Kentucky Law Journal

Volume 44 | Issue 2 Article 14

1955

Nine Men by Fred Rodell

Jesse J. Dukeminier Jr.
University of Kentucky

BOOK REVIEWS

NINE MEN. By Fred Rodell.* Random House, 1955, pp. xii, 338. $5.00.

A few hours after the historic decision in the School Segregation Cases Senator Maybank of South Carolina and Senator Eastland of Mississippi humphed in near-unison: "a shamefully political rather than a judicial decision," "this legislative decision by a political court."[1] Although the Senators meant to abuse the Justices, the plain fact is the United States Supreme Court is and since the time of John Marshall has been a political body rendering political decisions. The myth that the Court is "above" politics, that a Justice shucks his political, economic, social, and racial views as he turns in his gray flannel suit for a robe has been debunked so often it is hard to believe it still has currency. Yet apparently a good number of Southerners had—like the Senators—put so much store in that myth (and in the companionable doctrine of *stare decisis*) that the segregation decision came as a genuine shock. If there be any left who cling to the notion that the institution known as the Supreme Court is not responsive to the political views of the Justices who run it, Professor Rodell's lively and irreverent low-down on the high Court, hard on the heels of an obviously political decision, should provide revelation.

To be deplored is not so much the political role of the Court which Professor Rodell so well describes in his subtitled "Political History of the Supreme Court of the United States from 1790 to 1955"; "political" decisions can be as wise and judicious as any other kind. More distressing is the seeming unawareness of many of the real factors moving court decisions and of the fact that not only the highest court in the land but *any* court in the land is to a greater or lesser degree a political force simply because the problems before the court are solved by men and men are moved by, among other things, political considerations.

The idea that law is not made by legislators and judges but discovered in the same kind of way as that in which the physical laws of nature are supposedly discovered ought to be of historical interest only. It is foolish to think that judges are like Socrates who in the *Crito* imagines himself talking to the Laws of Athens and being persuaded and rebuked by them, or that tough

* Professor of Law, Yale University.

[1] New York Times, May 18, 1954, p. 15, col. 6.

problems are solved solely by reference to word symbols in constitutions, statutes and authoritative doctrine. In the first place these symbols seldom come equipped with plain meaning indicating only one solution; *no person shall be deprived of life, liberty or property without due process of law* does not have the lucidity of an axiom of Euclid. Many of our traditional legal symbols point in a confusing way to the protection of different values which may in the problem before the court be in conflict. Take, for example, the Dennis case involving the jailing of 12 top native communists. The First Amendment ("Congress shall make no law abridging the freedom of speech.") pointed toward protecting the freedom of the communists to speak. Justice Black took this position. Holmes' "clear and present danger" exception to the First Amendment points either way. Justices Vinson, Reed, Burton and Minton thought conspiring to teach and advocate communism was a "clear and present danger" to national security; Justice Douglas thought it was not. "Judicial self-restraint" also points either way depending upon whether the judge chooses to restrain himself or not. Justice Frankfurter fretted about the wisdom of the Smith Act, but kept his hands off its neck; Justice Clark chose not to sit at all. And to Justice Jackson, who found communism to be a "conspiracy", the conspiracy doctrines pointing to conviction were persuasive. Can it be seriously argued that any Justice was moved solely or even primarily by any of the words invoked? Symbols influence but do not make decisions.

But above and beyond the inherent ambiguity in the collocations of words which serve us as constitutions, statutes and doctrines, is a more telling reason why political perspectives enter into judicial decision. Neither the analysis of what is the "issue" nor the judicial response to the factors involved in solving it is made except by reference to a (for each judge) unique frame of experience-given perspectives, which include all his economic and political identifications and demands. As Professor Rodell remarks, "The idea that a human being, by a conscious act of will, can rid his mind of the preferences and prejudices and political slants or values that his whole past life has accumulated in him, and so manage to think in the rarefied atmosphere of simon-pure objectivity, is simply a psychological absurdity. Granted, a wise Justice like Holmes, out of tolerance for the views of others, may try to temper those of his private biases of which he himself is aware. But only a dull-witted Justice would suppose, and only an intellectually dishonest one pretend—and the Court has been manned by far too many of both—that he could ever purge his thinking processes, for the purpose of making decisions, of all his personal

predilections even of the conscious kind, much less the unconscious and unrecognized." This has been said before, early by Holmes and Pound and Cardozo, later by Jerome Frank in his sparkling and trenchant *Law and The Modern Mind,* and more recently by a whole galaxy of scholarly lights. But it is well to say it again for "the quaint notion that wording, whether of constitution or statute, can govern, without men to use the words as the men see fit to use them" is a dangerous illusion—an illusion that more than once has led men away from their liberty.[2]

