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## Judicial Legislation, by Fred V. Cahill

James L. Magrish  
*University of Cincinnati*

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# BOOK REVIEWS

JUDICIAL LEGISLATION. By Fred V. Cahill, Jr. New York: The Ronald Press Company, 1952. Pp. ix, 164. \$4.00.

The author of *Judicial Legislation* contrasts what he calls the traditional theory of our legal system, namely, that judges can discharge their judicial function without legislating and that they ought so to discharge it, with subsequently developed theories that judicial legislation is both necessary and proper. The traditional theory, as shown, was attacked for its inadequate explanation of our legal history and as an imperfect governmental device to serve for the future. In addition, we are reminded that

there has grown up an increasingly important body of legal theory that holds that judges not only can legislate, but also ought consciously to do so. Legal writers who hold these views urge in effect that judges should cease to be merely the dispassionate oracles of the law and should assume an active role in the creation of the legal rules themselves.<sup>1</sup>

The theories of the judicial function propounded by Oliver Wendell Holmes, Jr. and the various schools of jurisprudence, are examined with special reference to "sociological jurisprudence" and "legal realism." The examination is made in an interesting manner. The book contains good material, an abundance of useful notes and many shrewd observations. However, it may not analyze sufficiently the reasons and possible remedies for the confusion shown to exist in the theories surveyed.

The apparent inconsistency of legal writers who approve "judicial legislation" when the application of the Fourteenth Amendment to civil rights is involved, and yet disapprove "writing into" the Fourteenth Amendment the invalidation of legislation in the social and economic fields, is cited but not reconciled.

The meaning of "judicial legislation" is shown to be ambiguous and emotive. The term is used both to condemn and to praise. Another inescapable conclusion, though not explicit, is that "judicial legislation" involves a confused concept. The concept touches on, but does not aid

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1. P. 3.

in bringing into focus, the many problems involved in the constitutional assignment of functions to courts and legislative bodies.

Let us examine the various meanings of "judicial legislation." The words may imply a wrongful exercise by the courts of a power constitutionally assigned only to the legislature, thus charging a usurpation by the judiciary. The charge of usurpation assumes that the judge can ascertain when his action is within the limits of the proper exercise of the judicial function and when his action would infringe on the legislative function. "Judicial legislation" also may be applied to a court's activity in praise of what the court has done and said. Far from condemning judicial action on the ground that it amounts to "judicial legislation," and hence is wrong, it is argued that a court cannot exercise properly its judicial function without legislating, and that it is wrong to condemn a court for doing that which it must do. Although it is also here assumed to be possible for a judge to recognize when a choice of decision would or would not be "judicial legislation," the importance of recognition and proper classification is not stressed as a means of avoiding usurpation by the judiciary. Rather, the recognition and proper classification is sought on the assumption that the quality of the judicial legislation will be increased or the extent thereof reduced, if the judge does his "judicial legislating" consciously and intentionally.

The author considers that the empirical basis of criticisms of the traditional view is best understood from "the constitutional and legal problems faced by the United States in its transition toward the positive or service state."<sup>2</sup> A constitutional crisis is seen to have occurred in the conflict between the legislative response to the development of our industrial society and the judicial veto of important aspects of that response. In the area of constitutional law, we are told, the legal theory of the modern state has resulted in a return of the judicial function to the narrowest possible boundaries, and that although there appears to be no tendency to relinquish the right of judicial review, the tendency has been for the courts to "solve" the problem of judicial legislation by ceasing to legislate judicially. This is seen as a return to the original concept of judicial function, with the possible difference that modern judges, more aware of the dangers of their position, will be less likely than their predecessors to read their unconscious predilections into the law. Such a "solution" need not involve an acceptance of the principle (which Holmes is cited as supporting) that a statute,

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2. P. 47.

being the product of a legislative majority, indicates a degree of popular acceptance that should be binding on the courts. The author observes that even Holmes apparently departed from this view in the area of civil rights, particularly in cases of freedom of speech and expression.

The legislature thus again becomes the principal agency of change in adapting government to the problems of modern society.

Even now, however, it can be said that the Constitution has in the past few years fundamentally changed from a judicially defined Constitution to one that is in important areas to a far greater degree an instrument of legislative definition. Once again the nature of our institutions has changed. But, as has been the case in the past, that change has been brought about by the use of the judicial power.<sup>3</sup>

"Sociological jurisprudence" and "legal realism," though charged with being stronger in criticism than in constructive force, are given some credit for the changes brought about in judicial attitudes.

