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BOOK REVIEWS

LAW AND POLITICS. By Felix Frankfurter. New York: Harcourt, Brace & Co., 1939, pp. xxiv, 352.

In 1896, an immigrant lad of twelve arrived in the United States. His native tongues were German and Hungarian. In the course of time, the lad grew up, and became a renowned professor at Harvard Law School. In 1938, the National Institute for Immigrant Welfare bestowed upon him its achievement award.[1] In January, 1939, the President of the United States appointed him Justice of the Supreme Court, successor to Justice Cardozo, and Justice Frankfurter (the one-time immigrant lad), after a quarter of a century of law teaching at the Harvard Law School, left the professor's dais for the judge's bench. Two of his former law students [2] have collected and published excerpts from books, law review articles, public addresses, book reviews, magazine articles, and editorials, which he wrote during the quarter-century span. The papers have been grouped into eight divisions: The Supreme Court, The Elements of Judicial Greatness, The Liberties of a Free People, Labor and the Courts, Government and Administration, Business and the Courts, Law and Science, and A Political Autobiography. Here is a wealth of opinion on a diversity of legal-economic problems affecting the state politic. I select for consideration and comment *The Elements of Judicial Greatness.*

The Elements of Judicial Greatness include Frankfurter's six papers on "Three Great Justices"—Holmes, Cardozo, and Brandeis.

The first Holmes paper—*Justice Holmes Defines the Constitution*—appeared in 1938 in the *Atlantic Monthly.*[3] The second Holmes paper—*The Early Writings of O. W. Holmes, Jr.*—originally appeared in 1931 in the Harvard Law Review in celebration of the 90th birthday of Justice Holmes.

The first Cardozo paper—*Mr. Justice Cardozo and Public Law*—originally appeared in January, 1939, as one of a group of essays published jointly by the Harvard Law Review, the Columbia Law Review, and the Yale Law Journal, and dedicated to the memory of Justice Cardozo. The second Cardozo paper—*When Judge Cardozo Writes*—originally appeared in 1931 in the *New Republic* as a book review of Cardozo's *Law and Literature.*

The first Brandeis paper—*Brandeis*—originally appeared in 1916 as an unsigned editorial in the *New Republic,* shortly after President Wilson's nomination of Mr. Brandeis to the Supreme Court. The second Brandeis paper—*Mr. Justice Brandeis and the Constitution*—originally appeared in 1931 in the Harvard Law Review in celebration of the 75th birthday of Justice Brandeis.

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[1] On this occasion, Professor Frankfurter gave eloquent expression to the gratitude of the immigrant to this his Promised Land for the historic hospitality extended to those who sought its liberty, and for the freedom to participate in its fellowship.

[2] Archibald MacLeish, one time editor of the *Harvard Law Review,* now poet, writer and librarian of the Library of Congress, and E. F. Prichard, also one time editor of the *Harvard Law Review.*

[3] Prior thereto, it appeared in Frankfurter's book, MR. JUSTICE HOLMES AND THE SUPREME COURT (1938).

Long before Holmes took his seat on the Supreme Court bench in 1902, he had achieved distinction as a legal scholar and as an eminent judge of the Massachusetts Court. *The Common Law,* published in 1881, and still a legal classic, was the inspiration for much of the progress in modern historical and philosophic jurisprudence.[4]

Holmes' enduring contribution to American jurisprudence was his constitutional philosophy. To him, the Constitution was an organic living institution, and not a mathematical formula.[5] The significance of the provisions of the Constitution, said Holmes, "is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth".[6] The great theme of his judicial life, wrote Frankfurter, was "the amplitude of the Constitution as against the narrowness of some of its interpreters".[7]

Holmes' justiceship on the Supreme Court covered thirty years, one-fifth of the life of the Court, and one-third of its adjudications.[8]

When Holmes resigned in 1932, the nation was unanimous in the conviction that Cardozo was his natural successor.[9] Cardozo was deeply honored by the general acclaim and the invitation of President Hoover to be the successor to Holmes.[10] He accepted, but not without some hesitancy at leaving his brethren on the New York Court of Appeals.

Justice Cardozo sat on the bench of the Supreme Court for less than six years.[11] But they were turbulent years, replete with meaning in the economic life of the nation. The times demanded keen intellect, forthright courage, and bold steering. Pilots sought to steady the Ship of State by ameliorative legis-

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[4] Holmes, wrote Frankfurter in 1931, "was born invincibly to ask the meaning of things and to cut beneath the skin of formulas, however respectable." P. 84.

[5] A "constitution", wrote Holmes, "is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez-faire.*" "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Pp. 75, 74.

[6] P. 71.

