

THE SUPREME COURT
HISTORICAL SOCIETY

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New Publication Heralds Constitutional Bicentennial

As 1987 and the Bicentennial of the Constitution of the United States approaches, numerous organizations across the country have begun to make plans for this important national commemoration. Perhaps the best known is Project '87, a joint activity of the American Historical Association and the American Political Science Association.

Headed by James MacGregor Burnes of Williams College and Richard B. Morris of Columbia University, the Project's most recent contribution is its inaugural edition of *This Constitution*, a quarterly publication intended to serve as a "chronicle" of the Bicentennial.

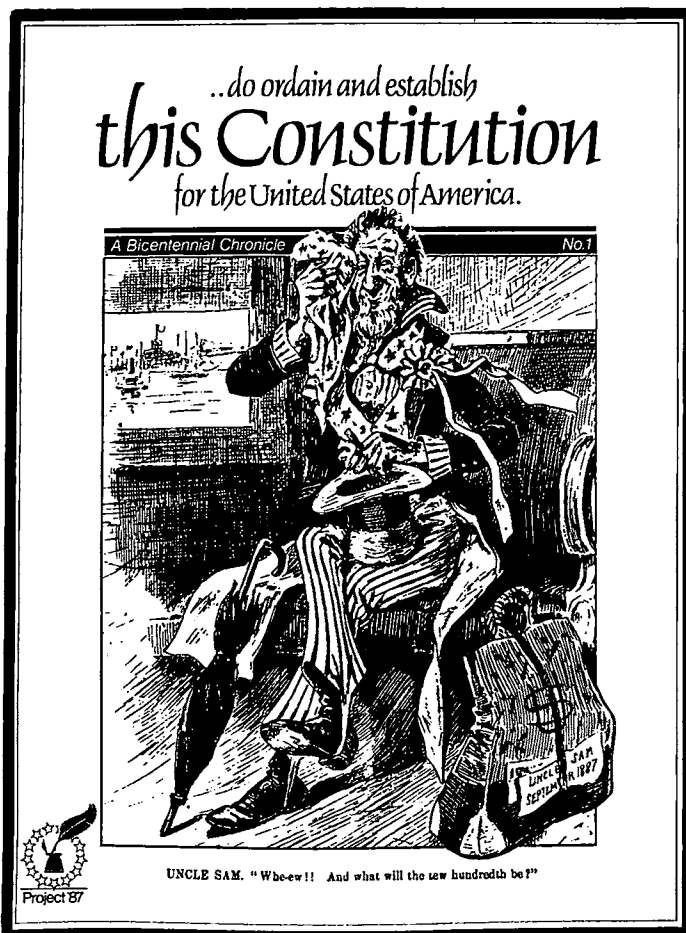
Published with the assistance of the National Endowment for the Humanities as part of its special Bicentennial initiative, the magazine features three distinct sections that seek to provide ideas, resources, and practical information for individuals and organizations interested in the Bicentennial. The first section presents essays by leading scholars on thirteen topics identified by the editors as "Enduring Constitutional Issues." The second section highlights original documents, with the documentary sources of the Constitution's Preamble being the subject of the first edition. The third section contains a "clearinghouse" of information about the wide variety of Bicentennial programs and events sponsored by organizations across the country, and provides the best short index to current and planned programs published to date. The first edition also includes an excellent article on "Eighteenth-century American Constitutionalism" by Gordon S. Wood, the noted historian at Brown University and the author of *The Creation of the American Republic, 1776-1787*.

For subscription information on this well-illustrated and reasonably priced publication, please contact Cynthia Harrison, Managing Editor, at Project '87, 1527 New Hampshire Avenue, N.W., Washington, D.C. 20036.

Society Names Board of Editors

As a consequence of a general restructuring of the Society's *Yearbook* staff which was approved by the Executive Committee at its September meeting, the Society recently named several noted historians and legal scholars to the *Yearbook's* Board of Editors. Joining William F. Swindler, John Marshall Professor of Law Emeritus at the College of William and Mary, and Jeffrey B. Morris, a professor of political science at the University of Pennsylvania, who

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Courtesy Project '87

The first edition of *This Constitution*, a new quarterly publication on the bicentennial of the U.S. Constitution.

Nathan Clifford: Loyal in Opposition

In December 1846, a few days before the scheduled reopening of the Supreme Court's Fall session, President James Polk received a disquieting note from his newly appointed Attorney General, Nathan Clifford. Though placed in office only weeks before, and not yet confirmed by the Senate, Clifford dismayed Polk by submitting his letter of resignation.

Prior to 1870, when the office of the solicitor general was created, one of the primary duties of the attorney general had been to litigate federal cases before the Supreme Court. Clifford, concerned that his legal training and credentials might prove inadequate for this important public duty, succumbed to a crisis of confidence and asked Polk to relieve him. Polk's faith in his appointee, however, remained unshaken and he prevailed upon Clifford to remain in office. His confidence proved well-founded, as Clifford's subsequent appearance before the Court sufficiently impressed the Senate to earn him unanimous confirmation, bringing a difficult period in his public career to a satisfactory close. Clifford's able service eventually resulted in sufficient recognition to enable him to become the second attorney general in the Nation's history to later be elevated to the Supreme Court—the first being Chief Justice Roger Brooke Taney. Like Taney's, Clifford's appointment to the high bench followed a difficult path through the political controversies of the pre-Civil War era.

Nathan Clifford was born in Rumney, New Hampshire on August 18, 1803, to a family of English ancestry who had settled in America in 1644. The oldest child, and only son among seven children, young Nathan spent much of his youth working on the family's small farm alongside his father, Deacon Nathaniel Clifford, and his mother, Lydia Simpson Clifford. There was neither time nor money for a formal education, and the only schooling Clifford received came from attending Haverhill Academy, where he earned his tuition by giving lessons to the school's younger students.

Though poorly educated, young Clifford was extremely industrious, and was able to persuade local attorney, Josiah Quincy, to take him on as an understudy in the early 1820's. By 1827, he had passed the bar and moved to Newfield, Maine, where he opened a law office. Shortly thereafter, he met and married Hannah Ayer, the daughter of an influential family whose local connections brought him a substantial real estate practice. Despite this steady flow of clients, money remained tight, however, with much of the family budget necessarily being spent on maintaining a household of six children.

