that I had when I first came to the Court have not in any way dimmed since. And I still, I still walk down the marble halls thinking how lucky I have been to be there.

Endnotes

1. "All is changed, and not for the better. We no longer see the reporter sitting in court, noting the oral argument and colloquies between judge and counsel, which in the older reports, and in those of England sometimes even now, are so instructive and enable the reader to understand much that he might otherwise overlook." Henry Budd, "Reports and Some Reporters," *47 Am. L. Rev.* 481, 514 (1913). Compare the remark of Chief

Justice John Marshall in 1830 to Richard Peters, then Reporter of Decisions, who had inquired whether he should omit the arguments of counsel from the reports so as to save space. Responded the great Chief Justice: "I believe we all think that the arguments at the bar ought, at least in substance, to appear in the Reports. They certainly contribute very much to explain the points really decided by the Court." John Marshall to Richard Peters, March 22, 1830, in 3 *Peters* iv.

2. Walter Wyatt, Reporter of Decisions, 1945 to 1963 (326 U. S. to 374 U. S.).
3. Most lawyers think that it is a very simple matter to write a good headnote or a syllabus. It is, if one knows how. But experience has shown that while every lawyer deems himself capable, but a few can actually perform the work. It is a work requiring special and peculiar skill. Practice alone in the absence of the particular ability, will not develop a good writer." Rosbrook, "The Art of Judicial Reporting," 10 *Cornell L. Q.* 103, 114 (1925).
4. Henry C. Lind, now Reporter of Decisions, who succeeded Mr. Putzel by appointment of the Court, effective February 25, 1979.
5. 39 Va. L. Rev 883 (1953). Compare "some Curious Headnotes." 108 *The Law Times* 467(1900).
6. 399 U. S. 392 (1970).
7. "And, in every part of his work, the reporter should never forget that the brevity, terseness, and the most careful choice of words, are his highest duties." "Wallace's Reports," 1 *Am. L. Rev.* 229, 230(1867). In reviewing the first three volumes of Wallace, the editors of the *American Law Review* concluded that Mr. Wallace had failed miserably as a Reporter: "But his elaborate and bombastic statements of fact prove that he radically misconceives his office. He takes great pains to do what is utterly unfit to be done in a volume of reports. Before he can begin to learn his duties, he has so much to unlearn, he must undergo such intellectual revolution, that we despair of him. . . . To insure us against such reports in the future nothing less will suffice, than that Mr. Wallace should cease to be reporter. If this cannot be, then we demand in behalf of the profession, an entire change in his theory and practice of reporting. He must be more brief, more accurate, and more modest." *Id.* at 237. Wallace did not resign, however. He held on until 1876, completing 22 volumes of reports during his twelve years as Reporter of Decisions. In taking note of Wallace's resignation, the editors of the *American Law Review* continued to fuss at him: "Still, the experience of twelve years, so far from making him a good reporter, has rather tended to demonstrate his unfitness for the task

- of reporter of judicial decisions; and it was with a feeling far from regret that we heard of his resignation." 10 *Am. L. Rev.* 357 (1876).
8. Once in a great while a Justice insists on having the Reporter headnote what is said in the footnotes. This is all wrong, says Mr. Putzel, who opposed the practice, but to no avail. "Two of the rare instances in which syllabi were based in part on footnotes are: *Head v. New Mexico Board*, 347 U.S. 424(1963) (see numbered item 4 of syllabus), and *United States v. Gaddis*, 424 U. S. 544(1976) (see numbered item 3)." Henry Putzel, Jr. to Paul R. Baler, March 29, 1977. Doubtless Mr. Putzel would agree with De Quincey's comment, in his essay on style, that "such an excrescence as a note argues that the sentence to which it is attached has not received the benefit of a full development for the conception involved .. *Representative Essays on the Theory of Style* 66 (Brewster, ed., 1928). Compare Justice Frankfurter's comment on the celebrated *Carolene Products* footnote, *United States v. Carolene Products Co.*, 304 U. S. 144, 152-53 n.4, which, incidentally, was not headnoted, as follows: "A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine. . ." *Kovacs v. Cooper*, 366 U. S. 77, 90-91 (1949) (concurring opinion).
 9. Charles Henry Butler, the Reporter of Decisions from 1902 to 1915 (242-321 U.S.), in his wonderful book *A Century at the Bar of the Supreme Court of the United States* 79 (1942) exclaimed that the headnotes "just grow as *Topsy* did."
 10. "The headnote is a part of the case and should be as reliable as the opinion from whence it sprang. It is the duty then of each judge—a duty which is conscientiously performed by most judges—to examine the headnote with care and suggest such changes, if any, that should be made to make it truly represent the rule announced and applied in the opinion." Rosbrook, "The Art of Judicial Reporting," 10 *Cornell L. Q.* 103, 119 (1925). But compare the remark of one Supreme Court Justice to Charles Henry Butler: "If the Court is not to be bound by the headnote, as declared in several opinions, no member of the Court should be in any way connected with its promulgation, as it is exclusively the expression of the ideas of the Reporter on what the opinion holds and the Court decides." *A Century at the Bar of the Supreme Court of the United States* 80.
 11. It has not always been so. Henry Budd in his delightful article "Reports and Some Reporters," 47 *Am. L. Rev.* 481, 491-92 (1913), tells of one reporter who, believe it or not, ignored what the court said in its opinion in preparing his syllabus: "Bravery of another kind has been shown by an American reporter for, some years ago, in reading a case I found that the syllabus contradicted the opinion of the Court. This was explained by a

note to the following effect. The reporter cannot convince himself that the Court intended to overthrow the law as settled by a long course of decisions which are adverse to this opinion, he has therefore stated the law as it is."

12. For the true story of the Ohio syllabus rule, see the Appendix to this article.
13. For details as to the legal status of the headnote in these and other states, see the Appendix.
14. The Government, relying on the second paragraph in the headnote to *Hawley v. Diller*, 178 U. S. 476, claimed that the Detroit Lumber Company was not a good faith purchaser of certain timber lands. But the Government got nowhere. Reliance on the headnote was wrong, said Justice Brewer, for several reasons: "[un the first place, the headnote is not the work of the court, nor does it state its decision— though a different rule it is true, is prescribed by statute in some States. It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession in examination of the reports." *United States v. Detroit Lumber Co.*, 200 U. S. 321, 337 (1906). But this was not all. It seems that J. C. Bancroft Davis, who reported *Hawley v. Diller* during the October Term 1899, committed false report: "And finally," said Justice Brewer, "the headnote is a misinterpretation of the scope of the decision."

It's interesting to note that Charles Henry Butler, the Reporter of Decisions when the Detroit Lumber Co. case came down, promptly made a headnote out of the proposition that headnotes don't count. See paragraph 4 of Mr. Butler's syllabus, 200 U. S. at 322.

A few years later another lawyer made the grave error of trying to get Holmes's ear on the thin reed of a Louisiana headnote. To which O. W. H. responded: "Reliance also is placed upon the head note of the decision below . . . But the head note is given no special force by statute or rule of court, as in some States. It inaccurately represents the reasoning of the judgment. In 129 Louisiana it is said to have been made by the court. However, that may be, we look to the opinion for the original and authentic statement of the grounds of decision." *Burbank v. Ernst*, 232 U. S. 162, 165 (1914). It should be noted that Mr. Butler, true to his calling, promptly made another headnote out of this discussion. See paragraph 3 of the syllabus to *Burbank v. Ernst*, 232 U. S. at 162-63. And when the question later arose in Louisiana, Justice Holmes's view of the importance of Louisiana headnotes was adopted by the Louisiana Supreme Court. See *Cabral v. Victor & Provost*, 181 La. 139, 158 So. 821 (1934).

Felix Frankfurter, who followed Holmes from Harvard to the Court, also followed Holmes on Headnotes. But F. F., never at a loss for words, of course insisted on his own

pen. And so in his dissenting treatise in *Bisso v. Inland Waterways Corp.*, 349 U. 5. 85, 100(1955), Justice Frankfurter, speaking of certain "time-honored rules for reading cases," professed that "cases hold only what they decide, not what slipshod or ignorant headnote writers state them to decide; that the decisions are one thing, gratuitous remarks another. A stew may be a delicious dish. But a stew is not to be made in law by throwing together indiscriminately decision and dictum. . ." What else is there to say?

15. The word "parameter" has blighted the pages of the United States Reports 23 times since 1938, or so says the LEXIS machine. The first offender, who had better go unnamed, spoke of the "constitutional parameters of the copyright power" on October 19, 1971. See *Lee v. Runge*, 404 U. 5. 887, 888. The latest offense occurred in *Gertz v. Robert Welch, Inc.*, 418 U. 5. 323, 355 (June 25, 1974), when one of the Justices talked about the "parameters of a 'negligence' doctrine as applied to the news media."
16. In his opinion in *Ballew v. Georgia* rejecting a jury of less than six in all nonpetty criminal cases, Mr. Justice Blackmun noted that "only three States, Georgia, Louisiana, and Virginia, have reduced the size of juries in certain nonpetty criminal cases to five." Slip Opinion at 21. But as reported in the Preliminary Print, Justice Blackmun's opinion makes no mention of Louisiana: "Perhaps this explains why only two States, Georgia and Virginia, have reduced the size of juries in certain nonpetty criminal cases to five." 435 U. S. at 244. And so it goes thanks to the Reporter and his helpers.
17. "So, also, a good reporter will watch the opinion carefully for grammatical errors. There is nothing sacred about opinions. They are written by human beings, possessing human frailties, whose work is not necessarily perfect, and, indeed, in many instances it is far from perfect. Every judge is grateful to a reporter who points out actual errors in English. Judge Story in a letter to Mr. Richard Peters, the reporter of the Supreme Court of the United States said:

"As to the correction of verbal and grammatical errors in an opinion, I can only say for myself, that I have always been grateful for the kindness of any reporter of my opinions, for doing me this favor. Verbal and grammatical errors will occasionally occur in the most accurate writers. I have found some in my own manuscript opinions, after careful perusal, and have not detected them till I saw them in print. I think it would be a disgrace to all concerned, to copy gross material and verbal errors and misrecitals, because everyone must know that they would at once be corrected if seen. They mar the sense, and they pain the author. So the occasional change of the collocation of a word often improves and clears the sense. If a reporter do no more than acts of this sort,

removing mere blemishes, he does all Judges a great favor. I do not believe any good reporter in England or America ever hesitated to do so. This is my opinion. Other persons may think differently from me, but I have never supposed this is not a part of the appropriate discretion of a fair and accomplished reporter.' "Rosbrook, "The Art of Judicial Reporting," 10 Cornell L. Q. 103, 123 (1925).

18. Ernest Knaebel, Reporter of Decisions, 1916 to 1943 (242 U. S. to 321 U. S.).
19. 245 U. S. 154 (1917).
20. "Exactness to the minutest detail is likely to become an obsession with those who do this kind of work." Rosbrook, "The Art of Judicial Reporting," 10 Cornell L. Q. 103, 122 (1925).
21. "With all respect to my dissenting Brethren, I deem little short of frivolous the contention that the Equal Protection Clause prohibits enforcement of marital obligations, in either the mandatory or the suppletive form." *Labine v. Vincent*, 401 U. S. 532, 540 (1971) (Harlan, J., concurring).
22. It turns out that "suppletive" is indeed a civil law term. The word means "permissive," in the sense that a legal rule applies only if those affected by it have not excluded its application by private agreement. "Statutory rules may be either suppletive or imperative. A suppletive rule applies only if those affected by it have not excluded its application. On the other hand, rooted in public policy considerations, an imperative rule is applied without regard to the intention of the individuals concerned." *Badon's Employment, Inc. v. Smith*, 359 So. 2d 1284,1286 (La. 1978). The distinction between suppletive anti mandatory rules is recognized in Article 12 of the Louisiana Civil Code and in contemporary civil law systems throughout the world. *See generally*, Yiannopoulos, *Louisiana Civil Law System* § 42 (1977).
23. In taking note of the publication of the first two volumes of Otto's reports, the editors of the American Law Review observed that: "These two volumes are entitled 'United States Reports;' and, although they are the first of a new series, they are numbered volumes 91 and 92. We believe that this title and arrangement were adopted in accordance with the wishes of the Court, instead of designating the volumes, as heretofore, by the name of the reporter. . ." Book Notice, 11 *Am. L. Rev.* 335, 337 (1877).
24. Mr. Justice Frankfurter, as the price of a law review contribution, once required the lads of the Harvard Law Review, who had devised a new schoolboy scheme for citing cases before Otto (e.g., *Marbury v. Madison*, 5 U. S. (1 Cranch) 137), to adhere to the traditional form of citation by the name of the reporter alone. The Justice rebuked the

editors for making the change, insisting on the "need for preserving ancient traditions." "With the Editors," 69 *Harv. L. Rev.* (Dec. 1955, p. v.). One of Justice Frankfurter's best students, Colonel Frederick Bernays Wiener, "whose spirit is lineal to Plowden, Wheaton, and Wallace," *Yearbook 1976* at 71, also insists on citing cases before Otto in the traditional form. Why be so fussy about this? Because, as the Colonel himself explains it: "Citations to such cases other than by the name of the reporter alone mark the brief-writer as a legal illiterate or, at the very least, as one not very well brought up or educated." *Briefing and Arguing Federal Appeals* 228 (1967).

25. "The view is widespread that when a court comes to the hard business of decision, it is the briefs, and not the oral argument, which count. I think that view is a greatly mistaken one. . . . I think that the lawyer who depreciates the oral argument as an effective instrument of appellate advocacy, and stakes all on his brief, is making a great mistake." Harlan, "What Part Does the Oral Argument Play in the Conduct of an Appeal," 41 *Cornell L. Q.* 6 (1955).
26. *Briefing and Arguing Federal Appeals* (1967), first published as *Effective Appellate Advocacy* (1950), a book that was so popular it was literally stolen off library shelves.
27. *See, e.g., Lochner v. New York*, 198 U. 5. 45, 74 (1905) (Holmes, J. dissenting).
28. 344 U. 5. 443, 540 (1953) (Jackson, J. concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

A REPORT ON THE REPORTER APPENDIX

The True Story of the Ohio Syllabus Rule

For more than 100 years the rule in Ohio has been that its Supreme Court, except for *per curiam* opinions, speaks as a court only through the syllabi of its cases and not through the justice's individual opinions. *See* Rule VI of the Ohio Supreme Court's Rules of Practice, 94 Ohio St. ix; 5 Ohio St. v. Under Rule VI, which was adopted by the judges of the Ohio Supreme Court in 1858, "A syllabus of the points decided by the court in each case, shall be stated in writing, by the judge assigned to deliver the opinion of the court, which shall be confined to the points of law, arising from the facts of the case, that have been determined by the court." And these syllabi alone constitute the law in Ohio. "Individual opinions speak to the conclusions of their writers. What useful purpose they serve is an open question." *Thackery v. Heifrich*, 123 Ohio St. 334,

336 175 N. E. 449, 450 (1931).

There are many references to Ohio's syllabus practice, both in the syllabi and in the opinions of the Ohio Supreme Court. *See, e.g.* point 6 of the syllabus to *State v. Phillips*, 168 Ohio St. 191, 151 N.E. 2d 722 (1958) ("Only what is stated in a syllabus or in an opinion per curiam or by the court represents a pronouncement of law by the court"); and point 6 of the syllabus to Chief Justice Kingsley Taft's opinion for the court in *Cassidy v. Glossily*, 12 Ohio St. 2d 17, 231 N.E. 2d 64 (1967) ("The syllabus of a decision of the Supreme Court of Ohio states the law of the case"). Strictly speaking, what Judge, later Chief Justice, C. William O'Neill said in his opinion for the Court in *Lyons v. Lyons*, 2 Ohio St. 2d 243, 246/§, 208 N.E. 2d 533, 536 (1965), about the power of an Ohio syllabus ("the syllabus of a case is the law of Ohio") cannot be regarded as authoritative, because the statement is not in the syllabus as Rule VI requires.

One wonders about the purpose of Ohio's syllabus rule. Most states follow the general common law practice, as expressed by the Supreme Court on Maine in 1936 that "A head-note to a reported decision, it is the general rule, is not law except so far as it is warranted by the judgment of the court upon the facts of the case." *Brown v. Railway Express Agency*, 134 Me. 477, 479-80, 188 A. 716, 717. Accord, *Cabral v. Victor & Provost*, 181 La. 139, 158 So. 821 (1934); *Harris v. Lahn*, 122 N.J. L. 91, 4 A. 2d 772 (Ct. Err. & App. 1939); *Jaroszewski v. Pennsylvania R. Co.*, 122 N.J.L. 350, 5 A. 2d 678 (Sup. Ct. 1939); *Westlake v. District Court*, 119 Mont. 222, 231, 173 P. 2d 896, 901 (1946) ("Syllabi may lay down no rule not in complete accord with the opinion itself"); *State v. Dizon*, 47 Hawaii 444, 390 P. 2d 759 (1964).

Nebraska also follows the general common law rule. "The opinion controls the syllabus, the latter being merely explanatory of the former and having no more force and effect than the statements made in the opinion upon which they are based." *Maxwell v. Hamel*, 138 Neb. 49, 292 N.W. 38 (1940). And in this Nebraska case Chief Justice Simmons explains why the headnotes are not regarded as controlling at common law: "A judge, in writing an opinion, must be permitted a certain latitude in stating his reasons for the conclusions that are reached. It quite often happens that statements are made and conclusions announced in the body of an opinion that are not necessary for a decision of the questions presented and are not directly applicable thereto. These statements are also sometimes carried in the syllabus of the case, which is prepared by the writer of the opinion. Writers of opinions endeavour to prevent those occurrences. When they do occur, they are not considered to be controlling, although they are often helpful and likewise are often later adopted by the court by subsequent reference thereto." 138 Neb. at 5455, 292 N.W. at 41-42.

In the late 1800's the Michigan Supreme Court declared an act of the legislature requiring the justices to write syllabi unconstitutional. See *Matter of Headnotes*, 43 Mich. 641, 8 N.W. 552 (1881). And a little later the Indiana Supreme Court did the same thing. Writing headnotes, said Chief Justice Elliot, "is essentially and intrinsically ministerial, and, therefore, can not be performed by the judges or the court." *Exparte Griffiths, Reporter*, 118 Ind. 83, 84, 20 N.E. 513, 514 (1889). That kind of tedious work was for the reporter of decisions, said the Indiana Court, and certainly not for the judges.

But in Ohio the practice is otherwise, and in 1920 Justice Robinson cautioned the bench and bar of Ohio to keep Rule VI and the comparative authority of the syllabus and the opinion in mind so that "the administration of the law in Ohio will more nearly approach an exact science." *State v. Hauser*, 101 Ohio St. 404, §/408, 131 N.E. 66, 67.

Unfortunately, subsequent experience shows that the syllabus rule neither promotes exactitude in the administration of Ohio law, nor does it further the cause of legal science in that State. Exceptions to the rule inevitably sprang up. Thus in 1934 in *Williamson Heater Co. v. Radich*, 128 Ohio St. 124, 126, 190 N.E. 403, 404, Chief Justice Weygandt conceded in his opinion for the Court that: "It is, of course, true that the syllabus of the decision of the Supreme Court of Ohio states the law of Ohio. However, that pronouncement must be interpreted with reference to the facts upon which it is predicated and the questions presented to and considered by the court. It cannot be construed as being any broader than those facts warrant. When obiter creeps into a syllabus it must be recognized and so considered." And, *nota bene*, Chief Justice Weygandt spoke authoritatively in this case on the subject of how properly to read an Ohio syllabus; for he promptly elevated what he had said in his opinion in *Williamson* to the legal plateau of point 1 of the syllabus in that case.

Later, in *DeLozier v. Sommer*, 38 Ohio St. 2d 268, 271 n.2., 313 N.E. 2d 386, 389 n.2 (1974), the Ohio Supreme Court further conceded in a footnote that "this court has in certain instances held some parts of the syllabi of earlier cases to be less than a conclusive statement of the law." And the Court repeated its earlier admonition that "the fact of placement of a statement in a syllabus paragraph does not transform dictum into a conclusion of law."

It's fair to say that the Ohio syllabus rule, far from promoting the cause of legal science in that State, has rather made a farce out of the administration of justice in the Ohio Supreme Court. At least that is the conclusion of the latest law review note on the subject. "Not only is the syllabus unable to pay its way in the world of realistic jurisprudence, it can be an active force for evil in that world." Note, "Deceptive 'Certainty' of the Ohio syllabus," 35 *U. Cinc. L. Rev.* 630, 642 (1966).

Quite sensibly, the Ohio Court of Appeals has not adopted a syllabus rule for the conduct of its judicial business. See *Parkview Hospital v. Hospital Service Assn.*, 8 Ohio App. 2d 315, 222 N.E. 2d 314 (1966).

Unfortunately, the Justices of the Supreme Court of the United States have not escaped struggling with Ohio's syllabus rule. Follow it they must, but not without great labor and considerable consternation. See, *e.g.*, Mr. Justice Burton's painstaking application of Ohio's syllabus rule in *Perkins v. Benguet Mining Co.*, 342 U. S. 437 (1952), and Justice Potter Stewart's explication of the rule in his opinion for the Court in *Beck v. Ohio*, 379 U. S. (1964). Mr. Justice Stewart, who is from Ohio and thus in a good position to know, once told the author that he had always understood that the real reason for the Ohio syllabus rule was that lawyers in Ohio, many of whom used to farm on the side, did not want to wade through page after page of judicial utterance to find out what the law was; instead, they wanted it set out in a neat package that could be quickly digested in the office, along with a good sandwich, presumably after a hard day's work in the fields. Thus, the push of agricultural necessity may have had more to do with the adoption of Ohio's syllabus rule than the pull of legal science. It has also been suggested that the origin of the rule "probably lies in a combination of the human tendency to utilize any available shortcut and the once-popular philosophical outlook that all law is 'found' in the form of immutable abstract principles." Note, 35 *U. Cinc. L. Rev.*, at 637.

At times the Supreme Court of the United States has found it impossible to determine from a particular syllabus just what the Supreme Court of Ohio has decided, thus requiring a remand in order to permit the state court to further explicate its judgment. See *Ohio v. Gallagher*, 425 U. S. 257 (1976), *vacating and remanding* 38 Ohio St. 2d 291, 313 N.E. 2d 396 (1974). All of which wastes time and effort, but such is the comic operation of Ohio's Rule VI. What is worse, the federal Supreme Court has been told by its Columbus counterpart, and in the manner of a grade school lesson, that contrary to what the Justices in Washington think, "the 'italicized headnote' which follows the style in each of our opinions should not be understood to be included as part of or 'in the * * * syllabus' of any decision of this court. Such a headnote is prepared by the reporter merely for indexing purposes." *State V. Gallagher*, 46 Ohio St. 2d 225, §/226 n.l, 348 N.E. 2d 336, 337 n.l (1976). Oops! And thus the opera continues.

Even so graceful a pen as Mr. Putzel's has been pushed into this unseemly Ohio saga. See, *e.g.*, point 1 of the Reporter's syllabus to *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U. S. 562 (1977), which is all about the Ohio syllabus rule. Doubtless Mr. Putzel drafted this particular headnote out of his sense of duty to the Reporter's Office and not out of his allegiance to tidy expression. After all, headnoting headnotes is at best unruly, and at worse inelegant. What's

more, if judicial opinions were more succinct, there will be little need for syllabi, and no need at all for an Ohio syllabus rule.

But, to wrap up this note, Mr. Putzel is quite right: the syllabus is King in Ohio." 'But he has nothing on!' a little child cried out at last." Hans Christian Anderson, "The Emperor's New Clothes," in *Wonder Stories for Children* 236, 238.

A Kansas statute, originally passed in 1867 shortly after the Ohio Supreme Court adopted rule VI, requires the preparation of a syllabus in any case decided in the Supreme Court of Kansas by the judge delivering the opinion. For the current provision, see *Kan. Stat. Ann.* § 20-203 (1974). But the Kansas Supreme Court has never determined whether these syllabi alone constitute the law in Kansas. What the Court has said, speaking through Chief Justice Parker, is that "A syllabus is confined to points of law arising from the facts of the case that have been determined by the court and is in no sense to be construed as reaching out and deciding a question of law which is not fortified by the factual situation presented by the record in the case." *Wenzel Machinery Rental & Sales Co. v. Adkins*, 189 Kan. 435, 439, 370 P. 2d 141, 144 (1962). One Kansas justice has intimated, however, that "one may look to an opinion to determine what a case holds rather than accepting the law from the concise abstract statement thereof as it appears in the syllabus." *Moore v. Kansas Turnpike Authority*, 181 Kan. 840, 851, 317 P. 2d 384, 392 (1957) (Schroeder, J., dissenting).

In Kentucky "it is the rule that a syllabus, even though written by the court, is no part of the decision." *Ohio Valley F. & M Ins. Co.'s Receiver v. Skaggs*, 216 Ky. 535, 540, 287 S.W. 969, 971 (1926) (citing *Black on Judicial Precedents* 53).

It used to be the law in Oklahoma that "The law adopted by the court is declared in the syllabus prepared by the court." Point 4 of the syllabus to *Corbin v. Wilkinson*, 175 Okl. 247, 52 P. 2d 45 (1936). And for 75 years the Oklahoma Supreme Court labored under another version of the dreaded syllabus rule. Fortunately the statute requiring preparation of syllabus rule. Fortunately the statute requiring preparation of syllabi in all cases decided by the Oklahoma Supreme Court, *OkI. Stat. Ann.* tit. 12, § 977, was repealed in 1969, thus freeing the justices from the shackles of reading and writing the syllabi. They can now concentrate instead on writing clear opinions. In Georgia Chief Justice Russell once opined that "under the law, the entire court is committed" to the headnotes, which he said, constitute "the authoritative expression of the court as such." *Forester v. Forester*, 155 Ga. 722, 727, 118 S.E. 373, 375 (1923). But in the very same year, Chief Judge Broyles of the Georgia Court of Appeals laid it down as point 2 of the syllabus to *Walker v. City of Cairo*, 31 Ga. App. 307, 308, 121 S.E. 138, that "When this court

delivers an opinion with headnotes by the court, the headnotes are not to be considered alone as showing what is decided, but the headnotes and opinion are to be taken together." So the law on headnotes in Georgia remains unclear.

Bushrod Washington and The Mount Vernon Slaves

Gerald T. Dunne

His name was Bushrod Washington, but he would have been better off had it been Bushrod Smith. The dominant circumstance of his entire life was his station as George Washington's favorite nephew, and it was a circumstance which literally outlasted life itself for he was buried by the great man's side. To be sure, the relationship was not without its pleasant side, for George Washington was something of a second father, and persisted in affording counsel, advice, and guidance to the younger man. But paternalism has its limits, and this association showed them clearly. Overall it must be said that Bushrod Washington gave far more than he got. He suffered from that most insidious form of injustice—a patron's leaning backwards to give the appearance of fairness.

Yet, in his way, Bushrod Washington was a man of immense ability and would have gone far—perhaps farther—had his name been Bushrod Smith and his relationship to George Washington non-existent. Charter member of Phi Beta Kappa, cited for service as a private of dragoons in the Revolution, member of the Virginia ratification convention, Bushrod Washington studied law under James Wilson, his predecessor on the Supreme Court, made an outstanding record at the Virginia bar, and was appointed to the Supreme Court in 1799 by President John Adams, far more on his own merits than on his distinguished name. And in his thirty-one years on the Court, he made a record which was the subject of favorable appraisal by critics as demanding and diverse as Justice Joseph Story in the nineteenth century and Justice Felix Frankfurter in the twentieth.[1]

To be sure, he was not very much to look at, "a little, sharp-faced gentleman with only one eye and a profusion of snuff distributed all over his face." [2] Yet there was steel beneath the non-descript surface, and associates were constantly aware of it. Indeed Henry Clay became the envy of Washington when he once paused in the course of argument and took a pinch of snuff from Washington's open snuff box. "I do not believe," said an observer, "that there is an-other man in the United States who could have done that. . ." [3]

But the steel was also, and more appropriately, displayed on great occasions. Justice Washington showed it when, sitting as a lonely Virginian in tumultuous Philadelphia, he sent a Pennsylvania militia general to jail for obstructing federal process.[4] He showed it when he contributed his vote in favor of state insolvency laws on an otherwise evenly divided court and sent John Marshall into dissent on a constitutional question for the one and only time in the

great Chief Justice's tenure.[5] Yet it was not a concern for debtors that prompted such action. Indeed Washington's only formal dissent in thirty-one years on the Supreme Court came when he insisted that states could not retroactively abolish imprisonment for debt.[6] And perhaps his own hard-headed sense of rectitude, whatever its popularity or other consequences, was summed up in an opinion which he knew would provoke bitter criticism:

We hold ourselves accountable to God, our consciences, and our country to decide this question according to our best judgment be the consequences what they may.[7]

But there was more than steel in him. "There was," said his colleague, Justice Story, "a daily beauty in his life, which won every heart. He was benevolent, affectionate and liberal, in the best sense of the terms." [8] Particularly touching was his unfailing care and devotion to his half-mad wife whom an associate with nineteenth century delicacy styled "a valetudinarian in body and mind." [9]

Like the converging elements in a Greek tragedy, these qualities met in the affair of the Mount Vernon slaves which, at one level threw Justice Washington's basic benevolence into conflict with his hard-headed response to any suggestion of being pushed, and in a larger perspective luminously set out the dilemma of a thoroughly decent man caught in a web of circumstances which was not made by him and which was beyond his control.

In a sense the episode began with the direction in George Washington's will that his slaves be freed upon Martha Washington's death and that this direction be "religiously fulfilled ... without evasion, neglect, or delay." [10] Needless to say, as his uncle's executor (and probably the draftsman of the document) Bushrod Washington saw that the directed emancipation was carried out. He did not regard the action as a model for himself, but he was concerned enough about slavery to be one of the organizers and the lifetime president of the American Colonization Society.

The Society attracted a variety of members who joined for a variety of reasons. In retrospect, its basic goal—the elimination of slavery from American life by voluntary emancipation of the slaves resettling them in Africa—was logistically and politically impossible. Nonetheless, it had widespread popular support. To some, it was a device to be rid of the free Negro. To others, it meant that the black man, slave or otherwise, had no place or allowance in the country. Another point of view approved the Society as the first step in rousing the slave-holder conscience. To yet another, it was a hoax and delusion, an impossible scheme lulling the conscience and preventing

more fundamental reform to the extent that the epithet "colonizationalist"[11] became almost the most pejorative epithet in the abolitionist vocabulary.

If his connection with the Colonization Society was one of the less favorable developments in Justice Washington's career, his inheritance of Mount Vernon must have ranked as about the worst. The house came to him in poor condition; only one room was liveable and it was unfurnished thanks to the personal property having been disposed of by sale or legacy. But even worse was the basic economic *malaise*— the estate could not support its staff. Indeed just a few months before his death, George Washington had put his finger on the dilemma:

To sell the overplus I cannot, because I am principled against this kind of traffic in human species. To hire them out is almost as bad . . . What must be done? Something must or I shall be ruined.[12]

At least George Washington was a countryman and planter, but Bushrod Washington was neither; during the first twenty years of the latter's occupancy the accounts went into the red from \$500 to \$1,000 a year, and visiting in 1821 Justice Story commented on the "general symptoms of decay . . . (and) little effort to repair the silent ravages of time." [13] But in addition to the basic problem of costs and productivity, the Justice had to struggle with a problem that the General never had to face, and in a sense, caused—a rising insubordination on the part of the Mount Vernon slaves.

In explaining why this condition was prevalent at Mount Vernon and not at other plantations in the neighborhood, Justice Washington noted that the estate "has at times been visited by some unworthy persons; who have condescended to hold conversations with my negroes, and to impress upon their minds the belief that as the nephew of General Washington, or as president of the Colonization Society, or for other reasons, I could not hold them in bondage, and particularly that they would be free *at my death*." [14]

The implications of the latter phrase, even though made ten years before Nat Turner, prompted the Justice to call the slaves together in March of 1821 and tell them that he had no intention of freeing any one of them, either before or after his death. While there had been difficulty at the estate earlier including suspected arson, events now took a new turn as the slaves took the next word in the dialogue with their master. Three escaped during the late spring ("one, a valuable cook") with one making it to the northern states and two being taken on their way to Pennsylvania but at a cost to Justice Washington of \$250.00.

This started an escape game that Washington could not win, and the Justice's response was

the same steely inflexibility he had previously shown both Chief Justice Marshall and the Pennsylvania militia general—he arranged to sell for \$10,000 the -active core of the estate work force, some 54 of around 90, to the dread destination "down the river," in this case the Red River in faraway Louisiana. Yet even here he showed how some decencies might survive the brutalities of a system for he demanded assurances from his buyers that the slaves would be kept together and moreover went to some expense in a partially successful effort in keeping families together.

And in extraordinary yet characteristic action, Justice Washington made a speech to the slaves who had been sold, and as would be the case in any group, there were those who found it politic to publicly agree with him. These were not the young for youth and insubordination seemed to run together, but "the elders (who) admitted the necessity which compelled me to part with them, and confiding in the assurances made to them by the respectable gentlemen to whom they had been sold, expressed their belief their situation would be improving." [15] Then, as the Justice saw the situation, the group moved off cheerfully and proved their unconcern by their behavior during a two-day layover in Alexandria where "an almost unlimited license (was) allowed them by their new masters."

