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ARTICLE

THE TRAGEDY OF FELIX FRANKFURTER:

FROM CIVIL LIBERTIES AND CIVIL RIGHTS ACTIVIST TO REACTIONARY JUSTICE

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This article reconsiders the life and record of Supreme Court Justice Felix Frankfurter. Frankfurter was smart, hardworking, and talented, serving as a great activist lawyer and important law professor in his early career. When nominated to the court, there were high hopes he would follow Holmes and Brandeis in leading a progressive Court that would protect civil liberties and minority rights. However, it was not to be. On the Court Frankfurter became increasingly conservative and ultimately reactionary. In his opinions, he upheld persecution and discrimination of religious and racial minorities, occasionally hindered racial justice and civil liberties efforts, and opposed due process in criminal trials and fairness in elections. Arrogant and dismissive, he constantly fought with his brethren, alienating almost all of them. In the end Frankfurter was far too often on the wrong side of history, liberty and the law, and even legal ethics. The tragedy of Frankfurter is that he abandoned the constitutional rights and protections that he supported from his graduation from law school until he donned his robes. He could have been a great justice. Sadly, he was not.

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I wrote much of this article when I was the Robert F. Boden Visiting Professor of Law, Marquette Law School. I thank Elana Olson, Martin Kluge, and the rest of the Marquette Library Staff for their help on this article; Joseph Kearney, Chad Oldfather, Melissa Love Koenig, Peter Rofes, my other Marquette colleagues who commented on this at a faculty workshop; my research assistant, Alissa Schuning at Marquette, Thomas Hemstock, Assistant Director of the Albany Law School Library, and my fellow scholars, Linda Barness, John Q. Barrett, Jonathan Bush, David G. Cotter, Robert J. Cottrol, Eric M. Freedman, Candace Jackson Gray, Rande W. Kostal, Douglas Laycock, Richard Quinlan, Melvin I. Urofsky, Samuel Walker, William M. Wiecek, and Nicole Yanoso. I also want to thank the journal editors, especially Amanda Lu, Aileen McKinstry, Malik Morris-Sammons, Jamail Gibbs, Gabriela R. Ornelas, and Marisa Mancini for all their hard work and excellent editing.

I. INTRODUCTION

Felix Frankfurter (1882-1965) should have been one of our greatest Supreme Court Justices. He was razor sharp, a prolific scholar and author, hardworking, "with seemingly superhuman energy,"[2] extremely well-read, knowledgeable in many areas outside of the law, and capable of producing elegant prose. Before coming to the Court, he served in the Justice Department and the War Department in the Taft and Wilson administrations, was a Harvard Law School professor, a public interest lawyer at the highest levels of social change, and an advisor to Franklin Delano Roosevelt both before and after his presidential election.[3]

Brad Snyder, a journalist and professor at Georgetown Law School, recently published a massive biography of Frankfurter: *Democratic Justice*.[4] What follows is not a review of that book, although I will cite the book often, rely on some of Snyder's impressive research, and challenge many of his arguments and conclusions. Rather, this article is a review of Frankfurter himself and an evaluation of his place in our legal and constitutional history. I particularly focus on his jurisprudence on race, minority rights, religious freedom, civil liberties, voting rights, progressive reform, social justice, and his shocking response to knowledge of Holocaust. At a moment in time when the ethics of the Supreme Court itself are under intense scrutiny,[5] I will also discuss Frankfurter's questionable behavior and his persistent ethical lapses while on the Court.

Snyder defensively asserts that "the standard story about Frankfurter is that he struggled to fill the seat once held by Holmes. Scholars have portrayed Frankfurter as a judicial failure, a liberal turned conservative justice, and as the Warren Court's principal villain."[6] Snyder asserts that "none of these narratives rings true."[7] He argues that

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[2] WILLIAM M. WIECEK, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941-1953 (2006) 89. Frankfurter's wife, Marion, once blurted out "Do you know what it is like to be married to a man who is never tired?" JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 50 (1989).

[3] MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES 1-44 (1991). After FDR's election Frankfurter "tutored" various members of the administration on civil liberties and the importance of the ACLU. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 97 (1990).

[4] BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT 714 (2022) [hereinafter "SNYDER"]. The book is 979 pages long.

[5] *See* Alison Durkee, *Here are All the Supreme Court Controversies That Led to Adopting an Ethics Code*, FORBES (July 29, 2024), https://www.forbes.com/sites/alisondurkee/2024/07/29/supreme-court-ethics-controversies-all-the-scandals-that-led-biden-to-endorse-code-of-conduct/. *See also* Jennifer Ahearn & Michael Milov-Cordoba, *Alito Piles on Reasons for Congress to Act on Supreme Court Ethics*, BRENNAN CTR. FOR JUST. (May 24, 2024), https://www.brennancenter.org/our-work/analysis-opinion/alito-piles-reasons-congress-act-supreme-court-ethics; Devon Ombres, *With Its Release of a New Nonbinding Code of Conduct, the Supreme Court Fails on Ethics Again*, CTR. FOR AM. PROGRESS (Nov. 15, 2023), https://www.americanprogress.org/article/with-its-release-of-a-new-nonbinding-code-of-conduct-the-supreme-court-fails-on-ethics-again/; *and* Michael Waldman, *New Supreme Court Ethics Code is Designed to Fail*, BRENNAN CTR. FOR JUST. (Nov. 14, 2023), https://www.brennancenter.org/our-work/analysis-opinion/new-supreme-court-ethics-code-designed-fail.

[6] SNYDER, *supra* note 4, at 4.

[7] *Id.*

Frankfurter made significant contributions to "twentieth Century America's liberal democracy" because of his deep commitment to "the democratic political process," his commitment to judicial restraint, and his mentoring of "a who's who of American liberals in law and politics."[8]

Frankfurter did indeed make significant contributions to American law and culture as a legal activist working for social and economic reform from the time he left law school until he went on the Court in 1939. He mentored many people who held important positions in American politics and law. But far from being a "Democratic Justice"—the title of Snyder's biography—I argue that Frankfurter was in fact deeply anti-democratic. Far too often he refused to lift his pen to defend the civil rights of minorities, to protect civil liberties, and to support meaningful representation in legislatures. As a Justice he was not in fact supportive of "the democratic political process,"[9] but vigorously opposed the entire idea of legislatures accurately representing people and voters, and complained bitterly when the Supreme Court began to require this.[10] Frankfurter was "important," but importance is not the same thing as being admirable or on the right side of history—indeed, a review of Frankfurter's career reveals his often-repressive jurisprudence, which shows that indeed Frankfurter was "a judicial failure, a liberal turned conservative justice."[11] In his last major opinion, he vigorously opposed the concept of "one person, one vote,"[12] which almost all scholars and political commentators believe is central to any democracy.

Snyder has not convinced me that the "standard story" is wrong. On the contrary, his heavily researched and often elegantly written addition to the rather large literature on Frankfurter,[13] demonstrates that, to a great extent, the "standard story" is quite correct. Although an early advisor and litigator for the American Civil Liberties Union, once on the Court Frankfurter "was a great disappointment to the ACLU," as he became "the leading advocate of judicial restraint,"[14] especially in cases of freedom of religion, civil rights, and fair political representation. An early advisor of the NAACP, on the Court he opposed federal prosecutions of police officers who brutalized or killed Black Americans while they were in custody, and found nothing unconstitutional about state agencies

[8] *Id.* at 4-5, 15, and 7.

[9] *Id.* at 5.

[10] *See* Baker v. Carr, 369 U.S. 186 (1962) (Frankfurter, J. dissenting) at 266-330.

[11] SNYDER, *supra* note 4, at 4.

[12] *Id.* at 266-330.

[13] An incomplete list of the many books on Frankfurter includes UROFSKY, FELIX FRANKFURTER, *supra* note 3. NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010); SIMON, THE ANTAGONISTS, *supra* note 2; LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY (1984); BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES (1982); MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING (1984); H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981); MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS (1982); ROBERT BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND (1988).

[14] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 106.

operating segregated restaurants.[15] As Melvin I. Urofsky, our leading historian of the modern Supreme Court, noted some three decades ago: "Instead of being the herald of a new jurisprudential age, Frankfurter fought a valiant but ultimately ineffective rearguard action to divert the Court from what he considered a disastrous path. A quarter century after his death his opinions are all but ignored by both the courts and academia."[16] If one were to update Urofsky's analysis, we would note that six decades "after his death," Frankfurter's opinions are not only ignored, but are mostly forgotten.

Despite Snyder's valiant efforts to rehabilitate him, Frankfurter's two decades on the Court remain largely forgotten in Constitutional law, except when his opinions are remembered to point out some of his outrageous attacks on civil liberties and civil rights, which remain embarrassments in U.S. Reports.[17] As I will argue below, while on the Court, Frankfurter was not heroic, but tragic. He could have been great, but he was not.

This Article analyzes Frankfurter's early career and several of his judicial failings. Part II discusses Frankfurter's life before joining the Supreme Court. Part III looks at his many protégés and how his relationship with them was problematic after he went on the Court. Part IV examines his jurisprudence during World War II, when he increasingly supported repressive laws and became what we might call the "anti-Democratic Justice." This Part also examines his response to the Holocaust. Part V examines his jurisprudence after World War II, when he became increasingly hostile to protecting civil rights and civil liberties. Apart from his frequent (but inconsistent) opposition to blatant segregation involving African Americans, Frankfurter was often a stubborn opponent of civil liberties, civil rights, and human rights. Part VI raises questions about Frankfurter's ethics while on the Court. Part VII considers his

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[15] Screws v. United States, 325 U.S. 91 (1945) (Frankfurter, J., dissenting); Monroe v. Pape, 365 U.S. 167, 202 (1961), (Frankfurter, J., dissenting); Burton v. Wilmington Parking Authority, 365 U.S. 715, 727 (1961), (Frankfurter, J., dissenting).

[16] UROFSKY, FELIX FRANKFURTER *supra* note 3, at xii-xiii.

[17] Most infamously are his opinions in the two flag salute cases: Minersville Board of Education v. Gobitis, 310 U.S. 586 (1940) and West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) (Frankfurter, J., dissenting), where he argued for the constitutionality of persecuting elementary school children because their religious beliefs forbade them from saluting the flag; his dissent objecting to a federal civil rights prosecution of a White Georgia sheriff who beat a Black man to death while he was handcuffed, Screws v. United States, 325 U.S. 91 (1945) (Frankfurter, J., dissenting), which the Court majority described as "a shocking and revolting episode in law enforcement" Screws at 92; his lone dissent in a grotesque case of police brutality against a Black family on the grounds that the federal government should not abridge the rights of the states to conduct their law enforcement as they saw fit, Monroe v. Pape, 365 U.S. 167, 202 (1961), (Frankfurter, J., dissenting), his one hundred page concurrence supporting laws that fined Orthodox Jewish merchants who sold Kosher food or retail merchandise on Sunday because their religion precluded from doing so on Friday evenings or Saturdays, McGowan v. Maryland, 366 U.S. 420, 459 (1961) (Frankfurter, J. concurring and Appendix I, 543-550; and Appendix II, 551-559); and his stubborn dissent protesting reapportionment of outrageously unequal electoral districts and his weird belief that Democracy does not require one person, one vote, in electing state or federal legislators. Baker v. Carr, 369 U.S. 186 (1962), Frankfurter, J. dissenting at 266-330.

decisions at the end of his Supreme Court career. Part VIII offers some conclusions.

I approach this article with the understanding that "democracy" means equal civil rights, equal justice under the law, equal political rights for all Americans, and a political system that allows all voters equal representation in Congress or state legislatures. In this context, Frankfurter was a failure, as he upheld state laws and federal policies that supported racism and religious bigotry and opposed decisions giving voters fair representation in Congress. In his biography of Frankfurter, Snyder praises this behavior as "judicial restraint," often claiming it was "prescient." But one can only wonder what sort of "Democratic Justice" supports expelling elementary school children for refusing to publicly violate their religion,[18] or the incarceration of 120,000 innocent people in what one Justice (and many commentators and scholars) described as concentration camps solely because of their ethnicity or "race."[19] Frankfurter's version of "judicial restraint" was often judicial abdication, as he vigorously opposed striking down repressive legislation and objected to applying federal civil rights laws to police who brutalized African Americans,[20] while upholding arbitrary and oppressive executive acts. His commitment to "democracy" did not include guaranteeing fair representation of the electorate in legislative districts; as I noted above, his last important act on the Court was to vigorously oppose what we call "one person, one vote."[21] In his early career he supported fair trials for some controversial figures, such as the Italian immigrant anarchists Nicola Sacco and Bartolomeo Vanzetti.[22] But while on the Court his commitment to due process of law and fair criminal trials did not include supporting a right against self-incrimination in state criminal trials[23] or requiring counsel for indigent criminal defendants.[24]

Frankfurter's pre-Court advocacy contrasted sharply with much of his jurisprudence on due process once on the Court. Furthermore, as explored in Parts III and VI, Frankfurter often engaged in questionable judicial ethics. He constantly meddled in politics from the bench and adamantly refused to recuse himself from cases in which he had been involved before they reached the Court.[25] Furthermore, and most striking, Frankfurter's notion of judicial restraint did not extend to his own off-the-Court political activities like lobbying government officials and the President, political meddling, helping the administration draft legislation

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[18] *See infra* Part V., Section A (discussion of Minersville Board of Education v. Gobitis, 310 U.S. 586 (1940) and West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)).

[19] See *infra* pp. 1131-34 (discussion of the Japanese Internment cases).

[20] Screws v. United States, 325 U.S. 91 (1945) (Frankfurter, J., dissenting); Monroe v. Pape, 365 U.S. 167, 202 (1961), (Frankfurter, J., dissenting).

[21] Baker v. Carr, 369 U.S. 186 (1962).

[22] *See infra* pp. 1098-99.

[23] Adamson v. California, 332 U.S. 46 (1947) (Frankfurter, J. concurring).

[24] Betts v. Brady, 316 U.S. 455 (1942).

[25] *See infra*, text at notes 365-66 (discussing Service v. Dulles, 354 U.S. 363 (1957)). Frankfurter, while on the Court, advised Secretary of State Dean Acheson, before Acheson fired Service from the State Department, without any due process, or evidence of wrongdoing. Service sued to get his position back, and when the case came before the Supreme Court Frankfurter stubbornly refused to recuse himself.

that might later be reviewed by the Court, and sometimes giving legal advice to government officials or private litigants whose cases were likely to reach the Court. Justice Frankfurter even testified as a character witness for Alger Hiss, in a case that seemed likely to later come before him. In other words, he could never "restrain" himself from political activities and other questionable behavior, while always insisting on "judicial restraint" when hearing cases that subverted due process, racial equality, and civil liberties.

II. FROM IMMIGRANT SCHOOL CHILD TO HARVARD PROFESSOR AND PRESIDENTIAL ADVISOR

In 1894, the eleven-year-old Vienna-born Frankfurter passed through Ellis Island, speaking only German.[26] In 1902, at age nineteen, he graduated third in his class from New York's City College with a stunning command of English and a deep respect for Anglo-American history and culture.[27] William M. Wiecek observes, correctly, that he had "a facility with the English language that would have been extraordinary even in a native speaker," although "his prose sometimes tended to preciosity."[28] A year later, he entered Harvard Law School where he would be first in his class for three years in a row.[29] He served on the law review, but not as president, perhaps because he was Jewish,[30] since when "Frankfurter reached the Harvard Law School as a student in 1903 . . . Jewishness had assumed an openly stigmatizing meaning in American life"[31] and gentlemanly antisemitism was common at Harvard well into the 1930s.[32] However, at this time none of the students knew what their class standing was, so being first in his class certainly did not guarantee this leadership role. Moreover, while clearly hardworking and brilliant, Frankfurter could be grating, argumentative, egotistical, and dismissive of people with whom he disagreed.[33] Thus, not being president of the law review was likely a function of both his personality and antisemitism.

Between graduation from law school and the beginning of World War I, he had two short stints in private practice on Wall Street,[34] but

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[26] SNYDER, *supra* note 4, at 9.

[27] FELDMAN, SCORPIONS, *supra* note 13, at 5.

[28] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra note* 2, at 89.

[29] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 2.

[30] Snyder suggests this, SNYDER, *supra* note 4, at 24.

[31] BURT, TWO JEWISH JUSTICES, *supra* note 13, at 38.

[32] SNYDER, *supra* note 4, at 142-45; BURT, TWO JEWISH JUSTICES, *supra* note 13, at 38. The great African American historian John Hope Franklin was shocked in his first year at Harvard's graduate program in history, in 1935-36, when he suggested a fellow graduate student Oscar Handlin, be chosen as the president of the Henry Adams Club, the graduate student history organization. Franklin noted Handlin was a straight A student. One of the other members of the Club, with the support of everyone else in the room, explained to Franklin "that although Oscar did not have some of the more objectionable Jewish traits, he was still a Jew." Franklin, the only Black in the room, was stunned by this open bigotry. JOHN HOPE FRANKLIN, MIRROR TO AMERICA: THE AUTOBIOGRAPHY OF JOHN HOPE FRANKLIN 65 (2005). Handlin would later have a distinguished career as a Harvard Professor and win the Pulitzer Prize in history.

[33] See HIRSCH, ENIGMA OF FRANKFURTER, *supra* note 13, at 177 and passim for descriptions of the many unpleasant aspects of Frankfurter's personality.

[34] In 1905-06 he was briefly at Hornblower, Byrne, Miller & Potter, before going the U.S. attorney's office under Henry L. Stimson, in New York City until 1909, when he followed Stimson into private practice until 1911.

otherwise until he went on the Court, Frankfurter served as a government lawyer, legal activist, public intellectual, scholar, and a key advisor to Franklin D. Roosevelt, before and after he reached the White House.[35] During most of this period, from 1914 to 1939 he was also a professor at Harvard Law School. He was active in the NAACP, a significant player in the American Zionist movement, and an early supporter of the ACLU, serving as the organization's expert on labor injunctions, which were a major tool corporations used to stifle freedom of expression for union organizers.[36] In 1914 he worked closely with Herbert Croly in the founding of *The New Republic*, and while declining to officially be one of the editors, he worked closely with the journal and often wrote for it. He was an engaging conversationalist; famous for mixing great cocktails[37] and acquiring and serving champagne during Prohibition; and fond of good food, good wine, stylish clothing, and other trappings of elegance.[38] And he was quirky. For example, he never learned to drive a car.[39]

From World War I until 1939, when he went on the Court, Frankfurter was extraordinarily influential in shaping public and legal policy, while both in and out of government service. In this period, Frankfurter made his most important contributions to American law and society. The NAACP, ACLU, and *New Republic*, which Frankfurter worked with from the 1910s to the 1930s, are still flourishing more than a century later. His persistent support for progressive legislation and safe and fair working conditions for laborers still influences American law. His successful argument in *Bunting v. Oregon* established the precedent that states could constitutionally pass maximum hours laws.[40] He put the Securities Act of 1933 into its "final form" before FDR sent it to Congress,[41] helped draft the National Labor Relations Act (the Wagner Act),[42] which the Supreme Court would narrowly uphold in *NLRB v. Jones & Laughlin Steel Corp.*[43] His use of data and research to improve law enforcement and criminal justice, which followed the work of his mentor Louis D. Brandeis,[44]

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[35] UROFSKY, FELIX FRANKFURTER, *supra* note 34, at 6-44.

[36] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3 at 55, 66.

[37] FELDMAN, SCORPIONS, *supra* note 13, at 9.

[38] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 2; HIRSCH, THE ENIGMA OF FRANKFURTER, *supra* note 13 at xii-xii.

[39] SNYDER, *supra* note 4 at 152, 215, and 637.

[40] 243 U.S. 426 (1917); *see also* SIMON, THE ANTAGONISTS, *supra* note 2, at 44-46; SNYDER, *supra* note 4, at 81-82.

[41] JEAN EDWARD SMITH, FDR 323 (2007). "An act to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes," Act of May 27, 1933, 48 Stat. 77 (1933).

[42] SNYDER, *supra* note 4, at 253-54; Act of July 6, 1935, 49 Stat. 449 (1935).

[43] 301 U.S. 1 (1937).

[44] See Brandeis's famous brief in Muller v. Oregon, 208 U.S. 412 (1908); MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 212-28 (2009). Along these lines, one of Frankfurter's great contributions while a full-time professor was the massive (more than 750 pages) study written by The Cleveland Foundation and The Survey of Criminal Justice, of which Frankfurter was a co-Director. THE CLEVELAND FOUNDATION, CRIMINAL JUSTICE IN CLEVELAND (1922). One reviewer wrote of this pathbreaking study: "A book like this is the despair of a reviewer. It is so chock full of good material that one cannot even summarize it in a review. The best advice to those interested in the subject, and everyone ought to be, is to get the book and read it . . ." A.M. Kidd, *Book Review*, 11 CALIF. L. REV. 59 (1922). This advice remains true today.

helped revolutionize law and social policy. Frankfurter's legacy of fighting for fair trials for unpopular defendants such as Nicola Sacco and Bartolomeo Vanzetti[45] is an inspiration to many modern lawyers. Indeed, I would argue Frankfurter's most important legacy was as the nation's premier public interest lawyer for a quarter of a century. In this period, Justice Louis D. Brandeis, who was known as "the people's lawyer" before he went on the Bench, called Frankfurter "the most useful lawyer in the United States."[46] If he had never gone to the Court, and continued in these activities, he would be remembered as one of the great figures in American law and worthy of serious scholarly attention.

In these years Frankfurter was able to assiduously ingratiate himself with powerful men who helped his career. After law school, he briefly worked at Hornblower, Byrne, Miller, and Potter, which made him the first Jewish attorney to work at an elite "white shoe" Wall Street firm.[47] The firm hired him because of his stunning record at Harvard and on the strong recommendations from the Harvard faculty.[48] The fact that he had only one offer from a Wall Street firm, after graduating first in his class at Harvard, illustrates the nature of antisemitism at the time. While this may not seem like a civil rights achievement today, it was clearly a breakthrough in 1907, when elite law firms did not hire Jews.[49] Illustrative of the antisemitism and xenophobia of the time, while at Hornblower, Byrne, Miller, and Potter senior partners urged him to change his name,[50] to hide his immigrant, and implicitly his Jewish, roots. Frankfurter rejected this advice.

