Vanderbilt Law Review

Volume 31
Issue 1 *Issue 1 - January 1978*

Article 9

1-1978

Law and Social Order in the United States

James W. Ely, Jr.

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

 Part of the Law and Economics Commons, and the Legal History Commons

Recommended Citation
James W. Ely, Jr., Law and Social Order in the United States, 31 *Vanderbilt Law Review* 227 (1978)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol31/iss1/9

This Book Review is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

BOOK REVIEW

LAW AND SOCIAL ORDER IN THE UNITED STATES. By James Willard Hurst. Ithaca, N.Y., and London: Cornell University Press, 1977. Pp. 318. $15.00.

*Reviewed by James W. Ely, Jr.**

No student of American legal history can overlook the significant work of J. Willard Hurst, who has been described as "the foremost historian of American law."[1] A prolific author,[2] Hurst has been concerned primarily with the relationship between law and the economic system. His most recent volume, *Law and Social Order in the United States,* is an important contribution to the rapidly growing literature in the legal history field. Based upon the Carl L. Becker Lectures that Hurst delivered at Cornell University in 1976, the book ranges broadly over America's nineteenth- and twentieth-century legal past, with emphasis upon law and social policy. Throughout, the author is mindful of his own injunction: "Realistic legal history must be a social history, pursuing law into whatever relations it has had to the whole course of the society."[3]

Hurst treats four diverse topics: the range of United States legal history, the power of legal agencies, science and public policy, and the role of conflict and consensus in determining resource allocation. Recognizing that he ventures into some inadequately investigated areas, Hurst characterizes his purpose as being "to sketch subjects that promise useful development."[4]

Despite some qualifications,[5] Hurst places himself squarely in

---

* Associate Professor of Law, Vanderbilt University, and Editor of the Legal Papers of Andrew Jackson. A.B., Princeton University, 1959; LL.B., Harvard University, 1962; Ph.D., University of Virginia, 1971.

1. Flaherty, *An Approach to American History: Willard Hurst as Legal Historian,* 14 AM. J. LEGAL HIST. 222 (1970). *See* Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography,* 10 LAW & SOC'Y REV. 9 (1975); Murphy, Book Review, 39 N.Y.U. L. REV. 900 (1964); Scheiber, *At the Borderland of Law and Economic History: The Contributions of Willard Hurst,* 75 AM. HIST. REV. 744 (1970).

2. Hurst is a Professor of Law at the University of Wisconsin. His earlier works include *The Growth of American Law: The Law Makers* (1950); *Law and the Conditions of Freedom in the Nineteenth-Century United States* (1956); *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (1964); *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (1970); and *A Legal History of Money in the United States, 1774-1970* (1973).

3. J. HURST, LAW AND SOCIAL ORDER IN THE UNITED STATES 42 (1977).

4. *Id.* at 6.

5. Hurst recognizes that an artificial consensus was achieved by excluding some groups,

the consensus camp that has dominated much of American historiography since World War II. He asserts that "people generally have used law in a narrowly practical way" and have been "concerned with law more as an instrument for desired immediate results than as a statement of carefully legitimated, long-range values."[6] Yet what results did lawmakers almost invariably seek? Hurst observes that "[s]ubstantial consensus existed also . . . about values of the striving, business-oriented middle class."[7] Thus, the law promoted the creative will of individuals and manifested confidence in the efficacy of bargaining to resolve most issues. Moreover, the quarrels between creditor and debtor, businessman and agrarian, and management and labor occurred largely within a middle-class context. The author points out that "[e]xcept for the Civil War the country's politics never embraced a significant drive for radical change in the institutions of power, though political polemics sometimes borrowed the colorful language of class war."[8]

