

# **S P E E C H E S**

**BY**

**PAUL R. BAIER.**



**NEW ORLEANS :  
LOUISIANA BAR FOUNDATION  
2014.**

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BY PAUL R. BAIER.

NEW ORLEANS:  
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THESE chance utterances of faith and doubt  
are printed for a few friends who will care to  
keep them.

—Oliver Wendell Holmes, Jr.  
SPEECHES, 1891.

To the memory of  
Albert Tate, Jr.  
William V. Redmann  
Jimmy Gulotta  
with thanks to the  
Louisiana Bar Foundation.

A WORD ON BEHALF OF THE  
LOUISIANA BAR FOUNDATION.

by Judge Eldon E. Fallon.

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The Louisiana Bar Foundation invited Professor Paul Baier to be its first Scholar-in-Residence some twenty-plus years ago. I was a member of the inviting committee of three. We waited on Paul in confidence at the Louisiana Bar Center on St. Charles Ave. in New Orleans. Judge Jimmy Gulotta and Marcel Garsaud joined me in putting the squeeze on Paul, whose first reaction was one of curiosity. "Must I move in with you?" "No, of course not." So far so good. Next, Paul asked inquisitively, "What would you have me do as your scholar-in-residence?" Our committee really had no firm idea. The program was new. It was an experiment.

We suggested arranging a few educational programs. Perhaps Paul could give some speeches during his two-year tenure, 1990-1992. I distinctly remember Paul's acceptance of our offer. He quoted Holmes, something about shooting an arrow into the sky. He said he welcomed the company of the Bar—"real lawyers on Poydras Street"—beyond the "joy of the classroom." He hugged Jimmy Gulotta.

I remember hearing our first Scholar-in-Residence's speech "Time and the Court" delivered in the chamber of the Louisiana Supreme Court on February 2, 1990, the Bicentennial of the Supreme Court of the United States. Paul arranged the entire program at Chief Justice John Dixon's request. Our State Supreme Court was one of only a handful of state high courts that took note of the event.

Professor Baier knows his history. He has a way with words. His speeches, like Holmes's before him, touch hearts.

On behalf of the Louisiana Bar Foundation, may I say we are grateful to our first Scholar-in-Residence for giving us a vibrant canvas of life and law in his book of SPEECHES—from the Great Hall of the Supreme Court of the United States, Washington, D. C., to the great bronze statue of Louisiana's Edward Douglass White. Our "Father Chief Justice"—as "Playwright Baier" has portrayed him—lives immortally, in bronze and on the stage, a majestic presence guarding the entrance to the Louisiana Supreme Court building, 400 Royal Street, the *Vieux Carré*, New Orleans

—E. E. F.

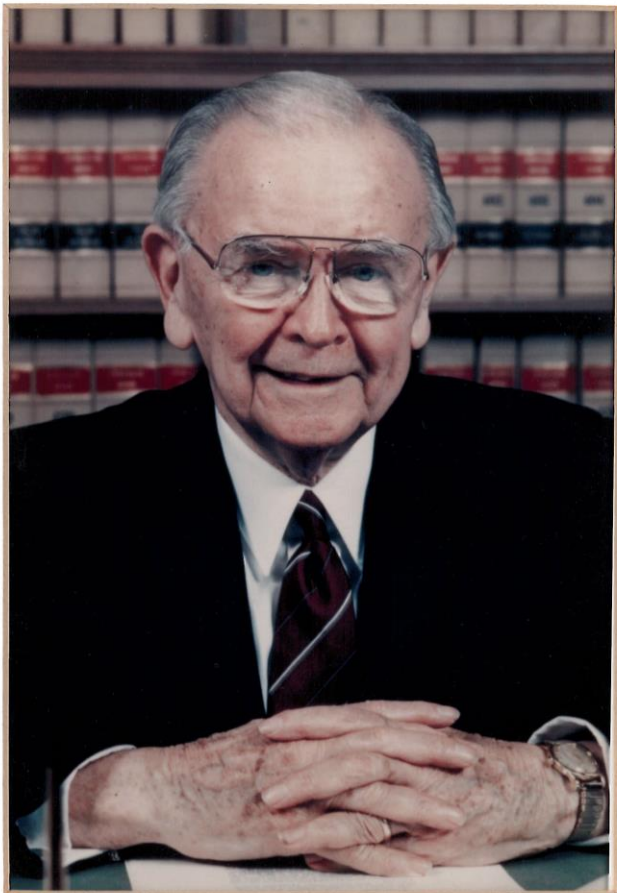
January 1, 2014  
United States District Court  
Eastern District of Louisiana  
New Orleans.

