

2-1-1950

THE CONSTITUTIONAL WORLD OF MR.
JUSTICE FRANKFURTER: SOME
REPRESENTATIVE OPINIONS. Selected and
Edited by Samuel J. Konefsky. New York: The
Macmillan Company, 1949.

Edward Sofen

Follow this and additional works at: <http://repository.law.miami.edu/umlr>

Recommended Citation

Edward Sofen, *THE CONSTITUTIONAL WORLD OF MR. JUSTICE FRANKFURTER: SOME REPRESENTATIVE OPINIONS*.
Selected and Edited by Samuel J. Konefsky. New York: The Macmillan Company, 1949., 4 U. Miami L. Rev. 260 (1950)
Available at: <http://repository.law.miami.edu/umlr/vol4/iss2/21>

This Book Review is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

Matters of form, however, must not be permitted to divert attention from the inherent merit of this volume. *An Introduction to Criminalistics* is a "must" for every police department library and should be studied by every officer interested in this branch of law enforcement.

ROLLIN M. PERKINS

PROFESSOR OF LAW

SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA

THE CONSTITUTIONAL WORLD OF MR. JUSTICE FRANKFURTER: SOME REPRESENTATIVE OPINIONS. Selected and Edited by Samuel J. Konefsky. New York: The Macmillan Company, 1949, pp. xviii, 325. \$4.50.

PROFESSOR Konefsky, who has already established himself as a student of keen understanding by his penetrating study of "Chief Justice Stone and the Supreme Court,"¹ is deserving of additional accolades for his superb job in compiling and editing some of the more representative opinions of Mr. Justice Frankfurter during his past ten years on the Supreme Court bench. The task confronting a successful editor of legal opinions is threefold: first, there is the choice and organization of materials; then, the problem of achieving a literary and scholarly blending of the different portions of the opinions quoted, and lastly, the necessity of helping the reader to gain an understanding of the cases without forcing the editor's viewpoint upon him. The author has succeeded admirably in all these endeavors. He has arranged the subject matter in such vital categories as the limits of the judicial process, government and economic interests, civil liberties, criminal and administrative justice, and the complexities of our dual system of government. Each opinion is prefaced by a clear and pithy explanation of the underlying factors of the case. The brilliance of Mr. Frankfurter's decisions would be excuse enough for such a work, but far more important is the insight that one gains into the philosophical differences that have beset the Court during this history-making decade.

To attempt to categorize Frankfurter's opinions is an impossible task, and has led this reviewer to conclude that the esteemed justice is neither consistent as to the "means" nor the "ends" by which he arrives at his decision. There are times when he reasons like a social scientist but draws conclusions like a legalist, and other occasions when just the reverse is true. The liberal elements have been particularly antagonized by the learned jurist's sacrificing of ideals for what they have conceived to be his mistaken idea of the mechanics involved in declaring a law unconstitutional. The static concept of a Court that mechanically lays the Constitution beside a statute which is challenged in

1. KONEFSKY, CHIEF JUSTICE STONE AND THE SUPREME COURT (1945). See Kent, Book Review, 2 MIAMI L.Q. 251 (1948).

order to decide whether the latter squares with the former² is no longer in good standing. Most jurists today readily acknowledge that they too have social and economic predilections which do and in fact must come into play in their consideration of any case. It might be worthwhile to examine the philosophy and beliefs of Justice Frankfurter and place them beside his opinions in order to decide whether the latter squares with the former.

Justice Frankfurter views the Supreme Court as an oligarchic, non-democratic organ of our government, and almost reluctantly accepts its right to declare acts of legislative bodies unconstitutional as being far too well established to question. It is for this reason that he places such great emphasis throughout his opinions on what he refers to as self-restraint by the judiciary, and constantly warns the Court against "the danger of sliding unconsciously from the narrow confines of the law into the more spacious domain of policy." Looking back at the past, he feels that the judiciary has been prone to confound private notions with constitutional requirements. "Such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace." He cautions his colleagues that one's own opinion as to the wisdom of the law must be excluded in the performance of judicial duty. He concludes that democratic society rests upon the people, and that if a law is found wanting, it should be removed by the legislature, not by judicial fiat.³

