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The Supreme Court in Modern Role (Carl Brent Swisher, 1958) and Justice Reed and the First Amendment (F. William O'Brien, S. J., 1958)

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BOOK REVIEWS

THE SUPREME COURT IN MODERN ROLE. By Carl Brent Swisher. New York: New York University Press. 1958. Pp. x, 214. \$4.95.

During the course of our national history, the Supreme Court of the United States has been subjected on many occasions to criticism ranging from mild to vitriolic. The Court has found itself in disfavor with Congress; presidents have censured it; press and public have added their share to the more than occasional opprobrium heaped upon the nation's highest tribunal. Periods of calm have been followed by the thunders and lightnings of outrage against one, or several, judicial determinations.

Yet in spite of criticism — constructive or destructive — accorded the Court when its decisions have been generally unpopular, and the lack of appreciation received by it in the more unspectacular but equally notable moments when its rulings squared with the popular view, the Supreme Court — and subordinate courts of the federal judicial system — has continued to share with the other branches of the government a full and important measure of responsibility for the shaping and maintenance of a great, democratic, constitutional tradition.

Controversy rages and swirls today around the Supreme Court's pronouncements over the segregation of the races in the public schools, together with other decisions having great significance in the field of state-federal relationships. Such controversies should never be allowed to blind students of American constitutional processes to the indisputable fact that the federal courts, and specifically the Supreme Court, are for better or worse frequently forced, in the settlement of controversies properly brought before them, to pronounce decisions vitally affecting the course of public policy. The power of judicial review and demands of federalism project the Supreme Court inevitably into many storm centers of American politics; criticism of the judicial product is as inevitable as the projection.

What, then, is the role of a federal, particularly a Supreme Court, judge? And what is the collective function of the nine men who constitute the most powerful judicial body in the world? Where are the signs, the jurisprudential guideposts to aid the justices? And having given some answer, albeit an indeterminable one, to the question of what the role of the Supreme Court has been and is, what answer

may be suggested as to the propriety, in the American democratic system, of such a role?

Thoughtful students of the Supreme Court will recognize that Dr. Carl Brent Swisher, Professor of Political Science at The Johns Hopkins University, has been notably successful in presenting his conception of the role of the federal judge and of the Supreme Court as an institution in American society. The full breadth of Professor Swisher's acknowledged scholarly ability and the maturity of his years of study of the Court were brought to bear in his delivery of the James Stokes Lectures on Politics at New York University in 1957. These lectures, published as *The Supreme Court in Modern Role*, represent a significant contribution to the field of American constitutional law.

Professor Swisher's concept of the proper role of the Court proceeds through an examination of important cases in recent problem areas, together with historical analysis when necessary to illuminate a particular point. Separate lectures, now chapters, deal with judicial activity (1) in the area of checks on governmental activity in civil rights matters, (2) in the area of civil rights and subversive activities, (3) concerning the place of the military and its relationships with civil government, and (4) in handling the whole emotionally explosive issue of segregation. This last chapter, particularly, is thought provoking in the parallels that Professor Swisher draws between the 1857 case of *Dred Scott* and the 1954 decision in the Segregation Cases.

In his concluding chapter Professor Swisher states carefully his conception of the central role of the Supreme Court. That role, to him, is the responsibility of relating a constitution, in which the terminology employed is largely undefined, to a kaleidoscopic social, economic, and political order. The issue for the Court then becomes one of balancing the necessities for stability in society — that is, the proper province of precedent — with the demands that society grow, change, and develop — or die.

Professor Swisher's thesis will not be acceptable to many readers. He is critical, for example, of the course taken by the Supreme Court in the Segregation Cases, and many will argue that his conclusions on the "proper" role of the Court do not square 100 per cent with this criticism. None will be able to gainsay, however, that his volume is a major expression of a point of view on a much-debated issue.

Swisher's volume is a study of the Court as an institution — yet it should be recognized that individual justices leave their marks and that the study of individual justices can contribute much to the de-

velopment of a philosophy of what the proper role of a judge should be. So great an artist in the field of judicial biography could never divorce himself from such realizations.¹

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JUSTICE REED AND THE FIRST AMENDMENT. By F. William O'Brien, S. J. Washington: Georgetown University Press. 1958. Pp. xii, 264. \$5.00.

Father William O'Brien, a member of the government faculty at Georgetown University, has devoted his major attention to a single justice, Stanley Forman Reed. This book is no full scale biography, nor even a study of Reed's total case work during the roughly twenty years of his labors on the Supreme Court. Specifically, Father O'Brien is concerned with Reed's activity and philosophy in the field of First Amendment cases. The presentation is a sympathetic one, attempting with at least partial success to demonstrate that Reed's approach to the "function of a judge" was based on judicial restraint, the principles of federalism and the separation of powers, and the efficacy of pluralism in the solution of the nation's social, economic, and political problems.

Thus the author's effort constitutes, in effect, a case study in the broader area so capably delineated by Professor Swisher in *The Supreme Court in Modern Role*. So read, the volume has meaning, perhaps, beyond the original intent and will be useful to persons other than specialists. Father O'Brien's style and analytical ability do not compare, of course, with Professor Swisher's; few writers have as great an ability in these respects as Professor Swisher. Yet the reviewer ventures the assertion that no future student of the Court who studies the period of history from 1938 to 1958 will neglect Father O'Brien's effort. It contains far too much useful information and presents too controversial a view of Mr. Justice Reed to be ignored.

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¹See, e.g., his masterful biography of Mr. Justice Field, STEPHEN J. FIELD, CRAFTSMAN OF THE LAW (1936).