Supreme Court Justice Appointments: II

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A new judicial order had its foundations in the tremendous industrial and economic changes of the latter part of the Nineteenth Century. Those changes are reflected in a contrast of railroad expansion and agricultural depression. Railroad mileage increased from 30,000 in 1860 to 93,000 in 1880 and 166,000 in 1890, while farm profits dropped to the vanishing point. The financial collapse of 1873, like those of 1893 and 1933, followed an agricultural depression of many years standing and mortgage burdens increased as farm prices went down.

High and discriminatory freight rates gave the farmers a readily identifiable enemy, and the agrarian-railroad clash of the Seventies was accentuated by the passing of the frontier. This process, which was completed by 1890, removed the safety valve from the economic machine. By 1870 the day was rapidly approaching when cheap land in the West would no longer afford an opportunity for the economic derelicts. Great areas of land had passed into railroad hands; 35 million acres had been given them by 1873 and 145 million acres more were promised to the transcontinental railroads alone.

The simultaneous development of railroad empires, manufacturing monopolies and farm poverty was accompanied by a growth of widespread political movements based on class interests. For example, in 1867 a handful of government clerks in Washington founded the Patrons of Husbandry, commonly called the Grange, and by 1874 the organization had 500,000 members. The Grangers caused the enactment of state legislation to improve the economic condition of farmers, and national parties with similar purposes tried to follow suit. The Labor Reform party began in 1872, the Greenbackers had national candidates from 1876 to 1884, the United Laborites were active in 1888, and the Socialists and Populists had their first national candidates in 1892. In 1878 Greenback candidates received over a million votes in the Congressional elections and in 1892

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1 Frankfurter and Landis, The Business of the Supreme Court (1927) 56.
2 Buck, The Agrarian Crusade, 23.
3 For discussion of the development of the Grange, see Buck, op. cit. supra note 2, at 4.
James B. Weaver polled more than a million votes for President on the Populist ticket.

Inevitably these great forces affected the work of the Supreme Court and in turn were molded by the judicial power. "Capitalism pushes ultimately before the Court the clashes of interest that are attendant on the growth of any economic system."

This effect was heightened by an expansion of the federal jurisdiction in 1875 through which Congress gave recourse to the federal courts for all litigants who claimed a right under the laws, constitution, or treaties of the United States. This addition to the diversity of citizenship ground of federal jurisdiction "gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789."

Obstruction of Granger legislation was one of the chief objects of the bill. These circumstances—the economic developments and expansion of federal jurisdiction—have resulted in a transformation of the work of the Court. In 1925 the Court handled about as many cases as it had in 1875, but in the latter year the percentage of common law actions was 43%, and in 1925 this proportion was down to 5%. While there had been no cases involving the due process of economic regulation in 1875, there were 20 in 1925; and the number of cases involving construction and constitutionality of federal statutes under the commerce clause grew from none in 1875 to 29 in 1925.

The new role of the Court is particularly clear upon examination of the great cases decided in the latter part of the Nineteenth Century. Consideration of the litigants alone would leave one blind to the vast alignment of interests in Munn v. Illinois (regulation of enterprises vital to agriculture), Wabash Railway v. Illinois (regulation of railroad rates), Smyth v. Ames (regulation of utility rates), Pollock v. Farmer's Loan and Trust (power to levy income taxes), and United States v. E. C. Knight Company (anti-monopoly prosecutions). These cases were more than disputes over the

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* Lerner, The Supreme Court and American Capitalism (1933) 42 Yale L. J. 685.
* Ibid.
* Frankfurter and Landis, op. cit. supra note 1, at 302.
* 94 U.S. 113 (1876).
* 118 U.S. 557 (1886).
* 169 U.S. 466 (1898).
* 156 U.S. 1 (1895).
allocation of the power of government, as in *Marbury v. Madison.* They were more than disputes among a homogeneous group over division of spoils, as in *Gibbons v. Ogden* or *Charles River Bridge v. Warren Bridge.* They were phases of a struggle for social reorganization.

The new issues that came before the Court caused new factors to weigh in the selection of its membership. After 1877, in greater degree than ever before, politicians and the public examined a prospective Justice's economic as well as his political views. The chief objections to appointees considered earlier in this discussion were levelled at their political sins or personal characteristics. After 1877 the farmers objected to Matthews as a railroad lawyer; labor fought Lurton because it considered him biased. "Friends of property" quailed at Holmes' appointment and revolted at the choice of Brandeis. This is not to say that the economic factor became the sole criterion of judicial selection; but the key to the understanding of Supreme Court appointments after 1877 is in the increasing attention given to the economic significance of an appointment.

**MATTHEWS' APPOINTMENT**

January 26, 1881, President Hayes appointed Stanley Matthews to the Supreme Court. Matthews, an Ohioan, was selected to succeed Swayne, who was retiring. A United States district attorney before the War and a colonel in the Union army, he had become an active Republican, and was a United States Senator from 1877 to 1879. But while his fame came from politics, his income came from regular employment as a railroad lawyer.

Some lawyers and all staunch Republicans supported the Matthews appointment. Party members in the Ohio Senate forced through a resolution of endorsement over the protest of every Democrat in that body. Lawyers throughout Ohio wrote to their Senators, Thurman and Pendleton, to express approval. The Cleveland Bar Association asked confirmation, "in view of his great ability and superior attainments as a lawyer and of his stainless personal char-

\[137\] Cranch 137 (U.S. 1824).
\[9\] Wheat. 1 (U.S. 1824).
\[10\] For a discussion of the circumstances surrounding the retirement of Swayne, see Fairman, *Mr. Justice Miller and the Supreme Court* (1939) 380.
acter." Two judges of the Kentucky Court of Appeals expressed similar sentiments, and the Cincinnati Board of Trade and Transportation, of which Matthews was a member, "earnestly urged" the Senate to confirm.

But the volume of denunciation overwhelmed this spattering of applause. In popular imagination, Matthews was a "Railroad Lawyer," and critics jumped to say so. The California Anti-Monopoly League wired the Judiciary Committee that Matthews would "sustain the usurpation of monopoly if elevated to the Supreme Bench." The head of the Pennsylvania Grange, which claimed thirty thousand members, asserted that the railroads of the country were attempting to control the Court, and that Matthews "naturally views railroad questions from a railroad standpoint." The president of the National Anti-Monopoly League charged that Matthews had been attorney for the Central Pacific Railroad Company and that the people "look upon this effort to bring it [the Supreme Court] under corporate control with amazement and alarm."

Not only the poor and weak feared the power of the railroads. The New York Board of Trade and Transportation was a leader in the fight against Matthews. Using precisely the same language as did the Pennsylvania Grange, the president of the Board, "in behalf of eight hundred business firms" protested the selection. The Board did more than pass resolutions; it collected and published excerpts from newspapers throughout the country criticizing the appointment.

Matthews was confirmed, but the fight could not have been closer. Hayes' Lame Duck Congress failed to approve, and it was necessary for Garfield to send the name back to the Senate ten days after he took office. On March 18th, the name went to the Judiciary Com-

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17 Copy of resolution addressed to Senator Thurman in Committee files.
18 M. H. Cofer and W. D. Pryor to Judiciary Committee, February 15, 1881.
19 Telegram to Senate Committee, date undecipherable.
20 Leonard Rhone, master of the Pennsylvania State Grange, to Judiciary Committee, March 11, 1881.
21 President of the Anti-Monopoly League to Senator Edmunds, March 15, 1881.
22 The collection of newspaper statements was representative of both the Republican and Democratic press. Among the critics were the Chicago Tribune, the Springfield Republican, and the Boston Herald. The fact that the Pennsylvania Grange and the New York Board of Trade used identical language suggests either that one copied from the other or that some interested third party supplied both with the statement. In the absence of further evidence, it seems likely that the Grange copied the Board's statement, which was widely published. The precise dates of each are not clear.
mittee, and on March 24th, records were sought by the Committee from the Attorney General. On April 26th the nomination was “considered informally” by the Committee and on May 9th was adversely reported. On May 12th Matthews was confirmed, 24-23.23

ARTHUR APPOINTMENTS

No new documents have been found on Arthur's choices for the two vacancies which occurred during his administration, and the secondary sources are too general in their comment to warrant recapitulation. All that can be said is that when Justice Clifford died in 1881, Arthur appointed Horace Gray, Chief Justice of the Supreme Judicial Court of Massachusetts, as his successor. Within 24 hours of his appointment, Gray was approved by the Judiciary Committee and confirmed by the Senate.

When Judge Hunt finally made official by resignation a departure from the Bench which had taken place four years before, Arthur nominated Roscoe Conkling to succeed him. Conkling had refused Grant's offer of nomination for the chief justiceship in 1883, and while he did not hear of his appointment as Associate in time to prevent his confirmation, he immediately resigned. Arthur's next choice, Samuel Blatchford of New York, a federal judge, was confirmed March 27, 1882.24

CONFEDERATE TO THE COURT

The economic surge was not the only barrier to speedy confirmation of a President's Supreme Court choice. Partisan politics continued to be an even more effective impediment to the presidential will. No one learned that lesson more thoroughly than did Grover Cleveland. During his first administration Republican control of the Senate almost resulted in defeat of his nominees and in his second administration a quarrel within his own party caused two rejections.

When William B. Woods died in 1887, Cleveland chose his Secretary of the Interior, Lucius Quintus Cincinnatus Lamar, for the vacancy.25 Lamar, who was 62 at the time of his nomination, had

23 The chronology of Committee action on this, as on the other appointments, is taken from the Committee journals.
24 Howe, Cheater A. Arthur (1934) adds nothing of value on these appointments.
25 See Cate, Lucius Q. C. Lamar, (1935) 469 et seg. for a discussion of Lamar's pre-nomination support. John A. Campbell, the Justice who had resigned in 1861 to join the Confederacy, recommended Carleton Hunt, dean of the Louisiana Law School and a Member of Congress, 1883-85.
a long career in public office behind him. He was a Democratic Member of Congress from Mississippi from 1857-1860 when he resigned to join the Confederacy. During the War he was a lieutenant colonel and in 1873 he went back to the House. After two terms there he was elected to the Senate where he stayed until he became Secretary of the Interior in 1885.

