Frankfurter and Popular Constitutionalism

Brad Snyder*

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

* Copyright © 2013 Brad Snyder. Assistant Professor, University of Wisconsin Law School. Thanks to John Barrett, Or Bassok, R.B. Bernstein, Andy Coan, Dan Ernst, David Fontana, Willy Forbath, Tony Freyer, Abbe Gluck, Ben Kercher, Michael Klarman, Larry Kramer, Gerard Magliocca, Bill Nelson, Victoria Nourse, John Ohnesorge, David Schwartz, Larry Solum, Mark Tushnet, Mel Urofsky, Geoffrey Watson, Bill Whitford, William Wiecek, John Witt, and participants in faculty workshops at the D.C. Legal History Roundtable, Marquette University Law School, Midwest Conlaw Schmooze, New York University Legal History Colloquium, and University of Toronto Law School for their comments; Steve Curry, David Moon, and especially Debbie Sharnak for their research assistance; Dan Moore for his editorial assistance; and the following librarians and archivists: Lilly Li, Cheryl O’Connor, and Bonnie Shucha at the University of Wisconsin Law Library; Fred Augustyn, Jennifer Brathovde, Jeff Flannery, Lia Kerwin, Patrick Kerwin, Bruce Kirby, Joe Jackson, Lewis Wyman, and Daun van Ee at the Library of Congress Manuscript Division; Ed Moloy, Margaret Peachy, and Lesley Schoenfeld at the Harvard Law School Special Collections Library.
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.

TABLE OF CONTENTS
INTRODUCTION ................................................................................... 345
I. FRANKFURTER’S PRE-COURT PHILOSOPHY ................................ 351
   A. Thayer ............................................................................... 352
   B. Government Service ........................................................... 355
   C. Shaping Public Opinion ..................................................... 356
   D. Elections ............................................................................ 358
   E. Judicial Frustration ............................................................ 360
   F. New Deal Legislation ......................................................... 365
II. JUDICIAL CAREER ...................................................................... 367
   A. Flag Salute Cases .............................................................. 369
      1. State Legislature ........................................................... 370
      2. Public Opinion ............................................................. 373
      3. Departmentalism .......................................................... 376
      4. Less Court-Centric ....................................................... 377
   B. Brown ................................................................................ 383
      1. Departmentalism ........................................................... 383
         a. Executive Branch Support ........................................ 383
         b. Congressional Remedies .......................................... 384
      2. Court’s Limited Institutional Competence .................. 386
      3. Public Opinion ............................................................ 387
      4. Frankfurter’s Brown Critics ......................................... 397
         a. Klarman ................................................................. 397
         b. Tushnet ................................................................ 400
   C. Frankfurter’s Prophecy: Baker v. Carr ............................... 404
      1. Democratic Political Process ........................................ 406
      2. Departmentalism and Federalism ................................. 407
      3. Institutional Impotence and Competence .................... 408
      4. The New Deal Crisis .................................................... 410
      5. Bush v. Gore ............................................................... 411
CONCLUSION....................................................................................... 414
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

---


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

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.").


6 See Michał 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.").


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.\(^17\)

---

\(^13\) See Mark V. Tushnet, Taking the Constitution Away from the Courts 154-76 (1999) [hereinafter Tushnet Taking the Constitution Away].
\(^15\) 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.
\(^17\) 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. 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. 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. “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.”

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. Scholars have written about popular constitutionalism in terms of on having the last word, if not the only one.

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.1 (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.”).


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, the Southern Manifesto’s opposition to *Brown*, and the opposition to the Affordable Care Act. Others have identified elected officials as popular constitutionalists including state court judges, state attorneys general, and U.S. Presidents.

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.

---


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. 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. 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. Frankfurter has served as the villain in the standard Warren Court narrative and has been labeled a jurisprudential failure.

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.

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?”).
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 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. 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."  

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. Frankfurter heard about Thayer from his professors and read Thayer's 1893 essay, The Origin and Scope of the American Doctrine of Constitutional Law. 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."  

