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MR. JUSTICE FRANKFURTER AND THE PROCESS OF JUDICIAL REVIEW

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*"The art of life is to derive sufficient conclusions
from insufficient premises"*—SAMUEL BUTLER.

One of the threads in the fabric of American history is the clash between political and economic power. Its early manifestations in the struggle between Hamiltonians and Jeffersonians clearly indicated that victory went to the side that could obtain judicial support. Or more accurately, a constantly growing faith in democracy insured the supremacy of political power unless the judiciary intervened. The industrial revolution that followed the Civil War merely posed the old problem in modern terms. Rapid expansion of industry provoked new political pressures which in due course were reflected in legislation and then in litigation. The problem is epitomized in the Granger Movement. Prosperity incidental to war and momentous railroad expansion was followed in the seventies by agonizing agricultural depression. Farmers, who had greeted the railroads cordially, soon discovered that freight charges were often discriminatory, if not extortionate; that competition, which had been relied upon as a regulator, was being stifled by combination. For relief they turned to their state legislatures and got the famous Granger legislation. This "hayseed socialism" raised in modern dress the classic problem of the extent to which the community may interfere with established property rights in the interest of public well-being. Specifically, could the public regulate rates

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charged by privately owned railroads and grain elevators? To Mr. Chief Justice Waite and his Court this seemed hardly a legal issue. "We know that this [political power] may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."¹

But the tide was soon running the other way. First by dicta² and then by decision³ the Granger cases and with them judicial humility were abandoned. Judge Holmes, of the Massachusetts bench, suspected that fear of socialism "has led people who no longer hope to control the legislatures to look to the courts as expounders of the Constitutions, and that in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of the economic doctrines [*laissez-faire*] which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not thing about right."⁴

In any case, before the end of the century the legal foundations of *laissez-faire* economics were firmly entrenched in the Constitution. The plantation economy had been destroyed for all time. Middle-western agrarianism, seeking legislatively to check the worst abuses of the Gilded Age, had been checkmated in court. Emasculation of the Interstate Commerce Commisison⁵ left railroads free to continue their old practices without state⁶ or national hindrance. The labor injunction had been invented.⁷ "Trusts" had obtained a large measure of judicial protection.⁸ Their ill-got income was immune from federal taxation.⁹ With the destruction of the income tax as a source of federal revenue, hope for tariff reform was nil. Thus the consumer—farmer and industrial worker—was saddled with the cost of monopoly as well as the cost of government. Such were the social implications of judicial interference with the processes of democratic self-government at the turn of the century. The Supreme Court had departed so far from the court's hands-off position in the Granger cases that President Hadley of Yale could say in 1908: "the fundamental division of powers in the Constitution of the United States is between the voters on the

1. *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

2. See, e.g., *Stone v. Farmer's Loan & Trust Co.*, 116 U.S. 307, 331 (1885).

3. *Chicago, Milwaukee & St. P. Ry. v. Minnesota*, 134 U.S. 418 (1890).

4. *The Path of the Law* in HOLMES, COLLECTED LEGAL PAPERS 184 (1920).

5. *ICC v. Alabama Midland Ry.*, 168 U.S. 144 (1897); *Social Circle Case*, 162 U.S. 184 (1896); *Texas & Pacific Ry. v. ICC*, 162 U.S. 197 (1896).

6. *Wabash, St. Louis & Pac. Ry. v. Illinois*, 118 U.S. 557 (1886).

7. *In re Debs*, 158 U.S. 564 (1895).

8. *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

9. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

one hand and property owners on the other. The forces of democracy on the one side, divided between the executive and the legislature, are set over against the forces of property on the other side with the judiciary as arbiter between them. . . ."¹⁰

Mr. Justice Holmes' brilliant dissenting struggle against this judicial role may be summarized in excerpts from what he wrote in *Lochner v. New York*:

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agree with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . .

". . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."¹¹

As Attorney General (later Mr. Justice) Jackson put it: "By 1933 the Court was no longer regarded as one of three equal departments among which the powers of government were distributed. Instead [it was said to be] 'invested with acknowledged and *supreme* authority,' and the whole conservative and property philosophy became oriented around 'judicial supremacy.'" ¹²

Whatever may be said about discord within the "Roosevelt-Truman Court," on one issue there has been complete agreement—in grafting laissez-faire upon the Constitution "the nine old men" had gone too far; they had transgressed upon the political processes and made themselves a super-legislature. But how was the Court to extricate itself? What is the true nature of the judicial function? The difficulty, as Professor Frankfurter long ago observed, is that while "[c]ertain constitutional provisions are so definite in their terms and history that they canalize judicial review within narrow limits" other provisions allow all but boundless play for individual judgment as to social policy. "Words like 'liberty' and 'property,' phrases like 'regulate Commerce . . . among the several States,' 'due process of law,' and 'equal protection of the laws' are the foundations for judgment upon the whole

10. LXIV THE INDEPENDENT 837 (1908).

11. *Lochner v. New York*, 198 U.S. 45, 75-76 (1905).

12. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 72 (1941).

appalling domain of social and economic facts," but they provide only the vaguest, if any, norms for judicial action.¹³ This is the basic problem of constitutional law—where are to be found the criteria for judgment in cases arising under such amorphous and viable terms? On this fundamental question the "Roosevelt-Truman Court" has been divided between views for which Justices Black and Frankfurter respectively are the most articulate spokesmen.

Mr. Justice Black's position starts with a series of "absolutes" that would radically alter the First Amendment along with the Due Process and Commerce Clauses on which his predecessors had been so vulnerable. To insure the states broad latitude in the regulation of economic affairs the Justice holds unconditionally that corporations are not "persons" within the coverage of the Fourteenth Amendment.¹⁴ To the same end, Due Process and related clauses in the same amendment are held to have no substantive content with respect to economic affairs.¹⁵ What then shall they import? Only so much as is expressed in the Bill of Rights.¹⁶ Similarly, the Commerce Clause loses all force as a direct restraint upon the states except in case of outright discrimination against interstate trade.¹⁷ But as a grant of power to Congress (for all that yet appears) it would be as extensive as brilliant imagination might conceive.¹⁸ For congressional abuse thereof the remedy apparently would be the polls; for abuses by the states (except as noted in the case of discrimination) the appeal would be to Congress. Allowing so much to the political processes, Mr. Justice Black would take special care to insure their purity. Thus the freedoms of the First Amendment would have a "preferred position."¹⁹ State or national action brushing against them would be destroyed by a presump-

13. Frankfurter, *Mr. Justice Holmes And The Constitution*, 41 HARV. L. REV. 121, 124 (1927).

14. See his dissenting opinion in *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85 (1938), and Mr. Justice Douglas' dissent in which Mr. Justice Black joined in *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576 (1949).

15. *Polk Co. v. Glover*, 305 U.S. 5, 10 (1938) (dissenting opinion).

