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Book Review (reviewing Wallace Mendelson, Justice Black and Frankfurter: Conflict in the Court (1961))

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ESSAYS AND BOOK REVIEWS

JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT. By Wallace Mendelson. Chicago: The University of Chicago Press. 1961. Pp. 151. $4.00.

This book is another contribution to the recently burgeoning literature on the judicial process.[1] It is evident that the dilemmas of judicial review which were so much discussed in the early 1930's are fashionable puzzles once again.

Professor Mendelson has entered the debate from an attractive angle. Selecting Justices Black and Frankfurter as representing polar opposites in the judicial role, he has proceeded to trace the judicial profile of each through a formidable number of cases.

At the outset it would appear that he is neutral as between his two contending champions and is merely delighted with the opportunities for analysis the conflict between them has created. The rift in the current Court, he states, "wears a jewel in its head. Never before on the bench has the role of the Court in our federal democracy been canvassed with such outspoken intellectual vigor. Here perhaps posterity will find unique greatness in the 'new' Supreme Court."[2] However, before many pages are read, it is quite apparent that Professor Mendelson does not intend to merely anatomize two different views of the judicial role; his interest is normative and he has a clear perference. The preference is for Justice Frankfurter's definition of the role and the book is in effect an able, reasoned defense of the Frankfurter position.

As would be expected, the detailed comparison of Justices Black and Frankfurter proves to be rich, complex and intellectually strenuous fare. Professor Mendelson writes fluently and with enthusiasm and economy, and the essay almost comes off as a tour de force in constitutional law criticism.

That it does not come off completely is due, I think to certain difficulties in Professor Mendelson's method and approach; that it comes

1. LLEWELLYN, THE COMMON LAW TRADITION (1960); HAND, THE BILL OF RIGHTS (1958); BLACK, THE PEOPLE AND THE COURT (1960); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Hart, *Foreword: The Time Chart of the Justices, The Supreme Court 1958 Term*, 73 HARV. L. REV. 84 (1959); Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960); Shapiro, *Judicial Modesty, Political Reality, and Preferred Position*, 47 CORN. L.Q. 175 (1962).

2. Page 8.

off as well as it does is due to the strength and deep fascination of Justice Frankfurter. We shall consider these points in turn.

A first difficulty is that the author was not content with the large task set for himself but wished also to write a general essay on constitutional law. Such endeavors are simply too great a burden for so small a book to carry. The author has organized the essay into three major segments: issues of federalism, of separation of powers and of democracy or individual liberty. Although this organizational pattern permits some interesting generalizations about these topics, I found that it hampered the job of closely comparing the work of the two justices. I would have been helped had the author organized along lines more functionally related to the judicial role such as judicial review of federal legislation, judicial review of state legislation, construction of statutes, judicial review of administrative agencies, the handling of petitions for certiorari, etc.

A second difficulty is more fundamental. It was a mistake to have included Justice Black as a foil for Justice Frankfurter. I doubt if they exemplify different conceptions of the judicial role. The difference between them stems more from substantive disagreements.[3] If Justice Frankfurter read the Constitution as Justice Black does, his special view of the role of a Supreme Court Justice would not necessarily keep him from deciding the way Black does. And in any event, Justice Black has not, like Justice Frankfurter, discussed explicitly from the bench his view of judging. Hence, the comparison is not between two articulate views of the role of the judge but between the articulated view of the one and a series of decisions by the other.

Perhaps because of this, Professor Mendelson constantly gives the appearance of seeking to diminish Justice Black in order to enhance Justice Frankfurter. Very probably no one could have succeeded in comparing these two judges to the complete satisfaction of enthusiasts in both camps, but Professor Mendelson is so much less empathetic to the Black position than he is to the Frankfurter position that we keep feeling he has loaded the dice. He speaks warmly of Justice Black as a man—he is seen as generous, courageous, idealistic, democratic and principled; but on Professor Mendelson's view, he is not really a judge, but rather a layman amateur who on the bench is doctrinnaire, simplistic, irresponsible, inconsistent and given to making decisions *ad hoc* under the dictates

3. Arguably the crucial difference lies in the preferred position controversy. It would be a useful exercise to remove this area of disagreement and see how vital a difference remains. See Shapiro, *Judicial Modesty, Political Reality, and Preferred Position*, 47 CORN. L.Q. 175 (1962).

