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2001

Book Review: Division and Discord: The Supreme Court Under Stone and Vinson, 1941-1953. by Melvin I. Urofsky

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Recommended Citation
Powe, L. A. Scot, "Book Review: Division and Discord: The Supreme Court Under Stone and Vinson, 1941-1953. by Melvin I. Urofsky" (2001). *Constitutional Commentary*. 589.
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DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-1953. By Melvin I. Urofsky.[1] University of South Carolina Press. 1997. Pp. xv, 298. $39.95 cloth; $21.95 paperback.

L.A. Powe, Jr.[2]

If either a colleague or a student asked me to recommend a book on the Supreme Court between the Court-packing crisis and the Warren years, I would unhesitatingly select Melvin I. Urofsky's *Division and Discord*. Part of the University of South Carolina Press series on the Chief Justiceships of the United States Supreme Court, *Division and Discord* admirably describes the justices and the cases of the Stone (1941-46) and Vinson (1946-53) Courts,[3] emphasizing it was an era of transition from the old order to the Warren Court.

Never does naming a Court after its chief justice look sillier than during this era, and Urofsky knows it. Thus he focuses on the major players, Hugo Black and Felix Frankfurter, primarily, and William O. Douglas and Robert H. Jackson, secondarily. These major intellects—attached to huge egos—were simply too much for Harlan Fiske Stone and, especially, Fred Vinson to keep calm, much less tame.[4] The book opens with an excellent chapter on the men, their personalities, and their battles—both jurisprudential and personal. In that era, the Court was filled with men with broad and extensive public service (rather than simply experience on a court of appeals), and the justices were able to write their own opinions (rather than delegate them to twenty-seven year-old law review alums).[5]

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1. Professor of History, Virginia Commonwealth University.

2. Anne Green Regents Chair, The University of Texas School of Law. This review was commissioned in the summer of 2000 for the paperback edition. _ ed.

3. When Fred Vinson took his seat, the Court became the youngest in American history and the least experienced once experience had become possible. David N. Atkinson, *Leaving the Bench: Supreme Court Justice at the End* 191 (U. Press of Kansas, 1999).

4. "In part, as we shall see, the force of Frankfurter's views led Black and Douglas to develop an opposing jurisprudence, and in the clash of those ideas, first Harlan Stone and then Fred Vinson could do little more than try to keep the conferences from exploding." (pp. 32-33)

5. Until the 1947 Term the justices also had but a single clerk; then all except Douglas went to two. L.A. Powe, Jr., *Go Geezers Go: Leaving the Bench*, 25 Law & Social Inquiry 1227, 1238 (2000).

Black and Frankfurter were strong advocates and ceaseless proselytizers who took losing hard and personally. Both shared the New Deal revulsion at the old order. Their conflict brought out the best in each other as each created a jurisprudence that was intended to limit judicial discretion.

Black came to the Court with a strong populist record in the Senate, and his populism continued on the Court, where he found a jurisprudential style that fit his views. He saw the Constitution as a Protestant document to be read and understood according to its original intent. It turned out that (in Black's reading of history) the Framers had populist views, too, nicely matching his own. His demand that the First Amendment be interpreted literally and the Fourteenth Amendment be deemed to incorporate the Bill of Rights counterbalanced Frankfurter's view that all constitutional provisions save one[6] be interpreted with a deferential reasonableness standard.

Frankfurter brought with him enormous experience and the not unreasonable view that he was the intellectual heir to Holmes and Brandeis and therefore the natural leader of the Court. It just didn't work out that way. As Urofsky shows, had Frankfurter displayed better (any?) interpersonal skills, he might well have been more persuasive within the Conference.[7] Instead, his "rage at the failure of the other justices to follow his lead often turned splenetic." (p. 34) Because he knew so much about both the Court and constitutional law, he believed reasonable men could not differ with him; instead they were "the Axis"[8]—"enemies." (p. 40) Frankfurter never understood how his notes and diaries would read to those who did not know and like him personally, and Urofsky consistently lets Frankfurter hang himself with his own words.

The Douglas of this era is not as ascerbic, as liberal,[9] or as much a soloist, as the Warren era Douglas was. Instead he is a younger[10] man wanting to get back to the Executive Branch,

6. The Establishment Clause. Frankfurter dissented in both *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947), and *Zorach v. Clauson*, 343 U.S. 306 (1952), and concurred in *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948). These Establishment Clause opinions stand in very stark contrast to Frankfurter's general jurisprudential approach as well as in complete opposition to his views on federalism.