16. *Adamson v. California*, 332 U.S. 46, 68 *et seq.* (1947) (dissenting opinion).

17. *E.g.*, *Gwinn, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 442 *et seq.* (1939) (dissenting opinion).

18. There is no significant evidence that Mr. Justice Black's views in this respect are broader than those of most of his associates. He does, however, seem unusually generous in his interpretations of congressional regulations based on the commerce power. See his position in *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 355 (1941) (joining in Mr. Justice Douglas' dissent); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (opinion for the Court); *10 E. 40th St. Bldg., Inc. v. Callus*, 325 U.S. 576, 585 (1945) (joining in Mr. Justice Murphy's dissent).

19. For the case-by-case evolution of the "preferred position" doctrine, see Mr. Justice Frankfurter's dissenting opinion in *Kovacs v. Cooper*, 336 U.S. 77, 89 *et seq.* (1949).

tion of *un*constitutionality that could be overcome only upon a showing of clear and present danger.²⁰

Obviously this is the reflection of a new scale of values. Where the old regime gave a preferred place to selected economic interests, Mr. Justice Black would prefer selected civil liberties. But the basic premise of the two positions is the same—it is the judge's function to read (or find) in the ample generalities of the Constitution his own system of values. On that premise no one of liberal persuasion could fail to admire Mr. Justice Black's results, except perhaps in the search and seizure cases.²¹ But, apart from the fact that his absolutes are not so clearly in the Constitution as to have been discovered by his predecessors, or accepted by his contemporaries, in their application the Justice himself reveals the weakness of his premise. For his absolutes have a self-destroying way of running into one another. When that happens the Justice is faced with personal choice in the rawest form. Then corporations suddenly and without explanation re-emerge as Fourteenth Amendment "persons,"²² only to pass again into limbo.²³ The Commerce Clause on occasion regains its old potency as a restraint upon the states²⁴ and the Fourteenth Amendment ranges for a time beyond the particular standards enumerated in the Bill of Rights.²⁵ Even the preferred position rule is riddled with gaps and quibbles.²⁶ Thus, while Mr. Justice Black holds that religious proselytizing on the streets occupies "the same high estate" as worship in a church and so must be immune even from non-discriminatory license taxes,²⁷ it is not immune from child labor regulations.²⁸ The latter holding was justified on the ground that the state has greater control over children than over others—but we are not told why that greater control was not relevant

20. The broadest statement of this position is found in Mr. Justice Rutledge's concurring opinion in *United States v. CIO*, 335 U.S. 106, 140 (1948), in which Mr. Justice Black joined.

21. See, e.g., Mr. Justice Black's position in *Davis v. United States*, 328 U.S. 582 (1946) (joining in opinion for the Court); *Zap v. United States*, 328 U.S. 624 (1946) (joining in opinion for the Court); *Harris v. United States*, 331 U.S. 145 (1947) (joining in opinion for the Court); *Trupiano v. United States*, 334 U.S. 699, 710 (1948) (joining in dissenting opinion); *Brinegar v. United States*, 338 U.S. 160 (1949) (joining in opinion for the Court).

22. *Bridges v. California*, 314 U.S. 252 (1941) (opinion for the Court).

23. See note 14 *supra*.

24. *Morgan v. Virginia*, 328 U.S. 373, 386 (1946) (concurring opinion).

25. *Winters v. New York*, 333 U.S. 507 (1948) (joining in opinion for the Court); see FREUND, ON UNDERSTANDING THE SUPREME COURT 32-33 (1949).

26. See Mendelson, *Clear and Present Danger—From Schenck to Dennis*, 52 COL. L. REV. 313 (1952).

27. *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943) (joining in opinion for the Court).

28. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (joining in opinion for the Court).

in the flag salute decisions.²⁹ Similarly Mr. Justice Black's position in the picketing cases shows that what he calls the "preferred" civil liberties are not always preferred over less mundane interests; free speech via picketing gives way before state antitrust laws,³⁰ though not before state right-to-work legislation.³¹ But examples need not be multiplied for the difficulty is clear. Not even the genius of Mr. Justice Black's mind can capture within its categories the copious life of the American people. The breakdown of his absolutes, revealing once again the weakness of the mechanistic approach, drives him ultimately to the subjectivity that destroyed the "nine old men."

Between the willfulness of the old regime and Mr. Justice Black's futile effort to find relief in a mechanical jurisprudence, Mr. Justice Frankfurter would follow a Holmesian middle way. The pain of judging is not to be escaped either by resort to wooden rules or by enforcing personal predilections. Even in constitutional law a judge must somehow reconcile the claims of continuity and change. But courts are not the only agencies of government that must breathe life into the written Constitution. Indeed, because their life-giving "interpretations" are not subject to the restraints of political responsibility they are constantly at loggerheads with the basic principle of democratic self-government. But "[o]ur right to pass on validity of legislation is now too much part of our constitutional system to be brought into question."³² And so, because this right is "inherently oligarchic"³³ in that "it serves to prevent the full play of the democratic process,"³⁴ in "the day-to-day working of our democracy it is vital that [this] power of the non-democratic organ of our Government be exercised with rigorous self-restraint."³⁵ But if self-restraint—objectivity—is crucial, no one is more conscious of the difficulty of capturing that will-o'-the-wisp than Mr. Justice Frankfurter; nor of the plain fact that a constitution made for an indefinite and expanding future is not so compellingly clear as to remove all doubt in present cases. And so, to honor the accepted

29. *West Va. State Bd. of Education v. Barnette*, 319 U.S. 624, 643 (1943) (concurring opinion).

30. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (opinion for the Court); see also *Hughes v. Superior Court*, 339 U.S. 460, 469 (1950) (concurring opinion).

31. *Local 10, United Ass'n of Journeymen Plumbers & Steamfitters v. Graham*, 345 U.S. 192, 201 (1953).

32. *AFL v. American Sash & Door Co.*, 335 U.S. 538, 556-57 (1949) (concurring opinion).

33. *Id.* at 555.

34. *West Va. State Bd. of Education v. Barnette*, 319 U.S. 624, 650 (1943) (dissenting opinion).

35. *AFL v. American Sash & Door Co.*, 335 U.S. 538, 555 (1949) (concurring opinion).

power of judicial review and avoid its tendency to degenerate into judicial supremacy, the Justice, following Holmes, resorts to that ancient, tried and true principle of the common law whereby jury findings are safeguarded from intrusion by judges. Thus a statute, like a jury verdict, must stand regardless of how mistaken it may seem to judges, unless they are prepared to hold that reasonable men could not have found as the legislature did find.

