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Book Review

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Nine Men: A Political History of the Supreme Court From 1790 to 1955. By Fred Rodell. New York. Random House, 1955. Pp. xii, 338. $5.00.

Fred Rodell, professor of law at Yale, has produced a *strong* book. In a candidly written preface he exposes two of his fundamental prejudices: an admiration for liberalism and liberals (among whose ranks he counts himself), and a devotion to the kind of personal integrity which combines intellectual honesty with courage. The title of the first chapter, however, is even more revealing of the particular slant of the author's view of the role of the Supreme Court: "Powerful, Irresponsible, and Human." The Court, according to Rodell, is and has been the most powerful and irresponsible group of men in the world.

Following from this irresponsible possession of power by mere humans is the fact that the Court is basically a political body. The whole idea of a government of laws and not of men is "an insult and an undemocratic canard".[1] The evil in the situation is that these men who enjoy life tenure "inevitably act as a check, a lag, on the forward momentum of government and on the democratic directing of national policy by other men who are perpetually responsible to the voters. . . ."[2] The oft-claimed advantage of this judicial check, the protection of civil liberties, Rodell emphatically denies. It is precisely here, he insists, that the justices throughout American history have been "most bumblingly bashful, most reluctant to assert the autocratic power they hold. . . ."[3]

With this frank beginning Professor Rodell unfolds the history of the Court from 1790 to 1955. His interest is not primarily in the great legal issues as such but in the men who form the ruling clique which uses "ceremony and secrecy, robes and ritual, as instruments of its *official* policy, as wellsprings of its power".[4] The story of the Supreme Court, and indeed of the nation, from 1801 to 1833 is John Marshall's powerful personality. The great Chief Justice formed *his* court into a super-legislature at the apex of political power and from that height asserted the doctrine

[1] RODELL, 6.

[2] *Ibid*, 10.

[3] *Ibid*, 23. *Cf.* Frank, *Review and Basic Liberties* in CAHN (ed.), SUPREME COURT AND SUPREME LAW (1954), 114: "The dominant lesson of our history in the relation of the judiciary to repressions is that the courts love liberty most when it is under pressure least."

[4] RODELL, 4.

of national supremacy. Neither of these acts was done for its own sake or for any higher motive than the protection of vested interests. If alive today and consistent to his basic principles, Marshall would be, Rodell believes, an ardent states-righter.

After Marshall came Roger Brooke Taney. Rodell sees Jackson's appointee from Maryland as fundamentally neither a liberal nor a states-righter, but as the judicial spokesman of the Old South.[5] Under Taney's leadership the Court led on to war and to judicial impotence. Then after the ardor of the Reconstruction Congresses had cooled, the Supreme Court rode back to power under the guidance of railroad and corporation lawyers. The instrument in this resurrection was, of course, the substantive due process interpretation of the Fourteenth Amendment.

The peak of Supreme Court power, Rodell writes, was attained in 1895 in the *Debs*,[6] *Knight*,[7] and *Pollock*[8] decisions. What was laid down there was not law in any scholarly sense of the word but pure, or rather impure, politics. And, "in this Court created vacuum from almost all government restriction, this open invitation to a money-making mazurka, the kings and captains of industry and finance moved with loose-limbed abandon all the way from McKinley's 'full dinner pail' to Hoover's 'two cars in every garage'."[9]

Justice Holmes and his influences on the Court are the subjects of a full chapter. Obviously fascinated by the character and strength of Holmes, Rodell presents the period from 1902 to 1933 against the backdrop of the dissents of the Olympian. But it was after Holmes' resignation from the bench that the most famous, important, and interesting short span period in Court history occurred. For three years, from 1935 to 1937, the Supreme Court majority did battle with Franklin D. Roosevelt and won that battle — at the cost of defaulting the war.[10] Then, when Roosevelt was afforded the opportunity of appointing his own people, for the very first time liberalism was promoted from a minority dissent to a Court majority view.

