BOOK REVIEWS

ON UNDERSTANDING THE SUPREME COURT. By Paul A. Freund.[1] Boston: Little, Brown and Company, 1949. Pp. vii, 130.

The Supreme Court has provided subject matter for many books, articles, and book reviews. Seldom, however, has it been treated with such insight and wisdom as in this small volume by Professor Paul Freund, which is the product of three lectures delivered in April, 1949, at Northwestern University Law School under the auspices of the Julius Rosenthal Foundation.

Professor Freund's experience and background make him exceedingly well qualified for an appraisal of the Supreme Court. He studied the Court and its traditions as a student of Professor Felix Frankfurter. He continued his study as a law clerk of Mr. Justice Brandeis, a rare privilege which gave him the opportunity "to appraise at first hand the effect on judicial judgment of varying policies and values, political and economic."[2] After this experience he became one of the select staff in the Office of the Solicitor General, where he took part in the preparation and argument of many of the Government's cases in the Court during the early New Deal period when constitutional law was a flourishing and exciting subject.[3]

Understanding the Court must begin with a study of its position as an institution in our society and the significance to our democratic principles of the resolution of problems presented to it during each Term.[4] In one sense, the Court is the creator and builder of the kind of democratic principles we should and must live by. It is for this we look to it for guidance to prevent us from veering too far to one side or the other and to show us how to apply our democratic traditions to everyday living.

While playing this role, the Supreme Court must function as a court of law: it is hemmed in by the judicial process. The Court is at the pinnacle of the federal judicial system, and, within the confines of the Constitution, it is

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1. Professor of Law, Harvard Law School.

2. Roberts, Book Review, 63 HARV. L. REV. 1080, 1081 (1950).

3. Professor Freund again served with the Solicitor General's staff during the recent war period.

4. *E.g.*, in the 1948 October Term, the Supreme Court was presented the question to what degree municipalities could prohibit sound trucks without violating the constitutional right of free speech, Kovacs v. Cooper, 336 U. S. 77 (1949); the question whether conviction of a stirring speaker, surrounded by disorder, for breach of peace violated his constitutional right to speak, Terminiello v. Chicago, 337 U. S. 1 (1949); the question whether security in one's home and effects was protected constitutionally from state officers under the Fourteenth Amendment as it is from federal officers under the Fourth Amendment and whether evidence secured by such illegal means could be admissible in the state courts against the defendant, Wolf v. Colorado, 338 U. S. 25 (1949). For a full resumé of the 1948 Term, see Frank, *The United States Supreme Court: 1948-49*, 17 U. OF CHI. L. REV. 1 (1949); and Comment, *The Supreme Court, 1948 Term*, 63 HARV. L. REV. 119 (1949).

the tribunal of ultimate appeal for the courts of the forty-eight states, the territories and possessions. As the author puts it, its primary problem is the "problem of 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."[5] This is true in its resolution of constitutional issues. It is also true in the interpretation and application of congressional statutes in the federal courts and, under some congressional acts, in the state courts as well.[6]

The author's first lecture, entitled "Concord and Discord," deals with the cases in the field of civil liberties and demonstrates that individual Justices must choose from a number of competing values to reach their decisions.[7] The propriety of the description of civil liberties as "human rights contrasted with property rights" is considered at length by Freund.[8] Admittedly, the Court places civil liberties in a preferred position, possibly protected by a presumption of unconstitutionality against infringing measures, when contrasted to the Court's approach to the broader areas of economic regulation.[9] While Mr. Justice Frankfurter[10] and Judge Learned Hand[11] have protested the placing of civil liberties in a preferred position within the confines of due process, nevertheless, there has been broad accord on the Court in this realm of values.[12] "In short, when freedom of the mind is imperiled by law, it is freedom that commands a momentum of respect; when property is imperiled, it is the lawmakers' judgment that commands respect."[13]

Looking at the problem as a contrast between freedom of expression and right of property or the giving of one a preferred position over the other is an oversimplification, tending to emotionalize thinking and to becloud wisdom and understanding. In one sense, laws which enter the area of communication of mind and spirit are as truly adjustments and accommodations as are laws fixing prices or wages or controlling competition. The legislature must be the adjustor in the first instance both with reference to freedom of expression

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5. P. 7.

6. Examples of federal statutes in which federal and state courts have concurrent jurisdiction are the Fair Labor Standards Act of 1938, as amended, 52 STAT. 1060, 1069, 29 U. S. C. §§ 201, 216(b) (1947); and the Federal Employer's Liability Act, as amended, 35 STAT. 65, 66, 45 U. S. C. § 56 (1948).

