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CHARLES EVANS HUGHES: AN APPEAL TO THE BAR OF HISTORY*

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Preparations for this Pulitzer prize-winning biography began in 1932 when a Princeton University undergraduate, Henry C. Beerits, took Hughes' public career as the topic of his senior thesis. On the suggestion of friends and instructors Beerits sent his sympathetic, uncritical essay to the Chief Justice. Evidently much pleased, Hughes promptly invited the youthful author to Washington, where he spent nearly a year arranging the Justice's public papers. Many sessions were spent together; the Chief Justice reminisced at great length, all this being noted down and turned over to Mr. Pusey. After retirement in 1941 the Chief Justice wrote "several hundred pages of biographical notes," and had long talks with his biographer.

"I visited him once or twice a week over a period of two and a half years," Mr. Pusey writes. "He would often answer my questions for three hours without a break, speaking with candor and clarity—drawing upon his amazing memory of events over fourscore years. In this manner we reviewed his experiences as a youth and as a young lawyer and discussed all the momentous events of his public career."[1] These interviews and Hughes' notes, along with Beerits' "extensive memoranda," were the author's "primary sources."[2] Thus Hughes himself, as Mr. Pusey says, "contributed more to this volume than any other individual."[3]

Mr. Pusey's most absorbing pages relate to heritage and youth. They are also among the most revealing. If the author had done no more than give us these chapters his work would have been of enduring significance.

Hughes, an "only child," the son of an orthodox Baptist clergyman, was born April 11, 1862. Except for preoccupation with grinding out their meager livelihood, his parents plied him with attentions to develop "pious submission to their counsel," "implicit confidence in their

* Being a review of CHARLES EVANS HUGHES. By Merlo J. Pusey. New York: The Macmillan Company, 1951. Two vols. Pp. xvi, vii, 829. $15.00.

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1. Preface, VII.
2. *Ibid.*
3. *Ibid.*

judgment."[4] There was endless prodding, preaching, cajoling. Play had to be saturated with moral uplift; even his beloved hobbyhorse took him galloping to those sacred places he learned about in the Bible, or in approved travel stories. Athletics, children's books and other such trivialities were taboo. There were more important things to do. At age five his mother gave him a *New Testament and Psalms* so he "could take his turn in reading the verses at family prayers."[5] On "Charlie's" eighth birthday, his father presented him with a Greek *New Testament with Lexicon.*[6] *"Be thorough, Be Thorough, BE THOROUGH,"* was the family by-word. His parents once thought of adopting another child to give him companionship. But "Charlie," overhearing talk of it, "marched into the room and said he thought it would be a mistake." Education was, he said, more important than companionship.[7]

Parental goading kept up even after "Charlie" was in college. No detail which if neglected might inflict moral or spiritual harm, was overlooked. While at Colgate University (September, 1876 to June, 1878) young Hughes was questioned about the temperature of his room, table manners, the condition of his neck, ears, nails, wrists and feet. Failure to hang flannels, sheets and stockings around the stove after being returned from the wash might result, his mother warned, "in rheumatism or consumption, if not death in a short time."[8]

"Charlie" did his level best: "I try to follow your injunctions, in regard to everything," he said.[9] "What will Pa or Ma say?" was always foremost in his mind when questions of right and wrong came up.[10] But there were worldly attractions hard to resist. "Charlie" liked fraternity life; he felt the surge of scholastic ambition, and wanted a chum for his roommate. "Pa" turned thumbs down on the latter, because companionship would make it impossible to "throw yourself on your knees frequently and whenever you were inclined to do so."[11] Scholastic success came naturally, inevitably. But when such triumphs were complete, as in oratory, he felt "abominable," "unworthy"; a deplorable sense of "selfish-self" overcame him. "How," he prayed, "I wish I could get out of *self,* and know that God's glory is my only aim."[12]

That such piously austere upbringing left its mark, there can be no doubt. Hughes said: "Whatever I may do, or become, there is no danger that I will ever be able to rid myself of the truth implanted in

4. Vol. I, p. 33.
5. Vol. I, p. 6.
6. Vol. I, p. 8.
7. Vol. I, p. 12.
8. Vol. I, p. 29.
9. Vol. I, p. 36.
10. Vol. I, p. 31.
11. Vol. I, p. 33.
12. Vol. 1, p. 36.

early childhood." It is equally clear that these daily doses of moralizing that continued even after he transferred in September, 1878, to Brown University, were not entirely effective. On one occasion he yielded to the worldly ambition to own a pair of skates. To get the requisite three dollars, he wrote essays for fellow students, carefully gauging their quality to the "customers' " usual performance in such work. For a "fair" essay the rate was $1, for a "fine" one $2. "I shouldn't wonder," he wrote his father proudly, "if I had more such jobs."[13] In this "Charlie" was sadly mistaken, as his parents brought this promising enterprise to an abrupt halt. But "Charlie" felt no penitence. He was elated that "the way I earned my skates had been a subject of discussion among you."[14]

It was now "Charlie's" turn to moralize, and he made the most of it. "I think my conduct proper," he wrote, and listed five reasons in defense. Among other things, skating was, he said "very healthy exercise," and "earning money a fine thing"; "writing for money is a perfectly legitimate business." There were also "advantages accruing to myself from much writing." "No blame could attach itself to me in any case. . . . And the other fellows must settle the moral point with themselves."[15] Even after his parents pushed him to the wall, he was not persuaded. "You know the proverbial rashness of youth," he explained. "You also know my fondness for skating." As his final clincher, the youthful ghost-writer insisted that he "knew perfectly well," as his needy "customers" perhaps did not, "that my course is not reprehensible before the faculty or before justice."[16] Clearly, "what Pa and Ma may say" when "the question of right and wrong comes up" had ceased to be his guiding rule. The embryonic lawyer was pleading his case in his own way.