This broad consensus, with its reliance upon private initiative and talent, influenced legal developments in many areas. The universal demand for fee simple titles to real property was irresistible and rendered land monopoly impossible.[9] Notwithstanding early hostility to the corporate form of business organization, "a growing consensus grew to see the corporate device as simply a handy, utilitarian instrument for doing business, which the community welcomed."[10] Similarly, by the twentieth century the dominant view was that corporate law should not regulate the exercise of corporate power, but should leave this function to other statutes. On the other hand, the author contends that lack of a consensus has hampered governmental attempts to curtail the economic power of business. Since the public associates rising productivity with large scale enterprise and depends upon business to create jobs, Hurst finds "no evidence" that occasional criticism indicates "potential support for antitrust action vigorous enough drastically to restructure an economy built around operations of large-scale firms."[11] Indeed, he concludes that "antitrust law neither had prevented nor corrected the

such as Indians and blacks, who might have rejected or contested it. Thus, "the law of slavery stood as a consensus of whites in slaveholding states." *Id.* at 219, 227.

6. *Id.* at 23.

7. *Id.* at 226.

8. *Id.* at 227.

9. For the failure of one attempt to resist the desire for fee simple ownership, see Sutherland, *The Tenantry on the New York Manors: A Chapter of Legal History*, 41 CORNELL L.Q. 620, 634-35 (1956).

10. HURST, *supra* note 3, at 240.

11. *Id.* at 260.

existence of large concentrations of market power in private hands."[12]

There was general agreement to rely upon market forces, the private exchange of goods and services, to organize and adjust social relationships. "From the late eighteenth century into the depression of the 1930's," Hurst writes, "the prevailing consensus accepted market processes as major means for allocating economic resources."[13] Of course, market values never dictated all policy determinations. By the mid-twentieth century such nonmarket concerns as national security, public health, and conservation increasingly were advanced as qualifications on the private ordering of society. Still, Hurst stresses that market goals remain very important in American life. He recognizes that "public policy has accomplished little fundamental shift in the distribution of wealth and income."[14] It has proved very difficult for the law to operate effectively outside this middle-class consensus. The author concludes:

> Drastic redistribution of wealth and income and unflinching enforcement of civil rights legislation could deeply affect class alignments. But the lack of politically effective demand for such changes ran too broad and deep in the whole structure of the society to be attributed simply to the legal order.[15]

Hurst's emphasis upon the high degree of consensus in fashioning American law runs counter to a recent volume by Morton J. Horwitz. In *The Transformation of American Law, 1780-1860,* Horwitz contends that during the early nineteenth century commercial groups secured "a disproportionate share of wealth and power in American society" at the expense of farmers and workers.[16] This was accomplished in large measure through the legal system, especially the judiciary's reinterpretation of private law rules governing torts, property, and contracts. Horwitz even asserts that the law "actively promoted a legal redistribution of wealth against the weakest groups in the society."[17] This policy was dictated by the decision to hold down governmental budgets and to promote enterprise by means that avoided taxation. Where Horwitz sees conflict and a power grab in the guise of legal norms, Hurst finds widespread agreement on both the necessity and the modes of fostering economic growth. For instance, Hurst maintains that during the nineteenth century "government found it impracticable to command sizable resources

12. *Id.* at 263-64.
13. *Id.* at 234.
14. *Id.* at 269.
15. *Id.* at 65.
16. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at xvi (1977).
17. *Id.* at 254.

by taxation in a chronically cash-scarce economy."[18] One can hardly be surprised, then, at policies designed to muster private talent and capital. A full assessment of the differences between Hurst and Horwitz cannot be undertaken here, but rather clearly Horwitz does not share Hurst's opinion about the impact of a widely shared faith in the market as the key to economic development.

The author rightly highlights the significance of unplanned events that often affect the uses of law and the course of social policy. Thus, foreign immigration in the nineteenth century and the northward migration of blacks in the twentieth century profoundly influenced the nature of urban problems. Hurst observes that the growth of cities, "rather than being a chosen policy, thrust upon policy makers a host of unwanted problems in providing service and regulation."[19] Similarly, the abundance of natural resources in North America encouraged a belief that supplies were limitless, a view that continues to hamper legal efforts to protect the environment or to conserve energy.

