REVIEWS

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

JUSTICES Black and Frankfurter sat together on the Supreme Court for a quarter century. In that time, they were part, if not the leaders, of a revolutionary change in judicial attitude that has given the Court a totally different role in the political process than it had previously performed. That this change was salutary, that the Court was right in giving up the task of sanctifying property rights by erecting insurmountable constitutional barriers to shield them from governmental encroachment, is now almost universally agreed. There remains, however, intense disagreement as to what the shape of the Court's new role should be. Staggering amounts of words have been written on this topic in the past two decades, but they have only added fuel to the fire, for the controversy continues to rage unabated. Two competing schools are now dominant in this controversy—the activist school, which believes that the Court should act positively to protect human liberties against repressive actions of the majority, and the self-restraint school, which believes that the Court should offer no more protection to individual liberties than to property rights, but should defer to all rational decisions of the legislature on matters of policy. Since Mr. Justice Black has become the champion of the activists and Mr. Justice Frankfurter, despite his retirement, is still considered the leading apostle of restraint, it is altogether fitting and timely that Professor Mendelson should present us with a book that highlights the "conflict in the Court" by contrasting the judicial styles of these two Justices.

Professor Mendelson, unfortunately, is entirely unsuited for the task he has chosen, for he is a partisan so deeply committed to the cause of judicial restraint that he allows himself to treat the opinions and pronouncements of Mr. Justice Frankfurter with uncritical enthusiasm and those of Mr. Justice Black with ill-disguised contempt. If there was an occasion while he was sitting on the Court that Mr. Justice Frankfurter's position or opinion in a case was in any way less than definitive, one would not know it from reading Professor Mendelson's book. His statements are accepted without caveat or question, and their rightness is considered proven by the mere fact of their appearance in his opinions. Mr. Justice Black, on the other hand, is under constant attack throughout the book, and if the reader does not come away with the impression that he is always wrong, it is only because he has, on occasion, inexplicably concurred silently in one of Mr. Justice Frankfurter's opinions. Even then, how-

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ever, Professor Mendelson is careful to state or to imply that Mr. Justice Black was undoubtedly right for the wrong reasons.

This approach to matters of public policy is perfectly natural and acceptable in campaign literature, where no gradations between black and white are permissible, but it is most assuredly not acceptable in work that is purported to be scholarship. The very existence of the conflict between Justices Black and Frankfurter and between their adherents indicates that there are grave logical and practical weaknesses in either position that render each unacceptable to the other. The main weakness in Mr. Justice Black's position is reiterated throughout the book—policy-making is a function of the legislature, and an activist judiciary that substitutes policies of its own for those of the legislature is negating the advantages of democracy. The principal weakness in Mr. Justice Frankfurter's position is only alluded to, and then is dismissed as being important only to those, like Mr. Justice Black, who think with their "hearts" and who are not "coldly cerebral." The weakness is, of course, that legislatures are demonstrably unreceptive to the claims of unpopular or disadvantaged minorities, so that, if protection of the rights of minority groups is considered to be a requirement of democracy, this protection must be supplied by the judiciary.

Despite his partisanship, however, Professor Mendelson has done much in this small book that is extremely commendable. He has carefully gone through the United States Reports from Volume 302, when Mr. Justice Black made his appearance (Mr. Justice Frankfurter's first volume is 306), through Volume 359, which was the latest citation I found. He has culled out a large number of cases that provide a contrast between the approaches of his two protagonists and has broken them down into meaningful categories that permit ready comparison of their work over the various subject areas with which the Court is principally concerned. In some areas, he has compiled statistics that are quite damaging to Mr. Justice Black's cause. He found, for example, that in fifty-nine cases dealing with the interpretation of the Fair Labor Standards Act from 1941 through 1959, Mr. Justice Black cast a "pro-labor" vote in all but four, and these exceptions were in unanimous decisions on simple questions.[1] In more than sixty cases under the Federal Employers' Liability Act, according to Mendelson's figures, with only one exception "it does not appear that Justices Black or Douglas ever voted against a workman."[2] Or: "In ten years (1949-59) the Court reached decision on Sherman Act 'monopoly' issues in nineteen clashes (direct or indirect) between business and consumer interests. Only Mr. Justice Black found a violation of the law in every instance."[3] Finally, Mendelson observes that from 1941 to 1945, when the National Labor Relations Board was a "liberal" body and the Interstate Commerce Commission was not, "Mr. Justice Black voted to sustain the NLRB in twenty out of twenty-one instances, the ICC in only two out of fifteen."[4]

