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2024

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### Recommended Citation

Bernstein, R. B. (2024) "The Law Professor as Public Intellectual: Felix Frankfurter and the Public and Its Government," *Touro Law Review*: Vol. 39: No. 3, Article 6.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol39/iss3/6>

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**THE LAW PROFESSOR AS PUBLIC INTELLECTUAL: FELIX  
FRANKFURTER AND *THE PUBLIC AND ITS GOVERNMENT***

*R.B. Bernstein\**

**ABSTRACT**

Professor R.B. Bernstein was a legal historian with a J.D. from Harvard Law School who taught at the Colin Powell School for Civic and Global Leadership at City College of New York and New York Law School. He presented the paper below on Professor Felix Frankfurter's *The Public and Its Government*, published in 1930. A little more than two months after the conference, sadly, Professor Bernstein passed. His brother Steven Bernstein provided the *Touro Law Review* with the draft of the paper that Professor Bernstein was preparing to submit for publication. We have added footnotes and made only minor revisions. It is our honor and privilege to publish Professor Bernstein's paper.

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\* R.B. Bernstein was a lecturer in political science at the Colin Powell School for Civil and Global Leadership at City College of New York, where he taught from 2011 to 2023. He also was a distinguished adjunct professor of law at New York Law School, where he taught from 1991 to 2014.

## THE LAW PROFESSOR AS PUBLIC INTELLECTUAL

Good morning.

I would add my thanks to Brad Snyder. I have been reading his biography of Frankfurter now with extraordinary enthusiasm and attention. I've just seen FDR die, I still have about 250 pages to go, and I'm looking forward to them. And all of you should look forward to reading it too. It's one of the best judicial biographies I have ever read.

But Felix Frankfurter was more than a judge.

And that's what I'm going to be talking about today. Most Americans today remember Felix Frankfurter as a member of the Supreme Court. As we all know, FDR appointed him to the Court in 1939, where he served until he retired in 1962, having suffered a stroke. He died in 1965 three years later.

But it's only with the publication last year of Brad's extraordinary biography that we get to know the extraordinary congress of people, of roles, of professional and personal identities that make up the person we know as Felix Frankfurter.

What I'd like to talk about is Frankfurter as, as I say in the title of my talk, the law professor as public intellectual. And what I'm using to base that on is FF's 1930 book *The Public and Its Government*.

That's a key aspect of Frankfurter's career. Even before he was named to the Court he had spent about twenty-four years as a professor at the Harvard Law School. And he was not a shy, cloistered academic intellectual at Harvard. He was, as John Barrett has just told us, a collector of people.<sup>1</sup> A one-man, nationwide-operating, personal placement bureau. Frankfurter was an extraordinary legal scholar and constitutional scholar. He was a champion of civil liberties. He represented poor immigrants in their battles against the federal government that was seeking to deport them. He was one of the key people involved in the creation of the ACLU. He did other things too. He wrote books. He wrote *The Case of Sacco and Vanzetti*.<sup>2</sup> He wrote *The Commerce Clause under Marshall, Taney, and Waite*.<sup>3</sup> He wrote

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<sup>1</sup> See John Q. Barrett, *Felix Frankfurter, Collector of People*, 39 TOURO L. REV. 777 (2024).

<sup>2</sup> FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN* (Little, Brown, and Co. ed., 1927).

<sup>3</sup> FELIX FRANKFURTER, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE* (Chapel Hill, The Univ. of N.C. Press ed., 1937).

*The Business of the Supreme Court* with his student James Landis.<sup>4</sup> He wrote *The Labor Injunction* with his student Nathan Greene.<sup>5</sup> And then he wrote *The Public and Its Government*, all by himself.<sup>6</sup> Although he may have had some help: there's a guy he mentions in the acknowledgements section for pulling the book together.<sup>7</sup>

But this book is a remarkable book. When Professor Citron got in touch with me and told me I was invited to be part of this conference, I thought, why me? I've never written about a 20th-century person. I write about the Founding guys! George, Jim, Alex, John—the guys! I'm one of the people who says they're not demigods—they do guy things. They yell at each other, they get petulant, they sulk, they have ambitions, they have thwarted ambitions. They're guys.

