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There is, unfortunately, no way one can predict whether a person appointed to the Supreme Court will be a great justice or a mediocre one. The nomination of John Marshall, for example, evoked numerous complaints about his lack of ability. The Philadelphia *Aurora* characterized him as "more distinguished as a rhetorician and sophist than as a lawyer and statesman," and the Senate, in fact, delayed its confirmation vote for a week hoping President John Adams would change his mind.[1] When Woodrow Wilson appointed Louis D. Brandeis to the Court in 1916, pillars of the bar crowded into the Senate judiciary sub-committee hearings to denounce Brandeis as "unfit" to sit on the nation's highest court.[2]

On the other hand, some appointees who gave much promise of greatness have proven disappointing. Harlan Fiske Stone, for example, had been so praised as an associate justice in the 1930's that Franklin Roosevelt elevated him to chief justice in 1941. Stone, however, proved a disaster in the center chair and could not control an increasingly fractious bench.[3] Perhaps the greatest disappointment in the high court was Felix Frankfurter, appointed to succeed Benjamin Nathan Cardozo in 1938. Many held high hopes that he would become the intellectual leader of the Court; instead, he proved a divisive figure whose jurisprudential philosophy is all but ignored today. What happened to this man whom Brandeis once called "the most useful lawyer in the United States?"[4]

This article suggests that Frankfurter's failure can be traced in

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1. CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 177-82 (rev. ed. 1935). Adams, however, believing Marshall would in fact be a great justice later declared that "my gift of John Marshall to the people of the United States was the proudest act of my life." *Id.* at 178.

2. ALDEN L. TODD, JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS ch. 5 (1964); *see also* ALPHEUS T. MASON, BRANDEIS: A FREE MAN'S LIFE chs. 30-31 (1946).

3. ALPHEUS T. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW pt. 6 (1956).

4. Letter from L.D. Brandeis to Harold Laski (Nov. 29, 1927), *reprinted in* BRUCE MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION 43 (1982).

part to his abrasive personality and inability to get along with other members of the Court. More importantly, he became a prisoner of jurisprudential views that he had developed and solidified during his tenure as professor at the Harvard Law School. That mindset was a response to a particular set of circumstances and conditions that had begun to change dramatically, even before Frankfurter took his seat on the Court in early 1939.

I. A New Deal Appointment

On January 4, 1939, shortly after Franklin D. Roosevelt sent the Senate the nomination of Felix Frankfurter as Associate Justice of the United States Supreme Court, a group of top New Dealers gathered to celebrate in the office of Secretary of the Interior, Harold L. Ickes. Attorney General Frank Murphy came, as did Missy LeHand and Harry Hopkins; Tommy Corcoran brought two magnums of champagne, and the chairman of the Securities and Exchange Commission, William O. Douglas, rounded out the party. All of them heartily agreed with Ickes, who described the nomination as "the most significant and worthwhile thing the President had done."[5]

Liberals in the government, academics, and the general community joined in celebratory praise. The *New Republic*, with which Frankfurter had been associated since its founding, naturally cheered; it noted his "abhorrence of the second rate in thought or action," and termed him the "ideal choice" to fill the chair once held by Holmes and Cardozo.[6] *The Nation* exalted: "Frankfurter's whole life has been a preparation for the Supreme Court," and "his appointment has an aesthetically satisfying inevitability. No other appointee in our history has gone to the court so fully prepared for its great tasks."[7] Archibald MacLeish, a close friend, proclaimed that Frankfurter's great devotion to civil liberties, as evidenced over the previous twenty years, would mark his tenure on the bench.[8] Many conservatives also applauded the appointment. The *New York Times* commented approvingly that "he [would] serve no narrow prejudices, that he [would] be free from partisanship, [and] that he [would] reveal the organic conservatism through

5. Harold L. Ickes, 2 The Secret Diaries of Harold L. Ickes 552 (1954).

6. *Mr. Justice Frankfurter*, New Republic, Jan. 18, 1939, at 297.

7. *Justice Frankfurter*, The Nation, Jan. 14, 1939, at 52.

8. Archibald MacLeish, *Foreword* to Law and Politics: Occasional Papers of Felix Frankfurter, 1913-1938 (Archibald MacLeish & E.F. Prichard, Jr., eds., 1939).

which the hard-won victories [which] won liberty in the past [could] yield a new birth of freedom."[9]

Frankfurter's supporters, who had mounted an extensive campaign to put him on the Court,[10] expected that he would assume the intellectual leadership of the Court. Harold Ickes believed that Frankfurter's appointment would solidify Roosevelt's "Supreme Court victory." Regardless of who would be President after Roosevelt, there would now be "aggressive, forthright and intelligent leadership."[11] While Roosevelt mulled over the nomination, Ickes told the President that Frankfurter's "ability and learning are such that he [would] dominate the Supreme Court for fifteen or twenty years to come."[12] Solicitor General Robert H. Jackson, in a sentiment echoed by Harlan Stone, claimed that only Frankfurter had the legal resources "to face Chief Justice Hughes in conference and hold his own in the discussion."[13]

There is no question that Frankfurter exerted a powerful influence during his twenty-three years on the bench. On his eightieth birthday, which followed soon after his retirement from the Court, the *Harvard Law Review* dedicated an issue to him. In that issue, Frankfurter's colleague, John Marshall Harlan, asserted confidently that Frankfurter's career on the bench need not await the judgment of future historians; rather, "[h]e [would] surely be numbered among that select group of 'greats' who have sat in that tribunal."[14]

Harlan's judgment seemed to have been born out nearly a decade later in a unique poll taken in 1970 of sixty-five professors of law, history, and government regarding whom they considered the best and the worst of the ninety-seven justices who had served from 1789 through the retirement of Earl Warren in 1969. In that poll, Frankfurter rated among the twelve "greats," along with John Marshall, Joseph Story, Oliver Wendell Holmes, Louis Brandeis, and Hugo Black.[15]

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9. *Felix Frankfurter*, NEW YORK TIMES, Jan. 6, 1939, at 20, col. 2.

10. *See* MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES 274-76 (1982); FROM THE DIARIES OF FELIX FRANKFURTER 63-64 (Joseph P. Lash, ed., 1975).

11. ICKES, *supra* note 5, at 552.

12. *Id.* at 540.

13. EUGENE C. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 165 (1958); MASON *supra* note 3, at 482.

14. John M. Harlan, *The Frankfurter Imprint as Seen by a Colleague*, 76 HARV. L. REV. 1, 2 (1962).

15. ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTI-

In the balloting, only John Marshall received a "great ranking" from all of those polled. Brandeis received sixty-two votes, Holmes sixty-one and Black forty-two. Although the authors did not report how many of the respondents rated Frankfurter as "great," they did note that he received a number of "average" votes and "one of the raters graded Frankfurter with a surprising 'failure.' "[16] The unidentified professor who rated Frankfurter a failure commented on the Justice's "preoccupation" with judicial restraint. He believed that Frankfurter's abilities had been "consistently overrated" and that he "had used his brilliance to restrict the development of the law."[17]

One should note, however, that even William O. Douglas, who shared this view of Frankfurter, nonetheless put him on the "All-American" team, drawn from the men he had sat with in his thirty-six years on the Court.[18] Shortly before his death, Douglas told James Simon that "Felix belonged on this Court. He knew constitutional history and he knew this Court. He was a brilliant advocate of his conservative philosophy."[19]

Evaluating justices, of course, is very much a function of the time and of those who do the evaluation. In the case of this poll, in 1970 a general negative reaction had set in to the judicial activism of the Warren Court, and even liberal academics believed that the Court should show more judicial restraint. Interestingly, a majority of the sixty-five members of the panel[20] had been educated during the 1930's and 1940's, a time when Frankfurter's views were identical to those prevalent in the law schools. As times change, so often do our views of greatness, not only in jurisprudence[21] but in art

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CAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 37 (1978). The other members of this top group were Roger B. Taney, John M. Harlan I, Charles Evans Hughes, Harlan Fiske Stone, Benjamin N. Cardozo, and Earl Warren. Portions of the study first appeared in Albert P. Blaustine & Roy M. Mersky, *Rating Supreme Court Justices*, 58 A.B.A. J. 1183 (1972).

16. BLAUSTINE & MERSKY, *supra* note 15, at 40 (the categories used were "great," "near-great," "average," "below average," and "failure").

17. *Id.* at 44.

18. WILLIAM O. DOUGLAS, THE COURT YEARS, 1939-1975, at 42 (1981).

19. JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS 8 (1980).

20. The panelists are listed in BLAUSTEIN & MERSKY, *supra* note 15, Tbl. 4, at 117-18.

21. For a good example of changing reputation, see G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51 (1971). It should be noted that although White reports a declining reputation for Holmes, the Blaustein-Mersky poll, taken a year earlier, listed Holmes among the "greats." White's sampling of writers differs significantly, and the more recent and critical articles he cited were written by younger scholars just coming into their own. As for judicial "reputation," there has not been a great deal written on the sub-

and other fields as well; one wonders what would be the results of a poll taken in 1991, of men *and* women, white *and* black, who had been educated in the 1960's and 1970's.

Perhaps a more accurate method of evaluating justices and their greatness is through examining their lasting influence. For example, the Court still relies on Chief Justice Marshall's opinion in *Marbury v. Madison*[22] for justification of judicial review, and both liberals and conservatives cite Brandeis's dissent in *Olmstead v. United States*[23] as justification for protecting privacy. By this standard, few of Frankfurter's opinions have had a lasting impact.[24]

II. A PROFESSORIAL JUSTICE

To be an effective leader, especially in the collegial atmosphere of the Supreme Court, the justices must be able to get along with one another. Frankfurter certainly knew this as well as anyone, as he had this lesson driven home time and again in conversations with Louis D. Brandeis in the 1920's and 1930's.[25] Frankfurter could be the most charming of persons, an ebullient conversationalist who, as his longtime friend and former student Dean Acheson once wrote, had "a genius for friendship."[26]

When Frankfurter took his seat on the high court in early 1939, he did so with the air of a veteran rather than that of a novice side judge. Frankfurter had studied the Court for years, and from his extensive contacts with Holmes, Brandeis, Stone, and Cardozo, knew the institution inside and out.[27] He not only studied the written opinions, but the interaction of the judges, as well as the wider

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ject. The one significant exception is found in RICHARD POSNER, CARDOZO: A STUDY IN REPUTATION (1990).

