

PREVIEW OF A JUSTICE

By WALTON HAMILTON †

A MAN writes — an event transpires — the work is reset to another theme. Felix Frankfurter scribbles about Mr. Justice Holmes; an advance sheaf of the opinions of Mr. Justice Frankfurter is sought within his pages. Thus circumstance interposes to transmute what was to have been a review of a book into a preview of a justice.

To search his printed word for the judge-to-be is a revealing adventure. Apropos of Holmes, Frankfurter speaks for himself.¹ On other occasions he has written about Marshall, Taney and Waite;² about Mr. Justice Brandeis³ and Mr. Justice Cardozo.⁴ In reciting what other jurists have done, he cannot escape what he as a jurist might do. In attention to legal events of yesterday, he addresses himself to issues now current.⁵ A gallery of affectionate portraits reveals less of judgments to come than would an exhibition from the judicial workshop; and we may anticipate less clearly the concretions which to Frankfurter will be the Constitution than we could with Holmes and with Cardozo.⁶ But the new justice lives in a democracy; he has freely chosen his gods. His pieces are appreciations rather than critical appraisals; his selection and comment have remade his subjects; another choice of items and a different text would have

† Southmayd Professor of Law, Yale Law School.

1. FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* (1938). This work is cited below as "On Holmes II." A former essay on *Mr. Justice Holmes and the Constitution* (1927) 41 HARV. L. REV. 121, reprinted in *MR. JUSTICE HOLMES* (1931) 46-177, is cited as "On Holmes I."

2. FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937). Cited below, save for the introductory chapter, as "On Marshall," "On Taney," and "On Waite," respectively.

3. Frankfurter, *Mr. Justice Brandeis and the Constitution* (1931) 45 HARV. L. REV. 33, reprinted in *MR. JUSTICE BRANDEIS* (1932) 47-126. Cited below as "On Brandeis."

4. Frankfurter, *Mr. Justice Cardozo and Public Law* (1939) 48 YALE L. J. 458, 39 COL. L. REV. 88, 52 HARV. L. REV. 440. Cited below as "On Cardozo."

5. At public hearings on his appointment, Mr. Frankfurter informed the Judiciary Committee of the United States Senate that his opinions are matter of open record. A little diligence in probing into his published work would have given the Committee far greater knowledge about the "views" he brings to his office than its public hearings were able to elicit.

6. "Barring only Holmes, no man has ever so completely revealed the map of his mind before he went on the Court as had Cardozo. If surprise there was in anything he wrote as a Justice, it was not for want of disclosure by him as to the way he looked at questions that would come before him." On Cardozo, 48 YALE L. J. 459, 39 COL. L. REV. 89, 52 HARV. L. REV. 441. The same can be said of Frankfurter, with the important proviso that his views have been put on record as a personal expression, not as responses to questions in the litigious setting in which a judge meets them. It need hardly be added, even for the lay reader, that such a difference in the form of the question is of utmost importance.

created another Marshall, Holmes or Brandeis.⁷ In citation, comment, concurrence we catch the potential jurist within the writer. In respect to fellow members of his craft, Felix Frankfurter recites his faith.⁸

The office to which Frankfurter has been called is of its own kind. In form it is judicial; matters of litigation, great and small, converge there. In essence it is as definitely set within the political order and the national economy as in the judicial system. In our scheme of things its function is to mediate between the individual and the government and to mark the boundaries between state and national action.⁹ Its character as a court restates the questions of policy brought before it; its exercise of statesmanship is hemmed in by the restrictions attending the adjudicatory process.¹⁰ It must attend to its task within the confined procedures of a lawsuit; the general problem is presented in a mutilated form and without facts adequate to its full understanding. It rarely has a chance at an issue whole and complete; it must do its work with the uncreative resources of judicial review.¹¹ Its constructive drive is compromised by the accidents of unrelated and intermittent cases, the confinement of issues to the legal record, the limited learning and insight of counsel fortuitously selected, the necessity of imprisoning the judgment within legal limitations and past utterances.¹² In all its work it is confronted with an interplay of legal doctrines with political and industrial forces.¹³ Yet, in spite of judicial trappings and usage, the court cannot escape its compromised office as an arbiter of policy.¹⁴

To Frankfurter the court is at once an abstraction, a fiction and an aggregate of individuals acting within an institutional frame-work.¹⁵ His accent falls in reiterated beat, not upon the bench, but upon its personnel. It does make a difference who is numbered among the elect. It would deny all meaning to history to believe that the course of human events would have been the same if Kenyon rather than Mansfield, Spencer Roane

7. Of the essays Marshall, Taney and Waite have more of a critical note than Holmes, Brandeis, Cardozo. He states that Holmes almost accepted the simplicities of the wage-fund theory and that in a question of federal immunity from state taxation Holmes "was himself caught in this web of unrealities." On Holmes II, p. 85. But, such minor flaws aside, neither the frailties nor even the human traits of his later jurists are passed in review.

8. In the paragraphs that follow I have attempted, so far as a running account will allow, to express Mr. Frankfurter's views in his own words. The pages that follow are replete with phrases, clauses, even occasional sentences from these essays. Except where his idiom is distinctively unique, quotation marks have been omitted; to include all would veritably be to sprinkle the paragraphs with them. As atonement for the omission and as a reference for the critical reader, a series of footnotes provides, point by point, a ready reference to the Frankfurter text.

9. On Holmes II, p. 5.

11. On Waite, p. 96; On Marshall, p. 71.

13. On Marshall, p. 26.

15. On Holmes II, p. 8.

10. On Marshall, p. 22.

12. On Marshall, p. 22.

14. On Taney, p. 58.

rather than John Marshall, Roscoe Conkling rather than Morrison Waite had been accorded high office.¹⁶ It was a realization that the man is father to the jurist which led Theodore Roosevelt to set down the hopes and doubts he felt about Mr. Justice Holmes.¹⁷ A power to determine doctrine often falls to a single judge; that Marshall was *there* and Taney and Cardozo — and not others — has shaped the very fabric of the Constitution.¹⁸ All of heredity and culture, of impulse and reaction, that go into personality pass on into legal opinion. Against individual preference not even the higher law is insulated.

