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MR. JUSTICE FRANKFURTER—LAW AND CHOICE

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> Our essential weakness—that of making mistakes—will not be eradicated by a central agency. Morris Cohen

> In the past the courts have reached their conclusions largely deductively from preconceived notions and precedents. The method I have tried to employ in arguing cases before them has been inductive, reasoning from the facts. Louis D. Brandeis

> In this and like communities public sentiment is everything. With public sentiment nothing can fail; without it nothing can succeed; consequently he who moulds public sentiment goes deeper than he who enacts statutes and decisions. He makes statutes and decisions possible or impossible to be executed. Abraham Lincoln

> [T]he attitude of a society and of its organized political forces, rather than its legal machinery, is the controlling force in the character of free institutions. Mr. Justice R. H. Jackson

JUSTICE V. JUSTICE UNDER LAW

In an opinion that seems destined to live as long as the ideals of democracy survive, Justices Holmes and Brandeis rejected their colleagues' narrow conception of free speech, yet concurred in the judgment affirming conviction.[1] Though the accused had claimed protection under the appropriate constitutional provision, she had failed at the trial level to raise the "clear and present danger" issue. Raising it in the Supreme Court was futile, thought Holmes and Brandeis, because "Our power of review in this case is limited not only to the question whether a right guaranteed by the Federal Constitution was denied [in the state court] . . . but to the particular claims duly made below and denied."[2] It may be said, of course, that Holmes and Brandeis had "no feel for the dominant issues"; that, preoccupied with "crochet patches of legalism on the fingers of the case," they let a technicality prevail over Justice. Others may suppose the two great judges, well aware of what was at stake, deemed themselves not free to do Justice, but bound to do *justice under law, i.e.,* in accordance with that very special allocation of function and authority which is the essence of Federalism and the Separation of Powers. The point is, one's estimate of a judge hangs on one's conception—articulate or otherwise—of the judicial function.

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1. Whitney v. California, 274 U.S. 357, 372 (1927).
2. *Id.* at 380. Mr. Justice Frankfurter's position in Terminiello v. Chicago, 337 U.S. 1, 8 (1949) was based on this principle.

To those for whom the Supreme Court's first concern is Justice, a great judge on that bench is an activist, one who does not readily permit "technicalities" to frustrate the ultimate. It follows, of course, that in so far as activism prevails the Court is the final governing authority. For, to that extent, its basic job is to impose Justice upon all other agencies of government, indeed upon the community itself. But what is Justice? Not so long ago, activists among the "nine old men" found it in a modified (read perverted) laissez-faire, called Rugged Individualism. Modern activists see it is a humane and virile libertarianism. Holmes facetiously suggested that its roots are in one's "can't helps."[3]

All this is unacceptable to those who take the more modest view that the Court's chief concern is *justice under law*. For them, the great judge is the humilitarian, the respecter of those "technicalities" which allocate among many agencies different responsibilities in the pursuit of Justice. In this view, the Court's special function is to maintain a constitutional balance between the several elements in a common enterprise. The Court, so to speak, tends the machinery. What the plant produces depends upon the management, *i.e.*, the political processes.

While these two views are distinct at their cores, they fuse into one another at their peripheries. Both are deep in American culture. Neither prevails to the complete exclusion of the other even in the work of a single judge. Eventually, the ardent activist gives way to a rule, just as his counterpart on occasion ignores rules for something deemed transcendental. What is important is the tilt of a judge's mind, his conception of the nature of his function and the depth of his convictions. It is a matter of goal and tendency, not of absolutes.

Some insist that regardless of what a judge should do, he cannot long escape his own sense of Justice, *i.e.*, his own bias. Perhaps detachment is an illusion. Objectivity may belong to the gods—or to demons. "Be that as it may," says Learned Hand, "we know that men do differ widely in this capacity; and the incredulity which seeks to discredit that knowledge is a part of the crusade against reason from which we have already so bitterly suffered. We may deny—and, if we are competent observers, we will deny—that no one can be aware of the danger [of his bias] and in large measure provide against it."[4] Chief Judge Hand's career on the bench, like those of Holmes, Brandeis, Stone and Cardozo, are monuments to the truth of this insight.

Of the great dissenters in the days of laissez-faire activism only Mr. Justice Stone remained on the Court to see the new libertarian activ-

3. That is, things which because of one's background are so familiar that one can't help believing them. See HOLMES, *Natural Law*, in COLLECTED LEGAL PAPERS 310 (1920).

4. HAND, THE SPIRIT OF LIBERTY 218 (2d ed., Dilliard 1953).

ism after 1937. He was as unpersuaded by the one as by the other. For in his view both entailed abuse of the judicial function. At the close of a long career spanning the two quite different eras of judicial Justice, he wrote a trusted friend, "My more conservative brethern in the old days [read their preferences into legislation and] into the Constitution as well. What they did placed in jeopardy a great and useful institution of government. The pendulum has now swung to the other extreme, and history is repeating itself. The Court is now in as much danger of becoming a legislative and Constitution-making body, enacting into law its own predilections, as it was then."[5] As Thomas Reed Powell put it, "Four of the Roosevelt appointees were as determined in *their* direction, as four of their predecessors were determined by attraction to the opposite pole."[6]

