THE HONORABLE MR. JUSTICE RUFUS W. PECKHAM, JR. FROM ALBANY, NY TO THE UNITED STATES SUPREME COURT

By: Hon. W. Dennis Duggan, J.F.C.

Lists of Best, Worst, Most, Least, etc. always carry a fascination for most of us. They are at once tidy, pretentiously definitive and, of course, gossipy. For example, who was the smallest United States Supreme Court Justice? Answer: Alfred Moore (1755 - 1810). Moore was four feet five inches tall and weighed ninety pounds. His production on the Court was diminutive as well. In five years, he wrote only one opinion, the body of which was one page in length. His chance at greatness, or at least notoriety, came when he was expected to dissent from Justice Marshall in Marbury v. Madison (5 US 137 [1803]). Unfortunately for him, he was late in traveling to Court and missed the oral arguments. He did go on to help establish the University of North Carolina and was otherwise a distinguished member of the North Carolina Bar.

A Book of Legal Lists by Bernard Schwartz contains a collection of such lists that should entertain most lawyers and judges. Schwartz was the Chapman Distinguished Professor Law at the University of Tulsa and biographer of Chief Justice Earl Warren. Alfred Moore gets Professor Schwartz’s vote for the worst Supreme Court Justice. That strikes me as a bit unfair since Moore was not around long enough to be truly undistinguished and he had no negative accomplishments to speak of. So Schwartz should have limited his selections to judges who had at least, say, 500 at bats. My vote for the worst Supreme Court Justice goes to James Clark McReynolds (1862 - 1946). McReynolds was just a nasty man. That wouldn’t be so bad by itself (because he did like children) but he was also racist, sexist and anti-Semitic, even by the forgiving standards of the first half of the twentieth century. Schwartz reports that when Cardozo was being sworn in as a Supreme Court Justice, McReynolds occupied himself by reading the newspaper. When Brandeis spoke in conference, McReynolds would leave. In commenting on one of Brandeis’ dissents, he wrote to Holmes: “that for four thousand years the Lord tried

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to make something out of the Hebrews, then gave it up as impossible and turned them out to prey on mankind in general-like fleas on the dog for example.” Chief Justice Taft noted that McReynolds was “fuller of prejudice than any man I have ever known.”

From a legal point of view, McReynolds was one of the Four Horsemen (with Van DeVanter, Sutherland and Butler) who formed the conservative block that voted down virtually all of Roosevelt’s early New Deal legislation. Nowadays, a Judge striking down legislative acts as unconstitutional would probably be labeled a liberal or activist or even leftist. Unless, of course, it’s the current United States Supreme Court striking down portions of the Americans with Disabilities Act, the Violence Against Women Act, the guns near school law, Florida Election Law or the Child Pornography Prevention Act. In that case, the Court would be labeled ??? — well, I give up. It seems that the political and ideological treadmill upon which judges run is, in reality, a Mobius strip. Sir Wilmott Lewis of the London Times once remarked that, “Legislation in the United States is a digestible process with frequent regurgitation by the Supreme Court.”

From 1933 until his resignation in 1941, McReynolds wrote 146 dissents. It is not surprising that McReynolds, a former professor of commercial, insurance and corporation law at Vanderbilt Law School should become one of the Court’s strongest proponents of laissez-faire constitutionalism. “I can not find any authority in the Constitution for making the Federal Government the great almoner of public charity throughout the United States,” McReynolds said in dissent in Steward Machine Co. v. Davis (301 US 548 [1931]) where the majority upheld the Social Security Act. McReynolds was Woodrow Wilson’s Attorney General and some think Wilson appointed him to the Supreme Court to get such a disagreeable man out of his cabinet. If any should doubt the contrary nature of Justice James Clark McReynolds, just consider that the board of directors of the country club where McReynolds played golf voted to expel him from the club because no one would play in foursome with him.

