Ex Nihilo Nihil

_The Birth of the English Common Law._ By R. C. Van Caenegem. 

Reviewed by Morris S. Arnold†

Royal justice was rarely invoked in England at the beginning of the twelfth century, but, as many medievalists have recently noted, during the course of the century it became generally available to litigants and was more or less commonly sought in lieu of feudal or seignorial justice.¹ This remarkable and indisputable development is apparent from even a cursory comparison of the _Leges Henrici Primi_ (circa 1115)² with Glanvill’s _Tractatus de Legibus_ (circa 1188).³ Yet the exact steps in this process, and more important, the theories of government that made the change possible, have been the subject of much debate. The work of Professor Van Caenegem has been conspicuous in this debate, and his present book, as its author notes, is in the main an abridged recapitulation of the views expressed at much greater length in his _Royal Writs in England from the Conquest to Glanvill._⁴ It is good to have those ideas in the more succinct and accessible form in which they are now presented.⁵

I

The gradual displacement of local courts by central royal justice was once seen in terms of a jurisdictional battle between a grasping and usurping central government and a local nobility less than willing to surrender judicial power. Magna Carta, clause 34—which prohibits

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5. _R. Van Caenegem, The Birth of the English Common Law_ (1973) [hereinafter cited to page number only].
"the writ praecipe by which a free man may lose his court"—was viewed as an attempt (although all realize it proved futile) to restore in some measure the original jurisdictional autonomy of the feudal lords; thus some modern commentators have arrayed imperial pretensions against local sovereignty. This was exciting stuff, providing historians of the cataclysmic school opportunities to speculate on the personal characters of the principal actors—of Henry II, Richard, and especially John—and to develop sweeping generalities based on the "national spirit" of the English. All this is now antique, however, because a more sober examination of the sources has uncovered complexities against which these modes of analysis are impotent. Modern historical thought tends to minimize drastically the competitive nature of the centralizing forces and underplay the confrontation between feudal and royal jurisdiction.

It seems more accurate now to describe the disappearance of feudal jurisdictions as a gradual withering process and to see the concomitant triumph of royal justice as a development which the feudal magnates acquiesced in or even actively encouraged. Our understanding of the broad trends in the twelfth century accommodates this description. In a truly feudal world the lord's right to decide in his own court cases involving land in his fee was obviously the crucial element of feudal jurisdiction: for to decide rights to land in the fee was to decide who could enter the lord's land. This unremarkable power to exclude an interloper remains one of the ordinary indicia of ownership in present-day law; it flows less from public notions of jurisdiction than from private notions of property. The economic revival and expanding money economy of the twelfth century led in part to an increased use of paid troops, which in turn helped diminish the lord's power over his land and tenants. So also did natural occasions for the applications

6. See, e.g., W. Meckie, Magna Carta 346 (2d ed. 1914): "In extorting from John a solemn promise to restrict the use of this particular writ, the barons gained something of infinitely greater value than a petty reform of court procedure; they committed their enemy to a reversal of a line of policy vigorously pursued for half a century. The process by which the jurisdiction of the King's courts was undermining that of the feudal courts was now to be arrested."


8. H. Richardson & G. Sayles, supra note 1, at 384, devote almost no time to the feudal courts and state that clause 34 was merely intended "to simplify the procedure under which a lord claimed an action for his own court."

9. See, e.g., Hurnard, supra note 7. Magna Carta, clause 17, providing that the court of common pleas should be held at some fixed place, and clause 18, providing for regular visits of assize justices, indicate quite clearly that the feudal classes had no general objection to royal justice.

of the lord's justice diminish; as he lost what would now be called the elements of ownership over property, his jurisdiction—based on control of property—disappeared.

A good story would be needlessly lost, however, by a refusal to see any competition at all between baronial and central courts. Magna Carta, clause 34, must stand for more than the symbolic assertion of seignorial rights long obsolete and abandoned. First, although the twelfth century development of the tenant’s powers of alienation and heir’s right of inheritance severely restricted the lord’s “ownership” rights in his fees, nonetheless the incidents of feudal tenure remained quite lucrative. The lord’s desire to maintain these incidents, such as wardships and marriages, would result in some continued interest in retaining jurisdiction over rights to land. Second, the mere existence of clause 34 indicates that lords desired to keep at least ultimate jurisdiction over the question of entitlement to lands within their respective fiefs. The only other explanation is that the barons, in a fit of pique, insisted on including in Magna Carta an undesired concession which they forced from the defeated king only to demonstrate their awful power over him. This rationale must surely be a distortion, a fit of fancy.

Richardson and Sayles, in their recent book, have gone a great distance toward dismantling the neat and inaccurate picture of English medieval government as a vertical hierarchy conforming to some rigid feudal organizing principle, with the king as suzerain only. Yet even if the king was always something more than the richest and most powerful landlord in England, and even if the English structure of government was far flatter than strict feudal theory would admit, antipathy and competition between seignorial and royal justice nevertheless must have existed at some level. The particular writ praecipe quod reddat at which clause 34 was evidently aimed robbed the lord’s court of first-instance jurisdiction: It short-circuited the feudal framework and brought litigation directly to the Curia Regis. Apparently the writ annoyed the nobility enough to insist on clause 34, by which they indicated some intention to retain their lordly jurisdictions. It seems, then, that the assize of novel disseisin, the invention of Henry II’s reign which extended to all freeholders disseised “unjustly and without judg-

11. Clanchy, Magna Carta, Clause Thirty-Four, 79 ENGL. HIST. REV. 542 (1964), makes clear what was not clear before: the writ praecipe quod reddat disappeared altogether after Magna Carta and was replaced by the writs praecipe in capite and praecipe quia dominus remisit curiam suam.
ment” the efficiencies of direct royal justice, was on its face an interference in feudal jurisdictions which would be met with resentment. Thus, instead of denying the likelihood of resentment, it seems necessary to devise a theory accounting for the lords’ acceptance of this encroachment on their jurisdictional domains.