I realize though, as I was reading Brad's book, that Felix Frankfurter reminds me of John Adams. Like Adams, Frankfurter was not tall (like me too). Like Adams, Frankfurter was a scholar. Like Adams, Frankfurter was hopelessly addicted to books. Like Adams, Frankfurter was voluble: voluble in print and voluble in person.

So, when we think about FF, we should think about him before 1939. And Brad's book does an extraordinarily wonderful job at bringing alive the Frankfurter of the New York City public school system, of City College of New York, where I am now privileged to teach, of Frankfurter the lost student, of Frankfurter the public interest lawyer, of Frankfurter the law professor. And of Frankfurter the public intellectual.

And he was a public intellectual. He held forth on issues that he thought were relevant to the United States, to the American people, to American law, and indeed to Anglo-American law. As I was writing my paper, I thought back to a paper I read a long time ago. The late great English scholar Isaiah Berlin wrote an essay in one of his books called *Felix Frankfurter at Oxford*.<sup>8</sup> He chronicled what Frankfurter

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<sup>4</sup> FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* (The MacMillan Co. ed., 1928).

<sup>5</sup> FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (The MacMillan Co. ed., 1930).

<sup>6</sup> FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* (1930) [hereinafter *THE PUBLIC AND ITS GOVERNMENT*].

<sup>7</sup> *Id.* at Acknowledgments (stating that “Dr. James Forrester Davison, now of the faculty of George Washington University Law School, helped in the preparation of the lectures”).

<sup>8</sup> See Isaiah Berlin, *Felix Frankfurter at Oxford*, in *FELIX FRANKFURTER: A TRIBUTE* (Wallace Mendelson ed., 1964).

was like visiting Oxford University. One of the things Berlin writes about is one of the things John Barrett just talked about, and one of the things Brad Snyder writes about, and that is what it must have been like to be sitting at a table across from Felix Frankfurter and to have him suddenly reach out and grab you by the elbow and pull you in and interact with you person-to-person. With blazing eyes, with extraordinary powers of speech, with energy of discussion, Felix Frankfurter was a one-man university faculty.

You get that when you read that book, *The Public and Its Government*. Now, John Barrett did mention that although he is a deep admirer of Brad's book, as I am, like John I had some minor quibbles. And one minor quibble is that we do not get a sense of Frankfurter as author. We don't get a sense of Frankfurter in his books, the ones I have already mentioned, even though they are really important parts of his life and legacy.

And so what I am going to do today is talk about *The Public and Its Government*, which is in some ways the most intellectually ambitious of FF's books because it is a book about democracy. Not about a specific clause of the Constitution. Not a book about legal devices or technology, like *The Labor Injunction* book, or *The Business of the Supreme Court*.

It's about democracy. And this compact, wide-ranging book offers us a valuable chance to assess Frankfurter's work as a public intellectual, shedding light on the ideas and principles that guided his long life of engaged scholarship, that he ultimately brought to the Court.

So, when we think about Felix Frankfurter as a Justice, we also must think about him as a Justice who was drawing on his life, and his ideas, as a public intellectual.

When Frankfurter lectured on citizenship at Yale University,<sup>9</sup> he was the best-known law professor in the United States in May 1930. He had won fame, and he had provoked controversy, by championing civil liberties; by representing poor immigrant defendants against government prosecutions;<sup>10</sup> and by helping to organize the American Civil Liberties Union.<sup>11</sup> He had been the target of hostile criticism from

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<sup>9</sup> These lectures would go on to be published as *THE PUBLIC AND ITS GOVERNMENT*, *supra* note 6.

<sup>10</sup> BRAD SNYDER, *DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT* 159 (2022).

<sup>11</sup> *Id.* at 123, 124.

leaders of the organized bar and of higher education such as William Howard Taft,<sup>12</sup> John Henry Wigmore,<sup>13</sup> and A. Lawrence Lowell.<sup>14</sup> And he never was daunted by such hostility.

Felix Frankfurter was an extraordinarily courageous public intellectual. He was an extraordinarily courageous advocate of his views. He didn't give a damn about what people thought of him, or about whether other people would be angry at him, resentful or hostile to him, or indeed scheming against him.

