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REVIEWS

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A man can have no definitive biography. If he has led an army, created a nation, established a religion, or even spoken with the voice of the law, his life is as his biographer shapes it. As he recedes into the past, age after age makes its own selection from all that he was, and a series of revised portraits attends his journey towards oblivion. The changing picture of the great man—always a bit out of balance—moves towards the ever-new focus of current interest. As the years pass, a new biographer may be blessed with a fresh insight, a novel turn of events may give fresh importance, a change in problems that are insistent may throw a life's work into unexpected relief. The history of constitutional law is reflected in the successive lives of John Marshall—and our generation has not yet been served with an appropriate one. We are just escaping the relative evaluation of Marshall and Taney which we inherited from the Civil War; our revised appraisals rest upon standards drawn from our own times. Of the remaking of the lives of great jurists there is no end.

Thus the age decrees focus and importance, and the biographer shapes the portrait from the materials at hand. To the great mass of men today the name of Waite is unknown. A questionnaire among the intelligentsia would elicit little knowledge and less curiosity. Among lawyers the personality of the former Chief Justice has faded into a verbal symbol which announces some rather outmoded, but still respectable, opinions of our highest court. The name prompts concrete response only within the narrow circle of persons who torture themselves with the mutations through which constitutional doctrines have gotten thus far on their way to parts unknown. In this group the prestige of Waite, eclipsed in the days when laissez-faire was riding high, is on the make. As problems of public control are again to the fore and the police power reclaims its supremacy over due process, his work takes on a renewed relevance. As long ago as 1934 the United States Supreme Court relegated intervening cases to the footnotes to ground the concept of public interest in a holding of Waite's; and of late that most decorous of all bodies, in spite of the advanced years reputed to its members, has shown remarkable agility in vaulting the hurdles of recent individualistic decisions. As the "liberal" bench of today fortifies its novelties in opinion with the precedents of a conservative past, the judgments of Waite may well become a standard of judicial orthodoxy.

REVIEWS

The antennae of current interest set the task of the biographer. The genealogy, the miscellany of incident that befell Waite by birth, Waite by marriage and Waite by collateral kinship, the bevy of virtues which came down by germ-plasm or cultural heritage are told off as if the future Chief Justice alone had ancestors and only his blood-kin had inconsequential things happen to them. The stages of Waite's early life—the Yale student laying out dimes and quarters on political pamphlets, the young attorney consorting with the members of his craft as he rode circuit, the amateur not quite at home in Ohio politics, the lawyer who sold his services but not his soul to corporations, the citizen of his small town ever alert to the public good—fix the half-century rather than distinguish the individual. If, long before he is across this hundred pages, the reader cries out against monotony in impatience to get on, it will be because of his failure to understand that the significance of Waite's work as a jurist must by contagion pass to the infinitude of inconsequential detail that came before. When Salmon Portland Chase died, Waite had had no judicial experience. He had never argued a case before the United States Supreme Court. Save as an attorney for the government in a single arbitration of international differences, he was without national reputation. But President Grant and his Senate were not of one mind; the illustrious Roscoe Conkling would not take the appointment; the upper house would have nothing of George Williams or Cabel Cushing; those who "longed for a John Marshall" were forced to accept "an innocent third party without notice," and Waite gave farewell to obscurity to become Chief Justice of the United States.

As relevancy demands, Waite's work upon the bench occupies nearly half the book. As an inquirer who must ground argument in citation of authority, the author sticks close to the United States Reports. If he must go beyond the opinions of the court, it is to quote a stock work such as Burdick or Warren: his sparing use of legal periodicals is confined to early volumes which have stood the test of time and of dust; the host of articles of recent vintage concerned with Waite's contribution to constitutional doctrine find no standing in his austere pages. The volley of briefs with which attorneys for plaintiffs-in-error beat upon the court to convert vested interest into legal immunity lie beyond the limits of his academic—only the querulous reader will say pedantic—tolerance. To the author the lack of merit in such material must be evident in the neglect it receives; and to him it seems obvious that only such arguments as emerged from plea to opinion became the law.

The same scholarly faith that truth lies only in official documents attends the use of non-legal material. He must set down an occasional paragraph upon the nature of the causes that came before the court, the movements which brought them into being, and the incidence of decision in the wide world

3. The parties were the United States and Great Britain; the matter, American claims growing out of "the Alabama affair" and other Civil War matters; the place, Geneva; the time, 1872.
5. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (1923).
without; for the mores which have grown up in respect to this sort of writing command it. But if occasional use must be made of a sentence from a letter, an off-hand scribble, or a newspaper clipping, such miscellany are kept discreetly upon the side-lines. The author seems to have had a voluminous treasury of memorabilia upon which to draw; and it is hard to think of another biographer who could have preserved the purity of his scholarly chastity in the face of so insidious a temptation. So the biographer sticks close by the Reports and does for the reader what the latter with time and patience could do for himself.