"It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law.³⁶ . . . I know of no other test which this Court is authorized to apply in nullifying legislation."³⁷

Perhaps the Justice sees that just as it is a function of juries to temper the law with justice as understood by the community, so it is a function of legislatures similarly to temper the linguistic absolutes of the Constitution—at least when they collide with one another. But fundamentally his position is founded upon a deep respect for popular self-government. The reasonable man test thus serves constitutional law as it served the common law, to allow play for the joints of the legal system, and yet preclude capricious, *ad hoc* adjudication. It does not give automatic answers. It will not make a great judge of a little man and, like other tools, is subject to misuse. But at its best it does suggest an external standard for the guidance of a hard pressed court; a standard rooted in the only sound basis for any legal system—"the actual feelings and demands of the community, whether right or wrong."³⁸

"Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government. Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people. . . .

36. *West Va. State Bd. of Education v. Barnette*, 319 U.S. 624, 647 (1943) (dissenting opinion).

37. *Id.* at 666.

38. HOLMES, *THE COMMON LAW* 41 (1881); *cf.* HOLMES, *COLLECTED LEGAL PAPERS* 225-26, 258 (1920).

"But there is reason for judicial restraint in matters of policy deeper than the value of experiment: it is founded on a recognition of the gulf of difference between sustaining and nullifying legislation. . . . The Court is not saved from being oligarchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace. Judges appointed for life whose decisions run counter to prevailing opinion cannot be voted out of office and supplanted by men of views more consonant with it. They are even farther removed from democratic pressures by the fact that their deliberations are in secret and remain beyond disclosure either by periodic reports or by such a modern device for securing responsibility to the electorate as the 'press conference.' But a democracy need not rely on the courts to save it from its own unwisdom. If it is alert—and without alertness by the people there can be no enduring democracy—unwise or unfair legislation can readily be removed from the statute books. It is by such vigilance over its representatives that democracy proves itself."³⁹

For Mr. Justice Frankfurter this judicial humility applies with respect to all provisions of the Constitution, not just to those which a judge's fancy may relegate to a deferred position. "The Constitution does not give us greater veto power when dealing with one phase of 'liberty' than with another Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. . . . Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom. . . . [R]esponsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered."⁴⁰

39. *AFL v. American Sash & Door Co.*, 335 U.S. 538, 553, 555 (1949) (concurring opinion).

40. *West Va. State Bd. of Education v. Barnette*, 319 U.S. 624, 648-49 (1943). When the Justice writes that "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum of respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements," he plainly means something quite different from the "preferred position" doctrine with its presumption of unconstitutionality. *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (concurring opinion).

This regard for the democratic process is the basic premise of Mr. Justice Frankfurter's judicial approach. From it springs a second characteristic attitude. We are apt to think of litigation as a clash of right against wrong in which the function of courts is simply to see that the former prevails. Free speech and freedom of religion, for example, are great historical rights—interferences with them are plainly wrong. For some that may be the end of the matter, just as for certain pre-1937 Justices iteration of the magic phrase "liberty of contract" was enough to lay at rest whole bodies of social legislation. But long ago Holmes pointed out that "general propositions do not decide concrete cases," to which Mr. Justice Frankfurter adds the caveat, "But the intensity with which a general principle is held may determine a particular issue, and whether we put first things first may decide a specific controversy."⁴¹

At least in the kind of issues that reach the Supreme Court sound principles or rights are apt to be found on both sides of a case. How simple the judges' lot if it were otherwise! "Formulas embodying vague and uncritical generalizations offer tempting opportunities to evade the need for continuous thought. But so long as men want freedom they resist this temptation. Such formulas are most beguiling and most michievous when contending claims are those not of right and wrong but of two rights, each highly important to the well-being of society. Seldom is there available a pat formula that adequately analyzes such a problem, least of all solves it."⁴² Mr. Justice Cardozo spoke of the clash of "pretending absolutes"⁴³ and long ago Mr. Chief Justice Marshall held that "when two [constitutional] principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent."⁴⁴ Otherwise one form of liberty may abridge or cancel out another.⁴⁵ "Our [frequent] task . . . then," says Mr. Justice Frankfurter, "is to reconcile two rights in order to prevent either from destroying the other. . . . No mere textual reading or logical talisman can solve the dilemma."⁴⁶ Even the "clear and present danger test" is only a "rule of reason."⁴⁷

41. *West Va. State Bd. of Education v. Barnette*, 319 U.S. 624, 648 (1943) (dissenting opinion).

42. *Pennekamp v. Florida*, 328 U.S. 331, 351 (1946) (Mr. Justice Frankfurter's concurring opinion). As Holmes put it: "To rest upon a formula is a slumber that, prolonged, means death." HOLMES, *COLLECTED LEGAL PAPERS* 306 (1920).

43. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 687-88 (1931).

44. *United States v. Burr*, 25 Fed. Cas. 38, 39, No. 14692e (D. Ky. 1807).

45. Cf. *Mr. Justice Holmes in Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908), which Mr. Justice Frankfurter frequently cites.

46. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 594, 596 (1940) (concurring opinion).

47. *Bridges v. California*, 314 U.S. 252, 296 (1941) (dissenting opinion quoting Mr. Justice Brandeis).

FREEDOM OF THE PRESS V. FAIR TRIAL

Freedom of the press is an important constitutional right, but so is a fair trial. What is a judge to do when interests of such a fundamental nature run into one another as when newspaper comment puts pressure upon one side in pending litigation.⁴⁸ Powerful arguments may be made on both sides, but the Constitution simply does not provide the answer. Some one must. If general propositions are to be decisive, which one shall it be in such a case, fair trial or free press? Is the intensity of a particular judge's attachment for one or the other to ground decision? Unless the specific facts of a concrete case are such as to put the issue beyond debate (such cases do not often reach the Supreme Court), Mr. Justice Frankfurter would not intrude upon a state's decision to give priority to one or the other. Different jurisdictions will pursue different solutions; the experience so gained will be fitting grist for the political (read educational) processes. And above all the moral responsibility of the people for the burdens of self-government will not have been diluted by letting George do the job.

FREEDOM OF RELIGION

The same solution is pertinent when freedom of religion brushes against the community's right to prescribe a flag salute as part of the curriculum for public schools.⁴⁹ Here again the Justice finds a clash of fundamental interests in a context not so plain as to justify a court in holding that a political decision in favor of the salute is beyond the realm of reason. But what of the school-bus,⁵⁰ and released-time cases⁵¹ where the Justice did see fit to intrude upon the political processes? If the Court risks becoming a "school-board for the country"⁵² in the one situation, does it not in both? Possibly here the Justice's personal predilections have got the best of him. It was in our public schools that, as an immigrant boy, he got his first glimpses of the American dream in action. Through them he gained admittance to what Holmes called "the one club to which we all belong."⁵³ Perhaps this experience has weighted his scales unduly against the possibility of

48. *Id.* at 279.

49. *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) (opinion for the Court by Mr. Justice Frankfurter); *West Va. State Bd. of Education v. Barnette*, 319 U.S. 624, 646 (1943) (dissenting opinion by Mr. Justice Frankfurter).

50. *Everson v. Board of Education*, 330 U.S. 1 (1947) (joining in Mr. Justice Jackson's dissent and agreeing with Mr. Justice Rutledge's dissent).

51. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 212 (1948) (separate opinion by Mr. Justice Frankfurter); *Zorach v. Clauson*, 343 U.S. 306, 320 (1952) (dissenting opinion by Mr. Justice Frankfurter).

52. *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 598 (1940).

53. Quoted by Mr. Justice Frankfurter in *AFL v. American Sash & Door Co.*, 335 U.S. 538, 544 (1949) (concurring opinion).

a divisive intrusion of religious controversy into the public schools. But something may be said on the other side. For one thing the flag salute on one hand and released-time and school-bus problems on the other arise under different constitutional provisions; one relates to freedom of religion, the other to separation of church and state. One's right to the free exercise of religion is *positive* in nature and endless in its implications as a club to defeat other legitimate claims. But the required separation of church and state is a much narrower restraint upon government and much more nearly *negative* in its implications. It provides not a weapon, but a shield, for the individual. As Hohfeld might have put it, the difference is between a "right" and an "immunity." The "right" freely to exercise one's religion takes multitudinous forms and will often jeopardize important secular powers of government, as for example, the power to provide training in patriotism for school children, to tax, or to raise and train an army. But one's "immunity" from an establishment of religion, being much narrower in scope, does not present the same possibilities of conflict between religious rights and secular powers. Accordingly there is no (or less) counterweight to the flat prohibition of the First Amendment. And it is precisely those areas of conflict between two critically important claims, at the periphery where one shades into the other, which the Justice finds legislative in nature.⁵⁴

Moreover in the "establishment" cases the legislators had dealt directly and intentionally with religion as such. In the school-bus case public funds had been allocated specifically for selected parochial school students. In one of the released-time cases public property had been turned over to church personnel for religious purposes,⁵⁵ and in both the public school compulsory attendance system was used to give leverage to the appeals of religious instruction. But in the "free exercise," *i.e.*, flag salute, cases the legislatures were pursuing purely secular ends. Indeed *a priori* it would have required an unusual gift of imagination to foresee that the measures in question had anything whatsoever to do with religion. They did not deal with it as such. They did not in purpose or effect single out religion, or any denomination, for special treatment. Finally the crux of the "establishment" clause is more sharply defined historically than the "free exercise" clause and Mr. Justice Frankfurter is an uncommonly perceptive historian. In history he sometimes finds the certainty, the refuge from subjectivity, which alone for him justifies judicial interference with legislative law.⁵⁶

54. See *id.* at 546.

55. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948).

56. See *AFL v. American Sash & Door Co.*, 335 U.S. 538, 550 (1949) (dissenting opinion).

FREEDOM OF SPEECH

In Mr. Justice Frankfurter's view the great historical rights, such as freedom of speech and press, do not relate to monolithic things of fungible nature. There is speech and speech. Some utterances have far greater claims to protection than others. "Not every type of speech occupies the same position on the scale of values. There is no substantial public interest in permitting . . . 'the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace' We have frequently indicated that the interest in protecting speech depends on the circumstances of the occasion. It is pertinent to the decision before us to consider where on the scale of values we have in the past placed the type of speech now claiming constitutional immunity."⁵⁷ Then, finding that conspiratorial teaching and advocacy of violent overthrow of government, "ranks low" "[o]n any scale of values which we have hitherto recognized,"⁵⁸ the Justice considered the interests which Congress had found at stake on the other side of the scale—national self-preservation vis-a-vis the communist menace. On balance he could not say that Congress in the Smith Act had gone beyond the realm of reason. To inquire further as to the wisdom of what the legislative body had done would be an intrusion into the legislative domain.

For those who find in this position a retreat from the Justice's life-long, off-the-bench liberalism it should be noted that years before he left Harvard he wrote, "It must never be forgotten that our constant preoccupation with the constitutionality of legislation rather than its wisdom tends to preoccupation of the American mind with a false value. Even the most rampant worshiper of judicial supremacy admits that wisdom and justice are not the tests of constitutionality. Even the extreme right of the Supreme Court occasionally sustain laws which they abominate. But the tendency of focusing attention on constitutionality is to make constitutionality synonymous with propriety; to regard a law as all right so long as it is 'constitutional'. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech *much that is highly illiberal would be clearly constitutional* . . . [T]he real battles of liberalism are not won in the Supreme Court. To a large extent the Supreme Court . . . is the reflector of that impalpable but controlling thing, the general drift of public opinion. Only a persistent,

57. *Dennis v. United States*, 341 U.S. 494, 544 (1951) (concurring opinion).

58. *Id.* at 545.

positive translation of the liberal faith into the thoughts and acts of the community is the real reliance against the unabated temptation to straitjacket the human mind.”⁵⁹

DUE PROCESS

Because of their inherent vagueness and breadth of coverage, the constitutional provisions with respect to due process probably have caused more difficulty than any others. Sharper provisions, indeed, have been relegated by the Court to the limbo of “political questions”⁶⁰ for exercise by those who hold what Holmes called “the sovereign prerogative of choice.” Clearly Professor Frankfurter contemplated a similar fate for due process when long ago he was often heard to say that no nine men are wise enough or good enough to exercise the vast, unguided power which it has been found to confer upon the Court.⁶¹ But on the bench such private views are irrelevant. “These are very broad terms by which to accommodate freedom and authority. As has been suggested from time to time, they may be too large to serve as the basis for adjudication, in that they allow much room for individual notions of policy. . . . The fact is that the duty of such adjudication on a basis no less narrow has been committed to this Court.”⁶² But it does not follow that personal notions are to fill in what Mr. Justice Holmes called the “void of ‘due process.’ ”⁶³ When substantive regulations of economic affairs are at issue it is “immaterial that [they] may run counter to the economic wisdom either of Adam Smith or J. Maynard Keynes, or may be ultimately mischievous even from the point of view of avowed state policy. Our inquiry must be much narrower”;⁶⁴ namely, is the challenged measure such (to use Holmes’ language) “that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”⁶⁵

59. *Can the Supreme Court Guarantee Toleration?*, 43 NEW REPUBLIC 85, 86-87 (1925), FRANKFURTER, LAW AND POLITICS 197 (McLeish & Prichard ed. 1939) (emphasis added).

60. See, e.g., *Luther v. Borden*, 7 How. 1 (U.S. 1849). Cf. Mr. Justice Frankfurter’s remarks in *New York v. United States*, 326 U.S. 572, 581-82 (1946) (separate opinion).

61. Cf. the Justice’s current strictures on the Privileges and Immunities Clause of the Fourteenth Amendment. *Adamson v. California*, 332 U.S. 46, 61-62 (1947) (concurring opinion).

62. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 468 (1947) (concurring opinion).

63. *Baldwin v. Missouri*, 281 U.S. 586, 596 (1930) (dissenting opinion).

64. *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940) (opinion for the court).

65. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (dissenting opinion).

