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BOOK REVIEW

The Justices of the United States Supreme Court, 1789-1969: Their Lives and Major Opinions. Leon Friedman & Fred L. Israel, editors. New York: R. R. Bowker Company in association with Chelsea House Publishers. 1969. 4 Volumes. Pp. 3373. \$110.00.

Court and Constitution in the 20th Century: The Old Legality, 1889-1932. By William F. Swindler. Indianapolis: The Bobbs-Merrill Company, Inc. 1969. Pp. 458. \$11.50.

Why constitutional history, so ancient and until quite recently a relatively neglected field of study, should now be enjoying a revival is not hard to explain. The historian's quest *is* conditioned by the demands and interests of the contemporary society, and there can be no doubt that the activism of the Supreme Court over the past fifteen years has made it and the document that it interprets a focal point of concern.

The new constitutional history must be different from that of the past, for the country has changed dramatically over the last half-century, and the questions that we now deem relevant and worthy of exploration are ones that the old histories were not designed to answer. One tendency of the new approach is to push the frontiers of the field outward to develop a wider and more inclusive perspective. Another deals with methodology, including the writer's willingness to experiment with psychological and social observation and to probe more deeply beyond the who, what, when, and where, and speculate upon the why. To determine how well these new volumes meet the summons of the present is the task of this review.

In four volumes, *The Justices*, edited by Leon Friedman and Fred L. Israel, is obviously designed to fill a well-recognized gap in our historical record, a gap that has existed, in part, because we have tended to study the Supreme Court as an institution and its work as a group product. Though the commanding personalities among the ninety-seven men who have sat on the Supreme Court have not escaped attention, the work of their associates has probably been obscured. While biographical history is certainly as old as the discipline itself, probing and analytical judicial biography is relatively new. Viewing law as a malleable cultural product has led us to scrutinize more closely the work of the judge.

Finally, we have begun to realize that the background, personality, predilections, and guiding assumptions of the men who sit on the bench are powerful determinants of the law. For instance, Frankfurter called for "penetrating studies" of the Justices, which he promised would illuminate not only the history of the Supreme Court but also the history of the United States. Since the editors of *The Justices* quote these comments in their preface, apparently they hoped that this composite work would meet the demand for "penetrating studies." How well this demand is met is the major question to be answered.

The editors and the publishers conceived of the work as reference material, and the price of the set confirms this expectation. How well, then, have the editors succeeded in their aim to fill a reference need? Editors are like executives in that they are judged on their conceptual ideas and on their success in obtaining others who can execute them well. The basic scheme in *The Justices* was to gather a group of contributors among whom to parcel the ninety-seven Justices of the Supreme Court, including the eight now sitting, for the purpose of obtaining a biographical essay evaluating each one, his background, his appointment, and his work on the Court. In addition, each contributor was to select some opinions of the Justice that would illustrate his work and ideas and then compile a selected bibliography. To the editors' credit, the essays are generally readable, considering that they often contain a considerable amount of case discussion. The individual selection of opinions, which again to the editors' credit are reported in full, can be questioned. For instance, why is Iredell's opinion in *Calder v. Bull*¹ omitted, or why is Wiley Rutledge's ringing dissent in the *Yamashita*² case left out? Though such obvious omissions cannot be explained, the task here is fraught with personal judgment, and generally the authors did an adequate job.

From a reference standpoint, the most serious deficiency of the volumes is the lack of more complete bibliographies; and despite whatever problems their collaborators posed, the editors have the final responsibility. Since the essays are not footnoted, except in a few cases when the disturbed author cited his source-material in parentheses, the bibliography becomes all the more essential. No one could reasonably expect the citation of every piece of material that mentions a Justice, but when Anthony Lewis can ignore his assignment by mentioning only a collection of Warren's speeches, the editors are not doing their job. The work

¹ 3 U.S. (3 Dall.) 386 (1798).

² *In re Yamashita*, 327 U.S. 1, 41 (1945) (Rutledge, J., dissenting).

would have been considerably strengthened by a general bibliography listing the useful books and articles that cut across the assignment of the individual authors. Then an author could have briefly referred to the more general works before listing the entries bearing specifically on the Justice that he covered. Considering the comprehensive charts and statistical information, comprising eighty-nine pages of volume four, that do provide useful reference material, the slighting of the bibliographical task is extremely unfortunate.