JUSTICE UNDER LAW AND THE PRINCIPLE OF POLARITY

Mr. Justice Frankfurter (it is no secret) is deeply humilitarian. Plainly this is an acquired characteristic, a judicial mold superimposed upon a powerfully active and thoroughly libertarian personality (again no secret). If to some his humility seems exaggerated—breastbeating it has been called—that may be the measure of the struggle within him or within the Court. Just as Holmes was more skeptical, so he was less vocal in his humility. In any case, there can be no doubt of the deep Holmesian mark upon Mr. Justice Frankfurter. Before he took his seat upon the bench he was the intimate personal and professional confidant of Holmes, as well as Brandeis, during the whole, long course of their struggle against the activism of "the nine old men." The shared ardours of that contest must have reinforced what Professor Frankfurter was learning as teacher of federal jurisdiction at Harvard, namely, that since the Supreme Court cannot review more than a drop in the flood of American litigation, by long established principle that drop must be selected not on the basis of Justice to any litigant, but in the interest of balance among the various elements in the governmental structure. Moreover, if the Court takes jurisdic-

5. As quoted in MASON, SECURITY THROUGH FREEDOM 145-46 (1955). In this, in their view of the Court as a balancer of interests, and in their disdain for abstractions Justices Stone and Frankfurter were in full accord. Compared with this area of agreement their differences were small. See MASON, *op. cit. supra,* app. The trend of voting records suggests that as the libertarians became more aggressive these differences dimmished. See Mendelson, *Clear and Present Danger—From Shenk to Dennis,* 52 COLUM. L. REV. 313 (1952). Obviously the libertarians read much more in Stone's famous footnote 4, United States v. Carolene Products Co., 304 U.S. 144, 152 (1938), than its author intended. *Cf.* MASON, *op. cit. supra* at 125-37. Indeed there is some doubt whether Stone wrote, or accepted, the crucial first paragraph of that footnote. BRADEN, THE SEARCH FOR OBJECTIVITY IN CONSTITUTIONAL LAW 571, 580 & n.28 (1948).

6. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 82 (1956).

tion on the one ground and decides on the other, balance is jeopardized and though Justice (in its then current version) be done for a few, the result is hardly fair to the many whose cases, however worthy, cannot for physical limitations hope to reach the judicial summit. What Paul Freund has said of Mr. Justice Brandeis is relevant here. "[H]e would not be seduced by the quixotic temptation to right every fancied wrong which was paraded before him. The time was always out of joint but he was not [commissioned] to set it right. . . . Husbanding his time and energies as if the next day were to be his last, he steeled himself, like a scientist in the service of man, against the enervating distraction of countless tradgedies he was not meant to relieve. His concern for jurisdictional and procedural limits reflected, on the technical level, an essentially Stoic philosophy. For like Epictetus, he recognized 'the impropriety of being emotionally affected by what is not under one's control.' "[7]

Constitutional Law: The basic articulate premise of government in the United States is the diffusion of power. Ultimate political control is spread broadly among the people. This is the foundation of democracy. Governmental power is divided between nation and states. This is federalism. What is given to each is parcelled out among three branches to accomplish the separation of powers. The purpose is not merely—what schoolboys emphasize—to avoid a tyranical concentration of power. We seek as well the alignment of form to special function and above all that unique democratic efficiency, the promise that, if decisions be slow, they will be acceptable to those who must live with them.

For Mr. Justice Frankfurter, dispersion of the power to govern is not just a sophomoric slogan. It is the essence of our system. That is why he is so mindful of the political processes, state authority and the division of labor between legislative, executive, administrative, and judicial agencies. In Professor Jaffe's accurate account the Justice "is forever disposing of issues by assigning their disposition to some other sphere of competence."[8]

But this is only half the problem. Familiarity obscures for us what to outsiders is a marked characteristic of American government, our habit of dressing up the most intricate social, economic and political problems in legal jargon and presenting them to the courts for "adjudication." In view of this a foreign observer long ago concluded that, if asked where he found the American aristocracy, *i.e.*, the governing class, he would reply "without hesitation . . . that it occupies the judicial bench and bar."[9] The short of it is that behind and overshadow-

7. FREUND, UNDERSTANDING THE SUPREME COURT 65 (1949).
8. Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357, 359 (1949).
9. 1 DE TOCQUVILLE, DEMOCRACY IN AMERICA 355 (Bowen ed. 1862).

ing our open commitment to the fragmentation of power lies a brooding, inarticulate distrust of popular government. This finds expression in judicial review, or what its detractors call judicial supremacy. Whatever the name the essence is clear, *concentration in a single agency*—significantly that farthest removed from the people—of power to supervise all other elements of government whether at the national, state, or local level. Neither Congress nor President, no administrative agency, no governor, no state court or legislature, not a single city or county functionary is immune from the centralized power of judicial review. Indeed in some eras the Court has been so domineering that from time to time dissenters have felt compelled to remind it that the judiciary is "not the only agency of government that must be assumed to have capacity to govern." Equally pointed reminders have come from the outside. Most of the great leaders of American democracy, Jefferson, Jackson, Lincoln, Bryan and the two Roosevelts, among others, on occasion have challenged the practice of judicial review. But except perhaps in some academic circles the principle has withstood abuse and criticism. It stands only a shade less firmly grounded in our polity than its counterpart, the dispersion of power.