Not surprisingly, Frankfurter disliked private practice, and happily accepted a 25 per cent pay cut to join the staff of Henry L. Stimson, the new United States Attorney for the Southern District of New York.[51] This was also pathbreaking in an environment where immigrants and Jews were rarely seen. When Theodore Roosevelt did not run for reelection in 1908, Stimpson went back to private practice, and Frankfurter went with him.[52] He was Stimson's campaign manager in his unsuccessful run for governor of New York in 1910 and worked as his assistant when Stimson served as President William Howard Taft's Secretary of War.[53] In 1912, Frankfurter supported Teddy Roosevelt's Bull Moose campaign for president, running

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[45] *See infra* pp. 1098-99.

[46] UROFSKY, FELIX FRANKFURTER, *supra* note 3 at 20.

[47] SIMON, THE ANTAGONISTS, *supra* note 2, at 33-34. At this time there was only one Jewish federal judge, Jacob Treiber, who was also the first Jewish federal judge in U.S. history. He served on the eastern district of Arkansas from 1900 to 1927. https://encyclopediaofarkansas.net/entries/jacob-trieber-26/. It would be another decade before a Jew, Benjamin N. Cardozo, would serve on the New York Court of Appeals.

[48] FELDMAN, SCORPIONS, *supra* note 13, at 7.

[49] *Id.* Frankfurter graduated from the law school the same year Theodore Roosevelt chose Oscar Straus to be Secretary of Commerce, thus becoming the first to Jew ever serve in a United States presidential cabinet. Judah P. Benjamin, a former senator, served in the Confederate cabinet during the Civil War.

[50] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 2.

[51] *Id.* at 2-3.

[52] SIMON, THE ANTAGONISTS, *supra* note 2, at 35-36.

[53] *Id.* at 36-38. Frankfurter would later play a key role in Stimson being brought back as Secretary of War under Franklin D. Roosevelt. See discussion of this at *infra* note 340 .

against Taft. Despite working against Taft's reelection, Frankfurter retained his position in Taft's War Department.[54] After both Taft and Roosevelt lost, Frankfurter remained in the War Department under Woodrow Wilson until June 1914, when he became the first full-time Jewish faculty member at Harvard Law School.[55] This short history highlights Frankfurter's political adroitness. He was able to stay in the administration while campaigning against the sitting president, and then remained in the next administration, whose election he had also opposed.

At Harvard Law School, Frankfurter taught, wrote, and actively participated in progressive causes. Working with Herbert Croly and Walter Lippman, he was a co-founder of *The New Republic*.[56] While declining to be officially on the masthead, "he in essence became a fourth editor, writing numerous pieces and often sitting in on editorial meetings."[57] He published unsigned pieces, often praising his hero, Justice Oliver Wendell Holmes Jr., and supporting the Supreme Court nomination of his mentor, Louis D. Brandeis.[58] Frankfurter would follow this pattern throughout his life—quietly, secretly, or anonymously advocating on public issues while keeping his name out of the limelight. Some of this was clearly strategic, such as his admonition during the Brandeis confirmation fight "that no Jews should make the slightest peep about a race issue," by which he meant Brandeis's Judaism.[59] But Frankfurter's penchant for secrecy went beyond strategy. He seemed to relish being behind the scenes, pulling strings, maneuvering, and constantly pushing his friends and favorite former students into government positions. Frankfurter then relied on these protégés for information about pending policies and inside information. Even after going on the Court, he used them to advise and lobby administration officials and the President for his favorite causes.[60] As I discuss below, most legal scholars and political commentators think it is inappropriate for a sitting Justice to be actively involved in political machinations and talking constantly with people in the executive branch, including the President himself. Frankfurter, however, never paused for a moment to consider the ethics of his behavior. It is worth noting, however, that he never sought to line his own pockets or accept valuable presents and vacations while on the bench.

Before the United States entered World War I, Frankfurter joined the U.S. Army reserves as a major in the Judge Advocate General's (JAG)

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[54] SIMON, THE ANTAGONISTS, 40.

[55] FELDMAN, SCORPIONS, *supra* note 13, at 11. Many scholars (such as Feldman) assert, incorrectly, that Frankfurter was "the first Jewish professor at Harvard Law School." Id. In fact, Louis Brandeis taught evidence at Harvard in 1881, with an offer directly from Harvard's president, Charles W. Eliot. The following year, Dean Christopher Columbus Langdell, at the urging of the law faculty, offered Brandeis a full-time position as an assistant professor, but Brandeis declined because he preferred practice. MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 79, 80-81 (2009).

[56] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 8; SIMON, THE ANTAGONISTS, *supra* note 2, at 114.

[57] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 8; SIMON, THE ANTAGONISTS, *supra* note 2, at 114.

[58] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 8; SNYDER, *supra* note 4, at 72.

[59] SNYDER, *supra* note 4, at 72.

[60] *Id.* at 219-30.

Corps.[61] When the United States entered the war in 1917, Frankfurter returned to Washington as a special assistant to Secretary of War Newton Baker.[62] This was one of his finest hours.[63] As the Army's Judge Advocate General, he supervised court-martials, trying to ensure fairness and due process.[64] As the head of the War Labor Policies Board, he established fair wages, decent working conditions (including an eight-hour day), and limited the use of child labor in defense industries.[65] With an uncanny ability to befriend important (or soon-to-be important) people, Frankfurter became reacquainted with Franklin Roosevelt, the Assistant Secretary of the Navy, who he had met a decade before when he worked on Wall Street. They developed a relationship which would eventually lead to Frankfurter's Supreme Court seat.[66]

In 1918, Frankfurter went to Europe in an ultimately failed attempt to negotiate a separate peace with the Ottoman Empire.[67] While there, he also worked unsuccessfully to establish a Jewish state in Palestine.[68] After the War, he attended the Paris Peace Conference at the request of the World Zionist leader Chaim Weizmann and met with Saudi Arabia's Prince Faisal and Col. T.E. Lawrence (a.k.a. Lawrence of Arabia).[69] Frankfurter believed he had secured a peaceful future for Jews and Arabs in Palestine, but of course he was either overly optimistic or naïve.[70] He conferred with Brandeis, who met with him in Paris before the Justice went on to Palestine and Egypt.[71] Meanwhile, Frankfurter visited impoverished Jewish communities in Poland where he was appalled at the "systematic, pervasive anti-Semitism."[72] Frankfurter never expressed interest in his Jewish heritage and abandoned religious practice very early in life, but at this time he was sensitive to the oppression of Jews in eastern Europe and in the 1930s would express concerns for the safety of Jews in Nazi Germany.[73] As a Justice he was sometimes hostile to Jewish religious

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[61] SNYDER, *supra* note 4, at 84-85, says this took place in 1916.

[62] *Id.*

[63] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 10-16.

[64] SNYDER, *supra* note 4, at 84-85, 84-104.

[65] *Id.* at 84-93.

[66] SNYDER, *supra* note 4, at 98-100. They were in "periodic contact" in the early 1920s, when FDR was struck down with polio, but after FDR became governor of New York in 1928 he increasingly sought Frankfurter's advice. UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 35-37.

[67] SNYDER, *supra* note 4, at 104-05.

[68] UROFSKY, FELIX FRANKFURTER, *supra* note 3 at 16-19.

[69] *Id.*; SIMON, THE ANTAGONISTS, *supra* note 2, at 21-23. Prince Faisal (also spelled Feisal) was born in Mecca in 1885 and was King Faisal I of Iraq from 1921 until his death in 1933. *Faisal I: King of Iraq*, BRITTANICA, https://www.britannica.com/biography/Faisal-I (Last accessed Mar. 9, 2024).

[70] *Faisal I: King of Iraq*, BRITTANICA, https://www.britannica.com/biography/Faisal-I (Last accessed Mar. 9, 2024). Faisal sent Frankfurter a letter asserting that Zionist aspirations were "moderate and proper," and promised "we will wish the Jews a most hearty welcome home," that is to Palestine. SIMON, THE ANTAGONISTS, *supra* note 2, at 23. But in the end, nothing positive came of this meeting or the exchange of letters between the future Supreme Court justice and the future King of Iraq.

[71] On Brandeis in Palestine, *see* PHILLIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 240-47; 277-80 (1984).

[72] SNYDER, *supra* note 4, at 115.

[73] BURT, TWO JEWISH JUSTICES, *supra* note 13, at 38-39; FELDMAN, SCORPIONS, *supra* note 13, at 6. In planning for his death, Frankfurter insisted that no Rabbi be at a service for him, but did ask that a former student, Lewis Henkin, who was a practicing

liberty (such as in the Sunday closing cases).[74] However, he worked closely with Brandeis on the Zionist cause from World War I until his mentor died in 1941. After the United Nations voted to partition Palestine, Frankfurter quietly lobbied for U.S. recognition of the new nation of Israel.[75]

During the War, Frankfurter also mediated labor strikes and investigated the barbaric treatment of more than 1,100 peaceful striking miners in Bisbee, Arizona.[76] The local sheriff, with some 2,000 deputies, rounded up the majority of the strikers and shipped them in boxcars to Columbus, New Mexico, on the Mexican border. The law enforcement officials denied the workers food, water, and shelter for two days.[77] Most of the strikers were immigrants—Mexicans, Slavs, and Finns were the largest groups—but American-born citizens constituted more than 15 per cent of those deported. At the time anti-immigrant sentiment was a particular kind of racism.[78] Frankfurter's report castigated the sheriff and other officials, asserting that their behavior was "wholly illegal and without authority in law, state or federal."[79] In this period he also investigated the murder conviction and death sentence of labor activist Tom Mooney for a bombing in San Francisco. Frankfurter helped expose that the conviction was based on perjured testimony.[80] Because of Frankfurter's work, President Wilson persuaded California's governor to commute Mooney's sentence to life in prison.[81] In 1935, the Supreme Court declined to hear Mooney's appeal because he had failed to exhaust all his

Orthodox Jew, say something. He explained, that Henkin was "my only close personal friend who is also a practicing, orthodox Jew. He knows Hebrew perfectly and will know exactly what to say. I came into this world a Jew and although I did not live my life entirely as a Jew, I think it is fitting that I should leave as a Jew." UROFSKY, FELIX FRANKFURTER, *supra* note 3 at 174. Like much of his life, even in death Frankfurter was disingenuous and somewhat hypocritical. His opinion in West Virginia Board of Education v. Barnette, his refusal to even discuss the Holocaust with FDR, and his opinion in the Sunday closing cases illustrates that he was often hostile to civil liberties and civil rights of Jews. It was not that he "did not live" his life as a Jew, but he often acted on the Court in ways that were hostile to Jews.

[74] *See* discussion of these cases, *infra* at note 71.

[75] SNYDER, *supra* note 4, at 105-116; 506-07.

[76] For a long discussion of these events, *see* PARRISH, FELIX FRANKFURTER AND HIS TIMES, *supra* note 3, at 87-101. Also, UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 10-14.

[77] PARRISH, FELIX FRANKFURTER, *supra* note 13, at 90.

[78] *Id.* While the majority of the strikers were probably from Europe, Id. at 90 there was some fear that the strike was tied the revolutionary activities of Francisco "Pancho" Villa in Mexico. Michael Daly Hawkins, *The Bisbee Deportation: There Will be Ore*, 31 W. LEGAL HIST. 91 (2020-21). A list of 900 deportees shows that Mexicans may have been the largest single group of deportees, followed by U.S. citizens, but the combined total of Finns and people from what later became Yugoslavia exceed either U.S.-born citizens or Mexicans. *Deportees*, BISBEE DEPORTATION OF 1917, https://wayback.archive-it.org/8851/20171217204532/http://www.library.arizona.edu/exhibits/bisbee/deportees/index.html (last visited Feb. 21, 2024). About 15 per cent of those deported were American-born citizens, whose ancestry, based on their last names, appears to be from the British Isles and northern Europe.

[79] SNYDER, *supra* note 4, at 91.

[80] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 11-12.

[81] SNYDER, *supra* note 4, at 95.

state remedies.[82] In 1939 Governor Culbert Olson, a liberal Democrat, would pardon Mooney.[83]

Frankfurter's powerful report on the mistreatment of the Bisbee strikers and the perjury in the Mooney case had its costs. The aging Theodore Roosevelt, once a friend and ally who Frankfurter had actively campaigned for, publicly called him a Bolshevik for his defense of Mooney and because Frankfurter exposed that "the chief instigator of the [Bisbee] deportation was Arizona mine operator John C. Greenway," who had been one of Teddy's Rough Riders in Cuba[84] and "whose wife, Isabella Selmes, had long been a close friend of the Roosevelt family."[85] Roosevelt considered the strikers threats to the war effort, even though more than a third of them, including many non-citizen immigrants, were registered for the draft and ready to serve their country.[86] But Teddy Roosevelt's personal connections to Greenway and his wife were more important to the former president than Frankfurter's longtime support for him or the fact the strikers posed no threat to the nation or the war effort. By this time Teddy Roosevelt "was a sad, jingoistic reactionary, a far cry from the inspiring" Progressive of 1912.[87] This surely helps explain Roosevelt's "vicious attacks" on Frankfurter's patriotism and calling him a Bolshevik.[88]

The important unanswered question, at least in Snyder's comprehensive biography, is why Frankfurter still had "faith in him," and "believed the country needed Roosevelt's leadership."[89] What led Frankfurter to crave the affirmation of Roosevelt, after the ex-president so viciously defamed him, striking at his immigrant (and by implication Jewish) heritage and calling him a Bolshevik? What was it about Frankfurter's personality, or insecurity, that led to this behavior, and how did it affect his later career on the Court?

Starting with Frankfurter's investigation of the Bisbee deportations and the Mooney case, conservatives, including the now-reactionary Theodore Roosevelt, began to think of Frankfurter as the most dangerous man in America.[90] It is easy to see why conservatives, supporters of segregation, nativists, and opponents of legal protections for workers, feared him.

In 1920, Frankfurter helped found the ACLU and served on its board. He devoted enormous energy, albeit unsuccessfully, to save the lives of the Italian immigrant anarchists Nicola Sacco and Bartolomeo Vanzetti, who had been convicted in an outrageously unfair trial for a murder that neither of them (or perhaps only one of them) likely committed.[91] His strong

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[82] Mooney v. Holohan, 294 U.S. 103 (1935).

[83] *Mooney Pardoned; To Dedicate Life to the "Common Good;" Absolved of Guilt*, NEW YORK TIMES, January 8, 1939, cited in FELDMAN, SCORPIONS, *supra* note 13, at 438 n.23.

[84] SNYDER, *supra* note 4, at 94.

[85] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 12.

[86] *Id.* at 94.

[87] SNYDER, *supra* note 4, at 104.

[88] *Id.*

[89] *Id.*

[90] Snyder's chapter 9 is titled "A Dangerous Man." SNYDER, *supra* note 4, at 117.

[91] FELDMAN, SCORPIONS, *supra* note 13, at 15-27.

commitment to fair trials and due process for labor activists and radicals, and his denunciation of the Palmer raids and the Red Scare after World War I, gave Frankfurter an unjustified reputation as a radical and a communist.[92] He was neither, and was as anti-communist as anyone could be. His support for McCarthy-era suppression of freedom of speech would later underscore his deep hostility to Communism.[93] However, in some McCarthy-era cases he supported civil liberties involving alleged communists.[94]

Despite his personal hostility to most of the goals of radicals, before he went on the Court, Frankfurter sometimes worked to insure they received fair trials. On the Supreme Court, he would courageously support a full review of the espionage convictions of Ethel and Julius Rosenberg, not because he sympathized with their politics, but because their trials were unfair,[95] just as he had worked to overturn the outrageously unfair convictions of Sacco and Vanzetti, whose anarchist politics he deplored. These failed attempts to save the lives of "radicals" illustrate Frankfurter's willingness to take unpopular positions as an activist lawyer and later, in some cases, as a Justice. But they also may reflect a desire to be associated with famous cases and well-known defendants. He showed little concern with denying run-of-the-mill defendants protection from self-incrimination or trying them without providing them with counsel.[96]

Before going on the Court, Frankfurter's scholarship and advocacy for labor causes, improved race relations, and other pressing social issues made him a leading figure and advocate among progressives. He worked with the NAACP on civil rights, argued Supreme Court cases to support minimum wages and maximum hours, and helped draft the Norris-La Guardia Act, which was the first federal law to successfully protect organized labor.[97] Frankfurter's impact on social policy from World War I to the 1930s illustrates his importance. As I noted above, Justice Louis Brandeis, who mentored Frankfurter, called him "the most useful lawyer in the United States."[98]

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[92] SIMON, THE ANTAGONISTS, *supra* note 2, at 50-59. While defending radicals, he clearly was not sympathetic to most of their larger political goals. While never a fan of corporate wealth, he was hardly a socialist. *Id*. at 14-15.

[93] *See, e.g.,* Feiner v. New York, 340 U.S. 315 (1951); Dennis v. United States, 341 U.S. 494 (1951); Ullman v. United States, 350 U.S. 422 (1956); Barenblatt v. United States, 360 U.S. 109 (1959); Konigsberg v. State of California, 353 U.S. 252 (1957) (Frankfurter, J. dissenting); *and* Konigsberg v. State of California, 366 U.S. 36 (1961) (evidencing his votes upholding the suppression of communists and other radicals).

[94] *See* Alder v. Board of Education of the City of New York, 342 U.S. 45 (1952); Sacher v. United States, 343 U.S. 1 (1952); Rosenberg v. United States, 346 U.S. 273 (1953); Peters v. Hobby, 349 U.S. 341 (1955); Pennsylvania v. Nelson, 350 U.S. 497 (1956); Slochower v. Board of Higher Education of the City of New York, 350 U.S. 551 (1956); Sweezy v. New Hampshire, 350 U.S. 234 (1957); Yates v. United States, 3454 U.S. 298 (1957); *and* Kent v. Dulles, 357 U.S. 116 (1958) (evidencing his support of civil liberties and due process for some alleged Communists).

[95] Rosenberg v. United States, 346 U.S. 273 (1953), (Frankfurter, J., dissenting).

[96] *See infra* at notes 451-52 (discussing Adamson v. California) *and infra* at note 204 (discussing Betts v. Brady).

[97] An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes, act of March 23, 1932, Chapter 90, 72nd CONG., 47 Stat. 70.

[98] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 20.

At the same time, Frankfurter increasingly showed a conservative—often reactionary—streak, opposing Supreme Court decisions protecting individual liberty and religious freedom. He privately denounced the Court's decision in *Meyer v. Nebraska*, overturning the conviction of Robert T. Meyer for teaching the German language in a private Lutheran school in violation of a Nebraska statute which prohibited teaching children any modern foreign language before the ninth grade.[99] At the time, many Lutherans used the German language Bible translated by Martin Luther.[100] In his biography of Frankfurter, Brad Snyder praises Frankfurter's opposition to overturning Nebraska's repressive law for supporting "a prescient theory of limited judicial review."[101] It is not at all clear why Frankfurter was "prescient" in opposing decisions to strike down truly repressive legislation aimed at minorities and immigrants. More prescient was Brandeis, who joined the majority in *Meyer*, and a month later explained to Frankfurter that "fundamental rights" such as "education," or "choice of profession" should "not be impaired or withdrawn except as judged by [the] 'clear and present danger' test."[102] It is hard to imagine how teaching children to read the Bible in the language of their choice threated society in any way, much less created a "clear and present danger." Unfortunately, this was a moment when Frankfurter failed to learn anything from his mentor.

The law used to convict Meyer was a classic form of racial,[103] ethnic, and religious hatred and discrimination against German immigrants and German Americans, who during and after World War I were demonized as "Huns" and barbarians.[104] As one professor at the University of Nebraska explained, in language similar to the way many Southerners described Black people and many Americans had described Native Americans, "The Prussian" is "a moral imbecile, an arrested development, a savage in

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[99] SNYDER, *supra* note 4, at 138-39. Meyer v. Nebraska, 262 U.S. 390, 391 (1923). The law did allow teaching children Biblical Hebrew, Biblical Greek, and Latin, which of course supported the religious liberty of Jews, Roman Catholics, Orthodox Catholics, and some Protestants, but emphatically *not* German Lutherans.

[100] *Paul Finkelman, German Victims and American Oppressors: The Cultural Background and Legacy of* Meyer v. Nebraska*, in* LAW AND THE GREAT PLAINS 33, at 44, (ed. John R. Wunder) (1996).

[101] SNYDER, *supra* note 4, at 139.

[102] Brandeis to Frankfurter, quoted in ROBERT C. POST, THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921-1930 (2024), 828-29.

[103] It is worth noting that in this period ethnicity and religion were often combined with concepts of "race." For example, THE DICTIONARY OF RACES OR PEOPLES. REPORTS OF THE IMMIGRATION COMMISSION. Senate Document No. 662. 61st Cong. 3rd. Session. (1911), refers to people of European ancestry as being of different "races" such as "[t]he principal race or people of England," (54), "[t]he principal race or people of France," (61), "[t]hat section of the French race or people which lives in Canada," (63), "[t]he race or people whose mother tongue is German," (64), "[h]he modern Greek race," (68), "the Gypsy belongs to the Aryan race," (71), "[t]he race or people that originally spoke the Hebrew language" (73) noting that "the Hebrew is a mixed race, like all our immigrant races or peoples, although to a less degree than most" (73), [t]he principal race or people of Ireland: the race which originally spoke Irish," (79), "[t]he race or people of Italy," noting that the "bureau of Immigration divides this are into two groups, North Italian and South Italian," (81). Thus, people talked about the "German race" in WWI and when discussing immigration, there were references to such groups as the Irish, Italian, or Jewish race. For example, *see*, NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (2009).