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[5] Compare conclusions in SWISHER, ROGER B. TANEY (1935), Ch. 27.

[6] In re Debs, Petitioner, 158 U. S. 564 (1895).

[7] United States v. E. C. Knight Company, 156 U. S. 1 (1895).

[8] Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601 (1895).

[9] RODELL, 186.

[10] Compare statement of JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS (1941), 196: "In politics the blackrobed reactionary Justices had won over the master liberal politician of our day. In law the President defeated the recalcitrant Justices in their own Court."

The honeymoon was short, however. Quickly this first liberal Court splintered into factions. This happened principally, Professor Rodell believes, because of the fuzziness of the whole political concept of liberalism.[11] Each justice on the Roosevelt Court had a different response to the intra-liberal issues. The most enduring contribution of the New Deal Court to constitutional law is labeled as the one great issue on which the liberal judges were able to unite, the defense of Negro civil rights.

With the death of Chief Justice Stone, the resignation of Roberts, and later the passing of Murphy and Rutledge, President Truman selected four justices who "judged by either ability or industry, in qualitative or quantitative estimate of their work, were the least happy choice of a Court quartet since President Harding picked Taft, Sutherland, Butler, and Sanford, about a quarter of a century before".[12]

The majority of the Vinson Court, the Truman appointees plus Reed and frequently Jackson and Frankfurter, were more often the "nation's shame than its pride".[13]

> "The tragedy . . . is that the Supreme Court's majority, with the most magnificent opportunity ever granted so small a group to show the world the profound difference between the humanity of a democracy and the brutality of a dictatorship, so miserably failed; that the Court—except in the Negro cases—while purporting to fight a foreign tyranny, actually aped it."[14]

For the future, Rodell sees an outlook hardly less bleak unless Chief Justice Warren is able to lead his brethren along the path of the recent Black-Douglas dissents.

Although no summary can do justice to Professor Rodell's smooth and lucid prose, enough has been said to indicate the general tenor of the book. It is not a balanced history, and indeed makes no pretention to being more than an interpretative essay. Precisely because it will evoke criticism from both conservatives and liberals this bold interpretation is of value. Like Professor William Winslow Crosskey's monumental volumes,[15] *Nine Men* cannot be

[11] For a more detailed examination of the causes of this splintering see: PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947 (1948), particularly Chs. III and X.

[12] RODELL, 305.

[13] *Ibid*, 304.

[14] *Ibid.*

[15] CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953). For a list of reviews of Crosskey, most of them admitting the thought provoking value of the work but insisting that fundamentally it is wrong, see the articles by David Fellman in: 48 American Pol. Sc. Rev. 63, fn. 3 (1954) and 49 American Pol. Sc. Rev. 63, 64, fn. 11 (1955).

read passively. The reader is constantly forced to re-examine, but in the end not necessarily to change, the bases of his thought about the role of the Supreme Court in American government and politics. If it does no more than keep the waves of constitutional interpretation from subsiding after the Crosskey hurricane, the book will have justified its existence.

A close second in value to this stimulation of thought is Professor Rodell's literary style. He writes with an ease and clarity which lawyers, historians, and political scientists should envy. The sentences are crisp, bold, and even at times a bit shocking. The volume is naked of annotation, but the internal arrangement is such that anyone with legal training has no difficulty in following the cases. The general reader, of course, is not interested in documentation.

There are many points on which issue could be taken with Professor Rodell. The glaring searchlight of his criticism which exposes so mercilessly the arguments of opponents is never turned on his own premises. One of those assumptions is that the Supreme Court is nothing more, or at best little more, than a political institution. The fact that today no informed observer of the Court can repeat without a smile Justice Roberts' assertion of the slot machine theory of judicial review in the *Butler*[16] case is not an ineluctable demonstration that all Court opinions are political polemics. Every student of constitutional law is familiar with Max Lerner's famous phrase that judicial decisions are not babies brought by constitutional storks;[17] it does not follow that such decisions are political bombshells dropped by constitutional vultures.

