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# THE "LIBERALISM" OF CHIEF JUSTICE HUGHES

SAMUEL HENDEL\*

Charles Evans Hughes ascended the bench as Chief Justice of the United States in February 1930 in the midst of the most serious and steadily worsening economic crisis in American history; a crisis which was to put the institution of judicial review, the Court, and the leadership of its Chief Justice to their severest test. "One may search in vain," said Harlan F. Stone, "for a period in the history of the Supreme Court in which the burden resting on the Chief Justice has been so heavy or when his task has been more beset with difficulties."<sup>1</sup>

Now, twenty years after the bitter controversies that stirred the nation as many vital New Deal measures fell before the Court and an attempt was made to "pack" the Court itself, and more than fifteen years after the retirement of Chief Justice Hughes on July 1, 1941, it may be possible to appraise his record with close regard for the evidence and with some dispassion.

Hughes brought to his tasks as Chief Justice a wide range of experience, a penetrating mind, and qualities of character that contributed to his skilled leadership of the Court in a period of crisis and marked him as one of its great "Chiefs." "He took his seat at the center of the Court," Mr. Justice Frankfurter tells us, "with a mastery, I suspect, unparalleled in the history of the Court, a mastery that derived from his experience, as diversified, as intense, as extensive, as any man ever brought to a seat on the Court, combined with a very powerful and acute mind that could mobilize these vast resources in the conduct of the business of the Court. . . . To see him preside was like witnessing Toscanini lead an orchestra."<sup>2</sup> And elsewhere he says of Hughes that "He never checked free debate, but the atmosphere which he created, the moral authority which he exerted, inhibited irrelevance, repetition, and fruitless discussion. . . . He also showed uncommon resourcefulness in drawing elements of agreement out of differences and thereby narrowing, if not always escaping, conflicts."<sup>3</sup>

Hughes' superb skill in the conduct of the work of the Court is of considerable importance in any inclusive appraisal of his record. But it is obvious that his place in history as Chief Justice will depend primarily on the role he played with respect to the great constitutional

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1. Stone, *The Chief Justice*, 27 A.B.A.J. 407 (1941).

2. Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 901 (1953).

3. Frankfurter, "The Administrative Side" of Chief Justice Hughes, 63 HARV. L. REV. 1, 3 (1949). See also McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5 (1949).

issues that came before the Court and, in this connection, I turn first to certain general propositions.

It is a truism—no longer seriously controverted—that a justice brings to his tasks certain social, economic, intellectual, and political predilections derived from his background, training, and experience. And it has also been recognized, as Felix Frankfurter has written, that the “words of the Constitution,” upon which the solution of constitutional problems frequently depend, “are so unrestricted by their intrinsic meaning or by their history or by tradition or by prior decisions that they leave the individual justice free, if indeed, they do not compel him, to gather meaning not from reading the Constitution but from reading life.”<sup>4</sup> What is just as true, if less frequently explicitly acknowledged, is that those who concern themselves with evaluating the work of the justices are also freighted with particular biases. Accordingly, I herewith declare that with respect to the period under examination, I am much more prone to find wisdom in the opinions of, let us say, Justices Brandeis and Cordozo than, for example, in those of Justices Butler and McReynolds.

I have just suggested that bias derived from the value-systems of justices and legal writers inevitably and inexorably intrude themselves in their opinions and comments. It is understandable, therefore, that much of the discussion in legal circles and the press with respect to the Hughes court should turn upon the relative liberalism of the justices.<sup>5</sup> And I agree that the liberal-conservative criteria, however lacking in comprehensiveness, are more meaningful and better calculated to reveal operative biases and the social consequences of decision than any other criteria.

It is true, of course, that the concept of liberalism admits of a variety of definitions. It certainly differs in content when used, on the one hand, by T. H. Green or Walter Lippman and, on the other, by L. T. Hobhouse or Harold J. Laski. But in the terms that marked Holmes, Brandeis, Stone and Cardozo, as liberals, and Butler, Sutherland, Van Devanter and McReynolds, as conservatives, I assume that the liberals were those who displayed greater solicitude for civil liberties and civil rights than for property rights and revealed a marked disposition to sustain social and economic reforms.

