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Alfred S. Neely

University of Missouri-Columbia

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Mr. Justice Frankfurter's Iconography of Judging*

BY ALFRED S. NEELY**

INTRODUCTION

Some judges are revered by consensus. Chief Justice John Marshall of the United States Supreme Court comes readily to mind.¹ With others, the reverence is far more mixed and complicated in nature and origin, and the acclaim less universal. Even Justices Joseph Story and Oliver Wendell Holmes, Jr., who many might think worthy of reverence by acclamation, and who are ranked in the company of Marshall, flirt with unanimity, but fall just short.² Justices Louis D. Brandeis and Benjamin N. Cardozo also

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** Professor of Law, University of Missouri-Columbia. I am grateful to the Thomas E. Deacy, Jr., Charles H. Rehm, and Stephens Faculty Research Fellowships for financial assistance in partial support of this Article.

¹ Marshall appears, for example, in Roscoe Pound's 1938 list of "the ten judges who must be ranked first in American judicial history," ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 4 (1939), and in Professor Bernard Schwartz's 1978 revisitiation of the matter. Bernard Schwartz, *The Judicial Ten: America's Greatest Judges*, 1979 S. ILL. U. L.J. 405, 407; see also Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 A.B.A. J. 1183, 1183 (1972) (proposing another list); George R. Currie, *A Judicial All-Star Nine*, 1964 WIS. L. REV. 3, 4 (proposing another list).

Frankfurter, too, was an occasional maker of lists. In 1957 Frankfurter identified, from among the first seventy-five Justices to serve on the Court, sixteen "of distinction in the realm of the mind and spirit It would indeed be a surprising judgment that would exclude Marshall, William Johnson, Story, Taney, Miller, Field, Bradley, White (despite his question-begging verbirosities), Holmes, Hughes, Brandeis and Cardozo in the roster of distinction among our seventy-five. I myself would add Curtis, Campbell, Matthews and Moody." Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 783 (1957) [hereinafter Frankfurter, *Mirror of Justices*], reprinted in 44 A.B.A. J. 723 (1958); see also Felix Frankfurter, *Personal Ambitions of Judges: Should a Judge "Think Beyond the Judicial"?*, 34 A.B.A. J. 656, 659 (1948) [hereinafter Frankfurter, *Personal Ambitions*] (listing great Presidents and Secretaries of State and War who were also lawyers).

² Story and Holmes are included in each of the lists cited *supra* note 1, but only John Marshall was "unanimously classified as 'A' by all participants" in the Blaustein and Mersky poll of selected law deans and professors. Blaustein & Mersky, *supra* note 1, at 1183.

come close to unanimity, but share the acclamation of Marshall, Story and Holmes in only most, but not everyone's, eyes.³ For most judges the judgment is even more mixed and the acclaim, at best, more ambiguous. Justice Felix Frankfurter of the United States Supreme Court is of this lot.⁴

Prominence alone is not a guarantee of the kind of respect accorded the likes of a Marshall, Story or Holmes. Felix Frankfurter enjoyed a prominence unusual for even a Supreme Court Justice. Long before joining the Court, his reputation as academic, advocate, and advisor to the country's political elite was firmly established.⁵ As one Frankfurter biographer has commented, "Professors of law, even those who sometimes reach the United States Supreme Court, do not usually achieve the status of celebrities in American society. Felix Frankfurter, however, commanded the awe, devotion, hatred, and paranoia normally reserved for presidents, generals, movie stars, and eccentric millionaires . . ." ⁶ For

³ Cardozo appears on most lists of great judges. See POUND, *supra* note 1, at 431; Blaustein & Mersky, *supra* note 1, at 1183; Schwartz, *supra* note 1, at 407; see also RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 143 (1990) ("[H]e deserves to be called a great judge," although with an "abiding disquiet" that this label is the product of Cardozo's capacities as a "master rhetorician"). However, Cardozo did not make Judge Currie's team. Currie's interesting alternative to Cardozo was Chief Justice Charles Evans Hughes. Currie believed that Hughes, outside Marshall, made as great a contribution to American constitutionalism as any other. Currie, *supra* note 1, at 27-31.

Brandeis received "great judge," Blaustein & Mersky, *supra* note 1, at 1183, and "top ten" status, Currie, *supra* note 1, at 3, 4, when the search was confined to the United States Supreme Court. He did not make the list when the search was expanded to include American judges without regard to court, federal or state. See POUND, *supra* note 1, at 430-31; Schwartz, *supra* note 1, at 407.

⁴ Frankfurter made neither the Pound nor Schwartz lists, which included American judges without regard to court, federal or state. POUND, *supra* note 1, at 430-31; Schwartz, *supra* note 1, at 407. However, he did make the highest grade of "great" in the Blaustein and Mersky poll. Blaustein & Mersky, *supra* note 1, at 1183. As a retired, yet living, member of the Court, Frankfurter was not eligible for consideration in Judge Currie's "all-star nine." Currie, *supra* note 1, at 3.

⁵ See, e.g., MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 39-272 (1982); MARK SILVERSTEIN, CONSTITUTIONAL FAITHS—FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING 55-89 (1984); MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 2-44 (1991).

⁶ PARRISH, *supra* note 5, at 1-2; see also Wallace Mendelson, *Introduction to FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE* vii (Quadrangle Books, Inc. 1964) (1937) [hereinafter FRANKFURTER] ("[A]s one reviewer said . . . 'Professor Frankfurter [was] probably the nation's best known teacher of law;'""); H. N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 99 (1981) (noting that during the 1930s, "he was perhaps the single most important nonselected official in national

example, in 1936 the editors of *Fortune Magazine* reported that General Hugh S. Johnson, himself the influential head of the National Recovery Administration, considered Frankfurter "the most influential single individual in the United States."⁷ Yet Frankfurter's efforts as a Justice have often, although by no means always, been taken to task.⁸

government"); Dean Acheson, *Felix Frankfurter*, 76 HARV. L. REV. 14, 14-15 (1962) (drawing parallel between the influence of Frankfurter and Benjamin Franklin in their respective times); Archibald MacLeish, *F.F.: frame for a portrait*, 76 HARV. L. REV. 22, 22 (1962) ("Posterity may or may not take our word for it that Felix Frankfurter had more influence on more lives than any man in his generation . . ."); Tony Freyer, Book Review, 36 AM. J. LEGAL HIST. 390, 390 (1992) (reviewing UROFSKY, *supra* note 5) ("As a public figure . . . Frankfurter played a significant role as an intellectual and policymaker . . .").

⁷ ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945, at 303 (Max Freedman ed., 1967).

⁸ One prominent critic, Professor Fred Rodell of the Yale Law School, labeled Frankfurter's advocates, admirers, and defenders the "Felixphiles." Fred Rodell, Book Review, 59 YALE L.J. 1013, 1014 (1950) (reviewing THE CONSTITUTIONAL WORLD OF MR. JUSTICE FRANKFURTER: SOME REPRESENTATIVE OPINIONS (Samuel J. Konefsky ed., 1949)); see Wallace Mendelson, *Mr. Justice Frankfurter and the Process of Judicial Review*, 103 U. PA. L. REV. 295, 320 (1954) (reacting in Frankfurter's defense to the Rodell book review). One commentator has observed that "Frankfurter until recently possessed a gleaming historical reputation solidly rooted." Mark B. Rotenberg, *Politics, Personality and Judging: The Lessons of Brandeis and Frankfurter on Judicial Restraint*, 83 COLUM. L. REV. 1863, 1863 (1983) (book review). Actually, critics such as Rodell never allowed Frankfurter's reputation to develop untarnished from the outset. Nevertheless, there have always been ample sympathetic supporters of Frankfurter. See generally WALLACE MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT 124-31 (2d ed. 1966) (discussing Frankfurter's restraint); William T. Coleman, Jr., *Mr. Justice Frankfurter: Civil Libertarian as Lawyer and as Justice: Extent to Which Judicial Responsibilities Affected His Pre-Court Convictions*, in SIX JUSTICES ON CIVIL RIGHTS 85 (Ronald D. Rotunda ed., 1983); Acheson, *supra* note 6, at 14 (fondly discussing Felix Frankfurter's affinity for friendship, getting along with children, and good conversation); Alexander M. Bickel, *Felix Frankfurter*, 78 HARV. L. REV. 1527 (1965) (describing Frankfurter as more than a judge, as a teacher and scholar, a friend and supporter of justice, education, and liberty); Hugo L. Black, *Mr. Justice Frankfurter*, 78 HARV. L. REV. 1521, 1521 (1965) (Justice Black's comments on his personal relationship with Felix Frankfurter and his respect for Frankfurter as a servant to his country); Ernest J. Brown, *Professor Frankfurter*, 78 HARV. L. REV. 1523, 1523 (1965) (giving his impression of Felix Frankfurter's impact as a teacher on Brown's relationship with and appreciation for the law); Jerome A. Cohen, *Mr. Justice Frankfurter*, 50 CAL. L. REV. 591, 592 (1962) (noting how Felix Frankfurter's practical background in public service gave him special insight into achieving fair administration of justice); John M. Harlan, *The Frankfurter Imprint as Seen by a Colleague*, 76 HARV. L. REV. 1 (1962) (crediting Frankfurter with a deep impact on his time and attributing this impact in part to Frankfurter's role in keeping the judicial decision making process true to its purpose); Mark DeW. Howe, *Felix Frankfurter*, 78 HARV. L. REV. 1526 (1965) (suggesting that Frankfurter's strong

The principal thrust of the criticism of Frankfurter has been that he was too willing and quick to surrender to the will of the legislature—that his philosophy of judicial self-restraint entailed an abdication of judicial responsibility on exactly those occasions when judicial intervention was most warranted.⁹ In a 1972 poll of sixty-five law school deans and

adherence to a belief in judicial restraint was necessitated by Frankfurter's awareness of his personal zeal for causes dear to him as a man); Paul A. Freund, *Mr. Justice Frankfurter*, 76 HARV. L. REV. 17 (1962) (commenting on Frankfurter's respect for the legislative and judicial processes and how this respect was by no means obsolete); Louis L. Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357 (1949) (arguing that Justice Frankfurter does not make decisions based on classification as liberal or conservative, but rather, his decisions result from his views on many factors that bear on the propriety of any particular decision); Willard L. King, *Mr. Justice Frankfurter Retires*, 48 A.B.A. J. 1143, 1145 (1962) (discussing Frankfurter's belief in judicial restraint); John H. Mansfield, *Felix Frankfurter*, 78 HARV. L. REV. 1529 (1965) (recanting fond memories of his friendship with Felix Frankfurter and the profound impact of knowing him); Reinhold Niebuhr, *Tribute to Felix Frankfurter*, 76 HARV. L. REV. 20, 20-21 (1962) (suggesting that Frankfurter was guided by an enlightened balance of deference to tradition, as well as concern for the rights of individuals); Thomas R. Powell, *Judicial Protection of Civil Rights*, 29 IOWA L. REV. 383, 395 (1944) (noting that Frankfurter's practice of judicial restraint was true given that he often deplored the action that such restraint prohibited him from condemning); cf. CLYDE E. JACOBS, JUSTICE FRANKFURTER AND CIVIL LIBERTIES 12 (1961) (presenting a generally sympathetic view of Frankfurter, "one of the most criticized members of the contemporary Court," and of the relationship between his "libertarian activism" before joining the Court and his philosophy of judicial restraint while on the Court); Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1930 (1991) (discussing Brown v. Board of Education, Frankfurter's role in the decision, and "the deep structure of Frankfurter's posture of judicial restraint").

⁹ One of Frankfurter's defenders suggests that "his reputation has suffered not because he was paralyzed, but because the lesson of judicial humility constantly tempered his judgments." Coleman, *supra* note 8, at 88. What Frankfurter had created was "a passive model of appellate judging" which he adhered to in the traditions of Holmes, Brandeis, Cardozo, and Stone. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 331 (1976). The result was "a consistent and wide-ranging philosophy of adjudication: his particular version of passivity, articulated in virtually unchanging fashion during his twenty-three years on the Court." *Id.* His philosophy of adjudication resulted in the appearance of inconsistency with his previously established positions. "Many of those remembering him [Frankfurter] from the days of his association with liberal causes and publications have the impression that his work on the court is inconsistent with the reputation he had earned for himself. As a judge he has disappointed in particular liberal and labor circles." THE CONSTITUTIONAL WORLD OF MR. JUSTICE FRANKFURTER xvi (Samuel J. Konefsky ed., 1949).

A further and ironical development that Professor Bruce Allen Murphy raised was Frankfurter's continuing political activism off the bench even after he had joined the Court and developed his reputation for apolitical judicial self-restraint on the bench. BRUCE A.

professors rating Justices of the Supreme Court, Frankfurter was among those who received the highest "great" rating. However, it was "for this preoccupation with 'restraint' that one of the law professors rated Frankfurter not great but a failure. He termed Frankfurter 'consistently overrated', the point being that he used his brilliance to restrict the development of law."¹⁰

One of the sharpest of Frankfurter's critics was Professor Fred Rodell of Yale Law School. Rodell considered Justice Frankfurter one of "the passivists, the self-deniers, the apostles of undifferentiated judicial self-restraint"¹¹ who "come very close to contending that the Court should never overrule Congress on constitutional grounds—that is, to disavowing the right of judicial review that Marshall asserted in *Marbury v. Madison*."¹² To Rodell, Frankfurter was the "chief spokesman" of the

MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES* 268 (1982). Murphy suggests that Frankfurter's "two lives" in this respect made Frankfurter's extrajudicial politics more palatable to Frankfurter. *Id.* at 269. Extramurals of this sort were a source of discomfort and sometimes denial for Frankfurter. See, e.g., JOSEPH P. LASH, *FROM THE DIARIES OF FELIX FRANKFURTER* 345-50 (1975) (1953 exchange of letters with editor of the Forrester Diaries on what Frankfurter believed that Frankfurter had and had not done on behalf of a Jewish state and how Frankfurter had stayed within the bounds of judicial propriety).

