from treatises, and sections of the *Restatements* cram the book and offer take-off points for exciting discussions on a great variety of live and important questions. And there is more of Wright's original work in the volume than appears at first glance. His notes, questions and comments are set in text type and bear no distinguishing headings; the result is that despite their frequency they will be easily missed by the page-flipping teacher making a casual inspection. They deserve a closer look, for Wright writes well, his comments are pointed, and his questions, directed to the functions of rules and the needs presently unmet by existing remedial doctrines, are searching.

But, above all, the book as a whole cuts across traditional curricular lines to present a simplifying and sensible course pattern. Most of the editor's faults can be charged to his ambition and to his enthusiasm for his job. In trying to bring together in one book enough teachable materials to support a large part of an entire legal education, he has spread himself much too thin. He has had to over-edit and to over-organize and so in the end he has produced too rigid and too busy a teaching tool. But if Professor Wright's reach has thus exceeded his grasp, legal education is the richer for it. His *Cases on Remedies* ought to stimulate curriculum committees in general and Damages, Restitution and Equity teachers in particular to some hard and much needed thinking.

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THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT. By Robert H. Jackson. Cambridge: Harvard University Press, 1955. Pp. viii, 92. $2.00.

A FEW days after the Supreme Court reconvened for the October Term, 1954, Robert H. Jackson died. In the next several months, the Justice's son and his law clerk footnoted and brought to publishable form a short manuscript entitled *The Supreme Court in the American System of Government*—three lectures which Justice Jackson had been preparing for delivery at Harvard the following February, and which appeared to be "substantially complete"[1] when he died.

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1. William Eldred Jackson and E. Barrett Prettyman, Jr., who shepherded the Justice's manuscript into print, say in their Foreword:

> "This, therefore, is an unfinished, yet substantially completed, work. It is unfinished in the sense that had the Justice lived the final product would have been polished to the perfection which he demanded of himself. It is, however, substantially completed in the sense that it expresses his matured and deep convictions regarding the institution of which he had been so close and keen an observer, first from without and then from within, over the past two decades."

P. viii. Jackson was to have given the 1955 Godkin Lectures at the Harvard Graduate School of Public Administration. He outlined, drafted and redrafted the lectures throughout the spring, summer and early fall of 1954. He had been hard at work on them the day before he died. P. vii.

According to a venerable principle which has come to be widely regarded as settled law, *de mortuis nil nisi bonum*. But the late Justice would himself have been the last to inflate the principle into a rigid exclusionary rule. First, because he was rightly suspicious of all vague catchwords: the cliché that fits one set of facts may be a "verbal trap" in another.[2] Second—and more important—because he hated cant. "Candor, indeed, was one of his deepest veins."[3] Ever the adversary, Jackson would have chafed at hiding behind notions of decorum that fortuitously limited the scope of review.

Viewing Jackson's last work on the merits, then—without any bow to the amenities—it is hard to avoid the feeling that the Justice's valedictory to the Court he knew so well is a pretty pedestrian affair. And this is not only regrettable but surprising. Jackson had, after all, been one of the Court's most gifted and articulate members for thirteen years (including the year he was away at Nuremberg prosecuting the major German war criminals). And for almost a decade before he became a Justice he had been a distinguished practitioner before the Court in a variety of official capacities. Moreover, his *Struggle for Judicial Supremacy*, written after the armistice between Franklin Roosevelt and the Court, remains to this day an invaluable account of how judicial review briefly but calamitously became judicial usurpation. Nevertheless, the author's wide experience seems to have had little significant impact on this last work: there are few signs of Jackson's profoundly practical insights or of his customary vigor and clarity of expression. The book is a whisper by a man who once talked loud.