These, then, are the criteria in terms of which I shall attempt an appraisal of Chief Justice Hughes' record on the Court. But, first, it is

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4. *The Supreme Court*, 3 PARLIAMENTARY AFFAIRS 68, 69 (1949).

5. See, e.g., KELLY AND HARBISON, *THE AMERICAN CONSTITUTION* 727 (1948); PERKINS, CHARLES EVANS HUGHES AND AMERICAN DEMOCRATIC STATESMANSHIP 185 (1956); RODELL, *NINE MEN* 213-99 (1955); SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 780 (1943); Mason, *Charles Evans Hughes: An Appeal to the Bar of History*, 6 VAND. L. REV. 1 (1952); Brant, *How Liberal is Justice Hughes*, *The New Republic*, July 21, 28, 1937, pp. 295-98 and July 28, 1937, pp. 329-32.

necessary to deal with the denial of his authorized biographer, Mr. Merlo J. Pusey, that these criteria had any great relevance to Hughes' role in the Court. Basing his work in considerable part upon conversations with the Chief Justice and upon his private papers, Mr. Pusey writes: "One of the most striking characteristics of Hughes' work on the bench was his high degree of objectivity. . . . He was an open-minded judge. . . . In a large measure Hughes succeeded in freeing his judicial reasoning from any social or economic pattern. . . . The human mind does not operate independently of its experience. But Hughes' basic intellectual loyalty was to the idea of justice itself. . . . For him justice was not a means to an end; it was the end." In 1932, Hughes is quoted as replying to a question whether he was a liberal or conservative: "A judge who does his work in an objective spirit, as a judge should, will address himself conscientiously to each case, and will not trouble himself about labels."<sup>6</sup>

It is revealing to observe that while Pusey rejects the liberal label for Hughes, how sedulously he contrasts his record with that of such "rock-ribbed" and "dogged" conservatives as Butler and McReynolds. More important is the fact that "justice"—meaningful as a philosophical concept and in the contest of purely private rights—was appealed to by all sides in the great public controversies that divided the Court and seldom, if ever, furnished any accepted or agreed guide to decisions. The differences among the justices, therefore, if we are to credit all with sincere convictions and basic integrity—the conservatism of Butler no less than the crusading zeal of Brandeis—derived not from the unequivocal dictates of "justice" but from the intellectual commitments of the justices.

It does not follow from the foregoing that Hughes must be categorically forced into either a clearly defined "liberal" or "conservative" position, and my basic quarrel is precisely with those who have sought to do so. Few justices, in my opinion, have more successfully eluded such characterization. My own conclusion is that Hughes' record was decidedly liberal on issues of civil liberties and civil rights and moderately conservative on issues of social and economic reform. This view, I recognize, will bring little comfort to those who prefer easily identifiable heroes and villains—however variously the roles may be assigned. But I believe it to be the only view fully consistent with the evidence; and a significant conclusion which goes far to explain Hughes' ambivalence, his clinging to outmoded precedents in the process of their repudiation, and, given the composition of the Court, his balance of power position. And, Mr. Pusey notwithstanding, it helps explain his heightened sensitivity to political considerations.

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6. 2 PUSEY, CHARLES EVANS HUGHES 691 (1951).

I now propose to test my thesis by references to the record of Hughes: (1) before he became Chief Justice; (2) as Chief Justice in respect to civil liberties and civil rights issues; and (3) as Chief Justice in respect to issues of economic significance.

### I

No Chief Justice in American history came to the Court with greater diversity of public experience than Hughes. If it may be said that some of this experience marked him as a "conservative," it may with equal validity be said that much of this experience marked him as a "liberal." On the conservative side, inter alia, may be placed his Republican Party presidential candidacy against Wilson in 1916; his subsequent support of the candidacies of Harding, Coolidge, and Hoover; as Secretary of State from 1921 to 1925, his "narrow and uncomprehending insistence at all costs on the most extreme interpretation of American property rights, notably in our oil diplomacy and our relations with Mexico and Russia";<sup>7</sup> and, as acknowledged leader of the American Bar, his close affiliation with and representation of many of the most powerful corporate interests in America.