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

34 Id. at 4-5.
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.”\textsuperscript{40} His “rule of administration” was analogous to the burden of proof for criminal convictions and standard of review for civil jury verdicts:\textsuperscript{41} courts should deem legislation unconstitutional only in cases of “clear mistake” or “beyond a reasonable doubt.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{46} He applauded \textit{Munn v. Illinois}, the other \textit{Granger Cases}, and the \textit{Legal Tender Cases} of the 1870s, all of which upheld legislation “thought by many to be unconstitutional and many more to be ill-advised . . . .”\textsuperscript{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.”\textsuperscript{48} He concluded of judicial review:

\begin{quote}
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
\end{quote}

\textsuperscript{40} Thayer, \textit{Origin and Scope}, supra note 38, at 153-55; see Thayer \textit{et al.}, \textit{supra} note 38, at 87.

\textsuperscript{41} Thayer, \textit{Origin and Scope}, supra note 38, at 150; Thayer, \textit{Letter}, \textit{supra} note 38, at 315.

\textsuperscript{42} Thayer, \textit{Origin and Scope}, supra note 38, at 144, 146; Thayer, \textit{Letter}, \textit{supra} note 38, at 314.

\textsuperscript{43} Thayer, \textit{Origin and Scope}, supra note 38, at 138.

\textsuperscript{44} See supra text accompanying note 39.

\textsuperscript{45} Thayer, \textit{Origin and Scope}, supra note 38, at 156; Thayer, \textit{Letter}, \textit{supra} note 38, at 315.

\textsuperscript{46} Thayer \textit{et al.}, \textit{supra} note 38, at 86.

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{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.  

What Thomas Grey described as Thayer’s “civic republicanism” 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, yet exuded contempt for legislatures and politics. 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.” 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

---

49 Id. at 88.
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)).
Frankfurter’s article with James Landis on the Compact Clause quoted Thayer as support for “the profound reasons for deference to Congressional judgment.” 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.”

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. 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. 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. At Stimson’s urging, he stayed in the Wilson administration

---

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

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 Bolshevik 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.”

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; his writings triggered a counter-protest from Northwestern law professor John Henry Wigmore and an investigation chaired by Harvard president A. Lawrence Lowell. 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. 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”).

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.” 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

---

66 Id. at 82.


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.”

depends upon a far-sighted and statesmanlike Court. And the Court’s ultimate dependence is upon the confidence of the people.”

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

---

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. During four of the next five presidential elections, Frankfurter endorsed candidates in New Republic editorials or speeches.

The 1924 election was particularly important to him. He attacked Democratic candidate John W. Davis as “under retainer by the house of Morgan” and a “legal attaché of Big Business.” 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. 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.”

During that election, Frankfurter endorsed Progressive Party candidate Robert La Follette. 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.” Frankfurter wrote Davis supporter Walter Lippmann:

---

82 Frankfurter, Reminiscences, 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.
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, Reminiscences, 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

---

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.”
industrial legislation” base[d] on a Fifth or Fourteenth Amendment due process/“liberty of contract” theory.

Frankfurter’s bête noire was the Court’s 1905 decision in *Lochner v. New York* 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.

He believed that, unlike *Lochner*, “[q]uestions as to the constitutionality of modern social legislation are substantially questions of fact,” “[c]oncepts like ‘liberty’ and ‘due process’ are too vague in themselves to solve issues,” “[c]onditions change, legislation deals with these changed conditions, and so must the courts,” and “[l]aw must be related to the other social sciences.” 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.”

Three years after *Lochner*, *Muller v. Oregon* represented a potential “turning point” and Frankfurter believed that its method of argument was “epoch making.” 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

---

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.
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.” Frankfurter believed, responded to Lochner’s emphasis “on tenacious theories of economic and political philosophy” with “an air of reality” and scientific facts. Yet, even after Muller, the Supreme Court (and state supreme courts) invalidated pro-labor legislation in cases such as Adair and Coppage.

