

JUDICIAL BIOGRAPHY: SOME TENTATIVE OBSERVATIONS ON THE AUSTRALIAN ENTERPRISE

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Political historians take for granted that it matters who wins an election. Military historians routinely attribute battles won or lost to the talents of particular generals. But the suggestion that particular judges make a difference involves questions of a different order in a political system premised on the notion that government consists "of laws, and not of men." Consequently, simply by taking up the enterprise, every judicial biographer necessarily becomes something of a legal realist. Only if "the Constitution is what the judges say it is" does it matter who is talking.¹

A notable feature of legal writing in Australia has been the lack of biographical studies of judges who have been members of the High Court of Australia.²

[J]udicial biography is an infrequent and neglected product of English legal scholarship ... [S]ophisticated and original treatment of English judicial luminaries is conspicuous by its absence.³

Pessimism ought not to pervade the quest for Australian judicial biographies. Advances have been made. Quantitatively and qualitatively, literature focusing on the lives, intellect and professional careers of individual judges in Australia has not been dismal. At one end of the spectrum several biographical studies illuminate and explain new dimensions of the Australian legal system. Concentration on the colonial (1788-1900) judiciary has produced more than a few scattered pages of reminiscences.⁴ If early Australian legal history continues to

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1 G. Kannar, "Representative Egos" (1982) 16 *Harv Civil Rights-Civil Lib L Rev* 875 (footnote omitted) (reviewing H. Hirsch, *The Enigma of Felix Frankfurter* (1981) and J. Simon, *Independent Journey: The Life of William O. Douglas* (1980)).

2 C. Pannam, "Judicial Biography - A Preliminary Obstacle" (1964) 4 *UQLJ* 57.

3 A. Hutchinson, "Book Review" (1982) 3 *J Legal Hist* 83 (reviewing Hirsch, note 1 *supra*).

4 For some examples see Appendix B.

attract first rate scholars⁵ prospects for a continuing evolution of penetrating biographies of Australia's colonial judges should not fade.⁶

Newer biographical ventures have, however, selected Justices of the High Court of Australia. Standard examples are book length portraits of Edmund Barton, Isaac Isaacs, Herbert Evatt and Garfield Barwick. Shorter monographs, theses, articles and reviews on other Justices are also available. The list is already formidable.⁷ Even so, productivity continues and there must now be added to the present accumulation two books — *Samuel Walker Griffith*⁸ and *H.B. Higgins: The Rebel as Judge*.⁹

Beyond a raconteur's delight in exposes, does nurturing of such biographical scholarship matter? Yes — if beneath the rhetoric of

5 E.g. Professor Alex C. Castles and John M. Bennett. Professor Castles' writing includes *An Australian Legal History* (1982); *An Introduction to Australian Legal History* (1971); "Justiciability: Political Questions" in L. Stein (ed.), *Locus Standi* (1979) 202; "Boothby" in D. Pike (gen. ed.), *Australian Dictionary of Biography 1851-1890* (vol. 3) (1969) 194. John Bennett's scholarship includes *A History of the New South Wales Bar* (1969); *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (1980); *A History of Solicitors in New South Wales* (1984); "Early Days of Law in Country Districts" (1972) 46 *ALJ* 578; "The Establishment of Jury Trial in New South Wales" (1961) 3 *Sydney L Rev* 463; "The Office of Sheriff: Historical Notes on its Evolution in New South Wales" (1976) 7 *Sydney L Rev* 360; "The Day of Retribution - Commissioner Bigge's Inquiries in Colonial New South Wales" (1971) 15 *Am J Legal Hist* 85. For Bennett's biographical articles see Appendix B. See also, J. Bennett and A. Castles, *A Source Book of Australian Legal History* (1979); A. Melbourne, *Early Constitutional Development in Australia* (1963 ed.); L. Whitfeld, *Founders of the Law in Australia* (1971); W. McMinn, *A Constitutional History of Australia* (1979). For more provocative legal history see e.g. M. Horwitz, *The Transformation of American Law 1780-1860* (1977); G. Schwartz, "Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation" (1981) 90 *Yale LJ* 1717. See also note 10 *infra*; K. Hall, "For Whom the Bell Tolls: The Substance and Pedagogy of American Legal History" (1982) 77 *Nw U L Rev* 112.

6 Compare the literature in Appendix B with the more sophisticated analysis in S. Presser, "A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federal Jurisprudence" (1978) 73 *Nw U L Rev* 26; S. Presser, "Judicial Ajax: John Thompson Nixon and the Federal Courts of New Jersey in the Late Nineteenth Century" (1981) 76 *Nw U L Rev* 423; S. Presser and B. Hurley, "Saving God's Republic: The Jurisprudence of Samuel Chase" (1984) *U Ill L Rev* 771.

7 For some examples see Appendix A.

8 R.B. Joyce, *Samuel Walker Griffith* (Uni. Qld Press 1984), pp. xi, 456. Recommended retail price \$40. Initial reviews include N. McLachlan, "Closer look at a man of self-deception" *Age* 8 Dec. 1984, 19 (Saturday Extra); F. Hutley, "Australia's First Chief Justice" (1985) 29 (3) *Quadrant* 85; D. Waterson, "Book Review" (May 1985) 16 *J Aust Stud* 97. See also note 32 *infra*.