The barons, apparently, were content to permit the king his action of novel disseisin but kept for themselves the ultimate power to decide the question of the right to land.\textsuperscript{14} This compromise, ideally suited to a system of dual sovereignty, vindicated the central authority’s right to enforce order through summary process—for the assize was “possessory”—and yet recognized that the lord, by the writ of right, had jurisdiction over the ultimate question of entitlement. Henry II himself may have claimed some personal jurisdiction over land. The Norman kings had been careful to claim from St. Edward by hereditary right and had reinforced their putative Englishness by confirming to the English their old laws. In succeeding to the Anglo-Saxon throne, Henry may have considered himself to be succeeding also to the jurisdiction over land exercised by early English kings. When forcefully and unpleasantly presented with the ecclesiastical theory of the state in his confrontation with the church, moreover, Henry may have adopted for his imperial purposes the church’s description of the king as “the minister of the common interest . . . [who] bears the public person in the sense that he punishes the wrongs and injuries of all . . . \textsuperscript{15}” The lords’ claims, on the other hand, were sanctioned by long years of feudal custom and by the logic of private property as it was then understood.

The argument over ultimate jurisdiction of questions of entitlement to land was mooted, in a large number of cases, perhaps a majority, because the outcome of the assize would dictate a similar result in an action on the right. This would be most obviously true of the \textit{praecipe} writs of entry which proliferated after Magna Carta;\textsuperscript{16} hardly ever would a writ of right, though always theoretically available, produce a result different from the judgment on a writ of entry. The later development of elaborate proprietary pleas in bar to the assize of novel disseisin\textsuperscript{17} also helped diminish the number of occasions when resort to a writ of right, and thus to feudal jurisdiction, would be a worthwhile enterprise. The marginal feudal jurisdiction, in effect, existed in the theoretical region between actions asserting absolute rights to land

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\item \textsuperscript{14} Magna Carta provided for regular visits of the assize. See note 9 \textit{supra}.
\item \textsuperscript{15} \textit{JOHN OF SALISBURY, POLICRATICUS} 7 (J. Dickinson transl. 1963).
\item \textsuperscript{16} \textit{See} \textit{generally 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW} 62 \textit{passim} (2d ed. reissued 1968).
\item \textsuperscript{17} \textit{See} D. SUTHERLAND, \textit{THE ASSIZE OF NOVEL DISSEISIN} 153 \textit{passim} (1973).
\end{itemize}
and less *droiturel* actions such as the assize. In the twelfth and early thirteenth centuries, this region shrank nearly to nothingness. Therefore the lord who complained of the interferences of royal jurisdiction evidently would have to be satisfied with the reply that his jurisdiction remained intact: The writ of right was still available, and belonged to the feudal courts. The general feudal proposition that land cases belong to the lord of the land was exploded. Yet the odd structure of English real remedies—the vertical progression from purely possessory to absolutely *droiturel*—bears the imprint of the old vertical feudal world which it eventually brought down; in fact, the remedies may have assumed their odd structure as a result of efforts to circumvent the levels of authority in the vertical feudal world.

A somewhat different explanation of novel disseisin's role in the developing government structures of the twelfth century has been offered recently by Professor Milsom. He sees the assize as initially designed to buttress the feudal tenant-lord relationship by providing tenants royal remedies against lords acting contrary to feudal principles. The assize, he maintains, was originally designed to operate against lords as disseisers. He deduces this theory partly from the opinion that the verb "to seize" was employed originally to describe what a lord does when he puts his tenant in possession; to "disseise," therefore, is what a lord does when he puts his tenant out of possession "unjustly and without judgment." Milsom's idea is quite appealing, and it is not altogether unlikely that a desire to protect tenants against lords generated the assize. Professor Sutherland, in his new book on the action, sees it otherwise; but both Milsom and Sutherland agree that the assize, far from buttressing feudal jurisdictions, in the end contributed significantly to their collapse. In any event, the lords perhaps were never comforted by the idea that the assize would preserve the feudal order and the effects of the assize would certainly justify lordly disquiet from its very inception.

Professor Sutherland's book appeared too late for Van Caenegem to deal with in *The Birth of the English Common Law*, but it seems singularly odd that he has ignored Professor Milsom's striking thesis of the assize's origin. At any rate, Professor Van Caenegem has a very different explanation of the growth of royal jurisdiction. He sees the growing royal jurisdiction as the natural solution to the confusion

20. S. Milsom, *supra* note 18, at 119; D. Sutherland, *supra* note 17, at 80 passim.
engendered by the welter of local courts, ecclesiastical and secular, to which application for redress might properly be made in the days of the Norman kings. The old English courts (the county and the hundred) were left intact by the conquerors, and the feudal courts were instituted by their side. The question of proper venue for a particular action could be enormously complex and "the inevitable result of it all was a good deal of overlapping, uncertainty and confusion. . . . It is no wonder that many court records leave an impression of basic weakness, hesitation and slowness." So, he concludes, royal orders to do right "without delay" were necessary to cure the "evil of the age": *penuria recti* or *defectus justicie.*

Professor Van Caenegem's assessment of the impotence of feudal and other local courts may be exaggerated and is, in any event, almost entirely conjectural. Moreover, the connection between the availability of a number of courts and the assertion that there was a resulting lack of justice is tenuous. Nevertheless, Van Caenegem is right to see the procedural difficulties inherent in such a fragmented system, especially when the parties lived in different fiefs. American lawyers may see central court jurisdiction in such instances as analogous to the federal diversity jurisdiction; but whereas the development of a federal common law in such cases was halted by *Erie Railroad v. Tompkins,* the English central courts developed a law which applied in all cases regardless of the residence of the parties or site of the action. Van Caenegem refers quite frequently to this common law, yet while its existence cannot be denied it should be remembered that the royal justices often ruled according to well-established local custom rather than the general common law. Bracton marks many local peculiarities, and he constantly had to qualify his generalities by references to possible local aberrations.