His pioneer task demands of the jurist a severe fitness. He must have the capacity to assimilate, modify and reject the discursive and subtly partisan arguments of counsel. He must be able to transmute the raw materials of record and argument into an enduring opinion; yet remain consciously aware of his own intellectual processes.¹⁹ Above all a happy resource must enable him to reconcile confused aims and conflicting pressures within the frame-work of a legal formula.²⁰ So exacting a competence cannot be reduced to specifications. No man can apply the Constitution as a linear measure to a statute to discover whether it be valid or void;²¹ no formula will make great judges of little men.²² The jurist must dwell above the sound of passing shibboleths,²³ yet not regard our highest tribunal as a Grand Lama.²⁴ He must be able to discover the vital in the undramatic.²⁵ It is men—with their diversities in endowment, experience, outlook—who direct the path of the law.²⁶ There is no inevitability in history except as men make it.²⁷

Individuals make it up, yet the court is a court. Its members act within the network of its usages and traditions. As a court they make decisions and lay down doctrines. In time they give way to successors who do not build anew, but refine, modify, reinterpret, transmute, pass on the heritage.²⁸ No judge writes on a wholly clean slate;²⁹ he must live within the intellectual climate generated by his brothers on the bench. Whoever the spokesman, the Court imparts to its opinions the distinction of its own accent. Even Marshall, who invented "the opinion of the Court," spoke as a member of a bench. The idea that he dominated leaves out of the reckoning the strong personalities of his brethren. Mr. Justice Johnson's opinions reveal a tough-mindedness; Mr. Justice Story had "devotion to Marshall, but also vanity and views." To Frankfurter the wisdom of the

16. On Holmes II, p. 9; *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937) 4.

17. On Holmes II, p. 21.

18. On Marshall, p. 43.

19. On Holmes II, p. 8.

20. On Holmes I, p. 118; Holmes II, p. 93.

21. On Holmes II, p. 28.

22. On Holmes II, p. 9.

23. On Marshall, p. 12.

18. On Marshall, p. 44.

20. On Taney, p. 65.

22. On Marshall, p. 32.

24. On Holmes I, p. 118.

26. On Holmes II, p. 8.

28. On Holmes II, p. 9.

group has a value above the wisdom of the individual. The individual may be bold, the court must be wary. The individual can afford to be outspoken, the court must consolidate its position step by step and realize its strategy in a series of decisions.³⁰ Inner conviction or outward circumstance may at times allow to a jurist no outlet save in dissenting opinion.³¹ But quite as often individual preference must yield before the prevailing temper of the bench.³² In general the voice of the court must be "an orchestral and not a solo performance."³³

The work goes forward under the aegis of the great tradition. The past must converge upon the instant case, the future lead out from it. An attitude which only an experience with the annals of man can impart must be omnipotent. As docket follows docket, germs of opinion are to be converted into constitutional doctrine. In the process many notions, indulged for the moment, prove abortive, while enduring life is assured to others. The judges, even the great judges of the past, lived in their times, not in ours. Their tentative gropings must not be turned into obscuring formulas or traps for retrospective interpretation.³⁴ Ideas have their genealogies;³⁵ a holding has fortuitous as well as intended consequences;³⁶ and, where there is fumbling and growth, we must not expect consistency in detail.³⁷ Law is an aspect of our cultural history; its forms are related to its functions;³⁸ doctrines that no longer serve must melt away in the light of later experience.³⁹ If he is not to be imprisoned by the rags and tags of learning, the judge needs the sweep of vision which a sense of time imparts. "Today we study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow."⁴⁰ In fact civilization is nothing more than a sequence of new tasks.⁴¹

The perspective of history makes the judge mindful of the limited range of human foresight.⁴² Frankfurter does not deny authority to the world's

30. On Marshall, p. 25.

31. One who has lived long with opinions and has studied the divisions within the court can discover the influence of individual judges in the common product. *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937) 8. He also becomes conscious of the fortuitous circumstances which shape a majority opinion. On Brandeis, p. 74. It is, however, "a teasing mystery" how a judge, satisfied with the result, yields concurrence in an opinion which presents uncongenial doctrine. On Taney, p. 56.

32. On Marshall, p. 43.

33. *Ibid.*

34. *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937) 9-10; On Marshall, p. 32.

35. Quoting James Bradley Thayer in *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937) 4.

36. On Taney, p. 66.

37. On Marshall, p. 18.

38. On Cardozo, at 48 *YALE L. J.* 477, 39 *COL. L. REV.* 107, 52 *HARV. L. REV.* 459.

39. *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937) 6.

40. Quoting Maitland, in *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937) 3.

41. On Brandeis, p. 124.

42. On Brandeis, pp. 105, 124.

most powerful court;⁴³ instead he pleads for self-restraint in its exercise. Thus on occasion it was a flaw in Taney that the temptation to express right views broke through an attitude of judicial reserve;⁴⁴ and Waite fulfilled one of the greatest duties of a judge, the duty not to enlarge his authority.⁴⁵ The court is the brake on other men's actions, the judge of other men's decisions.⁴⁶ But no words on parchment will suffice to perform the office, "for clauses are not truly censors, the men who apply them are." Judges must not become builders of policy;⁴⁷ even the absence of legislation does not create a vacuum for judicial architecture.⁴⁸ Judicial action has its obverse in judicial limitation.⁴⁹ The whole of the question may not be before the court; the specific claim may be enmeshed in larger public issues; a suitable remedy may exceed its resources. Even the law is only partially in the keeping of the judiciary.⁵⁰ Thus judicial restraint is set in the very nature of the judicial process. A recognition of the rational limits of its competence is not an abdication of the court's power.⁵¹

Another source of restraint is a critical attitude towards the judicial process. Here the text is from the gospel according to Holmes that "we should think things and not words."⁵² Discretion is a function, not of mechanics, but of imponderables.⁵³ So no verbal formula, no sanctifying phrases, can provide an escape from judgment.⁵⁴ Marshall's decisions may be rooted in principles, but, blessed with a gift for empiricism, he was pragmatic in their application.⁵⁵ The *ad hoc* tends to become the universal; what judges say, even as asides, has an influence upon what they do next; the rule, no matter how halting, projects the present into the future.⁵⁶ So a *caveat* is always in order lest the words be over-large, the saying over bold. A glory of the common law is its disrespect for dicta; in constitutional cases side-remarks are pernicious usurpers; to let accumulated dicta govern is to deny the future a hearing.⁵⁷ In short it is a parlous adventure to tame instances into a general rule.⁵⁸

43. On Brandeis, p. 125.

44. On Taney, p. 72.

45. On Waite, p. 80.

46. On Holmes II, p. 30.

47. On Holmes II, p. 25.

48. On Brandeis, p. 98.

49. On Waite, p. 95.

50. On Brandeis, p. 98.

51. It is interesting to note that in all these essays Mr. Frankfurter preaches the gospel of judicial self-restraint, but nowhere commits himself to an abridgement of judicial power.

52. On Holmes II, p. 57.

53. On Cardozo, at 48 YALE L. J. 459, 39 COL. L. REV. 89, 52 HARV. L. REV. 441.

54. On Taney, p. 53; On Waite, p. 87.

55. It was only when Marshall's statements were turned into obscuring formulas by minds less sensitive to practical exigencies of government that issues were confused and evaded. On Marshall, pp. 14, 31.

