

# Nine Men: A Political History of the Supreme Court from 1790 to 1955 (Book Review)

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## BOOK REVIEWS

NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955. By Fred Rodell. New York: Random House, 1955. Pp. xii, 338. \$5.00.

If this reviewer had the appointing power, he would be sorely tempted to place Mr. Rodell on the bench of the Supreme Court, for it is a reasonable guess that only responsibility would temper the views here expressed. It brings to mind something Cardozo once said about his experiences while still at the bar. Often, he complained, briefs of flawless logic would not prevail in court. He did not understand the reasons for such frustration until he became a judge.

Mr. Rodell is what is called an economic interpreter of history. He is of the opinion, apparently, that man's chief motives are to be found in the purse and that government, at least the government of the United States, is in the hands of the Supreme Court, and that, by and large, the members of that Court were and are devoted to the interests of the rich few and oblivious of the interests of the vast majority of us.

To support this thesis, he runs through the history of the Supreme Court from 1790 to date in some three hundred pages. No authorities are cited but his own erudition. There are no footnotes or other distractions. In short, there is no proof, except such as appears from the very forceful language for which the author has a great gift.

For example, the Supreme Court declared unconstitutional the Railway Retirement Act by a vote of 5 to 4. All five of the majority Justices at one time or another represented one or more railroads. Hence, it follows, says Mr. Rodell, that the five were especially favoring railroads. The fact that among the four Justices who dissented there were two who also represented railroads at one time or another, does not show to Mr. Rodell that a lawyer who represents railroads while at the bar does not always lean in their favor while on the bench. Again, Marshall's entire contribution to American constitutional law is dismissed as a specially acute political device to establish the Federalist philosophy which favored the rich capitalists at the expense of the poor. Taney, on the other hand, was equally venal. Though he did not favor the rich capitalists, he was extremely partial to rich farmers.

Some of the author's most telling invectives are directed against the Court's record in civil liberty cases. And, of course, it is an open secret that freedom of speech is accorded much wider latitude in England than here. But the blame therefor cannot be laid entirely at the

door of the Court. Congress and its committees are equally, if not more, responsible. Americans who have had the task of absorbing many alien cultures are, perhaps, more tense about conformity in manners and speech than are older and more homogeneous peoples. In any event, had Mr. Rodell lived in eighteenth century France, he would probably have had to publish his books in Holland under a concealing alias and then be obliged openly to criticize their contents. Even now, were he a resident of that vast area that lies east of the Danube, it would prove dangerous even to think his ideas, let alone express them.

One gets the feeling that a Supreme Court Justice is honorable so long as he agrees with the author. For example, Justice Stone, of whom the author speaks with the highest praise, finally disappoints him when he fails to agree with the views of Black and Douglas. He says, ". . . when such comparative upstarts as Black and Douglas declined to follow either of their [Frankfurter and Stone's] leads and began to push ahead of them along new liberal trails, first Frankfurter, later Stone, seemed to sulk into a sort of we-won't-play conservatism."<sup>1</sup>

The real hero of the book is, of course, Oliver Wendell Holmes. It would be, perhaps, unkind to detract from this hero worship. For it is one of the few phases of this remarkable book which shows a feeling for people. Otherwise, adjectives abound here which most of us would long hesitate about using. Thus, Marshall was conservative because he was born poor. No doubt, Washington was conservative because he was not born poor. Frankfurter is authoritarian because he came here at the age of ten from a country that had an authoritarian history; McReynolds, no doubt, for the opposite reason. Communists are psychotic, and Washington and Lincoln played petty politics for selfish reasons. The book fairly teems with vituperative epithets against national heroes and leaders, all of whom seem to the reader to be guilty of nothing more venal than bad judgment in Mr. Rodell's eyes.

But to return to the hero of the book, Mr. Justice Holmes. According to the writer, there is not a blot on his escutcheon. I say he did not read the writings of Holmes carefully. It was Holmes who allowed Sacco and Vanzetti to go to their death with a trumped up distinction between void and voidable trials, never before articulated in the history of jurisprudence. Not until he was dead did we discover that he did this in condonation of one wrong by another. On August 24, 1927, he wrote to a friend—himself a brilliant, radical misfit—"Your last letter shows you stirred up like the rest of the world on the Sacco-Vanzetti case. I cannot but ask myself why this so much greater interest in red than in black."

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<sup>1</sup> P. 262.

Holmes' much vaunted tolerance of other peoples' faith is made crystal clear in a letter to Pollock on April 5, 1917. He says: "If I had to choose, I think I would rather see power in the hands of the Jews than in the Catholics"—not that I want to be run by either." Such characterizations of public officers need no comment.

A striking illustration of the ability of the author to read his own views into Holmes' mind is illustrated by the *German Language Cases*. There Holmes dissented from the majority holding that statutes banning the teaching of German in public schools were unconstitutional. Mr. Rodell calls his opinion "a troubled dissent," adding that the dissent was the ". . . more troubled by reason of the fact that McReynolds, scarcely a champion of human rights, was this time the Court's chief spokesman."<sup>2</sup> Nothing Holmes ever wrote justifies this inference. What our author neglected to mention was that Sutherland, whom he calls a "reactionary corporation lawyer," joined both in the dissent and in the opinion.

This book, contrary to some opinion, is not a menace. The popularizations of the author are well known. His point of view is so obviously compulsive that most scholars will just smile and feel sorry.

The other day this reviewer appeared at a hearing before a federal administrative agency. There were a number of lawyers present representing various parties. When one of them, younger than the rest, became very abusive, and another objected, the hearing officer said wisely, "[n]ever mind, it's easier to ignore him than to try to correct him."

MAURICE FINKELSTEIN.\*



A COMMON LAWYER LOOKS AT THE CIVIL LAW. The Thomas M. Cooley Lectures. Fifth Series. By F. H. Lawson. Ann Arbor: University of Michigan, 1955. Pp. xvii, 238. \$4.00.

Dr. Charles Phineas Sherman, a keen scholar and researcher in Roman Law, writing almost forty years ago, made the following profound observation:

The revival in the United States of the study of the Civil Law has already assumed ample proportions which are yearly increasing, and its full fruition with many far-reaching consequences is but a question of time. The greatest contribution of this revival to American law will be a powerful influence operating for the betterment of the private law of the United States, purging it of

<sup>2</sup> P. 206.

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