

THE JUDGE.

Who He Ought to be, and How We Ought
to Make Him.

BY

CHARLES E. FLANDRAU

FOREWORD

BY

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In 1895, when Charles E. Flandrau wrote the following article for *The Minnesota Law Journal*, he was more than someone who had served as a delegate to the constitutional convention in 1857, more than a former judge who had served on the Territorial Supreme Court in 1857 and 1858 and as associate justice on the Minnesota Supreme Court from 1858 to 1864, more even than the hero of the battle of New Ulm in 1862—besides filling all those roles, he had become an authority on pioneer lawyers and judges in this state. He was never the writer his son became, but in his own way, he was a historian, albeit, an amateur.

In the late 1880s and 1890s, he published three articles in the *Magazine of Western History*,¹ and three more in *The Minnesota Law Journal*.² Each of

¹ “The Bench and Bar of Ramsey County, Minnesota (Pt. I),” 7 *Magazine of Western History* 328-336 (January, 1888); “The Bench and Bar of Ramsey Count, Minnesota (Pt. II),” 8 *Magazine of Western History* 58-69 (May, 1888); and “Judge Isaac Atwater,” 8 *Magazine of Western History* 254-260 (July, 1888).

² “The Judge,” 3 *The Minnesota Law Journal* 100-101 (May 1895); “Contempt of Court,” 3 *The Minnesota Law Journal* 219-221 (October 1895); and “Lawyers and Courts of Minnesota Prior to and During its Territorial Period,” 5 *The Minnesota Law Journal* 41-48 (March, 1897), which was delivered first as an address to the annual meeting of the Minnesota Historical Society on January 13, 1896, and published subsequently at 8 *Minnesota Historical Society Collections* 89-101 (1895-98).

these articles, except two, was a fond recollection of the bench and bar in territorial days or in the decades following statehood. They dealt, in other words, with the past. Two articles, however, addressed current legal topics: the first, on the selection of judges, appeared in the May, 1895, issue of *The Minnesota Law Journal*, and the second, on the contempt power of courts, appeared in the October, 1895, issue.

In 1895, Flandrau was still reeling from the Panic of 1893. A fixture on St. Paul's social scene, the proprietor of "Hotel de Flandrau," as his home on Pleasant Avenue was called because of the whirligig of guests, he was nearly bankrupt.³ In response to a letter from his son begging for an increase in his allowance in early 1896, he replied, "I have not deserted you, but I have never been so hard up in my life as I have been the past year. I actually overdrew my bank account for the first time in my life, simply to live."⁴ He was 67 years old.

If Flandrau's personal life was in turmoil, his former profession was too. Since the beginning of the republic, the judiciary has been under attack from some quarter, but aside from the reaction to the *Dred Scott* case, courts in the nineteenth century were never under such heavy siege as during the populist revolt in the late 1890s. Three rulings by the Supreme Court fueled the uproar: *United States v. E. C. Knight*, 156 U. S. 1 (1895), holding that the federal government lacked power under the commerce clause to require the Sugar Trust to divest several recent acquisitions, *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601 (1895), holding the income tax act unconstitutional, and *In Re Debs*, 158 U. S. 564 (1895), sustaining the use of injunctions to curtail labor strikes. The effect of these rulings was described by Arnold Paul in *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895*, a work widely regarded as a classic in American legal history:

The expanding professional protest against the new judicialism was but one facet of the developing political crisis of 1896. The deepening of the depression in 1894 and early 1895 had

³ Larry Haeg, *In Gatsby's Shadow: The Story of Charles Maccomb Flandrau* 26-28, 68 (Iowa City: University of Iowa Press, 2004).

⁴ Letter from Charles E. Flandrau to Charles M. Flandrau, dated January 13, 1896, quoted in Haeg, *supra* note 3, at 68. Close readers of Flandrau's essay will note that he was making a plea for "adequate salaries" for judges at the same time he overdrew his bank account.

intensified the grievances of Southern and Midwestern farmers, labor unionists, the unemployed and partially employed, and thousands of bankrupt and failing businessmen. President Cleveland's handling of the financial panic in 1893-1895 (the repeal of the Sherman Silver Purchase Act and the bond sales through Wall Street syndicates) and his vigorous suppression of the Pullman strike had alienated a large section of the Democratic party. While the silver miners flooded the country with free-silver propaganda as a ready panacea for all evils, both the Populists and the left-wing Democrats gained strength, the latter preparing to capture the Democracy for silver and thorough antimonopolism in 1896. Into this seething political scene was thrown the *E. C. Knight* opinion emasculating the antitrust act, the income tax decision, and the *Debs* ruling. A surge of resentment swept through the protesting forces everywhere, adding strength to the growing radicalism. Populist and Democratic members of Congress, led by such Southern fire-eaters as Senator Benjamin R. ("Pitchfork Ben") Tillman of South Carolina, to denounce the Supreme Court in the harshest terms. Farmers and merchants, already smarting under federal railroad receiverships and other judicial devices interfering with state regulation, were now sure the Supreme Court itself had succumbed plutocracy. And Illinois Governor John P. Altgeld, who bitterly denounced Cleveland's intervention in the Pullman strike as "government by injunction," added the Supreme Court to the list of people's oppressors and soon became perhaps the most powerful figure in the Democratic intraparty conflict.