22. 5 U.S. (1 Cranch) 137 (1803).

23. 277 U.S. 438, 471 (1928).

24. In an admittedly unscientific survey, I checked several of the leading casebooks in criminal procedure, federal court jurisdiction, administrative law and constitutional law, and found practically no Frankfurter opinions among the leading cases. In fact, in some instances, a Frankfurter opinion is either reprinted or referenced to indicate that the law is no longer what he claimed it to be.

25. Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299 (1985).

26. Dean Acheson, *Felix Frankfurter*, 76 HARV. L. REV. 14 (1962).

27. In fact, Frankfurter co-authored the first extensive analysis of the Supreme Court as an institution, and it remained the definitive work on the subject for many years. *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM (1927).

range of administrative and procedural concerns.[28] He claimed to possess a greater understanding of the Court than those who were members. "Not even as powerful and agile a mind as that of Charles Evans Hughes," Frankfurter told Stanley Reed, "could, under the pressures which produced adjudication and opinion writing, gain that thorough and disinterested grasp of these problems which twenty-five years of academic preoccupation with the problem should have left in one."[29]

Even before going on the bench, he had been asked to assist Hugo Black, a new member of the Court, in understanding the proper judicial protocols. Black's tradition-ignoring dissents worried Brandeis and Stone, who invited Frankfurter to have a chat with their new colleague. Frankfurter gladly did so, and reported back that while the Alabaman was not "technically equipped" for the job, he had a "good head" and was "capable of learning if . . . rightly encouraged."[30]

Once on the bench, Frankfurter believed he had an obligation to instruct his brethren. Just as he had "helped" Black and taught a generation of Harvard law students, he shared his knowledge and experience with his fellow justices. Many of them, especially in their first months on the bench, no doubt welcomed all the help they could get — but Frankfurter never knew when to stop. Consequently, when men whom he believed should be grateful for his offers of help indicated their resentment at his continuing patronization, he could become downright nasty. One of the great tragedies of Frankfurter's career is that a man renowned for his talents in personal relations, who knew so well the high value the justices placed on careful collegiality, could so terribly misread the situation and the characters of those with whom he served.

Frankfurter could never, for example, shake the professorial mindset. In fact, he believed it part of his strength as a judge. "I am an academic," he told Stanley Reed, "and I have no excuse for being on this Court unless I remain so."[31] In a letter to Robert

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28. Alexander Bickel, *Applied Politics and the Science of Law: Writings of the Harvard Period*, *in* FELIX FRANKFURTER: A TRIBUTE 164, 197 (Wallace Mendelson ed., 1964).

29. Letter from Felix Frankfurter to Stanley Reed (Dec. 2, 1941) *in* Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.

30. MASON, supra note 3, at 469-70; Letter from Felix Frankfurter to Louis Brandeis (May 28, 1938) *in* Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.

31. Letter from Felix Frankfurter to Stanley Reed (Dec. 2, 1941), *in* Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.

Jackson in which Frankfurter expounded at length on a point of law, he concluded that "[i]f all this sounds to you professorial, please remember that I am a professor unashamed."[32] Mr. Justice Frankfurter carried this professorial air into conference, where Chief Justice Hughes called him "Professor Frankfurter."[33] There, Frankfurter tended to lecture his fellow justices constantly quoting Holmes and Brandeis to buttress his argument, instead of treating his fellow justices as colleagues. Ironically, Justice William Brennan commented, "[w]e would be inclined to agree with Felix more often in conference . . . if he quoted Holmes less frequently to us."[34] Justice Potter Stewart recalled that if Felix were really interested in a case, "he . . . would speak for fifty minutes, no more or less, because that was the length of the lecture at the Harvard Law School."[35]

In conference, Frankfurter could often be as abrasive and condescending as he had been in the classroom. For example, "[i]t is the lot of professors to be often not understood by pupils," he wrote Stanley Reed after Reed failed to grasp a point of law expounded by Frankfurter, "[s]o let me try again."[36] Another time he told Reed that he taught Harvard students that in order to construe a statute correctly, they should read it not once but three times. He then advised Reed to go back and reread the law.[37]

Frankfurter could become splenetic when he did not get his way. For example, while he considered Frank Murphy a man of principle, he constantly fumed about Murphy's desire to do justice and write compassion into the law rather than to follow Frankfurter's example of judicial restraint. He charged Murphy with being "too subservient" to his "notions of doing 'the right thing,' " and sometimes addressed Murphy as "Dear god." In a note passed to Murphy during the 1944 term, Frankfurter listed as among Murphy's clients " 'Reds', Whores, Crooks, Indians and all other colored people, Longshoremen, M'tgors [Mortgagors] and other Debtors, R.R. Employees, Pacifists, Traitors, Japs, Women, Children and Most Men." "Must I become a Negro rapist," he complained, "before

32. Letter from Felix Frankfurter to Robert H. Jackson (Jan. 29, 1953) *reprinted in* BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT 39 (1985).

33. SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 159 (1984).

34. Dennis Hutchinson, *Felix Frankfurter and the Business of the Supreme Court, O.T. 1946-O.T. 1961*, 1980 SUP. CT. REV. 143, 205 (1980).

35. BERNARD SCHWARTZ & STEPHAN LESHER, INSIDE THE WARREN COURT 24 (1983).

36. FINE, *supra* note 33, at 159.

37. *Id.*

you give me due process?"[38]

Frankfurter's intellectual arrogance, combined with a nastiness some of his students had seen years earlier, led him to alienate nearly all of his colleagues at one time or another. He would flatter them so long as they agreed with him; but, at the first sign of independent thought, he would explode. During his tenure on the bench, no one — with the possible exception of Robert Jackson — escaped his scorn. Typical are the comments he scribbled on an opinion by Wiley Rutledge that went against his advice: "if I had to expose all your fallacies I would have to write a short book on (1) federal jurisdiction (2) constitutional law [and] (3) procedure generally."[39] In another instance, Frankfurter told Learned Hand that Hugo Black "[was] a self-righteous, self-deluded part fanatic, part demagogue, who really disbelieve[d] in Law, [and thought] it [was] essentially manipulation of language."[40]

According to one biographer, after the "siege" of his first five years on the bench, Frankfurter "mentally divide[d] his colleagues into three categories — adversaries, allies, and potential allies."[41] Unfortunately, the pattern might better be described in the viewpoint of the judges still friendly or already alienated by Frankfurter's treatment of them.

For example, Frankfurter, at first, expressed great enthusiasm for Earl Warren, whom he believed to be a clever politician (who could, therefore, protect the Court as Taft and Hughes had done), but somewhat weak in the law, and thus open to his tutelage. He also assumed that William J. Brennan, Jr., a former student of his at Harvard, would be open to his suggestions.[42] Frankfurter never seemed to learn or to stop hoping. He repeated the same pattern of flattery, attention, cajoling, and endless attempts at instruction[43]

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38. FINE, *supra* note 33, at 258-59.

39. *Id.* at 255.

40. Letter from Felix Frankfurter to Learned Hand (Nov. 5, 1954), *reprinted in* SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 251 (1984).

41. H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 177 (1981).

42. See, for example, the semi-humorous memo addressed to "Mr. Justice of New Jersey," who may one day become "Mr. Justice of the United States," as soon as he recognizes it is the U.S. Constitution and not New Jersey law that governs at the federal level. Letter from Felix Frankfurter to William Brennan (Oct. 25, 1957), Felix Frankfurter Papers, Harvard Law School Library, Cambridge, Massachusetts.

43. To take but one example, shortly after he went on the Court Warren asked if Frankfurter could recommend a book or an article on a particular point of law. Two hours later a clerk wheeled in a cart loaded with several dozen volumes and a note from Frankfurter stating once Warren had read through these, he would understand the issue. In contrast,

to no avail.

As Warren grew accustomed to the Court, he relied more on his own judgment and began to resent Frankfurter's constant stream of advice. "All Felix does is talk, talk, talk," Warren told his colleagues. "He drives you crazy!"[44] Within three years, the new Chief Justice moved from a centrist position in the Court's makeup to alignment with the liberal wing, and for this he earned Frankfurter's condemnation.[45] In a letter to Learned Hand in 1957, a bitter Frankfurter lumped Warren with Black and Douglas as men whose "common denominator [was] a self-willed self-righteous power-lust," and as men "undisciplined by adequate professional learning and cultivated understanding" who made decisions on the basis of "their prejudices and their respective pasts and self-conscious desires to join Thomas Paine and T. Jefferson in the Valhalla of 'liberty' and in the meantime to have the avant-garde of the Yale Law School . . . praise them!"[46]

III. An Arrogant Justice

Even when Frankfurter had constructive comments to make, his didactic manner rubbed the brethren the wrong way, especially Douglas. As Dennis Hutchinson has shown, Frankfurter began making suggestions for improving and strengthening Court procedures around 1946. At the beginning of every term he would circulate a lengthy memorandum enumerating and explaining his proposed changes. One can recognize in one section of the 1956 term memorandum all the irritating features discussed above:

> Even before I came on the Court, I had good reason to believe that

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when Warren asked Black if he could recommend anything that would help him to improve his writing, Black sent over a single volume, a work by Aristotle. Interview with Gerald Gunther, clerk to Earl Warren during the October 1954 Term (Aug. 1989).

44. G. Edward White, Earl Warren: A Public Life 179 (1982); Schwartz, *supra* note 32, at 25-27.

45. *See* Bernard Schwartz, *Felix Frankfurter and Earl Warren: A Study of a Deteriorating Relationship*, 1980 Sup. Ct. Rev. 115 (1980).

