



JUSTICE MAHLON PITNEY  
1912-1922

# MR. JUSTICE PITNEY AND PROGRESSIVISM

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## I. INTRODUCTION

In a book published in 1912, Marxist historian Gustavus Myers branded the United States Supreme Court a tool of the dominant capitalist class.<sup>1</sup> Part of the evidence he offered to support his characterization was the appointment that year of Associate Justice Mahlon Pitney, a native of what Myers called “that essentially plutocratic town,” Morristown, New Jersey.<sup>2</sup> This was, he claimed, an event that gratified the great capitalist interests and “was inimical to the workers.”<sup>3</sup> Summarizing Justice Pitney’s career in 1969, historian Fred Israel also pictured him as a conservative bulwark against innovation,<sup>4</sup> notable mainly for his persistent hostility to labor.<sup>5</sup>

Such characterizations of Pitney are inaccurate. He did hand down a number of antiunion decisions, and he did interpret the income tax amendment in a manner arguably favorable to the wealthy, but this judge was no tool of the capitalists. Indeed, Pitney opposed monopoly in both the political and judicial arenas. Although hostile to trade unions, he wrote opinions that advanced the interests of unorganized workers, especially those victimized by industrial accidents. Far from being a die-hard reactionary, Mahlon Pitney was a judge whose career reflected the Progressivism that dominated American politics during the early years of the twentieth century. Some of Pitney’s ideas seem illiberal today, but many of the reformers of his own time shared his views. Consequently, they gave him their political support. As a state judge, and later as a United States Supreme Court Justice,

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<sup>1</sup> See G. MYERS, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES 783-85* (1912, reprint 1925).

<sup>2</sup> *Id.* at 783.

<sup>3</sup> *Id.* at 784.

<sup>4</sup> Israel, *Mahlon Pitney*, in 3 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1978: THEIR LIVES AND MAJOR OPINIONS 2001* (L. Friedman & F. Israel eds. 1980).

<sup>5</sup> See *id.* at 2005.

he took positions on issues similar to those of contemporaries whom historians have labeled "Progressives." That appellation fits Pitney too, for his judicial opinions mirror concerns, values, and biases characteristic of Progressivism.

## II. PROGRESSIVISM

Pitney's judicial opinions link him to the "[c]onvulsive reform movements [that] swept across the American landscape from the 1890s to 1917."<sup>6</sup> These movements promoted a variety of economic, political, and social changes, which their proponents believed would "improve the conditions of life and labor" and stabilize American society.<sup>7</sup> Progressive reform crusades were extremely diverse. As several historians have pointed out, Progressivism was not a unified movement. Progressives pursued a variety of goals; indeed, they often disagreed among themselves, even about how to achieve commonly held objectives.<sup>8</sup>

On no issue were the disagreements among reformers sharper than on the question of what to do about the giant combinations of capital that Americans referred to inaccurately and pejoratively as "the trusts."<sup>9</sup> One group of Progressives, for whom Theodore Roosevelt was the most prominent spokesman, considered bigness in business inevitable and desirable. Rather than smashing the trusts, they argued, the Federal Government should subject them to continuous administrative supervision.<sup>10</sup> It should distinguish between those that behaved themselves and those that did not, and it should use intermittent law suits to discipline the miscreants.<sup>11</sup> Woodrow Wilson and his advisor in the 1912 presidential campaign, Louis Brandeis (later a colleague of Pitney on the Supreme Court), favored a vastly different approach. They idealized small economic units, and rather than

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<sup>6</sup> A. LINK & R. MCCORMICK, *PROGRESSIVISM* 1 (1983). This book is the best short survey of Progressivism. It also provides a good introduction to the scholarly literature on the subject.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *See id.*

<sup>9</sup> Most of these big businesses were not true trusts. John D. Rockefeller did accomplish a horizontal combination of competing firms in the oil industry in 1882 by creating a trust. G. PORTER, *THE RISE OF BIG BUSINESS, 1860-1910*, at 56 (1973). After 1889, however, such a horizontal combination was normally achieved by creating a holding company incorporated under the laws of New Jersey. *See id.*

<sup>10</sup> *See* J. GARRATY, *A SHORT HISTORY OF THE AMERICAN NATION* 368-69 (2d ed. 1974).

<sup>11</sup> *See id.* at 369.

regulating monopolies, they wanted to break them up by enacting legislation that would effectively outlaw giant combinations of capital.<sup>12</sup>

Progressives of this type held views deeply rooted in the American past, views that had been widely accepted since before the Civil War. Both Jacksonian Democrats and the leaders of the infant Republican party of the late 1850's were deeply suspicious of corporations and economic concentration. They feared that these might restrict the options open to wage earners and small entrepreneurs and interfere with the efforts of these groups to attain economic independence and upward social mobility. The Democratic version of this antebellum ideology emphasized conflict between labor and capital, but most Republicans believed there was a harmony of interests between different social classes. For this reason, the Republicans opposed self-conscious, working-class actions such as strikes, which they saw as interfering with the rights of others. They believed that an individual might quit any job he chose, but that it was wrong for him to join with others to shut down his employer or to keep those who wanted to work from doing so.<sup>13</sup> Unions, like corporations, were aggregations of power that threatened the opportunities of enterprising members of the middle class.<sup>14</sup> Hostility toward combinations of both labor and capital was central to the thinking of the advocates of *laissez faire*,<sup>15</sup> who gained intellectual pre-eminence in the United States during the decades after the Civil War.

Turn-of-the-century Supreme Court Justice John Marshall Harlan, known as a rigorous enforcer of the antitrust laws, also exhibited a distinct lack of sympathy for workers' organizations.<sup>16</sup> Even Brandeis, although a friend of the trade union movement, "was absolutely opposed to the closed shop as a form of labor despotism."<sup>17</sup> As late as 1909, Woodrow Wilson declared, "I

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<sup>12</sup> See T. McCRAW, *PROPHETS OF REGULATION* 111 (1984).

<sup>13</sup> See generally E. FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 16-17 (1970) (discussing the free-labor outlook).

<sup>14</sup> See *id.* at 20, 22, 25.

<sup>15</sup> See Benedict, *Laissez-Faire and Liberty: A Re-evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 *LAW & HIST. REV.* 293, 308 (1985).

<sup>16</sup> For Harlan's views on concentrations of capital and the enforcement of the Sherman Antitrust Act against them, see G.E. WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 136-38 (1976). For his attitudes toward unions and his views on liberty of contract in the labor market, see his opinion in *Adair v. United States*, 208 U.S. 161 (1908).

<sup>17</sup> P. STRUM, *LOUIS D. BRANDEIS* 343 (1984).

am a fierce partizan [sic] of the Open Shop and of everything that makes for individual liberty.'"<sup>18</sup> To many small employers and middle-class professionals, unions seemed like just another type of monopoly—originated for the same reasons as the industrial monopoly and likely to produce similar results.<sup>19</sup> During the late 1890's and the early years of the twentieth century, the average middle-class citizen viewed himself as a member of an unorganized, and therefore helpless, consuming public, threatened from above by mushrooming trusts and from below by workers combining to protect themselves.<sup>20</sup>

Historian Richard Hofstadter once characterized Progressivism as "the complaint of the unorganized against the consequences of organization."<sup>21</sup> His thesis that it was caused by the status anxieties of the middle class<sup>22</sup> has by now been largely refuted by other scholars.<sup>23</sup> There were, however, other reasons for members of the unorganized middle class to feel threatened by the growing power of big business above and trade unions below. One was inflation. During the period from 1897 to 1913, the cost of living rose thirty-five per cent. Although the increase was modest by today's standards, the Country was then emerging from a period of deflation, and the public tended to blame rising prices on "the sudden development of a vigorous, if small, labor movement, and an extraordinary acceleration in the trustification of American industry."<sup>24</sup> The second important reason for the development of reform sentiments within the unorganized mid-

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<sup>18</sup> A. LINK, WILSON: THE ROAD TO THE WHITE HOUSE 127 (1947) (footnote omitted). During his 1910 campaign for governor, Wilson repudiated what he had said earlier about unions, claiming he had not really meant it. *Id.* at 159, 184.

<sup>19</sup> G. MOWRY, THE ERA OF THEODORE ROOSEVELT: 1900-1912, at 100 (1958).

<sup>20</sup> R. HOFSTADTER, THE AGE OF REFORM 170 (1955).

<sup>21</sup> *Id.* at 216. *Contra* R. WIEBE, THE SEARCH FOR ORDER: 1877-1920 *passim* (1967) (arguing Progressivism was part of effort to impose order upon chaotic, new society created by rapid industrialization).

<sup>22</sup> See R. HOFSTADTER, *supra* note 20, at 135. Hofstadter states:

It is my thesis that men of this sort [Progressive reformers], who might be designated broadly as the Mugwump type, were Progressives not because of economic deprivations but primarily because they were victims of an upheaval in status that took place in the United States during the closing decades of the nineteenth and the early years of the twentieth century. Progressivism, in short, was to a very considerable extent led by men who suffered from the events of their time not through a shrinkage in their means but through the changed pattern in the distribution of deference and power.

*Id.*

<sup>23</sup> See A. LINK & R. MCCORMICK, *supra* note 6, at 7 ("No interpretation has been more sharply criticized than Hofstadter's status-revolution theory.").

<sup>24</sup> R. HOFSTADTER, *supra* note 20, at 168-69.

dle class was a sudden increase in public awareness of the extent to which big corporations were corrupting the political process in order to advance their own interests at the expense of other segments of American society.<sup>25</sup> The fears and resentments of the middle class were certainly not the only reasons for the development of Progressivism,<sup>26</sup> but they do explain the career of Mahlon Pitney and its relationship to that reform movement.<sup>27</sup>

### III. THE NEW JERSEY YEARS

#### A. Background and Early Life

Progressives were mostly old-stock Americans with British ethnic backgrounds who came from economically secure middle-class families.<sup>28</sup> Religiously, they were most often Calvinists, affiliated with denominations such as the Congregationalists and the Presbyterians.<sup>29</sup> In a day when few Americans went to college, most Progressives were college graduates.<sup>30</sup> A majority of those active in politics were lawyers.<sup>31</sup>

In other words, the typical Progressive reformer was someone very much like Mahlon Pitney. Pitney's ancestors had come to New Jersey from England in the early 1700's, and the great grandfather for whom he was named served in George Washington's army during the Revolutionary War.<sup>32</sup> The future Justice was born the second son of attorney Henry C. Pitney on the family farm near Morristown on February 5, 1858.<sup>33</sup> He attended private schools in Morristown, and as befits a New Jersey Presby-

<sup>25</sup> See *id.* at 172-73.

<sup>26</sup> Arthur Link and Richard McCormick contend that "middle-class interpretations of Progressivism" are meaningless because at the turn of the century, most Americans were part of the middle class. A. LINK & R. MCCORMICK, *supra* note 6, at 7-8. While it is true that only a minority of Americans were not members of the middle class, it does not follow that the concerns of the middle class did not inspire some of those who belonged to it to become reformers.

<sup>27</sup> It may be that an interpretation of Progressivism that emphasizes the reaction of the middle class to what its members perceived as threats from above and below is more useful for explaining the development and nature of that phenomenon in the region from which Pitney hailed—the urban Northeast—than in the South and Middle West, where the organization of the working class into labor unions had not progressed nearly as far as it had in states such as New Jersey.

<sup>28</sup> See G. MOWRY, *supra* note 19, at 86.

<sup>29</sup> See *id.* at 86-87.

<sup>30</sup> See *id.* at 86.

<sup>31</sup> See *id.*; see also Thelen, *Social Tensions and the Origins of Progressivism*, 56 J. AM. HIST. 323, 330-34 (1969) (arguing that Progressives came from backgrounds similar to those of their conservative opponents).

<sup>32</sup> See Israel, *supra* note 4, at 2001.

<sup>33</sup> *Id.*

terian, he enrolled at Princeton in 1875.<sup>34</sup>

Pitney studied hard at Princeton, and during his senior year, he played first base on and managed the baseball team.<sup>35</sup> Among his classmates were Robert McCarter, who would later serve as attorney general of New Jersey,<sup>36</sup> and Thomas Woodrow Wilson, who was destined to become President of the United States.<sup>37</sup> On November 30, 1915, the class of 1879 held a reunion at the White House hosted by President Wilson and attended by, among others, Justice Pitney.<sup>38</sup>

After graduating from Princeton, young Mahlon followed his father into what was rapidly becoming the family profession—law. H.C. Pitney, a country lawyer who had served as prosecutor of the pleas for Morris County in the 1860's, capped a successful career by becoming a vice chancellor in 1889, a position he held until 1907.<sup>39</sup> His sons, Henry C., Jr. and John O.H. (founding partner of Pitney, Hardin, Kipp & Szuch) also took up the practice of law.<sup>40</sup> “‘I could hardly have escaped it,’” Mahlon once remarked.<sup>41</sup> After discussing career options with his father, he decided that following graduation, he would read law in the elder Pitney's office.<sup>42</sup> That form of preparation for the bar proved to be less than thrilling. “‘I found the work very dull at first, and Blackstone very dry reading,’” the future Supreme Court Justice admitted later.<sup>43</sup> On the other hand, he learned an immense amount, “‘most of it from [his] father who was a walking encyclopedia of law.’”<sup>44</sup>

### B. Law Practice

After a period of intense cramming with his close friend

<sup>34</sup> *Id.* See generally *Obituaries*, 48 N.J.L.J. 29, 29 (1925) (summary of Pitney's life).

<sup>35</sup> *Obituaries*, *supra* note 34, at 29.

<sup>36</sup> *Id.*; see also Princeton College, *The Class Of 1879: Quindecennial Record 1879-1894*, at 85 (1894) (stating Pitney was “in frequent conflict with” McCarter) [hereinafter cited as *Class of 1879*].

<sup>37</sup> Israel, *supra* note 4, at 2001.

<sup>38</sup> Newark Evening News, Dec. 1, 1915, in Mahlon Pitney Papers (in the personal possession of James C. Pitney, Morristown, New Jersey) [hereinafter cited as *Pitney Papers*]; see Letter from Woodrow Wilson to Mahlon Pitney (Nov. 22, 1915), in *Pitney Papers*, *supra*.

<sup>39</sup> See BENCH AND BAR OF NEW JERSEY 209 (1942).

<sup>40</sup> See *Obituaries*, *supra* note 34, at 29.

<sup>41</sup> A. Breed, Mahlon Pitney: His Life and Career—Political and Judicial 8 (undated, unpublished thesis, Princeton University).

<sup>42</sup> See *id.* at 8-9.

<sup>43</sup> *Id.* at 9.

<sup>44</sup> *Id.* at 10.