Beginning his lectures, Frankfurter acknowledged key predecessors in that lectureship—James Bryce, William Howard Taft, and Charles Evans Hughes.<sup>15</sup> At the same time, he voiced his determination to make his own mark by bringing together abstract principle and the world of fact: “I invite consideration of the actual tasks of government, the demands citizens make upon government, the instruments by which these demands are executed, and the interactions between governors and governed.”<sup>16</sup>

Frankfurter broke his subject into four parts: (1) “The Demands of Modern Society upon Government”; (2) “Does Law Obstruct Government?”; (3) “Public Services and the Public”; and (4) “Expert Administration and Democracy.”<sup>17</sup> Any of these topics would have been enough for a big book. The fact that Frankfurter tackled all four of these subjects in a book only about 169 pages long shows his intellectual ambition and his power for distilling what he had to say.

In presenting and exploring these subjects, Frankfurter took great pains in all four lectures to use an empirical approach. He quoted facts and figures often.<sup>18</sup> Just as important, he probed beneath the surface of those facts and figures. He explained how and why those facts and figures should matter, spelling out how and why hard facts were

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<sup>12</sup> *Id.* at 132 (“‘I never liked Frankfurter,’ the chief justice wrote Elihu Root, Sr. in 1922, ‘and have continued to dislike him more the more I have known him.’”).

<sup>13</sup> *Id.* at 170 (“Wigmore had turned into a superpatriot during his wartime service in the Judge Advocate General’s Corps and opposed anyone who protected the civil liberties of antiwar radicals.”).

<sup>14</sup> *See generally id.* Chapter 12 (describing the feud between Dean Lowell and Felix Frankfurter during Frankfurter’s time at Harvard Law in the early 1920s).

<sup>15</sup> THE PUBLIC AND ITS GOVERNMENT, *supra* note 6, at 1.

<sup>16</sup> *Id.* at 2.

<sup>17</sup> *See id.* at 2-3.

<sup>18</sup> *See, e.g., id.* at 10 (discussing various sets of statistics, including population data, urban development data, and patent data that illustrated the “warp and woof of our dynamic industrial system”).

and must be relevant to his arguments.<sup>19</sup> As he said, “we must be fully alive to what might be called the raw material of politics—the nature and extent of the demands made upon the machinery of government, and the environment in which it moves.”<sup>20</sup>

The overarching theme of *The Public and Its Government* is complexity, and each lecture addressed complexity in a different way, with each complementing the other three. First was the complexity of the relationships among society, economics, and government;<sup>21</sup> second, the complexity of the relationship between law and government;<sup>22</sup> third, the complexity of the interactions between providing public services and the governmental task of regulating those services and the utilities providing them;<sup>23</sup> and fourth, the complexity of the interaction between democratic administration of public policy and using expertise and expert knowledge to guide a modern democracy’s administration of public policy.<sup>24</sup> In addressing this theme of complexity, Frankfurter showed how concepts and issues previously seen as antithetical actually were complementary; he also showed how these concepts could be made to interact constructively if approached and used with sensitivity and understanding.

In his first lecture, *The Demands of Modern Society Upon Government*, Frankfurter explored the bewildering intricacy of modern economics and society.<sup>25</sup> He sketched the differences between the social and economic world of the 1790s, in the first years of the American constitutional system, and he juxtaposed that world with the modern

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<sup>19</sup> *Id.* at 10 (“To the novelist and critic, moralist and educator, the influence on this urban and industrial concentration upon our whole culture furnishes themes for endless speculation. To the student of government, its effects upon the operations of government are unmistakable.”).

<sup>20</sup> *Id.* at 7.

<sup>21</sup> *Id.* at 34-35 (“The interplay between government and the complicated structure of industrial society demands as never before men of independence and disinterestedness in public life.”).

<sup>22</sup> *Id.* at 39 (“We cannot be too often reminded that constitutions are not literary compositions but ways of ordering society.”).

<sup>23</sup> *Id.* at 81 (“The legal conception of ‘public utility’ is merely the law’s acknowledgment of ‘irreducible and stubborn facts.’”).

<sup>24</sup> *Id.* at 133 (“I am the last person to undervalue the extent to which devotion, intelligence, and technical equipment are enlisted in government.”).