[7] P. 75. The Supreme Court has been the supreme interpreter of the Constitution but "the history of the Supreme Court", Frankfurter reminded us, "is not the history of an abstraction, but the analysis of individuals acting as a Court who make decisions and lay down doctrines * * *. In law also men make a difference." P. 62. "His deepest allegiance", wrote Frankfurter on Holmes' 90th birthday, "is to civilization—a civilization neither parochial nor utopian, but groping for realization on the stage of the new world as part of the whole world." P. 87.

[8] P. 63.

[9] "The history of the Supreme Court affords no analogue to the unanimity of lay as well as professional opinion that Chief Judge Cardozo was the one man adequate to fill the historic place vacated by Holmes." P. 89.

[10] Cardozo referred to Holmes as "the Master". This "was not merely the language of playful deference which made Cardozo always speak of Holmes as 'the Master'." P. 88.

[11] Cardozo was appointed February 24th, 1932 and died July 9th, 1938. Absence on account of illness before his death reduced his participation in the work of the Court.

lation. Much of it was poorly conceived.[12] Most of it was nobly conceived, and was destined to run the gauntlet of Constitutional challenge.

Cardozo, like Holmes and Brandeis, sharply differentiated between the responsibility of the judge and the discretion of the legislator. "A motive to build up through legislation the quality of men may be as creditable in the thought of some as a motive to magnify the quantity of trade. Courts do not choose between such values in adjudging legislative powers. They put the choice aside as beyond their lawful competence." So wrote Justice Cardozo in an opinion sustaining a West Virginia graduated chain organization tax.[13]

"In the domain of economic affairs," wrote Frankfurter, "Cardozo walked humbly"; [14] here, Brandeis was his superior, though Cardozo should be credited for his part in the development of the law governing the duties of the corporate fiduciary.[15] But his enduring contribution to the Supreme Court was his sense of moral grandeur and human values; here, he was unmatched. Man, made in the image of his Maker, took on for him a new spiritual form. There is no parallel, wrote Frankfurter in 1939, "to the deep feeling of the country as a whole that the death of Cardozo was not merely the premature termination of a distinguished judicial career, but the end of the living energy of one of the most powerful moral resources of the nation." [16] "It is astonishing," he wrote in the same paper, "that so cloistered a spirit should have attained such a hold on popular feeling." [17]

In the life of a nation, as in the life of an individual, many an event has consequences which are immediately disturbing but ultimately salutary. President Wilson's nomination of Mr. Brandeis to the Supreme Court in 1916 brought on an avalanche of ugly criticism, protest and vituperation. For many years, Brandeis, as the "People's Lawyer", had been the center of controversy, and his foes now determined to prevent his confirmation. A Senate Committee conducted an investigation to determine his fitness, and nation-wide discussion as to the rôle of the Supreme Court in the life of the nation ensued. Frank-

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[12] "Fallible wisdom", wrote Frankfurter, "produces fallible legislation. To deny government the right to act except with omniscience and prescience is to deny it the right to act at all." P. 95.

[13] Fox v. Standard Oil Co., 294 U. S. 87, 100, 101, 55 Sup. Ct. 333 (1935), cited at p. 93. Continuing, Justice Cardozo wrote: "The tax now assailed may have its roots in an erroneous conception of the ills of the body politic or of the efficacy of such a measure to bring about a cure. We have no thought in anything we have written to declare it expedient or even just, or for that matter to declare the contrary. We deal with power only." In an opinion sustaining the Social Security Act, he reiterated the same constitutional principle: "Whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II, it is not for us to say. The answer to such inquiries must come from Congress, not the courts. Our concern here, as often, is with power, not with wisdom." Helvering v. Davis, 301 U. S. 619, 644, 57 Sup. Ct. 904 (1937), cited at p. 100.

[14] P. 96.

[15] McCandless v. Furlaud, 296 U. S. 140, 56 Sup. Ct. 41 (1935); dissenting opinion in Jones v. Securities and Exchange Commission, 298 U. S. 1, 56 Sup. Ct. 654 (1936).

[16] P. 89.

[17] P. 88.

furter espoused the Brandeis cause. The nominee, he wrote, was pre-eminently fitted for the post, and possessed "the passion of public service and the genius for it".[18] Brandeis' past assured his conformity with the teaching of Chief Justice Marshall that it is a "Constitution that we are construing, a great charter of government with all the implications that dynamic government means". The questions before the Supreme Court, wrote Frankfurter, were "not abstractions to be determined by empty formula". Brandeis had devoted his whole life to the consideration of public questions, and had "amassed experience enjoyed by hardly another lawyer to the same depth and richness and detail".[19] After months of investigation, the Senate confirmed the Brandeis nomination.[20] The liberals had won; the reactionaries had lost; and the nation had learned much about constitutional construction. The conflict had salutary consequences.