1. Pp. 21-22.
2. P. 24.
3. P. 29.
4. P. 40.

It ought also to be noted, however, that Mr. Justice Frankfurter himself failed to live up to Professor Mendelson's description of him as a staunch, hard-headed defender of such principles as *stare decisis* and deference to the will of the legislature and the expertise of the administrative agency.[5] He may have defended these principles in the dramatic cases involving civil liberties and on the economic questions that exorcise Mr. Justice Black, but where the question was one on which he had a strong personal predisposition against such deference, he was not unwilling to write his own conception of wisdom into the terms of a statute, *stare decisis* and legislative intent to the contrary notwithstanding. I have recently had occasion to analyze at some length two of Mr. Justice Frankfurter's dissents in cases involving federal interference with state responsibilities in the administration of justice, a practice which he plainly abhors.[6] In these two dissents, in *Screws v. United States*[7] and *Monroe v. Pape*,[8] Mr. Justice Frankfurter argued for the reversal of the interpretation given in *United States v. Classic*[9] to the phrase "under color of . . . law" which appears in two unrepealed remnants of the Civil Rights Acts of the Reconstruction era. The *Classic* interpretation permits the Department of Justice to prosecute for civil-rights violations of state officials who, while on duty, commit acts, such as murder, that are illegal under state law. Mr. Justice Frankfurter, who concurred in *Classic*, apparently not recognizing the potential effect of the interpretation, quickly sought to reverse this ruling despite the operation of the rule of *stare decisis* and despite the difficulty involved in showing that the intent of the Reconstruction Congresses was not correctly interpreted in the *Classic* decision. In Mr. Justice Frankfurter's mind, the States must remain fully responsible for prosecuting their own criminals, and if Congress, as in the Civil Rights Acts, should enact clearly constitutional provisions tending to relieve the States of this responsibility in any way, he was not above construing these provisions to meet his own notions of wisdom in this area, irrespective of congressional intent.

The disturbing assumption that carries through the whole of Professor Mendelson's book is that Mr. Justice Frankfurter's opinions were always correct beyond question. Only once can one find any hint that an opinion of his was the target of professional criticism, and then Mendelson offers a lengthy

5. For example, Professor C. Herman Pritchett, who has done much of the pioneering work in the area of judicial behavior, has noted with regard to decisions dealing with administrative agencies during the 1940's that "both wings of the Court have been willing to reverse the I.C.C. when its policies were 'wrong,' and have adjusted their arguments accordingly," and has observed in "the curious capacity of the S.E.C. to make Frankfurter forget his principles" a marked similarity between Mr. Justice Black's attitude toward the ICC and Mr. Justice Frankfurter's toward the SEC in that period. PRITCHETT, THE ROOSEVELT COURT 180, 195 (1948).

6. Alfange, *"Under Color of Law": Classic and Screws Revisited*, 47 CORNELL L.Q. 395 (1962).

7. 325 U.S. 91 (1945). This dissent was unsigned and was filed by Mr. Justice Frankfurter together with Justices Roberts and Jackson, 325 U.S. 138.

8. 365 U.S. 167 (1961).

9. 313 U.S. 299 (1941).

three-page defense of it.[10] The case involved was *United States v. Hutcheson*,[11] in which Mr. Justice Frankfurter, speaking for the Court, expanded the prohibition of the Norris-LaGuardia Act against the issuance of injunctions in labor disputes to prohibit also prosecutions under the Sherman Act for conducting secondary boycotts. In view of the events leading to the passage of the Norris-LaGuardia Act, its expansion in this manner appears warranted, and both Mr. Justice Frankfurter's opinion and Mendelson's defense of it are highly persuasive.[12] The point is, however, that nowhere in the book is any similar defense offered for one of Mr. Justice Black's opinions that superficially may be equally incorrect. Since Mendelson suggests no criteria whatever for the proper exercise of activism except to offer *ad hoc* apologias for Mr. Justice Frankfurter's excursions into the area of judicial legislation, his analysis may, in the simplest terms, be reduced to this: activism is reprehensible unless Mr. Justice Frankfurter is involved, but then it is praiseworthy.

Activism, however, is neither entirely reprehensible nor entirely praiseworthy. Professor Mendelson's statistics, cited earlier, strongly suggest that Mr. Justice Black's activism is "result oriented," in that his opinions seem to be shaped more by the nature of the parties involved or the nature of the claims raised than by "neutral principles" of law, and insofar as result orientation determines a judge's position to the exclusion of other relevant factors, it merits the deprecation it has received.[13] Professor Mendelson declares that Mr. Justice Black's opinions are aimed at achieving substantive justice, and he recalls as "significant" Mr. Justice Holmes's supposed statement that his job on the Supreme Court was not to do justice but to enforce the law. Mr. Justice Black's voting record aside, however, one may wonder whether there is not some interrelationship between "results," "principles," and "justice." Critics of result orientation invariably speak of "immediate results"; they state that neutral principles of law should not be distorted so that the immediate result will be that a Negro will overcome one of the barriers of segregation or that the advocate of an unpopular ideology will be freed from prison, no matter how just their causes may seem. At this point it is difficult to disagree with the critics; justice does not require that Negroes and other disadvantaged minorities always win in the courts. When one turns from immediate to ultimate results, however, the importance of justice becomes overwhelming. Legal systems can tolerate occasional injustices that are necessitated by the operation of neutral principles, but if these principles preserve an unjust order in which justice becomes the exception rather than the rule, the legal system itself is doomed. Judge Learned Hand recognized that the school segregation decisions were inconsistent with a policy of restraint and frankly criticized

10. Pp. 33-36.

11. 312 U.S. 219 (1941).

