Fordham Law Review

Volume 9 | Issue 1 Article 8

1940

Book Reviews

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Part of the Law Commons

Recommended Citation
Book Reviews, 9 Fordham L. Rev. 152 (1940).
Available at: https://ir.lawnet.fordham.edu/flr/vol9/iss1/8

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

BOOK REVIEWS

LAW AND POLITICS. By Felix Frankfurter. New York: Harcourt Brace & Co. 1939. pp. xxiv, 352. $3.00.

This book contains a representative sampling of the writings of Felix Frankfurter covering a period of over twenty-five years. The value of the book is enhanced by the elevation of the author to the Supreme Court. And doubtless this fact inspired the editors to publish Frankfurter's writings at this time. It is not an overstatement to say that even more than in the cases of Holmes or Cardozo, Frankfurter has revealed in the pages of this book, and in many others not included herein, not alone his philosophy of law, but what is more pertinent, his philosophy of constitutional law. The elevation of Justice Frankfurter to the Supreme Court necessitates a revision of the following sentence from his pen: "Barring only Holmes, no man had so completely revealed the map of his mind before he went on the Court as had Cardozo. If surprise there was in anything that he wrote as a Justice, it was not for want of disclosure by him as to the way he looked at questions that would come before him."[1] It now appears that Frankfurter has more completely set down his matured judgment on methods of constitutional interpretation and his views on current constitutional issues than did either of his distinguished predecessors on the Supreme Court. Holmes' contribution to constitutional law in his writings (apart from his occasional contact with this segment of the law as Justice and Chief Justice of the Massachusetts Supreme Judicial Court) was such that Theodore Roosevelt was obliged to seek advice from Senator Lodge as to the social and economic views of the man he was considering for appointment to the Supreme Court.[2] Cardozo, in his brilliant career as a Judge and later Chief Judge of the Court of Appeals, and in his well-known books on the nature of the law and particularly of the judicial process, set forth only infrequently his attitude on current constitutional issues. Not so in the case of Frankfurter. Beginning with his address delivered at the Twenty-fifth Anniversary Dinner of the Harvard Law Review in 1912,[3] and ending with his address before the Survey Associations in 1937,[4] there is gathered within the pages of *Law and Politics* the frank and fearless comment of a legal scholar on practically every important problem of constitutional law. Not without good reason do his editors proclaim that the captured papers, penned before the writer had any immediate thoughts of the Supreme Court in mind, are "an index to the American future"[5] since they "chart the social and economic and political thinking of a man who may well sit on the Supreme Court for the next quarter of a century."[6]

Perhaps one of the most striking features of the book which mirrors clearly Frankfurter's off-stage estimate of the true position of a Justice of the Supreme Court, is the following excerpt from a letter written by President Theodore Roosevelt to Senator Lodge, the elder, which Frankfurter quotes with approval:

"In the ordinary and low sense which we attach to the words 'partisan' and 'politician', a judge of the Supreme Court should be neither. But in the higher sense, in the proper sense, he is not in my judgment fitted for the position unless he is a *party man*, a con-

1. Pp. 90.
2. Pp. 66-67.
3. Pp. 3-9.
4. Pp. 345-352.
5. P. ix.
6. P. xi.

structive statesman, constantly keeping in mind his adherence to the principles and policies under which this nation has been built up and in accordance with which it must go on; and keeping in mind also his relations with his fellow statesmen who in other branches of the government are striving in *cooperation* with him to advance the ends of government."[7]

The editors conclude that his approval of the foregoing passage indicates that "Mr. Frankfurter . . . agrees with Mr. Roosevelt and agrees therefore that the political and social views of a Justice of the Court are proper matters of inquiry."[8]

It is interesting to recall the violent outburst of temper displayed by President Theodore Roosevelt when Justice Holmes refused to accept the trust-busting attack of President Roosevelt in the *Northern Securities* Case.[9] The magnificent language of Justice Holmes which begins his famous dissent may be pertinently recalled:

"Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend."[10]

More interesting perhaps, in view of Theodore Roosevelt's insistence that a Justice of the Supreme Court should be a "party man", is the angry retort which Roosevelt made upon learning of Holmes' independent judgment. He said that he could carve out of a banana a Justice with more backbone than that.[11]

