R. J. SKLENÁŘ
(Ann Arbor, University of Michigan)

RECUSATIO AND *PRAETERITIO* IN AMERICAN JUDICIAL RHETORIC

I. INTRODUCTION

Recusatio and *praeteritio* were two of the most important techniques in the repertoire of ancient writers and rhetoricians. *Recusatio,* literally an expression of un unwillingness,[1] occurs when the speaker or writer adopts a pose of inability: that is, a refusal to undertake a particular assignment because it is beyond the speaker's powers. *Recusatio* comes down to us in Latin literature with such a degree of elaboration that there can be no question of the people using this technique actually having been as powerless as they portrayed themselves to be; it was a standard device, familiar to ancient audiences and accepted as such. It was a convention of self-portrayal, and must therefore be regarded as a rhetorical technique despite the fact that the most familiar examples of *recusatio* come from poetry.

Praeteritio, from the verb *praeterire*, "to pass by," designates in rhetorical and literary usage an omission to mention or include something.[2] *Praeteritio* was especially valuable to the orator, who, by simply listing everything that would not be discussed, ensured that those very things got mentioned.[3] This technique, like *recusatio*, was developed to a high degree of sophistication and complexity; indeed, many *praeteritiones* are quite lengthy. Here, too, it is certain that audiences recognized and

[1] OXFORD LATIN DICTIONARY 1587 (P. Glare ed. 1892). This use of *recusatio* is not to be confused with *recusatio* as a legal term, which designates a counterplea or demurrer. *Id.*

[2] *Id.* at 1446.

[3] G. KENNEDY, The Art of Rhetoric in the Roman World 35 (1972).

appreciated the device for what it was, and approved of an orator's skillful use of it.[4]

This article will demonstrate that *recusatio* and *praeteritio* figure prominently in American judicial opinions, and that in fact they are so deeply ingrained in the rhetorical culture of the law that their use suggests nothing about the judge's classical training or lack thereof. The likeliest explanation for this phenomenon is that these techniques entered the legal culture at a time when classical education was more widespread among lawyers than it now is, and lodged themselves so firmly in our legal tradition that they survided the decline of interest in Classics. Be that as it may, American judicial *recusatio* and *praeteritio* are recognizable cognates to classical models. The typical judicial version of *recusatio* is the familiar rhetoric of judicial constraint: courts frequently claim that their decisions are compelled by the law even when they are not, and this claim can serve as a way of justifying a decision with which a judge is uncomfortable.[5] *Recusatio* thus enables a judge, as it enabled an ancient rhetorician, to make his or her decision appear less dependent on personal volition than it actually is. Judicial *praeteritio,* on the other hand, usually entails a statement to the effect that the court "need not determine" some issue or other, even thougt in many such cases the court could quite easily have determined the very issue it has decided to pass over, so that a true *praeteritio* takes place: the court raises an issue in the minds of everyone reading the court's opinion by the mere acts of noting that the issue has been deemed irrelevant.

I will begin my discussion with a brief section discussing two passages from Latin literature — an example of *recusatio* from Horace and an example of *praeteritio* from Cicero — in order to illustrate the classical usage of those techniques. I will then analyze how both techniques function in specific judicial opinions. The analysis will range from opinions by classically educated jurists such as John Marshall and Oliver Wendell Holmes, who knew perfectly well what *recusatio* and *praeteritio* were, to opinions by contemporary lower-court judges about whose literary background no assumptions can be made. In this way, I hope to

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[4] This was probably not true in the early stages of thetoric, when rhetoric was an art of persuation. By Cicero's time, however, rhetoric had begun to develop "from an art of persuation to an art of expression" (G. KENNEDY, *supra* note 3, at 203), which owed much of its effect to the satisfaction of aesthetic expectations.

[5] The literature on the rhetoric of judicial constraint is vast, thanks to the work of the Legal Realiste and, more recently, of certain members of the Critical Legal Studies movement. For a particularly sensitive analysis of the problem, see Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology,* 36 J. LEGAL EDUC. 518 (1986).

show how classical rhetoric has affected every level of the American judiciary.

II. TWO CLASSICAL EXAMPLES

1. *Recusatio:* Horace, Odes 1.6

Scriberis Vario fortis et hostium
victor Maeonii carminis alite,
quam rem cumque ferox navibus aut equis
miles te duce gesserit.

Nos, Agrippa, neque haec dicere, nec gravem
Pelidae stomachum cedere nescii,
nec cursus duplicis per mare Ulixei,
nec saevam Pelopis domum

conamur, tenues grandia, dum pudor
inbellisque lyrae Musa potens vetat
laudes egregii Caesaris et tuas
culpa detererer ingeni.

