Vanderbilt Law Review

Volume 4
Issue 3 *Issue 3 - A Symposium on Current Constitutional Problems*

Article 15

4-1951

Book Reviews

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BOOK REVIEWS

LIONS UNDER THE THRONE. By Charles P. Curtis, Jr. Boston: Houghton Mifflin, 1947. Pp. xviii, 368. $3.50.

MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS. By John P. Frank (Introduction by Charles A. Beard). New York: Knopf Company, 1949. Pp. xix, 357. $4.00.

ON UNDERSTANDING THE SUPREME COURT. By Paul A. Freund. Boston: Little, Brown & Co., 1949. Pp. vi, 130. $3.00.

MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES, 1888-1919. By Willard L. King. New York: Macmillan Company, 1950. Pp. 394. $5.00.

CHIEF JUSTICE STONE AND THE SUPREME COURT. By Samuel J. Konefsky. (Prefatory Note by Charles A. Beard). New York: Macmillan Company, 1949. Pp. xxvi, 289. $3.00.

THE CONSTITUTIONAL WORLD OF MR. JUSTICE FRANKFURTER: SOME REPRESENTATIVE OPINIONS. By Samuel J. Konefsky. New York: Macmillan Company, 1949. Pp. xviii, 325. $4.50.

THE NINE YOUNG MEN. By Wesley McCune. New York: Harper & Brothers, 1947. Pp. viii, 299. $3.50.

BRANDEIS: A FREE MAN'S LIFE. By Alpheus Thomas Mason. New York: Viking, 1946. Pp. xiii, 713. $5.00.

THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947. By C. Herman Pritchett. New York: Macmillan Company, 1948. Pp. 314. $5.00.

HUGO BLACK: A STUDY IN THE JUDICAL PROCESS. By Charlotte Williams. Baltimore: Johns Hopkins Press, 1950. Pp. 208. $3.50.

A Symposium to the Memory of Wiley B. Rutledge (1894-1949), IOWA L. REV., Vol. 35, No. 4 (Summer, 1950). Pp. 541-692. $1.00 per issue.

Issue Dedicated to the Memory of Mr. Justice Murphy, MICH. L. REV., Vol. 48, No. 6 (April, 1950). Pp. 737-810. $1.00 per issue.

Until the second decade of this century when Albert J. Beveridge brought out his monumental four-volume work on John Marshall, few books were published analyzing the institution and the personnel of the Supreme Court. The Beveridge venture started a flow which in recent years has reached the

figurative proportions of an avalanche. The reasons are no doubt many. The fact that a new book in any hitherto uncultivated field has captured public attention is likely to stimulate further publication in that field. Public interest in the Marshall story suggested that people might be willing to read about other Supreme Court justices as well. Then in the 1920's Charles Warren published his three volume history of the Supreme Court which stirred enthusiasm comparable to that stirred by the life of Marshall. Thereafter came biographies and court studies in ever increasing numbers. The part played by the Supreme Court in the 1920's in holding back legislative programs, by means of due process clauses and other restrictive provisions, the tendency to divide sharply on the questions involved, and the exposure of differences in legal philosophy and differences about the proper functions of the Court via "Holmes, Brandeis, and Stone dissenting" persuaded many people that the Court was not a passive mouthpiece of the law as they had been taught to believe but was a human institution with the motivations and limitations of other human institutions. More and more they welcomed books which explained the workings of the Supreme Court in terms which they could understand. The blocking of the New Deal program by the Court and President Roosevelt's attempt to renovate it by the addition of new personnel further emphasized and exaggerated the political characteristics of Court action and vastly enlarged the stream of books and articles. The stream has continued to flow until the present day and seems in little prospect of drying up.

The ten books and two collections of law review articles here under composite review reflect part of the literary output on the Supreme Court and its personnel from 1945 to 1950. They are so varied in character and so diverse in methods of approach and use of subject matter that it is hard to find in all of them a common element beyond the fact that they deal with the Court. It is in large part true that six of the books and all of the law review articles deal with individual members of the Court whereas the other four books deal with the Court more generally, but even this statement must be restricted. The four general books have a great deal to say about personalities, and one of the three lectures in Freund's little book provides a "Portrait of a Liberal Judge: Mr. Justice Brandeis." On the other hand the volumes labeled as individual studies of one kind or another tell us a great deal about the Court apart from the individual subjects. Of the individual studies two are full length biographies—Mason's *Brandeis,* and King's *Melvin Weston Fuller.* By contrast with these, Konefsky's *Chief Justice Stone and the Supreme Court* is devoted almost exclusively to analysis of Stone's opinions, and contains little biographical material apart from the introduction by Charles A. Beard. Well over half of Frank's volume on Justice Black and almost all of Konefsky's work on Frankfurter consist of abridged opinions with introductory notes. The Williams volume on Justice Black fits in between the biographies and the

collections of opinions, with an introductory account of Black's life and a broad interpretation of his judicial work. The law review articles range from obituary comments to technical analyses of opinions in particular fields. Of the four nonbiographical books, Freund presents three lectures without attempt at close integration, Curtis presents a philosophical discussion of the work of the Court, McCune presents a newspaper man's version of the Court with Roosevelt-Truman appointees, and Pritchett combines a broad analysis with a statistical study of voting alignments among the justices in the decade from 1937 to 1947. A common pattern in such an aggregation of works is indeed hard to find.

The very process of looking for unity, however, brings out illumination in the contrasts. King's biography of Chief Justice Fuller differs from the other books in that it deals with a man who is not and for the most part never was a controversial figure. It is not that there were no controversies in his period on the Court—1888-1910—for heavy fighting ranged around the income tax case of 1895, the Insular cases of the early 1900's, and other cases. It is rather that there was less isolation of individual judicial personalities during that period than there is now, that there were fewer tendencies toward sharp personal and philosophical differences on the Court than there are today, and that Chief Justice Fuller himself mellowed into the Court as an institution instead of standing out as a personality. He no doubt was, as Justice Holmes said and as the author has pointed out, an outstanding Chief Justice in terms of his quality as a presiding officer, but he made no such attempt at doctrinal leadership as is made by a number of present justices. The author reflects approval of his subject, and advances no body of doctrine with respect to Fuller or the Court comparable to what might be called the liberal bias of many of the other authors. The value of the book consists largely in the presentation of a considerable amount of hitherto unavailable material about not only Fuller but also Field, Harlan, Holmes and other prominent justices.

