



School of Law

# **THE ANCIENT AND JUDICIAL GAME: JAMES WILSON, JOHN MARSHALL HARLAN, AND THE BEGINNINGS OF GOLF AT THE SUPREME COURT**

**Ross E. Davies, Professor,  
George Mason University School of Law**

***Journal of Supreme Court History,*  
Forthcoming**

**George Mason University Law and Economics  
Research Paper Series**

**10-17**

This paper can be downloaded without charge from the Social Science Research Network at [http://ssrn.com/abstract\\_id=1573857](http://ssrn.com/abstract_id=1573857)

# THE ANCIENT AND JUDICIAL GAME

## JAMES WILSON, JOHN MARSHALL HARLAN, AND THE BEGINNINGS OF GOLF AT THE SUPREME COURT

Ross E. Davies<sup>†</sup>

Golf has a long history at the Supreme Court, not only as a sometimes illuminating, sometimes entertaining interest of some personalities at the Court, but also as both a factor in and a reflection of the evolving work and culture of the place (and of the nation it serves). This article revisits a few early developments involving the first golfer on the Court (Justice James Wilson), the first golf enthusiast (the first Justice John Marshall Harlan), and the first golfing majority (October Term 1906).

### WILSON IN SCOTLAND

The earliest visible connection between the Supreme Court and golf predates the Court. In the summer of 1765, James Wilson was in Edinburgh, Scotland, studying bookkeeping and merchant accounting. According to Wilson biographer Charles Page Smith, “[t]he drudgery of accounting turned out to be no more congenial than the drudgery of tutoring [Wilson had recently given up teaching], and his brief experience with ledgers and accounts merely hardened Wilson’s resolve to go to America.”<sup>1</sup> Wilson would indeed emigrate the next year and, after a distinguished career in private practice and public service, serve on the Supreme Court from 1790 until his death in 1798. But before he left Scotland in 1766, he played at least one round of golf. Writing to Wilson in 1785, his accounting instructor recalled the event:

Upon recollection you will remember, that on June 13th, 1765, you did me the honour to begin the writing [of] a Course of Bookkeeping . . . . I have often reflected with regret, that our acquaintance had no sooner commenced, than it was inter[r]upted, by your going abroad . . . . You will perhaps recollect, that during your stay here, I one day pressed and prevailed with you, to take a game at golf with me on Brun[t]sfield links,<sup>2</sup> a diversion you was totally unacquainted with, my proposal was to instruct you in it, but how sadly was I mortify’d at your beating me every round; this I thought often since, had something prophetic in it; & may it always happen to you, and your opponents in all your laudable undertakings.<sup>3</sup>

Wilson does not seem to have kept up with the game in the New World. There are glimpses to be had of golf in America from the mid-18th century to the early 19th, scattered from New York to the District of Columbia to South Carolina to Georgia. But there is not enough evidence to say with confidence that the

---

<sup>†</sup> Ross Davies is an editor of the *Green Bag*, *An Entertaining Journal of Law*, a law professor at George Mason University, and, like Justice Anthony Kennedy, “not very good at golf.” Oral Argument, *PGA Tour, Inc. v. Martin* at 33 (Jan. 17, 2001). Although Kennedy may have been too modest. See *Washington’s Top 200*, Golfdigest.com, April 2008, at 136, 138 (ranking him 192nd) (vis. Apr. 23, 2009). Thanks to Curtis Gannon, Paul Haas, and Allison Hayward. Copyright © 2010 Ross E. Davies.

<sup>1</sup> CHARLES PAGE SMITH, *JAMES WILSON: FOUNDING FATHER, 1742-1798*, at 18 (1956).

<sup>2</sup> See [www.bruntsfieldlinks.co.uk/](http://www.bruntsfieldlinks.co.uk/) (vis. Jan. 19, 2010).

<sup>3</sup> Letter from Thomas Young to James Wilson, Jan. 24/26, 1785, James A. Montgomery Collection, Historical Society of Pennsylvania; see also BURTON ALVA KONKLE, *JAMES WILSON AND THE CONSTITUTION* 8 (1907); SMITH, *JAMES WILSON: FOUNDING FATHER* at 395 n.8 (Smith incorrectly gives October 6, 1783 as the date of the letter).

game was actually being played anywhere in particular at any particular time, or perhaps even at all. Thus, although Wilson's work on the Court and on circuit took him to or through all those places,<sup>4</sup> it may well be that he never encountered someone with whom to play.<sup>5</sup>

The consensus among golf scholars is that if anyone was playing golf in the early Republic, they gave it up sometime in the early 1800s, and no one took up the game again for a long time. In his authoritative *A History of Golf*, Robert Browning offers a compact and representative summary of this stage of golf in the United States:

A reference to golf in Georgia appears as late as 1818, but the declaration of war by the United States against Great Britain in 1812 may have had something to do with the fading out of the popularity of the game. For the next seventy years or so golf in the United States would appear to have fallen into desuetude, and it is not until the early eighties that we find the game beginning to attract attention again.<sup>6</sup>

And so it should come as no surprise that there is nothing to be seen of members of the Court playing the game during that period.

## THE RETURN OF GOLF

During the American golf renaissance (or perhaps nascence) in the late 19th century,<sup>7</sup> golf reconnected with the bar in general<sup>8</sup> and the Supreme Court in particular.

The first recorded reconnection with the Court was a remotely familial one involving Beatrix Hoyt, a granddaughter of Chief Justice Salmon P. Chase (1864-1873). In 1896, the 16-year-old Hoyt won the U.S. women's amateur golf championship.<sup>9</sup> She repeated in 1897 and 1898, and remained the youngest women's amateur champion until 1971, when Laura Baugh succeeded to that honor.<sup>10</sup> Since Hoyt's heyday several fine players have served or served on the Court, but none has come close to matching her accomplishments.

Golf was soon making closer approaches to the Court. Indeed, in the late 1890s and early 1900s, several Justices were in the vanguard of what rapidly became one of the country's most popular pastimes.<sup>11</sup> And a vanguard it was. The idea of mature, devout, professional men engaging in frivolous, strenuous, competitive sports – especially on Sundays – was still novel and controversial.<sup>12</sup> Thus, for example, one turn-of-the-century periodical could approvingly report of President William McKinley,

---

<sup>4</sup> See 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 71, 76 293, 483-84, 496 (Maeva Marcus ed., 1988).

<sup>5</sup> See Ross E. Davies, *Founders' Golf* (forthcoming).

<sup>6</sup> ROBERT BROWNING, A HISTORY OF GOLF 116-17 (1955); see also, e.g., HERBERT WARREN WIND, THE STORY OF AMERICAN GOLF 16-17 (3d ed. 1975) (hereafter "WIND"); H.B. MARTIN, FIFTY YEARS OF AMERICAN GOLF 49-50 (1936; 1966 prtg.) (hereafter "MARTIN").

<sup>7</sup> GEORGE B. KIRSCH, GOLF IN AMERICA 3 (2009) (hereafter "KIRSCH").

<sup>8</sup> One sign of an early interest in golf among lawyers is the game's frequent appearances in an entertaining 19th-century law magazine, the *Green Bag*. See, e.g., See *The Law Courts in Edinburgh*, 1 GREEN BAG 79 (1889); *London Legal Letter*, 3 GREEN BAG 435 (1891); *The Story of the Parnell Commission*, 6 GREEN BAG 362, 364 (1894); Irving Browne, *The Lawyer's Easy Chair*, 8 GREEN BAG 345 (1896); *Editorial Department*, 9 GREEN BAG 286, 416, 464, 508 (1897); *Editorial Department*, 10 GREEN BAG 411 (1898); *Editorial Department*, 11 GREEN BAG 290 (1899); *Editorial Department*, 12 GREEN BAG 434 (1900); Charles C. Soule, *The First Editor of the Green Bag*, 13 GREEN BAG 551, 552 (1901); *Editorial Department*, 16 GREEN BAG 115 (1904).

<sup>9</sup> C. Turner, *Golf: The Woman's Championship*, OUTING, AN ILLUSTRATED MONTHLY MAGAZINE OF RECREATION 193 (1896); *Personals*, THE INDEPENDENT, Oct. 29, 1896, at 9; WIND, *supra* note \_\_, at 38, 582.

