Amicus Curiae

Association of Retired Attorneys of Sarasota, Inc.

www.retiredattorneyssarasota.org

IF YOU HAD THE MISFORTUNE TO MISS OUR SEPTEMBER LUNCHEON PROGRAM, you can read concise summaries of former law professors Martin Fried and Michael Polelle's outstanding presentations on recently published books about the U.S. Supreme Court. **BRING A PROSPECTIVE MEMBER** (a retired attorney) to a meeting; their first meal is free.

NEXT LUNCHEON MEETING

WHEN: Friday, **OCTOBER 31**, 2014, at 12:00 Noon.

WHERE: Same Venue — Salute! Restaurant, 23 N. Lemon Ave., Sarasota, Florida. It is immediately north of Mattison's City Grille on Main Street.

WHO: **FRANK ALCOCK, Ph.D.**, Associate Professor of Political Science at New College of Florida in Sarasota.

"Who Will Win the Florida Gubernatorial Race and Why — Is this Florida Politics at its Worst or Best?"

Place your bets! The candidates are at the gate! Now they're coming around the final bend.... Here to hazard a prediction is Dr. Frank Alcock, an Associate Professor of Political Science at New College, where he teaches courses on international law and world politics. He has held positions as a senior U.S. Fulbright Scholar to New Zealand, a senior fellow within Florida's Collins Center for Public Policy, and a Belfer Fellow in the Kennedy School of Government at Harvard University. He holds a B.A. in Economics from Binghamton University, an M.A. in International Affairs from George Washington University, and a Ph.D. in Political Science from Duke University.

Your entrée choices are: (1) Honey Orange Grilled Salmon, (2) Angelotti Pasta stuffed with ricotta cheese and spinach under a cream sauce, and (3) an Entrée Salad with grilled chicken.

Luncheon Reservations are mandatory. Checks and Luncheon Reservations (below) should be received by Benjamin Berman, Esq., 4223 MacKay Falls Ter., Sarasota, FL 34243, by October 28, 2014. Telephone: 355-2469.

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Mail this reservation form for the October 31 luncheon and your check for **$18.50** per person (includes dessert, gratuity, and tax) payable to "Association of Retired Attorneys" in the enclosed addressed envelope. Indicate your entrée-selection quantity(ies).

___Salmon ___Pasta ___Salad with Chicken

Member's Name _____ Phone #_____

Guest's(s') Name(s) _____

Martin Fried's synopsis of his presentation on *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices*, by Noah Feldman. A comparison of the four Roosevelt Justices (Black, Douglas, Frankfurter, and Jackson) with the current Justices.

Economics. FDR: All four Justices were from economically disadvantaged backgrounds. TODAY: Only Sotomayor and Thomas come from poor families.

Rural v. Urban. Three (Black, Douglas, and Jackson) came from rural areas; Frankfurter was the only one raised in a big city. TODAY: Thomas was born in a small, all-African-American town in Georgia, but moved to Savannah when he was young. The rest come from urban or suburban areas.

Education. The four went to different law schools. Black attended the University of Alabama (40 students, 2 professors). Douglas went to Columbia. Frankfurter studied at Harvard. Jackson attended Albany Law School for one year, receiving a certificate of attendance. He was the last Justice not to have graduated from law school. TODAY: The educational background is quite different. Ginsburg attended Harvard for one year, but transferred to Columbia for her last two years. Sotomayor and Thomas attended Yale. All the others went to Harvard.

Judicial Experience Prior To Joining the Court. None had prior judicial experience. TODAY: only Kagan never served as a federal appellate judge; she was nominated, but the nomination expired before she could be confirmed.

Religious Affiliation. Black, Douglas, and Jackson were Protestants; Frankfurter was Jewish. (The only Catholic on the Court was Justice Murphy.) TODAY: There are six Catholics, three Jews, and no Protestants.

Getting to the Court — the Backgrounds of the Four Justices. Black was a Southerner, one of few who have served on the Court. FDR traded a generally reliable vote in the Senate for an equally reliable spot on the Court. Black had not practiced law for more than ten years. Black's prior membership in the Ku Klux Klan did not stand in the way of his confirmation. (He apparently resigned his membership after having been elected to the Senate.) Black was confirmed by the Senate (63 in favor, 16 opposed, 17 abstentions) five days after being nominated.