Van Caenegem's explanation of the growth of English royal justice includes his famous "judicialization" theory: that many common law writs began as mere executive orders and only later became means to initiate litigation—*i.e.*, writs of summons. Royal intervention in feudal jurisdictions began in these executive orders: these were writs of command issued after an *ex parte* hearing of a claimant's story; the

22. P. 17.
23. For citations to the literature on this subject, see D. SUTHERLAND, supra note 17, at 214-15.
24. 304 U.S. 64 (1938).
25. See, e.g., pp. 20, 22, 24, 29, 90, 91.
king or his ministers would peremptorily command an unheard adversary, or a royal minister, to restore to the petitioner some right which was withheld. This could lead, the argument runs, to the adversary obtaining a rescinding command, thus producing what the author calls a “war of writs.” The solution was “to judicialize royal interventions, i.e., to surround them with the necessary judicial guarantees, to ensure fair examination of the merits of the case . . . .” In this fashion “judicialization turned these executive measures into original writs and judicial instruments initiating formal lawsuits . . . .”

The evidence for Professor Van Caenegem’s theory is, first, the form which the *praecipe* writ exhibited for centuries: It commenced with a mere order to do or stop doing something and when it came to be employed to initiate litigation, the argument runs, a clause was tacked on the end commanding the offender to come and tell the king’s court why he did not do as ordered. The writ *praecipe* was thus “not redrafted after it became a simple writ of summons, but nobody expected the opening command—a mere fossil—to be carried out.”

Professor Van Caenegem’s interpretation of the available evidence as supporting his judicialization pattern is not unreasonable, and indeed the theory has a certain amount of appeal. It may well be that some of the common law writs in some way have their beginnings in earlier executive prototypes.

Some caution, nonetheless, is appropriate before accepting Van Caenegem’s “judicialization” theory. There is, first, no way of knowing what lay in the mind of the king or, more likely, the king’s ministers, when certain *ex parte* orders were issued. It is not at all clear, for instance, that some of these peremptory writs might not have been employed in much the same way as temporary restraining orders are today. Thus, further litigation may have been contemplated after the issuing of certain *praecipe* writs, even without the “show cause order” added to the end of the writ. Moreover, some *praecipe* writs may have been used as writs of execution after a full hearing; because they fail to recite the existence of a hearing preceding the writ’s issue, they may appear falsely as mere *ex parte* orders.

II

In his new book, Professor Van Caenegem interests himself again in the extent to which the English legal system is indebted to foreign
influences for its institutions and ideas of liability. To the debate over the origin of the jury not much can be added. The jury's central idea, that the best way to discover facts is to ask people who live in the vicinity where the facts presumably occurred, is simple enough that one need not impute it to any administrative genius—either of the Normans or anybody else.31 Professor Van Caenegem sees the jury as a tertium quid, an amalgam of Norman and indigenous Anglo-Saxon fact-finding institutions.32 That there was a Norman contribution at all, however, is difficult to maintain since there is not one example known of the use of a jury in Normandy prior to 1066.33 Perhaps it is not irrelevant to note that the most assiduous supporters of Norman origins for the jury are continental writers;34 English medievalists, on the other hand, have stoutly, and almost unanimously, argued for the jury's insular roots.35

A more interesting question, however, is the debt, if any, which English law owes to the twelfth-century Roman law revival on the continent. Much literature has been devoted to this subject,36 and happily it has recently attracted a number of new investigators.37 Van Caenegem himself has made large and interesting contributions in this area;38 and his book is perhaps most interesting when treating this question.39 Most scholars agree that true substantive borrowings, such as rules resulting from raids on the Corpus Juris Civilis and its associated literature, are extremely rare. A body of law, after all, is not an isolated intellectual system which can be transferred at will to different societies without regard to the political and economic environment in which its rules must operate.40 The Roman revival, however, may have made popular the perception that the law could be approached scientifically, organized according to principle, and, perhaps, manipulated for the sovereign's purposes. English lawyers took some time to learn these lessons, but the example of the Roman lawyers may have provided helpful impetus.

31. For the view that the jury was imported by the Normans, see H. Brunner, Die Entstehung der Schwurgerichte (1871).
33. Van Caenegem himself makes this point. P. 74.
34. See, e.g., H. Brunner, supra note 31.
35. See, e.g., H. Richardson & G. Sayles, supra note 1, at 205-08.
37. D. Sutherland, supra note 17, at 20-24, makes the latest contribution to the question of the Romano-canonical influences on the assize of novel disseisin.
38. See R. Van Caenegem, supra note 1, at 349-90.
There are, further, two principal reasons why English legal historians ought to devote attention to the medieval Roman law. The first, and more obvious, is that an insular immersion in English law may give a student the sense that its rules are the inevitable products of reason and observation—as medieval English lawyers themselves believed. Historians may dispel that illusion by revealing to students that other equally “reasonable” rules of law existed in the middle ages which were capable of solving legal problems. A second reason for familiarity with Roman law principles rests on the odd circumstance that continental legal systems were greatly affected by those principles while England’s law shows almost no substantive influence. Why did England alone remain relatively unaffected?

Professor Van Caenegem alludes to several possible explanations, but in the end he attributes the English aberration to the fact that “a centralized and modernized legal system took place exceptionally early in England (and Normandy) before Roman law was in a position to exert any profound influence.” This explanation, however, as Van Caenegem realizes, only leads one to ask why the English were in this respect so precocious. The old Anglo-Saxon state was certainly remarkably centralized and modern for its day; and no doubt the Norman conquest was facilitated by the pre-Hastings centralization of government in the country. And so the common law for the most part eluded the influence of the universities which flourished later in the middle ages; it was born and continued “an anomaly, a freak in the history of western civilization, less modern because it was modernized earlier . . . .” Yet still unelaborated are the reasons for the early coherence of English law.

III

Professor Van Caenegem’s patient and exhaustive work in the scattered records of this period has greatly increased our knowledge of the details and causes of the significant legal changes occurring in twelfth-century England. Some caveats, however, perhaps may be usefully advanced here. Van Caenegem’s concentration on writs—necessary since other sources, though not entirely wanting, are meager—almost
inevitably turns the reader's thoughts to those supposedly ineradicable categories known as the "Forms of Action." The association of the growth of the common law's substantive ideas with the growth of writs has in the past resulted in the false view that the substantive idea represented in a later form of action, or writ, somehow grew out of a simpler substantive idea present in an earlier, simpler writ. This seductive idea may be irresistible to a generation whose minds are polluted in the social sciences by the Idea of Progress and in the physical sciences by Darwinism. But Professor Milsom demonstrated convincingly in his work on the "action" of trespass, for instance, that there is no such simple relationship between earlier and later writs employed to redress wrongs. It seems likely that other examples can be exposed after a systematic, comprehensive examination of available plea roll evidence.

