

Mr. Justice. Edited by Allison Dunham and Philip B. Kurland. Chicago: University of Chicago Press, 1956. Pp. xi, 241. \$3.75.

Effective functioning of the system of separated powers under the Constitution of the United States depends on the kind of men who exercise the powers as well as on the structure of government. The legislator and the principal executive officers in a democratic system must necessarily be responsible to majority pressures. We planned it that way. We have jealously struck down every attempt to limit the political persuasion that organized groups may seek to exercise on state legislators, governors, congressmen, and the President. These officers must live in continual storms. The qualities their careers require are less contemplative than they are qualities of sensitivity to public desires, strengthened by resistance, resolution, cheerful endurance. They must know the arts of pleasing, without entire self-surrender.

Such an arrangement and such men are admirably adapted to producing much responsiveness to the popular impulse; but our people have always distrusted all power over themselves, including power held by the mass of neighbors. We have never believed Hamilton's thesis in the Eighty-Fourth Federalist Paper, that bills of rights are unnecessary in "constitutions professedly founded upon the power of the people and executed by their immediate representatives and servants." We saw at once when we set up our system in 1787, that majorities could be wrong, and we took steps to provide the judiciary as a limiting organ of government deliberately isolated from the pressures of popularity.

In those instances, not infrequent, where the judicial task is creative rather than merely declaratory of an accepted rule, the Supreme Court of the United States does not function so very differently from a legislature. To be sure, the judiciary does not originate occasions for promulgating new rules of law, while a legislature may do so; but one finds many instances where the legislator is urged to act by the insistence of moving parties very like litigants. The considerations prompting the legislator's choice of action are not greatly different from those moving the judge—considerations of utility, a sense of justice, responsiveness to the felt necessities of the times.

The executive, when he functions as lawmaker or as judge, behaves much the same. He understandably and properly wants to be both right and President. He is motivated in his governing choices by much the same considerations that move the judge. Does the judge then characteristically resemble the legislator and the administrator? In general humanity, obviously yes. Men are all one species. Many judges have served well in other governmental tasks. But the judge, despite his partial resemblance of function, becomes, when he accepts the robe, to some extent another sort of person. His character seems to change. We entrust him with his duties of government precisely because he will be a different sort of man. When we choose judges, most of us drop our

otherwise somewhat pervasive cynicism about public officials. We want to believe in judges.

This mutation helps account for the popularity of judicial biographies—full-length or short; monographic or comparative. Here is a subject perennially attractive and puzzling to us. This man was once much as we are; we saw him plain; like the rest of us he sought at the bar for arguments to make the worse appear the better reason. In public life he may have made the inevitable compromises of politics. Now he has become a little remote, he has moved a step away from the crowd. In his public duty he must forego those pleasantly stirring partisanshipes that the rest of us savor. Upon what meat does this our one-time brother feed? Even at dinner he takes on a faint austerity. He is a little lonely in his power and uprightness.

The editors of *Mr. Justice*, Professors Kurland and Dunham of the University of Chicago Law School, here present short biographical sketches and character analyses of nine Supreme Court Justices. The papers were delivered by their authors as lectures at that University. William Winslow Crosskey writes on Marshall, Carl Brent Swisher on Taney, Charles Fairman on Bradley, Francis Biddle on Holmes, Merlo J. Pusey on Hughes, Paul Freund on Brandeis, J. Francis Paschal on Sutherland, Allison Dunham on Stone, and John Paul Stevens on Rutledge. The choice of justices must have been difficult. What of the violent Chase in the Court's first decade, with his vehement italics? Story, sensitive and wise? Stephen J. Field? John Marshall Harlan? Taft? McReynolds? Pierce Butler? Owen Roberts? Frank Murphy? There is material for many more such lectures and books, treating of the very different sorts of men who through the years have been charged with the curiously aristocratic duties of their Court; essays treating of their wholesome or disturbing influence on our polity; books written without the violence and malice of *Nine Old Men*,¹ judging them as they judged.

Mr. Justice is an interesting contribution to this history. One may differ with details. I could wish for a different title: this one has a touch of whimsy. The order of the essays is puzzling, until one perceives that they are arranged not in the chronological sequence of the justices they describe, but alphabetically according to author.

There are matters of substance that raise questions. In his essay on Marshall Professor Crosskey repeats the principal thesis of his *Politics and the Constitution*;² he writes that Marshall was not, as most of us have been taught, a principal architect of a strong national government. Marshall's chief justiceship came, the author tells us, in a period of constitutional decay when what the founding fathers intended as an unrestricted federal legislative power was cut down by Jeffersonian contenders for states' rights. Marshall's career, we read here, was a long, stubborn, and on the whole losing rearguard fight

¹ Rodell, *Nine Old Men* (1955).

² Crosskey, *Politics and the Constitution* (1953).

against "the subversive principles of Jeffersonianism." Marshall's claim to greatness was his "unflagging courage in the face of these odds and in the face of constantly recurring defeats."

