



THE SUPREME COURT HISTORICAL SOCIETY

Quarterly

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Memorializing Justice Antonin Scalia

For well over a century and a half, there have been special ceremonies to honor the memory and contributions of deceased Supreme Court Justices. On November 4, 2016, this cherished custom was observed to memorialize the late Justice Antonin Scalia. The ceremonies have traditionally consisted of two parts. First, members of the Supreme Court Bar gather with family members and friends of the Justice to consider resolutions of the Bar. Then the Court itself convenes in special session to receive a copy of the Resolutions of the Bar and to incorporate the Resolutions as part of the permanent record of the Court.

The formal portrait of Justice Scalia was displayed adjacent to a speaker's platform in the Great Hall, the program was opened by the Acting Solicitor General of the United States, Ian Gershengorn. In his remarks, Mr. Gershengorn thanked Gene Scalia for his invaluable assistance in planning the memorial. Thanks were also expressed to Judge Jeffrey Sutton and Paul Clement who co-chaired the resolutions committee.

The remaining speakers had all served as clerks to the Justice, a group the Justice affectionately referred to as his "clerkeratti." Paul Cappuccio made personal remarks and acted as chair for the meeting. Mr. Cappuccio recalled the Justice's long history of public service. Justice Scalia served on the Supreme Court of the United States from 1986 until his death early in 2016. He had prior service as a Judge on the United States Court of Appeals for the District of Columbia

Circuit, and in the Executive Branch where, among other duties, he served as Assistant Attorney General for the Office of Legal Counsel in the Department of Justice.

Mr. Cappuccio said that over his nearly three decades of service on the Court, Justice Scalia made profound contributions to the nation and the legal system. Generations of lawyers, judges and professors will be affected by his reasoning and approach to textual interpretation of the law. Considering him on a personal level, Mr. Cappuccio observed that Justice Scalia was ". . . a man of deep faith, blessed with a towering intellect, a wonderful sense of humor and an abiding respect for the Constitution."

Other speakers, also former Scalia clerks, were chosen to represent the variety of legal fields now pursued by this special society of colleagues. Judge Jeffrey Sutton represented clerks who have followed paths that have led them to service in the federal judiciary. Professor Brad Clark of the George Washington School of Law

represented the 28 individuals who became law professors. He emphasized that Justice Scalia's service has influenced not only the practice of law, but also its teaching. Legal teaching has been changed, he emphasized, because of Scalia's eloquence and his approach to the interpretation of the law. Textual examination and interpretation is now an



Collection of the Supreme Court

The official oil portrait of Justice Antonin Scalia was displayed for the memorial meeting. Justice Scalia's portrait was painted by noted artist Nelson Shanks.

A Letter from the President



Can a woman be denied a license to tend bar unless she is the “wife or daughter of the male owner” of the establishment? As obvious as the answer to this question may seem now, it wasn’t always so. In 1948, the Supreme Court addressed the validity of a Michigan statute so providing in *Goesaert v. Cleary*, and the case will be considered again on May

1, 2017, at the next Frank C. Jones Reenactment.

We are honored that Justice Ruth Bader Ginsburg, whose career as a Supreme Court advocate included landmark cases that challenged gender discrimination, will preside at the reenactment. The reenactment of *Goesaert* will be argued by two highly accomplished Supreme Court advocates, Roy T. Englert, Jr., and Deanne E. Maynard (listed alphabetically and gender neutrally). The program is cosponsored by the Women’s Bar Association of Washington, DC, which celebrates its centennial this year. Make your reservations quickly as this event will draw a capacity crowd.

