Felix Frankfurter

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Published by Johns Hopkins University Press

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

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In discussing civil liberties a good deal of space is devoted to building out the implications of liberty versus order, freedom versus authority, as if each were mutually exclusive and mutually hostile categories. Concern for the individual takes a prominent place in any such discussion. There are times, however, when the claims of a politically organized society also have to be given credence. The fact that the United States works under a truly representative system does not mean that all problems of liberty and order, freedom and authority have been solved. Certainly the people must limit themselves or be limited by the Constitution under which they operate. To say this, however, is not to agree with the proposition that liberty totally excludes order or that freedom totally excludes authority.

We have been largely concerned with the proper place for liberty and authority in the clashes between individual rights and group or community interests. In addition, a conceptual
scheme is needed for dealing, not with complications of social power and individual protection, but with the equally difficult area where individual freedoms collide with other such freedoms, individual rights clash with other such rights. In this area, too, questions of liberty and order are present, but they are present on a particularized lower level.

I

For Justice Frankfurter, the initial determination that must be made is that between the Bill of Rights and governmental power granted by the Constitution. As he has said, "Where the First Amendment applies, it is a denial of all governmental power in our Federal system." Some other members of the Court, totally concerned with balancing rights against power and usually finding the first inviolate and the second foreclosed to use, stay at the point where one determination or judgment is necessary. Given their predisposition toward protecting the individual at all costs, that judgment is almost an automatic one. Thus in a deceptively easy manner, more difficult or trying problems are avoided.

We are apt to think of litigation as a clash between right and wrong with the judiciary primarily concerned with seeing that the former prevails. Unfortunately, things are not always this black and white. For Justice Frankfurter, the finding that some portion of the Bill of Rights is applicable is only the initial stage when various individual freedoms are at stake. It may be true that at times the Court can very clearly discern that an individual's right is being threatened by another individual totally in the wrong. More often than not, however, when governmental coercive power is not originally involved, there appears a clash of rights, freedoms, or whatever other term best describes the situation wherein no single correct disposition of a case can automatically be attained through saying that the Bill of Rights covers the situation. At this point a secondary determination between the freedoms involved has to be made. "When we are dealing with conflicting freedoms," Justice Frankfurter has noted, "we are dealing with large concepts that too readily lend themselves to

" Preferred Freedoms"—A Negative View

Only a pragmatic judgment on the circumstances of the situation allows any accommodation between the conflicting set of individual freedoms.

It is on the reality and nature of this secondary determination that Justice Frankfurter differs from some of his brethren. Rhetorical eloquence he feels will not solve the judicial puzzle of having to weigh one right against another. In the pre-New Deal period, many of the justices could discourse with force and persuasion upon the magic phrase "freedom of contract," whose very mention seemed to them to settle any and all controversies. Current Court members who refuse to acknowledge that merely citing the Bill of Rights is not enough to work out practical arrangements are not acting very differently from earlier justices whom they chastised for their championing of economic rights to the possible exclusion of other considerations. It is necessary to recognize that within the covering protection of the Bill of Rights there may still be clashes of individual freedoms, clashes that the judiciary must moderate, neither side being completely right or completely wrong. Any formula or approach to the Constitution and the Bill of Rights that sees them as self-contained entities that do not allow for any conflict once they are in operation is beguiling and mischievous. Especially is this so "when contending claims are those not of right and wrong but of two rights, each highly important to the well-being of society. Seldom is there available a pat formula that adequately analyzes such a problem, least of all solves it." To deny the reality of this secondary determination between rights is to deny much of the judicial function.

Although society's power does not immediately make itself felt, after the judgment as to which freedom should be favored in particular instances has been made, this power may be called upon by the judiciary to reassert itself on behalf of the right adjudged predominant. With this reassertion comes considerable confusion. Those who find only one judgment necessary—is or is not the Bill of Rights applicable—seem unable to distinguish between the original rejection of governmental power as antithetical to the Bill of Rights and governmental power invoked to aid, after a secondary determination, the predominant right. As Frankfurter


said in 1929, "Legal rights do not necessarily define moral claims. Legal rights are not even the measure of equitable relief. A wise social policy may well consider the manner in which parties exercise their legal rights before putting the coercive powers of society behind those rights." Once again, it bears repeating that the Supreme Court is a court of law, not primarily justice or morality. Those who find within the Bill of Rights a complete moral decalogue would have difficulty in recognizing that individual legal rights covered by that document could clash. In the clash of rights some judicial choice as to the more worthy must result, and, depending upon the manner in which those rights are exercised, society may have to lend aid to one individual. This is all that Professor Frankfurter was trying to say; it is all that Justice Frankfurter claims.