The most striking area in which the drift of events simply overwhelmed legal processes is the outpouring of technological developments. Hurst expresses concern that "the pace, variety, and depth of changes largely based on uses of the products of science and technology outran our capacity for directed intelligence in social relations."[20] Legal regulations, for example, lagged far behind the introduction of the automobile. Yet mass use of the automobile contributed to the growth of suburbs, required a great expenditure on highways, undermined public transportation, created the problem of adjusting the costs of accidents, and rendered national employment dependent on the manufacture of vehicles. None of this was the result of deliberate policy, but reflected reliance upon the market to order priorities. Here, as in other fields, courts and legislatures have been left to struggle with the consequences of technology.[21] Even more ominous is the extent to which "various products of scientific and technical development have tended steadily to erode the relative capacities of private ability to withstand official might."[22] Hurst contends that governmental power to invade privacy or to intimidate political opponents has increased dangerously

18. HURST, *supra* note 3, at 167.

19. *Id.* at 64.

20. *Id.* at 213.

21. *See, e.g.*, County Bd. of Arlington County v. Richards, 98 S. Ct. 24 (1977) (restrictions on commuter parking); Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977), *cert. denied*, 56 U.S.L.W. 3258 (U.S. Oct. 17, 1977) (enforcement of transportation controls).

22. HURST, *supra* note 3, at 210.

by virtue of electronic surveillance and data-gathering techniques and now threatens the basis of constitutionalism.

Hurst also gives considerable attention to the exercise of judicial power, a topic of intense debate in recent years. Concurring with Alexander Hamilton that the judiciary is "the least dangerous branch,"[23] Hurst declares that "for the judges to have lasting effect, their decisions either must be withdrawn from areas of broad controversy or must accord with deep and powerful currents of values in the society."[24] Pointing out that the impact of judicial decisions is difficult to determine, the author cautions that one must not exaggerate the effects of judicial review. By invalidating state and federal statutes between 1880 and 1930, for example, courts employed "a kind of delaying veto," but rarely blocked any sustained community goal.[25] Supreme Court decisions striking down the federal income tax and New Deal legislation, for instance, eventually were reversed through the political process. Moreover, Hurst asserts that the great nineteenth-century age of the common law, in which judges were prime lawmakers, has ended. Judicial time increasingly is occupied with the interpretation of statutes and rules, and judges act within policies set out by legislators. The author states that "the twentieth century has witnessed an apparently permanent shift toward dominance of legislative and executive-administrative over judicial policy making."[26]

In reaching this conclusion Hurst fails to examine, and impliedly rejects, recent literature that strongly argues that the federal courts have overstepped their bounds and that they exercise power inconsistent with a democratic society. In essence, critics allege that since 1960 federal courts have expanded the doctrine of standing to accommodate more litigants, have sought to pass upon matters better governed politically, and have substituted their own view of appropriate policy for that of legislative bodies.[27] The late Alexander M. Bickel observed that "[a]ll too many federal judges have been induced to view themselves as holding roving commissions as problem solvers, and as charged with a duty to act when majoritarian institutions do not."[28] Moreover, the character of judicial relief has

23. THE FEDERALIST No. 78 (A. Hamilton).

24. HURST, *supra* note 3, at 100.

25. *Id.* at 92.

26. *Id.* at 143.

27. *See* L. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 14-15, 258-62 (1976); P. KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT xxi-xxii, 172-206 (1970); Glazer, *Towards an Imperial Judiciary*, in THE AMERICAN COMMONWEALTH 104 (N. Glazer & I. Kristol eds. 1976).

28. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 134 (1970).

changed significantly. Courts are less content to declare unconstitutional statutes void and increasingly tell the legislative and executive branches what actions they must take. Perhaps the most striking evidence of this philosophy is the recent line of decisions that reorganize governmental services and institutions and impose fiscal and tax policies upon popularly elected officials.[29]

Hurst never comes to grips with this question. He briefly discusses the concept of judicial self-restraint, grounded in the doctrines of standing and mootness, but neglects to note the extent to which such limitations eroded during the Warren Court years.[30] The author states that the legislature, through its power to tax and appropriate, has the primary responsibility to allocate societal resources. The doctrine denying taxpayers standing to challenge the validity of federal expenditures was calculated to shield the spending power from judicial scrutiny. Although historically accurate and doubtless retaining a large measure of vitality, Hurst's emphasis upon the legislative authority to set priorities by appropriation requires qualification. As noted above, courts increasingly are more willing to mandate expenditures. Hurst's traditional view of the judicial role may be explained by his preoccupation with law and economic policy. Since the 1930's this has not been a major area of activity for the courts, and indeed judges apply "a strong presumption of constitutionality to economic regulatory legislation."[31] Hence, the author does not treat at length those fields of social and educational policy in which the federal courts have been active, and this omission influences his judgment.

Whereas Hurst sees the judiciary as the least powerful branch of government, he rightly stresses the marked rise in executive authority during the twentieth century. The distrust of executive power, inherited from the colonial period, slowly gave way after 1800. Although nineteenth-century presidents such as Jackson and Lincoln occasionally expanded the executive role and thereby created precedents for future application, the emergence of the modern presidency really dates from the Progressive Era before World War

29. *See, e.g.*, Milliken v. Bradley, 97 S. Ct. 2749 (1977); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); James v. Wallace, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977). *See also* Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791, 813-21 (1976).

30. For discussions of the erosion of the doctrines of standing and mootness, see Cox, *supra* note 29, at 803-13; Mendelson, *Mr. Justice Douglas and Government by the Judiciary*, 38 J. POL. 918, 921-37 (1976).

31. HURST, *supra* note 3, at 93.

I. The rapid growth of the federal bureaucracy and the establishment of independent regulatory agencies strengthened executive power and "put in question Congress's capacity significantly to determine national public policy."[32] Indeed, Congress began to delegate large areas of policy determination to the President.[33] Two world wars and the prolonged tensions of the Cold War completed this transformation of the presidency. Foreign policy and national security concerns since 1940 have made it easy for presidents to extend the reach of their office. "Wars and threats of war, after all," James T. Patterson maintains, have "been primary causes of expansion in presidential power."[34] Congress and the courts have proved particularly reluctant to check the exercise of presidential war power.[35] While few would fault Hurst's outline of the growth of executive authority, one must observe that it is hardly a novel analysis.

Hurst is concerned about several aspects of this development. First, he contends that the Watergate affair was symptomatic of "a dangerous insulation of the executive office of the President that had been developing since the 1930's."[36] Second, although the Supreme Court has rejected the concept of inherent presidential power[37] and unlimited executive privilege,[38] Hurst doubts that this will prove sufficient to check a strong-minded President. President Truman in 1952 and President Nixon in 1974 enjoyed low public esteem and could not muster support in Congress. Consequently, it was politically impossible for them to defy court decrees.[39] Would the judiciary necessarily be able to secure compliance from a popular chief executive? Hurst is pessimistic: "[T]he record of strong presidential initiatives taken under the claim of stewardship gives ground for questioning how far future Presidents will obey the Court, if events press them hard."[40] To the author, the executive is

32. *Id.* at 147.

33. Hurst declares:

> In the 1970's, after some forty years of this course of events, it was evident that the future vitality of the Congress would depend largely on Congress's capacity to delegate with more care and caution and to use its great investigative authority to hold its chief delegate under effective scrutiny.

Id. at 150.

34. Patterson, *The Rise of Presidential Power Before World War II*, 40 LAW & CONTEMP. PROB. 39, 55-56 (1976).

35. Wasby, *The Presidency Before the Courts*, 6 CAP. U.L. REV. 35, 42-44 (1976).

36. HURST, *supra* note 3, at 149.

37. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-88 (1952).

