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in the Humanities & Social Sciences

James W. Ely, Jr., ed. *A History of the Tennessee Supreme Court.* Knoxville: University of Tennessee Press, 2002. xvi + 459 pp. $46.00 (cloth), ISBN 978-1-57233-178-5.

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Published on H-Tennessee (August, 2002)

Tennessee's Supreme Court: A Tribunal's Troubled Past

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As the preface by Professor James W. Ely, Jr., of Vanderbilt University wisely observes, not enough attention has been devoted to the history of state supreme courts. "This omission," according to the preface, "threatens to distort our understanding of the evolution of legal doctrine and the importance of state law in the federal system" (p. ix). The handsome and well-bound volume is an important step in addressing that omission. However, as Ely also warns, the Tennessee Supreme Court was "rarely an innovator in national legal development" (p. xi). This admission points to a frustration, namely, that the Court's impact on history has usually been minimal. Aside from a lack of influence on, and sometimes even resistance to, national judicial trends, most notable statewide legal reforms and events were commenced and centered on other institutions of Tennessee governance. It is a history more of tribulations than triumphs. Accordingly, one is left hoping for a wider study of the entire judicial or legal history of the state. Since the book's production was sponsored by the Tennessee Supreme Court Historical Society, Inc., its scope is understandably limited and does not address other dimensions of Tennessee's fascinating legal history.

Chapter 1, "The Formative Period," by Atlanta attorney and legal historian Theodore Brown Jr., covers the complex and sometimes foggy days of the Court's history from 1796 to 1835. Brown notes that the framers of the Constitution of 1796 did not create an independent judicial branch, but left it to the General Assembly to establish "such superior and inferior courts of law and equity" as deemed desirable (p. 5). This was a significant failure, as Brown shows, for the early years were a time of repeated reorganization of the judicial system, occasioned by docket delays only exacerbated by the state's dramatic growth, and culminating in efforts by the Court to secure its institutional independence. An example of the legislature's ill-advised plan is that the first Supreme Court, called the Superior Court, heard original or trial matters and appeals from lower county courts. By necessity, the Court's trial jurisdiction was eventually replaced by new trial courts. The chapter also presents short but interesting sketches of early judges. These include figures such as Hugh Lawson White, Andrew Jackson, John McNairy, Archibald Roane, Willie Blount, and John Catron. Finally, the chapter concludes with a survey of the Court's early development of substantive law and the Cherokee Reserve Cases in which the judges asserted their independence through the power of judicial review.

Professor Timothy S. Huebner of Rhodes College prepared chapter 2, entitled "Judicial Independence in an Age of Democracy, Sectionalism, and War, 1835-1865." This chapter covers what many believe to be the golden era of Tennessee jurisprudence and the fateful years leading to the Civil War. His discussion commences with the drafting of the Constitution of 1835, a document correcting the failure of the previous Constitution in not designing the state's judicial structure. Adding to the achievement, the new Court would be staffed by the triumvirate of Nathan Green, William B. Turley, and William B. Reese. As Huebner states, "Judges Green, Turkey, and Reese would dominate the Tennessee Supreme Court for much of its pre-Civil War history" (p. 74). By the conclusion of their famous tenure, not only had numerous important decisions developing private law been pronounced, but more judicial reforms were also enacted, the most important of which was the popular election of Tennessee judges, including the judges of the Supreme Court. Just as these reforms reflected the democratizing forces of the Age of Jackson, the Court's rulings reflected the temper of the times. Decisions on family law and public morality were in tune with the reform-minded and evangelical mood of the era. Huebner next traces how the war's coming impacted the Court's composition and terminated its operation at the height of hostilities. The

chapter ends with the efforts of Military Governor Andrew Johnson in rebuilding the judiciary, most successfully at the trial court level, and the appointment of a Unionist bench by Governor William G. Brownlow. Arguably, Huebner's chapter covers the extreme high and low points in the Court's history.

Professor R. Ben Brown addresses the traumatic age of "Reconstruction and Redemption" in chapter 3. Governor Brownlow appointed a short-lived Radical Court, one which Brown views "as staffed by non-elite second-tier lawyers and politicians" (p. 105). They were committed to "Radical policies and disdain for those who had thrown in their lot with the Confederacy. Their jurisprudence would reflect their policies" (p. 105). Brown clearly has his own disdain for these Unionist jurists, and his assessment of these men seems a bit harsh. Although the Radical judges refused to give credence to Confederate transactions and currency, a not altogether unexpected position, they also strove to secure the legal rights of freedmen. Ironically, these judges paved the way for ex-Confederates to regain the vote en masse and thus ultimately bring down the Radical regime.