Then the storm broke. A report from a Lees-burg paper on August 21, 1821, had it that:

"(on) Saturday last a *drove* of negroes, consisting of about 100 men, women, and children passed through this town for a southern destination. *Fifty-four* of the above unhappy wretches were sold by *Judge Washington* of Mount Vernon, president of the *Colonization Society*. [16]

A letter to a Baltimore paper added further details:

I was at Mount Vernon a few days since, and was told by some of the slaves, whose countenances were remarkably indicative of despondency, and dejection, that, more than fifty of their companions.., had been sold but a week before... One would have the poor creatures who were left, the aged and blind, had lost every friend on earth. I inquired the reason. They answered that husbands had been torn from their wives and children and that many relations were left behind. I asked an old slave if he were living at Mount Vernon when George Washington died. His answer was "no sir, nor so lucky—I should not be a slave *now* if I had. The reader ought to know that George Washington set all his slaves free at his death, and that Judge Washington is *his* nephew. [17]

Hezekiah Niles, of the *Washington Weekly Register*, reprinted the two reports and added his own comment: "Judge Washington, certainly, has as *much* right to sell his slaves as any other . . . but there is something excessively revolting in the fact that a herd of them should be driven from Mount Vernon, sold by the nephew and principal heir of GEORGE WASHINGTON, as he would dispose of so many hogs or horned cattle; violating every tie that fastens on the human heart, and dissolving the connection of husband and wife, mother and child! We do hope that there is some mistake about the matter." [18]

Washington was not a man to take these judgments in silence, and quickly accepted an offer of the Baltimore *Federal Republican* "for the purpose of refuting certain illiberal remarks which have appeared in other journals of the day." While irritated at what he regarded as the covert attack on the Colonization Society, his basic response involved a more fundamental point where he regarded the *Register* as containing an "implied censure" of his conduct:

I take the liberty, on my own behalf and on that of my southern fellow citizens, to enter a solemn protest against the propriety of any person questioning our right; *legal or moral*, to dispose of property which is secured to us by sanctions equally valid with those by which we hold every other species of property . . . I acknowledge, at the same time that if in the exercise of it, I have disregarded the dictates of humanity, or unnecessarily given pain to those who were affected by it, my conduct is justly open to public reprehension. [19]

He then passed to particulars and was particularly incensed with what he saw as the gratuitous intermeddling which he regarded as the cause of all his troubles:

How correct it was, in the person who made the statement, to visit Mount Vernon in my absence and there to hold conversations with my negroes upon such delicate topic... I submit.., to the public judgment to decide. But I surely have a right to complain, that he not only gave credit himself to the assertions of *such informers* but that he would publish them to the world *as facts*, without first applying to me to admit, deny, or explain them.

He then gave his principal explanation—that he had not "voluntarily" separated families and detailed his efforts and expenses to keep families together. Unfortunately, his explanations of dollars-and-cents were not calculated to lull criticism and still less were his irate and insensitive

asides—that the United States was in large part a nation of immigrants to which the parting of parent and child and even of husband and wife were matters of daily instance. Still less was his sarcastic rejoinder that "I have never heard a sigh or a complaint from the parents of two of the most valuable servants I ever owned, that their sons had abandoned them, and my service, and sought new habitations in the northern states, where they now are."

Then noting and laying to one side, "the *insinuation* that, because General Washington thought it proper to free his slaves, his nephew ought to do likewise," the Justice got to the three reasons for his decision—the losing economics of Mount Vernon, the insubordination of the slaves, and the "last motive"—an anticipation of the escape to the north of any slaves who were able to do so.

Niles denied any censure of the Justice by implication or otherwise, pointing out that the bulk of the reports in his own paper, including the current story were but reprints from other publications. He found it pleasant to observe that Justice Washington did not think himself superior to a trial at the bar of public opinion, or "if he has succeeded in vindicating himself from the charges preferred against him, as many think he has (considering his peculiar situation), no one will rejoice at it more than myself, on account of the name which he bears and as the proprietor of *Mount Vernon*—where the ashes of the father of his country repose."

Yet this ambiguous comment was preceded by an equally equivocal one which might be taken as a disclaimer for the content of reprinted material or, possibly on the Justice's action in selling the slaves. For after noting that Justice Washington "though a Judge, he has not rendered justice," Niles also asserted, "I am not a little surprised that the Judge did not act upon the facts as presented to him; but it only goes to show the truth of what I always believed, that even judges of the Supreme Court of the United States may commit errors." [20]

Endnotes

1. See W. W. Story, Vol. 2, *Life and Letters of Joseph Story*, (1851) p. 29 (hereinafter cited as W. W. Story), and Felix Frankfurter, *The commerce clause Under Marshall, Taney, and Waite* (1937), p. 5.
2. George Ticknor, *Life, Letters, and Journal* (Hillard ed., 1876) p. 38.
3. Charles Warren, Vol. 2, *The Supreme Court in United States History* (1937), p. 470 n.
4. *United States v. Bright*, 24 Fed. Cas. 1232 (1809).
5. *Ogden v. Saunders*, 25 U.S.

6. *Mason v. Haille*, 25 U.S. (12 Wheat.) 270 (1827).
7. *Green v. Biddle*, 21 U.S. (8 Wheat.) at 92 (1821).
8. W. W. Story, Vol. 2, p. 32.
9. Horace Binney, *Bushrod Washington* (1858) p. 10.
10. George Washington, Vol. 37, *Writings* (1937 ed.) p. 277.
11. *See, e.g., The Garrisons; Vol. 4: The Story of His Life* (1889) p. 414.
12. Letter to Robert Lewis, August 17, 1799, in Prussing, *The Estate of George Washington, Deceased* (1914) p. 158.
13. W. W. Story, Vol. 1, p. 399.
14. Letter to the editor, *Niles Weekly Register*, Sept. 29, 1821.
15. *Ibid.*
16. Reprint in *Niles Weekly Register*, Sept. 1, 1821.
17. *Ibid.*
18. *Ibid.*
19. Letter to the editor, *supra*, note 14.
20. *Niles Weekly Register*, Sept. 29, 1821.

William Moody

Profile of a Public Man

Paul T. Heffron

In his seven years as President, Theodore Roosevelt appointed three men to the Supreme Court: Oliver Wendell Holmes Jr., William Rufus Day, and William Henry Moody. Holmes is a legendary figure. Day is known to diplomatic historians for his service as President McKinley's Secretary of State, and has been the subject of a judicial biography.[1] Moody in contrast has been buried in obscurity.

Taking his seat on the Court in 1906 at age fifty-three, Moody could have reasonably looked forward to a tenure of fifteen to twenty years. In less than four full terms, however, his public career came to a tragic end. A breakdown of the central nervous system turned Moody into a helpless cripple, forcing him to retire in 1910. For seven years he lived on in his Haverhill, Massachusetts, home; in his own words as one of the "crucified dead." [2] Despite a distinguished career in state and national politics as district attorney, Congressman and Cabinet member, the *Boston Herald* commented editorially at the time of his death: "Many people who read in the newspapers of his death yesterday morning doubtless expressed to themselves surprise that he was still living, if indeed they remembered him at all." [3]

Moody, of course, is only one of many Justices neglected by historians. Of the more than 100 men who have sat on the Court, a comparatively small number have been the subjects of full length studies. Various reasons account for this gap in our legal history; brief service on the Court is certainly one of them. "With rare exceptions," said Felix Frankfurter, "the great reputations on that Court have been partly a function of time." [4] It was Frankfurter's opinion that in the history of the Court, only three Justices who had served short tenures left a lasting impression: Benjamin R. Curtis, Benjamin N. Cardozo, and William H. Moody. [5]

The Early Years

The social origins of judges is a subject of interest to scholars. Like his judicial brother Holmes, Moody's roots ran deep into the New England soil. He was in a direct line of descent from

William Moody, who with a small band of Puritans founded Newbury, Massachusetts, in 1635.[6] Throughout the 17th and 18th centuries the family name was imprinted on the religious and educational institutions of frontier New England communities. His branch had remained in Newbury, however, as simple dirt farmers and were not prominent. Here in the 200 year old family farm house in the Byfield parish section of the town he was born on December 23, 1853, to Henry Lord and Melissa Emerson Moody. His earliest recollections were wearing a Lincoln-Hamlin badge, working on his father's dairy farm in neighboring Danvers, and delivering milk in Salem. The family was neither rich nor poor, he said, but of sufficient means to send him to the best schools New England could offer. They were Phillips Academy in Andover and Harvard College.

Moody studied classics at Andover for three years and entered Harvard College in 1872. He was an indifferent student, barely surviving the first two years. In his junior year he began courses with Henry Adams. This experience transformed his intellectual life. Inspired by Adams' seminar in medieval institutions, he wrote a thesis and received honors at commencement in 1876.

In his *Harvard Class Lives* Moody wrote: "I shall probably study law." [7] He enrolled in Harvard Law School in September, 1876, but withdrew abruptly in January to take up an apprenticeship in the Boston law office of Richard Henry Dana, author of *Two Years Before the Mast*, and a founder of the Free Soil Party in Massachusetts. Probably he saw this route as a short cut to the bar. In any case, he remained in Dana's office for fifteen months. Years later he remembered this period as an important step in his education. "I was a boy and he an old man, and so the relations between us were not intimate, but I profited immensely by my contact with him. It is always well to get near to men of genius. The very air in which you live is an inspiration." [8]

At the end of his apprenticeship, Moody had studied law scarcely a year and a half. It was not, even then, considered sufficient preparation for admission to the Massachusetts bar. There was no officially prescribed period, but the general understanding was that a candidate should have had a total of three years study in a law school or lawyer's office. Nevertheless, Moody presented himself for the examination in Salem in April, 1878. Examinations were administered orally in each county by a board of three lawyers appointed by the Supreme Judicial Court. The story of Moody's performance became a tradition of the Essex bar. At first the board refused to hear him because of his brief legal training, but finally gave in to his pleading that he be given a chance. At the end of the questioning the board rated his answers the best they had ever heard. On April 7,

1878, he inscribed his name in the "Book of the Bar," and the following month was formally admitted to practice by Chief Justice Horace Gray in the old Salem court house.

At the Essex Bar

From 1878-1895 William Moody was engaged in the public profession of the law in Haverhill. He served also during these years in elective office: on the school committee, as city solicitor, and district attorney of Essex County. That he was a lawyer of more than ordinary talent was apparent from the beginning. In his first appearance before the Supreme Judicial Court at age twenty-six, he argued a case involving complex questions of real property law. At the conclusion of the argument, Chief Justice Gray, in an unusual gesture, left the bench to personally congratulate the young attorney for his searching analysis of the subject. That evening at a social gathering in Salem, Judge Endicott who had sat in the case, also remarked on the display of legal learning he had heard that day in court. The story circulated around the country and Moody himself confirmed it in a letter to his brother: "At the conclusion of my argument I received very high compliments from the Chief Justice and later from other of the Judges. What they said I do not care to repeat." [9]

This was not the only occasion that the Supreme Judicial Court was impressed by Moody's arguments. Holmes was on the state bench at this time and later wrote: "I saw his legal career almost from the beginning. On what must have been at least one of his first appearances before the Supreme Judicial Court of Massachusetts, with Mr. Boyd B. Jones on the other side I said to my associates that those were the two ablest men of their age in the state." [10] In all, Moody made some seventy appearances before this court.

There were countless other cases large and small through which Moody developed his legal skills in these formative years. Two cases especially brought his name to state wide and national attention. While district attorney he was called in to assist the prosecution in the celebrated murder trial of Lizzie Borden, accused of murdering her father and step-mother with an axe. Though Lizzie escaped conviction, Moody's opening statement and his arguments on the admissibility of certain evidence won praise from such authorities on the rules of evidence as John H. Wigmore [11]

The case for which Moody was best remembered in Haverhill and around the county, however, was that of the so-called "boodle aldermen." As district attorney he had the painful duty of prosecuting some of his friends, who as members of the Haverhill Board of Aldermen,

were accused of taking bribes in return for granting liquor licenses. Moody secured a conviction, but an appeal was taken to the Supreme Court where one of the main contentions was that Moody's comment on the fact that the defendants had invoked the privilege against self-incrimination before the grand jury, vitiated the trial. The Court, which included Holmes, unanimously upheld the conviction. In an age when the self-incrimination privilege was less highly valued, it ruled that when the defendants elected to take the stand at the trial, they thus waived any privilege against being questioned about their grand jury testimony.[12]

This period of Moody's life also provides an interesting footnote to Supreme Court history. Harlan Fiske Stone was then teaching chemistry and physics at Newburyport High School. The future Chief Justice later wrote of Moody's influence on his life. "After a year I left my work and delightful associations there with genuine regret. But the law was beckoning to me. Perhaps a friendship which I had formed with a brilliant young district attorney who used to attend court at the courthouse on the mall just across from the old high school building may have stimulated my interest in the law. His name was Moody, and he afterward became Mr. Justice Moody, one of the ablest judges of the United States Supreme Court." [13]

We have Moody's own testimony that the five years as county prosecutor were an important phase of his training. "The District Attorneyship was the best single experience of my life. That kind of practice is to a lawyer what a surgeon or physician gets in a hospital.[14]

National Politics

Moody entered national politics as a Republican when he was elected to fill a vacancy in the House of Representatives in 1895. He served in the House from the 54th through part of the 57th Congress. It was a period when America entered upon the world stage; for Moody these years were important personally for it was then that he met Theodore Roosevelt, a circumstance which led ultimately to his appointments to the Cabinet and the Supreme Court.

In the House, Moody made his mark as a master of parliamentary procedure and for dogged attention to the details of legislation in committee and on the floor. He was Uncle Joe Cannon's chief lieutenant on the Appropriations Committee and according to Henry Cabot Lodge had "more influence with Cannon than any one." [15] He was also close to Thomas B. Reed and even mentioned as a possible successor when the Speaker retired.

Although he followed the Republican Party program on the large matters of currency, tariff, and immigration controls, Moody asserted his independence at times on constitutional issues

and foreign affairs. He moved reluctantly to vote for war with Spain, first voting with a small group against recognizing Cuban belligerency. As a member of the Insular Affairs Committee, he was a chief author of the bill for the civil government of Puerto Rico. He did not believe the Constitution of its own force followed the flag, but argued that its fundamental guarantees of religious freedom, trial by jury, habeas corpus, and due process of law did extend to the peoples of the newly acquired territories.

Moody was a strong advocate of civil service reform, the eight-hour day for government workers, and favored direct election of United States Senators. He spoke out against southern disenfranchisement of the Negro and with a minority of fellow Republicans urged an investigation of the voting practices of the southern states. By the end of his congressional service he was considered a leading progressive Republican.[16]

The Cabinet

Within a few months of assuming the Presidency, Roosevelt named Moody to be Secretary of the Navy. The President said he was looking for a New Englander, a Cabinet officer who could work harmoniously with Congress, and who could explain administration policies on the political hustings. Moody's two years in this office coincided with the initiation of Roosevelt's shipbuilding program, a program designed to produce a navy second only to Great Britain's. They also witnessed confrontation with foreign navies in the Caribbean and a revolution in Panama. Moody's standing in Congress was helpful in achieving the President's goals. During his administration Congress accepted the concept of the large battleship, substantial increases of officers and men were made, and a major naval base at Guantanamo was established. Moody also sowed the seeds for a much needed administrative reform of the Department. Roosevelt was largely his own Secretary, but the office brought out Moody's capacity for effective administrative management.[17]

When Philander Knox resigned as Attorney General in June, 1904, to take a seat in the Senate, Roosevelt moved Moody into this position. As a member of the Cabinet he had followed Knox's anti-trust prosecutions closely. He had his own ideas on, the subject, one being that the criminal provisions of the Sherman anti-trust law should be used in prosecuting the trusts, something Knox had declined to do. The administration's anti-trust program reached its peak during Moody's two and a half years as Attorney General. He initiated some eighteen cases, eleven of them being criminal prosecutions. Favorable judgments were secured against the paper trust,

the coal trust, the fertilizer trust, the drug trust, the beef trust, and several of the major railroads.[18]

The case which excited the greatest public interest was the beef trust trial in Chicago which Moody argued himself in the Federal District Court. He was determined to put the chief officers of the packing companies in jail for criminal conspiracy, but was frustrated by the judge's ruling that they had acquired immunity by giving information to the Bureau of Corporations. He was successful, however, in persuading the Supreme Court that the companies were in the stream of interstate commerce and could be enjoined permanently from rigging meat prices.[19]

Moody personally argued four cases before the Supreme Court. In *Clyatt v. United States*,[20] he was pitted against Senator Bacon of Georgia in a dramatic duel over the constitutionality of the federal anti-peonage law. The Court sustained the act and Justice Harlan was so moved by Moody's exposition of the 13th Amendment that he wrote to the Solicitor General: "Of course I cannot say anything about the merits of the case, but I can say that the case of the Government was magnificently presented by the Attorney General. It was an argument of rare power and eloquence." [21]

Moody's nearly five years in the Cabinet were undoubtedly the happiest of his life. Beyond the challenging work of administering two great departments of government and counseling the President, he enjoyed a close friendship with his colleagues Elihu Root and William Howard Taft. In an unusual spirit of camaraderie they became known in Washington circles as the Musketeers, even assuming the names of Dumas' characters. Root became Athos; Taft took on Porthos; and Moody was Aramis.

Appointment to the Court

Theodore Roosevelt's third opportunity to name an Associate Justice of the Supreme Court came on March 3, 1906, when Henry Billings Brown called at the White House to tell him he would retire at the end of the term. Brown suggested William Howard Taft as his replacement; but the President replied he was presidential timber and not available. The Justice then recommended Philander C. Knox. That very day, after consulting with Root, Taft, and Moody, Roosevelt offered the seat to Knox. Knox declined, preferring to stay in the Senate to which he had been recently elected.[22]

The President took special interest in the Court, indeed in the entire federal judiciary. Aware that over the next two decades the Court would be called upon to decide the constitutionality of

much far-reaching social legislation, he was anxious to appoint men possessed of the "right" economic and social philosophy. For the next several months the vacancy was constantly on his mind. Despite his remark to Justice Brown, Roosevelt's choice now was Taft. Taft, however, was reluctant to go on the bench, except as Chief Justice, and his family, especially Mrs. Taft, was strongly opposed. However, he had another candidate. It was Horace Harmon Lurton, a former colleague on the Sixth Circuit Court of Appeals. Throughout the summer and into the fall he was unceasing in his efforts to put Lurton on the Court. By late summer Roosevelt had virtually made up his mind to appoint Lurton, telling Henry Cabot Lodge that he was "right on the Negro question; he is right on the power of the Federal Government; he is right about corporations; and he is right about labor." [23]

Lodge was agitated that his friend was to place a Democrat, an ex-Confederate, and in his view a "strict constructionist," rather than a Hamiltonian on the Court. His candidate was Moody. Lodge's opposition bothered the President and he began to waiver. The turning point came when Moody received a letter from E. A. Mosely, Secretary of the Interstate Commerce Commission, in answer to a request of the Attorney General to investigate Judge Lurton's decisions in cases involving interstate commerce. "With one exception," he reported, "Judge Lurton has decided against the contention of the Government *in every case* under the Interstate Commerce Law which has come before him." [24] Moody forwarded this information to the President and the jig was up for Lurton.

There is no written record of the exact circumstances in which Roosevelt offered the appointment to Moody. He told Holmes that the President had not spoken to him about the possibility. [25] To another Massachusetts friend he gave an oral account. After Lurton's rejection, Moody had begun to go over a list of other candidates with the President, when suddenly he stopped him, grinned and said: "Is it possible you do not know whom I am to appoint to this position? You, and you only are the man. [You are] (sic) entirely our kind of a Judge." [26]

Moody took his seat on the Court on December 17, 1906. He was no stranger to the brethren. Chief Justice Fuller welcomed him, writing to a Chicago lawyer friend that he liked the way Moody argued cases. Justice Day told Roosevelt that Moody would be a tower of strength from the moment of going on the bench.[27] The Court was certainly in need of strength. Both Justices Brewer and Peckham were in ill health, and the Chief Justice and Justice Harlan were seventy-three. It was rather a melancholy period in the Court's history, and Moody's service was destined to be all too brief. He left, however, a record of his constitutional and judicial philosophy not only in the reports, but also in remarkable letters to Roosevelt while a sitting Justice.

Moody followed what he called the Wilson-Hamilton-Marshall theory of national power. An occasion for relating this theory to current conditions arose in the fall of 1907 when the President with little regard for the separation of powers sent him a draft of a speech he was soon to deliver in St. Louis. "This is a letter that I naturally could not write to any other member of the Court." [28] The speech was an attack on conservative judges for striking down social legislation, and in it he referred to a speech of federal judge Charles Amidon of North Dakota, given before the American Bar Association. Amidon had railed against the strict constructionists and spoke of the necessity at times of bending or breaking the Constitution.

Moody agreed with Roosevelt's theme, but cautioned against the use of expressions which would alarm the conservatives and the bar whose opinion "is still wonderfully potent." The Wilson-Hamilton-Marshall view that the national government should be allowed the widest choice of means in controlling the economy, was, he said, "*now in peril*." He regarded any word spoken authoritatively of a constitution which could be bent or broken as unfortunate and tending to strengthen the strict constructionists. "Do not my dear Mr. President, speak or endorse it. The true and I believe the adequate statement is that while the constitution is unchanged and unchangeable, the conditions to which it is to be applied have undergone a change which is almost a transformation, with the result that many subjects formerly within the control of the states have come under the control of the nation." The future depended upon the spirit in which the courts approached the questions which would be unfolding. His final words to the President did not discourage further communication. "I cannot tell you how much as an individual I wish to be of service now and at all times." [29]

In subsequent letters Roosevelt replied: "You have given me just the information I need," and "I hope you will like *your* speech at St. Louis? You will agree with most of it, I guess, for the excellent reason that most of it is taken from your letter." [30] Roosevelt retained the reference to Amidon's speech, he said, to shake up the judges, and Moody wrote back: "I have no doubt I

shall like the St. Louis speech even if you do not share my respect for terminology. We are both bound for the same spot, I am going over the public highway and I do not want you to jump the fences for the sake of a short cut, and get arrested for trespass." [31]

An exchange of correspondence along the same lines continued into Moody's second term. In December, 1908, Roosevelt forwarded for comment a letter from William Allen White in which the Kansas editor castigated conservative judges, saying he would like to have the power to "name some judge who would hand down an opinion declaring that courts had only judicial and not political power." [32] Moody agreed with White's "apprehension of the gravest consequences if the judiciary does not stick closely to its own task," but felt that his condemnation was too indiscriminate, citing Holmes and Day as judges who stuck to their last. [33]

Moody's full reply, however, was a frank recognition that judges were all too frequently abusing the power of judicial review by striking down laws because they conflicted not with the Constitution, but with their own predilections. "For many years we have been taught the slavish doctrine, that the courts are infallible and the protest against this doctrine has been, in the main, inarticulate until you gave it voice." Moody "abhorred" the doctrine and "sympathized with the thought that courts were as much subject to criticism as any other branch of government." The greatest danger in his mind was not executive or legislative usurpation. There were adequate political and legal safeguards to restrain the other branches. "But if the Supreme Court is thought to exceed its authority, our system places no power over it to inquire into or correct the errors. More accurately, that Court in legal theory can do no wrong, because its judgment of what is right is final." [34]

With apologies for immodesty, Moody went on to cite three of his recent opinions as examples of judicial restraint. The first was *St. Louis, Iron Mountain, and Southern Railway v. Taylor*, [35] in which Moody had spoken for the Court in giving a broad construction to the Safety Appliance Act. "Some of the circuit courts," he informed the President, "had whittled away the law by saying that Congress could not have intended so radical a measure, imposing such great hardships upon the railroads.... the kind of reasoning that makes anarchists." In the opinion Moody had answered that it was quite conceivable that Congress had intended to place the burden of injuries upon those who could control their causes, instead of upon those who were helpless in that regard.

The second case he referred to was *Twining v. New Jersey*, [36] which stood as a landmark until overruled in 1964. Here the Court had held that the 14th Amendment did not incorporate the self-incrimination provision of the Federal Bill of Rights. Reminiscent of Justice Frankfurter's views of many years later, Moody was reluctant to deny states the leeway to devise

their own rules of criminal procedure. If the people of New Jersey were dissatisfied with the law, they should seek to change it through the political process.

Moody went on in his letter to confess that: "my test will come not when there is before me a law in which I believe, but when there are laws before me which I think are unwise and disastrous in their consequences." He thought he had met that test in *Berea v. Kentucky*,^[37] where he and Holmes had concurred silently in Brewer's opinion upholding a law which prohibited integrated education; a law he labeled "vicious and unjust." The President sent this letter to White with the notation that Moody "is entirely our kind of a judge. If they were all like him we would have no trouble."^[38]

The fullest exposition of Moody's views on the extent of the national commerce power came in his dissent in the *Employers' Liability Cases*.^[39] At stake was the constitutionality of the recent act making common carriers liable to its employees for injuries resulting from negligence or defects in their cars, appliances, and tracks. The Sixth Circuit Court of Appeals had invalidated the act and the Supreme Court affirmed by a vote of five to four. It was a curious decision. Justices White and Day admitted that Congress under the commerce clause had the power to regulate the subject, but read the law as also extending to intrastate commerce. Justices Peckham, Brewer, and the Chief Justice maintained that Congress lacked totally the power to regulate the employer-employee relationship.

In his dissent, Moody reiterated Marshall's views on the scope of the commerce clause, quoted Madison's *Federalist* 42, and his notes on the Constitutional Convention. The statute could clearly be read as authorizing Congress to exercise its power only where it had power, i.e., over interstate commerce. It was decisive for him that the act was silent as to any power over intrastate commerce, and the Court should assume that the other branch would stay within its own boundaries. "This is more than a canon of interpretation, it is a rule of conduct resting upon considerations of public policy."

Moody was at odds with the Court in other commerce clause cases. In *Penn Railroad Company v. Western New York and Pennsylvania Railroad Company*,^[40] he dissented from the decision which overturned an Interstate Commerce Commission ruling that a carrier had given preference to shippers who used tanks rather than barrels for transporting oil. He dissented again in *General Oil Company v. Crain*,^[41] against a Tennessee tax on oil which only briefly came to rest in the state. "The single consideration that the property enjoys in Tennessee the protection of the laws of the State cannot be enough to justify state taxation. If that were so, all property in the course of interstate transportation would be subject to state tax in every state through which it should pass."

Disagreeing once more in *Missouri Pacific Railway Company v. Larabee*,^[42] Moody stated that the commerce power even though unexercised precluded state action. "A power clearly withdrawn from the State and vested in the Nation, can no longer be exercised by the States, even though Congress is silent." That he was not unaware of the necessity of a state police power, however, is evidenced in his opinion for the Court in *Asbell v. Kansas*,^[43] upholding a law requiring animals entering the state to be inspected. Here he quoted Marshall to the effect that both nation and state may on occasion act upon the same subject, but on the basis of different powers.

Despite his nationalism, Moody was not a foe of state power. He was ready to sanction it when it was exercised in the interest of the community. Thus in *Rochester Company v. City of Rochester*,^[44] he held that the company was bound to pay for the pavement of the streets through which its tracks ran, even though the company it had taken over did not have this obligation. Privileges of the preceding corporation did not pass by implication to its successor. Again in *Metropolitan Life Insurance Company of New York v. City of New Orleans*,^[45] he spoke for the Court in upholding the right of a state to tax loans made by the company on its policies in Louisiana, even though the notes were sent to the home office in New York. The statute was not arbitrary, but a legitimate exercise of legislative power and discretion.

One of Moody's major opinions in this area came in *City of Knoxville v. Knoxville Water Company*,^[46] a case concerning the constitutionality of a city ordinance fixing maximum water rates. The company claimed that the rates fixed were so low as to be confiscatory and thereby took its property for public use without compensation in violation of the 14th Amendment. The Circuit Court of Appeals had agreed with the company on the basis of a finding by a special master.

Moody possessed special knowledge of municipal water works problems; his largest fee had been \$14,000 from the city of Haverhill for negotiating the transfer of a private aqueduct company to public ownership. Whether the Court would have examined the special master's findings de novo and overturned them, as it did, without such expertise at hand, is doubtful. In any case Moody was assigned the opinion and he went into great detail in exposing several errors in the method of fixing the value of the property, the fatal flaw being that depreciation of the property had not been considered. But the function performed in this case was not one courts should assume. With ever greater frequency, Moody concluded, regulation of public service corporations would occur, and the responsibility for setting valuations ought to be borne by legislatures and subordinate governmental bodies.

From these representative samplings Moody's jurisprudence can be characterized by its adherence to judicial restraint, a spacious view of the national commerce power, and a deference to state power when exercised for social ends.[47] He was thus at the threshold of a distinguished tenure when tragedy struck. His illness prevented him from sitting during the 1909 term, and on November 20, 1910, he resigned his seat. It was probably the saddest year in the Court's history; Justice Peckham died in October 1909, Justice Brewer in March 1910, and on July 4, 1910, the kindly Chief Justice passed on. Theodore Roosevelt too was gone from the White House, and the reconstituting of the Court fell to a President with quite different ideas about the judiciary.

Endnotes

1. Joseph E. McLean, *William Rufus Day: Supreme Court Justice from Ohio* (Baltimore: Johns Hopkins University Press, 1946).
2. Mabel Boardman to W. H. Taft, July 8, 1917. Taft Papers, Manuscript Division, Library of Congress.
3. *Boston Herald*, July 3, 1917.
4. Philip Elman, ed., *Of Law and Men* (New York: Harcourt Brace & Co., 1956), p. 200.
5. Frankfurter to author (interview), December 27, 1961.
6. Joshua Coffin, *A Sketch of the History of Newbury, Newburyport, and West Newbury* (Boston: Samuel G. Drake, 1845).
7. *Harvard Class Lives, 1876*, Harvard University Archives.
8. Interview in *Boston Globe*, November 11, 1906.
9. William Moody to Andrew Moody, November 17, 1879. Hampton L. Carson Collection, Free Library of Philadelphia.
10. Holmes to Boyd B. Jones, March 22, 1919. This letter was in the possession of Miss Eleanor Jones of Haverhill, Massachusetts, when used by the author. It was later given to Professor Mark Howe to add to the Holmes papers in the Harvard Law School Library.
11. John H. Wigmore, "The Borden Case," *American Law Review*, v. 27 (1893), pp. 819-845.
12. 164 Mass. 544.
13. Harlan F. Stone to Editor, March 4, 1937, *Newburyport Daily News*.
14. Interview in *Boston Globe*, November 11, 1906.
15. Lodge to Roosevelt, November 1, 1901. Roosevelt Papers, Manuscript Division, Library

- of Congress.
16. Moody's congressional career may be followed through the daily press, especially *Boston Evening Transcript*, and in the *Congressional Record*.
 17. See Paul T. Heffron, "Secreatry Moody and Naval Administrative Reform: 1902-1904," *American Neptune*, v. 29 (1969), pp. 30-48.
 18. See Homer Cummings and Carl McFarland, *Federal Justice* (New York: Macmillan Company, 1937), pp. 332-336 for a summary of Moody's work as Attorney General.
 19. *Swift v. United States*, 196 U.S. 375 (1905).
 20. 197 U.S. 207 (1904).
 21. Moody to Roosevelt, December 17, 1904, Roosevelt Papers.
 22. See Paul T. Heffron, "Theodore Roosevelt and the Appointment of Mr. Justice Moody," *Vand. L. Rev.*, v. 18 (1965), pp. 545-568, for a detailed account of Moody's appointment.
 23. Roosevelt to Lodge, September 4, 1906, Roosevelt Papers.
 24. E. A. Mosely to Moody, October 22, 1906, Roosevelt Papers.
 25. Moody to Holmes, November (n.d.) 1906, Haverhill Historical Society.
 26. *Proceedings at the Meeting of the Essex Bar in the Supreme Judicial Court in Memory of Honorable William Henry Moody* (1919).
 27. *Roosevelt to Moody, December 16, 1906*, Roosevelt Papers.
 28. *Roosevelt to Moody, September 3, 1907*, Roosevelt Papers.
 29. Moody to Roosevelt, September 9, 1907, Roosevelt Papers.
 30. Roosevelt to Moody, September 11, 1907; September 21, 1907, Roosevelt Papers.
 31. Moody to Roosevelt, September 26, 1907, Roosevelt Papers.
 32. W. A. White to Roosevelt, November 27, 1908, Roosevelt Papers.
 33. Moody to Roosevelt, December 3, 1908, Roosevelt Papers.
 34. *Ibid.*
 35. 210 U.S. 281 (1907).
 36. 211 U.S. 78 (1908).
 37. 211 U.S. 45 (1908).
 38. Roosevelt to White, November 30, 1908, Roosevelt Papers.
 39. 207 U.S. 463 (1907).
 40. 208 U.S. 208 (1907).
 41. 209 U.S. 211 (1907).
 42. 211 U.S. 612 (1908).
 43. 209 U.S. 251 (1907).

44. 205 U.S. 236 (1906).
45. 205 U.S. 395 (1906).
46. 212 U.S. 1 (1908).
47. See James F. Watts, Jr. "William Moody," *The Justices of the United States Supreme Court*, Leon Friedman & Fred Israel, eds. 4 v. (New York: Chelsea House, 1967) v. 3, pp. 1801-1821, for an analysis of Moody's opinions.

