

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

One hesitates in deciding where to begin in a discussion of this book. In *Justices Black and Frankfurter: Conflict in the Court*, Professor Mendelson has written an unabashed polemic extolling the virtues of the latter. It is surprising to hear such a gross over-simplification of the role that these two great Justices have played in the Court's recent history from one who claims to possess a deep appreciation for the complexities of competing interests that face the judiciary. According to Professor Mendelson, Justice Black is driven so intensely by ideological loyalty and sympathy for the "underdog"—*e. g.* the Negro, labor unions and the Government's position in antitrust cases—that he does not conduct himself properly as a judge. Justice Frankfurter, however, is quite different. For him,

humanitarian ends are served best in that allocation of function through which the people by a balance of power seek their own destiny. True to the faith upon which democracy ultimately rests, the Justice would leave to the political processes the onus of building legal standards in the vacuum of doubt. For in his view only that people is free who chooses for itself when choice must be made.¹

And what is the evidence that Professor Mendelson presents us with in promulgating these far flung generalities? First, he exerts a great deal of energy in exhibiting to the reader Justice Black's proclivity not only for hearing cases arising under the Federal Employers Liability Act but also for deciding them in favor of workers. Professor Mendelson thinks that these cases occupy far too much of the Court's time which could be spent in contemplating larger issues of the day rather than the mundane problems of workers' injuries. However, in light of Professor Mendelson's advocacy of an approach to Bill of Rights cases which would limit the judicial function (although as I shall point out, I believe that the end result will be the precise opposite) one might ask, with some justification, if there would not be a resulting time compensation which would permit the Court to give consideration to FELA cases.

Professor Mendelson accuses Justice Black of voting according to a "labor prone pattern." He points out the number of times that Justice Black has upheld the National Labor Relations Board and the changing percentage which accompanies the advent of Taft-Hartley and the Eisenhower Administration.² It appears that charts and tabulations

1. P. 131. [References are to pages of JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT.]

2. P. 40.

as to "pro" and "con" votes are quite vogue today³ and they may, in some instances, be useful. But I would consider their utility, in the context of attempting to establish a Justice's bias towards a particular group, highly doubtful. Professor Mendelson completely overlooks the fact that the Eisenhower Board did stray considerably from the original intent of both Wagner and Taft-Hartley, that the *entire* Court overruled the Board eleven out of fifteen times from 1959 to 1961, and that this is a situation which the present Board, by the Chairman's own admission, is attempting to remedy.⁴

An atmosphere of special pleading is also conveyed by the author's citation of *Hill v. Florida ex rel. Watson*⁵ to indicate Justice Frankfurter's restraint in implying Congressional pre-emption in the labor field. Professor Mendelson does not mention the fact that Justice Frankfurter subsequently reversed his field, indulging in a broad policy decision in the second *Garmon* case.⁶ Incidentally, I fear that the author would be compelled to admit that *Garmon* was prompted by the confusion engendered by the Court's acceptance of the Frankfurter rationale in *Hill*.⁷ Similarly, in his criticism of the *Lincoln Mills* case,⁸ the author does not point out the chaotic future for litigants that the Frankfurter opinion in the *Westinghouse* case⁹ (predecessor of *Lincoln Mills*) foreshadowed.

It is on this note that I find a discussion of the author's attitude concerning the Bill of Rights and the Court particularly fitting. Here, most clearly, that lack of certainty mentioned above has been accentuated in the area of civil liberties because of the Court's acceptance of the "balancing" approach which touches the hearts of Justice Frankfurter and the author. This approach declines to heed the strong prohibitory language in the Bill of Rights and instead defers, almost always, to legislative judgment. Thus perpetual litigation is invited as the individual and government grope through murkiness to ascertain the limits which the Court will set on governmental intrusions into individual liberty.

3. Hays, *The Supreme Court and Labor Law, October Term, 1959*, 60 COLUM. L. REV. 901 (1960).

4. Address by Frank W. McCulloch, *The How and Why of Recent National Labor Relations Board Decisions*, February 15, 1962.

5. 325 U.S. 538 (1945), cited at p. 101.

6. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

7. See Gould *The Garmon Case: Decline and Threshold of "Litigating Elucidation,"* 39 U. DET. L.J. 539 (1962).

8. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), cited at 92, 93. In this case the Court held that collective bargaining agreements were to be enforceable in federal court and that federal substantive law was to be applied.

9. *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955).

Furthermore, such abdication ultimately involves the Court in many more policy judgments than would an adherence to the so-called "activist" or "absolutist" position. Thus, it is submitted that the balancing of rights protected by the Constitution sends the Court down the exact path that Professor Mendelson finds Justice Black traveling. Of course, the Court cannot avoid the balancing process in defining what is protected—*e. g.*, speech. I believe, however, that potential judicial meddling is at a low ebb when the Court goes through the balancing process in defining liberty and that the interest demonstrated by the Founding Fathers in the individual's protection is more certain to be followed in this manner.¹⁰

Justices Black and Frankfurter is rather one-sided in its treatment of the issues and personalities that divide the Court today. For Professor Mendelson there are no in-betweens. The uninitiated reader is led to the inescapable conclusion that a great struggle between truth and error is proceeding. This review has, I think, made clear who, according to the author, possesses the truth.

I believe that this book is in the nature of a brief rather than a study and, as such, I cannot recommend it to the serious student of constitutional law.

WILLIAM B. GOULD†

PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT. By Frederick M. Rowe. Boston: Little, Brown and Company. 1962. Pp. xxx, 675. \$22.50.

This book, published in The Trade Regulation Series and edited by S. Chesterfield Oppenheim, the distinguished scholar of Michigan University, represents a major contribution to the Series and to anti-trust literature in general. Written by a practising attorney highly experienced in the field, it is destined to remain a most useful tool for lawyers concerned with the perplexing problems of the Robinson-Patman Act.

Among the chief virtues of the book are depth of analysis, completeness of material and clarity of expression. Separate chapters are devoted to each provision of the Act, which is dissected in the light of its legislative history, economic significance and pertinent adjudications of the F.T.C. and the Courts.

Born as an effort by grocery wholesalers to curb the aggressive expansion of the A. & P. Tea Co., the Robinson-Patman Act was given

10. See Charles Black, *Mr. Justice Black, The Supreme Court and the Bill of Rights*, Harper's Magazine, Feb. 1961, p. 63.

† Assistant General Counsel, United Auto Workers AFL-CIO.