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Jerome A. Barron

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BOOK REVIEW

FELIX FRANKFURTER: SCHOLAR ON THE BENCH. Helen Shirley Thomas. Baltimore. The Johns Hopkins Press, 1960. Pp. xiv, 381. \$6.50.

Dr. Helen Shirley Thomas of the Political Science Department of Goucher College has written a study of Mr. Justice Frankfurter's work on the Supreme Court from the time of his appointment in 1939 to the present. Essentially, Dr. Thomas' book is an essay on Mr. Justice Frankfurter's judicial philosophy. All the main ingredients of the Frankfurter judicial ethic—the enormous respect for the legislative function, the insistence that the particular requirements of a federal system be honored, the keen sense of jurisdiction, the grand conception of the kind of case the Supreme Court should consider—are itemized and discussed.

Traditional attitudes toward Justice Frankfurter's judicial philosophy will not be upset by anything in Dr. Thomas' book. But the book is valuable because it emphasizes the intense consistency and coherence with which Mr. Justice Frankfurter has maintained a core of precepts on American constitutional law. In Dr. Thomas' view, everything the Justice has written and said is of a piece. Dr. Thomas suggests that the significant concepts in Mr. Justice Frankfurter's judicial philosophy were developed long before he went to the Supreme Court. She reveals that Justice Frankfurter's tireless lecture on the folly of confusing the constitutionality of legislation with its wisdom received its first utterance when he was a professor on the Harvard Law School faculty.

Dr. Thomas illustrates Frankfurter's consistency by comparing two passages from Frankfurter's writings which are separated by a time interval of a quarter of a century. In an article in *The New Republic* entitled "Can the Supreme Court Guarantee Toleration?" written in 1925, Professor Frankfurter said:

It must never be forgotten that our constant preoccupation with the constitutionality of legislation rather than its wisdom tends to preoccupation of the American mind with a false value. Even the most rampant worshipper of judicial supremacy admits that wisdom and justice are not the basis of constitutionality.¹

In *Dennis v. United States*,² Justice Frankfurter wrote:

Preoccupation by our people with constitutionality, instead of with the wisdom, of legislative or executive action is preoccupation with a false value. . . . Focusing attention on constitutionality tends to make constitutionality synonymous with wisdom.³

The quotations cited above are testimony to the longevity of Justice Frankfurter's enduring polemic that the Supreme Court's approach to questions of the validity of legislation must be founded on duty rather than on choice. Dr. Thomas

¹ Quoted at p. 276.

² 341 U.S. 494, 555-56 (1951).

³ Quoted at p. 276.

is very much a partisan to this polemic. She underscores Justice Frankfurter's disapproval of a concept of "preferred freedoms." She does not deal very tenderly with those justices who assert the "firstness of the First Amendment." In her view, Justices Black and Douglas are "judicial activists" guilty of the sin of grafting private judgment into the context of the judicial process:

In their assertion of judicial power, the Black-Douglas group appears logically undistinguishable from the pre-New Deal group. 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 . . . 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.⁴

Dr. Thomas charges that Justices Black and Douglas have created a constitutional doctrine to accord with their predilection for personal liberty. She points to decisions of Justice Frankfurter which show him free from such "activism." In *Minersville School District v. Gobitis*,⁵ the Supreme Court was presented with the issue of whether the refusal of two children, adherents of the Jehovah's Witnesses, to abide by the school board's command to salute the flag was protected by the Constitution. The essence of Justice Frankfurter's opinion in *Gobitis* was that he could not create a constitutional inhibition where he found none. But of course, the Gobitis children were not asking for that. As they saw their rights, the Framers had intended to prevent the state from requiring a man to act against his conscience. In *Gobitis* Justice Stone dissented. He was not "persuaded that we should refrain from passing upon the legislative judgment 'as long as the remedial channels of the democratic process remain open and unrestricted.' This seems to me no less than the surrender of the constitutional protection of the liberty of small minorities to the popular will."⁶

Throughout her book Dr. Thomas reacts to problems such as these as if the justices who dissent from her mentor's views are operating on the basis of private judgment alone. This is to function within the framework of epithet rather than analysis. These opinions of the Supreme Court cannot be studied with a view to celebrating those justices who find their constitutional conclusions in conflict with private judgment and denigrating those who apparently do not. The issue is the latitude which is to be given to constitutional limitations and the readiness with which the Court will wield the weapon given it to deal with infringement of those limitations: judicial review.

For Mr. Justice Frankfurter, situations such as *Gobitis* present the Court with a "grave responsibility."⁷ But for Justice Frankfurter the Court can permit itself to reach conclusions of unconstitutional action only with surpassing abstinence.

⁴ Quoted at p. 240.

⁵ 310 U.S. 586 (1940).

⁶ Id. at 605-606.

⁷ Id. at 591.

In *Gobitis* Justice Frankfurter tells us that for his part the requirement of the school board is unsound.⁸ But though it offend his private sense of judgment, he cannot find a constitutional ground for rendering the school board's requirement invalid. Perhaps it is time to question a concept of due process which necessarily finds its content more primitive, less sensitive, and far narrower in scope than the conscience of a wise and learned judge.