If, with the exception of the bibliographical deficiency, the editors conceived their project well, were they then able to choose the right collaborators to carry out their scheme? The publicity blurb refers to the work as the product of "38 distinguished scholars and historians." In such a document some puffing is to be expected, but perhaps this characterization is more misleading than usual. Thirty of the Justices were covered by four authors—the two editors; Frank Otto Gatell, the workhorse of the group; and David Burner. Their coverage is pedestrian and totally uninspired. To compound the felony, Friedman is unmercifully harsh in his condemnation of Whittaker; and Fred Israel, whose treatments are usually bland and sympathetic, fails to grasp the character and contribution of Wiley Rutledge.

The editors did persuade a number of legal scholars to contribute their services, but with surprising results. Paul A. Freund, seemingly slighting the task and not the man, dashed off a seven-and-a-half page essay of Holmes that in terms of coverage uncomfortably puts the Justice in the company of John Blair, Jr., Thomas Todd, and Edward Terry Sanford. Philip B. Kurland contributed a thirty-page piece on Robert Jackson that consists primarily of excerpts drawn from interviews with Jackson prepared for The Oral History Project of Columbia University. Though the hitherto unpublished material is interesting, it hardly qualifies as an historical assessment of the man. In contrast, Norman Dorsen contributed a good effort on the present John Marshall Harlan, and Andrew Kaufman, who has long been working on a biography of Cardozo, served that Justice well.

The political scientists among the contributors were more uniformly in tune with the task and worked fairly well from previously-established research bases. One could quarrel with the particular emphases of the authors and their treading of now familiar paths, but Alfred Thomas Mason's essays on Brandeis, Taft and Stone; C. Herman Pritchett's contribution on Reed; and Donald Morgan's on William Johnson are

authoritative. Moving beyond the good summation and solid research base are the essays of Robert G. McCloskey on James Wilson and Field. In both pieces the author places the subject in bold perspective and provides that level of interpretation and analysis lacking in the collection as a whole.

Despite advance publicity that tried to sell the work as one done from many perspectives—that of the lawyer, the legal scholar, the political scientist, and the journalist—the task, in essence, makes them all historians; so the fact that the majority of Justices are covered by professional historians is not surprising. What is surprising is that the editors did not use greater care and judgment in their selection of contributors. The best essays done by an historian are the four by Arnold Paul, a respected constitutional specialist. Though assigned none of the leading figures of the Court, he brought keen judgment, perspective, and analysis to his treatment of Blatchford, L. Q. C. Lamar, Brewer, and Shiras and the roles that they played. What is more, he asks the question, why? Too rarely throughout the entire collection is that question raised.

Herbert Alan Johnson, one of the editors of the Marshall Papers, did contribute an interesting essay on the great Chief Justice. Even if his suggestion that Marshall's continued role as spokesman for the Court from the mid-1820's on was due to his basic identification with the policies and views of the Jeffersonian Republicans is not entirely convincing, Johnson at least had the courage to venture out on an interpretive limb. The essay is better for it. To be fair, a few of the other historians among the contributors did seek to develop some perspective and interpret the material, but their success was limited.

Two non-academicians whose work should be mentioned are Gerald T. Dunne and John P. Frank. Dunne, covering Livingston, Story, and Thompson, ran into some problems of organization, but the pieces reveal an understanding of the law of the period that make them stand out. Frank, who has done a considerable amount of writing about the Court in recent years, gave Douglas and Black—though not Murphy—the most human treatment in the collection.

Finally, the work of two journalists, Anthony Lewis on Warren and John P. MacKenzie on Burger, adds some flavor to the collection. Lewis' treatment of Warren's background and appointment to the Court is sketchy and insufficient, but his evaluation of the man, as a statesman motivated by a strong, old-fashioned, generally expansive sense of justice and unencumbered by a vested interest in the law as he found it, seems

sound. Another exercise into contemporary history is the rather lengthy but fascinating study that centers on Warren Burger's succession to the Chief Justiceship. Burger's background both off and on the bench is fairly well handled, but the true worth of the piece is found in the fairly extensive report of President Nixon's informal meeting with reporters prior to the announcement of the appointment.

