Frankfurter and Popular Constitutionalism

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This Article reframes the way we think about Justice Frankfurter — not as a Warren Court antihero, but as an opponent of judicial supremacy, forerunner of popular constitutionalism, and exemplar for scholars who criticize Shelby County v. Holder, NFIB v. Sebelius, *and other recent decisions as contemptuous of Congress and other elected branches. Frankfurter shared Jefferson's faith in the democratic political process and enlightened public opinion and distrusted courts as historically reactionary institutions that thwarted the popular will and social change. This is the first article to broaden the definition of popular constitutionalism beyond political and social movements and elected officials to include the Supreme Court Justices themselves. By arguing that Justices can be popular constitutionalists, this Article links judicial restraint with popular constitutionalism. Frankfurter's judicial restraint stemmed from his belief that the democratic political process was a more enduring, effective, and legitimate method of protecting civil liberties and producing constitutional change. His last opinion, his dissent in* Baker v. Carr, *warned about the evils of judicial supremacy.* Bush v. Gore *and*

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Citizens United *made his* Baker *dissent seem prophetic. This Article invites scholars to rethink how Frankfurter's jurisprudence fits into the ongoing debate about the role of the Court and into progressive constitutional theories including popular constitutionalism.*

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INTRODUCTION

On April 13, 1943, Justice Felix Frankfurter delivered an address at the Library of Congress on the 200th anniversary of the birth of Thomas Jefferson and on the same day that President Franklin D. Roosevelt dedicated the Jefferson Memorial. Frankfurter's speech, *The Permanence of Jefferson*, praised Jefferson's "democratic faith" and defended Jefferson as

> no simple-minded believer in the popular will. The popular will can steer a proper course only when sufficiently enlightened to know what is the proper course to steer. . . . Jefferson had faith but it was not founded on naiveté. . . . For he knew that freedom and democracy are unremitting endeavors, not achievements.[1]

After his speech, Frankfurter received laudatory letters from historians Charles Beard, Dumas Malone, and Charles Warren; theologian Reinhold Niebuhr; Roosevelt administration officials James F. Byrnes, Paul Freund, Robert Patterson, and Charles Wyzanski, Jr.; and old progressive friends.[2]

The Permanence of Jefferson captured the enduring ideas in Frankfurter's jurisprudence. Frankfurter, like his progressive peers, advocated Hamiltonian means but Jeffersonian ends. Neither a lifelong Democrat nor a Republican, he was a small "d" democrat. He believed that the democratic political process and enlightened public opinion advanced societal interests and protected individual liberties. By contrast, he distrusted courts as historically reactionary institutions that thwarted the popular will and social change. He shared Jefferson's democratic faith.

Less than two months after he delivered *The Permanence of Jefferson*, Frankfurter stayed true to his democratic faith with his dissent in *West Virginia Board of Education v. Barnette*.[3] His dissent argued that the

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[1] Felix Frankfurter, Associate Justice, U.S. Supreme Court, "The Permanence of Jefferson," Apr. 13, 1943, at 2, 7-8, *in* Felix Frankfurter Papers, Library of Congress [hereinafter FF-LC], Box 211, Folder "The Permanence of Jefferson 1927-1947," *and in* FELIX FRANKFURTER, OF LAW AND MEN: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1939–1956, at 228, 230, 235 (Philip Elman ed., 1956). Chief Justice William Rehnquist, a Frankfurter admirer, is one of the few scholars to cite Frankfurter's speech. *See* William H. Rehnquist, *Thomas Jefferson and His Contemporaries*, 9 J.L. & POL. 595, 595 (1993).

[2] Frankfurter, *supra* note 1, *in* FF-LC, Box 211, Folder "The Permanence of Jefferson 1927-1947."

[3] West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

people of West Virginia had the right to compel public school students, including Jehovah's Witnesses, to salute the flag.[4]

Conventional historical wisdom asserts that Justice Frankfurter was a failure who, after *Barnette*, became "'uncoupled from the locomotive of history' during the Second World War, and who thereafter left little in the way of an enduring jurisprudential legacy."[5] The Frankfurter-as-jurisprudential-failure narrative reflects the views of liberal Supreme Court clerks, historians, and law professors who came of age during the 1960s and who have celebrated the Warren Court's individual rights revolution.[6] Even Richard Posner, a former clerk to Justice William Brennan, declared that Frankfurter's judicial restraint is dead — and that the Warren Court killed it.[7]

History, however, is long. Progressive scholars have begun to rethink their triumphalist Warren Court narrative and to question judicial supremacy. If that is the case, they should also rethink the jurisprudential legacy of Felix Frankfurter. Frankfurter's *Baker v. Carr* dissent warned about the evils of judicial supremacy. *Bush v. Gore*[8] and

[4] *Id.* at 649 ("[R]esponsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.").

[5] Michael E. Parrish, *Felix Frankfurter, The Progressive Tradition, and the Warren Court*, *in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 54 (Mark Tushnet ed., 1993) (quoting Joseph P. Lash, *A Brahmin of the Law*, *in* FROM THE DIARIES OF FELIX FRANKFURTER: WITH A BIOGRAPHICAL ESSAY AND NOTES 73 (Joseph P. Lash ed., 1974)).

[6] *See* MICHAL R. BELKNAP, THE SUPREME COURT UNDER EARL WARREN, 1953–1969, at 98 (2005) (describing Frankfurter as an "overrated judge who left a very limited judicial legacy" and whose "long-term influence on constitutional law was minimal"); MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES, at x (1991) ("A quarter-century after his death, his opinions are all but ignored by both the courts and academia."); Melvin I. Urofsky, *The Failure of Felix Frankfurter*, 26 U. RICH. L. REV. 175, 176 (1991) (arguing Frankfurter was a failure because of his "abrasive personality" and "he became a prisoner of jurisprudential views that he had developed and solidified during his tenure as professor at the Harvard Law School"); G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 576 (1995) [hereinafter *Canonization of Holmes & Brandeis*] (describing Frankfurter as "passed from revered to ridiculed status in two recent decades"); Mark Tushnet, *Antonin Scalia as Felix Frankfurter*, BALKINIZATION (Aug. 19, 2004, 1:48 PM), http://balkin.blogspot.com/2004/08/antonin-scalia-as-felix-frankfurter.html ("Frankfurter['s] reputation has declined substantially — even from the time when I was a law student — to the point where he's regarded, I think, as at most a moderately interesting failure.").

[7] *See* Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 546 (2012).

[8] 531 U.S. 98 (2000).

Citizens United[9] made his defense of the political question doctrine and caution in law of democracy cases seem prophetic.

This Article argues that Frankfurter's jurisprudence is alive and well in the theory of popular constitutionalism. During the mid-1990s, progressive scholars reacted to Rehnquist Court decisions such as *City of Boerne v. Flores*[10] that empowered the judiciary at the expense of the elected branches by retreating from Court-centric constitutional interpretation. Legal scholars have advanced positive theories about backlash[11] and argued that the Court usually follows public opinion.[12] Scholars have also advanced normative theories such as abolishing judicial review,[13] judicial minimalism,[14] and calls for increased public participation,[15] including popular constitutionalism.[16]

Popular constitutionalism, espoused by Larry Kramer and others, has become a cornerstone of progressive constitutional theory. Its driving force lies in its opposition to judicial supremacy — the Court's self-appointed role as the ultimate constitutional interpreter.[17]

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[9] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[10] 521 U.S. 507 (1997).

[11] *See* MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2013); Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431 (2005) [hereinafter Brown *and* Lawrence]; Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81 (1994); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007). *But see* Linda Greenhouse & Reva B. Siegel, *Before (and after)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028, 2086 (2011) (arguing pre-*Roe* party realignment contributed to political polarization about abortion).

[12] *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 381-85 (2009); LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE 1789–2008, at ix (2009); JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 3 (2006).

[13] *See* MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154-76 (1999) [hereinafter TAKING THE CONSTITUTION AWAY].

[14] *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 259 (1999).

[15] *See* RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 4-5 (1994); JAMIN B. RASKIN, OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE 2 (2003); TUSHNET, TAKING THE CONSTITUTION AWAY, *supra* note 13, at 154; Post & Siegel, *supra* note 11, at 374.

[16] *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CALIF. L. REV. 959 (2004); Larry D. Kramer, *The Supreme Court, 2000 Term — Foreword: We the Court*, 115 HARV. L. REV. 5, 12 (2001).

[17] Judicial supremacy lacks a precise definition. Exclusivity is key. *See* FRIEDMAN, *supra* note 12, at 7 ("[O]n issue after issue of grave public concern the justices insist

One of the weaknesses of popular constitutionalism is that it lacks a precise working definition.[18] Instead of a direct democracy where constitutional interpretation occurs by referenda, Kramer offered a more republican vision like the one in Frankfurter's *The Permanence of Jefferson* — departmentalism.[19] Departmentalism, as Kramer defines it, does not simply mean that each branch of the federal government is responsible for interpreting its own constitutional sphere. Rather, departmentalism suggests that our governmental institutions all play roles in interpreting the Constitution, and that these institutions respond to enlightened public opinion.[20] "If all these politically accountable institutions then agree on the constitutionality of a measure of government, that's as close as we're ever going to come to knowing that the measure has the kind of popular support that must ultimately decide," Kramer wrote. "And I mean not just that the measure is popular. I mean that it has the right kind of popularity: that it is a product of a reasonable and reasoned popular will."[21]

Kramer explained his theory by exploring American political and constitutional history from the eighteenth and nineteenth centuries; he invited other scholars to identify more contemporary examples.[22] Scholars have written about popular constitutionalism in terms of

on having the last word, if not the only one."); Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1138 (2011) ("[T]he Supreme Court appears to have the 'exclusive' power to determine the meaning of the Constitution, even with regard to the work of the coordinate branches of the national government."). The degree of judicial supremacy often depends on the judiciary's power in a particular area. *See id.* at 1144 (defining judicial supremacy based on "power taken by the courts with permission" and "power granted to the courts by design").

[18] Tom Donnelly, Essay, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159, 160-62 (conceding it "defies easy definition" but "its leading theorists do share one key attribute, a populist sensibility — a common belief that the American people (and their elected representatives) should play an ongoing role in shaping contemporary constitutional meaning"); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2060-64 & tbl.I (2010) (dividing popular constitutionalism into "robust," "medium," and "modest" forms based on "juricentrism," "departmentalism," and "populism"); *see* KRAMER, *supra* note 16, at 8 ("Both in its origins and for most of our history, American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution. Final interpretive authority rested with 'the people themselves,' and courts no less than elected representatives were subordinate to their judgments.").

[19] KRAMER, *supra* note 16, at 252; Larry D. Kramer, *Response*, 81 CHI.-KENT L. REV. 1173, 1175 (2006).

[20] Kramer, *supra* note 19, at 1176.

[21] *Id.*

[22] *Id.* at 1174.

interest-group politics and political and social movements including Theodore Roosevelt's stump speeches lambasting *Lochner* and his Bull Moose presidential campaign,[23] the Southern Manifesto's opposition to *Brown*,[24] and the opposition to the Affordable Care Act.[25] Others have identified elected officials as popular constitutionalists including state court judges,[26] state attorneys general,[27] and U.S. Presidents.[28]

This is the first article to broaden the definition of popular constitutionalism beyond political and social movements and elected officials to include the Supreme Court Justices themselves. Justices, as well as legislators, executives, and motivated interest groups, can be popular constitutionalists — particularly Justices who believe in judicial restraint.

By arguing that Justices can be popular constitutionalists, this Article links judicial restraint with popular constitutionalism.

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[23] *See* William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967 (2006); Victoria F. Nourse, *A Tale of Two* Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 778-85 (2009).

[24] Justin Driver, *Supremacies of the Southern Manifesto*, TEX. L. REV. (forthcoming).

[25] *See* Josh Blackman, *Popular Constitutionalism and the Affordable Care Act*, 27 PUB. AFF. Q. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2217965; Jared A. Goldstein, *Can Popular Constitutionalism Survive the Tea Party Movement?*, 105 NW. U. L. REV. COLLOQUY 288 (2011); Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827 (2011); Mark Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism*, 61 U.C.L.A. L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233362; Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193, 194 (2011); Illya Somin, *The Tea Party Movement and Popular Constitutionalism*, 105 NW. U. L. REV. COLLOQUY 300 (2011); Ernest Young, Essay, *Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law*, 74 LAW & CONTEMP. PROBS. 157 (2012); Rebecca E. Zietlow, *Democratic Constitutionalism and the Affordable Care Act*, 72 OHIO ST. L.J. 1367 (2011); Rebecca E. Zietlow, Essay, *Popular Originalism?: The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483 (2012).

[26] *See* Pozen, *supra* note 18. For arguments that lower court judges can be popular constitutionalists, see Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J.L. REFORM 971 (2010); Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197 (2013), *available at* http://yalelawjournal.org/2013/9/15/eyer.html.

[27] *See* Joseph Blocher, *Popular Constitutionalism and the State Attorneys General*, 122 HARV. L. REV. F. 108 (2008).

[28] *See* David L. Franklin, *Popular Constitutionalism as Presidential Constitutionalism?*, 81 CHI.-KENT. L. REV. 1069 (2006); Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 FORDHAM L. REV. 1837 (2009).

Frankfurter advocated judicial restraint because he wanted to reduce reliance on courts to solve the nation's problems and to increase reliance on the democratic political process. He believed that the democratic political process was a more enduring, effective, and legitimate method of protecting civil liberties and producing constitutional change. Frankfurter, like his mentor Justice Louis Brandeis, espoused a Jeffersonian vision of democracy and enlightened public opinion. Many progressive scholars who revere Brandeis loathe Frankfurter because the latter was out of step with the Warren Court's rights-oriented jurisprudence and not sufficiently protective of civil liberties.[29] But perhaps it was the Warren Court that was out of step with the progressive tradition of distrusting courts and seeking constitutional change and rights protection through the political process. The Warren Court's complicated legacy consists not only of triumphs for racial justice such as *Brown v. Board of Education*, but also the beginning of an uninterrupted era of judicial supremacy.

Forty years ago, Sandy Levinson published a *Stanford Law Review* article, *The Democratic Faith of Felix Frankfurter*.[30] The article, part of Levinson's Ph.D. thesis on Frankfurter's and Oliver Wendell Holmes's jurisprudence, addressed Frankfurter's pre-judicial career as a leading progressive lawyer, law professor, and government official. Since the death of his protégé and former clerk Alexander Bickel, Justice Frankfurter's defenders have been few and far between. Frankfurter has suffered from unfair comparisons to his judicial idols Holmes and Brandeis based on idealized conceptions of their civil liberties jurisprudence.[31] Frankfurter has served as the villain in the standard Warren Court narrative and has been labeled a jurisprudential failure.[32]

This Article attempts to reframe the way we think about Justice Frankfurter — not as a Warren Court antihero but as an opponent of judicial supremacy, a forerunner of popular constitutionalism, and an exemplar for scholars who criticize the current Court as contemptuous of Congress and other elected branches.

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[29] *See, e.g.*, UROFSKY, *supra* note 6, at 177-78 ("Frankfurter claimed that he modeled himself after Holmes and Brandeis, yet one looks in vain in his opinions for the type of concern they showed in regard to free speech. What can one compare to Holmes's dissent in *Abrams* or the Brandeis opinion in *Whitney*?").

[30] Sanford V. Levinson, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430 (1973). For the best book on Frankfurter's pre-judicial career, see MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES (1982).

[31] *See* source cited *supra* note 29.

[32] *See* sources cited *supra* notes 5-6.

Part I explains why Frankfurter shared Jefferson's faith in democracy and enlightened public opinion. As a twelve-year-old Austrian-Jewish immigrant, he embraced his adopted country like a religious convert and espoused an unshakeable belief in America and its political system. As a Harvard law student, he became enamored with civic republican aspects of James Bradley Thayer's conception of judicial review. As a young man in politics and government service, he learned how elections and the executive branch shaped constitutional debates. As a Harvard law professor, he sought to mold public opinion, criticized the Court for acting like a super-legislature, and called for the abolition of the Due Process Clause in order to curb judicial power. The New Deal constitutional crisis reinforced his belief in elections, public opinion, and departmentalism.

Part II argues that, even when it was unpopular, Justice Frankfurter rejected judicial supremacy and adhered to his democratic faith. The *Flag Salute Cases*, *Brown v. Board of Education* and its progeny, and *Baker v. Carr* reveal his belief in public opinion and departmentalism and his skepticism about the Court's institutional competence. His votes and published opinions in these cases warned about judicial supremacy, anticipated the theory of popular constitutionalism, and provide insight into the ongoing debate about the role of the Court.

The Article concludes by inviting scholars to rethink how Frankfurter's jurisprudence fits into their critique of the current Court as contemptuous of Congress and other elected branches and into progressive theories including popular constitutionalism. They should celebrate Frankfurter's faith in the democratic political process and enlightened public opinion. A consistent application of judicial restraint, however, might not always lead to progressive outcomes. Frankfurter's judicial career illustrates the difficulties of remaining faithful to less Court-centric theories and of identifying extreme cases of unconstitutionality. Any potential revival of judicial restraint or judicial use of popular constitutionalism requires more theoretical work. A good start would be a reconsideration of the jurisprudence of Felix Frankfurter.

I. FRANKFURTER'S PRE-COURT PHILOSOPHY

Frankfurter developed a Jeffersonian faith in democracy and enlightened public opinion because of his intense pride in his adopted country, its history, and its form of government. He arrived in America from Austria at age twelve without knowing a word of English.[33] He

[33] FELIX FRANKFURTER, FELIX FRANKFURTER REMINISCES 4 (Harlan B. Phillips ed.,

learned English at New York City's P.S. 25 and developed an interest in politics while attending free lectures at Cooper Union.[34] The agnostic Frankfurter, who recalled his father's naturalization as one of the most important days in his family's life, embraced his adopted home country with the zeal of a religious convert: "As one who has no ties with any formal religion, perhaps the feelings that underlie religious forms for me run into intensification of my feelings about American citizenship."[35]

A. Thayer

With his immigrant's faith in American democracy, Frankfurter arrived at Harvard Law School and discovered the constitutional theory of James Bradley Thayer. Any discussion of Frankfurter's jurisprudence must begin with Thayer. When Frankfurter arrived at Harvard Law School in the fall of 1903 as a first-year student, Thayer's views were "in the air" a year after his death.[36] Frankfurter heard about Thayer from his professors[37] and read Thayer's 1893 essay, *The Origin and Scope of the American Doctrine of Constitutional Law*.[38] Indeed, Frankfurter deemed it "the most important single essay" about American constitutional law: "Because from my point of view it's the great guide for judges and therefore, the great guide for understanding by non-judges of what the place of the judiciary is in relation to constitutional questions."[39]

Thayer was primarily concerned with federal courts reviewing federal statutes, but also with state courts reviewing state statutes. He

1960) [hereinafter REMINISCES].

[34] *Id.* at 4-5.

[35] JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 211 (1974) (summarizing Frankfurter's December 5, 1942 Conference discussion on Schneiderman v. United States).

[36] *See* Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 225 (1955); Felix Frankfurter, *Joseph Henry Beale*, 56 HARV. L. REV. 701, 702 (1943).

[37] ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928–1945, at 25 (Max Freedman ed., 1967) (quoting letter from Frankfurter to Arthur Schlesinger, Jr., June 18, 1963); Felix Frankfurter, In Memoriam, *Samuel Williston: An Inadequate Tribute to a Beloved Teacher*, 76 HARV. L. REV. 1321, 1322 (1963).

[38] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) [hereinafter *Origin and Scope*]; *see* JAMES BRADLEY THAYER ET AL., JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL 82-88 (Philip Kurland ed., 1967); James B. Thayer, *Letter to the Editor, Constitutionality of Legislation: The Precise Question for a Court*, THE NATION, Apr. 10, 1884, at 314-15 [hereinafter *Letter*].

[39] FRANKFURTER, REMINISCES, *supra* note 33, at 301, 300.

was not concerned with federal review of state statutes but "where judges pass upon the validity of the acts of a co-ordinate department."[40] His "rule of administration" was analogous to the burden of proof for criminal convictions and standard of review for civil jury verdicts:[41] courts should deem legislation unconstitutional only in cases of "clear mistake" or "beyond a reasonable doubt."[42] Judges, he wrote, should possess the "combination of a lawyer's rigor with a statesman's breadth of view which should be found in dealing with this class of questions in constitutional law."[43]

Thayer aimed to reduce reliance on the courts and to increase public participation. He did not, as Frankfurter observed, simply write a guide for judges.[44] Thayer called on legislators and the American people to take their constitutional duties more seriously — legislators needed to do a better job drafting legislation, and people needed to do a better job electing legislators.[45] In his 1901 mini-biography of John Marshall, Thayer lamented that judicial invalidation of legislation had become "too common" and tended "to dwarf the political capacity of the people, and to deaden its sense of moral responsibility."[46] He applauded *Munn v. Illinois*, the other *Granger Cases*, and the *Legal Tender Cases* of the 1870s, all of which upheld legislation "thought by many to be unconstitutional and many more to be ill-advised . . . ."[47] He emphasized in those cases "the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed . . . far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature."[48] He concluded of judicial review:

> The judiciary to-day, in dealing with acts of their coordinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off their acts wherever it is possible

[40] Thayer, *Origin and Scope*, *supra* note 38, at 153-55; *see* THAYER ET AL., *supra* note 38, at 87.

[41] Thayer, *Origin and Scope*, *supra* note 38, at 150; Thayer, *Letter*, *supra* note 38, at 315.

[42] Thayer, *Origin and Scope*, *supra* note 38, at 144, 146; Thayer, *Letter*, *supra* note 38, at 314.

[43] Thayer, *Origin and Scope*, *supra* note 38, at 138.

[44] *See supra* text accompanying note 39.

[45] Thayer, *Origin and Scope*, *supra* note 38, at 156; Thayer, *Letter*, *supra* note 38, at 315.

[46] THAYER ET AL., *supra* note 38, at 86.

[47] *Id.*

[48] *Id.*

> to do so. For that course — the true course of judicial duty always — will powerfully help to bring the people and their representatives to a sense of their own responsibility.[49]

What Thomas Grey described as Thayer's "civic republicanism"[50] appealed to Frankfurter. Like his mentor Brandeis, Frankfurter was a political animal who believed that people should be encouraged to seek legal change through the political process and elections rather than through the courts. Holmes, by contrast, admired and agreed with most of Thayer's famous essay,[51] yet exuded contempt for legislatures and politics.[52] As much as he worshipped Holmes, Frankfurter adopted Thayer's theory because of its ability to increase political participation and to promote democratic constitutional change.

As a law professor beginning in 1914, Frankfurter quoted Thayer's ideas in ways that reflected his democratic faith and that anticipated popular constitutionalism. Frankfurter's first signed contribution to the *Harvard Law Review*, a 1915 note on *The Present Approach to Constitutional Decisions on the Bill of Rights*, concluded by quoting Thayer that "responsibility for mischievous or inadequate legislation may be sharply brought home where it belongs, — to the legislature and to the people themselves."[53] Frankfurter's 1924 *Note on Advisory Opinions* quoted Thayer that "the true course of judicial duty" is "to bring the people and their representatives to a sense of their own

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[49] *Id.* at 88.

[50] Thomas C. Grey, *Thayer's Doctrine: Notes on Its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28, 39 (1993).

