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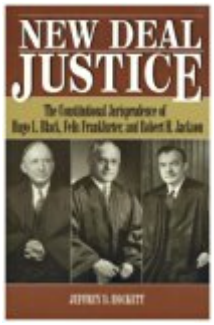
Jeffrey D. Hockett. *New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson.* Lanham, Md.: Rowman & Littlefield Publishers, 1996. x + 322 pp. $39.95 (paper), ISBN 978-0-8476-8211-9; $93.00 (cloth), ISBN 978-0-8476-8210-2.



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Three New Deal Justices

The question of how to account for the constitutional transformation of the 1930s has generated significant academic controversy for decades. [1.] On one point, however, there should be no controversy: Much of the change was consolidated and advanced by Franklin Roosevelt's appointment of a slew of justices, beginning with Hugo L. Black soon after the Court-packing battle of 1937 and eventually constituting virtually the entire Court. Jeffrey Hockett has written a study of three of the most able of those justices –Black, his ideological foe Felix Frankfurter, and Robert Jackson. The idea of comparing Black and Frankfurter is not at all original. [2.] Throwing Jackson–who took an ideological stance between Black and Frankfurter, but usually closer to Frankfurter–into the mix is an interesting choice. The book is well written and has some good insights. But it delivers less than one might hope.

Once the Supreme Court made clear that it was going to take a largely hands-off approach with respect to economic legislation, the great questions–highlighted by the famous footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938)–were the extent to which, and the theory on which, this development left leeway for the Court to impose constitutional restrictions in other realms on the political branches of government. Black, Frankfurter, and Jackson took very different approaches to this problem.

Black came to read the Fourteenth Amendment as incorporating the entire Bill of Rights against the states. This understanding allowed him to advocate a great degree of activism across a broad range of issues, and at the same time to advocate an extreme degree of judicial restraint–substantially more than had been articulated by the time he joined the Court–on economic matters. This approach enabled him to put tremendous weight on the text of the Constitution, and not only with respect to questions involving civil liberties.

In contrast to the sharp lines and absolutism of Black's approach, Frankfurter read the Fourteenth Amendment as having broader bounds but less categorical demands. In his view, the scope of the Amendment was not limited by that of the Bill of Rights. But neither did it automatically condemn state action that would fall afoul of the Bill of Rights had it been taken by federal actors, nor did the Bill of Rights speak in absolutist terms. Such an analytical framework could be applied in ways more or less deferential to governmental actors. Frankfurter usually acted with deference, refusing to condemn state action that had a rational basis or that did not offend accepted notions of justice. This latter aspect of Frankfurter's jurisprudence was consonant with his general emphasis on the need for judicial self-restraint; thus, he openly embraced the need for a judge to tolerate, across the gamut of constitutional contexts, results that he found extremely distasteful.

Jackson's approach lacked the ideological near-purity of either Black's or Frankfurter's ("near-purity" because, as Hockett shows, neither Black nor Frankfurter adhered

without fail to his theory, though both were willing to allow their theories to pinch rather hard without being temporarily abandoned). Perhaps Jackson's votes were guided by a consistent approach running so deep that it is barely observable to others [3.], but so far as appears he tended to view hard cases relatively unconstrained by any overarching theory or even by his votes in prior cases. Such an approach poses obvious problems for any court, given that consistency and predictability are generally considered two critical, even if not universally indispensable, attributes of law. Those problems are magnified in a court of last resort. And yet the approach is appealing to some, as it has been to Justices Potter Stewart and Sandra Day O'Connor. Jackson himself, a person of superb intelligence, erudition, and a glittering pen, was such a virtuoso that his opinions, each taken on its own, have great persuasive and explanatory force.