Thus, Justice Frankfurter believes that laws dealing with economic and social problems are matters of trial and error, and that the Court has discharged its function when it has made certain that such legislation is not destructive of our cherished freedoms. One can point to many cases where he has been guided by this doctrine.⁴ He has objected to placing the Court in a position where there was no dependable criterion to guide it.⁵ In other instances, however, he has seen fit to inject the Court in the role of arbiter even as to economic questions. This was true when he refused to join the majority in applying the Sherman Act to insurance companies.⁶ Here we have an example of legalistic exactness. This did not stop him, however, from applying the National Labor Relations Act to a firm engaged in the business of insurance. It would indeed appear that "constitutional questions that look alike often are altogether different, and call for different answers."⁷ The same observation might be made in reference to the fine lines of distinction drawn

2. See *United States v. Butler*, 297 U.S. 1 (1936).

3. These sentiments may be found in *American Federation of Labor v. American Sash and Door Co.*, 335 U.S. 538 (1942); *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177 (1941); *Osborn v. Ozlin*, 310 U.S. 53 (1940); *West Virginia State Board of Education v. Barnette*, 319 U.S. 646 (1943); and *Bridges v. California*, 314 U.S. 279 (1941).

4. *Tigner v. Texas*, 310 U.S. 141 (1940); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945); *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177 (1941).

5. *New York v. United States*, 326 U.S. 572 (1946).

6. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

7. *Polish National Alliance v. National Labor Relations Board*, 322 U.S. 643 (1944).

by Frankfurter between the *10 East 40th Street*⁸ and *Kirschbaum*⁹ cases involving maintenance employees in buildings having tenants engaged in interstate commerce. The fundamental criticism is not that there might not be some distinction between the two cases, but rather that the Court speaking through Mr. Justice Frankfurter is substituting its judgment on hair-splitting technicalities for that of an expert agency.

Professor Konefsky has stated that Frankfurter's attachment to the value of federalism has led him to take the side of the states more frequently than his colleagues. Konefsky also notes that he has written significant opinions upholding the commerce powers against the states. An example of this was the decision in the *Greyhound* case¹⁰ voiding a gross receipts tax on busses which operated between certain points within the State of New York but over routes that traversed the highways of New Jersey and Pennsylvania. Far more extreme than the latter action was the decision of the Court rendered by Justice Frankfurter in the *Freeman* case.¹¹ Here the Court held that an Indiana Gross Income Tax could not be applied to the gross receipts on the sales of securities that had taken place in interstate transactions. The dissent was moved to declare that *the receipt of income in Indiana* was a local transaction which constitutionally could be made a taxable event. Justice Frankfurter distinguished between the denial of police powers affecting interstate commerce not regulated by Congress, which might be vital in safeguarding local interests, and the denial of a particular source of income derived from such commerce which would not cripple the state. Such reasoning strikes the reviewer as an attempt to substitute one's own wisdom as to the relative importance of different values, and should according to the Frankfurter formula belong within the realm of legislative discretion.

Contrast this with Mr. Frankfurter's opinion upholding the right of Minnesota to tax a fleet of airplanes engaged in interstate commerce with Minnesota as its home port.¹² The dissenters protested that this exposed airlines to the risk of having their earnings taxed by numbers of different states. To this contention Frankfurter replied that the taxability of any part of the fleet by any other state than Minnesota, in view of the taxability of the entire fleet by the state, was not before the Court.¹³ In *Hill v. Florida*,¹⁴ a majority of the Court held that a 1934 Florida statute requiring labor organizers to obtain a license curtailed the freedom of choice of the employees in the selection of collective bargaining agents as guaranteed by the National Labor Relations

8. *10 East 40th Street Building v. Callus*, 325 U.S. 578 (1945).

9. *Kirschbaum Co. v. Walling*, 316 U.S. 517 (1942).

10. *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948).

11. *Freeman v. Hewitt*, 329 U.S. 249 (1946).

12. *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944).

13. It might be noted that there is an urgent need for a reevaluation by the Court of the relationship between the states and the federal government in matters pertaining to taxation and interstate commerce.

14. 325 U.S. 538 (1945).

Act. An injunction prohibiting unions from functioning in order to enforce the other parts of the statute providing for annual reports and exacting a one dollar annual fee was held to be inconsistent with federal protection of collective bargaining. Justice Frankfurter vigorously protested against the entire decision on the grounds that there was no conflict between the state action and the federal statute, and that the majority opinion deprived the states of their constitutional powers over local issues. This writer believes that both majority and minority opinions erred in that the decision, at least insofar as the selection of organizers are concerned, should have been based upon the question of whether it interfered with any of the fundamental freedoms guaranteed by the due process clause of the Fourteenth Amendment.