[51] Letter from Oliver Wendell Holmes to James Bradley Thayer, Nov. 2, 1893, at 1-2, *in* Oliver Wendell Holmes Papers, Harvard Law School, Box 50, Folder 25-28, Reel 58 at 473.

[52] Letter from Holmes to Harold Laski, Mar. 4, 1920, *in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, at 249 (Mark DeWolfe Howe ed., 1953) ("I always say, as you know, that if my fellow citizens want to go to Hell I will help them. It's my job."); *see* Letter from Holmes to Frankfurter, Mar. 24, 1914, *in* HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934, at 19 (Robert M. Mennel & Christine L. Compston eds., 1996) [hereinafter HOLMES AND FRANKFURTER CORRESPONDENCE] ("[A] law should be called good if it reflects the will of the dominant forces of the community even if it will take us to hell."); *see also* Thomas C. Grey, Speech, *The Colin Raugh Thomas O'Fallon Memorial Lecture on Law and American Culture: Holmes, Pragmatism, and Democracy*, 71 OR. L. REV. 521 (1992) (discussing Holmes's contempt for politics).

[53] Felix Frankfurter, *The Present Approach to Constitutional Decisions on the Bill of Rights*, 28 HARV. L. REV. 790, 792-93 (1915) [hereinafter *Present Approach*] (citing JAMES BRADLEY THAYER, LEGAL ESSAYS 39, 41 (1927)).

responsibility."[54] Frankfurter's article with James Landis on the Compact Clause quoted Thayer as support for "the profound reasons for deference to Congressional judgment."[55] And Frankfurter frequently concluded articles by quoting Thayer: "[p]etty judicial interpretations have always been, are now, and always will be, a very serious danger to the Country."[56]

B. Government Service

Frankfurter's executive branch service introduced him to non-judicial methods of constitutional change. By age thirty, he had served in three presidential administrations — Roosevelt, Taft, and Wilson — mostly thanks to Henry Stimson. The United States Attorney for the Southern District of New York, Stimson hired Frankfurter less than a year removed from finishing first in his class at Harvard Law School to assist in prosecuting railroads, bank executives, and sugar trusts.[57] Stimson showed Frankfurter the prosecutor's constitutional power.

Frankfurter's understanding of the executive branch's constitutional powers continued in 1911 when then-President William Howard Taft named Stimson Secretary of War. Frankfurter became Stimson's "junior partner" in Washington as a law officer of the Bureau of Insular Affairs.[58] Although Frankfurter argued insular affairs cases before the Supreme Court, he primarily worked with generals and other military officials; implemented executive orders about the Panama Canal Zone, Puerto Rico, the Philippines, and other U.S. territories; and suggested legislation to the Committee on Insular Affairs.[59] At Stimson's urging, he stayed in the Wilson administration

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[54] Felix Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, 1008 (1924).

[55] Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution — A Study in Interstate Adjustments*, 34 YALE L.J. 685, 728 (1925).

[56] *See* FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 114 (1937) (quoting THAYER ET AL., *supra* note 38, at 159); FELIX FRANKFURTER, THE PUBLIC & ITS GOVERNMENT 74-75 (1930) (same); Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term, 1933*, 48 HARV. L. REV. 238, 281 (1934) (same).

[57] FRANKFURTER, REMINISCES, *supra* note 33, at 38-39.

[58] *Id.* at 56. Letter from Henry Stimson to Frankfurter, June 30, 1911, *in* FF-LC, Box 103, Folder "Stimson, Henry L. 1908-12"; Letter from Stimson to Frankfurter, July 1, 1911, *in id.*; Letter from Stimson to Frankfurter, July 3, 1911, *in id.*

[59] FRANKFURTER, REMINISCES, *supra* note 33, at 58-66; *see, e.g.*, Memorandum from Frankfurter to Stimson, Mar. 11, 1914, *in A Bill To Provide a Civil Government for Porto Rico, and for Other Purposes*, S. 4604, 63d Cong. §§ 21-24 (2d Sess. 1914) (advising how to give Puerto Ricans U.S. citizenship but not statehood).

until 1914 to oversee regulation and licensing of federal water and power projects.[60]

At the behest of Secretary of War Newton Baker, Frankfurter returned to Washington during World War I as a labor-relations expert.[61] For the President's mediation commission, Frankfurter drafted a report on the deportations of striking workers in Bisbee, Arizona, and the use of perjured testimony in convicting labor leader Tom Mooney for the San Francisco Preparedness Day parade bombing. Frankfurter's report exposed him to criticism from Theodore Roosevelt and Solicitor General James Beck.[62] Frankfurter later chaired the War Labor Policies Board, which set new wartime labor standards and which revealed the power of the administrative state.[63]

Frankfurter's government service primarily dealt not with the courts, but with implementing and enforcing laws on behalf of the American people. As a result, he taught classes at Harvard on administrative law and public utilities. Indeed, he focused on "legal questions growing out of modern problems and to a considerable extent concerned with the enforcement of legislation . . . ."[64]

C. Shaping Public Opinion

One reason that Frankfurter joined the Harvard law faculty was to mold public opinion. He believed that legal elites could help change public opinion and effect constitutional change: "There should be a constant source of thought for the guidance of public men and the education of public opinion, as well as a source of trained men for public life."[65] As a civil servant or law professor, his goal was the same:

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[60] FRANKFURTER, REMINISCES, *supra* note 33, at 73, 78.

[61] *Id.* at 114-17.

[62] James Beck, *A Reply to Mr. Frankfurter*, NEW REPUBLIC, Jan. 18, 1922, at 212; Felix Frankfurter, *In Answer to Mr. Beck*, NEW REPUBLIC, Jan. 18, 1922, at 215; Felix Frankfurter, *Letter to the Editor*, NEW REPUBLIC, Oct. 19, 1921, at 205; James Beck, *Letter to the Editor*, Oct. 12, 1921, NEW REPUBLIC, at 189; Letter from Theodore Roosevelt to Frankfurter, Dec. 19, 1917, *in* FF-LC, Box 98, Folder "Roosevelt, Theodore 1917-18 & undated" (describing Mooney report as "an attitude which seems to me to be fundamentally that of Trotsky and the other Bolsheviki leaders in Russia; an attitude that may be fraught with mischief to this country"); *see* FRANKFURTER, REMINISCES, *supra* note 33, at 132-34, 137-39.

[63] *See* War Labor Policies Board Correspondence, *in* FF-LC, Boxes 190 & 191.

[64] FRANKFURTER, REMINISCES, *supra* note 33, at 167.

[65] *Id.* at 81.

"'To enlighten public selfishness and harmonize public will' — that may be my job."[66]

In his highest-profile attempt to sway public opinion, he lobbied for new trials for convicted murderers and anarchists Sacco and Vanzetti. His *Atlantic Monthly* article (and eventual book) contended that they had been railroaded and their trials had been riddled with constitutional violations;[67] his writings triggered a counter-protest from Northwestern law professor John Henry Wigmore and an investigation chaired by Harvard president A. Lawrence Lowell.[68] The executions of Sacco and Vanzetti notwithstanding, Frankfurter persuaded many people that an injustice had been done.

Believing that the Court's power depends on public confidence and support, Frankfurter tried to educate the public in numerous ways. In 1914, he helped found the *New Republic* and contributed to the magazine.[69] Six years later, he joined the National Advisory Committee for the nascent American Civil Liberties Union ("ACLU"). From 1929 to 1939, he served on the legal advisory committee of the National Association for the Advancement of Colored People ("NAACP").[70]

By mobilizing public opinion, Frankfurter believed that he could change the Court's behavior. "Public opinion," he wrote in 1923, "if sufficiently sustained and sufficiently strong, seeps into Supreme Court decisions."[71] Discussing a Supreme Court nomination seven years later, he wrote: "In theory, judges wield the people's power. Through the effective exertion of public opinion, the people should determine to whom that power is entrusted. The country's well-being

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[66] *Id.* at 82.

[67] FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN (1927); Felix Frankfurter, *The Case of Sacco and Vanzetti*, ATLANTIC MONTHLY, Mar. 1927, at 409.

[68] *See* John Henry Wigmore, *Wigmore Replies to Frankfurter in Sacco-Vanzetti Controversy*, BOS. EVENING TRANSCRIPT, May 10, 1927, at 15; John Henry Wigmore, *J.H. Wigmore Answers Frankfurter Attack on Sacco-Vanzetti Verdict*, BOS. EVENING TRANSCRIPT, Apr. 25, 1927, at 1; see *also* FRANKFURTER, REMINISCES, *supra* note 33, at 202-17; Felix Frankfurter, *Wigmore Didn't Read Case, Says Frankfurter*, BOS. HERALD, May 11, 1927, at 3; Felix Frankfurter, *Professor Frankfurter Replies to Dean Wigmore*, BOS. EVENING TRANSCRIPT, Apr. 26, 1927, at 15.

[69] FRANKFURTER, REMINISCES, *supra* note 33, at 88-93; LASH, *supra* note 35, at 31, 65.

[70] Letter from Frankfurter to Walter White, Nov. 6, 1929, *in* FF-LC, Box 111, Folder "White, Walter 1929-32."

[71] *Exit the Kansas Court*, NEW REPUBLIC, June 27, 1923, *reprinted in* FELIX FRANKFURTER, FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION 142 (Philip B. Kurland ed., 1970) [hereinafter EXTRAJUDICIAL ESSAYS].

depends upon a far-sighted and statesmanlike Court. And the Court's ultimate dependence is upon the confidence of the people."[72]

D. Elections

Early in his career, Frankfurter learned about the impact of elections on the Court. One of his early political mentors, former President Theodore Roosevelt, showed him the potential impact of public opinion on the Court. In August 1910, Roosevelt accused the Court in *Lochner*[73] and *E.C. Knight*[74] of preventing state or federal regulation of big business.[75] Two years later on the campaign trail, he called for public referenda on judicial decisions and, as a last resort, a recall of judges.[76] "I may not know much about law," Frankfurter quoted Roosevelt, "but I do know one can put the fear of God into judges."[77]

Roosevelt's Bull Moose presidential campaign captivated Frankfurter and underscored the power of electoral politics. Indeed, Frankfurter nearly left his War Department job with Stimson to work on the campaign. Frankfurter lived with other young progressives in a Dupont Circle rowhouse known as the House of Truth, a house where Roosevelt reigned supreme.[78] Frankfurter was so disillusioned with President Taft and the Supreme Court and so enthralled with Roosevelt that the young aide submitted his resignation. Stimson, however, persuaded him to stay.[79]

After 1912, Frankfurter viewed every presidential election as an opportunity for constitutional change. In 1916, he found the campaign

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[72] Felix Frankfurter, *The Appointment of a Justice*, CURRENT HISTORY, June 1930 [hereinafter *Appointment of a Justice*], *reprinted in* FRANKFURTER, EXTRAJUDICIAL ESSAYS, *supra* note 71, at 217.

[73] Lochner v. New York, 198 U.S. 45 (1905).

[74] United States v. E.C. Knight Co., 156 U.S. 1 (1895).

[75] Theodore Roosevelt, Speech Before the Colorado Legislature: The Nation and the States (Aug. 29, 1910), *available at* http://www.theodore-roosevelt.com/trspeechescomplete.html.

[76] Theodore Roosevelt, Address at Philadelphia, Pennsylvania: Recall of Judges and Referendum of Decisions (Apr. 10, 1912), *available at* http://www.theodore-roosevelt.com/trspeechescomplete.html.

[77] *The Red Terror of Judicial Reform*, NEW REPUBLIC, Oct. 1, 1924 [hereinafter *Red Terror*], *reprinted in* FRANKFURTER, EXTRAJUDICIAL ESSAYS, *supra* note 71, at 166; Felix Frankfurter, *The Supreme Court and the Public*, THE FORUM, June 1930 [hereinafter *Supreme Court and the Public*], *reprinted in id.* at 226.

[78] Brad Snyder, *The House that Built Holmes*, 30 LAW & HIST. REV. 661, 669 (2012) [hereinafter *House that Built Holmes*].

[79] Letter from Frankfurter to Stimson, Sept. 10, 1912, *in* FF-LC, Box 103, Folder "Stimson, Henry L. 1908-12"; Letter from Stimson to Frankfurter, Sept. 19, 1912, *in id.*; *see* FRANKFURTER, REMINISCES, *supra* note 33, at 50-55.

of Republican challenger Charles Evans Hughes to be uninspired, pro-tariff, and not sufficiently pro-labor and, after Brandeis's Supreme Court nomination, voted for Woodrow Wilson.[80] During four of the next five presidential elections, Frankfurter endorsed candidates in *New Republic* editorials or speeches.[81]

The 1924 election was particularly important to him.[82] He attacked Democratic candidate John W. Davis as "under retainer by the house of Morgan"[83] and a "legal attaché of Big Business."[84] Frankfurter wrote three unsigned *New Republic* editorials, letters and editorials in New York and Boston newspapers, and letters to unpersuaded friends, including C.C. Burlingham, Learned Hand, and Walter Lippmann.[85] In another unsigned *New Republic* editorial, Frankfurter criticized Coolidge's and Davis's praise for liberty of contract theory as "this doctrine with which to slay most important social legislation and to deny the means of freedom to those least free."[86]

During that election, Frankfurter endorsed Progressive Party candidate Robert La Follette.[87] Even though he disagreed with La Follette's proposal that a two-thirds vote of Congress should be able to override a Supreme Court decision that invalidated a federal statute, Frankfurter recalled: "The specific program of La Follette meant nothing to me, but the general direction in which he was going meant everything to me."[88] Frankfurter wrote Davis supporter[89] Walter Lippmann:

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[80] Felix Frankfurter, The Election of 1916, *in* FF-LC, Box 204; Letter from Frankfurter to Stimson, Oct. 26, 1916, *in* FF-LC, Box 103, Folder "Stimson, Henry L. 1915-16."

[81] Felix Frankfurter, *Why I Shall Vote for La Follette*, NEW REPUBLIC, Oct. 22, 1924, at 199 [hereinafter *For La Follette*], *reprinted in* FELIX FRANKFURTER, LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER, 1913–1938, at 314 (Mac Leish, Archibald & Prichard, E.F., Jr., eds., 1939) [hereinafter LAW AND POLITICS]; *see* Felix Frankfurter, *Why I Am for Smith*, NEW REPUBLIC, Oct. 31, 1928, at 292, *reprinted in id.* at 320; *see also* Felix Frankfurter, *Why I Am for Governor Roosevelt*, Nov. 5, 1932, *reprinted in id.* at 329.

[82] FRANKFURTER, REMINISCES, *supra* note 33, at 193-99; Levinson, *supra* note 30, at 435-44.

[83] *Why Mr. Davis Shouldn't Run*, NEW REPUBLIC, Apr. 24, 1924, at 193.

[84] *Abstemious Liberalism*, NEW REPUBLIC, Aug. 6, 1924, at 285.

[85] *John W. Davis*, NEW REPUBLIC, July 23, 1924, at 224, *in* FF-LC, Box 194, Scrapbook "Writings 1913-1924," at 272; *see* FF-LC, Box 163, Folders "1924 Election, #1-4."

[86] *Red Terror*, *supra* note 77, at 165.

[87] Frankfurter, *For La Follette*, *supra* note 81, at 199, *reprinted in* LAW AND POLITICS, *supra* note 81, at 314.

[88] FRANKFURTER, REMINISCES, *supra* note 33, at 199.

> You see, I'm incorrigibly academic, and, therefore, the immediate results of the 1924 election do not appear very important. The directions which we further or retard for 1944 are tremendously important. Coolidge and Davis have nothing to offer for 1944; they have no dreams, no 'pictures in their heads' (which [Lippmann's book] *Public Opinion* has taught me is the all-important thing) except things substantially as is. The forces that are struggling and groping behind La Follette are, at least, struggling and groping for a dream, for a different look of things in 1944. That is why I'm for them — and in my small way want to help to give direction and definiteness to the dream.[90]

He fervently supported Democrat Al Smith's reformist candidacy in 1928 and was dismayed by the anti-Catholic bias that helped defeat the New York governor.[91] Although his candidates lost in 1912 (T. Roosevelt), 1924 (La Follette), and 1928 (Smith), Frankfurter never lost faith in the transformative power of presidential politics. In 1932, he delivered a radio endorsement, "Why I Am for Governor Roosevelt,"[92] and finally picked a winner. Roosevelt's victory, coupled with past defeats, affirmed Frankfurter's belief in presidential power to set legislative agendas, to nominate judges, and to safeguard the people's role in constitutional interpretation.

E. Judicial Frustration

Frankfurter's biggest source of frustration during the 1910s, 1920s, and early 1930s was the judiciary. State and federal courts thwarted the political process by invalidating pro-labor legislation. Along with his progressive friends at the House of Truth, he viewed judges, particularly the Supreme Court, as hostile to organized labor. His early scholarship criticized judicial decisions invalidating "social and

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[89] Walter Lippmann, *Why I Shall Vote For — I. Davis*, NEW REPUBLIC, Oct. 29, 1924, at 218.

[90] Letter from Frankfurter to Walter Lippmann, July 18, 1924, *in* FF-LC, Box 163, Folder "Election of 1924 July-Sept. #2."

[91] *See* FF-LC, Box 163, Folders "Presidential Election of 1928 #1-7."

[92] Frankfurter, *Why I Am for Governor Roosevelt*, WBJ RADIO, Nov. 5, 1932, *reprinted in* FRANKFURTER, LAW AND POLITICS, *supra* note 81, at 329; *Hoover Piled Up Deficit, Failed to Halt Depression, Says Frankfurter*, HARVARD CRIMSON, Oct. 15, 1932, at 1, *in* FF-LC, Box 197, Scrapbook "Writings 1932-1938," at 33.

industrial legislation"[93] based on a Fifth or Fourteenth Amendment due process/"liberty of contract" theory.[94]

Frankfurter's bête noire was the Court's 1905 decision in *Lochner v. New York*[95] invalidating a maximum-hour law for bakers. For Frankfurter, *Lochner*

> affects the very bases on which constitutional decisions are reached and, therefore, affects vitally the most sensitive point of contact between the courts and the people. The statute under discussion may well have been of no particular social import. The decision which nullified it, one may be sure, offers no intrinsic obstruction to needed legislation, and in itself has merely ephemeral vitality. But, unfortunately, the evil that decisions do lives after them. Such a decision deeply impairs that public confidence upon which the healthy exercise of judicial power must rest.[96]

He believed that, unlike *Lochner*, "[q]uestions as to the constitutionality of modern social legislation are substantially questions of fact,"[97] "[c]oncepts like 'liberty' and 'due process' are too vague in themselves to solve issues,"[98] "[c]onditions change, legislation deals with these changed conditions, and so must the courts,"[99] and "[l]aw must be related to the other social sciences."[100] Like Holmes, Frankfurter believed that "legislatures are ultimate guardians of the liberty and welfare of the people in quite as great a degree as the courts."[101]

Three years after *Lochner*, *Muller v. Oregon*[102] represented a potential "turning point"[103] and Frankfurter believed that its method of argument was "epoch making."[104] Based on a brief prepared by his sister-in-law Josephine Goldmark for the National Consumers' League, Brandeis defended the constitutionality of a maximum hour law for

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[93] Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 353 (1916) [hereinafter *Hours of Labor*].

[94] *See id.* at 359; Frankfurter, *Present Approach*, *supra* note 53, at 792.

[95] 198 U.S. 45 (1905).

[96] Frankfurter, *Hours of Labor*, *supra* note 93, at 371.

[97] Frankfurter, *Present Approach*, *supra* note 53, at 791.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 792.

[101] *Id.* (quoting Mo., Kan., & Tex. Ry. Co. v. May, 194 U.S. 267, 270 (1904)).

[102] 208 U.S. 412 (1908).

[103] Frankfurter, *Hours of Labor*, *supra* note 93, at 362.

[104] *Id.* at 365; *see* Frankfurter, *Present Approach*, *supra* note 53, at 792.

women based on what Frankfurter described as "an array of facts which established the *reasonableness* of the legislative action."[105] *Muller*, Frankfurter believed, responded to *Lochner*'s emphasis "on tenacious theories of economic and political philosophy" with "an air of reality" and scientific facts.[106] Yet, even after *Muller*, the Supreme Court (and state supreme courts) invalidated pro-labor legislation in cases such as *Adair*[107] and *Coppage*.[108]

For a time, Frankfurter succeeded with the *Muller* formula. After Brandeis joined the Court, Frankfurter supervised the National Consumers' League's fact-laden briefing of more than 1,000 pages and argued *Bunting v. Oregon*[109] and reargued its companion case, *Stettler v. O'Hara*.[110] The Court upheld *Bunting*'s maximum hour law, 5–3, and divided 4–4 in affirming the Oregon Supreme Court's decision upholding *Stettler*'s minimum wage law.

Frankfurter's two victories were short-lived; his belief in the institutional competence of courts was even shorter. He criticized the anti-labor decisions of Chief Justice Taft in unsigned *New Republic* editorials,[111] and in a letter to Holmes questioned the wisdom of the due process clauses:

> All of which makes me wonder more and more about the "due process" clause. Of course, a Court composed of Holmes and Brandeis and Learned Hand and Cardozo makes the question an easy one: the due process clause does serve as an articulate expression of age-old experience. But one has no business to assume in the run of life our Court will have dominantly such a membership and the question then becomes a balancing of gains and costs. And I must say I increasingly have me doots. Not the least of the things that weigh with me is the weakening of the responsibility of our legislators and of our

[105] Frankfurter, *Hours of Labor*, *supra* note 93, at 365; *see* FRANKFURTER, REMINISCES, *supra* note 33, at 95-97.

[106] Frankfurter, *Hours of Labor*, *supra* note 93, at 363-64.

[107] Adair v. United States, 208 U.S. 161 (1908).

[108] Coppage v. Kansas, 236 U.S. 1 (1915).

[109] 243 U.S. 426 (1917).

[110] 243 U.S. 629 (1917) (per curiam); FRANKFURTER, REMINISCES, *supra* note 33, at 97-103.

[111] *Taft and the Supreme Court*, NEW REPUBLIC, Oct. 27, 1920, *in* FRANKFURTER, LAW AND POLITICS, *supra* note 81, at 37-40; *see also The Same Mr. Taft*, NEW REPUBLIC, Jan. 18, 1922, *in* LAW AND POLITICS, *supra* note 81, at 41-47.

> public opinion, or rather, the failure to build up a responsible public opinion. We expect our Courts to do it all.[112]

Indeed, he wrote in the *New Republic* that "the discouragement of legislative efforts in fields related to that involved in a particular adjudication and the general weakening of the sense of legislative responsibility have wrought incalculable harm to the fruitful development of American political life."[113]

Adkins v. Children's Hospital[114] confirmed Frankfurter's worst fears and destroyed his faith in the Court. Briefing and arguing the case for the National Consumers' League, he defended the District of Columbia's minimum wage law for women and children. He believed that *Muller* controlled. The Court disagreed and held that "freedom of contract" is "the "general rule and restraint the exception."[115] *Adkins* permanently altered his outlook on the judiciary: "[T]he possible gain isn't worth the cost of having five men without any reasonable probability that they are qualified for the task, determine the course of social policy for the states and the nation."[116] He never argued another case after *Adkins*, which "struck the death knell not only of this legislation, but of kindred social legislation because it laid down as a constitutional principle that any kind of change by statute has to justify itself, not the other way around."[117]

After *Adkins*, Frankfurter wrote unsigned *New Republic* editorials criticizing the Court and advocating repeal of the due process clauses. In October 1924, he wrote that an extensive study would show "that no nine men are wise enough and good enough to be entrusted with the power which the unlimited provisions of the due process clauses confer."[118] He cited the absence of similar clauses in other countries' constitutions and concluded: "[t]he due process clauses ought to go."[119] He even criticized due process cases with liberal outcomes such as *Meyer v. Nebraska*[120] and *Pierce v. Society of Sisters*,[121] which upheld

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[112] Letter from Frankfurter to Holmes, Apr. 18, 1921, *in* HOLMES AND FRANKFURTER CORRESPONDENCE, *supra* note 52, at 108.

