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BOOK REVIEWS

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ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER. Ed. by Morris D. Forkosch (Bobbs-Merrill Company, 1966. Pp. 647. $17.50).

Conceived as a *Festschrift* or tribute to Felix Frankfurter, this book contains some forty essays on legal history by Frankfurter's fellow jurists, lawyers and teachers from many lands. The essays woven loosely around this highly appropriate theme are as varied as "The Golden Bull of Hungary and the Problem of Human Rights," and "The Spanish Watercourses of Texas." Of greatest value, perhaps, is the composite picture which emerges of Frankfurter's own use of legal history as a Justice of the United States Supreme Court. A number of essays, including the contributions of five of the Justice's former law clerks, deal specifically with this subject. They describe how, with his unique knowledge of the historical influences which shape the law, he instinctively employed legal history to help decide the cases which came before the Court.

Aware that history rarely provides a full answer and that it must not be used as a substitute for careful examination of fact and law and definition of the issues, Frankfurter regarded history as the essential context within which a case is to be considered. For Frankfurter, the legal history in which he grounded his reasoning embraced constitutional, decisional and legislative as well as relevant political and economic history.

Frankfurter's distrust of "historically unoriented legal opinions" is stressed in the introduction to this volume by his colleague on the bench, Mr. Justice John M. Harlan, who writes:

> He steadfastly set his face against the developing of new legal principle out of thin air. He did not hesitate to withhold his assent to results which he personally believed to be good when he felt that they could be achieved only at the expense of ignoring or taking impermissible shortcuts through what had gone before.[1]

This generalization of Harlan's is substantiated by other contributors, one of whom names Frankfurter's concurrence in the *Sunday Laws Cases* as the pre-eminent articulation of his his-

1. FORKOSCH, ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER *ix* (1966) (hereinafter cited as ESSAYS).

torical sense.[2] In a more than one hundred page concurring opinion (including annotations and appendices), Frankfurter presented a review of the history of Sunday restrictions on the Continent, in England and the American colonies and nation, which led to the conclusion that "from failure to make a substitution for Sunday in securing a socially desirable day of surcease from subjection to labor and routine a purpose cannot be derived to establish or promote religion."[3] In another opinion concurring in a decision to reverse a conviction based on a coerced confession, Frankfurter wrote:

> The safeguards of "due process" and "equal protection of the laws" summarized the history of freedom of English-speaking peoples running back to Magna Carta and reflected in the constitutional development of our people.[4]

And Frankfurter's concurrence in the *Little Rock School Case*[5] was, in the words of a law clerk privy to its preparation, "a cry for observance of law—a cry rooted in history."[6]

A number of cases are cited to illustrate Frankfurter's concern for the intentions of the Framers[7] of the Constitution. In support of the Court's refusal to make a constitutional determination which was unnecessary for disposition of a case, he recalled "the failure of the ablest members of the Philadelphia Convention to associate the judiciary through a Council of Revision in the legislative process."[8] He added that the original Supreme Court, several of whose members had been delegates to the Constitutional Convention, "felt constrained to withhold even from the Father of his Country"[9] answers to questions regarding his powers as President. References to the Federalist papers and to what was in the minds of Hamilton and Madison are found in his opinions interpreting the First Amendment in the *Dennis*[10]

2. Konvitz, "Justice Frankfurter's Historical Sense," ESSAYS 339.
3. McGowan v. Maryland, 366 U.S. 420, 507 (1961).
4. Malinski v. New York, 324 U.S. 401, 413-14 (1945).
5. Cooper v. Aaron, 358 U.S. 1, 20 (1958).
6. Kalodner, "Mr. Justice Frankfurter's Views and Use of Legal History," ESSAYS 37.
7. The actions of Congress—the "framer" of the Amendments to the Constitution—in *admitting states* with apportionment not based on population alone was seen by Frankfurter as pertinent to the consideration of the case of *Baker v. Carr*, 369 U.S. 186, 316-18 (1962).
8. United States v. CIO, 335 U.S. 106, 124 (1948) (concurring opinion).
9. *Ibid.*
10. Dennis v. United States, 341 U.S. 494, 523 (1961) (concurring opinion).

and *WDAY*[11] cases. His objection to the Court's decision in *Northwest States Portland Cement Co. v. Minnesota*,[12] he wrote, was "the policy that underlies the Commerce Clause, namely, whatever disadvantages may accrue to the separate States from making of the United States a free-trade territory are far outweighed by the advantages not only to the United States as a Nation, but to the component States."[13] In defining the scope of the war power in *Korumatsu v. United States*,[14] the Justice noted that a majority of the "hard-headed Framers" of the Constitution had had actual participation in war. And, in dissenting from the Court's interference with the regulation by local ordinance of the use of sound trucks for the preaching of Jehovah's Witnesses sermons on Sundays, Frankfurter observed that "the men whose labors brought forth the Constitution of the United States had the street outside Independence Hall covered with earth so that their deliberations might not be disturbed by passing traffic."[15]

