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Judicial Values: The Justice Robinson Experience

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JUDICIAL VALUES: THE JUSTICE ROBINSON EXPERIENCE

HERBERT L. MESCHKE* AND TED SMITH**

I. ROBINSON'S RELEVANCE.....	25
II. ROBINSON'S BACKGROUND	28
III. ROBINSON'S ADVERSARY	31
IV. ROBINSON'S ELECTION	35
V. ROBINSON'S COURT	43
A. SATURDAY EVENING LETTERS.....	43
B. THE BACKLOG	45
C. ABSENCES AND DELAYS.....	47
D. REFORMING RULES	53
E. PREMATURE OPINIONS.....	55
F. OPINION WRITING	56
G. MORE DELAYS.....	60
H. BRUCE'S COUNTERATTACK	64
I. ROBINSON'S RESULTS.....	68
VI. ROBINSON'S NATIONAL NOTORIETY	75
A. <i>CENTRAL LAW JOURNAL</i> : BRUCE'S ATTACK	75
B. <i>CENTRAL LAW JOURNAL</i> : ROBINSON'S RESPONSE.....	76
C. <i>HARVARD LAW REVIEW</i> NOTE.....	79
D. <i>CALIFORNIA LAW REVIEW</i> ARTICLE	82
E. <i>CALIFORNIA LAW REVIEW</i> : THE BOOK REVIEW	86
VII. BRUCE'S BOOK: <i>NON-PARTISAN LEAGUE</i>	87
VIII. ROBINSON'S BOOK: <i>WRONGS AND REMEDIES</i>	94
IX. ECHOES OF ROBINSON'S IDEAS.....	99
X. JUDICIAL VICES, VIRTUES, AND VALUES	103

I. ROBINSON'S RELEVANCE

In the World War I era, two justices on the North Dakota Supreme Court competed as judicial candidates, clashed as colleagues, and openly criticized each other's conduct.¹ The clashes between Justice Bruce and

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Justice Robinson uncovered widely divergent judicial values.² Many of those values remain relevant for today's standards of judicial conduct.

Justice James E. Robinson served on the North Dakota Supreme Court from January 1917 through December 1922.³ Elected in a very partisan judicial election, he was probably the most colorful and eccentric figure in the history of the Court, but he should be remembered more for his fervent efforts to reform the judicial system.⁴

Justice Andrew A. Bruce served on the Court from October 1911 to December 1918.⁵

Robinson doggedly criticized Bruce's poor performance as Chief Justice during their two years together on the Court.⁶ Robinson advocated shorter opinions, better procedures, and more deference to a trial court's discretion in most cases.⁷ Bruce accused Robinson of improper judicial speech and disparaged his opinion writing.⁸ Bruce became an arch and bitter critic of Robinson. Their clashes over judicial values brought national notoriety to Robinson and the North Dakota Supreme Court.

We sketched some of Robinson's story in our previous law review article, *The North Dakota Supreme Court: A Century of Advances*.⁹ Since then, we have located more materials about his conflicts with Bruce, and their differing judicial values. In this article, we develop a more detailed account of their conflicts with an eye to their relevancy for current standards of judicial conduct.

Long established standards of judicial conduct are changing since the major 2002 decision of the United States Supreme Court in *Republican Party of Minnesota v. White*.¹⁰ That decision invalidated judicial standards

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1. See discussion *infra* Parts IV, V (detailing Robinson's election).

2. See discussion *infra* Parts IV, V.

3. Hon. Herbert L. Meschke & Ted Smith, *The North Dakota Supreme Court: A Century of Advances*, 76 N.D. L. REV. 217, 307 (App. A) (2000).

4. See discussion *infra* Part X (discussing judicial vices, virtues, and values).

5. Meschke & Smith, *supra* note 3, at 307.

6. See discussion *infra* Part V (discussing Robinson's court).

7. See discussion *infra* Part V (delivering information on Robinson's court).

8. See discussion *infra* Part V.H, VI.A (discussing Bruce's Counterattack and *Central Law Journal*: Bruce's Attack respectively).

9. Meschke & Smith, *supra* note 3, at 242-47. See also *A Century of Advances: The NPL's Justice Robinson*, <http://www.ndcourts.com/court/history/century/II.F.htm> (last visited May 7, 2006).

10. 536 U.S. 765 (2002).

constraining campaign speech by candidates for election to judicial offices.¹¹

In *White*, the five-member majority ruled that the First Amendment prevented the Minnesota Supreme Court from prohibiting candidates for judicial election from announcing their views on disputed legal subjects.¹² In the majority opinion, Justice Scalia carefully said, “we express no view” on the parallel “so-called ‘pledges or promises’ clause which separately prohibits judicial candidates from making ‘pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.’”¹³

Yet, the separate opinions in *White* plainly anticipate that prohibitions of “pledges or promises” will be strictly scrutinized under the First Amendment, too.

Thus, Justice O’Connor’s concurrence expressed misgivings about electing judges instead of appointing them.¹⁴ She declared Minnesota had “voluntarily taken on the risks [of] judicial bias” by choosing to elect judges.¹⁵ “As a result,” she cautioned, “[Minnesota’s] claim that it needs to significantly restrict judges’ speech in order to protect judicial impartiality is particularly troubling.”¹⁶ In his concurrence, Justice Kennedy expressed a similar view: “The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgement of speech.”¹⁷

Minority opinions by Justices Ginsburg and Stevens, each joined by all four dissenters, explained their understanding of the effect of the *White*-majority decision. Justice Stevens said “. . . the reasoning [of] the Court’s opinion . . . create[s] the false impression that the standards for the election of political candidates apply equally to candidates for judicial office.”¹⁸ Indeed, the majority clearly gives that impression, but whether the impression is false or not remains to be decided.

Justice Ginsburg described the effect of the majority opinion:

Uncoupled from the Announce Clause, the ban on pledges or promises is easily circumvented. By prefacing a campaign commitment with the caveat, ‘although I cannot promise anything,’ or

11. *White*, 536 U.S. at 765.

12. *Id.*

13. *Id.* at 770.

14. *Id.* at 792.

15. *Id.* (O’Connor, J., concurring).

16. *Id.*

17. *Id.* at 795 (Kennedy, J., concurring).

18. *Id.* at 802 (Stevens, J., dissenting).

by simply avoiding the language of promises or pledges altogether, a candidate could declare with impunity how she would decide specific issues.¹⁹

We think the history of North Dakota's 1916 election of Justice Robinson, when no written standards of conduct circumscribed campaign speech by a judicial candidate, confirms the doubts of the dissenters.²⁰ Bruce complained particularly about Robinson's announced views and pledges during his 1916 election campaign.²¹ North Dakota's experience with Justice Robinson thus prefigured post-*White* campaigns for judicial office.

In this article, we trace Bruce's and Robinson's rise to the Court, sketch their election campaigns, and chronicle their conflicts. We review the publications of that time about their judicial attitudes, conduct, and values. These include Robinson's published weekly accounts, several key judicial opinions, five law review pieces, and a book that each wrote. Altogether, this public conflict brought Bruce and Robinson—as well as the North Dakota Supreme Court—much national attention. We also note recent legal articles that continue to echo some of Robinson's ideas. Overall, we endeavor to explain the modern relevance of the judicial vices, virtues, and values observable in North Dakota's experience with Justice Robinson.

II. ROBINSON'S BACKGROUND

James E. Robinson was born in Michigan in 1843²² and reared there.²³ He served as a soldier for the Union in the Civil War.²⁴ He was graduated

19. *Id.* at 819. In her footnote 5, Ginsburg added:

In the absence of the Announce Clause, other components of the Minnesota Code of Judicial Conduct designed to maintain the nonpartisan character of the State's judicial elections would similarly unravel. A candidate would have no need to "attend political gatherings" or "make speeches on behalf of a political organization," for she could simply state her views elsewhere, counting on her supporters to carry those views to the party faithful. And although candidates would remain barred from "seek[ing], accept[ing], or us[ing] endorsements from a political organization," parties might well provide such endorsements unsolicited upon hearing candidates' views on specific issues. . . . Those unsolicited endorsements, in turn, would render ineffective the prohibition against candidates "identify[ing] themselves as members of a political organization."

Id. at 820 n.5 (citations omitted) (Ginsburg, J., dissenting).

20. See discussion *infra* Part IV (describing and discussing Robinson's election).

21. See discussion *infra* Part V.H. (discussing Bruce's Counterattack).

22. *James E. Robinson, Former Member of High Court, Is Dead*, BISMARCK TRIB., Mar. 23, 1933, at 1. His obituary and memorials gave Michigan as his birthplace. See, e.g., *id.* However, other sources indicate his birthplace as Canada. *1870 Census for Trempealeau, Wis.*, 1870 U.S. Federal Census, Reel M593-1737, Page 263, Image 526; *1880 Census for Winona, Minn.*, 10th

from the University of Michigan in 1868 with a Bachelor of Laws.²⁵ He was admitted to the practice of law in Wisconsin, and served as district attorney of Trempealeau County, in Whitehall, Wisconsin, for several years.²⁶ Whitehall is just north of Lacrosse, Wisconsin, and just across the Mississippi River from Winona, Minnesota. Robinson lived and practiced at Winona, Minnesota, for some time.²⁷

Robinson moved west to Fargo in Dakota Territory in the early 1880s. He obtained homestead patents in 1894 and 1895 for land near Stratford, South Dakota.²⁸ After homesteading, he divided his time between practicing law in Fargo and farming at Stratford.²⁹

He was admitted to practice before the Supreme Court of Dakota Territory on May 16, 1884.³⁰ Robinson, or his firm, participated in two cases before the Dakota Territorial Supreme Court and in sixty-four cases

Census 1880, Minnesota, Reel 638, Page 267A; 1885 *Fargo, Dakota Territory Census*, <http://dp3.lib.ndsu.nodak.edu/cgi-bin/1885Census/family.pl?page=22-036-17>.

23. *James E. Robinson, Former Member of High Court, Is Dead*, BISMARCK TRIB., Mar. 23, 1933, at 1.

24. Robinson served in Company B of the 39th Wisconsin Infantry. 32 WIS. NECROLOGY 148 (1933) (containing a clipping of Robinson's obituary from the *Milwaukee Journal*, dated Mar. 23, 1933, among other obituaries from Wisconsin newspapers contained within the scrapbook). The 39th Wisconsin Infantry was organized for 100 days of service and assisted in the defense of Memphis, Tennessee in August 1864. Wisc. Dep't of Veterans Affairs, http://museum.dva.state.wi.us/Res_regiments.asp (last visited June 8, 2006). Robinson enlisted May 28, 1864, and mustered out September 22, 1864. 2 ROSTER OF WISCONSIN VOLUNTEERS: WAR OF THE REBELLION 1861-1865 660 (Democrat Printing Co. 1886).

Robinson wrote little about his Civil War experience, even though he wrote extensively on many subjects. His only reference to the Civil War that we have found was this fragment in an editorial he wrote condemning conscription for military service in World War I:

Even in our day and generation, poor white soldiers were tied to posts and flogged on the bare back with a rawhide by order of snobbish, well-paid officers. And it would not be far amiss to say that they were flogged because of being poor and ill-paid. If the soldiers had received a man's pay of \$100 a month, then there would have been no flogging and no Bull's Run.

Saturday Evening Letter, BISMARCK TRIB., May 26, 1917, at 4. In Robinson's view, conscription was an unconstitutional taking of a person's right to the fruits of his labor. *Id.*

25. *James E. Robinson, Former Member of High Court, Is Dead*, BISMARCK TRIB., Mar. 23, 1933, at 1. The University of Michigan Law School, *Alumni Directory 2002* (listing "Robinson, James E." in the class of 1868).

26. *Id.*

27. See 1880 *Census for Winona, Minn.*, *supra* note 22 (listing Robinson's family and his occupation as an attorney).

28. See *Homesteader of Stratford Dies: James E. Robinson, North Dakota Politician and Jurist, Passes Away*, ABERDEEN EVENING NEWS, Mar. 24, 1933, at 1.

29. Even after Robinson went on the North Dakota Supreme Court, he sometimes mentioned "going to look after my good grain, stock and pig farm" in South Dakota. *Saturday Evening Letter*, BISMARCK TRIB., May 5, 1919, at 3. "Farming is my hobby," he said. *Id.*

30. DAKOTA TERRITORIAL S. CT. J., 741 (June Term, 1862-February Term, 1885).

before the North Dakota Supreme Court.³¹ Early in his Dakota Territorial practice, he was charged with subornation to perjury and subsequently won a dismissal on demurrer; the Territorial Supreme Court affirmed the dismissal.³² In Fargo, Robinson gained a reputation as a “title attorney.”³³ According to records in the Cass County Recorder’s office, he acted as trustee of lots in Fargo from 1898 to 1910, likely a form of investment trust in use at the time.³⁴

Robinson’s wife’s name was Isabella.³⁵ On his death in 1933, he left a son, Arthur Robinson, of Jamestown, North Dakota, and two daughters, Mrs. Jessie R. Broom, of Stratford, South Dakota, and Angie Blair, of Groton, South Dakota.³⁶ Apparently, another daughter, Lillie, predeceased him.³⁷

Robinson often exhibited eccentric behavior. “While practicing law in Fargo, he is said to have gone bare-headed and bare-foot in the winter time on many occasions.”³⁸ Robinson believed that “the best way to keep well was to have the flesh in contact with the soil, so he went about the streets barefooted.”³⁹

31. Search of West’s North Dakota Reporter CD-Rom Cases database (using search strategy: attorney(robinson) & date(<1918)) (on file with the author). One of the cases before the Territorial Court was the appeal of his acquittal for subornation of perjury. *United States v. Robinson*, 23 N.W. 90 (1885). Of the 64 cases before the North Dakota Supreme Court, he is listed as the sole counsel for one of the parties in 41 of the cases, Robinson and William Lemke as counsel for 8 of the cases, and the balance named either Robinson’s firm without designating the primary attorney or else named Robinson and others as joint counsel.

32. *United States v. Robinson*, 23 N.W. 90, 91 (1885). The actions complained of took place in January 1883 in Fargo. *Id.* Robinson was indicted by a grand jury in February 1884 for inducing another to lie, under oath, in a homestead proceeding. *Id.* He demurred for the reason that the facts did not constitute a public offense. *Id.* The trial court sustained the demurrer and the Supreme Court affirmed. *See United States v. Robinson*, (No. 160) Roll 8, Dakota Territorial S. Ct., *Microfilm Edition of The Dakota Territorial Records* (available at the *Orin G. Libby Manuscript Collection*, Department of Special Collections, Chester Fritz Library, University of North Dakota).

33. *James E. Robinson, Former Member of High Court, Is Dead*, BISMARCK TRIB., Mar. 23, 1933, at 1.

34. *See 7 DEEDS 511; 68 DEEDS 426; 81 DEEDS 188; and 99 DEEDS 608* (available at the Cass County Recorder’s Office in Fargo, North Dakota).

35. *See 1880 Census for Winona, Minn., supra note 22.*

36. *James E. Robinson, Former Member of High Court, Is Dead*, BISMARCK TRIB., Mar. 23, 1933, at 1 (naming only one daughter, Jessie R. Brown); *Homesteader of Stratford Dies: James E. Robinson, North Dakota Politician and Jurist, Passes Away*, ABERDEEN EVENING NEWS, Mar. 24, 1933, at 1 (naming two daughters, Jessie Broom and Angie Blair).

37. *See 1885 Fargo, Dakota Territory Census, supra note 22* (listing Lillie as a daughter). *But see James E. Robinson, Former Member of High Court, Is Dead*, BISMARCK TRIB., Mar. 23, 1933, at 1 (failing to identify Lillie as surviving Robinson).

38. *James E. Robinson, Former Member of High Court, Is Dead*, BISMARCK TRIB., Mar. 23, 1933, at 1.

39. JAMES E. ROBINSON, *WRONGS AND REMEDIES: ECONOMIC LIVE WIRE ESSAYS* 283-84 (Knickerbocker Press 1923) (republishing an excerpt of an undated article attributed to the *New*

Robinson and William Lemke practiced law together in Fargo, beginning about 1906.⁴⁰ Lemke became “one of the inner circle of [Non-Partisan] League leaders.”⁴¹ Later, their association contributed to Robinson’s election to the Supreme Court as the League flourished politically.

Robinson became a capable campaigner for public office. He sought the nomination for Congress in the 1908 primary as a Republican.⁴² He ran “on a radical platform, proposing the most progressive revision of established legal forms and practices. . . .”⁴³ Robinson campaigned with a cowbell. When he came to a convenient place, he rolled out a barrel, climbed on it, and swung his cowbell until he gathered a curious crowd to listen.⁴⁴ Robinson lost in the 1908 primary when he ran sixth in a field of nine candidates for congress, capturing only five percent of the Republican ballots.⁴⁵

Robinson first sought election to the Supreme Court in 1912. His only opponent was Bruce.

III. ROBINSON’S ADVERSARY

Andrew Alexander Bruce led a storied life to the North Dakota Supreme Court.

Bruce was born April 15, 1866, of Scotch parents with the British military service at the mountain fort of Nunda Drug near Madras in India.⁴⁶ His father, Edward Archibald Bruce, was a British general; his mother,

York Times). Robinson also opposed vaccinations for immunizations. “In the early days of Fargo my children were excluded from the public schools because I would not allow them to be vaccinated, there being no real or apparent necessity for vaccination.” *Saturday Evening Letter*, BISMARCK TRIB., Nov. 3, 1917, at 4.

40. Lemke came to Fargo in 1906, and Robinson and Lemke are listed as partners in the 1907 Fargo City Directory. 1907 FARGO AND MOORHEAD DIRECTORY 190 (Pettibone Directory Co. 1907).

41. See ROBERT L. MORLAN, POLITICAL PRAIRIE FIRE: THE NONPARTISAN LEAGUE 1915-1922 52-53 (1983) (recounting the ascent of the Non-Partisan League between 1915 and 1922 as a political force in North Dakota).

42. TIM EIKEN, JODI LARSON, & LLOYD OMDAHL, NORTH DAKOTA VOTES 128 (Lloyd Omdahl, Tim Gelinske, & Bruce Grindy eds., 1993).

43. ROBINSON, *supra* note 39, at 279 (republishing an excerpt of an article from *Country Gentleman* dated May 5, 1917).

44. *Id.* at 279-80. In his own book, Bruce remarked on Robinson’s unsuccessful 1908 campaign “in which he adopted the peculiar practice of collecting his audiences by ringing a cow-bell while standing at street corners, on railroad platforms, and on the top of freight cars.” ANDREW A. BRUCE, NON-PARTISAN LEAGUE 68 (Richard T. Ely ed., The MacMillan Co. 1921).

45. NORTH DAKOTA VOTES, *supra* note 42, at 128.

46. PROCEEDINGS OF THE BAR ASSOCIATION OF NORTH DAKOTA FOR THE YEAR 1911, at 3-4 (1911) [hereinafter PROCEEDINGS 1911] (offering a biographical sketch of Andrew Alexander Bruce, President of the State Bar Association, 1910-1911); *Memoriam for Hon. Andrew A. Bruce*, in 12 BAR BRIEFS OF STATE BAR ASS’N OF N.D. 166 (1935) [hereinafter 1935 *Memoriam*].

Anne Young McMaster, was the daughter of a colonel.⁴⁷ His parents sent Bruce to Europe to be educated, but both parents died when he was young.⁴⁸ This orphaned teen-ager immigrated to the United States in 1881.⁴⁹ After landing in New York City, alone, destitute, and friendless, Bruce made his way to Minnesota.⁵⁰ There, in the Winona area, he worked as a farm laborer and as a bookkeeper.⁵¹ In 1886, Bruce entered the University of Wisconsin and worked his way through. He did manual labor and stenography, and he wrote for newspapers.⁵² He completed both academic and law degrees at the University of Wisconsin.⁵³

Bruce worked two years as secretary to the judges of the Wisconsin Supreme Court while attending law school.⁵⁴ In 1892, he became chief clerk of the law department of the Illinois Central Railway.⁵⁵ He later became attorney for the Illinois board of factory inspectors and practiced law in Chicago.⁵⁶ In 1898, Bruce became a law professor at the University of Wisconsin.⁵⁷

He married Elizabeth Pickett, a native of Kentucky, in June 1899.⁵⁸ By 1911, they had two children: a daughter, Glenna Bruce, and a son, Edward McMaster Bruce.⁵⁹

Bruce left his Wisconsin law position in 1902 for a similar one at the University of North Dakota, and soon became dean of that law school.⁶⁰ In 1911, Governor John Burke appointed Bruce to the North Dakota Supreme Court to fill the vacancy left by the resignation of Chief Justice Morgan.⁶¹

At the time, Bruce served as President of the State Bar Association.⁶² A Bar publication acclaimed his qualifications:

47. PROCEEDINGS 1911, *supra* note 46, at 3-4.

48. *Id.*; see also *Andrew Alexander Bruce, Candidate to Succeed Himself as Justice of Supreme Court*, in N.D. STATE PUBLICITY PAMPHLET 44 (Devils Lake Journal 1912) (edited and compiled under authority of law, P.D. Norton, Secretary of State, Bismarck, North Dakota) (providing statements of candidates for the primary election on June 26, 1912).

49. PROCEEDINGS 1911, *supra* note 46, at 3-4.

50. *Id.* (providing that at first he was without money and without friends and worked as a farm laborer in Minnesota.)

51. *Id.* No record suggests Bruce and Robinson knew each other while both lived in the Winona area. Robinson lived in that vicinity from about 1868 to 1885.

52. PROCEEDINGS 1911, *supra* note 46, at 3.

53. *Id.*

54. *Id.*

55. *1935 Memoriam*, *supra* note 46, at 166.

56. *Id.*

57. *Id.*

58. PROCEEDINGS 1911, *supra* note 46, at 4.

59. *Id.*; *1935 Memoriam*, *supra* note 46, at 166.

60. *1935 Memoriam*, *supra* note 46, at 166.

61. PROCEEDINGS 1911, *supra* note 46, at 3.

62. *Id.* at 4.

He has written extensively for the legal magazines and encyclopedias and has done much work on the lecture platform. He has been on some of the more important committees of the American Bar Association, and was a delegate from that association to the World's Congress of Jurists and Lawyers. He was chairman of the committee on Organization of the Judicial Section of the American Bar Association, and has read several papers before the association. He has been . . . an associate editor of the *Central Law Journal*, and a member of the National Commission on Uniform State Laws.⁶³

Later, Bruce used his editorial connection to the *Central Law Journal* to air his differences with Robinson in a national forum.⁶⁴

When Bruce sought election to a full six-year term on the Court in 1912, Robinson opposed him.⁶⁵ The 1912 election contest opened a rivalry between Bruce and Robinson that lasted a decade.⁶⁶

63. *Id.* at 3-4. Bruce served on the following A.B.A. Committees:

-Special Committee on Classification of the Law, 1905-07. 1905 A.B.A. ANN. MEETING REP. 198; 1906 A.B.A. ANN. MEETING REP. 170; 1907 A.B.A. ANN. MEETING REP. 192.

-Uniform State Laws Committee, 1908-09, 1913-18. 1908 A.B.A. ANN. MEETING REP. 171; 1909 A.B.A. ANN. MEETING REP. 171; 1913 A.B.A. ANN. MEETING REP. 167; 1914 A.B.A. ANN. MEETING REP. 160; 1915 A.B.A. ANN. MEETING REP. 127; 1916 A.B.A. ANN. MEETING REP. 150; 1917 A.B.A. ANN. MEETING REP. 190; 1918 A.B.A. ANN. MEETING REP. 200.

-Grievances Committee, 1917-18. 1917 A.B.A. ANN. MEETING REP. 188; 1918 A.B.A. ANN. MEETING REP. 199.

-Special Committee on Co-operation Among Bar Associations, 1919. 1919 A.B.A. ANN. MEETING REP. 146.

-Legal Aid Committee, 1921. 1921 A.B.A. ANN. MEETING REP. 159.

-Special Committee American Citizenship, 1922. 1922 A.B.A. ANN. MEETING REP. 160.

-Committee on Noteworthy Changes in Statute Law, 1923-26. 1923 A.B.A. ANN. MEETING REP. 187; 1924 A.B.A. ANN. MEETING REP. 23; 1925 A.B.A. ANN. MEETING REP. 24; 1926 A.B.A. ANN. MEETING REP. 26.

Bruce read the following papers to sections of the A.B.A. at its Annual Meetings:

-*The Relation of the Bar Examiner to the Law School and Legal Education*, to the Legal Education Section, 1908. 1908 A.B.A. ANN. MEETING REP. 828.

-*The Function of the Bar Examiner*, to the Legal Education Section, 1911. 1911 A.B.A. ANN. MEETING REP. 689.

-*A Government by Men and Not by Law*, 1918. 1918 A.B.A. ANN. MEETING REP. 495.

-*Interest of the Public in Legal Education*, to the Legal Education Section, 1920. 1920 A.B.A. ANN. MEETING REP. 480.