I think it a noble and pious thing to do whatever we may by written word and molded bronze and sculptured stone to keep our memories, our reverence, and our love alive and to hand them on to new generations all too ready to forget.

— Oliver Wendell Holmes, Jr.

*At the Unveiling of Memorial Tablets,  
July 31, 1902, Ipswich, Massachusetts.*





For Paul Baker  
Distinguished Teacher -  
in pursuit of justice  
Wm J. Brennan

PROFESSOR BAIER'S MUSEUM  
THE PORTRAIT GALLERY  
ACKNOWLEDGMENTS.

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We have a student newspaper at L.S.U. Law School. It is called *The Civilian*. The January 2013 issue carried a New Year's Resolution: "You must see Professor Baier's Museum. It even has a portrait of himself." True enough. Jacob A. Stein, Washington D.C. lawyer and legal spectator, painted it as a gift to his stage companion Professor Richard Henry Jesse. You will see them both in these pages. Thanks to Jake for his friendship and random act of portraiture. Other portraits, mainly photographic, add life to this knockoff book of SPEECHES.

In his youth the author tossed a gauntlet at the feet of the Legal Academy and asked out loud, "What is the use of a law book without pictures or conversations?" Hence "Professor Baier's Museum"—of photographs, tapes of Supreme Court oral arguments, dried red roses, and, of late, a bronze statue of a Jesuit priest holding a skull entitled: "Contemplation of Mortality." ("Alas, poor Yorik! I knew him, Horatio.") It sits in front of a fading *New York Times Magazine* (October 5, 1986) featuring a glorious William J. Brennan, Jr. on its cover (*A Life on the Court, A Conversation With Justice Brennan*).

In short, the author teaches dead people. He likes to have them around. A teacher is a curator. This is especially true in Constitutional Law. It helps to have Hugo Black and his judicial contemporary Antonin Scalia in class. Justice Brennan tags along as a foil to Scalia's poker.

## THE PORTRAIT GALLERY.

Here, then, is a list of the portraiture, the dramatis personae, of this contemporary book of SPEECHES, some hundred years after Holmes's first edition (1891), in order of appearance, with thanks to their respective sources:

## THE PORTRAIT GALLERY.

---

William J. Brennan, Jr.

*Chambers of Justice Brennan.*

Albert Rosenthal Portrait of Edward Douglass White

*Collection of the Supreme Court of the United States.*

E. D. White, Signature Portrait

*The National Cyclopedic of American Biography.*

Mr. Justice and Mrs. Black

*Courtesy of Random House.*

Judge Albert Tate, Jr.

*The Times-Picayune.*

Judge Albert Tate, Jr., Paul R. Baier

Third Circuit Court of Appeal Building

*Josh Guillory.*

Chief Judge William V. Redmann

*Louisiana Secretary of State W. "Fox" McKeithen.*

Chief Justice John Marshall Bicentennial Stamp

*United States Postal Service.*

Chief Justice John Marshall, Bronze Statue, Capitol Building

*Paul R. Baier.*

Chief Justice John Marshall, Bronze Statue, Exhibit Area

*Collection of the Supreme Court of the United States.*

Chief Justice Edward Douglass White

*Library of Congress.*

Chief Justice John Dixon

*The Times-Picayune.*

## THE PORTRAIT GALLERY.

François-Xavier Martin

*David Rigamer, Louisiana Supreme Court.*

Justice Antonin Scalia

*Conference of State Bar Presidents.*

Justice Luther F. Cole

*Portrait by Lucien Le Breton.*

Supreme Court of the United States, 1993

*Collection of the Supreme Court of the United States.*

Chief Justice Warren E. Burger

*Chambers of Chief Justice Burger.*

Captain Oliver Wendell Holmes, Jr.