¹⁰ Blaustein & Mersky, *supra* note 1, at 1184; see Melvin I. Urofsky, *The Failure of Felix Frankfurter*, 26 U. RICH. L. REV. 175, 178 (1991) (noting that Justice William O. Douglas shared this disappointment in Frankfurter, yet still placed him on his own "All-American" team" of Supreme Court Justices).

¹¹ Fred Rodell, *Judicial Activists, Judicial Self-Deniers, Judicial Review and the First Amendment—Or, How to Hide the Melody of What You Mean Behind the Words of What You Say*, 47 GEO. L.J. 483, 484 (1959) [hereinafter Rodell, *Judicial Activists*]. A few years before, Rodell had leveled an even more serious charge against Frankfurter. Rodell claimed that Frankfurter's judicial restraint was only "selective," especially when his mentors Holmes or Brandeis had voted a particular way in a earlier case, "or where a liberal answer fitted his private blueprint." FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955*, at 272 (1955). Rodell considered Frankfurter "the New Deal Court's outstanding disappointment." *Id.* at 273; see also Rodell, *supra* note 8, at 1014-15 (disputing the "myth" that Frankfurter was a consistent proponent and practitioner of "judicial self-restraint").

¹² Rodell, *Judicial Activists*, *supra* note 11, at 484-85. The case that drew Professor Rodell's fire was *Feiner v. New York*, 340 U.S. 315 (1951). At issue was the breach-of-peace conviction of a college student for a street-corner, political harangue. Justice Frankfurter concurred in upholding the conviction. The professor considered the Justice (and former professor) too solicitous of "public tolerance and intelligent police administration" as the ultimate source of substance for the Court's own views on free speech. *Id.* at 289. Rodell believed that the Court should take its own lead on issues of constitutional protection of civil liberties. Rodell, *Judicial Activists*, *supra* note 11, at 490.

Court for this view of a limited judicial role.¹³ In contrast and opposition to “whole-hog self-deniers” of the likes of a Frankfurter were “the allegedly illogical and inconsistent activists.”¹⁴ Rodell saw the activists as appropriately willing to test the measure of a statute against constitutional principles.

Rodell was by no means unique in his perspectives on Justice Frankfurter.¹⁵ He was just more candidly trenchant in his criticism of

¹³ Rodell, *Judicial Activists*, *supra* note 11, at 485. Outside the Supreme Court, Rodell believed that the “[m]ost articulate living advocate of this view is the venerable Judge Learned Hand, who has touted the propriety of judicial impotence in the face of legislative arrogance.” *Id.* See generally KATHRYN GRIFFITH, *JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY* 208-10 (1973) (analyzing various characteristics of judges who are judicial activists and judges who believe in judicial restraint).

¹⁴ Rodell, *Judicial Activists*, *supra* note 11, at 485. Of course, Rodell considered the activists neither “illogical” nor “inconsistent,” and thought that the problem was that the “self-deniers” did not believe quite strongly enough in First Amendment freedoms. *Id.* at 485, 490.

The division Rodell described was not a new one. It had existed for some years, and Frankfurter was but a recent illustration of one side of it. On this side one found “Taney, Waite, Holmes, Brandeis, Learned Hand, Stone, Cardozo, and Frankfurter. These are the humilitarians, the pragmatists. Recognizing that judicial legislation is inevitable, they would hold it to a minimum.” MENDELSON, *supra* note 8, at 115 (footnote omitted). On the other side were “Marshall, Field, Peckham, Fuller, Sutherland, and Black. These are the activists. For them judicial legislation . . . is the heart of the judicial process.” *Id.* at 116.

¹⁵ See, e.g., ROBERT A. BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* 43-48, 60, 129 (1988) (discussing how Frankfurter’s stance of judicial restraint related to his movement from outsider to insider, and how in the process, unlike Brandeis, he “lost his balance” and “always remained homeless in spite of himself”), reviewed by Thomas L. Shaffer, *Judges as Prophets*, 67 *TEX. L. REV.* 1327, 1327, 1330 (1989) (Burt presents Felix Frankfurter as the “villain” and, in the process, “is harder on the memory of Justice Frankfurter than any respectable commentator I know about”); HIRSCH, *supra* note 6, at 191 (“He . . . choked off the opportunity for a truly creative jurisprudence; his total commitment to deference [judicial restraint] led him into contradictions and, ultimately, into absurdities.”); UROFSKY, *supra* note 5, at 176 (“The problem . . . is that judicial restraint can quickly become judicial abdication.”), reviewed by Freyer, *supra* note 6, at 390 (“Although he is regarded as an important twentieth-century American, Felix Frankfurter almost invariably disappoints biographers. . . . In each case the subject elicited guarded respect subordinated to a general conclusion that when it came to what counted most Frankfurter often failed.”); Urofsky, *supra* note 10, at 175-76 (1991) (describing Frankfurter as one of those “appointees who gave much promise of greatness [but] have proven disappointing” because, in great measure, of “his abrasive personality and inability to get along with other members of the Court” as well as his philosophy of judicial restraint); Leonard B. Boudin, Book Review, 89 *HARV. L. REV.* 282, 284-85 (1975)

Frankfurter, who Rodell said "wanted so hard to be a famous Justice," when he was "really a rather pathetic figure as he bustle[d] his way toward historical obscurity."¹⁶

This picture of Frankfurter as judge is hardly flattering. It is one of a jurist of limited imagination and limited courage, with a corresponding boundless capacity for deference and even obsequiousness. The purpose of this Article is not directly to refute these views, nor to mount the campaign to rehabilitate the Frankfurter reputation across broad fronts. Rather, its purpose is the more limited one of adding a measure of balance.

(reviewing LASH, *supra* note 9) (discussing why Frankfurter should have been "a dominating figure on the Supreme Court . . . who . . . would protect the rights of political and religious minorities," but who instead "emerged as the paradigm rationalist, the academics' Justice" . . . whose "primary concerns were with regularity, neutrality, and judicial humility"); Walton Hamilton, Book Review, 56 YALE L.J. 1458, 1460 (1947) ("Mr. Justice Frankfurter has no feel for the dominant issues; he operates best when weaving crochet patches of legalism on the fingers of the case. . . [I]t is a calamity that his skills happen to be petty skills."). See generally LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY 399-406, 466-68, 487-89 (1984) (discussing how Frankfurter's philosophy of judicial restraint brought criticism and division from liberals and some colleagues on the Court); JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 16-18 (1989) (discussing Frankfurter's stance of judicial restraint and how, among both the liberals and conservatives who heralded his appointment to the Court, the conservatives were most satisfied over the long term).

¹⁶ Rodell, *supra* note 8, at 1017; see also Fred Rodell, Book Review, 41 COLUM. L. REV. 766, 769 (1941) (reviewing BERYL H. LEVY, OUR CONSTITUTION: TOOL OR TESTAMENT? (1941)) (describing Frankfurter as "a spry and cocksure authoritarian[]—that even the most elegant of language can not quite conceal").

H.N. Hirsch is a close second to Rodell in unsparing Frankfurter criticism. The "central hypothesis" of his book on Frankfurter was "that Frankfurter can only be understood politically if we understand him psychologically, and that we can understand him psychologically as representing a textbook case of a neurotic personality." HIRSCH, *supra* note 6, at 5. According to Judge Posner, the Hirsch biography is of the "controversial genre" of "psychobiography" and has "not been well received." POSNER, *supra* note 3, at 5 n.10.

Actually, Frankfurter had tried his own hand in a comparable manner on the subjects of Chief Justices Marshall, Taney and Waite. He did so with the "utmost wariness" with "[i]ts chief impulse . . . the hope of stimulating confirmation or contradiction, and especially that pertinacious inquiry into the cultural and psychological roots of legal doctrine on which very little spadework has yet been undertaken." FRANKFURTER, *supra* note 6, at 8.

If indeed Frankfurter did exhibit serious limitations as a jurist—a concession of major dimension—the question of the origin of such limitations is still to be answered. What was his sense of what he, as judge, should be about? Was the problem one of execution of his ideals? Is it the even more fundamental problem of inadequate aspirations—that Frankfurter failed to even properly conceive what he should be about? Putting aside concessions to Frankfurter's critics, it may be that he had a perfectly fit and articulated sense of aspirations for judging. It may be that his life as jurist was comfortably consistent with these aspirations.¹⁷ If so, a picture of a very different jurist will come into focus—one dramatically unlike that painted by Professor Rodell.

I. SOURCES OF FRANKFURTER'S ICONOGRAPHY

Some of the answers lie in the judicial record Frankfurter created in over twenty years on the Court.¹⁸ Another particularly illuminating and interesting source is his writings on specific judges he especially admired.¹⁹

¹⁷ See, e.g., Mark DeW. Howe, *Felix Frankfurter*, 78 HARV. L. REV. 1526, 1526 (1965) (developing the "tentative hypothesis" that Frankfurter's insistence upon judicial restraint was "accentuated by his consciousness of his own fervor and zest").

¹⁸ Justice Frankfurter joined the Court on January 30, 1939, and retired on August 28, 1962, for health reasons. Black, *supra* note 8, at 1521.

¹⁹ Frankfurter's activities in this respect were not limited to extolling the virtues of judges and occasionally exposing their shortcomings. He wrote in similar vein and for similar purpose of other persons, from poets to professors, and presidents to philosophers. Numerous examples of both are reprinted in the following works.

His writings of this sort were first published in *FELIX FRANKFURTER, LAW AND POLITICS* (Archibald MacLeish & E.F. Prichard, Jr. eds., 1939) and covered the period from 1913 to 1939. The continuation sequel was *FELIX FRANKFURTER, OF LAW AND MEN* (Philip Elman ed., 1956), and covered the period from 1939, the year that Frankfurter joined the Supreme Court, to 1956, the year of the book's publication. The work's origin lay in a suggestion that his many memorials be collected and published, and grew to include his papers and addresses while on the Court "beyond those elicited on melancholy occasions." *Id.* at viii. A final entry was *FELIX FRANKFURTER, OF LAW AND LIFE AND OTHER THINGS THAT MATTER* (Philip B. Kurland ed., 1965) [hereinafter *FRANKFURTER, OF LAW AND LIFE*], which includes papers and addresses from the years 1956 to 1963.

A fourth work of similar sort is *FELIX FRANKFURTER ON THE SUPREME COURT: EXTRAJUDICIAL ESSAYS ON THE COURT AND THE CONSTITUTION* (Philip B. Kurland ed., 1970) [hereinafter *EXTRAJUDICIAL ESSAYS*]. Many of the pieces included in the preceding three works are also presented in *EXTRAJUDICIAL ESSAYS*.

These were the product of numerous occasions and circumstances: they are found in testimonials upon retirement,²⁰ upon death,²¹ upon

²⁰ Felix Frankfurter, *Calvert Magruder*, 72 HARV. L. REV. 1201, 1201 (1959) [hereinafter *Magruder*, HARV. L. REV.]; Felix Frankfurter, *Calvert Magruder*, HARV. L. SCH. Y.B. (1959) [hereinafter *Magruder*, HARV. L. SCH. Y.B.], reprinted in FRANKFURTER, OF LAW AND LIFE, *supra* note 19, at 136; Felix Frankfurter, Remarks of Justice Frankfurter at Broadcast (NBC) in Honor of the Termination of the Service of Charles Evans Hughes as Chief Justice of the United States (June 30, 1941), in Frankfurter Papers, U.S. Library of Congress, Container 201, Reel 126, at 101 [hereinafter Remarks of Justice Frankfurter].

²¹ Felix Frankfurter, Letter to Chief Judge Simon E. Sobeloff, Court of Appeals for the Fourth Circuit (Dec. 5, 1962), in In Memoriam: Honorable Armistead M. Dobbie, 311 F.2d 5, 12-13 (Jan. 18, 1963); Felix Frankfurter, Letter to Chief Justice Robert B. Williamson, Supreme Court of Maine (Aug. 22, 1962), in In Memoriam: Honorable Edward F. Merrill, Late Chief Justice of the Supreme Judicial Court, 158 Me. 513, 534 (Sept. 4, 1962); Felix Frankfurter, *Foreword*, 55 COLUM. L. REV. 435 (1955) [hereinafter Frankfurter, *Foreword*, COLUM. L. REV.]; Felix Frankfurter, *Jerome N. Frank*, 24 U. CHI. L. REV. 625 (1957) [hereinafter Frankfurter, *Jerome N. Frank*]; Felix Frankfurter, *Learned Hand*, 75 HARV. L. REV. 1, 3 (1961) [hereinafter Frankfurter, *Learned Hand*, HARV. L. REV.]; Felix Frankfurter, *Mr. Justice Brandeis*, 55 HARV. L. REV. 181, 181 (1941) [hereinafter Frankfurter, *Mr. Justice Brandeis*] (issue dedicated "to the memory of Mr. Justice Brandeis"); Felix Frankfurter, *Mr. Justice Cardozo*, 24 A.B.A. J. 638, 638 (1938) [hereinafter Frankfurter, *Mr. Justice Cardozo*]; Felix Frankfurter, *Mr. Justice Cardozo and Public Law*, 39 COLUM. L. REV. 88, 88 (1939), 52 HARV. L. REV. 440, 440 (1939), 48 YALE L.J. 458, 458 (1939) [hereinafter Frankfurter, *Cardozo and Public Law*]; Felix Frankfurter, *Mr. Justice Holmes*, 48 HARV. L. REV. 1279 (1935) [hereinafter Frankfurter, *Mr. Justice Holmes*]; Felix Frankfurter, *Mr. Justice Jackson*, 68 HARV. L. REV. 937 (1955) [hereinafter Frankfurter, *Mr. Justice Jackson*]; Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 312 (1955) [hereinafter Frankfurter, *Mr. Justice Roberts*]; Felix Frankfurter, "The Administrative Side" of Chief Justice Hughes, 63 HARV. L. REV. 1 (1949) [hereinafter Frankfurter, *Chief Justice Hughes*]; Frankfurter, *Mirror of Justices*, *supra* note 1, at 781, reprinted in 44 A.B.A. J. 723 (1958) (the first Owen J. Roberts Memorial Lecture at the University of Pennsylvania Law School, March 20, 1957); Felix Frankfurter, *Harlan Fiske Stone*, in Y.B. OF THE AM. PHIL. SOC'Y 334, 335 (1946) [hereinafter Frankfurter, *Harlan Fiske Stone*]; Felix Frankfurter, *Dedication to the Memory of Learned Hand*, HARV. L. SCH. Y.B. (1962) [hereinafter Frankfurter, *Learned Hand*, HARV. L. SCH. Y.B.], reprinted in FRANKFURTER, OF LAW AND LIFE, *supra* note 19, at 224; Felix Frankfurter, *For the 1949 Harvard Law School Yearbook Dedicated to Charles Evans Hughes, 1862-1948*, in Frankfurter Papers, U.S. Library of Congress, Container 198, Reel 125, at 385 [hereinafter Frankfurter, *1949 Harvard Law School Yearbook*] (type-written manuscript); Felix Frankfurter, Tribute at the Funeral of Louis D. Brandeis, Oct. 7, 1941, 87 CONG. REC. A4762 (daily ed. Oct. 21, 1941) [hereinafter Frankfurter, Tribute to Louis D. Brandeis] (extension of remarks of Rep. Thomas H. Eliot); see also Felix Frankfurter, *Nathan Benjamin Cardozo, 1870-1938*, 11 DICT. AM. BIO. 93 (Supp. 2 1958) [hereinafter Frankfurter, *Nathan Benjamin Cardozo*], reprinted in EXTRAJUDICIAL ESSAYS, *supra* note 19, at 525; Felix Frankfurter, *Oliver Wendell Holmes, 1841-1935*, 11 DICT. AM. BIO. 416 (Supp. 1 1944) [hereinafter Frankfurter, *Oliver*

