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## Friedman and Israel: The Justices of the United States Supreme Court, 1789-1969: Their Lives and Major Opinions

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## RECENT BOOKS

### BOOK REVIEWS

THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969: THEIR LIVES AND MAJOR OPINIONS. Edited by *Leon Friedman* and *Fred L. Israel*. New York: Chelsea House Publishers and Bowker & Co. 1969. 4 Vols. Pp. xiv, 3,373. \$110.

To students of the use and abuse of book titles, it may come as a surprise that these four massive volumes are exactly what one would expect from the title. They contain biographies, or, more precisely, biographical sketches, of ninety-seven of the ninety-eight men<sup>1</sup>—no woman has yet been appointed to the High Bench—who have served as Justices of the Supreme Court of the United States. Appended to each biography are two opinions, although occasionally there is but one and sometimes there are three, selected by the biographer as most representative of his subject's important judicial efforts. The 3,200 pages of text afford an interesting, yet formidable reading assignment—one of sufficient magnitude to explain the relative tardiness of this book review notwithstanding the reviewer's great capacities for procrastination.

The authors of the biographical sketches represent a wide range of professional talents. The bulk of the material, however, comprising fifty-eight of the ninety-seven articles, was contributed by twelve American historians, most of them young ones. Indeed, four of these, Frank Otto Gattel, David Brewer, James F. Watts, and Fred Israel—one of the two editors of these volumes—accounted for thirty-one of the exercises. Law professors, on the other hand, were responsible for only seven of the sketches, and none of them contributed more than one. Six political scientists did nine of the studies, six practicing lawyers wrote sixteen essays, and four journalists authored seven of the pieces.<sup>2</sup>

Some of the authors were particularly well chosen. Paul Freund, of course, would have admirably performed any assignment, but Oliver Wendell Holmes proved a particularly felicitous subject for him. Certainly his is the choice essay in the collection. Alpheus T. Mason wrote sketches on three Justices who had already been the subjects of full-length studies by him: Louis Dembitz Brandeis,<sup>3</sup> Harlan Fiske Stone,<sup>4</sup> and William Howard Taft.<sup>5</sup> Donald Morgan

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1. Mr. Justice Blackmun, the most recent appointment to the Supreme Court, is not included in the coverage of the book.

2. This statistical reaction, however primitive, seems to me a not unlikely response to this collection. At least for me and, as I shall suggest, probably for others, the comparative aspects of the volumes inspire the greatest interest and make possible an important contribution to an understanding of the Court as an institution.

3. A. MASON, *BRANDEIS, A FREE MAN'S LIFE* (1946).

4. A. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* (1956).

5. A. MASON, *WILLIAM HOWARD TAFT, CHIEF JUSTICE* (1965).

was able to epitomize his excellent work on William Johnson.<sup>6</sup> Stephen J. Friedman had published a collection of William J. Brennan's papers before preparing the essay on Brennan for this collection.<sup>7</sup> The late Robert G. McCloskey dealt with figures that had become particularly familiar to him through his earlier books on James Wilson<sup>8</sup> and Stephen Field.<sup>9</sup> Two of the other authors had a similar base on which to build: Gerald Dunne's book on Joseph Story will probably appear even before this review is published; and Andrew Kaufman's biography of Benjamin Cardozo ought to be forthcoming shortly afterward.

Occasionally, however, the editors seem to have avoided assignments that seemed most logical. John P. Frank wrote three of the articles, on Hugo L. Black, William O. Douglas, and Frank Murphy. But he did not do the piece on Justice Daniel, who was the subject of one of his books.<sup>10</sup>

Especially because my own contribution (Vol. IV, p. 2,543) on Robert H. Jackson is numbered among the studies in these volumes, it would be nice to be able to say that all of them are of uniformly high quality, matching or at least approximating the pace set by Professor Freund. Unfortunately, not all of the articles adhere to those rigid standards of scholarship or afford such insights into the character and function of the Justices scrutinized. Indeed, much of the volumes consists of studies that, except for their length, would not seem out of place in the *Encyclopedia Britannica*.