I have reproduced here the first three stanzas of an ode in which Horace professes himself unworthy to adopt as a poetic subject the military exploits of his contemporary Agrippa.[6] Horace thinks this is a more appropriate task for an epic poet, and reinforces this idea by referring to Homer and by listing the subjects of the two Homeric epics, the wrath of Achilles (*gravem Pelidae stomachum*, an allusion to *menin ... Peleiadeo Akhileos oulomenen* from the first line of the Iliad) and the wanderings of Odysseus (*cursus Ulixei*). He therefore recommends his colleague, the epic poet Varius. The recommendation of Varius, however, is far less important than Horace's refusal to undertake the task himself; the etiquette of poetic *recusatio* required the suggestion of another writer to take the place of the one who respectfully declined his commission.[7] The claim of inability, moreover, is disingenuous.[8] Horace was eminently capable of the grand manner, and epic themes and language were by no means beyond him. It is this disingenuous assertion of incapacity that links classical literary to modern judicial *recusatio:*

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6) R. NISBET & M. HUBBARD, A Commentary on Horace: Odes Book 1 80—81 (1970).
7) E. FRAENKEL, Horace 234 (1957).
8) "[Horace] shows elsewhere a juster knowledge of his own worth." R. NISBET & M. HUBBARD, *supra* note 6, at 83.

courts find it much more comfortable to declare that an issue is beyond their province than that they would rather not deal with it.

2. *Praeteritio:* Cicero, *In Catilinam* 1.6

One of the most famous and effective *praeteritiones* in all of Latin literature occurs in Cicero's First Catilinarian Oration, where, after rehearsing a list of the personal vices of Catiline, the political revolutionary and general desperado,[9] Cicero continues:

quod ego praetermitto et facile patior sileri, ne in hac civitate tanti facinoris immanitas aut exstitisse aut non vindicata esse videatur. Praetermitto ruinas fortunarum tuarum quas omnis proximis Idibus tibi impendere senties: ad illa venio quae non ad privatam ignominiam vitiorum tuorum, non ad domesticam tuam difficultatem ac turpitudinem, sed ad summam rem publicam atque ad omnium nostrum vitam salutemque pertinent.

Cicero here announces that he will pass over the very things which he has just mentioned before launching his *praeteritio*; in fact, he discusses Catiline's personal vices at some length. Moreover, he repeats the verb of dismissal (*praetermitto*, literally "I put aside") and applies it to Catiline's money troubles. In this way, Cicero ensures that Catiline's financial irresponsibility is at least alluded to. He then proceeds to the political dangers posed by Catiline's attempt to stage a coup at Rome,[10] ostensibly passing over but in the process mentioning once again Catiline's dissolute character. A number of Cicero's techniques recur in judicial opinions, notably a tendency to announce that the judge is passing over something that in fact has already been discussed. Cicero also uses *praeteritio* here to ridicule his target. Catiline is an unsavory character, and Cicero will not let his audience forget it; but far more important to Cicero's purpose is the fact that Catiline is a political menace, so that his lifestyle serves mainly as a target for invective.[11] We will see American judges using *praeteritio* to ridicule importunate litigants as well. Finally, there is the authoritative tone that Cicero takes. Cicero was consul at Rome during Catiline's uprising, and he regarded Catiline's capture and execution as one of his most glorious achievements.[12] Speak-

[9] At least it was as a desperado that the literature of the Roman Republic portrayed him, probably with enough accuracy to transcend the unmistakable elements of caricature. R. SYME, The Roman Revolution 149 (1939).

[10] Catiline turned to terrorism after unsuccessfully running for the consulship. R. SMITH, Cicero the Statesman 107—108 (1966).

[11] It should be remembered, however, that Rome had a tradition of incorporating this kind of *ad hominem* invective into political rhetoric; Cicero's attacks on Catiline's personality are clearly part of that tradition. O. SEEL, Cicero 72—73 (1961).

[12] Rightly so, despite the annoyance that his self-congratulation must eventually have caused. R. SMITH, *supra* note 10, at 125.

ing from the position of the highest elective office in the Roman Republic,[13] Cicero considers himself to be the right man to define precisely the nature of the threat that Catiline poses and to deal with that threat. In a similar vein, American judges consciously and openly use the authority of their office to define the nature of the issue at hand, often doing so in such a way as to make much of a litigant's case seem irrelevant, thus ripe for dismissal in a *praeteritio*.

III. JUDICIAL *RECUSATIO*

Literary *recusatio*, as the passage from Horace shows, is a technique of avoidance; one declines a particular literary assignment by protesting, often falsely, that one lacks the resources of talent to complete it. American judges use a similar technique: a court's assertion that it lacks the power or the authority to do something it often no more true than Horace's pretense of lacking any aptitude for epic. The pretense of contraint in judicial *recusatio* should thus not automatically be taken at face value; what lies behind it is frequently a decision not to use a power that the court actually possesses.

