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CAPITALISM, DEMOCRACY, AND THE SUPREME COURT. By Wallace Mendelson. New York: Appleton-Century-Crofts, Inc. 1960. Pp. 128 plus index. \$1.25.

Harold Lasswell tells us that politics is a question of who gets what, when, and how, and that the elite are those who get the most of what there is to get. According to Karl Marx, what there is to get is primarily economic wealth and the power that accompanies it. In a capitalistic society, Marx argued, social, moral, and political institutions are the means by which capitalists enrich themselves. And courts of law are not excepted from this generalization. From such a perspective freedom and democracy may be promoted by those who pursue wealth and power as long as such an emphasis serves narrow self-interest. In this vein, Charles Beard has pointed to the economic motivations of those who framed the Federal Constitution; and C. Wright Mills has posited a conspiratorial elite composed of economic, political, and military leaders who manipulate the trappings of American democracy for their own ends.

In the same tradition, Wallace Mendelson outlines what might be called the "incidental theory of democracy." The thrust for freedom from church, feudal, and royal interference by the entrepreneur of an earlier era is seen as incidental to profit-making. The business class "philosophized in universal terms; but time revealed that the freedoms it sought were fashioned for its own peculiar business needs." (Page 3.) Since the lower classes failed to note the subtle distinction, the possessors of wealth found themselves pressed from below by those proclaiming the very same values on a universal scale: the difference was that the "scum" meant it. Thus, the American Revolution was "also a struggle for power between the merchant-planter oligarchy of the seacoast and the radical-democratic western frontiersmen." (Page 4.)

Although the interest of the northern merchant lay in accommodation with the British Empire, having lost its legalistic argument, the merchant class resorted to the lower classes for support and as a result lost control of the Revolution. Some ground was regained in the framing of the Constitution, but

interpretive struggles between the Hamiltonians and the Jeffersonians have continued to this day.

The role played by the United States Supreme Court in this conflict is sketched through a series of essays built around Chief Justices Marshall and Taney and Associate Justices Field, Holmes, Black, and Frankfurter. The Court's role, as Mendelson sees it, has not been to referee the conflict in any objective sense. Rather, the Court has behaved consistently with Mendelson's own conception of the "function of law and its minions," *i.e.*, "to vindicate dominant social ideas, interests, and institutions." (Page 35.) While Marx might say that the dominant interests are always capitalistic, Mendelson suggests that "dominance" has oscillated between Hamiltonian and Jeffersonian interests.

Each school of thought has had its supporters on the Supreme Court at crucial times. John Marshall is viewed as a Hamiltonian mercantilist, opposed to states' rights localism, whose opinions "subsumed the claims of democracy to vested business interests." (Page 27.) Jacksonian democracy was anti-mercantilist and stood for a *genuine* laissez faire and states' rights (but not for state sovereignty). Its chief spokesman on the Court — Roger Taney — contributed the concept of judicial self-restraint, emphasized so frequently in the present day by Justice Frankfurter. The period of Mr. Justice Field saw the establishment of the gospel of wealth in the Court's opinions. As Holmes was later to note, Herbert Spencer's social statics were written into the Constitution in this era. As a judge, Holmes brought humility and skepticism to the Court. Mendelson sees Holmes' genius as lying in his "refusal to read his own experiences and beliefs into the Constitution, and his alertness in opposing judicial associates who, often unconsciously, did so." (Page 75.)

That laissez faire is not a mandate of the Constitution eventually prevailed. And in the "new Court" there is complete unanimity on the point — but only in reference to economic policy. In the area of civil rights, both state and federal measures continue to be vetoed ostensibly to safeguard civil liberty. The Court is presently split on the role it should play in this respect as is also true on questions of federalism. Mendelson identifies Justices Black and Frankfurter as representing the opposing schools of thought on these questions. These two Justices and their supporters differ fundamentally on the issue: "[T]o what extent should such matters be left

for solution by the political processes themselves?" (Page 98.)

It seems clear, then, that Mendelson does not see the present era as one in which economic interests are controlling the Court for selfish advantage and to the detriment of democracy. But he is concerned about the activist philosophy that Black is said to represent. Since Black acts on this philosophy primarily in the area of civil liberty, one may wonder how and why this constitutes a threat to freedom or democracy. The answer, for Mendelson, seems to be that the Court should not "wet nurse" democracy, but should hold back and "permit the American dream to develop its own democratic devices of responsibility and self-confidence." (Page 128.) Justice Black subscribes, it has been charged, to the notion that unfortunate litigants occupy a preferred position when in conflict with government, whether state or federal. Black is quite willing to upset state or federal legislative and administrative actions in such cases. Frankfurter is said to have a more reasonable approach — an approach involving less rigidity, and a greater appreciation for the policy choices made by the political branches of government.

