Economic Interpretation of Judges

TEN years ago political discussion was focussed on the problem,—what is the proper task of judges in carrying on the work of a modern democracy? Those of us who think that the advocates of the recall of judges and of decisions were on the wrong scent must at least admit that they illustrated the proposition of John Stuart Mill, that the free expression of error is valuable because it puts truth on its mettle and forces it to justify itself to the public by strong arguments instead of resting content with antique and flabby reasoning. The controversy over the origin and merits of judicial review of legislation bade fair to produce a thorough reexamination from a twentieth century point of view of the questions, what does a judge do, what ought he to do, how shall he be chosen, how long shall he be left undisturbed in his office? There was a popular overhauling of these questions in speeches, newspaper editorials, and ten-cent magazines, and the publication of scholarly investigations by Beard, Corwin, and McLaughlin. But before the problem of the judicial function was completely solved, the outbreak of the European war and the collapse of progressivism caused its importance to be forgotten.

New life has now been given to these issues by the publication of Senator Beveridge's widely-read biography of our greatest judge. Study of the part which Marshall played in American economic and political development inevitably throws light on the work of judges in general. Moreover, those who regard a judge as really a political official, who consequently ought to be elected, controlled, and removed by the people at large, point to Beveridge's frequent praise, not so much of Marshall's legal ability, as of his statesmanship. It is repeatedly stated that he deliberately made use of small cases to establish his own views of what was good for the nation. We are told that the dispute in Marbury vs. Madison had become "of no consequence whatever to any one" as a concrete matter, when Marshall used it to establish the power to declare acts of Congress unconstitutional, a step "which for courage, statesmanlike foresight, and, indeed, for perfectly calculated audacity, has few parallels in judicial history"; that his decisions on international law illustrate, not only his legal knowledge but "his broad conceptions of some of the fundamentals of American statesmanship in foreign affairs"; that in McCulloch vs. Maryland he rebuked disunionists and the Virginia Republican machine. Beveridge describes Fletcher vs. Peck as a trumped-up case, which a weaker man would have refused to decide, but thinks it one of the firmest proofs of Marshall's greatness that he considered it necessary for the nation's highest court to lay down plainly the law of public contract. Still more startling is Beveridge's opinion that Johnson, a Republican Justice, would have differed outright from Marshall in this case, had not the disposition that Marshall made of it been ardently desired by the Republican leaders, Jefferson and Madison.*

Even if we regard with considerable doubt this presentation of judges as using controversies before them to carry out definite party policies, we must reckon with the sober judgment of Corwin, that Marshall refused "to regard his office merely as a judicial tribunal; it was a platform from which to promulgate sound constitutional principles." † Is the Chief Justice of the United States not merely the arbiter of disputes according to settled law, but in fact a statesman, creating national policies? If so, should not he be responsive to the popular will like the Lord Chancellor of England? And the same question exists, with slightly less importance, with respect to all other judges, federal and state.

Certainly, the views just quoted from Beveridge and Corwin are far from the orthodox theory of the judge's part in the development of law, that he applies already existing rules to the facts before him, or if a new rule is necessary he evolves it from existing rules by the application of rigid logic. This theory makes his operations as impersonal as those of an adding machine. The facts press the buttons, the cogs revolve, out comes the answer. Only one right answer is possible, but if the judge's mind is of an inferior make, a cog occasionally slips and the wrong result gets printed. However, the quality of the additions is not affected by the fact that the machine has been set in the city or the country, among rich or poor, scholars or men of action. Advocates of this theory resent even the suggestion that Marshall's decisions were influenced by his early contact with Washington and his experiences of state incompetency in and after the Revolution.

At the opposite pole is the theory of Gustavus

* Beveridge, III, 125, 132, 593; IV, 121, 304.

† Corwin, John Marshall and the Constitution, page 122.

Myers' History of the Supreme Court, that a judge is a loaded roulette-wheel, which always makes the banker come out ahead. He describes Marshall and his associates on the bench as engaged in a ceaseless practice of "You scratch my back and I'll scratch yours," each justice virtuously abstaining from participation in the decision of cases affecting his own pocket-book in the confident expectation that the rest of the Court would stand by him in return for similar favors when their cases came up. The holocaust of corruption which he paints makes one suspect that Mr. Myers got his two books mixed up, and carried over into the Supreme Court too many impressions gathered in his researches into the history of Tammany Hall.

Others (and in part this is Mr. Myers' view) without charging a judge with corruption, lay great emphasis on his unconscious class bias as the main explanation of his legal doctrines. It is evident that as soon as we reject the adding-machine theory and admit that those doctrines depend on something besides strict logic, the question what the additional factors are becomes very important. If a judge is only a political official, statesman perhaps, who makes deliberate choice of policies, the way is readily open for supporters of the economic interpretation of history to insist that his choices are largely attributable to financial motives and class attitude. Thus the reviewer of Beveridge in the New Republic * thinks that "perhaps the decisive influence" in determining Marshall's mind toward nationalism was "his own economic interests," and that the fact that the Constitution of 1787 was calculated to protect Marshall's ownership of one thousand acres of land in Fauquier county under the Fairfax title, because it would prevent Virginia from disregarding treaty rights, "no doubt was influential in inclining Marshall to support" that Constitution in the Virginia Convention of 1788.