7. P. 9.

8. P. 10 *ff.*

9. See Kovacs v. Cooper, 336 U. S. 77, 88 (1949); Thomas v. Collins, 323 U. S. 516, 530 (1945).

10. Concurring opinion in Kovacs v. Cooper, 336 U. S. 77, 95 (1949).

11. L. Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COL. L. REV. 696, 698 (1946).

12. Pp. 11, 12-14.

13. P. 11.

and to "shifting economic arrangements."[14] But in so far as the role of the Court under judicial review is greater in the one case than in the other, it is not actually because one set of rights is preferred over the other. Rather the difference lies in the function of the judicial process compared with that of the legislative process in the totality of government. When we consider the adequacy of the judicial process and the capacity of the Court to arrive at minimum standards for the broad, flexible regulations necessary for determining rates and services of utilities, for example, the answer can only be that the legislative and administrative processes have the greater capacity. The due process principle of confiscation with all its requisite theories of valuation is of small import. Basically, therefore, judicial deference in this field is caused by the lack of competency of the Court in such matters, and only confusion can follow in the wake of statements that the Court is without power or that other rights are in a preferred position.

Moreover, it is essential to the preservation of a democratic society that regulation of freedom of expression be withdrawn to a very great extent from the legislative and executive processes. Such freedoms are individual and personal and are not equities to be weighted and measured among different groups.[15] They must be preserved for all individuals and all groups. Such preservation falls within the special competence of the judicial process to protect individual liberties from the overreaching of legislative and executive processes. For the moment, the Court has left for experimentation in the legislative process, and in the forum of public opinion, the question of how much individual control over property is essential to human freedom.[16] But the Court may eventually intervene to protect the individual's right over his property as differentiated from the conflicts of larger economic interests.

Disagreements among the Justices of the Vinson Court, no less than among those of the Stone Court, have been widely publicized. Criticism has been levelled by members of the legal profession at the number of dissenting and concurring opinions.[17] The author discusses three "themes of discord" in the Court in the field of civil liberties, not as a single discord, but in three

14. Kovacs v. Cooper, 336 U. S. 77, 95 (1949) (concurring opinion, Frankfurter, J.); P. 11.

15. West Virginia State Board of Education v. Barnette, 319 U. S. 624, 638 (1943).

16. P. 20.

17. *Cf.* Palmer's articles published in the American Bar Association Journal, 34 A. B. A. J. 554, 677, 761, 887, 1000, 1092 (1948); 35 A. B. A. J. 13, 101, 189 (1949). Palmer includes in his listings of the "Causes of the Justices' Disagreements" the following:

> A shift in constitutional interpretation from the concept of the Constitution to be construed like any other legal document in the light of the intent of its creators, to the idea of the Constitution *as a living organic instrument of government* furnishing general ideals for the judiciary to be adapted to the needs of a changing and changed society. 35 A. B. A. J. 189 (Emphasis added).

distinct lines of conflict.[18] The first is called "aggressive and passive liberties." Freund explains that on the whole "active proselyting interests have been given greater sanctuary than the quiet virtues or the right of privacy."[19] Obviously the "active proselyting interests" refer to the Jehovah's Witnesses cases.[20] The search and seizure cases, in which the individual has received wavering protection from unauthorized invasion of his home and private papers by officers of the law, are examples of the passive liberties.[21] The second theme of discord within the Court concerns whether the "clear and present danger" principle is applicable to such situations as newspaper comment interfering with the judicial process.[22] The third theme of discord relates to the extent of the difference in the scope of review accorded state as distinguished from federal action where individual liberties are involved.[23]

The cases show that the difference in understanding and application of fundamental principles of our democracy cause divisions among the Justices on the Court. The divisions do not always result from giving vent to personal bias, a supposition of some writers and statistical analysts of the Court.[24] Also, it is not too commonplace to suggest that the Court best serves its function if the Justices insulate from their considerations, or at least place in a proper perspective, the political and social pressures which move different groups in our society. Such pressures are matters to be compromised in the processes of elections and legislation. The Court's function is to consider the cases in the broader perspective of government. For this, our democratic society needs the seasoned and scholarly judgment of the Justices of the Supreme Court to be secured in an atmosphere of isolation. This is not the same as saying the Court should be exalted. But it should not be expected that the Supreme

18. P. 22 *ff.*

19. P. 22.

20. Murdock v. Pennsylvania, 319 U. S. 105 (1943) (Roberts, Reed, Frankfurter and Jackson, JJ., dissenting; held unconstitutional the application of municipal ordinance for license tax to distribution of religious literature); Martin v. Struthers, 319 U. S. 141 (1943) (Roberts, Reed, Frankfurter and Jackson, JJ., dissenting; held unconstitutional the application of municipal ordinance forbidding door-knocking or bell-ringing to distribution of religious literature); Follett v. McCormick, 321 U. S. 573 (1944) (Roberts, Frankfurter and Jackson, JJ., dissenting); *cf.* Prince v. Massachusetts, 321 U. S. 158 (1944) (Jackson, Roberts and Frankfurter, JJ., concurring; Murphy, J., dissenting).

21. See notes 39, 41 *infra.*

22. Bridges v. California, 314 U. S. 252 (1941) (Stone, C. J., Roberts, Frankfurter, and Byrnes, JJ., dissenting); Pennekamp v. Florida, 328 U. S. 331 (1946) (Frankfurter, Murphy and Rutledge, JJ., concurring); Craig v. Harney, 331 U. S. 367 (1947) (Frankfurter, J., Vinson, C.J., and Jackson, J., dissenting).

