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Book Reviews

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BOOK REVIEWS

CHARLES EVANS HUGHES AND THE SUPREME COURT. By Samuel Hendel.¹ 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.² 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.³

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

¹ Assistant Professor of Government, College of the City of New York; Member of the New York Bar.

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

³ 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 recurrently 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,"⁴ or in saying, "By what tortuous alchemy these cases may all be reconciled is difficult to discern."⁵ And this leads to the final judgment:⁶

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.⁷ Here, too, courage and directness are the watchwords. Does Holmes' dictum—somewhat weakly accepted here⁸—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."⁹ For a biography which

⁴ Text, at 257.

⁵ *Id.*, at 260.

⁶ *Id.*, at 279.

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

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

⁹ 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.

*Charles E. Clark**

THE BRITISH CONSTITUTION (Third Edition). By Sir Ivors Jennings.¹ 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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¹ K. C., Litt.D., LL.D., Vice-Chancellor, University of Ceylon.

Electors generally do not want candidates possessing independent views but regular party men who can be counted on to execute the program to which the party is pledged. A ballot need never be a shot in the dark.

Jennings presents the argument for political parties in telling phrases. "The critic who asserts that parties are unnecessary has a belief in the rightness of his own opinion so profound that he does not realize that it is a partisan opinion."² This is something the American voter should take to heart. Lip service is paid here to the principle of two-party government, but so lacking is the American citizen in the convictions of a philosophy of parties that he welcomes any proposal to weaken parties. The Briton practices what he proclaims and there is no cult of non-partisanship, no urge for non-partisan elections, no move to take the politics out of politics.

This reviewer witnessed the election of last year in England. Heated as the campaign was the similarity of the parties could not escape him. It was significant that the Conservatives were almost furious at the Labor government's claim of credit for socialized medicine—it was no less the baby of the Conservatives. "A Conservative can be almost a Socialist," observes Jennings, "and a trade unionist a very good Conservative because the parties are not fundamentally divergent in policy and are appealing for the same votes."³

Indeed an analysis of the group structure of British parties should make an American feel at home. The rural areas, the residential suburbs, and the seaside resorts are usually Conservative quite as these tend to be Republican in the United States. The industrial areas contain a very high proportion of Labor seats. Elections are lost or won there, as here, in the semi-industrialized areas.

Parliament does not govern—that is the function of the ministry. Parliament instead can only criticise. "To find out whether a people is free it is necessary only to ask if there is an Opposition and if there is, to ask where it is."⁴ Let those who admire the "efficiency" of dictatorship reflect on this: "The German citizen could reach Herr Hitler only through an immense bureaucracy. Any British subject can reach the ministry at once through his member [of Parliament]."⁵

The function of the House of Lords is made clear. Even a good bill framed by the ministry becomes mutilated passing through the House of Commons and needs the "cleaning up" the House of Lords is able to give it "if our statute book is not to be even a stranger

² Text at 22.

³ *Id.* at 52.

⁴ *Id.* at 82.

⁵ *Id.* at 36.

document than it is now." ⁶ Incidentally, Jennings observes that the conservatism of the House of Lords is evidence that party division is largely an economic division or, as we Americans might put it, the "Haves" against the "Have Nots."

Americans need especially to be enlightened as to the function of the monarch. There is a well authenticated story, not mentioned by Jennings, that when Clement Atlee after the Labor victory of 1945, went to the King with his list of the ministers the monarch inquired "Who is your best man?" "Ernest Bevin," was the reply. "Then make him the foreign minister." Atlee promptly complied although he had another on his list for that post. We need incidents like this to correct the American impression that the King is only a figurehead. He is in fact a hard working man putting in more hours than British union rules would permit. Jennings stresses that the King will authorize no official act unless convinced that circumstances call for it. He will not permit a dissolution of Parliament unless convinced public opinion requires it. He will not permit the prostitution of his prerogatives to partisan purposes.

This scholarly little book is eloquent with the enthusiasm of an ardent democrat. "A people can be forcibly enslaved but it cannot be 'forced to be free.' It becomes free because it desires to be free, and it remains free because it so intends." ⁷ The pages bristle with sentences rich with the flavor of proverbs. "A constitution is not a framework of laws but a tissue of dynamic relationships." ⁸ "There is an inevitability about social movements that is obscured by the quarrels of petty politicians." ⁹ Here is a little book that will quicken the pulse as you grow in wisdom while perusing its pages.

