UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 41 | Number 2 Article 4

2-1-1963

# Book Reviews

North Carolina Law Review

# BOOK REVIEWS

**Mr. Justice Holmes and the Supreme Court.**

Second Edition. By Felix Frankfurter. Cambridge: The Belknap Press of Harvard University. 1961. Pp. 112. Bound in Boards. $3.00.

This little book comprises three lectures delivered in the spring of 1938 as part of the program of the Harvard Committee on Extra-curricular Reading in American History and is therefore intended for laymen rather than lawyers. Justice Frankfurter, as Professor Frankfurter, has given us his views on Justice Holmes on several occasions in the past.[1] The present study when it first appeared in 1938 had great interest as a summing-up in brief compass of the constitutional work of a great and striking figure in our judicial history by his friend and disciple on the eve of the latter's taking up the same duties on the Supreme Bench. There were, indeed, those who ventured prophecies of Justice Frankfurter's judicial conduct in what they here and elsewhere in his writings read between the lines.[2]

The book, long out of print, has lost none of its value in the intervening years and now appears in its second edition under the imprint of Harvard's Belknap Press (which, like Oxford's Clarendon Press, is reserved for the more scholarly works) on the eve, as it happens, of Justice Frankfurter's retirement from the court in his eightieth year. The new edition includes a valuable addition, the sympathetic and illuminating biography of Holmes by Justice Frankfurter which first appeared in 1944 in the *Dictionary of American Biography* (Supp. One, vol. XXI). The only other changes are minor, the omission of the appendices on "Cases holding State action invalid under the 14th Amendment," and regrettably, the original

[1] *The Constitutional Opinions of Justice Holmes,* 29 HARV. L. REV. 683 (1916); *Twenty Years of Mr. Justice Holmes' Constitutional Opinions,* 36 HARV. L. REV. 909 (1923); *Mr. Justice Holmes and the Constitution,* 41 HARV. L. REV. 121 (1927). The last is reprinted in substance in the volume edited by him: MR. JUSTICE HOLMES (1931).

[2] For instance, see Professor Walton Hamilton's almost word-by-word analysis of this book, of the articles edited by Professor Frankfurter on Justice Brandeis in 1932, and of his book THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE (1937), in *Preview of a Justice,* 48 YALE L.J. 819 (1939).

dedication to Justice Cardozo, "rightful successor" of Holmes; and the addition of a brief Foreword by Professor Freund and of a new frontispiece portrait of Holmes. The book's format is handsome, but certainly two errors should not have been reproduced, one in a Latin phrase in the original D.A.B. essay (p. 22), and the other in a proper name in the Lectures (p. 86).

Holmes, of course, came of old American stock. Of those origins the author speaks sparingly in the Lectures, fully in the biography. But no one who has ever sat with that great man in the high, book-lined rooms of his house in I Street and heard him discourse on the War of Secession and the part he took in it, on his father and his writings, and on his mother's tales of early New England customs, could ever come away uncertain of the vital part those origins and experiences played in his own make-up. As a man who had fought to save the Union, the Constitution had for him, as it had for the Founding Fathers after the struggle which established the nation, a reality born of a sharp experience. But, although so essentially American, he was also a philosopher and a Citizen of the World, whose studies in legal history and realistic approach and regard for the social ends of law freed him from all meaningless bonds of precedent. In constitutional matters his freedom from *a priori* economic concepts, his respect for the State's expressed command—for he was a Hobbesian to the last, always insistent that "some play must be allowed for the joints of the machine"[3] and ready to treat legislative action, however doubtful in wisdom, as a social laboratory experiment[4]—the metaphor varied but the principle remained constant; his wide tolerance of the opinions of individual citizens when their expression came into collision with the power of the State; and his unshaken belief, when one leaves the field of limitations on the states and looks to the express powers conferred on the general government, that the Constitution, despite the belief of some of its founders that 150 years would mark its ultimate usefulness,[5] was still sufficiently elastic as an organic law to meet the needs of a growing and changing people; all these seemingly various but philosophically consistent attitudes shocked certain people, including some

[3] Missouri, K. & T. Ry. v. May, 194 U.S. 267 (1904).

[4] See Truax v. Corrigan, 257 U.S. 343 (1921) (dissent).

[5] Mr. Gorham, of Connecticut, in the Federal Constitutional Convention, 8 Aug. 1787, MADISON'S NOTES ON THE DEBATES 359 (Gaillard Hunt's ed. 1920).

of his brethren on the Bench, while with others they earned for him the not always discriminating label of "Liberal." In the latter aspect he now figures, like another St. Francis of Assisi, in the frescoes of the buildings of Government.