23. *Compare* McNabb v. United States, 318 U. S. 332 (1943) (Reed, J., dissenting), *with* Adamson v. United States, 332 U. S. 56 (1947) (Black, Douglas, Murphy and Rutledge, JJ., dissenting); Watts v. Indiana, 338 U. S. 49 (1949) (Black, Douglas and Jackson, JJ., concurring; Vinson, C. J., Reed and Burton, JJ., dissenting); Ashcraft v. Tennessee, 322 U. S. 143 (1944) (Jackson, Roberts and Frankfurter, JJ., dissenting).

24. *See, e.g.,* PRITCHETT, THE ROOSEVELT COURT, c.9, 239 *ff.* (1948).

Court's decisions will always receive popular acceptance at the moment. Some of the Court's greatest contributions have come in eras of incensed non-acceptance of its decisions.

In addition, it should be recognized that many important considerations presented to the Court are not only broad, difficult and soul searching, but, in a sense, new. Principles of democracy are not so concretely and semantically definable as to pave the way for unified application by nine Justices of the Supreme Court. The application to concrete situations of constitutional principles based upon general theories of democracy must, from the nature of things, be made in the face of competing social interests in our society. Mr. Chief Justice Hughes, in 1936, expressed amazement that amidst controversies on every conceivable subject one should expect unanimity in opinions upon difficult legal questions that go to the very core of our democratic way of life.[25] The history of theology, philosophy and economics, or indeed of any intellectual discipline, is a long record of disagreement and controversy.

The Court's function as an institution of government may be better understood by examining cases under each of the three themes of discord put forward by the author with such sophistication and insight. The cases under each of the three themes show the difficult problems which the Court must wrestle with when it is required to face the awful responsibility for determining constitutionality by reconciling conflicts among our democratic institutions.

A good example of the proselyting interests of the Jehovah's Witnesses cases are the flag salute cases. Those cases presented the Court with the problem of reconciling a conflict between state control over public education and freedom in the exercise of religious beliefs. Public education and freedom of religion are cherished institutions and each must function without destroying the other. In the flag salute cases boards of education, with or without legislative authority, required flag salute ceremonies in the public schools. Participation in the ceremonies conflicted with the basic religious beliefs of the Jehovah's Witnesses sect.[26] Refusal to conform with the boards' orders was dealt with by expulsion of the children from the public schools and prosecution of the parents for contributing to the delinquency of their children. At first the Court handled the cases by *per curiam* decisions,[27]

25. Address of Mr. Chief Justice Hughes, 13 PROC. AM. L. INST. 61, 64 (1936); P. 8.

26. The Jehovah's Witnesses sect draws on Chapter 20 of Exodus for its refusal to salute the flag.

27. Leoles v. Landers, 302 U. S. 656 (1937) (*appeal dismissed* for want of a substantial federal question; 184 Ga. 580, 192 S. E. 218 (1937)); Hering v. State Board of Education, 303 U. S. 624 (1938) (*appeal dismissed;* 118 N. J. L. 566, 194 Atl. 177 (1937), 117 N. J. L. 455, 189 Atl. 629 (1937)); Gabrielli v. Knickerbocker, 306 U. S. 621 (1939) (*cert. denied;* 12 Cal.2d 85, 82 P.2d 391 (1938)); Johnson v. Deerfield, 306 U. S. 621 (1939) (*rehearing denied,* 307 U. S. 650 (1938), *aff'g.,* 25 F. Supp. 918 (1939)).

upholding the regulations upon the theory that no substantial constitutional question had been presented. The issues received full dress review for the first time in the case of *Minersville School District* v. *Gobitis*.[28] The majority, in an opinion by Mr. Justice Frankfurter, did not perceive the issue as one of closing or narrowing the area for the exercise of freedom of religion. His opinion was posited upon the principle of judicial review which severely limits the Supreme Court's control over the legislative and administrative processes of the state. The Court concluded that the legislative judgment properly sought to provide order and unity in our society; this exertion of political authority was to be sustained so long as basic considerations of religious freedom were left inviolate. Here the exercise of religious beliefs invaded the area of secular authority and it was not a question of the political authority restricting the area of freedom of religion.

Mr. Justice Stone took a different view of the case which he expressed in a powerful dissenting opinion.[29] The issue which he perceived was the restriction of the expression of one's religious beliefs through the exercise of state control over public education; the right to express one's beliefs extends beyond religious services into everyday living and the state was without power under the Constitution so to deny. The state's power over public education was not, in his judgment, on the same plane with the War Power of the Federal Government to protect the very existence of our society, under which some restriction on the expression of one's religious beliefs is recognized.[30] The Frankfurter-Stone debate, therefore, shows that the issue went, not to the American Legion versus the Jehovah's Witnesses sect, but to the warp and woof of a fundamental fabric of democracy.

The issue was reargued in the 1942 Term and the Court reversed itself.[31] The majority opinion on the reargument broadened the issue over that considered and decided by the majority of the Court in the first case. The issue

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28. 310 U. S. 586 (1940).

29. *Id.* at p. 601.

