sented as evidence in the trial court to become a part of the fact-finding process. Attacking counsel may then attempt to impeach or contradict the data. While in due process cases the truth of the data on which a legislature might have relied need not be proved, the validity of such data may be quite relevant in commerce cases in weighing the burden on or interference with commerce over and against the need for the state's social control.[84] The Court's reluctance to invalidate state legislation unless civil liberties are in issue may, as the author suggests, cause counsel to move constitutional litigation from the federal courts to the state courts by seeking relief under the State rather than the Federal Constitution. There is no legal axiom that state due process must have the same limitations over state legislative power as federal due process.[85] When the Supreme Court speaks, the legislative power of forty-eight states is in issue. Local problems may justifiably play a greater role in application of state due process.

Understanding requires that the Supreme Court be considered in its proper perspective in the totality of government. The Constitution must be understood for what it is, an organic and protective document, furnishing ideals as well as strength to all governmental institutions. The problems faced by the Court are always those of government, whether of interpretation and application of government in action or of definition of spheres of power under the Constitution. Understanding also demands recognition that the Court must assign regulation and control of economic activity, liberty of contract and ownership of property, the area of freedom of speech and religion, power to tax, and each of the others, its proper place and perspective among the different processes of government. Many values, with many degrees of competition and accommodation, play a large role. The true function of the Court, then, we must admit "includes philosophy as well as law and statesmanship."[86]

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THE CONSTITUTIONAL WORLD OF MR. JUSTICE FRANKFURTER, by Samuel J. Konefsky. New York: The Macmillan Company, 1949. Pp. xviii, 325.

There is ground for gratitude for any book which permits any improvement in the public knowledge of the Justice, whose slight figure is now one of the most picturesque and one of the most battered in the public eye on the current judicial scene. For years, the Justice has been an almost constant

84. See, *e.g.*, South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 177, 192-6 (1938).

85. *Cf.* Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 92 (1950).

86. CURTIS, LIONS UNDER THE THRONE, 333 (1947).

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victim both of a bad press and of the inability of the public accurately to comprehend the complexities of judicial business.

Battered he has been, as have been few men in our time. Roosevelt, Black, Norris are names which in this respect at least are comparable. A conception has been fostered of Frankfurter as an alien bogey man, a conception which is a by-product of the unrelenting anti-Semitism, heightened by his odd name and foreign birth, which has pursued him over the years.[1] These factors, plus the hostility engendered against him by the press before and since his appointment as a reputed New Deal adviser, have made him a constant object of attack in many quarters. Those attacks focused upon what was in fact one of the greatest public services of the Justice's career, his encouraging able young lawyers to forego Wall Street law offices for a period of government service.

There have likewise been misunderstandings stemming from friendlier sources. The notion is circulated that Frankfurter, in administering the judicial process, is somehow more impersonal than other Justices, that he is somehow peculiarly "judicial." This conception, stated moderately and with as much persuasiveness as it can have by Dean Jaffe,[2] has become grotesquely exaggerated in journalistic hands. Schlesinger turned Frankfurter into an apostle of something called "judicial self-restraint," who kept all personal policy judgments out of his decisions so that policy might be left to other branches of the government.[3] In less competent hands than Schlesinger's, the description of Frankfurter's judicial process comes almost to the point of suggesting that his decisions are so impersonal that they are delivered to him by some kind of judicial stork.[4]

Frankfurter himself is in part, though only in part, responsible for this misunderstanding. Judges are commonly fond of crying that somehow they alone reflect the truly ascertained will of the legislature, and that those who disagree with them distort it.[5] Frankfurter is somewhat fonder than most judges of making that claim, and frequently rhetorically words his opinions as

1. For material illustrative of the extent of these attacks at the time of Frankfurter's appointment, see Frank, *The Appointment of Supreme Court Justices,* [1941] Wis. L. Rev. 506-509. For more recent illustrations, see the daily papers.

2. Jaffe, *The Judicial Universe of Justice Frankfurter,* 62 Harv. L. Rev. 357 (1949). The Jaffe essay combines affection for its subject and objectivity in rare degree.