This completes one half of the conceptual scheme when governmental power is balanced against the Bill of Rights and the latter prevails, although perhaps with incidental reinsertion of the first quality. The other half of the scheme is not so complicated or involved, even though some confusion may result from the fact that those who rely on a single determination when the Bill of Rights proper is under consideration apparently seem bound to refuse the second part of the equation. There are certain instances when a clash between individual freedoms is not possible because governmental power is already available to enact general legislation, which in turn might incidentally favor one right over another. Take, for example, the classic situation in which claims to religious liberty under the First Amendment collide with individual claims to privacy that can be provided under the police power of states as encompassed within the Tenth Amendment. While the legislature may decide that special consideration is due religious scruples in the example given above, it need not do so. This certain members of the Court seem unable to grasp.

II

There is a good deal of absolutism in portions of today's constitutional approach. Terms within the Bill of Rights may be

absolutely defined, and these terms are absolutely binding upon the states. It is somewhat amusing that within the Bill of Rights certain portions are held to be more absolute than others, bringing to mind the quip that everything is relative except relativity. The most absolute portion apparently is the First Amendment, providing the basis for interpretations of "preferred freedoms" to which we will soon turn. Before doing this, it is well to recall certain of the strengths and weaknesses of any generalized absolute interpretation.

Writing in 1927, Professor Frankfurter said: "... 'principles' are rarely absolute. Usually they are sententious expression of conflicting or at least overlapping policies. The vital issue is their accommodation. Decisions thus become a matter of more or less, of drawing lines." There is nothing new or startling in this quotation. It merely points up the attitude that Justice Frankfurter carried into the New Deal period. Attempting an intellectual characterization of that period, one might say that the search for immediate solutions, rather than an inquiry into the longer-range implications of problems that had to be faced, intrigued the creative mind as this became evident in policy decisions or constitutional doctrines. Perhaps because he did not exactly fit into this pattern Justice Frankfurter was criticized for his attention to detail, for his preoccupation with procedural regularity, and for his insistence on keeping constitutional holdings as narrow as possible.

The New Deal Court as a whole displayed disarming enthusiasm towards the task of clearing away the holdings of previous Courts. Opinions had not only a communicative but also an emotive function. Very little attempt was made to reduce the emotional element. Evocation of a sense of fairness seemed a very legitimate aim. In place of the rather cold and austere emphasis on economic rights came a new, youthful liveliness directed towards that ever shining goal, human rights. And in no way was it easier to evoke an emotional response towards this goal than by citing the Bill of Rights and treating it as though it captured the absolute essence of human rights for all times and all places.

This rather engaging enthusiasm for certain assumed absolute

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values did, however, have one major drawback. Because conclusions rather than legal reasoning were sought, the doctrines enunciated to rationalize these conclusions often had to be of an absolute nature to cover the absolute values. "Preferred freedoms" was changed from its original form as a suggestion of attitude toward certain provisions of the Bill of Rights into a self-contained and very definite constitutional concept. The concept has remained static. The New Deal initiated vast changes in American constitutional development. But, just as the New Deal Court was the example, par excellence, of changing times, it was not the agency that could arrest further development. The world in which it operated continued to show different traits and attitudes. Thus the attempt to make the Bill of Rights absolute in eighteenth-century terms and the attempt to make more absolute still certain portions thereof by a concept that is static and unbending led to futility and frustration.

To their credit, the judicial activists are interested in seeking out the essence of human existence. They have a well-defined and well-articulated approach to this quest. The only difficulty is that, as members of the Supreme Court, their approach is basically not a legal one. It is much more tempered by political-humanitarian considerations in the widest sense of the term. The desire to have the Supreme Court give something beyond legal protection means that, when the inevitable clash of absolute rights occurs, they are pushed to utter subjectivity on the basis of political-humanitarian considerations. This may or may not be fortunate. But, similar subjectivity on the basis of other considerations helped destroy the Nine Old Men. When absolutes tumble, the destruction that they wreak is apt to be fairly complete.