30. *Id.* at p. 602. Mr. Justice Stone's citation of Hamilton v. Regents, 293 U. S. 245 (1934), with Selective Draft Law Cases, 245 U. S. 366 (1918), confuses state power under the Fourteenth Amendment with the expansiveness of the National War Power. The issue presented in *Hamilton v. Regents* was whether the power of the Regents over the University of California was exercised so as to be in conflict with the religious beliefs of University students and therefore invalid under the Due Process Clause of the Fourteenth Amendment. The Regents made R.O.T.C. compulsory; and the War Department had not been empowered nor had it attempted to require military instruction in the "land grant" colleges. It was not determined that the Regents' compulsory regulation came under the War Power of the National Government. Neither was it determined that the state's police power over military training was equal to the National War Power. For a similar confusion, see *In re* Summers, 325 U. S. 561, 572 (1945) (Black, Douglas, Murphy, and Rutledge, JJ., dissenting), where petitioner was denied membership in the Illinois Bar Association because of a religious conscientious objection to war.

31. West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943).

decided in the second case was freedom of belief and expression in the broad sense. The very purpose of the Bill of Rights, said the majority, was to withdraw religious beliefs, freedom of mind and spirit, "from the vicissitudes of political controversy,"[32] and, for the most part, to place them beyond the reach of legislative and administrative processes.[33] Mr. Justice Frankfurter in his dissent refused to accept the broad issue upon which the majority placed its decision. For him it was still a question of religious beliefs being extended beyond freedom from conformance to any enforced religious dogma. The question still remained one of limiting the function of judicial review. And he took advantage of the majority's weakness in its attempt to distinguish *Hamilton* v. *Regents*.[34] According to the majority, the University trustees could invade the area of religious beliefs because the students were not required to attend the University. Such a position would mean that a state could discriminate, even as to the expression of one's religious beliefs, in the conferring of benefits, though not in the imposition of duties.

The willingness of the Court to protect the proselyting interests provides an interesting comparison with its reluctance to accord equality of treatment to the "passive liberties." History teaches that the right of individuals to be free from unauthorized invasions of privacy is "the most comprehensive of rights and the right most valued by civilized men."[35] The Revolution ended the epoch of general warrants and the Fourth Amendment was enacted to ensure that there would be no revival of such practices.[36] But history's teachings are sometimes considered to be out of date and a hindrance to progress.

The question usually arises over the use of items seized, without authorization of a search warrant, as evidence against the accused. It was long ago determined for the federal courts that material secured through uncon-

32. *Id.* at p. 638.

33. The concreteness of the majority's interpretation and application of the Bill of Rights suggests for future cases a phrase of Mr. Justice Frankfurter in McCollum v. Board of Education, 333 U. S. 203, 212 (1948): "This case . . . demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer."

34. 293 U. S. 245 (1934). See Note 30 *supra*.

35. Brandeis, J., dissenting in Olmstead v. United States, 277 U. S. 438, 478 (1928). Tucked away in this dissenting opinion is an inspiring and appreciative description of the Bill of Rights:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

Professor Freund expressed a thought worth repeating that "in a police state there can be few if any liberties more obnoxious and indeed impossible than the liberty to record and transmit one's thoughts and one's transactions without fear of the unchecked official eavesdropper." P. 24.

36. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361-6 (1921).

stitutional searches and seizures was not to be used as evidence.[37] The basic conflict in the search and seizure cases may be said to be between crime detection and apprehension of the criminal on the one hand, and the right to be free from unwarranted invasion of one's privacy in his home and personal effects on the other. The fact that some criminals may escape punishment is part of the price which must be paid to protect this right so fundamental to a democracy.

The Court has retained the language of its opinions prohibiting the use in evidence of items illegally seized.[38] It has come close, however, to achieving a practical abolition of the rule by continual diminution of the area in which the rule is held applicable. It has done so first by creating an illusive and expanded concept of "public documents," and authorizing coercive visitation on the part of government agents to seize such documents.[39] Before the "public documents" case, searches and seizures without a warrant were "unreasonable" and illegal except search of the person upon arrest or search of moving vehicles.[40] A second means used to make the search not "unreasonable" and to permit the use of items seized as evidence against the accused has been an extreme expansion of a concept, developed formerly by a few lower federal courts, of "search incident to arrest."[41] If the arrest

37. Weeks v. United States, 332 U. S. 582, 587 (1946); *cf.* Wolf v. Colorado, 338 U. S. 25 (1949).

38. Davis v. United States, 328 U. S. 582, 587 (1946): "The law of searches and seizures . . . reflects a dual purpose—protection of the privacy of the individual, his right to be let alone; protection of the individual against compulsory production of evidence to be used against him."