The author's way with such impeccable materials bears little trace of heresy. So far as their intractable character permits, he imposes upon the cases the conventional classification. He gives a chapter to the judicial problems arising out of Southern Reconstruction—but history rather than legal error is responsible for such a categorical lapse. He promptly retrieves his closed system; and in proper order discusses the public interest, due process of law, limitations upon the obligations of contract, commerce among the several states, "fundamental rights," jurisdiction of the federal courts, international law and "property." The result is a series of close-ups; in the drab gray of the true scholar Waite is shown working away on many minute segments of the constitutional front. If the picture seems to lack perspective, it atones adequately with isolated detail. If again and again quotations are repeated, the staccato of monotony is doubtless a device to drive the argument home. And if again and again scissors and paste are the chosen instruments of categorical statement, the author only follows where brilliantly the corpus juris has blazed the way. In these pages the words of Waite in cases hot out of life are frozen into a superb exegetical display.

As befits the scholar, warmth of feeling appears only in directing the tools of inquiry. The author would have Waite sound; and for his subject he has the highest doctrinal aspirations. Mr. Trimble is clearly an enlightened liberal with a deep regard for the general welfare; he also believes that "the most important guarantee of civil liberty known to American constitutional law" is the Fourteenth Amendment. Surely it is reasonable to expect a subject to accept the fundamental views of his recreator; and surely the biographer has a duty to see, within the limits of his honest craft, that a somewhat obstinate justice is brought along. The author's technical resources are brilliantly displayed in his handling of this difficult problem. It is easy enough to make Waite the architect of the doctrine of public interest; the documents can be cited and the conclusion is generally accepted. The one distinctive touch is to broaden the concept of public interest, to make it coterminous with the police power, and to allow the credit claimed for Taney to be dismissed in a casual sentence. It is a far more heroic feat to make Waite "a craftsman of due process," for the Reports are barren of cases in which substance was read into the words in actual judgment. And, as if to make impossible the task of his biographer, Waite had more than once declared that against the public regulation of business the proper appeal is, not to the courts, but to the legislature.

A less intrepid inquirer might have been estopped by such formidable barriers, but the logomachy of the biographer is equal to the emergency. The
injunction "go to the legislature" is airily dismissed as adictum, a search for evidence in contradiction is undertaken, and from Waite's opinions are extracted a number of sentences upon the limits of the province of legislation. A less purposive researcher might regard such statements as rhetorical concessions to the minority on the bench, as courteous answers due to losing lawyers as officers of the court, or as words addressed to unsuccessful litigants intended "to beautify what must be disagreeable to the sufferers." But such rival explanations are ignored; the words of the Chief Justice are elevated to the plane of oracular utterance; and the trick is done. In effect the author makes doctrinal twins of "public interest" and "due process" and imposes paternity upon the departed jurist. Waite blazed the way for social legislation with the doctrine of public interest; Waite was a craftsman of "due process" with which to make hard the way of social legislation. The biographer commands and the subject obeys; the Allah and the Mohammed exchange rules in a pleasant dialectical tale. One suspects—though the evidence saturates the narrative rather than invites specific documentation—that the opinions of Waite fell less easily into the categorical precisions of the law than the author would have liked. At times the old gentleman's departures from an orthodoxy which did not come into being until some decades later must have been trying to a biographer with a passion for the rectitude of the category and the exactions of the syllogism. But such frailties are, of course, waved away as of the times and not of the man. It is in just such feats of academic legerdemain that the quality of the whole volume lies.

It is not to be expected that an account so scholarly should completely escape criticism. Readers whose trade it is to quibble will note exceptions. It is not mathematical truth to set down Waite's early court as "probably the ablest group of jurists ever to sit on the bench at the same time." In Munn v. Illinois, Mr. Justice Field did not dissent "alone;" his good brother Strong saw eye to eye with him.6 The division of the court in issues of public control did not begin with the Munn case; it was dramatically in evidence under Chase—and long before. The significance of Yick Wo v. Hopkins7 does not survive translation from the Reports to these pages; it was the first cause in which "the right to a trade"—the contention of counsel in the Slaughter House Cases8—was read into the Fourteenth Amendment. In view of their widely divergent techniques "the Holmes-Brandeis" is a rather broad "school of constitutional philosophy;" nor was either the one or the other "the first"—or anywhere near the first—to apply "what is now called the sociological interpretation." If, during Waite's term "the individualism of the majority of the court" was "too much for him," the Reports fail to supply adequate corroborative evidence. But an author can always dismiss error in detail as picayune; and, to distract attention, he may point grandly to the testamentary foundations of his study and its documentary integrity as proof against any attack.