<sup>25</sup> THE PUBLIC AND ITS GOVERNMENT, *supra* note 6, at 7-8 (“These new material forces and devices are having their reflex upon finance, upon industrial organization, upon law and government, upon the manner of man’s thoughts in ways and to an extent that we have hardly begun to understand.”).

world circa 1930.<sup>26</sup> In this setting of the stage, he focused on the challenges posed by those social and economic intricacies to modern government, recognizing at the same time that those complexities were real but were not unsurmountable.<sup>27</sup>

In his second lecture, *Does Law Obstruct Government?*, Frankfurter rejected a conventional question about the relationship between modern government and the law—one that assumed an adversary relationship between law and government.<sup>28</sup> With that rejection, he disputed the seductive appeal of simple, clear “answers” that others had used to guide the application of law in solving problems.<sup>29</sup> Instead, invoking two of his heroes, President Abraham Lincoln and Justice Oliver Wendell Holmes, Jr., Frankfurter argued that the American constitutional and legal systems were not opposed to solutions to modern problems;<sup>30</sup> instead, they taught that American law and constitutional government were adequate to the demands of the modern reformer’s and regulator’s tasks.<sup>31</sup> In one of this book’s most challenging passages, Frankfurter declared, “In simple truth, the difficulties that government encounters from law do not inhere in the Constitution. They are due to the judges who interpret it.”<sup>32</sup> Frankfurter assured us that the Constitution “has ample resources for imaginative statesmanship, if judges have imagination for statesmanship. When seen through the eyes of a Mr. Justice Holmes, there emerges from the Constitution the conception of a nation adequate to its national and international duties,

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<sup>26</sup> *Id.* at 10 (“What government today is called upon to do will appear most vividly from its comparison with the business of government in the early days of the Union.”).

<sup>27</sup> *Id.* at 29 (“Practically the whole gamut of economic enterprise is under the state’s scrutiny by an intricate administrative system of licenses, certificates, permits, orders, awards, and what not.”).

<sup>28</sup> *See id.* at 51 (“[M]uch more significant than these expressions of episodic discontent is the absence of any widespread or sustained demand for a general revision of our Constitution.”).

<sup>29</sup> *See id.* at 62.

<sup>30</sup> *See, e.g., id.* at 76-77 (quoting Oliver Wendell Holmes’ explanation of the Constitution’s flexible, adaptable nature).

<sup>31</sup> THE PUBLIC AND ITS GOVERNMENT, *supra* note 6, at 78 (“By these means Congress has been able to move with freedom in modern fields of legislation, with their great complexity and shifting facts, calling for technical knowledge and skill in administration.”).

<sup>32</sup> *Id.* at 79.



consisting of federated states possessing ample power for the diverse uses of a civilized people.”<sup>33</sup>

In his third lecture, *Public Services and the Public*, Frankfurter tackled the thorny question of public utilities regulation.<sup>34</sup> In the process, he demonstrated that that governmental responsibility requires a mastery of the utilities to be regulated and a profound understanding of the means to regulate them with knowledge and effectiveness. This enterprise required Frankfurter to discern and address a modern regulatory problem’s technical and legal complexity. In this third lecture, Frankfurter undertook a case study in which he applied to one of his academic specialties, the study of public utilities regulation, the lessons that he formulated in his first and second lectures.

With his fourth lecture, *Expert Administration and Democracy*, Frankfurter concluded *The Public and Its Government*—returning to the general level of his opening discussion.<sup>35</sup> Here, also, he confronted a perennial problem in a new and creative way. The problem was that of expertise versus democracy: What mode of interaction should operate between democratic governance and the expertise needed to enable that government to carry out economic and social regulation, consistent with democratic values and expectations?

In answering this question, Frankfurter sought to make us recognize that simple answers were no longer relevant, satisfactory, or even possible: “We now realize that democracy is not remotely an automatic device for good government nor even for a peaceful society. We now know that it is dependent on knowledge and wisdom beyond all other forms of government. The grandeur of its aims is matched by the difficulties of their achievement. For democracy is the reign of reason on its most extensive scale. It seeks to prevail when the complexities of life make a demand upon knowledge and understanding never made before, and when the forces inimical to the play of reason have power and subtlety unknown in the past.”<sup>36</sup>

The power and subtlety of the problems confronting us in modern times required and still require that we draw on expert knowledge

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<sup>33</sup> *Id.* at 79-80.