Justice Frankfurter in his treatment of the Bill of Rights does not lean toward an absolute position. His statement that "many a decision of this Court rests on some inarticulate major premise and is none the worse for it"⁶ may open him to the charge of subjectivity that has been raised against Justice Black. The subjectivity is, however, of a slightly different kind. It is not a subjectivity forced by a breakdown of a supposedly self-contained system that should mechanically provide answers to any conflict.

It is self-assumed on the understanding that clashes of legal, not political-humanitarian, rights must be mediated by the judiciary and that no single standard, absolute, or concept can serve in place of pragmatic determination.

Writing after fifteen years on the Supreme Court, Justice Frankfurter still showed that his abiding interest was in judicial technique and method rather than conclusions: "Alert search for enduring standards by which the judiciary is to exercise its duty in enforcing those provisions of the Constitution that are expressed in what Ruskin called 'chameleon words,' needs the indispensable counterpoise of sturdy doubts that one has found those standards." 7 Although Justice Black may not entertain doubts about the absolutes that he champions, Justice Frankfurter entertains them for him. When the absolutes are all in the area of civil liberties, the doubts take on larger proportions. Three decades ago the absolutes were in the area of "property" or "freedom of contract." Today they all abide in the Bill of Rights. Who can say where they will be located five or ten years from now? If absolutes tend to paralyze thought and imprison their holders in a straitjacket of their own making, then the trial and error that is the very basis for accommodation within democratic society will be abandoned to the detriment of all. The judiciary demands tough-minded relativists, not soft-hearted absolutists. It is in the light of this contrast that "preferred freedoms" must be examined.

III

To retell in full the story of the appearance of "preferred freedoms" is unnecessary, since this has been done very successfully on many occasions and the tale is one that is now well known. It has, of course, been done most successfully by Professor Alpheus T. Mason in his biography of Harlan Fiske Stone, from whose opinion the doctrine stems. In what Professor Mason

calls the "otherwise obscure case of United States v. Carolene Products Co.," there appeared a footnote written by Louis Lusky, Justice Stone's law clerk at the time, which made some interesting, although novel, suggestions. Since "it was not unusual for Stone to allow his law clerks to use footnotes as trial balloons for meritorious ideas," the uniqueness of Footnote Four was not immediately apparent. It was only after it was picked up and used as a rationalization for the primacy of civil liberties, particularly as found in the First Amendment, over other constitutional rights, that discussion of its implications became numerous.

In its original formulation by Lusky, Footnote Four contained only two paragraphs. It is assumed that the first paragraph, as the footnote appears in the Court reports, was superimposed by Chief Justice Hughes. The complete footnote reads as follows:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exact judicial scrutiny under the general scrutiny of the Fourteenth Amendment than are most other types of legislation . . . .

Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

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10 For a listing of the early cases in which preferred freedoms were mentioned, see Kovacs v. Cooper, 336 U.S. 77, 90-96 (1949).
No one is as qualified to explain the meaning of this footnote as is its author. In an article devoted to this task, it is a fairly telling point that the first paragraph was not even mentioned, leading to the speculation that the originator of the larger idea thought Chief Justice Hughes' addition unimportant or unnecessary. Of the third paragraph Lusky says in part: "Where the regular corrective processes are interfered with, the Court must remove the interferences; where the dislike of minorities renders those processes ineffective to accomplish their underlying purpose of holding out a real hope that unwise laws will be changed, the Court must step in." 12 In a consideration of the original meaning of "preferred freedoms" these are the raw materials with which one has to work—the footnote itself and its author's explanation of a portion thereof.

Justice Frankfurter has never rejected the pristine meaning of paragraphs one and two of this footnote, which say only that legislation relating to the Bill of Rights, and in particular to the First Amendment, should be subject to "more exact judicial scrutiny" than other legislation. Before becoming a member of the Court and in defending the proposition that economic rights could be considered a function of personality, Professor Frankfurter admitted that "the various interests of human personality are not of equal worth. There is a hierarchy of values." 13 Even in his Supreme Court opinion that is considered the epitome of anti-preferred freedoms philosophy, he said that "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." 14

Whether a society is open or closed depends to a good extent upon the capacity of a representative body to reflect the felt needs and desires of the people. So that a relatively exact reflection can become evident, keeping the channels of public pres-