That trial court rulings do turn upon a great number of environmental and predispositional factors other than the legal doctrines invoked is pretty standard knowledge among practising lawyers as well as scholars. It is hard to believe Supreme Court decisions are wrought differently, particularly in view of the accountable-to-no-one-except-Conscience position the Justices hold in our scheme of government. There is nothing revolutionary or even very suprising about this. It is simply a statement about observable regularities. It has long been the basis of prediction commonly, if roughly, employed by successful lawyers. But so far few studies of any court have pricked out the veins of economics and politics. Our research remains primarily concerned with the protective skin of legal symbols which a judge pulls around him. There have been studies in New York of the effect of a judge's religion upon his decisions in divorce cases, and a few other studies involving psychoanalysis of some cooperative judges relating the personality insights thereby gained to decision. Nevertheless in the main the problem of *why* judges decide the way they do has been little explored. The difficulty appears to be that in order to get the problem into the laboratory it is necessary to limit the number of factors considered relevant to decision, resulting in fatal oversimplification. This difficulty has not stopped Professor Rodell from tackling the problem of giving meaning and motive to Supreme Court decisions, and whether or not one agrees with his conclusions (and I dare say *no* reader will agree with *all* of them and many readers, particularly lawyers, will find some conclusions a bit too easily reached) Professor Rodell deserves a hearty E (Encore!) for effort.

In tracing the political history of the Court Rodell starts at the beginning, for, as he points out, many profess to see something

[2] Note the remarks of Judge Learned Hand, THE SPIRIT OF LIBERTY 189 (1953): "What do we mean when we say that first of all we seek liberty? I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it."

sinister in the fact that Justices are moved by political considerations, not realizing it was the greatly revered John Marshall who installed the Court in the political arena. By successfully asserting the power of the Supreme Court to declare an act of Congress unconstitutional, by establishing the supremacy of the Court over Congress and the President, Marshall propelled the Court into a governmental position with power unequalled by any court anywhere. And not without purpose, for the Chief Justice conceived of law as a servant and of the Court as a political instrument to achieve the goals of society—as the Court (and Marshall *was* the Court in those days) saw the goals. "If ever a figure in U. S. history embodied in his career clear proof that ours is a government of men, not of laws, that figure is," says Rodell, "John Marshall, the great Chief Justice." He did not "follow" law; he made it. And he made it fit his own Federalist ideas of how the government should be run which were strongly shaped by his unyielding economic conservatism. He made of the federal government a citadel against the radical leveling philosophy then prevalent in the state legislatures. (Paradoxically, Rodell concludes that Marshall would be a states' rights advocate today on the theory that he championed a strong central authority primarily to protect the creditor class which since FDR looks to the states rather than to the federal government for help. Wonder, then, where that would put a modern Thomas Jefferson?)

Marshall was not the first Justice to exercise judicial power for political ends; among others before him was Samuel Chase, who was (not to put too fine a point to it) a hoax of a Justice. (Chase once ordered a farmer who resisted the federal tax collector to be hanged for treason; he also has the singular honor of being the only Justice impeached—although not convicted—for his free-wheeling political partisanship.) Nor was Marshall the last, as Professor Rodell demonstrates. There was Roger Taney, Marshall's successor as Chief Justice. Says Rodell: "There is not one of his decisions as Chief Justice —from his years of nipping at the Marshall-nurtured rights of Northern capitalists to his ill-fated last-ditch effort to hold the dike for slavery—but can be traced, directly or indirectly, to his big-plantation birth and background." Then there were Samuel Miller and the elder John Harlan of Kentucky, independent liberals, and their contemporaries, the private-property-protecting Swayne, Field, Strong and Bradley about whom Justice Miller was moved to write: "It is vain to contend with judges who have been, at the bar, the advocates of railroad companies, and all the forms of associated capital, when they are called upon to decide cases where such interests are in con-

test. All their training, all their feelings are from the start in favor of those who need no such influence." Following them came Brandeis and the Four Horsemen, crusaders all—but for different political faiths. In the whole first century and a half of the Court's history only one Justice clearly stands out as able to slough off his personal political, economic and social views—Oliver Wendell Holmes. It is a telling comment on his brethren that Holmes was so frequently in dissent.

