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Book Review

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BOOK REVIEW

THE JUSTICES OF THE UNITED STATES SUPREME COURT, THEIR LIVES AND MAJOR OPINIONS. Vol. V. Edited by Leon Friedman. New York: Chelsea House. 1978. Pp. vi, 494.

*Reviewed by Kenneth F. Ripple**

This anthology is a fifth and supplemental volume to an earlier collection¹ of short biographical essays on each Justice of the Supreme Court of the United States. In the case of modern-day Justices, these essays are supplemented by representative opinions of each. In the preface to this new addition, the editor, Professor Leon Friedman, quoting Henry Steele Commager, justifies the present undertaking on the ground that judicial biography is necessary for an adequate history of the Court and of our nation.² It would indeed be difficult to take issue with that statement. The Court's great judicial events are also great historical events and reach deeply into the fabric of our national character. Furthermore, the Court has no doubt been perceptibly influenced by the individual intellectual and ideological traits of the men who have sat upon its Bench. An undertaking such as this project, if done well, can therefore fulfill a very important need. Although the individual essays are of varying quality, especially with respect to their objectivity,³ they make a respectable contribution to our biographical knowledge⁴ of the Justices and indeed to our perspective on various constitutional doctrines.⁵ Of course, in the space constraints imposed by the volume's format, comprehensive treatment of the life and work of a Justice would have been impossible. A comprehensive critique in this brief review of each of the twelve biographies would likewise be superficial.

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¹ The original volumes were published in 1969 under the editorship of Professor Leon Friedman and Professor Fred L. Israel. The first volume also contains an introduction by Judge Louis H. Pollak, then Dean of Yale Law School.

² *Preface to V. THE JUSTICES OF THE SUPREME COURT, THEIR LIVES AND MAJOR OPINIONS* at v (L. Friedman ed. 1978) [hereinafter cited as *THE JUSTICES*].

³ Personal disenchantment with current trends at the Court often becomes a barrier to full exploration of the subject's judicial contribution. For example, Professor Shapiro never really attempts to assess why Justice Rehnquist has had the influence on other more moderate members of the Court which he quite obviously enjoys. Mr. Lewin's essay on Justice Brennan is so preoccupied with a lament over the shift in the Justice's role from majority opinion architect to minority spokesman that he does not really give the Justice credit for his extraordinary effectiveness in that new role. *See, e.g., Massachusetts v. United States*, 435 U.S. 444 (1978). Personal disenchantment with a Justice's result also leads, on occasion, to overstatement. *See, e.g., Mr. Pollet's description of Justice Blackmun's supposed relegation of free speech values "to the status of being but one value in a plural system which is to be weighed and balanced against competing social values"* (p. 8). *But see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

⁴ Mr. Ramsey Clark's decision to focus on Justice Marshall's criminal law decisions on the ground that the "subject is large in American history, human nature, law and the Supreme Court docket" (p. 387) is regrettable. Certainly, criminal law is an area where Marshall has "involved himself passionately and served effectively" (p. 387). However, his contribution to American law, as Mr. Clark admits without further exploration, has been far greater. *See, e.g., Kulko v. California Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

⁵ Professor Newborne's essay on Justice Powell contains especially illuminating material on the equal protection clause (pp. 71-73), procedural due process (pp. 73-75), and first amendment developments (pp. 75-78).

Moreover, this volume's overall approach provokes consideration of its treatment of a far more basic facet of the Court and of the process of constitutional litigation.

By emphasizing the role of the individual Justice, the project tends to deemphasize, at least passively, the institutional aspects of the Court which are probably more important in assessing its overall role in our national life. It is no accident that in his historical farewell to the Court⁶ Chief Justice Warren, who certainly had already attained his own personal niche in judicial history, chose to stress two institutional characteristics of the Court—its continuity and its collegiality. His remarks manifest, with a sensitivity perhaps only possible for those who have sat at the Court's rectangular conference table, the importance of those features in the life of that tribunal. Addressing himself principally to the President of the United States, who had just delivered a short congratulatory statement⁷ on behalf of the bar, the Chief Justice said:

I might point out to you, because you might not have looked into the matter, that it is a continuing body as evidenced by the fact that if any American at any time in the history of the Court—180 years—had come to this Court he would have found one of seven men on the Court, the last of whom, of course, is our senior Justice, Mr. Justice Black. Because at any time an American might come here he would find one of seven men on the Bench in itself shows how continuing this body is and how it is that the Court develops consistently the eternal principles of our Constitution in solving the problems of the day.

