

1985

Book Review: The Constitution: That Delicate Balance. by Fred W. Friendly and Martha J. H. Elliott.

Mark Silverstein

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**Recommended Citation**

Silverstein, Mark, "Book Review: The Constitution: That Delicate Balance. by Fred W. Friendly and Martha J. H. Elliott." (1985).  
*Constitutional Commentary*. 663.  
<https://scholarship.law.umn.edu/concomm/663>

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at the heart of American education is an ambiguity that we have never resolved, in all likelihood cannot and probably should not resolve. Is the education of the child fundamentally an extension of home, parents, community, and sect? Or is it fundamentally a process of socialization into citizenship, into the "public culture," and into a set of life choices that transcend the boundaries of one's immediate circumstances? It can be either; for most of us, it is some of each; but we aren't likely ever to reach consensus about how much it is the one and how much the other. Hence we aren't likely ever to settle the profound political controversies that underlie and surround the narrower issues examined in this book.

**THE CONSTITUTION: THAT DELICATE BALANCE.**  
By Fred W. Friendly<sup>1</sup> and Martha J. H. Elliott.<sup>2</sup> New York:  
Random House. 1984. Pp. 339. \$17.95.

*Mark Silverstein*<sup>3</sup>

Soon after the Supreme Court's decision in *Powell v. Alabama*, Felix Frankfurter (then America's best known Harvard law professor) wrote a piece for the *Times* explaining the meaning and significance of the decision.<sup>4</sup> Within a few days he received a note from Justice Harlan Fiske Stone:

I liked your piece in the Times about the Scottsboro case. I doubt if you realize how important it is that judicial action be interpreted to the common man. Just at the moment I am getting violent letters from many people who seem to think that in the Scottsboro case we passed on the guilt or innocence of the petitioners, and starting with that assumption the writers draw the conclusion that the Supreme Court has now started out on a course which will afford no protection to the innocent victims of assault.

Frankfurter quickly replied:

How generous you are in your encouragement, that you should note so modest a piece as the one in the Times about the *Scottsboro* case. When the request for it came from the Times, urging the need of a correct exposition of the meaning of the decision, I was under great pressure. . . . But just because I feel as strongly as you do about the importance of clarifying judicial action to the laity, I felt it in the nature of a public duty to yield to the request of the Times.

Doubtless I do not realize the extent of such a need, certainly as you are made to feel it from the correspondence which comes to you from time to time. Indeed I

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1. Edward R. Murrow Professor of Journalism, Columbia University.
  2. Instructor, Columbia University Graduate School of Journalism.
  3. Assistant Professor of Political Science, Boston University.
  4. Frankfurter, *A Notable Decision*, N.Y. Times, Nov. 13, 1932, § 2, at 1.

was surprised at the number of letters that the Times piece brought me from otherwise very intelligent laymen who had queer notions about what was decided until—at least so they said—they read the Times.<sup>5</sup>

The exchange between Frankfurter and Stone points to one of the great unknowns of constitutional sociology. How does the public come to understand developments in constitutional law? Despite attempts by jurists like Hugo Black to make opinions understandable by all, the number of citizens who take the time and make the effort to read important opinions must be infinitesimal. Scholarly literature on public law and judicial behavior is often dry and technical, impenetrable even to many students of the law. To the typical citizen, the men and women who staff the judiciary remain both nameless and faceless.<sup>6</sup> If indeed the Supreme Court is engaged in “a continuing colloquy . . . with society at large”<sup>7</sup> one might well wonder how many of us are really listening.

We need an intermediary between the Court and the public. For Frankfurter that intermediary was the press; for much of his judicial career he was in constant communication with the editors of America’s major newspapers, continually urging better coverage of the Court. Years after Frankfurter’s death, Hugo Black took a much more direct approach. In 1968, when Gallup polls showed a marked decline in public respect for the Supreme Court and after a newly elected President made the Court a prime campaign issue, Black appeared in an unprecedented hour-long interview on CBS. Unquestionably one reason for Black’s willingness to break with tradition was a perceived need to defend the Court and explain its actions to the public. In the more recent past, several members of the Burger Court have been strikingly candid in their statements to reporters.

