CONSTITUTIONAL HISTORY AND THE HIGHER LAW

SHOULD an act of parliament be against any of his natural laws, which are immutably true, their declaration would be contrary to eternal truth, equity and justice, and consequently void."

... "There are eternal principles of justice which no government has a right to disregard. . . . Some acts, although not expressly forbidden, may be against the plain and obvious dictates of reason." ... "It is conceded . . . that there are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances and which are as inflexible and absolute in their restraints as if directly imposed in the most positive of words." ... "It is true that no one has a vested right in any particular rule of common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve."

Here are four obiter dicta. The first is from James Otis’ famous argument against Parliamentary tyranny in 1764, the second from Justice Green’s opinion in the Tennessee bank case of 1831, the third from the great Cooley’s ruling on the nature of a public purpose in 1870, the fourth from Chief Justice Taft’s defense of the use of the injunction in labor disputes in 1921. Approximately half a century separates each of these four dicta; the philosophy, even the language, is the same. Nor would it be difficult to discover similar expressions of juristic philosophy for every decade of our history; such an exer-

1 James Otis, Rights of the British Colonies Asserted and Proved, p. 70.
2 Bank of State v. Cooper 2 Yerg. (Tenn.) 599.
5 "Writing in 1894 Judge Dillon pointed out that "Rules regulating civil conduct may . . . be imported by the tribunals, when necessary for the purposes of actual decisions of causes, from the field of morality. Such rules, however, become invested with the quality of law only when and to the extent that the judges authenticate or adopt, or set upon them the imprimatur of the State,—that is, recognize and enforce them by their judgments. . . . It is a mistake to suppose that this process has ceased. In consequence of modern inventions, aggregations of capital, and changed social conditions, I am inclined
cise is scarcely necessary to emphasize what these brief excerpts illustrate the persistence of the doctrine of the higher law—a persistence all the more remarkable in that the philosophy which justifies it has been repudiated now for three-quarters of a century.

It is as dangerous, perhaps, and as gratuitous, for the historian to suggest a definition of the higher law as for the courts to attempt a definition of due process or the police power, and we would have inreproachable precedent for evading the task. Yet we may submit a characterization. We may suggest that higher law is that body of law which is grounded in the nature of man and finds its inspiration and derives its authority from a priori or intuitive rather than experimental facts. Such a law was natural, inevitable, indeed, in the eighteenth century. It fitted a universe ruled, it might be supposed, by reason, and susceptible to understanding. It was the logical expression of the philosophy of the enlightenment, and served well as the constitution for the heavenly city of the eighteenth century philosophers. It is superfluous here to observe, what has been observed so often and so learnedly, that it served, too, the purpose of Americans in their struggle with the mother country and in their effort to construct a political system grounded on reason—superfluous to recall Jeffer-

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son's appeal in the Declaration to self-evident truths and to the laws of Nature and Nature's God, or John Adams' faith in rights "rooted in the constitution of the intellectual and moral world," or the youthful Hamilton's joyous assurance that "the sacred rights of mankind are... written as with a sunbeam in the whole volume of human nature, by the hand of Divinity itself, and can never be erased or obscured by mortal power."\footnote{Quoted in C. E. Merriam, American Political Theories, p. 48.}

This concept of law, which was to Americans the common sense of the matter, implied if it did not implacably require that law was a science, that it followed a fixed and regular course, that it was the same yesterday, today, and forever. The principles of law were like the axioms of Euclid, nor did they appeal with any less compelling force to the understanding of right-minded men. This attitude toward law, like the concept of higher law itself, is a tenacious one. It persists today in what Dean Pound has called mechanical jurisprudence,\footnote{Pound, "Mechanical Jurisprudence," 8 Columbia Law Rev. 605. The great John Austin referred to "the childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something made by nobody, existing, I suppose, from eternity and merely declared from time to time by the judges." Lectures on Jurisprudence (4th ed.) 655.} Professor Cohen the phonographic theory of the law;\footnote{"The judges make no laws, they establish no policy, they never enter into the domain of public action. They do not govern." Justice Brewer, in The Movement of Coercion (1893), quoted in Dickinson, "Law Behind the Law" 29 Col. Law Rev. 113, at 115; and in South Carolina v. U.S., 199 U.S. 437 at 448, Justice Brewer said, "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now." "Any intimation that the Constitution is flexible, even in response to the police power, is unsound. ... That a state may not impair the obligations of a contract or that a person can not be deprived of his property without due process of law, are principles fundamental, and if the Legislature, in response to public clamor for an experimental social reform, may break down these constitutional guaranties ... all guaranties of the Constitution ... may be exchanged, modified, or totally eliminated." Judge Van Orsdel, in Adkins v. Children's Hospital. Quoted in Boudin, Government by Judiciary, vol. 2, 551. "The provisions of the Constitution seem so direct and definite as to need no reinforcing words and to leave no other inquiry than, Does the statute under review come within their prohibition? ... By the Fifth Amendment no person can be deprived of property without due process of law. The prohibitions}
and few things are more suggestive than the cavalier and even contemptuous manner in which masterly analysis of this phonographic theory was dismissed by members of the Bar Association of New York. We have here to recognize what Justice Holmes called the illusion of certainty, and that it is an essential part of the concept of natural law.