The success of the Democratic insurgents in capturing the Chicago convention and nominating William Jennings Bryan on a free-silver anti-Wall Street platform has long been a celebrated episode in American political history. Less noticed by historians have been the three separate anticourt planks contained in the platform: one plank criticized the income tax decision and hinted that the Supreme Court might well be packed to secure a reversal, another denounced government by injunction as a form of judicial "oppression," and a third opposed life tenure in the public service except as provided in the Constitution. The impact of these planks was considerable; for with traditional symbols, constitutional and monetary, under

joint challenge the conservative defense became especially fierce, and proved effective. In the legal profession, men of both parties joined against Bryan, isolating the advanced progressives.

The defeat of Bryan—who had emphasized the silver question above all others, thus obscuring the broader issues from much of the urban public—was a great victory for American conservatism. It was especially satisfying to right-wing legal conservatism, and the congratulatory notice of the Albany Law Journal was well taken:

With the covert threat against the United States Supreme Court which was inserted in the platform of the defeated party, with the wild theories which were advanced against the so-called principle of “government by injunction,” and with the abuse which was heaped upon the laws of our country, it would seem that the lawyers had the greatest concern, and almost as a body they have responded to the emergency, and have done their full share in the work, and that without respect to partisanship or prejudice.

The judicial triumph of conservatism in the spring of 1895 had been confirmed by the political triumph of 1896. The conservative crisis of the 1890s was over.⁵

It was against this “seething” political background that “Judge” Flandrau put aside his interest in reminiscences and wrote two articles intended to foil recent attacks on the courts. He of course did not know that the following year, his side would triumph. At the time of composition, he only knew that his way of life, personal and professional, was threatened. Flandrau disliked the way the country was changing. It no longer was a “country where, law

⁵ Arnold Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* 224-226 (Ithaca, Cornell University Press, 1960)(citations omitted). In his study of the court, Owen M. Fiss emphasizes that *E. C. Knight* did not rile the populists at all. See *Troubled Beginnings of the Modern State, 1888-1910* 111-112 (New York: Macmillan Pub. Co., 1993) (Vol. 8 of the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*).

and order were generally respected by the people, and the government and courts were regarded as institutions entitled to the reverence and unquestioned support of everybody. Foreign immigration had not brought its socialistic and anarchical ideas into the land; and labor organizations had not grown to their present proportions.”

There is a sharpness of tone in parts of Flandrau’s essay on judges, an edge not found in his historical writings. He names his enemies—“Governor Waite of Colorado, Governor Penoyer of Oregon, Governor Altgeld of Illinois,”⁶ and Eugene Debs⁷—and gives a broadside to the populists’ “agrarian cranky notions” but in doing so, he comes across as a bit of a crank himself, a reactionary who lacks the optimism of his early years in Minnesota.

Charles Eugene Flandrau was a remarkable character who participated in many of the early, formative events of this state. He deserves a biography by someone who can provide insights into his character, someone who understands his times, someone who writes well—in other words, a biography like his son got: *In Gatsby’s Shadow: The Story of Charles Macomb Flandrau* by Larry Haeg.

The following essay appeared on pages of 100-101 of the May, 1895, issue of *The Minnesota Law Journal*. Though reformatted, it is complete. Flandrau’s punctuation and spelling are not changed. ■

⁶ Davis Hanson Waite (1825-1901) was governor of Oregon from 1893 to 1895. See Robert W. Larson, *Populism in the Mountain West* 17-43 (University of New Mexico Press, 1986).

Sylvester Penoyer (1831-1902) was governor of Oregon from 1887 to 1895. He was the defendant in the landmark, *Penoyer v. Neff*, 95 U. S. 714 (1877), and so it is surprising that Flandrau misspelled his last name.

John Peter Altgeld (1847-1902) was governor of Illinois from 1893 to 1897. See *Eagle Forgotten: The Life of John Peter Altgeld* (Secaucus, New Jersey: Lyle Stuart, Inc., 1938); and Henry M. Christman ed., *The Mind and Spirit of John Peter Altgeld: Selected Writings and Speeches* (Urbana: University of Illinois Press, 1960).

⁷ Eugene Victor Debs (1855-1926). See Ernest Freeberg, *Democracy’s Prisoner: Eugene V. Debs, The Great War, and the Right to Dissent* (Cambridge: Harvard University Press, 2008); Nick Salvatore, *Eugene V. Debs: Citizen and Socialist* (Urbana: University of Illinois Press, 1982); Ray Ginger, *The Bending Cross: A Biography of Eugene Victor Debs* (New Brunswick: Rutgers University Press, 1949).