It is, however, in the sparing use of secular material that the asceticism of the scholar is most in evidence. A less legally-minded person would have

7. 118 U. S. 356 (1886).
8. 16 Wall. 36 (U. S. 1873).
drawn copiously from the memorials of Waite's life to light up his opinions. The author, as if in penance for minor errors of fact, allows himself scant indulgence. Here and there a fragment of a letter appears in the offing and a chapter is entitled "behind conference doors." But no more than half of its pages profess so profane a concern; and in them the author is much too awe-stricken to probe far into the veiled mysteries of the executive session and the exchange of opinions in the making. From these scanty entries we learn that David Davis was as adept a jurist as he was a politician—"when justice required a decision in a particular way he could always find a good reason for doing so." That, at the time of Waite's appointment, Clifford who had been presiding officer ad interim suggested that he tarry a while to learn the ways of the court before taking over the gavel. That Waite complained that "those fellows up there want to treat me as an interloper;" but that he "got on the box" as soon as he arrived, "gathered up the lines and drove." That there was bother with Clifford and Field over their assignments and that Field was not always responsive to a reason that was not his own. That a soothing letter failed to reconcile Field to the denial of an opportunity to employ his "vigorous style" in a railroad case and it required the sharp retort of his Chief to remind him that his connection with the company would leave "the opinion of the court" under suspicion. That George Bancroft had helped Waite with his "sermon on the religion of polygamy;" and that the great historian allowed his indignation to flame in a dissenting pamphlet when his friend the Chief Justice betrayed the cause of sound money and the Constitution by his vote for greenbacks as legal tender. That Hunt lingered on the bench for four years after he had ceased to attend court and that the persuasions of the Chief Justice had to be supported by an Act of Congress to induce him to retire. It is easily argued that the Reports are available to all and that here alone in all the ponderous volume is color, freshness, drama and meaning to be had. But such a complaint will come only from those undisciplined folk who prefer the delights of understanding to the rigidities of methodology. The feet of the biographer could never stray far down so uncanonical a road.

In a period of constitutional confusion it is too much to expect that even such a book should satisfy everyone. It must be frankly admitted that a more reckless person would have written a rather different life. Another biographer might have presented background as background to moving judicial events, not as a series of pictures apart. He might have lifted Miller, Field, and Bradley from the shadows and have assigned them roles in a living drama of the law. It has been urged that a great deal that is now the constitution emerged from the ever-changing conflict and coincidence of views among this judicial quadrumvirate. He might have fused the fragments here garnered into an account of the concessions in procedure and dicta which the court of the next decade began to turn into substantive rulings. He might have

presented a bit of the march of doctrines on the make, their setting in national movement, their rhetorical expression in legal dress, and the compulsions in the outside world which drove them into the constitution. He might have drawn a sharp contrast between Waite's court and Fuller's which in the nineties set the supreme law in the path of laissez-faire. But the legalistic shortcomings of so different a biography are obvious. It would have subdued Waite's solo performance to a role in a group movement. It would have degraded his colleagues from abstract instruments of justice to mere creatures of flesh and blood. It would have placed distance between appraisal and a myopic scrutiny of the cases, and in a creation of perspective have sacrificed footnotes to art. It would have opened the gates to alien forces from far and near as causal factors in shaping the usages of the constitution. It would have invited forays beyond the Reports and the uncertain blending of legal and secular material in a unified narrative.

As fortune would have it, the faith of the author in the scientific method was proof against so parlous an adventure. Against such a hypothetical life we possess the peradventureless biography before us. If it lacks the creation of the artist and the perspective of the historian, it presents more substantial stuff. We are blessed with an account of "a great judge" and "a good man." Waite found the court to be at least tainted by politics. Chase had angled for the Presidency and doubtless found his heavenly reward a poor compensation for an earthly ambition denied. Davis, intent upon his cases, took at least an occasional peek towards political preferment; he resigned in 1877 to become United States Senator from Illinois. Field sublimated his experience into a burning passion for the reform of the whole judicial system and came to believe that only from the White House could it come to pass and only he could realize it. And even Miller might have heeded the call had it come unsought. Waite set himself against allowing the work of the court to be colored, even unconsciously, by such deep-seated urges. The age was one in which high officials too generally felt the need of a modest supplement to niggardly salaries and essayed ways honest or near-honest to supply the deficiency. Yet Waite, insistently in need of ready cash, held himself aloof from every financial affair which might taint his impartiality upon the bench. It is a vivid picture—that of an honest man, a citizen devoted to the public interest, a heroic soul slaving away at his docket while the nation's judicial business broke in a stream too mighty to be handled, and debt stealthily closed upon him to claim all that he had.