Surely no Justice now on the Supreme Court has devoted so much of his energies to surveying the metes and bounds of judicial review. Central to the course of this inquiry is the manner by which it is to be conducted. What is required is a "self-searching disinterestedness almost beyond the lot of men." By what means is this disinterestedness to be achieved? Dr. Thomas writes:

Justice Frankfurter's philosophy (has) touches of the mystical, but it is a communal mysticism that tries to articulate social feelings and perceptions. Even though the articulation must be done by an individual, the attempt is made to honor scientific terms, to have him act as a conductor rather than as a transformer.⁹

One wonders whether such an explanation can aid in the meaningful exploration of constitutional problems. Communal mysticism is rather a gossamer fabric with which to weave a doctrine of constitutional interpretation.¹⁰

Dr. Thomas does not praise Justice Frankfurter's judicial philosophy only for the deference shown to past decision and legislative enactment. She asserts that his concept of due process provides for a vital resilience in constitutional law which makes it plastic and capable of growth. Justices Black and Douglas, particularly Mr. Justice Black, are reproached because their conceptions of the meaning of due process are said to be frozen and inflexible.¹¹ Under Justice Frank-

⁸ Mr. Justice Frankfurter wrote at p. 598:

Even were we convinced of the folly of such a measure, such belief would be no proof of its unconstitutionality. For ourselves, we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most crochety beliefs . . . It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy . . . So to hold would in effect make us the school board for the country.

In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the Supreme Court reversed itself and held that the Jehovah's Witnesses could not be required to participate in patriotic exercises against the tenets of their faith because of the guarantee of freedom of religion in the First Amendment and the due process clause of the Fourteenth. Justice Frankfurter dissented and penned the famous lines indicating the extent to which devotion to a pristine concept of constitutional construction led him into conflict with deeply cherished personal beliefs. Justice Frankfurter wrote at p. 662:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution.

⁹ Quoted at p. 353.

¹⁰ At least one federal judge, the late Jerome Frank, questioned whether judicial opinions were not in reality merely a rationalization for a predisposition. Judge Frank liked to tell the story about Chief Justice Marshall: "Judgment for the plaintiff; Mr. Justice Story will furnish the authorities." See Frank, "What Courts Do In Fact," 26 Ill. L. Rev. 645 at 654 (1932).

¹¹ P. 183.

furter's theory, however, due process is sometimes more and sometimes less than the Bill of Rights. The touchstone of decision in a particular case is properly whether the "notions of justice of English-speaking peoples" are offended.¹²

In fairness to Mr. Justice Black, it should be pointed out that he has nowhere written that the confines of due process can not be extended beyond the Bill of Rights. The Black theory of due process is by no means miserly with our liberties. Justice Black merely makes a modest assertion which he believes to be historically justified. This assertion is that whatever due process may come to mean, it contains some fundamental constants: the liberties protected in the Bill of Rights. In any summary of the content of due process, these constants are the irreducible minimum. It is a great injustice to assume that because this much is insisted upon, further growth is denied. The gravamen of Justice Black's whole concept is that while new centuries may create new liberties for the American people, there are certain liberties against which infringement is denied and for which, no matter what the social stress of the moment, the Constitution is an unyielding protector.

In *Dennis v. United States*, *supra*, Justice Frankfurter in his concurring opinion resisted the idea that the Bill of Rights was an absolute prohibition to governmental action. He wrote at pp. 524-525:

Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules. The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidean problem to be solved.

Justice Black in his dissent made this rejoinder at p. 580:

So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.'

And again at p. 581, he said:

Public opinion being what it now is, few will protest the conviction of these Communist petitioners. There is hope, however, that in calmer times, when present pressures, passions, and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.

The lines of this constitutional battle are by now well-drawn. Dr. Thomas, for her part, finds in the Frankfurter position the balance, flexibility, and restraint which she thinks are the necessary accompaniments of judicial review. By way of conclusion, it is worth suggesting that partisans of either of these theories of due process perhaps exaggerate their differences. As so often happens when the contrary winds of doctrine are stilled by crisis, it is found that all that was involved

¹² *Malinski v. New York*, 324 U.S. 401, 416-417 (1945).

were distinctions which in moments of stress yielded no differences. In *Korematsu v. United States*,¹³ the constitutionality of a military directive confining West Coast Japanese-Americans to prison camps was in issue. The Court said that the directive was authorized by the war power. Justice Black wrote the opinion for the Court. Justice Frankfurter concurred in a separate opinion. Justice Black wrote at p. 224:

There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Justice Frankfurter wrote at p. 225:

To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.

Adherents of both the Black and Frankfurter theories of due process might well ponder the failure of either view to reach a conclusion of due process infringement in *Korematsu*.¹⁴

Dr. Thomas has written an interesting book on Justice Frankfurter. The reader will be forewarned that what he will find in these pages is a labor of love, well documented and well written. It must be left to another scholar, however, to analyze Justice Frankfurter's judicial philosophy with a less enchanted eye, to subject its content to rigorous criticism, and to assay its effectiveness in implementing basic constitutional demands.

JEROME A. BARRON*

¹³ 323 U.S. 214 (1944).

¹⁴ Justices Roberts, Murphy, and Jackson dissented in *Korematsu*. Justice Roberts based his dissent on the view that the constitutional rights of the petitioner had been violated. He believed that the petitioner had been confined because of his ancestry alone with no inquiry made as to his loyalty and no attempt made at fair procedure in the consideration of his confinement.

*Member of the Massachusetts and District of Columbia Bars. Lecturer in Law, The George Washington University Law School.