Out of the foregoing episode, which is not mentioned by Frankfurter in his tribute to Justice Holmes,[12] comes forth a query: Would Frankfurter endorse the rebuke of President Roosevelt directed at Justice Holmes following the *Northern Securities* decision? Gauged by the refusal of Frankfurter to accept the proposal of President Theodore Roosevelt in 1912 for the "recall of judicial decisions" and his silence regarding President Franklin D. Roosevelt's "court packing" plan in 1937, the answer seems to be clear. Despite Frankfurter's alleged endorsement of Roosevelt's sentiments regarding judicial subservience to "party", as set forth in the latter's letter to Senator Lodge, it seems beyond dispute that Frankfurter would bitterly resent the violent words of Theodore Roosevelt as an unwarranted criticism of the independent action of a fearless judge.

All that any President has a right to expect from his appointees to the Supreme Court is sympathetic consideration, not rubber stamp approval, of his social or economic views. Judicial "cooperation" is one thing; subservience to the appointing power is something else. It is respectfully submitted that Roosevelt's letter to Senator Lodge, construed in the light of the aftermath of the *Northern Securities* Case, needs revision before it can be accepted as a safe and sound formula of the relations which should obtain between the President and the Justices of the Supreme Court.

Throughout the pages of this book there is ample evidence that Frankfurter conceives of the judicial process in the field of constitutional law as one which is widely different from the approach of a judge dealing primarily with common law litigation.

---

7. P. 67. (Italics inserted.)
8. P. xiv.
9. Northern Securities Co. v. United States, 193 U. S. 197 (1904).
10. *Id.* at 400.
11. BENT, JUSTICE OLIVER WENDELL HOLMES (1932) 251.
12. Pp. 66-67.

Constitutional issues are concerned with national problems, directly affecting all the people of the country. Frankfurter says:

"These are tremendous and delicate problems. But the words of the Constitution on which their solution is based are so unrestricted by their intrinsic meaning or by their history or by tradition or by prior decisions that they leave the individual Justice free, if indeed they do not compel him, to gather meaning, not from reading the Constitution, but from reading life."[13]

Thus in order to "read life", he approves of "an instinct against the tyranny of dogma and skepticism regarding the perdurance of any man's wisdom, though he be judge."[14] His skepticism finds an outlet in his insistence upon an unrelenting search for the facts, upon the functional approach[15] and in his distrust of generalities.[16] But Frankfurter seems to be far away from the so-called realism of the Columbia and Yale law faculties. His skepticism of legal dogma is paralleled by a skepticism of spurious facts even when they are prematurely stamped with approval by the social scientists.[17]

"So we have to be constantly on our guard lest psychology be more unequivocal in her wisdom when she speaks to lawyers than when she speaks to psychologists. In the treacherous domain of the social sciences we must be wary lest we live on one another's washing —lest we prove an unknown in one field by an unknown in another."[18]

The investigating spirit of Brandeis, the impatience of Holmes when social experimentation is retarded and the lucid style of Cardozo—his three mentors in the law—all these are visible in the structure and content of Frankfurter's pre-judicial writings. It will be interesting to follow his judicial career and to determine whether *Law and Politics* contains an accurate forecast of coming juristic "weather" in the Supreme Court.

WALTER B. KENNEDY†

MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890. By Charles Fairman. Cambridge: Harvard University Press. 1939. pp. vii, 456. $4.50.

In 1862 President Lincoln began to remake the Supreme Court by appointing three new and young justices and a fourth early in the new year. Samuel Freeman Miller was the second of this quartette of jurists and so little known that the New York Tribune was editorially certain that Daniel F. Miller and not Samuel was the new justice. After over ten years of study Professor Fairman has produced this excellent volume as the fruit of painstaking research and diligent scholarship that enriches the field of judicial biography and from the oblique point of view of a singular personality pictures the Supreme Court for a twenty-eight year period.

The Kentucky country doctor, who turned lawyer at thirty and hating slavery, went west and settled at Keokuk, Iowa, where he soon became a leader at the local

13. P. 30.
14. P. 122.
15. P. 290.
16. P. 119.
17. Kennedy, *Realism, What Next? II* (1939) 8 FORDHAM L. REV. 45.
18. Pp. 297-298.
† Professor of Law, Fordham University, School of Law.

bar and a vigorous member of the young Republican party. After a few short years the break came and this ill-prepared western lawyer was named to the high Court and came east to face the old Chief Justice whom he had hated. At the end of the term he loved the old and broken man who predicted a career of great usefulness and honor for him.