<sup>10</sup> DAVID L. HUDSON, JR., WOMEN IN GOLF: THE PLAYERS, THE HISTORY, AND THE FUTURE OF THE SPORT 11-12 (2007); KIRSCH, *supra* note \_\_, at 54; [www.laurabaugh.com/history.htm](http://www.laurabaugh.com/history.htm) (vis. Apr. 23, 2009).

<sup>11</sup> *Beautiful Golf Links Draw Army of Players*, WASH. POST, June 3, 1906, at S2; Robert L.A. Adams and John F. Rooney, Jr., *Evolution of American Golf Facilities*, 75 GEOGRAPHICAL REV. 419 (1985).

<sup>12</sup> KIRSCH, *supra* note \_\_, at 8-10, 21-23.

The President is not a sportsman. . . . Tho Cabinet officers and even Justices of the Supreme Court have been known to play golf or tennis, no President has ever done so. Mr. McKinley is fortunate in requiring little exercise. . . .<sup>13</sup>

While another could almost simultaneously observe that,

Many prominent public men are devotees of the game [of golf], and find in it great relaxation from the severe strain of public life. The Justices of the Supreme Court of the United States do not consider themselves lapsing too much from their dignity when wielding a mashie, or fear that they may get into a legal bunker at their next session if they devote too much time to lofting a stymie.<sup>14</sup>

Justice John Marshall Harlan was the first of those Justices, and one of the greatest golf enthusiasts in the history of the Court.<sup>15</sup>

## HARLAN IN CANADA

While Hoyt was winning championships, Harlan was learning the game. In *Some Memories of a Long Life, 1854-1911*, Malvina Shanklin Harlan recalled her husband's introduction to golf in 1897:

Shortly after his arrival at Murray Bay [a resort town in Quebec, now known as La Malbaie], sometime in July, my husband was persuaded to learn the game of golf, which was, and still is, the chief diversion among the men visitors at Murray Bay. It was a radical change in his habits of life, for up to that summer he had never indulged in any out-of-door diversion as a relief from the constant strain of his exhausting professional labours. It proved to be a most healthful pastime for him, both mentally and physically. His love for the game grew upon him steadily, and during the next fifteen summers which he spent at Murray Bay [that is, until his death in 1911] his interest in it never flagged.<sup>16</sup>

Malvina then cut short her golf narrative, saying,

As my son Richard was the one who persuaded my husband to take up Golf, giving him his first lessons, he is better qualified than I am to tell the story of how his father became interested in "The Ancient and Royal Game."<sup>17</sup>

At this point, alas, the publisher of Malvina's memoir confesses, "This story was never added." It would seem that Malvina, who completed her memoir in 1915 and died the following year, never had a chance to incorporate her son's memories of Justice Harlan and golf. No one noticed because Malvina's *Some Memories of a Long Life* languished unpublished until 2001.<sup>18</sup>

---

<sup>13</sup> Albert Halstead, *The President at Work – A Character Sketch*, THE INDEPENDENT, Sept. 5, 1901. It has been reported that McKinley did in fact play "a few rounds" of golf in 1897 at the urging of Vice President Garret Hobart, but "gave it up, because of the walking that it required." MARTIN, *supra* note \_\_, at 262; but see *National Capital Topics*, N.Y. TIMES, June 11, 1899, at 17 (reporting that McKinley showed some curiosity about golf, but opted not to play).

<sup>14</sup> Gustav Kobbé, *The Country Club and its Influence upon American Social Life*, OUTLOOK, June 1, 1901; see also *The Sport of Presidents*, CHI. DAILY TRIB., June 28, 1902, at 12 (noting – after the active Theodore Roosevelt succeeded McKinley as president – that, "It is not long since people were shocked to read of a justice of the supreme court and a senator profanely batting a little ball around a golf course."); see LINDA PRZYBYSZEWSKI, THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN ch. 7 (1999) (hereafter "PRZYBYSZEWSKI") (discussing changing conceptions of manhood in American society and Harlan's conception of it in particular); cf. Harold H. Burton, *John Marshall—The Man*, 104 U. PA. L. REV. 3 (1955) (describing the ever-extraordinary Chief Justice: "A champion at quoits, and generally a leader in athletic contests, he was nicknamed 'Silver Heels' because of the white yarn that his mother had knitted into the heels of the woolen stockings in which he won many foot races.").

<sup>15</sup> *Nestor of the High Tribunal*, WASH. POST, Apr. 16, 1905, at E7 ("Judge Harlan is a famous golfer, unquestionably the greatest golfer[] of the American bench, now or heretofore.").

<sup>16</sup> MALVINA SHANKLIN HARLAN, SOME MEMORIES OF A LONG LIFE, 1854-1911 at 152 (1915; 2002 prtg.) (hereafter "HARLAN").

<sup>17</sup> *Id.*

<sup>18</sup> See Ruth Bader Ginsburg, *Foreword*, in HARLAN, *supra* note \_\_, at viii, xvii; 26 J. SUP. CT. HIST. 109-211 (2001).

But that does not mean that Richard Harlan never told the story. It appeared in *Scribner's Magazine* in 1917, shortly after Malvina's death,<sup>19</sup> and is reproduced in its entirety at pages \_\_\_\_-\_\_\_\_ below.

In short, Richard's narrative described a typical introduction to golf. Justice Harlan at first was reluctant to play. Then, when he tried it, he found it simultaneously frustrating and fascinating. Finally, once he was good enough to fail less than spectacularly some of the time, he was hooked for life. Every summer thereafter, Harlan would play innumerable rounds of golf at Murray Bay, many of them with his good friend William Howard Taft.<sup>20</sup>

## HARLAN IN THE U.S.A.

When Harlan returned to Washington from Murray Bay in 1897, the newspapers quickly noted that he had brought his newfound passion for golf home with him. In October, the *Baltimore Sun* reported,

Lately Justice Harlan developed a fancy for golf, and is so much fascinated with the game that he devotes much of his leisure time to its enjoyment. He finds abundant room in the spacious grounds attached to his mansion on Fourteenth street for indulgence in the pastime, and takes much pleasure in showing off his prowess with the crooked club to his friends.<sup>21</sup>

Golf remained a part of Harlan's routine for the rest of his life. As his son reported in the *Scribner's* article, Harlan filled his summers with golf at Murray Bay. And in other seasons he golfed wherever and whenever he could. Contemporary news stories and gossip columns make clear that when the Supreme Court was in session he played nearly every day at the Chevy Chase Club in Bethesda, Maryland, weather permitting.<sup>22</sup> And when opportunity knocked, he played on circuit as well.<sup>23</sup>

Moreover, golf became an important part of Harlan's public persona. When he shot a 75 on his 75th birthday in 1908, it was national news.<sup>24</sup> From 1897 until his death in 1911, newspapers and magazines abounded with anecdotes about his golf.<sup>25</sup> Some made connections between his work as a judge and his passion for the game. For example, in 1908 the *Green Bag* published this story under the title "Conflicting Evidence":

The venerable and learned Justice John M. Harlan, during a game of golf at Chevy Chase, explained the intricacies of evidence to a young man.

"Usually, in conflicting evidence," he said, "one statement is far more probable than the other, so that we can decide easily which to believe.

"It is like the boy and the house hunter.

"A house hunter, getting of a train at a suburban station, said to a boy:

---

<sup>19</sup> Richard D. Harlan, *Justice Harlan and the Game of Golf*, 52 *SCRIBNER'S* 626 (1917); see also TINSLEY E. YARBROUGH, *JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN* 207, 265 n.8 (1995).

<sup>20</sup> See *Taft's Singularly Progressive Career*, *BOSTON DAILY GLOBE*, June 19, 1908, at 7.

<sup>21</sup> *Athletic Justices*, [Baltimore] *SUN*, Oct. 7, 1897, at 2.

<sup>22</sup> *East May Get Place in Supreme Court*, *N.Y. TIMES*, Apr. 7, 1910, at 7; *Young Men in Public Life and Some Old Ones*, *ATLANTA CONST.*, June 5, 1903, at 6; *Justice Harlan as a Golf Player*, *ATLANTA CONST.*, June 3, 1899, at 6.