An association of the change in the Registra Brevium with the growth of the law, then, may promote the mistaken impression that legal thought about remediable wrongs developed in the same ways as did the Register. The truth more often is that the appearance of new royal remedies represents a jurisdictional shift from the local or even ecclesiastical courts into the royal courts. Inventions of novel substantive liabilities in medieval England are extremely rare, perhaps virtually nonexistent. No doubt some statuses changed; for instance, a guardian in socage did become liable to account. And the notion of strict liability for damages in a particular set of circumstances occasionally might relax sufficiently to admit some concept of culpable negligence. Generally, however, the subtler rules of liability are not to be perceived in the wording of writs. It is more likely that "rules" of this sort are to be discerned not by investigating the mysteries of chancery pleading or even the erudite verbal fencing of serjeants-at-law, but instead are to be discovered by reconstructing the attitudes of the community whose representatives, the jury, had in many instances unbridled authority to decide cases.

There is indeed much to be learned still from an examination of the Register. The legal historian of medieval England who wants to answer the important questions, however, must develop research tech-

48. Professor Van Caenegem himself invites the reader's attention in this direction. Pp. 33, 41.
50. Statute of Marlborough, c. 17 (1267). It is possible that the obligation to account previously existed and only the royal remedy was new.
51. For an example of such a reconstruction, see Green, Societal Concepts of Criminal Law Liability for Homicide in Medieval England, 47 Speculum 669 (1972).
niques and methods of analysis which face the reality that the life of the medieval common law did not lie principally in the stereotyped writs that initiated litigation. The law did come to be so regarded, or at least the nineteenth-century reformers said it did; but this development occurred long after the medieval period. The essential story of the law's later dependence on writs can be fairly well documented in the history of attempts to control the jury's authority, although this story remains to be told. The tendency to see the beginning of this development in medieval centuries, however, must be resisted assiduously, and medieval legal history must be seen as something more than a branch of archival study.
Born With His Trousers Creased


Reviewed by Lewis L. Gould†

After John W. Davis captured the Democratic presidential nomination in 1924 on the 103rd ballot, his defeated rival, William G. McAdoo, sailed for England to recuperate from the long and bitter national convention. "When you get to England," Will Rogers telegraphed McAdoo, "find out for me who John W. Davis is and cable particulars." Rogers' waggish wire indicated that the former ambassador to Great Britain was not, in the phrase of a later day, a "household word" in July 1924, and the crushing defeat that Davis suffered at the hands of Calvin Coolidge returned him to the obscurity that often envelops men who finish second in the making of presidents.

In winning the nomination, however, Davis was not a genuine dark horse emerging from nowhere to lead the divided Democracy. A former congressman from West Virginia, solicitor general and ambassador under Woodrow Wilson, and a partner in the New York law firm now known as Davis, Polk & Wardwell, he was as much the result of "the logic of the situation" for the Democrats in 1924 as William Jennings Bryan had been in 1896. Yet despite his long career in public service and at the bar, Davis has received only passing, and often disdainful, notice in standard textbooks and general academic accounts of national history in this century. William H. Harbaugh's careful biography endeavors to illuminate more fully all the facets of a life passed on the scene of many great events.²

Davis presents difficulties for even the most well-disposed biographer. There are the embarrassments of his participation in the Liberty League attacks on the New Deal in the early 1930's and his staunch defense of the "separate but equal" doctrine before the Supreme Court in the School Segregation Case³ in 1952 and 1953. More important,

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2. W. HARBIAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS (1973) [hereinafter cited to page number only].
Davis's life lacked intrinsic excitement. Compared to Harbaugh's previous subject, Theodore Roosevelt, the man seems pallid. As a Washington correspondent observed in 1924, Davis was "born with his trousers creased." Harbaugh's biography accurately reflects the man's absence of personal magnetism and his deserved position as a second-level actor in the drama of his time. Yet Davis was often close to large figures and developments, and accordingly this first detailed study of his life is instructive and enlightening.

The career of John W. Davis also serves as a useful reminder of the persistence of a conservative tradition within the Democratic party, a heritage sometimes overlooked because of the triumph of liberal ideas within party councils since the New Deal. To see the Democrats as the undoubted champions of reform principles and programs throughout the 40 years after 1900 does violence to complex developments in which the success of what a subsequent generation would call "liberalism" was not foreordained or uncontested. Men like Davis spoke loudly in the Democratic dialogue, and have not yet been silenced in the party's debates.

As a young lawyer and politician in Clarksburg, West Virginia, Davis instinctively gravitated toward the conservative wing of the Democracy and the legal profession. "The framework of his mind," Walter Lippman wrote of him in 1924, "was formed in West Virginia. It is that of the traditional Democrat with the Jeffersonian distrust of centralization, a powerful dislike of bureaucracy, and a strong prejudice in favor of home rule." During childhood and 15 years of West Virginia practice with his father, John J. Davis, a lawyer and congressman in the 1870's, John W. acquired a reverence for the doctrines of Thomas Jefferson, as the late nineteenth century conceived them, with the addition of a generous dose of racism. Accepting as well the emphasis on inexpensive government, low tariffs, and negativism that the elder Davis and most Democrats displayed, the son was reluctant to enhance government power in order to deal with problems of social justice. Like many of conservative persuasion in his party, Davis had trouble accepting the evangelical rhetoric and activist programs of William Jennings

5. Blythe, The Personable Mr. Davis, SATURDAY EVENING POST, August 30, 1924, at 3.
6. There are, moreover, too few extended and rich treatments of modern American conservatives, and Harbaugh's volume, like James T. Patterson's study of Robert A. Taft, makes an important contribution. See J. Patterson, MR. REPUBLICAN: A BIOGRAPHY OF ROBERT A. TAFT (1972).
Bryan in 1900 but voted readily for Judge Alton B. Parker at the Democratic National Convention in 1904.