64. See discussion *infra* Part VI.A. (discussing *Central Law Journal*: Bruce's Attack).

65. BRUCE, *supra* note 44, at 68.

66. *Id.*

According to Bruce, Robinson campaigned in 1912 “on a platform in which he promised many fantastic legal reforms; and in which he denounced the lawyers and judges of the past as the tools of big interests and the servants of corruption.”⁶⁷

Robinson did indeed endorse extensive changes in judicial administration:

[T]he law is still in its dark ages and some of its doctors still “grope as if they had no eyes and stumble at noon day as in the night.” The judges have time and opportunity to note the defects of the law and to draft and secure the passage of measures to remedy every defect. They have power to make rules of court, and to put an end to all of the delays, grafts and technicalities which continue to be a reproach to the law. They have power to get out of the old ruts of the law and to deal out remedial justice in a plain, common sense and businesslike manner. This they have never done. On the contrary, they keep in the old ruts of the law and permit an old technical procedure to blind their eyes and to shut out the light of truth, and often to make a mockery of justice. Hence it is that they may take months or years to decide a simple case *erroneously* which should be decided *correctly* in a day.⁶⁸

Robinson caustically deplored the outlandish expense of printed records for simple cases; “it is quite an easy matter to refer to the original record.”⁶⁹ He characterized holding only two terms of court each year as “a relic of judicial barbarism.”⁷⁰ Anticipating his later attitude on the Court, Robinson emphasized: “*There is no honesty in drawing a salary for the doing of work which is left undone.*”⁷¹

Robinson also promised, “if elected, to give an account of his work . . .”⁷² As we will see, he kept this promise.

According to Bruce, Robinson’s 1912 “campaign was managed by his law partner William Lemke, [who became a leader in the Non-Partisan League in 1916], and though it was unsuccessful, it served both to bring

67. *Id.*

68. *James E. Robinson, Candidate for Nomination as Justice of Supreme Court*, in N.D. PUBLICITY PAMPHLET 46 (Devils Lake Journal 1912) (edited and compiled under authority of law by P.D. Norton, Sec’y of State, Bismarck, North Dakota) (providing Robinson’s candidate statement for primary election on June 26, 1912).

69. *Id.*

70. *Id.*

71. *Id.* at 47.

72. *Id.*

Robinson's name before the people, and as a training school in political methods for his astute manager."⁷³

Bruce defeated Robinson in the 1912 primary for this Supreme Court seat, 36,128 votes to 30,341, and routed him in the general election, 43,989 to 28,901.⁷⁴

Robinson had an eccentric personality, an energetic temperament, and a dignified appearance.⁷⁵ He was a large man with an erect carriage and a full, flowing white beard;⁷⁶ he "looked like an Old Testament Prophet."⁷⁷ In 1916, at age seventy-three, Robinson ran again for the Supreme Court.

IV. ROBINSON'S ELECTION

Robinson's 1916 campaign for a Supreme Court position was much different than his 1912 campaign. Several big changes in judicial elections combined with a strong shift in political currents to make the 1916 campaign dramatic and extraordinary.

Three justices stood for re-election at the same time. This happened because in 1908, the people had approved a constitutional amendment to expand the Court from three to five members,⁷⁸ but defeated a companion proposal to increase a justice's term of office from six years with three staggered terms to ten years with five staggered terms.⁷⁹ In 1909, the Governor had appointed two justices to fill the new positions.⁸⁰ However, in 1910, two district judges, Edward T. Burke of Valley City and Evan B. Goss of Minot, defeated those appointees and won six-year terms, along with Charles J. Fisk, an incumbent who was re-elected.⁸¹ All three sought re-election in 1916.⁸²

73. BRUCE, *supra* note 44, at 68.

74. NORTH DAKOTA VOTES, *supra* note 42, at 89.

75. In an introduction published with one of Robinson's *Letters*, *The Bismarck Tribune* once described Robinson as "a character compelling attention." *Saturday Evening Letter*, BISMARCK TRIB., Dec. 22, 1917, at 4.

76. Meschke & Smith, *supra* note 3, at 245 (quoting former Clerk of the North Dakota Supreme Court, J. Henry Newton, Lecture No. 1 at the University of North Dakota School of Law, at 2 (1950) (lecture notes available at the North Dakota Supreme Court Law Library)).

77. Hon. Robert Vogel, *Justice Robinson and the Supreme Court of North Dakota*, 58 N.D. L. REV. 83, 84 (1982).

78. See N.D. CONST. of 1889 art. IV, § 89 (repealed 1976); 1907 N.D. Laws 410-11.

79. See I COLONEL CLEMENT A. LOUNSBERRY, NORTH DAKOTA HISTORY AND PEOPLE 447 (1917). Later, in 1930, the people approved a constitutional amendment for ten-year staggered terms. 1931 N.D. Laws 578, art. 46.

80. Meschke & Smith, *supra* note 3, at 241, 307.

81. *Id.*

82. *Id.* at 242-43.

Another big change was the No-Party ballot for all judges, which was enacted in 1909 and first used in the 1910 election of judges.⁸³ This law only prohibited references to party affiliation in the petition nominating a judge, and it prescribed a separate “Judiciary Ballot” to list candidates without any political affiliation shown.⁸⁴

No law, however, prevented political parties from endorsing judicial candidates. No statute or rule prohibited judicial candidates from announcing their political affiliations publicly. Indeed, during the 1916 campaign, one newspaper identified Justice Goss as a Republican and Justice Fisk as a Democrat, even though they had been elected on a no-party ballot in 1910.⁸⁵ Ironically, despite the efforts to separate politics from judicial elections, the 1916 campaign for the Supreme Court became the most partisan one in North Dakota’s history.

The March 1916 convention of the Non-Partisan League endorsed candidates for all state offices, including the three Supreme Court positions.⁸⁶ The League endorsed:

Luther Birdzell, professor in the law school of the state university and a former member of the State Tax Commission, known to be a “single-taxer”; Richard H. Grace, a lawyer of Mohall having Socialist inclinations, [He was later to become a staunch Harding man.] and James E. Robinson, Fargo law partner of William Lemke, a League attorney and one of the inner circle of League leaders. Robinson was an elderly gentleman with a flowing gray beard, known to be rather eccentric, though prominent as a crusader for judicial reforms.⁸⁷

The North Dakota State Publicity Pamphlet for the June 28, 1916 primary election contained statements from seven candidates for the three Supreme Court positions.⁸⁸

Among those seeking re-election, Edward T. Burke carefully distanced himself from any political endorsement: “It is my wish to owe my election to the voters themselves and not to any group of politicians.”⁸⁹ C.J. Fisk

83. *Id.* at 240.

84. 1909 N.D. Laws 82, ch. 82.

85. Meschke & Smith, *supra* note 3, at 242 n.160.

86. *Id.* at 242.

87. MORLAN, *supra* note 41, at 52-53 (chronicling the ascent of the Non-Partisan League between 1915 and 1922 as a strong political force in the state).

88. *See, e.g.*, N.D. STATE PUBLICITY PAMPHLET 13-20 (Globe-Gazette Printing Co. 1916) (edited and compiled under authority of law by Thomas Hall, Sec’y of State, Bismarck, North Dakota) (providing statements of the candidates for the primary election on June 28, 1916).

89. *Id.* at 14.

emphasized his ten years of experience as a trial judge and his ten years on the Supreme Court.⁹⁰ E.B. Goss insisted he had “industriously endeavored to assist this court to get abreast and kept up with its work. And for the first time in many years this Court is deciding cases soon after they reach here, to the satisfaction of the bar, the litigants and the people generally.”⁹¹ Keep this singular assertion in mind!

Among the League’s candidates, L.E. Birdzell emphasized his experience as a law professor and as chairman of the “first State Tax Commission,” but declared, “it is both impossible and inexpedient that I should make a campaign, canvass the voters or solicit votes, however much I may desire to do so.”⁹² R.H. Grace’s statement made him out to be a reformer like Robinson:

I shall advocate certain judicial reforms, among them being decisions, which shall be clear and more concise; decisions which are concise and clear are of more service to the Bench and Bar and also more easily understood by the public, than are lengthily written decisions.

Another much desired reform is to avoid the technicalities of law and procedure; rules of court can be so amended as to render much assistance along this line, as well as legislation may be procured to that end by the bench and bar properly presenting such needs to the legislature.⁹³

Robinson published two pages in the Publicity Pamphlet without a picture of himself, unlike the other judicial candidates who each put a picture in his publicity statement.⁹⁴ He pledged “[t]o draft and secure Court Rules and Laws to remedy the wrongs of the legal procedure; To write decisions concise and just, in accordance with law and reason; to show how to reduce the tax burdens in each year *at least several hundred thousand dollars*.”⁹⁵ Robinson complained about judges:

They seem to think that their duty is merely to dole out legal remedies and to draw their salary. Hence it is that the legal procedure is still in its Dark Ages, and some Law Doctors still grope as if they had no eyes, and stumble at noon-day as in the night. . . . They have power to get out of the old ruts of the law and to deal

90. *Id.* at 15.

91. *Id.* at 16.

92. *Id.* at 13.

93. *Id.* at 17.

94. *Id.* at 18-19.

95. *Id.* at 18.

out remedial justice in a *plain, common-sense, courteous and business-like manner*. This they have never done.⁹⁶

He summarized a number of unjust applications of procedure and de-claimed: “*The Court rules and rulings, do ever impose needless burdens, delays and complications.*”⁹⁷

Robinson concluded his publicity statement, declaring that “[t]he Supreme Court judges have power to make the crooked ways straight, and to establish in judicial procedure a new and just era. They have power to make the procedure a beacon to lighten the darkness of jurisprudence.”⁹⁸

None of the judicial candidates’ publicity statements mentioned a party affiliation or endorsement, except one, Burleigh F. Spaulding, who said, “Although a Republican, I was appointed to the Supreme Court by Governor John Burke in February, 1907, and . . . served until January, 1915.”⁹⁹ But Robinson cleverly included the separate word “Non-Partisan” in the heading of his statement, unlike any of the other candidates.¹⁰⁰ Since citizens received a “Non-Partisan Ballot” to vote for judges, Robinson apparently got away with an evident double meaning that connected him to the Non-Partisan League.

Heated public debates on disputed legal subjects have often affected judicial elections. A controversial decision by the North Dakota Supreme Court in early September influenced the 1916 election. The case arose after the people had approved a legislative proposal¹⁰¹ in the 1914 general election, amending the constitution to authorize constitutional amendments by popular initiative.¹⁰² Following that authorization, an initiated petition was filed in 1916 with the Secretary of State to amend the constitution to relocate the state capitol from Bismarck to New Rockford.¹⁰³

Several taxpayers sought an original writ in the Supreme Court to enjoin the Secretary of State from submitting it to the voters.¹⁰⁴ The taxpayers mainly argued that the constitutional amendment for initiated

96. *Id.*

97. *Id.* at 19.

98. *Id.*

99. *Id.* at 20. Governor Burke was a Democrat who later became a Supreme Court justice. See Meschke & Smith, *supra* note 3, at 241.

100. James E. Robinson, *Candidate for Judge of the Supreme Court*, in N.D. PUBLICITY PAMPHLET 18 (Globe-Gazette Printing Co. 1916) (edited and compiled under authority of law by Thomas Hall, Sec’y of State, Bismarck, North Dakota).

101. 1911 N.D. Laws 163-65, ch. 89; 1913 N.D. Laws 123-24, ch. 98,

102. 1915 N.D. Laws 401-02, art. XVI. The yes vote totaled 43,111; the no vote was 21,815. *Id.* at 402.

103. State *ex rel.* Linde v. Hall, 159 N.W. 281, 282 (N.D. 1916), *overruled by* State *ex rel.* Twichell v. Hall, 171 N.W. 213 (N.D. 1918).

104. *Linde*, 159 N.W. at 282.

amendments was only enabling and still needed legislative action to implement it.¹⁰⁵

On September 11, 1916, in a unanimous opinion by Justice Goss in *State ex rel. Linde v. Hall*,¹⁰⁶ the Supreme Court ruled that the 1914 constitutional amendment authorizing initiated amendments was not self-executing, and so the proposed capitol relocation amendment could not go on the ballot.¹⁰⁷ In a remarkably rigid interpretation, the Court specifically held that legislative action was necessary for several reasons, including to designate the number of voters above “at least twenty-five percent of the legal voters in each of not less than one-half of the counties” needed to file a petition for an initiated amendment.¹⁰⁸

Three justices wrote concurring opinions. Justice Burke’s one paragraph insisted, “This case has received the most careful consideration by every member of the court”¹⁰⁹ Justice Christianson wrote extensively, expanding on the reasoning of the main opinion.¹¹⁰ Justice Bruce’s short opinion criticized the “autocratic” conduct of the Secretary of State in taking it on himself to declare the petitions sufficient.¹¹¹

The Non-Partisan League apparently saw this decision, consigning all initiated amendments to legislative control, as hostile to the League’s plans to authorize public ownership of some businesses. The League leadership believed that friendlier judges would be important in implementing its programs.¹¹² After the *Linde* decision, the 1916 campaign centered on the contests for the Supreme Court.

With Lynn Frazier and most of his associates on the [League’s] state ticket looking more and more like “sure things” in November, the campaign during the fall months boiled down for the most part to a single issue. The Good Government League and the opposition press decided to concentrate their efforts on keeping control of the state Supreme Court, and the three League candidates were subjected to both abuse and ridicule Since the judges were elected on a separate nonpartisan judicial ballot, the chances were good that it would be neglected by many voters. The other three candidates for the positions on the five-man court

105. *Id.* at 284.

106. 159 N.W. 281 (N.D. 1916).

107. *Linde*, 159 N.W. at 289.

108. *Id.* at 287-88.

109. *Id.* at 289.

110. *Id.* at 290-99.

111. *Id.* at 289-90.

112. Meschke & Smith, *supra* note 3, at 243.

were incumbents and on the basis of past decisions the League was certain that they could be counted upon to join with their old colleagues to strike down any “radical” acts of a League legislature.

Throughout the fall months almost the entire emphasis of the [*Nonpartisan*] *Leader* was upon the absolute necessity of electing the League judicial candidates if the work of the legislature was not to be thwarted.¹¹³

The Nonpartisan Leader, the League’s weekly journal, published its endorsed candidates’ views on the function of the judiciary.¹¹⁴ “Robinson discussed his favorite theme of preference for the substance of justice over legal technicalities.”¹¹⁵

The League-endorsed candidates won decisively: Robinson topped the field with 62,675 votes; Birdzell had 61,109; and Grace had 57,170.¹¹⁶ The incumbents trailed far behind: Chas. J. Fisk had 44,028; E.T. Burke, 43,442; and Burleigh F. Spalding, 37,890.¹¹⁷

Campaign animosities continued past the election. A serious question arose regarding when the victors should take their offices.

The 1889 Constitution directed: “The judges of the supreme court shall, immediately after the first election, . . . hold his office . . . from the first Monday in December, A.D., 1889.”¹¹⁸ Relying on this clause, Robinson, Grace, and Birdzell made known plans to begin work on the first Monday in December 1916. One historian explained, “Several important cases were to be decided during the month of December, and it was generally assumed that the League was eager to utilize its new majority.”¹¹⁹

The Attorney General quickly petitioned the Supreme Court for an “orderly determination . . . of the rights of the respective contenders.”¹²⁰ The three defeated justices disqualified themselves, and the two remaining justices, Bruce and Christianson, called three district judges as replacements.¹²¹ The three temporary justices permitted Bruce and Christianson to

113. MORLAN, *supra* note 41, at 83.

114. *Id.* at 84.

115. *Id.*

116. See NORTH DAKOTA BLUE BOOK 263 (1919) (containing the 1919 *N.D. Legislative Manual*).

117. Spalding had defeated the incumbent, Goss, in the June 1916 primary. NORTH DAKOTA VOTES, *supra* note 42, at 89.

118. N.D. CONST. of 1889 art. IV, § 92 (1889) (repealed 1976).

119. MORLAN, *supra* note 41, at 94.

120. State *ex rel.* Linde v. Robinson, 160 N.W. 512, 512 (N.D. 1916)[*Robinson I*].

121. *Id.*

withdraw as well because “determination on the merits of the controversy may affect the tenure of [their] office . . .,” and also ordered the defeated justices, Burke, Fisk, and Goss, “be interpleaded as parties respondent . . .”¹²² The three temporary justices also named two more district judges as replacements.¹²³

In a counter-move, the three Justices-elect convened as the Supreme Court at noon on Thursday, December 7, 1916, and issued an order advising the “third court” that “you have no right or jurisdiction to appear as a court and to assume to hear and adjudicate” whether the Justices-elect properly held office.¹²⁴

Yet that afternoon, the “provisional court” of four District Judges Pollock, Nuessle, Crawford, and Leighton heard oral arguments on the petition by the Attorney General in the house chamber at the capitol “in the presence of a hundred or more spectators.”¹²⁵ Attorneys William Lemke and William Langer (the newly elected attorney-general) represented the Justices-elect and argued the provisional court had no jurisdiction.¹²⁶ Grace and Robinson also orally argued similarly.¹²⁷ *The Bismarck Tribune* quoted Robinson extensively and headlined its story, “Justice-Elect [Robinson] Derides and Defies Provisional Body in Long Tirade.”¹²⁸

The four temporary justices promptly issued an opinion on Monday, December 11.¹²⁹ The opinion¹³⁰ concluded elected justices begin their terms on the first Monday in January of the year after they are elected.¹³¹

In a closing paragraph, the opinion rebuked Robinson:

During the course of the argument herein James E. Robinson, one of the judges-elect, threatened that, upon taking their seats the judges-elect would put aside and render nugatory the acts of this court as now constituted, as well as those of the court wherein Judges Fisk, Goss, and Burke have taken part since December 4th.¹³²

122. *Id.* at 513.

123. *Id.* at 514.

124. *North Dakota Has Two Too Many Courts*, BISMARCK TRIB., Dec. 7, 1916, at 1.

125. *Robinson Calls Supreme Court Picked Tribunal*, BISMARCK TRIB., Dec. 8, 1916, at 1.

126. *Id.*

127. *Id.*

128. *Id.*

129. *State ex rel. Linde v. Robinson*, 160 N.W. 514 (N.D. 1916) [*Robinson II*].

130. This opinion was recently described, oddly, as “[o]ne of the most cogent expositions of text-based [constitutional] analysis” in North Dakota. Lynn M. Boughey, *A Judge’s Guide to Constitutional Interpretation*, 66 TEMP. L. REV. 1269, 1270 (1993).

131. *Robinson II*, 160 N.W. at 520.

132. *Id.*

The temporary Court expressed disbelief: “[W]e cannot bring ourselves to believe that the remaining judges-elect will support any such revolutionary action.”¹³³

Despite Robinson’s histrionics, the three Justices-elect apparently recognized the jurisdiction of the “old” Court during the rest of December.¹³⁴ The “old” Court continued to decide cases throughout December.¹³⁵

In January 1917, however, the “new” Court received several petitions to rehear those decisions.¹³⁶ Those petitions were denied.¹³⁷ One denial drew a harsh dissent from Robinson, the only “new” justice who participated on the rehearing motions: “The case is a travesty on the administration of justice.”¹³⁸

The three newly elected justices joined sitting justices, Adolph M. Christianson, who was elected in 1914, and Andrew A. Bruce, on the first Monday in January 1917.¹³⁹ Since he then had the shortest remaining term, the Constitution made Bruce Chief Justice.¹⁴⁰ Before taking office, Robinson explained some of his philosophy to the press:

The average jurist is, after all, a very ignorant man. He knows the law, or pretends to, or honestly believes that he does. But he doesn’t know enough of his fellow man; he is not familiar enough with the arts and the sciences; with the practical trades; he doesn’t know enough, as a rule, of the average man and woman; of their aspirations; their point of view. Hemmed in at every side by the written law, we are too much inclined to ignore the higher law—the rights of every man and woman. Sometimes, we even go to the point where we place written law and precedent above sound common sense. But, we are progressing. We are, at least, not standing still. And perhaps the time is not far distant when we will

133. *Id.*

134. A few days after the decision, Robinson notified the State Auditor “that he would be held legally responsible should he recognize any warrants for December salary presented by the retiring supreme court justices.” *Robinson Warns Auditor to Hold Up Judges’ Pay*, BISMARCK TRIB., Dec. 16, 1916, at 1. But cooler heads apparently prevailed. “The new supreme court will proceed with its business January 1, without any formality or delay, Justice-elect James E. Robinson announced this morning.” *Supreme Court Situation Not Changed Today*, BISMARCK TRIB., Dec. 18, 1916, at 6.

135. MORLAN, *supra* note 41, at 94.

136. *Id.*

137. *Id.*

138. *Youmans v. Hanna*, 161 N.W. 797, 806 (N.D. 1917) (Robinson, J., dissenting).

139. Meschke & Smith, *supra* note 3, at 307.

140. The 1889 Constitution directed that the Supreme Court “judge having the shortest term to serve, not holding his office by election or appointment to fill a vacancy, shall be chief justice” N.D. CONST. of 1889 art. IV, § 92 (repealed 1976).

find the key to simple justice, which is, after all, that thing in whose interests all laws are, presumably, written.¹⁴¹

It must have disconcerted his colleagues when Robinson declared most judges were “ignorant.”

Robinson also expressed a similarly unrestrained thought, stating that “[t]he judge of the future will be an alienist, a practical philanthropist, a man with a keen knowledge of all the sciences and above all a humanitarian.”¹⁴²

V. ROBINSON’S COURT

A. SATURDAY EVENING LETTERS

From the beginning, Robinson changed one thing dramatically. He wrote a weekly letter to the public about the activities of the Court. The newspaper in the capitol city, *The Bismarck Tribune*, regularly published it.¹⁴³ His *Saturday Evening Letters (Letters)* chronicled his years on a contentious appellate court.

Robinson’s introductory *Letter* explained his principal purpose: “As I think the public officers should give to the Press and the public some regular account of their doings, my purpose is to submit to you a Saturday evening letter on the progress of the Supreme Court.”¹⁴⁴ Later, Robinson expanded his objectives:

141. *Judge of the Future Will be Many-sided Expert Thinks J.E. Robinson*, BISMARCK TRIB., Dec. 23, 1916, at 4.

142. *Id.* It is difficult to tell what shade of meaning Robinson intended with his use of “alienist.” See THE ANGLO-AMERICAN ENCYCLOPEDIA AND DICTIONARY 133 (J.A. Hill & Co. 1906) (defining alienist as “[o]ne skilled in the treatment of mental diseases.”). Modern dictionaries define an “alienist” as “A psychiatrist who specializes in giving legal evidence.” THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 37 (Unabridged ed. 1976). Black’s Law Dictionary defines alienist as “a psychiatrist, esp. one who assesses a criminal defendant’s sanity or capacity to stand trial.” BLACK’S LAW DICTIONARY 80 (8th ed. 2004). The term did not appear in *Black’s* until the third edition in 1933!

143. In his *Letter* published Tuesday, June 11, 1918, Robinson explained: “The letter is given free as sunshine. It was sent to all the big dailies as long as they cared to use it. Now I think it is published only by two progressive newspapers, The Bismarck Tribune and Jamestown Daily Alert.” *Saturday Evening Letter*, BISMARCK TRIB., June 11, 1918, at 4.

144. *The Supreme Court*, BISMARCK TRIB., Jan. 8, 1917, at 1. Robinson recognized that it was the first time that ever a supreme court judge has undertaken to give the press and the people weekly Letters in regard to the public service. On such matters the people have been kept in utter darkness, and, of course, they have had poor service, and so it must ever be until the press and the people show some special interest in public affairs and in the doings of their public servants.

Saturday Evening Letter, BISMARCK TRIB., July 21, 1917, at 4. At the same time, he recognized “the editors of some big dailies do not like me and do not care to aid the cause of judicial reform by publishing my weekly Letters.” *Id.* Later, *The Tribune* said his *Letters* had “appeared

The purpose of these weekly Letters is to throw the light of publicity on the procedure of our courts and judges so each and all may have a greater incentive to do his duty and to make the public service as prompt and efficient as any private service.¹⁴⁵

As we will see, Robinson flooded “the light of publicity” on a difficult and dysfunctional Court. Robinson’s innovation illuminated the judicial branch for public scrutiny.

In his first Letter, Robinson began reporting his colleague’s attendance and activities:

D[u]ring the past week all the Judges have worked five days. We have heard arguments in a dozen cases that should have been considered and decided last May. We have some ninety-five cases on the calendar and we purpose, if possible, to consider and decide those cases during the months of January and February, and then to keep right up with the work.¹⁴⁶

Later *Letters* gave even more details on their work.

After his second week, Robinson expressed impatience with a system that had left so much work undone:

The idea of any court being six months, or a year, or two years, behind with work is perfectly ridiculous. If judges cannot keep up with their work, they should have manhood enough to resign. For a judge to leave his work undone and to draw his salary for doing it is, in effect, the same as stealing the money.

* * *

We are still hampered with the old court rules and do not make progress with throwing them off and adopting new rules.¹⁴⁷

These thoughts became recurring themes in subsequent *Letters*.

In mid-January 1917, Bruce and Robinson had a public squabble. It came in oral argument on a special petition to recall the record for an unusual second rehearing in *Youmans v. Hanna*,¹⁴⁸ one of the contentious cases decided by the lame-duck justices in late 1916.¹⁴⁹ After their exchange of words, Robinson denounced an assertion by Bruce as “un-

regularly only in *The Tribune*” and boasted they had become “a national institution.” *Saturday Evening Letter*, BISMARCK TRIB., Dec. 22, 1917, at 4.

145. ROBINSON, *supra* note 39, at 69.

146. *The Supreme Court*, BISMARCK TRIB., Jan. 8, 1917, at 1.

147. *Saturday Evening Letter*, BISMARCK TRIB., Jan. 15, 1917, at 4.

148. 161 N.W. 797 (N.D. 1917).

149. *Robinson and Bruce Engage in Brief Tilt*, BISMARCK TRIB., Jan. 17, 1917, at 1.

true.”¹⁵⁰ This skirmish commenced years of personal conflict between Bruce and Robinson.

Early on, Robinson aspired to a hard-working and well-prepared Court—a “hot court”—that would actively discuss each case with counsel at oral argument. He explained why:

Now it often happens that a lawyer has not a way of stating his case so as to appeal to the understanding of the judges and he may talk over their heads, while they sit and listen like dummies. To prevent this I have assumed the task of looking into the records of every case before it is argued, and then I am in a position to state the case in a few words so that any person can understand it, and to direct counsel to the material points of the case and to discuss it with the lawyers. In that way we save much time and come to a good understanding of the case.¹⁵¹

Robinson’s colleagues did not meet his expectations.

