



THE SUPREME COURT
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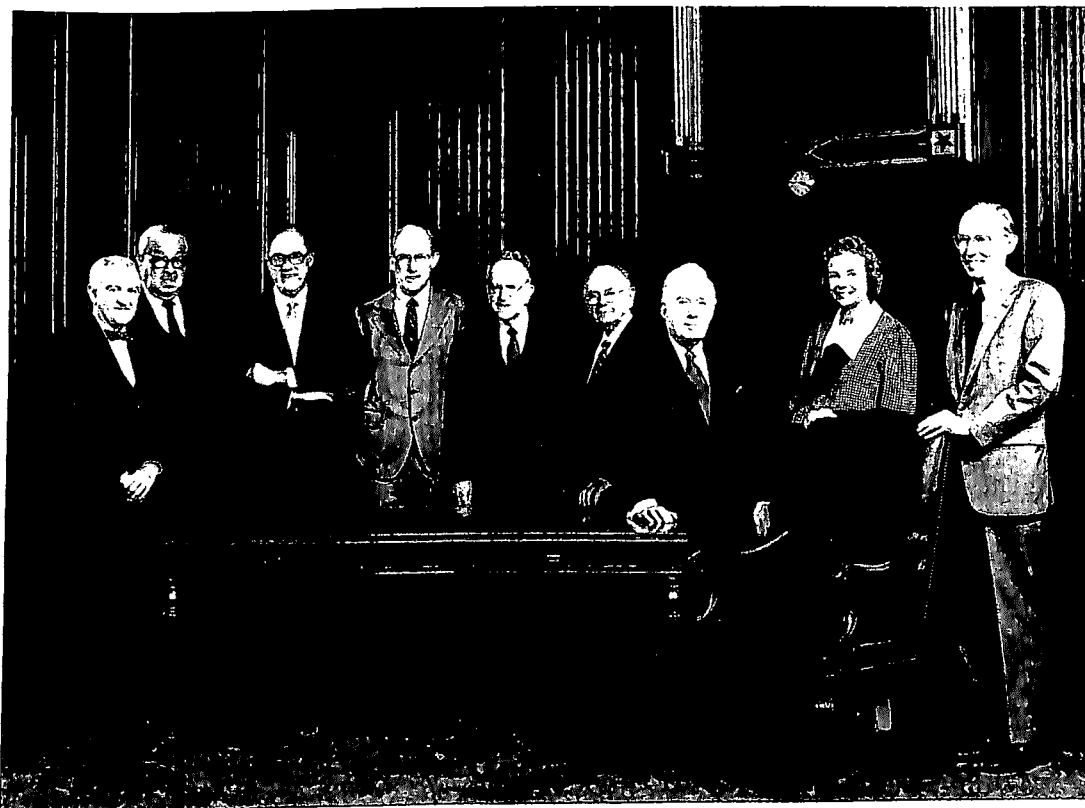
SUMMER 1982

New Edition of *Equal Justice Under Law*

A newly revised and expanded edition of an informative, illustrated history of the Supreme Court has recently been published by the Society. Produced with the cooperation of the National Geographic Society and previously sponsored by the Foundation of the Federal Bar Association, *Equal Justice Under Law: The Supreme Court in American Life* is a 160-page introduction to the history of the Court. This new edition describes important landmark decisions and provides an excellent account of the Court's contributions to our national heritage. Beautifully illustrated in full color and accompanied by many photographs, *Equal Justice* traces the history of this uniquely American institu-

tion from the appointment of Justice John Jay in 1789 through the 1981 confirmation of the nation's first woman justice, Associate Justice Sandra Day O'Connor.

Initially conceived and published in 1965 and subsequently revised in 1975, this publication is perhaps most notable as a well-written summary of the American experience of liberty under law, making it an especially valuable educational resource. As one reviewer noted, "The cases are brought to life for the reader, not only by the lively text, but by graphic illustrations." Another reader has commented that, although he "was reading about old
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An informal portrait of the current Court appearing in the new edition of *Equal Justice Under Law*. The full color photo, measuring 11 x 14 inches, and matted upon a 13 x 16 inch mat, may be purchased from the Society.

