

He certainly made no bones about articulating his "major premises," in other words, those very tenets of Federalism of which Professor Haines so much complains. These, he thought, with good reason, expressed the intentions of the makers of the Constitution, and ought therefore to govern its interpretation, it being then commonly agreed that the intention of the law-maker should be controlling.¹⁵

One further cause for discontent with Marshall's performance Professor Haines finds in the fact that his views were neither those "of the majority of the Nation during the period of their adoption by the Court, nor the only rational views which could be entertained."¹⁶ Marshall himself would have heartily concurred in the first branch of this charge, his own belief being that the views of the majority were heading back to the very confederatization of the Union which it had been the chief purpose of the Constitution to get rid of, and that it was his sworn duty to oppose this tendency, albeit the cause he represented was foredoomed to defeat. As to the second branch of the charge, is it not asking rather too much to demand that a Judge's views should be "the *only* rational" ones possible; is it not enough if they are rational? Actually, the sole alternative views suggested in Professor Haines's pages seem to be the preposterousities before mentioned of Jefferson, Roane, Taylor & Co.

There are a number of other matters on which I should like to take issue with Professor Haines, but this review is already much too long. Professor Haines revives old controversies but contributes few new facts and nothing new in the way of analysis toward their final settlement. His volume distills just enough of the acridity of the old quarrels it retells to season a not unpleasant escape from today's stern realities. Still I wish Professor Haines had devoted his time, learning, and skill to a more useful task. Had he shifted his attention almost exactly one hundred years to the role of the Supreme Court between the death of Waite and the decision in the *Schechter* case he could have given us a volume which badly needs doing.

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PHILADELPHIA LAWYER: AN AUTOBIOGRAPHY. By George Wharton Pepper. Philadelphia and New York: J. B. Lippincott Co., 1944. Pp. 407. \$3.75.

LIVES of great lawyers are prescribed reading for the younger members of the profession and afford their elders the vicarious enjoyment of famous battles won or lost, or triumphs of skill and professional ingenuity reaping their just reward. Often, too, such biographies are authentic contemporary

15. See, *e.g.*, his words in *Gibbons v. Ogden*, 9 Wheat. 1, 188-9 (U. S. 1824).

16. P. 623.

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social documents, since the attorney so sedulously represents the prevailing sentiments of at least the upper and most successful stratum of his society. This frank personal history deserves reading on all these grounds, and not the least because it shows so clearly how determinedly the leaders of the bar of our era have set themselves against those social reforms which are far-reaching along lines realistically democratic.

To those who know Senator Pepper—wise, witty, and urbane, one of the two or three leading advocates of our generation—it is not surprising that his book should touch so many points of interest or show so full and rounded a career. He seems in fact to have had every qualification for success in the true American way save two—he was not born in a log cabin or reared in dire poverty. Indeed, in one of his revealing comments about himself, he confesses that, while he can realize the hardships of a soldier's life, he has had no real contact with the thoughts and desires of the taxi driver, the share-cropper, the miner, and finds it harder to appreciate the anxieties of the so-called "underprivileged." The son of a Philadelphia physician and grandson of a lawyer of note, he grew up in a congenial environment and achieved a natural social and intellectual success in college and law school at his native University of Pennsylvania. Then, entering upon practice in one of the larger city firms, he spent over twenty years as a part-time law teacher at his alma mater, reorganizing what soon became the important *University of Pennsylvania Law Review*, introducing the case method of teaching there, and forecasting modern curriculum integration of courses by joining "corporations" and "partnerships" to form the law of "associations." At twenty he was, *mirabile dictu*, a Democrat, but by twenty-five he was safely in the Republican fold. Before and during the early days of World War I, he not only was for preparedness and war, but appears to have been something of an internationalist. While the reasons for the transition are not made clear, he took the stump in opposition to President Wilson's peace plans even before the Senate coalition against the Versailles Treaty developed, and his effective campaigning then seems to have brought him to the attention of the Republican leaders.

Then followed his term as Senator, his intimate relations with Presidents Harding, Coolidge, and Hoover, his later Court battles and triumphs against New Deal legislation, the presidency of the American Law Institute, the vice-chairmanship of the Advisory Committee of the Supreme Court on the Federal Rules of Civil Procedure, the American Bar Association medal for distinguished legal service, innumerable college honorary degrees, and the other high honors our society delights to bestow on those who serve it devotedly and without too great deviation from the normal.¹ Interspersed are work of the

1. Room is lacking for any extended reference to the author's famous cases, often taken as a matter of public service entirely, for such distinguished clients—if that term is applicable—as the Senate against the President or vice versa. Perhaps the most renowned of his victories was that in the Agricultural Adjustment Act case, where his stirring peroration: "Indeed, may it please your Honors, I believe I am standing here

most extensive character for his church, both locally and nationally—he has, as he points out, a simple religious faith—and gifts and works for charitable and educational purposes, including prizes established at two colleges, where the prize winners now rise up to call him blessed. There is no doubt that he is a really good citizen; and, particularly because my own views on many matters are unlike his, I am glad to make this simple statement wholeheartedly. And now in his seventy-eighth year he still leads an active and a busy life. Rising at 6:45 to setting-up exercises, shower, and a light breakfast, he commutes into the city for a happy day, where even Miss May, who hands him his paper at the newsstand, is convinced that the Democrats must be “run out of Washington” if we are to win the war.