All other books on the list reflect a considerable measure of approval of the so-called liberalism of the Roosevelt Court by contrast with the conservatism of its predecessor. By and large, they are written by liberals for liberal consumption. Although there is controversy and disagreement there is no hearking back to the old order—to the order ante-Roosevelt. In his study of Justice Brandeis Professor Mason has written a full length biography of one of the principal ancestors of the present liberal regime. As a biography it is the best-rounded work of the lot, although some readers have criticized it because of lack of detail on the Supreme Court. The author, indeed, although a writer and a teacher in the field of constitutional and political theory, seems to have been much more interested in the development of his subject as a

man and as a philosopher than in writing the history of the Supreme Court during the Brandeis period, or even in presenting at length the judicial performance of his subject. Even so, the highly compact analysis of Brandeis' career on the Supreme Court stands up well in comparison with other writing in this field. The book, showing the development of Brandeis as an enormously successful liberal lawyer, is entitled more clearly than any other book on this list to a permanent place in the history of Supreme Court personnel. The chapter entitled "Holmes and Brandeis Dissenting" is a particularly rich account of the two charter members of the so-called liberal group. The above-mentioned lecture by Freund adds revealing interpretation of Brandeis by a man who in earlier years was one of his law clerks.

Konefsky's study of Associate Justice and then Chief Justice Stone is altogether lacking in biographical materials such as those presented in Mason's *Brandeis*. It was written as a Doctor's thesis at Columbia while Stone was still a member of the Court. Apart from the introduction by Charles A. Beard it consists of six chapters analyzing judicial opinions in particular fields, and a brief concluding chapter of interpretation. It is written with a considerable amount of technical legal skill and provides useful summaries of cases in the selected field. A lawyer and a teacher of constitutional law will find or will have found it useful. The lay reader is not likely to get far beyond the sprightly introduction by Beard, for the author, confining himself closely to his legal materials, tends to bog down in the technicalities of his subject matter. While presenting enough detail to satisfy the most thorough of lawyer-critics, he fails to escape easily from his materials into significant interpretation, in contrast with Miss Williams, whose study of Justice Black was also written as a doctoral thesis. Both the Konefsky and the Williams studies provide materials for discussion in the controversy among political scientists over the extent to which candidates for the doctoral degree may ordinarily be expected to master significant constitutional materials for presentation in thesis form. Although neither of them is or even pretends to be a definitive work, each is of a sufficiently high standard within its field to reflect important achievement during the period of doctoral study.

Of the present members of the Court, two are here presented in book form, Black and Frankfurter, and Black is the subject of two books, those of Frank and Williams. Miss Williams presents Justice Black's judicial performance in a series of thoughtful chapters, concluding, among other things, that "the fountainhead of his political philosophy is a desire to improve the lot of the common man and protect him from the oppression of powerful forces. . . . It is probable that Justice Black belongs to that school of thought which holds that every judge, consciously or unconsciously, writes into his opinions his own economic, social, and political ideas and that the notion of

judicial impartiality is little more than a myth" (pp. 187, 189). Professor Frank, formerly one of Justice Black's law clerks, provides in the first third of his book a biographical account and characterization of the judge as he sees him, and devotes the remainder of the book to the presentation of excerpts of selected opinions. While his admiration for his subject is apparent the author, as if waiting for the achievement of broader perspective, leaves unsaid much of what he may eventually have to say in characterization of Justice Black and his performance. He divides the opinions presented into two major groups, control of the economy and civil rights, a technique which he has recently used also in a casebook in constitutional law. He adds headnote summaries to put the cases in factual and legal perspective, and puts Justice Black in perspective in relation to the other members of the Court.

The opinion portion of Frank's book on Justice Black is to be compared with Konefsky's book on Frankfurter, which almost in its entirety consists of excerpts from opinions, with brief explanatory notes. The modern use of collections of Supreme Court opinions to portray the work of a judge began in 1929 with the publication of *The Dissenting Opinions of Mr. Justice Holmes,* which was followed by *The Social and Economic Views of Mr. Justice Brandeis,* and *Representative Opinions of Mr. Justice Holmes.* These earlier collections of opinions of Holmes and Brandeis did much to popularize the philosophies and points of view of these two liberal and oftentimes outvoted Justices. It remains to be seen whether opinions of current justices will make a similar contribution. Answer to this question will depend in part no doubt on the vigor and fluency of the judicial writings. Both Black and Frankfurter are vigorous and fluent. It remains to be determined, however, whether either of them has in his opinions enough to say to the general reader to justify publication in this form. The Black opinions portray his interest in the little man and in the downtrodden, and his willingness to see economic power brought under effective governmental controls. They show his preoccupation with the facts of particular cases, and his earnest desire to find justice not so much in the technicalities of law as in the totality of factual situations.

Whereas Justice Black, although a skillful lawyer with vision as to the long range implications of decisions, is concerned primarily with justice in individual situations, Justice Frankfurter is preoccupied with the courts and with the law. He is concerned about the developing pattern of the law and about the prestige and the effectiveness of the judiciary. While it would not be completely accurate to say that whereas Black is concerned about justice Frankfurter is concerned about jurisprudence, there would be more than a grain of truth in such a statement. The Frankfurter opinions, carefully excerpted to give the essence of his thinking, lose more than do the Black opinions by being torn from their context. For some reason the literary gems

submitted by Frankfurter in the process of stating legal principles lose something of their allure when divorced from the total situation as presented by the case as a whole. On the other hand the factual situations, most strategically presented by Justice Black in such a way as to create the impression of wholeness, slip quickly into history and fail to present that illusion both of timeliness and timelessness which conveys the sense of judicial greatness.