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American jurisprudence is a lineal and direct descendant from England, and for a long series of years after the achievement of our independence we followed in the footsteps of our ancestor without material deviation. The great state of New York constructed its Court of last resort upon the plan of the British final Court of Appeals, by adding the members of the Senate to the Judges, and called it the Court of Correction of Errors, thus substituting the Senate for the House of Lords, and in this way introducing both the appointive and elective systems into the selection of judges, the Senators being chosen by the people, and the judges appointed by the Executive, with life tenure. This plan worked very well for a long series of years, the appointed Judges being generally chosen from the most prominent and eminent members of the bar, and the Senate being a small body (thirty-two, I think) each representing a large constituency and occupying a distinguished position in his district. The decisions of this court will bear favorable comparison with those of any court of any country, many of the strongest and most learned opinions being delivered by the Senators.

But it must be remembered that this condition of things existed at a time when, and in a country where, law and order were generally respected by the people, and the government and courts were regarded as institutions entitled to the reverence and unquestioned support of everybody. Foreign immigration had not brought its socialistic and anarchical ideas into the land; and labor organizations had not grown to their present proportions.

It was about the year 1846 that New York adopted a new constitution and introduced the feature of an elective judiciary with limited terms of service, accompanied by the abolition of the Court of Chancery as an independent tribunal, amalgamating law and equity in the same courts. This change in the administration of justice was at once so generally approved that subsequent imitations of the New York system, or code of practices, as it was called, adopted the elective system of the judges along with the code without much discussion; the one carried the other through, and in nearly all the new states the New York system had been adopted bodily with few variations, and the choice of judges with limited terms, high and low, by the people has become almost universal in the several states of the Union.

Has the elective system for the choice of Judges been a success? And does the future outlook indicate the wisdom and safety of its continuance? The latter branch of this question is daily becoming more and more a vital factor in the success of our governmental system. I answer yes and no. The people have, in many instances, when an unworthy candidate has been presented for their suffrages, and nothing was at issue but the qualifications of the man, acted with great wisdom and intelligence, and rejected him, proving to be true, what I have always thought, that the mass of the voters when uninfluenced by any extraneous considerations will choose the best men, regardless of party or politics, for their Judges. But I have seen the system work the other way. In many elections very exciting questions are involved, the solution of which may largely depend on the political bias of the Judge instead of the application of appropriate legal principles. In such instances the people are, and a very large element of them will always be, swayed in their votes for a Judge by their partisan desires, and therein rests the danger of the elective system. A ship may prove a very safe vehicle as long as she sails in smooth water, but it is in the storm that tests her strength. No system of government is safe that will not

endure through the worst of trials. We are almost too young as a nation to decide this question from experience, and especially as the federal judiciary, high and low, is all under the appointive system, with terms for life or during good behavior, which has so far proven a sheet anchor in all the storms we have been as yet subject do.

There can be no doubt at all that the Judge who sits upon the bench in the calm security that no matter what party, individual or organization his judgment may antagonize his position is beyond their malice or attack, will act more fearlessly and independently than the Judge who feels that his decision of today, no matter how correct, may prove his official death warrant tomorrow. There are men who no doubt can rise above such considerations, but where one will stand the test many will fail. It is cruel to subject men to such pressure.

When the constitutional convention of Minnesota was in session, the report of the committee on judiciary presented quite an experiment. It essayed to try both methods by providing for the appointment of the Supreme Judges and the election of the District Judges, giving each a term of seven years. It failed to pass in that way, and all judges made elective. I think it is better as it is, if the term of the Supreme Judges is to be a limited one. No better results can be expected in securing non-partisan Judges under an appointment by a partisan Governor than by an election by the people; and my experience leads me to believe that as a general thing and under normal conditions, a selection by the people is by far the safest of the two methods. What could be expected of Judges appointed by Governor Waite of Colorado, Governor Penoyer of Oregon, or Governor Altgeld of Illinois? It would be a calamity to have such Judges imposed on a state for the life of the incumbent. The appointing power might as well be conferred on Mr. Debs. The only solution of the question is to make the highest Judges elected for life and the minor ones for a shorter term, not less than ten or twelve years. The fact that their decisions are subject to the revision of a tribunal divorced from all extraneous influences will serve to keep them in order, and we will get our law filtered of all the agrarian cranky notions that have found a lodgment in the jury box, and by irresistible reflex influences reached the bench in many instances, as it is at present constituted.

There is nothing in the world that depends for its action upon the human mind, or the making of the machinery, that will not at some period go astray, no matter how perfect it may be in its origin, and no system of making Judges will ever be perfect; but about as near as we can come to it is to make the best selections possible and then remove them from all dependence of any character. This can only be done by paying adequate salaries, and giving life tenures to those making ultimate decisions.

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