Hughes was now eighteen, and in his junior year at Brown. His academic record had been not only superior; it was very nearly perfect. Yet "Charlie's" retreat from "fallacious reasoning was somewhat grudging," Mr. Pusey solemnly observes, "but it is evident that his father's strictures made their mark."[17] I find no further reference to this in Pusey's pages, though Hughes noted years later, its possible significance: "As I look back upon that training at home, in the light of subsequent views and experiences, I realize that what interested me most was the *dialectic* rather than the premises."[18]

Hughes' life represents a tremendous achievement, embodying as it does not one but eight careers: jurist and lawyer, feared and fearless

13. Vol. I, p. 48.
14. Vol. I, p. 49.
15. *Ibid.*
16. *Ibid.*
17. Vol. I, p. 50.
18. Vol. I, p. 25.

investigator, crusading Governor, Associate Justice of the Supreme Court, Republican candidate and near winner in a race for the Presidency, Secretary of State, World Court judge and Chief Justice of the United States. The story is all here, told engagingly and in satisfactory detail. In the face of such an imposing catalogue of accomplishments and because of the idolatrous cult now developing around the Chief Justice,[19] one must be bold indeed to suggest any modification in the Hughes-Pusey portrait. And yet the subject's enterprising initiative in assembling the record, his avowed purpose to have those who write of him "know the facts" — that is, understand them as he did — leads one to wonder whether this may not be substantially a self-portrait. If so, does not the biographer's intervention serve, as in the essays episode at Brown, to obscure rather than illuminate Hughes' sharp reality?

Hughes had a penchant for picturing himself as he wished the public eye to see him. In both personal and public life, he exhibited extraordinary sensitivity to "what people might think." At times this was carried to such lengths as to make him rather less than human. For fear of being accused of "marrying the boss's daughter," he "deliberately avoided" courting Antoinette Carter so long as he was a clerk in her father's firm. He "would not permit himself to fall in love with her," Mr. Pusey tells us, until he was a full fledged member of the firm.[20] Is "sterling integrity" the only thing illustrated by Job E. Hedges' interview with Hughes after the 1906 gubernatorial campaign? Hedges had been a faithful and enthusiastic Hughes supporter; he was a reputable citizen and apparently qualified for public service. After the election, Hedges dropped into the Governor's office to tell of the part he had played in the campaign. He said frankly that he wanted a job. Hughes expressed high regard for Hedges. "But you see," the Governor added, "I can't very well appoint you because you are a personal friend." "By God," Hedges replied, "you need no longer consider that an obstacle."[21]

In 1929, Hughes returned to Washington to argue before Chief Justice Taft whom he had known and admired for twenty years. To Taft he owed his appointment in 1910 as Associate Justice of the Supreme Court. On adjournment, the two friends met in the corridor. "Hughes, my boy, I am delighted to see you," the Chief Justice exulted with his usual joviality. Drawing himself up in rigid dignity, Hughes shook the Chief's hand coldly and said: "Mr. Chief Justice, I am honored to see you."[22] Quite deflated, Taft proceeded with the

19. See Frankfurter, Book Review, N.Y. Times, Nov. 18, 1951, § 7, p. 1; see also reviews by Powell, Frank and Pepper, note 28 *infra*.
20. Vol. I, p. 85.
21. Vol. I, p. 189.
22. Vol. II, p. 635.

other Justices to the robing room. Why did Hughes react so inconsiderately? His own explanation comes straight from that Baptist parsonage of years before: "I did it intentionally, as I intended to win my cases on their merits and not through friendship with the judges." Familiarity, even simple courtesy, under these circumstances might be misunderstood, might mar the image he had of himself.

The same apprehension troubled him at the peak of his professional career. When President Hoover offered him the Chief Justiceship in 1930, (he had barely missed the post on two previous occasions) he agreed to accept with the understanding that there would be no public review of his life and work. "If you are convinced that the nomination will be confirmed by the Senate without a scrap," he told the President, "I will accept it. But I don't want any trouble about it."[23] Here, one might suppose, was an unusual opportunity to set the record straight, to let the "facts" be known. Why should he have been so apprehensive? Brandeis, whose public work in certain respects parallels that of Hughes, welcomed the showdown when President Wilson appointed him a Supreme Court Justice.[24]

One clue to the puzzle may be this: there are facts and facts. Facts, moreover, do not, as John Stuart Mill says, interpret themselves. Take the simple matter of why Hughes grew a beard. The *factual* explanation he gave Pusey is that "the auburn stubble was allowed to take its own course as a matter of saving time. Had safety razors been in use at the time, the famous beard would never have been grown."[25] Mr. Pusey, apparently, has no doubt as to the accuracy or completeness of this factual explanation. Yet O. W. Holmes, Sr. wrote in the early 1880s that the safety razor had already transformed shaving from "an irksome task" into "a pleasant amusement." The idea was even then "an old one," he said. Holmes not only used a safety razor — the Star — but commended it warmly "to all who travel by land or sea, as well as to all who stay at home."[26] Furthermore, Pusey's own materials suggest more basic reasons for the famous whiskers. Very early in his career, Hughes was brought up short by appearing to lack those qualities a beard is supposed to signify. "Why, you've no more beard than an egg,"[27] a prospective employer commented when young Hughes sought to secure from him a teaching position. Any reader who takes the trouble to compare the clean shaven picture facing page 47 with the truly magnificent figure opposite page 79, may dismiss the alleged backwardness of applied science as entirely unrelated to the matter. The beard flourished long after safety razors were widely used —

23. Vol. II, p. 652.
24. See the reviewer's BRANDEIS: A FREE MAN'S LIFE 469 (1946).
25. Vol. I, pp. 88-89.
26. 10 THE WRITINGS OF OLIVER WENDELL HOLMES 17 (Riverside ed.). See also KANE, FAMOUS FIRST FACTS 387 (1950).
27. Vol. I, p. 64.

and with good reason. It gave Hughes the appearance he wished to present. Indeed, the beard worked altogether too well, putting his biographer at pains to show that Hughes was not an icicle, but a devoted, even romantic husband, a loving father and genial companion.

Charles Evans Hughes is, by any standard, one of the most important public figures of this century. He may also be one of our greatest Chief Justices. Pusey's book is apt to create that impression. This appraisal is concurred in by lawyers, judges and commentators competent to speak.[28] One should not, however, overlook the fact that the most serious crisis in the Court's history occurred during his administration. Three questions suggest themselves: What responsibility, if any, must he share for provoking the crisis? How did he conduct himself in the heat of that fierce battle? After the storm receded, what contribution did he make to an understanding of that episode?