14 Kovacs v. Cooper, 336 U.S. 77, 95 (1949).
sure open is of utmost importance. This is apparently what Justice Frankfurter thought the second paragraph of Footnote Four to mean, for he wrote to Justice Stone shortly before the decision in one of the first cases invoking the “preferred freedoms” concept, “I am aware of the important distinction which you so skillfully adumbrated in your footnote 4 (particularly the second paragraph of it) in the Carolene Products Co. case. I agree with that distinction; I regard it as basic.” He complimented Stone for his understanding that, even in dealing with civil liberties, the Supreme Court was not “in the domain of absolutes. Here, also, we have an illustration of what the Greeks thousands of years ago recognized as a tragic issue, namely the clash of rights, not the clash of wrongs.” The Supreme Court in its judicial scrutiny was, however, guided by an understanding that it was not the primary resolver of conflict. This role was assigned to legislative assemblies freely influenced by various portions of the population. As long as representatives could be informed of desires or removed from office through political processes, the courts had done their job in seeing that the processes themselves were not corroded or legal rights denied. Whether this is a correct interpretation of Stone’s position or not, it is, at least, Justice Frankfurter’s understanding of that position.

Justice Frankfurter’s difficulty in following the course of development for “preferred freedoms” taken by the Court links with the inversion of meaning given paragraph one and the judicial interpretation of paragraph three rather than with what paragraph three itself says. The initial section by Chief Justice Hughes speaks of a narrower scope for the presumption of constitutionality when a statute could conceivably invade the freedoms of the first ten amendments. In the application of the doctrine, first a subtle and then not so subtle change occurred, ending with the meaning that there was a presumption of unconstitutionality for any statute even remotely related to the First Amendment. With this position and the extreme statement of “preferred freedoms” even Stone himself disagreed.

If it is a wise man who knows his own children, Stone in deny-

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15 Frankfurter to Stone, May 27, 1940. Quoted in Mason, Harlan Fiske Stone, p. 218.
16 Ibid.
ing paternity of this offspring exhibited a good deal of discernment and discretion. Both he and Justice Frankfurter worked within the accepted scheme where legislation is presumptively valid although “more exact judicial scrutiny” may be needed to establish this validity when the Bill of Rights is involved. This is not to say that the two men always agreed. Quite obviously, as the flag salute cases show, they did not. Their disagreement came, however, not on the absolute nature of the First Amendment, or even of the Bill of Rights itself, but on the value choices necessary to establish validity. Neither ever accepted the implications of presumptive invalidity. On the other hand, those who have made the “preferred freedoms” doctrine into a concept that challenges all legislation and places the complete burden of proof upon representative assemblies have placed themselves in the position of Platonic guardians exercising discretion over absolute values protected by an absolute doctrine.

Louis Lusky’s explanation of paragraph three of the footnote—that when there is little hope that “unwise” laws will be changed, the Court must step in—shows an orientation completely different from that of Justice Frankfurter. Subsequent action by the Court has shown that many of the justices at one time or another have accepted the Lusky explanation. Unwisdom, then, becomes dependent upon the degree to which a statute deviates from the preconceived notion held by the justices as to the absolute content of First Amendment rights. Under this interpretation the Court should not hesitate to act as a superlegislature, automatically turning aside any statute that incidentally collides with the absolutist judicial interpretation of the First Amendment. To this Justice Frankfurter takes very marked exception. Since “the function of this Court does not differ in passing on the constitutionality of legislation challenged under different Amendments,” he has told his brethren that

The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom.¹⁷

The Justice's very pronounced views on the fact that due deference should be paid by the judiciary to the legislature did not keep him from agreeing that "more exact judicial scrutiny" might be called for to prove the constitutionality of legislation touching the Bill of Rights, but the presumption of validity stayed with the legislature. Judicial determination of "unwisdom" was totally out of the question for him as the basis for striking down a statute. Because the Bill of Rights warranted extra study did not mean that it should be elevated over other constitutional provisions, and it certainly did not mean that one portion of that section should be "preferred." Justice Frankfurter's conception of the nature of the Constitution is extremely important here, and it is the crux of the difference over the "preferred freedoms" doctrine.

This conception is that "the Constitution is an organic scheme of government to be dealt with as an entirety. A particular provision cannot be disjoined from the rest of the Constitution." Constitutional powers and provisions are intrinsically of equal worth. To suggest that, on the basis of judicial supremacy, one cluster of constitutional rights should be favored at one time, while, at another time, a totally different set could be substituted, is, in the words of Justice Frankfurter, "to disrespect the Constitution," and coincidentally to deny its organic nature. "As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. . . . To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it." As there can be no second-class citizens, so there can be no second-class rights.