No good end will be served by here renewing the long controversy over Mr. Crosskey's view of a constitutional paradise lost. I have elsewhere expressed my skepticism; others have gone farther.³ The mission of reviewing a book entitles the reviewer to some prejudices, and mine incline me to Holmes's and Frankfurter's more conventional estimates of Marshall's work.⁴

Carl Brent Swisher's paper on Chief Justice Taney is a balanced judgment. Of Taney, Professor Swisher writes

. . . he brought to the Supreme Court a preoccupation with local welfare and local rights that had not hitherto characterized it. . . . He believed in regionalism within the national pattern and apparently assumed that the essence of good living, which the Constitution was intended to protect, was to be found in the relations of people in their local communities. [P. 225].

But Taney "lacked that dispassionateness which we consider an ideal for the Supreme Court." (P. 224). He was unable to embody his political and social theories of localism in judicial doctrine "without involvement in the almost frantically emotional issue of slavery." (P. 225). He can be understood only "in terms of his conviction that not the South but the North violated principles of natural law and hence of the Constitution itself, making inevitable the attempt at disunion." (P. 226). Taney was a good man, eminently humane in his personal relations with Negroes. He freed his own slaves and cared for them thereafter. He helped at least one worthy slave to purchase his freedom. But whether he wrote the Dred Scott opinion or adopted a draft by Wayne, he was responsible for it. History has condemned him by incomplete quotations from that opinion. Professor Swisher does justice to Taney's ability to see law not merely in terms of abstract principles, but in terms of the intimate life of diverse communities; but Mr. Swisher sees, as well, Taney's provincialism that would not expand to full national vision.

The third paper in chronological order would be Charles Fairman's essay on Mr. Justice Bradley. Had the book been so ordered the reader could better follow the growth of the nation's political thought: Marshall and the founding of our system; Taney and the persisting conception of local autonomy that was defeated at Appomattox; then Joseph P. Bradley, one-time insurance and railroad lawyer, sitting on the Court from 1870 to 1892, the new man of a developing national economy, who despite his professional background of great private affairs was influential on the Court in establishing the doctrine of the *Granger* cases. Professor Fairman points out that

³ See a review of *Politics and the Constitution*, 39 Cornell L. Q. 160 (1953) and other commentaries cited therein.

⁴ See Frankfurter, "John Marshall and the Judicial Function," in *Government Under Law*, proceedings of the Marshall Bicentennial Conference at Harvard Law School (1956).

Professional detachment is a great virtue, one that becomes rarer as economic interests become more highly concentrated and lines of conflict are more sharply drawn. [P. 92.]

Bradley's mastery of the business of the law was admirable, but independence of judgment was his most valuable trait. Mr. Fairman does well to end his piece with this lesson.

Holmes is next in historic order. Willard Hurst, in his *Law and the Conditions of Freedom in Nineteenth Century United States*,⁵ has recently pointed out the mood of self-appraisal, self-doubt, questioning of the hitherto accepted, that came with the end of the century. Holmes, coming to the Supreme Court in 1902, believing that the mark of a civilized man is his willingness to question his own premises, was a new sort of judge. Francis Biddle, in his essay, says that Holmes would have been more often amused than annoyed at the easy classifications by the casual critics who try to pin him down as a museum-piece. Mr. Biddle, remembering Holmes, writes

. . . with the hope of catching and holding for a fleeting moment of memory the characteristics that were peculiarly his and that are worth handing down to a generation of young Americans who are beginning their careers in the law and under the law twenty years after his death. . . . And if the future enlarges the actuality of the present, the memory of our own heroes can banish our historical insecurity and strengthen the direction of our national aim. They can lift us by the sense of their nobility. [P. 1.]

Hughes was stern where Holmes was whimsical. He had not lived Holmes's soldier's life, and was perhaps more unbending with himself for that reason. He was certain of premises where Holmes wondered. Like Holmes's, Hughes's experience on the bench took place in a span of thirty years—Hughes served from 1910 to 1916 and again from 1930 to 1941. But in the middle years Hughes campaigned for the presidency, was Secretary of State and was the leader of the American bar. His biographer, Merlo Pusey, here gives a picture of that strong, confident, able judge who formed part of two very different courts—that before and that after the New Deal.

Louis D. Brandeis, George Sutherland, and Harlan Fiske Stone all shared with Chief Justice Hughes their membership on the Court before the New Deal crisis, and their continuance on the bench for a while after the great change of 1937. Paul Freund writes of Mr. Justice Brandeis with the affection and comprehension of a friend. Brandeis was a believer in the individual. The characteristic mass movements of this century were antipathetic to his view of man's potentialities. Professor Freund writes

The problem of recognizing human fault and frailty, virtue and talent in the context of giant enterprise is to be found in twentieth-century industry, in governmental undertakings, and national structures themselves. This problem was, I believe, central in Brandeis' thinking. To him the rise of giantism and the moral dilemmas it has

⁵ Hurst, *Law and the Conditions of Freedom in Nineteenth Century United States* (1956).

posed—the curse of bigness, as he was not ashamed to describe it—was lamentable, corrupting man's character, and by no means so inevitable or irredressible as is commonly assumed. [P. 97.]