On May 10th, the Society will sponsor a panel discussion on the seminal decision in *Gideon vs. Wainwright* together with the Supreme Court Fellows Alumni Association. You will recall that, in a handwritten petition to the Supreme Court, Gideon contested his conviction, stating that his Constitutional rights had been violated when the State of Florida refused to appoint a lawyer for him when he was unable to pay for one himself. We have assembled a distinguished group of panelists for the program: the Honorable James E. Boasberg of the U.S. District Court for the District of Columbia; the Honorable Timothy B. Dyk of the U.S. Court of Appeals for the Federal Circuit; Jelahn Stewart, an Assistant United States Attorney for the District of Columbia; and Elizabeth Woodcock, an Assistant Attorney General in the Criminal Justice Bureau of New Hampshire. *Gideon* has been the subject of many articles and documentaries, notably including a program entitled “Clarence Gideon: Poor Man and the Law” produced by CBS in 1965. Joseph and Shirley Wershba, who worked on that program and came to know Gideon very well, donated a wonderful collection of Gideon artifacts to the Society. This includes a handwritten copy of the original petition Gideon submitted to the Supreme Court. Many of the Gideon items will be on display that evening.

This year the 2017 Leon Silverman Lecture Series will be presented in a more compressed timeframe in the fall. The theme is *Justices and the Presidential Cabinet*, and the lecturers will consider the service of John Marshall, John Jay, Salmon P. Chase, James Byrnes, and Robert Jackson.

The Society continues to focus as well on the creation of outstanding publications, such as the most recent issue of the **Journal of Supreme Court History**. We are at work on the production of a cookbook that will feature recipes from past and present Supreme Court Justices and their family members, blended with historical anecdotes about food traditions at the Court (such as clerk luncheons with Justices, and dinners welcoming new Justices to the Court). We are aiming to publish this volume late this fall, in time for holiday gift giving (Please take this as a hint).

The work of the Society has been greatly enriched — and in many ways made possible — by the support and participation of the Justices of the Court. They host programs, give lectures and participate in panel discussions and other Society events. We lost a stalwart supporter when Justice Scalia passed away last year, but we continue to honor the memory of his many contributions. The story on page 1 of this issue discusses the Memorial of the Supreme Court Bar in his honor. The Society’s Board of Trustees also passed a resolution in honor of the Justice. Below is a portion of the Resolution expressing gratitude for his invaluable assistance.

NOW, THEREFORE, be it resolved, that the members of the Board of Trustees of the Supreme Court Historical Society hereby express the Society’s profound appreciation of, and gratitude for, Justice Scalia’s tremendous contributions to support the Society and its mission, and commemorate that expression of gratitude by adopting this Resolution of Tribute which will become a permanent part of the records of the Supreme Court Historical Society.

Of course, none of the Society’s efforts would be possible without the support and generosity of you, the members. Many of you have donated to the Annual Fund campaign, the proceeds of which help to fund the Society’s projects. We established a new level of giving support recently, The John Marshall Circle. The Society does important and valuable work, and your support is vital to its success. Please consider joining the Marshall Circle, or make a contribution to the Annual Fund in an amount that is appropriate for your situation.

We have a rich history of accomplishments and honor the assistance of all who have so generously supported the work in any way. Much has been accomplished, and there is much more we can do as we look forward. Thank you for all you do to make the Society’s work possible.

Cregory P. Joseph



Kristin Linsley observed that Justice Scalia's life reflected his twin commitments to the law and to his faith.

integral part of legal instruction.

Former Solicitor General Paul Clement represented the former clerks who are advocates before the Supreme Court. Mr. Clement observed that he made his first oral argument to the Supreme Court before Justice Scalia. Clement said, "it did not go well." Throughout his career as an advocate in the Court, he appeared before his former boss many times. He said that Justice Scalia's influence has extended to many aspects of the American legal world. He noted that



Photo by Steve Petteway

Brad Clark, a Professor at the George Washington University School of Law, represented the former Scalia clerks who work in academia.

in the Court's previous Term, 11 former Scalia clerks argued before the Court, and a former Scalia clerk was involved in nearly one-third of the Court's cases.