The collections of law review articles dealing respectively with Justice Rutledge and Justice Murphy present from various angles the judicial careers of the most extreme of the recent defenders of civil rights. The articles vary greatly in length, quality and method of approach. The first of those about Justice Rutledge is an obituary tribute of less than a page by Justice Black which begins with the statement, "Wiley Rutledge was my friend." Perhaps the most richly revealing is the article by Irving Brant entitled "Mr. Justice Rutledge—The Man." From this and other articles we get an impression of a courageous liberal, an ardent defender of civil liberties, who without the use of a well-rounded and articulate philosophy worked pragmatically and strenuously for the defense of liberty by all available techniques. He was not a voluminous author. He was not known for use of the apt phrase or the happy figure of speech. He was not a captivating teacher. Yet by means of earnestness, conviction and integrity, he performed effectively as a teacher of law and as a judge. The articles about Justice Murphy reveal a man who was perhaps a bit more of a philosopher than was Justice Rutledge, and who equally, or even more so, fought always in defense of liberty. He made no claim to profound legal scholarship. Neither did he claim to present a well-rounded legal philosophy as the basis of his several opinions among which the more significant dealt with civil liberties. Yet out of a sensitive conscience with respect to liberty, and no doubt also out of a set of principles imbibed through Catholic learning and Catholic association, he presented a consistent defense of liberty in all its fullness which gave him a unique position on the Court during the period of his service. Law clerks of Justices Rutledge and Murphy share in the writing of these articles and bring to them a sense of intimacy which few such writings possess. Perhaps it is from the atmosphere of the times rather than from the articles themselves that we get a sense of the uniqueness of the two men as defenders of liberty in their relatively brief periods on the Court, and of the fact that a drift toward a new conservatism began with their replacement by other men.

Of the four largely nonbiographical books, the most controversial is Pritchett's *The Roosevelt Court*. The book is a synthesis and an enlargement upon articles which Professor Pritchett wrote over a number of years charting the votes of members of the Supreme Court to show what justices voted with or against what others in the total work of each year and in decisions in

particular fields. Some of the charts are fascinating in their disclosure of behavior tendencies. Although members of the Court are rumored to dislike this kind of analysis, and one justice has been heard to denounce the author with an assertion that judges just don't think that way, the patterns of behavior are disclosed whether or not they are arrived at by the process of thought. Voting tendencies and intra-Court relationships are disclosed in the over-all and in connection with cases involving economic relations, civil liberties, the punishment of crime, bureaucracy and labor. Beyond the range of the voting charts the books is a shrewd commentary on the Court as a political institution and on the plight of liberalism in a highly pragmatic regime.

The Curtis book, picturesquely entitled *Lions Under the Throne,* is the product of a lawyer with leisure at his command, with a flair for the apt phrase, and with illuminating sparks of insight. The imaginative flashes coming from almost every page are more important than the thesis that the Supreme Court is a political institution operating within the framework of the law, and more important also than the seeming lack of consistency among some of the sparkling generalizations. It may or may not be true, as the author asserts, that in the field of constitutional law as distinguished from "ordinary" law we have no right to know what the law is and what the Court may be expected to say, but there is challenge to thought in presentation of the statement by a brilliant writer. There is potency in its reminder that when the justices decide cases according to their own philosophy, it is not merely their own philosophy but ours as well. Without resort to a philosophy of some kind, frontier constitutional cases could not be decided. The philosophy or philosophies used by the Court are not created by justices individually but are absorbed from the society of which they are a part.

The title of McCune's *The Nine Young Men* is a play upon words highlighting a contrast with *The Nine Old Men,* the title of a book published in 1936 which was highly critical of the aged and conservative Court of that time. The Court of 1947 was indeed a young Court by contrast with the Court of 1936, and very different indeed in outlook and philosophy. This book represents an unusually competent attempt of a newspaper man to explain the Court to a new reader. Something of the sprightliness of his presentation is indicated by sample chapter titles, as for example "A Study in Black: Hugo L. Black"; "Center of Gravity: Stanley F. Reed"; "Associate Professor of Justice: Felix Frankfurter"; "Life Begins at Forty: William O. Douglas"; and "Justice Tempered with Murphy: Frank Murphy." Without, of course, getting far into jurisprudential questions, the author succeeds in creating a vivid picture of Court personalities and Court performance.

Much more philosophical is Freund's *On Understanding the Supreme Court,* wherein he suggests that the philosophical counterpart of the work of

the Court is the age-old problem of reconciling the one and the many. In a discussion of "Concord and Discord" the author attempts to penetrate to the heart of a number of themes of discord in the present Court. For understanding of judicial decisions he calls attention to the fact that in performing its task the Court must operate in more than one realm of values at the same time, with consequent tendency toward discord. Professor Freund's brief but thoughtful analysis will be appreciated not only by those who find significance in Pritchett's statistical studies, but also by some who cringe at the attempts to measure important aspects of the judicial process by statistics of judicial voting.

In summary, there is rich diversity in the approaches of these ten books and two collections of articles to the behavior of the Supreme Court or individual members thereof. The emphasis, however, is upon diversity and not upon synthesis. Neither in the authors nor in the judges about whom they write is there evidence of that settledness and tendency toward uniformity of attitude which we might desire with respect to our body of constitutional law and its foremost institutional interpreter. In a high degree the Court and the law which it expounds have succumbed to the pragmatism of our culture. While it is true, as Curtis has pointed out, that the Court decides cases in terms of the philosophies of the American people, those philosophies represent not so much an integrated pattern of thinking as a series of only vaguely related or unrelated conclusions as to what ought to happen in given sets of circumstances. The opinions of the Court, in other words, the products of the philosophical discontinuity of our culture, perform inadequately the task of verbal synthesis of our institutions which the judiciary is in a unique position to perform. A court, it is true, can effectively portray in our institutions in the process of deciding cases only such pattern and synthesis as to thoughtful minds are implicit in them. It cannot turn a population of mere pragmatists into a people with an integrated body of beliefs. Perhaps the present Court goes as far as any tribunal can be expected to go in view of the lack of assurance which the American people feel about the pattern of their institutions and fundamentals on which those institutions rest.

On the other hand, if our society is not to continue philosophical fragmentation to the point of preoccupation only with the event of the moment without reference to broader patterns of belief and of tradition, we may have a right to demand from the Supreme Court philosophical leadership, leadership with the vision and courage of a John Marshall. We have no reason to believe that such leadership will come from an executive harried with more problems than it can effectively meet. We see no evidence in Congress of that sense of mission which would lead our legislative body to think and act grandly with respect to the pattern of our institutions. Only from the Supreme Court

might we expect that enunciation of wisdom which would help us reformulate and reintegrate our institutions and develop a philosophy of our institutions which would give us a sense of at-homeness among them. We do not see the present Court rising to the occasion, but we can at least continue to hope that it will do so. Perhaps impetus could come from more in the way of suggestion along this line than is to be found in the several books here under review.