The constricted application that Justice Frankfurter fears is one that rigidly insists on a preconceived absolute value scale and ignores the fact that our constitutional system is one identified by the diffusion of power. In the last century, jurisprudence tried to solve the problems of law by a theory of natural rights that held that those rights were absolute and could not conflict. The individual in the enjoyment of these rights was placed above state and society. In gaining such enjoyment, neither adjustment nor compromise was recognized. It is true that economic rights largely over-

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18 Reid v. Covert, 354 U.S. 1, 44 (1957).
shadowed what we would call civil rights. Nevertheless, no agency of government was ever equal to giving them the precise delimitation in practice that theory demanded. It was against this emphasis that the mid-twentieth century reacted. But what had been the difficulty for the nineteenth century in turn became the difficulty of the twentieth.

Justice Frankfurter's name cannot be disassociated from a variant natural law position in that he thinks due process of law approximates the enduring values of human existence, or, at least, human existence in the Anglo-American world. This, however, is more expressive of a feeling than of an absolute commitment. Those who make the Bill of Rights absolute through definition and then try to concretize the absolutes by a doctrine that gives prominence to one portion thereof come closer to the nineteenth-century conceptions—and with the same drawbacks. The validity of adjustments and compromises is never recognized. Walton Hamilton and George Braden, two subsequent defenders of the libertarian-activist approach, wrote in 1941 that "the several ancient liberties [enshrined in the First Amendment] were never absolutes; and, as caught in the generic term liberty, they do not completely escape the finite. The Court has never said, the current bench is unlikely to say, that executive and legislature may never interfere with a person's freedom." This was a sanguine appraisal that was disproved by many cases following shortly after 1941.

The opinions of Justices Black, Douglas, Rutledge, and Murphy are especially significant for their very forthright espousal of the position that Hamilton and Braden thought the Court would never take. Justice Douglas, for instance, has written that "The First Amendment is couched in absolute terms—freedom of speech shall not be abridged. Speech therefore has a preferred position as contrasted to some other civil rights." He is not entirely consistent on this point, however, as a few years earlier he had said that "freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless

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20 Walton Hamilton and George Braden, "The Special Competence of the Supreme Court," Yale Law Journal, L (June, 1941), 1351.
shown likely to produce a clear and present danger of a serious substantive evil . . . .” 22 Since a clear and present danger rarely if ever exists for those who hold a “preferred freedoms” position, the end result is very much the same as when the First Amendment is given an absolutist interpretation.

Again, it was Justice Douglas who suggested recently that there might be areas outside the First Amendment that should also be elevated. According to him, “Citizenship, like freedom of speech, press, and religion, occupies a preferred position in our written Constitution, because it is a grant absolute in terms.” 23 It seems reasonable to question just how many absolutes the present Court is going to be able to find. Another question may be raised: Are any of the “preferred freedoms” more preferred than others? Stated hierarchically, we have seen a section of the Constitution, the Bill of Rights, given prominence over other sections of the same document, and then a portion of the section, the First Amendment, elevated and absolutized. In some of the cases the suggestion was made that a segment of the portion of the section held top position. Justice Murphy, for example, implied that freedom of religion was the most precious of all rights and should be given ultimate preference over all others. To this even Justice Rutledge, another very staunch supporter of the absolutist interpretation, could not agree, “If . . . appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme.” 24 While the Court as a whole has not taken the last step and agreed on any particular freedom as being ultimately indispensable, the tone of certain of its opinions dealing with subversion leads one to wonder whether freedom of speech has not implicitly been given this distinction.

As there have been many opinions written on the need to elevate the First Amendment, so there have been many written to denounce such a course. It is in the case of Kovacs v. Cooper, 25

22 Terminiello v. Chicago, 337 U.S. 1, 5 (1949).
however, that the most articulate and complete rejection of the doctrine of "preferred freedoms" comes. At question was a city's power to prohibit the use of sound amplifying devices on public streets when they emitted "loud and raucous" noises. Justice Murphy alone of the nine members held that even reasonable regulation was not consonant with the First Amendment. Justices Black, Douglas, and Rutledge did not take this extreme view but did hold that, since speech was a "preferred freedom," the city had to prove without a shadow of a doubt what constituted "loud and raucous" noises and then show that the sound device involved was definitely emitting such a noise. This they did not think had been done in this case, and so they dissented. The judgment of the Court was announced by Justice Reed. His opinion upheld the ordinance against charges of indefiniteness and violation of the First Amendment.