. . . .

We do not always agree. I hope the Court will never agree on all things. If it ever agrees on all things, I am sure that its virility will have been sapped because it is composed of nine independent men who have no one to be responsible to except their own consciences.

It is not likely ever, with human nature as it is, for nine men to agree always on the most important and controversial things of life. If it ever comes to pass, I would say that the Court will have lost its strength and will no longer be a real force in the affairs of our country. . . .

. . . In the last analysis, the fact we have often disagreed is not of great importance. The important thing is that every man will have given his best thought and consideration to the great problems that have confronted us.⁸

This volume assesses the work of individual Justices principally on the basis of their authorship of opinions of the Court. These opinions, while "delivered" by one Justice and certainly attributable to his principal authorship, are, in a very real sense, the product of the Court's collegial deliberative process. Other Justices may have directly suggested the incorporation of certain language or even the adoption of a particular approach. Alternatively, the author may, from the beginning, amalgamate into the final product the positions expressed by others in conference or in earlier writings. This interreaction among the Justices with respect to the "signed opinions" of the Court is,

6 395 U.S. at x-xi (1969).

7 *Id.* at vii-x.

8 *Id.* at x-xi.

moreover, but one facet of the Court's collegial life. The Justices also must react and interreact to the constant stream of jurisdictional statements and petitions for certiorari which appear on the Court's weekly "conference list." As Mr. Justice Douglas noted, "[a]cross the screen each Term come the worries and concerns of the American people—high and low—presented in concrete, tangible form."⁹ Over the Terms, in the atmosphere of relative isolation which the Court imposes (or inflicts) on its members, it is indeed impossible not to grow in one's own intellectual perspective and, in the process, to synthesize into one's own thinking the insights of a brother Justice who walked a very different road to the same high place.¹⁰ Evidence of this phenomenon can be seen in the subtle changes which appear to take place in the "chemistry" of the decision-making process with the arrival of just one new member of the Court.¹¹ The same is also true of a departure, although, for some Justices, retirement or death does not abruptly cut off their influence on the internal intellectual life of the Court. A perusal of any recent volume of the United States Reports or even attendance at any week of oral argument will reveal, for example, that Justice Black, Justice Harlan and, of course, Chief Justice Marshall have not yet really vacated the conference room.¹²

While such a deemphasis on institutional characteristics ought to be kept in mind by the serious reader, it would certainly not be fatal in itself to the legitimacy of the primary biographical mission of this volume. However, in several ways, this book goes beyond passive deemphasis and affirmatively demonstrates inadequate concern for the Court's collegiality and continuity. For example, the editor justifies the necessity of a fifth volume on the "Burger Court" at this time on the ground that the personnel changes in the Court within two years after the publication of the original four volumes "surely altered the course of the Supreme Court as it had developed under Chief Justice Earl Warren"¹³ requiring "a reexamination of its new direction and its distinct philosophy created by the four new Justices."¹⁴ This justification accepts in large measure the "conventional wisdom," fortunately not accepted by all of the essayists whose pieces appear thereafter, that the present Court has, since the last change in the incumbent of the center chair, radically departed on a different road chosen by the four Justices appointed by President Nixon. However, if any conclusion can be distilled from the individual essays, the present Court has strong and effective spokesmen on both the left and the right with the fulcrum of power reposing in those Justices who have learned to master the techniques of the collegial function.¹⁵ In short, the analysis of the

9 *Tidewater Oil Co. v. United States*, 409 U.S. 151, 175 (1972) (Douglas, J., dissenting).

10 The collection of these biographies in this one volume serves to emphasize the great diversity in the backgrounds of the present members of the Court. Some of the authors, most notably Professor Newborne in his treatment of Justice Powell and Mr. Clark in his essay on Justice Marshall, make some attempt to explain the personal judicial philosophies of their subjects in terms of this background. As noted at some length in the text, there is little opportunity, however, to discuss the fascinating question of how these particular backgrounds affect the Court's collegial deliberations.

11 *Compare* *National League of Cities v. Usery*, 426 U.S. 833, 880 (1976) (Stevens, J., dissenting) *with* *Maryland v. Wirtz*, 392 U.S. 183, 201 (1968) (Douglas, J., dissenting).

12 *See, e.g.,* *Ohio v. Kentucky*, No. 27 Orig., Tr. Oral Arg. 38.