"Judicial legislation" is seen as related not only to the constitutionality of statutes, but also to the entire field of judicial review. In modern juristic theory, the author states, the legal system ceases to be a social adjustment and becomes a process by which social adjustment is secured. Law becomes an instrument of social ends, and every court decision is positive in the sense that it lends the support of the state to some interest that is seeking its protection. This concept, the author believes, goes far towards undermining the notion that law is an impartial arbiter arising in some undetermined fashion above the interests of society. Law is thus not a fixed system, and becomes liable to evaluation in terms of its social policy in a way that was not formerly possible.

Recent legal theory is deemed affected by the emergence of the concept of the modern state as predicated upon social change and the conscious use of governmental power. Because issues of governmental power are or had become judicial questions, the need for a new theory of the judicial function became acute. The problem to which the modern jurist addresses himself is viewed as one

to devise a philosophy of judicial action that would induce the courts either to accomplish the necessary changes or, at the very least, to refrain from blocking the efforts of others to accomplish them.<sup>4</sup>

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3. P. 69.

4. P. 149.

We are told that modern jurisprudence has attempted to accomplish both by the legislative theory of the judicial function, which

holds that courts should be sensitive to legislative considerations both in construing the powers of other agencies of government and in the development of those areas of the law traditionally in the keeping of the courts.<sup>5</sup>

Apparently this view has not displaced the traditional theory, for the author observes that one of the most interesting aspects of modern American jurisprudence is that, although there is general dissatisfaction with the traditional conception of the judicial function, no commonly accepted theory has grown up to replace it. It would be possible, he recognizes, to accept modern criticisms of the nature and functions of law without necessarily arriving at a legislative theory of the judicial function. In many cases the need was felt to reduce that function by noting when it was taking place. On such a basis, the so-called modern theory of judicial legislation need not involve an implication that the judges are being urged to usurp the legislative function. Rather it can mean that they are urged to undertake a necessary function that would otherwise either go undone or, given the necessities of the legislative process, would not be well done. Yet we are warned that the advocate of "judicial legislation," by suggesting legislative action by non-elected and formally irresponsible agencies, comes close to questioning the necessity of electoral processes as we now understand them.

The author seems to agree that in fact our judges have engaged in "judicial legislation." He apparently assumes that "judicial legislation" is a meaningful term and chides the theorists by pointing out that surely there was no necessity for the flood of books and articles to tell the judges that theory justified their doing what they were already doing. Whether and how it is possible for a judicial act to be both judicial and legislative, or whether the concept "judicial legislation" is helpful, are not investigated. The author is concerned with pointing out the inadequacies and ambiguities of current legal theories. He complains that despite the avowed intent of the current legal theorists to inform the legal process with more precise knowledge, none of them

has made any quantitative statements about either the amount of judicial legislation he favored or the extent of the changes he expected to accomplish thereby.<sup>6</sup>

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5. *Ibid.*

6. P. 157.

The nature of the quantitative statements which the author thought might have been made, is not indicated.

The author notes that the basic failure of the newer jurisprudence is that, thus far, it has failed to achieve any real clarification of the position of the courts in our total governmental structure, and that it has failed to present a scheme for the solution of the problems that now face us. He concludes that the invalidation of legislation under broad constitutional phraseology has not entirely disappeared and that thus far the efforts of some judges to show that they are not "legislating" in the constitutional field somehow fail to carry conviction.

That legislative activity should be most strongly suggested in the very field where the theory seems most firmly opposed to it does not render any easier the problems of evaluating the influence of either legal realism or sociological jurisprudence.<sup>7</sup>

It is observed that despite the attempts of theorists to broaden the scope of jurisprudence, with few exceptions they approach the problem of judicial function as if it were a legal problem exclusively. Issues of the location and control of the legislative power and the position of the expert in government are seen as more important while conflicts with the formal theory of the separation of powers are not deemed of great importance.<sup>8</sup> The separation of powers is considered not an end in itself, but only a means to another end. Of greater importance, we are told, is the problem of the efficiency of the courts as legislative bodies. The Brandeis brief, as a technique for keeping the courts informed when they are engaged in judicial legislation, is no guaranty of satisfactory results unless taken together with the appropriate presumption of constitutionality. The author contends that if this is honored, the Brandeis brief is rendered unnecessary; that in any event the Brandeis brief, even as restricted, was most prominently a constitutional law device and in an area in which the modern theory tended generally to try to eliminate "judicial legislation."

The assertion that the judges are representative of the deep and enduring desires of the American people as they are expressed in our Constitution, is met with the statement that if this is true there remains the problem arising from the determination of which values are permanent and which are less permanent, and that the sudden recourse to

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7. P. 155.