Every appellate judge ought to emulate Robinson in preparation. Thorough study of the briefs and records before each oral argument is important to make the most effective use of the appellate process.

B. THE BACKLOG

Robinson and his colleagues confronted a huge backlog. One hundred fifty completed appeals awaited action.¹⁵²

At age seventy-four, Robinson remained vigorous. And he urgently wanted to catch up with the work.

“In his first year [1917] on the court, . . . [Robinson] wrote the amazing total of forty-eight opinions of the court, thirty-one dissents with opinions, and twenty-nine concurrences with opinions (a total of one hundred and eight written opinions) . . .,” according to former Justice Robert Vogel, who surveyed Robinson’s first years of work.¹⁵³ Robinson was proficient, but the Court needed more than just his forceful efforts.

Robinson knew how to bring the calendar current and soon explained it to his colleagues and the public:

150. *Id.* Robinson gave a premature public explanation of his view of that case in a *Saturday Evening Letter*. *Saturday Evening Letter*, BISMARCK TRIB., Jan. 22, 1917, at 4. Later, Robinson published his dissent in a *Letter* blasting the decision to deny the motion: “The case is a travesty on the administration of justice.” *Saturday Evening Letter*, BISMARCK TRIB., Mar. 19, 1917, at 4.

151. *Saturday Evening Letter*, BISMARCK TRIB., Jan. 22, 1917, at 4.

152. *Saturday Evening Letter*, BISMARCK TRIB., Sept. 28, 1918, at 6.

153. Vogel, *supra* note 77, at 85.

We have still on hand about 70 old appeal cases. To clean the slate, we must decide and finally dispose of ten cases every week. We must shunt [sic] down on motions for rehearing, which counsel are in the habit of making, just to ease their mind when a decision is given against them. Though we incubate over a case for a year, it does not lessen the chance of error. Without proper self-confidence, there is a lack of clear mental vision. A person who is always in doubt and always hesitating and reconsidering, ceases to have a quick and clear perception. He makes his mind a beast of burden.

Under the present system a judge has to go over the details of a case several times and to keep it in his mind about two months. This is mental drudgery. It is intolerable. We must stop it. Every case should be decided and finally disposed of within a few days after it is argue[d] or submit[ted].¹⁵⁴

His colleagues were slow to accept his suggestions, and Robinson repeatedly prodded his colleagues:

The other judges have not yet come to follow my easy ways, and so they make themselves a lot of work. They continue to write decisions which are too long and too learned to be published or read. They take much time in criticizing my decisions¹⁵⁵

In the same *Letter*, in a single sentence, Robinson complained both about an unnamed colleague's absence on long trips for American Bar Association (A.B.A.) meetings and about one who wrote long opinions.¹⁵⁶ Robinson was clearly disapproving of Bruce who was most active in the A.B.A.¹⁵⁷

Robinson recognized past justices who would often "go off on long trips and leave their work undone and . . . they waste[d] [their] time in writing long-winded decisions."¹⁵⁸ But Robinson now believed "it will be different," since the A.B.A. itself had recently "condemned the delays and technicalities of the judges and the writing of long-winded decisions"¹⁵⁹

154. *Saturday Evening Letter*, BISMARCK TRIB., Feb. 24, 1917, at 4.

155. *Saturday Evening Letter*, BISMARCK TRIB., Mar. 10, 1917, at 4.

156. *Id.*

157. "[Bruce] has been on some of the more important committees of the American Bar Association, and was a delegate from that association to the World Congress of Jurists and Lawyers. He was chairman of the Committee on Organization of the Judicial Section of the American Bar Association, and has read several papers before the association." PROCEEDINGS 1911, *supra* note 46, at 3-4.

158. ROBINSON, *supra* note 39, at 70.

159. *Id.*

In mid-March in 1917, Robinson complained pointedly about the slow pace and lack of concerted effort:

During the past two weeks we have heard arguments in only two or three cases. Some judges have been on the sick list, some absent, two, three or five days. The judges have not yet adopted . . . any good working system. Some cases that were argued early in January have not yet been decided, and I know of no good reason why competent judges should not decide every case within a week after it is argued.¹⁶⁰

Two months later, Robinson expressed his frustration about absent judges.

This week all judges have all been present and at work. Last week there was a general absence of from two to six days. I do wish it were law that no state officer should receive his monthly pay without filing an affidavit showing his daily and monthly service. Then judges would not retire from office leaving a good part of a year's work undone.¹⁶¹

Robinson pressed hard for more concerted action to cut the backlog.

C. ABSENCES AND DELAYS

In June 1917, Robinson reported:

This week we have heard arguments in eight cases. Next week we hear arguments in 20 cases. Then, during the June month, we purpose to write up and sign up on every case argued and submitted during this year. Then the pending appeals will be reduced to about 50 cases. In the meantime, so that our judges may be good and keep steadily at work and not run off and leave me, as they sometimes do, I must write a few Jeremiads.¹⁶²

His "jeremiads" had little effect.

Robinson also complained about the Court's inefficient procedures:

The purpose of these Letters is to make the demand for reform more and more insistent by exposing the wrongs and showing how to right them. The judges have been too much in the habit of covering up and concealing their own wrongs.

* * *

160. *Saturday Evening Letter*, BISMARCK TRIB., Mar. 19, 1917, at 4.

161. *Saturday Evening Letter*, BISMARCK TRIB., May 12, 1917, at 4.

162. *Saturday Evening Letter*, BISMARCK TRIB., June 9, 1917, at 4. A jeremiad is "a lamentation, mournful complaint." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 766 (Unabridged ed. 1976).

Thus far there is a radical defect in our system of procedure. We double our work by a system of nursing it. We sit and hear arguments day after day for a month or more and decide the cases in one, two or three months, when the arguments are forgotten. Then we hear motions for review in every petty case and go all over the same old records, and the result is mental drudgery and a fearful waste of time. But soon, very soon, I hope we will learn how to better conditions and to adopt rules to reduce the procedure to a more businesslike system.¹⁶³

There are cases, of course, requiring more research, study, and time than Robinson recognized. The reasons vary from the complex or unusual nature of the case to the poor quality of the submissions by the lawyers in a case that will be a significant precedent. But, in the main, Robinson rightly expected faster action and prompter disposition of the usual cases.

After his first six months on the Court, Robinson reported hopefully on the status of the Court's work.

This time I have no scandal to write about absent judges. We have all been good and have sworn a thousand oaths to catch up and to keep up with the court business. Every judge has a pile of decisions written up and ready for signing and we hope to dispose of them in short order.¹⁶⁴

Robinson was disappointed yet again.

Robinson believed a justice's unexcused absence from the Court was irresponsible.

What are the causes of judicial inefficiency; why do courts waste time in hearing arguments without deciding cases? When in one week the judges hear arguments in 12 or more cases, why do they not write up and sign up and dispose of them during the same or the next week, so as to average at least one decision a day? The reason is that in court business, there is no business system. Hence, the business is delayed and the work of the court is doubled. One judge writes a decision and gives a copy to each of the other judges, who should examine it and concur or dissent within a week; but after the lapse of several weeks when a conference is called, one or more judges have not examined the case and so it goes over from week to week or month to month. One cause of it is the absence of the judges. They do not seem to realize that they

163. *Saturday Evening Letter*, BISMARCK TRIB., June 9, 1917, at 4.

164. *Saturday Evening Letter*, BISMARCK TRIB., June 30, 1917, at 4.

have sworn to do their duty faithfully, and that their duty is to be on time and at their work during business hours of every day, just the same as other hired men who get less pay.

To one brother judge I say: What means it that one judge is absent today? The answer i[s]: Has he not a perfect right to be absent? I say: No, sir; he has no more right than any other hired man to steal his time and leave his work undone. The theft of time is even worse than the theft of money.¹⁶⁵

Robinson left his readers to guess which colleague he accused of stealing part of his salary by absences. We think it was widely understood at the time, and you, too, can identify who Robinson accused.¹⁶⁶

Robinson realized that he could do little more than publicize his colleagues' absences and failings and hope they would respond to public opinion. So he continued to lecture them.

By needless delays the judges double their work. They double it again in writing long-winded decisions on numerous trivial points of no merit, which deserve only a severe reprimand. The work is also increased and delayed by lack of punctuality. A judge does not feel ashamed to come to his chambers at 9:30 o'clock or 10 o'clock in the morning or at 2 or 3 o'clock in the afternoon. I am sure it is not thus with the workers of the Ford Motor company or with those who work on the streets of Bismarck. They are on time to a minute and their work is amazingly efficient. They sit down by a tree, eat their lunch and get up and work like men deserving honor and respect.

I am the acting censor of the supreme court, When my young judges play truant boy, come late to school, as they often do, or do not come at all for days, it is no pleasure for me to call them to time and to hear them say it is none of my business. It is truly amazing that any judge should claim the right to go and come as he pleases and to hold up and delay the court's business. But such is the fact. Were the judges hired to do the same work for a James Hill or any good business company they would do it promptly or promptly lose their jobs. But the judges are appointed for life or for a term of years, and nobody can discharge them. They are put

165. *Saturday Evening Letter*, BISMARCK TRIB., July 7, 1917, at 4.

166. Two weeks later, Robinson wrote more about an unnamed justice's absences: "This week we charged one judge with an absence of two full days and now hope that he will make up for a month of lost time." *Saturday Evening Letter*, BISMARCK TRIB., July 21, 1917, at 4.

upon their honor and left free to do as they please. Too often they forget that they have sworn to do their duty faithfully and to sustain the constitution and to administer justice without denial or delay; and the editors of newspapers do not care to publish of a judge that he is a thief; that he steals his time or disregards his oath. Still, for such wrongs the only present remedy is by continuously pointing them out with the finger of publicity . . . [T]he first step is to make of ours a model court, with model rules and model business methods. We must learn to be on time and dispose of court business in a business way and to waste no time in writing long, stuffy decisions, or on the hearing of endless arguments.¹⁶⁷

After this “finger of publicity,” Robinson felt the need to defend his own brief absence:

During August we do not hear arguments; but four of the judges remain at work to clean up the slate and make up for lost time. On every case thus far submitted I have written a special opinion, concurring or dissenting, as it may be, and these I leave with our good clerk. Now, having no work on hand I am off to my harvest and threshing. Goodbye.¹⁶⁸

Robinson was back at work ten days later, “where, until Christmas, I purpose to be on time to a minute every day—and I pray that my good friends the other judges may do likewise.”¹⁶⁹

Robinson’s complaints about absences, delays, and inefficiencies continued:

We now have pending 25 appeals which were submitted in the days of long ago. These we hope to sign up and dispose of during the present month, and in the first week of September to commence the hearing of new case[s], so as to clean the slate during the present year. Still we must count on some disappointment because of a chronic system which is radically wrong.

As it seems, one judge has a good reason for going off all next week and so we must excuse him. Two judges who have been longest in office are now absent without leave. They are at Dickinson, hobnobbing and feasting with the members of the Bar association, and of this, the propriety is at least very questionable;

167. *Saturday Evening Letter*, BISMARCK TRIB., Aug. 4, 1917, at 5.

168. *Id.*

169. *Saturday Evening Letter*, BISMARCK TRIB., Aug. 20, 1917, at 4.

but next year is coming fast. Then there is to be an election, and in the meantime it may behoove some public servants to be good and at their post of duty.¹⁷⁰

Robinson plainly hoped his “fingers of publicity” before the 1918 election, when Bruce would be up for re-election, would pressure Bruce to stick to the work at hand.

Robinson’s exasperation, however, did not go away:

This week I am as blue as Jeremiah the Prophet. During the present year most of our judges have been six weeks absent from their post of duty. During the past two weeks we have done nothing. One judge is off to New York; one at Chicago; one on the exemption board. We have 25 cases which were submitted months ago and they are still undecided. We have a system of doing business which doubles our work.¹⁷¹

Occasionally, Robinson became hopeful about possibilities of improvement, but generally he despaired of any real progress.

We are looking for the return of our Chief Justice from a session of the American Bar Association at New York. It was well for him to be there as that great body of wise lawyers passed a resolution charging all the judges to cease writing those long decisions against which we have so often argued and protested. Indeed they commended to the judges the principles of judicial reform advocated in these Letters. A prophet is not without honor save in his own country. I hope we have seen the last of the long-winded decisions (20 or 40 pages) imposing needless burdens upon the suitors and tax payers.

We still have hope that from now on during the present year each judge of our court will take some pride in devoting all his time to his duties at the capitol so that by Christmas we may be right up with the work. During the past five weeks we have made little progress. We have not had a quorum of the judges. . . . [I]t seems vain to hope for greater efficiency until the people and the press demand it and make the demand manifest and emphatic.¹⁷²

Still, Robinson went on publicly pushing for improvement.¹⁷³

170. *Id.*

171. *Saturday Evening Letter*, BISMARCK TRIB., Sept. 3, 1917, at 5.

172. *Saturday Evening Letter*, BISMARCK TRIB., Sept. 8, 1917, at 4.

173. *Saturday Evening Letter*, BISMARCK TRIB., Sept. 15, 1917, at 4 (“The public servants must be given to understand that their time belongs to the state and when they steal their time they steal money and put themselves on a par with money stealers, that is to say, with common

As the year went on, Robinson sometimes became glumly optimistic about a potential for progress:

This week all our judges have been at work and I think they are well disposed to try to make up for lost time. We have now . . . some eighty appeals which have not been argued and forty appeals argued and submitted and ready for conferences. If we clean up all the forty cases this month we may dispose of most of the rest during December, but it seems there is little chance of cleaning the slate during the present year.¹⁷⁴

At the same time, Robinson publicly complained about Chief Justice Bruce permitting overlong oral arguments and conferences.

Our time record is not good. We spend too much time in hearing mere talk and in conferences on small matters—in deciding cases and re-considering them to please offended counsel and in doing the same work over and over.

* * * *

One cause of delay is the hearing of long arguments on kindergarten matters. Our chief justice in his kindness is never disposed to shut off needless talk. He does not want to offend the lawyers. He says: “Let them talk. They have a constitutional right to talk.”¹⁷⁵

Robinson also complained about “[u]mbersome whale decisions,” including an eighteen-page opinion by Justice Grace that Robinson boiled down to one page to show how it could be done.¹⁷⁶

Robinson’s public attention to his colleagues’ absences and delays did not sit well with them.¹⁷⁷ He realized this:

This week all our judges have been present and at work, but not always promptly on time. Last week one judge was absent six days and one for three days. I do not think either one would thank me for giving his name.¹⁷⁸

thieves.”); *Saturday Evening Letter*, BISMARCK TRIB., Sept. 29, 1917, at 4 (“This week our court has made little progress.”); *Saturday Evening Letter*, BISMARCK TRIB., Oct. 6, 1917, at 4 (“During the last two months our court has made little progress.”); *Saturday Evening Letter*, BISMARCK TRIB., Jan. 26, 1918, at 4 (“This week I can report no progress.”).

174. *Saturday Evening Letter*, BISMARCK TRIB., Nov. 12, 1917, at 4.

175. *Id.*

176. *Id.*

177. Likely, Robinson’s other eccentric antics at the Court also perturbed his colleagues. See Meschke & Smith, *supra* note 3, 246, 246 n.184.

178. *Saturday Evening Letter*, BISMARCK TRIB., July 14, 1917, at 4.

Yet, by modern standards of judicial conduct, Robinson's public reports on repeated absences and constant delays promoted important judicial values.¹⁷⁹

D. REFORMING RULES

In September 1917, Robinson explained how he had tried to get new rules to improve the Court's procedures: "Last January I submitted to the court a draft of rules to expedite and better the practice which appeared to meet with the approval of the other judges but so far we have had so much absence and so many delays that we have not adopted a single rule."¹⁸⁰ It took even longer for the Court to improve the rules.

In October 1917, Robinson reported a little progress on rules.¹⁸¹ Explaining judicial procedures to his readers, Robinson praised his Court for eliminating the old system of holding a single term of court each six months.¹⁸² "Now every day is a term day," he rejoiced, so that a completed appeal could be heard whenever it was ready, rather than waiting up to nine months for an arbitrarily fixed hearing date.¹⁸³ Wisely, the North Dakota Supreme Court has kept this practice of a continuous term.¹⁸⁴ The Court schedules oral arguments each month (except July and August) for nearly all appeals ready by the middle of the prior month.¹⁸⁵

Robinson applauded a rule revision that did away with the need for a printed record in every appeal. "The printing was a cause of delay and of terrible expense," he explained.¹⁸⁶ Robinson also scolded attorneys for filing lengthy briefs that often contained "40 to 80 assignments of error. That is folly."¹⁸⁷

Robinson accused trial attorneys of causing needless delays and expenses by raising "a continuous string of exceptions and objections to every question."¹⁸⁸ He argued that witnesses were often hindered in telling the

179. "The judicial duties of a judge take precedence over all the judge's other activities." N.D. CODE OF JUD. CONDUCT Canon 3A (2004-2005). "A judge shall dispose of all judicial matters promptly, efficiently and fairly." *Id.* at 3B(8).

180. *Saturday Evening Letter*, BISMARCK TRIB., Sept. 15, 1917, at 4.

181. *Saturday Evening Letter*, BISMARCK TRIB., Oct. 13, 1917, at 4.

182. *Id.*

183. *Id.*

184. "Presently, a case is assigned to the next court term at least 17 days after the brief of the appellee or cross-appellee is filed." N.D. R. APP. P. 45 Explanatory Note.

185. *Id.*

186. *Saturday Evening Letter*, BISMARCK TRIB., Oct. 13, 1917, at 4.

187. *Id.* The North Dakota Rules of Appellate Procedure limit the length of briefs; principal briefs are limited to 10,500 words or 40 pages and reply briefs to 2,500 words or ten pages. N.D. R. APP. P. 32(a)(7)(A),(B).

188. *Saturday Evening Letter*, BISMARCK TRIB., Oct. 13, 1917, at 4.

truth by “persistent objections and rulings of the court. It is high time to put a stop to that kind of practice.”¹⁸⁹ Robinson believed judges and lawyers shared responsibility for improving the system.

Robinson coached lawyers on how to present oral arguments:

Young lawyers do some time[s] come to court with a set speech on fundamental principles of the law with extracts from the sayings of numerous judges. Then we may give them a gentle hint that we know all about it and do not play second fiddle to any other judges. The best argument a lawyer can make is to state in few words and in proper consecutive order the facts, the law and the c[on]trolling principles of the case.¹⁹⁰

This remains good advice to lawyers.

Robinson prevailed on his colleagues to adopt an “efficient” method for handling new cases while they ground away on the old ones.¹⁹¹ “Hence, we make it a rule to decide every case within two weeks after it is submitted, but we have still pending quite a number of old cases which were submitted before the rule took effect.”¹⁹² He explained, “[I]n this state . . . judges are sworn to do their duty faithfully and to observe the constitution which provides for justice without denial or delay.”¹⁹³

Robinson described other unnecessary causes of delay:

This week we had before the court an argument on a big divorce suit . . . [that] was argued at great length some six months ago, but the chief justice was then absent, and as some of the judges had no longer a fresh memory of the case it was thought well to have a second argument in the nature of a refresher. On each side the counsel talked for two hours.¹⁹⁴

Robinson, thus, deftly demonstrated how a single absence complicated their work and nimbly blamed Bruce for this delay.

Robinson insisted the Supreme Court failed in its constitutional duty to supervise the trial courts.¹⁹⁵

189. *Id.*

190. *Saturday Evening Letter*, BISMARCK TRIB., Mar. 22, 1918, at 4.

191. *Saturday Evening Letter*, BISMARCK TRIB., Oct. 13, 1917, at 4.

192. *Saturday Evening Letter*, BISMARCK TRIB., Oct. 27, 1917, at 4

193. *Id.*

194. *Id.*

195. “The supreme court . . . shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law.” N.D. CONST. of 1889 art. IV, § 86 (repealed 1976). Today’s constitution declares: “The supreme court shall have authority to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state. . . .” N. D. CONST. art. VI, § 3.

There are few who can be trusted to work for others without any control or supervision and without some system of reporting. Assuredly every judge and state officer should give at least a monthly report of his doings.

By the constitution the supreme court is charged with the duty of supervising all inferior courts, though the duty has been sadly neglected. There has been no supervision and no reporting to any one. The result is that some judges have held cases under incubation for a whole year. It has taken two, three and four years to work some cases through the courts. I have heard of judges leaving their work and going off and spending the winter in Florida or in California, and of judges leaving their work and spend a large part of their time in trying to get votes; but I [n]ever heard of any of them failing to draw their salary. It is no uncommon thing for a judge to send a man to prison for a theft of \$20 or \$30 . . . , but it is quite uncommon for a judge to sentence himself to prison when he steals pay of several hundred dollars for work left undone. And surely the one theft is just as bad as the other.¹⁹⁶

“Under proper rules and supervision, and a proper system of reporting,” Robinson declared, “it is fair to assume that all the courts would be more faithful and efficient.”¹⁹⁷

Later, Robinson summarized the basic organization and procedures for the Supreme Courts of North Dakota, Illinois, Montana, Wisconsin, and the United States.¹⁹⁸ He deplored “the usual delays and the fearful expense” of litigation, but heaped credit on his own Court: “In North Dakota, the Supreme Court has nearly reduced to a minimum the delays of the law and the expense of an appeal”¹⁹⁹

E. PREMATURE OPINIONS

In his *Letters*, Robinson sometimes gave his views on a pending case before the Court had decided it.²⁰⁰ Today, this would subject a judge to certain discipline.²⁰¹

196. *Saturday Evening Letter*, BISMARCK TRIB., Mar. 3, 1917, at 4.

197. ROBINSON, *supra* note 39, at 66.

198. *Id.* at 57.

199. *Id.*

200. An early example was in *The Bismarck Tribune*, on Saturday, March 31, 1917, where Robinson said the Court should deny Attorney General William Langer’s pending petition to invalidate Governor Frazier’s appointments to the board of regents. *Saturday Evening Letter*, BISMARCK TRIB., Mar. 31, 1917, at 1. A bold example was on Saturday, May 19, 1917, where he

While the United States Supreme Court in *White* valued free speech over preserving the appearance of impartiality in judicial elections, the *White* opinion certainly did not undercut all control of judicial speech designed to improve impartiality within the judicial process.²⁰²

In Robinson's time, however, no written rules or statutes governed judicial speech.²⁰³ North Dakota did not have a code of judicial ethics until 1977, six decades after Robinson.²⁰⁴ Thus, the Court had no way to put a stop to Robinson's public expressions on pending cases.

In October 1917, Robinson described his unusual practice of sending a "tentative opinion" to counsel before oral argument.²⁰⁵ He rationalized this novel effort at efficiency in an accompanying form letter to counsel: "If you concur with me it may save you a trip to Bismarck. If you dissent, it will give you my views in advance and can do you no harm."²⁰⁶ Unfortunately, Robinson acted unilaterally without his colleagues' prior approval of this abrupt break from tradition.²⁰⁷ Undoubtedly, this too further unsettled his relations with his fellow justices, and it exposed him to accusations of unethical conduct.²⁰⁸

F. OPINION WRITING

Robinson often grumbled about overlong opinions that encumbered the Court's work.

According to the Docket of the West Publishing company, based on a count of the average number of words in the decisions of the several state courts, the longest decisions are given in North Dakota. That is a sorry compliment to our Supreme Court. It shows,

published a proposed opinion "in which the Court has not yet concurred." *Saturday Evening Letter*, BISMARCK TRIB., May 19, 1917, at 4.

201. "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing." N.D. CODE OF JUD. CONDUCT Canon 3B(9) (2004-2005).

202. *See generally* Republican Party of Minn. v. White, 536 U.S. 765 (2002) (valuing political speech over some rules of judicial conduct).

203. "The first code regulating judicial conduct was adopted by the ABA in 1924." *White*, 536 U. S. at 786 (citing 48 ABA REP. 74 (1923) (report of Chief Justice Taft); P. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL CAMPAIGNS 86 (1990)).

204. *See* Meschke & Smith, *supra* note 3, at 276.

205. *Saturday Evening Letter*, BISMARCK TRIB., Oct. 13, 1917, at 4.

206. *Id.*

207. There are other examples of Robinson's premature opinions. *See Saturday Evening Letter*, BISMARCK TRIB., July 20, 1918, at 4 (offering an "advanced opinion" on a pending case).

208. Robinson later claimed he did so "only in rare and plain cases." James E. Robinson, "Peculiarities" in *the Administration of Justice in North Dakota—Justice Robinson's Explanation*, 88 CENT. L.J. 155, 156 (1919).

as the fact is, that the decisions consist largely of mere stuffing in the form of quotations and citations. For a judge to say to his stenographer: Copy the complaint, this document, and this testimony, is much easier than it is for him to give a concise and terse statement of the same. Hence the long decision is no compliment.²⁰⁹

This blunt sermon had little effect.

Robinson attributed much of the Court's poor performance to overlong opinions.