On the liberal side, on the other hand, may be put his scathing exposures of powerful gas and insurance company malpractices in 1905; his noteworthy record of social reforms as Governor of New York State from 1906 to 1910; his stirring attack in 1920 on the expulsion of five Socialist members of the New York Assembly, and his castigation that same year of the indiscriminate use of war powers "after the military exigency had passed and in conditions for which they were never intended";<sup>8</sup> and, most significantly, his record as an Associate Justice of the Supreme Court from 1910 to 1916. In this role, he voted to sustain exercises of governmental power designed to permit the self-organization of employees free from employer interference, and to limit the hours of labor of women and railroad employees. In general, he sought to construe public franchises and grants strictly and to sustain the regulatory and taxing powers of the state against the claim of contract impairment. On the other hand, he cast his vote to deny governmental authority to enact a peonage statute, to limit the rights of aliens to ordinary employment, or to foster unequal accommodations for Negroes in intrastate commerce.<sup>9</sup> And, perhaps, most important of all was his decision in the *Shreveport Case* (*Houston, E. and W. Texas R.R. v. United States*)<sup>10</sup> in which he ruled that Congress had the authority to subject to its control the purely intrastate rail-

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7. Nation, Feb. 12, 1930, p. 165.

8. CHAFEE, *FREE SPEECH IN THE UNITED STATES* 162 (1941).

9. Documentation may be found in HENDEL, *CHARLES EVANS HUGHES AND THE SUPREME COURT* cc. 2-5 (1951), and in 1 PUSEY, *op. cit. supra* note 6, cc. 28, 30.

10. 234 U.S. 342 (1914).

road traffic of a state that impinged upon and had become interwoven with the interstate railroad traffic of the nation. Small wonder that if even so vigorous a liberal as Fred Rodell recently characterized these as "six stunningly liberal years."<sup>11</sup>

## II

With respect to Hughes' record as Chief Justice from 1930 to 1941, it is significant that no serious challenge has been made to his liberalism on issues of civil liberties and civil rights. In any fair appraisal; this side of his endeavors ought not to be neglected—especially in times like these—by an over-concentration upon his economic opinions. Even a summary recital of Hughes' position in important cases *in which the Court divided* speaks eloquently of his devotion to basic freedoms and equality of rights.

In 1931, Hughes spoke for the Court in upsetting a conviction under a statute which made display of a red flag a criminal offense;<sup>12</sup> and dissented against the Court's decision to deny citizenship to one who would not commit himself in advance to bear arms in defense of the United States.<sup>13</sup> His dissent, to be sure, turned on the question of congressional intention but his own sympathies were made patent when he wrote: "There is abundant room for enforcing the requisite authority of law . . . without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to civil power." That same year he wrote the prevailing opinion which struck down a statute that imposed prior censorship;<sup>14</sup> and the following year, he spoke for the Court in imposing the first clear and significant limit on martial law powers of governors.<sup>15</sup>

In 1937, in two decisions affecting Communists, he gave broad scope to constitutional protections of freedom. In the first, he upset a conviction which rested upon a statute making it a crime to assist in the conduct of a meeting called by any organization advocating criminal syndicalism or sabotage, and took the occasion to say:

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.<sup>16</sup>

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11. *RODELL, op. cit. supra* note 5, at 223.

12. *Stromberg v. California*, 283 U.S. 359 (1931).

13. *United States v. Macintosh*, 283 U.S. 605 (1931).

14. *Near v. Minnesota*, 283 U.S. 697 (1931).

15. *Sterling v. Constantin*, 287 U.S. 378 (1932).