12. But *cf.* PRITCHETT, *op. cit. supra* note 5, at 212-18.

13. See, *e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), reprinted in WECHSLER, PRINCIPLES, POLITICS AND FUNDAMENTAL LAW (1961).

them on these grounds.[14] Mr. Justice Frankfurter, on the other hand, realizing the alternatives, chose to abandon self-restraint in these cases rather than abandon the Negro to the mercy of the southern state legislatures. Neutral principles of constitutional law, of course, are no less compatible with justice than with injustice, and, consequently, are no less compatible with *Brown v. Board of Education*[15] than with *Plessy v. Ferguson*.[16] It was thus clearly within the province of the Court to replace the *Plessy* principle of "separate but equal" with a more realistic and equally neutral interpretation of the equal protection clause when the *Brown* case arose. Whether it did so successfully or not is another question.

It is not at all unnatural that Professor Mendelson should complain that: "Apologists for the modern version of activist Justice seem to concentrate upon its First Amendment aspects and ignore its economic implications as in the FELA, FLSA, ICC, NLRB, and Sherman Act cases."[17] But surely this is true not only because the current advocates of judicial activism are more concerned with first amendment problems, but also because the case for activism is far stronger in the first amendment and "equal protection" areas where the Court would be invoking specific (although admittedly not self-interpreting) constitutional provisions which were and are intended as limitations on Congress and the state legislatures, and which prohibit them from doing "certain things which they might at some point in time think it well to do."[18] Even Judge Hand agreed that the activists "have the better argument so far as concerns Free Speech,"[19] but he would still reject their position because of his faith in the democratic process.

Congress is no more likely to concern itself with the civil liberties of an accused Communist than southern state legislatures are to concern themselves with the plight of the Negro.[20] The democratic process serves the victim in neither case, and the victims of Congress are not only hard-core Communists but innocent people, who may have had but a fleeting connection with Communism in the distant past, but who are nevertheless required to suffer such penalties as the loss of Social Security benefits by an act that gives every appearance of being a bill of attainder.[21] The case for judicial activism in the area of individual liberties is not negated by showing, as Professor Mendelson attempts to do, that activism has grave defects when applied to cases dealing with economic regulation. The parallel that Mendelson draws between Justices Black and Sutherland[22]—a vain endeavor to impute guilt by association—is

14. HAND, THE BILL OF RIGHTS 54-55 (1958).
15. 347 U.S. 483 (1954).
16. 163 U.S. 537 (1896).
17. P. 119.
18. BLACK, THE PEOPLE AND THE COURT 105 (1960).
19. HAND, *op. cit. supra* note 14, at 69.
20. See Shapiro, *Judicial Modesty, Political Reality, and Preferred Position*, 47 CORNELL L.Q. 175 (1962).
21. See Flemming v. Nestor, 363 U.S. 603 (1960).
22. Pp. 118-24.

thus not the *coup de grace* it was intended to be. Mr. Justice Black's activism, whatever its merits or demerits, cannot be condemned by demonstrating the weaknesses in Mr. Justice Sutherland's activism. It must be attacked in its own right.

The choice between activism and restraint is not a choice between good and evil, or right and wrong. Either may be fatal if taken in large doses to the exclusion of tempering quantities of the other, and the choice between these approaches requires a careful eclecticism together with a delicate and thoughtful balancing of competing interests. Professor Mendelson is apparently content to define the only acceptable occasions for the exercise of activism as those occasions in which Mr. Justice Frankfurter saw fit to employ it. That is rather shallow analysis, and that is why his book is ultimately so dissatisfying.

Ironically, he has provided the ideal closing sentence for a review of his own work. Speaking of activist doctrine, he declares: "There is more subtlety, more depth, and more complexity in our culture than such one-sided polemics dream of."[23] There is, indeed. The "conflict in the Court" is one of great subtlety, depth, and complexity, and is not adequately to be understood on the basis of the one-sided polemic that Professor Mendelson has offered us.

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RELIGIOUS PERSPECTIVES IN AMERICAN CULTURE: Volume 2 of the four volume RELIGION IN AMERICAN LIFE. Princeton: Princeton University Press, 1961. Pp. 427.

Religious Perspectives in American Culture is meant for readers innocent of sophistication in constitutional processes. It spreads thin ink over education, theology, politics, sociology, statistics, history, economics, and law and overflows into the unrelated topics of religion in the arts: in fiction, novels, poetry, music and in architecture. The mere range of these topics and the insignificant portion devoted to legal analysis invite shallowness. But the main fault of this book is that its shallowness is selective. It passes for an objective, authoritative study, an oversimplified view of our constitutional history and church-state relations. The doctrine of Separation of Church and State is thus criticized without seriously considering either the majority view of the Supreme Court or the views of some of the more extreme proponents of Separation. In the end, the reader faces a city of one way streets. Discretion keeps one from questioning and delicacy prevents him from even guessing the reason for such editorial policy.

Will Herberg's essay on "Religion and Education in America" argues for federal aid to parochial schools and advances the proposition that "if the public

23. P. 127.

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