Recent scholarship[18] has proved the important role of personal ideology in constitutional interpretation, but the matter is not as simple as Professor Rodell states it. Few who have read the concurrences and dissents of Justice Frankfurter or the writings of Justice Jackson[19] can lightly dismiss their earnest efforts, which may or may not be successful, to assume a truly neutral position. In an explanation of why he was withdrawing from consideration of a

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[16] United States v. Butler, 297 U. S. 1, 62 (1936).

[17] LERNER, IDEAS FOR THE ICE AGE (1941), 259.

[18] See particularly the work of PRITCHETT, *supra*, n. 11, and his CIVIL LIBERTIES AND THE VINSON COURT (1953).

[19] For Justice Frankfurter see especially his dissent in Board of Education v. Barnette, 319 U. S. 624, *dis. op.* 646 (1943); and his concurrence in Francis v. Resweber, 329 U. S. 459, *conc. op.* 466, and particularly 471 (1947). See JACKSON, *supra*, n. 10, *passim*, and more important his THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955), Ch. 3.

case, Justice Frankfurter has something to say which is very much to the point:

> "There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions."[20]

One of the other basic premises of the volume, the complete irresponsibility of the Court, is in part refuted by Professor Rodell's own account in chapter seven (particularly pp. 248-249) of the switch of Justice Roberts in 1937. In this regard, as in the topic noted in the two previous paragraphs, there is a tendency in *Nine Men* to discuss the situation in black and white terms, while in reality, to use a phrase of Justice Douglas, shades of grey predominate. Of course, the Supreme Court fulfills a political function, but this is not its only function nor necessarily its most important one. Or, the fact that the Court is not as sensitive to the fluctuations of public opinion as the House of Representatives is does not mean that it will make a practice of flouting the popular will. The Court may get so badly out of tune with the times as to interfere with the healthy operation of a democratic society, but there are ways of bringing it back into harmony with public policy which have more than fleeting popular support.[21] It may well be that Professor Rodell is deliberately overstating his case here, hoping to bring his audience at least part of the way along the road indicated.

The handling of some of the recent civil liberties cases also provides difficulty. In his disappointment over the Court's decision in the *Dennis*[22] opinion which upheld the conviction of the eleven Communist leaders, Rodell says that Holmes would have been shocked at such a mockery of the First Amendment. Leaving aside the merits of the *Dennis* judgment it is dangerous to invoke the ghost of Holmes here. After all it was Holmes who wrote the opinion for a unanimous Court validating the conviction of Eugene Debs[23] for violating the Espionage Act of 1917 on the ground that Debs tended to obstruct recruiting by delivering a routine socialist speech before a socialist convention. In not one sentence did Debs urge resistance to the draft, nor did he direct any portion of the speech to

[20] Public Utilities Comm'n. v. Pollak, 343 U. S. 451, 466 (1952).
[21] For an interesting approach to this problem see Roche, *Judicial Self Restraint*, 49 American Pol. Sc. Rev. 762 (1955).
[22] Dennis v. United States, 341 U. S. 494 (1951).
[23] Debs v. United States, 249 U. S. 211 (1919).

members of the armed forces. Holmes also wrote the opinion in the *Frohwerk*[24] case sustaining a ten-year jail sentence for a salaried employee writing in a small pro-German newspaper. The allegations in the more renowned *Schenck*[25] case were only slightly less trivial.

