# THE JUDICIAL CAREER OF CHIEF JUSTICE HUGHES

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THE afterglow of a distinguished career is not a satisfactory light in which to subject it to critical judgment. Only the perspective that comes with time enables a severance of the work from the worker, and supplies the criteria to appraise the value and endurance of one's effort.

This is particularly true in the case of Chief Justice Hughes because contemporary lawyers are under the sway of his impressive personality and because his most dramatic and memorable contributions to federal jurisprudence are so recent that we cannot call hindsight to the aid of judgment. But his judicial record is permanent and forthright and can stand before all generations on its merits.

Perhaps the greatest of the contributions of Charles Evans Hughes to the Supreme Court is, however, perishable and can be better estimated by contemporaries than by posterity. Even more than by his judgments this man imparted strength to the Court during our time by his character. He presided over the Court through the most critical of its hours since the Civil War. The Court found itself constrained to overrule some of its very recent and positive affirmations as well as to depart from some long-established precedents. That process, however salutary—and I am one who thinks it was long overdue—does strain public confidence in the Court.

It was fortunate then that the Chief of the Justices at such a time was one whose established position in public opinion gave the country a sense of steadiness, in spite of rapid movement, and an assurance that he was leading in the direction of amendment of doctrine rather than toward destruction of institutions. The Chief Justice was himself a symbol of stability as well

as of progress. The country might think his leadership bold, but it would not fear it as reckless.

It was the indispensability of this kind of assurance that made the succession of Harlan F. Stone to the Chief Justiceship not only appropriate but well nigh inevitable if the interest of the Judiciary as an institution were to be fostered. The two Chiefs are of similar rugged honesty and courage and known devotion to the best in our legal and political tradition. Both of them had protested some of the more provocative of the "old" Court's decisions. They had stood shoulder to shoulder in most of the landmark decisions that have studded the reports of the last four years.

While the more impressive part of Mr. Hughes' judicial record was made during his Chief Justiceship, the earlier service as an Associate Justice is significant and foreshadowed many of the positions he later took. During this period he wrote about one hundred fifty opinions on a wide variety of subjects. Then, as later, he took a broad view of legal issues and in the main set his course by the fixed stars which have guided the best minds in our judicial history.

It was characteristic of the Chief Justice to show a sound practical approach to procedural problems. His conduct of the administrative work of the Court in keeping it abreast of its problems and making it a well-administered institution reveals his genius for the practical. He was a driving force in obtaining the Rules of Civil Procedure to overcome confusion, delays and difficulties in the conduct of a lawsuit. In dealing with controversies over procedure, he displayed a strong realistic approach.[1]

The period of Mr. Hughes' service on the Court has witnessed the growth of administrative law, and he has not only written upon the subject in cases before the Court but he has made several addresses in which he discussed the problems arising from the increasing number of administrative agencies. It is not easy to reconcile all of the decisions in which he has participated, which perhaps is not surprising in a developing field of law. As early as 234 U. S. he rejected an argument which he thought "necessarily invites the Court to substitute its judgment for that of the Commission upon matters of fact within the Commission's province," and concluded "This is not the function of the Court."[2] While this has been his general rule of action, he declined to apply it to facts which he considered to be jurisdictional, although Justices Brandeis, Stone, and Roberts dissented.[3]

1. His dissenting opinion in *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364, has since been at least partly vindicated by *Baltimore & C. Line* v. *Redman*, 295 U.S. 654, and Rule 50(b) of the new Federal Rules of Civil Procedure. See also *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243. But cf. *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 394. Hughes' practical attitude is also reflected by his dissenting vote in *Dimick* v. *Shiedt*, 293 U.S. 474. See also *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227; *United States* v. *Wood*, 299 U.S. 123.

2. *Los Angeles Switching Case*, 234 U.S. 297, 314.

3. *Crowell* v. *Benson*, 285 U.S. 22. But cf. *South Chicago Co.* v. *Bassett*, 309 U.S. 251.

