

## BACKGROUND BOOKS

### THE SUPREME COURT

The Supreme Court of the United States has inspired a vast body of literature, some of it ill-informed and much of it useful only to specialists. But the broader, more thoughtful studies represent a wide variety of approaches used by scholars to examine the Court's intricate workings.

Three writers have successfully attempted major historical assessments of the Court. Charles Warren, a lawyer with unusual narrative skills, produced a two-volume treatment after World War I that remains a standard reference work. **THE SUPREME COURT IN UNITED STATES HISTORY** (Little, Brown, 1922-60) is a lively, comprehensive account of the high tribunal from its 18th century origins to the 1920s, with special emphasis on constitutional law cases. Warren quotes liberally from news and editorial columns of the partisan newspapers that carried word of the Court's doings to the public. He notes that "while the Judges' decision makes law, it is often the people's view of the decision which makes history."

**THE AMERICAN SUPREME COURT** (Chicago, 1960, cloth & paper) by Robert McCloskey, a Harvard political scientist, provides a briefer chronicle, again with a focus on constitutional issues. Like Warren, McCloskey is struck by the impact of popular opinion on the Justices, noting "it is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand."

Although not a history of the Court per se, Edward Corwin's masterful **THE CONSTITUTION AND WHAT IT MEANS TODAY** edited by Harold

Chase and Craig Ducat (Princeton, rev. supp. ed., 1962, cloth & paper) is an annotated history of the Court's varying interpretations of the Constitution.

Some writers have sought to assess the Court in its role as an American governmental institution, like Congress or the Presidency; many of them fail to understand how cases come before the Court, or the special internal relationships that influence its decision-making. One study that escapes this weakness is **THE LEAST DANGEROUS BRANCH** (Bobbs-Merrill, 1962, cloth & paper) by the late Alexander Bickel, a professor of law at Yale. Sensing that the Court is "second only to the presidency in having effectively at its disposal the resources of rhetoric," Bickel argues for a carefully limited role for the Court in "political" affairs. In a later book, **THE SUPREME COURT AND THE IDEA OF PROGRESS** (Harper, 1970, cloth & paper), he renews this theme with a critique of the activist Warren Court.

Studies of individual Courts are surprisingly rare, but Oliver Wendell Holmes, Jr.'s \$263,000 bequest to the nation has resulted in the Holmes Devise Fund's sequential, multivolume **HISTORY OF THE SUPREME COURT OF THE UNITED STATES**. Three installments have appeared: Columbia law professor Julius Goebel's **Antecedents and Beginnings to 1801** (Macmillan, 1971), covering the formative period from colonial times through the 18th century; Harvard law professor emeritus Charles Fairman's two-volume **Reconstruction and Reunion** (Macmillan, 1971), portraying the Court between 1864 and 1888; and Johns Hopkins politi-

cal scientist Carl Swisher's **The Taney Period** (Macmillan, 1974), which covers the years 1835 to 1864. The editors of the Holmes Devise series opted for close narrative detail rather than broader thematic coverage. Only Swisher thus far has attempted to generalize about the Court's character in a given historical period.

Other valuable studies of individual Courts include historian Arnold Paul's **CONSERVATIVE CRISIS AND THE RULE OF LAW** (Cornell, 1960). Although written as a study of late 19th century legal thought rather than as an analysis of the performance of any one Court, it nonetheless casts light on the workings of the Court under Chief Justices Morrison R. Waite and Melville W. Fuller. Political scientist C. Herman Pritchett's **CIVIL LIBERTIES AND THE VINSON COURT** (Chicago, 1954) is a provocative treatment of the Court in the 1940s and '50s, which argues that the Vinson Court was too deferential to widespread public fears of Communist subversive activity in the McCarthy era. Harvard law professor and former special prosecutor Archibald Cox's **THE WARREN COURT** (Harvard, 1968, cloth & paper) attempts to comprehend and justify the Court's intense activism of the late 1950s and '60s.

The better biographies of Supreme Court Justices provide insights into the inner workings of the high tribunal. Albert J. Beveridge, a U.S. Senator from Indiana, produced a lively four-volume **LIFE OF JOHN MARSHALL** (Houghton Mifflin, 1916, 1975), which opens with Marshall's birth in rural Virginia in 1755, describes his role as the first great Chief Justice, and ends with his death at Philadelphia in 1835.

Journalist Leonard Baker's modern biography, **JOHN MARSHALL** (Macmillan, 1974), is comprehensive and readable but gives Marshall's decisions only

surface treatment, perhaps because of the author's lack of legal training.

Carl Swisher has written two impressive biographies, **ROGER B. TANEY** (Archon, 1935, 1961) and **STEPHEN FIELD: CRAFTSMAN OF THE LAW** (Brookings, 1930; Archon, 1963). Each is a full account of its subject's career and a model of balance and insight. Charles Fairman's **MR. JUSTICE MILLER AND THE SUPREME COURT** (Russell & Russell, 1939, 1966) is a revealing study of a colorful Justice, whose well-crafted opinions failed to resolve completely the sharp conflicts over property rights and civil rights that prevailed in his day. The book is based largely on Fairman's access to correspondence between Miller and his friends and relatives while Miller sat on the Court from 1872 to 1890.

Law professor and former banker Gerald T. Dunne's **JOSEPH STORY AND THE RISE OF THE SUPREME COURT** (Simon & Schuster, 1970) began as an account of the origins of Story's ideas on the law of money, banking, and commerce but became a study of the Court's role in America's expansionist period prior to the Civil War. A just-published biography by Dunne, **HUGO BLACK AND THE JUDICIAL REVOLUTION** (Simon & Schuster, 1977) assesses Black's judicial posture in the context of the Court's expanded role after World War II.

