

University of Pennsylvania Law Review

FOUNDED 1852

Formerly
American Law Register

VOL. 105

APRIL, 1957

No. 6

THE SUPREME COURT IN THE MIRROR OF JUSTICES*

Felix Frankfurter †

"Let us now praise famous men" was not an exhortation for a gesture of pietistic generosity, the placing of verbal flowers on the graves of famous men. It is for our sake that we are to praise them, for, as Ecclesiasticus added, they have given us an "inheritance." We commune with them to enlighten our understanding of the significance of life, to refine our faculties as assayers of values, to fortify our will in pursuing worthy ends. The qualities of mind and character of Owen Roberts and the uses to which he put them summon us to a better appreciation of the good life and a steadier devotion to it. This law school, which so proudly knew him as student, teacher and dean, and from which he drew such strength throughout his life, fittingly commemorates him in the mode that would have pleased him most. And so, I am more deeply grateful than I can put into words for your generosity in allowing me to inaugurate this Lectureship and to salute my friend and brother, Mr. Justice Roberts, howsoever inadequate the manner of doing it.

The last thing that Justice Roberts would want is that this Lectureship should be turned into a laudatory exercise. Nothing would that exquisitely modest man deplore more. But in opening this Owen J. Roberts Lecture series what is more natural than to turn our

*Address given as the First Owen J. Roberts Memorial Lecture at the University of Pennsylvania Law School, Philadelphia, March 20, 1957.

†Associate Justice, United States Supreme Court.

thoughts to the institution to which, by the very nature of the problems that are its concerns, he gave his deepest reflection. While Justice Roberts suggests my general theme, it has, for one in my place, almost forbidding difficulties. If I hug the shore of safety, I shall go very little beyond a snug harbor. If I set out as a privateer I would quickly be out of bounds, heedless of the course that it is my first duty to observe, above all to observe on an occasion dedicated to the example of Justice Roberts's character. I am temerarious enough to believe that I can clear the horns of this menacing dilemma. At all events, I shall attempt to escape offering you the jejune product of timid discretion and yet speak only of things this side of indiscretion. My justification for saying what I feel free to say rests on the observation of that least conventionally minded intellect in the Court's history, Mr. Justice Holmes, when he said, in a different context more than forty years ago what is equally applicable today, "at this time we need education in the obvious more than investigation of the obscure," and, may I add, disclosure of the private.

To so learned a legal audience, I need hardly confess that my title is a plagiarism. Unlike the author of the famous, or should I say notorious, *The Mirror of Justices*, I do not shrink from responsibility for what I have written, partly at least because I have labored to avoid his unreliability. And my motive, if I know it, is the antithesis of that thirteenth century author, Andrew Horn, if it was Andrew Horn. He wrote to expose the judges of his day but also, romancer that he was, so Maitland tells us, to amuse his readers. My purpose is to attest my devotion to an institution for which I have a feeling akin to reverence and to do so, as becomes an old teacher, by contributing to whatever small extent to a better understanding of the nature of its functions and of the qualifications for their exercise.

During the one hundred and sixty-seven years since the day appointed for its first session, ninety Justices have sat on the Supreme Court. The number of men over so long a period would seem to be sufficient to afford some light on the kind of experience or qualifications that may be deemed appropriate for service on the Court. Indeed, the actualities about the men who were appointed to the Court may well be wiser guides than abstract notions about the kind of men who should be named. Of the ninety Justices I shall consider seventy-five, omitting contemporary and relatively recent occupants of the Court. And my concern is not with the substantive views of these Justices—neither their conception of the nature of the judicial process generally nor of that process in the specialized context of Supreme Court business. I am dealing with externally ascertainable factors. One of these has

been intermittently urged and, in recent years, revived in an extreme form. I refer to the suggestion, indeed the assumption that, since the Supreme Court is the highest judicial tribunal, prior "judicial service" is not only a desirable, but an indispensable, qualification.

What is the teaching of history on this? Of the seventy-five Justices, twenty-eight had not a day's prior judicial service. Seven more had sat on some bench from a few months to not more than two years. Nine sat six years or less. Measures have been proposed that would require "judicial service" of not less than five years in a lower federal court or as a member of the highest court of a State; some bills demand ten years of such service. A five-year requirement would have ruled out at least thirty-five of the seventy-five judges (in fact more, because several of the Justices who had had judicial experience did not sit on a federal bench or on the highest court of a State), and the ten-year requirement would have barred certainly forty-five of our seventy-five Justices.