<sup>34</sup> *See id.* at 81 (“No task more profoundly tests the capacity of our government, both in nation and state, than its share in securing for society those essential services which are furnished by public utilities.”).

<sup>35</sup> *See id.* at 123 (“Epitaphs for democracy are the fashion of the day. Both left and right acclaim its failure.”).

<sup>36</sup> THE PUBLIC AND ITS GOVERNMENT, *supra* note 6, at 127.

in the effort to devise solutions to them. At the same time, Frankfurter pointed out, the need to reconcile democracy with expertise leaves us uncertain about how to establish the interactions between democracy and expertise.<sup>37</sup> It is not a matter of choosing between them, nor is it a matter of choosing which to give priority. As Frankfurter taught, we need both democracy and expertise, for democracy without expert knowledge and the wisdom to guide its use is mere opining, whereas expert knowledge without the guidance of democracy turns knowledge into arrogance and arrogance into tyranny.<sup>38</sup> As Frankfurter warned, “the quiet, detached, laborious task of disentangling facts from fiction, of extracting reliable information from interested parties, of agreeing on what is proof and what surmise, must precede, if agitation is to feed on knowledge and reality, and be equipped to reach the mind rather than to exploit feeling.”<sup>39</sup>

Thus, the need that Frankfurter identified for a modern democracy in a highly complex world was the need for an informed democracy.<sup>40</sup> In an informed democracy, the great democratic public is an informed and informationally literate public; moreover, that public also can draw on a community of professionals expert in obtaining and in dealing with facts and complicated technical situations: “In a democracy, politics is a process of popular education—the task of adjusting the conflicting interests of diverse groups in the community, and bending the hostility and suspicion and ignorance engendered by group interests toward a comprehension of mutual understanding. For these ends, *expertise* is indispensable. But politicians must enlist popular support for the technical means by which alone social policies can be realized.”<sup>41</sup>

Frankfurter rejected the idea of a modern society in thrall to a scientifically and technically literate oligarchy: “the power which must more and more be lodged in administrative experts, like all power, is prone to abuse unless its exercise is properly circumscribed and seriously scrutinized. For,” as Frankfurter observed, “we have greatly

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<sup>37</sup> See *id.* at 129-30.

<sup>38</sup> See *id.* at 150-51 (“Indeed, honesty and public zeal without training and a sophisticated judgement may very readily become the unwitting tool of half-truths and misrepresentation.”).

<sup>39</sup> *Id.* at 153.

<sup>40</sup> See *id.* at 159-60.

<sup>41</sup> *Id.* at 161.

widened the field of administrative discretion and thus opened the door to arbitrariness.”<sup>42</sup>

The ultimate message of Frankfurter’s book is one about the nature of modern democracy, whether that of 1930 or that of 2023. Democracy is not a goal but a process, and that process is not easy but often difficult, even fearfully so—demanding and inexorable. Democracy requires us to be learned and to work for our learning and to put that learning to work.

In every line and paragraph and footnote and chapter of his book, Felix Frankfurter issued a call to a learned democratic public and to the professionals of knowledge and facts and information. He bade these communities to work together in steering the modern democracy forward, and he held that democratic voyage to be the purpose that modern democratic men—and women—should undertake, have no choice but to undertake.

In conclusion, *The Public and Its Government* is a fitting book to bear the name of Felix Frankfurter on its spine. Its reviewers hailed it as compact but rich, laden with wisdom.<sup>43</sup> For in this book of lectures, Frankfurter not only defined the meaning and the mission of modern democracy. He also gave us a sign that he was destined to become what Brad Snyder calls him and proves him to be in his magisterial biography—a democratic Justice.

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<sup>42</sup> *Id.* at 157-58.

<sup>43</sup> See, e.g., Charles P. Howland, Book Review, *The Public and Its Government by Felix Frankfurter*, 40 YALE L.J. 672 (1931) (commending *The Public and Its Government* as “an essay on a high level indicating how the lagging movement of American political life can be urged forward and brought measurably abreast and in reasonable control of the tremendous economic forces and technological achievements of the time”).