[104] Finkelman, *German Victims, supra note 100, at 43.*

civilization's garb, and even the garb he has stolen. Like the savage he is boastful and cunning. Among the nations he is precisely what the type of moral imbecile but intellectually educated criminal is among individuals."[105] More succinctly, Professor Vernon Kellogg, an evolutionary biologist and zoologist at Stanford University, and the first permanent secretary of the National Research Council in Washington, D.C. declared that all Germans were "unclean."[106] Several other states passed similar laws at this time.[107] The Court ruled seven to two that the Nebraska statute violated the due process clause of the Fourteenth Amendment.[108] Frankfurter's mentor Justice Brandeis was in the majority, but his hero Holmes was not.[109] Frankfurter privately denounced the Nebraska law as "uncivilized,"[110] and apparently liked the outcome,[111] but at the same time strenuously objected to the Court overturning the law.[112] In a preview of his anti-libertarian opinions on the Court, he said he would have voted with Holmes, arguing that the Supreme Court should not overturn state laws, no matter how much they repressed religious freedom, freedom of speech, or the right of parents to educate their children.[113] Brad Snyder argues that Frankfurter was "opposed to invoking the Due Process Clause [of the Fourteenth Amendment] no matter how horrible or objectionable the law."[114] But surely such a cramped view of liberty was neither "prescient" nor admirable.

This position was anachronistic, oppressive, bigoted, and destructive of civil liberties. Brandeis in *Meyer* and both Holmes and Brandeis in a number of other cases,[115] and Brandeis alone after Holmes left the bench,[116] embraced using the Fourteenth Amendment to strike down repressive state legislation, support freedom of speech, and reverse unfair criminal verdicts that denied people due process of law. Frankfurter's view of the role of the court and his rigid deference to state legislation meant that, in Frankfurter's view, it was constitutionally permissible, in the name of "democracy," for the majority of the population to persecute a minority, as in the case of German Lutherans in Nebraska.

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[105] *Id.* at 38.

[106] *Id.* During the War one German immigrant, Robert Prager, was lynched and many were tarred and feathered and physically attacked. Id. at 34-39; See also PAUL MURPHY, WORLD WAR I AND THE ORIGINS OF CIVIL LIBERTIES IN THE UNITED STATES (1979) 119-24 and 128-32 for a list of vigilante attacks on German immigrants during the war, when Germans were considered to be a "dangerous race."

[107] For a full history of these laws and the surrounding litigation, *see* WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917-1927 (1994).

[108] Meyer v. Nebraska, 262 U.S. 390, 391 (1923).

[109] *Id.*

[110] SNYDER, *supra* note 4, at 138-39.

[111] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3 at 81.

[112] SNYDER, *supra* note 4 at 138-39.

[113] *Id.*

[114] *Id.* at 139.

[115] *E.g.,* Pierce v. Society of Sisters, 268 U.S. 510 (1925); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes and Brandies, JJ. dissenting); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis and Holmes, JJ. concurring); Stromberg v. California, 283 U.S. 359 (1931); Near v. Minnesota, 283 U.S. 697 (1931).

[116] Nixon v. Condon, 286 U.S. 73 (1932); Powell v. Alabama, 287 U.S. 45 (1932); Patterson v. Alabama, 294 U.S. 600 (1935); Herndon v. Georgia, 295 U.S. 441 (1935); Herndon v. Lowry, 301 U.S. 247 (1937)

The only explanation, which is indeed grim, is that Frankfurter stood for the "tyranny of the majority" over the fundamental rights of discreet minorities and believed that such tyranny was good for the nation and the Constitution. It is quite frankly bizarre that any modern scholar would praise Frankfurter's support of this sort of religious persecution or defend his rigid constitutional theory that led him to this position.

Two years after *Meyer*, in an unsigned *New Republic* essay, Frankfurter denounced the Court's unanimous decision in *Pierce v. Society of Sisters*,[117] striking down Oregon's Ku Klux Klan-inspired law prohibiting any parochial schools or private schools from operating in the state.[118] As in Meyer's case, Frankfurter was intellectually inflexible and out-of-touch with reality, unlike his hero Holmes and his mentor Brandeis, both of whom voted to strike down the Oregon law. The Oregon law was certainly the result of a "democratic" process. Oregon's overwhelmingly white Protestant majority supported a referendum to implement the law, which was aimed at Catholics and immigrants.[119]

Claiming he did not like the law, and even admitting that the results in *Meyer* and *Pierce* were "just cause for rejoicing,"[120] Frankfurter argued that it was anti-democratic for the Court to strike down state laws because it interfered with the will of the elected legislature.[121] Frankfurter further claimed that it was dangerous to rely on the Court to protect liberty because the same doctrines that preserved liberty in *Meyer* and *Pierce* would "be used as a sword against what Frankfurter viewed as economically progressive legislation."[122] He believed that whatever might have been gained by both decisions was not worth the cost to his peculiar notion of "democracy."[123] But this begs the question why Frankfurter believed that the Constitution did not in fact protect minorities from the bigotry of the majority. Here and throughout his career, we see Frankfurter's stubborn inability to distinguish between laws that

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[117] Pierce v. Society of Sisters, 268 U.S. 510 (1925). SNYDER, *supra* note 4, at 157-58. *See also* ROSS, FORGING NEW FREEDOMS, *supra* note 107.

[118] In the 1920s a reinvigorated Ku Klux Klan, often called the "second Klan," emerged in the North (and the South) focusing mostly on opposition to Catholics, Jews, and immigration from anywhere except the British Isles and northern Europe, and hatred for Blacks. The KKK was heavily involved in the election of Governor Walter Pierce of Oregon, who supported the KKK's slogan of "100 percent Americanism." PAULA ABRAMS, CROSS PURPOSES: PIERCE V. SOCIETY OF SISTERS AND THE STRUGGLE OVER COMPULSORY PUBLIC EDUCATION (2009). David A. Horowitz, *Social Morality and Personal Revitalization: Oregon's Ku Klux Klan in the 1920's*, 90 OR. HIST. Q. 365 (1989); Paul M. Holsinger, *The Oregon School Bill Controversy, 1922-1925*, 37 PAC. HIST. R. 327-340 (1968); NANCY MACLEAN, BEHIND THE MASK OF CHIVALRY: THE MAKING OF THE SECOND KU KLUX KLAN (1995); LINDA GORDON, THE SECOND COMING OF THE KKK (2017); KENNETH T. JACKSON, THE KU KLUX KLAN IN THE CITY, 1915-1930 (1992). DAVID A. HOROWITZ, INSIDE THE KLAVERN: THE SECRET HISTORY OF A KU KLUX KLAN OF THE 1920'S (1999) and Robert R. McCoy, *The Paradox of Oregon's Progressive Politics: The Political Career of Walter Marcus Pierce*, 110 OR. HIST. Q. 390 (2009) argue that Pierce was in fact a member of the Klan.

[119] In 1930 Oregon had 938,597 White residents and 15,189 non-white residents. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* Table 52-Oregon (U.S. Census Bureau, Working Paper No. 56)

[120] POST, THE TAFT COURT, *supra* note 102, at 860 n.107.

[121] ROSS, FORGING NEW FREEDOMS, *supra* note 107, at 195.

[122] *Id.* at 196.

[123] SNYDER, *supra* note 4, at 157.

oppressed minorities by denying "liberty" and economic regulations, which applied to everyone.

Frankfurter also seemed oblivious to the reality that if the Court would not protect fundamental liberties, as it did in *Meyer* and *Pierce*, there was no hope that such liberties could be vindicated. Frankfurter's belief in "democracy" was surely misplaced, especially in this period. The repressive laws at issue in Nebraska and Oregon had been properly passed by democratically elected legislators and signed by democratically elected governors. Frankfurter's commitment to "democracy" and his opposition to judicially protected liberties rings hollow in the face of democratically adopted laws that targeted minorities for their religion, ethnicity, or race.

Frankfurter does not seem to have understood the problem of the "tyranny of the majority"—the problem that without constitutional limitations, the majority of the population can easily run roughshod over minorities. These issues were not new. In the nineteenth century both Alexis de Tocqueville[124] and the great English philosopher of freedom of expression, John Stuart Mill, had eloquently described the problem.[125] But Frankfurter need not have used a French scholar or an English philosopher to understand this. He could have cited James Madison's arguments that in a republic, threats to liberty would emanate from the popularly elected legislature, where a determined majority would simply ignore the civil liberties of the minority.[126] Or he could have learned from Madison's Federalist 10 that threats to liberty came when "a number of citizens, whether amounting to a majority or minority of the whole" were "united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens."[127] Most importantly, he might easily have turned to Thomas Jefferson's brilliant single-sentence explanation of the need to support the will of the majority (the essence of democracy) while protecting the basic liberties of the minority: "All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression."[128]

Throughout his career, in private conversation, essays, and on the Court, Frankfurter would wring his hands about unjust and uncivilized laws—but then proceed to explain why the Court should refrain from stopping such oppression.[129] Similarly, while he claimed to oppose the

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[124] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1835) and 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (1840).

[125] JOHN STUART MILL, ON LIBERTY (1859).

[126] "Madison in the Virginia Ratification Convention," reprinted in 11 THE PAPERS OF JAMES MADISON 130 (ed. Robert Rutland) (1977). See also Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301-47.

[127] Federalist No. 10, 10 PAPERS OF JAMES MADISON 264, 269.

[128] Thomas Jefferson, *First Inaugural Address*, March 4, 1801, available at https://founders.archives.gov/documents/Jefferson/01-33-02-0116-0004 (last visited Mar. 17, 2024).

[129] For an example of this while on the Court, see Frankfurter's majority opinion in Minersville Board of Education v. Gobitis, 310 U.S. 586 (1940) (supporting the expulsion of students who refused to salute the flag because it violated their religious beliefs, and upholding legal sanctions against their parents); his angry dissent in West Virginia Board

death penalty, he provided the fifth vote that led to the electrocution of Willie Francis in Louisiana.[130] He felt compelled to write a concurrence to explain his vote, as he did so often. Frankfurter later told Learned Hand that he found the Francis execution "barbaric," but insisted that due process did not require a different decision. Francis, a Black teenager, was convicted by an all-white jury of murdering a white businessman when he was sixteen. His court appointed lawyers called no witnesses, offered no evidence, made no motions, and did not challenge a confession by Francis that many commentators believed was coerced. Evidence in the case was mishandled. The police who arrested Francis claimed he had the victim's wallet at the time, but the prosecution never produced the wallet, which apparently disappeared (assuming it ever existed). At age seventeen Louisiana sent Francis to the electric chair, but the execution malfunctioned. When Louisiana moved to send him to the electric chair a second time, his new attorney argued executing him a second time constituted double jeopardy and cruel and usual punishment.[131] Four justices agreed with the argument, but Frankfurter, the former ACLU attorney, provided the fifth vote for execution.

In claiming the execution was barbaric, Frankfurter could once again privately protest the horrendous outcome of this case, proving (at least to himself) that he was really in favor of justice, while voting for a barbaric outcome, even though four other justices thought due process should lead to a different result. For Frankfurter, fidelity to an outdated, rigid, and anachronistic legal theory mattered far more than a Black life in segregated Louisiana. But, as if to salve his conscience, Frankfurter urged the governor of the rigidly segregated former Confederate state to commute Francis's sentence.[132] That Frankfurter believed this tactic would have worked suggested he was either unrealistically naïve or cynical. That he thought it was even appropriate for a sitting Justice to lobby a state governor illustrates Frankfurter's lack of judicial ethics as well as his absurd hubris. This improbable result did not happen, and Francis was executed. Put another way, when in the position to prevent a grotesque miscarriage of justice, Frankfurter voted with the majority to uphold the injustice and the execution. With the power of his vote, in a 5-4 decision, Frankfurter refused to act to save Francis's life. But he was able to salve

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of Education v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J. dissenting) (protesting a reversal of his position in Gobitis and arguing for the constitutionality of new laws directly aimed at Jehovah's witnesses); and his massive concurrence in McGowan v. Maryland, 366 U.S. 420, 459 (1961) (Frankfurter, J. concurring and appendix I, 543-550; and Appendix II, 551-559) (justifying laws discriminating against religious Jews in a variety of ways). Similarly, while he claimed to oppose the death penalty, he provided the fifth vote that led to the electrocution of Willie Francis, in Louisiana. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947). *See also* UROFSKY, FELIX FRANKFURTER, *supra* note 3 at 154-55. Frankfurter insisted that due process did not require a different decision. For Frankfurter, fidelity to an outdated, ridged, and anachronistic legal theory mattered far more than Black lives in segregated Louisiana.

[130] Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947). For details of the case see the dissent in this case by Justice Burton, 329 U.S. 459, 480. See also UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 154-55.

[131] For a full history of the case, see ARTHUR S. MILLER and JEFFREY BOWMAN, DEATH BY INSTALLMENTS: THE ORDEAL OF WILLIE FRANCIS (1988).

[132] SNYDER, *supra* note 4, at 468-87.

his conscience by an improper appeal to a governor who could, and did, ignore him.

In his biography of Frankfurter, Snyder explains the Francis case as an example of Frankfurter's "lifelong reluctance to invoke the Fourteenth Amendment's Due Process Clause to interfere with state political process."[133] But in fact, despite Snyder's lame defense of Frankfurter, this was not about the "political process" in Louisiana. It was about the judicial process. Indeed, by writing to the governor of Louisiana Frankfurter was interfering (arguably improperly) in the political process.

Furthermore, by failing to use the Fourteenth Amendment in this case, Frankfurter demonstrated that as both a scholar and a Justice, he apparently missed the history of the Fourteenth Amendment, adopted after the Civil War to prevent the states from denying due process and equal protection of the laws to all people in America, and to reverse the holding in *Dred Scott v. Sandford* that African Americans could *never* be citizens of the United States and under the Constitution they "had no rights which the white man was bound to respect."[134] Although almost no Frankfurter scholars discuss it,[135] it is worth remembering that before he went on the Court, Frankfurter had written admiringly of Chief Justice Roger B. Taney,[136] praising his jurisprudence while failing to seriously examine *Dred Scott*[137] and his many other proslavery and racist decisions.[138] Snyder notes that William Coleman, who was Frankfurter's clerk and the first Black clerk in the court's history, argued with the Justice about his praise of Taney,[139] but Snyder never considers whether Frankfurter's refusal to see the Fourteenth Amendment as a vehicle for the protection of racial, religious, and political minorities was in part a function of his unabashed admiration for the person generally considered to be the worst and most racist Justice in our history. Frankfurter, who had once been a "liberal" and a civil libertarian, consistently supported allowing state governments, and the Federal government in the Japanese Internment cases, to oppress religious, racial, and ethnic minorities. Snyder asserts that "Frankfurter understood the need to protect free speech, fair criminal trials, and racial and religious minorities."[140] But, as in *Meyer* and *Pierce*, even before he was on the Court, and in many cases when he was on the Court, the evidence actually demonstrates the opposite.[141] With the exception of his support for Black civil rights (and even here he is inconsistent), Frankfurter's record on these issues is, quite frankly, appalling. His reaction to *Meyer* and *Pierce*, while he was teaching at Harvard, was simply an appetizer to his often-repressive jurisprudence

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[133] *Id.* at 486.

[134] Dred Scott v. Sandford, 60 (19 How.) U.S. 393, 407 (1857).

[135] None of the Frankfurter biographies I have cited here do, for example.

[136] Felix Frankfurter, "Taney and the Commerce Clause," 49 HAR. L. REV. 1286 (1936).

[137] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[138] PAUL FINKELMAN, SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT (2018) and Paul Finkelman, *"Hooted Down the Page of History": Reconsidering the Greatness of Chief Justice Taney*, 1994 J. SUP. CT. HIST. 83-102 (1995).

[139] SNYDER, *supra* note 4, at 523.

[140] *Id.* at 139.

[141] *Id.* at 157-58.

while on the Court. These cases demonstrate Frankfurter's support of religious persecution, antisemitic laws, federal discrimination based on race, discriminatory and murderous police practices, state sponsored segregation, denial of fair trials for indigent defendants, and state voting laws that denied equal representation to a majority of the population.[142] Ironically, when he was on the Court, those who valued fundamental liberties might have agreed with the inter-war conservatives who asserted that Frankfurter was a "dangerous man,"[143] but of course for very different reasons. The thousands of Jehovah's Witnesses booted out of public schools after Frankfurter's *Gobitis* opinion[144] or the 120,000 Japanese Americans sent to concentration camps, with Frankfurter's support,[145] surely knew how dangerous he actually was.

III. FRANKFURTER'S PROTÉGÉS AND THE PROBLEM OF JUDICIAL ETHICS

After Franklin D. Roosevelt's presidential nomination and his election, Frankfurter became a key insider, advising FDR, helping draft legislation, and writing (sometimes anonymously) essays to support the New Deal.[146] However, as Melvin Urofsky notes, it is "manifestly false" that "Frankfurter's ideas governed early New Deal policy," in part because shortly after FDR's inauguration Frankfurter went to Oxford University for a year.[147] While he was at Oxford, Frankfurter continued to give the president advice by mail.[148] When he returned from England he was a key advisor to FDR, who used him as a sounding board.

In this period Frankfurter backed all of FDR's policies, including the court packing plan, which in some ways made sense, but was also somewhat ill-conceived and poorly rolled out to the American people.[149] Before leaving for Oxford he had declined FDR's offer to make him solicitor general of the United States, even though the President said it would be a stepping stone to the Supreme Court.[150] Frankfurter believed that he could better serve his friend "Frank," as he called him when they were alone, in a less conspicuous and unofficial role as an "outsider-insider."[151] FDR was surprised by this rejection, and called Frankfurter "an independent pig," and then explained "that's one reason I like you."[152] Even while he was at Oxford, Frankfurter continued give the president advice.[153]

As an unofficial presidential advisor and a self-appointed lobbyist and talent scout, Frankfurter helped place at least sixty of his students and

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[142] See *infra,* Parts III, V, and VII.

[143] This is the title of Snyder's Chapter 9, describing conservative reactions to Frankfurter's legal activism from World War I until the 1930s. SNYDER, *supra* note 4 at 117.

[144] For a discussion of *Gobitis*, see *infra* at Part V., Section A .

[145] Korematsu v. United States, 323 U.S.214, 224 (1944) (Frankfurter, J., concurring).

[146] SNYDER, *supra* note 4, at 282-309; UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 35-6.

[147] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 36-7.

[148] *Id.* at 37.

[149] *Id.* at 40-44.

[150] *Id.* at 36; SNYDER, *supra* note 4, at 215-18.

[151] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 36.

[152] *Id.*

[153] *Id.* at 37.

friends, sometimes known as the "Happy Hotdogs"—a play on Frankfurter's first and last name—in one New Deal agency after another.[154] The list of Frankfurter's protégés in the administration is "staggering."[155] *Fortune* magazine called him "the most famous legal employment service in America."[156] With direct access to the President, and connections to many others in the administration, a word from Frankfurter easily led to a job offer. Snyder asserts that Frankfurter's "eye for talent was second to none,"[157] although as I suggest below, some of his choices proved very problematic. Most of those he helped place in the federal government had been on the *Harvard Law Review*, clerked for Justices Holmes or Brandeis or federal judges Julian Mack and Learned Hand, and entered private practice until Frankfurter recruited them for government service.[158] Some ended up at the highest levels of American politics, such as the future Secretary of State Dean Acheson. Frankfurter recommended Archibald MacLeish (the lawyer-poet) to be the Librarian of Congress (1939-44). Later, as Assistant Secretary of State, MacLeish helped create the precursor of the Central Intelligence Agency. Nathan Margold, William Hastie, and Charles E. Wyzanski, Jr. served in numerous positions before becoming federal judges.

Frankfurter's former students, protégés, and friends served in sub-cabinet positions (or their equivalent) at the Departments of State, Justice, Interior, Labor, and Commerce.[159] Frankfurter protégés Benjamin V. Cohen, Thomas Corcoran, and Joseph L. Rauh, Jr. were part of FDR's "brain trust." The chairs of both the Tennessee Valley Authority (David Lilienthal) and the Securities and Exchange Commission (James M. Landis) had been Frankfurter's students. A number of these young lawyers, including Cohen, Wyzanski, Rauh, Lilienthal, and Margold, were Jewish, which infuriated isolationists, assorted anti-Semites, and some conservatives. In an age when major law firms usually hired White Protestants who were born in the United States, the federal government, with an endorsement from Frankfurter, offered more equal opportunities. With Frankfurter's help, his former student William Hastie would become the first African American federal judge.[160]

Along with his former students, many of Frankfurter's law clerks would help shape American politics and law. His clerk William T. Coleman was the first African American to hold that position.[161] Coleman's co-clerk that year, Elliot Richardson, later served with great integrity as Attorney General during Watergate, playing a key role in saving the nation by standing up to Richard Nixon's attempt to corrupt our legal system for

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[154] *Id.* at 36. SNYDER, *supra* note 4, at 219-230, Chapter 15, titled "Happy Hot Dogs."

[155] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 37.

[156] *Id.*

[157] *Id.* at 229, 224.

[158] Those listed in this paragraph and the following two paragraphs are discussed in UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 36-40 and in SNYDER, *supra* note 4, at 219-230.

[159] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 37.

[160] SNYDER, *supra* note 4, at 151.

[161] *Id.* at 523. Later, as Secretary of Transportation, he was the second Black man to serve in a presidential cabinet.

political gain. These students and clerks are key to the subtitle of Snyder's biography, "Making the Liberal Establishment."[162]

When he went on the Court, Frankfurter gave his former Harvard colleague Al Sacks "carte blanche power to select his clerks,"[163] but he rejected Sacks's selection of Ruth Bader Ginsburg.[164] Frankfurter claimed this was because *he* had recently had a heart attack and did not want to burden Mrs. Ginsburg, as he referred to her.[165] He could have a Black clerk, but not a female clerk. Frankfurter, perhaps unsurprisingly, wrote for the Court upholding a Michigan law that denied a woman the right to work in a bar, unless it was owned by her father or her husband.[166]

Some of Frankfurter's protégés were problematic and serve as a caution for understanding the Justice's judgment and ethics. A few of Frankfurter's went to federal prison, including Alger Hiss for perjury, Edward Prichard for election fraud, and James M. Landis for tax evasion. His relationship with his former students after he went on the bench is also problematic. Frankfurter's former student John McCloy, as Assistant Secretary of War, was the leading policy maker in planning and implementing the internment of Japanese Americans.[167] He deflected discussion on civil liberties to avoid a disagreement with Attorney General Francis Biddle, who objected to denying civil liberties to American citizens.[168] But when a Justice Department lawyer questioned the constitutionality of incarcerating U.S. citizens who had never been charge with a crime, much less convicted of one, McCloy declared, "The Constitution is just a scrap of paper to me."[169] We can only wonder what Professor Frankfurter taught him about the Constitution. Interior Secretary Harold Ickes wrote in his diary that many people thought McCloy was "more or less inclined to be a Fascist."[170] Apparently, Frankfurter's "eye for talent" did not catch that flaw. When the Court heard the Japanese Internment cases, *Hirabayashi v. United States*[171] and

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[162] *Id.* (giving the full title of the book, which ends with "The Making of the Liberal Establishment.").