3. Schlesinger, *The Supreme Court: 1947,* 35 Fortune 73 (1947).

4. See, e.g., Levy, review of the Konefsky book, N. Y. Times, Nov. 27, 1949, § 7, p. 39, col. 2. (This is not to say that there has been any lack of intelligent professional comment on the subject of Frankfurter. See Jaffee, *supra* note 2. Other valuable analyses are Rodell, *Felix Frankfurter, Conservative,* Oct., 1941, Harpers, and Pritchett, The Roosevelt Court (1948).

5. Even Justice Murphy, remarkably level-headed about statutes as he was, was not completely immune to the use of this rhetoric. Frank, *Mr. Justice Murphy,* 59 Yale L. J. 1, 23 (1949).

though they were peculiarly pure conduits of the legislative will.[6] But Frankfurter, like any other sophisticated student of the subject, knows that a Justice of the Court of last resort is necessarily a substantial partner in the making of public policy. He cheerfully assumes that responsibility.

As a maker of public policy, Frankfurter is today distinctly "precedent minded." This is by no means to say that there are not in Frankfurter's jurisprudence occasions of reconsideration of legal fundamentals.[7] But in dealing with the flavor of the whole, there is a strong preference to follow a precedent solely because it is a precedent,[8] or to stop where Holmes and Brandeis stopped in matters of substance without serious contemplation of whether the times may have progressed to needs they did not know.[9] If, as was suggested above, Frankfurter's views are really brought by a judicial stork, then Frankfurter keeps a distinctly conservative stork. Whether this slant to his judicial policy making is good or bad will obviously be decided by a reader in terms of his own predispositions, and will not be argued here. The point is that the existence of that policy slant is a fact, an observable phenomenon of judicial life.

Liberals are inclined to be extremely severe in their judgment of Frankfurter, particularly in respect to civil liberties cases, despite the fact that he is somewhat closer to the "liberal point of view" in these matters than several of his colleagues. This annoyance is in part the product of his being colorful, but it is in larger part because that judicial conduct was unexpected. The faithful reserve the hottest fires for heretics, a reservation particularly unwarranted in this case; for Frankfurter never was, in the contemporary liberal's sense, a liberal. Shrewd observers knew when he was appointed that he was far from being a militant New Dealer.[10] He grows more conservative on the Bench, not only relative to the shifting issues of the times, but also relative to stands he himself once took.[11]

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6. See, e.g., an observation that the Court, in interpreting a provision of the Internal Revenue Code differently from Frankfurter, was "disregarding the limits of the judicial function which we will profess to serve" (emphasis added); and that it "flouted" Congress. Spiegel's Estate v. C. I. R., 335 U. S. 701 (1949). Professor Bittker has shown very clearly that this word choice was hyperbole. Bittker, *The Church and Spiegel Cases,* 58 YALE L. J. 825, 851 (1949).

7. An extreme instance of this is New York v. United States, 326 U. S. 572 (1946).

8. See, e.g., Adamson v. California, 332 U. S. 46, 68 (1947).

9. This sometimes makes it difficult for the Justice to diverge from his two great preceptors even when they were pretty clearly wrong. See Jamison v. Texas, 318 U. S. 413, 417 (1943).

10. See, e. g., the very penetrating New York Times editorial of Jan. 6, 1939, quoted at KONEFSKY, xii; and see observations by Rodell, *supra* note 4.

11. On Frankfurter's basic shifts of attitude on rate regulation and right to counsel, see KONEFSKY, pp. 296 and 213, respectively; on the "presumption of unconstitutionality" in the civil rights area, see Kovacs v. Cooper, 336 U. S. 77 (1949); on the two topics of state taxing power and federal review of state administrative agencies see Jaffe, *supra*

Should there be a Frankfurter biographer, that biographer, when he is done cataloging a few foibles which are at worse vexing, will find much to admire. He can record the courage of the Justice, as in his labors for Sacco and Vanzetti thirty years ago or his participation in the recent Hiss trial. But above all else, the Justice is both learned and able, and his best work is extremely good. His superb dissent in the *Harris* search and seizure case will serve as a colorful example of that best work, while the *Keifer* case demonstrates his able handling of highly technical legal materials. His opinion in *Wolf* v. *Colorado,* practically denuding the constitutional prohibition of unreasonable searches and seizures by the states of serious meaning, seems to this commentator as able as it is wrong.[12]

As a stylist, quite apart from substance, Frankfurter's mode of expression would seem a little elaborate to most writers on law, who probably would not emulate him if they could, and he has an affection for English and Empire source materials which seems to some an affectation.[13] His is a style far from simple, and as with all Justices, the meaning of particular passages is occasionally opaque.[14] But jokes about the Justice's alleged unintelligibility are completely unwarranted. Far removed from the styles of either of his great predecessors, Holmes and Cardozo, Frankfurter's writing has two similarities in brevity and a rich vocabulary. As judicial writing goes, his stands high.