In view of the low value of frontier land and the number of forcible arguments of public advantage stated by Marshall to support his vote, it seems rash to assume that because his private profit might have swayed his opinion on a matter which obviously affected thousands of persons on whose behalf he knew he was deliberating, therefore it did sway him. As well assume that a man's insistence that exemption from Panama tolls for American shipping is a breach of a treaty, arises from his ownership of a few transcontinental railway shares, which may suffer from marine competition. That the desire to obtain necessities and luxuries for one's self and family, and the craving for the power which comes with wealth, are elements in the formation of character and opinions is conceded. Furthermore, the accumulation of a large number of instances where differences of political views coincide with differences in economic status, as Beard proposes in his Economic Interpretation of the American Constitution, may show that economic motives must have guided the action of enough unspecified men in a mass to decide the action of the mass. It is a very different matter to pick out a particular man in that mass and feel sure that economic motives explain his action. In the same way, life insurance tables show how long the average man of thirty may expect to live, but not the actual longevity of Mr. Richard Roe, aged thirty.

The statement that the decisive influence upon the legal principles of any judge is economic is a generalization which, to be sound, requires first, the elimination of his logical powers of reasoning and of negative data which indicate the presence of non-economic motives of greater strength than the economic motives; and secondly, the careful verification of affirmative data which indicate the operation of economic motives. For instance, in Marshall's case, the reviewer already quoted says, "As a practicing attorney in Richmond his largest fees are coming from the members of those very commercial classes who, with the land speculators, were most influential in the support of the new government." Is it so certain that his clients were mainly of this type? This could be tested by an examination of all Marshall's cases in the Virginia Court of Appeals (listed at the close of Beveridge, Vol. II). An inquiry into ten cases argued in 1793 and ten in 1797 † shows four cases of family disputes over the division of a decedent's property, one case on behalf of a sheriff, one defence of a prosecution for assault and battery. No class conflict here! Two land-title disputes turn on technical points of law. Four cases on behalf of creditors look more promising for the economic interpretation; but one is against the grantee of a fraudulent conveyance, another to collect a debt from an English tobacco-buyer, another by a son-in-law against his father-in-law for a marriage portion, and the fourth to foreclose a mortgage on slaves. And in eight cases, Marshall's clients were debtors, the very class which suffered from the Constitution as interpreted by him. The only client from "the commercial classes" is the tobacco-seller! Although a complete investigation of all the cases appealed—and his

* Review by B. B. Kendrick, April 6, 1921; correspondence between Mr. Kendrick and Charles H. Burr, May 4, 1921.

† The first ten in 1 Call Reports, and in 1 Washington Reports.

poorer clients would be less likely to appeal—may not conform to these twenty, it may be surmised and is indicated by Beveridge's anecdotes, that Marshall's clients were well-scattered through the social scale, and at any rate that he had no chance to become biassed from constantly representing the rich against the poor.

The trouble with the economic interpretation of the conduct of an individual is that it is a vaticinium post eventum, which knowing the result is able to seize upon the particular economic factors which seem to justify that result. If the result had been exactly the opposite, very likely other economic factors could have been found to justify that. For instance, suppose the general attitudes of Marshall and Jefferson had been reversed. Whatever the influence of a thousand frontier acres on Marshall, what more natural than that Jefferson who inherited 6,900 acres nearer civilization and bought 3,000 more should be a conservative, that as an eldest son he should oppose the abolition of primogeniture whereas he actually secured it, that the founder of the University of Virginia should applaud the Dartmouth College case which safeguarded the wishes of donors, that the widely-travelled internationalist should despise state lines? And John Marshall, born poor on a farm where thorns were used for buttons, married on small earnings, who spent years in paying off indebtedness to British creditors, who had frequent cases against wealthy men, so that their iniquities may have become clear to him, who had many debtors as his clients, who saw Europe under conditions which gave him good cause to hate all foreigners, who never went North after his military campaigns, how plain indeed the reasons why he became the champion of Southern localism, the narrow interpreter of treaty obligations, and the partisan of agrarian debtors against urban and European capitalists!

All these explanations of the judicial task are too simple. A judge is not a calculating machine, but a human being, subject to the subtle influence of heredity and environment, especially the surroundings and mental training of his first twenty-five years. And he cannot get outside of himself to do his thinking. His product is, therefore, bound to be affected by these influences. All the more need to recognize this frankly, so that he may lessen the risk of unjust decisions by allowing for the effect of large means or other personal factors upon his reasoning processes and thereby reduce their operation to a minimum, just as the astronomer learns to estimate the habitual lapse of time between the appearance of a star and his visual reaction to its light, and corrects his observations accordingly.