Morrison Waite 's Court

Jeffrey B. Morris

During the fourteen years Morrison Remick Waite was Chief Justice, the United States skyrocketed to the front rank of the world's nations, shedding some republican virtue along the way. Called upon, like its predecessors, to face many of the nation's great domestic problems posed as questions of constitutional or statutory interpretation—but called upon to face them in an era of "cascading vitality" and failed civic morality—the Supreme Court of this era rose to the challenge. By its performance during these years, the Court repaired much of the institutional damage which it had brought upon itself by the decisions in the *Dred Scott* and *Legal Tender* cases. Not all of its jurisprudence was well received by posterity, but with the perspective of a century, it is fair to regard the Court of this era as one of the most able in American history.

The Nation

Alexander Hamilton had advised Americans of his generation to think "continentally." During the era which stretched from the end of the Civil War to the turn of the century (Waite serving as Chief Justice from 1874 to 1888), America began to act "continentally." Frederick Jackson Turner pronounced the frontier closed as of 1890, two years after Waite's death. By then the Indian had been defeated and the buffalo almost exterminated. In their place had come miners, cattlemen, and shepherders. Farmers began to reap an agricultural miracle—turning America into the world's largest breadbasket. That huge common market, anticipated by the Framers and sanctioned by Marshall's great opinion in *Gibbons v. Ogden*, was becoming a reality. Huge areas were drawn together by the telegraph, by the telephone, and the railroads. Millions of immigrants came from Europe, Japan and China. Most were used as a cheap labor force, but American freedom unleashed their creative energies.

By making use of abundant raw materials, by developing a superb transportation system, by stimulating the endless supply of immigrants, with a people driven by a spirit of enterprise and optimism, America surged forward.

But the remarkable accomplishments of this era were not without their social and political costs. Some problems were pushed out of the way. Some were swept under the rug. New ones were created. Quite a few were to return to haunt the Nation in the mid-Twentieth Century.

A terrible human price was paid for the settlement of the West—the extermination of Indian culture. Richness of natural resources permitted their profligate use; a habit that continues to haunt. The small farmer was mythologized by his fellow Americans, but he began to disappear due to shortage of capital, high railway and grain storage rates. Many went bankrupt and ended up as tenants.

Great fortunes were spawned during an era of child labor, sweat shops and urban crowding. Trusts and combinations began to flourish during a time dominated by a far from compassionate ethos, the philosophy of Social Darwinism.

It was an age of boom and bust. There were great crashes in 1873 and 1886. Stocks fell, banks collapsed, currency payments were suspended, factories closed, railroad building was halted, bankruptcies multiplied, wages plummeted, unemployment grew, the farmer suffered. Labor tensions mushroomed—the first large-scale industrial violence in the United States occurred with the railroad strikes of 1877. The great strike in 1886 at the McCormick Harvester Works led to the Haymarket Riot. There was a search for scapegoats—anarchists, communists, and immigrants were blamed for the nation's ills.

The most profound political consequences of the politics of the 1870's and 1880's arose from the decision to sweep the "Negro Problem" out of sight. The high point of Reconstruction was reached with the Enforcement Acts of 1870 and 1871, guaranteeing suffrage and providing penalties for infringement upon the right to vote. But soon America began to pull away from a commitment to black Americans that had lasted but a decade. Vigilantes rode in the South intimidating blacks from participating in the political process. Captains of industry in the North saw their interests as lying with the white southerner. The radical leaders of the Republican Party—men like Charles Sumner and Thaddeus Stevens—passed from the scene. The new leadership—the Blaines and Conklings—were attuned to the needs of business. The national attention span for social reform was not long in those days either. One decade of concern for the black man seemed long enough.

The bargain was sealed at that conference between southerners and Republicans on February 26, 1877, held at the Wormley Hotel! in Washington, which settled the election of 1876. Hayes won the Presidency, but part of the price was withdrawal of the U. S. troops supervising Reconstruction in the South. That bargain settled the pattern of race relations in the South for a generation.[1]

Although some who participated in the bargain, motivated by a desire for national reconciliation, did not want to abandon the black American, that was its effect. First came denial of the franchise, then segregation. By 1885 most Southern states had separate schools for black and white. Laws segregating blacks on railroads were a feature of the late 1880's. By 1888 the South was moving towards complete disenfranchisement of the black and to apartheid.

As republican virtue ebbs among a people, the quality and performance of those they elect declines as well. Perhaps the nadir at the national level was reached just as Waite became Chief Justice, but public life was to be characterized by a low tone for the following decade and one-half. One scandal followed another during Grant's Presidency; scandals remembered in history by pithy phrases—Black Friday, Credit Mobilier, Salary Grab, and Whiskey Ring. Blind to the conduct of subordinates and friends, Grant saw his Vice President, Schuyler Colfax, resign to escape impeachment, his Secretary of War, William W. Belknap, resign after impeachment, and his close advisor and private secretary, General Orville E. Babcock, indicted.

Nor was corruption limited to the national executive. John Garraty relates that "Coffis P. Huntington, president of the Southern Pacific Railroad divided the members of the Senate in 1876 into three groups: the 'clean' (who would do what he wanted without asking for favors), the 'commercial' (who would do the right thing if paid for it), and the 'communists' (who resisted his logic and his money).[2] The corruption seeped down into state and local politics, where votes and jobs were sold. Bribes, were given for inside information and excessive profits were made on land acquisition and public works contracts.

There were many reasons why American governance deteriorated. Rapid economic growth often engenders corruption. Entrepreneurial opportunities attracted many of the most able and strongest men, leaving the less competent for political affairs. The educational level of the electorate had declined with the infusion of immigrants and freedmen. But, not only the immigrant and the freedman acquiesced in the "politics of corruption." It was America as a whole. As Henry Adams wrote, "Rich and poor joined in throwing contempt on their own representatives." [3] As F. W. Taussig explained a generation later:

A good electorate will choose honest and capable officials, a debased and indifferent one will tolerate the demagogues and thieves.[4]

America was now choosing thieves and demagogues, but not for its high court.

Waite's Court

How did the Supreme Court perform in this age of vitality and venality? The bench over which Morrison Waite presided was one of the strongest in the Court's history. Two Justices were legitimate "super-stars"—Samuel F. Miller and Stephen J. Field. Two others were among the finest the Court has had—the elder John Marshall Harlan and Joseph P. Bradley. (In the 1970 poll of professors of constitutional law, history and politics, Harlan was rated "great"; Waite, Miller, Field and Bradley rated "near great").[5]

These men were not weak in personality or intellect. Willard King describes Miller as "a big man—blunt as a hippopotamus and candid as sunlight."[6] A great constitutional lawyer and a Lincoln appointee, Miller proved to be sympathetic to national power, skeptical about the new capitalism, careful about individual liberties, and committed to a role of balanced restraint for the judiciary.[7]

Miller's colleague Field had the "power and arrogance of an Old Testament prophet." [8] Willful, indomitable, obdurate, vital, vain and irascible, Field's powerful but not subtle mind saw the truth as a series of broad incontestable generalities. He doubted neither his premises nor his right to impose them on his fellows.[9] In his grand tenure of thirty-four years (1863-1897), the second longest of any Justice (to William O. Douglas), Field's tenacity in linking vested rights and the Due Process Clause was ultimately successful. But this did not occur until after 1888. Although occasional concessions were made, some of them important in the long run, while Waite was alive he held the majority together, which staved off the victory of Field's jurisprudence.

Like Field, John Marshall Harlan was a powerful rather than a subtle jurist, convinced of the righteousness of his cause. His jurisprudence has survived better than Field's, however. More than any Nineteenth Century Justice, Harlan saw the true meaning of the Reconstruction Amendments for the freedmen. He resisted the Waite Court decision in the *Civil Rights Cases* as he later would the Fuller Court's decision in *Plessy v. Ferguson*.

Field and Harlan were "true believers," lacking juristic doubts. Miller was a craftsman-like judge but not a truly learned one. Joseph Bradley was both a craftsman and a man of great learning, whose work was characterized by force, tightness, and "mental muscularity." [10] This Court could boast of other able figures—the erudite Horace Gray (who hired the Court's first law clerk), the devout and gentlemanly William Strong, and Stanley Matthews, whose career was brief but impressive. David Davis, Lincoln's good friend, and Lucius Quintus

Cincinnatus Lamar, Mississippi's flamboyant Senator, were among the more interesting men ever to sit on the Supreme Court, although their contribution to the jurisprudence of the time was slight. Samuel Blatchford was "one of the hardest working men ever to sit on the Court."^[11] Writing in these pages, Professor Tom Baynes has made the case that William B. Woods, ranked "below average" in the 1970 professors' poll, deserves better treatment by posterity.^[12]

The Business of the Court

This Court, which met in the Old Senate Chamber, was among the most hard working in history. Its docket exploded after the Civil War. Taney's Court had 253 cases pending in 1850 and 310 in 1860; Chase's had 636 in 1870. By 1880, 1212 cases were pending. In 1884 there were 1,315 cases; in 1886 there were 1,396; and in Waite's last year there were 1,563.^[13] The Marshall Court had decided twenty-six cases during the 1825 term; the Waite Court decided 193 cases fifty years later. Five volumes of *U.S. Reports* had been sufficient for the pre Marshall era. Twenty-seven encompassed the Marshall Court's thirty-four years. In almost three decades the Taney Court filled up thirty-six volumes. Fourteen years of Waite Court decisions used up forty full volumes of *U. S. Reports*.

Normally, there are no simple explanations for litigation explosions. In part, this one was the result of the Nation's vigorous economic life. In part, it was the result of claims asserted under the new Fourteenth Amendment. Not for the last time Congress had increased the workload of the federal courts without providing those courts with sufficient assistance to do the job properly. The Removal Act of March 3, 1875, had given the federal courts the vast range of powers available under Article III which Congress previously had refused to grant. That statute opened the federal courts to any suits asserting rights under the Constitution, the laws and treaties of the United States. It provided for the removal of such cases to the federal courts, if begun in state courts. And, not for the last time the High Court contributed to its own workload through its jurisprudence. A prime example of this occurred in the *Pacific Railroad Removal Cases* in which the Court held that every action involving federally chartered corporations might be tried in federal courts because a federal charter of incorporation was a law of the United States.^[14]

As case filings accelerated, the Court was functioning at less than full strength. For five years, from 1878 to 1883, Justices Noah Haynes Swayne and Nathan Clifford were giving way to old age and Justice Ward Hunt was disabled by a stroke. After 1883 the Court was at full strength,

although it takes some time for new Justices to become acclimatized. The workload continued to increase. Relief would not come until the creation of the U. S. Courts of Appeals in 1891—an end for which Strong, Harlan, Miller, Field and Waite had all spoken out.

While many cases were of the "flotsam and jetsam" variety, now disposed of by Courts of Appeals in short opinions, the Waite Court, like its predecessors and successors, was asked to grapple with cases raising the great domestic issues facing the nation. From 1874 to 1888 the Court considered cases involving the commerce and contract clauses, state and municipal repudiation of debt obligations, the exercise of state police power over the sale of liquor and oleomargarine. There were cases involving minorities such as Mormons, Chinese-Americans, as well as litigation arising out of strikes and riots.

The jurisprudence of this Court which proved of most significance to the Twentieth Century occurred in decisions involving Reconstruction legislation and state regulation of parts of the economy. By gutting the Enforcement Acts of 1870 and 1871, the Court laid the foundation for North-South reconciliation. By its decision in the *Civil Rights Cases*,^[15] nullifying the Civil Rights Act of 1875, the Court destroyed the delicate balance of federal guarantees, black protest, and private enlightenment which had been producing a "steadily widening area of peacefully integrated public facilities."^[16] Yet, the Court did leave "a hedge of sanctioned Congressional power over civil rights resurrected by the abolitionists in the Twentieth Century."^[17]

In consideration of state economic regulation, the Waite Court left a mixed heritage. In the most important decisions of the era, the six *Granger Cases*,^[18] the Court sanctioned state laws regulating rates as well as various business practices of common carriers. In his opinion for the Court in *Mann v. Illinois*,^[19] Chief Justice Waite—heavily influenced by Justice Bradley—held that states could regulate businesses affected by the public interest. In later cases as well, Waite Court decisions favored public regulation, striking down no social legislation of substance. For these decisions the Court was sharply criticized by business leaders. To some extent the bold stroke of the Granger cases was replaced by tentativeness in later cases. Even in *Mann v. Illinois* and certainly in later cases, the Waite Court left the implication that businesses unaffected by the public interest could not be regulated, that under some circumstances legislation might violate the due process clause,^[20] and it granted that corporations were protected by the Fourteenth Amendment.^[21] It was upon the latter heritage that—after Waite died—Fuller's Court built, coupling vested rights with the due process clause so that it became a substantive limitation upon the power of the state. It was to be forty-six years after Waite died before the Supreme Court would return to the precepts of *Munn v. Illinois*.^[22]

The Chief Justice

Composed of strong personalities, faced with a grinding caseload, the Supreme Court needed a leader. But, perhaps no one has come to the office of Chief Justice with so many strikes against him as Morrison Remick Waite. No President had ever so demeaned the office of Chief Justice while searching for an appointee as had Grant. Waite was Grant's fifth (or possibly his seventh) choice. Several of the previous choices had had the reputation of being corrupt. One had been seventy-four years old. Thus, Waite's nomination was greeted with broad relief and disappointment. Gideon Welles expressed his relief with a typically acerbic comment: "It is a wonder that Grant did not pick up some old acquaintance, who was a stage driver or bartender, for the place . . ."[23] Charles Sumner was disappointed, yearning, as did many, for a John Marshall to "plot the country through the rocks and rapids in which we are." [24] The general view may have been that of *The Nation* which wrote that "Mr. Waite stands in the front rank of second-rank lawyers." [25]

Waite was, in fact, a fine lawyer, but he was the first man to come to the office of Chief Justice without national reputation and important national experience. Waite was an outsider. He had been appointed to lead Associate Justices whose intellects appeared to be greater than his own. Their egos and ambitions were definitely larger than his. Indeed, Miller, Swayne and Bradley had sought his position. Furthermore, no one ever chosen to guide the high tribunal was less familiar with its procedures. Waite's experience before the Court was the barest minimum. He had appeared before it but once—the day he was admitted to the Supreme Court bar.

The institution Waite was called upon to lead, slowly recovering from one self-inflicted wound, the *Dred Scott* case, had just administered another with the *Legal Tender* decision. Even the illustriousness of the office Jay and Marshall had held had been tarnished by the bitter attack on Taney during his last years and by Chase's political activities.

Waite overcame all these handicaps to preside over the Supreme Court with distinction. He proved to be an excellent manager and harmonizing leader. In few eras has the High Court been as immune from political and personal attack as it was from 1874 to 1888.

Possibly because of all these handicaps, Waite "tried harder." He was a man with a delightful personality. Kenneth Bernard Urnbreit wrote of that "singularly winning nature." [26] Justice Samuel Miller, a sharp critic of most everybody, including Waite at times, spoke of his "kindliness of heart rarely if ever excelled." [27] Some of the adjectives which were used by

Waite's colleagues, contemporaries, and biographers to describe him are not those typically applied to great men of affairs—"considerate," "kind," "unaffected," "humble," "lovable," "a good listener," "approachable," and "affable." Waite was not, of course, Lincoln's equal, and he lacked his streak of melancholy, but in many ways his personality was Lincolnian.

It is not simply that Waite had a nice personality. A good amateur psychologist, he was sensitive to "the benefits which could be derived from relieving interpersonal tension and supporting fuller egos."^[28] As D. Grier Stephenson has suggested, Waite attempted to fashion the camaraderie necessary for the Court to function effectively from among separate prides and passions.^[29] Naturally affable, Waite worked at his social leadership and kept his strong-headed brethren puffing together.^[30]

Waite found time for people. He always took time to advise his colleagues. In his role as manager of the employees and officers of the Court, he was intent from the beginning in showing that he cared. He wrote:

I went into the office of the Marshal of the Court and had him introduce to me all the inferior officers and the servants. . . . It seemed an entirely new thing and they were all apparently delighted. Judge Chase kept himself on the dignity of his office and permitted no one to interfere with him.^[31]

In order to cope with the heavy docket, the Justices had to work extremely hard. Another reason for Waite's effective leadership was the example he set by his hard work. He usually took the largest share of opinions to write. He would take over unfinished tasks of his ill colleagues. Indeed, one summer he even heard admiralty cases in New York, replacing Justice Ward Hunt on circuit. When asked why he worked so hard, Waite would say simply that he was doing it for the honor of his grandchildren.

Waite's energy and contributions are exemplified by the number of opinions he authored. His 872 opinions for the Court in fourteen years rank him second only to Holmes, who sat more than twice as long. His output of majority opinions per year is far higher than that of any other Justice—62.29 (64.93 total opinions annually). (Colleagues Harlan, Miller, Field, and Blatchford, who served only eleven years, rank fourth, seventh, eighth and nineteenth, in opinions for the Court).^[32]

Waite was a good manager, perhaps a great one. He directed the conference effectively, assigned cases sensibly, and, to the extent possible, kept his court abreast of its docket. He proved to be energetic and able in ruling on motions upon which the Chief Justice rules alone

for the Court, and in enforcing the rules of the Court. He presided over the Court with dignity, fairness and competence, and was known for his courtesy to the attorneys before the Court. Attorney General August H. Garland regarded him as "almost unequalled in the discharge of ... executive duties, as the presiding officer of the Court . . . one of the best administrative judges I have ever seen." [33]

In spite of the foregoing accomplishments, Waite still has been viewed by many observers somewhat in the manner in which Holmes wrote of Franklin Delano Roosevelt—as combining a second-rate intellect with a first-rate personality. Such analysis is not fair to either F.D.R. or Waite. To be sure, posterity has not regarded his opinions highly. Felix Frankfurter, a great admirer, wrote that Waite lacked the "stuff of the artist," that his brief opinions lacked power, written as they were in "humdrum, matter-of-fact, dry lawyers' English, unrelieved by the flashing word or the overtone of meaning." [34]

But, even if he did lack the stuff of the artist, Waite held his own for fourteen years among brilliant jurists. Resisting Field's approach to economic due process, he held together that majority which staved off the victory of Field's jurisprudence. Not only did he write the most opinions, but he specialized in tough legal areas such as jurisdiction, federal practice and procedure, patents, copyrights and property. He assigned himself a reasonable share of the great cases, among them *Munn v. Illinois*, *Reynolds v. United States* [35]—the polygamy case—and the *Telephone Patent Case*, [36] the longest suit in U.S. history with the longest opinion in Supreme Court history.

Waite thought about his judging. In a sense, he is the link between Taney and Holmes/Brandeis. Not considering wealth to be an end in itself, he refused to raise property rights to an absolute. He respected state police powers. With a deep-seated faith in representative democracy, Waite was chary about upsetting legislative decisions. He was concerned that judges sometimes "make too much law at once." [37] He deferred to the legislature on questions of constitutionality, refusing to deprive it of its choice of policy. In his great decision, *Munn v. Illinois*, Waite wrote that "For protection against abuses by the legislatures the people must resort to the polls, not to the courts." [38] With a fact-consciousness which anticipated Brandeis, Waite transcended his background. As Felix Frankfurter put it:

. . . he did not confine the Constitution within the limits of his own experience. . . . The disciplined and disinterested lawyer in him transcended the bounds of the environment within which he moved and the views of the client whom he served at the bar. [39]

Chief Justice Waite had character as well as personality. As important as what he did as Chief Justice was—at least in two instances—what he did not do. One was his decision not to sit as a member of the Electoral Commission which was to decide the disputed election of 1876. In part this was because of his close friendship with candidate Rutherford B. Hayes. It also appears that Waite was concerned with the reception of the opinions in the *Granger* Cases—about to be handed down—and was determined not to give critics extra ammunition.

The second major decision which Waite made, which was right for his Court and his office, was his decision not to be considered for the Presidency. His predecessor Chase had hungered for that office. His brethren, Davis, Miller and Field, made some effort to attain it. But, in a moving series of letters, Waite disavowed Presidential ambitions, and stifled the effort to draft him in 1876. His concern was with the honor of his office:

The office has come down to me covered with honor. When I occupied it, my duty was not to make it a stepping stone to something else, but to preserve its original purity and make my own name as honorable as that of any of my predecessors. No man ought to accept this place unless he takes a vow to leave it as honorable as he found it.[40]

Conclusions

While later courts destroyed some of its jurisprudence in the area of economic regulation and its handling of Reconstruction legislation had to be undone, there is much in the Waite Court to which posterity could and can repair. The men of the New Deal looked to *Munn* and other Waite Court decisions interpreting the due process, commerce, and contract clauses. Those in search of balanced theories of judicial power can do much worse than to look to an approach of restraint, yet one short of abdication, that of Waite himself. And later Chief Justices could do much worse than to live up to the model of the bearded Ohioan who worked so hard, guided his brethren so lovingly, and passed his office on to his successors covered with honor.

For Further Reading

Waite, Miller and Field are the subjects of three of the finest judicial biographies. See C. Peter McGrath, *Morrison R. Waite The Triumph of Character* (New York: The Macmillan Co., 1967); Charles Fairman, *Mr. Justice Miller and the Supreme Court 1862-1890* (New York: Russell and Russell, 1939); Carl Brent Swisher, *Stephen J. Field Craftsman of the Law* (Chicago and London: University of Chicago Press, 1930).

On Waite see also: D. Grier Stephenson, "The Chief Justice as Leader: The Case of Morrison Remick Waite," 14 *W & M L.R.* 899-926 (1973); Rocco J. Tresolini, "Chief Justice Morrison R. Waite and the Public Interest," 34 *NW Ohio Q* No. 3 (Summer 1962) 124-137 Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (Chicago: Quadrangle Books, 1964); Kenneth Bernard Umbreit, *Our Eleven Chief Justices* (New York and London: Harper & Brothers, 1938.)

While I do not agree with his theory indicting the Waite Court for coupling vested rights and the due process clause, Robert G. McCloskey's work is interesting and important. See for example, his introduction to the 1969 edition of Swisher's *Field and The American Supreme Court* (Chicago and London: University of Chicago Press, 1960).

* I acknowledge with appreciation the research assistance of Daniel C. Richman, a senior at Harvard College.

Endnotes

1. J. G. Randall and David Donald, *The Civil War and Reconstruction* (Boston: D.C. Heath & Co., 1961), p. 701.
2. John A. Garraty, *The New Commonwealth, 1877-1890* (New York: Harper & Row, 1968), p. 231.
3. *The Education of Henry Adams* (Boston: Houghton Mifflin Co., 1918), pp. 280-281.
4. Frank W. Taussig, *Principles of Economics*, (New York: The Macmillan Co., rev. ed. 1938), II, 431.
5. Albert Blaustein and Roy M. Mersky, "Rating Supreme Court Justices," 58 *ABA J* 1183 (Nov. 1972).
6. Willard King, *Melville Weston Fuller* (Chicago: University of Chicago Press, 1967), p. 125.
7. Alan F. Westin, *An Autobiography of the Supreme Court* (New York: The MacMillan Co., 1963), p. 108.

8. Alan F. Westin, "The Case of the Prejudiced Doorkeeper," in John A. Garraty (ed.), *Quarrels that Have Shaped the Constitution* (New York: Harper Colophon ed., 1966) 128-144 at p. 137.
9. Robert G. McCloskey, "Introduction" to Carl Brent Swisher, Stephen J. Field, *Craftsman of the Law* (Chicago: University of Chicago Press, 1969), p. xix.
10. See Willard King, Melville Weston Fuller, *supra* n. 8, p. 189, and Charles Fairman, "Mr. Justice Bradley" in Allison Dunham and Philip B. Kurland, *Mr. Justice* (Chicago: University of Chicago Press, 1956).
11. Robert J. Steamer, *The Supreme Court in Crisis* (Massachusetts: Amherst University of Massachusetts Press, 1971), p. 118.
12. Thomas E. Baynes, "Yankee From Georgia, a Search for Mr. Justice Woods," 1978 *Yearbook*, SCHS 31-42.
13. Felix Frankfurter & James M. Landis, *The Business of the Supreme Court* (New York: The MacMillan Co., 1928), in *passim* esp. p. 86.
14. 115 U.S. 2 (1885). See also *Ex Parte Schollenberger*, 96 U.S. 369 (1877). *C.f. Murdock v. Memphis*, 20 Wall 590 (1875) where the Court shut off what might have been a phenomenal increase in its work by holding that it had not been required by the Act of Feb. 5, 1867, when reviewing state judgments to review all errors in the record whether federal questions or otherwise.
15. 109 U.S. 3 (1883).
16. Allan F. Westin, *Freedom Now* (New York: Basic Books, Inc., 1964), p. 73.
17. Michael Les Benedict, "Preserving Federalism: Reconstruction and the Waite Court," 1978 *Sup. Ct. Rev.* 39 at p. 79.
18. 94 U.S. 113-187 (1877).
19. 94 U.S. 113 (1877).
20. See *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307 (1886).
21. *Santa Clara Co. v. Southern Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).
22. *Nebbia v. New York*, 291 U.S. 502 (1934).
23. Gideon Welles to Edgar T. Welles, Jan. 22, 1874, quoted in D. Grier Stephenson, "The Chief Justice as Leader: The Case of Morrison Remick Waite, 14 *W & M L. Rev.* 899, 904.
24. Quoted by Samuel Shellabarger in his "remarks" in Proceedings in Memoriam Morrison R. Waite, 126 u.s. 585, 599-600 (1888).
25. *The Nation*, Jan. 22, 1874, quoted in Stephenson, "The Chief Justice as Leader," *supra* n.

- 23 at p. 904.
26. Kenneth Bernard Umbriet, *Our Eleven Chief Justices* (New York & London: Harper and Brothers, 1938), p. 297.
 27. "Remarks" of Justice Samuel Miller, *Proceedings in Memoriam, supra* n. 24, 126 U.S. at p. 610.
 28. D. Grier Stephenson, "The Chief Justice as Leader," *supra* n. 23 at p. 907.
 29. *Ibid.*, p. 908.
 30. C. Peter Magrath, *Morrison R. Waite, The Triumph of Character* (New York: The MacMillan Co., 1963), p. 224. *See also* Rocco J. Tresolini, "Chief Justice Morrison R. Waite and the Public Interest," 34 *N.W. Ohio Q.* No. 3 (Summer 1962) at p. 128.
 31. Morrison R. Waite to Amelia Waite, Feb. 22, 1874, quoted in C. Peter Magrath, *Morrison R. Waite, supra* n. 30, p. 97.
 32. Albert P. Blaustein and Roy M. Mersky, *The First Hundred Justices* (Hamden, Conn.: Archon Books, 1978), p 101.
 33. Quoted in Bruce R. Trimble, *Chief Justice Waite, Defender of the Public Interest* (Princeton: Princeton University Press, 1938), pp. 257-258.
 34. Felix Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* (Chicago: Quadrangle Books, 1928), p. 79.
 35. 98 U.S. 145 (1878).
 36. *Dolbear v. American Bell Tel. Co., Molecular Tel. Co. v. American Bell Tel. Co.; American Bell Tel. Co. v. Molecular Tel. Co.; Clay Commercial Tel. Co. v. American Bell Tel. Co.; People's Tele. Co. v. American Bell Tel. Co.; Overland Tel. Co. v. American Bell Tel. Co.*, 126 U.S. 1 (1888).
 37. Morrison R. Waite to Robert W. Hughes, Mar. 25, 1897, quoted in C. Peter Magrath, *Morrison R. Waite, supra* n. 30, at p. 209.
 38. *Munn v. Illinois*, 94 U.S. 113, 134 (1877).
 39. Felix Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite, supra* n. 34, at p. 111.
 40. Morrison R. Waite to John T. Waite, Nov. 1975, quoted in C. Peter Magrath, *Morrison R. Waite, supra* n. 30, pp. 281-282.

The Federalist Papers

The Selling of the Constitution

William F. Swindler

When the Constitutional Convention at Philadelphia rose from its work on September 17, 1787, the first—and perhaps the easiest—step in establishing a workable national government had been achieved. The second step was also relatively easy, persuading the Continental Congress that in disregarding its original instructions, to propose amendments for strengthening the Articles of Confederation, the Convention had come up with something that might work where the Articles obviously had not. After some grumbling, and after some effort to muster a quorum to take any action at all, the Congress ratified the unauthorized action of the Philadelphia delegates, and submitted the new document to state conventions for acceptance or rejection.

Now came the hardest part—the persuading of the public to accept, rather than reject, the proposed Constitution. The Convention itself had not been unanimous on the matter, and in fact only eleven of the thirteen states were officially represented by the signatures of their delegates on the document. Rhode Island, which would continue to be governed under its colonial charter for more than half a century, had boycotted the whole business. As for New York, Alexander Hamilton's signature did not commit the state, since two of the three-man delegation had withdrawn from the sessions weeks before, alarmed and protesting at the course of events. Even Hamilton, as he requested permission to add his name as an individual, was not enthusiastic about the final draft—but it was, he said, a choice between this proposal with its inadequacies, or no national government at all.

The pessimism of the men later to be called the Founding Fathers was realistically based. As the course of the next eight months would show, ratification was to be a struggle against superior odds. Rhode Island and North Carolina formally rejected the proposed Constitution and in their first conventions called for considering the question, and did not join the Union until it had been organized and functioning for several months, in North Carolina's case, and for more than a year in Rhode Island's. Connecticut and New Hampshire both experienced virulent opposition in the early period of the ratification process, and Pennsylvania's ratification, although one of the first, was bitterly condemned by large numbers of the electorate.

Although the final article of the Constitution had declared that it would go into effect when approved by nine of the states, it was obvious that the new plan of government could not succeed unless the majority included the states of New York and Virginia. These were the most important states, economically and politically, and their geographic locations would split the new nation into three separate parts if they refused to go along with the other nine. This became strikingly evident after New Hampshire, the ninth state, approved in June, 1788. Both Virginia and New York were in full debate over ratification at the time, and apparent majorities for disapproving the new Constitution were present in both conventions. Indeed, Governor George Clinton of New York had written to Governor Edmund Randolph of Virginia that he could hold his majority in line if Randolph would hold his—and the whole effort to replace the Articles would be frustrated.

Clinton, indeed, had begun his fight against the Constitution within ten days of the Convention's rising. On September 27, 1787 the text of the new document had been printed in the *New York Journal*, and the same issue carried a contribution by a writer identified by the pseudonym "Cato," which warned the readers that "if you are negligent or inactive, the ambitious and despotic will entrap you in their toils, and bind you with the cord of power from which you, and your posterity, may never be freed." This "Cato" was readily identified as Clinton himself; and his hostile essay was followed by one written under the nom de plume of "Sydney," who was in fact one of the original New York state delegates to Philadelphia, Robert Yates. These were powerful enemies of ratification, and their newspaper writings were reinforced by others who chose such pennames as "Brutus," "Cincinnatus," "Countryman" and "Expositor."

What the modern age would call a media battle was already in full cry within a few weeks of the adjournment of the Philadelphia Convention; and Hamilton, leading a minority campaign against the entrenched opposition, realized that a massive publicity effort would be needed to overcome the Clinton forces. Whether or not he was an enthusiast for the new Constitution, it was enough that his political foes were against it; whoever could win this fight would emerge as the dominant party figure in New York—and open the road to a dominant position in the new national government as well. Hamilton's political future was tied to ratification, and the battle for men's minds compelled him to become a champion of the Constitution.

In every state, the media campaigns, pro and con, were under way. The magnitude of the debates, from the first news of what the Convention had done to the initiation of the new government itself, is being made clear to modern Americans by the massive *Documentary History of the Ratification of the Constitution* now being prepared under the editorship of Professor Merrill Jensen of the University of Wisconsin. Many an eloquent, albeit anonymous,

disputation on political theory would find an ephemeral place in the arguments published in newspapers and pamphlets from New Hampshire to Georgia. But, as it was to turn out, those that were organized and published under Hamilton's leadership would become the prototype and classic of all of them.

Under the series title, *The Federalist*, and signed with the classical pseudonym "Publius," the articles were ultimately the product of three collaborators—Hamilton himself, his fellow New Yorker, John Jay, and a kindred spirit from Virginia, James Madison. Others were approached, including, it is believed, William Duer and Gouverneur Morris, and Duer did contribute some supporting essays under the name "Philo-Publius." Madison wrote in later years that Hamilton approached him on the idea of participating in the essay series, and although the authorship of each of the eighty-five numbers has never been entirely settled, there is general agreement that Hamilton and Madison between them wrote by far the majority of the essays, and Jay only a few. The most persuasive tally, by Jacob Cooke, editor of the Hamilton Papers, gives Jay credit for five numbers, Madison fourteen, and the remainder to Hamilton.

The writing of such a vast number of articles for newspaper deadlines—four a week was the desired schedule, which was maintained for much of the time from October 27, 1787 when the first of the series appeared, until the final number on May 28, 1788—was a demanding enough challenge in itself. But the maintenance of a systematic, reasoned plan of argumentation was even greater. What made it succeed was the fact that the three authors were persons who had been close to the heart of the great events of the past decade of independence and the struggle for nationhood. Jay had become the new country's most knowledgeable foreign affairs expert; Madison had taken such copious notes at the Philadelphia Convention that he would earn the title of "Father of the Constitution." As for Hamilton, his perception of the fundamental need for economic stability and centralized control of the essentials of defense, commerce and foreign relations, established the practical foundation for the American theory of government.

Under the circumstances, the organization of the argument in *The Federalist* was remarkably systematic. First came a series of numbers (1-14) reviewing the flaws in the Confederation government and the manner in which the proposed new government would provide remedies. Then came a series of rebuttals to criticisms of the new Constitution expressed by hostile writers (Numbers 15-29). Madison and Hamilton then published their most persuasive essays (Numbers 30-46), on the political theory upon which representative government rests—thus giving the papers their claim to enduring future authority. Finally (Numbers 47-85), the articles gave a detailed analysis of the anticipated functions of the several departments of government in the new plan.