Americans having discovered the usefulness of natural law, elaborated it, and having justified its application by success, protected that success by transforming natural into constitutional law: the state and federal constitutions. And in so far as natural law had found refuge in written law, there was little reason to invoke it; it was automatically invoked whenever the constitution was invoked, and this was the logic of Marshall in the Marbury case. There were, to be sure, occasions when judges of state and federal courts found it desirable to suggest natural law limitations distinct from and superior to even written constitutions, but the impressive thing is the paucity of such occasions in the first half century of our history.

Not indeed until the rise of transcendentalism in the eighteen-forties did the doctrine of the higher law become again significant, and then it was applied more realistically, more radically, and more need no strengthening comment. They are as absolute as axioms.” Dissenting opinion of Justice McKenna, in Block v. Hirsh, 256 U.S. 135. And as recently as 1937, we may read, “It is urged that the question involved should now receive fresh consideration . . . because of the 'economic conditions which have supervened,' but the meaning of the Constitution does not change with the ebb and flow of economic events.” Justice Sutherland, in West Coast Hotel Co. v. Parrish, 75th Cong. 1st Sess. Sen Doc. no. 46, p. 10.

See discussion of Prof. Cohen's address, in 38 Proceedings New York State Bar Association, 177.

Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put decisions in terms upon their views as lawmakers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion nevertheless.” Collected Legal Papers, 126. See also “The Path of the Law” ibid., 167, and W. N. Hohfeld, “Fundamental Legal Conceptions as Applied to Judicial Reasoning,” 26 Yale Law J. 711.


Corwin, Haines, and Wright are all agreed on this point.
honestly, than at any other time in our history.\textsuperscript{18} Judges such as Marshall, Chase, Story, or Kent, and their successors, were always under compulsion to circumscribe their interpretation of the higher law by written constitutions, precedents, and juridical philosophy; this left some room for intuition, but only in limited fields. Emerson, Channing, Parker, Sumner, Phillips and Garrison were embarrassed by no such considerations. They recognized readily enough that the higher law was intuitive, recognized it even where they made concessions to the scepticism of men by substantiating facts of intuition with facts of experimental observation. And they applied the higher law not only to the institution of slavery—the most familiar application—but to all human institutions: church, state, property, the family, and not the least of these was property.\textsuperscript{19} They challenged society to show, before the bar of reason, its title to the accepted order of things.\textsuperscript{20}

It was not difficult for philosophers to do this, only courageous, for consistency demanded the philosophical conclusion but did not require its practical application. Men breathed still the intellectual atmosphere of the enlightenment, lived in a universe guided by reason and guarded by a beneficent providence, cherished faith in virtue and in the ultimate authority of justice and morality. The appeal to the higher law was valid; it was inevitable. And it was made on behalf of human rights rather than of property rights.

It was, to be sure, a matter of emphasis. The Revolutionary Fathers had invoked the higher law on behalf of life and liberty as well as of property, but did not assume or even suspect the existence of any conflict; the transcendentalists discovered a basic conflict between liberty and property, and invoked the higher law on behalf of the former.\textsuperscript{21} Justice Shaw had already defined the police power,\textsuperscript{22} but

\textsuperscript{18} H. S. Commager, \textit{Theodore Parker} (Bost. 1936), passim.

\textsuperscript{19} See, for example, Parker's sermons on "The Mercantile Classes," "The Perishing Classes," "The Dangerous Classes," and "The Moral Dangers Incident to Prosperity" in \textit{Works}, Centenary Ed. vol. 10.

\textsuperscript{20} Emerson's "New England Reformers" is still the best account of this.

\textsuperscript{21} See for example Parker's sermon on "The Function of Conscience in Relation to the Laws of Men," \textit{Works}, vol. 11: "The law of God has eminent domain everywhere, over the private passions of Oliver and Charles, the special interests of Carthage and Rome, over all official business, all precedents, all human statutes, over all the conventional affairs of one man or of mankind. My own conscience is to declare that law to me, yours to you, and is before all private passions or public interests, the decision of majorities and a world full of precedents." For a fuller discussion, see Commager, \textit{op. cit.} chapter x, "Slavery and the Higher Law."

