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Rodell: Nine Men: A Political History of the Supreme Court of the United States from 1790 to 1955

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NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT OF THE UNITED STATES FROM 1790 TO 1955. By *Fred Rodell*. New York: Random House. 1955. Pp. xii, 338. \$5.

Students of constitutional law and of government realize the importance of studies of the Supreme Court as an institution, and of individual justices who make up that institution, as an aid to the understanding of the functioning of the judicial branch of our government. The Court, in its interpretation and application of the provisions of our Constitution, determines, possibly more effectively than either the legislature or the executive, the kind of government we have and are destined to have in the future. It can hardly be over-emphasized that what these nine men do to our present and our future largely depends upon the background, environment and experience of the individual justices. Therefore a political history—perhaps better still, a political, economic and social history—of the United States Supreme Court is something that every serious student of government and of the Constitution awaits with great anticipation, and, because the

present volume seems to have done little to fill the need, the next announcement of such a study will be awaited with equal anticipation. Perhaps this inadequacy would necessarily be true of any volume of such small proportions addressed to so large an undertaking, but this book is criticized principally for its excesses of bad taste in expression and its near personal slanders which seem to serve no other purpose than to relieve some apparently extreme personal feelings of the author.

Probably no careful student of the work of the Supreme Court, or even of public affairs in general, is likely to disagree wholly with the major premise on which the book proceeds, or the early basic assertions suggested by the title of Chapter One (characterizing the Court as "Powerful, Irresponsible, and Human"), that an understanding of the court's work requires a consideration of the political, social and economic background and outlook of the individual justices. One can also embrace the conviction implied in the quotation from Abraham Lincoln that, "Our judges are as honest as other men and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. . . . Their power is the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control," without being willing to accept the assertion of complete irresponsibility and complete subservience to partisan political advantage so vigorously asserted by the author. It can be true that there are decisions that fully justify Justice Stone's admonition in dissent in the *Butler* case that "the only check upon our own exercise of power is our own sense of self-restraint," and Justice Holmes' earlier castigation of a majority in a state tax case when he said, "As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights [constitutional rights of the states] if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the [Fourteenth] Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions." Yet it does not necessarily follow that a popular or semipopular treatise on the Supreme Court can justifiably paint the whole picture so dark as is here presented without running the risk of doing much more harm than good.

Any volume directed to the functioning of a governmental agency, as this volume is, presumably is intended to add to the store of information and understanding of its readers, and since Mr. Rodell appears to disclaim (in fact, banish the thought) any purpose to write for lawyers, the popular reader must have been expected to be the richer, intellectually, informationally and understandingly, for having taken advantage of the opportunity thus presented to him. The suggestion that the general reader can grasp the full significance of the book's contents, or even have a greater appreciation of the tasks being devolved upon the members of the Supreme Court, could hardly have been taken seriously by the author, who appears to assume that no constitutional problems, as such, exist or are grappled with

by the Court or its members, but rather that all decisions are dictated by some ad hoc partisan political expediency.

Long before the time of Rodell it was well known that John Marshall conceived of himself as more than a judge, something of a judicial statesman shaping the destinies of the new national government, giving effect to political considerations, in the sense that the political scientist uses that term, without divorcing himself from the partisan political considerations that are the stock in trade of the practical politician. Even if a judge made conscious effort to divorce his thinking from such influences, it would be as impossible as it would be undesirable, certainly as to the former and partly as to the latter. Since both types of political considerations are affected or controlled by background, environment, and social and economic experience, which inevitably dominate a man's point of view and his thinking on and off the Court, the characterization of the Court as a political institution really introduces no new conception, yet the coarseness of its emphasis in the pages of this book does perhaps achieve the status of novelty.

That presidents throughout our history from Washington to Eisenhower have not been blind to political considerations, not only in the larger sense but in the partisan sense, in making appointments to the bench does not necessarily mean the Court is properly considered a solely partisan political institution. Certainly politics in the broader political science sense is a not improper concern of the Court and each of its members. That partisan politics has been the sole or the dominating influence in the minds of most Supreme Court justices throughout our history is not likely to be generally accepted as a correct appraisal, even if it has been true in too many cases.