39. The problem arose in one of the many O.P.A. cases during the recent war. The defendant operated an incorporated gasoline station and the attendant sold gasoline at twenty cents a gallon above the ceiling price to Government agents without securing in return the necessary coupons. The agents arrested the defendant and demanded entrance into a locked room upon a theory, somewhat astonishing but not too astonishing to be later accepted by the Court, that the coupons were "property of the Government" for which defendant was a mere custodian. *Cf.* Frank, J., in case below, 151 F.2d 140, 144 (2d Cir. 1945). Mr. Justice Douglas, writing for the Court, analogized that the Government was in the same situation as a man whose property has been stolen and who attempts to take it from one unlawfully in possession. The Court also made mention of the fact that the coupons were kept in a business establishment, implying that the Fourth Amendment may not secure offices or other places of business. Davis v. United States, 328 U. S. 582 (1946) (Frankfurter, Murphy and Rutledge, JJ., dissenting).

40. Harris v. United States, 331 U. S. 145, 168 (1947) (Frankfurter, J., dissenting); *cf.* Brinegar v. United States, 338 U. S. 160 (1949).

41. Five agents of the Federal Bureau of Investigation entered defendant's apartment under the official authorization of a warrant for his arrest. Without a search warrant, the agents spent five hours ransacking a small, three room apartment looking for two stolen checks. Among fresh laundry in a bureau drawer they found an envelope containing forged draft cards. Now, says the Court through Mr. Chief Justice Vinson, "It is equally clear that a search *incident to arrest,* which is otherwise reasonable, is not automatically rendered invalid by the fact that a dwelling place, as contrasted to a business premises, is subject to search." (Emphasis added.) The Court seems to find an additional reason that since the search was successful in turning up fruits of crime the search therefore became valid. Harris v. United States, 331 U. S. 145 (1947) (Frankfurter, Jackson, Murphy and Rutledge, JJ., dissenting).

is valid, either by warrant of arrest or by any means recognized under the law of arrest such as commission of criminal acts in the officers' presence, the constitutional limitations to search and seize without a valid search warrant appear to be lifted almost entirely.

The Court in the recent cases has been groping for a test—a block of words, anything—to uphold federal officers and investigators in their continuous refusal to secure a search warrant.[42] A good example is the majority opinion in *United States* v. *Rabinowitz*,[43] where it is stated:

> Assuming that the officers had time to procure a search warrant, were they bound to do so? We think not, because the search was otherwise reasonable, as previously concluded. . . . To the extent that *Trupiano* v. *United States*, 334 U. S. 699, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after lawful arrest, that case is overruled. *The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.* That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case. (Emphasis added.)

Such an approach lowers consideration of the historical protections under the Fourth Amendment to the level of the "scope of employment" cases in the law of agency where, in the end, the employer always pays; the individual likewise will always pay, not with his insurance dollars, but with his constitutional liberties. The majority opinions in the recent search and seizure cases give little recognition to the historical inter-relation of the Fourth Amendment to our democratic principles with the consequence of shocking inroads on individual liberties.[44]

The other two "themes of discord" in the Court which the author dis-

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42. In Johnson v. United States, 333 U. S. 10, 13-14 (1948), Mr. Justice Jackson in the majority opinion emphasizes the need for search warrants as follows:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

43. 70 Sup. Ct. 434, 435 (1950).

44. Mr. Justice Frankfurter's dissenting opinions offer a decided contrast to the majority opinions: *e.g.*, Davis v. United States, 328 U. S. 582, 594 (1946); Harris v. United States, 331 U. S. 145, 155 (1947). A statement of Judge Learned Hand in United States v. Di Re, 159 F.2d 818, 820 (2d Cir. 1947), should give us pause: "If the prosecution of crime is to be conducted with so little regard for that protection which centuries of English law have given to the individual, we are indeed at the dawn of a new era; and much that we have deemed vital to our liberties, is a delusion."

cusses are as fundamental as the first but are too broad to be properly canvassed in a book review. They ought, however, to be mentioned. One involves the conflict between the integrity of the judicial process to be preserved against outside pressures and the right of constitutional free speech to talk about and even to criticize the judicial process. The Court has said that there must be a showing of a "clear and present danger" of an interference with the judicial process.[45] A minority insists the principle is inapplicable; that the matter should be left largely in the hands of the state under a limited judicial review; and that if the freedom of newspapers is carried too far, the integrity of the judicial process will thus be endangered.[46] The reviewer agrees with the author that the problem is too broad and involves too many values to solve by reliance on the efficacy of the phrase "clear and present danger."[47] Reliance on such a phrase as a protective concept provides no greater protection in unskilled hands than the "tendency test" of the *Gitlow* case which today is in general disrepute.[48] The question involved is the actuality of the subjugation of the judicial process, a social misuse of the power of the press, weighed against the social interest in the freedom of the press. The determination of the area of protection of such interests and values cannot properly be made by reliance on analytics.

The third area of discord within the Court involves the power it should exercise over the judicial process in administration of criminal justice. The Court has here exercised considerable control over the federal courts without relying on constitutional restrictions, although the cases have due process undertones.[49] But the Court's control over the criminal process in the state courts must be restricted to the confines of the Fourteenth Amendment.[50] One faction of the Court wishes to apply the protections contained in the entire Bill of Rights through the Fourteenth Amendment.[51] The other view, now in the majority, is of the opinion that the Fourteenth Amendment protects only against the absence of the fundamental requisites of due process determined by the Court in the particular case.[52]

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45. See note 22 *supra.*

46. See dissenting opinions in Bridges v. California, 314 U. S. 252, 279 (1941); Craig v. Harney, 331 U. S. 367, 384 (1947).