7. He seemed to enjoy going after Frank Murphy in the same way that some children turn turtles on their backs.

8. Black, Douglas, and Frank Murphy. (p. 40)

9. L.A. Powe, Jr., *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 Colum. L. Rev. 371 (1974).

10. I guess I have to note that Urofsky mistakenly makes Douglas the youngest ap-

preferably as FDR's successor.[11] Until the domestic security cases arise, Douglas looks like the center of the Court, albeit more liberal on business regulation and federalism[12] and more conservative in the wartime disloyalty cases.[13] With the exception of his creativity in *Skinner*,[14] Douglas plays a strong second-fiddle to the Hugo Black who was like a needed older brother.

If for no other reason, this book would be welcome because it necessarily reminds us what fun it can be to read a Jackson opinion. They are just delights; perhaps he was fortunate in never completing law school—the last such Justice in our history. His time on the Court was nevertheless marred by his ambitions and his conflicts with the equally combative Black. Jackson believed that FDR's promise that he would be Chief Justice (p. 9) should have been fulfilled by Truman; he went to Nuremberg as chief American prosecutor and then blew up when Truman selected Vinson for the center seat (pp. 140-45) (a position clearly necessitated by the public battle over whether Black should have participated in the portal-to-portal case[15] where he cast the deciding vote).

While the Stone and Vinson Courts were consolidating the New Deal revolution and initiating protection of civil rights and civil liberties, their dominant motif was war, World War II for Stone, the Cold War for Vinson. In his preface Urofsky states

pointee ever. (p. 23) That honor is Joseph Story's; William Johnson holds second place, and Douglas is in third, the youngest of the twentieth century.

11. Nevertheless, he turned down Truman's offer of the vice-presidency in 1948, probably on the assumption that Truman could not win. His rejection of Truman was not gracious, either, since he still fumed at Truman's luck in 1944 and quipped to Senator Burton Wheeler that he wouldn't be a number two man to a number two man. James F. Simon, *Independent Journey: The Life of William O. Douglas* 274 (Harper & Row, 1980). The quip came back to Truman, and he was not amused.

12. But see his dissent in *New York v. United States*, 326 U.S. 572 (1946), which leads to his dissent in *Maryland v. Wirtz*, 392 U.S. 183 (1968), and would place him in harmony with the "new federalism" decisions of the Rehnquist Court. Go figure; I've tried and haven't been able to.

13. *Viereck v. United States*, 318 U.S. 236 (1943); *Hartzel v. United States*, 322 U.S. 680 (1944); *Cramer v. United States*, 325 U.S. 1 (1945); *Haupt v. United States*, 330 U.S. 631 (1947).

14. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

15. *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161 (1945), extended the Fair Labor Standards Act to the time the miners entered the mine rather than when they started work. Congress overturned the decision. The UMW attorney had formerly been a partner of Black's, hence the issue of recusal on a petition for rehearing *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 897 (1945). Black and Jackson eventually made up, which is far more than Douglas and Frankfurter ever did with their feud (which seems personality-driven in the extreme).

that with the exception of the Japanese internment[16] and Nazi saboteur[17] cases and then *Dennis*,[18] "this is not an era that grabs the observer's attention." (p. xiii) He may undersell his era. To pick three cases, one everyone knows, one most know, and one that virtually all have forgotten—and all with an opinion by Jackson—consider: (1) What constitutional law student ever forgets Farmer Filburn's wheat?[19] (2) *West Virginia State Board of Education v. Barnette*[20] is as good as any opinion in the *United States Reports*. (3) And the Court's absurd results when confronting quickie[21] Nevada divorces (at a time the other 47 states required cause) deserves to be remembered and laughed at.[22] As usual Jackson's pen helps: the Court's judgment "permits [Herbert] Rice to have a wife who cannot become his widow and to leave a widow who was no longer his wife."[23] (p. 136)

There is no way to undo the Court's performance with the Japanese internment. The best that can be said is that Franklin Roosevelt and Earl Warren—not to mention John McCloy in the War Department[24]—come off worse. Perhaps if Black and Douglas had been further along in their careers or the president had been someone more like Nixon or Clinton, the Court could have declared the internment unconstitutional. But those are ifs

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16. *Korematsu v. United States*, 323 U.S. 214 (1944).

