

First Two Volumes of Holmes Devise History of the United States Supreme Court Are Published

The first two of the projected eleven volumes of the Oliver Wendell Holmes Devise *History of the Supreme Court of the United States* have been published by the Macmillan Company, bringing to fruition a major undertaking financed by Justice Holmes's unusual gift to his nation.

WHEN Oliver Wendell Holmes, Jr., Associate Justice of the United States Supreme Court, the "Great Dissenter", renowned legal scholar, died in Washington on March 6, 1935, at the age of ninety-three, he left a will containing an unusual residuary clause—one reading, "All of the rest, residue and remainder of my property of whatsoever nature, wheresoever situate, of which I may die seized and possessed, or in which I may have an interest at the time of my death, I give, devise, and bequeath to the UNITED STATES OF AMERICA". His beloved wife, Fanny, had died in 1929; the couple had no children. He was remembering his nation—the one he had served so long in both war and peace.

That nation was a long time in making use of Justice Holmes's gift. Since 1960 there has been an annual lecture financed by the gift, but the major undertaking—the publication of a multi-volume history of the Supreme Court of the United States—has now come to fruition with the publication of the first two of eleven projected volumes. The first volume, dealing with the antecedents and early beginnings of the Supreme Court to 1801, is reviewed below by George C. Christie, professor of law at Duke University.

The Holmes residuary bequest came to a little more than \$263,000 at the time of his death. The next month, April, 1935, President Roosevelt recommended in a message to Congress that the bequest be set aside in a special fund and "at a later date be devoted to purposes which will effectively promote the contributions which law can make to the national welfare". In 1938 Congress created a committee of nine members—three from the Senate, three from the House and three from the Supreme Court—and this committee

submitted its recommendations for use of the bequest in 1940.

The four projects that received the most support, according to the committee, were: (1) acquiring and maintaining a collection of legal literature in the law department of the Library of Congress; (2) establishing the residence of Justice Holmes as a permanent memorial; (3) preparing and publishing Justice Holmes's writings; and (4) establishing a small open space or park in Washington as a memorial to Justice Holmes.

Congress authorized the committee to carry out the third and fourth projects, but World War II intervened and forced the committee to defer execution of its plans. The purchase of the land contemplated for the park or garden later became impractical because of the Federal Government's building program. Ultimately the committee, under the chairmanship of Chief Justice Warren, recommended a draft of bill that became Public Law 84-246, approved August 5, 1955.

This legislation not only established the Permanent Committee for the Oliver Wendell Holmes Devise but also contained the first official mention of publishing a history of the Supreme Court. The committee, as established by Public Law 84-246, consists of five members, of which the Librarian of Congress is a member ex officio and chairman. The other four members are appointed by the President of the United States from panels of three names each submitted by four organizations—the Association of American Law Schools, the American Philosophical Society, the American Historical Association and the Association of American Universities.

President Eisenhower designated the first four appointive members of the

committee on January 9, 1956. The principal project to be supported by the Holmes bequest, as stipulated in the enabling act, was the preparation and publication of a history of the Supreme Court. In September of that year, Paul A. Freund of the Harvard Law School was appointed general editor of the multivolume history. The committee circulated an announcement informing the publishing industry of the projected publication, and proposals were received from six publishers.

The scope, substance and physical dimensions of the history were outlined by the committee as comprehensive, authoritative and interpretive. It would be self-contained and form an integrated whole, developing its subject chronologically, in the larger outline, by distinguishable periods in political, economic and social history, as reflected in the work of the Supreme Court. The investigations would reach far into collateral fields in order to set the Court at all stages firmly in the political, economic and intellectual context of the moment. The history was also to be an expert account of the professional task of the Court, and to show the Court as a working institution for the settlement of specific controversies through the process of collective decision. As a whole, the history would seek to portray the Court as a living institution, to trace its vital growth and development, and to show and interpret the interactions between the Court and its cultural environment over a period of more than a century and a half.

From a total of about seventy-five biographical sketches, carefully studied, the committee authorized the chairman to extend invitations to the present authors of the history, all experts of the various periods of the history. The authors began their research and writing shortly after the committee contracted with the Macmillan Company in 1958 to publish the history.