47. Pp. 27-8.

48. Gitlow v. New York, 268 U. S. 652, 670, 671 (1925).

49. *E.g.,* McNabb v. United States, 318 U. S. 332 (1943).

50. *E.g.,* Watts v. Indiana, 338 U. S. 49, 50 (1949).

51. Adamson v. California, 332 U. S. 46, 68 (1947) (Black, Douglas, Murphy and Rutledge, JJ., dissenting). For an exhaustive treatment of the play of history, see Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?,* 2 STAN. L. REV. 5 (1949). See also, Green, *The Bill of Rights, The Fourteenth Amendment and the Supreme Court,* 46 MICH. L. REV. 869 (1948).

52. Adamson v. California, 332 U. S. 46 (1947); Betts v. Brady, 316 U. S. 455, 461-2, 473 (1942); *cf.* Palko v. Connecticut, 302 U. S. 319, 328 (1937); Twinning v. New Jersey, 211 U. S. 78, 96, 100 *ff.* (1908).

The author's second lecture presents a portrait of Louis Dembitz Brandeis after his appointment to the Court. Freund suggests that donning the judicial robes insulates men to some extent from the ties of the past. This factor is often forgotten when a particular Justice fails to vote as anticipated. "Donning the judicial robes" is also deeply personal, a transformation from the active life to spiritual loneliness: not even his closest friends are able to understand the humbling feeling of inadequacy that overcomes a new Supreme Court Justice as he weighs his obligation to history.

In this second lecture Freund superbly paints for his readers the greatness of Mr. Justice Brandeis. The author's description is of a "morality of mind," the elements of which are: "(1) an insistence on knowledge as indispensable to judging; (2) a rejection of opportunism; (3) an insistence on jurisdiction and procedural observances; and (4) a rejection of sentimentality."[53]

Understanding the record, the facts as raw data, is one of the most difficult tasks in appellate judging. Its primary significance all too often is not recognized. It is indeed a key to the greatness of Mr. Justice Brandeis, his recognition that the facts are the touchstone of every case, the fountainhead of the judicial process.[54] Brandeis' presentation of facts had all the art of a masterpiece. In his opinions the facts were not mere hurried reportings to be disposed of prior to concentration on legal analysis and discussion of precedents. The issues to be decided were drawn from description of the facts in the context of reality and the social forces involved. He never confused the facts with their legal connotations; nor did he allow precedent and legal analysis to control the presentation of facts. This often placed Brandeis in a different intellectual world from some of his brethern on the Court.[55] For example, in the *Duplex* case,[56] Mr. Justice Pitney, who spoke for the Court, dealt with the case as one of malicious injury by employees to the property of their employer and the resulting stoppage of commerce. But Mr. Justice Brandeis pointed out that there were only four manufacturers of printing presses in the country, that all save the Duplex Company were organized, that the effectiveness of the union shop in the other three companies was threatened by competition from the nonunion shop, and that the

53. P. 50.

54. Many tragic examples could be cited where the fact finding portion of the judicial process was an empty form or was thwarted to reach a particular result. *E.g.*, Chambers v. Florida, 309 U. S. 227 (1940). Indeed, fact finding of high performance gives the judicial process its protective firmness. See FRANK, COURTS ON TRIAL 54 *ff.* (1949).

55. Hamilton, *The Jurist's Art,* in FRANKFURTER (*Ed.*), MR. JUSTICE BRANDEIS, 171, 178 (1932).

56. Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921) (Brandeis, Holmes, and Clarke, JJ., dissenting).

purpose of the boycott was the preservation of wages and working conditions of union employees.[57] The vital issue in the case then, as presented by Mr. Justice Brandeis, was the legal limits of union activity in our industrial society. These facts, attuned to their economic and psychological counterparts, showed clearly that such group activity of the union was meant to be freed from illegality in the federal courts under Sections 6 and 20 of the Clayton Act.

Mr. Justice Brandeis' concern over matters commonly referred to as jurisdictional and procedural caused some to say he was a "conservative" in such matters as contrasted to his being a "liberal" in social and economic thought or in matters of substance. Such labeling is misplaced. It is fair to say that for him proper resolution of the problems of jurisdiction and procedure was necessary to the preservation of constitutionalism, especially where the problem related to review of state courts or validity of state laws.[58] Concern over such matters cannot be separated from his thesis of encouraging experimentation in social and economic regulation generally in the states. Indeed, such observances spring from his confidence in the legislative process. For example, Mr. Justice Brandeis dissented in *International News Service* v. *Associated Press*,[59] not because he was against innovation by the Supreme Court in proper situations, not because the Supreme Court was without power or jurisdiction in any narrow sense, but because questions of news pirating could be more effectively regulated by legislature than by the Supreme Court.[60] Again, his dissent in *Pennsylvania* v. *West Virginia*[61] demonstrated that the Supreme Court was without specialized knowledge sufficient to deal constructively with the problems of apportioning the natural gas resources for the State of West Virginia.[62] These cases, along with *Erie R. R.* v. *Tompkins*[63] and numerous others,[64] show that to Mr. Justice Brandeis "jurisdiction and procedure" were integral to lawmaking; indeed, these often constituted the very essence of the constitutional case. He concurred in the *Whitney* case[65] because of defendant's failure properly to raise in the state court the defense of "clear and present danger." His concurring opinion, which the author calls "one of the classics in the literature of freedom of