[113] *Red Terror*, *supra* note 77, at 164-65.

[114] Adkins v. Children's Hosp., 261 U.S. 525 (1923).

[115] *Id.* at 546, 554; *see* FRANKFURTER, REMINISCES, *supra* note 33, at 103-04.

[116] Letter from Frankfurter to Learned Hand, Apr. 11, 1923, *in* Hand Papers, Box 104, Folder 104-10.

[117] FRANKFURTER, REMINISCES, *supra* note 33, at 103.

[118] *Red Terror*, *supra* note 77, at 166.

[119] *Id.* at 167.

[120] 262 U.S. 390 (1923).

[121] 268 U.S. 510 (1925).

the rights of public schools to teach German and the rights of students to attend Catholic schools. "These words mean what the shifting personnel of the United States Supreme Court from time to time makes them mean," he wrote. "The inclination of a single Justice, the tip of his mind — or his fears — determines the opportunity of a much-needed social experiment to survive, or frustrates, at least for a long time, intelligent attempt to deal with a social evil."[122] There was no such thing, according to Frankfurter, as good and bad due process because "we regard the cost of this power of the Supreme Court on the whole as greater than its gains."[123] In the *New Republic*, he charged the Court and its due process decisions with thwarting the will of the people and their elected legislators.[124]

Rather than undertake a time-consuming and usually futile constitutional amendment process,[125] Frankfurter focused on faster approaches to constitutional change — Supreme Court nominations. In 1916, he led the *New Republic*'s campaign to confirm Louis Brandeis to the Court.[126] Fourteen years later, he spurred the *New York World*'s opposition to Hoover's failed Supreme Court nominee John J. Parker as anti-black and more importantly anti-labor.[127] Two years later,

[122] *Can the Supreme Court Guarantee Toleration?*, NEW REPUBLIC, June 17, 1925 [hereinafter *Guarantee Toleration?*], *reprinted in* FRANKFURTER, EXTRAJUDICIAL ESSAYS, *supra* note 71, at 175; *see The Supreme Court as Legislator*, NEW REPUBLIC, Mar. 31, 1926 [hereinafter *Supreme Court as Legislator*], *reprinted in* FRANKFURTER, EXTRAJUDICIAL ESSAYS, *supra* note 71, at 181; Letter from Frankfurter to Hand, June 5, 1923, at 1, *in* Felix Frankfurter Papers, Harvard Law School Special Collections [hereinafter FFHLS], Box 198, Folder 12, Pt. III, Reel 26 at 413.

[123] *Guarantee Toleration?*, *supra* note 122, at 176.

[124] *Supreme Court as Legislator*, *supra* note 122, at 181; *see* Frankfurter, *Appointment of a Justice*, *supra* note 72, at 214-17; Frankfurter, *Supreme Court and the Public*, *supra* note 77, at 223-27.

[125] Letter from Frankfurter to Stephen Wise, May 31, 1922, at 1, *in* FF-LC, Box 157, Folder "National Consumers' League 1922"; Letter from Florence Kelley to Frankfurter, May 26, 1923, at 2, *in* FF-LC, Box 157, Folder "National Consumers' League 1923."

[126] *Brandeis and the Shoe Machinery Company*, NEW REPUBLIC, Mar. 4, 1916, at 117-19, *in* FF-LC, Box 194, Scrapbook "Writings 1913-1924"; *The Nomination of Mr. Justice Brandeis*, NEW REPUBLIC, Feb. 5, 1916, *reprinted in* FRANKFURTER, EXTRAJUDICIAL ESSAYS, *supra* note 71, at 43.

[127] Telegram from Walter Lippmann to Frankfurter, Mar. 26, 1930, *in* FF-LC, Box 77, Folder "Lippmann, Walter 1930 #11"; Letter from Frankfurter to Lippmann, Mar. 27, 1930, *in id.*; *see* Letter from Frankfurter to Lippmann, Apr. 1, 1930, at 2, *in id.* at "Lippmann, Walter 1930 #12"; Letter from Lippmann to Frankfurter, Apr. 2, 1930, *in id.* at "Lippmann, Walter 1930 #11"; *see also* Letter from Louis Brandeis to Frankfurter, May 8, 1930, *in* "HALF BROTHER, HALF SON" THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER 424-25 (Melvin I. Urofsky & David W. Levy eds., 1991) ("In the defeat of Parker — or rather of H.H. — you have played an important

Frankfurter lobbied his old boss Henry Stimson, then Hoover's Secretary of State, to persuade the President to nominate Benjamin Cardozo.[128] Finally, Frankfurter privately defended FDR's first Supreme Court nominee, Hugo Black, against charges of prosecutorial misconduct and Klan involvement because Frankfurter believed that Black, a radical New Dealer, would not obstruct FDR's legislative agenda.[129]

F. New Deal Legislation

Frankfurter's role in the New Deal and his reaction to the subsequent constitutional crisis exemplified his belief in non-judicial constitutional change. He rejected FDR's offer to be solicitor general, insisted that he "could be more use to the public" and the President as an outside adviser,[130] and stocked the administration with friends and former students who drafted and implemented legislation. For example, when Roosevelt needed new securities laws drafted, Frankfurter sent Benjamin Cohen and James Landis to Washington.[131] Together with Tommy Corcoran, they redrafted the statute, and Landis implemented the legislation at the SEC.[132]

Frankfurter viewed FDR's election in 1932, Democratic victories in the 1934 mid-term elections, and FDR's reelection in 1936 as mandates for constitutional change and for the Court to stop invalidating Roosevelt's New Deal programs and other state legislation.[133] Although publicly silent about Roosevelt's plan to

part, through The World and otherwise. . . . Directly, Organized Labor has doubtless gained most by the encounter.") (citation omitted).

[128] Letter from Frankfurter to Stimson, Feb. 10, 1932, at 1, *in* FF-LC, Box 103, Folder "Stimson, Henry L. 1932 #12"; *see* Letter from Stimson to Frankfurter, Feb. 12, 1930, *in id.*; Letter from Frankfurter to Stimson, Feb. 17, 1932, *in id.*; Interview by Gerald Gunther with Felix Frankfurter, Sept. 15, 1960, pt. II, at 5-6, *in* FFHLS, Box 201, Folder 10, Pt. III, Reel 28; *see also Unsigned Editorial*, NEW REPUBLIC, Feb. 24, 1932, at 28, *in* FF-LC, Box 197, Scrapbook "Writings 1932-1938," at 4.

[129] Letter from Frankfurter to C.C. Burlingham, Sept. 1, 1937, *in* ROOSEVELT AND FRANKFURTER, *supra* note 37, at 408-09.

[130] Letter from Frankfurter to Roosevelt, Mar. 14, 1933, *in* ROOSEVELT AND FRANKFURTER, *supra* note 37, at 120.

[131] Telegram from Roosevelt to Frankfurter, May 23, 1933, *in* ROOSEVELT AND FRANKFURTER, *supra* note 37, at 133; Letter from Frankfurter to Roosevelt, May 24, 1933, *in id.* at 133-34; *see* LASH, *supra* note 35, at 138-39.

[132] *See* THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN 171-73 (1984).

[133] Letter from Frankfurter to Roosevelt, Feb. 7, 1937, *in* ROOSEVELT AND FRANKFURTER, *supra* note 37, at 380-81.

increase the number of Supreme Court Justices, Frankfurter privately supported and advised the President.[134] At the time, Frankfurter viewed Justice Owen Roberts's supposed "switch-in-time," in which Roberts affirmed and then reversed *Adkins*, as vindicating the court-packing plan and a triumph for public opinion.[135] "Something had to be done," Frankfurter wrote in notes to Roosevelt for a State of the Union address. "If nothing was done, the mandate which the people of the United States had given to carry on would have become a nullity."[136]

Frankfurter's draft of Roosevelt's September 17, 1937, Constitution Day speech described the country's constitutional history as a "constant struggle between the great mass of the plain people of the United States who want national unity and justice against the lawyers who professionally complicate things in the service of those who want neither unity nor justice . . . ."[137] Frankfurter concluded: "When the people and the lawyers have clashed on great questions of legislative policy, ultimately the people have had their way."[138]

For Frankfurter, the court-packing crisis underscored the Court's limited role and the people's principal role in interpreting the Constitution. The people had repeatedly spoken; it was the Court's job to listen. Legislation and its implementation, not Court victories, changed constitutional law; Frankfurter supplied FDR with the human capital to make it happen. And FDR stayed in office long enough to remake the Court by appointing eight of the nine Justices, including Frankfurter himself.

During his pre-judicial career, Frankfurter developed a constitutional philosophy that emphasized the democratic political process, public opinion, and departmentalism. Building on Thayer's civic republicanism, Frankfurter believed that people trumped legislatures, and legislatures trumped courts. He viewed public

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[134] *Id.* at 371-417; *see* JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 332-35 (2010).

[135] Letter from Frankfurter to Roosevelt, Mar. 30, 1937, *in* ROOSEVELT AND FRANKFURTER, *supra* note 37, at 392. For Frankfurter's changed attitude about Roberts and the Switch, see Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955); Richard D. Friedman, *A Reaffirmation: The Authenticity of the Roberts Memorandum, or Felix the Non-Forger*, 142 U. PA. L. REV. 1985 (1994); Mark Tushnet, *Felix Frankfurter on the "Switch in Time,"* LEGAL HIST. BLOG (July 9, 2010, 11:53 AM) http://legalhistoryblog.blogspot.com/2010/07/felix-frankfurter-on-switch-in-time.html.

[136] Notes for a State of the Union Address, Aug. 10, 1937, *in* ROOSEVELT AND FRANKFURTER, *supra* note 37, at 405.

[137] *Id.* at 410.

[138] *Id.*

opinion and elections, not Supreme Court litigation, as the surest paths to constitutional change. He stayed true to those Jeffersonian democratic principles as a Justice.

II. JUDICIAL CAREER

This Part reveals Frankfurter's enduring jurisprudential legacy by dissecting three of the most important and oft-criticized constitutional moments of his judicial career — the *Flag Salute Cases*, *Brown v. Board of Education* and its progeny, and *Baker v. Carr*.[139] It does not attempt to reargue the merits of these cases. Rather, it uses these cases to understand Frankfurter's jurisprudence and to show how his judicial restraint anticipated popular constitutionalism and can contribute to the ongoing debate about the role of Court.

Frankfurter's judicial shortcomings have been well-documented.[140] He lost the leadership of the Court after the *Flag Salute Cases*. His pedantic, persnickety, and at times paranoid personality alienated his colleagues and prevented him from building coalitions. He wrote overlong, over cited opinions and never could turn a phrase like his idol Holmes or his closest colleague Robert Jackson. Nor did he ever write a landmark majority opinion about constitutional law.[141] But a difficult personality, lack of leadership skills, and dearth of plum assignments do not make Frankfurter a jurisprudential failure.

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[139] Other reviled constitutional decisions reveal Frankfurter's populist and departmentalist instincts. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 539-40 (1951) (Frankfurter, J., concurring in affirmance of the judgment) ("Free-speech cases are not an exception to the principle that we are not legislators, that direct policymaking is not our province. How best to reconcile competing interests is the business of legislatures, and the balance they strike is a judgment not to be displaced by ours, but to be respected unless outside the pale of fair judgment."); Korematsu v. United States, 323 U.S. 214, 225 (1944) (Frankfurter, J., concurring) ("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."). His principles are also revealed in the Court's triumphs. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring).

[140] *See* H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981); Dennis J. Hutchinson, *Felix Frankfurter and the Business of the Supreme Court, O.T. 1946–O.T. 1961*, 1980 SUP. CT. REV. 143.

[141] The only one ever assigned to him, *Smith v. Allwright*'s ban on all-white primaries, was reassigned because Jackson persuaded Chief Justice Stone that a message from a New Englander, a Jew, and not an identifiable Democrat "may grate on southern sensibilities." Letter from Robert H. Jackson to Harlan Fiske Stone, Jan. 17, 1944, *in* Harlan Fiske Stone Papers, Library of Congress, Box 75, Folder "Jackson, Robert H. 1943-44."

Frankfurter's jurisprudence consisted of three basic premises:

First, like today's popular constitutionalists, he valued the people's role in interpreting the Constitution and opposed judicial supremacy. He believed that Justices should not read their personal views into the Constitution, particularly through the Fifth and Fourteenth Amendments' Due Process Clause, to invalidate social and economic legislation. Elections and enlightened public opinion mattered. He believed that the Court should not lead the people, but that people, through their elected representatives, should often (but not always) lead the Court.

Second, he advocated departmentalism. He was uncomfortable with the Court initiating social or political change and preferred that the Court follow or act in concert with the executive or legislative branches.

Finally, he recognized the Court's limited institutional competence. Indeed, he agreed with Holmes's remark that "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states."[142] Yet he understood that "[t]he very notion of our federalism calls for the free play of local diversity in dealing with local problems."[143] Like Brandeis,[144] Frankfurter viewed states as laboratories of experimentation and promoters of liberty, and often voted to uphold state legislation and criminal convictions despite the unpopularity of federalism during the 1950s and 1960s.[145]

The *Flag Salute Cases*, *Brown* and its progeny, and *Baker v. Carr* highlight Frankfurter's Jeffersonian faith in enlightened public opinion, the democratic political process, and departmentalism, and his skepticism about the Court's institutional competence. These cases also demonstrate affinities between Frankfurter's judicial restraint and

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[142] Felix Frankfurter, *Mr. Justice Holmes and the Constitution: A Review of His Twenty-Five Years on the Supreme Court*, 41 HARV. L. REV. 121, 136 (1927) (quoting OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295-96 (1921)).

[143] FRANKFURTER, THE PUBLIC & ITS GOVERNMENT, *supra* note 56, at 48-49; *see* Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism,"* 27 GA. L. REV. 697, 736 (1993).

[144] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[145] *See* Mapp v. Ohio, 367 U.S. 643, 672 (1961) (Frankfurter, J., joining Harlan, J., dissenting); Monroe v. Pape, 365 U.S. 167, 202 (1961) (Frankfurter, J., dissenting); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 466 (1947) (Frankfurter, J., concurring); Screws v. United States, 325 U.S. 91, 138 (1945) (Roberts, Frankfurter, and Jackson, JJ., dissenting).

today's less Court-centric constitutional theories, including popular constitutionalism.

A. Flag Salute Cases

The *Flag Salute Cases* produced the first major constitutional moment of Frankfurter's judicial career. His critics identify these cases as when he became "conservative"[146] and "uncoupled with the locomotive of history,"[147] he lost the intellectual leadership of the Court, he failed to live up to Holmes's and Brandeis's tradition of protecting civil liberties,[148] and he became a jurisprudential failure.[149]

At first glance, Frankfurter's refusal to change his mind about the *Flag Salute Cases* may seem antithetical to popular constitutionalism. In 1940, he wrote the majority opinion, joined by seven Justices, in the first flag salute case, *Minersville School District v. Gobitis*,[150] which upheld the expulsion of two children of Jehovah's Witnesses from public school for refusing to salute the flag. Events and politics overtook *Gobitis*. At home, the decision sparked violent backlash in 1940 against Jehovah's Witnesses[151] and elite disapproval in law reviews and newspaper editorials.[152] Abroad, the United States entered World War II; Nazi Germany was sending Jehovah's Witnesses along with Jews to concentration camps.[153] In a subsequent case involving Jehovah's Witnesses, Justices Black, Douglas, and Murphy renounced their votes in *Gobitis*.[154] In 1941, Frankfurter lost another vote when

[146] Fred Rodell, *Felix Frankfurter, Conservative*, HARPER'S, Oct. 1941, at 449; *see* Letter from Fred Rodell to Frankfurter, May 29, 1956, *in* FFHLS, Part III, Box 205, Folder 9, Reel 32, at 94 (criticizing him "in many articles of mine stretching fifteen years back"); *see also* Andrew Yaphe, *"Reputation, Reputation, Reputation": Fred Rodell, Felix Frankfurter, and the Reproduction of Hierarchy in the Unlikeliest of Places*, 36 J. LEGAL PROF. 441 (2012).

[147] LASH, *supra* note 35, at 73.

[148] UROFSKY, *supra* note 6, at xi, 117-18.

[149] *Id.*

[150] 310 U.S. 586 (1940).

[151] SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 72-95 (2000) (discussing mob attacks in Texas, Maine, Illinois, Maryland, West Virginia, and elsewhere); Gregory L. Peterson et al., *Recollections of* West Virginia State Board of Education v. Barnette, 81 ST. JOHN'S L. REV. 755, 762-63 (2007) (same).

[152] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 635 n.15 (1943).

[153] DETLEF GARBE, BETWEEN RESISTANCE AND MARTYRDOM: JEHOVAH'S WITNESSES IN THE THIRD REICH (Dagmar G. Grimm trans., 2008); JAMES PENTON, JEHOVAH'S WITNESSES AND THE THIRD REICH: SECTARIAN POLITICS UNDER PERSECUTION (2004).

[154] Jones v. Opelika, 316 U.S. 584, 623-24 (1942) (Black, Douglas, & Murphy, JJ., dissenting).

Chief Justice Hughes retired, lone *Gobitis* dissenter Harlan Fiske Stone replaced Hughes as Chief Justice, and Jackson joined the Court. The following year, Wiley Rutledge replaced James F. Byrnes, who would have been another likely Frankfurter vote. It was no shock, therefore, when Frankfurter lost his majority and the Court reversed *Gobitis* three years later in the second flag salute case, *West Virginia Board of Education v. Barnette*.[155]

Frankfurter stayed true to his jurisprudential philosophy in his *Barnette* dissent. He maintained his faith in the democratic political process and in state legislatures, his votes were consistent with non-elite public opinion, he was conscious of mixed departmentalist signals, and his dissent was less Court-centric than the majority opinion. Nor did he abandon the tradition of Holmes and Brandeis in protecting civil liberties.

1. State Legislature

Frankfurter objected to *Barnette* primarily because it blocked enforcement of a state regulation. Factually, *Barnette* differed from *Gobitis* in this respect. In *Gobitis*, as Richard Danzig observed, the pledge of allegiance occurred "by custom."[156] After the students refused to salute the flag, the Minersville School District received permission from the state to compel a flag salute. The board then established the requirement and, based on an *ex post facto* law, expelled the students.[157] Frankfurter's *Gobitis* opinion, Danzig argued, was guilty of "inflation" because the Pennsylvania legislature had not passed a mandatory flag-salute law or even addressed the issue.[158]

Barnette, in contrast, enjoined the enforcement of a post-*Gobitis* West Virginia law that required its public schools to teach courses in history, civics, and the Constitution "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government."[159] With the state legislature's

[155] *Barnette*, 319 U.S. 624.

[156] Richard Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, 1977 SUP. CT. REV. 257, 261-62 [hereinafter *How Questions Begot Answers*]; Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675, 714 (1984) [hereinafter *Justice Frankfurter's Opinions*].

[157] *See* sources cited *supra* note 156.

[158] Danzig, *How Questions Begot Answers*, *supra* note 156, at 261-62; Danzig, *Justice Frankfurter's Opinions*, *supra* note 156, at 714-17.

[159] *Barnette*, 319 U.S. at 625-26.

imprimatur and inspired by *Gobitis*, the school board established a mandatory flag salute requirement.[160] The *Barnette* children then refused to salute the flag and were sent home from school.[161]

In *Barnette*, Frankfurter was on much stronger footing when he argued that the Court was thwarting the goals of a state legislature. He argued that liberty was best protected by legislatures, not by courts, quoting Holmes that "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[162] Holmes's opinion, Frankfurter wrote, "went to the very essence of our constitutional system and the democratic conception of our society."[163] Frankfurter concluded with a lengthy quotation from Thayer.[164] Like Holmes and Thayer, Frankfurter believed that "responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered."[165]

Frankfurter, moreover, argued that that it was not within the Court's institutional competence to "make accommodations" for Jehovah's Witnesses about saluting the flag.[166] Such accommodations or exceptions were better left to legislatures, not courts: "If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate."[167] He believed that the Court was not "free to act as though [it] were a superlegislature."[168]

Barnette reminded Frankfurter of the "good" substantive due process decisions that he had objected to years earlier in the *New Republic*,[169] decisions such as *Meyer v. Nebraska* and *Pierce v. Society of*

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[160] *Id.* at 626.

[161] Peterson, *supra* note 151, at 769-71 (interviewing the Barnett sisters, who recalled that they were repeatedly sent home at the start of each school day).

[162] *Barnette*, 319 U.S. at 649 (Frankfurter, J., dissenting) (quoting Mo., Kan., & Tex. Ry. Co. v. May, 194 U.S. 267, 270 (1904)).

[163] *Id.*

[164] *Id.* at 667-71 (quoting JAMES BRADLEY THAYER, JOHN MARSHALL 104-10 (1901)).

[165] *Id.* at 649.

[166] *Id.* at 651 ("But the real question is, who is to make such accommodations, the courts or the legislature?").

[167] *Id.* at 652.

[168] *Id.* at 648.

[169] *Red Terror*, *supra* note 77, at 166.

Sisters that trumped state legislatures based on the "liberty" interests of students to learn German and parents to send their children to private schools. According to Frankfurter, *Barnette* was even broader than *Pierce* — for once parents decided to send their children to public schools, *Barnette* dictated to public schools how to teach children about citizenship.[170] He wrote: "I cannot bring my mind to believe that the 'liberty' secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen."[171]

Indeed, Jackson's beautiful and stirring majority opinion in *Barnette*[172] was based on more nebulous constitutional concepts and implied First Amendment freedoms than was *Gobitis*. *Gobitis* was a free exercise case; *Barnette* was based on compelled speech. Jackson went well beyond free speech to "freedom of mind"[173] and "freedom to be intellectually and spiritually diverse."[174] Indeed, he concluded that the flag salute invaded "the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[175]

For Frankfurter, Jackson's non-textual freedoms smacked of such implied due process concepts as freedom of contract that resulted in Frankfurter's defeat in *Adkins*.[176] During the *Gobitis* deliberations, he revealed that *Adkins* was on his mind:

> Just as *Adkins v. Children's Hospital* had consequences not merely to the minimum wage laws but in its radiations and in its psychological effects, so this case would have a tail of implications as to legislative power that is certainly debatable and might easily be invoked far beyond the size of the immediate kite, were it to deny the very minimum exaction, however foolish as to the Gobitis children, of an expression of faith in the heritage and purposes of our country.[177]

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[170] *Barnette*, 319 U.S. at 656-58.

[171] *Id.* at 647.

[172] *Id.* at 642 ("If there is any fixed star in our constitutional constellation . . . .").

[173] *Id.* at 637.

[174] *Id.* at 641.

[175] *Id.* at 642.

[176] Danzig, *How Questions Begot Answers*, *supra* note 156, at 272-74 (connecting *Gobitis* to his defeat in *Adkins*).