Mr. Fairman traces this career with warm sympathy and the reader witnesses the growth of this able partisan into the dominant figure on the Court—lonely, before Justice Harlan came in 1877, in seeing clearly the social implications and high duties of the court—a thorough party-man though never a mean one, Mr. Justice Miller disapproved of the bulk of radical legislation, but as a judge refused to strike it down. Nevertheless, through these troubled years as he looked doubtfully at Republican action he comforted himself with the reflection that the Democrats would have done worse! With "dauntless will" he upheld the Legal Tender Act of 1862 and hewed to his strict interpretation of the Fourteenth Amendment and the two chapters on these cases are very fine. One sees not only the justice's legal action set in the frame of the Court's opinions, but also the candid thinking of Justice Miller as expressed in his voluminous correspondence with his brother-in-law, William Pitt Ballinger of Texas, and by judicious quotation from these letters and Ballinger's diaries the biographer interlards a warmly human and exceedingly personal note into a sometimes arid and over-legalistic study. Miller's opinions of fellow justices and other important contemporaries are refreshing, amusing and surprising and his sympathy for the tax-burdened men of his generation often brought about lengthy disagreement with his fellows as his bold and challenging mind develops a social consciousness that makes him seem born out of time in judicial biography.

In a book of such general excellence it is vain to carp at minor faults of structure and emphasis or explanations that sometimes make the author apologize for the subject's partisanship. These are small things beside the satisfaction of knowing this eventually grand old man who lives in a work that casts a searchlight on the field of judicial biography and clarifies a large segment of Supreme Court history as it reveals a figure so like the great Marshall in strength of mind and ability and so different in his social concepts—probably "the greatest figure in constitutional law since Marshall."

SAMUEL F. TELFAIR, JR.†

THE PROBLEM OF THE CONSTITUTION. By Edward Jerome. New York: Longmans, Green & Co. 1939. pp. ix, 224. $2.00.

The thesis that the frame of American government of today is not what the founding fathers envisioned in 1787 has become a commonplace of political thought. Indeed, it could be called a truism, since it is no more than conjectural that the members of the Federal Convention had any vision of the precise way their Document would work after the arrival of the Industrial Revolution, the demolition of time and distance by the inventions of tranportation and communication, and the expansion of the field of the private corporation. The present author expounds this familiar thesis, but his development of it is so novel, not to say startling, as to demand more than passing mention.

The argument of the book is quite involved, and based in large part upon premises of questionable validity, so that it is difficult to select a starting point of criticism.

† Professor of History, Fordham University.

Briefly, the "problem" of the constitution is that of effecting a division of "sovereignty" between States and Nation.

The first premise of the argument is Hamilton's statement to the Federal Convention of 1787: "Two sovereignties cannot coexist within the same limits." This proposition is justified, apart from the authority of Hamilton, by repeated allusions to the maxim, "No man can serve two masters." But it is recognized that the Convention set out to do the impossible—to make a division of sovereignty, and there follows a speculation as to the basis of the division. This, since a division along territorial or temporal lines would be impracticable, must be according to categories of conduct: in some of their conduct citizens will be subject to national regulation, in the rest, to state regulation. In this connection there is postulated a classification of sovereign powers. "Powers of the first class" are powers to establish "institutions ancillary to the operation of government," while "powers of the second class" are "those to make laws regulating conduct." The federal government has all powers of the first class save those expressly denied it by the constitution, while it has only those powers of the second class which are expressly granted. In the allocation of the powers of sovereignty to Nation and States it is further postulated that whenever one government has "powers of the second class" with respect to a certain category of conduct, it has such powers exclusively, and the other government has no such powers in that respect. To put it in another way, when a power to regulate a certain kind of conduct is given to one government, the citizen is immune from regulation of that class of his conduct by the other government, and the latter government is under a disability to impose regulations on that class of conduct. The judicial function in this scheme is to enforce the immunities of citizens, but, unfortunately, the Supreme Court has failed to keep in mind the difference between law and politics, the original line of division of State and National powers has been allowed to fall from political (i.e., responsive to popular pressure) considerations, and we are now at the point where we must consider whether to rebuild the line or to do away with attempts to divide sovereignty and adopt the original Hamiltonian plan of a single central government.