In the numerous cases dealing with civil liberties he has been a consistent and forthright champion of the American freedoms. He held unconstitutional a California statute which prohibited the display of a red flag,[4] a Minnesota statute which condemned publication of a "malicious" newspaper,[5] and an Oregon statute which rendered criminal participation in a Communist meeting.[6] He vigorously supported "the maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and the changes may be obtained by lawful means . . . "[7] He has been a persistent opponent of various types of race discrimination.[8]

He generally took a strong position in support of statutes designed to protect the public against commercial exploitation and in one instance crossed with Justice Holmes on that subject. Holmes construed the "misbranding" provisions of the Food and Drug Act of 1906 as inapplicable to false statements relating to the curative effect of a drug, and as applicable only to misstatements as to the identity of the drug, possibly including strength, quality and purity.[9] Hughes, together with Harlan and Day, dissented and resorted to legislative history to show that Congress intended to outlaw interstate traffic in a proprietary medicine proclaimed as a cancer "cure" when in fact it was utterly worthless. Holmes prevailed on the Court, but Hughes soon prevailed in the Congress, which amended the act to incorporate the Hughes doctrine.[10]

In the field of taxation the views of Chief Justice Hughes and of Mr. Justice Stone frequently have been in conflict. The expanding needs of both the state and Federal governments for additional revenue have resulted in a wide variety of tax statutes which have been challenged as violative of the Constitution. Particularly in the case of state taxation the attacks have been vigorous, and the Fourteenth Amendment together with the commerce clause have frequently been invoked to strike down a statute. With due appreciation of the danger of generalization, it may be said that Justice Stone's record in general has been one of liberality toward the exercise of the taxing power, while the Chief Justice has found frequent occasion to cast his

4. *Stromberg* v. *California*, 283 U.S. 359.

5. *Near* v. *Minnesota*, 283 U.S. 697.

6. *De Jonge* v. *Oregon*, 299 U.S. 353.

7. *Stromberg* v. *California*, 283 U.S. 359, 369. See also *Lovell* v. *Griffin*, 303 U.S. 444.

8. See *McCabe* v. *A., T. & S. Ry. Co.*, 235 U.S. 151; *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337; *Mitchell* v. *United States*, No. 577, 1940 Term, decided April 28, 1941; *Aldridge* v. *United States*, 283 U.S. 308; *Norris* v. *Alabama*, 294 U.S. 387; *Patterson* v. *Alabama*, 294 U.S. 600; *Brown* v. *Mississippi*, 297 U.S. 278. Cf. also *Bailey* v. *Alabama*, 219 U.S. 219; *Truax* v. *Raich*, 239 U.S. 33; *Frank* v. *Mangum*, 237 U.S. 309 (dissenting vote).

9. *United States* v. *Johnson*, 221 U.S. 488.

10. The Sherley Amendment of August 23, 1912, c. 352, 37 Stat. 416. And when an attempt was made to avoid the effect of these provisions as well as to attack their constitutionality, Hughes, writing for a unanimous Court, rendered their effectiveness beyond question. *Seven Cases* v. *United States*, 239 U.S. 510.

vote for the nullification of these taxing statutes.[11]

Apart from the field of taxation, however, the Chief Justice has gone very far in sustaining state regulatory statutes, particularly those which have been assailed as being in conflict with federal power. He has always appeared careful to concede the broad sweep of federal authority which could supersede the state statute if Congress should so desire; but even where Congress has legislated in the field, he has generally upheld the state statute if it was not in conflict with the federal legislation.[12]

State regulatory statutes generally have received hospitable consideration at his hands. His opinion in the historic Minnesota Mortgage Moratorium case[13] is illustrative of his willingness to respect the action of the legislature except where there is a clear constitutional prohibition.[14] The fictitious constitutional concept of "liberty of contract" was one that he had early demolished in 1911 when he declared:[15]

> But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community. * * *

He had thus laid the foundation which later enabled him to sustain state regulation of minimum wages,[16] and thereby overrule the much-criticized decision which had meanwhile been rendered in *Adkins v. Children's Hospital,* 261 U. S. 525.