Supreme Court Succession, or, Who Succeeded Whom?

A newly confirmed member of the Supreme Court bench generally fills the only vacant seat. Therefore, the new member's place in terms of seniority and succession is self-evident. Likewise, there can be no ambiguity as to succession in the case of two simultaneous vacancies on the Court when one seat is that of the Chief Justice, because the individual nominated to occupy the center chair is so identified by the President. However, when two or more vacancies occur simultaneously within the ranks of the associate justices, succession and seniority can become confused, and have been on several occasions during the past 190 years.

Simultaneous vacancies on the Court have occurred more frequently than one might guess. The first instance occurred in 1796 during George Washington's second administration; more recently, President Nixon was faced with a similar situation in 1970. Since an orderly process is prescribed and followed for appointment to the Court, there has been general unanimity among Supreme Court historians concerning succession and seniority on the bench. However, concerning at least five episodes in the Court's history, there is no total agreement.

In September of 1810, Justice William Cushing of Massachusetts died. Before a replacement for Cushing was confirmed, Justice Samuel Chase of Maryland died. President Madison simultaneously nominated a Massachusetts lawyer and a Maryland jurist as replacements for Cushing and Chase, and in terms of simple geography it appears obvious that Justice Joseph Story of Massachusetts was selected to succeed Cushing and that Gabriel Duvall was

named to fill Chase's "Maryland seat" on the bench. In one sense, of course, such a conclusion may be entirely accurate. Geography certainly has played a role in Supreme Court appointments, and at various times throughout the Court's history, it was correct to say that there was a "New England seat," a "Southern seat," etc. But by following a geographical convention of succession from Cushing to Story, at least one historian has given Justice Story precedence on the bench before Duvall of Maryland, apparently because Cushing's was the first of the two seats to become vacant in 1810 and 1811.

Justices Duvall and Story were nominated, confirmed, and commissioned simultaneously. However, Duvall took the oath of judicial office ten weeks before Justice Story. From the beginning of their joint service on the Court during the February term of 1812, their colleagues on the bench, out of respect for the Marylander's greater age if not necessarily as a result of the earlier date of his oath, recognized the 58-year-old Duvall's seniority over Justice Story, who at 32 was his junior by more than a generation.

Seniority on the Court is a matter of some importance as it has special significance in the business of the Court. Succession is more a matter of academic interest, but one which has been of central concern to many historians. By reversing Duvall and Story in terms of their relative precedence, the question of seniority is confused and subordinated to a determination of succession based on geography alone. Application of a "first vacant, first filled" rule to the situation would suggest that Cushing of Massachusetts was actually succeeded by Duvall of Maryland

and that Samuel Chase of Maryland was replaced on the bench by Story of Massachusetts, a result entirely consistent with the actual behavior of the Court in 1812.

President John Tyler made no serious attempt to fill the Court vacancy created by the death of Justice Henry Baldwin of Pennsylvania in April 1844, believing perhaps that a hostile Senate would frustrate any nomination a "lame duck" president might present for confirmation. President Polk ignored the empty Baldwin chair on the bench until Justice Story's sudden death in September 1845. Polk eventually filled the unoccupied "Pennsylvania" and "New England" seats with Pennsylvania and New England replacements, but in reverse order. Levi Woodbury of New Hampshire was sworn in under a recess appointment more than ten months prior to the nomination of Robert Grier of Pennsylvania. Geography provides the only justification for arguing, as do several writers, that Justice Grier succeeded Justice Baldwin.

Applying the "first vacant, first filled" rule produces a rather less arbitrary and more reasonable conclusion than application of the geographical succession contention. Accordingly, Henry Baldwin of Pennsylvania was replaced by Levi Woodbury of New Hampshire and Joseph Story of Massachusetts was replaced by Robert C. Grier of Pennsylvania.