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CASES AND MATERIALS ON CONSTITUTIONAL LAW, Fourth Edition. By Walter F. Dodd. St. Paul: West Publishing Co., 1949. Pp. xxxv, 1477. Same, SHORTER SELECTION, Fourth Edition, 1950. Pp. xxix, 950. Same, 1950 SUPPLEMENT. Pp. vii, 23.

CASES ON CONSTITUTIONAL LAW, Fourth Edition. By Noel T. Dowling. Brooklyn: The Foundation Press, Inc., 1950. Pp. xxxv, 1273.

CASES AND MATERIALS ON CONSTITUTIONAL LAW. By John P. Frank. Chicago: Callaghan & Co., 1950. Pp. xxviii, 1054.

AMERICAN CONSTITUTIONAL DECISIONS, Revised Edition. By Charles Fairman. New York: Henry Holt & Co., 1950. Pp. xiv, 489.

CASES AND MATERIALS ON CONSTITUTIONAL LAW. By Henry Rottschaefer. St. Paul: West Publishing Co., 1948. Pp. xxvii, 975.

AMERICAN CONSTITUTIONAL LAW. By Frank R. Strong. Buffalo: Dennis & Co., Inc., 1950. Pp. xxxii, 1523.

CURRENT CONSTITUTIONAL CASES. By Arthur E. Sutherland, Jr. Rochester: The Lawyers Co-Operative Publishing Co., 1950.

It is significant that there is enough new material in the casebook field to be able to attempt a composite book review of casebooks in Constitutional Law presenting the varied approaches and techniques of seven authoritative scholars. For the approaches and techniques are as varied and diverse as the number of authors and editors. There is agreement in one thing at least, the subject is important. All would agree that in judicial review we find the unique contribution of our governmental system. The appearance of so many examinations of this contribution within so short a time, shows that a lot of people are thinking about the role of "Constitutional Law." The fact that it is viewed from so many angles may suggest that we approach the phe-

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nomenon with a preoccupation with our own predelictions. It is healthy, if this is true, that we are put in the position of being able to re-examine our own, and compare them with those of others.

The smallest, the shortest, and probably the most simple is the book by Fairman. The author is Professor of Law and Political Science at Stanford University. His book is designed for courses in American Government. It contains but 36 cases, which are divided into six chapters. Each case is preceded by an introduction giving the problem and the background and analyzing the issues. The opinion follows, and this in turn is followed by a comment by the author. This appears to give the student in American Government a great deal that he needs to know, and probably all he will be able to handle. The opinions are edited quite thoroughly. Thus *Marbury v. Madison* is cut to a little over five pages, while Dowling's cutting leaves almost nine pages. Of course Rottschaefer cuts it to about three and one half pages, but Frank leaves in eight pages of opinion.

The treatment seems effective for the purposes for which it is designed, but the coverage is necessarily limited, and the implications may be misleading. Thus, under the heading "Constitutional Limitations" there are ten cases. These include the *Slaughter House Cases,* hours of labor and wage regulation, zoning, sterilization of the feeble minded, the requirement of voluntariness in a confession, the exclusion of negroes from juries, freedom of the press and a flag salute case. However, the comments broaden the coverage greatly. For example, the flag salute case is followed by a comment which brings in the *Everson* case, *Vashti McCullum,* and In re *Summers.*

The most traditional approach is that of Rottschaefer. He is, as is well known, at Minnesota, and is the author of the handbook on Constitutional Law. The basic organization is the same as that of the handbook. The editing of the opinions has been drastic and has already been referred to. There seems to be no concern with dissenting opinions. In those fields in which we are or were getting numerous dissents and special concurring opinions, this seems a particular weakness. It may indicate a doctrinaire approach and a feeling that constitutional law as easily as contracts may be reduced to a series of general principles, or at least, illustrative applications of general prinicples. In a certain sense the coverage is comprehensive as compared with some of the other treatments. There are specific chapters on "Eminent Domain," "The Amendment of the Federal Constitution," and "The Federal Executive." However, the shortness, matched only by Dodd's *Shorter Selection,* is indicative of the brief treatment given to various topics, and the large amount of editing of the cases. Outside of the notes which complement the selected cases and call attention to the periodical literature, the only material observed is

case material. This is in contrast to the large amount of other types of material found in some of the other books.

This use of other material is only one of the striking characteristics of Strong's book. It is the largest of the books examined and, along with Frank, offers a novel approach to the problem. The physical casebook is divided into two books. The first book, "The Adaptation of the Judicial Function to Delimitation of Governmental Power," seeks to present adequate materials on judicial review as an institution to provide insight into the institution as a whole. Book One thus devotes itself to the historical development of the major constitutional doctrines and to the techniques which have evolved for the conduct of constitutional litigation.

This first book apparently reflects a sympathy with the "growing skepticism regarding the competency of the Supreme Court to provide disinterested, juridical interpretation of the Federal Constitution." The approach may be suggested by examining briefly the first 76 pages. These present excerpts from Malcolm McDermott's paper, *Government Unlimited,* Mr. Justice Dore's *Essay on Human Rights and the Law* from the Congressional Record, Lerner's *Minority Rule and the Constitutional Tradition,* and De Tocqueville's *Democracy in Action.* In addition there are quotations from Magna Carta, early state constitutions, early English cases, early American state constitutional decisions, and the Declaration of Independence. The most striking element of the whole book is the terminology. The above material is under the headings of Political Validity of the Delimitation of Governmental Powers, Theories of Delimitation, Techniques for Delimitations, and Multiple Constitutionalism. Then United States constitutional cases appear. The next section is labelled "Judicial Competency for Constitutional Determination." Here the problems include such diverse ones as the requirement of a case or controversy, the declaratory judgment, the competence of the state as a complainant, the ability of Mr. Levitt to object to the seating of Mr. Justice Black, jurisdiction against states, advisory opinions, the "technically gratuitous constitutional determination," the adequacy of judicial mechanics, government by lawsuit, and the factual foundation for constitutional adjudication. The cases in this section deal with regulation of insurance agency commissions, censorship of newspapers, the milk control act, immunity of income of Indian lands to state taxation, state control of commerce, mortgage moritoria, maritime jurisdiction of federal courts, the migratory bird treaty act, taxability of judges' salaries and the A.A.A.

