

# In the Beginning: The Washington Supreme Court a Century Ago

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The tradition of government by consent, the nature of the federal constitution, and the reasoning of the United States Supreme Court<sup>1</sup> have compelled each state to fashion its own compact between the government and the citizenry.<sup>2</sup> The government of the State of Washington, no less than that of the United States, is a product of such a compact. The preamble to the 1889 Washington Constitution reads: "We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution,"<sup>3</sup> and section 1 of the Declaration of Rights (article I) declares that "All political power is inherent in the people, and the governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."<sup>4</sup> Indeed, the founders of the state regarded the constitution as a compact between citizens and their government and viewed the writing of this covenant as a difficult philosophical and political enterprise.

Clearly, the structure of the judiciary and the role of the State Supreme Court in the governing process were major parts of the enterprise. This Article will discuss (1) the politics that influenced the drafting of the judicial article (article IV)

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1. In *Barron v. Baltimore*, 32 U.S. 243 (1833), Chief Justice John Marshall explained the "dual compact" concept: "The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated." *Id.* at 247.

2. See D. ELAZAR & J. KINCAID, *COVENANT, POLITY AND CONSTITUTIONALISM* (1987).

3. WASH. CONST. preamble.

4. *Id.* art. 1, § 1.

in the constitutional convention; (2) the election of the first five members of the bench and the backgrounds of those inaugural judges; (3) the particular approach toward judicial review adopted by these five jurists (activism-restraint); and (4) the personal relations among these members of the supreme court. This Article will provide a personal perspective of the first five judges and their court.

## I. THE CONSTITUTIONAL COMPACT AND JUDICIAL REVIEW

As with all writers of constitutions since the beginnings of the American Republic, the formidable task confronting the seventy-five delegates to the 1889 Washington Constitutional Convention was to reconcile two antithetical demands.<sup>5</sup> They had to design a fundamental law that would endow the new government with sufficient power to effectively carry out the diverse duties assigned and, at the same time, impose meaningful constraints on that government to prevent the abuse of power. Writing a constitution was an exercise in balancing these demands.

In contrast to their federal counterparts in Philadelphia 102 years earlier, however, Washington's founding fathers worked from a different constitutional premise. The government of the Union, like that of the state, was to be a government of limited powers.<sup>6</sup> But the Union's governing power was confined to those functions enumerated in the constitutional document. In contrast, government under the Washington Constitution possessed plenary powers, and consequently, any limits were to be enumerated in the fundamental law.<sup>7</sup> A parsimonious grant of power was to hold the federal government in check while a generous inventory of limits would control

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5. B. ROSENOW, *THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION* (1962) [hereinafter ROSENOW JOURNAL].

6. Chief Justice John Marshall stated the principle as follows:

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.

*Marbury v. Madison*, 5 U.S. 137, 176 (1803).

7. R. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025 (1985).

state government. According to Justice James A. Andersen of the Washington high bench:

As this court has often observed, the United States Constitution is a *grant* of limited power authorizing the federal government to exercise only those constitutionally enumerated powers expressly delegated to it by the states, whereas our state constitution imposes *limitations* on the otherwise plenary power of the state to do anything not expressly forbidden by the state constitution or federal law.<sup>8</sup>

The difference has consequences. For example, the "explicit affirmation of fundamental rights" in article I of the state constitution, is a "guaranty of those rights."<sup>9</sup> The state is compelled to enforce the observance of those rights, not merely refrain from breaching them, as in the federal scheme.

Excessive power is further checked by creating and maintaining a proper balance between the executive, legislative, and judicial branches. Finally, the Declaration of Rights of the state constitution, reinforced by the imposition of provisions of the Federal Bill of Rights through the doctrine of incorporation,<sup>10</sup> provides additional checks against the overreach of government and, in some cases, of private intrusions into individual affairs.<sup>11</sup>

Thus, the compact, the separation of powers, the Declaration of Rights, and the fourteenth amendment to the Federal Constitution safeguard against the abuse of state power. Crucial to the imposition of these limits is the judiciary, for the judges are responsible for ascribing meaning to these confining provisions of the constitution through the power of judicial review.<sup>12</sup>

The members of the 1889 Washington Constitutional Con-

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8. *State v. Gunwall*, 106 Wash. 2d 54, 66, 720 P.2d 808, 815 (1986).

9. *Id.* at 62, 720 P.2d at 812.

10. *Duncan v. Louisiana*, 391 U.S. 145 (1968). See R. CORTNER, *THE SUPREME COURT AND THE SECOND BILL OF RIGHTS* (1981).

11. *Alderwood Assoc. v. Washington Envtl. Council*, 96 Wash. 2d 230, 635 P.2d 108 (1981).

12. See generally C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (1932); C. WOLF, *THE RISE OF MODERN JUDICIAL REVIEW* (1986); C. Sheldon, *Judicial Review and the Supreme Court of Washington, 1890-1986*, 17 *PUBLIUS* 69 (1987) [hereinafter *Judicial Review*]; Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1760-1860*, 120 *U. PA. L. REV.* 1166 (1972); M. NELSON, *A STUDY OF JUDICIAL REVIEW IN VIRGINIA, 1789-1928* (1947); F. SMITH, *JUDICIAL REVIEW OF LEGISLATION IN NEW YORK 1906-1930* (1952); O. FIELD, *JUDICIAL REVIEW OF LEGISLATION IN TEN SELECT STATES* (1943).

vention were aware of this central role of the courts. Long before statehood was awarded Washington, courts in other states had established the power to void the actions of the other departments and agencies of government.<sup>13</sup> Even before Chief Justice John Marshall affirmed the power of judicial review for federal courts in *Marbury v. Madison*,<sup>14</sup> a number of state courts had negated the acts of their legislatures.<sup>15</sup> By 1818, all states but Rhode Island recognized the validity of judicial review.<sup>16</sup> Nonetheless, judicial review was used only sparingly. "It was not until after the Civil War . . . that the doctrine of the legislatively declared will of the people gave way before the doctrine of the supremacy of the law judicially interpreted."<sup>17</sup>

The "Golden Age" of the judiciary was reached when the common law dominated the jurisprudence of the times. James Willard Hurst summarized the period into which Washington was thrust into statehood:

Actually, between 1820 and 1890 the judges were already taking the initiative in lawmaking. Far anticipating the leadership of the executive or administrative arms, the courts built upon the common law in the United States—a body of judge-made doctrine to govern people's public and private affairs. At the same time the courts played a great role not only in declaring, but also in administering, policy.<sup>18</sup>

Through the use of injunctions and receiverships, courts were also assuming regulatory roles. By 1889, interventionist judicial review was commonly exercised if not commonly praised.<sup>19</sup> It was during this age of judicial activism that the founders gathered in Olympia in 1889 to write their governing compact.

## II. ARTICLE IV AND THE FOUNDERS

Much of what eventually found its way into the judicial

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13. *Rutgers v. Waddington* (N.Y.C. Mayor's Ct. 1784); *Bayard v. Singleton*, 1 N.C. (Mart.) 42 (1787); *Trevett v. Weeden* (R.I. 1787); *Cases of the Judges*, 8 Va. (4 Call) 135 (1788); *Holmes v. Walton* (N.J. 1780). "Between 1787 and 1803 state courts held void state laws in more than twenty instances." A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION* 94 (1976).

14. 5 U.S. 137 (1803).

15. F. AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM* 191 (1969).

16. *Id.*

17. *Id.* at 160.

18. J. HURST, *THE GROWTH OF AMERICAN LAW* 85 (1950).

19. See *Judicial Review*, *supra* note 12, at 80.

article (article IV) of the Washington Constitution was dictated by the territorial experience. Since 1853, upon the separation from Oregon, Washington Territory was served by three Supreme Court judges, appointed by the President and confirmed by the United States Senate.<sup>20</sup> Justices of the peace and probate judges provided a local dimension for the judiciary.<sup>21</sup> The three territorial high court judges rode circuit, hearing trials in their respective jurisdictions and meeting once a year in Olympia to hear appeals from their trials.<sup>22</sup> In 1884, another judge joined the three in order to allow a three-judge panel with rotating membership to hear cases, thus permitting the fourth member to excuse himself from reviewing trials over which he had presided as circuit judge.<sup>23</sup>

Although a number of the territorial judges were respected, competent, and devoted public servants, the local citizenry viewed many of them with distrust.<sup>24</sup> Territorial courts were legislative courts and thus at the mercy of the Congress. Incumbents were appointed and removed for partisan reasons. They were often selected with little or no regard for local feelings. Half of those appointed were outsiders. The dangers and discomforts of travel, the Indian wars, and the need to reside in often remote districts prompted several of the justices to remain away from their assignments.<sup>25</sup>

The elected justices of the peace and probate judges were given greater responsibilities by the Territorial Legislature out of frustration with the often-absent territorial judges and to gain a degree of timely justice.<sup>26</sup> These territorial experiences were not lost on the seventy-five delegates at the 1889 Constitutional Convention held in the territorial capital of Olympia in July and August.

W. Lair Hill, a successful attorney, former territorial judge

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20. C. SHELDON, *A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT* 15 (1988) [hereinafter *A CENTURY OF JUDGING*].

21. J. WUNDER, *INFERIOR COURTS, SUPERIOR JUSTICE* (1979). See also E. POMEROY, *THE TERRITORIES AND THE UNITED STATES, 1861-1890* (1969) [hereinafter *POMEROY*].

22. POMEROY, *supra* note 21, at 52; *A CENTURY OF JUDGING*, *supra* note 20, at 15-16.

23. *A CENTURY OF JUDGING*, *supra* note 20, at 16.

24. Hall, *Hacks and Derelicts Revisited: American Territorial Judiciary 1789-1959*, 14 *WASH. HIST. Q.* 289 (1981).

25. AIREY, *A HISTORY OF THE CONSTITUTION AND GOVERNMENT OF WASHINGTON TERRITORY* 272 (1945) (doctoral dissertation available at the University of Washington library).

