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## Review of “Mr. Justice Holmes and the Supreme Court,” By Felix Frankfurter

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## BOOK REVIEWS

**MR. JUSTICE HOLMES AND THE SUPREME COURT.** By Felix Frankfurter. Cambridge: Harvard University Press, 1938. Pp. x, 139.

When one has read cursorily Professor Frankfurter's book, *Mr. Justice Holmes and the Supreme Court*, has read it again with close attention, and finally has put it to one side, the impression that remains is one of brilliant, scintillating sentences; of clear, vigorous, striking style; of the veneration in which the author held his hero; of the community of thought between them; and—that the essence of the book could have been embodied in three sentences. It is a valuable, worth-while book, but its chief value is in its form. Nor does that detract from it in any way. "Form," said Justice Cardozo once, "is not something added to substance, for the two are fused in unity." Undoubtedly Professor Frankfurter had read that line (we know how much he admired Cardozo—this very book is dedicated to him), for the author says of the opinions of Mr. Justice Holmes, "In his case, form and substance were beautifully fused."

The book contains the substance of three public lectures delivered last April and entitled, respectively, "Property and Society," "Civil Liberties and the Individual," and "The Federal System." When the first has been boiled down, the residue is this: Mr. Justice Holmes served on the Supreme Court during a period of struggle between individual enterprise and social well-being; he was convinced that the adjustment of these sometimes conflicting interests was a legislative, not a judicial, task; the courts, he thought, should apply brakes to legislation only in rare instances, should do it only when the very spirit and letter of the Constitution demanded it. When the second has been boiled down, the residue is this: To Mr. Justice Holmes, liberty of thought and speech and press was in a different and higher category than liberty in the field of property; it was among those "enduring liberties" as to which the Constitution protects the individual against both nation and state, whereas the protection accorded the second type of liberty is less absolute, yielding with little difficulty to social necessity. When the third lecture has been similarly epitomized, the essence is this: In the Federal system Mr. Justice Holmes interpreted broadly, not narrowly, the national power "to regulate commerce" and equally broadly the national power "to lay and collect taxes"; but the latter power he believed the states also should be allowed to exercise largely without restriction.

There is nothing in any of these results that is new, especially to those who have studied the work of Mr. Justice Holmes. But it is not the end results in the opinions the great jurist wrote which make those opinions great. It is not the substance of them that will cause them to be read during many years. If, as Professor Frankfurter puts it in the last sentence of this little book, "Mr. Justice Holmes \* \* \* has written himself into the slender volume of the literature of all times," he did that by his capacity to write with the pen of Cicero and Milton. In all he wrote was

an eloquence like that of the great orators and the great poets. It is something of that same quality that brightens this little book.

Let us string together in a paragraph some of the sentences in the book that one may read over and over again—as one may read over and over again burning lines in Holmes' opinions—as Holmes himself, so it is said, was wont to read again and again, in the original Greek and Latin, the purple passages of classic literature. Here are some of them: "A lawyer's life before he becomes a judge, like that of an actor, is largely writ in water." " \* \* \* legal opinions are not conducive to biographical revelation. \* \* \* opinions are symphonies, not solos." " \* \* \* the burst of capitalistic activity following the victory of the North early revealed that reconciliation of unfettered individual enterprise with social well-being would be the chief issue of politics." " \* \* \* the 'square deal' of Theodore Roosevelt, the 'new freedom' of Woodrow Wilson, and the 'new deal' of Franklin D. Roosevelt, have a common genealogy." " \* \* \* how profoundly important it is that a judge be on his guard lest he read his conscious or unconscious sympathy with one side or the other prematurely into the law." "Mr. Justice Holmes had been singularly outside the current of public affairs. \* \* \* He was \* \* \* the philosopher who turned to law. \* \* \* That he did not read newspapers \* \* \* mirrored his worldly innocence." " \* \* \* [his] specialty was great utterance. He dealt with intrinsic significance, not with meretricious, because evanescent, importance. \* \* \* He saw the vital in the undramatic; to him, inconspicuous controversies revealed the clash of great social forces." "For the Justice, the Constitution was not primarily a text for dialectic but a means of ordering the life of a progressive people. While its roots were in the past, it was projected for the unknown future. \* \* \*"

If now and then there is a striking sentence in the book which it were best not to examine too closely, that is true also even of Homer's and Virgil's epics. It is a nodding which ought to be forgiven. Professor Frankfurter has much to do and does it well, and the nation should be grateful that so busy a scholar takes time to write and speak so often for the profession. But the reviewer must not praise every sentence in a book reviewed, lest it be suspected that he has not read the book. There are sentences in this excellent piece of work that are not quite as accurate as they might be. That is true, for instance, of the very first sentence in Lecture No. 1: "The United States got under way nearly one hundred and fifty years ago, and only seventy-seven men have shaped its destiny, in so far as law has shaped it." More error could hardly be crowded into so small a space. The "seventy-seven men" referred to, presumably, are those who have been justices of the Supreme Court. Are they the "only" men who have shaped the destiny of the United States "through law"? Those who wrote and those who adopted the Constitution made some contribution, did they not, toward shaping the nation's destiny through law? The Congresses that have enacted laws for a century and a half, the Presidents who have recommended and approved laws,—have they done nothing to shape the country's destiny through law? There are in the book

a few other sentences that the very captious might lift out for microscopic criticism. But that is not the way to view any book, no more than it is the way to view a great painting or a great piece of statuary. The seated statue of Zeus by Phidias was said to be the greatest achievement of its kind in all the world, but, it will be remembered, there were a few who complained that if Zeus should rise from his throne his head would strike the roof of the temple. They thought of that!

The book not only presents Mr. Justice Holmes, but it also portrays Felix Frankfurter. He delivered these lectures because he revered the great son of Massachusetts, because he saw in him a noble ideal for emulation, because he saw in his philosophy a rule worthy to be followed. He has pictured Holmes with a brush held in a devoted hand and has portrayed at the same time himself. One may not agree with the extreme views either of the master or the disciple, but one can respect them greatly. One can believe that in much of their thinking they were and are nearer the truth than many of their contemporaries. A "liberal" was Holmes and Frankfurter is a "liberal"; but Holmes was and Frankfurter is a real scholar, a profound lawyer, a true patriot—as far within "the lunatic fringe" as some are well beyond it.

MERRILL E. OTIS.†

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TRADE ASSOCIATIONS IN LAW AND BUSINESS. By Benjamin S. Kirsh in collaboration with Harold R. Shapiro. New York: Central Book Company, 1938. Pp. 339.

In the preface Mr. Kirsh has described this book as "a critique of the strength and weaknesses of the trade association movement"<sup>1</sup> but makes it clear that "the views are those of the practitioner who has given considerable thought to the varied issues raised in the actual administration of trade association activity."<sup>2</sup> The prospect is held out to the reader that he will find an analysis not only of court decisions but also of articles in law reviews, economic and business journals, addresses, and reports. There is reference also to recent legislation, such as the Robinson-Patman Act, the Wheeler-Lea Act, and statutes dealing with resale price maintenance; and these, the reader is told, will be treated in so far as they have a bearing on trade association activities. This is an inviting prospect. Then follows an introductory chapter in which the authors have put together a general survey of the development of trade associations, some pointed remarks on the ineffectiveness of the anti-trust acts in curbing a growing centralization of economic activity, and a brief reference to the inconsistencies and contradictions of governmental policies. There is a final reference to the great unanswered question in all trade association work: what of the recalcitrant minority in any trade or industrial group?

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1. P. 5.
2. P. 7.