Francis J. Swayze (who would be his colleague on the New Jersey bench and rival for a seat on the United States Supreme Court),<sup>45</sup> Pitney took and passed the bar examinations. He was admitted as an attorney at law and solicitor in chancery in 1882, and three years later he became a counselor.<sup>46</sup> For the first seven years after his admission to the bar, Pitney practiced alone in Dover, New Jersey.<sup>47</sup> There he acted as counsel to the Cranbury Iron Company, which he also served as a director and an officer.<sup>48</sup> In addition, Pitney found time to manage a Dover department store.<sup>49</sup>

When his father was appointed vice chancellor in 1889, Mahlon returned to Morristown to take over H.C.'s firm, Pitney & Youngblood.<sup>50</sup> He achieved a reputation as both a skillful appellate advocate and a clever trial lawyer.<sup>51</sup> By 1894, Pitney was "justly regarded as one of the leading legal lights in New Jersey."<sup>52</sup>

### C. Political Career

#### 1. Congress

In the fall of 1894, Pitney entered politics, running for the House seat from the Fourth Congressional District.<sup>53</sup> Like his father, Mahlon was a Republican, and the Fourth was normally a Democratic stronghold.<sup>54</sup> In 1894, the Country was in the depths of a depression, however, and voters troubled by hard times were turning against the party of Democratic President Grover Cleveland.<sup>55</sup> Although a newspaper supporting his opponent, Johnston Cornish, stated that "no Democrat [could] be expected to vote for Mr. Pitney, because he represents in the most radical degree every principal [sic] of Republicanism that is dis-

<sup>45</sup> See *id.* at 9.

<sup>46</sup> See *id.* at 9-10; Letter from Wilbur F. Sadler, Jr. to Mahlon Pitney (May 5, 1914), in Pitney Papers, *supra* note 38.

<sup>47</sup> A. Breed, *supra* note 41, at 10.

<sup>48</sup> *Id.*

<sup>49</sup> See *id.*

<sup>50</sup> *Id.*

<sup>51</sup> See *id.* at 11.

<sup>52</sup> Class of 1879, *supra* note 36, at 85. Robert McCarter, Pitney's classmate at Princeton and frequent rival at the bar, once wrote, "The aggravating fact about Pitney was that whatever he did, he did well." R. McCARTER, MEMORIES OF A HALF CENTURY AT THE NEW JERSEY BAR 89 (1937). This included chess, dancing, and golf, as well as the practice of law. *Id.* at 88-89.

<sup>53</sup> See *Obituaries*, *supra* note 34, at 29-30; A. Breed, *supra* note 41, at 12.

<sup>54</sup> See *supra* note 53.

<sup>55</sup> See Gould, *The Republican Search for a National Majority*, in THE GILDED AGE 171, 183 (H. Morgan ed. 1970).



tasteful to a Democrat,"<sup>56</sup> many obviously did. Pitney carried the district by 1407 votes.<sup>57</sup>

During his first term in the House, Speaker Thomas B. Reed named him to both the Committee on Reform in the Civil Service and the powerful Appropriations Committee.<sup>58</sup> Although Pitney seldom opened his mouth on the floor,<sup>59</sup> the performance of the quiet freshman from New Jersey obviously pleased "Czar" Reed. When Pitney stood for re-election in 1896, the Speaker traveled to Morristown to give a major address and to endorse his candidacy.<sup>60</sup> Pitney again prevailed at the polls, defeating Democrat Augustus W. Cutler by 2977 votes.<sup>61</sup>

During his second term in the House, he assumed a somewhat higher profile, frequently participating in debate.<sup>62</sup> Pitney spoke out against what he regarded as the excessively large appropriations proposed for various departments of the Government.<sup>63</sup> He also served on the committee to which the Alaska boundary dispute was assigned. All of its members were asked to prepare briefs on the controversy, and Pitney's was so "exhaustive that he was assigned to manage the passage of the . . . report" that the committee presented to the full House.<sup>64</sup>

## 2. State Senate

Although successful, Pitney's second term ended prematurely. He resigned on January 5, 1899 to take a seat in the New Jersey Senate.<sup>65</sup> Both he and his wife, the former Florence Shelton, "longed to return to Morristown and their friends" there.<sup>66</sup> In addition, Pitney wanted to be governor.<sup>67</sup> Early in 1898, he made the obligatory pilgrimage to the Camden railroad office that served as the headquarters of New Jersey's Republican

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<sup>56</sup> True Democratic Banner, Sept. 27, 1894, in Pitney Papers, *supra* note 38.

<sup>57</sup> A. Breed, *supra* note 41, at 12.

<sup>58</sup> *See id.*

<sup>59</sup> It is interesting to note that the *New York Daily Tribune* later claimed, "Pitney surprised some of the old-timers by making a number of excellent speeches during his first term in Congress." *N.Y. Daily Tribune*, May 10, 1897, in Pitney Papers, *supra* note 38. The *Congressional Record*, however, lends no support to this bit of Republican puffery.

<sup>60</sup> *See Morris County Chronicle*, Oct. 16, 1896, in Pitney Papers, *supra* note 38.

<sup>61</sup> A. Breed, *supra* note 41, at 13.

<sup>62</sup> *Id.*

<sup>63</sup> *See id.*

<sup>64</sup> *Obituaries*, *supra* note 34, at 30.

<sup>65</sup> *See* A. Breed, *supra* note 41, at 14.

<sup>66</sup> *Id.*

<sup>67</sup> *See id.* at 16.

“boss,” William J. Sewall, seeking Sewall’s endorsement.<sup>68</sup> He did not get it. The “boss,” who favored another candidate, told Pitney that he had to broaden his base in state politics before seeking the governorship.<sup>69</sup> Assured by Sewall that if elected to the New Jersey senate he could have the minority leadership, Pitney ran for the Morris County seat in November of 1898,<sup>70</sup> winning by a plurality of 831 votes.<sup>71</sup>

When the Republicans gained control of the upper chamber in 1900, he became president of the senate.<sup>72</sup> During his three years in Trenton, Pitney won acclaim for a thorough “study of the proposed Morris Canal abandonment scheme,” which he revealed was almost exclusively for the benefit of the lessee of the canal, the Lehigh Valley Railroad.<sup>73</sup> His efforts prevented consummation of this dubious project<sup>74</sup> and even won him praise from a newspaper otherwise highly critical of the state senate.<sup>75</sup>

Pitney’s success in Trenton made him a leading contender for the Republican gubernatorial nomination and a likely winner of the state’s highest office.<sup>76</sup> Before the 1901 election, however, the Chief Justice of the New Jersey Supreme Court, David A. Depeew, resigned.<sup>77</sup> Governor Foster M. Voorhees elevated Associate Justice William S. Gummere to the chief justiceship, and on February 5, 1901, he nominated Pitney to fill the resulting vacancy.<sup>78</sup> On that day, Pitney also celebrated his forty-third birthday.<sup>79</sup> His fellow senators quickly confirmed their colleague from Morristown,<sup>80</sup> bringing an end to his career in elective politics.

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<sup>68</sup> *Id.* at 15; Israel, *supra* note 4, at 2002.

<sup>69</sup> See Israel, *supra* note 4, at 2002.

<sup>70</sup> *Id.*

<sup>71</sup> *Obituaries*, *supra* note 34, at 30.

<sup>72</sup> See *id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See Letter from Mahlon Pitney to the Editor of the *Sunday Call* (Mar. 28, 1901), in Pitney Papers, *supra* note 38. In his letter, Pitney complained, “You give me full credit for the defeat of the Morris Canal bill.” *Id.* He also defended the integrity of the New Jersey Legislature: “And I want to say, Mr. Editor, that your wholesale denunciation of the Senate as debauched, corrupt, incapable of good action and subservient to the bosses is as cruel and unjust an accusation as I have ever read.” *Id.*

<sup>76</sup> Israel, *supra* note 4, at 2002; *Obituaries*, *supra* note 34, at 30; A. Breed, *supra* note 41, at 16.

<sup>77</sup> A. Breed, *supra* note 41, at 17.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

### 3. Progressive Politician

His career suggests that Pitney was part of the emergent Progressive movement that was just beginning to gather momentum around the Country when he abandoned the political arena for the bench. To be sure, Pitney took traditional Republican positions on the issues in his two races for Congress.<sup>81</sup> As historian George Mowry has pointed out, however, most of those who would later be identified as Progressives were conservatives in the middle 1890's.<sup>82</sup> In the landmark Presidential election of 1896, these nascent Progressives opposed William Jennings Bryan, who, as the candidate of the Democratic and Populist parties, advocated the free and unlimited coinage of silver as a panacea for the economic woes of American farmers and workers.<sup>83</sup> Certainly, Pitney was part of this opposition. " 'What we need,' " he thundered, " 'is . . . not more money, but more confidence and more business.' " <sup>84</sup> Pitney's Princeton classmate Woodrow Wilson, now remembered as a Progressive governor and President, took a similar position. He denounced Bryan and cast his ballot for a breakaway faction of the Democratic party that favored retention of the gold standard.<sup>85</sup>

What made reformers of men such as Wilson and Pitney were the economic and political abuses of the great corporations.<sup>86</sup> Such abuses were particularly serious in New Jersey, where during the 1880's and 1890's, the legislature adopted a series of laws designed to facilitate the formation of holding companies and monopolies.<sup>87</sup> Between 1896 and 1913, the state did

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<sup>81</sup> Besides defending the gold standard, Pitney also supported that traditional Republican bromide, the protective tariff. See *infra* notes 83-84 and accompanying text. In 1894, a Democratic newspaper characterized him as "a Protectionist of the rankest and most radical sort." True Democratic Banner, Sept. 27, 1894, in Pitney Papers, *supra* note 38.

<sup>82</sup> G. MOWRY, *supra* note 19, at 87.

<sup>83</sup> See Fite, *Election of 1896*, in 2 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1787, 1822 (A. Schlesinger ed. 1971). Many American farmers were deeply in debt. Bryan's proposal for the free and unlimited coinage of silver into money would have produced inflation, thus lightening the burden of their debts. See J. HICKS, THE POPULIST REVOLT 315-16 (1931). The idea was not very appealing to urban workers, however, for it would have meant a shrinkage in their real wages. See Fite, *supra*, at 18, 22-23. As Pitney pointed out in a speech on the House floor on February 3, 1898, the free-silver issue caused New Jersey Democrats to desert their party by the thousands in 1896. See 31 CONG. REC. 165 app., 167 app. (1898).

<sup>84</sup> Morris County Chronicle, Oct. 16, 1896, in Pitney Papers, *supra* note 38.

<sup>85</sup> See A. LINK, *supra* note 18, at 25.

<sup>86</sup> See *id.* at 134-35.

<sup>87</sup> *Id.* at 134; R. NOBLE, JR., NEW JERSEY PROGRESSIVISM BEFORE WILSON 4-6, 9-11 (1946); see McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of*

a bargain-counter business in corporate charters, enriching its treasury with filing fees while giving a legal home to all of the largest holding companies in the Nation and a majority of the lesser trusts as well.<sup>88</sup> Their rush to incorporate in New Jersey earned her the nickname "the mother of trusts."<sup>89</sup> Particularly offensive to New Jerseyans themselves were the utility companies, which controlled gas, electric, trolley, and street railway service in the northern part of the state.<sup>90</sup> Backed by the major banks and insurance firms, these corporations enjoyed intimate relations with the leaders of both the Democratic and Republican parties, many of whom had financial interests in the companies.<sup>91</sup> It is hardly surprising that utilities benefited from extremely favorable franchise arrangements and quite low taxes.<sup>92</sup>

During the period from 1905 to 1912, these firms came under attack by reformers in both political parties. The first to take the offensive were the so-called "New Idea" Republicans, led by Jersey City Mayor Mark Fagan, his corporation's counsel, George Record, and Essex County Senator Everett Colby.<sup>93</sup> By 1906, the "New Idea" men had become such a potent force in the northern part of the state that the Republican majority in the legislature hastened to endorse their demands for increased taxation of railroad property and for legislation imposing limitations on the franchises that local governments routinely granted to utility corporations.<sup>94</sup> In 1911, Democratic Governor Woodrow Wilson joined the assault. His administration secured passage of legislation creating a board of public utility commissioners and

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*American Corporation Law, 1869-1903*, 53 *BUS. HIST. REV.* 304, 322-23 (1979). As McCurdy notes, "Between 1891 and 1894 the rise of the New Jersey corporation overshadowed all other aspects of the trust problem in the public mind." *Id.* at 328. Particularly useful to the great industrial combinations of the era were two Acts of the New Jersey Legislature. One authorized New Jersey corporations to do business outside the state and to issue their own stock in order to purchase stock in other corporations. See Act of May 9, 1889, ch. 265, §§ 1, 4, 1889 N.J. Laws 412, 412, 415. The other allowed corporations organized for any lawful purpose to carry on business anywhere, to hold securities in other concerns, and to issue their own stock in payment for property. See Act of Apr. 21, 1896, ch. 185, §§ 7, 49, 50, 1896 N.J. Laws 277, 280, 293-94, 294. The latter law also gave corporations organized under it wide power to alter their charters. See *id.* § 28, 1896 N.J. Laws at 286.

<sup>88</sup> See A. LINK, *supra* note 18, at 134.

<sup>89</sup> *Id.*

<sup>90</sup> R. NOBLE, JR., *supra* note 87, at 10-11.

<sup>91</sup> *Id.* at 9-10.

<sup>92</sup> *Id.* at 10-11.

<sup>93</sup> *Id.* at 24, 51.

<sup>94</sup> *Id.* at 65 n.3, 66-71.

investing it with the power to set rates and regulate service.<sup>95</sup>

Fourteen years before that measure became law, Mahlon Pitney had spoken out against abuse of the public by a utility corporation. In particular, he focused on the United States Electric Lighting Company, a firm that for years had enjoyed a monopoly franchise for lighting the streets of the Nation's Capital. In an 1897 debate on the floor of the House of Representatives, Pitney vigorously attacked the lighting company and endorsed the efforts of the District of Columbia Commissioners to give some of its business to a competing firm.<sup>96</sup> No company "that has the full control in a matter of this sort can be trusted to care for the public interests," Pitney told his colleagues.<sup>97</sup> What would best serve the interests of consumers was competition.<sup>98</sup> The following year, in probably his most famous House speech, Pitney defended his home state against charges by Populist Congressman "Sockless" Jerry Simpson of Kansas that New Jersey was guilty of coddling the trusts. Although denouncing Simpson for preaching a doctrine that would "lead us directly to socialism," Pitney endorsed "reasonable measures of regulation for the government of corporations" and the use of the equity powers of the judiciary to prevent corporate abuses.<sup>99</sup> As he left the New Jersey Senate for the bench in 1901, he denounced "bills . . . contrived for the purpose of establishing or bolstering up a partial or total monopoly."<sup>100</sup>

#### *D. State Judge*

Like his political rhetoric, Pitney's performance as a state judge reflected attitudes commonly associated with Progressivism. He served as an associate judge of the New Jersey Supreme Court from February 19, 1901 to January 22, 1908.<sup>101</sup> During

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<sup>95</sup> A. LINK, *supra* note 18, at 262-63; *see also* Act of Apr. 21, 1911, ch. 195, 1911 N.J. Laws 374 (creating the Board of Public Utility Commissioners).