Clifford's modest means and family background led him early on to embrace the principles of Jacksonian Democracy. He soon gained the respect of local organizers in the Democratic Party, and in 1831 he was elected to Maine's House of Representatives on the Democratic ticket. In 1833, at the age of 28, he became speaker of that legislative body, and the following year he was appointed as Maine's attorney general. During his tenure in that office, Clifford unsuccessfully sought a seat in the United States Senate. He



Associate Justice Nathan Clifford, 1858-1881

recovered from that political defeat by capturing a seat in the U.S. House of Representatives in 1838, a seat which he occupied from 1839 to 1843. While in Congress, Clifford staunchly opposed high tariffs and became a loyal supporter of the policies of President Martin Van Buren. Clifford criticized abolition and supported sectional compromises. Political opponents quickly labelled him a "dough face" — a northern Democrat with southern sympathies. Congressional redistricting divided Clifford's political base in 1843 costing him reelection, but in 1848, near the end of President Polk's tenure, Clifford received appointment as attorney general succeeding John Mason. Despite Clifford's early reticence, his service as attorney general was relatively successful. The two most memorable cases he argued before the Court were *Braashear v. Mason*, 6 How. 92 (1848) and *Luther v. Borden*, 7 How. 1 (1849), argued near the end of Clifford's tenure as attorney general in 1848. The first case involved a suit alleging the federal government's obligation to retain sailors serving on four ships the Navy had acquired from Texas when that state was annexed. Clifford persuasively argued that the provisions of the treaty of annexation did not entitle the ships' crews to employment in the U.S. Navy and the Court agreed.

The second case was more notable for the controversy which surrounded it than for Clifford's involvement. The case involved rival factions each claiming to be the legiti-



On orders from its colonial charter government, the Rhode Island militia raided Chepachet, a village supposedly loyal to Thomas Dorr. President James Polk (below) appointed Nathan Clifford as his Attorney General, and the Federal government's advocate in *Luther v. Borden* in 1848.

Courtesy Rhode Island Historical Society



JAMES K. POLK

mate state authority in Rhode Island. *Luther v. Borden*, the legal consequence of Dorr's Rebellion, was heard in January 1948. A large group of Rhode Island's citizenry, led by Thomas Dorr, had attempted to expand that state's limited electoral franchise by establishing a new state government with more liberal voting requirements. The original government, acting under a modified colonial charter dating back to 1663, refused to accept as legitimate a public referendum effecting transfer of authority, and violence ensued. The charter government ultimately prevailed by declaring martial law and by using the state militia to capture and imprison leaders of the rival faction. Although the government eventually released Dorr and other leaders of the rival faction, Dorr's supporters charged that the charter government had violated the U.S. Constitution's guarantee of a republican form of government and had illegally seized and imprisoned its opponents. Clifford, arguing on behalf of the federal government, supported the claimants' position. The Court, however, agreed with Daniel Webster, Clifford's able opponent, holding the question before the Court to be essentially political in nature, and therefore outside the Court's jurisdiction.

Shortly after arguing *Luther v. Borden*, Clifford found himself thrust into the role of troubleshooter for the Polk administration's policy in Mexico. Polk's prosecution of the Mexican-American War, which had been raging since 1846, was finally drawing to a close. The Mexican government had sued for peace, and Polk asked Clifford to resign from the Cabinet to serve as his peace commissioner to Mexico.

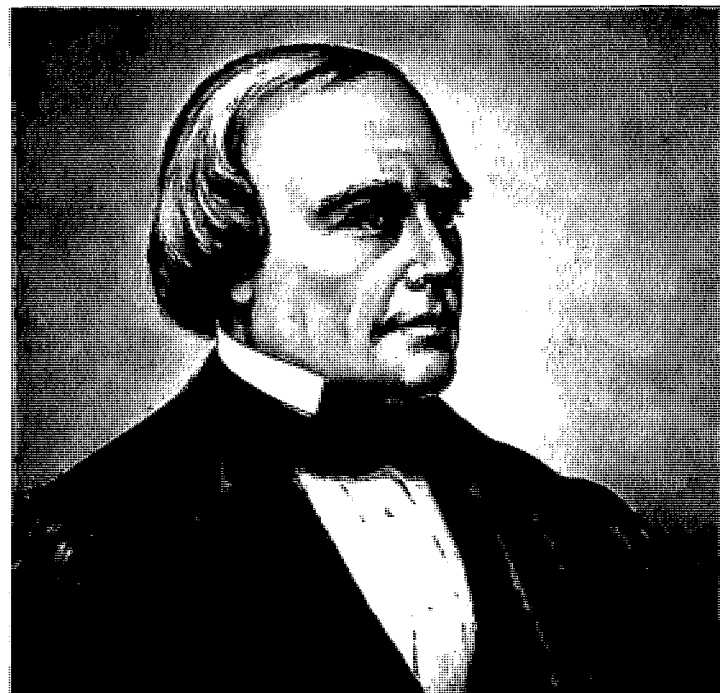
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Clifford (continued)

Polk noted in making the appointment that Clifford was familiar with the details of the treaty, and with the President's own views on policy. Clifford arrived in Mexico City in April 1848, and ultimately secured Mexico's ratification of a treaty highly favorable to America's growing ambitions in the West. In recognition of that success, Polk asked Clifford to remain as his minister to Mexico. Though Clifford was to remain in that post until September 1849, it was not to prove pleasant duty, as he was twice assaulted in his coach by local bandits and once robbed at gunpoint. Understandably, relations were cool between the representative of the American invaders and the conquered Mexicans. Clifford noted in his correspondence that the "... Mexicans keep aloof from us and I am not sorry that they do so as I am not pleased with them in the least degree." Despite this mutual antipathy, Clifford devoted considerable energy to encouraging progressive reforms in Mexico, genuinely hoping that America's southern neighbor might resolve its chaotic political problems. His efforts were cut short, however, by the election of 1848 and his recall by Zachary Taylor in 1849.

The Democrats' repudiation at the polls had also removed any immediate opportunity for Clifford to secure a new appointment. He returned to Maine to establish a new law partnership with John Appleton of Portland. Private practice, however, seemed pale employment indeed and Clifford occupied much of his time trying to restore his political career. He was twice unsuccessful in bids for a Senate seat in 1850 and 1853, even though his party had recaptured the presidency in 1852. Finally, in 1858, President James Buchanan named his old political ally to fill a vacancy on the Supreme Court.

The vacancy on the high court had been created by the resignation of Justice Benjamin Curtis, who left the Court in protest over the *Dred Scott* decision. Selection of Curtis' successor had been a difficult choice for Buchanan. To retain the Court's geographic balance, it would be necessary to appoint a New Englander, but the vacancy came at a time when political in-fighting over the division of Kansas and the fugitive slave issue was near its peak. Buchanan's own Democratic Party was being torn apart over these issues, and nomination of a Yankee abolitionist or a pro-slavery Southerner would have likely split the President's supporters in the Senate making confirmation impossible. Clifford was a logical compromise, being a New Englander with southern sympathies whose party loyalty was beyond ques-



Associate Justice Benjamin Curtis (1851-1857), who resigned in protest of the *Dred Scott* decision.