On the other hand, even if we reject the adding-machine theory and conclude that a judge's political or economic views play some part in the making of law, this does not mean that he should be selected on the basis of those views, as if he made law like a legislator or carried out policies like a Cabinet officer. The legislator initiates measures or votes on them solely according to his own views of policy or those of his supporters. The judge must wait until a controversy comes before him, and then must decide it, not by unrestricted considerations of policy or according to party welfare, but by rules of law. It is true that he sometimes has to work out new rules, and that even in the application of statutes his decision as to what they mean adds something to them which in a sense was not there before, but in all this his scope is limited by the pre-existing law. No one has stated this better than the judge who has been most quick to recognize social and economic aspects in law, Justice Holmes:

> We do not forget the continuous process of developing the law that goes on through the courts, in the form of deduction, or deny that in a clear case it might be possible even to break away from a line of decisions in favor of some rule generally admitted to be based upon a deeper insight into the present wants of society. But the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change but to work out the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds, with such consistency as he may be able to attain.*
>
> I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.†

This being so, the most important factor determining the quality of a judge's output is not his economic or social doctrine, but his legal power. By this I do not mean his knowledge of law conceived as a body of static rules, the way a football referee knows the rules of the game. The game of life cannot be played under conditions which remain constant from year to year, and law must change with life. Legal power includes comprehension of the principles of law evolved out of past experience; and in addition the training and ability to distinguish rules workable today from the unworkable, to discard outworn conceptions, to refuse to employ time-honored words without finding exactly what they mean. The principles of the past, after being thus clarified, are used and gra-

* Stack vs. R. R., 177 Mass. 158.

† Dissent in So. Pac. Co. vs. Jensen, 244 U. S. 221.

dually extended to solve the complex problems of the judge's own time. If a whole court without this understanding of the law were installed in order to carry out a radical program which they heartily endorsed, they would accomplish very little. Their efforts to make a great leap forward would be futile for want of a solid jumping-off place, and they would be too confused to know whether in the end they were going backward or ahead. The ultimate tangled result would furnish no sound body of principles to guide either subsequent judges or ordinary citizens anxious to conduct daily transactions in such a way as to be safeguarded by law.

All the talk about Marshall as a great statesman has obscured the fact that he based all his opinions on the words of the Constitution. He understood the law which he was applying. This, of course, meant more than knowing the clauses of the Constitution by heart. A judge interpreting a contract construes its words in the light of its purpose, and the more he knows of business, the better he understands the contract. So Marshall read the words of the Constitution so as to carry out the framers' purpose of founding a nation. Another man might have understood that purpose differently, but it is noteworthy that all his associates of the opposite party invariably agreed with him, with the exception of one decision where the split did not at all coincide with party lines. This indicates that the part which political views play is after all very small. And so probably with a judge's personal economic views. The so-called radical opinions of Justice Holmes proceed from a man who expresses a conservative view-point off the bench, in his letter on Economic Elements.* There is, indeed, a non-legal element in his making of law as with Marshall. Holmes interprets a statute or common law principle in the light of its purpose, and understands that purpose because of his open-minded comprehension of the human activities which law serves only to regulate. So Lord Mansfield created modern business law because he understood business as well as law. Legal power is much; it is not all; but the important residuum in the equipment of a great judge is not, I believe, the possession of this or that political or economic or social view, but the desire to understand human life as well as embalmed legal experience.

The problem of the judiciary is, therefore, not the selection and easy removal of judges on a political or class basis, but the question, what methods will make it easier to place men of this legal and ultra-legal power on the bench, and after they are there will enable them to keep in continuous fruitful contact with the changing social background out of which controversies arise.

ZECHARIAH CHAFEE, JR.

Industrial War in Chicago

THE building situation, corrupt before in many communities, was so worsened under war conditions that the Lockwood Committee undertook reform in New York, and the Dailey Commission was charged with a similar task for Chicago. The disclosures of the Lockwood Committee and the resultant prosecutions and prison sentences both for corrupt labor officials and corrupt material dealers are generally known. The recent alleged miscarriages of trials of indictments secured by the Dailey Commission against labor leaders have also received liberal notice. Meagre publicity has, however, been given to the fact that year-old indictments against material men are still dormant in Chicago, and to the fact that, according to alleged admissions from one of the jurymen concerned, the reason for the recent notorious acquittal of four of the accused labor officials in that city was the fact that the indicted material men were being left undisturbed.

While these sinister Chicago conditions bear only indirectly upon the existing war in that city's building industry, they should be remembered in gauging not only the anti-labor publicity, but likewise the activities of commercial forces in relation to that strife.

That industrial war is not too strong a term to apply to this strife is evidenced by the fact that through an aggressive and highly financed Citizens' Committee, created by the Association of Commerce, a considerable portion of the army of building journeymen in Chicago are being told that their trades, hitherto unionized, can never again be carried on as union trades in Chicago. The martial character of the situation is also evidenced by the fact that the country is being combed by that Committee to recruit men to come to Chicago to take the places of those journeymen, by the fact that bombing of certain jobs appears to have occurred, by charges that the recent murder of two police-

* Holmes, Collected Legal Papers, page 279.