It thus would have been interesting to compare the contributions of these three towering figures across a range of issues and contexts. Certainly, there were significant cases in which each of them, or at least two of them, played significant roles. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the steel seizure case and still one of the leading cases on Presidential power but one not mentioned at all by Hockett, Black wrote the opinion for the Court, brief, simple, and categorical. Frankfurter joined the opinion, but wrote that "the considerations relevant to the legal enforcement of the principle of separation of powers seem to me more complicated and flexible than may appear from what Mr. Justice Black has written." He then offered a 36-page opinion, plus a famous fold-out appendix plowing through the entire history of Presidential seizures. And Jackson presented with seeming effortlessness an analytical framework that has ever since played a significant role in discourse on separation-of-powers issues.

Similarly, a comparative understanding of the jurisprudence of the three justices might be advanced by a careful look at *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the second flag-salute case. There, Jackson wrote for the Court, overruling its decision of three years before in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), and holding that children of Jehovah's Witnesses attending a public school could not be compelled to salute the flag. Black, together with William O. Douglas, wrote a brief opinion explaining their turnabout. Frankfurter, the author of *Gobitis*, wrote an impassioned dissent; the case seems to have had a profound and lasting impact on him. [4.]

Consider also one case in which none of the three wrote a published opinion, but in which all three played significant roles–*Brown v. Board of Education*, 347 U.S. 483 (!954), arguably the most historic Supreme Court ruling not only of the joint tenure of these three justices but of all time, and strangely one that Hockett mentions only once and in passing. Black contributed early on by lending authority, as a voice of the enlightened South, to the view that segregated schools were unconstitutional. Frankfurter shared that view–though squaring it with his general jurisprudence was not easy–but characteristically was less forthright in expressing it. Ever the inside player, he worked hard to build a unanimous court, managing to postpone decision from the 1952 Term and, with his law clerk Alexander Bickel, drafting the questions that the Court posed in asking for reargument. And Jackson seemed to point the way as early as December 1952 to the resolution the Court eventually adopted, a decision holding segregation unconstitutional but not suggesting that the South had been acting illicitly all along, and giving the South considerable time to adjust. Characteristically, he wanted the Court "to admit that it was making new law for a new day." [5.]

Much of the benefit that might be gained by looking at these and other important cases and issues in a genuinely comparative way is lost by the organization of Hockett's book. [6.] After an introductory chapter, Hockett embarks on a two-chapter summary of the political, social, intellectual, and economic history of the United States beginning in the early nineteenth century. This portion of the book is well done and will fill in lacunae in the knowledge of many readers–or, in the case of some readers such as myself, great yawning gaps. But the added value of this discussion to this particular book strikes me as minimal. To be sure, connections can be drawn, link to link, between this earlier history and the jurisprudence of the three justices that Hockett discusses, but the same could be said if one began back at Creation. Hockett then offers substantial portraits of each of the three justices, in each case with a biographical sketch up to the time of the justice's appointment to the Court and then an analysis of his jurisprudence. To be sure, Hockett does draw some comparisons, particularly in a brief closing chapter, but the weight of the book is in the individual portraits.

Black – Hockett argues persuasively that Black was motivated in large part by a desire to achieve antihierarchical results. He is less successful in explaining the motivation; though Black was surrounded by Populism as a youth, he was, as Hockett acknowledges, raised

in modestly privileged circumstances and in an anti-Populist household.[7.] Even as a Senator from Alabama, Black showed some signs of progressivism on racial matters, and once he was freed from his segregationist constituency he was quite consistently liberal in that realm. [8.] Hockett does essentially nothing to explain why this proud son of the South took such a dramatic, and historically crucial, course. Moreover, Hockett does not help much in explaining the intellectual cast of Black's jurisprudence, his tendency (like Justice Scalia, who–perhaps ironically–is his closest intellectual heir on the contemporary Court) to draw sharp, simple lines. [9.] Hockett seems correct that Black's "total incorporationist" interpretation of the Fourteenth Amendment achieved results that, for the most part, Black found appealing. But the same intellectual style transcended the area of individual liberty, as suggested by opinions such as *Youngstown*. I am thus not inclined to construe Black's rather idiosyncratic reading of the history of the Fourteenth Amendment as motivated entirely, or even primarily, by his result orientation. I believe it probably also fit well with his intellectual orientation and his views of the nature of justice, the role of the judiciary [10.], and of American history. *A Constitutional Faith* was the title that Black gave to a book that he wrote near the end of his life, and it expressed his view that pretty much everything we need to know about American constitutionalism we learned from the Framers.