This quality is very much in evidence in an early example of judicial *recusatio*, John Marshall's opinion in the case of *Ex parte Tobias Watkins*.[14] Tobias Watkins had been tried and convicted before the circuit court of the District of Columbia for corrupt financial practices during his tenure as fourth auditor of the United States treasury.[15] He sought a writ of habeas corpus from the Supreme Court, alleging that his subsequent confinement in prison was improper on the grounds that

> the ... convictions and judgments are illegal and wholly void upon their faces, and give no valid authority or warrant whatever for his commitment and imprisonment; ... that the indictments do not, nor does any one of them charge or import any offence at common law whatever, ... and especially no offence cognizable or punishable by the said circuit court.[16]

Marshall's majority opinion concludes that the Supreme Court was without power to issue a writ of habeas corpus in a case where a prisoner had been fully tried and convicted; yet, early in his argument, he betrays the possibility that the Court is not quite as powerless as he suggests. "No law of the United States," he says, "prescribes the cases

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13) Cicero held the consulship in 63 B.C. "[His] accession to the consulship [ ] meant, of course, the acquisition of a new rhetorical weapon, consular prestige." J. MAY, Trials of Character: The Eloquence of Ciceronian Ethos 50 (1988).

14) 28 U.S. (3 Pet.) 193 (1830).

15) 28 U.S. at 194—196.

16) 28 U.S. at 194—195.

in which this great writ shall be issued, nor the power of the court over the party brought up by it."[17] In other words, Marshall admits that nothing in existing American law would prevent the Court from applying habeas corpus quite broadly. But Marshall wants to justify a much narrower construction of habeas corpus; he therefore immediately presses into service the language of constraint and compulsion, which is the hallmark of *recusatio:* "This general reference to a power which we are required to exercise, without any precise definition of that power, *imposes on us the necessity*[18] of making some inquiries into its use, according to that law which is in a considerable degree incorporated into our own."[19] Marshall is saying that the lack of a clear limit to the use of habeas corpus in American law does not liberate the Court to use the writ freely, but obligated it to search for such limits in the English law in which habeas corpus originated. Marshall also notes that England's Habeas Corpus Act,[20] passed during the reign of Charles II, exempted convicted persons from entitlement to habeas corpus, then concludes by asking rhetorically: "The exception of persons convicted applies particularly to the application now under consideration. The petitioner is detained in prison by virtue of the judgment of a court, which court possesses general and final jurisdiction in criminal cases. Can this judgment by re-examined upon a writ of habeas corpus?"[21] Marshall fully intends to answer this question in the negative. A simple yes or no will not do, however: Marshall is fully aware that the question could have been reformulated in such a way as to invite the opposite answer from the one he wants. If Marshall had wanted to issue the writ in this case, he might have asked, "can the United States Supreme Court in 1830 act in contravention of seventeenthcentury English law?", and he would have had little trouble arguing that proposition in the affirmative. Marshall instead restates the question as follows: "... if it be the judgment of a court of competent jurisdiction, is not that judgment in itself sufficient cause?"[22] In response to his own rhetorical questioning, Marshall issues four portentously declarative sentences:

A judgement, in its nature, concludes the subject on which it is rendered. The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world

17) 28 U.S. at. 201.
18) My emphasis.
19) 28 U.S. at 201—202.
20) Habeas Corpus Act, 1679, 31 Car. 2, ch. 2, § 3.
21) 28 U.S. at 202.
22) 28 U.S. at 202.

as the judgment of this court would be. It is as conclusive on this court as it is on other courts. It puts an end to inquiry concerning the fact, by deciding it.[23]

In these four sentences, the remarkable simplicity of the syntax contracts with an elaborate development of the *recusatio* motif. The language itself is spare to the point of starkness, with very little addition to or variation of the basic subjectverb-object armature. This is quite unlike the rich and expansive prose that Marshall was capable of.[24] But on closer inspection, we see a high degree of literary sophistication at work. Though the language of each individual sentence is simple, the four sentences together make an interlocking verbal pattern of notable complexity. The subject of the first two sentences is "judgment"; for the second pair, Marshall switches to the pronoun "it". This forms the sequence AABB, where A stands for a subject noun and B for a subject pronoun. A second pattern, call it CCCD, can be seen, where C stands for occurences of a form of "conclude", D for its absence. This first sentence has "concludes" the next two "conclusive", only the final sentence lacks such a form. There is also a close syntactical parallelism between the two middle sentences:

judgment	is as conclusive on	all the world	as
it	is as conclusive on	this court	as

This parallelism reinforces the passage's thematic progression from generality to specificity and back again. The first sentence states Marshall's proposition in highly abstract terms: "[a] judgment, in its nature ... the subject on which it is rendered ... the law of the case." Marshall could be speaking of any judgment, any subject, any law, any case. In the next sentence, he is only slightly more specific: "[t]he judgment of a court of record whose jurisdiction is final" — but note that he is merely narrowing his abstractions, not abandoning them. He is still not specifying a particular court, and the prevailing air of generality is in no danger of being dissipated by such phrases as "on all the world".

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23) 28 U.S. at 202—203.

24) Compare the following single-sentence paragraph:

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject, over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?

Marbury v. Madison, 5 U.S. (1 Cranch) 49, 64 (1803).