Who were these Justices who came on the Supreme Court without any "judicial service," without even the judicial experience of an Iredell, who at the age of twenty-six sat on the Superior Court of his State, North Carolina, only long enough—six months—to resign.¹ They begin with your own James Wilson and include Bushrod Washington, Marshall, Story, Taney, Curtis, Campbell, Miller, Chase, Bradley, Waite, Fuller, Moody, Hughes, Brandeis, Stone and Roberts. Of the twelve Chief Justices within our period, five had not had any judicial experience at the time of their appointment as Chief Justice and two more had had none when they first came on the Court.

Apart from the significance of a Chief Justice as the administrative head of the Court² what of the quality of judicial service of the men who came on the Court totally devoid of judicial experience? Assessment of distinction in the realm of the mind and spirit cannot exclude subjective factors. Yet it is as true of judges as of poets or philosophers that whatever may be the fluctuations in what is called the verdict of history, varying and conflicting views finally come to rest and there arises a consensus of informed judgment. It would indeed be a surprising judgment that would exclude Marshall, William Johnson, Story, Taney, Miller, Field, Bradley, White (despite his question-begging verbiages), Holmes, Hughes, Brandeis and Cardozo in the roster of distinction among our seventy-five. I myself would add Curtis, Campbell, Matthews and Moody. (Some might prefer the first Harlan or Brewer or Brown.) Of the first twelve, five had had

1. 1 McREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 367, 395 (1857).

2. See KING, *MELVILLE WESTON FULLER* 334-35 (1950) (statement by Mr. Justice Holmes).

judicial experience and seven none before coming on the Court; of the others only Matthews can be counted a judge, for a brief period, before he came to Washington. Of the sixteen Justices whom I deem pre-eminent, only six came to the Court with previous judicial experience, however limited. It would require discernment more than daring, it would demand complete indifference to the elusive and intractable factors in tracking down causes, in short, it would be capricious, to attribute acknowledged greatness in the Court's history either to the fact that a Justice had had judicial experience or that he had been without it.

Greatness in the law is not a standardized quality, nor are the elements that combine to attain it. To speak only of Justices near enough to one's own time, greatness may manifest itself through the power of penetrating analysis exerted by a trenchant mind, as in the case of Bradley; it may be due to persistence in a point of view forcefully expressed over a long judicial stretch, as shown by Field; it may derive from a coherent judicial philosophy, expressed with pungency and brilliance, reinforced by the *Zeitgeist*, which in good part was itself a reflection of that philosophy, as was true of Holmes; it may be achieved by the resourceful deployment of vast experience and an originating mind, as illustrated by Brandeis; it may result from the influence of a singularly endearing personality in the service of sweet reason, as Cardozo proves; it may come through the kind of vigor that exerts moral authority over others, as embodied in Hughes.

The roll-call of pre-eminent members of the Supreme Court who had had no judicial experience in itself establishes, one would suppose, that judicial experience is not a prerequisite for that Court. It would be hard to gainsay that this galaxy outshines even the distinguished group that came to the Court with prior experience on state courts, though these judges included the great names of Holmes and Cardozo. It has been suggested that the appearance on the Court of Marshall, Story, Taney, Curtis, Campbell, Miller, Bradley, Hughes and Brandeis, all without prior judicial experience, is "a curious accident." But this accident has been thrown up by history over a period of one hundred and fifty years. After all, these men were not self-appointed. They must have been found by, or suggested to, the various and very different Presidents who named them. In at least one instance a lawyer without prior judicial experience was urged on a President by the Court itself—John A. Campbell, whose prior judicial experience was his refusal, twice, to go on the Supreme Court of Alabama.³ (It would indeed be interesting to ascertain what men

3. CONNOR, JOHN A. CAMPBELL 16-17 (1920); 87 U.S. (20 Wall.) ix (1873).

were recommended for appointment when the Executive invited suggestions from the Court.)