[163] *Id.* at 663.

[164] *Id.*

[165] *Id.*

[166] Goesaert v. Cleary, 335 U.S 464 (1948). In a rare criticism of Frankfurter, Snyder rightly finds his opinion "indefensible," noting that it would not "be the last time that Frankfurter's gender bias resulted in a serious error in professional judgment." SNYDER, *supra* note 4, at 522.

[167] ROGER DANIELS, THE DECISION TO RELOCATE THE JAPANESE AMERICANS 35 (1975).

[168] CLIFF SLOAN, THE COURT AT WAR: FDR, HIS JUSTICES, AND THE WORLD THEY MADE (2023) 178.

[169] DANIELS, DECISION TO RELOCATE, *supra* note 167, at 35; *see also* ROGER DANIELS, CONCENTRATION CAMPS USA: JAPANESE AMERICANS AND WORLD WAR II 55-56 (1971). McCloy would later admit his errors but at the same time "tried to justify them in a calmer time when hindsight ought to have conferred on [him] greater wisdom." WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 339.

[170] Robert Sherrill, *The Real McCloy: THE CHAIRMAN: JOHN J. McCLOY; The Making of the American Establishment*, LA TIMES (April 19, 1992), https://www.latimes.com/archives/la-xpm-1992-04-19-bk-588-story.html. Ickes, a member of the ACLU, is described as the ACLU's staunchest friend" in FDR's administration. WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 97.

[171] Hirabayashi v. United States, 320 U.S. 81 (1943).

Korematsu v. *United States*,[172] McCloy was heavily involved in suppressing a memo from a "Naval Intelligence official" showing that it "was entirely feasible to separate the loyal from the disloyal" in the Japanese American community and "that wholesale restrictions against those of Japanese descent were neither appropriate nor justified."[173] McCloy also helped suppress a report from the senior army commander in California, Lt. General John L. DeWitt, that the push for the internment was mostly about racial hatred of the Japanese.[174]

In 1981, McCloy would admit before the Commission on Wartime Relocation and Internment of Civilians that the Internment had not been about military necessity or fear of sabotage by Japanese Americans, but was the result of the "surprise attack" that started the War and was implemented "in the way of retribution for the attack that was made on Pearl Harbor."[175] In other words, McCloy admitted that in implementing and defending the internment he misled the Court and the nation in order to incarcerate in concentration camps some 120,000 American citizens and their elderly immigrant relatives as an act of revenge for something done by people from another county. He sought revenge against these completely innocent Americans because of their race and shared ethnicity with the people from another country who had attacked the United States. As one scholar recently noted, the dishonesty of Frankfurter's protégé, who the Justice was quietly advising, led to a "historic and shameful failure by the best and brightest of the American legal establishment," which included McCloy who "orchestrated the withholding [from the Court] of critical information known the government."[176]

When Jewish Americans pleaded with McCloy to authorize the bombing of the gas chambers or crematoria at Auschwitz, or the railroads leading to the death camp, to slow down the mass murder of Jews, he categorically refused to consider it, dishonestly asserting that United States bombers could not reach that location, when in fact they could.[177] He furthermore, absurdly, argued "that bombing Auschwitz would inflict worse punishment on the Jews interned there, Jews *whom he knew*, were destined for the gas chambers."[178] As United States High Commissioner in Germany from 1949 to 1952, McCloy pardoned scores of war criminals (including some mass murderers), restored property to German

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[172] Korematsu v. United States, 323 U.S.214, 224 (1944) (Frankfurter, J., concurring).

[173] SLOAN, COURT AT WAR, *supra* note 168, at 194, 197-98.

[174] *Id.* at 301-03.

[175] McCloy quoted in PETER IRONS, JUSTICE AT WAR 353 (1983).

[176] SLOAN, COURT AT WAR *supra* note 168, at 301-03.

[177] On the ability to reach Auschwitz, *see*, *OPERATION FRANTIC: Shuttle Raids to the Soviet Union*, NAT. MUSEUM OF THE U.S. AIR FORCE, https://www.nationalmuseum.af.mil/Visit/Museum-Exhibits/Fact-Sheets/Display/Article/1519682/operation-frantic-shuttle-raids-to-the-soviet-union/; *and Auschwitz, Bombing of*, SHOAH RESOURCE CENTER, https://www.yadvashem.org/odot_pdf/Microsoft%20Word%20-%205786.pdf (last visited Sept. 22, 2024). *See also* RICHARD BREITMAN AND ALLAN J. LICHTMAN, FDR AND THE JEWS (2013) 282-86.

[178] DEBORAH E. LIPSTADT, BEYOND BELIEF: THE AMERICAN PRESS AND THE COMING OF THE HOLOCAUST, 1933-1945 71-72 (1986).

industrialists who had enriched themselves by using slave labor during the war, and allowed ex-Nazis into the new government.[179]

By 1950, under McCloy's administration, more than 80 per cent of the judges in Bavaria were ex-Nazis. Roger Baldwin, the leading figure in the American Civil Liberties Union complained, after a fact-finding mission to Germany that "The wrong men are at the top of the government," and "former Nazis hold too many posts." Other observers reached the same conclusion.[180] In addition to placing ex-Nazis in post-war government positions, McCloy pardoned, granted clemency, or commuted sentences for 64 of 74 Nazi war criminals. Those pardoned or had their sentences commuted included mass murderers, doctors who performed inhumane experiments on concentration camp and death camp inmates, and industrialists who used slave labor, with many of their workers dying from starvation or punishment. He commuted the sentences of ten of the fifteen war criminals sentenced to death for mass murder, enslavement, and similar crimes.[181] While McCloy was considering the fate of these war criminals, some of the murderers, doctors, and industrialists who used slave labor were appealing their sentences to the U.S. Supreme Court. While the cases were pending Justice Frankfurter and McCloy corresponded, even though McCloy was in effect a party to the case.[182] Oddly, the former law professor saw nothing unethical about what amounted to ex parte communications with parties to cases that were on appeal to his court.

Frankfurter's relationship with McCloy during the War and while McCloy was the High Commissioner of Germany raises an important question about his role on the Court and his ethics as a justice. During the War, Frankfurter lived around the corner from McCloy. The two met for evening walks and had numerous phone conversations, where they discussed "departmental matters."[183] Through these conversations Frankfurter, while on the Court, was involved in helping the administration draft legislation connected to the war, policies on the conduct of the war, and international negotiations.[184]

Historians of the internment have documented that Frankfurter "informally advised 'Jack' McCloy about restrictions on aliens."[185] This of course would include the internment of tens of thousands of Japanese immigrants living in the United States who were unable to naturalize because federal law prohibited the naturalization of anyone from East Asia.[186] Was Frankfurter's unwavering support for the internment of

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[179] KAI BIRD, THE CHAIRMAN: JOHN J. MCCLOY, THE MAKING OF THE AMERICAN ESTABLISHMENT 359-88 (1992).

[180] R.W. KOSTAL, LAYING DOWN THE LAW: THE AMERICAN LEGAL REVOLUTIONS IN OCCUPIED GERMANY AND JAPAN 286-301 (2019).

[181] BIRD, THE CHAIRMAN, *supra* note 179, at 364; *see* 359-88 (describing crimes of these Nazis).

[182] *Id.* at 373-74.

[183] MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION, *supra* note 13, at 204, 219. SLOAN, COURT AT WAR, *supra* note 168, at 177.

[184] MURPHY, BRANDEIS/FRANKFURTER CONNECTION, 219-20, 285, 291.

[185] DANIELS, CONCENTRATION CAMPS USA, *supra* note 169, at 135.

[186] Gabriel Jack Chin and Paul Finkelman, *The "Free White Persons" Clause of the Naturalization Act of 1790 as Super-Statute*, 65 WILLIAM & MARY L. REV. 1047 (2024).

Japanese Americans, including his concurrence in *Korematsu* v. *United States*, influenced by the fact that his protégé was the architect? We do not know exactly what advice Frankfurter gave McCloy while planning the internment, but it is reasonable to think that Frankfurter talked about the internment with McCloy and also with FDR. We know Frankfurter "maintained regular contact while McCloy was actively involved in defending the legality of the internment."[187] Frankfurter had been advising McCloy on these issues and while he was on the Court, the Justice was heavily involved in administrative policymaking and working with his many contacts, and former students in the administration.[188] Was Frankfurter's *Korematsu* concurrence, upholding the internment,[189] a function of an unethical relationship with the McCloy? Should the Justice have recused himself in *Korematsu*?[190]

IV. THE NEW JUSTICE TRAPPED IN A TIME WARP

In 1939, Frankfurter joined the Supreme Court. Some conservatives opposed his nomination, as Teddy Roosevelt's ancient and absurd claim that he was a "Bolshevik" resurfaced.[191] Unlike other nominees at the time, the Senate committee insisted that he appear in person to answer questions.[192] "Frankfurter faced opposition from 'a strange assortment of crackpot crusaders, Fascists, professional Jew-haters, and others.'"[193] In the end, the Senate unanimously confirmed him by a voice vote.[194] Thus began his long tenure on the Court. But as noted in the previous discussion of the Japanese Internment, which I will return to later in this article, on the Court he did not cease advising the President and other administration officials. Indeed, Frankfurter continued to meet with the President and had back-door access to the White House, where he frequently visited.[195]

When he went to the Court, Progressives had high hopes for him. The *Nation* asserted that "[n]o other appointee . . . has gone to the court so fully prepared for its great tasks."[196] In 1930, in a speech at Yale, "Frankfurter posited a living Constitution, which 'within its own ample and flexible resources permits adequate response to changing social and

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[187] ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG, FRAK WU, RACE RIGHTS AND REPARATION: LAW AND THE JAPANESE INTERMENT (2001) 162.

[188] SNYDER, *supra* note 4, at 353, 710, and 506-09; UROFKSY, FELIX FRANKFURTER, *supra* note 3, at 37.

[189] Korematsu v. U.S., 323 U.S. 214, 224 (1944), Frankfurter, J., concurring. Snyder does not appear to have consulted Record Group 107 in the National Archives, where the correspondence with McCloy is documented.

[190] One of the most "scathing law review critiques" of *Korematsu*, WIECEK, BIRTH OF THE MODERN CONSTITUTION *supra* note 2, at 346, was by the niece of Louis Brandeis. Nanette Dembitz, *Racial Discrimination and Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 46 COLUM, L. REV. 175 (1945).

[191] SNYDER, *supra* note 4, at 104.

[192] MARK TUSHNET, THE HUGHES COURT: FROM PROGRESSIVISM TO PLURALISM, 1930-1941 320 (2021).

[193] Id.

[194] SNYDER, *supra* note 4, at 328.

[195] *Id.* at 353.

[196] MARK TUSHNET, HUGHES COURT, *supra* note 192, at 320.

economic needs.'"[197] But on the Court he either abandoned or forgot these insights.

On the Court Frankfurter was sometimes brilliant, but he was also stubborn and egocentric. In the end he would be intellectually and jurisprudentially trapped in the early twentieth century, while the American century passed him by. In the laudatory conclusion of his biography, Snyder praises Frankfurter for following the constitutional theories of Harvard professor James Bradley Thayer, who died in 1902.[198] It is as though Frankfurter never had a new constitutional thought of his own after he left law school. There was no intellectual or jurisprudential growth even as the United States and the world changed in the six decades between Frankfurter entering law school and stepping down from the Supreme Court. As a law student and young lawyer, Frankfurter watched the Supreme Court eviscerate some progressive state legislation, most famously illustrated by striking down New York's limitation on working hours for bakers in *Lochner* v. *New York*.[199] He became convinced that the Supreme Court should rarely, if ever, override state legislation, should never do so through the Due Process Clause of the Fourteenth Amendment, and should never override federal laws "unless they were unconstitutional beyond a reasonable doubt."[200] "As one critical commentator put it," for Frankfurter "'all things should be stretched almost to the breaking point in order to hold any act of a state constitutional.'"[201] Once Frankfurter's mind was made up, he never looked back.

Frankfurter never reconsidered his own constitutional theories, which were undisturbed by the great events of the age in which he lived. In the international arena, Frankfurter's constitutional theories were unaffected by World War I, the rise of communism and fascism in Europe, World War II, the Holocaust, the Atomic Age, the Korean War, and the Cold War. Domestically he was unaffected by women's suffrage, the rise of organized crime during prohibition, the repression of free speech during World War I, the red scare of 1919, the wave of white attacks on Black communities after World War I, the Great Depression, the New Deal, the emergence of the labor movement and powerful unions, the persistence of lynchings and racially motivated murders throughout the country, the lynching of Leo Frank, the great migration of African Americans to the North, the rise of the second Ku Klux Klan, the religiously and racially motivated immigration restrictions of 1921 and 1924, McCarthyism, and the civil rights movement. He never paused to consider whether any of these events called for a reevaluation of how a judge might approach the Constitution, the Bill of Rights, the Civil War Amendments, and other constitutional and historical developments.

While other Justices were legally realistic in changing times, even though they were not "legal realists," Frankfurter was locked in the past,

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[197] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 88,

[198] SNYDER, *supra* note 4, at 710. UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 30-31.

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

[200] SNYDER, *supra* note 4, at 710.

[201] TUSHNET, THE HUGHES COURT, *supra* note 192, at 1114; Tushnet quoting Fred L. Howard, *Freedom of Speech and Labor Controversies*, 8 MO. L. REV. 25, at 43 (1943).

almost always looking backwards. He was convinced that laws passed by legislatures and executive branch policies should almost never be overturned, even when they were oppressive, religiously intolerant, or racist.[202] He regretted police brutality and unfair trials but did not think existing federal laws should be used to prosecute police who brutalized or murdered Blacks or that the Constitution allowed the Court to overturn unfair trials. He probably thought all defendants needed lawyers to have a fair chance at a trial, but he "vehemently disagreed" [203] with the idea that the right to counsel in the Sixth Amendment could be incorporated to the states.[204] In conference he argued that doing so "would uproot all the structure of the states."[205] Fidelity to states' rights was far more important to Frankfurter than fair trials for indigent defendants, and if Black people like Willie Francis were executed after a patently unfair trial, Frankfurter was willing to accept such "costs" to preserve his legal theories. Frankfurter's opposition to the Court providing meaningful protections against bigoted legislatures' racially motivated police violence, or segregated juries, may have been unshakable because he believed in "democracy."[206] However, it is hard to understand how he did not see the way democracy and the tyranny of the majority were used to attack minorities, including African Americans, German Americans in Nebraska, Japanese Americans and Japanese immigrants during World War II, or Jehovah's Witnesses. His rigid opposition to using existing federal civil rights laws and the Civil War Amendments to the Constitution cannot be reasonably based on his alleged "Democratic" principles. Certainly, he knew that throughout the South, and much of the North, Blacks were segregated, subject to police brutality, local vigilantism, and faced massive educational and economic discrimination. Especially in the South, where most Black people lived and were universally disfranchised, democracy was a hollow concept.

Thus, in one case after another Frankfurter voted to uphold bigotry, intolerance, unfair trials, repression, racism, and some of the most outrageous governmental behavior in American history, because these policies had been created by an elected legislature, were implemented by an elected governor or President, or were consistent with his support for states' rights.[207] Although he voted against segregated schools,[208] he supported allowing a segregated restaurant which received a subsidy from the city to operate in a publicly owned building.[209] Always claiming to be progressive on race and civil liberties, he supported laws that incarcerated Japanese Americans (the majority of whom were American citizens born in the United States) in concentration camps, solely on the basis of their

[202] *See* discussion *infra* Parts V and VII.

[203] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 494.

[204] Betts v. Brady, 316 U.S. 455 (1942).

[205] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 494.

[206] Hence the title of Snyder's book.

[207] *See* discussion *infra* Parts V. and VII.

[208] Brown v. Board of Education, 347 US 483 (1954).

[209] Burton v. Wilmington Parking Authority, 365 U.S. 715, 727 (1961), (Frankfurter, J., dissenting).

race,[210] expelling elementary school children for refusing to violate their religious beliefs by bowing down to an idol,[211] denying observant Jews (as well as Seventh-Day Adventists and other Christian Sabbatarians) the right to have a six-day work week because their faith precluded them from working on their sabbath (Saturday) and states prosecuted them for working on the traditional Christian sabbath,[212] and upholding outrageously malapportioned legislative districts on the absurd ground that the self-serving legislators who had created or perpetuated these districts should be expected to fix the problem.[213]

Frankfurter was clearly a gentle soul and never personally favored police brutality. While on the Court he almost always upheld federal laws. But oddly, when it came to police brutality against African Americans, Frankfurter was unwilling to enforce federal laws. In *Screws v. United States* he opposed applying federal civil rights laws against policemen who brutalized and beat to death an African American prisoner.[214] The majority opinion in *Screws* began with a stark description of the case:

> This case involves a shocking and revolting episode in law enforcement. Petitioner Screws was sheriff of Baker County, Georgia. He enlisted the assistance of petitioner Jones, a policeman, and petitioner Kelley, a special deputy, in arresting Robert Hall. . . . The arrest was made late at night at Hall's home on a warrant charging Hall with theft of a tire. Hall, a young negro about thirty years of age, was handcuffed and taken by car to the court-house. As Hall alighted from the car at the court-house square, the three petitioners began beating him with their fists and with a solid-bar blackjack about eight inches long and weighing two pounds. They claimed Hall had reached for a gun and had used insulting language as he alighted from the car. But after Hall, still handcuffed, had been knocked to the ground they continued to beat him from fifteen to thirty minutes until he was unconscious. Hall was then dragged feet first through the court-house yard into the jail and thrown upon the floor dying. An ambulance was called and Hall was removed to a hospital where he died within the hour and without regaining consciousness. There was evidence that Screws held a grudge against Hall and had threatened to "get" him.[215]

In dissent, Frankfurter argued that Sheriff Claude Screws might be "guilty of manslaughter, if not of murder, under Georgia law," for beating Hall to

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[210] Korematsu v. United States, 323 U.S.214, 224 (1944) (Frankfurter, J., concurring).

[211] Minersville Board of Education v. Gobitis, 310 U.S. 586 (1940); West Virginia Board of Education v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J. dissenting).

[212] McGowan v. Maryland, 366 U.S. 420, 459 (1961) (Frankfurter, J. concurring).

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

[214] Screws v. United States, 325 U.S. 91 (1945) (Frankfurter, J., dissenting). For another example of Frankfurter's utter insensitivity to protecting Black people from outrageous police brutality, see the discussion of his lone dissent in Monroe v. Pape, 365 U.S. 167, 202 (1961).

[215] *Screws*, at 92-93. No gun was ever found in Hall's possession.

death, but he refused to connect the murderous police officials to the utter lack of democracy for African Americans in Georgia. Thus, Frankfurter refused to support a federal prosecution under Reconstruction-era civil rights laws. Rather, Frankfurter believed the case should be left to "vindication by Georgia law,"[216] utterly ignoring the reality that in 1945, in a state that was thoroughly segregated and virtually all African Americans were disfranchised, no White police officer was going to be charged for murdering a Black man.[217] His dissent in *Screws* suggest that while Frankfurter, who once worked with the NAACP to support civil rights, might have thought Black lives mattered, they did not matter very much.

Frankfurter's hero, Justice Oliver Wendell Holmes, Jr., famously dissented in *Lochner* and other economic due process cases in the early part of the twentieth century, objecting to the use of the due process clause of the Fourteenth Amendment to strike down state economic regulation. But, by the mid-1920s, Holmes had embraced the idea that the Fourteenth Amendment should be used to strike down bigoted and repressive state legislation aimed as suppressing minorities or freedom of speech. Frankfurter's mentor, Justice Louis D. Brandeis, joined Holmes in creating this jurisprudence. Thus, Holmes and Brandeis joined the majority in striking down the Ku Klux Klan-inspired Oregon law which prohibited parochial and other private schooling in the state.[218] Frankfurter vigorously denounced that outcome but did it anonymously,[219] perhaps because he did not want to publicly disagree with Holmes and Brandeis. Similarly, while Holmes and Brandeis supported a repressive federal law that denied free speech to opponents of World War I in *Schenck v. United States*,[220] they soon changed their jurisprudence toward both federal and state laws that suppressed freedom of expression, even though they never formally recanted the earlier opinions.[221]

Frankfurter was not a failure as a justice because he wrote opinions which in retrospect were wrong. *All* justices have done that. No justice is perfect. Frankfurter's ultimate failure as a Justice was rooted in his inability (or unwillingness) to admit he had *ever* made a mistake. That failure is compounded because he never understood that his opposition to striking down economic regulations—like wage and hour laws or bans on child labor—which affected all citizens equally, did not translate to legislative acts that singled out disfavored minorities for bigoted and

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[216] *Screws*, at 138. Frankfurter rejected that Screws could be prosecuted under a federal law, the Civil Rights Act of 1866, despite the clear language of the statute: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects . . . any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States . . . ." *Screws*, at 139.

[217] The details of the beating of Hall are found here. https://go.gale.com/ps/i.do?id=GALE%7CA689949004&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=21587345&p=AONE&sw=w&userGroupName=anon%7Ebcd5f7aa&aty=open-web-entry (last visited 3/34/24). The killing of Hall took place in 1943, but the case did not reach the court until 1945.

[218] See text *supra*, at notes 117-23.

[219] SNYDER, *supra* note 4, at 157-58.

[220] Schenck v. United States, 249 U.S. 47 (1919).

[221] Abrams v. United States, 250 U.S. 616, 624 (Holmes, J. dissenting); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes and Brandies, JJ. dissenting); and Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis and Holmes, JJ. concurring).

repressive treatment. Unlike Holmes (his hero) and Justice Louis D. Brandeis (his mentor), Frankfurter never understood that the Court had an obligation to protect civil liberties, civil rights, due process, and fair political representation from oppressive legislatures and executive officials.