26. POMEROY, *supra* note 21, at 59, 61.

(1870-71), and ex-reporter for the *Portland Oregonian*, was commissioned by his former newspaper to draft a model constitution.<sup>27</sup> Relying heavily on the 1879 California Constitution, Hill drafted his version, which was made available to the delegates and ultimately provided the exact wording for fifty-one sections and similar wording for forty-one sections of Washington's fundamental law. The Constitution of California provided the wording for forty-five sections. Oregon's fundamental law accounted for twenty-three provisions, Wisconsin's for twenty-seven, and Indiana's for seven.<sup>28</sup> An earlier attempt at constitution-writing also supplied examples for the Olympia convention.<sup>29</sup> In 1878, at Walla Walla, a draft constitution was completed and received the approval of the voters but was defeated in Congress while in committee. Nineteen sections of the 1889 document were borrowed straight from the earlier version and thirty sections had nearly the same wording used in the 1878 draft. Although opportunities for creativity and for consideration of unique features of the state were present, the delegates to the convention obviously relied most heavily on the experiences of other states.

The judicial article closely followed the Hill model<sup>30</sup> and prompted enlivened debate, of which surprisingly little was motivated by partisan considerations. The delegates had anticipated otherwise. The Republicans controlled the convention<sup>31</sup> and correctly anticipated assuming the responsibility for the new government upon statehood. They intended to use the convention to consolidate their position. In the words of Republican delegate Trusten P. Dyer: "The Democrats intend to thrust the responsibility for what is done by this convention upon the Republican Party, and this being the case it is there-

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27. According to Lebbus J. Knapp, the convention notes of the day (July 10th) read: "The admirable draft of a state constitution by W. Lair Hill, which appeared in the *Oregonian* of the 4th inst., has been the theme of many members who look upon it in the main as just such a constitution as is needed for the new state. The *Oregonian* of that date has been largely in demand by the members ever since its issue." Knapp, *Origins of the Constitution of the State of Washington*, 4 WASH. HIST. Q. 253 (1913).

28. See STATE OF WASHINGTON LEGISLATIVE MANUAL 356 (1985).

29. See Beckett, *The Constitutional Framework*, THE GOVERNMENT AND POLITICS OF WASHINGTON STATE (1978); P. BECKETT, FROM WILDERNESS TO ENABLING ACT: THE EVOLUTION OF THE STATE OF WASHINGTON (1968).

30. WASH. CONST. art. IV. Knapp concluded that the Hill draft "probably contributed more to the finished product as adopted by the convention than any other written document." 4 WASH. HIST. Q. 241.

31. The Republican delegates at the convention numbered 43, the Democrats 29. Three were independents. A CENTURY OF JUDGING, *supra* note 20, at 25.

fore only right and just to ourselves that we put the stamp of the party upon our acts.”<sup>32</sup> The *Seattle Daily Times* continued, “most of the Republicans coincide in this, and a caucus will be held this evening to determine upon a plan of action.”<sup>33</sup> However, partisanship remained subdued during most of the discussions on article IV.<sup>34</sup> Only when the debate turned to how the judges were to be selected did politics appear on the agenda.<sup>35</sup> Afterward, however, party loyalties were quickly forgotten as the delegates moved to considering matters of court jurisdiction and judicial salaries.

On July 16, the Judiciary Committee reported its version of article IV.<sup>36</sup> The majority report recommended a court of three judges, the number on the earlier territorial high court and on many other states’ high courts. They further recommended terms of six years for the jurists. However, a minority of the Committee (composed of one Democrat and five Republicans, including future high court Judges Dunbar and Stiles), although agreeing with the term of six years, urged a court with five members.<sup>37</sup>

The minority feared that a three-member bench would be dominated by one strong judge or by corporate interests. For example, Dunbar “thought it would be a one man power.”

He contended that corporations were just as anxious to control judges as legislators, and the way would be made easy with a bench of three judges. “Caesar said that his wife should not only be virtuous but should be above suspicion, and our courts should not only be incorruptible, but be above suspicion of being so” concluded the honorable gentleman.<sup>38</sup>

Also, five judges meant that much more “wisdom and integrity” would be brought to bear on the troublesome issues that

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32. *Seattle Daily Times*, July 3, 1889, at 1, col. 4.

33. *Id.*

34. No Republican or Democrat “line-up” was evident from the newspaper records of the convention. ROSENOW JOURNAL, *supra* note 5, at 593-629.

35. See *infra* text accompanying notes 41-58.

36. ROSENOW JOURNAL, *supra* note 5, at 607.

37. The minority report read: “We concur in the . . . report of the majority of the committee on the judicial department with the following exceptions: That the supreme court provided for in section 2 be composed of five instead of three judges and that said section be so amended.” *Seattle Post-Intelligencer*, July 17, 1889, at 1, col. 6. Judge Hoyt, the presiding officer, threw his weight behind an enlarged court. He announced his support for the minority report immediately following its reading. *Id.*

38. *Seattle Daily Times*, July 19, 1889, at 1, col. 3.

would confront the court.<sup>39</sup>

Opponents of the larger court argued that it would add unnecessarily to the costs of the new government. Additionally, they argued the demands on the court would not be too great for three judges. As one delegate put it, even with a three-judge bench, "they would have a very soft snap of it."<sup>40</sup> The minority report was adopted (forty-four votes "for" with the "nays" unrecorded) after the addition of an amendment permitting the legislature to increase the number of judges and to authorize the court to sit in departments.<sup>41</sup>

The issue of judges' selection brought out partisan loyalties. The Judiciary Committee had quickly dismissed as unacceptable a proposal to have the supreme court judges subject to gubernatorial appointments with legislative approval. The committee reported: "We have considered the proposition . . . providing for the supreme court to be appointed by the governor, but think it most in accord with the genius of our institutions that these offices should be made elective."<sup>42</sup> Memories of the unresponsiveness of the appointed territorial judges remained. Thus, elections were seen as the best method of selecting the jurists.

C.H. Warner, a Democrat from Colfax, moved to amend the Committee's report and have two of the five justices elected for three years and the remaining three elected for five years.<sup>43</sup> When two were to be elected, a voter could cast a ballot for only one. If three were to be elected, the voter would choose only two of them. Consequently, the minority Democrats could salvage some representation on the new court.<sup>44</sup>

[Warner argued] that he had only one result in view in introducing this substitute, and that was the general good of the future State of Washington. The principle of minority representation . . . should always be considered, and especially so in the judiciary. If such safeguards are thrown around the judiciary as to keep it pure, and prevent politics from enter-

39. *Seattle Post-Intelligencer*, July 19, 1889, at 1, col. 4.

40. *Seattle Daily Times*, July 19, 1889, at 1, col. 4.

41. ROSENOW JOURNAL, *supra* note 5, at 597-98.

42. *Seattle Post-Intelligencer*, July 17, 1889, at 1, col. 6.

43. ROSENOW JOURNAL, *supra* note 5, at 600.

44. With the practice of voting a straight party ticket, which was encouraged by the party list ballots, limiting the voters as suggested by Warner would permit minority representation. This form of voting had been used to elect delegates to the constitutional convention, accounting for the high number of Democrats (24). *Seattle Post-Intelligencer*, July 19, 1889, at 1, col. 3.



ing into the decisions, it would be for the advantage of the whole people.<sup>45</sup>

The Republicans condemned the proposal as a crass political move that would introduce political discord into the court's deliberations. Dunbar feared such a plan would "curtail the right of suffrage. Every man has a right to vote for the man of his choice. . ." <sup>46</sup> Judge Turner thought the proposal would "introduce politics into the supreme court, something that should never be done."<sup>47</sup> Republican E.H. Sullivan believed that "to the victor belongs all the fruits of victory."<sup>48</sup> Another Republican concurred: "[T]he majority should rule. He could see no reason why the minority should be represented on the bench. The voice of the people is the voice of God. They and they alone have the right to say who shall administer their laws."<sup>49</sup> Furthermore, argued several Republicans, minority representation assured that the evil influence of partisan loyalties would be felt among the members of the supreme court.

The Democrats defended the proposal. M.M. Goodman, later an unsuccessful candidate for the supreme court, "depre- cated the fact that politics had obtruded into the discussion."<sup>50</sup> Principle was most important. "[W]hat is right in principle and best for the people at large"<sup>51</sup> should be the issue. If the proposal of his fellow Democrat Warner brought better men to the bench, it ought to be adopted.<sup>52</sup> Others warned that one day the Republicans might be the minority and without representation on the court.<sup>53</sup> However, the Republicans prevailed, and the Warner proposal was rejected by a vote of forty-three to twenty-four. The vote split along party lines.<sup>54</sup>

James Z. Moore, a Republican from Spokane Falls, pro- posed that the state be separated into two judicial districts with

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45. Seattle Daily Times, July 19, 1889, at 1, col. 4.

46. *Id.* at 1, col. 5.

47. *Id.*

48. *Id.*

49. *Id.* D. Buchanan said "the voice of the people is the voice of God, but it is not the voice of the rabble. It is, then, the voice of that great throng in Jerusalem who cried out against Jesus. 'Crucify Him, crucify Him' was the voice of God. The same rabble also sounded the voice of God a few days before when it strew flowers in His path and cried, 'Hosanna, hosanna in the highest.'" Seattle Post-Intelligencer, July 19, 1889, at 1, col. 6.

50. Seattle Daily Times, July 19, 1889, at 1, col. 5.

51. *Id.*

52. *Id.*

53. *Id.*, cols. 5 & 6.

