

Book Review

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Book Review

ON UNDERSTANDING THE SUPREME COURT. By Paul A. Freund. Boston. Little, Brown and Company, Pp. X, 130. \$3.00.

This book originated from a series of three lectures delivered as the Rosenthal Foundation lectures at the Law School of Northwestern University in April 1949. The author, Professor of Law at Harvard University, has added an introduction and notes. The result is a very readable, yet documented, analysis of the Supreme Court in action with an excellent chapter on Mr. Justice Brandeis describing the role played by such a justice.

Chapter I, "Concord and Discord," is introduced with the suggestion of Alfred North Whitehead "that the key to a science of values will be found in aesthetics" and "that the Supreme Court is seeking the aesthetic satisfaction of bringing the constitution into harmony with the activities of modern America". After a brief suggestion as to the philosophical problem of the Court in reconciling "the One and the Many; one nation and many states; one Supreme Court and many organs of government; one Court speaking with many, often disconcertingly many voices," the author settles down to a discussion of the Court's recently rapidly expanded development of the constitutional protection afforded in the field of civil liberties, of "human rights contrasted with property rights". The author concludes that "the degree of concord in this area is much more important than the degree of discord, and that the themes of discord are not . . . symmetrical". His support for this conclusion is a brief, interesting, and illuminating portrayal of much of what the Court has been doing in recent years and how it is controlled by (as well as controls in part) the framework of democratic government within which it operates.

Chapter II, "Portrait of a Liberal Judge: Mr. Justice Brandeis," is a careful study of this Justice by a former Secretary who had opportunity to know him intimately. Suggesting that Mr. Justice Brandeis' liberalism as a judge lay "in an essential morality of mind" which quality was "his essential and enduring contribution to the Court", the author finds four principal manifestations of this quality: "(1) an insistence on knowledge as indispensable to

judging; (2) rejection of opportunism; (3) an insistence on jurisdictional and procedural observances; and (4) rejection of sentimentality". The first manifestation is reflected in the Brandeis brief and a similar approach to problems before the Court. The second is developed from several illustrations and the author's personal conviction that Justice Brandeis did not in his opinions espouse his personal evaluations of business practices or social cures except when in "elucidation of legislation which he was glad to accept". The third is illustrated by: his devotion to the federal principle in his opinion in *Erie Railroad v. Tompkins*¹; his rejection of nationalization of rules of procedure for the federal courts; his stand against declaratory judgments as applied to the determination of constitutional questions; his forbearance when sitting in judgment on administrative determinations but insistence upon their observance of procedural guarantees; his further insistence that procedures for challenging administrative orders be adequate; and his pervading concern with the fitness of the members of the body politic for their respective tasks, legislatures, administrative boards, and courts. The fourth manifestation is illustrated by cases pointing to the fact that as in all great judges his sentiments of affection yielded to devotion to the larger cause, that his sense of "institutional solidarity for the court was stronger than his attachment to anyone of his colleagues, even to Holmes", and that his opinions were "uniformly addressed to problems and not to persons".

Chapter III, "Judge and Company' In Constitutional Law" starts with the thought that in relation to the quotation from Jeremy Bentham, the "Company" who share the lawmaking activity of Supreme Court judges include at least the lower tribunals as well as counsel. After brief discussion of the part played by "strong" courts, the author turns to analysis of the shaping of constitutional litigation by the strategy and tactics of counsel. He moves from illustrations from the cases argued by Daniel Webster, which demonstrate his tremendous influence as advocate, to the more recent instances of planned litigation from the Attorney General's office, the federal agencies, or from private counsel for large industrial groups. The TVA cases, the Holding Company litigation, the Gold Clause cases, intergovernmental tax immunity cases and others are discussed. The responsibility of counsel is heavily emphasized. The chapter concludes with two important practical implica-

¹ 304 U. S. 64 (1938).

tions from the Supreme Court's recent reluctance to declare state laws unconstitutional under the due process clause unless basic liberties are involved: (1) that constitutional litigation over state laws will be concentrated more and more in state courts with state constitutional law becoming of dominant importance, and (2) that in the field of federal legislation, the constitutional issues may be transferred from the judicial to the legislative stage, with the constitutional lawyer's function being discharged more frequently before Congressional committees than in court.

The book is recommended reading for those who are interested in understanding the Supreme Court during this new transition period of its history.

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