Felix Frankfurter

Thomas, Helen Shirley

Published by Johns Hopkins University Press

Thomas, Helen Shirley.
Felix Frankfurter: Scholar on the Bench.

For additional information about this book
https://muse.jhu.edu/book/70845
A good deal of interest in this century has centered on the individual, his rights and responsibilities in modern society. Parallel­ing this interest, but perhaps not quite so pronounced until recent years, has been the attempt to evaluate the role of groups within a community. The great proliferation of organized group action in the economic field—labor unions, chambers of commerce, re­tailing associations—and in the noneconomic fields—National Association for the Advancement of Colored People, Polish Al­liance—indicates that in many instances the individual in a com­plex technological age is only able to express himself through an identification with others of like needs and desires. The individual is protected by the group and restrained by it. Groups, then, become the real loci of power within society and in their clashes lies much of the explanation for the tensions of our time, tensions that may become articulate in litigation. It is in the working out of adjustments that the majoritarian elements in Justice Frank-
furter's philosophy become evident. Instead of the traditional emphasis on the individual as the basic unit of representation, culminating in a coalescence of wills that can be majoritarian, he utilizes a social, in the sense of nonindividualist, approach. Groups as organic entities become the basic unit for representation. Majoritarianism results, but it is majoritarianism of a different type. Just as individual rights were created largely to foster social interest in general security, so group rights are the modern counterpart of efforts to maintain social cohesion. Often under-emphasized or completely overlooked is the fact that in both instances, rights entail duties. Justice Frankfurter would probably choose as a guiding thought Justice Brandeis' declaration that "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community."\(^1\) It is easy for governing bodies representative of economic or political interests to forget the fact that society as a whole must be given some consideration. If these interests are symbols, they are symbols only to a restricted group. It is also easy for minority groups, simply because they are minorities, to insist upon freedom of action, which could prove disruptive in the larger context of community living. Certainly dissent and efforts to persuade others to join their cause must be allowed minorities, but not to the point where the majority is foreclosed from ruling in a peaceful, nondiscriminating manner. The group nature of modern society and the conflicts to which it has given rise exaggerate the need for a feeling of responsibility on the part of each and every individual as citizen and as a member of numerous organized and unorganized bodies. It also means that the state or national government, and particularly the judiciary, must make sure that arbitrary power, whether lodged in groups or in the government itself, does not check freedom.

Group conflicts are often most forcefully demonstrated in the area of civil rights. Here "societal self-restraint" must be exercised

\(^1\) Duplex Printing Press Co. v. Deering et al., 254 U.S. 443, 488 (1921).
if the miscellaneous crowd that makes up the nation is to be turned into a smoothly running community. Since one of the most vociferous minorities demanding privileges and protection has been the Jehovah’s Witnesses, it is in cases involving this group that Supreme Court discussion of group freedom in the context of societal living has come. It is also in these cases that the Court has had to differentiate group rights from group license.

Beginning in the late 1930’s the Supreme Court repeatedly had to determine whether Jehovah’s Witnesses could be made to comply with generalized regulations enacted by states and municipalities in furtherance of community policies, mostly in the realm of health and general welfare. Many of these regulations required a license before certain activities could be undertaken—selling magazines through street-corner or house-to-house soliciting, holding public meetings or making speeches in public parks, using amplifying devices. The position of Justice Frankfurter throughout this period was that when religious activities spread into the public domain they lost their immunity and had to meet the obligations that the community created for all and sundry. The public is often called upon to provide extra services in the form of police protection, street cleaning, etc. To require the payment of a license fee or the obtaining of a permit had nothing at all to do with interference with religious matters. It is merely stipulating that each segment of society pay its own way or that it abide by conditions thought necessary for the general welfare. Justice Frankfurter has not questioned tax immunity for religious or philanthropic organizations on the use of their own buildings and resources, although even here sanitary and health standards must be met, pleas of religious freedom to the contrary notwithstanding. What he has really objected to in the licensing and permit cases has been placing one group in a preferred position vis-à-vis society as a whole. In sum, “the constitutional protection of religious freedom terminated disabilities, it did not create new privileges. . . . Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma.”

While religious minorities cannot shirk their responsibilities, neither can the community that shelters them act in such an arbi-

---

trary manner as to make compliance with regulations impossible. Thus Justice Frankfurter joined in striking down a conviction of a Witness who had attempted to get a permit so that a meeting could be held in a public park but who had been refused by municipal authorities in exercise of a power derived, not from a statute or ordinance, but from a local practice containing no standards.3 The meeting was held anyway, but since no disorder, threats or violence, or riot became evident, the conviction was invalid. Where, however, a city council under authority from a valid enactment wrongfully refused to grant the license requested, a conviction for holding the meeting in disregard of this refusal has been upheld, with Justice Frankfurter concurring.4

In other like cases he has voted that an administrative official cannot simply refuse a permit without stating the reasons, and that a refusal based on past conduct in ridiculing and denouncing other religious beliefs was insufficient reason.5

