Michigan Law Review

Volume 79 | Issue 4

1981

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Recommended Citation

Alfred S. Konefsky, *On The Early History of Lower Federal Courts, Judges, and the Rule of Law*, 79 MICH. L. REV. 645 (1981).

Available at: <https://repository.law.umich.edu/mlr/vol79/iss4/8>

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ON THE EARLY HISTORY OF LOWER FEDERAL COURTS, JUDGES, AND THE RULE OF LAW

*Alfred S. Konefsky**

THE POLITICS OF JUSTICE: LOWER FEDERAL JUDICIAL SELECTION AND THE SECOND PARTY SYSTEM, 1829-1861. By *Kermit L. Hall*. Lincoln: University of Nebraska Press. 1980. Pp. xvii, 268. \$19.50.

FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816. By *Mary K. Bonsteel Tachau*. Princeton: Princeton University Press. 1978. Pp. ix, 234. \$16.50.

Kermit Hall and Mary Tachau have written books that at first glance appear to complement one another in adding to our slim knowledge about lower federal courts and their judges in post-Revolutionary and antebellum America. Each, however, has a different historical approach. Tachau is thoroughly phenomenological and eschews most theoretical inquiry, while Hall confines his analysis within the parameters of antebellum political history. Both authors are sound historians, but neither quite knows what to do with his findings. Although Hall is better than Tachau in wrestling with the significance of the historical data, neither appreciates fully where the facts stand in relation to the big picture. Since I cannot convey in a short review what Tachau and Hall have mined in the way of historical detail, I will focus on only one problem that the books raised by implication: where the events presented could fit into the current debate over the historical role of the rule of law.

Professor Tachau's book is built upon a formidable research base. She has examined the hitherto ignored 2,290 cases that came before the federal district court in Kentucky between its inception in 1789 and the death of the original district judge, anti-Federalist Harry Innes, in 1816. Her general argument is relatively straightforward: Innes's court enjoyed a sound reputation within the potentially hostile Kentucky community because it was accessible and

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responsive, and eventually provided "the most visible" and stable "link" (p. 191) between the West and the federal government. To support her thesis, Tachau provides material on procedure, private civil suits, criminal cases, land disputes, and the enforcement of the internal revenue laws. Revenue cases accounted for about one third of the court's business during this period (pp. 6, 95). I would like to focus particularly on the attempt to impose and enforce the despised whiskey tax.

Tachau sets the historical scene well. Passed shortly after the birth of the new republic,

[t]he whiskey tax was designed by Secretary of the Treasury Alexander Hamilton to defray the cost to the federal government of its recent assumption of the debts of the states. Most Kentuckians thought that they had already done their part in absorbing state debts by accepting depreciated currency and by purchasing Virginia treasury warrants for Kentucky lands, which were proving to be worth little more than the paper they were written on. They strongly objected to paying taxes to a government that seemed uninterested in solving either of their most pressing problems: protecting them from the Indians or securing the free navigation of the Mississippi from the Spanish. Moreover, a tax on domestic distilled spirits appeared to them to be discriminatory because it did not fall equally on all parts of the country. It seemed unfair because whiskey was often the only common medium of exchange in the West, where specie was rare. And it seemed oppressive because it taxed their most valuable export. [P. 98.]

And so Kentucky resisted, not as violently as Pennsylvania, where federal troops were needed to suppress the famed Whiskey Rebellion, but nevertheless boldly and stubbornly. Kentuckians could resist without violence because they had acquired a powerful ally: the law as espoused by the federal district court. The legal challenge to the internal revenue laws employed evasive devices to ensure that the tax remained uncollectible.

Tachau richly details the federal government's attempts to enforce the whiskey tax. Her examination of conflicting legal and political strategies and her analysis of the intermittently arrogant and occasionally incompetent Federalist enforcement attempts is often perceptive, but her major effort is to tie together two significant historical ideas: first, the utilization of rigorous English common-law procedural technicalities and standards, and second, the surprisingly good local reputation of the Kentucky federal court. She overlooked, however, the most important and illuminating aspect of her findings, and in the process created, I think totally unconsciously, an historical illusion.