of spontaneous personal preference. We are constantly told what Justice Frankfurter *said* but only how Justice Black *decided;* when they happen to agree, it is Justice Frankfurter who has thought the problem through and Justice Black who has taken a short cut; when Justice Stone, who seems universally regarded as a sound man, agrees with Justice Frankfurter, the author dutifully notes the fact; when Justice Stone agrees with Justice Black, the fact is often overlooked. In any event, the position of Justice Frankfurter is sufficiently complex and sufficiently powerful in its own right to stand alone. By choosing to set Frankfurter off against Black the author has enormously complicated his task of analysis and, worse, has invited the charge of partisanship.

The effort to make a comparative study has aggravated certain problems of method. If one is not to examine and discuss all of the decisions of the two justices, how can he safely sample them? Professor Mendelson does not confine himself to cases in which each has written an opinion in opposition to the other; several times the opposition is traced through decisions alone. Thus he makes a strong point about the difference in technique found in *Vermilya-Brawn v. Connell,*[4] which posed the question of whether the Fair Labor Standards Act could be read as applying to a United States army base in Bermuda. To be sure, the case is a good one for the author's purposes, but unless one reads very carefully he will not note that what we are comparing is a majority opinion of Justice Reed in which Justice Black merely concurred with a dissenting opinion by Justice Jackson in which Justice Frankfurter merely concurred.

There is tension here on any approach. The problems of judicial role are not found solely in the cases of constitutional challenge but are reflected in all of the phases of the Court's complex agenda. Hence, it is attractive to consider a large number of cases. But as the number of cases increases there are two sharp difficulties. First, the reader will always have still another case which he feels should have been put under scrutiny;[5] and second the treatment of so many cases—Professor Mendelson must cover well over one hundred—in so short a space, although he does it most ably, is in the end almost indigestible.

My own preference, to put in a plug for the home team, would be for the technique of our *Supreme Court Review* which limits its articles to a detailed discussion of a single problem. Perhaps only in so confined

4. 335 U.S. 377 (1948); discussed by Professor Mendelson at pages 18-19.

5. Thus, this reader would have liked something on the congressional committee, the obscenity and the bar admission cases. The omissions are not all in one direction, however; for example, the courageous Frankfurter dissent filed after the execution in *Rosenberg v. Denno,* 346 U.S. 271 (1953) is not noted.

a compass is the full exploration of differing judicial roles a safe enterprise. And while I am so full of suggestions for the design of a book Professor Mendelson did not want or try to write, I might as well go the whole way and suggest that I would have found more rewarding a full scale examination of a single case—the second flag salute case which exacted the fullest statement from Justice Frankfurter of his stance.[6]

But the important point is that despite these difficulties Professor Mendelson has written an interesting and useful book, and that he has done so, to repeat, because he reminds us systematically of how extraordinarily rich the profile of Justice Frankfurter is.

At every level of the Court's business from judicial review of constitutionality to the administration of petitions for certiorari, Justice Frankfurter's touch has a distinctive emphasis. The roster is as impressive as it is familiar—extreme self-restraint in exercising the power to declare legislation unconstitutional, repudiation of any preferred position doctrine, insistence on precedent and stability, insistence on not deciding more than is absolutely necessary, insistence that the Court confine itself to significant cases, deference to competence in other areas, an acute allergy to absolutes in any form, an insistence that there is no short cut for judicial decision, a deep respect for procedural due process, a recognition that the states are areas of social experiment, etc., etc. Each of these facets is deserving of discussion and Professor Mendelson's book has helped illuminate them.

With so large a theme and with the space, time, and competence available to me, I can at most touch on a few points. Justice Frankfurter seems to me a singularly interesting judge—perhaps the most interesting of all judges—because he is cursed with a sophisticated realist insight into the judicial process, and unlike Holmes, Cardozo, Hand or Jerome Frank, he has chosen to struggle explicitly with this insight while on the bench. The insight is the realization of how much power a judge really has—that he often must in some sense legislate whichever way he decides. Justice Frankfurter has further complicated his life as a Supreme Court Justice by adopting the view that the Constitution is in some way a growing organic document taking on new meanings for new times. What is arresting here is not the insight about judicial power or the Constitution, but the moral struggle it has imposed on Justice Frankfurter. His quest as a judge is for some objective criteria which in so free an enterprise as judging will keep him from simply translating personal preference into law. If legislate he must, then legislate he will; but only if he can

6. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

find a way to exercise that power decently, responsibly and objectively. One might well say that Felix Frankfurter is the first fully self-aware judge we have had the privilege of watching at work. One might also say that he is almost in the position of knowing too much about the judicial process to function as a judge. In brief, he is Hamlet on the bench.