Former clerk Kristin Linsley, a lawyer in private practice, said that the Justice's strict text-based approach to reading laws and interpreting the Constitution is now widely followed. The Justice maintained that the text was the determining factor, "not watered-down by new social mores or technology." She said that his life reflected his twin commitments to the law, and to his faith. When he was asked what he would do if his faith ever came into conflict with the law to the degree that he would be unable to reconcile them, Justice Scalia unhesitatingly responded that he would step down from the Court before allowing the conflict to jeopardize his convictions and faith.

All of the speakers noted that Justice Scalia's approach to oral argument was both intense and fun-filled. In different eras of the Court there has been a distinction between a "hot" Court and a "cool" Court—the difference being, of course, whether the Justices interrupt the attorneys with questions, or leave them relatively in peace. Prior to Justice Scalia's joining the Court "cool Courts" were more common. Justice Scalia did not like that dynamic, and peppered the advocates with questions. His unique and penetrating comments offered law students and members of the public alike many memorable moments. This ability to speak or write memorable sentences was a distinguishing characteristic of the Justice, whether in oral argument or in his opinions. He particularly relished dissent which allowed for full expression of his view, without having to accommodate, those of others.

The opening paragraph of the Resolutions of the Supreme Court Bar reads:

Today the bar of this Court convenes to pay respect to a towering figure in American law—a Justice of conviction, character, and courage; a treasured colleague; an irreplaceable mentor; and a man devoted to his country, its Constitution, and this Court. In his nearly 30-year tenure on this Court, Antonin Scalia displayed a forceful intellect, a remarkable wit, and an inimitable writing style. His ideas helped to shape the way we

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Managing Editor Kathleen Shurtleff

Advisory Editor James B. O'Hara

think about law. And for those blessed to know him, his compassion, humanity, and commitment to his family, friends and faith will remain an inspiration.

At the conclusion of the Memorial Session in the Great Hall, guests moved to the Courtroom where the Court convened a special session with all of the Justices. Following custom, Attorney General Loretta Lynch presented to the Court the official Resolutions of the Bar that had been adopted at the conclusion of the previous meeting. The Chief Justice accepted the resolutions on behalf of the Court. They will now become a part of the permanent record of the Court.

In her comments, Attorney General Lynch observed that

“... Justice Scalia’s greatest legacy may be that he brought unmatched conviction and enthusiasm to his jurisprudence. In doing so, he elevated our national legal discourse for all Americans. He challenged even those who agreed with him and earned the respect of those who did not. Lawyers who appeared before Justice Scalia found themselves compelled to clarify their positions and to sharpen their arguments. Readers of Justice Scalia’s opinions could not disregard the strength of his reasoning and were forced to reexamine their convictions. Justice Scalia knew that this was a point of debate—and he also knew that debate was the essence of democracy. For decades, he had an outsized role in the debates over the meaning of our most fundamental principles:



Paul Cappuccio provided introductions of other speakers and represented the Scalia clerks who work in the corporate world.

principles of liberty, justice and equality. And because of the brilliance, the eloquence, and the unique passion he brought to that debate, he guaranteed that he will continue to shape it for decades to come.”

Speaking from the Bench, Chief Justice Roberts accepted the Resolutions of the Bar and speaking for himself and his colleagues commented that:

Those of us on the Court will miss Nino, but we will continue to feel his presence throughout this building. Our ears will hear his voice in this courtroom when advocates invoke his words searching for powerful authority. Our minds will move to the measure of his reason in our chambers when we study his opinions. And our hearts will smile, even as our eyes glisten, when we walk the halls and recall how happy we were whenever we saw him rounding the corner.

The portrait of Justice Scalia is now displayed with other portraits of recent Justices of the Supreme Court on the ground floor of the Supreme Court Building. It was painted in the year 2007 in the studio of portrait artist Nelson Shanks.



Former Solicitor General Paul Clement represented the Supreme Court Bar.

