

REVIEWS

SUPREME COURT PRACTICE. By Robert L. Stern and Eugene Gressman. Washington, D. C., Bureau of National Affairs, Inc. 1950. Pp. xiii, 553.

CHIEF Justice Charles Evans Hughes is reported to have once remarked: "Many counsel lose but few win a Supreme Court case."¹ Certainly no court hears a greater percentage of "inexperienced" counsel—counsel who are appearing before it for the first time. There has never been—at least not since the very early days of the Court—a Supreme Court "bar," in the sense of a defined and limited group of specialists who have developed a real or apparent competency before the Court. Yet the Court now decides, one way or another, well over a thousand cases a year. It is a minor mystery why a manual of practice and procedure has not been written before.

Yet to call this book a "manual" may be misleading; it is not a handbook of "do's" and "don'ts." As the authors state in their preface:

"It [the book] endeavors to inform the reader as to the principles of jurisdiction which determine whether a case can and should be taken to the Supreme Court, and as to the kinds of petitions for certiorari, jurisdictional statements, briefs, and oral arguments which are thought to be favored by the Court. The effort has been to set forth in a single volume which would be neither too expansive nor expensive, as close as possible to everything, outside of the field of substantive law, that a lawyer would want to know in handling a case in the Supreme Court."

The authors do not offer the book for sustained reading, yet the lawyer must be rare indeed who could not profitably study this volume from cover to cover before undertaking his next Supreme Court proceeding.

It is not a reflection on the book to say that it will be particularly valuable to the lawyer whose next Supreme Court proceeding will be his first. It is written to be practical, as well as scholarly, and it does not hesitate to deal with the mundane, but nonetheless important, problems of how to get admitted to the Supreme Court bar, or how to get books out of the library for use during an oral argument. On the other hand, the authors are willing to wrestle with such matters as the niceties of the distinction "between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court [and permits a direct appeal to the Supreme Court] and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional." Ex parte *Bransford*, 310 U.S. 354, 361 (1940).

On many matters, the practitioner needs only to know, accurately, what to

1. McElwain, *The Business of the Supreme Court as Conducted by Chief Justice Hughes*, 63 HARV. L. REV. 5, 16 (1949).

do and when to do it. Getting a case from a state court to the Supreme Court by way of appeal, for example, is an inordinately complex task if one works solely from the statutes and the rules. Partly this is so because the procedure is full of minor but essential detail, and partly because the usual last-resort standby—common sense—is not only useless but dangerously misleading. The Clerk's office can and does help—it is indeed extraordinarily able and helpful—but it is usually many miles away in Washington, D.C. For some lawyers, the solution has been to find a record in some case which has been successfully appealed, and to follow—"ours not to reason why"—the route indicated. Here the authors not only have laid out the procedures step by step, with the time limits on each, but also have tried to indicate the rationale, past or present, behind the several steps, and have provided an admirable set of forms. Appeals from a state court are of course only one instance; there are many other similar matters on which the answers to jurisdictional and procedural problems can be categorical, forms can be useful, and timesaving can be substantial.

On other matters, there can be no categorical answers; the problem is the *best* way, or, perhaps more accurately, the way which experience has shown to be that preferred by the Justices. Whether or not you agree with the authors in every respect, a judgment on a point by two men who combine both long experience in presenting cases to the Court and a knowledge of the reaction of the Justices is well worth checking against your own conclusions.

On most points which are doubtful, the authors have supplied at least a minimum of citations, usually the most recent ones. Perhaps it is an indication of the importance of procedure in the Court, and of its ever-present nature, that almost half of the cases cited have been decided since Volume 300 U.S. On the other hand, the book does not purport to be an encyclopedia, nor a substitute for the Supreme Court Digest. You will not find here your brief, ready-written, on the "nice" questions, nor even on the major procedural matters that make practice before the Court both a high art and a headache. You will find, however, leads to the case law, and certainly an explanation of just what your problem is.²

2. On occasion, the attempts at summary statement have led the authors into what may be misleading simplicity. An example may be drawn from the problems raised when the highest state court opinion does not clearly show that it decided a federal question. On the efficacy of a certificate by a state court of the existence of a federal question (pp. 86-87), reference is made only to *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 186, n. 1 (1945), which appears to give considerable weight to such a certificate. The *Alderson* case held, however, only that the certificate of the presiding judge alone was inadequate, and in *Honeyman v. Hanan*, 300 U.S. 14, 18-19 (1937), Chief Justice Hughes stated that such a certificate of the court cannot "import into the record a federal question which otherwise the record wholly fails to present." *Cincinnati Packet Co. v. Bay*, 200 U.S. 179 (1906), from the record of which the authors take the form of certificate they use (p. 423), held only that the certificate was adequate to show that a federal question, shown by the record to have been raised, was not raised too late under local procedure. Note might also have been made of the fact that the only safe way to make the certificate that of "the