Appointment of a Confederate officer to the Supreme Court twenty-two years after the War may not appear extraordinary to the Twentieth Century mind, but in 1887 it was High Treason to Republicans. The Bloody Shirt had held the party in office until Cleveland's election, and here was an opportunity to give it another flourish. The patriots descended upon the Senate.

There were collateral as well as frontal attacks. Lamar's opponents charged that he was too old for the position. They claimed that the 62 years to which he admitted was short of the truth by five, a charged based on an 1857 collection of Congressional biographies by a private publisher. In the days before the official preservation of vital statistics this was a hard charge to disprove, but Lamar had an ace witness. The family Bible was appealed to as the ultimate authority. On December 21, 1887, Mrs. Mary Ross, Lamar's sister, appeared before George H. Hill, clerk of the District Court of the United States for Northern Mississippi and presented the venerable record. After solemnly examining the book and discovering that it looked like a family Bible to him—"the same bears all the indicia of an old family record"—Clerk Hill copied out several pages of genealogical data which completely put the doubters to rout.

Another collateral attack arose from a post card sent to Senator Edmunds by J. W. Hubbard, a Mississippian. "If you will send for Col. W. P. Wood, and Col. J. Q. Thompson, they will let you know the relations which existed between Mr. Lamar and Miss Mary McBride, now under indictment for setting fire to a house on 11th St. S.W. to collect the insurance money," wrote Hubbard. He suggested that Lamar was paying Miss McBride's attorney's fees.

When sex and arson cropped up in what had been a routine political squabble, the newspapers gave their full attention to the controversy. The New York Evening Telegram regaled its readers with "Serious Charge Against the Secretary of the Interior—A

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2 For an analysis of the partisan nature of the attack on Lamar, see Cate, op. cit. supra note 25, at 475.
27 Hubbard to Edmunds, date undecipherable.
Lady in the Case—Alleged Relations with a Woman Accused of Arson.” The Chicago News featured similar headlines. Miss McBride wrote to the Committee to defend her character. She had, said she, a position in the Government Printing Office which she had obtained without assistance from Lamar. Although she was “under the sinister bar of indictment for arson,” she had never boasted, as the newspapers suggested, that her influence in high places would protect her. Rather, her fortitude arose from “the undismayed confidence of guiltless courage, sustained by the omnipotent power that gave force to the tiny pebble hurled from the feeble sling of Israel’s youthful flock-tender and through which I am emboldened to ask your aid against those ambushed assailants who seek through my misfortunes to make me the Delilah of their evil conspirings against the political Sampson whose unshorn strength they thus attempt to weaken through disgrace.” With appropriate reference to the action of the English Parliament in a similar case and with a neat allusion to Roman history, Miss McBride concluded.

The main attack on Lamar was directed, however, not at his morals nor his age, but at his political background. Governor Ebenezer Ormsbee of Vermont was appalled that a President could even think of appointing a man to the Supreme Court who thought that the rebels “were not traitors but patriots.” The Kokomo Lincoln League was more detailed in its criticisms. They found that Lamar was on the wrong side in the War, that he was unfaithful to the Civil War Amendments, that he had referred in laudatory fashion to Jefferson Davis, and that he was an incompetent lawyer.

There were more specific attacks on Lamar’s patriotism. A former clerk of the Committee on Foreign Relations recalled for Edmunds that Lamar had once said to Governor Foster of Ohio that Negroes would be prevented “by fair means or foul” from gaining ascendancy in Mississippi. Foster had related the incident to the clerk whose recommendation that it be carefully examined was ignored.

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28 New York Evening Telegram, December 22, 1887.
29 Mary J. McBride to Judiciary Committee, January 9, 1888. A suspicious biographer might care to investigate the extent to which these words of a minor government employee reflect the style of the Justice.
30 Ormsbee to Edmunds, December 12, 1887.
31 Resolutions of the Kokomo Lincoln League—Northwest Corner of the Public Square—Kokomo, Indiana, January 2, 1888. The defense of Davis for which Lamar was criticized widely by the Republicans concluded with the words, “No man shall in my presence call Jefferson Davis a traitor without my responding with a stern and emphatic denial.” Cate, op. cit. supra note 25, at 409.
32 Vance to Edmunds, December 12, 1887.
As Secretary of the Interior, Lamar had occasion to pass on soldiers' claims for preference in civil service. The National Veterans' Rights Union protested vehemently that he had discriminated against some of their members. They listed four instances of discharge of employees of the Pensions Bureau which had inferentially been approved by Lamar through his refusal to reinstate the employees at the request of the Union.\textsuperscript{3} As reported in the press the National Veterans were confused with the Union Veterans Union. The head of the latter organization hastened to assure the Judiciary Committee that his organization had never condemned Lamar, as "Secretary Lamar has always recognized the true soldier." The Union Veterans Union recommended confirmation.\textsuperscript{3}

Lamar had his friends, most of them of Democratic political persuasion, as well as his enemies. Mississippi lawyers who knew Lamar assured the Senate that his withdrawal from practice to enter politics had not dimmed his legal intelligence. Lamar's intimate friend and his successor in the Senate, E. C. Walthall, assiduously circulated such statements among his colleagues. Since every Justice confirmed between 1860 and 1887 was primarily either a lawyer or judge at the time of his appointment, except Chase, Stanton, and Conkling (and the latter two never served), a tradition against appointing politicians had developed. This was not of dominant weight, but some consideration had to be given to the argument that Lamar had lost the legal touch.\textsuperscript{5}

One prominent endorser of Lamar, Eli S. Hammond, was himself a Republican. Hammond was a federal district judge from Tennessee from 1878 to 1904, and in 1880 had been seriously considered for the appointment which went to William B. Woods. Hammond, a Republican who knew the South, felt that an exhibition of tolerance by Republicans might have great influence in building party prestige in the area. However, that argument was but makeweight to accompany his real contention, that Lamar would be a capable judge

\textsuperscript{3}Chairman of Executive Committee, National Veterans' Rights Union, to Edmunds, December 10, 1887.
\textsuperscript{4}Department Commander, Union Veterans Union, to Judiciary Committee, December 11, 1887.
\textsuperscript{5}Senator Shelby M. Cullom, Republican of Illinois, recorded his views on Lamar's legal experience: "I voted against his confirmation in the Senate; not because I had anything against him personally, or because he was a Southern Democrat, but I understood that he had not practised law at all, and I did not believe that sort of man should be appointed to fill so high and responsible a position." Cullom, \textit{Fifty Years of Public Service} (1911) 227.
and one well qualified for the office. Hammond felt that the grave responsibilities of judicial office would cause Lamar to rise above the sectional and partisan prejudices which influence an active politician and that his legal knowledge was at least equal to that of Chase.\textsuperscript{96}

This appeal to Republicans to ignore partisanship almost failed, the difference between almost and complete failure being the measure of Lamar's margin when the Senate vote was taken. The Judiciary Committee held the nomination a month until January 10, 1888, when it was reported adversely. Senator Wilson of Iowa even obtained a special privilege to vote by proxy to insure his vote's being cast against Lamar in Committee. The Committee recommendation was laid before a Senate which consisted of 37 Democrats, 38 Republicans, and one Independent, Riddleberger of Virginia. Riddleberger and Republicans Stewart and Sawyer voted for Lamar and carried him through.\textsuperscript{97}

\textbf{FULLER, C. J.}

In 1888 an epoch in Supreme Court history, the passing of which had long been foreshadowed, came to an end. The vanishing age of judicial tolerance of legislative experimentation ceased with the death of Morrison R. Waite and the appointment of Melville W. Fuller. The new appointment marked the sanctification of Due Process and Freedom of Contract with \textit{Lochner v. New York}\textsuperscript{88} and the \textit{Income Tax Cases}\textsuperscript{99} as the chief fruits of the new era.

Three of the principal aspirants to succeed Waite were Edward J. Phelps of Vermont, Senator George Gray of Delaware and Justice Field of the Supreme Court. Phelps was a Vermont Democrat who had been Comptroller of the Treasury before the Civil War, and who was his party's candidate for governor in 1880. Cleveland chose him as Minister to Great Britain, a post he held throughout the first Cleveland administration. Gray, a Democrat, was Attorney General of Delaware, 1879 to 1884, and United States Senator, 1885-1899. Hence he had the support of many of his fellow Senators and was

\textsuperscript{96} Hammond to Edmunds, December 27, 1887.
\textsuperscript{97} For further details on the stand of individual Senators, see Cate, \textit{op. cit. supra} note 25, at 485.
\textsuperscript{88} 198 U.S. 45 (1905).
\textsuperscript{99} Pollock v. Farmers Loan & Trust, 157 U.S. 429 (1895).
recommended to the President by 27 of them. Justice Field, who felt that his long service on the Bench entitled him to the post, held a life-long grudge against Cleveland for not advancing him.

Cleveland determined to appoint a Westerner—a maneuver which Field claimed was calculated to win support for renomination and his first inclination was to choose Justice Schofield of the Illinois Supreme Court. Schofield refused on the ground that he did not care to rear his children in Washington. This left the way open for Fuller or any other moderately well-known Illinois lawyer, and while Fuller was so obscure as to be almost unknown outside of Illinois, he at least had the advantage of having known Cleveland personally for some time.

Fuller had a case to argue before the Supreme Court in which co-counsel was James R. Doolittle, Wisconsin wartime Republican Senator who joined the Democrats during Reconstruction. The two men called on Cleveland together, and, upon his return to Chicago, Doolittle assured the President that Fuller was worthy of the highest regard. As proof of the confidence in which Doolittle held Fuller, he pointed to "the highest testimony which any man can give," his choice of Fuller as associate counsel in a case "involving a large sum of money." If James R. Doolittle could trust his pocketbook to Fuller, ran the inference, the country could trust him with its Constitution.