The balance of Book One deals with "Metamorphosis of the Judicial Function in Constitutional Delimitation." This covers 160 pages, and deals with such problems as the changes in the interpretation of the commerce clause as a grant of federal power, intergovernmental immunities, picketing

as free speech, the flag salute cases, taxability of state activities by the Federal Government, the development of the "favored position" doctrine, state control over labor relations, federal common law, the scope of the 14th Amendment as including the first eight amendments, freedom of religion, and the retreat in the supervision of the administrative process.

The first book contains much valuable material to assist students to see the problems and to raise questions concerning the technique of judicial review, and is well worth anyone's time, who has the time. The question remains whether so much emphasis on political theory, on judicial competence, and philosophical terminology is worth the time and energy in the law school curriculum when it will produce comparatively little material upon which the student may base an argument before the court as to the constitutionality of any particular sort of governmental action. The cases are frequently cut to emphasize the philosophical or political theory to the extent that the traditional substantive rule seems slighted, and the frame of reference to which the author refers is left incomplete for the more traditional job of the lawyer.

Book Two presents the great body of current constitutional law in terms of differentiation and integration of considerations which basically control the course of constitutional decision. The chapters or sections are indicated by such novel terminology as Constitutional Criteria, Criterion Synthesis, Referents for Ascertaining Legislative Objective, Nexus Required between Legislation and Permitted Objective, Component Conjunction, Delegational Merger, Invasional Merger, Constitutional Contacts, National Interpolity and International Polity. Of course the terminology seems sound, but its use, in addition to being novel, reflects what apparently is viewed as the use of "functionalization of presentation" to reduce the number of chapters and provide a "maximum systemization of the mass of material."

The scope of the material included under headings is nontraditional. The topic "Expropriation of Property" includes wage regulation and religion in public schools. The topic on "Shaping Civil Organization" includes *Pierce v. Society of Sisters,* as well as *Hague v. C.I.O.,* the *Terminello* case, and *Shelley v. Kraemer;* under the subheading "Factor Synthesis" of the same topic are found *Martin v. Struthers,* and the *Doud* cases. Under the heading "State Governmental Planning," we find problems of full faith and credit, extraterritoriality, substantive jurisdiction, commerce clause cases, and cases under the privileges and immunities clauses.

The material in Book Two is largely United States Constitutional Law decisions. Only about one-ninth of the cases are state cases. The material is also quite modern. Less than 10% of the cases are older than 1920. Over one-

fourth of the cases were decided since 1946, and better than 75% of the cases have been decided since 1936.

In the use of modern cases, and in a novel or new approach, Frank's case book has similarities to Strong's. There the similarity ceases. The organization is striking. Professor Frank, of Yale, seeks to assist students in the study of constitutional law as involved in the controversies of our day. Consequently two-thirds of the material is dated within the past fifteen years. But, because he feels that the roots of today's problems go back to the beginning, the first third of the book is devoted to the treatment of these problems from that time. He views two problems as central: (1) the analysis of the legal devices by which the Constitution has been put to the work of facilitating the economic prosperity of shifting groups, and (2) the analysis of the legal devices by which the Constitution has been used in the everlasting struggle over the contraction or expansion of individual liberty.

He states that he has chosen the historical material because of its direct relevance to current problems. Because of this and because he believes "that in Constitutional Law there is more value in studying method closely than in studying substance widely," he does not try to cover all problems.

The particular innovation that is used is in the approach by eras. Thus, the first era is that of Marshall, which introduces the large problems of judicial review, the application of the 5th Amendment to the states, and the supremacy of national powers against state discrimination or burden. Also in the Marshall era are the beginnings of the commerce cases limiting state power, and of the impairment of contract clause.

The Taney era continues with the development of the commerce clause and the contract clause, and the emergence of the corporation into the shelter of the law. It also introduces the problems of the rights of the people and the slavery issue. The era of Chase and Waite continues with the commerce clause, the contract clause, the early developments of due process, and the growth of the cases under the "Rights of the People." Fuller's era is seen primarily as a development in the "Protection of the Commercial Interest," while the era of White and Taft, which continues this development, sees the beginnings of increased protection of the "Rights of the People." This has brought the book down to the era of "Changes" (1930-37) and on to "The Constitution Today," and finally "Contemporary Problems."

The topics under the era of Changes see the crisis, the jam and the breaking of the jam largely as a commercial matter, which it was, with, of course, beginnings of new emphasis upon civil rights. The Constitution Today devotes large sections to the regulation of business, and to the civil rights with large emphasis on the problems of criminal justice. The final topic of Con-

temporary Problems is devoted to three large headings, Jurisdiction to Tax, Negro Problems and Freedom of Communication. The emphasis upon thoroughness rather than breadth is shown by the fact that the last half of the book including The Constitution Today and Contemporary Problems utilizing practically five hundred pages contains only about 61 cases. There is nothing for instance on separation of powers, administrative law supervision, no *Buck v. Bell,* no *Osborn v. Ozlin.*

The cutting of the cases has been judicious and full use is made of concurring and dissenting opinions. Liberal use of other materials such as reports, articles, speeches, comments, notes, and short historical essays add greatly to the presentation. The emphasis throughout appears to be on social engineering, and the lawyer's place in that job.

Strong and Frank together constitute the two novel and provocative books. They do not however, exhaust the stimulating and valuable elements. Dowling, of Columbia, has produced a more traditional, but very modern stimulating book. He sees the need of a new edition just four years after the third edition to portray the settling down and developments since the transition period of 1937-47. He sees, however, more than a mere need to bring up to date. Though the basic plan has not changed, new broadening of the treatment of the war powers, and the powers of the executive, the national protection of civil rights and of the relationship between the states and the national government seems to him to be necessary. He also has increased the emphasis on the procedural aspects of review, and added a new section on freedom of religion and has made the section on state taxation more extensive and more detailed.