16. *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

In the other case, he joined in the majority opinion of Mr. Justice Roberts (against four dissents) to invalidate a Georgia statute which was applied to a Negro Communist charged with attempting to incite insurrection on the basis of his enrolling activities and possession of a booklet urging "Self-Determination For the Black Belt."<sup>17</sup>

In general, he aligned himself with those members of the Court who sought to uphold legislation designed to protect the organizing activities of labor and to upset legislation designed to restrict those activities. In 1937 he stood with a narrow majority of the Court which upheld a state law prohibiting the use of injunctions against peaceful picketing,<sup>18</sup> and the following year he voted to sustain the general scope and validity of the procedural requirements of the Norris-LaGuardia Act regulating and limiting the issuance of injunctions in labor disputes.<sup>19</sup> In 1939, he joined a majority of the Court in invalidating a Jersey City ordinance prohibiting assemblies on public streets without official permit.<sup>20</sup> In 1940, he concurred in decisions which brought the right of peaceful picketing and the display of signs within the scope of "liberty" under the due process clause.<sup>21</sup> Only in two important cases, did he take a restrictive position. In 1941, he agreed with the majority opinion of Mr. Justice Frankfurter that peaceful picketing may be enjoined when enmeshed with violent conduct;<sup>22</sup> and later joined in support of Mr. Justice Roberts' dissenting view that picketing might be legally enjoined when part of an attempt to "organize" a business in which none of the employees was or wished to become a member of the union.<sup>23</sup>

In the civil rights field, he spoke for the Court in ruling that the refusal of a state to furnish a Negro facilities for legal education available to whites within its borders constituted a denial of equal protection of the laws. That right, he said, is not based on race but is a personal one.<sup>24</sup> And subsequently, he joined in the majority of the Court which struck down an Oklahoma statute designed to restrict the Negro's right to vote.<sup>25</sup>

This record thoroughly justifies the comment of then Attorney General Robert Jackson, on the occasion of Hughes' retirement from the bench, that "In the numerous cases dealing with civil liberties he has been a consistent and forthright champion of the American free-

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17. *Herndon v. Lowry*, 301 U.S. 242 (1937).

18. *Senn v. Tile Layers Union*, 301 U.S. 468 (1937).

19. *Lauf v. Shinner & Co.*, 303 U.S. 323 (1938); *New Negro Alliance Co. v. Sanitary Grocery Co.*, 303 U.S. 552 (1938).

20. *Hague v. CIO*, 307 U.S. 496 (1939).

21. *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Carlson v. California*, 310 U.S. 106 (1940).

22. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941).

23. *AFL v. Swing*, 312 U.S. 321 (1941).

24. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

25. *Lane v. Wilson*, 307 U.S. 268 (1939).

doms.”<sup>26</sup> Even a severe critic of many of Hughes’ economic opinions was on this occasion impelled to write that “As a jurist, Charles Evans Hughes will be best remembered as a friend of civil liberties and the rights of minorities, particularly that minority which has most needed protection, the Negro.”<sup>27</sup>

### III

An attempt to review Chief Justice Hughes’ position on all the important economic issues that the Court dealt with during his tenure would make this paper unconscionably prolix. The selected point of departure, therefore, is to consider the twelve decisions that the Court handed down during the period from January 1935 to June 1936, while its composition remained constant, and which President Franklin D. Roosevelt later said had “fairly completely undermined” his New Deal program and persuaded him to offer his court-reform bill in February of 1937.<sup>28</sup>

It may be noted, at the outset, that in three of the twelve cases cited by Roosevelt the Court in 1935 had been unanimous in ruling against the Administration. The first invalidated the Frazier-Lemke Act for the relief of farm mortgage debtors.<sup>29</sup> The second restricted the power of the president to remove members of independent regulatory commissions with whose views the president disagreed.<sup>30</sup> The third struck down the NIRA as an unconstitutional delegation of legislative power and as in excess of Congress’ interstate commerce regulatory power.<sup>31</sup> In one other case, decided earlier that year, the Court united, except for the lone dissent of Justice Cardozo, in ruling that a section of the NIRA which authorized the president to bar the shipment of “hot oil” across state lines constituted an unlawful delegation of legislative power.<sup>32</sup>

