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Book Review

BOOKS REVIEWED

A Living Bill of Rights. William O. Douglas. New York: Doubleday and Co. 1961. Pp. 72. $1.50.

The dean of popular publications on the United States Supreme Court bench has done it again. He now has written a handy thin volume entitled *A Living Bill of Rights* which is designed to interpret the fundamental freedoms and the basic protections against domestic tyranny enshrined in the federal constitution.

The practicing lawyer will find in this book a comprehensive view of recent Supreme Court doctrine. It provides perspective over a profoundly important area of the body politic which holds a key to the singular nature and destiny of our American way of life.

Tested in the time of a critical rivalry between communist tyranny and the free world, in which the United States is the bastion of strength, our liberties retain uncommon vigor—the vigor of doctrine on which there is general consensus among our countrymen—while yielding to the necessities of internal security and relations abroad. The outline of their shape in mid-century is described here by Mr. Justice Douglas.

The scope of the Bill of Rights, for the purpose of this exposition, comprehends not only certain provisions of the original text of the Constitution relating to civil liberties and the first ten amendments, which are a restraint on the federal power, but also the judicial interpretations that have grafted certain of the first ten amendments onto the states via the fourteenth amendment.

The significance of the prefatory word "Living" in the title, as explained by the author, is that these guarantees are truly secure only when part of the fabric of our daily life, enforced by the people in their mutual daily contact. We cannot afford dissension of a destructive character which would weaken our nation in the face of the challenge abroad; but on the other hand we are capable as a nation, and our courts are capable, of making mature judgments on the limits of a free speech and press which will enable wide latitude for stimulating, legitimate, controversial, and fresh thinking, political and otherwise.

Not that free speech is without its limits, as Mr. Justice Holmes' celebrated formulation of the standard of "clear and present danger"[1] attests. The focus of the early '60's, however, no longer seems to be on subversion as the prime battleground of civil rights issues. It seems to be on the struggle for equality of opportunity for all people which has been making steady progress since World War II, and is now being projected onto new scenes with tremendous impetus. The "sit-ins" of 1960, like a bolt, inaugurated one trend, creating the major challenge to Southern mores since the Civil War. At another part of this spectrum is the pressure to secure full and equal accommodations for the diplomats of the new African nations.

The decisions[2] by the United States Supreme Court, declaring unconstitutional any form of state supported racial segregation in schooling, inaugurated another significant wave toward equality.

Far from least among the civil rights issues of our time, is the line between the requirements of the police in combating crime and the rights of the person who is

1. Schenck v. United States, 249 U.S. 47 (1919).

2. Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

arrested. Due process and other constitutional guarantees derived from the great English system of common law protect our citizenry from tyranny at the hands of the criminal authorities.[3] So, too, there are civil rights problems implicit in legislation which would subject to the same penalty as obscene literature any of the "hate" literature which defames racial, religious or ethnic groups, thereby inciting the commission of crime. For this reason the bill[4] penalizing "hate" literature which was recently recommended to the New York legislature was recommended for study only so that community leaders might first have the opportunity to comment on the civil liberties problems which the proposed legislation raises.

In such fields as these our first amendment decisions have been formulated. In more recent years we have been posed in a deadly serious conflict with the communist world. These are trying times for our civil rights, an inextricable part of the way of life which we are fighting to preserve.

Mr. Justice Douglas has performed a significant service in contributing through his book to public understanding of our precious heritage of individual freedom and dignity.

LOUIS J. LEFKOWITZ*

The Tax Practice Deskbook. Harrop A. Freeman and Norman D. Freeman. Boston: Little, Brown and Company. Pp. xx, 581. $17.50.

This book, according to its preface, is directed at five groups: lawyers, accountants and businessmen who handle tax cases; tax specialists; and students of taxation. It deals wholly with tax procedure and practice, not with the substantive law of taxation; and only with federal procedure, not with state. So far as federal practice is concerned, the book ranges from the conduct of a case in the Internal Revenue Service to practice in the appellate courts. Particular chapters are devoted to "How to Brief a Tax Case," "The Justice Department and Tax Cases" and to "Common Procedural Problems." The volume is replete with citations of statutes, decisions, regulations, and bibliographies of books and law review articles. The authors obviously spent much time preparing their material and enjoyed excellent assistance.