His career at the bar reinforced his political premises. At the Washington and Lee School of Law Davis was exposed to "the States' rights doctrine in its purity" from instructors "more concerned that you should learn what the law was, than that you should be invited to speculate on what the law ought to be." Reform through new legislation was hardly a lawyer's function to Davis, who described an attorney as a kind of technician who "must steel himself like the surgeon to think only of the subject before him and not of the pain his knife may cause." Harbaugh suggests that Davis gained such clinical detachment with difficulty, that it was not easy "to suppress his compassion." Yet his willingness to accept as clients the corporations industrializing and mining his state and his apparent unwillingness to extend his father's tradition of a law office that "stood for the little man" indicate that Davis managed the suppression without excessive exertion.

By 1910 Davis was 37, moderately well-to-do, and ready to accept greater challenges than Clarksburg could offer. He yielded to the importuning of friends, became the Democratic candidate from the First Congressional District, and won a solid victory over his Republican opponent. Elected again, by a narrow margin, in 1912, Davis returned to the House in which he had won respect and admiration for his diligence, graciousness, and expertise at drafting legislation and making arguments. He showed to excellent advantage during the impeachment trial of a federal judge when he argued persuasively that "misde-meanors," as used in the Constitution, did not refer only to an indictable offense, "that one impeachment proceeding after another has been based upon offenses not within the law of crimes." He also drafted part of a bill that eventually became a portion of the Clayton Act's anti-labor injunction section and made an excellent argument for workmen's compensation, although the bill he twice reported out of the Judiciary Committee did not become law while Davis was in Congress.

Davis was re-elected to Congress as the Democrats returned to na-

10. P. 46.
11. Id.
12. P. 49.
13. U.S. CONST. art. II, § IV.
14. 49 CONG. REC. 1267 (1913). Davis's argument on this point has received contemporary attention. See Lewis, Negligence or Perfidy, N.Y. Times, Dec. 10, 1973, at 37.
tional power for the first time since the debacle of Grover Cleveland in the 1890's. The Republican division after 1909 brightened the party's prospects and the Democratic faithful debated how best to exploit the opportunities that the discord of the opposition presented. Should the party adhere to its tradition of states' rights and small government, or should it argue for enhanced government power and progressive reforms as its rival moved to the right? The public record that Davis left sheds scant light on his position in this discussion and does not buttress Harbaugh's conclusion that by 1912 "he had been forced to reexamine some of his fundamental assumptions."

The author is silent on whether Davis, like his father, supported the most progressive candidate, Woodrow Wilson, for the Democratic nomination; there is, at least, an indication that he did not emerge as a "mild Wilsonian" until after the Baltimore convention. In 1913 Davis sought but was denied an appointment to the Fourth Circuit Court of Appeals. Wilson, however, took note of his skills and in August 1913 named Davis solicitor general. For five years Davis championed a host of progressive causes before the Supreme Court. His brilliant advocacy made him a favorite of the Court, especially with Chief Justice White and Justices Day and Van Devanter. Davis was a master of the oral argument and the persuasive brief. One of his memorable early triumphs was in the Government's effort to strike down the Alabama peonage system, by which the state permitted sureties to pay the fines of blacks convicted of petty crimes and work them on plantations under court-approved contracts. The Court held the system a violation of the Thirteenth Amendment and the Peonage Act of 1867. Another victory was Wilson v. New in which the Court upheld the Adamson Act establishing an eight-hour day on the nation's railroads. Davis was less successful in Hammer v. Dagenhart, where

15. P. 79.
18. Oliver Wendell Holmes, Jr. may not have been as impressed. Harbaugh, at p. 128, quotes some secondhand praise of Davis from Holmes, but does not mention Holmes' restrained evaluation in 1924. "I should have some hesitation about Davis—he makes beautiful arguments—but I don't feel sure that I haven't had glimpses of a weaker side. Nothing very tangible—some expressions in his face—possibly an economic divagation—I know not—and may be quite wrong—as all that I have seen I have liked very much." Letter from Holmes to Harold J. Laski, February 1, 1924, 1 HOLMES-LASKI LETTERS 587 (M. Howe ed. 1953).
20. This is the involuntary servitude amendment. U.S. Const. amend. XIII.
22. 243 U.S. 332 (1917).
the Court held the Keating-Owen Child Labor Act of 1916 to be unconstitutional. Harbaugh demonstrates an obvious zest for this kind of legal history, and these chapters are among the most interesting of the biography.

At the same time Harbaugh misses some opportunities to put Davis into sharp focus and mark the limits of his response to the progressive pressure of the Wilson years. There is some evidence that Davis was ideologically out of step with the administration which he represented before the Court, and Harbaugh fails to indicate precisely why Wilson named the man solicitor general. Even four years after his appointment, Davis's politics worried some progressives; Julia Lathrop, former chief of the Children's Bureau, complained in 1917 that Davis "was so conservative that he might not do justice" to the Government in the Child Labor Law Case. When Assistant Attorney General Charles Warren advocated various repressions of civil liberties in the name of the war effort, Davis, according to Harbaugh's account, acted as a moderating influence. Yet although Davis is said to have "left no record of his own views" on the civil liberties excesses, he did agree with Warren in the winter of 1918 that military rather than civilian courts should have jurisdiction in sabotage cases. "I am with Mr. Warren," he wrote Attorney General Thomas W. Gregory, "in believing that the trial and execution of a spy under one or the other of these statutes would be wholesome." Finally, Wilson's judgment on Davis needs more thorough scrutiny: When the President heard Davis's name mentioned for the presidency in 1920, he said Davis was "a fine man but he is a formalist. If you want to stand still, he is just the man to nominate."

