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Book Review: William Wayne Justice-A Judicial Biography. by Frank R. Kemerer.

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WILLIAM WAYNE JUSTICE — A JUDICIAL BIOGRAPHY. By Frank R. Kemerer.[1] Austin: The University of Texas Press. 1991. Pp. 503. $29.95.

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This is a good book, not a great book. It is about a good man, who some would say is a great judge. I would say that William Wayne Justice is the kind of United States District Judge that Earl Warren would have been, had he sat on the trial court bench.[3] This review, however, is about the book, not the Judge.[4]

This book is not a judicial biography on the order of Judge Posner's book about Justice Cardozo.[5] There, the author sought to look at how Justice Cardozo's reputation was formed and to trace his influence as a thinker and a jurist, both qualitatively and quantitatively. That work ambitiously sought to create a new genre of judicial biography as a study in reputation.

Professor Kemerer conceived his book as a different sort of "*judicial* biography," by which he meant to focus more on Judge Justice's decisions than on his personal life. He spends four chapters and some 111 pages, however, writing a linear account of Judge Justice's life and legal career. When I began to read this first part, I expected to agree with Judge Justice's own self-effacing concern expressed to the author: "I really don't think my somewhat colorless background and lifestyle would be sufficiently interesting to be wor-

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3. I leave my reader to decide whether this comparison is a compliment. The author apparently means to flatter Judge Justice by comparing him to William O. Douglas, and the Judge would take that as a compliment, for he "reveres" Justice Douglas. This would *not* be a compliment to my mind. See Ruth Marcus, *Brennan Interviewed in Playboy; Douglas Faulted On Later Years*, Washington Post A7, col. 3 (June 3, 1991).

4. That people line up to be the friend or the foe of Judge Justice should come as no surprise.

> Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.
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> But judges are also people of peace. Among warring sects, each of which wraps itself in the mantle of a law of its own, they assert a regulative function that permits a life of law rather than violence. The range of the violence they could command (but generally do not) measures the range of the peace and law they constitute.

Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 Harv. L. Rev. 4, 53 (1983); see also Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 Va. L. Rev. 1141 (1988).

5. Richard A. Posner, *Cardozo — A Study in Reputation* (U. of Chi. Press, 1990); see also Robert F. Kennedy, Jr., *Judge Frank M. Johnson, Jr.* (Putnam, 1978).

thy of a biography." I was wrong. Kemerer paints a thoughtful and engaging portrait of a judge who is best understood against his family background, education, and career at the bar.[6]

In the second part of the book, the author chronicles Judge Justice's major decisions in eleven areas of public policy in as many chapters,[7] including commentary from critics and supporters. Several of these chapters deal with cases which could support their own book-length study, prison reform being one example.[8] When Professor Kemerer deals with some of these topics, his lack of professional training in law sometimes results in predictable and superficial analysis. I do not want to take a cheap shot at him, however, for on the whole his legal analysis is sound and his expertise in education law noticeably deepens the analysis in those related chapters. Furthermore, he does a first-rate job of describing the arcana of legal procedures and federal court jurisdiction for readers who lack a legal background.

One of the unique features of this book is the author's use of direct quotes from the subject.[9] He recorded extended interviews of Judge Justice; quotations are sprinkled on nearly every page of the biographical part, and Judge Justice regularly editorializes "in his own words" about his decisions in the second part. This feature almost gives the book an "as-told-to" quality. Furthermore, Kemerer might have been subject to criticism for appearing to be in awe of his subject, but this he explicitly acknowledges. From beginning to end, this book is an admittedly admiring view of a controversial judicial figure and his judicial work.[10]

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6. In a post-Freudian world, there can be no serious doubt that a judge's . . . personal values influence the way in which he or she interprets the Constitution. Society can require that judges be neutral between parties to a case; but no one can ask a mature adult to be neutral between ideas that go to the heart of political philosophy. Not only do we all carry the effects of early childhood, religious and moral instruction, family relations, and social class, but we are affected by our more formal education and our experiences through life. These factors shape the values that we apply to choices; they also influence the way in which . . . we make choices.

Walter F. Murphy, James E. Fleming and William F. Harris, *American Constitutional Interpretation* 61 (Foundation, 1986).