[177] Letter from Frankfurter to Stone, May 27, 1940, at 4, *in* Stone Papers, Box 65,

In his *Barnette* dissent, Frankfurter alluded to *Adkins* and his prejudicial criticism of the Court's liberty of contract cases: "In the past this Court has from time to time set its views of policy against that embodied in legislation by finding laws in conflict with what was called the 'spirit of the Constitution'. Such undefined destructive power was not conferred on this Court by the Constitution."[178] Upholding the democratic process and powers of state legislatures to set public school agendas was more important to him than creating new implied constitutional rights.

2. Public Opinion

Frankfurter also factored in public opinion. As a general matter, public opinion is difficult to gauge and often depends on which public. This is especially true of the *Flag Salute Cases*.[179]

In *Gobitis*, Frankfurter was trying to persuade the average American of the importance of "national unity" as the country vacillated about entering World War II.[180] Indeed, as *Gobitis* was being decided, he was helping Roosevelt with war mobilization speeches, successfully encouraging Roosevelt to make Henry Stimson Secretary of War and Judge Robert Patterson Assistant Secretary of War, and lobbying for a pre-war draft.[181] Law clerks, alluding to Germany's invasion of France the month before the decision, referred to *Gobitis* as "Felix's Fall-of-France Opinion."[182] Frankfurter desperately wanted the United States to enter the war and had long understood the gravity of the Nazi threat.[183] He cut ties with columnist Walter Lippmann after

Folder "Minersville School District v. Gobitis Dissent."

[178] *Barnette*, 319 U.S. at 666 (Frankfurter, J., dissenting).

[179] Robert L. Tsai, *Reconsidering* Gobitis*: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 425 (2008) ("Nor is it any easier to classify the outcome [of *Barnette*] as either majoritarian or counter-majoritarian.").

[180] *Barnette*, 319 U.S. at 662-63 (Frankfurter, J., dissenting).

[181] ROOSEVELT AND FRANKFURTER, *supra* note 37, at 512; Danzig, *How Questions Begot Answers*, *supra* note 156, at 267-70.

[182] John P. Frank, Book Note, 32 J. LEGAL EDUC. 432, 442 (1982) (reviewing BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982)). Frank had clerked for Hugo Black the term after *Gobitis*. *But see* Felix Frankfurter, Columbia Oral History Draft 146-47, *in* FF-LC, Box 205, Folder "Felix Frankfurter Reminisces Transcript 26 Nov. 1954 #7" (insisting conference vote took place April 28, 1940, and "[t]he guns weren't booming until May").

[183] Felix Frankfurter, *Persecution of Jews in Germany*, THE WORLD TODAY, Apr. 1934, at 36-38, *in* FF-LC, Box 197, Scrapbook "Writings 1932-1938," at 162-64; *see* David M. Bixby, *The Roosevelt Court, Democratic Ideology, and Minority Rights: Another*

Lippmann's isolationist 1933 column described Hitler as "the authentic voice of a genuinely civilized people . . . ."[184] In 1938, Frankfurter appealed to Lady Nancy Astor, a Nazi appeaser in London, who helped secure the release of his 82-year-old uncle, University of Vienna scholar and librarian Salomon Frankfurter, from a Nazi prison.[185] Two years later, at the height of the German bombing of Great Britain and the Court's internal debate about *Gobitis*, the childless Frankfurter and his wife took in three children of a British former student.[186] Recalling a heated argument between Attorney General Robert Jackson and Frankfurter after *Gobitis*, Harold Ickes remarked: "The latter is really not rational these days on the European situation."[187] In 1940, Frankfurter felt the effects of the war more personally than did many friends in the administration.

Frankfurter believed that public schools also played a role in creating national unity.[188] His immigrant experiences instilled in him the assimilationist function of public schools and their impact on public opinion. At P.S. 25, his teacher, Miss Hogan, threatened his German-American classmates with corporal punishment if they spoke to him in German. He remained forever grateful to her and to public schools for helping Americanize him.[189]

Despite Frankfurter's belief that "national unity" was pivotal to mobilizing the country for war, elite public opinion turned against him after *Gobitis*. He had written the majority opinion over the objections of his current, future, and former clerks.[190] Stone's

Look at United States v. Classic, 90 YALE L.J. 741, 767-70 (1981).

[184] Letter from Frankfurter to Lippmann, Nov. 28, 1936, *in* FF-LC, Box 78, Folder "Lippmann, Walter 1936-57 #22" (quoting Walter Lippmann, *Hitler's Speech*, N.Y. HERALD TRIB., May 19, 1933, at 19).

[185] Letter from Frankfurter to Roosevelt, Oct. 24, 1941, *in* ROOSEVELT AND FRANKFURTER, *supra* note 37, at 619; Interview by Max Freedman with Frankfurter, undated, at 2-4, *in* FFHLS, Box 218, Folder 19, Pt. III, Reel 40 at 270-72.

[186] LASH, *supra* note 35, at 193-94 n.1.

[187] HAROLD L. ICKES, *Diary Entry of June 5, 1940*, *in* 3 THE SECRET DIARY OF HAROLD L. ICKES: THE LOWERING CLOUDS 199 (1954).

[188] Interview by Max Freedman with Frankfurter, *supra* note 185, at 35-36 (relating that Chief Justice Hughes assigned *Gobitis* to Frankfurter because of the latter's passionate conference speech about the importance of public schools in achieving national unity). In retirement, Hughes praised Frankfurter's *Barnette* dissent. Letter from Charles Evans Hughes to Frankfurter, June 17, 1943, at 1-2, *in* FFHLS, Box 10, Pt. I, Reel 7 at 810-11.

[189] FRANKFURTER, REMINISCES, *supra* note 33, at 4-5.

[190] KATHARINE GRAHAM, PERSONAL HISTORY 121-22 (1997) (recalling argument about *Gobitis* between Frankfurter, current clerk Edward Pritchard, former clerk Adrian Fisher, future clerk Philip Graham, and other members of Kay Graham's

biographer reported that 171 newspapers agreed with Stone's dissent.[191] Frankfurter's friends in elite circles publicly and privately disagreed with him. Harold Laski wrote Stone: "I want to tell you how right I think you are in that Educational case from Pennsylvania and, to my deep regret, how wrong I think Felix is."[192] Thomas Reed Powell and other legal elites criticized *Gobitis* in law reviews[193] and national magazines.[194] Zechariah Chafee and Monte Lemann co-authored the ABA's *Barnette* amicus brief on the children's side.[195] The ACLU, an organization that Frankfurter had helped found, also filed a brief on the children's behalf.[196]

Frankfurter believed that the people of West Virginia, as well as the rest of America, were on his side. The *Flag Salute Cases* are similar to the flag burning case more than forty years later[197] — decisions about unpopular and possibly counter-majoritarian First Amendment rights. Indeed, in his *Barnette* dissent, he did not believe that a person's "freedom of conscience" or "freedom of mind" should trump the majority's democratic process:

> That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and

wedding party); MICHAEL E. PARRISH, CITIZEN RAUH: AN AMERICAN LIBERAL'S LIFE IN LAW AND POLITICS 59-60 (2010) [hereinafter CITIZEN RAUH]; Joseph L. Rauh, Jr., *Felix Frankfurter: Civil Libertarian*, 11 HARV. C.R.-C.L. L. REV. 496, 503 (1976) (recalling Pritchard and Graham asked Rauh, Frankfurter's first clerk, to intervene about *Gobitis*, but Rauh declined).

[191] ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 532 (1956). Frankfurter contended that Stone's law clerk Allison Dunham influenced Stone's dissent, a contention that Dunham did not deny. *Id.* at 527-28 & n.* (citing Frankfurter interview and Dunham letter). Frankfurter echoed others' criticism of Mason's biography as "one-sided." Clyde Spillenger, *Lifting the Veil: The Judicial Biographies of Alpheus T. Mason*, 21 REV. AM. HIST. 723, 729 (1993).

[192] Letter from Laski to Stone, July 10, 1940, *in* Stone Papers, Box 19, Folder "Laski, Harold J."

[193] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 635 n.15 (1943).

[194] *See, e.g.*, Rodell, *supra* note 146, at 457 (describing opinion as "most anti-liberal decision in years" and "in effect, he ordered the children to 'Heil'").

[195] *Barnette*, 319 U.S. at 625.

[196] *Id.*

[197] Texas v. Johnson, 491 U.S. 397, 399 (1989) (invalidating Texas flag burning statute).

> more enshrined in the Constitution than the consciences of a majority.[198]

Non-elite public opinion, especially in West Virginia, may have supported Frankfurter.

3. Departmentalism

Departmentalism, like public opinion, was a mixed bag. As *Barnette* was being deliberated in December 1942, Congress passed a joint resolution "to codify and emphasize rules and customs pertaining to the display and use of the flag."[199] Frankfurter sent the resolution to Stone without taking a position on whether it supported his position.[200] He alerted Stone to Section 7, which said:

> That the pledge of allegiance to the flag, "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all", be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. . . .[201]

This section could be interpreted as support for *Gobitis*, respect for the flag, and national unity. The *Barnette* majority, however, argued that the resolution made "flag observance voluntary" and "prescribe[d] no penalties for nonconformity."[202] Whether a statute supported by the American Legion and other patriotic organizations with language watered down to permit widespread display of the flag[203] cuts for or against Frankfurter's "national unity" rationale is at best a debate between legislative intent and the lack of plain language about a flag salute (or enforcement for noncompliance). He did not view the statute as a rebuke.

Nor did Frankfurter feel constrained by the actions of the President. One of Roosevelt's most trusted unofficial advisers, Frankfurter visited Hyde Park after *Gobitis*. Eleanor Roosevelt "feared the decision would

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[198] *Barnette*, 319 U.S. at 662 (Frankfurter, J., dissenting).

[199] H.R.J. Res. 359, 77th Cong. (1942), *enacted by* 56 Stat. 1074.

[200] Letter from Frankfurter to Stone, Jan. 7, 1943, *in* Stone Papers, Box 74, Folder "Frankfurter, Felix Jan.-Apr. 1943."

[201] H.R.J. Res. 359 § 7.

[202] *Barnette*, 319 U.S. at 638, 642 n.17.

[203] Tsai, *supra* note 179, at 413 n.199.

generate intolerance, especially in a period of rising hysteria";[204] the President, however, sided with Frankfurter that the regulation was "'stupid, unnecessary, and offensive' but it fell within the proper limits of their legal power."[205]

To be sure, Roosevelt often told different people different things. Robert Tsai argued that Roosevelt's *Four Freedoms* and other pre- and post-war speeches found their ways unattributed into Jackson's *Barnette* opinion.[206] Tsai also observed a diversity of views within the executive branch: then-Attorney General Jackson privately blasted *Gobitis*,[207] Solicitor General Francis Biddle delivered a national radio address condemning violence against Jehovah's Witnesses,[208] and two Justice Department officials wrote an article criticizing *Gobitis*.[209]

Frankfurter, however, knew Roosevelt's mind. He had contributed to Roosevelt's speeches before the U.S. entry in World War II and was so proud of his *Gobitis* and *Barnette* opinions that he wanted them included in the Roosevelt Presidential Library. The "whole series of opinions," Frankfurter wrote Roosevelt, "ought to furnish to the future historian food for thought on the scope and meaning of some of the Four Freedoms — their use and their misuse."[210]

4. Less Court-Centric

Frankfurter's *Barnette* opinion was less Court-centric than Jackson's. "The ruling struck a blow for liberty, to be sure, yet it also promoted a decidedly judge-centered vision of freedom," Tsai wrote. "Where Frankfurter's ruling painted a romantic vision of republican deliberation sans judicial participation, Jackson's aesthetic choices threatened to erase non-judicial actors from the social landscape."[211] Indeed, Tsai lamented that Jackson had deleted from earlier drafts

[204] LASH, *supra* note 35, at 70 (citing JOSEPH LASH, ELEANOR ROOSEVELT: A FRIEND'S MEMOIR 159 (1964)) and ROOSEVELT AND FRANKFURTER, *supra* note 37, at 699-701); *see* ELEANOR ROOSEVELT, *"My Day" Column, June 23, 1943*, *in* ELEANOR ROOSEVELT'S MY DAY: HER ACCLAIMED COLUMNS, 1936–1945, at 169 (Rochelle Chadakoff ed., 1989) (decrying compelled flag march of "six people of a certain religious sect" in Wyoming).

[205] ROOSEVELT AND FRANKFURTER, *supra* note 37, at 701.

[206] Tsai, *supra* note 179, at 367, 385-91.

[207] *Id.* at 397 (citing ICKES, *supra* note 187, at 199, 211).

[208] Tsai, *supra* note 179, at 406 (citing Francis Biddle, Radio Address, June 16, 1940).

[209] *Id.* at 411-12.

[210] Letter from Frankfurter to Roosevelt, May 3, 1943, *in* ROOSEVELT AND FRANKFURTER, *supra* note 37, at 699.

[211] Tsai, *supra* note 179, at 430-31.

concerns from members of the Executive Branch and more overt references to the lack of enforcement provisions in the joint congressional resolution.[212]

What rankled Frankfurter most was that *Barnette* reflected merely the Court's shifting political preferences and changing personnel. He privately contended that Stone had contradicted some of his earlier votes on related cases.[213] He claimed that Black changed his vote not because he has "reread the Constitution" but because "he has read the papers."[214] Jackson and Rutledge replaced two likely Frankfurter votes, Hughes and Byrnes. Frankfurter believed that new Justices and old ones ignored stare decisis and not only overruled *Gobitis* but also prior decisions joined by thirteen Justices including Hughes, Brandeis, and Cardozo. "We are dealing with matters as to which legislators and voters have conflicting views. Are we as judges to impose our strong convictions on where wisdom lies?" Frankfurter wrote. "That which three years ago had seemed to five successive Courts to lie within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justices."[215]

Frankfurter argued that the people should interpret the Constitution. During the *Gobitis* deliberations, he wrote Stone about intending "to use this opinion as a vehicle for preaching the true democratic faith of not relying on the Court for the impossible task of assuring a vigorous, mature, self-protecting and tolerant democracy by bringing the responsibility for a combination of firmness and toleration directly home where it belongs — to the people and their representatives themselves."[216]

Nor do Frankfurter's flag salute opinions demonstrate that he had abandoned the tradition of Holmes and Brandeis of protecting civil rights and civil liberties. The famous opening paragraph of his *Barnette* dissent[217] revealed that Frankfurter lacked Holmes's detachment and

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[212] *Id.* at 431-35.

[213] Letter from Frankfurter to Alpheus Thomas Mason, Oct. 29, 1955, *in* FFHLS, Box 205, Folder 8, Pt. III, Reel 32, at 24 (identifying Johnson v. Deerfield, 306 U.S. 321 (1939)).

[214] LASH, *supra* note 35, at 209; *see id.* at 70 (quoting Frankfurter, Columbia Oral History Draft 309) (arguing that *Gobitis* was "okayed by those great libertarians until they heard from the people").

[215] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 665 (1943) (Frankfurter, J., dissenting).

[216] Letter from Frankfurter to Stone, May 27, 1940, *in* Stone Papers, Box 65, Folder "1939 Term — No. 690- Dissent Minersville School District et al. v. Gobitis".

[217] *Barnette*, 319 U.S. at 646-47 (Frankfurter, J., dissenting) ("One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the

fellow political animal Brandeis's cold reserve, but Frankfurter nonetheless believed that he was acting in accord with his judicial idols. Holmes's World War I-era free speech opinions came up during the *Gobitis* deliberations. "I had many talks with Holmes about his espionage opinions and he always recognized that he had a right to take into account the things that he did take into account when he wrote *Debs* and the others, and the different emphasis he gave the matter in the *Abrams* case," Frankfurter wrote Stone. "After all, despite some of the jurisprudential 'realists[,]' a decision decides not merely the particular case."[218] And retired Justice Brandeis, according to Frankfurter's diary, read *Gobitis* and remarked: "After I read it I assumed you would get the whole Court with you."[219]

Some scholars have presented an idealized view of Holmes and Brandeis as limiting their judicial restraint to "cases primarily involving economic questions."[220] Neither protected World War I-era free speech. Holmes wrote three majority opinions upholding the criminal convictions of antiwar protesters including Socialist Party presidential candidate Eugene Debs; Brandeis joined all three.[221] Before the war, Holmes believed that freedom of speech was limited to freedom from prior restraint.[222] During post-World War I Communist hysteria, Holmes morphed "clear and present danger" into a doctrine that eventually protected "freedom for the thought that we hate."[223]

freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should whole-heartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic . . . ."). Several justices — Roberts, Murphy, and Stone — tried to persuade Frankfurter to omit his personal opening paragraph. But he believed that it revealed how disinterested he could be. *See* LASH, *supra* note 35, at 253-55.

[218] Letter from Frankfurter to Stone, May 27, 1940, at 3-4, *in* Stone Papers, Box 65, Folder "Minersville School District et al. v. Gobitis."

[219] LASH, *supra* note 35, at 255; *see* Frankfurter, Columbia Oral History Draft 26, *in* FF-LC, Box 205, Folder "Felix Frankfurter Reminisces, Transcript 19 August 1955 #12" (asserting Brandeis and Second Circuit Judges Learned and Augustus Hand supported *Gobitis*). *But see* HIRSCH, *supra* note 140, at 243 n.190 (noting that Alpheus Thomas Mason doubted Frankfurter's assertion). *See generally* Spillenger, *supra* note 191, at 725-27 (explaining that enmity between Mason and Frankfurter ran deep in part because Frankfurter had denied Mason access to Brandeis's Supreme Court papers).

[220] UROFSKY, *supra* note 6, at 58.

[221] *See* Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).

[222] Patterson v. Colorado *ex rel.* Att'y Gen. of Colo., 205 U.S. 454, 462 (1907).

[223] United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting); *see* Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

Brandeis wrote a few dissents after the war,[224] but did not fully articulate his vision of free speech until 1927.[225] And neither Holmes nor Brandeis possessed a sterling record when it came to protecting the civil rights of African Americans.[226] Progressive scholars have been forcing Frankfurter to live up to a false standard.

Nor do Frankfurter's flag salute opinions demonstrate that he failed to protect civil rights and civil liberties. To be sure, he was not as protective of civil liberties during the post-World War II Communist hysteria as Holmes and Brandeis were after World War I. Frankfurter's patriotism, as the *Flag Salute Cases* revealed, sometimes got the best of his judgment. He voted to uphold the criminal convictions of Communists and the constitutionality of the Smith Act in *Dennis*[227] and to revoke the citizenship of a Communist in *Schneiderman*.[228] He displayed a willingness to balance away their rights because of his belief in departmentalism and the broad scope of congressional and executive power. Frankfurter's balancing in *Dennis*, however, is now considered a "liberal technique" and much closer to today's free speech jurisprudence than Black's absolutist approach.[229]

On the other side of the ledger, Frankfurter sided with the *Dennis* lawyers in *Sacher* because he questioned the fairness of contempt convictions for zealously defending their clients.[230] He repeatedly voted to grant certiorari to hear arguments that convicted atomic spies

[224] *See* Gilbert v. Minnesota, 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting); Schaefer v. United States, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting).

[225] *See* Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring). Brandeis nearly published his *Whitney* concurrence as a dissent in *Ruthenberg v. Michigan*, which was mooted when the petitioner died. *See* Ronald K.L. Collins & David M. Skover, *Curious Concurrence: Justice Brandeis' Vote in* Whitney v. California, 2005 SUP. CT. REV. 333, 336; Brandeis Papers, Harvard Law School, Box 44, Folder 11.

[226] Snyder, *House that Built Holmes*, *supra* note 78, at 710-12 (discussing Holmes's and Brandeis's poor records in race cases).

[227] Dennis v. United States, 341 U.S. 494, 518 (1951) (Frankfurter, J., concurring in the affirmance of the judgment).

[228] Schneiderman v. United States, 320 U.S. 118, 198 (1943) (Frankfurter, J., joining Stone, C.J., dissenting); *see* FRANKFURTER, REMINISCES, *supra* note 33, at 211-14 (discussing impassioned conference speech about his American citizenship); Letter from Frankfurter to Stone, Mar. 13, 1943, *in* FF-LC, Box 106, Folder "Stone, Harlan Fiske 1943."

[229] *See* Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1233-34 (2002) [hereinafter *Law and Prudence*] (citing Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972)); *see also id.* at 1233 ("Frankfurter's heirs on the Court are today's balancers.").

[230] Sacher v. United States, 343 U.S. 1, 23 (1952) (Frankfurter, J., dissenting).

Julius and Ethel Rosenberg had not received a fair trial, and he believed that they deserved full briefing and argument before the Supreme Court.[231] He also voted to grant certiorari about the fairness of the trial of convicted perjurer and suspected Communist William Remington.[232]

Frankfurter's first clerk Joseph Rauh, himself a lifelong civil libertarian,[233] argued that the line that Frankfurter became "uncoupled . . . from the locomotive of history" "cuts too broad a swath."[234] Rauh reviewed the Justice's accomplishments related to civil rights and civil liberties:[235] hiring the Court's first black law clerk William T. Coleman, his role in the school desegregation cases, his desire to hear the *Rosenberg* and *Remington* cases, his votes in cases about the separation of church and state,[236] his search and seizure opinions,[237] his testimony as a character witness at the perjury trial of former student Alger Hiss,[238] his votes in Confrontation Clause cases involving loyalty oaths,[239] and his votes in four 1957 cases about the rights of suspected Communists and labeled by critics as Red Monday.[240]

Frankfurter's flag salute opinions demonstrate flaws in his constitutional philosophy. They place tremendous faith in the

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[231] *See* Rosenberg v. United States, 346 U.S. 273, 301 (1953) (Frankfurter, J., dissenting); Brad Snyder, *Taking Great Cases: Lessons from the* Rosenberg *Case*, 63 VAND. L. REV. 885, 941-43 (2010) [hereinafter *Taking Great Cases*].

[232] *See* United States v. Remington, 191 F.2d 246 (2d Cir. 1951), *cert. denied*, 347 U.S. 913 (1954); Snyder, *Taking Great Cases*, *supra* note 231, at 934 n.284.

[233] *See generally* PARRISH, CITIZEN RAUH, *supra* note 190.

[234] Rauh, *supra* note 190, at 507.

[235] *Id.* at 507-19.

[236] *See* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948) (Frankfurter, J.); Everson v. Bd. of Educ., 330 U.S. 1, 28 (1947) (Frankfurter, J., joining Jackson & Reed, JJ., dissenting).

[237] *See* Rochin v. California, 342 U.S. 165, 172 (1952) (holding that pumping a man's stomach for evidence "shocks the conscience"); Harris v. United States, 331 U.S. 145, 155 (1947) (Frankfurter, J., dissenting) (objecting to warrantless search of home).

[238] G. Edward White, *The Alger Hiss Case: Justices Frankfurter & Reed as Character Witnesses*, 4 GREEN BAG 2D 63, 63 (2000) (arguing Frankfurter's testimony was more symbolically than substantively helpful); *see* G. EDWARD WHITE, ALGER HISS'S LOOKING-GLASS WARS: THE COVERT LIFE OF A SOVIET SPY 12-29 (2004).

[239] *See* Greene v. McElroy, 360 U.S. 474, 508 (1959) (Frankfurter, J., concurring in the judgment); Peters v. Hobby, 349 U.S. 331 (1955); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 149 (1951) (Frankfurter, J., dissenting).