Mr. Pusey's chapter, "The Court Packing Fight," gives the impression that the crisis was unprovoked, that the New Deal President's nefarious scheme was the result of impulse, perhaps of a childish desire to wreak vengeance on the Justices who, presumably in a huff, had refused to make the usual White House call in the fall of 1936. Nor would anyone suspect that the Chief Justice himself bore any responsibility for the 1935-36 impasse. In the midst of the battle that ensued after the President's announcement of his plan, the Court back-tracked, but the Chief Justice assured his biographer that the Court packing plan had absolutely nothing to do with this retreat. Nor did he, in any case, shift his own position. His major interest was still "the dialectic."

Mr. Pusey assays the difficult task of demonstrating that, amid the ravages of depression, Hughes consistently followed a "liberal" course as to government power to correct social and economic ills, the inference being that whenever he joined issue with the New Deal the differences were purely matters of law, or of loosely drafted legislation, not politics. The "facts" do not bear out this picture. Hughes joined Sutherland in holding that the Oklahoma legislature was powerless, even in "an emergency more serious than war," to prevent in-

28. See Powell, *Charles Evans Hughes*, 67 POL. SCI. Q. 161 (1952); Frank, Book Review, 1 J. PUB. L. 138 (1952); Pepper, Book Review, 38 A.B.A.J. 200 (1952). Judge Charles E. Clark gives us an altogether different appraisal. "What happened in the 30's," Judge Clark asks, "that affairs could suddenly develop to a crisis without careful planning and forethought of the Judiciary's role? And was that crisis really resolved by preserving the form and letting substance go?" "As a Justice," this reviewer observes, "he [Hughes] went to rather extreme lengths to distinguish away, rather than overrule, out-worn cases. This . . . is perhaps the chief defect in his craftsmanship as a Justice, but it is entirely in keeping with his entire career. To attempt to control or shape the future of the Court, or to direct it into strange waters, would have been foreign to his nature." Therefore, Judge Clarke concludes, that Hughes "is not a great Chief Justice in the sense of impressing his individuality upon the status and function of the Court, and of that, in turn, upon the country, in the sense that Marshall and Taney were." Clark, Book Review, 27 NOTRE DAME LAW. 481 (1952).

dividuals from entering an already hopelessly crowded ice business, provoking Justice Brandeis to exclaim: "If we would guide by the light of reason we must let our minds be bold."[29] Hughes set aside the NIRA in an opinion which ranks with one of the most reactionary judicial pronouncements of this century.[30] For the constitutional principles enunciated in this case, the Chief Justice went back forty years to that landmark of evil memory — the Sugar Trust case.[31] Hughes himself gave Justice Roberts the theme for that fantastic opinion which set aside the AAA.[32] Mr. Pusey tells us how "Hughes' analysis of the case led him back to an opinion on the general welfare clause that he had prepared for a private client in 1919. His research at that time had [Mr. Pusey observes] convinced him that Hamilton and Story had been right in contending that the Constitution gives Congress power to tax and spend for 'the general welfare' beyond the scope of its enumerated powers. Madison had been wrong in trying to confine the taxing and spending power to the relatively narrow scope of the purposes mentioned in the Constitution. Hughes' notable achievement in the *Butler* case was in bringing the entire court to acceptance, for the first time, of the broad Hamiltonian thesis."[33] How, then, could the AAA be destroyed? Hughes and his majority had considerable difficulty with this question. The Chief Justice did not capitalize on the research he had devoted to this subject years earlier. He chose to assign this crucial opinion to Justice Roberts. In a detailed memorandum of February 4, 1936, Justice Stone tells of the scant consideration given the case in conference.

The case had been discussed at conference in mid-December, 1935, when the Chief Justice recommended that the statute be overturned for improper delegation. He also suggested that the AAA was a regulation of agriculture and, as such, an invasion of the reserved power of the states. There was no suggestion of federal coercion of the states, no analysis of the relation of conditional grants or the contracts to Congressional spending power. Thus, the main question in the case was decided practically without discussion.

Nor is this all. Chief Justice Hughes concurred in setting aside the Guffey Coal Act, a decision that struck boldly at the foundation of all national regulation of our economy.[34] As late as 1936, he tried desper-

29. New State Ice Co. v. Liebmann, 285, U.S. 262, 52 Sup. Ct. 371, 76 L. Ed. 747 (1932).
30. Schechter Bros. v. United States, 295 U.S. 495, 55 Sup. Ct. 837, 79 L. Ed. 1570 (1934). See, in this connection, Edward S. Corwin's merciless criticism in *The Schechter Case: Land-Mark, or What?* 13 N.Y.U.L.Q. REV. 151 (1936).
31. United States v. Knight, 156 U.S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325 (1895).
32. United States v. Butler, 297 U.S. 1, 56 Sup. Ct. 312, 80 L. Ed. 477 (1936).
33. Vol. II, p. 743.
34. Carter v. Carter Coal Co., 298 U.S. 238, 56 Sup. Ct. 855, 80 L. Ed. 1160 (1936).

ately to keep alive the *Adkins* precedent.[35] He did this in the face of recent rulings, he had himself approved, that had left the 1923 precedent hanging by the slenderest thread.[36]

By the spring of 1936 it looked as if the Court had put the New Deal firmly on the rack of unconstitutionality. Loud acclaim then resounded in the ranks of the old guard. Said Raoul E. Desvernine, vice-president of the American Liberty League: "The Judiciary has again proved itself to be the bulwark of defense against the subtle and skillful manipulation of democratic processes to achieve unsanctioned theories."[37] Addressing the 1936 Republican National Convention, Herbert Hoover expressed his heartfelt thanks "to Almighty God for the Constitution and the Supreme Court."[38]

Earlier than spring the Chief Justice himself had joined in that triumphant chorus. "I am happy to report," he remarked jauntily in his American Law Institute address, "that the Supreme Court is still functioning." Members and guests of the Institute vigorously applauded the announcement, obliging the speaker "to pause for more than two minutes."[39]

In fashioning this seemingly impassible blockade against the power to govern, the Court not only resurrected and refurbished old doctrine in the service of narrow construction, but also invented new devices.[40] 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. Justice Stone, among others, singled him out as the one "most difficult to understand," yet, "the one chiefly responsible." Superior intellectual talents should have given him an insight into the long-run effects of obscurantist court decisions as profound as those of Stone,