What Tachau has unwittingly uncovered is that Judge Innes's

handling of the whiskey tax prosecutions in Kentucky was a classic example of the manipulation of the rule of law. Judge Innes, a political ally of Jefferson, was systematically making it difficult, if not impossible, for any Federalist prosecutor to win convictions under the terms of an act promulgated by a Federalist Congress. By interposing the strict procedural standards of British common law, supposedly antithetical to the Jeffersonian world view, Innes protected anti-Federalist defendants who asserted their local customary rights to produce whiskey. He apparently had little compunction in using the law of the King's Bench, so admired by the Federalists, to further his own Jeffersonian political principles. He thus managed to hamstring the effective administration of Federalist law by using a favorite Federalist device, English common law.

What does Innes's behavior say about the rule of law as an effective jurisprudential concept in early post-Revolutionary America? Was the rule of law, as symbolized in this instance by strict English procedural standards, simply raised, as any legal tool, somewhat cynically to serve a political, and certainly not neutral, function? These questions are worth inquiring into, but Tachau is apparently either unaware of or uninterested in the recent significant literature on the rule of law¹ to which her work might contribute. In ignoring these questions, unfortunately, she may have misperceived events. In her eyes, Innes quite naturally went about his business in bringing to the frontier the civilizing, neutral, dispassionate English jurisprudence that legitimated his judging. I suspect Judge Innes was smarter than that. If in fact, as Tachau contends, Kentuckians respected their federal court because it enforced the rigorous technicalities of English law, it seems unlikely that they did so out of devotion to English jurisprudence. Such faith would seem almost counterintuitive. What seems more likely is that Kentuckians respected Judge Innes because he was willing to use law, from whatever source, to reach appropriate political results. Law, therefore, was used to further politics. Kentuckians appreciated English procedure not for its neutrality, but for the services that it could perform in the guise of neutrality.

E.P. Thompson has written of early eighteenth-century England's Black Act that the rule of law

1. See, e.g., E. GENOVESE, *ROLL, JORDAN, ROLL* 25-49 (1974); E.P. THOMPSON, *WHIGS AND HUNTERS* 258-69 (1975); Hay, *Property, Authority, and the Criminal Law*, in *ALBION'S FATAL TREE* 17-63 (1975); F. NEUMANN, *The Change in the Function of Law in Modern Society*, in *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 39-43 (1957); Horwitz, *Book Review*, 86 *YALE L.J.* 561 (1977).

could not be reserved for the exclusive use only of . . . [a particular social] class. The law, in its forms and traditions, entailed principles of equity and universality which, perforce, had to be extended to all sorts and degrees of men. And since this was of necessity so, ideology could turn necessity to advantage. What had been devised by men of property as a defense against arbitrary power could be turned into service as an apologia for property in the face of the propertyless. And the apologia was serviceable up to a point: for these "propertyless," as we have seen, comprised multitudes of men and women who themselves enjoyed, in fact, petty property rights or agrarian use-rights whose definition was inconceivable without the forms of law. Hence the ideology of the great struck root in a soil, however shallow, of actuality. And the courts gave substance to the ideology by the scrupulous care with which, on occasion, they adjudged petty rights, and, on all occasions, preserved proprieties and forms.²

Thompson's insights seem particularly applicable to Judge Innes's response to the whiskey tax. By applying English procedural standards — in manipulating the rule of law — Judge Innes nullified positive law and in effect reaffirmed customary law. The rule of law thus apparently preserved the integrity of certain neutral and unsailable legal principles. But there may have been a hidden cost. Though from the perspective of Kentucky whiskey distillers an appropriate and justifiable outcome was reached, the hidden message was that the rule of law could just as easily be used, in different hands, to suppress conduct that most would recognize as legitimate. The rule of law can only pretend to be neutral. Judge Innes intuitively understood that, conveniently situated, it could be used to justify the elevation of one set of political principles over another only as long as the appearance of neutrality was maintained. In the face of diametrically opposed political views, the rule of law cannot guarantee that the appearance of evenhandedness and neutrality will avoid conflict. This is an underlying theme of some interest and importance in Kermit Hall's book.