[240] *See* Service v. Dulles, 354 U.S. 363 (1957); Yates v. United States, 354 U.S. 298 (1957); Sweezy v. New Hampshire, 354 U.S. 234 (1957); Watkins v. United States, 354 U.S. 178 (1957).

democratic political process and value departmentalism and public opinion, but they provide no guidance for judicial intervention and no account of rights. He selectively read *Carolene Products*' famous footnote four,[241] perhaps not realizing within five years of the decision the footnote's concern with fascism and protecting minority rights.[242] His flag salute opinions, as Richard Danzig observed, read more like rational basis review in *Carolene*'s text and focused solely on paragraph two of footnote four because there was no interference with the political process.[243] But he ignored paragraph one of footnote four about safeguarding the Bill of Rights and paragraph three about protecting "discrete and insular minorities."[244]

Frankfurter's failure to protect minority rights in *Barnette* and his emphasis on *Carolene*'s protection of the political process suggests a different outcome in *Brown*. Perhaps he would argue that segregated schools violated the Equal Protection Clause, but the flag salute law did not violate the Due Process Clause because there was no such thing as "freedom of conscience" or "freedom of mind." Perhaps the answer is to allow courts to stake out the scope of minority rights and allow legislatures and executives to enforce them. But Frankfurter broadly defined legislative powers and reluctantly defined rights. It is easy to see why his *Barnette* dissent was unpopular among many of his elite peers as America fought against racial and religious intolerance and totalitarian regimes from overtaking the world.

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[241] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[242] During the *Gobitis* deliberations, Frankfurter wrote Stone: "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. I have taken over that distinction in its central aspect, however inadequately, in the present opinion by insisting on the importance of keeping open all these channels of free expression by which undesirable legislation may be removed, and keeping unobstructed all forms of protest against what are deemed invasions of conscience, however much the invasion may be justified on the score of the deepest interests of national wellbeing." Letter from Frankfurter to Stone, May 27, 1940, at 2, *in* Stone Papers, Box 65, Folder "Minersvillle School District et al. v. Gobitis Dissent"; *see also* Am. Fed'n of Labor v. Swing, 312 U.S. 321, 325 (1941) (citing footnote four a year later to argue that the "right [to free discussion] is to be guarded with a jealous eye"). *But see* LOUIS LUSKY, OUR NINE TRIBUNES: THE SUPREME COURT IN MODERN AMERICA 126 (1993) (noting that "in the entire four years between the Footnote's appearance and *Jones v. Opelika*, not one legal scholar had accepted the invitation that it extended for further analysis and discussion").

[243] Danzig, *Justice Frankfurter's Opinions*, *supra* note 156, at 686-91.

[244] *Id.*

B. Brown

Frankfurter protected minority rights in the biggest issue facing the Court — voting with the majority in every school desegregation case and playing an instrumental role in achieving unanimity in *Brown v. Board of Education*.[245] His role in deciding and enforcing *Brown*, though not without its faults, reveals his belief in departmentalism, the impact of public opinion, and the Court's limited institutional competence.

1. Departmentalism

a. Executive Branch Support

In *Brown*, Frankfurter revealed his departmentalist instincts by seeking executive branch support. During the 1952 Term Conference, he argued for holding all the cases for reargument because "[t]he social gains of having them accomplished with executive sanction would be enormous."[246] He particularly wanted the incoming Eisenhower administration to lead with regard to Washington D.C.'s segregated schools.[247] He said it was "intolerable that [the federal] government should permit segregation in D.C. life."[248] In desegregating the city, it "is important for the government that will be responsible to enforce it."[249] Therefore, he said, the Court "should set down [the] D.C. case for [re]argument under [the] new administration."[250]

Frankfurter elicited the Eisenhower administration's views on the school desegregation cases. He tried to influence the administration's position by discussing the pending cases during regular phone conversations with his former law clerk, Phil Elman, an assistant in the Solicitor General's office. Although these extrajudicial conversations have exposed Frankfurter to justifiable criticism,[251] they

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[245] 347 U.S. 483 (1954).

[246] Tom C. Clark, *1952 Conference Notes on* Brown, Dec. 13, 1952, at 4, [hereinafter *1952 Conference Notes on* Brown], *in* Tom C. Clark Papers, Tarlton Law Library, University of Texas, Box A27, Folder 4.

[247] Harold Burton, *1952 Conference Notes on* Brown, Dec. 13, 1952, at 5, [hereinafter *1952 Conference Notes on* Brown], *in* Harold Burton Papers, Library of Congress, Box 251, Folder 10.

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] Randall Kennedy, *A Reply to Philip Elman*, 100 HARV. L. REV. 1938, 1944 (1987); *With All Deliberate Impropriety*, N.Y. TIMES, Mar. 24, 1987, at A30.

spurred the administration's participation and briefing. During the 1952 Term, Elman persuaded his Justice Department superiors to allow him to write a brief supporting the *Brown* plaintiffs.[252] Before the 1953 Term reargument, Elman drafted the government's brief urging the Court to declare racially segregated schools unconstitutional but giving "district courts a reasonable period of time to work out the details . . . ."[253] It was Frankfurter's idea, Elman recalled, to invite state and federal officials to file amicus briefs and for the executive branch to participate in the reargument.[254] In the federal government's brief, Elman advocated gradual desegregation, which had "the seal of approval of both the Democratic Truman and Republican Eisenhower administrations . . . ."[255] Elman's inspiration for the government's argument came from "many conversations with [Frankfurter] over a period of many months. He told me what he thought, what the other Justices were telling him they thought. I knew from him what their positions were."[256] For Frankfurter, the importance of the executive branch's support in *Brown* outweighed the ethical concerns with conversing with Elman.

b. Congressional Remedies

Frankfurter also revealed his departmentalist instincts by supporting Jackson's idea that the Court should declare racially segregated schools unconstitutional and leave enforcement to Congress. Jackson repeatedly asked about congressional enforcement at the 1952 Term oral argument[257] and suggested at the conference: "If [we] can work it out so we can say segregation 'bad' — under approval of court *and*

[252] Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817, 826-27 (1987); *see also id.* at 827 (describing the brief as "the one thing I'm proudest of in my whole career").

[253] *Id.* at 827; *cf.* Letter from Philip Elman to Frankfurter, July 15, 1953, *in* FF-LC, Box 53, Folder "Elman, Philip," Reel 32, at 223 (worrying about his "role" in 1953 Term brief).

[254] Elman & Silber, *supra* note 252, at 832; Transcript of Oral Argument, Brown v. Bd. of Educ., 347 U.S. 483 (1954) *in* 49A LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 523 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS AND ARGUMENTS].

[255] Elman & Silber, *supra* note 252, at 828.

[256] *Id.*

[257] 49 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 254, at 377, 386-87; *see also* 49A LANDMARK BRIEFS AND ARGUMENTS, *supra* note 254, at 467, 488-89, 527 (raising the Section V question at the 1953 Term argument).

support of Congress — and must be done in certain period."[258] A few years after *Brown*, Frankfurter revealed that "Bob Jackson strongly played with the idea of leaving enforcement to Congress, i.e. Sec. 5 of the Fourteenth [Amendment]. He found that it just wouldn't write. He tried it, tried hard for a considerable time, drafted and re-drafted, and finally gave up and agreed to court opinion."[259]

The last draft of Jackson's concurrence was more complicated than Frankfurter's description. Jackson asserted that Section 5 permits Congress to deal with "changes of conditions and public opinion always to be anticipated in a developing society."[260] And "[i]f the Amendment deals at all with state segregation and education, there can be no doubt that it gives Congress a wide discretion to enact legislation on that subject binding on all states and school districts."[261] For Jackson, "[t]he question is how far this Court should leave this subject to be dealt with by legislation, and any answer will have far-reaching implications."[262] He understood the "limitations on the nature and effectiveness of the judicial process" and the "futility of effective reform of our society by judicial decree."[263] He believed that "[t]he Court can strike down legislation which supports educational segregation, but any constructive policy for abolishing it must come from Congress. Only Congress can enact a policy binding on all states and districts, and it can delegate its supervision to some administrative body provided with standards for determining the conditions under which sanctions apply."[264]

At times, Jackson's concurrence bordered on prophecy: "To eradicate segregation by judicial decree means two generations of

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[258] Clark, *1952 Conference Notes on* Brown, *supra* note 246, at 4; *see* Burton, *1952 Conference Notes on* Brown, *supra* note 247, at 6-7 (quoting Jackson: "If stand up to first, they may abolish it.").

[259] Letter from Frankfurter to Hand, Oct. 12, 1957, *in* Hand Papers, Box 105D, Folder 105D-23, *reprinted in* REASON AND IMAGINATION: THE SELECTED CORRESPONDENCE OF LEARNED HAND 381 (Constance Jordan ed., 2013) [hereinafter REASON AND IMAGINATION]; *see* Letter from Frankfurter to Hand, Feb. 13, 1958, at 2, *in* FF-LC, Box 65, Folder "Hand, Learned 1958 #39"; *see also* Elman & Silber, *supra* note 252, at 824, 829, 840-41. On June 27, 1956, Frankfurter read Jackson's March 15, 1954, draft opinion. Notation of Elsie Douglas, undated, *in* Robert Jackson Papers, Library of Congress, Box 184, Folder 8.

[260] Robert Jackson, *Draft* Brown *Concurrence*, Mar. 15, 1954, at 11 [hereinafter *Draft* Brown *Concurrence*], *in* Jackson Papers, Box 184, Folder 8.

[261] *Id.*

[262] *Id.*

[263] *Id.* at 12.

[264] *Id.* at 13.

litigation."[265] He rejected the government's suggestion of leaving enforcement to district courts and refused "to be a party" to this proposed remedial solution.[266] Of the argument that Congress "may or probably will refuse to act" and that the Court "must act because our representative system has failed," Jackson believed that this "was not a sound basis for judicial action,"[267] but that the Court had to act because it had led Congress to believe that racial segregation was constitutional by sanctioning the separate but equal doctrine.[268] He voted to strike down segregated schools and reargue the enforcement question,[269] a reargument he never lived to see because six months after *Brown* he died of a heart attack.

2. Court's Limited Institutional Competence

If Jackson had lived, Frankfurter might have encouraged congressional enforcement out of concern for the Court's limited institutional competence. Frankfurter was "very sympathetic" to Jackson's position, Elman recalled, "that Congress ought to exercise its section five power to enforce the fourteenth amendment, as it later did in the Civil Rights Act of 1964, long after he had moved out of the picture."[270] Although the idea died with Jackson, Frankfurter

[265] *Id.* at 14; *see also* 49A LANDMARK BRIEFS AND ARGUMENTS, *supra* note 254, at 541 ("I foresee a generation of litigation if we send it back with no standards, and each case has to come here to determine it standard by standard.").

[266] Jackson, *Draft* Brown *Concurrence*, *supra* note 260, at 14-15.

[267] *Id.* at 17; *see also* William O. Douglas, *1953 Conference Notes on* Brown, Dec. 12, 1953, at 4, *in* William O. Douglas Papers, Library of Congress, Box 1150, Folder "Original Conference Notes" (noting that after reargument, Jackson remarked at conference that "[i]f we have to decide this question, then representative government has failed. We would have to give advice to the lower courts").

[268] Jackson, *Draft* Brown *Concurrence*, *supra* note 260, at 18 ("The necessity for judicial action on this subject arises from the doctrine concerning it which is already on our books.").

[269] *Id.* at 22-23. For more on Jackson's draft concurrence, see Brad Snyder, *What Would Justice Holmes Do (WWJHD)?: Rehnquist's* Plessy *Memo, Majoritarianism, and Parents Involved*, 69 OHIO ST. L.J. 873, 882-89 (2008).

[270] Elman & Silber, *supra* note 252, at 841; *cf.* Interview by Richard Kluger with Alexander Bickel, Aug. 20, 1971, at 3, *in Brown v. Board of Education* Papers, Yale University, Sterling Memorial Library, Box 1, Folder 4 (recalling "Jackson wanted an advisory opinion, setting forth the background and neutralizing [*Plessy*], but leaving it up to Congress to act . . . and this is just exactly [sic] what FF feared most: for the Court to issue a constitutional decision and be powerless to do anything about it"). This is Kluger interpreting Bickel interpreting Frankfurter. Bickel was not clerking during the 1953 Term and probably never saw Jackson's draft concurrence. Frankfurter would have been against an advisory opinion, but at the 1953 oral argument favored congressional enforcement. *See* 49 LANDMARK BRIEFS AND

repeatedly suggested at oral argument that the Court lacked the institutional competence to enforce desegregation on its own.[271] During the 1954 Term, Frankfurter proposed numerous options delegating authority to the lower courts, most of them giving judges the ability to conform remedies to local conditions.[272] Although none of them involved congressional enforcement, he reminded his colleagues of institutional concerns that "we do not propose to operate as a super-school board."[273] In *Brown*, Frankfurter knew that even if the Court were to lead the way, it could not go it alone.

3. Public Opinion

During the school desegregation litigation, Frankfurter counseled a strategy of delay because of his sensitivity to the impact of public opinion. At the 1952 Term Conference, he told his colleagues that it was "important *when* we decide."[274] He then quoted Brandeis that the "most important things . . . often [are] what we do *not* do."[275] Frankfurter's delay tactics allowed the Justices to unite behind a single opinion and presented a unified Court to the American people about the rightness of declaring racially segregated schools unconstitutional.

Frankfurter cautioned against premature reconsideration of *Plessy*'s separate but equal doctrine in the 1950 graduate school cases. During

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ARGUMENTS, *supra* note 254, at 378 (remarking that congressional enforcement under Section V as opposed to judicial decree "would come with all the heavy authority, with the momentum and validity that a congressional enactment has").

[271] 49 LANDMARK BRIEFS AND ARGUMENTS, *supra* note 254, at 321 ("I think that nothing would be worse for this Court — I am expressing my own opinion — nothing would be worse, from my point of view, than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks."); 49A LANDMARK BRIEFS AND ARGUMENTS, *supra* note 254 at 541 ("[Q]uestions of abating a nuisance which the local fellow has to determine is or is not an evasion of the requirements, are one of those facts of life that not even a court can overcome."); *id.* at 544 ("Rather than looking forward to having endless lawsuits of every individual child in the seventeen states for the indefinite future."); *id.* at 1154 ("I do not imagine this Court is going to work out the details of all the states of the Union."); 49A *id.* at 1156 ("There are certain unalterable facts of life that cannot be changed, even by this Court. I am not talking about the feelings of people; I am talking about districting the accommodations, the arrangement of personnel, and all the complexities that go with the administering of the schools.").

[272] Memorandum from Frankfurter on the School Desegregation Decree, Undated, at 3, *in* FF-LC, Box 219, Folder "Memoranda Segregation Decrees Undated."

[273] *Id.*

[274] Burton, *1952 Conference Notes on* Brown, *supra* note 247, at 5 (emphasis in original).

[275] *Id.*

the *McLaurin* Conference about the University of Oklahoma's separate graduate school facilities, he suggested that the Court "should not go beyond what is necessary" and "should not go out and meet problems."[276] He did not want to guess whether the Fourteenth Amendment was intended to abolish segregation.[277] Nor in *Henderson* did he want the Court to question *Plessy* and to guess whether Congress had intended the 1887 Interstate Commerce Act to abolish segregated dining cars on interstate train travel.[278] He also warned about using the word "symbolic" in *Henderson* because it was an "anti-segregation slogan."[279] Of *Sweatt*'s racially separate Texas-sponsored law schools, Frankfurter remarked: "This is no *Dred Scott* case. Here is the slow growth of insight and understanding. To have two schools is not equality. It can't be made so."[280]

One of Frankfurter's overlooked efforts was to avoid hearing the school desegregation cases during the 1951 Term in order to prevent them from becoming a political football during the 1952 presidential election. During the 1951 Term, the Court (over Black's and Douglas's objections) remanded the South Carolina case to the lower court and repeatedly held the Kansas case to wait for the other cases.[281] Several law clerks confronted Frankfurter at a group lunch. "Do you think we're going to decide that case in an election year?" he replied in reference to the impending November election between Dwight Eisenhower and Adlai Stevenson.[282] The law clerks were outraged that political considerations would enter the Court's thinking. Even Frankfurter's clerk, future Harvard law professor Abram Chayes, was embarrassed by this response.[283] Frankfurter basically told them all to

[276] Burton, *Conference Notes on* McLaurin, Apr. 8, 1950, at 6, *in* Burton Papers, Box 182, Folder 1.

[277] *Id.*; *see* Clark, *Conference Notes on* Sweatt, McLaurin, *and* Henderson, Undated, at 2 [hereinafter *Conference Notes on* Sweatt, McLaurin, *and* Henderson], *in* Clark Papers, Box A2, Folder 3.

[278] Memorandum from Frankfurter to Conference, May 31, 1950, at 1, *in* Jackson Papers, Box 160, Folder 3.

[279] *Id.* at 3.

[280] Clark, *Conference Notes on* Sweatt, McLaurin, *and* Henderson, *supra* note 277, at 2-3.

[281] Brown v. Bd. of Educ., 344 U.S. 1, 2 (1952); Briggs v. Elliott, 342 U.S. 350, 351-52 (1952).

[282] Telephone Interview with Abner Mikva, 1951 Term clerk to Justice Sherman Minton (Sept. 24, 2006); Interview with Newton Minow, 1951 Term clerk to Chief Justice Fred Vinson, in Chicago, Ill. (Sept. 20, 2006); *see* Glen Elsasser & Jack Fuller, *The Hidden Face of the Supreme Court*, CHI. TRIB., Apr. 23, 1978, at H18.

[283] Interview with Minow, *supra* note 282.

"grow up."[284] On June 7, the Court agreed to hear the cases from South Carolina, Kansas, and Virginia and delayed oral argument until after the election.[285]

During the 1952 Term Conference, Frankfurter strongly advocated reargument of all the school desegregation cases. Five Justices agreed with him.[286] He expressed two principal concerns: "the problems of enforcement" and the original intent of the Fourteenth Amendment regarding segregation.[287] He and law clerk Alexander Bickel drafted five questions for the parties to brief and argue.[288]

Frankfurter helped eliminate concerns about the Amendment's historical intent regarding segregation by assigning a research project to Bickel. For nearly a year, Bickel reviewed the *Congressional Globe* and wrote a sixty-six-page memo on the Fourteenth Amendment's historical intent regarding segregation,[289] a memo Frankfurter shared with his fellow Justices[290] and where Frankfurter and Bickel first asserted that the Amendment's history was "inconclusive."[291]

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[284] *Id.*

[285] Douglas, Brown *1951 Term Docket Sheet*, *in* Douglas Papers, Box 1150, Folder "Original Conference Notes, Transcriptions, and Docket Book pages re: Segregation Cases"; Jackson, Brown *Cert Memo (with handwritten Jackson notes)*, *in* Jackson Papers, Box 184, Folder 5.

[286] Douglas, Brown *1953 Term Docket Sheet*, Dec. 9, 1952, *in* Douglas Papers, Box 1150, Folder "Original Conferences Notes, Transcriptions, and Docket Book Pages re: Segregation Cases" (listing Clark, Douglas, Reed, and Vinson vote to "decide now" and Minton, Burton, Jackson, Frankfurter, and Black as "put down for reargument").

[287] Burton, *1952 Conference Notes on* Brown, *supra* note 247, at 5-6; Clark, *1952 Conference Notes on* Brown, *supra* note 246, at 4-5; Douglas, *1952 Conference Notes on* Brown, Dec. 13, 1952, at 3-4 [hereinafter *1952 Conference Notes on* Brown], *in* William O. Douglas Papers, Library of Congress, 17 Box 1150, Folder "Original Conference Notes."

[288] Draft Memorandum from Frankfurter to Conference, June 4, 1953, *in* FFHLS, Box 72, Folders 6-14, Pt. II, Reel 4 at 219-21 (containing five reargument questions); Second Draft Memorandum from Frankfurter to Conference, June 4, 1953, *in* FFHLS, *id.* at 221-22; *see* Final Draft Memorandum from Frankfurter to Hugo Black, June 4, 1953, *in id.* at 225-26.

[289] Interview by Kluger with Bickel, *supra* note 270, at 2; *see* Letter from Alexander Bickel to Frankfurter, Aug. 22, 1953, at 1, *in* FFHLS, Box 205, Folder 4, Pt. III, Reel 30, at 749 (submitting memo with cover letter); *id.* at 2-3 ("But all this only means that the legislative history is inconclusive. For the Congress was on notice that it was enacting vague language of 'indeterminate reach.' . . . I think the legislative history leaves this Court free to remember that it is Constitution it is construing. I think also that a charitable reading of the sloppy draftsmen of the Fourteenth Amendment would ascribe to them the knowledge it was a Constitution they were writing") (emphasis omitted); *see also* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 1 n.b1 (1955).

[290] Memorandum from Frankfurter to Conference, Dec. 3, 1953, at 1, *in* Burton

At the 1953 Term Conference, Frankfurter reiterated the importance of speaking in one voice and not alienating the South: "One has to put curb on tongue when dealing with such problems . . . . The awful thing about the Insular cases was not too many opinions — (no. pages) — is that they looked in too many directions."[292] He warned the Court that it should not become the "trustee" of the Due Process Clause by creating *Adkins*-like rights and that it "must not be self-righteous and 'Gold Almighty,'" referring to Arthur Goldberg's amicus argument that the unconstitutionality of segregation has been "so-settled."[293]

Frankfurter confided to friends that "the wise use of time," i.e., reargument, "was probably the chief factor in the ultimate decision."[294] The Court was much better off not having produced a divided opinion during the 1952 Term. Chief Justice Fred Vinson had lost control of the Court.[295] During the *Rosenberg* special term, the Court was in

Papers, Box 244, Folder 5 (enclosing Bickel's first draft and declaring that it "indicates that the legislative history of the Amendment is, in a word, inconclusive, in the sense that the 39th Congress as an enacting body neither manifested that the Fourteenth Amendment outlawed segregation in the public schools or authorized legislation to that end, nor that it manifested the opposite"). Frankfurter shared the memorandum with his colleagues on December 3 before the 1953 reargument, and the revised version the day after *Brown* had been decided. Memorandum from Frankfurter to Conference, May 17, 1954, *in* Burton Papers, Box 251, Folder 10 (enclosing final Bickel draft).

[291] Brown v. Bd. of Educ., 347 U.S. 483, 489 (1954); Letter from Bickel to Frankfurter, Aug. 22, 1953, at 2, *in* FFHLS, Box 72, Folders 6-14, Pt. II, Reel 4, at 213; *see* Memorandum from Frankfurter to Conference, Dec. 3, 1953, *supra* note 290.

[292] Burton, *1953 Conference Notes on* Brown, Dec. 12, 1953, at 4 [hereinafter *1953 Conference Notes on* Brown], *in* Burton Papers, Box 251, Folder 10. In 1901, the Court decided the *Insular Cases*, nine decisions, many of them divided, about the constitutional status of the people and places among the U.S. territories acquired during the Spanish-American War. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244 (1901).

[293] Burton, *1953 Conference Notes on* Brown, *supra* note 292, at 4-5.

[294] Letter from Frankfurter to C.C. Burlingham (copied to Grenville Clark), Apr. 15, 1957, at 1, *in* FFHLS, Box 71, Folder 14-17, Pt. II, Reel 3, at 699; *see also* Letter from Frankfurter to Burlingham, May 28, 1954, at 1, *in* FF-LC, Box 37, Folder "Burlingham, Charles C. 1954 #74"; Letter from Frankfurter to Hand, July 21, 1954, at 1, *in* FF-LC, Box 65, Folder "Hand, Learned 1954 #33," *reprinted in* REASON AND IMAGINATION, *supra* note 259, at 343.