Many of us, after a lifetime of tax practice, have contemplated writing such a book. The desire to pass on one's experience to associates, students, or even to purchasers of one's book, is universal and perhaps even insatiable. The troublesome questions are: can it be done at all, and how can it be done? In particular, can the distilled essence of years of practical experience be conveyed to someone through chapters in a book? Certainly applicable regulations, statutes, and decisions can be assembled and organized, so that they will be more readily available than they would be in a tax service. But even so, would a practitioner dare, after the year the book is issued, to rely on it to the exclusion of the inevitably more up-to-date tax service?

Can any book be a substitute for the education a tax lawyer gives his young associate by taking him to a conference, or by working with him on the preparation of a protest, a memorandum, or a brief? Chapter three of this book is entitled "Facts! Facts! Facts!" and the emphasis is well placed. Appreciation of the im-

3. On this problem I have prepared and published a booklet outlining the rights of a person arrested. See Lefkowitz, Your Rights if Arrested (undated booklet published in cooperation with the N.Y. State Bar Ass'n).

4. N.Y. Assembly No. 1977 (1961); N.Y. Senate No. 1380 (1961).

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portance of thorough preparation of the facts comes from actual work with witnesses and documents in getting a case ready for trial. No amount of citations of decisions, or statutes, and no amount of text, can have quite the same educational effect.

The customary process for legal education and the transmission of legal experience has come to be a combination of law school study, followed by practice in an office under the direction of men who work every day in the various fields. When he hires a recent law school graduate to work in the field of taxation, a lawyer is apt to be more interested in the young man's sound general training and his ability to analyze legal problems than in the seminars he has attended on pension trusts or on Internal Revenue practice. The employing lawyer probably believes that the young graduate will receive the best training in such subjects while he works in the office.

The Tax Practice Deskbook is a useful assemblage of technical materials. It is well designed for the "students of taxation" for whom it was written. It will not be so useful to tax specialists, who can find most of the material elsewhere. The *Deskbook* does not present quite enough of the authors' own experiences; and the comments sometimes border on the naive. Some of us have occasionally found Internal Revenue agents who did not know "all the law and rulings" even "in a [their] specialized field. . . ." (p. 148.) Closing agreements are not quite as easy to get as the authors indicate. (p. 165.) The discussion of Tax Court stipulations does not sufficiently bring out the facts that negotiations for stipulations are common, are the accepted avenue for seeking settlements in Tax Court cases, and that the bulk of such cases are settled and not tried. The utility of the *Deskbook* would have been greater had it included an appendix of forms and at least a selection of applicable rules of court.

The *Deskbook* is nicely printed with a minimum of proof errors. It is a useful collection of technical material for a student, and a lawyer handling his first tax case could read relevant chapters to advantage. It does not transmit much of the wisdom of practical experience. So far as I am aware, this has to be acquired the hard way.

ROSWELL MAGILL*

A Century of Civil Rights. Milton R. Konvitz. New York: Columbia University Press. 1961. Pp. viii, 293. $6.00.

Some very creditable books are unsuccessful because the author's reach exceeds his grasp, and he is unable to execute the design envisioned. Others misfire because, despite a wealth of interesting detail, the basic conception is too sketchy or lopsided.

The latter is the shortcoming that afflicts the present work. Although the early chapters contain much fascinating historical information, the sequences are too brief and broken to classify this book as a history. The later chapters offer a *tour d'horizon* of state legislation in the field of civil rights, but they are not sufficient to serve adequately as a reference work. The authors write as avowed protagonists of civil rights enforcement, but their argumentation is presented here and there in so patchy a way that the book can hardly be described as an analytic or discursive study.

Though thus nondescript, the work is far from valueless. In an excellent opening chapter entitled "Freedmen or Free Men," Milton R. Konvitz, Professor of Law and

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Industrial Labor Relations at Cornell University, traces the social and psychological background of the post-Civil War civil rights legislation. By most illuminating comparisons with other slave-owning societies, he lays the basis for understanding why the emancipation of the Southern slave accomplished little or nothing for him as a Negro. In both Roman and Greek civilizations, slavery was basic to the economy and to the existence of a cultured leisure class. But slavery was a status which could be dissolved by purchase of freedom or by manumission, and no stigma attached to the freedman—he was a free man. Centuries later in South America these same traditions were preserved by the Roman Catholic Church, and the result was a legal system in which the Negro slave enjoyed far more protection than he did in the Southern United States.

