Notre Dame Law Review

Volume 37 | Issue 5 Article 6

8-1-1962

Book Reviews

Thomas L. Shaffer

W. J. Wagner

JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT. By Wallace Mendelson. Chicago: University of Chicago Press, 1961. Pp. xi, 151, $4.00. Partisans of judicial deference in the Supreme Court of the United States threaten to be permanently more articulate than their opponents; this book is the second notable brief for deference in the past five years; the first was Professor Bernard Schwartz' longer and more exhaustive study of "activism" published in 1957.[1] Wallace Mendelson, who is professor of government at the University of Texas, ostensibly compares the constitutional jurisprudence of the two oldest members of the Court, but his purpose is clear — and is, indeed, in no way disclaimed. Justice Black is used — and misused — only to point up by contrast the author's admiration for his colleague.

Structurally, the book contains five chapters on five areas of constitutional decision. The first outlines the historical field on which the modern jurisprudential battles between the Alabama Senator and the Harvard Professor are said to have been fought: dual federalism, substantive due process, the constitutional protection of business. The second discusses the separation of powers and, for the most part, Justice Frankfurter's theory of deference to Congress in both economics and civil liberties. The third deals more directly with civil liberties, and the "preferred status" which has dominated Supreme Court decisions — as distinguished from Supreme Court rhetoric — in recent years.

The fourth chapter discusses for the most part Justice Frankfurter's theory of federalism; the fifth and last chapter summarizes the analysis of the earlier parts of the book and clarifies Professor Mendelson's opinions.

Without attempting to hide a sympathy for the Court's civil libertarians behind mock objectivity, I found the book inadequate in at least four particulars.

I.

Professor Mendelson's case analysis is done with his hypothesis firmly in mind. The cases he discusses are cases which suggest that the two Justices are at loggerheads most of the time. The result of this is that Justice Frankfurter emerges as the leader of the "conservative wing" of the Court. But the conservative-liberal dichotomy, the "activist" label, and the existence of a Frankfurter faction within the Court may not stand an analysis of all the Court's activity.[2]

II.

Professor Mendelson's partiality for Justice Frankfurter has led him into not unexpected overstatement. If the book has any central theme, for instance, it is the Professor's admiration for judicial deference. One of the cases chosen to

1 SCHWARTZ, THE SUPREME COURT (1957), reviewed at 33 NOTRE DAME LAWYER 141 (1957).

2 In the decisions reported between November 15, 1960, and May 15, 1961, in the West *Supreme Court Reporter,* Justice Frankfurter is seen as a faction unto himself, if the Court must be analyzed in terms of factions. Seventy-six cases were decided by written opinion in that period. Justice Frankfurter confronted his brethren as follows:

A.	Unanimous opinions:	26	
	Divided opinions:	50	
B.	Justice Frankfurter and:	*agreed*	*disagreed*
	Chief Justice Warren	46	30
	Justice Douglas	40	36
	Justice Brennan	51	25
	Justice Black	44	32
	Justice Harlan	68	6
	Justice Clark	61	15
	Justice Stewart	59	16
	Justice Whittaker	61	15

illustrate this, oddly, is *Vermilya-Brown v. Connel*,[3] in which Justice Frankfurter, in dissent, took the position that Congress did not intend the Fair Labor Standards Act to apply to United States bases in Bermuda, "an effect which Congress surely had not foreseen,"[4] even though Congress did not in terms confine the statute to the continental United States. A few pages later, Justice Frankfurter is praised for his attitude toward appeals brought under the Federal Employers Liability Act — a position which is stated as a laudable respect for jury decisions in negligence cases. The opinion used to illustrate this virtue is *Moore v. Terminal Railroad Ass'n.*,[5] in which the trial jury found negligence and the Supreme Court of Missouri reversed. The decision of the Supreme Court of the United States — which reinstated the decision of the jury below, and from which Justice Frankfurter dissented — cannot, whatever its merit, be called an example of disrespect for juries. In the FELA context, furthermore, nothing is said of Justice Frankfurter's dedicated efforts to frustrate the Court's "rule of four," an effort his most consistent ally, Justice Harlan, has pointedly condemned.[6]