Sutherland had much in common with Bradley. Both grew up in times of hope and expansion. Each, because of his own early professional achievement, had a strong sense that for anyone with intelligence, energy and determination, success was attainable. Neither sensed social helplessness. It may be that Mr. Justice Sutherland will be the last of our justices to reach the Court full of this confident optimism of an opening continent. In his own strength and his sense of its rewards in life, he was a man of the Nineteenth Century, believing in the freedom of individuals to govern themselves by their own contracts, even when they were not so placed as to bargain equally. J. Francis Paschal describes him with sympathy and understanding.

One reads the Freund and Paschal papers and wonders if Justices Brandeis and Sutherland were not much alike in fundamentals? To each success came in comparatively youthful days. Each was impatient of the individual's surrender to social forces; each felt that a strong man could survive as an integer, and that man should take the responsibility that this opportunity carries with it. Each had some of the impatient hopefulness of the nation's beginnings. Each was in his way a romantic. Mr. Freund suggests that Justice Brandeis was a man of the Nineteenth Century. Perhaps he and Sutherland had in their characters much of the Eighteenth.

Harlan Fiske Stone was not a convert to the constitutional revolution of 1937; he was always of the new court, from his appointment in 1925. He and Wiley Rutledge had each spent many years as university teachers; and while life in a university may make some men into unworldly dreamers, it encourages the best of them to be hard realists. The dreamer, the romantic, is more apt to be the man of large affairs. Holmes, that extraordinarily complex person, had more scholar in him than his short tenure as a professor would suggest, and his surgical realism was a scholarly trait. Stone and Rutledge, as the Dunham and Stevens essays well demonstrate, shared this hard-eyed insight, this stubborn unwillingness to accept the easy delusion of words, this entire unbelief in the Emperor's new clothes. Call it disillusion or clear vision, this scholar's trait appears significantly in the realistic competence with which both Stone and Rutledge handled the troublesome business of state incursions into the national economy, a field in which words have had a peculiar delusive power for many. Wiley Rutledge, the only one of the nine justices here described whose entire career on the Supreme Court—1943 to 1949—came after the great turn of 1937, was never so misled. His sudden and early death was a sad loss to the nation's judicial institutions.

What, then, is the characteristic of the good judge? The nine men described in this book are very different: Marshall at first glance seems quite unlike

Rutledge; Taney and Stone surely have little in common. One ends the book with a feeling that the great trait of the best judges is unselfishness, the capacity to see society clearly, without the distortion of vision that accompanies the drive to succeed, to persuade, to gain power. We trust the justices of our Supreme Court with some of the greatest powers of government; we do so because they are characteristically beyond the desire for power. Much of their labor is disclaiming the exercise of power. In a society of frantic grasping for influence, of shrill competing claims, of strident advertisement, the good judge is calm and quiet. In the troublesome days between 1935 and 1937 there was much discontent among the loquacious because judges were not more like legislators. But perhaps the reverse would be a more wholesome ideal for our time.

ARTHUR SUTHERLAND*

6 Professor of Law, Harvard University.

Freedom, Virtue, and the First Amendment. By Walter F. Berns. Baton Rouge: Louisiana State University Press. 1957. Pp. 264. \$4.00.

Professor Berns, of the Yale Political Science faculty, has written an unusual book. In considering the function of the Supreme Court in American government,¹ he rejects the "libertarian" doctrine of "judicial restraint."² He also rejects the "libertarian" thesis that the freedoms of the Bill of Rights are ultimate and absolute values in our society.³ He would have the Court exercise all its power to decree the good, the true and the beautiful.⁴ Perhaps some day he will provide the touchstone so that we may all readily recognize these qualities. In the meantime we must accept on faith his assertion that the nine robed men in the marble palace in Washington could accomplish his objective if only they wanted to do so. Professor Berns's book bears all the earmarks of a revised doctoral dissertation: it is heavy without being weighty.

PHILIP B. KURLAND*

¹ See Kurland, *The Supreme Court and Its Literate Critics*, 64 *Yale Review* 596 (1958), of which this review was once a part.

² Cf. Hand, *The Bill of Rights* (1958).

³ Cf. Douglas, *The Right of the People* (1958).

⁴ Cf. Buckley, *God and Man at Yale* (1954).

* Professor of Law, The Law School, The University of Chicago.

Reflections on Hanging. By Arthur Koestler. New York: Macmillan Co., 1957. Pp. xxiii, 231. \$4.50.

The Sanctity of Life and the Criminal Law. By Glanville Williams. New York: Alfred A. Knopf, 1957. Pp. xii, 350, xiii. \$5.00.