*Collection of the Supreme Court of the United States.*

Bryant Baker Statue of Chief Justice White

*Library of Congress.*

Dottie Blackmun ("Miss Clark") and Harry A. Blackmun

*Collection of the Supreme Court of the United States.*

Mr. Justice Blackmun

*Collection of the Supreme Court of the United States.*

Justice Lewis F. Powell, Jr.

*Chambers of Justice Powell.*

Chief Judge Melvin A. Shortess

*David Wood.*

Hopkinson Portrait of Holmes

*Collection of the Supreme Court of the United States.*

J. A. S. Portrait of Paul R. Baier

*Jacob A. Stein.*

Portrait of Chief Justice William H. Rehnquist

*Painted by Thomas Loepp*

*Collection of the Supreme Court of the United States.*

Chief Justice Rehnquist, in chambers

*Collection of the Supreme Court of the United States.*

THE PORTRAIT GALLERY.

Frederick Bernays Wiener, Colonel, U.S.A., Retired

*Paul R. Baier.*

Justice Antonin Scalia

*Collection of the Supreme Court of the United States.*

Justice Hugo L. Black

*Courtesy of Random House.*

Paul R. Baier

Law Professor of the Year 2010

*Jim Zietz.*

Justice-Elect John L. Weimer, Penny, Katherine, Emily

*The Courier, Terrebonne Parish, Louisiana.*

Professor Richard Henry Jesse and Jacob A. Stein

Playing Justice Holmes

*Vicens Feliú.*

Judge Jane Triche Milazzo

*Chambers of Judge Triche Milazzo.*

Professor Richard Henry Jesse

*Social Law Library.*

Portal Portrait, Yours, E. D. White

*The American Law Review, May-June 1911.*

A. N. Yiannopoulos and Paul R. Baier

Two Biophiles

*Jennifer Roche.*

Professor Baier's Museum

Exeunt

*Jim Zietz.*

Professor Richard Henry Jesse

Old State Capitol

*Jim Zietz.*

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FOREWORD.

by Justice Harry A. Blackmun.

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Professor Paul R. Baier has favored all of us by way of publication of his speeches covering, roughly, 15 years of the author's life in the Academy, his service to the Bar generally and to Louisiana lawyers in particular.

They range from intense verbal portraits of jurists the author has admired—with fine and peppery doses of Holmes and Scalia—to serious detailed reviews of the work of the Supreme Court at critical points.

The breadth and scope of the author's scholarship are impressive. Yet, his writing is precise, clear, and readable. One knows where the author stands and thereby one is fortified in his own thinking and conclusions about the principal issues that have confronted the legal world during the last decade and a half.

This is a stimulating and worthwhile publication.

—H. A. B.

February 1997  
Washington, D.C.

SPEECHES

BY

OLIVER WENDELL HOLMES, JUNIOR.



BOSTON:  
LITTLE, BROWN, AND COMPANY.  
1891.

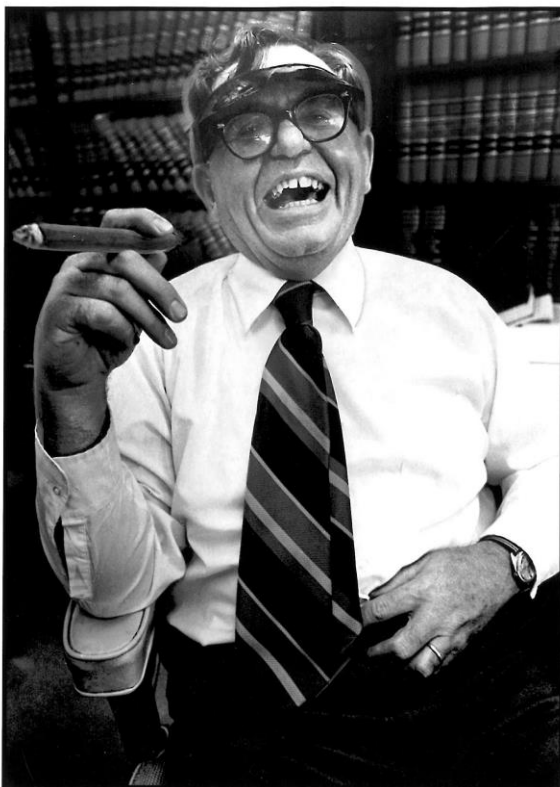
KF  
213  
.H6  
1891





OF JUDICIAL FREEDOM AND  
JUDICIAL CONSTRAINT:  
THE VOICE OF JUDGE  
ALBERT TATE, JR.