<sup>23</sup> See, e.g., *Justice Harlan Plays Golf*, *CHI. DAILY TRIB.*, June 5, 1900, at 5 ("I have been holding court in Cleveland and took advantage of the nearness to Chicago to run up here for a few days . . . and am going out to show my friend [Robert Todd] Lincoln how we play golf in Washington.").

<sup>24</sup> See, e.g., *Harlan's Birthday Golf: Down in 75 and Was 75 Years Old Yesterday*, *N.Y. TIMES*, June 2, 1908, at 1; see also, e.g., *Justice Harlan at Golf: Celebrates 30th Anniversary of His Appointment to Supreme Bench by Playing Justice McKenna*, *BOSTON DAILY GLOBE*, Nov. 30, 1907, at 14.

<sup>25</sup> See, e.g., *Supreme Court Justices at Play*, *TRENTON EVENING TIMES*, Oct. 25, 1910, at 9 (Deputy Clerk of the Court James D. Maher declines early morning round with Harlan); *Our Supreme Court as Human Beings*, *SUNDAY [PORTLAND] OREGONIAN*, June 5, 1910, § 6, at 4 (cow picks up ball); *Snapshots of Secretary Taft*, *PENSACOLA JOURNAL*, Sept. 8, 1907, at 2 ("Can you beat Mr. Taft at golf, Judge Harlan?" he was asked the other day. "Oh, no, although he weighs a ton or more, he is twenty-five years younger than I," replied the justice."); *Gossip from Washington*, *SALT LAKE HERALD*, May 17, 1903, at 6 (hole in one).

“My lad, I am looking for Mr. Smithson’s new block of semidetached cottages. How far are they from here?”

“‘About twenty minutes’ walk,’ the boy replied.

“‘Twenty minutes!’ exclaimed the house hunter. ‘Nonsense! The advertisement says five.’

“‘Well,’ said the boy, ‘you can believe me or you can believe the advertisement; but I ain’t tryin’ to make no sale.’”<sup>26</sup>

Nor was public attention to Harlan’s interest in golf limited to the journalistic. Speaking at a dinner in 1902 honoring Harlan “[i]n recognition of the completion of twenty-five years of distinguished service on the bench,” Edward Blake (a prominent Canadian Liberal Party politician, longtime chancellor of the University of Toronto, and “the leading Canadian lawyer of his day”<sup>27</sup>) took as his theme a week in the life of Harlan the vacationer at Murray Bay. Blake concluded with a few comments about Harlan’s golf habit:

But almost all that I have talked about is play. I come to the serious side and the real business of his Murray Bay life. I have known Harlan the Golfer! [Laughter.] Not that I play the game. It is enough for me to watch the judge. My wife and I have often driven, in the late afternoon, on the village road which borders the links. They are all deserted; the golfers have gone home for the day. Presently we catch in the distance, between trees and rocks, a little scarlet gleam that lights up the sombre landscape. As we approach we discern one human form – did I say human? No! A form “larger than human, on the turf-clad hill.” [Laughter.] It is the Judge, clad in a red garment, followed by one forlorn and melancholy caddie; filling all alone the vast area of the links; selecting his weapon; poisoning it and testing it; meditating his tactics; and in the end delivering, hit or miss, a terrific assault upon one small ball, driving it I know not whither, and pursuing it I know not why. [Great laughter.] Strenuous in this as in all else, he enables me to apply to a good man the description the Roman writer gives of one of those “bad men who do,” spoken of by the President [Theodore Roosevelt] to-night, “Quid vult id valde vult.”<sup>28</sup> And my opinion is that, next to those prime objects of his devotion which have been mentioned – the Bible and the Constitution – he holds in his heart the laws and practices of the game of golf.<sup>29</sup>

At the same event, Justices David J. Brewer and William R. Day reportedly combined to characterize Harlan’s three great interests in life, saying that he “slept with the Bible in one hand, the constitution in the other and his golf sticks under his pillow.”<sup>30</sup>

Other Harlan-and-golf anecdotes revealed durable truths about the game that might resonate with modern observers of the Court. Compare, for example, the story of Harlan’s game with the Reverend Doctor James M. Sterrett (page \_\_\_\_ below) to Justice John Paul Stevens’s recent insight in *FCC v. Fox Television Stations, Inc.*, the cursing-on-television case:

As any golfer who has watched his partner shank a short approach knows, it would be absurd to accept the suggestion that the resultant four-letter word uttered on the golf course describes sex or excrement and is therefore indecent. But that is the absurdity the FCC has embraced in its new approach to indecency.<sup>31</sup>

---

<sup>26</sup> 20 GREEN BAG 384 (1908); see also, e.g., Frederic J. Haskin, *Personal Stories*, WASH. HERALD, Apr. 11, 1907, at 7.

<sup>27</sup> R. Douglas Francis, *Blake, (Dominick) Edward (1833–1912)*, Oxford Dictionary of National Biography, Oxford University Press, 2004, www.oxforddnb.com/view/article/31916 (vis. July 6, 2009).

<sup>28</sup> Roughly: “What they do, they do with a will.”

<sup>29</sup> *Speech of Sir Edward Blake*, in DINNER GIVEN BY THE BAR OF THE SUPREME COURT OF THE UNITED STATES TO MR. JUSTICE JOHN MARSHALL HARLAN IN RECOGNITION OF THE COMPLETION OF TWENTY-FIVE YEARS OF DISTINGUISHED SERVICE ON THE BENCH 49, 55-56 (Dec. 9, 1902).

<sup>30</sup> *Young Men in Public Life and Some Old Ones*, ATLANTA CONST., June 5, 1903, at 6; *Justice Harlan at 70*, WASH. POST, June 2, 1903, at 13; LOREN P. BETH, JOHN MARSHALL HARLAN: THE LAST WHIG JUSTICE 160 (1992).

<sup>31</sup> 129 S. Ct. 1800, 1827 (2009) (Stevens, J. dissenting); see also *Legal Notes*, 63 ALB. L.J. 124, 126 (Mar. 1901) (“It was at one of the [Court’s] lunch symposiums, it is said, that Justice Harlan made the remark that golf was the most blasphemous game ever

Although Harlan's interest in golf was intense, and media attention to his playing was also intense, there are no reports that his consuming hobby interfered seriously with his day job, although there were small inroads and close calls, as this 1899 report indicates:

Sometimes Mr. Harlan overstays his time at the links. Then his man drives out to the club for him and takes him straight to the Supreme Court Chambers, the Justice meanwhile reading his morning mail as he drives into town. On one or two occasions Mr. Harlan has arrived at the Capitol so late that he has barely had time to rush into the robbing-room, throw his black silk gown over his golf suit in time to join the stately procession of the Justices as they cross the main corridor of the Capitol and file with solemn dignity into the courtroom.<sup>32</sup>

Similarly, the April 22, 1902 *Washington Post* reported that, "Justice Harlan, of the Supreme Court, arrived at the Capitol yesterday just in time to don his silk robe and fall in the procession of justices on their way to the courtroom. These are the mornings when Justice Harlan likes to make a tour of eighteen holes before he goes to court."<sup>33</sup> In the same vein, both news reports and his summertime personal correspondence suggest that his love of golf trumped his good intentions to catch up on Court work during summer recesses. He seems to have completed opinions he had to write in decided cases,<sup>34</sup> but beyond that, not much.<sup>35</sup> As he wrote to Justice Day in September 1904, "I cannot say that I have given any material time to study. I have lived constantly in the open air, working on my place here [Murray Bay] or playing golf."<sup>36</sup> And in July 1906, "Of course I allow nothing to interfere with my golf."<sup>37</sup>

There was, however, at least one report that Harlan mixed golf friendship with Court business in a way that may have been acceptable then but would not pass muster today. The story had him signaling to his "golf friend, Solicitor-General [John K.] Richards," the outcome in *Downes v. Bidwell*, a 1901 customs case in which Richards represented the government.<sup>38</sup>

And so perhaps it is a good thing that Harlan was never confronted with a golf case: It might have taxed his self-restraint or undermined his dignity.<sup>39</sup> (The Court did not decide a golf case until *Landress v. Phoenix Mutual Life Insurance Co.* in 1934.<sup>40</sup>) It is suggestive of the bar's appreciation of Harlan's appreciation of golf that golf became a tool of argument before the Court not long after he took up the game. A brief filed in *Reloj Cattle Co. v. United States*<sup>41</sup> on February 15, 1901 contained the first recorded golf analogy presented to the Court. Counsel for Reloj Cattle challenged the government's evidence regarding the location and existence of a land grant as follows: "A hundred people may search for a lost golf ball, but what is their evidence

---

invented."). Many years ago the *Green Bag* proposed a partial solution of a sort: "A law should declare it perfectly proper for a clergyman to say something besides 'Fudge' when he hits at a golf ball and plows up a ton of earth." *Items of Needed Legislation*, 18 *GREEN BAG* 704 (1906).

