

choose for itself when choice must be made. After all, voters have relatively direct and immediate control over Congress, but only the remotest power to correct judicial error. It is not that Justice Black's "adversaries" like free speech less, but that they like democracy—in *all its aspects*—more. Accordingly, when the two responsible, *i.e.*, elected, branches (Congress and the President) agree upon a line in the area of doubt or choice, the Court hesitates to interfere. (The Constitution, remember, does not provide an unmistakable boundary.) This is to say, the Court is reluctant to intrude upon the democratic processes unless it is convinced beyond reasonable doubt that the legislative balance has no rational foundation. To put it differently: the Court starts with a presumption that the people, speaking through their elected representatives, are "right"; Justice Black presumes that they are "wrong." Each side, of course, will consider arguments in rebuttal of its presumption.

In short, both Justice Black and his "adversaries" believe deeply in free speech—probably more deeply than any comparable group of their predecessors. They differ mainly in their attitude toward the judicial role in a democracy. It comes, perhaps, to this: How can democracy work, if its fundamentals (free speech, for example) are not preserved? Yet, how can democracy prosper, how deep is our respect for it, if we do not trust it with fundamentals? We practice intolerance and expect the Court to preserve the Bill of Rights. Should judges try to save us from ourselves even in the area where the Constitution leaves room for doubt and choice; or should they leave us free to gain the strength that grows with the burden of responsibility—the wisdom that comes with self-inflicted wounds? That is the oldest, most basic, and most tantalizing problem in American constitutional law. We have no solution, unless it be this: we almost always manage to have both attitudes represented on the bench.

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**Lincoln's Manager: David Davis.** BY WILLARD L. KING. Cambridge: Harvard University Press, 1960. Pp. xiii, 383. \$6.75.

Willard King, a member of the Chicago Bar, has now completed his task of writing a biography of each of the two Justices of the United States Supreme Court appointed from Illinois since its statehood in 1818. In 1950, he published a biography of Chief Justice Fuller, the second of Illinois' two judges.<sup>1</sup> Now after ten years of painstaking research, Mr. King's second biographical effort has been published. Mr. King thus belongs in that first rank of legal scholars who have sought to rescue the Supreme Court "from the limbo of impersonality," about which Mr. Justice Frankfurter complained almost twenty-five years ago.

<sup>1</sup> KING, MELVILLE WESTON FULLER (1950).

In this book on David Davis, Mr. King has employed the same exacting standards of scholarship and even detective work in ferreting out missing papers that he employed in the Fuller biography. Quotations from the voluminous Davis correspondence are used effectively throughout the book to illuminate the practice of law and politics during Davis' life. Yet there is a difference between this book and the Fuller book. That difference appears to be two-fold: Mr. King's emotional involvement with the Lincoln era as compared with his observer's view of the Cleveland era; and a subject with more appeal to the modern reader and lawyer.

The biography of David Davis is very well written. Mr. King makes us feel that we too rode circuit with Lincoln and Davis, or maneuvered in the political convention of 1860, or sought jobs for our friends. There was nothing dull or retiring about David Davis; he lived life to the full with zest and with strong prejudices; he was an activist *par excellence*. Mr. King has made an important contribution to legal scholarship by recreating life in the circuit-riding period of our legal history.

Davis was on the Supreme Court for fifteen years from 1862 to 1877 and Mr. King rightly makes *Ex parte Milligan*<sup>2</sup> stand as Davis' major "printed" contribution to our Supreme Court history. While it cannot be said that Davis was an unknown or insignificant judge, he must be classed with that large number of justices who have not made significant intellectual contributions to our constitutional jurisprudence. The *Milligan* case is the exception. Interestingly enough the same may be said of his subsequent period in the United States Senate. As Mr. King points out, no major legislation bears his name and no major policy debate was ever resolved by his participation. Davis' major contribution to society was a remarkable capacity for organization. As Mr. King says, this quality resulted in Lincoln's nomination. Quite properly therefore, a biography of Mr. Justice Davis is, as the title indicates, really the biography of a political manager and belongs to the plethora of Lincoln era histories.

Yet we also get another picture of Davis from this biography. Activist though he was; prejudiced though he was; loyal though he was to friends who, by hindsight at least, did not deserve loyalty; David Davis both on the Court and off had the judicious attitude when a decision was necessary. Notwithstanding his emotional commitment to Lincoln in the 1860 campaign, he seems to have restrained himself in the political commitments he would have liked to have made to promote Lincoln's cause. Friend and foe alike seem to have seen this quality in Davis, for he was frequently suggested as the "impartial" representative in committees and groups formed to resolve bitter controversies. His election as President of the Senate stems from the respect which his colleagues had for him. Mr. King has given us a picture of a man

<sup>2</sup> 71 U.S. (4 Wal.) 2 (1866).

who exhibited all the human weaknesses until he had to assume responsibility; then he acted in our common law tradition of the judicious and reasonable man.

Justices of the Supreme Court are said to have been appointed from time to time for political reasons. Now that Mr. King has completed biographical sketches of the only justices Illinois has produced, we may ask whether these books help explain Illinois' inability, as a strategically important state politically since 1860, to secure the appointment of more than two justices. In the case of Fuller and Davis, personal friendship with the President seems to have been more significant than the political obligations which the President owed them or the state. But if appointments to the Supreme Court are made for reasons other than personal friendship why hasn't Illinois received any of these appointments? If anything is discernible from the careers of Davis and Fuller and of their Illinois competitors for appointment, it would appear to be that only friendship is strong enough to overcome the position in which the Illinois style of political fighting leaves the prominent lawyer. At least in much of Illinois history since Lincoln, a prominent lawyer who participates in public affairs is never permitted by the press to reach the stature of "statesman." Mr. King quotes Lincoln as noting that the Illinois press seems to wage "unrelenting warfare on a *man* as well as on his ideas which happened to be opposed to that of the press" (*italics supplied*). Both Fuller and Davis saw themselves and other prominent lawyers pilloried by political tides and debates in the state; other prominent lawyers seem to have been unable to provide a public image sufficient to enable a President to appoint them, even when the President agreed with the ideas which caused the man to be pilloried.

Other explanations may be suggested by Mr. King's two books. Even Davis and Fuller made all too many recommendations to Presidents based upon the obligations of personal and political loyalty. Perhaps Presidents tend to think that all Illinois recommendations to Presidents for appointments to the Supreme Court are of this type.

In any event Mr. King, a distinguished Chicago lawyer, now has a firm position in that select few of distinguished legal historians. While it is unlikely that a legal biography of another Illinois justice will come his way, he will, it is hoped, find other appropriate biographical subjects in the field of law.

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**Henry A. Wallace: Quixotic Crusade 1948.** By KARL M. SCHMIDT. New York: Syracuse University Press, 1960. Pp. 362; Index. \$5.50.

Karl M. Schmidt, who tells us of his own early role in "Republican Students for Wallace," spins a remarkable account of the ill-fated Wallace crusade