Davis was named ambassador to Great Britain in the fall of 1918, and served until the end of Wilson's presidency. Relying primarily on Davis's own diary, his biographer presents a winning picture of the ambassador striving to shore up worsening Anglo-American relations while charming his hosts with an aristocratic manner and ceremonial speeches. There are vignettes of Lloyd George, Lord Reading, and King George V, but, strangely, no study of British sources to gain private perspectives on Davis's tenure. A recent student of this period of Atlantic foreign policy has issued a negative verdict on

28. P. 126.
29. See pp. 126-27.
Davis's performance at the Court of St. James', but justification of this conclusion will depend on a wider examination of diplomatic documents than Harbaugh has made. For Davis himself, at any rate, the two-year sojourn in the still-comfortable world of the British upper class may have counteracted any impact of Wilsonian progressivism and reconfirmed him in the old faith of his party. The expenses of the ambassadorship, moreover, encouraged Davis in his resolve to resume private practice and leave public service. He happily returned from England in 1921 to become the leading partner of Stetson Jennings & Russell, a large New York City firm listing the House of Morgan among its many well-paying clients; the ex-ambassador saw his income rise somewhere above $150,000 a year.

Only three years after returning to the bar, Davis was the Democratic nominee for President. The selection of a conservative Wall Street lawyer reflected the party's enfeebled state in the 1920's. Upon the retirement of Woodrow Wilson the Democrats entered a decade of sectional discord and factionalism that only ended with the Great Depression. Ethnocultural issues like prohibition and the Ku Klux Klan separated the dry, predominately Protestant South and West from the wet, often Catholic East. Both sides had progressive goals and progressive spokesmen, but cultural tensions kept them apart until hard times and Franklin Roosevelt reunited them in 1932. With the forces of reform split, conservative Democrats like Davis could postpone deciding whether the "party of the fathers" had permanently forsaken its nineteenth century traditions. They could participate in decisions, and even lead the party, without having to make intolerable ideological concessions to the divided progressives.

As 1924 approached Davis emerged as a leading compromise candidate without having to subject his conservatism to any rigorous public scrutiny. A mild boomlet at the 1920 convention had laid the foundation for a later race, and friends urged potential delegates to make him their second choice should the front-runners, William C. McAdoo and Alfred E. Smith, stumble. A limited schedule of public appearances reminded Democrats of his availability without excessively emphasize-
ing the conservative views he articulated. When McAdoo, the candidate of the drys, the West, and the South, became “splattered with oil” because of his legal service to participants in the Teapot Dome scandal, a deadlocked convention loomed. Through the preliminary process Davis avoided explicit statements on the issues that divided his party. “A campaign manifesto,” he told a friend, was “the very thing I have endeavored to avoid.”

On one matter, however, public criticism forced Davis to speak out. The major obstacle to his chances was his representation of large corporations, banks, and railroads. In a public letter, Davis defended his independence. “No one in all this list of clients,” he wrote, “has ever controlled or even fancied that he could control my personal or my political conscience.” The letter defused the issue to a degree, but Davis’s candidacy never wholly escaped the stigma of the phrase “Wall Street lawyer.” In response to Davis’s justification of his conduct, liberal publications quoted an interview that the lawyer had given to a Brooklyn newspaper that set the problem in a different perspective. “I have a fine list of clients. What lawyer wouldn’t want them? I have J. P. Morgan and Company, the Erie Railroad, the Guaranty Trust Company, the Standard Oil Company, and other foremost American concerns on my list. I am proud of them. They are big institutions, and so long as they ask for my services for honest work I am pleased to work for them. Big Business has made this country what it is. We want Big Business. But it must be honest.”

At Madison Square Garden in July 1924, Davis was offered to the delegates as “a man who has the calm courage of a Cleveland and the progressiveness of a Wilson.” After dozens of ballots confirmed the stalemate between McAdoo and Smith, the assembled Democrats reverted to the caution they had displayed in 1904 and 1920 and nominated Davis as an attractive alternative to further futility. As H. L. Mencken tartly observed, “The Hon. Mr. Davis won the nomination by dodging every issue that really stirred the convention.” A British correspondent summed up the work of the convention most acutely: “But for his views on the Tariff, Mr. Davis would make an ideal Republican candidate.”

25. P. 208.
26. P. 199.
30. The Choosing of Mr. Davis, 35 THE NATION AND THE ATHENEUM, August 2, 1924, at 557.
Born With His Trousers Greased

Harbaugh contends cogently that 1924 was an impossible year for any Democrat.\textsuperscript{41} Calvin Coolidge had a stranglehold on the conservative vote, and the candidacy of Senator Robert M. LaFollette on the Progressive Party ticket eroded potential support from the left. The vice-presidential candidate, William Jennings Bryan's brother Charlie, was a disaster, and the defeated aspirants, Smith and McAdoo, gave only lukewarm endorsements to the ticket. The party lacked money, organization, and unity. Chief Justice William Howard Taft passed on to a friend the apt prescription of a Democratic newspaper for party victory: "[W]hat Davis needs is a rabbit's foot."\textsuperscript{42}

Yet Davis was also an inept candidate. He chose an old West Virginian friend, Clem Shaver, to run his campaign and the selection was maladroit. "Davis seems to have succeeded," concluded Taft, "in finding one of the biggest asses for his campaign manager that we have had in politics."\textsuperscript{43} The Democratic hopeful wrote graceful speeches and delivered them in a manner that charmed some and bored most. Davis's mind, noted Felix Frankfurter, was "characteristically conventional,"\textsuperscript{44} a judgment that the canvass confirmed. Davis did denounce the Klan, a courageous act in 1924, and he made strong attacks on Coolidge's silence and the scandals of Harding's administration. He said little, however, to suggest his own answers to social problems. He had, as Harbaugh writes, "no real grievance against the existing order,"\textsuperscript{45} and it showed. The Republicans concentrated on LaFollette. The issue, they proclaimed, was "Coolidge or Chaos." Davis was ignored, "simply concealed in the crowd," commented Mencken, "like a bootlegger at a wedding."\textsuperscript{46} Forced to choose among a conservative Democrat, a conservative Republican, and the maverick LaFollette, the voters went overwhelmingly for Coolidge.