Hall has written a very able book describing the politics of the

2. E.P. THOMPSON, *supra* note 1, at 264. In the concluding portion of his book, Thompson is concerned with the complex relationship between the rule of law and class relations, and in particular the extent to which law mediated class relations. In reviewing Tachau's book, I cannot directly address Thompson's theoretical revisions of traditional Marxist thought. First, I do not know anything about class relations in Kentucky circa 1800, and second, Tachau's book, one of the few sources available to me on the subject, does not tell me anything useful. All that appears from the litigation, an extremely risky source from which to generalize, is that the people against whom the federal government sought to enforce the federal law *seemed to be* either individuals relatively isolated from the central government seeking to maintain their customary rights or Jeffersonian political partisans of some prominence. (The tax collectors, of course, were Federalists.) Standing alone, this record does not prove that class conflict existed. I am far more interested, though, in the theoretical implications of Thompson's broader point about the rule of law as rule of law, pure and simple.

selection process for federal district court and territorial court judges from the presidencies of Andrew Jackson to James Buchanan — the period of the second party system.³ Hall argues that “the distribution of political influence through the judicial patronage during the era of the second party system can be viewed in the context of political modernization” (p. xv). To determine whether lower federal court judicial selection is an example of “political modernization,” Hall focused on two criteria: first, “the extent to which the progress became institutionalized,” and second, “the degree to which a functional elite replaced a traditional elite” (p. xv). Institutionalized judicial selection “tends to become formal, impersonal, automatic, and bureaucratic” (p. xv), almost Weberian, as it becomes more modern, and as a result “nominees for appointment to public office are usually selected on the basis of special training and experience” (p. xv), and become somehow “functional.” The movement, then, is away from “traditional” expressions of political behavior, such as the selection of judges through “an informal hierarchy of kinship and friendship relations” (p. xv), which was supposedly symptomatic of presidential lower federal court appointments in the first American party system dominated by Federalists and Jeffersonians. The vehicle with which the transformation was accomplished, according to Hall, was the disciplining force of party politics as practiced by Whigs and Democrats. Parties rationalized what was once left to traditional kinship and friendship ties. The role of parties can best be appreciated by tracing the interaction of two constraints: those that emerged from members of the political party in control, in this case, the gradual rise of an early form of senatorial courtesy, and those that emerged from the “executive branch’s internal organization” (p. xvii), in this case the allocation of the president’s control of the political patronage process for judicial selection.

In enormous, almost numbing, detail, Hall takes us through a painstaking re-creation of the judicial selection process in a great number of appointments in every presidential administration from 1829 to 1861. (I never thought, for instance, that in order to pay my dues as a legal historian, I would be required to read twenty pages on the lower federal court appointments of Millard Fillmore.) Along

3. Hall captures the current historiographical characterization of the second party system: [S]o called to distinguish it from earlier party competition between Federalists and Jeffersonians, [it] began with the election of Andrew Jackson in 1828 and ended with the election of Abraham Lincoln in 1860. The second party system was the product of a distinctive political culture in which popular participation and partisanship replaced social deference and disdain of party.

P. xiii (footnote omitted).

the way, we are treated to mostly pithy, sometimes cryptic, and occasionally perceptive descriptions of the internal dynamics of the various appointments. Hall describes who was proposing whom, where the proposers, opposers, and prospective nominees stood within the various factions in the state parties (there were many factions — Whigs and Democrats were hardly monolithic), where the same clusters stood in light of the distribution of power in the House and the Senate, and what the aspirations of the various presidents were as they created and then attempted to enforce standards in the appointments process.

Hall shows a fine command of both the different political situations and the general tendencies and trends. A number of institutional developments did occur — interested senators and congressmen tended to assert greater control over time, stepping into the increasing power void created by undisciplined, squabbling, party organizations and weak presidents without natural constituencies. Eventually responsibility for screening and managing judicial patronage appointments was transferred from an overburdened Secretary of State to a less burdened and seemingly more qualified Attorney General. Not surprisingly, however, traditional kinship and friendship ties lingered to a degree despite the increasingly “modern” institutionalization of appointment criteria, as appointment “mediators” continued to emphasize that these ties could cement political alliances.

Whether all of this is more “modern” in comparison with other historical stages or periods is not an issue on which I have a position. What does strike me as interesting is another theme illustrated by the pattern of appointments — a pattern that emerged as the Civil War approached. Sectionalism and slavery dominated the debates about, and the perceptions of the prospective appointees.⁴ Particularly as