<sup>96</sup> *See* 29 CONG. REC. 1448-55 (1897). When Representative Baker of New Hampshire argued that the new firm, the Potomac Company, would have to tear up the streets in order to lay a conduit for its lines, Pitney replied, "[S]o far as my personal feeling is concerned, if the Commissioners had any discretion they might better authorize the tearing up of a few blocks more of the sacred pavements of Washington, in order to break up this controlling monopoly that has been here for so many years." *Id.* at 1453.

<sup>97</sup> *Id.* at 1454.

<sup>98</sup> *Id.* at 1455.

<sup>99</sup> 31 CONG. REC. 167 app. (1898).

<sup>100</sup> Letter from Mahlon Pitney to the Editor of the *Sunday Call* (Mar. 28, 1901), in Pitney Papers, *supra* note 38.

<sup>101</sup> Israel, *supra* note 4, at 2003; A. Breed, *supra* note 41, at 17-18.

this tenure, he wrote a total of 167 opinions, dealing with a wide variety of civil and criminal legal problems.<sup>102</sup> Only four times did the court of errors and appeals reverse one of his decisions.<sup>103</sup>

Pitney's performance earned him a promotion. When Chancellor William J. Magie retired in January of 1908, Governor J. Franklin Fort nominated him to a full seven-year term as Magie's successor.<sup>104</sup> The senate, not even bothering with the usual reference to committee, quickly confirmed the choice.<sup>105</sup> During Pitney's four years and two months as chancellor, he headed both the law and equity branches of the court of errors and appeals.<sup>106</sup> He handed down forty-seven decisions on the law side and approximately eleven on the equity side.<sup>107</sup> His responsibilities as chancellor also included coordinating the work of the vice chancellors, who presided over the various districts into which the state was then divided.<sup>108</sup> This made him briefly the superior of his father, who had already submitted his resignation before Mahlon's appointment, but remained on the job for a few months after his son took office.<sup>109</sup> As chancellor, Pitney inaugurated the practice of having all the vice chancellors meet two or three times a year to discuss any problems they were experiencing in their districts.<sup>110</sup> What attracted the attention of the press, however, was his "scoring [of] the Camden law firm of French & Richards for oppressive conduct in attempting to charge the Amparo Mining Company \$75,000 for legal fees" by reducing the firm's fee to

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<sup>102</sup> Israel, *supra* note 4, at 2003.

<sup>103</sup> *Id.*

<sup>104</sup> See *Obituaries*, *supra* note 34, at 30.

<sup>105</sup> *Id.* When his friend Francis Swayze expressed regret about his leaving the supreme court, Pitney told him "that [he] would like to be *both* a Supreme Court Justice and Chancellor." Letter from Mahlon Pitney to John R. Hardin (Jan. 25, 1908), in Pitney Papers, *supra* note 38.

<sup>106</sup> Israel, *supra* note 4, at 2003; A. Breed, *supra* note 41, at 20.

<sup>107</sup> A. Breed, *supra* note 41, at 20.

<sup>108</sup> See *id.*

<sup>109</sup> Family legend has it that Chancellor Pitney was once seen by a friend at a railroad station with a dour look on his face. Asked what was bothering him, he replied that he was on his way to reverse a decision of his father. Interview with James C. Pitney, Grandson of Justice Pitney, in Morristown, New Jersey (Apr. 15, 1985). At a banquet held to honor Pitney shortly after his appointment to the United States Supreme Court, his Princeton classmate, then-Attorney General Robert H. McCarter, recalled "those scenes at [Pitney's] father's home at Morristown, when [he] would return from Trenton and announce that the Court of Errors and Appeals had reversed the decision of Vice Chancellor Pitney, the judgment being rendered by Pitney, J." *Jersey's Honor to Justice Pitney*, 35 N.J.L.J. 139, 140 (1912) [hereinafter cited as *Jersey's Honor*].

<sup>110</sup> A. Breed, *supra* note 41, at 20.

only \$12,500.<sup>111</sup>

The Amparo Company had more reason to applaud Pitney's performance on the state bench than did most corporations. His decisions in cases challenging efforts to subject railroads to increased taxation revealed the continuing development of the incipient Progressivism that he had displayed as a politician. The constant in these rulings was the identity of the losing party; it was always the railroad. For example, Pitney spurned<sup>112</sup> the Bergen and Dundee Railroad's challenge to the constitutionality of the 1905 Duffield Act,<sup>113</sup> a measure subjecting all property of railroads and canals except their "main stem" to taxation by local governments. He also upheld the validity, under both the state constitution and the fourteenth amendment,<sup>114</sup> of 1906 legislation that removed the main stem classification from property formerly so denominated<sup>115</sup> and equalized the tax rates on that part of railroad and canal property subject solely to state taxation with the rates on other New Jersey real property.<sup>116</sup>

Pitney again rebuffed railroads when they complained about the amount of their tax assessments<sup>117</sup> and when they objected to the inclusion of particular pieces of real estate in the "second class" category subject to local taxation.<sup>118</sup> He ruled in favor of the mayor and aldermen of Jersey City in a suit against both the State Board of Equalization and the Central Railroad Company of New Jersey.<sup>119</sup> The suit arose after the board, at the instigation of the railroad, ordered a reassessment of all real property in the community without giving notice to other taxpayers.<sup>120</sup>

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<sup>111</sup> Newark Evening News, June 8, 1910, in Pitney Papers, *supra* note 38. Both French and Richards were friends of the chancellor; in reducing their fee, he rejected arguments made on their behalf by his Princeton classmate, Robert McCarter. *See id.*

<sup>112</sup> *See* Bergen & Dundee R.R. v. State Bd. of Assessors, 74 N.J.L. 742, 67 A. 668 (1907).

<sup>113</sup> Ch. 91, 1905 N.J. Laws 189.

<sup>114</sup> *See* Central R.R. v. State Bd. of Assessors, 75 N.J.L. 120, 67 A. 672 (Sup. Ct. 1907), *aff'd*, 75 N.J.L. 771, 69 A. 239 (1908).

<sup>115</sup> *See* Average Rate Law, ch. 82, 1906 N.J. Laws 121.

<sup>116</sup> *See* Perkins Act, ch. 280, 1906 N.J. Laws 571; *see also* Act of Apr. 18, 1906, ch. 122, 1906 N.J. Laws 220 (defining "main stem").

<sup>117</sup> *See* Tuckerton R.R. v. State Bd. of Assessors, 75 N.J.L. 157, 67 A. 69 (Sup. Ct. 1907).

<sup>118</sup> *See In re* New York Bay R.R., 75 N.J.L. 389, 67 A. 1049 (Sup. Ct. 1907); *In re* United N.J.R.R. & Canal, 75 N.J.L. 385, 67 A. 1075 (Sup. Ct. 1907), *rev'd*, 76 N.J.L. 830, 71 A. 275 (1908).

<sup>119</sup> *See* Mayor of Jersey City v. Board of Equalization of Taxes, 74 N.J.L. 753, 67 A. 38 (1907).

<sup>120</sup> *See id.* at 754, 67 A. at 39.

Pitney also supported Jersey City's Progressive Republican administration in two disputes with local street railway companies. In 1905, he ruled that the municipality could collect a license fee from the North Jersey Street Railway Company.<sup>121</sup> Two years later, Pitney upheld as reasonable a municipal regulatory ordinance requiring North Jersey and another company to provide sufficient cars during rush hour so that all passengers could have a seat and no one would have to wait more than five minutes for a ride.<sup>122</sup>

This latter decision reflected Pitney's desire to see corporations regulated and controlled. Although he could wax eloquent about "the marvelous progress of the past half century in every line of human effort, carried on . . . more and more through the instrumentality of corporations,"<sup>123</sup> he deeply distrusted the increasing separation of ownership from control and the concentration of economic power into fewer and fewer hands,<sup>124</sup> two factors that distinguished corporate evolution at the turn of the century. His ideal corporation was a little democracy in which directors were elected annually for limited terms, real power rested with the shareholders, and minority rights were respected.<sup>125</sup> An equity judge, Pitney thought, should use his powers to preserve this ideal and at the same time to protect the public from corporate abuses such as restraint of trade.<sup>126</sup>

The nineteenth-century attitudes that permeated his corporation decisions also governed his approach to labor law. In the

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<sup>121</sup> See *Mayor of Jersey City v. North Jersey St. Ry.*, 72 N.J.L. 383, 61 A. 95 (Sup. Ct. 1905). The Company, a successor in interest to the Jersey City & Bergen Railroad Company, claimed that a supplement to the charter of the Jersey City & Bergen, passed by the legislature in 1867, exempted it from license fees imposed by a local government. *Id.* at 387-88, 61 A. at 96. *But cf.* *Fielders v. North Jersey St. Ry.*, 68 N.J.L. 343, 363, 53 A. 404, 411 (1902) (stating that an ordinance requiring street railway companies to pave the portion of the street over which their tracks passed was an illegal tax not justifiable as an exercise of the police power).

<sup>122</sup> See *North Jersey St. Ry. v. Mayor of Jersey City*, 75 N.J.L. 349, 67 A. 1072 (Sup. Ct. 1907). At the end of his opinion in the *North Jersey* case, Pitney announced that a like result had been reached previously in a similar case. *Id.* at 354, 67 A. at 1074; see also *State v. Atlantic City & S. R.R.*, 77 N.J.L. 465, 72 A. 111 (1909) (sustaining effort of the attorney general to forbid a railroad from owning stocks and bonds of a street railway company).

<sup>123</sup> See *Warren v. Pim*, 66 N.J. Eq. 353, 399, 59 A. 773, 790 (1904) (Pitney, J., concurring). In this case, Pitney was part of a seven-to-six majority that affirmed a decision handed down by his father. See *id.* at 428, 59 A. at 802.

<sup>124</sup> See *id.* at 364, 373, 378, 386-87, 59 A. at 777, 780, 782, 785 (Pitney, J., concurring).

<sup>125</sup> See *id.* at 395-97, 59 A. at 789 (Pitney, J., concurring).

<sup>126</sup> See 31 CONG. REC. 167 app. (1898).



case of *Brennan v. United Hatters, Local 17*,<sup>127</sup> Pitney expressed distaste for a union's claim that the value of belonging to it "consist[ed] in participation in a more or less complete monopoly of the labor market in the particular trade in question."<sup>128</sup> He subsequently cited *Brennan* as holding that the state constitution guaranteed a painter the "right to seek and gain employment in his lawful occupation,"<sup>129</sup> and added that, consequently, a union "had no right to interfere with him in his employment merely because he was not a member."<sup>130</sup> Finally, in *George Jonas Glass Co. v. Glass Bottle Blowers' Association*,<sup>131</sup> Chancellor Pitney upheld a sweeping injunction<sup>132</sup> issued by Vice Chancellor Bergen<sup>133</sup>

<sup>127</sup> 73 N.J.L. 729, 65 A. 165 (1906).

<sup>128</sup> *Id.* at 739, 65 A. at 169.

<sup>129</sup> *Levin v. Cosgrove*, 75 N.J.L. 344, 347, 67 A. 1070, 1071 (Sup. Ct. 1907).

<sup>130</sup> *Id.* at 347-48, 67 A. at 1071. It is not at all clear that this is really a holding of *Brennan*; the reasoning in the opinion is extremely murky. See *Brennan*, 73 N.J.L. at 742-43, 65 A. at 170-71.

<sup>131</sup> 77 N.J. Eq. 219, 79 A. 262 (1908).

<sup>132</sup> The injunction restrained the defendants as follows:

*First.* From knowingly and intentionally causing or attempting to cause, by threats, offers of money, payments of money, offering to pay expenses, or by inducement or persuasion, any employe of the complainant under contract to render service to it to break such contract by quitting such service.

*Second.* From personal molestation of persons willing to be employed by complainant with intent to coerce such persons to refrain from entering such employment.

*Third.* From addressing persons willing to be employed by complainant, against their will, and thereby causing them personal annoyance, with a view to persuade them to refrain from such employment.

*Fourth.* From loitering or picketing in the streets or on the highways or public places near the premises of complainant with intent to procure the personal molestation and annoyance of persons employed or willing to be employed by complainant, and with a view to cause persons so employed to refrain from such employment.

*Fifth.* From entering the premises of the complainant against its will with intent to interfere with its business.

*Sixth.* From violence, threats of violence, insults, indecent talk, abusive epithets, annoying language, acts or conduct, practiced upon any persons without their consent, with intent to coerce them to refrain from entering the employment of complainant or to leave its employment.

*Seventh.* From attempting to cause any persons employed by complainant to leave such employment by intimidating or annoying such employes by annoying language, acts or conduct.

*Eighth.* From causing persons willing to be employed by complainant to refrain from so doing by annoying language, acts or conduct.

*Ninth.* From inducing, persuading or causing, or attempting to induce, persuade or cause, the employes of complainant to break their contracts of service with complainant or quit their employment.

*Tenth.* From threatening to injure the business of any corporation,

against a labor organization that had attempted to pressure an employer into unionizing his factory. Besides instigating a strike and a boycott and picketing the plant, the union apparently had resorted to threats, intimidation, and even bribery to deprive Jonas Glass of a work force until the firm agreed to its demands.<sup>134</sup> Pitney characterized the union's actions as "a war of subjugation against the complainant corporation."<sup>135</sup> In issuing the injunction, Vice Chancellor Bergen was careful to emphasize that he was not disputing the right of workers to form a union or to state peacefully to others their position in a labor dispute.<sup>136</sup> Pitney, on the other hand, expressed distaste for a state statute that appeared to legalize both unions and strikes. He declared that if this law really permitted the use of peaceable measures to induce workmen to quit their jobs or refuse to enter someone's employment, it would have to be unconstitutional.<sup>137</sup>

Because Pitney's hostility toward unions was inspired by their tendency to monopolize in the labor market,<sup>138</sup> it did not extend to unorganized workers. In tort cases decided while he was on the New Jersey bench, he ruled in favor of injured workmen about as often as he ruled against them.<sup>139</sup> He did once

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customer or person dealing or transacting business and willing to deal and transact business with the complainant, by making threats in writing or by words for the purpose of coercing such corporation, customer or person against his or its will so as not to deal with or transact business with the complainant.

*Id.* at 221-22, 79 A. at 263.

<sup>133</sup> See *George Jonas Glass Co. v. Glass Bottle Blowers Assoc.*, 72 N.J. Eq. 653, 66 A. 953 (Ch. 1907), *aff'd*, 77 N.J. Eq. 219, 79 A. 262 (1908).

<sup>134</sup> See *id.* at 655, 66 A. at 954.

<sup>135</sup> *Jonas Glass*, 77 N.J. Eq. at 221, 79 A. at 263.

<sup>136</sup> *George Jonas Glass Co. v. Glass Bottle Blowers Assoc.*, 72 N.J. Eq. 653, 662, 66 A. 953, 957 (Ch. 1907), *aff'd*, 77 N.J. Eq. 219, 79 A. 262 (1908).