8. Compare the complaint by a member of the Bar, that an article allegedly condemning the constitutional separation of federal powers was a "masterpiece of un-Americanism unworthy of any American lawyer or teacher of American Law." 38 A.B.A.J. 611 (1952).

“permanent values” suggests a return to the “constitutionalism of former days.”<sup>9</sup> If the values to be represented by the judiciary are to be selected by the judiciary, where, he asks rhetorically, has there been a gain in constitutional theory.

Mr. Justice Frankfurter’s observations that judges do not hold press conferences, that they are responsible to no one for their tenure, that they deliberate in secret and announce the results of their deliberations in special language that requires interpretation before the beneficiaries of their actions can understand it, are recalled, with the comment

[b]ut to say that widening the legislative power of a branch of government so constituted would be to strengthen popular control over government is, on its face at least, somewhat startling. It is difficult to avoid concluding that the final recourse is, indeed, the judge.<sup>10</sup>

The author’s conclusion that an accurate appraisal of judicial power is an indispensable first step toward either its modification or intelligent public acceptance, either of which will stand as an advance in the achievement of responsible government in the United States, does not seem debatable. Moreover, the author’s modest hope that his book will contribute to an appreciation that the underlying issue with reference to the judicial function has been governmental in a broad sense, should be deemed accomplished. However, his suggestion that the whole question of popular control of legislative process has been involved seems true but inadequate.

This reviewer has suggested that the concept of “judicial legislation” itself may be confusing. Of course, the author is not responsible for that concept. It has a long tradition.

Although little proof is required to support the thesis that judicial action frequently has many aspects of similarity to legislative action, it would seem equally true that there are many points of dissimilarity. It should be recognized that the relation between judicial and legislative actions cannot be expressed without finding a common denominator between them.<sup>11</sup> “Rule-making” may be such a common denominator.

Traditional legal theory assumes that the constitution, legislation, and the “principles” of the common law provide a sufficient reservoir

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9. P. 159.

10. *Ibid.*

11. See NORTHROP, *THE LOGIC OF THE SCIENCES AND HUMANITIES* 77 (1948).

of rules to enable the judge to decide every case. Hence the judge need not "make" rules. As the author observes, his only functions within the assumptions of the traditional theory are discovery and deduction, and the only way in which the system can be extended is by analogy. On the other hand, constitutional conventions and legislative bodies are recognized rule-enacting agencies. Legislation by a legislative body, whatever else it also may be, is avowedly and intentionally a statement of rules to indicate how government will respond to conduct described in the legislation. Rules, as such, become the principal visible products of legislative bodies. Although rules are also formulated by the courts, such formulation is a by-product of the judicial function. However important the by-product is, and certainly it is very important, in considering when a court has abused its proper function in the creation of rules, it is necessary to consider the context in which the judicial rule-production takes place.

There usually is no complaint of usurpation by the judiciary if, in deciding cases not governed by clear precedents or clear statutory or constitutional language, the court announces no rules but merely decides for the "plaintiff" or for the "defendant." If, however, the court goes beyond announcing its decision and states rules as "reasons" for its action, then, and usually only then, is the charge of usurpation by the judiciary reasonably possible. The author recognizes that the charge of usurping legislative power arises in cases in which the language of the constitution or the statute is not "clear." Presumably he would agree that the charge is not usually made when a court's decision is based on a precedent "on all fours."

Among the early cases of alleged "judicial legislation," is *Marbury v. Madison*.<sup>12</sup> Here the rule was formulated that the Supreme Court of the United States had the power to hold a statute of Congress unconstitutional. Applying the rule, the Supreme Court held unconstitutional a statute purporting to authorize the Court to issue writs of mandamus. Whether it was proper that a rule with regard to the power of the Court to declare an Act of Congress unconstitutional be formulated in order to support the judgment dismissing plaintiff's motion for a writ of mandamus, was the subject of long debate. It is clear that the judgment for the defendant could have been given by the Supreme Court without invoking such a rule. The case is mentioned not on any issue as to whether the rule announced by the court was a correct interpretation of the Constitution, but to illustrate that the

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12. 1 Cranch 137 (U.S. 1803).

question whether an instance of judicial rule-making is a usurpation of legislative power may depend on whether the particular rule-making is a necessary or perhaps even a proper part of the justification for the decision.

The analyses of numerous scholars have shown that the assumption that judges need only apply pre-existing rules by logical implication simply is not a true description of method for the "new" case.<sup>13</sup> Rule-making by judges can come about not from any desire on their part to legislate, but from the necessity and requirement of our legal system.