In their proselytizing activities, Jehovah's Witnesses have encountered other general ordinances that have seemed to them obstacles in spreading their message. One such ordinance made it unlawful for anyone distributing literature to ring a doorbell or otherwise summon the residents to the door for the purpose of receiving such literature. On the surface this might seem arbitrary—as a matter of fact it did to a majority of the Supreme Court 6—until it is understood that the ordinance was passed by a town, many of whose residents were engaged in war work, often on the night shift, whose needed hours of rest were thus being disturbed. The problem then resolved itself into weighing the social interests—not, let it be emphasized, the religious ones—of the workers and the Witnesses. The town came down on the side of the workers, but the Court did not, bringing the dissenting comment from Justice Frankfurter that "the Due Process Clause of the Fourteenth Amendment did not abrogate the power of the states to recognize that homes are sanctuaries from intrusions upon privacy and of opportunities for leading

lives of health and safety." His aversion to intrusions upon privacy was manifested at the end of the last chapter. There, not only could a person be assaulted in his own home, but also in the depths of his personality through the "oral aggression" of messages being blurted out through loud-speakers. No escape was possible. Justice Frankfurter voted, therefore, for restraint of these devices so that reasonable use could be made of their potentialities without entirely disrupting the peace and quiet of the rest of the community.

Concededly, because of their activities, the Witnesses have engendered antipathy from many sources. Their violent and vituperative attacks on other denominations, especially the Roman Catholic Church, have done little to endear them to vast portions of the population. Irrespective of whether Witnesses show enough good sense to restrain themselves, the Court has on more than one occasion protected their right to speak and their access to communities in which to speak. Justice Frankfurter concurred in striking down a state regulation that would have permitted the managers of a company town to warn the Witnesses away. While title to property was regulated by state law, state law could not "control issues of civil liberties which arise primarily because a company town is a town as well as a congerie of property relations." Communities as well as groups have responsibilities.

To say merely that Justice Frankfurter weighs social interests in cases of the nature we have been discussing is to say very little. What seems to be the distinguishing factor is the degree to which groups are willing to work within the bounds of community behavior patterns that have evolved solely for the purpose of making community life possible at all. Order and discipline, while uncongenial to many spirits, are necessary ingredients in any social arrangement. Certain sacrifices are required of all participants. When the incidence of order and discipline do not fall upon a particular group based only on the nature of the group itself, then exemptions from general standards are hard to justify. Thus in a slightly different field, al-

\[7\] Ibid., p. 153.
though governed by the same considerations, Justice Frankfurter has held that no constitutional rights were violated by requiring labor organizers to conform with state regulations that they register, along with other solicitors, before beginning their campaigns for members. On some occasions statutes may be designed to remedy the specific evil flowing from a specific disregard of community welfare—ringing doorbells and awakening workers. On the other hand, when it appears that statutes or ordinances are being designed in a vengeful manner primarily to halt activities of minorities \textit{qua} minorities, these enactments must fall.

II

In addition to those instances when definite group demands must be judged against equally clear social considerations, there are other circumstances when the community must act to protect itself against disruptive forces that cannot be identified with any particular group but that are, nevertheless, very real. Publication of literature harmful to public morals, exhibitions of lewd or obscene movies, speeches that lead to riot or disorder, and, last, but not least, defamation of one portion of the population by another. Those agencies of modern life such as the press, radio, and television that devote their energies to disseminating ideas and ideals should at least feel some responsibility for the quality of their performance. They should attempt to add to community welfare, not dissipate it. The circumstances of modern living, where group tensions are apt to be high, call for dispelling prejudice rather than arousing it. At times, therefore, states and communities might have to act to protect their over-all interests from irresponsible forces.

In the massive cities, where the rise in juvenile delinquency and crimes of violence have been phenomenal, city authorities are warranted in prohibiting the publication of criminal news that centers attention on lust and bloodshed. They could reasona-

\footnote{See Thomas v. Collins, 323 U.S. 516 (1945) and Hill v. Florida, 325 U.S. 538 (1945).}
bly think, based on psychological and sociological studies, that this was one means whereby crimes might be curtailed. Not all criminal news need be prohibited. Obviously, an exercise of judgment must be made, but this is the task of the local authorities based on their own experience. "Unlike the abstract stuff of mathematics, or the quantitatively ascertainable elements of much natural science, legislation is greatly concerned with the multiform psychological complexities of individual and social conduct. Accordingly, the demands upon legislation, and its responses, are variable and multiform." 10 Thus, in other places and under other compulsions, city or state attempts to curtail publications on the basis that their sale might be detrimental to juveniles, but not to adults, would not be acceptable.11 As with magazines or newspapers, the compact nature of modern communities must be taken into consideration before any final decision can be made regarding the suitability of particular films for particular locales. Heterogeneous New York city might have to be governed differently from rural Iowa.12