54. ROSENOW JOURNAL, *supra* note 5, at 600.

two judges being elected from each district and the Chief Justice elected state-wide.<sup>55</sup> This would allow the voters greater knowledge of the bench. However, the view that citizens of the state should vote for all of the judges ultimately prevailed.<sup>56</sup>

Another proposal suggested that judicial elections be held at a time different from the November general elections. This proposal would remove judicial contests from the politics associated with partisan campaigning.<sup>57</sup> The proposal was rejected, however, largely for reasons of economy.<sup>58</sup> But, as a compromise, the delegates permitted the legislature to change the time for judicial elections should the solons regard it wise.<sup>59</sup>

The remaining article IV issues pertaining to the supreme court involved jurisdictional and salary questions. The money limit for appealing civil cases was placed at two-hundred dollars.<sup>60</sup> Several delegates urged removal of the dollar limit, arguing that every citizen, however rich or poor, ought to have a right to appeal to the supreme court.<sup>61</sup> Dunbar disagreed, pointing out that "rich men and corporations could oppress the poor simply by appealing and making litigation so expensive poor men would stop trying for their rights in court."<sup>62</sup> Hoyt moved to have the legislature establish the jurisdiction of the court but his motion was defeated.<sup>63</sup> The convention voted to retain the two-hundred dollar constitutional restriction.<sup>64</sup>

The Judiciary Committee recommended that the supreme court judges be paid five-thousand dollars.<sup>65</sup> Some thought that qualified lawyers could be attracted to the bench by a three-thousand dollar salary. Others questioned this assertion, arguing that "a competent lawyer can readily earn double the amount of salary attached to the office of supreme judge,"<sup>66</sup> and that the only "way to have a judge above criticism, as to capability, is to pay salaries commensurate with the talent

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55. *Id.* at 602.

56. ROSENOW JOURNAL, *supra* note 5, at 601.

57. *Id.* at 602.

58. *Id.*

59. *Id.*

60. *Id.* at 604.

61. *Id.* at 605.

62. *Id.*

63. *Id.*

64. *Id.* at 604.

65. Seattle Daily Times, July 20, 1889, at 4, col. 1.

66. *Id.*

required.”<sup>67</sup> Hoyt, arguing for more flexibility, thought the legislature should fix the salary, rather than placing a figure in the constitution. After a prolonged debate dominated by concerns for economy, the convention settled on a four-thousand dollar salary.<sup>68</sup>

On July 24th, 1889, the convention approved article IV by a vote of sixty-seven to six.<sup>69</sup> The entire constitution was approved on August 22 and seventy-one of the seventy-five delegates affixed their signatures to the document.<sup>70</sup>

### III. THE OCTOBER ELECTIONS TO THE STATE'S HIGH BENCH

Five days after the convention had completed its task, Territorial Governor Miles Moore called for October 1 elections to ratify the proposed constitution and, at the same time, to elect state officials, including five supreme court judges.<sup>71</sup>

Under the partisan system then in use, all candidates for public office were nominated at their respective party conventions.<sup>72</sup> Republican delegates met in Walla Walla during the first week in September and nominated Thomas J. Anders (Walla Walla), Ralph Oregon Dunbar (Goldendale), John P. Hoyt (Seattle), Elmon Scott (Pomeroy), and Theodore L. Stiles (Tacoma) as the G.O.P.'s candidates for the supreme court. Dunbar, Hoyt, and Stiles had been leading figures in the Constitutional Convention.

Upon return from the Republican convention and with an easy victory in sight, the G.O.P. candidates kept a low profile. John Hoyt's stature alone largely excused him from speaking out in partisan debates.<sup>73</sup> He most often represented the Republican candidates at the prominent rallies along with con-

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67. *Id.*, col. 2.

68. The Seattle Post-Intelligencer observed that the "idea of economy has become paramount in the eyes of the convention, and a disposition not to spare the pruning knife in cutting down expenses in all branches of government is evidenced in every measure in which the question of expense is involved." Seattle Daily Times, July 20, 1889, at 1, col. 4. Earlier, Theodore Stiles had argued that economy was not the issue "as the people of Washington had had enough of economy for the past 20 years." Seattle Post-Intelligencer, July 19, 1889, at 1, col. 5.

69. ROSENOW JOURNAL, *supra* note 5, at 629 (three Democrats and three Republicans voted "Nay").

70. E. MEANY, HISTORY OF THE STATE OF WASHINGTON 283 (1924) [hereinafter MEANY].

71. *Id.*; WASH. CONST. art. IX, § 3.

72. Election laws, 1889 Wash. Laws 415.

73. Seattle Post-Intelligencer, Sept. 16, 1889, at 1, col. 9.

gressional aspirant John L. Wilson and gubernatorial candidate Elisha Ferry.

The Democrats met in Ellensburg the next week and nominated their slate for the high court. William H. White (who would serve on the court in 1901), B. L. Sharpstein (a delegate to the constitutional convention), John P. Judson, James B. Reavis (who was elected to the high court in 1896), and Frank Ganahl were selected by their fellow delegates to carry the cause for the Democrats into the October elections.<sup>74</sup>

Even though they had argued for a nonpartisan bench in the convention, the Democrats assumed a partisan stance in the campaign. Former U.S. Attorney William White was the most outspoken. For example, *The Seattle Daily Times*, most often in support of the Republicans, reported that White “. . . made one of his ‘abusive’ speeches. Mr. White makes no other kind . . . [H]e does not seem to have been affected with that delicacy of respect for the high office to which he aspires, as characterizes other candidates for judgeships.”<sup>75</sup> White had been dubbed “War Horse” by both supporters and opponents for his skill as a political debater.<sup>76</sup> The *Seattle Morning Journal* revealed that Theodore Stiles had been “accused [while practicing law in the Arizona Territory] of speculating with the funds of the [Hudson and Co., bankers,] from which he accumulated a considerable fortune with which he went to Washington.”<sup>77</sup> But the *Seattle Daily Times* labeled the accusations as “mere political falsehoods” and a “malignant slander.”<sup>78</sup> A telegram from leading citizens in Tucson pledging support for Stiles did much to dispell the fears of the voters.<sup>79</sup>

John Hoyt also came under attack by the Democrats when he was accused of favoritism toward the Northern Pacific Railroad while a territorial judge. He also was said to have denied

74. A CENTURY OF JUDGING, *supra* note 20, at 37.

75. *Seattle Daily Times*, Sept. 12, 1889, at 3, col. 2. The *Seattle Post-Intelligencer* editorialized that “[t]he dignified attitude of the Republican nominees for judicial positions is in pleasing contrast with that of their opponents. The intensely personal harangues of ‘Bill’ White will not win him many votes among the thinking people. . . . He is not the style of man that the people want on the supreme bench.” *Seattle Post-Intelligencer*, Sept. 16, 1889, at 1, col. 5.

76. C. REINHART, HISTORY OF THE SUPREME COURT OF THE TERRITORY AND STATE OF WASHINGTON 86 (n.d.); “*In Memoriam*,” PROC. WA. ST. B. ASS’N 233 (1914).

77. *Seattle Post-Intelligencer*, Sept. 18, 1889, at 1, col. 6.

78. *Seattle Daily Times*, Sept. 14, 1889, at 8, col. 1.

79. *Id.*, Sept. 21, 1889, at 2, col. 3.

the anti-Chinese rioters of 1886 the right of appeal.<sup>80</sup> The *Seattle Post-Intelligencer* came to his defense and noted that every attorney in Hoyt's twelve-county territorial district had signed a petition for his reappointment as territorial judge.<sup>81</sup>

The tradition of voting a straight party ticket, which was encouraged by the party list that permitted a voter to cast a ballot for the entire party slate, led to a Republican landslide.<sup>82</sup> Dunbar, Hoyt, Stiles, Anders, and Scott overwhelmed the Democrats by nearly 10,000 votes, a significant margin in an election of 55,000 ballots.<sup>83</sup> The constitution also won overwhelming approval; 40,152 votes for ratification and 11,879 against.<sup>84</sup>

All five of the original justices remained on the bench until 1895, when Stiles was replaced by M.J. Gordon.<sup>85</sup> Apparently, Judge Stiles was a victim of his own political hesitation. He had initially decided not to seek reelection and picked Tacoma Superior Court Judge Pritchard as his successor. As support for Pritchard waned just prior to the county G.O.P. convention in August, 1894, Stiles reentered the race. This split the Pierce County delegates, preventing them from agreeing on a candidate prior to the state convention in September.<sup>86</sup> Another factor was crucial in Stiles' loss. Delegations to the state convention threatened that they would not support the simultaneous renomination of both a supreme court judge and a congressman, incumbent William H. Doolittle, from the same county. This position reflected the belief that political offices should be shared among the leading counties.<sup>87</sup> Thus, the Pierce County state delegation abandoned Stiles, threw their support to Judge Merritt J. Gordon of Thurston County and thereby assured themselves of the renomination of

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80. *Seattle Post-Intelligencer*, Sept. 28, 1889 at 4, col. 1.

81. *Id.*

82. The same party list voting was adopted by the first legislature. See 1889-90 Wash. Laws 410.

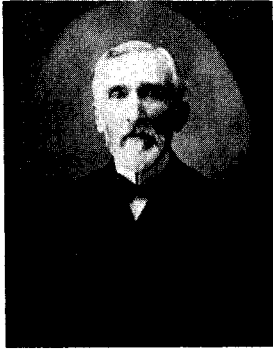
83. MEANY, *supra* note 70, at 287.

84. *Id.*

85. A CENTURY OF JUDGING, *supra* note 20, at 42.

86. *Seattle Post-Intelligencer*, Sept. 16, 1894, at 8, col. 1.

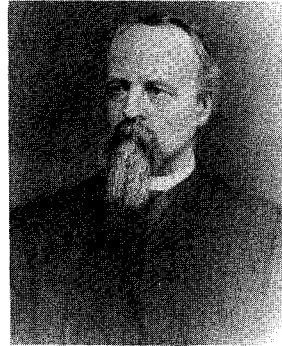
87. The Tacoma Daily Ledger reported on the eve of the Republican convention that: "Scalps are lying around a foot deep on the floor of Pierce County's . . . headquarters. . . . The friends of Judges Stiles and Pritchard fought gallantly to secure their favorites the full 50 votes but without avail. It was decided to retire both of the Pierce County aspirants for judicial honors and work solely and unremittingly for the renomination of Congressman Doolittle as the only candidate of the delegation. Tacoma Daily Ledger, Sept. 19, 1894, at 1, col. 3.