Justices Frankfurter and Jackson went further than others in the majority and held that the use of sound trucks in the streets may be completely prohibited without violating the constitutional right to free speech. Beginning with the proposition that "wise accommodation between liberty and order always has been, and ever will be, indispensable for a democratic society," Justice Frankfurter thought that to favor the former over the latter through a doctrinaire approach to constitutional issues simply disregarded reality. Of "preferred freedoms" proper, he had this to say:

This is a phrase that has uncritically crept into some recent opinions of this Court. I deem it a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity. It is not the first time in the history of constitutional adjudication that such a doctrinaire attitude has disregarded the admonition most to be observed in exercising this Court's reviewing power over legislation, "that it is a constitution we are expounding," . . . I say the phrase is mischievous because it radiates a constitutional doctrine without avowing it.27

26 Ibid., p. 90.
27 Ibid., p. 90.
Calling for clarity and candor in the treatment of the doctrine, Justice Frankfurter then proceeded to a long, historical account of its appearance, uses, and perversion.

The significance of the Kovacs opinion for a study of Justice Frankfurter's judicial performance is immense. The opinion is almost a compendium of his major views. Insistence on the Constitution as an organic document, acceptance of governmental power to deal with social problems, and recognition of liberty and authority as valid concerns for legislatures would have to be listed on the positive side of the ledger. Rejection of an absolutist interpretation of constitutional terms with its own implied avoidance of pragmatic solutions, denial of ultimate provisions in one portion of the Constitution in preference to others, and refusal to acquiesce in furthering the use of a doctrine all of whose major implications were not articulated are the negations that the opinion contains. While the decline and fall of a doctrine are not easy to trace, it would seem that Frankfurter's broadside against "preferred freedoms" in the Kovacs case inflicted enough damage and was so well placed that the Court as a whole has never again adopted that concept as the deciding factor in a case.

IV

Justice Frankfurter has leveled serious criticism at his colleagues on the issue of absolutism and preferred treatment for constitutional terms. He, in turn, has not escaped unscathed. The most obvious criticism is that he has been in the majority in some cases where a modified "preferred freedoms" position was taken. What considerations prompt him to yield concurrence to an approved result reached through inapposite doctrine? Many years ago he speculated how this could happen to members of the Court: "Long-term strategy, or immediate fatigue, hopelessness of opposition or depreciation of the importance of the pronouncement, bonhomnie of common labors or avoidance of undue division—such are the factors that may restrain the expression of individual views." 28 Whether one or more of these factors were

operative, Justice Frankfurter has at times not opposed the "preferred freedoms" approach.

More serious consideration must be given the comparative performances of Justices Black and Frankfurter in their respective treatments of the Bill of Rights and the Fourteenth Amendment. Recalling the incorporation proposals of Justice Black, one can say that when the absolute provisions of the Bill of Rights are made applicable to the states, they are made applicable equally. None can suffer subordination or deletion. No selectivity is advanced. Yet, when the Bill of Rights is proposed as a barrier against federal action, there is a very definite grading process in which the First Amendment becomes the most important civil rights guarantee. The perspective of Justice Frankfurter is almost the reverse. In determining what portions of the Bill of Rights are encompassed within the more general concept of due process as found in the Fourteenth Amendment, he automatically acknowledges that a choice is involved and that the jurist in trying to approximate an understanding of the traditions of English-speaking peoples is the agency for such a choice. On the other hand, when the Bill of Rights proper is under consideration, he discounts attempts to elevate one section of the Constitution over another, and he is particularly adverse to having one portion of that section given prominence.

The choice factor based on pragmatic value judgments plays an inordinately important part in assessing the opposing philosophies of Justices Black and Frankfurter. From his recorded votes, the suggestion has been made that the latter has his own set of "preferences," which he consistently champions. Preoccupation with national security and unity has been proposed as one of these, public education as another. It is true that on one occasion he said that "national unity" is an interest "inferior to none" in the hierarchy of legal values. But he did not say that it was an interest superior to all others. Unfettered public education, at the elementary, high school, or college level, seems to come closer to being an absolute for him. To protect this interest, he has turned certain provisions of the Bill of Rights into very rigid concepts. Thus, in the released-time cases, involving an interpretation of the establishment clause of the First Amendment, he found the

It may be noted that, in part, Justice Frankfurter was not trying to protect religion or the state *per se*, but was using available constitutional tools to fashion protection for broader considerations that cannot be captured in any phrase or cliché. Separation of church and state was picked up and used, in the particular circumstances presented to the Court. There was no automatic elevation of constitutional provisions nor obstinate holding to an absolute that must be applied in all situations. This selectivity can be disagreed with on the basis of end result; the process itself, however, should not be confused with the process that accepts a closed set of values and sets out to defend them at all costs. This is a like confusion to that found in freedom of speech cases. No differentiation seems to be made between restrictions on the means by which information is disseminated and restrictions on the actual information being disseminated.

