Missouri Law Review

Volume 4
Issue 1 *January 1939*

Article 7

1939

Book Reviews

Book Reviews

BRANDEIS: THE PERSONAL HISTORY OF AN AMERICAN IDEAL. By Alfred Lief. New York: Stackpole Sons, 1936. Pp. 508.

It is common knowledge that Supreme Court decisions are inevitably influenced by the social and economic viewpoints of the individual justices, thus making it highly important to study the personnel of the Court if one is to understand its output. Perhaps no better subject for such a study has ever existed than Mr. Justice Brandeis. His encyclopedic knowledge and profound understanding of our social and economic systems, unequalled, perhaps, by any other man in public life in this country, present or past, give reason and direction to his social and economic views so influential in the formulation of his opinions, where a less well informed and less socially and economically minded individual may find his opinions dictated by unconscious leanings or by political and economic concepts thrust upon him by an early training. Not infrequently described as a devoted adherent of Jeffersonian Democracy, Brandeis' conception of the role of government in protecting those who find it impossible effectively to protect themselves in our present-day economic and industrial set-up is in great measure the counterpart of that of Jefferson in a simpler agricultural society. From that angle, much that has been attempted by way of national legislation in recent years to cope more effectively with big business, to protect the interests of the public, and to place capital and labor more nearly on an equal basis in the bargaining struggle, would seem to fit into his philosophy of government. This is not to suggest that he had a direct part in formulating that program or that the actual legislation is as he would have it. But certainly his point of view and his influence had their effect upon those who did shape the program. His influence has ever extended far beyond the law. With his masterful understanding of economic problems it is not strange that his leadership in governmental affairs outside the Court should be constantly looked to.

No stauncher advocate of democracy has ever had a place upon our highest court. At the same time his thorough and practical understanding of economic enterprise, and his characteristic thoroughness, such as exemplified by his memorable brief in *Muller v. Oregon*,[1] lead one to think of him in terms of efficiency as well. Yet if the two seem to conflict, the choice is not difficult or delayed. It was Brandeis in his dissenting opinion in the famous *Myers* case who said, "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary

1. 208 U. S. 412 (1908).

power."[2] Always vigilant in the cause of democracy, he makes no exceptions for the Court itself. Like the late Mr. Justice Holmes, Brandeis is fully conscious of the fact that the Court's power to obstruct or destroy by a ruling of unconstitutionality is not offset by a similar constructive power. And further, like Holmes, he believes in the necessity of legislative freedom to experiment if social and economic problems are to be advanced toward intelligent solution, thus demanding that this power to obstruct or destroy, even in the name of the Constitution, be used only upon rare and urgent occasions. Perhaps this point of view has not been better expressed than in his brilliant and memorable dissent in the Oklahoma ice company case.

> "There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. . . . To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. . . . This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles."[3]

As Brandeis' epoc-making brief in the case of *Muller v. Oregon*[4] became a model for the later presentation of social and economic issues to the Supreme Court, so his dissenting opinions in such cases as *Missouri* ex rel. *Southwestern Bell Telephone Co. v. Public Service Comm.*,[5] *New State Ice Co. v. Liebmann*,[6] *Crowell v. Benson*,[7] and the *St. Joseph Stock Yards* case,[8] to mention only a few, stand among the most authoritative discussions of difficult social and economic problems in the whole field of our legal literature. The same might be said of the wiretapping dissent in the matter of personal liberty—"the right to be let alone."[9]

When President Woodrow Wilson presented his nomination to an associate justiceship of the Supreme Court to the Senate, Brandeis was branded by many as a dangerous radical and opposed by a great variety of leaders of public opinion, including seven former presidents of the American Bar Association, among whom were such men as Elihu Root and William Howard Taft. Yet this friend and protector of the common people, unperturbed through it all, has at all times, as a means of fostering and protecting democracy, held to an even course midway between radicalism and conservatism, and won for himself a place alongside the most respected and revered of the Justices who have ever graced our Supreme Bench.