Following defeat in 1924 Davis took up his practice once again and pursued it with great professional and financial success until his death in 1955. His conservatism, freed from the countervailing pressures of the political arena, deepened as his circumstances grew more comfortable and his body of corporate clients more impressive. Former associates in the public service regarded this period as anticlimactic. "I don't think Mr. Davis' career in New York is the one that should

\textsuperscript{41}. P. 221 \textit{passim}.
\textsuperscript{42}. Letter from William Howard Taft to Gus J. Karger, August 30, 1924, William Howard Taft Papers, Manuscripts Division, Library of Congress.
\textsuperscript{43}. Letter from Taft to Karger, September 16, 1924, id.
\textsuperscript{45}. P. 240.
\textsuperscript{46}. Mencken, \textit{supra} note 39, at 97.
be perpetuated," said one. "The story of the man who represented the telephone company and Morgan is an epilogue." 47

Davis, however, clearly seemed to prefer his hard-working, affluent, private life as a corporation lawyer to party politics. He supported Al Smith warmly in 1928, and responded vigorously to the rampant anti-Catholicism directed at Smith in the contest with Herbert Hoover. But he had little to offer in the Depression other than calls for his party to become once again "the militant champion of local self-government." 48 Attending the national convention in 1932, he murmured, when the trend toward Franklin Roosevelt became clear, "What a pity." 49 By the middle of the decade Davis was helping to lead the assault on the New Deal through suits against regulatory legislation and as a sponsor of the Liberty League. He opposed Roosevelt, he told British friends in 1936, because "he has multiplied the functions of government so recklessly." 50 A function to which Davis objected vehemently was taxation; even as he earned an average of $275,000 during the five worst years of the Depression, 51 he complained bitterly about the tax burden on the higher income brackets. 52 By the end of his life Davis was telling his family, "I did not leave the Democratic party. It left me." 53

During his last decade Davis participated in episodes that touched on some of the most central issues of the postwar era. He was an adviser to Alger Hiss and served as a character witness at both his trials. He also assisted the attorneys for J. Robert Oppenheimer in the security risk hearings. Harbaugh seems to imply that these activities off-set Davis's conservatism on other matters, 54 but he cannot show that Davis ever saw the Hiss and Oppenheimer controversies as part of a larger assault on civil liberties. Nor can he demonstrate that the fate of either man engaged Davis's energies to the extent that the Steel Seizure Case 55 or the School Segregation Case 56 did.

The Steel Case and the battle to perpetuate segregation marked Davis's last appearances before the Supreme Court, and his advocacy of the two cases reflected the dominant themes of his public and professional life. Opposing President Truman's takeover of the steel in-

47. P. 266.
51. P. 259.
52. See, e.g., p. 338.
54. See p. 445.
Born With His Trousers Creased

dustry in 1952, Davis rejected an expansive view of presidential power and harked back to the political principles he adopted in West Virginia, in an earlier century. "Is it or is it not an immutable principle," he asked in his argument, "that our Government is one of limited powers? . . . Is it or is it not an immutable principle that the powers of government are based on a government of laws and not based on a government of men?" He closed with a quote from Jefferson: "In questions of power, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution." The result in the case, if not the language in Justice Black's brief opinion for the majority, marked one of the great victories of Davis's career at the bar.

Davis last appeared before the Supreme Court to contend against the challenge of the National Association for the Advancement of Colored People to segregated schools. His position was predictable. He had argued for Negro voting rights as Solicitor General and had received some black votes in 1924 after denouncing the Klan, but he had always accepted the racist beliefs that his region and his party shared in the Gilded Age. John J. Davis had opposed ratification of the Fifteenth Amendment because it would "by one stroke make the negroes our equals." The elder Davis believed in "the white man's party . . . [and] a white man's government, instituted by white men for the benefit of white men." John W. Davis, in more elevated language, sought the same ends. To him segregation was apparently another "immutable principle." Referring to segregation, he told the Court in oral argument on the South Carolina case combined with Brown v. Board of Education, "[S]omewhere, sometime, to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance."

The Supreme Court's repudiation of segregation in Brown in May 1954 severely distressed Davis, and, in the opinion of associates, hastened his death. A month and a half after the Brown decision, David Lilienthal noted in his journal: "I saw John W. Davis. He looked terribly old and shaken loose, like a formidable old building, which was once grand and imposing and strong, but some of its foundation stones

57. P. 476.
59. P. 8.
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had been jarred loose so that the whole structure was rather askew." On March 24, 1955, Davis died.

Harbaugh's study takes the reader through the fortunes of the elaborate edifice that was John W. Davis's career with great skill. If, in the end, the biography is less than the accumulation of its very well-done sections, the fault is Davis's, not Harbaugh's. As the author recognizes, the man summarized his own place in American history in a single sentence: "I seem to have caught at the skirt of great events without really influencing them." 64

64. P. 523.
PROFESSOR MOORE
In Honor of James William Moore

The Editors of the Yale Law Journal warmly dedicate this issue of Volume 83 to Professor James William Moore on the occasion of his retirement from teaching. Professor Moore was born in Condon, Oregon, on September 22, 1905. His parents were from Montana, and they soon returned with the infant to Bozeman where Professor Moore was raised. He graduated from Montana State College in 1924 at the age of 18; while there he fought in several boxing matches as a flyweight. He soon discarded dreams of a career in the ring and served from 1925-1931 as Chief Deputy Clerk of the Montana District Court for the Ninth Judicial District. From there he went to the University of Chicago where he obtained a J.D. in 1933 and to Yale where in 1935 he earned a J.S.D.

After obtaining his J.S.D. Professor Moore was appointed an instructor in law at Yale and served for one year. He returned to Chicago but shuttled back to Yale as an associate professor in 1938 and has with occasional short interruptions been here since then. He was appointed a full professor in 1943 and was honored with a Sterling Chair in 1958. He was a visiting professor at the University of Texas in 1941 and 1942 and at the University of Minnesota in 1956. Montana State College conferred an honorary LL.D. on him in 1962.

While at Yale Professor Moore has participated actively in a number of legal activities that relate to his two major scholarly interests, namely bankruptcy and procedure. He was Special Research Assistant to the Supreme Court's Advisory Committee on Federal Rules, 1935-1938; Co-Reporter to the International Academy of Comparative Law, The Hague, 1937; Special Consultant to the Legislative Committee to Revise the Judicial Code, 1944; Member of the Supreme Court's Advisory Committee on Federal Rules, 1954-1956; and of counsel for the State of Texas in the Texas “tidelands” oil litigation, United States v. Texas. He is at present a member of the Supreme Court’s Committee on Rules of Practice and Procedure and Counsel to the Trustees of the New Haven Railroad in Reorganization.