<sup>137</sup> See *Jonas Glass*, 77 N.J. Eq. at 224, 79 A. at 264. The statute read as follows: That it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise, to persuade, advise, or encourage, by peaceable means, any person or persons to enter into any combination for or against leaving or entering into the employment of any person, persons or corporation.

Act of Feb. 14, 1883, ch. 28, § 1, 1883 N.J. Laws 36, 36. In a mildly critical editorial, the *Newark Evening News* argued that Pitney had not overlooked this statute, but had ignored the strikers' "constitutional rights of personal liberty and free speech." *Newark Evening News*, Feb. 15, 1911, in *Pitney Papers*, *supra* note 38.

<sup>138</sup> See *Jonas Glass*, 77 N.J. Eq. at 224, 79 A. at 264.

<sup>139</sup> See *infra* notes 140-142 and accompanying text. He ruled for workers three times and against them four times. See *id.* If one discounts *Delaney v. Public Serv. Ry.*, 82 N.J.L. 551, 552, 82 A. 852, 852 (1912), in which he affirmed a nonsuit because the plaintiff had presented no evidence of the defendant's negligence beyond the fact that its pneumatic jack had injured him, there is an even split.

make rather heartless use of the doctrine of contributory negligence, employing it to reverse a jury verdict in favor of a fourteen-year-old boy whose hand had been crushed in his employer's machine.<sup>140</sup> In another case, Pitney declined to adopt the so-called vice-principal exception to the fellow-servant rule, thus precluding a telephone lineman from recovering against his employer for injuries caused by the negligence of his foreman.<sup>141</sup> On the other hand, he consistently took the position that employers must furnish their employees with safe tools and a safe place in which to work, and he would not allow those who failed to do so to avoid liability by hiding behind the fellow-servant doctrine.<sup>142</sup> In viewing workers favorably while loathing their organizations, Pitney was not unique.<sup>143</sup> "[F]or many a progressive the rise of the labor union was as frightening as the rise of trusts."<sup>144</sup>

Pitney's hostility to unions placed him squarely within the mainstream of the Progressive movement, as did his support of governmental efforts to regulate saloons<sup>145</sup> and to combat other forms of vice.<sup>146</sup> In addition, Pitney impressed Progressives by prodding a Hudson County grand jury into indicting for election fraud some opponents of Jersey City's New Idea mayor, Mark Fagan, men who, according to the *Newark Evening News*, had

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<sup>140</sup> See *Diehl v. Standard Oil Co.*, 70 N.J.L. 424, 57 A. 131 (Sup. Ct. 1904). The decision in *Gill v. National Storage Co.*, 70 N.J.L. 53, 56 A. 146 (Sup. Ct. 1903), seems also to be based on the doctrine of contributory negligence, but it may rest on the principle of assumption of the risk; the opinion is extremely unclear.

<sup>141</sup> See *Knutter v. New York & N.J. Tel. Co.*, 67 N.J.L. 646, 52 A. 565 (1902).

<sup>142</sup> See *Burns v. Delaware & Atl. Tel. Co.*, 70 N.J.L. 745, 59 A. 220 (1904); *Hopwood v. Benjamin Atha & Illingsworth Co.*, 68 N.J.L. 707, 54 A. 435 (1903); *Smith v. Erie R.R.*, 67 N.J.L. 636, 52 A. 634 (1902).

<sup>143</sup> See generally R. HOFSTADTER, *supra* note 20, at 238 (Progressives "[o]n one side . . . feared the power of the plutocracy [and] on the other the poverty and restlessness of the masses").

<sup>144</sup> G. MOWRY, *supra* note 19, at 99-100.

<sup>145</sup> See, e.g., *Meehan v. Board of Excise Comm'rs*, 75 N.J.L. 557, 70 A. 363 (1908) (upholding constitutionality of "Bishops' Law," which required interiors of taverns to be in full view from public street during hours when sale of liquor was forbidden by law); *Crocker v. Board of Excise Comm'rs*, 73 N.J.L. 460, 63 A. 901 (Sup. Ct. 1906) (upholding municipal ordinances designed to keep saloons closed on Sunday); *Bachman v. Inhabitants of Phillipsburg*, 68 N.J.L. 552, 53 A. 620 (Sup. Ct. 1902) (holding license issued to proprietor of beer saloon should be set aside because it had been obtained through fraud). The hostility of Progressives toward saloons arose from a belief that immigrants drank too much. See A. LINK & R. MCCORMICK, *supra* note 6, at 102-03.

<sup>146</sup> See, e.g., *Ames v. Kirby*, 71 N.J.L. 442, 59 A. 558 (Sup. Ct. 1904) (upholding jailing of Atlantic county man for bookmaking). See generally A. LINK & R. MCCORMICK, *supra* note 6, at 68-69 (discussing society's weakness of character).

“concocted” a “conspiracy to override the will of the people.”<sup>147</sup> A charge to a Passaic County grand jury also attracted favorable attention. In it, Pitney lashed out at local officials for failing to enforce the liquor laws and called for action against election officers in Paterson, who were alleged to have submitted false returns.<sup>148</sup>

His judicial support for causes dear to their hearts made him politically appealing to Progressives.<sup>149</sup> In 1906, some Morris County friends launched a campaign to elect Pitney to the United States Senate.<sup>150</sup> Their bandwagon never really got rolling, however, and even his hometown backers finally abandoned it in the legislature. Nevertheless, Essex County’s New Idea senator, Everett Colby, stuck with Pitney all the way by both nominating and voting for him.<sup>151</sup>

In the summer of 1907, President Theodore Roosevelt, then emerging as an outspoken champion of Progressivism,<sup>152</sup> encouraged New Jersey Republicans to nominate Pitney for governor.<sup>153</sup> That idea appealed to a Jersey City “Colbyite,” who was impressed by the fact that the justice had made the railroads pay an additional \$4,000,000 in taxes.<sup>154</sup> Pitney, however, did not get the gubernatorial nomination, despite being regarded as an acceptable candidate by a great majority of those who identified themselves with the New Idea movement.<sup>155</sup> He continued to be mentioned as a prospect for the governorship, though, and when Democrat Woodrow Wilson ran for that office in 1910, he

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<sup>147</sup> Newark Evening News, Nov. 2, 1907, in Pitney Papers, *supra* note 38.

<sup>148</sup> See Clipping from unidentified newspaper, Jan. 10, 1907, in Pitney Papers, *supra* note 38.

<sup>149</sup> Although his judicial rulings clearly served to enhance his political appeal, Pitney insisted in 1912 that he had never allowed politics to influence his decisions. “[H]e had simply considered what he believed to be the justice of the case and acted accordingly.” *Jersey’s Honor*, *supra* note 109, at 143.

<sup>150</sup> See Letter from Frederick Gordon to the Editor of the *Newark Evening News* (Jan. 11, 1907), in Pitney Papers, *supra* note 38. The *Evening News* commented favorably on Pitney as a possible Senatorial candidate. Newark Evening News, Sept. 4, 1906, in Pitney Papers, *supra* note 38.

<sup>151</sup> R. NOBLE, JR., *supra* note 87, at 83 n. 59; see *The Jerseyman*, Jan. 25, 1907, in Pitney Papers, *supra* note 38.

<sup>152</sup> See G. MOWRY, *supra* note 19, at 210-12, 218-20 (discussing Roosevelt’s “Progressive” steps).

<sup>153</sup> See Newark Public Ledger, Aug. 10 (year unidentified), in Pitney Papers, *supra* note 38.

<sup>154</sup> See Letter to the Editor of the *New York Times*, Aug. 9, 1907, in Pitney Papers, *supra* note 38.

<sup>155</sup> See Newark Evening News, July 27, 1907, in Pitney Papers, *supra* note 38.

thought his classmate might well be his opponent.<sup>156</sup>

#### IV. SUPREME COURT JUSTICE

##### A. Appointment

Pitney was headed not for the governor's office in Trenton, but for the Supreme Court in Washington. Although President William Howard Taft considered him for one of three open seats on the Court in 1910,<sup>157</sup> he ultimately gave those positions to other men.<sup>158</sup> Taft returned to Pitney after Associate Justice John Marshall Harlan died in October of 1911, but the chancellor was not his first choice for that appointment.<sup>159</sup> Scholars have never satisfactorily explained why the President finally chose Pitney for the Harlan seat.<sup>160</sup>

Perhaps the most important reason was his broad political appeal. During the early months of 1912, Taft was locked in a fight for control of the Republican party with his predecessor,

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<sup>156</sup> See undated clipping from unidentified 1910 newspaper, in Pitney Papers, *supra* note 38. In 1915, Morris County Republicans sought to promote the idea of a Pitney Presidential candidacy. See Newark Evening News, Nov. 24, 1915, in Pitney Papers, *supra* note 38. The Justice, however, then serving on the United States Supreme Court, released a letter to them saying he could not see his way clear to permit the use of his name as a candidate. See Newark Evening News, Nov. 30, 1915, in Pitney Papers, *supra* note 38.

<sup>157</sup> See Letter from William H. Taft to James E. Howell (Sept. 15, 1910), in Pitney Papers, *supra* note 38. On September 15, 1910, President Taft wrote to Vice Chancellor James E. Howell of the court of chancery in Newark, whom he had contacted earlier about the qualifications of Justice Francis Swayze. See *id.* He had put Swayze on the eligible list and now wanted "to get [Howell's] judgment as to the comparative ability of Justice Swayze and Chancellor Pitney; also a statement as to . . . their ages." *Id.*

<sup>158</sup> Willis Van Devanter was named to the Associate Justiceship vacated by Edward D. White when the latter was elevated to Chief Justice. Joseph R. Lamar replaced William Moody, and Charles Evans Hughes was named to the seat formerly held by David J. Brewer. See generally 9 A. BICKEL & B. SCHMIDT, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-21, at 3-85 (1984) (chapter entitled "Mr. Taft Rehabilitates the Court").

<sup>159</sup> See *infra* notes 163-169 and accompanying text.

<sup>160</sup> Fred Israel attributes the appointment to the impression that Pitney made on Taft when they met at a dinner in Newark the week before the appointment was made. See Israel, *supra* note 4, at 2003. Henry J. Abraham attributes it to political strategy related to the struggle between Taft and Theodore Roosevelt for the 1912 Republican nomination, but he fails to explain the relationship between the two satisfactorily. See H. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 162-63 (1974). After extensive research, the late Professor Alexander Bickel concluded, "The origins and the method of the Pitney selection are not discoverable." A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 326.

Theodore Roosevelt, who was seeking to deny him renomination and to capture the top spot on the GOP ticket for himself.<sup>161</sup> The President and his political strategists believed that New Jersey could become a crucial battleground in this contest.<sup>162</sup> Ultimately, this belief proved decisive in Taft's choice of a replacement for Harlan.

The President first offered the appointment to his Secretary of State, Frank Knox, who declined the honor.<sup>163</sup> For several months after that, the leading contenders appeared to be Secretary of Commerce and Labor Charles Nagel and Judge William C. Hook of the Court of Appeals for the Eighth Circuit. Nagel lost out because he was too old, lacked prior judicial experience,<sup>164</sup> and had made himself unpopular with labor by supporting immigration.<sup>165</sup> Some people objected to Hook because of his concurrence in a decision upholding an Oklahoma statute that allowed railroads to provide sleeping, dining, and chair cars for whites without making comparable facilities available to blacks.<sup>166</sup> Others disliked his issuance of an injunction prohibiting the city of Denver from constructing a new water plant and "requir[ing] it instead to buy [out] a private water company whose franchise had expired."<sup>167</sup> In addition, state railroad commissioners and Progressive governors from western states com-

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<sup>161</sup> See A. LINK, *supra* note 18, at 468-69. Although Roosevelt had hand-picked Taft to succeed him, he became dissatisfied with his choice when Taft drifted in a conservative direction, coming into increasing conflict with the Progressive insurgents in Congress. See W. HARBAUGH, *LIFE AND TIMES OF THEODORE ROOSEVELT* 402 (new rev. ed. 1963).

<sup>162</sup> See H. ABRAHAM, *supra* note 160, at 163.

<sup>163</sup> A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 318-19. Knox had also declined an appointment to the Supreme Court offered to him by Roosevelt, and Taft did not really expect the Secretary to accept at this time. See *id.*

<sup>164</sup> *Id.* at 326.

<sup>165</sup> H. ABRAHAM, *supra* note 160, at 163. Nagel's first wife was Louis Brandeis's sister. A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 326 n.26.

<sup>166</sup> A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 322-24. The case was *McCabe v. Atchison, T. & S.F. Ry.*, 186 F. 966 (8th Cir. 1911), *aff'd*, 235 U.S. 151 (1914). Hook's association with that decision made it likely that his nomination would add to the race-related political problems the administration was already experiencing in Oklahoma. See A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 323-24. The administration had previously refused to challenge the disfranchisement of black voters by a grandfather clause in Oklahoma, and it later acquiesced in an unauthorized prosecution attacking that device brought by an insubordinate Republican United States Attorney. *Id.* at 323.

<sup>167</sup> A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 321. The case was *City of Denver v. New York Trust Co.*, 187 F. 890 (8th Cir. 1911), *rev'd*, 229 U.S. 123 (1913).

plained that Hook's approach to rate making was prorailroad.<sup>168</sup> That was not the sort of nominee Taft needed at a time when he was laboring to keep Progressives from deserting to the Roosevelt camp.<sup>169</sup>

Pitney was. Franklin Murphy, a former governor of New Jersey and then the state's Republican National Committeeman, pushed him for the job. Murphy was a strong Taft supporter,<sup>170</sup> and because he hoped to be selected as his running mate, he was anxious to ingratiate himself with the President. Taft was scheduled to give a speech in New York City in February of 1912. With the objective of promoting his political fortunes in New Jersey, Murphy arranged for Taft to stop over in Newark on the way there to attend a luncheon at the ex-governor's home and a Republican reception at the Essex County Country Club.<sup>171</sup> At Murphy's house, the President sat next to Chancellor Pitney.<sup>172</sup> They had a pleasant conversation,<sup>173</sup> and a week later, on February 19th, Taft offered the chancellor a seat on the Supreme Court.<sup>174</sup>

Pitney was in many ways just what the President had been looking for. He was an experienced judge, but at fifty-four, he still had many years of judicial work before him.<sup>175</sup> In addition, he was from the Third Circuit, which had been unrepresented on the Supreme Court for a number of years.<sup>176</sup> A desire to correct that situation was one of the reasons Taft had approached Knox,

<sup>168</sup> A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 320-21. The decision to which the governors and railroad commissioners particularly objected was *Missouri, Kan. & Tex. Ry. v. Love*, 177 F. 493 (W.D. Okla. 1910), *aff'd*, 185 F. 321 (8th Cir. 1911).

<sup>169</sup> See generally W. HARBAUGH, *supra* note 161, at 401-06.