\textsuperscript{22} Commonwealth v. Alger, 7 Cushing 53 (Mass. Reports).
the possibilities of the police power for the regulation or even destruction of property devoted to anti-social or immoral uses was not apprehended. So transcendentalism, instead of formulating a socio-legal philosophy which would have permitted the state, in the exercise of its police power, to strike down slavery, intemperance, immorality, and the inequitable accumulation of wealth, encouraged instead a highly individualistic and personal repudiation of evil. It was a natural attitude, for transcendentalism is necessarily individualistic, but the failure of the transcendental reformers to socialize their conscience or to develop a legal instrument with which to implement their higher law concepts was significant. Had they been able to formulate a rationale for the identification of the individual conscience with the social conscience, had they been able, in short, to socialize the higher law, it is probable that much of the later conflict between due process and police power would have been avoided. It is probable, indeed, that the courts might have been forced to recognize the consonance of higher law and police power instead of arraying the two in opposition.

The world of reason, the universe of law, was shattered by the doctrine of evolution the kingdom of law gave way to the principalities of laws, the law of nature to the laws of men. Transcendentalism was abandoned for experimentalism, idealism for pragmatism. Science, theology, politics, education, economics even, all accommodated themselves to the new philosophy, all recognized the evolutionary and pragmatic character of their data. Yet the doctrine of natural law, repudiated in all the sciences and in most of the social sciences, found refuge in jurisprudence, or, at least, in the courts. It found not only refuge here, it found implementation.

This, the third chapter in the history of the higher law in America, begins properly with the due process clause of the Fourteenth Amendment. That clause was not a new one in our constitution, but it was new as a limitation upon states, and the meaning which was read into it was new. That property rights constituted one of the sacred trinity of natural rights was not a discovery of either Justice Field or Justice Brewer; the fact had been observed by the Fathers and adumbrated by the courts on numerous occasions. It was the singular achievement of the courts in the last half century to broaden immensely the concept of property, to read property into the concept of liberty, and to apply extra-constitutional guarantees to both by interpreting due
process as an implied limitation upon legislative action.23

This is a thrice-told tale. But what must be emphasized is that the court, in interpreting due process, police power, property, liberty, reasonable, fair return, public interest, public purpose, and so forth, has been engaged not only in legislation but in superlegislation.24 The function of the courts, in importing higher law doctrine into the constitution, has been constitutional rather than legislative merely, and it may be said that since the eighteen-eighties the Supreme Court has sat as a continuous constitutional convention. For the laws which the court has formulated are in very fact higher laws. They have not only legislative but constitutional validity. They are not subject to repeal, except through the most laborious and uncertain process, by ordinary political action.25

What we have to consider, then, is a body of legislation and of constitutional provisions, formulated by the courts with the particular purpose of protecting property against legislative restrictions or exactions. It would be superfluous to recall particular examples of such higher law legislation; it may be suggested that wherever the due process clause has been given substantive rather than merely procedural significance, and wherever police power has been challenged to show its credentials, such judicial legislation has occurred.26 It may


24 “The chief law-makers in our country may be and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process, liberty, they necessarily enact into law parts of a system of social philosophy; and since such interpretation is fundamental, they give direction to all law-making.” Theodore Roosevelt, Message to Congress, Dec. 8, 1908. “The Court in addition to the proper use of its judicial function has improperly set itself up as a third House of the Congress—a superlegislature, as one of the Justices has called it. . . .” F. D. Roosevelt, Address on Reorganization of the Federal Judiciary, March 9, 1937. “Denying that they are applying anything but the express terms of written constitutions the justices of higher courts in the United States have in effect created a super-constitution, a superior law which in certain respects is regarded as unchangeable by the people themselves.” Haines, Revival of Natural Law Concepts, p. 227.

25 The failure of President Roosevelt’s effort to reform the Federal Judiciary in 1937 is evidence enough on this point.

26 Note Judge Story’s reference to the due process clause of the Fifth Amendment: “This clause in effect affirms the right of trial according to the process and proceedings of the common law.” Commentaries on the Constitution, sec. 1789. The literature on this subject is immense. See especially, R. L. Mott, Due Process of Law. An Historical and Analytical Treatise, etc. (Indianapolis, 1926); L. P. McGehee, Due Process of Law Under the Federal Constitution (Northport, Long Island, 1906); E. Freund,
be suggested more specifically that every attempt by the judiciary to discover what property is clothed with a public interest, what action constitutes a public purpose, what occupations or what conditions are of a nature to justify state regulation, what constitutes liberty in the economic order, and what may be a reasonable and what a confiscatory return on investment, is higher law legislation.

And this judicial higher law, like all higher law, is intuitive and transcendental; Dean Pound characterized it more bluntly as "purely personal and arbitrary."

For, as Professor Corwin has recently ob-
served, "in relation to constitutional law . . . the constitutional document has become hardly more than a formal point of reference. For most of the Court's excursions in the constitutional sphere the constitutional document is little more than a taking-off ground; the journey out and back occurs in a far different medium of selected precedents, speculative views regarding the nature of the Constitution and the purposes designed to be served by it, and unstated judicial preferences."