One way to evaluate this philosophical difference is to consider its consequences for judicial decision making. If Black and Frankfurter are taken as representing the two polar positions, a perusal of their voting patterns in certain areas is suggestive. For example, we may ask what differences would occur between voting patterns of the activist and the nonactivist judge in civil liberty cases. This reviewer has, in his own work, compiled voting statistics in all cases involving aliens, alleged communist or communist sympathizers, and Negroes for the period 1955-1960. The varying rate at which the Justices have supported these litigant types are sufficient to raise some eyebrows. Support for aliens, for example, has ranged from 11 to 97 per cent; for communists the support rate is 25 to 100 per cent; in Negro cases support for the Negro claimant has varied from 40 to 89 per cent.

While such data does not prove that any particular Justice is pro-communist, pro-alien, or pro-Negro, it does suggest that certain Justices may be emotionally involved with the status of the litigant. If we compare Black and Frankfurter we find that Black supported the alien claim in 36 of 38 cases (97 per cent); the communist claim in 47 of 47 cases (100 per

cent); and the Negro claim in 24 of 28 cases (87 per cent). Frankfurter, on the other hand, split 19-19 (50 per cent) in the alien cases; he supported communist claims in 34 of 47 cases (72 per cent); and in Negro cases he voted for the claimant 19 times out of 28 possible opportunities (67 per cent). The Frankfurter pattern is consonant with his greater reluctance to interfere with government (state or federal), while the Black pattern suggests he may be straining to strike governmental action and needs little provocation to do so. If Black is right, the figures suggest that the Supreme Court is getting a large number of cases that should have been settled at a lower level, for the pressures of time dictate that the Supreme Court be reserved for marginal cases in which outcome for or against the litigant is doubtful.

If Mendelson's view of the function and role of the Supreme Court is correct, one may or may not be concerned with the particular results of judicial activism. For if the Court is deciding cases in terms of dominant social, political, and economic interests, the question becomes essentially whether one welcomes such a situation. From this perspective, if Black is out of tune with the dominant values of society, his philosophy would be of little importance. If otherwise, then the objection must lie not against Black but against prevailing mores which happen to be dominant at a point in time.

In short, one cannot subscribe to determinism and individual responsibility at the same time without, at least, offering some reconciliation of what seems to be incompatible positions. Presumably, Mendelson would have something to say about the values reflected in Supreme Court decisions if these values deviated sufficiently from those he holds dear. His essays leave such questions unanswered. It is not clear whether he feels that the Court should represent the views of a majority, a dominant minority, or neither. It is clear, however, that in his opinion the policy-making role of the Court should be somewhat reduced. The contemporary South is not likely to consider such a conclusion distasteful or unwise.

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THE VOICE OF MODERN TRIALS. By Melvin M. Belli. Vol. III—Illustrations of Cross Examination Techniques by John Alan Appleman. San Francisco: The Belli Foundation, 1961; three long-playing records.

This sound recording can be valuable to the trial lawyer or the law student. With introduction and comment by Mr. Belli, and the actual examples of cross-examination by Mr. Appleman, these three long-playing records require the undivided attention of the listener for the better part of an afternoon. The abilities of these men have been combined to show vividly the necessity for knowing the principles in the separate art of cross-examination.

Mr. Belli and Mr. Appleman adhere today to the well known admonition that one may not stumble or wander in this field, and it is more often true than not that no cross-examination is better than an unprepared one. In line with this cautious approach to cross-examination, the rules are negatively stated: Don't force an examination, don't reiterate the facts of the other side, be certain of the witness's answer, never ask "why" or "how," don't let the witness guess your objective, don't move in for the kill. Several positive rules are set forth by Mr. Appleman: Find the vulnerability of the witness beforehand, if possible; prepare questions ahead to be asked in an order carrying conviction.

Extensive examples are given on cross-examination of experts, with guiding principles applying mainly to these types of witnesses. Meeting an expert on his own ground is most difficult and should not be attempted unless preceded by intensive study. With many experts some success may be had by seeking to flatter the witness and by eliciting from him as many "yes" answers as possible. With some experts it is possible to encourage obvious exaggeration.

How and when to begin and to end is a most important feature in Mr. Appleman's lessons. He points out that many lawyers are too prone and too intent upon eliciting an admission without the proper foundation. The result is that many lawyers tend to move in for that last, best question without preliminary facts being established. This record shows with skill how one should have the witness irretrievably committed to certain facts, from which he cannot withdraw, before the final question is asked.

The listener should observe caution when Mr. Appleman asks questions of a witness but does not divulge how he knew what the answers were to be, thus apparently violating his own rule. Here it should be borne in mind that the answers given by the witness are designed to make the question a successful one in order that his point may be clear. Mr. Appleman must, of necessity, adopt a short, direct type of questioning for the purpose of the lesson he is giving and the listener should not assume the witness's responses to these demonstrations as those which an average person would normally give. The demonstration, it is believed, could have been improved by illustrating faulty questions with an accompanying victory by the witness. It is believed that this would have more vividly illustrated the valuable rules set forth at the outset. On the whole the recordings stand unimpaired and can be useful.

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