46. Letter from Felix Frankfurter to Learned Hand (June 30, 1957), *reprinted in* G. Edward White, Earl Warren: A Public Life 181 (1982). Interestingly enough, Frankfurter's hero, Louis Brandeis, was a great admirer of Jefferson. After a visit to Monticello, Brandeis wrote to Frankfurter: "I have spent a day at Charlottesville to see Monticello & the University. It is strong confirmation that T.J. was greatly civilized. Washington, Jefferson, Franklin, Hamilton were indeed a Big Four." Letter from Louis Brandeis to Felix Frankfurter (Sept. 22, 1927), Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.

> the course of proceeding leading to adjudication was not all that it might be. My grounds for feeling that the deliberative process was inadequate derived from the intimacies I had enjoyed over the years with Justices Holmes, Brandeis, and Cardozo.[47]

In his "October greeting" for the 1960 term, he suggested several changes that he thought would improve and speed up the voting and announcement procedures. In particular he wanted the per curiam decisions issued immediately, rather than allowing a single justice to hold up the announcement if he wanted to think about it some more; Frankfurter then asked for a conference to discuss his proposals. William O. Douglas, who by then had little patience for Frankfurter,[48] printed and circulated the following answer:

> With all due respect, I vote against a meeting to discuss the proposals. The virtue of our present procedures is that they are very flexible. If anyone wants a per curiam held over, it is always held. If anyone wants to pass and not vote on a case until a later conference, his wish is always respected. If anyone wants to circulate a memorandum stating his views on a case, the memo is always welcome. If we unanimously adopted rules on such matters we would be plagued by them, bogged down, and interminably delayed. If we were not unanimous, the rules would be ineffective. I, for one, could not agree to give anyone any more control over when I vote than over how I vote.
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> . . . We need not put ourselves in the needless harness that is proposed.[49]

When Frankfurter renewed the suggestion the following year, Douglas expressed his continued opposition in even stronger terms.[50]

As Professor Hutchinson notes, despite the existence of a number of worthwhile ideas in these annual memoranda, Frankfurter's

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47. Hutchinson, *supra* note 34, at 182-83.

48. The mutual dislike between the two is explored in Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 71 (1988).

49. Memorandum from William O. Douglas to Conference, October 13, 1960, *reprinted in* THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS 89 (Melvin I. Urofsky ed., 1987).

50. Memorandum of William O. Douglas to Conference (Oct. 23, 1961), *reprinted in* THE DOUGLAS LETTERS: SELECTIONS FROM THE PRIVATE PAPERS OF JUSTICE WILLIAM O. DOUGLAS 89 n.1 (Melvin I. Urofsky ed., 1987).

abrasiveness often prevented a fair hearing. For example, Frankfurter often held up decisions for weeks and even months as he laboriously prepared his elaborate opinions. At the end of the 1948 term, Douglas (who always wrote quickly) complained about delays and suggested that a case should be reassigned if a justice holds up his opinion more than three months after the case has been decided at conference. "I do not think," he told the brethren, "in fairness to each other and the litigants, one of us [Frankfurter] should be allowed to serve his own personal ends by holding cases beyond that time."[51]

Once again Frankfurter, who prided himself on understanding the importance of personal relations and individuality on the Court, misjudged the issue. His proposal can be seen as part of his emphasis on procedure, on getting the rules and the process right, and in his belief that the right procedure always will produce the right result. Douglas's chilly response is undoubtedly correct, in that judging can not always be girdled by rules, that there has to be room for flexibility, for the accommodation of a justice's second thoughts, to rethink and perhaps rediscuss a difficult issue rather than rushing to judgment because of an artificially imposed time limit.

Undoubtedly, tension existed between Frankfurter and his strong-willed colleagues on the nation's highest court. Other justices, however, holding equally strong views, have managed to remain on civil and even cordial terms with associates adhering to diametrically opposite opinions. With the exception of the anti-Semitic McReynolds, Brandeis got along well with the conservatives who dominated the Court during most of his twenty-three year tenure. In recent years William Rehnquist could not have been further apart doctrinally from William Brennan, yet the two got along quite well. Frankfurter, for all that he could be, charming, solicitous, witty and outgoing, was also duplicitous and conniving. These latter characteristics triggered confrontation.

Frankfurter tended to divide the world into disciples and mentors. While possibly an appropriate attitude for a professor, it boded ill when he had to deal with persons who did not care to be treated as students. For example, this attitude led to a break between Frankfurter and two of his most gifted protégés, Ben Cohen

51. Memorandum from William O. Douglas to Conference, June 15, 1949, *reprinted in* SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 254 (1984).

and Thomas Corcoran, who after seven years of doing top-level work for the President of the United States, refused to be treated any more as two of Frankfurter's brighter students. "Felix is incapable of having adult relationships!" Cohen complained; Frankfurter could relate well to his mentors and his students, but not to his peers.[52]

IV. An Analytical Justice

Besides personalities, far more basic an ingredient in Frankfurter's ineffectiveness as a justice were the philosophical differences in fundamental issues, such as judicial restraint and the incorporation of the Bill of Rights, that split the Court in the early 1940's and have still not been fully resolved today. One can characterize the division between the Frankfurter and the Black/Douglas views in several ways — restraint versus activism, process versus results, and even Yale versus Harvard, for both Frankfurter and Douglas started down their respective jurisprudential paths during the academic stages of their careers.

Frankfurter long venerated Holmes and Brandeis for their call to judges to refrain from allowing their own economic prejudices to overrule the proper policymaking role of elected officials. As a professor, Frankfurter championed the Holmes/Brandeis view. In his writings and classes he had advocated judicial restraint as a basic element of a proper jurisprudential credo. One of his students, Louis L. Jaffe, wrote that Frankfurter could not be characterized as either a conservative or a liberal: "It is of the very essence of his judicial philosophy that his role as a judge precludes him from having a program couched in these terms of choice."[53] Frankfurter's close friend and colleague at Harvard, Thomas Reed Powell, defended Frankfurter when former admirers claimed he had forsaken the liberal path. Powell suggested that one facet of liberalism in a judge, "may be the insistence that courts should not interpose their vetoes except under the strongest constitutional compulsions."[54]

Frankfurter's study of constitutional development, which em-

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52. Bruce Murphy, The Brandeis/Frankfurter Connection 191 (1982).

53. Louis L. Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 Harv. L. Rev. 357, 358 (1949).

54. Thomas Reed Powell, *Judicial Protection of Civil Rights*, 29 Iowa L. Rev. 383, 395 (1944).

phasized process, led him to believe that courts should limit their jurisdiction to matters of public law. He was not so naive to believe that personality and prejudice played no role in court decisions, but felt judges had the obligation to work earnestly to keep their personal considerations from affecting their decisions.[55] A critic claimed that while at Harvard, Professor Frankfurter worried over each case he taught like a terrier, exploring every minute matter of history, procedure, and philosophy, losing sight of the larger policy issues involved.[56] A fairer view may be gleaned from what Powell wrote of his own teaching:

> My emphasis is on process, process, process, on particularities, particularities, on cases, cases, cases, on the contemporary court, on resolving competing considerations, on watching for practicalities not likely to be expressed in opinions in which the Court pretends that the case is being decided by its predecessors rather than by itself.[57]

This coldly analytical method, Frankfurter believed, allowed courts and students to let reason triumph over emotion. "I have a romantic belief in Reason," he told Black. He told Jackson that "one drawback of a professor is that he does believe in reason and profoundly believes that the mode by which results are reached is as important — maybe more important — in the evolution of society as the result itself."[58] (Frankfurter might have profited if he had kept in mind a little aphorism he once quoted to Powell that logic "is the art of going wrong with confidence."[59])

A major problem with Frankfurter's claim of rational objectivity, of course, is that Frankfurter lacked the Olympian detachment of Holmes or the steely discipline of Brandeis to keep his emotions in

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55. "It's easy to write opinions," Frankfurter told a friend, "if one only writes what one thinks is right. But here, I suppose, naiveté is not a virtue but a handicap, or, at best, a habit." Letter from Felix Frankfurter to Thomas Reed Powell (Jan. 29, 1941), Powell Papers, Harvard Law School Library, Cambridge, Massachusetts.

56. Fred Rodell, *Felix Frankfurter, Conservative*, HARPER'S MAG., Oct. 1941, 449, 453.

57. LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960, at 51 (1986).

58. Letter from Felix Frankfurter to Jackson (Feb. 23 1944), Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C. Frankfurter captioned this letter, which dealt with a question of statutory interpretation, "*Some Reflections of an Unashamed Professor.*"

59. NGAIO MARSH, DEATH AT THE BAR (1940) (quoted in letter from Felix Frankfurter to Thomas Reed Powell (May 6, 1940), Powell Papers, Harvard Law School Library, Cambridge, Massachusetts).

check.[60] He had strong feelings; one friend, for example, called him "a passionate person, who ha[d] given up the other passions of his life for this one — the institution of the Court."[61] Douglas claimed that Charles Evans Hughes said that judges based their decisions ninety percent on emotions. Frankfurter, upon hearing this, denounced the idea, but Douglas noted "no one poured his emotions more completely into decisions, [than Frankfurter] while professing just the opposite."[62]

We can examine this confluence of alleged rationality and emotion, of adherence to judicial restraint and ignorance of changing circumstances, in three groups of cases: the flag salute cases decided early in Frankfurter's career on the Court;[63] the Communist speech cases midway through;[64] and the apportionment cases at the end of his tenure on the bench.[65]

V. The First and Fourteenth Amendments

The 1940 flag salute case[66] presented no new questions to either the Court or to Frankfurter. Whether or not a state could compel school children to salute the American flag had been an issue in twenty states between 1935 and 1940, and had been the subject of major litigation in seven. Prior to *Minersville School District v. Gobitis*, the United States Supreme Court had upheld state court decisions validating compulsory flag salute laws four times.[67] Jehovah's Witnesses objected to the flag salute because of their literal reading of Exodus 20:4-5, and their equation of the salute with bowing down to graven images.