The most noteworthy change has been the introduction of a new long section on the origins of judicial review. This section develops the idea of the interrelationship of two religious influences: the importance of the written word, and the reliance on chosen personnel to interpret the word. The documents themselves from Magna Carta on are included. The textual material begins with 1066 and before. The documents set out in full or in part include, The Petition of Rights, The Instrument of Government, The Bill of Rights, The Fundamental Orders of Connecticut, The Declaration of Independence, The Virginia Bill of Rights, The Articles of Confederation, and other similar material, and culminates on page 75 with the Constitution itself.

In addition, some interesting changes are made in the basic material. A new section title on the "Power to Tax and Spend" is more suggestive than the old title "Taxation and Fiscal Affairs." The interposition of "Impairment of the Obligation of Contracts" between two chapters on "Substantive Due Process" permits tying together the materials on economic regulation before

the excursion into the material on "freedom of the mind." There are separate sections on freedom of speech, press and assembly, and freedom of religion. The chapter on "National Protection of Civil Rights" brings together some material previously contained in the section on procedural due process, as well as material on what is state action, and some material formerly listed under "Suffrage."

The editor makes good use of dissenting opinions, though, possibly too frequently, they are often merely noted as having occurred. The notes are particularly exhaustive and contain much in the way of reference to cases and articles, as well as provocative and stimulating comments and questions. The book impresses as being sound and liberal, extreme neither in its traditionalness, nor in its novelty. It is more comprehensive than the books of the innovators and adequately detailed, although not so concentrated on particular questions as are the more novel approaches.

Probably the greatest similarity exists between the books of Dodd and Dowling. There are important differences, however. Dodd is probably the most traditional of all, next to Rottschaefer. Though he has taught law in the best tradition, he is primarily a practitioner of law in his Chicago firm. This is reflected in a lawyer's approach that is fundamental, traditional and complete. The approach is possibly shown best in the section headed "Due Process and Equal Protection" with the subheadings "Regulation Through Price Control," and "Employer and Employee." The completeness is shown in the fact that he uses as many cases to present the "Powers of the National Government: Other than Commerce," as Frank used to present either "The Constitution Today" or "Contemporary Problems." Most of the leading cases, as well as the detail-filling cases are included.

In the longer volume about thirty cases were changed from the previous edition. The short selection is reduced substantially from the longer volume. This is not done equally. In some sections there is no loss, as in the section "Regulation Through Price Control," while in other sections the omission is rather large, as in the section "Employer and Employee," in which 40% of the material is elided.

The supplements which appear frequently bring the material down to day before yesterday.

The book is not as provocative nor as stimulating to this reviewer as its competitor Dowling, though it seems a better presentation of the traditional than Rottschaefer. It may possibly, in the case of Dodd, reflect the lawyer's viewpoint, that dissenting opinions are treated rather casually.

The last book to be noted is not intended as a casebook, but is intended to make the chosen casebook contemporary. Sutherland, of Harvard, believes

that the time required to edit and publish a casebook prevents the book through most of its life from being completely contemporary. This problem is avoided by Mr. Sutherland by using the pages already prepared by the Lawyers Co-Operative Publishing Co., for its Lawyers' Edition of the Supreme Court cases. In its present form it includes cases selected from 91 L. ed. through 94 L. ed. Included are 55 cases, handed down during the October 1946, 1947, 1948, and 1949 terms. The technique has the value of giving a detailed picture of the current state of the authorities. It also permits, apparently, picking up previous cases omitted in the first compilation and adding them if more recent cases give added significance. In the future, of course, there will come a time when older cases must be withdrawn, or else when materials from whole volumes of Lawyers' Edition must be omitted as the case books catch up. The cases are extremely well chosen, and omissions cannot be objected to at all strongly. Conceivably the recent case on a succession tax on property outside of the taxing state should have been included, as well as the case on taxing municipal park admissions. Possibly also the recent case on *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals* should be included. Although it hardly seems like a constitutional decision today, it demonstrates the final ending of several constitutional points, embalmed in construction of the will of Congress.

It is believed that such a selection gives the student a particularly good chance to see what is significant today. The 1949 term selections include three cases involving communists and four involving rights of negroes as such. Four involve the control of the states over labor union and worker activities. Free speech is involved directly at least four times. On the other hand, criminal procedure due process, and the question of control over a foreign corporation are involved only once.

A decided advantage of the method is that it gives whole opinions uncut and unedited, and forms a basis for classroom analysis of the techniques of opinion writing, and judicial methodology. As a supplement to easebook method it possesses great value.

This review started with the proposition that it was significant that there was as much modern casebook material in the field as there is. It ends with the proposition that it is equally significant that there is as much variety in approaches and techniques as there is. This will enable the individual teacher to select the material whose approach and methodology most nearly approaches, contrasts with, or supplements his own.

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SECURITY, LOYALTY AND SCIENCE. By Walter Gellhorn. Ithaca: Cornell University Press, 1950. Pp. viii, 300. $3.00.

In the most objective manner conceivable and with real scholarship, Professor Gellhorn has examined the laws and policies of the Federal Government relating to the delicate subject of keeping scientific secrets and examining the loyalty of scientists. The main question sought to be answered by the book is: Does the existing program impair scientific progress and therefore defeat its own objectives? The answer is in the affirmative. This volume is one of a series of studies of "the impact upon our civil liberties of current governmental programs designed to ensure internal security and to expose and control disloyal or subversive conduct." (P.v.) The basic assumptions in the book seem to be the following: secrets must be kept in order to promote the general security; the maximum of individual liberty must be maintained for the scientists; and science will decay unless there is a cross-fertilization of ideas.

As a working standard of what to keep secret, the author proposes that the policy makers distinguish between secret information which we discover in our laboratories and which other scientists cannot duplicate without our vast technological developments, and those secrets which competent scientists can develop in the long run anyway. His thesis is that we are injuring our own scientific progress by keeping the latter discoveries too secret. The Atomic Energy Commission already has made available for public use some scientific discoveries. The author demands that more information be released. But to release more information requires that an adequate system of declassification of scientific data be inaugurated. At present, it is next to impossible to reduce the classification of information from the "secret" to the nonsecret category.