Supreme Court Justices on Paper Currency

By Maya Foo*

Only two Supreme Court Justices have had their portraits on U.S. paper currency—Salmon P. Chase and John Marshall. The Society was recently given a generous donation of examples of each by Jordan Cherrick, who practiced law in St. Louis, Missouri, for many years and is currently senior counsel in the litigation group of the Chicago office of the Sidley Austin law firm. He has argued before the Supreme Court of the United States, has been a member of the Society since 1985, and served as the State Chair for Missouri.

When the Civil War began in 1861, Salmon P. Chase resigned from the Senate to become the Secretary of the Treasury under President Lincoln. To help fund the Union war effort, Chase implemented a national banking system, established the Bureau of Internal Revenue, and oversaw the country's first income tax. In addition, the Bureau of Engraving and Printing was created to print the federal government's first paper currency.

Chase's portrait on this 1862 one dollar bill (first known popularly as a "greenback" due to its color) was based on a photograph by Henry Ulke. That year each bill included an engraving of an important person, including Alexander Hamilton (\$2, \$5) and President Lincoln (\$10). "I had some handsome pictures put on them..." Chase later recalled, "and as I like to be among the people...and as the engravers thought me rather good looking, I told them they might put me on the end of the one-dollar bills." As Chase likely suspected, the one dollar bill would be among the most circulated notes and his face soon became widely recognized. After the death

of Roger B. Taney in 1864, Lincoln chose Chase for the position of Chief Justice. In 1870-1871, in a series of cases known as the *Legal Tender Cases*, Chase voted to declare the currency notes he had helped institute unconstitutional, but the Court eventually found them to be legal currency.

Despite several other Justices having served as Treasury Secretary (Levi Woodbury, Roger B. Taney, and Fred M.



One Dollar Legal Tender Note from 1862 featuring Salmon P. Chase

Vinson), only Chief Justice John Marshall appears on any other U.S. paper currency. A steel engraving, likely based on Asher B. Durand's 1833 portrait of Marshall, appears on the \$20 Treasury (or Coin) Note of 1890 and the \$500 Federal Reserve Note of 1891. The reason Marshall's portrait was used has yet to be determined and seems out of place with the other persons depicted in this series, mostly from the Civil War era: Edwin Stanton (\$1), James McPherson (\$2), George H. Thomas (\$5), Philip Sheridan (\$10), William Seward (\$50), David Farragut (\$100), William T. Sherman (\$500) and George Meade (\$1,000).

*Maya Foo is the Exhibitions Coordinator in the Office of the Curator of the Supreme Court.



A Twenty Dollar Treasury Note from 1890 featuring Chief Justice John Marshall

Concluding 2016 Leon Silverman Lectures

The general theme of the 2016 Leon Silverman Lecture Series was “The Supreme Court and the Progressive Era.”

Following recent custom, the last two lectures were presented in the Fall. On November 2, Professor James W. Ely, Jr., Milton Underwood Professor of Law Emeritus at Vanderbilt University, spoke on the Court’s property rights jurisprudence in the Progressive Era. Professor Ely was introduced by Justice Samuel A. Alito, Jr., who in turn had been introduced by Charles J. Cooper, Trustee of the Society. Professor Ely has spoken in the Silverman Lectures several times before and is well known to the Society’s audience.

The Professor opened his remarks by observing that the Progressive movement dominated American political culture for the first decades of the early 20th century. The movement was characterized by an increase of governmental authority at both the federal and local levels. There was a general hostility to the central role of property rights in constitutional jurisprudence, and a rejection of individualism in favor of emphasis on the needs of the group. The result was a sea change in the way in which the Supreme Court, and also state courts, approached the general area of property rights. Increasingly municipalities and states began to encroach on the earlier understanding of property rights by enacting legislation under a variety of headings. These headings included tenement reform, land-use regulation, building height requirements, zoning laws, rent control, and private contracts. Little interest was paid to the claims of individual rights or the plight of racial minorities in this approach.