35. Adkins v. Children's Hospital, 261 U.S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785 (1923).

36. Nebbia v. New York, 291 U.S. 502, 54 Sup. Ct. 505, 78 L. Ed. 940 (1934).

37. DESVERNINE, DEMOCRATIC DESPOTISM 182 (1936).

38. Hoover, *Crisis of Free Men*, AMERICAN IDEALS VERSUS THE NEW DEAL 3 (1936).

39. N.Y. Times, May 8, 1936, p. 2, col. 2.

40. Perhaps the most extreme example is Colgate v. Harvey, 296 U.S. 404, 56 Sup. Ct. 252, 80 L. Ed. 299 (1935), where in the face of half a century of precedent to the contrary, the Court sustained the right to carry on business across state lines as a "privilege and immunity" of citizens of the United States protected under the 14th Amendment by the Federal Government. For the dissenters this extraordinary ruling indicated reactionary desire to build up, not a rational, consistent body of constitutional law, but rigid doctrinal bulwarks against effective government. "Resort was had to the privileges and immunities clause as a happy afterthought," Justice Stone commented. "This way of dealing with constitutional questions is even more alarming than the results themselves." (H. F. Stone to Felix Frankfurter, Dec. 20, 1935). "The Court suffered in this case," Stone believed, "from an over-stimulated inventive genius." "If," he added, "the inventor would only sponsor his invention in public I think I could write a really effective dissent." But, prudence, as usual warned Hughes against any unnecessary response to attack. (H. F. Stone to Felix Frankfurter, Dec. 23, 1935). This flare-up of the privileges and immunities clause was decisively squelched in Madden v. Kentucky, 309 U.S. 83, 60 Sup. Ct. 406, 84 L. Ed. 590 (1940).

Brandeis or Cardozo. Nevertheless the Chief Justice refused to take responsibility for shaping the law constructively.

Nor was the paralyzing effect of Hughes' effort confined to dissenting and concurring opinions. The Chief Justice could be as harmful to a broad construction of the Constitution when writing for a liberal majority as in dissenting from it. There is hardly a case[41] where the Chief Justice could speak for the Court without rousing the so-called liberal justices to protest. Justice Stone complained bitterly of the "loose statement and looser use of doctrine in our judicial opinions."[42] "I think there never was a time in our history," Stone told Prof. Felix Frankfurter, February 7, 1936, "when there has been so little intelligible, recognizable pattern in its judicial performance as in the last few years. Take, for example, as simple a matter as the presumption to which we occasionally pay lip service in favor of the constitutionality of a statute. It would be interesting to have some of your bright young men discover how often in recent years it has been relied upon and repudiated by the same judge."[43]

"It just seems," Justice Stone commented apropos *Colgate v. Harvey*[44] "the writer and those who united with him, didn't care what was said, as long as the opinion seemed plausible on its face."[45] In casting about for an explanation of the meandering course of judicial decision after 1930, Justice Stone cited "lack of vision and the unwillingness of certain gentlemen to trust their own intellectual processes."[46]

The Chief Justice, apparently, did not sense the danger to Constitution, Court and country inherent in the continuing disparity between legal justice and social justice. Nor did his attempt to run with the hares and hunt with the hounds win unqualified success. Occasionally, as in the TVA case,[47] he persuaded the old guard to placate public demands for the "new bases of public power," he proclaimed in the *Minnesota Moratorium* case.[48] But over the long pull the net result of his maneuvers was solidly obstructive. Quite apart from the perilous social consequences of the decisions themselves, the majority's slip-

41. Home Building & Loan Assoc. v. Blaisdell, 290 U.S. 398, 54 Sup. Ct. 231, 78 L. Ed. 413 (1934), being a notable exception.
42. H. F. Stone to Felix Frankfurter, Feb. 25, 1936.
43. In illustration, Stone suggested comparison of opinions by Mr. Justice Roberts: the statement in Tax Comm'r v. Jackson, 283 U.S. 527, 51 Sup. Ct. 540, 75 L. Ed. 1248 (1931), with Mayflower Farms v. Ten Eyck, 297 U.S. 266, 274, 56 Sup. Ct. 457, 80 L. Ed. 675 (1935); and of Mr. Justice Sutherland's opinions: Zahn v. Board of Public Works, 274 U.S. 325, 47 Sup. Ct. 594, 71 L. Ed. 299 (1935), with Colgate v. Harvey, 296 U.S. 404, 424, 56 Sup. Ct. 252, 80 L. Ed. 299 (1935); Los Angeles Gas and Electric Co. v. Railroad Commission, 289 U.S. 287, 304, 53 Sup. Ct. 636, 77 L. Ed. 1180 (1932), with West v. Chesapeake & Potomac Telephone Co., 295 U.S. 662, 55 Sup. Ct. 894, 79 L. Ed. 1640 (1934).
44. 296 U.S. 404, 56 Sup. Ct. 252, 80 L. Ed. 299 (1935).
45. H. F. Stone to Felix Frankfurter, Feb. 17, 1936.
46. *Id.*, Feb. 25, 1936.
47. 297 U.S. 288, 56 Sup. Ct. 466, 80 L. Ed. 688 (1936).
48. 290 U.S. 398, 54 Sup. Ct. 231, 78 L. Ed. 413 (1934).

shod methods in striking down New Deal enactments *seriatim* without bothering, as Justice Stone put it, to "rake after the cart," was rapidly undermining the Court's prestige. "I can hardly see the use of writing judicial opinions," Stone commented heatedly, "unless they are to embody methods of analysis and of exposition which will serve the profession as a guide to the decision of future cases. If they are not better than an excursion ticket, good for this day and trip only, they do not serve even as protective coloration for the writer of the opinion and would much better be left unsaid."[49] When six Justices, in *Jones v. SEC*,[50] set an "all-time high for judicial arrogance," Stone went so far as to accuse his colleagues of writing "for morons," expressing the conviction that no trained lawyer "will swallow such buncombe."[51]