Only in the third sentence does he make his specific point: "conclusive on this court." Now we see the purpose of the close syntactical relationship between the second and third sentences. The third sentence, which declares the source of the Supreme Court's putative powerlessness and hence functions as as the crux of the *recusatio,* is made, by a syntactical imitation of the highly abstract second sentence, to appear as if it grew organically out of the abstract proposition. With the final sentence, we are once again in the realm of abstraction; here, too, Marshall could be speaking of any "inquiry." The effect of this entire passage is to cause the *recusatio*, the fictive inability of the Supreme Court to issue a habeas corpus, to appear as if it were the logical outgrowth of an immutable and permanent abstract principle, the conclusiveness of judgment. This gives Marshall's *recusatio* a triumphant tone of universality. From a purely rhetorical point of view, this achievement is so impressive that the more modestly phrased *recusationes* of the following paragraph seem almost anticlimatic. This too, is probably deliberate; Marshall's point is strengthened by the fact that such statements as "[w]e have no power to examine the proceedings on a writ of error"[25] and "[this is] a judgment which the law has placed beyond our control"[26] seem obvious after his earlier, more developed *recusatio*. It is also interesting that Marshall does not turn to case law until after this masterly rhetorical performance.[27]

Whatever may have been Marshall's reasons for denying the writ of habeas corpus in *Ex parte Watkins*, he must at some level have sensed that his legal position was weak. The narrow doctrine he expounded in this case proved to be of limited duration.[28] Since 1867, Federal courts have been able to grant writs of habeas corpus for any prisoners unconstitutionaly detained.[29] But Marshall's rhetorical power, of which his control of traditional *recusatio* is here the most prominent feature, was such that he could lend a false sense of inevitability to a desperate argument and a doomed principle.

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25) 28 U.S. at 203.
26) 28 U.S. at 203.
27) 28 U.S. at 203—209.
28) *See* Fay v. Noia, 372 U.S. 391 (1963).
29) Act of Feb. 5, 1867, ch. 20, 1 Stat. 81; 28 U.S.C. §§ 2241, 2254, 2255 (1976; Hill, *The Forfeiture of Constitutional Rights in Criminal Cases,* 78, COLUM. L. REV. 1050, 1053 (1978), nn. 18—19 and acompanying text. For further discussion, see Robson & Mello, *Ariadne's Provisions: A "Clue of Thread" to the Intricacies of Procedural Default, Adequate and Independent State Grounds, and Florida's Death Penalty,* 76 CAL. L. REV. 89, 103—105 (1988); POWELL, *Capital Punishment,* 102 HARV. L. REV. 1053, 1039 (1989); Tushnet, *Judicial Revision of the Habeas Corpus Statutes: A Note on Schneckloth v. Bustamonte,* 1975 WIS. L. REV. 484, 487—491.

From an elaborate example of judicial *recusatio*, replete with intricate literary devices, we turn to an extremely straightforward example, written, as it happens, by one of the most sophisticated stylists in legal history, Oliver Wendell Holmes. The case of *Cami v. Central Victoria, Ltd.*,[30] spanning barely four pages of the United States Reports, arose as the result of a tax imposed by the municipality of Carolina, Puerto Rico. A suit was filed contesting the tax's validity; the Supreme Court of Puerto Rico upheld the tax, but was reversed by the circuit court of appeals. Holmes remarks that the United States Supreme Court would not have granted certiorari if the Appeals Court had upheld the Puerto Rican judgment, since "the appellate jurisdiction was granted with other ends in view than that of setting local courts right in the interpretation of their own laws. But since the case has been decided the other way, we cannot avoid dealing with the merits[.]"[31] "Cannot avoid" introduces the element of *recusatio,* which is completed in the later pronouncement "[w]hen we come to the merits we are compelled to agree with the circuit court of appeals."[32]

Holmes thus wants to present the Supreme Court's investigation of the merits and its decision to affirm the Court of Appeals as something externally conditioned; there is a deep note of reluctance in Holmes' language. Yet when we come to Holmes' treatment of the Puerto Rican laws in question, there is a marked change of demeanor. The municipal ordinance whose validity was under discussion imposed a ten cent per hundredweight tax on all sugar manufactured within the municipality. At the same time, a different statute covering the entire island of Puerto Rico reserved to municipalities the right to tax anything that was not also subject to Federal or island tax, which would seem to work in favor of the municipal ordinance; this very statute, however, also prescribed a rate of municipal taxation for sugar and molasses. Holmes concludes his analysis by saying that "it is difficult for us to believe that in one paragraph the ... act gave power to tax up to a specified maximum, and in another a general power, limited only by the other principles of taxation."[33]

Perhaps, *pace* Holmes, that may have been precisely what the Puerto Rican laws were intended to do; certainly, if Holmes had followed his own doctrine about deference to local courts, he would have assumed that the Supreme Court of Puerto Rico was in a better position than

30) 268 U.S. 469 (1925).
31) 268 U.S. at 470.
32) 268 U.S. at 471.
33) 268 U.S. at 471.

anyone else to determine the intent of Puerto Rican law. But the high-handed, sarcastic tone of the last-quoted statement reveals Holmes' true strategy. He felt that the Supreme Court of Puerto Rico had indulged in a perverse construction of the law and that the Court of Appeals had done the right thing to reverse. His *recusatio* is purely a rhetorical ruse, a pretense of legal compulsion designed to mask a dismissive treatment of Puerto Rico's highest court — and, quite possibly, a bias in favor of the exploitative sugar industry.