If, to paraphrase Gertrude Stein, a slave is a slave because he is a slave, then he has only to end his enslavement in order to be a free man. But if a slave is a slave because he is a Negro, then emancipation makes him a freedman but does not free him from the disabilities of his race. When the Rebellion was broken, the defeated states at once sought to ensure that emancipation should yield the Negro not freedom but racial thralldom. The legislative instruments of oppression were the "black codes" adopted in the Southern States which deprived Negroes of equality before the law, barred them from occupations other than service or agricultural labor, and perpetuated the essence of slavery through laws nominally dealing with apprenticeship, contract labor, and vagrancy.

Thus, throughout the Southern and Border States, the slavery question became the race question. The parallels to South Africa are striking and it is easy to imagine that even if the institution of slavery had never existed in Africa—or indeed, anywhere else—the lot of the South African Negro might not be very different from the present actuality.

It is not sufficiently realized that the harshness of "Reconstruction" was in large part a response to the harshness of the "black codes." Mr. Konvitz brings this out in his three chapters on the post-Civil War amendments to the Constitution and the federal civil rights enactments during the post-war decade, 1866-1875. Important parts of the Civil Rights Act of 1875[1] were declared unconstitutional in 1883 by the Supreme Court,[2] and Mr. Konvitz' analysis of the legislative history of this law, and the effect of the Supreme Court's decision, is perhaps the best part of the book.

The Civil Rights Act, as introduced by Senator Charles Sumner, contained provisions requiring racially integrated schooling. With the tacit consent of some of the Negro members of Congress these provisions were dropped, and the bill as enacted related chiefly to racial equality of treatment in common carriers, hotels, and other "public" places. But most of this was nullified by the decision in the *Civil Rights Cases*,[3] which limited Congress' power to the prohibition of discriminatory action by the state governments. It is a strange irony that the requirement of integrated schooling, which Congress then rejected, was reborn some eighty years later by the Supreme Court's decision in the *Brown*[4] case, while the things that Congress sought to advance in 1875 were nullified by the Court eight years later.

"Reconstruction, and the cause of Negro equality, was abandoned in the compromise of 1877. . . ." (p. 69). That is all Mr. Konvitz chooses to tell us. In his account, the "Century of Civil Rights" has a beginning and an end, but no middle. What were

1. 18 Stat. 335 (1875).
2. Civil Rights Cases, 109 U.S. 3 (1883).
3. 109 U.S. 3 (1883).
4. Brown v. Board of Educ., 347 U.S. 483 (1954).

the causes of the "compromise"? What happened from 1883 to 1953? What did Theodore Roosevelt, Woodrow Wilson, Robert LaFollette, and Herbert Hoover think or do about the racial issue? The curious reader must look elsewhere, for none of these men are even mentioned.

Scanning the intervening decades, Mr. Konvitz presents a brief analysis of the Civil Rights Acts of 1957[5] and 1960,[6] and sketches various developments since the *Brown* case, including the student "sit-ins" and decisions on restrictive covenants. Mr. Theodore Leskes, Director of the Legal Division of the American Jewish Committee, contributes four chapters on state anti-discrimination laws, covering public accommodations, employment, education, and housing. Mr. Konvitz concludes the book with a short chapter supporting the use of state power to enforce racial equality and deploring the concept of "voluntarism."

Prohibition was repealed, according to Mr. Konvitz, because "the overwhelming majority of the people had changed their position." (p. 261.) Senator Fulbright and others have compared the *Brown* case to prohibition, but Mr. Konvitz rejects the parallel: "The American people in general have not found the experiment with equality unsatisfactory. There is no national movement for the repeal of the Fourteenth Amendment." (p. 261-62.) This may be true, but it is questionable that either the contrast or the comparison can be pushed very far. If there are few, except in the South, who would repeal the Civil War amendments or overrule the *Brown* case, still there are not so many who will go to great lengths for full enforcement. It is almost as if everyone approved of prohibition as long as bootlegging was also tolerated.