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 and reargued its companion case, Stettler v. O’Hara. 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, 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.
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.\textsuperscript{112}

Indeed, he wrote in the \textit{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.”\textsuperscript{113}

\textit{Adkins v. Children's Hospital}\textsuperscript{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 \textit{Muller} controlled. The Court disagreed and held that “freedom of contract” is “the “general rule and restraint the exception.”\textsuperscript{115} \textit{Adkins} permanently altered his outlook on the judiciary: “[T]he possible gain isn’t worth the cost of having live men without any reasonable probability that they are qualified for the task, determine the course of social policy for the states and the nation.”\textsuperscript{116} He never argued another case after \textit{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.”\textsuperscript{117}

After \textit{Adkins}, Frankfurter wrote unsigned \textit{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.”\textsuperscript{118} He cited the absence of similar clauses in other countries’ constitutions and concluded: “[t]he due process clauses ought to go.”\textsuperscript{119} He even criticized due process cases with liberal outcomes such as \textit{Meyer v. Nebraska}\textsuperscript{120} and \textit{Pierce v. Society of Sisters},\textsuperscript{121} which upheld

\begin{itemize}
\item\textsuperscript{112} Letter from Frankfurter to Holmes, Apr. 18, 1921, in \textit{Holmes and Frankfurter Correspondence}, supra note 52, at 108.
\item\textsuperscript{113} \textit{Red Terror}, supra note 77, at 164-65.
\item\textsuperscript{114} \textit{Adkins v. Children’s Hosp.}, 261 U.S. 525 (1923).
\item\textsuperscript{115} \textit{Id.} at 546, 554; see \textit{Frankfurter, Reminiscences}, supra note 33, at 103-04.
\item\textsuperscript{116} Letter from Frankfurter to Learned Hand, Apr. 11, 1923, in Hand Papers, Box 104, Folder 104-10.
\item\textsuperscript{117} \textit{Frankfurter, Reminiscences}, supra note 33, at 103.
\item\textsuperscript{118} \textit{Red Terror}, supra note 77, at 166.
\item\textsuperscript{119} \textit{Id.} at 167.
\item\textsuperscript{120} 262 U.S. 390 (1923).
\item\textsuperscript{121} 268 U.S. 510 (1925).
\end{itemize}
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 Frankfurter to Hand, June 5, 1923, at 1, in FF Frankfurter Papers, Harvard Law School Special Collections [hereinafter FFHLS], Box 198, Folder 12, Pt. III, Reel 26 at 413.


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).
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.
increase the number of Supreme Court Justices, Frankfurter privately supported and advised the President. 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. “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.”

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 . . . .” Frankfurter concluded: “When the people and the lawyers have clashed on great questions of legislative policy, ultimately the people have had their way.”

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

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

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).


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

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 293-96 (1921)).
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” and “uncoupled with the locomotive of history,” he lost the intellectual leadership of the Court, he failed to live up to Holmes’s and Brandeis’s tradition of protecting civil liberties, and he became a jurisprudential failure.

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, 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 and elite disapproval in law reviews and newspaper editorials. Abroad, the United States entered World War II; Nazi Germany was sending Jehovah’s Witnesses along with Jews to concentration camps. In a subsequent case involving Jehovah’s Witnesses, Justices Black, Douglas, and Murphy renounced their votes in Gobitis. In 1941, Frankfurter lost another vote when


147 LASH, supra note 35, at 73.

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

149 Id.

150 310 U.S. 586 (1940).


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.\footnote{Barnette, 319 U.S. 624.}

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.”\footnote{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].} 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.\footnote{See sources cited supra note 156.} 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.\footnote{Danzig, How Questions Begot Answers, supra note 156, at 261-62; Danzig, Justice Frankfurter’s Opinions, supra note 156, at 714-17.}

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.”\footnote{Barnette, 319 U.S. at 625-26.} With the state legislature’s
imprimatur and inspired by Gobitis, the school board established a mandatory flag salute requirement.\textsuperscript{160} The Barnette children then refused to salute the flag and were sent home from school.\textsuperscript{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."\textsuperscript{162} Holmes’s opinion, Frankfurter wrote, "went to the very essence of our constitutional system and the democratic conception of our society."\textsuperscript{163} Frankfurter concluded with a lengthy quotation from Thayer.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.”\textsuperscript{167} He believed that the Court was not “free to act as though [it] were a superlegislature.”\textsuperscript{168}