For a final example of judicial *recusatio*, I turn to the very recent case of *State v. Kennison*,[34] in which a criminal defendant appealed his conviction to the Supreme Court of Vermont on a number of grounds, the relevant fact here being that the State had drawn blood from him pursuant to a nontestimonial identification order issued by the lower court in accordance with Rule 41.1 of the Vermont Rules of Criminal Procedure. The State did not notify the defendant's attorney that it had applied for such an order, but it did give notice of the order's execution. The defendant, in the occasion of his appeal to the Supreme Court, asserted that there had been an error in the application process, even though he had made no such claim before and in fact conceded that he had failed to make a motion to suppress the evidence (that is, the blood sample), even though that would have been the proper tactic. Moreover, since the defendant's attorney knew of the order before its execution, the motion to suppress would have had to be made pretrial. The defendant nevertheless claimed that the use of evidence derived from his blood sample, without notice to his attorney, violated his right to counsel.[35]

Citing *United States v. Wade*,[36] which held that measures such as the taking of blood samples constituted "preparatory steps... [not] critical stages at which, the accused has the right to the presence of his counsel,"[37] and *State v. Howe*,[38] which held that "procedures seeking authority for such taking [of, e.g., blood samples] necessarily prior to the actual taking, are also not 'critical,'"[39] the Vermont Supreme Court said "[g]iven the identical nature of the claim presented in *Howe*, and its sound rationale, we are compelled to decide this case similarly."[40]

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34) 149 Vt. 643, 546 A. 2d 190 (1987).
35) 546 A. 2d at 192.
36) 388 U.S. 218 (1967).
37) 388 U.S. at 227—228.
38) 136 Vt. 53, 386 A. 2d 1125 (1978).
39) 386 A. 2d at 1131.
40) 546 A. 2d at 193.

This is without a doubt the least disingenuous of all the *recusationes* I have discussed. *Wade*, a U.S. Supreme Court case, and *Howe*, a Vermont Supreme Court case, constituted virtually airtight precedent. But it is nevertheless interesting that the Court in *Kennison* resorted to the rhetoric of compulsion even though it was not needed. The Court could simply have dismissed the defendant's claim for the absurdity that it was. Instead, the Court presents as inability to decide in the defendant's favor what is in fact a justified unwillingness. The case law was against the defendant, his attorney was not diligent, and there was nothing in the record to suggest that anything about the defendant or the manner in which his trial was conducted should excite the kind of sympathy that might overcome these factors. Here, the court uses an unnecessary *recusatio* to add emphasis to the idea that this defendant simply has no leg to stand on, so that *recusatio* approaches the denigratory usage of *praeteritio* that we will observe in the following section.

IV. JUDICIAL *PRAETERITIO*

Praeteritio, as we have seen from the Ciceronian example, is a technique of commending a matter to the attention of an audience by remarking that one does not intend to discuss it. I take the standard judicial trope of deeming an issue unworthy of discussion to be a close relative of classical *praeteritio*; my task in analyzing the use of this device in judicial opinions, therefore, will be to show that it accomplishes something that would not be achieved by merely omitting to mention the supposedly unimportant issue.

I begin with the short and elegant opinion of John Marshall in *Chirac v. Chirac*.[41] This case concerned the descent of Maryland property owned by John Baptiste Chirac, a Frenchman who settled in Maryland in 1793. In accordance with an Act passed in 1799 by the Maryland Assembly, Chirac took citizenship oaths on September 22, 1795, and one day later received a conveyance in fee of land located in Maryland. He became a naturalized United States citizen under Federal law on July 6, 1798. Chirac died intestate in 1799, his only legitimate heirs being family members who were residents of France. The State of Maryland, on the theory that Chirac's land was escheatable, conveyed it to his "natural" (that is, illegitimate) son, John Charles Francis Chirac, who took and retained possession. In March 1809, the elder Chirac's heirs at law

[41] 15 U.S. (2 Wheat.) 259 (1817).

brought an action of ejectment; the case reached the Supreme Court on a writ of error from a judgment in favor of the plaintiffs.[42]

The controversy concerning the ultimate disposal of the land centered around the status and effect of a Maryland Act of 1780, which enabled French subjects to hold lands in Maryland under certain conditions,[43] a treaty of 1778 between the United States and France, subsequently abrogated, which enabled French subjects to purchase and hold lands in the United States, and a convention between France and the United States, ratified in 1800 with an expiration limitation, which permitted the citizens of one country who held lands in the other to dispose of them without obtaining letters of naturalization.[44]

After discussing the effects of Maryland's Act of 1780 and noting that it would require a French subject to be a Maryland citizen according to the laws in force at the time of the property's acquisition in order to hold lands in fee, and that Chirac was not, under that definition, a citizen at the time he purchased his land in Maryland,[45] Marshall goes on to say:

