Vanderbilt Law Review

Volume 10
Issue 2 *Issue 2 - February 1957*

Article 11

2-1957

The Supreme Court of History

Howard Jay Graham

THE SUPREME COURT OF HISTORY

HOWARD JAY GRAHAM*

Our theme is simple, overpowering: Justices of the Supreme Court, a number of whose predecessors destroyed the bulk or their correspondence, and who themselves may be tempted to do likewise, nonetheless quite evidently desire, and certainly deserve, faithful (if not quite full) reconstruction, both of their individual roles, and of the Court's, in our constitutional scheme. Much of this story, to quote the then Professor Frankfurter, is "largely irrecoverable,"[1] yet indispensable to an understanding of our institutions.

Manifestly, something of a paradox is involved in our whole attitude toward judicial history. Much of the law, particularly judge-made public law, is a product of highly selective formulae designed to achieve solutions by selection, by simplification, and even by oversimplification. Yet do we not also simultaneously criticize historians and biographers for abridging an historical record, for forcing their refractory and incomplete materials to fit some preferred or presumed thesis or formula? Reconsideration, of course, at once dispels the paradox: judges are privileged but historians, biographers and legislators are not. Silence, ellipsis, are acknowledged tools of the judicial craft, sanctioned as the lesser evils, in return for getting the job done, the decision made. Therefore reasons are offered, and expected, as matters of grace, not of right. This is elemental. The historian, on the other hand, really is stuck. He must document fully and fairly; he is liable for the full record. He must be "judicial" even when he suspects that counsel and judges were not. He must probe and assess, judge and clarify, not only the opinion and the mountainous record, but also the motives and motivations even when these are obscure, feigned, or denied. Else he is "uncritical," "superficial," or worse. Verily, to "unscrew the inscrutable," as Artemus Ward put it in another connection, is a burden that weighs as heavily on the biographer and historian as on the judge himself.

Small wonder that we have but a handful of first-rate biographies, even of front rank judges. Some of these have been unfairly criticized as lacking the distinction we expect of biographies of statesmen. Certainly few subjects or art forms present more drastic challenges and limitations. Law itself is technical, refractory stuff. Exciting to practi-

* Member of the staff, Los Angeles County Law Library.

1. "Often the intellectual history of a great judge before his appointment is largely irrecoverable." FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 9 (1937). For a reasoned statement of the importance and problems of preservation and use of papers of members of the Supreme Court, and a suggested policy, see Westin, Book Review, 66 YALE L.J. 462, 468-69 (1957).

tioners, yes. Often dramatic in its suspense, in its swift twists and turns. Yet the excitement and drama seldom are obvious and are not easily communicated. Even good trial reporting and legal fiction are rare enough. Complex public law issues, of course, compound the difficulties. In general, the biographer's problems tend to multiply with the square or cube of the distance from 1789. Beveridge had the immense advantage of having a subject who wrote in gold on a clean slate, cited little or no authority, made his own precedents, and above all, made little secret of his disesteem for the head of the "coordinate branch."

It is not surprising therefore, that until recently most of our distinguished biographies have been of judges of the early or Civil War and Reconstruction periods: Beveridge's Marshall; Swisher's Taney and Field; Morgan's Johnson; Horton's Kent; Fairman's Miller and forthcoming Bradley; King's Fuller.[2] Once we come to the period of Holmes, Brandeis, Sutherland, Hughes and Stone, the problems of focus and compression that beset Messrs. Howe, Mason, Paschal and Pusey are so great as to call for quite different, and indeed, quite varied techniques—straight editing of letters, preliminary treatment of specialized problems in law review essays and heavy reliance on dictated memoranda in the case of Pusey's Hughes. The main difficulties here are not with the judicial subjects, but rather with the cone-like social and political context, with the body of choice and pyramided precedent, nearly all of it vastly technical, yet the very warp and woof on any biographer's loom.