During the Progressive Era both state supreme courts and the Supreme Court of the United States justified as necessary a variety of legal encroachments on property rights that were deemed to be in the public interest. The underlying philosophy was that greater faith could be placed in the actions of government agencies whose salaried officials did not profit from their decisions. These “disinterested” parties would therefore do a better job regulating the economy. This set the stage for the “administrative state.” The passage of laws deemed to be outside the limitations of legislation in the preceding years were increasingly found to be appropriate. While many contemporary political figures and

scholars associated with the Progressive movement directed much of their criticism to the judiciary, including the Supreme Court, there

is a contrary thesis that in the area of property rights, the Supreme Court largely accommodated the Progressive agenda. Professor Ely said that in his opinion the Supreme Court “diminished the protection afforded rights of property owners under traditional constitutional principles, thus opening the door for New Deal legislation which would relegate property and contractual rights to a secondary place in constitutional law,” a place from which it has



Photos by Steve Petteway

(left to right) Charles Cooper, Professor James W. Ely, Justice Samuel A. Alito, Jr., were photographed following the lecture on November 2, 2016. In his lecture Prof. Ely suggested that property rights have been relegated to a secondary place in constitutional law.

not yet recovered. Professor Ely concluded his remarks by observing that this area of judicial history has been little studied and much misunderstood and he called for scholars to shed greater light on both the substance and the rationale for the great change.

On November 16, Professor Brad Snyder of the University of Wisconsin spoke on the *Sacco-Vanzetti* Case. Society President Gregory Joseph introduced the evening’s host, Justice Ruth Bader Ginsburg. Justice Ginsburg provided an introduction of the speaker. The *Sacco-Vanzetti* case was one of the most notorious cases of the early 20th century, even though it was never heard by the US Supreme Court. The case does involve, however, two Justices of the Court then sitting, and a future Justice who played a major role as the case unfolded.

In April 1920, two employees of a Massachusetts shoe factory were robbed and killed as they were transporting the factory’s payroll from the bank. Within a few days, police arrested two Italian immigrants who were also identified as radial anarchists. Their names were Nicola Sacco and Bartolomeo Vanzetti.

Convicted at trial, the two were sentenced to death, but in the meantime a sizeable number of interested advocates were convinced that the defendants had been unjustly convicted because of an anti-Italian and anti-extremist prejudice. A defense committee was formed and a group of distinguished lawyers took over the case. Utilizing a series of legal ploys, the executions were delayed. Harvard Professor Felix Frankfurter, who would later serve as a Justice, became an impassioned defender of the two defendants. He wrote



Justice Ruth Bader Ginsburg introduced Professor Brad Snyder's lecture on the Sacco-Vanzetti Case.

an influential article challenging Judge Webster Thayer's "errors." These included statements of prejudice by the jury foreman prior to a verdict being rendered, and faulty ballistics tests. Frankfurter reported these glaring irregularities and his article caught the attention of many people and was widely circulated.

Professor Snyder skillfully wove the story of the defense teams' efforts to bring the trial from the Massachusetts state courts to the Supreme Court of the United States. A first effort to convince Justice Oliver Wendell Holmes to stay the

sentence was unsuccessful. Justice Holmes believed that he had no power to do so since the murder and its subsequent trial and appeals had all been conducted appropriately under state law in state courts. An effort to approach Justice Louis D. Brandeis was also unsuccessful. Justice Brandeis' wife had actually contributed financially to the legal team representing Sacco and Vanzetti, and the Justice felt that that fact by itself disqualified him from participating in any review.

It might be noted that Professor Snyder is the author of a newly published book titled **The House of Truth: A Washington Political Salon and the Foundations of American Liberalism**. The title refers to a house in Washington, D.C. that was the shared home, in the early days of the 20th century, of a number of young progressive intellectuals including Felix Frankfurter. The group had been ardent supporters of the Progressive Movement, but later redirected their hopes for achieving political and legal goals



Photos by Steve Petteway

Members and their guests posed during a reception following a lecture.

from Theodore Roosevelt and other politicians, to the courts and legal system in general, and to the Supreme Court in particular. Supreme Court Justices, including Justice Oliver Wendell Holmes, were frequent visitors to the house and shared ideas freely in the discussions there.