The notion that prior judicial experience is a prerequisite for the Supreme Court, whether made a formal statutory requirement or acted upon as an accepted assumption, deserves closer scrutiny than its *ad hominem* refutation. Apart from meaning that a man had sat on some court for some time, "judicial service" tells nothing that is relevant about the qualifications for the functions exercised by the Supreme Court. While it seems to carry meaning, it misleads. To an uncritical mind it carries emanations of relevance in that it implies that a man who sat on a lower court has qualifications for sitting on a higher court, or, conversely, that a man has not the qualifications for sitting on a higher court unless he has had the experience of having sat on a lower court, just as a man presumably cannot run a mile in less than four minutes unless he had already run it in six, or a player has not the aptitude or experience for a major league unless he has played in a minor league.

Need I say that judicial experience is not like that at all? For someone to have been a judge on some court for some time, having some kind of business resulting in some kind of experience, may have some abstract relation to the Supreme Court conceived of as an abstract judicial tribunal. The Supreme Court is a very special kind of court. "Judicial service" as such has no significant relation to the kinds of litigation that come before the Supreme Court, to the types of issues they raise, to qualities that these actualities require for wise decision.

To begin with, one must consider the differences in the staple business of different courts and the different experiences to which different judicial business gives rise, and the bearing of different experiences so generated on the demands of the business of the Supreme Court. Thus, there is a vital difference, so far as substantive training is afforded, between the experience gained on state courts and on the lower federal courts. There are the so-called federal specialties whose importance for the Supreme Court has copiously receded since the Evarts Act of 1891,⁴ but is still relevant to its work. One would suppose that if prior judicial experience would especially commend itself for Supreme Court appointments, the federal courts would furnish most materials for promotion. History falsifies such expectation. Of the forty-seven Justices who had had some kind of prior judicial experience, no matter how short, fifteen came from the federal courts—Trimble, Barbour, Daniel, Woods; Blatchford, Brewer, Brown, Howell E.

4. Act of March 3, 1891, c. 517, 26 STAT. 826 (codified in scattered sections of 28 U.S.C.).

Jackson, McKenna, Day, Lurton, Taft, Sanford, Van Devanter and John H. Clarke—whereas thirty-two had only experience on state courts.

How meagerly the experience on a state court, even if of long duration, prepares one for work on the Supreme Court is strikingly borne out by the testimony of the two Justices who are indubitably the two most outstanding of those who came to the Supreme Court from state courts. After having spent twenty years on the Supreme Judicial Court of Massachusetts, part of it as Chief Justice, in the course of which he wrote more than a thousand opinions on every conceivable subject, Mr. Justice Holmes found himself not at all at home on coming to the Supreme Court. Listen to what he wrote to his friend Pollock after a month in his new judicial habitat:

“Yes—here I am—and more absorbed, interested and impressed than ever I had dreamed I might be. The work of the past seems a finished book—locked up far away, and a new and solemn volume opens. The variety and novelty to me of the questions, the remote spaces from which they come, the amount of work they require, all help the effect. I have written on the constitutionality of part of the Constitution of California, on the powers of the Railroad Commissioners of Arkansas, on the question whether a law of Wisconsin impairs the obligation of the plaintiff’s contract. I have to consider a question between a grant of the U. S. in aid of a military road and an Indian reservation on the Pacific coast. I have heard conflicting mining claims in Arizona and whether a granite quarry is ‘Minerals’ within an exception in a Railway land grant and fifty other things as remote from each other as these.”⁵

Nor did Cardozo, after eighteen years on the New York Court of Appeals, five of them as Chief Judge, in the course of which he gained the acclaim of the whole common-law world, find that his transplantation from Albany to Washington was a natural step in judicial progression. On more than one occasion he complained to friends (sometimes as bitterly as that gentle soul could) that he should not have been taken from judicial labors with which he was familiar and which were congenial to him, to types of controversies to which his past experience bore little relation and to which, though these were the main concern of the Supreme Court, he was not especially drawn.