9 J. Rickard, *H.B. Higgins: The Rebel as Judge* (George Allen & Unwin 1984) pp. ix, 350. Recommended retail price \$29.95. Initial reviews include P. Hasluck, "Puzzles remain unanswered" *Age* 8 Dec. 1984, 18 (Saturday Extra); B. Campbell, "Higgins — a fighter for unpopular causes" *West Australian* 29 Dec. 1984, 26; M. Finanne, "Book Review" (1985) 20 *Politics* 136; A. Davies, "Book Review" (1985) 56 *R H S V J* 55. See also note 45 *infra*.

judicial neutrality and autonomy lurk personal values and preferences.¹⁰ Perceptive biographies can assist endeavours to determine whether and, if so, what correlation exists between subjectivity and expositions of law contained in law reports. Prophecies, with varying degrees of accuracy, might then be more confidently espoused about the likely post-appointment performance of candidates for judicial office.¹¹ Even if this assistance is not forthcoming, revelation of previously undisclosed information concerning important cases might enhance understanding of judges' decision-making processes.¹²

A majority of Australian judicial biographies make no overt attempt to address these issues. *Samuel Walker Griffith* and *H.B. Higgins: The Rebel as Judge* are not exceptions. A conventional, not interpretative, approach is utilised. Chronological order predominates. Each stage of a judge's life, from birth to death, is reconstructed. Facts, public and private, are garnered. Evaluation — psychological, political and

¹⁰ A great deal of ink has been spilt, sometimes wasted, about the relationship of law and subjectivity. From formalism to realism to critical legal studies and beyond the debate continues. See e.g. Note " 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship" (1982) 95 *Harv L Rev* 1669; "Critical Legal Studies Symposium" (1984) 36 *Stan L Rev* 1; D. Kennedy & K. Klare, "A Bibliography of Critical Legal Studies" (1984) 94 *Yale L J* 461; A. Hunt, "Critical Legal Studies: A Bibliography" (1984) 47 *Mod L Rev* 369; J. Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984) 94 *Yale L J* 1; A. Hutchinson, "The Rise and Ruse of Administrative Law and Scholarship" (1985) 48 *Mod L Rev* 293. See also M. Horwitz, note 5 *supra*; Schwartz, note 5 *supra*; A. Simpson, "The Horwitz Thesis and the History of Contract" (1979) 46 *U Chi L Rev* 533; S. Presser, "Revising the Conservative Tradition: Towards a New American Legal History" (1977) 52 *NYU L Rev* 700; E. Purcell, *The Crisis of Democratic Theory* (1973). See also C. Howard, "Book Review" (1972) 18 *AJ Pol & Hist* 156.

¹¹ See e.g. J. Thomson, "The Teaching of Constitutional Law: Are the Materials Adequate?" (1983) 15 *UWALR* 418, 420; J.E. Clayton, *The Making of Justice: The Supreme Court in Action* (1964) 47 (quoting President Theodore Roosevelt's alleged comment after his recent appointee to the Supreme Court — Oliver Wendell Holmes — decided a case contrary to Roosevelt's predilection: "I could carve out of a banana a Judge with more backbone than that"); H. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (2nd ed. 1985); L. Tribe, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* (1985) 50-76; A. Kaufman, "Cardozo's Appointment to the Supreme Court" (1979) 1 *Cardozo L Rev* 23; R. Friedman, "The Transformation in Senate Response to Supreme Court Nominations: From Reconstruction to the Taft Administration and Beyond" (1983) 5 *Cardozo L Rev* 1; J. Thomson, "Removal of High Court and Federal Judges: Some Observations Concerning Section 72(ii) of the Australian Constitution" (June 1984) *ACLD* 36033, 36041 n. 8 (citing references). See also S. Simpson & P. Kelly, "Bob Ellicott on the Brink" (21 April 1979) *National Times* 9; R. Schneider, "The facts behind the anti-Ellicott campaign" (17-18 Jan. 1981) *Weekend Aust Mag* 4; G. Walsh, "Odds Lengthen Against Ellicott" (16 Jan. 1981) *Aust Financial Rev* 1, 2; D. Marr, "The Battle for the High Court" (18-24 Jan. 1981) *National Times* 3.

¹² See e.g. A. Mason, *Harlan Fiske Stone: Pillar of the Law* (1956); B. Schwartz, *Super Chief: Earl Warren and His Supreme Court — A Judicial Biography* (1983). See also R. Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (1975); D. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (1978); M. Marcus, *Truman and the Steel Seizure Case: the Limits of Presidential Power* (1977); P. Irons, *Justice at War* (1983); B. Woodward & S. Armstrong, *The Brethren: Inside the Supreme Court* (1979). See note 20 *infra*. See also J. Thomson, "A Torrent of Words: A Bibliography and Chronology of the Franklin Dam Case" (1984) 15 *F L Rev* 145 n.2 (citing references).

ideological — is only infrequently included. Broader comparative perspectives are also often missing. How does the individual's contribution to legal doctrines, interpretative techniques and the more mundane work of courts relate to the efforts of their contemporary brethren and judges who preceded or came after their term of office? Outside any particular jurisdiction an attempt, in geographically global terms, might be made to assess the relative ability of the judge being biographically perused against the credentials of judges who preside in foreign lands. Infiltration of some or all of these elements would provide a result which should satisfy not only readers who merely wish to add an enjoyable book to their literary repertoire but also others collating information and opinions for more esoteric pursuits.