But the problem is different when due process in its procedural aspects is before the Court. Here, if anywhere, that term has meaning and the judiciary an historic responsibility—not to make policy, but to see that policy is fairly enforced. "Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of Government, as they should on matters of policy which comprise substantive law."⁶⁶ Mr. Justice Brandeis had made the point when he said, "One can never be sure of ends—political, social, economic. There must always be doubt and difference of opinion; one can be 51 per cent sure." But as to means there is not the same room for doubt. Here "fundamentals do not change; centuries of thought have established standards."⁶⁷ Even so, as Mr. Justice Frankfurter points out, "due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."⁶⁸ For those who would have more precise rules Aristotle long ago observed, "It is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject permits; it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician scientific proofs."⁶⁹

When due process of the Fourteenth Amendment is before the Court, Mr. Justice Black, as we have seen, would equate it with the provisions of the Federal Bill of Rights. But for Mr. Justice Frankfurter "it would seem too late in the day to [argue] that a phrase so laden with historic meaning . . . can be given an improvised content" ⁷⁰—particularly when to do so either gets its author nowhere (for he has simply incorporated by reference the Due Process Clause of the Fifth Amendment into the Due Process Clause of the Fourteenth), or forces him to find new, or no, meaning in the former

66. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (dissenting opinion of Mr. Justice Jackson in which Mr. Justice Frankfurter joined).

67. MASON, *BRANDEIS, A FREE MAN'S LIFE* 569 (1946).

68. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (concurring opinion). Here is found a most explicit example of the balancing of interests process.

69. ARISTOTLE, *NICHOMACHEAN ETHICS* Book 1, par. 3. See also note 73 *infra*.

70. *Malinski v. New York*, 324 U.S. 401, 416 (1945) (separate opinion).

provision.⁷¹ Mr. Justice Frankfurter sees further difficulties with his brother Black's view, for under it "the States . . . [would be] restricted in devising and enforcing their penal codes . . . by the first eight amendments . . . [some of which] grew out of transient experience or formulated remedies which time might well improve. The Fourteenth Amendment did not mean to imprison the States into the limited experience of the eighteenth century."⁷² What then are the guide posts? Nothing less than "those canons of decency and fairness which express the notions of justice of English-speaking peoples."⁷³ Essentially what is involved is a "judgment that reflects deep, even if inarticulate, feelings of our society. Judges must divine that feeling as best they can from all the relevant evidence and light which they can bring to bear. . . ."; and then parenthetically, "It is noteworthy that while American experience has been drawn upon in the framing of constitutions for other democratic countries, the Due Process Clause has not been copied."⁷⁴ Here too, personal views must not be allowed to color judgment. "The nature of the duty . . . makes it especially important to be humble in exercising it. Humility in this context means an alert self-scrutiny so as to avoid infusing into the vagueness of a Constitutional command one's merely private notions. Like other mortals, judges, though unaware, may be in the grip of prepossessions. The only way to relax such a grip . . . is to explore the influences that have shaped one's unanalyzed views in order to lay bare prepossessions."⁷⁵

However broad the debate between Justices Frankfurter and Black as to the relation of the Fourteenth Amendment to the Bill of Rights, the immediately "pressing issue centers on the right of indigent defendants in [state] criminal cases to have counsel appointed as a matter of course."⁷⁶ This narrow, if important, point at which the real pinch comes illustrates again the basic differences in the conceptual and particularistic approaches of the two Justices. Mr. Justice Frankfurter (and the Court) would intrude with the blunderbuss of due process upon the judicial processes of the states only upon a showing that an indigent defendant did *in fact* suffer because of absence of ap-

71. *Id.* at 414-15.

72. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 468 (1947) (concurring opinion).

73. *Malinski v. New York*, 324 U.S. 401, 417 (1945) (separate opinion). "Because of their inherent vagueness [such] tests are unsatisfactory, but such as they are we must apply them." *Haley v. Ohio*, 332 U.S. 569, 605 (1948) (separate opinion by Mr. Justice Frankfurter).

74. *Haley v. Ohio*, 332 U.S. 569, 603 (1948).

75. *Id.* at 602.

76. FREUND, *op. cit.* *supra* note 25, at 34.

pointed counsel. In short, the fair conduct of state trials is essentially a state responsibility—only for actual, demonstrated unfairness is federal interference justified.⁷⁷ “At best . . . intervention by this Court in the criminal process of States is delicate business. It should not be indulged in unless no reasonable doubt is left that a State denies, or has refused to exercise, means of correcting a claimed infraction of the United States Constitution. Intervention by this Court in the administration of the criminal justice of a State has all the disadvantages of interference from without. Whatever short-cut to relief may be had in a particular case, it is calculated to beget misunderstanding and friction and to that extent detracts from those imponderables which are the ultimate reliance of a civilized system of law. After all, this is the Nation’s ultimate judicial tribunal, not a super-legal-aid bureau.”⁷⁸ But Mr. Justice Black out of the depths of a generous heart seems ever ready to give aid and comfort to those who excite sympathy. He would follow a wooden rule that irrespective of any showing of fairness or unfairness in particular proceedings no state trial can be valid unless the accused had aid of counsel.⁷⁹

The full import of Mr. Justice Frankfurter’s position in these state cases can be appreciated only when it is remembered that he is not to be outdone in strict enforcement of meticulous standards in *federal* criminal proceedings.⁸⁰ Clearly the Justice finds his supervisory functions with respect to the lower federal courts quite different from his constitutional responsibility with respect to state judicial systems. That the Justice has a record second to none in safeguarding the interests of those accused of federal crime need not be “explained” by a supposed special concern for the passive as against the aggressive liberties.⁸¹ The deference due a *legislative* determination as to where the proselytizing interests of communists, for example, must give way in the interest of national security is one thing; what is due a *police officer* who on his own undertakes to search without a warrant, or to obtain confessions by force, is something quite different. But what of a case in which the high deference due to state proceedings is countered by the low

77. *Carter v. Illinois*, 329 U.S. 173 (1946) (opinion for the Court by Mr. Justice Frankfurter).

78. *Uveges v. Pennsylvania*, 335 U.S. 437, 449-50 (1948) (dissenting opinion).

79. *See, e.g., Foster v. Illinois*, 332 U.S. 134, 139 (1947) (dissenting opinion).

80. *See, e.g., Bruno v. United States*, 308 U.S. 287 (1939) (opinion for the Court); *Nardone v. United States*, 308 U.S. 338 (1939) (opinion for the Court); *Sibbach v. Wilson Co.*, 312 U.S. 1, 16 (1941) (dissenting opinion); *McNabb v. United States*, 318 U.S. 332 (1943) (opinion for the Court); *Fisher v. United States*, 328 U.S. 463, 477 (1946) (dissenting opinion); *Harris v. United States*, 331 U.S. 145, 155 (1947) (dissenting opinion); *On Lee v. United States*, 343 U.S. 747, 758 (1952) (dissenting opinion).