Frankfurter, a naturalized American citizen who always took ideals of citizenship and patriotism very seriously, had little sympathy with those who, as he saw it, refused to meet their civic obligations. In a memorandum to Secretary of War Newton D. Baker in September 1918, Frankfurter condemned conscientious objectors who

60. For the striking temperamental differences between Holmes and Frankfurter, see Lash, *supra* note 10, at 77. Frankfurter himself admitted that he lacked Brandeis's "austerity." Letter from Felix Frankfurter to Thomas R. Powell (Feb. 13, 1942), Powell Papers, Harvard Law School Library, Cambridge, Massachusetts.

61. Bernard Schwartz, Super Chief: Earl Warren and His Supreme Court 40 (1985).

62. Douglas, *supra* note 18, at 33-34.

63. *See infra* notes 66-110 and accompanying text.

64. *See infra* notes 111-144 and accompanying text.

65. *See infra* notes 145-159 and accompanying text.

66. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

67. Fine, *supra* note 33, at 185.

refused to do even noncombatant service, suggesting they "be turned over to the Fort Leavenworth authorities for treatment."[68]

Frankfurter apparently saw no trampling of First Amendment rights and, during oral argument of the case on April 25, 1940, passed a note to Frank Murphy questioning whether the Framers of the Bill of Rights "would have thought that a requirement to salute the flag violate[d] the protection of 'the free exercise of religion?' "[69] Chief Justice Hughes assigned the opinion to Frankfurter, who circulated a draft in May. Douglas, who later intimated that he might have voted the other way had Stone circulated his dissent earlier,[70] endorsed not only Frankfurter's original draft, but the final version as well. "This is a powerful moving document of incalculable contemporary and (I believe) historical value," he wrote, terming the opinion "a truly statesmanlike job." He scribbled a similar encomium on the recirculation.[71]

In his opinion for the eight to one majority, Frankfurter framed the "precise" issue in terms of judicial restraint and called upon the Court to defer to the wisdom and prerogatives of local school authorities:

> To stigmatize legislative judgment in providing for this universal gesture of respect for the symbol of our national life in the setting of the common school as a lawless inroad on that freedom of conscience which the Constitution protects, would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence. . . . [T]o the legislature no less than to courts is committed the guardianship of deeply cherished liberties.[72]

There is almost a formulaic quality about the opinion that reappears in many of Frankfurter's later decisions. First, is the legislative end legitimate? Here the answer appeared obvious; of course school boards and the states have a real interest in promoting patriotism and loyalty to the nation, of which the flag is the symbol. Second, are the means chosen reasonable? If so, then it is not up to the courts to say that a better way exists. Therefore, if the end is

68. MASON, *supra* note 3, at 514.
69. FINE, *supra* note 33, at 185.
70. DOUGLAS, *supra* note 18, at 45.
71. HIRSCH, *supra* note 41, at 150.
72. *Gobitis*, 310 U.S. at 597-98, 600.

legitimate and the means chosen are reasonable, the measure — in this case the flag salute — is constitutional.[73] Frankfurter paid practically no attention to the Gobitis' claim that First Amendment rights of free exercise of religion had been violated, and in a nominal bow to balancing, found national unity a far more pressing matter.[74]

One might stop for a moment and compare the Frankfurter approach in *Gobitis* to later First Amendment analysis. Where Frankfurter's lead question was whether the state has a legitimate interest, modern courts ask whether speech or free exercise rights have been restricted. If yes, then the next question is whether the state has a *compelling* interest to warrant that restriction. A merely "legitimate" or even an "important" interest will not justify violation of the First Amendment. If, however, the state does have a compelling interest, then the courts ask whether the limitation has been imposed in the least restrictive manner.

The difference between the two approaches is neither semantic nor one of degree; it distinguishes between a view that sees regulations of speech or religion in the same manner as economic rules, and an approach that elevates the rights of the individual above the administrative convenience of the state. In terms of balancing, it places far greater weight on individual liberty than on any but the most compelling governmental interest.

Only Harlan Fiske Stone dissented to the decision in *Gobitis*[75] and much of the liberal press applauded his opinion and denounced that of Frankfurter. Harold Laski, a close friend of Frankfurter, wrote Stone to tell him "how right I think you are . . . [and] how wrong I think Felix is."[76] Harold Ickes, recognizing Frankfurter's concern about the war in Europe (the decision came down during the Dunkirk evacuation), thought the opinion worse than useless, "[a]s if the country can be saved, or our institutions

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73. *Gobitis*, 310 U.S. at 597-98; *see also* Sanford V. Levinson, Skeptism, Democracy, and Judicial Restraint: An Essay on the Thought of Oliver Wendell Holmes and Felix Frankfurter 225-26 (1969) (unpublished Ph.D. dissertation, Harvard University).

74. There is little question but that Frankfurter's own experience as an immigrant boy Americanized in the New York public school system, and his intense patriotic fervor, played a significant role in how he saw the facts of the two cases. For an interesting discussion of this see Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675 (1984).

75. *Gobitis*, 310 U.S. at 601.

76. MASON, *supra* note 3, at 532.

preserved, by forced salute of our flag by these fanatics. . . ."[77]

Frankfurter knew that the opinion troubled some of his friends and seemed to run counter to his earlier reputation as a civil libertarian. He wrote Alice Hamilton that he could appreciate her concern: "after all, my life has not been dissociated from concern for civil liberties."[78] In the files concerning the flag salute cases, there is an undated memorandum in Frankfurter's handwriting that reads: "No duty of judges is more important nor more difficult to discharge than that of guarding against reading their personal and debatable opinions into the Case." In this opinion, however, Frankfurter certainly read into it his zealous love of country and his belief that all other Americans should be just as patriotic as he.

Behind *Gobitis*, of course, was the whole issue of how far the protection of the Bill of Rights extended to the states, and what role the courts had in determining the limits of that protection. Frankfurter's mentor and hero, Louis Brandeis, first intimated that the Fourteenth Amendment's Due Process Clause could mean protection of speech as well as property.[79] By the 1930's, the doctrine of incorporation, as this idea came to be called, was accepted, at least in principle, by the Court.[80] Problems then arose in deciding particulars, and here Frankfurter followed the guidelines set down by another of his heroes, Benjamin N. Cardozo, in *Palko v. Connecticut*.[81] In *Palko*, Cardozo suggested that the Fourteenth Amendment only incorporated those protections that were "of the very essence of a scheme of ordered liberty"[82] and "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[83]

Despite the eight to one vote, at least three members of the *Gobitis* majority — Black, Douglas and Murphy — found themselves uncomfortable with Frankfurter's application of *Palko*. Murphy was troubled by the decision from the start.[84] Black did not

77. ICKES, *supra* note 5, vol. 3, at 199.

78. Letter from Felix Frankfurter to Alice Hamilton (June 13, 1940), Papers of Felix Frankfurter, Harvard Law School Library, Cambridge, Massachusetts.

79. *See* Gilbert v. Minnesota, 254 U.S. 325, 334, 343 (1920) (Brandeis, J., dissenting).

80. *See* Gitlow v. New York, 268 U.S. 652 (1925) (speech); Near v. Minnesota, 283 U.S. 697 (1931) (press); and Powell v. Alabama, 287 U.S. 45 (1932) (right to counsel).

81. 302 U.S. 319 (1937).

82. *Id.* at 325.

83. *Id.* (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

84. FINE, *supra* note 33, at 185. Murphy had even prepared a dissent, but reluctantly decided to go with the majority.

like the law, but saw nothing in the Constitution to invalidate the measure. When the Court convened after its summer recess, Douglas told Frankfurter that Black had had second thoughts about his *Gobitis* vote. When Frankfurter asked if "Black had been reading the Constitution," Douglas responded, "No — he has been reading the papers."[85] In the newspapers Black, and everyone else, would have noted the Justice Department reports which stated that in the weeks following the decision there had been hundreds of attacks on Jehovah's Witness members, especially in small towns and rural areas, and that this pattern continued for at least two years.

The three brooded over this situation and finally indicated their feelings when the Court announced its decision in another Jehovah's Witness case, *Jones v. Opelika*.[86] In *Opelika*, the sect had refused to pay a municipal licensing fee for peddlers prior to selling their religious tracts. The issue was essentially the same as in *Gobitis*; the extent to which the government's acknowledged power to maintain public order impinged on the free exercise of religion.

Frankfurter again voted with the majority in favor of the state, but this time four judges dissented — Stone, Black, Douglas, and Murphy. Moreover, in an unprecedented step, the latter three justices appended a statement acknowledging *Opelika* as a logical extension of *Gobitis*. They believed it "an appropriate occasion" to confess they had been wrong in the earlier case, since the majority opinion, as in *Opelika*, "put the right freely to exercise religion in a subordinate position," in violation of the First Amendment.[87] This recantation infuriated Frankfurter, who pointed out that *Gobitis* had not been challenged in the *Opelika* litigation or even mentioned in conference.