At the beginning of the December 1861 term, the bench had three vacant chairs. Justice Daniel of Virginia died in May 1860 and President James Buchanan was unable to get his nominee confirmed by the Senate; Justice John McLean of Ohio died in early April 1861; and Justice Campbell resigned on April 30, 1861. Lincoln took no action to fill these Court vacancies during the early months of his administration. Perhaps he hoped a quick political or

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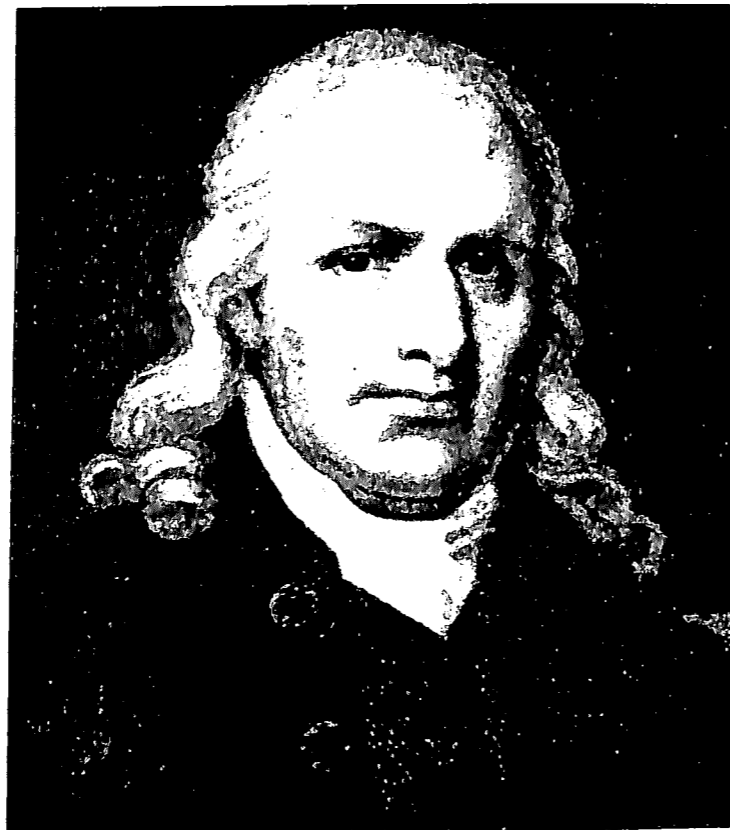
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Editor Alice L. O'Donnell
Assistant Editor David T. Pride

military solution would be found to end the secession crisis, and he could use the Court nominations to foster reconciliation and restore the union bonds. With no end to the war in sight, the President finally acted in January 1862 by nominating Noah Swayne of Ohio to the bench. Lincoln waited almost six more months before sending the name of Samuel Miller of Ohio to the Senate. It was an additional five months before the third vacancy was filled by Judge David Davis of Illinois. Seizing on an "Ohio connection," several authorities assert that Swayne succeeded McLean. These authorities are left with Daniel of Virginia succeeding Miller of Iowa, and Campbell of Alabama replacing Davis of Illinois. The Campbell/Davis succession fits the "first vacant, first filled" or "last vacant, last filled" rule. However, the Daniel seat had been vacant for more than ten months when McLean died, and it seems more reasonable and orderly to conclude that Noah Swayne of