other important events in the lives of judges,²² and upon various other circumstances.²³ They appear in a variety of settings—traditional books

Wendell Holmes], reprinted in FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 1, 21 (2d ed. 1961) [hereinafter FRANKFURTER, HOLMES AND THE SUPREME COURT].

²² Felix Frankfurter, Remarks at Proceedings of a Special Session of the United States Court of Appeals for the Second Circuit to Commemorate Fifty Years of Federal Judicial Service By The Honorable Learned Hand, 264 F.2d 20, 21-22 (April 10, 1959) [hereinafter Frankfurter, Fifty Years of Service]; Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217 (1955) [hereinafter Frankfurter, *John Marshall*] (opening address at September, 1955, Harvard Law School conference commemorating the two-hundredth anniversary of Marshall's birth), reprinted in JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL 135 (Philip B. Kurland ed., 1967) [hereinafter THAYER, HOLMES, AND FRANKFURTER]; Felix Frankfurter, *Judge Henry W. Edgerton*, 43 CORNELL L.Q. 161 (1957) [hereinafter Frankfurter, *Judge Henry W. Edgerton*] (in honor of Edgerton's twentieth anniversary on the bench); Felix Frankfurter, *Judge Learned Hand*, 60 HARV. L. REV. 325 (1947) [hereinafter Frankfurter, *Judge Learned Hand*] (in honor of Hand's seventy-fifth birthday); Felix Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33 (1931) [hereinafter Frankfurter, *Brandeis and the Constitution*] (in honor of Brandeis' seventy-fifth birthday), reprinted in MR. JUSTICE BRANDEIS 49 (Felix Frankfurter ed., 1932) [hereinafter MR. JUSTICE BRANDEIS]; Felix Frankfurter, *The Early Writings of O. W. Holmes, Jr.*, 44 HARV. L. REV. 717 (1931) [hereinafter Frankfurter, *Early Writings of Holmes*] (in honor of Holmes' ninetieth birthday); Felix Frankfurter, *October Days*, TODAY, March 9, 1935 [hereinafter Frankfurter, *October Days*] (article commemorating Holmes' ninety-fourth birthday), in Frankfurter Papers, U.S. Library of Congress, Containers 196-97, Reel 124, at 227-28; Felix Frankfurter, *The Moral Grandeur of Mr. Justice Brandeis*, N.Y. TIMES, Nov. 11, 1956 [hereinafter Frankfurter, *The Moral Grandeur of Brandeis*], reprinted in FRANKFURTER, OF LAW AND LIFE, *supra* note 19, at 54-55 (commemorating the one-hundredth anniversary of Brandeis' birth).

²³ FRANKFURTER, HOLMES AND THE SUPREME COURT, *supra* note 21, at 39 (Harvard lectures on Holmes delivered in April of 1938); Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883 (1953) [hereinafter Frankfurter, *Chief Justices I Have Known*] (informal talk at the University of Virginia Law School); Felix Frankfurter, *Foreword*, 3 AM. J. COMP. L. 1 (1954) [hereinafter Frankfurter, *Foreword*, AM. J. COMP. L.] (foreword to publication of a rediscovered piece about American law that Story had written for Continental lawyers and scholars); Felix Frankfurter, *Justice Holmes Defines the Constitution*, ATLANTIC MONTHLY (Oct. 1938) [hereinafter Frankfurter, *Holmes Defines Constitution*], reprinted in EXTRAJUDICIAL ESSAYS, *supra* note 19, at 377-78; Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 530-35 (1947) [hereinafter Frankfurter, *Some Reflections*], reprinted from 2 Record of the Ass'n of the B. of the City of N.Y. 213 (1947) (Sixth Annual Benjamin N. Cardozo Lecture delivered March 18, 1947); Felix Frankfurter, *Benjamin N. Cardozo*, COLLIER'S ENCYCLOPEDIA 418 (1962) [hereinafter Frankfurter, *Benjamin N. Cardozo*], reprinted in FRANKFURTER, OF LAW AND LIFE, *supra* note 19, at 185; Felix Frankfurter, Speech to Brandeis Lawyers Society, Philadelphia (April 17, 1951), in Frankfurter Papers, U.S. Library of Congress, Container 198, Reel 125, at 47 [hereinafter Frankfurter, Speech to

and law review articles, letters to editors, proceedings of courts, biographical dictionary entries, unsigned magazine editorials, bar association presentations, academic lectures, and even law school yearbooks.²⁴ These sources reveal Frankfurter's highest aspirations for judging,²⁵ although a few provide the sharp contrast of what he thinks a judge should not do and be.²⁶ The latter also offer some counterweight to the concern that Frankfurter's high praise was more a product of his celebrated capacity for flattery and the cultivation of friends²⁷ and less

Brandeis Lawyers]; Felix Frankfurter, *The Impact of Charles Evans Hughes*, N.Y. TIMES, Nov. 18, 1951 [hereinafter Frankfurter, *Charles Evans Hughes*], reprinted in EXTRAJUDICIAL ESSAYS, *supra* note 19, at 465; Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, 25 THE [N.Y.] CITY COLLEGE ALUMNUS—BENCH AND BAR NUMBER (Feb. 1929), in Frankfurter Papers, U.S. Library of Congress, Container 196-97, Reel 124, at 26.

Some are essentially traditional academic writings not triggered by any particular circumstance. FRANKFURTER, HOLMES AND THE SUPREME COURT, *supra* note 21; FRANKFURTER, *supra* note 6; Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, 41 HARV. L. REV. 121 (1927) [hereinafter Frankfurter, *Mr. Justice Holmes and the Constitution*, HARV. L. REV.]; Felix Frankfurter, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions*, 36 HARV. L. REV. 909 (1923) [hereinafter Frankfurter, *Twenty Years*]; Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683 (1916) [hereinafter Frankfurter, *Constitutional Opinions*]; Felix Frankfurter, Book Review, 16 VA. L. REV. 743, 743 (1930) [hereinafter Frankfurter, Book Review, VA. L. REV.] (reviewing THE DISSENTING OPINIONS OF MR. JUSTICE HOLMES (Alfred Lief ed., 1929)); Felix Frankfurter, Book Review, 77 U. PA. L. REV. 436, 436 (1929) [hereinafter Frankfurter, Book Review, U. PA. L. REV.] (reviewing BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE (1928)).

²⁴ See sources cited *supra* notes 19-23.

²⁵ See Professor Paul Freund's "perceptive remark, 'It is frequently true of memorial addresses that they provide a truer insight into the mind of the speaker than into the mind of the deceased' . . ." Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in FELIX FRANKFURTER THE JUDGE 30, 31 (Wallace Mendelson ed., 1964) (quoting Paul Freund, *Competing Freedoms in American Constitutional Law* 26 (U. of Chi. Conference on Freedom and the Law 1953)).

Similarly, in 1964 when the new Chief Justice of the Wisconsin Supreme Court wrote of his selections to "an all-time, all-star United States Supreme Court," the editors of the *Wisconsin Law Review* observed that "in so doing, [he] provides us with a valuable insight into what a Justice perceives as the characteristics of judicial greatness." Currie, *supra* note 1, at 3.

²⁶ See *infra* notes 142-66 and accompanying text (discussing Frankfurter's views on the travails and machinations of Judges Staley and Manton).

²⁷ HIRSCH, *supra* note 6, at 42-45 (discussing his persistent flattery of his principal mentors—Stimson, Holmes and Brandeis); David W. Levy & Bruce A. Murphy, *Preserving the Progressive Spirit in a Conservative Time: The Joint Reform Efforts of Justice Brandeis and Professor Frankfurter, 1916-1933*, 78 MICH. L. REV. 1252, 1258 (1980); see Urofsky, *supra* note 10, at 182 (suggesting that rather than being an inveterate

a function of true virtue. From both types of sources emerges Justice Frankfurter's iconography of judging.²⁸

None of this, or that which follows, should be taken as indication that Frankfurter placed any judge above all others. In his mind there were grand and impersonal forces of greater import in shaping the law and, for that matter, persons more influential than the most revered judges.

Events, not men, have been the most powerful molders of Anglo-American law. To the extent that men have molded events, the great propulsions to legal development have come not from lawyers but from those outside the law who have changed the face of society, of which law is largely the mirror. . . . Edison and Ford have loosed forces more transforming to the law than did David Dudley Field and Mr. Justice Holmes.²⁹

Frankfurter's icons are best measured in this partial light. At the same time, Frankfurter did not relegate the judge to the status of meaningless and mindless functionary: "One need not subscribe to the hero theory of history to recognize that great men make a difference, even in law."³⁰

or consistent flatterer, "[Frankfurter] would flatter them so long as they agreed with him").

²⁸ The present undertaking requires perspective and diminished expectations at the outset. A clear and consistent picture of what Frankfurter perceived as great judging may be too much to expect. As Frankfurter himself noted in speaking of that which is to be sought in a Justice of the Supreme Court, "Greatness in the law is not a standardized quality, nor are the elements that combine to attain it." Frankfurter, *Mirror of Justices*, *supra* note 1, at 784, reprinted in 44 A.B.A. J. 723, 724 (1958). Similarly, this Article is no substitute for thorough and searching judicial biography and only a facet of what a work of that nature would contain. Frankfurter, for one, also noted the special "difficulties that confront biographers of those who are thinkers rather than doers," which he thought compounded when the thinker happened to be a judge. Charles Fairman, *The Writing of Judicial Biography—A Symposium*, 24 IND. L.J. 363, 367-68 (1949) (reprinting Frankfurter's letter of December 27, 1948, in greeting to the symposium).

Furthermore, this study determines and assesses Frankfurter's sense of great judging through only a limited prism, excluding whatever his judicial record might reveal. In this aspect, however, the evidence examined may actually be the better evidence for the purpose. Frankfurter himself might have agreed. As one Frankfurter commentator has noted, "The most revealing insights regarding judges and judicial behavior come not from the published opinions but from a study of what Frankfurter once termed the individual judge's idealized political picture of the social order." SILVERSTEIN, *supra* note 5, at 15. The icons examined in the present study tend to be just that—"idealized picture[s]."

²⁹ Felix Frankfurter, *Foreword*, 47 YALE L.J. 515, 515 (1938).

³⁰ FRANKFURTER, *supra* note 6, at 4; see Frankfurter, *Holmes Defines Constitution*,

What he asked, however, was that the judge's importance, influence, indeed greatness, be determined in context and perspective.³¹

Importantly, Justice Frankfurter's icons are the product of a context and perspective of values and value judgments. Even if a judge's opinions do not make "delectable reading," and even if they lack the grand sweep of "largeness of utterance," in Frankfurter's eyes a judge might nevertheless be deemed great. He considered Chief Justice Morrison R. Waite of the United States Supreme Court a judge deserving of high praise. Notwithstanding Waite's perceived shortcomings, for Frankfurter the Chief Justice met "one of the greatest duties of a judge, the duty not to enlarge his authority,"³² and satisfied the "professed role" of judicial self-restraint.³³

Frankfurter believed that notoriety and influence alone would not be sufficient to constitute greatness in a judge, notwithstanding the story told by Judge Jerome N. Frank of a dispute he had with Frankfurter as to what it takes to be a "great" judge. The focus of their debate was the seventeenth century English jurist, Edward Coke, whose record includes his celebrated confrontation in defense of the common law with the absolutist monarch, King James I. Frank found little good in Chief Justice Coke and believed he "had retarded English and American legal development for centuries."³⁴ Frank reported that Frankfurter disagreed and had argued that "the duration of [Coke's] influence, no matter whether good or bad, made him a great judge."³⁵ This seems little more than a point of debate in the setting of friendly argument. As will be apparent, Frankfurter's icons reveal a very different and higher approach to determining greatness among judges. Celebrity is insufficient.

supra note 23, at 377-78 ("[I]n law also, men make a difference.").

