

Book Reviews

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Book Reviews

This Honorable Court. By Leo Pfeffer. Beacon Press, Boston: 1965.
Pp. 434. \$10.95.

Beginning with *Brown v. Board of Education*¹ through *Baker v. Carr*² and *Engel v. Vitale*³ and up to *Miranda v. Arizona*,⁴ a barrage of criticism has been leveled at each successive Warren Court decision, contributing to the erection of a cordon of judicial protection around civil rights and liberties. The critics have charged that the Court, in its desire to guard personal freedoms, has not only vitiated the principle of stare decisis and demonstrated a dearth of judicial deference toward the doctrine of federalism, but also has usurped executive and legislative prerogatives by making fundamentally political decisions. The attack on the Court has taken various forms, including bills to limit the ambit of judicial review, petitions to impeach Chief Justice Warren, a declaration of opposition endorsed by thirty-six State Supreme Court Justices, and proposed constitutional amendments, the most notable of which is the current proposal sponsored by Senator Dirksen to overrule the reapportionment decisions.

The hullabaloo over the Court's civil liberties decisions has obscured the fact that traditionally the Court has been the guardian of property, not personal rights. From the time of its inception until 1937, the Court, with almost missionary zeal, had sanctified and protected property rights and economic interests regardless of how they may have collided with and truncated personal freedoms. Chief Justice Marshall, a staunch Federalist, believed that the preservation of property rights was a primary function of government, and, through his decisions, he provided carte blanche for the nation's economic expansion. The Taney, Fuller, White, Taft, and Hughes Courts followed suit invalidating numerous laws affecting property interests on the ground that the laws either violated the contract impairment clause or the due process clause. One might recall that Chief Justice Taney justified his *Dred Scott*⁵ decision on the ground that slaves were property, and thus their disposition could not conflict with the constitutional provision that no person shall be deprived of property without due process of law.

The 1917 case of *Buchanan v. Warley*⁶ presents an interesting and, in light of the current controversy over open housing legislation, timely example of our earlier Courts' preoccupation with the protection

1. 347 U.S. 483 (1954).

2. 369 U.S. 186 (1962).

3. 370 U.S. 421 (1962).

4. 384 U.S. 436 (1966).

5. *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

6. 245 U.S. 60 (1917).

of property rights. In *Buchanan*, a white man, who had contracted to sell his home to a Negro, brought an action for specific performance. The Negro claimed that the contract could not be effectively consummated because a local ordinance prohibited Negroes from moving into white neighborhoods. The Court invalidated the ordinance, but not because it patently discriminated against the personal rights of Negroes. Rather, the Court overturned the law for violating the due process clause by infringing upon the constitutional right of a white man to dispose of his property as he saw fit.⁷

Decisions such as *Buchanan* which were premised on the preservation of property rights and which were quite oblivious to the preservation of personal freedoms are now, of course, relics of the past. (The reviewer personally believes that the nation is much the better for their passing.) The judicial revolution of 1937, which witnessed the Court's abdication of its traditional role as guardian of property rights, marked their end and paved the way for the libertarian spirit of the Court of today. This and more Mr. Leo Pfeffer brings to light in *This Honorable Court*, an opinionated account of Supreme Court history.

Mr. Pfeffer tells us that the current unpopularity is by no means unprecedented. In fact, the current assaults upon the Warren Court are not in either substance or design really very different from the attacks upon our earlier Courts. However, the change in judicial preference for personal rights over property rights has resulted in a wholesale switch in sides among the Court's critics and defenders. Mr. Pfeffer observes that today represents one of the few periods in Court history when the attacks upon the Court have for the most part emanated from the right side of the political spectrum rather than from the left.

Mr. Pfeffer apparently agrees with Mr. Dooley's satirical observation that ". . . th' supreme coort follows th' illiction returns." He begins his book with the proposition that the Court, when it renders constitutional decisions, is no court at all. Rather, he contends, it acts as a legislature engaged in shaping the moral, political, and economic patterns of America. Here, he says, in this political involvement, lies the source of the Court's unpopularity. Mr. Pfeffer perceives the Court as being interwoven in the political fabric of our country and, without passing judgment, accepts this as a political fact of life. He writes, "For better or for worse, the Supreme Court is one of the nation's major political institutions and there is no way it can be insulated from the nation's major political controversies."