The quest is, therefore, dramatic, courageous, valuable and fascinating, and we are all in his debt for the stoic persistence with which he has pursued it.

It is clear that certain of his critics are very wide of the mark. Justice Frankfurter is particularly a judge whose personal values cannot be read back from his decisions; there is always the high likelihood that he has been guided by some intermediate values about the judicial function which he deemed in the long run more important. Hence, it is meaningless to talk of him as a conservative; it is meaningless, it is unfair and it misses the whole point.

Again, there is a complex integrity and consistency in his approach. This is well illustrated by his opinion in the well-known *Wilkerson* case[7] involving the review of a state court judgment under the Federal Employers Liability Act. He is explicit that he thinks such cases are not the proper business of the Supreme Court, that the FELA is an outmoded law in its insistence on negligence in the handling of industrial accidents and that the court should go cautiously in reversing the judgments of state courts on such issues; but then he adds that if the issue must be decided he thinks there was enough evidence of negligence to go to the jury and he joins the majority in reversing the state court.

It is the great virtue of Professor Mendelson's book, whatever we may feel about his treatment of Justice Black, that he has done an admirable job on Justice Frankfurter and has made us see with special clarity the difficult task the Justice has set for himself. One cannot down, however, certain problems this definition of the judicial function raises and on these Professor Mendelson has been less helpful. First, there is the question of whether the intermediate values to which Justice Frankfurter accedes are, even in the long run, that valuable. In part this is the classic conundrum of law versus equity in a new form and we are not likely to reach an easy resolution of it. In part this takes us to a second question, the model of democracy which underlies the Frankfurterian values. It is, as we get glimpses of it in the opinions, disturbingly simple. Whatever the realism with which Justice Frankfurter has

7. Wilkerson v. McCarthy, 336 U.S. 53 (1949).

viewed the judicial process, we do not seem to find the same touch when he turns to the political process.[8] Any interference with the popular will as reflected in majority vote—at least if done by non-elective officials like judges—is taken as axiomatically wrong, anti-democratic and debilitating to the popular sense of responsibility. At this point, the questions come up fast. Might not the Court as a growing institution have achieved a politically meaningful role in the *total* political process today? If expression of the popular will is so critical, does not this lead to the Black insistence on keeping the political process free and open at all costs? And again does the Frankfurterian judicial review make any sense as a political institution—why should any one have preferred the setting up of this anemic check to the simplicity of not having judicial review at all? And how seriously are we to take the threat of debilitating the popular sense of responsibility said to reside in preventing the majority from learning from its own mistakes?

These are all, to be sure, familiar issues. For the moment, under the stimulus of Professor Mendelson's essay, I am intrigued by three other points. First, is the Frankfurterian quest humanly feasible? Once the judge realizes he is free, can he find sufficient objective reeds on which to lean in controlling that freedom? The brilliance with which Justice Frankfurter has discovered such reeds is perhaps the most fascinating technical aspect of his judging and would be the most rewarding topic for close study. And in any event the point may well be that here even the impossible quest is worthwhile. Second, there is the question of whether the definition of the judicial role does not itself tend to become an absolute and a source of rigidity? The answer may well be that this is simply the rigidity of neutrality and the rule of law, and that to temper this austere conception of the judicial role with equity in the particular case has all the difficulties captured in the old joke about the girl who was a little bit pregnant. Finally, there is the tantalizing problem of Justice Frankfurter's emulation of and admiration for Justice Holmes. The question simply is whether Holmes can properly be *his* hero and model. The difficulties here, I take it, are more with Holmes than with Frankfurter. Holmes as a judge was not introspectively concerned with the power *he* was exercising. His flair for epigrammatic brevity not only made him a judicial stylist quite different from Justice Frankfurter but it lead, as for example in *Eisner v. Macomber*[9] or *Buck v. Bell*,[10] to simplistic short cuts Justice Frankfurter would have found abhorrent.