Beginning with Chaplinsky v. New Hampshire 13 the Court has handled a series of cases in which it has had to determine the range of decency within which speech must operate if it is to be allowed. Speech leading to a breach of the peace could not be lightly suffered by any community. Its interests were as immediate in preventing such an occurrence as were the supposed interests of a person to say anything he wished. This point was emphasized by Justice Frankfurter, dissenting from the Court's holding in Terminiello v. Chicago.14 Terminiello, a defrocked priest, so inflamed a crowd surrounding the auditorium in which he was speaking that rocks were hurled, windows broken, and general mayhem prevented only by police action. Justice Douglas for the Court held, however, that the statute under which Terminiello was convicted, while aimed primarily at rioting, breach of the peace, or conduct tending to breach of the peace,

12 See Burstyn v. Wilson, 343 U.S. 495 (1952).
13 315 U.S. 568 (1942).
14 337 U.S. 1 (1949).
could not be used against a speech stirring people to anger, inviting public dispute, or bringing about a condition of unrest. To this Justice Frankfurter took exception, thinking the line very thin from the community's point of view between rioting, a condition of unrest, and what occurred on the streets of Chicago.

Very similar in some respects, although different in outcome, was the case of Feiner v. New York. Feiner, a University of Syracuse student, was haranguing a mixed crowd of Negroes and whites from a street corner, urging colored people vigorously to assert their rights. Traffic congestion and murmurs of unrest from the crowd prompted the police to request that Feiner terminate his performance. When he refused to do so, the police arrested him, and his subsequent conviction was upheld by the Supreme Court, Justice Frankfurter concurring. On the same day on which this decision was handed down—indeed, Justice Frankfurter's opinion covered both cases—the Court also gave some direction to New York city officials as to the breadth of lenience that should be allowed speakers on its public streets and parks. Once again one of the decisive points for Justice Frankfurter was the degree to which community welfare would be affected. "We must be mindful," he wrote, "of the enormous difficulties confronting those charged with the task of enabling the polyglot millions in the City of New York to live in peace and tolerance. Street preaching in Columbus Circle is done in a milieu quite different from preaching on a New England village green." Because the milieu is different and because peace and tolerance are fundamentally necessary in a community with the unique characteristics of New York, the malign as well as benign effects of speeches must be considered.

The case of Beauharnais v. Illinois occupies an unequaled position in American jurisprudence since it represents the first occasion on which the Supreme Court accepted a theory of group
libel. Publication of a scurrilous flier depicting all members of the Negro race as rapists, dope addicts, and degenerates initiated the proceedings. Heretofore, the common law of criminal libel had provided no redress against actions of this sort. The opinion of the Court in the Beauharnais case was written by Justice Frankfurter. His acceptance of a state's ability to punish libel of a group points up his acceptance of groups as important entities. While incorporated bodies such as business firms had been able to protect themselves somewhat in the past, unincorporated groups had been very much at the mercy of fate. This was especially true of groups whose binding tie was race, religion, or nationality.

It is not surprising to find Justice Frankfurter taking the lead in initiating protection for these groups against the type of persecution they were suffering. Having spent a good part of his boyhood on New York's lower East Side, he knew the hardships that can accrue to a person because of his heritage. His work with the Zionist organization made him realize the difficulty of integrating diverse groups, and from this work he understood intimately the harm that invective wrought. After World War I on a trip to the Near East to study for Zionist purposes the hostility between Syria and Palestine, he saw the breakdown of amiable relations after a hopeful start caused by misunderstanding and fear.\textsuperscript{18} Early in his career, 1916 to be exact, he spoke out for the need for compassion and tolerance.

When regard is had to the complexities of modern society and the necessary specialization and narrowness of individual experience, the need for tolerance and objectivity in realizing, and then respecting, the validity of the experience and beliefs of others, becomes one of the most dynamic factors in the actual disposition of concrete cases.\textsuperscript{19}

As no individual is totally perfect or imperfect, so no group is either totally right or totally wrong. Being a heterogeneous nation, we will display a variety of beliefs and creeds, races, and


nationalities, all entitled to mutual respect not only for themselves but also for the good of the country.

Therefore Justice Frankfurter in the Beauharnais case held for the majority that "if an utterance directed at an individual may be the object of communal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State." He thought that the Court could say no such thing, although he admitted that there might be other objections to the course being pursued by Illinois, namely that obstinate social issues would not be easily resolved by any legislative reform. No solution for group conflict was going to be perfect. Illinois was making an attempt to lessen the probability of tension through use of group libel laws. It was not for the Court to gainsay this advance, however limited it proved.

Justice Black would have none of this. He thought that the majority opinion degraded First Amendment freedoms to a "rational basis" level. He struck out at Frankfurter's reliance on the noted Chaplinsky precedent, saying that "New Hampshire had a state law making it an offense to direct insulting words at an individual on a public street. . . . Whether the words used in their context here are 'fighting' words in the same sense is doubtful, but whether so or not they are not addressed to or about individuals." Justice Black's own emphasis on individuals should be contrasted with Justice Frankfurter's concern over groups as the important elements in controversies of this nature. Only Black out of the dissenters in this case refused the idea that states might have power to punish for group libel. This tendency to deal solely with individuals, and to individualize justice, stands in marked contrast to the position of Justice Frankfurter. It will stand out in even starker terms when we consider the approaches of the two men to certiorari policy.

