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## Book Review (reviewing Dorsey Richardson, Constitutional Doctrines of Justice Oliver Wendell Holmes (1924))

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## BOOK REVIEW

CONSTITUTIONAL DOCTRINES OF JUSTICE OLIVER WENDELL HOLMES.  
By Dorsey Richardson. Johns Hopkins Studies in Historical  
and Political Science: Series XLII (No. 3). Baltimore:  
The Johns Hopkins Press, 1924. Pp. 105.

This study, presumably written in the course of graduate work at Johns Hopkins, deals with the greater part, but not with all, of Mr. Justice Holmes's constitutional opinions down to 1920. The topics included are indicated by the table of contents: Social Reform, Commerce Clause, Conflict of State and Federal Powers over Commerce, Fourteenth Amendment, and Rights Guaranteed by First Eight Amendments. The writer is apparently not a lawyer, though he shows considerable knowledge of the constitutional aspects of these topics. The preface contains a brief outline of Holmes's life and an explanation of the limits of the monograph.

It may be said at the outset that the author's achievement, though doubtless sufficiently creditable for its purpose, falls far short of approaching that 'final word' which some more experienced and more professionally competent person may later pronounce upon Mr. Justice Holmes's judicial contributions to the doctrines of American constitutional law. The permanent value of these contributions may well be thought perhaps second only to those of Marshall; but Mr. Richardson's estimate of them is too fragmentary and loosely arranged, too little informed by legal learning, and too much possessed by the idea of demonstrating a deep philosophical consistency in opinions upon very diverse subjects to be thoroughly well-balanced and trustworthy. Moreover, the omission of Holmes's opinions upon constitutional questions in fields like admiralty, administrative law, conflict of laws, and the separation and delegation of powers is an unfortunate limitation of the subject; and the treatment accorded his opinions upon taxation is especially inadequate. Doubtless the technicality of these subjects made them too difficult for the legal training of a graduate student in political science, and the same may be said of the still more involved concepts of the commerce clause which are also beyond the author's professional competence.

The best part of the book, however, concerns those opinions upon so-called 'social welfare' legislation which are Mr. Justice Holmes's most distinctive work and the ones by which he is most widely known. In this field it is not difficult to attribute to the learned justice a consistent and rational social and legal philosophy of the first importance, and Mr. Richardson's marshaling of the data here, while suffering somewhat from unskilful arrangement, is sufficiently convincing. But his attempts to establish the same philosophical consistency in other fields are not persuasive. What intelligent laymen, interested in social reform, often do not under-

stand is that Mr. Justice Holmes is not only a social philosopher but a great lawyer. When he is dealing with the effects of a general restriction like "due process" upon the legislative regulation of conditions of labor, one may readily see the influence of his social philosophy upon the decision; but when he is interpreting the meaning of the commerce clause, of "double jeopardy," of "unreasonable search and seizure," of "self-incrimination," of "full faith and credit," of "involuntary servitude," or of many other phrases and concepts of constitutional law, Mr. Justice Holmes is influenced by the same considerations of logic, history, precedent, custom, policy, justice, and professional tradition as are other good lawyers; and, where the questions at issue are pretty evenly balanced, he will, like any sound lawyer who is not a professional 'radical' or 'reactionary,' be found sometimes upon the 'liberal' and sometimes upon the 'conservative' side of them, in a manner quite confusing to those who picture the majority of legal problems as solvable by the touchstone of some single relatively simple system of social philosophy.

Mr. Richardson, for instance, generalizes thus from Mr. Justice Holmes's dissent in *Frank v. Magnum*:<sup>1</sup>

"Believing that the justification of the law is the social advantage, he sees that advantage increased by an interpretation of the law to grant to the individual all possible protection in the procedure of courts of justice. The constitutional guaranties as applied in the criminal law he has everywhere interpreted to the advantage of the individual, as against the state."<sup>2</sup>