No less important to Frankfurter were the attitudes and expectations of those who made up the conventions and legislatures which have ratified the Constitution and its amendments. In a concurring opinion in the case of *Adamson v. California*,[16] for example, he wrote:

> Thus, at the time of the ratification of the Fourteenth Amendment the constitutions of nearly half of the ratifying States did not have the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury. It could hardly have occurred to these States that by ratifying the Amendment they uprooted their established methods for prosecuting crime and fastened upon themselves a new prosecutorial system.[17]

Speaking for the Court in *Frank v. Maryland*,[18] Frankfurter wrote in a similar vein that "if a thing has been practiced for two hundred years by common consent, it will need a strong case

11. Farmers Educ. & Co-op. Union v. WDAY, Inc., 360 U.S. 525, 535 (1959) (dissenting opinion).
12. 358 U.S. 450 (1959) (dissenting opinion).
13. *Id.* at 473-74.
14. 323 U.S. 214, 225 (1944) (concurring opinion).
15. Saia v. New York, 334 U.S. 558, 565 (1948).
16. 332 U.S. 46 (1947).
17. *Id.* at 64.
18. 359 U.S. 360 (1959).

for the Fourteenth Amendment to affect it."[19] And from his concurring opinion in *McCollum v. Board of Educ.*,[20] which is described in one essay as "a superb analysis of the problem in its historic setting,"[21] we have Frankfurter's conclusion that "the upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people."[22]

Judicial precedent constitutes an obvious element of legal history. Professor Louis Henkin, a former Frankfurter law clerk, writes in his essay[23] that Justice Frankfurter did not accept the view that one can throw away the volumes of the United States Reports before Volume 300, and he proceeds to include more than two pages of the Frankfurter concurring opinion in *Adamson v. California*[24] which so well exemplifies this attitude of Frankfurter's. The passage begins as follows:

> Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court—a period of seventy years—the scope of that Amendment was passed upon by forty-three judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the

19. *Id.* at 370. The opinion concluded as follows: "In light of the long history of this kind of [health] inspection and of modern needs, we cannot say that the carefully circumscribed demand which Maryland here makes on appellant's freedom has deprived him of due process of law."

20. 333 U.S. 203 (1948).

21. Helman and Rosenthal, "Mr. Justice Frankfurter, Legal History, and Law Clerks," ESSAYS 47.

22. McCollum v. Board of Educ., 333 U.S. 203, 215 (1948). Frankfurter's dissenting opinion in *Baker v. Carr* contains a section entitled "The States at the time of ratification of the Fourteenth Amendment, and those later admitted," in which it is stated, "Particularly pertinent to appraisal of the contention that the Fourteenth Amendment embodied a standard limiting the freedom of the States with regard to the principles and bases of local legislative apportionment is an examination of the apportionment provisions of the thirty-three States which ratified the Amendment between 1866 and 1870, at their respective times of ratification." Baker v. Carr 369 U.S. 186, 310-11 (1962) (dissenting opinion). "Yet," it is pointed out in one of the essays, "Frankfurter was with an unanimous Court in [*Brown v. Board of Educ.*] the other major precedent-breaking civil liberties case with broad political overtones." Barnett, "Mr. Justice Frankfurter and the Holmes Tradition," ESSAYS 289, 315.

23. "The Uses of History," ESSAYS, 57. Another essay, by Harry K. Mansfield, is entitled "The Use of Legal History in the United States Supreme Court," ESSAYS 65.

24. 332 U.S. 46 (1947).

> Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States. Among those judges . . . [were] judges who were alert in safeguarding and promoting the interests of liberty and human dignity through law. But they were also judges mindful of the relation of our federal system to a progressively democratic society and therefore duly regardful of the scope of authority that was left to the States even after the Civil War.[25]

Another former law clerk tells how Frankfurter often pointed out to his clerks that, after he and his brethren on the Court were gone, "others would take their place, with instincts perhaps less friendly to minorities or to the weak, to social progress or economic change. And then, only respect for judicial precedent and for the gradual evolution of legal doctrine would be likely to prevent weakening of the role of law in our society on the one hand or deleterious interference with the progress of government and society on the other."[26]

The essays reveal a lively interest on Frankfurter's part in the legislative history of statutes the constitutionality or construction of which the Supreme Court was called upon to determine. Mr. Weaver Dunnan, the Justice's law clerk for the 1950 term, recalls[27] cases of that term which Frankfurter felt could not properly be decided without a careful study of the historical background of the doctrine of sovereign immunity,[28] of legislative investigations[29] or of the Taft-Hartley Act.[30] *Schwegmann Bros. v. Calvert Distillers Corp.*[31] is cited as the prime example that year of the danger of ignoring legislative history. In that case Frankfurter's dissent,[32] which with its appendix is devoted

25. *Id.* at 62 (1947) (concurring opinion). See also, Frankfurter's concurring opinion in Francis v. Resweber, 329 U.S. 459, 468 (1947).