The Supreme Court, then, is caught between basic principles that look in different directions. Mr. Justice Frankfurter seems more sensitive to the pinch than most, though doubtless no one in his position is immune. What is the judge's role in such an impass? A common "compromise" has been to emphasize diffusion or judicial supremacy according to the nature of the interest before the Court. At least since the Civil War some judges have demonstrated a marked propensity to assert their supremacy for the benefit of "private property" while other have shown a tendency to distrust the principle of diffusion only when "personal liberty" is at issue. For Mr. Justice Frankfurter such compromises only underscore the lawless quality of the Court's power. Deeply libertarian in private thought and action, he sees what partisans do not see: that while effective transcendental arguments may be made for the social priority of personal liberty, no less powerful considerations in the abstract would sustain the primacy of economic interests. What Wilmon Sheldon said of philosophers seems relevant to those who hold to either extreme. They are generally right in what they affirm of their own vision and generally wrong in what they deny in the vision of others. There is more subtlety, more depth and more complexity in our culture than such one-sided polemics dream of. We may be proud of the golden thread of liberalism that runs through American thought, but it is futile to pretend the "acquisitive instinct" and the old Whiggish concern for property are not as deep in our culture. As Daniel Webster put it long ago, "Life and personal liberty are, no doubt, to be protected by law; but property is also to be

protected by law, and is the fund out of which the means for protecting life and liberty are usually furnished."[10] President Hadley of Yale spoke for many when he explained the Constitution as a "set of limitations on the political power of the majority in favor of the political power of the property owner."[11] Such suggestions of the primacy of economic interests are wormwood to liberals, but the disease is deep. Man must eat and, not less important, he must "know where his next meal is coming from." Our cold-war experience in the "backward" areas of the world suggests that those who must choose are far more interested in economic security than in civil liberty. In any event it is important that neither is fungible and neither in the abstract is ever at stake in litigation. Typically some finite facet of one or both is imperiled and certainly in the kind of cases that now reach the Supreme Court the context is often such that intelligent men may differ as to whether a legitimate interest or its abuse is involved. This is what Holmes meant when he said that "general propositions do not decide concrete cases." Or, in Mr. Justice Cardozo's words, "Many an appeal to freedom is the masquerade of privilege or inequality seeking to entrench itself behind the catchword of a principle."[12] For the purpose of settling specific litigation abstract arguments as to the relative importance of personal as against proprietary interests are as futile as medieval arguments about realism and nominalism. They cut no wood. Morris Cohen has called "attention to the fact that the traditional dilemmas, on which people have for a long time taken opposite stands, generally rest on difficulties rather than real contradictions, and that positive gains . . . can be made not by simply trying to prove that one side or the other is the truth, but by trying to get at the difficulty and determining in what respect and to what extent each side is justified."[13] This principle of polarity is the foundation of Mr. Justice Frankfurter's jurisprudence. He cannot be true to the American tradition and ignore either the diffusion of power or judicial supremacy. Least of all can he accept reconciliation which raises now one and then another cluster of interests to a "preferred position" and correspondingly defers others.

Of course, when the Constitution speaks clearly there is no problem. The constant difficulty is that for many purposes it speaks in quite Delphic terms. This indeed is its genius. To resolve their doubts and disagreements, to accommodate the unknowable future, the Founding

10. For a brief survey of this tradition in America see FREUND, *op. cit. supra* note 7, at 14-17, where the quotation from Webster will be found.
11. *The Constitutional Position of Property in America,* 64 THE INDEPENDENT 838 (1908). When he is addressing outsiders even that great libertarian, Mr. Justice Douglas, recognizes that the security of property is "one of the preferred rights." DOUGLAS, WE THE JUDGES 288-89 (1956).
12. Cardozo, *Mr. Justice Holmes,* 44 HARV. L. REV. 682, 687-88 (1931).
13. COHEN, REASON AND NATURE 11 (2d ed. 1953).

Fathers (like the amenders) often wrote with inspired vagueness. Each generation's birthright then is to find its own wisdom—or the opposite—in the ancient document. And so the Constitution lives despite unforeseen vicissitudes because it derives vitality from the life about it. That is why so much depends upon the particular factual context in which constitutional issues arise. Mr. Justice Brandeis taught us anew, when we were in danger of forgetting it, that law is born of fact. "*Ex facto jus oritur.* That ancient rule must prevail in order that we may have a system of living law."[14] The facts after all make up the issue. The precise problem of a minimum wage case,[15] for example, is evaded, not solved, by invoking the abstraction "liberty of contract," just as *Terminiello's* case[16] is not solved by "reiterating generalized approbations of freedom of speech." A Brandeis Brief is as relevant in the one situation as in the other, if the Court is to decide real, not hypothetical, cases. Of course a judge can derive anything from an hypothesis that he puts into it.[17]

All this is obvious to liberals in application to the "nine old men," and to conservatives in reference to liberals. Seldom because of his blinding dogmas does either liberal or conservative see it in his own case. Mr. Justice Frankfurter tries to see it both ways. Accordingly for him the substitution of judicial judgment for the judgment of those to whom primary governmental responsibility has been given can never be justified by amorphous proprietarian or libertarian generalities. If the Constitution is to be a living instrument of government, the breath of life must come from the community—not from the "can't helps" of a few "independent" judges. It follows that judicial interference with the extrajudicial processes of government is permissible only when the concrete facts of a specific case leave no room for doubt, *i.e.*, when the Court is prepared to hold that no reasonable mind could support the challenged legislative view.[18] *This is to say simply that uncertainty is to be resolved in favor of the wisdom and integrity of sister organs of government and the people to whom they*

14. Adams v. Tanner, 244 U.S. 590, 600 (1917).
15. See, *e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923).
16. Terminiello v. Chicago, 337 U.S. 1 (1949).
17. The majority's position in the *Terminiello* case, *supra*, is a classic example of the libertarian tendency to ignore circumstances in favor of abstractions. As Mr. Justice Jackson put it, "The Court reverses this conviction by reiterating generalized approbations of freedom of speech with which, in the abstract, no one will disagree. Doubts as to their applicability are lulled by avoidance of more than passing reference to the circumstances of Terminiello's speech and judging it as if he had spoken to persons as dispassionate as empty benches . . . . But the local court that tried Terminiello was not indulging in theory. It was dealing with a riot and with a speech that provoked a hostile mob and incited a friendly one, and threatened violence between the two." *Id.* at 13.
18. This is simply an old adaption of the ancient principle governing the division of function between jury and court. Thus the two authentic voices of the people—jury and legislature—enjoy the same basic sanctity vis-a-vis judicial fiat.

