Indiana Law Journal

Volume 24 | Issue 3 Article 6

Spring 1949

The Judge in Historical Perspective

Carl B. Swisher
Johns Hopkins University

THE JUDGE IN HISTORICAL PERSPECTIVE

Carl B. Swisher†

The life of every human being is, to some extent, a product of the impact of current events and his cultural heritage one upon the other. Judges, more than people in most other walks of life, are steeped in a segment of the accumulated knowledge of the past. By virtue of their training in the subject matter and procedure of law and their professional obligation to apply it, they tend toward preoccupation with social stability rather than with social change. Whatever the leanings of the individual judge, however, his judicial performance must constitute a bridge between conditions of the past which gave rise to law and the conditions of the present to which the law is applied. In giving content and contour to law in the process of deciding cases, the judge acts as a frontiersman. If he functions behind the protective covering of judicial robes, he operates nevertheless upon the raw materials of the changing social order. The measure of the effectiveness of a judge at the Supreme Court level, indeed, is his ability at critical points to define harmonious relationships between nominally static rules of behavior proceeding out of the past and the dynamic behavior of his own day.

In the process of interpreting the Constitution and federal statutes, the Supreme Court justice usually has a narrow but enormously important area of discretion. Within restricted dimensions, he may, depending upon the figure, go right or left, east or west, upward or downward. Whatever the course or the extent of his deviation, however, no

---

† A.B. 1926, Pomona College; M.A. 1927, Ph.D. 1929, Brookings Graduate School. Thomas P. Stran Professor of Political Science, Johns Hopkins University. Author of THE GROWTH OF CONSTITUTIONAL POWER IN THE UNITED STATES (1946); AMERICAN CONSTITUTIONAL DEVELOPMENT (1943); ROGER B. TANEY (1936); STEPHEN J. FIELD: CRAFTSMAN OF THE LAW (1930).

justice of the type with which the American people are familiar ever startled them by breaking away into absolutely new country. His frontier activities are operations in the marginal areas only of the law. His innovations, insofar as he innovates at all, are legal rather than social or economic. When his interpretation expands or contracts or redirects the development of a legal principle, it does not create or rationalize new behavior but only behavior which has already found authors and defenders beyond the range of his own creative activities. Social and economic adventures are not for the judge, at least in his judicial capacity, and even his legal rationalizations are likely to have been drafted for his approval by the contending parties. The trends of his decisions represent his choices between different patterns of behavior which are sponsored and defended before him by different social groups. The favorable or unfavorable verdict which history renders with respect to a member of the Supreme Court, or perchance its complete neglect of him, may depend upon his possession of, and his instinctive surrender to, an intuitive perception of trends in the law which will receive majority approval in the years to come. History, in other words, rewards and punishes judges like men in other walks of life not only for their brilliance, their industry, and their integrity but for being right or wrong—with right and wrong being determined by the code of the age of the historian. Here, as in other fields furthermore, a single act of "sinfulness" may cloak with obscurity a thick catalog of good deeds.

Since in this field as in many others, however, generalizations tend to reveal their significance primarily through their illustrations, it is well to be concrete in terms of particular judges in particular periods. To begin with the most famous of them all, John Marshall has a prominent place in American history not because as a Federalist he stood alone among men, or not because he phrased new conceptions of federalism, but because he was able persuasively to read into constitutional law the conceptions of a powerful group in the society of his time which were to retain and increase their popularity during the years to come. He did not, of course, plan the use, or the distortion, depending upon the point of view, to which carefully selected segments of his ideas were put by spokesmen for the New Deal. Such re-

course, however, by men of deviating beliefs a century after his time could hardly be charged to his responsibility.

The judicial career of Roger B. Taney, like that of Marshall, is to be viewed in the light of the history of the period. Seldom is it appraised primarily in terms of his knowledge of law, his logic, his literacy, or his piety. What is said of him tends to be governed by what the speaker thinks about the struggle between the Federal Government and the Bank of the United States, about the relations of government to property generally, and about the relevant experience of the critical third of a century which culminated in the Civil War and which, in one way or another, colored thought about constitutional interpretation throughout Taney's judicial career. As a result of a number of decades of historical writing and teaching by northern Abolitionists, he was, with a condemning confidence matched only by its intrinsic error, labeled as the chief justice who had given it as his opinion that the Negro had no rights which the white man was bound to respect.