Wilfred E. Binkley*

THE CONFLICT OF LAWS, A COMPARATIVE STUDY. Volume III. By Ernst Rabel.¹ Chicago: Callaghan and Company, 1950. Pp. xlvii, 611. \$12.50.—However the late Professor Joseph Beale's work in the Conflict of Laws may be judged, it will be generally agreed that he provided a synthesis of the subject which lawyers and judges have found exceedingly useful. The central place of Beale's discussion in modern Conflicts' thinking is only underscored by the number and vigor of his critics. In many law schools the principal technique of Conflicts teaching is to de-

⁶ *Id.* at 104.

⁷ *Id.* at 207.

⁸ *Id.* at 36.

⁹ *Id.* at 59.

* Professor of Political Science, Ohio Northern University.

¹ Research Assistant, University of Michigan Law School.

molish a portion of Beale's treatise or the Restatement at least once during each class hour. The job of destructive critical attack has been done—almost too well. The need is to rebuild. The old structure has been razed; now the search is for architects to help with new plans.

Movements of reform and true restatement in the Conflict of Laws will find indispensable a thorough study of the conclusions and methods of Dr. Ernst Rabel. The three volumes of his treatise have presented the legal profession with an extraordinarily constructive and suggestive combination of research and analysis. The first volume treated some general conflicts questions and Family Law. Rabel's Volume Two canvassed the choice of law rules applicable to contracts generally. The third and most recent volume is devoted to a study of the rules of choice of law applicable to certain kinds of contracts, and to an exploration of the rules governing modification and discharge of obligations.

In the general contracts area Rabel's conclusions support the principle of party autonomy. Contracting parties should be given almost complete freedom to choose the law governing their obligation. The chief concern of Volume Three is to suggest answers to the question: what if the parties have expressed no choice of law in their agreement? In that event no general rule, such as place of making or place of performance, should be adopted for all contracts, but each contract should be judged by the law "most closely connected with its characteristic feature."² Different types of contracts will require different rules. "Place of making" and "place of performance" are too imprecise to serve as contact points for choice of law rules when they are tailored to particular categories of dealing. The bases of new conflicts rules employing new contact points may be found for the principal types of commercial transactions by a careful study of the facts of business life, and by comparing the possible advantages of the array of rules followed in different countries. Further, the law chosen should not vary with the question presented to a court. A single law ought to be employed to decide all the private law consequences of a single agreement.

Rabel's approach to a problem can be outlined by describing his treatment of insurance contracts and the conflicts of laws. He begins by making a survey of the judicial doctrine, the statutes (actual and proposed), and the constitutional problems of the subject in American law. Then different choice of law rules used in foreign countries are described. Throughout the whole discussion the author's wide knowledge of commercial practises pervades his comment on the law. The American doctrines are found unsatisfactory in that they emphasize the formation of the contract or its performance as the localizing factors

² Text at vii.

for choice of law purposes. Rules using these contact points permit courts to make "ritualistic gestures" which conceal practical results. A consideration of the European legal experience and the facts of the insurance business point to "intensive state control . . . as the most powerful force localizing insurance activities of all sorts."³ The insurance chapter concludes with tentative proposals:⁴

A contract of life insurance is governed by the law of the state where the insured has his habitual residence, provided that this state claims administrative supervision over the contract, and that an agent of the insurer in the state has participated in the negotiation of the contract.

A fire insurance contract respecting immovables, movables or other interests in a fixed location, is governed by the law of the state of the situation.

Dr. Rabel's most important gift to those interested in the conflicts of laws is a mode of working. Conflicts reform will require reconsideration of our present rules in the light of the law of other nations and of the characteristics of social and economic activity. We are not ready to restate or to legislate. Our need is to think and to study.