Today's Court is no less political than yesterday's, according to Rodell. From 1943 to 1945 when the Court was composed of Stone, Roberts, Black, Reed, Frankfurter, Douglas, Jackson, Murphy and Rutledge, "the Court was—without even a close competitor—the most brilliant and able collection of Justices who ever graced the high bench together; the least of them would have stood out on many Courts of the past." Four of those Justices remain on the Court today, joined by Truman's appointees, Burton, Clark and Minton, and Eisenhower's Warren and Harlan. Except for the last two, Rodell relates to their votes the background of each and finds various threads from their earlier life that keep running through the woof of their decisions. Inescapably some of his connections sometimes seem rather tenuous. Nevertheless, having found out where each Justice has been, Rodell settles himself comfortably out on a limb and claims it is not too hard to see where each Justice is going.

With little more to go on than their background Rodell finds in the appointment of Harlan and Warren "harbingers of hope" for (small *l*) liberalism and for the protection of personal freedoms which the author thinks were given rough treatment during the Vinson era. The new Chief Justice, he says, might come close to resembling John Marshall. "The same easy strength is there, and the same earthy approach to the esoterics of law. But where Marshall's achievement was to protect a weak nation, as a nation, from its people, Warren's opportunity is the precise opposite; it is to protect the people, as people, from their strong nation. Given the will and the goodwill to do it, he can succeed."

Now I do not suppose anyone will conclude from what I have said that this is an exquisitely careful, cautious scholarly study done in orthodox legal language or dressed up in the sociological vernacular. On the contrary, the virtues of this book are not the traditional lawerly ones (see the author's Foreword), and I would be less than honest if I did not point out that Professor Rodell's nothing-is-sacred attack upon the idea, sedulously fostered in some quarters, of Justices as mystical dedicated creatures living their lives apart from ordinary mortals will seem shocking to some readers. ("The villain of our

mythology is the scoffer," as Murray Kempton said of H. L. Mencken not long ago.) Even those who feel there is something in it may consider it in poor taste. It is furthermore precisely the line of thought which has in recent years been heavily attacked as tending to undermine our faith in our courts, and the commonest line of criticism developed against it from this point of view is that it is a kind of intellectual treason to suggest that courts can not be entirely "objective" or to suggest that political opportunism is a necessary ingredient in decision. In short, the criticisms by Professor Rodell smack of *lèse-majesté*. These attitudes were naturally anticipated by Professor Rodell who has a few Mencken-tart strictures for them,[3] although needless to say they can be made much more plausible than he has made them.

All in all, it is as provoking a book as one is likely to find for some time, and very readable besides. Professor Rodell's style is utterly uninhibited, the like of which may be indicated by the broad and jazzy notes deliberately sounded now and then in this review.

Associate Professor of Law J. J. DUKEMINIER, JR.
University of Kentucky

KENTUCKY PRACTICE—PROBATE PRACTICE AND PROCEDURE WITH FORMS, by Absolem C. Russell and James R. Merritt. St. Paul: West Publishing Co., 1955. Vol. 1, pages xxv, 575, Vol. 2, pages xxiii, 706, $35.00.

This first comprehensive reference work on the law of Wills and Administration of Estates in the Kentucky courts by two recognized authorities in the field, Dean Russell and Professor Merritt of the University of Louisville Law School, was made available to Kentucky lawyers last Spring. It has proven to be an indispensable tool in the practice of law. As indicated by the title, this work is part of a series by West Publishing Company on Kentucky Practice and the form of presentation is directed to providing an answer to nearly every procedural problem a lawyer is likely to encounter in his practice. Yet

[3] Less spleeny, but to the same point, are the words of Justice Brewer, *Government by Injunction*, 15 NAT. CORP. REP. 849 (1898): "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all." Quoted with approval by Professor, now Justice, Frankfurter, *Mr. Justice Holmes and The Constitution*, 41 HARV. L. REV. 121, 164 (1927).