Articles derived from these lectures will be printed in a forthcoming issue of the **Journal of Supreme Court History**. In addition, an audio recording of Professor Ely's lecture is available on the Society's website. An audio visual recording of Professor Snyder's presentation can also be accessed through the website. Both lectures can be located by going to the Home Page of the site, www.supremecourthistory.org, and using the Multimedia Tab to find the lectures.



Warm weather allowed guests to enjoy the reception on the patio off the Conference room.

Thomas Nast and the Disputed Tilden-Hayes Election

By Ryan Hyman*

The election of 1876 is one of the most interesting—and disputed—in American history. Ultimately, Supreme Court Justices played a crucial, although not judicial, role in determining its outcome.

The election pitted the Republican Rutherford B. Hayes of Ohio against the New York Democrat Samuel J. Tilden. Though the election was held on November 7, 1876, the outcome would not be decided until early in March, 1877, just a few days before the inauguration. As the votes were counted, Tilden had won the popular vote by about one quarter of a million votes. The Electoral College vote remained in question. Twenty electoral votes were in dispute: one from Oregon, seven from South Carolina, eight from Louisiana and four from Florida. Both parties sent delegates to each of these states with instructions to report a vote count. Republicans reported that Hayes had won the states while Democrats proclaimed victory for Tilden. Each side disputed the count of the other side. Both sides charged the other with voter fraud. And in fact, vote buying on both sides was common and in the South every effort was made to depress the African-American vote.

In response to the vote count confusion, Congress set up an elaborate bipartisan Federal Electoral Commission to decide which candidate would win the electoral votes and ultimately become the 19th President of the United States. The Commission consisted of five members of the Senate, five members of the House of Representatives, and five Supreme Court Justices. Three Republicans and two Democrats were chosen from the Senate, and two Republicans and three Democrats were selected from the House. From the Supreme Court, two Republicans, Justice William Strong and Justice Samuel Freeman Miller and two Democrats, Justice Nathan Clifford, President of the Commission, and Justice Stephen Field were selected. The final Supreme Court Justice was to have been an independent, Justice David Davis. But prior to the Commission's first meeting, Justice Davis was unexpectedly elected to the United States Senate from Illinois. His place

on the Commission was taken by Justice Joseph P. Bradley, a Republican with independent tendencies, who was acceptable to the Democrats.

The Senators, Representatives, and the four Supreme Court Justices were all expected to vote on partisan lines, making it a 7-7 tie. All did as expected. Ultimately, Justice Bradley's single voice would decide the election. If he awarded even one disputed electoral vote to Tilden, the Democrat would win. The Republican Hayes needed all twenty disputed

votes. In the Committee's deliberations, Bradley sided with Hayes in every case. Hayes was awarded the Presidency with 185 electoral votes to Tilden's 184 votes.

Behind-the-scenes negotiations between the parties also occurred. Republicans agreed to end the military presence in the south, which had been in place since the end of the Civil War and the Reconstruction Era would effectively end. The Commissions' decision then had to be ratified by Congress. Democratic filibustering took place, but the vote was finally approved in the early hours of the morning on March 2, 1877. Since the usual inauguration day fell on a Sunday that year, Rutherford B. Hayes was

privately sworn in at the White House, prior to a public inauguration on Monday, March 5, 1877. Chief Justice Morrison R. Waite administered the oath of office at both ceremonies.