are responsible. For doubt entails choice and choice in a democracy belongs to the political processes. Thus would Mr. Justice Frankfurter reconcile judicial supremacy with diffusion of the power to govern.[19]

Judicial libertarians accept this approach not merely as orthodox but as sound in all cases involving the regulation of economic interests. Indeed they question it only with respect to First Amendment freedoms—on the ground that these and these alone are fundamental in the democratic process.[20] But how deep is his respect for democracy who will not trust it with basic problems—who will not honor even those results of the democratic processes which by hypothesis, if debatable, are not clearly wrong, *i.e.,* not plainly proscribed by generally recognized legal norms?

Wise and devoted democrats believe that we threaten freedom when we send the communist leaders to jail, as in the *Dennis* case.[21] Equally wise and devoted democrats believe that we unduly jeopardize freedom if we do not send them to jail. Neither position, one suggests, is demonstrably true or false, or unequivocally written in the constitution.[22] In such a case, Aristotle long ago observed, even those who demand the rule of law know that man (not law) must make the choice, but they will insist that it be made by many, not by one or a few![23] Ringing down through the ages, this thought finds an echo in Thomas Reed Powell's final summation: "[W]hat I most object to in many Justices is something that springs from a feeling of judicial duty to try to make out that their conclusions come from the Constitution."[24] Despite unqualified language in some parts of the Bill of Rights, no past or present member of the Court has even suggested that any of

19. It will not do to say that the Justice's special willingness to remove state burdens on interstate commerce violates the diffusion principle by concentrating control in the judiciary. Along with the Court, he leaves the *final* word on such matters to Congress. See, *e.g.,* Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945). All agree of course that, if we are to be a nation, the last word must be left to some national agency rather than to the individual states.

If it be said that diffusion would be better served by a more willing assertion of judicial control in free expression cases, surely the answer is that by resolving doubt in favor of the political processes we increase, rather than diminish the power and responsibility of the people. The Justice's reluctance to intrude in the case of grossly unequal electoral districts is due not to "reasonable doubt," but to the inadequacy of judicial remedies. See, *e.g.,* Colegrove v. Green, 328 U.S. 549 (1946).

20. See, *e.g.,* Thomas v. Collins, 323 U.S. 516, 529-30 (1945). We skip the question of whether some other provisions of the Bill of Rights are not equally fundamental and whether indeed all First Amendment freedoms are "indispensable" to democracy. English experience, for example, demonstrates that democracy and an established church may thrive together. Can the free exercise of religion be deemed one of democracy's processes?

21. Dennis v. United States, 341 U.S. 494 (1951).

22. See Mendelson, *Clandestine Speech and the First Amendment—A Reappraisal of the Dennis Case,* 51 MICH. L. REV. 553 (1953).

23. See MCILWAIN, THE GROWTH OF POLITICAL THOUGHT IN THE WEST 88 (1932).

24. POWELL, *op. cit. supra* note 6, at 179.

its liberties are unlimited. As with the "rights of property" the only question has been when and how they may be qualified. Whom do we fool by calling this process constitutional interpretation? It is in fact law-making and no less so in the hands of liberals than in the hands of conservatives. Thus, it is one thing for Mr. Justice Frankfurter (in a conciliatory gesture?) to concede that certain civil liberties "come to this Court with a [special] momentum of respect": it is something quite different to buttress that respect with a presumption of invalidity for legislative law and use it as a substitute for judgement upon the peculiar facts of a concrete controversy.[25]

Some insist that extended judicial review in First Amendment cases is a desirable instrument of public education. The argument sounds strange in the mouths of its liberal sponsors. By their standards, most of the Court's teaching in this area has been erroneous. But right or wrong, the fate of the "nine old men" suggests that judicial precept is somewhat less than effective pedagogy. In Mr. Justice Frankfurter's view responsibility is a more reliable educator. We practice intolerance and expect the Court to save our freedom. History does not demonstrate that those upon whom we rely may be trusted to do for us what we lack conviction or will to do for ourselves.[26] This is not mere chance. The stream of the law cannot habitually rise above its source. "The law must have an authority supreme over the will of the individual, and such an authority can arise only from a background of social acquiescence, which gives it the voice of indefinitely greater numbers than those of its expositors. Thus, the law surpasses the deliverances of even the most exalted of its prophets; the momentum of its composite will alone makes it effective to coerce the individual and reconciles him to his subservience. The pious traditionalism of the law has its root in a sound conviction of this necessity; it must be content to lag behind the best inspiration of its time until it feels behind it the weight of such general acceptance as will give sanction to its pretension to unquestioned dictation."[27] Or as Mr. Justice Cardozo observed, "The law will not hold the crowd to the morality of saints and seers."[28] To build a jurisprudence of freedom upon the lag

25. Kovacs v. Cooper, 336 U.S. 77, 95 (1949).

26. As Mr. Justice Jackson put it, "In Great Britain, to observe civil liberties is good politics and to transgress the rights of the individual or the minority is bad politics. In the United States, I cannot say that this is so." JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 82 (1955).

27. HAND, THE SPIRIT OF LIBERTY 15-16 (2d ed., Dilliard 1953). Presumably the segregation case, Brown v. Board of Education, 347 U.S. 483 (1954), presented a situation in which a Court finally felt behind it "the weight of such general acceptance" as would justify a decision which "the best inspiration" of the community had long since demanded.