We can appraise the significance of Waite's work only for our own times. As for his style, the author and Field's biographer may do battle with the expressions of the combatants garnished with their own glosses—it would serve poorly the cause of dialectic to refer the issue to the opinions where the answer is plainly written. Waite was an ordinary man, but he possessed to an extraordinary degree the capacity for his office. He could judge without prejudging; he could put prejudice and preference aside, give to the instant case and its larger cause a full hearing, and allow issues to be considered

12. Unpublished letter to John W. Pomeroy, in the possession of the Library of the University of California.
before they were resolved. Moreover, circumstances supplied a distinctive
opportunity to his talent. Without the genius, or the term of service of a
Marshall or of a Taney, he became their peer as a law-giver. He is not to
be numbered with Holmes and Cardozo, or with Brandeis and Stone, as a
craftsman of the law. In sheer capacity he hardly ranks with such secondary
figures as Campbell, the elder Lamar, Moody, or perhaps Bradley of his own
court. But fate put him at the helm at a time when men, causes, and the
course of events had set the stage for the restatement of the ancient doctrine
of the common good—and he rose to the emergency. But was Waite the
architect of great constitutional doctrines? Or was he for his times the
personal symbol of a communal authorship through which the constitution
is being reshaped to the necessities of the people? At this point the concern
with Waite is lost in the larger mystery of the way of the law.

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The Power to Govern: The Constitution—Then and Now. By
Walton H. Hamilton and Douglass Adair. New York: W. W. Norton

This is a grand book, brilliantly maintaining a thesis and demonstrating
that sustained argument on momentous constitutional issues need not follow
hackneyed lines nor be carried on without benefit of literary distinction. In
a field thought to have been well explored, it is a work of genuine originality.
Its novelty does not lie in its conclusion that the purposes of the framers
and the text they wrote are sufficient to embrace all that the power to
govern in the national interest requires today, and that it is only the gloss
put upon the text since then that makes it seem otherwise. Judges like
Marshall and Holmes—and, doubtless, like Black—have found the text
adequate to the demands of contemporary society. Students following the
lead of Beard and Corwin have illuminated the purposes of the framers. The
distinction of the book is rather to have opened a fresh line of inquiry which
brings independent support to the familiar conclusion.

The argument takes as a point of departure for "the appeal from gloss
to text" a criticism of the Carter Coal Company case, which serves at once
as an irresistible occasion for indulging the principal author's favorite occupa-
tion of baiting Mr. Justice Sutherland, and as a lesson teaching how
governmental authority to act hangs on the meaning of a word, "commerce."
From that it turns to 1787, and sets the story of the Convention against the
background of prevailing economic doctrines, the immediate problems of
political economy to be solved, and the usage of words in the vocabulary
of the day.

The framers grew up in a world dominated by mercantilist policy—its
counterpart today we call economic nationalism. It held nothing alien to the
interest of the state that affected the wealth of the nation. The eighteenth

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century economy rested on domestic production, chiefly on a household scale, destined first for immediate family consumption, and second for the market. While state regulation of either was taken for granted as the need was felt, it was the second that was disrupted by the Revolution and the consequent separation from the English imperial system. The problems of readjustment now facing the emancipated Philippine Islands can suggest but a faint conception of the difficulties attending the substitution of thirteen colonial mercantilist policies for the unity of Privy Council regulation. What result could be less surprising than that a group of men in Convention, heavily overrepresenting the interests of property, should frame a national government equipped to promote national prosperity, grandly conceived? By statesmanlike regulation that prosperity could be advanced; such was the mercantilist belief. The overlordship of the state in matters of economic policy was generally assumed. The disputes in the Convention were thus not over the scope of national power, upon which delegates from large states and small were agreed, but over the relative influence the representatives of the several states should have in deciding when and how it should be exerted—questions of policy, not of power. Nor was the power conceived in rigid categories: war and diplomacy; taxation, regulation and tariffs; currency and bankruptcy were only alternative instruments to the accomplishment of national policy. When compromises were reached on the apportionment of shares to be voted in the new board of directors that was to be Congress, the rest was mainly draftsmanship. How could meaning be most clearly expressed?

The powers of Congress were enumerated, not defined. To elucidate meaning, the authors here resort to the eighteenth-century dictionaries for light on the usage of words. "Traffick" and "trade," though substantially synonymous with "commerce," had somewhat shabbier or meaner connotations; "business" and "industry" would have been unintelligible, and "manufacture" too restricted, for the purpose. Commerce "was a name for the economic order, the domain of political economy, the realm of comprehensive public policy . . . If trust was to be reposed in parchment, it was the only word which could catch up into a single comprehensive term all activities directly affecting the wealth of the nation." If agriculture was usually distinguished from commerce in definitions, it was because agriculture was the primary basis of the subsistence economy; but that it was clearly understood agriculture might be intimately affected by commercial regulation may be seen from the specific prohibition on export taxes. "The boundaries of commerce extended to the frontiers of the domestic economy."3

The Constitution proved flexible enough to accommodate the nineteenth-century change from mercantilism to laissez faire. By the time the transition