These views and preferences are conditioned, to be sure, by precedents, but the choice of precedents is almost limitless, and recent decisions and dissents have revealed that judges rarely find themselves embarrassed by the absence of precedents that appear controlling on either side of an issue. The question, indeed, is not one of precedents, but of the choice of precedents, and what conditions this choice is what Mr. Holmes has called the "inarticulate major premise."

Whenever the court is called upon to determine whether mining is a hazardous occupation, whether labor in a bakeshop is fatiguing, whether warehouses, slaughter-houses, insurance, banks, ice plants, employment agencies, theatres, are businesses

nothing but a persistent assumption that these considerations must themselves take the form of, or at least be conceived as constituting, jural law." "The Law Behind the Law," 29 Col. Law Rev. 307.


There is an illuminating discussion of this in E. S. Corwin, Twilight of the Supreme Court (New Haven, 1934) ch. 3.

Many of the New Deal decisions have taken the form of elaborate debates between liberal and conservative members of the Court. Note Justice Harlan's frank statement in Monongahela Bridge Co. v. U.S. 216 U.S. 177 at 195: "The courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy consistent with the law, for acts . . . that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

"The Path of the Law," Collected Legal Papers, 167. "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious."


Munn v. Illinois, 94 U.S. 113. Slaughter House cases, 16 Wallace 36.

German Alliance Ins. Co. v. Lewis, 233 U.S. 389.


clothed with a public interest, whether women are physiologically different from men, whether the decision of a commission conforms to due process, whether a minimum wage or a limitation upon hours or a prohibition of a yellow-dog contract constitutes deprivation of property without due process, whether education, or the distribution of seed, or the amelioration of the lot of the blind are public purposes—whenever the court is called upon to decide any of these questions, it makes a choice of precedents and invokes the higher law to validate the choice.

The character of that choice becomes more apparent if we note some of the alternatives among which the Court has chosen. Why, for example, has the court permitted a liberal interpretation of due process where state control over personal rights was at stake, but insisted upon a narrow and traditional interpretation where regulation of property was involved? Why has the court chosen to read a

46 Muller v. Oregon, 208 U.S. 412 and Adkins v. Children's Hospital, 261 U.S. 525.
49 Bunting v. Oregon, 243 U.S. 426, and supra, note 37, 38.
50 Hitchman Coal and Coke Co. v. Mitchell 245 U.S. 229.
51 The Supreme Court of Missouri invalidated a law providing for progressive inheritance tax for purposes of scholarships at the State University. "Paternalism" said the Court, "is an assumption by the government of a quasi-fatherly relation to the citizen and his family, involving excessive governmental regulation of the private affairs and business methods and interests of the people . . . and is pernicious in its tendencies. . . . Paternalism is a plant which should receive no nourishment upon the soil of Missouri."
52 State v. Oswakee Township Kansas, 418 invalidating a State law providing for the free distribution of seed to farmers.
53 Lucas Co. v. State 75 Ohio, 114, invalidating a county ordinance providing for allowances to indigent blind. "If the power of the legislature to confer an annuity upon any class of needy citizens is admitted upon the ground that its tendency will be to prevent them from becoming a public charge," said the court, "innumerable cases may clamor for similar bounties, . . . and it is doubted that any line could be drawn short of an equal distribution of property."
54 See for example Spies v. Illinois, 123 U.S. 131, Brooks v. Missouri, 124 U.S. 394, and, above all, Hurtado v. Calif., 110 U.S. 516. In his dissent in Maxwell v. Dow, Justice Harlan said, "If due process of law, required by the Fourteenth Amendment does not allow a state to take private property without just compensation, but does allow the life and liberty of the citizen to be taken in a mode that is repugnant to the settled usages and modes of proceeding authorized at the time the constitution was adopted . . . it would seem that the protection of private property is of more consequence than the protection of the life and liberty of the citizen." 176 U.S. 581, at 614. And Holmes, in his dissent in the Frank case, expressed the same idea even more bluntly: "We see no reason
broad interpretation into the word property, but a narrow interpretation into the phrase property clothed with a public interest? Why has it seen fit to sustain uniformity of railroad rates in intrastate as well as interstate commerce as a proper instrument for regulation, but rejected protection of the right of railway labor to organize as an improper extension of the commerce power? Why has it recognized the concept of public purpose and public interest with reference to the advantageous exploitation of natural resources, but not with respect to the advantageous conservation of human resources? Why has it imported the rule of reason into the Sherman Act with respect to industry but ignored it with reference to labor? The questions could be multiplied almost indefinitely, but these will suffice for illustration. In no instance was the answer inescapably determined by the words of the Constitution and by precedents. In every instance the answer was given on the basis of considerations of higher law imported into the Constitution by the judges themselves.