Writing almost a decade before the Illinois statute was brought to the Supreme Court, David Riesman startlingly foreshadowed many of the considerations which were to weigh so heavily with Justice Frankfurter. He concluded that "defamatory attacks on

---

*Beauharnais v. Illinois, 313 U.S. 250, 258 (1952).*

*Ibid., pp. 272–73.*
groups are attacks both on the pluralistic forces which make up a
democratic society and derivatively on the individual members
whose own status derives from their group affiliations." 22 Riesman
went on to warn, however, that if stratification was to be avoided
and a dynamic social life retained, groups must be subjected to
criticism by other groups and by their own members. Justice
Frankfurter's acceptance of a theory of group libel did not mean
rejection of this latter point. In old-fashioned terms, he was only
agreeing that criticism of one group by another had to be kept
within the bounds of decency. Group defamation spreads beyond
the immediate group. In our scheme of values, the individual
gains status and honor to a large degree based on his associa-
tions. Therefore at times it is only by guaranteeing adequate
protection to groups that individual reputations may be pre-
served. The isolated individual feeling helpless in his isolation
seeks refuge and strength in group association. To strike at the
group of which he is a member in an irresponsible way is to
strike at the foundation of much modern society.

In treating of group conflict in the area commonly known as
that of civil rights, we have seen Justice Frankfurter urging re-
sponsibility on the part of groups toward society and toward one
another. When this responsibility is not forthcoming voluntarily,
the community may have to act, demanding adherence to gen-
eralized regulations or intervening to prevent the break-down
of the social order. The pluralist position, which is the basis for
Justice Frankfurter's acceptance of groups as organic entities
within society, usually stops with recognition of these sub-
societies within society as a whole. He carries the position further
and asks that the independence attributed to both groups and
communities be made the foundation for a greater social unity.

III

In the economic realm we are brought face-to-face with eas-
ily identifiable and quite powerful aggregates in the form of

22 David Riesman, "Democracy and Defamation," Columbia Law Review, XLII
unches, corporations, management associations, etc. In dealing
with giant interests of this nature, two drawbacks immediately
present themselves; it is more difficult to protect the individual,
however derivatively, and it is more difficult to distinguish be­
tween special interests and public interests. The collective de­
mands of a union or corporation made in a collective capacity
are often impossible to resist, even though in a wider context so­siety as a whole suffers. Quite perceptively, Thomas A. Cowan
has differentiated social interests, those made for the good of
the community, from social security interests, those which lay
claims against the community for some particular part thereof. It is the social security type of interest that predominates in the
economic field, and it is this type that has gained the greatest
attention from Justice Frankfurter. Community as represented
by government, although this time usually the national govern­
ment, has to step in through administrative agencies and the
courts to prevent undue centralization of power in any of the
"private" governments in the economic field, be they those of the
teamsters, utilities, railroads, or any other agency that could
cause economic imbalance.

Professor Frankfurter before his appointment to the Supreme
Court was a noted authority on labor problems and on the labor
injunction in particular. He had gained practical experience in
this field as chairman of the War Labor Policies Board during
World War I. Author of many articles touching the use of the
labor injunction, he made his greatest scholarly contribution to
the subject by collaborating with Nathan Greene on a volume
under that title. When he went on the Court, people recalled
his writings and also the fact that he had been identified with
some of the New Deal legislation bolstering the legal position
of labor. For these reasons he was expected to be wholly pro-
labor in orientation. However, those who now profess surprise
and chagrin that Frankfurter does not follow the plan of the
prophecies—or the prophesiers—were really not too familiar with

---

his writings or with the positions that he had taken on labor questions in the past.

*The Labor Injunction* itself, although of necessity dealing with detrimental effects of peremptory court orders upon the labor movement, was not designed as a pro-labor tract. The central theme of the book was an examination and criticism of the abuse of judicial power as this became evident in the ways in which courts were using injunctions. Professor Frankfurter was concerned peripherally with labor problems, primarily with those of the judiciary. In writing about the famous Coronado Coal Case of the early 1920's, 25 he said that “complete immunity for all conduct is too dangerous immunity to confer upon any group.” 26 The United Mine Workers, after a particularly long and nasty dispute with the owners, were resisting attempts to make them amendable to suit under the Sherman Act. Professor Frankfurter thought the majority of the Court, including Justice Brandeis, an avowed friend of labor, quite right in holding the unions responsible for their actions: “If the union can be brought into court as an entity to pay a printer’s bill, by the same procedure the union can be haled into court to respond to a claim for damages unlawfully caused by it in the course of a strike.” 27 The Supreme Court was being realistic in holding that unions, like any other association, could be sued and could sue. Unions *qua* unions, just as religious minorities *qua* religious minorities, could not expect special treatment at the hands of the law.