7. The decisions are arranged topically: state-wide school desegregation; juvenile rights in Texas reform schools; the first amendment; voter discrimination; the education of undocumented alien children; bilingual education; rights of the accused; employment; care of mentally retarded persons; desegregating public housing; and prison reform.

8. See generally Larry W. Yackle, *Reform and Regret: The Story of Federal Judicial Involvement in the Alabama Prison System* (Oxford U. Press, 1989). Judge Justice drew on the experience of his Alabamian colleague and friend to deal with the Texas prison system.

9. The research is thoroughgoing, to include court documents, interviews with legions of others, newspapers and other secondary literature, and scholarly writings by Judge Justice and others. The notes cover more than fifty pages.

10. On their first meeting, Kemerer notes, "Here I was, alone in the presence of one of the most powerful persons in Texas." In the final summing up, he writes, "Justice is best

What all these chapters have in common is the injunctive power of the United States District Court. This is the leitmotif of this study of Judge Justice's judicial decisions, and it is the point of departure for this review.

We are told that in 1968, "[w]hen Wayne Justice was appointed to the bench, he did not have an articulated judicial philosophy. Nor did he have a defined social reform agenda which he intended to implement by judicial fiat. . . ." Today, nearing the end of his judicial career, Judge Justice wants to be remembered, in his own words, " 'as a very careful judge in the sense that I was trying to follow the law. . . . I hope that I can be regarded as a professional willing to do whatever I felt the law required me to do, right and justice considered.' " This theme is central to Judge Justice's jurisprudence. William Wayne Justice, in his personal politics, is a self-described populist. Judge Justice, the jurist on the bench, pursues the law, especially the Constitution as law, with an intellectual vengeance.[11] Judge Justice would brook no equation of politics and law; he is no devotee of critical legal studies.[12] Indeed, Judge Justice seems to eschew legal realism, at least the brand of legal realism of jaded first-year law students who would allow a judge first to make up her mind how she wants a case to come out, who she wants to win, and then to rationalize the preferred outcome with some lawspeak. Instead, Judge Justice seeks to translate the moral value of human dignity in the Constitution into the realities of everyday life.[13]

Judge Justice is at his best, his fans would say (and Kemerer is one of his biggest fans) when he is called on to interpret the Constitution and to order remedies for the violation of constitutional rights. His critics, of course, would be willing to convict Judge Justice of treason against the Constitution for many of those same injunctions. This disagreement provides the larger context for understanding this book.

There can be no denying the expansion of the role of the Arti-

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viewed as a courageous and fiercely independent jurist with a deep sense of right and wrong. . . . He has been true to his name: he has sought to secure justice in an often unjust society."

11. Compare *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). (The Constitution is law and "[i]t is emphatically the province and the duty of the judicial department to say what the law is.")

12. This is the appropriate place to note that the only time I met Judge Justice in person was as a fellow-student in Professor Roberto Mangabeira Unger's course in Jurisprudence at the 1990 Harvard Law School Program of Instruction for Lawyers. He seemed to be as overwhelmed as I was.

13. See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in Jack N. Rakove, ed., *Interpreting the Constitution* 23 (Northeastern U. Press, 1990).

cle III judiciary in the contemporary life of the nation. Indeed, much of the expansion occurred during Judge Justice's lifetime and professional career. Today, litigants "make a federal case out of it" all the time and for nearly everything. As far as separation of powers is concerned, matters previously left to the Congress or the Executive routinely turn up on the federal courts' dockets.[14] As far as federalism is concerned, many judges and commentators "are convinced that federal court involvement in state matters is justified by the Constitution's commitment to individual rights—the primary justification for the independence of the federal judiciary."[15] Judge Justice and Professor Kemerer are undoubtedly among the most enthusiastic believers in the miraculous power of the federal court injunction. There are others—and I am among them—who have somewhat mixed emotions:

> If the lower federal court decides that there has been a constitutional violation, a decree follows, detailing specific reforms state officials must accomplish. The more detailed the decree, the more attenuated the relief ordered is from the general language and intent of the Constitution, and the more deeply it intrudes on the traditional functions of the state legislature to establish state policy and the state executive to implement state policy.[16]