28. CARDOZO, *The Paradoxes of Legal Science*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 274 (1947). The dissenting opinion perhaps is a proper place for recording the "best inspiration of the time"; for instruction in moral values still struggling for general, *i.e.* political, acceptance.

between the public ethos and its reflection on the bench is to build upon what at best is transient and generally least available when needed most. Only for the protection of moribund economic claims have Anglo-American Courts shown substantial ability to withstand public opinion for extended periods! In sustaining such interests, courts have the support of influential segments of the community, the very forces indeed to which judges by training and background are apt to be most responsive. Judicial protection of "radical agitators" can claim no similar support. On the contrary this typically entails paddling against a strong stream of public emotion of a kind which economic controversy seldom arouses. It is one thing to expect judges to be reasonably up-to-date: it is something else to expect them to be ahead of their times.

When the Court strikes down a compulsory flag-salute in public schools,[29] liberals may cheer and be "educated," but an intolerant community will find a thousand ways to indulge its bigotry which no judicial process can reach. At best legal remedies are slow and costly. For this and other practical reasons, few victims of human cruelty can go to court. Hence, Mr. Justice Frankfurter's constant warning that, "Only a persistent positive translation of the liberal faith into the thoughts and acts of the community is the real reliance against the unabated temptation to straightjacket the human mind.... Hyde Park represents a devotion to free speech far more dependable in its assurances . . . than reliance upon the litigious process for its enjoyment."[30] The fate of Sacco and Vanzetti must have left its mark upon their chief defender!

How persistently in practice does Mr. Justice Frankfurter honor these principles? Those who know him know how frequently as a judge he sustains policies which as a private citizen, or a legislator, he would condemn. As a matter of statistics his record of intrusion upon legislative law is relatively quite moderate.[31] Still he does intrude —sometimes in cases which others find not free of constitutional doubt. The major instances, perhaps, are the church-state cases.[32] Can it be

29. Board of Education v. Barnette, 319 U.S. 624 (1943).

30. FRANKFURTER, LAW AND POLITICS 197 (1949); FRANKFURTER, OF LAW AND MEN 26 (1956).

31. Surely it is significant that the Justice is not to be outdone in strict enforcement of meticulous standards in federal prosecutions *where there is no problem of deference due a legislature or a state.* See, *e.g.*, On Lee v. United States, 343 U.S. 747 (1952); Harris v. United States, 331 U.S. 145 (1947); Fisher v. United States, 328 U.S. 463 (1946); McNabb v. United States, 318 U.S. 332 (1943); Nardone v. United States, 308 U.S. 338 (1939); Bruno v. United States, 308 U.S. 287 (1939). *Cf.* Sibbach v. Wilson Co., 312 U.S. 1 (1941). See McCloskey, *The Supreme Court Finds a Role: Civil Liberties in the 1955 Term,* 42 VA. L. REV. 735 (1956), as to the Justice's leadership in what is called "non-substantive scrutiny."

32. Zorach v. Clauson, 343 U.S. 306 (1952); Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203 (1948); Everson v. Board of Education, 330 U.S. 1 (1947). In cases like Joseph Brustyn, Inc. v. Wilson, 343 U.S.

said that the First and Fourteenth Amendments speak more clearly on such matters than on flag salutes?[33] And, aside from the possibility of doubt, why not judicial restraint in the Segregation cases[34] because of enforcement problems?[35] If these in fact entail silent departures from Frankfurtian humility, it may be significant that they seem to hang on a common thread. All involve the public schools. Felix Frankfurter was not born into our society. Coming to it as immigrant boy with an alien tongue, he lived his first American years in an old-world enclave. The public schools provided his entree into this country's fellowship. To this day he revers with tender thoughts that unsung Irish schoolmarm who with wit and sympathy—and sometimes with a ruler—led him over the first steps into what Holmes called "the one club to which we all belong." For such a one no doubt public schools have a meaning only dimly grasped by those who are born to the estate. And so when religious and racial parochialism threatens the great melting-pot of our educational system it may be that Mr. Justice Frankfurter's feelings impinge upon his logic.[36]

Administrative Law: Just as in constitutional law Mr. Justice Frankfurter finds in "reasonable doubt" a catalyst for reconciling legislative and judicial functions, so in administrative law he sees "expertise" as the harmonizing agent in the clash between administrative discretion and the rule of law.[37] This is simply another aspect of the principle of specialization and the division of labor. Here activism again acquires an economic content, though one quite different of course from that espoused by the old regime. In short, modern activism would leave esoteric matters for those specially competent to deal with them—unless the results offend liberal (read New Deal) tenets. The crux of the matter is seen in Professor E. M. Dodd's study of National Labor Relations Board orders reviewed by the Court during a crucial four year period. The Board was successful in seventeen out of twenty-one cases. The record, concluded Professor Dodd, "demonstrates that the Supreme Court is now insisting that circuit courts of appeals must give the Board a free hand to administer its statute, with

495 (1952); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952) and Jordan v. De George, 341 U.S. 223 (1951), Mr. Justice Frankfurter does not deny legislative power, he simply urges the "procedural" consideration that in exercising its power a legislature must speak with sufficient clarity to provide potential violators, defendants and law-enforcing officers with "ascertainable standards of guilt."

33. Board of Education v. Barnette, 319 U.S. 624 (1943); Minersville School District v. Gobitis, 310 U.S. 586 (1940).

34. Brown v. Board of Education, 347 U.S. 483 (1954).

35. *Cf.* Colegrove v. Green, 328 U.S. 549 (1946). See also note 30 *supra* and related text.