Snyder asserts that Frankfurter's "philosophy of judicial restraint" came from "reading" the "opinions" of Holmes and Brandeis.[222] But this is simply not correct. Had Frankfurter read their opinions in every free speech case after the spring of 1919, noticed Brandeis's vote in *Meyer* v. *Nebraska*, or recognized the support of both Justices for the unanimous decision in *Pierce* or their dissents in cases denying naturalization to pacifists,[223] he would have learned from them that judicial restraint has no place when the government tramples on the civil liberties of individuals or the police brutalize people under the color of law, especially because of their race or religion, but also because of their political views.[224] As he showed in his support for the incarceration of innocent Japanese Americans merely because of their race,[225] Frankfurter never understood or accepted that the Bill of Rights (and the three Civil War amendments) were designed to limit legislatures, governors, and even presidents, from trampling on fundamental rights.

The contrast with Justice Robert Jackson on this issue is striking. Jackson was hardly a liberal activist. In some ways, he was jurisprudentially quite conservative. But Jackson understood, and eloquently set out, the obligation of Justices to protect the fundamental liberties of all Americans. In the second Flag Salute case, *West Virginia Board of Education* v. *Barnette*, he wrote: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[226] Frankfurter vigorously and angrily dissented from Jackson's brilliant language and analysis supporting free speech and civil liberties.

In defending Frankfurter's *Barnette* dissent, Snyder asserts that "It was not hard for Frankfurter to believe that the political process, led to more liberal outcomes—especially with Roosevelt in the White House for the past eleven years."[227] The analysis based on the "liberal outcomes" of FDR's presidency is actually inconsistent with the history of the period.

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[222] SNYDER, *supra* note 4, at 353-54.

[223] United States v. Schwimmer, 279 U.S. 644 (1929), (Holmes, J. dissenting, with Brandeis joining the dissent) See the discussion of Girouard v. United States, 328 U.S. 61 (1946), *infra* at notes 303-05. In that case Frankfurter joined two other dissenters, arguing that a pacifist should not be allowed to become a naturalized citizen. In the wake of World War II, and the Holocaust, Frankfurter was unwilling to grant religious liberty to an alien who otherwise was entitled to naturalize.

[224] *See, e.g.*, Frankfurter upholding the conviction of a college student for a public speech denouncing racial discrimination in Feiner v. New York, 340 U.S. 315 (1951).

[225] Korematsu v. United States, 322 U.S. 214, 224-225 (1944), (Frankfurter, J. concurring).

[226] 319 U.S. at 638. See *infra*, Part V., Section A.

[227] SNYDER, *supra* note 4, at 429.

The laws oppressing Jehovah's Witnesses had been passed in the late 1930s and 1940s, during the Roosevelt administration. The New Deal did not offer any protection for the Witnesses, and Frankfurter clearly knew that. Indeed, the "political process" during this period led to one state after another passing laws to harass Witnesses and these were followed by local prosecutions. This state legislative and judicial oppression only increased after Frankfurter's opinion in *Gobitis*, as numerous states passed new and increasingly repressive laws, while mobs attacked Witnesses, often aided by local law enforcement.[228] Witnesses were beaten, kidnapped, mobbed, and arbitrarily arrested, while in some places terrorists and vigilantes burned down their churches. Some were tarred and feathered, in Arkansas some were shot, and in Nebraska one man was castrated.[229] It was this wave of terror and repression that in part led the Court to overturn *Gobitis*. The six justices in the majority in *Barnette* knew this, but if we are to believe Snyder, Frankfurter was unaware of these pogroms and repressive laws in his own country. A far more plausible explanation is that Frankfurter really did not care much what happened to the Witnesses and did not really believe in civil liberties for minorities, especially religious minorities. Or, alternatively, that having written an opinion in favor of repression he stubbornly refused to reconsider his views.

Unlike Chief Justice John Marshall, Frankfurter never understood that while the Constitution set out a basic plan for government, it was not frozen in time. In his greatest opinion, Marshall reminded Americans "we must never forget that it is a *constitution* we are expounding"[230] and that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."[231] The Civil War amendments were adopted to end slavery, make African Americans and other non-Whites equal citizens, and apply most of the Bill of Rights to the states to protect the liberties of all Americans from state legislatures and executives that trampled on the rights of minorities.[232] Frankfurter far too often forgot or ignored these aspects of constitutional law. Most importantly, trapped in the intellectual world of 1905, he was unable to adapt his own constitutional theories and jurisprudence to "the various *crises* of human affairs"[233] in a different age. Because of this, he was a failed justice.

V. THE NEW JUSTICE AND WORLD WAR II

In his first few years on the Court, Frankfurter emerged as an opponent of civil liberties and due process, especially for minorities. At the same time, he began a pattern of behavior that violated the traditional

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[228] Paul Finkelman, *The Flag Salute Cases*, in 2 HISTORIC U.S. COURT CASES 947, 951 (ed. John W. Johnson) (2nd ed. 2001).

[229] *Id.* at 950-51.

[230] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[231] *Id.* at 415.

[232] In the debates over the citizenship clause of the Fourteenth some members of Congress wanted to limit birthright citizenship to African Americans and exclude Chinese. The Congress emphatically rejected this idea. Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI-KENT L. REV. 1019, 1024-29 (2014). *See also* Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment,* 36 AKRON L. REV. 671 (2003).

[233] McCulloch v. Maryland at 415.

notion that Justices should not advise the executive branch and that Justices should stay out of politics. He was furious that Justice William O. Douglas was considering leaving Court for electoral politics. Ranting at this violation of his notion of judicial ethics, Frankfurter told Justice Frank Murphy, "When a priest enters a monastery, he must leave-or ought to leave-all sorts of worldly desires behind him. And this Court has no excuse for being unless it's a monastery."[234] But at the very time he wrote this, Frankfurter was constantly meddling in politics. With back door access to the White House, Frankfurter secretly left his "monastery" on a regular basis to consult with the president, cabinet members, and other administration officials.

Frankfurter also regularly violated his "monastic" vows in his jurisprudence. As William M. Wiecek aptly observed, while Frankfurter "consistently promoted judicial restraint" in civil liberties cases,[235] Frankfurter in fact "had difficulty disciplining himself" on the Court in his opinions. He ignored the American Bar Association's Canons of Judicial Ethics (1924) "which called on judges . . . to exercise 'self-restraint'" when writing opinions.[236] Indeed, Frankfurter could not restrain himself on the bench or exercise the discipline to refrain from political activity and egregious violations of the separation of powers.

This departure from judicial restraint is illustrated by two sets of cases involving Jehovah's Witnesses (partially discussed above), two cases involving the internment of Japanese Americans, and is further exemplified by Justice Frankfurter's response to the Holocaust. While constantly meeting with President Roosevelt and members of the administration during his time on the bench, a clear violation of judicial ethics, he adamantly refused to discuss the Holocaust with the President. Ironically, given his meddling in politics when he had no business doing so because the issues might come before the Court, he uncharacteristically kept his mouth shut on the one issue of pressing urgency—the Holocaust—where speaking out, or quietly lobbying President Roosevelt, Secretary of War Stimson, or Assistant Secretary of War McCloy would not have impinged on judicial ethics because it was highly unlikely to have impacted American law.[237]

A. The Flag Salute Cases

In 1940, Frankfurter wrote the majority opinion in *Minersville Board of Education v. Gobitis*,[238] upholding the expulsion of two children from an elementary school who refused to salute the flag. As Jehovah's Witnesses, the children believed this act of reverence towards a piece of

[234] Frankfurter Diaries quoted 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, at 101-02 (1988).

[235] WIECEK, THE BIRTH OF THE MODERN CONSTITUTION *supra* note 2, at 413.

[236] *Id.* at 89-90.

[237] One might argue that at the end of the war, in the light of the Nuremberg trials, a case might have reached the Court, but certainly in 1942 or 1943, when Frankfurter refused to discuss the issue with FDR, this would have seemed extraordinarily unlikely.

[238] Minersville Board of Education v. Gobitis, 310 U.S. 586 (1940).

cloth violated the Biblical injunction against idol worship. The Gobitas[239] children were polite and respectful to the flag ceremony but would not participate in it.

The case was fraught with local politics and religious bigotry. The Jehovah's Witnesses faith was notoriously anti-Catholic (believing the Pope was the anti-Christ) while the school officials, and eighty percent of the town, were Roman Catholics. This led to the school district's aggressive response to the request that the children not be forced to say the pledge.[240] The lower federal court ordered the readmission of the children. Judge Albert Maris, a Quaker with a personal understanding of religious persecution, noted that the school superintendent's behavior was "a means for the persecution of children for conscience's sake" and had little to do with the educational needs of the school. Maris noted "[o]ur country's safety surely does not depend upon the totalitarian idea of forcing all citizens to render lip service in a manner that conflicts with their sincere religious convictions."[241] He found this "doctrine . . . utterly alien to the genius and spirit of our nation and destructive of that personal liberty of which our flag itself is the symbol."[242] The Third Circuit Court of Appeals unanimously upheld his decision, noting that a compelled flag salute was "an affront to the principles for which the flag stands."[243] Both decisions reflected the view of the *New York Herald Tribune* that "[t]o compel school children to salute the flag is a step in the 'Heil Hitler' direction."[244]

This was the perfect case for the relatively new Justice to make his mark as the former ACLU advisor and litigator who would protect civil liberties and minorities on the Court. Frankfurter now had an opportunity to strengthen his pre-Court progressive stances that led Brandeis to call him the nation's "Most Useful Lawyer." [245] But this did not happen. With the Nazis gobbling up Europe, arresting and persecuting Jehovah's Witness, Roma, Jews, and others, Frankfurter shocked his friends with an over-the-top repressive decision condoning the religious bigotry of the small-minded, small-town school officials in Minersville. As one scholar has noted, "Frankfurter's opinion would be best remembered not for his clearly articulated position on the law so much as for the fact that Frankfurter, a founder of the ACLU, would reject one of the most dramatic civil liberties

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[239] The last name was actually Gobitas, but a court clerk misspelled it, and the spelling error remains in the case caption.

[240] Douglas Laycock notes that the Witnesses "own doctrines were intolerant, especially of Catholics." Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 419 (1986); Finkelman, *Flag Salute Cases*, *supra* note 228, at 947, 951. For a useful study of these cases, *see* IAN ROSENBERG, THE FIGHT FOR FREE SPEECH: TEN CASES THAT DEFINE OUR FIRST AMENDMENT FREEDOMS 26-54 (2021); DAVID MANWARING, RENDER UNTO CAESAR: THE FLAG SALUTE CONTROVERSY (1962); PETER IRONS, THE COURAGE OF THEIR CONVICTIONS (1988); and LEONARD A. STEVENS, SALUTE! THE CASE OF THE BIBLE VS. THE FLAG (1973).

[241] Gobitis v. Minersville School District, 24 F. Supp. 271, 274 (E.D. Pa. 1938).

[242] *Id.*

[243] Minersville Board of Education v. Gobitis, 108 F.2d 683, 691 (3d Cir. 1940).

[244] SNYDER, *supra* note 4, at 352.

[245] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 20.

claims of the modern Court era. His opinion would also prove his undoing as leader of the Roosevelt appointees."[246]

As his own European Jewish relatives were being arrested and persecuted for their faith,[247] Frankfurter vigorously supported the power of the school district's expulsion of the Gobitas children. Although the United States was not yet involved in the War in Europe,[248] Frankfurter argued national unity was "the basis of national security" and that the "flag is the symbol of our national unity." Therefore, he concluded that it was permissible to compel all children to participate in patriotic exercises in public schools.[249] With embarrassing rhetorical overkill, he compared forcing a ten-year-old to salute the flag to Lincoln authorizing the military to arrest pro-Confederate terrorists who were trying to destroy railroad tracks and bridges to isolate Washington D.C. from the rest of the nation decision at the beginning of the Civil War.[250] It is hard to imagine that Frankfurter truly believed that a couple of elementary school children refusing to salute the flag were the equivalent of armed pro-Confederate saboteurs trying to blow up bridges or destroy railroad tracks. But it is equally hard to understand why he used this analogy.

In his biography Snyder defends Frankfurter's opinion on a variety of grounds, including Frankfurter's "opposition to American neutrality and isolationism," "Hitler's threat to exterminate Europe's Jews," and Frankfurter's "preoccupation with his wartime policymaking and recruitment efforts on behalf of the Roosevelt administration."[251] However, this analysis is seriously flawed.

We can only wonder why Frankfurter believed that persecuting elementary school children because they were members of a small and powerless religious minority was an answer to "isolationism." On the contrary, the school districts and state legislatures, supported by Frankfurter's opinion, were playing directly into the hands of the bigots, isolationists, and xenophobes. Frankfurter's opinion simply encouraged the isolationists by justifying their bigotry, as his opinions "unleashed a new wave of violence against the Witnesses."[252]

Snyder's defense of Frankfurter is also inconsistent with the actual history of the time. In the spring of 1940, Hitler was persecuting Jews but had not yet initiated a program of genocide to "exterminate Europe's Jews."[253] Moreover, as will be described below,[254] when Frankfurter was

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[246] SIMON, THE ANTAGONISTS, *supra* note 2, at 114.

[247] The Nazis jailed Frankfurter's beloved eighty-two-year-old uncle in Vienna.

[248] The nation was officially neutral at this time, and while many people assumed war was on the horizon, the nation had taken no steps in that direction at the time the Court decided *Gobitis* in June 1940.

[249] *Gobitis*, 310 U.S. at 595, 596. It is worth noting that Hitler, Mussolini, Franco, Tojo, or Stalin would have completely agreed with this position.

[250] *Id.* at 596. On Lincoln's suspension of Habeas Corpus, see MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES (1991). *See also* Paul Finkelman, *Civil Liberties and the Civil War: The Great Emancipator as Civil Libertarian*, 91 MICH. L. REV. 1353 (1993).

[251] SNYDER, *supra* note 4, at 353.

[252] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 109.

[253] SNYDER, *supra* note 4, at 353.

[254] *Infra* at pp. 1134-36.

confronted with evidence of the Holocaust and the Nazi death camps, he categorically refused to believe the eyewitness who reported to him and refused to discuss the ongoing Holocaust with Roosevelt, even though he had direct and private access to the President.[255] Furthermore, it is absurd to argue that persecuting religious minorities in the United States was a response to Nazi persecution of Jews *and* Jehovah's Witnesses in Germany. It is worth remembering that the Nazis had rounded up Jehovah's Witnesses in Germany before they rounded up German Jews.

Finally, there is the explanation (or arguably the excuse) that Frankfurter was "preoccupied with his wartime policy making and recruitment efforts on behalf of the Roosevelt administration."[256] At the time Frankfurter wrote his *Gobitis* opinion, the United States was not at war and in fact had taken very few steps towards going to war. For example, Congress would not enact the first peacetime draft until September 1940, and Lend-Lease, which was a major step towards the war, would not begin until March 1941. Put simply, in June 1940 the United States had no "war-time" policy, so it is impossible to explain Frankfurter's opinion in *Gobitis* with such an argument.

Even more problematic is the justification (or excuse) for Frankfurter's repressive opinion because he was busy with "wartime" policy and staffing the administration. As a justice Frankfurter had absolutely no business staffing the administration or making military policy. Certainly, Frankfurter was not out of ethical bounds in recommending his former students for jobs. But giving advice to the President and other administration officials on legislation and policy matters, as Frankfurter was secretly doing, was unprofessional, violated traditional norms of judicial ethics, and undermined the whole notion of separation of powers. Certainly, this unethical behavior cannot be used to justify Frankfurter's authoritarian opinion. If Frankfurter truly believed he should be involved in making policy, then he should have left the Court, as other justices have done, and joined the administration.[257]

But assuming someone actually believes a Supreme Court Justice should be involved in executive branch staffing, drafting legislation, and making policy during "wartime," (even when the United States was not actually at war), it is hard to fathom how the desire of the Gobitas children

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[255] *See* discussion *infra* Part V, Section C.

[256] SNYDER, *supra* note 4, at 353.

[257] Frankfurter's judicial colleague James F. Byrnes served on the Court from July 1941 until October 1942, when he became the Director of the Office of Economic Stabilization and then left that post to become Director of the Office of War Mobilization until 1945, when became Secretary of State. This was the model Frankfurter should have followed if he wanted to be involved in policy making. There are other examples of this. Justice John Rutledge resigned from the Court in 1791 to become Chief Justice of South Carolina; Chief Justice John Jay resigned from the Court in 1795 to become governor of New York; David Davis left the Court in 1877 when he was elected to the United States Senate; Charles Evans Hughes resigned from the Court in 1916 to run for President and then returned to private practice until 1930 when he went back to the Court as Chief Justice; Frankfurter's successor on the Court, Justice Arthur Goldberg, resigned from the Court in 1966 to become the U.S. Ambassador to the United Nations. John A. Campbell left the Court in 1861 to join the Confederacy as Assistant Secretary of War, and thus to make war on his own country.

to remain silent and not raise their hands in supplication of the flag threatened that policy.

Frankfurter personally thought that the law was "foolish,"[258] but this only undermines his opinion. If he thought the law was foolish, and could accomplish little, why did he offer his over-the-top comparison of the flag salute to the crisis of the Union in 1861? If Frankfurter knew that this foolish law could not accomplish its goal, what exactly justified the religious intolerance of the state and the Court?

From his narrow analysis of constitutional law, Frankfurter believed courts should rarely if ever overturn state laws, however "foolish" they might be. He simply did not believe the Court should overrule state legislation that interfered with "liberty." Here, Frankfurter was intellectually frozen by *Lochner v. New York*[259] and similar cases in which a much earlier Court, with a thoroughly reactionary majority, had overturned Progressive Era economic legislation on the grounds that it interfered with liberty of contract. However, by 1940, the Court had emphatically rejected such jurisprudence as it applied to economic regulations[260] while selectively incorporating some of the Bill of Rights to the states to protect fundamental liberties.[261] Thus, Frankfurter certainly knew that the Court would no longer use (or misuse) substantive due process, the Fourteenth Amendment, and the Bill of Rights, or apply its earlier, and by 1940 outdated, distinction between manufacturing and commerce,[262] to strike down progressive economic regulations. Frankfurter's fears of this, in 1940, were quite frankly, absurd. Frankfurter was either incapable of seeing, or unwilling to see, the difference between protecting minorities from oppressive majorities and striking down economic regulations that helped the majority of people, which the Court had struck down decades earlier[263] but had been upholding since the late 1930s.[264] After Frankfurter became a Justice, the Court

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[258] SNYDER, *supra* note 4, at 358.

[259] 198 U.S. 45 (1905).

[260] This jurisprudential change began with Nebbia v. New York, 291 U.S. 502 (1934) and was solidified by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). *See generally*, BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) and Barry Cushman, *Teaching the Lochner Era*, 62 St. Louis U.L.J. 537 (2018). For an intriguing defense of *Lochner*, although not one I agree with, see DAVID BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS (2011).

[261] *See* Gitlow v. New York, 268 U.S. 652 (1925); Stromberg v. California, 283 U.S. 359 (1931); Near v. Minnesota, 283 U.S. 697 (1931); Powell v. Alabama, 287 U.S. 45 (1932); Patterson v. Alabama, 294 U.S. 600 (1935); Herndon v. Georgia, 295 U.S. 441 (1935); Herndon v. Lowry, 301 U.S. 247 (1937); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[262] For earlier examples of this, *see* E.C. Knight v. United States, 166 U.S. 1 (1895) and Hammer v. Dagenhart, 247 U.S. 251 (1918).

[263] *See* Lochner v. New York, 198 U.S. 45 (1905); Adair v. United States, 208 U.S. 161 (1908); Loewe v. Lawlor (the Danbury Hatters' Case), 208 U.S. 274 (1908); Coppage v. Kansas, 236 U.S. 1 (1915); Adams v. Tanner, 244 U.S. 590 (1917); Hitchmand Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917); Hammer v. Dagenhart, 247 U.S. 251 (1918); Truax v. Corrigan, 257 U.S. 312 (1921): Adkins v. Children's Hospital, 261 U.S. 525 (1923); Ribnik v. McBride, 277 U.S. 350 (1928); New State Ice Co. v. Liebman, 285 U.S. 262 (1932).

[264] The most important cases in this area were: Home Building & Loan Assn v. Blaisdell, 290 U.S. 398 (1934); Nebbia v. New York, 291 U.S. 502 (1934); The Gold Clause Cases [Norman v. Baltimore & Ohio Railroad, 290 U.S. 240 (1935); Nortz v. United States, 294 .S. 317 (1935); Perr v. United States, 294 U.S. 330 (1935)]; Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936); National Labor Relations Board v. Jones & Laughlin

continued to uphold federal and state economic regulations, with the new Justice in the majority.[265] By 1940, when he wrote his opinion in *Gobitis*, Frankfurter knew that the *Lochner* era, of the court overturning state and federal economic regulations, was effectively dead. Thus, his rigid refusal to protect basic liberties out of fear that the case could be used to strike down economic regulations simply makes no sense.

Most importantly, in *Gobitis*, Frankfurter ignored the economic regulation case of *United States v. Carolene Products Co.*,[266] where Justice Harlan Fiske Stone articulated that the Court should give wide discretion to economic regulations "affecting ordinary commercial transactions," reviewing them under a "rational basis" test,[267] while arguing in his famous Footnote 4 that the Court should not give a "presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."[268] This analysis would easily have led Frankfurter to support the two lower federal courts in striking down the Pennsylvania law persecuting Jehovah's Witness children. Surely the razor-sharp Frankfurter was smart enough to see the differences and understand the distinction. But, as Mark Tushnet has observed, because Frankfurter had "articulated the position that courts should not displace legislative judgments about economic regulation by invoking vague constitutional terms like 'due process,' how could he support displacing legislative by invoking other seemingly equally vague constitutional terms like 'equal protection' and even 'freedom of speech'?"[269] The answer, of course, is that he could have supported liberty by relying on Justice Stone's brilliant doctrine set out in *Carolene Products*. Significantly, Stone dissented from Frankfurter's opinion in *Gobitis*.