38. United States v. Nixon, 418 U.S. 683, 703-16 (1974).

39. For an account of the steel seizure crisis, see M. MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977).

40. HURST, *supra* note 3, at 104. Although no President has ever disobeyed a direct

clearly the dominant branch.

Hurst's study certainly suggests avenues for additional research. His discussion of the relation between the legal system and technology is particularly noteworthy. Yet in other respects this volume is disappointing. Few of the historical interpretations are original; instead, most reflect conclusions reached by Hurst in the 1950's. As in his other works, the author almost entirely ignores colonial law. Although economic issues receive sustained and skillful treatment, Hurst's handling of other problems is both skimpy and superficial. The author appears uneasy in presenting the civil rights litigation under the fourteenth amendment and rarely ventures beyond conventional liberal platitudes. Hurst's claim that nineteenth-century courts defeated "the more extensive grant originally intended" under the fourteenth amendment to protect blacks[41] is open to serious question. His conclusion is directly contradicted by Raoul Berger, who in his recently published *Government by Judiciary: The Transformation of the Fourteenth Amendment* emphasizes the limited aims of the framers of the fourteenth amendment.[42] Moreover, Hurst's assessment of post-1960 civil rights decisions seemingly contradicts his stress upon law operating within a consensus framework. It would be difficult to demonstrate much agreement in favor of racial busing or employment quotas.

Similarly, the author's views on the role of violence in American history are developed inadequately. He asserts that in some areas, notably race and labor relations, "law condoned, consciously accepted, or showed consistent neglect or indifference toward use of private violence to allocate benefits and burdens, privileges and deprivations."[43] At the same time, Hurst sees "a legitimate monopoly of force" as an essential attribute of the legal system.[44] Further,

---

judicial order, Franklin D. Roosevelt privately threatened defiance, and Lincoln disregarded a writ of habeas corpus issued by Chief Justice Roger Taney. R. SCIGLIANO, THE SUPREME COURT AND THE PRESIDENCY 39-51 (1971).

41. HURST, *supra* note 3, at 100.

42. Berger concludes:

> The historical records all but incontrovertibly establish that the framers of the Fourteenth Amendment excluded both suffrage and segregation from its reach; they confined it to protection of carefully enumerated rights against State discrimination, deliberately withholding federal power to supply those rights where they were not granted by the State to anybody, white or black. This was a limited—tragically limited—response to the needs of blacks newly released from slavery; it reflected the hagridden racism that held both North and South in thrall; nonetheless, it was all the sovereign people were prepared to do in 1868.

R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 407 (1977).

43. HURST, *supra* note 3, at 78.

44. *Id.*

he states that the "working norms" of society include a "high regard for peaceful order."[45] The author understates the long American tradition of extra-legal force to maintain order, supplement law enforcement, and discipline those on the fringe of society. Indeed, much American violence has been apolitical or conservative, not insurrectionary, in character, representing clashes between religious and ethnic groups or directed against those perceived as threats to the community.[46] Although agreeing with Hurst that violence is an appropriate concern for legal historians, this reviewer finds his treatment of the subject abbreviated and potentially misleading.

Despite some limitations, *Law and Social Order in the United States* provides a useful introduction to Hurst's views. The author is concerned with defining a framework for American legal history and is unafraid to offer broad hypotheses. Although some of Hurst's conclusions may prompt dissent, this volume should prove of interest to both specialists and general readers.

---

45. *Id.* at 57.

46. *See* R. BROWN, STRAIN OF VIOLENCE: HISTORICAL STUDIES OF VIOLENCE AND VIGILANTISM 4-5, 16-36, 93-235 (1975); Ely, *Negro Demonstrations and the Law: Danville as a Test Case*, 27 VAND. L. REV. 927 (1974).