[295] Letter from Frankfurter to Hand, July 21, 1954, at 1, *supra* note 294 ("It is a long story how unanimity was achieved in the Segregation cases and not at all a dramatic one. It could not possibly have come to pass with Vinson, which does not remotely mean that Warren drew votes out of his hat."); *see* Elman & Silber, *supra* note 252, at 840 (Upon Chief Justice Vinson's death, Justice Frankfurter told Elman: "I'm in mourning" and "Phil, this is the first solid piece of evidence I've ever had that there really is a God."). *But see* Carlton F.W. Larson, *What if Chief Justice Fred Vinson Had Not Died of a Heart Attack in 1953?: Implications for* Brown *and Beyond*, 45 IND. L.

turmoil.[296] After Vinson's death in September 1953, Earl Warren was the perfect antidote to the infighting. And the reargument allowed the Justices to rethink their positions and to elide the question of the original intent of the Fourteenth Amendment.[297] "One of these days I will tell you the story," Frankfurter wrote Learned Hand. "But I will tell you that if the 'great libertarians' had had their way we would have been in the soup."[298] Frankfurter was referring to Douglas's and Black's objections to holding the case over during the 1951 Term and Douglas's vote not to hear reargument after the 1952 Term. Frankfurter's more cautious approach and his sensitivity to public opinion helped the Court achieve unanimity.

Frankfurter's final contribution to *Brown* was his most maligned and unfortunate — the "all deliberate speed" language in *Brown II*.[299] Yet, as ill chosen as that Holmes-inspired language may have been, *Brown* would not have been unanimous without gradual desegregation. Several Justices objected to an order of immediate desegregation because it would have been unenforceable. Frankfurter was very sensitive to public opinion and the limits of the Court's enforcement powers. At the *Brown II* Conference, he did "not agree with [Thurgood] Marshall that attitudes are to be left out of consideration. Do not agree with Texas polls [against desegregation]. . . . What we

REV. 131, 144-51 (2011) (arguing that Vinson could have achieved unanimity in *Brown* had he lived).

[296] Snyder, *Taking Great Cases*, *supra* note 231, at 935-36.

[297] Letter from Frankfurter to Burlingham, Apr. 15, 1957, *supra* note 294 ("I could not have said that Warren got a unanimous decision about segregation in postponing the vote. What I may well have said and the only thing I could have said was that the wise use of time in the Court's dealing with the problem raised by segregation under the Fourteenth Amendment was probably the chief factor in the ultimate decision. The process which culminated in the Court's decision is very complicated and a long story. One thing is clear, however. No doubt Warren had a share in the outcome, but the notion that he begot the unanimous Court is nonsense. Things are not that simple."); Letter from Frankfurter to Hand, July 21, 1954, at 1-2, *supra* note 294. ("At the heart of the business was the wise and skillful ways by which the cases which came to the Court from the different States and the District at different times were dealt with so as not to have them come on for final disposition until they could all be heard together and were finally ordered to be reargued with specific questions put to counsel at this Term of the Court.").

[298] Letter from Frankfurter to Hand, July 21, 1954, at 2, *supra* note 294; *see* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 603 (1976).

[299] Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955); Memorandum from Frankfurter on the Segregation Decree #2, undated, *in* FF-LC, Box 219, Folder "Memorandum on the Segregation Decree: 1955 & undated," Reel 139, at 245.

say and [the] kind of feeling [are] important. . . . [The United States Supreme Court] is all [of the] U.S. including [the] South."[300]

Frankfurter's sensitivity to public opinion continued with post-*Brown* cases. A year after *Brown*, he persuaded the Court to decline to hear a miscegenation case, *Naim v. Naim*. He believed:

> [T]he body of legislation involved, both North and South, and the reach of the problem, namely, divers[e] assumptions affecting the regulation of marriage, indicate such a momentum of history, deep feeling, moral and psychological presuppositions, that as of today one can say without wrenching his conscience that the issue has not reached that compelling demand for consideration which precludes refusal to consider it.[301]

He also acknowledged "moral considerations" "raised by the bearing of adjudication this question to the Court's responsibility in not thwarting or seriously handicapping the enforcement of its decision in the segregation cases."[302] He recognized the dangers of the Court getting too far out in front of public opinion on interracial marriage without support from the two elected branches.

Frankfurter displayed his departmentalist instincts even amid the Warren Court's embrace of judicial supremacy in *Cooper v. Aaron*.[303] To be sure, all nine Justices put their names atop Brennan's opinion that makes the much-maligned claim that *Marbury v. Madison* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[304]

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[300] Burton, *1954 Conference Notes on* Brown II, Apr. 16, 1955, at 5-6 [hereinafter *1954 Conference Notes on* Brown II], *in* Burton Papers, Box 251, Folder 9.

[301] Memorandum from Frankfurter Read to Conference on *Naim v. Naim*, Nov. 4, 1955, at 2, *in* FF-LC, Box 219, Folder "Memoranda 1955."

[302] *Id.*; *see* Letters from Frankfurter to Hand, Sept. 8, 1957; Sept. 17, 1957; Sept. 27, 1957; Oct. 12, 1957, *in* Hand Papers, Box 105D, Folder 105D-23, *reprinted in* REASON AND IMAGINATION, *supra* note 259, at 374-82 (hoping to avoid miscegenation issue).

[303] Cooper v. Aaron, 358 U.S. 1 (1958); *see* TONY A. FREYER, LITTLE ROCK ON TRIAL: COOPER V. AARON AND SCHOOL DESEGREGATION (2007) [hereinafter LITTLE ROCK ON TRIAL]; TONY FREYER, THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION (1984); Tony A. Freyer, Cooper v. Aaron *(1958): A Hidden Story of Unanimity and Division*, 33 J. SUP. CT. HIST. 89 (2008) [hereinafter *Hidden Story*]; Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 73-86 (1979).

[304] *Cooper*, 358 U.S. at 18. For criticism of *Cooper*'s interpretation of *Marbury*, *see* KRAMER, *supra* note 16, at 220-21 (describing it as "bluster and puff"); *see also*

Harlan, a Frankfurter ally who wrote a competing draft omitting the references to *Marbury* and the assertion of judicial supremacy,[305] urged Brennan to remove these references,[306] but Brennan refused.[307] The Court eventually united behind Brennan's draft, but, as Tony Freyer has observed, *Cooper* reflected deep divisions about the meaning of "deliberate speed" and the flexibility of state remedies.[308]

Frankfurter favored the flexibility of "deliberate speed" because *Cooper v. Aaron* revealed less about the Court's self-importance than its impotence. In September 1957, Arkansas Governor Orval Faubus

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FRIEDMAN, *supra* note 12, at 248 ("The Court was the Constitution, and the Constitution was the supreme law — at least so long as there was force backing it up."); Friedman & Delaney, *supra* note 17, at 1174 (describing it as "the Court's strongest statement of supremacy to date").

[305] John Marshall Harlan, Draft, Sept. 19, 1958, at 23, *in* John Marshall Harlan Papers, Princeton University Library, Box 57, Folder "No. 1 August Special Term — Cooper et al. v. Aaron et al., 1958" (arguing that Article VI, Clause 3's oath requirement of all state and federal officials to swear to uphold the Constitution "embraces of course both acts of Congress and the judgments of this Court which under our federal system has the final responsibility for constitutional adjudication").

[306] Letter from Harlan to William J. Brennan, Sept. 23, 1958, at 8, *in* Harlan Papers, Box 57, Folder "No. 1 August Special Term — Cooper et al. v. Aaron et al., 1958."

[307] Brennan's drafts of Sept. 17 & Sept. 22, 1958 both contained his language about *Marbury*. *See* Brennan, Draft No. 1, Sept. 17, 1958, at 9, *in* Harlan Papers, Box 57, Folder "No. 1 August Special Term — Cooper et al. v. Aaron et al., 1958"; Brennan, Draft No. 2, Sept. 22, 1958, at 13, *in id.* After Harlan's suggestions, Brennan's Sept. 24, 1958 draft included language suggested by Hugo Black that "[t]he Constitution does not specifically declare how the meaning of that Constitution is to be finally and authoritatively determined [Harlan wrote 'Terrible!' in the margin]." It still equated *Marbury* with judicial supremacy, yet remarked: "This decision was not without its critics, then and even now, but it has never been deviated from in this Court." Brennan, Draft No. 3, Sept. 24, 1958, at 13-14, *in id.* Brennan's subsequent drafts, however, omitted Black's less-juricentric language and consistently equated *Marbury* with judicial supremacy. *See* Brennan, Draft No. 4, Sept. 25, 1958, at 14-15, *in id.* Brennan, Draft No. 5, Sept. 27, 1958, at 15, *in id.*

Frankfurter never commented on Brennan's interpretation of *Marbury*. But he preferred Harlan's draft and suggestions. After reading Brennan's Sept. 22 draft, Frankfurter wrote Brennan: "I strongly favor — after much overnight reflection and again, after your explanation of your reluctance to use it — John's closing full ¶ on pp. 24-25 of his memo." Frankfurter, Undated Note on Brennan's Draft No. 2, at 15 (Sept. 22, 1958), *in* FFHLS, Box 107, Folders 1-8, Pt. II, Reel 26, at 301. Overall, Harlan's draft and proposed changes were less Court-centric than Brennan's version and avoided misreading *Marbury*. Freyer, however, argues that "Harlan, Burton, Frankfurter, and, less so, Clark succeeded in narrowing the opinion, essentially maintaining the open-ended 'all deliberate speed' standard and stressing federal judicial supremacy instead of a shared judicial, congressional, and executive enforcement role." FREYER, LITTLE ROCK ON TRIAL, *supra* note 303, at 181.

[308] FREYER, LITTLE ROCK ON TRIAL, *supra* note 303, at 173-82; Freyer, *Hidden Story*, *supra* note 303, at 94, 102-03.

employed the Arkansas National Guard to prevent nine black children from entering Little Rock's Central High School. After a court ordered Faubus to stand down, mob violence forced President Eisenhower to send in the 101st Airborne to ensure the safety of the black students and to desegregate the school.[309] With a looming threat of additional violence, the school board sought and received court-ordered permission to delay further desegregation for two-and-a-half years.[310] The court order was reversed on appeal. The Court held a special term, affirmed the court of appeals, and ordered state officials to comply with *Brown*.[311] The people of Little Rock, however, voted to close the public schools.[312] Departmentalist support for the Court was thin. Though Eisenhower protected the Little Rock Nine and upheld the rule of law, he conveyed mixed signals about *Brown*.[313] And Congress tried and nearly succeeded in stripping other aspects of the Court's jurisdiction in 1957 and 1958.[314] The Court was almost on its own.

Frankfurter privately believed that Faubus's abhorrent conduct vindicated "deliberated speed." "Of course, I won't tell you that I foresaw a Governor Faubus," Frankfurter wrote Hand, "but I can honestly say that I expressed my strong conviction that we shall be in

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[309] *Cooper*, 358 U.S. at 9-12.

[310] *Id.* at 12-13.

[311] *Id.* at 4-5, 13-15.

[312] FREYER, LITTLE ROCK ON TRIAL, *supra* note 303, at 202-03.

[313] *Compare* Letter from Dwight D. Eisenhower to Swede Hazlett, July 22, 1957, at 4-5, *in* Swede Hazlett Papers, Eisenhower Library, Box 2 ("I think that no other single event has so disturbed the domestic scene in many years as did the Supreme Court's decision of 1954 in the school segregation case. . . . The plan of the Supreme Court to accomplish integration gradually and sensibly seems to me to provide the only possible answer if we are to consider on the one hand the customs and fears of a great section of our population, and on the other the binding effect that Supreme Court decisions must have on all of us if our form of government is to survive and prosper. . . . But I hold to the basic purpose. There must be respect for the Constitution — which means the Supreme Court's interpretation of the Constitution — or we shall have chaos."), *with* EARL WARREN, THE MEMOIRS OF EARL WARREN 291-92 (1977) (believing Eisenhower "resented our decision in *Brown v. Board of Education* and its progeny" based on Eisenhower's praise of John W. Davis' remarks at a White House dinner shortly before the decision came down that "[t]hese are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes," and coolness to Warren after *Brown*). For a rehabilitative portrait of Eisenhower on race, see DAVID A. NICHOLS, A MATTER OF JUSTICE: EISENHOWER AND THE BEGINNING OF THE CIVIL RIGHTS REVOLUTION (2007).

[314] *See* A Bill to Limit the Appellate Jurisdiction of the Supreme Court in Certain Cases, S. 2646, 85th Cong. (1957) (known as The Jenner-Butler Bill, attempting to strip jurisdiction in cases of suspected Communists).

for a long process & probably with some ugly episodes."[315] For Frankfurter, "deliberate speed" reflected his concern with "Southern influences to be won not on the merits of desegregation but on the overriding issue of non-nullification of final deference to the constitutional umpire."[316]

Frankfurter's *Cooper* concurrence reflected a much weaker form of judicial supremacy than Brennan's opinion.[317] Frankfurter believed not in the Court's exclusive power to interpret the Constitution but in departmentalism:

> Every act of government may be challenged by an appeal to law, as finally pronounced by this Court. Even this Court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process of law. The Court may be asked to reconsider its decisions, and this has been done successfully again and again throughout our history. Or, what this Court has deemed its duty to decide may be changed by legislation, as it often has been, and, on occasion, by constitutional amendment.[318]

For Frankfurter, *Cooper* was about obeying the rule of law. It was of no import whether that law came from the legislative, executive, or judicial branch, but that the law came from the Constitution. "Particularly is this so where the declaration of what 'the supreme Law' commands on an underlying moral issue is not the dubious pronouncement of a gravely divided Court but is the unanimous conclusion of a long-matured deliberative process," he wrote. "The

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[315] Letter from Frankfurter to Hand, Sept. 8, 1957, *in* Hand Papers, Box 105D, Folder 105D-23, *reprinted in* REASON AND IMAGINATION, *supra* note 259, at 374.

[316] Letter from Frankfurter to Bickel, Sept. 4, 1958, at 2, *in* FFHLS, Box 206, Folder 2, Pt. III, Reel 32, at 411.

[317] *See* FREYER, LITTLE ROCK ON TRIAL, *supra* note 303, at 201 (arguing that Brennan's quest for unanimity eliminated the departmentalist aspects of his drafts and that judicial supremacy was the only remaining common ground — "Brennan's opinion drafts looked more to the future, whereas Frankfurter's concurring opinion remained bound by the past"). But Brennan refused Harlan's request to omit the judicial supremacist interpretation of *Marbury*. Frankfurter's concurrence is far more departmentalist than even Brennan's earlier drafts (all of which contained his questionable interpretation of *Marbury*). *See supra* note 307 and accompanying text. If anything, Brennan looked to the future — of "judicial supremacy" — whereas Harlan's and Frankfurter's warnings against Brennan's judicial supremacy went unheeded and not for the last time.

[318] Cooper v. Aaron, 358 U.S. 1, 23 (1958) (Frankfurter, J., concurring) (quoting United States v. United Mine Workers, 330 U.S. 258, 308 (1947) (Frankfurter, J., concurring)).

Constitution is not the formulation of the merely personal views of the members of this Court, nor can its authority be reduced to the claim that state officials are its controlling interpreters."[319]

In the context of maintaining a federal system, he believed in a little judicial supremacy. Frankfurter argued, as Thayer and Holmes did before him, that the Court has more power to enforce the Constitution against the states than against co-equal branches of the federal government. With this added power, the Court protected the rule of law and our federal system against state defiance and mob violence.

Frankfurter published his delayed *Cooper* concurrence, much to the consternation of his colleagues,[320] because of his sensitivity to public opinion. He believed that southern lawyers could play a key role in persuading their fellow citizens to obey Supreme Court opinions and federal court orders out of respect for the rule of law even though they disagreed with *Brown*.[321] His *Cooper* concurrence was directed not only at former classmates such as Monte Lemann of New Orleans or prized former students/clerks such as Edward Prichard, Jr. of Kentucky, but also at Harvard law graduates throughout the South.[322] Indeed, Frankfurter knew several moderate Harvard-educated Little Rock lawyers.[323]

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[319] *Id.* at 24-25 (Frankfurter, J., concurring).

[320] At Brennan's behest, Warren called a special October 6th conference about Justice Frankfurter's concurrence. Black and Brennan drafted a special concurrence that Frankfurter's concurrence "must not be accepted as any dilution or interpretation of the views expressed in the Court's joint opinion." Concurrence of Brennan & Black, Oct. 6, 1958, *in* Harlan Papers, Box 57, Folder "No. 1 August Special Term — Cooper et al. v. Aaron et al., 1958." They withdrew their concurrence after Harlan drafted (and Clark joined) a one-paragraph concurrence/dissent from the Brennan/Black concurrence. Harlan "doubted the wisdom" of Frankfurter's concurrence, saw "no material difference" between it and the Court's opinion, and left it up to Frankfurter whether to publish. Concurrence and Dissent of Harlan, Oct. 6, 1958, *in* Harlan Papers, Box 57, Folder "No. 1 August Special Term — Cooper et al. v. Aaron et al., 1958." For Frankfurter's version of events, see Memorandum from Frankfurter to File, Oct. 6, 1958, *in* FF-LC, Box 220, Folder "Cooper v. Aaron 1958."

[321] *See* Letter from Frankfurter to Harlan, Sept. 2, 1958, at 2, *in* FF-LC, Box 65, Folder "Harlan, John M. 1957-58"; Letter from Frankfurter to Earl Warren, Sept. 11, 1958, at 1-2, *in* FF-LC, Box 220, Folder "Cooper v. Aaron 1958"; Letter from Frankfurter to Bickel, Sept. 12, 1958, at 1-3, *in* FFHLS, Box 206, Folder 2, Pt. III, Reel 32, at 417-20; Memorandum from Frankfurter to Conference, Nov. 10, 1958, *in* FF-LC, Box 220, Folder "Cooper v. Aaron 1958"; Letter from Frankfurter to Burlingham, Nov. 12, 1958, *in* FF-LC, Box 37, Folder "Burlingham, Charles, C. 1958 #78."

[322] Letter from Frankfurter to Burlingham, Nov. 12, 1958, at 2, *supra* note 321.

[323] FREYER, LITTLE ROCK ON TRIAL, *supra* note 303, at 198 (relying on recollection of Harvard law graduate Robert Leflar, a professor at the University of Arkansas Law School in Fayetteville).

Although Frankfurter deserves criticism for some of his actions in the school desegregation cases, he displayed sensitivity to departmentalism, public opinion, and the Court's institutional limitations. He understood the impact of *Brown* backlash long before the phrase existed.

4. Frankfurter's *Brown* Critics

Frankfurter's concern about the public reaction to the Court's decisions and his belief in the people's role in constitutional interpretation should endear him to such esteemed scholars as Michael Klarman and Mark Tushnet. Yet they have never acknowledged affinities between Frankfurter's jurisprudence and Klarman's positive theory of backlash and Tushnet's normative theory of populist constitutional law. Nor has their scholarship been kind to Frankfurter. In their histories of *Brown*, Klarman and Tushnet portray Frankfurter's role in a negative light. They reacted in part to former clerk Philip Elman's exaggeration of Frankfurter's role as *Brown*'s "grand strategist . . . inside the Court"[324] and Frankfurter's positive portrayal, based on interviews with Elman and Bickel, in Richard Kluger's standard account.[325] Klarman and Tushnet both imply that, rather than attempting to achieve unanimity, Frankfurter was wavering on the merits and considered affirming *Plessy*.

a. Klarman

Klarman, a leading historian of school desegregation and progenitor of backlash theory, made three claims: 1) Frankfurter would have voted to affirm *Plessy* after the 1952 Term;[326] 2) During the 1953 Term Conference, Frankfurter "conceded that, based on legislative history and precedent, '*Plessy* is right'";[327] and 3) Frankfurter "later observed

[324] Elman & Silber, *supra* note 252, at 831; *see also id.* at 822-25, 828-33.

[325] *See* KLUGER, *supra* note 298, at 596-602, 614-16, 650-51, 653-55, 683-87, 696-97.

[326] MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 300-01 & 544 n.13 (2004) [hereinafter FROM JIM CROW TO CIVIL RIGHTS] (citing Memomorandum from Douglas to File, May 17, 1954, at 1-2, *in* Douglas Papers, Box 1149, Folder "Segregation Cases O.T. 1953"); Michael J. Klarman, Brown *at 50*, 90 VA. L. REV. 1613, 1614 (2004) [hereinafter Brown *at 50*]. Klarman acknowledged that "Douglas's dislike of Frankfurter may have colored his perception of his colleague's likely vote, but his interpretation is consistent with the conference notes." KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra*, at 300-01, 544 n.13. But the only conference notes Douglas's interpretation is consistent with are Douglas's. *See* discussion *infra* note 330.

[327] KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 326, at 304, 544 n.24;

that he would not have supported a school segregation challenge in the mid-1940s."[328]

There is a fundamental problem with Klarman's assertions and quotations — they are based on the unreliable recollections of Justice William O. Douglas. Douglas wrote a memo to himself on May 17, 1954, the day that *Brown* was decided, which claimed that during the 1952 Term Frankfurter (and Jackson) would have voted to uphold *Plessy*.[329] No vote was taken at any 1952 Term Conference — any speculation on how the Justices would have voted was just that, speculation. Douglas, moreover, was the only Justice to quote Frankfurter at the 1953 Conference that "history in Congress and in this court indicates that *Plessy* is right,"[330] a quote contradicted by

Klarman, Brown *and* Lawrence, *supra* note 11, at 435; Klarman, Brown *at 50*, *supra* note 326, at 1616; Michael J. Klarman, *Civil Rights Litigation and Social Reform*, 115 YALE L.J. POCKET PART 12, 17 (2005) [hereinafter *Civil Rights Litigation*]. Klarman has refused to question Douglas's motives in quoting Frankfurter that "[*Plessy*] was right." Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 GEO. L.J. 433, 443 n.46 (1994) [hereinafter *Civil Rights Law*] (reviewing MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 (1994)) ("I see no reason to doubt that Frankfurter said precisely that.").

In other places, Klarman's discussion of Frankfurter's views on *Brown* is more nuanced. *See* KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 326, at 295-96, 302-04. But it is unclear which justice's notes Klarman relies on for many of his Frankfurter quotations. Klarman eschewed citing specific notes because he believed that the "conference notes are broadly similar . . . . I am quoting from the notes, but one should not assume that they perfectly captured what was said at the conferences. On the whole, however, they appear to be quite accurate." *Id.* at 543 n.6. That is not the case with regard to Douglas's quote about Frankfurter. No other justice's notes quoted Frankfurter this way.

[328] KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 326, at 223, 528 n.133; *see also* Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 241 (1991); Klarman, Brown *at 50*, *supra* note 326, at 1621; Klarman, *Civil Rights Litigation*, *supra* note 327, at 16.

[329] Memorandum from Douglas to File, May 17, 1954, at 1-2, *in* Douglas Papers, Box 1149, Folder "Segregation Cases O.T. 1953." Frankfurter's post-hoc vote counting is equally suspect. In an effort to console Justice Stanley Reed after the decision, Frankfurter claimed that during the 1952 Term there had been four votes in favor of *Plessy* — Vinson, Reed, Jackson, and Clark. Frankfurter's memo, given when it was written and for what purpose, is no more reliable than Douglas's. *See* Letter from Frankfurter to Stanley Reed, May 20, 1954, *in* FFHLS, Box 170, Folder 19, Pt. II, Reel 3, at 404.