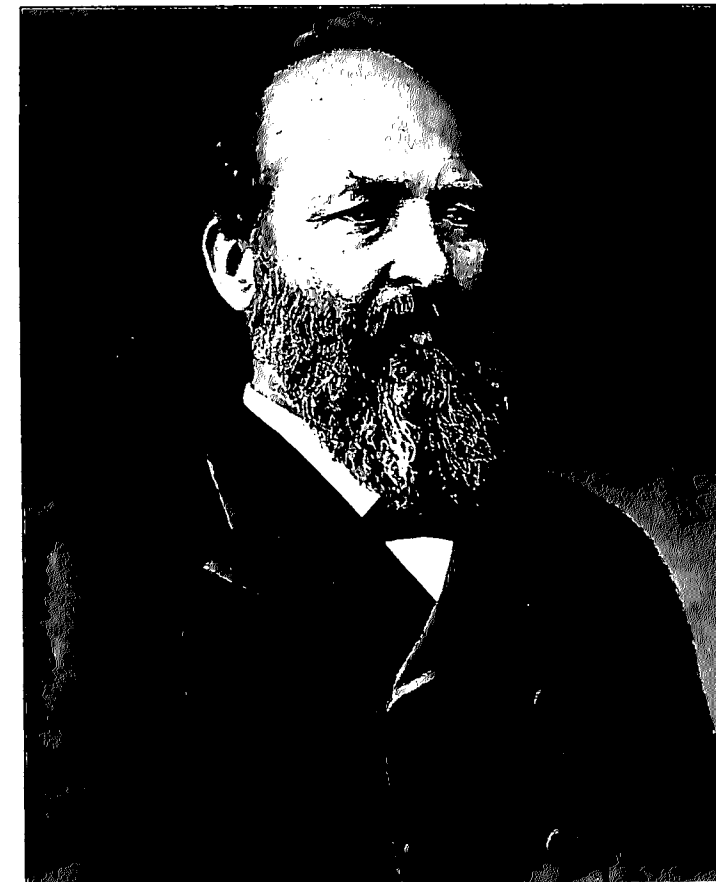
tion. Yet, even with such strong credentials, his confirmation became mired in a heated debate which reflected the nation's state of political turmoil. Following over a month of exchanges over his legal qualifications, and criticism of his lack of political independence, Clifford was confirmed on January 12, 1858 by a narrow margin.

The political strain of sectionalism which had colored Clifford's confirmation hearings also intruded upon much of his 23-year tenure on the Court. His unpopular Democratic Party affiliation drew critical scrutiny to his jurisprudence during five successive Republican administrations. His frequent dissents in important cases denied him the opportunity to write opinions for the Court, and many critics attacked his alleged judicial shortcomings. But, during his relatively long tenure, Clifford wrote more opinions for the Court than any of his colleagues, and more than any preceding justice with the sole exception of Chief Justice John Marshall. Although Clifford frequently opposed Republican attempts to expand federal authority at the expense of the states, he considered the Union itself sacred, and condemned the idea of secession as a "wicked heresy." During the Civil War he supported the government in cases involving the issuance of unsecured paper currency crucial to financing the war effort. By voting with the majority in *Ex parte Vallandigham*, 1 Wall. 243 (1864), he also upheld the government's extensive use of martial law during wartime. Clifford occasionally did take exception to the Lincoln administration's conduct of the war, as exemplified by his dissent in the *Prize Cases* of 1863, but such criticism was the exception rather than the rule.

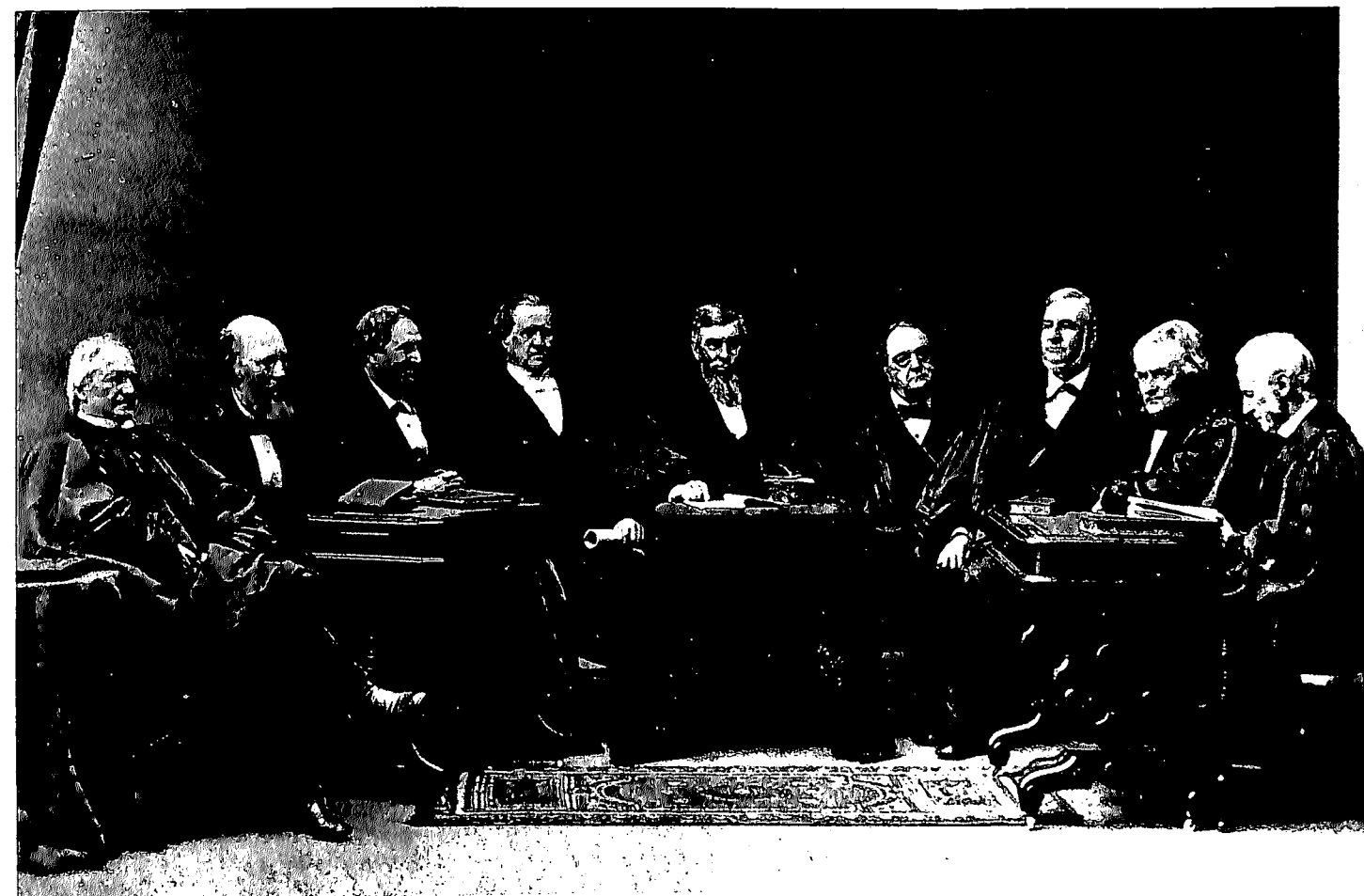
After the war, when the survival of the Union was no longer at stake, Clifford's opposition to the policies of the Radical Republicans became far more pronounced. He consistently dissented from Court opinions upholding federal wartime confiscations of property, and was often joined in these dissents by Justice Stephen Field, a Lincoln appointee

from California and a fellow Democrat. Clifford also objected to the government's policy of paying prewar contractual obligations with devalued postwar currency, as evidenced in his opinions on the legal tender cases which came before the Court again in the early 1870s. In *Loan Association v. Topeka*, 20 Wall. 655, 667 (1875), Clifford chastised the majority for voiding a statute authorizing a town to issue bonds to aid a local manufacturer. The Court asserted that such a law constituted an unlawful transfer of private property to aid private individuals which was not in the public interest. Clifford, consistent to his strict interpretation of the Court's prerogatives and federal authority in general, argued that the Court was empowered to void only those laws expressly prohibited by the Constitution, and not "... on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the Constitution..."