It is undeniable that racial discrimination persists only because the American people as a whole do not sufficiently will its extinction. If they did, there would be wealthy Negroes living along Park and Fifth Avenues and playing golf at Piping Rock and tennis at Easthampton; unions would expel southern locals that practice discrimination, and chain stores and hotels would close their southern branches or admit Negroes; the Federal Communications Commission would deny radio and television licenses to southern universities and other segregated institutions, and northern universities and educational associations would refuse accreditation to segregated schools. If churches, corporations, athletic associations, and a hundred other social and economic institutions would follow a determined and effective integrationist policy, there would soon be no segregation, and Thurgood Marshall could apply his talents in other fields.

But that is not the temper of the country, and so the *Brown* case will have its sequels, and ten or twenty years from now some will write a book called "A Century and a Quarter of Civil Rights."

TELFORD TAYLOR*

5. 71 Stat. 634 (1957), as amended, 5 U.S.C. § 295-1 (1958), 28 U.S.C. §§ 1343, 1861 (1958), 42 U.S.C. §§ 1971, 1975, 1975a-1975e, 1995 (1958) (Supp. II, 1959-1960).

6. 74 Stat. 86 (1960), 18 U.S.C. §§ 837, 1074, 1509, 20 U.S.C. §§ 241, 640, 42 U.S.C. §§ 1971, 1974-1974e, 1975d (Supp. II, 1959-1960).

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Justices Black and Frankfurter: Conflict in the Court. Wallace Mendelson. Chicago: University of Chicago Press. 1961. Pp. xi, 151. $4.00.

Every so often an important work comes along which bucks the tide of conventional academic opinion and sacrifices popular idols and idolatries. Such a work was Mayers' *Shall We Amend the Fifth Amendment?*[1] and such a work is Mendelson's *Justices Black and Frankfurter: Conflict in the Court.* Neither Mr. Justice Black nor Mr. Justice Frankfurter are figures to whom legal scholars and political scientists[2] have a neutral reaction. Add the views of Professor Mendelson, whose reaction is both sharp and profound and the result is a powerful work. As might be expected from the title, it necessarily tills some of the ground covered in the recent exchanges on "neutral principles of constitutional law."[3] From the work of Justices Black and Frankfurter the author derives useful examples for this controversy, particularly on such mooted matters as consistency and generality in the decision-making and rationalization process and intellectual honesty. The book is presented with an incisiveness of thought, captivating brevity, and clarity of expression which is all too rare in current legal discourse.

The fascination which the Court and its Justices have held for American scholars goes back to the dawn of our Nation and has generated some of our enduring literature on the theory and practice of American government. Certainly a part of this fascination, perhaps the major part, is grounded on a continuing uncertainty over the "true" or "proper" role of the Court in the operation of American government and the structure of public law and policy. *Marbury v. Madison*,[4] gave a partial answer but afterthoughts continue. Part of the difficulty lies in the fact that the institution of judicial review represents a marriage of two opposing traditions of the colonists. One is democracy, in the 17th and 18th century sense of middle class autocracy. The other is monarchy. People do not really want full and ultimate responsibility for their destiny, nor for the natural consequences of their desires and acts, nor for the delicate business of communal preservation and evolution. The Supreme Court therefore, like the President, is looked to as a kindly king, benevolent despot, "great white father," or spiritual counselor. With this child-like adoration there goes child-like wilfulness. We are disturbed when the Court acts contrary to our wishes in policy matters; but we would feel frightened and abandoned if it entirely abdicated its policy role. The last thing that even the Court's severest critics want is to abolish judicial review; at most they want to blunt the horn that gores their ox.

Mendelson's focus is on Justices Black and Frankfurter, seen as representing,

1. Mayers, Shall We Amend the Fifth Amendment? (1959).

2. The author and this reviewer have the dubious distinction of being both. A frequent contributor to legal journals, Professor Mendelson is a professor of political science at the University of Texas.

3. See Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959); Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1 (1959); Hart, Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959); Arnold, Professor Hart's Theology, 73 Harv. L. Rev. 1298 (1960); Griswold, Foreword, Of Time and Attitudes—Professor Hart and Judge Arnold, 74 Harv. L. Rev. 81 (1960); Miller & Howell, The Myth of Neutrality in Constitutional Adjudication, 27 U. Chi. L. Rev. 661 (1960). Mendelson makes no reference to these works, the principal reason being that it is obvious that his basic research and writing was done by early 1959, despite the publication date of 1961.