Barnette reminded Frankfurter of the “good” substantive due process decisions that he had objected to years earlier in the New Republic,\textsuperscript{169} decisions such as Meyer v. Nebraska and Pierce v. Society of

\begin{footnotes}
\item[160] Id. at 626.
\item[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).
\item[162] Barnette, 319 U.S. at 649 (Frankfurter, J., dissenting) (quoting Mo., Kan., & Tex. Ry. Co. v. May, 194 U.S. 267, 270 (1904)).
\item[163] Id.
\item[164] Id. at 667-71 (quoting James Bradley Thayer, John Marshall 104-10 (1901)).
\item[165] Id. at 649.
\item[166] Id. at 631 (“But the real question is, who is to make such accommodations, the courts or the legislature?”).
\item[167] Id. at 652.
\item[168] Id. at 648.
\item[169] Red Terror, supra note 77, at 166.
\end{footnotes}
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 Barnette172 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

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 pre-judicial 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

---

178 *Barnette*, 319 U.S. at 666 (Frankfurter, J., dissenting).
180 *Barnette*, 319 U.S. at 662-63 (Frankfurter, J., dissenting).
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


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.


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. 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.” Thomas Reed Powell and other legal elites criticized *Gobitis* in law reviews and national magazines. Zechariah Chafee and Monte Lemann co-authored the ABA’s *Barnette* amicus brief on the children’s side. The ACLU, an organization that Frankfurter had helped found, also filed a brief on the children’s behalf.

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 — 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...
more enshrined in the Constitution than the consciences of a majority.\footnote{Barnette, 319 U.S. at 662 (Frankfurter, J., dissenting).}

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

3. Departmentalism

Departmentalism, like public opinion, was a mixed bag. As \textit{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.”\footnote{H.R.J. Res. 359, 77th Cong. (1942), \textit{enacted by} 56 Stat. 1074.} Frankfurter sent the resolution to Stone without taking a position on whether it supported his position.\footnote{Letter from Frankfurter to Stone, Jan. 7, 1943, in Stone Papers, Box 74, Folder “Frankfurter, Felix Jan.-Apr. 1943.”} He alerted Stone to Section 7, which said:

\begin{quote}
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. . . \footnote{H.R.J. Res. 359 § 7.}
\end{quote}

This section could be interpreted as support for \textit{Gobitis}, respect for the flag, and national unity. The \textit{Barnette} majority, however, argued that the resolution made “flag observance voluntary” and “prescribe[d] no penalties for nonconformity.”\footnote{Barnette, 319 U.S. at 638, 642 n.17.} Whether a statute supported by the American Legion and other patriotic organizations with language watered down to permit widespread display of the flag\footnote{Tsai, \textit{supra} note 179, at 413 n.199.} 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 \textit{Gobitis}. Eleanor Roosevelt “feared the decision would

\begin{footnotes}
\item[Barnette] 319 U.S. at 662 (Frankfurter, J., dissenting).
\item[H.R.J. Res. 359, 77th Cong. (1942), \textit{enacted by} 56 Stat. 1074.]
\item[Letter from Frankfurter to Stone, Jan. 7, 1943, in Stone Papers, Box 74, Folder “Frankfurter, Felix Jan.-Apr. 1943.”]
\item[H.R.J. Res. 359 § 7.]
\item[Barnette, 319 U.S. at 638, 642 n.17.]
\item[Tsai, \textit{supra} note 179, at 413 n.199.]
\end{footnotes}
generate intolerance, especially in a period of rising hysteria”; 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.

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. Tsai also observed a diversity of views within the executive branch: then-Attorney General Jackson privately blasted Gobitis, Solicitor General Francis Biddle delivered a national radio address condemning violence against Jehovah’s Witnesses, and two Justice Department officials wrote an article criticizing Gobitis.

