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Book Review: The American Judicial Tradition: Profiles of Leading American Judges, by G. Edward White

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THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES, G. EDWARD WHITE, New York: Oxford University Press, 1976. Pp. 441. $18.25 (hard cover).

The main title of this book is intended to conjure up the late Richard Hofstadter's widely acclaimed *American Political Tradition*,[1] to which White explicitly refers in his preface. The dust jacket claims that this book "does for the judiciary what . . . *The American Political Tradition* did for the executive and legislative branches, taking us behind the mystique of judging and bringing us closer to an understanding of the role of the judiciary in America."

Those interested in the functioning of appellate courts, the development of American constitutional jurisprudence, and the subtle impact of the philosophical disposition of judges on the development of that process, will find this book essential reading. White has performed a valuable service not only for American students of law and the legal process, but also for many others as well. It should prove especially helpful to Canadian law students and lawyers who live so close to the American scene but find many aspects of the American judicial tradition puzzling.

The subtitle of the book, "Profiles of Leading American Judges," does not do justice to its scope and depth. This tends to call to mind the many books on American judges such as Sidney H. Asch's *The Supreme Court and Its Great Justices*,[2] which is a superficial character sketch of the more popular United States Supreme Court Justices. *The American Judicial Tradition* is not of that genre. White's book is an account of the struggle to define the proper role of the judiciary in the American federal process as it has moved from a republican to a democratic form of government while professing to remain true to the intention of the Framers. Put another way, this book is an account of the search for the correct understanding of the judicial function under the Constitution of the United States.

The author skilfully places each judge — mainly justices of the Supreme Court of the United States but occasionally important state judges — in the context of the dominant economic and political issues of the day as well as in the context of the evolution of American constitutional jurisprudence. In short, this is a valuable study of the transformation of the judicial function from the time of John Marshall to that of Earl Warren.

The book follows closely the historic chronology, beginning with John Marshall's quest for the correct perception of the judicial function. And while it is probably the most important chapter in the entire book (since it identifies the foundation of the tradition), it is also the one most likely to come under critical analysis. Scholars such as Martin Diamond[3] have done much in recent

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[1] R. Hofstadter, *The American Political Tradition* (New York: Vintage, 1974).

[2] S. Asch, *The Supreme Court and Its Great Justices* (New York: Arco, 1971).

[3] M. Diamond, et al., *The Democratic Republic* (Chicago: Rand McNally, 1971); R. Horowitz, ed., *The Moral Foundations of the American Republic* (Charlottesville: University of Virginia Press, 1977); R. Goldwin, ed., *A Nation of States: Essays on the American Federal System* (Chicago: Rand McNally, 1969).

years to bring out the republican character of the American founding and how the transformation of the United States into a democracy was not intended by the Framers of the Constitution. One must ask the question (which White does not articulate but answers favourably by implication throughout the book) whether that transformation has been good for the United States. One may also ask to what extent the judiciary has contributed to the process. It would be too much to expect White to resolve these questions in the context of the task he has set himself. His discussion of John Marshall is broadly based and he wisely uses Robert Faulkner's *The Jurisprudence of John Marshall*.[4] It would be a mistake, however, to think that White exhausts the subject in the first chapter.

Having identified Marshall's principles of jurisprudence and political theory, White proceeds to show how successive Supreme Court Justices and several state judges have contributed to the development of the tradition by succeeding perceptions of the judicial function. Especially well done is the treatment of the role the Supreme Court played in the resolution of property rights under Justices Kent, Story, and Shaw. White shows less discernment in his treatment of Roger Taney, the man whose reputation will forever be tarnished by *Dred Scott*,[5] than he does of others. White blames Taney for *Dred Scott* and even goes so far as to say that "Taney overstepped the limits of judicial power" (p. 83). White appears to blame Taney for not seeing the "subsequent history of the nation," i.e., the movement towards egalitarianism and equality for blacks, and castigates him for making "the alleged inferiority of blacks a principle of law" (p. 82). But did not the Constitution do so? Despite White's moral indignation, the Declaration of Independence and the Constitution were never intended to apply to blacks. No doubt this offends us today, but it did not offend most of the signers of the Declaration or the Framers of the Constitution.

White shows how the evolution of judicial reasoning and constitutional interpretations in the area of state and federal power increased the role of the court in the American governmental process. He also shows how the Supreme Court under the "Four Horsemen" (i.e., Van Devanter, Butler, McReynolds and Sutherland) "openly resisted the legislative reforms of the New Deal and thereby helped precipitate the Court-packing crisis in 1937" (p. 178).

The author's discussion of Holmes, Brandeis and the origin of "American Judicial Liberalism" is much less critical than one would hope. Crucial to this chapter is a perceptive discussion of what the author means by "modern liberalism" and how it can be viewed as compatible with the aspirations of the Founders. Such concerns are extremely important and are given prominence from this point in the book to the end. It is clearly not sufficient to say, however, that "the principal innovation of modern liberalism was its utilization of the state as an agent to fill the void left by consensual value disintegration" (p. 152). Holmes emerges in a much less favourable light than one

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[4] R. Faulkner, *The Jurisprudence of John Marshall* (Princeton, N.J.: Princeton University Press, 1968).