In very conventional fashion, the lectures describe the functions of the Supreme Court: (a) as one of the three branches of the national government; (b) as a court adjudicating the kind of litigated matters that Anglo-American courts have dealt with for centuries; and (c) as a "political institution" arbitrating within our federal framework the constitutional controversies arising between sovereign states, between a state and the nation, between contending branches of the national government, and between an individual and a state or the nation. Major themes frequently recurring are the intricate distribution of power within the federal system, the dangers inherent in substantial centralization of power,[4] and the narrow limits within which judges have au-

2. Dennis v. United States, 341 U.S. 494, 568 (1951) (concurring opinion).

3. Frankfurter, *Mr. Justice Jackson*, 68 HARV. L. REV. 937, 939 (1955).

4. A minor theme that has major implications is Jackson's fear, reinforced by his study of the rise of Nazism, of an expanded federal police. Coming from a former Attorney General, the following sentences are of more than routine interest:

> "I cannot say that our country could have no central police without becoming totalitarian, but I can say with great conviction that it cannot become totalitarian without a centralized national police. At his trial Hermann Goering, with great candor, related the steps by which the Nazi party obtained complete domination of Germany, and one of the first was the establishment of the supremacy of the national over the local police authorities. So it was in Russia, and so it has been in every totalitarian state. All that is necessary is to have a national police competent to investigate all manner of offenses, and then, in the parlance of the street, it will have

thority or competence to resolve conflicts of major concern to the community. Under these more generalized headings are to be found little essays on the mechanics of the Court; the folly of maintaining diversity jurisdiction in the light of *Erie*[5] and its progeny; the unplumbed potentialities of the full faith and credit clause;[6] the development of administrative agencies and their relations with courts, and kindred matters. All this is safe, sane and dull.

Nor are there any surprises in Jackson's ultimate conclusions about the limited capacity of judges to cope with threats to the fundamental framework of our society. "I know," wrote Jackson, "of no modern instance in which any judiciary has saved a whole people from the great currents of intolerance, passion, usurpation, and tyranny which have threatened liberty and free institutions . . . . [I]t is my belief that the attitude of a society and of its organized political forces, rather than its legal machinery, is the controlling force in the character of free institutions."[7] Stated in this general form, the Justice's thesis can hardly be refuted. It is a cogent but hardly original reminder that judges and printed words are not enough to preserve the liberties of a people that has lost interest in remaining free.[8]

The book would warrant no further comment, were it not for a few sentences in which pedagogy is pushed to the background and Jackson's own views about the qualities essential to responsible exercise of judicial power come to the fore. For a few brief moments sparks are struck, and Jackson's anger at his adversaries illuminates the scene. The sentences, which reduce to specifics his more general views on judicial restraint, merit close examination—not because they substantially alter the character of an otherwise disappointing book, but because they help to round out one's picture of the late Justice:

> enough on enough people, even if it does not elect to prosecute them, so that it will find no opposition to its policies. Even those who are supposed to supervise it are likely to fear it. I believe that the safeguard of our liberty lies in limiting any national policing or investigative organization, first of all to a small number of strictly federal offenses, and secondly to nonpolitical ones. The fact that we may have confidence in the administration of a federal investigative agency under its existing heads does not mean that it may not revert again to the days when the Department of Justice was headed by men to whom the investigatory power was a weapon to be used for their own purposes."

Pp. 70-71.

5. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

6. See JACKSON, FULL FAITH AND CREDIT, THE LAWYER'S CLAUSE OF THE CONSTITUTION (1945).

7. Pp. 80-81.

8. Compare the following from Learned Hand's address on "I am an American Day," May 21, 1944:

> "I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it. . . ."

HAND, THE SPIRIT OF LIBERTY 189-90 (1952).