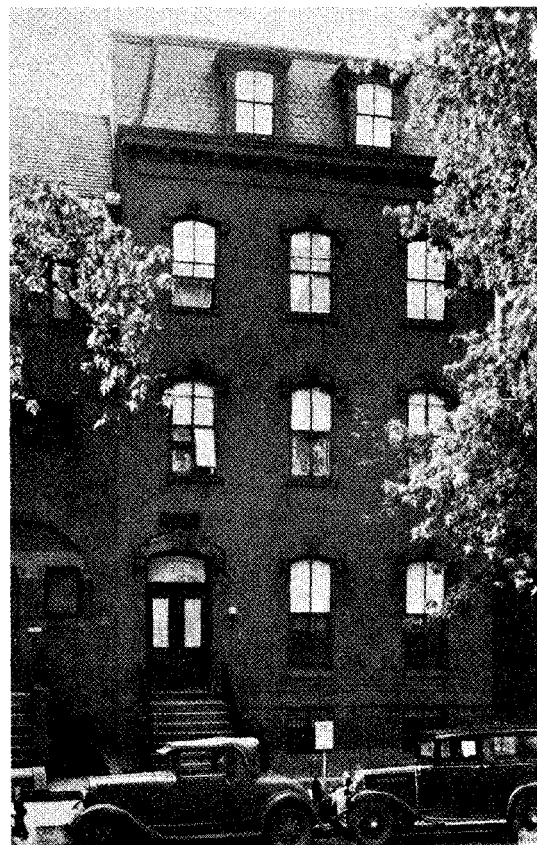
Following is the review of Volume I of the history. The other volume now published, Volume VI, will be reviewed in a subsequent issue of the *Journal*.

ANTECEDENTS AND BEGINNINGS TO 1801 (Volume I of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States). By Julius Goebel, Jr. The Macmillan Company, 866 Third Avenue, New York, New York 10022. 1971. \$30 (\$25 by subscription to the entire set of eleven volumes). Pages 864, xxv. *Reviewed by George C. Christie, professor of law at Duke University.*

This first volume of the Oliver Wendell Holmes Devise History of the Supreme Court is a definitive study. It is exactly the sort of work that one hoped the Holmes devise would produce. A reader without substantial legal and historical training will find the book heavy going. However regrettable this may be, it was inevitable. The historical, legal and political influences at work during the establishment and formative years of the federal judiciary are too complex to be described usefully in catchy phrases or to be amenable to simplistic analyses. Of course, notions derived from Montesquieu about the "separation of powers" were important, but so was the contemporary understanding of legislatures, judges and practicing lawyers about writs of error, *scire facias* and *capias ad satisfaciendum*.

Professor Goebel, George Welwood Murray Professor of Legal History Emeritus at Columbia, starts from the unquestionably correct premise that the establishment of the Supreme Court and the lower federal courts cannot be understood apart from the context of colonial law and the "common law" administered by the courts in Westminster. Professor Goebel is, of course, our foremost authority on the reception of English law in the American colonies. The first few chapters of this book are a positively masterful summary of the historical scholarship on this important subject. There is the right balance between concise textual statement and elaborate footnote discussion to make these chapters an excellent primer on American legal history during the colonial period.

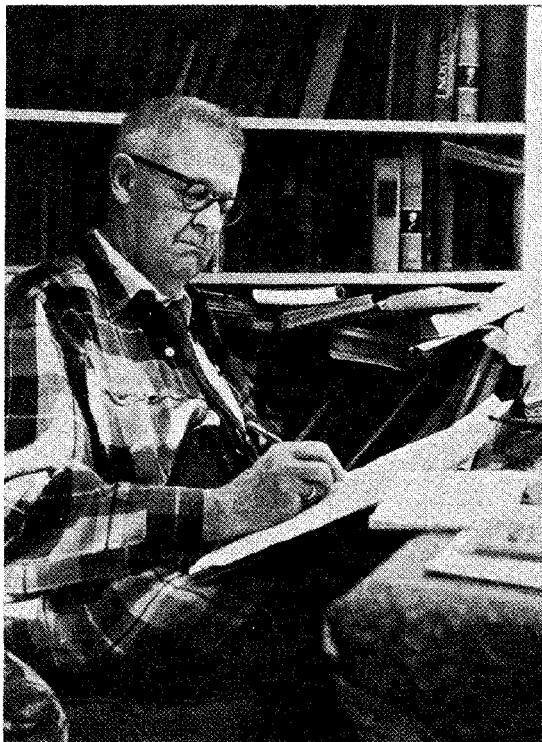
Professor Goebel states his previously developed thesis that the first colonists often brought with them a rather



Harris & Ewing

WHEN HE DIED, Justice Holmes lived in this residence at 1720 Eye Street, N.W., in Washington. The building was part of the residue of his estate and was conveyed by his executor, John G. Palfrey, to the United States in 1938.

detailed knowledge of English legal forms and procedures, but that this knowledge pertained not to the courts of Westminster but to the local courts and governmental institutions with which the simple folk who provided most of the earliest immigrants to this country were familiar. The one English institution of local government with perhaps the greatest influence was that of the justices of the peace. As economic conditions improved in the colonies and a professional Bar came into being, the Westminster experience came to play a more important role in the development of colonial law. In some states—Virginia, New Jersey and, particularly, New York—the adoption of the law and especially the procedure followed in Westminster reached a relatively high level.