The question of how judicial action is interpreted to the public is an important one and deserves increased scholarly attention. I suspect that one of the most important sources of public education is the popular literature of Court and Constitution. The classic of the genre is Anthony Lewis’s *Gideon’s Trumpet*. An educated guess is that for a generation or so the story of Clarence Earl Gideon and his battle to secure counsel has been the primary source material on the workings of the Supreme Court and the American legal system. I still use the book in my introductory courses about American gov-

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5. The letters appear in the Felix Frankfurter and Harlan Fiske Stone collections at the Library of Congress.

6. Even law students seem remarkably ignorant about the lives and thoughts of Supreme Court Justices. See Bryden, *Teaching Constitutional Law: Homage to Clio*, 1 CONST. COMM. 131 (1984).

7. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 240 (1962).

ernment and the judicial process. I'm often struck by how many students were introduced to the book in high school. What Lewis achieved in *Gideon* was an immensely readable, exciting, human story which conveyed to the lay reader a good deal about the Supreme Court and constitutional law. Similar works, unfortunately, are all too few.<sup>8</sup>

*The Constitution: That Delicate Balance* seeks to redress that deficiency. The authors' goal is to "provide a way for all citizens—not just lawyers and judges—to take part in the great constitutional debates of our time." To further this admirable goal, sixteen essays are presented, each about a landmark constitutional case. The structure of each essay is basically the same. First the factual history of the case is developed, then the constitutional background and precedents are examined, and finally the decision of the Court is explained and its significance determined. There is nothing unique in this formula; it has been successfully employed before.<sup>9</sup> What distinguishes this book is the authors' understanding that beneath the legal theory and stale drama of constitutional adjudication are the more human tales of courage and cowardice, strength and frailty, wisdom and foolishness. By concentrating on this human drama, Friendly and Elliott not only make the landmarks of constitutional development more accessible but they give to the study of constitutional law and history the vitality it deserves.

Hence, there is much to be learned from this work, even for the constitutional scholar. The discussions of the intricacies of constitutional law are limited but this is to be expected given the book's audience and the wide range of issues it attempts to cover. Where the book really shines is in its account of the stories behind the cases. When possible, the authors interviewed participants in the drama. We hear the anger and frustration of Norma McGorvey (better known to students of constitutional law as Jane Roe) as she recounts a horrible rape and subsequent attempts to secure an abortion. We meet a young admissions officer at the University of California, Davis, Medical School, uncomfortable with the Davis admission policies, who suggests to a rejected applicant, Allan Bakke, that he consider questioning the legality of quota-based admissions. We learn that the famous case of *DeJonge v. Oregon* might never have reached the Court but for the efforts of a young Portland attorney, Gus J. Solomon, who preferred a Communist

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8. Among the works I would include with Lewis's classic are B. MAHONEY & A. WESTIN, *THE TRIAL OF MARTIN LUTHER KING* (1974); R. KLUGER, *SIMPLE JUSTICE* (1976); F. FRIENDLY, *MINNESOTA RAG* (1981); P. IRONS, *JUSTICE AT WAR* (1983).

9. See, e.g., *QUARRELS THAT HAVE SHAPED THE CONSTITUTION* (J. Garraty ed. 1964).

freed as a symbol of American justice rather than jailed as an example of capitalist oppression. Years later, Solomon's efforts on behalf of the Communist DeJonge would be cited by his foes in a futile attempt to block his appointment to the federal bench.

This is not the stuff found in the typical constitutional law textbook. But the human stories recounted by Friendly and Elliott are as much a part of our constitutional heritage as the words of a Marshall or a Holmes, a Brandeis or a Warren. One might quibble with the selection or omission of a case or wish that the essays had been arranged in a more logical sequence. But the goal of making the Constitution more accessible to the citizenry is a noble one and Friendly and Elliott have made an important contribution.