The Brandeis life story as written by Mr. Lief lays bare the forces which account so vividly for his point of view and the purposes which have mo-

---

2. Myers v. United States, 272 U. S. 52, 293 (1926).
3. New State Ice Co. v. Liebmann, 285 U. S. 262 (1932).
4. 208 U. S. 412 (1908).
5. 262 U. S. 276 (1923).
6. 285 U. S. 262 (1932).
7. 285 U. S. 22 (1932).
8. St. Joseph Stock Yards Co. v. United States, 298 U. S. 38 (1936).
9. Olmstead v. United States, 277 U. S. 438, 478 (1928).

tivated his action since long before he came upon the Court, and makes thoroughly understandable the position he takes in all of his opinions. Such a service rendered with respect to one whose work has bulked so large and whose influence is destined to go so far as that of Mr. Justice Brandeis is one for which all lawyers and students of government may well be grateful. Other biographies of the Justice have been written and no doubt still others of greater compass are sure to follow, but the contribution of Mr. Lief will remain distinctly worthwhile.

University of Missouri School of Law ROBERT L. HOWARD

CASES AND OTHER MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE. Second Edition. By Carl C. Wheaton. Rochester: The Lawyers Co-operative Publishing Co., 1938. Pp. xiv, 656.

Here is a one volume library on the conduct of litigation in the federal courts. After brief survey of the types of United States courts and their jurisdiction in general, the major portion of the book deals with the jurisdiction and procedure of the district courts. This is followed by materials regarding the circuit courts of appeals and the Supreme Court. Taking up but one inch of shelf space, its leading cases, statutes, rules, forms, text and notes provide the basic information as to how to get into, or keep out of, the federal courts and what to do when one gets there. The detailed table of contents and the adequate index make the work usable as a book of reference. If the lawyer whose practice is principally confined to the state courts wishes a single volume in the field of federal procedure, this is the one for him.

However, one should estimate the work primarily in the light of the purpose for which it was prepared, namely as a vehicle for law school study of federal jurisdiction and procedure. Certainly it differs markedly in several related respects from other casebooks on the subject. First of all, probably no other modern casebook on any subject has as large a proportion of pages taken up with materials other than court opinions. No other casebook in the field goes into as much detail in matters of federal jurisdiction. Finally, the materials are given—in so far as they could be given at the time of publication—for pleading and trying cases and taking appeals under the new rules.

The trend of books prepared for law school study is to use fewer pages of opinions and more materials of other sorts. The book under review shows this tendency to a greater degree than other recent casebooks, but both the subject matter and the editor's plan of treatment warrant the allotment which has been used. Nevertheless, decisions remain, and probably will remain, the principal units of study in ordinary law school courses. Professor Wheaton's book contains upwards of 130 principal cases and these alone would provide sufficient materials upon which to center the discussion for 30 or 35 class meetings. The

opinions are well chosen, though one misses a few familiar faces.[1] Naturally *Swift v. Tyson* is supplanted by *Erie R. R. v. Tompkins*. A generous sprinkling of district court opinions gives the book a rather earthy flavor. The cases are skillfully, though sometimes severely, edited. Occasionally one is somewhat confused by the fact that a large type note follows immediately after the opinion without anything to indicate a break.[2]

There is no attempt in Professor Wheaton's book to present a philosophy of federal jurisprudence by tracing the development of ideas in prevailing and dissenting opinions. There is likewise no attempt to center the work around a dozen or a score of judicial battle-grounds on particular topics. The book is designed to show the full picture of what we have in the federal judicial system. The teacher can be as philosophical as he wishes about that. The details which the editor supplies can be used for such a development, or can be treated purely as matters of additional routine information.

On first thought, it is rather startling to notice that the work contains more sub-divisions than principal cases. Frequently a section will contain only a statute, a rule, or a note. The subject of "amount in controversy" may be taken as typical of the method of treatment. There are four principal cases placed under four sub-sections, the titles to which indicate the subject matter of the cases. In addition the notes contain references to perhaps a hundred cases with holdings stated briefly, the gist of numerous periodical articles, and a few other matters.

Throughout the book the editor's notes are so complete that it is certainly not profitable for the teacher to present problems based upon sources not contained in the student's book. This imparting of detailed information in the casebook has the advantage of permitting the teacher to start with an analysis of the materials given and proceed either to build up a beautiful synthesis of the authorities, or, as frequently happens in this and other fields, to be obliged to admit irreconcilable discord. The editor has not tried to put federal procedure in a nutshell. There is plenty of stimulating work left for the individual teacher.