<sup>170</sup> See N.J. Journal, Feb. 21, 1912, in Pitney Papers, *supra* note 38 (stating Murphy was a Taft delegate at the Republican National Convention).

<sup>171</sup> See N.J. Journal, Jan. 22, 1912, in Pitney Papers, *supra* note 38; N.J. Journal, Feb. 12, 1912, in Pitney papers, *supra* note 38.

<sup>172</sup> A. Breed, *supra* note 41, at 22.

<sup>173</sup> *Id.* at 23. Pitney and Taft had met earlier, once having played golf together at Chevy Chase, Maryland. *Id.* at 22. The game of golf would continue to provide something of a bond between them after Pitney's appointment. See Letter from Mahlon Pitney to the President (June 18, 1912), in Pitney Papers, *supra* note 38 ("I wrote last week from Washington to Messrs Von Lengerke & Detmold, Fifth Ave. Bldg., New York City, from whom I buy my golfing supplies, asking them to send you a dozen small size Zome Zodiaks.").

<sup>174</sup> See Letter from William H. Taft to Mahlon Pitney (Feb. 19, 1912), in Pitney Papers, *supra* note 38. While the two of them were driving from Newark to New York on February 12th, Taft told Murphy that he would likely appoint Pitney. A Breed, *supra* note 41, at 23.

<sup>175</sup> See H. ABRAHAM, *supra* note 160, at 163; J. SEMONCHE, CHARTING THE FUTURE 267 (1978).

<sup>176</sup> See H. ABRAHAM, *supra* note 160, at 163.

and only reluctantly had he turned his attention to candidates from further west.<sup>177</sup> After dining with Pitney, the President, a former judge himself,<sup>178</sup> spent several hours reading a number of his opinions.<sup>179</sup> These apparently confirmed a favorable assessment of Pitney's abilities that Taft had received from New Jersey Vice Chancellor James E. Howell in 1910.<sup>180</sup> Finally, Pitney was from New Jersey. Taft had become convinced that he had to name someone from that state.<sup>181</sup>

Although the chancellor satisfied many of the President's other criteria, political considerations eventually earned him a seat on the Supreme court. Taft considered at least three other New Jersey judges,<sup>182</sup> among them Pitney's friend Justice Swayze.<sup>183</sup> Swayze, who was Governor Murphy's initial choice for the job, had the support of United States Senator Frank O. Briggs<sup>184</sup> and even the chancellor himself.<sup>185</sup> Howell had advised the President, however, that Pitney was preferable because of his more extensive involvement in politics.<sup>186</sup> Eventually, Pitney became Murphy's choice.<sup>187</sup> The ex-governor was a conservative who considered the Progressive movement dangerous, but he recognized the value of appeasing those Republicans who were attracted to it because they needed their vote.<sup>188</sup> Thus, he invited two or three Progressives, among them Senator Colby, to

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<sup>177</sup> See A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 318-19.

<sup>178</sup> Taft had been a judge on the Ohio Superior Court from 1887 to 1890 and a judge on the United States Court of Appeals for the Sixth Circuit from 1892 to 1900. A. MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 12 (1964).

<sup>179</sup> A. Breed, *supra* note 41, at 23.

<sup>180</sup> See Letter from James E. Howell to William H. Taft (Sept. 15, 1910), in Pitney Papers, *supra* note 38.

<sup>181</sup> See *Jersey's Honor*, *supra* note 109, at 143-44.

<sup>182</sup> See *id.* at 140.

<sup>183</sup> J. SEMONCHE, *supra* note 175, at 266. Semonche claims that Swayze was the leading contender from New Jersey. *Id.* Certainly, that is what Pitney thought. See A. Breed, *supra* note 41, at 22.

<sup>184</sup> See A. Breed, *supra* note 41, at 26-27.

<sup>185</sup> *Id.* at 22. Briggs was also a Taft supporter. See *id.* at 26-27. According to Robert McCarter, Murphy at first urged Taft to appoint Swayze. Taft responded by offering to appoint Swayze to the United States Court of Appeals for the Third Circuit. R. MCCARTER, *supra* note 52, at 85.

<sup>186</sup> Letter from James E. Howell to William H. Taft, *supra* note 180. After Pitney's selection was announced, the *New York Times* reported, "The appointment of the Chancellor, who has long been a prominent figure in New Jersey politics, will tend, it is thought, to throw the influence of New Jersey leaders to the President." *N.Y. Times*, Feb. 19, 1912, in Pitney Papers, *supra* note 38.

<sup>187</sup> See *N.Y. Times*, Feb. 25, 1912, in Pitney Papers, *supra* note 38; see also A. Breed, *supra* note 41, at 22 (Murphy and Pitney were close friends).

<sup>188</sup> R. NOBLE, JR., *supra* note 87, at 23.



his luncheon, an event arranged to generate enthusiasm for the Taft movement.<sup>189</sup> The appointment of Pitney was almost certainly another move of the same kind, intended to curry favor with the New Idea men and thus help Taft retain control of the New Jersey Republican party.<sup>190</sup>

Reaction to the nomination from within the state was extremely positive,<sup>191</sup> and Governor Wilson commended Taft's choice.<sup>192</sup> To the rest of the Country, however, Pitney "was 'an unknown quantity.'" <sup>193</sup> The *New York Times* nevertheless predicted that the Senate would quickly and easily confirm him.<sup>194</sup>

The *Times* was wrong. First, the president of the Iowa Federation of Labor protested the Pitney appointment to Senators from his state.<sup>195</sup> He failed to substantiate his objections, however, because his argument was based on *Frank & Dugan v. Herold*.<sup>196</sup> As the nominee swiftly pointed out, the Pitney who had granted a sweeping injunction against picketing and other union activity in that case was his father.<sup>197</sup> Mahlon Pitney claimed not to be an enemy of labor,<sup>198</sup> and the president of the New Jersey Federation of Labor, who was also a Hudson County assemblyman, supported him, claiming to be unable to recall any decision by the chancellor that had borne heavily against union inter-

<sup>189</sup> See A. Breed, *supra* note 41, at 22.

<sup>190</sup> Bickel asserts that Taft "decided to nominate Pitney in the teeth of the Progressives." A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 328. Bickel is guilty of reading history backward, however, assuming that Taft knew at the time he made the appointment the sort of controversy that it would ignite. See *infra* notes 195-206 and accompanying text. He also views the opposition to Pitney's confirmation as more Progressive than it was. See *infra* note 206 and accompanying text. Pitney was a close friend of the conservative Franklin Murphy. A. Breed, *supra* note 41, at 22. Murphy probably regarded him as a true conservative, like himself and the President, but someone appealing enough to Progressives to attract support for Taft from the New Idea wing of the party. That is probably what he told the President during the latter's Newark visit, and it is likely what Taft had in mind when he made the appointment. See *supra* notes 170-174 and accompanying text.

In Washington, political observers commented that the Pitney appointment would have a sharp bearing on the political contest for control of New Jersey, which would be developing within the next few weeks, and that it would help Taft hold the state against the Roosevelt supporters who were "set[ting] things in line" to give New Jersey's delegates to their man. See *N.Y. Times*, Feb. 19, 1912, in Pitney Papers, *supra* note 38.

<sup>191</sup> See A. Breed, *supra* note 41, at 30-31.

<sup>192</sup> *Id.* at 32.

<sup>193</sup> A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 329.

<sup>194</sup> *N.Y. Times*, Feb. 19, 1912, in Pitney Papers, *supra* note 38.

<sup>195</sup> A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 329.

<sup>196</sup> 63 N.J. Eq. 443, 52 A. 152 (Ch. 1901).

<sup>197</sup> A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 330.

<sup>198</sup> *Id.* at 330 n.41.

ests.<sup>199</sup> He apparently had forgotten *Jonas Glass*. When the Senate took up the nomination on March 8th, Charles A. Culberson, a Texas Democrat, raised objections to the *Jonas Glass* decision.<sup>200</sup> It aroused enough controversy that the Senate had the opinion printed.<sup>201</sup> For three days, Senators read and debate raged.<sup>202</sup> At one point during the executive sessions on the nomination, Pitney's supporters reportedly lacked sufficient votes for confirmation.<sup>203</sup> Governor Wilson, Senator James E. Martine, and other leading New Jersey Democrats sprang to the defense of their state's native son,<sup>204</sup> and on March 13th, the Senate approved Taft's choice by a vote of fifty to twenty-six.<sup>205</sup> The division was basically along partisan lines, although four Insurgent Republicans did join twenty-two Democrats in voting "no."<sup>206</sup>

### B. Supreme Court Decisions

Five days later, Pitney took the oath of office,<sup>207</sup> beginning a tenure on the Supreme Court that would last for just under eleven years.<sup>208</sup> A durable Justice, he was seldom absent from the Bench, participating in all but nineteen of the 2412 decisions that the Court rendered during his tenure.<sup>209</sup> Pitney authored a total of 268 opinions, speaking for the majority on 244 occasions, dissenting 19 times, and writing 5 concurrences.<sup>210</sup>

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<sup>199</sup> A. Breed, *supra* note 41, at 31-32.

<sup>200</sup> A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 331; N.Y. Times, Mar. 9, 1912, in Pitney Papers, *supra* note 38; *see also supra* notes 131-137 and accompanying text (discussing Pitney's opinion in *Jonas Glass*).

<sup>201</sup> 48 CONG. REC. 3011 (1912).

<sup>202</sup> A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 331.

<sup>203</sup> *See* Newark News, Mar. 13, 1912, in Pitney Papers, *supra* note 38.

<sup>204</sup> *See id.*; A. Breed, *supra* note 41, at 33.

<sup>205</sup> Newark News, Mar. 13, 1912, in Pitney Papers, *supra* note 38.

<sup>206</sup> A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 332. Although four Insurgent (Progressive) Republicans voted against Pitney, one of his leading supporters in the Senate confirmation debates was William E. Borah of Idaho, also an Insurgent. Professor Bickel somewhat grudgingly acknowledges that "[the] Insurgents did not unite against him." *Id.* Earlier, Bickel implies that they should have done so because Pitney was supported by the president of the National Association of Manufacturers. *See id.* at 329. What he fails to point out is that this endorsement came only after "labor agitation" had nearly defeated Pitney in the Senate. *See generally* A. Breed, *supra* note 41, at 33-36 (discussing Senate debates on Pitney's labor positions).

<sup>207</sup> *See* A. Breed, *supra* note 41, at 36.

<sup>208</sup> *See* Israel, *supra* note 4, at 2004. Pitney served for 10 years, 9 months, and 12 days. *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

## 1. Taxation

For lawyers practicing today, Pitney's most important opinion is *Eisner v. Macomber*.<sup>211</sup> In that case, he defined income for purposes of the sixteenth amendment, drawing the line between those additions to wealth that were subject to the Federal income tax and those that were not.<sup>212</sup> The specific question in *Eisner* was whether stock dividends constituted taxable income.<sup>213</sup> Congress had passed a law in 1916 treating them as if they did,<sup>214</sup> but the financial community expected the Court to hold that measure unconstitutional. Early in his opinion, Pitney explained the intent of the disputed act.<sup>215</sup> Apparently, he mumbled as he did so.<sup>216</sup> An agent for Dow Jones misunderstood him as saying not that Congress had sought to tax stock dividends as income, but that the Court was holding it had the power to do this.<sup>217</sup> The Dow Jones man rushed out to wire the news to Wall Street.<sup>218</sup> The result was a brief plunge in stock prices.<sup>219</sup> When the false report was corrected, however, the market recovered what it had lost and more.<sup>220</sup>

The stock market's favorable reaction to Pitney's actual opinion probably did not surprise Justice Louis Brandeis. In a strong dissent, he charged, "If stock dividends representing profits are held exempt from taxation under the Sixteenth Amendment, the owners of the most successful businesses in America will . . . be able to escape taxation on a large part of what is actually their income."<sup>221</sup> Brandeis's Populist rhetoric was nearly as unjustified a reaction to Pitney's opinion as the collapse of stock prices. Informed observers recognized that *Eisner* had not created much of an opportunity for the distribution of tax-free profits, and virtually all of the voluminous scholarly literature that the case gen-

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<sup>211</sup> 252 U.S. 189 (1920).

<sup>212</sup> Pitney wrote that income was "not a gain accruing to capital, not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested or employed, and coming in, being 'derived', that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal." *Id.* at 207.

<sup>213</sup> *Id.* at 199.

<sup>214</sup> See Revenue Act of 1916, ch. 463, § 2(a), 39 Stat. 756, 757 (current version at 26 U.S.C. § 61 (Supp. II 1984)).

<sup>215</sup> See *Eisner*, 252 U.S. at 201-05.

<sup>216</sup> See A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 508.

<sup>217</sup> See *id.*

<sup>218</sup> *Id.*

<sup>219</sup> See *id.*

<sup>220</sup> *Id.* at 509.

<sup>221</sup> *Eisner*, 252 U.S. at 237 (Brandeis, J., dissenting).

erated supported Pitney's position.<sup>222</sup>

That is hardly surprising, for the Justice from New Jersey had become something of a tax specialist. *Eisner* was only one of six majority opinions that he wrote explicating the concept of income as it related to the sixteenth amendment.<sup>223</sup> Pitney also spoke for the Court in cases involving Federal taxation of corporations,<sup>224</sup> inheritances,<sup>225</sup> and imports.<sup>226</sup> In addition, he wrote a total of twenty majority opinions<sup>227</sup> and one dissent<sup>228</sup> dealing with various constitutional issues raised by state tax measures.

## 2. Labor Unions

Although Pitney devoted more attention to taxation than to any other subject, as one of his biographers has pointed out, "It is in the area of labor decisions . . . that the Justice made his most

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<sup>222</sup> A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 509. On the other hand, the Supreme Court was "unquestionably ready in the next generation to overrule *Eisner v. Macomber*, [but] could not find the occasion to do so." *Id.*

It is not surprising that Pitney defined income restrictively and thus limited what the National Government could tax under the sixteenth amendment. New Jersey had refused to ratify that amendment. See A. LINK, *supra* note 18, at 267-68. Governor Wilson had supported it, and the assembly had passed it without a dissenting vote in 1911. *Id.* The Senate, which was controlled by Pitney's Republican party, had refused to go along, however. *Id.*

<sup>223</sup> See, e.g., *Miles v. Safe Deposit & Trust Co.*, 259 U.S. 247 (1922); *Rockefeller v. United States*, 257 U.S. 176 (1921); *United States v. Phellis*, 257 U.S. 156 (1921); *Peabody v. Eisner*, 247 U.S. 347 (1918); *Lynch v. Hornby*, 247 U.S. 339 (1918); *Southern Pac. Co. v. Lowe*, 247 U.S. 330 (1918).