Monrad G. Paulsen*

A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW. By Phanor J. Eder.¹ New York: New York University Press, 1950. Pp. xii, 257. \$6.00.—Mr. Eder's book is based upon lectures originally delivered in Spanish before the Inter-American Academy of Comparative and International Law in Havana, February, 1947. The lectures were repeated in English with some additions as an introductory course for Latin-American students at the New York University Law School. The author, born in Colombia of American parents, has been a member of the New York Bar for almost fifty years and has also practiced law extensively in several Latin-American countries. His earlier writings on Latin-American law and history are well known. He is thus eminently qualified to undertake a *Comparative Survey of Anglo-American and Latin-American Law*, and in the present volume, given the rather narrow limitations of space and the lecture medium, he has performed his task in an effective and readable manner.

The book is brief, some 159 pages of text plus a bibliography of publications in English and other languages on comparative law with

³ *Id.* at 336.

⁴ *Id.* at 343.

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particular reference to Anglo-American and Latin-American systems. Consequently, it cannot be expected to do more than introduce the student to two vast legal fields. Some selection was required with regard to the methods, concepts and principles of the two systems compared. Torts, Equity, Trusts and Future Interests receive the main treatment. Brief mention is made of similarities and differences between the two systems in the fields of Agency, Contracts, Property, Partnership, Corporations and Family Law. The author suggests that the basic principles of Latin-American and Anglo-American Law are alike, and that the characteristic differences between the two systems lie more in the difference of methods. The Latin-American lawyer works under a completely codified system; the Anglo-American lawyer is primarily a "case" lawyer and his principal tool is "precedent." Mr. Eder recognizes that *stare decisis*, at least to the extent of paying some respect to previous decisions, is making headway in certain Latin-American countries while the trend toward codification still continues in the United States. The interesting question is whether *stare decisis* will ever attain in Latin-American law the position it holds in America, and will American codification be codification in the Continental or Latin-American sense. This may make a fascinating chapter in some future survey of the two systems if they continue to influence each other, and, indeed, Mr. Eder's book contains numerous instances indicative of such reciprocal influence.

The author is not concerned with the details of statutes or of code provisions in which Latin-American and Anglo-American Law differ from each other so widely—property law and domestic relations law being two of many possible examples. Thus the book is not to be looked to for any detailed summary of the law of any of the twenty Latin-American countries. The stress is rather upon what truly "marks the essence" of the two systems. It would seem that there is greater emphasis placed on Anglo-American law. Perhaps this is due to the fact that the lectures upon which the book is based were originally meant for students not familiar with Anglo-American law. Thus the chapter on Equity is an admirable summary of the origin and development of English chancery, while less space is given to corresponding doctrines in Latin-American law.

Obviously, any writer who undertakes to deal with Latin-American Law faces the fact that in each of the twenty republics there are two or more elaborate codes to be considered. While these codes have in general a Roman or Civil law background, there are wide variations in detail. It is difficult to generalize even when one eschews details to concentrate on essential features. The comparatively recent Mexican Civil Code, inspired in many respects by the ideologies of the Mexican Revolution of 1917, may disclose in time differences not of mere detail but of essential concepts, from, for example, the Argentine Code of Velez Sarsfield.

The above are merely minor caveats. They do not detract from the merits of Mr. Eder's accomplishment within the limits he set for himself. The book whets the appetite of the student for more extensive works along the same lines. Indeed we look forward from the present volume sponsored by the Inter-American Law Institute of New York University Law School to further excellent publications in the rich field of comparative Anglo-American and Latin-American law, as well as to more comprehensive presentations of Latin-American substantive and procedural law itself. Earlier summaries of the latter field in English seem out-of-date. Would it not be possible to produce a *Book of Latin-American Law* along the lines of Professor Jenks' *Book of English Law*? The excellent bibliography, which is one of the most valuable portions of Mr. Eder's book, indicates the wealth of material awaiting comprehensive coordination.

Edward F. Barrett*

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* Associate Professor of Law, University of Notre Dame.

*Reviewed in this issue.

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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION,
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St. Joseph County } ss.

Before me, a Notary Public in and for the State and County aforesaid, personally appeared M. H. Berens, who having been duly sworn according to law, deposes and says that he is Editor-in-Chief of THE NOTRE DAME LAWYER and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in Section 411, Postal Laws and Regulations, to-wit:

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