In the absence of cases under the new federal rules, the editor has included the rules themselves and statements as to their sources, together with the official forms. Many of them deal with the problems which are discussed in the standard courses in pleading, evidence, and practice. Is it likely that law school curricula will give general courses in these subjects without reference to the new federal rules? This scarcely seems probable. Already teachers are groping for methods to bring the new rules into the general procedural courses. In a couple of years there will be little need to call these matters to the students' attention again in the course of federal procedure. However, as the book under review appears in

1. Such as McCormick v. Sullivant, Sheldon v. Sill, *Ex parte* Young, Prentis v. Atlantic Coast Line Co., Barney v. Latham, Kline v. Burke Construction Co.

2. Pp. 21, 102, and perhaps pp. 39, 198, 235, 339, 492.

a transitional period, it is wise to include all the rules in the casebook. In addition they take little space and their presence adds to the completeness of the work even if little attention is given to some of them in the course on federal procedure.

Throughout, the work bears evidence of Professor Wheaton's careful scholarship and thorough knowledge of the field. Apparently he has firm convictions upon the manner in which the subject should be presented for study. This plan has necessitated departure from tradition, both in form and in scope of topics treated. He has the courage to carry through these convictions. Without the advantage of the acid test of use of the book in the class-room the reviewer suspects that the editor has made a valuable contribution upon the general problem of presenting specialized fields of the law to third year students.

University of Missouri, School of Law THOMAS E. ATKINSON

SIR WILLIAM BLACKSTONE. By David A. Lockmiller, Chapel Hill: The University of North Carolina Press, 1938. Pp. xviii, 308.

On October 25, 1758, after five years of lecturing at Oxford on English law, Dr. William Blackstone began his Vinerian lectures which in turn paved the way for his *Commentaries on the Laws of England* (1765). The lectures, the first of their kind, were immensely significant, but the *Commentaries* were even more so. So extensive indeed has been their influence that the man Blackstone has long been obliterated by his own smoothly flowing periods. Having taught jurisprudence to speak the language of the scholar and the gentleman, Blackstone blended insensibly into his own reputation. This fate, shared in one way and another with many diverse personalities, is perhaps not unwarranted if conclusions may be drawn from the present volume. Blackstone, whatever his own qualifications, had greatness thrust upon him through the authorship of a work that struck a popular fancy and fulfilled a genuine need. In personality, he appears to have lacked the salt and sap that makes Coke, for example, stand out from his crabbed dogmatisms.

Unfortunately, the present volume does little to rescue the *man* from oblivion. Of the rather brief total, one-third is given over to appendices many of which have a negligible value. The biography itself is vitiated by a style and outlook which, never more than mediocre, at times borders on the infantile. Verbosity, monotony, and crudities of expression mar almost every page. In preparation, the author evidently attempted to acquire a knowledge of background. The result is painful. Time and again, he throws in passages far too elementary for a schoolboy, even one much less precocious than Macaulay's. Random and often misleading gestures concerning the social and political atmosphere of the eighteenth century possess no virtue. Who, furthermore, needs to be told that the common law is "one of the great legal systems of the world?"

Almost every feature of the book shows signs of haste and carelessness, not excluding the proof-reading. Moreover, despite some rather pretentious, almost sophomoric, claims as to sources of information, only a casual check is necessary to show that without Clitherow's preface to Blackstone's reports, Odgers's article in the *Yale Law Journal*, and an early *Biographical History*, this volume would have been very, very slim.

In fine, the author has boggled an excellent opportunity to write a definitive life of an influential jurist. Despite an admirably comprehensive view of Blackstone's career, he has largely failed to integrate the man with his time. He has scanted Blackstone's place in English legal and constitutional history and in eighteenth century civilization. By this neglect, the volume has value neither for the lawyer nor for the historian; and the complete lack of literary charm destroys the "popular" appeal. We should like to know, for example, why a Blackstone appeared, how he influenced his own and later generations, and much more about his critics who were more numerous and shrewd than this volume indicates. Indeed, we should have liked a full length portrait of an influential man, cast against a large and detailed background. Instead, we are given a sort of sugar-plum puppet performing woodenly against an amateurishly constructed backdrop.

Associate Professor of History
University of Missouri CHARLES F. MULLETT