81. *See FREUND, op. cit. supra* note 25, at 22-24.

deference due unauthorized police activities? Which consideration, for example, is to prevail on appeal from a state conviction based on the fruits of a policeman's unauthorized search? In *Wolf v. Colorado*⁸² Mr. Justice Frankfurter struck a balance somewhere between the two extremes. Characteristically the balance struck was predicated not on the high standards which the Justice would doubtless require, if he were acting as legislator or police chief, but upon an objective, outside norm—the *practice* of a majority of state (indeed a majority of all Anglo-American) appellate courts.⁸³ Surely such a pedigree guarantees reasonableness. It requires little imagination to guess that Mr. Justice Frankfurter knows the dilemma which the great Mansfield described to David Garrick, "A judge on the bench is now and then in your whimsical situation between Tragedy and Comedy; inclination drawing one way and a long string of precedents the other."⁸⁴ That the Justice sometimes finds the clash between his heart's desire and the external standard worse than whimsical there can be no doubt.⁸⁵ But that price must be paid, if judicial review is to be a disciplined, scientific instrument as little related as possible to the private policy preferences of those who for the moment are upon the bench.

THE COMMERCE CLAUSE

Just as the Court has found in due process and the Bill of Rights a crucial base for balancing the claims of the individual as against those of government, so it has found in the Commerce Clause a basic authority for mediating between state and nation. In litigation involving state impositions upon interstate commerce Mr. Justice Frankfurter follows the same balance-of-interest approach that he uses in other cases. The claims of a national market must be weighed against those of local self-government. On one side is the danger of Balkanization; on the other the scourge of outside interference with local affairs. Mr. Justice Black, as we have seen, would leave the problem to Congress (except in the case of outright discrimination against national intercourse). This, of course, would put the inertia of the national legislature on the side of local self-government. Mr. Justice Jackson would have put it on the other side, "[Usually] these restraints are individually too petty, too diversified, and too local to get the attention of a Congress hard

82. 338 U.S. 25 (1949) (opinion for the Court).

83. See Appendix, *id.* at 33-39.

84. HOLLIDAY, *THE LIFE OF WILLIAM . . . EARL OF MANSFIELD* 211 (London 1797).

85. See, *e.g.*, his remarks in *West Va. State Bd. of Education v. Barnette*, 319 U.S. 624, 646-47 (1943) (dissenting opinion); *Harisiades v. Shaughnessy*, 342 U.S. 580, 596-98 (1952) (concurring opinion).

pressed with more urgent matters. The practical result is that in default of action by us they will go on suffocating and retarding and Balkanizing American commerce, trade and industry.”⁸⁶

Between these extremes Mr. Justice Frankfurter finds “the basic function of this Court as the mediator of powers within the federal system.”⁸⁷ In a case in which his brother Jackson wrote for the Court, Mr. Justice Frankfurter felt “constrained to dissent because [he could not] agree in treating what is essentially a problem of striking a balance between competing interests as an exercise in absolutes. Nor does it seem to me that such a problem should be disposed of on a record from which we cannot tell what weights to put in which side of the scales.”⁸⁸

In fact the views of Justices Black and Jackson have failed to secure majority backing. But for a brief period Mr. Justice Rutledge seemed to have Court support for his multiple burden rule in state tax cases. Eschewing both extremes with his brother Frankfurter, Mr. Justice Rutledge wanted a precise guide between them. He found it in a *mechanistic* rule that, discrimination aside, any state tax on interstate trade must be upheld unless it is such that another state could repeat it.⁸⁹ In a word, just as states may tax the incidents of local business, so they may tax the corresponding, local incidents of national business. Only multi-state incidents would be protected directly by the Commerce Clause, and only to the extent that taxes thereon would have to be apportioned among the states in which the multi-state taxable event occurs. The multiple burden rule has great appeal for those who like apparent precision. But it weights the scales rather heavily in favor of local affairs, for the several states in which an interstate business operates are apt to put more localized burdens upon it than would be imposed upon a competing local business by the one state in which it functions. To protect each individual incident of interstate trade from double taxation does not necessarily result in the protection of interstate trade itself from cumulative burdens. Moreover, the “immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a

86. *Duckworth v. Arkansas*, 314 U.S. 390, 400 (1941) (concurring opinion).

87. *West Va. State Bd. of Education v. Barnette*, 319 U.S. 624, 667 (1943) (dissenting opinion).

88. *H. P. Hood & Sons v. DuMond*, 336 U.S. 525, 564 (1949) (dissenting opinion).

89. See Mr. Justice Rutledge's concurring opinion in *Freeman v. Hewit*, 329 U.S. 249, 259 (1946). These views apparently were derived from earlier opinions of Mr. Justice Stone; see, e.g., *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 438-40 (1939).

particular moment.”⁹⁰ Accordingly, for all its vaunted realism, the Rutledge rule dealt for the most part only with hypothetically possible, not actual, multiple burdens. It treated all taxes as fungible, ignoring the fact that two or more cumulative interstate taxes may indeed be less burdensome than a single localized tax. In a word it appears to have meant that, absent obvious discrimination in favor of local trade, any state could tax any aspect of interstate commerce, provided it pick an incident occurring exclusively within its own boundaries. This is a bit like trying to save a forest by partially protecting only those trees which straddle section lines—all others being left to the proven appetites of the residents of the respective sections in which they grow.

The short of it is that, as the history of all the great English-speaking federal systems demonstrates, the interrelations between national and local levels of government raise questions not susceptible of formally logical, or even fully explicit, considerations as the basis for striking a balance.⁹¹

“We have considered literally scores of cases [involving state burdens on interstate commerce]. Whatever may be the generalities to which these cases gave utterance and about which there has been, on the whole, relatively little disagreement, the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances.”⁹²

Of course, the fact, or possibility, of multiple burdens must be and perhaps always has been considered as an element of the problem, but surely there are others that merit consideration. Mr. Justice Frankfurter would weigh all of them. Interstate commerce must pay its own way among the several states which give it protection, but the national market must not be sacrificed. Here again is the familiar clash of two rights, not right against wrong. “The incidence of the particular state enactment must determine whether it has transgressed the power left to the States to protect their special state interests although it is related to a phase of a more extensive commercial process.”⁹³

It has annoyed some that the Justice in striking a balance—or rather in judging the balance struck by others—has “reverted” to the

90. *Freeman v. Hewit*, 329 U.S. 249, 256 (1946) (opinion for the Court).

91. Mendelson, *Dual Federal In Canada, Australia and the United States* in SHANNON *et al.*, *THE STUDY OF COMPARATIVE GOVERNMENT* 127 (1949).

92. *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 211 (1944) (Mr. Justice Frankfurter's opinion for the Court).