In addition to his numerous professional endeavours Professor Moore has been and remains a teacher without peer. He leads his classes gently when the material is complex or the problems insoluble. When he has some observations of his own they are always succinct and cogent. His time is his students', and many of us and our predecessors have troubled him for advice and recommendations. His words are few, but choice, to be savored by the bestowed. We thank him for what he has given us and hope that this issue, comprised of work produced by his colleagues and students, will be a fitting embodiment of our gratitude.

Writings of James William Moore

Books

**Moore**'s **Federal Practice** (1st ed. 4 vols. 1938-1942).
**Moore**'s **Federal Practice** (2d ed. 9 vols. 1948-1974).
**Moore**'s **Federal Practice—Judicial Code Pamphlet** (1967).
**Moore**'s **Federal Practice—Rules Pamphlet** (1971).
**Moore**'s **Bankruptcy Manual** (1939).
**Gilbert**'s **Collier on Bankruptcy** (4th ed. J. **Moore** & E. **Levi** 1937).
**Moore and Oglebay on Corporate Reorganization** (2 vols. 1948).
J.W. **Moore**, **Debtors' Estates** (mimeograph 1947).

Articles

**Moore**, **Conflict of Jurisdiction** (Address), 23 La. L. Rev. 29 (1962).
Writings of James William Moore

Moore, The Supreme Court: 1940, 1941 Terms—The Supreme Court and Judicial Administration, 28 Va. L. Rev. 861 (1942).
Moore & Rogers, Federal Relief from Civil Judgments, 55 Yale L.J. 623 (1946).
Moore & Tone, Proposed Bankruptcy Amendments: Improvement or Retrogression?, 57 Yale L.J. 683 (1948).

Book Review


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Foreword

Fleming James, Jr.†

Bill Moore is a giant in the field of procedure. His treatise on federal practice is one of the classics of our time.1 It has a wealth of background material from history, ancient and modern, including the many reports of the advisory committee and the steps taken in the formulation and changes of the Rules themselves. Beyond that it rates penetrating analysis and broad vision, all expressed in lucid style. Others will treat more fully Bill's impressive contributions to his chosen fields of scholarship. I shall not try to do that here but want there to be no doubt about my hearty amen to praise on this score.

During the summer of 1935 Dean Clark, who was Reporter for the Supreme Court's Advisory Committee on Rules for Civil Procedure, was engaged in putting the finishing touches on a draft of the Rules and had money from somewhere to employ a number of younger men to work under him. At this time Bill Moore had just completed the work for his J.S.D. at Yale and was to teach here the following year; I was a junior teacher in procedure and a profound admirer of Dean Clark. Both of us were in the group. I first got to know and respect Bill that summer. Out of it (and out of his previous work in procedure) came some articles which played a seminal role in the early days of the Rules and as forerunners of his monumental treatise.2

That summer, or shortly after it, I was present at a discussion between Bill and Thurman Arnold about class suits. Thurman was then greatly preoccupied with res judicata—he was teaching virtually a whole course by ringing the changes on the Baldwin cases3—so the conversation naturally turned in that direction. Under Thurman's

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1. J.W. Moore, Federal Practice (2d ed. 1948). (The first edition was published in 1938.)
questioning and prodding, Bill then and there, as the conversation developed, charted out the analysis which became embodied in Rule 23 and dominated the thinking about class suits which prevailed for a good many years.  

This incident reveals one of Bill's great points of strength. From the very first he has shown an unusual capacity to work with other scholars, to profit by their ideas, and to be a catalyst to the thinking of others. Many of his early articles were done in coauthorship, and the treatise has been the product of a considerable staff. But the work throughout has borne the stamp of Bill's own strong personality, his power of analysis, and his fine craftsmanship. As Clark had been before him, Bill has been the creator and the architect. And because of his capacity to work with and through others he has been able to project himself on a scale which has seldom been matched.

Another occurrence shows how this man, the leading procedure scholar of his generation, never became pedantic or doctrinaire at the expense of common sense. When Bill and I were co-counsel for the trustees in bankruptcy of the old New Haven Railroad, the trustees had to petition the court for authority to borrow money under a federal guaranty in order to continue operation of the road. The loan was to be secured by a lien on the property which (after the manner of receivers' certificates) would be given priority over existing mortgages. I drafted a petition along the spare, economical lines of federal pleading according to the teaching of Clark and of Moore. Bill took issue with my draft. The situation, we all knew, was a touchy one so far as relations with the bondholders and the public were concerned. Bill felt that the petition, which would get immediate publicity, should be made a vehicle for explanation and justification of our petition far beyond what the rules of good pleading would require or condone. At the time I viewed Bill's draft as a baroque monstrosity—and so it was to the purist in pleading—but the trustees saw it his way, which was certainly the wiser one.

During the New Deal and much of the early postwar period the law school faculty was almost monolithically liberal in political viewpoint.

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4. See Moore, supra note 2, at 570-76.
5. In addition to the sources cited in note 2 supra, see Moore & Wiseman, Market Manipulation and the Exchange Act, 2 U. Cin. L. Rev. 46 (1934).
6. During the second world war I was director of the litigating division of the Office of Price Administration and as such had extensive contact with federal practice and federal practitioners throughout the country. In this experience two things impressed and gratified me. One was the universal respect accorded to Clark as the master of procedure and guiding spirit in formulating the federal rules. The other was the recognition which Bill's Federal Practice was already beginning to have among courts and practitioners.
Bill stood out as a militant and conspicuous conservative, a role he enjoyed and often dramatized. But beneath the dramatics and the accompanying humor I have always felt were deep and sincere feelings. Moreover, Bill had the courage and independence to express these feelings when they were generally unpopular and before he had eminence in his own field.

The affection and respect I formed for Bill during that summer of 1935 have increased over the years in spite of many differences of opinion. I enjoyed and profited from being his colleague and friend for so many years and welcome him to the fraternity of the prematurely retired.