Thomas Jefferson Anders



Ralph Oregon Dunbar



John P. Hoyt



Theodor Lamme Stiles



Elmor Scott

THE WASHINGTON SUPREME COURT  
1889-1895

Congressman Doolittle.<sup>88</sup>

Thomas J. Anders remained on the supreme court bench until January of 1905, when he retired at the age of sixty-seven. Judge Hoyt was the first incumbent to experience electoral defeat when, in November 1896, he became the victim of the People's Party sweep of state offices, losing to James B. Reavis.<sup>89</sup> He thereafter returned to Seattle to manage his banking and business interests.<sup>90</sup> Elmon Scott retired in 1899 to practice law in Bellingham. Ralph Dunbar died in September of 1912 while still serving on the court.<sup>91</sup> This Article will analyze the period between 1889 and 1895, when all five members of the inaugural court served together.

#### IV. PROFILES OF THE INAUGURAL MEMBERS OF THE WASHINGTON SUPREME COURT

All of the victorious judges were experienced attorneys, long active in Republican affairs. Thomas Jefferson Anders was the eldest at fifty-one. In deference to his age, his colleagues selected him as the state's first Chief Justice. Anders had arrived in Washington Territory in 1871, after graduating from the University of Michigan law department and practicing law in Wisconsin. Before his legal studies, he had taught high school in Ohio. The need to regain his health prompted Anders to travel west, first to Montana where he made a small fortune in mining, and then to Walla Walla. He was regarded as a legal scholar, although he had gained political prominence earlier in his ten years of service as prosecuting attorney for the Eastern Washington (Walla Walla) District. While in private practice, he was elected for a two-year term as the Walla Walla City Attorney.<sup>92</sup>

Unlike his fellow jurist, Anders, Ralph Oregon Dunbar had lived in the west nearly all of his life. He had arrived in the Willamette Valley in 1847, barely surviving the arduous trek from St. Louis with his family. Among those who left St. Louis with the Dunbars were members of the Donner party who later perished when taking a different route over the Sierra Nevada mountains. The Dunbars' party also encoun-

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88. *Id.*, Sept. 16, 1894, at 8, col. 1.

89. By 12,145 votes.

90. Seattle Post-Intelligencer, Dec. 28, 1980, (Northwest Magazine), at 14, col. 1.

91. A CENTURY OF JUDGING, *supra* note 20, at 42.

92. Seattle Daily Times, Sept. 12, 1889, at 7, col. 1.

tered adversity. An attack by Indians left members of the family unharmed, but, except for one horse, all their livestock was stolen in the raid. The one remaining horse was ridden by Dunbar's mother, who carried the one-year-old Ralph in her arms. His parents named him "Oregon" in celebration of their safe arrival near Salem.

Dunbar attended Willamette College and stayed on to teach for two years. In 1867 he studied law under territorial Judge Elwood Evans. Immediately after he was admitted to the Washington bar in 1869, Dunbar clerked for Justice Orange Jacobs of the Territorial Supreme Court. Later, Dunbar returned to Salem and then set up practice in Yakima (1871), then The Dalles (1875), and finally in Goldendale (1877) on the Washington side of the Columbia River. He was elected to the Upper House of the Territorial Council in 1878; served in Goldendale as prosecuting attorney for one term; and later, served as Goldendale's City Attorney. Dunbar was elected Speaker of the Territorial Lower House in 1885. He was also publisher and editor of the *Goldendale Sentinel*, a paper known for its unwavering support of Republican causes. Dunbar was elected as a delegate to the 1889 Washington Constitutional Convention and was largely responsible for the constitutional article on school lands. He had earnestly desired to be Washington's first congressman but lost at the Republican convention to John L. Wilson by three votes.

Dunbar was charming, witty, and persuasive, but firm, if not stubborn. He was known as a master storyteller. His contemporaries viewed him as a "safe conservator of society," holding a proper check on "radicalism and iconoclasm."<sup>93</sup>

A third jurist, John P. Hoyt, was elected at forty-eight years of age and possessed impressive credentials. He was born in Ohio, raised on a farm, and educated in public schools as well as the Grand River Institute in Austinburg, Ohio. After teaching school for a short period, he volunteered for the Union Army, serving four years. Upon discharge from the army, Hoyt attended Ohio State University and then Union Law School in Cleveland, graduating in 1867. He began his

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93. Dunbar and Hoyt were in serious contention for the honor of being presiding officer of the convention. However, their strong support for the women's vote was a hindrance. According to *The Seattle Daily Times*: "Hoyt is objected to by the anti-suffragists, but his views upon the subject are mild, compared with those of Dunbar, consequently Dunbar's changes for the coveted honor have melted away like snow in the sunshine." *Seattle Daily Times*, July 3, 1889, at 1, col. 4.



legal and political careers in Michigan; first as a prosecuting attorney for Tuiscola County, then; as a member, and later as speaker, of the Michigan House of Representatives. President Grant appointed him as Secretary of the Territory of Arizona and later as Governor of the Territory in 1877. Hoyt later turned down an appointment as Governor of Idaho Territory but accepted a position on the Washington Territorial Supreme Court instead, serving from 1879 to 1887. He became active in banking affairs after finishing his term on the territorial court and later entered into several successful real estate ventures. The politics of statehood brought Hoyt back into public life and he was elected President of the 1889 Washington Constitutional Convention.

A fourth member of first supreme court, Theodore Lamme Stiles was forty-one years old when elected to the bench. He had graduated from the law department of Columbia College in 1872 after earning a classics degree from Amherst College in Massachusetts. He began his law practice in Indiana, but soon returned to New York City to associate with the law firm of Jordan and Thompson. He eventually was drawn by the opportunities available in the west and moved to Tucson and finally to Tacoma in 1887.

Stiles was immediately attracted to local Republican politics and was selected as a delegate to the Constitutional Convention, serving as chairman on the County, Township, and Municipal Organizations Committee. He was elected permanent chairman of the Republican Nominating Convention. After retirement from the court, Stiles practiced law in Tacoma, served as Tacoma City Attorney and President of the Washington State Bar Association, and became known as the "Dean of the Tacoma Bar."

At thirty-six, Elmon Scott was the youngest member of the first supreme court. He had read law in Michigan and served as a city attorney for a short time. In the spirit of adventure, he joined a wagon train that was headed west. He worked on a farm in Boise and drove an ox team to Walla Walla. Upon hearing of a cousin in Pomeroy, Washington, Scott moved there in 1882 to open up a law office. Although a staunch Republican, his sole political experience was three terms as Mayor of Pomeroy.

All five of the jurists possessed identical partisan identities. Their social backgrounds and legal and political exper-

iences, however rich, were not especially diverse. The results of the Republican-dominated October 1889 elections brought them together within the confines of the decisional procedures of the state's high bench.

#### V. THE DECISIONAL STYLE OF THE FIRST SUPREME COURT

The decisional process by which the five jurists resolved the disputes before them involved both individual and collective elements. The decisional process was a product of their knowledge of the territorial benches, their experience from other state judiciaries, the dictates of personal habit, and their desire to encourage a fruitful and efficient interchange among themselves.

The weekly briefs filed by attorneys were reviewed by each judge prior to oral arguments. Monday through Thursday was usually devoted to the attorneys' oral presentations. A number of disputes were decided solely on the briefs. At the end of each week, the judges, in a closed conference, gave collective attention to the cases heard that week. Discussions, and occasionally debates, culminated in tentative votes on the disposition of the cases. Opinion-drafting responsibilities were assigned "to several of the judges in rotation." These assignments were made without reference to the subject matter or consideration of the preferences of the litigants or the judges. Each judge was to receive an equal number of assigned cases and would assume sole responsibility for researching his assignments.<sup>94</sup>

On those rare occasions when the conference discussions left an issue unresolved, the assigned judge reviewed the record further and consulted informally with his brethren.<sup>95</sup> If dissension remained, each judge went back to the record and consulted with others. Finally, if the assigned judge failed to hold a majority, the court's opinion was given to the member of the new majority—the group that had initially expressed misgivings. Any dissenter was free to draft an opinion or simply dissent without opinion. Concurring in the results only was not an uncommon response.<sup>96</sup>

Petitions for rehearing were commonly filed but rarely

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94. Rudkin, *The Court's Work*, PROC. WA. ST. B. ASS'N 170 (1906).

95. *Id.*

96. *Id.* at 171.

granted.<sup>97</sup> However, if any member of the court felt that further consideration was appropriate, he discussed his misgivings with the other judges. If a majority was convinced that another look at the issue was appropriate, the petition was granted.<sup>98</sup> However, a short opinion denied the petition and closed the matter under usual circumstances.<sup>99</sup>

In contrast with the modern court,<sup>100</sup> court opinions were numerous and brief. Dissenting opinions were rare. Heavy reliance was placed on the oral arguments, and informal consultations were encouraged.<sup>101</sup>

The decisional process was designed both to promote the exchange of ideas among the judges and to encourage agreement among the bench. Ideally, five diverse approaches would be melded into a unanimous resolution of the issues presented. The members of the first supreme court had similar views of law and politics, and shared the experience of drafting the state constitution. One would expect a high level of agreement among such a group.

## VI. JUDICIAL REVIEW AND THE FIRST COURT

Each judge brought to the high bench his characteristic set of attitudes nurtured by a not-altogether-unique background and training. The inaugural members, all Republicans, had a common political perspective. They were placed together in a decisional framework that encouraged a majority to agree on often contentious and complicated legal issues. These issues had serious public policy implications and placed a heavy burden on the jurists' shared perspective. This was especially evident when issues involving constitutional provisions were at bar.