In light of the spate of attacks on Jehovah's Witness members, the apparent shift in Court sentiment, and the news of Hitler's "Final Solution" of the Jewish question in Europe, the Court accepted another case dealing with required flag salutes and free exercise of religion. Both the American Bar Association Committee on the Bill of Rights and the American Civil Liberties Union, a rare tandem, filed amici briefs in support of the Jehovah's Witness members. Justice Jackson, who hardly ever voted for minority

85. FINE, *supra* note 33, at 187.
86. 316 U.S. 584 (1942).
87. *Id.* at 623-24.

rights against a public interest argument, this time joined the liberals to strike down the mandatory salute. In fact, he wrote one of the most eloquent opinions of his judicial career declaring that: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."[88]

Frankfurter's impassioned dissent, if taken literally, nearly denies the Court any role in enforcing the Bill of Rights and seems to warrant Douglas's denunciation of it in his memoirs. "The Frankfurter philosophy was fully exposed," he wrote. "[A]lthough free exercise of religion was guaranteed by the First and Fourteenth Amendments, the legislature could nonetheless regulate it by invoking the concept of due process, provided they stayed within reasonable limits."[89] Indeed, despite Frankfurter's comment that he belonged to "the most vilified and persecuted minority in history,"[90] he in fact dismissed judicial protection of minorities. The Framers, he said, "knew that minorities may disrupt society."[91]

Frankfurter worked for weeks on his dissent, and in apologizing to Jackson for holding up the decision, he described his dissent as "the expression of my credo regarding the function of this Court in invalidating legislation."[92] He reiterated the formula he had used in the earlier decision that "this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered."[93]

However, because of Jackson's eloquent depiction of the meaning of free exercise of religion, Frankfurter could not pass over it as lightly as he had in *Gobitis*. Instead he took a minimalist approach. The First Amendment provided "freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma."[94] Claims of conscience by themselves could never

88. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
89. DOUGLAS, *supra* note 18, at 45.
90. *Barnette*, 319 U.S. at 646.
91. *Id.* at 653.
92. Letter from Felix Frankfurter to Robert H. Jackson (June 4, 1943), Papers of Felix Frankfurter, Harvard Law School Library, Cambridge, Massachusetts. Frankfurter evidently had a difficult time in writing the opinion, and as he told Jackson, "perhaps because it is credo and not research that the expression of it is so recalcitrant." *Id.*
93. *Barnette*, 319 U.S. at 649.
94. *Id.* at 653.

justify exemption from valid laws which have a reasonable basis. Since, as Sanford Levinson points out, the state could always create the nexus of a reasonable justification for its action, the courts would never impose any serious review on state action.[95]

Frankfurter's pride in his dissent and the importance he attached to it led him to an active extrajudicial campaign to publicize his views. He sent copies to retired Chief Justice Hughes,[96] and suggested to President Roosevelt that a copy be placed in the Hyde Park library, since it would "furnish to the future historian food for thought on the scope and meaning of some of the Four Freedoms — their use and their misuse."[97] He wrote friends in the press, such as Bruce Bliven of the *New Republic* and Frank Buxton of the *Boston Herald*, pointing out that Learned Hand and Louis Brandeis had agreed with his *Gobitis* opinion. But, he noted, "those great libertarians," Black and Douglas, had also agreed "until they heard from the people."[98]

There is a bitter sadness here, due perhaps to Frankfurter's recognition that he had lost an opportunity to lead the Court down the road of what he considered its proper jurisprudential role, namely a limited jurisdiction in mediating among the elements of the federal system. But one can also regret the failure of a man who had studied the Court for over a quarter-century, a man who in his own words "knew all there was to know . . . on what had gone on behind the scenes,"[99] a man who had argued brilliantly that the Court had to be sensitive to changes in the larger society — only to allow his views to become so rigid as to deny him flexibility or room for change and maneuver.[100]

His heroes, Holmes and Brandeis, argued for judicial restraint,

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95. Levinson, *supra* note 73, at 232.

96. *See* Letter from Felix Frankfurter to Charles Evans Hughes (June 15, 1943), Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.

97. Letter from Felix Frankfurter to Franklin D. Roosevelt (May 3, 1943), *reprinted in* MAX FREEDMAN, ROOSEVELT & FRANKFURTER: THEIR CORRESPONDENCE 1928-1945, at 699 (1967). Frankfurter must have sent the President an early draft of his dissent, since the final decision did not come down for another month.

98. HIRSCH, *supra* note 41, at 175. However, see Hirsch's interesting footnote to this passage, indicating that Brandeis may not have been as supportive of the *Gobitis* opinion as Frankfurter claimed. *Id.* at 243 n.190.

99. Lash, *supra* note 10, at 175 (diary entry dated Jan. 30, 1943).

100. Robert Burt sees the flag-salute cases as epitomizing Frankfurter's role as the outsider become insider, and that all he would offer to the Jehovah's Witnesses was an invitation that they give up their absurd practices and become full-fledged Americans, as he had. ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 44-45 (1988).

but they did so in cases primarily involving economic questions. Holmes, in *Lochner v. New York*,[101] and Brandeis, in *New State Ice Co. v. Liebmann*,[102] called upon courts not to interpose their economic views in place of legislative policy. But Holmes and Brandeis also initiated the modern jurisprudence of free speech.[103] Brandeis was the first to suggest that the Fourteenth Amendment incorporated parts of the Bill of Rights and that courts had a special obligation to scrutinize legislative actions which restricted those rights.[104] Another one of Frankfurter's judicial heroes, Benjamin Nathan Cardozo, was the first to express the doctrine of incorporation in a systematic fashion,[105] and Harlan Fiske Stone, in his famous *United States v. Carolene Products Co.* footnote,[106] called for a heightened level of review when basic rights were at stake. The tragedy of Mr. Justice Frankfurter was that he became a prisoner of an idea — judicial restraint — and failed to distinguish between the regulation of economic and property rights and limitations upon individual liberties.

As for the charge that Douglas and Black "heard from the people," one might recall Holmes's comment in *Lochner* that the case had been decided "upon an economic theory which a large part of the country does not entertain."[107] One might also note Brandeis's famous talk on "the living law" and his charge that courts had been "largely deaf and blind" to the great revolutionary changes then taking place, and had "continued to ignore newly arisen social needs."[108] Much of the agitation over the judicial system during the Progressive Era resulted from popular perceptions that the courts and the law had not kept up with the times. In *Gobitis*, the Court made a mistake,[109] and in doing so, unleashed ugly passions

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101. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

102. 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting).

103. *See* PAUL L. MURPHY, WORLD WAR I AND THE ORIGINS OF CIVIL LIBERTIES IN THE UNITED STATES 266 (1979). One might also compare Frankfurter's earlier comments on Holmes and free speech, which can almost be read as implying that Holmes supported a "preferred position" for First Amendment rights, and Frankfurter's own more cramped views as expressed in the flag salute cases. FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 84-85 (1938).

104. Gilbert v. Minnesota, 254 U.S. 325, 334, 343 (1920) (Brandeis, J., dissenting).

105. Palko v. Connecticut, 302 U.S. 319, 324-26 (1937).

106. 304 U.S. 144, 152 n.4 (1938).

107. Lochner v. United States, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

108. Louis D. Brandeis, *The Living Law*, 10 ILL. L. REV. 461, 464 (1916).

109. Chief Justice Stone, in a conversation with writer Irving Brant, said (although not in connection with *Gobitis*): "I believe the Court should correct its own errors, even when I help to make them." MASON, *supra* note 3, at 589.

and prejudices. That it rectified its error ought not to be seen as pandering to popular tastes, but as a sign of strength and self-confidence. The Court has, after all, adhered to other unpopular opinions when it has believed them to be right.[110]

VI. The Red Scare, Free Speech, and the Restrained Justice

In the spring of 1946, Winston Churchill stepped to the podium of Westminster College in Fulton, Missouri, and, in describing conditions in Europe, declared that "From Stettin in the Baltic to Trieste in the Adriatic an iron curtain has descended upon the Continent." Within an amazingly short time the Soviet Union, our ally in the war against fascism, became our enemy, and the United States would be engaged in a "cold war" against Russia for the next four decades.

The fear of communist expansion triggered a new Red Scare in the United States, one even worse than the hysteria following the first World War. In 1919, the bugaboo had been far more imaginary than real, but while false fears and the incitement of demagogues fanned the flames of nativism and paranoia in the 1940's and 1950's, even the most level-headed person could find much to worry about. In a relatively short period of time one witnessed the Berlin blockade, the triumph of Mao Tse-tung and the communists in China, the first Soviet atomic bomb, the discovery that British and American scientists had spied for the Russians, the invasion of South Korea, and the exposure and subsequent conviction of the Rosenbergs.

In response to both real and imagined threats, federal and state governments established a number of so-called loyalty and security programs that affected nearly everyone who worked for government, from janitors on up, in what William O. Douglas called "the most intensive search for ideological strays that we have ever known."[111] The various laws passed, the committees that attempted to ferret out "security risks," and the loyalty and security programs led to numerous court challenges, primarily under the First and to a lesser extent the Fifth Amendment, requiring judges to balance the real or perceived needs of national security against

110. *See* Brown v. Board of Educ., 347 U.S. 483 (1954) (school desegregation); Engel v. Vitale, 370 U.S. 421 (1962) (school prayer); Miranda v. Arizona, 384 U.S. 436 (1966) (rights of the accused); Roe v. Wade, 410 U.S. 113 (1973) (abortion).

111. Douglas, *supra* note 18, at 57.

the individual rights guaranteed in the Constitution.

Brandeis had warned in the post-World War I cases that in determining whether speech, no matter how seemingly inflammatory, actually posed a clear and present danger, courts "had to exercise good judgment; and to the exercise of good judgment, calmness [was], in times of deep feeling and on subjects which excite passion, as essential as fearlessness and honesty."[112] But where Brandeis saw the judiciary as fearlessly standing against the tide of mob emotion, Frankfurter saw danger in the courts becoming involved in any manner. Frankfurter privately deplored the excesses of McCarthyism and the witch-hunts conducted in the name of national security, and risked personal opprobrium in his defense of some of the accused. "History teaches," he declared, "that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day."[113] On the bench, however, he continued to call for deference to the other agencies of government, since he approved of their nominal goal of repulsing communism.

Frankfurter, it should be noted, did not stand alone; until the mid-fifties only Black and Douglas protested the attacks on First Amendment rights, and their professional reputations suffered at the hands of Frankfurter's acolytes at Harvard who praised his "process jurisprudence" and devotion to judicial restraint and institutional deference.[114] If there is any group of cases that highlights the failure of Frankfurter's philosophy, it must be the First Amendment decisions that came out of this second Red Scare.[115]

In March 1940, Congress reenacted the Espionage Act of 1917, and then in June passed the Alien Registration, or Smith Act which drew together a variety of anti-alien and anti-radical proposals. Although aimed primarily at the Communists, its broadly phrased terms could apply to anyone conspiring to overthrow the government, or even conspiring to advocate an overthrow.[116] The

112. Schaefer v. United States, 251 U.S. 466, 482-83 (1920) (Brandeis, J., dissenting).

113. Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

114. L.A. Powe, Jr., *Justice Douglas after Fifty Years: The First Amendment, McCarthyism and Rights*, 6 CONST. COMMENTARY 267, 277-79 (1989).