Hamilton was aware of the moment in history at which he wrote his opening essay. His first sentences emphasized this to his readers in *The Independent Journal; or, the General Advertiser*:

After an unequivocal experience of the inefficiency of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the *union*, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world. It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.

This preamble set the tone for the series of essays which followed during the winter of 1787-88, when New York was watching the progress of ratification in other states and preparing to select the delegates to its own ratifying convention. The series of articles caught public attention at once; two other of the city's newspapers, the *Packet* and the *Daily Advertiser*, began reprinting them. The demand for copies became so insistent that even Clinton's own party organ, the *Journal*, began publication with Number 23—although it soon discontinued the practice upon the petition, it said, of thirty subscribers.

Washington, to whom Hamilton sent the first several numbers, was deeply impressed, and sought to have the essays reprinted in Virginia. Jefferson, who received his copies from Madison, declared them to be "the best commentary on the principles of government which ever has been written." Yet they were part of a vast outpouring of writing on the new Constitution, at last being collected into a comprehensive edition by the Wisconsin documentary project. Elbridge Gerry, Roger Sherman, Oliver Ellsworth, James Wilson, Luther Martin, Richard Henry Lee and James Iredell were among the contributors of similar essays in their respective states,

from Massachusetts to the Carolinas. It is safe to say that no state document in history was ever so thoroughly analyzed, before the people who were to be governed under it took their action.

The art of political persuasion, of course, is to minimize differences among those whose support is being sought; and for the two strong nationalists, Hamilton and Jay, to enlist the Virginian Madison in their publicity campaign required some intellectual compromises. At the convention, Madison had come off as a strong nationalist; but back home in Virginia, and under Jefferson's influence, his next twenty years would be substantially anti-Federalist. When, as President himself, he was his own man, and under the Philadelphia Convention, Madison had boldly stated: "The states never possessed the essential rights of sovereignty." He was referring, then, to the *locus* of power to deal with foreign nations or with relations between two or more states. Yet in No. 39 of *The Federalist*, he was to declare:

Each state, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a *federal*, and not a *national*, Constitution.

This ambivalence would haunt Madison's own reputation, and it gave rise to charges in later editions of the book version of the Federalist Papers that he had been the godfather of the compact theory of national government to which the secessionists of 1861 appealed. Yet even Hamilton, about whose nationalism there was never any doubt, found it expedient to temporize in dealing with some of the state sovereignty factions in New York. In No. 84 of the Federalist papers, he had excused the lack of a Bill of Rights in the new Constitution with the argument that the protection of the citizen was the exclusive concern of the states. In an earlier number, Hamilton had soothingly stated that "the plan of the Convention aims only at a partial union or consolidation" (No. 22). Yet at the Convention early in June, 1787 he had made a renowned speech in favor of a powerful national government.

The fact was that none of the writers, for or against the proposed Constitution, had any means of foreseeing how the new government would work in practice. Because the pro-ratification advocates persuaded the majority of the delegates in the ratifying conventions to accept the instrument more on faith than any tangible evidence—and four of the eleven ratifications were conditioned upon a series of amendments to be drafted by the first Federal Congress—it became possible to subject the theories of *The Federalist* to the tests of practical experience. Not all of its assurances to the state-sovereignty advocates were borne out; within five years of the operation

of the new Constitution, *Chisholm v. Georgia* confirmed the right of a citizen or resident of one state to sue another state—confirming the worst fears of the anti-Federalists. As a result of this Supreme Court decision, the Eleventh Amendment, purporting to grant the states immunity from such suits, was rushed through Congress and ratified by the states, as Justice Frankfurter later phrased it, with "vehement speed."

Whether *The Federalist*, or any single group of newspaper essays or pamphlets, actually tipped the scales in New York or Virginia, cannot be demonstrated conclusively. The manifest shortcomings of the government under the Articles of Confederation, the mounting majority of states in favor of ratification, and the eloquence of the Constitution's supporters in their own conventions, were the practical considerations which probably had the cumulative ultimate effect. Yet the exhaustive exploration of all aspects of the proposed instrument in print, particularly in the weeks prior to the selection of delegates to the ratifying conventions, at least made Americans aware of the issues and options. If anything, the high level of political theory which pervaded the Federalist Papers was, as one contemporary observed, "not well suited for the common people." But written as the essays were by three thinly-disguised persons who had been at the heart of national affairs throughout many of the critical years of the struggle for independence, their potential authority in the implementation of the principles espoused in the essays was great.

There was also the fortuitous decision to republish the essays in book form—the first volume appearing in March, 1788 and containing all the essays printed in the newspapers to the time of going to press. The second volume appeared in May and contained the remainder of the newspaper articles, even though the last eight in the series had not yet been printed in the media. It was obviously an attempt to put the complete series in the hands of those who would determine the ratification question at the meeting at Poughkeepsie; but it also prepared the way for one of the best-selling, and longest-lived, commentaries on the American system of government ever written. Four years later, a French translation was published in Paris, and the French National Assembly in August, 1792 made Hamilton and Madison honorary citizens in recognition of their contribution to the theory of national representative government. Before the end of the eighteenth century, a second American edition and second and third French editions had been published.

Another fortuitous contribution to the enduring influence of *The Federalist*, early in the history of the Constitution, was the citation of specific numbers as authority by the Supreme Court. Seeking for any American precedent in preference to English, both state and national courts tended to turn to it in preparing opinions on constitutional subjects—and opinions rely-

ing on *The Federalist*, at least in part, were then cited by later opinions. Joseph Story, in his *Commentaries*, called it a source "to which we must give serious weight;" while James Kent in his own work on American law declared, at the end of the first quarter of the nineteenth century:

I know not indeed of any work on the principles of free government that is to be compared . . . to . . . *The Federalist*, not even if we resort to Aristotle, Cicero, Machiavelli, Montesquieu, Milton, Locke or Burke. It is equally admirable in the depth of its wisdom, the comprehensiveness of its views, the sagacity of its reflections, and the fearlessness, patriotism, candor, simplicity and elegance with which its truths are uttered and recommended.

The book form of the essays would, over the next two centuries, go through nearly one hundred printings in half a dozen languages, including a flurry of translations in Europe after the second World War. But the nineteenth century saw a series of editions in Italian, French, German and Spanish, as new governments seeking to emulate the American example of representative democracy took *The Federalist* as their basic textbook. Yet the success of the work was not without controversy, the recurring one being the question of authorship of specific numbers among the essays.

Hamilton had, according to one story, slipped a sheet of notes, giving the name of the contributor of each number, into his copy of an 1802 printing shortly before his duel with Aaron Burr. Madison, late in life when he was editing his own papers for publication, went through the essays and "corrected" some of the attributions of authorship. Jay seems to have stayed out of the whole business—but this did not deter his grandson from attacking a Madison supporter, on grounds of ideology rather than authorship. The Madisonian was a local historian of some reputation in New York, Henry B. Dawson, who was meantime having trouble over the authorship question with James Hamilton, a son of the original instigator of the essays.

The third-generation Jay charged Dawson with aggrandizing Madison's role in order to give aid and comfort to the secessionist doctrine of states' rights—this now being the time of the Civil War. The second-generation Hamilton charged Dawson had gratuitously impugned his father's authorship by basing his edition on Madison's "corrected" version rather than on Hamilton's own list prepared in 1804. (Another son, John Hamilton, a decade earlier had brought out a collection of Alexander's works which refuted the Madison list of authors.) Dawson, however, declined to give ground on either front—with the result that, for a generation after the Civil War, rival editions of *The Federalist* came out regularly with pro Hamilton and pro-Madison versions.

The somewhat ludicrous dispute has all but been laid to rest in the third quarter of the twentieth century, with the editors of the papers of Hamilton and Madison undertaking to come to a working agreement on the authorship lists. Jacob Cooke, one of the editors of the Hamilton Papers, in 1965 prepared a definitive edition of *The Federalist*, although other editions continue to come out as later scholars use it for documenting their own studies or teaching. While new editions of the essays show promise of going on indefinitely, the occasion in which the writing is cited as authority in the Supreme Court has declined in the twentieth century. In the early 1920s, a researcher for a law journal compiled—in the age before computers—a formidable list of cases in which *The Federalist* had been cited, which came to nearly a hundred. But a sampling of this list of cases, followed by a checking of later cases citing these samples, suggests the ultimate proof of the enduring quality of the newspaper articles, written so hastily to encourage one state's approval of the Constitution, is that the succeeding generations of brief and opinion writers, rely on authority of the original essays.

Ratifying the Constitution—A Near Thing

Approval of the work of the Founding Fathers was a hard-fought matter in the winter of 1787-88, and on into the summer. Two state conventions rejected the Constitution outright, and in at least one there was a vigorous effort to reconsider the ratification. Massachusetts, New Hampshire, New York and Virginia carried the day by uncomfortably narrow margins. Without the all-out educational campaign to persuade reluctant majorities in a number of these states, the thing might not have come off at all. The dates of the final action, and the vote in state conventions, illustrate the struggle:

December 7, 1787	Delaware	unanimous
December 12, 1787	Pennsylvania	46-23
December 19, 1787	New Jersey	unanimous
January 2, 1788	Georgia	unanimous
January 9, 1788	Connecticut	128-40
February 6, 1788	Massachusetts	187-168*
March 24, 1788	Rhode Island	rejected
March 28, 1788	Maryland	63-11
May 23, 1788	South Carolina	149-73

May 29, 1788	North Carolina	rejected
June 21, 1788	New Hampshire	57- 46*
June 25, 1788	Virginia	89-79*
July 26, 1788	New York	30-27*

*Ratification conditional upon adoption of Bill of Rights.

With eleven of the thirteen states ratifying the new plan of government, it went into operation in 1789—but only after much sputtering and coughing. Although March 4 had been chosen as the starting date, it took all of the month for enough Congressmen and Senators to show up to obtain a quorum for organizing—the House of Representatives on April 1 and the Senate on April 6. Washington was not sworn in as President until April 30. The judicial branch was not organized until Congress adopted the Judiciary Act the following September 24, and the Supreme Court did not open its first term until February 1, 1790. Meantime, the remaining holdout states finally joined the union, viz.:

September 25, 1789	North Carolina	194-77*
May 29, 1790	Rhode Island	34-32*

*Ratification conditional upon adoption of Bill of Rights.

A Revolution Runs Wild.

Mr. Justice Roberts Last Four Years on the Supreme Court *

Charles A. Leonard

The Roosevelt Supreme Court is usually dated from February 1940 at which time there were a majority of the Justices on the Court who had been appointed by President Franklin Delano Roosevelt. It was, however, at the beginning of the 1941 term, when Owen Josephus Roberts remained the only Justice who had not been appointed by F. D. R. that we see a tribunal on which the New Deal philosophy was firmly entrenched.[1] The expected unanimity of a Roosevelt Court was missing, however, and Harlan Fiske Stone, who presided as "Chief" from 1941 to 1946, described the Justices during that period as "wild horses." [2]

Charles Evans Hughes had submitted his resignation as Chief Justice on the last day of the (1940) term to become effective on July 1, 1941. He had not been ill, in fact, he was the first Chief Justice since John Jay to retire in good health,[3] but as Hughes later explained, "I realized that the work was too heavy for me at my age, as it was increasingly difficult to maintain the necessary number of hours of sustained effort. I had criticized judges for trying to hang on after they were unable to bring full vigor to their task. As I felt that I could not keep the pace that I had set for myself as Chief Justice, I decided that the time had come to follow my own advice." [4]

It is believed that Roosevelt's first choice as Hughes' successor was Attorney General Robert H. Jackson, but that he was talked out of that appointment by the retiring Chief Justice and Justice Felix Frankfurter. They urged, in light of the impending war emergency, that national unity and a sense of continuity with the pre-New Deal era were needed.[5] Associate Justice Harlan F. Stone was suggested as the person who would be the best able to fulfill these demands, and in addition, his voting record during the early New Deal period made him acceptable to the President. Stone was elevated to the center chair at the beginning of the 1941 term and was only the second sitting Justice in Supreme Court history to be so designated.[6]

Hughes and Stone were as different as could be imagined in their conduct of the Court's business. As Walter Murphy notes,

[T]he senior Justices had come to expect the Chief to act both as a task and a social leader. But Stone did not play either role, at least not in a fashion comparable to that of either of his immediate predecessors. Since he had felt frustrated by Hughes' methods, the new Chief preferred not to cut off discussion—indeed, he joined in angry wrangling with his associates, something which Hughes considered beneath his station. Long acrimonious harangues which often stretched from Saturday until Wednesday, marked the Stone conferences.[7]

Frankfurter supports Murphy's description when relating a conversation at a social affair which occurred about a year after Roberts' departure from the Court. "Roberts and I said nothing about Stone's ineffectiveness, because of Roberts' warning to me that [Judge D. Lawrence] Groner is a great admirer of Stone, but our very silence about Stone's quality as Chief Justice furnished an obvious contrast to our enthusiasm about Hughes." [8]

A suspicion is planted that the new Chief Justice's inability to control the conference in an orderly fashion contributed to the creation of the unbridgeable conflicts that grew among the New Deal Justices during his tenure. Roberts certainly believed it to be true when, on one occasion after a long wrangling conference in 1943 which left him dispirited, he said to Frankfurter, "Of course, one difficulty is that the present Chief is not strong at the helm—you were on the Court long enough to see with what mastery Hughes presided over our conferences." [10]

After a drought of appointment opportunity during his first term, President Roosevelt appointed seven Justices in rapid succession after 1936. Hugo Black replaced Willis VanDevanter in 1937; Stanley F. Reed replaced George Sutherland in 1938; Felix Frankfurter replaced Benjamin Cardozo in 1939; William Douglas took Louis Brandeis' seat, also in 1939; and Frank Murphy that of Pierce Butler in 1940. Along with Chief Justice Stone, James F. Byrnes, replacing James McReynolds, and Robert Jackson, taking Stone's old seat as associate, occupied their places on the Court at the beginning of the 1941 term. Between that date and Roberts' resignation on July 31, 1945, there was only one change in the personnel of the Court. When Justice Byrnes resigned in 1942 to become Director of Economic Stabilization, Wiley B. Rutledge was appointed in his place, about whom Samuel Knoefsky makes an interesting point, "of the seven Associate Justices serving by the appointment of Mr. Roosevelt, only Mr. Rutledge came to the bench with the kind of previous judicial experience which could be considered as preparation for service on the high court." [11]

The changes in personnel during the four years created a Court comprised of two Republicans, Stone and Roberts, and of seven Democrats, who had made their way to the bench, in the

opinion of Stone's biographer, through faithful and unremitting service to the New Deal.[12] But, Alpheus Mason continues, there was "no basic core of philosophy or of legal doctrine . . . around which a solid majority could be rallied. It seemed certain at least that a bare majority—Stone, Roberts, Reed, Frankfurter, and Byrnes—would not be led astray by the visions of the social theorists." [13]

The new Chief Justice's job was further complicated by the fact that the services of Justice Roberts were to be lost to the Court from December 18, 1941 to January 23, 1942. He had accepted the President's invitation to chair the investigation into the attack on Pearl Harbor.[14] Evidently, Roberts had not profited from his earlier unpleasant excursion into extra-judicial duties as the umpire on the German-American Mixed Claims Commission from March 1932 to December, 1933.[15] His rulings regarding the liability of the German government for acts of sabotage by its agents during World War I had pleased neither of the participating nations nor did his efforts in the Pearl Harbor matter meet with any more success. With hindsight in 1948, he noted, "I accepted, at the hands of two Presidents, commissions to do work not strictly of a judicial nature. I have every reason to regret that I ever did so. I do not think it was good for my position as a Justice, nor do I think it was a good thing for the Court." [16] The *United States Reports* from January 5th to February 11th indicate that, "Mr. Justice Roberts did not participate," and there were several similar entries over the following month or so, indicating the absence of the Justice's vote.

The Chief Justice was annoyed at Roberts' absence as he wrote to his sons on January 23, 1942, "Roberts has returned from Hawaii but I think he is still busy preparing his report, I am hoping we can get him back on the job soon." [17]

As noted earlier Chief Justice Stone saw the members of his Court as a group of "wild horses"; it is clear that these horses soon separated into two herds. Generally, Justices Black, Douglas, and Murphy frequently joined by Rutledge, formed one group, and Frankfurter, Jackson, and Roberts formed another, with the Chief Justice and, especially, Stanley Reed wandering back and forth between both groups. A change had clearly taken place in Roberts' relationship with the Court. When he came to the high bench in 1930 he stood at the center and along with Chief Justice Hughes frequently determined the direction of the Court, "without much relish on his part," [18] it might be added. One commentator even goes so far as to refer to the first six years of Hughes' Chief Justiceship as "the reign of Roberts." [19] After the "switch" in 1937 and especially after the resignation of Sutherland in 1938 Roberts' dominance declined though he continued to vote consistently with the majority until the end of the 1940 term.[20] From '41 to '45 Roberts, moved to the right fringe of the Court, or it moved to his left, depending on one's perspective.

According to Percival Jackson this "left Roberts to be himself"[21] and where "he could still be looked to as 'the great postulator against change." Yet he did not represent, "a rallying point for intellectual counter—insurgency, states William Swindler, "for he had 'abandoned most of his former restrictive views of the constitutional scope of the national powers'." [22]

What had happened, then, to that Supreme Court which F. D. R. had hoped would be in tune with the other branches of the federal government? Even before Roosevelt's death in April, 1945, the Court had split into two bitterly contesting camps with Justices Black and Frankfurter as leaders of the two groups: "Black, the legislative crusader, zealous to give the expressions of Congress the broadest judicial construction, and Frankfurter, the academician, demanding that Congress rather than the Court determine how broad the effect of its own acts should be. Both were committed to an affirmative role in the regulation of modern economic processes,[23] or as Wallace Mendelson concisely states, "Mr. Justice Black is an idealistMr. Justice Frankfurter is a pragmatist." [24] The division was aggravated because both men claimed Justice Oliver Wendell Holmes, Jr. as their model and both believed in the absolute correctness of their position.[25]

The inability of Chief Justice Stone to control the conference, as noted in the beginning of this study, led to the deepening of the conflicts, and the effect on Roberts was that he "was driven back toward his old convictions by the vehemence of Black's judicial radicalism, while the subtleties of Frankfurter's argumentation did not equip [Roberts] to deal on equal terms in the intellectual melee of Stone's Court." [26]

In analyzing the two hundred forty-nine cases between 1941 and 1945 we find that Justice Owen Roberts supported the federal economic power in its legislative or executive exercise in seventy-eight cases or forty-one (41) percent of the time, while he voted against the government or its agents on one hundred thirteen occasions. Clearly, this demonstrates that he had returned to his pre-1937 attitude toward governmental activity in the economic sphere. In arriving at this posture he wrote thirty-two opinions for the majority and either wrote a dissenting opinion, joined in the dissent of others, or issued a simple statement of dissent in seventy cases, or thirty-seven (37) percent of the time. (See charts provided at the end of this article.)

Summarizing, during the same period, Roberts voted to uphold state power in the economic sphere thirty-nine times and to void on nineteen occasions, or to state it another way to support government sixty-nine (69) percent of the time, and against thirty-one (31) percent. He wrote five opinions for the Court, two dissents, joined in ten others, and issued four simple statements of dissent.

Totaling his record in the matter of governmental activity in the economic area, he supported

the federal or state authority in one hundred and seven instances, or forty-seven (47) percent and opposed the government in one hundred thirty-two, fifty-three (53) percent. He wrote thirty-seven opinions for the majority, penned twenty-nine dissents, joined in thirty-six others, and simply indicated his dissent in thirty-one instances. Between 1941 and 1945, then, Mr. Justice Roberts disagreed with the majority in thirty-nine (39) percent of the cases in the economic sphere.

The divisions existing on the Court spilled out onto the pages of the *United States Reports*. During the 1940 term, Hughes' last, twenty-eight (28) percent of the opinions were non-unanimous; during Stone's first, the 1941 term, they rose to thirty-six (36) percent; forty-four (44) percent in 1942; fifty-eight (58) percent in 1943 and 1944. The total number of dissenting votes cast similarly reflects the increasing conflict, in 1940 the year before Stone took over as "chief" there were one hundred seventeen (117); during the 1941 term, one hundred sixty (160); 1942, one hundred seventh-six (176); 1943, one hundred ninety-four (194); and finally, in the 1944 term, two hundred forty-five (245) were recorded.[27] Roberts was the chief dissenter, and as Swindler notes, "his outburst of criticism in the winter of 1944 had grown into a torrent of objections that were recorded in fifty-three dissents in the term ending in June, 1945." [28]

The depth of the bitterness can be seen in the issue of judicial disqualification in cases where there was a possible conflict of interest. It was first raised in conference by Justice Roberts, who questioned the propriety of the Chief Justice sitting in a case in which he might have some interest, because of the participation of his former law partners. Stone became so angered that he had one of his law clerks prepare a list of cases in which Roberts had sat even though his former law partners or clients were involved.[29] Indeed, Roberts was not clean; he had participated in a *U. S. v. Butler*, [30] the Agricultural Adjustment Act case in 1936, in which George Wharton Pepper, his old law school teacher and friend, was counsel for appellee. Not only did Roberts participate but he wrote the opinion in support of his friend's position, and even incorporated some of the language directly from Pepper's written and oral argument.[31] The matter of disqualification exploded at the end of the 1944 term when the Court took up the request for a rehearing of *Jewell-Ridge Coal Corp. v. Local 6167 UMWA*. [32] The Court had ruled five-to-four in the original decision that portal-to-portal time for miners was included within the work week and therefore was to be compensated under the FLSA. Justice Black's former law partner had acted as counsel for the union, and so the operators were asking for a rehearing with Black disqualifying himself. There was a violent exchange in the conference. The petition was denied on June 18, 1945, but a concurring opinion was filed by Justice Jackson, joined by Frankfurter, which only vaguely cloaked the bitter feelings.[33]

Why did the members of the "liberal" Roosevelt Court fall out? Herman Pritchett suggests three reasons, aside from personal incompatibility: first, the shortcomings of American liberalism as a social and economic philosophy; second, the liberal tradition which the Court had inherited was a divided one, i.e., judicial self-restraint of Holmes, pragmatist, versus judicial activism of Brandeis, theorist; and, finally, the Roosevelt Court had to effectuate its liberalism under conditions of being in power—unlike Holmes and Brandeis.[34] A fourth reason, it appears to this author, is equally valid; the majority of the Roosevelt Court Justices were as absolute in their view of what a government should or should not do as were the "Four Horsemen" of the pre-1937 Court, and given the divergent views of Black and Frankfurter this proved disastrous for unity. In 1945, Chief Justice Stone had written to Irving Brant, that, as the old court has written their economic prejudices into law so, "the pendulum has now swung to the other extreme and history is repeating itself, the Court is now in as much danger of becoming a legislative Constitution-making body enacting its own predilections as it was then." [35] Justice Jackson took official note of this in his dissent in *Ashcraft v. Tennessee*, in which Roberts and Frankfurter joined, "the use of the due process clause to disable the States in the protection of society from crime is as dangerous and delicate a use of federal judicial power as to use it to disable them from social or economic experimentation." [36]

Roberts' dissatisfaction increased during his last four years on the Court. When he resigned in 1945 he wrote to former Chief Justice Hughes, "when you left the Court, the whole picture changed. For me it would never be the same." [37] Roberts was especially unhappy with his brethren over three issues which appeared, again and again, in his dissents: first, the rewriting of statutes by the Court according to the prejudices of the majority, second, the willingness of the majority to review cases which he felt the Court had no business taking, e.g., on the second last decision day in which he participated, Mr. Justice Roberts dissented in an original jurisdiction suit involving the solution of a water consumption dispute involving three states. He delivered his final *caveat* in this matter in *Nebraska v. Wyoming* [38]

Without proof of actual damage in the past, or of any threat of substantial damage in the near future, the Court now undertakes to assume jurisdiction over three quasi-sovereign states and to supervise, for all time, their respective use of an interstate stream . . . I doubt if, in such interstate controversies, any state is entitled to a declaratory judgment from this court, . . . The precedent now made will arise to plague this court not only in this present suit but in others. The future will demonstrate, in my judgment, how wrong it is for this court to attempt to become a continuing umpire or a standing Master . . . In

such controversies the judicial power should be firmly exercised on proper occasions, but as firmly withheld unless the circumstances plainly demand the intervention of the court.[39]

But, thirdly, above all else, the Justice abhorred the abandonment of precedent by the majority of the Court. He expressed his concern to Felix Frankfurter, "the way we tear up the law with complete indifference to the precedents or the consequences [leaves me] dispirited." [40] He had publicly stated his views in *Mahnich v. Southern SS. Co.* in 1944 when he explained "I should say nothing further on [the question of this case] save that the method of reaching the decision seems to me contrary to the right exercise of the judicial function." He warned, further,

The evil resulting from overruling earlier considered decisions must be evident . . . [T]he law becomes not a chart to govern conduct but a game of chance; instead of settling rights it unsettles them. . . . Defendants will not know whether to litigate or to settle for they have no assurance that a declared rule will be followed. . . . [A]nd the courts below [are left] on an uncharted sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow.[41]

In a more familiar case, *Smith v. Allwright*, [42] the Court overruled, eight-to-one, *Grove v. Townsend*, [43] which had dealt with the voting rights of blacks. Roberts had written the opinion in *Grove* so there is a bit of rancor in his words,

This tendency [to overrule precedents], it seems to me, indicates an intolerance for what those who have composed this court in the past have conscientiously and deliberately concluded, and involves an assumption that knowledge and wisdom reside in us which was denied to our predecessors. The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of current decisions, that the opinion announced today may not be shortly repudiated and overruled by justices who deem they have new light on the subject. . . . It is regrettable that in an era marked by doubt and confusion, . . . this court, which has been looked to as exhibiting consistency in adjudication, and a

steadfastness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions.[44]

If Owen J. Roberts came to the end of his judicial career unhappy and embittered by the direction which he saw the New Deal Justices leading the Court, his colleagues were equally stung by the attacks upon them for what he considered their injudicious performance. When Roberts resigned—he did not retire, but severed completely his ties with the Court— Justice Hugo Black refused to sign the usual congratulatory letter of farewell, and so none was ever sent.[45] There is merit in William Swindler's comment that, "Roberts in a sense was a whipping boy for both elements on the bench . . . It was Roberts' misfortune to have remained on the bench too long; a retirement with Hughes in 1941 would have ended his career on a note of reasonable accommodation of the new jurisprudential climate." [46]

Professor Maurice Merrill had suggested in 1934 that it was too early to evaluate the constitutional philosophy of Mr. Justice Roberts, but that his "present accomplishments give every assurance that he will rank with the leaders of the Court." However, time has produced "mixed reviews" on Roberts' contribution to American constitutional law; on the other hand, the reviewers have frequently become enmeshed in their own political prejudices. For example, Professor Herman Pritchett, rather snidely, remarked in 1949 that, "Roberts had a curious record. The only liberties he considered worthy of protection being those of evacuated Japanese, indicted Nazis and Nazi sympathizers, and the Associated Press." [48] Interestingly, today that would classify the Justice as a "raving" liberal.

Roberts' own evaluation of himself is noteworthy, "I have no illusions about my judicial career, but one can do only what one can. Who am I to revile the good God that he did not make me a Marshall, a Taney, a Bradley, a Holmes, a Brandeis, or a Cardozo." [49] While one must concur with the Justice that he does not rank with these greats, one must also agree with Dean Erwin Griswold that, "Roberts' important function on the Court was to smooth the process of transition." [50] This, indeed, accounts for the years between 1930 and 1940, but it is Mr. Justice Roberts' last years which defy evaluation. Unless, that is, we see him fulfilling Chief Justice Hughes' definition of a dissenter—one who speaks for "the brooding spirit of the law," or, in the words of present Supreme Court Justice William H. Rehnquist, as one who appeals "to present and future brethren to see the light." [51]

Endnotes

1. While it is true that Stone had been originally appointed by President Calvin Coolidge, his elevation to the Chief Justiceship had been made by Roosevelt.
2. Mason, *Harlan Fiske Stone: Pillar of the Law*, p. 580.
3. Atkinson, *Harlan Fiske Stone: Pillar of the Law*, p. 580.
4. *Autobiographical Notes of Charles Evans Hughes*, p. 324.
5. Swindler, *Court and the Constitution in the 20th Century*, pp. 120-121.
6. While Hughes had also served as an Associate Justice (1910-1916) there had been an interval of fourteen years between his first resignation and the appointment by President Herbert Hoover in 1930. Edward D. White was the other associate to be elevated.
7. Murphy, "Marshaling the Court," 29 *U. Chi. L. Rev.* 644.
8. *From The Diaries of Felix Frankfurter*, October 19, 1946, p. 275.
9. Murphy, p. 645.
10. Murphy, p. 645.
11. *Chief Justice Stone and the Supreme Court*, p. 256.
12. Mason, *Stone*, p. 573.
13. *Ibid.*, p. 576.
14. "Report of the Roberts Commission, *Hearings before the Joint Committee on the Investigation of the Pearl Harbor Attack*, 79th Cong. 1st Sess. 1946.
15. 27 *Am J Intl Law* 339 (1933); 34 *AJIL* 154 (1940).
16. Address to a Luncheon of the Bar of the City of New York, December 11, 1948, 35 *ABAJ* (1949).
17. Mason, *Stone*, p. 581.
18. Griswold, "Owen J. Roberts as a Judge," 104 *UPLR* 336 (1955).
19. Percival Jackson, *Dissent in the Supreme Court*, p. 174.
20. Leonard, *A Search for a Judicial Philosophy*, p. 174.
21. Jackson, p. 191.
22. Swindler, p. 129.
23. *Ibid.* p. 123.
24. Mendelson, *Justices Black and Frankfurter*, p. 13.
25. Pritchett, *Roosevelt Court*, p. 280.
26. Swindler, p. 134.
27. Pritchett, *Roosevelt Court*, p. 25. Mason in *Stone* gives slightly different figures but they

- are substantially the same, p. 639.
28. Swindler, p. 133.
 29. Mason, *Stone*, p. 641.
 30. 298 U.S. 1 (1936).
 31. Leonard, p. 51ff.
 32. 325 U.S. 161 (1945).
 33. 325 U.S. 897 (1945).
 34. *The Roosevelt Court*, pp. 264-67.
 35. Mason, *Stone*, p. 153.
 36. 322 U.S. 143 at 174.
 37. Griswold, "Owen J. Roberts as a Judge," 104 *UPLR* 349.
 38. 325 U.S. 589 (1945).
 39. *Ibid.* at 657-58.
 40. *Diaries of Felix Frankfurter*, p. 227.
 41. 321 U.S. 96 at 105, 112-13 (1944).
 42. 321 U.S. 649 (1944).
 43. 295 U.S. 45 (1935).
 44. 321 U.S. 649 at 666.
 45. Mason, *Stone*, pp. 365-9; Swindler, *Court and Constitution in the 20th Century*, p. 134.
 46. Swindler, p. 134.
 47. "The Constitutional Opinions of Mr. Justice Roberts," 21 *Penn. Bar Assn. Quarterly* 147 at 149, 153 (1934).
 48. *The Roosevelt Court*, p. 250.
 49. Quoted in Frankfurter, "Mr. Justice Roberts," 104 *UPLR* 312 (1955).
 50. "Owen J. Roberts as a Judge," 104 *UPLR* 347 (1955).
 51. "Supreme Court: Past and Present," 59 *ABAJ* 361 at 363 (1973).

Populism and the Supreme Court

Alan F. Westin

(A dramatic and well-documented record of the *laissez-faire* constitutionalism of the Supreme Court in the 1890s was published in the *Journal of Politics* in 1953, Professor Westin, who went on to publish a number of perceptive studies of the Court, and the publishers of the *Journal*, have graciously granted permission to reprint portions of this graphic paper in the **YEARBOOK**. The Editor has made a necessary abridgement of the original article due to the limited space available for this reproduction.—ED.)

I. BACKGROUND TO DISENCHANTMENT

A. *The Supreme Court and the Farmer's Debt Crisis*. The literature of the protest movements from 1876-1896 reveals one constantly recurring theme—the farmer's public and private burden of debt. William A. Peffer, later Populist Senator from Kansas, wrote in 1889: "As the years came and went, and as private mortgages and municipal bonds increased in number, it required more wheat, more corn, more cotton, more cattle, more swine to meet maturing obligations . . . With the fall in values of products generally, the value of the dollar in debt grew correspondingly higher. . . the market value of everything but dollars, bonds and mortgages had fallen." [1] Although the farmer had to speculate about the factors which produced low crop prices or scarce currency, he had no such problem of divination as to the municipal bond obligations. As the leading commentator on municipal law noted in 1890, "That such securities have any general value left is largely due to the course of adjudication in respect thereto by the Supreme Court." [2]

Possessing no railroad or canal but only a cabinet full of embossed shares in a corporation mortgaged dry by its promoters, [3] towns found themselves deep in bond-debt without the expected "increase in population and wealth" to "take care of the taxes." [4] A wave of repudiations shook Iowa, Kansas, Wisconsin, Missouri, and the southern states; legislatures passed acts forbidding municipalities to levy taxes to pay railroad subscriptions; [5] state constitutions were amended to prohibit further railway aid issues; and state courts worked overtime in rejecting the claims of bondholders who tried to enforce fraudulently procured issues. Behind these actions

was the farmer, upon whom the major burden of local and state taxation fell under a land-focused system of taxes. Enforcing the bonds were large-income investors—men skilled in the litigatory arts—and suits upon railway aid bonds were soon being shunted into the federal courts, with ultimate resort to the United States Supreme Court.