4. 5 U.S. (1 Cranch) 137 (1803).

loosely, the opposite poles of Platonic idealism and Aristotelian pragmatism. But because the time span, covered by the book, is the last three decades, and perspective requires some allusion to earlier periods, the book is also a quite respectable treatise on constitutional law per se.

The position of Mr. Justice Black on civil liberties is well-known, and has been characterized as absolutistic in the first amendment area. If a case is presented as having—or as in *Terminiello*,[5] has implicit in it—a conflict between freedom of expression and the regulatory power of the state, Justice Black's vote is foreordained. Such "result-determinatism" in Justice Black, Mendelson finds, is not confined to the civil liberties field, but it runs the gamut of public law.

For example, in sixty Federal Employers Liability Act[6] cases decided from 1938 through 1958, turning on the sufficiency of the evidence, it does not appear that Justices Black or Douglas ever held against a workman, save in one case where the employee on the witness stand virtually repudiated his own claim. Through this approach Justice Black and his like-minded brethren are seen as having converted an oldstyle negligence statute, with fault as a necessary element of proof, into a modern compensation statute making the employer an insurer for its employees. Granted that this may be good policy and in accord with present values—should the courts "recognize this trend and 'interpret' statutory law accordingly, or should they wait for legislation?" (p. 28.)

Direct comparison with Mr. Justice Frankfurter is not possible here because of his well-known dissociation from FELA cases since 1949, but his expressed views are obviously contrary to those of his colleague. In Fair Labor Standards Act[7] cases (FLSA), where direct comparison is possible, a sharp conflict in approach is apparent. Congress, exercising its prerogative of legislative choice, chose not to make the coverage of FLSA coterminous with the full reach of potential national jurisdiction under the commerce clause. Instead it was made to apply to employees "engaged in [interstate] commerce," or in occupations necessary to production of goods for commerce. Mr. Justice Black and others from the outset took a broad view of FLSA coverage. The Court, however, speaking through Justice Frankfurter, finally drew a line. The *10 East 40th St.*[8] case distinguished between maintenance workers in a commerce producer's separate office building, and maintenance workers in a general office building wherein some space was leased for executive and sales offices of manufacturing companies. This line obviously was "dialectically vulnerable, as such lines always are, when judged exclusively by bordering cases." (p. 18.) But some line was essential if the Court was to respect Congress' compromise, essential to the enactment of the law, between exercising all or none of its commerce power in this field. In terms of raw numbers, in fifty-nine FLSA cases from 1941 through 1959, Justice Frankfurter upheld workmen's claims in thirty-two and employer claims in twenty-seven. Justice Black voted consistently pro-labor, except in four cases where the issues were simple enough to be settled unanimously.

From the standpoint of the debate over judicial neutralism alluded to earlier,[9] Mendelson's FELA and FLSA case review is especially interesting, even when allowance is made for the fact that these cases involved statutory interpretation rather than constitutional adjudication. Is Justice Black's approach to FELA cases illus-

5. Terminiello v. Chicago, 337 U.S. 1 (1949).
6. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1958).
7. 52 Stat. 1060 (1938), as amended, 29 U.S.C. §§ 201-19 (1958) (Supp. II, 1959-1960).
8. 10 East 40th Street Bldg., Inc. v. Callus, 325 U.S. 578 (1945).
9. Note 3 supra and accompanying text.

trative of Professors Miller and Howell's advocacy of " '*a Teleological jurisprudence, one purposive in nature* . . .' "[10] or a " 'policy-oriented' law,"[11] or "systematic participation . . . in the travail of society . . ."?[12] Also, are Justice Black's expansionist views on the coverage of FLSA, repudiated four times by Congress by Mendelson's count, simply part of the price of judicial participation "in the travail of our society," or are there some "equal justice *under law*" values also at stake?

The antitrust record is similar. The Court in the decade 1949-1959, decided nineteen business-consumer clashes under the Sherman Anti-Trust Act.[13] Only Mr. Justice Black found a law violation in each instance. More instructive perhaps, is the Black-Frankfurter contrast in administrative agency cases. In Justice Frankfurter, Mendelson finds a strong tendency to support administrative decision, based on Frankfurter's general or "legal," or perhaps "neutral" (?) principle of respect for the administrative process. His votes are comparable for the Interstate Commerce Commission and the National Labor Relations Board—voting to sustain the NLRB in sixteen out of twenty-one cases and the ICC in thirteen out of sixteen, in the early period. In Mr. Justice Black he sees a selective—or "result-determinative"—principle of supporting the "liberal" agency with far greater frequency than the other. The record showed support for the NLRB in twenty out of twenty-one cases and the ICC in two out of fifteen. In a later period, from 1953 through 1957, Justice Black supported the ICC in two out of ten cases; the NLRB in only eight out of eighteen. "If the Justice's [Black's] attitude in the one area remained constant, in the other it seems to have changed. The Taft-Hartley Act—to say nothing of the Eisenhower Administration—had intervened." (p. 40.)