There are less conspicuous trappings of zeal. Justice Frankfurter, for instance, is credited with pioneering the Court's respect for administrative agencies — even though he came on the Court some years after the principal decision indicating that aspect of judicial deference had been handed down.[7] Professor Mendelson gives his approval to a will-of-the-community approach to due process — an unsatisfactory way out of hard cases which Dean O'Meara thoroughly attacked two years ago.[8] He praises the Justice's dissent from the "grounds of decision" part of the *Lincoln Mills* opinion,[9] although, since the book was published, two decisions of the Court on that question[10] indicate that the Court is able to work out a system of desirable federal rules for the decision of labor disputes without crippling state courts. As the Professor admits, of interstate commerce decisions, "It is a commonplace that in this area the Court's results have been better than its ability to explain them."[11] It should, finally, be left to the individual reader to decide whether the Professor is fair in contrasting the two Justices on the basis of Justice Frankfurter's greater humility, and in observing that, "among those judges whom history has labeled 'great,' the humble outnumber the others."[12]

III.

The book gives a poor picture of the Justice from Alabama. It engages repeatedly in the very generalization that is said to characterize Justice Black's opinions.

> Mr. Justice Black understands the power of the elemental. His characteristic tools are the great, unquestioned verities. He draws no subtle distinctions. The niceties of the skilled technician are not for him. His target is the heart, not the mind. His forte is heroic simplicity.[13]

This at times is almost insulting: "Law, then, is simply a tool to be manipulated

3 335 U.S. 377 (1948).
4 Text at 19.
5 358 U.S. 31 (1958), discussed at Text 26-28.
6 Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 559 (1957).
7 What Professor Mendelson is talking about would seem to date from *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), where the Court clearly upheld the broad powers being exercised by the infant Labor Board, noting that its powers "do not offend against the constitutional requirements governing the creation and action of administrative bodies." 301 U.S. at 46-47.
8 O'Meara, *Natural Law and Everyday Law*, 5 NATURAL LAW FORUM 83 (1960).
9 Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1956).
10 Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); Retail Clerks Assn. v. Lion Dry Goods, Inc., 369 U.S. 17 (1962).
11 Text at 108.
12 *Id.* at 124.
13 *Id.* at 13.

in accordance with the judge's vision of right and wrong."[14] And the alternatives the Professor leaves his reader in deciding where in the judicial cosmos Justice Black belongs are painfully simplified: "To his admirers, Hugo Black is another John Marshall; one who — before most of his contemporaries — saw and accommodated the needs of his age. Others see in him the shadow of Sutherland."[15]

The book is not without specific examples, but they are not entirely fair either. Professor Mendelson keys two essays, for instance, to Justice Black's majority opinion in *Times-Mirror v. Superior Court*,[16] which was one of at least three decisions putting firm limits on a judge's power to summarily punish for criminal contempt of court. The first point is that Justice Black endangers fair trials; but one would have thought that the "clear and present danger" test applied in that case says that a newspaper may publish criticism of judges deciding pending cases as far as, and only as far as, there is no clear and present danger to the administration of justice.[17] Secondly, he finds inconsistent Justice Black's theory that corporations are not "persons" within the Fourteenth Amendment and the freedom of speech protection given a corporation in the *Times-Mirror* decision. It is more logical, surely, to say that a corporation should enjoy whatever civil liberties its incorporators require, as natural persons, in carrying out their purpose in using the corporate form. In other words, a newspaper corporation must have freedom of the press for the same reason a church corporation must have freedom of religion. A commercial corporation making vacuum cleaners may very well need neither.[18]

In the midst of this demand that Justice Black be more technically accurate, the Professor praises Justice Frankfurter for departing from the Constitution in free speech cases and relying instead on "fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed."[19]

The Professor condemns Justices Black and Douglas for their insistence that the "due process" clause of the Fourteenth Amendment incorporated into that amendment the civil liberties protected by the Bill of Rights. The suggestion is that any theory which calls for application of the so-called "fundamental freedoms" to the states — something most citizens assume is the law anyway — is revolutionary. Professor Peters has demonstrated, recently and in these pages, that the Black-Douglas theory is not only historically more accurate, but shows every indication of once again being the approved interpretation of the Constitution.[20]