Recommendations for Fuller came from all over the country, many from Fuller's first home state, Maine, and most of the rest from Illinois. Robert T. Lincoln, son of Abraham Lincoln and Secretary of War under Garfield and Arthur, crossed the party line to back Fuller. He based his argument on Fuller's merits and on the claim of the Seventh Circuit for representation on the Court, there having been no Justice from that circuit since the resignation of Davis

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40 Chicago Tribune, May 1, 1888. Nevins states that the position would have gone to Gray if the Democratic leaders of Delaware had been willing to elect Thomas F. Bayard to the vacancy, but that they refused. Bayard was Cleveland's Secretary of State. He lists Frederic R. Coudert and Solicitor General Jenks as others considered by Cleveland. Nevins, Grover Cleveland (1934) 446.

41 "Swisher, Stephen J. Field (1930) 319.

42 Ibid.

43 Cullom, op. cit. supra note 35, at 236.

44 Nevins says that Fuller and Cleveland corresponded frequently, and that Fuller turned down three offers of positions from Cleveland before accepting the chief justiceship. Nevins, op. cit. supra note 40, at 446.

45 Doolittle to Cleveland, April 24, 1888.
in 1877. Lyman Trumbull, also of Chicago, and, like Doolittle, a Republican Senator who later became a Democrat, praised Fuller highly. Trumbull's own reputation for character and ability gave special weight to his description of Fuller: He possessed "all the requisites socially, morally, and mentally to make him a worthy successor to the eminent jurists who have heretofore filled that high office."

The Fuller campaign was well organized. Every person who could be induced to sign a recommendation was contacted and added to the list. Justices of the Supreme Court of Illinois and 25 Cook County judges of one or another generation were recorded for Fuller. Several federal district judges including Walter Q. Gresham, a prominent contender for the Republican presidential nomination in 1888, allowed their names to be used.

Since the Senate had a Republican majority, some such Republican support was absolutely essential if Fuller was to be nominated with any hope of confirmation. Before Cleveland sent the name of Fuller to the Senate, he called in Shelby M. Cullom, senior Senator from Illinois, and sounded him out for approval. Cullom thought that Fuller was one of the "five best lawyers of Illinois belonging to his party." He gave his approval to the nomination, and his support in the Senate played a vital part in the confirmation.

The fight in the Senate was a long one. The appointment stayed in the Judiciary Committee for two months after Cleveland sent Fuller's name to the Senate on April 30, 1888, and confirmation was not granted until July 20th. The nomination came before the Committee May 2, May 4, May 21, May 28, May 31, June 1, and June 11. Not until Republican Committee Chairman Edmunds, who, being a Vermonter, would have preferred to see his friend Phelps nominated, had run down every clue as to Fuller's character, did the Committee report the nomination, and even then it was unable to agree on either a favorable or an adverse recommendation.

The charges against Fuller centered about his political record and his legal practices. Although it was not as easy for Republican

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46 Lincoln to Cleveland, April 12, 1888. See first article in this series (1941) Wis. L. Rev. 172, at 207, for objection of Fuller to appointment of Harlan as Davis' successor on the grounds of failure to appoint from within the circuit.

47 Trumbull to Cleveland, April 10, 1888.

48 Cullom, op. cit. supra note 35, at 237.

49 On May 4th, the Executive Docket shows, it was agreed to seek "information from the President and the Supreme Court"; why and how is not disclosed.
partisans to prove Fuller a Civil War “traitor” as it had been in the
case of Confederate Colonel Lamar, careful party researchers were
able to make a fair case. Fuller had been a member of the Illinois
legislature in 1863, and had voted with his party on many contro-
versial issues. Twenty-five years later that record was resurrected
and attacked. The Bloomington *Pantagraph*, for example, printed
Fuller’s votes on Civil War problems and asked their readers
“whether Mr. Fuller would not make a fit companion piece to Mr.
Lamar on the supreme bench.” 50 The argument ran through Re-
publican journals, and made good fodder for stump speeches in the
country and in the Senate.

A charge against Fuller’s character, rather than his politics, gave
a basis for some discussion. During the Ninteenth Century much
state legislative consideration was given to public utility companies
desiring franchises. Occasionally two or more companies fought for
the same franchise with such violence that an innocent observer might
have thought that legislatures existed primarily to settle disputes over
the right to the public purse. The Civil War dwarfed the magnitude
of these controversies, but it did not end them, and one such battle
took place in the 1863 session. Three men sought, through the
Wabash Railway bill, to form a corporation to construct a street rail-
way on Wabash Avenue and other Chicago streets. The Chicago
City Railway, which had a competing franchise, led the opposition.

The passage of the Wabash Railway bill was marked by several
peculiar events. The bill was called up in the state senate as a sur-
prise, quickly read by title, and passed before the senate knew what
the subject matter was. Even the City Railway attorney, who was a
senator, did not realize until too late what had happened. Later the
Governor prorogued the session, and subsequently attempted to veto
the measure. The Illinois courts held that the bill did not become
a law for failure of authentication.

Why this incident should have any special bearing on Fuller’s
fitness for the Supreme Court as a matter of moral qualification
is mysterious. Fuller was counsel for the Wabash Company and
represented it in the litigation arising from the bill. 51 But he was
a member of the house rather than the senate and was at least not
directly guilty of the deception of the upper house. Furthermore,
his record as a public utility counsel was a recommendation rather

50 Bloomington *Pantagraph*, May 26, 1888, in Committee files.
51 See, e.g., Wabash Railway v. Hughes and Selz, 38 Ill. 174 (1865).
than a disqualification to the leaders of both parties in 1888. How-
ever, a charge of improprieties was made, and the attack was an-
swered by one of Fuller’s ablest supporters, W. C. Goudy, one of
the most prominent Democrats of Illinois. Although he held no
office, Goudy had great influence with the party, and only his com-
plete identification in practice with railroad interests kept Cullom
from recommending his appointment to the chief justiceship.

Goudy was a close friend of both Cleveland and Fuller and was
one of the latter’s chief aides in the confirmation controversy.52
Congressman Springer of Illinois, for twenty years a Democratic
member of the House, asked Goudy for sufficient facts to refute the
Wabash rumors in Washington,53 and Goudy replied with a chrono-
logical account of the incident. He was unable to imagine what
charges were made against Fuller so he could give no definite de-
fense.54 From the manner in which the charge was quietly dropped,
it may be supposed that it was never more than a full blown rumor
which collapsed upon investigation. Judge Harry M. Shepard of the
Cook County Superior Court gave Springer an account of the affair
similar to Goudy’s and concluded that Fuller showed no character
deficiency by his role.55

Fuller had two enemies in Chicago who were primarily respon-
sible for the delay in confirmation. One was John C. Dunlevy, the
other, Jacob Forsyth. Just as the Wabash Railway charge was
evaporating Senator Edmunds received an urgent wire from Dun-
levy: “Please suspend action on Fuller’s nomination until objections
and charges mailed tonight reach you.”

John C. Dunlevy is difficult to identify. He was a lawyer and
was referred to as “judge”; yet he was not of sufficient prominence
to find his way into Nineteenth Century surveys of the Bar of Illi-
nois. He was described as “quite a figure in Andrew Jackson’s ad-
ministration” by an 1888 newspaper;56 yet he is not mentioned in
standard works on Jackson. All that is clear is that at one time Dun-

52 Goudy consulted with Fuller at length on the day of Fuller’s nomination,
perhaps in anticipation of the Senate fight. Chicago Tribune, May 1, 1888.
53 When Cleveland asked Goudy’s advice as to who the best Democratic lawyers
in Illinois were, Cullom replied that Goudy was the ablest, “but that he was
a railroad attorney, and it would probably not be a good thing to appoint him.”
Cullom, op. cit. supra note 35, at 237.
54 Goudy to Springer, May 29, 1888.
55 Shepard to Springer, May 29, 1888.
56 Dunlevy to Edmunds, May 31, 1888.
57 Unidentified clipping in Committee files.
levy lived in Ohio, where he made a hazily favorable impression on Senator John Sherman.

Dunlevy's formal charges involved two cases. In one, *Lay v. West Chicago Park Board*, a district court case, the action involved the acquisition of land for the city by the park system. Dunlevy alleged that Fuller raised the price from $45,000 to $103,000 and then pocketed about half that sum. The second case was a similar condemnation proceeding, *Kerr v. South Park Commissioners*, a case which had been carried to the United States Supreme Court in 1886.\(^5\)

Dunlevy charged that Fuller used his influence as jury commissioner to have the jury put in charge of one J. J. Douglass when it went out to view the property; and that Douglass caused the jury to be divided into two groups of six, one of which was subjected to improper influence by Fuller. In some fashion Fuller was supposed to have made $10,000 out of the transaction. Dunlevy claimed a personal grievance here as he owned some of the land involved.

Probably the reason that Dunlevy's hastily scribbled accusations received any credence was their inferential approval by Senator Sherman. The first Dunlevy letter was sent by Dunlevy to Sherman who turned it over to Edmunds with the recommendation that the matter be investigated. Sherman had not seen Dunlevy in many years, he told Edmunds, but at their last contact Dunlevy had been "a man of high standing in his profession."\(^5\)

June 11th, Edmunds wrote Fuller asking for any comment Fuller might care to make on the Lay, Kerr, and Forsyth charges.\(^5\) Fuller replied instantly that he could not "consent to reply to anonymous aspersions of the character referred to" and asked for permission to publish the correspondence.\(^6\) Upon Edmunds' consent, Fuller announced that "publication will dispose of these fabrications without subjecting me to the humiliation of having to notice them."\(^6\) The correspondence was accordingly published.\(^6\)

The Lay charges proved to have no basis at all. Lay's brother wrote that he had handled the business aspects of the case, and that Fuller had nothing whatsoever to do with the matter. His brother

\(^{17}\) 117 U.S. 379 (1886).
\(^{48}\) Sherman to Edmunds, May 28, 1888.
\(^{48}\) The nature of the Forsyth charges is described below.
\(^{46}\) Telegram, Fuller to Edmunds, June 13, 1888.
\(^{46}\) Telegram, Fuller to Edmunds, June 15, 1888.
\(^{46}\) Chicago *Tribune*, June 16, 1888, p. 8.
did not even know Fuller. Counsel for the park commissioners corroborated Lay’s account and they, as well as Lay’s attorneys, took the opportunity to ask for speedy confirmation of Fuller.