Alternatively, Frankfurter's support for liberty was never what he claimed it to be. Perhaps in *Gobitis*, he was deceiving himself and his readers. The record in the District Court overwhelmingly demonstrated

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Steel Corporation, 301 U.S. 1 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937); Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Electric Bond & Share Co. v. Securities and Exchange Commission, 303 U.S. 419 (1938). After Frankfurter became a justice, the Court continued to support economic regulations. See Currin v. Wallace, 306 U.S. 1 (1939); Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939); Mulford v. Smith, 307 38 (1939. Frankfurter would also have been familiar with a number of cases from before World War I through the Hoover administration that had upheld state and federal economic regulations, including Muller v. Oregon, 208 U.S. 412 (1908), which Frankfurter's mentor Louis Brandeis has argued and won, Hipolite Egg Co. v. United States, 220 U,.S. 41 (1911); Standard Oil Co. v. United States, 221 U.S. 1 (1911); Sturgis & Burns Mfg. Co. v. Beauchamp, 231 U.S. 320 (1913), Shreveport Rate Cases, 234 U.S. 342 (1914); and Bunting v. Oregon, 243 U.S. 426 (1917), which Frankfurter litigated and won. Other cases upholding economic regulations before FDR's election included: Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925); Village of Euclid v. Ambler Realty Co, 272 U.S. 365 (1926); United States v. Swift & Co., 286 U.S. 106 (1932).

[265] Currin v. Wallace, 306 U.S. 1 (1939); Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939); Mulford v. Smith, 307 38 (1939.

[266] 304 U.S. 144 (1938).

[267] *Id.* at 152.

[268] *Id.*

[269] TUSHNET, HUGHES COURT, *supra* note 192, at 551.

that the flag salute regulation was not a neutral law, with a legitimate purpose, and it was not enforced neutrally. Here, Frankfurter might have turned to the case of *Yick Wo* v. *Hopkins*,[270] an early Fourteenth Amendment case, where the Court struck down a law that pretended to be a fire regulation but was only used to persecute Chinese immigrants and their American-born children.

Frankfurter's solution for the Gobitas family was to send their children to private schools, rather than to reign in the oppressive nature of the local school board.[271] As noted earlier, in 1925 Frankfurter had vigorously denounced the Court's decision in *Pierce v. Society of Sisters*, which struck down a state law prohibiting private schools. Had some state decided to prohibit private or parochial schools, in part to create the very "national unity" that Frankfurter was demanding or passed legislation requiring that private schools require flag ceremonies (just as Nebraska had prohibited private schools from teaching German), he likely would have supported these new school laws. Thus, Frankfurter, who never agreed with the decisions in *Meyer* and *Pierce*, was in the position of urging private schools for Jehovah's Witnesses, and in effect inviting states to ban them, as Oregon had.[272] Finally, there is the financial issue. As he later would in the Sunday Closing Cases and cases upholding tax laws on religious books designed to harass Witnesses,[273] Frankfurter seemed to think it was permissible for the government to make religiously observant people "pay" for their faith by forcing them to choose between religious obligation and being able to support themselves.

Legal scholars and public intellectuals roundly condemned the *Gobitis* decision. Although Jehovah's Witnesses were notoriously anti-Catholic, law reviews at major Catholic law schools condemned the decision.[274] Frankfurter's opinion became an open invitation for bigots across the country to pass laws directly aimed at the Jehovah's Witnesses. Thus, the "Democratic Justice's" *Gobitis* opinion led to a spate of new state laws to punish children who would not "bow down" to the flag.

In 1941, West Virginia adopted a law requiring flag salutes in all public schools.[275] The law contained a clause declaring that refusal to salute the flag for religious reasons would "be regarded as an act of insubordination"[276] and lead to the children being expelled from school and declared truants. This would subject their parents to thirty days in jail and a fine of $50, which was equivalent to a month's salary at the prevailing federal minimum wage.[277] The West Virginia law reflected the language of Frankfurter's *Gobitis* opinion. Within a few years, more than 2,000 children were expelled from schools across the country, with their parents

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[270] 118 U.S. 356 (1886).

[271] SNYDER, *supra* note 4, at 356.

[272] *See* discussion *supra* Part V, Section A.

[273] Follett v. Town of McCormick, 321 U.S. 573 (1944). *See also* discussion of "Sunday closing" cases *infra* 80-82.

[274] Finkelman, *Flag Salute Cases*, *supra* note 228, at 947, 951.

[275] *Id.* at 951.

[276] *Id.* at 952.

[277] Barnette at 629.

subject to fines and jail sentences.[278] In addition to new repressive laws, Frankfurter's opinion also unleashed massive persecution and violence against Jehovah's witnesses, as across the nation Witnesses were terrorized by vigilantes and local police.[279]

Frankfurter certainly did not intend these outcomes, nor did he approve of them. However, he was surely politically savvy enough to have foreseen that such laws and violent attacks might follow from his opinion forcing Jehovah's Witnesses to comply with authoritarian and repressive community standards of patriotism and religious belief.

The flag salute cases are a clear example supporting "[t]he standard story about Frankfurter . . . that he struggled to fill the seat once held by Holmes" and that he ultimately failed in that struggle.[280] *Gobitis*, and his dissent in *Barnette* three years later, call into question the claim that Frankfurter's "philosophy of judicial restraint" came from "reading . . . Holmes's and Brandeis's opinions."[281] In 1919 backlash against Holmes's opinion in *Schenck v. United States*[282] led both Holmes and Brandeis to quickly distance themselves from the test in *Schenck*. And while Frankfurter almost worshipped both justices, he failed to learn from them that when justices make a mistake, they should not double down on their error, but should find a way, as Holmes and Brandeis did in subsequent free speech cases, to move in a different direction.[283]

Law professors, liberal activists, journalists, and others denounced Frankfurter's opinion. Only Justice Harlan Fiske Stone dissented in *Gobitis*. But, shortly after *Gobitis,* three of the Justices in Frankfurter's majority—Black, Douglas, and Murphy—realized how oppressive this decision was. In 1943*,* the Court reconsidered the flag salute issue in *West Virginia Board of Education v. Barnette*.[284]

This was Frankfurter's golden opportunity to redeem himself, concede he was wrong in *Gobitis*, and make his mark as a great Justice. Had he done so he might have become the intellectual and moral leader of the Court, as he always believed he should be. In this context he might have learned from Holmes and Brandeis, who supported free speech in *Abrams* by distinguishing it from the oppressive opinion in *Schenck*. Frankfurter was smart enough to change his jurisprudence, distinguish the cases, and move the Court to support liberty, without having to admit he was wrong in *Gobitis*.

But Frankfurter did not do this, instead, he doubled down on his support for religious persecution in an angry dissent. Frankfurter responded with fury at the rejection of his *Gobitis* opinion and his

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[278] Finkelman, *Flag Salute Cases*, *supra* note 228 at 950-51.

[279] *Id.*

[280] SNYDER, *supra* note 4, at 4.

[281] *Id.* at 353-54.

[282] 249 U.S. 47 (1919). On the immediate scholarly pushback from these opinions, see ZECHARIAH CHAFEE, JR. FREEDOM OF SPEECH (1920). *See also* MURPHY, WORLD WAR I, *supra* note 106.

[283] Abrams v. United States, 250 U.S. 616, 624 (Holmes, J. dissenting); Gitlow v. New York, 268 U.S. 652, 672 (1925) (Holmes and Brandies, JJ. Dissenting); and Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis and Holmes, JJ. Concurring).

[284] West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943).

unrestrained support for expelling children and fining and jailing their parents because their faith precluded them from saluting the flag. Without any sense of irony, as the Nazi extermination of the Jews was in progress, he raged on, using his Jewish heritage to justify persecuting Jehovah's Witnesses. To "his colleagues' horror, the opinion began with an excursus into Frankfurter's own identity as a Jew."[285] He wrote: "One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution."[286] He then justified expelling children and incarcerating their parents for their religious beliefs, showing that in fact he was utterly "insensible to the freedoms guaranteed by our Constitution."[287] As one scholar correctly notes, his *Barnette* dissent was "the most agonized and agonizing opinion recorded anywhere in the U.S. reports."[288]

Snyder praises Frankfurter's support of judicial restraint in *Barnette,* endorsing the Justice's view that the Courts should not interfere with democratically adopted legislation, even when it targets a minority group or young children. Ignoring the massive and growing attacks on Jehovah's Witnesses, Snyder explains that Frankfurter's opinion "cannot be divorced from his obsession with the war [World War II] to save civilization."[289] This may in fact have been what motivated Frankfurter, but it does not really explain exactly how emulating "the 'Heil Hitler' direction," as the *Herald Tribune* put it, and vigorously supporting religious persecution of minorities would "save civilization." To be blunt, Snyder defends a bigoted, oppressive, and utterly uncivilized opinion by absurdly claiming it was necessary to "save" civilization.

While Frankfurter was almost always a cheerleader for Roosevelt, his *Barnette* opinion ran totally contrary to FDR's enunciation of the "Four Freedoms" in his annual message to Congress (today called the State of the Union Address) on January 6, 1941. In that speech he asserted:

> [T]here is nothing mysterious about the foundations of a healthy and strong democracy. The basic things expected by our people of their political and economic systems are simple. They are: Equality of opportunity for youth and for others. Jobs for those who can work. Security for those who need it. The ending of special privilege for the few. The preservation of civil liberties for all.[290]

Frankfurter apparently failed to understand that if he was truly worried about saving "civilization," he should have supported FDR's notion that civil liberties even applied to Jehovah's Witnesses. Roosevelt ended the speech with what is perhaps his most enduring legacy to American liberty:

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[285] FELDMAN, SCORPIONS, *supra* note 13, at 229.

[286] Barnette at 646 (Frankfurter, J. dissenting).

[287] *Id.*

[288] FELDMAN, SCORPIONS, *supra* note 13, at 229.

[289] SNYDER, *supra* note 4, at 419.

[290] Franklin Delano Roosevelt, *Annual Message (Four Freedoms) to Congress*, NAT. ARCHIVES (Jan. 6, 1941), https://www.archives.gov/milestone-documents/president-franklin-roosevelts-annual-message-to-congress.

> In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms. The first is freedom of speech and expression—everywhere in the world. The second is freedom of every person to worship God in his own way—everywhere in the world. The third is freedom from want—which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world. The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.[291]

Frankfurter was ready to deny all these freedoms to Jehovah's Witness, who were living in fear from the repercussions of his *Gobitis* opinion, which denied them freedom of speech and religion, and severely threatened them economically, by allowing for severe fines because of their faith. Frankfurter's "solution" to the Flag Salute was to make Jehovah's Witnesses send their children to private schools, which would have been a severe economic hardship, or an impossibility because in much of the nation there were either no private schools, or the only private schools were Catholic.

Frankfurter ignored all these goals of the President and the nation, and weirdly, his most recent biographer does as well. Thus, Frankfurter's opinion ran completely counter to the war against Nazism and FDR's truly prescient notion, in his Four Freedoms declaration, that the War was in part about religious liberty. You do not support that liberty, or any liberty, by persecuting religious minorities. This is something Felix Frankfurter never understood or believed in.

Snyder effusively praises the *Gobitis* opinion for what he calls Frankfurter's "stirring conclusion about unchecked judicial power,"[292] quoting Frankfurter's assertion that "[o]f course patriotism can not be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation."[293] Here, Frankfurter admitted that the law was not only unnecessary to promote the patriotism he wanted, but that it would not accomplish that goal. Thus, Frankfurter was ready to expel young children from school, while fining and jailing their parents, for a meaningless law because he was blindly wedded to an abstract theory of constitutional interpretation that led to such outrageous results. Had he reread Stone's Footnote 4 in *Carolene Products*, Frankfurter would have been able to support his theory of constitutional interpretation while also supporting fundamental civil liberties. But this did not happen. As Melvin Urofsky explained, "That Frankfurter showed

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[291] *Id.*

[292] SNYDER, *supra* note 4, at 427.

[293] *Id.* (quoting Frankfurter, 319 U.S. at 670).

consistency is admirable; that he showed absolutely no sensitivity to the need to protect unpopular speech is deplorable."[294]

In his majority opinion in *Barnette*, Justice Robert Jackson responded to the portion of Frankfurter's *Gobitis* opinion that compared expelling children from school to Lincoln's suspension of Habeas Corpus to arrest terrorists and saboteurs during the Civil War:

> It may be doubted whether Mr. Lincoln would have thought that the strength of the government to maintain itself would be impressively vindicated by our confirming power of the State to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favor of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.[295]

In overturning the West Virginia law, the Court was not trying to "enforce" a liberal spirit, as Frankfurter disingenuously claimed in his dissent, but instead trying to prevent local majorities from using their political power to oppress minorities. Despite Snyder's claims that Frankfurter was "prescient" in his opinions, it was Jackson who was prescient. In the years following *Barnette*, persecution of Jehovah's Witnesses abated, in part because the Court was no longer willing to tolerate it. Within less than a decade, such persecution had completely disappeared. The lesson here is that a pro-liberty decision, such as *Barnette*, can change minds and teach citizens and legislatures the value of supporting liberty.

Snyder argues that the "lasting import" of Frankfurter's support of religious persecution was "his deep skepticism about judicial power"[296] and "his boundless democratic faith."[297] But once again, this misses the point that the attacks on Jehovah's Witnesses were hugely popular, supported by democratically elected legislatures, and in many cases aggressively enforced by democratically elected school boards. This history suggests that Frankfurter's "democratic faith" was not justified when voters and legislators used their power to oppress the powerless.[298] Nor does it explain why Frankfurter thought, in the middle of the Holocaust, that it was legitimate for him to use his Jewish heritage (which he usually ignored and rejected) to claim moral superiority in supporting religious persecution. In the end, it was the logic of Justice Jackson, not Frankfurter's "democratic faith" in repressive state legislatures, which ended the reign of terror against Jehovah's Witnesses.

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[294] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 58.

[295] Barnette, at 636.

[296] SNYDER, *supra* note 4, at 425.

[297] *Id.* at 429.

[298] Under the theories of both Snyder and Frankfurter, all statutory segregation in the American South was fully justified, because it was passed by democratically elected legislatures, which determined Blacks should not eat in the same restaurants as Whites, sit next to them in movie theaters, stay in the same hotels with them, or marry them.

Justice Jackson's final point in *Barnette* was infinitely more stirring than Frankfurter's. It is one of the most eloquent statements on liberty in American constitutional law, which is quoted and taught far more than anything Frankfurter ever said while on the Court: "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. If there are any circumstances which permit an exception, they do not now occur to us."[299] Two years later, Justice Jackson would take this philosophy, that persecution of people for their religion was unacceptable, to Europe as the chief American prosecutor at the Nuremberg War Crimes Trials.

Some people criticized Jackson for not resigning when he accepted the role as the Nuremberg prosecutor, but the difference between Jackson and Frankfurter is that Jackson openly acted at Nuremberg and his work on the war crimes trials did not appear to be something that would ever come before the Court. This contrasts with Frankfurter's role in FDR's administration after he went on the Bench, which was concealed, never open, and clearly involved many issues which could (and some did) come before the Court. Furthermore, Jackson's role was a one-time extraordinary moment, while Frankfurter's secret role as an advisor and policy maker was on-going.

Apparently conceding, *sub silentio,* that Frankfurter's Flag Salute opinions were repressive, Snyder claims that after *Barnette*, Frankfurter "began to adapt judicial restraint to protect minority rights."[300] This leads to the question of "why" Frankfurter needed to change his jurisprudence, unless he realized he wrong. And *if* he was wrong, why did Snyder so effusively praise these two "repressive" Flag Salute opinions and argue that Frankfurter's legal theory was prescient and correct?

Finally, in looking at his jurisprudence after *Barnette,* it is not at all clear that he really *did* change his views on liberty and rights. Both before and after *Barnette*, Frankfurter often supported laws aimed directly

[299] Barnette, at 642.
[300] SNYDER, *supra* note 4, at 429.

at Jehovah's Witnesses for no other reason than their faith.[301] Frankfurter was equally hostile to the claims of other religious minorities.[302]

Three years after *Barnette*, in 1946, Frankfurter continued his jurisprudence of religious intolerance in his dissent in *Girouard v. United States*.[303] James Girouard, a Canadian seeking naturalization, had complied with every aspect of the oath for citizenship except one. As a Seventh Day Adventist he was a pacifist and refused to agree that he would take up arms in defense of the nation.[304] In the wake of World War II, a majority of the Court approved his right to naturalize, thereby overturning earlier precedents that denied naturalization to pacifists.[305] Both Holmes and Brandeis had dissented in those earlier cases, arguing for a more flexible approach to naturalization, that protected religious freedom. Had Frankfurter actually been influenced by Holmes and Brandeis, he would have cited their dissents in the earlier naturalization cases and quoted them to support religious liberty, thereby vindicating his hero and his mentor. Instead, he dissented in *Girouard*, arguing against citizenship for anyone who would not join the military. As he had in the Flag Salute Cases, he once again supported religious discrimination.

Many scholars argue that the Flag Salute Cases were the undoing of Frankfurter. He never recovered from the scholarly opposition to his opinions, and he increasingly fought with his colleagues after these cases. Frankfurter "took the reversal of his *Gobitis* opinion as a professional and personal calamity."[306] As Urofsky noted, Frankfurter "personalized every battle, so that within five years he had divided his colleagues into 'we' and 'they'—allies and enemies"—and "the Court and its members suffered for more than two decades from the personal animosities generated by this prima donna of the law."[307]

Unfortunately, the rest of the nation had to suffer the increasingly anti-libertarian and sometimes racist opinions of Frankfurter. This began

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[301] For example, see his votes and opinions in these cases which Snyder ignored where Frankfurter voted against the liberties of Jehovah's Witnesses, often writing a separate concurrence to support prosecutions of Witnesses, or writing dissents when the majority of the Court supported civil liberties and religious freedom: Jones v. Opelika, 316 U.S. 548 (1942) (before *Barnette)*), Murdock v. Pennsylvania, 319 U.S. 105 (1943) and Martin v. City of Struthers, 319 U.S. 141 (1943) (in the same term as *Barnette*), and after *Barnette*, Follett v. Town of McCormick, 321 U.S. 573 (1944), Saia v. New York, 334, 562 U.S. 558 (1948) (Frankfurter, J. dissenting), Kovacs v,. Cooper, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring), Poulos v, New Hampshire, 345 U.S. 395, 415 (1953) (Frankfurter J., concurring). Frankfurter joined a unanimous court in Largent v. Texas, 318 U.S. 416 (1943), ruling on free speech grounds that the city of Paris, Texas could not require that Jehovah's witnesses to obtain a permit to solicit orders for religious books, and joined a dissent in Prince v. Massachusetts, 321 U.S. 158 (1944). He also did not support the persecution of Jehovah's Witnesses is Marsh v. Alabama, 326 U.S. 501 (1946) (Frankfurter, J., concurring). For a list of many of these cases, see Laycock, *A Survey of Religious Liberty*, *supra* note 240, at 419-20.

[302] *See* discussion *infra* Part VII, Section A.

[303] Girouard v. United States, 328 U.S. 61 (1946).

[304] *Id.*

[305] United States v. Schwimmer, 279 U.S. 644 (1929); *and* United States v. Macintosh, 283 U.S. 605 (1931).

[306] FELDMAN, SCORPIONS, *supra* note 13, at 229.

[307] UROFSKY, FELIX FRANKFURTER, *supra* note 3, at 63; *see also* HIRSCH, ENIGMA OF FRANKFURTER, *supra* note 13, at 176.

a year after *Barnette*, when Frankfurter went out of his way, with a separate concurrence, to voice his approval for sending 120,000 Japanese Americans, about two-thirds of whom were American-born citizens, to concentration camps, encased in barbed wire and guarded by armed soldiers, solely because of their ethnicity.

B. The Japanese Internment

The Japanese Internment cases illustrate that Frankfurter did not change his views on liberty and government oppression after *Barnette*. Instead, he never blinked at sending Japanese Americans to concentration camps—a term used to describe them by many people at the time including one member of the Court[308]—simply because of their race,[309] without any trial or evidence that they had committed any crimes or were even likely to do so.[310] In the 1920s Frankfurter had devoted years and enormous energy to reverse the convictions of Sacco and Vanzetti because their trials were unfair and they were in part being persecuted for their ethnicity and immigrant status. But in 1943 and 1944 he saw no legal problems with incarcerating American citizens and their immigrant parents (who were never allowed to naturalize because of their race) in concentration camps without any trials at all because of their ethnicity.

A week after striking down the West Virginia Flag Salute law, a unanimous Court approved curfews for Japanese Americans, in *Hirabayashi v. United States*.[311] However, three concurring justices—Justices Douglas, Murphy, and Rutledge—expressed deep skepticism about the inherent racism of the policy, under which, as Justice Murphy put it, "70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial identity."[312] Murphy noted that the policy "bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe," and that it went "to the very brink of constitutional power."[313] Murphy, who had joined the Court a year after Frankfurter, actually wrote his opinion as a dissent, but "under pressure from his colleagues, particularly Felix Frankfurter," Murphy turned his opinion—which reads like a dissent—into a concurrence.[314] As the leading historian

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[308] It is important to understand that "concentration camps" were used by the Nazis for political prisoners and unwanted people—like Jews, Jehovah's Witnesses, and Roma—well before the Nazis created extermination camps like Auschwitz and Treblinka. In his dissent in Korematsu, Justice Roberts asserted this was a "case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. He noted the "so-called Relocation Centers," was in fact "a euphemism for concentration camps." Korematsu v. United States, 323 U.S.214, 226, 230 (Roberts J. dissenting) (1944).

[309] Korematsu v. United States, 323 U.S.214 (1944).

[310] Of course, being "disloyal" should not itself have mattered, as long as people did not actually break a law by acting in ways that harmed the nation.

[311] Hirabayashi v. United States, 320 U.S. 81 (1943).

[312] 320 U.S. at 111, Murphy, J. concurring. Murphy's figure did not include the 50,000 or so Japanese immigrants in the United States, who were prohibited from becoming naturalized citizens. Ozawa v. United States, 260 U.S. 178 (1922) and Chin and Finkelman, *The "Free White Persons" Clause*, *supra* note 186.

[313] 320 U.S. at 111, Murphy, J. concurring.