Five willful Supreme Court Justices — the fifth always in doubt until the decision came down — had in fact contrived well-nigh complete absence of the power to govern. "A Supreme Court of nine we are assumed to have," Thomas Reed Powell observed in the summer of 1935, "but if on vital issues it is certain that four will be on one side and four on the other, the Constitution is the voice of the casting vote of the one who is now on one side and now on the other." "Years ago," Powell continues, "that learned lawyer John Selden in talking of 'Council' observed: 'They talk (but blasphemously enough) that the Holy Ghost is President of their General Councils when the Truth is, the odd Man is still the Holy Ghost.' "[52] In working toward *his* goal, this obstructionist had evoked vehement protest from other justices, especially Stone, who saw judicial obtuseness as "placing in jeopardy a great and useful institution of government."[53] "The way out will be found shortly," one newspaper predicted, "because it must be found."[54] So it was. Fresh from his second triumphal inauguration, and at the very peak of personal prestige, President Roosevelt sent to Congress on February 5, 1937, his message recommending a drastic shake-up in the judiciary. Throughout the ensuing months debate

49. H. F. Stone to Felix Frankfurter, Feb. 25, 1936.
50. 298 U.S. 1, 1936.
51. H. F. Stone to Felix Frankfurter, Apr. 7, 1936.
52. Powell, *The Constitution and Social Security*, 181 ANNALS 149 (1935).
53. H. F. Stone to Irving Brant, Aug. 25, 1945.
54. St. Louis Star-Times, June 4, 1936. Mr. Pusey indulges in interesting speculation as to the probable course of events if President Taft had appointed Hughes Chief Justice in 1910 instead of White. In that event, the biographer supposes that Hughes would not have resigned from the bench to run for the Presidency in 1916. As Chief Justice from 1910 to 1930, he also supposes that Hughes "would have led the Court in more sweeping and successful adaptations of the law to our changing civilization than either the White Court or the Taft Court achieved." (Vol. I, p. 281.) Certain support for this hypothesis may be found in Hughes' opinions as Associate Justice, 1910-16, but an unusual opportunity for "successful adaptation" came to Hughes in the crucial decade of the thirties. The use he made of it provoked President Roosevelt's audacious attempt to pack the Court. If evidence is needed beyond that contained in the leading cases decided between 1930 and 1936 of Hughes' heavy responsibility for the 1936 impasse between Court and Administration, it can be found in Hughes' opinions of 1937 as he beat a speedy retreat.

waxed furiously. Every segment of our society joined in; only those directly involved, the obstinate and sedate justices, kept silent.

The Chief Justice, however, had been "entirely willing" to appear before the judiciary committee "for the purpose of giving the *facts* as to the work of the Court."[55] Justice Brandeis was strongly opposed; so it was not until March 18 that Senator Wheeler, spearhead of the Court-packing opposition, opened the way for the Chief Justice to enter the fray as F.D.R.'s major antagonist. Wheeler wanted to know from the justices themselves whether the President's oft-repeated allegations about the swollen Court docket, lack of efficiency, etc., had any bases in fact. The Senator went first to see Justice Brandeis who promptly advised him to consult the Chief Justice.[56] Hughes rose to the lure with alacrity. Though Wheeler did not reach him until Saturday, the 20th, he was able somehow to prepare a long and closely reasoned document for the Senator's use the following Monday, March 22. The Chief Justice was not only enlisted but enthusiastic. "The baby is born," he said with a broad smile, as he put the letter into Wheeler's hand late Sunday afternoon.[57]

Hughes' literary *coup* of March 21 reveals him once more as a canny dialectician. To match the nimbleness with which he trod the line between fact and opinion, procedure and substance, one must go back to his account of how he earned his skates. Though carefully refraining from open opposition to the plan, his letter suggests that the President's idea of an enlarged Court and the hearing of cases in divisions might run counter to the Constitutional provision for "one Supreme Court." It was extraordinary enough, some of his colleagues thought, for justices to go out of their way to meet constitutional issues unnecessary for deciding a case. Hughes went further and handed down an advisory opinion on a burning political issue. He did this, moreover, in flat opposition to the stand he had taken in 1928.[58] Hughes also managed to convey the impression that the entire Court endorsed his statement. Ignoring the customary disavowal of authority to speak for members of a body not consulted, he was "confident that it is in accord with the views of the justices," though he admitted "on account of the shortness of time, I have not been able to consult with members of the Court generally."

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55. Vol. II, p. 754.
56. The story is told in MASON, BRANDEIS: A FREE MAN'S LIFE 626 (1946).
57. Vol. II, p. 755.
58. Discussing Justice Johnson's favorable response, on behalf of a unanimous bench, to a request from President Monroe for an extra-judicial opinion on internal improvements, Hughes said: "This, of course, was extra-official, but it is safe to say that nothing of the sort could happen today. The Court has rejected the overtures of the Congress for opinions on constitutional questions in the absence of a real 'case' or 'controversy' to be decided." HUGHES, THE SUPREME COURT OF THE UNITED STATES 31 (1928). See also HARRIS, THE JUDICIAL POWER IN THE UNITED STATES 125, n.47 (1940); 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 595-96 (2d ed. 1926).

Mr. Pusey criticizes the Chief Justice rather severely for not consulting his colleagues before releasing the letter: "Considering the delicacy of the issue, Hughes' action with the approval of only two of his eight colleagues was certainly a tactical error."[59] Not at all. From the Chief Justice's point of view, his strategem was perfect. He knew in advance that Justices Vandevanter and Brandeis approved his letter. What could be more lethal than a pronouncement endorsed by major representatives of the divergent wings of the Court? If Hughes had consulted all his colleagues, as Mr. Pusey insists, there would have been a far different letter or no letter at all.

We know that Cardozo and Stone, at least, objected strongly to Hughes' "extra-official-expression on a constitutional question."[60] "I did not see the Chief Justice's letter, or know of it until I read it in the papers," Stone exploded. "I certainly would not have joined in that part of it which undertakes to suggest, what is and what is not constitutional."[61] As to the reasons assigned by the Chief Justice for not consulting other members of the Court, Stone said there was plenty of time if the Chief had chosen to do so. The justices were then in recess, it is true, but all were in the city, the telephone was at hand and three of them — Sutherland, Cardozo and Stone — were "within five minutes walk of the residence of the Chief Justice."[62] Hughes followed the only course possible to get precisely the effect he wanted. Years earlier, he had known that the faculty did not disapprove ghost-written student essays but there is no evidence that he had ever consulted any of them about the matter.