To be sure, by the time that Holmes and Cardozo came to the Supreme Bench, the heavy stream of commercial and common-law litigation that reached the Supreme Court in its earlier periods had been

5. 1 HOLMES-POLLOCK LETTERS 109-10 (Howe ed. 1941).

diverted to the courts of appeals and largely stopped there. But even when a good deal of the business of the Court consisted of litigation related to what loosely may be called common-law litigation, the transition from a state court to the Supreme Court was not in a straight line of experience. Thus, although on the bench in Connecticut Ellsworth's opinions sustained "his reputation as a good lawyer and a just and able judge"⁶ and in the Senate he had been the chief architect of the First Judiciary Act, on his appointment by Washington as Chief Justice, he "undertook a severe course of study and reading."⁷ And when Monroe offered a place on the Court to his Secretary of the Navy, Smith Thompson, who had been a New York judge for seventeen years and for nearly five Kent's successor as Chief Justice, Thompson hesitated to accept, in part because of his lack of judicial experience outside the common law.⁸

But, it may be suggested, if experience on a state court does not adequately prepare even the greatest of judges for the problems that are the main and certainly the most important business of the Supreme Court, judicial experience intrinsically fosters certain habits of mind and attitudes, serves to train the faculties of detachment, begets habits of aloofness from daily influences, in short, educates and reinforces those moral qualities—disinterestedness and deep humility—which are indeed preconditions for the wise exercise of the judicial function on the Supreme Bench. Unhappily, history again disappoints such expectation. What is more inimical for good work on the Court than for a Justice to cherish political, and more particularly Presidential, ambition? Who will disagree with Mr. Justice Holmes's observation, "I think a judge should extinguish such thoughts when he goes on the Bench."⁹ Sad and strange as it may be, the most numerous and in many ways the worst offenders in this regard have been men who came to the Court from state courts, in some instances with long service on such courts. Their temperamental partisanship and ambition were stronger than the disciplining sway supposedly exercised by the judiciary. To be sure, there have been instances of such political ambition by those who came on the Court without judicial experience. Salmon P. Chase, of course, is a conspicuous example. But I think it is fair to say that fewer Justices who had had no prior judicial experience dallied with political ambition while on the Court than those who came there with it. And it deserves to be noted that the

6. BROWN, *THE LIFE OF OLIVER ELLSWORTH* 109 (1905).

7. *Id.* at 242.

8. 18 *DICTIONARY OF AMERICAN BIOGRAPHY* 472 (Malone ed. 1936).

9. 1 *HOLMES-POLLOCK LETTERS* 192 (Howe ed. 1941).

most vigorous, indeed aggressive hostility to availability of a member of the Court for a Presidential nomination came from one who had no prior judicial experience, Chief Justice Waite,¹⁰ and from another whose name ought not to go unmentioned on this occasion—Mr. Justice Roberts.

Even though the history of the Court may demonstrate that judicial experience whether on state or federal bench ought not to be deemed a prerequisite, what of the lower courts as a training ground for the Supreme Bench? The fact is that not one so trained emerges over a century and a half among the few towering figures of the Court. Oblivion has overtaken almost all of them. Probably the most intellectually powerful of the lot, Mr. Justice Brewer, does not owe the weight of the strength that he exerted on the Court to his five years on the circuit court after his long service on Kansas courts. Surely it is safe to attribute it to the native endowment that the famous Field strain gave him. Mr. Justice Van Devanter was undoubtedly a very influential member of the so-called Taft Court. But he was that essentially on the procedural aspect of the Court's business and by virtue of the extent to which Chief Justice Taft leaned on him. It was characteristic of Taft's genial candor that he spoke of Van Devanter outside the purlieus of the Supreme Court as "my chancellor."

One is not unappreciative of Chief Justice Taft by saying that his significance in the Court's history is not that of an intellectual leader but as the effective force in modernizing the federal judiciary and in promoting jurisdictional changes to enable the Court to be capable of discharging its role in our federal scheme. Moreover, it was not Taft's eight years of service on the Sixth Circuit, highly esteemed as it was, that led President Harding to make him Chief Justice White's successor after Taft's twenty years of separation from active concern with law. Taft's situation reminds of the Hamilton Fish incident. That very able man declined President Grant's offer of the Chief Justiceship, believing that his knowledge of the law had become stale and his feeling for it rusty, having for long been unexercised. "I insisted that I could not accept it; that it was upwards of twenty years since I had had any connection with the bar or practise, and I had no familiarity now with the proceedings of the courts. . . ." ¹¹ It was of course true of Fish as it was of Taft that his unusual experience in public affairs informed his understanding, even if not in their legal aspects, of problems that reach the Supreme Court. But in Taft's

10. TRIMBLE, CHIEF JUSTICE WAITE: DEFENDER OF THE PUBLIC INTEREST 141 (1938).

11. NEVINS, HAMILTON FISH 661 (1936).

case, after his political career was over, he must have renewed his familiarity with legal problems as Kent Professor at the Yale Law School, light as were his duties there.