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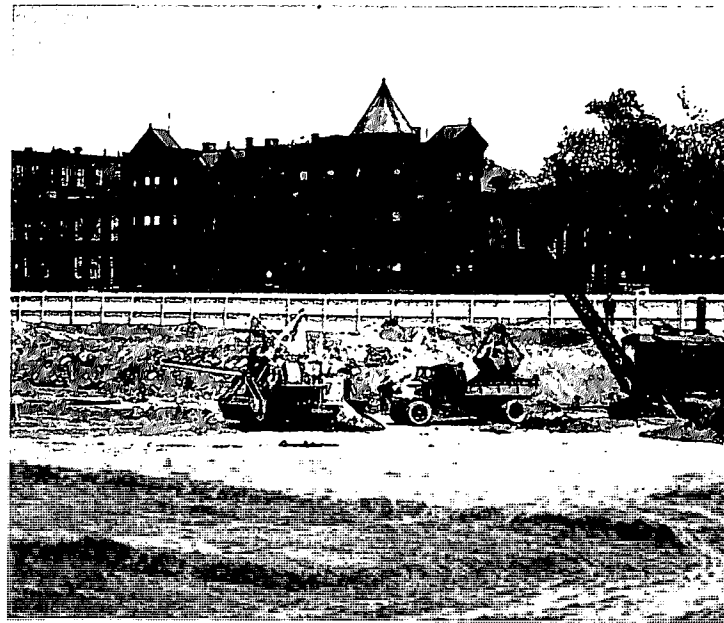
The nearly concurrent deaths of Justices William Cushing (left), of Massachusetts, and Samuel Chase (right), of Maryland, opened an historical controversy over succession in 1810-1811.

Though Justice Duvall (left) took his oath of office ten weeks prior to Justice Story (right) some historians discount the "first vacant, first filled" rule in favor of a geographic convention citing Story's succession to the seat of fellow Marylander Samuel Chase.

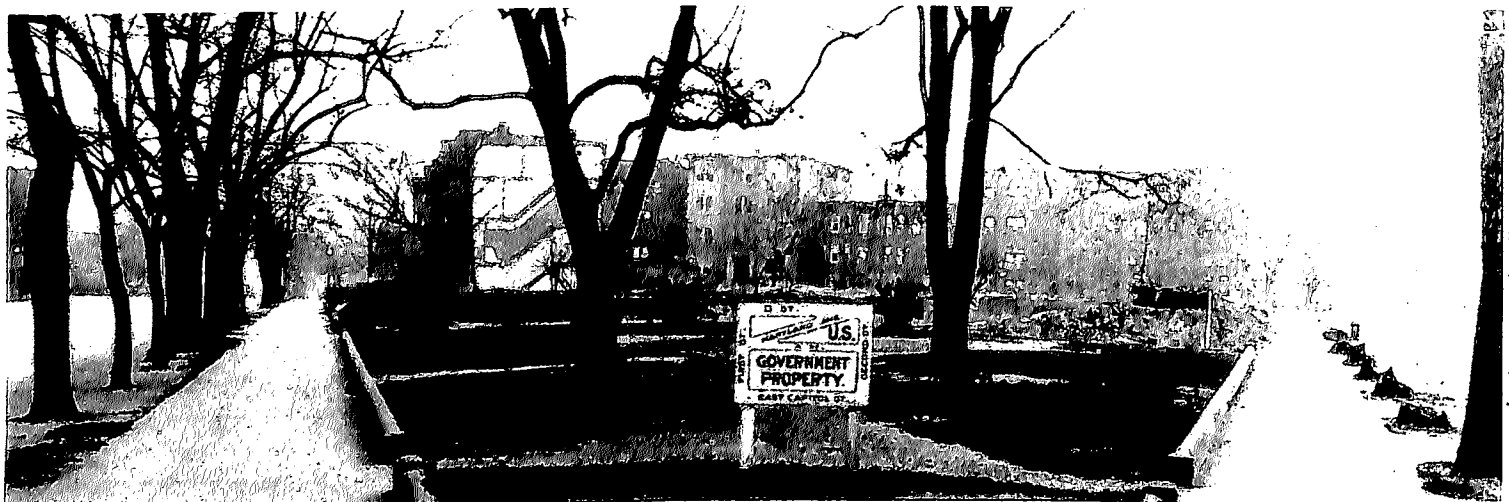
Society Acquires Headquarters Building

By special action of its Executive Committee, the Society recently purchased a building on Capitol Hill to be used as its permanent national headquarters. Located immediately adjacent to the Supreme Court Building at 111 Second Street, N.E., the three-story brick townhouse dates from the 1880s. Typical of the architecture of the District of Columbia of this period, the original building had two rooms on each floor, the ground floor being partly underground in the English tradition. The building is distinguished by a large three-story front bay characteristic of nineteenth-century Washington residences. By special ordinance, builders were permitted to construct bays extending into the unusually wide dedicated public ways reserved for the capital city's streets and boulevards.