56. On Marshall, p. 26.

57. On Brandeis, p. 102.

58. On Brandeis, p. 52. His skepticism of verbalisms frees Frankfurter from the tyranny of *stare decisis*. If holdings are to be read, not as general rules, but in the light of their particulars, the past may be invoked as experience rather than as compulsion.

Logic alone is sterile. Frankfurter knows, as well as Holmes or Brandeis, "how slender a reed" is reason—how recent its emergence in man, how powerful the countervailing instincts and passions, how treacherous the whole rational process.⁵⁹ He speaks with admiration of Cardozo who never rested on a formula, even one that embodied the most precious victory of reason. The jurist must use lawyers' artifices as instruments of judicial policy.⁶⁰ But symbols mean only as much as conduct has put into them,⁶¹ and the compulsion does not lie in the verbalism in which judgment is cast. For the same economic motive may quicken disparate clauses into action,⁶² the same legal device serve to implement opposite policies.⁶³ In fact, since the law draws its juices from life and is not a system of stagnation, its unfolding can reveal neither harmony in detail nor logic in development.⁶⁴ A sprawling growth at times makes priestcraft something of a necessity. The creative role of the Supreme Court in interpreting the meaning of "the Delphic language of the Constitution" must not become too obvious.⁶⁵

As cases come, a scheme of values resolves. And in resolution the interpreter becomes the creator. As Bishop Hoadley has it, an absolute authority makes the expositor the law-giver,⁶⁶ and, as Mr. Chief Justice Hughes confesses, our fundamental instrument of government means what the Supreme Court makes it mean. To Frankfurter it is not so much a document as a stream of history.⁶⁷ In his spacious view the instrument was made, not at one time but on several occasions⁶⁸ and it owes its continuity to a process of revivifying change.⁶⁹ It contains within itself the formulated past and is designed for the unfolding future.⁷⁰ Its provisions are not mathematical formulas, but organic living institutions;⁷¹ their significance is not formal but vital.⁷² It is not a literary composition, nor a document for fastidious dialectics,⁷³ but the means of ordering the life

59. On Brandeis, pp. 105-106.

60. On Taney, p. 59.

61. On Cardozo, at 48 YALE L. J. 482-3, 39 COL. L. REV. 112-3, 52 HARV. L. REV. 464-5.

62. On Waite, p. 75.

63. On Taney, p. 61.

64. On Taney, p. 66.

65. On Marshall, p. 25.

66. Quoting Bishop Hoadley, quoted in Gray, *THE NATURE AND SOURCES OF THE LAW* (1921) 102; On Holmes II, p. 7.

67. *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937) 2.

68. On Marshall, p. 46.

69. On Brandeis, p. 103.

70. On Cardozo, at 48 YALE L. J. 461, 39 COL. L. REV. 91, 52 HARV. L. REV. 443.

71. As O. W. Holmes, Jr., became Mr. Justice Holmes, so much that was the common law became the Constitution. An assumption, by Taney, by Holmes, by Frankfurter that our common law is the law of England helps to make it so.

72. Quoting Holmes, J., in *Gompers v. United States*, 233 U. S. 604, 610 (1914); On Holmes II, p. 77.

73. Within the meaning of words lie issues involving the future of society. Words are to be interpreted in the light of our whole experience. See note 70, *supra*.

of a progressive people.⁷⁴ It is a source of governmental energy as well as of governmental restriction⁷⁵ and its "power is as broad as the need that invokes it."⁷⁶ The Constitution has ample resources within itself to meet the changing needs of successive generations.⁷⁷ In short it is "not a printed finality but a dynamic process."⁷⁸

These are brave words—but general. They are of an amplitude to allow the jurist his discretion.⁷⁹ In more specific terms, and within their contours, Frankfurter reveals urges of mind and spirit which impel towards judgment. A dominant question, which the court must continuously face, is the public control of business. As case follows case, the question in controversy—in substance always the same—can be set down in a variety of legal forms. It may be postulated as the police power against due process of law, as the limits in individual freedom to the province of government, as the rightful orbits of the legislature and the judiciary, as social experimentation against constitutional restraint, as the philosophy of *laissez faire* against a policy of collectivistic oversight, as vested interest against the general welfare. In diverse questions Frankfurter recognizes a common issue. He knows that at most the Constitu-

74. On Brandeis, p. 53; On Holmes I, p. 58; On Holmes II, p. 29. It is of note that to Frankfurter American history is constitutional history. *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937) 2.

75. See note 70, *supra*.

76. Quoting Cardozo, J., dissenting in *Carter v. Carter Coal Co.*, 298 U. S. 238, 328; On Cardozo, at 48 *YALE L. J.* 487, 39 *COL. L. REV.* 117, 52 *HARV. L. REV.* 469.

77. Quoting James Bradley Thayer, On Brandeis, p. 53. Thayer has never had adequate recognition as a Constitutional Father. Aside from his general influence as a teacher and writer, he contributed directly to the stream of constitutional doctrine. Holmes, J., was his associate; Moody and Brandeis, JJ., his students; Frankfurter, J., brought up in his tradition. His view of the spirit of the Constitution and the amplitude of its competence for the changing necessities of a people is reflected in the opinions of all these justices.

78. On Holmes II, p. 76. "What is the Constitution? A writing set down on parchment in 1787 and some twenty-one times amended? Or a gloss of interpretation many times the size of the original page? Or a corpus of exposition with which the original text has been obscured? Or 'the supreme law of the land'—whatever the United States Supreme Court declares it to be? Or the voice of the people made articulate by a bench of judges? Or an arsenal to be drawn upon for sanction as the occasion demands? Or a piling up of the hearsay about its meaning in a long parade of precedents? Or a cluster of abiding usages which hold government to its orbit and impose direction upon public policy? Or 'a simple and obvious system of natural liberty' which even the national state must honor and obey? And is the Constitution engrossed on parchment, set down in the United States Reports or engraved in the folkways of a people? And . . . has the United States a written or an unwritten Constitution?"—Walton H. Hamilton, *1937 to 1787 Dr.* in *THE CONSTITUTION RECONSIDERED* (1938) xv-xvi. Mr. Frankfurter would probably accept "the gloss," doubt "the corpus," limit "natural liberty" to "civil rights" and answer most of the questions in the affirmative. For him the United States has an unwritten as well as a written Constitution.

79. The Constitution is "adequate." If it fails the necessities of the people, the failure stems from the narrowness of the men who interpret it. On Holmes II, p. 36.

tion provides a ready formula whose terms must be weighted with the stuff of life to secure judgment. For him decision must cut through rhetorical statement and be grounded in the facts of the case and the necessities of society. In answering one of these questions he will not leave the others untouched.