Following the woeful habit of lading men with burdens grievous to be borne we write long winded decisions of 20, 30 or 40 pages, regardless of the cost of transcribing, booking and publishing the same amounting to about \$20 a page. By actual count of words our court decisions are much longer than any other state in the union. We let the stenographer copy pleadings, statute, contracts and evidence and take no pride in condensing anything. Our state reports are swollen by inserting a large part of the brief of counsel just as if the court reporter stood in with the bookmaker. The proper way is to omit briefs to make short and prompt decisions and to make the printed decisions show when each case was submitted and when decided. Thus in West Virginia and in Montana reports there are no briefs and the average length of a decision is about four pages, and at the head of each decision there is given the date when the case was submitted and when decided.²¹⁰

Robinson believed "long and complicated opinions . . . are never read."²¹¹

Robinson tried to teach his colleagues how to improve their opinion writing. "Goldsmith once said to Samuel Johnson: 'Doctor, if you were to write a fable about little fishes you would make them talk like whales.' And so it is with some of our judges. They seem to pride themselves on writing whale decisions and whale sentences."²¹² Robinson went on to quote "four such sentences copied from a recent decision by one of our

209. *Saturday Evening Letter*, BISMARCK TRIB., May 19, 1917, at 4.

210. *Saturday Evening Letter*, BISMARCK TRIB., Sept. 3, 1917, at 5.

211. *Saturday Evening Letter*, BISMARCK TRIB., Feb. 10, 1917, at 4. "Some judges take pride in writing long and complicated decisions, which are never read. And in this state the average length of a Supreme Court decision is greater than in any other state. This habit we purpose to reverse." *Id.*

212. *Saturday Evening Letter*, BISMARCK TRIB., Nov. 3, 1917, at 4.

judges.”²¹³ Robinson lectured his colleagues on good composition in other *Letters*, as well.²¹⁴

Robinson pointed out: “Under the constitution when a cause or matter is [sic] considered and decided, the reasons must be concisely stated in writing, signed by the judges and filed so as to become a public record.”²¹⁵ To emphasize conciseness, Robinson deplored the public expense of publishing long opinions.²¹⁶

Robinson instructed on how to write concisely:

In drafting a decision, it is not uncommon for a judge to give a literal copy of the complaint, answer, findings, Letters, testimony and a copy of a long statute. Of course that is easier than to state the gist or substance of such things, but as a rule such a composition is slovenly and slipshod; it shows no just regard for time or expense; [and] the time of the reader and the expense of booking the lumbering matter.

A brief or a decision in proper form commences with a lucid and coherent statement of the case, the facts and the law in one or two short paragraphs. The reasoning or discussion may cover three, four or five paragraphs. The final summary [or] conclusion, one paragraph. The whole may not exceed four or five pages and of course it must be all lucid, coherent and in good marching order.²¹⁷

Sometimes Robinson’s criticism of a colleague’s writing style could be very blunt. In one *Letter* for his “class in grammar,” Robinson singled out an opinion, written by Grace, as “three times too long. He repeats and uses many redundant words, not thinking that for every idle word he must give

213. *See id.* He did not name the justice. *Id.* *But see* Huber v. Zeisler, 164 NW 131, 132 (N.D. 1917) (naming Grace as the author).

214. *See, e.g.,* *Saturday Evening Letter*, BISMARCK TRIB., Nov. 26, 1917, at 4; *Saturday Evening Letter*, BISMARCK TRIB., Dec. 22, 1917, at 4; *Saturday Evening Letter*, BISMARCK TRIB., Dec. 29, 1917, at 4; *Saturday Evening Letter*, BISMARCK TRIB., Jan. 21, 1918, at 4.

215. *Saturday Evening Letter*, BISMARCK TRIB., Sept. 21, 1918, at 4. *See* N.D. CONST. of 1889 art. IV, §101 (repealed 1976) (explaining the importance of being concise). “When a judgment or decree is reversed or confirmed by the supreme court every point fairly arising upon the record of the case shall be considered and decided, and the reasons therefore shall be concisely stated in writing, signed by the judges concurring . . .” *Id.* That same language remains in today’s North Dakota Constitution. N.D. CONST. art. V, § 5.

216. *Saturday Evening Letter*, BISMARCK TRIB., Sept. 21, 1918, at 4.

217. *Id.*

an account in the day of judgment.”²¹⁸ Robinson also quoted other examples and suggested a more concise phrasing for each.²¹⁹

Similarly, Robinson singled out another colleague’s overlong opinion.

In the Motor Vehicle Tax case, Justice Birdzell has just filed a majority decision of some 27 large typewritten pages. Of course, I have not much time to read it. It looks like a mass of words dictated or thrown together in an off hand manner. Doubtless it would be very different if the learned justice followed the example of Lord Bacon and with his own hand wrote his decision two or three times before giving the same to his stenographer.²²⁰

Robinson also complained about the length of the headnotes written for the Court’s decisions:

In North Dakota more than any other state ther[e] has prevailed a habit of making lumbering court decisions. Most of the decisions might be reduced one-half by revising them into clear and concise language. The same is true of the head notes which are usually called the syllabus. The purpose of a head note is to show at a glance the leading points of the decision. Hence, it should consist of not more than three or four simple sentences.²²¹

Robinson particularly criticized a 4,800 word opinion “in a petty case of no merit” involving only \$107.²²²

Robinson made a persuasive plea for brevity: “[L]ife is short and so the long lumbering decisions must go. We have not time to write them or to read them nor money to pay the expense of booking a mass of useless stuff.”²²³

218. *Saturday Evening Letter*, BISMARCK TRIB., Feb. 11, 1918, at 4. See *Saturday Evening Letter*, BISMARCK TRIB., May 27, 1918, at 5 (reminding Grace of his own campaign remarks criticizing long-winded opinions and promising “clear and more concise” opinions).

219. *Saturday Evening Letter*, BISMARCK TRIB., Feb. 11, 1918, at 4. See *Saturday Evening Letter*, BISMARCK TRIB., May 27, 1918, at 5 (naming each justice, including himself, and itemizing how many opinions and pages each justice had in volume 37 of the North Dakota Reports). He editorialized:

There is no possible reason or excuse for spreading a judicial opinion or decision over more than four, five or six printed pages. The long-winded decisions must go. They are contrary to all business principles. They are monuments of folly. They serve no good purpose only to lumber the record, make needless expense, and to wast[e] and fritter away the valuable time of the judges, and that is one of the reasons why we are so fearfully behind

Id.

220. *Saturday Evening Letter*, BISMARCK TRIB., June 17, 1918, at 4.

221. *Saturday Evening Letter*, BISMARCK TRIB., Feb. 18, 1918, at 4.

222. *Id.*

223. ROBINSON, *supra* note 39, at 86.

“In formulating a legal decision the greatest care should be taken to avoid the use of every needless word and to state the facts and the law of the case in a few simple marching sentences and paragraphs,” Robinson urged.²²⁴ His recommended method remains a model for modern judges.

Robinson was frustrated by the voluminous case citations that lawyers put in their briefs and that were too often repeated in his colleagues’ opinions. Thus:

For instance, in 35 N.D. 244-274 [sic] there is a thirty-page case in which the attorneys and the court cite over five hundred decisions from other states. The citations cover some nine pages; and for booking the useless stuff, the people do pay about \$20 a page. I purpose to ask the next legislature to “cut that all out” and to make no appropriation for reporting any decision in excess of four or five pages.²²⁵

Robinson was “well versed in the classics and the Bible, and often quoted both in his opinions. He decried the writing of long opinions and citation of a long list of authorities. He [took] pride in the fact that his opinions rarely exceeded in length over two legal size pages of typewriter paper,”²²⁶ according to John Henry Newton, longtime Clerk of the Supreme Court.²²⁷ Yet, as Justice Vogel observed, only eight of his first one hundred and eight opinions contained citations of case law.²²⁸

G. MORE DELAYS

In January 1918, Robinson reported “no progress,”: “All of the week our Chief Justice has been absent without leave or license and our good looking young judge, the pride of our court, has been absent a great [deal] of the time.”²²⁹

In March 1918, Robinson again reported very little progress on the huge backlog:

This week our court has not done much to clear the calendar. No man can do his duty as a Supreme Court Judge without giving to the work six or seven hours every day. There are still on the

224. *Id.* at 87.

225. *Saturday Evening Letter*, BISMARCK TRIB., Sept. 28, 1918, at 6.

226. See Meschke & Smith, *supra* note 3, at 245 (quoting J.H. Newton, Lecture No. 1 at the University of North Dakota School of Law, at 8 (1950)) (lecture notes available at the North Dakota Supreme Court Law Library).

227. Meschke & Smith, *supra* note 3, at 237. Newton began service with the Court in 1913. *Id.*

228. Vogel, *supra* note 77, at 85.

229. *Saturday Evening Letter*, BISMARCK TRIB., Jan. 26, 1918, at 4.

calendar 90 cases awaiting argument and 40 cases awaiting a prompt decision and some of them have been waiting a long, long time.²³⁰

Astonishingly, in the fourteen months after January 1, 1917, the Court had only pared twenty cases of the 150 pending cases it started with—less than one and a half per month.²³¹ No wonder that Robinson remained exasperated and frustrated.

Robinson expanded his list of causes of delays to add long-winded arguments and collegiate courtesies:

In the Trading Stamp case which should have been considered and decided in two hours, we sat and heard six great lawyers talk for two whole days and it all amounted to nothing. It was mere waste of time. In the big Minot Divorce case we heard the lawyers talk for nearly two days The real object of argument as usually conducted is to confuse and mislead the Judges and not to enlighten them.

* * * *

There are other causes of delay. We have too many judges and too much senatorial courtesy. When a decision is written and signed by a [majority] of the Judges, one Judge may hold up the case indefinitely by just failing to concur or dissent. In that way some decisions are held up for months.²³²

Robinson concluded, “We have a system which doubles our work and as it seems we do not know enough or do not care to improve it.”²³³

Later, Robinson complained that in “one of the old chronic cases, a decision was formulated and signed by three of the judges in November, 1917, and since then it has been held up for one judge to dissent.”²³⁴

230. *Saturday Evening Letter*, BISMARCK TRIB., Mar. 11, 1918, at 4. Nearly two weeks later, Robinson said, “This week the judges have made no default.” *Saturday Evening Letter*, BISMARCK TRIB., Mar. 22, 1918, at 4.

231. *Compare Saturday Evening Letter*, BISMARCK TRIB., Mar. 11, 1918, at 4 (identifying that only 40 of 130 pending cases were heard) with *Saturday Evening Letter*, BISMARCK TRIB., Sept. 28, 1918, at 6 (stating that the beginning backlog was 50 completed appeals awaiting action).

232. *Saturday Evening Letter*, BISMARCK TRIB., Mar. 11, 1918, at 4. A month later, Robinson again complained about a two-day argument and five-month delay after three justices had signed an opinion that was still held up waiting for action by the two justices who had not signed. *Saturday Evening Letter*, BISMARCK TRIB., Apr. 13, 1918, at 4. A month later, Robinson complained about a “ghost case . . . in which the decision was signed by three judges six months ago,” and added: “Truly that is carrying judicial courtesy to the limit of absurdity.” *Saturday Evening Letter*, BISMARCK TRIB., May 18, 1918, at 4.

233. *Saturday Evening Letter*, BISMARCK TRIB., Mar. 11, 1918, at 4.

234. *Saturday Evening Letter*, BISMARCK TRIB., June 17, 1918, at 4.

Robinson expressed even more frustration over the fact that a dissent had just been written “and it is signed by one of the three judges who had signed the first opinion.”²³⁵ Robinson thereupon proposed four new rules to his colleagues entitled, “To Expedite Court Business and to Prevent Doubling the Work by Delaying It.”²³⁶ The first three dealt with how to assign cases to promote efficiency, and the fourth confronted the effect of absences:

When any judge is absent without unanimous consent for more than one day in a week, the other judges shall go on with the work of the court and hand down decisions without waiting for his concurrence or dissent, which may be given or filed during the time for a rehearing.²³⁷

In June 1918, Robinson described how the backlog had become chronic:

[O]ur Supreme Court has on its calendar ninety-five cases not yet argued or submitted, and thirty-seven of the fifty cases submitted prior to the first day of May. Some of these are old chronic appeals that should have been decided six to ten months ago. As our Chief Justice [Bruce] has decided to retire from office when his term expires, we are very anxious to aid him in cleaning the slate so that he may retire with credit. The prior Chief Justice retired leaving on the docket 150 appeals and his predecessor left 192 appeals, and still each of them claims great credit for experience, ability, and efficiency,²³⁸

Robinson blamed Chief Justice Bruce for the logjam. “The Chief Justice is the captain of the judicial team. It is for him to say when to play ball.”²³⁹

The rest of the justices shared some responsibility, Robinson reasoned. “[W]e have a way of doubling the work by holding it up and [by] delaying it, by writing long-winded decisions and by hearing long arguments which serve only to mislead and confuse the judicial mind.”²⁴⁰

“In doing judicial business,” Robinson urged, “[t]he right way is for each judge during business hours of every day to give all his time to the

235. *Id.*

236. *Id.*

237. *Id.*

238. ROBINSON, *supra* note 39, at 80 (combining material from two *Letters* published in *The Bismarck Tribune*, on Tuesday, June 11, 1918, and Tuesday, June 18, 1918, and an unpublished *Letter* dated June 1, 1918).

239. *Id.*

240. *Id.* at 81.

business, . . . and do it well and to decide every case within a few days after the argument and while it is still fresh in the memory.”²⁴¹

Robinson summarized his private correspondence with the Chief Justice of the Minnesota Supreme Court, who outlined their “new system” and told Robinson they were “get[ting] along very well under this practice”²⁴² After that, Robinson repeatedly urged his Court to use the Minnesota system of efficient scheduling and frequent conferences. Thus,

We are bound to adopt the Minnesota system and to cease doubling our work by delaying it. In Minnesota the supreme court work is fully twice as much as it is in this state, and as the chief justice writes, they have reduced the work to a system; they have daily conferences following arguments and go over every case while it is still fresh in the mind and so the decision of a case is rarely delayed longer than one month after argument. Now since the Minnesota judges are able to promptly dispose of their work, with half their efficiency, we should be able to do half as much work and in that way to keep right up with the work of our court.²⁴³

Later in July 1918, Robinson again grumbled about inheriting “a very bad working system.”²⁴⁴

And we have been so stupid as to follow in their ways. We have willfully and deliberately doubled our work by a system of procrastination, wasting our time in hearing arguments and seldom considering a case until the argument is forgotten. Now we must completely undo and reverse that system and, when we do so, it will give me great pleasure to write you about it.²⁴⁵

Despite his repetitive prodding, Robinson saw little progress and became depressed.

This week I feel like Bunyan’s Pilgrim when he fell into the Slough of Despair. The reason is that when I come to court at 9 a.m. I look for my judicial brethren, and they are nowhere to be found. Hence, we make little progress in disposing of the chronic cases that were argued and should have been decided a year ago.²⁴⁶

241. *Id.*

242. *Saturday Evening Letter*, BISMARCK TRIB., June 24, 1918, at 4.

243. *Saturday Evening Letter*, BISMARCK TRIB., July 15, 1918, at 8.

244. *Saturday Evening Letter*, BISMARCK TRIB., July 29, 1918, at 4.

245. *Id.*

246. *Saturday Evening Letter*, BISMARCK TRIB., July 20, 1918, at 4.

By September 1918, Robinson despaired of catching up anytime soon. He reported:

When I first took office I really hoped that by this time our Court would be up with its work and have a clean slate so as to decide every appeal within thirty days, but that is all a matter of the future.

On January 1, 1917, when three judges were retired, . . . they left undecided 150 appeals when they should have left a clean slate. At present there are undecided 166 appeals. Fifty of these were argued and submitted and most of them should have been decided in the days of long ago. Now, what are the reasons for such a gross failure to administer justice without delay: . . . [O]ne of the chief reasons is that each judge does feel perfectly at liberty to follow the old custom, to do his work or leave it undone, to pass a large part of his time in fishing, hunting, speech-making or in some outing. There is rarely a day or a week that all of the judges are to be found at their chambers during regular business hours; some are nearly always absent or tardy for one, two or three days in a week. They do not seem to think it a sin or a shame to draw a good salary for doing work which is left undone. . . . To clear the slate we must allow less time for talk, write shorter decisions, and give full time to the work.²⁴⁷

Given their troublesome backlog, Robinson's insistence on less talk, shorter opinions, and concerted effort was understandable.

H. BRUCE'S COUNTERATTACK

Blistered by Robinson's incessant criticisms, Bruce found a way to strike back. After he chose not to seek re-election, Bruce publicly attacked Robinson for unethical conduct.

Bruce's counterattack came in another politically polarized case, a sequel to the one decided shortly before the 1916 general election. The 1917 legislature did nothing to implement the constitutional amendment authorizing popularly initiated amendments, as directed by the 1916 decision in *Linde*.²⁴⁸ Despite that hiatus, several petitions to initiate constitutional amendments were circulated, signed, and filed with the Secretary of

247. *Saturday Evening Letter*, BISMARCK TRIB., Sept. 28, 1918, at 6.

248. *State ex rel. Linde v. Hall*, 159 N.W. 281 (N.D. 1916).

State in 1918.²⁴⁹ The sponsors apparently anticipated the new majority on the Court would rule differently than the 1916 Court.²⁵⁰

When the Secretary of State approved the new petitions for balloting at the November 1918 general election, a taxpayer petitioned the Supreme Court to enjoin the Secretary of State from placing them on the ballot.²⁵¹ The petitioner principally relied on the controversial 1916 precedent, *Linde*, that held the amendment authorizing popularly initiated constitutional amendments needed legislative implementation.²⁵²

On October 5, 1918, a three-justice majority, those endorsed and elected by the Non-Partisan League in 1916, filed three separate opinions to decide *Twichell*.²⁵³ Together, the majority opinions expressly reversed the controversial 1916 decision.²⁵⁴ Each of the three wrote an opinion explaining why *stare decisis* did not control.²⁵⁵

Thus, Birdzell wrote: “A careful study . . . leads us to the conclusion that the [*Linde*] interpretation of the amendment in question was so extreme in the direction of nullifying its force that it ought not to stand as the final expression of this court.”²⁵⁶ Their *Twichell* decision held the 1914 constitutional amendment was indeed self-executing to authorize submission of a qualified initiated petition to the voters without further action by the legislature.²⁵⁷

249. State *ex rel.* *Twichell v. Hall*, 171 N.W. 213, 221 (N.D. 1918) (Birdzell, J., concurring).

250. Robinson had given the public reason to expect a more favorable ruling. *Saturday Evening Letter*, BISMARCK TRIB., Mar. 18, 1918, at 4. In his March 18, 1918, *Letter in The Bismarck Tribune*, Robinson had said:

Some two years ago the judges of the supreme court held that this amendment is not self-executing and that it must remain a dead letter without any force or effect until such time as the legislature may see fit to doctor it up with supplemental legislation. The decision was roundly denounced. It did not appeal to the people. Three of the judges who made the decision were promptly let out and replaced by three judges who openly disapproved of the decision.

Id.

251. *Twichell*, 171 N.W. at 214.

252. *Linde*, 159 N.W. at 284.

253. *Twichell*, 171 N.W. at 214.

254. *Id.* On the same day, Robinson announced the decision to his readers, praising Grace’s and Birdzell’s opinions as “thoro [sic], conclusive and splendid,” while explaining, “My little short opinion was written long ago.” See *Saturday Evening Letter*, BISMARCK TRIB., Oct. 5, 1918, at 2. Some might think that the majority was premature in filing their opinions without awaiting the dissents. Two factors supported prompt action. Election regularity called for a prompt decision to facilitate the general election in early November. Given the past abuse of collegiate courtesy in delaying separate opinions for months, the decision of a majority to immediately file their controlling opinions was appropriate.

255. State *ex rel.* *Twichell v. Hall*, 171 N.W. 213, 213 (N.D. 1918).

256. *Twichell*, 171 N.W. at 224 (Birdzell, J., concurring).

257. *Id.* at 217-18 (majority opinion).

Christianson eventually filed an eleven-page dissent that mainly stressed the importance of *stare decisis*.²⁵⁸ In a one-page dissent, Bruce rebuked the majority for its failure to follow precedent, and personally attacked Robinson for having publicly expressed his views about *Linde* during his 1916 election campaign:

It is no doubt true, as has been publicly stated by my Associate, Mr. Justice ROBINSON, that he, the said Justice, made a pre-election promise to overrule the decision in the case of *State ex rel. [Linde] v. Hall*, supra, and that he would not have been elected if he had not done so, and it may be true, as asserted by Mr. Justice ROBINSON, that the secretary of state was conversant with this fact. I have yet to learn, however, that the making of any such pre-election promises were ever contemplated by the framers of our government, or that a show of force in the shape of a numerously signed petition should serve as a proper justification for a violation of my oath of office, and a reason why I should hold that to be the law which I do not believe to be the law.²⁵⁹

After Bruce filed his dissent on January 28, 1919, Robinson claimed Bruce's accusation was "not exactly true."²⁶⁰ Robinson explained:

It is said that at the last general election Justice Robinson obtained his great majority of 63,000 votes by promising to reverse the decision against the right of the people to amend the constitution, but that is a sorry compliment for the decision which has been reversed, and it is not exactly true. Robinson made no promises, except to use his best efforts to put a stop to the law's delays, and thus far he has met [this goal] with little success.²⁶¹

258. *Id.* at 234-45. Six separate opinions were filed. The three majority opinions were filed on October 5, 1918, but Christianson's full dissent was not filed until January 28, 1919. *Id.* at 213. Then, Birdzell filed a three-page addendum, responding to some of Christianson's remarks. Robinson's one-page concurrence and Bruce's one-page dissent were the shortest. *Id.* at 232-34. Grace wrote nearly seven pages in his opinion for the court and Birdzell's concurrence ran nearly nine pages. *Id.* at 214-30 (offering concurrences and dissents).

259. *Twichell*, 171 N.W. at 234 (Bruce, J., dissenting) (italics added). Without naming Robinson, Bruce had begun this attack several months before in an address, entitled "A Government by Men and Not by Law," to the Judiciary Section of the American Bar Association at its annual meeting. See 1918 A.B.A. ANN. MEETING REP. 495-500 (containing Bruce's address). "How many [landowners] would really approve of a judge, or rather a candidate for a judicial office, doing what was done in North Dakota, and that is going before a political convention and promising that if elected he would construe the law and the constitutions as these conventions desire?" *Id.* at 497.

260. *Saturday Evening Letter*, BISMARCK TRIB., Nov. 12, 1918, at 5.

261. *Id.*

Bruce cited no source for his assertion about Robinson's promises, but Bruce later insisted Robinson "candidly admitted from the bench [during oral argument] that he had made pre-election promises."²⁶²

Interestingly, Bruce did not accuse Grace or Birdzell of misconduct, although the League surely understood they too believed *Linde* had been wrongly decided. Apparently, they had been more discreet.

Bruce cited no precedent for his charge of unethical conduct by Robinson, but reasoned simply "that the making of any such pre-election promises were [n]ever contemplated by the framers of our government . . ."²⁶³ Bruce did not identify a specific regulatory or statutory restraint. Nor did he consider the constitutional right of free speech.²⁶⁴

Robinson's alleged "pre-election promise to overrule" *Linde* would violate current standards of judicial conduct prohibiting "pledges or promises."²⁶⁵ Today, such a promise would present a clear post-*White* case for the United States Supreme Court to decide whether a "pledges or promises" clause restraining the speech of candidates for judicial office violates the First Amendment. We think such a challenge is likely and may very well succeed.

Bruce did not seek re-election in 1918, so his personal attack on Robinson in his *Twichell* dissent had no effect on Bruce's judicial career. One might wonder if he chose not to run out of frustration with Robinson's criticism.²⁶⁶ More likely, Bruce anticipated the political trend of the 1918 election and realized he had little hope of re-election, particularly in the face of Robinson's public criticisms of his absences and poor

262. BRUCE, *supra* note 44, at 68.

263. *State ex rel. Twichell v. Hall*, 171 N.W. 213, 213 (N.D. 1918).

264. "Every man may freely write, speak and publish his opinion on all subjects, being responsible for the abuse of that privilege." N.D. CONST. of art I, § 9 (renumbered as art. I, § 4). This clause is now found in art. I, § 4, unchanged. N.D. CONST. art. I, § 4. The First Amendment right to Freedom of Speech had not yet been applied to limit state action. 16A AM. JUR. 2D *Constitutional Law* §§ 401-406 (1998).

265. "[A] candidate for judicial office shall not: (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." N.D. CODE OF JUD. CONDUCT Canon 5A(3)(d) (2002).

266. Later, in a national review of Bruce's book, *Non-Partisan League*, a reviewer concluded Bruce "resigned on account of the non-judicial attitude of his Socialist colleagues." A.M. Kidd, *Book Review: Non-Partisan League*, 10 CAL. L. REV. 269 (1922) [hereinafter Kidd, *Book Review*]. This assertion was made without attribution to Bruce. *Id.* It apparently represented the reviewer's inference from Bruce's polemic about the "socialistic" League having endorsed and elected Robinson and two colleagues. *Id.* We question whether Bruce made a fair case to condemn Grace and Birdzell as "non-judicial," let alone a satisfactory one against Robinson on his whole record. To do so, Bruce would have had to justify his own lackadaisical performance, overstuffed opinions, and lack of diligence.

performance.²⁶⁷ Bruce did not even serve out his term; he resigned on December 1, 1918, to return to teaching law.²⁶⁸

Apparently no one sought to impeach Robinson for malfeasance in office.²⁶⁹ Even if someone thought of it, the political realities stood against it; the Non-Partisan League controlled both houses of the state legislature in the 1919 session, although its opposition regained control of the legislature in the 1920 general election.²⁷⁰ It is unlikely Robinson could have been impeached while the Non-Partisan League remained a strong force in the legislature.