In a brief introductory chapter the author exposes the fact, familiar to lawyers but not always so clear to laymen, that certain constitutional clauses leave much to the predilections, economic, political, and social, of the individual judge. There fell to Chief Justice Marshall, Holmes once said, "the greatest place that ever was filled by a judge."[6] Thereby our Federal system became a reality. Taney's great work modified but did not undo the fabric. A century after Marshall, Holmes came to the court, and although it cannot be said that his personality ever dominated its decisions as did Marshall's, his ideas, whether expressed as the Court's or in the isolation of dissent, soon sowed seeds which have long borne fruit in the three main fields of the Court's functions: of property in its relation to society, of civil liberties and the individual, and of the federal system. Professor Frankfurter devotes a chapter to each.

The rise of great corporate wealth and private fortunes, the economic policy of *laissez-faire,* and the shibboleth of the "liberty of contract" on the one side, and on the other the attempts at social reform by legislation—necessarily empirical in their nature, asymmetrical in their scope, and variously vulnerable to those of too liberal logic—these things bespoke the age of Theodore Roosevelt, with the added fact of significance that the great power of the Federal Government which had hitherto lain dormant was then first positively exerted toward social betterment. Throughout this strenuous era of the "Square Deal," the period of the "New Freedom" and the years of "Normalcy" which followed, Holmes treated the Constitution as a broad charter of powers, elastic enough to meet the present and the future, and again and again denied that it embodied any set of opinions, partisan and "by no means . . . held *semper ubique et ab omnibus.*"[7] His dissenting opinions in the Bakers' Maximum Hours case,[8] the Women's Minimum Wage case,[9] the Arizoina Picketing

[6] *Speech from the Bench on John Marshall,* HOLMES, COLLECTED LEGAL PAPERS 266, 270 (1920).
[7] Otis v. Parker, 187 U.S. 606, 609 (1903).
[8] Lochner v. New York, 198 U.S. 74 (1905) (dissent).
[9] Adkins v. Children's Hospital, 261 U.S. 567 (1923) (dissent).

case,[10] the State Tax cases of his last years,[11] to mention only a few, are now classical. In all this there was nothing doctrinaire about his espousal of the cause of the common man, of the property-less, such as we frequently find in the opinions of even so good a judge as Brandeis, but there was a strong and steady belief in the power of Congress and of State legislatures to choose such a course as new social or economic conditions might seem to demand. But none can convict him of a simple faith in the ultimate wisdom of legislators. He very firmly believed in giving them, as he said in *Truax v. Corrigan*,[12] however "futile or even noxious" he might regard their social hypothesis, full laboratory room for experiment in the "insulated chambers afforded by the several states." His innate scepticism and lofty detachment, with its implicit confidence in the democratic process, perhaps never received finer expression than in his famous dissent in that case. At another time he pungently expressed his doubt of social panaceas by the remark that "the notion that with socialized property we should have women free and a piano for everybody seems to me an empty humbug."[13] Professor Frankfurter gently intimates something of Holmes's detachment at the end of this chapter, but nowhere is there forcibly brought out the profound philosophical cleavage between him and such judges, to take polar opposites in economic and social views, as Brandeis and McReynolds.

On the other hand, when it came to civil liberties, Justice Holmes was not always so ready, as Professor Frankfurter points out, to accord to state action that provisional validity, often dependent upon so many factors of time and place known only to the legislators, recognition of which he thought so necessary in social and economic experiments. Freedom of speech, he felt, can never, except under the most extreme circumstances of national danger, be safely abridged in a free country.[14] Philosophers cannot flourish where thinking is to become governmentally canalized. Just so, Thomas Jefferson, a

[10] Truax v. Corrigan, 257 U.S. 343 (1921) (dissent).

[11] Evans v. Gore, 253 U.S. 264 (1920) (dissent); Schlesinger v. Wisconsin, 270 U.S. 241 (1926) (dissent); Farmer's Loan & Trust Co. v. Minnesota, 280 U.S. 216 (1930) (dissent); Hoeper v. State Tax Commission, 284 U.S. 218 (1931) (dissent).

[12] 257 U.S. 343 (1921) (dissent).

[13] *Ideals and Doubts,* HOLMES, COLLECTED LEGAL PAPERS 303, at 307 (1920).