Despite a series of "modernizations," the house retains many of its original details, and although modest in size, should make an excellent headquarters building. Working with Nicholas Pappas, a Washington architect sensitive to the peculiarities and special character of old homes, the Society is currently rehabilitating the building for its new use. When completed, the building's ground floor will house a small exhibit and meeting room, and the second or main floor will have a reading room and restored "front parlor." The third floor will be used for the Society's offices, which have been located since the Society's inception in a commercial office building in downtown Washington. In addition to the obvious benefits of being located near the Court on Capitol Hill, the acquisition of a headquarters building provides exciting possibilities for new programs and expanded membership activities. Already under consideration is a possible lecture series, and a special exhibits program. The Student Chapters Committee is also discussing ways in which the headquarters building might be used to expand its program for student members. Although additional funds will be needed to complete the renovations and a great deal more work remains to be done, the headquarters building represents an important milestone in the Society's eight-year history and serves as a signal tribute to the dedication and commitment of the Society's founders and supporters.



Above; the Society's townhouse, obscured by trees (top, far left), as it appeared while the Court was still under construction in the early 1930's (foreground). Below; the Society's townhouse (far right) as it appeared while the Court's lot was still being cleared.



Tree stumps (right) attest to the early stages of the Court's construction, which eventually resulted in the closure of A Street (also right) between First and Second Streets. Centered in the background above the right hand corner of the "Government Property" sign, is the building recently acquired by the Society as its headquarters building.

Succession *(continued from page three)*

Ohio replaced Peter Daniel of Virginia and Samuel Miller of Iowa replaced John McLean of Ohio.

Tracing succession on the Court becomes especially confusing between 1863 and 1869, primarily as a result of the bitter feud between President Andrew Johnson and the Senate which culminated in the impeachment trial of the President. In 1863, the bench had been expanded to ten members, and Lincoln had placed Judge Stephen J. Field of California in the new seat. Six weeks after Lincoln's assassination, Justice Catron of Tennessee died. President Johnson attempted to fill the vacancy, but his relations with the Congress had so deteriorated that instead of simply rejecting the nomination, Congress eliminated the possibility of any Johnson Court nominations by passing legislation in 1866 which reduced the size of the Court from ten members to seven. When Justice Wayne of Georgia died in 1867, the Court by simple attrition was reduced to an eight-member body. In 1869, with President Ulysses S. Grant safely in the White House, Congress restored two seats to the Court, thereby creating one vacancy for the new president to fill. Before the vacancy was filled, however, Justice Grier retired. By the end of March 1870, all nine seats were again filled and the Court has remained a nine-member body ever since. But during this traumatic period of the Court's history, who succeeded whom?

If the change in the Court's size is considered as a one-step process, from a ten-member to a nine-member bench, then it seems logical and appropriate to designate the Catron chair, the first vacant, as the only seat permanently disestablished by the combined effects of the Acts of 1866 and 1869. This is the most common, but not unanimous, opinion of Court historians. A different opinion holds that the tenth chair, newly created in 1863, was the one seat permanently eliminated, and that the seat was never filled after the resignation of its only incumbent. This explanation is awkward, however, since its incumbent, Justice Stephen Field, did not resign until 1897. Further, Justice Field was clearly succeeded by fellow Californian Joseph McKenna. Selection of one of the other two seats for "disestablishment," either the Wayne or the Grier chair, seems totally arbitrary and even less satisfactory than the two theories already mentioned. In 1870, President Grant sent to the Senate his nominations to fill the two vacancies on the reconstituted nine-member bench. Some writers seize on a Pennsylvania connection to claim succession to Grier's seat by William Strong, but this claim violates the "first vacant, first filled" rule and does not help explain the other changes on the bench. The conclusion must be that Justice Catron of Tennessee had no successor; his chair was permanently disestablished by the Act of 1866. Justice Wayne of Georgia was succeeded by William Strong of Pennsylvania. Joseph P. Bradley of New Jersey replaced Robert Grier of Pennsylvania.