We come here, at long last, to the business of the constitutional historian. In so far as our constitutional history, especially since the Fourteenth Amendment, is judicial legislation inspired by higher law, his business is to trace that legislation and analyze that law. The for a less liberal rule in a matter of life and death." Frank v. Magnum, 237 U.S. 309. See also J. R. Commons, Legal Foundations of Capitalism, p. 341 ff.


See the thoughtful remarks in Goodnow, Social Reform and the Constitution, p. 325 ff., and citations.

It is unnecessary here to recapitulate the long history of judicial review of wage and hour, tenement house and factory inspection and compensation legislation. Ives v. South Buffalo, 201 N.Y. 271 and Adkins v. Children's Hospital, 261 U.S. 525, are typical.


I imply that a "rule of reason" for labor would have resulted in a different decision in Duplex Printing Press Co. v. Deering, 254 U.S. 443, and in Bedford Cut Stone Co. v. Journeymen Stonemasons, 274 U.S. 37, both involving some phase of the secondary boycott.
historian certainly cannot be content with recording the conclusions of the court, as if they were self-explanatory. Conclusions may be sufficient for the professional lawyer and are—if we may trust the case books—sufficient for constitutional law, but the historian can no more read constitutional history through decisions than he can read political history through statutes. He is required to discover the philosophical and temperamental bases of judicial legislation, required, particularly, to discover the nature of the higher law concepts which control so many of the more important decisions.

We live under governments whose limits are set by courts, and with reference to intuitive ideas that find expression in the slippery phrases of due process, police power, liberty, public purpose, and so forth. Nor are these limits negative merely; the application of limitations is a positive act. Yet we lack appreciation of the nature of these intuitive concepts, and we lack a codification of legislation inspired by them. We confess that the judiciary is a constitutional convention, but we have not inquired into its membership, credentials, purposes or achievements; we confess that it is a legislative chamber, but we do not know what laws it has made. We have not even analyzed the psychology of popular acquiescence in the higher law, though it constitutes obviously a basic paradox in our political system. How does it happen that democracy not only tolerates but encourages the application by courts of higher law restrictions upon itself? Hamilton, who approved of judicial review, pointed out that abuse of this power, if it ever occurred, would be speedily rebuked by impeachment; how does it happen that the sanction of impeachment, as a weapon of democracy, has never been effectively invoked to restrain judicial

62 "We are governed by our judges and not by our legislatures. . . . It is our judges who formulate our public policies and our basic laws." Bruce, The American Judge (N.Y. 1924) p. 6, 8. On judicial government see also Brooks Adams, The Theory of Social Revolutions (N.Y. 1914), Cardozo, Nature of the Judicial Process (New Haven, 1921), Holmes, The Common Law, p. 34 ff.

63 The Federalist, No. 81. "It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, . . . is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. . . . And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body and of determining them in another, would give to that body upon the members of the judicial department. This is alone a complete security. . . ."
abuse of power? An elective rather than an appointive judiciary held promise of articulating the courts to democracy; can it be shown that elective judges have been less eager to apply higher law limitations upon democratic processes than have appointive judges?⁶⁴

The fact is that a certain divinity has hedged the court and its cabalistic oracles, until it has come to seem almost blasphemous for historians to suggest that the court is a political institution or that jurisprudence is sociological, though deans of law schools may, apparently, make these observations with impunity.⁶⁵ The historian has no hesitation in investigating the mechanism of the legislative or executive departments or the history of tariff or land or banking legislation, but he has avoided a realistic consideration of the mechanism of the judiciary or the history of judicial legislation. He abandons Plutarch and embraces Boswell or even Strachey as a model for political biography, but he has scarcely attempted to write biographies of judges, and when he does he dons his most sombre robes.⁶⁶ He assumes cheerfully enough the rôle of social or economic or intellectual historian where the executive or legislative departments are concerned, but does not willingly confess the same technique applicable to the study of courts.

Yet the character of the modern higher law, subjective as it is, is no more elusive than the character of Jeffersonian democracy or Manifest Destiny or other concepts which the historian has managed to pin down and survey. Certainly it is subject to investigation and susceptible to interpretation. We cannot discover with finality just how and why the court imported into the Constitution higher law doctrines of laissez-faire capitalism, any more than we can discover with finality just how American business embraced Spencerian philosophy. But we can achieve an awareness of the fact and we can perhaps illuminate the process.

⁶⁴ Dean Frank Sommer of the New York University School of Law has investigated this subject and concludes that elective judges are, on the whole, no more responsive to democratic opinion than are appointive judges.