[314] DANIELS, CONCENTRATION CAMPS USA, *supra* note 169, at 135. .

of the internment noted, "Had Murphy's opinion been submitted as a dissent, it would have focused a little more public light on the sweeping nature of the *Hirabayashi* decision."[315] Significantly, Frankfurter's former student, John McCloy suppressed evidence from an internal War Department report, that would have undermined the government's argument for the necessity of the curfew and the subsequent internment.[316] Had McCloy not suppressed this information it is entirely likely that the decision would not have been unanimous, and might even had led to a different outcome.

While he often wrote separate concurrences, in *Hirabayashi* Frankfurter was silent. The decision was unanimous, so a dissent by Murphy, Douglas, or even Frankfurter would not have changed the outcome. But had Frankfurter dissented, or joined Murphy's hostile concurrence, others might have joined him. Just as Stone's dissent in *Gobitis* proved prophetic, Frankfurter raising the problem of this blatant racial and ethnic discrimination might have had a real impact. While not writing an opinion in *Hirabayashi*, Frankfurter pressured Chief Justice Harlan Fiske Stone to resist a suggestion by Justice Douglas that would have left "open the possibility of individual Japanese being able to prove their loyalty."[317] Frankfurter's clerk, Philip Elman, believed the Justice was so adamant about supporting the government in this case because of "Jack McCloy, a close friend who owed his job to Frankfurter."[318] As a recent history of the wartime Court noted, "Nobody in the senior ranks at the War Department had been more responsible for FDR's Executive Order 9066 [allowing for the internment], and for the military's curfew, expulsion, and detention orders, than John J. McCloy." [319]

A year later in *Korematsu* v. *United States*,[320] three justices—Owen Roberts, Frank Murphy, and Robert Jackson (who had written the stirring majority opinion in *Barnette*)— refused to condone the actual incarceration of Japanese Americans solely based on their race, without any evidence of disloyalty or acts against the interest of the United States. Fred Korematsu had tried to enlist when the War began, but he failed his physical. He then took a welding course to work in a defense plant. He did not report to an assembly center, as a prelude to being deported to a camp. In his dissent, Justice Roberts correctly asserted that this was a "case of . . . imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry. . . ."[321] Justice Jackson also wrote an eloquent opinion denouncing the internment.

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[315] ROGER DANIELS, THE JAPANESE AMERICAN CASES: THE RULE OF LAW IN TIME OF WAR 60 (2013). There is also evidence that Justice William O. Douglas was planning to dissent, but Frankfurter talked him out of it. ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG, FRAK WU, RACE RIGHTS AND REPARATION: LAW AND THE JAPANESE INTERMENT 124-25 (2001).

[316] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 350.

[317] *Id.* at 351.

[318] Elman quoted in SLOAN, COURT AT WAR, *supra* note 168, at 205.

[319] *Id.*

[320] 321 U.S. 214 (1944).

[321] *Id.* at 226 (Roberts, J. dissenting).

Rather than "adapt[ing] judicial restraint to protect minority rights" as Snyder claims Frankfurter did after *Barnette*,[322] in *Korematsu* Frankfurter concurred in using race and ethnicity to send United States citizens and lawful immigrants—to concentration camps.[323] In *Barnette*, Frankfurter had used his Jewish heritage to justify expelling students from schools and jailing their parents over a flag salute. With his European relatives being sent to concentration camps and extermination camps, he remained oddly silent on the issue of sending Americans to concentration camps because of their race. Here was a moment for Frankfurter to speak up in favor of justice. He did not. Instead, he ignored the lack of due process in the internment and felt obligated to write a separate concurrence to support sending American citizens to concentration camps, guarded by armed soldiers authorized to shoot anyone attempting to leave the camp without permission. In his opinion, Frankfurter claimed that it was not his responsibility to consider this mass incarceration and washed his hands of the whole issue, asserting this was the "business of Congress and the Executive," and "not ours."[324] One can only wonder why Frankfurter thought it was not the business of courts to ensure that people are not rounded up and locked up without due process, a liberty which the Constitution guarantees to all people.

Justice Owen Roberts had the correct answer to Frankfurter's claim. This was a "case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States" and there was no reason to "labor the conclusion that Constitutional rights have been violated."[325] Justice Murphy simply noted that the internment went "over 'the very brink of constitutional power' and falls into the ugly abyss of racism," which was impermissible under the Constitution.[326]

When working to secure due process for labor radicals during World War I, Frankfurter "refused to sacrifice civil liberties and fair criminal trials in the name of patriotism."[327] But in the Flag Salute and Internment cases, this is exactly what Frankfurter did, arguing that expelling elementary school children over their religious beliefs was necessary for instilling patriotism and later concurring in sending law-abiding American citizens to concentration camps because of their ethnicity. His positions in these and other cases illustrate why most "scholars have" correctly

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[322] SNYDER, *supra* note 4, at 429.

[323] Fred Korematsu was convicted of violating the evacuation orders that led to internment, but the judge suspended his sentence giving him "five years of probation." DANIELS, JAPANESE AMERICAN CASES, *supra* note 315, at 36. There was some question whether he could appeal this conviction since he was not incarcerated. Both Korematsu and the U.S. government believed the case was reviewable, as did eight justices. Frankfurter argued from "the bench that it might not be" reviewable. Id at 55. If Frankfurter had had his way, Korematsu would have been unable to challenge the legality of the internment and to vindicate himself.

[324] 323 U.S. 225 (Frankfurter, J., concurring).

[325] 323 U.S. 226 (Roberts, J., dissenting).

[326] 323 U.S. 233 (Murphy, J., dissenting).

[327] SNYDER, *supra* note 4, at 94.

"portrayed Frankfurter as a judicial failure, a liberal turned conservative justice."[328]

C. Frankfurter and the Holocaust

In the midst of his support for the internment, Frankfurter refused to use his political connections and backdoor access to the White House[329] to influence something that would not likely come before the Court: American policy towards the Holocaust. As one scholar has noted, "Supreme Court Justice Felix Frankfurter had regular access to Roosevelt during the war, and he exercised a quiet but powerful influence in many sectors of the administration. Although he used his contacts to press numerous policies and plans, rescue [of Jews in Europe] was not among them."[330]

The same year that Frankfurter dissented in *Barnette* and silently joined the majority in *Hirabayashi*, he met with Jan Karski, a Catholic member of the Polish resistance. Karski briefed Frankfurter on the Warsaw Ghetto and the system of concentration camps and sub-camps (including one he had infiltrated), which then sent Jews on to the Belzec death camp, where they were systematically murdered.[331] Karski spelled out, in precise detail, the ongoing extermination of Europe's Jews. He asked Frankfurter to convey this information to President Roosevelt. Before joining the Court, Frankfurter advocated removing barriers to Jewish immigration to the United States.[332] In 1940, he contacted everyone he could to successfully obtain the release of his eighty-two-year-old uncle, Salomon Frankfurter, who the Nazis had jailed.[333] By 1943, there was substantial evidence of the ongoing Holocaust from British officials and the Polish government in exile. Frankfurter knew about this. Karski enhanced this knowledge with his first-person account of the horrors. Jan Ciechanowski, the Polish ambassador to the United States, was present at this meeting.

But Frankfurter simply rejected Karski's evidence, saying, "I do not believe you." When Ambassador Ciechanowski challenged his response, Frankfurter denied that he thought Karski was lying. Ever the law professor, he parsed his words, asserting: "I did not say he is lying; I said I don't believe him. These are different things. My mind and my heart are made in such a way that I cannot accept it."[334] He declared, "I know humanity, I know man, no, no, it is impossible."[335] Snyder simply notes "[t]he justice did not want to believe that the Nazis were capable of

[328] *Id.* at 4.

[329] SNYDER, *supra* note 4, at 457, 474, and 610 (discussing Frankfurter's "back door" access to the White House).

[330] DAVID S. WYMAN, THE ABANDONMENT OF THE JEWS: AMERICA AND THE HOLOCAUST, 1941-1945 (1984) 316.

[331] SNYDER, *supra* note 4, at 416-17.

[332] *Id.* at 226-29.

[333] *Id.* at 295-96, 417.

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

[335] ANNETTE BECKER, MESSENGERS OF DISASTER: RAPHAEL LEMKIN, JAN KARSKI, AND TWENTIETH CENTURY GENOCIDES (2021) 4.

slaughtering Jews like cattle,"[336] even though, as Snyder points out, he had ample evidence to know this is exactly what was happening.

Frankfurter's response contrasts with Snyder's claim that his *Gobitis* opinion was based on "Hitler's threat to exterminate Europe's Jews"[337] and Snyder's claim that his *Barnette* opinion was a function of his "obsession with the war [World War II] to save civilization."[338] Given the opportunity to possibly save at least a small portion of civilization by speaking to the President, Frankfurter simply denied the existence of what he knew was happening.[339]

Frankfurter never took Karski's information to Roosevelt. He refused to sit down with his old friend Frank in the White House to discuss the ongoing extermination of the Jews. If the persecution of Jews motivated Frankfurter's repressive opinion in *Gobitis,* as Snyder claims, then we might wonder why he wasn't similarly motivated to discuss the issue with Roosevelt.

What might the United States have done if Frankfurter had convinced FDR to act, or had used his connections in the administration to lobby for actions that could have saved lives? The possibilities are tantalizing. Frankfurter's former student, Assistant Secretary of War John McCloy, who he had been in contact with throughout the War, was in a position to do something about this. American bombers, flying from airbases in the Soviet Union, might easily have bombed the gas chambers and crematoria at Auschwitz and the other death camps and the railroad tracks leading to them. This would have slowed down the Holocaust and forced Germany to repair its death camp operations. As noted earlier, when Jewish Americans pleaded with McCloy to authorize such bombings, he categorically refused to consider it, dishonestly claiming American bombers could not reach Auschwitz. If Frankfurter had met with FDR on this, would his former student, McCloy, have changed his mind? Similarly, in 1940 Frankfurter had been instrumental in getting FDR to appoint the Justice's old boss Henry L. Stimson to be Secretary of War.[340] Surely, Frankfurter could have gone directly to him—McCloy's boss—to discuss bombing Auschwitz or in some other way helping to stop the Holocaust. The United States might also have used neutral powers to help rescue some Jews. Obviously, the most effective way to finally stop the Nazi genocide was to win the war, but categorically denying evidence of the Final Solution was hardly useful. The most recent scholarship on this issue notes that "[n]either in Frankfurter's published memoir nor in his handwritten notes is there any mention of his meeting with Karski," even though he had known of the "gassings" of Jews by the Nazis since late 1942.[341] Frankfurter refused to believe the Holocaust was happening, and thus did

[336] SNYDER, *supra* note 4, at 417.

[337] *Id.* at 353.

[338] *Id.* at 419.

[339] In early 1933 Frankfurter was aware of the increasing danger for Jews in Germany and had access to meaningful information about what was happening there. But Frankfurter declined to discuss the rising antisemitism and threats to Jews with FDR. SNYDER, *supra* note 4, at 227-29.

[340] SMITH, FDR, *supra* note 41, at 450.

[341] BECKER, MESSENGERS OF DISASTER *supra* note 335, at 12-13.

not bother to discuss it with the President, Secretary of War Stimson, the assistant secretary, McCloy, bother to record it in his many notes, or recall in his memoir how he learned about it from an eyewitness. When confronted with the catastrophe of the Holocaust, Frankfurter did nothing.

These three examinations of Frankfurter during the War illustrate his stubbornness in the face of facts on the ground, such as the persecution of Jehovah's Witnesses, Japanese Americans, and European Jews. They underscore the correctness of the general scholarly consensus that Frankfurter was a failure as a Judge and that once he went on the bench, he lost his commitment to life, liberty, and justice.

VI. THE "DEMOCRATIC JUSTICE," HIS BRETHREN, AND THE PROBLEM OF ETHICS

Frankfurter served on the Supreme Court from 1939 to 1962. While Frankfurter is most famous for this high office, Frankfurter's service on the Court was the least successful part of his life. He initially served on a Court with a moderate to liberal majority, with most of his colleagues nominated or elevated, like Chief Justice Stone, by FDR or his hand-picked successor, Harry Truman. In the 1950s, they were joined by Eisenhower's greatest federal appointments, Chief Justice Earl Warren and Associate Justice William J. Brennan. Even some of the more conservative members of the Court, like Justices Robert Jackson, Tom Clark, and Potter Stewart, were sensitive to individual rights. This was a Court that seemed "made" for Frankfurter, populated by smart, hardworking civil libertarians and progressives. As the famous "Professor" on the Court, he had a grand opportunity to be a progressive leader. Indeed, he could have been the leader of a Court, at least from 1939 to 1954, that might have been called "The Frankfurter Court," the way William J. Brennan became the leader of the Court under Chief Justice William Rehnquist.[342] But unlike Brennan, Frankfurter was often in petty conflicts with one after another of his fellow Justices. Throughout his years on the Court, he was arrogant, stubborn, often non-collegial, and sometimes simply nasty. He tried to dominate every discussion while often lecturing his brethren. He had "boundless self-confidence" but also boundless "self-esteem."[343] Indeed, "his conduct on the Court, his self-defeating and isolating relations with his brethren," in the end "obstructed" his jurisprudential goals.[344] He bragged about his intelligence, telling Justice Stanley Reed that his years as a professor made him a better judge than Chief Justice Charles Evans Hughes.[345] As one scholar noted, "Such cocksure chutzpah served him badly in the collegial relationships of the Court."[346] Furthermore, Frankfurter did not understand Brennan's notion of the "the Rule of Five,"[347] that a Justice must find four more votes to shape an opinion.

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[342] *See* Mark Tushnet, *Themes in Warren Court Biographies*, 70 N.Y.U. L. REV. 748 (1995).

[343] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 89.

[344] BURT, TWO JEWISH JUSTICES, *supra* note 3, at 53.

[345] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 89.

[346] *Id.*

[347] *Id.* at 763.

He could clearly mentor and act as a guiding professor to young men (but not young women, like Ruth Bader Ginsburg), and he could ingratiate himself with more powerful men, such as Henry Stimson, Oliver Wendell Holmes, Jr., Louis D. Brandeis, Teddy Roosevelt, and Franklin D. Roosevelt. But, Frankfurter was never able to collaborate with most of his colleagues. That Frankfurter wrote more dissents than majority opinions and felt the necessity of persistently concurring, often to disagree with his colleagues even if he accepted the outcome of a case, illustrates his failure to build coalitions and majorities to achieve his jurisprudential goals. Frankfurter's heroes, Holmes and Brandeis, often dissented on a reactionary Court led by the "Four Horsemen of the Apocalypse"—Justices Pierce Butler, James Clark McReynolds, George Sutherland, and Willis Van Devanter—who were bolstered by the deeply conservative Chief Justice William Howard Taft. But Frankfurter dissented from liberal outcomes that many assumed he would have supported. This underscores that this liberal activist of the 1920s and 1930s morphed into a conservative and even a reactionary.

Often noted for his gregarious charm, Frankfurter privately wrote snide comments about his fellow Justices, calling them by snarky nicknames while denigrating their intelligence and honesty, especially if they did not vote as he did. As one perceptive biographer noted, "Frankfurter would mentally divide his colleagues into three categories—adversaries, allies, and potential allies. He would react to adversaries as he had throughout his life—with heated anger and frustration, with attacks on their integrity and motives, with a search for vindication."[348] During World War II, in private memos, he called those who disagreed with him "the Axis"—as though Justices Hugo Black, William O. Douglas, and Frank Murphy were Nazis—and he absurdly accused Justice Douglas of anti-Semitism, merely because Frankfurter hated him.[349] In the 1950s he would add Chief Justice Earl Warren and Justice William J. Brennan to his list of enemies,[350] comparing "the civil libertarian bloc of Warren, Black, Douglas, and Brennan to the conservative Four Horsemen of the 1920s."[351] The comparison truly boggles the mind. The justice who had begun his legal and academic career crusading for civil liberties, due process, and protection of minorities—who seemed to be destined to become an icon of American liberty—ended his years on the Court as an intractable opponent

[348] HIRSCH, ENIGMA OF FRANKFURTER, *supra* note 13, at 177. Frankfurter's former clerk noted that the Justice referred to his colleges and others in private conversation and notes with various nicknames, some of which belittled them as though they were country bumpkins from rural places or make fun of their core beliefs, such as Justice Frank Murphy's Catholicism: "Douglas was Yak or Yakima, because he came from Yakima, Washington. Hugo Black was Lafayette, his middle name. Stone was Vermont. Hughes was Whiskers. Minton was Shay. Stanley Reed was the Chamer, which means fool, or dolt, or mule in Hebrew; now that might be very difficult for somebody to decipher. The others wouldn't have been. Murphy was the Saint. Roberts was the Squire. He was the country Squire. Jackson was Jamestown, the town in upstate New York that Jackson came from. Francis Biddle, the Attorney General, was Frawn-cis." Philip Elman, *Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817, 844 (1987). This interview was conducted by Norman Silber.

[349] Indeed, as I will discuss below, Douglas was far more sensitive to the liberty issues of Jews than Frankfurter.

[350] HIRSCH, ENIGMA OF FRANKFURTER, *supra* note 13, at 180.

[351] SNYDER, *supra* note 4, at 649.

of jurists like Brennan, Warren, Douglas, and Black, who are remembered as icons of liberty, civil rights, and equal justice for all.

Justice Frankfurter was far too often on the wrong side of history, the wrong side of the law, and the wrong side of liberty. Justices make mistakes, but the great ones will admit them, either explicitly—as Black, Murphy, and Douglas did in *Barnette* after having been in the majority in *Gobitis*—or by silently changing their jurisprudence, as Holmes and Brandeis did when they reversed their anti-free speech positions starting with *Abrams*.[352] Holmes and Brandeis never explicitly recanted their position in *Schenck*, but starting in the Fall of 1919, they consistently supported free speech while eviscerating the idea that peaceful opposition to government policies should be punished.[353] They managed to distinguish every subsequent free speech case from *Schenck*. Frankfurter, on the other hand, seems to have never changed his mind. As I mentioned earlier, most of the people who mattered to Frankfurter roundly condemned his *Gobitis* opinion. Three years later, when given the opportunity to back away from his repressive *Gobitis* opinion, Frankfurter doubled down to support expelling children from schools. The contrast with Holmes and Brandeis after *Schenck*, when they reversed course, is striking.

In addition to his inability to get along with his colleagues and his stubborn refusal to ever admit a mistake while on the Court, Frankfurter violated numerous ethical rules and practices without batting an eye while condemning other justices for less egregious behavior. As already noted, while on the Court, Frankfurter remained one of FDR's closest advisors. With "back door" access to the President, entering the White House without any record of his comings and goings, he discussed "wartime policy making and recruitment efforts on behalf of the Roosevelt administration."[354] Indeed, Frankfurter seemed to think he was still working for the President while on the Court. His law clerk, Philip Elman, recalled that when the Court heard *Hirabayashi* Frankfurter "saw himself as a member of the President's war team."[355] The distinguished constitutional historian

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[352] *See* Holmes's opinions in Schenck v. United States, 249 U.S. 47 (1919): Frohwerk v. United States, 249 U.S. 204 (1919); and Debs v. United States, 249 U.S. 211 (1919). On the immediate scholarly pushback from these opinions, *see* ZECHARIAH CHAFEE, JR. FREEDOM OF SPEECH (1920).

[353] Abrams v. United States, 250 U.S. 616 (Holmes, J. dissenting); Gitlow v. New York, 268 U.S. 652 (1925) Holmes, J. dissenting; and Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J. concurring). While technically concurring in Whitney because of the procedural posture of the case, Brandeis's eloquent defense of free speech is a stirring dissent in opposition to the majority's anti-free speech position. For background to these cases, *see* RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH (1987) and MURPHY, WORLD WAR I, *supra* note 106.

[354] SNYDER, *supra* note 4, at 353. He also stayed with FDR at Hyde Park. *Id.* at 240-41.

[355] Elman quoted in SLOAN, COURT AT WAR, *supra* note 168, at 205. In his oral history Elman recalls that in the wake of Pearl Harbor Frankfurter told Elman, who was then his clerk, that he (Frankfurter) "was going to have to devote his full energies to helping in the war effort, to helping FDR. That would be his overwhelming priority, to which everything had to yield." NORMAN I. SILBER, WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN, AN ORAL HISTORY MEMOIR 83 (2004). This attitude seems to have led to his unrestrained support of the internment and for suppressing Jehovah's Witnesses, since Frankfurter articulated that denying them religious liberty was central to creating the patriotism necessary to win the war.

William M. Wiecek notes that Frankfurter "was not the first Supreme Court Justice to advise presidents on affairs of state. But few have done so as extensively as he, and his consultative activities often posed ethical questions that would have troubled someone with a lesser capacity for self-exoneration."[356] Additionally, it seems likely he also discussed other policies including the constitutionality of planned legislation. Indeed, given Frankfurter's personality, it is inconceivable that he did not discuss these issues with the President. While on the Bench, he remained in constant contact with many of his former students working in the government, advising them on legislation, policymaking, and the law. We know he talked to John McCloy when he was planning the Japanese Internment, but it seems likely that he also talked to the President. This in part may explain Frankfurter's unconscionable support for sending innocent people to concentration camps purely because of their race. In *Korematsu*, Frankfurter specifically concurred in what Justice Murphy called a policy that goes "over 'the very brink of constitutional power' and falls into the ugly abyss of racism."[357]

On his many unrecorded visits to the White House, Frankfurter ignored separation of powers, giving FDR legal and/or political advice and then ruling on these issues from the Bench. Since 1793, when John Jay refused to give President George Washington an advisory opinion on pending legislation,[358] the Court has insisted that its members cannot give advice to the executive branch or Congress. Similarly, Justices should never discuss cases with parties that might someday come before the Court. They are not lawyers who give advice, and they must stay away from such activity. Frankfurter ignored these rules throughout his time on the Court.