Any judicial biography which with a reasonable degree of competence accomplished the encapsulation of some of these multi-dimensional facets would enhance the theoretical and pragmatic realms of legal literature. Jurisprudence, insofar as theories of law are enriched, stimulated, changed or germinated by intellectual endeavours of the courts, might seize upon detailed analysis of an individual judge's judicial opinions.¹³ Revelation of institutional working arrangements, illuminated through an exposition of a judge's daily routine should add

13 For a preliminary start see e.g. L. Zines, "Sir Owen Dixon's Theory of Federalism" (1965) 1 *FL Rev* 221; L. Zines, "Mr Justice Evatt and the Constitution" (1969) 3 *FL Rev* 153; G. Lehmann, "The Income Tax Judgments of Sir Garfield Barwick: A Study in the Failure of the New Legalism" (1983) 9 *Monash U L R* 115; M. Coper, "A Decade of Chief Justice Barwick — Crisis in Constitutional Interpretation" (1975) (unpub. paper partially reproduced in M. Coper, "The High Court and Section 90 of the Constitution" (1976) 7 *FL Rev* 1); P. Bickovskii, "No Deliberate Innovators: Mr Justice Murphy and the Australian Constitution" (1977) 8 *FL Rev* 460; M. Turnbull, "A radical on the High Court" (19 March 1977) *The Bulletin* 38; D. Armstrong, "The changing role of Justice Lionel Murphy" (20 March 1984) *The Bulletin* 32. See e.g. J. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); D. Shapiro, "Mr Justice Rehnquist: A Preliminary View" (1976) 90 *Harv L Rev* 293; J. Rydell, "Mr Justice Rehnquist and Self Restraint" (1975) 26 *Hastings L J* 875; J. Powell, "The Compleat Jeffersonian: Justice Rehnquist and Federalism" (1982) 91 *Yale L J* 1317; W. Luneburg, "Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction" (1982) 58 *Ind L J* 211; R. Riggs & T. Proffitt, "The Judicial Philosophy of Justice Rehnquist" (1983) 16 *Akron L Rev* 555; T. Kleven, "The Constitutional Philosophy of Justice William H. Rehnquist" (1983) 8 *Vermont L Rev* 1; J. Denver, "Justice Rehnquist and Constitutional Interpretation" (1983) 34 *Hastings L J* 1011; S. Davis, "Justice Rehnquist's Equal Protection Clause Analysis" (1984) 63 *Neb L Rev* 288; S. Massey, "Justice Rehnquist's Theory of Property" (1984) 93 *Yale L J* 541; M. Ash, "The Growth of Justice Black's Philosophy on Freedom of Speech" [1967] *Wis L Rev* 840; L. Maddocks, "The Two Justices Harlan on Civil Rights and Liberties: A Study in Judicial Contrasts" (1979-1980) 68 *Ky L J* 301; S. Dane, "'Ordered Liberty' and Self Restraint: The Judicial Philosophy of the Second Justice Harlan" (1982) 51 *U Cin L Rev* 545; R. Danzig, "How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion" [1977] *Sup Ct Rev* 257; R. Danzig, "Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking" (1984) 36 *Stan L Rev* 675; Comment, "The Emerging Jurisprudence of Justice O'Connor" (1985) 52 *U Chi L Rev* 389; R. Riggs, "Justice O'Connor: A First Term Appraisal" [1983] *Brigham Young U L Rev* 1; M. Silverstein, *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making* (1984); H. Pohlman, *Justice Oliver Wendell Holmes and Utilitarian Jurisprudence* (1984). See also R. Cover, "The Origins of Judicial Activism in the Protection of Minorities" (1982) 91 *Yale L J* 1287.

a touch of reality to scholarship which focuses upon the history, practice, procedure and organisation of courts.¹⁴ Milieu does matter. Like the relationship of substance and process,¹⁵ the reciprocal impact between judges and their environment, including other judicial brethren, counsel, litigants and less immediate influences emanating from the world outside the courtroom, requires comment and evaluation.¹⁶ A perceptive author, having laboured through these myriad topics, may as a closing gesture endeavour to glean from available fragments of a judicial life the larger themes and premises which often provide unstated but controlling and pervading postulates. Success in these adventures would ensure the availability of perceptive, as well as informative, judicial biography.

Prerequisites to the enjoyment of that achievement have also been paraded by Justice Frankfurter.¹⁷

The excellence of a biography is hardly to be measured by the extent to which it echoes a reader's opinion. A biography is to be judged by the insight it gives into the complexities of character, not by the satisfaction it affords the reader's presuppositions.

[J]udicial biography has all the difficulties that confront biographers of those who are thinkers rather than doers. But there are additional difficulties as to judges. A member of the Supreme Court is at once a soloist and part of an orchestra. While dissenting opinions seem like solo performances, even that is not always true and, in any event, the private rehearsals, as it were, behind the impenetrable draperies of judicial secrecy may tell much more about the soloist and the rest of the orchestra than the public performance even remotely reveals.

Judges like other people have their inborn qualities, deflected and disciplined, enriched or narrowed, by their education, their reading, their experience, their associations, their depth and drive of creative reflection, their capacity for rigorous, undeceiving self-analysis.

Judges are seldom men of great literary talent and not always are they copious letter writers yielding self-revelation . . . One can infer much of Holmes's outlook on life as well as on law from his opinions. But how much greater our opportunity for knowing him by reason of his voluminous correspondence and

14 See e.g. G. Sawyer, *Australian Federalism in the Courts* (1967) 35-51; Bennett, *Keystone of the Federal Arch*, note 5 *supra*. See e.g. Schwartz, note 12 *supra*; B. Woodward & S. Armstrong, note 12 *supra*; J. Goebel, *Antecedents and Beginnings to 1801* (1971) (vol. 1 of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States); G. Haskins & H. Johnson, *Foundations of Power: John Marshall, 1801-15* (1981) (vol. 2 of Holmes Devise); C. Swisher, *The Taney Period 1836-64* (1974) (vol. 5 of Holmes Devise); C. Fairman, *Reconstruction and Reunion 1864-88* (1971) (vol. 6 of Holmes Devise); A. Bickel & B. Schmidt, *The Judiciary and Responsible Government 1910-21* (1985) (vol. 9 of Holmes Devise).

15 See e.g. P. Brest, "The Substance of Process" (1981) 42 *Ohio St L J* 131; L. Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories" (1980) 89 *Yale L J* 1063.