36. It was perhaps crucial for the Justice that Minersville in which the *Gobitis* case arose was a polyglot community struggling with the problem of Americanizing its numerous, conflicting, old-world elements.

37. We are referring here to cases in which relevant legislation is less than clear as to the scope of judicial review of administrative action.

a minimum of judicial interference. . . . This judicial attitude is explicable to some extent as a specific application of a general tendency to limit judicial interference with administrative agencies in their performance of the duties which the legislature has imposed upon them. But it is clear that the Board's string of victories has not been due solely to the Supreme Court's general attitude toward administrative agencies. For a majority of the members of the Court—and particularly [the activists] Justices Black, Douglas, Murphy and Rutledge, the Justices who have been the most unwilling to set aside anything which the Labor Board has done—have during the same four terms of court shown considerably less reluctance to reverse the Interstate Commerce Commission, an administrative agency at present somewhat out of favor in so-called liberal circles."[38] During the period in question ICC orders were sustained in only nine out of sixteen cases.[39] That respect for the administrative process was more compelling for Mr. Justice Frankfurter and that regard for "liberal" results was more weighty for Mr. Justice Black—the leader of the activists—is suggested by their contrasting positions in these two groups of cases. Mr. Justice Black voted to sustain the NLRB in twenty out of twenty-one instances, the ICC in only three out of sixteen. The percentages are approximately ninety-five and eighteen respectively. Mr. Justice Frankfurter on the other hand voted to sustain the NLRB in sixteen out of twenty-one cases and the ICC in thirteen out of sixteen. Here the percentage figures are roundly eighty-one and seventy-six respectively.

Statutory Construction: In the telltale field of statutory interpretation (free of administrative law considerations) the pattern is repeated. Here the principle of polarity leads Mr. Justice Frankfurter to seek the meaning of a doubtful statute in the legislative compromise, the balance of social pressures, that produced it. The activists are apt to find that meaning—where a New Deal measure is involved—in the hopes of the statute's sponsors without benefit of legislative adjustment.[40] For example, the primary problem in the enforcement of the Fair Labor Standards Act has been dispute as to the scope of its coverage. As introduced to his colleagues by Senator Hugo Black in

38. Dodd, *The Supreme Court and Organized Labor, 1941-1945*, 58 HARV. L. REV. 1018, 1066-67 (1945). See also Huntington, *The Marasmus of the ICC*, 61 YALE L.J. 467 (1952).

39. See Dodd, *supra* note 38, at 1067 & n.174.

40. See, Mendelson, *Mr. Justice Frankfurter on the Construction of Statutes*, 43 CALIF. L. REV. 652 (1955). As to the activists' reading of Old Deal legislation, see the discussion of the Federal Employers' Liability Act, *infra*. Where personal freedom is involved Mr. Justice Frankfurter seems to follow the ancient tradition that penalizing measures are to be construed in case of doubt so as not to "squeeze the Act . . . [to make it] yield every possible hardship of which its words are susceptible." United States *ex rel.* Eichenlaub v. Shaughnessy, 338 U.S. 521, 533 (1950).

New Deal days the embryo of that measure invoked the full scope of congressional commerce power.[41] But after sustained opposition by powerful forces it emerged in much compromised form.[42] Again Professor Dodd's statistics are instructive. "Employer victories would have been much more numerous if the views . . . of Mr. Justice Roberts had uniformly prevailed, but would have been few indeed if Justices Black, Douglas, Murphy and Rutledge had always been able to get one other member of the Court to agree with them. For hardly more than a third of the decisions were unanimous. There were dissents by Mr. Justice Roberts in twelve cases, by Mr. Chief Justice Stone in seven and by Mr. Justice Frankfurter in two—all of them dissents from decisions adverse to an employer. On the other hand, there were dissents by Mr. Justice Black in seven cases, by Mr. Justice Douglas in seven, by Mr. Justice Murphy in six, by Mr. Justice Rutledge [who was on the bench for only a small part of the period in question] in four . . . all of them cases in which the Court's decision was in favor of the employer."[43]

Thus, at one extreme Mr. Justice Roberts of the old guard read the FLSA narrowly which must have comforted those who had opposed it at the legislative level. On the other extreme the libertarians found in the same language something strikingly close to the ideals of the sponsors of the original bill. If these positions are incompatible, neither is demonstrably false. For in effecting a balance between the sponsor's hopes and the opposition's fears Congress used terms of less than crystal clarity. The problem is common, for ambiguity is a frequent vehicle of legislative compromise. "Such laws," says Learned Hand, "need but one canon of interpretation, [namely] to understand what the real accord was."[44] Thus, Mr. Justice Frankfurter found in the FLSA an intermediate meaning distasteful to those whose sense of Justice puts them at either extreme—*just as the congressional compromise was distasteful to Senator Black and also to his advisaries.* For Congress plainly avoided unequivocal commitment to either side. To disturb such a settlement by judicial interpolation is to undermine those processes of give and take by which democracy achieves a workable balance of social forces. It is ironical that those who in the name of the democratic process would give free speech a "preferred position" seem least respectful of legislative compromise in other fields.

41. *Joint Hearings Before the Senate Committee on Education and Labor and the House Committee on Labor,* S. REP. 2475 and H. R. REP. 2700, 75 Cong., 1st Sess. 54, 58-62 (1937).