In their preface, which precedes a charming but irrelevant introduction, the editors set forth their grand objectives in putting the collection together. After quoting the lamentations of Henry Steele Commager and Felix Frankfurter about the lack of "acceptable biographies" or "penetrating studies" of the Justices of the Supreme Court, the editors tell us:

Excellent biographies of some recent Court members and a handful of nineteenth-century Justices have been published. But so little has been written on fully half the men who have wielded the nation's highest judicial power—even though they were important political figures in their own time, friends and advisers to Presidents, and leaders of the bar in a society traditionally deferential to its lawyers—that today many legal scholars hardly recognize their names. (Vol. I, p. v.)

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6. D. MORGAN, *JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER* (1954).

7. *AN AFFAIR WITH FREEDOM, A COLLECTION OF THE SPEECHES AND OPINIONS OF JUSTICE WILLIAM J. BRENNAN, JR.* (S. Friedman ed. 1967).

8. *THE WORKS OF JAMES WILSON* (R. McCloskey ed. 1967).

9. R. MCCLOSKEY, *AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE* (2d ed. 1964).

10. J. FRANK, *JUSTICE DANIEL DISSENTING, A BIOGRAPHY OF PETER V. DANIELS, 1784-1860* (1964).

Certainly no one can quarrel with the proposition that many of the Justices remain obscure, if not anonymous. Names such as Thomas Todd, Gabriel Duvall, Smith Thompson, John McKinley, Ward Hunt, William B. Woods, and Howell E. Jackson—just to suggest some examples—are hardly household words, even in the households of constitutional scholars. The second part of the editors' statement of reasons for engaging in this enterprise, however, is of more doubtful validity:

Many of these "unknown" jurists authored key constitutional decisions, or at least, as collaborators or opponents, helped shape the great opinions of the judicial giants such as Marshall, Story, Taney, Bradley and Holmes. Who were these men? How did they rise to the top of the judicial ladder? Why have they been forgotten? Why did they support or oppose the more luminous stars of the Court? What role did they play in the development of the most powerful judicial institution in world history? These ninety-seven essays attempt to answer these questions. (Vol. I, p. v.)

It is regrettable but understandable that, measured by the editors' objectives, most of the studies must be regarded as failures. With regard to some of the subjects, even the most talented biographer probably could not have provided answers to the questions posed. In most cases, there were two essential barriers that could not be overcome. The first was a lack of space. Maybe a Freund, or a Frankfurter—as he did with his famed essay on Holmes in the *Dictionary of American Biography*<sup>11</sup>—can encapsulate the career of an important judicial figure in a very short space. But it is extraordinarily difficult for a biographer to tell what a man was like, and at the same time to answer the questions that the editors wanted answered, in the compass of a few dozen pages. The lesson that would seem to come from these volumes is that such an achievement is possible, if at all, only when the author has brought a deep and intimate concern with his subject to the preparation of his study.

The second problem was even more difficult. The life of a Supreme Court Justice is essentially a private life. The deliberations of the Court are unrecorded, except as they may be revealed in the private papers of the participants. For the most part, such private records were either not maintained or deliberately or accidentally destroyed. Owen J. Roberts destroyed his papers; Hugo Black threatens to do the same with his; Cardozo's papers were carelessly lost; and only Frankfurter's intervention prevented the incineration of Brandeis' court records. For the Justices whose anonymity had heretofore been preserved, there was usually an absence of personal data on which to recreate any meaningful story of their roles on the

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11. Vol. IX, at 169 (D. Malone ed. 1932).

High Court. Putting bits and pieces of a man's life together from other sources is a difficult and time-consuming task—one that could not realistically be expected of those biographers whose interests were both created and fulfilled by writing single chapters for these volumes.