<sup>32</sup> *Judge Harlan's Recreation*, *NEW HAVEN EVENING REGISTER*, Dec. 29, 1899, at 16; but see *National Capital Topics*, *N.Y. TIMES*, June 11, 1899, at 17 (Harlan "combined business with pleasure, for he would take along his decisions and read and correct them while making the journey to and from the [Chevy Chase] club.").

<sup>33</sup> *Capitol Chat*, *WASH. POST*, Apr. 22, 1902, at 6.

<sup>34</sup> See, e.g., Letter from John M. Harlan to William R. Day, June 14, 1904, in Box 20, Papers of William R. Day, Library of Congress, Manuscript Division (hereafter "*Day Papers*"); Letter from John M. Harlan to William R. Day, July 10, 1906, in Box 21, *Day Papers*.

<sup>35</sup> See, e.g., *Notes*, 37 *AM. L. REV.* 724, 757 (1903) ("It is said that Mr. Justice HARLAN, of the Supreme Court of the United States, took a box of papers with him to his country home to study during his summer vacation. He did not do any studying. His cheerful excuse was that golf was not a game, but a disease, and that he had caught it.").

<sup>36</sup> Letter from John M. Harlan to William R. Day, Sept. 20, 1904, in Box 20, *Day Papers*, *supra* note \_\_.

<sup>37</sup> Letter from John M. Harlan to William R. Day, July 10, 1906, in Box 21, *Day Papers*, *supra* note \_\_.

<sup>38</sup> 182 U.S. 244, 247 (1901); *The "Tip" of a Calf's Tail*, *LAW NOTES*, July 1901, at 80.

<sup>39</sup> *Cf. Flood v. Kuhn*, 407 U.S. 258, 260-64 (1972) (Blackmun, J.).

<sup>40</sup> 291 U.S. 491 (1934).

<sup>41</sup> 184 U.S. 624 (1902).

worth as against that of one man who actually finds the ball?”<sup>42</sup> It was to no avail. The Court unanimously affirmed judgment for the United States.

As Harlan advanced in years, his vigorous pursuit of golf became entwined with speculation about his inclination and capacity to continue serving on the Court. Thus, for example, in 1903, the *Albany Law Journal* reported that Harlan had reached the age (70) at which he could retire from the Court with a full pension, but then went on to observe that “he betrays few signs of dotage. In fact, he is the picture of a hale and vigorous old man. To see him . . . as he makes his way to the golf links, one would very likely put him down mentally as not a year over fifty-five.”<sup>43</sup> And five years later, when Harlan reached 30 years’ service on the Court, *Law Notes* paired a report on “[t]he imperishable rumor that Judge Harlan is about to resign” with the observation that “[h]e is seventy-four years old, but is still hale and hearty, and frequently plays golf as a recreation.”<sup>44</sup> And in 1910, the year before Harlan’s death, the *New York Times* doubted he would retire, because “he is still in vigorous health, and puts in his spare afternoons tramping sturdily around the golf links . . . .”<sup>45</sup> Thus was begun golf’s long service as a bellwether of continuing service by senior Justices.<sup>46</sup>

## THE GOLFING COURT

At the opening of the Court’s Term in October 1897, it was John Marshall Harlan, the lone golfing Justice.

I have found no evidence that anyone else who was on the Court when Harlan returned from Murray Bay with his clubs for the 1897 Term had ever played the game – not Stephen J. Field (1863-1897), Horace Gray (1882-1902), Melville W. Fuller (1888-1910), David J. Brewer (1890-1910), Henry B. Brown (1891-1906), George Shiras, Jr. (1892-1903), Edward D. White (1894-1921), or Rufus W. Peckham (1896-1909). Moreover, of Harlan’s eight 1897 colleagues, only a couple – Chief Justice Fuller and Justice Brewer – would eventually pick it up.<sup>47</sup> Thereafter, however, everyone who joined the Court during Harlan’s tenure played,<sup>48</sup> except for Oliver Wendell Holmes, who had no interest in sports of any sort.<sup>49</sup>

First came Joseph McKenna, President William McKinley’s only Supreme Court appointee, who joined the Court in 1898. The limited available evidence can be read to support an inference that it was Harlan who introduced McKenna to golf. In the summer of 1899, the *New York Times* reported that, “Justice

---

<sup>42</sup> Statement of the Case, Points and Authorities, Brief and Argument for Appellant 17, *Relej Cattle Co. v. United States*, No. 204, OT1900 (filed Feb. 15, 1900).

<sup>43</sup> *Current Topics*, 65 ALB. L.J. 201, 202 (Mar. 1901).

<sup>44</sup> *Justice Harlan Has Served Thirty Years*, LAW NOTES, Jan. 1908, at 196; see also, e.g., *Look for Change in Supreme Court*, CHI. DAILY TRIB., Feb. 15, 1907, at 1 (Harlan was unlikely to step down because “He is as good on the golf field as he is on the bench”).

<sup>45</sup> *East May Get Place in Supreme Court*, N.Y. TIMES, Apr. 7, 1910, at 7.

<sup>46</sup> See, e.g., Tony Mauro, *Coming of Age: Slowing Down? Hardly. Justice John Paul Stevens Is Playing a Lead Role This Term*, LEGAL TIMES, Mar. 9, 2009, at 1.

<sup>47</sup> *Dominant Figure Removed by Death*, WASH. TIMES, July 4, 1910, at 2 (Fuller “was occasionally a visitor at the Chevy Chase or Metropolitan Club. At the former he sometimes took a turn upon the links, although not so ardent a devotee of golf as Mr. Justice Harlan.”); *Bishop on the Links*, WASH. POST, Sept. 29, 1907, at 2 (“[T]he Bishop of London was carried off to the Chevy Chase Club, seven miles away from Washington, to try his skill at golf with Justice Brewer, of the United States Supreme Court . . . .”). The *Philadelphia Inquirer* reported that White was among the “famous golfers” who were members of the Chevy Chase Club, but I have found no reports of White actually playing. *Golf Down South Is All the Rage*, PHILA. INQUIRER, Mar. 2, 1913, at 3; see also *Dull Cares of State Forgotten on the Golf Links*, WASH. TIMES, Mar. 15, 1903, at 7 (“Justice White . . . acknowledges that he is ‘always an interested spectator,’ but who can tell when he, too, may fall by the wayside and emulate the example of his brother legal luminaries [Harlan and McKenna]?”).

<sup>48</sup> See Ross E. Davies, *Golf and Fitness . . . for Office* (forthcoming).

<sup>49</sup> Holmes “did not participate in athletics and did not mention any regular forms of exercise in his correspondence.” G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES, JR. 122 (2006); see also THE MAKING OF THE NEW DEAL: THE INSIDERS SPEAK 34 (Katie Louchheim ed., 1983) (quoting Donald Hiss, one of Holmes’s secretaries: “There was nothing that did not interest him except athletics.”).

