

The Role of the Judiciary in Making Public Policy

by John V. Orth



A hundred years ago in the novel *Billy Budd*, Herman Melville gave us a fictional account of one type of judge. Captain Vere, whose very name means truth, was called upon to judge a crewman who had unintentionally killed one of the ship's officers. While recognizing that the defendant was innocent in the eyes of God, Captain Vere ordered him to be executed. The judge, he said, must enforce the law as it is, and the law required the order he gave. Although Captain Vere himself is fictional, judges with a Captain Vere philosophy are not. Indeed, historians tell us that Captain Vere was modeled on Lemuel Shaw, a famous Massachusetts judge and Herman Melville's father-in-law.

At about the time that Melville was writing *Billy Budd*, North Carolinians were hearing much the same thing about judging that Captain Vere had said. But in North Carolina the spokesman was not a fictional character; he was the state's "fighting judge," Walter Clark, who for over 20 years was Chief Justice of the North Carolina Supreme Court. Clark based his philosophy in terms of popular sovereignty: "Whatever tends to increase the power of the judiciary over the legislature diminishes the control of the people over their government." The question, for Clark, was whether the people governed themselves through their representatives, or were governed by their judges.

The ideal that judges should enforce the law, not make it, has attracted many judges, not just in the last century. Susie Sharp, Justice of the North Carolina Supreme Court from 1962 to 1975 and Chief Justice from 1975 to 1979, often expressed this position. As she once put it, there are four steps in deciding a case: 1) state the facts; 2) state the issue raised by the facts; 3) state the law relevant to the issue; and 4) decide the issue in light of the law. Using this method, any two judges should make the same decision. If a judge thinks legislation is desirable, he may say so, but may not anticipate the legislation by judicial decree.

Charles Becton, the newest member of the North Carolina Court of Appeals and the only black judge on that court, has a similar outlook. "I view the role of the judiciary in the traditional sense," he said, "of applying the law — not making it."

If the judge's role is so limited, why do talented men and women leave lucrative careers in private practice to don judicial robes? Why is an effort made to see that more women and members of minority groups are chosen as judges? And why are judicial decisions so anxiously awaited by persons not party to the suits?

The answer to the last question, of course, is that in the American legal system the judge does

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Photo by Paul Cooper

more than decide disputes: he or she makes precedents, which guide other judges. The rule of following prior decisions in similar cases is known by the Latin phrase *stare decisis*, "to stand by decided matters."

Yet this answer only makes the other questions more perplexing. If the judge is bound by statutes and the decisions of his predecessors, why, aside from the emoluments, should anyone want the office? And why, once minimum qualifications are met, should society care who holds it?

The answers to these questions lie in the process of judicial decision-making. First of all, our law is more than a collection of statutes and precedents. Every judge swears above all to uphold the Constitution of the United States. In addition,

North Carolina Supreme Court Justices. Front (left to right): J. Frank Huskins, Joseph W. Branch (chief justice), J. William Copeland. Back (l to r): J. Philip Carlton, James G. Exum, Jr., David M. Britt, and Louis B. Meyer.

every state judge swears to uphold the Constitution of his state, except to the extent that it conflicts with the federal Constitution. Every state judge must swear to deny effect to any law that violates either Constitution. Because the U.S. and state Constitutions embody many American ideals, the judiciary is called upon from time to time to measure laws against fundamental assumptions, and to throw out those laws that do not conform with the expressions of the Constitutions. Our constitutional system encourages an independence of mind among the judiciary.

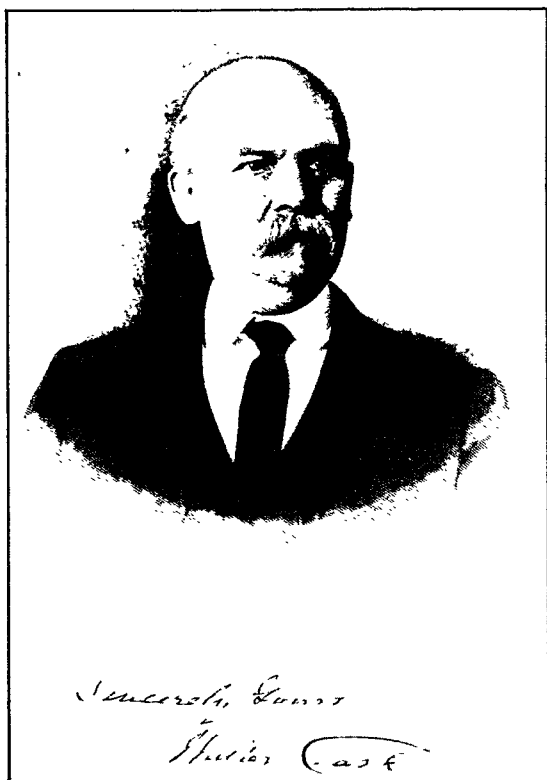


Photo courtesy of N.C. State Archives

Walter Clark, N.C. Supreme Court Chief Justice, 1902-24.