In the light of the foregoing, Mendelson very likely would heartily approve the following comments made by Professor Wechsler in his 1959 Oliver Wendell Holmes Lecture at the Harvard Law School:

> I now add that whether you are tolerant, perhaps more tolerant than I, of the *ad hoc* in politics, with principle reduced to a manipulative tool, are you not also ready to agree that something else is called for from the courts? I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? . . . A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.[14]

Justice Black's apparent "result-determinative" approach in the quite different field of diversity of citizenship is illustrated by *Byrd v. Blue Ridge Rural Elec. Co-op.*,[15] where the issue was employee status, *vel non,* under state workmen's compensation law. If there was employee status then the plaintiff-laborer's exclusive remedy

10. Miller & Howell, The Myth of Neutrality in Constitutional Adjudication, 27 U. Chi. L. Rev. 661, 684 (1960).

11. Id. at 691.

12. Id. at 692.

13. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1958).

14. Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 15, 19 (1959).

15. 356 U.S. 525 (1958).

was workmen's compensation, and this attempted common-law suit was barred. In accord with the *Erie-York*[16] principle the lower federal courts, following state practice, treated the issue as a question of law and ruled against the plaintiff-laborer. The Supreme Court majority, including Justice Black, reversed and ordered the employee status issue determined by a jury. It talked about the seventh amendment, and the mandate for jury trial of "disputed questions of fact." However, in its true light, the issue would seem to have been one of statutory construction—the existence of a *statutory* employee relation—on an accepted set of facts. Mendelson comments:

In the FELA *certiorari* cases Mr. Justice Black and others seem to use the well-known sympathies of the jury to evade the old law of negligence and achieve something like the assurance of workmen's compensation. Here they seem to use the same device to get around genuine workmen's compensation in favor of the potentially more remunerative negligence verdict. The common denominator apparently is a humane concern for the victims of industrial accidents. But the cost of *Byrd* is a step back towards *Swift v. Tyson*. . . . (p. 85.)

Further examples could be developed from the *Dennis*[17] case in regard to preferred position,[18] or the *Dean Milk* case[19] in regard to the issue of Balkanization versus a national free market of the type for which Europe is still striving. Enough has been said to indicate the general drift. Justice Frankfurter is marked by his regard for all the sticky little facts, his rigorous thought, and his careful and reasonably consistent use of categorization. Add separation of powers and the duty of judicial respect for legislative determinations, and the result is Justice Frankfurter's "judicial re-

16. See Erie R.R. v. Tompkins, 304 U.S. 64 (1938) and Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

17. Dennis v. United States, 341 U.S. 494 (1951).

18. One of Mendelson's chief virtues is that he covers the waterfront of public law with Justices Black and Frankfurter. He avoids myopic preoccupation with a few selected areas of constitutional law. But this is also a partial defect resulting in giving less room than might be anticipated to the Bill of Rights and first amendment area with its much mooted questions of preferred position, and of absolutism versus balancing. This may be the area where Justice Black's "result-determinism" is most appealing, to avoid the erosion of plausible exceptions that may come with balancing. Perhaps the short answer is that Mendelson feels, with Wechsler, that "the 'preferred position' controversy hardly has a point . . . [and] is pernicious if it implies that there is any simple, almost mechanistic basis for determining priorities of values having constitutional dimension, as when there is an inescapable conflict between claims to free press and a fair trial." Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 25 (1959). Mendelson does recognize that Justice Black's absolutism breaks down in practice and that Justice Black does "balance" by a definitional process rather than forthrightly. The Justice only insists that *within* its "area" freedom of speech is absolute, but recognizes that the "scope" of the area is uncertain. See C. L. Black, Jr., Mr. Justice Black, the Supreme Court, and the Bill of Rights, Harper's, Feb. 1961, p. 63.