In emphasizing that Justice Frankfurter was not radically pro-labor in New Deal terms, let it not be intimated that he was anti-labor either. It is simply that since he became a member of the Court his opinions dealing with labor questions do not form any identifiable unit if judged merely on the basis of how often he voted to sustain or negate union claims. His votes have been more or less predicated on his understanding of unions as one type of economic collectivity having rights and duties. Early in his career he emphasized that unions had a very important part

---

to play in American life, but they were only a part and not the whole. In 1920 he wrote that “these are not the days of Hans Sachs, the village cobbler and artist, man and meister-singer. We are confronted with mass production and mass producers; the individual, in his industrial relations, but a cog in the great collectivity.”28 Such a collectivity had to find representatives, and it was natural that labor unions should appear to fill such a need. He was even willing to agree that “recognition of the social utility and, indeed, of the necessity of trade unions implies acceptance of the economic and social pressure that can come from united action.”29 This having been said, there still remained the troublesome problem of when and how far such pressure should be exerted. The form of concerted action that he preferred for our system was collective bargaining, not strikes.

IV

Justice Frankfurter has been brutally frank about the nature of unions and unionism as he conceives them.

A union is no more than a medium through which individuals are able to act together; union power was begotten of individual helplessness. But the power can come into being only when, and continue to exist only so long as, individual aims are seen to be shared in common with the other members of the group. There is a natural emphasis, however, on what is shared and a resulting tendency to subordinate the inconsistent interests and impulses of individuals. From this, it is an easy transition to thinking of the union as an entity having rights and purposes of its own.30

Justice Frankfurter does not make this transition. Unions do have rights and purposes but only as these are granted by the community in recognition of the fact that in our day and age individual economic man can normally be protected only through

the group with which he identifies himself. Labor's long hard-won struggle to gain recognition for itself has been aided immeasurably by the changing climate of public opinion as reflected in legislation. But it is important to remember, however, that such legislation is "to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." 31 It is in interpreting such legislation that Justice Frankfurter often displays his deepest insights into the nature of group action.

Thus in United States v. United Mine Workers 32 he agreed with the Court that the restrictions on the issuance of injunctions in labor disputes found in the Clayton and Norris-LaGuardia Acts did not apply to the United States government as an employer. The case grew out of John L. Lewis' conviction for criminal contempt for refusing to be bound by a court order postponing unilateral union termination of an agreement with the Federal Coal Mines Administrator. That the government as protector of the national interest supposedly could not deal with such circumstances seemed utterly incredible to Justice Frankfurter.

In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. For legal process is subject to democratic control by defined, orderly ways which themselves are part of law. In a democracy, power implies responsibility. The greater the power that defies the law the less tolerant can this Court be of defiance.33

Although this paragraph was written over a decade ago it could be applied as is to the actions of Governor Faubus of Arkansas. The same considerations that made Justice Frankfurter speak

out against the anarchical implications of the Little Rock situation made him speak out many years ago against allowing any man or union to gain a strangle hold on even a limited portion of our economic life. Whether the individual is John L. Lewis or Jimmy Hoffa, union power is exerted and union responsibility accrues through their actions. Therefore, Frankfurter has held unions liable for the deeds of their officers or agents under the Norris-LaGuardia Act.

On a diversified number of issues Justice Frankfurter has first voted for and then against labor depending upon the type of restriction involved and its importance to the community. He has held that union officials must take the loyalty oath prescribed by the Taft-Hartley Act before federal support for collective bargaining rights would be forthcoming. With the majority he held that the Taft-Hartley prohibition against union contributions to political campaigns was not violated by publication of an article in a dues-supported magazine urging backing for a particular candidate. On the other hand, he wrote the opinion of the Court upholding conviction of a union for using its funds to buy television time in order to influence an election.

Although any division between the nature of unionism as a group activity and the methods of unionism possible because it does involve a group is arbitrary, it has seemed best to distinguish the two for analytical purposes. In the picketing cases there is conjoined not only the group aspects of an economic activity but also civil rights aspects under the First Amendment's guarantee of free speech. Since the New Deal all members of the Court have been willing to admit that picketing is a right that warrants protection under either the First or through the due process clause of the Fourteenth Amendment. With this position Justice Frankfurter is wholly in accord. But as with any other right there are duties, and freedom can be turned into license. Therefore, depending upon the circumstances, some restrictions may

---

have to be placed by the community upon labor’s right to picket, just as Jehovah’s Witnesses were obliged to conform to standard social regulations.

In Milk Wagon Drivers v. Meadowmoor Dairies 38 Justice Frankfurter took this view very forcefully. A bitter labor dispute in which violence played an important part preceded a recommendation by an Illinois court-appointed master that all picketing, and not merely acts of violence, be enjoined. Frankfurter agreed that the whole situation was so enmeshed in violence that the community’s right to protect itself outweighed the union’s right to picket. Beyond the mere fact that the Court, if it struck down the Illinois order, would be substituting its beliefs for those of the state court, lay the distinction between rational modes of communication and those based on fear.