In fact, Mr. Justice Holmes has in several important cases taken a narrower view of such protection to the individual than have some of his brethren. In *Kepner v. United States*<sup>3</sup> he espoused the view, denied by the majority, that a new trial granted in a criminal case, on the appeal of the state, would not be a second jeopardy. In *Ju Toy v. United States*<sup>4</sup> he gave the majority opinion (three judges dissenting) that one claiming to be a United States citizen could by Congress be denied access to the courts upon this issue, and be compelled to take the decision of immigration officials as final. In *Weems v. United States*<sup>5</sup> he dissented from a decision that a criminal punishment could be "cruel and unusual" because it involved a term of imprisonment grossly disproportionate to the offense, accompanied by the wearing of chains and the duty of hard and painful labor. In *Bailey v. Alabama*<sup>6</sup> he dissented from the view that it was "involuntary servitude" to coerce the performance of an agricultural labor contract by a threat of criminal imprisonment for its fraudulent breach, the fraud being presumed unless admissible. It is probable that Holmes's views in all four of these cases would be inconsistent with any thoroughgoing radical or even liberal social philosophy; but, whether right or

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1. (1915) 237 U. S. 309.

2. *Richardson* p. 74.

3. (1904) 195 U. S. 100.

4. (1905) 198 U. S. 253.

5. (1910) 217 U. S. 349.

wrong, they were all views that a sound lawyer might hold, though the arguments in their favor were obviously inconsistent with the premises suggested in the quotation from Mr. Richardson.

In the main it is true, as Mr. Richardson says, that Mr. Justice Holmes does not interpret constitutional provisions as forbidding historical usages not in terms prohibited. His concurrence in the dissent in the *Weems* case, above, went chiefly upon the historical meaning of "cruel and unusual" punishments, which he thought did not include mere severity of a well-approved method of punishment, like imprisonment. This view is applauded by Mr. Richardson,<sup>7</sup> who does not notice, however, that, in a subsequent case,<sup>8</sup> in which Mr. Justice Holmes wrote in favor of enlarging the operation of the provisions against illegal searches and seizures and self-incrimination so as to forbid the use in evidence by the government of property illegally seized by its agents, the historical arguments in favor of the use of such evidence were quite as strong as those approved by him in the *Weems* case.<sup>9</sup>

Quite obviously history is followed in the *Weems* case and not in the *Silverthorne* case because the judge thinks the policy of the Eighth Amendment not inconsistent with its historical background, while thinking otherwise of the policy of the Fourth and Fifth Amendments as contrasted with the earlier practices. Why each decision was made as it was cannot be answered by an appeal to any consistent social philosophy. A good many considerations properly appealing to a lawyerlike mind entered into both decisions, and in each a tenable balance was struck—it being relatively an accident that in the one case history was on the winning side and in the other not. That is the way good judges do their work<sup>10</sup>—not as they are often imagined to do it by those who delight in labeling them comprehensively as 'liberal' or 'reactionary.' It may profitably be recalled that the nationalist John Marshall limited the federal admiralty jurisdiction to tidal waters (thus excluding the great lakes and inland rivers),<sup>11</sup> while the states-rights Roger Taney enlarged it to include all waters affording navigable passage from state to state.<sup>12</sup>

JAMES PARKER HALL.

LEGAL FOUNDATIONS OF CAPITALISM. By John R. Commons. New York: The Macmillan Co., 1924. Pp. viii + 394.

The Supreme Court of the United States has upon occasion found it appropriate to express in adequately emphatic terms its failure to discover—and its disinclination to seek—in the classifications and the theories of the economists aid or enlightenment in the

6. (1911) 219 U. S. 219.

7. *Richardson* pp. 102-3.

8. *Silverthorne Lumber Co. v. United States* (1920) 251 U. S. 385. See also *Gouled v. United States* (1921) 255 U. S. 298.

9. See A. J. Harno "Illegal Search and Seizure" (1925) ILL. LAW REV. 19:303; *Wigmore* "Evidence" (2d ed. 1923) IV sec. 2183-4.

10. *Cardozo* "Nature of the Judicial Process" (1921) pp. 64-67.

11. *The Thomas Jefferson* (1825) 10 Wheat. 428.

12. *The Genesee Chief* (1851) 12 How. 443.