Though Clifford was willing to support an imperiled Union in time of crisis, he denied the efficacy of extending federal authority to meet the questionable policies of Reconstruction. Thus, he occupied the anomalous position of a loyal critic with Yankee roots who shared southern sentiments. These credentials, which at least arguably were responsible for his nomination to the Court, and which exposed him to criticism throughout most of his career, made him the logical choice to preside over the electoral commission established in 1876 to resolve the hotly disputed Hayes-Tilden election. That Clifford placed patriotism above politics was demonstrated by his agreement to join in the work of this controversial body at all. That he declined to



Rutherford B. Hayes, nineteenth President of the United States, and beneficiary of Clifford's acquiescence as Chairman of the Election Commission of 1876.



During the 1870s, the Supreme Court, presided over by Chief Justice Morrison Waite, was dominated by Republican appointees.

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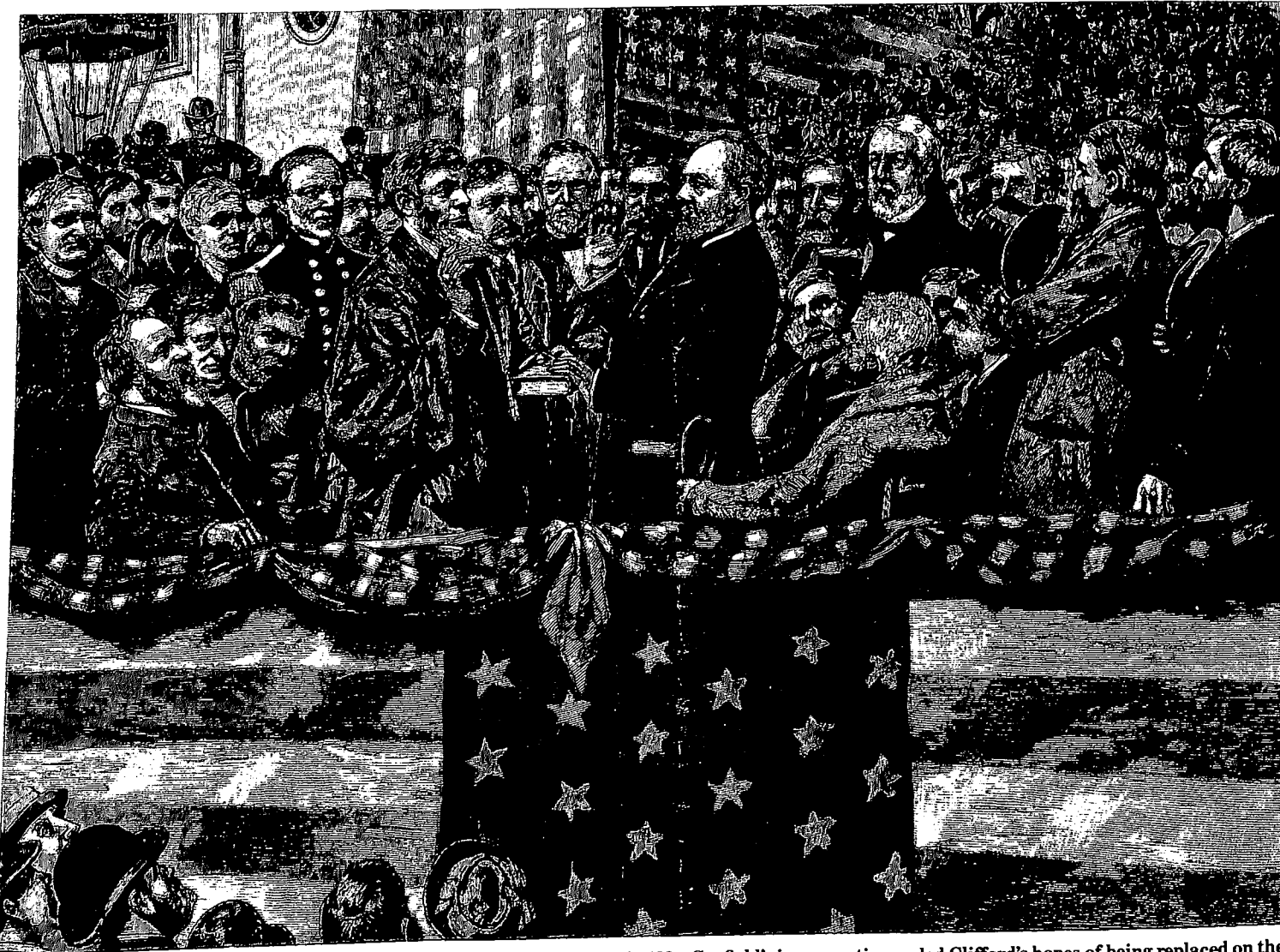
Clifford (continued)

sabotage its proceedings when it became clear that the Republican majority on the commission supported a purely political solution is also to his credit. Clifford dutifully reported the commission's findings to Congress, signing the order certifying Hayes' election as President. It was perhaps too much to expect Clifford to forgive the betrayal of principles which giving Hayes the election embodied. Tilden, the Democratic candidate, had won a majority of the popular vote, and, had the commission certified only one of the electoral votes in his favor in any of the states with disputed returns, he would have become the next president. Indeed, Hayes himself later acknowledged that his victory was the result of "... a strictly party vote ..." which demonstrated "... the strength of party ties." Clifford declined to attend Hayes' inauguration, and refused to accompany the other justices on traditional visits to the White House during Hayes' tenure as President.