The authors have, necessarily, revealed a large number of instances in which the Court appears to be doing less than justice to itself, and to its practitioners, in its failure to revise its rules, or to recommend changes in its governing statutes. The Rules of Civil Procedure, and the Rules of Criminal Procedure, were each, of course, landmarks in the simplification and clarification of practice in the Federal courts. In each of them the Supreme Court played an active and important role. Yet for reasons known only to itself, the Court continues to operate under Rules which are woefully complicated, confusing and outmoded.

One obvious example relates to the form of petitions for certiorari. It seems obvious that the best style is that recommended by the authors (p. 170) as the "preferable" one—the form in which the section on "Reasons for Granting the Writ" contains such argument as is deemed necessary, with the consequent elimination of the "Brief in Support of the Petition." The separate brief—whether bound in with the petition or filed separately—is almost necessarily redundant, and must in many instances lead to nothing but extra labor for the Justices. Over fifteen years ago, Justice (then Professor) Frankfurter strongly favored the single petition, yet pointed out that Rule 38 "not only fails to make clear that it is proper and to be encouraged, but permits the inference that it is improper."³ Rule 38 remains the same today.

A similar, and related matter, is the confusion in the Rules on the necessity for an "Assignment of Errors." Rule 38, which prescribes the form for a petition for certiorari, has no specific requirement, but in prescribing the form of the "supporting brief" which "may" be filed, refers to Rule 27, which prescribes the form for a brief on the merits. Rule 27(6) appears to make an assignment of errors mandatory. Apparently, however, Rule 27(6), which was drafted in the 1920's, had reference to a *prior* assignment of errors which, before the Rules of Civil Procedure, was required in appealing from the District Court to the (then) Circuit Court of Appeals. The confusion here, therefore is twofold: need there be an "Assignment of Errors" in the petition (whichever form is used), and need there be one in the brief on the merits? The authors, referring to cases in which the Court has implied that it would treat a question as before it for review when raised even in the body of the petition—the "Reasons for Granting the Writ" section⁴—conclude that it may be safe to rely, in both instances, on the "Questions Presented" (pp. 174, 281), even though Rule 27 does not require or even mention them. Certainly that *should* suffice, yet no one can be blamed, as the Rules now stand, for including an "Assignment of Errors" as a precautionary, albeit useless, measure.

Court," rather than only of the presiding justice, is to have it signed by each judge. Cf. *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938).

3. Frankfurter and Hart, *The Business of the Supreme Court at October Term, 1933*, 48 HARV. L. REV. 238, 266 (1934).

4. *Olson v. United States*, 292 U.S. 246, 262 (1934); *Connecticut Ry. Co. v. Palmer*, 305 U.S. 493, 496-497 (1939).

The Rules relating to appeals are even more obviously archaic. Here the assignment of errors is mandatory (Rule 9), though no reason appears why "Questions Presented" would not also suffice here. Even less reason attaches to the procedure for having an appeal "allowed" by the Petition for Appeal and the "Order Allowing Appeal" (Rule 36). The apparent early hope that requiring appeals to be "sifted" by the lower courts would eliminate frivolous appeals has long since vanished.⁵ Now, except in very rare instances, state courts either allow appeals as a matter of course, or avoid all responsibility by refusing them all (see pp. 209, 210). This simply adds one more burden—an application to a Supreme Court Justice—to the appellate procedure. Frivolous appeals can be, and are in fact, handled by the "Motion to Dismiss or Affirm" under Rule 12. As the authors say (p. 210), "A simple notice of appeal should be sufficient, as it is now in all other federal appeals."

One further illustration of the point relates to the procedure on a petition for certiorari from the Court of Claims (pp. 185-187). In 1939, Congress, for the first time, permitted parties petitioning for a writ of certiorari to the Court of Claims to attack the findings of that court as unsupported by evidence or otherwise insufficient.⁶ Because of the language of the 1939 Act, the Court of Claims assumed the responsibility for approving the record, and by its Rule 99(a) required that both the proposed record and the proposed petition for certiorari be filed with it in 45 days—half of the time allowed for filing the petition in the Supreme Court—in order that it might have the remaining 45 days to ensure that the record was proper. The validity of the rule is open to serious doubt, but only carelessness or recklessness will ever create a situation in which it will be challenged. The hardship as to time is usually met by securing from the Supreme Court an extension of time of 45 days within which to file the petition, and then, armed with that, securing a similar extension of 45 days from the Court of Claims. The hardships resulting from the unnecessary mechanics are unavoidable.