The Chief Justice's letter, combined with the Court's dramatic about-face, put a fatal crimp in the President's project. As the fight raged about them the justices began shameless destruction of their most recent handiwork. To avoid "misrepresentation" of what the Court did, the Chief Justice indulged in explanation and rationalization calculated to strain the credulity of his most fervent admirers. Within a year after Hughes had considered the *Adkins* case a viable precedent, the Court expressly set it aside,[63] yet the Chief Justice told Mr. Pusey: "The President's proposal had not the slightest effect on our decision." "We are told," a skeptical paragrapher has noted, "that the Supreme Court's about-face was not due to outside clamor. It seems that the new building has a soundproof room, to which the justices may retire to change their minds."[64]

59. Vol. II, p. 756.
60. H. F. Stone to Felix Frankfurter, Dec. 21, 1939.
61. *Id.*, Apr. 8, 1937.
62. *Id.*, Dec. 21, 1939.
63. West Coast Hotel v. Parrish, 300 U.S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703 (1937). Here the Chief Justice went out of his way to deplore "exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage. . . ." 300 U.S. at 399.
64. Brubaker, *Of All Things*, The New Yorker, Apr. 10, 1937, p. 34.

Nor, according to Mr. Pusey, does Hughes' *Jones and Laughlin* decision[65] mark anything more than a "superficial" reversal of what the Chief Justice had written in the *Schechter* and *Carter Coal* cases. Mr. Pusey concedes that "some shift in emphasis is undeniably apparent, but it may be traced entirely to the vast differences between the situations with which the Court was dealing."[66] Such rationalization has gagged more than one reviewer,[67] but I submit that there is more truth in this seemingly preposterous claim than may appear at first glance. These critics tend to overlook the most characteristic feature of Hughes' leading opinions — the escape hatch through which he might move in whatever direction expediency may seem to demand. "He could," says a friendly critic, "pose polar opposites without confessing that they were opposites, but he would leave it clear what the Court was doing."[68]

The Chief Justice did not repudiate completely the rationale of the *Schechter* and *Carter Coal* cases. Even in his *Jones and Laughlin* opinion, the high water mark of his liberal construction of commerce and of the commerce power, Hughes distinguished "between what is national and what is local in the activities of commerce," and cited the 10th Amendment as an explicit barrier against national authority. It may be significant that in 1941, when the Court, upholding the Fair Labor Standards Act,[69] at last confirmed the New Deal's claim that the Constitution grants ample power to meet the nation's needs, Stone, not Hughes, spoke for the Court. No false modesty had heretofore hampered the Chief Justice's instinctive recognition of those "occasions when an opinion should carry the extra weight which pronouncement by the Chief Justice gives."[70] Surely, this was such an occasion; yet the chief chose not to speak. The fact is that he initially entertained grave doubt as to the act's constitutionality. For one thing, he considered the undefined phrase, "production *for* commerce", which Congress used to delimit the scope of the act, as too vague to be valid in a criminal statute. Even the best possible test of the meaning of this phrase seemed to him "a highly unsatisfactory one." In such a borderline case, he preferred not to write.[71]

65. 301 U.S. 1, 63 Sup. Ct. 1249 87 L. Ed. 1541 (1937).
66. Vol. II, p. 767.
67. See, *e.g.*, Frank, Book Review, 1 J. PUB. L. 146 (1952); Konefsky, Book Review, 61 YALE L.J. 772 (1952). Edward S. Corwin, in a most perceptive review to be published in the December 1952 issue of the AMERICAN POLITICAL SCIENCE REVIEW, takes the same position.
68. Powell, *supra* note 28, at 172.
69. United States v. Darby, 312 U.S. 100, 61 Sup. Ct. 451, 85 L. Ed. 609 (1941).
70. Frankfurter, *'The Administrative Side' of Chief Justice Hughes*, 63 HARV. L. REV. 1, 4 (1949). United States v. Butler, 297 U.S. 1, 56 Sup. Ct. 312, 80 L. Ed. 477 (1935), may be the exception that proves the rule.
71. C. E. Hughes to H. F. Stone, Jan. 27, 1941. Compare, in this connection, chapter 20 of HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT (1951), entitled "End of an Era: Reexamination and Retreat," with Mr. Pusey's chapter 71, "Triumph of Restraint." Mr. Hendel's treatment seems to me more realistic.

Though Hughes and his biographer claim that F.D.R.'s war on the judiciary had not the "slightest effect" on the course of judicial decision, the Chief Justice's part in the somersault has, nevertheless, been praised to the skies. "A synthetic halo" was thus being fitted, as one lifetime student of the Court commented, June 2, 1937, "upon the head of the most politically calculating of men." "The Chief Justice read the opinion confessing error,"[72] Robert H. Jackson wrote in 1941 of the *Parrish* decision, "But his voice was one of triumph. He was reversing his Court, but not himself. He was declaring in March the law as he would have declared it the previous June, had his dissent been heeded."[73]

It was not, however, quite that way. In the *Tipaldo* case,[74] Justice Stone explained: "The Chief Justice wrote an opinion saying that the New York statute was distinguishable in some of its features from that one before the Court in the *Adkins* case, and that the *Adkins* case consequently was not controlling. I wrote an opinion stating that while I agreed that there were the distinctions pointed out by the Chief Justice, I nevertheless thought that it should be placed on broader grounds, namely that due process had nothing to do with wage regulation wherever at least there was a serious legislative problem presented. In October the Court denied a motion for reargument of the case. Monday the Chief Justice wrote the opinion, overruling the *Adkins* case and adopting the views expressed in my opinion of last June. Justice Roberts switched so the vote stood 5 to 4 in favor of validity."[75]

The Chief Justice's build-up as a liberal continued as he read opinion after opinion overturning his own work. In control of the assignment of opinions, he took for himself and Justice Roberts the glory of announcing the extremely popular pro-New Deal decision.[76] It was, someone suggested, the psychological price of their conversion. Thus still another idealized image was fashioned, and to this one also Hughes himself "contributed more than any other individual."