16 See generally, "The Writing of Judicial Biography — A Symposium" (1949) 24 *Ind L J* 363; Pannam, note 2 *supra*. See also B. Schwartz, "Felix Frankfurter and Earl Warren: A Study of a Deteriorating Relationship" [1980] *Sup Ct Rev* 115; W. Mendelson, *Justices Black and Frankfurter: Conflict on the Court* (1961).

17 There is a growing literature on Felix Frankfurter. See e.g. L. Baker, *Felix Frankfurter* (1969); H. Hirsch, note 1 *supra*; M. Parrish, *Felix Frankfurter and His Times: The Reform Years* (1982); B. Murphy, *The Brandeis/Frankfurter Connection: The Secret Correspondence of Two Supreme Court Justices* (1982); L. Baker, *Brandeis and Frankfurter: A Dual Biography* (1984); Silverstein, note 13 *supra*. See also notes 19 and 24 *infra*.

that awing list of books covering his reading for half a century. Reading maketh a man only in part – yet how illuminating it would be to have a list of the books read by the justices, as well as to know who were their intimates before they went on the bench and after.

But the fullest knowledge of the elements that play upon a judge do not automatically reveal or explain him, any more than even Lowes's penetrating *Road to Xanadu* accounts for the creativeness of Coleridge. Still less do the variegated and illusive aspects of human personality lend themselves to tidy but tight categories. . .

[T]hese exciting problems . . . go to the root of the judicial function and to our capacity to produce men adequately equipped to discharge it.¹⁸

What materials must be used to accommodate such specifications and thereby craft a first rate judicial biography? Obvious sources of information will not suffice. Opinions in law reports, scholarship in journals and books, parliamentary and other public addresses, personal letters and diaries are amongst the usual litany of select bibliographical material.¹⁹ More, however, must be obtained. Unpublished judicial opinions,²⁰ court records, transcripts of argument, including occasions

18 Letter of 27 December 1948 from Felix Frankfurter to Charles Fairman reproduced in (1949) 24 *Ind L J* 367-369. Much of Holmes' correspondence has now been published. See note 19 *infra*.

19 See e.g. J. Latham, "Changing the Constitution" (1953) 1 *Sydney L Rev* 14; J. Latham, "Interpretation of the Constitution" in R. Else-Mitchell (ed.), *Essays on the Australian Constitution* (1961); O. Dixon, *Jesting Pilate and Other Papers and Addresses* (1965); O. Dixon, "The Law and The Constitution" (1935) 51 *Law Q Rev* 590; H. Evatt, *Certain Aspects of the Royal Prerogative* (LL.D. thesis Uni. Syd. 1924); H. Evatt, *The King and His Dominion Governors* (2nd ed. 1967); H. Evatt, *William Holman: Australian Labour Leader* (1942); H. Evatt, *Rum Rebellion* (1938); H. Evatt, "Amending the Constitution" (1937) 1 *Res Judic* 264; H. Evatt, "The Discretionary Authority of Dominion Governors" (1940) 18 *Can B R* 1; H. Evatt, "Constitutional Interpretation in Australia" (1939) 3 *U Toronto L J* 1; H. Gibbs, "Developments in the Jurisdiction of Federal Courts" (1981) 12 *UQLJ* 3; H. Gibbs, "The Constitutional Protection of Human Rights" (1982) 9 *Monash U L R* 1; H. Gibbs, "The State of the Australian Judicature" (1983) 4 (12) *Legal Rep* 4; H. Gibbs, "The High Court Today" (1983) 10 *Sydney L Rev* 1; H. Gibbs, "The State of the Judicature" (1985) 59 (9) *L Inst J* 968; H. Gibbs, "Some Thoughts on the Australian Constitution" (Nov. 21, 1985) (Address delivered at All Nations Club, Sydney); A. Mason, "The courts and their role in changing the law today" in A. Tay & E. Kamenka (eds), *Law-making in Australia* (1980) 11; A. Mason, "Book Review" (1983) 6 *UNSWLJ* 234; A. Mason, "The role of Counsel and Appellate advocacy" (1984) 5 (13) *Leg Rep* 4; A. Mason, "Jurisdictional and Procedural Constraints on the Evolution of Australian Law" (1984) 10 *Sydney L Rev* 253; L. Murphy, "The Responsibility of Judges" in G. Evans (ed.), *Law, Politics and the Labor Movement* (1980) 2; L. Murphy, "Courts' work 'needs critics'" (26 May 1980) *Canberra Times* 26, 28 [Supplement on High Court 12,14]; L. Murphy, "Preface to the First Issue" (1982) 1 *A J L & Socy* 6; L. Murphy, "Standing and the Law" (1985) 10 *Sydney L Rev* 483; D. Dawson, "The Constitution - Major Overhaul or Simple Tune-up?" (1984) 14 *MULR* 353. See also M. Howe (ed.), *Holmes-Pollack Letters* (2nd ed. 1961); M. Howe (ed.), *Holmes-Laski Letters* (2 vols 1953); J. Peabody (ed.), *The Holmes-Einstein Letters* (1964); D. Burton (ed.), *Holmes-Sheehan Correspondence* (1976); D. Burton (ed.), *Progressive Masks: Letters of Oliver Wendell Holmes, Jr., and Franklin Ford* (1982); M. Freedman (ed.), *Roosevelt and Frankfurter: Their Correspondence 1928-45* (1967); H. Phillips, *Felix Frankfurter Reminisces* (1960); J. Lash (ed.), *From the Diaries of Felix Frankfurter* (1975). Judges occasionally provide detailed autobiographical manuscripts. See e.g. Rickard, note 9 *supra*, vii; D. Danelski & J. Tulchin, *The Autobiographical Notes of Charles Evans Hughes* (1973); E. Warren, *The Memoirs of Earl Warren* (1977).