The basic difficulty in this book's assessment of Justice Black is the same difficulty that was current a few years ago in condemnation of the "nine old men" of pre-New Deal jurisprudence. There is here a failure to respect a broad philosophy of decision, which is not mechanical, not simple, not susceptible of offhanded generalization by the attacker, when the reason for attack is that the attacker — perhaps with good reason — disagrees with it. As Professor Rodes said of the intemperate critics of the "old" Court:

> Regardless of what may be said about the opinions just discussed on the conservative side, a reading of them should indicate that they are no more examples of "mechanical jurisprudence" than are any of the more recent emanations from the court. They are opinions of earnest men coming to grips with live issues. They are marked by an ardent convic-

14 *Id.* at 116.
15 *Id.* at 123.
16 314 U.S. 252 (1941).
17 See 35 NOTRE DAME LAWYER 165 (1959).
18 Credit for this theory belongs to Professor Robert E. Rodes, Jr., of the Notre Dame law faculty; the profession would be enriched by his reducing it to a published article.
19 Text at 57.
20 Peters, *Molar Motions in Supreme Court Decisions*, 37 NOTRE DAME LAWYER 128 (1961), which is incidentally a thorough argument in itself for those who are less worried than Professor Mendelson about "activism."

> tion that we should not fail to respect, even if we might wish it bestowed on doctrines more worthy of it.[21]

One suspects that the criticism of Justice Black in this book springs from the same philosophic intemperance Professor Rodes was talking about. In any case, one cannot believe Professor Mendelson serious when he criticizes Justice Black for searching the record in a civil liberties appeal;[22] or for condemning a state statute which would have barred labor organizers with less than ten years' residence in the state they sought to organize;[23] or when he seems to assume that Justice Frankfurter's peculiar theory of free speech more succinctly follows the Holmesian "clear and present danger" rule than the "liberal wing's" theory of "preferred status."[24]

IV.

The final and most potent disagreement with this book will come from those — represented, usually now, by a majority of the Court, and possibly by a majority of the profession as well — who insist on a distinction between what the majority in a democracy decides as to economic matters, and what the majority seeks to impose upon the freedom of persons. In that connection, the book will receive the same vehement challenge that Professor Schwartz received five years ago. When Alfred Long Scanlan reviewed the Schwartz book in these pages, his text was: "The founders of this country did not intend the Bill of Rights to limit the Congress only so far as the Congress saw fit to abide by its prohibitions."[25] There, as in Professor Mendelson's book, an attempt was made "to reincarnate the philosophy of Justice Holmes through the decisions of Justice Frankfurter," and there, as in the present book, the attempts remain "a resurrection that does not occur."[26] Mr. Scanlan stated his reasons pointedly:

> Justice Holmes, the patron saint of judicial self-restraint, showed time and again that his deference toward legislative action did not deter him from objecting to legislative or executive action which interfered with or impeded the "free competition of ideas" which constituted the essence of his powerful, pragmatic philosophy. The author of the "clear and present" danger test never gave any evidence, either in his opinions or his other writings, that he believed that judicial self-restraint was the proper position for a judge to assume in the face of legislative action which attempted to restrict the right of any minority group or faction, or individual, to think, speak, assemble, and petition freely.[27]

The will of the majority is expressed both in its particular attitude at any given time on any given issue, and in its enduring commitment to values which it will not allow even itself to override in a period of stress. This is what Walter Lippmann meant when he distinguished between The People and *The People* in a democratic society.[28] There are, as Dean Rostow has emphasized, "maxims of construction for a Constitution designed to help preserve an essential continuity in our legal tradition through long periods of time."[29] And as to these principles, not even the majority would approve a deference to a historically particular group of lawmakers:

> The weight of one hundred and sixty-nine years of history is evidence that the people do expect the courts to interpret, declare, adapt and apply