Holmes may have been more favorably disposed toward free speech than the majority in these cases and may have joined with them so that he could write the doctrine of clear and present danger into American constitutional law. Yet the famous formula does not appear in two of the three opinions; it is in the first, not in the last two. Despite his later memorable dissents, Holmes admitted here that such speeches and writings as charged to these defendants did not come under the protection of the First Amendment in time of national danger. Logically, then, he could not be called on as an authority to object to the convictions of the leaders of a world-wide conspiracy in the midst of a quasi-war. Indeed, the contrast in seriousness between the Cold War and World War I situations moved Chief Justice Vinson to refer to the acts of the earlier period as constituting only an "insubstantial gesture".[26] Actually it makes little difference in the protection of free speech whether a defendant may be convicted under a broad interpretation of a strictly drawn statute, as were those in 1919, or whether he may be convicted under a broad statute strictly applied, as were Dennis and his cohorts. In either case the accused goes to the penitentiary quite finally.

A last point may be noted. Professor Rodell's characterizations are sharp, often so sharp as to become lampooning caricatures. Although disagreeing with much of what the Truman appointed justices have opined in their official

[24] Frohwerk v. United States, 249 U. S. 204 (1919).

[25] Schenck v. United States, 249 U. S. 47 (1919). Holmes' opinion on the Massachusetts bench in Commonwealth v. Davis, 162 Mass. 510, 39 N. E. 113 (1895), is also worth noting. He held that the state had complete control of public parks and could forbid public speaking there. *Cf.* Hague v. C.I.O., 307 U. S. 496 (1939), reaching the opposite conclusion. In Patterson v. Colorado, 205 U. S. 454 (1907), Holmes, over Harlan's vigorous dissent (463) refused to hold that freedom of speech was protected against state interference by the Fourteenth Amendment. Although Pitney wrote the opinion for the Court in Prudential Ins. Co. v. Cheek, 259 U. S. 530, 543 (1922), Holmes filed no official objection to the statement that the Constitution of the United States imposed no restriction upon the States "about 'freedom of speech'." Though these last are state, not federal, cases they do give an indication that Holmes' position as a defender of free speech is usually grossly overstated. For an effort to deflate the Holmes' myth see Hickman, *Mr. Justice Holmes: A Reappraisal*, 5 Western Pol. Q. 66 (1952). Chapters II-III of MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) contain a penetrating analysis of the weaknesses of the whole Holmesian doctrine of "clear and present danger".

[26] Dennis v. United States, *supra*, n. 22, 504.

capacities, one can still doubt whether such tart dismissals of their judicial efforts as the following are altogether fair:

Vinson: ". . . could always be counted on the anti-libertarian side. Freedom of speech meant nothing to him, except as a pretty phrase. . . . For all his undoubted patriotism, chauvinist style, Vinson, less than any other man who ever headed the Court — less than Ellsworth, less than Waite, less than Taft — understood the real meaning of American democracy."[27]

Burton: "At the start, Burton was clearly out of his depth on the Court; plodding along in pursuit of old cases to use as precedent like a lady shopper trying to match colors, exploring irrelevant trivia for page after dull page in near-parody of the job of judging. . . . But Burton has grown some in stature as the Court has shrunk. . . . Indeed, the least-able-in-a-century label, once hung on Burton would far better fit either Clark or Minton."[28]

Clark: ". . . has been a Texas Democrat all his life and a politician-prosecutor for most of it, his six years on the Court not excluded. . . . As a Justice, Clark has been uninteresting, unintelligent, and — in line with his own career and his late boss Vinson's lead — illiberal. . . . Clark's chief virtue is a rather appealing awareness of his own limitations as lawyer and as judge."[29]

Minton: "By contrast, Sherman Minton . . . is conspicuously unaware of his judicial shortcomings."[30]

In summary, Professor Rodell has written a highly readable and stimulating interpretation of American constitutional history. His is a book which may be warmly discussed and heatedly criticized, but it cannot be cooly ignored by anyone with a serious interest in the future of the American system of government.

WALTER F. MURPHY*

[27] RODELL, 308-309.
[28] *Ibid*, 310.
[29] *Ibid*, 311-12.
[30] *Ibid*, 312.

* Charles E. Merriam Fellow, Department of Political Science, University of Chicago; A.B., University of Notre Dame; M.A., George Washington University.