93. *Id.* at 210. For an example of the multitudinous factors which the Justice deems relevant, see *H. P. Hood & Sons v. DuMond*, 336 U.S. 525, 573-74 (1949).

old direct-burden language. It is perhaps characteristic that at least until something clearly better is found, he follows the old way. Of course, the "nine old men" perverted the "direct burden" rule to their own laissez-faire purposes!⁹⁴ Mr. Justice Frankfurter has not reverted to that usage; rather he has returned, if that term is applicable,⁹⁵ to the approach that Mr. Justice Holmes expressed so clearly in the *Galveston Railway* case:

"It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."⁹⁶

If it be said that in view of his general hands-off attitude, Mr. Justice Frankfurter is rather free in rejecting state taxation of interstate commerce, the answer is clear. Such measures infringe upon the interests of persons outside the offending state. It is the old problem of taxation without representation. Texans who are damaged by a Louisiana tax cannot readily participate in the democratic processes in Louisiana; and, as Mr. Justice Jackson pointed out, the damage will often not be extensive enough to attract the attention of Congress. Thus there is in these federalistic problems something of an hiatus, or

94. See the dissenting opinions of Justices Brandeis, Holmes and Stone in *DiSanto v. Pennsylvania*, 273 U.S. 34, 37, 43 (1927).

95. The Justice is often charged with having joined in his brother Black's leave-it-to-Congress approach in *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 183 (1940) (dissenting opinion of Justices Black, Frankfurter and Douglas). A careful reading of the opinion discloses that while much of the language supports this view, there are also saving words (see *id.* at 184) which must have been inserted at the behest of Mr. Justice Frankfurter. His acceptance of the broader language may be explained by the borderline nature of the case involving as it did two closely balanced claims of the kind that the Justice's general philosophy would leave to legislative discretion. To read his *McCarroll* dissent otherwise is to suggest that in this *single* instance he took a position at odds with his thought and teaching of a lifetime.

96. *Galveston, H. & S.A. Ry. v. Texas*, 210 U.S. 217, 227 (1908) (opinion for the Court).

interregnum, in the machinery of our democracy. Accordingly the balance on the freedom-for-state-experimentation side of the scale is rather lighter than when a state affects only interests within the circle of its political processes.⁹⁷ Moreover, the Justice agrees fully with the Court that its decisions in this area—upholding or rejecting state measures affecting interstate commerce—may be reversed by Congress.⁹⁸

It may be significant that the Justice refers to the Court's role in these cases as that of "mediator"⁹⁹—Mr. Chief Justice Stone used the term "arbitor."¹⁰⁰ Such language in conjunction with the strange, not fully explained,¹⁰¹ power of Congress to override Court decisions as to the scope of state power under the Commerce Clause suggests that at least some judges conceive that in this area the Court acts in a non-judicial capacity. Hence possibly the rather general avoidance of precise rules as being incompatible with the mediatory function.

With respect to the positive implications of the Commerce Clause as a grant of power to Congress, Mr. Justice Frankfurter has shown concern. "The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single state, but that cannot justify absorption of legislative power by the United States over every activity."¹⁰² Such precautionary language—rare indeed in the past decade—is simply another segment of the same thread that runs through the Justice's due process opinions. Within their insulated chambers the states are still responsible agencies in the pattern of American government.

CASE OR CONTROVERSY, ETC.

Clearly the Justice does not approach his task in the narrow spirit of a technically-minded lawyer. Probably no Justice since Mr. Chief

97. But where state regulation, rather than taxation, of interstate trade is involved the Justice takes a more generous view of state power for the reasons indicated in *Freeman v. Hewit*, 329 U.S. 249, 253 (1946) (opinion for the Court).

98. "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible . . . or exclude state regulation even in matters of peculiarly local concern which nevertheless affect interstate commerce." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945).

99. *West Va. State Bd. of Education v. Barnette*, 319 U.S. 624, 667 (1943) (dissenting opinion).

100. *Southern Pacific Co. v. Virginia*, 325 U.S. 761, 769 (1945).

101. *Id.* at 768.

102. *Polish Nat. Alliance v. NLRB*, 322 U.S. 643, 650 (1944) (opinion for the Court).

Justice Marshall has been so aware that his job requires more in the way of statesmanship than of strictly legal competence. But how the latter may serve the former is excitingly illustrated in the Justice's vigorous invocation of the traditional limits of the Court's jurisdiction. Questions of jurisdiction in constitutional controversies entail questions of political power. History admonishes against needless or premature decisions. Only a case or controversy, a live, concrete, present issue between litigants justifies opening of the judicial doors.¹⁰³ "It is not our function, and it is beyond our power, to write legal essays or to give legal opinions, however solemnly requested and however great the national emergency Unlike the role allowed to judges in a few state courts and to the Supreme Court of Canada, our exclusive business is litigation. The requisites of litigation are not satisfied when questions of constitutionality though conveyed through the outward forms of a conventional court proceeding do not bear special relation to a particular litigant. The scope and consequences of our doctrine of judicial review over executive and legislative action should make us observe fastidiously the bounds of the litigious process within which we are confined. No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to vindicate, apart from a political concern which belongs to all."¹⁰⁴

Even when the Court is presented with a real case or controversy and judgment is called for, constitutional decision must be avoided if other grounds for settlement are available. "It is not for us to find unconstitutionality in what Congress enacted although [the measure] may imply notions that are abhorrent to us as individuals or policies we deem harmful to the country's well-being Particularly when Congressional legislation is under scrutiny, every rational trail must be pursued to prevent collision between Congress and Court. For Congress can readily mend its ways, or the people may express disapproval by choosing different representatives. But a decree of unconstitutionality by this Court is fraught with consequences so enduring and far-reaching as to be avoided unless no choice is left in reason The approach appropriate to such a case as the one before us was thus summarized by Mr. Justice Holmes in a similar situation: '. . . the

103. These sentences and those which introduce each of the next three paragraphs are paraphrases of what Professor Frankfurter wrote in 1931 with respect to Mr. Justice Brandeis. Frankfurter, *Mr. Justice Brandeis And The Constitution*, 45 HARV. L. REV. 33, 79-85 (1931).

104. *Coleman v. Miller*, 307 U.S. 433, 462-64 (1939) (separate opinion of Mr. Justice Frankfurter).

rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.' ” ¹⁰⁵

Similarly abstention from constitutional or other adjudication may be required by the restricted nature of the judicial process; the inadequacy of its remedies; or the entanglement of the legal issue before the Court in larger public issues beyond the judicial pole. Such was the nature, thought the Justice, of Professor Colegrove's suit to enjoin the conduct of elections on the basis of a hopelessly outdated districting law. “We are of opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about ‘jurisdiction’. It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our government revealed this issue to be of peculiarly political nature and therefore not meet for judicial determination In effect this is an appeal to the federal courts to reconstruct the electoral process of Illinois. . . . Of course no court can affirmatively re-map the Illinois districts. . . . At best we could only declare the existing electoral system invalid. The result would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a state-wide ticket. The last stage may be worse than the first. The upshot of judicial action may defeat the vital political principle which led Congress, more than a hundred years ago, to require districting.” ¹⁰⁶

But even when all requirements of jurisdiction are met, tribunals other than the Supreme Court may be more fit to exercise it—especially when decision turns on subtle local arrangements or the meaning of local legislation not yet interpreted by local courts. In such cases the experience and judgment of local tribunals should be called upon at least preliminarily. Thus when a constitutionally questionable order of the Texas Railroad Commission was before the Court, the case was remanded to the federal district court to be held for a reasonable time pending determination in the state courts as to whether the Railroad Commission had statutory authority to issue the challenged order. “Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in

105. *United States v. Lovett*, 328 U.S. 303, 319, 329 (1946) (concurring opinion).

