

## BOOK REVIEWS

CHARLES EVANS HUGHES AND THE SUPREME COURT. By Samuel Hendel.<sup>1</sup> New York City: King's Crown Press, Columbia University, 1951. Pp. xii, 337. \$4.50.—Charles Evans Hughes had, outwardly, such a cold austerity that, whatever his inward warmth, he is hard to transfer to paper. That is a pity in many ways, for he lived an extraordinarily full life as lawyer, public servant, and judge, of rare distinction in each capacity. In addition, he was head of our highest Court in a period of crisis for it, perhaps the most spectacular and notorious crisis of its history. The story of his life cries out to be told; and yet his personality eludes. Of course Hollywood will approach it in time and without hesitation, though one wonders what the result will be.

The problem before his biographer, while perhaps more striking, is not different in kind from that faced by other biographers of justices. Just a few years back we had very little on the lives of our Supreme Court members; now we have a sizable shelf, and more volumes are coming along rapidly. This is important and desirable. No one can now doubt that personalities have had a large part in shaping our law. John Marshall may have been a perfect embodiment of his time, and Roger Taney of his; but constitutional law responded successively to the respective bents of their minds. Exploration of the Justices as individuals is necessary and enlightening. But it is not easy. There is danger, on the one hand, of a catalogue of legal opinions, reflecting little more than the bare bones of the man, or, on the other, of a caricature of a lively old coot whose significance in the law is hard to fathom. Perhaps it is too soon for definitive rules of judicial biography-making to have become established, though we have gone far enough to have a symposium thereon—and an interesting one, too.<sup>2</sup> In any event, we probably need more material on each Justice, so that the inquiring mind of a born writer can then fuse this all in an “exciting” result—to use the expression of one successful protagonist of the art.<sup>3</sup>

The present is the first full-length book on the work of Chief Justice Hughes as a judge. Professor Hendel, lawyer and teacher of government, has set himself definable limits which he reaches with

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<sup>2</sup> *The Writing of Judicial Biography—A Symposium*, 24 *IND. L. J.* 363-400 (1949).

<sup>3</sup> The author of *YANKEE FROM OLYMPUS* and *JOHN ADAMS AND THE AMERICAN REVOLUTION*, Catherine Drinker Bowen, in *The Business of a Biographer*, 187 *ATL. MONTHLY* 50 (May 1951), adopts a definition from Gertrude Stein of “the business of an artist” to hold that it is the business of a biographer “to be exciting.”

scholarly precision, if not with dramatic force. He has centered his attention upon the judicial record of his subject, carefully subordinating the other parts of the story. Further, he concerns himself primarily with Hughes' solution of important *constitutional* issues before the Court. He intersperses frequent summaries and some evaluations, including one "summary evaluation," of the constitutional decisions just considered at more length. Finally he fashions a connecting thread through the medium of the doctrine of judicial review, ending with his own analysis and prognosis of that ancient, but still thorny, subject.

In result he has achieved a studious and worth-while exegesis of the Justice's greater cases. I like the careful preparation of a framework and the specific device he has adopted. I wish I could say that I thought it more successful than I fear it is. For it almost seems as though the virtues of the book prove to be its defects and leave it merely the helpful tool for future scholars, rather than the revealing or exciting history it almost becomes. As it is, it is still a catalogue of cases of chief significance to the constitutional scholar who should already know them. And the Chief Justice, except for several worth-while insights which are surely the beginnings of definitive analysis, remains for the most part a shadowy reconciler of judicial precepts and dicta, rather than a sharp protagonist for a particular concept of the judicial function.

Perhaps I have somewhat overstated the point I would make. Certainly this is not a negligible book; too much work and thinking have gone into it to be lightly dismissed. But I conceive that having done this, the author can do a yet better book with the knowledge and background he now has and with courage to limit his subject matter even more and to follow the gleam he already has, wherever it takes him. It might take him to the point of showing why Hughes, with his marvelous equipment and confronted with his opportunity, remains an important, but not an unusual, Chief Justice. And it might lead him to explain why the extraordinary Court crisis left nothing permanently solved, but merely made it more clear that like crises must arise recurringly in the future.