17. *Ex parte Quirin*, 317 U.S. 1 (1942). Frankfurter, who was in intense consultations with the War Department over what to do with the captured saboteurs, did not recuse himself. (pp. 60-61)

18. *Dennis v. United States*, 341 U.S. 494 (1951).

19. *Wickard v. Filburn*, 317 U.S. 111 (1942).

20. 319 U.S. 624 (1943).

21. Six weeks in residence plus an intent to stay at least as long as necessary to get the first available transportation home.

22. That's *Williams v. North Carolina*, 317 U.S. 287 (1942), and *Williams v. North Carolina* 325 U.S. 226 (1945), where two North Carolinians, each with a twenty-year marriage became new Nevadans when they made their "domicile" at the Alamo Auto Court in Las Vegas. *Williams I* overturned their bigamous cohabitation convictions because North Carolina had to give full faith and credit to the Nevada divorce; *Williams II* held the conviction was valid because North Carolina could decide for itself whether the divorced and then married couple had in fact established a Nevada domicile. Stone, Roberts, Reed, Frankfurter, and Murphy joined each majority.

23. *Rice v. Rice*, 336 U.S. 674, 680 (1949) (Jackson, J., dissenting). The issue was inheritance because Herbert died intestate. Like Otis Williams and Lillie Hendrix of *Williams* fame, he was ending a twenty-year marriage. But there were some distinctions from *Williams*: Hermoine, Herbert's new wife, did not accompany him and came to Reno for their marriage some three weeks after his divorce; and the pair never returned to Connecticut, Herbert dying some six months into the marriage. Jackson, who had been adamant that Williams and Hendrix had not acquired a Nevada domicile, quite reasonably believed that Rice had. Black, Douglas, and Rutledge also dissented.

24. See generally Peter Irons, *Justice at War* (Oxford U. Press, 1983) (discussing the Japanese-American internment and the Supreme Court cases that validated it).

that did not happen. If one can exclude the inexcusable, then the Court, like the federal government in general, performed well during World War II. "[I]ts views on defining treason, denaturalization, the precedence of civilian courts, and freedom from an imposed flag salute have become staples in American constitutional law." (p. 84)

Amazingly, the Japanese internment excluded again, the Court performed far better with respect to civil liberties during World War II than it did in the early Cold War. Whether it is *Douds*[25] or *Dennis* or the rush to see that the Rosenbergs were executed on schedule, (pp. 178-83) there is little to say for the Court beyond Black's closing note in *Dennis*: maybe in calmer times things will get better—as they eventually did some *nine* years after the Senate condemned Joe McCarthy.[26]

The full chapter devoted to labor issues, including Truman's personal battles to keep the coal mines[27] and the steel mills[28] working, is a clear indication that Stone's and Vinson's time was another era, when legislatively and judicially organized labor initially had a dominance and then the pendulum swung. The legislative pendulum, with Republicans and the Taft-Hartley Act, is well known. But a lesser known judicial swing was at work, too, as the Court was unwilling both to apply *Lochner* analysis to anti-labor legislation and to extend First Amendment protections from peaceful picketing to coercive activities. In the end, labor may have demanded too much; at bottom, as Urofsky notes, none of the New Dealers was an across-the-board champion for labor (as most of them were for Roosevelt). (p. 212)

The chapters on the rich Black-Frankfurter debate over incorporation and the meaning of due process as well as "The Road to *Brown*" cover well-known materials in a traditional manner. As is typical in the book, Urofsky's case analysis is excellent.[29]

There is one case where I differ significantly from Urofsky—*Everson*.[30] I think he too readily accepts Jefferson's famous Establishment Clause metaphor—that wall of separation between church and state—articulated by both its majority and dis-

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25. *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).
26. Lucas A. Powe, Jr., *The Warren Court and American Politics* 154-56, 218-21, 310-17 (Belknap Press, 2000).
27. *United States v. United Mine Workers*, 330 U.S. 258 (1947).
28. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
29. His footnotes helpfully highlight the relevant secondary literature.
30. *Everson v. Bd. of Education*, 330 U.S. 1 (1947).

senters. In Black's words—and the dissenters' outcome—the "wall must be kept high and impregnable."[31] While happily mentioning Europe's religious wars, Black was tying the Establishment Clause to the legal position articulated in but a single state (through its most articulate spokesman).