D. D. & E. P. Schroeder

JULIUS GOEBEL, JR., author of Volume I of the Holmes Devise History of the Supreme Court, is George Welwood Murray Professor Emeritus of Legal History at Columbia University School of Law. He joined the Columbia faculty in 1925 and became professor emeritus in 1961. Since then he has devoted his full attention to research and writing.

Strictly speaking, however, for all the rhetoric about the common law's being the birthright of Englishmen and despite the fact that the Crown used the common law as a standard in reviewing colonial legislation, it was never the Crown's position that the common law, as such, was introduced in America. It would have been inconvenient to have done so because, even after the Stuarts had passed from the seat of power, it was the official position that the Crown governed in America through the prerogative and not through Parliament, even though it came to be accepted that acts of Parliament could by express provision reach the colonies.

From the colonists' point of view, on the other hand, there was much about the common law that was inappropriate and even distasteful. Whatever the

theory, the reception of the common law in America was eclectic and the result of the efforts of the Bar. Factors such as the availability of English reports and the publication of Blackstone's *Commentaries* were important.

This ambivalence toward the common law continued into Revolutionary and post-Revolutionary times. The Constitution of the United States was attacked for denying the people the protections and benefits of the common law, but later, especially during the period of the Alien and Sedition Laws, the federal courts were attacked for attempting to apply the common law in derogation of the rights of the people.

During the colonial period two particularly important influences on subsequent American constitutional development were at work. The colonial charters and, in royal colonies, the governor's instructions came to play the role of a fundamental or higher law against which ordinary legislation was measured. At the same time the review of colonial legislation by the Privy Council accustomed the colonists to accept the notion that the legislature did not have the last word on the validity of its acts. As the judicial business of the Privy Council increased during the eighteenth century with the docketing of appeals from the American plantations, occasions were presented in which the validity of legislation was subjected even to judicial review. Professor Goebel rightly emphasizes how important for future developments these aspects of colonial practice were.

After surveying the establishment by the former colonies of new judicial and constitutional structures after the Declaration of Independence, Professor Goebel examines the appellate jurisdiction in prize cases that the Continental Congress somewhat ineffectually tried to establish and that was vested, with not much better results, in the United States by the Articles of Confederation. The ineffectiveness of these attempts at establishing national courts—even when the need was generally recognized—profoundly influenced the later decision to provide not only for a Supreme Court but also for lower federal courts.

The eleven projected volumes of the Oliver Wendell Holmes Devise History of the United States Supreme Court are:

Volume I, *Antecedents and Beginnings to 1801*, by Julius Goebel, Jr., George Welwood Murray Professor Emeritus of Legal History, Columbia University School of Law.

Volume II, *Foundations of Power—John Marshall, 1801-15*, by George L. Haskins, professor of law at the University of Pennsylvania.

Volume III, *The Struggle for Nationalism: The Marshall Court, 1815-25*, by Gerald Gunther, professor of law at Stanford University.

Volume IV, *The Challenge of Jacksonian Democracy: The Marshall Court, 1826-35*, also by Professor Gunther.

Volume V, *The Taney Period, 1835-64*, by the late Carl B. Swisher, former Thomas P. Stran Professor of Political Science at Johns Hopkins University.

Volume VI, *Reconstruction and Reunion, 1864-88*, Part One, by Charles Fairman, professor of law emeritus, Harvard Law School.

Volume VII, *Reconstruction and Reunion, 1864-88*, Part Two, also by Professor Fairman.

Volume VIII, *National Expansion and Economic Growth, 1888-1910*, by Philip C. Neal, Dean of the Law School at the University of Chicago and Owen M. Fiss, Professor of Law at the University of Chicago.

Volume IX, *The Judiciary and Responsible Government, 1910-21*, by Alexander M. Bickel, professor of law at Yale University.

Volume X, *The Judiciary and Responsible Government, 1921-30*, also by Professor Bickel.

Volume XI, *Depression, New Deal and the Court in Crises, 1930-41*, by Paul A. Freund, Carl M. Loeb University Professor at Harvard University, who is general editor of the series.

In the fall of 1973, Macmillan will publish a twelfth volume that will supplement the history itself with charts, photographs, biographical data and other materials related to the history of the Court.