It must never be forgotten . . . that the Bill of Rights was the child of the Enlightenment. Back of the guaranty of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. . . . But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force.39

Over the caustic dissent of Justice Black, Frankfurter held that even so powerful an aggregate as a union, championing what was inherently a worthy cause, could not appeal to tactics that might prove harmful to the community.

To seal the point that Justice Frankfurter was interested in protecting the general population from violence in the Meadowmoor case, all one has to do is to look at the very next case involving picketing in which he wrote an opinion. In this case he held that even though no immediate employer-employee dispute was evident, a state could not forbid resort to peaceful picketing that had as its aim the unionization of a business employing non-members of the union.40 When, however, it appears that the community must be considered on the basis of the consequences to which economic conflict may lead, Justice Frankfurter will immediately begin to re-evaluate union rights.

38 312 U.S. 287 (1941).
39 Ibid., p. 293.
The effects of such a re-evaluation can be seen in Carpenters and Joiners Union v. Ritters Cafe.41 As said by the Justice in a later case, "the constitutional boundary line between the competing interests of society involved in the use of picketing cannot be established by general provisions." 42 Consequently, a pragmatic approach must be utilized. Since a state may protect itself against economic conflict, it may require that picketing be limited to industrially related disputes. Thus in Ritters Cafe he held for the Court that a state may, consistently with constitutional rights, forbid picketing of the place of business of one who has entered into a contract for the nonunion construction of a building over a mile away, a building having nothing at all to do with the business. Commenting that "the economic contest between employer and employee has never concerned merely the immediate disputants," he then went on to say that "the clash of such conflicting interests inevitably implicates the well-being of the community. Society has therefore been compelled to throw its weight into the contest." 43 Society as it becomes articulate through legislation can require competing elements to show some consideration for the greater good. Amelioration of potential conflict is a legitimate legislative aim.

The Taft-Hartley Act outlawed closed shops. Following this lead, several state legislatures attempted to curtail the growth of union shops. In a deservedly notable opinion in American Federation of Labor v. American Sash and Door Company 44 Justice Frankfurter concurred in the Court’s holding that unions were not denied equal protection of the laws by state statutes or constitutional amendments providing that no person be denied an opportunity to obtain or retain employment based on union membership. He thought that "if concern for the individual justifies incorporating in the Constitution itself devices to curb public authority, a legislative judgment that his protection requires the regulation of the private power of unions cannot be dismissed as insupportable." 45 The legislature had a perfect right to decide against the union shop. Professor Frankfurter learned from early

41 315 U.S. 722 (1942).
44 335 U.S. 538 (1949).
anti-labor decisions that the Court should acknowledge its incompetence and allow legislative determination of union rights. This earned him the reputation of a liberal on labor matters. It is somewhat ironic that when the lesson was put into practice in this case, it exposed him to criticism as a conservative. The very same thing has continued to happen with later cases.\footnote{See, for example, International Brotherhood v. Vogt, 354 U.S. 284 (1957).}

While Justice Frankfurter's labor opinions do not form any identifiable unit because they fit into the wider pattern of his concern with groups and group conflict, it is also true that his picketing opinions cannot be subsumed under discussion of free speech and assembly, for they too reflect vaster considerations as to the nature of community well-being. For him, picketing is not so fundamental a means of communication or so deeply rooted in our system of values that it cannot be limited. Especially is this so when explicit legislative statement defines a policy of limitation. In analyzing group interests, those of labor must be recognized and given the fullest support commensurable with social welfare. But unions as a group can only expect treatment as a part, albeit a very important part, of society. Other associations must have their day.

V

In Justice Frankfurter's philosophy, the economic rights and responsibilities of unions are closely paralleled by those of business, more specifically of corporations in all their various guises. From the time when he took on Cardozo's mantle, he followed somewhat the pattern of his New Deal compatriots on the bench in that he too required of corporations, especially those in the utility field, a good deal of perception and public feeling in their dealings. His requirements stemmed, however, from a more general philosophic view, which recognized economic and property rights as necessary ingredients in the total pattern of human rights and which insisted that corporations have their place in the sun as valid, but responsible, representatives of a good portion of the population.

Before he took his place on the Court he agreed that there
was "truth behind the familiar contrast between rights of property and rights of man." But he added the very important statement that

certainly in some of its aspects property is a function of personality, and conversely the free range of the human spirit becomes shrivelled and constrained under economic dependence. Especially in a civilization like ours where the economic interdependence of society is so pervasive, a sharp division between property rights and human rights largely falsifies reality.\(^{47}\)

He has therefore been equally careful in affording protection to economic rights as he has been in giving Court sanction to civil liberties, whether these be those of Jehovah's Witnesses in religious freedom cases or those of unions in picketing controversies. Likewise, he has required of the recipients of economic rights, be they individuals or corporations, the degree of co-operation for social good that he exacted from religious minorities or laboring groups.