26. Kalodner, *op. cit. supra* note 6, at 35.

27. Dunnan, "Time, Place and Circumstances," ESSAYS 39.

28. Snyder v. Buck, 340 U. S. 15 (1950).

29. Tenney v. Brandhove, 341 U.S. 367 (1951).

30. Amalgamated Ass'n v. Wisconsin Employment Bd., 340 U.S. 383 (1951).

31. 341 U.S. 384 (1951).

32. *Id.* at 397. Frankfurter, whom Black and Burton joined, wrote that the words of the sponsors of the Miller-Tydings Amendment "confirm the plain meaning of the words of the statute and of the congressional reports." *Id.* at 400.

to an examination of the words of the sponsors and congressional reports, concluded with this warning: "There are matters beyond the Court's concern. Where both the words of a statute and its legislative history clearly indicate the purpose of Congress, it should be respected. We should not substitute our own notion of what Congress should have done."[33] The court's holding there that state fair trade laws applicable to non-signers were not exempted by the Miller-Tydings Act from the operation of the Sherman Act was in effect reversed by Congress.[34]

Two of his former law clerks point out that for Frankfurter legislative history encompassed not only committee reports, speeches from the floor, etc., but also "the entire history of the problem which the statute was designed to meet."[35] By going outside the record and taking judicial notice of the economic history of the slaughtering industry in *United States v. John J. Felin & Co., Inc.*,[36] he enabled the Court to dispose of that case without the unnecessary adjudication of a constitutional issue. Frankfurter's difference with the Court majority in its interpretation of the Fair Labor Standards Act with regard to portal-to-portal and overtime pay (in the *Anderson v. Mt. Clemens Pottery Co.*[37] and *Bay Ridge Operating Co., Inc. v. Aaron*[38] cases respectively) is also illustrative of his concern with economic ramifications of judicial problems. Both cases are reminiscent of *Schwegmann* in that the Congress promptly overturned the decision in each case.[39] Dissenting in *Bay Ridge*, Frankfurter said the decision in that case "is heedless of a long-standing and socially desirable collective agreement and is calculated

33. 341 U.S. 384, 402 (1951).

34. Federal Trade Commission Act, § 5(a) (1-5,2,3), as amended 15 U.S.C. § 45(a) (1-5,2,3) (1965); sustained in Hudson Distributors, Inc. v. Upjohn Co., 377 U.S. 386 (1946).

35. Helman and Rosenthal, "Mr. Justice Frankfurter, Legal History, and Law Clerks," ESSAYS, 45, 51.

36. 334 U.S. 624 (1948).

37. 328 U.S. 680 (1946).

38. 334 U.S. 446 (1948).

39. The Portal-to-Portal Pay Act of 1947 begins as follows: "(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that . . . ." 29 U.S.C. § 251 (1965). See Fair Labor Standards Act, 63 Stat. 914 (1949), 29 U.S.C. § 207 (d)-(f).

to foster disputes in an industry which has been happily at peace for more than thirty years."[40] In addition he stated that:

> The judgement of Congress upon another doctrinaire construction by this Court of the Fair Labor Standards Act ought to admonish against an application of that Act in disregard of industrial realities. Promptly after the Eightieth Congress convened, Congress proceeded to undo the disastrous decisions of this Court in the so-called portal-to-portal cases.[41]

As indicated by many Frankfurter opinions cited in this book, democracy and federalism are salient, related aspects of American political history which for the Justice were an indispensible part of the context of constitutional adjudication. Something that "goes to the very structure of our federal system in its distribution of power between the United States and the States," he wrote, "is not a mere bit of red tape to be cut, on the assumption that this Court has general discretion to see justice done."[42] Frankfurter practiced judicial restraint because he saw himself as a member of "the non-democratic organ of our government," exercising "inherently oligarchic"[43] powers in a federated society "affording opportunity for seeking change."[44] Felix Frankfurter is described by Mr. Justice Harlan as having been a profound believer in the American federal system which he saw as:

> [N]ot merely an act of superb political and legal statecraft through which the Union was achieved, but as something which through its diffusion of governmental functions between federal and state authority afforded safeguards to our free society quite as important as those found in the Bill of Rights or in the judge-made protections evolved under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[45]

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40. Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 478 (1948).
41. *Ibid.*
42. Irvin v. Dowd, 359 U.S. 394, 408 (1959).
43. AFL v. American Sash & Door Co., 335 U.S. 538, 555 (1949).
44. Board of Educ. v. Barnette, 319 U.S. 624, 656 (1948).
45. ESSAYS *ix.*