There, setting a "face of flint against repudiation,"[6] the Supreme Court brushed aside its long settled policy of adopting state court constructions of their own constitution and laws, and held these bonds enforceable in over three hundred and fifty cases between 1870 and 1896. Viewing the problem as one of settling a loss between an "innocent issuer" and an "innocent holder," the Court ruled that a suit by a *bona fide* purchaser for value automatically barred defenses of fraud, misrepresentation, bribery, corruption, or failure of conditions, and ruled that the only defense open to the municipality could be an original lack of legal authority by the municipal officers to issue the bonds.[7] Coupled with this doctrine went a policy of accepting virtually at face value the "innocence" of suing bondholders, creating elaborate presumptions of innocence which prevented municipal attorneys from establishing that these suits were collusive.

Moreover, the Supreme Court adopted a vigorous policy of placing the machinery of the federal judiciary at the disposal of bondholders for enforcement and collection purposes. Thus the Court held that it could examine the city budget and manage municipal expenses in the interests of bondholders;[8] that taxes could be levied under a writ of mandamus from the federal court despite proof of diminished resources by the city;[9] and that the court could decide in its discretion that the community must pay a full assessment in one year rather than over a budget period based on the city's ability to pay.[10] As the desperate municipalities attempted to escape payment by creating new municipal corporations in place of the corporation legally responsible on the bonds,[11] or by having the state legislature dissolve the township and create a new town slightly different in area and population,[12] the Court continued its creative role by striking down such actions as "indirect repudiations."

In response, farmers organized "Taxpayers Associations" which attempted by coercion to prevent federal courts from selling municipal property to meet judgments in favor of bondholders.[13] Congressmen from debtor communities introduced bills to forbid suits against a municipality or public corporation in the United States courts, and to prevent "the unlawful removal of causes from the state courts to the United States Courts." [14] Under an old common law rule that a writ of mandamus abates with the death, resignation, or removal from office of

the officer to whom the writ was directed, municipalities adopted a policy of rotating officers successively as federal writs were issued." [15]

The federal courts retaliated by imprisoning state officers who refused to levy taxes as ordered in bondholder judgments. As these incidents mounted across the country, popular indignation reached a fever pitch, dramatized in the famous Missouri Judges case in 1893. [16] There municipal bonds had been issued under clearly fraudulent conditions to a railroad corporation which had failed to build a single foot of road and had fled with the subsidy funds. The United States Circuit Court ignored the Missouri court ruling which invalidated the issue, and held the bonds to be commercial paper, negotiable and binding on the issuers. The court then directed a writ of mandamus to the county judges of St. Clair and Cass counties commanding them to levy sufficient taxes to pay the bond judgments. When the judges refused, the federal court committed them to a "common jail in Kansas City" for an indefinite period for contempt.

The 1890's thus found hundreds of farmer communities like those in Missouri "struggling under heavy loads of bond-taxes, levied twenty-five years ago, to aid railways of which not one foot has been built." [17] That justice might be blind at times, or that bad bargains might rise to haunt their makers, the farmers could accept. But that justice could deliberately blind itself to the farmer's picture of fraud, failure of consideration, "innocent holders," and false diversity of citizenship suits was too much for even the prestige of the Supreme Court to weather.

B. The Supreme Court's Treatment of Public Land Disputes. Weaver wrote in his *Call to Action* that "the blackest pages in the history of legislative, administrative, and judicial procedure in this country are undoubtedly connected with the railroad land grant system." [18] From the 1870's onward, a steadily losing battle was waged by the protest forces to reclaim millions of acres of public land made available to promoters of internal improvements who then defaulted on their projects. Here, as in the bond cases, the bitterest battles were those in which the "plunderers" received judicial shelter in the Supreme Court, and typical of these contests was the *Wisconsin Reversion* case. [19] Congress in 1856 had granted 2,400,000 acres of federal land to the state of Wisconsin, to be allotted by the state legislature for the purpose of stimulating railroad projects in that territory. The Act contained the stipulation that if the railroad was not completed within ten years "no further sales shall be made, and the lands unsold shall revert to the United States." The granting act of the Wisconsin legislature provided that only upon the completion of every twenty miles of railway did the company acquire full title to that section of land grant. Portions were quickly parceled out—the La Crosse and Milwaukee Railroad alone receiving 1,000,000 acres—and within seventeen years railroad companies had

removed over 1,600,000 feet of valuable pine timber from their properties. Yet not a single road or part of a road had been built by these grant holders within the state as of 1873, fully seven years after the original reversion date set by Congress and two years after the extension date set by a second granting act of Congress in 1864.

Under impetus from the state Grange pressure, and spurred on by findings that Congress and the state legislatures had been bribed by applicants for these grants, the state of Wisconsin refused to let the railroad promoters remove further timber from the lands, maintaining that the complete failure of the railroads to build the lines reverted the property *either* to the United States *or* to the state of Wisconsin. The railroads replied by suing the state agent for cutting logs on their property, contending that the Congressional grants to the state of Wisconsin were absolute grants and that they had obtained full title from the state. When the case reached the Supreme Court, Justice Field held that even though the required completion date had not been extended past the 1864 provision, Congress's failure to take judicial or legislative action to enforce forfeiture of these lands showed that they were not meant to revert "automatically" to either state or national government. A public grant given for internal improvements on a specific limitation and with a fixed reversion date, was in the Court's conception, not sufficient Congressional intent to render reversion "automatic."

As similar scandals involving the Southern Pacific, Central Pacific, and Texas Pacific Railroads were uncovered, the Grange furor mounted, the United States government attempted to take the positive action required by the Court. In 1878, a suit was brought against the Union Pacific Railroad to declare void certain construction contracts, land grants, and income mortgages because of the failure of the road to fulfill specifications under which the original grant had been made.[20] Based upon the findings of a Senate Investigating (Wilson) Committee in 1872, the government alleged fraud by the Credit Mobilier Company in deliberately overcharging the United States for construction costs, appropriating illegal profits to the management, fraudulently marketing railroad bonds, and a long list of complicated, off-color maneuvers. The Supreme Court denied relief, however, on the astounding grounds that the United States had no interest in this case! Even though the Union Pacific may have failed to "display the gratitude which so much care called for . . ." said the Court, the United States was not the company, nor a stockholder in the company, nor a trustee, and not proceeding under its visitorial powers as the creator of these corporations, and thus, being merely a "creditor," the United States was not entitled to any relief from these frauds.[21] The government which had provided \$27,236,512 in bonds and 12,000,000 acres of coal, timber, and mineral lands had no substantial interest in the manipulations of Morton, Macy, McCormick and Pullman, and could

do nothing to prevent or redress their spoliation of the public domain.

Following similar holding in the lower courts, the Supreme Court in 1892 refused to allow forfeiture of 1,781,000 acres of timber and mineral land in Oregon given by Congress to various companies to pay for construction of military wagon roads,[22] and dismissed a United States suit to reclaim lands from the Des Moines Navigation and Railroad Company, which had received five acres of land on each side of the entire Des Moines River in Iowa conditioned upon their improving the navigability of that waterway.[23]

This line of decision soon raised furious protests from the farmers, who rebelled at the reckless disposal of rich soil, timber, and mineral lands for corporate rather than individual exploitation. The tempo of reaction to the Supreme Court's rulings can be seen in one sample state, Texas. In 1878 and 1880, the Texas Independent Greenback Convention and the Greenback Labor Party condemned donations to railroads and other corporations, and demanded ". . . repeal of all laws providing for sale of [public school lands] . . . other than to actual settlers, in quantities of not more than one hundred and sixty acres to any one purchaser." [24] As it became clear that forfeiture suits in the courts would not remedy the land grants frauds, the Greenback Party moved to a more radical program, stating in 1884:

we declare that in a true republican government the ownership of these sovereign properties cannot be transferred or alienated in unequal share without destroying the equal rights and sovereignty of the people . . . [25]

C. The Supreme Court and the Struggle to Control Railroads. As important to farmer-worker interests as the public debt and public lands was the problem of controlling railroad practices. With the Dred Scott case still a burning memory, the Supreme Court in 1876 had upheld the regulatory Granger laws as a valid exercise of state police power, declaring that "For protection against abuses by legislatures, the people must resort to the polls, not to the courts." [26] Yet twenty years later, in 1896, nothing was clearer in the Nation's constitutional universe than the fact that the states could not control the railroads under their police power, and that the railroads had resorted to the courts for protection with singular success.

To visualize this success story one need only consider three areas of railway regulation as treated by the Supreme Court: (1) state control of grain elevators; (2) state power over railroad rates; and (3) federal "removal" and "receivership" bars to state regulation.

1. *State Control of Grain Elevators*: During the 1880's, Farmer Alliance chapters set out to construct grain elevators in order to avoid oppressively high prices charged by elevator operators through their monopoly of storage facilities. This program required the signing of leases with the railroads to strips of property adjoining the tracks so that the elevators could be built close enough to load and unload grain from railway cars. Here the farmer's group met a solid wall of opposition—consistent refusal by railroads to lease rights-of-way in property which a few years previously had been *donated* to the railroad as a subsidy by the local community or the nation. In many cases this refusal was based on secret agreements between the railroads and private elevator operators, under which storage charges were maneuvered in order to control grain prices for speculative purposes. By thus discriminating in leasing agreements, the railroads were able to thwart the Alliance program, at least as long as the states did not step in to equalize the conflict.

That the state lacked constitutional power to arbitrate this power struggle was the thesis of the famous *Nebraska Elevator* case. The Missouri Pacific Railway had refused to lease any of their property to the Elmwood (Nebraska) Farmer's Alliance on the ground that the two privately owned elevators already operating were "adequate shipping facilities." The Alliance petitioned the State Board of Transportation, which investigated and found that the elevator operators had signed a restrictive charge agreement. The Board therefore found facilities to be "inadequate," ruled that the railroads' refusal to lease to the Alliance was an illegal discrimination, and ordered the Missouri Pacific to contract with the Alliance. On May 13, 1890, the Nebraska court, on petition from the Board of Transportation, gave the Missouri Pacific forty days in which to comply with the Board mandate, after which the Court would issue a writ of mandamus and itself execute the lease agreement. The railroad coolly sued out a writ of error to the United States Supreme Court. For *six years* thereafter the state was prevented from taking action, and when the Court finally delivered its decision in November of 1896, it ruled that the Board's order forcing the railroad to lease to the Alliance as it leased to other groups was a violation of the Constitution, a taking by the state of the private property of one "person" without his asprohibited by the due process clause of the Fourteenth Amendment.[27] Translated into the farmer's terms, this meant that the amendment passed to protect the newly emancipated Negro made impossible the prevention of railroad discrimination in lease agreements and marked the failure of farmer-owned grain elevator programs.

2. *State Power Over Railroad Rates*: The farmer's regulatory legislation also attempted to control rate discriminations and preferences, and this phase of their program was ruled upon in

Wabash, St. Louis, and Pacific Railway Co. in 1886.[28] An Illinois statute had made it unlawful for a railroad corporation doing business within the state to charge different rates for carrying passengers or freight of the same class for a similar distance. Upon showing that a railroad line had charged fifteen cents per hundred pounds of goods for a trip greater in distance than that for which they charged another shipper twenty-five cents per hundred pounds, the corporation was convicted in the Illinois courts and the conviction sustained by the Illinois Supreme Court as to the portion of the discriminatory overcharge which was exacted within the state of Illinois. The United States Supreme Court reversed, holding that the states have no power to regulate railroad transportation rates within their boundaries when such railways are part of an interstate system.

Having thus overthrown the Granger cases for all practical purposes, the Court went on to consolidate its doctrine, declaring unconstitutional in *Chicago, Milwaukee and St. Paul Railway Co. vs. Minnesota*"[29] a state statute which made conclusive the transportation charges recommended by the Minnesota Railway and Warehouse Commission. According to the Court, the final word on the reasonableness of rates rested not with expert commissions but with the judiciary, and the state could not thus cut off the corporation's resort to the federal courts for a rate review.

3. *Federal 'Removal' and 'Receivership' Bars to State Regulation:* Less spectacular than the elevator and rater decisions, but of critical importance to corporate interests, were the rulings of the Supreme Court broadening the avenues of escape for railroads into the receptive atmosphere of the lower federal courts.

In the *Removal cases*,[30] the Supreme Court held that suits against a railroad chartered by the United States were suits "under the laws of the United States" and could be removed by the corporation from the state to the federal courts. Then the court decided that any judicial question between the state and a railroad company which was a "citizen" of another state by primary incorporation was a suit between "citizens of different states" and similarly removable to the federal courts.[32] As we have seen, these doctrines had the effect of giving railroads a factual immunity from state control because of the property bias of the federal judiciary. Recognizing this, the National Farmer's Alliance Convention in 1888 at Des Moines, Iowa, resolved:

The proposed plan of making foreign corporations subject to state Courts in the States where they do business and depriving them of their power to remove these cases to the United States Courts meets approval.[33]

In 1892, People's Party support was rallied behind H.R. 493, a bill requiring that a "corporation doing business in any other state than that in which it is incorporated shall not bring a suit against a citizen of that state in the Federal courts." According to the *American Law Review*, this measure was a popular reaction to "a great fraud upon the jurisdiction of the state courts which has resulted from the Federal seizure of jurisdiction upon the casuistic pretense that a corporation is a citizen."^[34]

Under the second of these procedural moves, the "Receivership" doctrine,^[35] the Supreme Court broadened even further the corporation's immunity from state control. A railway corporation could on its own motion petition for appointment of a receivership under the equity powers of the federal court. If the Court granted the railroad's petition, it would designate a receiver, usually a director of the railroad, and the administration of the road would thereafter be *outside the regulatory control of the state*,^[36] exclusively under the direction of the federal court. In state after state these receiverships were extended, until the issue exploded into national prominence with the *Memorial of the General Assembly of South Carolina to the Congress of the United States in the Matter of Receivers of Railroad Corporations and the Equity Jurisdiction of the Courts of the United States*.^[37]

In South Carolina, then under the agrarian-focused administration of Governor Tillman, sheriffs who attempted to levy on receiver-held railroad property to satisfy overdue state taxes had been imprisoned by the federal courts under heavy bail. Governor Tillman met this action with a special message to the state legislature, in which he noted that one-half of all the railroads in South Carolina were held in federal receivership and were thus being nursed outside the taxing and police powers of the state; and that of the 165,000 miles of railroad in the United States, fully 33,000 were similarly insulated under court management, thereby placing in federal immunity \$1,300,000,000 worth of railroad property."^[38]

Following the Governor's speech, the South Carolina General Assembly drew up its now famous *Memorial*, a long document protesting the fact that ". . . the laws of a state are set at naught by the creature of a creature of an Act of Congress—a railroad receiver of a federal court . . ."^[39] The legislature further protested police immunity achieved under the federal judiciary's paternal shelter; and warned that the people could not long endure the galling sovereignty thus given to railroad corporations.

II. ON THE EVE OF CRISIS

Early in June, 1880, Senator David Davis of Indiana, formerly an Associate Justice of the United States Supreme Court, had a private conference with General Weaver, in which Davis warned him that a transformation was taking place on the Supreme Court bench, a "corrupting influence . . . of corporate power."^[40] Davis confided that "corporations were maturing their plans to gain complete control of the Supreme Court," to overthrow the Legal Tender Decision, the Thurman Act concerning the Pacific Railroads and the Grange decisions of 1876.

Increasingly, the Populist elements came to realize that the courts were being lost, that they were becoming active partisans and blocking social reform. Farmer attempts at political action in the Granges, the Greenback-Labor Party, and the Farmer's alliances were being stalled by the complicated procedure and maddening delays in federal courts. Even more fundamentally, the protest groups were faced with a supreme Court concept of property rights which ran directly counter to their reform programs, as well as a general conservative bias in the federal judiciary which was beyond their ability to affect by popular processes.

As the Populists came to understand their grievances, the judicial process became increasingly an issue of the Party.

William Peffer lamented that "Money controls our legislatures, it colors our judicial decisions . . ."^[41] and Governor Pennoyer of Oregon put among his "governmental abuses and derelictions for which the two old parties are responsible" the "unsurped interference by the federal judiciary with the States, with their laws and tribunals."^[42] Farmer's Alliance newspapers in Nebraska branded the Supreme Court our "American Bastille" and complained that corporations were packing the bench.^[43] The famous St. Louis platform of the People's Party began its ledger of indictments with the charge that: "Corruption dominates the ballot box, the legislatures, the Congress, and touches even the ermine of the bench."^[44]

Beyond this general criticism came an attempt to meet directly the challenge of the reconstructed federal judiciary. The State Populist Party in Iowa called for an elective United States Supreme Court, holding office for a definite term, with subordinate federal courts subject to the same control through the vote. The Illinois and Kansas Alliances passed similar resolutions, and in Kansas the alliance candidate elected to the twenty-eighth judicial district of the state under a non-partisan election system refused to foreclose mortgages and declined to punish officers of his court for disobeying mandates of the United States Supreme Court. John P. Steele stated that the Farmer's Mutual Benefit Association stood for periodic election of

federal judges with no more than a nine-year term, since "If this is not the people's government, whose government is it? If it is the people's government, who should choose their officers?"[45]

The stage was thus set for the judicial eruptions of 1895 and the Presidential campaign of 1896. The Supreme Court had laid the foundation for its grand role, and every actor was in his place.

III. THE THREE-PRONGED ATTACK OF 1895

"The Constitution intended . . . to prevent an attack upon accumulated property by mere force of numbers."[46] The demand for a tax upon incomes received its initial formulation and impetus from third party movements during the 1880's and 1890's. It had been a Democratic-Populist coalition in Congress which had added to the 1894 Tariff Act a provision taxing at two percent all incomes over \$4,000; and the conservative press plainly considered the income tax a "pet measure of a half-Populist administration." [47]

Although Senator David Hill of New York had challenged the constitutionality of the tax rider in the floor debates, this attack was regarded merely as a political tactic, since from 1796 constitutional theory, governmental practice, and the vital nature of Congress's revenue needs had supported the tax in unequivocal Supreme Court opinions.

The entire nation was startled, therefore, when the Supreme Court held that the tax was invalid as to income from real estate and municipal bonds [sic][48] and, on rehearing, decided that the entire income tax law was unconstitutional.[49] Choate's impassioned argument to the bench against the "communistic, socialistic, populist" tax, and the widely known fact that the pivotal judge had shifted at the last moment from support of the law to a vote invalidating it made the case a topic of heated discussion in every bank, barbershop, and barroom in the Nation. The dissenting justices were judicially violent in their opinions. Harlan termed the ruling a "judicial revolution" and a "disaster" subjugating the people to "the dominion of aggregated wealth,"[50] and Justice Brown warned that the decision might be "the first step toward the submergence of the liberties of the people in a sordid despotism of wealth:"[51]

In all quarters the ruling was received as a class-oriented decision. Editorialized the *New York Herald Tribune*, "Thanks to the Court, our government is not to be dragged into communistic warfare against rights of property and the rewards of industry . . ."[52] The *Tribune* collected opinions from twenty leading newspapers (both Democratic and Republican) and a dozen bankers that the decision was the "beginning of the downfall of Populism," and a major blow to

the People's Party. According to Senator David Hill, Cleveland's "deal" with the Populists had been defeated, no income tax would ever be passed by the national government, and "the battle has been fought and won." [53]

From the Populist camp came a joinder of battle. Senator Butler filed S.R. 351, a joint resolution for an amendment to the Constitution to authorize collection of an income tax. M. W. Howard in his book *The American Plutocracy* (1895) attacked the concept that "it is unconstitutional for these men who have grown wealthy off the toil and life: blood of others, to pay a miserable, beggarly two per cent on their incomes above four thousand dollars." [54]

The most fundamental attack came from Governor Altgeld, who declared that "The Supreme Court has come to the rescue of the Standard Oil kings, the Wall Street people, as well as the rich mugwumps." Altgeld saw the decision as "radically defective in a number of particulars"; however, it should have contained a "panegyric on the majesty of the law and the exact character of eternal justice" as well as a "Stinging rebuke to the growing discontent of the times." Still, Altgeld saw the decision as suggesting "a most important question to the American people." The judges of the Supreme Court wear black gowns, he noted,

... to impress the people with their infallibility. Now as these gowns are not very thick, and as some people might be able to see through them and be unpatriotic enough to question the justice of having to bear the burdens of government while the rich escape, and as there is a danger that some of these men may doubt the infallibility of the Court, would it not be well to have each judge wear two gowns for a while, until the storm blows over?" [55]

The storm, however, was just beginning.

The *coup de grace* was struck by the Supreme Court on January 21, 1895, in *United States vs. E.C. Knight Company*, popularly called the "*Sugar Trust cases*" [56] The American Sugar Refining Company through contract agreements had brought out four competing Pennsylvania sugar producers, thereby gaining complete control over 98 per cent of the sugar output in the United States. The government indicted E. C. Knight Company, one of the Pennsylvania concerns, for violating the Sherman Act section which forbade "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states." Despite the fact that the district court had found the purpose of such contract to be the attempt "to obtain a greater influence or more perfect control over the business of refining and selling sugar in this country," the Supreme Court held the Sugar Trust to be innocent of any

violation of the Sherman Law. According to the Court, the conduct of the sugar companies was not the conduct "intended" by Congress to be regulated; this was "manufacture" only "indirectly" affecting commerce—a matter for state regulation and beyond the authority of the national government to deal with under its interstate commerce power. Furthermore, even if this were commerce, the corner on 98 per cent of the national sugar production would not "necessarily" be a monopoly in restraint of trade, since the justices saw no theoretical reason why other companies could not enter the sugar business in the future if they so desired.

Justice Harlan's dissent pointed out that no amount of verbiage could disguise the fact that this was an arrangement which controlled the price of all the refined sugar in the United States, and that this was a "combination" by the Act. Harlan pointed out the dangers of this ruling when he asked,

Suppose another combination organized for private gain and to control prices, should obtain possession of all the large flour mills in the United States; another of all the grain elevators; another of all the oil territory; another of all the salt-producing regions; another, of all the cotton mills; and another of the great establishments for slaughtering animals and the preparation of meals.[57]

These combinations were clearly a matter for national control, concluded Harlan, and he wrote:

I cannot assent to that view . . . that the general government is . . . placed by the Constitution in such a condition of helplessness that it must fold its arms and remain inactive while capital combines under the name of a corporation, to destroy competition. . . .[58]

As William Howard Taft wrote twenty years later in his book, *The Anti-Trust Act and the Supreme Court*, "The effect of the decision in the Knight case upon the popular mind, and indeed upon Congress as well, was to discourage hope that the statute could be used to accomplish its manifest purpose and curb the great industrial trusts." [59]

"[To] tribunals. . . is committed the determination of questions of right and wrong between individuals, masses and states." [60] Defeated at the bar of the Supreme Court in the trust and income tax cases, United States Attorney-General Olney turned the government's attention from defending laws he "believed to be no good" [61] to preparation for the prosecution of Eugene Debs, in which, Olney said, his interest was much greater. [62]

Olney had obtained a conviction of Debs and other officers of the American Railway Union in the United States Circuit Court for Illinois, for violating an *ex parte* injunction which forbade the Pullman strikers from "hindering, obstructing or stopping any of the business" of the railroads operating in the Chicago yards. On a note of superb irony, the Supreme Court upheld this conviction on May 27, 1895[63]—the first successful *criminal* prosecution based upon the Sherman Act. The Supreme Court thus struck down not the oil trust, or the sugar or beef or steel trusts, but the *union trust*, the "conspiracy and combination" by the railroad workers "to secure unto themselves the entire control of the interstate industrial and commercial business of Chicago and the other communities along the lines of road of said railways"; the attempt by Eugene Debs to prevent "any independent control or management" of the Pullman empire. In a veritable parody of its decision in the *Knight* Case, the suddenly virile Court found new lodes of constitutional power for the United States, boasting that "The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails,"[64] and ruled that the action of the American Railway Union was "clearly" an obstruction. In its closing paragraphs, the Supreme Court lectured the American worker:

We yield to none in our admiration of any act of heroism or self-sacrifice, but it is a lesson which cannot be learned too soon or too thoroughly that under this government of and by the people, the means of redress of all wrongs are through the courts and at the ballot box, and that no wrong, real or fancied, carries with it legal warrant to invite as a means of redress the cooperation of a mob.[65]

At least five governors charged, in their official messages, that the federal courts have flagrantly usurped jurisdiction, first, to protect corporations and perpetuate their many abuses, and second, to oppress and destroy the powers of organized labor."[66] From Chicago came a fierce blast from Altgeld, in which he stated that the *Debs* case "marks a turning point in our history, for it established a new form of government never before heard of among men, that is, government by injunction."[67]

In Congress, People's Party members moved to take these issues to the electorate. Representative Boatner of Louisiana introduced a bill "to limit the power of judges of the courts of United States to punish for contempts of court." Senator Peffer filed S.237 "to protect the rights of parties defendant in certain injunction cases." Senator Call in S. 1729 moved "to prevent the oppressive exercise of judicial power in the Courts of the United States," and after a spirited

debate between Senator Allen and Senator Hill, a Senate Resolution was passed ordering an investigation of the Supreme Court's contempt ruling in the *Debs* case.

The Supreme Court had thus completed its work for 1895. In three swift decisions, it had convinced the Populists that it stood as a stubborn barrier to social change. As one conservative spokesman expressed it, glowingly, "In times of political upheaval, of sectional animosity, of communistic uprising, the nine quiet men who spend their lives away from the political field, free from the necessity of demagogery, constitute . . . the very sheet anchor of the institutions of our land." [68] How long this anchor could be permitted to drag along the bottom became a vital public issue as the election year of 1896 arrived.

IV. THE SUPREME COURT AS A CAMPAIGN ISSUE IN 1896

When the Democratic Convention convened in Chicago in July 7, 1896, the vast hall was drenched with heat, but every convention rumor predicted that things would get even hotter once the proceedings got under way. This was to be rough-and-tumble fight between the silver and radical Democrats on the one hand and the old line Cleveland men on the other. Everyone was ready for a barrage of oratory on the "money question," "bunco dollars," and the "pernicious machinations of Wall Street and Lombard Street." But few observers were ready for the attack on the sheet-anchor, the august tribunes, the injection of a shout, "No government by judges" to accompany the cry of "No cross of gold."

The Convention's opening address was delivered by Temporary Chairman John W. Daniel, Senator from Virginia, on the morning of July 7. Daniel wasted no time in raising the Court Issue.

So far as revenue to support the Government is concerned, the Democratic Party, with but a slender majority in the Senate, was not long in providing it, and had not the Supreme Court of the United States reversed its settled doctrines of a hundred years, the income tax incorporated in their tariff bill would long since have supplied the deficit. [69]

This was the warming-up process. At the morning session on the eighth, Governor J. S. Hogg of Texas let loose a full-scale blast, branding the Supreme Court an instrument of Republican corporate power and a threat to the working man. Said Hogg:

The protected class of Republicans proposes now to destroy labor organizations ... proposes through Federal courts, in the exercise of their unconstitutional powers by issuance of extraordinary, unconventional writs, to strike down, to suppress, and to overawe those organizations.[70]

Already an undercurrent of astonishment was felt in the hall at the introduction of the federal judiciary and the Supreme Court into the convention oratory. When the first draft of the platform was read by Senator James K. Jones (Arkansas) for the Committee on Resolutions and Platform, the battle began in earnest, for under its section of the income tax appeared the following:

But for this decision of the Supreme Court, there would be no deficit in revenue under the law passed by a Democratic Congress in strict pursuance of the uniform decisions of that Court for nearly one hundred years, that Court having in that decision sustained constitutional objections to its enactment which had previously been overruled by the ablest judges who have ever sat on that bench.[71]

Furthermore, asserted the plan:

We declare that it is the duty of Congress to use all the constitutional power which remains after that decision, or which may come from its reversal by the Court as it may hereafter be constituted, so that the burdens of taxation may be equally and impartially laid, to the end that wealth may bear its due proportion of the expense of the government.

In a later section, the platform added:

We especially object to government by injunction as a new and highly dangerous form of oppression by which Federal judges, in contempt of the laws of the states and rights of citizens, become at once legislators, judges and executioners. . . .[72]

The conservative press was horrified by the platform, by the suggestion that constitutional verities might change with shifts in the Court's personnel. The *Tribune* considered the Democratic Platform as an "anarchistic attack on the federal judiciary"[73] and *Harper's Weekly*

wrote that "It is because their programme is one of spoliation that Mr. Bryan and his mentor Governor Altgeld want free riots and a Supreme Court that will obey the passions of the multitude." [74] Everyone recognized the mark of the Populists on the phrasing of the issues, and could recall the authorship by Trumbull, Lloyd, and Altgeld of the "government by injunction" charge. The Richmond (Virginia) *Times* (Democrat) stated it would not support these men "who avow a purpose to overturn the courts—the palladium of an orderly government," and the Leavenworth (Kansas) *Times* (Republican) concluded that "There is more in the Chicago platform than the clamor for unlimited silver coinage. There is the old spirit of secession and rebellion against the Constitution."

When the silver-tongued orator rose the next day to make his famous speech to the assembled delegates, he concentrated heavily on this issue of the Supreme Court and the income tax. Bryan declared to the convention:

They say we passed an unconstitutional law. I deny it. The income tax was not unconstitutional when it was passed. It was not unconstitutional when it went before the Supreme Court for the first time. It did not become unconstitutional until one judge changed his mind, and we cannot be expected to know when a judge will change his mind. (Applause, and cries, "Hit 'em again") [75]

As to the press attack on the anti-Court planks, Bryan made it clear that the Court was not above criticism, and that the doctrines of the Court would be an integral part of the Democratic campaign.

Following this Democratic onslaught, the People's Party Convention in St. Louis, on July 24, was almost an anticlimax. The two sections of the Populist platform dealing with the Supreme Court were almost identical with the statements of the Democrats. These read:

Seventh: We demand a graduated income tax, to the end that aggregated wealth shall bear its just proportion of taxation, and we regard the recent decision of the Supreme Court relative to the in-come tax as a misinterpretation of the Constitution and an invasion of the rightful powers of Congress over the subject of taxation. [76]

Under their "Miscellaneous" section, the People's Party declared:

The arbitrary course of the courts in assuming to imprison citizens for indirect contempt and ruling by injunction should be prevented by proper legislation.

When Bryan delivered his speech of acceptance for the Democratic nomination in New York City on August 12, 1896, he dealt again with the Court issue, since it had been seized upon by Mark Hanna as "warfare against the courts," a blow at the "integrity and independence of the judiciary," and a "Covert Threat to Pack the Supreme Court of the United States." Bryan answered in defense of the Democrats' platform:

Our critics even go so far as to apply the name Anarchists to those who stand upon that plank of the platform. . . . Not only shall I refuse to apologize for the advocacy of an income tax law by the National Convention, but I shall also refuse to apologize for the exercise by it of the right to dissent from a decision of the Supreme Court.[77]

Two weeks later, former President Benjamin Harrison delivered a major Republican campaign address before a mass meeting in Carnegie Hall. Harrison declared:

In my opinion there is no issue presented by the Chicago convention more important or vital than the question they have raised of prostituting the power and duty of the national courts and national Executive. Tariff and coinage will be of little moment if our constitutional government is overthrown.[78]

Harrison went on for the remainder of his speech to lash the Chicago "frenzy" under which "government by the mob was given preference over government by the law enforced by the court decrees. . .

Warned Harrison:

I cannot exaggerate the gravity and the importance and the danger of this assault upon our constitutional form of government; [upon] the high-minded, independent judiciary that will hold to the line on questions between wealth and labor, between the rich and poor. . . .[79]

The Philadelphia *Press* (Republican) applauded vigorously, stating it was useless for Bryan to deny he is an anarchist when the platform he proudly endorses proposes "to pollute the stream of Federal law at its source by making partisan changes in the Supreme Court." The New York *Evening Post* (Independent) said Harrison "showed that the intention of the Chicago convention was to make judicial decisions on purely legal and Constitutional questions matters of party determination, and that the inevitable end and finish of such a course must be overturning of liberty."

The Supreme Court had by this time become a major concern at the Democratic Convention in Chicago, had been mentioned prominently as a cause of defection by the rump Democrats, and was developing into a constant stump-issue as the campaign of 1896 wore on. A keen observer suggested in a letter to the *Tribune* that the attack on the Supreme Court probably stemmed from a fear on the part of free silver-men as well as Populists that the Supreme Court would declare a silver law to be unconstitutional."^[80] The August issue of *Bankers' Magazine* reassured their subscribers that the silver cause could not be won at the polls "as long as special gold contracts are upheld by the Supreme Court of the United States," and the editors stated that the Court "as now constituted" would certainly declare a Congressional silver act unconstitutional.^[81]

As the campaign heat grew in intensity, the Supreme Court plank of the Democrats and Populists received increasing attention. *Harper's Weekly* on September 12 published a front page cartoon of "A forecast of the Consequence of a Popocratic Victory to the Supreme Court of the United States." (See cartoon in *Yearbook 1976*.) Amid the smoking skull and daggers of Anarchy, a big "50 cent Bunco Dollar," a torn, falling Constitution, and the scowling busts of Guiteau, Spies, Fisher, and Lingg sat the fierce justices: a diabolic Altgeld, Tilman with his pitchfork in hand, "King Debs," General Coxey, "Bloody Bridle Waite," and a first-clenching Pennoyer. "Gold Clause Stewart" was pictured with his feet upon the bar, and in the extreme right-hand corner of the cartoon, draped over the court desk, was a long black beard representing General Weaver.