115. For a fuller discussion of Frankfurter's position in the various internal security cases, see MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 104-27 (1991).

116. The genesis and provisions of the Smith Act are detailed in MICHAEL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES 9-34 (1977).

Smith Act had caused little immediate impact because none of the men serving as Attorney General during the war sympathized with its provisions.[117]

After the war, however, anti-communist sentiment within the United States built as the iron curtain descended across Europe. Harry Truman established a Temporary Committee on Employee Loyalty in November 1946, and following criticism that he had not gone far enough, set up a full scale Federal Loyalty and Security Program the next year. The Attorney General and the FBI launched a massive investigation of all federal employees under Executive Order 9835. The Attorney General compiled a list of allegedly subversive organizations, with membership in any of these groups constituting "reasonable doubt" about a person's loyalty.[118]

The Supreme Court entered the postwar era with relatively little Speech Clause jurisprudence aside from the "clear and present danger" test developed by Holmes and Brandeis in the 1920's. But Holmes's famous aphorism about falsely shouting fire in a crowded theater is not a very useful analytical tool to determine when a danger is real, and if real, when it is proximate, and if proximate, if it is of the magnitude that justifies state intervention.[119]

Justices Black and Douglas became increasingly unhappy with the test, especially as applied by the conservative majority after the war. Douglas believed that had Holmes and Brandeis had the opportunity to develop their ideas more fully in additional speech cases, they would have eventually abandoned the "clear and present danger" test in favor of a free and unrestricted speech test except in the most dire emergency. Douglas, in fact, later claimed

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117. *See, e.g.*, FRANCIS BIDDLE, IN BRIEF AUTHORITY 233-51 (1962).

118. PAUL L. MURPHY, THE CONSTITUTION IN CRISIS TIMES, 1918-1969, at 256-57 (1972). The Court evaded the First Amendment issues involved in the blacklists when it upheld the power of the Attorney General to make such a list, but granted a declaratory judgment removing three organizations from the list. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1949). Frankfurter concurred in the result, but did address the constitutional questions in terms of the Fifth Amendment's Due Process Clause rather than on First Amendment grounds, reasoning that the Attorney General had not given notice, established criteria for inclusion on the list, or held hearings at which the accused could respond, and thus had failed to meet the constitutional test. *Id.* at 149, 171-72. Black and Douglas also concurred and were the only justices even to indirectly inquire into the right of the government to regulate ideas through proscriptive lists. *Id.* at 144 (Black, J., concurring); *Id.* at 174 (Jackson, J., concurring).

119. In this regard, see Alan M. Dershowitz, *Shouting "Fire!,"* ATLANTIC, Jan. 1989, at 272.

the Holmes dissent in *Gitlow v. New York*[120] "moved closer to the First Amendment ideal."[121]

Black and Douglas, but especially Black, began to develop a new jurisprudence that viewed the First Amendment, particularly the Speech Clause, as occupying a "preferred" position among constitutionally protected rights. They argued for an "absolutist" interpretation of the First Amendment's prohibition against the abridgement of speech. The First Amendment, in their view, barred all forms of governmental restriction on speech such that there was "no place in the regime of the First Amendment for any 'clear and present danger' test."[122] The reason, as Black explained elsewhere, was because the test "[could] be used to justify the punishment of advocacy."[123] It could only function as a balancing test, and rights protected under the First Amendment cannot be balanced; as such, it became "the most dangerous of the tests developed by the justices of the Court."[124]

For Frankfurter, on the other hand, the evaluation and balancing implicit in the "clear and present danger" test fit perfectly with his conception of the role of the judiciary. By applying rigorous tools of analysis and clear-headedly evaluating the circumstances, judges would be able to say with reasonable certainty when a clear and present danger existed warranting state action and when it did not. But by this view, explicating First Amendment issues did not differ at all from explicating Commerce Clause questions. In a letter to Stanley Reed, Frankfurter asked:

> When one talks about "preferred," or "preferred position," one means preference of one thing over another. Please tell me what kind of sense it makes that one provision of the Constitution is to be "preferred" over another. . . . The correlative of "preference" is "subordination," and I know of no calculus to determine when one provision of the Constitution must yield to another, nor do I know any reason for doing so.[125]

Comments like this led Douglas to charge that Frankfurter saw the

120. 268 U.S. 652, 672 (1925) (Holmes, J., dissenting).
121. Brandenburg v. Ohio, 395 U.S. 444, 452 (1969) (Douglas, J., concurring).
122. *Id.* at 454.
123. HUGO L. BLACK, A CONSTITUTIONAL FAITH 52 (1969).
124. *Id.* at 50.
125. Letter from Felix Frankfurter to Stanley Reed (Feb. 7, 1956), Felix Frankfurter Papers, Manuscript Division, Library of Congress, Washington, D.C.

First Amendment, not as a protection against state regulation of speech, but as an invitation to do so, with "the constitutional mandate being construed as only a constitutional admonition for moderation."[126] In fact, Frankfurter saw moderation as the guiding light of jurisprudence; but would moderation serve the interests of either justice or the First Amendment when the entire society seemed inflamed by hysteria? The answer to this question can be found in *United States v. Dennis*.[127]

While actively seeking "security risks" inside the government, the Truman Administration went after the Communist Party directly. On July 20, 1948, it secured a grand jury indictment against twelve members of the Party's national board, including Eugene Dennis and William Z. Foster, for conspiring with one another and with unknown persons to:

> organize as the Communist Party of the United States, a society, group, and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force, which said acts are prohibited by . . . the Smith Act.[128]

It would take nearly three years from this initial indictment for the case to reach the Supreme Court on appeal from one of the most bombastic political trials in American history.

Dennis constituted the final judicial validation of the government's loyalty-security program.[129] In *Dennis* the Court determined the constitutionality of the Smith Act as applied to leaders of the Communist Party. They had been indicted for (1) conspiring

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126. DOUGLAS, *supra* note 18, at 47.

127. 341 U.S. 494 (1951); *see infra* text accompanying notes 130-133.

128. BELKNAP, *supra* note 116, at 51.

129. Unions had been purged of known or admitted communists under § 9(h) of the Taft-Hartley Act, sustained by the Court in American Communications Association v. Douds, 339 U.S. 382 (1950). Frankfurter had concurred in all but one section of Chief Justice Vinson's opinion. He and Jackson rejected that provision covering people who "believe in" the overthrow of the government by force or unconstitutional methods, since "probing into men's thoughts trenches on those aspects of individual freedom which we rightly regard as the most cherished aspects of Western civilization." *Id.* at 415, 421 (Frankfurter, J., concurring). Additionally, the government loyalty program was upheld in Bailey v. Richardson, 341 U.S. 918 (1951) (per curiam) (equally divided court). *Bailey* relied heavily on the Attorney General's list of suspected organizations, which had been upheld in *McGrath*.

to organize as an assembly of persons who teach and advocate the overthrow and destruction of the government of the United States by force and violence, and (2) advocating and teaching the duty and necessity of overthrowing the government by force and violence.[130]

At no point in the indictment did the government allege that any revolutionary acts other than teaching and advocacy had taken place, and although "seditious conspiracy" remained a crime on the statute books, the Justice Department did not charge the eleven men with conspiring to overthrow the government.[131] In essence, they were tried and convicted of conspiring to form a party to teach and advocate the overthrow of the government. By a vote of six to two (with former Attorney General Tom Clark not participating), the Court affirmed the conviction.

The central issue involved in the case was reconciling the constitutional guarantee of free speech with a conviction for no more than speaking and teaching. The trial judge, Harold Medina, solved the problem by the bridge of intent, instructing the jury that it could find the defendants guilty if it believed the defendants intended to overthrow the government as soon as the opportunity arose.[132] The highly respected Learned Hand sustained the conviction on appeal, arguing that courts had to balance a number of factors in applying a version of the clear-and-present danger test. "In each case they must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[133] Given the recent events in Europe and Asia, it seemed evident that Russia intended to conquer the world, and the American Communist Party, as a highly disciplined arm of the international movement, stood ready to act at a moment's notice. The conspiracy existed, and the government could act to avert the evil.

Chief Justice Vinson closely followed Hand's reasoning in his plurality opinion for the Court, an opinion joined by Burton, Minton and Reed. Although he paid lip service to the Holmes test,

130. United States v. Dennis, 183 F.2d 201, 205 (2d Cir. 1950), *aff'd* 341 U.S. 494 (1951).
131. *See id.* (no charge was listed).
132. *Id.* at 215.
133. *Id.* at 212. Hand personally disliked the Smith Act and, under his own earlier formulation of the test, would have limited restriction of speech only to those instances where the speech constituted a direct incitement to illegal action. *Id.* This test, however, never won the support of a majority on the high court.

Vinson pointed out that communism posed a far different and more menacing danger than the anarchism and socialism that Holmes and Brandeis dealt with in the 1920's cases. Therefore, the clear and present danger test could not possibly mean that before the government could act, it had to wait "until the *putsch* [was] about to be executed, the plans [were] laid and the signal [was] awaited."[134] By this line of reasoning, the government could not only reach speech directly inciting unlawful action, conspiring to promote such action or teaching that such action should occur, but could also reach speech that conspired to organize a group that would teach that such action ought to occur.[135]

Michael Belknap claims that Frankfurter realized that the Hand-Vinson modification of the clear-and-present danger test "could produce harmful results in future cases which had nothing to do with communism."[136] Frankfurter therefore refused to join in the plurality opinion, not because he objected to the results, but because he disagreed with Vinson's reasoning. Frankfurter's concurring opinion in *Dennis* clearly states his judicial philosophy regarding the First Amendment, and it stands in stark contrast to the powerful dissents filed by Black and Douglas.

Frankfurter began his opinion with the mandatory invocations of judicial restraint and deference. "History teaches," he declared, "that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures."[137] The primary responsibility for those decisions lay with the legislature, even in speech cases, and "there is ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security."[138] A careful review of all the relevant decisions made it clear, he asserted, that the Court had reached the right results.

