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The Supreme Court in United States History

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WEST VIRGINIA BAR ASSOCIATION NOTES:
NEWS OF THE PROFESSION.

BAR EXAMINATION.—At the examination held in Charleston by Board of Law Examiners, on March 14th and 15th, 1923, the following applicants successfully passed all requirements:

John V. Brannan,	Charleston, W. Va.
Geo. I. Davisson,	Weston, W. Va.
Geraldine G. Driscoll,	Lewisburg, W. Va.
G. Gilmer Easley,	Lewisburg, W. Va.
John Floyd Ellison,	South Charleston, W. Va.
Edgar J. Goodrich,	Charleston, W. Va.
John E. Jenkins, Box 276,	Huntington, W. Va.
T. C. Phillips,	Bluefield, W. Va.
R. N. Stephens, Jr.,	Charleston, W. Va.
L. B. Sutherland, 311 3rd St.,	Bluefield, W. Va.
Roscoe F. Walter,	Charleston, W. Va.

BOOK REVIEWS

THE SUPREME COURT IN UNITED STATES HISTORY:—By Charles Warren; 3 vols. Boston: Little, Brown & Company, 1922, pp. xvi, 540; x, 551; x, 532.

These painstaking volumes tracing the relation between the Supreme Court and the history of the United States constitute an interesting and a valuable side-light on American history, presenting both the influence of the Supreme Court on American life and institutions and also the responses of public opinion. They attempt "to revivify the important cases decided by the Court and to picture the court from year to year in its contemporary setting." They view the Court and its decided cases as living elements and important factors in the course of American history. They satisfactorily supplement and complete the work begun by the small volume published by Willoughby in 1890, and the two volumes published by Carson in 1892. Written for laymen as well as for lawyers, while they lay emphasis on constitutional problems

they properly omit most decisions which deal exclusively with the lawyer's work in contracts, torts, and criminal law.

Although they are not law-books in the usual sense of that term, no law library is complete without them. They will prove especially valuable to students of American constitutional history.

Of the total thirty eight chapters (1623 pp.) contained in the three volumes, three (137 pp.) are devoted to the period before 1801 (twelve years), seventeen (656 pp.) to the period of Marshall (thirty-four years), nearly eight (400 pp.) to the period of Taney (twenty-eight years), over five (158 pp.) to the period of Chase (ten years), and two (67 pp.) to the period of Fuller (twenty-two years) and White (eight years) to 1918. Inevitably, the treatment of the last thirty years is inadequate.

A brief appendix (four pages) furnishes a convenient list of all persons who were nominated from 1789 to 1921 to serve as members of the Court. Twenty full-page illustrations include three illustrations of the rooms in which the Court sat at different periods after 1800, three group portraits of the members of the Court in 1865, 1882 and 1899, and several single portraits of prominent judges of the Court and of prominent attorneys in prominent cases before the Court. An excellent index facilitates the work of the reader in finding treatment of subjects and references to persons.

In addition to the essential facts and related circumstances concerning cases and decisions, the volumes tell of the appointments to judgeships, the previous career and peculiarities of the appointees, the different rooms in which the Court sat before it occupied (in 1860) the old senate chamber which is still its home, interesting incidents and customs of the sessions (including the attendance of women), impressions of counsellors and visitors, and new business and industrial conditions and changes which produced novel legal problems.

Of interest to the student of American political history is the list of prominent men who were offered a place on the Court but never served.

The author, a well known Boston lawyer who served as Assistant Attorney-General of the United States from 1914 to 1918, and who had already published a volume on the history of the American war, is eminently qualified to undertake the task and has performed it in a masterly manner. He deserves praise for his thoroughness of investigation, fairness of spirit and clearness of expression.

Evidence of extensive researches appear in the many footnote

citations of sources of materials. In obtaining material for the historical background, the author has industriously used the reports of congressional debates, many unpublished papers in the Library of Congress and in other libraries, diaries and private correspondence of American lawyers and statesmen, and contemporary newspaper accounts and criticisms.

The reviewer finds the volumes unusually free from errors. Only one or two small inaccuracies of statement are noticed. The statement (vol. 2, p. 409) that Chicago had been connected with the East by rail by 1851, is evidently not correct. (The last link was completed in 1853.) The Confederate official documents, mentioned (Vol. 3, p. 280) as containing Caleb Cushing's letter to Jefferson Davis, were not purchased from a "Confederate agent who had fled to Canada," as stated, but from Col. John T. Pickett who had obtained them from their hiding place in Virginia and arranged the sale and transfer in Canada in 1872 because he feared the United States Government might seize them without payment if a transfer had been arranged in Washington. Apparently there are only two typographical errors: "Buller" for "Fuller" (vol. 1, p. 23) and "almsot" for "almost" (vol. 2, p. 414).