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.”

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.” Indeed, Tsai lamented that Jackson had deleted from earlier drafts

---

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.
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.\textsuperscript{212}

What rankled Frankfurter most was that \textit{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.\textsuperscript{213} He claimed that Black changed his vote not because he has “reread the Constitution” but because “he has read the papers.”\textsuperscript{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 \textit{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.”\textsuperscript{215}

Frankfurter argued that the people should interpret the Constitution. During the \textit{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.”\textsuperscript{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 \textit{Barnette} dissent\textsuperscript{217} revealed that Frankfurter lacked Holmes’s detachment and

\textsuperscript{212} \textit{Id.} at 431-35.

\textsuperscript{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)).

\textsuperscript{214} \textit{LASH, supra} note 35, at 209; see id. at 70 (quoting Frankfurter, Columbia Oral History Draft 309) (arguing that \textit{Gobitis} was “okayed by those great libertarians until they heard from the people”).


\textsuperscript{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. \textit{Gobitis}.”

\textsuperscript{217} \textit{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.” 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.”

Some scholars have presented an idealized view of Holmes and Brandeis as limiting their judicial restraint to “cases primarily involving economic questions.” 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. Before the war, Holmes believed that freedom of speech was limited to freedom from prior restraint. 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.”

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 203, 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).

Brandeis wrote a few dissents after the war, but did not fully articulate his vision of free speech until 1927. And neither Holmes nor Brandeis possessed a sterling record when it came to protecting the civil rights of African Americans. 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 and to revoke the citizenship of a Communist in Schneiderman. 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.

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. 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).
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, Reminiscences, 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."
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.\textsuperscript{231} He also voted to grant certiorari about the fairness of the trial of convicted perjurer and suspected Communist William Remington.\textsuperscript{232}

Frankfurter’s first clerk Joseph Rauh, himself a lifelong civil libertarian,\textsuperscript{233} argued that the line that Frankfurter became “uncoupled . . . from the locomotive of history” “cuts too broad a swath.”\textsuperscript{234} Rauh reviewed the Justice’s accomplishments related to civil rights and civil liberties:\textsuperscript{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,\textsuperscript{236} his search and seizure opinions,\textsuperscript{237} his testimony as a character witness at the perjury trial of former student Alger Hiss,\textsuperscript{238} his votes in Confrontation Clause cases involving loyalty oaths,\textsuperscript{239} and his votes in four 1957 cases about the rights of suspected Communists and labeled by critics as Red Monday.\textsuperscript{240}

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

\textsuperscript{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].

\textsuperscript{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.

\textsuperscript{233} See generally PARRISH, CITIZEN RAUH, supra note 190.

\textsuperscript{234} Rauh, supra note 190, at 507.

\textsuperscript{235} Id. at 507-19.


\textsuperscript{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).

\textsuperscript{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).


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,\(^\text{241}\) perhaps not realizing within five years of the decision the footnote’s concern with fascism and protecting minority rights.\(^\text{242}\) 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.\(^\text{243}\) But he ignored paragraph one of footnote four about safeguarding the Bill of Rights and paragraph three about protecting “discrete and insular minorities.”\(^\text{244}\)

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.


\(^{242}\) 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 “Minersville 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”).


\(^{244}\) 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.* 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.” He particularly wanted the incoming Eisenhower administration to lead with regard to Washington D.C.’s segregated schools. He said it was “intolerable that [the federal] government should permit segregation in D.C. life.” In desegregating the city, it “is important for the government that will be responsible to enforce it.” Therefore, he said, the Court “should set down [the] D.C. case for [re]argument under [the] new administration.”

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, they

---

248 *Id.*
249 *Id.*
250 *Id.*
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 argument257 and suggested at the conference: “If [we] can work it out so we can say segregation ‘bad’ — under approval of court and


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).


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

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.”).