Mr. Pfeffer remains faithful to this theme throughout his discussion of the pre-New Deal Courts. He pictures our earlier Courts as being super-legislatures in the area of economic legislation. However, in discussing the post-New Deal Court, particularly the Warren Court, he changes course. He says that Justice Black's appointment

7. The decision is now considered to have been based upon the Negro's personal rights. See Mr. Justice Douglas' dissent in *Communist Party v. SAC Board*, 367 U.S. 1, 186 (1961).

to the Court in 1937 was the harbinger of the Court's abolition as a third branch of the legislature. And the abdication by the Court of its role in protecting economic interests changed the Court's entire political complexion. He says that since the judicial revolution of 1937, the Supreme Court "has become a court, and is no longer a branch of the legislature."

The reasoning Mr. Pfeffer employs in characterizing our pre-1937 Courts as legislatures and our post-1937 Courts as judiciaries is tenuous. He bases the distinction on the ground that today's judicial activism occurs when the Court merely steps into a vacuum left by legislative inactivity, while in the past the Court engaged in judicial activism by directly overruling acts of Congress. And he asserts that in the area of civil rights and liberties, the Court must step in and act because the legislatures won't, the reason being that the laws infringing such rights also often operate to restrain those attempting to influence remedial legislation. In the mind of the reviewer, when the Court departs from prior judicial authority and by necessity or otherwise creates law, it is, in reality, just as much engaged in legislating as when it overturns Acts of Congress.

Present members of both the liberal and conservative wings of the Warren Court have accused the Court of doing just that. Dissenting in *Reynolds v. Sims*⁸ (a reapportionment case), Justice Harlan said:

The Constitution is not a panacea for every blot upon the public welfare nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements . . . This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process.⁹

And quite recently, in *Harper v. Virginia State Bd. of Elections*¹⁰ (the poll tax case), the same charges of legislating were leveled against the majority by none other than Justice Black. Castigating the majority for failing to apply *stare decisis* and for overturning Virginia's poll tax, Black said:

For Congress to do this [overturn the poll tax] fits in precisely with the division of powers originally entrusted to the three branches of government — Executive, Legislative and Judicial. But for us to undertake in the guise of constitutional interpretation to decide the constitutional policy question of this case amounts, in my judgment, to a plain exercise of power which the Constitution has denied us but has specifically granted to Congress.¹¹

8. 377 U.S. 533 (1964).

9. *Id.* at 624-25.

10. 383 U.S. 663 (1966).

11. *Id.* at 680.

The point is that the Court, as recognized in the Harlan and Black dissents, is still legislating, though in a different manner than before. Mr. Pfeffer's assertion to the contrary is not only unrealistic but also a departure from the central theme of his book.

Mr. Pfeffer characterizes the Court as a "three-fold paradox," that is, a court exercising important political functions, making enemies but withstanding any attack upon its status, and obtaining compliance to its decisions without any direct means of enforcement. He then poses a question: "Where does one find the solution for the riddle of a court that exercises political power not possessed by any other tribunal and yet has no means whatsoever at its disposal to defend that power if it were seriously challenged?" And he suggests that the answer to the riddle is to be found in his book.

The reader is first led to believe that the answer lies in the Court's sensitivity and responsiveness to prevailing public opinion, but then he is told that the Court has succeeded because of its ability to withstand the shifts in popular passion and to shape the patterns of the nation. He is led to believe that it would be suicidal or disastrous for the Court to depart from prevailing public opinion, but then he is told that despite the unpopularity of some of its decisions the Court has remained practically unscathed and that the Court now has in its defense the American people. He is led to believe, as noted earlier, that the Court acts more like a court than ever before, but then he is told that the present Court has more often ignored the principle of stare decisis than ever before. And so on. In short, I've read Mr. Pfeffer's book, but nowhere was I able to find that promised answer.

Notwithstanding its shortcomings, the book has quite a bit to offer. It animates many a decision which, in my mind's eye, had theretofore existed solely within the four-corner confines of a case-book. It also provides the reader not only with a good understanding of the social and economic ramifications of a constitutional decision but also with considerable insight into the political nature of Court activities. Unencumbered by a heavy scholastic style, the book is well-written and makes for enjoyable reading. Though certainly not a reference book, *This Honorable Court* should be found stimulating by both the law student and the lawyer.

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Modern Bankruptcy Manual Law And Practice. By the Lawyers Co-Operative Publishing Company, Rochester, New York; 1966. Vols. I, II & III. \$68.50.

The compulsion a woman feels to buy a new hat every time she is faced with a problem, real or fancied, must be similar to the constraint legal publishers feel to publish whenever some area of law appears to present any difficulty actual or illusory to the practitioner. It doesn't seem to matter what the difficulty may be or whether the new publication will serve any useful purpose with regard to the problem.

Few would deny that there are enormous problems in the field of bankruptcy law and practice, and The Lawyers Co-Operative Publishing Company in its new three volume treatise entitled *Modern Bankruptcy Manual* says it is addressing itself to what it thinks these problems are; however, because the publishers seem not to understand the difficulties and because the essence of these difficulties are not curable by any publication, *Modern Bankruptcy Manual* falls far short of its purpose.