The general impression of the reviewer is that a devoted admirer of Alexander Hamilton has set forth a rather labored and artificial rationalization of selected historical facts in support of Hamilton's political ideals. That is certainly a labored work which will exclude from a public law application the Holmesian, "the life of the law has not been logic; it has been experience" simply because the phrase appeared in *The Common Law,* and will, at the same time, insist upon a public law application of the Hohfeldian correlatives, "immunity" and "disability" which were designed almost exclusively for private law use. That is a labored work which distorts Hamilton's *Report on Manufactures* into a claim that the "general welfare" clause is a grant of a substantive legislative power rather than a qualification of the taxing and spending powers, and which tortures Mr. Justice Johnson's concurrence in *Gibbons v. Ogden*[1] into an opinion that the federal power extends to all commerce, not merely that which concerns more states than one. That work is artificial which proceeds upon the assumption that "constitutional law is a group of logical deductions from the meaning of the words written into the constitution," and that constitutional "guaranties" ought to be ascertainable "by logical and simple deductions from the applicable provisions in the constitution."

The reviewer is not impressed with an argument which, at its core, mistakes a variable for an absolute. It is not convincing for an author, in 1939, to set up a

1. 9 Wheat. 1, at 222 (U. S. 1824).

definition of sovereignty and then criticize the constitution because it does not fit his definition. Rather, he should, if necessary, revise his definition of sovereignty in the light of the working of the constitution and other similar organic laws. There is no evidence that the founding fathers considered themselves bound by existing abstractions on internal sovereignty any more than they were by other accepted categories of statecraft. Their task was to set up a government from which others might learn political principles but which was not itself to be confined by the principles which others had taught.

Nor is the reviewer impressed with an argument based, ultimately, on nothing more substantial than an epigram: "An ordinary law regulates civil conduct, while an organic law, or written constitution of government, regulates the conduct of those who govern." Take that at its face value, and it is easy, with the aid of Hohfeld's terminology, to come to the author's theory of constitutional law. But implicit in this process are two major fallacies. The first is that the Austinian, or "command" theory of law is adequate—that "the law" consists of a number of propositions in the form of "thou shalt" or "thou shalt not." The other is that Hohfeld's system of correlatives and opposites is expressive of the essence of law rather than a convenient lawyers' shorthand for describing the legal consequences of individual fact situations. We know, for example, that the State of Ohio cannot constitutionally impose criminal sanctions upon the superintendent of a federal soldiers' home for serving his charges oleomargarine instead of butter.[2] But is it safe to conclude that the law of the Constitution forbids the State to *regulate this conduct* of the superintendent? Or that the superintendent has an *immunity* against regulation of this conduct of his by the State? There seems to be nothing in the Constitution to prevent the State accomplishing the desired result by forbidding other persons to *sell* oleomargarine,[3] or by requiring sellers to exact such a price that it would not be profitable for the superintendent to buy.[4] There has been some unfortunate language in judicial opinions which lends color to such theories. Thus, we hear of the "constitutional right" of a foreign corporation to invoke the diversity jurisdiction of the federal courts,[5] but there are effective ways for states to prevent this jurisdiction attaching.[6]

The author falls into the fallacy of over-simplification. It is to be doubted that there are in fact any concrete instances of what he calls "powers of the first class." In the establishment, or at least in the operation of, for example, the Post Office, there is necessarily involved the regulation of individuals. The Post Office does not exist, nor can its legal or its political status be discussed as if it existed in a vacuum. It hires and fires men and women, it grants, withholds and revokes special privileges, it makes contracts, buys and sells equipment and lands and buildings, and in all of these activities it exercises powers of sovereignty which involve real and direct regulations of the conduct of individuals. The author recognizes some measure of this when he states that, "any regulation of conduct that is only incidental to the maintenance and protection" of governmental institutions is within "powers of the first class." But this qualification hardly goes well with the argument that demands a strict categorization of regulatory powers, and insists that there must be no regulation of such activities as manufacture, agriculture, and mining under the guise of a power to regulate commerce.

2. Ohio v. Thomas, 173 U. S. 276 (1899).
3. Powell v. Pennsylvania, 127 U. S. 678 (1888).
4. *Cf.* Milk Control Board v. Gosselin's Dairy, Inc., 16 N. E. (2d) 641 (Mass. 1938).
5. Terral v. Burke Construction Co., 257 U. S. 529 (1922).
6. Railway Express Agency v. Virginia, 282 U. S. 440 (1931).