[14] *Compare* the Court's opinion per Holmes, J., in Schenck v. United States, 249 U.S. 47 (1919) *with* his dissent in Abrams v. United States, 250 U.S. 624 (1919).

philosopher and freethinker himself, had always before him the menace of an established religion, not only as a taker of tithes but also as a trammeler of thought. A healthy scepticism, the habit of doubting one's own first premises, was the beginning of wisdom, but the free expression of one's ideas, and the natural selection of the ideas fittest to survive in the competition of the market-place alone would guarantee that condition of "liberty" so essential to social progress by trial and error; or, for that matter, so essential to make a free man's life worth living. Holmes, therefore, thought and spoke of the Bill of Rights in terms of absolutes and not relatives. No higher expression of that faith can be found than in his dissents in *Abrams's*[15] and in *Schwimmer's*[16] cases. Equally zealous was he in preserving the right of "due process" as that term was understood by its framers, to mean a fair trial according to law.[17] He once said that he never passed the old State House in Boston without recalling that there James Otis argued against the writs of assistance;[18] and this traditional regard for the law of the land as a bulwark against despotism, however benevolent the despot's guise, quickened the conscience of the American people, and, when in his latter years it came to be fully appreciated by them, more than anything else earned him a popularity which John Wilkes himself might have envied.

The third aspect of a Supreme Court Justice's functions, maintaining the Federal balance, we have already touched on in defining Justice Holmes's attitude toward the Union. Of the two clauses of the Constitution which still today retain their pristine energy, one confers a positive power on the general government, while the other limits federal, and in its later context, state, power. Of the due process clauses enough has already been said. Of the commerce clause and its phases of growth this is not the place to speak beyond saying that no one has more brilliantly analyzed them than Professor Frankfurter in his Chapel Hill lectures.[19] Holmes, as is well known, found in the Congressional prohibition of child-made goods in interstate commerce no unwarranted assumption of power.[20] Nor could

[15] *Supra* note 14.
[16] United States v. Schwimmer, 279 U.S. 653 (1929) (dissent).
[17] See Frank v. Mangum, 237 U.S. 345 (1915) (dissent).
[18] *Speech from the Bench on John Marshall,* HOLMES, COLLECTED LEGAL PAPERS 266 (1920).
[19] FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE (1937) (The Weil Lectures on American Citizenship, 1936).
[20] See Hammer v. Dagenhart, 247 U.S. 277 (1918) (dissent).

he find an "invisible radiation" from the tenth amendment which would forbid the federal government to protect migratory birds under a treaty.[21] On the other hand, he believed that interstate commerce must pay its way;[22] and he did not shrink from upholding state taxes which did not unfairly discriminate against such commerce. This, like most questions worth while discussing in the law, as he often said, was a question of degree, and abstractions were not to rule concrete cases. Thus he sought always to maintain that delicate equilibrium between the paramount sovereign and the states which is the essence of federalism. Only when the Union's might is directly touched by some state statute does one see in one's mind's eye, as one reads (as in that noble passage on national power *Missouri v. Holland*[23]), the tall, old form stiffen, the white mustaches bristle and the eyes sparkle with anger; and then one recalls that this man was seriously wounded at Ball's Bluff, at Sharpsburg, and at Marye's Heights (Chancellorsville Campaign) in the cause of preserving that Union; all wounds, he once told the writer, which his body would bear to the grave; and one remembers again that of his long life of service his laconic epitaph records but two facts:

CAPTAIN AND BREVET COLONEL
20TH MASS. VOL. INF., CIVIL WAR
JUSTICE SUPREME COURT OF THE UNITED STATES.

Professor Frankfurter—the old title still comes familiarly to the pen of one who sat in his classroom—has clearly shown us how justly Holmes is to be regarded as "Αναξ ἀνδρῶν.[24] He quotes amply from Holmes's opinions and writes with his usual felicity. If it cannot always be said of the disciple, as Sir Frederick Pollock once said of the master, that his style is as simple as Sterne's at his best,[25] it may truthfully be said that it is almost as colorful as Cardozo's and has its own peculiar power.

One word more by way of epilogue. Thirty years have elapsed since Justice Holmes retired from the Supreme Court. Much water has since run over the judicial dam. But judges have the

[21] Missouri v. Holland, 252 U.S. 416 (1920).
[22] See Galveston, H. & S.A. Ry. v. Texas, 210 U.S. 225 (1908) (dissent).
[23] 252 U.S. 416 (1920).
[24] Lord of men. An heroic epithet used in the *Iliad* for Agamemnon—ED. NOTE.
[25] *Ad Multos Annos,* 31 COLUM. L. REV. 349, 351 (1931).

same tendencies today that they had in Holmes's day. One of the most dangerous of these is the tendency to legislate. As Professor Frankfurter said in the original lectures:

> Therefore, whenever he upheld, as he so often did, legislation in the substance of which he disbelieved, he exhibited the judicial function at its purest. He transcended his own preferences, for he was the guardian of the country's past, present, and future. . . . From the constitutional opinions of Mr. Justice Holmes there emerges the conception of a nation adequate to its national and international duties, consisting of federated states in their turn possessed of ample power for the diverse uses of a civilized people. He was mindful of the Union . . . ; he was equally alert to assure scope for the states upon which the Union rests.[26]

Years later as Justice Frankfurter, in his D.A.B. biography, reprinted in this volume, he says the same thing in almost the same words but more at length.[27]

Much more recently one of the greatest of all American judges, the late Justice Learned Hand, in his brilliant Oliver Wendell Holmes Lectures before the Harvard Law School, after examining the slender constitutional grounds upon which the power of judicial review of legislative acts, or those of the President, rests, and after reviewing many of the Supreme Court's decisions arising out of the first eight amendments and the fourteenth in the effort to determine in which the Court had sought merely to keep Congress or the states within their proper legislative roles, and those in which it had substituted its own reappraisal of the relative values at stake and thus had overruled the "legislative judgment" of the state, concludes with these words:

> I must therefore conclude this part of what I have to say by acknowledging that I do not know what the doctrine is as to the scope of these clauses; I cannot frame any definition that will explain when the Court will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the states within their accredited authority. Nevertheless, I am quite clear that it has not

[26] FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 110-11.
[27] *Id.* at 21-23.

> abdicated its former function, as to which I hope that it may be regarded as permissible for me to say that I have never been able to understand on what basis it does or can rest except as a *coup de main*.[28]
>
> And near the conclusion of his last lecture, he continues:
>
> Moreover, it certainly does not accord with the underlying presuppositions of popular government to vest in a chamber, unaccountable to anyone but itself, the power to suppress social experiments which it does not approve. Nothing, I submit, could warrant such a censorship except a code of paramount law that not only measured the scope of legislative authority but regulated how it should be exercised.
>
> . . . For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not . . . . Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture. If you retort that a sheep in the flock may feel something like it; I reply, following Saint Francis, 'My brother, the Sheep.'[29]

May we not hope, then, that Justice Holmes's great example of judicial restraint, so ably set forth by Justice Frankfurter, may help to bring back "the Guardians" to their proper role, and thus avoid decisions which are so contrary to the *mores* of the people affected that they must be enforced by the bayonet, or else raise proposals of constitutional amendment to remove the questions from judicial cognizance? Is not government by the consent of the governed still an ideal to be sought in a free world?

MANGUM WEEKS
MEMBER OF THE BAR
DISTRICT OF COLUMBIA

[28] HAND, THE BILL OF RIGHTS 55 (1938) (The Oliver Wendell Holmes Devise Lectures).
[29] *Id.* at 73-4.

**Reconstruction Bonds and Twentieth-Century Politics: South Dakota v. North Carolina (1904).**

By Robert F. Durden. Durham: Duke University Press. 1962. Pp. xi, 274. Illustration, index. $6.00.

Robert F. Durden, Associate Professor of History at Duke University, has unravelled a tangled skein of legal history that would challenge the ingenuity of a Philadelphia lawyer. But it was a Wilmington lawyer (and rice planter) who contrived the whole outlandish thing—Daniel Lindsay Russell, the last Republican governor of the state and the central figure in this book. Many a reputation was tarnished in the course of the affair, but Russell, bold and hot-tempered, yet withal shrewd and perservering even through a fatal illness, emerged from the episode the noblest rascal of them all.

As a young Confederate veteran, Russell, like many another old Whig, had gone Republican. A political career that seemed foreshortened by the end of Reconstruction reached its unexpected apogee in 1896 with his election as governor when the Populists divided the former Democratic vote. But Russell's triumph proved his torment, forcing him to deal first with a mismatched Populist-Republican majority and then a hostile Democratic majority in the legislature, to face the violent Democratic red shirt campaigns of 1898 and 1900 (including the revolutionary overthrow of the Republican city government in Wilmington), and finally to leave office almost insolvent because of the meager salary.