57. *Id.* at p. 480.
58. P. 58.
59. 248 U. S. 215, 248 (1918).
60. P. 64.
61. 262 U. S. 553, 605, 610, 616, 623 (1923).
62. P. 64.
63. 304 U. S. 64 (1938).
64. *Cf.* Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 293 (1921) (dissenting); Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249 (1933); Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 341 (1935) (concurring).
65. Whitney v. California, 274 U. S. 357, 372 (1927).

speech,"[66] sprang from his concern not over something narrow and technical, but from his belief in federalism, preserving to the states their proper sovereignty. The fact that Mr. Justice Brandeis carried such concern to extremes in the judgment of some, does not detract from the soundness of his position or from the wisdom of the author in listing this concern as a key to the greatness of Mr. Justice Brandeis on the Court.

The reviewer to be candid must admit unhappiness with the other two facets in the author's portrait of Brandeis as a Justice. "Rejection of opportunism" and "rejection of sentimentality" are like saying Brandeis was an "honest judge." They are not distinguishing factors of the judicial art of Brandeis. They are not distinguishing factors unless the author is prepared to defend the position that many Justices of the Court, present and past, are or were opportunists or sentimentalists. Such emotional phrases do not delineate the character of the author's portrait.

Freund demonstrates that Mr. Justice Brandeis was capable of disciplining his mind against allowing strongly held and closely articulated convictions on economic and social problems to control his work as a judge. Thus, the fact that Brandeis disliked the limitation of production as a depression cure did not prevent his writing a brilliant dissent in the *New State Ice* case.[67] As a judge he was willing to permit the extension of state legislative power even to the point of carving a regulated monopoly out of a competitive business.[68] He would not permit the Court to interfere with state policy, though he thought the policy unsound. Freund is saying that one of the keys to the greatness of Mr. Justice Brandeis is that he approached the ideal of objectivity. This, of course, is a distinguishing greatness.

The third lecture is concerned with problems of constitutional litigation.[69] The development of judicial review of legislation is a fascinating subject. This art is restricted to those countries, like the United States, in which the courts exercise the power of judicial review. Freund is concerned primarily with the part counsel, the lower courts, and administrative bodies play in constitutional litigation. Little is said about the responsibility of the legislature in its role of articulated policy-making.

The author observes that the quality and respect held by the Justices for the lower tribunals (federal and state courts and administrative agencies) influence constitutional validity; that since the era of Daniel Webster, the ability of counsel both in oral argument and brief writing has had considerable influence upon the outcome of constitutional litigation; and that "there are

66. P. 62.
67. New State Ice Co. v. Liebmann, 285 U. S. 262, 309 (1932).
68. P. 55.
69. P. 77.

other and subtler ways in which counsel have a crucial role to play in the shaping of constitutional law."[70] The principal story of the lecture is about those "other and subtler ways."

Constitutional questions presenting broad issues of policy necessarily affect the power of government throughout the United States and are in essence political questions; nevertheless, they are presented in the form of ordinary litigation.[71] There are instances in which the Court decided constitutional issues when those issues were not properly before it, with unfortunate consequences to the nation and to the Court as an institution. Mr. Chief Justice Hughes aptly referred to these decisions as "self-inflicted wounds."[72] For example, the *Dred Scott* case[73] involved a colorable transfer of a slave to create federal diversity jurisdiction.[74] As the author suggests, the consequence was an advisory decision on a grave constitutional question which should have been averted. The *Income Tax* cases of 1890[75] were decided in stockholders' suits when the corporation clearly had an adequate remedy at law in payment under protest to recover the tax.[76] Again, the Court was too anxious to decide questions of constitutional law with dire consequences to the financial future of the Federal Government. In the *Income Tax* cases the Government lawyers were partially responsible for the failure to insist on procedural inadequacy, giving little weight to their responsibility to the Court to avoid a decision on the constitutional questions.[77]

The potential serious consequences of undue haste in constitutional determination support the Court's strong policy of refusing to decide constitutional questions "unless and until it is necessary to the decision of an actual controversy."[78] The delicacy and enormity of the task of declaring a statute or administrative ruling unconstitutional, the cumbrousness of the amending process and the political impossibility sometimes of effectuating an amendment, and the possibility that time and experience will aid the decision on the constitutional question or a change will be effectuated through other processes, all go to support the wisdom and strength of the Court's guiding principle. The reviewer agrees, however, with the author's suggestion that statutes enforcing actual or psychological impediments upon the freedom of expression and the exercise of civil and political rights generally may provide justification

70. P. 82.

71. *E.g.*, the validity of the gold clause legislation was decided in a case brought by a bondholder against a railroad on a coupon for $22.50. Norman v. Baltimore & Ohio R. R., 294 U. S. 240 (1935); Pp. 82-3.