> It is unnecessary to inquire into the consequences of this state of things, because we are all of opinion that the treaty between the United States and France, ratified in 1778, enabled the subjects of France to hold lands in the United States. That treaty declared that "the subjects and inhabitants of the United States, or any one of them, shall not be reputed Aubains (that is *aliens*) in France." "They may, by testament, donation, or otherwise, dispose of their goods, moveable and immoveable, in favour of such persons as to them shall seem good; and their heirs, subjects of the said United States, whether residing in France or elsewhere, may succeed them *ab intestat*, without being obliged to obtain letters of naturalization. The subjects of the most christian king shall enjoy, on their part, in all the dominions of the said states, an entire and perfect reciprocity relative to the stipulations contained in the present article."
>
> Upon every principle of fair construction, this article gave to the subjects of France a right to purchase and hold lands in the United States.
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> It is unnecessary to inquire into the effect of this treaty under the confederation, because, before John Baptiste Chirac emigrated to the United States, the confederation had yielded to our present constitution, and this treaty had become the supreme law of the land.[46]

One immediately notices the close proximity of the two phrases "it is unnecessary to inquire;" two such lofty dismissals, following so closely upon each other, lend even to this minor opinion of Marshall's something of the "magisterial tone"[47] of Marshall's more famous opinions. One

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42) 15 U.S. at 261—262.
43) 15 U.S. at 262.
44) 15 U.S. at 260.
45) 15 U.S. at 270.
46) 15 U.S. at 270—271 (citations omitted).
47) J. B. WHITE, When Words Lose Their Meaning 256 (1984), applies this phrase to *McCulloch v. Maryland;* I can scharcely think, however, of a more apt characterization of Marshall's style in general.

wonders, however: if it is "unnecessary to inquire into th[e] state of things" produced by the Act of 1780, why does Marshall spend the first part of his opinion doing precisely that? And if it is "unnecessary to inquire into the effect of th[e 1778] treaty under the confederation," why raise issue in the first place?

The purpose of the *praeteritiones* in this passage is to affirm a hierachy of legal authorities. In the first place, Marshall wants to drive home the point that the treaty of 1778 takes precedence over an Act passed by a state assembly, and he does this by framing a lengthy quotation from the treaty with the two formulaic phrases of dismissal, "it is unnecessary to discuss." Unnecessary, that is, in part because of this treaty, whose text dominates the passage. With the treaty as a centerpiece, framed by two *praeteritiones*, the passage is constructed in such a way as to accentuate the authoritative position to which Marshall assigns the treaty. It is not so much that no issue arises under the Act, but that the treaty settles any such issues once and for all. By suggesting that inquiry into the effect of the 1780 Act is unnecessary in light of the treaty, Marshall does not denigrate the Act so much as affirm the treaty's superiority. But since the treaty itself was ratified while the United States was still under the Articles of Confederation, which the Constitution superseded, Marshall needs the second *praeteritio* to affirm the treaty's continuing validity. In this second *praeteritio*, Marshall invokes the Supremacy Clause to declare that the treaty is part of United States law,[48] rendering irrelevant the question of the treaty's effect under the Articles[49] and sidestepping the potentially thorny problem of the predominantly state, as opposed to Federal, character of land law.[50] Marshall ultimately affirms the judgment in favor of the plaintiffs by relying on the 1800 convention and noting that the rights created by that convention survive its expiration;[51] to do this, however, he had to find a way of subordinating other legal authorities on which the parties to the case had been relying, and *praeteritio* supplied him with an efficient means of doing this.

Even more laconic than *Chirac* is Oliver Wendell Holmes' opinion in *Anglo-American Provision Co. v. Davis Provision Co.*,[52] in which *praete-*

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[48] Treaties, being part of Federal law, control state law when the two come into conflict. Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 Minn. L. Rev. 35, 55 (1979).

[49] *See also* Currie, *The Constitution in the Supreme Court: State and Congressional Powers, 1801—1835*, 49 U. Chi. L. REV. 887, 915 n. 195 (1982).

[50] Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 629 (1976).

[51] 15 U.S. (2 Wheat.) at 278.

[52] 191 U.S. 373 (1903).

ritio is used, as commonly in judicial rhetoric, to end an opinion. In *Anglo-American Provision Co.,* both parties were Illinois corporations, one of brought suit against the other in the New York Supreme Court on an Illinois judgment. The case was dismissed pursuant to a provision of the New York Code of Civil Procedure, which required that a foreign party could maintain an action against another foreign party only if the cause of action originated in New York. The appeal alleged that this provision violated the Constitution's Full Faith and Credit Clause.[53] After distinguishing *Christmas v. Russell,*[54] in which a suit on a Kentucky judgment was successfully brought in Mississippi against a Mississippi citizen, Holmes ends his opinion with the following paragraph:

> **What, if any, limits there may be to state restrictions upon the jurisdiction of state courts, when such restrictions do not encounter article IV, section 2, of the Constitution, it is unnecessary to discuss. But we think it too plain for further argument that the New York restriction upon suits by foreign corporations against foreign corporations is not affected by either section 1 or section 2 of article IV. It will be time enough to consider the suggestion that the law is an interference with interstate commerce... when the record presents it. The question is one of degree, and it is obvious that the supposed interference is very remote.[55]**