Though there are bright spots in the collection of ninety-seven essays, the total effort is disappointing. There are no new departures, and there is too little refinement in biographical analysis. The only psychological observations found in the entire work are those made by Paul in his discussion of L. Q. C. Lamar, which provide the reader with new insight into the man. Whether the biographer wants to play psychologist is no longer an open question; the psychological dimension can only be ignored at the author's peril. That it will not always be possible to form opinions on the material available is to be expected, but look at the opportunity Friedman missed in his treatment of Bradley.

Friedman tells the following story, which is in the literature on Bradley. At his wife's insistence, Bradley was persuaded to change his trousers before leaving for the railway station. By the time he got to the depot, the train had departed. He returned home where his wife discovered him ripping the trousers to shreds with his penknife and mumbling, "You will never compel me to miss another train." Friedman, in his favorable evaluation, cites the story only as evidence that Bradley was an irascible man who brooked no interference in his affairs.

Material such as this is available, but its relevance and meaning must be probed. In most cases the authors failed to be challenged by their task, to find some approach that would add a dimension of significance to what some acknowledged was a dreary responsibility. Recognizing that many of its members have contributed little, some critics might question the essential worth of covering each one of the ninety-seven men who have sat on the Court; but I have no quarrel with the idea, just its execution. There is too little analysis and interpretation, and what appears is often uncritically drawn from available secondary sources. Few authors were without source-material of a primary nature, including a Justice's opinions or even the opinions to which he subscribed, but too often the authors bemoaned the absence of other material and missed the opportunity to find and then mine what was available. Though the composite effect of the essays is to produce an unorthodox constitutional history, the effort contains few surprises. The relevance of a Justice's background to his

judicial career is rarely contended with, and labels tend to substitute for analysis. Frankfurter's plea for "penetrating studies" remains unfulfilled, and though some may question how well it could possibly have been met by short biographical essays, the apparent conclusion is that this work could have come closer to that goal. Unfortunately, the work does not support well its implied thesis that Supreme Court history has been distorted by our focus on only a small percentage of the Court's membership.

The editors left the task of summarizing to Albert P. Blaustein and Roy M. Mersky, who are responsible for the appendix entitled "The Statistics on the Supreme Court," which contains four charts and two tables. Chart III consists of two graphs representing the average age of Justices and their average length of service. The other three charts list the Justices according to appointment, seat number, and alphabetical order. Other information is collated in these three charts, including the position that each Justice left for service on the Supreme Court. Table I lists the acts of Congress held unconstitutional by the Court through June, 1969, and Table II lists the decisions of the Court that have been overruled by a later Court. Introducing the charts and tables are fifteen pages of commentary that provide a limited summary of the work.

In conclusion, Friedman and Israel have provided a convenient set of biographical essays, generally reliable as to the data included, and useful statistical material that has some reference value. It is unfortunate, however, that so much time, effort, and money was expended without greater benefit to our understanding of Supreme Court history.

While Friedman and Israel miss the mark of bringing their grandiose work up to the sophisticated level that should, and only partially does, characterize constitutional studies, William F. Swindler in the first published volume of his two-part study succeeds admirably well. In this volume, subtitled "The Old Legality, 1889-1932," he explores a period that has received little concentrated attention by constitutional historians. What he has attempted is really quite ambitious, for he works from the correct assumption that to focus on the work of the Supreme Court exclusively is insufficient in rendering constitutional history. Swindler discusses most of the significant cases of the Supreme Court in the period, and they are placed in a useful—if at times somewhat overblown—political, economic, and, to a lesser extent, social context. The book, perhaps, could be characterized as a political history of the period with special emphasis on the particular factors that have constitutional significance. What is even more surprising is that the author has constructed a narrative of

considerable appeal. The book is generally well written, with case names often relegated to the notes at the back of the book, and the errors that find their way into print are minor.

In three hundred pages of closely-printed type, Swindler has told his story well, but there are certain problems in his book. At times the inclusion of historical material seems to serve as a substitute for analysis and explanation. While not always true, I suspect that this weakness results from a legal scholar learning his history so well that it has crowded out the careful delineation of his thesis.