More immediately relevant to our subject is the fact that even Justices who have come to the Supreme Court fresh from a longish and conspicuously competent tenure on the lower federal courts do not find the demands of their new task familiar. Their lower court experience does not make the transition an easy one. Thus Phillip Barbour, despite the deserved reputation that he brought to the Supreme Court from his years on the United States district court, felt it necessary to fit himself by "conscientious study" for his duties on the Supreme Court.¹² A recent striking example of how hard the sledding can be for a judge who also made an exceptional record over long years on the district court and was an uncommonly cultivated man, was Mr. Justice Sanford. Thus it has been as true of capable Justices who came to Washington from lower federal courts as of those who came to the Court richly endowed but without judicial experience, that they actively set about educating themselves for the work of the Court and were educated by it.

Mr. Justice Moody, who had had exceptional preparation for the Court's work as lawyer, legislator, and member of the Cabinet, including forensic activity as Attorney General, on his appointment to the Court turned to his classmate, Professor Eugene Wambaugh of the Harvard Law School, for guidance in the study of constitutional law and the jurisdiction of the Supreme Court as eagerly as any avid neophyte. Again, Mr. Justice Brandeis who brought not only as well-stocked a mind for the substantive issues with which he had to deal as a Justice as any member of the Court but also a reputation second to none as an advocate before it, used to say that no one can have the right kind of feel regarding the distinctive jurisdictional and procedural problems touching the Court's business in less than three or four Terms of actual service on the Court. He set about to acquire mastery of this essential aspect of the Court's business by studying the Reports, from Dallas down. Nor did he limit his systematic study of the Court's business to these aspects. Thus, he spent one whole summer in familiarizing himself with all the decisions of the Court pertaining to criminal law. These modern instances are recognition of the truth discerned from the beginning of the Court, that membership on it involves functions and calls for faculties as different from those called for by other judicial positions as those called for by private practice or non-judicial public service.

12. 1 DICTIONARY OF AMERICAN BIOGRAPHY 596 (Johnson ed. 1928).

In response to an inquiry by the House of Representatives into the federal judicial system that had just been set up, Attorney General Edmund Randolph, addressing himself more particularly to the undesirability of the circuit duties with which the Justices were charged, wrote the following:

“Those who pronounce the law of the land without appeal, ought to be pre-eminent in most endowments of the mind. Survey the functions of a judge of the Supreme Court. He must be a master of the common law in all its divisions, a chancellor, a civilian, a federal jurist, and skilled in the laws of each State. To expect that in future times this assemblage of talents will be ready, without further study, for the national service, is to confide too largely in the public fortune. Most vacancies on the bench will be supplied by professional men, who, perhaps, have been too much animated by the contentions of the bar deliberately to explore this extensive range of science. In a great measure, then, the supreme judges will form themselves after their nomination. But what leisure remains from their itinerant dispensation of justice? Sum up all the fragments of their time, hold their fatigue at naught, and let them bid adieu to all domestic concerns, still the average term of a life, already advanced, will be too short for any important proficiency.”¹³

Circuit-riding ceased long before members of the Court were statutorily relieved of it, and the establishment of the circuit courts of appeals in 1891 freed the Court of the vast mass of what roughly may be called private litigation that used to come to it by way of diversity jurisdiction and the federal specialties. And the Judiciary Act of 1925¹⁴ has made the Court the master of its docket so that it now may be free to concern itself only with cases that have a substantial public interest. Yet it is still true today as it was when Randolph wrote in 1790 that “in a great measure . . . the supreme judges will form themselves after their nomination.” This is true as we have seen even of men of the highest capacity, men who had had wide professional experience with the federal courts before they came on the Supreme Court as well as of judges with long service on the federal bench.

In addition to all other considerations, this is so because the practical workings of the Supreme Court, not only in our governmental scheme but in the influences it exerts on our national life, to no small extent are determined by the effective administration of the appellate

13. 1 AMERICAN STATE PAPERS 23-24 (1834) (report of the Attorney General on the judiciary system, read in the House of Representatives, Dec. 31, 1790).