⁶⁶ See for example the reverent approach of Beveridge in his biography of Marshall or of Trimble in his recent Waite. Only Silas Bent, Justice Oliver Wendell Holmes (N.Y. 1932) and Mason, Brandeis and the Modern State (Princeton, 1933) escape the taint.
"The very considerations which judges so rarely mention," said Justice Holmes, in his memorable study of the *Common Law*, "and always with an apology, are the secret roots from which the law draws all the juices of life. I mean, of course, considerations of what is expedient to the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. What Judge Holmes had in mind was in part, and only in part, the intellectual climate in which judges lived and wrote. Thus it is easy to discover the judicial reaction to the philosophy of laissez- faire, easy to remark, as Holmes himself remarked in the most hackneyed of his asides, that judges wrote into the Constitution Herbert Spencer's *Social Statics*. We need not subscribe to Mr. Dooley's conclusion that the Supreme Court follows the election returns in order to appreciate the facts that courts cannot be insensitive to public opinion nor fail to reflect it; a comparison of the New York and the Washington minimum wage decisions, the Schechter and the Jones and Laughlin cases, illuminates this generalization. Nor is it an original observation that judicial opinions are often political as well as constitutional. We know that *Marbury v. Madison* was concerned

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67 *The Common Law*, p. 35-36. See also, dissenting opinion in *Vegelahn v. Guntner*, 167 Mass., 92: "The true grounds of decisions are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes," and perspicacious observations in "The Path of the Law," *Collected Legal Papers*: "I think that the judges themselves have failed to recognize their duty of weighing considerations of social advantage. . . . I cannot but believe that if the training of lawyers led them habitually to consider more distinctly and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions." p. 184.


with something more than the right of Marbury to his job,\textsuperscript{74} that \textit{Cohens v. Virginia} squinted toward state rights,\textsuperscript{75} that \textit{Scott v. Sandford} was designed to allay sectional antipathies,\textsuperscript{76} that the Milligan case was a declaration against political radicalism\textsuperscript{77} and the Pollock decision directed against the rising tide of socialism,\textsuperscript{78} and we may suspect that recent decisions on New Deal legislation were not announced in a judicial void nor uninfluenced by the threat of judicial reform.

But it is equally obvious that the intellectual air which judges have breathed is conditioned; every judicial invalidation of a legislative act proves that the air of the court room is not the same as the air of the legislative chamber. It is not sufficient, then, that we discover the explanation for \textit{Chicago, Milwaukee and St. Paul v. Minnesota},\textsuperscript{79} or \textit{Smythe v. Ames},\textsuperscript{80} or \textit{in re Jacobs},\textsuperscript{81} or \textit{Lochner v. New York},\textsuperscript{82} or \textit{People v. Williams},\textsuperscript{83} or \textit{Adair v. U.S.},\textsuperscript{84} or \textit{Ives v. South Buffalo},\textsuperscript{85} or \textit{Hitchman Coal Co. v. Mitchell},\textsuperscript{86} or \textit{Hammer v. Dagenhart},\textsuperscript{87} or \textit{Adkins v. Children's Hospital}\textsuperscript{88} and scores of similar decisions in general ideas of laissez-faire. Legislators who voted affirmatively for the acts invalidated by these decisions were equally exposed to ideas of laissez-faire, and rejected them.

The historian has to recognize that in tracing the formulation and application of the higher law he is concerned with a body of philosophy which has been cherished especially by the judiciary. For, as Dean Pound has observed, "We must admit the divergence between legal thought... and economic and sociological thought.... Hence we have not merely to ask, what is the legal idea of justice? It is of no less moment to know why this idea differs from the economic and sociological idea of justice. We have to ask, why did the legal idea come to be what it is, and why does it so persistently remain such?"\textsuperscript{89}

But there is a preliminary observation which must be made if we are to understand why the judicial differs from the political atmosphere, even in a democracy. We must realize that the law, like

\textsuperscript{74} 1 Cranch. 137.
\textsuperscript{75} 6 Wheaton. 264.
\textsuperscript{76} 158 U.S. 601.
\textsuperscript{77} 2 Wallace. 2.
\textsuperscript{78} 19 Howard. 393.
\textsuperscript{79} 169 U.S. 466.
\textsuperscript{79} 134 U.S. 418.
\textsuperscript{80} 189 N.Y. 131.
\textsuperscript{81} 198 U.S. 45.
\textsuperscript{81} 201 N.Y. 271.
\textsuperscript{82} 245 U.S. 229.
\textsuperscript{83} 98 N.Y. 98.
\textsuperscript{84} 247 U.S. 525.
\textsuperscript{84} 220 U.S. 161.
other faiths, lives by symbols, and that two symbols most passionately cherished are those of Reason (a brooding omniscience in the sky, Holmes called it) and of consistency. We demand of law that it should be both philosophy and science, and we call it jurisprudence, we sternly require of judges that they justify their pronouncements upon more than opportunistic grounds. And it follows from this popular image of the law as a science that we demand consistency; it is indeed a common observation that certainty in law is more important than justice.

We expect our judges, then, to be both scientific and consistent, but we do not expect our legislators to be either scientific or consistent, and we have rejected a statesman who tried to be an engineer and embraced enthusiastically one who avowed the opportunistic policy of the football quarterback.