> "The question that the present times put into the minds of thoughtful people is to what extent Supreme Court interpretations of the Constitution will or can preserve the free government of which the Court is a part. A cult of libertarian judicial activists now assails the Court almost as bitterly for renouncing power as the earlier 'liberals' once did for assuming too much power. This cult appears to believe that the Court can find in a 4,000-word eighteenth-century document or its nineteenth-century Amendments, or can plausibly supply, some clear bulwark against all dangers and evils that today beset us internally. This assumes that the Court will be the dominant factor in shaping the constitutional practice of the future and can and will maintain, not only equality with the elective branches, but a large measure of supremacy and control over them. I may be biased against this attitude because it is so contrary to the doctrines of the critics of the Court, of whom I was one, at the time of the Roosevelt proposal to reorganize the judiciary. But it seems to me a doctrine wholly incompatible with faith in democracy, and in so far as it encourages a belief that the judges may be left to correct the result of public indifference to issues of liberty in choosing Presidents, Senators, and Representatives, it is a vicious teaching."[9]

Professor Rodell is doubtless right that Hugo L. Black and William O. Douglas are the "libertarian judicial activists" whose "vicious teaching" chiefly stirred Jackson's ire.[10] For it is plain that Justices Black and Douglas have not been reluctant, in an era of cumulative restrictions on personal rights, to give what Jackson felt to be excessive scope to constitutional guarantees.[11] Yet Professor Rodell is only half right in his intimation that Jackson was just as much an "activist" (assuming the word has some identifiable meaning) as Black and Douglas, but that Jackson limited his "activist" judicial energies to the protection of property rights.[12]

It is true that Jackson's Constitution was extremely sensitive to certain types of economic regulation. For example, its Commerce Clause rigidly forbade state legislation that Jackson regarded as antithetic to a unified national economy.[13] But it is not true that Jackson was wholly unconcerned about

9. Pp. 57-58.

10. Rodell, *Justification of a Justice*, Saturday Review of Literature, July 16, 1955, p. 18.

11. See, *e.g.*, their separate dissents in Dennis v. United States, 341 U.S. 494, 579, 581 (1951); and Justice Black's dissent, joined in by Justice Douglas, in Adamson v. California, 332 U.S. 46, 68 (1947). Not that Black and Douglas acknowledge the activism attributed to them. Douglas, indeed, had recent occasion to observe that Black's opinions "disprove the charge that he is an 'activist' and a devotee of judicial power." Douglas, *Mr. Justice Black: A Foreword*, 65 YALE L.J. 449 (1956). It seems safe to say that most judges regard "judicial activism" as an alien "ism" to which their misguided brethren sometimes fall prey.

12. Rodell, *supra* note 10, at 18.

13. Jackson in his book candidly disclosed his distrust of local policies that threaten to turn the nation into "a collection of parasitic states preying upon each other's commerce." P. 67. See H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949).

Presumably because of his vivid recollection of the dangers posed by a Court which made the Fourteenth Amendment an ideological road-block to state economic legislation,

infringements of personal liberty. All that can be said is that some infringements affected him more profoundly than others. Thus, he consistently chastised his brethren for what he felt was a sentimental over-solicitude for the due process rights of defendants in state criminal proceedings.[14] Yet Jackson frequently manifested substantial concern about invasions of procedural rights in federal criminal and quasi-criminal proceedings;[15] and he was on occasion zealous to protect rights under the First Amendment.[16] And in the *Korematsu* case he showed a sensitivity not displayed by Justices Black and Douglas to the rights of American citizens held in custody indefinitely without trial, solely because of their ancestry.[17] Moreover, Jackson indicated in the *Joint Anti-Fascist* case [18] doubts as to the validity of the loyalty program which he made even more concrete not long before his death:

Jackson had no more enthusiasm than most of his colleagues for relying on "due process" or "equal protection" to outlaw state economic regulation. But an enactment that was special enough could provoke his fire. See Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 425 (1952), where Jackson dissented alone from the Court's approval of a Missouri statute requiring employers to give employees four hours leave with pay on election day. "Perhaps my difficulty with today's decision is that I cannot rise above an old-fashioned valuation of American citizenship which makes a state-imposed pay-for-voting system appear to be a confession of failure of popular representative government. . . . [A] constitutional philosophy which sanctions intervention by the State to fix terms of pay without work may be available tomorrow to give constitutional sanction to state-imposed terms of employment less benevolent." *Id.* at 428.