Mr. Konefsky's volume, *The Constitutional World of Mr. Justice Frankfurter,* consists almost entirely of excerpts from Frankfurter's opinions. The introduction is a few pages, largely of quotes well chosen to show the variety of attitudes about the Justice. The selection of his opinions gives a fair sample, and the editorial notes are excellent. In short, Mr. Konefsky has

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note 2, at 395, 380. This note is not meant to imply criticism of changes of mind, but to note its fact—and its trend.

12. The cases referred to in this paragraph are Keifer & Keifer v. R.F.C., 306 U. S. 381 (1939); Harris v. United States, 331 U. S. 145, 155 (1947), KONEFSKY, 219; Wolf v. Colorado, 338 U. S. 25 (1949).

13. For an extreme example both of discursiveness and of interest in English materials, see Maryland v. Balto. Radio Show, Inc., No. 300 O.T. 1949, and individual opinion attached to the denial of a petition for certiorari, which first explains that no conclusions of any kind are to be drawn from the denial of certiorari, and then appends a 16-page summary of the English cases that might have been relevant if the petition had been granted.

14. There is frequently a contrived quality to the Frankfurter prose which in rare instances achieves more art than meaning. See, e.g., his reduction of the contract clause decisions to "this governing constitutional principle; when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State 'to safeguard the vital interests of its people' . . . is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment." East N. Y. Savings Bank v. Hahn, 326 U. S. 230, 232 (1945); KONEFSKY, pp. 27-28. Students running on to this passage sometimes have difficulty telling just what the "governing principle" is.

succeeded in the job he has set for himself and has given a fair impression of the manner in which the Justice has executed his public duties.

JOHN P. FRANK*

THE CASE OF GENERAL YAMASHITA. By A. Frank Reel. Chicago: The University of Chicago Press, 1949. Pp. 324.

Hurriedly picked from various army commands in the Philippines at the end of the war, six American lawyers were assigned the task of defending the Japanese general, Yamashita, who, as commander of Japanese forces in the Philippines from October 9, 1944, to the surrender on September 3, 1945, was charged by the American Government with responsibility for the war crimes committed by his troops. At no time in a position to offer coordinated resistance to the American Army, which began its relentless return to the Islands with the landings on Leyte on October 18, 1944, the Japanese forces had succumbed to an orgy of murder, destruction, pillage, and rape. Unlike the atrocities at the time of the surrender on Bataan, which were committed against American prisoners of war, these later acts were committed for the most part against Philippine civilians. The only extenuating circumstance was the problem which guerrilla warfare posed for the Japanese—a factor, however, which was not involved in Manila where the wanton behavior of the Japanese forces was particularly shocking.

Yamashita was served with the charge on September 25, 1945, and was arraigned on October 8. On October 29, the trial began and on December 7, the anniversary of Pearl Harbor, the sentence of death was pronounced. The author of this present volume, viewing the trial from the standpoint of the defense counsel of which he was a member, makes the reader cognizant of the impatient haste with which the Military Commission conducted the trial and also of the pressure which the Commission itself was under from General MacArthur's headquarters. From the point of view of the military authorities speed seemed to accentuate the justice of a result which they anticipated with certainty; but from the point of view of the defense counsel, all but one of whom were civilian lawyers in uniform, it seemed to be a gross violation of even the minimum requirements of due process—a fault which for them was compounded by their belief that the charge itself failed to define a war crime and that Yamashita was in fact innocent.

The prodigious labors of defense counsel, which the author relates with a nice appreciation of the human drama involved, did not arise out of mere professional zeal. Nor did they arise out of fondness for Yamashita, although the author was obviously attracted by his personality and persuaded

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