Hayes' election galvanized Clifford's conviction to remain on the bench until a Democratic president could name his successor. His final years on the Court were unfortunately marred by frequent absences resulting from a steady deterioration in his health. In 1880, he suffered a severe stroke which impaired him both physically and mentally. After a

long absence from the bench, he was visited by Justice Samuel Miller, a former physician, who reported Clifford's condition to be extremely poor. Though Clifford continued to assert his intention to return to his duties, his health prevented him from doing so. The election of Republican James Garfield in 1880 ended his hope that a Democratic president might appoint his successor. On July 25, 1881, Clifford died, bringing to a close 23 years of tumultuous service on the Court. Sadly, Clifford's great contributions to the Court have become obscured by the contemporary criticism of his anti-abolitionist stance and his advocacy of strict constitutional interpretation at a time when the Court was moving toward an expansion of federal authority. Eulogizing Clifford's passing in 1881, Supreme Court bar member J. Hubley Ashton described him as "... the connecting link between the past and the present." Ashton's colleague before the high bench, Montgomery Blair praised Clifford's jurisprudence, saying:

In my own judgment, when the era of passion through which we have lived shall have passed away, those moderately stated opinions, respectful to his colleagues always, and to those who differed with him will be vindicated by time as the true principles of the Constitution.



Chief Justice Morrison Waite swearing in President-elect James Garfield in 1881. Garfield's inauguration ended Clifford's hopes of being replaced on the Court by a successor appointed by a President of his own party.

Charles Evans Hughes: A Personal Interpretation

By H. Stuart Hughes*

Throughout my childhood and youth I suffered from being invariably identified as the grandson of one of the country's most prominent citizens. It was an awkward situation, which I handled mostly by evasion. I counted it a triumph when I managed for a few days or weeks to make my mark on my own without somebody referring to my antecedents. Subsequently, when I settled on the profession of historian, I found another reason for discretion: if I spoke or wrote of Charles Evans Hughes, how could I be true both to my calling and to family loyalty? And so my self-imposed silence continued for a quarter century after my grandfather's death.

Of late, however, my reticence has begun to strike me as strained and pedantic. After all, during the last two years of his life, when I was living in Washington, I dined with him twice a week; no one else, I think, saw him with quite this regularity. At the time, he had just completed his *Autobiographical Notes*, which, he told me, he never intended for publication. Their belated appearance suggests that the moment has come for me to write on so delicate and difficult a topic, more particularly since the bare record my grandfather left behind him seems to call for a personal interpretation.

There is a further reason for finally trying to put down my thoughts: it is no longer true that I come from a prominent family. To the American public the name Hughes now stands for an eccentric and fabulously wealthy recluse. Most people, especially the young, know almost nothing of Charles Evans Hughes. Diplomats remember him as skillful, no-nonsense secretary of state who appreciated the work of the career foreign service. Lawyers recall a thoroughly professional chief justice who gave firm but tactful leadership to his colleagues. In 1960 the press briefly evoked his presidential race of 1916 as the closest of the century. And that is about all.

Such is the riddle Hughes presents. How could a figure who loomed so large in his own day have become so misty in current memory? Initially one may hazard the guess that our contemporaries find something unbelievable about a man who looked like God, to whom integrity was so much second nature that it would never remotely have entered his head to commit the sort of acts which in the early 1970s were routine in the highest spheres of government, and whose life with one great exception embraced everything to which an American statesman might aspire. The career too nearly perfect: it seems to leave no chink through which the weak-

**On May 30, 1974, an article appeared in the New York Review of Books entitled "They Don't Make Them Like That Any More." Written by H. Stuart Hughes, the Chief Justice's grandson, the review noted the "belated" publication by the Harvard University Press of The Autobiographical Notes of Charles Evans Hughes, edited by David J. Danelski and Joseph S. Tulchin. This excerpt is reprinted with the permission of the author and the New York Review of Books © 1974 NYREZ, Inc.*



Chief Justice Charles Evans Hughes (1890-1941)

ness of common humanity might make Hughes's career credible to an age of ethical mediocrities and fallen idols.

If the term work ethic—or secularized Protestant ethic—had not already been invented, it would have had to be coined to catch a figure like Charles Evans Hughes. His capacity for work was awesome: he exulted in it, he felt at his best when he "was going ahead full steam," he returned from his vacations "with abundant zest" to plunge into it anew. His work and his vacations alike were adventures to him—and with this trait of adventurousness we reach the less charted ground which the *Notes* only hint at and which needs to be sketched in with extrapolations from oral family lore or personal reminiscence.

The exploration is hampered by the fact that Hughes's writings and his talk totally lacked two categories which to a contemporary mind seem indispensable for explaining almost anyone—the notion of social class and the notion of the unconscious. The *Autobiographical Notes* in fact give a

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Hughes (continued)

fairly accurate idea of Hughes's own curious class position as a very special sort of self-made man; but it has to be got at from random clues rather than explicit statement. The closest approach Hughes makes to speaking of a class situation is in describing one of his boyhood homes—his family moved frequently—as located in “a community of . . . self-respecting families of moderate means.”

As for the unconscious, it must be searched out in the *Notes* through even greater indirection. Certainly Hughes knew that powerful emotions underlay the iron self-control with which he faced the public: he was bewildered when what he took to be overwork alone more than once drove him to near-breakdown and the refreshment of Alpine hiking. But he would doubtless have considered it morbid to have probed these matters further. Like most of his generation—perhaps like most people even today—he thought that the only thing to do was to pull himself together and return to harness. Scornful of weakness, he refused the indulgence of fuller self-knowledge.

A first and simple way to discover the man beneath the phraseology of convention is by pinpointing the episodes on which he felt compelled to correct the record—those which still nettled him after he had turned eighty and his public career was behind him. The readiest to hand is the single quotation most often attributed to him: “The Constitution is what the judges say it is.” This remark, dating from his



Even as a child, Hughes demonstrated exceptional talent.

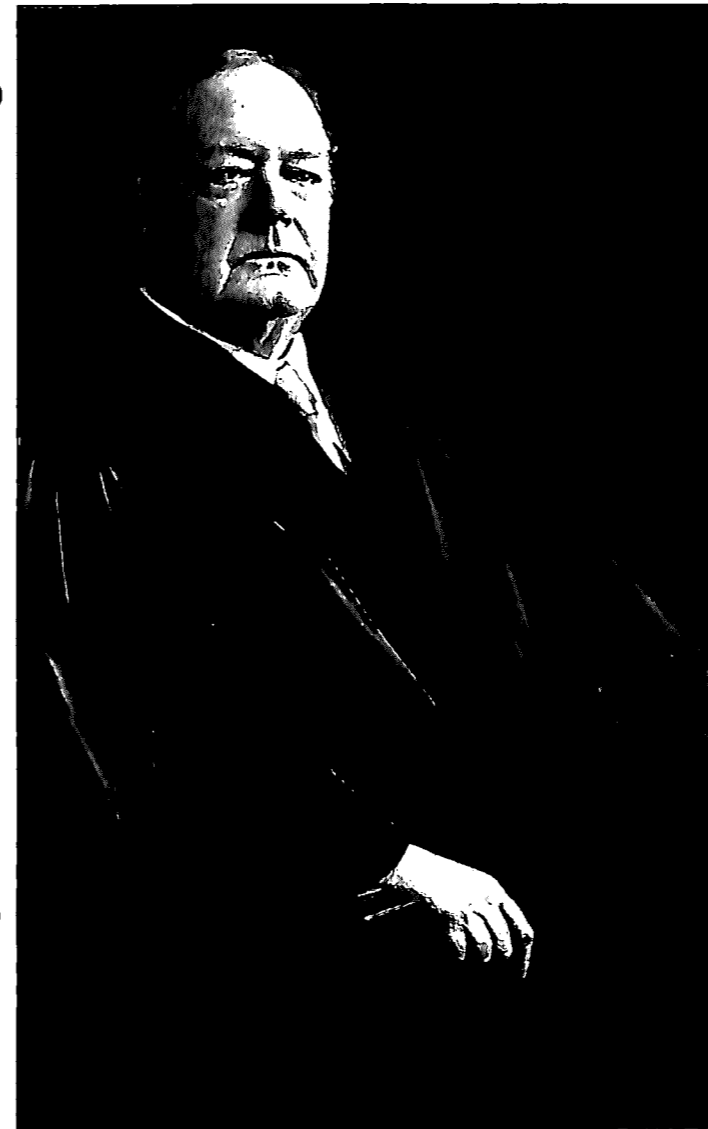
early period of prominence as governor of New York, has frequently been interpreted as flippant or even cynical. Quite the contrary, Hughes insists; taken in context it was intended to emphasize the crucial role of the judiciary and the need for surrounding the judicial process with respect. And this reading is borne out by the fact that when three years later, in 1910, he was himself appointed an associate justice of the Supreme Court, he was so impressed with the responsibilities of his new office and so uncertain of his capacity to carry them out that Justice White once had to take him for a midnight walk to calm him and bolster his confidence.