Frankfurter – As Hockett shows, Frankfurter's jurisprudence–in stark contrast to Black's–was characterized by an antipathy for abstraction, decisions based on generality without taking the facts of the particular case into account. Hockett seeks the roots of this attitude in Frankfurter's background in Progressivism, with its emphasis on social interdependence. Perhaps he has a point here, but I doubt the hypothesis can bear the weight Hockett puts on it. Frankfurter's reluctance to impose constitutional limits on the states, and so restrict the degree to which they may adopt divergent solutions to social problems, seems hardly to be based on a perception of the critical nature of interdependence. It seems to me that complexity was a more important factor than interdependence in shaping Frankfurter's jurisprudence; in a passage quoted by Hockett (p. 193), he said, "An extremely complicated society inevitably entails special treatment for distinctive social phenomena." It may have been this sense of complexity that shaped Frankfurter's jurisprudence along two different dimensions. One was his unwillingness to allow "doctrinal short-hand statements of complicated ideas" to govern judicial decision-making. [11.] The second was his belief in the importance of judicial self-restraint, because judges are so often unlikely to have the information necessary to make sound decisions. Frankfurter may have had an inclination to perceive and emphasize complexity because it satisfied his own psychological needs; complexity puts more of a premium on intellectual ability, and Frankfurter, who frequently lectured his colleagues, clearly relished the chance to show off his intellect. An understanding of Frankfurter's jurisprudence may therefore require a good understanding of his psychological makeup. [12.] One flaw of Hockett's account is that it leaves Frankfurter's personality almost completely out of the picture; this is a remarkably dry account of an extraordinarily vivid person. [13.]

Jackson – Hockett does a nice job of showing that Jackson's experience as Nuremberg prosecutor had some impact–leftward in some contexts, rightward in others–on his decision making, but that this impact did not pervade his jurisprudence. Beyond that, I am not sure that Hockett's analysis makes Jackson any more predictable, though that goal may be unattainable. Hockett attempts to explain Jackson's seeming inconsistency as the pragmatic jurisprudence of a traditionally trained common lawyer. But there is nothing particularly pragmatic about deciding cases on a seemingly ad hoc basis, nor is that the approach prescribed by the common law. Jackson himself drew a distinction between the roles of precedent as "a force for stability and predictability" in common law adjudication but as "the most powerful influence in forming and supporting reactionary opinions" in constitutional law. [14.] His sense of freedom from the constraining force even of his own prior opinions helped make him "the most intellectually charming member of the Court," but it also leads to the impression that no stable set of principles or values guided his decisions. [15.] Not that this particularly bothered Jackson; he seems to have had a strong sense of whimsy that affected his jurisprudence. "If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position," he wrote in one case, after listing several such ways from old cases, "I invoke them all." *McGrath v. Kristensen*, 340 US 162, 177-78 (1950) (concurring). And in a memorandum quoted by Hockett (p. 287), he wrote, "If it should become necessary to revise my views I shall prove that I am then right by declaring that I have theretofore been wrong. I would not be without precedent." Another, related aspect of Jackson's judicial performance is that, though not an ideological extremist, like Justice Stevens today he frequently wrote sepa-

rate opinions, speaking for nobody but himself. Perhaps deep-seated aspects of Jackson's personality may explain his tendency to treat cases nearly as stand-alone projects, with relatively slight need to tie his decision making either to earlier cases or to the views of his colleagues. I doubt that the fact that Jackson was lived and practiced law in small-town upstate New York has much explanatory power.