Judges Do Make Law

Much of a judge's day-to-day work, of course, involves matters more mundane than constitutional adjudication. Statutes must be construed, which involves more than reading plain language. Anyone who has ever tried to puzzle his way through a statute knows that the meaning is often far from plain. But statutes in the modern world of regulation must be fitted into the complicated machinery of the modern state. Since a statute is

produced in the political give-and-take of legislative bargaining, many gaps and inconsistencies may be left for the courts to deal with, as best they may. Charged with the duty of carrying out the will of the legislature, the modern judge must read the statutes in such a way that public policy will be effectuated, not stymied. In the case of *Morrison v. Burlington Industries*, for example, discussed in the article that follows this one, the North Carolina Supreme Court has been asked to construe the Workers' Compensation Act as it applies to disability caused by brown lung disease. The N.C. Industrial Commission, which administers the workers' compensation laws, needs a definite rule, and the textile industry, insurance companies, textile workers, and the general public are also watching the outcome closely.

In addition to clarifying the statutes, a judge must also restate the common law. When interpreting a statute, the court is enforcing a law made by the legislature. When applying the common law, on the other hand, the court is enforcing a rule made by judges. The common law is, by definition, non-statutory law — law made by past judicial decisions in keeping with the then current views of public policy. As society changes, so does the common law in order to conform to changed conditions. Should the judges fail to update the common law, the legislature will be forced to act. The Workers' Compensation Act, for example, was originally enacted because of public dissatisfaction with common law rules that limited employers' liability for injuries to workers on the job.

The renovation of the common law, however, need not await legislative action. What the judges have done, they also undo. In 1967, for example, Justice Susie Sharp wrote an opinion in which the judges of the N.C. Supreme Court reversed the common law rule of "charitable immunity." Until that decision, charities running hospitals in North

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Chief Justice Walter Clark, c. 1902

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Carolina were not liable for injuries to patients caused by the negligence of their employees. Because she recognized that hospitals relying on their immunity might not have taken out liability insurance, Justice Sharp limited the new rule to the case before her and to similar cases arising subsequently. In effect, the decision was like a statute — only it hadn't been passed by the legislature and signed by the governor. On this ground, three of the seven judges dissented from Justice Sharp's opinion.

Within limits, judges *do* make law. The common law is their creation, and statutes require their interpretation. All law must constantly be squared with the Constitution. And the Constitution means what judges decide it means.

Making Public Policy Every Day

The realization that judges are policymakers came early in the history of the United States. More than 150 years ago a campaign began to replace the common law with statutory law in the form of a comprehensive code. Deprived of the common law and under the watchful gaze of the legislature, the judges would have less room to maneuver. But the codification movement failed to reach its goals. After winning a famous victory in modernizing legal procedure, the movement faded away.

A more widespread response to the felt need to make judges more accountable was the movement for an elected judiciary. If they were going to legislate, the argument ran, let them run for office like other legislators. Beginning with Mississippi in 1832, one state after another adopted constitutional provisions requiring the election of all state judges. Chief Justice Walter Clark of North Carolina even called for a national crusade for the election of federal judges.

The election of state judges has not succeeded, however, in making them accountable as policymakers. Even ambitious lawyers have hesitated to turn judicial elections into out-and-out political campaigns. The people have never wanted active politicians on the bench, for fear that the life, liberty, or property of individual litigants could become political footballs. The practice arose early in North Carolina, as elsewhere, to reduce judicial elections to mere form. Every North Carolina judge mentioned in this article was first appointed by the governor to fill a vacancy. In any later election, the judge runs as an incumbent.

The fact that a judge may escape effective challenge at the polls does not mean that he has a free rein. As mentioned above, there are limits to judicial law-making. And a judge who misbehaves may, of course, be impeached. But the most effective restraint on a judge is his or her own sense of integrity and mission.

How activist do North Carolinians expect the state's judges to be? A purely passive bench would have left an outmoded "charitable immunity" on the books, and washed its hands like Captain Vere when he condemned Billy Budd. In time, perhaps, the legislature would have changed the law, but until then individuals would have suffered. Groups that can more easily influence the legislature than the courts will reasonably prefer that the courts in most cases await legislative fiat. Lobbying is an accepted part of the legislative, but not the judicial, process. Investigation is more easily carried out by legislative committees than by judges. And horse trading is an inevitable part of the legislative process.

For present purposes, perhaps, the most that should be said is that, whether activist or not, judges are making public policy every day. They bear watching. □