14. Act of Feb. 13, 1925, c. 229, § 237, 43 STAT. 937.

jurisdiction allotted to the Court, the manner in which it conceives what issues are open on review, and how it deals with them—raising not only unique problems in the wise articulation of its jurisdiction with that of the lower federal courts and the state courts but often involving perplexities in the successful operation of our federal system. These are subtle matters carrying deep implications that do not lie on the surface. Partly because of their seemingly technical nature and partly because they have few dramatic ingredients, they are hardly appreciated by the laity and all too little by the profession at large. The proper treatment of these problems has far-reaching consequences, but they do not bulk big in the work of lower courts and therefore do not become part of the experience of judges either on the state courts or on the lower federal courts.

Not only is the framework within which the judicial process of the Supreme Court operates drastically different from the jurisdictional and procedural concern of other courts but the cases that now come before the Court, and will increasingly in the future, present issues that make irrelevant considerations in the choice of Justices that at former periods had pertinence. Mastery of the federal specialties by some members of the Court was an obvious need of the Court in days when a substantial part of the Court's business related to such specialties. Thus, when maritime and patent cases appeared frequently enough on the Court's docket, it was highly desirable to have a judge so experienced in these fields as was Judge Blatchford when he was named to the Court. The extent of the Court's maritime litigation naturally brought Henry Billings Brown, an outstanding admiralty judge, to the Court. And since the business that came to the Court in times past reflected to no small degree sectionally different economic interests, geographic considerations had their relevance. Thus, when the western circuit, consisting of Ohio, Kentucky and Tennessee, was established, at a time when litigation dealing with land title and other local property questions was important, the selection of one conversant with these problems was clearly indicated. Therefore, on the recommendation of the representatives in Congress from the interested states, Jefferson named Thomas Todd, the then Chief Justice of the Kentucky Court of Appeals. Still later, when California opened up not only a new world for gold-rushers but also a new world of litigation for the Supreme Court, it was inevitable that a judge as knowledgeable about western land and mineral law as was Stephen J. Field should be named to the Court.

All this has changed. Not only in the course of a hundred years but in the course of fifty years. Today there is a totally different flow

of business to the Court from what it was a hundred years ago; it is predominantly different from what it was fifty years ago.

An examination of the Reports in these three periods demonstrates the great changes that have taken place. Analysis of the written opinions of the Court a hundred years ago, in the 1854 and 1855 Terms (17 and 18 How.) discloses that, aside from questions of Supreme Court practice and procedure, four major categories of litigation, comprising two-thirds of the cases decided by written opinion, occupied the Court's time. The four categories were (1) estates and trusts, (2) admiralty, (3) real property, and (4) contracts and commercial law. With one partial exception, common-law questions comprised the major categories of the litigation coming before the Court. The exception is that perhaps one-third to one-half of the real property cases involved, directly or indirectly, questions of federal land law. The remaining third of the litigation that occupied the Court one hundred years ago involved a variety of issues: a number of constitutional cases, a few patent, tariff, corporation, tort, and bankruptcy cases, and the rest scattered.

Fifty years later, in the 1904 and 1905 Terms (195-203 U. S.), not only had the volume of the Court's work increased greatly but its nature had changed considerably, especially because of the fourteenth amendment, the Judiciary Act of 1875,¹⁵ and the Circuit Court of Appeals Act of 1891.¹⁶ Constitutional law had become by far the major item of the Court's business, involving approximately one-third of the cases decided by written opinion. And questions under the fourteenth amendment comprised one-half of all the constitutional cases. These apart, the Court's business was almost equally divided between questions of public and private law. Real property law was the next largest class of cases after constitutional law, with federal land law comprising almost the entire category. The remaining principal types of litigation included federal jurisdiction, bankruptcy, corporations, estates and trusts, commercial law and contracts, and torts. Admiralty litigation, which had formed a major portion of the Court's work fifty years previous, was negligible. Significant as indicating the increasing industrialization of the country was the dual increase in corporate and tort law cases. Significant also for the number of pages in the Reports and perhaps also as a portent for the future were several antitrust and Interstate Commerce Commission cases.