My worry is that this book is the story of the failure of our republican democracy. This is the constitutional dilemma for "ourselves and our Posterity." It implicates the most important principles of our founding:[17] the federal government was a government of limited and enumerated powers; the states were sovereign governments, entrusted with the responsibility of protecting individual rights, which for the most part were Lockean property rights; under the separation of powers, the legislative branch wielded the "necessary and proper" power. This was the original system designed to solve the Madisonian dilemma: how to empower the government sufficiently for its tasks and, at the same time, how to limit it from overreaching the individual.[18]

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14. See Thomas E. Baker, *The Good Judge* 42 (Priority Press Pub., 1989). Chapter 14 describes Judge Justice's supervision of the United States Department of Housing and Urban Development.

15. Id. at 46.

16. Id. at 48-49.

17. See generally Thomas E. Baker and James E. Viator, Not *Another Constitutional* Law *Course: A Proposal to Teach a Course on the* Constitution, 76 Iowa L. Rev. 739 (1991).

18. James Madison put it more elegantly:

> It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on gov-

The contemporary constitutional understanding demonstrates a profound discontinuity with these first principles. The Civil War and its amendments reconstructed these principles, although this was not readily apparent to the Supreme Court until a good while later. Since Franklin Roosevelt and his Congress and his Supreme Court reconfigured the constitutional landscape, power has flowed from the state capitols to Washington, D.C., as water flows downhill. In the 1960s, the Warren Court revolution made the Bill of Rights the centerpiece of constitutional thought about individual rights. An activist federal judiciary drew power to itself to intervene in everything state governments do, at least everything of any importance. And the more important the area, the more thorough and complete has been the intervention; consider, for example, what has taken place in the areas of public education and corrections.[19] We have moved from a government of laws that loathed a government of men to a government of lawsuit that lionizes the men and women on the federal bench.

What is worst about this situation is that we have not come any closer to solving the Madisonian dilemma. Our constitutional system is dysfunctional. Our failures have been compounded. I would be among the first to admit that the states have performed in such an inferior manner that they have failed of their essential purpose in many important areas of public policy. Then the federal courts have rushed in to fill the sovereignty vacuum.[20] In the area of corrections, for example, no one, not even the most dyed-in-the-wool conservative, could countenance and condone the deplorable, inhumane conditions in the state penitentiaries that resulted in lawsuits like *Ruiz v. Estelle*.[21] In 1992, nearly fifteen years later, can anyone, even the most dyed-in-the-wool liberal, say that the forty-one state prison systems that currently operate under federal court orders are

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> ernment would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

Federalist 51 (Madison) in Clinton Rossiter, ed., *The Federalist Papers* 320, 322 (Mentor, 1961).

19. The book being reviewed describes at great length what Judge Justice has done in these two areas. See also note 7.

> 20. It may be that sovereignty, like nature, abhors a vacuum. In nature, molecules of gasses mindlessly rush in to fill and destroy any vacuum that occurs. But in the political sciences and the governing arts, those of us who might be tempted to fill a vacuum are not mindless. We are given reason by which we may determine, for ourselves, whether one branch of the Government should rush into the province of another when the inaction of the other seems to create a vacuum.

Wilson v. First Houston Investment Corp., 566 F.2d 1235, 1244 (5th Cir. 1978) (Hill dissenting).

21. 503 F. Supp. 1265 (S.D. Tex. 1980), aff'd in part, rev'd in part, 679 F.2d 1115 (5th Cir. 1982), amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982).

all that much more humane?[22] Perhaps no one can run a decent prison system.[23]

I worry that our dysfunctional polity may even be further away from solving the Madisonian dilemma than we were when we began this experiment in self-government.[24] Federal court injunctions have taken on a mystical, mythological quality that defies understanding. Our platonic guardians cannot seem to agree on how best to reconcile this power with the Constitution. Apparently, no one is satisfied with their efforts. Recall the hue and cry from the political left when the Supreme Court hinted in *Dowell*[25] that there may be some limits on the federal injunctive power over public schools. Recall the similar outcry from the political right when the Supreme Court once again sanctioned broad remedial powers that held the local government hostage in *Spallone*.[26] The basic problem is the logical one that we can never know whether the policy imposed by the federal judge is superior to the policy that the state actor would have implemented, because the state political process has been preempted. We are told to accept this as inevitable, almost as a matter of faith.[27] I am not a believer. For example, my hunch is that the Kansas City public schools were pretty sorry before the district court's order and that the broad remedial court order will cost a lot of money without effecting any real change.[28]

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22. Kemerer insists that this is true about the Texas Department of Corrections (p. 398) and that the case "is a major professional achievement" for Judge Justice (p. 400).