In 1937 various pictures appeared on the horizon. One eulogized Hughes as the central figure in the 1937 judicial drama. "However one looks at it," Mr. Pusey writes, "Hughes' unwavering courage and cool restraint contributed powerfully to saving the Supreme Court from the most formidable attack ever launched against its independence."[77] Others, noting the zig-zag course of his decisions during the years 1930-36, portrayed him somewhat derisively as "the man

72. West Coast Hotel v. Parrish, 300 U.S. 379, 57 Sup. Ct. 578, 81 L. Ed. 703 (1937).
73. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 208 (1941).
74. Morehead v. New York, 298 U.S. 587, 56 Sup. Ct. 918, 80 L. Ed. 1347 (1936).
75. H. F. Stone to Youngsters, Apr. 1, 1937.
76. *Ibid.*
77. Vol. II, p. 766.

on the flying trapeze." Though this characterization is easily sustained, it is not one in which Hughes himself took any pride. Rather, the Chief Justice wished to be known as a "liberal" and his prerogative in assigning opinions, in speaking for the Court himself whenever he was with the majority, or passing the task along to one of his associates, made this quite easy. In a most perceptive article, Mr. Irving Brant tells how this self-portrait was executed: "When the Court is liberal, and Mr. Hughes is one of the liberals, he writes more than his share of liberal opinions. When the Court is reactionary, and Mr. Hughes is one of the reactionaries, he practically never writes the reactionary opinion. Since Mr. Hughes went on the Court in 1930, he has formed part of a liberal majority in 43 cases. In 13 of these cases he has written the opinion of the Court. During this same period, Mr. Hughes formed part of a reactionary majority in 51 cases. In these cases he has written the opinion of the Court just once."[78]

It was not unusual for Hughes to take the lead in conference on the reactionary side, and then vote with the liberals if they had a majority without him. The strategy he followed is, as Brant saw it, even more subtle. "Nobody should get the impression" he observes, "that Mr. Chief Justice Hughes objects, in the abstract, to being made the target of dissenting opinions. He revels in hostile criticism by Mr. Justice McReynolds, Butler, or Sutherland. Mr. McReynolds has written 16 dissents from the opinions of Mr. Hughes, each one of them strengthening the reputation of the Chief Justice as a liberal. One can only wonder what the reputation of Mr. Hughes would be if, in the 51 cases in which he helped to create a reactionary majority, he had exposed himself 16 times to the dissenting logic of Mr. Justice Stone. Mr. Stone has written 19 dissents in cases in which the Chief

78. In his brilliant article, *How Liberal is Justice Hughes,* THE NEW REPUBLIC, July 21, 1937, pp. 295-98, and July 28, 1937, pp. 329-30, Irving Brant lists the Chief Justice's votes during six periods and suggests the forces that impelled the reactionary-liberal swings: "First period. February to June, 1930. Reactionary 2, liberal 0. (No evident external influence.) Second period. October, 1930, to June, 1931. Reactionary 2, liberal 9. (Reflex of the arrival of Mr. Justice Roberts on the Court, and cumulative effect of the Senate fight against the confirmation of Hughes and the defeat of Judge Parker.) Third period. October, 1931, to March, 1933. Reactionary 20, liberal 6. (Effect of Senate fight worn off. Period ends with inauguration of Franklin D. Roosevelt, but includes March 13 because decisions announced then were reached before March 4.) Fourth period. March, 1933, to February 18, 1935. Reactionary 6, liberal 16. (Era of New Deal acceptance by the business world, ending with gold-clause decisions.) Fifth period. February, 1935, to November 3, 1936. Reactionary 19, liberal 11. (Period of business hostility to Roosevelt and belief among conservatives that the New Deal had lost popular support.) Sixth period. November, 1936, to June, 1937. Reactionary 2, liberal 16. (Influence of 1936 Roosevelt landslide and proposal to reorganize the Supreme Court.) During three periods of liberal pressure from outside the Court, Mr. Chief Justice Hughes voted liberal forty-one times, reactionary ten times. During three periods when liberal pressure was absent, he voted liberal seventeen times, reactionary forty-one times." On motion of Senator Joseph F. Guffey, Brant's article was reprinted in the *Congressional Record.* Ninety-seven thousand reprints were distributed, but apparently none reached Mr. Pusey.

Justice formed part of the reactionary majority, but not once has he had an opportunity to analyze an opinion written by the Chief Justice himself." "In brief," this writer concludes, "when Charles Evans Hughes is a liberal, he proclaims it to the world. When he is a reactionary, he votes silently and allows somebody else to be torn to pieces by the liberal dissenters."[79]

We come, finally, to the question of Hughes' contribution to our understanding of judicial power as revealed in the 1937 conflict. The judges themselves in their desperate attempt to kill the New Deal had unwittingly advanced popular understanding of the judicial process, disabusing even the most credulous of the belief that Court "decisions are . . . babies brought by constitutional storks. . . ."[80] Thrusting themselves into the vortex of political controversy, they had abandoned traditional judicial caution, and indulged in what one of the dissenting justices characterized as a "form of indecent exposure."[81] They thus made clear what they had sought so anxiously to disguise — that judicial decisions are, in fact, born out of the travail of economic and political conflict.

Especially useful in this educational process, and quoted *ad nauseam,* was Governor Hughes' disarming assertion of 1907: "We are under a constitution, but the constitution is what the judges say it is." Though mildly shocking when first uttered this statement had become by 1937 a simple statement of fact. Yet Hughes, to his dying day, smarted under the use made of it by commentators and others — especially F.D.R. All had been guilty, he said, of misrepresentation. By taking the half-sentence out of its context, these distortionists made it appear that Hughes "exposed the solemn function of judging as a sort of humbuggery." I am not aware that it was used for that purpose. It was, in fact, cited by erudite scholars, politicians and commentators alike to show what the justices themselves had so clearly revealed, that "the great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."[82] Nor does taking the words out of context do any violence to this interpretation.[83]

79. "The Chief Justice's experience in Crowell v. Benson, 285 U.S. 22, (1931)," Brant said, "may be called the exception that proves the rule, confirming him in a system that even then was fully matured."

80. Lerner, *The Fate of the Supreme Court,* THE NATION, Mar. 25, 1936, p. 379.

81. H. F. Stone to Felix Frankfurter, May 30, 1936. The comment has specific reference to Ashton v. Cameron Co. Water District, 298 U.S. 513, 62 Sup. Ct. 1132, 86 L. Ed. 1634 (1936).

82. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1922).