Liberal persons can agree with Frankfurter's contention that the Court must beware lest it interfere with the right of the legislatures to meet the economic and social problems of the day. The danger lies in attempting to place civil liberties in the same category, however. It is in this latter sphere that so much criticism has centered upon Frankfurter. It must be brought out that Justice Frankfurter has been responsible for writing such notable opinions as that in the *Baumgartner* case,¹⁵ the concurrent opinion in the *McCullum* case,¹⁶ and vigorous dissents in the search and seizure cases.¹⁷ Dr. Konefsky has observed that one of the greatest contributions of our age has been the inclusion of many of our fundamental liberties within the scope of the due process clause of the Fourteenth Amendment. It is in this area that Justice Frankfurter confuses ordinary legislative discretion dealing with economic and social matters with those that affect our fundamental freedoms. Certainly one cannot compare legislation limiting the hours of labor of women and children or regulating public utilities, with legislation prohibiting an individual in his freedom of expression or denying to him adequate counsel in his very fight for life and freedom.¹⁸ "The very purpose of the Bill of Rights [and of those freedoms included within the concept of due process] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied in the court."¹⁹ The opinions of Justice Frankfurter in the flag salute cases,²⁰ in cases dealing with the question of adequate counsel,²¹ and the finality of state court findings²² and in numbers of other

15. *Baumgartner v. United States*, 322 U.S. 665 (1944).

16. *McCullum v. Board of Education*, 333 U.S. 203 (1948).

17. See *Davis v. United States*, 328 U.S. 582 (1946); *Zap. v. United States*, 328 U.S. 624 (1946); and *Harris v. United States*, 331 U.S. 145 (1947).

18. See Sofen, *The Trend Towards the "Denationalization" of Civil Liberties* 3 *MIAMI L.Q.* 397 (April, 1949).

19. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

20. *Id.* at 646 and *Minersville School District v. Gobitis*, 310 U.S. 586 (1940).

21. *Betts v. Brady*, 316 U.S. 455 (1942); *Carter v. Illinois*, 329 U.S. 173 (1946).

22. *Milk Wagon Drivers' Union v. Meadowmoor Dairies*, 312 U.S. 287 (1941); *Carter v. Illinois*, 329 U.S. 173 (1946).

decisions, confuse the issue by failing to distinguish between these two distinct types of legislation. That the approach of the Court must differ in accordance with the legislative problem involved was stated quite adequately by Mr. Justice Jackson when he declared:

The right of a State to regulate, for example, a public utility, may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech, and of press, and of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.²³

The basic fallacy of the Frankfurter philosophy is the failure to accept this dual classification. Typical of this approach was his dissent in the *Bridges* case.²⁴ Mr. Frankfurter opined that the utmost protection to be accorded freedom of speech and press could not displace the duty of the Court to give due regard also to the state's power to deal with essentially local situations. He added rather meaningfully that the literary difference between "clear and present danger" and "reasonable tendency" is not of constitutional dimension. Justice Frankfurter warns that reliance for protection of the most precious interests of civilization must be found outside of courts of law. This is only half a definition of democracy for while it is true that "the pursuit of liberty is a great affirmation inspired by the positive energies of the human race" it must never be forgotten that "the constitutional means to liberty are, in the main, a series of negatives raised against the powerful."²⁵

We are told by the author that as a Professor of Administrative Law Frankfurter had urged the bench to respect the activities of regulatory tribunals, but that he had also been aware that the exercise of administrative discretion was open to potential abuse. On the whole one can find both these attitudes reflected by the opinions of Justice Frankfurter. In the *Morgan* case,²⁶ he declared that the administrative agencies and the courts were to be deemed collaborative instrumentalities of justice, and that the appropriate independence of each should be respected by the other. In the *Scripps-Howard* case,²⁷ he brought out that the courts no less than administrative bodies are agencies of the government, and held that the power of the court to stay execution was a power as old as the judicial system of the nation. He has protested against the use of the so-called "jurisdictional question" as one of the most deceptive of legal pitfalls, and has maintained that the insistence on such empty formal-

23. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943).

24. *Bridges v. California*, 314 U.S. 252 (1941).

25. LIPPMAN, *THE GOOD SOCIETY* 353 (1937).

26. *United States v. Morgan*, 313 U.S. 409 (1941).