The general conclusion to be drawn is that a little learning is a dangerous thing. What the author has apparently done is to read Hohfeld's juridical terminology, postulate that it is the meat and bones of a system of law, select a few generalities from court opinions on the technique of exercising the power of judicial review, consider a few isolated Supreme Court decisions quite apart from their antecedents and surrounding circumstances, criticize them against the standard of the Hohfeldian postulate, and draw from the criticism general conclusions as to the existence and validity of principles of constitutional law. Under such an unscientific method, it is only by the rarest sort of coincidence that sound results will be reached. They were not reached in this book.

JOHN D. O'REILLY, JR.†

MARSHALL AND TANEY, STATESMEN OF THE LAW. By Ben W. Palmer. Minneapolis: The University of Minnesota Press. 1939. pp. viii, 281. $3.50.

This book is designed to reappraise the judicial careers of Marshall and Taney in the light of modern knowledge, which recognizes the importance of extra-legal factors in the shaping of judicial decisions. Environment, background, economic determinism and personal impulses have been potent factors in the judicial process, but it is only of late years that the potency of such non-legal forces has been discovered through the growth of social sciences and the use of scientific methods in the appraisal of human activities. So runs the preface of the book indicating that the author plans to delve into the hidden springs of judicial action and to fathom the subconscious impulses which guided the pens of Marshall and Taney.

Palmer's opening chapter is suggestively entitled "Are Judges Human Beings?" His analysis of the judicial process is thoroughly modernistic and emphasizes the extreme view that judicial decision is based upon behavior and that the judge's behavior is explainable only by a consideration of the depths of his public and private life. Naturally this theory disregards the face value of judicial opinions and finds that judicial conduct grows out of a jungle of "wishes, desires, emotions, questions, commands, imaginations, hopes and fears which constitute the psychic life of every person."[1] Palmer accepts the skepticism of Frank, Hamilton, Arnold and other legal realists who reject the value of rules and principles, reason and logic, and offer instead the primary importance of considering the impact of immediate or remote facts, external stimuli, hidden inhibitions and similar behavioristic and psychoanalytical terms in explanation of the judicial process. Of course the obvious result of such mechanistic explanation of judicial decisions is to render obsolete or to minimize the traditional value of case law. If the reasons set forth in the reported cases are not the real reasons motivating the courts, why bother classifying and publishing digests and encyclopedias of law?

If his thesis is sound and judges are actually controlled by personal impulses rather than legal principles, by hidden inhibitions rather than expressed reasons, then indeed there is warrant for the rewriting of judicial biography and attempting to translate into the opinions of the judges those subterranean forces which control the making of law.

Before proceeding too far in the way of a wholesale acceptance of the "newer

† Professor of Law, Boston College, School of Law.

1. P. 32.

social sciences, particularly psychology",[2] as curative disciplines in the improvement and understanding of the judicial process, it may be permissible to suggest a few difficulties which must be faced by the advocates of the "backstairs" formula of weighing decisions of the courts. At least three hurdles must be successfully surmounted before judicial psychoanalysis will be widely accepted by the conservative wing of the legal profession.

(1) The traditional technique of the common law has been functioning for six centuries. Any system which seeks to oust the basic process of painfully building up the law on a theory of developing precedent has the burden of proving that it offers advantages above and beyond the proven results of the past. And in this study of the common law approach it is not enough to poke holes in the ancient edifice of the classic law. What the critic must be prepared to prove is something more than an imperfect system of adjudication; the proponents of the new scientific approach are burdened with the definite task of clearly showing that their substitute proposals offer a truer explanation of the real ways of judges at work and that the acceptance of this technique will be a real benefit. Granting the defects necessarily present in all human institutions, are we prepared to junk the common law and to take in its place the personalized approach of the New Psychology? The prediction of Justice Stone deserves restatement:

"Whatever its defects, the [common-law] system, deep rooted in our tradition and habit of mind, after serving us for some six centuries, will not be discarded. In the rôle of critics and prophets we will do well to accept that as the probable verdict of history."[3]