ALBERT TATE, JR. SEMINAR:  
BRIDGING ACADEMIA, BENCH & BAR  
MAY 9, 1987  
ROUSSELL AUDITORIUM  
LOYOLA UNIVERSITY  
NEW ORLEANS.



*The Times-Picayune*

GOVERNOR EDWARDS, CHIEF JUSTICE DIXON, DISTINGUISHED MEMBERS OF THE BENCH, FELLOW LOUISIANA LAWYERS, MY COLLEAGUES IN ACADEMIA, MRS. TATE AND FAMILY, LADIES AND GENTLEMEN: —

THE other day I reached for a volume of the *Federal Reporter*, 2d Series, in search of some point or other of the law—I forget which. My eye caught the name of Albert Tate, Jr., on the spine of the report. We are all familiar with the countless number of judicial memorials, published in endless volumes of reports that line the walls where we work.

The sight of Judge Tate's name in gold letters draped in black made me wince at the thought of dying young with so much energy wasted away. We all know the disbelief of losing Judge Tate, especially Claire, his companion in life. Their home on Octavia Street is empty without him. It seems only yesterday that his exuberance for life and his big smile filled our hearts with joy.

Al Tate was extraordinary. His human spirit enveloped all who knew him with love. His voice was galvanic.

I remember seeing him in a small cubicle at New York University where he taught the Appellate Judges Seminar in the summer. He was surrounded by stacks of books, his green visor jutting out from his forehead. Perhaps you know the image I have in mind.

And what was he doing while others had escaped to Washington Square and beyond? A thousand miles from home, he was writing an article on his beloved Acadiana. I owe much to Judge Tate. Fifteen years ago when Piper was in the Gerry-carrier he urged me to transplant my family to Louisiana soil. Al Tate loved L.S.U.'s Law School and he advised me to join its faculty. "You'll have fun," he said.

## PART II. HARRY A. BLACKMUN AND MORE.

### A NOTE TO THE READER.

Justice Blackmun read the manuscript of the foregoing collection of *SPEECHES*, Part I, and wrote his Foreword at the author's request in February 1997. What follows is the author's tribute to Mr. Justice Blackmun written at the request of the *American University Law Review* for inclusion in a symposium issue honoring Justice Blackmun upon his retirement from the Court. Thereafter, Part II brings us down to the author's seventieth birthday, January 26, 2014—a pretty good time to lay down one's pen and to say to one's self, "The work is done."

"But just as one says that, the answer comes, 'The race is over, but the work never is done while the power to work remains.' The canter that brings you to a standstill need not be only coming to rest. It cannot be, while you still live. For to live is to function. That is all there is in living."

This from Justice Holmes's ninetieth birthday radio address to the Nation, March 8, 1931, in Mark deWolfe Howe's compilation, *The Occasional Speeches of Justice Oliver Wendell Holmes* (Cambridge, Massachusetts 1962).





Collection of the Supreme Court of the United States.

Dottie and Harry.

“Harry, you haven’t answered the question.”

MR. JUSTICE BLACKMUN:  
REFLECTIONS FROM THE *COURS MIRABEAU*.

AMERICAN UNIVERSITY LAW REVIEW  
SPRING, 1994.

---

MAIN Street in the old quarter of Aix-en-Provence, France, is the *Cours Mirabeau*, a golden archway of Platanes trees and mossy fountains. At one end stands the statue of the good Roi René, who was loved in his day for his kindness, his wisdom, his good works.

I recall Bastille Day, 1986, the summer of the dissent in *Bowers v. Hardwick*, Justice Blackmun's ringing plea for human dignity and for freedom to differ in matters that count most. Dottie and Harry Blackmun were lost in a faceless crowd that watched fireworks explode ephemeral streams of red, white, and blue in the nighttime sky above the *Grande Fontaine d'Aix*. This was the summer the French press and *Le Monde* laughed at the spectacle of police invading an American citizen's bedroom.