27. *Scripps-Howard Radio v. Federal Communications Commission*, 316 U.S. 4 (1942).

isms was but a reversion to seventeenth century pleading.²⁸ He was instrumental in destroying the "mischievous formula" of *Smyth v. Ames*²⁹ as a guide for utility regulation. In 1944 the Court declared that if the total effect of a rate order made by the Federal Power Commission³⁰ was not unjust and unreasonable, judicial inquiry came to an end. Oddly enough, Justice Frankfurter dissented on the ground that when Congress provided for judicial review as it had in this case the "just and reasonable" concept was one over which the Court was to have the last word, and was not to be left to the skill of experts. The requirement that rates be "just and reasonable" was not an issue of fact over which the Commission's own determination was to be conclusive. Social as well as economic costs had to be considered, and the Court could not be guided by the mere impact of the rate order. Apparently "just and reasonable" as considered by Frankfurter still meant that the Court could examine every factor so as to determine its reasonableness. One wonders if this formula is any less mischievous than *Smyth v. Ames*.

There is no doubt that the growth of the administrative state calls for adequate safeguards against arbitrary action and against violations of statutory and constitutional guarantees. Surely this also includes having an adequate record so that the Court may be able to determine the basis for the agency's rulings. The difficulty is encountered when there is an insistence that everything be spelled out in detail. Frankfurter refuses to accept the relationship of a higher court to a lower court when dealing with an administrative body. Justice Black felt impelled to state in the *Chenery* case³¹ that "judicial requirement of circumstantially detailed findings as the price of court approval can bog the administrative power in a quagmire of minutiae." In another rather interesting development, the majority held that a lower court could not uphold the subpoena of an agency and then do nothing about procuring the evidence for which the subpoena had been issued.³² Frankfurter maintained that since an order directing obedience to a subpoena does not issue automatically when applied for by an agency, it was to be assumed that the lower court judge, in view of some previous acquaintance with the case, had adequate reasons for his action. Without meaning to be facetious, it might be suggested that the lower court should have spelled out these reasons. An agency has a right to such a court order when it is complying with the law, and has a right to appeal from a lower court which has arbitrarily denied such a request.

Professor Konefsky has done a remarkable job of pointing up the significant parts of Frankfurter's opinions, and of presenting them in the context

28. *City of Yonkers v. United States*, 320 U.S. 685, 692 (1944).

29. 169 U.S. 466 (1898).

30. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 624 (1944).

31. *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80 (1943).

32. *Penfield Company v. Securities and Exchange Commission*, 330 U.S. 585, 603 (1947).

of both majority and minority utterances. In doing so he has unfolded an exceptionally lucid picture of constitutional development in the last decade with one of the most learned jurists of all times as the leading character. The book is stimulating and provocative and enables the reader to gain an understanding of the relationship of the Supreme Court to our system of government.

EDWARD SOFEN

ASSISTANT PROFESSOR OF GOVERNMENT
UNIVERSITY OF MIAMI

ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES. By Chester Rohrllich. Albany: Matthew Bender & Co., 1949. Pp. 533. \$12.00.

THIS book will serve the purpose of supplying a need keenly felt by lawyers and businessmen for a long time. Of course, it is impossible to treat exhaustively in one volume the many aspects of legal and economic aspects touched upon by the author. However, this brief treatise gives much insight into many vital problems confronting the businessman about to launch an enterprise or contemplating changes in the nature of his organization.

Far too many commercial prospectors launch businesses before adequate knowledge is gained as to the relative merits of different types of entrepreneurial units or the devices provided or permitted by law in organizing their business setup, corporate or otherwise. So often a policy of trial and error is invoked with little regard for pitfalls that may lurk just around the corner. Every attorney engaging in any volume of commercial practice can vouch for the many legal difficulties which might have been avoided if a little more foresight had been employed during the creation of the business unit.

This book is more than a legal textbook; it will serve the purpose of a business guide or manual. Every business promoter contemplating the launching of a business project, as well as the attorney supplying him with legal advice, can well afford to read carefully a major portion of this book before he decides upon the type of unit he is to employ and the details of its setup.

The main portion of the book is divided into thirteen chapters. The author first takes up preliminary matters to be considered in a survey of the projected enterprise, giving an analysis of possible legal restrictions to be met and making suggestions as to meeting them. He points out problems to be considered in protecting and making use of inventions, copyrights, trademarks, trade names, etc. Chapter III deals with matters confronting the promoter as to his rights and liabilities. In Chapter IV the merits of the various forms of business units are contrasted and evaluated. In the following two chapters he offers suggestions for choosing the "best" form of business organization, place of domicile, etc., under varied sets of facts.

Chapter VII is concerned with the problems relating to corporate pro-