Although the author sometimes takes longitudinal excursions for logical generalization upon the apparent trend of decisions upon particular subjects, and upon their relation to political and economical changes, he usually follows an approximately chronological order of presentation. For the period to the close of the chief justiceship of Waite he gives a detailed description of the Court and its important cases. For the succeeding thirty years, 1888 to 1918, still lacking historical perspective he gives only a broad general outline of the leading cases and doctrines.

He recognizes that a great feature in the history of the Court has been the emergence of new groups of problems in each succeeding generation. In the first third of the nineteenth century, its two chief tasks were to demonstrate the duty of the judges under constitutional limitations to protect the individual against unbridled power of executive and legislative departments, and to insist that the nation is paramount over the states; In the second third its task was to prevent the constitution by the contract clause and otherwise from clogging the development arising from railways and factories; In the last third, its chief tasks were to determine the limits of the state and nation under the fourteenth amendment and the commerce clause.

The earlier history of the Court is characterized by qualitative

rather than quantitative production. Before 1825, the average number of cases decided each year was only twenty-four. From 1826 to 1830 the average was fifty-eight. From 1846 to 1850 it was seventy-one. In the last five years the Court had an average of over one thousand cases pending each term, and disposed of approximately six hundred.

Considerable attention is given to changes in organization, customs, and composition of the Court. A long contest which had been waged for twenty years was terminated by an act of March 3, 1837, increasing the number of associate judges of the Court from six to eight, establishing two new circuits in the west and southwest, and abolishing Circuit Court jurisdiction of the District Courts. The Court with increasing cases finding itself unable to give proper attention to its circuit duties, sought relief. In Congress a bill for temporary relief was defeated in 1848; but, from the debate, grew a Rule of Court of March 1849 which substantially relieved the pressure on the Court by imposing for the first time a limitation on the length of counsel's argument. It is interesting to note that an opening wedge for the abolition of circuit duty by the Supreme Court Judges was effected by the passage of a singular act establishing a Circuit Court of the United States for California and Oregon with a separate Circuit Judge who should not be a member of the Supreme Court—an anomaly necessitated by lack of railway connection between the Pacific Coast and Washington. In 1869, Congress created a new Circuit Court system with nine new Circuit Judges but without entirely relieving the Supreme Court Judges of Circuit duty. Although this duty still exists nominally, it has ceased in practice.

One interesting feature of the first century of the Court's existence was the fact that the chief conflicts arose over its decisions restricting the limits of state authority and not over those restricting the limits of Congressional power, and one of the most significant features of the Court's history is that the exercise of this power has been the chief cause of attack upon the Court and upon its decisions. Through the exercise of the power to pass upon the validity of state statutes, under authority of the judiciary act of 1789, the Court has largely controlled and directed the course of American economic and social development. Its support of the police power of the state has been one of the most remarkable features of its career.

For a century the power to pass on the constitutionality of Federal legislation was regarded as of less importance. During the

first eighty years, only four Federal statutes (only two of importance) were declared unconstitutional. And of the thirty-two acts of Congress held unconstitutional between 1869 and 1917, the author suggests that with the possible exception of the decision in the Civil Rights Cases, none had any important influence upon the integral history of the country.

The evidence of these volumes, however, leads to the conclusion that "the nation owes most of its strength to the determination of the Judges to maintain the national supremacy." The Court's actual decisions at critical periods have steadily enhanced the power of the national government. The Judges, irrespective of political party, have recognized the nationalistic intent of the Constitution and have inevitably tended to emphasize the national power rather than the state power. They have recognized that the constitution was established to save the country and that fortunately it gave the national government powers greater than have ever yet been used and competent to control situations as they arise under conditions of constant growth and changes.

Mr. Warren traces the constant expansion of Federal power and the waning power of the states—far beyond any changes contemplated by the framers of the Constitution—and shows that the great changes have been largely the result of legislative action rather than judicial action.

He devotes two-fifths of his space to the important period of John Marshall who attained the Chief Justiceship in January 1801 at the age of forty-six in the face of pronounced Federalistic opposition (and only because of the obstinacy of President Adams), and who served for a period of thirty-four years—until he reached the age of eighty.

