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BOOK REVIEWS

FAITH AND FREEDOM - RELIGIOUS LIBERTY IN AMERICA

BY

MARVIN E. FRANKEL

HILL & WANG - NEW YORK 1994

In his fifth book, retired District Court Judge and one-time law professor, Marvin E. Frankel, sets forth an eloquent and persuasive analysis of why Americans must fight to uphold the "wall of separation" between church and state established by the First Amendment. Through a review of the relevant history, the intentions of the Framers of the Constitution, and judicial holdings over the past hundred years, Frankel sets forth a strong critique against the melding of religion and politics. Specifically, Frankel emphasizes the need to maintain tolerance through avoiding government intervention in religious matters. Although his analysis can at times be confusing, Frankel's use of witty insights makes *Faith and Freedom* entertaining and timely reading.

The First Amendment is traditionally thought to have developed as a response to the deprivation of freedom which our forefathers suffered in Europe, where they were obligated to support government-favored churches. Frankel reminds us, however, that liberty of conscience "was scarcely the order of life in colonial America." In reality, the settlers quickly forgot the suffering which they endured at the hands of an intolerant majority which was unwilling to recognize their religious views. As Frankel points out, most of the colonists were actually highly intolerant; many maintained established religions and discriminated openly against Catholics, Jews, and even certain Protestant sects.

"How then, did the United States get so lucky as to acquire the First Amendment?" Frankel asks. He explains that only after the American Revolution did change begin to take place. Around 1789, with the enactment of the Bill of Rights and the work of James Madison and Thomas Jefferson, the government became increasingly willing to accept more liberal constructions of religious practice. Although the Bill of Rights may be viewed as the cornerstone of the recognition of individual's rights, Frankel points out that in essence these were the result of a focused self-interest on the part of the Framers. The Framers had been members of the oppressed minority in Europe, and recognized that their new-found majority status may not be everlasting. The Bill of Rights was, therefore, simply intended to serve as a safeguard against majority oppression of the individual.

Full-blown separation of church and state, however, is essentially a product of the twentieth century, and specifically of post-1940s jurisprudence. The existence of the First Amendment's religious component, Frankel reminds, has not always guaranteed that the wall of separation between church and state will remain undisturbed. The First Congress opened its sessions with a Protestant chaplain's invocation prayer, and continues to do so today. Until 1844, blasphemous speech (against Christianity) was still considered a state crime. In 1864, Congress "blessed" the placement of the national motto "In God We Trust" on our currency. This remained unquestioned until President Franklin Delano Roosevelt ordered the motto deleted from the currency. The Congress, however, saw his actions as vandalism and ordered the motto put back on the money. Mormons were historically prosecuted for practicing polygamy on the basis it was "contrary to the spirit of Christianity." Even the Supreme Court as late as 1931, with a Jewish Justice on the bench, continued to proclaim the United States "a Christian Nation." In 1954, Senator Joseph McCarthy and his colleagues in Congress found it necessary to "improve" upon the Pledge of Allegiance through the insertion of the words "under God" after "one nation." These members of Congress justified their actions as necessary in denying the atheistic and materialistic concepts of communism and strengthening this country's resistance to it. These actions may be viewed by some as harmless and merely "ceremonial and patriotic," yet, Frankel reminds us that these seemingly harmless acts inevitably carry a heavy burden and contribute to the weakening of the wall of separation.

Frankel explains that the wall of separation ought to serve to protect several freedoms; the freedom to believe and practice our religion of choice, the right not to believe any government ordained religion or participate in religious practice unwillingly, as well as the right to not feel singled out for being a member of a minority religion. By subjecting others to our religious practices, which they may not share, we are acting as inquisitors or enemies of freedom. Problems present themselves, Frankel notes, primarily in the areas of free-exercise due to the inevitable overlap which exists between religion and custom. When members of one religion, usually the majority Christian religion, seek to impose their beliefs on others through moments of silence, commencement prayers, or religious-holiday displays, and are prohibited from doing so, these prohibitions are most often characterized as encroachments on their freedom of expression. Frankel believes this is primarily because, historically, many of these activities have been viewed simply as ceremonial or cultural customs. This is evident in recognized national holidays such as Christmas or Easter, or the unquestioned acceptance of store closings on Sundays. What Frankel points out is that in order to preserve the division between church and state, some encroachment on the majority's "free exercise" is inevitable if we are to protect members of minority religions from being forced to follow the majority's beliefs and customs. Nonetheless, both Christians and Jews alike frequently seek to display religious symbols in public, although they are in no way essential to the practice of the religions. The importance to believers, Frankel says, lies in having others recognize their presence, due to a "powerful

urge" most people feel to compel the acceptance of our most deeply held beliefs by others. This need for social homogeny has historically made it extremely difficult for non-conformists. The First Amendment's religious component aims to counter this drive for conformity.