Of course there are dangers in such an historical adventure. One can easily fail in so bold an approach to a complex human personality. And the American doctrine of judicial review is so much a king that only killing, not wounding, can be successful; and that, to date at least, savors of the impossible. Indeed, I understand that some reviewers have reacted against even the discussion of that respected dogma, desirable as it seems to me. But the leads to the larger view here outlined are at least intriguing. The discussion of Hughes' liberal opinions in his first term of service on the Court—more numerous than Holmes' in the same period—raises at once the question why Holmes

made the greater impress. Suggestions for answers appear in Hughes' reverence for the judicial approach, leading him to such resorts as a barren distinction, rather than a forthright overruling, of outworn precedents. By the time of his second period of service, this acceptance, formal or substantial, of the past appears a guiding principle, having no small part in fanning the crisis and in dulling or postponing its ultimate resolution. This the author notes in referring to "the labored, if characteristic, attempt of the Chief Justice at a non-existent distinction, whether motivated by concern for stability or by expediency,"<sup>4</sup> or in saying, "By what tortuous alchemy these cases may all be reconciled is difficult to discern."<sup>5</sup> And this leads to the final judgment:<sup>6</sup>

Having sedulously sought to protect the precedents of the Court, sometimes at the risk of offending logic, he witnessed and often participated in the shattering of one precedent after another. He stood thus as a kind of heroic and, in a sense, tragic figure, torn between the old and the new, seeking at first to stem the tide but then relentlessly caught up and moving with it.

It is now a matter of history that the Hughes Court executed a rightabout and then a retreat which to some has seemed statesmanlike, to others only ignominious. The question still remains whether thus preserving the form at the expense of the substance was the best course in the long run for either the Court or the people. The author does well therefore to reassess the values of judicial review.<sup>7</sup> Here, too, courage and directness are the watchwords. Does Holmes' dictum—somewhat weakly accepted here<sup>8</sup>—that while the United States would not come to an end if the Court lost its power to declare an Act of Congress void, yet "the Union would be imperiled if we could not make that declaration as to the laws of the several States"—stand up in the light of this latest crisis? Power to hold the Union together must exist somewhere; the Civil War showed as much. But it did not demonstrate that the situs of that power must be the judiciary.

One final word. To be "exciting," biography must be well written. As the quotations above suggest, the author has not shown himself deficient in literary skill. But often, as if weighed down by the details he has suffered to intrude, he does permit himself such solecisms as the "probably inadvertent slight" to a senator but for which "he probably would have been elected President."<sup>9</sup> For a biography which

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<sup>4</sup> Text, at 257.

<sup>5</sup> *Id.*, at 260.

<sup>6</sup> *Id.*, at 279.

<sup>7</sup> My own views are more fully set out in *The Dilemma of American Judges*, 35 A. B. A. J. 8 (1949).

<sup>8</sup> Text, at 295, 296, quoting from HOLMES, *Law and the Court* in COLLECTED LEGAL PAPERS 295, 296 (1920).

<sup>9</sup> Text, at 71.

would really set forth a fascinating person and era for posterity to view whole and complete, there is needed the technical equipment our author has now developed, plus the bold concepts and graphic writing of a Vernon Parrington.

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THE BRITISH CONSTITUTION (Third Edition). By Sir Ivors Jennings.<sup>1</sup> Cambridge: The University Press, 1950. Pp. xviii, 220. \$2.25.—Seldom has there been a greater need that Americans understand British problems, policies, politics and government. There were those who would have denied Marshall Aid unless socialization were abandoned, an invitation to Britain to commit economic suicide, as well as an interference with domestic policies almost as intolerable to a self-respecting people as threatened annihilation. When such a suggestion can come from the president of one of our largest state universities, it is time for ordinary citizens to read a book such as the one under review. Britain is a crowded land with a rapidly growing, almost hungry population whose very existence requires production of an extraordinary volume of exportable goods to be traded for indispensable food and raw material. In this land of meager resources the sheer necessity of conservation of them by means of a planned economy is accepted by all political parties. In a very real sense all parties in Britain are socialist parties.

This little book is not an epitome of Sir Ivor Jennings' heavier books on parliament and cabinet government. It is rather a charcoal sketch, the lines of which are drawn with the bold strokes of the artist. Without aiming specifically to do so, he reveals how a constitution, evolved out of the experience of a people that practiced free enterprise, can be adapted to the solution of the problems of a mixed economy possibly now twenty percent socialized.

A sound political scientist, Jennings recognizes in the party system the key to an understanding of the present British Constitution. Britain is a small island with a homogeneous population, and here lies one explanation of the difference between American and British political parties. Unlike the United States, Britain has nationalized its politics. For example, one would never hear a British voter saying, "I have no politics. I always vote for the best man." There it is the label that counts, that is, the candidate's party. The British elector votes for the program, not the man. The local member of Parliament is rarely a "favorite son," observes Jennings. Often he is a non-resident.

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