<sup>224</sup> See, e.g., *LaBelle Iron Works v. United States*, 256 U.S. 377 (1921); *United States v. Cleveland, C.C. & St. L. Ry.*, 247 U.S. 195 (1918); *Hays v. Gauley Mountain Coal Co.*, 247 U.S. 189 (1918); *Anderson v. Forty-Two Broadway Co.*, 239 U.S. 69 (1915); *Stratton's Independence, Ltd. v. Howbert*, 231 U.S. 399 (1913); *McCoach v. Minehill & S.H.R.R.*, 228 U.S. 295 (1913).

<sup>225</sup> See, e.g., *United States v. Field*, 255 U.S. 257 (1921).

<sup>226</sup> See, e.g., *St. Louis, J.M. & S. Ry. v. J.F. Hasty & Sons*, 255 U.S. 252 (1921).

<sup>227</sup> See, e.g., *Texas Co. v. Brown*, 258 U.S. 466 (1922); *Citizens Nat'l Bank v. Durr*, 257 U.S. 99 (1921); *Bowman v. Continental Oil Co.*, 256 U.S. 642 (1921); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920); *Shaffer v. Carter*, 252 U.S. 37 (1920); *Wagner v. City of Covington*, 251 U.S. 95 (1919); *American Mfg. Co. v. St. Louis*, 250 U.S. 459 (1919); *Mackay Tel. & Cable Co. v. City of Little Rock*, 250 U.S. 94 (1919); *Leary v. Mayor of Jersey City*, 248 U.S. 328 (1918); *Postal Tel. Cable Co. v. City of Newport*, 247 U.S. 464 (1918); *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321 (1918); *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917); *Illinois Cent. R.R. v. Greene*, 244 U.S. 555 (1917); *Louisville & N.R.R. v. Greene*, 244 U.S. 22 (1917); *Greene v. Louisville & Interurban R.R.*, 244 U.S. 499 (1917); *St. Louis S.W. Ry. v. Arkansas*, 235 U.S. 350 (1914); *Singer Sewing Mach. Co. v. Brickell*, 233 U.S. 304 (1914); *Ohio Tax Cases*, 232 U.S. 576 (1914); *United States Fidelity Co. v. Kentucky*, 231 U.S. 394 (1913).

<sup>228</sup> See *Union Tank Line v. Wright*, 249 U.S. 275, 287 (1919) (Pitney, J., dissenting).

significant contribution.”<sup>229</sup> These were also the opinions that earned him his reactionary reputation.<sup>230</sup> As a member of the Supreme Court, Pitney continued to exhibit the hostility toward unions that he had displayed on the New Jersey bench.<sup>231</sup> In a 1915 case known as *Coppage v. Kansas*,<sup>232</sup> he held unconstitutional a state statute that made it unlawful for employers to require their workers, as a condition of employment, to agree not to join a labor organization.<sup>233</sup> Pitney insisted that he was not questioning “the legitimacy of such organizations,” but added, “Conceding the full right of the individual to join [a] union, he has no inherent right to do this and still remain in the employ of one who is unwilling to employ a union man.”<sup>234</sup> Pitney viewed the Kansas statute as one designed for “leveling inequalities of fortune” through “an interference with the normal exercise of personal liberty and property rights . . . and not an incident to the advancement of the general welfare.”<sup>235</sup> Not even a national emergency, he argued in a later case, could justify legislative interference with management’s freedom to negotiate with its workers for the employment terms it wanted.<sup>236</sup>

Pitney’s antistatist attitudes did not cut both ways. Although hostile to governmental interference with employers’ freedom of action, he generally gave enthusiastic support to governmental interference with the liberty of unions. Pitney remained a champion of the labor injunction. In *Paine Lumber Co. v. Neal*,<sup>237</sup> he argued unsuccessfully that open-shop sash and door manufactur-

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<sup>229</sup> Israel, *supra* note 4, at 2004.

<sup>230</sup> See J. SEMONCHE, *supra* note 175, at 298.

<sup>231</sup> See Levitan, *Mahlon Pitney—Labor Judge*, 40 VA. L. REV. 733, 748 (1954).

<sup>232</sup> 236 U.S. 1 (1915).

<sup>233</sup> *Id.* at 26. Such agreements were commonly referred to as “yellow-dog contracts.” In striking down this statute, Pitney relied on an earlier case in which the Court had invalidated a Federal statute outlawing yellow-dog contracts for railroad workers. See *id.* at 9-18 (citing *Adair v. United States*, 208 U.S. 161 (1908)). For a criticism of both *Coppage* and *Adair*, see Powell, *Collective Bargaining Before the Supreme Court*, 33 POL. SCI. Q. 396 (1918).

<sup>234</sup> *Coppage*, 236 U.S. at 19.

<sup>235</sup> *Id.* at 18.

<sup>236</sup> See *Wilson v. New*, 243 U.S. 332, 377 (1917) (Pitney, J., dissenting). In order to prevent a nationwide strike by several railway unions during a period of increasing military preparedness prior to American entry into World War I, Congress had reduced the workday for the railroad industry to eight hours, but had provided that railroad workers should continue to receive the same pay they had gotten for working longer hours. See generally Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67, 79-81 (1983) (discussing the *Wilson* case and the national emergency powers doctrine).

<sup>237</sup> 244 U.S. 459, 472 (1917) (Pitney, J., dissenting).

ers were entitled under the Sherman Antitrust Act<sup>238</sup> to have a Federal court enjoin a boycott of their products by the Brotherhood of Carpenters and Joiners and certain unionized firms. Later, as a spokesman for the majority in *Hitchman Coal & Coke Co. v. Mitchell*,<sup>239</sup> Pitney held that a coal-mining company that had required its employees to agree to work on a nonunion basis might have a Federal district court restrain the United Mine Workers from trying to organize its labor force.<sup>240</sup> In a revealing passage, he declared: "Defendants' acts cannot be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were their conduct exceeds the bounds of fair trade."<sup>241</sup> Pitney believed that a union had no right to reduce an employer's freedom of choice through economic coercion, although he regarded it as perfectly acceptable for management to limit the independence of workers by making them agree not to join a union in order to obtain a desperately needed job.<sup>242</sup> *Hitchman Coal and Eagle Glass & Manufacturing Co. v. Rowe*,<sup>243</sup> which was decided the same day on *Hitchman Coal's* authority, exhibit what one commentator has characterized as a "zeal bordering on vindictiveness in an effort to strike at labor."<sup>244</sup>

Despite his deep and long-standing hostility toward unions, Pitney wound up supporting their position in his last labor law decision. The New Jersey Justice gave no preliminary indication that he would soon support a judicial inroad on the formidable restrictions on organized labor and union activity that he had helped to erect. Speaking for the Court in a January 1921 case called *Duplex Printing Press Co. v. Deering*,<sup>245</sup> he upheld the action of a Federal district court, which had enjoined a secondary boycott organized by the International Association of Machinists in an effort to force a manufacturer to unionize.<sup>246</sup> Pitney ruled this way despite the fact that the district court had based its injunction on the antitrust laws.<sup>247</sup> He refused to acknowledge that by

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<sup>238</sup> Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)).

<sup>239</sup> 245 U.S. 229 (1917).

<sup>240</sup> *Id.* at 261-62.

<sup>241</sup> *Id.* at 259.

<sup>242</sup> See Powell, *supra* note 233, at 421-22.

<sup>243</sup> 245 U.S. 275 (1917).

<sup>244</sup> Levitan, *supra* note 231, at 744.

<sup>245</sup> 254 U.S. 443 (1921).

<sup>246</sup> *Id.* at 478-79.

<sup>247</sup> See *id.* at 461.

enacting section 20 of the Clayton Act<sup>248</sup> in 1914, Congress had made conduct of the type in which the machinists had engaged lawful and nonenjoinable under those statutes. Justice Brandeis responded with a powerful dissent in which he argued that rights were subordinate to the interests of the community and that how far "industrial combatants" might push their struggle was something for the community's representatives in the legislature to decide and "not for judges to determine."<sup>249</sup> Certainly that had never been Pitney's view, but he was not a man who clung to his own conclusions out of vanity, and he could be persuaded by study to change his mind.<sup>250</sup>

Twelve months later, in *Truax v. Corrigan*,<sup>251</sup> the New Jersey Justice adopted Brandeis's position. Taft, who was then Chief Justice, assigned Pitney to write an opinion invalidating an Arizona statute that forbade the issuance of injunctions in labor disputes. Pitney soon received a memorandum from Brandeis opposing the decision, which he "read with interest."<sup>252</sup> The New Jersey Justice then changed his vote, joining his critic in dissent.<sup>253</sup> Pitney's opinion suggested his sympathies still lay with businessmen seeking assistance from the courts rather than with unions,<sup>254</sup> and he declined to endorse "the wisdom, or policy, or propriety" of the Arizona law.<sup>255</sup> It now seemed clear to him that the labor injunction could be abolished "in the normal exercise of the legislative power of the State."<sup>256</sup>

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<sup>248</sup> Ch. 323, § 20, 38 Stat. 730, 738 (1914) (current version at 29 U.S.C. § 52 (1982)).

<sup>249</sup> *Duplex Printing*, 254 U.S. at 488 (Brandeis, J., dissenting).

<sup>250</sup> See A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 585.

<sup>251</sup> 257 U.S. 312 (1921).

<sup>252</sup> Letter from Mahlon Pitney to Mr. Justice Brandeis (Nov. 3, 1920), in Louis D. Brandeis Papers, folder 14, manuscript box 114 (available at Harvard Law School Library) [hereinafter cited as Brandeis Papers]. In a note on the back of a memorandum on *Truax v. Corrigan*, which he wrote sometime during the 1920 Term, Pitney stated: "At the last Term the conference voted to reverse, and opinion was allotted to me. Being unable, on further examination, to write in accordance with the vote, I circulated this Memorandum as a report." Memorandum by Justice Pitney in No. 72, Oct. Term 1920, in Brandeis Papers, *supra*, folder 9, manuscript box 7.

<sup>253</sup> Conversations between L.D.B. and F.F., in Brandeis Papers, *supra* note 252, folder 14, manuscript box 114; see *Truax*, 257 U.S. at 344 (Pitney, J., dissenting).

<sup>254</sup> See *Truax*, 257 U.S. at 346-47 (Pitney, J., dissenting).

<sup>255</sup> *Id.* at 349 (Pitney, J., dissenting).

<sup>256</sup> *Id.* at 348 (Pitney, J., dissenting). Somewhat earlier, Theodore Roosevelt had evolved from a defender to an opponent of the labor injunction. See J. LURIE, *LAW AND THE NATION, 1865-1912*, at 59 (1983). During the period from 1894 to 1896, he denounced those who opposed this device, but by 1901 through 1902, he endorsed the right of labor as well as the right of capital to combine. See *id.* at 59-

### 3. Industrial Accidents

Pitney's dissent in *Truax* "demonstrates that it would be an error to dismiss him simply as an antilabor judge."<sup>257</sup> Although too oriented toward the individualistic world of the nineteenth century to appreciate that unions might be necessary counterweights to rapidly expanding aggregates of capital (whose legitimacy he also could not accept), the Justice from New Jersey did have some understanding of America's emergent industrial society. Like a number of his colleagues on the Supreme Court, he was willing, where union activity was not involved, to give a wide berth to state labor regulations.<sup>258</sup> Thus, for example, Pitney wrote opinions upholding the constitutionality of Missouri<sup>259</sup> and Oklahoma<sup>260</sup> statutes that required employers to give workers who either quit or were fired letters setting forth the nature and duration of their service and the reasons for its termination.

Like his *Truax* dissent, both of these decisions came near the end of his service on the Supreme Court. Much earlier, however, in cases arising under the Federal Employers' Liability Act (FELA) and state workers' compensation statutes, Pitney had displayed the sympathy for unorganized workers already apparent during his years as a New Jersey judge. Compensating laborers injured in the course of their employment, which was the purpose of these laws, was a long-standing Progressive objective, which he supported every bit as vigorously as did such outspoken champions of reform as Theodore Roosevelt.<sup>261</sup>

Four years before Pitney's appointment to the Supreme Court, Congress had enacted the FELA,<sup>262</sup> a statute that abolished the fellow-servant rule in cases where interstate railroad

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61. By 1907, Roosevelt admitted that there were good reasons for some of the attacks that had been leveled at the labor injunction, and in 1908, he sent a special message to Congress denouncing the way some judges used their power to issue injunctions. *Id.* at 62-63.

<sup>257</sup> Levitan, *supra* note 231, at 748.

<sup>258</sup> *See id.* at 752.

<sup>259</sup> *See Prudential Ins. Co. v. Cheek*, 259 U.S. 530 (1922).

<sup>260</sup> *See Chicago, R.I. & Pac. Ry. v. Perry*, 259 U.S. 548 (1922).

<sup>261</sup> On the attitudes of Roosevelt, Congress, and the Progressive movement concerning compensation for the victims of industrial accidents, see A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 205-13. *See generally* Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

<sup>262</sup> Ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51-60 (1982)).



workers sued their employers for on-the-job injuries.<sup>263</sup> The FELA also greatly modified for purposes of such litigation two other common employers' defenses—contributory negligence<sup>264</sup> and assumption of the risk.<sup>265</sup> During his tenure on the Court, Pitney decided a total of sixteen cases arising under the FELA. Twelve times he ruled in favor of the injured worker or his estate.<sup>266</sup> In two of the cases that the railroad won, the issue before the Court was not whether the railroad was liable, but only whether the damages that the plaintiff had recovered were excessive.<sup>267</sup> In a third case, Pitney disposed of all of the substantive issues in a manner favorable to the worker, but reversed a jury verdict in his favor because some local practice rules in the jurisdiction where the case arose had not been followed.<sup>268</sup> Similarly, in litigation arising under the common law of torts<sup>269</sup> and the Safety Appliance Act,<sup>270</sup> he ruled for railroad employees injured on the job.

It was in cases involving workers' compensation statutes, however, that Pitney aligned himself most dramatically with Progressivism. At the time of his appointment to the Supreme Court, states had begun to enact laws that made employers liable without fault for injuries that their workers suffered on the job; usually these statutes also limited the amount that the victim could recover.<sup>271</sup> New Jersey was a part of this national trend. In 1911, Woodrow Wilson secured enactment of a workers' compensation statute for the state.<sup>272</sup> By then, it had become appar-

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<sup>263</sup> *Id.* § 1, 35 Stat. at 65 (current version at 45 U.S.C. § 51 (1982)).

<sup>264</sup> *Id.* § 3, 35 Stat. at 66 (current version at 45 U.S.C. § 53 (1982)).

<sup>265</sup> *Id.* § 4, 35 Stat. at 66 (current version at 45 U.S.C. § 54 (1982)).