This seemingly inconsequential contribution to the Holmes corpus contains, in reality, an elaborate *praeteritio.* Holmes decides that it is "unnecessary to discuss" limits to state restrictions on state jurisdiction "when such restrictions do not encounter" the Full Faith and Credit Clause, but he does not stop there. He goes on to say that it is "too plain for further argument" that the New York provision "is not affected by" the Clause. That is the same as saying that it "does not encounter" the Clause; thus Holmes maneuvers the central issue in the case — whether or not the provision is constitutional — into the category of things that are "unnecessary to discuss": a somewhat intemperate description of any case that manages to be litigated all the way up to the Supreme Court, no matter how perfunctory the treatment it receives once it gets there. Holmes then declines to consider the suggestion that the New York provision interferes with interstate commerce, saying that "[i]t will be time enough ... when the record present it." This, too, is pure *praeteritio:* Holmes has not completely refrained from considering the question of interstate commerce; rather, he has considered it and decided he woulr rather not bother with it. Evidently, the record presented enough of a question of interstate commerce to merit Holmes's dismissal, if

53) 191 U.S. at 373—374.
54) 72 U.S. (2 Wall.) 290 (1866).
55) 191 U.S. at 375 (citations omitted).

nothing else. Holmes finishes by saying that "[t]he question is one of degree, and it is obvious that the supposed interference is very remote." In this final sentence, we see Holmes defining the question in such a way as to make it easy to dismiss it, and then dismissing it summarily.

In this passage from *Anglo-American Provision Co., praeteritio* functions, as so often in both judicial and classical rhetoric, as a technique of denigration, and Holmes' prose artfully emphasizes that aspect. Every sentence in this final paragraph contains an impersonal expression: "it is unnecessary to discuss"; "it will be time enough"; "it is obvious." These three expressions, moreover, occur in main clauses; thus the syntax of the paragraph conveys the idea of denigration by placing these dismissive impersonal statements in dominant positions in the sentences in which they occur. The second sentence is the only one that contains a first-person pronoun, but that "we" is redolent of authority and hierarchy, especially since it subsumes yet another impersonal dismissal. "We think it too plain for further argument" puts the idea "it is too plain for further argument" in an indirect statement depending on "we think" — that is, the matter is too plain for further argument because "we," the court, say so, and with that the litigants must content themselves. Thus, in just a few sentences of an almost telegraphic simplicity, Holmes calls forth, in quite sophisticated fashion, the technique of *praeteritio* to emphasize the authority with which he dismisses the case.

I have so far discussed *preteritio* in two historical Supreme Court cases; I now turn to a case from a modern Federal Appellate Court, *Falcone v. Pierce*,[56] in which the general partner of partnership that owned a low- to moderate-income housing complex in Boston sued the then Secretary of Housing and Urban Development, Samuel Pierce. The general partner, Falcone, had in 1983 signed a series of documents related to HUD's Flex program, which would subsidide physical improvements at the complex. The provisions of these documents seemed to require that the property be subject to use restrictions until September, 2010, but HUD officials allegedly told Falcone that these restrictions could be avoided by prepayment of both the Residual Reports Note, which was one of the Flex documents, and an FHA note which had consolidated the initial Federal subsidization of the apartment complex itself. In 1984, the partnership was approached by a potential buyer for the complex; this party's attorneys reviewed the Flex documents, which Falcone had signed without consulting an attorney, and concluded that the use restrictions would continue to the end of their term, and could

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[56] 864 F. 2d 226 (1st Cir. 1988).

not be avoided by prepayment; this made the sale of the property impossible. Falcone then petitioned HUD to hape the Flex agreement rescinder or reformed in order to accord with his original understanding, and sued the HUD Secretary upon denial of this request.[57] Falcone appealed after the District Court rejected his claim under the government non-estoppel principle, according to which a party "cannot assert the misrepresentation of a Federal official as the basis of a contract claim."[58]

Judge Coffin, writing for the Appeals Court, uses *praeteritio* to dismiss one of the most important claims raised by Falcone: that the District Court should not have applied the non-estoppel principle in his case because he had offered to repay the borrowed funds, whereas government non-estoppel cases traditionally applied "only where the private party seeks to receive the benefit of the bargain to which it assented."[59] Rescission would thus, according to Falcone, merely restore the government to the position it occupied prior to the misrepresentations of its agents, rather than, as in typical non-estoppel cases, confer a windfall on Falcone.[60] Judge Coffin dispenses with this claim:

> We do not attempt today to decide whether or not a pure rescission case should be exempt from the government non-estoppel principle. Instead, we follow the lead of the Supreme Court in *Community Health Services:*
>
> "Though the arguments the Government advanced for [a flat rule disallowing estoppel against the Government] are substantial, we are hesitant, when it is unnecessary to decide this case, to say that there are *no cases* in which [these arguments] might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with the Government."
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> 467 U.S. at 60—61, 104 S.Ct. at 2224. We need not decide whether the government non-estoppel principle is properly applied in rescission actions, because appellant does not allege a case sufficient to satisfy the required element of reasonable reliance. We now turn to this issue.[61]