Of the other broader considerations that weigh heavily with Justice Frankfurter and that he finds worthy of judicial protection, the integrity of the political and democratic process and the ultimate responsibility of the legislature for social well-being must be numbered. To insure integrity, freedom of speech and press might have to be strictly applied and, in this instance, for particular cases, the applicable part of the Bill of Rights becomes absolute. But the Bill of Rights does not give total insurance, and so, in other situations, the right to suffrage takes on greater import. As a counterweight to the libertarian-activists' faith in the absoluteness of freedom over authority, liberty over order, Justice Frankfurter suggests faith in legislative competence to work out accommodations between the two sets of concepts. Pushed to its logical extreme, it would be very difficult to prove that there was not some basis in reason for all legislative acts. Although Justice Frankfurter has come very close to expressing the view that judicial review of legislative determinations, especially those of

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the federal government, should be abolished altogether, he has not carried the doctrine of presumptive constitutionality to the point where it has been turned into legislative absolutism. His judicial philosophy is a profession of faith that neither the Court nor any other nonrepresentative body can completely or adequately correct the evils of our day. If faith in the legislature and concern for democratic processes are absolutes, they are absolutes with a venerable tradition, which cannot be preserved by automatically invoking concepts to fit a preconceived set of values.

"Preferred freedoms," whether as the cause or corollary of incorporation proposals, bring into use certain parts of the Bill of Rights more than others. It must be admitted that in his pragmatic search for accommodation of clashing interests, Frankfurter calls upon one constitutional concept more than upon any other. His view of due process, whether found in the Fifth or Fourteenth Amendment, is that here is to be located a source of fluidity and flexibility with which the judiciary can work. Due process of law, then, because of its wider, more inclusive nature, becomes the over-all safeguard for a democratic form of government. It is the "preferred" instrument by which the automatic preference for arbitrary absolute values can be avoided. It is the alternative to treating liberty and order as opposing forces. This awareness has not escaped members of the Court who find it necessary to make the Bill of Rights specific and specifically binding upon the states. Justice Douglas has complained that

The decision we render today exalts the Due Process Clause of the Fifth Amendment above all others. Of course any power exercised by the Congress must be asserted in conformity with the requirement of Due Process. . . . But the requirement of Due Process is a limitation on powers granted, not the means whereby rights granted by the Constitution may be wiped out or watered down.31

Justice Douglas is correct that whether the federal government or state authorities are involved, due process is procedural—or, at least, should be. Being procedural, it should not concern itself

with limiting power, but should see that power is exercised only in certain ways. Contrariwise, it should not be used as a supplementary mechanism to enforce absolute values—rights, if you prefer—against any government. Justice Frankfurter is not blameless in his substantive use of due process. The substances that he does propose are, however, variables and not predetermined choices. For him also there is a hierarchy of values, but this hierarchy is not absolute and is constantly changing as the needs of society change.

V

There are other hierarchical tendencies in the thought of Justice Frankfurter. He said at one time that "decisions of this Court do not have equal intrinsic authority." 32 Such authority apparently derives from the length of time the decision has stood in good stead. Decisions of long validity cannot be disregarded. Neither can those that have recently been handed down, but the latter do not have the encrustation of prestige or demonstrated workability that older decisions hold. Conjointly, in deciding which precedent should govern the disposition of a current case, choice is normally involved. With choice comes an infusion of considerations that influence personal judicial performance. For Frankfurter, the longevity of a precedent is one of these considerations, its originator another. If either Justice Holmes or Justice Brandeis can be cited, he seems to feel that extra weight is given the correctness of his choice. Holmes and Brandeis are the outstanding examples of judicial authority, but there are others, Judge Learned Hand among them. Quite frankly, he has listed those past members on the Supreme Court whom he thinks rank high in the hierarchy and thus deserve careful attention to their opinions. "It would indeed be a surprising judgment that would exclude Marshall, William Johnson, Story, Taney, Miller, Field, Bradley, White (despite his question-begging verbosities), Holmes, Hughes, Brandeis and Cardozo in the roster of distinction . . . I myself would add Curtis, Campbell, 33 Adamson v. California, 332 U.S. 46, 59 (1947).
"Preferred Freedoms"—A Negative View