Still, Robinson's vice of publicly discussing pending cases resulted in censure shortly after Bruce left the Court. At its 1919 annual meeting, the State Bar Association of North Dakota "condemned" Robinson's premature publication of his views. The State Bar "place[d] upon the record the condemnation of this association, of the unethical acts of one of the judges of the supreme court, in publishing his opinions in the newspapers, long before the case is decided and before the official opinion of the court is filed in regular form."²⁷¹ The Bar's resolution did not identify Robinson by name, but it was plainly aimed only at his "unethical acts."²⁷²

I. ROBINSON'S RESULTS

After Justice Bronson was elected in November 1918, and shortly before Bruce resigned, Robinson wrote his most caustic lecture yet on his colleagues' absences:

267. "In the elections of 1918 the farmers stormed the last stronghold of the conservatives as three-fourths of the senate became League." LLOYD B. OMDAHL, *INSURGENTS* 16 (Lakeland Color Press 1961). According to the *1919 Legislative Manual*, Bruce's successor, Harrison A. Bronson, another UND law professor, obtained the "endorsement of the Nonpartisan League and of Organized Labor" and then won election in November 1918. See NORTH DAKOTA BLUE BOOK, *supra* note 116, at 558 (containing *1919 Legislative Manual*).

268. See Meschke & Smith, *supra* note 3, at 246 n. 187, and 307 (App. A).

269. N.D. CONST. of 1889 art. XIV, § 196 (renumbered in 1980 to N.D. CONST. art. XI, §10): "The governor and other state and judicial officers . . . shall be liable to impeachment for habitual drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office, but judgment in such cases shall not extend further than removal from office and disqualification to hold any office of trust or profit under the state."

270. The 1919 Senate had 45 Republican and 5 Democratic members; the House 94 Republican and 19 Democratic members. See NORTH DAKOTA BLUE BOOK, *supra* note 116, at 558 (containing *1919 Legislative Manual* at 198h-198m). The League filed its candidates in the Republican column in those days.

271. See Meschke & Smith, *supra* note 3, at 246.

272. Two years after the State Bar Association of North Dakota censured Robinson, a parallel judicial censure took place at the national level. In August 1921, the American Bar Association annual assembly endorsed a resolution of "unqualified condemnation" of "the conduct of Kenesaw M. Landis in engaging in private employment [as Baseball Commissioner] and accepting private emolument while holding the position of a Federal Judge and receiving a salary from the federal government. . . ." 7 A.B.A.J. 477 (1921).

[W]e have now on the court calendar 144 appeals awaiting arguments and 36 cases long since argued and submitted—some of them over a year ago. This shows we need some better timber, better management and better court rules.

. . . Bronson has faithfully promised to be at his chambers or in the court rooms of the Capitol and at work on each business day from nine a.m. to five p.m., the same as the writer.

* * * *

We have not fairly attempted to administer justice without delay, in accordance with our oath and the mandate of the constitution. Indeed, we have not yet commenced the work of judicial reform. As a rule, our judges follow the old custom of doing their work or leaving it undone. They come and go as they please and show no regard for time. During about one-third of the business days they are absent from their chambers and from the capitol. During the past two months our Chief Justice has not been at the capitol more than four or five days. And our Justice Grace—his presence at court is an occasion for rejoicing. Our Justice Birdzell has been giving a large part of his time to a side job, as a member of the draft exemption board. Now he realizes that the duties of the court demand all his time and thought and that no man can serve two masters, and he promises to decline all side jobs.²⁷³

As this lecture reflected, the Court's backlog of 150 pending appeals in January 1917, had grown to 180 by November 1918. Robinson saw no progress despite his persistent prodding.

After Bruce left on December 1, 1918, Christianson became Chief Justice.²⁷⁴ Yet the Court was clearly "Robinson's Court" from his strenuous and strident campaign to improve it.

Soon after Bruce resigned, Robinson wrote hopefully:

With the advent of Justice Bronson and our new chief justice, our court has turned a new leaf. During this week every judge has reported for duty promptly at nine a.m. We have set out in good earnest to catch up and keep up with the work of the court and to administer justice without denial or delay.²⁷⁵

273. *Saturday Evening Letter*, BISMARCK TRIB., Nov. 16, 1918, at 4.

274. The Constitution then required rotation of the Chief position to the justice next up for re-election. See Meschke & Smith, *supra* note 3, at 286-87 (explaining the history of electing of the Chief Justice).

275. *Saturday Evening Letter*, BISMARCK TRIB., Dec. 7, 1918, at 4.

Given Robinson's constant publicity about their attendance, he may have expected the justices would gradually choose to arrive promptly every day.²⁷⁶

Robinson was disappointed. In February 1919, he reported:

This week I regret to give our judges a black mark for absence without leave: Birdzell, J., one day; Bronson, J., two days; Grace, J., three days. The result is that the work lags behind and is doubled by delays, and yet by the constitution the judge is bound to administer justice without denial or delay and he swears to do his duty faithfully and not indifferently. In time, of course, there must be a change. The judges are public servants, and when they serve[,] the state must learn[] to give all their time to the work and to do it as faithfully as if the work were done for any other corporation. But it is hard to get out of the bad habit which has so long prevailed and which still continues to prevail in every state.²⁷⁷

Robinson persisted.

Robinson's Court may have hired the first law clerk in the history of the Court. A Robinson *Letter* in early 1919 sought applications for this job description:

[T]he supreme court has for some one a nice plum—a position of \$2,500 a year as law librarian, court reporter and court briefer. To get the place one must show that he will gladly give all his time to the work, care well for the library, brief up and present to the judges the law on any question. In short, he must be a worker of ability and capacity, of clear mental vision and about as smart as chain lightning.²⁷⁸

In our experience, many of the law clerks and staff lawyers hired by the Court since have fulfilled those high expectations.

The 1919 legislature authorized the Supreme Court to make rules of pleading, practice and procedure.²⁷⁹ Robinson explained three new rules the Court then adopted “which serve to expedite the business:”

275. Through 1918, *The Bismarck Tribune* published Robinson's *Letters* nearly every week. But beginning in 1919, its publication of his *Letters* became more sporadic. It is not clear if Robinson wrote fewer *Letters* or if *The Tribune* concluded they were no longer all newsworthy. Furthermore, his *Saturday Evening Letters* were not always published on Saturday, nor on the same page, so we may have overlooked some of them in our searches.

276. *Saturday Evening Letter*, BISMARCK TRIB., Feb. 22, 1919, at 4.

278. *Saturday Evening Letter*, BISMARCK TRIB., Mar. 8, 1919, at 4. See generally NORTH DAKOTA CENTENNIAL BLUE BOOK 1889-1989 465 (1989) (noting that Joseph Coghlan was hired).

279. See 1919 N.D. Laws 284, ch. 167, § 6 (codified as amended at N.D. CENT. CODE § 27-02-08 (2004)).

(1) As each case is argued or submitted, it is automatically allocated to one of the judges to formulate and submit a tentative decision. (Of course he should do it within two we[e]ks.). (2) On every Tuesday and Friday at 3 p.m. the judges meet in conference on pending cases, and those who agree upon a decision sign it. (3) When a decision is signed by a majority of the judges, if one or more fail to concur or dissent, then it is filed with the clerk of the court for a concurrence or dissent to be given within ten days. Thus when a majority of the Court agree upon a decision, the other judges can no longer hold up the case indefinitely; within ten days they must fish or cut bait. I give Justice Grace the credit of suggesting those rules.²⁸⁰

Robinson was making some progress.

By mid-May 1919, Robinson was optimistic that “in June we must hear and decide thirty cases, and that will clear the court calendar.”²⁸¹ While Robinson felt “[s]ome judges are still prone to write long-winded decisions of ten or more pages,” he believed “the decisions show a marked improvement and promise soon to compare well with those of the U.S. Supreme Court.”²⁸²

By mid-June 1919, Robinson became even more optimistic about clearing the backlog:

When we dispose of [forty-five pending] cases, as we hope to do early in July, it will clear the calendar. The Court will be right up with its work for the first time in a score of years. Then it will be in order to take a day of rejoicing and a summer vacation.²⁸³

Robinson was getting results.

Justice Bronson later explained how the Court implemented new rules:

Commencing in January, 1919, . . . rules of the Supreme Court, from time to time, have been adopted and these, in connection with the later additional authority granted to the Supreme Court, pursuant to legislative act, have made a substantial change in method of presenting, hearing and determining causes upon appeals before this Supreme Court.

* * * *

280. *Saturday Evening Letter*, BISMARCK TRIB., May 17, 1919, at 4.

281. *Id.*

282. *Id.*

283. *Saturday Evening Letter*, BISMARCK TRIB., June 7, 1919, at 4.

For a period of approximately six months [before July 1920] the Supreme Court of this state has been entirely up with its calendar. This is termed a novel situation in the history of appellate procedure in this state.²⁸⁴

After detailing the rule changes “proposed by Justice Grace, and unanimously adopted by this Court,”²⁸⁵ Bronson described what the new procedures had brought about:

In 1919 the Supreme Court considered and determined about 275 cases, including original actions. It is readily observed that there has been an actual reduction of judicial delay under the new procedure, whether the matter be viewed from the delay occasioned by attorneys in bringing a record on appeal at issue, the delay of the Court in bringing the same on for argument or the delay of the Court in actual disposing of the cause after argument.²⁸⁶

So by July 1920, a year and a half after the Court had shed Bruce, Robinson proudly trumpeted:

This letter should commence with a big Democratic rooster well disposed to crow long and loud over the achievements of our Supreme Court. It is no[] idle boast to say that our court is now right up with its work and that no motion or appeal remains undecided. Nothing is left undone.²⁸⁷

Robinson’s emphasis on concerted effort finally brought results.

Robinson fully credited his colleagues for the adoption of progressive procedures:

New, progressive court rules, formulated by Justice Bronson, have been adopted. To secure justice without denial or delay, there will be regular terms of court commencing on the first Tuesday in each month, excepting July and August, which are vacation months, when there is no pending court business.²⁸⁸

In the end, Robinson largely achieved the reforms he had vigorously promoted from his first day on the Court.

284. H.A. Bronson, *The Law’s Delays in Appellate Procedure*, 91 CENT. L.J. 83, 85-86 (1920).

285. *Id.* at 86.

286. *Id.* at 87.

287. *Saturday Evening Letter*, BISMARCK TRIB., July 3, 1920, at 4. A few months earlier, Robinson had tentatively predicted victory: “Now, for the first time in twenty years, our court is right up with their work. The last [old] case has been finally decided. The slate is clear and suitors may get justice while they wait.” *Saturday Evening Letter*, BISMARCK TRIB., Feb. 23, 1920, at 4.

288. *Saturday Evening Letter*, BISMARCK TRIB., July 3, 1920, at 4.

Robinson declared, “The system [now] gives hope and promise of fair justice without denial or delay.”²⁸⁹ He compared the old system with the new:

Under the former system judicial courtesy was carried to [the] limit of absurdity. It was not in good form for one judge to write and submit a tentative decision in a case not assigned to him by the Chief Justice, nor to press any case to a final decision until each judge consented. But now, under a splendid rule, formulated by Justice Grace, each judge writes and submits an opinion in every fifth case, which falls to him automatically. Twice a week the judges meet in conference and when a majority sign a decision it is filed with the clerk so that within ten days the judges not signing may concur or dissent or call a conference; but within the time limit of ten days the dissenting judges, if any, must “fish or cut bait.” That is good business.²⁹⁰

Robinson finally had the efficient, businesslike system he had championed.²⁹¹

While things were improving, Robinson occasionally had to caution his colleagues about unexcused absences:

Of late I have not been reporting the absences of our judges, but I must commence again—and must give Justice Bronson twenty black marks for long continued absences without leave. On every day during business hours the honest duty of every judge and of every state officer is to be at his place in the capitol.²⁹²

289. *Id.*

290. *Id.*

291. The Court has kept it. Although not reflected in its written rules, the North Dakota Supreme Court still employs the tradition of automatically assigning each justice to write and submit a proposed opinion in each fifth case.

292. *Saturday Evening Letter*, BISMARCK TRIB., Jan. 26, 1920, at 4. *See also Saturday Evening Letter*, BISMARCK TRIB., Apr. 12, 1920, at 4 (“Mr. Justice Bronson, I think, he was elected on condition that during the business hours of each day he would give all his time to the duties of his office. Will he confess and try to excuse his frequent and long continuing absences from court for one-third of his time?”) Robinson’s latter criticism prompted an anonymous letter to the editor of *The Bismarck Tribune* asserting that Bronson was “a great worker” and “that he attends strictly to work at all times and can do fifty per cent [sic] more work than Judge Robinson.” *Saturday Evening Letter*, BISMARCK TRIB., Apr. 24, 1920, at 4. Robinson’s reply agreed Bronson was “a great worker,” but insisted:

Judge Bronson had been for three weeks continuously absent from court, and . . . his absence for one, two or three weeks had grown to be rather common. To do the work of the court as it should be done, it is necessary for every judge to be at his post of duty in the Capitol during the business hours of each day, and as a judge is a public servant, sworn to do his duty faithfully, he is not at liberty to leave his post of duty, and to go and come as he may please.

In September 1921, Grace published a national article to show off his Court's success with its new and efficient procedures.²⁹³ Grace declared "[t]he result of operating under this procedure has been to eliminate delay and to bring the work of this Court entirely up"²⁹⁴ Grace said, "at the expiration of each month, there remain no undetermined nor undecided cases. In other words, we have a term of court, commencing on the first Tuesday of each month, at which all cases on the calendar must be argued and submitted."²⁹⁵

Grace reviewed the old process and outlined the "substance" of the new rules and procedures. As soon as a draft opinion is signed by three justices, it is filed with the clerk "and if not signed by or dissented from by the other two members within ten days, it becomes the decision in the case."²⁹⁶ Grace touted another rule that scheduled conferences automatically at three o'clock on Tuesday and Friday of each week.²⁹⁷ Grace explained at length the advantages of the procedure that automatically assigned cases in equal numbers to each justice to "distribute[] the work evenly."²⁹⁸ Grace also discussed the rule change that required the appellant's brief to be filed at or before filing the record, with the appellee's brief due in fifteen days.²⁹⁹

Grace listed a number of advantages to the more efficient procedures: "saving of a vast amount of money, which is otherwise lost by the delays of the law"; "it does not delay justice"; "prevention of appeals taken solely for delay"; and "great saving[s] to litigants."³⁰⁰

Grace concluded with a discussion of the proper role of *stare decisis* that sounded remarkably like Robinson had written it. Thus:

The Judges of Appellate Courts should not always have their faces turned towards the past. In other words, should not always be guided in their decisions, figuratively speaking, by the hands of the dead. In this day and age, they should, a good part of the time at least, have their faces toward the future. The age in which we live

Id.

293. Richard H. Grace, *The Law's Delays and Who is to Blame*, 93 CENT. L.J. 42 (1921). His article was soon republished in 5 J. AM. JUDICATURE SOC'Y 114 (1921).

294. *Id.* at 42.

295. *Id.*

296. *Id.* at 44.

297. *Id.*

298. *Id.*

299. *Id.* at 46.

300. *Id.* at 47.

is far different in many respects than that of fifty years, a century, or five centuries ago.³⁰¹

In his final paragraph, Grace echoed one of Robinson's main themes: "Courts should not forget that they are the servants of the people"³⁰²

Bronson, Bruce's replacement, became active in the American Bar Association like his predecessor. Bronson carried Robinson's ideas about judicial efficiency to a 1922 Judicial Section meeting of the Association. Bronson moved:

the Executive Committee of the Section be requested to include in the program of the next annual meeting of the Section a symposium devoted to the subject of prevention of delays in appellate procedure, embracing (1) some methods of speeding up delays in appellate procedure, (2) rendition of judicial opinions, and (3) consideration of rules of court in the administration of justice in appellate courts.³⁰³

The motion passed. Robinson's ideas for improving judicial administration had found a national forum.

Robinson had succeeded in shaping a model court.

VI. ROBINSON'S NATIONAL NOTORIETY

A. *CENTRAL LAW JOURNAL*: BRUCE'S ATTACK

Shortly after Bruce left the Court, he carried his attack on Robinson to another level. In early 1919, he wrote an eight-page article, *Judicial Buncombe in North Dakota and Other States*, published in a national law journal at St. Louis.³⁰⁴ The publisher's note explained: "This article, by a former Chief Justice of North Dakota, is interesting as affording a peep behind the scenes."³⁰⁵

Bruce's article criticized Robinson for the brevity of his opinions, for another alleged campaign promise "to decide cases on the argument without opinions and without leaving the courtroom," and for having sometimes

301. *Id.* at 48.

302. *Id.*

303. John T. Tucker, *Proceedings of the Judicial Section*, 1922 A.B.A. ANN. MEETING REP. 457-58.

304. Andrew A. Bruce, *Judicial Buncombe in North Dakota and Other States*, 88 CENT. L.J. 136-43 (1919). Before his 1911 appointment to the North Dakota Supreme Court, Bruce had served as an "associate editor" of the *Central Law Journal*. See PROCEEDINGS 1911, *supra* note 46, at 4.

305. See *Foreword* to Andrew A. Bruce, *Judicial Buncombe in North Dakota and Other States* 88 CENT. L.J. at 136 (prefacing Bruce's article).

“come into court with an opinion already written before counsel have even been heard from.”³⁰⁶

Bruce condemned Robinson’s brand of brevity: “Mr. Justice Robinson, as a general rule, cites and reads no cases, he announces no definite rules of law. His opinions furnish no guide to attorneys or to the public in subsequent controversies.”³⁰⁷

However, the Supreme Court’s present Rule 35.1, within the *North Dakota Rules of Appellate Procedure*,³⁰⁸ authorizes “summary dispositions” of routine cases without citation of precedents. Thus, Bruce has largely lost this argument. The hydraulic pressure of an increasing number of appeals in the pipeline to an often-overloaded appellate court has impelled further terseness. Still, Bruce’s views should caution modern appellate courts to carefully confine summary decisions to cases without any new or complex legal question.

Justice Bruce also complained: “Every Saturday night he publishes a letter in the newspapers in which he prints these alleged opinions, and often before they have even been read by the other members of the court.”³⁰⁹ Bruce cited four cases with voluminous records and briefs as examples that “required weeks of careful study,” and he deplored the complicating and misleading effects of Robinson’s premature and simplistic public comments.³¹⁰ As we noted earlier, Bruce was rightly indignant about this unagreed and unprecedented procedure, despite the lack of any available disciplinary mechanism to constrain Robinson’s premature public discussion of pending cases.

B. *CENTRAL LAW JOURNAL*: ROBINSON’S RESPONSE

The *Central Law Journal* invited Robinson “to explain his point of view” in the following week’s edition.³¹¹ In less than a page and a half captioned, “*Peculiarities*” in *The Administration of Justice in North Dakota—Justice Robinson’s Explanation*, he answered six questions from the editors:

We called attention to the charge, first, that he lowered the dignity of the court; second, that he insisted on decisions being made without argument and due consideration; third, that he gave a “weekly

306. Bruce, *supra* note 304, at 136.

307. *Id.* at 137.

308. See N.D. R. APP. R. 35.1. The rule, first adopted for affirmances by summary opinion in 1986, was amended to include reversals by summary opinion in 1998. *Id.* at Explanatory Note.

309. Bruce, *supra* note 304, at 136.

310. *Id.* at 137.

311. Robinson, *supra* note 208, at 155-57.

letter” to the press calling attention to the delinquencies of other members of the court; fourth, that he favored oral opinions; fifth, that he totally ignored the rule of *stare decisis* and assumed to decide every case according to the justice of the particular case and not according to the law established by any preceding decision; sixth, that he sometimes wrote his opinion deciding a case before argument and notified attorneys in advance of his decision.³¹²

Robinson’s reply was characteristically concise.³¹³

On degrading the dignity of the Court, he acknowledged, “It is true that in many ways I am peculiar,” but, he explained, “my purpose has been to get the Court out of the old ruts of the law and to administer justice in a plain, common-sense and businesslike manner.”³¹⁴ To explain how he justified “the writing of an opinion before hearing the argument of counsel,” Robinson said he did so “only in rare and plain cases.”³¹⁵

Occasionally, when looking over the record in advance of the debates, when it appears that the case is clear beyond reasonable dispute, I formulate a concise tentative opinion and mail a copy to the attorneys for each party and save them the expense of a trip to Bismarck if they concur in the opinion [T]here is no law to prevent an appellate court deciding an appeal without oral argument, and in small cases, it is common to deny oral argument.³¹⁶

Robinson summarized his oft-repeated views on judicial efficiency:

The oral debate of counsel is far from being desirable in all cases. It is often a great waste of time and a cause of needless delay and expense and it often tends only to mislead the judges. It is most beneficial, I think, when one or more of the judges have looked well into the case and are able to turn the debate into a conference and when the judges decide the case while it is fresh in their memory.

The judges double their work by delaying it. There is no reason why the United States Supreme Court or any appellate court should be three months behind with its work. It is time for

312. *Id.* at 155.

313. Robinson’s response was also published by *The Bismarck Tribune* as one of his *Saturday Evening Letters*. *Saturday Evening Letter*, BISMARCK TRIB., Feb. 11, 1919, at 4.

314. Robinson, *supra* note 208, at 155.

315. *Id.* at 156.

316. *Id.* at 156-57.

appellate judges to get out of the old ruts and to be more *peculiar*.³¹⁷

His desire to limit oral argument was not fully realized until 2003 when the North Dakota Supreme Court amended its rules “to make clear that the court has discretion to determine whether oral argument should or should not be permitted.”³¹⁸

Robinson defended his practice of giving the press “a weekly report on the doings of the Court, the time that each judge is absent from the Court and his manner of writing decisions.”³¹⁹ It was done “[t]o expedite the business of the Court”³²⁰ In this too, Robinson was ahead of his time with press releases to inform the public about the work of the Court. This virtue was stained, however, by his lack of tact, bluntness, and premature disclosures.

In his response, Robinson denied that he “oppose[d] the practice of writing decisions” or favored oral opinions. He pointed out that the “State Constitution provides that every decision must be given in writing, with the reasons concisely stated, and signed by the judges—and of course that is the only proper practice.”³²¹

Justice Robinson carefully answered the charge that he appeared “to favor a decision of every case on its merits, without regard to former decisions.”³²²

It is true that I have little regard for old, obsolete or erroneous decisions and prefer to decide every case in accordance with law, reason and justice. I do never—like Pontius Pilate—wash my hands and blame the law or a precedent or party zeal for an unjust decision. I do not believe in building error upon error I am so peculiar as to believe in due process of law³²³

Robinson, thus, affirmed *stare decisis*, but asserted a judicial obligation to analyze precedent for error. Both the importance of precedent and the recurrent need to re-examine it are still universal values in our doctrines, even though reasonable persons sometimes differ on how to apply them.

317. *Id.* at 157.

318. N.D. R. App. P. 34 Explanatory Note (2003).

319. Robinson, *supra* note 208, at 156.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

C. *HARVARD LAW REVIEW* NOTE

After the exchange of articles between Bruce and Robinson in the *Central Law Journal*, several national law reviews examined Robinson's reform-minded views. His prophecies captured the attention of the *Harvard Law Review*.

In 1920, the *Harvard Law Review* published an unsigned four-page Note on *Rule and Discretion in the Administration of Justice*.³²⁴ It discussed one of Robinson's main ideas for substantive judicial reform—discarding or disregarding bad precedent.³²⁵

The Note identified Robinson's view as part of the growing twentieth-century movement towards “legal realism” in reaction to nineteenth century courts' . . . “unyielding . . . faith that justice must be administered in accordance with fixed rules, which could be applied by a rather mechanical process of logical reasoning to a given state of facts and made to produce an inevitable result.”³²⁶

Besides describing the ensuing development of administrative tribunals to handle special problems, the Note identified another important part of the reaction to “mechanical” justice. “[T]he ultimately satisfactory solution lies in overhauling and readjusting our legal machinery to meet the present social demands . . .”³²⁷ “In this connection it is interesting to note the attempts at legal reform made by Mr. Justice James E. Robinson of the Supreme Court of North Dakota.”³²⁸

Largely from the exchange between Bruce and Robinson in the *Central Law Journal*, the *Harvard Law Review* editors gathered Robinson disliked the rule of precedent because “[h]e rarely cite[d] authorities in his more recent opinions, and . . . express[ed] a preference for deciding ‘every case in accordance with law, reason and justice.’”³²⁹

The Note analyzed a sampling of Robinson's opinions.

In *Bovey-Shute Lumber Co. v. Farmers' & Merchants' Bank of Leeds*,³³⁰ Robinson “dismissed in a few sentences and without citation of authority the contention of a banking corporation that a contract of guaranty

324. Note, *Rule and Discretion in the Administration of Justice*, 33 HARV. L. REV. 972 (1920) [hereinafter *Rule and Discretion*].

325. *Id.* at 972.

326. *Id.*

327. *Id.* at 973.

328. *Id.*

329. *Id.*

330. 173 N.W. 455 (N.D. 1919).

made by its cashier was *ultra vires* and void.”³³¹ The Note criticized his opinion for failing to consider the interests of the depositors of the bank:

The learned justice’s opinion shows clearly one of the chief dangers of “administrative” justice, of justice by discretion rather than of justice by rule, namely, the tendency to take snap judgment upon the basis of more obvious and pressing interests, to the neglect of those which are more subtle and far-reaching. Granting . . . the decision is supportable, the “reasoning” of the court should not have ignored the judicial experience of the past in solving the problem of *ultra vires* acts of banking corporations.³³²

Considering the arcane shape of the doctrine of *ultra vires* in that era, the Note’s criticism may have been somewhat justified.³³³

The Note questioned Robinson’s brevity in stating the facts in *Froelich v. Northern Pacific Railway Co.*,³³⁴ asserting his rundown was too abbreviated, since the per curiam opinion on rehearing gave a statement of facts twice as long as his.³³⁵

The Note insisted “something far more important than saving print-paper is involved in the court’s statement of the facts.”³³⁶

A full, clear, and impartial statement of facts by the court is necessary in order that the legal profession and the public may determine whether the judge has decided the case in accordance with the law or in accordance with his individual caprice. It is not only an important safeguard against the exercise of an arbitrary discretion by a court of last resort, but also an essential part of the decision as a precedent for future guidance.³³⁷

This is excellent instruction on opinion writing. The Note rightly criticized Robinson’s extreme simplicity in this one case, but it failed to grasp that there was at least some value in Robinson’s consistent efforts at brevity in the face of an enormous backlog of undecided cases and the prevalence of overstuffed opinions.