In this varied clash of values he has made clear where the balance lies. His advocacy of the shorter workday and the minimum wage are not isolated commitments,⁸⁰ but an expression of an articulate philosophy. His tolerance of the legislature — in times past little short of militant — extends far beyond personal conviction. To him the police power, true to its etymology, is the power to shape policy.⁸¹ It defies legal definition; as a response to the dynamic aspects of society, it cannot be reduced to a constitutional formula.⁸² The law must be sensitive to life; in resolving cases, it must not fall back upon sterile *clichés*; its judgments are not to derive from an abstract dialectic between liberty and the police power. Instead, in a world of trusts and unions and large-scale industry, it must meet the challenge of drastic social change.⁸³ For him, as for Holmes, "society is more than bargain and business" and the jurist's art rises to no higher peak than in vindicating interests not represented by the items in a balance-sheet.⁸⁴ In a progressive society, new interests emerge, new attitudes appear, social consciousness quickens. In the face of the unknown one cannot choose with certainty. Nor as yet, has the whole of truth been brought up from its bottomless well;⁸⁵ and how fragile in scientific proof is the ultimate validity of any particular economic adjustment. Social development is a process of trial and error; in the making of policy the fullest possible opportunity must be given for the play of the human mind.⁸⁶ If Congress or legislature does not regulate, *laissez faire* — not the individual — must be the regulator.⁸⁷

Discretion belongs where power is and knowledge resides. In economic affairs, the penumbral region where law and policy blend, judges must walk humbly. They must not measure the legislature's reasons by their own intellectual yardsticks;⁸⁸ translate their own doubts into judgments of law; or confound personal disapproval into constitutional prohibition.⁸⁹ The dry terms of abstract power are a constant temptation to word-spinning and self-deception.⁹⁰ Jurists must constantly be alert to the treacherous appearance which the law gives to issues of fact, lest they

80. Briefs for the Appellees, *Bunting v. Oregon*, 243 U. S. 426 (1917); *Stettler v. O'Hara*, 243 U. S. 629 (1917); *Adkins v. Children's Hospital*, 261 U. S. 525 (1923).

81. *Police Power* (1934) ENCYC. SOC. SCIENCES.

82. On Marshall, p. 27.

83. On Brandeis, p. 52.

84. On Holmes II, p. 91.

85. On Holmes II, p. 61.

86. On Holmes II, p. 50.

87. On Waite, p. 100.

88. Quoting Judge Hough, in Holmes II, p. 34.

89. On Cardozo, at 48 YALE L. J. 462, 39 COL. L. REV. 92, 52 HARV. L. REV. 444.

90. On Holmes II, p. 79.

forget that legislation derives from actuality and get lost in the fog of obstruction.⁹¹ Long, long ago Marshall himself characterized the power of the courts to sit in judgment upon legislative acts as a "delicate function."⁹²

The judge must meet glib terms which invite judicial discretion with a stern *caveat*. The words of nullity at hand are alluring but vague in outline and uncertain of meaning. The Constitution enjoins the equal protection of the laws; but its essence of fairness neither derives from hollow abstractions nor drives to judgment pedantic arguments.⁹³ An infinite variety presents an ever new detail;⁹⁴ the clause cannot be applied with delusive exactness. Here no absolute is adequate;⁹⁵ constitutional issues become questions of more or less, matters of fine lines and delicate degrees.⁹⁶ To expect uniformity in law where there is diversity in fact is mischievous.⁹⁷ In a situation in which things are unlike, acts of state are not to be struck down in the name of "fictitious inequalities."⁹⁸

So, too, with due process. Legislative power is pent in by no doctrinaire formula;⁹⁹ it is to be cabined by no imprisoning definition of its allowable scope.¹⁰⁰ If facts and symbols clash, it is the business of the court to harmonize the talk of the cases with business actualities.¹⁰¹ Liberty of contract is an alien doctrine which came out of economics into the Constitution; and, as Holmes has insisted, due process is only the bench's way of voicing its preference for *laissez faire*.¹⁰² Its invocation must not force the court to define the police power. To him, as to Learned Hand, the requirement of due process is merely an embodiment of the English sporting idea of fair play.

At a number of strategic points Frankfurter's attitude is no deep secret. He is persuaded that on the labor front fair play requires "that equality in position between the parties in which liberty of contract begins."¹⁰³ The conditions of employment and the remuneration of the workers cannot safely be left to the free play of economic forces within the market. A corrective in labor standards must be supplied, either by the trade union or by the legislature. If liberty of contract is to shape terms of employment, the law must be broad enough to make of collective bargaining an effective instrument and the labor injunction must be

91. On Waite, p. 84.

92. On Cardozo, at 48 YALE L. J. 473, 39 COL. L. REV. 103, 52 HARV. L. REV. 455.

93. On Brandeis, p. 66.

94. On Holmes I, p. 64.

95. On Brandeis, p. 117.

96. On Brandeis, p. 96; On Cardozo, at 48 YALE L. J. 474, 39 COL. L. REV. 104, 52 HARV. L. REV. 456.

97. On Brandeis, p. 65.

98. On Waite, p. 75.

99. On Holmes II, p. 42.

100. On Waite, p. 87.

101. On Taney, p. 65.

102. On Waite, p. 75.

103. Quoting Holmes, J., dissenting in *Coppage v. Kansas*, 235 U. S. 1, 26-27 (1915); On Holmes I, p. 86.

severely limited to the protection of public rights.¹⁰⁴ But if, for want of organization, workers lack bargaining strength, the government has an obligation to secure their well-being.¹⁰⁵ As an interest within the commonwealth their status is of conscious public concern. Here a host of problems break in a tangle of legal issues, whose formal concern is cause of action,¹⁰⁶ jurisdiction, procedure, statutory interpretation, the law of the constitution. Frankfurter will consider such issues within their judicial setting; he will accord full due to all the proprieties of legal usage. But his values — set in an intellectual system that brooks no divisions between the social and the legal — will shape his judgments.

Along the business frontier his views are less fortified by long study and concrete experience. But sign posts are already set from which as occasion demands he may get his judicial bearings. It is an easy step from a legal minimum wage to the constitutionality of legislative price control. Here time hurries, bothers press, legislation cannot wait for accord among economists or general acceptance of their theories. Here "powerful forces produce problems which must be dealt with by legislators with whatever fallible and tentative wisdom they possess."¹⁰⁷ Here Frankfurter accepts the judgment of the court in *Nebbia's*¹⁰⁸ and rejects its decision in *Carter's* case.¹⁰⁹ Thus he refuses to recognize any fixed category of industries affected with a public interest, to elevate price above other terms of the bargain, or to create for business a zone of legislative immunity.¹¹⁰

On public utilities Frankfurter's position is fully abreast the most advanced rulings of the court. He is critical, in theory and application alike, of cost of reproduction new. He finds the formula a temptation to economic legerdemain, a most luxuriant means for creating fictitious values,¹¹¹ an indulgence in constitutional metaphysics about valuation. He insists that the grab-bag nature of the rule of *Smyth v. Ames*¹¹² must

104. FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1930). It is well known that Mr. Frankfurter was instrumental in shaping the provisions of the Norris Act.