These reflections flash to mind, and indeed ramify, as one learns that the nation's memorial to Justice Holmes is to be a multivolume history of the Supreme Court.[3] Full details of this project are eagerly awaited. That such a work will be a corporate and cooperative one, both intensive and extensive; that it will cover the entire personnel, powers, functions and achievements of the Court in a fashion that will illuminate and inspire, goes without saying. That in its various parts it must serve layman and lawyer, specialist and general citizen, and that it will involve years in the planning and execution, is equally certain. Under such circumstances, the hazard to avoid may be a race of attrition between compounded resources and research and compounded precedent! Indeed, in some respects it would seem almost

2. The scheduled life of Story by Professor Commager is certain to redress a century of neglect in demonstrating, by the range and quality of Story's learning and the volume of his extrajudicial activity, how unwarranted it is to credit Marshall alone with orienting our law during the formative years. Professor Farrelly's life of the senior Harlan will similarly broaden the picture of the period 1877-1910.

3. 69 STAT. 533 (1955). An act to establish a Permanent Committee for the Oliver Wendell Holmes Devise, and for other purposes. See also N.Y. Times, Sept. 8, 1956, p. 15, col. 5, announcing the Committee's appointment of Professor Paul Freund as editor-in-chief of the history.

as if the American Law Institute's *Restatements* were comparatively simple projects: the "law" at least was there to restate. The "history" more often is not. For many periods and subjects, not even preliminary spade work has been done. The cases themselves, digests, annotations, critiques, comments, exposés, and lamentations—these we have by record thousands. Yet there has been almost no synthesis, nor even the chance of synthesis, for even the formative period. Charles Warren's work is a brilliant achievement, extraordinary in research and coverage, the more for being undertaken and executed singlehandedly. Yet it treats, as the title indicates (*The Supreme Court of History*) the Court's central and supreme role; in short, the emergence and beginnings of that role, not the full story. It deals, as do Haines' in many respects complementary and corrective works, with the establishment of judicial supremacy, with the Court as institutional pivot and storm center. Except for a few leading cases, Warren ends with the Civil War. Here again, fan-like complexity imposed drastic limitations. As the narrative proceeded, themes and precedents multiplied, and the volume of primary material and research simply became overwhelming. Warren's focusing and organizational device was brilliantly suited to the needs of a single researcher, and to the first comprehensive work on the Court. Yet the book covers but one primary sector. Professor Haines' two works likewise illuminate the foundation and early operation of judicial supremacy, and from avowedly Jeffersonian premises which stress and correct the pro-Federalist bias of Beveridge and Warren. Yet here again the sheer immensity and complexity of the research burden brought the main enterprise to an end short of the Civil War.

Of other major works, Boudin's *Government by Judiciary* is the frankly hurried product of a resourceful and energetic lawyer, often ingenious, and at times, like Professor Crosskey's gargantuan essay in condemnation and avoidance, also a work of provocation. The Frankfurter-Landis survey, *The Business of the Supreme Court,* is a model of what we need much more of, but fail to get. Except for specialized monographs and practice books, these works are all there are. All are valuable, and in different ways, but the gaps and limitations are evident.

Two corollaries and consequences of this situation call for brief comment. First, is that our knowledge of the Court, and its role, is generally based on a few landmark cases decided during the Marshall-Taney era. Our picture of judicial review, and our knowledge of its operation, aside from the sheer impressionism of current events, is based largely on what happened more than a century ago—before the country was fully settled, while judges still rode circuit, before Congress had affirmatively exercised the commerce power, even before

there was a Pacific Railroad! Above all, while legislative supremacy still existed in practice. Dramatic, inspiring and important as this story is, we can have no illusions about its adequacy. A nation's picture of itself is probably always dated, but the lag here is serious and startling. Faced with the problem of integrating our public schools in order to maintain national self-respect and international prestige, of rooting out the remnants of slavery and race discrimination (outlawed 90 years ago), we hark back to Calhoun, States' Rights, and interposition, blissfully ignorant, it would seem, that these were the very doctrines at which the fourteenth amendment was aimed. Again, confronted in the 30's with a paralyzing constitutional crisis, brought on by the Court's inability to focus its own precedents and attention on the problems of a complex urban industrial society, we witnessed and waged perhaps the world's greatest historical pillow fight—talk for weeks of the "Dred Scott parallel," of "constitutional laissez faire" and the like. Even lawyers were seldom able to explain how this impasse had developed, or why, because the story had been ignored or regarded as too technical for laymen to grasp. And currently, faced with the problem of conducting diplomacy in the air-nuclear age, with the need for streamlining executive-legislative relations in the conduct of foreign affairs, we witness the nation's bar association sponsoring a constitutional amendment that would hamstring the executive branch of government, disperse authority, put a premium on delay, secrecy, and *faits accomplis*.