1. "Trade" in 1787 had already expanded beyond the earlier conception of a skilled calling which survives in "trade union," "trademark," and "trade school;" but like "commerce" it was not until much later restricted to the exchange part of the transaction implicit in such phrases as "restraint of trade."
became recognizable in judicial decisions, *laissez faire* "had already permeated common sense, economic theory, and public policy. It would have been strange if it had not made its way into constitutional interpretation . . . The supreme law of the land was not immune to an outlook on affairs which had already penetrated the infringing intellectual world." 4 But the process is obviously one that will also work in reverse. "The judicial chapter did not start until the whirl of industrialism had put *laissez faire* on the defensive; its recent victories have been won with its popular cause in full retreat." 5 This may seem a counsel of optimism. "The abiding text can again be furbished out with a more fitting gloss." 6 But the book closes on a more Olympian note. The courts may make the change. Or the more frankly political branches may "contrive ways and means for drawing erring judicial eyes from the margin back to the page." Or "it may be that the gloss lies so thick that the power to govern must be written afresh in the language of today. No matter . . . A great democracy can be depended upon to make of the Constitution a living instrument of government." 7

There is doubtless conscious oversimplification in concentrating the story upon the mutations of "commerce." Other words in the document, including "regulate" in the same clause, have undergone a similar metamorphosis. But by comparison with more orthodox accounts, such as McLaughlin's, the book comes as a breath of fresh air. Its factual basis is sound, its treatment concrete, and the relevant and significant are assembled with a sure touch. The style is Cardozoic in its phrasing and in its command of the adjectival resources of the language. And not least among the book's merits is its quality of suggesting more worlds in need of similar conquest. It would, for instance, be a great service to the study of administrative law to have so lucid an account of the effects of the transitions to and from *laissez faire* upon the doctrines of judicial review of administrative action. The niceties of administrative finality and of "jurisdictional facts" are not to be explained solely as a result of a desire to aggrandize judicial power; they reflect also underlying beliefs as to the purposes that power should serve.

New Haven, Conn.

Harvey C. Mansfield†


This little book consists of five lectures delivered by the author at the Northwestern University School of Law. Dean Green graces it with a generous introduction.

As a handbook for laymen it is not without certain arresting, journalistic qualities. Neither lawyers nor law students, however, will discover in its

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5. P. 189.

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pages any original or even coördinated contribution to the field of municipal
law. Mr. Hodes' approach is sententious but superficial, and he indulges
a weakness for polemics which unfortunately impairs the value of much
that he has to say. Too often his argument-belabored conclusions limp into
view rather the worse for the fray and hence not readily recognizable.

After sketching the historic development of the modern city, he inveighs
at length against the "legal strait-jacket" which fetters municipal independence
as a result of the "child-parent relationship" between city and state. This
creature-theory represents a form of serfdom which the author finds galling
and intolerable. He is all for abolishing the anachronism.

"The solution to this dilemma of modern cities appears to be exceedingly
plain. Our cities must be given broader powers of self government. They
must be emancipated from state authority in matters in which the city alone
is concerned. The creature theory must be discarded, or drastically modified in
its modern application. In short, our modern cities must be given "home rule."

To this theme of municipal emancipation from the legislature's paternal
restraint, Mr. Hodes gives vehement voice throughout the book. It is the
recurring leitmotif. Branding insufficient home rule as a bar to progress in
modern cities, he implements his argument by illustrations from his experience
as corporation counsel of Chicago.

Those who, like the author, deal with the legal affairs of municipalities
will agree that the growing scope and importance of urban functions call
for some corresponding expansion of local powers. Reasonably enlarged
local autonomy, conscientiously assumed, does more than merely stimulate
the efficiency of local government. It relieves harrassed legislators of the
minutiae of local laws now clogging the hoppers, which divert them from
vital state-wide problems and serve only as mutual quid-pro-quos at roll-
calls. Elimination of this burden might well elevate the influence and oper-
ating effectiveness of the legislature itself. What Mr. Hodes fails to make
clear is that this challenge is beginning to be met in the form of broader
charter grants and through home rule charters carrying the right of self-
amendment by means of local referenda and similar devices.

On the whole Mr. Hodes does a persuasive piece of pamphleteering for
the legal independence of cities. Quite evidently his viewpoint is conditioned
by barriers which have frustrated some of his legal plans as corporation
counsel. But in his role of special pleader he abandons the detachment essen-
tial to a broad survey of the entire problem.

It is not surprising therefore that his treatment overlooks important factors
underlying public disinclination to invest American cities with powers of
self-government too abruptly or too completely. Nearly half a century ago
James Bryce cited the government of cities as the one conspicuous failure of
the United States. It can not be denied that extravagance, mismanagement
and unsavory political domination of cities are still matters of common knowl-
edge and concern. Local political machines constantly pound legislative doors
with demands for increased powers tending to intrench their control, for the
right to issue new bonds in excess of fixed statutory limitations, and for all
sorts of questionable special legislation. Insofar as the legislature resists
such demands it is discharging a function that is prophylactic rather than stultifying.