42. Forsythe, *Legislative History of the Fair Labor Standards Act,* 6 LAW & CONTEMP. PROB. 464, 468-69 (1939).

43. Dodd, *The Supreme Court and Fair Labor Standards, 1941-1945,* 59 HARV. L. REV. 321, 372-73 (1946). Not all of the cases referred to turn on the commerce clause problem. All of them spring out of dubious language permitting play of private preference.

44. HAND, THE SPIRIT OF LIBERTY 157 (2d ed., Dilliard 1953).

There is little point in full discussion and the other tools of freedom, if the legislative fruits thereof are to be stifled by judicial Justice.

Perhaps the most generally condemned of all Mr. Justice Frankfurter's opinions is that in *United States v. Hutcheson*[45] where, its critics urge, in order to avoid a niggardly, old construction of one statute, he read much more into another than was plainly there. This case, plus two others[46] also early in his judicial career, suggests that the Justice at first may have been more willing to stretch a statute—or at least to abandon established "misconstructions"—than he has been in later years.[47] Perhaps the change (if such it be) was induced by the widespread criticism of Hutcheson's case—and perhaps too by the increasingly obvious instrumentalism of some of his colleagues.

Certiorari Policy: In the exercise of the discretionary power to issue writs of certiorari a judge's inclination for or against activism must be crucial. Normally, of course, such matters are treated *per curiam.* Only rarely is a separate opinion recorded. But Federal Employers' Liability Act litigation reveals something of what transpires in the conference room. Unlike more modern state workmen's compensation statutes based on the concept of insurance, the FELA rests upon negligence principles. An injured laborer, that is, can recover only when he proves proximate negligence on the part of his employer. Some of the bite of this highly illiberal measure can be at least mitigated, if four Justices (four control for certiorari purposes) are especially willing to reconsider the *evidence* in cases where the lower courts have found no liability. In Mr. Justice Frankfurter's view, this is precisely what has happened,[48] quite contrary to the *raison d'etre* of certiorari. Crucial for him, in addition to the matter of statutory construction, is the same polarity principle that he finds controlling in the relation between administrative discretion and rule of law, *i.e.,* specialization and the division of labor. As he put it in *Wilkenson v. McCarthy,* "Considering the volume and complexity of the cases which obviously call for decision by this Court, and considering the time and thought that the proper disposition of such cases demands, I

45. 312 U.S. 219 (1941).

46. Nye v. United States, 313 U.S. 33 (1941); Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939).

47. *Cf.* Girouard v. United States, 328 U.S. 61 (1946); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). As to penal measures see note 40 *supra.*

48. See the bitter remarks of a United States Circuit Court in Griswold v. Gardner, 155 F.2d 333 (1946). "Any detailed review of the evidence in a case of this character for the purpose of determining the propriety of the trial court's refusal to direct a verdict would be an idle and useless ceremony in the light of the recent decisions of the Supreme Court. This is so regardless of what we may think of the sufficiency of the evidence in this respect. The fact is, so we think, that the Supreme Court has in effect converted this negligence statute into a compensation law thereby making, for all practical purposes, a railroad an insurer of its employees." *Id.* at 333-34.

do not think we should take cases merely to review facts already canvassed by two and sometimes three courts even though those facts may have been erroneously appraised. The division of this Court would seem to demonstrate beyond peradventure that nothing is involved in this case except the drawing of allowable inferences from a necessarily unique set of circumstances. For this Court to take a case which turns merely on such an appraisal of evidence, however much hardship in the fallible application of an archaic system . . . may touch our private sympathy, is to deny due regard to the considerations which led the Court to ask and Congress to give power to control the Court's docket. Such power carries with it the responsibility of granting review only in cases that demand adjudication on the basis of importance to the operation of our federal system; importance of the outcome merely to the parties is not enough."[49]

The Justice then observes that what is at stake cannot be appreciated in the perspective of a single case. "Despite the mounting burden of this Court's business, this is the thirtieth occasion in which . . . certiorari has been granted during the past decade to review a judgment denying recovery . . . in a case turning solely on jury issues. The only petition on behalf of [an employer] that brought such a case here during this period was dismissed . . . ."[50] There follows a broad hint as to who is responsible.

Justices Douglas, Murphy and Rutledge answered by way of confession and avoidance.[51] Mr. Justice Black apparently was with them in spirit. For as their Brother Frankfurter suggests, "Of course, some light on the situation is derivatively shed by the disclosed position of the Justices on the merits of the cases."[52] According to Professor Pritchett, "In 23 nonunanimous decisions in federal workmen's compensation [sic] cases from 1946 to 1952, none of the four libertarian activists ever cast a vote against an employee claim."[53] So convinced was Mr. Justice Frankfurter of the perversion of certiorari in these cases that shortly after the crises of *Wilkenson v. McCarthy* he took the unusual step of refusing to vote on the merits. "Again and again and again has it been authoritatively announced that controversies such as this are not for this Court. Nor does it follow that because the case in fact was brought here and has been argued, the merits should be decided. The short answer is that to entertain this kind of case inevitably will encourage petitions for certiorari in other like cases . . . . Thus, will

49. 336 U.S. 53, 66-67 (1949). The Judiciary Act of 1916 was adopted primarily to free the Court of FELA appeals as of right. See FRANKFURTER AND LANDIS, THE BUSINESS OF THE SUPREME COURT 206-14 (1928).

50. Wilkenson v. McCarthy, 336 U.S. 53, 67 (1949).

51. *Id.* at 68.

52. *Id.* at 67.

53. PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 276 n.14 (1954).

again begin demands on the Court which it wisely cannot discharge and for which legislative relief had to come, or a feeling of discrimination will be engendered in taking some cases that ought not to be taken and rejecting others."[54] "The only effective way to respect these considerations is to cease acquiescence in their disregard."[55]

Is Mr. Justice Frankfurter's "narrow" view of certiorari simply the reflection of an ulterior policy purpose?[56] The fact is his disclosed position in FELA cases leads to sharply "conservative" results. But his insistence upon administrative law principles in NLRB cases brings markedly "liberal" results. His constructions of the FLSA on the other hand are more nearly middling. A common element in these cases is that each is an incident in the so-called struggle between labor and capital. Apparently, sympathy for one side or the other was less important for Mr. Justice Frankfurter than the distinctive and generally recognized legal considerations by which he measured each of the three different problems. It may of course be merely coincidence that the activist position in each situation had a plainly New Deal, i.e., "pro-labor," thrust. Perhaps, too, it is only chance that activism in the 1940's found "administrative law" skeptical of the conservative ICC and tolerant of the liberal NLRB—whereas activism in the 1920's found in "administrative law" a special reverence for the safe, railroad-minded ICC and hostility towards the Federal Trade Commission, then a young off-spring of Woodrow Wilson's "radical" New Freedom.[57]

CONCLUSION

If, as tradition holds, the law is a jealous mistress, it also has the feminine capacity to tempt each devotee to find his own image in her bosom. No one escapes entirely. Some yield blindly, some with sophistication. A few more or less effectively resist—Cardozo, because he could not quite forget that ethic of self-denial which man has never mastered; Holmes, from the hopeful scepticism of an inquiring mind; Frankfurter, largely perhaps, from remembrance of things past. Surely willfulness on the bench prior to 1937 was a catalyst in the making of all the "Roosevelt judges." Some of them with appropriate justifications seemed to fly to an opposite willfulness.[58] Mr. Justice Frank-

54. McAllister v. United States, 348 U.S. 19, 24 (1954).

55. Carter v. Atlanta & St. Andrews Bay Ry., 338 U.S. 430, 439 (1949). At least two more Justices seem now to have adopted Mr. Justice Frankfurter's tactics. See Cahill v. New York, N.H. & H.R.R., 350 U.S. 898 (1955) [This *per curiam* order granting *certiorari* and reversing the lower court's decision was later amended, 351 U.S. 183 (1956).]

56. Max Lerner long ago urged that Holmes' humility was merely a cloak to serve his private purposes. Professor Frankfurter was "unpersuaded and impenitent." See LERNER, IDEAS ARE WEAPONS 64, 69 n.8 (1940).

57. See MCFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND THE INTERSTATE COMMERCE COMMISSION (1933) (especially c. 5).

58. See note 6 *supra* and related text.

furter has tried to subsume will to law and where the law is vague judicial will to the will of the community. If he falters, is it that his grasp is short, or that his reach is long? The discrepancy, Robert Browning tells us, is "what a heaven's for." Meanwhile clearly such a judge must carry a heavier burden than does he whose commitment to proprietarian or libertarian abstractions—whose sense of Justice—is automatically decisive. "Believing it still important to do so," Mr. Justice Frankfurter, has "tried to dispel the age-old illusion that the conflicts to which the energy and ambition and imagination of the restless human spirit give rise can be subdued . . . by giving the endeavors of reason we call law a mechanical or automatic or enduring configuration. Law cannot be confined within any such mold because life cannot be so confined."[59] The Justice knows the essential wisdom of "Lord Nottingham's answer," and the contrasting vapidity of hornbooks. He has lived too long with the law to be fooled by the simple antinomy. Abraham Lincoln made the point when he cut short the ranting of a Northern extremest, "Mr. ————————, haven't you lived long enough to know that two men may honestly differ about a question and both be right?"[60] In this paradox lies the genius of our system. "Often 'the American Way of Life' is pictured in terms of rigid adherence to some idealogy, ignoring that our search for 'a more perfect union' has been directed less to seeking final solutions than at establishing a tolerable balance of confiict among ourselves."[61]

Tolstoi saw that a great leader never leads. Does a great judge? At least for cases that reach the Supreme Court the law is seldom clear. The typical controversy entails a clash of interests each of which has some, but no plainly preponderant, legal foundation. Yet the Court is expected to give a decision.[62] And so perhaps in the end the intrinsic problem is this: for whom or in what direction shall doubt be resolved? Some have made uncertainty the servant of selected economic interests. Others have been guided by more generous considerations. In Mr. Justice Frankfurter's view this "sovereign prerogative of choice" is not for judges. He would resolve all reasonable doubt in favor of the integrity of sister organs of government and the people to whom they must answer. He would adhere, that is, to the deepest of all our constitutional traditions, the dispersion of power—though, as in the Flag Salute cases, the immediate result offend his own generous heart's desire. He is wary of judicial attempts to impose Justice on the community, *i.e.*, to deprive it of the wisdom that comes from self-inflicted wounds and the strength that grows with the burden

59. FRANKFURTER, OF LAW AND MEN 28 (1956).
60. Quoted in SANDBURG, ABRAHAM LINCOLN 660 (one vol. ed. 1954).
61. LUBELL, REVOLT OF THE MODERATES 239 (1956).
62. It might be otherwise, if we believed as deeply as we pretend in the rule of law, *i.e.*, if we did not confuse the rule of law with the rule of judges.

of responsibility. It is his deepest conviction that no five men, or nine, are wise enough, or good enough to wield such power over the lives of millions. In his view humanitarian ends are served best in that allocation of function through which the people by a balance of power seek their own destiny. True to the faith upon which democracy ultimately rests, the Justice would leave to the political processes the onus of building legal standards in the vacuum of doubt. For in his view only that people is free who chooses for itself when choice must be made.