8. See especially the challange in Shapiro, *op. cit. supra* note 3.
9. 252 U.S. 189 (1920).
10. 274 U.S. 200 (1927).

And however "clear and present danger" may have begun in the Holmes opinions, it seems to me unlikely that Holmes, by the time of the great dissents, would have found Justice Frankfurter's current reading of it congenial.

It is instructive after reading Professor Mendelson's book to go back and read the second flag salute case again. Who now seems to have the better of the debate there? Certainly Justice Frankfurter's explicit statement of his approach is impressive. It could not be clearer that he is deciding the case against the dictates of his own heart in deference to other values; he is effective in his insistence that the result be squared with precedent and that it is not easy for the majority to do so; he is persuasive in his exposition of the Church-State doctrine and in his contention that there is no violation of that doctrine here; he is thoughtful in his consideration of future cases this decision will embarrass; he is effective in his reminder that the Court did not find the state action unconstitutional in the earlier cases of flag salutes; he is eloquent in his statement of the rationale for judicial self-restraint. Yet I feel that in the end he has come down on the wrong side and that his preoccupation with defining the judicial role has caused him to pay insufficient attention to the precise issue that was before him. Nowhere in his elaborate 9,000 word essay do we find him confronting the oddity of the case—compelling children to assert something they did not believe; nowhere are we told why it is reasonable for the state to require a hypocritical compliance by the children. The point cannot be adequately pursued here but if we were to test his approach by comparing his opinion to the dissent of Justice Stone in the first flag salute case,[11] it seems to me that Stone has all the better of it, and that at times the Frankfurterian drive toward total purity in the judicial role will prove too inhibiting on the judge. We would like our judicial self-restraint to be exercised with some flexibility. But perhaps it is we who want the impossible and perhaps the Frankfurter moral is that we cannot have it both ways. We cannot, that is, decry the intervention of the anti-New Deal judges in the 1930's and applaud the inervention in the flag salute case. If so, Justice Frankfurter's dissent in *Barnette* looms as historic evidence of what the price for judicial impartiality and neutrality really is.

Professor Mendelson has packed a remarkable amount into his small book and, by reflecting so much of the genius of Justice Frankfurter, has done a singularly thought-provoking job. It should not, therefore, be taken as a criticism but as a measure of his success if I conclude by

11. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

observing that what we now need is the big, full length portrait of Justice Frankfurter as a judge.[12] Such a portrait would make a major contribution to our jurisprudence.

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FIFTY-EIGHT LONELY MEN. By Jack Walter Peltason. New York: Harcourt, Brace & World, Inc. 1961. Pp. xiii, 270. $4.95.

No process of social change has ever proceeded with more prescience and self-conscious accumulation of data and observation than American desegregation. The initial decision, *Brown v. Board of Education of Topeka,*[1] in 1954 was self-diagnosed as opening up a generation of litigation. Since then the careful coverage of events by floods of *New York Times* reporter teams, the myriad of articles, the many books and the highly laudable yet typically American packrat archivism of the *Southern School News* and the *Race Relations Law Reporter,* have all focused minutely on this intricate and embroiled social context.

From the beginning a dichotomy developed between a small group of observers who viewed the process as a potential for value-free research, urging avoidance of commitment on the substantive issue; as opposed to a larger group who openly or inferentially believed in some particular outcome and subordinated social research to that end. It goes almost without saying that the value commitments of American social science and intellectual life generally are such that approval of desegregation is virtually demanded of individual professionals; to be a segregationist in any of the relevant subject matters of law and social science is to be a Neanderthal.

Perhaps for that reason the argument over value-commitment has proven of no deep significance, and few works have really acute positions on this question. Even taking a stand would not preclude many forms of objectivity, so that a still further point must be made—that most work in this area radiates a form of single-minded commitment that precludes depth of view. Weber's speculation that fresh religious insight tends to develop among peoples on the fringes of a great empire and Veblen's analysis of the role of marginal social groups in initiating

12. An important start in this direction is the book by Helen Shirley Thomas, FELIX FRANKFURTER, SCHOLAR ON THE BENCH (1960).

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1. 347 U.S. 483 (1954).