(2) Palmer places great confidence in the scientific approach and pays tribute to the "outsiders" who are viewing the law objectively "unhampered by reverence and the traditional respect of the profession for the courts."[4] These outsiders are the sociologists, the psychologists and the historians. "Nor were the social sciences, newly rich in their claim to be sciences and each looking for more worlds to conquer, content to endure the hauteur of our lady of the law."[5] Now a lively respect for the research being done in the social sciences and psychology is one thing; but a ready acceptance of their unproven experiments and trial-and-error hypotheses is something else. The amazing attitude of the new realists seems to be that the law should submit to the entry of the social sciences and psychology into the legal order as a proving ground for the theories of these bordering disciplines at a time when these tentative proposals are widely questioned in their respective laboratories. Lest the last statement be dismissed as a rhetorical flourish, read the opening lines of Robinson, *Law and the Lawyers,* wherein a psychologist seriously contends that the entire field of the law must be brought into line with psychological knowledge.[6] A study of the "outsider's" own estimate of psychology discloses the utter confusion of psychological

2. P. viii.

3. Stone, *The Common Law in the United States* (1936) 50 HARV. L. REV. 7.

4. P. 29.

Palmer emphasizes again his liking for psychology of the present-day type. "But under the impact of modern psychology the bubble of inflated self-esteem and pretense [of the lawyer] burst." (p. 30).

By way of query it might be asked whether this "bubble of self-esteem" has not also been visible in the unwarranted and unscientific claims of "modern psychology." *Cf.* PSYCHOLOGIES OF 1925, *passim,* and see particularly Murchison, Preface, ix.

5. *Ibid.*

6. ROBINSON, LAW AND THE LAWYERS (1934) v.

theories, and yet note his continued insistence that every jurist must be "his own psychologist" and must reject all legal theories which are out of joint with "plain psychological facts"![7] Where is the lawyer or judge to find these "plain psychological facts"? This same unreasonable attitude and impatience is evidenced in the writings of Münsterberg, who finds fault because his psychological formula for examining witnesses received scant attention in the courts.[8] It is of more than passing interest to record that Münsterberg's theories have since been overthrown by later developments in laboratory techniques,[9] and a lawyer has convincingly shown that Münsterberg's experiments were most unscientific and easily upset by the test of common sense.[10] It is just this naivete of realism (seemingly endorsed by Palmer) in offering free entrance into the law of all the partisan proposals of science which leaves the conservative unimpressed. Certain it is that the New Psychology has plenty of work to do in its own discipline *before* it can be given unconditional welcome in the mansion of the law.

(3) The use of the new realism as a foundation for the analysis of judicial decisions has a boomerang effect in operation which is seemingly unknown to or conveniently ignored by many of its advocates. If judicial opinions are enmeshed in a tangled jungle of wishes, desires and emotions latent in the language of the courts the task of the "jurisprude"[11] is to find out why the judges acted as they did in the past; and the search must be made for the impulses and stimuli which control judicial conduct. Let us accept for the moment the full sweep of Palmer's argument as to the hidden sources of juridical acts. What reliance may we place on the studies into the personal, political, social and economic environment of the judiciary? Is there any prospect that the "new history" will succeed in fathoming the dark secrets of the judge's boyhood and the malign influence of a fall from his mother's knee on his later judicial attitude toward the Rule in Shelley's Case? Quite apart from the intangible and elusive nature of such psychic excursions, a more formidable question presents itself. If this bog of imaginations, emotions, prejudices and impulses muddies not only judicial thinking, but also "the psychic life of every person", how does the new historian propose to escape this morass of predetermined influences in his own scientific investigation of the judges' environment? In a word, what intrigues the onlooker is the assumed ability of the New Psychology to examine impartially the partisan viewpoint of our judges, both living and dead. Is not an inconsistency visible in the *open* mind of realism dissecting the *closed* mind of the judge?[12]

Before leaving Palmer's preliminary chapter on the nature of the judicial process, it is to be noted with regret that Palmer did not see fit to annex footnotes indicating the original sources of his quotations which are used to illustrate or support his analysis of judicial thinking. Such anonymity decreases the value of his book and correspondingly increases the danger of unintentional error. "Freed of the check of the concrete the most learned err."[13] For example, a reader might gain the impres-

7. ROBINSON, *supra* note 6, *passim*.

8. MÜNSTERBERG, ON THE WITNESS STAND (1922) Introd. 10-11.

9. Kennedy, *Principles or Facts?* (1935) 4 FORDHAM L. REV. 68, n. 82.

10. TAFT, WITNESSES IN COURT (1934) Ch. III.

11. A word coined, I believe, by Professor Llewellyn.

12. This difficulty of getting results of a scientific nature is not wholly missed by Palmer. He recognizes the danger of the critic's bias in evaluating the judicial work of Marshall and Taney. P. 271.