The author's castigation in Chapter Two of the Court's refusal to give advisory opinions, in what becomes his typical disregard of and complete refusal to recognize the possibility that there may be justifying considerations for Supreme Court decisions with which he disagrees, serves to set the stage for his complete and continuous intimation, if not assertion, that he alone is wise enough to have directed proper decisions, and that the determinations made by the Court have either been due to the laziness of the justices or have been dictated by political considerations, nearly always partisan, the great majority of which have been almost equally unfortunate, unwise, unjust and destructive of the common good, and primarily directed to something like a conspiracy to assert and maintain an autocratic power over the legislative and executive branches of the government. Nowhere does the author recognize that there may be considerations weighing against the practice of the justices functioning as the active advisers of the executive and the legislature as he considers desirable.

Again, to say that the "clear and present danger test" is a perversion of the First Amendment, which says "Congress shall make *no* law . . .," hardly serves to clarify the problems both groups on the Court have always

recognized as present in the application of our constitutional guarantees of freedom of speech and freedom of the press. It is, no doubt, easy to apply if we accept the literal wording of the amendment—Congress shall make *no* law—as precluding any possible limitations or qualifications, regardless of the extreme nature of the incitement involved or the extent of the danger to which it gives rise. That, indeed, avoids all problems by pronouncing that there can be none, constitution-wise. Without entirely denying the possible validity of this position as to the First Amendment, it seems that it would have been appropriate to apprise the reader of the fact that serious problems do exist in such cases, as evidenced, for example, by recent decisions circumscribing and whittling away the doctrine of freedom of speech applied in the *Thornhill* case, moving in the direction of complete destruction of that important liberty, at least in one phase of its application, if, in fact, that point has not already been reached. A consideration of the factors that must weigh in the minds of the justices, liberal or conservative, in dealing with such a problem, together with some evaluation thereof, might produce a more important contribution, even though obviously fraught with infinitely more difficulty, little of which Mr. Rodell finds in the disposition of any constitutional problems—if he is willing to admit that there are or can be any such problems.

Belaboring the Court for its refusal to step in before a case comes to it in regular course may demonstrate either the author's complete absence of understanding of the established place of the judiciary generally in the Anglo-American governmental system, or, what is more likely, when coupled with his bad taste in his personal references to individual justices, a quest for some public attention that may not otherwise be forthcoming. To refer to one justice as "frogmouthed" or to another as "sloppy, snuff-sniffing, slight of build and slight of mentality," to mention only two instances of extreme bad taste, certainly contributes nothing to scholarly achievement and seems intended only to give publicity to the fact that the author has reached such heights that he, alone perhaps, can print the unpleasant truth.

Had this book come a quarter of a century earlier when the synthetic halo about the Court had not been so effectively pierced by other writers, it might have served a useful purpose, notwithstanding its bad taste and the fact of being greatly overdrawn. With the need for a political, economic and social history of the Supreme Court being so great as many of us feel it is, it is indeed unfortunate that anyone with sufficient apparent familiarity with the work of the Court—even if somewhat superficial—to catalog with recognizable accuracy so many landmark decisions, should not be able to turn his talents to a more constructive purpose.

Nine Men is in many ways a very peculiar book and that which primarily characterizes the first two chapters is either not applicable to the rest of it, or is so in a very much lesser degree. That the author is capable of writing effectively, understandingly and revealingly about the Court is amply demonstrated by his chapter on John Marshall. His appraisals of

Justices Johnson and Story in the same chapter are also worthy of a book unmarred by the major sins already enumerated.

The significant transition from Marshall to Taney and from almost sole concern for the protection of property interests to the direction of judicial power for the protection of human rights and human liberty, or as the author puts it, the rights of people, is at least fairly implied if not effectively expressed in the parting shots of the same useful chapter. And in his next chapter, Four, more directly dealing with Taney's regime, he correctly stresses this basic difference rather than the surface indications of shifting from an emphasis on a strong central government to an emphasis on state rights. Even today some people seem to see in the differing philosophies of the two major political parties only a cleavage between state rights and centralization of power, in reverse, it is true, as between Democrat and Republican, as their most important manifestation, without taking note of the fact that the fundamental difference is still the protection of property rights versus the protection of human rights.