McKenna plays well, it is admitted by Justice Harlan, ‘for a beginner.’<sup>50</sup> The same story implied that at that time Harlan and McKenna were the only golfers:

The other Supreme Court Justices as yet content themselves with exercise not much more violent than the daily walks they take between their homes and the Capitol, American conservatism about sport being quite different from that English reverence for outdoor sports . . . .<sup>51</sup>

And a 1901 *Washington Post* story reported that, “Justice McKenna, of the Supreme Court, has caught the enthusiasm [for golf], which inspires Justice Harlan, and is developing into a fine player.”<sup>52</sup> Plainly Harlan and McKenna were compatible – McKenna’s “principal source of diversion was golf which he frequently played in the company of Justice Harlan at the aristocratic Chevy Chase Country Club”<sup>53</sup> – and over time his game improved relative to Harlan’s. In 1907, Harlan “celebrated the thirtieth anniversary of his appointment to the United States Supreme Court by playing a hotly contested game of golf with Justice McKenna, in which he held his own, notwithstanding his seventy-five years.”<sup>54</sup> By 1910, the *Montgomery Advertiser* was reporting that, “Justice McKenna is a golf player and says that he can beat Justice Harlan on the links.”<sup>55</sup>

Next came William R. Day (an avid sportsman) in 1903. President Theodore Roosevelt had appointed Holmes (the non-sportsman) to the Court in 1902, and then elevated Day from the U.S. Court of Appeals for the Sixth Circuit the following year. News reports connecting Day with sports tended to dwell on his intense interest in baseball.<sup>56</sup> But that does not mean that he neglected golf. Indeed, by the late spring of 1904, he and Harlan were corresponding about the prospect of golfing together at Harlan’s Murray Bay summer retreat.<sup>57</sup> And correspondence between Day and Vice President Charles W. Fairbanks in the summer of 1906 suggests that it was Day who taught the game to Fairbanks.<sup>58</sup> Day did not, however, become a resident member of Harlan’s club – the Chevy Chase Country Club – until 1914, which may explain the dearth of Washington-area media coverage of Day and Harlan playing together.<sup>59</sup>

Roosevelt’s third and last appointment to the Court was Moody, in 1906. Like Day, Moody was more prominently connected with baseball than with golf, but he did play.<sup>60</sup> Sadly, it was not for long. Moody suffered from increasingly severe rheumatism, the upshot of which was that he retired from the Court after less than four years’ service, and passed away in 1917 at the age of 63.

Although Harlan clearly played a great deal of golf with McKenna and at least occasionally with Day or Brewer – and surely relished the rising popularity of his beloved sport on the Court – his favorite golf partner was not a Supreme Court colleague. It was William Howard Taft, with whom he played in Washington, as well as at Murray Bay, from the late 1890s onward.<sup>61</sup> And so it was fitting, at least from a golfing per-

---

<sup>50</sup> *National Capital Topics*, N.Y. TIMES, June 11, 1899, at 17.

<sup>51</sup> *Id.*; see also, e.g., *Supreme Court Golf*, N.Y. TIMES, Nov. 30, 1907, at 7.

<sup>52</sup> *Capitol Chat*, WASH. POST, Jan. 20, 1901, at 16.

<sup>53</sup> MATTHEW MCDEVITT, JOSEPH MCKENNA, ASSOCIATE JUSTICE OF THE UNITED STATES 227 (1946) (citing *Illustrated Sunday Magazine*, May 21, 1916).

<sup>54</sup> *Thirty Years in Supreme Court: Justice Harlan Celebrates Anniversary by Playing Golf*, N.Y. DAILY TRIB., Nov. 30, 1907, at 6.

<sup>55</sup> *Uncle Sam’s Highest Court and Men Who Compose It*, MONTGOMERY ADVERTISER, Jan. 30, 1910, at 5.

<sup>56</sup> See Ross E. Davies, *A Crank on the Court: The Passion of Justice William R. Day*, 38 *BASEBALL RES. J.* 94 (2009).

<sup>57</sup> Letter from John M. Harlan to William R. Day, June 14, 1904, in Box 20, *Day Papers*, *supra* note \_ (“By the time you get here, I will be able to hold my own with you under a handicap of one stroke a hole.”).

<sup>58</sup> Letters from Charles W. Fairbanks to William R. Day, Aug. 16 and 26, 1906, in Box 21, *Day Papers*, *supra* note \_ (“. . . Mr. Justice Day was responsible, for it was he who had led me from the gently paths of meditation to the all-absorbing ‘links.’”).

<sup>59</sup> Letter from William R. Day to James H. Hayden, Mar. 27, 1914, in Box 3, *Day Papers*, *supra* note \_.

<sup>60</sup> See *Ex-Justice Moody Dies at His Home*, N.Y. TIMES, July 2, 1917, at 9 (golf); *Forgot Court for Baseball Talk*, PHILA. INQUIRER, Dec. 12, 1908, at 10; “*What Is Your Ideal Vacation?*” *Answered by Prominent Washington Men*, WASH. TIMES, June 26, 1904, at 5 (sailing).

<sup>61</sup> See, e.g., Frederic J. Haskin, *President Taft’s Birthday*, FORT WORTH STAR-TELEGRAM, Sept. 15, 1910, at 6; *Taft Vigor Due to Outdoor Life and Wholesome Habits*, CHI. DAILY TRIB., June 19, 1908, at 20; *Athletes Run Government*, BOSTON DAILY GLOBE, July 16, 1905, mag. sec. at 5.

spective, that by the time Harlan's #1 golf buddy took the presidential oath of office on March 4, 1909, the Court was majority-golfer – Harlan, Brewer, McKenna, Day, and Moody – and thus in all likelihood well-prepared to accept the Taft Golf Court that was soon to come.<sup>62</sup>



## JUSTICE HARLAN AND THE GAME OF GOLF

*By Richard D. Harlan*

Note: The article reproduced here – Richard Harlan's story about teaching his father the Supreme Court Justice to play golf during their summer vacation in 1897 – first appeared in the November 1917 issue of *Scribner's Magazine* (pages 626-635), although it seems perfectly suited to fill a gap in Malvina Shanklin Harlan's 1915 autobiography. See MALVINA SHANKLIN HARLAN, *SOME MEMORIES OF A LONG LIFE, 1854-1911* at 152 (1915; 2002 prtg.). The text, photos, and photo captions are from the original. The footnotes are mine. – *Ross Davies*

It was in the summer of 1897, shortly after he had passed his sixty-fourth birthday, that Justice Harlan took up the royal and ancient game of golf, of which he soon became a devotee.

From early manhood walking had been his only outdoor recreation. It had been his daily habit to walk from his residence to the court, a distance of two miles or more, and usually he would return on foot after the adjournment in the afternoon. He was fond of occasional tramps, and on holidays and not infrequently on Sunday afternoons he was to be seen with a friend or some of his children making his way through the fields and woods of the countryside around Washington. But he had taken no other form of physical exercise and had never indulged in any sort of game, except chess and an occasional rubber of old-fashioned whist.

While he took a keen interest in current events both at home and abroad, and in a general way followed the world's progress, his chief mental diversion had been found in books of history and biography. He was a diligent reader of the lives of the great English statesmen and judges and of the great men of his own country. It is true also, as has many times been said of him, that it was his nightly habit, after retiring, to light the candles near the head of his bed, and then to read his Bible until he was ready to fall asleep. He was a constant reader of the Scriptures, and he particularly enjoyed the Psalms.

Perhaps the greatest relief to him from the tedium and pressure of his judicial labors was to meet his law students at The George Washington University, where, for more than twenty years, and to very large classes, he lectured twice a week (often without notes) on the Constitution and constitutional law. For an even longer period he conducted a men's Bible class at the New York Avenue Presbyterian Church in Washington, of which he was one of the ruling elders. This contact with young men was a source of great satisfaction and pleasure to him.

In the fulfillment of his judicial duties he was a hard taskmaster for himself. During the long years of his service in the Supreme Court of the United States he had usually been at his desk until midnight and fre-

---

<sup>62</sup> Cf., e.g., *Mr. Taft and Two of His Golf Cabinet*, ATLANTA CONST., Mar. 7, 1909, at B1; *A Review of the World*, 46 CURRENT LITERATURE 347, 358-60 (1909); *A Session of the Golf Cabinet*, PUCK, Jan. 6, 1909, at 6.

quently until one or two o'clock in the morning. At times he would reverse his schedule and, retiring at about eleven o'clock, would get up before daylight to continue the study of his cases or work at his opinions until starting for the Capitol just in time for the opening of the court at the noon hour.

In that summer of 1897 he had sent his family to Murray Bay, the Canadian resort on the lower Saint Lawrence, eighty miles below Quebec, which from that time on and until his death was his summer residence, while he himself, for the month of June, went down to the summer law school of the University of Virginia to deliver a course of lectures on the Constitution. For the rest of that summer he had laid out his usual vacation tasks, having sent on to Murray Bay the records and briefs in a number of cases, in order, as was his custom, to work at them during the summer and to have his opinions ready when the court resumed its sessions in October.