In the Kerr case Goudy and Fuller were associated as counsel for the park commission while Leonard Swett, best known as a friend of Lincoln, was chief counsel for the plaintiff. Dunlevy representing his own interest worked with Swett, as did several other attorneys. The case involved the valuation of property to be acquired for a park and at the first trial a valuation of about $350,000 was reached. This was considered so excessive that a new trial was ordered. At the new trial, Fuller and Goudy succeeded in scaling the amount payable by the commissioners down to about $150,000. The main reason for the difference was that in the second case Judge Gresham as trial judge refused to accept evidence of value which was based on the increase in value of adjacent property due to the presence of the park. This rule was sustained by the Supreme Court of the United States.63

Swett, who had been on the losing side in the Kerr case, assured Senator Edmunds that there was no ground for criticism of Fuller. He declared that Dunlevy had been pre-occupied with the Kerr case for so long that he had become mentally unbalanced with respect to it. Lyman Trumbull, who was another of the countless lawyers who participated in the litigation at one time or another, told Edmunds that Fuller had never been guilty of unprofessional conduct in the case.64

The heart of the Dunlevy charge was that the jury had been manipulated to arrive at the desired end. A. W. Green, Goudy’s partner, told the Senate Committee that Douglass was the regular bailiff of Judge Gresham’s court, and that the jury had never been separated. This was supported by affidavits presented by Trumbull. The affidavits were those of Douglass, the bailiff, and Waite and Foster, two engineers who accompanied the jury. Each declared that there were no improprieties. Another affidavit, sworn to by one of the jurors, explained that the reason for the reduced verdict was the obstinacy of one juror; but there was no suggestion of any corrupting influence.

The other enemy of Fuller was Jacob Forsyth. His grievance arose from the case of Forsyth v. Doolittle,65 an action by Fuller's

63 117 U.S. 379 (1886).
64 Trumbull to Edmunds, May 29, 1888. Trumbull, it will be remembered, was one of Fuller’s pre-appointment endorsers.
65 120 U. S. 73 (1887).
friend, Doolittle, for fees for representation of Forsyth. Doolittle retained Fuller as associate counsel and won a verdict of $40,000 for extended services in the transfer of 8000 acres of Indiana lands near Chicago for a million dollars. There is no evidence on the face of the case that the fee was exhorbitant. One of the jurors was quoted as having said: "Doolittle had done so much to help sell this worthless land and in aiding Forsyth swindle the Englishman, and had done dirty work for Forsyth, and that he, Riddle [the juror], and the jury thought that was little enough, and that he, Doolittle, ought to have a good share in the swindle, and that he, Riddle, thought Forsyth was a damned rascal and perjurer"--a phrase that catches the spirit of the age as well as the spirit of the litigation.

Forsyth's complaint against Fuller, stripped of its vague innuendo, was that there were men on the jury who had been put on the panel during Fuller's term as jury commissioner. Forsyth claimed that his counsel, William H. King, was dissuaded from calling this matter to the court's attention by a special appeal "as a personal favor" by Fuller. He also charged that the jury was corrupted by Doolittle and Fuller and that Fuller had taken the case on a contingent fee basis.

There was little development of the contingent fee allegation except for Doolittle's statement that Fuller took the case as a gesture of friendship, never rendering a bill and receiving about $2,000 as a fee. Edmunds wrote King to check on the jury commissioner's tale, and King repudiated the story that he had been influenced by Fuller to ignore Fuller's office as commissioner. Doolittle had mentioned the matter to him, said King, but Fuller was not present at their discussion. King did not mention the matter at the first trial of the case because he did not know of it, but on the motion for a new trial that factor was brought to the attention of the court and was overruled as a ground for a new trial. King referred to his former client as "semi-irresponsible."

If there was any culprit on moral grounds, the evidence, even taking it at its face value, put the primary blame on Doolittle. One
of Forsyth's affidavits quoted a juror as telling the affiant that he had been promised a job by Doolittle for a favorable verdict, but there is no reference to Fuller. 99

The chief complaint against Fuller directly was that he had appeared before a jury which he himself had chosen. Edmunds ran this charge down as thoroughly as he could. Fuller was jury commissioner from 1881 to 1883. Under the practice of the time, half the names were put on the panel by a fellow commissioner and half by Fuller. When Fuller appeared in the Doolittle case in April, 1883, he had already resigned his post as jury commissioner, but four members on that jury came from the Fuller panel and had been placed there either by Fuller or by his associate commissioner. 70 Forsyth's counsel did not object, presumably because they did not know until after the trial that Fuller had been commissioner. When, as is described above, they moved for a new trial on the grounds of Fuller's position, they were overruled.

By the end of June, Edmunds had run down every rumor against Fuller that he could find. He had corresponded briefly with King, and at length with Dunlevy and Forsyth. As a stalwart Republican, he had done his best to build up a case against Fuller, but he could not convince his Committee. Tactics of delay came to an end when Cullom appeared before the Judiciary Committee and insisted that the name be reported out. Edmunds took the floor in the executive session and attacked Fuller for alleged Southern sympathies during the War. Cullom replied by showing that Phelps, Edmunds' choice, had been a violent Lincoln-hater. While Democratic Senators sat back and chuckled, the two Republicans fought out the confirmation issue. 71 The Senate finally sided with Cullom, and granted confirmation, 41-20.

80 Obviously, if Doolittle was dishonest, Fuller may have been cognizant of his associate's misdeeds. There is not enough evidence one way or another on this problem to justify even a tentative opinion.

99 These facts are drawn from the various affidavits of William H. Bradley, clerk of the federal courts for northern Illinois. Forsyth claims that Bradley, who made his statement at Edmunds' request, was a close friend of Fuller.

100 Cullom, op. cit. supra note 35, at 238. After his confirmation Fuller wrote to Cullom:

"I cannot refrain from expressing to you my intense appreciation at the vigorous way in which you secured my confirmation. I use the word 'vigorous' because, though it was more than that, that was the quality that struck me most forcibly when I saw the newspapers this morning. When we meet, as I hope we will soon, I would very much like to talk this matter over with you. I hope you will never have cause to regret your action. I
THE HARRISON CHOICES—BREWER AND BROWN

The Supreme Court has frequently been subject to almost complete change of personnel within a short period. One such period was the Lincoln administration. Another more recent example was the Harding reconstruction, which, in philosophic spirit, has been duplicated in the reverse by the Roosevelt reformation. A similar transformation took place between 1887 and 1894. At the end of that period only three Justices who were on the 1887 Bench, Field, Harlan, and Gray, were still on the Court.

Four of the new appointments were made by President Benjamin Harrison. His choices varied greatly in length of service and in significance. Howell Jackson held office for two years, and George Shiras for eleven; both are remembered for little more than their parts in the income tax litigation. Henry B. Brown and David Brewer held their positions for sixteen and twenty years, respectively, and the latter particularly became famous for the tenacity and ability with which he opposed social improvement.

The Brewer and Brown appointments were made within a year of each other, and may logically be considered together because both men were considered for the first vacancy, and because the two men had been close friends since their Yale days. The vacancy was caused by the death of Justice Matthews in 1889 at the end of his ninth year in office.

Since Matthews was an Ohioan, the Ohio politicians thought that they should have a dominant voice in choosing his successor. Had it not been for the fact that their first choice, Thomas McDougall, a practising lawyer of Cincinnati, refused to be considered for the position, Brewer might never have been appointed.

Governor Joseph Foraker of Ohio led the McDougall forces. McDougall, said Foraker, was not only the foremost lawyer of Cincinnati, but he was a man of good character and firm Republicanism. This fact was of primary importance to Foraker; he distinguished Democrats from Republicans by their views on constitutional provisions, and, he told Harrison, "you owe it to posterity to settle these questions as they should be settled." Foraker was proud of the
progress his candidate had made in the world. Starting as a penniless Scotch immigrant, McDougall had amassed at least $200,000 through his legal talents.

But apparently the primary objective of the Ohio candidates was to avoid Supreme Court positions rather than to get them. Foraker had repudiated the endorsement of the Cincinnati Lincoln Club for himself—"My chief ambition is to get rid of the office I have got"—and McDougall displayed the same lack of enthusiasm. Not only Foraker, but Congressmen McKinley, Butterfield, and other Ohio representatives as well as members of the bar and of the state legislature were ready to do their best to help McDougall. When a delegation of the Ohio legislature came to him to ask him to accept the position if it were offered him, McDougall told them that he would make no effort for the place and that he would only take it regretfully if the opportunity were given him.

He speedily repented of this concession, and ended by asking Harrison not to consider his name at all. He did not assume that Harrison was going to offer him the justiceship but, in the light of his backing, he thought it necessary to ask the President to turn his attention elsewhere. All his reasons were not disclosed, but he did reveal some of them. The pleasure of his private practice and his obligations to his children, perhaps financial, influenced his choice. McDougall felt himself torn between the wish to discharge whatever duties he owed his adopted country and the desire to continue his practice, and concluded that his best opportunity for "service under God" was in a continuation of his private life. The

Having failed in his first attempt because of the unwillingness of his candidate, Foraker selected as second choice a man to whom such reluctance would never have occurred. William Howard Taft would have sacrificed much to have been appointed to the Supreme Court. In 1889 Taft had been a judge of the Cincinnati Superior Court for three years, and although his experience as a municipal judge hardly qualified him to be a Supreme Court Justice, still Foraker thought he would fill the position well and that his appointment would delight Republicans as well as forestall Democrat criticism.