Brandeis' enduring contribution to the Supreme Court during the twenty-three years of his justiceship was his scientific approach to legal problems. No one who has graced the Supreme Court bench was so thoroughly familiar with economic problems. He was the Supreme Court's chief economist. His opinions on valuation of public utilities and rate fixing,[21] the right of a state to experiment with the limitation of production through the use of the certificate of public convenience and necessity,[22] the limitation of undue corporate expansion and the use of progressive chain store taxation,[23] and the desirability of consonance between the general law of the federal courts and the state courts,[24] are classics in economics and political theory. His plea for the right of the several states to experiment in social and economic controls, unhampered by federal judicial interference, is a scientist's affirmation of faith in the doctrine of state sovereignty. "To stay experimentation in things social and economic," wrote Brandeis," is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel, social and economic experiments without risk to the rest of the country. * * * If we would guide by the light of reason, we must let our minds be bold." [25]

In law's Hall of Fame, Holmes the philosopher, Cardozo the moralist, and Brandeis the economist, will have conspicuous places. In no small measure has

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[18] P. 112.

[19] Pp. 109, 110.

[20] See *Hearings and Report on Nomination of Louis D. Brandeis, Sen. No. 409,* 64th Cong., 1st Sess. (1916).

[21] Dissenting opinion in Missouri *ex rel.* Southwestern Bell Telephone Co. v. Public Service Commission, 262 U. S. 276, 43 Sup. Ct. 544 (1923).

[22] Dissenting opinion in New State Ice Co. v. Liebmann, 285 U. S. 262, 52 Sup. Ct. 371 (1932).

[23] Dissenting opinion in Louis K. Liggett Co. v. Lee, 288 U. S. 517, 53 Sup. Ct. 481 (1933).

[24] Erie R. R. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817 (1938).

[25] Dissenting opinion in New State Ice Co. v. Liebmann, 285 U. S. 262, 311, 52 Sup. Ct. 371 (1932). "To quote from Mr. Justice Brandeis' opinions", wrote Frankfurter, "is not to pick plums from a pudding, but to pull threads from a pattern. He achieves not by epigrammatic thrust but through powerful exposition. * * * His opinions march step by step towards demonstration, with all the auxiliary reinforcement of detailed proof." P. 125.

Mr. Justice Frankfurter contributed to the perpetuation of the memory of "Three Great Justices". I like to think of the many readers of these collected legal papers as visitors to my imaginary Hall of Fame.

LOUIS PRASHKER.*

LOOK AT THE LAW. By Percival E. Jackson. E. P. Dutton & Co., Inc., 1940, pp. 377.

The author of this book is an eminent lawyer, with many years of experience, whose work typifies the concept of the people's lawyer and whose interests in law spring from a desire to view it and to help make it an effective vehicle for social control in a democratic society. The enthusiastic reception which this book was accorded at the hands of lawyers and laymen alike is a heartening indication of the trend of modern juristic thought.

The facts detailed in this volume are of utmost importance to the modern public. They are facts which law schools are apt to overlook. Where interests are necessarily confined to theoretical exposition, the distempers of the law in practice are all too frequently ignored. Here is a book which gives to the law student an opportunity to peer behind the scenes and to see how the standards and principles that are worked out in the classroom fare when they are applied in the courts. The author is not unaware of the difficulties confronting the task which he has so efficiently accomplished. He is conscious of the deep responsibility which rests upon anyone who would undertake an analysis of the legal system from its practical point of view, but he has a gift for clear and trenchant statement and for calling things by their right names. He employs this art dexterously to reveal the fundamental deficiencies of the legal system as it is applied to the courts and to suggest some thoroughly sensible remedies, which certainly will not be long in forthcoming.

Mr. Jackson is not an iconoclast. His suggestions are not destructive and his view of the law does not indicate any hopelessness or any feeling of ultimate despair. On the contrary, throughout the book runs an optimistic note and one gets the feeling that the author is conscious of the considerable progress that has already been made and confident that more is bound to come. Without sparing the sensibilities of lawyers or judges, he yet is able to cast blame only where it belongs and to recognize the essential soundness that exists in the basic concepts of our legal system. He says, speaking of law: "Generally, far from being condemned for its hypocrisies, it should be praised for its ability to reconcile law and life, for its effort to obtain a balance between the requirements of justice and the calls of mercy." Speaking of the law's delays, he weighs a careful balance between a radical innovation and progress, pointing out that "we must be careful to limit the pruning of technicalities so that matters of substance are not emasculated".

He has something specific and detailed to say about almost every branch of

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