19. Dean Milk Co. v. Madison, 340 U.S. 349 (1951). The Dean Milk opinions are especially instructive because only by ignoring one crucial fact could the dissenters, including Justice Black, even purport to sustain it as a permissible local health measure. They avoid the commerce clause by suggesting that Dean could still market in Madison by bringing their raw milk in and pasteurizing it within five miles of the city. Forgetting for the moment the complete unfeasibility of this economically, this suggestion ignores entirely the other Balkanizing provision, i.e., twenty-five mile radius limitation on the source of raw milk. (pp. 109-11.)

straint." The reasonable man test enters too, serving constitutional law as well as the common law. Its use is to balance popular sovereignty and general principles in the context of the hard facts of the actual case. It is subject to misuse, of course, and is easily criticized by those who think it is devastating to ask if anyone has ever seen a reasonable man. "But at its best it does suggest an external standard for the guidance of a hard-pressed court; a standard rooted in what Holmes called the only sound basis for any legal system—'the actual feelings and demands of the community, whether right or wrong.'" (p. 48.)

Mr. Justice Black proceeds in quite a different manner:

Plainly, Mr. Justice Black leans one way when "liberal" values are at stake and another way in the face of "conservative" claims—be the issue one of constitutional law, statutory interpretation, or evaluation of evidence. . . . His humane sympathy for the common man, his courage, creative vigor, and perseverance mark him as a dedicated being in pursuit of utopian ends. But is the bench a proper vehicle to use in pursuing them? (p. 119.)

Devotees of intellectual honesty, knowing that only with rigorous honesty can there be effective intellectual communication, would say no. If the facts are dropped out or are only selectively used as in *Dean Milk*, and logical categories do not hold firm but yield to *ad hoc* policy grounds for decision, has not the Justice effectively destroyed the basis for scholarly discourse on principles of public law? Do we not have in effect the "Senator on the Bench," whom we must meet on his own terms or not at all?

We may note in this connection that Justice Brandeis is best known for his stress on the factual setting in which constitutional issues arise. To this tradition Mr. Justice Frankfurter, with Mendelson as his disciple, is heir. The "reasonable man" test and "balancing" lead straight to detailed factual scrutiny. The absolutistic, almost formulary system of Justice Black leads in the opposite direction:

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. His opinions attain great power because they seldom bother with mundane considerations that baffle others—e.g., application of the winged principle in a less than ideal world; or the impingement of one vast Platonic truth upon another. . . . He insists that we live up to our highest aspirations—and when we fail to do so he would save us from ourselves. Finally, it will appear, his idealism is deeply colored (some might say compromised) by sympathy for what the New Deal called the "forgotten man." In contrast, Mr. Justice Frankfurter is a pragmatist. His wisdom is the wisdom of experience. His forte is reason, not hallowed bias or noble sentiment. He has little confidence in the capacity of judges to sit in judgment upon the community, to erase its errors—if such they be. He counts more on man's ability to learn than to be taught. In the absence, then, of unusually compelling circumstances he accepts our compromises with eternity as the essence of the law—and leaves us free to grow with experience; to learn the lessons that come with self-inflicted wounds. (p. 13-14.)

The legends about Justice Holmes include the story that upon departing to assume his duties on the Supreme Court he was admonished to do justice, and responded thoughtfully that his job was merely to enforce the law. Mr. Justice Frankfurter follows this Holmesian view in his emphasis on regularity and uniformity as the essence of the law—along with neutrality as the crux of the judicial function. For the liberal cynic Holmes' reply is seen as a question-begging response. In part it is, but

it is more than that. Justices Holmes and Brandeis, as their concurrence in *Whitney*[20] amply illustrates, were concerned with justice, but also felt keenly that they were bound to do *justice under law,* i.e., in accordance with that very special allocation of function and authority which is the essence of federalism and separation of powers.