³¹ Any hesitancy that Frankfurter had in identifying greatness in a judge was compounded when he attempted to identify its sources. For example, Frankfurter rejected the idea that one could predict greatness in a judicial appointee on the basis of prior judicial experience because "it would demand complete indifference to the elusive and intractable factors in tracking down causes." Frankfurter, *Mirror of Justices*, *supra* note 1, at 784, *reprinted in* 44 A.B.A. J. 723, 724 (1958).

When Frankfurter wrote of Brandeis' greatness, he gave an indication of his own standards. Greatness in a judge would entail "a place in the national consciousness or . . . an impress on the jurisprudence of the country or merely extend[ing] on the court the contribution to social thought and action . . . made before" taking the bench. Brandeis, he believed, met all three standards. Frankfurter, *The Moral Grandeur of Brandeis*, *supra* note 22, *reprinted in* FRANKFURTER, *OF LAW AND LIFE*, *supra* note 19, at 54-55.

³² FRANKFURTER, *supra* note 6, at 80.

³³ *Id.* at 81.

³⁴ Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 666 (1957).

³⁵ *Id.*

II. JUDGES OF DISTINCTION

Highest on Frankfurter's list of judges of distinction were three Justices of the United States Supreme Court who are likely candidates for any such list—Justices Holmes, Brandeis and Cardozo.³⁶ When Frankfurter wished to explore the judge's task in the enterprise of statutory construction, he turned to them: "When one wants to understand or at least get the feeling of great painting, one does not go to books on the art of painting. One goes to the great masters. And so I have gone to great masters to get a sense of their practise of the art of interpretation."³⁷

Chief Justice John Marshall's absence from this list is without special significance. Frankfurter's list was prepared with an eye to the judicial task of statutory construction. He saw even Holmes as active in only the early days of the age of American statutes. Marshall came long before its dawn.³⁸ But when Frankfurter turned his attention to Marshall on his own terms and times, Frankfurter was at least equally lavish in his praise of Marshall as jurist. Actually, he took his cues from Holmes and, in an oblique way, Cardozo. In the opening address to a conference at Harvard Law School in September of 1955, in commemoration of Marshall's birth, Frankfurter said:

Two hundred years ago a great man was born who indisputably is the "one alone" to be chosen "if American law were to be represented by a single figure." John Marshall was the chief architect "of a new body of jurisprudence, by which guiding principles are raised above the reach of statute and State, and judges are entrusted with a solemn and hitherto unheard-of authority and duty." (Holmes, COLLECTED LEGAL PAPERS 270 (1920).) Such is the verdict of one whom so qualified a critic as Mr. Justice Cardozo deemed probably the greatest intellect in the history of the English-speaking judiciary.³⁹

³⁶ See *supra* note 1 for Frankfurter's longer list of sixteen Supreme Court Justices drawn from the first seventy-five to serve on the Court.

Story was high on Frankfurter's personal list. In a foreword to publication of a rediscovered piece about American law that Story had written for Continental lawyers and scholars, Frankfurter wrote: "On the roll of truly great American judges, Story indubitably has a conspicuous place." Frankfurter, *Foreword*, AM. J. COMP. L., *supra* note 23, at 1.

³⁷ Frankfurter, *Some Reflections*, *supra* note 23, at 530.

³⁸ *Id.*

³⁹ Frankfurter, *John Marshall*, *supra* note 22, at 217, *reprinted in* THAYER, HOLMES, AND FRANKFURTER, *supra* note 22, at 135.

According to Frankfurter, Marshall held a special place as one of "the main builders of our nation . . . [and also held the exclusive and] decisive claim to . . . [the] distinction as a great statesman . . . as a judge."⁴⁰ Yet Frankfurter cautioned against giving any judge, including Marshall, "mythical treatment" and "godlike qualities."⁴¹ For Frankfurter, viewing Marshall as other than an originator of "transforming thought" was both appropriate and adequate because such "implies too great a break with the past, implies too much discontinuity, to be imposed upon society by one who is entrusted with enforcing its law."⁴² And for those who would explain Marshall's greatness by noting the excellence of the lawyers who appeared before him, Frankfurter observed that "[n]ot the least distinction of a great judge is his capacity to assimilate, to modify, or to reject the discursive and inevitably partisan argument of even the most persuasive counsel and to transform their raw material into a judicial judgment."⁴³

An even more important caution concerns Frankfurter's sense of Marshall on what, as will be seen,⁴⁴ was critical to Frankfurter in measuring the greatness of a judge—the judge's stance on the issue of judicial restraint. Although he believed that "[t]he classic formulation of the judicial duty of respect for the legislative judgment [was] Marshall's,"⁴⁵ he also thought that with Marshall "the formula often lost its meaning in application."⁴⁶ Thus, Marshall may in fact have held a "special place" in Frankfurter's mind, although shaded by Frankfurter's disappointment that Marshall did not always carry his stated principles into practice. Frankfurter would expect a truly great judge to do so.

When Frankfurter spoke of Justice Holmes, he did so in superlatives. He saw Holmes as "the most learned and most philosophic-minded of judges."⁴⁷ When considering greatness in the Court's Chief Justices, Frankfurter referred to Holmes, who never was Chief Justice, as "that greatest mentality of all, that greatest intellect, in my judgment, who ever sat on the Court."⁴⁸ Upon

⁴⁰ Frankfurter, *John Marshall*, *supra* note 22, at 217-18. The "special place" may indeed have been special to Marshall and his times.

⁴¹ *Id.* at 219.

⁴² *Id.* at 220.

⁴³ *Id.*; see also FRANKFURTER, *supra* note 6, at 42-43.

⁴⁴ See *infra* notes 167-79 and accompanying text.

⁴⁵ FRANKFURTER, *supra* note 6, at 82.

⁴⁶ *Id.* When Frankfurter contrasted Marshall and Chief Justice Waite on this point, it was clear that Waite fared better and, for that reason, was the greater of the two in Frankfurter's mind. *Id.* at 80-82.

⁴⁷ Frankfurter, *Benjamin N. Cardozo*, *supra* note 23, at 418, *reprinted in* FRANKFURTER, OF LAW AND LIFE, *supra* note 19, at 185, 187.

⁴⁸ Frankfurter, *Chief Justices I Have Known*, *supra* note 23, at 901. Frankfurter was,

Holmes' death in 1935, Frankfurter wrote in the *Harvard Law Review*: "Nor can there be more doubt about his place in the calendar of judges. . . . [F]or the Supreme Bench he is Marshall's closest compeer, however unlike their endowment and services."⁴⁹ In his entry on Holmes in 1944 in the *Dictionary of American Biography* Frankfurter wrote: "Probably no man who ever sat on the court was by temperament and discipline freer from emotional commitments compelling him to translate his own economic or social views into constitutional commands."⁵⁰

Frankfurter's celebration of Holmes was lifelong. His principal objects of attention were Holmes and the Constitution,⁵¹ for he believed that "the enduring contribution of . . . Holmes to American history is his constitutional philosophy."⁵² Frankfurter's article on Holmes' early writing in a 1931 issue of the *Harvard Law Review* in honor of Holmes' ninetieth birthday⁵³ encapsulates Frankfurter's sense of the greatness of Holmes. This sense runs throughout his "Holmes' commentary" over the years. For Frankfurter, the wellspring of Holmes lay "in the deep impulses of his own nature. He was born invincibly to ask the meaning of things and to cut beneath the skin of formulas, however, respectable."⁵⁴ From this followed Holmes' greatness.

Since his mind is scrupulously sceptical, he has escaped sterile dogma and romantic impressionism. Only the methods of reason, unsubordinated by ephemeral episodes, can unite coherence with vitality. To this life of reason he has passionately adhered in responding

of course, not alone in that respect. See, e.g., Frankfurter, *October Days*, *supra* note 22 (article commemorating Holmes' ninety-fourth birthday), in *Frankfurter Papers*, U.S. Library of Congress, Containers 196-97, Reel 124, at 227-28 ("[I]n the judgment of . . . Cardozo . . . Holmes is probably the greatest name in the history of Anglo-American law.").

⁴⁹ Frankfurter, *Mr. Justice Holmes*, *supra* note 21, at 1279.

⁵⁰ Frankfurter, *Oliver Wendell Holmes*, *supra* note 21, at 21, reprinted in FRANKFURTER, *HOLMES AND THE SUPREME COURT*, *supra* note 21, at 21; see Frankfurter, *Speech to Brandeis Lawyers*, *supra* note 23, at 53 ("[He] represents the judicial function at its highest, because, so far as I am concerned, Holmes, more uncompromisingly than any other Judge, never allowed his personal preferences to enter his decisions.").

⁵¹ See Frankfurter, *Mr. Justice Holmes and the Constitution*, *HARV. L. REV.*, *supra* note 23, at 121; Frankfurter, *Twenty Years*, *supra* note 23; Frankfurter, *Constitutional Opinions*, *supra* note 23; Frankfurter, *Holmes Defines Constitution*, *supra* note 23, reprinted in *EXTRAJUDICIAL ESSAYS*, *supra* note 19, at 377; Frankfurter, *Mr. Justice Holmes and the Constitution*, *supra* note 23.

⁵² FRANKFURTER, *HOLMES AND THE SUPREME COURT*, *supra* note 21, at 58.

⁵³ Frankfurter, *Early Writings of Holmes*, *supra* note 22, at 717.

⁵⁴ *Id.* at 721.

to the most exacting of demand that is made upon judges—to compose clashing interests of an empire by appeal to law. The philosopher's stone which Mr. Justice Holmes has constantly employed for arbitrament is the conviction that our constitutional system rests upon tolerance and that its greatest enemy is the Absolute.⁵⁵

It was this philosophy, in judicial action, that cemented Holmes' position in Frankfurter's eyes.

But his skepticism and even hostility, as a matter of private judgment, toward legislation which he was ready to sustain as a judge only serve to add cubits to his judicial stature. For he thereby transcended personal predilections and private notions of social policy, and became truly the impersonal voice of the Constitution.⁵⁶

The result perceived by Frankfurter was a detached, disinterested, and unbiased decision maker, one not inclined to substitute personal judgment for that of others such as the legislature, and constantly—sometimes painfully—aware of the absence of simple and absolute answers. For these qualities, Holmes became Frankfurter's archetype for judicial greatness.

There was an especially personal backdrop to Frankfurter's view that Justice Louis D. Brandeis was also a great judge. For years, Brandeis

⁵⁵ Frankfurter, *Early Writings of Holmes*, *supra* note 22, at 723-24. This is one of many examples of Frankfurter's pragmatic inclination to "recycle" his words and ideas: "Just because his mind is scrupulously skeptical has he been able to escape sterile dogma and individualistic anarchy." Frankfurter, Book Review, VA. L. REV., *supra* note 23, at 743.

Holmes' was not the method of detached reason. Frankfurter wrote: And Holmes' whole juristic philosophy precluded an attitude of intellectual isolation for law. Since the essential task of law is "weighing considerations of social advantage," law as a preoccupation of scientific study is merely a part of the whole domain of humanistic learning. "If your subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life." Thus spoke Holmes nearly fifty years ago. And the extent to which this wisdom is reflected in the volumes of the United States Reports gives the measure of the differences between Mr. Justice Holmes and some of his colleagues.

Felix Frankfurter, Book Review, 43 HARV. L. REV. 1168, 1169 (1930) (review of THE ENCYCLOPAEDIA OF THE SOCIAL SCIENCES (Edwin R.A. Seligman ed., 1930)) (footnotes omitted). Thus, for example, Frankfurter found in Holmes "the wholesome truth that the final rendering of the meaning of a statute is an act of judgment." Frankfurter, *Some Reflections*, *supra* note 23, at 531.

⁵⁶ Frankfurter, *Holmes Defines Constitution*, *supra* note 23, reprinted in EXTRAJUDICIAL ESSAYS, *supra* note 19, at 377, 400.

provided financial backing to then Professor Frankfurter to allow him to meet expenses without succumbing to the necessity of consulting for the private bar. This financial assistance afforded Frankfurter the opportunity to advance projects such as his law school case books.⁵⁷ Notwithstanding this, Frankfurter did not withhold his personal judgment on Brandeis' greatness. As will be seen, Frankfurter customarily insisted on disinterestedness in a judge,⁵⁸ but he apparently imposed no corresponding test of disqualifying bias to keep him from judging his mentor, friend, and colleague.⁵⁹ Thus, in 1941, when Frankfurter spoke at Brandeis' funeral, he was unstinting in his praise of "the great man" whose "pursuit of reason and . . . love of beauty were Hellenic."⁶⁰ Frankfurter continued in a similar vein later that year when he wrote in an issue of the *Harvard Law Review* dedicated "to the memory of Mr. Justice Brandeis,"⁶¹ and fifteen years later, on the one hundredth anniversary of Brandeis' birth, when he wrote in the *New York Times Magazine*.⁶²

Much of these writings echoed Frankfurter's views of Brandeis offered as part of a 1931 issue of the *Harvard Law Review* in celebration of Brandeis' seventy-fifth birthday.⁶³ The greatness Frankfurter found in Justice Brandeis was not unlike that he found in Holmes. Brandeis, too, exhibited "an instinct for the concrete and . . . distrust of generalities."⁶⁴

⁵⁷ NELSON L. DAWSON, LOUIS D. BRANDEIS, FELIX FRANKFURTER AND THE NEW DEAL 4-5 (1980); see "HALF BROTHER, HALF SON": THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER (Melvin I. Urofsky & David W. Levy eds., 1991) 454 (Letter No. 453 dated Feb. 14, 1931) ("I am glad of the progress on Fed. Jur. and Adm. Law case books, and am asking Miss Malloch to deposit \$500 to your special account to see you through as suggested.").

⁵⁸ "If there is one word that Justice Frankfurter uses more than any other, even than 'self-restraint,' it is 'disinterestedness.'" HELEN SHIRLEY THOMAS, FELIX FRANKFURTER—SCHOLAR ON THE BENCH 348 (1969).

