

BOOK REVIEWS

CASES AND MATERIALS ON CONSTITUTIONAL LAW. By John P. Frank.* Chicago: Callaghan & Company. 1950. Pp. xxviii, 1054.

In 1895 James Bradley Thayer published his two-volume case book on Constitutional Law and required 2434 pages to present the subject as he saw it. The course which he gave at that time ran for three hours a week during the school year, with the possibility of taking it as a two-hour course by quitting after two-thirds of the year. Yet even with that liberal allowance of time and space, he found it necessary to confine himself to "the leading titles," to which, however, he gave a "fairly full treatment." He added that he "preferred to make the two volumes as large as they could well be, with any regard to convenient use, and to pack them closely, rather than to take the much easier course of letting the work run over into three or four volumes."

If such an expanse of print were thought fitting or necessary in 1895, ten times as much could readily be regarded as requisite today. Constitutional law prior to 1895 seems fairly simple and modest in amount, compared with what has come from the Supreme Court since that time. The bite of the law is in its application more than in its doctrine, and twentieth-century economic issues raised by state and national legislation and administration make the work of the United States Supreme Court in the nineteenth century seem merely introductory to the varieties and complexities that have had to be dealt with later. More and more the stress has been on economics rather than on history and political theory. This means that the efficient training of future practitioners requires intensive exploration and analysis of detailed differences and similarities in the situations and the prescriptions that call for judgment.

Materials for such thorough-going discipline on all the topics of constitutional law can obviously not be set forth for the fare of the student. He could hardly be expected to pay for them, to lug them around or to digest them. There are other fields of the law which can rightly claim at least a fraction of his time. So some compromise is essential. For the most part the publishers seem to favor case books that at least touch on many digest headings, even then giving so much in all that individual teachers must make their courses selective rather than comprehensive. Such at least has been confessed by some publishers as the creed demanded by the state of the market. The only case books since that of Thayer which have offered anything approaching comprehensiveness in a few chosen topics have been those of Hall and McGovney. With either of these books in their season, one could really dig into a multitude of issues in commerce, taxation and police power—at least to the full extent that time permitted.

* Associate Professor of Law, Yale Law School.

It must of course be at once recognized that this is not so tragic a decline of devotion to constitutional law since the days of Thayer as would be assumed if attention were to be confined to the course with the curricular label of constitutional law. Much constitutional law is given in courses in taxation, labor law, governmental regulation of industry, administrative law, corporation finance, creditors rights, federal jurisdiction and procedure, criminal law, evidence, conflict of laws, domestic relations and other proliferations of the 1895 curriculum. It is a fruitful development to combine common law, legislation, administrative and constitutional law in an endeavor to focus on matters cognate to each other from a practical standpoint—and this without necessarily getting into the quarrel between the functional and the conceptual or the other isms that have been matters of debate among law teachers eager to substitute something intellectual in nature for what some of their colleagues have been satisfied with.

Naturally this effloration of constitutional criteria into so many of these other courses has raised the problem of what should be the stuff of the basic course in the field. Shall it be put into the second year as introductory to the more specialized third year courses in which legislation and administrative action are part and parcel of the material to be dealt with? And, if so, how shall this affect the scope or the nature of the primary course? Shall it be a cursory, compendious, birds-eye survey of the entire terrain or shall it concentrate on one or two topics and deal with them as intensively as time permits? Should the primary concern be a catalogue of rubrics and formulae or an adventure in discipline in the professions and the practices of various Supreme Court Justices? Or can there be some combination or alternation of the two that will yield both knowledge and power in sufficient breadth and strength?

Some such questions as these, and very likely more of them, must present themselves to any deviser of a casebook in the primary or elementary course in constitutional law. It is all to the good if there is no single dogmatic answer. The more varieties, the better. It would hardly be fair to appraise one choice in the light of the other possibilities. The two may be better than either alone, even though only one may be adopted in any single course. Moreover, there is always available the caveat of the reviewer of a case book to the effect that of course the test should not be an *a priori* one but must await the actual experience of classroom use. With these considerations in mind, there remains only to indicate the nature of the choice that Mr. Frank has made and perhaps to add a few comments.

The striking characteristic of Mr. Frank's book is its separation into two distinct parts. The first consists of six chapters giving the major controversies in the Supreme Court prior to 1930. After matters preliminary to the adoption of the Constitution, there are separate chapters on "The Marshall Era" and "The Taney Era" followed by others on "Chase and Waite, C. J.'s

(1864-1888)"; "Fuller, C. J. (1888-1910)"; and "White and Taft, C. J.'s (1910-1930)." Each chapter contains the leading cases of the period involved, and the selection seems unexceptionable, much as one might wish for more. A unique feature here and later are the biographies and appraisals of the leading Justices whose opinions are chosen. Some of these are written by Mr. Frank. Others are borrowed from the Dictionary of American Biography and other sources. This venture in humanizing the subject is worthy of all acceptance and imitation. These landmark cases are not enough to provide full knowledge of the subjects involved, but some hints of later developments are given in notes, which contain also some bits of orientation and suggestions for teaching and study.

The second and longer part of the collection fills three chapters on selected issues of the past twenty years. There is bound to be difference of opinion as to the wisdom of the inclusions and omissions. A chapter on cases from 1930 to 1937 starts with the judicial blocks on prescription of a minimum wage for women and of prices and wages in coal mining and on the processing tax and use of the proceeds to restrict crop production in order to enhance the price. Then follow the cases sanctioning the Minnesota Mortgage Moratorium Law, the New York regulation of milk prices, the new judicial light on minimum wages for women, and the condonation of the National Labor Relations Act. The chapter concludes with four cases in the field of Civil Rights, followed by a note on picketing and the problems raised by the obstreperous activities of members of the sect known as Jehovah's Witnesses. Perhaps this is enough to give to students a hint of what lay behind President Roosevelt's proposed legislation for the reorganization of the federal judiciary, but it certainly is none too much.

The two concluding chapters are entitled "The Constitution Today" and "Contemporary Problems." Here is an excellent selection of the recent cases on state and federal regulation of interstate commerce and enough of them to give a satisfactory picture of the main aspects of our contemporary federalism. For the rest, the space is taken up mainly with cases in the field of Civil Liberties with a long section on "Negro Problems" and another on "Freedom of Communications." This emphasis seems more the product of special interests of the editor rather than the fruit of an endeavor to provide a balanced ration for future practitioners. Indeed the arrangement and the selection of topics and cases throughout the work are better designed to contribute to an informed and intelligent citizenship than to prepare for practice at the bar.

This is a merit as well as a defect, depending upon the angle of approach. For students of political science in colleges and graduate schools, Mr. Frank's contribution merits the highest commendation and unqualified recommendation. For the law school curriculum, the wisdom of its adoption may well be

thought to be wholly dependent upon what will be offered to the student by way of information and technical discipline in subsequent more specialized courses in public law.

THOMAS REED POWELL†

CHARLES EVANS HUGHES AND THE SUPREME COURT. By Samuel Hendel. King's Crown Press. 1951.

"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.¹ 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.² 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."³ But in the bitter-sweet story of *Bob White v. Texas*⁴—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.⁵

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*,⁶ *Morehead v. People ex rel. Tipaldo*,⁷ and *West Coast Hotel Co. v. Parrish*,⁸ for those important cases, as clearly as any, show Hughes' ability to distinguish, compromise, and finally

† Story Professor of Law Emeritus, Harvard Law School.

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).