Examination of the work of the two most recent Terms (348-351 U. S.) indicates how complete the reversal of the character of the

15. Act of March 3, 1875, c. 137, 18 STAT. 470.

16. Act of March 3, 1891, c. 517, 26 STAT. 826 (codified in scattered sections of 28 U.S.C.).

Supreme Court's business has been. Whereas a hundred years ago, private common-law litigation represented the major part of the Court's business, and fifty years ago, constitutional cases apart, public and private law business was equally divided, today private litigation has become virtually negligible. Constitutional law and cases with constitutional undertones are of course still very important, with almost one-fourth of the cases in which written opinions were filed involving such questions. Review of administrative action, mainly reflecting enforcement of federal regulatory statutes, constitutes the largest category of the Court's work, comprising one-third of the total cases decided on the merits. The remaining significant categories of litigation—federal criminal law, federal jurisdiction, immigration and nationality law, federal taxation—all involve largely public law questions.

The Court was of course from the beginning the interpreter of the Constitution and thereby, for all practical purposes, the adjuster of governmental powers in our complicated federal system. But the summary of the contemporaneous business before the Court that is reflected in written opinions statistically establishes these constitutional adjudications and kindred public law issues as constituting almost the whole of Supreme Court litigation. It is essentially accurate to say that the Court's preoccupation today is with the application of rather fundamental aspirations and what Judge Learned Hand calls "moods," embodied in provisions like the due process clauses, which were designed not to be precise and positive directions for rules of action. The judicial process in applying them involves a judgment on the processes of government. The Court sits in judgment, that is, on the views of the direct representatives of the people in meeting the needs of society, on the views of Presidents and Governors, and by their construction of the will of legislatures the Court breathes life, feeble or strong, into the inert pages of the Constitution and the statute books.

Such functions surely call for capacious minds and reliable powers for disinterested and fair-minded judgment. It demands the habit of curbing any tendency to reach results agreeable to desire or to embrace the solution of a problem before exhausting its comprehensive analysis. One in whose keeping may be the decision of the Court must have a disposition to be detached and withdrawn. To be sure, these moral qualities, for such they are, are desirable in all judges, but they are indispensable for the Supreme Court. Its task is to seize the permanent, more or less, from the feelings and fluctuations of the transient. Therefore it demands the kind of equipment that Doctor Johnson rather grandiloquently called "genius," namely, "a mind of large general powers accidentally determined to some particular direc-

tion as against a particular designation of mind and propensity for some essential employment."

For those wielding ultimate power it is easy to be either wilful or wooden: wilful, in the sense of enforcing individual views instead of speaking humbly as the voice of law by which society presumably consents to be ruled, without too much fiction in attributing such consent; wooden, in uncritically resting on formulas, in assuming the familiar to be the necessary, in not realizing that any problem can be solved if only one principle is involved but that unfortunately all controversies of importance involve if not a conflict at least an interplay of principles.

If these commonplaces regarding the reach of the powers of the Supreme Court and the majesty of the functions entrusted to nine mere mortals give anyone the impression that a Justice of the Court is left at large to exercise his private wisdom, let me hasten to say as quickly and as emphatically as I can that no one could possibly be more hostile to such a notion than I am. These men are judges, bound by the restrictions of the judicial function, and all the more so bound because the nature of the controversies that they adjudicate inevitably leaves more scope for insight, imagination, and prophetic responsibility than the types of litigation that come before other courts. It was the least mentally musclebound and the most creative mind among Justices, Mr. Justice Holmes, who, with characteristic pithiness, described his task as "that of solving a problem according to the rules by which one is bound."¹⁷ Some years later, Chief Justice Hughes spelled out Holmes's thought. "We do not write on a blank sheet. The Court has its jurisprudence, the helpful repository of the deliberate and expressed convictions of generations of sincere minds addressing themselves to exposition and decision, not with the freedom of casual critics or even of studious commentators, but under the pressure and within the limits of a definite official responsibility."¹⁸

This is not abstract or self-deceiving talk. The great men in the Court's history give proof of its truth. Will anyone deny that the four most distinguished minds of the latter part of the period under review were Holmes, Hughes, Brandeis, and Cardozo? All four had the largeness of view so essential for adjudicating the great issues before the Court. But is it just a coincidence that all four were to a superlative degree technically equipped lawyers? They built on that equipment for the larger tasks of the Court; they were not confined by it. Again, is it mere coincidence that all four were widely read and deeply

17. *SPEECHES BY OLIVER WENDELL HOLMES* 99 (Holmes ed. 1934).