4. In addition to analyzing the political considerations that led to appointments, Hall also includes a substantial amount of very valuable prosopographical data on all the lower court federal judges appointed during this period. In the process, a kind of input-output problem is raised. Hall organizes his material in two ways: internally, comparing both district court to territorial court appointees, and Whig to Democratic presidential appointees; and externally, comparing the post-1829 appointees to those of the pre-1829 period. (One problem is that the book fails to make the comparison to the pre-1829 group on the basis of the judicial selection process itself. We are, more or less, left assuming it was different.) Hall quantifies a good deal of social historical material — social origins, social standing, education, age, and political activism. It turns out that on the social status side of the equation, there were few internal or external differences. Both Whigs and Democrats appointed judges largely from the same “elite or prominent” social class, and ignored those candidates who had only “modest” roots. And the differences between pre-1829 appointments and post-Jacksonian appointments is statistically quite small. In short, judges generally came from the same social “class,” as difficult as that term is to define, from the Revolution to the Civil War. This fact raises several interesting questions. Not the least of these is how the similarity in class origin (one form of input)

Democrats Pierce and Buchanan grappled with the dual legacy of the Mexican War — expansionism and slavery — and attempted to forestall “the impending crisis,” a curious kind of compromise developed. The compromise was based on the perceived need, on the eve of the disintegration of the Union, to appoint judges, in both the North and South, who understood the necessity of imposing the rule of law on the threatened chaos.

The compromise was affected with an eye toward finding a solution to the moral problem of slavery. The rise of the Republican party in the 1850s was built on the failure of Democrats and Whigs to confront successfully the moral failings of the state. The legal necessity of preserving the Union “added political fervor to the notion that in a society paradoxically committed to slavery and human freedom, moral obligation derived from the individual’s rather than the state’s understanding of the law” (p. 130). “Sectional harmony” (p. 149) became the preferred solution. The search for “harmony” intruded itself into the judicial selection process as well as other aspects of national life since judges were likely to have to make important decisions affecting various aspects of slavery under the Constitution.⁵ Therefore, it was important to appoint judges who had the true interests of the Union at heart. Judicial appointments were made to capitalize on and exploit “the *image* of a disinterested judiciary” in order to promote “sectional harmony” (p. 149). In theory, the implementation of this program was easy. As long as one could find “qualified” judges, politically qualified of course, one could insure success. Federal district judges “in the free states would enforce the Fugitive Slave Law; their slave-state counterparts would supervise prosecutions of violators of the neutrality and slave trade laws” (p. 149). The commitment to the equal enforcement of the

affected the evolutionary pattern of private-law legal doctrine (the output). Obviously the problem of grappling with enough variables to get an effective model for evaluating judicial behavior is incredibly complex. But it is an intriguing thought, given that we know so little about these early judges, that social class may be an important factor in determining ideology. Obviously social class does not *necessarily* determine ideology. There can be vast ideological differences within a social class. But it does appear that lower court federal judges were for a long time socially homogeneous. The similarities may warrant further inquiry.

5. It does not appear from Hall’s study whether the judges appointed in the last decade or so before the Civil War had any substantial impact on the legal issues surrounding slavery. Hall makes no attempt to evaluate doctrinal output based on or matched to the political criteria isolated in the appointments process. He follows, for instance, no individual judicial careers. Though beyond the parameters of Hall’s study, such an evaluation would have proved useful in measuring, even in Hall’s terms, the effectiveness of the modern, party-directed appointment trend. Finally, for a useful study of how courts dealt with the legal aspects of slavery, see P. FINKELMAN, *AN IMPERFECT UNION* (1981).

law, North and South, free and slave, was designed to defuse the potential conflict between moral principles.

This strategy failed. As Hall points out:

Equal federal enforcement of the laws did not mean equal justice. The legal perpetuation of slavery compromised the legal institutions of the nation to such a degree that the doctrine of judicial impartiality came to be seen as a violation of the moral imperatives of the more radical element of the Republican party. [P. 149.]

In a sense, then, the Civil War became a crisis of law and order because law could not carry the burden of moral violation. The rule of law, appearing neutral, assumed totally artificial importance — a mere symbol powerless to prevent the oncoming confrontation. The legal idea of constitutional union could not incorporate the moral conception of freedom. What appeared neutral and unassailable — the equal enforcement of the law — could not disarm the moral assault on the law's integrity. What reliance on the rule of law had established was that equality does not necessarily mean freedom. The attempt to use law to suppress the moral dilemma ultimately failed, and with it, the right of law to command our unqualified respect.

Though the reasons for the failures of the past may eventually become clear, it is not altogether obvious how they might aid us in arriving at what our present alternative visions, hopes, or social theories ought to be. It is not even apparent that we consistently understand what we ought to avoid. What Tachau and Hall have done is to give us more grist, in very fine historical detail, for the mill.