Frankfurter personally disagreed with the policy of the Smith Act and feared that its heavy-handedness would silence not only

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134. Dennis v. United States, 341 U.S. 494, 509 (1950).

135. For an analysis of this distortion of the original Holmes-Brandeis formulation, see Louis B. Boudin, *"Seditious Doctrines" and the "Clear and Present Danger" Rule*, 38 VA. L. REV. 143, 315 (1952). The decision is defended in Wallace Mendelson, *"Clear and Present Danger" — From Schenck to Dennis*, 52 COLUM. L. REV. 52 (1952).

136. BELKNAP, *supra* note 116, at 145.

137. *Dennis*, 341 U.S. at 525 (Frankfurter, J., concurring).

138. *Id.* at 542.

those who sought to overthrow the government, but honest and loyal critics of its policies as well. But his devotion to judicial restraint and his refusal to accept a preferred-position status for speech or a special role for the courts in protecting civil liberties, left him limited room to maneuver. He tried to do so by reserving to the judiciary the right to review the application of laws which otherwise appeared facially valid.[139]

That is what the Court had done in this case, and Frankfurter emphasized that the seriousness of the communist danger far outweighed the "puny anonymities" that Holmes had defended in *Abrams* or the "futile" advocacies in *Gitlow*. The Communist Party, with its extensive organization, membership, and discipline constituted a serious threat to the nation. On the other hand, of course, one valued freedom of speech. But not "every type of speech occupies the same position on the scale of values,"[140] and "it is not for us to decide how we would adjust [this] clash of interests. . . . Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction of freedom of speech."[141]

If in the Court's judgment Congress abused its discretion, unreasonably tipped the balance too far in favor of security at the expense of freedom, or if the executive applied the law in an arbitrary and unfair manner, the Court would intervene; otherwise, a reasonable judgment by Congress touching upon the security of the nation should not be overturned by the judiciary. Frankfurter's opinion in *Dennis*, read in light of history, reflects more of judicial abdication of responsibility than measured deference and restraint.

It would be unfair to deride Frankfurter for failing to see then what others only saw later. However, the evidence seems to suggest that while he privately opposed the Smith Act prosecutions, he truly did not believe the Court could interfere. Douglas's harsh judgment that Frankfurter saw no difference between the Speech Clause and the Commerce Clause seems borne out by Frankfurter's own words. Douglas and Black did see a difference, and

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139. Frankfurter quoted from an essay by his former student Paul Freund that the clear-and-present danger test became a simplistic and useless tool unless it took into account numerous factors. These included the relative seriousness of the danger, the availability of other forms of control, and the specific intent of the speaker. PAUL A. FREUND, ON UNDERSTANDING THE SUPREME COURT 27 (1949).

140. *Dennis*, 341 U.S. at 544 (Frankfurter, J., concurring).

141. *Id.* at 550.

their eloquent dissents in *Dennis*, derided at the time by the process theorists as lacking in analysis, hit the mark perfectly.

Douglas summarized the majority position, including that of Frankfurter, as the product of fear and panic. He then quoted from Andre Vishinsky's *The Law of the Soviet State* that there could be no freedom of speech for foes of socialism. Douglas also warned his brethren and the country that "our concern should be that we accept no such standard for the United States."[142] Eventually the country would recover from the Red Scare madness, and the Black-Douglas position would be hailed for its unflinching defense of free thought. Before that happened, however, many more cases came to the Court, and although Frankfurter could occasionally find procedural means to support free speech, his devotion to judicial restraint and deference put him more often than not in the antilibertarian camp.[143]

VII. The Failure of Restraint

In 1957, to celebrate Frankfurter's seventy-fifth birthday, the *Yale Law Journal* dedicated its December issue in his honor.[144] No other law journal took notice of the event, not even Harvard's, although such milestones had long been an occasion for this type of homage. Frankfurter himself had helped arrange a number of these celebrations to honor Holmes, Brandeis, and Cardozo. While Frankfurter no doubt took satisfaction that he and his followers had captured Yale, the lack of recognition elsewhere only underscored the fact that he had never been able to exercise the leadership over the Court that he and his supporters had expected. Although he had managed to keep the Court's activist wing hemmed in over the past dozen years, that limited hegemony would soon pass. In 1962, his brethren on the Court handed Frankfurter a stunning defeat and elicited from him his last major dissent.

In 1946 Frankfurter thought he had erected a high and impenetrable wall to block judicial challenges to malapportioned state legislatures.[145] Then the civil rights movement burst on the national scene, and the NAACP went to court to challenge various southern devices to deprive blacks of their votes. In *Gomillion v.*

142. *Dennis*, 341 U.S. at 591 (Douglas, J., dissenting).
143. *See* Urofsky, *supra* note 115, at ch. 7.
144. *See* 67 Yale L.J. 179 (1957).
145. *See* Colegrove v. Green, 328 U.S. 549 (1946).

Lightfoot,[146] blacks challenged a gerrymandering scheme in Tuskegee, Alabama, that redrew city boundaries from a square into "an uncouth twenty-eight-sided figure."[147] The plan disenfranchised all but four or five of Tuskegee's registered black voters without depriving a single white of the franchise.

Alabama argued that the doctrine of *Colegrove v. Green*[148] barred jurisdiction. However, Frankfurter rejected this claim completely. The facts in *Colegrove* had affected all citizens; in Tuskegee "the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights. That was not *Colegrove v. Green*."[149] The Fifteenth Amendment to the Constitution spoke directly to the issue of black suffrage, and that moved the case from the realm of political questions to direct constitutional litigation.

Despite Frankfurter's best efforts to distinguish *Gomillion* from *Colegrove*, the inherent contradiction could not be hidden. If black citizens could secure judicial redress because their votes had been diluted, then why shouldn't white citizens, suffering from a different form of the same ailment, be able to seek similar relief?

The answer came one week later when the Court noted probable jurisdiction in a case challenging Tennessee's apportionment scheme.[150] The Tennessee legislature had not been reapportioned since 1901, even though the state constitution allocated representation on a population basis. The challengers claimed that this malapportionment foreclosed the option of securing redress through the traditionally preferred manner of legislative reform. They asked the Court to block any further elections under the 1901 apportionment and either direct at-large elections or decree a reapportionment based on the latest census figures.

Before the Court could decide whether to grant or deny relief,

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146. 364 U.S. 339 (1960). Although Frankfurter spoke for a unanimous Court, Douglas and Whittaker both filed brief concurring opinions. Douglas reiterated his adherence to his dissent in *Colegrove*, *id.* at 348, while Whittaker believed the decision should have been grounded in the Equal Protection Clause rather than in the Fifteenth Amendment. *Id.* at 349.

147. *Id.* at 340.

148. 328 U.S. 549 (1946).

149. *Gomillion*, 346 U.S. at 346-47.

150. Baker v. Carr, 364 U.S. 898 (1961) (probable jurisdiction noted). The decision in this case is printed at 369 U.S. 186 (1962).

however, it had to decide whether it had the power to do so. In *Colegrove*, Frankfurter had argued that the Court lacked jurisdiction in so-called "political questions" cases. If the Court followed *Colegrove*, as Frankfurter urged his brethren to do, then the petitioners would have to find some other way to break out of their trap. To affirm jurisdiction required overruling *Colegrove*.

The Court heard oral argument on the case on April 19 and 20, 1961, and then ordered reargument for October 9, 1961.[151] On March 26, 1962, the Court announced its decision. Justice Brennan held that jurisdiction existed, that the complaint stated a justiciable cause of action, and that the claimants had standing to pursue the case and seek relief. Brennan did not specifically overrule *Colegrove*. He noted accurately that four of the seven justices who participated in that case had held that jurisdiction existed, but one of them had also believed that a remedy could not be provided before the next election and had therefore concurred in the result. Frankfurter's former student adopted his one-time teacher's analytical method, although Frankfurter probably did not appreciate his former student's purpose. Brennan knew what the objections would be, and prepared a careful and lengthy opinion developing all of the salient points, each one leading to the inevitable conclusion that the Court could, in fact, take jurisdiction.

Six justices either joined in or concurred with Brennan; Whittaker did not participate, and Harlan and Frankfurter entered lengthy dissents. An obviously angry Frankfurter prefaced the delivery of his dissent with the comment that "[t]oday the Court begins a process of litigation that it requires no prophet to say — and Cassandra was sometimes right — will outlast the life of the youngest member of this Court."[152]

The majority decision would plunge the Court into a task which it had neither the experience nor the ability to handle: devising "what should constitute the proper composition of the legislatures of the fifty states."[153] Frankfurter retraced the history of the political question, explaining why previous courts in their wisdom had refused to entertain such claims. One could hardly fail to note that

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151. For oral arguments before the Court, see RICHARD C. CORTNER, THE APPORTIONMENT CASES ch. vi. (1970).

152. *Id.* at 140 (quoting *Old Struggle on Apportionment Rescues Turning Point in Court*, N.Y. TIMES, Mar. 27, 1962, at 20). The youngest member, of course, was not Brennan, but Stewart. Brennan was the second youngest.

153. *Baker*, 369 U.S. at 269 (Frankfurter, J., dissenting).

the states had "widely varying principles and practices that control state legislative apportionment," and about the only common feature Frankfurter could discern was "geographic inequality in relation to the population standard."[154]

Frankfurter predicted that the Court had plunged itself into a morass from which it would be impossible to emerge, a quagmire lacking judicially discoverable or administrable standards, an area epitomized by partisan politics. The federal system itself would be endangered by a new and "virulent source of friction and tension" as the judiciary became embroiled in political matters.[155] Clearly Frankfurter felt that the Court had taken a terrible step.

One wishes that Frankfurter might have gone out on a better note. His prophecies of a judicial nightmare never materialized, and although the entrenched legislatures fought to prevent reapportionment, once it happened and a majority of the population controlled a majority of the legislative seats, all opposition ceased. Justice Douglas provided a judicially manageable standard of "one man, one vote,"[156] which Chief Justice Warren later applied in a suit against the Alabama apportionment scheme.[157] The obvious justness of the decision, and the equally obvious facility with which it could be implemented, made subsequent readings of Frankfurter's opinion seem more and more paranoid and unrealistic. Compared to the democratic majesty of Warren's opinion in *Reynolds*, Frankfurter's claim that "there is not under our constitution a judicial remedy for every political mischief"[158] sounds crabbed and visionless. Warren spoke to the possibilities of democracy, Frankfurter apparently could see only its limits.