The decision of Marshall in 1824 in the famous steamboat monopoly case (*Gibbons v. Ogden*)—potent both for its economic results and for its political effect—is designated as the first great "trust" decision and as the emancipation proclamation of American commerce. It was especially a potent factor in determining the growth of New York as a commercial center. Its trend and scope caused considerable Southern alarm which the author explains on the ground of the possible relation of its doctrines to commerce in slaves.

The decision which he rendered in March 1824 in the case of *Osborn v. Bank of United States* is regarded as a fateful one, proclaiming a new doctrine in constitutional law, that a state officer who had committed trespass, relying upon an unconstitutional

state statute, might be sued in spite of his official position—and holding untenable Ohio's contention that the suit against Osborn was barred by the eleventh amendment.

A chapter entitled "International Law" shows the influence of the Supreme Court on foreign relations and problems of foreign policies in the decade after 1815. In a series of cases extending from 1816 to 1825, and presenting the greatest variety of facts, the Court reaffirmed its well-established doctrine that the taking of a prize by ship fitted out or acting in violation of the neutrality of the United States would be held invalid by our courts, and restitution of the prize decreed.

One of the most interesting chapters (chapter 17) is one on judiciary reform devoted to the first series of legislative attacks (in Congress) beginning in 1821 and lasting for ten years, proposing to curb or abrogate the powers and functions of the Court. In 1831-32, the Court confronted a real crisis in its history when a determined effort was made to induce Congress to repeal its appellate jurisdiction in connection with the consideration of the famous Cherokee Cases—a crisis which was fortunately averted by the decision of the Governor of Georgia to avoid a direct collision with the Federal Government. The author asserts that the oft-repeated charge that President Jackson actually defied the Court's decree in the Cherokee Case is clearly untrue.

While the author agrees that it is impossible to exaggerate Marshall's service in vitalizing the Constitution and making it a stronger bond of union, he states that by 1835 the Chief Justice who had served for thirty-four years was clearly out of touch with the new era of development resulting from the various changes and reforms in economic and social conditions with their new problems which made desirable a change in the leadership of the Court.

For this new leadership, he evidently approves the selection of Roger B. Taney, whose nomination in January 1835 to fill a vacancy on the Court had been rejected by the Senate (although Marshall was favorable to confirmation), and whose appointment a year later to succeed Marshall as Chief Justice was confirmed by the Senate only after a struggle of two months and a half. Referring to the gloom and pessimism with which Taney's appointment was regarded by the Whigs, he asserts that when viewed from the light of history Whig attacks led by Webster and Clay on political grounds had no reasonable basis or justification.

Taney showed a human side and perhaps a sense of humor, in his wish that as a lesson for people and politicians he who had

been "rejected by the panic Senate" might have the gratification of administering the presidential oath of office to another rejected nominee of Jackson—a hope which was fulfilled in the presence of Jackson at the presidential inauguration of Van Buren on March 4, 1837. Beginning his judicial career as Chief Justice in his sixty-first year, he presided over the Court for 28 years, and in that period inducted into office nine presidents of the United States.

Although Judge Story charged that the decisions in the first three cases under Taney reversed the broad lines of construction on which Marshall had been proceeding, both Whig forebodings and Democratic hopes were unjustified and unfulfilled. His first judicial decision, in the important case of the *Charles River Bridge v. Warren Bridge*, modified in favor of the public interests the rigid principles of the Dartmouth College Case which "had acted like a band of iron on legislative action." His second, in *Mayor of New York v. Miln*, involving a state statute enacted for protection from the influx of foreign paupers, sustained the state law as a mere exercise of political power. His third, in *Briscoe v. Bank of Kentucky*, sustained a state statute authorizing the issue of notes by a chartered bank whose stock was owned by the state (holding that the notes were not bills of credit).

While in doubtful cases the Court under Taney possibly tended to give the benefit of the doubt to the state more than in Marshall's time, and while it gave more attention to the development of the political power (personal rights and community welfare) than to the doctrine of vested rights which had been the leading doctrine under Marshall, it did not relax in the determination to uphold national authority whenever attacked. The author asserts that "Taney went even farther than Marshall had been willing to go in extending the jurisdiction of the Federal Courts in admiralty and corporation cases and in many other directions." He shows that some of the most important decisions confirming wider Federal power were pronounced by the Court during this "reactionary or states-rights period." Notable among these is the decision of Taney in the case of the *Genesee Chief* (1852) declaring that jurisdiction of the Federal Courts included navigable rivers and lakes, and thus reversing an earlier decision (10 Wheaton 428) which had limited Federal jurisdiction to the ebb and flow of the tide.