Our paths crossed that summer at Aix-Marseille-III University, its *Faculté de droit*, the school of Portalis:

"[B]ut there must be a body of case law. In the host of subjects that make up civil matters, the judgments of which, in most cases, require less an application of a precise provision than a combination of several provisions leading to the decision rather than containing it, one cannot dispense with case law any more than he can dispense with legislation. . . . It is for experience gradually to fill up the gaps we leave. The Codes of nations are the *fruit of the passage of time*, but *properly speaking*, we do not make them."

WILLIAM H. REHNQUIST:  
THE CHIEF AT L.S.U. LAW.

CONSTITUTIONAL LAW SEMINAR  
SEPTEMBER 6, 2005.

---

NOTE: *Chief Justice Rehnquist died September 3, 2005 shortly after Hurricane Katrina hit New Orleans hard. The day after Labor Day, we were back in class. I talked about W.H.R. as I knew him to my students. After class, one of my students suggested that my remarks should be published. I went back to my office and wrote them out. The Louisiana Bar Journal published them. I'm glad to include them in this keepsake scrapbook of speeches and dramatis personae.*



Portrait by Thomas Loepp.

AN avalanche of snow shut down the United States Capitol. Across First Street at the Rehnquist Court, it was business as usual.

Katrina knocked us down hard, but the day after Labor Day L.S.U. Law was back on its feet. Such is our strength. Our stomachs were in knots, truth to tell. Chief Justice Rehnquist died the preceding Saturday. Sadly, Jim Bowers and I paid our respects in the Law Review Seminar. Rehnquist's former law clerk John Roberts succeeds him as Chief Justice of the United States. Thus life gives our law reviewers and our courageous students another season—we have witnessed it ourselves—of hurricane, Court, and Constitution. "We are very quiet there, but it is the quiet of a storm centre, as we all know."

As it happens, William H. Rehnquist was a great friend of L.S.U. Law Center, visiting us twice a decade apart—first his Edward Douglass White Lectures in 1983, next his Alvin and Janice Ruben Lectures in 1993. For a Rehnquist tribute, nothing flowery will do. The Chief Justice was not a flowery guy.

One remembers well a few gold stripes on the Chief's black robe—a Rehnquist touch of *Gilbert and Sullivan*. As an Associate Justice, he let himself go. I remember seeing him in a loud orange tie and long sideburns during oral argument in what I call the *Policeman's Long Hair Case*. The Chief Justice voted with the Chief of Police, our students know. For my little prayer, I will let The Chief at L.S.U. Law do the talking. I will only set the stage.

Professor Baier's Museum.



EXEUNT.

**ABOUT THE AUTHOR.** Born Cincinnati, Ohio, birthplace of



Old State Capitol.

William Howard Taft and Potter Stewart. Graduated Walnut Hills High School and University of Cincinnati. Gravedigger, Spring Grove Cemetery, Cincinnati (“Alas, poor Yorik! I knew him, Horatio.”). Thence to Harvard Law School, Cambridge, Massachusetts. Professor Benjamin Kaplan—he was of the Old School—inspired the author to make a law teacher of himself. He started out (thanks to Doug Kahn) as an Instructor in Law, University of

Michigan Law School, where he heard Yale Kamisar’s booming voice for the first time. The siren call of Judge Albert Tate, Jr., brought the author and his family to Louisiana. A year inside the Supreme Court as a “Judicial Fellow” made him a scriptwriter and stage director. He made movies featuring Chief Justice Burger, Justice Lewis Powell, Justice Holmes, Justice Brandeis, Chief Justice Hughes, and others. The Louisiana Bar Foundation has been a loyal patron, sponsoring fifteen years’ production of “Father Chief Justice”: Edward Douglass White and the Constitution (Coolidge Auditorium, Library of Congress; Social Law Library, Boston). His sweetheart, Barbara Baier (“Princess Barbara of Gretna”), is the author’s director and best critic. Publication of SPEECHES marks the author’s seventieth birthday, January 26, 1944, a pretty good time to lay down one’s pen and to say to one’s self, “The work is done.” “But just as one says that, the answer comes: ‘The race is over, but the work never is done while the power to work remains’”—O. W. Holmes, Jr., his ninetieth birthday radio address to the Nation, March 8, 1931. Professor Jesse thanks you for visiting Professor Baier’s Museum.