20 See e.g. A. Bickel, *The Unpublished Opinions of Mr Justice Brandeis: The Supreme Court at Work* (1957); B. Schwartz, *The Unpublished Opinions of the Warren Court* (1985).

prior to judicial appointment when the judge represented clients in court,²¹ law office opinions, files and cases²² and, as Frankfurter suggests, a knowledge of the judge's personal library²³ need also to be within the author's field of inquiry. Boundaries of research ought not to be represented by law books and legal activities. Social, economic, psychological and philosophical theories and practices of life must also be investigated.²⁴ Nothing can substitute for an imaginative, patient and persistent quest to locate, synthesise and interpret. For a judicial biographer anything less would be insufficient.

Can *Samuel Walker Griffith* and *H.B. Higgins: The Rebel as Judge* carry accolades reserved for biographical enterprises which nurture and exhibit at least some of these traits? An affirmative answer might be proffered at least insofar as both books provide some intellectual and practical sustenance. For example, *Samuel Walker Griffith* and *H.B. Higgins: The Rebel as Judge* extol immigrant success stories. Chronologically and geographically the setting is almost identical. Professional achievements also follow similar paths. Admission to the legal profession, parliamentary and ministerial service, participation in debating and drafting of the Australian Constitution²⁵ and appointment to the High Court of Australia are among the focal points. Even the personal histories of Samuel Griffith and Henry Bournes Higgins contain a number of more than fleeting resemblances. Fathers in religious service, dominant mothers, long and seemingly happy marriages, death of a son, visits to England and America and life spans of nearly commensurate duration are some obvious private details behind their public image. Differences in degree and kind are also

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- 21 See e.g. D. Marr, *Barwick* (1980) 39-42, 63-68, 83-87, 106-123; A. May, *The Battle for the Banks* (1968) 82 n. 14; Sawyer, note 14 *supra*, 44-45. See also L. Friedman (ed.) *United States v. Nixon: The President before the Supreme Court* (1974); L. Friedman (ed.), *Argument: The Oral Argument Before the Supreme Court in Brown v. Board of Education of Tepeka, 1952-55* (1970 rep. 1983); L. Friedman, *Obscenity: The Complete Oral Arguments Before the Supreme Court in the Major Obscenity Cases* (rev. ed. 1983).
- 22 See e.g. P. Brazil & B. Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia: volume 1: 1901-1914* (1981); Joyce, note 8 *supra*, 33, 36, 46-52, 63-69, 74-79, 119-122; C. Cullen & H. Johnson (eds), *The Papers of John Marshall* (projected 10 vols 1974 vol. 1, 1977 vol. 2, 1979 vol. 3, 1984 vol. 4); I. Rhodes (ed.), *The Papers of John Marshall: A Descriptive Calendar* (2 vols 1969); M. Urofsky & D. Levy, *Letters of Louis D. Brandeis* (5 vols 1972-1978).
- 23 See e.g. D. Meador, *Mr Justice Black and His Books* (1974). In the context of the judicial appointment process it has been suggested that "[p]robably the best place to look, if you want to guess [a judge's] future attitude toward important cases, is not in his file of clients or his safe-deposit box but at the books in his library at home." Z. Chafee, "Charles Evans Hughes" (1949) 93 *Proc Am Philos Society* 267, 272.
- 24 For examples of how these factors and personal perceptions and values infiltrate judicial decision making see e.g. Pohlman, note 13 *supra*; Hirsch, note 1 *supra*; A. Stone, "Book Review" (1981) 95 *Harv L Rev* 346; B. Glad, "Using Personality Theory to Dispel the Frankfurter Enigma" (1982) 10 *Rev Am Hist* 241; E. Gressman, "Psycho-Enigmatizing Felix Frankfurter" (1982) 80 *Mich L Rev* 731; A. Watson, "A Psychohistorical view of Mr. Justice Frankfurter" (1982) 80 *Mich L Rev* 742; J. Howard, *Mr. Justice Murphy: A Political Biography* (1968); R. Daniels, "Tempering Justice with Murphy" (1985) 13 *Rev Am Hist* 257.
- 25 Commonwealth of Australia Constitution Act, 63 & 64 Vict. c. 12 (1900) (U.K.).

illuminated by comparative glances at the Griffith and Higgins' biographies. Prominent is Griffith's experience in Queensland colonial executive and judicial offices. Higgins' brief sojourn as Commonwealth Attorney-General is comparable neither in tenure nor responsibilities. After gathering facts and evaluating personal preferences and philosophies the intriguing question, however, remains: How did these individual characteristics meld to generate distinctive and, at least in constitutional law cases,²⁶ antithetical judicial doctrines, theories and decisions?

Samuel Walker Griffith (1845-1920) resided for a considerable portion of his life in the top echelons of government in Australia. Within three decades of his birth in Wales and arrival in Australia (1854), Griffiths graduated with Bachelor (1862) and Master (1870) of Arts degrees from Sydney University, gained admission as a Queensland Barrister (1867) and was elected to the Queensland Legislative Assembly (1872). By 1874 he was Attorney-General with responsibilities which included reviewing the constitutional validity of colonial legislation.²⁷ At 32 years of age Griffith advised the Queensland Governor on an important matter of constitutional law.²⁸ In 1875 Griffith met Sir Henry Parkes and during 1879 became the Leader of the Opposition and was offered, but refused, an appointment to the Queensland Supreme Court. From those beginnings Samuel Griffith's public projectory almost²⁹ uniformly ascended. Premier of Queensland (1883-1888, 1890-1893), President of the Federal Council of Australasia³⁰ (1888), principal draftsman and expositor of the 1891 Constitution Bill,³¹ Chief Justice of the Queensland Supreme Court (1893-1903) and Chief Justice of the High Court of Australia (1903-1919) are the pinnacles of his success.