[5] *Scott* v. *Sandford*, 60 U.S. (19 How.) 393.

would expect; he is seen as a majoritarian historicist for whom the law "was simply an embodiment of the ends and purposes of a society at a given point in its history" (p. 157). And while White implies that this view of the law was not Marshall's, he does not contrast Holmes's position with that of the Framers of the Constitution. Holmes appears as a superficial jurisprudent, but one is led to believe that White agrees with Holmes's view of the judicial process as historically progressive. In short, this book professes to settle any doubts that the Supreme Court of the United States has aided the development of modern egalitarian liberalism in the United States.

The last half of the book — chapters 9 to 14 — deals with the emergence and impact of sociological jurisprudence, legal realism, and process jurisprudence, which, the author says, "emerged in a consecutive sequence from the 1900's through the 1950's" (p. 252). White claims that as a result of this movement the appellate judge no longer saw himself as an oracle as Marshall did, i.e., as one "who could discover the law's technical mysteries but who could not influence the content of law itself" (p. 8).

One of the best chapters in the book is that on Benjamin Cardozo, Learned Hand, and Jerome Frank. The author shows how at "a time of profound and rapid social change" (p. 253), these three influential state judges "made prime contributions to an understanding of the dialectic of freedom and restraint in the appellate judiciary" (p. 253).

The longest chapter in the book is entitled "The Mosaic of the Warren Court: Frankfurter, Black, Warren and Harlan." It is perhaps not surprising that this is the longest chapter or that Chief Justice Earl Warren is given full approval, since White served as Warren's law clerk in 1972 and 1973. It begins with a useful discussion of how we have come to personalize the Supreme Court by the name of the Chief Justice. While White shows how this has often been unhelpful, he states that the designation "Warren Court" is an apt one, because "Earl Warren invested his Court with a discernible character, if not necessarily a coherent jurisprudence" (p. 318). White views Warren's achievement with favour because he met "the challenge of extracting unity from diversity, that of supplying channels for intellectual energies, and that of giving a loosely identifiable cast to the institution" (p. 318). But, one might ask, is the loss of "a coherent jurisprudence" too much to pay for that achievement? Ought not a Chief Justice be more concerned with procuring "a coherent jurisprudence" than giving "a loosely identifiable cast" to an institution? The one decision which best confirms White's point just as it brings out the problems is *Brown* v. *The Board of Education.*[6] It was a unanimous decision, and it gave "a loosely identifiable cast" to the Supreme Court, but as a work of legal reasoning it leaves much to be desired.

This discussion of the Warren Court raises many questions and gives few answers, but it is a fitting capstone in a study which favours an active role by the Supreme Court of the United States in expanding the conception of modern egalitarian liberalism. As White says, "The shared values of the

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[6] *Brown* v. *Board of Education of Topeka,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

Warren Court Justices, in short, were those of modern liberalism" (p. 320). The author professes to explore in this chapter the "costs and benefits of a substantive judicial commitment to modern liberalism" (p. 322). There is no doubt in White's mind that there are few costs and that these have been far outweighed by the benefits.

White does not discuss the Burger Court but does claim that to all outward appearances the "momentum of modern egalitarianism may have crested in the last phase of the Warren Court" (p. 368).

The final chapter, "The Tradition and the Future: A Summary," is a useful recapitulation of the main themes of the book. Unfortunately, the author does not give us an analytical summation of what we are left with after this intriguing and often exciting odyssey from Marshall to Warren. Is it not reasonable to expect that, having understood the past in the light of the present, it would be profitable to judge the present in the light of the past? Can we judge the results of Warren by the standards of Marshall? Or are we necessarily committed to Holmes's historicism?

There can be no doubt that White's book will be of positive value to Canadian readers, but it is also distressing in that it points to a manifest deficiency in the Canadian legal literature. Not only is there no equivalent general assessment of the Canadian judicial tradition, but a dearth of judicial biography as well. Not even Paul Weiler's excellent study of the Supreme Court of Canada, *In the Last Resort*,[7] qualifies in these respects. Why has there been such a systematic avoidance of judicial biography and assessment of the Canadian judicial tradition? We have had many outstanding jurists and our tradition is long and honourable. Perhaps some will say that the reason has been the dominance of the Privy Council until 1949. There is little doubt that our judicial tradition has had to suffer the restraining influence of the Privy Council and that our courts have not yet had to confront issues as serious for the survival of the nation as the Supreme Court of the United States has had to do. But our courts, especially the Supreme Court of Canada, were confronted with major problems — mainly relating to jurisdictional matters — in the early years following Confederation. An account of their efforts to solve those problems, and the disposition of members of the first Supreme Court of Canada to learn from American constitutional cases, are a part of our heritage that merits further study.

Whatever may be the reasons for past neglect, one cannot help lamenting the clear absence in historical and legal scholarship of writings on the Canadian judicial tradition. Surely the time has come to correct this deficiency. G. Edward White has provided us with an excellent model for such a task.

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[7] P. Weiler, *In the Last Resort* (Toronto: Carswell/Methuen, 1974).

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