The battle to maintain separation, Frankel points out, is ongoing. When the Supreme Court announced its ruling in *Abington School District v. Schempp*, 374 U.S. 203 (1963), prohibiting Bible reading in public schools, one senator declared that the Supreme Court had made God unconstitutional. Since that holding over 30 years ago, constitutional amendments favoring prayer in schools have continued to be proposed. The most recent disguise for school prayer, the moment of silence, has even attained acceptance and has been held to pass constitutional muster. The ongoing struggle, Frankel says, is necessary to combat what is characterized as a religious double standard which discriminates against underrepresented religions. Jehovah's Witnesses have been banned from distributing pamphlets, Christian Scientists have been criminally prosecuted for refusing medical treatment, Mormons for practicing polygamy, and American Indians from using peyote in their religious ceremonies. Congress has for a long time been granted conscientious exemptions from combat for draftees opposed to war by reason of "religious training and belief" but not for those philosophically opposed in terms of purely personal moral code. The Supreme Court did, however, make exceptions for persons who hold moral beliefs "with the strength of more traditional religious convictions."

This need to justify beliefs through analogies to religion is what Frankel believes is a central problem in the law and general public's belief that the minds and hearts of the so-called non-religious are empty of any concern or conception of what the ultimate truths in life may be. However, Frankel finds this disturbing and urges the recognition of religion on more basic grounds. William James, renowned psychologist, defined religion as the "feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they consider divine." Frankel also refers to Thomas Paine's characterization of religion as "no more than a human invention set up to enslave mankind, and monopolize power and profit."

The fragility of the lessons which history has taught and the importance of respecting the First Amendment's religious component cannot be overemphasized. Frankel reminds us in *Faith and Freedom* that its purpose is to secure everyone's freedom of conscience, and to ensure fundamental tolerance and our inheritance as Americans; to believe what we chose to and be faithful to our consciences, is priceless. We owe ourselves and our progeny the duty to preserve it.

Adrianna Quintero

BEYOND POLITICS: MARKETS, WELFARE, AND THE FAILURE OF BUREAUCRACY

BY

WILLIAM C. MITCHELL & RANDY T. SIMMONS

FOREWORD BY GORDON TULLOCK

WESTVIEW PRESS, DECEMBER 1994.

In *Beyond Politics: Markets, Welfare, and the Failure of Bureaucracy*, authors William C. Mitchell and Randy T. Simmons prove themselves adept at using public interest techniques in a manner not normally associated with a traditional public interest viewpoint. The major premise of the book is that the measures taken in the United States to correct "market failures" have produced "government failures" instead. Mitchell and Simmons question the existence of market failures and suggest that the welfare economists who originated and perpetuated the idea of market failures were short-sighted in their analysis. The authors use economic models and analysis persuasively to argue that governmental intervention in markets should be limited to defining, clarifying, and enforcing private property rights rather than creating and regulating monopolies and oligopolies.

The book begins with welfare economists' view of market failure and government intervention. The authors characterize this view as sincere and noble, promoting the common good of all, and placing high value on civic virtue in the citizenry. A brief explanation of how markets work and the influence of the "unseen hand" includes discussions of public goods, imperfect competition, distributive inequities, and transaction costs. The first chapter ends with a summary of the results of welfare economists' analysis.

The authors then examine the assumptions welfare economists make about the political system: namely that we are a well-informed, fair-minded democracy; transactions have little or no cost; there is an absence of externalities; and these choices achieve pareto optimality through an efficient political system. The authors point out that these assumptions are similar to those of a perfectly competitive market and suggest that they better describe an ideal political system, as opposed to the system we currently have. Mitchell and Simmons propose that the nature of politics and its effect on humans undermines welfare economists' assumptions about the political system.

The true political system, according to the authors, consists of voters, interest groups, bureaucrats, and politicians, all trying to advance their own agendas. Thus the polity is like the economy, with each actor assumed to want something controlled by others. Public choice theory is used to explain how voters and interest groups seek services from politicians and bureaucrats, bureaucrats seek larger budgets from politicians, and politicians seek votes and other support from voters and interest groups.

An analysis of collective choice follows, contrasting individual market decisions with the coercive joint decision rules of plurality, simple majority, and supra-majority which enable us to have a government of democratic processes. These rules force minorities to be bound by the decisions of others, and the winning majorities can use the coercive power of the government to enforce their decision. The discussion proceeds to the fiscal incentives of politicians and how they can buy votes by giving public money to bureaucrats to "administer" it in the "public interest."

Mitchell and Simmons contend that most bureaucrats are hard-working, dedicated professionals, unlike some stereotypes suggest. These professionals are merely trying to achieve the goal of doing good at zero cost to the recipient. That desire, say the authors, is exactly what prompts the growth of government—bureaucrats asking for more money to do more good. The problem with this is that spending decisions are separated from revenue decisions, resulting in markedly inefficient allocation of resources.