On September 21, Attorney-General Harman issued a statement to the press criticizing Bryan's support of the Chicago platform in its denunciation of the *Debs* case. The issue of "government by injunction" was taken up in hundreds of newspapers, articles, speeches, and pamphlets, and the editors of the *Literary Digest*, in collecting samples of these opinions declared that "No plank of the Chicago platform seems to have aroused more radical differences of opinion . . ."^[82] than the injunction plank. When Chauncey Depew delivered a major address before an immense "sound-money" audience in the Chicago Coliseum on October 9, he said the

monetary issue was fundamentally linked with the Supreme Court question. Depew thundered against the "wild career of constitutional and economic changes" being advocated and stated that

There are two places in this country where all men are absolutely equal: One is the ballot-box and the other is the Supreme Court. Bryan proposes to abolish the Supreme Court and make it the creature of the party caucus whenever a new Congress comes in, because it decided the income tax to be unconstitutional.[83]

Replies from the anti-Court spokesmen were not lacking. Horace L. Traubel wrote in the *Conservator* (Philadelphia) that "Even supreme courts may be summoned to the tests of the higher courts of conscience. The court of final resort is not this court of august judges but that court of the personal soul which passes upon the court at Washington. If the Washington court stands between man and his liberties, between any man and the justice that belongs to him . . . it is all folly to pretend that it is the buttress of law and order." [84]

Governor Altgeld devoted his Cooper Union speech in New York City on October 17 to defending the Court plank, stating that "The Supreme Court cannot by mere decision upon a constitutional question rob the people of the powers of self-government . . ." [85] and he was quickly answered by the fiery new Republican orator Theodore Roosevelt who roundly condemned these denunciations of the Court by Altgeld to a delighted audience in Chicago. [86] In Pennsylvania, the state People's Party resolved:

We disapprove of the way in which our courts have in recent years too frequently taken sides in favor of capital and corporations against the laboring and producing classes. All citizens and all legal interests should be absolutely equal before the law. We depend upon an upright judiciary to be absolutely impartial in the dispensing of justice, regardless of the wealth or poverty of those applying for justice. [87]

Perhaps the most spectacular single campaign event was a letter suddenly issued by Archbishop Ireland of St. Paul Minnesota. Circulated profusely by the Republicans, and setting off violent reactions in the press, the letter attacked Bryan and his program, stating that "The monetary question is, indeed, a secondary issue in this campaign; the primary issue being the spirit of socialism that permeates the whole movement." [82] Specifically, the Catholic prelate highlighted the Court stand of the Democrats, warning that

The personification of law and of social order in America is our courts, and the promise of safety to our free institutions is the prompt obedience of the people to those courts . . . And now, the courts are to be shorn of their power... [by a program] borne in hands of reckless men, [who] may light up in the country the lurid fires of a "commune"!

November finally arrived, the polls were opened, the votes counted and the results of the election made public. The press comment on the day after the election reveals even further how important a part of the campaign the Court had been. The Rochester (New York) *Post-Express* declared that "The continental verdict means that the Supreme Court is to continue to be one of the very bulwarks of our institutions, safeguarded against any and all attempts to soil its ermine."^[83] The Indianapolis (Indiana) *News* termed the election "a determination on the part of the people everywhere to maintain the dignity and supremacy of the courts."^[84] The Seattle (Washington) *Post-Intelligencer* (R) applauded the defeat of the movement to debase our currency and "the really more dangerous threat to the perpetuity of our national institutions involved in the proposals to subvert the courts and to withdraw from the national government the power to enforce its own laws."^[85] The New York *Press* exulted, "Never again in our time or in our children's time will the right of the Federal Judiciary to interpret or of the Federal Executive to enforce Federal laws be questioned,"^[86] and a similar breath of relief appeared in the New York *Herald*. (I)^[87]

The campaign of 1896 was thus the second in the great "anti-Supreme Court" campaigns of American party politics, matched only the furor in 1860 over the Dred Scott decision and to be equalled again only by the struggle for "recall" in 1912. By 1896, the discontent with the Court which had been reserved to the Populist forces had been transferred to the "Popocratic" coalition, and the conservative elements of the Democratic Party had been forced to bolt the Democracy. The Supreme Court had fallen from its position as a venerated, inviolate tribunal and had emerged as a personal villain in the minds of millions of citizens.

V. THE FRUITS OF SUPREME COURT POLICY

The fact that the Supreme Court became a major issue of the People's Party and, through its agitation, of the Democratic Party, is itself highly significant. The intensity with which a large

segment of the population resists Supreme Court opinions is a useful standard for testing the conceptions of judicial review and constitutional limitation being used by the Court. Beyond this index of workability, however, the record of the Supreme Court in the Populist era provides many insights into the impact of a Supreme Court on our political and economic processes.

First, the development by the Supreme Court of constitutional interpretations denying state power to control corporations, through legislation, helped to turn the focus of progressive forces from local or state-based organizations to the national arena and the People's Party. As Granger and Farmer's Alliance groups saw their hard-won regulatory statutes invalidated by an agency far off in Washington, and as these groups were told by the Supreme Court that their problems were matters for national legislation, it was a natural reaction for the progressive elements to move toward nationally focused efforts. At the same time, much of the breakdown of "non-partisan" farmer and labor organizations can be traced from the same development, since the influence which a nonpolitical organization could exert at the state level was difficult to apply nationally.

Second, the legally defensible but insensitive decisions of the Supreme Court in the municipal bond cases revived in the most direct way the anti-legal tradition which had been a farmer-debtor heritage since Shay's Rebellion, the Whiskey Rebellion, and the Jacksonian period. As in the earlier cases, this disenchantment with "law" and courts and lawyers forced the farmer to seek redress through political activity. In this way, by breaking into farmer patterns of group action and imposing upon farmer communities debt burdens which could not be endured, the Supreme Court assisted the impulsion of the farmer into politics, and, ultimately, radical politics.

Third, the Supreme Court stimulated the strength of the Populist movement by convincing large segments of the nation that the entire government was in the hands of the "plutocrats," that they had no voice in their government, and that only a fundamental change in the relations of property to people could remedy the situation. Traditionally, faith in the ballot and the legislative process have been a deterrent to radical activity in the United States. Thus, when progressive forces were told by the Supreme Court that they could not enact an income tax law, that their Sherman Act did not apply to the sugar trust, that guardianship of property rights permitted federal courts and the Supreme Court to intervene in labor disputes in favor of corporations, and as these forces foresaw that their basic currency reform of free silver was likely to meet a similar fate, the foundations were laid for a violent break with traditional social protest. In 1895, the most respectable agency of American government, an agency beyond the reach of ordinary political processes, was dedicated to private property, "due process" of law,

and Herbert Spencer's *Social Statics*. In this position as Seneschal of the Status Quo, the Supreme Court strengthened the radical character of the People's Party, weakened the influence of its moderate leadership, and aided it immeasurably in capturing the Democratic Party.

Fourth, by severely limiting the possibility of social and economic reform at the popularly accessible legislative level, the Supreme Court gave capitalist forces in the United States a vital period of protected incubation. This cutting off of popular control of corporations and monopoly at the state level in 1880's and at the national level in the 1890's, sheltered corporate development in its most vulnerable moments — the years of expansion and consolidation. Through this protection, the Supreme Court affected the distribution of wealth in the Nation, the class stratification of the population, and the developing relationships between individuals and government in a rapidly centralizing social system. It would be an error to assign too great a causative function to the Supreme Court alone, but the Court's contribution as a master sculptor of American society is too often minimized. Since the Populist movement was an attempt to resist the development of a monopoly-capitalist society in which the farmer and the worker could neither compete successfully nor retain their former status, the Supreme Court by sheltering corporations was in fact as much of a midwife to the Populist revolt as the sugar trust, the railroads, or the debt crisis.

Endnotes

1. Peffer, "The Farmer's Defensive Movement," *The Forum*, VII, (December, 1889), 464, 465; cf, John D. Hicks, *The Populist Revolt* (Minneapolis: The University of Minnesota Press, 1931), p. 35.
2. John Forrest Dillon, *Commentaries on the Law of Municipal Corporations* (4th ed.; Boston: Little, Brown, and Company, 1890), p. 580. Judge Dillon was formerly Chief Justice of the Iowa Supreme Court and a judge of the United States Eighth Judicial Circuit.
3. Professor Hicks points out that railway promoters would make their profits from the cash subsidy paid by the municipality or state, unload the bonds on eastern investors, and then capitalize the paper railroad for two or three times its value, making collapse almost inevitable. Hicks, *op cit.* p. 29.
4. A famous Kansas editorial in the *Belle Plaine News* had declared: "Too much cannot be spent this year if properly applied. Let the bugaboo of high taxes be nursed by old

- women. Do all you can for Belle Plaine regardless of money, and let the increase of population and wealth take care of the taxes." Hicks, *op. cit.* p. 28.
5. See *Seibert v. Lewis*, 122 U.S. 284 (Mo. 1887), subsequent repeal of the taxing statute; *Ralls County Court v. United States*, 105 U.S. 733 (Mo. 1881), statute passed--after a bond issue--took away the power to levy taxes to meet the bond obligation. Both cases held the state action invalid.
 6. Dillon, *op. cit.*, p. 580.
 7. *Humboldt Township v. Long*, 92 U.S. 642 (1875). The Supreme Court held in this leading case that construction of a railroad through the township was not a condition upon which payment was rested, despite the fact that the bond read:

"This bond is issued for the purpose of subscribing to the capital stock of the Fort Scott and Allen County Railroad, and for the construction of same through the said township . . . and for the payment of said sum of money and accruing interest thereon, in manner aforesaid, upon the performance of the said condition [sic] the faith of the aforesaid Humboldt township, as also its property, revenue and resources is pledged."

See Dillon, "The Law of Municipal Bonds," 2 Southern Law Review (N.S.) 437 *et seq.* (1876); cases n. 9 *supra*.
 8. *Mayor of City of New Orleans v. United States ex. Rel. Stewart*, 1 C.C.A. 148, 49 F. 40 (La. 1891).
 9. *City of Galena v. Amy*, 5 Wall. 705 (Ill. 1866); The Court considered "vicious" the argument that refusal to pay "an honest debt" is justifiable because of the debtor's distress or diminished resources. *Rees v. City of Watertown*, 19 Wall. (Wisc. 1873).
 10. *East St. Louis v. Amy*, 120 U.S. 600 (Ill. 1887); *Commissioners v. Loague*, 129 U.S. 493 (Tenn. 1889); *United States ex. Rel. Baer v. City of Key West*, 78 F. 83 (Fla. 1896).
 11. *Barkley v. Levee Commissioners*, 93 U.S. 258 (1876); *Broughton v. Pensacola*, 83 U.S. 266 (1876).
 12. *Mobile v. Watson*, 116 U.S. 289 (Ala. 1889).
 13. *Findlay v. McAllister*, 113 U.S. 104 (1885).
 14. H. R. 5215, 7 Cong. Rec. 4835, 45th Cong. 2nd Sess. (1878).
 15. See *United States v. Boutwell*, 17 Wall. 604 (1873); *Rees v. Watertown*, 19 Wall. 107 (1873).
 16. "Message of Governor Stone to Missouri Legislature," (1893).
 17. Tracy, "Rise and Doom of the Populist Party," *The Forum*, XVI 242; w. Scott Morgan, *History of the Wheel and Alliance (Fort Scott Kans.; T. H. Rice and Sons, 1889)*, p. 576.

18. Weaver, *op. cit.*, p. 151.
19. *Schulenberg v. Harriman*, 21 Wall. 44 (1874).
20. *United States v. Union Pac. R.R. Co.*, 98 U.S. 569 (1878).
21. *Ibid.*, p. 620.
22. *United States v. California and Oregon Land Co.*, 148 U.S. 31 (1892); *United States v. Dallas Military Rd. Co.*, 148 U.S. 49 (1892).
23. *United States v. Des Moines Navig. & Ry. Co.*, 142 U.S. 510 (1892).
24. Ernest William Winkler, *Platforms of Political Parties in Texas* (Austin, Texas: The University of Texas, 1916), pp. 181, 188, 200.
25. *Ibid.*, p. 225.
26. *Munn v. Illinois*, 94 U.S. 113, 134 (1876).
27. *Missouri Pac. Ry. Co. v. Nebraska*, 164 U.S. 403 (1896).
28. 118 U.S. 557 (1886).
29. 134 U.S. 418 (1890).
30. Thomas Edward Watson, *Political and Economic Handbook* (5th ed.; Atlanta: Telegram Publishing Co., 1916), p. 292.
31. *Ibid.*, pp. 300-01.
32. *Texas and Pac. Ry. Co. v. Kirk*; 115 U.S. 1 (1885).
33. Polk, "The National Farmer's Alliance," in Allen, *op. cit.* p. 398.
34. "Congress and the 'Tramp Corporation'." 26 *American Law Review* 412 (1892).
35. *Wabash R.R. v. Central Trust Co.*, 22 F. 272, 29 F. 623 (1884); *Quincy, Missouri, and Pacific R.R. v. Humphreys*, 145 U.S. 82 (1892). See Thompson, "The Court Management of Railroads," 27 *American Law Review* 31 (1893), attacking the Supreme Court position.
36. 24 *American Law Review* 663 (1890).
37. 28 *American Law Review* 161 (1894).
38. 28 *American Law Review* at 171-72.
39. *Ibid.*, at 193.
40. Weaver, *op. cit.*, pp. 83-85.
41. Peffer, *op. cit.*, p. 54.
42. "The New Political Party," 153 *North American Review* 220 (1891) at 222.
43. Barnhart, *op. cit.*, p. 139, citing "Farmer's Alliance" for February 7, 1891.
44. Hicks, *op. cit.*, Appendix E, p. 436.
45. Allen, *op. cit.*, p. 423.

46. Pollack v. Farmer's Loan Co., 157 U.S. 429, 582-83 (1895).
47. New York Herald Tribune, Editorial, Jay 21, 1895, p. 6, col. 2.
48. *Pollock v. Farmer's Loan Co.*, 157 U.S. 429 (1895).
49. *Ibid.*, 158 U.S. 601 (1895).
50. *Ibid.*, at p. 685.
51. *Ibid.*, at pp. 686, 695.
52. May 21, 1895, p. 6, col. 2.
53. *New York Herald Tribune*, May 21, 1895, p. 3, cols. 1, 2, and 3.
54. M. W. Howard, *The American Plutocracy* (1895), p. 153.
55. *Live Questions*, 1899, ed. Pp. 464-65; quoted in Harry Bernard, *Eagle Forgotten: The Life of John Peter Altgeld* (New York: 1938), p. 336).
56. *United States v. E. C. Knight, Co.*, 156 U.S. 1, 16 (1895).
57. 156 U.S. at 45.
58. 156 U.S. at 43.
59. William Howard Taft, *Taft, The Anti-Trust Law and the Supreme Court*, (New York: 1914), p. 60.
60. *In re Debs*, 158 U.S. 564, 598 (1895).
61. Olney to Straw, January 22, 1895, Olney Papers in Library of Congress, Cummings and McFarland, *op. cit.*, p. 323.
62. Cummings and McFarland, *op. cit.*, p. 442.
63. *In re Debs*, 158 U.S. 564 (1895).
64. *Ibid.*, at 598-99.
65. *Ibid.*, at 582.
66. William Howard Taft (then Judge of the United States Circuit), "Criticisms of the Federal Judiciary," 29 *American Law Review* 641, 644 (1895).
67. Barnard, *op. cit.*, p. 339. See "Press Criticisms of Altgeld's Attack on the Supreme Court," *New York Herald Tribune*, June 7, 1895, p. 7. Col. 2.
68. Parker, "The Supreme Court and its Constitutional Duty and Power," 30 *American Law Review* 357 at 362 (1896).
69. *Official Proceedings of the Democratic National Convention, Chicago, 1896*, (Logansport, Ind.: Wilson, Humphreys and Company, 1896).
70. *Ibid.*, pp. 116-17.
71. *Ibid.*, pp. 191, 193-95. The text as adopted is at pp. 252-53.
72. *Ibid.*, p. 210.

73. *New York Herald Tribune*, July 10, 1896, p. 3, col. 1.
74. Quoted in Waldo Browne, *Altgeld of Illinois* (New York: B. W. Huebsch Inc., 1924), p. 290.
- ?? *Public Opinion*, XXI (July 16, 1896), 73.
- ?? *Ibid.*, p. 76.
75. *Great Leaders and National Issues of 1896*, (Washington: Non-Partisan bureau of Political Information, 1896), p. 640.
76. *Political Party Platforms 1840-1904*, (Washington, n.d.) p. 137.
77. Official Proceedings, *op. cit.*, pp. 403-04.
78. *Public Opinion*, XXI (September 3, 1896), 297.
79. *Loc. Cit.*, 298.
80. Letter from Joseph Culbertson Clayton, *New York Herald Tribune*, September 18, 1896, p. 14, col. 5.
81. *Literary Digest*, XIII (August 29, 1896), 551.
82. *Literary Digest*, XIII (October 24, 1896), 801-04.
83. *Ibid.* (October 17, 1896), 776-77.
84. *Ibid.* (October 10, 1896), 738.
85. Barnard, *op. cit.*, p. 385.
86. Henry Fowles Pringle, *Theodore Roosevelt* (New York: Harcourt, Brace and Company, 1931). P. 163.
87. *Blue Book of Pennsylvania 1896*, p. 594.
82. *Public Opinion*, XXI (October 22, 1896), 517.
83. *Ibid.* (November 12, 1896), 613.
84. *Ibid.*, 621.
85. *Ibid.* (November 19, 1896), 649.
86. *Ibid.* (November 5, 1896), 582.
87. *Ibid.*, 583.

Justice John Campbell

Last of the Jacksonians

Christine Jordan

(Continuing the series of studies of lesser-known members of the Supreme Court—initiated with the article, "In Search of Justice Woods" in **YEARBOOK** 1978—the author of the present article deals with the career and philosophy of an Alabama lawyer whose work in the Supreme Court was both before the bench and on it. A free enterprise apostle who nevertheless endorsed the reasonable limitation of corporate powers and privileges, a Confederate advocate of reconciliation, a natural law philosopher in a pragmatic economy, Campbell's half-century career at the bar and on the Bench uncovers some subtle dimensions of constitutional jurisprudence in the main years of the nineteenth century.— ED.)

Justice John Archibald Campbell was preeminently a man of the nineteenth century: his life spanned all but its first and last decades, and his personal philosophy of economic individualism reflected an age when industrialization and development of vast natural resources seemed to present the opportunity for every individual to elevate himself. The driving force of Campbell's life was the belief, stemming from his experiences in Alabama politics, in the individual right to equality of economic opportunity. His career, as a lawyer and Supreme Court Justice, is best understood as a quest to reduce this political precept to constitutional principles capable of uniform judicial application.

I

Campbell was born in 1811 in Washington, Georgia, the scion of North Carolina and Georgia families with strong Democratic connections.[1] He enjoyed a cultured upbringing in prosperous surroundings—but hardly the "big plantation" childhood which has been ascribed to him.[2] After graduating from the University of Georgia at the age of fourteen, he was appointed to West Point by John C. Calhoun, an old friend of his father's.[3] Upon the death of his father in 1828, he resigned from West Point and returned home to find his family estate heavily encumbered with debt. After teaching school in Florida for a year to pay off the debt he returned to Georgia to

study law, and was admitted to the bar at the early age of eighteen. In 1830 he moved to Alabama, and quickly built a reputation as a brilliant lawyer. Through painstaking study he mastered the intricacies of Spanish land grant titles. In the 1840's he argued before the United States Supreme Court what were in monetary terms the decade's most important cases, "The Mobile Riverfront Litigation." Twice he was offered, and twice he refused, a seat on the Alabama Supreme Court.

Campbell was affiliated politically with the mercantile wing of the Democratic Party in Alabama. This group opposed rechartering of the Second Bank of the United States, favored liquidation of the state bank in 1840, were moderate states' rightists in 1850 and were cooperationists in 1860. As a member of the state legislature in 1842 Campbell chaired the committee which oversaw the reorganization of the state bank.

On the whole Campbell found participation in politics distasteful and preferred the practice of law. In 1838 he moved to Mobile, which provided a larger arena for his talents, especially in commercial law. He was eminently successful, handling most important civil cases from Mobile between 1838 and 1853.[4]

In 1853 President Pierce nominated Campbell to the Supreme Court at the request of the other Justices, the only man ever to be so honored.[5] During his tenure on the Court from 1853 to 1861 he and Justice Nelson were considered Chief Justice Taney's closest associates. He is said to have been Taney's personal choice as the next Chief Justice.[6] He was reputed to have the most extensive law library of his day and to be the intellectual equal of Justice Story, the acknowledged giant of the Marshall Court.[7]

Campbell's knowledge of civil law was unparalleled among his contemporaries on the Court. As a result he wrote most of the Louisiana and California land-title opinions, which involved unprecedented amounts of money but little substantive law. Campbell became most famous for his constant vigilance against corporate special privileges. He authored a number of brilliant dissents in contract clause and diversity cases. He was also the spokesman for protection of state sovereignty from federal encroachment.

In 1861 Campbell resigned from the Court after indefatigable efforts to prevent secession and war. Vilified by his fellow Alabamians for not supporting secession, he was forced to move to New Orleans. There he practiced law until October, 1862, when he became Assistant Secretary of War for the Confederacy. Of this position he later said: "I found the means to do a great deal of good. I diminished the weight of the heaviest calamity that ever befell a country, to many. . . One motive for accepting this office was that I might have some influence in promoting peace." [8] As early as 1864 he made several personal overtures in the cause of peace through his old friend,

Justice Nelson, and participated in the Hampton Roads Conference. As the highest ranking Confederate official left in Richmond at the end of the war, he handled the early negotiations with Lincoln.[9]

After Lincoln's assassination, Campbell was imprisoned for several months. Although the official reason was possible involvement in the assassination, the general belief was that he was being punished for having been a Confederate official." [10] He was released after the intervention of his old friends, Justice Nelson and former Justice Curtis. He returned to Mobile to find his property destroyed and a family of five women in need of support. Although prospects of beginning a new life at age fifty-five seemed rather dim, Campbell opened a law office in New Orleans with his son, Duncan Campbell, and former state Supreme Court Judge Henry Spofford. Applying himself with the same diligence he had shown in Alabama thirty-five years earlier, he soon became a leader of the New Orleans Bar, and argued numerous cases before the United States Supreme Court. "Leave it to God and Mr. Campbell" became an often heard exclamation. Although the originator was a former slave whom Campbell had helped buy freedom, it soon came to be applied to his phenomenal success as a lawyer.[11]

Campbell participated in some of the most important litigation of the second half of the nineteenth century. His most famous argument, the *Slaughterhouse Cases*, was the first interpretation of the Fourteenth Amendment.[12] In *New Orleans Gas Light Co. v. Louisiana Light Co.* he redefined contract clause protection of corporate monopolies in accordance with the concept of public utilities.[13] In the *Railroad Commission Cases* he attempted to protect private property from the state police power by emphasizing the due process clause of the 5 and 14th Amendments.[14] And, he reaffirmed his belief in state sovereignty and the 11th Amendment in *New York and New Hampshire v. Louisiana*. [15] When he died in 1889 at the age of 78, Campbell was one of the Nation's leading lawyers.

II

Campbell believed in a political philosophy which predated Andrew Jackson but which came to adopt him as its hero. Its fundamental principle was that the liberty to acquire, own and enjoy property served as the foundation of all other liberties. This principle's most important corollary was that no man could legitimately be denied the equal chance to exercise his talents to acquire property and to elevate himself economically. To deny a man the right to pursue a lawful calling of his choice was to strike at the heart of the liberty and property rights inherent in the concept

of individual liberty. The Jacksonians considered corporations to be the greatest threat to individual liberty and attempted to limit their growth. The Jacksonians of Alabama feared corporations because by permitting individual plantation owners to join together, they threatened the balance of power within Alabama's agrarian society.

Campbell's political beliefs were similar to those of his fellow Alabama Democrats. On national issues he supported Andrew Jackson. Although he personally opposed the tariff, he backed Jackson against the Nullifiers, criticizing them as weak and narrow minded.[16] He also opposed federally financed internal improvements and supported Jackson's Maysville veto. Alabama Democrats opposed federal internal improvements because they feared that they threatened individual liberty and state sovereignty, and because some projects—such as the proposed Tennessee River-Mobile Canal system—were seen as largely benefiting Whig planters who marketed their cotton abroad. Campbell also passed the number one test of Jacksonian loyalty by opposing rechartering of the Second Bank of the United States.

As a lawyer in Mobile he represented businessmen, planters, and banks with local economic interests, rather than the Whig planter-capitalists with Northern ties. Although Campbell shared his fellow Democrats' concern over the corrupting influences of aggregations of wealth, he did not oppose all corporate development. He realized that the future of Alabama and the South was in commercial development and that if Alabamians did not develop commercial enterprises for themselves, Northern capital would do it for them. Campbell wanted the profits from commercial development to stay in Alabama where they would aid the development of Southern society as a whole. He, therefore, favored careful locally controlled commercial development through state chartering of local corporations.

When Alabama embarked on a period of dynamic growth in the late 1840's, Campbell supported the chartering of private corporations. He even helped organize—and invested in—the Mobile and Ohio Railroad, part of a plan by Mobile businessmen to compete with New Orleans as the port for the midwestern grain belt. Campbell's legal practice reflected his mercantile Democratic politics. Over half of his three hundred cases before the Alabama Supreme Court involved commercial law, contracts, negotiable paper, bankruptcy and foreclosure. Over fifty were bank cases. Most of the time he represented the debtor against the bank. On a few occasions in the 1840's he represented private banks. In all Campbell argued for strict construction of corporate charters.[17]

III

Campbell brought with him to the Supreme Court the aversion to special privileges for corporations, which typified the Southern mercantile Democrats. He had long believed the South's future lay in commerce. But he hoped the South's commercial economy could develop according to its own timetable, rather than having the pace accelerated through infiltration by the large multi-state corporations already prevalent in the North. Campbell had never believed that "Cotton was King" and had predicted long before the war that "Slavery was doomed." [18]

As corporate enterprise grew throughout the nation, Campbell sought primarily to limit the resulting deprivation of individual rights rather than—like the agrarian Jacksonians—fighting the corporate form itself. When he joined the Court he opposed the two great protections previously won by corporations: the protection of corporate property under the contract clause from the exercise of the states' eminent domain, tax, and police powers and corporate citizenship under diversity jurisdiction, which made it easier for corporations to sue in federal court. Campbell considered the legal fiction of corporate citizenship to be a travesty of justice which allowed corporations to escape state control. States naturally wished to maintain their courts' control over the corporation, the most dynamic form of business organization. Whigs and corporations themselves, desiring national economic development, preferred to litigate in federal courts, which they expected to be more sympathetic to their national aspirations. [19] After the Panic of 1837 and ensuing litigation, corporations were especially anxious to get into federal court. They had little desire to be left to the mercies of the radical state Democrats who emerged from the anti-bank movements.

The main problem for the Whigs was the creation of a mechanism through which an "artificial being" could get into federal court. The jurisdiction of federal courts was limited primarily to suits involving diversity of citizenship between the parties. Common sense indicated that a corporation was not a citizen. Justice Marshall first resolved the difficulty in *Bank of the United States v. Deveaux* (1809) by looking to the citizenship of the persons who made up the corporation. [20] If all the stockholders of a corporation were citizens of a state different from that of the adverse party then suit could be brought in federal court. The growth of corporations and increasing stockholder investment soon led to overlapping citizenship in most cases. Under the *Deveaux* reasoning federal courts were losing jurisdiction over most corporations cases.

The Taney Court had little intention of leaving such important vehicles of economic development unprotected. In *Louisville, Cincinnati & Charleston R.R. v. Letson*, the Court unanimously held that a corporation could be treated as a citizen of its state of incorporation

just as a natural person was a citizen of his state of birth." Campbell attacked the *Letson* definition of corporate citizenship because it raised the spectre of corporations enjoying privileges and immunities of citizenship under Article IV, section 2 of the Constitution.

In the face of rising Whig agitation for privileges and immunities of citizenship for corporations, a majority of the Court retreated from the *Letson* doctrine in *Marshall v. Baltimore & Ohio RR* (1845).[22] They held as in *Deveaux* that corporate citizenship was derived from the shareholders. But by a curious legal fiction they found the state of incorporation to be the residence of all the incorporators and therefore the source of corporate citizenship. This enabled the Court to give the same protection as *Letson* without raising the spectre of privileges and immunities. The Court was willing to provide corporations with the necessary protection to foster national economic growth, but at the same time it did not wish to impinge upon state sovereignty. With the growing slavery crisis an extension of corporate citizenship could have led to agitation in favor of citizenship rights for blacks.

Campbell's dissent reiterated Marshall's reasoning in *Deveaux* that a corporation could not be a citizen. According to Campbell, the Federalist Papers clearly indicated that diversity jurisdiction had been created only to protect privileges and immunities of citizenship granted in Article IV, section 2. He was convinced that diversity jurisdiction had never been intended as a mechanism for extending citizenship.[23] Campbell clearly wished to avoid the "Pandora's Box" of extending citizenship rights, but it was economic development in the South rather than slavery which he sought to protect. He was particularly concerned by the corrupt nature of the large corporations which demanded special privileges from the legislatures. The increasing numbers and size of corporations, he felt, forebode ill for less developed states:

. . . no offering could be made to the wealthy, powerful and ambitious corporations of the populous and commercial states of the Union so valuable and none which would so serve to enlarge the influence of those states as adoption of the conclusion "that (corporations). . . are capable of being treated as a citizen as much as a natural person.[24]

IV

During Campbell's tenure the Court took an increasing number of corporation cases. Unlike his colleague Justice Daniel, who dissented until the end, Campbell eventually realized the fu-

tility of his position. With the continued growth of corporations, especially in Alabama, Campbell became more inclined toward a positive role for the Supreme Court in guiding corporate responsibility toward its shareholders and the public.

Campbell came to accept corporate citizenship for purposes of diversity jurisdiction as the Court increasingly demanded more corporate responsibility. But he remained opposed to contract clause protection for corporate charters. In a series of Ohio cases involving the taxation of corporations, Campbell wrote his most brilliant and well-known opinions. His major concern was to protect the states' sovereign powers— taxation, eminent domain and police power—in dealing with corporations. To Campbell, contract clause protection was inherently unequal because it resulted in better protection of corporate property rights than individual property rights.

The Ohio General Banking Act of 1845 had allowed any five persons to incorporate as a bank and become a branch of the state bank. By one of its provisions, six per cent of the profits every six months went to the state in lieu of taxes. In 1851 the State enacted a law taxing bank profits. The 1851 statute was the precursor of a new constitution in 1852 which required the taxation of bank property at a rate equal to that imposed upon individuals. In 1852 the legislature enacted a statute effectuating the new constitution. Both tax statutes eventually came before the Supreme Court and both times the Court declared them void as impairing the contract created by the 1845 act. Campbell dissented on both occasions.

In *Piqua State Bank v. Knoop* (1854), the Court found that the State had made an explicit tax-exemption contract in the 1845 Banking Act which could not be revoked by future legislation.[25] Campbell dissented emphasizing that perpetual tax exemptions must be explicit. Nowhere in the Banking Act did Ohio impose any limit on its taxing power or explicitly bind itself for the future. Campbell concluded that even if the Banking Act was considered to represent a corporate charter, a perpetual tax exemption was only implied. He was convinced that the tax power was an aspect of state sovereignty which was essential to the state in order for it to provide "full and unshackled self-government."

In *Deshler v. Dodge* (1845) the banks organized under the Banking Act successfully gained access to federal court by transferring their claims for refund of the state taxes to a New York resident.[26] Four Justices, including Campbell dissented. It was not enough, however, for the banks to get their refund claims transferred to federal court. They wished to bring a suit in federal court which would prevent the initial collection of taxes. To accomplish this the bank directors induced John Woolsey, a Connecticut citizen and stockholder, to bring a suit against the bank and the county treasurer. Even though there was evident collusion on the part of the

bank and Woolsey, who acquired the stock only five days before filing suit, the Court took the case and again upheld the tax exemption of the Banking Act—this time in the face of the attempted revocation in the new constitution.

Campbell's dissent in *Dodge v. Woolsey* was the high point of his career on the Court.[27] He restated his belief that corporations threatened both state sovereignty and individual liberty and distinguished the rights of individuals from the rights of corporations. In true natural rights fashion, he said:

A material distinction has always been acknowledged to exist as to the degrees of authority that a people could legitimately exert over persons and corporations. Individuals are not the creatures of the state, but constitute it. They come into society with rights, which cannot be invaded without in-justice. But corporations derive their existence from the society, and are offspring of transitory conditions; and with faculties for good in such conditions, combine durable dispositions for evil. They display a love of power, a preference for corporate interests to moral or political principles or public duties, and an antagonism to individual freedom which have marked them as objectives of jealousy in every epoch of their history.[28]

Campbell considered the state sovereignty question in *Dodge v. Woolsey* as the most important and elemental principle ever submitted to the Court.[29] The contract clause was not a strong enough textual link in the Constitution, he felt, to justify interference with the State's sovereign power:

If the court is to have an office so transcendent as to decide finally the powers of the people over persons and things within the state, a much closer connection and a much more direct responsibility of its members to the people is a necessary condition for the safety of popular rights.[30]

In 1860 Campbell won something of an ironic victory over the contract clause. In *Christ's Church Hospital v. Philadelphia* he wrote for a unanimous Court that a Pennsylvania law revoking a tax exemption previously granted to a corporation or association did not violate the contract clause.[31] He made no reference to the sovereign tax power, but rather redefined the contract clause on a narrower basis. Following the concept of "consideration" in private law of

contracts, he found no contract in the State's earlier grant of a tax exemption to the hospital because the State had not received anything in return for the tax exemption.