In the fifth case in which he wrote an opinion the Justice warned his brethren that "the only relevant function of law in dealing with the intersection of government and enterprise is to secure observance of those procedural safeguards in the exercise of legislative powers which are the historic foundations of due process." \(^{48}\) Legislation in general is only the product of compromise between conflicting interests of society. To have the Court intrude into this domain by consciously throwing its influence behind one or another of the combatants would probably upset the delicate equipoise upon which democracy, both political and economic, depends. Many years ago he thought that the Court should constantly keep in mind the elementary facts of modern existence—technology, large-scale industry, progressive urbanization, accentuation of groups and group interests. Only by doing so could the law avoid the pitfall of disassociating legal problems from the general texture of society. "The tasks of government have meaning only as they are set in the perspective of the forces outside government. Modern society is substantially reflected in


legislation.” In giving corporations their due in accord with legislative desires, the Court would merely be bowing before an indisputable fact—that corporations have an indispensable role in the American scene as now constituted.

Although most economic rights and even more corporation rights are based on private arrangements, these arrangements cannot be abstracted from their public context. Even impairment of contract does not preclude a state from assuming that the conditions of the general welfare are implied parts of every contract. According to the Justice, “A more candid statement is to recognize . . . that the . . . police power is an exercise of the sovereign right of the government to protect . . . the general welfare of the people and is paramount to any right under contracts between individuals.” Although Frankfurter does think that federal court calendars become unnecessarily loaded through assumption of diversity jurisdiction, there is another reason for his belief that cases based on diversity of citizenship should not be placed under federal auspices. A good deal of diversity litigation entails corporations of one kind or another. To remove these from the reaches of state judicial power means to some extent leaving the state wholly dependent for protection of its economic well-being upon exterior, federal sources.

On the national level, although the government is not as intimately concerned with the contract stage of business organization or with the effects upon the economy of withdrawing local judicial supervisions from corporations, legislative attempts to regulate the concentration of power have been given concerted support by him. Utilizing all the tools that Congresses over the years have provided, he has consistently held corporations strictly to account for their actions. Whether the basis for decision has been the Sherman or Clayton Acts or the Interstate Commerce, Securities and Exchange, Federal Communications Acts, he has insisted that business organizations can and should be made to realize that the rights of the community have to be respected.


Cut-throat competition does little to enhance societal composure. Corporations of course have a right, and even a duty to their stockholders, to advance their interests—but only to the point where no harm will be done the public.

That there is a national policy favoring competition cannot be maintained today, without careful qualification. . . . Certainly, even in those areas of economic activity where the play of private forces has been subjected only to the negative prohibitions of the Sherman Law, this Court has not held that competition is an absolute.51

If corporations themselves do not show some discretion, as well as discrimination in the policies they pursue, the government must step into the picture.

On a number of topics, then, Justice Frankfurter has upheld state and national action. Proration orders limiting the production of oil wells, losses incurred through changes in various tariff acts, and administrative determinations that the public interest would best be served by curtailing the duplication of radio facilities 52 have all been approved on the basis that business organizations may have to suffer some pecuniary disability in the interest of larger community concerns. While agreeing that "the freedom of enterprise protected by the Sherman Law necessarily has different aspects in relation to the press than in the case of ordinary commercial pursuits," 53 Justice Frankfurter has differed from some other members of the Court in that he would require from all organs of communication in their business relations the type of responsibility that is demanded of other profit-seeking firms under the Sherman Act and other anti-trust legislation. Claims of freedom of the press do not justify complete autonomy. And so

53 Associated Press v. United States, 326 U.S. 1, 28 (1945).
when merely business relationships are involved, no area of the nation's life is beyond the purview of government action.

In treating Jehovah's Witnesses or labor unions, communities had been required to avoid discrimination. All regulations hemming in the activities of these groups had to have some very definite justification as judged by community welfare. In the treatment of business combines, the same kind of approach is utilized. They too must be protected within the limits of their rights. The Fifth Amendment's provision concerning just compensation has been given a very strict interpretation. While businesses must expect to suffer along with the rest of the community when generalized regulations make a change in the over-all economic position of the country, they can demand restitution when their particular property is singled out for community use. There is no doubt that the community can demand property or other economic assets from individuals or corporations, but it then must assume the responsibility of seeing that repayment is made. "When there is a taking of property for public use, whether in war or in peace, the burden of the taking is the community's burden." Justice Frankfurter has been very staunch in his demands that the community shoulder such a burden. Other areas of business dealings that are vital to the maintenance of the economic system and that therefore indirectly concern the general public have also received sympathetic treatment in his hands.

To name but one area, he has been extremely active in the protection of bona fide trade-marks and patents. "The protection of trade-marks is the law's recognition of the psychological function of symbols. If it is true that we live by symbols, it is no less true that we purchase goods by them." It is to the interest of the general public that they be not duped by false claims. Conversely, to merit a patent some genuine inventiveness must be shown, otherwise general progress may be curtailed through premature granting of legal and economic rights. In a different field, although very much in the same vein of thought, have been Justice Frankfurter's votes on stock reorganization plans. Although he

has written relatively few opinions on this question, those that he has composed have reiterated time and time again the fiduciary trust placed by stock-holders in boards of directors and the consequent necessity for directors to be above reproach in their dealings. Not only are their own reputations at stake, but also the future of a good many innocent people may be determined by their actions.