Metaphor as constitutional doctrine, whatever its literary attraction, invites chaos,[32] and the "wall of separation" has been under sustained attack now for two decades and not without reason. The *Everson* justices were from an educated cohort for whom organized religion had acquired a bad name, and they lived in an intellectual milieu where intense anti-Catholicism was a given. Anti-Catholicism was a fully acceptable prejudice because it had been lifted from its bigoted KKK nature to an intellectual and academic construct[33] where the Catholic religion was seen as antithetical to democratic values and, indeed, positively conducive to fascism.[34] At least four[35] of the justices—Black, Frankfurter, Rutledge, and Burton—were *expressly* aware of this anti-Catholic movement and favorably disposed toward it.[36] It is inconceivable that it did not influence the rhetoric chosen to reject the standard Catholic position of a union of church and state.[37] With organized religion in better shape than in *Everson's* era (the former so-called "mainstream" Protestant denominations excepted) and anti-Catholicism a relic of pre-Vatican II, it is no wonder that *Everson* seems less a statement of eternal truths (or original intent) than simply a snapshot encapsulating the attitudes of a by-gone era.

While I would have emphasized politics more, Urofsky's choices are all perfectly reasonable. He moves among opinions,

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31. Id. at 18.

32. "Black's rhetoric in *Everson* was simultaneously inflammatory and unsustainable." Powe, *The Warren Court* at 182 (cited in note 26). Using Holmes' "marketplace of ideas" metaphor as the foundation for First Amendment doctrine succeeds no better.

33. Paul Blanshard, *American Freedom and Catholic Power* (Beacon Press, 1949). A Book-of-the-Month Club selection, it was widely and favorably reviewed in both academic journals and the popular press.

34. John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 J. Am. Hist. 97 (1997).

35. I am certain Douglas should be added to the four.

36. Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43, 57 (1997).

37. As late as 1962 (prior to the commencement of Vatican II but after the election of John Kennedy), an article in Atlantic Magazine could note that many Americans were deeply distrustful of the Catholic church on the matter of church and state. Francis J. Lally, *Points of Abrasion*, 210 Atlantic 78 (August 1962).

the justices' internal papers, and secondary sources and succeeds in doing what he sets out to do.

If I have a criticism, it is minor. *Division and Discord* is a whig history; that is, the book takes as a given what came afterwards and attempts to show how the foundations—in this case for the Warren Court—were being laid. Yet the Warren Court was hardly inevitable. Warren himself could have continued to be the former prosecutor and governor, the Warren of *Barsky*[38] and *Irvine,*[39] rather than the liberal icon so revered. Attorney General Herbert Brownell could have followed President Eisenhower's directive to find a conservative Catholic jurist instead of breaching it and choosing William J. Brennan.[40] Felix Frankfurter could have accepted President Kennedy's entreaties about retiring, and it would have been Paul Freund instead of Arthur Goldberg.[41] On a more important level, if Martin Luther King, Jr., had not come up with his "children's crusade" in May 1963, he would have been defeated in Birmingham just as he had the previous year in Albany, Georgia,[42] and the Civil Rights Act would have been delayed, with a chance for the constitutional doctrine that trespass statutes trumps peaceful demonstrations to become the law in the interim.[43] In short, the Warren Court needed events to fall in particular ways, and worrying about whether prior Courts were a prelude necessarily ignores a number of contingencies.

Yet, even though Urofsky has written a whig history, *Division and Discord* does the Stone and Vinson Courts justice on their own terms. It is a book we all should have in our libraries.

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38. *Barsky v. Bd. of Regents*, 347 U.S. 442 (1954).
39. *Irvine v. California*, 347 U.S. 128 (1954).
40. Powe, *The Warren Court* at 89-90 (cited in note 26).
41. Id. at 211.
42. Id. at 223-25; Taylor Branch, *Parting the Waters: America in the King Years, 1954-63* at 753, 756-802 (Simon & Schuster, 1988); David J. Garrow, *Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference* 173-264 (William Morrow & Co., 1986); John Morton Blum, *Years of Discord: American Politics and Society, 1961-1974* at 106 (W. W. Norton & Co., 1991).
43. Black's majority coalition in *Adderley v. Florida*, 385 U.S. 39 (1966), had already come together in *Bell v. Maryland*, 378 U.S. 226 (1964). It took Brennan's heroic efforts and all his creativity to pull Tom Clark and Potter Stewart loose in order to reverse those sit-in convictions. Powe, *The Warren Court* at 227-29 (cited in note 26).