Courts of justice engage in delicate balancing when they invoke the constitution in settling legal disputes. Occasionally, judges must refer to the fundamental law to check the excesses of the policy-making bodies of the government. However, judicial review also raises the possibility that the judges will substitute their view of what is best for the community for

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97. *Id.* at 173.

98. *Id.*

99. *Id.*

100. A CENTURY OF JUDGING, *supra* note 20, at 250.

101. For an analysis of the modern court, see Sheldon, *An Interpretation of the Judicial Process: The Washington Supreme Court as a Small Group*, 13 GONZ. L. REV. 97 (1977).

that of the elected representatives of the people. Restraint, therefore, must be part of the judicial formula.<sup>102</sup>

Before Washington became a state, judicial review of legislative acts was well established. The Washington Territorial Supreme Court had invalidated legislation several times.<sup>103</sup> By the time the constitution was ratified, no one challenged the court's power to check the legislative and executive branches through judicial review. A few years after statehood, Judge Stiles expressed the prevailing view:

The courts are, and in the nature of things, must be the appellate body, and their power to review extends over the entire domain of public and private right. Once it is conceded, as it is now, universally, that a statute may be declared void as unconstitutional, there is no denying the proposition of judicial supremacy. Whenever the legislature enacts a law it thereby assumes and asserts it is constitutional; and whenever the court declares the contrary, the judgment of the court prevails, and there is no power except that of the people in constitutional convention that can reverse it.<sup>104</sup>

Although not as controversial as the oversight of legislative acts, courts also reviewed the constitutional validity of executive actions, county and city ordinances, and the practices of lower courts.

Because judicial review permits courts to be equal if not leading actors in the governing process, the practice is an ideal source for political analysis. The opinions of judges, in those cases that have compelled them to contemplate the nature and wording of the fundamental law, are likely to provide insight into the relations among the judges and to illuminate their relative effectiveness. For example, were the disagreements among the judges more pronounced in constitutional cases? Also, was one judge most effective in cases involving judicial review?

The incidence of judicial review between 1890 and 1895

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102. See S. HALPERN & C. LAMB, *SUPREME COURT ACTIVISM AND RESTRAINT* (1982).

103. For example, *Dacres v. Oregon R.R. Navigation Co.*, 1 Wash. 525, 20 P. 601 (1890). The Territorial Supreme Court exercised judicial review at least a dozen times and invalidated six legislative acts.

104. T. Stiles, *Legislative Encroachments Upon Private Right*, PROC. WA. ST. B. ASS'N 66 (1899).

was similar to subsequent years.<sup>105</sup> Table 1 illustrates the number of cases involving judicial review and the number of statutes or ordinances declared unconstitutional.

TABLE 1  
INCIDENCE OF JUDICIAL REVIEW<sup>106</sup>

Year	Number of Cases Involving Judicial Review	Percent	Number Declared Unconstitutional	Percent
1890	12 (100)	12%	3	25%
1891	13 (186)	7%	2	15%
1892	9 (314)	3%	2	22%
1893	15 (354)	4%	4	27%
1894	14 (391)	4%	4	29%
1895*	0 ( 37)	0%	0	0%
Totals	63 (1382)	4.6%	15	24%

\* From January 1 to January 14, 1895 when Stiles still participated.

During the court's first year in operation, the judges were confronted with constitutional issues in nearly one out of eight cases. This ratio dropped considerably and leveled off at approximately one out of thirty cases by 1895. One would think that most of the issues in 1890 would result from the transition from organic law, under the territorial system, to the new constitution. However, all territorial laws not specifically replaced or revised by the state constitution or legislature, and all relevant territorial court rulings, remained in force. This discouraged conflicts between the state constitution and organic law. The court was called upon to interpret some of the territorial laws,<sup>107</sup> but such questions rarely required a choice between the territorial organic law and the state constitution. A large number of the cases involved the taxing powers and indebtedness of local governments.<sup>108</sup>

Despite the relatively modest exercise of judicial review,

105. See *Judicial Review*, *supra* note 12.

106. Only those cases involving a constitutional (U.S. as well as state) challenge to a legislative enactment, an ordinance (county, city, town, special districts), or an executive action based on a statute were tabulated. These presented the greatest challenge to judicial authority. Some criminal cases and those questioning court procedure were often challenged on the basis of "due process" but not tabulated because these were the sort of questions that courts would ordinarily resolve without presenting a threat to the prerogatives of the executive or the legislature.

107. *Ah Lim v. Territory of Washington*, 1 Wash. 156, 24 P. 588 (1890).

108. *Metcalf v. City of Seattle*, 1 Wash. 297, 25 P. 1010 (1890).

in approximately twenty-four percent of all judicial review cases, or sixteen out of sixty-three, legislation was invalidated.<sup>109</sup> This rate of invalidation continued throughout the five years under consideration.

The judges' judicial review behavior presents a paradox. On the one hand, the judges were provided with limited opportunities to intervene in the governing process; on the other hand, they were not reluctant to strike down legislation if it appeared inconsistent with the constitution. Was the court best characterized as activist or restraintist? Comparisons with the numbers compiled by other courts in other times fail to provide the answer because the case context would be missing. The issue must be resolved by the decisions themselves. What were the judges' views of their role in the governing process? Had they accepted Judge Stiles' perspective, or was he

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109. 1890 cases in which a law was declared unconstitutional: *Kelly v. Stewart*, 1 Wash. 98, 23 P. 405 (1890); *Oregon Ry. & Navig. Co. v. Dacres*, 1 Wash. 195, 23 P. 415 (1890); *Oregon Ry. & Navig. Co. v. Smalley*, 1 Wash. 206, 23 P. 1008 (1890). Cases in which the jurists exercised judicial review but found the law adequate: *Ah Lim v. Territory*, 1 Wash. 156, 24 P. 588 (1890); *Van Houten v. Routhe*, 1 Wash. 306, 25 P. 728 (1890); *Yesler v. Seattle*, 1 Wash. 308, 25 P. 1014 (1890); *Tacoma Land Co. v. Board of County Comm'r*, 1 Wash. 482, 25 P. 904 (1890); *Board of Comm'r v. Davies*, 1 Wash. 290, 24 P. 540 (1890); *In re Rafferty*, 1 Wash. 382, 25 P. 465 (1890); *Hickman v. Hickman*, 1 Wash. 257, 24 P. 445 (1890); *Metcalf v. Seattle*, 1 Wash. 297, 25 P. 1010 (1890).

1891 cases declaring laws unconstitutional: *In re Cloherty*, 2 Wash. 137, 27 P. 1064 (1891); *Wilson v. Seattle*, 2 Wash. 543, 27 P. 474 (1891). Other judicial review cases: *State v. Spokane*, 2 Wash. 40, 25 P. 903 (1891); *Alger v. Hill*, 2 Wash. 344, 27 P. 922 (1891); *Bellingham Bay Ry. & Navigation Co. v. Loose*, 2 Wash. 500, 27 P. 174 (1891); *Lybarger v. State*, 2 Wash. 522, 22 P. 449 (1891); *Baker v. Seattle*, 2 Wash. 576, 27 P. 462 (1891); *In re Lybarger*, 2 Wash. 131, 25 P. 1075 (1891); *Eisenbach v. Hatfield*, 2 Wash. 236, 26 P. 539 (1891).

1892 cases declaring laws or ordinances unconstitutional: *State ex rel. Dyer v. Twichell*, 4 Wash. 715, 31 P. 19; (1892); *State ex rel. Snell v. Warner*, 4 Wash. 715, 31 P. 19 (1892). Other judicial review cases: *State v. Womack*, 4 Wash. 19, 29 P. 939 (1892); *State ex rel. Wiesenthal v. Denny*, 4 Wash. 135, 29 P. 991 (1892); *Board of Directors v. Peterson*, 4 Wash. 147, 29 P. 995 (1892); *State v. Carey*, 4 Wash. 424, 30 P. 729 (1892); *Wilson v. Beyers*, 5 Wash. 303, 32 P. 90 (1892); *State v. Anderson*, 5 Wash. 350, 31 P. 969 (1892); *DeMattos v. New Whatcom*, 4 Wash. 127, 29 P. 933 (1892).

1893 cases declaring laws unconstitutional: *McMurray v. Hollis*, 5 Wash. 458, 32 P. 293 (1893); *Peterson v. Smith*, 6 Wash. 163, 32 P. 1050 (1893); *State ex rel. Baldwin v. Moore*, 7 Wash. 173, 34 P. 461 (1893); *Denver v. Spokane Falls*, 7 Wash. 226, 34 P. 926 (1893). Other judicial review cases: *Lewis v. Seattle*, 5 Wash. 741, 32 P. 794 (1893); *Pacific Mfg. Co. v. School Dist.*, 6 Wash. 121, 33 P. 68 (1893); *Seymour v. Tacoma*, 6 Wash. 138, 32 P. 1077 (1893); *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33 P. 428 (1893); *Germond v. Tacoma*, 6 Wash. 365, 33 P. 961 (1893); *State ex rel. Reed v. Jones*, 6 Wash. 453, 34 P. 201 (1893); *Columbia & Puget Sound R.R. Co. v. Chilberg*, 6 Wash. 612, 34 P. 163 (1893); *Heilig v. City Council of Puyallup*, 7 Wash. 29, 34 P. 164 (1893); *Romine v. State*, 7 Wash. 215, 34 P. 924 (1893); *State ex rel. School Dist. of Snohomish County v. Grimes*, 7 Wash. 270, 34 P. 836 (1893); *State ex rel. Thurston County v. Grimes*, 7 Wash. 445, 35 P. 361 (1893).

largely speaking for himself when he spoke of “judicial supremacy?”