13. Llewellyn, *Some Realism About Realism* (1931) 44 HARV. L. REV. 1225.

sion that Dean Pound favors the current vogue of explaining judicial opinions in terms of human behavior. Palmer quotes from an article by Dean Pound without disclosing to the reader its source:

"Psychological exposure of the rôle of reason in human behavior, of the extent to which so-called reasons come after action as explanations instead of before action as determining factors, has made a profound impression on the rising generation of jurists. It has led many of them to insist on the non-rational element in judicial action as reality and the rational as illusion. In contrast to the nineteenth century emphasis on certainty and uniformity and ignoring of the continual fallings short of those ideals, they emphasize the uncertainties, the lack of uniformity, and the influence of personal and subjective factors in particular cases."

This excerpt was taken from Pound, *The Call for a Realist Jurisprudence*,[14] and standing alone, it seems to add the force of Pound's name and scholarship to the advocates of the new psychology. But in the very same article from which the above quotation was taken, Dean Pound later wrote:

"Today some conceive in like manner that jurisprudence must at the outset choose definitely and decisively from among the competing psychologies and commit itself irrevocably to one of them. On the contrary, I submit that jurisprudence can't wait for psychologists to agree (if they are likely to), and that there is no need of waiting. We can reach a sufficient psychological basis for juristic purposes from any of the important current psychologies. Here again real means significant. The things which are significant for jurisprudence are in all of them. We have problems enough of our own in the science of law without wasting our ammunition in broadsides at each other over our wrong choices of psychological parties."[15]

Likewise it is regrettable that Palmer did not annex the formidable list of critics who strongly oppose the entry of behavioristic psychology into the law and contest its adequacy as a true explanation of judicial conduct.[16]

Summing up the preliminary chapter, the fear is expressed that Palmer has expanded a single factor of the judicial process, concededly of some value particularly in the field of constitutional law, into a theory which is offered as an explanation of all judicial decisions.

Having examined at length and approvingly the new psychology which reduces judicial decisions to the level of hopes and fears, one might expect that Palmer would apply the current psychic formulas in his probe of the statesmen of the law. But Palmer does not do so. He says:

"In our consideration of Marshall and Taney we shall shun the alluring bypaths of a speculative jurisprudence that is ultra-psychological, biological, visceral, glandular, or episodic. We shall not see in the decisions of these two men merely the exemplification of a judicial process that is the sole and Freudian product of inhibitions, wish fulfillments, suppressed desires, intimate primal drives."[17]

Instead he promises to confine his footsteps "to the firm highway of history and

14. Pound, *The Call for a Realist Jurisprudence* (1931) 44 HARV. L. REV. 704.

15. *Id.* at 706.

16. Pound, *supra* note 14; Adler, *Law and the Modern Mind: Legal Certainty* (1931) 31 COL. L. REV. 91; Fuller, *American Legal Realism* (1934) 82 U. OF PA. L. REV. 429; Goodhart, *Some American Interpretations of Law*, MODERN THEORIES OF THE LAW (1933) 15.

17. P. 38.

of law."[18] Despite his sympathetic coverage of the modern viewpoint, one may find in his cautious conclusion a certain doubt about the new techniques, at least an unwillingness to follow the alluring bypaths of surmise and suspicion in dealing with the judicial careers of Marshall and Taney.

Having returned to the firm footing of the law, one finds an interesting and scholarly study of the judicial careers of Marshall and Taney. Written in a style which holds the attention of the reader, Palmer sketches out the characters of his heroes, weaves into the fabric of their judicial decisions their personal qualities, considers the economic and social forces at work in their particular times and estimates the long-range effect of their important decisions. However objectionable an overemphasis on judicial behavior rather than laws may be in the field of the common law in general, it is concededly true that the personal equation cannot be wholly eliminated from the study of the justices of the United States Supreme Court. Frankfurter has well stated the distinction:

> "The Supreme Court has thus ceased to be a common law court. The stuff of its business is what on the continent is formally known as public law and not the ordinary legal questions involved in the multitudinous lawsuits of *Doe v. Roe* of other courts."[19]

The most original part of Palmer's book is his chapter dealing with the judicial career of Chief Justice Taney. Time has softened appreciably the partisan verdict of his contemporaries. Palmer does an excellent piece of writing in showing that Taney like Marshall remembered that it was a Constitution that he was interpreting, not an inexorable code. He points out that Marshall's opportunity came first; it was he who laid the foundations of constitutional interpretation. Taney had the more delicate task of rearing the structure without fundamental change of base.[20] Both deserve the praise which he bestows upon them as statesmen in the law.

