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Book Review of The Sovereign Prerogative

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THE SOVEREIGN PREROGATIVE

By EUGENE V. ROSTOW. New Haven: Yale University Press, 1962. 318 pp. \$6.00.

Eugene Rostow, Dean of the Yale Law School and author of many articles concerning the functions of the Supreme Court and problems of constitutional law, has in this volume collected certain of his papers published since 1945, and through this work he addresses himself to the subjects of what are the proper functions of the Court, what are the sources of its ideas and authority, and how well has the Court met its responsibilities. The title of the book is appropriate. The "sovereign prerogative", paraphrasing Holmes, is the prerogative of choice, and Dean Rostow's position is that in the exercise of the "sovereign prerogative" the Court is not and should not be bound by rules of law and construction and notions of policy proven unsatisfactory by experience.

The essays which comprise this volume are grouped in three sections, the first of which, entitled "Sources of Judge-Made Law", is essentially a defense and exposition of the philosophy of legal realism or sociological jurisprudence and an advocacy of the pursuit of moral objectives in the formulation and development of law. The viewpoint of the author is best expressed in his own words when he says:

The position exemplified in this book considers law to be the means through which social policies become social action. It views law as an integral part of the process of social change. It accepts as normal the fact that judges have a limited but inescapable duty to make some of the decisions through which law develops in response to changing notions of policy.

To the extent that law is the framework through which society functions, law in its development must learn from experience, must consider man and his needs in the light of the advances made in the social sciences, and must respond to national objectives. Using the recent decisions on civil liberties and segregation as illustrations of the proper application of the philosophy of legal realism, the author argues for a "result

oriented, sociological jurisprudence, rather than a mechanical one.”

In the second section of the book, entitled “The Nature and Legitimacy of Judicial Review”, Dean Rostow answers the critics of the Court who contend that it should exercise greater self-restraint and give greater deference to the positions of Congress, the Executive and the States. To those who indict the Court on the ground that it is making law rather than interpreting and applying it, the author replies that it is the duty of judges to relate law to the changing needs of society. Law is not a stagnant pool but a running stream and it is not improper for judges to influence the direction of the stream. Nor is it undemocratic in and of itself, Rostow contends, for judges to obstruct the will of Congress, an elected body, in instances where Congress is disregarding constitutional limitations. A constitutional system, to be democratic, cannot permit legislative discretion to be the standard of limitation on the role of government in the affairs of men. We do not operate under a parliamentary system, but under a written Constitution, and it is the function of the courts to insure constitutional democracy by prescribing the constitutional limitations on governmental action.

In the third section of the book, entitled “Toward an Affirmative Constitutional Theory of Judicial Action”, the author limits his discussion to the Court’s position with respect to the confinement of the Japanese-Americans on the West Coast by the military during World War II, the need for a rational security program and the concept of federalism in modern constitutional law. The treatment of the Japanese-American cases is particularly valuable, not only as a critique of the Court’s reasoning, but as a factual presentation of the mistreatment of our Japanese citizens during the war. Rostow’s chief criticism of the Court in upholding the actions taken by the military commander on the West Coast is that in so doing the Court “. . . upheld an act of military power without a factual record in which the justification for the act was analyzed. Thus it created doubt as to the standards of responsibility to which the military power will be held.”

With respect to our present security program Dean Rostow challenges the propriety of permitting summary dismissal of

government employees suspected of being security risks by reason of their possible political leanings or susceptibility to blackmail, and argues for an application of procedural safeguards of the kind that "characterize admission to and removal from the bar, the practice of medicine, or the conduct of licensed callings". The test should be the employee's fitness or suitability for the job in question and its application would "make the government's right to inquire into a man's beliefs and his entire history, a function of the requirements of the job he is called upon to do."

The concept of federalism in our Constitutional system has been a changing one. Analyzing leading decisions applying the Commerce Clause to limit the States where there have been conflicts between State regulation and national needs, the author concludes that federalism is still a vital feature of our Constitutional structure, but that the problem is no longer how to divide governmental authority between nation and state, but "how to guide the evolution of governmental institutions in ways that fulfill the purposes of the federal conception."

At a time when the Supreme Court is being attacked and criticized by interest groups of every economic and political hue, Dean Rostow's treatment of the Court's "sovereign prerogative" is a needed contribution to constitutional literature and thought. Applying the standards of the philosophy of legal realism, he criticizes some decisions, defends many and expounds a theory of judicial responsibility that is *certain* to affect the development of law to a great extent in coming years. This volume is not and does not purport to be a complete formulation of the precepts of sociological jurisprudence nor a comprehensive analysis of the problems confronting the Court as it strives to apply constitutional principles to the changing needs of society. It is instead a collection of essays dealing with diverse subjects, but having a common theme, and its value would have been enhanced had it been more systematic in its treatment. However, inasmuch as it is an authoritative, clear and concise statement of the standards and principles that *are likely* to govern the future development of constitutional law, the volume can be of inestimable worth to members of the bar and students of political science.

JOHN E. DONALDSON