26 See e.g. *Barger* case (1908) 6 CLR 41; *Union Label* case (1908) 6 CLR 469; *Huddart Parker* case (1909) 8 CLR 330. See generally L. Zines, *The High Court and the Constitution* (1981) 1-9, 59-60; P. Coward, *Henry Bournes Higgins and the Australian Constitution* (LL.M. thesis A.N.U. 1975). Cf. Joyce, note 8 *supra*, 266-273, 282-283, 288-301, 326-337, 341-342 and Rickard, note 9 *supra* 265-288.

27 Joyce, note 8 *supra*, 52. Similar requirements to review the validity of colonial legislation are discussed in J.A. Thomson, *Judicial Review in Australia: The Courts and the Constitution* (S.J.D. thesis Harvard 1979) 44-57.

28 Joyce, note 8 *supra*, 44. When Griffith was Chief Justice of the Queensland Supreme Court he had "frequent discussions" with Queensland Governors. *Id.*, 217. He also gave advice to Governors-General. *Id.*, 215, 249, 259, 287, 321, 349-352. See also D. Markwell, "On Advice from the Chief Justice" (1985) 29 (7) *Quadrant* 38; D. Markwell, "The Dismissal" (1985) 29 (10) *Quadrant* 5.

29 Griffith was "in Opposition" for "twenty-six months" (May 1888-August 1890) after being the Queensland Premier. Joyce, note 8 *supra*, 150.

30 Federal Council of Australasia Act, 48 & 49 Vict. c. 60 (1885) (U.K.). Griffith drafted and revised the Federal Council of Australasia Bill 1884. Joyce, note 8 *supra*, 90. The Bill is in *Report of the Proceedings of the Intercolonial Convention* (1883) 17-20.

31 Joyce, note 8 *supra*, 185-215. See also J. La Nauze, *The Making of the Australian Constitution* (1972) 289-290, 297-302 (successive versions of 1891 Bill).

In the welter of detail, personalities, economic, political and legal history which Roger Joyce³² unfolds³³ in *Samuel Walker Griffith* to reveal these highlights are secreted two important, but hitherto neglected, steps in the evolution of the Australian Constitution. First is Griffith's response to proposals to divide Queensland into northern and southern colonies.³⁴ He suggested provincial autonomy rather than territorial separation and in 1890 drafted terms upon which central and provincial executives and parliaments might operate.³⁵ Amended provisions were provided in 1891 to the Queensland Legislative Assembly.³⁶ Details of the division of legislative, executive and judicial power between the colony – “The United Provinces of Queensland” – and its central and northern provinces were elaborated in two 1892 Queensland Constitution Bills which Griffith introduced into the Legislative Assembly. Neither Bill passed both Houses of the Queensland Parliament.³⁷ Together with Griffith's Federal Council of Australasia Bill 1884,³⁸ these 1890 and 1892 documents in numerous instances constitute a link with draft and final provisions in the

32 Professor Joyce died on 30 October 1984. J. Gregory, “Roger Joyce” (1985) 21 *Hist Stud* 469.

33 The first manuscript of *Samuel Walker Griffith* was “780,000 words”. The second was “442,000 words”. The book is “200,000 words”. Joyce, note 8 *supra*, x.

34 Unfortunately neither the text nor footnotes of *Samuel Walker Griffith* provide precise or detailed references on this matter. Joyce, note 8 *supra*, 101, 105-106, 173-175. See generally C. Doran, *Separatism in Townsville 1884 to 1894: “We Should Govern Ourselves”* (1981); C. Doran, *North Queensland Separatism in the Nineteenth Century* (Ph.D. thesis James Cook Uni. 1981) esp. 327-372 (“Griffith's Provincial Scheme”); G. Shaw, “The ‘Tangled Web’ of Separation” (1983) 29 *A J Pol & Hist* 245. As to the creation of new States within the Australian Federation see ss. 111, 121 of the Commonwealth Constitution. For secession from the Australian Federation see G. Craven, “An Indissoluble Federal Commonwealth: The Founding Fathers and the Secession of an Australian State” (1983) 14 *MULR* 281; G. Craven, “The Constitutionality of the Unilateral Secession of an Australian State” (1984) 15 *FL Rev* 123; G. Craven, *The Lawfulness of the Secession of an Australian State* (LL.M. thesis Melb. Uni. 1984); G. Craven, *Secession: The Ultimate States' Right* (1986) (forthcoming).

35 Macrossan on 17 Oct. 1890 moved a motion for territorial separation of the Northern portion of Queensland. *Qld. Legislative Assembly Debates* (vol. 62, 1890) 984. Griffith's amendment for a provincial scheme (*id.*, 996) was passed (*id.*, 1092-1093). On 11 Nov. 1890 Griffith gave notice of an addition to his amendment which specified a division of executive and legislative powers. (*Id.*, 1330-1331). This division of powers is also reproduced in *id.*, 1518, 1593-1594 and *Journals of the Legislative Council of Queensland* (vol. 41, Pt 1, 1891) 13-15. See also La Nauze, note 31 *supra*, 49, 51-52, 338 n.35. For debate on this see *Qld. Legislative Assembly Debates* (vol. 62, 1890) 1509-1530, 1593-1617.

36 On 15 Sept. 1891. *Qld. Legislative Assembly Debates* (vol. 64, 1891) 1045-1046, 1057-1058, 1101-1102. For example the 1890 proposal assigned 34 heads of power and the 1891 proposal 38 to the United Provinces Legislature. Debate in 1891 see *id.*, 1046-1052, 1058-1090, 1102-1126, 1511-1522, 1595, 1750-1773, 1776-1796.