It is impossible to predict the uses of scientific information; therefore, it is argued, undue restriction of information leads to unforeseen injury. The author supports this thesis by giving many examples, among which is that of Galvani's observation that frogs' legs "moved convulsively upon being brought in contact with iron and copper." (P. 36.) Galvani did not know it at the time, but his discovery led to long distance communication. This shows that science cannot be compartmentalized and prosper. The immense values to public health, industry and agriculture which are promoted by free exhaustion of the uses and implications of scientific data are to be carefully weighed against a system of nonutilization. The latter for the moment may be good, but inevitably the policy will lead to far greater losses to the national welfare. Moreover, scientists are reluctant to work where they cannot discuss what they are doing and the discoveries of others. The fact that scientists demand freedom of research and publication is shown by the tendency of many of them

to shy from government classified work. This compartmentalization has even led to an impairment of instruction in universities: " 'At present no adequate course in nuclear engineering can be taught at a university; the material is too secret.' " (P. 61.) A few young scientists receive this training in Atomic Energy Commission programs. "And it is thousands rather than a few who are needed." (P. 61.)

Having laid the groundwork for the ultimate policy issues involved, Professor Gellhorn discusses in detail the standards, mechanics and procedures of security clearance in various government agencies. He finds that all of them neglect basic procedural safeguards. There are two classes of standards: (1) those which if violated establish a presumption of a security risk, such as membership in subversive organizations; (2) those which are broader in scope and relate to one's ideas, and the ideas and associations of one's relatives and associates. The fault with the latter standard is its vagueness. Without proper safeguards any idea of a liberal character might denote lack of loyalty. Also any questionable association, howsoever tenuous, might create in the minds of boards a fear that the person is a bad security risk.

The author warns against the dangers implicit in the President's Loyalty Order and the dangers of extending the program of security to scientists who are not actually engaged in secret work. This has been done. Yet, "not a single one of the scientists involved in security clearance proceedings during the years of Russo-American tension since World War II has been found to be a spy, either amateur or professional." (P. 117.) Congress also aids the antispy hysteria. Newspapers highlight the search for disloyalty. Is there any wonder, asks the author, that scientists enter the govenment with misgivings? "The scientific creator is likely to be broadly cultured, complex, alert, and unafraid of the unconventional. Too many men who possess those characteristics are today avoiding work for which clearance must be sought, or are being passed in favor of more pedestrian spirits." (P. 125.)

The loyalty nemesis is spreading to the universities. Fifty per cent of all funds spent in the United States on scientific research are spent by the federal government. (P. 1.) Universities need federal funds. Scientists in universities may be security risks, and the security consciousness of universities may spread even to those scientists who are not engaged in secret activities. Thus, science in universities is demoralized. Colleagues fear colleagues. Administrations want funds. Indeed, the book illustrates how the whole program for the training of young scientists has been demoralized by this hypersecurity consciousness. The Government has the money. It has the security procedures. One must pass them to obtain scientific training. Young scientists are reluctant to join the forces of secrecy.

The solution for this problem relates to policies and procedures. The policy is to release the maximum amount of information consistent with the general security. But such a policy is emasculated without procedural improvement. The author offers the following suggestions for procedural reform: opportunity to defend against charges of disloyalty, specifications of charges, rejection of testimony of undisclosed witnesses, assistance to scientists (those employed and those seeking employment) in bringing witnesses to hearings and the making of formal findings and decisions. Professor Gellhorn realizes that some rare exceptions must be made in the interest of security. His point is that the maximum of procedural due process should be granted, and that an intelligent regard for the national interest in scientific progress and in the freedom of scientists should replace the present hysteria surrounding security and loyalty proceedings.

The book reveals in sharp clarity the grave dangers faced by our democratic society in these crisis-filled times. The strength of our nation lies in its fundamental ideals of freedom and in its vast natural resources which are available for exploitation. The current security program is undermining both. This weakens democracy. Finding a balance between the maintenance of an unprecedented system of secret-keeping, the achievement of scientific progress, and the prevention of inroads upon the freedom of minds to search for ideas is, indeed, a big task. Yet, this is but one of the tasks which must be done quickly and well.

We know that our constitutional system cannot exist without a substratum of faith in democratic ideals and in the democratic process. The author poses a dilemma for the people, not for the courts. We cannot expect the Supreme Court to assist in correcting the evils which he illustrates. For example, the social scientist working for the government is in a situation similar to that of the scientist. If the economist, political scientist, military strategist, sociologist, anthropologist and others are afraid to deal with new ideas for fear of being held disloyal, then what is to happen to the nation's role of leadership in furthering democratic institutions in the world? The simple answer is that the nation will not play its role. Democracy will suffer at home and abroad. Likewise the process of suspicion spreads, as the area of security risks has spread, to the universities. All scholars are becoming frightened. The unorthodox idea is taboo. Yet it is the unorthodox idea which will be the means of meeting the "unorthodox" situation faced by the United States at home and in the world. The preservation and furtherance of democratic constitutionalism demands intelligent, inquiring and fearless people. The current program, based on the presumption of disloyalty and on primitive procedures, has seeped beyond the proper limits of its efficacy and is consuming the strength of the nation.

The main role of universities is to counteract this poisonous seepage. The role of lawyers should be to see the dynamic issues at stake, and enter the arena with their skills to see that basic due process is established. The challenge to law schools is to assist our students to visualize the great conflict in national and world demands and give them knowledge and a sense of responsibility.

One of the nation's authorities in the field of administrative law, Professor Gellhorn has written this book in a manner which other scholars may emulate. He has conducted exhaustive, often firsthand, studies of the places, persons and methods involved. There is restraint in his orderly analysis. He has not condemned promiscuously. He has praised where praise was due. He has not destroyed without creating. The book is a real contribution toward the achievement of sanity. The issues presented must be resolved as a condition to the survival of the democratic process.

JAY MURPHY*

THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY. By Edward Dumbauld. Norman: University of Oklahoma Press, 1950. Pp. 194. $3.00.

Perhaps we ought to have named the Constitution of the United States something else, for by so styling the instrument we have encouraged the assumption that only by virtue of express mention in that document can a governmental frame or political principle demand a position of "constitutional" dignity. Yet at the time of the Constitution's adoption there were tenets of political faith to which the people of the states were so resolutely attached that omission from a formal covenant could not materially have weakened them as an actual base of government. There is no evidence that the framers of the Constitution ever hoped to encompass within a single document all the fundamentals of what Jefferson called "Americanism." They had been and continued to be enunciated on many occasions, the most important of which was that signalized by the Declaration of Independence.