In a chapter on "Slavery and State Defiance," Mr. Warren states that the train of circumstances which led directly to the crash of the Court's reputation in the Dred Scott decision in 1857 was set in motion in the summer of 1848 by Jno. M. Clayton, a

Whig Senator, in the introduction of a bill providing for the right of appeal to the Supreme Court from the territorial courts with the purpose of referring to the Supreme Court the decision as to the power of Congress over slavery in the territories. By 1849 the Freesoilers were evidently preparing for a deliberate campaign to undermine popular confidence in the Court. In 1850, Senator Salmon P. Chase of Ohio led in a vigorous expression of lack of confidence in the Court. Hale led the attack in Congress in 1851 and Summer in 1852. By 1854 the Court was confronted with two delicate political issues, the anti-slavery movement and the anti-corporation movement, both of which contributed to its increasing unpopularity at the north thereafter.

Although the author seems to regard the Dred Scott decision as a "gross abuse of trust by the body which rendered it," he states that the whirlwind of abuse which swept upon the Court after its decision was due more largely to misunderstandings of the decision and to falsehoods relative to Taney's opinion than to the actual decision itself. These attacks upon the Court, especially in Ohio, California and Wisconsin, threatened gravely to impair its supremacy.

The author, regarding as false the charge that the Court was controlled by the slavery interests, presents the political activities of Judge John McLean of Ohio as proof of his statement that the South had more cause than the North to complain of political bias of the Court.

Although Chase had once been mentioned by Taney as the best man in the Union for Chief Justice, his appointment as Taney's successor in 1864 was regarded with general disappointment by his opponents who falsely predicted that his decisions would be influenced by politics. He proved to be a valuable judge in the decision of a tremendous number of cases growing out of the war, including about thirty noted prize cases, the famous Milligan Case, reconstruction cases, the Legal Tender Cases and the Slaughterhouse Cases. His period was distinctly one of extreme nationalism until 1870, after which appeared signs of reaction which became distinct by 1873. In the decision of the Slaughterhouse Cases in 1873, construing for the first time the scope of the fourteenth amendment, the Court profoundly affected the course of the future history of the country.

Chief Justice Waite's greatest contribution to American law and to American history in his fourteen years of service (1874-1888), was his expounding of the scope of the war amendments. In 1877, decisions of the "Granger" cases, involving the power of the

state to regulate the rates and charges of railroads and the breaking down of the extreme doctrine of vested rights asserted in the Dartmouth College Case, the Court most profoundly and permanently affected economic and social development in American history. In 1880, it rendered a latitudinarian decision (in *Stone v. Mississippi*) holding "that a state could not bargain away the public health or the public morals"—an anti-monopoly decision which greatly modified the doctrines of the Dartmouth College Case in regard to the degree of control retained by a state over its corporations. In 1885 in the case involving the notorious Mahone-Riddleberger legislation in Virginia for repudiation of the state debt, the Court rendered a majority decision which marked a new era in the development of the domain of national power, and began a new epoch in the relation of Federal and state powers. Making a distinction between a state and its government, it proclaimed the doctrine that an action might be brought against a state official for administering an unconstitutional law, and that no official could hide behind the eleventh amendment or claim exemption from personal responsibility for acts committed under an invalid law. It also sternly discountenanced another form of repudiation attempted by municipalities and counties.

It was in the period after 1888, under Fuller and White, that the Court developed its great function of upholding progressive and experimental, social and economic legislation of modern times. In this period its jurisdiction was twice extended and twice restricted by Congress.

Chief Justice Fuller's period of twenty-two years, 1888 to 1910, a period of expansion of national power through affirmative action of Congress in new directions "which had not been dreamed of prior to Waite's death," was a notable era in American law. Gradually the Court developed the formulation of a body of national law, distinct from state law and applicable to the national courts until it became a distinct factor in the increase of national power.

A prominent feature of this period was the awakening of Congress to the realization of the vast power contained in the commerce clause, the increasing exercise of that power and the breadth of the decisions by which the Court sustained this exercise of power. This exercise of power included regulation of common carriers, regulation relating to prohibition, regulation of trusts, the regulation of the products of manufacturers, sale and transportation of various articles such as lottery tickets, impure foods and narcotics. The number of subjects, the manufacture and sale

of which Congress has regulated in great detail under the commerce clause or under the taxing power, is large and constantly increasing. Among the more recent examples of expansion of Federal jurisdiction is the law of Congress, enacted in conformity with an Anglo-American treaty, protecting migratory birds within states through which they passed *en route* between the Gulf and northern Canada.