The author then turns to the Constitutional Convention and the debates over ratification. He focuses on the controversy over the establishment of a federal judiciary. While this material has been combed by others, Professor Goebel exhaustively reviews and marshals the material in such a way as to suggest that the founders positively understood that they were providing for judicial review rather than that they merely did not exclude it or, as one

noted commentator has concluded, merely "foresaw it—indeed invited it". He also states that his thorough review of the evidence suggests to his mind that the founders' lodging in Congress of the power to establish inferior federal courts and to regulate the appellate jurisdiction of the Supreme Court was more in the nature of a housekeeping measure and that it did not give Congress the power to abolish the federal courts or to eliminate the Court's appellate jurisdiction.

When confronted with the question of judicial review on circuit during the period covered by this volume, the Justices generally upheld the power, and Chase's charge to the jury in the *Callender* case is generally acknowledged to have been an important influence on Marshall's opinion in *Marbury v. Madison*. On the second point—Congress's control over the creation and jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court—Chief Justice Ellsworth, writing for the Court in *Wiscart v. Dauchy*, 3 Dall. 319 (1796), upheld the expansive view of Congressional power that is generally accepted today.

The greatest effect the early Court had on subsequent developments was in procedural matters. After describing the ratification struggle and the drafting of what became the Bill of Rights, Professor Goebel proceeds to explore at

great length the Judiciary Act of 1789 and the early Process Acts. He then describes, in the last third of the book, how in the actual operation of the circuit courts and the Supreme Court the groundwork for the subsequent development of the Supreme Court's jurisdiction was laid. It should be remembered that until 1796 the Supreme Court had no substantial number of cases on its appellate docket. In these early years the Justices made their greatest impact while enduring the martyrdom of circuit riding.

A substantial and important portion of the early business of the federal courts involved the admiralty and maritime jurisdiction, and Professor Goebel devotes to these cases the close consideration they deserve. The great constitutional issues of the day, however, are not ignored. *Chisholm v. Georgia*, 2 Dall. 419 (1793), is suitably discussed together with its progeny, the Eleventh Amendment, as is that landmark of judicial deference to legislative judgments on matters of general public policy, *Calder v. Bull*, 3 Dall. 386 (1798). Of particular practical importance in its time, as Professor Goebel clearly points out, was *Ware v. Hylton*, 3 Dall. 199 (1796), in which the Court courageously refused to countenance the states' attempts to avoid the provisions of the Treaty of Peace of 1783 concerning debts owed to British subjects and

in which the Court gave effect to the Constitution's declaration that treaties made under the authority of the United States are the supreme law of the land. In his discussion of the cases brought before the Court, the author points out a number of inaccuracies in the Dallas Reports, some of which are fairly substantive. Scholars also will find useful the appendix's analyses of the docket of the Court prior to 1801.

In the last few pages of the book Professor Goebel touchingly reviews the Court's work during the period covered by this volume. The Court upheld the independence of the judiciary from the executive and the legislative branches. At the same time "it left the formulation of policy to the branches of government where it conceived such belonged". Within the confines of what the "Court considered to be the bounds of its authority there was no lack of professional acumen or, indeed, of moral courage". It was undeterred by the pressure of foreign powers—notably France in the cases involving enforcement of the Neutrality Act—and by political pressure as in the war debt cases. Had it not displayed this combination of moral courage and restraint, as Professor Goebel so aptly states in his concluding sentence, "the storms ahead might not have been weathered".

—GEORGE C. CHRISTIE

Short Courses for Defense and Prosecuting Attorneys Announced

SHORT COURSES for defense and prosecuting attorneys will be sponsored again this year by the Northwestern University School of Law in Chicago under the direction of Fred E. Inbau, professor of law at Northwestern.

The course for defense lawyers will be held July 17-22 and will cover these topics: "Trial Techniques", "Recent Developments in the Law of Arrest, Search and Seizure, and Confessions", "Discovery of Prosecution and Defense Evidence", "Severances", "Eye-Witness Identifications", "Scientific Crime De-

tection and Scientific Proof", "Drunk Driving Cases", "Representation Before Pardon and Parole Boards" and "State and Federal Postconviction Remedies".

The course for prosecutors will cover "Trial Techniques", "Recent Developments in the Law of Arrest, Search and Seizure, and Confessions", "Discovery", "Scientific Proof", "Tactics and Techniques in the Interrogation of Criminal Suspects", "Meeting Motions to Suppress Eye-Witness Identification Evidence", "Prosecution of Environ-

mental Hazards" and "Prosecution of Drunk Driving Cases". Attendance at the prosecutors' course is limited to lawyers holding office as a prosecutor or assistant prosecutor or to nominees for those offices, and also to personnel in the Armed Forces and professors of law.

The registration fee for each course is \$175. Further information and the course programs may be obtained from Professor Inbau, Northwestern University School of Law, 357 East Chicago Avenue, Chicago, Illinois 60611.