Now there is nothing either scientific or consistent about the higher law, in actual experience; and the words due process, reasonable, and liberty have no precision. Yet when judges fall back upon the higher law, they appear to be conforming to the ideal of a law of nature, and thus satisfy the demand for reason and consistency in law. Actually judicial higher law, as we have seen, is moral law, and when judges invoke it they speak as the conscience of political society. But moral attitudes are determined, in large part, by intellectual

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91 "The truth is" wrote Holmes, "that the law is always approaching and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other. . . . It will become entirely consistent only when it ceases to grow." *Common Law*, 36 Arnold has some shrewd comments on the necessity of the appearance of consistency, *Symbols of Government*, p. 49.
93 Even Justice Holmes subscribed to this doctrine. See, "The Path of the Law," *Coll. Legal Papers*.
95 "We must begin by ourselves understanding that the constitutional provisions which are contained in our bill of rights in the state and federal constitutions are moral principles, as weighty in moral authority and as vital to the safety of society as any that have ever been promulgated, not even excepting the golden rule. After that we must teach the people. We must make them understand that constitutional rights are moral rights, and . . . that they must never try any experiments which will imperil those moral rights." *Report* of Special Committee . . . to Consider the Question of an Amendment to the Constitution of the State of New York Empowering the Legislature to Enact a Workmen's Compensation Law. p. 17.
inheritance and environment, and the moral attitudes of judges, as expressed in the higher law, reflect an individual or a professional philosophy of life. "The words of the constitution," as Professor Frankfurter has recently said, "leave the individual justice free, if they do not compel him, to gather meaning not from reading the Constitution but from reading life. . . . The process of constitutional interpretation compels the translation of policy into judgment, and the controlling conceptions of justices are their 'idealized political picture' of the existing social order. Only the conscious recognition of the nature of this exercise of the judicial process will protect policy from being narrowly construed as the reflex of discredited assumptions or the abstract formulation of unconscious bias."97

In the last analysis, then, history, in so far as it takes cognizance of the legislative character of higher law pronouncements, comes back to judicial inheritance and environment, and to judges individually and collectively. Judges are in society, but insulated from it. They are students and scholars, but concerned daily with practical problems of the most complex and urgent nature. They are recruited from and servants of a capitalist economy, but barred from personal participation in that economy. They are part of a democratic political system, but aloof from it. Their function is to pronounce law as immutable justice and to interpret the law as the will of the sovereign.98 Needless to remark, they cannot meet these contradictory specifications, perform these contradictory functions. But what determines the choices which are made?

We may suggest here a few of the more obvious factors which require consideration: the rôle of the bar, and of arguments of counsel; the nature of professional training; the influence of the great commentators and text-writers; and the character of the judges themselves. We must begin with the bar, rather than the bench, and this not only because our jurists are trained first to professional life, but because the interaction of bar and bench is continuous. Most of our justices have been recruited from the bar; it is not inconceivable that the tendency of the bar, in the last half century, to become an adjunct to corporate business, has had some influence upon the judicial view of economic questions. Nor can we ignore the fact that the

psychology of the bar is transferred, imperceptibly to the bench; that partisanship cannot become impartiality overnight, nor alertness to technicalities become sublimated to anxiety for principles.

Mr. Gustavus Myers is the only historian of the Court who has attempted to discover, in a realistic way, the professional training and interests of the members of the highest bench, but even Mr. Myers has failed to appreciate the influence of the bar on the bench through arguments of counsel, and historians have largely ignored this factor, until it might be supposed that judicial information was acquired by inspiration. We are reminded, to be sure, of the impassioned appeal of Webster in the Dartmouth case, the eloquent argument of Pinkney in the McCulloch case, the surprising gesture of Conkling in the San Mateo case, the perfervid demagoguery of Choate in the Pollock case, and the famous Brandeis brief in the Muller case, but these exceptional instances have been noted rather for their dramatic qualities than for their constitutional significance. Yet the economic and sociological complexities of modern cases make the court in large measure dependent upon the facts and briefs presented by counsel.

There is, of course, the important reservation that the choice which judges make from opposing briefs will depend in part upon the prepossessions of the judges themselves. Yet it is not quite true, as Mr. Justice Sutherland acrimoniously remarked, of the minimum wage legislation that "the elucidation of that question cannot be aided by counting heads." Quantitative as well as qualitative considerations do weigh with judges, and it is well to recall Mr. Justice Cardozo's recent observation, apropos social security legislation, that "it is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed... is a use for any purpose narrower than the promotion of the general welfare." However much, or little, confidence judges may place in counsel, it remains true that they are dependent upon counsel for facts; when the history of constitutional decisions is writ-

99 Gustavus Myers, History of the Supreme Court (Chicago, 1918).
102 Adkins v. Children's Hospital, 261 U.S. 525.
103 C. C. Steward Machine Co. v. Davis, 57 Supreme Court Reporter, 883.
ten without reference to this source of information, it is written in a vacuum.