83. In context, Hughes' statement reads: "I have the highest regard for the courts. My whole life has been spent in work conditioned upon respect for the courts. I reckon him one of the worst enemies of the community who will talk lightly of the dignity of the bench. We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary the safeguard of our liberty and of our property under the Constitution. I do not want to see any direct assault upon the courts, nor do I want to see any indirect assault upon the courts. And I tell you, ladies and gentlemen, no more insidious

Whether in or out of context the words mean that "the Supreme Court *is* the Constitution."[84] As a matter of fact, Hughes' own decisions supply a context so apt that any attempt at this late date to make these discerning words mean anything but what they say seems like "Pandora's difficulty in trying to return the ills of life to her box."[85] The "humbuggery," if any, consists in the effort to maintain the patent fiction that "courts are mere instruments of the law, and can will nothing."[86]

The basic over-all truth to be deduced may be this: Aside from his convictions as to civil rights, Hughes' mind was singularly devoid of ideological content or commitment. His strength, as one perceptive reviewer has said, "was not in ideas but in a highly developed ear for the aspirations of the American people." This reviewer is convinced, as I am, "that in the Thirties Hughes became hard of hearing."[87] Hughes and his biographer may be correct in contending that there was no essential shift of position in 1937. By that time, Hughes had been awakened to an important truth. He had at last learned the lesson Brandeis and Stone had long been trying to teach—that the majority's recalcitrance imperiled the very things the mastiffs thought they were safeguarding. He now realized that "the continual expansion of federal power with consequent contraction of state powers" was perhaps inevitable; he now could see that moderate change was necessary in order to fend off drastic changes; that, in the long run, the dissenters' position was conservative, the majority's stand correspondingly radical. "Hughes had the acumen," the *Nation* commented June 14, 1941, "to recognize the inevitable." Justice Roberts expresses the point in these words:

"Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country —for what in effect was a unified economy. . . . An insistence by the Court on holding federal power to what seemed its appropriate orbit when the Constitution was adopted might have resulted in even more radical changes in our dual structure than those which have been gradually accomplished through the extension of the limited jurisdic-

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assault could be made upon the independence and esteem of the judiciary than to burden it with these questions of administration, — questions which lie close to the public impatience, and in regard to which the people are going to insist on having administration by officers directly accountable to them." Vol. I, p. 204.

84. Frankfurter, *The United States Supreme Court Moulding the Constitution,* 32 CURRENT HISTORY 235 (1930).

85. Vol. I, p. 205.

86. Chief Justice Marshall in Osborn v. United States, 9 Wheat. 738 (1834). Cf. Justice Sutherland's strained effort to sustain this proposition apropos Justice Stone's merciless exposure of it in West Coast Hotel v. Parrish, 300 U.S. 397, 401-04, 68 Sup. Ct. 987, 92 L. Ed. 1231 (1937).

87. Paschal, Raleigh (N. C.) News and Observer, Nov. 25, 1951.

tion conferred on the federal government."[88] The "popular urge" of which Roberts speaks, and to which Hughes was so long purblind, found effective expression in F.D.R.'s plan to pack the Supreme Court. In responding to it, even he may have been motivated by genuinely conservative impulses.

On its own terms, this is truly a magnificent portrait. Hughes deserves great credit for preserving the mass of pertinent material on which his biographer was able to draw, as well as for recording his reminiscences. In Mr. Pusey, he found a competent and sympathetic co-worker. If the final result falls short, as I think it does, the fault lies more with Hughes than with his biographer. Pusey labors hard and, on the whole, successfully to destroy that familiar caricature depicting the Chief Justice as a frigid, humorless automaton. He writes convincingly of Hughes' magnificent contribution to efficient judicial administration. His chapter, "Organizing Courts for Efficiency," ranks among the best in the book. The Chief Justice, revealed as "Guardian of Freedom," is impressive. The dawn of a new day for our basic freedoms coincided precisely with his early years on the Court. Mr. Pusey is less successful in dealing with the political aspects of his subject's career. In this area, especially, the subject hinders rather than helps. He seems always to be whispering in his biographer's ear, giving the cue, prompting his Boswell to set down "CEH Notes" as the incontrovertible Q.E.D., even on those rare occasions (as in the 1916 Presidential campaign) when his hero admittedly took a false step.

Such cooperation between subject and biographer raises important questions as to how history should be written. Mr. Hughes repudiated autobiography as smacking of "apologia"; he distrusted independent research as running the risk of "misrepresentation." Conscious of both these pitfalls, he chose his biographer and worked closely with him over a period of several years. "In view of all the assistance the Chief Justice gave to his chosen biographer," a sympathetic reviewer observes, "one can hardly escape the conclusion that he wished to have a record against misrepresentation after his death."[89] This, of course, is a perfectly natural desire. But in response to it did not Hughes run afoul of the implacable demands of history? Who, better than the subject himself, is entitled to take such precautions in an auto-

88. ROBERTS, THE COURTS AND THE CONSTITUTION 61-62 (1951). Samuel Hendel makes much the same point as to Hughes: "When the pressure for innovation became great, and the risks to the nation and to the Court itself apparent, reluctantly at first, but increasingly he went along with change. Having sedulously sought to protect the precedents of the Court, sometimes at the risk of offending logic, he witnessed and often participated in the shattering of one precedent after another. He stood thus as a kind of heroic and, in a sense, tragic figure, torn between the old and the new, seeking at first to stem the tide but then relentlessly caught up and moving with it." HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT 279 (1951).

89. Powell, *supra* note 28, at 163.

biography written under his own name? Readers of such works naturally make the usual discounts resulting from the understandable bias that afflicts any self-appraisal. In a "joint work"[90] such as Mr. Pusey's, the most sympathetic reader finds it difficult to tell when the author is speaking on his own and when he is drawing on conversations with Hughes or on the typewritten notes prepared by the Chief Justice himself. The effect is to blur the thin line separating "official" from "authorized," a distinction which Mr. Pusey is so anxious to have his reader see. Has not Hughes thus succeeded in achieving a portrait the more pleasing to himself because it bears the stamp of objectivity?

Why present Hughes as a superman? Why not portray him as a human being, endowed with superior gifts, titantic energy, submerged native wit, who, surmounting the regimen of theological orthodoxy, reached high rank in the roster of American statecraft? I venture to suggest that there is still need for a biography to which Hughes himself does not "contribute more than any other individual."[91]

90. The characterization is Thomas Reed Powell's in the review cited above.
91. The possibilities may be seen in Samuel Hendel's book, CHARLES EVANS HUGHES AND THE SUPREME COURT (1951).