In the election of 1870, the judges elected were "important antebellum politicians and lawyers or high-ranking Confederate officers" (p. 121). Brown believes these "Conservative judges brought much more prestige to the bench than the relatively obscure Radical judges" (p. 121). This Court did include undoubted talents like A.O.P. Nicholson and T.A.R. Nelson. Nevertheless, it is doubtful that freedmen would have agreed with the glowing description of this redeemed bench. The Conservative justices were committed to giving legitimacy to the Confederacy, reversing the jurisprudence of the Radicals, and rolling back the social equality achieved by blacks during Republican rule, such as through the Court's use of lien law to enshrine the legally and economically debilitating sharecropping system.

Editor James Ely examines the years 1866-1910 in chapter 4. This period saw the creation of a much-needed intermediate appellate system and provision for the selection of a chief justice, but even with these reforms, the caseload of the Court remained unduly heavy. In contrast to the United States Supreme Court, the Tennessee Supreme Court deferred to the legislative branch concerning economic and social matters, and its decisions were not in step with the progressive temper of the times nationally. Ely thoroughly surveys the Court's jurisprudence in this era, including rulings promoting racial segregation and disregarding the legal rights of black Tennesseans.

Professor Ruth Anne Thompson of Georgia State University writes chapter 5. Perhaps the most important proposition in this portion of the book is Thompson's statement: "The decisions of the Tennessee Supreme Court between 1910 and 1946 support recent studies concluding that the notion that Progressive-era courts courts were enemies of reform is largely a myth" (p. 189). Although the Court was not an enemy of progressive reform, this may not have been so much from conviction as from its usual deference to the legislature. The Court simply did not challenge progressive actions of the overtly political branches. Thus, there was really no break from earlier patterns of deferential behavior or traditional ideas of judicial conservatism. Thompson also provides a fine account of the scandal surrounding Governor Malcolm Patterson's pardon of Duncan Cooper, Cooper's involvement in the murder of Patterson's political nemesis Edward Ward Carmack, and the alleged attempt by the Governor to influence the Supreme Court's handling of Cooper's case through the Democrats' judicial nominating process.

Chapter 6 by Professor John R. Vile of Middle Tennessee State University highlights the jurisprudentially conservative nature of the Supreme Court at mid-century. The justices from 1946-1974 were not judges interested in innovation. They usually adhered to precedent and, as usual, deferred to the legislature. The Court seemed more interested in protecting state sovereignty than individual rights and "was clearly uncomfortable with the demonstrations that occupied the struggle for civil rights" (p. 251). This chapter concludes with the repeal of the Missouri Plan's application to the Supreme Court in order to prevent newly-elected Republican Governor Winfield Dunn from choosing justices from those nominated under the plan.

Chapter 7 by Professor Carl A. Pierce of the University of Tennessee covers 1974 to 1998. This chapter discusses the continued Democratic dominance of the Court, achieved through partisan nominations and elections, and the appointment of the first black and female justices. Finally, it addresses the welcomed return of the Missouri Plan. In reviewing the Court's recent jurisprudence, Pierce mentions the landmark *McIntyre* decision, by which contributory negligence was replaced with a comparative fault scheme. He fails, however, to convey the tremendous controversy this decision caused in legal and academic circles, for many saw it as usurpation of legislative authority and negation of the codification of the contributory negligence system. It is clear from Pierce's account, however, that the current Court is no longer showing the accustomed deference to legislative

authority and has even taken an activist role.

Some mention should have been made of the Court's involvement, or at least that of the Chief Justice Joe Henry, in the ouster of Governor Ray Blanton in 1979 by swearing into to office Lamar Alexander three days early. Although adequately addressing Justice Penny White's doomed retention effort, the last chapter fails to discuss the stunning reversal by the regular justices of the Supreme Court of a unique "special" Supreme Court panel appointed to determine who was eligible to be nominated to fill White's seat. The special justices ruled that the seat had to be filled by another East Tennessean, but the Court disagreed with this decision and interjected itself to hold otherwise, thus defeating the very reason for naming a special panel.

Overall, the work is well balanced, well researched, and well written. Although there are seven authors, the style and organization are consistent throughout. It avoids becoming a collection of biographical sketches on one hand or a ponderous recitation of cases and enactments on the other. It also successfully integrates the Court's history with that of Tennessee's overall development, without falling into the trap of seeming to make its subject the keystone of history. The work honestly faces the Court's limitations and failures. The volume features an excellent index, bibliography, and list of cited cases, and provides a helpful chart showing which judges served during each period and a compilation of biographical sketches. The notes are superb. The illustrations are appropriate and serve the text. Nevertheless, more images of justices and more biographical information would have been desirable. This is a groundbreaking volume in Southern legal history and standard and reliable resource for generations to come.

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Citation: Russell Fowler. Review of Ely, James W., Jr., ed., *A History of the Tennessee Supreme Court.* H-Tennessee, H-Net Reviews. August, 2002.
URL: http://www.h-net.org/reviews/showrev.php?id=6668

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