The more frequent vice in judicial opinions, we think, has been wordiness. The Note could have suggested balanced cautions: “Full” does

331. *Rule and Discretion*, *supra* note 324, at 973.

332. *Id.* at 974.

333. But today, any interest of depositors would have little relevance. See 7A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF CORPORATIONS § 3407 (Perm. ed. 1997).

334. 173 N.W. 822 (N.D. 1919).

335. *Rule and Discretion*, *supra* note 324, at 974.

336. *Id.*

337. *Id.*

not mean prolix or repetitious. To be “clear,” an opinion’s statement of facts needs to be concise and coherent, as well as complete. Complete means impartially framing the essential facts emphasized by the losing party, as well as those favoring the prevailing party.

Indeed, when an appellate court does not fairly address relevant facts or germane arguments without explaining why, lawyers become skeptical both about the court’s competence and its impartiality.

The Note correctly criticized Robinson’s inappropriate use of judicial notice for facts within his personal knowledge in his dissent in *Ingmundson v. Midland Continental Railroad Co.*³³⁸ The Note’s explanation is another primer on this aspect of opinion writing:

Judicial justice implies a right to be heard, which in turn implies a right to be confronted with the facts upon which the tribunal relies in denying one’s claim, and to be given an opportunity to rebut them. While an exception is made in the case of facts which are notorious, this does not extend to a judge’s personal observation of the particular facts of a case. If the tribunal relies upon its own private knowledge, it in effect prejudices the [party’s] case and denies him “due process of law.” Here again the dangers of discretion untrammelled by rule are obvious.³³⁹

Still, discretion is often vital in administering justice. In his concurrence in *Horton v. Wright, Barrett & Stilwell Co.*,³⁴⁰ Robinson objected to the majority’s assertion that “[t]he rule of stare decisis is especially applicable to decisions on matters of procedure and practice.”³⁴¹ Robinson protested: “I do strenuously dissent to the building of error upon error. I concur in the result, but not in the reasoning or the stare decisis.”³⁴² The Note agreed with Robinson and credited his position:

Mr. Justice Robinson’s methods sometimes find their appropriate field. Thus, in questions of fact in divorce cases, and in questions of procedure, the exercise of judicial discretion, within broad limits such as “due process,” appears at its best [I]f there is any field in which the doctrine of *stare decisis* is least important, it is in the field of procedure. No man can acquire a vested right in his opponent’s procedural error.³⁴³

338. 173 N.W. 752, 753 (N.D. 1919)

339. *Rule and Discretion*, *supra* note 324, at 975.

340. 174 N.W. 67 (N.D. 1919).

341. *Horton*, 174 N.W. at 67.

342. *Id.* at 68.

343. *Rule and Discretion*, *supra* note 324, at 975.

The Note concluded with a cautious endorsement of legal reform, but criticized Robinson's efforts as "haphazard attempts to break away from justice according to rule."³⁴⁴

Before rejecting utterly the experience of the past, legal reformers should make a careful study of the ends to be attained, and of the fields in which rule, or discretion, as the case may be, will conserve the most and sacrifice the least of the interests which the law has to secure. Only thus can the courts follow "the path of the law."³⁴⁵

In other words, the *Harvard Law Review* editors felt Robinson was headed on the right "path" for reform, but doing so "haphazardly" without careful study.

Robinson thus advocated some significant substantive reforms before their time. Even though a pariah to his colleagues, Robinson was a real prophet of legal reforms.

D. CALIFORNIA LAW REVIEW ARTICLE

In 1922, Professor Max Radin³⁴⁶ wrote an article recognizing Robinson's place in America's emergent movement for judicial reform.³⁴⁷ The *California Law Review* published Radin's eleven-page article on *The Good Judge of Chateau-Thierry and His American Counterpart*.³⁴⁸

The French "Good Judge," Radin explained, was M. Magnaud, president of the tribunal at Chateau-Thierry between 1889 and 1904, who later became a deputy in *Parlement*.³⁴⁹ Magnaud became famous in France "for exercising his discretion in accordance with his conscience" and "his liberal

344. *Id.* at 976.

345. *Id.*

346. Radin was a distinguished and liberal legal scholar. He was a professor of law at the University of California Law School from 1919 to 1948. A.M. Kidd, *Max Radin*, 38 CAL. L. REV. 795 (1950) [hereinafter Kidd, *Tribute*]. Curiously, while Earl Warren was chairman of the California Judicial Qualifications Committee, it is said that he blocked the confirmation of Radin for the California Supreme Court because Warren thought Radin to be too liberal. Earl Warren, Norwegian American, <http://www.mnc.net/norway/warren.htm> (last visited June 11, 2002). When Radin retired in 1948, William O. Douglas, Associate Justice of the United States Supreme Court, wrote a tribute to Radin and his scholarship. William O. Douglas, *Max Radin Tribute*, 36 CAL. L. REV. 163 (1948). An accompanying bibliography selectively listed fourteen books and over 90 legal articles (not including over 200 book reviews) written by Radin. *Id.* at 165-68. After his death in 1950, Radin's former professorial colleague at the California Law School, A. M. Kidd, wrote a memorial tribute to Radin. See Kidd, *Tribute*, 38 CAL. L. REV. 795 (1950).

347. Maxwell Radin, *The Good Judge of Chateau-Thierry and His American Counterpart*, 10 CAL. L. REV. 300 (1922).

348. *Id.*

349. *Id.*

political and social views.”³⁵⁰ “He scorned ‘legal law’ . . . and would be guided only by equity—not an altogether novel idea.”³⁵¹

According to Radin, “M. Magnaud scorned precedent . . . because it did not do justice in the specific case before him. In this, he was justified by the principles of the system within which he worked, a system that never accepted *stare decisis*.”³⁵² For these judicial traits, Radin reported, Magnaud became known as “*le bon juge*,” or “the Good Judge.”³⁵³

The phenomena of “good judges,” Radin suggested, was “not unknown to the Anglo-American system, if by ‘good’ judges we mean those who have attempted, as freely as they could, to determine causes in accordance with their personal sympathies or personal conscience.”³⁵⁴ Radin recognized “Mr. Justice James E. Robinson of North Dakota” as “such a judicial phenomenon.”³⁵⁵

Radin thought the “recent judicial experiment in North Dakota ha[d] given us an episode strikingly similar in its tendencies and results to that of the work of Magnaud in France.”³⁵⁶ North Dakota’s “recent judicial experiment” was electing “judges of the Non-Partisan League” to the state’s Supreme Court.³⁵⁷

Radin described how Robinson reached the Court: “Elected in 1916 by an unprecedented majority, he took office on January 2, 1917, as a Non-Partisan League partisan with the avowed intention of sweeping away the dry-rot of technicalities and precedents and deciding every case on the merits as they appeared in his conscience.”³⁵⁸

Radin compared Robinson’s approach to Magnaud’s as having “a striking similarity between Mr. Robinson and M. Magnaud. Both are earnest; both immensely confident in their rectitude; both active politicians; both radical in their views and sympathies; both dislike lawyers; and both have scant awe for their colleagues.”³⁵⁹ “But,” Radin declared, “there the similarity ends.”³⁶⁰

Based on his reading of several French accounts of “*le bon juge*,” Radin saw Magnaud as “much the more consistent and much more

350. *Id.* at 301.

351. *Id.* at 303.

352. *Id.* at 306.

353. *Id.* at 300.

354. *Id.* at 305.

355. *Id.* at 306.

356. *Id.* at 304.

357. *Id.*

358. *Id.* at 306.

359. *Id.*

360. *Id.*

consciously determined to carry out the principle that immediate justice must be done to the litigants, whatever statute or precedent say.”³⁶¹

Based on his sampling of twenty-four “prevailing, concurring, partially concurring, dissenting and partially dissenting opinions”³⁶² by Robinson, Radin contrasted him unfavorably with his continental counterpart. Radin denounced the shortcomings of Robinson’s style and the failings of his philosophy.

Radin recognized Robinson frequently used precedents to support his opinions, although “in general, he cites fewer cases than his colleagues,” and concluded that “[o]ften his views are fully in accord with precedent—and arbitrary technical precedent.”³⁶³ Indeed, “[a]s in the case of Magnaud,” Radin recognized, “much the larger number of Judge Robinson’s decisions, even when he supposes them to be violent departures from established rules, can be paralleled elsewhere. His language is more violent and picturesque than that of other judges, but that is all.”³⁶⁴ Thus, Radin did not criticize Robinson for any lack of respect for precedents, only for not putting enough of them in his opinions.

Radin deplored Robinson’s tendency to retry “issue[s] of fact without sight of the witnesses or renewed examination of them . . . even to the extent of raising points on appeal that [counsel] had never raised.”³⁶⁵ Radin condemned this as “an ancient and evil practise,” enjoined by an ancient Jewish maxim: “In the judge’s seat, act not the counsel’s part.”³⁶⁶

Radin appropriately criticized a poor practice, but he failed to fathom the fault fell not on Robinson, but largely on a unique North Dakota appellate procedure fixed by statute.

“Trial anew” review, sometimes called “*trial de novo*,” drawn from ancient Roman and ecclesiastical law, had been codified in North Dakota since 1893.³⁶⁷

Though forcefully criticized by legal scholars and historians for decades, the entrenched practice of “trial anew” review prevailed until repealed in 1971, over a half-century after Robinson’s time on the Court.³⁶⁸ Still, Robinson shared some responsibility for Radin’s criticism of his

361. *Id.*

362. *Id.* at 307.

363. *Id.*

364. *Id.*

365. *Id.* at 308 (citing Robinson’s dissent in *Westerland v. First Nat’l Bank of Carrington*, 164 N.W. 323, 325 (1917)).

366. Radin, *supra* note 347, at 308.

367. See Meschke & Smith, *supra* note 3, at 277-79.

368. *Id.* at 279-82.

opinions by not citing the statutory source when he employed “trial anew” review in his opinions.³⁶⁹

Radin thought some of “Judge Robinson’s announcements . . . startling in form and unusual in substance,” but believed they were not “all mischievous in tendency.”³⁷⁰ Radin complained about the “lucubrations” of one of Robinson’s longer opinions contrasted to the “terseness and directness of one of his earlier opinions,” approving particularly one four-sentence concurrence.³⁷¹

But “the real difficulty with Judge Robinson,” according to Radin, was use of his “great office to support and extend certain set political doctrines . . . in so flagrant or inconsistent a manner . . .”³⁷² For this conclusion, Radin relied mainly on the 1921 account of former Justice Bruce, in his book, *Non-Partisan League*.³⁷³ Radin also condemned Robinson’s spoken “conduct before election” as “gross violations of all canons in this regard.”³⁷⁴ Like Bruce’s criticisms, Radin specified no particular authorities or canons.

Radin also cited three 1921 opinions by Robinson in reproving his “gross violations of all canons”: “The most outrageous instance is *Wilson v. City of Fargo*,³⁷⁵ in which he sets aside explicit constitutional provisions with the contemptuous statement that the people had progressed considerably since they ‘swallowed the constitution whole as the whale swallowed Jonah.’”³⁷⁶ Radin rebuked Robinson: “The direct partisan purpose of this decision, overladen with phrases of great moral earnestness, is indicated by the fact that on another occasion he denounced an act which violated the very constitutional safeguard he here sets aside.”³⁷⁷

For this accusation, Radin does not cite Robinson’s prior inconsistent statement, but again relies on critical comments in Bruce’s book, *Non-Partisan League*.³⁷⁸ Still, inconsistency can create uncertainty in the application of the law. Inconsistency is thus a judicial vice, even though nearly every judge commits that sin occasionally, often inadvertently.

369. See *Westerland v. First Nat’l bank of Carrington*, 164 N.W. 323, 325-26 (N.D. 1917) (Robinson, J., dissenting).

370. Radin, *supra* note 347, at 308.

371. *Id.* at 309 (citing *Crowson v. Minneapolis St. Rwy. Co.*, 161 N.W. 725 (N.D. 1917)).

372. Radin, *supra* note 347, at 309.

373. BRUCE, *supra* note 44, at 170.

374. Radin, *supra* note 347, at 309.

375. 186 N.W. 263, 266 (N.D. 1921).

376. Radin, *supra* note 347, at 309.

377. *Id.*

378. *Id.* at 309 n.46; BRUCE, *supra* note 44, at 181-83.

Civility of expression is a virtue. Radin strongly criticized some of Robinson's expressions as intemperate. "[T]here seems no sufficient reason why the language even of 'good' judges, should not be the language of a gentleman."³⁷⁹

Quoting Robinson's colorful wording in several opinions, Radin complained: "It really is not necessary to say that the defendant was a 'goosie' or a 'sucker' in order to do equity."³⁸⁰ Radin characterized Robinson's "reference to marital or sex relations" in another opinion as "not so much undignified as it is unpleasant."³⁸¹ Radin reprimanded Robinson with his own words: "In the conduct of a legal proceeding the rules of common courtesy must prevail."³⁸²

Radin ended his article by praising Magnaud as "a consistent and conscious radical," while declaring Robinson, "would scarcely be recognized as a radical in France or even as a liberal."³⁸³

In fact he can be quoted for points of view that might be called reactionary and blindly conservative. It is the veering inconsistency in his practise, more than the vague looseness of his professions that make his "*jurisprudence*" an evil example.³⁸⁴

We wonder, though, if condemnation of another's less-disciplined views as an "evil example," instead of a "poor example," is not also an instance of incivility?

E. CALIFORNIA LAW REVIEW: THE BOOK REVIEW

After he left the North Dakota Supreme Court in late 1918, Bruce returned to the University of North Dakota School of Law.³⁸⁵ Over the next few years, he wrote a 284-page book, *Non-Partisan League*.³⁸⁶ One part of that book was aimed directly at the North Dakota Supreme Court and at Robinson in particular.³⁸⁷ We discuss his book next in this article, but here we look at a two-page book review of it.³⁸⁸

379. Radin, *supra* note 347, at 309.

380. *Id.*

381. *Id.* at 310.

382. *Id.* (quoting Robinson's opinion in *City of Minot v. Olson*, 173 N.W. 458, 461 (N.D. 1919)).

383. *Id.*

384. *Id.*

385. *1935 Memoriam*, *supra* note 46, at 166.

386. BRUCE, *supra* note 44, at 170.

387. *Id.* at 170-84.

388. Kidd, *Book Review*, *supra* note 266, at 269.

The reviewer, A.M. Kidd,³⁸⁹ saw Bruce's book as a "history of the Non-Partisan League in North Dakota" that would be "of much interest" to California readers because "the Socialists" were "now organizing a Non-Partisan League in California."³⁹⁰ Kidd regarded Bruce as an "unimpeachable" source, apparently because he "was formerly [the] Chief Justice of North Dakota [who] resigned on account of the non-judicial attitude of his Socialist colleagues."³⁹¹ Because Bruce wrote "from the point of view of a Progressive-Republican" who had "fought the old machine boss rule and the economic abuses of which the people justly complained," Kidd suggested, "the League is not likely to have a fairer opponent."³⁹²

Kidd tried to summarize the economic conditions that the League confronted and the League's failings in two paragraphs, using only Bruce's account.³⁹³ Kidd concluded: "Whatever the ultimate solution, it will not appeal to the sober sense of men to revert to primitive justice and abrogate the distinction between the executive and the judiciary."³⁹⁴

Kidd then sweepingly indicted the entire North Dakota Supreme Court based on Bruce's accusations against Robinson:

The Non-Partisan League judges have announced that they will not be bound by precedent. They have opened up cases long after the time for appeal has gone by, and have publicly stated in advance how they are going to decide cases that may come up in the future for decision. Their avowed purpose is to carry out the policies of the Non-Partisan League.³⁹⁵

As we explain next, Bruce's book accused Robinson of each of those sins. But, we think, Kidd uncritically expanded Bruce's accusations to unfairly indict the entire North Dakota Supreme Court.

VII. BRUCE'S BOOK: *NON-PARTISAN LEAGUE*

Bruce's book was a lengthy (29 chapters, 284 pages) polemic against the policies and politics of the League. In chapter after chapter, Bruce assailed the League's leadership as "socialistic," its policies as "socialistic,"

389. Kidd, *Tribute*, *supra* note 346, at 795. Kidd was a professor at the University of California at Berkeley and was a contemporary and friend of Max Radin. *Id.* Kidd's praise for Bruce's book was published in the same volume as Radin's criticism of Robinson. *See supra* Part VI.D.

390. Kidd, *Book Review*, *supra* note 266, at 269.

391. *Id.*

392. *Id.*

393. *Id.* at 270.

394. *Id.*

395. *Id.*

and its administration of state government as bumbling. Thus, Bruce charged:

Its socialistic leadership is tolerated and its socialistic tendency is overlooked by the naturally conservative and (except where his own interests can be subserved) anti-socialist farmer, because he thinks that he sees in it the means of obtaining his present ends.

* * * *

As a political movement it is an attempt to . . . serve both as a present avenue to political power for its leaders and as an entering wedge for a communistic America.³⁹⁶

For any recognition of a worthy aspect of the League's early years, one has to read Bruce very closely.³⁹⁷ The following quotation was a back-handed acknowledgement, nearly the only credit Bruce gave the League:

Many of [the League's] ideas, like those of the earlier populists, will remain in our permanent legislation. The organization, however, must sooner or later fall to pieces, and this because there are no points of common interest between the farmer and the socialist, and the farmer and the laboring-man, save the one attempt to curtail the power of the middleman and the excessive power of organized capital, which no doubt will be accomplished, and which would have been accomplished if the League had never existed.³⁹⁸

Bruce was right on one thing; many of the League's ideas have survived and flourished as permanent legislation. Notable successes include the State Mill and Elevator and the Bank of North Dakota.

But Bruce badly misjudged the League's staying power when he predicted that it "must sooner or later fall to pieces." Bruce would be surprised to learn that the League survived his aspersions of socialism and communism. In the last fifty years, the Democratic-NPL alliance, created in 1956, has succeeded in electing many state officials, including three governors, three United States Senators, and five United States Congressmen.³⁹⁹

396. BRUCE, *supra* note 44, at 4-5.

397. See OMDAHL, *INSURGENTS*, *supra* note 267, Chapter 1 (offering a more balanced chronicle of the League's beginnings in the first chapter).

398. BRUCE, *supra* note 44, at 10.

399. Governors: Guy (1961-72), Link (1973-80), and Sinner (1985-92); Senators: Q. Burdick (1960-92), Conrad (1987-present), and Dorgan (1992-present); and Congressmen: Q. Burdick (1959-60), Redlin (1965-67), Link (1971-73), Dorgan (1981-92), and Pomeroy (1993-present). NORTH DAKOTA BLUE BOOK 198, 201-02, 330 (2003-2005).

In an early chapter entitled *The League and its Socialist Leadership*,⁴⁰⁰ Bruce gave his perception of the League's campaign to elect members of the Supreme Court:

The League members of the Supreme Court, from whom much was expected and much was obtained, were Richard H. Grace, Luther E. Birdzell, Harry Bronson and James E. Robinson. These men were selected by William Lemke and their election was secured on the theory that they had committed themselves to the policies of the League. During the argument in the Supreme Court of the case of *State ex rel. Twichell v. Hall* one of them, James E. Robinson, candidly admitted from the bench that he had made pre-election promises. During the campaign, also, Mr. Townley and other League orators frequently stated that the election of these Judges was of more importance to the success of the League program than even that of the governor himself; and this statement was reiterated in the League's principal organ, *The Nonpartisan Leader*, and in other campaign publications.⁴⁰¹

Bruce thus condemned the League for choosing sympathetic candidates for the Court, endorsing them, and campaigning for them openly.

For our purposes, the important part of Bruce's book is chapter XIX, *The League and the Courts*.⁴⁰² There, Bruce again damned Robinson for "openly [going] before the [League] convention and promis[ing] if elected to support its measures."⁴⁰³ In doing so, Bruce recognized pledges were often expected of judicial candidates by some factions, but he expressed an odd preference for the process to remain behind closed doors:

These things have perhaps been done secretly in the past, and it is no doubt true that the so-called vested interests have often taken a prominent part in the selection of what they have termed safe and sane judges who, they believed, would favor their social, constitutional and economic views.⁴⁰⁴

This attitude, we think, brands Bruce's attack on Robinson as hypocritical and opportunistic—a way to get back at Robinson for his constant criticism of Bruce's absences and inaction as Chief Justice.

Bruce mentioned no precedent, standard, or statute that prohibited or penalized Robinson's remarks to the League convention. Instead, Bruce

400. BRUCE, *supra* note 44, at 60-70.

401. *Id.* at 67-68.

402. *Id.* at 170-84

403. *Id.* at 170.

404. *Id.* at 171.

based his censure on the generalized need for the public to see the courts as impartial and unbiased, claiming that “in order that there may be a stable government under the laws, the courts must be trusted, the courts must be respected, and in order to be respected they must themselves be respectable and respectful.”⁴⁰⁵ This conception has been central to regulating judicial conduct in most states since Bruce expressed it. The first canon of the North Dakota Code of Judicial Conduct dictates, “A judge shall uphold the integrity and independence of the judiciary.”⁴⁰⁶

To support his view that Robinson’s judicial behavior made him less than “respectable and respectful,” Bruce quoted the entirety of his own dissent in *Twichell*,⁴⁰⁷ and two complete *Saturday Evening Letters* to show how Robinson’s public statements compromised the Court.

In an October 26, 1918, *Letter*, Robinson accused the North Dakota legislature of corruptly adopting a “bone-dry” (prohibition) act in its 1917 session, and Robinson extolled the medicinal uses of alcohol.⁴⁰⁸ Bruce declared this, “in advance of any lawsuit testing the validity of the so-called bone-dry law of North Dakota, [was] by way of gratuitous advice to prospective litigants”⁴⁰⁹

Although no action was then pending on the subject, Robinson acted indiscreetly to question the validity of a specific enactment unrelated to the judicial branch. Today, it is clear, “A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness”⁴¹⁰ Further, “A judge shall conduct all of the judge’s extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.”⁴¹¹ By today’s standards, Robinson’s remarks on prohibition “cast reasonable doubt on [his] capacity to act impartially” on any case involving prohibition.⁴¹²

405. *Id.* at 184.

406. N.D. CODE OF JUD. CONDUCT Canon 1. The text after the blackletter canon elaborates: An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Id.

407. State *ex rel.* *Twichell v. Hall*, 171 N.W. 213, 234 (N.D. 1918)(Bruce, J., dissenting).

408. BRUCE, *supra* note 44, at 180-84.

409. *Id.* at 180-81.

410. N.D. CODE OF JUD. CONDUCT Canon 3B(9).

411. *Id.*

412. *Id.* at Canon 4(A).

A judge, who publicly comments on a potential case, would likely be required to recuse himself from that case.⁴¹³ But a judge is entitled to speak out “concerning the law,” absent an imminent specific case.⁴¹⁴

Bruce quoted all of Robinson’s December 7, 1918, *Letter*,⁴¹⁵ commenting dimly, “It is rarely in America that we find Supreme Court Justices writing to the press Letters such as that. . . .”⁴¹⁶ Robinson’s *Letter* chortled and crowed about the recent election of Justice Bronson to Bruce’s seat.

Robinson depicted Christianson as the “last rose of summer,” since he embodied “the last of the old line judges—the last of the Mohicans.”⁴¹⁷ Robinson gloated: “All his lovely companions are faded and gone and their places are filled by good Non-partisan judges.”⁴¹⁸ Robinson also

venture[d] to predict that the Non-partisan court will in efficiency and fairness far surpass any former court of the state; that they will not be slaves to any erroneous or rotten decisions called precedents—and that in future no person will be deprived of life, liberty or property without due process of law.⁴¹⁹

Robinson’s personalized critique of former justices is a little startling to modern judges, accustomed to the decorum of modern collegiality.

It is doubtful, however, this kind of criticism would bring disciplinary action under modern standards. In defense of Robinson, judges are not beyond criticism of their performance. Modern standards do not insulate judges from their critics, nor from each other. And judges themselves are

413. *E.g.*, Justice Scalia recused himself from the “pledge of allegiance” case after making comments which were critical of the lower court decision to a college audience. *See Newdow v. U.S. Cong.*, 328 F.3d 466 (9th Cir. 2002); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). *See also* Charles Lane & David Von Drehle, *Is Scalia Too Blunt To Be Effective?: Justice Out of Case About Which He Cares*, THE WASH. POST, Oct. 17, 2003, at A27; Charles Lane, *High Court To Consider Pledge in Schools; Scalia Recuses Himself From California Case*, THE WASH. POST, Oct. 15, 2003, at A1; Dahlia Lithwick, *Scaliapalooza: The Supreme Court’s Pocket Jeremiah*, <http://slate.msn.com/id/2090532> (posted on Oct. 30, 2003).

The same would hold true in North Dakota. *See* N.D. CODE OF JUD. CONDUCT Canon 3E(1):

A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where: [] the judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of disputed evidentiary facts concerning the proceedings.”

N.D. CENT. CODE, Court Rules Annotated 1007 (2004-05).

414. N.D. CODE OF JUD. CONDUCT Canon 4B.

415. BRUCE, *supra* note 44, at 176-80 (quoting *Saturday Evening Letter*, BISMARCK TRIB., Dec. 7, 1918, at 4).

416. *Id.* at 176.