To say that these volumes failed to achieve their stated purpose, however, is not to say that they do not perform an important service. Wittingly or otherwise, the editors have made a significant contribution to what historians who can spell it or pronounce it call "prosopography":

Prosopography is the investigation of the common background characteristics of a group of actors in history by means of a collective study of their lives. The method employed is to establish a universe to be studied, and then to ask a set of uniform questions—about birth and death, marriage and family, social origins and inherited economic position, place of residence, education, amount and source of personal wealth, occupation, religion, experience of office, and so on.<sup>12</sup>

If one is seeking not insights into personalities or detailed analyses of the roles of individuals in the collegial task that falls to Supreme Court Justices, but rather a composite picture of those who have performed this distinctive institutional function, these books are indeed most informative.

Whatever the deficiencies in the various papers' answers to the questions that the editors sought to have explored by the biographers, the questions stated above in the definition of prosopography have almost all been answered in each of the sketches. One might say of these volumes what Professor Stone said of the *Dictionary of National Biography*—that they afford "a mass of biographical information already collected and in print, and merely waiting to be analyzed, collated and used."<sup>13</sup> At the same time, I hope that one will not find an analogy to Professor Stone's description of earlier collections of such data: "In terms of psychological motivation, these obsessive collectors of biographical information belong to the same category of anal-erotic males as the collectors of butterflies, postage stamps, or cigarette cards; all are byproducts of the Protestant Ethic."<sup>14</sup>

As a matter of fact, these volumes have already made an excellent beginning on the prosopographic process. To some, the most interesting part of these books may prove to be that portion of the appendix written by Professors Albert Blaustein and Roy Mersky entitled

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12. Stone, *Prosopography*, 100 DAEDALUS 46 (1971).

13. *Id.* at 49.

14. *Id.*

"The Statistics on the Supreme Court" (Vol. IV, p. 3,187), to which are added several charts and tables that I found fascinating. There, gathered for prosopographers of the High Court, are what the authors of the appendix call "background statistics"—*i.e.*, data on family matters such as ancestry, religion, marital status, and parental status; on education; and on occupational experience. It will be interesting to see what conclusions prosopographers will be able to draw from certain of the facts: for example, that four of the Justices—Livingston, Curtis, Salmon P. Chase, and Douglas—were each married three times, while eight—Baldwin, Blatchford, Moody, McReynolds, Clarke, Butler, Cardozo, and Murphy—were bachelors; that four Justices—William Johnson, Todd, Matthews and Fuller—had eight children each, while the "fourteen Chief Justices had the amazing total of eighty-two children" (Vol. IV, p. 3,196), with Marshall, the greatest Chief Justice of them all, having ten children.

For those whose hearts beat a little faster every time a vacancy occurs on the High Bench, this appendix contains interesting data on the positions occupied by the men who were appointed just before they received the call: thirty-eight were judges, twenty-four were in private practice, seven were United States Attorneys General, seven held other Cabinets posts, six came from the United States Senate, four held other government positions, three were state governors, two were in the House of Representatives, two were Solicitors General, and one was a Deputy Attorney General. Only two Justices were professors of law at the time of their elevation—William Howard Taft, a former President of the United States, and Felix Frankfurter—and for both the academic chair was only a part-time endeavor.

Even the opinions set out in these volumes, which tend to make for tedious reading since they are out of context, may provide many a computer with the opportunity to discover how much of each opinion was from the pen of the Justice who signed it and how much, if any, was a contribution of one of his colleagues. It may be that the samples included, however, will not be sufficient for this task.

These volumes, then, afford that minimum of information that is available in any good biographical collection. They reveal details that are readily recordable about the men who have served in an exalted post. The editors obviously aspired to the impossible and, of course, they failed. But what was intended as a culmination is, instead, a promising beginning. The lode of ore is here; it remains only for those with the new machines of modern historiography to refine it, perhaps into something more meaningful than even the editors had hoped to accomplish.

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