[330] Burton's conference notes detail Frankfurter's discussion of the history of the Fourteenth Amendment, but do not quote Frankfurter that "*Plessy* is right." Instead, Burton's notes conclude by quoting Frankfurter: "Psychological changes and that is what this is about." Burton, *1953 Conference Notes on* Brown, *supra* note 292, at 5. *Compare* Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1918 (1991) (admitting that Douglas "almost

Frankfurter's cover memo prior to the 1953 oral argument that the Amendment's history vis-à-vis segregation was "inconclusive."[331]

Douglas's 1954 memo was written eighteen months after the 1952 Term Conference, six months after the 1953 Term Conference, and intended to paint Frankfurter in an unflattering historical light. In October 1954, Frankfurter alluded to "some of my brethren in their conviction that I've 'sold out' civil liberties,"[332] a likely reference to Douglas and his emissaries. Six years later, Douglas wrote another memo to himself claiming that at conference Frankfurter said he would have voted to uphold *Plessy* in 1946 (when Douglas had wanted to overturn it) because public opinion "had not then crystallized against it" and because the Eisenhower administration's support had been critical to the Court's decision.[333] Frankfurter also sought to portray Douglas in negative ways. As Tushnet observed of the 1952 and 1953 Terms (and thereafter), "Douglas and Frankfurter were nearly at each other's throats during this period."[334] During the 1952 Term, Douglas had alienated his colleagues by repeatedly voting to deny certiorari or a stay of execution in the case of convicted atomic spies Julius and Ethel Rosenberg and then granting his own last-

certainly conveys a distorted sense of what Frankfurter had in mind"), *with* THE SUPREME COURT IN CONFERENCE, 1940–1985: THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 657 n.66 (Del Dickson ed., 2001) (not sharing Tushnet's skepticism about Douglas's conference notes), *and* Klarman, *Civil Rights Law*, *supra* note 327 (agreeing with Dickson).

[331] Memorandum from Frankfurter to Conference, Dec. 3, 1953, *supra* note 290, at 1. Klarman does not cite or rely on Frankfurter's cover memo. Instead, Klarman relies on a three-page, unsigned, undated, typewritten document labeled "1st draft" for Frankfurter's unsurprising conclusion that justices should not let their personal views alone affect their decisionmaking. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra* note 326, at 304 & 544 n.23 (citing "First Draft" Memo, Undated, *in* FFHLS, Pt. II, Reel 4, at 378); Klarman, Brown *and* Lawrence, *supra* note 11, at 433-34; Klarman, Brown *at 50*, *supra* note 326, at 1615; Klarman, *Civil Rights Law*, *supra* note 327, at 441-42; Klarman, *Civil Rights Litigation*, *supra* note 327, at 21. The problem with this document is that it is unclear whether Frankfurter or one of his law clerks drafted it, when they drafted it, and for what purpose. Although it sounds like Frankfurter, his papers contain many other notes on segregation in his own hand. In many ways, this typewritten document is only a slightly more reliable reflection of Frankfurter's views than Douglas's notes. Frankfurter's signed and dated cover memo prior to the 1953 conference is a more reliable document.

[332] Letter from Frankfurter to Bickel, Oct. 6, 1954, *in* FFHLS, Box 205, Folder 5, Pt. III, Reel 31, at 833.

[333] Memorandum from Douglas to File, Jan. 25, 1960, *in* Douglas Papers, Box 1149, Folder "O.T. 1953 Opinions Segregation Cases Correspondence, 1953-Apr. 1954."

[334] Tushnet & Lezin, *supra* note 330, at 1881.

minute stay (which the Court quickly reconvened to overturn).[335] Douglas's recollections about his own life and what happened at the Court, moreover, are notoriously unreliable and have been debated extensively by scholars.[336]

Conference notes about *Brown*[337] (or any case) make for tricky reading and should be treated with caution. They reveal incomplete and biased portraits of what a particular Justice said at conference. To a certain extent, reading conference notes is a like a Rorschach test — the notes can be read in so many different ways that they reveal a scholar's (or the Justice's) psychological biases. The accusation that Frankfurter supported affirming *Plessy* can be found only in Douglas's questionable memos and conference notes. Frankfurter, moreover, voted for black plaintiffs in every single school desegregation case. Just because he took a cautious approach in the way the Court declared separate but equal schools unconstitutional did not mean he ever favored upholding *Plessy*.

b. Tushnet

Like Klarman, Tushnet's 1991 revisionist interpretation of *Brown* painted Frankfurter in an unflattering light.[338] Tushnet argued that during the 1952 Term Frankfurter's indecisiveness, not Chief Justice Fred Vinson's lack of leadership, prevented the Court from reaching

[335] *See* Snyder, *Taking Great Cases*, *supra* note 231, at 917-28, 938-43.

[336] *Id.* at 894 n.34 (discussing scholarly debate about Douglas's "exaggerations" about his personal history); *id.* at 919-20, 936, 938 (addressing Douglas's embellished recollections about *Rosenberg*).

[337] There are four main surviving conference notes from Dec. 13, 1952: Burton, *1952 Conference Notes on* Brown, *supra* note 247; Clark, *1952 Conference Notes on* Brown, *supra* note 246; Douglas, *1952 Conference Notes on* Brown, *supra* note 287; and Jackson, *1952 Conference Notes on* Brown, Dec. 12, 1952, *in* Jackson Papers, Box 184, Folder 5.

[338] This article primarily addresses Tushnet's 1991 *Columbia Law Review* article about *Brown*. Tushnet & Lezin, *supra* note 330. Tushnet's book version is less harsh, but still revisionist and unflattering to Frankfurter. *See, e.g.*, MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961, at 188 (1994) [hereinafter MAKING CIVIL RIGHTS LAW] ("Frankfurter . . . was ambivalent, not about segregation, but about whether a legally satisfactory opinion overruling *Plessy* could be written. His ambivalence led him to delay a decision."); *id.* at 193 ("[His statement at the 1952 Term Conference] left Frankfurter no ground on which to rest a conclusion that segregation in the states was unconstitutional."); *id.* at 195 ("[In 1952,] Frankfurter himself would not have gone along with the decision."); *id.* at 215 ("Frankfurter himself needed the time to put his mind at rest regarding the 'legality' of the decision he wanted to reach.").

agreement on *Brown*.[339] "What stood in the way," Tushnet wrote, "was Frankfurter's inability, at the early stages of the discussions, to figure out a way to reconcile his desire to overrule *Plessy* with his commitment to the proposition that constitutional law was, at its core, law rather than politics."[340] Frankfurter's strategy of delay, Tushnet argued, was "designed primarily to allow *him* to resolve his own difficulties"[341] and Tushnet described Frankfurter as "paralyzed" with indecision.[342] Today Tushnet insists that he never questioned Frankfurter's willingness to vote in favor of *Brown* on the merits as opposed to concerns about the reasoning.[343] Some of Tushnet's statements could be interpreted this way,[344] but others suggest that Frankfurter was wavering about the merits.[345]

To his credit, Tushnet conceded the unreliability of Douglas's May 17, 1954 memorandum to his file.[346] Tushnet later reiterated that Douglas's memo "overstated the opposition to overruling *Plessy*" at the 1952 Conference.[347] And Tushnet also conceded that Douglas's 1953

[339] *See* Tushnet & Lezin, *supra* note 330, at 1870-72.

[340] *Id.* at 1872.

[341] *Id.* at 1875; *see id.* at 1873-75.

[342] *Id.* at 1920-21; *cf.* NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 476 n.24 (2010) ("[P]aralysis was not in Frankfurter's personality . . . .").

[343] Email from Mark Tushnet to Brad Snyder, Jan. 4, 2012 (on file with author).

[344] *See* TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 338, at 188 ("Frankfurter . . . was ambivalent, not about segregation, but about whether a legally satisfactory opinion overruling *Plessy* could be written. His ambivalence led him to delay a decision."); Tushnet & Lezin, *supra* note 330, at 1918 ("Unlike Jackson, he was not ambivalent about overruling *Plessy*, but he found it extremely difficult to explain why.").

[345] *See* Tushnet & Lezin, *supra* note 330, at 1872 ("What stood in the way was Frankfurter's inability, at the early stages of the discussions, to figure out a way to reconcile his desire to overrule *Plessy* with his commitment to the proposition that constitutional law was, at its core, law rather than politics."); *id.* at 1909 ("But Jackson's position that a decision to overrule *Plessy* could only be sociological or political and not judicial made it difficult for Frankfurter to come to a certain conclusion on the merits."); *id.* ("If *Brown* had been decided in 1953, the Court would have been splintered — not, however, primarily because the 'libertarians' had misgauged the positions of their more conservative colleagues, but because Frankfurter would not have gone along with the decision, with the effect of reinforcing the reluctance expressed by Clark, Vinson, Reed, and Jackson."); *id.* at 1930 ("The objections, however, came primarily from Frankfurter himself; without Frankfurter's formula the Court's opinion might not have been unanimous because Frankfurter would not have joined it.").

[346] *Id.* at 1881 ("We must interpret this memorandum knowing that Douglas and Frankfurter were nearly at each other's throats during this period.").

[347] *Id.* at 1912.

Conference notes "almost certainly convey[] a distorted sense of what Frankfurter had in mind."[348]

Yet Tushnet's "alternative interpretation"[349] that Frankfurter was "indecisive" or "paralyzed" lacks persuasive primary source evidence. Tushnet argues that Bickel's memo (and Frankfurter's cover memo) that the history of the Fourteenth Amendment was "inconclusive" was only important to Jackson and Frankfurter and somehow freed Frankfurter to join the majority.[350] Frankfurter's circulation of the memo before the 1953 Term Conference sought to resolve a contentious issue for the entire Court and evidently persuaded Warren to use "inconclusive" in the text of the opinion.

Tushnet also observes that Frankfurter's private correspondence offers multiple reasons for his desire for reargument: to prevent *Brown* from coming out the other way, to avoid a divided Court, and to elicit the Eisenhower administration's support.[351] "The very fact that Frankfurter offered so many reasons for his 'filibuster' suggests that he had some deeper concern that he found hard to articulate," Tushnet concluded.[352] But it is just as likely that all these explanations might be true. A unanimous Court and Eisenhower administration support were important to Frankfurter. The mere fact that Frankfurter wanted reargument does not suggest that he was wavering on the merits. Nor, as Tushnet suggests, is there any new evidentiary support for this interpretation.

Tushnet's explanation for his interpretation is revealing:

> An alternative interpretation is now possible in part because more evidence is available. More important, however, is the sociology of the legal academy, where Frankfurter's reputation has declined to an extent remarkable to those who received their schooling in constitutional law before the early 1960s. As his former law clerks have aged, they have been replaced in the legal academy by those who served as clerks to Justices

[348] *Id.* at 1918.

[349] *Id.* at 1872.

[350] *Id.* at 1921.

[351] *Id.* at 1920-21. Klarman was unpersuaded by Tushnet's revisionist argument because Tushnet "provides no satisfactory explanation of how Justice Frankfurter ultimately persuaded himself to join the Court's judgment." Klarman, *Civil Rights Law*, *supra* note 327, at 437. Tushnet's claim that Bickel's memo somehow changed Frankfurter's mind and freed Frankfurter to join the majority, Klarman argued, "makes Frankfurter seem just as foolish." *Id.*

[352] Tushnet & Lezin, *supra* note 330, at 1920; *see also* TUSHNET, MAKING CIVIL RIGHTS LAW, *supra* note 338, at 215 ("Still, the changing stories suggest that Frankfurter's statements about his strategy cannot be taken at face value.").

> Brennan and Marshall. These academics have been schooled in the understanding that *Brown* was a triumph for the Supreme Court, and, perhaps more important, that it was in fundamental ways an easy case rather than a hard one, as Frankfurter took it to be.[353]

Tushnet's revisionist history of *Brown* lays a disproportionate amount of blame at Frankfurter's feet. Indeed, Tushnet concluded that "the failure of the nation to resolve its problems of race relations can be laid to some degree at Frankfurter's door. The gradualism he favored, it seems, evidently failed, in part because there were fewer 'good Southerners' than Frankfurter believed there were."[354] Tushnet's conclusion ignored support for gradualism from Warren, Black, Jackson, and every other Justice.[355] An opinion calling for immediate desegregation would not have been unanimous. Nor would it have been enforceable. The results for the Court and the country would have been disastrous. "All that the instant decree might have gotten was a large-scale discredit for the Court," Bickel said in 1971.[356]

Klarman's and Tushnet's negative portrayals of Frankfurter are puzzling. Both scholars agree that *Brown* was a hard case for Frankfurter because of his belief in judicial restraint.[357] Frankfurter was concerned about public opinion, departmentalism, and the Court's institutional competence. Instead of criticizing him, Klarman and Tushnet should praise Frankfurter's populist concerns and his reluctance to engage in judicial supremacy. In recent years, Klarman has written eloquently about the effect of backlash on the Court; Tushnet has called for a return to populist interpretation of the Constitution. Neither has credited Frankfurter for his prescient concerns about these issues.

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[353] Tushnet & Lezin, *supra* note 330, at 1883-84.

[354] *Id.* at 1884.

[355] Burton, *1954 Conference Notes on* Brown II, *supra* note 300, at 2-3 (discussing Black's support for gradual remedies); Burton, *1953 Conference Notes on* Brown, *supra* note 292, at 7-8 (discussing Jackson's and Clark's gradualist views); Burton, *1952 Conference Notes on* Brown, *supra* note 247, at 2-3, 7-8 (discussing Black's and Jackson's gradualist views); Clark, *1952 Conference Notes on* Brown, *supra* note 246, at 2-3 ("Segregation is per se violation? To so hold would bring drastic things. . . . One of worse features is courts are put on the battle front. . . .").

[356] Interview by Kluger with Bickel, *supra* note 270, at 4.

[357] *Compare* Klarman, Brown *and* Lawrence, *supra* note 11, at 433 (observing *Brown* "was a hard case for the justices"), *and* Klarman, Brown *at 50*, *supra* note 326, at 1613 (same), *with* Tushnet & Lezin, *supra* note 330, at 1918 (describing Frankfurter as "in a difficult position").

C. Frankfurter's Prophecy: Baker v. Carr

No opinion articulates his faith in the people's role to interpret the Constitution better than the final one of his judicial career, his dissent in *Baker v. Carr*. *Baker* overruled his 1946 plurality opinion in *Colegrove v. Green*,[358] which refused to hear a Guarantee Clause challenge to Illinois's legislative apportionment scheme based on the political question doctrine. "Courts," Frankfurter warned in *Colegrove*, "ought not to enter this political thicket."[359] He failed to turn several subsequent per curiam opinions into a majority opinion.[360] But the misplaced emphasis on Frankfurter's limitations as a coalition builder ignores his enduring message that the Court should not adjudicate political questions. "I hope — I say hope — never to use the phrase again," he wrote Bickel in 1957.[361] The political question doctrine became one of Bickel's "passive virtues" that he urged the Court to employ to avoid certain cases.[362] Bickel believed that the Court played a legitimizing role not only in invaliding legislative actions, but also in affirming them. His theory justified *Brown,* defended the decision to duck *Naim v. Naim*, but questioned whether *Baker* would force the Court to legitimate apportionment plans based on unenforceable standards.[363] *Baker*, Bickel and Frankfurter believed, raised troubling institutional concerns.

In *Baker*, Brennan's majority opinion made an even bolder assertion of judicial supremacy than in *Cooper v. Aaron* by proclaiming that the Court was the "ultimate interpreter of the Constitution."[364] In doing so, Brennan's opinion limited the political question doctrine to the

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[358] 328 U.S. 549 (1946).

[359] *Id.* at 556.

[360] Roy A. Schotland, *The Limits of Being "Present at the Creation,"* 80 N.C. L. REV. 1505, 1506-07 (2002); *see* Baker v. Carr, 369 U.S. 186, 208-09 n.29 (1962); *id.* at 234-35 (Frankfurter, J., dissenting) (discussing per curiams).

[361] Letter from Frankfurter to Bickel, early Aug. 1957, at 2, *in* FFHLS, Box 205, Folder 12, Pt. III, Reel 32, at 252; *see* Coleman v. Miller, 307 U.S. 433, 469-70 (1939) (Frankfurter, J., concurring).

[362] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 183-98 (2d ed. 1986) [hereinafter THE LEAST DANGEROUS BRANCH]; Alexander M. Bickel, *The Supreme Court 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 74-79 (1961) [hereinafter *1960 Term Foreword*]. *But see* Gerald Gunther, *The Subtle Vices of the "Passive Virtues" — a Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 3 (1964) (describing it as "100% insistence on principle, 20% of the time").

[363] BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 362, at 71-72, 130-32, 174, 197. *See* Note, Baker v. Carr *and Legislative Apportionments: A Problem of Standards*, 72 YALE L.J. 968 (1963).

[364] *Baker*, 369 U.S. at 211.

relationship between the judiciary and coordinate branches of the federal government rather than with the states.[365] The Court, however, has ignored political questions even in separation of powers cases. It ran roughshod over the doctrine when it forced Congress to seat Adam Clayton Powell[366] and President Nixon to hand over his tapes rather than to allow the impeachment process to play out.[367] Indeed, since *Baker*, a majority of the Court has invoked the political question doctrine only twice.[368]

For many years, Frankfurter seemed to be on the wrong side of history given *Baker*'s widespread popularity. The Court agreed to hear (and re-hear) *Baker*, a case about Tennessee's apportionment laws that had not been revised for sixty years and favored rural voters over urban voters.[369] Indeed, *Baker* invoked the Equal Protection Clause rather than the Guarantee Clause and led to a one-person, one-vote rule.[370] Earl Warren dubbed *Baker*, not *Brown*, "the most important decision of my tenure on the Court."[371]

It was only after *Bush v. Gore*[372] that scholars began to reassess *Baker v. Carr* and to understand the political question doctrine as a forgotten bulwark against judicial power run amok.[373] Frankfurter's *Baker* dissent was his most important contribution to constitutional law, an act of prophecy, a jeremiad against judicial supremacy. It revealed his faith in the democratic political process, departmentalism, and federalism, and his skepticism about the Court's institutional competence to adjudicate apportionment cases.

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[365] *Id.* at 210.

[366] Powell v. McCormack, 395 U.S. 486, 517-22 (1969).

[367] United States v. Nixon, 418 U.S. 683, 714 (1974). *See* Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The* Nixon *Case and the Impeachment Process*, 22 UCLA L. REV. 30 (1974).

[368] Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 267-68 (2002).

[369] *Baker*, 369 U.S. at 348-49 (Harlan, J., dissenting).

[370] *Id.* at 228-29, 237. *But see id.* at 297 (Frankfurter, J., dissenting) (describing *Baker* as "a Guarantee Clause claim masquerading under a different label").

[371] WARREN, *supra* note 313, at 306.

[372] 531 U.S. 98 (2000).

[373] *See, e.g.*, Barkow, *supra* note 368, at 240 ("[T]he demise of the political question doctrine is of recent vintage, and it correlates with the ascendancy of a novel theory of judicial supremacy."); Tushnet, *Law and Prudence*, *supra* note 229, at 1230 (describing "the acceptance in our political and legal culture of a strong form of judicial supremacy that was only uncertainly accepted when *Baker v. Carr* was decided").

1. Democratic Political Process

Frankfurter's *Baker* dissent exemplified his faith in democratic political process. He was willing to invoke the Fifteenth Amendment to prevent the disenfranchisement of African Americans and to provide them with a remedy against discriminatory voting practices.[374] But he believed that long-term solutions to redistricting and other voting problems should come from the political process, not the Courts. "In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives," Frankfurter wrote. "In any event there is nothing judicially more unseemly nor more self-defeating than for this Court to make *in terrorem* pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope."[375]

Short-term political events vindicated Frankfurter soon after his death. On March 7, 1965, Dr. Martin Luther King, Jr. led the first of three marches for black voting rights from Selma to Montgomery, Alabama. The aborted first march ended on the Edmund Pettus Bridge with brutal violence that shocked and saddened a national television audience, including President Lyndon B. Johnson. Eight days later, Johnson spoke to a joint session of Congress, introduced the Voting Rights Act, and vowed that "we shall overcome."[376] On September 15, he signed the Voting Rights Act into law.[377]

Constitutional change of the 1960s exemplified Frankfurter's departmentalist vision. New constitutional rights originated not with the courts, but with the people and their elected representatives. The leading constitutional actors of that era, as Bruce Ackerman argues, were civil rights protesters led by Dr. King and politicians led by President Johnson.[378] The Civil Rights Act of 1964 and the Voting Rights Act of 1965, what Ackerman dubbed "landmark statutes,"[379] resulted in non-judicial constitutional change. Frankfurter's less

[374] *See Baker*, 369 U.S. at 286-87 (Frankfurter, J., dissenting); Gomillion v. Lightfoot, 364 U.S. 339, 346-47 (1960) (distinguishing the case from *Colegrove*).

[375] *Baker*, 369 U.S. at 270 (Frankfurter, J., dissenting).

[376] 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1965, at 280-87 (1965).

[377] Voting Rights Act of 1965, Pub. L. No. 89-110, § 15, 79 Stat. 437, 445 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1 (1994)).

[378] *See* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1768-70, 1781-82, 1786-87 (2007).

[379] *Id.* at 1742, 1761, 1792.

Court-centric story proved to be correct; during the 1960s, the people made their voices heard in the White House and the halls of Congress.

2. Departmentalism and Federalism

Colegrove was not just a warning about courts entering the political thicket. A forgotten aspect of Frankfurter's plurality opinion was its emphasis on departmentalism and in particular, the constitutional powers of Congress. "To sustain this action would cut very deep into the very being of Congress," he wrote. "Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."[380] The Illinois apportionment scheme, which had not been revised in more than thirty-five years, dealt with congressional rather than state representatives.[381] Even if state legislators refused to reapportion and even if the people lacked the power to vote their state legislators out of office, Frankfurter believed that Article I, § 4 explicitly provided the remedy: Congress could refuse to seat the legislators or make any regulations it saw fit. "If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people," Frankfurter wrote. "Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress."[382]

Baker raised a slightly different issue than *Colegrove* because the Tennessee apportionment plan affected the state legislature, not Congress. For Frankfurter, however, it was a distinction without a difference.[383] Both the history and structure of the Constitution and the Supreme Court's long line of cases refusing to intervene in Guarantee Clause cases counseled against judicial intervention. His dissent displayed a strong sensitivity to federalism: "The Court has been particularly unwilling to intervene in matters concerning the structure and organization of the political institutions of the States."[384] And he viewed *Baker*'s equal protection claim as a "Guarantee Clause claim masquerading under a different label."[385] Especially in Guarantee Clause cases, the Court has shown "reluctance to interfere

[380] Colegrove v. Green, 328 U.S. 549, 556 (1946).
[381] *Id.* at 550.
[382] *Id.* at 554.
[383] *See* Baker v. Carr, 369 U.S. 186, 279-80 (1962) (Frankfurter, J., dissenting).
[384] *Id.* at 284.
[385] *Id.* at 297.

with matters of state government . . . ."[386] If the people of Tennessee want reapportionment, he again suggested that they should go to the ballot box and elect new state legislators. Apportionment, he feared, "will add a virulent source of friction and tension in federal-state relations to embroil the federal judiciary in them."[387]

3. Institutional Impotence and Competence

In hindsight, some of Frankfurter's concerns about judicial intervention in state apportionment cases seem overblown. At the time, however, some of his fears were justified; the Court's legitimacy was at stake. *Brown* had triggered a wave of delayed backlash from congressmen who in 1956 signed the Southern Manifesto.[388] The 1957 Jenner-Butler Bill attempted to strip the Court's jurisdiction in cases about suspected Communists.[389] And the Court in 1962 was only a few years removed from needing the President to call in the 101st Airborne to integrate Little Rock's Central High School and seeing the people of Little Rock vote to close the public schools rather than integrate them.[390] Frankfurter did not want the Court to issue another opinion it could not enforce.