Under a constitutional system, it is assumed that no governmental action should be arbitrary whether the action is taken by the courts, the legislature, or the executive. Each governmental action is expected to be an instance of a rule.<sup>14</sup> When only one adequate rule "pre-exists," the requirement can be met easily. When, after the determination of the facts, logical implication from a previously formulated rule is not possible, a rule must be formulated when the governmental action is taken. When no adequate rule exists to determine the decision, the judge in deciding the new case must generalize his action and state the rule of which his decision is an instance.

Two different, though related, assumptions are involved in the so-called traditional legal theory. These are: (1) that all cases can be decided rationally without the formulation of new rules; (2) the judges ought to decide the cases brought before them without invoking rules which did not previously "exist." Asking whether judges should "legislate," is not the same as asking whether judges rationally can decide all cases without sometimes formulating new rules or asking whether old rules should be discarded and new rules formulated.

What is called "judicial legislation," as a condemnatory term, may be a decision accompanied by an opinion containing rules which are challenged. The impropriety alleged may be that a new rule was announced though the case could have been decided by an old rule.

The theory that judges do not legislate can be maintained as a formally correct statement if the term "legislate" is defined to include only rule-making by legislative bodies. Although such a definition

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13. See COHEN & COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 445 ff. (1951); compare BURKE, *A GRAMMAR OF MOTIVES* 104 (1945)—"For it is always a matter of casuistry to decide whether you will treat the modification of a principle as an 'extension of' the principle or a 'deviation from' it. . . ."

14. See John Dickinson, *My Credo about the Law* in *MY PHILOSOPHY OF LAW* 91, 95 (1941).

does not solve the difficult problems arising out of separate judicial and legislative agencies of government, it should promote clarity in dealing with such problems. Courts, when deciding cases not governed by clear-cut precedents, and legislative bodies in their day-to-day functioning, should both be seen as rule-enacting agencies of government.

The rule-enactments of both courts and legislative bodies are subject to constitutional requirements. The fact that under our constitutional system the courts have the "last word" does not mean that there need be a return to the "constitutionalism of former days," in the sense of arbitrary disregard of legislative rule-making prerogatives. Judicial rule enactment must remain not only "interstitial," but must be justified through the application of suitable criteria.

Just as no single criterion for "truth" can be given, so also no single criterion can be given for what constitutes justification for the formulation by a court of "new" rules to support its decision. Yet the distinction between judicial and legislative action remains a valuable one. It should not be discarded because of the profound difficulties of applying it in borderline cases. Nor should the problem be confused with any current attitude of the courts or the legislatures toward social changes.<sup>15</sup> Calling a decision "judicial legislation" because it partakes in a sense of both, can be as destructive of clarity as calling an altruistic action "selfish" because the altruistic person is pleased with his altruism.

If the inevitability of rule-making by the judiciary for some cases is granted, the problem for judicial theory seems to become one of developing the criteria for applying the division of labor imposed by the Constitution. The justification for judicial rule-making may depend on the areas of subject-matter in which it is exercised. For example, when dealing with civil rights cases and the enforcement of provisions of the Constitution obviously not dependent upon the will of a particular legislative majority, it would seem improper to condemn judicial rules even though judicial rule-making is required. The fact that the legislature has spoken contrary to the requirements the judiciary deems applicable may be a sound reason for judicial interference in some cases. On the other hand, broad areas exist in which it would seem

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15. Morris R. Cohen, though contending in 1912 that the American doctrine of government by three coordinate branches was then "the bulwark of our economically regnant classes," noted that the doctrine originated in certain logical considerations in Aristotle and was copied into the American Constitution not because of any class interests, but because of the imposing character of the learning in Montesquieu in his *Spirit of Laws*. COHEN, REASON AND LAW 135 (1950).

proper for the judiciary to defer to the legislature's rule, even though such rule is deemed unwise by the court.

The need for judicial rule-making in appropriate cases, as well as the requirements of representative government and of the maintenance of the values which are deemed by the judiciary to be prescribed by the Constitution, must be recognized. It necessarily will remain true under our judicial system that to a very great extent we are dependent on the self-restraint of the judiciary itself. Yet the self-restraint should not be considered a matter of grace. Better formulation by the judiciary of the broad rules under which its rule-making may proceed properly seems desirable. The problem which the author sees of making "an accurate appraisal of the nature of the judicial power" perhaps may include determining the types of cases requiring judicial rule-making and formulating the criteria to be applied to determine when judicial rule-making is justified. It seems doubtful whether this task can be accomplished apart from the philosophical and psychological implications of the doctrine of separation of powers as a governmental device.

JAMES L. MAGRISH\*

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\* Member of the Ohio and District of Columbia Bars and Lecturer on Jurisprudence, University of Cincinnati.