Douglas (the longest serving) had been a professor at Columbia Law School, then Yale Law School, where he was named a Sterling Professor at age 34. He served on the Securities Exchange Commission, campaigning for the chairmanship by claiming to have an "offer" to be the Dean of Yale Law School. The seat that he was to occupy became available when Justice Brandeis resigned for health reasons in February 1939. FDR wanted to appoint a Westerner, and Douglas was one, even though he had not been West for 16 years. He was confirmed in April.

Frankfurter, FDR's "Jewish advisor," courted FDR assiduously. He was offered the post of Solicitor General, but turned it down because he thought he could do more good (have more influence?) from Cambridge and Harvard Law School. He replaced Justice Cardozo, who died in the summer of 1938. FDR did not appoint Frankfurter until six months later. The appointment may have come as a reward for Frankfurter's backing of FDR's Court-packing plan. The Senate held hearings on the nomination, a rare occurrence at that time. The only prior instance of such a hearing involved Justice Brandeis. Frankfurter appeared before the Senate, something that is commonplace now, but not then. He was confirmed unanimously.

Jackson was a country lawyer who became a successful lawyer in a small western New York State city. He became counsel to the Bureau of Internal Revenue, where he successfully brought suit against Andrew Mellon for tax avoidance. He then became an Assistant Attorney General, where he wrote to FDR supporting the Court-packing plan. He later was appointed Attorney General.

Chief Justice Charles Evans Hughes resigned from the Court in June 1941. Jackson was the natural frontrunner for the post, but FDR appointed Harlan Fiske Stone. Jackson was appointed to fill Stone's seat and was sworn in a month later.

Similarities at the Start — the Common Bond. All four were liberal and committed to the New Deal. They were opposed to the *Lochner* doctrine and the Court's property-protection stance, namely, that liberty of contract was included in the liberty of individuals protected by the 14th Amendment. They all had a reverence for Justice Brandeis.

Judicial Philosophies — Constitutional Theories. Black was an originalist — the text of the Constitution means what it was originally intended to mean. For Black, the Constitution did not protect corporations, only people. This principle guided him for his 34 four years on the Court (5th longest), a period during which he saw originalism become a conservative doctrine. Douglas's philosophy was legal realism — the law is not what judges say in formal rulings, but what legal actors do in the real world. Social, psychological, and, especially, economic factors determine results. Frankfurter's hallmark was judicial restraint, the "unofficial" constitutional philosophy of American idealism. The doctrine eventually led Frankfurter to become conservative; he abandoned his liberal views out of fidelity to his constitutional philosophy. Jackson espoused constitutional pragmatism. This was designed to balance competing forces and achieve the ends of civilization. This is best seen in Jackson's opinion in the steel-seizure case.

Disagreements and Animosities. The visions of the four diverged, their personalities clashed, each had his own theory of how to understand the Constitution. By choosing Stone as Chief Justice, FDR set in motion the disagreements that were to follow. Frankfurter despised Douglas, calling him "one of the two completely evil men I have ever met." Douglas considered Frankfurter a pedant, stating that Frankfurter would hold forth for 50 minutes in conference, 50 minutes being the length of a Harvard class. The animosity between Black and Jackson stemmed from Jackson blasting Black for not recusing himself in a case in which Black's former law partner was involved. This led Black to oppose Jackson's appointment as chief Justice.

Extracurricular Activities and Aspirations. Frankfurter took the unusual step of advising Henry Stimson not to serve on military commissions. He also actively went to work to block Tommy Corcoran's nomination to be Solicitor General. Jackson served as Prosecutor at the Nuremburg war-crimes trials. Douglas harbored the desire to be Vice President or even President. Another Justice, Byrnes, served on the War Mobilization Board and later became Governor of South Carolina.

Some Important Cases. Gobitis — the Jehovah's Witnesses Cases: the first case of the FDR court to be overturned. Frankfurter treated the reversal as a professional and personal calamity. It marked the rejection of the philosophy of judicial restraint. Korematsu — Japanese-American Detention Case: one of the two or three worst decisions of the Court. Dennis — Communist Party Member Case: Frankfurter's decision in the case marked the moment he could no longer be described as a liberal. Griswold: Douglas finds that the guarantees in the Bill of Rights have a penumbra formed by emanations from the guarantees that help give them life and substance. Brown v. Board of Education: the last significant decision of the Roosevelt Court.