By a decision holding the Child Labor Law of 1916 unconstitutional, the Court finally set a limit to congressional power under the commerce clause.

In this period the Court with comparatively few exceptions of importance upheld the validity of state legislation enacted under the police power. Late in the nineteenth century the Court in deciding these constitutional cases in favor of the state police power finally worked out the progressive doctrine of "the paramount right of public necessity," a long step toward the acceptance of the theory of modern sociological jurists that the law must recognize the priority of social interests.

The Judges of the Court have recently been so thoroughly and increasingly alive to the necessity of intellectual contact with new conditions and theories that the author fears not the danger of reluctance to bow to the legislative will, but rather "a too facile readiness to confirm whatever the Legislature may have temporarily chosen to decree" as the despotism of the majority.

The Courts action from 1889 to 1918 certainly furnishes no basis of justification for the demand for recall of judges or of judicial decisions.

Popular confidence in the Court is explained by its independence from temporary excitement, its support and criticism by the Bar, its voluntary limitation upon the exercise of its own power, early adopted as a rule of practice, its scrupulous care in refraining from assumption of any authority to decide the policy or impolicy of legislation.

In referring to the historical influence of the people's view of the judges' decisions, the author emphasizes the importance of attacks upon the Court in affecting or modifying its status and its decisions, and asserts that "the reaction of the people to judicially declared law has been an especially important factor in the development of the country." Prediction of the direful results of majority decisions have not been realized.

The author asserts that the Court has been substantially independent of party since 1801, and that hasty charges of political

motives of its members have been unwarranted. Although Rufus King in 1823, indorsing the nomination of the active politician Martin Van Buren for the Supreme Court had warned him that "entering the Judicial Department, like taking the vow and the veil in the Catholic Church, must forever divorce him from the political world," in the earlier practice there were many instances of political participation not consistent with this theory. John Jay, while Chief Justice, served as secretary of state for six months, and as ambassador to England for over a year, and was also a candidate for election to the office of Governor of New York. Ellsworth, while Chief Justice, was minister to France for over a year. Cushing, while on the Bench, ran for Governor in Massachusetts in 1794. Bushrod Washington while Judge was active in the campaign of 1800 in support of C. C. Pinckney. Marshall, while Chief Justice, continued to serve as secretary of state for over a month, in 1801. Nothing, however, is more striking in the history of the Court than the manner in which the hopes of those who expected a judge to follow the political views of the president appointing him have been disappointed. The most notable cases were under Jefferson and Madison when the Judges appointed by them joined Marshall in sustaining and developing the nationalistic interpretation of the Constitution, and under Jackson when the whole Bench appointed by him decided against his policy in relation to the Spanish claims. The author reminds his readers that "in every case involving slavery, anti-slavery Judges joined with pro-slavery Judges in the decisions rendered."

The disagreement of Judges on decisions of the Court has seldom followed a partisan line. In the two decades after 1892, there was but one case (*Snyder v. Bettman* in 1903) involving a question of constitutional law in which the Judges in making their decision were divided on distinctly party lines.

President Taft's appointment of Judge White to the place made vacant by the death of Chief Justice Fuller in 1910 "was notable, not only because it was the first promotion of a Judge of the Court to the Chief Justiceship since the appointment of Judge Cushing in 1796, but also because the Republican President was broad-minded enough to promote a Democratic Judge."

The enlightenment of these volumes creates a greater respect for the members of the Supreme Court and prepares the reader to view with grave disrespect the irresponsible or partisan expressions in which newspapers and politicians often indulge.

The greatest lesson of the narrative is found in the fact that all

members of the Court have conscientiously and skilfully co-operated, and that the combined body, notwithstanding personal shortcomings and occasional erroneous decisions, has successfully built upon the basis of the brief Constitution a system of law covering manifold relations of individuals and of state and nation. Those who read Mr. Warren's volumes will agree that "The Court has fully and worthily fulfilled the purposes for which it was designed" and that in its power to declare the law is found "the safeguard which keeps the whole mighty fabric of government from rushing to destruction." They may even accept the author's conclusion that, "Certainly no other human institution ever functioned with a slighter percentage of error."

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