In the other eight cases, the justices approved of the Administration’s basic position as follows: Brandeis, Stone, and Cardozo in all eight; Hughes in five; Roberts in three; Van Devanter, Sutherland, and Butler in one; and McReynolds in none. Specifically, in three of the five cases in which Hughes supported the Administration, however qualifiedly, he wrote the prevailing opinion. In one, the constitutional validity of Congress’ legislation in barring repayment of private debts in gold was sustained.<sup>33</sup> In the companion case, while the obligation of the United States to honor its promise to pay in gold was deemed

26. Jackson, *The Judicial Career of Chief Justice Hughes*, 27 A.B.A.J. 408, 409 (1941).

27. Nation, June 14, 1941, p. 685.

28. *The Fight Goes On*, Collier’s, Sept. 20, 1941, p. 48.

29. *Louisville Joint Stock Bank v. Radford*, 295 U.S. 555 (1935).

30. *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

31. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

32. *Panama Refining Co. v. Ryan*, 293 U.S. 389 (1935).

33. *Norman v. Baltimore & O.R.R.*, 294 U.S. 240 (1935).

binding on its moral conscience and beyond its power of repudiation, it was nevertheless held not legally enforceable because individual damage could not be established.<sup>34</sup> In the third case, the validity of a TVA contract providing for the disposal of surplus energy was upheld.<sup>35</sup> In two other cases, Hughes joined the liberals and wrote telling dissents from the decisions of the Court. In one he attacked the invalidation of the Railroad Retirement Act which provided pensions for retired railroad employees<sup>36</sup> and, in the other, he assailed the declaration of unconstitutionality of minimum-wage-for-women legislation.<sup>37</sup>

In the three remaining decisions, in which the Administration was opposed, Hughes aligned himself with the conservatives of the Court: to approve invalidation of the AAA;<sup>38</sup> to support an intemperate excoriation of the SEC for refusing to permit a registrant to withdraw an allegedly false or misleading statement;<sup>39</sup> and to upset the Bituminous Coal Conservation Act of 1935.<sup>40</sup> (With respect to his position in the AAA case, it is an open secret that Hughes argued for constitutional validity but finally voted with the majority to avoid another 5-4 division in the Court.)<sup>41</sup>

In the period before the court-reform proposal, Hughes took the conservative position in a number of important cases other than those named by President Roosevelt. His was the primary responsibility for hobbling the administrative process with the concept that its findings of fact, to which finality normally attached if supported by substantial evidence, would be subject to independent judicial determination when these findings related to "fundamental" or "jurisdictional" facts<sup>42</sup> or to rate-making where "a large capital investment is involved and the main issue is as to the alleged confiscation of that investment."<sup>43</sup> He found himself, too, arrayed with the four conservatives in striking down an Oklahoma statute that required a license for the business of manufacturing and selling ice in circumstances in which chaotic conditions had come to prevail in that industry.<sup>44</sup>

On the other hand, in this same period, Hughes joined the liberal dissenters in opposition to the 5-4 decision of the Court invalidating the Municipal Bankruptcy Act of 1934;<sup>45</sup> and spoke for the Court in

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34. *Perry v. United States*, 294 U.S. 330 (1935).

35. *Ashwander v. TVA*, 297 U.S. 288 (1936).

36. *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935).

37. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

38. *United States v. Butler*, 297 U.S. 1 (1936).

39. *Jones v. SEC*, 298 U.S. 1 (1936).

40. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

41. *RODELL*, *op. cit. supra* note 5, at 238.

42. *Crowell v. Benson*, 285 U.S. 22 (1932).

43. *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936).

44. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

45. *Ashton v. Cameron County Water Dist.*, 298 U.S. 513 (1936).

upholding federal legislation barring the shipment of prison-made goods across state lines.<sup>46</sup> Additionally, the Chief Justice joined in an opinion of Mr. Justice Roberts which in fact, if not in name, reversed the Court's decision in the "ice" case and sustained the validity of a New York statute fixing maximum and minimum prices for the sale of milk.<sup>47</sup> Most important of all, perhaps, was his decision sustaining the Minnesota Mortgage Moratorium Act in such sweeping terms as to suggest that constitutional prohibitions would have to yield to emergency conditions.<sup>48</sup>

In the period of Hughes' tenure on the bench following Roosevelt's proposal to reform the Court, his record in the economic sphere was one of almost complete liberalism. Even before the membership of the Court had been reconstituted and while the court bill was being debated in Congress, he wrote the opinion of the Court (when Roberts came over) reversing its decision of less than a year and sustaining minimum-wage-for-women legislation.<sup>49</sup> He also spoke for the Court, in the face of four conservative dissents, to hold valid the National Labor Relations Act;<sup>50</sup> and joined in the 5-4 decision written by Justice Cardozo which upheld the social security legislation of Congress.<sup>51</sup> Thereafter, with the reconstitution of the Court, with rare dissent, he joined in the liberal tide.

In reviewing Hughes' positions in economic cases, I have made no attempt to present the detailed or precise bases of his views, to judge his consistency or lack of consistency, or to subject his thinking to close, critical analysis. All of this I have attempted to do elsewhere.<sup>52</sup> My purpose has been the limited one of spreading his record before us in a broad canvas as a basis for judgment. It is only by rejecting the partial and highly selective approach that it becomes possible to truly assess the role of Hughes as Chief Justice and establish that to compress him into the mould of either arch conservative or thoroughgoing liberal is an error. For the rest I must content myself with some more or less categorical assertions which critical analysis of Hughes' record, I am convinced, reveals.

I assert, first, that this record, even in its summary form, negatives the charge that Hughes was a calculating reactionary whose reputation for liberalism, such as it is, derived almost wholly from the fact that when the court was liberal, Hughes wrote more than an appropriate

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46. *Kentucky Whip & Collar Co. v. Illinois Cent. R.R.*, 299 U.S. 334 (1937).

47. *Nebbia v. New York*, 291 U.S. 502 (1934). The reference is to *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

48. *Home Bldg. and Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

49. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

50. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

51. *Stewart Machine Co. v. Davis*, 301 U.S. 548 (1937).

52. HENDEL, *op. cit. supra* note 9.

share of its decisions and when it was conservative, and he agreed, almost never wrote its decisions.<sup>53</sup>

Secondly, I believe that although the record shows that there is some truth in it, it is nevertheless an over-statement to assert, as Alpheus T. Mason does, *with the clear implication that Hughes was basically an extreme conservative*, that "Chief Justice Hughes proved himself a particularly fertile source of restrictive interpretation, an imaginative adapter of old dogma to serve as a sword against the rising popular demand for effective government."<sup>54</sup>

Thirdly, I think it contrary to the evidence to pretend, as Merlo J. Pusey does, that the record of Hughes is "utterly barren of evidence that he trimmed his principles" or "reversed his judgment," and that "no other factor" was "as important" in the decisions of the Court after 1937 in sustaining New Deal legislation "as the changes in the character of the legislation passed—the self-reversal on the part of Congress."<sup>55</sup> While I would agree that careful draftsmanship played its part in making New Deal legislation more palatable to the Court after 1937, it is almost fantastic to suggest that this was *the primary* factor. Even Mr. Pusey acknowledges that "The changed temper of American democracy" played some part in this change.<sup>56</sup> The fact is, too, that few judges were more adept in clinging to precedents in the very process of their emasculation or repudiation than Hughes.<sup>57</sup>

Finally, I maintain that Hughes' very lack of clear commitment to conservatism or liberalism in his economic philosophy made him extraordinarily sensitive—unlike the four arch conservatives—to the pressures of changing times and political expediency.

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53. The charge is that of Brant, *supra* note 5.

54. Mason, *supra* note 5, at 8.

55. 2 PUSEY, *op. cit. supra* note 6, at 771.

56. *Ibid.*

57. This view is thoroughly documented in HENDEL, *op. cit. supra* note 9.