Judge Coffin goes on to conclude that because of the plaintiff's long history of involvement with government-funded housing, he was responsible for knowing the relevant law, and his failure to consult an atorney before signing the documents constituted a lack of due diligence on his part, rather than reasonable reliance on Federal officials.[62]

This *praeteritio*-laden passage combines the familiar themes of hierarchy and perspective-shifting. The paragraph begins with a *praeteritio:*

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57) 864 F. 2d at 227—228.
58) 864 F. 2d at 228.
59) 864 F. 2d at 229.
60) 864 F. 2d at 229.
61) 864 F. 2d at 230.
62) 864 F. 2d at 231.

"[w]e do not attempt today to decide," and offers as a reason for not deciding the issue a citation from another case which itself contains a *praeteritio:* "when it is unnecessary to decide." Thus Judge Coffin justifies his use of *praeteritio* in this case on the grounds that the Supreme Court used *praeteritio* in a precendent; here, the legal tradition of arguing from authority can be seen in its most extreme form. After the citation comes a recapitulation of the original *praeteritio,* "[w]e need not decide," coupled with a transition to the issue that Judge Coffin actually wants to discuss: "because appellant does not allege a case sufficient to satisfy the required element of reasonable reliance." Then, with lapidary finality, comes the sentence "[w]e now turn to this issue."

This example shows a modern Federal appellate judge, in an exceedingly brief opinion, using *praeteritio* with as much literary sophistication as Marshall or Holmes. One need only look at the organization of the paragraph: first, the judge's own *praeteritio*: next, a *praeteritio* from a Supreme Court case, used as authoritative justification; next, the original *praeteritio* repeated. The *praeteritiones* themselves are arranged in an elegant A-B-A pattern, like an *aria da capo*, and the subsequent transition to the main (or, what Judge Coffin prefers to regard as the main) issue is executed with a remarkable smoothness. Judge Coffin has no alternative but to deal with non-estoppel and rescission, since these issues figured so prominently below, but one can only admire the virtuosity with which he shifts from this issue to that of reasonable reliance, which serves as the core of his decision to affirm the lower court.

My final example of judicial *praeteritio* comes from the inconspicuous state court case of *Price v. State*,[63] in which the defendant, Price, who had pled guilty to first-degree sexual assult in a Wyoming court, was committed to a hospital for psychological treatment, at the end of which he was to be transfered to the Wyoming State Penitentiary.[64] After a year of treatment, Price was removed to the penitentiary on the order of a judge, who considered that the treatment was complete.[65] Price, on appeal, argued among other things that because his treatment had been inadequate, his transfer to the penitentiary constituted cruel and unusual punishment.[66] Justice Cardine, writing for the Wyoming Supreme Court, responded with the following *praeteritio:*

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63) 716 P. 2d 324 (Wyo. 1986).
64) 716 P. 2d at 326.
65) 716 P. 2d at 326—327.
66) 716 P. 2d at 331.

> We disagree with Price's initial premise that he did not receive adequate treatment. Therefore, it is unnecessary for this court to determine the constitutional question of whether Price's confinement, in the penitentiary, violated the prohibition against cruel and unusual punishment.[67]

This *praeteritio,* though not nearly as developed as some of the others discussed above, remains a typical example of the genre. Particularly notable is the causal relationship expressed by "[w]e disagree ... [t]herefore, it is unnecessary for this court to determine[ ]." Price's constitutional argument is denigrated not only by the fact that it is dismissed in a *praeteritio*, that is, deemed irrelevant, but also because its irrelevance, in the court's conception, stems from the court's own disagreement with one of Price's factual allegations. We recall from the Ciceronian example that *praeteritio*, in Roman rhetoric, could serve as an effective method of ridicule. So too, apparently, in Wyoming.

V. CONCLUSION

My review of cases in which judges have resorted to the classical techniques of *recusatio* and *praeteritio* has, if nothing else, demonstrated the ubiquity and the persistence of these techniques in judicial writing. Thousands of cases can be found in which some form of *recusatio* or *praeteritio* appears. I have deliberately selected a broad cross-section of cases to show that the use of *recusatio* or *praeteritio* by a judge is not conditioned by the antiquity of the case; if these techniques enjoyed a greater currency in old cases, one might attribute the fact to the then greater prevalence of classical education,[68] but *recusatio* and *praeteritio* flourish in judicial writing to the present day. Nor is the use of these techniques conditioned by the nature or, for that matter, the importance of the issue involved or the prestige of the court on which the judge sits. They are conventions of American law as they were of classical literature and oratory, and they demonstrate the degree to which our legal culture depends upon the cunning manipulation of a rhetorical style that is the legacy of an elite educational tradition.

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[67] 716 P. 2d at 331.

[68] Until about 1875, classics served in America as "the basic liberal arts discipline and the training school of elite orators and lawyers." M. REINHOLD, Classica Americana: The Greek and Roman Heritage in the United States 18 (1984).