In spite of the rigor of his court work, his physical strength had shown no signs of abatement; but at that time his family had reasonable grounds for fearing that the continuation of his intense labors in these different ways might within the next few years somewhat impair his vigor unless he could be persuaded to give himself more diversion, and particularly in the open air. Very fortunately, one of his sons, early that first summer at Murray Bay, had just taken up golf – the sport was then comparatively new in this country. At once he saw that it was the very game for his father. He therefore wrote several letters to him, at the University of Virginia, in which he dwelt upon the importance of an outdoor diversion for a man of his years, his sedentary habits and exacting labors. He described “this new game of golf”; he expressed the opinion that it would afford him a much-needed recreation, as old age was drawing on, besides being a form of exercise in which he would find no small pleasure and interest; and he urged him to buy a set of clubs and suitable clothes and bring them up with him to Murray Bay.

Those members of his family who specially wished him to take up golf were confident that he would become a good player. He had what sportsmen call “a good eye.” For example, he had always been able to defeat his boys at such a game as quoits. He was a good shot with the rifle. Often, in the shooting-gallery improvised at the annual outing given by the lawyers of the District of Columbia, at Marshall Hall on the Potomac, he had been known to hit the bull’s-eye nine times out of ten.

But apparently his son’s enthusiasm for golf had as yet made no impression on him, for when he wrote from the University of Virginia in reply to his son’s letters he did not even refer to what had been their chief theme.

When he arrived at Murray Bay in July he found that the place had gone golf-mad and that the entire summer colony was absorbed in it, either in actually playing it or in forming a gallery to watch the game of the more expert of the Canadian and American players. His own sons were among the most enthusiastic of the beginners at “this new game of golf.” The result was that his summer home was somewhat deserted during the day, and during the evening there was much golf talk among his family and the friends who dropped in. All of this left him somewhat out of the running, so to speak, and this was unusual, for he had always been the centre of the family interests.

The concerted efforts in the family to interest him in the game made little or no progress for a week or two. To all of the arguments in favor of a form of exercise so suitable for elderly men, and to the assurances we gave him that he would not fail to find it an interesting and beneficial diversion, his invariable reply was:

“It would *never* do for a judge to be seen playing a game of that kind.”

That dictum represented the attitude toward sport that was then generally taken by men of his own and the other learned professions. But it had nothing in it of the austere, Puritan objection to sports as such. It was what might be called the American view, which, up to that time, had characterized our strenuous national life.

For example, up to twenty-five years ago, no prominent senator or representative would have dared, in the course of a great debate in Congress, to snatch an afternoon off in order to take part in a golf match, or would even have dreamed of doing so – although that was the very thing such a leader of the British Parlia-

ment as Mr. Balfour often did at that time, without impairing in the least his prestige or reputation as a serious-minded politician.<sup>63</sup>

When his oft-repeated objection as to the propriety of “a judge playing a game of this kind” showed that the justice was apparently adamant in his feeling that it would be beneath the dignity of a professional man to be “wasting his time” by indulging in any outdoor sport, one of his sons, with a carefully feigned nonchalance, casually remarked one day that he had been “teaching Chief Judge Andrews of the New York Court of Appeals to play golf,” and that he had developed “quite a good game.”<sup>64</sup>

That far-from-innocent passing remark evidently arrested the justice’s attention, for, after a few moments of eloquent silence (during which, as will appear later on in this story, he began to be attracted by the idea of beating his fellow jurist at “this new game”), he said that if he played at all he would “only play very early in the morning – long before any one else was on the links.” His son replied that it made no difference at what hour he played, and that after a few days he intended to give him his first lesson. The justice did not “know about that,” and would “make no promises.” There the matter was allowed to rest, and we all waited for the fruitful seed of rivalry to germinate.

A day or two thereafter his curiosity as to “this new game” tempted him to walk round the links and watch his sons play. He was probably struck by the absurd disparity between the tiny ball and the six-foot-four enthusiast who was trying so hard and ineffectually to make a good shot. At all events, after observing several very poor drives, the justice remarked rather severely that the game did not “seem to be worthy of the attention of a grown-up, serious-minded man.”

The criticism must have somewhat nettled his son, for he turned on his father rather savagely and said that it was very unfair and even unjudicial to condemn a game so sweepingly without first trying it himself; and at the next tee we forced a club into his hands and insisted upon his making “one drive, anyway.”

The principle embodied in the ancient legal maxim, “*Audi alteram partem*,”<sup>65</sup> must have appealed to his judicial conscience, for he consented to “try one shot.” He missed the ball entirely! Whereupon, with a gesture of mingled disgust and anger, he threw the club on the ground, exclaiming that the game was “even sillier” than he had “supposed.” And at that moment it looked as if his objections to taking it up might prove to be insurmountable.

Nevertheless, a day or two afterward he was seen in an out-of-the-way field secretly trying a few shots, in the company of a sympathetic and close-mouthed clergyman of his acquaintance. And finally he consented to allow the writer to give him his first regular lesson; and an arrangement was made with a small French-Canadian caddy to meet them on the links at six o’clock the next morning.

The night before that first lesson, in a conversation with Senator Newlands, of Nevada,<sup>66</sup> the justice was

---

<sup>63</sup> Arthur James Balfour was a prominent British politician of the late 19th and early 20th centuries. While a Member of Parliament (1874-1922), he held numerous offices, including Prime Minister (1902-1905) and Foreign Secretary (1916-1919). Mention of his name here would have seemed especially appropriate to a reader of *Scribner’s Magazine* in November 1917 because Balfour was very much in the news at that time, having just issued what is known to history as the Balfour Declaration (November 2, 1917): “His Majesty’s government view with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.” See, e.g., *Zionists Get Text of Britain’s Pledge*, N.Y. TIMES, Nov. 14, 1917, at 3.

<sup>64</sup> Charles Andrews served on the New York Court of Appeals from 1870 to 1897, and as Chief Judge from 1881 to 1882 and 1893 to 1897. In *Memoriam: Minute of the Court of Appeals in reference to the Death of Charles Andrews*, 224 N.Y. [unpaginated insert between pages 733 and 735] (1919).

<sup>65</sup> Roughly: “Hear the other side” or “No one should be condemned unheard.” BRYAN A. GARNER, ED., BLACK’S LAW DICTIONARY 1706 (8th ed. 2004).

<sup>66</sup> Francis G. Newlands of Nevada served in the U.S. House of Representatives from 1893 to 1903 and in the Senate from 1903 to 1918. See Newlands, Francis Griffith, (1846-1917), in *Biographical Directory of the United States Congress: 1774-present*, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=N000069> (vis. Feb. 14, 2010).

overheard saying, rather solemnly:

“I observe that my parson son, Richard, is playing this new game of golf. I suppose it’s all right, here in Murray Bay, during his vacation; but I hope he will not keep it up after returning to Rochester. I fear that his congregation would not like to see their minister playing a game of that kind.” The old American idea as to the propriety of a professional man indulging in a sport was dying very hard in his mind.

Six o’clock the next morning saw the justice and his son and his caddy on the links, and he felt that for two hours he could make a thorough trial of this newfangled sport without risk of discovery.

After being given a few instructions as to his stance and the method of holding his club and approaching the ball, he took his position for the drive. He looked rather scornfully at the tiny white object perched so invitingly on the top of the high tee that had been arranged for him. Then, quickly drawing back his powerful arms, he swung the club through with a mighty effort, fully expecting, as he afterward confessed, to “knock the ball to thunder.” To his amazement, he missed it altogether!

Again the golfer’s everlasting chant, “Keep your eye on the ball,” was repeated to him. He was, first, to look at the place where the ball *had been*, and *then* he could look up to see where it had gone to. But his second effort was almost as complete a failure as his first; for the breath of his powerful swing only caused the ball to slip off the tee for a foot or two.