23. The persistence of brutality, the damage to inmates and their families, the lack of useful purpose, and the great amounts of time wasted behind bars all suggest that the problems are inherent in the institution. No one has been able to run a decent prison—not the Quakers, not the Soviets, not the conservatives or liberals, not the federal government, not the state governments, and not the counties. There is something basically wrong with the idea of forcibly removing lawbreakers from society, bringing them together in a single location, and placing them under the domination of keepers for long periods.

Robert Sommer, *The End of Imprisonment* 8-9 (Oxford U. Press, 1976). See generally Charles W. Colson and Daniel H. Benson, *Restitution As An Alternative To Imprisonment*, 1980 Detroit Coll. L. Rev. 523.

24. To use the Congress as an example would be too easy. Perhaps we should ask some *conservative* federal judge somewhere to issue the federal budget in the form of an injunction with the "right" funding priorities. Cf. Don J. DeBenedictis, *Right to Funds*, 78 ABA J. 17 (April 1992) (reporting how two state supreme courts "vetoed" arrangements by the political branches of the state judiciary's budget).

25. *Board of Education v. Dowell*, 111 S. Ct. 630 (1991).

26. *Spallone v. United States*, 493 U.S. 265 (1990).

27. Query whether Kemerer would engage in the same uncritical assumption if the preempting injunction was issued by a judge named Bork?

28. See *Missouri v. Jenkins*, 495 U.S. 33 (1990). We are told by the new communitarians that a middle way exists between the Scylla and Charbydis of left liberal and right conservative politics. See generally Richard H. Fallon, Jr., *What is Republicanism, and Is it Worth Reviving?*, 102 Harv. L. Rev. 1695 (1989); Cass R. Sunstein, *Beyond the Republican Revival*, 97 Yale L.J. 1539 (1988). I confess to some skepticism regarding the communitarian utopia. Considering my personal experience as a member of a university community, I can-

This is heresy, of course, coming from a lawyer, a law professor, a person who makes his living teaching and writing about federal courts. It probably is not politically correct. But I think I am right, and I think thoughtful people who step back from the process of government by injunction would agree.

This should be a matter of concern no matter what your politics. The power over state institutions first claimed in the good fight to end *de jure* segregation is not limited to any area of public policy. It can be pressed into the service of a conservative agenda just as easily, with citations to the applications discussed in this book as precedents.[29]

Let me end with a quotation from a book by Gerald N. Rosenberg that Professor Kemerer and Judge Justice ought to read. Aptly titled, *The Hollow Hope — Can Courts Bring About Social Change?*, the concluding paragraph reads:

> American courts are not all-powerful institutions. They were designed with severe limitations and placed in a political system of divided powers. To ask them to produce significant social reform is to forget their history and ignore their constraints. It is to cloud our vision with a naive and romantic belief in the triumph of rights over politics. And while romance and even naiveté have their charms, they are not best exhibited in courtrooms.[30]

THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? By Gerald N. Rosenberg.[1] Chicago: The University of Chicago Press. 1991. Pp. 425. Cloth, $29.95.

Samuel Krislov[2]

The Hollow Hope is an exciting and challenging volume which contests contemporary liberal over-valuation of courts as instruments of social change. There is a danger that it will be mistaken for a trendy tract, but it is a far more serious venture, a book that

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not imagine how true community can be achieved on the local, state and national levels. However, I hope my pessimism is just that.

29. See note 24.

30. Gerald N. Rosenberg, *The Hollow Hope — Can Courts Bring About Social Change?* 343 (U. of Chi. Press, 1991).

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