Frankfurter was more on target in suggesting that *Baker*'s "arbitrary and capricious" equal protection standard was judicially unenforceable.[391] "Talk of 'debasement' or 'dilution' is circular talk," Frankfurter wrote. "One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth."[392] Bickel believed that by employing an unenforceable rationality standard, discarded two years later for *Reynolds v. Sims*'s one-person, one-vote rule, the Court would affirm apportionment schemes it should not affirm and reverse apportionment schemes it should not reverse. Either way, the Court would "legitimate" the apportionment scheme just by hearing the case rather than avoiding it on political question grounds.[393] Today's legal

[386] *Id.* at 289.

[387] *Id.* at 324.

[388] *See* Driver, *supra* note 24.

[389] *See supra* note 314; Barry Friedman, *"Things Forgotten" in the Debate Over Judicial Independence*, 14 GA. ST. U. L. REV. 737 (1998).

[390] *See supra* notes 309 & 312 and accompanying text.

[391] *Baker*, 369 U.S. at 297 (Frankfurter, J, dissenting). In his majority opinion, Brennan addressed the standards issue as follows: "Judicial standards under the Equal Protection Clause are well developed and familiar . . . ." *Id.* at 226.

[392] *Id.* at 300 (Frankfurter, J., dissenting).

[393] BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 362, at 197; *see* ALEXANDER

scholars, even *Baker*'s biggest champions, have criticized one-person, one-vote.[394] The Court has struggled to articulate a workable standard to apply to redistricting cases.[395]

Frankfurter's most important critique in *Colegrove* and *Baker* was that the Court lacked the institutional competence to police apportionment schemes and redraw legislative boundaries.[396] "We are of opinion that the petitioners ask of this Court what is beyond its competence to grant," he wrote in *Colegrove*.[397] This is precisely why he invoked the political question doctrine in *Colegrove* and believed

M. BICKEL, POLITICS AND THE WARREN COURT 177-82 (1st ed. 1965); Alexander M. Bickel, *The Supreme Court and Reapportionment*, *in* REAPPORTIONMENT IN THE 1970S, at 61-64 (Nelson W. Polsby ed., 1971); Alexander M. Bickel, *Reapportionment and Liberal Myths*, COMMENTARY, June 1963, at 383.

[394] Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411, 1413, 1430, 1443 (2002) (describing one-person, one-vote as having done "little to define the conceptual terrain in voting-rights cases" and "circular"); Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 670-71 (2002) [hereinafter *Exit Strategies*] ("[I]t turns out that Justice Brennan was wrong along several dimensions . . . there is nothing quite like the rigidly numerical standard of the one-person, one-vote cases anywhere else in constitutional law."); Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1297 (2002) ("Whatever the historical explanation of the Warren Court's interest in political districting, it enunciated its doctrines in highly general terms. I hope that I have demonstrated the extent to which the Supreme Court's venture into legislative districting has failed to confront adequately the profound questions embedded in the now almost forty year-old maxim of one person, one vote."); Robert J. Pushaw, Jr., *Judicial Review and the Political Question Doctrine: Reviving the Federalist "Rebuttable Presumption" Analysis*, 80 N.C. L. REV. 1165, 1201 (2002) ("Although the majority in *Baker* correctly found the case to be justiciable, they did so by creating and applying an ahistorical, totally discretionary multifactor approach that has not produced, and cannot yield, legally consistent results."). *But see* Richard L. Hasen, *The Benefits of "Judicially Unmanageable" Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469, 1503 (2002) ("Unmanageability in the pursuit of political equality is no vice.").

[395] *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 301 (2004) (Scalia, J.) (plurality opinion) (discussing unworkable standard and dismissing gerrymandering claims as nonjusticiable). *See id.* at 307-8 (Kennedy, J., concurring in judgment) (agreeing that "we have no basis on which to define clear, manageable, and politically neutral standards" but not willing to rule out determining one in the future).

[396] Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of* Baker v. Carr, 80 N.C. L. REV. 1103, 1109 (2002) (dividing Frankfurter's concerns into four categories: "institutional boundaries; institutional impotence; institutional competence; and judicial legitimacy"). In disagreeing with Frankfurter about the use of democratic theory to interpret the Constitution, Charles does not account for the impact of the New Deal constitutional crisis on Frankfurter. *Id.* at 1162-63.

[397] Colegrove v. Green, 328 U.S. 549, 552 (1946).

the Court should have invoked it again in *Baker*. "From its earliest opinions this Court has consistently recognized a class of controversies which do not lend themselves to judicial standards and judicial remedies," he wrote in *Baker* and endorsed Bickel's passive virtues.[398] In a passage Bickel later quoted in support of the virtues of his passive virtues,[399] Frankfurter wrote:

> Apportionment, by its character, is a subject of extraordinary complexity, involving — even after the fundamental theoretical issues concerning what is to be represented in a representative legislature have been fought out or compromised — considerations of geography, demography, electoral convenience, economic and social cohesions or divergencies among particular local groups, communications, the practical effects of political institutions like the lobby and the city machine, ancient traditions and ties of settled usage, respect for proven incumbents of long experience and senior status, mathematical mechanics, censuses compiling relevant data, and a host of others.[400]

With the Court struggling to implement school desegregation, Frankfurter's concern about the Court's competence to decide apportionment cases was a legitimate one.

4. The New Deal Crisis

Frankfurter's final impetus for his *Baker* dissent was his lesson from the New Deal constitutional crisis that judges should not read their personal, normative preferences into the Constitution. "Unless judges, the judges of this Court, are to make their private views of political wisdom the measure of the Constitution . . . ," he wrote, "the Fourteenth Amendment . . . provides no guide for judicial oversight of the representation problem."[401] By turning a Guarantee Clause claim into an Equal Protection Clause claim and by creating an unenforceable standard where none existed in the text, history, or structure of the Constitution or in prior caselaw, he saw the Court returning to a *Lochner*-like liberty of contract. He saw the majority as choosing political sides like the Four Horsemen did with Roosevelt's

[398] *Baker*, 369 U.S. at 280 (Frankfurter, J., dissenting); *see id.* at 281 n.10 (citing Bickel, *1960 Term Foreword*, *supra* note 362, at 45).

[399] BICKEL, THE LEAST DANGEROUS BRANCH, *supra* note 362, at 194.

[400] *Baker*, 369 U.S. at 323 (Frankfurter, J., dissenting).

[401] *Id.* at 301-02.

New Deal legislation: "What is actually asked of the Court in this case is to choose among competing bases of representation — ultimately, really, among competing theories of political philosophy — in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union."[402]

5. *Bush v. Gore*

After *Bush v. Gore*,[403] some scholars began to reexamine Frankfurter's *Baker* dissent. *Baker*'s evisceration of the political question doctrine vis-à-vis the states and its equal protection rationale to resolve an electoral dispute provided precedential support for ending the state of Florida's recount in the 2000 presidential election.[404] Frankfurter's defense of the political question doctrine was an unheeded warning against judicial supremacy. Michael Dorf wrote: "[M]aybe Frankfurter was right . . . Justice Frankfurter's critique of judicial review of politics in *Baker v. Carr* was derided by liberals for nearly forty years. Then the Supreme Court decided *Bush v. Gore*, and Frankfurter didn't look so bad."[405]

Some scholars agree that Frankfurter's dissent was right about not entering the political thicket.[406] Some agree with certain aspects of Frankfurter's critique.[407] They gave the prudentialist[408] approaches of

[402] *Id.* at 325.

[403] 531 U.S. 98 (2000).

[404] *See* Robert J. Pushaw, Jr., Bush v. Gore*: Looking at* Baker v. Carr *in a Conservative Mirror*, 18 CONST. COMMENT. 359, 390 (2001) (observing that "*Bush* is *Baker v. Carr* in conservative garb" and similarities between Frankfurter's *Baker* dissent and Breyer's *Bush v. Gore* dissent); *cf.* Nelson Lund, *From* Baker v. Carr *to* Bush v. Gore*, and Back*, 62 CASE W. RES. L. REV. 947 (2012) (arguing *Baker v. Carr* and its progeny were wrongly decided, but *Bush v. Gore* was rightly decided with or without *Baker* precedent).

[405] Michael C. Dorf, *Whose Ox Is Being Gored? When Attitudinalism Meets Federalism*, 21 ST. JOHN'S J. LEGAL COMMENT. 497, 523-24 (2007).

[406] Luis Fuentes-Rohwer & Laura Jane Durfee, *Leaving the Thicket at Last?*, 2009 MICH. ST. L. REV. 417, 453 ("In our minds, this is a debate with a clear winner: to this day, Justice Frankfurter's forceful argument has gone both unheeded and unanswered. The evidence is in, and so, after forty years of judicial review in the realm of politics, the question for the future should be whether judicial intervention in the realm of politics is worth the cost."); Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 251 (2003) ("[T]he first thing the problem of interpersonal utility comparisons reveals about the one person, one vote standard is that Justice Frankfurter was right: there is nothing in our conception of democracy that requires the standard. Instead, it is a normative choice among many 'competing bases of representation.'").

[407] *See* Charles, *supra* note 396, at 1137 (recognizing "Frankfurter is clearly correct

Frankfurter protégé Alexander Bickel a second look in light of the Court's slide into an uninterrupted era of judicial supremacy — *Baker* begat *Bush v. Gore* which begat *Citizens United*.[409] In 2002, Pam Karlan wrote:

> Whatever its initial intentions, the Supreme Court is now embroiled in the very heart of the political thicket. A substantial share of the Court's docket consists of cases involving the regulation of politics — restrictions on campaign spending, redistricting, ballot access, candidates' speech, and so on. If anything, recent history reveals a Court that seems willing to head even deeper into the woods.[410]

Though not entirely persuaded by Frankfurter's *Baker* dissent or that Bickel's passive virtues provide solutions, she conceded that Brennan's opinion was "wrong along several dimensions"[411] and presciently concluded that "the current Court is deeply distrustful of the political branches and ambitious for its own power."[412]

Like Karlan, Tushnet viewed *Bush v. Gore* and the abrogation of the political question doctrine as symptoms of the Court's embrace of judicial supremacy. For Tushnet, it began with *Baker*. He identified "the acceptance in our political and legal culture of a strong form of judicial supremacy that was only uncertainly accepted when *Baker v. Carr* was decided."[413]

Among Frankfurter's critics about his role in *Brown*, Tushnet adopted a different tone after *Bush v. Gore*:

> Bickel's mentor Felix Frankfurter was centrally concerned with the legacy of the pre-New Deal Court, but clearly believed that judicial power should be used to achieve racial justice. For Frankfurter and Bickel, success required that the Court carefully calculate when it could succeed in disciplining local and national majorities that acted against the vision of

that the Constitution is unhelpful in resolving most issues of democratic politics" but disagreeing that matters of political theory are beyond the sphere of judges).

[408] Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695, 716-21 (1980) (labeling Frankfurter's and Bickel's approach a "prudential argument").

[409] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[410] Karlan, *Exit Strategies*, *supra* note 394, at 671-72.

[411] *Id.* at 670.

[412] *Id.* at 698.

[413] Tushnet, *Law and Prudence*, *supra* note 229, at 1230.

> civil rights and civil liberties to which Frankfurter and Bickel were committed.[414]

Tushnet blamed the Warren Court. According to Tushnet, "the Warren Court's legacy was a theory of judicial supremacy accepted along every point of the political spectrum."[415] He lamented that few people in today's legal culture had Bickel's courage "to say that judicial supremacy is in principle a bad thing."[416] Tushnet, however, stopped short of identifying Frankfurter as an exemplar of less Court-centric or even Tushnet's populist theory of judicial review. Others have begun to reconsider Frankfurter's jurisprudence.[417] Burt Neuborne wrote: "The path not taken in the Court's democracy cases has led us to Felix Frankfurter's revenge: an accidental democracy built by judges who never ask themselves what kind of democracy they are building."[418]

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One hallmark of an exalted judicial reputation is prophecy through dissent. Scholars, led by Frankfurter, venerated Holmes and Brandeis for their dissents in post-World War I civil liberties cases and their dissents in economic cases vindicated by the New Deal constitutional crisis.[419] Yet scholars criticized Frankfurter for holding on too tightly to Holmes's and Brandeis's judicial restraint and not joining the Warren Court's rights-oriented revolution.[420]

During the early 1960s, Frankfurter did not abandon progressivism; progressives abandoned Frankfurter out of political expediency because they now had five or more votes on the Court to accomplish their rights-oriented agenda. For the next thirty years, Frankfurter's judicial reputation suffered at the hands of scholars intent on

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[414] *Id.* at 1231.

[415] *Id.* at 1235.

[416] *Id.*

[417] *See, e.g.*, Josh Benson, *The Past Does Not Repeat Itself, But It Rhymes: The Second Coming of the Liberal Anti-Court Movement*, 33 LAW & SOC. INQUIRY 1071, 1085-88 (2008) (connecting Frankfurter and Bickel to modern "anti-Court scholars"); Jeffrey Rosen, *Originalism and Pragmatism: False Friends*, 31 HARV. J.L. & PUB. POL'Y 937, 937-38 (2008) (embracing "tradition of Thayer, of Holmes, of Frankfurter, and most recently of the lamented Justice White" requiring "deference to democratic processes in most situations").

[418] Burt Neuborne, *Felix Frankfurter's Revenge: An Accidental Democracy Built by Judges*, 35 N.Y.U. REV. L. & SOC. CHANGE 602, 662 (2011).

[419] Snyder, *House that Built Holmes*, *supra* note 78, at 662-63; White, *Canonization of Holmes & Brandeis*, *supra* note 6, at 577, 585.

[420] *See* sources cited *supra* notes 5, 6, & 29.

preserving the Warren Court's legacy of protecting civil rights and civil liberties. Frankfurter's *Baker* dissent, however, has proven to be just as prophetic as some of Holmes's and Brandeis's dissents because it revealed the ugly underside of the Warren Court's legacy — judicial supremacy.

CONCLUSION

Today's progressive scholars continue to debate the role of the Court, yet they continue to underestimate the jurisprudential legacy of Felix Frankfurter. "Sometimes the Justices seem barely able to hide their disdain for the other branches of government," Pam Karlan wrote in her *Harvard Law Review* foreword, *Democracy and Disdain*, about the Court's Affordable Care Act and other recent decisions.[421] Karlan was rightly concerned about the future of the Voting Rights Act as well as other landmark federal statutes.[422] After cataloguing the Court's contempt for Congress and other elected branches, she concludes: "A Court with a transsubstantive distrust for the political process seems more likely to adopt a restrictive vision of the political branches' powers across the array of constitutional provisions."[423]

Yet Karlan only mentions Frankfurter to criticize his *Baker* dissent, describing his implicit concern about *Baker* eroding the Court's ability to enforce *Brown v. Board of Education* as "unfounded."[424] Putting aside the Court's record of enforcing school desegregation, Frankfurter's *Baker* dissent issued a prescient warning about the Court's lack of institutional competence in law of democracy cases, the importance of the political question doctrine, and the Warren Court's unfortunate legacy of judicial supremacy.

No Justice from the last fifty years has embraced judicial restraint more than Felix Frankfurter.[425] Frankfurter's judicial restraint was a

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[421] Pamela S. Karlan, *The Supreme Court, 2011 Term — Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 2 (2012) [hereinafter *2011 Term Foreword*]. *But see* Randy E. Barnett, *The Disdain Campaign*, 126 HARV. L. REV. F. (2012), http://www.harvardlawreview.org/issues/126/november12/forum_975.php; Stephen G. Calabresi, *The Constitution and Disdain*, 126 HARV. L. REV. F. (2012), http://www.harvardlawreview.org/issues/126/november12/forum_976.php.

[422] Karlan, *2011 Term Foreword*, *supra* note 421, at 2-3, 9-11 (discussing Voting Rights Act and other landmark statutes).

[423] *Id.* at 70.

[424] *Id.* at 8.

[425] *See* Lee Epstein & William M. Landes, *Was There Ever Such a Thing as Judicial Self-Restraint?*, 100 CALIF. L. REV. 557, 570 (2012) (explaining how Posner associated Brandeis and Frankfurter with the rise of judicial restraint, but contending that Frankfurter "did not approach federal laws with a heavier touch as the Court's

product of his Jeffersonian faith in the democratic political process and enlightened public opinion. He distrusted courts as reactionary institutions that thwarted social change, a distrust reaffirmed by *Adkins*'s assertion that the liberty of contract doctrine did not entitle legislation to a presumption of constitutionality as well as by the New Deal constitutional crisis.[426] He believed that the best way to cabin judicial power was to invalidate state and particularly federal legislation only in extreme circumstances and to increase political participation by leaving the protection of rights to the people and their elected representatives. His jurisprudence anticipated today's progressive constitutional theory, including popular constitutionalism.

Progressive scholars should reconsider Frankfurter's jurisprudence because it has much to contribute to the ongoing debate about constitutional interpretation. Today's progressives should appreciate Frankfurter's faith in the political process and enlightened public opinion. But his lifelong theoretical commitment to these ideas also makes him something of a cautionary tale. His reputation as a jurisprudential failure stems in part because less Court-centric theories do not always lead to progressive outcomes.

If Frankfurter had been on the Court during the last forty years, some of his decisions would have annoyed today's progressives. He never would have voted to circumvent the political process and to constitutionalize abortion rights in *Roe v. Wade*, especially not based on substantive due process. He might have upheld those same rights in *Planned Parenthood v. Casey* based on stare decisis.

The 2012 Term gay marriage cases would have been both easy and hard for Frankfurter. *Hollingsworth v. Perry*[427] would have been easy. He believed in the passive virtues and avoiding unnecessary constitutional questions and therefore would have joined the majority's decision that the Proposition 8 defenders lacked standing.[428] *United States v. Windsor*[429] would have been more difficult. Frankfurter was loath to strike down an act of Congress and would have felt compelled to tell the plaintiffs to resort to the democratic political process. Thus, Justice Scalia's dissent would have been attractive on

leadership changed hands from Hughes to Stone to Vinson to Warren."); Posner, *supra* note 7, at 530-31; *see also* Epstein & Landes, *supra*, at 570 n.41 (disagreeing with political science literature that criticized Frankfurter "as a faux restraintist").

[426] *See* sources cited *supra* notes 117-24 (reacting to *Adkins*), 131-34 (writing Roosevelt about the New Deal constitutional crisis).

[427] 133 S. Ct. 2652 (2013).

[428] *Id.* at 2667-68.

[429] 133 S. Ct. 2675 (2013).

this latter score as well as his argument that there was no Article III case or controversy.[430] However, the Obama administration's refusal to defend the Defense of Marriage Act ("DOMA") would have weighed heavily on Frankfurter's thinking just as the Eisenhower administration's stance mattered a lot in *Brown*. DOMA also interfered with the power of the states to define marriage. Given the executive branch's lack of support for the statute, the state of public opinion on gay marriage, and his belief in protecting the power of the states, Frankfurter would have been more comfortable with the majority's reliance on federalism and less so with a *Bolling*-like Fifth Amendment due process analysis.[431]

More to the point, however, progressives would have cheered many of his decisions during the last ten years. He never would have stopped the Florida recount during the 2000 presidential election and would have considered *Bush v. Gore* an evisceration of the political question doctrine. He never would have voted to invalidate federal campaign finance laws in *Citizens United*.

Nor would he have voted to overturn any portion of the Affordable Care Act. Chief Justice Roberts's opinion in *NFIB v. Sebelius* has been described as channeling the "spirit" of Felix Frankfurter.[432] It did and it didn't. Frankfurter never would have ruled on a constitutional question unnecessary to the result, and he would not have joined an opinion holding that the federal government exceeded its spending powers. Yet he would have applauded Roberts for putting aside personal and political preferences, taking institutional considerations into account, and construing a federal statute as mostly constitutional.

During the 2012 Term, Frankfurter would have dissented in *Shelby County v. Holder*[433] because striking down section 4 of the Voting

[430] *Id.* at 2697-705 (Scalia, J., dissenting) (urging respect for "democratically adopted legislation," rejecting judicial supremacy, and arguing there was no Article III case or controversy).

[431] *See id.* at 2693 (relying on Fifth Amendment's Due Process Clause and citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

[432] Noah Feldman, *Roberts Chooses Judicial Restraint Over History in Obamacare*, BLOOMBERG NEWS (June 28, 2012), http://www.bloomberg.com/news/2012-06-28/roberts-chooses-restraint-over-history-on-obamacare.html (describing decision as "[i]n the spirit of Justices Oliver Wendell Holmes and Felix Frankfurter"). *But see* Dan Ernst, *"My Whole Life" Redux*, LEGAL HIST. BLOG (June 29, 2012), http://legalhistoryblog.blogspot.com/2012/06/my-whole-life-redux.html ("I don't doubt that today's Frankfurters will find much to wretch over in the decision.").

[433] 133 S. Ct. 2612, 2630-31 (2013) (striking down section 4b of the Voting Rights Act).

Rights Act usurped Congress's power under section 2 of the Fifteenth Amendment and unnecessarily entered the "political thicket."[434]

This thought experiment about Justice Frankfurter circa 1973–2013 reveals some weaknesses of progressive constitutional theory. The challenge for progressive scholars going forward is why the Court should defer to the democratic political process when it comes to the Affordable Care Act and the Voting Rights Act, but not when it comes to DOMA. The Affordable Care Act (part of it) and DOMA were struck down on liberty and federalism grounds. Why are the decisions different? One answer lies in the NFIB's implicit individual economic liberty rationale and DOMA's interference with social relationships and its discriminatory motive based on sexual orientation. But, again, more theoretical work needs to be done in order to make judicial restraint a more coherent progressive constitutional theory, about when the Court should respect the democratic political process and when that process is worthy of disdain.

Frankfurter and other Thayerians, as Richard Posner has observed, failed to theorize how to determine whether a statute (or executive action) was unconstitutional.[435] Frankfurter's jurisprudence emphasized that extreme cases mean extreme — as his role in *Brown* attests. He may not have always have struck the right balance; his flag salute opinions remain as unpopular among today's legal scholars as they were then. But in this contentious constitutional climate, erring on the side of upholding a federal or state statute is a good thing. The challenge is explaining why. A revival of judicial restraint or judicial implementation of popular constitutionalism will need more than citations to Holmes and Brandeis. It will require additional theorizing, a reexamination of the legacy of the Warren Court, and a reconsideration of the jurisprudence of Felix Frankfurter.

[434] Colegrove v. Green, 328 U.S. 549, 556 (1946).

[435] Posner, *supra* note 7, at 544 ("Not in Holmes, nor in Thayer, Brandeis, Frankfurter, or Bickel, can one find a theory of how to decide whether a statute is unconstitutional.").