⁵⁹ See generally DAWSON, *supra* note 57 (discussing the close, personal, and professional relationship between Brandeis and Frankfurter and their joint impact upon the New Deal).

⁶⁰ Frankfurter, Tribute to Louis D. Brandeis, *supra* note 21, at A4762 (extension of remarks of Rep. Thomas H. Eliot).

⁶¹ Frankfurter, *Mr. Justice Brandeis*, *supra* note 21, at 181.

⁶² Frankfurter, *The Moral Grandeur of Brandeis*, *supra* note 22, reprinted in FRANKFURTER, OF LAW AND LIFE, *supra* note 19, at 54.

⁶³ Frankfurter, *Brandeis and the Constitution*, *supra* note 22, at 33 (in honor of Brandeis' seventy-fifth birthday), reprinted in FRANKFURTER, MR. JUSTICE BRANDEIS, *supra* note 22, at 49.

⁶⁴ Frankfurter, *Brandeis and the Constitution*, *supra* note 22, at 58, reprinted in FRANKFURTER, MR. JUSTICE BRANDEIS, *supra* note 22, at 75.

Frankfurter saw him as “one who had given . . . striking proof of not being partial to current dogmas.”⁶⁵ As with Holmes, Frankfurter believed this to be a consequence of Brandeis’ essential skepticism: “Mr. Justice Brandeis was captive to no dogma. Final truth was the unattainable bottom of an unfathomable well.”⁶⁶ “He regarded generalities as traps for error, and rhetoric as the enemy of wisdom. Problems that seemed simple to more shallow minds almost oppressed him with their complexity.”⁶⁷ These insights were tempered in Brandeis’ own humility, which Frankfurter thought came from his sense of “the limited range of foresight.”⁶⁸ Ultimately, Brandeis arrived at a philosophy of judicial restraint—an awareness that “the duty to abstain from adjudicating . . . may arise from the restricted nature of the judicial process”⁶⁹ and an understanding that “[t]o forgo judgment under such circumstances is not an abdication of judicial power, but recognition of rational limits to its competence.”⁷⁰ This mirrors much of what Frankfurter saw in Holmes. Naturally, one who had the capacity for such restraint was also capable of the disinterest that permitted the separation of personal inclination and bias from legal judgment.⁷¹ The judgment of greatness stood.

There were also special qualities in the relationship between Felix Frankfurter and Benjamin N. Cardozo. Frankfurter had been married by Cardozo while the latter was a judge on the New York Court of Appeals, and in 1939 Frankfurter took Cardozo’s place on the United States Supreme Court.⁷² In Frankfurter’s view, Cardozo was “one of the great

⁶⁵ Frankfurter, *The Moral Grandeur of Brandeis*, *supra* note 22, reprinted in FRANKFURTER, OF LAW AND LIFE, *supra* note 19, at 54, 56.

⁶⁶ *Id.* at 60. This confirmed what Frankfurter had predicted when Brandeis was nominated to the Court. *Brandeis*, NEW REPUBLIC (Feb. 5, 1916) (unsigned editorial), reprinted in EXTRAJUDICIAL ESSAYS, *supra* note 19, at 43, 47 (“We may be perfectly certain . . . that Mr. Brandeis is no doctrinaire. He does not allow formulae to do service for facts.”).

⁶⁷ Frankfurter, *Mr. Justice Brandeis*, *supra* note 21, at 182.

⁶⁸ Frankfurter, *Brandeis and the Constitution*, *supra* note 22, at 105 (in honor of Brandeis’ seventy-fifth birthday), reprinted in FRANKFURTER, MR. JUSTICE BRANDEIS, *supra* note 22, at 49.

⁶⁹ Frankfurter, *Brandeis and the Constitution*, *supra* note 22, at 80, reprinted in FRANKFURTER, MR. JUSTICE BRANDEIS, *supra* note 22, at 49, 98.

⁷⁰ *Id.*

⁷¹ *Taft and the Supreme Court*, NEW REPUBLIC, Oct. 27, 1920, Jan. 18, 1922, Jan. 25, 1922 (unsigned editorials), reprinted in EXTRAJUDICIAL ESSAYS, *supra* note 19, at 49, 51 (defense of Brandeis from criticisms of ex-President and then-Yale law professor William Howard Taft).

⁷² LIVA BAKER, FELIX FRANKFURTER 89 (1969).

judges of our time,"⁷³ and as such, "the one man adequate to fill the historic place vacated by Holmes."⁷⁴ Frankfurter considered Cardozo one of the elite among the elite of Supreme Court Justices. He felt Cardozo's "enduring significance" that much more remarkable and even "unique" because Cardozo served on the Court for less than six years.⁷⁵

Frankfurter found special worth in Cardozo on matters of statutory interpretation. He wrote that his "elucidation of how meaning is drawn out of a statute gives proof of the wisdom and balance which, combined with his learning, made him a great judge."⁷⁶ What Frankfurter believed Cardozo exhibited, along with Holmes and Brandeis, was the appreciation that "[a] judge must not rewrite a statute, neither to enlarge it nor to contract it. . . . He must not read in by way of creation."⁷⁷

Frankfurter found similarly sophisticated restraint in Cardozo's approach to adjudication generally and constitutional adjudication in particular. Frankfurter began with the proposition that "the task of constitutional construction is a function not of mechanics but of imponderables [for which t]here is . . . no authorized catalogue . . . ; still less is there an accepted organon for striking the balance among competing and conflicting values."⁷⁸ The best and most imaginative judges were, according to Frankfurter, those who understood this and also knew "that the ultimate determination of values is not within the power of formula or measurement . . . [and thus] explore[d] to the uttermost the rational foundations of what they affirm[ed] and what they reject[ed], in order to avoid confusion between their private universe and the universe."⁷⁹ Frankfurter considered Cardozo a judge of this

⁷³ Felix Frankfurter, *Some Observations on Supreme Court Litigation and Legal Education*, at 5 (Feb. 11, 1953) (manuscript of speech given at the Ernst Freund Lecture at the University of Chicago) [hereinafter Frankfurter, *Litigation and Legal Education*], in Frankfurter Papers, U.S. Library of Congress, Container 199, Reel 125, at 175, 182; see also Frankfurter, *Mr. Justice Cardozo*, *supra* note 21, at 638 ("The verdict of history has already been rendered in counting Cardozo among our great judges, however restricted the list."); Felix Frankfurter, *Nathan Benjamin Cardozo*, *supra* note 21, at 95 (stating that Cardozo was "among our great judges"), reprinted in *EXTRAJUDICIAL ESSAYS*, *supra* note 19, at 525.

⁷⁴ Frankfurter, *Cardozo and Public Law*, *supra* note 21, at 39 COLUM. L. REV. at 88, 52 HARV. L. REV. at 440, 48 YALE L.J. at 458.

⁷⁵ Frankfurter, *Benjamin N. Cardozo*, *supra* note 23, at 418, reprinted in *FRANKFURTER, OF LAW AND LIFE*, *supra* note 19, at 185.

⁷⁶ Frankfurter, *Some Reflections*, *supra* note 23, at 532.

⁷⁷ *Id.* at 533.

⁷⁸ Frankfurter, *Cardozo and Public Law*, *supra* note 21, at 39 COLUM. L. REV. at 89, 52 HARV. L. REV. at 441, 48 YALE L.J. at 459.

⁷⁹ *Id.* at 39 COLUM. L. REV. at 90, 52 HARV. L. REV. at 442, 48 YALE L.J. at 460.

order.⁸⁰ Above all, he also found in Cardozo the keys for translating this philosophy of judging into practice, "the almost automatic exercise of the two most important faculties called for in a Justice—disinterestedness and humility."⁸¹

Judge Learned Hand of the Court of Appeals for the Second Circuit is another whom Frankfurter ranked at the highest level. Notwithstanding the hopes of Holmes and many others,⁸² Hand never became a Justice of the Supreme Court. However, Frankfurter believed that Hand was appropriately a part of "our national tradition" and belonged to the "company" of Holmes and Brandeis.⁸³ In Hand, Frankfurter found the disinterestedness so central to his conception of a great judge, that "rare disinterestedness of mind and purpose, freedom from intellectual and social parochialism."⁸⁴ This frame of mind in a judge was especially important to Frankfurter because judging, "so dependent on the scientific spirit of truth-seeking, without the aids of scientific verification, depends ultimately on those rare men in whom disinterestedness is an intellectual and moral habit, discernment on inadequate data almost a prophetic talent."⁸⁵

Frankfurter was also convinced that "the kind of faculties that are needed for affairs are more likely to be trained in men brought up in the law than in any other calling—the ability to see the many-sidedness of what appear to be simple problems; [and] the ability to give to those problems the points of view of the interests of all relevant factors."⁸⁶ He

⁸⁰ "It is not without significance that the two judges [Holmes and Cardozo] in our day who have given powerful direction to juristic thinking have done so not by heavy treatises on jurisprudence," but through essays. Frankfurter, Book Review, U. PA. L. REV., *supra* note 23, at 436. And Cardozo, as Frankfurter saw him, viewed "the judge not as technician, but as philosopher." *Id.* at 437.

⁸¹ Frankfurter, *Benjamin N. Cardozo*, *supra* note 23, at 418, reprinted in FRANKFURTER, OF LAW AND LIFE, *supra* note 19, at 185, 188.

⁸² Frankfurter, *Learned Hand*, HARV. L. REV., *supra* note 21, at 3. Frankfurter actually believed that Hand had been "lucky" and better served by not being appointed to the Supreme Court. Frankfurter, *Fifty Years of Service*, *supra* note 22, at 21; see also Frankfurter, *Learned Hand*, HARV. L. SCH. Y.B., *supra* note 21, reprinted in FRANKFURTER, OF LAW AND LIFE, *supra* note 19, at 224.

⁸³ Felix Frankfurter, *The Spirit of Liberty*, N.Y. HERALD TRIBUNE, May 18, 1952, at § 6, 1 (reviewing LEARNED HAND, THE SPIRIT OF LIBERTY (Irving Dillard ed., 1953)) [hereinafter Frankfurter, *The Spirit of Liberty*]; see Frankfurter, *Judge Learned Hand*, *supra* note 22, at 325 (recognizing that Cardozo, as well as Holmes and Brandeis, are part of "our national tradition" in which Hand should be included).

⁸⁴ Frankfurter, *The Spirit of Liberty*, *supra* note 83, at § 6, 1.

⁸⁵ *Id.*

⁸⁶ Felix Frankfurter, *The Government Lawyer*, 18 FED. B.J. 24, 25 (1958).

believed that those who could resist "the illusory simplicity with which legal problems are ordinarily stated"⁸⁷ were members of a "select company,"—along the way they would necessarily encounter, recognize, and deal with "the interplay of the subjective element in any judgment[,] . . . the objective criteria by which it professes to be guided, . . . [and] the mode of bringing unconscious influences and inarticulate assumptions to the surface."⁸⁸ Sharing such insights with others was, to Frankfurter, a high calling and honor:

He who persuasively confronts those whose concern is law with the duty of facing such questions, who does not himself flinch from their complexity nor from the necessity of seeking answers though recognizing the elusiveness and impermanence of all answers, joins the company of the relatively few who build their permanent share in the coral-reef of the law.⁸⁹

In Frankfurter's eyes, Learned Hand was of this stature. After Hand's death, Frankfurter wrote of him using the metaphor of the reef:

The individual contribution of judges is absorbed in the anonymity of the coral reef by which the judicial process shapes law. Their name and fame are writ in water. In the course of a century, the acclaim of a bare handful survives their day. Learned Hand now joins this most select company.⁹⁰

Judge Hand warranted such praise because he "liberated bar and bench, perhaps not less pervasively than Holmes and Cardozo, from the bondage of jejune categories and question-begging formulas and thereby enabled them effectively to appreciate that the complexities of life can not be ruled by unreal simplicities of law."⁹¹

Chief Justice Charles Evans Hughes also ranked high on Frankfurter's list of great judges. Frankfurter included him on his list of those Justices

⁸⁷ Felix Frankfurter, *Foreward to A Jurisprudential Symposium in Memory of FELIX S. COHEN*, 9 RUTGERS L. REV. 355, 355 (1954) [hereinafter Frankfurter, *Foreward to A Jurisprudential Symposium*].

⁸⁸ *Id.*; see Frankfurter, *Judge Learned Hand*, *supra* note 22, at 327 ("Learned Hand knows what he does not know; and he knows the importance of not obstructing deeper analysis tomorrow by the illusory certainty of obsolete or premature generalization.").

⁸⁹ Frankfurter, *Foreward to A Jurisprudential Symposium*, *supra* note 87, at 355.

⁹⁰ Frankfurter, *Learned Hand*, HARV. L. REV., *supra* note 21, at 4.

⁹¹ *Id.* at 2.

he considered to be "of distinction in the realm of the mind and spirit"⁹² and "pre-eminent."⁹³ However, his treatment of Hughes is tentative and veiled in comparison with that of Marshall, Holmes, Brandeis, Cardozo and Hand. Such tentativeness was perhaps natural in 1930 when Professor Frankfurter reviewed Hughes' book, *The Supreme Court of the United States: Its Foundation, Methods and Achievements*.⁹⁴ Hughes had recently become Chief Justice Hughes, and as Frankfurter saw it, one who had been more "the narrator of the Court's history . . . now [became] the maker of its history."⁹⁵ Frankfurter's reserve was hardly characteristic. Clearly he was marking time while awaiting Hughes' future. However, he did much the same in a 1941 NBC Radio broadcast honoring Hughes' retirement.⁹⁶ Frankfurter stressed that "[t]he verdict of history [would] not be hurried" and withheld commentary of substance. However, he did feel free to recognize Hughes' "patience, his complete devotion to duty, the farsightedness of his wisdom, the twinkle in his eye, the translation into every day action of his precepts of tolerance and reason and his bracing good will."⁹⁷

After Hughes' death in 1948, Frankfurter still seemed to refrain from commentary on the late Chief Justice's substance. What he was willing to talk of, and typically in glowing terms, was Hughes' running of the Court. Thus, in 1949 he wrote in the *Harvard Law Review* of Hughes' "administrative side."⁹⁸ He had nothing but kind things to say of Hughes as "an administrator of distinction."⁹⁹ As first among the equals of the Court, "[t]o see him preside was like witnessing Toscanini lead an orchestra."¹⁰⁰ Frankfurter struck the same themes when he wrote of Hughes for the 1949 Harvard Law School Yearbook,¹⁰¹ and also when

⁹² Frankfurter, *Mirror of Justices*, *supra* note 1, at 783 reprinted in 44 A.B.A. J. 723, 802 (1958).