105. On Holmes II, pp. 9-45.

106. The cause of action is the most conventional of things. A society will impress its dominant values upon the pattern. As the labor interest wins recognition, the courts will serve it in continuing new causes of action. Along this neglected front the courts have always done—and will continue to do—creative work.

107. On Cardozo, at 48 *YALE L. J.* 470, 39 *COL. L. REV.* 100, 52 *HARV. L. REV.* 452.

108. *Nebbia v. New York*, 291 U. S. 502 (1934).

109. *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

110. The court did not succeed in reconciling the two judgments, and Frankfurter does not attempt to do so. On Cardozo, at 48 *YALE L. J.* 471-4, 487-8, 39 *COL. L. REV.* 101-4, 117-8, 52 *HARV. L. REV.* 453-7, 469-70.

111. On Brandeis, p. 76.

112. 169 U. S. 466 (1898). In the case of *Driscoll v. Edison Light & Power Co.* (No. 509, Oct. Term, 1938), the Department of Justice as *amicus curiae* has just filed with the Supreme Court a brief asking to have *Smyth v. Ames* overruled.

presently drive the court in fact, if not in form, to the doctrine of prudent investment. A price policy, even in respect to public utilities, involves many considerations other than the value of property.¹¹³ But even prudent investment is an injunction against experimental rate-making; and it remains to be seen whether Frankfurter is willing to accord to the commission the opportunity he does not withhold from the legislature. He may even insist that, since the cause at law cannot comprehend all the factors, rate cases should be dismissed for want of jurisdiction.¹¹⁴ For he professes unwillingness to substitute judicial judgment for administrative judgment in the face of the "obscurity which envelops the economic process."¹¹⁵

At the moment all is excitement along the administrative front. As a specialist in administrative law Frankfurter is conversant with the march of events and the emerging issues. He recognizes the increasing complexity of modern life, the changing wants of the people, the enlarged offices of the government, the demand for a detailed accommodation of controls to situations, the necessity for lodging discretion hard by the facts. He is willing to accord to administrative bodies, within their statutory domains, an independence adequate to their social duties. He is not likely to lend concurrence to the doctrine of the non-delegation of power which, in the "hot oil" and "the industrial code" cases,¹¹⁶ came out of nothingness into constitutional law and disappeared as mysteriously as it came. He will as certainly prove hospitable to the informality of procedures which these agencies must be allowed to adopt as he will be loath to permit them "to disregard evidence or dispense with the logic of relevance."¹¹⁷

Even more fundamental is Frankfurter's basic attitude towards the administrative process. It is easy enough, with Mr. Chief Justice Hughes, to approach the matter as an adversary proceeding, to look upon the utility as a person awaiting judgment, and to accord to "the accused" all the perquisites of due process. But such a procedure mistakes the very nature of the problem.¹¹⁸ The matter at issue is a continuing relation between the concern which furnishes the services and the consumers who must foot the bills. The task of the commission is to insert terms of the bargain when no market is there to turn the trick. Hence a con-

113. It is, of course, evident that a question in price policy was whittled down into an issue of the valuation of property to meet the requirements of judicial challenge under the Fourteenth Amendment.

114. Note Black, J., dissenting, in *McCart v. Indianapolis Water Co.*, 302 U. S. 419 (1938).

115. On Brandeis, p. 79.

116. *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935); *Schechter Poultry Co. v. United States*, 295 U. S. 495 (1935).

117. On Brandeis, p. 121.

118. *Morgan v. United States*, 304 U. S. 1 (1938).

tractual approach to the problem is legally as plausible as one grounded in criminal law and civil rights — and far more relevant. For in procrastination over a procedural due process, the rights of the public — an equal party to the bargain — are likely to be forgotten. After all, the task — alike of commission and court — is to fix the terms of a contract; and here the procedures of business are rather more relevant than those of litigation.¹¹⁹ Assuredly here, if anywhere, “to deny the government the right to act,” unless it can act “with omniscience and prescience” is “to deny it the right to act at all.”¹²⁰

But the years pass — and the constitutional battle moves to a new front. In the emergent future questions are likely to turn far more upon somewhat more or less, the concretions of usage, the precisions of regulation.¹²¹ As yet the impact of the modern corporation¹²² has been assimilated neither by the law nor into public policy. Corporations are creatures of the several states, yet operate in a national economy. They are instruments of individual or collective purpose, yet persons at law and in equity. We know that Frankfurter is willing to admit differences between individual and corporate enterprise and to distinguish cooperatives from ordinary profit-seeking venture.¹²³ But the public law of the corporation is to be woven from very fine strands; and, save for general values which he will bring to his task, his writings tell little of the design he would impose.

Nor is his attitude to the anti-trust acts a matter of concrete record. He does not regard all concentration of economic power as a decree of nature nor even as the inevitable consequence of modern technology. But he is not likely to read the Sherman Act as a call to “a policy of anarchic *laissez faire*.”¹²⁴ He is much too skeptical of the principles of economics and much too wary of the laws of trade regulation to assume that specific cases can be disposed of by an easy reference to rules. In respect alike to the corporation and the combination his way is almost certain to be that of the concrete instance. He will be sensitive to social tensions and conflicts of interest; he will keep himself informed about the processes of government and of industry.¹²⁵ He will bring to judgment an alertness to the concentration of economic power and a devotion to the egalitarian hopes for American society which stem from Jefferson, Jackson and Lincoln.¹²⁶

Beyond this, along the industrial front, all is less certain. At the moment a curious paradox attends the status of due process. As civil

119. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938) 8-10.

120. On Cardozo, *loc. cit. supra* note 110.

121. *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* (1937) 8.