37 The Queensland Constitution Bill 1892 was introduced on 23 June 1892 and Griffith's second reading speech was on 26 July 1892. *Qld. Legislative Assembly Debates* (vol. 67, 1892) 458, 786-798. Debate on the Bill see *id.*, 839-863, 868-885, 893-909; *id.*, (vol. 68) 912-934, 1016. A revised Bill (No. 2) – The Queensland Constitution Bill 1892 – was introduced on 18 August 1892. *Id.*, 1017. Griffith's second reading speech was on 8 Sept. 1892. *Id.*, 1207-1211. Debate on the revised Bill see *id.*, 1016-1020, 1207-1218, 1224-1246, 1340-1354, 1356-1374, 1401-1416, 1433-1472, 1481-1491, 1493-1526, 1543-1554. Debate in the Legislative Council on the revised Bill see *Qld. Legislative Council Debates* (vol. 66, 1892) 162-188.

38 See note 30 *supra*.

Australian Constitution.³⁹ Revelation of Griffith's presence in Melbourne and discussions with colonial premiers in 1899 during their deliberations on and amendments of the 1898 Constitution Bill is the second bonus. Left to be explored and precisely reconstructed is what occurred.⁴⁰ *Samuel Walker Griffith* should therefore serve as a catalyst for historically accurate observations concerning the lineage of the Constitution's individual sections.

Some, though not a great deal, of 'inside' information touching upon relationships between judges and processes of judicial decision-making is provided in *Samuel Walker Griffith*.⁴¹ Much more attention is devoted to reciting opinions Griffith delivered as public reasons for his decisions.⁴² Given the availability of law reports⁴³ an opposite balance might have been more stimulating. Do the Griffith papers⁴⁴ contain draft opinions, notes between judges as to the formulation and conclusion of their opinions or correspondence and diary entries which may assist in conveying a better sense of how the court carried out its adjudicative function? If so, Griffith's tenure on the Queensland Supreme Court and the High Court could provide contrasts and comparisons over a wide range of common law, equity, probate, statutory and constitutional law cases.

John Rickard's biography⁴⁵ of Henry Bournes Higgins (1851-1929) does exhume nuances.⁴⁶ *H. B. Higgins: The Rebel as Judge* narrates the story of an active, not sedentary or cloistered, life in the law. Following his arrival in Australia (1870) from Ireland, Higgins graduated from Melbourne University Law School and was admitted to the Victorian Bar (1876), entered the Victorian Legislative Assembly (1894-1900), participated in the 1897-1898 Australasian Constitutional Convention, became a member of the House of Representatives (1901-1906) and Commonwealth Attorney-General (1904) and was a Justice of the High Court (1906-1929) and President of the Commonwealth Arbitration Court (1907-1921). Interwoven are general themes — Irish education,

39 Professor La Nauze considers that Griffith's 1890 proposal "is relevant to what ultimately became Sec. 51" of the Constitution and outlines s.51(xxvi) and (xxix) as direct connections. La Nauze, note 35 *supra*, 49, 51-52. There are others. The 1891 proposal and 1892 Bills were introduced after the 1891 Constitutional Convention.

40 Joyce, note 8 *supra*, 207, 395 n.66. Professor Joyce leaves a tantalising opening: "Perhaps Griffith had a hand in drafting the eight decisions that were inserted in the constitution in precisely the words agreed to by the premiers." *Id.*, 207 (footnote omitted).

41 Joyce, note 8 *supra*, 220, 271, 295-296, 301, 327, 346, 347, 360. *Cf.* note 59 *infra*.

42 Joyce, note 8 *supra*, 220-245 (Supreme Court), 268-285, 289-318, 326-346 (High Court).

43 Professor Joyce utilises the Queensland Law Journal Reports and Commonwealth Law Reports. Griffith's unreported circuit cases are also mentioned. Joyce, note 8 *supra* 240-241, 398-399 nn. 47-55. These together with the description of the cases in which Griffith appeared as Counsel (*id.*, 24-26, 31, 33, 36-38, 47-51, 65-69, 74-79, 119-122) provide a vivid picture of commercial and criminal aspects of colonial life.

44 Joyce, note 8 *supra*, 412-419 (list of primary sources). *Cf.* note 60 *infra*.

45 For Rickard's views on biography see S. Sayers, "Some words of advice on the historian as a biographer" *Age* 8 December 1984, 20 (Saturday Extra).

46 Rickard, note 9 *supra*, 266, 271, 274, 279, 281, 283, 285-288.

colonial and federal politics and family life during the late nineteenth and early twentieth centuries – which contributed to Higgins' life and character. Numerous personalities also played a part. Alfred Deakin and William Hughes, for example, influenced his political and judicial careers. His mother's indomitable character and the death of his only child in the First World War pervade almost every aspect of Higgins' private and family life. Three features of *H. B. Higgins: The Rebel as Judge* will, however, at least for lawyers, be of particular interest.

Higgins' public⁴⁷ participation in debating, drafting and opposing the Australian Constitution might be expected to provide some clues to his subsequent judicial utterances on its nature and provisions. If any correlation can be postulated, John Rickard does not, in this instance,⁴⁸ attempt to hypothesise.⁴⁹ Speculation might centre upon two provisions of the Constitution which are synonymous with Higgins' status as a Founding Father. Extension of an industrial dispute beyond the limits of any one State as a component of federal legislative power, conferred by section 51(xxxv), with respect to conciliation and arbitration was proposed by Higgins. Although rejected by the 1897 Adelaide Session of the Constitutional Convention, he was, by a vote of 22 to 19 at the 1898 Melbourne Session, able to turn defeat into victory. Without that interstate element, the Commonwealth Parliament may have been able to extinguish State industrial relations machinery and on this issue John Rickard suggests radicals and trade unionists believed that the future of progressive politics resided with State, not Commonwealth, governments.⁵⁰ Similarly, Higgins' proposal to prohibit State and Commonwealth laws establishing any religion or prohibiting the free exercise of any religion was not accepted. His amended prohibition applicable only to Commonwealth laws, however, eventually emerged as section 116.⁵¹ Higgins was not always on the winning side. Several of his suggestions, for example, that equal State representation in the Senate was unnecessary and undemocratic and that the amendment requirements rendered the Constitution excessively rigid, did not persuade a majority of Convention delegates. In the final equation, for Higgins, failures outweighed successes. He became president of the

47 There was also a private side. For a glimpse see Rickard, note 9 *supra*, 96-97, 321 (letter to Deakin explaining tactics).