Michael Polelle's synopsis of his presentation on *Six Amendments: How and Why We Should Change the Constitution,* by John Paul Stevens (Little, Brown & Co., 2014)

In this reviewer's opinion, Justice Stevens is to be commended for proposing changes that require public participation through the amending process rather than having the Court effectively act as an informal "amender" of the Constitution, a role it was never given. This former Supreme Court Justice proposes the Constitution be amended in six different ways to avoid future crises before they occur:

1. **The Anti-Commandeering Rule**. Art. VI (Supremacy Clause) of the Constitution omits "public officials" from following federal law even though "judges" are named. Can the

federal government impose duties on local officials to carry out federal policy without violating state sovereignty? Ruling that it can't, the Supreme Court held in a close vote that federal law can't impose obligations on local law enforcement to determine whether the sale of a firearm would be unlawful. He would cure this by adding the words "public officials" to Art. VI. He would amend Art. VI by adding "public officials."

2. **Political Gerrymandering**. In 1962, the Supreme Court reversed the principle that courts should avoid the "political thicket" of legislative redistricting. It held that the principle of "one person-one vote" means equal protection under the 14th Amendment could be violated by political gerrymandering. So many exceptions and qualifications have limited court intervention, however, that Justice Stevens proposes that a state have the burden of showing that neutral criteria have been used, such as "natural, political, or historic boundaries," but "enhancing the political power of the party in control of state government" would not be a valid criterion. Unfortunately, it is difficult, if not impossible, to distinguish his "neutral" factors from those that would be considered invidious discrimination under the 14th Amendment. Why not, in an age of computers, just have districts drawn impartially with relatively equal populations and take the human (and inherently biased) factor out of redistricting?

3. **Campaign Finance**. He would reverse Citizens United and adopt an amendment stating that neither the 1st Amendment nor any other part of the Constitution prohibits Congress or the states from reasonably regulating campaign financing. In the reviewer's opinion, he doesn't go far enough because his amendment would still allow corporations to be treated as "persons" under the 1st Amendment even though they are not "persons" under 4th Amendment protection nor under the Privileges and Immunities of Art. IV, Sec. 2. The claim that "campaign money" is "speech" under the 1st Amendment ignores the reality that campaign money is not inherently part of speech. Money may talk, but it also is used in ways ranging from bribery to buying donuts on election day that have no reasonable connection to 1st Amendment speech protection. I doubt anyone would claim the campaign money found on the Watergate burglars would be considered "free speech" money. Overstretching the 1st Amendment to cover all kinds of "symbolic speech" is precisely the evil Justice Hugo Black warned against: expanding free speech via symbolic speech could ultimately mean less protection for real speech.

4. **Sovereign Immunity**. Art. III clearly allowed a citizen to sue another state in federal court. But two years later, public outrage led to the 11th Amendment that barred such a suit. Justice Stevens believes the 11th Amendment is outdated and that the adage, "the king can do no wrong," has no place in a democratic society. Government should pay for its wrong just like any other entity. He would amend the Constitution to say that neither the 11th Amendment nor any other part of the Constitution prevents any state from being sued. It seems to this reviewer that he could have accomplished the same result by simply repealing the 11th Amendment, which would lead Art. III of the Constitution to operate without any qualification.

5. **Death Penalty**. Justice Stevens would simply abolish the death penalty by amending the 8th Amendment's "cruel and unusual" penalty clause with the added phrase, "such as the death penalty inflicted." It is refreshing that Justice Stevens is willing to put the issue up for amendment and have a public debate rather than have nine unelected judges decide what is "cruel and unusual."

6. **The 2nd Amendment (Gun Control)**. On the equally controversial issue of gun control, he would amend the 2nd Amendment to make it clear that the right to bear arms exists only "when serving in the Militia." This would revert to an earlier view of the Supreme Court before the Heller case belatedly discovered a right to bear arms independent of militia service. Again, in the reviewer's opinion, Justice Stevens deserves credit for forcing a public debate on these issues through the amendment process instead of having the Court pull rabbits out of a constitutional hat under the pretense that it is merely "interpreting" the Constitution.