⁹³ Frankfurter, *Mirror of Justices*, *supra* note 1, at 784, reprinted in 44 A.B.A. J. 723, 802 (1958); *see supra* note 1.

⁹⁴ Felix Frankfurter, Book Review, 16 A.B.A. J. 251 (1930), reprinted in EXTRAJUDICIAL ESSAYS, *supra* note 19, at 206.

⁹⁵ *Id.* at 252. Frankfurter did, however, discern Hughes' inclination toward judicial restraint. "First and foremost, these lectures leave no doubt that the new Chief Justice realizes that the effectiveness of the Court's work does not derive from any language of the Constitution or the compulsions of logic or the mechanical contrivances of its organization. It depends upon the self-denying ordinances of the Justices." *Id.* at 208.

⁹⁶ Remarks of Justice Frankfurter, *supra* note 20.

⁹⁷ *Id.*

⁹⁸ Frankfurter, *Chief Justice Hughes*, *supra* note 21, at 1.

⁹⁹ *Id.* at 4.

¹⁰⁰ Frankfurter, *Chief Justices I Have Known*, *supra* note 23, at 901.

¹⁰¹ Frankfurter, *1949 Harvard Law School Yearbook*, *supra* note 21.

he reviewed Hughes' official biography for the *New York Times*.¹⁰² Not surprisingly, for one he rated so highly¹⁰³ Frankfurter also noted Hughes' disinterestedness.¹⁰⁴ Still, Frankfurter made no serious attempt at engaging Hughes' work as jurist. Consequently, Frankfurter's ratings of Hughes' greatness are ratings with a marked difference.

What this may mean is that Frankfurter was willing to alter his terms for greatness in this special case. That he said so little of Hughes as judge seems unusual unless he indeed had less to say in superlative terms. Nonetheless, Frankfurter might have deemed a judge worthy of greatness for other reasons. For example, in the 1930s Hughes had shown great resourcefulness and skill in presiding over an often divided and contentious Court in an era of transition. Hughes had seen the Court successfully through the perilous times of President Roosevelt's "court-packing" scheme, performing the sort of task that an administrator *might* perform with distinction. Hughes had done so, and Frankfurter was fully appreciative.

Another judge clearly in Frankfurter's favor was Chief Judge Calvert Magruder of the United States Court of Appeals for the First Circuit, with whom Frankfurter had a longstanding relationship. Upon Frankfurter's recommendation, Magruder was Brandeis' first law clerk and, in Brandeis' view, his best. Frankfurter recommended Magruder on "a hunch," thus proving the proposition that "the art of life . . . is accurate guessing on inadequate data."¹⁰⁵ For Frankfurter, Magruder's special strength was his

¹⁰² Frankfurter, *Charles Evans Hughes*, *supra* note 23, reprinted in EXTRAJUDICIAL ESSAYS, *supra* note 19, at 465.

¹⁰³ "I should say the three greatest Chief Justices we've had were John Marshall, Roger Taney, and Charles E. Hughes." Frankfurter, *Chief Justices I Have Known*, *supra* note 23, at 885.

¹⁰⁴ Frankfurter, *Charles Evans Hughes*, *supra* note 23, reprinted in EXTRAJUDICIAL ESSAYS, *supra* note 19, at 469. Frankfurter also observed: "No Chief Justice, I believe, equalled Chief Justice Hughes in the skill and the wisdom and the disinterestedness with which he made his assignments." Frankfurter, *Chief Justices I Have Known*, *supra* note 23, at 904. Frankfurter thought that disinterestedness was especially important and even "indispensable" in Justices of the Supreme Court because of the reach of the Court's powers and responsibilities "to seize the permanent, more or less, from the feelings and fluctuations of the transient." Frankfurter, *Mirror of Justices*, *supra* note 1, at 793, reprinted in 44 A.B.A. J. 723, 802 (1958). Furthermore, he considered it imperative that judges put aside personal ambitions, particularly those political in nature, with the object of avoiding even the appearance of bias. Frankfurter, *Personal Ambitions*, *supra* note 1, at 658.

¹⁰⁵ *Magruder*, HARV. L. REV., *supra* note 20, at 1201. This piece was an introduction to a forum of lead articles on Magruder and in "tribute" to Magruder upon his retirement from the bench. See Editors' Note, 72 HARV. L. REV. vii (1959).

successful combination of potentially antagonistic opposites. In Magruder Frankfurter found the realization "that form and substance in legal opinions are not opposite or alien ingredients but constitute a fused whole."¹⁰⁶ Similarly, but on the personal side, Frankfurter noted, "Still less is there a separation in him between the judge and the man."¹⁰⁷ In this Frankfurter meant that Magruder's virtues as an individual infused the man, as a judge, and did so in positive ways to the benefit of all. Consequently, Magruder's tendencies toward personal modesty made him modest on the bench, with the result that Magruder presented himself as "a true disciple of [Oliver Wendell Holmes'] deepest conviction that the first duty of a judge is to remember that he is not God."¹⁰⁸ Or as Frankfurter put it, "While no one could have a higher regard for the office of judge, [Magruder] does not confuse the occupant with the office."¹⁰⁹ From this it followed that "[h]is opinions irradiate[d] what may fairly be called moral qualities, particularly candor and complete absence of pretense in all its manifestations, from stuffiness to spurious learning."¹¹⁰ Magruder's qualities made Frankfurter "dominantly aware of humility as perhaps the prime judicial requisite."¹¹¹

Finally, Frankfurter looked upon Magruder as anything but an example of "the slot-machine theory of adjudication which holds that one can find an answer for every legal problem in the law reports, or even in the best of legal writings, or by means of merely syllogistic reasoning. Cardozo's admirable discussion of the creative aspect of a judge's work did not come to Magruder as revelation."¹¹² In what he tells us Magruder was not, one sees what Frankfurter believed a judge should be.

A judge need not be nationally prominent to qualify for greatness in Frankfurter's eyes. Less well-known persons serving on less well-known

Although Magruder did not take any of Frankfurter's courses while a student at Harvard, Frankfurter "selected him as the first clerk to Mr. Justice Brandeis." *Magruder*, HARV. L. SCH. Y.B., *supra* note 20, *reprinted in* FRANKFURTER, OF LAW AND LIFE, *supra* note 19, at 136. Brandeis' respect for Magruder's critical judgment was such that he said: "Among all my law clerks Magruder was the best critic I had." *Id.* at 1201. Magruder later taught at Harvard, and continued to teach while on the bench. *Magruder*, HARV. L. SCH. Y.B., *supra* note 20, *reprinted in* FRANKFURTER, OF LAW AND LIFE, *supra* note 19, at 136.

¹⁰⁶ *Magruder*, HARV. L. SCH. Y.B., *supra* note 20, *reprinted in* FRANKFURTER, OF LAW AND LIFE, *supra* note 19, at 137.

¹⁰⁷ *Id.* at 138.

¹⁰⁸ *Id.*

¹⁰⁹ *Magruder*, HARV. L. REV., *supra* note 20, at 1202.

¹¹⁰ *Id.* at 1203.

¹¹¹ *Id.* at 1202.

¹¹² *Id.*

benches might qualify. As was so often seen, Frankfurter placed special worth in an independent judiciary: "[T]he judge, if he is worth his salt, must be above the battle. We must assume in him not only personal impartiality but intellectual disinterestedness."¹¹³ When an individual placed that value above personal goals, Frankfurter was ready and quick in his praise. In 1956 Judge Reuben Oppenheimer stood for reelection to the Supreme Bench of Baltimore City and was returned to a full fifteen-year term by "the largest total of votes secured by any of the candidates."¹¹⁴ What caught Frankfurter's eye and led him to write about Oppenheimer, notwithstanding his sensitivity to the need that "a member of the Supreme Court should keep scrupulously aloof from politics,"¹¹⁵ was the nature of Judge Oppenheimer's campaign.

Not long before the 1956 election, Oppenheimer had been persuaded to accept a short appointment to the bench by Maryland's governor, Theodore McKeldin. When he agreed to run in his own right,

Judge Oppenheimer refused to make any campaign speeches, to make any contributions or to do anything except to say that if the people wanted him he would serve. To emphasize this, immediately after the primary he took off for Europe and stayed there for two months. The people vindicated this appropriately austere attitude in an emphatic way.¹¹⁶

For this, Frankfurter praised the public and its recognition of "the indispensable need in a democracy of a completely disinterested judiciary."¹¹⁷

III. OBLIGATION AND CRITICISM

Other of Frankfurter's commentaries, memorials and assorted testimonials about individual judges are more qualified in presentation

¹¹³ Frankfurter, *Some Reflections*, *supra* note 23, at 529, *reprinted from* 2 Record of the Ass'n of the B. of the City of N.Y. 213 (1947) (Sixth Annual Benjamin N. Cardozo Lecture delivered March 18, 1947).

¹¹⁴ Felix Frankfurter, *Letter to the Editor* (Nov. 12, 1956), N.Y. TIMES, Nov. 14, 1956, at 34.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* Frankfurter noted that this was not a recently acquired appreciation in this country. As evidence, he pointed to the Massachusetts Constitution of 1780 and its call for "judges as free, impartial and independent as the lot of humanity will admit." *Id.*

and conclusion. Some seem the product of obligation, shaped by little (or sometimes too much) knowledge of the subject. Typically the thrust and tenor of the commentary are muted, no doubt out of respect for the individual, the occasion, and the office.¹¹⁸ Such commentaries provide one with reinforcement for what Frankfurter believes a great judge should and must be, and often glimpses of his sense of the antithesis of greatness. On occasions of aggravated and egregious circumstance, Frankfurter drops all inclination toward pretense. The resulting criticism can be scathing.

Frankfurter's tributes to his colleague, Justice Robert H. Jackson, seem more the product of obligation than approbation. In the year following his death in October of 1954, Jackson was remembered in issues of both the Harvard and Columbia law reviews, and Frankfurter contributed to both.¹¹⁹ The two Justices had not been kindred judicial spirits. By Frankfurter's admission they had not seen "things with a common eye."¹²⁰ Frankfurter did, however, return to the theme of the imperative of a disinterested judiciary—"the Supreme Court as the ultimate voice . . . must always be humbly mindful of the fact that it is entrusted with power which is saved from misuse only by a self-searching disinterestedness almost beyond the lot of men,"¹²¹ and he found this virtue in Jackson.¹²² Yet, ultimately, his comments concerning Jackson reveal faint criticism and even fainter praise. In opinion-writing, Jackson "belonged to what might be called the naturalistic school. He wrote as he talked, and he talked as he felt."¹²³ It is certain that Frankfurter saw limitation and risk in the way Jackson felt. He considered Jackson

¹¹⁸ Compare Letter to Chief Justice Robert B. Williamson, *supra* note 21, at 534 ("With the possible exception of Mr. Justice Cardozo, I do not think I ever knew a lawyer who was more deeply soaked in the traditions of the common law or cared more for its continuing potential values for Western civilization. . . . I am not qualified to speak of Ned's services as Chief Justice of your State . . .") with Letter to Chief Judge Simon E. Sobeloff, *supra* note 21, at 13 ("I ought not to make any comment on Armistead as a judge, for no man should pass judgment on a fellow judge without having read the whole corpus of his opinions. . . . He was a devoted and generous friend and a kindly spirit, wholly apart from the fact that by his wit and interstitial wisdom he lightened the burdens of many of us.").

¹¹⁹ Frankfurter, *Foreword*, COLUM. L. REV., *supra* note 21, at 435; Frankfurter, *Mr. Justice Jackson*, *supra* note 21, at 937.

¹²⁰ Frankfurter noted that they were opposed to one another in the cases in which Jackson wrote his first and last opinions as a Supreme Court justice. Frankfurter, *Mr. Justice Jackson*, *supra* note 21, at 937.

¹²¹ *Id.* at 938.

¹²² *Id.*

¹²³ *Id.*

"specially endowed as an advocate" and observed that as a judge, "his aims increasingly groped beyond that of mere advocacy."¹²⁴ By Frankfurter's lights, this tendency in Jackson was compounded by, and the product of, Jackson's years in practice. Correcting the tendency was made that much more difficult by the "meager systematic legal training . . . [of this] self-educated man and . . . self-taught lawyer."¹²⁵ As Frankfurter observed:

His wide reading helped to counteract the powerful impact of the immediate and the concrete, natural enough in one so thoroughly immersed for so long in practice. Undue regard for the so-called practical leaves out of account the fact that a generalization based on it too often works injustice to the practical needs of the future.¹²⁶

Here Frankfurter revealed a classic, almost stereotypical academic's bias in favor of the necessity of the training which he believes that only *he* can provide, and his own bias against the practical fruits of life in the so-called real world. For Frankfurter, the ideal judge can have too little of the former and too much of the latter.¹²⁷

Frankfurter's 1946 memorial to Chief Justice Harlan Fiske Stone in the *Yearbook of the American Philosophical Society* is not quite as hesitant in its praise. Unlike Jackson, Stone had been a law professor and dean of Columbia University School of Law.¹²⁸ This may have, in whole or in part, provided a measure of the tutored grace Frankfurter found wanting in Jackson.¹²⁹ Frankfurter's piece, however, contains none of the ringing celebration of his commentary on those that he

¹²⁴ *Id.* at 939.