122. On Taney, p. 63.

123. On Brandeis, p. 69.

124. On Brandeis, p. 119.

125. On Cardozo, at 48 *YALE L. J.* 462, 39 *COL. L. REV.* 92, 52 *HARV. L. REV.* 444.

126. On Taney, p. 63.

rights are read into the classic words, liberty of contract departs its verbal home. In reaction to the late bench which struck down acts of Congress at will, the current court severely maintains its self-denying ordinance. If all statutes were social legislation, prompted by the necessities of a people, all would be well. But lobbies are often more than a third house and a plague of measures which enthrone privilege is sweeping the land. As favors are accorded to special interests and as the channels of economic opportunity are blocked, a struggle is on between the equal protection of the laws and the prevailing doctrine of judicial self-restraint. A formula, even one that is an expression of judicial humility, may drift from the cause it was meant to serve. It may cease to be a support to the general welfare and become a bulwark to those who would make even the law a card in an acquisitive game.¹²⁷ It is one thing to insist that as applied to diverse conditions, equal protection is an abstraction; it is quite another to withhold its protection when rights are accorded to some and denied to others.¹²⁸ Yet the current trends run strongly towards the finality of legislative judgment.¹²⁹

A kindred problem of opportunity and privilege is presented by patents. With technology in the saddle, access to the industrial arts is an essential of free enterprise. The inventor's right — from which as often as not he is excluded — has been elaborated into a vast network of intangible entities. As Frankfurter ascends the bench the law of patents is backward. A product largely of private litigation, it reflects far too little the

127. At the moment the Court is fully, even austere, committed to the doctrine of judicial self-restraint. In the court the focal points all indicate as much. In an about face, Mr. Chief Justice Hughes has led his court in a retreat from the peak of assumed powers in 1935 and 1936. Mr. Justice Brandeis has long engaged in a campaign to use procedural and jurisdictional devices to keep constitutional issues from being raised. Note, as typical, *Pennsylvania v. West Virginia*, 262 U. S. 553 (1923). Three years ago he led a fight, lacking success by a single vote, to dispose of the case of *Ashwander v. T.V.A.*, 297 U. S. 288 (1936), by denying the right of the plaintiff to sue. See the recent decision of the Court, by which *Tenn. Electric Power Co. v. Tennessee Valley Authority* [(1939) 6 U. S. L. WEEK 713] was disposed of by the denial that the plaintiffs had suffered any wrong of which legally they could complain. A superb triumph for his strategy attends him, as Mr. Justice Brandeis leaves the bench. Mr. Justice Black, harking back to the early rulings on due process, is likely to insist that even in respect to such legislative abuses as these the remedy points to the polls rather than to the bench. In such instances the judicial service of the cause of liberalism is likely to be left to *McReynolds* and *Butler, JJ.* That is, unless new members of the bench depart from the liberalism now established.

128. Undertakers, barbers, photographers, beauty-parlor specialists, and a host of others, are analogizing their trades to the learned professions, securing uniform acts from state legislatures, and hedging themselves against competition by legal protection. See Comment (1939) 48 *YALE L. J.* 847.

129. A number of factors, within the Court and without, give current support to a constitutional attitude. Note the reaction in this country to the totalitarian state which strengthens confidence in the finality of legislative judgment, since the legislature is a democratic institution. Mr. Frankfurter's attitude towards the European situation is not a thing apart from his general philosophy.

public interest. Holdings are given currency when no attorney would have the temerity to present citations on monopoly, employers' liability, or collective bargaining from the same vintage. Upon this issue these essays by the new justice are silent. But, in other connections, he praises Marshall and Waite for providing an ample constitutional frame for the development of the railroads, for keeping free the channels of national enterprise, for helping to release energies of national life.¹³⁰ In a return to constitutional intent, such enduring values can be served only by a revision of the corpus of patent law.¹³¹

As for state v. nation Frankfurter is a federalist rather than a nationalist. He envisages a nation adequate to its larger duties, made up of states, each with ample power for the diverse uses of a civilized people.¹³² It is true that all our activities have been caught up into a great industrial system, and that "commerce is a web of state and interstate activities." But it is not a seamless web, for the reserved power of the states and the commerce power of the nation together imply recognition of legal disparateness even where logical unity can be established.¹³³ The organic nature of society is not a decree of constitutional centralization and the states ought not to be hampered in dealing with evils at their points of pressure.¹³⁴ Even amidst the complexity of modern industry they must have the amplest opportunity for local development. Still the matter must not be pushed too far; national power must not be mutilated or paralyzed by sterile abstraction or by distinctions that do not respond to the actualities of modern industry.¹³⁵ Neither state nor nation must be enjoined from using an experimental program to fulfil its responsibilities.

The commerce clause is a repository of national power. In drawing upon it the bother is the constant temptation to logomachy.¹³⁶ As an illusory generality, it is a henchman eager for its conscript duty. It gave to Marshall an opportunity to restrain legislatures from hampering the free play of a national commerce.¹³⁷ Even though left dominant by Congress he found in it an implicit veto with which to save the larger economy from the particularism of the States.¹³⁸ To Taney the mere grant imposed no limit upon the state's police power; it was, instead, an authority for Congress to act.¹³⁹ To Waite, always mindful of local interests, it was proper for Illinois to regulate grain elevators, even though

130. On Marshall, pp. 35-39; On Waite, p. 76.

131. Note that the Constitution grants to Congress, not the power to issue letters patent, but "to promote the progress of science and the useful arts." The grant of patent is only an instrument by which the progress of the industrial arts is to be encouraged.

132. On Holmes II, p. 93; On Brandeis, pp. 84-85, 100.

133. On Waite, p. 97.

134. On Brandeis, pp. 65, 85; On Holmes II, pp. 75, 93.

135. On Holmes II, pp. 76, 79, 93. 136. On Holmes I, p. 67.

137. On Marshall, p. 14.

138. On Marshall, pp. 16, 37.

139. On Taney, p. 50.

they stood at the gates of a commerce which ignored state lines.¹⁴⁰ With the state as the agency of control, the commerce clause has often meant *laissez faire* — just as, when the nation has acted, states' rights have meant *laissez faire*. As a symbol it may be employed by the judiciary to secure for the states paralyzing authority over national interests or to dry up all state power.¹⁴¹

To Frankfurter such a term is no abstraction of logic — even of constitutional logic. As a norm, directionless in itself, it is servant to its master's result. The word commerce, drawn from the vocabulary of business, is a practical, not a technical legal concept.¹⁴² He has no quarrel with Marshall whose notion reflected the Virginia resolution; he would not deny to Congress authority to act in matters which are beyond the competence of the several states.¹⁴³ He would never hem in commerce by a formula concerned with the physical movement of goods. His conception is functional, not mechanistic; he speaks with never the trace of an accent the language of the organic relation of commercial transactions.¹⁴⁴ If a metaphor must be used, he prefers — because of its creative implications — “the stream of commerce.” The Fathers who granted to Congress the regulation of commerce among the several states, were too wise to attempt its definition, its scope was not to be confined within the bounds of their experience;¹⁴⁵ its changing contours were to be determined by a dynamic national economy, it was set down for an undefined and expanding future.¹⁴⁶ To Frankfurter the clause is a constant source of fresh authority — and commerce among the several states is the national economy.

Where, then, is the line to be drawn between national and state authority? Frankfurter is far too sensitive to the integrity of the industrial system to attempt to disentangle orbits and to define provinces. The metaphor of two powers, each a sovereign within its own dominion, is not for him. Instead, taking his cue from the Constitution, he makes the question a simple matter of precedence. If Congress has acted, then the law of the United States is the supreme law of the land¹⁴⁷ — and the

140. *Munn v. Illinois*, 94 U. S. 113 (1877). 141. On Holmes II, p. 80.