That basic shift in Supreme Court emphasis and direction, with the change from Marshall to Taney, as a highly significant turning point in our history, is properly recognized and emphasized. To say this, however, is not to deny the existence of substance in the author's emphasis upon Taney's concern for the property interest of the landowner and the slave owner, which, most noticeably at least in his later years, dictated decisions hardly consistent with what appeared to be his initial liberal approach. The fact that many of these decisions resulted, at least in large part, from concern for a different type of property interest than had received the protecting care of the Marshall Court does not altogether negate the liberalizing effect as compared with the prevailing decisions of the Marshall era. Had Taney's and the Court's developing tendency to exhibit concern for the institution of slavery, and, as many assert, including the author, the protection of slave-owning property, not eventuated in the disastrous *Dred Scott* decision, Taney's position as a liberal justice would have been much more secure.

The story of the eclipse of the Supreme Court after *Dred Scott*, during the Civil War and subsequent thereto, and of the slow regaining of a position of power, during which period the Court had few outstanding personalities among the justices, and no such dominating character as Marshall or Taney at the helm, is told reasonably effectively, if wholly unspectacularly. As we can count on the fingers of one hand the really great presidents this nation has had and may well agree with the comments of Lord Bryce on the mediocrity of the occupants of the presidency, it should not be surprising that many men appointed to the Supreme Court never rise above their level of mediocrity. The appointment of a lame duck politician to the Court can hardly be expected to convert him into a legal giant or an all wise judicial statesman. And, after all, a Holmes, a Brandeis or a Cardozo, or even a Hughes, a Miller or a Harlan—the first Harlan, that is—is not

always readily available. The author's revelation to his popular readers of the difficulty on the part of a president in predicting with accuracy what an appointee to the Court may do, as illustrated by Theodore Roosevelt's appointment of Holmes and his performance in the Northern Securities case, and Lincoln's appointment of Chase and his relation to the Legal Tender Cases, serves a useful and wholesome purpose, as does also his portrayal of the pressures upon a reluctant president that can bring about the appointment of a Cardozo.

The author's treatment of the *Slaughterhouse Cases* as the decision of the Court which temporarily stemmed the rising tide of due process—not yet fully asserted in its own name—and which became the vehicle for the Supreme Court's passing upon the merits of legislation, is an interesting and stimulating portrayal for those who already know the story, but the uninitiated are likely to find it scarcely revealing.

It hardly adds to the scholarship of the author's product, or makes a contribution to public information, to characterize as "judicial vandalism" the Court's determination that the language of the Fourteenth Amendment, which says only that "no state shall" do so and so, is applicable only to action by the state, or its officers or agents, and not to the acts of private individuals.

The Court's resurgence to a position of unprecedented primacy with its successful assertion of due process (originally intended and for nearly a century used only as a protection or guarantee of a fair trial as was its English counterpart) as authority for a veto based upon a consideration of the merits or reasonableness of any legislation, state or federal, is appropriately emphasized.

The author's portrayals of the *Debs*, the *Knight* and the *Pollock* cases of 1895 in exemplification of the Court's new power are perhaps among the best of his book, though in comparison with much else, the characterization of these three cases, particularly the last—among the most indefensible of Supreme Court decisions—is marked by considerable restraint. Perhaps the quotations from the dissents were regarded as sufficiently critical.

While there is passing reference to the Court embracing the doctrine of "freedom of contract," as well as the *Plessy v. Ferguson* "separate but equal" doctrine, the popular reader for whom the book purports to have been written is likely to gain small conception of the meaning or significance of either.

That the close of this era gave way to a new one most significantly marked, if not dominated, by the intellectual leadership of Justice Oliver Wendell Holmes, is properly recognized. The author's carefully correct characterization of Holmes as the political conservative (yet judicial and intellectual liberal) that he clearly was, ranks among his best performances in the volume. In his analysis of perhaps too few of Holmes' opinions, including the frequent quotations, usually from his dissents, striking at

the invalidation of tax and regulatory measures both state and federal, on due process or state rights bases, and the justice's emphasis on the protection of the First Amendment for freedom of speech and freedom of the press, the author, probably better than anywhere else, gives the popular reader for whom he writes some worthwhile understanding of what the Court was doing, and at the same time allows the uninitiated reader a fleeting glimpse of the judicial greatness that was and is Holmes' alone.