In his angry surprise and chagrin, his great dome of a forehead turned to a bright scarlet, and he sternly commanded his amateur teacher to “put the ball up again.” Once more the golfer’s orthodox “Don’ts” were repeated to him. He was *not* to take his eye off the ball; he was “*not* to try to knock the cover off the ball,” as he had been doing, but was simply to bring his arms through and let their weight “do the rest.” His third attempt was a complete success. The ball went like a rifle-shot, at an angle of about 25°, to a distance of perhaps 150 yards – a pretty fair drive for ordinary players. Turning round, with a delightfully boyish look of glee upon his face, he exclaimed: “Oh, Richard, this is a *great* game!”<sup>67</sup>

At that thrilling moment the old American idea as to the propriety of sport in the life of a professional man had received its death-blow in his mind, and from that delightful hour to the end of his life he was a confirmed golfer.

For a week or two he continued his secret, early morning lessons. He improved so rapidly and became so enthusiastic that a foursome match was suggested, consisting of himself and Judge William Howard Taft, as representing Uncle Sam, against Chief Judge Andrews and the writer, as representing the Empire State. By that time the golfing fever had so taken hold of him, and his former ideas as to the propriety of “a judge playing a game of that kind” had been so completely thrown to the winds, that he readily agreed to play the foursome during the regular hours.

The rumor of the great match having spread through the colony of summer visitors, quite a large gallery followed the contestants around the links. “Charley” Taft, now a redoubtable member of the Yale football eleven, acted as caddy for his distinguished and genial father. At the start the little lad was quite confident that Uncle Sam would win; but toward the end he followed the match with almost tearful anxiety, for the Empire State won by two or three holes.

On the way back to our cottage the justice was very silent. Evidently he was playing the match over in his mind and was wondering just how it happened that he and Judge Taft had lost it. Meaning to have a little quiet fun out of the situation, the writer determined to make no comments on the match, but to wait and see what his father would say and do next; and, hurrying into the cottage in advance, he enlisted the other

---

<sup>67</sup> Long before Richard’s memoir was published in 1917, this episode had morphed into the kind of myth of superhuman excellence with which admired celebrities are sometimes burdened. By 1908 at the latest, Harlan’s initial struggles to drive the ball had been journalistically papered over, and it was with his first casual swing of a club that “the almost startled justice saw the little white sphere sail gracefully away for 150 yards.” *How Harlan Learned Golf*, BOSTON DAILY GLOBE, Mar. 22, 1908, at 11. And it had become the famous and powerful Senator Francis G. Newlands, rather than the not-so-famous and not-so-powerful Richard Harlan, who induced Justice Harlan to swing the club in the first place. *Id.*

members of the household in a conspiracy of silence. Accordingly, no questions were asked as to the result of the great match, and the justice, like “Tar Baby” in Uncle Remus’s story, “kep’ on sayin’ nuffin,” while the writer, like the Bre’r Fox, “lay low” and waited for developments.<sup>68</sup> We might have been returning from the most commonplace tramp across the Murray Bay hills.

During supper that evening no one even mentioned golf, and the justice did not open his mouth upon any topic – which was unusual, for he was fond of table-talk. After supper he sat in his favorite corner near the blazing log fire, silent and very thoughtful. At about half-past eight he rose from his chimney-corner and said, “I think I will go to bed,” and, bidding us all “good night,” he slowly climbed the stairs to his bedroom.

The next morning we two were taking an early breakfast alone. Neither of us had even so much as mentioned golf since leaving the club-house the day before, and I was waiting to hear what he would say. Finally, he broke his long silence on the subject, and, just as if only one topic had been in our minds ever since the close of the match and he were only continuing a discussion that had been going on all night, he casually remarked that he “*didn’t think much of Taft’s game!*”

In after years the justice was in the habit of saying that “Golf is not a game, but a disease”; and from that somewhat disparaging remark about the other fellow’s game it was then evident that his own had already become a chronic case.

Hiding a smile with some difficulty, the writer admitted that Judge Taft had certainly been “clean off his game” the day before, and that he had never seen him play so badly – for the ex-President,<sup>69</sup> even then as a beginner, was a very dangerous antagonist; possibly “Charley’s” ill-concealed filial anxiety had “queered him.” To that explanation, slowly nodding his head up and down, with an air of having reached a final and thoroughly judicial conclusion, the justice replied:

“Well, I think *I* can learn this game; but *Andrews* never will!”

From that time on my father’s interest in the game increased apace. Especially during that first summer, he practised his strokes at all hours and in all places, whether suitable or not. For him, the sitting-room rug was a good imitation of the putting green and a salt-cellar an excellent counterfeit of the inviting but elusive hole. But woe betide the chandelier, or the passer-by in the rear, when at night he practised some new idea as to stance or swing which he had gotten from Harry Vardon<sup>70</sup> or Travers,<sup>71</sup> and the numerous other books by famous golfers which he read with great avidity at that period.

A week or two after he had thus tasted blood in his first real match game, he saw one of his daughters-in-law knitting a fancy red-and-black waistcoat, and he asked her what it was. Being told that it was a golf waistcoat for her husband, he asked her to let him try it on – which he immediately proceeded to do. It was

---

<sup>68</sup> See *The Wonderful Tar-Baby Story*, in JOEL CHANDLER HARRIS, *UNCLE REMUS: HIS SONGS AND HIS SAYINGS* 7, 9 (rev. ed. 1895).

<sup>69</sup> This is a clumsy reference. In 1917 (when this article was written) Taft was indeed an ex-President, but in 1897 (when the action in the article is taking place) he was a judge on the United States Court of Appeals for the Sixth Circuit.

<sup>70</sup> Harry Vardon, from the Bailiwick of Jersey (a British Crown dependency in the English Channel), was an early popularizer of golf in America. He won many golf competitions, including the U.S. Open in 1900 and several British Opens. He was most famous in the U.S., however, for his loss to Francis Ouimet in the 1913 U.S. Open. See generally MARK FROST, *THE GREATEST GAME EVER PLAYED: HARRY VARDON, FRANCIS OUIMET, AND THE BIRTH OF MODERN GOLF* (2002).

<sup>71</sup> Jerry Travers was a successful American amateur in the early 1900s, winning the U.S. Amateur Championship in 1907, 1908, 1912, and 1913, and the U.S. Open (as an amateur) in 1915. But he did not come out with his first golf book until 1913, two years after Justice Harlan’s death, which, when combined with the reference to “other books” in the text above, makes it unlikely that “Travers” is the correct name here. See WIND, *supra* note \_\_, at 54-61; JEROME D. TRAVERS, *TRAVERS’ GOLF BOOK* v (1913). Perhaps Richard Harlan meant Walter J. Travis, another early contributor to the growth of American golf. Born in Australia and a naturalized U.S. citizen, Travis was, like Travers, a successful amateur (he won U.S. Amateur Championships in 1900, 1901, and 1903, and the British Amateur in 1904). In addition, he was an early and prolific contributor to golf literature. He wrote two influential books – *Practical Golf* (1901) and *The Art of Putting* (1904) – and numerous articles, and founded “The American Golfer” magazine in 1908. See WIND, *supra* note \_\_, at 43-53. In a 1904 article on a golfing dispute, the *New York Sun* reported that it had been “laid . . . before Walter J. Travis, the supreme court of golfing law.” *Golf*, THE [NEW YORK] SUN, Oct. 31, 1904, at 8.

never seen again except upon his portly form! Not only did he thus commandeer another man's waistcoat, but he also bought a red coat to match it. He balked, however, at the knickerbockers then in vogue even for elderly men; but he compromised by putting on leggings, which gave him a very trim, sportsmanlike appearance.

Another anecdote is perhaps worth repeating, as additional evidence that a large amount of a very lovable kind of "human nature" went into the make-up of his character.

At the close of his first season at Murray Bay he played a match with a distinguished French-Canadian judge, and somewhat to his surprise he was badly beaten. Some friend of the Quebec jurist had evidently seen the match and been interested in its spicy international aspect, for several days afterward there appeared in one of the Montreal papers a full and rather amusing account of it, in which special emphasis was laid on the fact that the Canadian jurist had worsted "the United States Supreme Court at the ancient and royal game of golf," and the justice had to stand quite a bit of good-humored chaffing on the subject, at the hands of his boys and his Canadian and American friends at Murray Bay. Of course he took it most good-naturedly, but it was evident to his family that his growing pride as a golfer and his pride as an American had both received a rude shock, and we boys had premonitions then of a challenge from him for a return match at the very opening of the next summer.