142. On Holmes II, p. 79; On Marshall, p. 42.

143. On Marshall, pp. 41-42. The sixth resolution of the Virginia Plan, introduced in the Constitutional convention by Edmund Randolph, provided that the Congress was “to legislate in all cases in which the several states are incompetent or in which the harmony of the United States may be interrupted by the exercise of individual legislation.”

144. On Marshall, p. 42; On Taney, p. 60.

145. The experience of the framers was broad enough to identify “commerce” with the money economy. See HAMILTON AND ADAIR, *THE POWER TO GOVERN* (1937). The narrowing of the concept came later.

146. On Waite, p. 104-105.

147. “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every

states must yield.¹⁴⁸ If Congress has not occupied the field, the act of the state is not to be sacrificed to the unexpressed will of the national legislature. The silence of Congress is no invitation to judicial authority.¹⁴⁹ For its invasion of the individualism of the states is costly and capricious,¹⁵⁰ stops experimentation, bars needed increase in the fund of social knowledge, and involves jurists in matters not peculiarly within their competence.¹⁵¹ Yet, when the game is on, and nation disputes jurisdiction with state, then the Supreme Court must attend diligently to its office of umpiring the federal system. A clash of public wills, brought into an imperfect accord, may be something of a makeshift. But government itself is something of a makeshift — and until the coming of Utopia we must put up with compromise.¹⁵² The end will be — as often it has been — to impose artificial patterns upon the play of economic life.¹⁵³ None the less our federalism, as a means to an ordered social life, is worth all it costs.¹⁵⁴

In taxation the same issue is posed and receives an identical answer. The aims of taxation cannot be crowded into so simple a term as the raising of revenue. As society has become urban and industrial, the government has been compelled to seek the wherewithal with which to carry out newly assumed obligations. Its policy is experimental. Whatever its nature, an impost can hardly exclude social consequences — and the complexities of tax legislation are intensified wherever social policy is its predominant aim.¹⁵⁵ It is a difficult task to tap new sources of revenue without killing the goose that lays the golden eggs. In the face of the enormous diversity in types of business activity, nice calculations are involved in making classifications at once fair and effective.¹⁵⁶ The

State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." ART. VI, § 2.

148. On Brandeis, p. 91.

149. He is rather critical of Marshall for using against the states a national authority still dormant; "an exclusive commerce power could not be rigorously applied without changing the whole political character of the states."—On Marshall, p. 27. He concurs with Taney that for "the safety and convenience of trade, or for the protection of the health of its citizens," the states may make regulations for commerce—even in respect to ports and harbors—so far as they do not come into conflict with a law of Congress.—On Taney, p. 51. He records that "the abstraction of exclusive power in Congress in vacuo" was uncongenial to Waite's pragmatic mind; yet admits with him that once Congress had translated constitutional powers into policy, full scope was to be given to its action.—On Waite, p. 101.

150. It need hardly be added that such a conviction cuts athwart much current constitutional usage. Yet it runs deep with Mr. Frankfurter.

151. On Holmes II, p. 88.

152. On Cardozo, at 48 YALE L. J. 463, 39 COL. L. REV. 93, 52 HARV. L. REV. 445.

153. On Marshall, p. 21.

154. On Taney, p. 66.

155. On Cardozo, at 48 YALE L. J. 466, 39 COL. L. REV. 96, 52 HARV. L. REV. 448.

156. On Cardozo, at 48 YALE L. J. 464, 39 COL. L. REV. 94, 52 HARV. L. REV. 446.

bite of a tax case is in its particular circumstances.¹⁵⁷ Yet the whole matter is an elusive riddle and the fog of doubt and confusion has not been lifted by economists. There is at hand no legal litmus to give ready answers; legislative judgment must not be curtailed by judicial intrusion into the domain of policy; the Constitution must play no "preferences between competing theories."¹⁵⁸

Here Frankfurter is unwilling to open the door to judicial policy making wider than the Constitution obviously requires. If it expressly limits state power, the restriction must be enforced with scrupulous vigor. But, as with police measures, state taxing acts are not to be struck down or abridged by any implied prohibition in the commerce clause.¹⁵⁹ On the contrary, subject as they are to popular control, the states must be allowed the widest latitude.¹⁶⁰ Their empirical policies must be hampered by "no finicky limitation upon their discretion nor jejune formula of equality."¹⁶¹ The fictions by which immunities to taxation are clinched have little hold on his mind.¹⁶² In contemplation of the abstraction that the source of the income is the salary of a state official, Frankfurter is not likely to forget that the tax-payer is a citizen of the United States.¹⁶³ He will be prone to define with extreme narrowness the immunity conferred by tax exempt securities.¹⁶⁴ Where state and federal levies clash, he would do his judicial best to avoid conflict before deciding that the latter should yield. In short, for a modern society, in which parts are organically related, his fundamentals are the rejection of verbalisms, the spirit of accommodation, the reconciliation of contradictions.¹⁶⁵

In the article on civil rights his creed reaches its pinnacle. A line about his predecessor is prophetic of eloquence in opinions to come. In matters economic Cardozo walked humbly; but where the ethical precepts embodied in the Bill of Rights were invoked, he responded "as one whose constant companion was reason and whose life was rooted in moral law."¹⁶⁶ Frank-

157. See note 160, *infra*.

158. On Cardozo, at 48 YALE L. J. 467, 39 COL. L. REV. 97, 52 HARV. L. REV. 449.

159. On Taney, pp. 54-56.

160. On Cardozo, at 48 YALE J. L. 468-9, 39 COL. L. REV. 98-9, 52 HARV. L. REV. 450-1.

161. *Ibid.*

162. "Mr. Justice Holmes did not have a curmudgeon's feelings about his own taxes. A secretary who exclaimed, 'Don't you hate to pay taxes!' was rebuked with the hot response, 'No, young fellow, I like to pay taxes. With them I buy civilization.'"—On Holmes II, p. 42.

163. Such a position is well in advance of the latest line taken by the Supreme Court in its drive against immunity. *Helvering v. Gerhardt*, 58 Sup. Ct. 969 (U. S. 1938). The argument likewise holds for the citizen of the state who draws his income from federal office. In a brief, just filed for the United States as *amicus curiae*, the Solicitor-General concedes the point.