Mitchell and Simmons offer six reasons for the inefficiency in the polity: perverted incentives, collective provision of private wants, deficient signaling mechanisms, institutional myopia, dynamic difficulties, and electoral rules and the distortion of preferences. The separation of costs from benefits is key to this discussion, as is the inadequacy of a the signaling mechanism in the polity (a yes or no vote) in contrast to the mechanism of the market (a price which is variable in magnitude). The discussion of self-dealing, issue packaging, vote-trading, and log-rolling is particularly intriguing, and the authors have chosen examples which illustrate these concepts most clearly.

The authors then explore free-riding and forced-riding in the market for public goods. They challenge the assumption that free markets will under-produce these goods and charge the government with overproducing them. The authors' remedy is not for the government to reevaluate demand, but to decentralize the supply and privatize the market. Decentralization enables a greater variety of choices, and privatization encourages competition, also providing a wider range of choices as well as reducing costs.

The ensuing chapters all deal with political pursuit of specific types of private gain. Beginning with producer-rigged markets, the authors describe the phenomenon of rent-seeking—convincing the government to grant a monopoly (or oligopoly) or to regulate trade or industry in some manner beneficial to the rent-seeker. Examples include import quotas and farm subsidies. From there, the authors discuss government exploitation. Official exploitation is done in the form of taxation. More subtle exploitation is accomplished by bureaucracy and by agenda control—how issues are framed or packaged for polling/voting purposes.

The authors next deal with consumer protection laws and contend that markets protect consumers as a matter of course. For example, automakers attend to their own interests of selling more cars by making cars safer year after year. After Mitchell and Simmons share some surprising statistics about the 55 mile-per-hour speed limit (it has not saved lives, according to sources cited by them), they discuss vehicle inspection laws, public schools, and state sys-

tems of higher education.

The text then addresses environmental goods. The authors praise the Coase theorem (that externalities are not caused by market activity, but by the failure to specify property rights so that markets can account for all costs and benefits). They again suggest that specifying property rights will facilitate efficient resource allocation better than regulation will, and they discuss extensively how the costs of the Clean Air Act outweigh its benefits. Other examples given of the Coase theorem in action are private wildlife refuges, private ownership of ecologically valuable land, and fee hunting (landowners charging hunters a fee for the right to pursue wild animals who live on the owner's land).

Mitchell and Simmons then examine the actions of *homo economi* (economic man) in the effort of each person to maximize personal welfare. People make use of government to advance their own welfare by demanding benefits and dispersing the costs of those benefits to others, a practice which the authors call coercive redistribution. They then address the use and workings of coalitions, which are necessary to make this happen. The redistributed funds (transfer payments supposedly for the benefit of the poor) actually benefit the coalition-builders far more than they benefit the poor. This portion of the text concludes with some observations about distributive justice in a transfer society and the problem of how we define "equality."

An analysis follows of politicians' self-interest in perpetuating market instability. A number of studies cited by the authors seem to show a correlation between political objectives, fiscal policy, and market performance. Government spending is used to manipulate voter perceptions of incumbent politicians at election time, so as to effect their own re-election.

The authors then question some of the assumptions commonly made in Keynesian macroeconomic theory. Individual choice and personal welfare maximization are routinely ignored by Keynesian macro-economists who focus on aggregate saving, investment, and consumption. Individuals and firms comprising the market are assumed to be "infinitely amenable to policy changes." This assumption is valid only if macro-level changes are "consonant with the micro-foundations of individual choice." The authors further argue that the causes of unemployment today are far different than they were in the 1930s when Keynesian theory was developed, casting further doubt on the accuracy and adequacy of Keynesian theory in the U.S. economy today.

The book continues, praising markets, competition, and private property. European economists, we are told, are redefining competition as "rivalry," and the entrepreneurial rivals are the ones who move markets out of equilibrium. This is exactly the kind of behavior welfare economists fear and regulate; it is also what draws firms into (or pushes them out of) the market. Tribute is paid once again to Coase in an enlightening investigation into the nature of business organizations, and parallels are again drawn between the polity and the economy.

The authors' conclusion calls for privatization, deregulation, and constitutional change. Welfare economists have torn down free markets, but the gov-

ernmental monolith erected in their place has proven even less efficient at allocating resources. Government has been called upon to do more than it is capable of doing; it has failed, and it is time to say so. While admitting faults, failures, and shortcomings requires humility, it must be done in order to effect change. Markets may not be perfect, but they are more efficient than bureaucracy and regulation. Therefore, we as a nation should look to free markets for solutions to our economic problems and stop expecting them from a government that cannot deliver.

Jonathan Meindersma