Foraker had exhausted his enthusiasm in endorsing McDougall,

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7 Pringle states that Harrison offered the position and McDougall refused it.
1 Pringle, The Life and Times of William Howard Taft (1939) 106.
8 "Foraker to Harrison, September 23, 1889."
and his recommendation of Taft, whom he disliked personally, was comparatively cool.\footnote{Five years earlier Foraker had threatened to slap Taft's mouth. For an account of the Taft-Foraker difficulties, see 1 Pringle, \textit{op. cit. supra} note 73, at 93.} Other Taft supporters, however, made up for the deficiency. Judge Hiram D. Peck, a colleague of Taft on the Superior Court, organized the Taft campaign thoroughly. Several Ohio lower court judges and Cincinnati attorneys, the head of a group of Connecticut newspapers, and the Philadelphia \textit{Press} joined in the movement. Although the Taft boom in 1889 did not achieve its immediate purpose,\footnote{According to Pringle, Taft did not really expect to be appointed. 1 Pringle, \textit{op. cit. supra} note 73, at 107.} it did begin a chain of events which led to the appointment of Taft to the Court thirty years later, for Harrison was sufficiently impressed to make Taft Solicitor General, the appointment which began his career in federal office.

The most diligent applicant for appointment in both 1889 and 1890 was Alfred Russell of Detroit. Russell was a practising lawyer who, except for his years as United States district attorney, 1861-69, had held no public office. In politics he was an active Republican; as a lawyer his chief retainers came from railroads; in 1889 he was counsel in Michigan for the Wabash Railway. Among the lawyers who had been trained in Russell's office was Henry B. Brown, with whom Russell contended for the 1889 and 1890 vacancies.

If Russell ever in later life mused on his failure to win a justiceship, he could not have blamed himself for lack of diligence. He presented the President with a neat collection, carefully indexed, of recommendations for himself, and he did his best to destroy Brown's political character by telling Harrison that Brown was supported by political enemies of the President.\footnote{Russell to Harrison, November 25, 1889.} Russell obtained recommendations from everyone he could find. Senator McMillan of Michigan and Vice-President Morton gave half-hearted endorsement in response to strong appeals.\footnote{"I have "suggested your name to the President." Morton to Russell, March 28, 1889.}

The Russells made the appointment of Alfred a family matter. It was brother William Russell of New Hampshire who cautiously\footnote{"Cautiously" because of such phrases as, "Alfred has more than ordinary native ability. ..." and "His appointment would be gratifying to the people of Michigan, whose entire delegation at Washington (he tells us) is a unit in his favor. ..." and Alfred Russell ... a man possessing a trained mind, a sound body, and a character above reproach." William Russell to Morton, April 1, 1889.} broached the question of endorsement to Morton. And Russell's
family associations in New Hampshire, where he was born, earned him the backing of Senator Henry Blair of that state. Dartmouth did its best for the "bright ornament of his Alma Mater" by submitting a petition containing that phrase signed by nine faculty members to the New Hampshire delegation asking their Congressmen to use their influence.

Russell had support from politicians, but his main advocates were railroad officials. William C. Goudy, assistant to Fuller during his fight for confirmation as Chief Justice, and general counsel of the Chicago and Northwestern Railway in 1889, recommended Russell. The President of the American Midland Railroad said that Russell was "an upright, conscientious man and has been for 20 years." Midland's president thought conditions were bad; his railroad had been put into receivership by a federal judge and he carried a grievance against the clan. He wanted Russell or a man "of his stamp" on the Court: "Fill that Court with railroad wreckers, politicians, or tricksters, and the time for revolution will have come." The General Solicitor of the Union Pacific also endorsed Russell.

George McCrary had the most distinguished record in public life of any of the judicial aspirants. McCrary had been a Republican Member of Congress from 1869 to 1877, when he became Secretary of War in the Hayes Cabinet. He was a United States circuit judge for four years, resigned to become general counsel for the Atchison, Topeka, and Santa Fe Railroad and took up his residence in Missouri. McCrary ran his own campaign for the appointment, writing to friends and asking them to inform the President of his qualifications. Senators Cockrell of Missouri, Cushman Davis of Minnesota, Charles B. Farwell of Illinois and George Vest of Missouri, were among his endorsers, and at least seventy letters were written in his behalf, including expressions of praise from the Missouri and Iowa Supreme Courts. McCrary was expressly opposed by Senator Plumb of Kansas, who almost demanded the appointment of Brewer.

Several other men had supporters for the 1889 and 1890 vacancies. They included Judge Eli S. Hammond, Tennessee federal district judge; John A. J. Creswell, Maryland Republican and Grant's Postmaster General; John N. Jewett, Chicago attorney; and John

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80 Russell endorsements came from Ben Butler; Senator W. D. Washburn of Minnesota; Alpheus Felch, a former Michigan Governor and Senator; members of the Michigan Republican central committee; and many judges.

81 William Thorpe to Harrison, December 2, 1889.
Spooner of Wisconsin. Cyrus Hines, a personal friend of Harrison, suggested that it was necessary to do something to keep the Southern Republican party from becoming wholly extinct, and that the Hammond appointment would help. Senator Philetus Sawyer of Wisconsin was a Creswell advocate. Jewett was the candidate of Rutherford B. Hayes, who thought that "the great Republican State of Illinois should not be cut off by a Democratic appointment."

Spooner was recommended because he had lost his office in the Republican defeat of 1890. Shortly after that election Senator W. B. Allison of Iowa wrote Harrison:

"We have had rather hard luck in the result. There are many things I greatly regret. The loss of Spooner is a bad one. I believe it would be a wise thing to appoint him to the Miller vacancy. He is strong as a lawyer and would live long enough to survive this present incumbency of the Bench.

There were at least twenty-four other hopefuls in 1889-90. With so many to choose from, Harrison had a difficult time. Fortunately for the eventual appointees, they too had aligned firm support. The strongest voice for Brewer was that of Senator Preston B. Plumb of Kansas. Brewer's own record as a jurist was of considerable help; he had been a member of the Kansas Supreme Court from 1870 to 1884, when he had become a judge of the Eighth Circuit.

Plumb weakened McCrary's position by telling Harrison that McCrary was able but indolent, and that "his appointment will not be satisfactory." Such words from senatorial lips amount to a declaration of war. Harrison knew that if McCrary were appointed, Plumb would fight bitterly against confirmation. As Plumb saw it, the

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82 Hammond was mentioned above as a Lamar supporter in 1887. Others who endorsed Hammond were the Governor of Tennessee, members of the Tennessee Supreme Court, the Alabama Supreme Court, and many judges and officeholders.

83 There are over fifty endorsements of Creswell in the files, including those of many Maryland politicians and several United States Senators.

84 Hayes to Harrison, March 20, 1889.

85 Allison to Harrison, November 12, 1890. Former Governor Lucius Fairchild of Wisconsin also supported Spooner.

86 The list of those for whom papers were found include Simeon Baldwin of Connecticut, President of the American Bar Association in 1890; Thomas M. Cooley; and Walter Q. Gresham. For a discussion of Gresham's unwillingness to appear to be asking favors of his political enemy, Harrison, and of Harrison's refusal to appoint Gresham, see 2 Gresham, Life of Walter Q. Gresham (1919) 619.

87 Brewer was a nephew of Justice Field, with whom he sat on the Court until Field's retirement in 1897.
principal reason for the appointment of McCrary would be that, by putting the patronage into the doubtful states, they might be carried for the Republicans in 1892. If such a result could be achieved, Plumb was willing to waive the patronage for Kansas, a sure Republican state. But Plumb thought that nothing would save Missouri, although “A judicious use of patronage might strengthen us in St. Louis, which we carried last time with the help of the saloon...” Having thus stated his views “concerning public affairs,” Plumb left the matter to the President.88

Albert H. Horton, Chief Justice of the Kansas Supreme Court, marshalled that body for Brewer. Horton told Harrison that because Brewer refused to allow his friends to make any overt attempt for his appointment, they were not presenting the state-wide indorsement which they could easily have arranged; but that any of the Congressmen or Senators of the state would be glad to add to Harrison’s information about Brewer’s “health, popularity, ability, judicial experience, etc.” Health was one of the factors most stressed by the Kansas court. Brewer would last for a long, long time.89

Among the many aspirants for the position, Brewer’s chief rival in President Harrison’s mind was Henry B. Brown of Michigan. Brown was a federal district judge for Michigan from 1875 until his appointment to the Supreme Court. His judicial reputation grew because of his disposition of admiralty cases. Brown had the Michigan political backing that Russell thought was his own. C. G. Luce, Governor of Michigan, used his full influence to aid Brown.90 Michigan’s secretary of state, the president of the Michigan Senate, and the mayor of Detroit added their praise.

As a result of the Russell rivalry, tales of disqualification were spread about Brown. Senator Francis Stockbridge of Michigan personally assured President Harrison that the rumors were unfounded, and obtained statements from Brown to refute each of them. The first rumor was that Brown had voted for Cleveland in 1884. To this Brown replied: “I have voted the Republican ticket, National and State, ever since I cast my first vote for Lincoln in 1861, without a single exception. I am undoubtedly a believer in civil service reform, but I voted for Mr. Blaine in 1884.”

88 Plumb to Harrison, October 7, 1889.
89 Horton to Harrison, October 10, 1889. The average term of Harrison’s other appointees was less than ten years. Another judge who supported Brewer was Isaac C. Parker, federal district judge for Arkansas.
90 Luce to Senator McMillan, April 25, 1889.
The second charge was that Brown had done nothing for the party while judge. Brown answered: “It is entirely true that I have taken no active part in politics since I have been upon the bench. I have not thought it becoming that a judge should be or seem to be a politician.”