In January, 1929, Professor Frankfurter wrote to F.D.R. that "hydroelectric power raises without a doubt the most far-reaching social and economic issues before the American people, certainly for the next decade." 56 Hydroelectric power was but one of those many types of natural or manufactured products that were controlled by public utility companies. Professor Frankfurter’s reference to it was merely indicative of his deep concern over the role that public utilities were playing in the economic life of the country. In the very next year he wrote a volume, one of whose major contentions was that "those economic services upon which public well-being is so dependent that they are deemed to be public callings although in private hands, present in many ways the most complex series of problems for government, and their complexity is not likely to be abated in the future." 57 In this he was most certainly correct. He thought then that both state and national governments should make sure that society secured the essential service of the public utilities, even if the latter had to be put under strict supervision. In helping to draft the Public Utility Holding Company Act in 1935, he was able to translate a good deal of his theory into practice. On the Supreme Court he has reiterated the dispersal theory of economic power upon which the Act was predicated, and he has required of public utilities more than he has required of any other type of corporation.

While probably the Court’s most outspoken member on the necessity for curbing utility companies, Justice Frankfurter has been equally outspoken on the topic of administrative responsi-

57 Frankfurter, The Public and Its Government, p. 3.
bility. "Who ultimately determines the ways of regulation, is the
decisive aspect in the public supervision of privately-owned
utilities." This being so, the fact that Congress has delegated
so much responsibility for regulation to the independent com­
misions and boards means that these agencies are in many
instances the ultimate determinants. These professional adminis­
trative agencies through continuity of study, slow building up
of knowledge, and initiative in enforcement then become the real
protectors of the public interest and act as a counterweight to
the economic pressures exerted by business organizations.

Over and over again the following theme, or some variation
thereof, appears in his opinions: "Since these agencies deal largely
with the vindication of public interest and not enforcement of
private rights, this Court ought not to imply hampering restric­
tions, not imposed by Congress, upon the effectiveness of the
administrative process." In an oft-quoted passage Justice Frank­
furter wrote that modern administrative tribunals were the out­
growth of conditions far different from those that gave rise to
the judicial process. They were to be the transmitters of a social
policy of social control. In the protection of both public and
private interests and in the substantiation of a social policy of
dispersal of economic control, administrative agencies are the
organs of government through which business organizations are
made to realize the vital, though limited, contributions that they
can make to a responsible national life.

VI

The Supreme Court throughout its history has always been
aware of the group conflicts that seethed under a good deal of
litigation coming before it. While such conflict arose violently
to the surface on a limited number of occasions—Dred Scott,
Legal Tender, Income Tax Cases—it, nevertheless, remained as
an unspoken consideration in many others. The changing social

---

and behavioral pattern of modern society made the articulation of group interests a much more necessary ingredient of life in general and in Supreme Court opinions in particular. When the Court spoke of protecting property rights of business in the 1920's and 1930's, when it turned its attention to unions and the problems of labor in the 1940's, or when it agreed to the correspondingly new emphasis that should be given civil liberties of minority religious or racial factions, embryonic group interests were being taken into account. Like other members of the Court, although perhaps to a greater extent, Justice Frankfurter has accepted the fact that the law must accommodate itself to this new situation wherein groups often replace individuals as the central concern in ameliorating conflict. He has, however, added one very important qualification, which has not been wholly acceptable to some of the other justices. Given the fact that groups need to have their rights protected, the community as the greater whole must also have its day.

In a speech honoring the late Thomas Mann, Justice Frankfurter reminded his audience that “the essence of the democratic faith is the equal claim of every man to pursue his facilities to the humanly fullest—for his own sake, but no less for the sake of society.” Individuals and groups in the pluralist tradition have worth and validity in and of themselves. But their greatest significance is gained when they can contribute their unique strengths to the social fabric that can be, although need not be, represented by some type of governmental arrangement. To dissipate this strength through violence or through stubborn attempts to revamp by indirect coercion the cultural patterns of an unwilling majority harms not only the groups but society as well. It is “Law alone [that] saves a society from being rent by internecine strife or rules by mere brute power however disguised.” Legislative judgments that certain actions must be prohibited or curtailed for the peace, security, and economic well-being of the community are passive statements of what the law should be. Coming from the truly representative branch of government they deserve serious consideration. It is up to the

---

courts and administrative agencies to make this passive law into an active force whereby strife and conflict can be mitigated if not entirely done away with. In concluding a recent article on his conception of the Court's function, Justice Frankfurter agreed that his insistence on government under law might be charged with being an old-fashioned liberal's view. But to this he replied, "I plead guilty."

For the charge implies allegiance to the humane and gradualist tradition in dealing with refractory social and political problems, recognizing them to be fractious because of their complexity and not amenable to quick and propitious solution without resort to methods which deny law as the instrument and offspring of reason.62

No summation could better present the course that the Justice has followed in dealing with group conflicts in modern society.