The Court of Claims, however, has finished a complete revision of its rules, which will eliminate Rule 99(a) entirely. All legislative excuse for it was removed in the recent revisions of Title 28 of the U. S. Code, which repealed the 1939 Act and put the Court of Claims on a footing identical with the Court of Appeals.⁷ Yet Rule 41 of the Supreme Court, which like Rule 99(a) was framed in the light of the 1939 Act, remains unchanged, and still sets the Court of Claims apart.

This review of the apparent deficiencies of the Supreme Court rules could be extended far beyond what is possible here. One more illustration will suffice—that dealing with review on petition for certiorari by the Supreme

5. See Frankfurter and Hart, *The Business of the Supreme Court at October Term, 1933*, 48 HARV. L. REV. 238, 249 (1934); Ulman and Spears, "Dismissed for Want of a Substantial Federal Question," 20 B.U.L. REV. 501, 520 (1940).

6. 53 STAT. 752 (1939); repealed by 62 STAT. 992 (1948), 28 U.S.C. § 1255(1948).

7. See note 6 *supra*.

Court of cases in which the now common "appendix" system has been utilized for the record in the Court of Appeals, or in which, for any other reason, all of the record has not been printed in the lower courts. Rule 38(1) is so general as to be most inadequate; in fact it provides no guide as to the manner in which the parties shall designate the portions of the record which are to be certified to the Supreme Court. As the authors state (p. 154), "In practice the Clerk accepts any arrangement satisfactory to the parties, or to the petitioner if respondent's wishes are not expressed." Since no rule requires that respondent be consulted or even advised, until the petition for certiorari has actually been served on him—which is of course long after the record has been certified—the chances of later disagreement, confusion, and "motions for certiorari to correct diminution of the record," are multiplied.

When the case comes up on appeal, Rule 10(2) avoids the problem, in large part, by *praecipe* and counter-*praecipe*, which must be served on opposing counsel. In the Court of Appeals for the District of Columbia, the Clerk likewise enforces the use of a form for designation of record which must be filed with proof of service, and with five days permitted to the opposing counsel for a counter-designation. The solutions are neither complex nor, so far as experience has shown, impractical. Revision by the Supreme Court of Rule 38(1) in the interest of clarification and uniformity would be highly desirable.

No doubt the Court has built for itself a tradition. That is necessary and good. The practice and procedure of the Court can, in many respects, come properly within that field, and much that might now appear outmoded and old-fashioned—even archaic—can be, and should be, supported as a part of that tradition. Nevertheless, perhaps it is not irreverent to suggest that the present book has collected enough illustrations of procedural and practical inadequacies to warrant at least thoughtful consideration of the question whether the Court's present rules might not be more adequately harmonized with another great—though more recent—tradition of the Court—the one which is exemplified by the Rules of Civil Procedure and the Rules of Criminal Procedure.

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

IN organizing his case book in constitutional law Professor Frank has looked beyond the task of showing the major pattern of law in his chosen field and giving something of its content. He has attempted also to relate the constitutional law of the United States to the unfolding of United States

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history, and particularly to important historical events in the field of law and to the personalities of members of the Supreme Court. So it is that whereas other casebooks have their major divisions in terms of the commerce power, the taxing power, due process of law, etc., Professor Frank has arranged a third of his book according to the periods of service of given Chief Justices and has divided the remainder into chapters entitled "Changes," "The Constitution Today," and "Contemporary Problems." Even within these chapters the breakdown is not the conventional one but is made in terms of such classifications as "The Regulation of Business" and "Civil Rights." Only in the subdivision of these latter categories do we come to such topics as the control of commerce, contracts, criminal justice, and freedom of speech and press and freedom of religion.