In *The Declaration of Independence and What It Means Today* Edward Dumbauld, a practicing lawyer schooled at Princeton, Harvard and Leyden, seeks to interest us in the Declaration as something more than an historic pronouncement whose office was accomplished with the winning of the Revolution. He would have us regard it additionally as a proclamation of living faith and a functioning part of our constitutional system. He asserts his design to parallel the course traced by Professor Edward S. Corwin in

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The Constitution and What It Means Today and he makes a creditable effort to maintain the standard of his criterion.

If the book sins against the canon of unity, the reason lies in the scope of the undertaking, for it endeavors at one sitting to tell the factual story of how the Declaration came about, to locate the philosophy that inspired it, and finally to examine critically its phrases. When Professor Carl Becker in 1922 published his excellent work on the same subject as *The Declaration of Independence: A Study in the History of Political Ideas,* James Truslow Adams commented upon a similar lack of unity. The story of why it was done and the story of how it was done somehow do not seem to lend themselves to a gracious blending.

The book should serve a good purpose, not because of any novel or profound treatment, but because any scholarly account that turns attention to the Declaration of Independence is likely to increase considerably our respect for the faith of our fathers as there expressed. Its assertions were something more than the allegations of an international bill of divorce and its proclamation of principles reflected beliefs so engrained in the American political fabric that they have remained a part of it through all its periods of stress and convulsion.

Although it affirmed as a premise a theory of governmental origin now historically discredited; although it invoked the judgment of mankind upon statements that did not altogether square with the truth; although, as is so often a fault of special pleading, the ostensible was not quite the actual—it nevertheless managed to express conclusions upon government that must remain unimpeachable so long as our democracy is true to its heritage, and to express them in language apt enough to become the basis of a political catechism. Does it make much difference that governments were not in fact instituted among men to preserve life, liberty and the pursuit of happiness if that assumption leads us as surely as a true one to the conclusion that governments derive their just powers from the consent of the governed? Why cavil now about the factual accuracy of the indictment against the king when the main thesis is that if his subjects want to get rid of him they have an inalienable right to do so?

A superficial consideration of the Declaration of Independence offers less than a rapid reading of many another state paper. A deeper study opens an inspiring record. By taking the document phrase by phrase Mr. Dumbauld has offered an incentive to interest and contemplation, and so deserves our gratitude. A full bibliography invites further study.

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PRE-TRIAL. By Harry D. Nims. New York: Baker, Voorhies and Co., Inc., 1950. Pp. 334. $5.75.

One of the outstanding reforms in the administration of justice in our times has been the introduction of a procedure known as "pretrial." This device had its precursor in England in a practice known by the mysterious name of "summons for directions." Its history in the United States has been a "twice told tale." It was introduced in the state courts in Detroit in the late 1920's under the leadership of Judge Ira W. Jayne, where it broke the backlog of a docket that was several years in arrears. The state courts in Boston followed the example of Detroit.

Pretrial did not make any substantial headway, however, until it was made a part and parcel of the Federal Rules of Civil Procedure in 1938, which introduced this system into the federal courts on an optional basis. A number of federal courts promptly availed themselves of this innovation. One of the pioneers was the United States District Court for the District of Columbia, where this reform was actively sponsored by Chief Judge Laws, who has been instrumental in the adoption of many progressive measures in the administration of justice. In this busy court, pretrial has been made compulsory. Every civil case is pretried as a matter of course, with the exception of matrimonial cases and suits against the Commissioner of Patents. Several other federal districts are pursuing the same course. A number of others are pretrying selected cases, in which a request for this procedure has been made by counsel, or in which the judge directs that a pretrial be had. Some of the states have commenced the use of pretrial, although as is frequently the case in improving the administration of justice, they have been lagging behind the federal courts in taking advantage of this measure. A strong impetus to its adoption in the state courts has been recently given in New Jersey by Chief Justice Arthur T. Vanderbilt, a dynamic leader in the reform of the law.

Harry D. Nims, an eminent member of the New York Bar, has written what is believed to be the first treatise on the subject of pretrial. The preparation of the book was suggested by the Pretrial Committee of the Judicial Conference of the United States. It is published under the joint auspices of that committee and the Section of Judicial Administration of the American Bar Association. It should be required reading for all those interested in improving the administration of justice. It discusses in detail the manner in which pretrial should be conducted and it summarizes the accomplishments in this field in various courts throughout the United States. It contains a very useful appendix comprizing verbatim transcripts of pretrial hearings conducted in various courts, as well as forms of pretrial orders and rules relating to pretrials. Judges and lawyers desirous of learning how pretrial operates and what can be accomplished by it can learn much from this invaluable work.

A pretrial in its essence is nothing but a conference between court and counsel, in which issues are clarified and narrowed, facts are stipulated, exhibits identified, and other matters are disposed of, in order to shorten the trial and confine it to the essential matters actually in controversy. At first blush it would not seem that it should require inventive genius to devise such a procedure. It should be remembered, however, that a great many inventions in all fields are obvious after they have been made. The operation of the pretrial system has demonstrated that trials are shortened and hence heavy dockets are expedited by this means. Settlements frequently result from discussions bad at pretrial, but valuable as they are, they are a by-product rather than the principal aim of pretrial.

One of the most instructive features of the book is Judge Jayne's credo for the pretrial judge. Among the precepts contained in it are the following: "That the success of the pretrial docket depends upon the pretrial judge. . . . That he . . . persist in securing the agreement of counsel to all undisputed facts. . . . That items of record . . . be stipulated. That he assume responsibility that all undisputed items of fact be included." Pretrials differ from trials in that the former require the active participation of the judge, who must take the initiative and suggest matters that may be stipulated and must exhaust items as to which controversy can be eliminated. Without energetic cooperation on his part, it is doubtful whether pretrial can be a success.

The book indicates that other types of conferences have been conducted with the objective of disposing of busy dockets, such as conferences for the purpose of settling cases conducted by the Supreme Court of New York County, and a somewhat similar procedure by the Supreme Court of Kings County. Valuable as these measures are, they should not be confused with pretrial, which, as has just been indicated, is intended to narrow the issues and stipulate facts not actually in controversy in order that trials may be shortened and rendered less expensive.

It is hoped that Mr. Nims' book will lend additional impetus to the use of pretrial, which has proved its value in the crucible of experience.

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