106. *Colegrove v. Green*, 328 U.S. 549, 552-53 (1946) (opinion by Mr. Justice Frankfurter announcing the judgment of the Court). It is important to note that the Justice's position here was vindicated by subsequent acts of the Illinois legislature.

our independent judgment regarding the application of that law to the present situation.”¹⁰⁷

CONCLUSION

Mr. Justice Frankfurter's judicial technique is not newly contrived. Long ago he pointed out that, "The stuff of constitutional law, it cannot be too often recalled, differs profoundly from ordinary law. The dominant issues of Supreme Court litigation and the consequences of their adjudication are not those of the familiar law suits between John Doe and Richard Roe. The Supreme Court marks the boundaries between state and national action; it mediates between citizen and government. . . . The Court thus exercises essentially political functions."¹⁰⁸ But exercising such functions, the Court in organization and ideal is "independent." Here is the crux of the difficulty—for the exercise of political power by those who are not politically responsible is the essence of oligarchy. There can be little doubt that, if the Justice were writing on a clean slate, he would not claim the power of judicial review in its present breadth. For to combine in a single body judicial functions which require independence and political functions which in a democracy must entail political responsibility is to pervert one or both of two major functions of government. But the slate is not clean; nor does the Justice conceive it to be his duty to erase what the past has so indelibly written. Somehow he must reconcile democratic ideals with a practice that tends strongly towards oligarchy. This is at the bottom of his constant, agonizing preoccupation with the problem of keeping his personal views as to social policy out of his decisions. For the curse of oligarchy is at least to some extent neutralized if in the exercise of judicial review judges are guided by some objective mark outside themselves.¹⁰⁹

This objective or, in Holmesian phrase, "external" standard Mr. Justice Frankfurter seeks in the tradition of the common law—the reasonable man, or "those canons of decency and fairness which

107. *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496, 499 (1941) (opinion for the Court).

108. Frankfurter, *Mr. Justice Holmes And The Constitution*, 41 HARV. L. REV. 121, 122 (1927).

109. "Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable. Matters of policy, however, are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise of prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the [legislative] body chosen for those purposes by the people." *AFL v. American Sash & Door Co.*, 335 U.S. 538, 557 (1949) (concurring opinion).

express the notions of justice of English-speaking peoples." That he, like Holmes, should seek it there is significant, for common and constitutional law are much the same. Both are essentially judge-made in default of more explicit political creation and yet to be effective both must reflect something more than the merely personal views of judges. That constitutional law starts with a written document makes little difference for the "vague contours"¹¹⁰ of the Due Process and Commerce Clauses, for example, are neither self-explanatory nor self-executing. Their convenient vagueness leaves essentially the same room and need for creative interpretation as English common-law judges faced in building the law of torts or contracts. Indeed this very flexibility, this freedom of the law to work itself pure is the special genius of the two systems. It is worth noting that common-law judges were embarrassed by the same separation of powers question that troubles Mr. Justice Frankfurter—whence comes a judge's power to make law? The old answer (behind which some of the "nine old men" also tried to hide)¹¹¹—we do not make, but only find the law—will no longer do.

But the common law prospered on its practice, not on that answer. Of course, common-law judges made the common law, but they made it on the basis of external standards which they wisely sought and in the long view accurately found, in the mores of the community, *i.e.*, in the reasonable man. Similarly, our judges make constitutional law, or as Charles Evans Hughes put it "the Constitution is what the judges say it is."¹¹² The real problem is not shall or shall they not make it, but with what materials shall they build. Mr. Justice Sutherland and those for whom he spoke came to grief because the Spencerian laissez-faire which they found in the Constitution had long since been rejected by the community upon which they tried to foist it. The reasonable man test is a device to guard against such imposition of personal views upon the Constitution. It makes the community rather than the judge the prime mover in the unfolding of the Constitution. "A judge . . . must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of his time—at all hazards he must maintain that tolerable continuity without which society dissolves and men must begin again the weary path up from savagery . . ."¹¹³ The genius of a Holmes or a Mansfield lay not in a special ability to divine the

110. *Id.* at 555.

111. *See, e.g.*, *United States v. Butler*, 297 U.S. 1, 62-63 (1936).

112. *ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES* 139 (1st ed. 1908).

113. L. Hand, *Mr. Justice Cardozo*, 52 *HARV. L. REV.* 361 (1939).

dominant trends of their times, but in systematizing, or institution-alizing, judicial machinery for ascertaining objectively and admitting those trends into the legal stream. Absent such machinery, law is no more than Aaron Burr said it was, namely "whatever is boldly asserted and plausibly maintained."¹¹⁴

Some who call themselves realists have been bitterly critical of Mr. Justice Frankfurter, finding in his search for objectivity nothing but crass ostentation.¹¹⁵ It is easy enough to ridicule another's answers when one sees no problem in his problem. But it requires a short memory to forget that those same realists who are now so critical thought Mr. Justice Frankfurter's problem was very real indeed prior to 1937. For them apparently judicial self-restraint is a one way ticket good only for judges whose private social outlook is conservative. Not so for Justices Holmes and Frankfurter! For them humility and objectivity is the rule for all who have the power to frustrate the will and aspirations of the people.

It is ironical that Felix Frankfurter, who off the bench is and long has been one of the great liberal forces in American life, is condemned as conservative; while Holmes, whose private social views were thoroughly conservative, is reputed the liberal. Since their judicial approaches were identical, the fault lies not in themselves, but in their times. Despite significant backslidings and false starts Holmes' tenure in Washington coincided with a great wave of progressive legislation—particularly at the state level—from Roosevelt to Roosevelt. His hands-off attitude thus generally led to liberal results. But when Mr. Justice Frankfurter took his seat upon the bench the progressive cycle had largely spent itself. Conservatism (at best) is in the legislative saddle. Judicial self-restraint now often leads to conservative results. But is it the immediate result, whether liberal or conservative, that is important, or the sanctity of the democratic processes? For Justices Frankfurter and Holmes there can be but one answer.

114. 1 PARTON, *LIFE AND TIMES OF AARON BURR* 149 (1864).

115. See Rodell, Book Review, 59 *YALE L.J.* 1013 (1950).