Judge Hoyt expressed<sup>110</sup> the classical version of judicial restraint:

When any question involving the constitutionality of an act of the legislature is presented to a court for adjudication, it calls for the utmost care and consideration of such a court in determining the same, and if this is true in an ordinary case, it is much more so in the one at bar, which presents a question of public policy of the gravest nature; one in fact upon which depends to a great extent on the prosperity of a very considerable portion of the inhabitants of the state.<sup>111</sup>

In contrast, Judge Scott was not the least bit hesitant to void a law when, in his view, it ran counter to the constitution. In a dissent,<sup>112</sup> he angrily took the majority to task for not being active:

There must be a right of review or control, to some extent, in the courts. Each citizen is entitled to the protection of all the branches of government. A declaration by the legislature as to what the law shall be, is not necessarily a conclusion reached by the state. The legislature is not the state, although a very important or essential part of it . . . . [The courts] are at liberty—indeed are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority.<sup>113</sup>

In reviewing the sixty-three cases in which judicial review was exercised, a clear indication of which of the judges accepted Hoyt’s or Scott’s view may be gleaned.

Table 2 reports the degree of activism, i.e., declaring laws unconstitutional, exercised by each of the judges.

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110. *Board of Directors v. Peterson*, 4 Wash. 147, 29 P. 995 (1892).

111. *Id.* at 148, 29 P. at 995.

112. *Ah Lim v. Territory*, 1 Wash. 156, 24 P. 588 (1890).

113. *Id.* at 178, 24 P. at 592.

TABLE 2  
RATE OF JUDICIAL ACTIVISM

Judge	No. Majority Opinions with Judicial Review	Percent of Jud. Rev. Opinions Authored	Number Declaring Laws Unconstitutional	Percent of Invalidating Opinions Authored
Stiles	20	32%	5	33%
Hoyt	14	22%	3	20%
Anders	7	11%	3	20%
Scott	9	14%	2	13%
Dunbar	13	21%	2	13%
Totals	63	100%	15	99%

Judge Stiles' record clearly reflects the most activist perspective among the five judges. Judge Dunbar was most reluctant to strike down legislation. Judge Stiles was the workhorse in constitutional cases. Although the assignments were supposed to be randomly awarded, he tended to write for the court in constitutional issues involving municipalities and city charters. He had been chairman of the constitutional convention's Committee on County, Township, and Municipal Organization. He was not only an authority on the subject, he was the "founding father" of article XI.

A review of several cases in which Judge Stiles' and Dunbar's views conflict is instructive regarding the early court's attitude toward the role of judicial review in the governing process. The first cases involving the court's review of a legislative act hinted at Judge Dunbar's restraintist perspective. In *Territory ex rel. Kelly v. Stewart*,<sup>114</sup> Chief Justice Anders, writing for the court, struck down an act permitting a district judge to validate signatures on a petition for the incorporation of a town. He held that "a judicial court cannot exercise legislative functions and . . . the legislature cannot impose such power on them."<sup>115</sup> Judge Dunbar concurred in the result but could not "concur in the opinion that the act of the legislature was unconstitutional."<sup>116</sup> He did not explain an alternative theory that would reach the same results.

In *Parmeter v. Bourne*,<sup>117</sup> Judges Stiles and Dunbar confronted an issue that divided them throughout. The case

114. 1 Wash. 98, 23 P. 405 (1890).

115. *Id.* at 170, 23 P. at 408.

116. *Id.*

117. 8 Wash. 45, 35 P. 586 (1894) (dissent reported separately in 35 P. 757).



involved the question of whether an election to remove a county seat was a "political question," and thus, beyond the concern of the court. Dunbar argued that the issue was non-justiciable because:

This decision was based upon the theory that the legislature was one of the coordinate departments of the government, with equal authority with the others, and that the assumption is a false one, that the 'mandatory provisions of the constitution are safer if the enforcement thereof is entrusted to the judicial department than if so entrusted to the legislature'. . . .<sup>118</sup>

Judge Stiles, as might be expected, expressed a different view in his dissent:

The term "political question" has been made, in the opinion of the court deciding this case, to perform a very large and imposing, but, it seems to me, at the same time, misleading part. I think it is a shadow without substance. . . . In my judgment, the only question which a court, with the allegations of this complaint before it, should consider, is, what is the proper remedy? To refuse any relief because the legislature has failed to make a complete election law, is to nullify the constitutional right of each elector to vote and to have his ballot counted.<sup>119</sup>

Like the United States Supreme Court in federalism cases,<sup>120</sup> the five judges rarely were reluctant to review county and municipal ordinances. But congressional acts generated debate. Even activists would often explain that they were "constrained" to hold the statute invalid<sup>121</sup> or that they should not "embarrass" their legislative counterparts.<sup>122</sup>

The judicial review cases drawn from the first five years of the supreme court suggest generally a restraintist bench concerned for its role in the separation of powers scheme. The activist Stiles, however mild, tended to lose to the restraintists,

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118. *Id.* at 56-57, 35 P. at 590 (in part quoting *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 P. 201 (1893).

119. *Id.* at 58, 65, 35 P. at 757, 759.

120. Since *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), the Supreme Court has invalidated state legislation with impunity. Nearly a thousand (970) state laws and state constitutional provisions have been declared unconstitutional. H. ABRAHAM, *THE JUDICIAL PROCESS* 293 (1986).

121. *E.g.*, *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98, 110 23 P. 405 (1890).

122. *E.g.*, *Seymour v. Tacoma*, 6 Wash. 138, 149, 32 P. 1077 (1893).

Scott and Dunbar, and the moderates, Anders and Hoyt, who provided balance in close cases.

However, judicial review cases constituted but a portion of the court's calendar. Constitutional cases might be considered the most important disputes before the judges, but an analysis of their opinions and votes in nonconstitutional cases can reveal much about the political and legal relations among the jurists.

## VII. DECISIONAL RELATIONS AMONG THE JUSTICES

To enhance our understanding of the nature of the relationships among the five judges,<sup>123</sup> this Article will analyze two aspects of judicial interaction. First, the level of agreement among the members of the bench will be isolated. It is expected that the shared backgrounds and politics should encourage a high level of agreement. Second, the effectiveness of each of the five jurists will be determined. It might be assumed that if a high level of agreement is lacking, variance in judicial effectiveness likely exists.

The data base is the compilation of the 1,382 cases heard by the court between 1890, the first year of the court, and 1895, when Judge Stiles was replaced by Judge M.J. Gordon. The source is the *Washington Reports* and the method is simply to "count" the votes and opinion-writing responsibilities in each of those cases. Ten volumes of the *Reports* are involved with an average of 139 cases reported in each volume. In its first year the court decided 100 cases, and in 1894 the court decided 396. Eighty-six percent of the 1,382 decisions were unanimous and fifteen percent (203) involved a dissenting opinion.<sup>124</sup>

### A. *Patterns of Agreement*

This Article's concern, however, is not primarily with the court as a whole but rather with each of the judges as they worked with each other to render decisions. How was the workload distributed among the judges? Given the procedures involved in the decisional process, each judge should have been

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123. For such a social analysis of other periods of the Washington Supreme Court, see Note, *The Washington Supreme Court: What It Was Like Thirty Years Ago*, 19 GONZ. L. REV. 231 (1983/84); S. ULMER, COURTS AS SMALL AND NOT SO SMALL GROUPS (1971).

124. These figures were not altogether different from other courts. See A CENTURY OF JUDGING, *supra* note 20.

responsible for 274 decisions within the same five-year time period (1890-1895). But as Table 3 reports, the tasks were far from evenly distributed.

TABLE 3  
DISTRIBUTION OF OPINION ASSIGNMENTS AMONG  
JUDGES

Judges	Number Majority Opinions	Percent	"Not Sitting"	Percent of Absences from all Cases
Stiles	335	24.5%	20	1.5%
Hoyt	312	22.8%	55	4.0%
Dunbar	283	20.7%	71	5.2%
Scott	257	18.8%	54	3.9%
Anders	181	13.2%	136	9.9%
(per curiam = 14)				
Court average	274	20.0%	67	4.8%

Both Judges Stiles and Hoyt wrote more than an equal share of opinions for the court. Judges Scott and Anders wrote the fewest. In Anders' case, an explanation can be found in his many absences from the bench. For whatever reasons, he and Judge Dunbar did not sign the final version of some of the court's opinions and, thus, did not assume their full share of the assignments. Dunbar's name was missing from 71 of the opinions (5.2%) and Anders' from 136 (9.9%). Stiles missed twenty (1.5%), and Scott and Hoyt did not sit on fifty-four (3.9%) and fifty-five (4.0%) of the cases, respectively.

Various reasons may explain the absence of a judge's name on an opinion. If a judge disagreed with an opinion he could record his dissent by simply stating, "I Dissent," without explanation. Or, he could simply leave his name off the opinion. On the other hand, illness, unavailability, conflicts of interest, or other court business could have kept the judge from participating in the case.<sup>125</sup> Also, both Anders and Dunbar served a two-year term as Chief Justice. Perhaps ceremonial and adminis-

125. In only a few cases when a judge was missing did the *Reports* record a "disqualified." It was noted as either "not sitting" or the judge's name (signature) was simply missing. Richard F. Jones, reporter for decisions for the *Washington Reports* for over 20 years, attached little significance to the absences. He stated that "the judges whose names are not listed as participating in the decision simply were not present at the time of the argument or were not available for signing the opinion." A CENTURY OF JUDGING, *supra* note 20, at 258.

trative duties kept them out of the regular opinion assignment sequence. In the area of authorship, however, the figures indicate that Judge Stiles was the workhorse of the court, accounting for one-fourth of the majority opinions.

The uneven distribution of the court's opinion assignments may have been related to the patterns of agreement among the judges. For example, Judge Anders' low majority assignments might have been caused by his dissenting from many of the court's opinions. Table 4 records the dissonance level (dissenting and separate concurring opinions and votes) on the inaugural bench.<sup>126</sup> As Table 4 reports, disagreement also was not evenly distributed, suggesting some diversity among the members.