The editor's prefatory explanation of his strategy reads in part as follows: "The materials have been collected for consideration of two central problems: first, the analysis of the legal devices by which the Constitution has been put to the work of facilitating the economic prosperity of shifting groups; and second, the analysis of the legal devices by which the Constitution has been used in the everlasting struggle over the contraction or expansion of individual liberty. . . . A substantial quantity of non-case materials on the Court and its Justices is included, both because the course in Constitutional Law gives the best opportunity in the legal curriculum for the study of that institution, and, independently, because the law they made can best be understood by some knowledge of the men and courts who made it" (p. v). So it is that in addition to necessarily emasculated texts of cases the book includes materials such as introductory statements by the editor and excerpts from Farrands' *Records of the Federal Convention*, Elliott's *Debates*, *The Federalist*, *Dictionary of American Biography*, summaries of the lives of justices, law review articles about them, an account of the Great Depression, and other writings. Judicial opinions of course predominate, and all other materials are subordinated to them and are arranged for the purpose of highlighting their meaning, although the editor's concept of the meaning of a case is much broader than the technical aspects of the case itself.

After a chapter dealing with non-case materials to show constitutional history backgrounds, the book gets under way with a chapter entitled "The Marshall Era," leaving largely untreated the decade of the 1790's in which the Supreme Court was fumbling toward but had not yet adequately found its place in the governmental system. Apart from *Hylton v. United States*¹ and *Calder v. Bull*,² which are often used in constitutional law courses, the loss is not great, for the history of the Supreme Court as the powerful institution we know it to be begins with the Chief Justiceship of John Marshall. The Marshall chapter includes biographical sketches of Marshall and Story

1. 3 Dall. 171 (U.S. 1796).

2. 3 Dall. 386 (U.S. 1798).

and an introduction grouping together *Marbury v. Madison*, *Martin v. Hunter's Lessee*, *Barron v. Baltimore*, and *McCulloch v. Maryland*. A section on the protection of the commercial interest includes the three major commerce cases of the period and two major contract cases. In the absence of appropriate cases, non-case materials are drawn from the Sedition Act of 1798 and other documents on the subject of the rights of the people.

Materials of the Taney period are organized in similar fashion, with most space going to protection of the commercial interest, including commerce and contract cases, and with civil rights treated largely through non-case materials. The next grouping includes the Chief Justiceships of both Chase and Waite, incorporating important materials arising from the Fourteenth Amendment but for some reason excluding the at least historically important money cases. The Fuller chapter brings the story down to 1910, finding no important civil rights cases or contract cases but including commerce cases and important cases under the Fourteenth Amendment. The White-Taft chapter, coming down to 1930, has major groupings in terms of protection of the commercial interest and rights of the people, with the commerce clause and the Fourteenth Amendment constituting the first and with the latter group organized under headings of "Federal Invasion" and "State Invasion."

At this point the pattern of organization changes. The remaining two-thirds of the book consists of three chapters entitled "Changes," "The Constitution Today," and "Contemporary Problems." The first of these begins with an account of the Great Depression and biographical sketches of Justices Hughes, Stone, Roberts, and Cardozo; its case materials are grouped under "commercial crisis" and "civil rights." The former group contains some non-case materials on the attempt to pack the Supreme Court. Ten cases are given for the critical period from 1930 to 1937. Omitted altogether or given only incidental mention are the important money cases, the "hot oil" cases, *Rathbun v. United States*, and others.

The chapter entitled "The Constitution Today" follows biographical sketches of Justices Murphy and Rutledge with cases under the two major groupings of government and business and civil rights. The first includes commerce cases dealing with the scope of both federal and state action, contract cases, and a group entitled "The Control of Other Economic Relations." The civil rights group gives full play to *Adamson v. California* in terms of "General Principles," classifies other cases and non-case materials under "Criminal Justice," and classifies still others under "Speech and Religion." The final chapter, "Contemporary Problems," includes substantial groups of cases dealing with state taxation in its many aspects, Negro problems, and freedom of communication.

Professor Frank's book has the merits and the limitations of any new major case book in that it includes considerable numbers of cases decided too recently to be incorporated by its competitors and omits some of the landmark cases which we have been accustomed to use in constitutional

law courses. Its more obvious deviation from earlier books in the field lies in its arrangement to emphasize historical developments and personalities on the Supreme Court. The matter of historical emphasis should not be over-stressed, it is true, since the first third of the book brings us down to within twenty years of the present day. Yet teachers "set in their ways" may find frustration in such matters as the distribution of commerce cases through six of the seven chapters instead of in integrated groupings. The emphasis on business on the one hand and civil rights on the other, however proper it may seem to some readers, may to others seem to obscure significant constitutional law materials and significant aspects of the judicial process. They may want to know more about jurisdiction and procedure and other aspects of the subject than can be easily gathered from this arrangement. It does have the important effect, however, of relating cases in constitutional law to the dynamics of our national life in a way in which they are not related in books differently arranged. It goes beyond pre-occupation with the case as a case and with principles of law merely as law and integrates, or invites integration of, legal institutions with the whole network of institutions of which they constitute a part. In the light of this fact the preparation of the book is an important venture.