Equally important is a consideration of the professional training and equipment of judges. It may be observed, for example, that one explanation for the popularity of the higher law in the early years of the Republic was that no other law was available; lacking collections of cases, precedents, judges were forced to fall back upon their own conceptions of law. The reason has disappeared, but the habit has continued. Or, to look to modern conditions, it is suggestive that deans of law schools and editors of law journals complain with monotonous regularity of the inadequacy of the teaching of constitutional law and history; it is no less significant that until recently, and in a very few schools, the economic and sociological aspects of jurisprudence have been neglected. For every Brandeis familiar with economics, for every Holmes versed in literature, for every Cardozo learned in philosophy, there are a dozen judges who regard such learning as esoteric if not irrelevant.

Nor has the decisive influence of great expounders of the law upon our constitutional system been appreciated by the historian. The most recent, and best, constitutional history of the United States does not think it necessary to mention Judge Cooley or his Constitutional Limitations, though the author once edited Cooley's own Principles of Constitutional Law in the United States. We lack almost entirely studies of bar associations, law schools, the great teachers and text-writers of the past whose teachings have moulded American judicial thought from the days of Wilson and Story and Kent to those of Gray and Thayer, Cooley and Dillon.

Finally, we come to the judges themselves. If law is fixed and immutable, and if the function of judges is *jus dicere* only, and *jus*

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104 When Kent became Chancellor of New York State, in 1814, he was able to say "For the nine years I was in that office (court of equity) there was not a single decision, opinion, or dictum of either of my predecessors ... from 1777 to 1814 cited to me or even suggested." Quoted by Pound, "Judge Story and the Making of American Law," 48 *Am. Law Rev.* 676 at 683. See also J. Goebel, "The Courts and the Law in Colonial New York," *History of the State of New York*, vol. 3.


107 See comments by Pound, 48 *Am. Law Rev.* 676. Three of these teachers are subjects of old-fashioned memoirs, but there is no critical analysis of the contribution of any one of them.
dare belongs to God, then there is logic in judicial anonymity. But few now subscribe to this phonographic theory of the law, and the opposition to the appointment of Mr. Brandeis or of Mr. Black to the highest court indicates that the rôle of the judges in making law is acknowledged. Yet we know shockingly little about our judges. Of some four score judges who have sat upon the Supreme Court we have biographies of perhaps a dozen, and acceptable biographies of half that number. If we look to the state courts the situation is even more scandalous. Kent, Shaw, Gibson, Ruffin, Doe, Cooley, Dillon, Clarke, to mention only some of the more eminent, all want biographies. Nor can it be alleged that those studies vouchsafed us illuminate the rôle of the judges in reading higher law into the Constitution. The parts played by Marshall, Taney, Field, Lamar, Harlan, Brandeis and Holmes have been, after a fashion, revealed, but constitutional biography, like constitutional history, has evaded the crucial question of the nature of the judicial process and the creation and re-creation of the higher law.

If much of this is obvious, we can find refuge in Justice Holmes' observation that "we need education in the obvious more than investigation of the obscure." I have suggested that the higher law is intuitive, personal law, and that it persists down to the present. Used originally as a substitute for written law, it came to be embodied in written law, but continued an independent existence. In the hands of the mid-century reformers it became a weapon on behalf of human and against property rights, but the individualist approach of the transcendentalists prevented at this time the formulation of a higher law concept of police power that would command the approval of the courts and commend itself to society. With the Fourteenth Amendment began a new and increasingly important chapter in the history of the higher law. Largely through interpretation of due process, higher law was imported into the Constitution, and generally as a

108 Otis, Rights of the British Colonies, etc. p. 70.
110 There are biographies, some excellent, some passable, a few wretched, of Jay, Iredell, Marshall, Story, McLean, Taney, Curtis, Miller, Field, Chase, Waite, Lamar, Holmes, Brandeis, Harlan, Taft, Cardozo. Only those of Jay, Marshall, and Taney can be called definitive.
111 "Law and the Court" Coll. Legal Papers, 292.
limitation upon legislative control of property. This interpretation, taken collectively, constituted judicial legislation and constitution-making upon subjects of utmost importance; and the character of the new legislative and constitutional provisions was determined by the judicial view of the nature of society, the function of government, the relative importance of personal and property rights, and similar considerations. We can discover, more particularly, the nature of that legislation by an inquiry into those factors which have conditioned it: the symbolic rôle played by judges and courts, public opinion, political considerations, the judicial climate of opinion, the influence of the bar, of professional training and scholarship, and the character and career of the judges themselves. When we have achieved a codification of natural law and an appreciation of the nature of the judicial process, we shall be in a position to record our constitutional history in more realistic terms.

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