VIII. The Justice Revisited

One can appreciate Felix Frankfurter's contribution to American jurisprudence even if one believes that Frankfurter misgauged basic trends in the nation's life or disagrees with his views about the role of courts in protecting individual liberties. The values that he cherished are not inconsequential, and in fact are essential in any

154. *Id.* at 321.

155. *Id.* at 324. Frankfurter suffered a stroke on April 5, 1962, a little over a week after the *Baker* decision had been handed down. He retired from the Court on August 26.

156. Gray v. Sanders, 372 U.S. 368, 381 (1963).

157. Reynolds v. Sims, 377 U.S. 533, *reh'g denied*, 379 U.S. 870, 871 (1964).

158. *Baker*, 369 U.S. at 270.

scheme of ordered liberty. He matured intellectually at a time when conservative judges used their power to invalidate the reforms enacted by the legislature, that branch of the government most reflective of the will of the people. For him, judicial restraint meant that the popular will ought not be thwarted by the courts unless a specific constitutional prohibition existed. The ideal of popular democracy is a powerful notion, and all but the most elitist among us would agree that the will of the people should be the dominant force in a free government.[159] However, the voice of the people is not necessarily the voice of tolerance. Whatever their other virtues, majorities are rarely tolerant of dissident beliefs and dissenting voices, and while they may pay lip service to the protection of minority views or the rights of accused persons, American history shows few instances of the majority, on its own volition, behaving in such an ideal manner.[160]

The Constitution is a unique document that empowers the will of the majority while at the same time limiting that empowerment. There is, of course, a built-in tension between those competing operations, and resolving that tension is the unique function of the Supreme Court. Frankfurter put it quite well when he wrote:

> [T]he Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. . . . To that end they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be "as free, impartial, and independent as the lot of humanity will admit."[161]

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159. The view of judicial restraint as democratic in nature is explored in Sanford V. Levinson, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430 (1973). Levinson also concludes that Frankfurter's views on judicial restraint and its relation to democracy were forged in his academic years.

160. While Frankfurter certainly favored rights for unpopular speech, he seems to have seen it more as a question of governmental policy than of constitutional protection. There is a curious letter that Frankfurter wrote to an old friend, the great Harvard historian Samuel Eliot Morison, who had questioned the justice regarding the extent to which the First Amendment protected speech. Frankfurter referred to his own experience in the Sacco-Vanzetti case:

> Whether the Commonwealth of Massachusetts, through its appropriate organ, should have put Sedgwick and me in durance vile for the Atlantic article on the Sacco-Vanzetti case is one thing; whether Massachusetts would have been forbidden to do so by the Constitution of the United States quite another.

Letter from Felix Frankfurter to Morison (Jan. 6, 1942) [misdated 1941], Papers of Felix Frankfurter, Harvard Law School Library, Cambridge, Massachusetts.

161. United States v. United Mine Workers, 330 U.S. 258, 308 (1947) (Frankfurter, J., concurring).

Frankfurter studied the Court too long and too well not to recognize that judging could not be a mechanical exercise, by which one followed rigid rules to "discover" the law. He knew, even if he could not bring himself to admit it openly, that the emotions and biases of judges, as well as their learning and discipline, played a role in judicial decisionmaking. Following his philosophy of selective incorporation, judges have definitely made value decisions as to the greater importance of certain provisions of the Bill of Rights over other parts.

Justice Black tried to negate this balancing by tying the judges to an absolutist interpretation of the Constitution, and while in certain areas — such as the protection of individual liberties — this may be a more attractive option, it lacks the flexibility that Frankfurter saw, and rightly so, as one of the essential attributes of judging. Frankfurter understood that not all questions, not even all legal questions, are amenable to simple answers. Situations beyond the wildest imaginations of the Framers require judges to search long and hard in the Constitution and its history to determine what part of the document, if any, applies. In such circumstances, a judge must look to history, experience, and precedent, and then, through disciplined reasoning, reach the best result he can. Because this process is imperfect, judges must have humility; they must be willing to recognize that the other arms of government have as legitimate a claim to being right in these instances as the courts. The obvious solution is, therefore, judicial restraint and deference to the coordinate branches.

There is much to commend in a judiciary that is cautious in exercising its authority and aware that, in a federal system, the Constitution distributes power between the states and the national government as well as among the branches of government. A Supreme Court that has its own political agenda and pursues it actively violates the republican philosophy of a scheme of separated powers. Felix Frankfurter preached this for almost a half-century, first at the Harvard Law School and then on the Supreme Court, and his ideas have been taken up in recent years by conservatives such as Robert Bork and Edwin Meese who charge the Court with exceeding its proper responsibilities.

The problem, as Frankfurter once acknowledged, is that judicial restraint can quickly become judicial abdication. While the courts

should certainly respect the judgments of the other branches of government, they have a responsibility to measure those actions against constitutional standards. One can argue that in hard and complex questions courts should defer to the judgments of the elective branches; Frankfurter often made that argument. It can also be argued that in such situations the wisdom of the judiciary is as compelling as that of the legislature, and that it is the unique responsibility of the courts — not the legislature — to make those judgments in certain circumstances.

Frankfurter's judicial philosophy matured in the late 1920's and early 1930's and, with one or two minor exceptions, did not change after he went onto the bench. The problem is that the challenges coming before the Court changed radically at just about the time Frankfurter donned the silk robe. Prior to World War II, nearly all the major questions confronting the Court involved economic policy. While the Constitution places certain limits on the national government in these areas, for the most part the constitutional grants of power in regard to interstate commerce and taxation are broadly defined. Under John Marshall and Roger Taney, as Frankfurter himself had demonstrated,[162] the Court had taken an expansive view of these powers, so that between 1880 and 1937, the use of so-called freedom of contract and substantive due process to cripple those powers represented an obvious effort by judges to substitute their policy preferences for those of the legislature. In calling for judicial restraint and deference, Frankfurter endorsed a return to an older tradition.

Following the war, economic issues practically disappeared from the Court's docket, replaced by questions of civil liberties and civil rights. Here again Frankfurter's views appear to have been solidified well before he joined the Court, and they ran counter not only to views of his colleagues, but to the general sentiment among the population that the Court had a particular role to play in safeguarding individual rights and liberties.

Frankfurter simply did not believe that the Court had a special role to play in protecting rights. He treated questions of free speech the same as questions of economic regulation: in both, the courts should defer to the legislature.

Frankfurter claimed that he modeled himself after Holmes and

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162. FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE (1937).

Brandeis, yet one looks in vain in his opinions for the type of concern they showed about free speech. What can one compare in Frankfurter's career to Holmes's dissent in *Abrams*[163] or the Brandeis opinion in *Whitney*?[164] He pointed with pride to his dissent in the second flag salute case, in which he deferred to the wisdom of a state legislature in forcing young children to violate their religious beliefs by saluting the flag, and even suggested that Roosevelt include a copy in the presidential library.[165] His last major opinion, his dissent in the apportionment case,[166] called for continuing the dilution of voting rights in the name of judicial restraint.

It is not that Frankfurter lacked a vision, but rather that time outran his vision; he would have been the perfect judge a generation earlier. Once on the bench he seemed ignorant of the tides of history, of the changing social and political climate in the country — the same sins with which he, as an academic commentator, had lambasted the conservative judges in the 1920's and 1930's. He remained consistent, but consistency is not always a virtue.

Frankfurter failed to gain the leadership on the Court not just because of his abrasive personality. Black, Douglas, Murphy, Brennan, Warren, and other strong-minded justices resented his patronizing tone and schoolmaster lecturing. Beyond that, they believed that the Court had a special obligation to do justice in protecting the rights of racial minorities and those with dissident points of view. In the long run, the Warren Court may be judged as having been too activist, as having gone too far in its judicial revolution, but in the 1950's and 1960's Warren, and Brennan, Douglas, and Black, reflected the general sentiment that the Court ought to be the guardian of the Bill of Rights.

Is guardianship of the Bill of Rights the role of the Court? Frankfurter on numerous occasions seemed to indicate that it was, that the Court had the responsibility and the authority to interpret constitutional protections in the light of modern conditions, thus keeping the Bill of Rights up to date. But when it came time to put that theory into practice, he could not overcome his stronger

163. Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

164. Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., dissenting).

165. West Virginia Board of Education v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting); Letter from Frankfurter to Franklin D. Roosevelt (May 3, 1943), *reprinted in* MAX FREEDMAN, ROOSEVELT & FRANKFURTER: THEIR CORRESPONDENCE 1928-1948, at 699 (1967).

166. Baker v. Carr, 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

belief in a court of exceedingly limited powers.

Fortunately for the Court and the nation, during most of our history we have had a Supreme Court composed of justices with varying judicial philosophies. While there have been periods when one or another particular jurisprudence has been on the ascendent, for the most part justices with differing viewpoints have reached common sense conclusions that have met with the approval of the American people. Reaching these conclusions in times of rapid social and political change is difficult, and there will be some who cannot make the transition from one era to another. Felix Frankfurter did not make that transition, and so in one sense his story is tragic.

By adhering to his beliefs in judicial restraint, in deference to the coordinate branches of government, in respect of precedent, Frankfurter held up clear standards that forced the advocates of change such as Hugo Black to rethink their assumptions. As Black said after visiting with the ailing and retired Frankfurter, "Felix made me see something in a different light."[167] Black did not always agree with Frankfurter, but that did not matter. In the twenty-three years Felix Frankfurter sat on the United States Supreme Court he forced his more activist colleagues to slow down and think about what they were doing. If he could not get them to adopt his vision of a time past, he did help them to hone their own vision of the times to come.

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167. UROFSKY, *supra* note 115, at 173.