A law unto themselves

Noah Feldman offers a fascinating account of four US Supreme Court justices whose constitutional vision dovetailed with their own personality and worldview

With the New Deal, president Franklin Delano Roosevelt sought to reduce the impact on Americans from economic disasters like the Great Depression by expanding the role of the federal government in regulating the economy and providing a safety net through unemployment insurance and Social Security for the elderly. Frustrated when the Supreme Court declared major New Deal legislation unconstitutional, Roosevelt tried – and failed – to “pack” the court by getting Congress to authorize him to increase its size from nine to a maximum of 15 justices. Although he lost that battle, he won the war. Retirements allowed the president to fill seven vacancies between 1937 and 1941. Four of them – Hugo Black, Felix Frankfurter, William O. Douglas and Robert Jackson – helped reinvent the Constitution and remake modern America.

In Scorpions, Noah Feldman, a professor of law at Harvard University, takes us behind the scenes in a lively and informative account of the landmark decisions of the Supreme Court in the 1940s and ’50s. His quartet, he argues, articulated the jurisprudential theories that now comprise the entire field of constitutional thought: judicial restraint (Frankfurter), judicial activism and “legal realism” (Douglas), pragmatism (Jackson) and “original intent” (Black).

A work of popular history, Scorpions is at its best describing the different backgrounds of these four intensely ambitious men. A Jewish immigrant from Austria, Frankfurter became a Harvard professor, denounced the murder trial of radicals Nicola Sacco and Bartolomeo Vanzetti as a travesty of justice, and advised Roosevelt on law-related appointments. Black, a former member of the Ku Klux Klan, became a US senator from Alabama. A brilliant, but insecure, country lawyer, Jackson became solicitor general of the United States (and later chief US prosecutor at the Nuremberg Trials of Nazis). And Douglas, a self-invented “boy genius” from Yakima, Washington, became a Yale professor and then head of the Security and Exchange Commission.

When they reached the court, and the issues changed from economic regulation and distribution to civil liberties and civil rights, Feldman demonstrates, clashes of personality and philosophy drove these former liberal allies apart.

Each of Feldman’s characters is complex, conflicted, cantankerous and compelling. At Nuremberg, he writes, Jackson insisted that international law was a pragmatic tool that could and should be used to achieve the ends of civilization. He struggled, not always successfully, to convince his contemporaries – and posterity – that the defendants were “guilty of crimes, not simply of being on the losing side of history.”

Declaring an end to segregation in public schools in Brown v. Board of Education, Feldman indicates, took “exceptional bravery” for Black, a man of the South. And in finding a constitutional right to privacy, Feldman reminds us, Douglas penned a pacan to marry, even though he had been thrice divorced.

But the most fascinating figure in Scorpions – especially for readers of The Jerusalem Post – is Felix Frankfurter. On economic issues, Feldman points out, Frankfurter’s judicial philosophy – unless there was a clear violation of the Constitution, courts should defer to legislatures – usually dovetailed with his liberal politics. But on civil liberties and civil rights – in cases involving laws that interned Japanese-Americans during World War II and compelled Jehovah’s Witnesses to salute the flag – he was forced to choose between the two. When he agreed that Congress could pass a law making it (in essence) a crime to belong to the Communist Party, Feldman concludes, “he could no longer be fairly described as a liberal.”

Frankfurter’s identity as a secular Jew also informed his judicial decisions. He was devastated when critics compared the flag salute case to Nazi oppression of Jews. “One who belongs to the most vilified and persecuted minority in history,” he wrote, “is not likely to be insensitive to the freedoms guaranteed by our Constitution.”

As a racial liberal and as a Jew, moreover, he overcame his doubts about whether the 14th Amendment to the Constitution mandated an end to segregation and contradicted his philosophy of judicial restraint to help engineer the unanimous decision in Brown v. Board of Education.

At the end of his life, Frankfurter, who had consciously substituted Americanism for Judaism, acknowledged his religious heritage: “I came into the world as a Jew and I think it is fitting that I should leave as a Jew.” He instructed that his memorial service end with a recitation of the Kaddish prayer for the dead. His protégés and law clerks, many of them Jewish-Americans, Feldman observes, knew that for all his faults, they had lost a surrogate father whose influence “in the world of legal thought would not soon be equaled.”

The retirement in 1975 of William O. Douglas, the last of the “Fab Four” to remain on the court, marked the end of an era. To be sure, these scorpions were replaced by new ones. Virtually all of them could sting – and some of them had great legal minds. But in an era of careful vetting and ideological litmus tests for potential nominees, the Supreme Court, Feldman implies, had fewer justices who went their own way, “developing a constitutional vision distinctive to their own personality and worldview” and, perhaps most importantly, were open to learning more about its true meaning, “its contours and commands.”

The writer is the Thomas and Dorothy Litwin Professor of American Studies at Cornell University.