TABLE 4  
DISSONANCE AMONG JUDGES

Judges	Number			Total Number	Percent**
	Number Dissenting Opinions	of Dissenting Votes	Number of Concurrences*		
Hoyt	65	69	52	186	14.0%
Dunbar	69	55	45	169	12.9%
Stiles	44	23	47	113	8.3%
Scott	20	44	45	109	8.2%
Anders	5	28	36	69	5.5%
Court Averages	41	44	45	129	9.8%

\* Concurring votes and opinions.

\*\* Total of dissents and concurrences divided by the number of cases on which the judge sat.

Judges Hoyt and Dunbar recorded the highest level of dissonance on the bench, disagreeing in the results (dissenting) or in the reasons for the results (concurring) in nearly one-eighth of the cases in which they participated. Judges Scott and Stiles parted from the majority in only eight percent of the decisions. Judge Anders' lower level of participation as noted in Table 2 was not caused by his recorded departures from the majority, because he rarely filed a dissent or a concurring opinion or vote.

As noted earlier,<sup>127</sup> the court's deliberations involved both

126. For further applications of the "dissonance" measure, see *id.* at 246-51. Dissenting behavior is ably analyzed in *JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS* (Goldman & Lamb eds., 1986).

127. See *supra* text accompanying notes 95-102.

individual and collective stages. The judges contemplated briefs filed by the attorneys, heard oral arguments, and drafted their opinions individually. They exchanged viewpoints through conferences, informal consultations, and debates in order to achieve a majority agreement. When the results of the individual clashed with those of the collective bench, dissonance resulted. Judge Hoyt's separate preferences kept him from joining the majority more than the other judges, while Judge Anders reached agreement with the majority more often than his brethren.

The dissonance data indicates that Judges Scott and Anders had higher levels of agreement with their brethren. With which judges did they most often agree? Table 5 records the percentage of agreements between pairs of judges.<sup>128</sup>

TABLE 5  
AGREEMENT PERCENTAGE BETWEEN JUDGES  
REGARDING DECISION RESULTS

Judges	Stiles	Scott	Dunbar	Hoyt
Anders	89.8%	87.8%	83.8%	81.6%
Stiles		84.2%	80.7%	81.9%
Scott			83.8%	81.5%
Dunbar				73.6%

Court Average = 83.1%

In all cases brought before the court, including petitions for rehearings that resulted in a court response, Judges Stiles and Anders (89.8%), Scott and Anders (89.8%), and Scott and Stiles (87.8%) tended to join one another. In contrast, Judges Hoyt and Dunbar (73.6%) tended to disagree significantly with each other.<sup>129</sup> As might be expected, the average percentage of agreement for each judge follows closely the ranking for dissonance reported in Table 4. Judge Anders garnered an average

128. Ordinarily, interagreement scales are referred to as "bloc analysis." See generally G. SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* (1959); Ulmer, *Toward a Theory of Sub-groups Formation in the United States Supreme Court*, 27 J. POL. 133 (1965); W. MURPHY & J. TANNENHAUS, *THE STUDY OF PUBLIC LAW* (1972); *JUDICIAL CONFLICT AND CONSENSUS*, (S. Goldman & C. Lamb eds. 1986).

129. Sprague has arrived at a "significance level" for interagreement scales by subtracting the court interagreement average (83.1%) from 100% (16.9%), dividing this in half (8.45%) and adding this to the court average (91.2%), or subtracting it (75.0%). Any interagreement above 91.2% or below 75% is regarded as statistically significant. See J. SPRAGUE, *VOTING PATTERNS OF THE UNITED STATES SUPREME COURT: CASES IN FEDERALISM, 1889-1959*, at 54 (1968).

of 85.8% agreement with his colleagues; Judges Stiles (84.2%), Scott (84.3%), and Dunbar (80.5%). The differences among the judges were slight, but Judge Hoyt was in agreement with his colleagues the least (79.7%). Considering that all the judges were Republicans, and many of them had been active in partisan affairs, it is surprising that the levels of agreement were not higher.

The interaction data suggest that Judge Anders was not as active a participant in the court's deliberations as might have been expected. He was absent from nearly ten percent of the cases heard by the court in the five years under study. He rarely dissented or concurred separately. However, when he did participate, he recorded a high level of agreement with all of his colleagues, especially with Stiles and Scott. Judges Dunbar and Hoyt were occasionally at odds with the other members, and, interestingly, were significantly in disagreement with each other. Perhaps some sense can be made of these relationships by attempting various measures of effectiveness for each of the judges. Political partisanship failed to hold the five together. Perhaps some of the jurists were more effective in achieving the goals of the court or in pursuing their own agendas.

### B. *Effectiveness on the Inaugural Bench*

Effectiveness, of course, is multi-faceted.<sup>130</sup> For example, one judge may provide expertise in certain areas of the law. Another may be a persuasive and convincing conference participant or an effective opinion writer. Another may be a social leader, providing the requisite atmosphere for deliberations. A Chief Justice may add to the effectiveness of the court by virtue of the responsibilities surrounding the office. To measure effectiveness or indications of effectiveness, then, requires a variety of computations. Nonetheless, some judges emerge as more effective when evaluated under the various criteria.

The question generated by the figures concerning inter-

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130. A number of studies have measured leadership and effectiveness on state courts. *E.g.*, C. DUCAT & V. FLANGO, *LEADERSHIP IN STATE SUPREME COURTS: ROLES OF THE CHIEF JUSTICE* (1976); Flango, Ducat & McKnight, *Measuring Leadership Through Opinion Assignments in Two State Supreme Courts*, *JUDICIAL CONFLICT AND CONSENSUS* 215 (Goldman & Lamb eds. 1986); McConkie, *Decision-Making in State Supreme Courts*, 59 *JUDICATURE* 343 (1976); Ulmer, *Leadership in the Michigan Supreme Court*, *JUDICIAL DECISION-MAKING* 16 (Schubert ed. 1963).

agreement rates reported in Table 5 concerns the most effective judge in the pairs reported. For example, in the pair of Anders and Stiles, who agreed nearly ninety percent of the time, which judge tended to provide effective leadership? By comparing the number of times Anders agreed with Stiles when Stiles wrote an opinion with the number of times Stiles agreed with Anders when Anders wrote, a measure of effectiveness—at least between those two considered—is possible. Table 6 reports these comparative calculations for each of the judges.

TABLE 6  
OPINION WRITING EFFECTIVENESS

Writing Judge	Agreeing Judge	Leader/Follower Ratio	Average Leader/Follower Ratio
DUNBAR ---->	Anders	93/82	Dunbar 90/83
DUNBAR ---->	Scott	93/86	
DUNBAR ---->	Stiles	91/84	Hoyt 88/82
DUNBAR ---->	Hoyt	84/81	
HOYT ---->	Anders	92/81	Stiles 88/87
HOYT ---->	Scott	95/79	
Hoyt <----	STILES	82/90	Scott 86/90 Anders 85/93
Stiles <----	SCOTT	83/86	
STILES ---->	Anders	96/88	
SCOTT ---->	Anders	92/87	

Whenever Judge Dunbar wrote, he garnered more support from the other judges than he provided them when they wrote. Judge Hoyt held sway in two relationships (Anders and Scott), but was influenced by Stiles and Dunbar. Judge Anders, despite his high interagreement score reported in Table 5, failed effectively to sway any of his colleagues over to his opinion.

Another perspective of the relationships between and among the judges concerning effectiveness is presented when data are gathered on the number of votes each judge received when he wrote an opinion, either majority, concurring, or dissenting.<sup>131</sup> When a particular judge wrote the opinion for the court, he would be expected to have enough commitment to

131. Sheldon, *An Interpretation of the Judicial Process: The Washington Supreme Court as a Small Group*, 13 GONZ. L. REV. 97, 117 (1977).

attempt to reach unanimity among his brethren. The decisional process described earlier was designed to reach unanimous agreement through formal and informal consultation. At the same time, a dissenter might be expected to attempt to gain enough votes to create a majority. Likely, then, the more persuasive judge would win more of his colleague's votes, and consequently be more effective. Table 7 reports the vote-gaining skills of the jurists.

TABLE 7  
AVERAGE VOTES PER OPINION

Judges	Opinions Written*	Number of Votes	Average Number of Votes/Opinion
Dunbar	300	1273	4.24
Hoyt	330	1394	4.22
Anders	200	796	3.98
Scott	280	1113	3.98
Stiles	365	1446	3.96
Court average =	295	1204	4.08

\* = Majority, concurring and dissenting opinions.

Judges Dunbar and Hoyt apparently were more convincing when writing an opinion than were Judges Scott or Stiles. When Judge Dunbar wrote and all members of the bench were present, he garnered an average of 4.24 votes for his opinions. Judge Hoyt's average was 4.22; Anders' and Scott's, 3.98; and Stiles', 3.96.

How could Judge Anders fail to dominate any of his colleagues, as reported in Table 6, but still equal the voting support of Scott and Stiles as depicted in Table 7? This occurred through avoiding dissents. Because Anders wrote so few dissenting (five) and concurring (twelve) opinions which could have garnered a maximum of two votes in a five-member court, he raised his vote support record above or equal to his colleagues who dissented or concurred separately more often.

Although effectiveness may not always be felt immediately on the bench and among the judges, the clarity, thoroughness and anticipatory value of an opinion may transcend the moment and become a leading precedent for future cases. For example, the great dissenter on the United States Supreme Court, the elder Justice John Marshall Harlan, anticipated a



number of future decisions and many of his dissents were eventually vindicated.<sup>132</sup> Effectiveness of this kind can be roughly measured by following the number of positive citations to a particular case in subsequent decisions of a court reported in *Shepard's Washington Citations*.<sup>133</sup> As recorded in Table 8, Judge Anders received an average of 7.7 citations per opinion between 1890 and 1982. Judge Hoyt, on the other hand, received 4.7 cites per opinion. Apparently, Judge Anders left the heaviest mark on the state's legal history. Judge Hoyt was apparently the least influential. Judges Stiles and Scott were average for the five judges and Judge Dunbar also contributed positively to the future law of the state.