It is doubtless true, as Mr. Hodes intimates, that the legislature's remoteness from the municipal scene occasionally engenders such indifference to or inadequate appreciation of local problems as seriously to embarrass municipal programs. On the other hand, it is equally true that this very remoteness, coupled with the cautious influence of rural legislators, often creates a skeptical or conservative attitude which acts to curb the arrogance of local machine-politicians. Mayor Daniel W. Hoan's recent volume on *City Government* traces some of the notorious practices rampant in American cities and paints a heartening picture of the progress that is possible even within the limits of existing legislative restraints.

The significant question which Mr. Hodes fails to consider is this: Local political conditions being what they are, can the average city administration be safely entrusted with a complete home rule? Is not such independence likely to precipitate disastrous abuses? It is fair to assume that the disturbing implications of this question may explain, and indeed justify, legislative reluctance concerning any premature re-orientation of the city-state relationship. In fact, one wonders whether Mr. Hodes has not been so intent on riding his hobby as to have mistaken the path of remedy. Most students of the problem seem to be of the view that what cities stand in need of today is not more government so much as better government. Given sounder and cleaner administration of municipal affairs, it follows that any hampering maladjustments between state and city powers can be swiftly rectified.

Mr. Hodes proceeds to a discussion of municipal tort liability, stressing some of the incongruities which inhere in the doctrine of governmental immunity. Here again, his treatment is argumentative and interesting but rarely penetrating. Space is devoted to the contrasting and frequently overlapping functions of the city and other governmental units such as the county and townships, as well as to the growing trend toward Federal-city relationships. The final chapter deals with the work of a modern municipal law department, a subject on which Mr. Hodes speaks with authority. Under his direction various hitherto unintegrated legal activities of the City of Chicago have been modernized and consolidated into a single, model law department.

Mr. Hodes' book can not be considered, nor is it intended to be, a serious contribution to legal literature. As a provocative plea for municipal home rule it enjoys a definite although limited value.

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Albrecht Mendelssohn-Bartholdy occupies a prominent position among the jurists of the modern world, having made substantial contributions in a great variety of fields, such as Civil Procedure, Conflict of Laws, Comparative Law, International Law and Foreign Affairs. He was a professor of law at the universities of Leipzig, Würzburg and Hamburg, where he founded the Institut Für Auswärtige Politik. From 1933 until the time of his death on November 28, 1936, he was a Senior Research Fellow of Balliol College, Oxford. The little volume contains an article which Mendelssohn-Bartholdy was completing at the time of his death. His friends felt that the ideas contained therein would constitute a valuable addition to the literature concerning a most difficult and controversial subject in the Conflict of Laws—that of renvoi, and prevailed upon Dr. Cheshire to put the manuscript in final form for publication.

Dicey writes in Appendix 1 of his work on the Conflict of Laws: “In any English rule of Private International Law, the term ‘law of a country’ means, as applied to a foreign country, e.g., Italy, any principle or law, whether it be the local law of Italy or not, which the courts thereof apply to the decision of the case to which the rule refers.” Referring to two later cases on the subject, In Re Ross,¹ and In Re Askew,² Professor Keith, the editor of the fifth edition, says: “In both cases the court investigated fully the issue and arrived at results which confirm the conclusions set out in previous editions of this work. The catena of English authority is thus unbroken, and could hardly be overruled, save by the House of Lords, especially as the doctrine has the clear approval by the Privy Council.”

In discussing the meaning of lex domicilii in English Private International Law, Cheshire reaches the same conclusion. He says: “An English judge, when required by the Private International Law of England to decide a matter according to the lex domicilii of a foreign country, refers to the whole law of that country, including the views entertained there with regard to Private International Law. His task is to ascertain as a fact how the foreign court would apply its own law in this wide sense to the circumstances in question.”

Mendelssohn-Bartholdy was not satisfied that the interpretation of the English decisions by these eminent English writers constituted a correct conclusion regarding the English law. Hence the present article.

A principle source of confusion in the English decisions has been former Article 13 of the French Civil Code dealing with “authorized” domicile, a preliminary step toward naturalization in France. “Domicile” in the Anglo-American sense was recognized in France for certain purposes and, to distinguish it from the “authorized” domicile, was called “domicile de facto.” A lack of clarity in the French decisions themselves, in speaking of domicile, as to whether in a given situation the authorized domicile or the domicile de facto was meant—plus the fact that the English lawyers and judges were not always aware of the double sense in which the term “domicile”

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¹ (1930) 1 Ch. 347. ² (1930) 2 Ch. 259.
was used by the French experts in court, is responsible for the impossibility of deriving accurate conclusions from some of the most important English decisions involving renvoi. Although seemingly approving the doctrine of renvoi, they can be distinguished upon the ground that the application of English municipal or local law resulted not in reality from the acceptance of renvoi but from the fact that French law as proved in the particular case referred to "authorized" domicile, which the particular individual had not acquired, and not to his de facto French domicile.

