

who is qualified to teach it, and no one tries—although most such schools have rather valuable library collections for its study, and would make quite strenuous and expensive efforts to repair any gaps that might be uncovered in them. The worship of our ancestors is apparently in the debased form in which only the idols remain—well preserved and cared-for, but with even their names unknown. Perhaps it is as well. On the one hand, the law schools can concentrate on such practical matters as “legal medicine” (How to Fake a Back Injury to the irreverent), while on the other, there are the rich fields of interdisciplinary research, to say nothing of International Legal Studies.

But to carp like this is to be ungrateful.⁸ One should be very thankful that there is at least one such person as Professor Dawson, and that he has given us this fine book. Though it is not being too greedy, I trust, to hope that he might sometime follow it up with another on the same subject.

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THE SUPREME COURT OF THE UNITED STATES. Paul A. Freund. Cleveland, Ohio: Meridian Books. 1961. Pp. 224. \$1.35.

Prominently mentioned among the candidates to ascend to the recent vacancy on the Supreme Court was Professor Paul Freund of the Harvard Law School. Although President Kennedy's first appointment went to Deputy Attorney General White, it is quite possible that Professor Freund may yet participate in the Court's deliberations—both because of his undisputed eminence in the area of constitutional law, and also his long established association with the President as a legal advisor. Thus, his most recent work, *The Supreme Court of the United States*, is deserving of attention not only as an excellent analysis of the Court's role in our national life, but also as a guidepost in predicting future judicial behavior.

There can be little doubt that Professor Freund is not in alliance with that wing of the Court which speaks in terms of absolutes when considering cases involving the Bill of Rights.¹ The disharmonies between his position and that viewpoint which is generally attributed to the “activist” wing would not, I believe, proceed along channels of judicial restraint, as expounded by Justice Frankfurter and Judge Hand,² but rather find their source in a respect for a balancing or

8. Though I think it is justified to carp at the fact that there is no bibliography.
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1. Mr. Justice Black's adherence to an interpretation of the Bill of Rights as unmistakably absolute is contained in Black, *The Bill of Rights* 35 N.Y.U.L. REV. 865 (1960).

2. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 87-91 (1961) [herein-after cited as FREUND]. See, for example, the concurring opinion of Justices

“polarization”³ of the competing interests of liberty and order.⁴ Viewed in this sense Professor Freund appears to bridge the gap between present day warring elements of the Court.⁵

Professor Freund’s attraction to what he calls “particularistic analysis” rather than “illusory absolutes,” while probably offensive to many liberals, appears to make good sense. Two examples utilized are the problems of prior restraint inherent in licensing statutes, and the often troubling interplay of speech and authority involved in group libel laws. Professor Freund wisely, I think, cautions the Court in firing off sweeping generalizations against the regulation of constitutional liberties. He would first focus attention on the existence of clearly defined, relevant standards and safeguards.⁶ Similarly, he notes the stresses, of which aphorisms are often oblivious, involved in any consideration of group libel laws.⁷ With regard to the former, he writes that:

In all these cases the Court is called on to weigh the claims of public order and the exhortations of the non-conformist. The task unfortunately cannot be performed by any mechanical device for testing the centripetal and centrifugal forces in our community. For the Court the problem is the fearful one of so measuring the tensions, or so reviewing the measurements made by others, as not to appear absurd in the sight of history.⁸

At the risk of being trite, I must here state the fundamental axiom of which every lawyer is daily reminded. This axiom is a necessary and primary concern for facts. I mention it because much of what Professor Freund writes is a plea to the Court to pay attention to a case’s peculiarities. Despite the undisputed importance of this ap-

Frankfurter and Harlan in *United Steelworkers of America v. United States*, 361 U.S. 39, 44 (1959). Note, 74 HARV. L. REV. 175 (1960).

3. Professor Freund would probably react unfavorably to the word “balancing.”

See FREUND at 187:

[I]n the field of compulsory disclosure, more particularly as it concerns legislative investigations, there has been a hardening of positions on both sides: on the part of one group, an absolutist protection from inquiry into memberships and associations is demanded; on the part of the other, a countervailing “balancing” of the public interest, which it quite regularly finds adequate to warrant the questioning. The “balancing” figure, against which Justice Black has repeatedly protested, is unfortunate if it assumes a choice between two polarities; if a metaphor is wanted, a spectrum of tone would be more promising of closer analysis and reconciliation.

4. FREUND at 44.

5. An instance of Professor Freund’s compatibility with the “activist” wing is apparent in his laudatory references to Chief Justice Warren’s dissenting opinion in the recent movie censorship case, *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961); FREUND at 66-67.

6. *Staub v. City of Baxley*, 355 U.S. 313 (1958).

7. *Beauharnis v. Illinois*, 343 U.S. 250 (1952).

8. FREUND at 74.

proach, it is submitted that Professor Freund's failure to emphasize the presumption in favor of individual liberties accorded by the Bill of Rights is an unfortunate omission.⁹ It is submitted that any judicial quest for a reconciliation of interests must take into account the Founding Fathers' propensity for unequivocal language in this area. This can be recognized without pushing the logic of absolute prohibition to absurdity.

All of this is not to deprecate Professor Freund's desire that the Court practice a Lincolnesque detachment and avoidance for immediate attachments. Nor is it meant to detract in any way from the proper concern of both Professor Freund and Justice Frankfurter that the Court remain intact as a symbol and teacher. But, as Justice Black has continually warned, the indulgence in a refusal to heed the Constitution and its sensitivity to the needs of people confronted with a potentially oppressive state can only take us down the road to the worst kind of judicial interference. I mean judge-made natural law. Mr. Justice Clark, concurring in the recent reapportionment case, correctly observed the Court's function as a protector of those who are not able to seek redress from the state when he wrote the following:

It is well for this Court to practice self-restraint and discipline in constitutional adjudication, but never in its history have those principles received sanction where the national rights of so many have been so clearly infringed for so long a time. National respect for the courts is more enhanced through forthright enforcement of those rights rather than by rendering them nugatory through the interposition of subterfuges. In my view the ultimate decision today is in the greatest tradition of this Court.¹⁰

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LABOR-MANAGEMENT CONTRACTS AT WORK. Morris Stone. New York: 1961. Pp. 307. \$5.50.

To some, the title, *Labor-Management Contracts at Work*, may appear to be a misnomer. The book does not deal with the parties' day-by-day compliance with the terms of their agreement; nor does it concern itself with how to achieve such compliance without resort to litigation (arbitration). The book deals—as its subtitle reveals—with “an analysis of cases and awards” of arbitrators in labor-management disputes under such agreements; it is, therefore, a study of labor-management contracts *in litigation* in the *forum* which the

9. BLACK, *THE PEOPLE AND THE COURT* (1960).

10. *Baker v. Carr* (Decided March 28, 1962); *contra*, Bickel, *The Great Reapportionment Case*, *The New Republic*, April 9, 1962. Professor Freund might well have been in disagreement with the majority opinion. FREUND at 178.

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