So, on to Justice Peckham. If we step back several decades from the 1930’s, we can see what happens when the law borrows from economics what economics borrowed from sociology what sociology borrowed from science and, at the end, it was all Charles Darwin’s fault. We all remember Darwin’s theory of “survival of the fittest.” Actually Darwin (1809 - 1882) never said that and it wasn’t any part of his theory of natural selection. Survival of the fittest was Social Darwinist Herbert Spencer’s (1820 - 1903) perversion of Darwin. With Darwin and Spencer, the capitalists had science and sociology and so after, with the help of Rufus W. Peckham, the Constitution on their side. You can throw God in there too because social Darwinism and creationism had a symbiotic relationship, which is ironical, since, as we know from the Scopes trial (1925), Darwinism and creationism were diametrically opposed. However, this ideological mix provided a fertile ground for laissez-faire economics and it was a small step to laissez-faire constitutional law. This theory of law was to be the law of the land for the first third of the Twentieth Century.

Laissez-faire constitutionalism got its legal start in the dissents of Field and Bradley in the Slaughterhouse cases (63 US 36 [1873]) which gave us the oxymoronic term “substantive due process.” However, it took another twenty years for the Supreme Court to fully adopt its anti-labor, anti-government regulation, pro-corporation positions that laissez-faire constitutionalism supported. No one gave stronger voice to this movement than Albany’s own, Justice Rufus W. Peckham, Jr.

Peckham came from good blood lines. His father, Rufus Sr., born in Rensselaer, was one of the first elected justices to the Court of Appeals in 1847. He died at sea in 1873 when his Europe bound ship collided with another vessel and sank. Rufus Jr. was born in Albany in 1838 and resided at 191 State Street, just a sand wedge down the hill from the residence of Learned Hand’s parents at 224 State Street. He died in Altamont on October 24, 1909 and is buried in Albany Rural Cemetery. Educated at Albany Boys Academy, Peckham read law and practiced with his father. He served as District Attorney, Albany Corporation Counsel, State Supreme Court Justice and then was elected to the Court of Appeals in 1886. Grover Cleveland nominated him to the United States Supreme Court in 1895, a spot which Judge Learned Hand felt would have gone to Hand’s father except for his untimely death. Actually, Peckham was Cleveland’s second choice. Two years earlier, the President nominated Peckham’s brother, Wheeler, whose nomination was blocked by New York’s United States Senator David Hill, the leader of the New York Democratic machine.

Peckham is most famous for authoring the majority opinions in Allgeyer v. Louisiana (165 US 578 [1897]) and Lochner v. New York (198 US 45 [1905]) which established the “liberty of contract” theory as a limit on state regulatory authority. These two opinions provided the bedrock legal support for laissez-faire capitalism and its hold on the law of the land. With the additional support of social Darwinism and religious conservatism, the hat trick was completed. After all, what Legislature could argue with an economic theory that had the Constitution, science and religion on its side? It is in this area that Peckham, in Professor Schwartz’s opinion, undistinguished himself. Peckham comes in at #5 on his list of the Ten Worst Supreme Court Justices (because he was the leading voice of laissez-faire constitutionalism), as the author of the third worst Supreme Court decision (Lochner) and as the author of the fifth worst state court decision (Hickey v. Taaffe). If Judges had composite ratings like quarterbacks, Rufus W. Peckham would, at least from Schwartz’s point of view, be the worst in the league all time. On balance, this is a bad rap on Peckham and fundamentally unfair.