Mark De Wolfe Howe's two-volume **MR. JUSTICE HOLMES** (Harvard, 1957, 1963) sets a new standard of excellence for judicial biography. Howe's first volume, **The Shaping Years**, covers Holmes's life between 1841 and 1872 and includes vivid descriptions of Civil War action from Holmes's own diaries. The second volume, **The Proving Years**, covers the intensely intellectual period Holmes spent as a lecturer and writer between 1872 and 1881. Howe, a law

professor at Harvard and a former clerk to Holmes, died before he could complete additional volumes.

Alpheus T. Mason has written comprehensive biographies of Justices Brandeis and Stone, **BRANDEIS: A Free Man's Life** (Viking, 1946, 1956) and **HARLAN FISKE STONE** (Shoe String, 1956, 1968). The latter book contains especially valuable information about the internal workings of the Court (e.g., the process of drafting and revising opinions to make them acceptable to fellow Justices), based on Mason's access to Stone's Court papers. Journalist Merlo Pusey's authorized two-volume **CHARLES EVANS HUGHES** (Columbia, 1951, 1963) is overly sympathetic but still thorough, informative, and well written. Helen S. Thomas's **FELIX FRANKFURTER: Scholar on the Bench** (Johns Hopkins, 1960) covers Frankfurter's judicial career from 1939 through the late 1950s. Thomas had inadequate access to her subject, but her portrait is nonetheless revealing as she explores Frankfurter's "intellectual debts, his own intellectual development, and the culmination of these factors in his Supreme Court opinions."

As yet there have been no outstanding studies of Justice William O. Douglas and Earl Warren, but Douglas's autobiographical **GO EAST, YOUNG MAN** (Random, 1974; Delta, 1975, cloth & paper) should be of interest to anyone eager to understand Douglas's liberal perspective as a Justice, although his narrative ends prior to his appointment to the Court in 1937. Two other volumes, neither of them full-length biographical studies, are worth mentioning here: **SERVING JUSTICE: A Supreme Court Clerk's View** (Charterhouse, 1974), by Virginia law professor J. Harvie Wilkinson, describes the author's tenure as law clerk to Justice Lewis F. Powell, Jr., offering an "in-

sider's" glimpse of how the Court works; and political scientist David Danelski's **A SUPREME COURT JUSTICE IS APPOINTED** (Random, 1964, paper) is an incisive account of how Chief Justice William Howard Taft lobbied for the appointment of his friend, Pierce Butler, to the Court in the 1920s.

Hard cases are said to make "bad law," but they often make good reading. The "great" Supreme Court decisions in American history have often involved the resolution of sharply conflicting values or principles. Jethro Lieberman's recently published **MILESTONES** (Oxford, 1976) provides brief histories of 14 significant Supreme Court cases. Lieberman is a skilled writer who understands the peculiar contradictions in American culture, including the penchant for lawlessness and civil disobedience in a society based on a system of law.

Anthony Lewis's **GIDEON'S TRUMPET** (Random, 1964, cloth & paper) is a chronicle of the Warren Court's *Gideon* case, which makes mandatory the appointment of counsel for indigent felony defendants. It is both a helpful mini-history of Supreme Court adjudication and a vivid account of the personalities involved in *Gideon*.

Perhaps the single most impressive study of a Supreme Court decision is Richard Kluger's monumental **SIMPLE JUSTICE** (Knopf, 1976), a history of the Warren Court's *Brown v. Board of Education* decision outlawing segregation in the public schools. Kluger's purpose is to dramatize the *Brown* decision, and he succeeds admirably, combining portraits of the various characters involved in the litigation with the atmosphere of the civil rights movement in the 1950s.

Justices have been conspicuously reluctant to write memoirs. This shyness stems in large measure from a tradi-

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tion of confidentiality that has continually surrounded the business of the Court. Public expectations of impartiality also have caused judges to be reticent about disclosing the personal aspects of their tenures. Nonetheless, a few Supreme Court Justices have written memoirs.

The two most readable are **THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES** edited by David Danelski and Joseph Tulchin (Harvard, 1974) and Douglas's **GO EAST, YOUNG MAN**, noted earlier. The following memoirs are primarily for specialists: John Marshall's **AUTOBIOGRAPHICAL SKETCH** edited by John S. Adams (Michigan, 1937; Da Capo, 1973); Roger Taney's "Early Life and

Education" in Samuel Tyler's **MEMOIR OF ROGER BROOKE TANEY** (Murphy, 1872; Da Capo, 1970); Stephen Field's **PERSONAL REMINISCENCES OF EARLY DAYS IN CALIFORNIA** (Da Capo, 1968) and **FROM THE DIARIES OF FELIX FRANKFURTER** (Norton, 1975). Earl Warren's autobiography was close to completion at his death in 1974, but publication is still uncertain.

Finally, a useful reference work on the Court and its members, past and present, is **THE JUSTICES OF THE UNITED STATES SUPREME COURT: Their Lives and Major Opinions, 1789-1969** (4 vols.) edited by Leon Friedman and Fred L. Israel (Chelsea House, 1969).

—G. Edward White

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EDITOR'S NOTE. *Mr. White, professor of law at the University of Virginia Law School, is the author of THE AMERICAN JUDICIAL TRADITION (Oxford, 1976), a series of interpretive profiles of several leading Supreme Court Justices, which focuses attention on the Court's changing institutional role.*