¹²⁵ Frankfurter, *Foreword*, COLUM. L. REV., *supra* note 21, at 437.

¹²⁶ *Id.*

¹²⁷ Frankfurter disclosed these inclinations on other occasions as well. For example, in expressing his preference for the university-educated lawyer Frankfurter attempted to withdraw the sting of his contention and, in the process, drove it home:

This is not because in the universities men are more honorable, more useful, than anybody else who does an honorable and useful piece of work; but because in the distribution of different functions in an advanced society they are charged with the special task of disinterested inquiry. They are charged with the duty of looking beyond the moment

Frankfurter, *Litigation and Legal Education*, *supra* note 73, at 20, in *Frankfurter Papers*, U.S. Library of Congress, Container 199, Reel 125, at 175, 197.

¹²⁸ See ALPHEUS T. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW 77-82* (1956).

¹²⁹ Frankfurter, *Harlan Fiske Stone*, *supra* note 21, at 336.

considered great. Frankfurter notes that Stone was not a philosopher, as Holmes had been. He then observes that it is difficult to be a philosopher if one is spending time, as Stone did, as “teacher, practitioner, administrator, [and] judge.”¹³⁰ Frankfurter concludes: “He had a strong historic sense and naturally enough was concerned with his place in history. Chief Justices of the United States are rarer than Presidents. A Chief Justice cannot escape history.”¹³¹ However, Frankfurter himself escapes telling what he believes Stone’s place might be. Along the way, and by way of contrasts, he perhaps tells us much.

When Frankfurter memorialized Justice Owen J. Roberts in the pages of the *University of Pennsylvania Law Review* in 1955,¹³² his purpose was not to explore the contours of greatness. By Roberts’ own admission, he had no pretensions of that sort: “I have no illusions about my judicial career. But one can only do what one can. Who am I to revile the good God that he did not make me a Marshall, a Taney, a Bradley, a Holmes, a Brandeis or a Cardozo.”¹³³ Although Frankfurter thought “Roberts was unjust to himself,”¹³⁴ what he found best in Roberts was his decency: “[N]o man ever served on the Supreme Court with more scrupulous regard for its moral demands than Mr. Justice Roberts.”¹³⁵ Instead of lionizing Roberts, Frankfurter’s specific purpose was to correct the record on the celebrated matter of “Roberts’ Switch,” in which Roberts was seen as having voted on one side of an issue, only to switch to the other months later, and all for reasons of politics rather than principle.¹³⁶ Frankfurter himself had contributed to this view of Roberts,¹³⁷ and he wrote to square things with Roberts, history, and, not unimportantly, himself.

Another piece of the record demonstrating that nothing was more important in Frankfurter’s eyes than an absence of bias is a 1957

¹³⁰ *Id.* at 335.

¹³¹ *Id.* at 340.

¹³² Frankfurter, *Mr. Justice Roberts, supra* note 21, at 311.

¹³³ *Id.* at 312 (quoting Roberts’ remarks upon leaving the Supreme Court).

¹³⁴ *Id.*

¹³⁵ *Id.* at 317.

¹³⁶ *Id.* at 313-17. The “switch” concerned Roberts’ vote with the majority in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), *overruled by Olsen v. Nebraska*, 313 U.S. 236 (1941), in which *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (invalidating New York’s minimum wage law) was reaffirmed, and his vote with the majority the following year in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), in which *Adkins* was overruled.

¹³⁷ ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945, *supra* note 7, at 392-95.

memorial in the *University of Chicago Law Review* to Judge Jerome N. Frank of the United States Court of Appeals for the Second Circuit.¹³⁸ The memorial illustrates that Frankfurter was quite willing to look beneath a harsh and seemingly rigid exterior to see whether a judge passed his test. Frankfurter wrote:

While he somehow managed to envelop himself in an atmosphere of dogmatism, he was singularly free of bias or imprisoning doctrine. His seeming iconoclasm was rooted in his zealous loyalty to the realization that the history of thought, particularly sociological thought, is the history of continuous replacement of erroneous dogma.¹³⁹

Frankfurter struck a similar note in a 1957 piece for the *Cornell Law Quarterly* celebrating Judge Henry W. Edgerton's twentieth year on the United States Court of Appeals for the District of Columbia Circuit.¹⁴⁰ Although Judge Edgerton did not seem to share Judge Frank's sharp edges, they did have in common the detachment that Justice Frankfurter so prized. Frankfurter wrote:

I venture to believe that the qualities which should be sought for in members of the Supreme Court are not less requisite for the court which Henry W. Edgerton graces. The first requisite is disinterestedness; the second requisite is disinterestedness; the third is disinterestedness. This means, in short, the habit of self-discipline so inured that merely personal views or passions are effectively antiseptized and thereby bar a corrosion of judgment leading to arbitrary determinations.¹⁴¹

Frankfurter's reach in praise of judges was not unlimited. His respect for the judiciary and the judicial office was a matter of critical discernment. When he saw fit, his scorn could be unbounded.¹⁴² On September 5, 1932, in a letter to the editor of the *New York Times*, Frankfurter wrote of Justice Ellis J. Staley of the Supreme Court of New York:

¹³⁸ Frankfurter, *Jerome N. Frank*, *supra* note 21, at 625.

¹³⁹ *Id.*

¹⁴⁰ Frankfurter, *Judge Henry W. Edgerton*, *supra* note 22, at 161.

¹⁴¹ *Id.* at 162.

¹⁴² His scorn could also be undisclosed. In a series of unsigned editorials in *New Republic* he challenged the judicial philosophy of ex-President William Howard Taft while Taft was a Yale law professor and, later, when Taft became Chief Justice of the Supreme Court. *Taft and the Supreme Court*, *supra* note 71, reprinted in *EXTRAJUDICIAL ESSAYS*, *supra* note 19, at 49. Frankfurter's principal challenge was to that species of judicial activism, substantive due process, that allowed judges to strike down legislation. *Id.*

The opinion of Justice Staley will long endure as a shining example of what an opinion should not be. After reaching the inescapable decision that he had no judicial power over the Governor, the justice officiously assumed the role of private counsel to the Mayor. After paying lip service to the principle of the separation of powers, Justice Staley violated the most deeply rooted requirement of that constitutional doctrine whereby judges should confine themselves to adjudication and, above all, abstain from participation in political controversies outside their jurisdiction.

. . . .
 . . . To indulge in the criticism of Governor Roosevelt which Justice Staley expressed was not only a flagrant abuse of judicial power. It violated the rudimentary canon against pronouncing views on ex parte statements.¹⁴³

The controversy which drew Frankfurter's ire involved the trio of Governor Franklin D. Roosevelt of New York, Mayor James J. Walker of New York City, and Justice Staley. At issue was Roosevelt's initiation of a proceeding to remove Walker from office. The charge was financial misdeeds and corrupt practices. The mayor attempted to stop Roosevelt by seeking a writ of prohibition from the court.¹⁴⁴ Staley denied the mayor's petition.¹⁴⁵

The judge's error was not in his ultimate finding. Staley denied the writ on the ground that the governor was within his powers in seeking to remove the mayor and was subject only to his own conscience and the will of the public. But the judge did not stop with that. He went on to critique the fairness of the removal proceeding, finding both Roosevelt and his procedures wanting in that respect.¹⁴⁶ This stirred Frankfurter to write his letter.¹⁴⁷

¹⁴³ Felix Frankfurter, *Letter to the Editor (Sept. 5, 1932)*, N.Y. TIMES, Sept. 7, 1932, at 18.

¹⁴⁴ *Court Limits Issue to Charter Section*, N.Y. TIMES, Aug. 20, 1932, at 6.

¹⁴⁵ *Text of Court's Decision in Walker Removal Case*, N.Y. TIMES, Aug. 30, 1932, at 2.

¹⁴⁶ *Id.*

¹⁴⁷ Frankfurter's attack on Staley probably involved more than an abstract defense of proper judicial behavior. Earlier in the summer of 1932, Roosevelt had been nominated by the Democratic party as its candidate for the Presidency. What Frankfurter considered ex parte, partisan and dicta would also have carried a danger of political risk to Roosevelt. This easily could have brought Frankfurter to the defense of his friend, Roosevelt.

A week later the *Times* carried a letter in defense of Staley in the face of Frankfurter's attack. The writer pointed out that in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice John Marshall devoted considerable attention to the illegality of Secretary of State Madison's refusal to issue Marbury's commission as justice of the peace, only to moot his own commentary by declaring the statute in question unconstitutional. The writer concluded: "Apparently Judge Staley, despite the severe castigation

As he saw it, the judge became a partisan. The judge's gratuitous commentary was, in any event, of little consequence; Mayor Walker resigned on September 1, 1932.¹⁴⁸

Frankfurter's criticism of Justice Staley, striking in its intensity, was not unique. There were other occasions when he conveyed extreme displeasure with individual judges. Such was the case later in 1932 when he criticized the actions of Judge Martin T. Manton, senior judge of the Second Circuit Court of Appeals. Judge Manton had invoked his supervisory power as senior circuit judge with respect to the District Court for the Southern District of New York. Using that power, Manton determined that it was in "the public interest"¹⁴⁹ to appoint himself to the position of temporary district court judge. His presence as district judge destroyed the otherwise unanimous views of the district bench on the timely and pressing matter of appointment of receivers in equity, especially in bankruptcy cases. Judge Manton thereupon took advantage of this newfound discord on the district bench to exercise another of his powers as circuit judge, namely, the power to assign cases among district judges when they were unable to agree among themselves. He then ordered that applications for appointment of receivers should be presented to him as temporary district judge. In this manner Circuit Judge Manton assigned tasks to District Judge Manton, instead of to others on the district bench. The effect was that Manton took over the task of appointment of receivers for the financially desperate Interborough Rapid Transit Company.¹⁵⁰

The Editor of the *New York Times* received word from Cambridge that Professor Frankfurter was displeased: "Had Judge Manton appointed the Angel Gabriel himself fundamental questions affecting the orderly administration of justice and the public's respect for the Federal courts would be raised."¹⁵¹ In this instance the effect, according to Frankfurter, was even more corrosive to "the maintenance of unimpaired confidence in the integrity and high traditions of the Federal judiciary; . . . [it was an] abusive exercise of judicial authority."¹⁵² What Frankfurter feared was that formalistic

which his opinion in the Walker case has suffered at the hands of Professor Frankfurter, had respectable precedent for his course." Robert E. Whalen, *Letter to the Editor* (Sept. 7, 1932), N.Y. TIMES, Sept. 15, 1932, at 20.

¹⁴⁸ *Walker Resigns, Denouncing the Governor; Says He Will Run For the Mayoralty Again, Appealing to "Fair Judgment" of the People*, N.Y. TIMES, Sept. 2, 1932, at 1.

¹⁴⁹ *Johnson v. Manhattan Ry. Co.*, 61 F.2d 934, 936 (2d Cir. 1932), *aff'd*, 289 U.S. 479 (1933).

¹⁵⁰ Felix Frankfurter, *Letter to the Editor* (Oct. 4, 1932), N.Y. TIMES, Oct. 14, 1932, at 18; see *Manhattan Ry. Co.*, 61 F.2d at 935-37.

¹⁵¹ Frankfurter, *supra* note 150, at 18.

¹⁵² *Id.*

manipulation of a court's jurisdiction and powers was an invitation to legislative correction. Frankfurter thought Manton's "abusive exercise of judicial authority" carried that risk and, in the process, disserved the Federal judiciary.¹⁵³ What Judge Manton fell short of was what Frankfurter considered "one of the greatest duties of a judge, the duty not to enlarge his authority."¹⁵⁴

Actually, Manton claimed to have a purpose other than personal aggrandizement: he said he was trying to deal with the district court's practice, which he opposed, of appointing the Irving Trust Company as receiver in *all* equity and bankruptcy cases that came before it. According to Manton, the machinations criticized by Frankfurter were intended to change this practice through the appointment of individual receivers rather than a single, corporate one.¹⁵⁵ The Federal Bar Association in the New York area appears to have agreed. At the time it "heartily commended" Manton's effort to break Irving Trust's court-sponsored monopoly.¹⁵⁶

In addition to his letter to the *Times* on the matter, Frankfurter also authored an unsigned editorial that appeared in *New Republic* in July of 1933.¹⁵⁷ The *New Republic* editorial provides a fuller understanding of the basis for Frankfurter's intense reactions to Manton's role in this case and suggests that more was involved than a federal judge's overreaching.

In the editorial, Frankfurter pointed out that this occasion, which eventually involved the Supreme Court of the United States, was not the first of Manton's troubles with the Court involving Interborough. In a 1928 dispute over a fare increase, Manton had sided with Interborough only to have the Supreme Court set aside the Court of Appeals' injunction prohibiting state or local interference with the increase.¹⁵⁸ Frankfurter also drew attention to Manton's role in litigation concerning the reasonableness of bonuses received by executives of the American Tobacco Company. He stressed how supportive Judge Manton had been of company management, as compared to the Supreme Court.¹⁵⁹

¹⁵³ *Id.*

¹⁵⁴ FRANKFURTER, *supra* note 6, at 80. Frankfurter made this observation in praise of Chief Justice Waite of the United States Supreme Court, who Frankfurter believed "preëminently belongs to the tradition of judicial self-restraint." *Id.* at 81.

¹⁵⁵ *Manton Defends His Action on I.R.T.*, N.Y. TIMES, Oct. 19, 1932, at 2.

¹⁵⁶ *Bar Group Criticizes Receiver "Monopoly"*, N.Y. TIMES, Sept. 23, 1932, at 2.

¹⁵⁷ *Judge Manton and the Supreme Court*, NEW REPUBLIC (July 19, 1933) (unsigned editorial), reprinted in EXTRAJUDICIAL ESSAYS, *supra* note 19, at 306.