While reviewing the rapid turnover that occurred on the Court in 1910, a succession claim may be found that violates both considerations of geography and the "first vacant, first filled" rule. Some Court historians have held that Joseph R. Lamar of Georgia replaced William Moody of Massachusetts, where a closer reading and application



Justice John Catron (1837-1865) whose seat was disestablished through the effects of the Judiciary Act of 1866.

of the "first vacant, first filled" rule would have allowed continuation of a "Southern seat" on the bench. In a triple play, he nominated incumbent Associate Justice Edward Douglass White to succeed Chief Justice Fuller. Having two vacant associate justice positions to fill, presuming correctly that White would be confirmed as Chief Justice, he nominated Willis Van Devanter and Joseph R. Lamar for the seats of Moody and White. White's elevation was effected in exactly one week, the new Chief Justice becoming the first incumbent associate justice to obtain confirmation as Chief Justice. Van Devanter and Lamar were nominated, confirmed, and sworn in together. Because his commission of office, or "Letters Patent," were signed one day earlier than Lamar's, Van Devanter enjoyed seniority. It seems entirely reasonable and accurate to conclude, therefore, that Van Devanter of Wyoming succeeded Moody of Massachusetts, and Lamar of Georgia replaced White of Louisiana.

The Supreme Court of the United States, as a collective body, provides a type of historical continuity unlike that of either of the other branches of the federal government. The concept of succession, and the geographic identification of particular seats on the Court, often helps to demonstrate and explain that continuity, and is aided by the emphasis many historians have placed on geography as an important consideration in the appointment process. Focusing primarily on geography, however, may distort our understanding of the actual behavior of the Court concerning succession and seniority. As illustrated above, the simple rule of "first vacant, first filled" provides a more accurate and reliable guide to the Court's own resolution of the succession question.

The Society acknowledges the substantial contribution of George A. Christensen, a student member of the Society, in the preparation of this article.

Equal Justice *(continued from page one)*

problems" which he had read about before, he "experienced a feeling of excitement and confidence" about our national heritage that he had never experienced before.

On the basis of such positive reactions, the Society has undertaken an ambitious public placement program to broaden public understanding and appreciation of the important role the Court has played in sustaining our constitutional system. As the book's foreword concludes: "In turning to the Supreme Court for final decisions, the people have preserved the rule of law. In peacefully abiding by the Court's interpretations, Americans have kept their sovereignty and freedom intact for two centuries."

The Society has already received an initial grant in support of this special educational project, which will allow it to distribute complimentary copies of *Equal Justice* to schools and libraries throughout the country. The Society is confident that "this disarmingly simple, but sincere and illuminating little book" will rekindle for many Americans, both young and old, a renewed sense of excitement and stimulate greater appreciation for the principles of constitutional government which the Court has upheld and supported for nearly 200 years.

[Copies of the new edition may be purchased for \$5.00 per copy from the Society's Executive Offices. SCHS members are reminded that they enjoy a 20% discount on all Society publications.]

Blatchford *(continued from page five)*

The Attorney General's observations about this "model of a competent, well-trained, laborious, conscientious, and above all, modest public servant," were undoubtedly shared by many in the hall. "Judge Blatchford bore his high honors so quietly and unostentatiously as to attract to himself but slight notice from the public he so faithfully served." In his remarks, the Chief Justice called attention to his colleague's "wide and varied knowledge of the law," his "keen and discriminating intellect," and his "indomitable patience," but most important, the Chief Justice singled out Justice Blatchford's "transcendent capacity of taking trouble." The Chief Justice concluded his reflections with the following thought: "If his death admonishes us of the swiftness of the passage of time, his example teaches through the results of the orderly method which regulated his every action, how time may be redeemed."

As the official Resolutions adopted by the Bar stated so eloquently, Justice Blatchford's friends had lost "a kind and amiable companion," his profession "a conscientious and earnest brother," the Court "a faithful, able and industrious member," and "the people of these United States an honest judge."

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