The analytical problem lies in the area of making the theme of the book ring true, making it more meaningful in itself rather than as a foil to the companion volume. The period covered by Swindler is a complex one and labeling it "The Old Legality," even in the perspective of the total eighty years to be covered by the two volumes, leads to the minimizing of the more liberal currents at work on the bench. *Hammer v. Dagenhart*³ in 1918 comes as such a surprise only because the Court departed from its reading of the commerce clause as a grant of the police power to the federal government. There is no coordinated discussion of the decisions on this point, and, although the author does recognize some liberality in the Court's decisions in the early Twentieth Century, he does not do full justice to the complexity of the so-called Progressive Era. The total effect is to further rather than undermine the generalizations that have passed for analyses of the Court's attitude and response to the reform-minded society. The book is weak in that it fails to closely and analytically inspect the total work of the Court. As the author promises in his foreword, he tends to leave the development of the constitutional argument to the members of the Court, whose opinions he summarizes.

Despite these reservations, I was impressed with a number of contributions that the author makes to the study of constitutional history. Much work remains to be done in the constitutional history of the forty-three years covered, and the most that any author can hope for is that, as he moves into largely virgin territory, he contributes to how the study should be approached and to our understanding of the period. From this perspective, Swindler's book is quite successful.

First, Swindler has become the first constitutional historian to emphasize consistently the crucial importance of the offices of Attorney-General and Solicitor-General in the development of our constitutional

³ 247 U.S. 251 (1918).

law. Now that the emphasis is placed, it seems quite obvious; yet, except in isolated instances or in particularized discussions of cases, no one else has emphasized this importance before. Swindler is especially effective in interweaving the personnel of the Justice Department into the story of the enforcement of the Sherman Antitrust Act.

Second, Swindler seems more sensitive than previous writers not only to the interaction between Congress and the Supreme Court but also, though he never states it in these terms, to the role of Congress as a primary interpreter of the Constitution through acts of legislation and the consideration of amendments.

Third, Swindler has dealt directly and analytically with the amending process as an indispensable facet of our constitutional history. Other writers have mentioned amendments, their proposal, their content, and their ratification; but there has been remarkably little analysis of the constitutional questions that have been raised about the process itself, the permissible content of amendments, and their relationship to other provisions of the Constitution. Illustrative of the value of this long-overdue approach is the excellent chapter Swindler entitles "Prohibition: A Socio-Legal Sketch."

In addition to these contributions to the enrichment of the field of constitutional history, Swindler does sprinkle a number of perceptive passages throughout the book. The following is an example:

McReynolds and his coalition of change-resisting colleagues insisted upon denying to the states the power to reform the existing economic system. In thus stunting the growth of state power, the conservatives permitted the problem to grow instead, until at a future date it attained such proportions that only a national power could cope with it.⁴

This passage makes good sense; the liberal may indeed face the future with too much optimism, but the conservative, who conjures up horrors as he contemplates the future, tends, by obstructing and delaying change, to make the nightmare more likely. Swindler's proposition that the states were willing and able to undertake fundamental reform of their economic systems is debatable, but perhaps the conservatives were, in reality, more responsible for the growth of our national government than were the liberals with their approving ideology.

⁴ W. SWINDLER, *COURT AND CONSTITUTION IN THE 20TH CENTURY: THE OLD LEGALITY, 1889-1932*, at 218 (1969).

Swindler's book, in addition to its index and adequate, but not impressive, bibliography, contains five appendices. The first gives brief biographical facts about the Justices, the Solicitors-General, and Attorneys-General of the period. Appendix B lists proposed constitutional amendments from 1889 to 1932. The third appendix contains brief descriptions of statutes dealing with the federal judiciary, and the fourth contains similar descriptions of selected congressional acts and a scorecard of the Court's record in invalidating legislation and in overruling earlier decisions. Appendix E covers chronologically the principal constitutional cases decided by the Court during the period, along with a running record of changes on the Court and in the Justice Department. This material adds a useful dimension to the book, as do the charts of the Supreme Court that precede each of three major sections in the text.

I heartily recommend this first volume of *Court and Constitution in the 20th Century* to all lawyers with some interest in history, and I await with anticipation the appearance of Swindler's second and concluding volume.

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HERBERT RALPH BAER

This issue of the *North Carolina Law Review* is dedicated to Alumni Distinguished Professor of Law Herbert R. Baer, who is retiring this month after twenty-six years at the Law School.

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