This question of the possibility of neutral principles of constitutional law is an old one. It is easy to insist, because it is partly true, that regardless of what a judge may profess, he cannot long escape his own sense of justice, i.e., his own bias. Objectivity is an aspiration, not a quality that exists in nature in its pure form. "Be that as it may," said the late Judge Learned Hand, "we know that men do differ widely in this capacity; and the incredulity which seeks to discredit that knowledge is part of the crusade against reason from which we have already so bitterly suffered. We may deny—and, if we are competent observers, we will deny—that no one can be aware of the danger [of his bias] and in large measure provide against it."[21]

This comes very close to the heart of Professor Mendelson's "quarrel" with Justice Black and necessarily proceeds from, and illuminates, his concept of the judicial function. With Learned Hand, in the tradition of "judicial restraint," Mendelson groups Taney, Waite, Holmes, Brandeis, Stone, Cardozo, and Frankfurter. "These are the humilitarians, the pragmatists. Recognizing that judicial legislation is inevitable, they would hold it to a minimum." (p. 115.) In the other tradition, forming a sort of "big brother club" (although Mendelson does not use this term), are Marshall, Field, Peckham, Fuller, Sutherland, and Black. "For them judicial legislation is not incidental, it is the heart of the judicial process. They see great visions and feel compelled to embed them in the law. Or, more mildly, their creative impulses are guided by their ideals. . . . Law, then, is simply a tool to be manipulated in accordance with the judge's vision of right and wrong." (p. 116.)[22]

The "activist" tradition is, of course, a way of getting things done, perhaps a good many good things. Marshall made us a nation, and Mendelson has no quarrel with Marshall's rendering of the commerce clause, and is glad to see the Court return to it, after the aberration of 1895-1935. One suspects though that he finds a certain consistency of ratiocination—a concern to develop a body of legal *doctrine* and not just a line of *judgments* based on a good guy-bad guy dichotomy—in Marshall, which he finds lacking in Black. And he says: [A]mong the activists in our judicial history

20. Whitney v. California, 274 U.S. 357 (1927).

21. Dilliard, The Spirit of Liberty 218 (1959) (Papers and Addresses of Learned Hand); Mendelson, Justices Black and Frankfurter: Conflict in the Court 57-58 (1961).

22. Compare, in this connection, the following observations:

"If one regarded himself as having a special mission to fulfill, or if he were quite largely the prisoner of his absolute convictions, he would not meet the highest standards of judicial performance. When decisions are too much result-oriented, the law and the public are not well served." Griswold, Foreword, Of Time and Attitudes—Professor Hart and Judge Arnold, 74 Harv. L. Rev. 81, 94 (1960), and: "Hence we suggest that judicial decisions should be gauged by their results and not by either their coincidence with a set of allegedly consistent doctrinal principles or by an impossible reference to neutrality of principle. The effects, that is to say, of a decision should be weighed and the consequences assessed in terms of their social adequacy. Alternatives of choice are to be considered, not so much in terms of who the litigants are or what the issue is, but rather in terms of the realization or non-realization of stated societal values. What those values might be, we do not now set forth." Miller & Howell, The Myth of Neutrality in Constitutional Adjudication, 27 U. Chi. L. Rev. 661, 690-91 (1960).

there are more Sutherlands than Marshalls; among those judges whom history has labeled 'great,' the humble outnumber the others." (p. 124.)

It is refreshing to have someone write thus about the Supreme Court as though it *were* a *court*, and not *simply* one more policy organ which rises every morning like Galahad or a Teddy or Franklin Roosevelt with the thought: "What new thing can I do today which will make the world a better place to live in."

Although Mendelson uses the vague catch phrases—judicial restraint and judicial activism—in his groupings of the justices, he is at bottom concerned with something more basic and more definite in his contrast of Black and Frankfurter. It has to do with Justice Black's "absolutism," and with Justice Frankfurter's everlasting, meticulous concern for the facts, for the pluralistic cast of American society and government, and the finiteness of human wisdom. In closing let Mendelson, using in part the words of Justice Frankfurter, speak for himself:

> Mr. Justice Frankfurter has tried to subsume will to law and, where the law is vague, judicial will to the will, or conscience of the community. If he falters, is it that his grasp is short, or that his reach is long? . . . Meanwhile, such a judge must carry a heavier burden than does he . . . whose sense of Justice—is automatically decisive.
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> "Believing it still important to do so," Mr. Justice Frankfurter has "tried to dispel the age-old illusion that conflicts to which the energy and ambition and imagination of the restless human spirit give rise can be subdued . . . by giving the endeavors of reason we call law a mechanical or automatic or enduring configuration. Law cannot be confined within any such mold because life cannot be so confined." (p. 129-30.)

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