The third charge was that Brown was “a states’ rights man.” Retorted Brown: “This is wholly without foundation. I am and always have been an uncompromising Federalist. Indeed I have had occasion to publish articles on this subject in which I took the strongest ground in favor of Federal authority.”

After lingering long over his choice between Brown and Brewer, President Harrison sent the name of Brewer to the Senate on December 4, 1889. With the exception of a twitter of discontent from the Women’s Christian Temperance Union of Pennsylvania, the nomination was well received. Brown wrote the President commending his choice:

I merely desired to assure you that while I felt a natural disappointment at coming (apparently) so near a nomination and yet failing to reach it, I have recognized fully the difficulties of your position . . . cheerfully acquiesce in your decision. Certainly if it were not offered to me, I know of no one whom I should have preferred to my old friend and classmate . . . . I should consider myself unworthy of his exalted position if I permitted any feeling of jealousy to stand between me and the promotion of so excellent a man.

December 9th, Brewer’s name was considered by the Judiciary Committee. The nomination was postponed one week on the motion of Senator Wilson of Iowa. On December 16th it was reported out and confirmation was granted December 18th by a vote of 53 to 11.

In 1890 a vacancy was caused by the death of Justice Miller. The Brown papers came before Harrison again and some new ones were added. Senator McMillan reminded the President of his promise to select Brown if any Michigan man were to be chosen, and assured Harrison that the choice would gratify the Michigan delegation. Howell T. Jackson, United States circuit judge for Tennessee and Harrison’s fourth appointee to the Supreme Court, recommended Brown for the Miller opening. Jackson thought Brown “the ablest judge in my circuit. . . . He has been reversed fewer times by the

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Stockbridge to Harrison, June 3, 1889.
Brown to Harrison, December 12, 1889.
Supreme Court during the same period of Judicial service than any Federal Judge in the United States."\(^3\)

December 23, 1890, Harrison sent the appointment of Brown to the Senate, and on the following day the Judiciary Committee asked the Michigan Senators for their approval and the Attorney General for any papers he might have. The Michigan Senators gladly gave their consent and the Attorney General replied that that he had no papers, whereupon December 29th the Committee reported favorably and the Senate confirmed.

**HARRISON APPOINTMENTS—SHIRAS AND JACKSON**

In the last years of Justice Bradley's term on the Bench his mind turned often to the choice of his successor. He collected information about potential appointees and studied it carefully to determine to whom he would turn over the mantle. Perhaps he intended to resign if Harrison would assure a satisfactory appointment; perhaps he only wanted to be of what assistance he could without attempting to dominate the selection. Justice Bradley died before he was ready to retire, but his memoranda to the Department of Justice may have had at least a negative influence on the presidential choice.

Richard W. Parker, who in 1892 had not yet begun his twenty-three years as a Republican Representative from New Jersey, informed President Harrison of a conversation between him and Bradley prior to the Justice's death. Between them, Parker and Bradley worked up a list of several possible New Jersey appointees. Jonathan Dixon of the New Jersey Supreme Court, Gilbert Collins, a former partner of Bradley, and several others were mentioned. Parker later suggested a few more possibilities\(^4\) to Bradley and after Bradley's death the whole correspondence was sent by Parker to Harrison and then to the Department of Justice.

Anyone who saw all the material in the Department of Justice must have enjoyed a smile at the expense of Parker, for Bradley had filed a memorandum with the Department expressly declaring that New Jersey had no one qualified for the Supreme Court—all were "out by age; my old classmate Cortlandt Parker is 73 last June 1,

\(^3\) Jackson to Harrison, November 20, 1890.

\(^4\) Edward T. Green of the New Jersey Supreme Court, Samuel H. Gray of Camden, and John W. Griggs of Paterson. There are 60 letters and petitions on file in behalf of Griggs.
Keasby, Dodd, Depue, McCarter are all nearing 70. . . . Along with the memorandum, Bradley submitted a letter from his old friend Judge Harding of Philadelphia. Harding discussed the possible Pennsylvania appointees. John G. Johnston refused to be considered—"He has a professional income of about 60 thousand dollars and loves luxury. . . ." George Tucker Bispham was thought well qualified. Robert N. Willson of the state district court would be "acceptable." Chief Justice Paxson of the Supreme Court of Pennsylvania had good political backing.96

George Shiras was another mentioned by Harding:97

George Shiras, Jr., is known to you. He is under 60, has a good reputation as a lawyer—he is not of as active mind as the others perhaps—I am informed slightly indolent; but I do not know this. His health may not be strong but if you desire, I will inquire further concerning this.

Cortlandt Parker, Bradley's old friend, had some Jerseymen to suggest. Besides those mentioned by R. W. Parker, there was Vice Chancellor Van Fleet and William J. Magie of the Supreme Court. Cortlandt Parker argued that New Jersey had had only two United States Supreme Court Justices in her history, Paterson and Bradley. As a matter of local pride he hoped that one of his suggestions would be taken.

Henry W. Williams of the Pennsylvania Supreme Court made a good campaign. Fourteen Pennsylvania Congressmen endorsed him; and Henry Clay Frick, coke and steel magnate who was shortly to arrange the execution of several Carnegie employees in the Homestead Strike, added words of high praise. Over a hundred letters and petitions, with the signatures of at least three hundred lawyers, came to the President in behalf of Williams.

George Shiras, however, was Harrison's choice. Shiras was a graduate of Yale Law School, and had gained his reputation entirely as a practising lawyer. He had the support of the ideal combination of forces—politicians, lawyers, churchmen, and industrialists. Senator McMillan of Michigan put in a good word; Senator Allison of Iowa reminded the President that Harrison had refused his request to advance Shiras' brother to a circuit judgeship and implied

96 Memorandum in Department of Justice files signed J. P. B. The memorandum concluded "I hope our Mem. will not be put in any files."
97 There were many endorsements for Willson and Paxson. Several hundred lawyers signed the latter's petitions.
98 Harding to Bradley, November 29, 1891.
that he ought to have his way about some Shiras and some court even if not the one he wanted.98 E. W. Seymour of the Connecticut Supreme Court, a former Yale classmate of Shiras, and Thomas Ewing of the Pennsylvania Court of Common Pleas also endorsed the Pennsylvanian.

Matthew Riddle, professor at the Western Theological Seminary, Allegheny, Pennsylvania; Thomas F. Davies, Michigan bishop; and James Allison, editor of the Presbyterian Banner, protested their faith in Shiras' capability. The inevitable railroad endorsement was forthcoming, this time from Chauncey Depew for the New York Central.99

A new industrial interest was represented in the endorsements and eventual selection of Shiras. Shiras' home was Pittsburgh, the center of the steel industry, and much of his work had involved representation of steel interests. The general manager of the American Iron and Steel Association, "in the name of the large and influential body of iron and steel manufacturers who constitute this Association," asked the appointment of Shiras. He assured Harrison that not only the Pennsylvania business men, but those in many other states "who know Mr. Shiras personally" would be gratified at the choice.100

On July 19, 1892, Shiras' name went to the Senate, and July 26th he was confirmed.101 As a result of the superannuation of New Jersey's eligibles and the lack of a first rate Pennsylvanian, and in deference to the unquestioned "principle" that either Pennsylvania or New Jersey must have a Justice, the man whose change of mind was to determine the unconstitutionality of the income tax went to the Bench.102

When Justice Lamar died in 1893 the Republican party had just suffered an overwhelming defeat at the polls. Hence there was some argument that Harrison could not appropriately fill the vacancy during his lame duck tenure and that the appointment should be held open for his successor, Cleveland. On the other hand, Republicans

98 Allison to Harrison, February 24, 1892.
99 Depew to Harrison, February 5, 1892.
100 James M. Swank to Harrison, March 1, 1892.
101 Warren refers to "strong opposition" to Shiras' confirmation, without adding any details. 2 Warren, The Supreme Court in United States History (1928) 719.
102 For a collection of references on this litigation, see 2 Warren, op. cit. supra note 101, at 699, 700.
felt that "the country is about to be plunged into a chaos of democratic misrule" and that to avoid anarchy the vacancy should be filled properly.103

Proposals to Harrison to save civilization by making an appointment were usually accompanied by the writer's suggestion as to the appointee. At least eighteen applicants appealed to Harrison, the most prominent of whom were Henry Clay Caldwell;104 Nathan Goff of West Virginia, former Secretary of the Navy, Congressman, and, in 1893, federal district judge; and Edward Green, who had also sought to be Bradley's successor.

Harrison solved the problem by compromise; he filled the vacancy without waiting for Cleveland, but he chose a Democrat. The choice was Howell Jackson of Tennessee, the federal circuit judge mentioned above for his endorsement of Brown. Republican officeholders in Tennessee vouched for his good character,105 and Harrison was convinced. The name was sent to the Senate February 2, 1893, and confirmed February 18th, just two weeks before Harrison's term expired. Since Democratic Senators could presumably have stalled off confirmation by filibustering, had they cared to, Jackson must be considered the choice of both parties. The appointment was of little importance as Jackson died in two years, and Cleveland named his successor.

CLEVELAND, MCKINLEY, AND THEODORE ROOSEVELT

The appointments of these three Presidents must be referred to only in passing. This is not because the appointments are unimportant or uninteresting, but because the records contribute nothing new on any of them. The papers bearing on appointments between 1894 and 1909 are apparently completely lost.

Cleveland found it no easier to fill Supreme Court vacancies in his second term than he had in his first. The only difference was that in his second term the opposition came from within his own party. When Justice Blatchford died in 1894, Cleveland's first choice for his successor was William B. Hornblower of New York. Hornblower, a New York attorney, had been prominent in the exposé by

103 F. H. Langworthy, agent for the National Transit Company, United Pipe Lines Division, to Harrison, January 24, 1893.
104 See first article in this series, (1941) Wis. L. Rev. 184, 189.
105 For example, Postmaster A. W. Wills of Nashville to Harrison, January 30, 1893, and Revenue Collector D. A. Numm of Nashville to Harrison, February 1, 1893.
the New York State Bar Association of the robbery of election records in New York by the state's assistant attorney general, Isaac Maynard. Maynard was a political tool of New York's Democratic boss, Senator David B. Hill, who was a bitter enemy of Cleveland. Hill determined that no person who had participated in the Maynard exposé would be confirmed by the Senate and, relying on senatorial courtesy, or the "principle" that no nomination will be confirmed over the objection of a Senator of the majority party from the state of the appointee, demanded rejection.