In quoting from Justice Holmes his famous dissenting statement that, "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect," along with others of similar significance, the author provides for any reader a basis for understanding something of the nature of the judicial conflict that has for so long a time occupied the Court, and at the same time furnishes an insight into the capacity of Justice Holmes, as an economic and political conservative, to practice that all-important self-restraint so pointedly emphasized some years later by Justice Stone in his famous dissent in the *AAA* case.

At the same time and by the same materials the author best illustrates his emphasis on judicial supremacy, which he asserts throughout, and his major point of judicial irresponsibility, by showing how the Court stood for years in the path of legislative progress as gauged by the temper and purposes of the "political" branches of the government, and wielded the axe of unconstitutionality to defeat governmental attempts, state and federal, to cope with concentrations of economic power and protect the public interest through measures that had the support of vast majorities of our people, particularly under the leadership of such executives as Wilson and Roosevelt.

On the whole, Chapter Six, "Associate Justice Holmes, Dissenting," is a highly worthwhile account of the Court's larger performances during the Holmes incumbency, without the marring pettiness applied to personalities in other parts of the volume, and is a useful contribution to the public understanding of a highly significant episode in our Supreme Court's and our nation's history. It does, however, demonstrate the unfortunate circumstance of trying to compress a major history within the confines of a single small volume.

Chapter Seven, "The Court Collides with the New Deal," is well prefaced by brief but effective, and not unduly derogatory, thumb-nail sketches of the so-called "Four Horsemen," Van Devanter, McReynolds, Sutherland and Butler, giving the reader, popular or otherwise, a fair indication of what to expect when New Deal measures reached the Court. The prior

reminder of the conditions that brought on the New Deal legislation and its widespread welcome, even from conservative business men temporarily cowed by fear, usefully presents facts that the reader might otherwise fail to bear in mind.

Likewise, the analysis of the Roberts-Hughes "swing" position, emphasizing that it was always the shifting of Roberts and not of Hughes that was determinative in crucial cases, brings even to the well initiated a helpful reminder of an important detail easy to lose sight of.

The brief but realistic sketches of Hughes, Brandeis and Stone, particularly the last two, being like Holmes distinctly within the author's favor, serve as helpful and enjoyable reminders for those already familiar, and do much to enable the general reader to understand and appreciate their distinctly liberal performances as justices upon the High Court.

The many significant cases which first vetoed in a wholesale manner New Deal and similar state legislation and later inconsistently sustained such measures as Social Security and the Wagner Act, along with the Supreme Court Reorganization Plan fight, are handled by the author in a way to intrigue those already familiar and to give to the most general reader a reasonably accurate picture of the historic developments of this history making period. This, which is done without the bad taste personality references of an earlier chapter, does much to counterbalance the "unadmirable" characteristics of the book.

That an all-liberal Court which next came on the scene might well develop divisions; or even splinters, as Chapter Eight sets out, was not particularly surprising, since the affirmative responsibility for control and direction of necessity brought forth reactions on the part of the justices different from those involved in the dissents to which their predecessors were accustomed, but to give even a reasonably accurate portrayal of the reasons therefor was no easy task.

If the analysis of the New Deal justices gives a fair picture of the men making up the first and only all-liberal Supreme Court in our history, the analysis of its decisions can be followed only with considerable difficulty by those already familiar, and by the general reader, it would seem, not at all. It should be said, however, that the nature of the cases and the great numbers of slightly differing views expressed make clarity of explanation not without great difficulty.

The fact that the author has little that is complimentary to say about the Vinson Court, and finds much to indicate a losing of ground in the field of civil liberties with which he manifests so much genuine concern, hardly furnishes a basis for any serious adverse criticism. His finding of some ray of hope for better things to come from the Warren Court largely rests in the category of unconfirmed speculation. No great quarrel can be had with the assertion that men of lesser ability have been coming to the Court with recent changes in personnel, and that both qualitatively and quantitatively much less work is being turned out than by the Hughes and

Stone Courts. It is with this Court that note is especially taken of the increased practice of denying certiorari in cases involving vital constitutional issues, a practice that has sparked many another adverse comment.

On the whole the book is neither so bad as its early chapters promised nor so good as it might have been with the omission of much that serves no useful purpose and has no proper place in a volume not dedicated to the task of degrading the Court in the popular mind or of destroying such respect as it does enjoy.

The much needed political, social and economic history of the Supreme Court of adequate proportions still cries out to be written.

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