These, it is submitted, may be symptoms of a single malady. Thinking occasionally has been crooked because it is anachronistic, outmoded. Until there is some clearer national picture of how judicial review operates, how in practice it has operated since the Civil War, of what our unique experiment in judicial supremacy entails and presumes, and what it must avoid (by the justices' own tenets and our national experience) we run grave risks of self-deception, of monumental, nationwide smugness.

Consider, for example, the notion voiced frequently today in the rather obvious flanking maneuver against the Court's picketing decisions, and against its stiffened defense of civil liberties and its steadfast stand against race discrimination. These, it is being insinuated, are areas in which the Court cannot hope to operate effectively. Education is a function of the states and localities, universal in extent with problems as varied as local conditions. How can the Court and the judicial power intervene and effectively supervise such activity? Ours is a federal system, with local responsibility; these matters simply are beyond judges reach and ken.

History riddles such positions. The development and growth of due process is a case in point. The complaints now made against the

picketing, civil rights and segregation decisions are an almost perfect repetition of arguments advanced—often with great cogency by judges themselves—against extending the scope of review to the substance of laws affecting business via due process and related doctrines. Business and contracts too were "universal" and "local"; to attempt to impose judicial standards and to scrutinize legislation would overwhelm the courts, throttle and intimidate legislatures, result in utter chaos. Certainly the threat was real enough; but the argument itself was irrelevant, and more to the point, it was ignored. Written guarantees of liberty and property, applied and interpreted by the courts in response to appeals of those adversely affected by legislation or state action, led naturally, almost imperceptibly, into this field from which there was no escape. The precedents moved step by step to the ultimate positions, irrespective of other views and tenets. These opposing views moreover, clearly assumed too much—that the courts must and would run the entire show. In practice, social inertia, appellate and jurisdictional controls, decisional formulae, the ruthless pace and pressure of social change, and even of jammed appellate dockets, assured otherwise. We managed; indeed, *this* expansion of judicial review was hailed as judicial statesmanship. We still have it, potentially, despite doctrinal retreats from the more extreme positions.

If we are to have the searching review of legislation affecting business, such review having been initiated largely by those who deemed their rights adversely affected—and the point is we had that from the beginning—must we not also have, by and large, a similar review, and somehow make it work passably or equally well, in these fields affecting say labor, and the civil rights of minorities? Either that or plead institutional bankruptcy. Is there some inherent difference between a "parent" or "person" seeking to invoke the Court's aid to protect his right to buy a decent house, or send his children to an unsegregated school, and say a corporate parent or "person" seeking to overturn regulatory legislation? The obvious answer is that there ought not to be—that in many instances these strong judicial stands in the picketing and race cases had their counterparts long ago in other fields, that due process in a sense here is overdue process, and the Court's faith in itself and in the nation, and its resolution and unanimity, stand in welcome contrast to the special pleading of those whose knowledge of constitutional history ends with the Civil War, or with liberty to contract applied to the defense of business.

Here, then, is evidence enough of need for a Holmes memorial history. Olympian thought and insight have not of themselves always been contagious. Lags in understanding of the modern Court's role, of problems inherent in judicial review and judicial supremacy within our system of divided and separated powers, and within an industrial-

ized society and world community, are not confined today to laymen. Already the technical and complex material requiring interpretation and synthesis, especially for the neglected period since the Civil War, staggers the imagination. Work in this area must be undertaken simultaneously with work in the early period and be prosecuted with equal vigor. This obviously must be a history of the *Supreme* Court—the story of achievement, evolution, and operation of judicial supremacy *in fact*—of the Court moving to the apex and functioning in that position, largely by acquiesence and in relation to the two other branches, and the once "sovereign" states—of the Court both as court and as national conscience. This means in practice a history of the entire constitutional system, a multidimensional synthesis of national experience, ideals and learning.