¹⁵⁸ *Id.* at 306-07; see *Gilchrist v. Interborough Rapid Transit Co.*, 279 U.S. 159 (1929), rev'g 26 F.2d 912 (S.D.N.Y. 1928).

¹⁵⁹ *Judge Manton and the Supreme Court*, *supra* note 157, reprinted in EXTRAJUDI-

Frankfurter saw all of this as prologue to the present "judicial shenanigan,"¹⁶⁰ which he suggested involved "the disposition of judicial patronage."¹⁶¹

The controversy surrounding Manton's role took a long and tortured path in the courts. Manton lost and won, was sustained and roundly criticized,¹⁶² and eventually found himself under Justice Stone's order to go no further until all questions were resolved concerning his continued involvement in the proceeding.¹⁶³ Eventually, in October of 1933, Judge Manton retired from the Interborough proceeding.¹⁶⁴ He indicated his need to return to his circuit court duties, as the "busy season" was about to begin.¹⁶⁵

It seems, however, that nothing with Manton was quite what it might have seemed. Frankfurter's mention of the tobacco bonuses in the *New Republic* editorial seemed, on its face, somewhat out of context and off the mark of the Interborough controversy, but perhaps it was not. Manton was later convicted of accepting a bribe from the tobacco company in the shape of loans never repaid.¹⁶⁶ Thus, at the heart of Frankfurter's objection was not simply a wayward judge, but a crooked one. To one such as Frankfurter whose philosophy of judging recommended disinterest, devoid of intangible personal bias and disqualifying prejudgment, Manton was ultimately guilty of the ultimate sin: tangible interest of the venal sort. This was the icon inverted.

CONCLUSION

The result of Frankfurter's iconography of judging is the celebration of the few, the acceptance of many, and the castigation of another small few. Along the way, two broad requisites for greatness in a judge take form.¹⁶⁷

CIAL ESSAYS, *supra* note 19, at 306, 307; compare *Rogers v. Guaranty Trust Co.*, 60 F.2d 114 (2d Cir. 1932) with *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1933) (reversing the lower court decision).

¹⁶⁰ *Judge Manton and the Supreme Court*, *supra* note 157, reprinted in EXTRAJUDICIAL ESSAYS, *supra* note 19, at 309.

¹⁶¹ *Id.* at 308.

¹⁶² *Johnson v. Manhattan Ry. Co.*, 61 F.2d 934 (2d Cir.), *rev'g* 1 F. Supp. 809 (S.D.N.Y. 1932) and *aff'd*, 289 U.S. 479 (1933); *Ex parte Relmar Holding Co.*, 61 F.2d 941 (2d Cir. 1932), *rev'g* 1 F. Supp. 820 (S.D.N.Y.) and *cert. denied*, 288 U.S. 614 (1933).

¹⁶³ *Order in I.R.T. Case Restrains Manton*, N.Y. TIMES, Sept. 24, 1933, at 1.

¹⁶⁴ *Manton Retires From I.R.T. Case*, N.Y. TIMES, Oct. 1, 1933, at 7.

¹⁶⁵ *Mack Succeeds Manton*, N.Y. TIMES, Oct. 3, 1933, at 3.

¹⁶⁶ See GEORGE T. WASHINGTON & V. HENRY ROTHSCHILD, 2 COMPENSATING THE CORPORATE EXECUTIVE 884 n.37 (3d ed. 1962).

¹⁶⁷ Although not prominent in Frankfurter's iconography, two factors that he also

First, and never far from Frankfurter's mind, was his sense of limitation upon judicial powers. The origins of his mindset were in the late-nineteenth century thoughts of Professor James Bradley Thayer of Harvard Law School. Thayer influenced Frankfurter directly,¹⁶⁸ as well as indirectly through his impact on Frankfurter's icons, Holmes and Brandeis.¹⁶⁹ Thayer's view of the role of the judiciary in constitutional adjudication was that the courts "can only disregard the Act [of the legislature] when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question."¹⁷⁰ Frankfurter took his cue from Thayer. His commitment to judicial restraint was firm and gave Frankfurter his place,

noted were the matters of judicial appearance and presence. Sometimes in seriousness, and on other occasions with that humor which carries its own serious truth, the diminutive Frankfurter noted and seemed to place value upon a judge's appearance and demeanor. Thus, he observed of Chief Justice Edward D. White: "There was something very impressive about him, both in appearance and otherwise. He was an impressive-looking person." Frankfurter, *Chief Justices I Have Known*, *supra* note 23, at 896. "He looked the way a Justice of the Supreme Court should look . . . He was tall and powerful." *Id.* at 892. Such statements were consistent with his generality that "[f]or myself, I think all Justices of the Supreme Court should be strong, big, powerful-looking men!" *Id.* at 887.

¹⁶⁸ On one occasion, Frankfurter opined:

[I]f I were to name one piece of writing on American constitutional law . . . I would pick . . . Thayer['s] . . . "The Origin and Scope of the American Doctrine of Constitutional Law" . . . Why would I do that? 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.

FELIX FRANKFURTER REMINISCES 299-300 (1960) (recorded in talks with Dr. Harlan B. Phillips); *see also* JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* 33 (1989) ("Thayer's thesis became Frankfurter's judicial credo: that judges must exercise restraint in their decisions, mindful of the strength and wisdom of the popularly elected legislators who passed the laws the jurists interpret.").

¹⁶⁹ *See generally* HIRSCH, *supra* note 6, at 128-32 (discussing Frankfurter's perception of himself as within the tradition of Thayer, Holmes and Brandeis on matters of judicial restraint); Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71 (1978); *see also* Sanford V. Levinson, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430 (1973) (discussing Frankfurter's sense of America and the American presidency as a contributing factor in his philosophy that judicial restraint was warranted because he believed that an activist and vigilant Court was unnecessary).

¹⁷⁰ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

along with Thayer, Holmes, and Judge Learned Hand, among "the outstanding jurisprudential voices in defense of the doctrine."¹⁷¹ This thread runs common among those whom Frankfurter held highest.

An expansionary and imperial judiciary was not Frankfurter's ideal. As Frankfurter observed, "If judges want to be preachers, they should dedicate themselves to the pulpit; if judges want to be primary shapers of policy, the legislature is their place. Self-willed judges are the least defensible offenders against government under law."¹⁷² Should anyone have "the impression that a Justice of the Court is left at large to exercise his private wisdom, let me [Frankfurter] hasten to say as quickly as I can that no one could possibly be more hostile to such a notion than I am."¹⁷³ He thought these limitations especially relevant for Justices of the United States Supreme Court because the sort of case they consider "leaves more scope for insight, imagination, and prophetic responsibility than the types of litigation that come before other courts."¹⁷⁴ Importantly, Frankfurter's restraint was far from mindless ritualism.¹⁷⁵

Second, and equally important for Frankfurter, was the judge's disinterestedness. As Helen Shirley Thomas noted, "If there is one word that Justice Frankfurter uses more than any other, even than 'self-restraint,' it is 'disinterestedness.'"¹⁷⁶ Without it, the opportunities for

¹⁷¹ THAYER, HOLMES, AND FRANKFURTER, *supra* note 22, at v; see also PHILIP B. KURLAND, MR. JUSTICE FRANKFURTER AND THE CONSTITUTION 5-15 (1971) (discussing judicial restraint evidenced in Frankfurter's Supreme Court opinions).

¹⁷² Frankfurter, *John Marshall*, *supra* note 22, at 238, reprinted in THAYER, HOLMES, AND FRANKFURTER, *supra* note 22, at 135; see DAWSON, *supra* note 57, at 27.

¹⁷³ Frankfurter, *Mirror of Justices*, *supra* note 1, at 794, reprinted in 44 A.B.A. J. 723, 803 (1958).

¹⁷⁴ *Id.*

¹⁷⁵ See, for example, Erwin N. Griswold, *Felix Frankfurter—Teacher of the Law*, 76 HARV. L. REV. 7, 11 (1962):

His teaching has been of the integrity of the judicial process, of the essential importance of sound procedures, of judicial self-restraint, and of the intellectual humility of the judge. In this, I venture to say, he has come closer to verity than any other judge of our time or most judges in history. It is futile—and is to miss the point of his influence and thought—to talk of him as "liberal" or "conservative." Such labels are quite irrelevant to a judge of Frankfurter's orientation and depth of thought.

But see HIRSCH, *supra* note 6, at 191 ("By making a total commitment to Thayer's philosophy of deference and by using that commitment as his principal philosophic shield against his opponents, Frankfurter lost whatever chance he might have had to work out the contradictions in his own beliefs.").

¹⁷⁶ THOMAS, *supra* note 58, at 348.

greatness, in Frankfurter's view, were remote. In 1953 Justice Frankfurter talked informally at the University of Virginia School of Law about Chief Justices of the United States Supreme Court whom he had known, and also discussed a few whom he had not known.¹⁷⁷ In his concluding comments he spoke broadly of what he believed to be desirable in a Justice of the Supreme Court. Much of what he said is relevant to anyone serving in any judicial capacity.

[W]hat you want in a Justice is not a specialist in this or that field, not necessarily a man who has prior experience on the bench, not necessarily a man who has been broadened by high office What is essential for the discharge of functions that are almost too much, I think, for any nine mortal men, but have to be discharged by nine fallible creatures, what is essential is that you get men who bring to their task, first and foremost, humility and an understanding of the range of problems and of their own inadequacy in dealing with them; disinterestedness, allegiance to nothing except the search, amid tangled words, amid limited insights, loyalty and allegiance to nothing except the effort to find their path through precedent, through policy, through history, through their own gifts of insight to the best judgment that poor fallible creatures can arrive at in that most difficult of all tasks, the adjudication between man and man, between man and state, through reason called law.¹⁷⁸

¹⁷⁷ Frankfurter, *Chief Justices I Have Known*, *supra* note 23, at 883.

¹⁷⁸ *Id.* at 905. Furthermore, the loftier the bench, the more demanding the judge's tasks might prove. Frankfurter believed that "true humility and its offspring, disinterestedness, are more indispensable for the work of the Supreme Court than for a judge's function on any other bench." Felix Frankfurter, Some Observations On the Nature of the Judicial Process of Supreme Court Litigation, Address Before the American Philosophical Society, at 14 (April 22, 1954) [hereinafter Frankfurter, Address Before the American Philosophical Society], in Frankfurter Papers, U.S. Library of Congress, Container 197, Reel 125, at 300, 314.

As to prior judicial experience, Justice Frankfurter stated that it "is neither a qualification nor a disqualification." Frankfurter, *Chief Justices I Have Known*, *supra* note 23, at 887. That "the correlation between prior judicial experience and fitness for the functions of the Supreme Court is zero" was Frankfurter's principal theme in 1957 in the first Owen J. Roberts Memorial Lecture at the University of Pennsylvania Law School. Frankfurter, *Mirror of Justices*, *supra* note 1, at 795, reprinted in 44 A.B.A. J. 723, 803 (1958). Indeed, he intimated that prior service on a state court might be undesirable because of the habits of "temperamental partisanship and ambition" that many state judges developed. *Id.* at 787. He also thought that "geographic considerations" and "political

Even for one armed with disinterest and a sense of judicial limitation, this calling could not be lightly or readily undertaken. A year later in an address to the American Philosophical Society, he once more spoke of the Supreme Court, yet of matters which at least in part pertain to all judges:

A judge . . . should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet. The last demanded upon him—to make some forecast of the consequences of his action—is perhaps the heaviest. To pierce the curtain of the future, to give shape and visage to mysteries still in the womb of time, is the gift of imagination. It requires poetic sensibilities with which judges are rarely endowed and which their education does not normally develop. These judges . . . must have something of the creative artist in them; they must have antennae registering feeling and judgment beyond logical, let alone, quantitative proof.¹⁷⁹

These dimensions of judging would be difficult, if not impossible, to teach or learn. They are more likely to be inherited with the wind.

As for Frankfurter himself, would he have considered himself worthy of a place in his own highest ranks, by his own standards? It seems clear that he aspired to, and hoped for, greatness by his own terms. But it seems unlikely that he would have accepted a place with Marshall, Holmes, Brandeis, Cardozo and the like, had it been offered.¹⁸⁰ At the same time, his record suggests that he was consistent in his own

affiliations" were irrelevant. *Id.* at 795-96. All of this bore the risk of self-serving.

¹⁷⁹ Frankfurter, Address Before the American Philosophical Society, *supra* note 178, at 11. In these themes Frankfurter draws upon strains previously evoked by Justice Cardozo. See Frankfurter, *Mr. Justice Cardozo*, *supra* note 21, at 638-39. Frankfurter had no expectation that a Cardozo, or anyone else, could mark a path to certainty. "Whenever Frankfurter was asked how he weighed the elements of history, precedent, custom, and social utility in reaching a decision, he was likely to reply, 'When Velazquez was asked how he mixed his paints, he answered, 'With taste.''" Paul A. Freund, *Foreword: Homage to Mr. Justice Cardozo*, 1 *CARDOZO L. REV.* 1, 4 (1979).

¹⁸⁰ Frankfurter's Harvard Law School friend and colleague, Professor Paul Freund's assessment was that

[w]hile Frankfurter was not, as were John Marshall and Holmes and Brandeis, an originator of transforming thought, he was a centrally influential figure in law and government. His immense energy, both intellectual and physical; the intensity of his caring for people and ideas; his unabashed reverence for the institutions of America and its heroes; and his learning carried with exuberance ignited the wide circle he reached, and left his imprint on them.

Paul A. Freund, *Felix Frankfurter*, *DICT. AM. BIO.* 260, 264 (Supp. VII 1961-65).

aspirations and efforts. Although he sometimes fell short,¹⁸¹ his consistent goals were judicial restraint accompanied by proper disinterest. In that, he seems to have bested the best of his critics.

¹⁸¹ See *supra* note 9.