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FEDERAL ESTATE AND GIFT TAXATION: CASES AND MATERIALS. By William C. Warren and Stanley S. Surrey. Brooklyn: The Foundation Press, Inc., 1950. Pp. xvii, 518. \$7.00.

I suppose that there are two fundamental requirements for a case book. One would be that it select for reprint and discussion the cases that are most important, for one reason or another, in the particular subject covered by the book. But authors of case books are no longer content merely to reproduce case reports; they also undertake to fill interstices and supply background which puts each case in an adequate setting. The second requirement of a case book would therefore be that the book illuminate with a secondary glow of understandable explanation the cases that are chosen for inclusion.

In these respects *Federal Estate and Gift Taxation* measures up to the standards one would expect from its authors. No two tax men would agree precisely upon what cases should be chosen for a case book on the federal estate and gift taxes. The problem of selection is particularly acute in the field of federal taxation where the material for selection is almost unlimited. The two authors of this volume must have made some difficult compromises in the process of deciding which cases should be included. It would serve no purpose to list the unselected cases which I think might have been included and the included cases which I think might have been omitted.

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On the whole my disagreement in this area is completely minor, and it can certainly be said with safety that the student who masters the material in the book will be as well equipped as can be expected of any law school graduate to face the wide world of tax practice.

The authors of *Federal Estate and Gift Taxation* must be excused for the lack of balance arising from the devotion of forty pages to the almost obsolete subject of contemplation of death as compared with only six pages to the perennial subject of powers of appointment. As an author and former representative of the Treasury on Capitol Hill, I can sympathize with any attempt to keep pace with revenue legislation. The mills of tax law do not always grind exceeding fine, but they rarely fail to grind exceeding fast. There is an unavoidable time lag in the printing process and Messrs. Warren and Surrey could hardly have been expected when they planned their case book to foresee that the Revenue Act of 1950 would deal a body blow at estate taxation in a provision denying the Government the right to challenge as gifts made in contemplation of death transfers made more than three years before death. It may be safely assumed that in a new edition the authors will rearrange their volume on this account.

Federal Estate and Gift Taxation departs in the matter of organization from the "unrealistic" method of treating estate and gift taxes separately or in sequence. The treatment used is unitary; this method is thought to be desirable or even essential to the understanding of these closely related taxes. I am not able to say whether the new method has advantage from the teaching standpoint over the older method, but I can say that the authors have tried an interesting experiment. When the returns are in, Messrs. Warren and Surrey may discover that their treatment is better suited to seminars and advanced classes than to complete strangers to the baffling subject of estate and gift taxation.

In this case book the authors have used selected writings dealing under the heading of "Policy Considerations Affecting Transfer Taxes" with the economic and social effects of inheritance and its taxation. The purpose is to develop students who are more than technicians. I imagine that there will be many who will protest that the law school should be satisfied with the Herculean job of training technicians, and that they should leave to other institutions and influences the development of knowledge of tax policy. But law students can no longer afford to make the reply of William Allen White when he was asked by Roosevelt if it was not in 1888 that the Democratic platform contained a recommendation for income taxes. White's laughing answer was: "I do not remember. I have had such hard work earning a living that I never looked into the philosophy of taxation." It may be added that this must have been one of the few items of philosophy White's intellectual diligence left untouched.

It might serve some purpose to register a mild disagreement with some of the selected readings on the economic and social effects of inheritance and

its taxation. The three authors quoted are John Stuart Mill, Sir Josiah Stamp, and Hugh Dalton. Seligman, Wedgwood, Ely, Rignano, Pigou, Taussig, West, and the famous Colwyn Report to the Committee on National Debt and Taxation in 1927, are left unquoted. At the very least, I would have substituted something from these sources for the material taken from Stamp.

