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# Charles Evans Hughes and the Supreme Court, by Samuel Hendel

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"A Chief Justice cannot escape history," Mr. Justice Frankfurter wrote in a tribute to Harlan F. Stone. But history has its deceptions and ironies, and not the least of these is that, within the past year, a biographer of a dull Chief Justice has made him interesting and a biographer of an interesting Chief Justice has made him dull. The first of these biographers was Mr. Willard King whose facile and loving pen made of Fuller's life and times a fascinating tale.<sup>1</sup> The second of these biographers, alas, is Mr. Hendel who, although he approaches his task with erudition and scholarship, has produced a soporific.

Mr. Hendel, unlike Mr. King, writes of Hughes only through the medium of his opinions, with the exception of a little interspersed biographical material, and he has laboriously strung out the facts of and quotations from these cases in page after page of doctrinal discussion. Although unquestionably the two authors had different objectives in mind, one cannot help but compare this biography with the shorter, far more lively, and I think more informative article by Mr. McElwain.<sup>2</sup> One example will suffice. Mr. Hendel has elaborately set out Hughes' opinions on civil liberties to prove that "Most noteworthy, perhaps, were his decisions affecting civil liberties and rights of minorities."<sup>3</sup> But in the bitter-sweet story of *Bob White v. Texas*<sup>4</sup>—an opinion which the Chief Justice did not even write—Mr. McElwain has described more succinctly and certainly much more interestingly Hughes' civil liberties attitude.<sup>5</sup>

The difficulty perhaps with Mr. Hendel's book is that judicial biography should not be approached as he attempts it. To try to unravel all the doctrinal lace of a long tenure on the Court is appropriate only for an antiquarian. It is clearly suitable to discuss, as Mr. Hendel does, the Chief Justice's position with respect to *Adkins v. Children's Hospital*,<sup>6</sup> *Morehead v. People ex rel. Tipaldo*,<sup>7</sup> and *West Coast Hotel Co. v. Parrish*,<sup>8</sup> for those important cases, as clearly as any, show Hughes' ability to distinguish, compromise, and finally

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1. KING, MELVILLE WESTON FULLER, CHIEF JUSTICE OF THE UNITED STATES (1950).

2. McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5 (1949).

3. P. 281.

4. 309 U.S. 631 (1940); 310 U.S. 530 (1940).

5. McElwain *supra* note 2, at 25-26.

6. 261 U.S. 525 (1923).

7. 298 U.S. 587 (1936).

8. 300 U.S. 379 (1937).

adjust. But to ask the reader to be interested in decisions like *Grand Trunk Western R.R. v. South Bend*,<sup>9</sup> *New York Electric Lines Co. v. Empire City Subway System*,<sup>10</sup> and *Russell v. Sebastian*<sup>11</sup> is surely too great a demand.<sup>12</sup> Moreover, there is little justification for the book in its present form. If Mr. Hendel is interested—as appears the case—in the constitutional doctrine and development during Hughes' time as an Associate Justice and then as a Chief Justice, then surely that subject cannot be adequately studied through the opinions of Hughes alone. If, on the other hand, he is interested in Hughes as a person and as a judge, then he must probe far deeper. For often—and this indeed was the case with Hughes<sup>13</sup>—the opinions of a Justice are no more indicative of his labors and contributions than is a violinist's virtuosity indicative of the hours spent in practicing.

Lengthy comment of Mr. Hendel's remarks concerning the power of the Court to declare legislation unconstitutional is not necessary. Like many others he favors that power as it relates to state legislation but not as to federal legislation. The logical—and I think even more than logical, governmental—absurdity of that position has not always been pointed out. Adoption of it would mean that although the Court would one day strike down as unconstitutional a state statute under the due process clause of the Fourteenth Amendment, it could not the following day declare unconstitutional an identical statute passed by the Federal Government, although the Fifth Amendment contains precisely the same clause. And to deprive the Court of the power to hold federal legislation unconstitutional might give Congress the power, at least in many instances, to enable the states to pass legislation which otherwise would be invalid. I am afraid that Chief Justice Hughes' unhappy times, constitutionally speaking, have exerted too great an influence on Mr. Hendel. All institutions are subject to abuse, and the three branches of our government have from time to time been abused. But Mr. Hendel wants to tinker without thinking hard or deeply enough.

RICHARD F. WOLFSON\*

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9. 227 U.S. 544 (1913).

10. 235 U.S. 179 (1914).

11. 233 U.S. 195 (1914).

12. One of the best examples I know of unriddling of ancient doctrine is the chapter on "The Insular Cases" in King's book on Fuller. A small masterpiece, it is proof that legal history can be absorbing.

13. Frankfurter, "The Administrative Side" of Chief Justice Hughes, 63 HARV. L. REV. 1 (1949).

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