Taney's intellectually able colleague from Virginia, Peter V. Daniel, prepared for his own disappearance into obscurity by making himself the judicial mouthpiece of state rights arguments from his own section of the country, arguments which were doomed to suppression. He also advanced arguments of equal ultimate unpopularity against the expansion of the legal rights of aggregations of power consolidated in business corporations.[1]

In the post Civil War period, Stephen J. Field made himself the spokesman of that considerable group within the population which attempted to merge the doctrine of inalienable rights with the doctrine of laissez faire. To him the Fourteenth Amendment "was intended to give practical effect to the declaration of 1776 of inalienable rights, rights which are the gift of the Creator; which the law does not confer, but only recognizes."[2] Linked with his conception of inalienable rights was a belief that survival and success were the inevitable products of fitness and merit, and that the stern and righteous pattern of God's laws must be per-

1. It is the good fortune of students of our constitutional history that Justice Daniel is in the process of being disinterred and presented in a judicial biography.

2. Slaughter-House Cases, 16 Wall. 36, 105 (U. S. 1873).

mitted to work itself out among men almost as a religion, a religion which was skillfully molded by the spokesmen of dominant business interests to justify the payment of devotions to the modern golden calf. Samuel Miller, one of Field's able colleagues, had less confidence in iron laws and deeper sympathy for debtor groups and other unfortunate members of society who sought protection and help from government. If the laws of money dealt cruelly with large numbers of people, he was willing to have government abrogate or modify the operations of those laws. Both justices reflected and made articulate in judicial opinions the sentiments of substantial groups of people. In the court of nine men, others of whom represented the same or other shading of belief, the pressures of conflicting interests which flowed from a restless, active, and aggressive population were finally worked out in constitutional compromise.

In the twentieth century those four judicial horsemen of ultra-conservatism, Van Devanter, McReynolds, Sutherland and Butler, reflected continued use of conceptualism with an outmoded content as at least a nominal guide for the interpretation of law. They did not stand alone. They had large numbers of friends and admirers who believed that the ship of state could proceed safely on its course only so long as men of this type remained at its judicial helm.

Oliver Wendell Holmes, by contrast, not only a New England contemporary but also as an early associate of William James, represented the growing stream of pragmatic thought even though the terminology of pragmatism and some of James' ideas had little appeal for him. For Holmes, old concepts inadequately related to the facts of present day situations provided confusion rather than guidance. He shook off, therefore, much of the burdensome sense of confused obligation which legal terminology stirred in the minds of his brethren and looked—or rather permitted the political branches of the government to look—to current factual situations for criteria as to what should and could be done.

Great as were the differences between Holmes and his friend and associate Louis D. Brandeis, they consisted primarily in the fact that whereas Holmes was willing by and large to permit legislatures and executives to decide what ought to be done on the basis of their examination of factual

situations, Brandeis was less Olympian in attitude. Brandeis wanted to get into the fray of policy determination or, at any rate, of policy appraisal. He believed in deciding cases on the basis of current factual situations but unlike Holmes, he eagerly took upon himself much of the drudgery of factual investigation. He and the substantial group of his admirers were able to find causes which they believed worth fighting for.

Holmes and Brandeis partly followed and partly led a growing group of pragmatists or hybrid pragmatists into the caldron of mixed thought, emotion, and behavior which we call the New Deal. Today, nine individual justices, often times one suspects, in nine individual ways, are attempting to establish and maintain a legal pattern in terms of a cluttered carry-over of traditional legal conceptions and a mass of facts which looks different with every slight shift in point of view. Here again, the states of mind and advocacy revealed by the justices but reflect the patterns of thought and behavior which are to be found in the country at large.

There is some evidence, it is true, of tendencies toward unanimity in processes of change. Due process clauses are no longer regarded as royal mandates to strike down state or federal legislation interfering drastically with rights of property. To the horror of the old guard on the Court as it passed out of existence, property rights came to be regarded as no more sacred than other rights which people might possess. For the older justices it must have been shocking indeed to sense the "wave of the future" in a challenge of the first New Deal appointee to the classification of corporations as persons entitled to the due process protection of the Fourteenth Amendment.[3] How fully this position has become the position of the new court remains yet to be disclosed. With respect to civil liberties as distinguished from rights of property, the Court takes a strong protective attitude even though the justices disagree sharply one with another in the process of rationalizing their conclusions.

Although there are such consistent trends to be found, the members of the Supreme Court today display the philosophical confusion and lostness of the American people as a

3. See the dissenting opinion of Justice Black in Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77, 83 (1938).

whole. Pragmatic reliance upon existing facts as primary bases of decisions may be gradually clearing the judicial house of antiquated moral and legal conceptions. Unfortunately, it is not providing adequate philosophical substitutes. It is seriously to be doubted whether men in general and judges in particular can live by facts alone. The judicial house, philosophically cleansed of outmoded conceptions, may, like a certain other house scripturally described, become the dwelling place of more and worse demons than the former inhabitants. Since the judicial house is but an upper room in the house of all of us, the custodianship of our nine berobed brethren is for us as well as for history a matter of deep concern. In any event, the integration of the activities of individual judges with the flow of history has never been more apparent than it is today.