The appointment went to the Judiciary Committee on September 25, 1893, where it was postponed for two weeks. At the next four meetings of the Committee the appointment was laid over for the absence of a quorum, but after the regular session began in December it was discussed at four meetings. Finally, on January 8, 1894, the Committee authorized Senator Hill to report the nomination adversely and rejection followed shortly by a vote of 30 to 24.

Cleveland refused to give in, and sent to the Senate the name of Wheeler Hazard Peckham who had been president of the Bar Association at the time of the Maynard investigation and had appointed the committee of which Hornblower was a member. Hill won again, and Peckham was rejected. Frustrated twice, Cleveland gave up the attempt to name a New Yorker over Hill's opposition, and chose Senator Edward D. White of Louisiana who was immediately confirmed without reference to Committee.106

When Justice Jackson died in 1895, Cleveland was determined not to risk another defeat. He asked Hill in advance whether the appointment of Rufus W. Peckham, Wheeler Hazard's brother, would be acceptable, and when Hill, who had wanted this appointment from the beginning, consented, Cleveland made the appointment, and confirmation without opposition followed.

Justice Field ended his marathon during McKinley's administration, establishing a new record of thirty-four years and eight months on the Court. As his successor, McKinley chose Joseph McKenna of California who, after two special meetings of the Judiciary Committee, was confirmed on January 21, 1898.107

106 For a discussion of Cleveland's attempt to fill the Blatchford vacancy, see Nevins, op. cit. supra note 40, at 569-572.

107 According to Swisher, McKenna was made Attorney General with the understanding that Field would resign and give him the justiceship during McKinley's administration. Justice Brewer is said to have made the arrangements. Swisher, op. cit. supra note 41, at 444.
Theodore Roosevelt's first and greatest appointment was Oliver Wendell Holmes. Holmes was chosen to succeed Justice Gray, who had also been a Massachusetts Chief Justice at the time of his appointment; and the story of the Holmes appointment is so familiar as not to warrant repetition. Roosevelt's recent fright over the *Insular Cases* caused him to consider very seriously the need to appoint Justices who were in sympathy with "my policies." After receiving assurances from Senators Lodge and Hoar of Massachusetts that the appointment would be well received, the President made the selection, and there was no dispute over confirmation.

Roosevelt's other two appointments were William Rufus Day and William H. Moody. Day, who succeeded Shiras, was a close friend of McKinley. He was McKinley's legal advisor during the latter's years as Representative and Governor of Ohio and in 1897 he became Assistant Secretary of State. During the time that he was Secretary of State, Sherman's memory had been gradually failing, and in 1898 Day became Secretary. After acting as Peace Commissioner at the end of the Spanish-American War, he became a circuit judge, a position which he held until his advancement to the Supreme Court in 1903. Moody was one of Roosevelt's closest friends and most trusted advisers. He was a Representative from Massachusetts from 1895 to 1902 when he became Secretary of the Navy. In 1904 he was switched to Attorney General, and in 1906 he went to the Court.109

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108 Roosevelt wanted Taft to take this position but Taft, much as he desired to be on the Court, refused to leave his work as Governor of the Philippines. For correspondence showing Roosevelt's insistence and Taft's adamance, see 1 Pringle, *op. cit. supra* note 73, at 240-247.

110 The correspondence of Elihu Root reveals that he was offered the position before Moody, but that he refused to take it:

"There is nothing in the story about the Chief Justiceship. The President offered me the appointment as Associate Justice to which Moody was appointed, and I told him I was too old and would not take it. I am inclined to think that I should say the same thing about the Chief Justiceship. I shall never have occasion to, however, because Fuller will stay indefinitely, and, as Vest said about old Senator Morrill, they will have to shoot him on the day of judgment. He will cling to the Bench with his last expiring ray of intelligence, and when that is gone he will be like our old friend Sanford, incompetent to resign or retire."

From 2 Jessup, *Elihu Root* (1938) 126. Although Moody remained on the Court only three years, he is remembered as an outstanding Justice. For evidence of Professor (now Mr. Justice) Frankfurter's high regard for Moody, see Frankfurter, *Mr. Justice Brandeis and the Constitution* (1931) 45 Harv. L. Rev. 33, 35.

Holmes had high expectations of Moody at the time of the appointment.

1 *Holmes-Pollock Letters*, 137.
THE CONSERVATIVE INTERREGNUM—TAFT APPOINTMENTS

The greatest irony in the life of William Howard Taft was that he was able to give five people jobs that he coveted for himself, and then had to wait until near the end of his life to get the position toward which he aspired for thirty years. But while Taft could not appoint himself as a Supreme Court Justice, he could save the Constitution from progressives by appointing conservatives, and this, he said in 1910, in view of the “present agitation in respect to the Constitution,” was an opportunity of grave importance. Taft chose men who would “preserve the fundamental structure of our government as our fathers gave it to us.” As late as 1937 two of the Taft appointees, Van Devanter and, after a fourteen year vacation and to a lesser degree, Hughes, were still saving the people from themselves. And although the people might have resented their guardians, Taft would have beamed approvingly at them up to the moment of their capitulation.

Taft’s first appointment went to Horace H. Lurton, his former colleague on the Sixth Circuit. Lurton had 33 years of judicial experience plus Taft’s friendship at the time of his appointment, and the combination was sufficient. Lurton began his campaign for the Court during Roosevelt’s second administration, seeking the vacancy which Moody was appointed to fill. Although nominally a Democrat he sought to influence Roosevelt with recommendations from Southern Republicans, and it appears that Roosevelt at least considered rising above the demands of party.

Tennessee’s Republican gubernatorial candidate of 1906 assured Roosevelt that Lurton had been a “sound money Democrat,” opposing Bryanism, and that he was “safe and sound on all constitutional questions.” Other Southerners added praise for Lurton. A son of a Confederate veteran, in the classic manner of sons of Confederate veterans, appealed to the “great,” “good” and “guileless” heart of the President to appoint Lurton, “a great jurist, of simple life and purity of heart.”

Roosevelt resisted this prayer, and chose Moody; but when Peckham died in 1909, Lurton renewed his efforts for advancement. It

111 Pringle, op. cit. supra note 73, at 536.
112 Ibid.
113 H. Clay Evans to T. Roosevelt, October 11, 1906.
114 Wiley Jones, South McAlester, Indian Territory, to Roosevelt, October 22, 1906.
took little urging to induce Taft to make an appointment which gave him such pleasure. Only Lurton’s age, 66, caused him to hesitate. Hence he held the appointment for two months until friendship cast the balance against judgment.

Meanwhile, endorsements piled up. Friends of Taft, lawyers, judges, politicians, deluged the President with letters. Alex Humphrey, Louisville attorney, had spoken to Taft in praise of Lurton so often that when the great moment at last came “words fail me.” The judges of the Georgia Supreme Court, Kentucky Court of Appeals, the Tennessee Supreme Court, and Texas and Tennessee lower courts wrote and wired the President. Southern federal judges who knew Lurton well stressed the fact that his age should be no impediment. Judge Harrington, Lurton’s colleague on the Sixth Circuit, worked out a clever rationalization—the choice of Lurton would not really be an appointment, it would be a mere transfer from one federal bench to another and in such a case, Harrington claimed, the age limit was irrelevant. Henry H. Ingersoll, Lurton’s successor as dean of Vanderbilt Law School, provided a scholarly argument. He reminded Taft that Bismarck, Andrew Jackson, Moltke, Disraeli, and Goethe did their greatest deeds late in life, and suggested that Lurton was fit to follow their example.

The significance of the Lurton appointment lies, not in the fact that his friends thought well of him or that Taft’s choice marked the beginning of any unusually significant service on the Court, but in the nature of the opposition to the appointment. Organized labor made its first strong protest against a judicial selection in the case of Lurton. The labor movement had grown greatly in numbers and prestige during the Roosevelt administration and had learned to feel enmity toward the injunction judges of whom Taft himself was an excellent example. The Railway Conductors thought that Lurton was “biased” and “not of an open mind” on vital labor issues. The Firemen and Enginemen’s Brotherhood thought Lurton’s “past record is such that working people fear to trust their cases with

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1Taft was greatly incensed because several of the Justices, too old to do their share, refused to resign. “It is an outrage that the four men on the bench who are over seventy should continue there and thus throw the work and responsibility on the other five.” Taft to Lodge, 1 Pringle, op. cit. supra note 73, at 530. Pringle has an excellent discussion of the Lurton and Hughes appointments and the White promotion. 1 Pringle, op. cit., at 529-537.

2Humphrey to Taft, October 28, 1909.

3A. B. Garretson, president, Order of Railway Conductors, to Taft, December 9, 1909.
him."\(^{118}\) The Railroad Telegraphers had no sophisticated argument, but said, "We know from experience that matters have not been going right for the working people in the Sixth Circuit where Judge Lurton has been presiding. . . ."\(^{119}\) Samuel Gompers added his criticism.\(^{120}\)

Such words carried no weight with President Taft. Lurton was liberal enough for him. The labor protest came to nothing but through the subsequent years their wishes have come to be of weight in the choice, or even, as in Parker's case, the rejection of a Justice. Labor's own "Supreme Court consciousness" has been alive since 1909.

When Taft's indecision as to whether the Lurton appointment would be as great a blessing to the country as it was a joy to him came to an end,\(^{121}\) he received applause from many sources.\(^{122}\) Edward T. Sanford, himself a federal judge who fifteen years later went to the Supreme Court, thought the choice the most fitting that could have been made. The Judiciary Committee promptly gave its consent and Lurton was confirmed by the Senate, December 20, 1909.