Hughes' vigorous championship of federal power under the commerce clause is reminiscent of Marshall. In the *Minnesota Rate Cases* during his first period of service on the Court he laid down classic dictum as to the sweeping character of the federal power.[17] In the *Shreveport* case he established the formula which enabled federal power to strike down intrastate rates which are found to discriminate against interstate commerce.[18] He expounded the plenary nature of the power of the United States over navigation,[19] and sustained the Railway Labor Act of 1926.[20] His ringing dissent from the decision holding the Railroad Retirement Act unconstitutional[21] was faithful to the doctrine he had previously announced for the Court.

In the *Schechter* case,[22] however, he declined to extend the concept of interstate commerce to include Schechter's chicken coop; and although he joined with the majority in striking down the Agricultural Adjustment Act,[23] the prevailing opinion nevertheless set forth a broad interpretation of the general welfare clause which was later to be invoked to uphold the Social Security Act.[24] In the municipal bankruptcy cases he joined in Cardozo's dissent when the act was held unconstitutional[25] and wrote the majority opinion when an act of substantially similar character was sustained.[26] In dealing with prison-made goods[27] and with the electric power industry[28] he sanctioned the exercise of federal power, and when regulation of agriculture was attempted through direct use of the commerce power instead of the taxing power, he was found casting his vote to sustain the legislation.[29] The lay world as well as those of the profession are familiar with his vigorous support of the national power in the Wagner Labor Act cases.[30]

Throughout his judicial career Chief Justice Hughes showed a keen awareness of this interdependent destiny of governmental branches as well as of the appropriate separations of their powers. He knew that if needless obstructions were placed in the way of governmental efficiency and rendered our system unworkable, the most perfect logic of the most brilliant court would not save our society from disintegration. To the major issues of constitutional interpretation he came as a constructive statesman. He spoke of the Court in 1927:

> "It must be conceded, however, that up to this time, far more important to the development of the country, than the decisions holding acts of Congress to be invalid, have been those in which the authority of Congress has been sustained and adequate m-

11. See *Baldwin* v. *Missouri,* 281 U.S. 586; *Coolidge* v. *Long,* 282 U.S. 582; *Hoeper* v. *Tax Commission,* 284 U.S. 206; *First Nat. Bank* v. *Maine,* 284 U.S. 312; *Anglo-Chilean Corp.* v. *Alabama,* 288 U.S. 212; *Liggett* v. *Lee,* 288 U.S. 517; *Sewart Dry Goods Co.* v. *Lewis,* 294 U.S. 550; *Senior* v. *Braden,* 295 U.S. 422; *Schuylkill Trust Co.* v. *Penna.,* 296 U.S. 113; *Colgate* v. *Harvey,* 296 U.S. 404 (overruled in *Madden* v. *Kentucky,* 309 U.S. 83); *Great Northern Ry.* v. *Weeks,* 297 U.S. 135; *Binney* v. *Long,* 299 U.S. 280; *Curry* v. *McCanless,* 307 U.S. 357; *Graves* v. *Elliott,* 307 U.S. 383; *McGoldrick* v. *Berwind-White Co.,* 309 U.S. 33; *Wisconsin* v. *J. C. Penney Co.,* 311 U.S. 435; *Nelson* v. *Sears Roebuck & Co.,* 312 U.S. 359. Cf. *Heiner* v. *Donnan,* 285 U.S. 312; *Burnet* v. *Coronado Oil & Gas Co.,* 285 U.S. 393 (overruled by *Helvering* v. *Mountain Producers Corp.,* 303 U.S. 376).

12. See *Minnesota Rate Cases,* 230 U.S. 352; *Atlantic Coast Line* v. *Georgia,* 234 U.S. 280; *Savage* v. *Jones,* 225 U.S. 501; *Port Richmond Ferry* v. *Hudson County,* 234 U.S. 317; *Anderson* v. *Pacific Coast S. S. Co.,* 225 U.S. 187; *Chi., Mil. & St. P. Ry.* v. *Iowa,* 233 U.S. 334; *Atchison Ry.* v. *Railroad Comm.,* 283 U.S. 380; *Sproles* v. *Binford,* 286 U.S. 374; *Hicklin* v. *Coney,* 290 U.S. 169; *Townsend* v. *Yeomans,* 301 U.S. 441; *Eichholz* v. *Comm'r.,* 306 U.S. 268.