Matthews and Moody." 33 Many times in his opinions one will find a list of the justices who have supported the position that he is backing. Joined to such a list or perhaps in place of it will be a long citation of cases supposedly leading up to the disposition that he favors.

In assessing the work of administrative agencies Justice Frankfurter initially showed somewhat of an hierarchical approach. Extreme politeness to the Interstate Commerce Commission was a noticeable trait, while the Federal Trade Commission, among other agencies, was subjected to more rigid scrutiny. This tendency has now somewhat abated and all areas of administrative action are held strictly to account. In a much more technical vein, he still follows the hierarchical course that he explained as a professor. In relation to judicial review of administration he wrote that the topic "must be studied not only horizontally, but vertically, e.g., 'judicial review' of Federal Trade Commission order, 'judicial review' of postal orders, 'judicial review' of warrants." 34 Judicial review is not an absolute concept. It is colored by the whole structure of the agency over which it is exercised. Therefore, while an agency-by-agency approach is basic, within each agency the treatment of a concept must be vertical.

These are but a few of the obvious hierarchical elements in Justice Frankfurter's philosophy. They are all predicated upon a continuing process of choice, which can be revamped when shown to be in error. They are not absolutized after the initial choice has been made. They do show preferences. They do not show automatic, unreflecting preferences that are good for any time or place. Realizing that if the law is not to become static, contemplative choice must be allowed the judiciary, Justice Frankfurter also believes that such choice should be allowed the legislature. 35 While the priority of civil rights may be the


treasured personal belief of all the justices, except on tran-
scendental, abstract grounds, that priority cannot be proved. No
less powerful rational arguments can be put forth to back the
priority of economic interests. If the legislature decides to give
heed to the latter rather than the former, courts should not over-
rule this decision—unless, of course, some explicit constitutional
provision is violated. If personal rights are to be given priority,
it is for the legislature to indicate which ones. Judicial elevation of
the rights of the First Amendment through “preferred freedoms”
runs counter then not only to the proper limited role of the
judiciary but also to the organic nature of the Constitution.

Justice Frankfurter recently wrote that “as good a test as I know
of the significance of an opinion is to contemplate the conse­
quences of its opposite.”36 This is an especially good insight in
comparing his position on “preferred freedoms” with that of
Justice Black. In their assertion of judicial power, the Black-
Douglas group appears logically indistinguishable from the pre-
New Deal Court. They do not strike down directly as many
federal statutes as did their predecessors, but they do rather
freely exercise a constitutional veto over state enactments. Up­
holding mild to severe economic regulation, they are staunchly
opposed to any regulation, federal or state, which they consider
to touch upon the sensitive area of personal liberty. To fashion
protection for civil rights they have been thrown into conflict
with the legislatures, and to justify this conflict they have taken
a doctrine and turned it into an absolute barrier. “Preferred
freedoms” and the corollary incorporation proposals are the out­
come. So fearful of having individual freedom limited, a fear
that is quite plausible within reasonable bounds, Justices Black
and Douglas often see freedom as being antithetical to order,
liberty, antithetical to authority. In their zeal to promote freedom
and liberty, they deny that governmental power as lodged in the
Constitution can ever be operative when a claim that they recog­
nize under the Bill of Rights, especially the First Amendment, is
made. They deny that governmental power may be subsequently
inserted to back the right that has been wronged in a clash of
rights, for, in their philosophy, no such clash can occur.

Put briefly, those who champion “preferred freedoms” appear to be more interested in the microcosm than in the macrocosm, seeming to forget that the former cannot exist without the latter. Their zeal for the individual is understandable and praiseworthy. When, however, it is taken to extremes and made the absolute basis for all existence, the zeal is misplaced. Justice Frankfurter, on the other hand, is interested in the macrocosm of representative government. His insistence on the competency of the legislature and his rejection of absolute solutions to any problems, or even absolute values for their solution, are necessary adjuncts to his faith in a politically mature and responsible people.