In this enterprise the Court's second hundred years, not the first, constitute the test and challenge. Developments during the period since 1877 need to be clarified for the conscientious citizen and general reader as well as for the lawyer-specialist. (Strange memorial it would be to the author of those marvelously terse, luminous opinions, read with delight even by students, which failed to address the same audience and *try* for similar illumination). Finally, the Supreme Court is our continuously sitting constitutional convention that keeps the written constitution workable and up to date. It also is a practicing faculty of economists, the first such authoritative body in history, as Commons[4] stressed.

An immense double burden thus falls on historians of the Court. One underlying difficulty is that to deal at all with many matters the historian so often is obliged to convert technical questions of power and right into a simple binary code—one in which answers and impulses are a mere plus or minus, expressed in terms of the attitude toward governmental power, or as a preference for private as opposed to public rights and interests. One such theme, which overarches nearly all broad treatments of constitutional development for the period since 1890, is the "rise," the "triumph," and, since 1937, the "decline," or "eclipse" of "constitutional laissez faire," or "laissez faire judicially enforced." This theme, moreover, pervades the work of biographers and of legal and constitutional, as well as of general historians. General historians in particular have had a bad time with the Court, and the courts. The judges' occasional bad guesses and a few major errors, have bulked larger than the hits. Long-continued sporadic interference with social and economic legislation—the seemingly wholly negative role—heavily overweight accounts. On the other hand, indispensable adaptive and interpretative functions of courts, easily ignored or taken for granted, tend to receive scant attention. Not only

4. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 7 (1939).

due process and liberty to contract, but the doctrines of federalism, separation of powers, the restraints of the commerce clause and of the rule of reason in antitrust cases, if covered at all, are treated and discussed within some such mechanical framework.

Lawyers and judges naturally throw up their hands at such oversimplification. This, they exclaim, makes a caricature of the judicial process. It emasculates doctrine, standardizes it, disregards all nice questions of degree, reduces every matter to a level, which, if it actually were the one on which the judicial mind had to operate, would make the bench and public law the most barren, unattractive fields imaginable.

All of which is perfectly true; yet largely irrelevant, and to a degree, impertinent. For the historian is writing *about* judges and their work, not for them; he is dealing, moreover, with the judicial process not as process, but in its social aspect, and as a result; not in terms of briefs and rules, but in terms of trends, direction, and political and social significance. Furthermore, the very generality of judicial decision, its terseness and brevity—the qualities we call "privileged," and justify as such—often leave the public and the historian with precious little beyond a plus or a minus—an affirmation or a negation of power or right—to identify the judicial handiwork.

Certainly here is a basic dilemma and challenge that confronts all historians of the American judiciary—even planners and authors of the Holmes memorial project. A purely "case" history in 12 or 15 volumes, larded with biographies and functional studies, and heavily bolstered with notes and similar apparatus, will serve the needs of scholars and specialists. But it will leave untouched the still more vital job of communicating the essence of this story to the American citizen. Perhaps it will be said in rejoinder that this result will follow in due course as scholars rework, popularize and interpret the findings. But will it? And why wait? Why not include as a part of the project—the capital of it—a final volume to be written by an historian as eminent as Professors Commager or Morrison or Hofstadter, which will perform this function? Far more than "popularizing" or "humanizing" knowledge is possible and is at stake here—as witness the insights and understanding currently gained from Professor Hofstadter's brilliant interpretative essay and survey of the *Age of Reform*[5] abstracted from an immense historical record. The Holmes project will amass and survey for the first time a record even more immense. It will be the more fitting memorial, certainly in this case, when the American people have not only the volumes, but the essence.

5. HOFSTADTER, THE AGE OF REFORM (1955).