In his single term, Hayes was able to appoint two Justices to the Court. The first, John Marshall Harlan, served for 34 years and is one of the Court's towering 19th century figures. He is most famous for his eloquent dissent in *Plessy vs. Ferguson*. *Plessy* is, of course, the case that made separate but equal treatment of African-American citizens constitutional. It was, therefore, the basis for much of the Jim Crow legislation later overturned in *Brown vs. Board of Education*. President Hayes had a second appointment when he named William B. Woods to the Court. Woods served only a brief six years and does not figure prominently in the Court's history.



A note from New York politician Abram S. Hewitt pledges support for Tilden: "You may BUY or COUNT ONE more 'Electoral' Mule for Tilden." He urges the messenger to go South in search of more votes.

Nast images by Stan Freeny



Justice David W. Davis was selected to serve on the Federal Electoral Commission to decide the Tilden-Hayes election. His own election to the Senate (depicted in the cartoon) required him to resign from the Court, thus losing the opportunity.

The election of 1876 was wonderfully chronicled in the political cartoons of Thomas Nast, often called the father of American political cartoons. The Macculloch Hall Historical Museum in Morristown, New Jersey is the major repository of Thomas Nast materials. It's collection contains over 5,000 items including engravings, paintings, sketches, pen and ink drawings, proofs, photographs and books and periodicals that belong to or are related to the cartoonist. The Museum displays the Thomas Nast collection in thematic, changing exhibitions. Past exhibitions in the Museum have focused on Boss Tweed and Tammany Hall; rarely seen original preparatory sketches; depictions of Santa Claus; and Presidential elections.

Thomas Nast was born in Landau, Germany. He came to the United States at the age of six. Early in his career, while working for *New York Illustrated News* and *The Illustrated London News* in 1860, Nast returned to Europe to cover a championship prize fight in London and later in the year followed Garibaldi's fight to unify Italy. Returning to

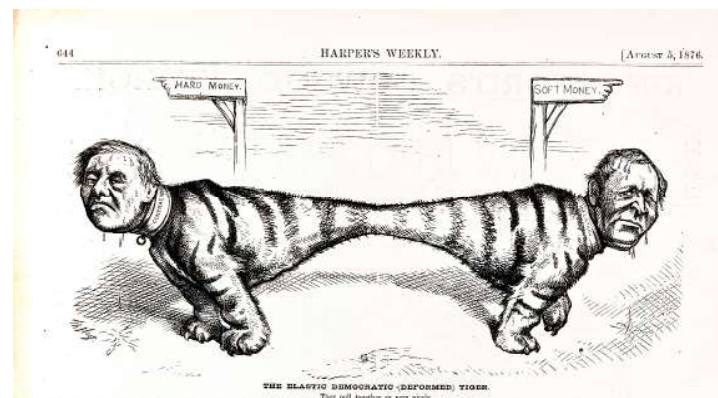
the United States, Nast soon began his long-time relationship with *Harper's Weekly* beginning with his coverage of the Civil War. Nast covered six Presidential elections starting with the election of 1864, and ending with the election of 1884 while working for *Harper's Weekly*. Nast is perhaps most remembered for his scathing cartoon indictments of Tammany Hall in New York under Boss William M. Tweed.

In the Fall of 2016, the museum presented "*Drawing Out the Vote: Thomas Nast and the Contested Election of 1876.*" Nast published more than 70 cartoons leading up to the election, during the controversy that followed, and after the election. Much of the material was published while he was working for *Harper's Weekly*. Nast was a staunch Republican for most of his career. Every candidate the artist supported won the office of the Presidency. In every election except that of 1884, Nast supported the Republican Party candidate. In 1884 he broke with his party to support the Democrat Grover Cleveland.

The accompanying cartoons provide a sample of Nasts' running commentary. One shows "the Democratic Tiger running at odds with himself." Candidate Tilden on the left was from the strong currency branch of the party and his running mate Thomas Hendricks came from the inflation or soft money branch. Nast shows the two pulling in opposite directions as the artist believed they would do if the Democrats won the White House. Nast sarcastically captioned the cartoon "They pull together so very nicely."