V

As Campbell was winning the battle for the sovereign power of taxation, he was about to face the greater issue of the sovereign rights of the states within the Union. Less than a month after the Court decided *Christ's Church Hospital*, Campbell's fellow Alabamians voted to secede. Although Campbell opposed secession, he believed it was legal. During the 1830's and 40's he helped develop its theoretical foundation, that the states retained all sovereign power not explicitly surrendered in the Constitution—including the right to secede. In 1838, Campbell was retained by several landowners whose claims of riparian rights in land between the high and low marks of the Mobile River were under attack in ejectment suits brought by the City of Mobile and the heirs of William Pollard, a grantee from the Spanish crown. The City claimed exclusive rights to some of the land under one act of Congress which purported to grant that portion to the City, and Pollard's heirs claimed exclusive rights in the rest under another act which purported to confirm Pollard's grant.

In the first case litigated, *Mayor of Mobile v. Eslava* (1849), Campbell enunciated a state sovereignty doctrine which both the Alabama and United States Supreme Court later recognized as original with him.^[32] He started with the accepted premises that each of the original states held exclusive sovereign rights to the navigable waters within its borders by royal grants which antedated the Union, and that the navigable waters extended to the high water mark. He then noted the Constitutional guarantee that each new state was to enter the Union on equal footing with the original states. Thus, he reasoned, Alabama also exercised exclusive sovereignty over the navigable waters—up to the high water mark—within its borders. And that meant that the acts of Congress relied upon by the City of Mobile and Pollard's heirs were null and void, because Congress could not legislate with respect to land over which it had no sovereignty.

Campbell's argument prevailed in the Alabama courts in *Eslava* and several other cases. Two of the cases were reversed by the United States Supreme Court on narrow grounds. Finally, in 1845, a case titled *Pollard v. Hagan* squarely presented to the Supreme Court the constitutional issue of whether the guarantee of equality among the states included a new state's right to sovereignty over the navigable waters within its borders to the same extent as that possessed by the original states. Campbell did not argue *Pollard* personally, but rather retained a member of

the Supreme Court Bar, John Sergeant. Sergeant's arguments and Justice McKinley's majority opinion, however, were drawn from Campbell's arguments to the Alabama courts in *Eslava* and *Pollard*.

The state sovereignty doctrine of Pollard was too valuable to be used only to justify a new state's sovereignty over navigable waters. Justice Catron, dissenting in *Pollard*, had realized the implications of Campbell's argument when he said:

this is deemed the most important controversy ever brought before the court, either as it respects the amount of property involved, or the principles on which the present judgment proceeds—principles in my judgment, as applicable to the high lands of the United States as to the low lands and shores.[34]

In the following decade several important slavery cases were decided in favor of the slaveowners on the basis of the state sovereignty argument in *Pollard* that each new state was entitled to the same degree of sovereignty as that possessed by the original states. In *Strader v. Graham* (1850) the Court held that a slave sojourning in a free state remained a slave.[35] Applying the principles of extraterritoriality, rather than the precedents of comity, the majority reasoned that slave property designated under a state's police power was just as entitled as any other property to protection from the laws of another state. Finally, in *Dred Scott v. Sanford* (1857) the Supreme Court held that slavery was protected in the territories despite federal laws to the contrary. The majority reasoned that the territories had to be considered as being held in trust equally for all the states in order to fulfill the constitutional requirement that all states entered the Union on an equal footing. Thus a police power designation of slave property had to receive the same protection as any other property designation.

VI

Campbell was a moderate on slavery. Between 1847 and 1851 he had written several unsigned articles on slavery in the *Southern Quarterly Review* advocating amelioration of slave living conditions and gradual emancipation. He did not consider himself as a pro-slavery advocate and was even considered an abolitionist by some of his fellow Southerners.[36]

The failure of the states' rights movement to gain from Congress legislation protecting slavery in the territories had greatly disappointed Campbell. He had hoped that such an enactment

would end the slavery controversy so that the country and the South in particular could get on with commercial development. He had recognized long before that the territories were unsuited for slavery, and that it would eventually disappear there. In *Dred Scott* Campbell felt compelled to keep the South from seceding.

Campbell's concurrence in *Dred Scott* was somewhat inconsistent. He argued for strict construction of federal power and a broad implied construction of state power. Although it was his most political and legislative opinion, it was not the pro-slavery exposition of which he has been accused. Campbell concurred in the judgment of the Court declaring Scott still a slave but he did not agree with the reasoning of the leading opinion by Chief Justice Taney. He did not believe that the Court could discuss whether or not Scott should be a citizen and refused to address that issue. He did agree that under Missouri law Scott was still a slave and could not sue in federal court. He also agreed that the Missouri Compromise was unconstitutional because Congress had no power to legislate in the territories.

Campbell attempted to ground his opinion in strict construction of the Constitution by arguing that the power to make rules and regulations for the territories did not explicitly give Congress legislative power. In so doing he reversed the stand he had taken in 1848 when he wrote John C. Calhoun that slavery depended upon positive law and that Congress could legislate in the territories.[37] He ignored the precedents he had cited then, including the Missouri Compromise and returned to the history of the Constitution. He could find no assertion of a:

supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, whose subject comprehended an empire and which had no restriction but the discretion of Congress.[38]

He distinguished between the power to dispose of the public domain or organize a government and the authority to determine police regulations. If the sovereign power over the territories had not been delegated to the federal government, he reasoned, then it must have been retained by the states. And if the Constitution had spoken of a Union of equal states then the sovereign power over the territories resided equally in each state. Thus to maintain this equality between the states, a police power designation of one state—such as slavery—could not be barred without invading a state's residual sovereignty.

Despite Campbell's attempt to treat *Dred Scott* solely as a state sovereignty case, his internal conflict over slavery showed through. His opinion is best known for its "overelaborate

scholarship" which could not disguise the fact that Campbell made a weak argument. He knew that slave property was not the same as any other property, and he could not deny to himself that a slave was also a person entitled to individual rights. In his proposals for just compensation to slave owners for freeing their slaves, he had hoped for a resolution of the dilemma. In a conflict between property rights and individual rights, in which he perceived the economic growth of the South was at stake, Campbell joined with the side which he believed best protected Southern economic development.

Three years after *Dred Scott* the Southern states seceded, believing that the election of Lincoln threatened their sovereign rights in the territories. Campbell tried to convince them that *Dred Scott* protected slavery, and that no matter what Lincoln said he was bound by a Constitution which protected slavery in the territories. He defended the federal government's affirmation that it had no power over slavery and that it had never acted to liberate a slave.[39] In May, 1861 after several efforts to save the Union, Campbell resigned to go with his native state.

Although Campbell was a high-ranking Confederate official, he was one of the first Southerners to accept the peace terms. After President Johnson issued a general pardon, he petitioned for amnesty and took an oath of loyalty to the Union. He endorsed the Emancipation Proclamation and counseled patience and reconciliation.[40] His major concern was for the creation of a climate of peace and stability which would foster economic recovery. He believed that the welfare of all Southerners, black and white, depended on their own hard work. He had recognized years before, in the unwillingness of the North to fund a program of compensation for freeing slaves, a lack of commitment in the North to federal spending which did not directly benefit the North.[41]

Campbell's most immediate concern was to provide for his family. In 1866 he moved to New Orleans and opened a law office with his son and former State Judge Henry Spofford. New Orleans offered the best economic opportunities for him, but even these were severely limited by his inability to practice in federal courts. Even before the war had ended, Congress had passed a test oath act barring from practice in federal courts lawyers who would not take an oath that they had not participated in the rebellion. Until *Ex Parte Garland* declared the oath unconstitutional in January, 1867, Campbell was only able to practice in state courts; but because of the chaotic conditions and the presence of military tribunals, the state courts opened only intermittently.[42] During this period he is believed to have authored a pamphlet attacking the constitutionality of the test oath act as a bill of attainder and ex post facto law. He was so concerned about the outcome of *Garland* that in December, 1866 he wrote the clerk of the

Supreme Court asking to be informed by telegram of the Court's decision.[43] Once readmitted to the federal bar, he turned his energies toward earning enough money to provide for his family's security.

VII

In keeping with his mercantile Democratic background, Campbell agreed with many of the Whigs and Republicans that the key to renewed prosperity depended upon the railroad. One of the lessons of the war had been the supremacy of railroad transportation. It had enabled the North to outmaneuver the South on all fronts. In particular, New Orleans looked to the railroad as the means for tapping the riches of Texas and the Southwest.[44] Although the transcontinental railroad was nearing completion, it would pass far to the North. New Orleans businessmen had good reason to believe that if they could get to Texas first, they would be well on the way to economic leadership of the country's heartland. The great wealth of Texas was its millions of beef cattle. Cut off from their natural Southern market by the capture of New Orleans in 1862, Texas cattle herds had multiplied enormously. The war had also greatly impoverished herds elsewhere in the country. New Orleans had only to provide transportation and slaughterhouse facilities in order to overtake Chicago as the heartland's economic center.

In 1869, in order to take full advantage of the cattle which would come by railroad from Texas, the Louisiana legislature enacted the "slaughterhouse monopoly." Several thousand butchers were forced to cease plying their trade except at the new Crescent City Slaughterhouse, and were forced to pay a fee to use the new facility. The act was justified by the legislature as a health measure, which would end pollution of the Mississippi River by removing the slaughtering business to the new facility south of the city. At the same time it also created a monopoly for twenty-five years for the benefit of the seventeen slaughterhouse corporators, most of whom were Northerners.

The butchers joined together to fight the monopoly and hired Campbell to plead their case. A fight against a corporate monopoly on behalf of the butchers' right to pursue a lawful calling was tailor-made to appeal to Campbell's Jacksonian instincts. In addition, the case involved bribery of the legislature by Northern economic interests. In the *Slaughterhouse Cases* (1874) therefore, Campbell had the opportunity to fight for both individual equality of economic opportunity and for a South free from Northern exploitation.[45]

If defeated Southerners were looking for a case to overturn the Reconstruction legislation, they had picked an unpromising one. Campbell had to fight the combined weight of the state's police power and the Constitution's contract clause. He was squarely faced with the inadequacy of his pre-war argument that the inviolability of the state's sovereign powers protected individual rights—such as the right to pursue a lawful calling. But a great change had occurred in the Constitution as a result of the Civil War Amendments. It had been changed to protect personal rights as adequately as it had protected property rights. As a member of the *Dred Scott* majority, Campbell had voted to accord property rights the higher protection. He had based his interpretation on a strict construction of the text of a constitution which explicitly recognized slavery. The textual link of national citizenship and protection of individual rights for which he had looked in vain in the corporations and slavery cases before the war, had been embodied in the Constitution through the Thirteenth and Fourteenth Amendments.

It has never ceased to surprise later generations that the first interpretation of the Fourteenth Amendment involved the right of butchers to pursue a lawful calling. That it was the first case was in great part due to the unique abilities of Campbell. That such a principle found protection under the Constitution should not be surprising. The economic equality fight of the individual to pursue a lawful calling had been the first principle of Jacksonian Democracy. One of the earliest defenses of this right was in the Alabama case, *In Re Dorsey* (1837), an opinion with which Campbell was very familiar and in 1884 termed "among the finest specimens of judicial exposition."^[46] For a time the slavery crisis had obscured the right to pursue a lawful calling. Jacksonian individual rights idealism had foundered on the shoals of property rights. Once the war had settled that a man could not make another man his property, Jacksonians such as Campbell, recovered their sense of purpose.

Campbell had a legal mind and breadth of vision unequalled by most of his contemporaries. These qualities enabled him to quickly grasp the potential of the Fourteenth Amendment. His *Slaughterhouse* argument was his interpretation of the Civil War peace settlement. He saw the Civil War not just as a political controversy within the United States, but also as part of the great revolutionary uprising for individual liberty which included the English, American and French Revolutions.^[47] Before the war he had warned that a revolution in public opinion was taking place. He had counseled the South to take heed of the winds of change and seek immediate amelioration and gradual abolition of slavery. Campbell saw an emerging Western civilization based on a philosophy of individual liberty and equality and the progress of man. He had encouraged the South to participate on its own initiative and warned against attempts on the

part of the South to take itself out of the mainstream of Western civilization to protect the relic of slavery.

In *Slaughterhouse* Campbell argued that the anti-slavery movement which culminated in the Thirteenth and Fourteenth Amendments was much more than just a movement against Negro slavery. He believed that it was part of a worldwide movement for individual freedom based upon the natural law philosophy which declared all men to be equal, with inalienable rights to life, liberty, property, and the pursuit of happiness. The right to labor for oneself and to enjoy the fruits of one's labor, he reasoned, was a fundamental corollary. In abolishing slavery and involuntary servitude, he argued, the Constitution implied that labor, which had once been an obligation or duty, had become a right and a privilege and the distinguishing factor between slave and freeman. He was convinced that the Thirteenth Amendment was meant to embody the right of a man "to labor for himself, and not at the will, or under the constraint of another, and that he should have the profit of his own industry."^[48]

Campbell's discussion of slavery in *Slaughterhouse* reflected the resolution of his earlier internal conflict. Once slavery had been abolished Campbell was freed from the convoluted reasoning of his *Dred Scott* opinion. In a sense he too was liberated by the Thirteenth Amendment and was free to return to a natural rights belief in individual liberty and equality. He did so wholeheartedly in his exposition of the Fourteenth Amendment.

Campbell was convinced that the Fourteenth Amendment granted legal protection to the natural law fundamental rights—such as the right to pursue a lawful calling—embodied in the Thirteenth Amendment. He argued that the Fourteenth Amendment promised "that UNION and LIBERTY . . . should be ONE and INSEPARABLE."^[49] The liberty was the natural law fundamental rights of man as embodied in the privileges and immunities, due process and equal protection clauses. The Union was the national citizenship given to all native born persons, independent of state citizenship. He believed that the amendment had been designed to secure the individual liberty, property, honor and security from arbitrary, partial proscriptive and unjust legislation of state governments.^[50]

At its broadest, Campbell's interpretation was an open-ended guardianship of individual rights by the federal judiciary. The Bill of Rights would apply to the states as well:

Conscience, speech, publication, security, occupation, freedom, and whatever else is essential to the liberty, or is proper as an attribute of citizenship, are now held under the guarantee of the United States. . . . The most important of the sections of the Magna Carta form only a clause of this article. The first article of the

French Charters of 1814 and 1830—the most efficient of all—is added, and does not exhaust it. The entire body of personal rights of men that state governments ought not to destroy or impair, have been placed under the guardianship of the government of the United States.[51]

As much as a resolution of the problems of the present, Campbell saw the Fourteenth Amendment as the pressure valve of the future, ensuring that never again would the country be torn by civil strife. Never again could some state governments deny fundamental rights which the majority of the Nation deemed vitally important:

The Fourteenth Amendment embodies all that the statesmanship of the country has ordained for accommodating the Constitution and the institutions of the country to the vast additions of territory in-crease of the population, multiplication of the states and territorial government, the influx of aliens, and the mighty changes produced by revolutionary events, and by social, industrial, and commercial developments.[52]

Although Campbell offered the Court an open-ended natural rights interpretation, he grounded his argument in the premise that the privileges and immunities, due process and equal protection clauses protected the butchers' right to pursue a lawful calling. He emphasized the privileges and immunities clause as his textual link because its concepts had been more developed in constitutional law before the war than had due process and equal protection. Having been a Supreme Court justice, he believed the Supreme Court was best able to provide an impartial guardianship of fundamental rights. Therefore he interpreted the legislative power of Congress as limited to that of enforcement against state action.

The Supreme Court did not accept Campbell's argument at first. Justice Miller's majority opinion held that privileges and immunities of national citizenship meant essentially what it had before the war. He denied that there was a substantive content to the due process clause or that it incorporated the Bill of Rights, and he applied equal protection of the laws only to racial discrimination against blacks. Campbell was able to persuade four Justices of the rightness of the butchers' cause. In dissent, Justices Field and Bradley declared that there was a natural law right to pursue a lawful calling and that it was protected by not only the privileges and immunities clause but also the liberty and property rights of due process and equal protection.

Through the *Slaughterhouse* dissent a fundamental rights interpretation of the Fourteenth Amendment was to be incorporated into constitutional law.

Campbell never gave up his belief that the first section of the Fourteenth Amendment was intended to have a broad natural rights meaning. In an 1884 address he reiterated his belief that its purpose was apparently fair, although he felt it had raised more questions than it had answered. It was not until the late 1880's after new life had been read into section one through the due process and equal protection clauses that he would look back and say that perhaps the *Slaughterhouse* decision had been for the best.[53]

Endnotes

1. The standard biography of Campbell is Henry G. Connor's *John Archibald Campbell* (Cambridge, 1920).
2. Most historians have supposed that Campbell was in favor of slavery. For a good discussion of this misconception see Justine Mann, "the Political Thought of John Archibald Campbell: The Formative Years 1847-1851," *Ala. L. Rev.*, 22 (1969-70).
3. The University of Georgia was the mecca for students from Georgia, Florida, Alabama, and Mississippi, who did not go North to Princeton, James e. Saunders, *Early Settlers of Alabama* (New Orleans, 1899). At West Point, Campbell met Robert E. Lee, Jefferson Davis, and Joe Johnston, with whom he would share a common destiny.
4. "Obituary of John A. Campbell," *New Orleans Picayune*, 1889, Groner Papers in Southern Historical Collection, (University of North Carolina, Chapel Hill). The Best work on the antebellum period in Alabama is J. Mills Thornton, "Power & Politics in a Slave Society: Alabama, 1820-1860," (unpublished PhD. Thesis, Yale University, 1974).
5. *Of the United States Supreme Court Bench and Bar: Memorium to John Archibald Campbell* (Washington, 1889).
6. George W. Duncan, "John A. Campbell," *Transactions of the Alabama Historical Society*, 5 (1905) 113.
7. R. Schmidhauser, "Jeremy Bentham, the Contract Clause, and John Archibald Campbell," *Vand. L. Rev.*, 11 (June 1958), 811.
8. Connor, John A. Campbell, 159-60.
9. See John A. Campbell, *Recollections of Evacuation of Richmond* (Baltimore 1880); and John A. Campbell, *Reminiscences and Documents Relation to the Civil War during 1865*

- (Baltimore, 1887).
10. Richard Leach, "John Archibald Campbell and the Alston Letter," *The Alabama Review*, 11 (1958) 64.
 11. Obituary of John A. Campbell," New Orleans *Picayune*, 1889, Groner Papers in Southern Historical Collection, (University of North Carolina at Chapel Hill).
 12. 16 Wall. 36 (1873).
 13. 115 U.S. 650 (1885).
 14. 116 U.S. 307 (1886).
 15. 108 U.S. 76 (1882).
 16. Campbell to Henry Goldthwaite, Nov. 29, 1836, Groner Papers in Southern Historical Collection, (University of North Carolina, Chapel Hill).
 17. Of some 300 cases Campbell handled before the Alabama Supreme Court over half (166) involved commercial law, contracts, negotiable paper, bankruptcy and foreclosure; 32 civil procedure; 40 real property; 8 corporate charters; 7 constitutional law, 8 torts, 2 taxation; 7 criminal law.
 18. Campbell to Benjamin R. Curtis, July 20, 1865, *Century Magazine* (1889), 950; and, Edwin Craigshead, *Mobile Fact and Fiction* (1930).
 19. *See generally*, James Willard Hurts, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, 1956); also, R. Kent Newmeyer, *The Supreme Court under Marshall and Taney*, (New York, 1968); and E. M. Dodd, *American Business Corporations Until 1860* (Cambridge, Mass., 1954).
 20. 5 Cranch 497 (1809).
 21. 2 How. 497 (1844).
 22. 16 How. 314 (1954).
 23. *Ibid.*, at 351.
 24. 16 How. 314 at 353 (1854).
 25. 16 How. 369 (1854).
 26. 16 How. 622 (1954).
 27. 18 How. 331 (1956).
 28. *Ibid.*, at 375.
 29. *Ibid.*, at 369.
 30. *Ibid.*, at 373.
 31. 24 How. 300 (1860).
 32. 9 Port. 577 (Ala. 1839).

33. *Pollard v. Hagan*, 3 How. 212 (1844). See also 14 Pet. 353, 9 Port. 712, 16 Pet. 234, 9 Port. 577, 2 How. 591, and 3 Ala. 47. See also, Edward W. Faith, "The Great Lawsuits Affecting Mobile," *The Alabama Lawyer*, 37 (July 1976) 339; and Carl w. Swisher, *The Oliver Wendell Holmes Devise History of the United States Supreme Court*, Vol. V.: *The Taney Period*, 1836-64, Chapter 30.
34. 3 How. 212 (1844) at 235.
35. 10 How. 82 (1850).
36. See "Slavery in the U.S." *Southern Quarterly Review* (SQR), 12 (July 1847) 91; "Slavery Among the Romans," SQR 14 (Oct., 1848). (1851), 205 new series; "British West India Islands," SQR, 16 (Jan. 1850), 342; "The Rights of the Slave States," SQR, 3 (Jan., 1851), 101, new series; "Slavery Throughout the World," SQR (April 1851), 305, new series; and, Campbell to B. R. Curtis, July 20, 1865; *Century Magazine* (1899), 953.
37. Campbell to John C. Calhoun, March 1, 1848, E. J. McCormac, "Mr. Justice Campbell and Dred Scott," *Mississippi Valley Historical Review*, 19 (1933), 568-70.
38. 19 How. 393 (1857) at 505.
39. John A. Campbell, "Address to the Alabama Bar," *op. cit.* 87. See also, Campbell to Daniel Chandler, No. 26, 1860, Duncan, *op cit.*, 149.
40. Johnj A. Campbell to B. R. Curtis, July 20, 1865, *Century Magazine* (1889) 953, See also, Colston Papers in Southern Historical Collection, (University of North Carolina, Chapel Hill).
41. See generally, C. Van Woodward, "Seeds of Failure in Radical Race Policy," *American Counterpoint*, (1964); also, Everette Swinney, "Enforcing the Fifteenth Amendments, 1970-1877," *The Journal of Southern History*, Vol. XXVIII, No. 2, (May 1962) 202.
42. 4 Wall. 33 (1867).
43. Charles Fairman, *The Oliver Wendall Holmes Devisee History of the Supreme Court*, Vol. VI: *Reconstruction and Reunion, 1864-88* (New York, 1971), 241.
44. See Mitchell Franklin, "The Foundation and Meanings of the Slaughterhouse Cases," *Tul. L. Rev.*, 18 (Oct. 1943), 20-88.
45. 16 Wall. 36 (1873).
46. 7 Port. 284 (Ala. 1837).
47. John A. Campbell, "Brief for the Plaintiffs in Error," *The State of Louisiana ex. rel. Attorney General v. the Livestock Dealers and Butchers' Association of New Orleans, et al.* (1871), 5.
48. *Ibid.*, at 13.

49. Ibid., at 26.
50. John A. Campbell, "Brief for the Plaintiffs in Error," *William Fagan et al. v. State of Louisiana, ex rel.* (1872), at 25.
51. *Livestock Dealers and Butchers Assoc.*, op cit. at 17 and 37.
52. William Fagan, et al., op. cit., at 28.
53. Connor, "John A. Campbell," *op. cit.*, p. 273.

"De Minimis," or, JUDICIAL POTPOURRI

Potpourri

The Judicial Robe

S. James Clarkson

The wearing of a black robe by judges was a custom utilized more by the judiciary in the United States than in other countries. Traditionally, black signifies death and mourning.

It had never occurred to me that the research I had conducted would serve me in such good stead when I was elected to the judiciary. I chose the color red for, as I discovered in my research, red was the color most widely used by jurists in England and Canada as well as France. It was also rooted in the history of the English judiciary, from whence comes most precedent for the law as it is practiced in the United States. Our adoption of the English legal system without its traditional judicial garb poses the mystery. The question, "Why do you wear red?" was therefore replaced by the question "Why do judges wear black?"

Sir William Dugdale, in his chapter concerning the personal attire of judges, said "That peculiar and decent vestments have, from great antiquity, been used in religious services, we have the authority of God's sacred precept to Moses, 'Thou shalt make holy raiments of Aaron and his sons, that are to minister unto me, that they may be for glory and beauty.' In this light and flippant age (18th Century), there are men irreverent enough to smile at the habiliments which our judges wear in court, for the glory of God and the seemly embellishment of their own natural beauty."^[1]

There is considerable difficulty in determining the origin and history of the use of judicial robes and their color. There is consensus; however, that English judges of the present day wear robes worn by their predecessors. Some judges wore different vestments varying with their particular offices and whether or not it was summer or winter. These robes were of fur and silk and were embellished with collars and cuffs of various shapes and forms.

In the eleventh year of Richard II, a distinction was made between the costumes of the chiefs of the King's Bench and Common Pleas and their assistant justices.^[2] At that time each of the assistant justices wore green robes in the summer; and in the twenty-second year of Henry VI, Chief Baron John Fray received "for his winter robe against Christmas, 'x' ells of violet in grain;

trimmed with various minever." The same judge received "for his summer robe, against Whitsuntide, ten ells of green cloth long, and half of a piece of green tartarin." The three other Barons of the Exchequer at the same time had "for the like summer robes, each of them ten ells of violet likewise trimmed in minever fur."

The various hues and colors of the robes and those used by the judiciary and the lawyers indicate such a diversity as to cause John Cordy Jeaffreson to write in part of his book entitled *Costume and Toilet*, "These notes are sufficient to prove that judicial costume varied with the fashion of the day or the whim of the sovereign in the 14th and 15th Centuries." [3] And, as an interesting comment, he cites that . . . "In the time of Charles I, questions relating to the attire of the common law judges were involved in so much doubt, and surrounded with so many contradictory precedents and traditions, that the judges resolved to simplify matters by conference and unanimous action." The result of their deliberation was a decree dated June 6, 1635. [4] It is the only decree I know of, other than one proposed by the new Michigan Court Rules, determining the type and color of robes to be used by the judiciary. The decree of June 6, 1635 provided the various colors and kinds of robes to be used for the respective "Holydayes" and terms of court. Scarlet, of course, was the favorite color, trimmed in various kinds of furs and other adorning trims. Violet was another favorite color, trimmed with black and faced with taffeta. Other trim commonly used with the various colors was velvet.

With the advent of the "Sergeants-at-Law," wherefrom the judges of the King's Bench and the Common Pleas and the Exchequer could only be chosen, the fashion of the bar was similar to the formal dress of the judiciary, and in Nicholas Sellers' article entitled "Sergeants at-Law," printed in the *Pennsylvania Bar Association Quarterly*, June, 1965, it is stated as follows: "Lastly, the sergeants-at-law were known, as we have said before, as the Order of the Coif, and could be deemed in the nature of a very select fraternity. They called one another 'Brother'; even from the bench this fraternal form of address continued, since the judges were of course still sergeants. ('Bardell and Pickwick,' called the clerk of the court, 'I am for the plaintiff, my Lord,' said Mr. Sergeant Buzfuz. 'Who is with you, Brother Buzfuz?' inquired the Judge.) The Coif was originally a form of skullcap of white silk worn by the sergeants; when wigs came in fashion, a patch of white was still fastened on top to indicate the dignity of sergeant. They were entitled to wear scarlet robes (purple for saints' days) and did so on state occasions, although usually adhering to the traditional black gown which had come in as mourning dress at the funeral of Queen Anne in 1714 and never changed since." [5]

This seems to give support to the proposition that in 1714, when Queen Anne died, the judges wore black mourning garb according to the wishes of the King, and have worn it ever since.

"It is a little known fact that for over 250 years, judges have been mourning the demise of the Queen of England! Chief Baron Pollock remarked that 'the Bar went into mourning at the death of Queen Anne and never came out again.' It is the red, not the black, robe which is rooted in antiquity." [6]

Parenthetically, it should be noted that the sergeants-at-law were appointed by the Crown, and that the Order of the Coif was in existence as far back as 1117 A.D.

In a letter to me from Ian A. R. Tofts, dated February 2, 1976, however, he disagrees, as here stated: [7]

With regard to your main question concerning the death of Queen Anne it is not known for certain whether or not it was at that time that 'Queen's Counsel' commenced wearing a mourning costume; indeed it is very unlikely as you will see below. The Costume as a whole, Court Suit and Gown, is said to date from the funeral of Queen Mary II in 1694, being reputedly the Official Court Mourning Dress worn on that solemn occasion. Some say it was at the funeral of Queen Anne and indeed reference is made to the celebrated remark of Sir Frederick Pollock, a 19th Century Judge, that the Bench and Bar have been in mourning and never came out. However, it would seem, and with the deepest of respect for the eminent Judge, he was sadly mistaken. I for my part feel that the Funeral of Queen Mary II in 1694 is more feasible for a number of reasons. In the Michaelmas Law Term of 1697 (some considerable time before the death of Queen Anne) Chief Justice Holt of the then Kings Bench Division (Queen Anne was not yet in fact on the Throne) told Banisters 'I will hear you henceforward only if you appear in your proper gowns and not in mourning one.'

This mourning garb however only appears to have been worn to Queen's Counsel. It may also have been worn by Junior Counsel but there is no apparent evidence whatsoever to support Judge Pollock's remarks that the whole of the Judiciary wore mourning garb. Certainly the Judges did not appear to have worn any mourning garb at all—pictures or paintings of the period would seem to support this.

The Queen's Counsel mourning garb worn on formal legal occasions consists of a black velvet coat with tails, knee breeches, lace stock and cuffs, black silk gown, white gloves and a full bottomed wig. At Royal Courts, State Banquets and other similar occasions

they appear simply in Velvet Court Dress with sword and crush hat. At Levees their dress is black cloth Court Suit, lace stock and cuffs, black silk gown and full bottomed wig.

When pleading in Court they wear a Court Tail Coat of cloth, trousers (instead of knee breeches) black silk gown and Bob Wig and bands similar to those of Junior Counsel. When appearing in the House of Lords they wear the full bottomed wig; frequently the mourning gown of stuff is worn in court, *strictly incorrectly*.

'The Mourning Dress' consisted of a hemmed stock and cuffs with mourning bands (lawn with a thin stripe down the middle) and (when not wearing a gown) a crepe band on the left arm. The gown worn on such occasions is of stuff material instead of silk, when pleading in court, white cuffs of muslin or linen known as 'Weepers,' are worn over the sleeves of the coat and mourning bands. The Queen's Counsel Gown differs from that of the Junior Counsel. As well as being normally of silk, it is practically sleeveless, has a square cut yoke or rudimentary hood at the back and is without the traditional flaps of cloth attached to the Junior Banister's gown.

Whatever the reason, it is established beyond a reasonable doubt that whether the choice of the robe be scarlet, purple, or green, that the use of the black robe was primarily a symbol of mourning and was used in respect for the monarchy at the time of death.

Mr. Tofts, in his letter of February 2, 1976 from Sunbury on Thames, Middlesex, England, answers my letter regarding the question of the use of the red or scarlet robes by stating as follows:[8]

Judges of the High Court are now invariably knighted on appointment. This honor appears to go back as far as the reign of Edward III (1327-1377) when Judges were made 'Knights Banneret,' a rank of office which became extinct in the 17th Century. While in office Judges are entitled to the prefix 'The Honourable,' being referred to as 'The Honourable Sir, So and So, Knight, one of the Justices of Her Majesty's High Court of Justice.' Since the 18th Century they have been addressed in Court as 'My Lord,' and 'Your Lordship.'

In earlier times, from the 14th Century, 'Sir,' was the customary form. High Court Judges are informally addressed as 'Mr. Justice So and So,' and in Law Reports and other Legal writings as 'So and So; J.,' which is also the form of their official signature.

You will most probably be interested to learn that the dress of the English Judge has not changed, in essentials, since the 15th Century. This of course adds weight to the belief that the judges did not in fact wear a mourning dress as did the Queen's Counsel when Queen Anne died or for that matter when Queen Mary II died.

The Official wardrobe of the High Court Judge comprises, and one must remember that little has changed since the 15th Century, as follows:

The Judicial Robe, made of cloth, is not unlike a cassock in shape, with sleeves, a straight front fastening and a high neck without lapels. The deep cuffs are of white fur or of silk and the front edges are trimmed with the same material for most of their length. Robes of this type were worn by the Sergeants, and at the period when the Order of the Coif began there was little distinction between lay and clerical garments. Originally the Robes were partly lined with fur, at first lambskin and later on Miniver (now called Ermine) early 16th Century portraits show the lining barely visible at the end of the sleeve. The Robe at this period was (and for time after) much fuller than at present, more like a full cub Alb than a cassock. The lining gave place to a mere facing, with deep cuffs as if turned back to display the fur or silk and a similar trimming at the front edges.

All High Court Judges have a full dress or State Robe of scarlet trimmed with ermine at the cuffs and front edges, and also a gown, not robe, but of the pattern worn by Queen's Counsel (referred to above) of black silk, comparatively sleeveless. In addition, Queen's Bench Division Judges have a black Robe, trimmed with ermine, one of scarlet trimmed with slate coloured silk and one of violet trimmed with salmon coloured silk. The two last are worn in summer to correspond with the scarlet and ermine and black and ermine which are worn in winter.