72. HUGHES, THE SUPREME COURT OF THE UNITED STATES, 50-4 (1928); p. 83.

73. Dred Scott v. Sandford, 19 How. 393 (U. S. 1857).

74. P. 83.

75. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429 (1895).

76. P. 84.

77. *Op. cit. supra,* note 75, argument of The Attorney General, at p. 499 *ff.*

78. P. 108.

for intervention without delay.[79] The application of this exceptional treatment may also take the form of invalidating on constitutional grounds the entire statute in place of the particular interpretation.[80] Invalidation of the statute does not necessarily leave the legislature powerless to act; often the consequence is to require greater responsibility in the legislature for caution and carefully-channelled drafting, so necessary to the preservation of the protections in the Bill of Rights.

The effect of counsel is also felt in the "Brandeis"-type of brief, inaugurated in constitutional litigation in the *Oregon Minimum Wage* case.[81] While it has proved helpful to the parties supporting the constitutionality of a statute, usually the federal or a state government, by its very nature it has been of little use to the party attacking the validity of the statute or regulation. It may be said to be directed to the part "judicial notice" plays in constitutional litigation in the Court, or the role of policy-making. The truth of the material need not be determined so long as there is some evidence on which a legislature can reasonably rely. Use of the Brandeis brief began in the era when there was, in effect, a presumption against the constitutionality of economic regulation. The social and economic data were used to justify legislative crossing of the protective lines into the presumptively forbidden area. Time and changing economic conditions have brought about a complete circle in the Court's approach. The strongest possible presumption now favors validity of regulatory statutes. The party attacking the statute's validity has an almost insuperable burden of showing either that the legislature had an unreasonable end in view, or that the means chosen were so unreasonable that reasonable minds could not possibly have chosen them.[82] Under the present approach there seems to be little need for the social data brief by the proponent of the constitutionality of the statute under the Due Process Clause of the Fourteenth Amendment. It may still be useful, however, when the validity turns on the implied negative under the Commerce Power or on whether the state regulation can exist alongside existing regulations under a federal statute.[83] In such cases the degree of state interest plays a deciding role. In the due process case the social data brief may, however, have psychological value in easing the Court's decision, although the expense of it for private litigants may be a greater burden than they should be asked to carry.

The author suggests that in some cases at least the data should be pre-

79. *Ibid.*

80. See Thornhill v. Alabama, 310 U. S. 88, 101 (1940).

81. Muller v. Oregon, 208 U. S. 412 (1908); p. 86.

82. See United States v. Carolene Products Co., 304 U. S. 144, 152-4 (1938); Nebbia v. New York, 291 U. S. 502, 536-8 (1934).

83. See Parker v. Brown, 317 U. S. 341 (1943); Southern Pacific Co. v. Arizona, 325 U. S. 761, 771 (1945).

sented as evidence in the trial court to become a part of the fact-finding process. Attacking counsel may then attempt to impeach or contradict the data. While in due process cases the truth of the data on which a legislature might have relied need not be proved, the validity of such data may be quite relevant in commerce cases in weighing the burden on or interference with commerce over and against the need for the state's social control.[84] The Court's reluctance to invalidate state legislation unless civil liberties are in issue may, as the author suggests, cause counsel to move constitutional litigation from the federal courts to the state courts by seeking relief under the State rather than the Federal Constitution. There is no legal axiom that state due process must have the same limitations over state legislative power as federal due process.[85] When the Supreme Court speaks, the legislative power of forty-eight states is in issue. Local problems may justifiably play a greater role in application of state due process.

Understanding requires that the Supreme Court be considered in its proper perspective in the totality of government. The Constitution must be understood for what it is, an organic and protective document, furnishing ideals as well as strength to all governmental institutions. The problems faced by the Court are always those of government, whether of interpretation and application of government in action or of definition of spheres of power under the Constitution. Understanding also demands recognition that the Court must assign regulation and control of economic activity, liberty of contract and ownership of property, the area of freedom of speech and religion, power to tax, and each of the others, its proper place and perspective among the different processes of government. Many values, with many degrees of competition and accommodation, play a large role. The true function of the Court, then, we must admit "includes philosophy as well as law and statesmanship."[86]

W. HOWARD MANN†

THE CONSTITUTIONAL WORLD OF MR. JUSTICE FRANKFURTER, by Samuel J. Konefsky. New York: The Macmillan Company, 1949. Pp. xviii, 325.

There is ground for gratitude for any book which permits any improvement in the public knowledge of the Justice, whose slight figure is now one of the most picturesque and one of the most battered in the public eye on the current judicial scene. For years, the Justice has been an almost constant

84. See, *e.g.*, South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 177, 192-6 (1938).

85. *Cf.* Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 92 (1950).

86. CURTIS, LIONS UNDER THE THRONE, 333 (1947).

† Associate Professor of Law, Indiana University School of Law.