In view of Palmer's preliminary chapter setting down the psychologic or visceral explanation of judicial decisions, it is interesting to follow his estimate of the personal divergencies between Marshall and Taney. The first, a leader with a power of facile speech, not particularly learned in the law, a dominating figure in his court; the latter, ascetic, retiring, essentially the scholar, deeply versed in knowledge of the law.[21] Here seems to be the perfect situation in which to look for a wide difference in constitutional interpretation if the internal forces of character and subconscious impulses alone shape judicial decisions. Yet Palmer finds that both alike showed an awareness of the needs of their times. The problems facing Marshall were quite unlike the problems facing Taney. Perhaps Marshall, had he lived in Taney's day, would have reacted to the novel questions of constitutional law in the same way as Taney did.[22] Who knows?

WALTER B. KENNEDY†

HANDBOOK OF INTERNATIONAL LAW (Third Edition: Hornbook Series). By George Grafton Wilson. St. Paul: West Publishing Co. 1939. pp. xxiv, 623. $5.00.

This admirable Handbook by the emeritus professor of International Law at Har-

18. P. 39.
19. FRANKFURTER, LAW AND POLITICS (1939) 29.
20. P. 269.
21. Pp. 267-269.
22. P. 267.

† Professor of Law, Fordham University, School of Law.

vard University has two features of its own, besides the usual characteristics of a Hornbook. First, it gives on many pages a picture of the historical development of different rules of international law and of international practices; and, second, the method of presentation of the subject consists to a large extent in the narration and description of numerous specific matters and in the quotation from a large number of documents and authorities. Both the character of the contents, and the method of presentation used, have great merit, because it is good to have in one book of modest size a wealth of valuable material, both old and new, expertly presented in a most convenient form.

These special features, however, limit somewhat the pedagogical value of the Handbook. The book is very informative as to numerous specific matters, but it is not equally instructive: one does not find in it a general discussion and a critical analysis of the principles and of the different doctrines and problems of international law, as given, for example, in the same author's textbook on International Law.[1] This Handbook, therefore, will continue to be very useful for reference purposes, but it would be quite difficult for a beginner to acquire from it alone an adequate understanding of the actual nature of international law and of its fundamental principles.

The new edition contains quite a bit of additional material, but the undersigned misses information on our recent "neutrality" legislation (1935-1939), on the act of 1935,[2] which introduced the notion of "customs enforcement areas" on the high sea, in the chapter on Jurisdiction over Vessels—the case of *United States v. Flores*,[3] and in that on Extradition—the cases of *Factor v. Laubenheimer*,[4] and *Valentine v. United States ex rel. Neidecker*.[5]

The several chapters of the book deal with the nature of International Law, International Persons, General Rights and Obligations (including Existence, Independence, Equality, Domain, Jurisdiction), Intercourse (diplomatic and consular relations, treaties) and International Differences. Chapters 12 to 27 are devoted to War and Neutrality. Appendices contain the texts of the Declaration of Paris (1856), the Geneva Convention (1929), The Hague Conventions (1907), the Declaration of London (1909), the League of Nations' Covenant, and the statute of the Permanent Court of International Justice. The new edition also gives a table of all cited cases, and there is a good Bibliography and an Index. The Handbook will continue its useful service as an informative compendium of International Law.

ALEXANDER N. SACK†

1. WILSON AND TUCKER, INTERNATIONAL LAW (9th ed. 1936).
2. Act of Aug. 5, 1935, 49 STAT. 517, 19 U. S. C. A. §§ 1701-1711 (Supp. 1935).
3. 289 U. S. 137 (1933).
4. 290 U. S. 276 (1933).
5. 299 U. S. 5 (1936).

† Professor of Law, New York University, School of Law.