14. See, *e.g.*, his concurring opinion in Brown v. Allen, 344 U.S. 443, 542 (1953); *cf.* his opinion for the Court in Stein v. New York, 346 U.S. 156 (1953). His attitude is hard to reconcile with his professed belief that lawyers have "a special trust and competence to safeguard every man's right to a fair trial, on which every other right is dependent." Jackson, *The American Bar Center: A Testimony to Our Faith in the Rule of Law*, 40 A.B.A.J. 19, 21 (1954).

15. See his dissents in Brinegar v. United States, 338 U.S. 160, 180 (1949) (search of an automobile); Frazier v. United States, 335 U.S. 497, 514 (1948) (jury composed of government employees); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 550 (1950) (Attorney General's refusal to disclose evidence upon which he ordered exclusion of war bride from United States); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 218 (1953) (exclusion on undisclosed evidence of resident alien temporarily abroad); and his concurrence in Krulewitch v. United States, 336 U.S. 440, 445 (1949) (discussion of dangers implicit in conspiracy indictments).

16. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 642 (1943). See Jackson's concurring opinion in Thomas v. Collins, 323 U.S. 516, 544 (1945); *cf.* his dissents in Everson v. Board of Education, 330 U.S. 1, 18 (1947); Zorach v. Clauson, 343 U.S. 306, 323 (1952); and his concurrence in Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 232 (1948). *But cf.* Jackson's concurrence in Dennis v. United States, 341 U.S. 494, 561 (1951); and his dissents in Douglas v. City of Jeannette, 319 U.S. 157, 166 (1943); Saia v. People, 334 U.S. 558, 566 (1948).

17. Korematsu v. United States, 323 U.S. 214, 242 (1944).

18. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 183 (1951) (concurring opinion).

> "We cannot approve any use of official powers or position to prejudice, injure or condemn a person in liberty, property or good name which does not inform him of the source and substance of the charge and give a timely and open-minded hearing as to its truth, safeguards without which no judgment can have a sound foundation."[19]

In short, it would be foolish to accept Jackson's denunciation of his brethren as proof that he was not himself an "activist"[20]—just as it would be foolish to dismiss Jackson as a business-oriented judge and nothing more. Jackson had a variety of strongly held beliefs, some of greater merit than others; he used the Constitution in candid support of his beliefs;[21] and he apparently had only superficial concern for abstract consistency.[22] "He was the fighting lawyer, contentious to a fault. . . . Battle was his only complete element; at best it gave him wings to soar."[23] Justice Brandeis declared that Jackson should be Solicitor General for life.[24] And Jackson himself, not long before his death,

19. Jackson, *supra* note 14, at 21. In the book under review Jackson refers critically to the fact that the Attorney General's list of allegedly subversive organizations has come to be widely used, notwithstanding the doubt cast on its validity in the *Joint Anti-Fascist* case. P. 25.

20. Jackson's opinion in National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), asserting that any inferior federal court can be vested with powers not derived from Article III of the Constitution, deserves special scrutiny in this context. Potentially it is perhaps the most sweepingly "activist" assertion of judicial power that can be found in the first three hundred and fifty volumes of the United States Reports. (In *Tidewater* Jackson announced the judgment of the Court—sustaining a federal statute conferring jurisdiction on all district courts to entertain diversity suits involving a citizen of the District of Columbia—but fortunately his remarkable rationale was supported only by Justices Black and Burton and therefore did not become an opinion of the Court).