In Allgeyer v. Louisiana, the Court held unconstitutional a law prohibiting an individual from purchasing an insurance policy on property within the state from an insurance company outside the state. Allgeyer would probably have been of little note had it been based on the supreme authority of Congress to regulate interstate commerce. However, it was decided on a liberty of contract theory. In Lochner, the Court struck down New York’s law regulating the number of hours a baker could work. Though, like Allgeyer, the decision was couched in the language of “freedom of contract,” what the Court really did in Lochner went much further. It upheld one economic theory over another that the Legislature felt justified its action. This gave rise to Holmes’ comment in his powerful and famous dissent in Lochner that, “The Fourteenth amend-
ment does not enact Mr. Herbert Spencer's Social Statics."
We often think of Supreme Court decisions as somehow being
the discovery of some immutable legal principle and then
ordained as the law of the land. In reality, they are often fragile
structures held together by a clause here and a phrase there.
The first vote in Lochner was 5 - 4 to uphold New York's law.
This would have made Justice John Marshall Harlan's dissent
the majority opinion and would have jump started New Deal
type legislation by some thirty years. Instead, one unknown
Justice switched his vote and, voila, Herbert Spencer's Social
Statics ruled for the next thirty years. It is suspected by court
watchers that Justice Melville W. Fuller switched his vote after
being persuaded by Justice Joseph McKenna to do so. McKenna's father owned a bakery and the theory is that he
convinced Fuller that bakery work was neither strenuous nor
unhealthy.

So, if Peckham didn't think bakers needed any protection
from the long arm of the state, how about fourteen year old
factory girls. No, they were also on their own. Kathleen Hickey
was 14 and employed in a commercial laundry in Brooklyn to
"bunch collars and cuffs." One day a co-worker called in sick
and Kathleen was asked to operate a steam roller press. (The
machine, made in Troy, carried the label "The Troy Collar and
Cuff Ironer.") As she fed collars and cuffs into the machine,
her finger got stuck in a button hole and pulled her hand into
the machine. Peckham, in writing for the majority in Hickey v.
Taaffe (105 NY 26 [1887]), held that there was no legal theory
which allowed Kathleen Hickey to recover. It made no matter
that there were no guards on the machine and no emergency
stop levers or switches or that she had never received training
on the machine. The Hickey decision was issued in 1887.
There was no thought given at that time to safety devices to
protect for 14 year old factory girls. Child labor in factories
was the norm in the United States in the late 19th century. It
would take Cardozo from 1914 to 1932 to rewrite the com-
mon law of negligence in New York to the version we recog-
nize today.

It is, of course, extremely unfair to rate Justice Peckham
based on these three mentioned decisions. If standing the test
of time were the only factor then, yes, Peckham's judicial
philosophy was a failure. However, by that test, Socrates and
Plato would be deemed philosophical failures and Aristotle
would be a scientific failure. It was Isaac Newton, writing to his

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fellow scientist Robert Hooke, who said, "If I have seen further than you and Descartes it is by standing upon the shoulders of Giants." Peckham's judicial philosophy only looks neanderthalic now because we have stopped the clock at this point. One hundred years from now we may be saying, "You know he had a pretty good point there." The debate on the proper level of governmental (and judicial) intrusion into the workings of the marketplace is far from settled. Peckham also had the misfortune of having his signature opinion in *Lochner* dissented from by our most eloquent Supreme Court Justice in his most famous dissent. Holmes' opinion in *Lochner*, considered by many to be the greatest dissent of all time, runs just two pages.

When Rufus Peckham died, the praise for him as a person and as a judge was effusive. The *Times Union*, on October 25, 1909, reported it in this way:

In the death of Rufus W. Peckham, Justice of the United States Supreme Court, ... the State and nation lose a great man and Albany, one of her most distinguished sons. Justice Peckham was esteemed highly by the bench and bar of Albany and by Albanians generally. His bearing was distinguished and his manner affable. His features were clear cut. He was stern in appearance, an impressive striking figure, but he was an agreeable, entertaining conversationalist. It was often said of him that he was "born for the position he held" and in Washington his associates are saying that he was one of the best and one of the brainiest jurists that ever sat upon the United States Supreme Court bench.

Justice Harlan is quoted as saying:

He was one of the ablest jurists who ever sat on the American bench. He was absolutely pure in mind and thought and free from everything that would prevent him from rendering an honest judgment in any case brought before him.