417. *Id.* at 177.

418. *Id.*

419. *Id.*

not second-class citizens, unable to express their views on public figures or subjects.

“A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, the administration of justice and non-legal subjects, subject to the requirements of the Code.”⁴²⁰ But public and personalized criticism of a colleague is certainly detrimental to efficient appellate processes.

In the *Letter* that Bruce criticized, Robinson also praised and appraised each of his colleagues. Bronson was a “pure-bred—a good worker and a thinker with a large bump of justice and a clear perception of the difference between right and wrong.”⁴²¹ Grace was “of the right pedigree, a worker, and a jurist of luminous mind.”⁴²² Robinson rated Birdzell “as a good half-breed; while the old-liners made him law professor at the U and tax commissioner, Bishop Lemke virtually made him judge.”⁴²³

Robinson spoke well of Christianson, too. “He is a jurist of capacity and a real gentleman. When left to his own good impulses he is sure to stand for the cause of right and justice.”⁴²⁴

But Robinson said Christianson “on many occasions . . . has fallen into error by putting too much trust in his former companions.”⁴²⁵ Robinson discussed why he believed Christianson had voted wrong in some cases, except for one where, “at the third conference a light seemed to shine around the intellect of Judge Christianson as it shown around Paul on his way to Damascus to persecute the Christians.”⁴²⁶

Robinson concluded expectantly: “But now under better influences it is hoped none of our judges will now feel inclined to continue piling error upon error by following the lead of decisions so manifestly erroneous or rotten.”⁴²⁷

Bruce complained, in one of the cases that Robinson argued was wrongly decided, that Robinson had:

carried on an active correspondence with the owner of the horses without the knowledge of the other parties to the litigation, and wrote several Letters to the press expressing his opinion of the case, and even published a tentative opinion. This was done in

420. N.D. CODE OF JUD. CONDUCT Canon 4B.

421. BRUCE, *supra* note 44, at 177.

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.* at 178.

426. *Id.*

427. *Id.* at 180.

order to bring public ridicule upon those of his associates who differed with him, and to compel them to concur in his view of the controversy. This, indeed, has been the jurist's common practice. Law suits to him should be tried by the public, and not the court, and the judges should be representatives and not the expounders of an established law. To Justice Robinson it is perfectly fitting and proper for a judge to talk to the litigants and council [sic] pending a law suit or pending an appeal, and to even announce his decision in advance of the litigation.⁴²⁸

Bruce, of course, was right on this. The only proper way for a justice to express a different view about a case before the Court is in a separate opinion at the time of the final decision, either concurring or dissenting. Any premature opinion is a serious impediment to impartial deliberations.

Three years after Bruce's book, the American Bar Association adopted its first recommended Standards of Judicial Conduct.⁴²⁹ The new standards contained directions that judicial candidates not make "promises of conduct in office" nor "announce his conclusions of law on disputed issues."⁴³⁰

In 1922, Bruce became a member of the law faculty at Northwestern University.⁴³¹ In 1924, Bruce published another book, *The American Judge*.⁴³² In 11 chapters and 212 pages, Bruce attempted "to throw some light on the problem[s of judicial administration], to present at least the issues, to explore perhaps some fallacies, and to discuss the limitations as well as the needs of a government of law among men."⁴³³

Bruce did not mention Robinson, but continued to name the Non-Partisan League as a bad example of political control of a court system.⁴³⁴ Yet Bruce's essays reflected some of Robinson's ideas, adopting some and still challenging others. For example, Bruce recognized "excessive costs and . . . unnecessary delays close our courts to the average citizen, and even the business man foregoes many a right before he will go to law."⁴³⁵

428. *Id.*

429. "The first code regulating judicial conduct was adopted by the ABA in 1924." Republican Party of Minn. v. White, 536 U. S. 765, 786 (2002) (citing 48 A.B.A. REPS. 74 (1923) (report of Chief Justice Taft); P. MCFADDEN, ELECTING JUSTICE: THE LAW AND ETHICS OF JUDICIAL CAMPAIGNS 86 (1990)).

430. A.B.A. CANON OF JUD. ETHICS 30 (1924).

431. *1935 Memoriam*, *supra* note 46, at 166.

432. ANDREW A. BRUCE, *THE AMERICAN JUDGE* (Richard T. Ely ed., The MacMillan Co. 1924).

433. *Id.* at 12.

434. *Id.* at 148, 167.

435. *Id.* at 117.

On the other hand, Bruce continued to argue against any abbreviated opinions.⁴³⁶ “It is easy for a judge to brush aside a case by saying it is ‘a kindergarten case’ and is not worthy of consideration.”⁴³⁷

Curiously, Bruce moved to Robinson’s position on one aspect of *stare decisis*, a major subject of criticism by Bruce during their years together on the Court. Bruce said, “[t]he fear of overruling previous decisions—a fear which the public by no means shares—has so paralyzed our courts as to render them at times almost ridiculous.”⁴³⁸

While still teaching law at Northwestern University, Bruce served as chairman of the National Reconstruction Administration’s compliance board for Chicago.⁴³⁹ Bruce died of a heart attack at the age of 68 on December 7, 1934.⁴⁴⁰ Bruce and his books are barely remembered today. Bruce’s positions on judicial speech have been largely rejected by the Supreme Court’s decision in *White*.⁴⁴¹ Judicial speech seems bound to become as open and robust as in Robinson’s days.

Still, Bruce’s conflicts with Robinson contributed a great deal to the shape of today’s judicial values.

VIII. ROBINSON’S BOOK: *WRONGS AND REMEDIES*

Robinson sought re-election in 1922. Among his League-endorsed colleagues, Grace retired, and Birdzell sought re-election, too.⁴⁴²

The political climate had changed since 1916. The League suffered a serious setback in the nation’s first and, until 2003, only gubernatorial recall election in 1921. Governor Frazer was recalled and Governor Nestos was elected in his place.⁴⁴³ The League still ran strong in the 1922 legislative races, but it was not as potent at the polls as in the three previous general elections.⁴⁴⁴

436. *Id.* at 77-79.

437. *Id.* at 77.

438. *Id.* at 67. *But see id.* at 181-82 (delivering wry comments about the Non-Partisan League Court’s lack of respect for precedent).

439. *1935 Memoriam*, *supra* note 46, at 166.

440. *Id.*

441. *See generally* Republican Party of Minn. v. White, 536 U.S. 765 (2002).

442. Meschke & Smith, *supra* note 3, at 246.

443. Frazier had 107,332 (49%) votes and Nestos had 111,434 (51%). NORTH DAKOTA VOTES, *supra* note 42, at 138.

444. After the 1922 election, the Independents had 26 members in the Senate, compared to the League’s 23; the Independents had 58 in the House, compared to the League’s 55. *Independents Win State Control*, DEVILS LAKE WORLD, Nov. 15, 1922, at 1.

Robinson had alienated the League leadership.⁴⁴⁵ He often criticized the League publicly⁴⁴⁶ and in his *Saturday Evening Letters*.⁴⁴⁷ The League's opponents used his criticisms to campaign against the League in 1921.⁴⁴⁸

Robinson entered the 1922 primary without the support of the League that he had enjoyed in 1916. The League, at its March 1922 convention, endorsed Grace, M.J. Englert, a district court judge, and George E. Wallace, a former state tax commissioner.⁴⁴⁹ The Democratic and Republican conventions did not endorse candidates for the Supreme Court.⁴⁵⁰

445. One publication reported Robinson "several times . . . proved a thorn in the flesh of the [League] leaders particularly when certain fundamental property rights were involved and Justice Robinson declined to sanction Socialistic assaults upon them." See ROBINSON, *supra* note 39, at 282 (republishing an excerpt of an undated *Duluth Herald* article).

446. Robinson's trouble with the League began during his first month on the Court. See *Robinson Says Plan Proposed Will Not Work*, BISMARCK TRIB., Jan. 15, 1917, at 1; *Robinson is Thorn in the League's Side*, Jan. 17, 1917, at 3; *Seeks to Save League Intact From Pitfalls*, BISMARCK TRIB., Jan. 18, 1917, at 1.

447. Just before the 1918 general election, Robinson publicly opposed seven of ten constitutional amendments that the League had promoted. See *Vote No on Amendment, J.E. Robinson*, BISMARCK TRIB., Oct. 19, 1918, at 1 (publishing Letter as a news story under this banner: "Venerable League Associate Justice Raps Seven Out of Ten Proposals"). In an introductory paragraph, *The Bismarck Tribune* observed Robinson's "independence of thought and action have time and again been found disconcerting by the league managers." *Id.* This same Letter appeared again in the Monday, October 21, 1918, edition of *The Bismarck Tribune*, in a full-page paid political advertisement by the Burleigh County Democratic Central Committee. Robinson did not oppose three proposed constitutional amendments, including the one on "Public Ownership of Industries." James E. Robinson, *Judge Robinson Says No!*, BISMARCK TRIB., OCT. 21, 1918, at 1.

448. *The Red Flame* was "an anti-League monthly magazine that surfaced in November, 1919, under the primary sponsorship of Carl Kositzky, and existed through the 12 months prior to the elections of 1920." ROBERT L. MORLAN, *Foreword to THE RED FLAME: A CHRONICLE OF THE FIERCE CONTROVERSY SURROUNDING THE EARLY DAYS OF NORTH DAKOTA'S NON-PARTISAN LEAGUE* (Lowe & Larson Printing, Inc. 1975). In this republication, see attributions to, and quotations from, Justice Robinson. *THE RED FLAME: A CHRONICLE OF THE FIERCE CONTROVERSY SURROUNDING THE EARLY DAYS OF NORTH DAKOTA'S NON-PARTISAN LEAGUE* 50, 52, 55-57, 58, 88, 181 (Lowe & Larson Printing, Inc. 1975). "It was Judge Robinson of the North Dakota supreme court, we believe, who took upon his own shoulders full responsibility for the reign of socialism which North Dakota is now experiencing, this venerable league justice declaring that in an unfortunate moment he placed in the hands of A.C. Townley a copy of Walter Thomas Mill's book [*The Struggle for Existence*]." *Id.* at 227.

449. *League Places a Full Ticket in the Field*, BISMARCK TRIB., Mar. 27, 1922, at 1, 3. *The Bismarck Tribune* account says five names were placed into nomination: A.G. Burr finished fourth in the balloting and the fifth person was not named. *Id.* at 3. Therefore neither Birdzell nor Robinson received the League's endorsement. We have found no explanation why Birdzell lost the League's favor. Grace declined the nomination, having decided to go back into law practice. *Justice Grace to Retire from Supreme Court*, BISMARCK TRIB., Mar. 30, 1922, at 1. Wallace later withdrew from the race after accepting a job in New York. *Wallace Takes Position with Western Union*, BISMARCK TRIB., May 29, 1922, at 3.

450. *Conventions Adjourned at Noon Today without Action on Senator Issue; "Fusion" on State Ticket*, BISMARCK TRIB., Apr. 20, 1922, at 1.

Robinson announced that he had filed for re-election in a *Letter* published by *The Bismarck Tribune* on May 13, 1922. He quoted from his *Publicity Pamphlet* statements for his 1912 campaign for Congress and his 1916 campaign for the Court that marked his reform-minded views. He next summarized what he had accomplished:

Now, as a result of those Letters, and of persistent work by some person, the laws delays and the compulsory expense of printing briefs and court records may be accounted a thing of the past. A suitor does not have to buy justice or to wait years for a decision. At a small expense a party may appeal to our Supreme Court, and obtain a final decision within a month.⁴⁵¹

Robinson's one-page statement in the 1922 *Publicity Pamphlet* similarly claimed credit for various changes:

In 1919 [Robinson] drafted and secured the passage of three acts of great benefit to the poor debtors: (1) An act limiting and reducing the costs of foreclosures. (2) An act providing for notice of thirty days before commencing a foreclosure. (3) An act giving debtors the use of their property during the year of redemption.⁴⁵²

Robinson claimed credit for circulating an initiated measure to reduce taxes by repealing certain tax measures enacted in 1919.⁴⁵³ Also:

[Robinson] is the first judge in all the world to give the press a weekly letter on the court procedure, the law's delays, the number of pending cases, the absence or offdays of each judge. Result: Monthly terms of court, no expense of printing, shorter and better decisions, no more delays, no more pawing over cases for a year, no judge lays off until his work is done.⁴⁵⁴

While his claimed successes were largely true, the voting public was not impressed.

Eleven candidates ran for six nominations for three Supreme Court positions in the 1922 primary election.⁴⁵⁵ Robinson finished ninth, garnering only 30,580 votes, and so was eliminated in the primary.⁴⁵⁶ Birdzell ran

451. *Saturday Evening Letter*, BISMARCK TRIB., May 13, 1922, at 4.

452. *James E. Robinson*, in N.D. PUBLICITY PAMPHLET 7 (Bismarck Tribune Company 1922) (issued under authority of law by Thomas Hall, Sec'y of State, Bismarck, North Dakota) (providing statements of the candidates for the primary election on June 22, 1922).

453. *Id.*

454. *Id.*

455. *68 Candidates Go on Ballot for Nomination in June Primaries of Republican and Democratic Parties*, BISMARCK TRIB., May 30, 1922, at 6.

456. NORTH DAKOTA VOTES, *supra* note 42, at 90.

fifth in the primary, but he finished in the top three in the fall to gain election, along with William Nuessle and Sveinbjorn Johnson, neither of whom was supported by the League.⁴⁵⁷

Nearing age 80, Robinson was thus involuntarily retired. As he had promised in a 1917 *Letter*,⁴⁵⁸ he soon published his book, *Wrongs and Remedies: Economic Live Wire Essays*.⁴⁵⁹

Robinson's book was a jumble of short essays on varied topics in no particular order. The book had 32 chapters, a conclusion, and two short appendices in 301 pages. Many of the chapters were republications of one or more of his *Saturday Evening Letters*.⁴⁶⁰ Chapter X, for example, had six parts, each apparently a different *Letter* or combination of *Letters* addressing court procedure and delays.⁴⁶¹ A number of chapters were republications of some of Robinson's opinions, concurrences, and dissents.⁴⁶²

Only some chapters of Robinson's book deal with judicial values. Earlier in our chapter on The Robinson Court, we looked at many of his *Letters* on the Court's work habits, efficiency, and performance, and on some of Robinson's ideas for judicial reform.⁴⁶³ But his book also advocated other judicial values.

Robinson's first chapter, entitled *Key-Note*,⁴⁶⁴ protested a number of perceived failings of the judicial system, and argued judges "have power to make rules and rulings to govern the court procedure and to put an end to all the delays, grafts and technicalities which continue to be a reproach to the law . . ."⁴⁶⁵ In this, Robinson was an early advocate of procedural reform by the courts themselves, without waiting indefinitely for legislative action.

Eventually judicial reform of procedure took place. The United States Supreme Court began it in the 1930s with new rules of civil procedure,⁴⁶⁶

457. *Id.*

458. *Saturday Evening Letter*, BISMARCK TRIB., Oct. 20, 1917, at 4 ("[W]hen the roses come again, then we shall publish a book of 'Letters, Essays and Decisions.'").

459. ROBINSON, *supra* note 39.

460. *Id.* 68-90.

461. *Id.*

462. *See id.* at 154 (reprinting Robinson's dissent in *Larson v. Russell*, 176 N.W. 998, 1009 (N.D. 1920)).

463. *See supra* Part V.

464. ROBINSON, *supra* note 39, at 74 (explaining his objectives in writing an opinion, Robinson told his readers what he meant by "Key-Note": "*The first half-dozen sentences should sound the keynote and fairly indicate the nature of the action and the defense.*") (italics in original).

465. *Id.* at 4.

466. *See* FED. C. JUD. P. AND R. at 25 (2004) (providing that the rules could be adopted and amended under a U.S. Supreme Court order on December 20, 1937, and pursuant to the Act of June 19, 1934, ch. 651, 48 Stat. 1064 (1934)).

and the North Dakota Supreme Court adopted similar civil rules in 1957.⁴⁶⁷ After new rules of civil procedure were embraced by nearly all states, reformation by the courts progressed to new rules of criminal procedure, rules of evidence, rules of appellate procedure, and rules for judicial and lawyer conduct with co-ordinate disciplinary procedures.⁴⁶⁸ We think Robinson would be pleased by what has been accomplished, but would still not be satisfied that enough has been done to minimize litigation delay and expense.

Although Robinson's book followed Bruce's, Robinson did not respond to Bruce's charges against him. The main historical importance of Robinson's book is the republication of many of his *Letters*, particularly his ideas for legal reforms. Robinson encouraged enduring judicial values.

Robinson stayed in Bismarck after he lost the election in 1922.⁴⁶⁹ In 1931, he moved to a "national soldiers home" at Milwaukee, Wisconsin.⁴⁷⁰ After "a long illness," he died at the age of ninety on March 23, 1933.⁴⁷¹

The Bismarck Tribune quoted one of his *Letters* in a front-page story of Robinson's death. It expressed his favorite theme:

Those who serve the public steal their time, soldier and neglect their duties That is true of nearly all judges and even the nine judges of the United States supreme court (sic).

Indeed the big nine are the chief sinners. They take long vacations, continue in the ruts of ages and hold only biennial terms of court. Instead of pushing their work and keeping their docket clean, like the North Dakota supreme court, they hold up most appeals for two or three years. Of course that is not business.⁴⁷²

This was a fitting memorial to Robinson's campaign to improve his Court. Robinson was able to praise his own Court that had become a model to emulate in "pushing their work and keeping their docket clean."

Despite some shortcomings, North Dakota's "Good Judge" had done a good job of shaping his own Court.

467. Meschke & Smith, *supra* note 3, at 272.

468. *See, e.g.*, N.D. R. CIV. P. (2004-2005).

469. *James E. Robinson, Former Member of the High Court, Is Dead*, BISMARCK TRIB., Mar. 23, 1933, at 1.

470. *Id.*

471. *Id.*

472. *Id.*

IX. ECHOES OF ROBINSON'S IDEAS

Reflections of Robinson's ideas about simplifying procedure, avoiding delay, and saving legal expense can be found in modern rules of procedure, as we have observed elsewhere in this article.⁴⁷³ Echoes of some of Robinson's ideas on legal realism can be found in modern legal literature, even though his ideas are more often criticized than credited.

In 1975, the *Southern University Law Review* published an article by Justice Albert Tate, Jr. of the Louisiana Supreme Court on *The Justice Function of the Judge*.⁴⁷⁴ He pondered the role of a judge in applying legal rules: "The adjudication in each case must result not only from an application of legal rule but, also, in what the judge feels to be a result that is as fair as possible to the individual interests concerned."⁴⁷⁵

In the second part of his article, Justice Tate discussed what he called "judicial impressionism:"

The performance of the justice function does not and should not involve judicial impressionism. The judge is not to apply what is merely his subjective preference rather than some objective rule of law. It would, of course, be unrealistic to assume that a judge's personal philosophy does not consciously or unconsciously influence his choice of legal rule, or (at least as important) his perception that a choice is available to him.⁴⁷⁶

As a "dramatic illustration of unwonted excess of judicial impressionism, characterized by some of its critics as judicial anarchy," Tate named French Judge Magnaud as described in Radin's article.⁴⁷⁷ Although Tate does not name him, the American counterpart of the "Good Judge" was, as we discussed earlier, Justice Robinson. Because Robinson largely failed to cite precedents in his opinions, he is thus identified as an example of "judicial impressionism."⁴⁷⁸

473. Notable examples include judicial rules of procedure, rather than legislative. *See supra* Part IV (discussing Robinson's Election); Part V.D. (discussing Reforming Rules); Part V.I. (discussing Robinson's Results); and Part VIII (discussing Robinson's book, *Wrongs and Remedies: Economic Livewire Essays*). For summary opinions in clear cases, see Part VI.A. (discussing *Central Law Journal: Bruce's Attack*). For limiting the length of appellate briefs and oral arguments, see Part V.D. (discussing Reforming Rules) and Part VI.B. (*Central Law Journal: Robinson's Response*).

474. The Hon. Albert Tate, Jr., *The Justice Function of the Judge*, 1 S.U. L. REV. 250 (1975).

475. *Id.*

476. *Id.* at 253.

477. *Id.* at 254, 254 n.6 (citing Max Radin, *The Good Judge of Chateau-Thierry and His American Counterpart*, 10 CAL. L. REV. 300 (1922)).

478. *Id.* at 250.

Without digesting Tate's entire article, we note he criticized "judicial impressionism," but concluded his article with a sympathetic thought, writing that "[t]he justice function of the judge requires his fidelity primarily to the purpose of the law, not to its lettering divorced of social reason."⁴⁷⁹ We think Robinson would have gladly agreed with this thought.

In 1987 the *Tulane Law Review*, published *In Memoriam: Honorable Albert Tate, Jr.*, by one of his former law clerks.⁴⁸⁰ Part of it discussed Justice Tate's original article:

In The Justice Function of a Judge [Tate] addressed himself more thoroughly and systematically than before to a search for the limits of judicial power. As an alternative to 'judicial impressionism' Tate found in Llewellyn and in Geny what he regarded as a serviceable definition of the 'fairness' a judge ought to require of the legal rules he chooses to fashion and/or enforce: the application of a rule should produce a result consistent with 'the normally expectable result of the conduct or agreement or event in the society of the time.'⁴⁸¹

In a footnote to the phrase "judicial impressionism" in this passage, the author cited Tate's article,⁴⁸² and added: "Tate discusses, as an example of 'judicial impressionism,' the so-called 'good judge' of Chateau-Th[er]erry who decided each case according to the needs or appealing qualities of the parties, with a corresponding loss of 'doctrinal consistency' and therefore of 'equality of treatment.'"⁴⁸³ Again, we note Radin designated Justice Robinson as the American counterpart of the "Good Judge" in his *California Law Review* article.⁴⁸⁴ Thus, Robinson has come to represent American "judicial impressionism" in contemporary legal literature.

In a 1985 article, Professor Dan-Cohen named Robinson in a long thesis on the theory of adjudication.⁴⁸⁵ The reference came in a footnote after this sentence in the concluding part of the article: "An attempt to practice any of the aspects of either of the models in its purity is likely to lead to a caricature of the judicial process."⁴⁸⁶

479. *Id.* at 265.

480. Grover Joseph Rees, III, *Albert Tate on the Judicial Function*, 61 TUL. L. REV. 721 (1987). Rees was then Chief Justice, High Court of American Samoa.

481. *Id.* at 737.

482. Tate, *supra* note 474, at 250.

483. Rees, *supra* note 480, at 737, 737 n.77.

484. Radin, *supra* note 347, at 300.

485. Meir Dan-Cohen, *Bureaucratic Organizations and the Theory of Adjudication*, 85 COLUM. L. REV. 1 (1985). Dan-Cohen was on the faculty at Boalt Hall School of Law, University of California at Berkeley. *Id.*

486. *Id.* at 35.

The footnote said: “This was probably the experience of Justice Robinson, who claimed to disregard precedent completely and insisted on deciding each case on its merits.”⁴⁸⁷

Robinson, more than any of his colleagues, was inclined to question a precedent he thought erroneous. Still, the conclusion that he “claimed to disregard precedent completely” was an exaggeration.

Robinson explained: “It is true that I have little regard for old, obsolete or erroneous decisions and prefer to decide every case in accordance with law, reason and justice.”⁴⁸⁸ Evidently the sweeping conclusion that Robinson ignored all precedent resulted from his habit of rarely citing specific precedents. Still, as one of his national critics recognized: “Often his views are fully in accord with precedent—and [even] arbitrary technical precedent.”⁴⁸⁹

In a 1992 article about Professor Karl Llewellyn, Robinson was made the subject of a long footnote.⁴⁹⁰ In part II(3)(e) on *Arts and Crafts: Lawman’s Intuition and the Big Lie*,⁴⁹¹ while outlining Llewellyn’s German-language publications, Ansaldi discussed Llewellyn’s ideas on how a judge must “choose whether to expand an old rule to cover the new case or refuse to expand it.”⁴⁹² Ansaldi quoted a paragraph from Llewellyn about “guidelines” the judge has “learned to derive”⁴⁹³ The footnote about Robinson comes after this last sentence of the quoted Llewellyn paragraph, and reads “[t]he constraints and socialization resulting from his membership in society and from his legal training guarantee the continuity of decisions, the continuity of legal norms, and the predictability of the ‘freest’ decision making.”⁴⁹⁴ After giving the source of this quotation in footnote 136, Ansaldi undertook “to clear up a lingering mystery” about what Llewellyn said in an aside: “In all Europe I have heard of only one Bonjuge Maniou, and in my country of only one, on a high-court bench.”⁴⁹⁵

In preparing his translation and analysis of Llewellyn’s German-language texts, Ansaldi declared his inability “to locate any information” in

487. *Id.* at 35, 35 n.112 (citing Andrew A. Bruce, *Judicial Buncombe in North Dakota and Other States*, 88 CENT. L.J. 136, 137 (1919); James E. Robinson, “Peculiarities” in the *Administration of Justice in North Dakota—Justice Robinson’s Explanation*, 88 CENT. L.J. 155, 156 (1919); *Rule and Discretion in the Administration of Justice*, 33 HARV. L. REV. 972 (1920))

488. Robinson, *supra* note 208, at 156.

489. Radin, *supra* note 347, at 307.

490. Michael Ansaldi, *The German Llewellyn*, 58 BROOK. L. REV. 705 (1992).

491. *Id.* at 740-745.

492. *Id.* at 740.

493. *Id.* at 741.

494. *Id.*

495. *Id.* at 741 n.136.