Hockett's overall conclusion – that there is "a strong connection between the justices' ideological backgrounds and their judicial performances" (p. 289)–should strike most readers as utterly unsurprising, though one should also recognize that other factors, such as intellectual orientation, will also play a significant role. The three justices he has chosen to help make this point are all fascinating and important subjects. Even though they–especially Black and Frankfurter–have been studied a great deal, they are well worth the attention Hockett has given them. His book accomplishes less than one might wish, but the juxtaposition of the three is in itself worthwhile, for they present three very different approaches, each with significant merits and flaws, to the most enduring problem of American constitutional law–how to determine when the Supreme Court should exercise its power of using the Constitution to invalidate conduct of the political organs of government, and when it should stay its hand.

Notes

[1]. I have written on this subject in *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U.Pa. L. Rev. 142 (1994). Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (1998), is a carefully researched book with ample references to the academic literature.

[2]. See, e.g., James F. Simon, *The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America* (1989).

[3]. Hockett, at 274, quotes Jackson's own reconciliation of his free speech opinions from his separate opinion in American Communications Ass'n v. Douds, 339 U.S. 382, 443-44 (1950).

[4]. H.N. Hirsch, *The Enigma of Felix Frankfurter* 210-11 (1981).

[5]. E Barrett Prettyman, Jr., a Jackson clerk from the 1953 term, in a 1971 interview reported in 2 Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 771 (1975). Much of this paragraph is drawn from Kluger's book, at 749-78.

[6]. Other cases that could provide the basis for useful comparative analysis include Everson v. Board of Education, 330 U.S. 1 (1947), in which Black wrote the majority opinion and Jackson the dissent. Hockett does discuss Adamson v. California, 332 U.S. 46 (1947), and a few other cases in which Black and Frankfurter squared off against each other. But the justice-by-justice organization makes the discussion somewhat repetitive and disjointed and the comparative analysis less salient than it might be.

[7]. Some insight on this problem may be gained from two recent and substantial works on Black: Howard Ball, *Hugo L. Black: Cold Steel Warrior* (1996); and Roger K. Newman, *Hugo Black: A Biography* (1994), though neither concentrates on it very much. It is clear that Black's sympathies with underdogs developed early; by age 15 he was actively working on a local Populist newspaper. Perhaps being the youngest of eight children contributed to this orientation, as well as to his defiant nature. Perhaps also his ambivalent relationship with his father – a well-to-do merchant who benefited from the hated crop-lien system but who seems to have had generous impulses and a more progressive racial outlook than most of the community – had some impact in this direction.

[8]. Kluger, *Simple Justice*, at 749.

[9]. I suspect that two factors mentioned but not analyzed or emphasized by Hockett–Black's Baptist upbringing and the devastating effects on his family of alcohol, an experience that presumably led to his avid prohibitionism early in his political career–account in part for this orientation.

[10]. Hockett says that Black did not distrust judicial discretion. I think it is more accurate to say that he did not distrust the exercise of judicial power, if the circumstances in which that power was to be exercised were clearly demarcated. But clearly he was afraid that judicial discretion would lead to excessive exercises of power in some contexts and insufficient exercises of power in other contexts. See, for example, his separate opinion in Rochin v. California, 342 U.S. 165 (1952).

[11]. Helen Thomas, Felix Frankfurter: Scholar on the Bench 182 (1960).

[12]. At least to this extent, I am in agreement with Hirsch, Enigma, at 5, who said that "Frankfurter can only

be understood politically if we understand him psychologically." Hirsch further says "that we can understand him psychologically as representing a textbook case of a neurotic personality," id. That strikes me as at least plausible, and nothing in what I am arguing is inconsistent with it.

[13]. See id. at 211 ("Judicial outcomes cannot be wrenched out of the context of a man's life; a member of the Court is not a composite of juridical abstractions but a complex individual of flesh and blood.").

[14]. *The Struggle For Judicial Supremacy* 295 (1941).

[15]. Kluger, *Simple Justice*, 764-65.

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