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.\footnote{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.\footnote{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.”\footnote{273} In \textit{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 \textit{when} we decide.”\footnote{274} He then quoted Brandeis that the “most important things . . . often \textit{are} what we do \textit{not} do.”\footnote{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 \textit{Plessy}’s separate but equal doctrine in the 1950 graduate school cases. During
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.
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.” On June 7, the Court agreed to hear the cases from South Carolina, Kansas, and Virginia and delayed oral argument until after the election.

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

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, a memo Frankfurter shared with his fellow Justices and where Frankfurter and Bickel first asserted that the Amendment’s history was “inconclusive.”

---

284 Id.
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”).
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.61 (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.” 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.”

Frankfurter confided to friends that “the wise use of time,” i.e., reargument, “was probably the chief factor in the ultimate decision.” 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. During the Rosenberg special term, the Court was in

---


294 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. 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. “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.” 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. 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).

Snyder, Taking Great Cases, supra note 231, at 935-36.

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.”).


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

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 hearing 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

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, urged Brennan to remove these references, but Brennan refused. 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.

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
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. 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. 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. The people of Little Rock, however, voted to close the public schools. 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. And Congress tried and nearly succeeded in stripping other aspects of the Court's jurisdiction in 1957 and 1958. 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

---

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).
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

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.\textsuperscript{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 \textit{Cooper} concurrence, much to the consternation of his colleagues,\textsuperscript{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 \textit{Brown}.\textsuperscript{321} His \textit{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.\textsuperscript{322} Indeed, Frankfurter knew several moderate Harvard-educated Little Rock lawyers.\textsuperscript{323}

\textsuperscript{319} \textit{Id.} at 24-25 (Frankfurter, J., concurring).

\textsuperscript{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.”


\textsuperscript{322} Letter from Frankfurter to Burlingham, Nov. 12, 1958, at 2, \textit{supra} note 321.

\textsuperscript{323} \textsc{Freyer, Little Rock on Trial}, \textit{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" and Frankfurter's positive portrayal, based on interviews with Elman and Bickel, in Richard Kluger's standard account. 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; 2) During the 1953 Term Conference, Frankfurter "conceded that, based on legislative history and precedent, 'Plessy is right'"; and 3) Frankfurter "later observed

---

324 Elman & Silber, supra note 252, at 831; see also id. at 822-25, 828-33.
327 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 that 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 that of his colleague's likely vote, but his interpretation is consistent with the conference notes. 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.”

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. 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,” a quote contradicted by Klarman, Brown and Lawrence, supra note 11, at 433; 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 “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.

Frankfurter’s cover memo prior to the 1953 oral argument that the Amendment’s history vis-à-vis segregation was “inconclusive.”

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,” 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. 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.” 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-cert.
minute stay (which the Court quickly reconvened to overturn).\textsuperscript{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.\textsuperscript{336}

Conference notes about \textit{Brown}\textsuperscript{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 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 \textit{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 \textit{Plessy}.

\textbf{b. Tushnet}

Like Klarman, Tushnet’s 1991 revisionist interpretation of \textit{Brown} painted Frankfurter in an unflattering light.\textsuperscript{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

\textsuperscript{335} See Snyder, \textit{Taking Great Cases}, supra note 231, at 917-28, 938-43.
\textsuperscript{336} \textit{Id.} at 894 n.34 (discussing scholarly debate about Douglas’s “exaggerations” about his personal history); \textit{id.} at 919-20, 936, 938 (addressing Douglas’s embellished recollections about Rosenberg).
\textsuperscript{338} This article primarily addresses Tushnet’s 1991 \textit{Columbia Law Review} article about \textit{Brown}. Tushnet & Lezin, supra note 330. Tushnet’s book version is less harsh, but still revisionist and unflattering to Frankfurter. See, e.g., \textit{Mark V. Tushnet, Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961}, at 188 (1994) [hereinafter \textit{Making Civil Rights Law}] (“Frankfurter . . . was ambivalent, not about segregation, but about whether a legally satisfactory opinion overruling \textit{Plessy} could be written. His ambivalence led him to delay a decision.”); \textit{id.} at 193 (“[H]is statement at the 1952 Term Conference] left Frankfurter no ground on which to rest a conclusion that segregation in the states was unconstitutional.”); \textit{id.} at 195 (“[In 1952,] Frankfurter himself would not have gone along with the decision.”); \textit{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 waffling 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...
Conference notes “almost certainly convey[] a distorted sense of what Frankfurter had in mind.”