Another element of uncertainty in the English decisions arises from the fact that the cases seemingly supporting renvoi in connection with the validity of wills without exception upheld the will. The question is whether the English courts would be as ready to invoke a renvoi where it would invalidate the will. Additional uncertainty relates to the question whether the renvoi is sanctioned in English law in cases other than those involving the lex domicilii. Even as restricted to this class of cases, the cases are obscure and contradictory regarding the specific meaning of renvoi. If the English court finds that an English subject is domiciled in France and that by the French rules of the Conflict of Laws the law of nationality controls, is the English court to apply English local law or is it to decide the case as the French courts? In the latter event, if the French courts themselves recognize renvoi under the circumstances, they would actually decide the case according to French local law. In case the decedent had been a citizen of a third country, and the renvoi rule of France included cases of transmission (Weiterverweisung) as well as of remission (Rückverweisung), the English judge would be referred to the law of such third country, and from there possibly to the law of still another country.

Mendelssohn-Bartholdy holds that In Re Ross leads to this conclusion. He contends that this is not what really happens in the English courts and that the case is therefore erroneously decided. He argues that the principal cases cited in support of the proposition that an English judge is to regard himself as sitting as a judge of the foreign country contain only dicta to that effect, the controversy turning in fact upon Article 13 of the French Civil Code. Examining earlier English decisions in regard to renvoi, Mendelssohn-Bartholdy concludes that the supposed authorities for the doctrine are "singularly weak." He suggests that the courts might well concentrate upon Bremer v. Freeman, a decision by the Privy Council which he regards as "fully supported by argument," but which in fact left it entirely uncertain whether probate was refused in the case by reason of the French internal or local law or by reason of what the Privy Council deemed to be the French Conflict of Laws.

In giving to the English decisions a more restrictive interpretation as regards renvoi than is done by Dicey, Keith or Cheshire, Mendelssohn-Bartholdy follows simply in the footsteps of Falconbridge and others. The most important as well as interesting aspect of the book is the emphasis placed upon the connection between renvoi and the theory of qualifications. The author devotes almost the entire first half of the book to an examination of the English cases to prove that they uniformly apply English local law (lex fori) in the ascertainment of domicile. There is no doubt in this regard

in the Anglo-American decisions, although different theories have been advanced in this matter, especially on the continent. Mendelssohn-Bartholdy insists that a system of law like the English which qualifies legal transactions in accordance with its own views on Private International Law (*lex fori*), should logically reject the *renvoi*, the adoption of which is tantamount to the recognition of the rules of Private International Law of another country. In that he is right.

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Mr. Lewis finds political thought in various places: systematic treatises, text-books in political theory, journalistic books, articles in semi-serious periodicals, court opinions, public addresses, speeches in Congress. His report of the debate over the adoption and early application of the Civil War Amendments and of the later controversies over police power and judicial review is in general good constitutional history; but it does not go far in indicating any fundamental political ideas embodied in those discussions. He properly deals briefly with the systematic treatises and text-books: one chapter seems enough for the dry abstractions of Brownson, Mulford, Woolsey and Hurd, the dogmatic pronouncements on sound political science by J. W. Burgess, the scientific metaphors of Henry Jones Ford, and the more realistic summaries of W. W. Willoughby, Woodrow Wilson, and J. W. Garner. He has a shorter and better chapter on the jurists—chiefly Carter, Gray, Holmes and Pound. More interesting is his account, in four longer chapters, of the lively discussions, pro and con, of projects for immediate political reform: the granger, greenback, populist, free-silver, anti-trust, and utility-regulation movements; the more comprehensive programs of Theodore Roosevelt, R. M. LaFollette, and Woodrow Wilson; the efforts to make government more democratic and efficient through civil service reform, the popular election of senators, the direct primary, the initiative, referendum, and recall, the short ballot, and woman suffrage.

In covering so wide a range of topics, Mr. Lewis makes incorrect or misleading statements at a few places. It is too sweeping to say that a Congressional statute of 1868 (sustained in *Ex parte McCord*) "took away the appellate jurisdiction of the Supreme Court"1 or that the income tax sections of the Wilson tariff act of 1894 imposed a tax "on all incomes from whatever source derived".2 It is incorrect to say that the bonds in litigation in *Texas

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1. P. 117.
2. P. 120.
v. White had been "sold by the Confederate Government" or that "electors ... vote on [federal] constitutional amendments". It is incorrect to imply that when Eugene Debs left prison in 1921 he was only then ending an imprisonment begun with his conviction, a quarter of a century earlier, for violating a federal injunction. It seems to me incorrect to say that Theodore Roosevelt, in the Progressive Movement of 1912, "distinctly represented the larger business man." Harold J. Laski was not "born in Canada," and it is using words in a very unusual way to say that he "was educated at the Harvard Law School". It is clearly wrong to say that in Marx's theory "value was based on labor cost"—in the sense in which Mr. Lewis is thinking of labor cost.