<sup>266</sup> *See, e.g.*, Philadelphia, B. & W.R.R. v. Smith, 250 U.S. 101 (1919); Southern Ry. v. Puckett, 244 U.S. 571 (1917); Erie R.R. v. Welsh, 242 U.S. 303 (1916); Spokane & I.E.R.R. v. Campbell, 241 U.S. 497 (1916); San Antonio & A.P. Ry. v. Wagner, 241 U.S. 476 (1916); Chicago & N.W. Ry. v. Bower, 241 U.S. 470 (1916); Chesapeake & O. Ry. v. Proffitt, 241 U.S. 462 (1916); Great Northern Ry. v. Knapp, 240 U.S. 464 (1916); Seaboard Air Line Ry. v. Horton, 239 U.S. 595 (1916); Kanawha & Mich. Ry. v. Kerse, 239 U.S. 576 (1916); North Carolina R.R. v. Zachary, 232 U.S. 248 (1914); Missouri, Kan. & Tex. Ry. v. Wulf, 226 U.S. 570 (1913).

<sup>267</sup> *See* Chesapeake & O. Ry. v. Gainey, 241 U.S. 494 (1916); Chesapeake & O. Ry. v. Kelly, 241 U.S. 485 (1916).

<sup>268</sup> *See* Chesapeake & O. Ry. v. De Atley, 241 U.S. 310 (1916).

<sup>269</sup> *See* Gila Valley, G. & N. Ry. v. Hall, 232 U.S. 94 (1914).

<sup>270</sup> *See* Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916); Southern Ry. v. Crockett, 234 U.S. 725 (1914).

<sup>271</sup> *See* A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 581; Friedman & Ladinsky, *supra* note 261, at 69-72.

<sup>272</sup> A. LINK, *supra* note 18, at 263 (footnote omitted). In 1910, an alliance of New Idea Republicans and Democrats had tried to secure the enactment of legislation

ent that traditional tort litigation served the interests of employers no better than it served those of employees; even the National Association of Manufacturers had concluded that compensation systems were inevitable and probably desirable.<sup>273</sup>

Nevertheless, in the 1911 case of *Ives v. South Buffalo Railway*,<sup>274</sup> the New York Court of Appeals unanimously struck down the first state law creating one, holding that it violated both the New York Constitution and the fourteenth amendment.<sup>275</sup> Constitutional law experts, led by Dean Roscoe Pound of Harvard, denounced the *Ives* decision in the press,<sup>276</sup> and Theodore Roosevelt expressed a desire to see every judge who had participated in the case removed from the bench.<sup>277</sup> In a February 1912 speech, Roosevelt, who was then mounting his challenge to Taft, urged giving the people the right to recall judicial decisions holding statutes unconstitutional.<sup>278</sup> Although denounced by the American Bar Association, Roosevelt's proposal and his concomitant attack on judicial power in general elicited a surprising

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abolishing the fellow-servant doctrine and other antiworker tort defenses, but Old Guard Republican strength in the senate had forced them to settle for a measure that only partially fulfilled their objectives. See generally Tynan, *Workmen's Compensation for Injuries*, 34 N.J.L.J. 164 (1911) (discussing New Jersey's workmen's compensation statute).

<sup>273</sup> See Friedman & Ladinsky, *supra* note 261, at 65-69. Although the assumption of the risk, contributory negligence, and fellow-servant doctrines all favored the employer, judges had riddled these rules with so many exceptions that often an injured worker could win despite them. See *id.* at 65. In addition, they were a source of labor unrest and thus interfered with management efforts to "rationalize and bureaucratize" enterprises. *Id.* Legal fees were a burden on employers as well as employees because they tended to eat up much of whatever judgments workers did manage to recover. *Id.* at 66.

In 1910, President Taft, set up a commission "to investigate employers' liability and workmen's compensation." A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 210. Although headed by conservative Republican Senator George Sutherland of Utah, it submitted a report in 1912 recommending that the FELA be replaced with a compulsory workmen's compensation statute. *Id.* Ironically, organized labor opposed workers' compensation legislation. J. WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918*, at 43 (1968). This was mainly because of the limitations on recovery that such laws usually contained. See *id.* Union leaders tended to see legislative abolition of the tort defenses traditionally relied upon by employers as a preferable alternative. See *id.*

<sup>274</sup> 201 N.Y. 271, 94 N.E. 431 (1911).

<sup>275</sup> See *id.* at 317, 94 N.E. at 448.

<sup>276</sup> Friedman & Ladinsky, *supra* note 261, at 68.

<sup>277</sup> J. LURIE, *supra* note 256, at 71; see also Friedman & Ladinsky, *supra* note 261, at 68 n.69 (President Theodore Roosevelt expressed revulsion at notion of employees bearing financial burdens occasioned by their work-related accidents).

<sup>278</sup> Stagner, *The Recall of Judicial Decisions and the Due Process Debate*, 24 AM. J. OF LEGAL HIST. 257, 257-58 (1980).

amount of support, even within the legal community.<sup>279</sup>

If the judiciary were to avoid a successful assault on its authority, it had to adjust constitutional law to accommodate legislation ensuring compensation for the victims of industrial accidents. Mahlon Pitney did that. In the wake of the *Ives* decision, New York amended its constitution and then enacted a new workers' compensation law limited to employees in supposedly hazardous industries.<sup>280</sup> In 1916, that statute came before the Supreme Court in *New York Central Railroad v. White*.<sup>281</sup> The employer argued that this law struck "at the fundamentals of constitutional freedom of contract."<sup>282</sup> Speaking for the Court, Pitney disagreed, holding that it was "a reasonable exercise of the police power of the State."<sup>283</sup> Pitney reasoned that the pecuniary loss caused by an employee's death or injury had to fall somewhere and that these damages were, after all, the result of an operation out of which the employer expected to derive a profit.<sup>284</sup> Pitney concluded that it was not "arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee."<sup>285</sup>

In a companion case, in which the Court upheld an Iowa statute, Pitney declared "that the employer has no vested right to have these so-called common-law defenses perpetuated for his benefit, and that the Fourteenth Amendment does not prevent a State from establishing a system of workmen's compensation without the consent of the employer, incidentally abolishing [these] defenses."<sup>286</sup> The New Jersey Justice also spoke for the Court in *Mountain Timber Co. v. Washington*.<sup>287</sup> The statute at issue in that case, unlike the New York law upheld in *White*, required employers in hazardous industries to contribute to a state fund for the compensation of injured workmen, whether or not any injuries had ever befallen their own employees.<sup>288</sup> Thus, a careful firm had to help pay for the harm caused by its negligent competitors. Nevertheless, stated Pitney, because "accidental

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<sup>279</sup> See *id.* at 259-64.

<sup>280</sup> See *New York Cent. R.R. v. White*, 243 U.S. 188, 192-97 (1917).

<sup>281</sup> 243 U.S. 188 (1917).

<sup>282</sup> *Id.* at 206.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 205.

<sup>285</sup> *Id.*

<sup>286</sup> *Hawkins v. Bleakly*, 243 U.S. 210, 213 (1917).

<sup>287</sup> 243 U.S. 219 (1917).

<sup>288</sup> *Id.* at 219-20.

injuries are inevitable," it could not "be deemed arbitrary or unreasonable for the State, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry."<sup>289</sup>

Four Justices dissented in *Mountain Timber*.<sup>290</sup> This suggests that the Court had not been nearly as unified in support of the other two decisions as their reported unanimity indicates. Years later, Brandeis said of Pitney, "But for [him] we would have had no workmen's compensation laws."<sup>291</sup> Originally, the New Jersey Justice "had been the other way," but "Pitney came around upon study,"<sup>292</sup> grasping the economic and sociological arguments for workers' compensation. He then voted to sustain those laws and wrote admirable opinions explicating the rationale for doing so.<sup>293</sup>

For the rest of his tenure on the Court, Pitney remained a champion of workers' compensation. He upheld as consistent with the fourteenth amendment the extension of New York's scheme to embrace all employers of four or more workers (even those in industries that were not hazardous)<sup>294</sup> and to provide payments for disfiguring injuries that did not deprive their victims of income-earning capacity.<sup>295</sup> Furthermore, when the Court held that a New York court's application of New York law to the case of a stevedore fatally injured while working upon the navigable waters of New York amounted to an impermissible invasion of the exclusive maritime jurisdiction of the Federal judi-

<sup>289</sup> *Id.* at 244.

<sup>290</sup> *See id.* at 246.

<sup>291</sup> A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 585 (footnote omitted).

<sup>292</sup> *Id.* (footnote omitted).

<sup>293</sup> *See generally* Powell, *The Workmen's Compensation Cases*, 32 POL. SCI. Q. 542, 553-69 (1917) (discussing Pitney's workers' compensation decisions). According to Bickel, "[W]hat Pitney came around to was a narrow and particular ground of decision." A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 585. The Court accepted the reasonableness of the statute before it, but reserved the right to strike down others later if it did not like them. *Id.* Although offensive to proponents of judicial restraint such as Bickel, Pitney's reliance on this approach, rather than on deference to legislative judgments, serves to demonstrate his commitment to Progressive policies. In an article written shortly after these decisions, Thomas Reed Powell of the Columbia Law School commended the reasoning of Pitney's opinions precisely because of his acceptance of "'economic and sociological arguments'" of the type that the New York Court of Appeals had dismissed in *Ives* "as not pertinent to the constitutional issue." Powell, *supra*, at 560. Powell stated, "Mr. Justice Pitney's opinion on the constitutionality of workmen's compensation legislation sets an example of judicial reasoning for judges everywhere to emulate." *Id.* at 569.

<sup>294</sup> *See Ward & Gow v. Krisky*, 259 U.S. 503 (1922).

<sup>295</sup> *See New York Cent. R.R. v. Bianc*, 250 U.S. 596 (1919).

ary, Pitney entered a vigorous dissent.<sup>296</sup> Although usually ruling in favor of the employee, he would go the other way when this was necessary to protect the integrity of a comprehensive workers' compensation system. This was also demonstrated in the case of an injured Texan who sought a higher recovery than his state's compensation act allowed by bringing a common law tort action against his employer.<sup>297</sup>

On the other hand, Pitney held that if a legislature gave laborers the option of either settling for the amounts authorized by a compensation statute or bringing tort actions against their employers (whose common law defenses it severely restricted), this violated neither the equal protection clause nor the due process clause.<sup>298</sup> The states, he wrote in the *Arizona Employers' Liability Cases*,<sup>299</sup> "are left with a wide range of legislative discretion, notwithstanding the provisions of the Fourteenth Amendment; and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts."<sup>300</sup> Novelty was not a constitutional objection.<sup>301</sup> The statute that the Arizona Legislature had enacted imposed no new financial burden on hazardous industries; the very nature of these industries made damages from accidental injuries inevitable.<sup>302</sup> All this law did was require the party who organized and took the profits from an enterprise to treat these damages like other costs of doing business, such as paying wages.<sup>303</sup> He could consider them in setting prices and thus pass through the cost of accidents to the consumer, rather than leaving injured workers, their dependents, and public welfare agencies to bear the burden.<sup>304</sup> Acceptance of such modern notions about spreading the costs of accidents, so incompatible with the fundamental assumptions of turn-of-the-century tort

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<sup>296</sup> See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 223 (1917) (Pitney, J., dissenting).

<sup>297</sup> See *Middleton v. Texas Power & Light Co.*, 249 U.S. 152 (1919). The employee had argued that the Texas workers' compensation statute violated the equal protection clause of the fourteenth amendment because it discriminated between those persons working for employers who had chosen to bring themselves under the system and those working for employers who had not. See *id.* at 156.

<sup>298</sup> See *Arizona Employers' Liability Cases*, 250 U.S. 400 (1919).

<sup>299</sup> 250 U.S. 400 (1919).

<sup>300</sup> *Id.* at 419.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 424.

<sup>303</sup> *Id.*

<sup>304</sup> See *id.* at 427.

law,<sup>305</sup> apparently did not come easily to Pitney.<sup>306</sup>

That it came at all is indicative of the extent to which one of the reform movements associated with Progressivism molded his thinking. Pitney did not always take a Progressive position in labor cases. For example, he voted against both a Federal child labor statute<sup>307</sup> and a state minimum-wage-for-women law.<sup>308</sup> Nevertheless, his positions in cases involving both unions and unorganized workers reflected the attitudes of Progressive reformers to a surprising extent.

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<sup>305</sup> See generally G. WHITE, TORT LAW IN AMERICA 61-62 (1980) (explaining early twentieth century views on tort law).

<sup>306</sup> Originally, the *Arizona Employers' Liability Cases* were assigned to Justice Holmes. See A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 586. He wrote an opinion that took the tack that all risk of damages should be imposed on the employer because he could pass them through to the public. See *id.* at 587. Holmes's majority fell apart when the other members of it saw what he had written. See *id.* at 587-88. At this point, there were four dissenters—including the Chief Justice, who had at first been with Holmes. *Id.* at 586-88. The opinion was also too strong for some of those who continued to favor upholding the Arizona statute. *Id.* at 586-87. One of those was Pitney, to whom the case was reassigned. See *id.* at 589. Yet, the opinion that he produced talked about the ability of employers to spread the cost of accidents and also stressed judicial restraint, the other theme Holmes had planned to emphasize. See *id.*

<sup>307</sup> See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918). See generally S. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW (1968) (discussing child labor reform). On this issue, Pitney was also out of line with New Jersey, which had passed legislation in 1903 and 1904 forbidding the employment of children under age 14 in mines, workshops, and factories, and limiting the number of hours per day and per week that youths aged 14 through 16 could be employed in such enterprises. See R. NOBLE, JR., *supra* note 87, at 122-25. It strengthened these measures in 1907 and 1910 with laws that limited the hours of children under age 16 working in mercantile establishments and banned night work in factories by all persons under age 16. *Id.*

<sup>308</sup> See, e.g., *Stettler v. O'Hara*, 243 U.S. 629 (1917) (per curiam); see also A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 593-603 (discussing *Stettler*). Immediately after *Stettler* was argued, Pitney voted with a five-member majority that favored holding the Oregon minimum-wage-for-women statute unconstitutional. *Id.* at 595. The decision had not yet been handed down for some unknown reason when one member of the majority, Justice Lamar, died. See *id.* at 598. The case was restored to the docket and reargued, but Lamar's replacement, Louis Brandeis, had to disqualify himself because he had participated as counsel in the first argument. *Id.* at 598-99. No other Justice changed his position, and thus an equally-divided Court affirmed an Oregon Supreme Court decision upholding the law. See *id.* at 602.

Although voting twice against a minimum-wage law for women, Pitney was part of the majority that upheld an Oregon statute setting maximum hours for both men and women and requiring time-and-one-half pay for overtime work. See *Bunting v. Oregon*, 243 U.S. 426 (1917). According to one scholar, the reason why he voted for this law, but against the one at issue in *Stettler*, was a strong hostility to wage setting. See J. SEMONCHE, *supra* note 175, at 342 n.46.