---

21 Rodes, *Social Legislation in the Supreme Court,* 33 NOTRE DAME LAWYER 5, 27 (1957).
22 Text at 95-96, discussing Terminiello v. Chicago, 337 U.S. 1 (1949).
23 *Id.* at 101, discussing Hill v. Florida *ex rel* Watson, 325 U.S. 538 (1945).
24 *Id.* at 110.
25 33 NOTRE DAME LAWYER 141, 143 (1957).
26 *Id.* at 145.
27 *Id.* at 142-43.
28 Lippmann, *Our Need for a Public Philosophy,* The Atlantic Monthly, April, 1955; this article was later published as a part of the book, THE PUBLIC PHILOSOPHY (1956).
29 Rostow, *The Supreme Court and the People's Will,* 33 NOTRE DAME LAWYER 573, 590 (1958).

> these constitutional provisions, as one of their main protections against the possibility of abuse by Presidents and legislatures.[30]

America's experiences with the emotional excesses of public opinion are written in the *United States Reports* as they are written nowhere else in our heritage. And these opinions, written by justices who had no sympathy for judicial deference when the personal liberties of persons were squarely at issue, testify "that man can be free, that political processes can in truth be democratic only when, and only because, the state is not free."[31]

Professor Mendelson draws the issue clearly when he says "the activist position assumes that courts are somehow inherently more competent to achieve a sound balance of interest in First Amendment cases than in others."[32] This is accurate and fair, and five cases involving opinions by Justice Frankfurter — two of them discussed in this book — illustrate it.

Professor Mendelson takes his place on the side of those who would not deprive the community — and by that he must mean the majority of the community — "of the wisdom that comes from self-inflicted wounds."[33] But that is hardly the issue. A community — majority — which enforces compulsory flag salutes,[34] or denies indigent criminal defendants an appeal,[35] or grants writs of assistance to rat inspectors,[36] or subjects its organs of self-expression to prior censorship by policemen,[37] or permits its elected forums to be controlled by a minority of the voters,[38] inflicts only prospective and remote wounds on itself. It afflicts immediate wounds on the aggrieved minority — and the minority is, in a particularly immediate sense, always made up of aggrieved individual persons. It is the aggrieved person who resorts to the courts — and he does so because he has nowhere else to go.

Law's most sacred function in a society which respects human beings is to shelter the person from the tyranny of those who outnumber him. A personal liberty which depends upon popular referendum is no personal liberty at all.

It is on this ground that the greatest disagreement with Professor Mendelson will arise. It is regrettable that the advocates of "activism" — a term coined, surely, by its opponents — have not developed articulate spokesmen of the Schwartz-Mendelson variety. Theirs is a case that cries for public airing.

*Thomas L. Shaffer**

COMPARATIVE LAW — CASES — TEXT — MATERIALS, 2nd ed. By Rudolph B. Schlesinger. Brooklyn: The Foundation Press; London: Stevens and Sons. 1959. Pp. XIX, 635. Appendix, Indexes. $11.00.

Twelve years ago, a professor commissioned to teach Comparative Law had a difficult task to fulfill. There was no casebook or textbook published, and the few

---

30 *Ibid.*
31 *Id.* at 577.
32 Text at 120.
33 *Id.* at 131.
34 *Id.* at 63, discussing West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
35 *Id.* at 68, discussing Griffin v. Illinois, 351 U.S. 12 (1956).
36 Frank v. Maryland, 359 U.S. 360 (1959).
37 Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961), noted at 36 NOTRE DAME LAWYER 406 (1961).
38 Baker v. Carr, 82 Sup. Ct. 691 (1962).

* B.A.; LL.B. (*cum laude*), Notre Dame; member of the Indiana Bar; former LAWYER editor.

instructors who were teaching Comparative Law had either to prepare their own mimeographed materials or else to conduct the course in the form of a seminar, with references to different case reports, codes and statutes, legal periodicals and texts. I was faced with the same fate when Dean Havighurst asked me to teach Comparative Law at Northwestern University Law School in 1950-1951. I was saved, at the last moment, by the publication of a pioneering work by Professor Schlesinger: the first edition of his book.