Finally, Mr. Lewis must have been thinking vaguely when he wrote the following sentence: "For over a generation Sumner exerted an enormous influence over the young men of Yale and of the country." That would be obviously correct if Mr. Lewis had in mind Sumner's influence over a leading school of sociologists, particularly at Yale, or his extraordinary ability and popularity as a college teacher. But Mr. Lewis presumably had in mind another sort of influence; for he was discussing Sumner's emphatic disparagement of current governmental policies. Can it be said that in this Sumner's influence was enormous? It seems doubtful that many academic sociologists, even of the Sumner school, have adopted his opinions on such measures as the Interstate Commerce Act or the Sherman Anti-Trust Act. And as for the young men of Yale and the country, how many of them have followed Sumner in his vigorous opposition to a protective tariff? And how many of these same men have needed Sumner's eloquent sermons against social legislation to make them devoutly hostile to that kind of "interference" with "natural law"?

These are minor flaws in Mr. Lewis' book. He has written clearly, comprehensively, and fairly. Where his appraisals give any basis for placing him in some political group, he should probably be classified as a Progressive of the school of Theodore Roosevelt or the elder LaFollette; but he makes a good many common-sense comments that ought to go well in any political group. His book is probably the best we have for a survey of American political ideas from the Civil War to the World War.

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3. P. 168.
5. P. 390.
7. P. 200.
8. P. 386.

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REVIEWS


This study is too elementary and superficial to be of interest to lawyers and law students and too technical and lacking in perspective to be of much significance to economists. The aim and objectives, as stated in the Preface, are vague. The primary concern is said to be "not with the legislative process involved, but with the nature of the corporation law which has resulted from a competitive policy, the conditions which have induced business men to seek new powers or privileges and the manner in which such new powers have been granted in Delaware and their effects." It is thus not entirely clear just what the author is driving at.

He skims over the surface of such complex legal topics as the changes in the Delaware law in its competition with other states for the organization fees and annual franchise taxes to be derived from liberal incorporation privileges; the freedom of contract allowed in corporate charters; the drastic powers of amendment given the majority holders to change contract rights such as preferred stock clauses; the methods of combination, particularly by the purchase of "assets as an entity" and the use of stock control of subsidiary corporations; the disregard of the separate corporate entity of parent and subsidiary corporations; the liability to creditors in stock watering cases and the good faith rule as to the valuation of consideration for stock; no-par stock and manipulation of paid-in surplus; state Blue Sky laws and the Federal Securities Act, in about four pages; corporate capital, surplus and dividend restrictions; fiduciary obligations of directors and majority shareholders; and finally the growth and fluctuation of incorporation under the Delaware law in the period from 1899 to 1934.

It is not worth while to attempt to criticize inaccuracies in such a cursory survey. The author cites a number of official reports, statutes, articles, cases, and books on corporation law and accounting, although he omits some important recent contributions. His statements as to the statutes of different states are apparently taken second-hand from compilations such as J. S. Parker's Corporation Manual. His assertion that under the laws of California "corporations may not purchase shares of any company by which it (sic) is controlled" is an obvious misreading of section 342 of the California Civil Code. He discusses state Blue Sky laws in connection with the Federal Securities Act but fails to bring out that Delaware is one of the few states which has no Blue Sky law whatsoever.

The last chapter on Incorporation in Delaware has some interesting charts and tables of statistics as to charters granted and voided in Delaware from 1899 to 1936 and other statistical tables as to corporate birth and mortality in Delaware showing the influence of the depression, as well as diagrams indicating the proportion between corporation revenue and total state revenue of Delaware. The number of industrial companies listed on the New York Stock Exchange and the Curb Exchange in 1932 classified as to the states of incorporation shows thirty-four of the former and thirty-eight percent of the latter incorporated in Delaware.
It is true, as the author says, that the Delaware corporation law has become national in its scope and has had an important influence on the legislation of other states, some of it good in the direction of efficiency, some of it bad in discouraging needed restraints to prevent abuse of power.

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Mr. Deutsch, a social historian, has written a solid and readable historical survey of the care and treatment of the mentally ill in America and, to some extent, a history of psychiatry which ably covers developments from the dark ages to modern times. The author deals with the great movements and the pioneering members of the profession in their individual roles—Benjamin Rush, Dorothea Dix, Adolf Meyer, Clifford Beers, in this country, Kraepelin and Freud abroad, to mention some of them. An enthusiastic chapter, Towards Mental Hygiene, concludes the book. Although apparently written for the layman, the book contains much material that should have great interest for the medical profession. And the lawyer who is interested in psychiatry and mental hygiene will read it with pleasure and profit, especially the chapters on Insanity and the Criminal Law, and Our Commitment Laws.

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