13. *Home Bldg. & L. Assn.* v. *Blaisdell,* 290 U.S. 398.

14. See *Chicago, B. & Quincy R. R. Co.* v. *McGuire,* 219 U.S. 549; *Sturges & Burn* v. *Beauchamp,* 231 U.S. 320; *Coppage* v. *Kansas,* 236 U.S. 1 (dissenting vote); *Miller* v. *Wilson,* 236 U.S. 373; *Bosley* v. *McLaughlin,* 236 U.S. 385; *Purity Extract Co.* v. *Lynch,* 226 U.S. 192; *Bandini Co.* v. *Superior Court,* 284 U.S. 8; *Corp. Commission* v. *Lowe,* 281 U.S. 431; *Cincinnati* v. *Vester,* 281 U.S. 439; *Nebbia* v. *New York,* 291 U.S. 514 (vote with majority in 5-4 decision); *Morehead* v. *Tipaldo,* 298 U.S. 587 (dissent). In marked contrast with the attitude shown in the foregoing cases, however, is his vote in *New State Ice Co.* v. *Liebman,* 285 U.S. 262.

15. *Chicago, B. & Quincy R. R. Co.* v. *McGuire,* 219 U.S. 549, 567.

16. *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379.

17. 230 U.S. 352, 398-399.

18. *Houston & Tex. Ry.* v. *United States,* 234 U.S. 343.

19. *Philadelphia Co.* v. *Stimson,* 223 U.S. 605, 634-638.

20. *Texas & N.O.R. Co.* v. *Ry. Clerks,* 281 U.S. 548.

21. *Railroad Retirement Board* v. *Alton R. Co.,* 295 U.S. 330.

22. *Schechter Corp.* v. *United States,* 295 U.S. 495.

23. *United States* v. *Butler,* 297 U.S. 1.

24. *Steward Machine Co.* v. *Davis,* 301 U.S. 548, 586-587; *Helvering* v. *Davis,* 301 U.S. 619, 640.

25. *Ashton* v. *Cameron County Dist.,* 298 U.S. 513.

26. *United States* v. *Bekins,* 304 U.S. 27.

27. *Ky. Whip & Collar Co.* v. *Ill. Cent. R. Co.,* 299 U.S. 334.

28. *Electric Bond & Share Co.* v. *Securities and Exchange Comm'n.,* 303 U.S. 419.

29. *Mulford* v. *Smith,* 307 U.S. 38. See also *Currin* v. *Wallace,* 306 U.S. 1.

30. *Labor Board* v. *Jones & Laughlin,* 301 U.S. 1; *Labor Board* v. *Fruehauf Co.,* 301 U.S. 49; *Labor Board* v. *Friedman-Harry Marks Clothing Co.,* 301 U.S. 58. See also *Santa Cruz Co.* v. *Labor Board,* 303 U.S. 453; *Consolidated Edison Co.* v. *Labor Board,* 305 U.S. 19

tional power to meet the necessities of a growing country has been found to exist within constitutional limitations."[31]

It is true of his own work as it was of that which went before.

The majestic presence of Chief Justice Hughes as a presiding officer shed a native and simple dignity upon all of the Court's proceedings. A keen and experienced advocate at the bar, he knew the problems and the arts of the working lawyer. No one ran away with his Court. He was helpful and patient with the inexperienced, but he despised the tricky statement and the bombast that is sometimes used to cloak poor preparation—and he knew how to deflate it. Even when passions were running high and his own associates were in sharp division, he never lost his poise. He was an ideal presiding judge.

I venture to speak for the practicing bar of the Supreme Court and on its behalf tender its affection and respect to him as one who, whether in the practice of the law or in important public office or upon the bench, was faithful to the best traditions of our profession.

31. Hughes, Charles E., *The Supreme Court of the United States*, Columbia University Press, 1928, pp. 95-6.