Yet Tushnet’s “alternative interpretation” 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. 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. 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. 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.\textsuperscript{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.”\textsuperscript{354} Tushnet’s conclusion ignored support for gradualism from Warren, Black, Jackson, and every other Justice.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{353} Tushnet & Lezin, supra note 330, at 1883-84.

\textsuperscript{354} Id. at 1884.

\textsuperscript{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. . . .”).

\textsuperscript{356} Interview by Kluger with Bickel, supra note 270, at 4.

\textsuperscript{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, 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.” He failed to turn several subsequent per curiam opinions into a majority opinion. 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. The political question doctrine became one of Bickel’s “passive virtues” that he urged the Court to employ to avoid certain cases. 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. 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.” In doing so, Brennan’s opinion limited the political question doctrine to the

---

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).
364 Baker, 369 U.S. at 211.
relationship between the judiciary and coordinate branches of the federal government rather than with the states. 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 and President Nixon to hand over his tapes rather than to allow the impeachment process to play out. Indeed, since Baker, a majority of the Court has invoked the political question doctrine only twice.

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. Indeed, Baker invoked the Equal Protection Clause rather than the Guarantee Clause and led to a one-person, one-vote rule. Earl Warren dubbed Baker, not Brown, “the most important decision of my tenure on the Court.”

It was only after Bush v. Gore that scholars began to reassess Baker v. Carr and to understand the political question doctrine as a forgotten bulwark against judicial power run amok. 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.

365 Id. at 210.
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.
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 ascendency 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. 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.”

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.” On September 15, he signed the Voting Rights Act into law.

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. The Civil Rights Act of 1964 and the Voting Rights Act of 1965, what Ackerman dubbed “landmark statutes,” resulted in non-judicial constitutional change. Frankfurter’s less

375 Baker, 369 U.S. at 270 (Frankfurter, J., dissenting).
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.”

The Illinois apportionment scheme, which had not been revised in more than thirty-five years, dealt with congressional rather than state representatives. 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.”

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. 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.” And he viewed Baker’s equal protection claim as a “Guarantee Clause claim masquerading under a different label.” 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.
384 Id. at 284.
385 Id. at 297.
with matters of state government . . . . " 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." 385

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.
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. The Court has struggled to articulate a workable standard to apply to redistricting cases.

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. “We are of opinion that the petitioners ask of this Court what is beyond its competence to grant,” he wrote in Colegrove. This is precisely why he invoked the political question doctrine in Colegrove and believed


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-Urriel 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. In a passage Bickel later quoted in support of the virtues of his passive virtues, 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 cohesion 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.

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.” 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.”

5. *Bush v. Gore*

After *Bush v. Gore*, 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. 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.”

Some scholars agree that Frankfurter’s dissent was right about not entering the political thicket. Some agree with certain aspects of Frankfurter’s critique. They gave the prudentialist approaches of

---

402 Id. at 325.
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. 693, 716-21 (1980) (labeling Frankfurter’s and Bickel’s approach a “prudential argument”).


410 Id. at 310.

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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{418}

***

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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{414} Id. at 1231.
\textsuperscript{415} Id. at 1235.
\textsuperscript{416} Id.
\textsuperscript{419} Snyder, House that Built Holmes, supra note 78, at 662-63; White, Canonization of Holmes & Brandeis, supra note 6, at 577, 585.
\textsuperscript{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.241 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


243 Id. at 70.

244 Id. at 8.

245 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.  

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* 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. *United States v. Windsor* 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
this latter score as well as his argument that there was no Article III case or controversy. 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.

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. 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 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)).


Rights Act usurped Congress’s power under section 2 of the Fifteenth Amendment and unnecessarily entered the “political thicket.”

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. 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.”).