18. 309 U.S. xiv (1940) (statement by Chief Justice Hughes on the occasion of the 150th anniversary of the Court).

cultivated men whose reading and cultivation gave breadth and depth to their understanding of legal problems and infused their opinions?

I have now come to the end of my story with its self-evident moral. Since the functions of the Supreme Court are what they are and demand the intellectual and moral qualities that they do, inevitably touching interests not less than those of the Nation, does it require an explicit statement that in choosing men for this task no artificial or irrelevant consideration should restrict choice?

The search should be made among those men, inevitably very few at any time, who give the best promise of satisfying the intrinsic needs of the Court, no matter where they may be found, no matter in what professional way they have manifested the needed qualities. Of course these needs do not exclude prior judicial experience, but, no less surely, they do not call for judicial experience. One is entitled to say without qualification that the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero. The significance of the greatest among the Justices who had had such experience, Holmes and Cardozo, derived not from that judicial experience but from the fact that they were Holmes and Cardozo. They were thinkers, and more particularly legal philosophers. The seminal ideas of Holmes, by which to so large an extent he changed the whole atmosphere of legal thinking, were formulated by him before he ever was a judge in Massachusetts. And while the Court of Appeals gave Cardozo an opportunity to express his ideas in opinions, Cardozo was Cardozo before he became a judge. On the other side, Bradley and Brandeis had the pre-eminent qualities they had and brought to the Court, without any training that judicial experience could have given them.

There is another irrelevance, regard for which may lead to a narrower choice than that to which the country is entitled—geographic considerations. The claims of uncritical tradition led President Hoover, who had the most impressive recommendations for naming Cardozo as Holmes's successor, to hesitate because there were at the time already two New Yorkers on the Court. When the President urged this difficulty on Senator Borah, the latter, to the President's astonishment, said that Cardozo was no New Yorker. When asked to explain, the Senator replied that Cardozo belonged as much to Idaho as to New York. Those of sufficient stature for the Court in its modern responsibilities should not be sought among men who have professionally a merely parochial significance and choice of them should not be restricted to a confined area. From the point of view of intrinsic need, any geographical consideration has long since become irrelevant. The pride of a region in having one of its own on the Court does not

outweigh the loss to the Court and the country in so narrowing the search for the most qualified.

Perhaps a word should be said on the bearing of political affiliations that men had before coming on the Court to their work on it. The fact is that past party ties as such tell next to nothing about future Justices. The Democratic President Wilson put two Democrats from the bar on the Court; but what notions about law and life, about their conception of their functions as Justices, did James C. McReynolds and Louis D. Brandeis share? President Harding was commended for his broad-mindedness in selecting the Democrat Pierce Butler for the Court¹⁹ at the time that he named his former Republican senatorial colleague, George Sutherland, a Justice much cherished by brethren most in disagreement with him. It would not be inaccurate to say that Butler, the Democrat, and Sutherland, the Republican, were judicial twins. But when Harlan F. Stone came on the Court, the stout Republicanism that Sutherland and Stone had shared was not at all reflected in a shared outlook as Justices. A matter that is kindred to looking for party ties as an index to the behavior of future Justices is the expectation of Presidents regarding the outlook of their appointees on matters of great moment that may come before the Court. There can be little doubt that Lincoln would have been as surprised and perhaps as displeased by his Secretary of the Treasury's attitude towards the Legal Tender Act, when Chase, as Chief Justice, passed on its constitutionality,²⁰ as was President Theodore Roosevelt by Holmes's dissent in the *Northern Securities* case.²¹ The upshot of the matter is that only by disregard of all these irrelevancies in the appointment of Justices will the Court adequately meet its august responsibilities.

Selection wholly on the basis of functional fitness not only affords the greatest assurance that the Court will best fulfill its functions. It also will, by the quality of such performance, most solidly establish the Court in the confidence of the people, and the confidence of the people is the ultimate reliance of the Court as an institution.

19. For a vivid delineation of this strong-minded judge, see 310 U.S. xiii (1940) (address by Attorney General Jackson to the Court).

20. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 570 (1870) (dissenting opinion).

21. *Northern Securities Co. v. United States*, 193 U.S. 197, 400 (1904).