164. On Brandeis, p. 56.

165. On Holmes II, p. 84.

166. On Cardozo, at 48 YALE L. J. 479, 39 COL. L. REV. 109, 52 HARV. L. REV. 461.

furter defends Holmes and Cardozo alike when they elevate the authority of the legislature above freedom of contract, yet make it yield before freedom of speech.¹⁶⁷ In matters of economics there is no authoritative fund of social wisdom to be drawn upon; the history of civilization is the displacement of truths by truths which in time have yielded to other truths. For that very reason the liberty of men to search for truth is of a different order from any economic dogma even if it is defined as a sacred right.¹⁶⁸ "Liberty is a greater good than efficiency";¹⁶⁹ human interests are of such dignity that the good judge never imprisons them in the subtle mesh of procedural technicality.¹⁷⁰ The very heart of the Constitution is the Bill of Rights; and the Constitution is the product of the Age of Reason.¹⁷¹

To Frankfurter, as to Holmes, "the ultimate good desired is better reached by free trade in ideas"; and "the best test of truth is the power of the thought to get itself accepted in the competition of the market."¹⁷² A sense of history teaches us to prefer the risks of tolerance to the dangers of tyranny.¹⁷³ The liberties defined by our Bill of Rights are, on the whole, more living realities in the daily lives of Englishmen without any formed constitution because they are part of the national habit; they are in the marrow of the bones of the people.¹⁷⁴ But there is no freedom without choice and there is no choice without knowledge. The valid test for freedom is the spirit of inquiry which keeps open the indispensable conditions of intelligent experimentation.¹⁷⁵ The real test of belief in "the freedom to believe" is to allow it to men whose opinions seem to you wrong or even dangerous.¹⁷⁶

At this point the heritage of the past is enlisted in the service of the future. We are an economic, as well as a political, community. As respects affairs of government a universal manhood suffrage is a half-way house; to become effective it must have its counterpart in individual

167. Note the contrast between *O'Gorman and Young v. Hartford Insurance Co.*, 282 U. S. 251 (1936), and *Near v. Minnesota*, 283 U. S. 697 (1931). See Shulman, *The Supreme Court's Attitude Toward Liberty of Contract and Freedom of Speech* (1931) 41 YALE L. J. 262.

168. On Holmes II, pp. 50-51; On Cardozo, *loc. cit. supra* note 166.

169. On Brandeis, p. 115.

170. On Cardozo, at 48 YALE L. J. 481, 39 COL. L. REV. 111, 52 HARV. L. REV. 463.

171. On Brandeis, p. 115.

172. On Holmes I, p. 74.

173. On Holmes I, p. 72.

174. On Holmes II, p. 63. Note here, and elsewhere, Mr. Frankfurter's admiration for the English political system. His respect for parliamentary government is clearly evident in his attitude towards judicial review.

175. Quoting Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 688; On Cardozo, p. 480. "To misrepresent fact is to corrupt the source of opinion."—On Brandeis, p. 110.

176. Quoting Scrutton, L.J., in *Rex v. Secretary of State for Home Affairs*, [1923] 2 K. B. 361, 382; On Brandeis, p. 106.

liberty within the industrial order. In fact an office of the state is to bring "to the masses economic freedom commensurate with their political freedom."¹⁷⁷ Public policy must voice with a new vitality the claims of civilization as expressed by constitutional protection to civil liberties.¹⁷⁸ Groups within society have newly become articulate within the commonwealth; a sympathetic attitude towards their aspirations was a presumption of Frankfurter's appointment. Here he takes his stand upon ancient ground and reaches out after fresh doctrine. The ordinance of the Constitution may be enduring; but "old principles have creative energies for new situations."¹⁷⁹

These are Frankfurter's articles of faith. It is a humane creed. As it shapes the contours of his judgments, the new justice will give it urbane expression. He is no dull pedant, to whom literacy is distasteful; the telling phrase and the overtone of meaning, anathema. He stands in the tradition of Holmes and Cardozo. He knows that style is substance; words, tokens of the thing's identity. For him "humdrum, matter-of-fact, dry, lawyer's English" does not carry a judge's reputation down the stream of history.¹⁸⁰ It is artistic sensibility which imports the touch of charm, colors the quality and makes the difference. Language is a sword whose utility depends upon its disciplined use.¹⁸¹ Figures of speech alone can lift legal rhetoric above aridity; yet, unless deftly employed, they are "dangerous instruments of constitutional law."¹⁸² The idiom of Frankfurter — replete with various figures which call for freedom and cry out against all that narrows, imprisons, or isolates from the forces of life — is a reflection of the very character of the man.

Thus, equipped with articles of faith, Frankfurter goes to his task. Far more often than not his voice will be merged in the opinion of the court. The cutting edge of personal conviction will be fully apparent only in separate concurrence or in dissent. But official utterance is the combined work of individual influences made articulate through an institution which has its usages. To persons blessed with insight, life which stems from persons "may be found to stir beneath the decorous surface of unanimous opinions."¹⁸³ In spite of the austerity which insulates the Supreme Court from knowledge of its intimate life, the impact of his creed is likely to remain transparent. His philosophy will find play beneath

177. On Holmes II, p. 49.

178. On Cardozo, *loc. cit. supra* note 166.

179. On Cardozo, at 48 YALE L. J. 477, 39 COL. L. REV. 107, 52 HARV. L. REV. 495.

180. On Waite, p. 79.

181. The judge must not, of course, allow the temptation of a lively style to betray him into gratuitous rhetoric, nor permit a triumph of eloquence over detail.—On Waite, p. 101.

182. On Brandeis, p. 91.

183. THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE (1937) 9.

the formal surface of litigation,¹⁸⁴ his judgments, like those of other jurists, will derive atmospheric support from the general body of his constitutional views.¹⁸⁵

In a myriad of subtle forms, within the recondite legal arrangements of our federalism, a new jurist faces his problems. It is rare that one has mounted the Supreme bench so consciously aware of the task which awaits him. Frankfurter has had enough contact with affairs to sense their restless quality. As no appointee before him, he knows the law of the Constitution and his court. He is acquainted with its annals, has examined its changing functions, has appraised its procedures, opinions, and judgments. He has brought to his studies a high regard for its office in the political system and the national economy. He has exhibited an appreciative and a critical attitude towards its work. In a sense his life has been a preparation for the responsibilities he now assumes.

The law is no respecter of persons. A man, howsoever steeped in its distinctive righteousness, can expect only within reason to live up to his creed. It is too much to hope that — amid the din of controversy, the hurry of the docket, the decorous usages of the bench, the variety of causes, the multiple ways of putting the question, the conflict of pressures and of values — human frailty can measure up to such a profession. But if the new jurist allows his "liberalism" to be frozen into a formula, he can understand the disposition which the law reviews will exhibit to lay on. For Felix Frankfurter himself has provided to Mr. Justice Frankfurter a standard of personal performance in a new set of "Lines of a Good Judge."

To many men it comes to say it; to the new jurist it is given to prove to us that the law "becomes more civilized as it becomes more self-conscious."¹⁸⁶

184. On Cardozo, at 48 *YALE L. J.* 459, 39 *COL. L. REV.* 89, 52 *HARV. L. REV.* 441.

185. On Marshall, p. 46.

186. On Marshall, p. 31.