13 THE JUSTICES, *supra* note 2, at vi.

14 *Id.*

15 Both Professor Friedman and Professor Newborne stress this factor in their respective essays on Justice Stewart and Justice Powell. Professor Friedman submits that Justice Stewart has emerged in a con-

various authors, unlike the volume's prefatory comment, seems to substantiate the observation of Chief Justice Warren that a Court "manned by men like those who have preceded us and by others like those who sit today"¹⁶ would pursue "a more or less steady course."¹⁷

There is another aspect of this volume's prefatory justification which ignores the importance of the Court's collegiality. As Supreme Courts go, the present Court is indeed a "young Court." We have, for a long time, rather easily accepted the proposition that a President must "grow into the job." It is no different for a member of the Supreme Court or for the Court as a whole. Yet this volume was compiled when five members had been on the Court less than ten years. The individual essays rather strikingly reveal that many of these Justices still appear to be engaged, to some extent, in the process of becoming comfortable with the unique perspective of American life available only from the Bench at "Number One First Street."¹⁸ Furthermore, if the badly fractured lineups of the past few Terms are any indication, the collegial "chemistry" of the current Court has yet to stabilize. Consequently, there is a substantial question as to whether this volume is premature. The entire multi-volume set would probably have been far more enhanced if publication had been deferred until its subjects¹⁹ had gone through a full gestation as Supreme Court Justices. To assess a man's work at so early a date demonstrates how much easier it is to write about a Justice than to be one.

Although this volume appears, in some ways, to ignore affirmatively the collegiality and continuity of the Court stressed by Chief Justice Warren, it must also be noted, in fairness, that the organization of the volume does, at least implicitly, recognize these institutional characteristics. It treats, with fairly equal coverage, the well-known and less-known, the ideological spokesmen who make headlines and the "workhorses" whose style may lack the clever twist of phrase required for headlines but whose broad legal expertise makes them likely candidates for writing the complex but lesser known cases. In giving these latter Justices equal coverage, there is an implicit recognition of the great importance of such a role to the Court's internal intellectual life.²⁰

trol position by his ability to stake out well-reasoned centrist positions solidly based in precedent and which have the effect of softening the ideologically oriented positions. Even when he loses a battle, a dissent drawn along these lines often permits him eventually to win the war. Professor Newborne stresses Justice Powell's ability to synthesize extreme positions into workable solutions which may or may not turn out to be durable ones.

¹⁶ 395 U.S. at xi.

¹⁷ *Id.*

¹⁸ It is interesting to contrast the styles of judicial maturation which the essays reveal. On the one hand, there is the slow, painstaking trial and error approach which Justice Blackmun often—but not always—has exemplified. By contrast, there is the propensity, best exemplified by Justice Stevens, to set out comprehensively a personal position in each case. Unfortunately, there is little opportunity in this volume to contrast the ramifications of those two styles in terms of the Court's decision-making process.

¹⁹ All Justices appointed prior to Justice Blackmun are also covered in Volume IV of the original set.

²⁰ Unfortunately, not all the essays acknowledge adequately the contribution of these "workhorses." In the essay on Justice White, for example, it is not really until the last paragraph that the author gets even close to the Justice's contribution to the Court. Through his mastery of the complex body of federal statutory role and his thorough knowledge of the Court's institutional role, Justice White has provided leadership in the intellectually difficult areas of jurisdiction, procedure, and federal administrative practice. Such matters, while no doubt less well-known than much of the Court's work, are essential to the daily task of accurately defining the nature and scope of the Court's power.

In summary, even with its rather restrictive focus, this work still contains many valuable insights into not only the lives of the Justices but also into many current issues in constitutional adjudication. With respect to those areas of the Court's life which it does not treat or which it even ignores, the serious reader is at least provoked to make further inquiry. This volume is the sort of responsible criticism which Mr. Justice Brewer identified over eighty years ago as the lifeblood of the Court.²¹ Paradoxically, therefore, even while largely ignoring the institutional aspects of the Court's life, this project may have made a significant contribution to it.

²¹ Brewer, *Government by Injunction*, NAT. CORP. REP. 848, 849 (1898), quoted in Frankfurter, *The Supreme Court and the Public*, reprinted in P. KURLAND, FELIX FRANKFURTER ON THE SUPREME COURT: EXTRA JUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 218 (1970). The original Frankfurter essay was published in 1930 in *The Forum*.

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Pages 161-168 are Intentionally Blank.