TABLE 8  
CITATION INDEX

Judge	Average Citations per Opinion
Anders	7.7
Dunbar	6.3
Stiles	5.8
Scott	5.4
Hoyt	4.7
Court Average	5.98

The position of Chief Justice may have also had its responsibilities and influential prerogatives beyond simply representing the court at ceremonial functions and sitting at the head of the conference table.<sup>134</sup> From the beginning, the Chief Justice presided in open court and in conference. He probably assumed some administrative responsibilities over the court clerk, court reporter, and bailiff. The duties involved in keeping the court effective would be assumed by the Chief Justice as well. Thus, in any discussion of leadership, the Chief Justice must be given some credit. Unfortunately, no descriptive account exists that details the Chief Justice's responsibilities during the inaugural period. However, some indication of the

132. See F. LATHAM, *THE GREAT DISSENTER* (1970).

133. Figures in Table 8 were arrived at by counting all subsequent citations reported in *Shepard's Washington Citations*. See *A CENTURY OF JUDGING*, *supra* note 20, at 253.

134. See generally C. DUCAT & V. FLANGO, *LEADERSHIP IN STATE SUPREME COURTS* (1976); *A CENTURY OF JUDGING*, *supra* note 20, at 327-28; Danelski, *The Influence of the Chief Justice in the Decisional Process*, *COURTS, JUDGES AND POLITICS* (Murphy & Pritchett eds. 1979).

distractions that the office imposed is found in the data from *Washington Reports*.

Because at age fifty-one, he was the most senior member of the new court, Theodore Anders was chosen Chief Justice by his colleagues.<sup>135</sup> Table 3 indicated that he had the lowest number of majority opinions of the five judges. Perhaps the duties of office prevented him from assuming his equal share of the opinion assignments. While Anders was Chief Justice, he wrote 97 of his 181 opinions, and 84 after he had turned the office over to Judge Dunbar. Dunbar had written 118 opinions before he was Chief Justice and 165 after assuming the duties as head of the court. If the burden of writing the court opinions was any indication, the Chief Justice had little to do and was able to be a fully contributing member of the court in the struggle against the ever-increasing docket.

In a court of five members, a single vote could often make the difference in the outcome of the case. A judge who persistently provided the single deciding vote in a three-to-two division was in a position of significance. Even a four-to-one vote gave the two judges who made the difference a degree of influence. Thus, the importance of the "swing" vote should be recognized in any calculation of effectiveness on the bench.<sup>136</sup>

TABLE 9  
SWING VOTE EFFECTIVENESS INDEX

Judge	Swing Vote Score
Anders	77.28
Stiles	71.38
Scott	69.08
Dunbar	55.16
Hoyt	50.70

Judges Anders, Stiles, and Scott, more often than Judges Dun-

135. Elmon Scott was the youngest at 36. Dunbar, Stiles, and Hoyt were 44, 41, and 48 respectively. Anders began his duties on November 11, 1889, and relinquished his office to Judge Dunbar on January 9, 1893. Dunbar served until January 14, 1895.

136. The "swing" vote index was arrived at by simply giving to the majority members in a four-to-one decision each one-fourth (.25) of the credit for the decision, and in a three-to-two decision, the members of the majority received one-third (.33) of the credit for the outcome. The grand total for each judge is the total score in all of the cases involving a dissent over the five-year period covered. See Shapley & Shubik, *A Method for Evaluating the Distribution of Power in a Committee System*, 48 AM. POL. SCI. REV. 787 (1954); G. SCHUBERT, *JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH* (1964).

bar and Hoyt, provided the third vote for a majority opinion or the fourth vote to consolidate the majority. They, and especially Judge Anders, were the swing voters, and thus occupied positions of some influence.

It would be expected that the degree of cohesion found among the judges could be attributed to the backgrounds of the jurists and to the effectiveness of one or another of the judges. The backgrounds of the judges had much to do with forming their political and legal attitudes and an effective judge could have melded these into a cohesive bench. The data suggests similar backgrounds that should lead to considerable cohesion. Yet, the data also indicates the absence of an effective manager of court business and of the members of the bench. However, effectiveness is an elusive and many-faceted phenomenon. By considering the several indicators of effectiveness together, a better perspective may emerge.

TABLE 10  
COMPOSITE EFFECTIVENESS

Judges	Number Average		Agreement			Opinion		Composite Ranking
	Majority Opinions	Opinion Votes	Swing Vote	Between Judges	No. of Citations	Dissonance Rating <sup>137</sup>	Writing Leadership	
	Table 3	Table 7	Table 9	Table 5	Table 8	Table 4	Table 6	
	Rank	Rank	Rank	Rank	Rank	Rank	Rank	
Dunbar	3	1	4	4	2	3	1	1 (18)
Stiles	1	5	2	3	3	1	3	1 (18)
Anders	5	3	1	1	1	5	4	3 (20)
Scott	4	4	3	2	4	2	5	4 (24)
Hoyt	2	2	5	5	5	4	2	5 (25)

The composite ranking of the judges placed Dunbar and Stiles as the most effective members of the bench and Judge Anders as an influential member as well. However, each of the judges, with the exceptions of Hoyt and Scott, enjoyed a primary ranking on at least one of the indicators of effectiveness. Clearly, no one jurist was able, or willing, to sway his colleagues or to set the course for the court. Perhaps, at best, we can conclude that Judges Hoyt and Scott were not strong

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137. Table 4 data on dissonance provides clues for effectiveness. Ideally, unanimity was reached after the clash of varying views. However, unanimity could have also signified the lack of a thorough exchange of ideas among the jurists. Thus, it would be reasonable to expect that those judges whose dissonance level hovered about the court mean (9.5%) were striking a practical balance between the extremes represented by Judges Hoyt and Anders. Judges Stiles and Scott provided the balance suggested.

factors in the negotiations and informal consultations involved in the court's decisional process.

Judge Anders, had he participated more in the deliberations, might have emerged as the future manager of the court. It was said of Judge Anders that he

was a very conscientious judge, so much that it was hard for him to come to a decision. He was well grounded in the general principles of the law, but he would spend an inconceivable amount of time in looking up authorities in support of even fundamental principles. He seemed to be as anxious to render his opinions satisfactory to the layman as to members of the bar.<sup>138</sup>

### VIII. SUMMARY AND CONCLUSIONS

The foregoing analysis indicates that the court had no single effective leader. No single judge emerged consistently from the various measures of effectiveness available from the data in *Washington Reports*. Judges Stiles, Dunbar, and Anders each held sway over some aspect of the court's work. No one justice dominated the bench.

This brief analysis of the exercise of judicial review suggests that an important factor which kept the judges divided, at least in the crucial constitutional cases, was their view of the proper role—activist or restraintist—of the state's highest bench. Perhaps Stiles' lack of legislative experience, contrasted with Dunbar's years in both houses of the territorial legislature, instilled in the latter a greater respect for the product of the legislative process. For that matter, except for a stint as city attorney, Stiles had not held an elective public office prior to his election to the bench, contributing to his less than respectful attitude toward the products of the legislative process. Judges Stiles, Anders, and Hoyt, the moderate to activist judges, all received their legal education at a law school or law department of an institution of higher learning. Both Judges Scott and Dunbar joined the ranks of the bar after office study under the supervision of a practicing attorney. On-the-job training in an intern relationship characteristic of clerking may have made them more cautious than their colleagues who had initially learned the law in the more abstract and isolated law school environment.

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138. C. REINHART, *supra* note 76, at 92.

The data also suggests that the judges tended to disagree more than expected in matters other than over the proper approach to judicial review. Of course, by modern standards and by comparison with the United States Supreme Court,<sup>139</sup> the state's high bench appeared to be fairly cohesive. However, within the context of the times, and given their similar backgrounds and identical politics, the judges were divided unexpectedly often.

Of course, differences among the judges must be attributed to different perspectives regarding the law. Again, the *Washington Reports* could provide some clues. For example, the relative low level of agreement between Judges Dunbar and Hoyt could be due to contrasting views of proper judicial procedures. Dunbar tended to be most reluctant to overturn a trial decision or insist upon a new trial while Hoyt tended to be more critical of procedures.<sup>140</sup> A computation of cases beyond 1895, in which both Hoyt and Dunbar participated, would likely confirm their contrasting perspectives regarding "due process" or court procedures.

Relying exclusively on the data available from the *Washington Reports* to understand the judiciary, of course, has limits. Indeed, more questions are generated than answered. Nonetheless, the initial step in analysis is to generate meaningful questions. In this we have succeeded, but the answers evade us. The next step is to go the archives, newspapers, personal accounts, and memorabilia to confirm our speculations. Unfortunately, the primary sources on which we could rely to test our expectations are unavailable, lost to history. One would hope that the history of the second century of the Washington Supreme Court will not suffer this loss. The judges have made and will make their mark on the history of the state. A complete record of their endeavors must be preserved and later made available.

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139. Peterson, *Dissent in American Courts*, 43 J. POL. 412 (1981).

140. For example, in *Pacific Cable v. McNatt*, 2 Wash. 216, 27 P. 869 (1891), Dunbar was emphatic: "In my opinion, the judgment in this case cannot be disturbed without usurping the province of the jury." *Id.* at 220. See also *Going v. Cook*, 1 Wash. 224, 23 P. 412 (1890); *McGraw v. Franklin*, 2 Wash. 17, 26 P. 810 (1891). See Hoyt's vote and opinion in *State ex rel. Coella v. Fenimore*, 2 Wash. 370, 26 P. 807 (1891); *Oregon Ry. & Navig. Co. v. Smalley*, 1 Wash. 206, 23 P. 1008 (1890); *Pierce v. Frace*, 2 Wash. 81, 26 P. 807 (1891).

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