European legal literature about “‘Bonjuge Maniou’ or to identify [Llewellyn’s] allusion to his American homologue.”⁴⁹⁶

Ansaldi concluded:

[I]t now seems virtually certain that “Maniou” was just Llewellyn’s, or his German publisher’s, mistranscription of the nearly homophonous surname of the so-called “Bonjuge” Magnaud, a French jurist made famous by the account of his judicial and political careers in [a French book], and about whom Max Radin had also written.⁴⁹⁷

Ansaldi cited Radin’s article in the *California Law Review* that we summarized earlier in this article.⁴⁹⁸

In the footnote, Ansaldi summarized Radin’s description of Justice Robinson:

Radin’s “American counterpart” to Magnaud, who was presumably also Llewellyn’s member of a “high-court bench,” was one James E. Robinson, an adherent of the controversial agrarian-socialist Non-Partisan League, elected in 1916 “by an unprecedented majority” to the North Dakota Supreme Court. Radin describes him as “earnest; . . . immensely confident in [his] rectitude; [an] active politician . . . radical in [his] views and sympathies; who dislike[s] lawyers; and . . . ha[s] scant awe for [his] colleagues.” He was “our Dakotan ‘bon judge’ . . . much moved by the recitals of plain, hardworking, simple people,” but also much given to “violent and picturesque” language, and far less consistent than his French counterpart in his rejection of the technicalities of statute or precedent.⁴⁹⁹

Llewellyn’s indistinct references and Ansaldi’s clarifications put Robinson in the vanguard of American Legal Realism.

In 1998, the *Southern California Interdisciplinary Law Journal* published a long article, elaborately titled *Chief Justice Traynor’s Contract Jurisprudence and the Free Law Dilemma: Nazism, The Judiciary, and California’s Contract Law*, by Stephen J. Lubben.⁵⁰⁰ Lubben identified the international scholars in the Free Law Movement, including Eugene

496. *Id.*

497. *Id.*

498. *See supra* Part VI.D.

499. Ansaldi, *supra* note 490, at 742 n.136 (citations omitted).

500. Stephen J. Lubben, *Chief Justice Traynor’s Contract Jurisprudence and the Free Law Dilemma: Nazism, The Judiciary, and California’s Contract Law*, 7 S. CAL. INTERDISC. L.J. 81 (1998). At the time, Lubben was a law clerk to Justice John T. Broderick, Jr., of the New Hampshire Supreme Court. *Id.*

Ehrlich, “whose 1903 lecture . . . marks the first ‘pure’ Free Law document, [and who] was widely cited by Pound and Cardozo.”⁵⁰¹ Another scholar, Hermann Kantorowicz, according to Lubben, “was read by key American Realists such as Max Radin and delivered a lecture in Karl Llewellyn’s seminar at Columbia University in 1934.”⁵⁰²

In that paragraph, Lubben concluded that “the Free Law Movement was, in many ways, the intellectual forerunner of the Legal Realist movement in this country. Yet, it appears no American jurists or scholars directly adhered to the Free Law doctrine.”⁵⁰³ A footnote to the second sentence of this text included references to Robinson:

See Kantorowicz, supra note 26, at 1241 (stating that Free Law “apparently has no adherents in this country”). *But see Note, Rule and Discretion in the Administration of Justice*, 33 HARV. L. REV. 972, 973 (1920) (detailing the career of Justice Robinson of the Supreme Court of North Dakota, who “expresses a preference for deciding ‘every case in accordance with law, reason and justice’”). For more on Justice Robinson, see Max Radin, *Good Judge of Chateau-Thierry and His American Counterpart*, 10 CAL. L. REV. 300 (1922).⁵⁰⁴

Thus, North Dakota’s “Good Judge,” Justice Robinson, gained lasting national attention as a principal in America’s Legal Realism movement.

X. JUDICIAL VICES, VIRTUES, AND VALUES

North Dakotans are apt to remember Robinson as sort of a buffoon on the bench. Indeed, he was abrasive, eccentric, and opinionated.

Robinson publicly scolded his colleagues for their indifference to the work, for the length and poor quality of their opinions and, often with his

501. *Id.* at 89-90 (footnotes omitted)

502. *Id.* at 90 (footnotes omitted).

503. *Id.* at 90-91 (footnotes omitted).

504. *Id.* at 91 n.48. The second paragraph of the footnote may be of interest to some readers: G. Edward White has described the late Justice William O. Douglas as a jurist who was guided by a sense of justice and was unwilling to let a lack of precedents, statutory law, or support from his brethren deter his march towards that goal. White’s interpretation of Justice Douglas suggests the existence of an American Free Lawyer. On the other hand, it could be argued that Justice Douglas was a Realist whose position in the law allowed him the rare opportunity to move from describing the “is” to initiating the “ought.”

Id. (citing G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 412-17 (2d. ed. 1988); HOWARD BALL & PHILLIP J. COOPER, *OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA’S CONSTITUTIONAL REVOLUTION* 278 (1992) (discussing Justice Douglas’ willingness to create rights in order to promote justice and Justice Black’s reticence to follow Douglas’ lead)) (internal citations omitted).

countless dissents, for the injustice of their decisions.⁵⁰⁵ He alienated the leadership of the League that put him on the Supreme Court.⁵⁰⁶

Robinson's eccentricities included unusual courtroom antics,⁵⁰⁷ premature publication of some of his opinions,⁵⁰⁸ and caustic public criticism of colleagues⁵⁰⁹—all things a dignified justice did not do. He repeatedly raged against enforcement of laws prohibiting the sale of alcohol;⁵¹⁰ challenged a Sunday closing law that prevented him from buying a newspaper on that day;⁵¹¹ and questioned some of the Non-Partisan League's pet projects.⁵¹² Robinson usually had an opinion on any subject, and he generally publicized it.

Despite his own vices, Robinson considered himself more virtuous than Bruce. Robinson demonstrated, again and again, that Bruce was indifferent to the delays, expenses, and failings of his Court; indifferent to the adverse effect of his absences on the Court's work; and indifferent to overstuffed opinions—all vices repugnant to Robinson.⁵¹³

On the other hand, Robinson's record verifies a real and remarkable reformer, a true pathfinder for the judicial branch.⁵¹⁴ He left a large legacy of valuable improvements, and he prophesied more reforms that eventually took place.

505. *See supra* Part V.

506. *See supra* text accompanying notes 412-15.

507. Robinson sometimes walked out or turned his back on counsel at oral argument when he thought they had gone on too long. *See Meschke & Smith, supra* note 3, at 247. If Robinson left the courtroom during a two-day oral argument, he should be cheered, not jeered. For examples of two-day oral arguments, see *Saturday Evening Letters*, BISMARCK TRIB., Mar. 11, 1918, at 4; *Saturday Evening Letter*, BISMARCK TRIB., Apr. 13, 1918, at 4.

508. *See supra* Part V.E.

509. *See supra* Part V.

510. *See, e.g., Booze Knocks Flu Bug, Says J.E. Robinson: Octogenarian Jurist Renews His Vigorous Drive on State Bone Dry Lid*, BISMARCK TRIB., Oct. 23, 1918, at 1; *Langer Unfit to Hold High Legal Berth*, BISMARCK TRIB., Oct. 30, 1918, at 1. "The consensus of opinion is that liquor is the most effective remedy, and to a great extent the prevailing sickness and deaths are due to the fact that liquor medicine cannot be obtained." *Saturday Evening Letter*, BISMARCK TRIB., Nov. 9, 1918, at 4.

511. *See, e.g., Attorney General Outranked by High Court*, BISMARCK TRIB., Jan. 8, 1917, at 1. The Bismarck Tribune discussed Robinson's role in the controversy when Robinson declared "North Dakota's Sunday closing statutes, a direct descendant of the old blue laws of the historic Massachusetts Bay colony, an outrage which should be tolerated by no free-born citizenry." *Id.*

Robinson "filed Bismarck's first Sunday lid with [an] order" directing the Sheriff and Police to allow businesses to remain open on Sunday. *Id.* A few days later, the newsstand operator, who had sold him a Sunday paper on Robinson's unilateral order, was arrested upon a warrant charging him with violating the Sunday closing law.

See id. *See, e.g., N.G. Nelson who Tilted Sunday Lid at Robinson's Request has been Arrested*, BISMARCK TRIB., Jan. 11, 1917, at 3.

512. *See supra* notes 445-449.

513. *See supra* Part V.

514. *Id.*

When Robinson took office, the Court was badly behind in its work and lacked a satisfactory system for doing it. He confronted the backlog in every way he could with his own industrious and innovative efforts. He advocated new rules to improve the Court's efficiency. He publicly pushed for more concerted efforts from his colleagues. Robinson urged less talk, more work, and shorter opinions.

After Bruce chose to leave, Robinson got results.⁵¹⁵ Robinson persuaded his Court to change its rules in a number of ways he championed.⁵¹⁶ The Robinson Court became much more efficient and cleaned up its backlog.

Many of Robinson's ideas have endured. They still guide much of the Court's procedures.

Cases are still scheduled for oral argument as soon as they are ready.⁵¹⁷ Printed briefs are not required, and the length of briefs is limited.⁵¹⁸ The time for oral argument is limited to less than an hour a case without special permission.⁵¹⁹ Every fifth case is automatically assigned to one justice to draft an initial opinion, so the work is equitably distributed among the five of them.⁵²⁰ Opinions are generally concise in the style Robinson recommended, but they usually include citation to more relevant precedents than Robinson practiced. His recommended form of summary decision for routine cases has been authorized by rule and is regularly used.⁵²¹

Eventually, over a third of a century after Robinson began preaching supervision of the trial courts in 1917, the North Dakota Supreme Court got around to actively doing it.⁵²² Although the Robinson Court did little about it, today the North Dakota Supreme Court actively supervises all trial courts with detailed administrative and procedural rules and with management by a Court Administrator.⁵²³ As Robinson foresaw, this modern system makes application and enforcement of the laws as uniform as possible throughout the state.⁵²⁴ Robinson would applaud.

515. *See supra* Part V.I.

516. *Id.*

517. *See* N.D. R. APP. P. 45, 45 Explanatory Note.

518. *See* N.D. R. APP. P. 32, 28(g).

519. *See* N.D. R. APP. P. 34(b).

520. No rule formalizes this fixed tradition, but it is carefully adhered to by the Clerk in assigning cases.

521. N.D. R. APP. P. 35.1.

522. *See* Meschke & Smith, *supra* note 3, at 270.

523. *See* N.D. ADMIN. R. 1 (providing for a state court administrator and explaining powers, duties and qualifications). *See generally* N.D. ADMIN. R. 1-46.

524. *See* Meschke & Smith, *supra* note 3, at 267-290.

Robinson planted important seeds for this modernization. The historical record reflects that Robinson influenced enactment of the 1919 statute that authorized the Supreme Court to make rules of pleading, practice and procedure.⁵²⁵ More than four decades after Robinson, Justice Ralph J. Erickstad, during his three decades on the Court from 1963 through 1992, cultivated and fertilized Robinson's reforms that enabled the modernization of the judicial system in North Dakota, largely through rulemaking.⁵²⁶

Even in substantive law, Robinson's brand of Legal Realism continues to provoke legal scholars to examine the role of discretion in decision-making.⁵²⁷ Indeed, since Robinson's efforts, reviewing courts have accorded trial courts considerably more discretion.⁵²⁸

History thus confirms Robinson as a more noteworthy judicial figure than North Dakotans have understood. While he gained national attention for his early stance on Legal Realism, much of that attention has been negative for his visible lack of deference to precedent.⁵²⁹ However, legal scholars have otherwise overlooked his significant achievements and leadership in judicial reforms. We believe Robinson deserves more respect as a medium of major reform of a dysfunctional bench. He endowed his court with a large legacy of efficient procedures.

Judicial values, however, may well inherit more than efficient procedures and some measure of Legal Realism from the Robinson experience. Robinson's outspokenness as a judge, with public positions on many subjects, reflected a judicial freedom that prophesied the United States Supreme Court's application of the First Amendment to judicial speech in *White*.⁵³⁰

In Robinson's time, no formal prior restraints on judicial speech existed.⁵³¹ Written rules of judicial conduct began shortly after North Dakota's experience with Robinson's outspokenness and Bruce's criticism

525. See 1919 N.D. Laws 284 ch. 167, § 6 (codified as amended at N.D. CENT. CODE § 27-02-08 (2004)).

526. Meschke & Smith, *supra* note 3, at 296-301.

527. See *supra* Part IX.

528. For a few illustrations, consider the widely used "abuse of discretion" standard employed in reviewing procedural decisions. *City of Medora v. Goldberg*, 1997 ND 190, ¶ 13, 569 N.W.2d 257 (discussing whether a taking was necessary for a public use); *State v. Neufeld*, 1998 ND 103, ¶¶ 13-14, 578 N.W.2d 536 (examining joinder of criminal charges for trial); *Tank v. Tank*, 2004 ND 15, ¶ 45, 673 N.W.2d 622 (analyzing motions to alter or amend divorce judgments and interim orders for temporary custody) (Maring, J., dissenting).

529. See *supra* Part IX.

530. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

531. See *id.* at 786 ("The first code regulating judicial conduct was adopted by the A.B.A. in 1924.").

of it as unseemly.⁵³² In the next eight decades, the judicial system developed regulations to control the speech of judges and judicial candidates.⁵³³ Now we are returning to unrestrained judicial speech.⁵³⁴ In this, too, Robinson was ahead of his time.

The *White* decision has abruptly brought us nearly full circle, to virtually unrestrained speech by candidates for judicial office.⁵³⁵ To be sure, *White* did not directly decide the validity of prior restraints on “pledges and promises” by judicial candidates.⁵³⁶ Still, *White* lifted restraints on judicial candidates expressing their views on virtually any subject, short of promising specific action in a particular case.⁵³⁷ As the dissents in *White* explained, candidates will be able to express their views adroitly enough to avoid judicial discipline, just as Birdzell and Grace apparently did in 1916. We have turned back the clock to Robinson’s time in free speech for judges.

Yet, decisions since *White* reflect many different views about what judicial campaign activities and speech can be regulated by the judicial branch or legislature. Good examples are the diverse panel opinions proposed on remand to the Eighth Circuit in *Republican Party of Minnesota v. White*.⁵³⁸

Two panel members concluded *White* required a “remand to the district court for entry of judgment in favor of Wersal and the other plaintiffs on their ‘announce’ clause claim.”⁵³⁹ But the panel majority also would have remanded for “the district court to receive new evidence and to determine whether the partisan activity clauses can survive strict scrutiny in light of the Supreme Court’s opinion.”⁵⁴⁰ Third, the panel majority concluded the

532. Meschke & Smith, *supra* note 3, at 268-76.

533. *White*, 236 U.S. at 765.

534. *Id.*

535. *Id.* at 770.

536. *Id.*

537. *Id.* at 819-20 (Ginsberg, J., dissenting)

538. 361 F.3d 1035 (8th Cir. 2004), *vacated*, 361 F.3d 1035 (8th Cir. 2004). En banc decision on remand, 416 F.3d 738 (8th Cir. 2005). The majority held that, in addition to the announce clause, rules prohibiting partisan activities and solicitation of funds by judicial candidates were unconstitutional and violated the First Amendment. They remanded for entry of summary judgment. But the holding was far from unanimous. Three of the thirteen-judge panel concurred in the judgment, but only in part of the reasoning. Three judges joined in a dissent; they would have remanded for a trial on the personal activity and solicitation prohibitions. One judge concurred in remanding for summary judgment on the partisan activity clause, but joined the dissents on the solicitation clause. The uncertainties continue.

539. *White*, 361 F.3d at 1039.

540. *Id.* at 1048.

regulatory defendants would be entitled to summary judgment upholding a rule against a candidate personally soliciting campaign funds.⁵⁴¹

The third member of the panel, Judge Beam, agreed the plaintiffs ought to have summary judgment declaring the “announce” clause unconstitutional.⁵⁴² Judge Beam dissented, however, because he believed “the plaintiffs [were] also entitled to judgment on their ‘partisan activities’ and ‘personal solicitation’ claims.”⁵⁴³

But the Eighth Circuit, sitting en banc, vacated the panel judgment and granted rehearing en banc in May 2004.⁵⁴⁴ This may indicate even more divergence of views. Other decisions since *White* differ on its effect.⁵⁴⁵ For example, in *Griffen v. The Arkansas Discipline and Disability Commission*,⁵⁴⁶ a four-justice majority quashed an admonishment of a black judge who had met with the informal “Black Caucus” of the Arkansas legislature to discuss the firing of a black coach at a state university.⁵⁴⁷ The majority concluded a canon prohibiting a judge from “appear[ing] at a public hearing before, or otherwise consult with, a[] . . . legislative body or official . . . except when acting pro se in a matter involving the judge or the judge’s interests,” was not sufficiently narrow to pass strict scrutiny under the First Amendment.⁵⁴⁸ Three justices wrote separate dissents, each joined by the other two.⁵⁴⁹

As we neared completion of this article, Judge Daniel L. Hovland, Chief Judge of the United States District Court for the District of North Dakota, issued a significant opinion on March 21, 2005, in *North Dakota Family Alliance v. Bader*.⁵⁵⁰

541. *Id.* at 1039, 1048-49.

542. *Id.* at 1049.

543. *Id.* (Beam, J., dissenting)

544. *Id.* at 1035.

545. *Compare* Spargo v. New York State Comm’n on Judicial Conduct, 244 F. Supp. 2d 72 (N.D.N.Y. 2003), *vacated for abstention*, 351 F.3d 65 (C.A. 2003), *cert. denied*, 124 S. Ct. 2812 (2004) (invalidating restrictions on political activity by judicial candidates), *with* In re Raab, 793 N.E.2d 1287 (N.Y. 2003) (upholding New York restrictions on political activity by judicial candidates as narrowly tailored to serve compelling state interests); In re Watson, 794 N.E.2d 1 (N.Y. 2003) (discussing a New York rule prohibiting judicial candidates from making pledges or promises upheld under strict scrutiny). *Compare* In re Dunleavy, 838 A.2d 338 (Me. 2003), *cert. denied*, 124 S. Ct. 1722 (2004) (upholding Maine restriction on a judge’s solicitation of support for political candidates as narrowly tailored) *with* Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002) (invalidating Georgia canon prohibiting judicial candidates personally soliciting campaign contributions and declaring judicial campaign speech protected like campaign speech for other elective offices).

546. 130 S.W.3d 524 (2003).

547. *Griffen*, 130 S.W.3d 524 (2003).

548. *Id.* at 528, 538.

549. *Id.* at 539, 544, 547.

550. N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021 (D.N.D. 2005).

Judge Hovland concluded the “pledges and promises” clause and the “commitment” clause in the *North Dakota Code of Judicial Conduct* “essentially prohibit the same type of constitutionally-protected speech” as in *White*,⁵⁵¹ and summarily declared them unconstitutional.⁵⁵²

However, in the same opinion, Judge Hovland rejected a constitutional challenge to the disqualification rule in the *North Dakota Code of Judicial Conduct*, Canon 3E(1).⁵⁵³ That rule requires a judge to disqualify himself whenever “the judge’s impartiality might reasonably be questioned”⁵⁵⁴ Judge Hovland reasoned that the “recusal provisions in Canon 3E(1) serve the state’s interest in impartiality and the canon is narrowly drafted to achieve that interest.”⁵⁵⁵

Similarly, editorial opinions have varied on what to do. Some advocate moving to an appointive system of selecting judges.⁵⁵⁶ Others seek to retain an elective system with such changes as may be necessary following *White*.⁵⁵⁷ Some merely ponder the problem: “some adjustments in the system might be valuable”⁵⁵⁸

In this uncertain context,⁵⁵⁹ North Dakota’s experience with Robinson’s forceful speech shows how difficult it will be to design any effective

551. *Id.* at 1021.

552. *Id.*

553. *Id.* at 20-21.

554. N.D. CODE OF JUD. CONDUCT, Canon 3E(1).

555. *N.D. Family Alliance*, 361 F. Supp. 2d at 1021.

556. Editorial, *Politicized Elections for Judges Must be Avoided*, ROCHESTER POST-BULLETIN (Rochester, Minn.), Aug. 6, 2003, at 9 (“If the U.S. Supreme Court rules that a significant change must be made, the state should move to an appointive system . . .”).

557. See Editorial, *Choosing Judges: What’s the Best Way to Do It?*, STAR TRIB. (Minn.), August 11, 2003, at A14 (“Don’t tinker with Minnesota’s system of picking judges”).

558. *Id.* According to a *Star Tribune* story, dated September 17, 2004, the Minnesota Supreme Court declined to adopt recommended changes to their judicial conduct rules, saying “Any changes relating to partisan political activity should wait for a period between elections.” <http://www.startribune.com/stories/462/4985643.html>.

559. The American Bar Association has tried to remodel its Model Code of Judicial Conduct. “In 1990, the ABA Model Code replaced the ‘announce’ clause with [a] ‘commit’ clause [to] prohibit a judicial candidate from mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.” ABA ANNOTATED MODEL CODE OF JUD. CONDUCT, Canon 5A(3)(d) (2004). After the *White* decision invalidated the “announce” clause, a Working Group on the First Amendment and Judicial Campaigns (created in 2001 by the ABA Standing Committee on Judicial Independence) recommended several changes in the Model Code. *Id.* at 356-357.

The ABA Working Group recommended expanding and modifying the “pledges or promises” clause. They combined parts of the “commit” clause with the “pledges or promises” clause and they modified language that restricts statements that commit a judicial candidate to protect a compelling interest in the maintenance of judicial impartiality, integrity and independence. See *id.* (containing the American Bar Association Standing Committee on Judicial Independence and the Standing Committee on Ethics and Professional Responsibility Report 105B to the House of Delegates (2003)). The amendments to Canon 5A(d)(3) were adopted by the A.B.A. House of Delegates in August 2003. See *id.* at 357-358.

prior restraints on judicial expression. Instead, we believe, the judicial branch should concentrate on refining the standards and procedures for assigning and disqualifying judges for specific cases and classes of cases.

Presently, the *North Dakota Code of Judicial Conduct*, the administrative rules, and the statutes on judicial administration largely leave disqualification to voluntary action by the individual judge.⁵⁶⁰ No mechanism exists to impose an involuntary disqualification on a judge, even when needed to assure the appearance of impartiality and the judge refuses to voluntarily step aside, at or after assignment. Only post-conduct discipline for egregious conduct is contemplated.⁵⁶¹

Judicial regulation will not be able to prevent a judge or judicial candidate from speaking out on any subject. Presumptively, prior restraints on judicial campaign expression are unlikely to work.⁵⁶²

Surely, the court system itself controls its internal processes for assigning and reassigning judges to cases. The judicial system retains the power to remove a judge from sitting on a pending case, before the need to impose discipline arises. An overly expressive judge certainly has no constitutional right to sit on any particular case if his prior public remarks suggest his impartiality is questionable. An independent process ought to determine his assignment or disqualification.

Moving in this direction, a better system of case management needs to be developed to minimize any appearance of bias or partiality. This will undoubtedly require more elaborate controls and procedures for assignment and reassignment of cases than exists now.

More categorical standards, on what speech will disqualify a judicial person from what cases, may have to be written. And, some improved intermediate-review mechanisms may be needed to correct assignments after a potential bias is suggested on the record. Leaving the disqualification to voluntary action of the sitting judge seems unlikely to prove satisfactory in preserving impartiality.

560. Compare N.D. CODE OF JUD. CONDUCT (2004-2005) Canon 3E(1) (“A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned . . .”) with N.D. CENT. CODE § 27-23-03 (2005) (authorizing the Judicial Conduct Commission to recommend the censure, transfer to disability status, or involuntarily retire a judge for egregious misconduct). See also N.D. CENT. CODE § 29-15-21 (2005) (authorizing an involuntary change of judge upon a timely demand by a party).

561. See *supra* note 560.

562. “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The North Dakota Constitution declares: “Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege” N.D. CONST. art. I, § 4.

Of course, designing this kind of process will not be easy. But then, fabricating our modern system of rules has not been easy, either. Rule-making is an ongoing process that builds on experience.

To begin, North Dakota's experience with Robinson should come in handy. For example, a premature opinion about a case should automatically disqualify the judge from that case and others like it.

Enough judicial work exists to obviate damage to the system by barring a judge from sitting on a class of cases after the judge's public remarks on the subject. It would be similar to the *de facto* disqualification for criminal trials, for a time, that has often been practiced by a prosecutor or criminal defense lawyer who has become a judge. Except in the most isolated rural places, there is plenty of judicial work to do, so that a judge disqualified in one or more categories should not unduly unbalance the judicial workloads. And if a judge thinks he can artfully reduce his own workload by selectively speaking out, the judge could be disciplined and other judges and candidates will be free to speak out against his re-election for deliberately shirking his responsibilities.

Those today that are keen in speaking out during judicial campaigns would do well to keep the Robinson experience in mind. His opinionated outspokenness may have helped elect him to one term, but he was decisively defeated for re-election despite his diligence and efforts to improve the system.

Bruce's characterization of Robinson has obscured Robinson's remarkable reforms and achievements. Bruce pinned Robinson with a bad reputation for unethical conduct by his vigorous attacks on Robinson's premature opinions. Bruce insisted that a judge's political activities and speech were inimical to the need for judicial impartiality. Bruce's views gained general acceptance and became merged into most standards of judicial conduct written as prior restraints. But, no longer.

Now, the judicial branch must "go back to the future." It must strengthen standards of impartiality. Rather than imposing prior restraints on judicial speech, the courts must attach specific post-speech consequences on judges who talk too much, instead of barring their way to office.

The appearance of impartiality remains an important judicial value. Improved and independent disqualification procedures can preserve it better than prior restraints.

Despite his vices, Justice James E. Robinson should be favorably remembered as North Dakota's "Good Judge" for the valuable improvements he contributed to the North Dakota judicial system.