The authors seem to me to have much the better of any argument that may develop on the more basic question whether a case book should include material on policy considerations affecting estate and gift taxes. Even on the assumption that tax lawyers have no concern with tax policy but only with the narrow though difficult job of winning cases for clients, I venture the opinion that a sense of tax policy, deeply rooted in the intangibles of the subject, can be helpful. It may even be indispensable in the most important, close cases. On a higher level the responsibilities of tax advisors—which is what some students hope, perhaps too optimistically, to become—extend far beyond the horizon of technical competence. Eventually they will have a job as the best informed citizens in an area of minimum understanding to preserve the best we now have in our tax system, and to help improve that system at many critical soft spots. Without adaptation to developing experience our tax system will be at a loss to perform its vast function.¹ If those who now study taxation prove unequal to the task of adapting the system to the changing needs of the future, I do not know how the system, or the civilization upon which it depends, is to survive.

H. G. Wells used to say that George Bernard Shaw was “always explicit and careful to make himself misunderstood.” On the point of present discussion, I want to be very careful to be understood. I am not saying that a sense of tax policy is enough in itself to equip a man for tax practice. I am saying that on the level of fitness to represent clients, and the possibly higher level of operating adequately in strenuous, critical times as a qualified American citizen, a feeling for policy is at the very least a valuable supplement to technical knowledge. Llewellyn once said that “ideals without technique are a mess,” but that “technique without ideals is a menace.”² It will usually be found that the best tax lawyers have something—perhaps not ideals, but something—more than technical competence.

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1. Griswold, *The Blessings of Taxation: Recent Trends in the Law of Federal Taxation*, 36 A.B.A.J. 999, 1002 (1950).

2. Llewellyn, *On What Is Wrong With So-Called Legal Education*, 35 COL. L. REV. 651, 662 (1935).

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THE CRISIS OF THE CONSTITUTION: AN ESSAY IN CONSTITUTIONAL AND POLITICAL THOUGHT IN ENGLAND, 1603-1645. By Margaret A. Judson. New Brunswick, Rutgers University Press, 1949. Pp. xi, 444. \$5.00.

THIS is a scholarly and stimulating book which students of constitutional history will be using for a long time to come. In the great debate on impositions in 1610 Hakewill asked, "Who shall be the judge between the king and his people?" He flicked the basic constitutional issue and passed on. Thirty-three years later Philip Hunton expanded that question into a thesis of political theory, and during the remainder of the century the great English contributions to political theory were composed. But the first forty years of the seventeenth century belonged to lawyers and politicians, to prelates and puritans, to gentry and merchants, who were groping their way through political argument and political action and were laying the foundations of political thought for the theorists of the last half of the century. John Lilburne had not taken to drafting Agreements when he went to the pillory; Thomas Wentworth served his apprenticeship in the ranks of the opposition before he turned back to take up defense of that symmetry of the law which Bacon and Hooker had expounded; Edward Hyde did not discover the prosperous wickedness of the opposition until the very eve of the open declaration of parliamentary sovereignty; at Edgehill Sir Edmund Verney died defending the king's standard after having declared he had no faith in the king's politics; Pym, Coke, Phelps, Sandys, wrought parliamentary supremacy out of the very substance of the old monarchy.

Professor Judson has analyzed the common denominator of political thought underlying the thrust and attack of both factions and then has described admirably the making of the political mind in the first half of the century. The men of the century were destined to tend to the unfinished business of the Tudor régime. Astir with the explosive ideas of the Reformation, but still indoctrinated with the mediaeval view of the constitution, they developed slowly a concept of the modern political state by a process of reasoning which we pretend was peculiar, though we are in much the same fix today with respect to the traditional concept of democracy. Royalists and parliamentarians drew upon a common stock of mediaeval concepts of the constitution. They contested for advantage, but within the balanced polity of the old constitution. It would not have been natural for those men to strike out into bold themes of experimental political theory or to try their hands at drafting written constitutions for a grand new political order. To their minds it was not new doctrine that was demanded but the discovery of the law which resided comfortably in the political heritage and experience of the state. They were fated not to find the solution in the traditional balanced polity. As Macaulay observed, in that situation it was beyond the control of human wisdom to preserve the ancient constitution. Search as they might, men would never find in the constitution of the balanced polity the answer to the question who should be judge when the responsible and

powerful partners were locked in mortal conflict. Long before they were ready to admit it the royalists began to wrench from tradition and precedent the exaltation of absolute monarchy, and the parliamentarians were exploiting the hidden significance of fundamental law, representation, and responsibility to the people.

This is the story of the birth of the concept of the democratic constitution in the minds of men who stoutly maintained their steadfast faith in mediaeval monarchy. They could not with one swift glance capture the vision of the modern state, but under pressure of political strife they could conveniently discover in the mediaeval constitution fundamental law and then go on to invent the liberal intent of that law as a public necessity.

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