Thanks to the opportunities for practice snatched at intervals during the open Washington winters at the Chevy Chase Country Club (which he joined immediately upon his return that autumn), his game had greatly improved by the following summer, and as soon as the Quebec jurist arrived at Murray Bay he was served with a good-humored, formal challenge to a return match in the "Canadian-American Champion Series." On that occasion the justice, to his great delight, was decidedly victorious.

For several days afterward it was observed that he carefully examined the sporting columns of that same Montreal paper – the part of a newspaper that he had never been known so much as to glance at. Finally, pointing accusingly at the paper in his hands, he said to the writer, somewhat quizzically (his very words are here quoted substantially as he uttered them):

"Last year, when Judge B., who had played golf all his life, beat *me*, that Montreal paper took nearly a half-column to tell its readers how the French-Canadian jurist had downed the Supreme Court of the United States; but I wish simply to call your attention to the fact that, *this* year, when the American judge was even more victorious than his opponent had been last year, this same enterprising Canadian newspaper doesn't even give a line to the return match."

It was a touch of "human nature" in a golfer that bridged all the years between father and son.

By the end of his second or third year on the links his descent of the golfer's Avernus<sup>72</sup> had become so complete that, quite as a matter of course, he accepted an election for one or two years to the presidency of the Murray Bay Golf Club, and for twelve or more years, during the happy summers spent in the bracing air of the lower Saint Lawrence region, he rarely missed a day on the links. In the first two or three summers he often played twice a day, making his thirty-six holes. To him an ordinary rain was no obstacle at all; he would say that it was "only a Scotch mist," and that it could easily be negotiated with the help of an umbrella, which he always carried in his golf-bag, as if it were one of his clubs. After making his stroke he would hoist the umbrella and, blissfully oblivious of even a sharp shower, he would follow up his ball with a stately and springy step, full of high hopes for his next stroke. And when he returned to the cottage he would tell us how he had made one hole in four strokes and a certain very difficult hole in five, and another,

---

<sup>72</sup> Compare *facilis est descensus Averni*, roughly: "easy is the descent to Hades." When this article was still slated to be a chapter in Malvina Shanklin Harlan's *Some Memories of a Long Life*, the working title was "Facile Descensus Golf-erni." See MALVINA SHANKLIN HARLAN, *SOME MEMORIES OF A LONG LIFE 1854-1911* (unpaginated typescript 1915), on Reel 16, John Marshall Harlan Papers, Library of Congress, Manuscript Division, Washington, DC ("Note. – The above mentioned story forms a separate and independent chapter of these 'Reminiscences' – see *Facile Descensus Golf-erni*.")

a short and very “sporty” hole, in three; and what hard luck he had on another, “perfectly simple hole,” etc., etc.

Eventually he developed a very accurate and effective game. Many a better golfer was quite often beaten by him because of his steady playing through the fair green – his safer though shorter shots more than making up for the longer but erratic shots of his more brilliant opponent. And on the putting-green he won many a hole with his deadly eight and ten foot putts, which, standing erect like a flagstaff, he generally made with one hand.

He became such a familiar and welcome figure on the Murray Bay links, and was so closely associated with the development of the club, that when, in later years, the course was rearranged and names given to the holes, one of his favorites was named “The Justice,” in his honor, another hole being called “The President,” in honor of his partner in that first foursome match of “Uncle Sam vs. the Empire State.”

So contagious was his pleasure in the game and such was his genial *camaraderie* that he became a much-sought-after companion on the links, both at Murray Bay and at Chevy Chase. Younger men were specially keen to try conclusions with “the justice.”

The writer remembers one instance where the much younger golfer (a certain Mr. S.) came home from the links “a sadder and a wiser man.” This gentleman was the writer’s guest at Murray Bay about the summer of 1900, by which time the justice was among the best of the group listed in golf-clubs as “Class C.”

Mr. S. was inclined to take his own game rather seriously. Though at the time he was on the shady side of fifty-five and was at least ten years younger than the justice, he never admitted his age, preferring to be classed with the “boys” in the forties. He confessed to the writer that he would like to see what *he* could do against “the justice.” Slyly encouraged thereto by the writer, he sent him a respectful challenge, which was gleefully accepted. Upon his return from the links, when asked by the writer how the match had turned out, Mr. S. exclaimed:

“He’s a wonder! Why, he beat me seven up, with six to play. I felt like that Texan whose house and barns and chickens and wife had been swept away by a tornado; it was ‘so d—d complete’ that I had to laugh.”

The next morning Mr. S. had a caller in the person of Jackson, the colored messenger assigned to the justice by the marshal of the court. Jackson had become so much attached to the family, and they to him, and had so identified himself with the justice and all that concerned him, that, in speaking to or of the justice, he never used the pronouns of the second or third persons, but always said “we” and “our.” The following dialogue then ensued:

“How are you feeling this morning, Mr. S.?”

“Oh, I’m feeling very well, Jackson. Why?”

“Well, Mr. S., we were just wondering how you felt this morning, after the game; for we have made up our minds that, after this season, we are only going to play with the *young* men, with the men of our class.”

And this double shot from the faithful henchman of a man of sixty-seven, who was also a novice! Mr. S., however, was a good enough “sport” to tell this good story on himself all over Rochester. He is probably still telling it.

The writer can vouch for the truth of a certain other story about the justice which even now, every once in a while some paragrapher sends on its fresh rounds through the newspapers.

Among his favorite companions on the Chevy Chase links was a prominent Episcopalian clergyman in Washington. The reverend doctor had just missed his drive completely. Though greatly surprised and disgusted, not a word escaped his lips. Whereupon the justice (quoting unconsciously from one of John Kendrick Bangs’s delightful golf tales, which he had recently read<sup>73</sup>) remarked:

“Doctor Sterrett, the things you didn’t say were something awful. That was the most profane silence I

---

<sup>73</sup> This might be a reference to *Golf in Hades*. See JOHN KENDRICK BANGS, *THE ENCHANTED TYPEWRITER* 157, 170 (1899).

ever heard!”<sup>74</sup>

Often, during the mild Washington winters, when he was troubled by a knotty point in some case before the court, he would go out very early in the morning to Chevy Chase, for a short singleton on the links, his small negro caddy being his only companion; and then returning home, with a freshened mind, he would successfully attack the legal problem that had perplexed him. And as the spring approached he would begin to look forward to the good times he meant to have, during the next summer, on the wind-swept links at Murray Bay, drinking in the glorious views of the majestic Saint Lawrence between strokes, and accumulating new strength of body and clearness of mind for his arduous work on the bench.

There can be no doubt that “this game of golf,” at which he shied so decidedly when first he was urged and tempted to try it, added not a few years to his life. It certainly kept him physically and mentally vigorous to the very end of his days.

A telegram of congratulation that was sent to him by a fellow golfer on his seventieth birthday will make an appropriate finis to this story:

“Many happy returns of the day,  
Seventy years up, and many more to play.”

And he did “play” eight years more – keenly enjoying his game up to almost the very last, when the curtain dropped upon his earthly life.



At least one of Justice Harlan’s colleagues on the Supreme Court approved of the son’s decision to publish his recollections. Richard Harlan passed a pre-publication draft of the article to Justice Day, who responded via letter on March 20, 1917:

My Dear Dr. Harlan:

I have read with great interest and pleasure your proposed sketch of “Justice Harlan and the Game of Golf”. It seems to me to present an interesting and attractive picture of what his friends thought to be a very human side of Justice Harlan’s character, and I think it will be greatly enjoyed by all who read it. I find nothing in it which can detract from his well-known character and standing in the more serious affairs of life.<sup>75</sup>

---

<sup>74</sup> “Doctor Sterrett” was probably James MacBride Sterrett, who was, like Justice Harlan, an avid golfer, a member of the Chevy Chase Country Club, and a member of the faculty at George Washington University. *Washington Rector Takes His Own Life*, N.Y. TIMES, June 1, 1923, at 8; see also *John Marshall Harlan*, 17 VA. L. REGISTER 497, 503 (1911); MARSHALL BROWN, WIT AND HUMOR OF BENCH AND BAR 126 (1899).

<sup>75</sup> Letter from William R. Day to Richard D. Harlan, Mar. 17, 1917, in Box 4, *Day Papers*, *supra* note \_\_\_\_.