When Hughes first mounted the bench, the chief justiceship was vacant, and President Taft had come close to promising it to him. Two months later, the President even went so far as to summon Hughes to the White House, apparently with the intention of making a formal offer. Half an hour later, while the new justice was dressing to go, the meeting was canceled; the post went to Justice White instead. Hughes nobly affirms that Taft “was entirely free from any commitment,” and the documents are sufficiently obscure to support conflicting accounts. Yet I recall that within the family it was guarded as the secret of secrets—which a child was solemnly sworn never to reveal—that the President had gone back on his word. Perhaps this disappointment may help to explain the alacrity with which twenty years later, with the approaching death of the same Taft—who in his turn had in the meantime become chief justice!—Hughes at the age of sixty-eight accepted the long-deferred honor from Herbert Hoover, even though he knew very well that his son (my father) would be obliged to resign the office of solicitor-general in which he had served for only eight months.

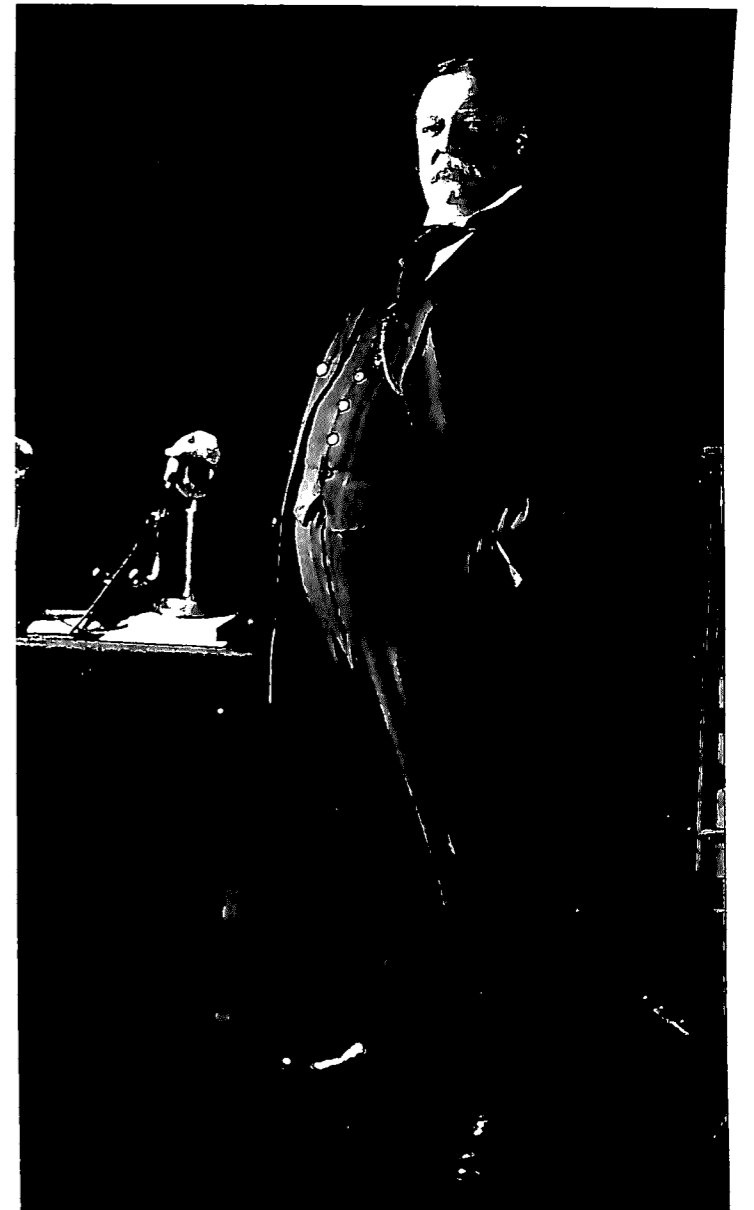
Quite naturally, in discussing the decade of presiding over the Supreme Court with which he closed a public life that had begun five years after the turn of the century and that ended in the year of Pearl Harbor, Hughes is most concerned about the charge that he and his colleagues “changed front” in order to beat President Roosevelt’s “court-packing” plan of 1937. In an uncharacteristically curt phrase, Hughes dismisses the assertion as “utterly baseless.” Here the documents and the weight of scholarly opinion seem to support him.

But it is also unquestionable that Hughes’s generalship and sense of timing—more particularly in proving that the court was not behind in its calendar—contributed mightily to turning the tide. Roosevelt took his discomfiture with his customary urbanity. Far from nourishing a grudge, the President, Hughes testifies, treated with “the utmost cordiality and friendliness” the chief justice whom his predecessor had appointed and who had inflicted on him the most stinging defeat of his twelve years in office. And perhaps some of this warmth was reciprocated. “After I had administered” to Roosevelt, Hughes recalls, “the oath of office for the third time, I told him that I had an impish desire to break the solemnity of that occasion by remarking: ‘Franklin, don’t you think this is getting to be a trifle monotonous!’”