It is interesting to note that scarlet was widely used as a judicial colour in Medieval Europe. Inderwick ('The Kings Peace,' 1895) says that the Venetian Magistrates who formed the Council of Ten wore Scarlet and so, apparently, did the Florentine Judges

who tried Savonarola in 1495. The same writer adds that Scarlet was a colour used by the Higher Order of the Clergy from whom (at that time) Judges would be drawn. However, I view that with some reservation and feel that this was only true of Cardinals, who one sees always in Scarlet. There are in fact four illuminations, now in the Inner Temple Library, of the time of Henry VI which show the Court of Chancery and the Three Common Law Courts. The Judges in all these Courts are portrayed in Scarlet Robes lined with fur. In early times, however, there was considerable variation in colour. The violet Robe now worn is said to date from Edward I (1272-1307). Green cloth for Common Law Judges is seen during Richard II's reign but only as a summer Robe. In Henry VI's reign the Chief Baron is found receiving violet cloth for a Winter Robe, and Green for Summer, while at the same time other Barons had Violet for Summer.

The remainder of the Judges Regalia which I will not bother to go into the history of at the present moment (but will be pleased to do so if you require further information) consists of the Scarf, (or stole), the Casting Hood, The Girdle (or Sash), The Hood, The Bands, The Court Suits, The Wigs, The Black Cap, The Tri-Cornered Hat (Tricorn) and the White Kid Gloves.

. . . There is also a great deal of tradition relating to the various Courts and Law Sittings and the Regalia changes to suit the occasion.

In this country judges vary greatly in order of seniority and, of course, their regalia changes according to their position. E.G., The Lord Chief Justice wears, on the installation of a new Lord Chancellor, Full Bottomed Wig, Scarlet and Ermine Robes. The Master of the Rolls on the same occasion wears his Black and Gold State Robe. The Lord Chancellor, when he appears, wears also a Black and Gold State Robe. These State Robes date from the 16th Century."

The best collection of portraits and pictures of early judges' attire in the United States can be found in the halls and classrooms of Harvard Law School. In continuing this research I spent many hours viewing portraits and pictures of the different judges depicting the garb and costumes of the judiciary.

It has been generally accepted that I was the first judge to resume wearing the red robe here in the United States, and soon thereafter other judges discarded the use of the black robe.

Endnotes

1. *A Book About Lawyers*, by John Cordy Jeaffreson, Vol. 1, 1867, p. 361.
2. *Ibid.*, p. 362.
3. *Ibid.*, p. 363.
4. *Ibid.*, p. 363.
5. *Case and Comment*, Vol. 70, No. 6, Nov-Dec 1965, p. 18
6. *Ibid.*, p. 20.
7. Ian A. R. Tofts, Sunbury on Thames, Middlesex, England, letter of 2-2-76.
8. *Loc. Cit.*, n. 7 *supra*.

Potpourri

Toward 1987:

Guidelines from the Centennial

The Editor

Planning is already afoot for the bicentennial of the Constitutional Convention coming up within the decade. Project '87, an "umbrella" administrative group jointly sponsored by the American Historical Association and the American Political Science Association, has been operational since the fall of 1978, having already made research grants to a number of scholars and held two national meetings, one in Philadelphia and one in Williamsburg. The Supreme Court Historical Society is cooperating with the District of Columbia Historical Society and the Washington Monument Association, on plans to observe both the 200th anniversary of the Constitution in 1987 and the beginning of the new government in 1989.

With all these prospective activities, it is appropriate to look backward as well, to the celebration of the first hundred years, in 1887. Philadelphia, which had been the site for a massive exposition on the centennial of the Declaration of Independence in 1876, was once more the scene of an anniversary party only slightly less sumptuous than the first. From some of the reports published in summation of the centennial of 1887, some guidelines for 1987 may possibly be discerned. *

The first official effort to get the centennial rolling came in June, 1886 with a joint resolution of the two houses of the New Jersey legislature, calling on the governors of the thirteen colonial states to meet in Philadelphia on Constitution Day, to plan appropriate activities for the anniversary. Accordingly, on September 17, the governors and a coterie of aides descended on the site of the original convention in Carpenters' Hall. Governor Fitzhugh Lee of Virginia was elected Chairman, and Hampton Carson of Pennsylvania the Executive Secretary.

The latter was the obvious choice; Carson, a prominent Philadelphia lawyer and avid student of constitutional history, had already picked up the ball and was running with it. By the time all of the centennial activity had been wound up, Carson had published a massive two-volume report on the anniversary, followed it with an equally massive history of the first century of the Supreme Court, and begun putting the finishing touches on a collection of books and pamphlets

which became the Hampton Carson Collection in the Free Public Library of Philadelphia. A graduate of the University of Pennsylvania, and later a member of its law faculty, Carson was state attorney-general in the period 1903-7, and in 1920 came out of retirement to serve on the constitutional revision commission of his state.

Meantime, the anniversary activities began assuming formal dimensions with the organization of the Constitutional Centennial Commission in December, 1886. The commission's first effort was to get the government of the United States—created by the Constitution whose anniversary was to be celebrated—to provide some public funds for the event. The first step was something of a debacle; President Grover Cleveland expressed his personal support for the request, and Congress appropriated the modest sum of \$100,000—but the special appropriation bill failed to pass "because it was not placed on the calendar," the Commission rather sheepishly had to admit.

Other sources of income were found, however; about half of the sought-after amount was raised by private subscription in Philadelphia, while the states of Massachusetts, New Hampshire, Rhode Island and Delaware appropriated a total of more than \$80,000. With this money assured, the commission issued a clarion call to the rest of the then forty-two states:

At various times and in different places you have been called together to commemorate by appropriate ceremonies the great events in your national history. In obedience to that impulse which bids a people do honor to its past, you have reared the lofty column, the triumphal arch, or the votive tablet . . . In 1874 you were summoned by the voice of Philadelphia to meet in the hall of the carpenters' Company, where the first Continental Congress protested against the tyranny of the Stamp Act . . . In 1875 you answered the call to Lexington and Concord and Bunker Hill. . . . In 1876 you again assembled in Philadelphia, like worshippers before a shrine . . . But lately you hurried to the plains of Yorktown, the scene of final triumph. . .

While the grandiloquent description of the Yorktown battlefield might make smiles come to faces of those who have visited it, the buildup was effective: "For a third time," said the commission's manifesto, "you are summoned to Philadelphia—the city of the Declaration of Independence—the city of the Constitution... the Mecca of America." This will wrap it all up, was the inference, and it will be some celebration. As matters turned out, it was.

To "hype" the public consciousness, the commission reprinted the description of the July 4, 1788 celebration of the ratification of the Constitution written by Francis Hopkinson, a rising young Philadelphia lawyer. (See article, "The Selling of the Constitution," elsewhere in this issue.) The first anniversary events began, wrote Hopkinson, "by a salute to the rising sun by a full peal of bells from Christ Church steeple, and a discharge of cannon from the ship *Rising Sun*, anchored off Market Street. At the same time ten vessels, named in honor of the ten adopting states, could be seen arranged the whole length of the harbor"—something suggestive of the regatta of "tall ships" in New York Harbor in 1976.

A mammoth parade of thirty-two units then began a procession through the city streets, led off by "twelve axe-men, dressed in white frocks, with white girdles around their waists, and wearing ornamented caps." This cryptically symbolic advance guard was followed, at various points in the order of march, by a horseman representing Independence; another horseman representing the French Alliance, the steed being "the same on which Count Rochambeau rode at the siege of Yorktown;" still another horseman representing—somehow—the Definitive Treaty of Peace, identified by a banner of olive and laurel bearing the date, "Third of September, 1783." One of the show-stopping units was the thirteenth, representing the recently adopted Constitution, represented by Chief Justice Thomas McKean of the Pennsylvania Supreme Court (no Supreme Court or Chief Justice of the United States having yet been brought into being):

[McKean and his associates] were seated in a lofty ornamented car, in the form of a large eagle, drawn by six white horses. The Chief Justice supported a tall staff, on the top of which was the cap of liberty; under the cap was the new Constitution, framed and ornamented; and immediately under the Constitution were the words, "The people," in large gold letters, affixed to the staff.

There was also a horseman "in complete armor," with the Seal of the United States (adopted by the Continental Congress) on his shield. He was followed a few units later by the judge of the state admiralty court, "wearing in his hat a gold anchor, pendant on a green riband;" the judge was preceded by his clerk, carrying a bag full of parchments and embroidered with the word "Admiralty" in large letters. Twenty-fourth was:

The New Roof, or Grand Federal Edifice, on a carriage, drawn by ten white horses. This building, thirty-six feet high [!] was in the form of a dome, supported by thirteen Corinthian columns ... Ten of the columns were complete, but three

left unfinished. On the pedestals of the columns were inscribed in ornamented letters the initials of the thirteen American states. Round the pedestal of the edifice these words: "*In union the fabric stands firm.*"

Near the end came the most dramatic float, the thirty-second:

The Federal ship *Union*, mounting twenty guns, commanded by John Green, three lieutenants, and four boys in uniform. The crew, including officers, consisted of twenty-five men.

The ship was thirty-three feet in length, width and riggings in proportion. Her hull was the barge of the ship *Alliance*, the same which formerly belonged to the *Serapis*, and was taken in the memorable engagement of Captain Paul Jones, in the *Bonhomme Richard*, with the *Serapis*. She was mounted on a carriage drawn by ten horses.

Boat-builders in a boat-builders' shop, eighteen feet long, eight feet wide, drawn by four horses. Seven hands were at work building a boat thirteen feet long, which was actually set up and nearly completed during the procession. Then followed large deputations of the different trades—sail-makers, ship carpenters, ship joiners, rope-makers, and ship-chandlers, merchants and traders, and others.

Hopkinson concluded his report with the statement: "It is, of course, but natural to expect that the celebration of 1887 will surpass that of 1788 in respect to grandeur and magnificence in every detail. To surpass it, however, in the joy and enthusiasm of the participants will not be such an easy task." Carson and his associates accepted the challenge, and although their procession, with its theme, "The Progress of a Century Under Constitutional Government," had only twenty-four units as against the thirty-two in 1788, it was intended to encompass every important facet of national life. As it was, the numbers of participants almost clogged the machinery of organization; the marshal of the grand parade reported in his concluding paper: "Even with the unexpectedly large increase in the number of men and vehicles which crowded into columns after they had been definitely arranged and assigned, there would not have been more than an hour's delay" if communications had been better.

The 1887 program tried to let everyone get into the act who wanted to; there were, accordingly, half a dozen floats by rival ice-making companies. A group called the Knights of the Golden

Eagle preened themselves immediately after a series of three floats representing "an old-time brewery," "a modern brewery" (22,500,000 barrels), and one depicting a temple housing King Gambrinus (?) refusing nectar in a preference for "beer, the staff of life and promoter of temperance."

The "civic and industrial procession" of September 15, 1887 was, of course, only part of the centennial program. The following day there was a massive military display of American advances in the martial arts since the Revolution. Meantime, leaders of the Philadelphia bar had breakfasted at the White House, perhaps an effort to make more palatable the national government's parsimony at the observance of its own birthday, and on Constitution Day itself a climactic memorial service was held in Independence Square. President Cleveland, former President Rutherford B. Hayes, Lincoln's former Vice-President, Hannibal Hamlin, and Chief Justice Morrison R. Waite (see Portfolio, this issue) were among the principal figures on the rostrum. Music by the Marine Corps band was conducted by a young Professor John Philip Sousa. The "orator of the day" was Justice Samuel Freeman Miller.

Miller's address was remarkable for the candid discussion of contemporary issues which had just been adjudicated by the Supreme Court. The Justice took this as a heaven-sent opportunity to deliver an earnest declaration of his own constitutional faith, which was unmistakably federalist. It was an off-the-bench attempt—rare in the records of sitting Justices—to make a critical evaluation of a number of current political problems. Miller in particular inveighed against legislative interference with executive powers—in the presence of Congressional delegates and an incumbent and past Chief Executive, and praised the wisdom of the Founding Fathers in making it possible for the judiciary to umpire the relationships of the other two branches.

Ideological polarity on the Supreme Court is hardly a new thing. Miller's vigorous espousal of a strong central government, with the judiciary as the logical agency for keeping it in balance, aroused the most conservative member of the bench, Justice Stephen Field, to seek an equally important rostrum to offer a rebuttal. This was provided a short time later at a centennial program in New York, where Miller's colleague made an emphatic answer to most of Miller's major points. The anniversary observations concluded by publishing both addresses in the next issue of the Supreme Court Reports.

Perhaps the most lasting contribution to professional literature for this centennial was Carson's own history of the Supreme Court, which after nearly a hundred more years is still one of the most comprehensive to have been published. Aside from this, however, it is hard to say

whether Hopkinson's sanguine statement of 1788 was surpassed by the works of 1887. And that, in turn, raises a question and a caveat for 1987-89.

Potpourri

Law Clerks—A Professional Elite

Barrett McGurn

Except for the Justices themselves no members of the Supreme Court staff are the subject of more enduring interest and speculation than the corps of law clerks, usually men and women in their middle twenties and at the outset of their professional careers.

Through the years the questions are the same: what do the law clerks do? How influential are they? Who are they? Where do they go from here?

Dean Acheson, who clerked for Justice Brandeis before serving some years later as Secretary of State, has provided some insights into what a law clerk does. There were some small errors in a text his Justice had drafted and the young clerk happily pointed them out.

"Your mission," Justice Brandeis told Law Clerk Acheson, "is to catch my mistakes! And not make any of your own!"

Who wrote the Brandeis opinions? Brandeis, the Secretary-of-State-to-be quickly discovered. But footnotes were something else.

"I wrote the footnotes," Mr. Acheson recalled in 1957 in "Recollections of Service with the Federal Supreme Court." "My footnotes were, up to that time, the Mount Everest of footnotes. Today Justices of the Supreme Court write textbooks as marginal annotations of their opinions, but up to that time I had written the greatest footnotes, fifteen pages of footnotes."

Law clerks are unknown in England but they are a significant part of the judicial scene now in appellate courts and even trial courts all across this country. It may seem odd both that the highest federal bench had no law clerks for almost half of its current history and that, in effect, the tradition of law clerks was born at the United States Supreme Court.

Justice Horace Gray is the father of the law clerk institution. Before he came to the United States Supreme Court he was Chief Justice of the Supreme Judicial Court in Massachusetts. Little noted while he served on that New England bench was a custom he began there: to hire a recent honor graduate of the Harvard Law School at his private expense to serve for a year as his legal assistant. In Washington on the supreme bench the Justice continued his practice but what passed little noted in Massachusetts attracted instant attention here. Attorney General A. H.

Garland used his annual report to Congress in 1885 to say that just as Washington heads of departments and United States Senators had government-paid assistants, so should each of the Supreme Court Justices. An annual stipend of not more than \$1,600 was what was needed to get the right quality of aides, the Attorney General added. Congress agreed; each Justice was allowed a clerk. In 1947 Congress raised the authorization to two. In 1970 it became three. Now most justices have four. To keep step with inflation something over a ten-fold increase has been made in the 1886 salary authorization.

Harvard was in on the ground floor when Mr. Justice Gray in Boston looked around for an institution to supply him law clerks, and Harvard has never lost that position of priority. To some extent it has been a revolving door situation for many Supreme Court law clerks have gone back to Cambridge as professors. One Brandeis clerk, James M. Landis, served successively both as dean of the Harvard Law School and also as chairman of the Securities Exchange Commission. "Juris Doctor" noted in 1972 that "a quarter of the current Harvard Law faculty and fifteen percent of the Yale law faculty" were made up of former United States Supreme Court law clerks.

Justice Gray died-in 1902 after twenty years on the Court. He was succeeded by Oliver Wendell Holmes who served for the next thirty years. Justice Holmes and another of his brethren on the same Court, Louis Dembitz Brandeis (1916-1939), followed the Horace Gray tradition, looking to Harvard for clerks. On campus they had a talent scout who watched for the most promising members of each graduating class. He was Professor Felix Frankfurter who himself joined the Court in 1939, serving until 1962. He in his turn continued a Harvard law clerk tradition (with such rare exceptions as Anthony Amsterdam of the Pennsylvania Law School, now a professor at Stanford).

Justice Brennan is another, himself a Harvard Law graduate, who emphasized his alma mater in choosing law clerks in his early Court years, but later, like the bulk of the Court itself, he began looking beyond the few large national schools to other institutions and other parts of the country. Harvard, accompanied by Yale, continues to provide the lion's share of clerks each year, but dozens of other law schools now contribute. In 1971 the Congressional Record reported that more than half of the 361 law clerks of the previous decade were products of the Harvard and Yale law schools—Harvard had 125 or 35%, Yale sixty. *Potomac Magazine* in 1976 said that fifteen of the previous term's thirty-two clerks came from Harvard, Yale, Columbia, Chicago and Michigan—just under half, and that if you added Pennsylvania, Stanford, Berkeley and Virginia the total was twenty-two, nearly seventy percent.

While all that may be said, it is also true that law schools from all corners of the country are succeeding in placing some of their graduates inside the corps of Supreme Court law clerks. In the 1973-1978 period this was the breakdown: in addition to 115 from Harvard, Yale, Virginia, Stanford, Chicago, Michigan, Pennsylvania and Columbia, there were six from Texas, and others from Minnesota, Northeastern, Berkeley, Boston College, Boston University, Catholic University, Vanderbilt, the University of Southern California, Duke, Arizona, Indiana, Colorado, Illinois, Washington and Lee, Backus (which formerly was Western Reserve), Santa Clara, Washburn, Loyola, Mississippi, and North Carolina.

Felix Frankfurter, the scout for Justices Holmes and Brandeis, is given credit for building the role of law clerk into a major American legal institution, but at the outset, in those first Horace Gray years, it was not always clear just who should be hired for the new judicial job or even what the new employee should be called. In his 1885 recommendation to Congress the Attorney General spoke of "stenographic clerks." Not until 1919 was the title "law clerk" used; Justice Holmes was the first to employ someone under that sobriquet. Secretary, law assistant, research aide and legal assistant are some of the names by which law clerks variously have been called in one court or another during the past century and, in at least one state, the name "briefing attorney" has been invoked in an effort to clarify just what are the important law clerk duties. This touches on the significant role the law clerks often play in helping Supreme Court Justices work through the flood of 4,000 incoming cases each year, choosing the 200 or 300 which will be decided on their merits. Memos from their clerks have helped many Justices winnow the frivolous cases from those raising important federal questions. These are the "briefing" duties.

Most law clerks now come from the top of their law school classes. Many have served on law reviews. Many also have had experience for a year or so as law clerks at an intermediate appellate level. With a grinding caseload weighing on each Supreme Court Justice, much is expected from each clerk. Workdays stretch into evenings and into the weekends. In the easier time of a century ago less rigorous talent searches seemed necessary since much less presumably was expected. There was even an occasional whiff of nepotism which would now be startling. When the Justice John Marshall Harlan was faced for the first time with hiring one of the Congressionally-authorized "stenographic clerks" he picked his own son, John Maynard Harlan. It is, of course, quite possible that the Justice was recognizing an important legal bloodline, for John Maynard Harlan's son, the second John Marshall Harlan, was another who mounted the Supreme Court bench as an Associate Justice, in 1955.

William Rufus Day, who was on the Court from 1903 to 1922, provided two of his sons to the corps of law clerks. Another son of the first Justice John Marshall Harlan—James S. Harlan—served Chief Justice Melville Fuller as his first law clerk.

With nearly 30,000 graduating each year from more than 150 law schools approved by the American Bar Association, and with a Supreme Court clerkship now seen as the finest available one-year post-graduate training course for a lawyer, Court watchers scrutinize the individual hiring practices of each Justice, trying to find the best way to qualify. In addition to meeting the standards of training and excellence already mentioned, some have discerned certain loyalties to the Justice's own alma mater and geographical region.

In this regard Kenneth Bass III, a 1969 law clerk of Mr. Justice Hugo Black, observed:

"The perfect clerk for Justice Black was an Alabama boy who went to Alabama Law School. If that wasn't possible, then someone from the South who went to a leading law school. He tried to convince his clerks to return to the South and a number of his clerks still practice in Alabama (1972)."

Mr. Justice Douglas often had a clerk from the Northwest or Far-West. Mr. Justice Whit-taker had many Mid-Westerners. Youths from his native mountain state area served often with Mr. Justice White. The late Justice Tom C. Clark seemed to enjoy association with fellow Texans.

Most clerks serve now for one year, some remaining for two, few staying longer than that. Some legal scholars see advantages in this arrangement. The young incoming clerks bring from the law campuses the ponderings on the law current amidst their generation of law professors. Service with a Justice provides its own distinctive alumni association and some bands of law clerks of a single Justice maintain close ties with him and with one another. The clerks of Earl Warren played an important role in his funeral exercises when the late Chief Justice lay in state in the Great Hall of the Supreme Court Building in 1974. Clerks of Mr. Justice Stanley Forman Reed (1939-1957) placed a plaque in his honor at the University of Kentucky Law School, listing each of their names, many of them now illustrious in recent national history.

Nowadays with the overwhelming caseload— a dozen new cases every calendar day—clerks have a more businesslike relationship to the Justices, but in the days before 1935, when there was no Supreme Court Building and Justices did much of their work at home, clerks often were like family members. When Mr. Justice Holmes had his 90th birthday in 1931 there was an incident reflecting that intimate relationship which later provided the closing scene for the dramatic play about the life of "The Magnificent Yankee." Mrs. Holmes invited fifteen of Justice Holmes twenty-five law clerks to a surprise party. They hid down in the cellar and at a dramatic moment were summoned "out of the coal bin."

Mr. Justice Black always appreciated law clerks who could give him a game of tennis. Mr. Justice White, a former all-American football player from Colorado, still enjoys a pick-up basketball game with clerks in what is known as "the highest court in the land." (The basketball court, in a converted fourth floor storeroom, is above the second floor courtroom of the Supreme Court, thus giving the basketball area its claim to preeminence.)

A few Justices in the past several years—the Chief Justice and Justice White—have experimented with "legal assistants," more mature and experienced lawyers who remain for several years. In a sense this is a return to an earlier tradition. The custom of a complete turnover of law clerks every year did not develop until the 1930s. In earlier years some few were even men who had business activities on the side. Justice Joseph McKenna who joined the Court in 1898 chose a law clerk who remained with him for the next twelve years, the remainder of the clerk's life.

Exemplary service has been a tradition among the law clerks although there is one blot on the group's record. In 1919 one of the law clerks was indicted for leaking Court opinions to speculators. He resigned. Prosecution of the case was dropped some years later.

With blacks and women entering law schools in greater numbers they also have joined the law clerk ranks. The first woman was hired by Justice Douglas in 1944. She was the Justice's sole clerk in that wartime year: Lucille Lomen. Justice Gray in the 1880's, looking around for his own first Supreme Court law clerk, would never have thought of a woman, for it was only in 1879 that Mrs. Belva A. Lockwood, a determined feminist, succeeded in crashing the all-male Supreme Court bar. By World War II it was different. Miss Lomen, a member of Phi Beta Kappa, had edited the law review at her law school at the University of Washington, the state to which Justice Douglas looks as home. By the early 1970s Miss Lomen was a counsel for General Electric in New York.

A score of years passed before the second woman law clerk was hired. She was Margaret Corcoran, law clerk to Mr. Justice Hugo Black in the 1966 term. While helping establish one tradition—women as Supreme Court law clerks—Miss Corcoran was carrying on a family custom, for she was the daughter of a previous clerk, Thomas ("Tommy the Cork") Corcoran, one of Mr. Justice Frankfurter's "happy hot dogs," and one of the foremost braintrusters of the first two immensely innovative presidential terms of Franklin D. Roosevelt. Miss Corcoran's promising career was cut short with her tragic early death at 28.

The third Justice to choose a woman law clerk was Justice Abe Fortas, who selected Margaret Alschuler (now Field) in 1968. Fourth was Justice Thurgood Marshall with Barbara Underwood in 1971. Miss Underwood went on to become the second woman to serve as a Yale law professor. In recent years the number of women law clerks has risen sharply, often four or five in a term.

Two of Justice Douglas' clerks in 1972 were women. There were five women among the law clerks in the 1978 term. Through that term there have been twenty-six women in the Supreme Court's law clerk corps.

The first black law clerk was William A. Coleman, Jr., taken by Justice Frankfurter in 1948. Mr. Coleman had been at the head of his Harvard law class. Justice Frankfurter had two clerks that year. The other was Elliott Richardson. It is part of the legend that the two Frankfurter clerks would use lunch breaks for joint poetry readings. Each of them later entered presidential cabinets. Mr. Coleman was Secretary of Transportation under President Ford while Elliott Richardson may have broken all the records of presidential history with the variety of his assignments at the top of the American bureaucracy: Secretary of Defense, Attorney General, Secretary of HEW, Under Secretary of State and Ambassador to the Court of St. James in Britain.

Two other blacks have followed in Mr. Coleman's law clerk footsteps: Tyrone Power, an Earl Warren clerk in 1967, now a Federal Communications Commissioner, and Karen Hastie Williams (a Marshall clerk, 1974), now general counsel of the United States Senate Committee on the Budget.

Three one-time clerks have returned to take their own place on the supreme bench and thus to choose another generation of their own successors: Justice Byron White who clerked for Chief Justice Vinson, Justice William H. Rehnquist (a clerk of Mr. Justice Robert H. Jackson), and Justice John Paul Stevens who clerked for Justice Wiley B. Rutledge.

One law clerk, Alger Hiss of the Department of State (a Holmes clerk), was convicted of perjury in one of the sensational cases of the post World War II Cold War period, but brighter headlines have told the story of scores of other graduates of this unique corps.

Law Clerk Alumni

The Chicago *Sun-Times* a year or so ago set itself to tracking down ex-clerks of the Supreme Court to determine what they had done after their youthful experiences as aides of the Justices. From their research and additional inquiries the following brief listing is drawn.

Many went to the Department of Justice, some at the highest levels: besides Attorneys General Elliott Richardson, (a clerk of Justice Frankfurter), and Francis Biddle, (who assisted Oliver Wendell Holmes), there have been Deputy Attorney General Warren Christopher (Douglas), Assistant Attorneys General James H. Rowe, last of the Holmes clerks (FDR's ad-

ministrative assistant and a member of the Hoover Government Reorganization Commission); Daniel J. Meador (University of Virginia law professor and author of law books including one on his Justice, Hugo Black), John Harmon (head of the Office of the Legal Counsel—a clerk of Chief Justice Burger), Peter Taft (Warren), Donald F. Turner (Clark), and Herbert Wechsler (Stone), and Deputy Solicitor General Lawrence Wallace (Black).

In addition to Secretary of State Dean Acheson, and Transportation Secretary William A. Coleman, Jr., many went to other sections of the federal government: Newton N. Minow (Vinson) as chairman of the Federal Communications Commission, Adrian S. Fisher, last of the Brandeis clerks, as general counsel of the Atomic Energy Commission; Philip B. Heymann, clerk to the second John Marshall Harlan, Deputy Assistant Secretary of State for International Organizations; Adam Yarmolinsky, Deputy Assistant Secretary of Defense and deputy director of a presidential anti-poverty task force (a Reed clerk); John Ely (Warren), general counsel of the Department of Transportation; Federal Trade Commissioner Philip Elman (Frankfurter), Richard Goodwin (Frankfurter), White House official in the Johnson and Kennedy administrations; Benjamin Heineman, Executive Assistant Secretary of HEW (Stewart), Chairman Roderick Hills of the SEC (Reed); E. Barrett Prettyman (Jackson, Harlan), White House official under President Kennedy; Under Secretary of the Treasury H. Chapman Rose (Holmes); and James Vorenberg (Frankfurter), executive director of the Presidential Commission on Law Enforcement and the Administration of Justice.

Some turned to the business world: Charles Luce, chairman of the board of Consolidated Edison (a black clerk); Irving Olds, chairman of the board of United States Steel (Holmes); George L. Harrison, president of the New York Life Insurance Company (also Holmes); and Arthur Seder (Vinson), president of the American Natural Gas Service.

Several became writers or publishers: Philip L. Graham, president of the *Washington Post* (Frankfurter and Reed); David Riesman (Brandeis), author of *The Lonely Crowd—a Study of the Changing American Character*; Professor Alexander Bickel of the Yale Law School (Frankfurter), author of a shelf full of books including *The Least Dangerous Branch: the Supreme Court at the Bar of Politics*; Professor Andrew Kaufman of the Harvard Law School, like Bickel the author of a volume on the Justice they shared—Felix Frankfurter; Professor Eugene Gressman of the University of North Carolina Law School (clerk to Mr. Justice Murphy), co-author of the standard guide to Supreme Court practice; Charles Reich (Black), author of *The Greening of America*, and John Frank (also Black), a writer on legal affairs.

In addition to the professors above, academia claimed many other clerk-alumni: President Dallin Oaks (Warren) of Brigham Young University; Deans Roger Cramton (Burton) of Cornell

Law School, Phil Neal (Jackson) of the University of Chicago, and Louis Pollak (Rutledge) of the law schools of Pennsylvania and Yale; and Professors Paul Freund (Brandeis) of Harvard (chairman of the commission to study problems of the appellate courts); Philip Kurland (Frankfurter) of Chicago Law School (chief counsel of a United States Senate committee on the separation of powers); Laurence H. Tribe (Stewart) of Harvard; Walter B. Leach (Holmes), also Harvard; Nathaniel Nathanson (Brandeis), Northwestern University Law School; Arthur Sutherland (Holmes) Harvard; Francis Allen (Vinson) U. of Michigan; Guido Calabresi (Black) Harvard; Kenneth Dam (Whittaker) Chicago University; Gerald Gunter (Warren) Stanford, A. E. Dick Howard (Black) Virginia; and Kenneth Ripple (Burger) Notre Dame.

Among those drawn to politics were Governor Dan Walker of Illinois (a clerk of Chief Justice Vinson), Congressman Abner Mikva of Illinois (Minton), and Joseph Rauh, Jr. (clerk to Justices Frankfurter and Cardozo), national chairman of the Americans for Democratic Action.

Among others practicing law were Thomas Austern (Brandeis) and Nathan Lewin (Harlan) in Washington, Chauncey Belknap (Holmes), and Alexis Coudert (Stone), in New York, and George Saunders (Black), and Howard Trienens (Vinson) in Chicago.

In addition to the three former clerks now on the bench of the United States Supreme Court others who became judges include United States Courts of Appeals Judges Henry J. Friendly (Brandeis), Harold Leventhal (Stone and Reed), and Philip Tone (Rutledge), and Chief Judge Calvert Magruder of the Federal Court of Appeals in Boston (the first clerk chosen by Mr. Justice Brandeis), and United States District Judge Louis F. Oberdorfer (Black).

CONTRIBUTORS

Felix Frankfurter was Associate Justice of the Supreme Court of the United States from 1939 to 1962.

Paul R. Baler was a Judicial Fellow in the Supreme Court, 1975–1976, and is Associate Professor of Law, Louisiana State University.

Gerald T. Dunne is Professor of Law at St. Louis University.

Paul T. Heffron is Assistant Chief of the Manuscripts Division, Library of Congress.

Geoffrey B. Morris was a Judicial Fellow in the Supreme Court, 1976–1977, and is Research Associate for the Administrative Assistant to the Chief Justice.

William F. Swindler is Editor of the SCHS Yearbook, and John Marshall Professor of Law, Emeritus, College of William and Mary.

Charles A. Leonard is Professor of Constitutional Law and Judicial Process, Western Illinois University.

Christine R. Jordan wrote her M.A. thesis on Justice Campbell at the University of Virginia, and is Assistant Editor, *Documentary History of the Supreme Court, 1789–1800*.

Alan Westin is Professor of Political Science at Columbia University.

S. James Clarkson is judge of the Michigan District Court No. 46.

Barrett McGurn is Information Officer for the Supreme Court of the United States.

ACKNOWLEDGEMENTS

The Supreme Court Historical Society acknowledges with deep appreciation the assistance and cooperation of a number of agencies and individuals who provided illustrative material for this issue of the **YEARBOOK**:

Supreme Court Historical Society for the formal color portrait of Chief Justice Morrison Waite.

Virginia Law Review of the Law School of the University of Virginia for permission to reprint the article "Chief Justices I have Known" by Felix Frankfurter which originally appeared, in part, in the *Virginia Law Review*.

Supreme Court Historical Society for the formal portraits of Justice Melville Weston Fuller, Bushrod Washington, William Henry Moody, Stanley Matthews, Samuel Blatchford, Horace Gray, Lucius Quintus Cincinnatus Lamar, Owen J. Roberts, and John Archibald Campbell.

Paul Baier, professor at Louisiana State University, for his pictures of Mr. Henry Putzel, Jr. and syllabus notes from various cases discussed in his article.

Library of Congress for the photographs of Theodore Roosevelt, and Dean Acheson. Mount Vernon Ladies Association for the use of the picture of Mount Vernon by Bulent Atalay.

Iowa State Historical Society for the picture of James B. Weaver.

New York Historical Society, NYC for the picture of the "Ship of State" that appeared in Mrs. Martha Lamb's *History of New York City*.

Smithsonian National Museum, Department of Political Science for the picture of John Marshall's robe.

Dr. Cletis Pride for the picture of the Justice's skull cap.

J. B. Lippincott Company, for the use of the frontispiece picture from their book *History of the Celebration of the One Hundredth Anniversary of the Promulgation of the Constitution of the United States*, published in 1889. The book is presently in the collection of the Supreme Court Library.