48 For another instance see *id.*, 103 (reconciling Higgins' views concerning amendments to the Constitution).

49 Hints do, however, appear. *Id.*, 206-207 ("Federation"). See also *id.*, 265-266, 272-273.

50 *Id.*, 96-98. See also J. Richardson, *Patterns of Australian Federalism* (1973) 32-35; J. Macken, *Australian Industrial Laws* (2nd ed. 1980) 3-14. For Higgins' judicial views see Rickard, note 9 *supra*, 272, 279.

51 Rickard, note 9 *supra*, 98. See also R. Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth 1891-1906* (1976). See also *Judd v. McKeon* (1926) 38 CLR 380, 387 (Higgins J.); L. Zines & G. Lindell (ed.), *Sawyer's Australian Constitutional Cases* (4th ed. 1982) 139.

Anti-Convention Bill League and actively campaigned against the adoption of the Constitution.⁵²

Presidency of the Commonwealth Arbitration Court offered the opportunity to conduct a more successful campaign. Delineation of a new province for law and order became Higgins' central objective. The *Harvester* judgment, enunciating a principle of "the normal needs of the average employee, regarded as a human being living in a civilized community" to calculate a minimum wage,⁵³ exposed his sympathies and indicated the likely direction of future industrial awards. Creation and consolidation of a Commonwealth arbitration system, not without moments of difficulty and confrontations, occurred under Higgins' aegis. *H.B. Higgins: The Rebel as Judge* evokes the multifarious tensions between the Arbitration Court and unions, employers, politicians and the High Court. On more than one occasion when the latter curtailed the Arbitration Court's activities, Higgins, in High Court attire, dissented.⁵⁴

A relatively small portion of *H.B. Higgins: The Rebel as Judge* is an exposition of Higgins' jurisprudential efforts on the High Court. Within that focus, predominant attention is devoted to constitutional cases in which Higgins rendered an opinion.⁵⁵ This canvas, painted during Higgins' twenty-two years of judicial tenure, is too large to encompass in twenty-three pages more than a superficial glance. Readers seeking detailed analysis and articulation of "the great forces that are behind every detail"⁵⁶ will have to look elsewhere.⁵⁷ Some revelations, but not approaching the dimension of internal disclosures available about decision-making processes of the United States Supreme Court,⁵⁸ are provided.⁵⁹ Are any languishing in collections of private

52 Rickard, note 9 *supra*, 94-107.

53 *Id.*, 172. See generally *id.*, 170-204.

54 "[I]t might well have seemed that Higgins never quite discarded the presidency [of the Arbitration Court] when the High Court considered cases which related to conciliation and arbitration." *Id.*, 276. See e.g. *Barger* case, note 26 *supra*; *Alexander* case (1978) 25 CLR 434; Rickard, note 9 *supra*, 174, 241, 269-271, 275-276.

55 *Id.*, 265-288. *Barger* case, note 26 *supra*; *Huddart Parker*, note 26 *supra*, *Whybrow* cases (1910) 10 CLR 266, (1910) 11 CLR 311; *Sawmillers'* case (1912) 15 CLR 308; *Farey v. Burvett* (1916) 21 CLR 433; *Alexander* case, note 54 *supra*; *Engineers'* case (1920) 28 CLR 129; *McArthur* case (1920) 28 CLR 530; *Pirrie v. McFarlane* (1925) 36 CLR 170; *Cowburns'* case (1926) 37 CLR 466. While "constitutional cases" are "the primary focus" of Rickard's biography — Rickard, note 9 *supra*, 266 — Professor Joyce includes a much greater variety. See note 42 *supra*.

56 "[T]o feel, the great forces that are behind every detail — for that makes all the difference between philosophy and gossip, between action great and small . . ." O. Holmes, "The Class of '61" in *Speeches by Oliver Wendell Holmes* (1891 rep. 1934) 95, 96. John Rickard may not agree that this should be attempted in a biography. Sayers, note 45 *supra*. But see note 46 *supra*.

57 See e.g. Zines, note 26 *supra*; Coward, note 26 *supra*.

58 See e.g. R. Saphire, "The Value of *The Brethren*: A Response to Its Critics" (1980) 58 *Tex L Rev* 1475; R. Fiscus, "Studying *The Brethren*: The Legal-Realist Bias of Investigative Journalism" [1984] *A B F Res J* 487. See also note 12 *supra*.

59 Rickard, note 9 *supra*, 268, 274, 275, 279, 287. Cf. note 41 *supra*.

correspondence or memoirs? John Rickard, like Professor Joyce, has consulted other manuscripts, including the Deakin and Griffith papers.⁶⁰ Higgins' autobiography ends in 1914. Whether a subsequent volume encapsulating the judicial years of Higgins' life was ever written and, if so, has been lost remains a matter of speculation.⁶¹

Samuel Walker Griffith and *H.B. Higgins: The Rebel as Judge* can join, with pride, the full length biographies of other Justices of the High Court. Cumulatively they add a personal dimension to the apex of Australia's judiciary. In terms of Australian law and history that is a significant achievement. It is, however, only a start. For those interested in courts, and particularly the High Court, as an institution of government in Australia much work remains to be done.

60 Rickard, note 9 *supra*, 339-340 (list of primary sources). *Cf.* note 44 *supra*.

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APPENDIX A – JUSTICES OF THE HIGH COURT

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