Between Hughes’s two periods on the bench, there had come his campaign for the presidency against Wilson in 1916



William Howard Taft (right) and Edward-Douglass White (above) whose political and judicial careers were interwoven with the public life of Charles Evans Hughes.



and his four years as secretary of state under Harding and Coolidge. In these phases of his career once more it is not difficult to detect the historical distortions or half-truths that got under his skin. In the *Notes* he repeatedly nails as legends the glib assertions about him which the journalists purveyed both contemporaneously with the events in question and long after they had occurred: that he lost the state of California—and with it the presidency—by “snubbing” its Progressive governor, Hiram W. Johnson; that he sympathized with the Senate “irreconcilables” who blocked America’s entry into the League of Nations; that in negotiating the Washington Treaty of 1922 he left his country dangerously unprepared for a naval showdown with Japan.

This last charge, as I can testify from conversations with my grandfather during the Second World War, was the one which bothered him the most. When, two decades after the Washington Conference, the long-predicted conflict in the Pacific finally broke out—and the American battle fleet lay crippled—it was all too easy to accuse Hughes of having denied the United States supremacy on the seas. Certainly he had agreed to a slashing reduction in the navy’s building

program. But what he contends in his *Notes*—and what I heard him say more than once—was that in making such an accusation the press of the early 1940s was neglecting to reckon with the totally different state of mind of twenty years before. Hughes reasons like a sensitive historian when he asserts: “If Congress, as was practically certain, was not going to provide the appropriations necessary . . . and we had no agreement for limitation, we were destined to fall behind the other great naval powers and thus get the worst of the competition our projects had started.”

The connecting thread in Hughes’s account of this series of episodes is an insistence that the truth was rather less sensational than it had been made out to be. Almost perversely—however valid his rectifications—he seems to be trying to delete the element of drama from his own life. Yet unquestionably he himself had a keen sense for the dramatic. His style of public speaking remained such long after it—along with the beard that became his hallmark—had passed out of fashion. His utterly devoted and strong-willed wife certainly took a dramatic view of him in regarding him as “a man of destiny” and in urging him to aspire to the

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Hughes (continued)

highest public office. "Fame is the spur," he would recite to me, "that last infirmity of noble mind." He did not shun fame — although it had a way of arriving modestly clothed in the garb of duty. Why did he feel it necessary to soft-pedal this side of his nature, to depict himself as a workhorse rather than as an adventurer, a sober servant of his country simply trying to get on with the job?

The answer may lie in his antecedents and in the intensely personal way Hughes both outgrew them and remained loyal to them. His *Autobiographical Notes* are full of his ancestry and family history (where a grandchild soon became helplessly lost) was a subject on which he loved to hold forth. Of his mother's influence nearly everyone who has written on Hughes seems convinced; her injunction to him when he was away at college. "Be thorough. BE THOROUGH. BE THOROUGH in all you undertake" is the most frequently quoted passage from his youthful correspondence. "Of old American stock," part Dutch and part "Scotch-Irish," she came of a solid but far from affluent or aristocratic Hudson River family. The usual picture of Hughes is the one familiar to American folk history of the adored only child pushed and prodded to greatness by a mother's inflexible resolve.

In this depiction Hughes's father has remained in the background as a weaker figure and possibly a henpecked husband. The nearest thing to a revelation in the *Autobiographical Notes* is the advance to center stage of the Welsh preacher David Charles Hughes — "black hair, snapping black eyes, . . . emotional, impulsive, . . . generous, sociable, and with a flair for adventure" — who arrived in New York in 1855 as a nearly penniless immigrant and five years later won for his wife a woman whose settled background no less than her austere temperament sharply contrasted with his.

(Their son followed his father's example by "marrying above him" in the social scale.) "Who was this upstart, this dark-hued Welshman?" the prospective bride's mother inquired, "Who knew but that he had left a wife in Wales?" Initially all that seemed to unite the ill-sorted pair was the fundamentalism of their religion — Methodist in his case, Baptist in hers — and predictably (although the husband was the one who did the preaching) it was to her denomination that he converted.

Not the least of the diplomatic triumphs of Charles Evans Hughes was the way in which he managed to shed his religious faith without seriously wounding his parents. That he was able to do so suggests, if only by inference, a good deal about his relation to his father. Fortunately the *Autobiographical Notes* provides us with a photograph of David Charles Hughes — the best I have ever seen — taken in his later years on the occasion of his receiving the honorary degree of doctor of divinity, something which as a self-educated man he must have appreciated to the full.

The face that gazes out from this picture is far more interesting than that of the future chief justice's mother: quizzical, dignified, with a look of both puckishness and vulnerability about the eyes. It is the face neither of a nonentity totally overshadowed by his wife's determination and his son's success nor of a father whose personal insecurity led him to play the eccentric. It is rather the face of a man whose modest achievements had brought him sufficient satisfaction to preserve him from jealousy of his son and to enable him to foster the latter's triumphal progress by the reassurance that life held other rewards besides those won through hard work and that a penchant toward merriment was not irredeemably sinful.

The associates or scholars who have written most perceptively about Charles Evans Hughes have taken pains to bring out the warmth and humor which the public seldom

saw. The legend of his coldness understandably arose because he reserved for his immediate family by far the greater part of his sense of fun. The same writers who stress his streak for playfulness comment on his almost total lack of close friends. Here once again an explanation based on social origins may help in resolving an apparent contradiction.

Hughes seems to have been uncertain as to where he "belonged"; although the respect that surrounded him grew to be universal, he found scarcely anyone with whom he could feel thoroughly relaxed and comfortable. The first wealthy people he encountered were a group of highly assimilated Jewish families — one of them named Cardozo — and throughout his life he enjoyed a special affinity with this milieu. In a period of ferocious social anti-Semitism, he had no truck with such an attitude. Of all the famous men whom he had known and of whom I heard him speak, Brandeis was the one he recalled with the strongest emotion. "Brandeis," he would say, characteristically putting the emphasis on integrity, "is a rock."

Of the others with whom he served on the Supreme Court, Holmes was the most eminent. But Holmes was a generation older than he, and although they shared little jokes on the bench, Hughes apparently never got over his awe of a man who had risen to the rank of captain in the Civil War. ("Hughes," Holmes once whispered to him just before his own retirement, "seventy years ago today I was left for dead on the field of battle.") Indeed, arranging this retirement in early 1932 was perhaps the most delicate task the new chief justice had to shoulder — and Brandeis was naturally the associate who aided him in it.

Holmes, Brandeis, Cardozo — these are the names that keep recurring in his *Autobiographical Notes* as they did in his conversation. They were the men whom he admired and whom in his self-contained fashion he counted as his friends. But he could not be quite as they were. Despite his advanced and courageous stands on civil liberties — his championing in 1920 of Socialist legislators denied their seats, and in 1931 of a pacifist denied citizenship — he remained "to the right" of the trio that ranked in Hughes family lore as the supreme pantheon of the legal profession. He was more cautious than they — for all the majesty of his bearing, less self-assured. Here lies another riddle. We may approach it indirectly through the apparent detour of domestic tragedy.