The *Times Union* editorial of October 25, 1909, read:

The best monument raised to anyone's memory is raised in the deep affection of the heart. He won and held friends by virtue of his qualities of mind as well as his qualities of heart. Those who knew him looked beyond the judge and at the man. They loved him as a man and were proud of him as a judge. Albany mourns the loss of its distinguished son. It was proud of his achievements; it was honored by his fame; it drops a tear at his bier. The law has lost one of the staunchest friends and most distinguished advocates.

Rufus Peckham had the funeral of the century in Albany. The entire United States Supreme Court attended as honorary pallbearers. St. Peter's Episcopal Church was filled to capacity. Albany County Bar Association president Albert Hessberg led the contingent of Albany lawyers. Governor Hughes, New York City Mayor McClennan, Albany Mayor Snyder, Chief Judge of the Court of Appeals Edgar M. Cullen and former Chief Judges Alton B. Parker and Charles Andrews were all in attendance. It was a fitting tribute to a great judge. Rufus W. Peckham served the public for thirty-six years of his professional life, twenty-nine years as judge. By any measure, he was a record of distinguished accomplishment.

2 Schwartz at 34.
3 Quoted in Pearson at 44.
4 Schwartz at 35.
5 See the Reynolds entry in the Oxford Companion to the Supreme Court of the United States, Kermit L. Hall, editor (Oxford University Press, 1992), at 542.
7 Laissez faire translates as "Let it be." It is commonly attributed to Frangois Quesnay (1694 - 1774). Quesnay was the royal physician to Madame de Pompadour and one of the Encyclopedists. He organized a group of French intellectuals who became known as the Economists or Physicocrats. Quesnay's terminology was adopted by Adam Smith (1723 - 1790) to refer to government non-interference in the marketplace.
8 The Slaughterhouse cases involved the legality of a Louisiana law that bestowed a monopoly on the Crescent City Slaughterhouse. The case is significant for the restrictive interpretation it gave to the Privileges and Immunities Clause of the Fourteenth Amendment.
9 See Hall, at 626 - 627.
11 Hickey v. Taaffe presents an interesting cascade of cases. In Hickey I, the trial court let stand a jury verdict for the plaintiff. On appeal in Hickey II (32 Hun 1 [1884]), the Appellate Division ruled that it was properly a jury question as to whether a certain child labor law provision applied to the plaintiff. The provision provided for criminal penalties for anyone who used a child under sixteen in any business dangerous to the life and limb of the child. In Hickey III (99 NY 204 [2885]), the Court of Appeals held that use of the word "business" in the statute referred to "an employment either vicious in itself, or one which partakes in the character of an amusement, and that it had no application to productive industries or useful or necessary business or occupation." How could the Appellate Division have missed such obvious interpretation? It would be only a few years later, when the heartbreaking photographs of child labor, taken by Jacob Riis and Lewis Hine were seen into the public consciousness that the legislatures, federal and state, would take action to protect children in the workplace. Hickey IV, an unpublished Appellate Division decision after the second trial also affirmed the jury verdict in favor of the plaintiff.
12 In Hickey V, the Court of Appeals, by Justice Peckham, again reversed the judgment of the jury, the trial judge and the Appellate Division. The Court now had before it the common law negligence claim but Kathleen Hickey would again hear only discouraging words in this venue. First, according to the Court, the fourteen year old girl assumed the risks that were apparent from operating the machine. Second, it didn't matter that there were no safety devices on the machine because they would not have prevented the injury. Third, it didn't matter that Kathleen received no instructions on the use and dangers of the machine because she worked on the machine for a few weeks before the injury and she should have figured out the dangers. Fourth, no one could have foreseen now the accident occurred, namely that Kathleen's finger would get caught in the button hole and draw her arm between the hot rollers. Unfortunately for Kathleen Hickey, it would take forty years until Justice Cardozo straightened this all out in *Palsgraf v. Long Island Railroad* (248 NY 339 [1928]).
13 "The Risk reasonably to be perceived defines the duty to be obeyed," Cardozo intoned. It was the foreseeability of harm to a specific person that had to be foreseen, not necessarily how the harm would occur.