Bankruptcy cases arise because a person or a corporation finds itself unable to pay its debts when due. These claims normally are forwarded to various collection agencies, which in turn send them to their own attorneys in due course for legal action. In a city such as Baltimore, there are no more than four firms handling any volume of diversified collection accounts, and this situation is by no means atypical in other cities of comparable size and structure. Thus, if a debtor is unable to pay his debts in a manner acceptable to a very few attorneys, he is likely to find himself faced with some form of involuntary liquidation. More often than not, the great mass of claims will be concentrated in two or three of these attorneys who will "work the matter out" between themselves. Most attorneys are bored with collection work and would not do it even if they had the opportunity.

The economics of collection work make system and volume imperative. The so-called "prestige" firms do not handle collections, except on a limited scale on behalf of valued retained clients, partly because collections are normally billed on a contingent basis, and these firms prefer to bill on a time basis. It follows naturally that since collection accounts precede the bankruptcy, the attorneys doing collection work become the bankruptcy lawyers. So the lawyer, whose day is already consumed with routine demands for payment, mass law suits, remittances, and all the other mundane details of the collection cycle, is further burdened with the administration of a bankruptcy case. Something must be relegated to the background, and too often it is the academic aspects of bankruptcy. Few bankruptcy cases involve profound legal issues, and the practical aspects of the administration very often compel practical solutions short of the academic determination. From the moment the case is filed, all attention is focused on closing it. It is doubtful that any publication could supply the answers or even guiding principles for operating in this context.

The editors of *Modern Bankruptcy Manual* obviously have not attempted to compete with the two definitive treatises on bankruptcy, Collier and Remington; indeed, they have merely editorialized the text material in *American Jurisprudence 2nd* and bound the forms relating to bankruptcy in *American Jurisprudence Pleadings and Practice* in the third volume. While not every law office will possess *American Jurisprudence*, virtually every library will have some general legal encyclopedia which will have at least two volumes dealing with bankruptcy in a manner approximating that of the *Modern Bankruptcy Manual*. Certainly, the active bankruptcy practitioner will not be satisfied with its "headnote" approach, but will lean more heavily upon the more studious Collier or Remington.

Few practitioners will ever have an opportunity to represent a client in a bankruptcy case beyond the mere filing of a proof of claim or, even more rarely, to represent a bankrupt. Bankruptcy cases are not born in a vacuum; the people who hold claims file the proceedings and elect themselves trustees and are represented by bankruptcy practitioners. It would seem that the limited universe of potential buyers would have discouraged Lawyers Co-Operative from going to the effort and expense of the publication, since it fills no void nor does it provide any answers for those already active in the field.

If one can separate the publication's lack of justification for existence from the publication itself, and if it is possible to ignore its failure to meet its declared purpose, *Modern Bankruptcy Manual* is not without merit. The text material is extremely readable and is couched in uncomplicated language, so that almost anyone, lawyer or not, can understand it. Subject matter is very often treated in much the same fashion as a case note would be; that is, in short, terse statements, with some tips on procedure interspersed. The footnotes key the reader right into the Bankruptcy Act, the forms, the General Orders, and the Federal Rules of Civil Procedure, where applicable. The publishers tell us that the purpose of *Modern Bankruptcy Manual* is "a practical approach that brings every lawyer the ability to handle virtually any bankruptcy matter." Of course, case authorities are cited for the legal propositions presented, but, as in any case where text material is presented in bold, broad statements or principles, the presentation is not only not definitive, but the cases cited do not generally by themselves stand for the precise principles stated. Seldom is consideration given to exception, nuance, or shading. To a lawyer not familiar with bankruptcy the mere statement of the rule is not enough.

It must be obvious to the reader that it was physically impossible to read every word of all three volumes, or to verify the accuracy of the text or citations; the approach used in this analysis was to try to find answers to several simulated problems. Generally, the index was found to be quite satisfactory, and little difficulty was experienced in finding whatever the editors had to say on the subject; unfortunately, the more complex the problem, the less satisfactory was the answer obtained. The inescapable conclusion is that the approach was deliberately superficial and that the editorial purpose was directed more to answering "how" questions than to "what" questions. If

it were not for the cost (\$68.50), this work would make a satisfactory text book to be used in conjunction with a law school course in bankruptcy.

Although it may appear that this review is needlessly critical, such is not the intention. Any tool which can make the practitioner's task a bit easier is worth having; unfortunately *Modern Bankruptcy Manual* fails by almost any standard for both practitioner and specialist, and it is doubtful it will enjoy wide use.

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