In the spring of 1920 Hughes's oldest daughter and the second of his four children died at the age of twenty-eight. Her loss left him, as he says in the strongest single passage in his *Notes*, with "a wound which . . . never healed." Helen Hughes's death broke his life in two; his gracious wife, with whom he had the closest of marriages, never fully regained the gaiety of spirit he had treasured in her. It is curious — but perhaps symptomatic of Hughes as an extremely private man — that it took the general public a long time to realize why in that election year he did not reach once more for the presidency, which, as Pusey puts it, "could have been his for the asking." After months of quiet grief, he assumed instead the unfamiliar role of directing his country's foreign policy under a second-rate, affable chief who gave him all the leeway a secretary of state could desire.



Photographed on the lawn of their summer home at Bridgehampton, Long Island, Charles Evans Hughes, Republican candidate for president, posed with members of his family. Seated were his beloved wife Antoinette and his youngest child, Elizabeth. Standing next to him was his daughter, Catherine, and to her left, Helen, whose tragic death four years later left him with "... a wound never healed." Not pictured was his eldest child and namesake, Charles Evans Hughes, Jr., father of the author. Referred to by members of the family as the "campaign baby," H. Stuart Hughes was born within months of when this photograph was taken in 1916.

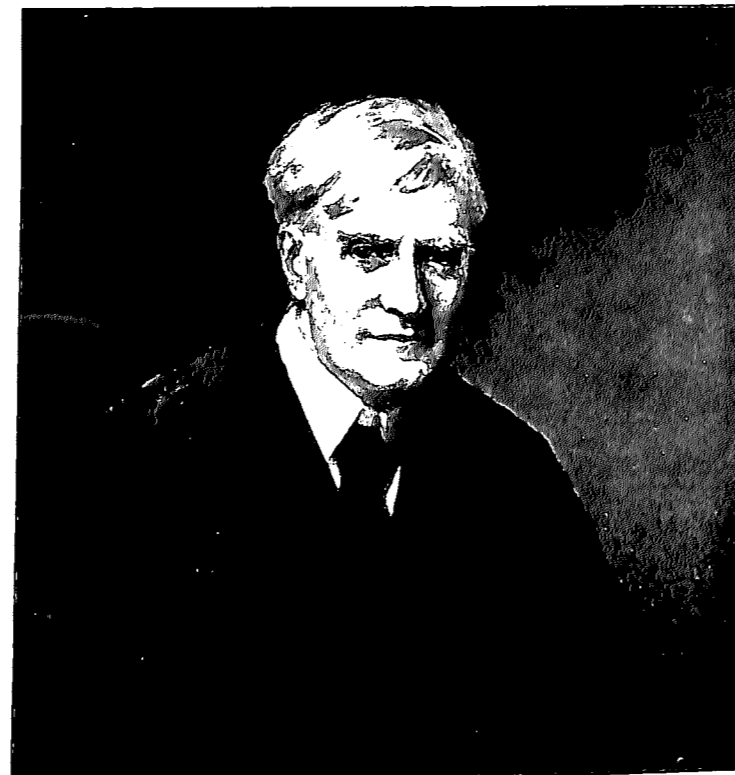
To the press and the public a "new Hughes" seemed to emerge in 1921. The frostiness had vanished: one portrait painter even went so far as to imagine him in the guise of a jovial, pink-cheeked French "President of the Republic"! In this case popular distortion included a misunderstood element of the truth. It was not so much that Hughes had changed; it was rather that he let the outside world glimpse more frequently the man behind the stern exterior. Intense private sorrow had followed closely on a spectacular public defeat: of the two blows, the personal one had been by far the more severe.

Whatever restraint his self-discipline demanded — however reluctant he might be to explore the recesses of his soul — the death of his daughter had forcibly cast him into the

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Holmes and Brandeis (left) and Cardozo (right) — "the trio that ranked in Hughes family lore as the supreme pantheon of the legal profession."



Hughes (continued)

nether world of his own emotions. He who had seemed invulnerable had known despair. From the ordeal he came out stronger than before. Gone were his periodic crises of "nerves" and self-doubt. He had lived nearly sixty years a life of success piled on success — but one whose psychic underpinnings sometimes shook in a storm. Now that he had experienced the full measure of grief it was as though his emotional make-up held no further surprises for him: he had gained intimate acquaintance with his capacities and his weaknesses alike, and he began to act accordingly.

Human disaster hit too late to alter the style and the work habits of a lifetime. Hughes still could not manage to bring into full incarnation the impulsive Welshman that had hovered so long just below the surface of his Anglo-Saxon manners. Yet at an advanced age the memory of the Wales he had visited as a boy returned to him when he saw, with tears swelling in his eyes, the film of *How Green Was My Valley*.

He suspected that in public speaking, like his Uncle John, whom he had met back in the "old country," he too possessed the "mysterious power of the Celtic temperament" that the Welsh call *hwyl*. To me visiting him evening after evening in the utter loneliness of bereavement after my grandmother died he looked very Welsh — with the massive head of a mortally wounded old lion, staring off without flinching toward his own end.

Hughes was of a special variety of American self-made

men which now seems virtually extinct. Reared without money in an educated household, he early acquired the accent and the "breeding" that smoothed his translation to an infinitely higher sphere and gave it the appearance of effortlessness. He could pass for a patrician even though he himself would have been the first to declare that he was nothing of the kind. Deep down, however, his ascent into the WASP establishment seems to have taken a great deal out of him. And in two senses: first, in leading him to curb, at least in public, what was volcanic in his own nature; second, in provoking doubt, mostly unconscious, about whether he might not still remain an outsider who was constantly required to prove himself and, along with this, the practice of driving himself to the verge of psychic collapse.

No wonder, then, that a certain conventionality of thought and more particularly of expression undercut his intellectual brilliance — it was the necessary form his self-protection assumed. Like so many other men who have taken a great leap in one generation, he simply assumed the economic system which had made this possible; like other reformers of his generation, he was concerned rather with correcting the abuses of a business society than with questioning its fundamentals. As Zechariah Chafee, Jr., pointedly observed, Hughes "had a powerful rather than an extraordinary mind." Few American leaders of the twentieth century have elevated public service as he did; few stand in such need of a nuanced re-creation of an emotional life that for the most part has gone unrecorded.

New Publication (continued from page one)

have served as Editors of the *Yearbook* for the past few years, are the following: Stanley N. Kratz of the Institute for Advanced Study at Princeton, and an editor of the Oliver Wendell Holmes Devise History of the Supreme Court; Maeva Marcus, Editor of the Society's Documentary History Project and a member of the faculty of the Georgetown University Law Center; Merlo Pusey, author of the Pulitzer Prize winning biography of Charles Evans Hughes, and for many years, Chairman of the Society's Publication Commit-

tee; Mary K. Bonsteel Tachau, a professor of history at the University of Louisville, and noted scholar on the early federal period; and, William M. Wiecek, a professor of history and law at the University of Missouri-Columbia, and author of several books on the Constitution. Gary J. Aichele, the Society's Executive Director, will serve the Board as Managing Editor. Members interested in contributing or recommending articles for the 1984 edition are encouraged to contact the Managing Editor or any member of the Board for further information.

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