As a contrast to the breadth of Jackson's *Tidewater* opinion, it is interesting to note the doubt expressed in his book as to the constitutionality, under the case and controversy limitation, of asking federal judges to pass upon prosecution requests for permission to wiretap or for approval of waivers of prosecution where necessary to prevent reliance on the privilege against self-incrimination. Pp. 11-12. The Court has just recently had occasion to deal with this issue, in Ullmann v. United States, 24 U.S.L. WEEK 4147 (U.S. Mar. 26, 1956). The Court concluded that, where the conditions set forth in the Immunity Act of 1954 are satisfied, a district judge is without discretion to refrain from ordering a recalcitrant witness to testify and thereby conferring the statutory immunity from prosecution; so construed, the statute does not exact of the judge a function that is not "judicial." *Id.* at 4150. *Cf.* Hecht Co. v. Bowles, 321 U.S. 321 (1944).

21. *E.g.*, "I make no concealment of and offer no apology for my philosophy that the federal interstate commerce power should be strongly supported and that the impingement of the states upon that commerce which moves among them should be restricted to narrow limits." P. 67.

22. For example, the text that harmonizes Jackson's reluctance to upset state criminal convictions and his alacrity to upset state economic controls is the following: "I think it is a mistake to lump all states' rights together as is done so frequently in political discussions." P. 66.

23. Jaffe, *Mr. Justice Jackson*, 68 HARV. L. REV. 940 (1955).

24. Frankfurter, *supra* note 3, at 939.

said in a moment of revealing retrospect: "The hard months at Nuremberg were spent in the most enduring and constructive work of my life."[25]

Perhaps Jackson never should have been a judge. It is at least true that his chief talents were not judicial ones, and it is questionable whether coming generations of lawyers and judges will put a high premium on his judicial achievement. Almost certainly, when future critics have discounted Jackson's verbal brilliance they will not find in the residue a contribution comparable to that of Hugo Black, the judge whom Jackson apparently regarded as "the mind and heart of an opposition party."[26] For present purposes it is sufficient to recognize that Jackson's last book is the work of a man who felt he should write about the judicial process but had very little to say.[27] At all events, it is a misnomer to describe the book, in a lawyer's poetic way, as "a remarkable testament"[28] or even as "a remarkable legacy."[29] There are in the book a few sentences of acrimony which, for good or bad, are reminiscent of a brilliant advocate. But the rest is silence.

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POLITICS, PLANNING, AND THE PUBLIC INTEREST: THE CASE OF PUBLIC HOUSING IN CHICAGO. By Martin Meyerson and Edward C. Banfield. Glencoe, Illinois: The Free Press, 1955. Pp. 353. $5.00.

IT is common knowledge that racial segregation is not restricted to the South. Every major industrial city in the North has a separate all-Negro community characterized by high population density, a very heavy percentage of slum dwellings, and steady expansion into whatever contiguous areas it can penetrate. The Northern pattern of segregation is much less severe than that of the South, but it has created serious problems in many areas—among them, housing. Rapid increase in the Negro population of Northern metropolitan

25. Dean, *Mr. Justice Jackson: His Contribution at Nuremberg*, 41 A.B.A.J. 912 (1955).

26. Jaffe, *supra* note 23, at 986. The philosophic differences between the two were profound; so, too—at least for a time—were the personal differences. Jackson, it will be remembered, felt that Black took advantage of Jackson's absence at Nuremberg to lobby against Jackson's elevation to the post of Chief Justice. Out of this seems to have grown Jackson's ill-founded public attack on Black for not disqualifying himself in Jewell Ridge Coal Corp. v. Local 6167, United Mine Workers, 325 U.S. 161 (1945). See RODELL, NINE MEN 282 (1955); Frank, *Disqualification of Judges*, 56 YALE L.J. 605 (1947); Jaffe, *supra* note 23, at 986-88.

27. The book's many references to and quotations from Justice Cardozo suggest that Jackson had taken the great lectures on *The Nature of the Judicial Process* as his model.

28. Griswold, *The High Court in a Democratic System*, N.Y. Herald-Tribune, Book Review Section, July 10, 1955, p. 2.

29. Cahn, *Balance in the Scales of Justice*, N.Y. Times, Book Review Section, July 10, 1955, p. 1.

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