Before he left office Russell had already hatched out and begun to nurture the scheme that finally brought on the strange legal confrontation of North Carolina and South Dakota. His dual objectives were to enrich Daniel Russell (and others who were drawn into his net) and at the same time embarrass his Democratic tormentors. The plan centered upon Southern state bonds that had been repudiated or scaled down after Reconstruction, an action based largely upon charges of Republican fraud and corruption. It centered particularly upon a North Carolina issue of 1866-1867 (just before radical reconstruction). Each of these bonds, issued to finance the Western North Carolina Railroad, was secured by a second mortgage on ten shares of stock in the older North Carolina Railroad. (The first mortgage secured certain ante-bellum bonds.) In 1879 the Democrats had scaled down the "ten share" bonds from $1,000 to $250 on the excuse of inability to pay. The settlement was ac-

cepted by most of the bondholders, but 234 shares continued to be held by the stubborn Schafer Brothers, bankers of New York, who had no legal recourse because of the state's immunity to private suit in the federal courts under the eleventh amendment.

Russell's "unpatented invention" was to have a portion of the bonds donated outright to another state which could then bring suit in the United States Supreme Court. Winning such a suit, he reasoned, would render the state amenable to a more favorable compromise on the rest of the bonds lest further donations bring further state suits. Russell and his associates, then, could reap a harvest of legal fees. Since there was altogether about $62,000,000 in the repudiated principal of Southern bonds, exclusive of interest, the field seemed ripe for a bumper crop.

Through a former law partner Russell actually approached Schafer Brothers even before he went out of office, although he was not formally associated with the case until later. Then, among others, he approached his old fusionist friend, Populist Senator Marion Butler, who quietly lined up the sovereign state of South Dakota through its Silver Republican Senator Richard F. Pettigrew. Schafer Brothers donated ten of the "ten share" bonds to South Dakota, which then proceeded to bring suit against North Carolina. After much pulling and hauling and a tremendous political pandemonium, all of it detailed by Durden, the case eventually was brought to a decision early in 1904. North Carolina was ordered to pay $27,400 or face the court ordered sale of a hundred shares of the state owned railroad stock.

In the political clamor set up by the judgment North Carolinians got far more heat than light from their press, particularly from the Raleigh *News and Observer*. Josephus Daniels thundered his suspicions of a non-existent plot of the Southern Railway to get control of the North Carolina stock and, like most Democrats, never seemed (or never wanted) to get entirely straight the distinction between the "ten share" bonds and the later "carpetbag" bonds. Under the influence of Daniels, the Democratic party in 1904 pledged adherence to the settlement of 1879. The new governor, Robert B. Glenn, however, proved more willing to compromise, and after deftly neutralizing Daniels with fulsome praise, proceeded to compromise on the basis of $892 per bond. This, it was explained, did not depart from the party's pledge, but merely represented $250 plus accrued

interest on the principal and deferred coupons over the years. In the end, after he had paid off his expenses and associates (amid many recriminations), Russell probably realized only about $7,000 for himself plus a return of about $5,000 from a few bonds held by himself and his partner, enough to pay off his debts and leave him barely solvent at his death in 1908.

The elusive "hundred millions" in other bonds, however, proved in the end out of reach. Durden gives the story of efforts by Russell, Butler, and Pettigrew, as well as two other groups, to pool them for a subsequent assault. But it proved difficult in the Progressive Era to find a state government willing to cooperate, especially with Democratic leaders alert to raise an outcry against efforts to collect the tainted "carpetbag" bonds.

One final irony in the affair was that Butler became identified in the Democratic propaganda as its author, and that after he went over to the Republicans in 1904, the issue of Butler and bonds became a favorite weapon in the Democratic arsenal over the next decade.

It is as curious and fascinating a tale of avarice and partisanship as exists in the history of any state, but it probably never could have been brought to light in all its complexity but for the fact that Russell's young partner preserved a trunkful of the papers that were acquired by the Southern Historical Collection at the University of North Carolina after his death in 1959. Professor Durden, delving into the manuscripts for material pertinent to a study of Marion Butler, soon realized that the papers presented a detailed inside picture of the bond case. The result is a model of compressed, lucid, and witty writing that represents the historical monograph at its best.

GEORGE B. TINDALL

PROFESSOR OF HISTORY
UNIVERSITY OF NORTH CAROLINA

## BOOKS RECENTLY RECEIVED

**The Genius of Lemuel Shaw.**

By Elijah Adlow. Boston: Mass. Bar Association. 1962. Pp. vi, 388. $5.00.

**Interstate Apportionment of Business Income for State Income Tax Purposes with specific reference to North Carolina.**

By Charles E. Ratliff, Jr. Chapel Hill: The University of North Carolina Press. 1962. Pp. xii, 132. $4.00.

**Law and Organization in World Society.**

By Kenneth S. Carlston. Urbana: University of Illinois Press. 1962. Pp. xvi, 356. $6.50.

INTENTIONAL BLANK