Taft's next choice was his only appointment which went to a man without judicial experience. Upon the death of Brewer in 1910, Taft offered his position to Charles Evans Hughes, then Governor of New York, with a broad hint that advancement to the chief justiceship might be forthcoming.\(^{123}\) When the Judiciary Committee met to discuss the nomination, Chairman Clark of Wyoming laid the name before the Committee "stating that all members of the

\(^{118}\) W. S. Carter to Taft, December 13, 1909.

\(^{119}\) H. B. Peckham, chairman, Railroad Employees Department, AFL, to Taft, December 17, 1909.

\(^{120}\) Pringle, \textit{op. cit. supra} note 73, at 531. \textit{Cf.} Roosevelt's estimate of Lurton: "He is right on the negro question; he is right on the power of the Federal Government; he is right on the insular business; he is right about corporations; and he is right about labor."\(^{2}\) Lodge, \textit{op. cit. supra} note 102, at 228.

\(^{121}\) See 1 Pringle, \textit{op. cit. supra} note 73, at 531, for an account of Taft's mental struggle.

\(^{122}\) Congratulations too often meant pomposity, as \textit{e.g.}, this letter from a solicitor for the Southern Railway:

"I am confident that in your administration of eight years, no more illustrious action will be had than the elevation of Lurton to the Supreme Bench. I did not send him the usual formality of congratulation, because that simply means a bow of the head; but I said to him by wire: 'I have been continuously on the watch tower, and have seen the President manage this campaign with ardent devotion and consummate tact.'"

W. A. Henderson to Taft, December 21, 1909.

\(^{123}\) 1 Pringle, \textit{op. cit. supra} note 73, at 532.
Committee knew the record of the nominee." Senator Bacon of Georgia moved that the nomination be laid over to a subsequent meeting but was voted down. On motion of Senator Clarke of Arkansas the Committee approved the nomination and the Senate confirmed on the same day.

When Fuller died in 1910, several years too late to suit Taft, Associate Justice White rather than Hughes was elevated to the chief justiceship. Elihu Root probably would have been appointed had he not been considered too old. His associates on the Court, and Theodore Roosevelt, preferred White to Hughes. The Senate confirmed the advancement on the day it received the nomination, December 12, 1910.

While he was considering a successor for Fuller, Taft had also to fill the vacancy caused by the resignation of Justice Moody. For this post he chose Willis Van Devanter, a reliable conservative from Wyoming who had been assistant Attorney General, 1897-1903, and was a United States circuit judge from 1903 until his advancement to the Court. Van Devanter was appointed the same day as White and was confirmed three days later.

Lurton, White, Hughes, and Van Devanter—it was no wonder that when Taft had to choose a successor to White he was hard pressed to find another man. He had run out of first-rate ideas, and in the absence of a grab bag from which he could choose at random, it was necessary to assign to Attorney General Wickersham the task of hunting up someone to take the job.

Perhaps Taft spoke to Wickersham of Joseph Lamar, whom he had met casually in Augusta, Georgia. Or perhaps Archie Butt, a native of Augusta, used his position as presidential aide to make the suggestion. Butt knew the Lamar family and was aware that Lamar was known primarily as a corporation and railroad lawyer and that he was thought by some Georgians to "hold the confidence of the people." Whatever the source of Wickersham’s information, he had a hazy notion that somewhere in Georgia there was a man named

124 Judiciary Committee, Executive Docket, May 2, 1910.
125 Pringle, op. cit. supra note 73, at 530.
126 Id. at 533; and 2 Jessup, op. cit. supra note 110, at 126.
127 1 Pringle, op. cit. supra note 73, at 534, 535. For evidence of Holmes' preference for White, see 1 Holmes-Pollock Letters, at 170.
128 P. A. Stovall, president of the Savannah Press, to Butt, August 6, 1910.
Lamar who had a fair reputation as a lawyer.\textsuperscript{129} The Attorney General wasn't sure just where in Georgia Lamar might be located, but he started fishing for information. His first request went to W. G. Raoul of Atlanta: "Can you tell me anything about a Mr. Lamar, member of the Bar of your City? I understand that he is well thought of and a man of prominence."\textsuperscript{130} Raoul, a little surprised, wrote back that close search revealed no Lamar in Atlanta, but that there was one in Augusta who might serve Wickersham's purpose.\textsuperscript{131}

What Wickersham discovered about Lamar in October and November, 1910, interested but did not completely convince him. All through the first week in December he kept up his correspondence with Southern friends who could add their judgments of the man. He learned that Lamar had been a member of the Georgia state legislature, that he was a Democrat, and that he had been on the Georgia Supreme Court from 1904 to 1906. In response to Wickersham's requests, Georgia lawyers reported that they respected Lamar and considered him well qualified. "I have repeatedly said in times past that if I were called upon to name the two best lawyers in Georgia, I would unhesitatingly name Judge Lamar as one of the two," said Attorney Sam Adams of Savannah.\textsuperscript{132}

Wickersham telegraphed Alexander R. Lawton, distinguished Georgia railroad counsel and scholar of sorts, asking his estimate of Lamar.\textsuperscript{133} While the telegram was going South, Lawton was on his way to see Taft to recommend Lamar, and he did not discover that his opinion was being officially requested until Taft told him so. Lawton was unequivocally for Lamar—"There is no man in the United States who is a better lawyer or who would make a finer Justice of the\textsuperscript{134}

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\textsuperscript{129} Perhaps when Wickersham began to investigate Lamar he was considering him as a possible judge for the Commerce Court. October 5, 1910, Wickersham wrote to James Byrne of New York: "I want to find out something about the professional standing and ability of Joseph Lamar, of Augusta, Georgia, especially whether he would be good material for the Commerce Court. I think you can find out confidentially from Lawton, or from some other of your correspondents at the South. I would appreciate any information you can get for me."

Byrne, a prominent New York lawyer and legal writer, replied that Lamar "was considered, on the whole, about the best lawyer in Georgia." Byrne to Wickersham ("Dear George"), October 7, 1910.

\textsuperscript{130} Wickersham to Raoul, September 30, 1910.

\textsuperscript{131} Raoul to Wickersham, October 3, 1910.

\textsuperscript{132} Adams to Wickersham, December 7, 1910. Adams did not indicate who he thought was the best lawyer in Georgia.

\textsuperscript{133} Lawton was a member of several political science and historical societies.
Supreme Court." Wickersham told him that his words would "certainly carry great weight with the President."

A Georgia lawyer who was called to Washington to consult with Wickersham was Alexander C. King of Atlanta. King was in the midst of a long career as railroad counsel during which he had advised the Atlanta and Western Railroad and the East and West Railroad of Alabama, among others. As late as Saturday, December 10, 1910, when Taft and Wickersham were still undecided, King called on the Attorney General and made a strong argument in behalf of Lamar.

Thus in the short period from October to December, 1910, Lamar progressed in Wickersham's and Taft's esteem from a position of complete obscurity to the rank of Supreme Court material. This change of view arose not only from the advice of those to whom Wickersham turned, but from the advice of those who sent their opinions unsolicited. Augusta's sheriff, the president of the Augusta Bar Association, and the Governor of Ohio asked Taft to appoint Lamar. Georgia Congressmen and judges as well as Georgia railroad magnates expressed their enthusiasm. At last Taft was convinced. Two days after King's call on Wickersham, the names of White, Van Devanter, and Lamar were sent to the Senate. The Judiciary Committee gave Senator Bacon of Georgia the privilege of reporting out Lamar and on December 15, three days after their appointments, Lamar and Van Devanter were confirmed.

Thus began the judicial career of Joseph Rucker Lamar, the choice of a President who had run out of ideas.

October 11, 1914, John M. Harlan, the last Nineteenth Century

183 Lawton to Wickersham, December 7, 1910.
184 Wickersham to Lawton, December 8, 1910.
186 "Judge Lamar is a great big headed man; a great big lawyer and would be a great big judge." J. C. C. Black of Bar Association to Taft, December 10, 1910.
187 "I do not know of any language that is too strong to use in my commendation of Judge Lamar. . . . " J. F. Hanson, Central of Georgia Railway Company to Taft, December 10, 1910.
188 Lamar's biography indicates that he had some fears that the Senate might refuse confirmation because of his railroad associations. Clarinda Pendleton Lamar, Life of Joseph R. Lamar (1926) 166. This book, an amazingly unsophisticated collection of pleasant anecdotes, has nothing of significance to add to the story of Lamar's confirmation except this statement, made after the appointment by Lamar: "I had a singular dream the other night; I dreamed that the President had appointed me to the Supreme Court of the United States." Id. at 168. It was such a pleasant surprise!
liberal on the Court, died. Taft kept up his record for conservatism by appointing as his successor Mahlon Pitney, New Jersey Chancellor. Pitney had been suggested by Senator Frelinghuysen of New Jersey for the chief justiceship, but Taft satisfied the Jersey delegation with his choice in 1912. Some friends of Wickersham were hesitant in expressing congratulations—"there is undoubtedly a little tendency to radicalism of view upon economic questions"—but the nomination was confirmed without open dissent.

In 1918 the Supreme Court held in *Hammer v. Dagenhart* that the federal government could not prevent the transportation of goods in interstate commerce when produced by child labor. The Court divided, 5 to 4, Holmes, McKenna, Brandeis, and Clarke dissenting. The majority was composed of Day, McReynolds, and the three Taft appointees still on the Court—White, Van Devanter, and Pitney. William Howard Taft knew how to pick conservatives!

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140 1858-1924; Republican Member of Congress from New Jersey, 1894-1898; state senator, 1898-1901; state Supreme Court, 1901-1908; Chancellor, 1908-1912.

141 Signature undecipherable; written from 54 Wall Street, New York, by a friend sufficiently intimate to discuss private business in the same letter to "My dear Wickersham," February 20, 1912.

142 247 U.S. 251 (1918).