I suppose such a life leads inevitably to anti-New-Dealism, in all its works and even ideas and aspirations, and that, too, of the most staunchly determined kind. It is a phenomenon of our times that, while individual lawyers, and particularly younger ones, not to speak of that hybrid animal the law professor, have labored hard to develop and then to enforce legislation to ameliorate the condition of the masses, yet the top practitioners almost uniformly have lent their souls' beliefs, as well as their talents, to the opposition. A striking example is the well-nigh complete obsession of the American Bar Association with fears of governmental activity, even under the pressing necessity of war. I must confess, however, that I was not prepared to find the Senator, so generally suave and judicious, here so definitely enlisted in the extreme, even bitter, opposition. And I had thought that, whatever might be the mutual irritations and dislikes of opposing political personalities of the time, the worth of much of the recent legislation was now generally conceded. But I cannot find that here; all seems bad or at the very least unsportsmanlike. Express condemnation is liberally sprinkled throughout the book; it goes so far that even the legislation creating the Tennessee Valley Authority—perhaps the most spectacularly successful of all New Deal measures—becomes “the bill setting up the stormy T. V. A.” There are a dozen or more references to the President, some brief and indirect, some of several pages each, and all of them derogatory. This includes his associates and advisers—“that motley group” known as the Brain Trust; while the “dead hand” of the New Deal “rests heavily upon American life.” Thus the New Dealers were “so unlovely in their entire lack of sportsmanship”—“the world's poorest losers”—when they objected to Supreme Court decisions against them; yet elsewhere we find that the Court has now become “just another federal agency.” And the late Wendell Willkie, who achieved the author's enthusiastic acclaim in his earlier political activities, appears to have lost it when he rose above party lines with

today to plead the cause of the America I have loved; and I pray Almighty God that not in my time may ‘the land of the regimented’ be accepted as a worthy substitute for ‘the land of the free’” [United States v. Butler, 297 U. S. 1, 44 (1936)] is the subject of some sparkling comment by Thurman Arnold in *THE FOLKLORE OF CAPITALISM* (1937) 150.

"his apparent ignorance of the first principles of party organization" and internationalist views which did "more credit to his heart than to his head."

This attitude is beautifully epitomized in the author's account of an incident not without local interest. He tells how in November, 1914, President Hadley tendered him the Deanship of the Yale Law School, which caused him to consider anew his decision to relinquish teaching for practice, but with the same conclusion. And then he says—quotes, capitals, and all—thus: "If the 'Liberals' who now dominate the Yale School read this they may well shiver at their narrow escape."² I cannot now claim to be official shiverer for the School, but I must confess to some sympathetic tremors at the thought of such intransigence dominating the School in stony opposition to a decade of fruitful legislation.

The dominance of our profession in matters governmental from the early days on has often been considered. Not so often have we had evaluations of the role played by the lawyer in opposing developments which now in the light of history seem inevitable. There have been a few such, however; one recalls, with sorrow at his early demise, that brilliant study by Professor Corwin's student, Dr. B. R. Twiss, entitled *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court*,³ showing how our most brilliant barristers have led, if not shepherded, the opposition to all recent social legislation, from the income tax on. But this statement, without more, is obviously an oversimplification; the lawyers do but faithfully represent the class to which they belong. One may perhaps wonder the more at the bitterness of class feeling in classless America as compared, say, to England, where the Tory party has long since sponsored the enactment of legislation still looked at askance here. The Tory does seem, however, to have a sense of obligation to the "lower" classes which is incompatible with the democratic tradition where the spirit of enterprise and the spirit of buccaneering often appear to coalesce. Of course, *noblesse oblige* has its own limitations; it is highly paternalistic, it may breed servility, and it is not extended to outsiders even in the Empire itself. And doubtless the pioneer spirit which was taught to push all incompetents down as it surged forward was necessary to conquer a virgin territory and make it fruitful. Now, however, with the passing of the frontier, that spirit has less place. It should yield more and more to that sense of responsibility to the entire social group which an older civilization may tend to develop. If such an ameliorating trend does appear, softening and thereby strengthening the American way of life to make it flexible and accommodating to changed demands, I expect autobiographies of future bar leaders may disclose what for all its charm I find sadly missing here, namely, a willingness to accept, nay to share, real adventures in democracy.

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2. P. 108.

3. TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* (1942).

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