Another cartoon shows former Governor of New York John Hoffman running to the south to "...buy or count one more electoral mule for Tilden." Tilden needed only one of these votes to become President while Hayes required all 20. Nast continued to publish cartoons against Tilden in *Harper's Weekly* as the controversy and ensuing waiting period continued.

In an additional cartoon, Nast depicts David Davis sliding off the judicial bench of the Supreme Court into the "Senatorial Arena." To the left, a notice is shown posted in the Supreme Court which reads: "Notice: No politicians wanted, Justice." Nast is making it clear that he regards the Supreme Court as impartial and fair. Apparently he regarded



This cartoon is a criticism of the differing views of the two members of the Tilden-Hendricks Presidential ticket. It implied that if elected, their aims would be in conflict.



In this cartoon, Nast implies that the Hayes victory had greatly damaged the reputation of both parties, but he considered the Republicans to have fared better than the Democrats.

Justice Davis as more political than his replacement would be.

The final cartoon calls the Republican victory a "pyrrhic victory" referencing the ancient Greek leader who lost large numbers of soldiers during a victorious battle. Nast here depicted the Republican elephant as battered and bruised after a hard-fought and controversial election. The despondent elephant seated, is wrapped in bandages with one leg in a sling and one supported by a crutch. The elephant's tail is severed; it lies on the ground near the artist's signature. In Nast's opinion despite the Republican elephant's condition, the Democratic tiger fared much worse. A headstone appears to the left of the image bearing the epitaph "Here lies the Democratic Tiger. Greatly mourned by bereaved filibusters."

Thomas Nast's images throughout the long and drawn-out election of 1876 may well have influenced voters. During the entire process Nast would continue to work for *Harpers*

Weekly and support the candidates he believed should become President in the next two elections. Nast died in 1902.

Many editorials were written proposing alternative methods of settling the election. President Hayes commented in a letter prompted by such an editorial that he thought the best remedy for such eventualities in the future would be an amendment to the Constitution.

... What is wanted is an Article [in the Constitution] which shall practically embody the views you maintain. The suggestion is not in a condition for presentation. We can't say yea or nay to it until we see it in form for a place in the Constitution.

I am overwhelmed with callers, congratulating me on the results declared in Florida and Louisiana. I have no doubt that we are justly and legally entitled to the Presidency.

Justice Bradley remained on the Court until his death in 1892. After his vote to settle the Electoral College controversy, wild partisan rumors circulated about Bradley. One rumor alleged that he had been ready to vote for the Democratic candidate up until the last moments of the day before his opinion was issued, but that a shadowy figure had visited him at night and either bribed or threatened him to change his vote. To his dying day, Bradley believed that he had decided as the law required and that he had acted honorably, with a clear conscience.

Modern historians sometimes agree with that assessment and sometimes disagree. At least one recent history of the election claims that it was stolen by the Republicans. Fortunately for Bradley's reputation, the most comprehensive analysis, written as part of *The Oliver Wendell Holmes Devise History of the Supreme Court* concludes in his favor. The volume discussing the 1876 election was written by one of the 20th century's most distinguished legal historians, Charles W. Fairman of Harvard. Professor Fairman was also responsible for a wonderful lecture titled "What Makes a Great Justice?" In the lecture he used Justice Bradley as the exemplar of judicial greatness.

Editor's Note: For a 12-minute documentary about the 1876 election which features many of Nast's cartoons see http://supremecourthistory.org/history_five.html

Ryan Hyman is the F. M. Kirby Curator of Collections at the Macculloch Hall Historical Museum in Morristown, New Jersey. The Museum, located in the heart of the historic district, is a Federal style mansion built in 1810. The home of Thomas Nast for the last thirty years of his life is located just across the street.

NEW SUPREME COURT HISTORICAL SOCIETY MEMBERSHIPS

October 1, 2016 through December 31, 2016

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