#### 4. Antitrust and Economic Regulation

The stands Pitney took in litigation arising under the anti-trust laws and various state and Federal regulatory statutes also mirrored the attitudes of Progressive reformers. The lack of sympathy for railroads, which was such a notable feature of his career on the New Jersey bench, persisted after his appointment to the Supreme Court. In disputes between carriers and shippers, Pitney exhibited a consistent preference for the latter.<sup>309</sup> He rejected railroads' challenges to orders of the Interstate Commerce Commission,<sup>310</sup> and was almost equally unreceptive to their constitutional complaints about the rules and rates imposed upon them by state regulatory agencies.<sup>311</sup> Pitney also continued for the most part to support the efforts of municipal governments to regulate the corporations that provided their citizens with utility services.<sup>312</sup>

The antimonopoly bias that had animated him during his days as a New Jersey congressman and judge manifested itself in cases arising under the Sherman Antitrust Act. "As a rule, he joined with the majority where it upheld and gave vitality to the Act, and could be counted among the dissenters where the Court resorted to 'strained and unusual' interpretations of the facts to uphold the legality of challenged practices."<sup>313</sup> When a Supreme Court that was growing noticeably more conservative<sup>314</sup> ruled in 1917 that the exclusive leasing agreements that the United Shoe Machinery Company had used to dominate the entire shoe manufacturing business did not violate the Sherman Act, Pitney joined

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<sup>309</sup> J. SEMONCHE, *supra* note 175, at 279; *see, e.g.*, *Spiller v. Atchison, T. & S.F. Ry.*, 253 U.S. 117 (1920); *Arkadelphia Milling Co. v. St. Louis S.W. Ry.*, 249 U.S. 134 (1919); *Morrisdale Coal Co. v. Pennsylvania R.R.*, 230 U.S. 304, 315 (1913) (Pitney, J., dissenting); *Mitchell Coal & Coke Co. v. Pennsylvania R.R.*, 230 U.S. 247, 267 (1913) (Pitney, J., dissenting); *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 208 (1913) (Pitney, J., dissenting).

<sup>310</sup> *See, e.g.*, *O'Keefe v. United States*, 240 U.S. 294 (1916); *Kansas City S. Ry. v. United States*, 231 U.S. 423 (1913).

<sup>311</sup> *See, e.g.*, *Darnell v. Edwards*, 244 U.S. 564 (1917); *Phoenix Ry. v. Geary*, 239 U.S. 277 (1915); *Michigan Cent. R.R. v. Michigan R.R. Comm'n*, 236 U.S. 615 (1915); *Louisville & N.R.R. v. Finn*, 235 U.S. 601 (1915).

<sup>312</sup> *See, e.g.*, *Lincoln Gas & Elec. Light Co. v. City of Lincoln*, 250 U.S. 256 (1919); *Puget Sound Traction, Light & Power Co. v. Reynolds*, 244 U.S. 574 (1917). *But see* *City of Denver v. Denver Union Water Co.*, 246 U.S. 178 (1918).

<sup>313</sup> Levitan, *supra* note 231, at 761.

<sup>314</sup> *See* A. BICKEL & B. SCHMIDT, JR., *supra* note 158, at 415; J. SEMONCHE, *supra* note 175, at 422-23.

Justices Day<sup>315</sup> and Clarke<sup>316</sup> in protesting its decision. When the Court employed the "rule of reason" to justify rejecting the Government's efforts to dissolve the United States Steel Corporation, he again stood with these two colleagues in dissent.<sup>317</sup> Pitney was, according to one scholar, the Supreme Court's "most consistent supporter of congressional policy as detailed . . . in the antitrust law."<sup>318</sup>

### 5. Civil Liberties

Although Theodore Roosevelt might not have applauded them, Pitney's votes in support of governmental efforts to control monopoly, like his rulings upholding Federal attacks on liquor<sup>319</sup> and prostitution,<sup>320</sup> were very much in the Progressive tradition.<sup>321</sup> So too was Pitney's endorsement of the National Government's attack upon dissent during World War I. For Progressives, among them President Wilson, American participation in "the war to end all wars" was a great crusade, in which the Nation fought to eradicate militarism, to protect liberalism, and to spread democracy.<sup>322</sup> Believing shared convictions were the cement of society, the Government resorted to publicity and appeals to conscience to unite the Nation behind this greatest of all reform efforts.<sup>323</sup> The results were intolerance, vigilantism, and persecution.<sup>324</sup> Congress passed the repressive Espionage<sup>325</sup> and Sedition<sup>326</sup> Acts, and despite the apparent inconsistency between those measures and the first amendment, the Supreme Court affirmed their constitutionality and regularly sustained convictions obtained under them.<sup>327</sup> Even the great Justice Oliver Wendell Holmes, Jr., before penning the first of his famous "clear and

<sup>315</sup> See *United States v. United Shoe Mach. Co.*, 247 U.S. 32, 75 (1918) (Day, J., dissenting).

<sup>316</sup> See *id.* at 75 (Clarke, J., dissenting).

<sup>317</sup> *United States v. United States Steel Corp.*, 251 U.S. 417, 466 (1920) (Day, J., dissenting).

<sup>318</sup> J. SEMONCHE, *supra* note 175, at 423.

<sup>319</sup> See, e.g., *Ex parte Webb*, 225 U.S. 663 (1912).

<sup>320</sup> See, e.g., *Zakonaite v. Wolf*, 226 U.S. 272 (1912).

<sup>321</sup> On Progressive attitudes concerning the control of liquor and prostitution, see A. LINK & R. McCORMICK, *supra* note 6, at 69, 79, 102-03.

<sup>322</sup> See D. KENNEDY, *OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY* 51 (1980).

<sup>323</sup> See *id.* at 74-75.

<sup>324</sup> See *id.* at 75-88.

<sup>325</sup> Ch. 30, 40 Stat. 217 (1917).

<sup>326</sup> Ch. 75, 40 Stat. 553 (1918).

<sup>327</sup> See generally Levitan, *supra* note 231, at 763-67 (discussing Supreme Court's treatment of cases under Espionage and Sedition Acts).



present danger” dissents, handed down three decisions in this vein.<sup>328</sup>

Pitney was in good Progressive company when, in *Pierce v. United States*,<sup>329</sup> he upheld the convictions of four Socialists under section 3 of the Espionage Act<sup>330</sup> based primarily on their distribution of a pamphlet called *The Price We Pay*.<sup>331</sup> This leaflet characterized the war as fought for the benefit of capitalists like J.P. Morgan, wailed about recruiting officers hauling young men away to awful deaths, predicted a rise in food prices, and accused the Attorney General of being so busy jailing those who failed to stand for the playing of “The Star-Spangled Banner” that he had no time for prosecuting speculators.<sup>332</sup> “Common knowledge,” Pitney believed, “would have sufficed to show at least that the statements as to the causes that led to the entry of the United States into the war against Germany were grossly false; and such common knowledge went to prove also that [the] defendants knew they were untrue.”<sup>333</sup> In his opinion, a jury might have found that *The Price We Pay* could tend to cause insubordination in the armed forces and to obstruct recruiting.<sup>334</sup>

Brandeis, on the other hand, considered it inconceivable that the lurid exaggerations with which this pamphlet was filled could induce any serviceman of normal intelligence to risk the

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<sup>328</sup> See *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>329</sup> 252 U.S. 239 (1920).

<sup>330</sup> Section 3 provided:

Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.

Espionage Act, ch. 30, § 3, 40 Stat. 217, 219 (1917).

<sup>331</sup> *Pierce*, 252 U.S. at 253.

<sup>332</sup> See *id.* at 245-47.

<sup>333</sup> *Id.* at 251. Brandeis attributed Pitney’s certitude that he knew the real causes of World War I to his Presbyterianism. Conversations between L.D.B. and F.F., in Brandeis Papers, *supra* note 252, folder 14, manuscript box 114. Brandeis stated, “Pitney . . . personally is very kindly, though in many ways naive and wholly without knowledge but still can’t shake his Presbyterianism or doesn’t realize he is in its grip.” *Id.*

<sup>334</sup> *Pierce*, 252 U.S. at 249.

severe penalties prescribed for refusal of duty.<sup>335</sup> In dissent, he pointed out the harm that could be done to the democratic political process if arguments were treated as criminal incitements merely because they seemed unfair, mistaken, unsound, or intemperate "to those exercising judiciary power."<sup>336</sup> His was a message lost on Pitney, who joined the majority that upheld numerous other convictions under the Espionage and Sedition Acts and related state statutes.<sup>337</sup>

In voting to jail opponents of the war, Pitney reflected the temper of his times. His greatest weakness was an inability to question the accepted wisdom of his own day. Thus, he affirmed a district court decision that had denied a writ of habeas corpus to Leo Frank, who was convicted of murder in an Atlanta trial so dominated by a mob that the defendant had to be absent from the courtroom when the jury returned its verdict.<sup>338</sup> Because Frank had failed to raise the matter of his exclusion from the courtroom promptly and because the Georgia courts had considered and had rejected his contention that the jury had been influenced by the threatening atmosphere that surrounded the trial, Pitney ruled that the defendant had not been denied his fourteenth amendment right to due process of law.<sup>339</sup>

Such exaggerated deference to state authority and such calous insistence that violations of fundamental rights by state institutions lay beyond Federal control were not peculiar to Pitney. They remained typical of the Court as a whole until well into the 1920's.<sup>340</sup> Furthermore, in refusing to impose national conceptions of due process on Georgia, Pitney was taking a position consistent with the one he adopted in other cases far less controversial than Leo Frank's.<sup>341</sup> Still, Holmes could see what Pitney could not: "Whatever disagreement there may be as to the scope

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<sup>335</sup> *Id.* at 272 (Brandeis, J., dissenting).

<sup>336</sup> *Id.* at 273 (Brandeis, J., dissenting).

<sup>337</sup> See Israel, *supra* note 4, at 2008.

<sup>338</sup> See Frank v. Mangum, 237 U.S. 309 (1915). See generally L. DINNERSTEIN, THE LEO FRANK CASE (1968).

<sup>339</sup> Frank v. Mangum, 237 U.S. 309, 338-40 (1915). Brandeis remarked, "Pitney had a great sense of justice affected by Presbyterianism but no imagination whatever." Conversations between L.D.B. and F.F., in Brandeis Papers, *supra* note 252, folder 14, manuscript box 114.

<sup>340</sup> See P. MURPHY, THE CONSTITUTION IN CRISIS TIMES: 1918-1969, at 82-83 (1972).

<sup>341</sup> See, e.g., Collins v. Johnston, 237 U.S. 502 (1915); Lem Woon v. Oregon, 229 U.S. 586 (1913); Ensign v. Pennsylvania, 227 U.S. 592 (1913); cf. Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922) (applying Federal due process principles to a state law).

of the phrase 'due process of law,' there can be no doubt that it embraces the fundamental conception of a fair trial. . . . Mob law [cannot be] due process."<sup>342</sup> Within less than a decade, the Court would inform the states, through a Holmes opinion, that the fourteenth amendment limited their discretion at least that much.<sup>343</sup>

### C. Resignation and Death

By the time it did this, Mahlon Pitney was no longer on the Bench. The Justice who reflected so well the attitudes of the Progressive era departed from the Supreme Court soon after Progressivism came to an end in the sour aftermath of World War I.<sup>344</sup> In early 1922, while attending a rededication of the Philadelphia room where the Court had held its first session, Pitney suffered what doctors diagnosed as "a blood clot on the brain."<sup>345</sup> Chief Justice Taft urged him to take some time off,<sup>346</sup> and he did.<sup>347</sup> Upon his return to Washington, Pitney still could not resume a full workload. Taft regarded him as a "weak" member of the Court, and after his "breakdown," he assigned him no further cases.<sup>348</sup> Pitney wrote only three more opinions before the end of the Term.<sup>349</sup>

Then, in August 1922, he suffered a massive stroke.<sup>350</sup> Pitney now recognized that he would have to leave the Court.<sup>351</sup> Unfortunately, if he did so, he would not be eligible for a pension; he had completed the required ten years of service, but was still six years short of the mandatory seventy years of age.<sup>352</sup> Congress enacted special legislation enabling Pitney to retire,<sup>353</sup>

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<sup>342</sup> Frank v. Mangum, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting).

<sup>343</sup> See Moore v. Dempsey, 261 U.S. 86 (1923).

<sup>344</sup> See generally B. NOGGLE, INTO THE TWENTIES (1974).

<sup>345</sup> A. Breed, *supra* note 41, at 164. Breed actually says Pitney suffered this illness in early 1921, but this appears to be a typographical error. See Israel, *supra* note 4, at 2009.

<sup>346</sup> See Letter from Chief Justice Taft to Justice Pitney (Jan. 20, 1922), in Pitney Papers, *supra* note 38.

<sup>347</sup> Letter from Pitney to Chief Justice Taft (Jan. 21, 1922), in Pitney Papers, *supra* note 38.

<sup>348</sup> A. MASON, *supra* note 178, at 213.

<sup>349</sup> A. Breed, *supra* note 41, at 164.

<sup>350</sup> *Id.* at 165.

<sup>351</sup> *Id.* According to certificates submitted to the Senate Judiciary Committee from four physicians, by November, Pitney was also suffering from hardening of the arteries and Bright's disease. S. 4025, 67th Cong., 3d Sess., 63 CONG. REC. 272 (1922).

<sup>352</sup> See A. Breed, *supra* note 41, at 165-66.

<sup>353</sup> *Id.* at 166.

however, and he did so on December 31, 1922.<sup>354</sup> A little less than two years later, on December 9, 1924, New Jersey's third Supreme Court Justice died at his house in Washington.<sup>355</sup> Then, for the last time, he came home to Morristown.<sup>356</sup>

### III. CONCLUSION

Neither contemporaries nor historians have ranked Pitney with the greats of the Supreme Court. Even among the four New Jersey Justices, he tends to be the forgotten figure. Nonetheless, Pitney deserves more credit than he has received. At the time he sat, a previously rural and agrarian America was struggling, often without really knowing quite how to go about it, to adjust to life as an urban and industrial society. That, at bottom, was what Progressivism was all about.<sup>357</sup> The Country needed judges who would support, rather than use their judicial power to thwart, the sometimes unwise but mostly necessary initiatives of a great reform movement. The Nation found one in Mahlon Pitney. Of all the Justices who sat on the Supreme Court during his tenure, "Pitney was the most consistent supporter of national reform legislation."<sup>358</sup> His opinions are as murky as one critic has charged,<sup>359</sup> but he was not the reactionary some have made him out to be.<sup>360</sup> Thrust onto the national scene by New Jersey Progressivism, and a mirror of its values and biases, Justice Pitney was a contributor to whatever success the Progressive movement achieved, both in his native state and in the Nation as a whole.

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<sup>354</sup> *Id.* at 165.

<sup>355</sup> *Id.* at 167.

<sup>356</sup> *See id.*

<sup>357</sup> *See generally* S. HAYS, *THE RESPONSE TO INDUSTRIALISM: 1885-1914* (1957).

<sup>358</sup> J. SEMONCHE, *supra* note 175, at 308 n.7.

<sup>359</sup> *See* H. ABRAHAM, *supra* note 160, at 179.

<sup>360</sup> *See id.* at 163-64; *cf.* Israel, *supra* note 4, at 2001 (Pitney adequately fulfilled the role of a Supreme Court Justice).