Subsequently, Professor von Mehren published his materials on the civil law systems, and recently, the second edition of Professor Schlesinger's work became available to law teachers and practitioners.

The most important changes he decided to make in the book are pointed out by Professor Schlesinger in the preface. A new introductory chapter has been added in which the manifold purposes which may be served by the comparative study of law are ably explained. More text materials are found in the second edition; principal cases occupy about half of the book. There are also more note cases, hypothetical illustrations and historical materials. The increased coverage of the book makes it possible for instructors to discuss with the students topics they deem most important, and to omit others. Thus, from the viewpoint of a practitioner, the 132[1] pages devoted to pleading and proof of foreign law are entitled to much attention; but they are of only small interest to scholars studying the merits of substantive foreign law rules.

Professor Schlesinger should be particularly congratulated for his unorthodox presentation of procedure in civil law countries. To cover this problem by cases, even most superficially, would require hundreds of pages. To cite tens of code or statutory provisions or describe them in the form of a text would make it dull reading, from which very little would be retained by the students. The author found an ingenious solution to the dilemma: on nearly fifty pages[2] he gave a "Fictional Dialogue[3] concerning a Not-too-Fictional Case," in which Dr. Comparovich, Professor of Law at a famous law school, imparts his knowledge of civil law procedure to two counsels of the giant International Dulci-Cola Corporation in connection with a case the corporation had with a Ruritanian lawyer consulted by the Corporation when it contemplated reorganization of its subsidiary in Ruritania. The conversation, interrupted by lunch, goes on smoothly, one point seems naturally to develop from another, and without even realizing it, the reader is being initiated into such problems as organization of the legal profession in the civil law countries, jurisdiction of courts, pleadings and formation of issues, evidence, delivery of judgments, appeals, commercial courts, criminal procedure, and public law disputes.

Professor Schlesinger has a special gift of presenting intricate and complex matters in an easy way. The touch of humor, here and there, will also be appreciated by the readers. Let me give one example. Stating that it is difficult to obtain precise data on the degree of judicial honesty in different countries, he explains: "Those who observe this form of corruption are not inclined to publish the results of their research."[4]

Even a demanding reviewer of the book will have difficulty in finding any weak points, besides the rather obvious defect that, as in the first edition, there is only one principal French case in the book.[5] Granted that French opinions are

1 Pp. 31-143.
2 Pp. 201-48.
3 Or rather a Trilogue, as the conversation takes place between three persons.
4 Text at 491.
5 Among the principal cases, there are 18 American, one Philippine, 13 German, 6 Swiss, and one each French and Brazilian.

not readily understandable to foreigners, perhaps an effort should have been made to give more justice to the importance of the law of France and the tremendous influence it exerted on other legal systems.[6]

*W. J. Wagner**

6 Materials other than cases are much more evenly balanced, dealing primarily with German, Swiss, and French law, but referring also to others, particularly Italian, Mexican and Swedish.

* Professor of Law, University of Notre Dame.

BOOKS RECEIVED

BIOGRAPHY

FELIX FRANKFURTER REMINISCES. By Harlan B. Phillips. Garden City: Doubleday & Co., 1962. Pp. 348. $1.45.

CENSORSHIP

VERSIONS OF CENSORSHIP. Edited by John McCormick and Mairi MacInnes. Garden City: Doubleday & Co., 1962. Pp. 374. $1.45.

CONSTITUTIONAL LAW

CIVIL LIBERTIES AND THE CONSTITUTION. By Paul G. Kauper. Ann Arbor: University of Michigan Press, 1962. Pp. 237. $6.00.

SALIENT ISSUES OF CONSTITUTIONAL REVISION. Edited by John P. Wheeler, Jr. New York: National Municipal League, 1961. Pp. 172. $3.00.

INTERNATIONAL LAW

LEGAL PROBLEMS IN INTERNATIONAL TRADE AND INVESTMENT. Edited by Crawford Shaw. Dobbs Ferry: Oceana Publications, Inc., 1962. Pp. 254. $12.50.

PORTUGAL'S STAND IN AFRICA. By Adriano Moreira. New York: University Publishers, 1962. Pp. 261. $3.95.