In addition to the President, Frankfurter gave others legal advice which was ethically and legally problematic. Frankfurter advised and coached his former student Alger Hiss and his lawyers when it seemed clear that Hiss's legal problems surrounding his communist past would lead him to a federal court and possibly an appeal to the Supreme Court.[359] Frankfurter's ethically questionable behavior did not come to light at the time only because Hiss never appealed to the Court. During the Hiss controversy, Frankfurter used a third party to try to pressure the great journalist Edward R. Murrow to stop reporting on Hiss and "keep his mouth shut."[360] Frankfurter publicly defended Hiss's honesty and character. But significantly more than a decade earlier "Frankfurter began to overlook Hiss's small deceptions."[361] This tells us a lot about Frankfurter, and to be blunt, it is not pretty.

The Hiss case again raises the issue of Frankfurter's "eye for talent" that Snyder incessantly praises.[362] Mentors can easily misjudge the skills

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[356] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 91.

[357] 323 U.S. 233 (Murphy, J., dissenting).

[358] John Jay to George Washington, August 8, 1793, available at: https://press-pubs.uchicago.edu/founders/documents/a3_2_1s34.html.

[359] SNYDER, *supra* note 4, at 528.

[360] *Id.* at 534.

[361] *Id.* at 526.

[362] *Id.* at 229, 224.

or abilities of their students. But we must wonder why Frankfurter pushed Hiss forward when, as Snyder demonstrates, he had reason to doubt Hiss's honesty, because of his "deceptions." There are also profoundly serious ethical questions when a Supreme Court Justice tries to prevent a reporter from covering a story. Snyder notes that the Hiss case "tested" Frankfurter's loyalty to someone he called "one of the very best men we have in many a day." But his support for Hiss also tested his judicial ethics, and here he clearly failed the test. Frankfurter's loyalty to his student was honorable, but giving Hiss legal advice was surely questionable and his attempt to intimidate a reporter certainly crossed an ethical line. Frankfurter was a character witness for Hiss in his perjury trial. There, Frankfurter asserted Hiss's "reputation" for "loyalty and veracity" was "excellent."[363]

But if Frankfurter had long before this known of "Hiss's small deceptions,"[364] his testimony under oath, vouching for Hiss's character and honesty, might have constituted perjury. The era of McCarthyism and the Red Scare of the early 1950s was a horrible period in United States history. Many people were heroic, and others were not. These were tough times. As a sitting Justice, Frankfurter should have declined to testify at Hiss's trial, explaining that as a sitting Justice it would be inappropriate for him to testify. That he did not decline to testify says something about his loyalty to a student, but it also says much about his arrogance and his lack of judicial ethics. That he was less than honest in his testimony, vouching for Hiss's integrity when he knew Hiss was dishonest, tells us much about Frankfurter's character.

The Hiss case underscores the limits of Frankfurter's "eye for talent," as well as his judicial ethics. Perhaps the problem is that "talent" in Frankfurter's eye did not include "character" or "honesty." That conclusion may help us understand Frankfurter's slippery notions of judicial ethics.

The ethics issue becomes clearer in the case of John S. Service, a career state department officer whom Senator Joseph McCarthy wrongly accused of disloyalty and being a communist sympathizer.[365] Under strong political pressure, Secretary of State Dean Acheson, Frankfurter's protégé and former student, fired Service without any due process or evidence of wrongdoing. Frankfurter privately discussed the firing with Acheson before it happened. Eventually, the case came to the Supreme Court.[366] By this time Acheson was no longer Secretary of State. The other Justices were aware of Frankfurter's earlier discussions with Acheson and their close friendship. Justice William O. Douglas urged Frankfurter to recuse himself because of the clear impropriety of his *ex parte* conversations with Acheson. This was not an attempt to change the outcome of the case. Ultimately the Court unanimously supported Service, who was reinstated in the State

[363] *Id.* at 532.

[364] *Id.* at 526.

[365] Unfortunately, Snyder provides none of the background to this case. *See* LYNNE JOINER, HONORABLE SURVIVOR: MAO'S CHINA, MCCARTHY'S AMERICA, AND THE PERSECUTION OF JOHN S. SERVICE (2009); *see also* RONALD RADOSH AND HARVEY KLEHR, THE AMERASIA SPY CASE: PRELUDE TO MCCARTHYISM (1996).

[366] Service v. Dulles, 354 U.S. 363 (1957).

Department. The recusal issue was simply a matter of basic judicial ethics and Douglas's view was that the Justice should avoid an appearance of impropriety. It is a view that every jurist should take very seriously.

Frankfurter stubbornly refused to recuse himself. The ethical issue here is not even close. A judge cannot give advice to a party and then later adjudicate the case. Snyder dismisses this clear—even outrageous—breach of judicial ethics by simply claiming "Frankfurter's friendship with Acheson did not stop him from voting against the State Department."[367] Such an answer would doubtless lead to a failing grade in a legal ethics course.

Snyder implies that Frankfurter's vote for Service is a rebuke of Acheson, but that may not be the case. For all we know, Frankfurter urged Acheson to protect his political career by firing Service, assuring him that the Supreme Court would "make it right" in the end, as in fact the Court did. The issue here is not "all's well that ends well," but rather Frankfurter's clear violation of judicial ethics, his obvious "appearance of impropriety," and his stubborn refusal to recuse himself in a case where his vote truly did not even matter. The case underscores Frankfurter's inability to exercise enough restraint to not meddle in politics or legal cases while on the bench and his refusal to recuse himself when he did.

The Service case also illustrates Frankfurter's own set of double standards. Chief Justice Fred Vinson almost certainly, and improperly, discussed the steel seizure case with President Truman.[368] These conversations certainly violated the concept of separation of powers. Frankfurter was furious when he learned this, as he ranted to Justice Jackson about Vinson's breach of ethics. The two cases underscore Frankfurter's double standards for judicial behavior. When Frankfurter discussed a case with a party, as in the Service case, he would not even consider recusing himself. Similarly, Frankfurter not only voted on the internment cases but wrote a concurring opinion in Korematsu, after discussing the internment with McCloy and probably Roosevelt. In addition to Acheson, Frankfurter met with lower-level executive branch officers to lobby for particular policies or to weigh in on them. In other words, while furious at Vinson, Frankfurter did the same thing more often than Vinson.[369]

A final example of the nature of Frankfurter's lack of ethical boundaries concerns *Brown v. Board of Education*. In the period leading up to the oral argument in the fall of 1953, Frankfurter had numerous private conversations with his former law clerk, Philip Elman. At the time Elman was writing an amicus brief for the United States government in support of desegregation. Frankfurter told Elman his fears about not getting a strong majority to strike down segregated schools, and Elman incorporated into his brief some of Frankfurter's suggestions on how to persuade other justices to join the majority opinion.[370] Frankfurter later said that Elman

[367] SNYDER, *supra* note 4, at 628.

[368] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); SNYDER, *supra* note 4, at 557-58, 569.

[369] SNYDER, *supra* note 4, at 557-58, 569.

[370] *Id.* at 573; SILBER, WITH ALL DELIBERATE SPEED, *supra* note 355, at 219-27.

was the "real strategist of the litigation" who "proposed what the Supreme Court finally decreed, namely that the Court should not become a school board for the whole country."[371]

Elman later admitted that these "ongoing private conversations with the Justice" and his sharing of parts of the brief, were problematic, but argued that the case "transcended ordinary notions about propriety in litigation."[372] We can easily imagine why a young justice department lawyer deeply committed to fighting segregation, relished the chance to develop his strategy with the help of a sitting justice, who would soon hear the case. Elman was no doubt delighted that Justice Frankfurter gave him "confidential information about his [Frankfurter's] and his colleagues' views on the case, Brown v. Board of Education, information that inspired Mr. Elman to write a crucial argument into the Justice Department's brief."[373] Thus, Elman recalled he and the justice "fully discussed" the case and that in *Brown* "'I knew everything, or at least he gave me the impression that I knew everything, that was going on at the Court. He told me about what was said in conference and who said it.'" [374]

While understanding why Elman had these improper conversations, we cannot understand why Frankfurter, or any justice, would secretly help one side of a case in ways that were utterly improper. The ethical issues here are not even close. A sitting jurist has absolutely no business revealing the private discussions of a judicial conference. This also violates well established judicial and legal ethics when a judge in a case has *ex parte* discussions with an attorney about the brief the attorney is writing.[375]

VII. THE ANTI-DEMOCRATIC JUSTICE: FROM WORLD WAR II TO THE COLD WAR

After World War II Frankfurter continued to have a mixed (at best) record on civil liberties and civil rights. Snyder argues that Frankfurter's commitment to "democracy" and civil liberties guided his jurisprudence. However, in addition to the flag salute and internment cases, a number of Frankfurter's opinions illustrate the problematic nature of this claim. These include cases involving: a) laws requiring that Orthodox Jews close their businesses on Sundays; b) flagrant examples of segregation and racism in which Frankfurter defended the racial status quo; and c) the gross malapportionment of state legislative districts, which made a mockery of "democratic" representation. In many of these cases Frankfurter supported existing laws and government policies that were

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[371] SILBER, WITH ALL DELIBERATE SPEED, *supra* note 355, at 223-24. We might argue that this outcome undermined integration and led to years of delay as southern states used this tepid approach to integration to prevent it.

[372] SILBER, WITH ALL DELIBERATE SPEED, *supra* note 355, at 223.

[373] Stuart Taylor, Jr., *Key 1954 Bias Case: A Drama Backstage*, NEW YORK TIMES (Mar. 22, 1987), https://www.nytimes.com/1987/03/22/us/key-1954-bias-case-a-drama-backstage.html?unlocked_article_code=1.JE4.8Vnx.XYZ62iXsSNAq&smid=url-share.

[374] *Id.*

[375] It is worth noting that when the story of these events became public, it was reported on the front page of the New York Times. *Id.*

fundamentally undemocratic. In these cases, he often supported states' rights over civil rights, civil liberties, and political fairness.

A. The Sunday Closing Cases

In 1961 the Court heard four cases dealing with Sunday closing laws.[376] Here Frankfurter wrote one of the longest opinions of his career—eighty-four pages plus two appendices covering another sixteen pages.[377] Frankfurter's opinion illustrates just how reactionary he had become and how insensitive he was to the liberties of minorities. His opinion in these cases undermines Snyder's claim that, after *Barnette*, Frankfurter "began to adapt judicial restraint to protect minority rights."[378] On the contrary, in the Sunday Closing Cases, which Snyder's biography does not even mention much less discuss, Frankfurter spent enormous energy to justify laws that blatantly discriminated against a small minority of Americans—Orthodox Jews, Seventh-day Adventists, and members of a few other Sabbatarian Christian denominations.[379]

The cases challenged Maryland, Pennsylvania, and Massachusetts laws requiring most, but not all,[380] businesses to remain closed on Sundays. Massachusetts, for example, allowed Sunday sales of wholesale chickens or cooked chickens in a restaurant, but not chickens sold by a Kosher butcher. It was legal to sell live bait to anglers and wholesale fish to restaurants and grocery stores, but not gefilte fish.[381] One provision of the Massachusetts law provided exemptions for some businesses operated by anyone *except* Christian Sabbatarians and observant Jews. The law stated that it did not apply to "the retail sale [on Sundays] of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week."[382] In other words, a mainstream Christian or an atheist who sold newspapers and tobacco Monday through Saturday was permitted to make the same sales on Sunday. But a Seventh-day Adventist or an observant Jew, who sold the same products on Monday through Friday, but for religious reasons was closed on Saturday, was prohibited from selling

[376] Braunfeld v. Brown, 366 U.S. 398 (1961); McGowan v. Maryland, 366 U.S. 420 (1961) Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Gallagher v. Crown Kosher Supermarket of Massachusetts, 366 U.S. 617 (1961).

[377] McGowan v. Maryland, 366 U.S. 420, 459 (1961) (Frankfurter, J. concurring and appendix I, 543-550; and Appendix II, 551-559).

[378] SNYDER, *supra* note 4, at 429.

[379] In Girouard v. United States, 328 U.S. 61 (1946), Frankfurter had also demonstrated his willingness to persecute Seventh Day Adventists.

[380] Maryland allowed the sale of, among other things, confectioneries, tobacco products, newspapers, periodicals, boating accessories, flowers, and souvenirs. McGowan at 420; Massachusetts allowed, among other things, professional and amateur sporting events (both outdoors and indoors) and the operation of businesses engaged in golf; tennis; the showing of "motion pictures;" the sale of "live bait for noncommercial fishing;" renting horses, carriages, boats, and bicycles; "the printing, sale and delivery of newspapers;" the wholesale sale of fresh fish and dressed poultry; the making of cheese and butter; the transportation of livestock to fairs and sporting events; "bowling and games of amusement where prizes are awarded;" amusement parks; beach resorts; digging for clams; the sale of art at exhibitions; "conducting of private trade expositions;" and the sale of alcoholic beverages, as long as they were not taken off the premises. Gallagher at 619-22.

[381] McGowan at 420; Gallagher at 619-22.

[382] Braunfeld at 636.

anything on Sunday. To add insult to this injury, the law specified that these prohibitions applied to the "Lord's Day," which of course was not the "Lord" for Jews or the "Lord's Day" for Jews or Christian Sabbatarians.[383]

Two of the Sunday Closing cases, *Braunfeld v. Brown*[384] and *Gallagher v. Crown Kosher Supermarket*,[385] involved Orthodox Jews, whose beliefs required them to be closed on Saturday. Thus, they opened on Sundays, so, like other businesses, they could operate six days a week. The Court upheld all of these laws and the convictions of the offending business owners.[386] Frankfurter wrote his own massive one-hundred-page concurrence supporting all of these Sunday closing laws. Douglas, Brennan, and Stewart dissented in the two cases involving observant Jews. Braunfeld, who operated a small clothing store, asserted that he would "be unable to continue in his [retail] business if he may not stay open on Sunday."[387] Presumably, Frankfurter did not care if Braunfeld suffered for his faith, or maybe he believed Braunfeld should have just taken on a non-Jewish employee to run the business on Saturday. As in the Flag Salute cases, Frankfurter was perfectly willing to allow the states to impose an economic cost for people of faith, giving Jehovah's Witnesses the choice of violating their religion or paying for private schools, and forcing observant Jews to choose between their faith and their livelihood.

Crown Kosher was even more problematic. The market sold Kosher food. Most of its customers were observant Jews. Under Jewish law, the store would not have been Kosher if it had opened on Saturday, whether operated by a Jew or a non-Jew. Furthermore, the observant Jewish customers could not have shopped on Saturday. However, if the store were not open on Sundays, observant customers who worked a traditional five-day-a-week job would have had difficulty buying food.[388]

Justice William J. Brennan, a Roman Catholic, dissented, noting that the "effect" of such laws "is that no one may at once and the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen." Brennan argued that "this state-imposed burden on Orthodox Judaism" was unconstitutional.[389] He noted that the law had "exactly the same economic effect as a tax levied upon the sale of religious

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[383] *Id.*

[384] Braunfeld v. Brown, 366 U.S. 398 (1961).

[385] Gallagher v. Crown Kosher Supermarket of Massachusetts, 366 U.S. 617 (1961).

[386] Douglas Laycock suggests that "The Court up-held Sunday closing laws on the ground that they functioned more as a restraint of trade than as an establishment of religion." Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1696 (2003).

[387] Braunfeld, 366 U.S. at 599.

[388] Arguably, someone should have made a Free Exercise claim in *Crown Kosher* on behalf of the observant Jews who were deprived of their one non-working day to buy groceries. This claim might have noted that people who did not keep Kosher had many opportunities to buy food of various kinds in Massachusetts on a Sunday, but observant Jews could not. Such a claim might not have been successful, but it should have been made. Or, Frankfurter might have made such an argument if he had been inclined to protect the rights of Jews or other religious minorities, but there is nothing in his jurisprudence that suggests he had any such inclinations.

[389] Braunfeld v. Brown, 366 U.S. 398, 613 (1961) (Brennan, J. dissenting).

literature," which the Court had struck down.[390] Two Protestant Justices, Potter Stewart and William O. Douglas (whom Frankfurter called an anti-Semite), also defended the rights of Jews.

Frankfurter was over-the-top in supporting this discrimination against Jews with a massive eighty-four-page concurrence in *McGowan v. Maryland*, followed by a seven-page appendix listing all colonial and post-Revolutionary War Sunday laws (when most colonies and many of the new states had official churches) and a second nine-page appendix of all current statutes on this issue. He provided these lists to defend his support for a law titled "Observance of the Lord's Day," making the traditional Christian sabbath an "official" state holiday, while irreparably harming observant Jews and Christian Sabbatarians.[391] Clearly Frankfurter felt compelled to justify to himself, and to the world, why he continued to support laws which discriminated against religious minorities.[392]

Frankfurter's narrow notion of "democracy," that almost anything a state legislature passed was constitutional, left no space to protect minorities, except in some (but not all) cases involving discrimination against African Americans. He saw no constitutional problem with Massachusetts requiring that all business owners close (except those that were exempt, such as bait stores, bakeries, and some stores that sold tobacco) in "Observance of the Lord's Day." He cited colonial and early American statutes to support his claim. It was as though, in Frankfurter's mind, nothing in Constitutional law, except equal protection for African Americans, had changed since 1787 or 1791. As with Jehovah's Witnesses or Japanese Americans, Frankfurter had no interest in protecting fundamental liberties of minorities.

Frankfurter was too ill to hear the last few cases of 1962, including the school prayer case, *Engle* v. *Vitale*.[393] Without any evidence or even a footnote, Brad Snyder asserts that "given his votes in favor of separation of church and state," Frankfurter would have voted to strike down school prayer.[394] Perhaps this is true, since he had favored separation of church and state in cases involving religious instruction in public schools or the state spending money on school buses to help parochial schools.[395] But he

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[390] *Id.*, citing Follett v. Town of McCormick, 321 U.S. 573 (1944). In passing, it is worth nothing that *Follett* involved a tax directed at Jehovah's Witnesses who went door-to-door seeking converts. The Court struck down the tax, but Frankfurter dissented, refusing to consider that the law was a form of religious persecution. *Follett* at 579. At least Frankfurter was consistent in his support for the persecution of religious minorities by local governments.

[391] McGowan v. Maryland, 366 U.S. 420, 459 (1961) (Frankfurter, J. concurring in appendix I, 543-550; and Appendix II, 551-559).

[392] Curiously, Robert Burt's book on the intersection between Frankfurter's career and his Jewish background does not mention the Sunday closing cases. Nor does Snyder mention them in his book. Burt notes that Frankfurter grew up as an observant Jew but abandoned all religious practice when he was a junior in college. BURT, TWO JEWISH JUSTICES, *supra* note 13, at 38-39. It seems likely that Frankfurter felt compelled to show how "neutral" he was to issues involving Jews (or to distance himself from his upbringing) with his opinion in these cases.

[393] 370 U.S. 421 (1962).

[394] SNYDER, *supra* note 4, at 699.

[395] McCollum v. Board of Education, 333 U.S. 203 (1948). Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947); Zorach v. Clauson, 343 U.S. 306 (1952).

might also have supported school prayer, just as he supported Sunday closing laws, which directly merged church and state by making the traditional Christian sabbath an official state holiday, and furthermore punished anyone who did not observe that religious holiday according to the dictates of the state. Similarly, in his opinions upholding laws requiring children to violate their own faith to salute the flag he argued that the state could require children to openly violate their religion and punish children and their parents if they refused. He might have written a long appendix, as in the Sunday closing cases, pointing out that colonial-era and nineteenth-century schools had prayers and Protestant Bible readings. He might also have asserted that amid the Cold War, children should be forced to pray for the country, just as he believed they should be forced to salute the flag during World War II. Modern scholars might *want* to think Frankfurter would have voted to strike down school prayer, but we cannot know, and the evidence is at best murky. In the context of the flag salute and Sunday closing cases (which Snyder never discussed), it is likely that Frankfurter would have supported an official prayer, just as he supported the Christian sabbath or Lord's Day.

B. Racial Justice, Segregation, Civil Rights, and Policing

Frankfurter's record on racial equality was sometimes progressive and smart, and sometimes not. He played an important role, but not the key role, in obtaining a unanimous decision in *Brown v. Board of Education*.[396] The key player was Chief Justice Earl Warren, whom Frankfurter disliked, in part because he wanted to be Chief Justice.[397] Frankfurter's landmark 1960 opinion in *Gomillion v. Lightfoot*[398] struck down new boundaries for the city of Tuskegee, Alabama that were explicitly created to exclude almost every African American from the city to prevent them from voting in municipal elections. However, this was his only important majority opinion in a civil rights case in his entire career.

Frankfurter's relationship to race and civil rights was mixed. Sometime after 1929, he began to serve as an advisor to the NAACP at the personal request of the organization's general secretary, Walter White.[399] He served as an advisor but never took any compensation. When he went on the Court, he terminated this relationship, as he did others, including his membership in the American Bar Association and the Harvard Club.[400] As noted above, in the early 1940s he asserted that "when a priest enters a monastery, he must leave—or ought to leave—all sorts of worldly desires behind him. And this Court has no excuse for being unless it's a monastery."[401] But, while terminating his formal relationships with institutions and organizations, Frankfurter did not terminate his far more

[396] 347 US 483 (1954).

[397] *See generally*, RICHARD KLUGER, SIMPLE JUSTICE (rev. ed., 2004) (1975).

[398] 364 U.S. 339 (1960).

[399] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 90. KLUGER, SIMPLE JUSTICE, *supra* note 390, at 133.

[400] *Justice Describes Former N.A.A.C.P. Tie,* N.Y. TIMES, September 30, 1958. https://www.nytimes.com/1958/09/30/archives/justice-describes-former-naacp-tie.html

[401] Frankfurter Diaries quoted in Melvin I. Urofsky, *Conflict Among the Brethren*, *supra* note 234, at 101-02.

ethically problematic informal political relationships with presidents, cabinet members, or major players in federal agencies.

In his early years at Harvard Law School, Frankfurter mentored Charles Hamilton Houston while he took his LL.B.[402] and then was his advisor when Houston continued on for his S.J.D. Frankfurter later mentored William Henry Hastie, Houston's cousin, who also did an S.J.D. under Frankfurter and would eventually become the first Black federal judge in the United States. Houston and Hastie were also the first Blacks to serve as editors on the Harvard Law Review.[403]

Frankfurter also connected his former law student Nathan R. Margold to Houston, and working together they developed a long-range strategy to challenge school segregation.[404] Frankfurter's work with Houston may have been his greatest contribution to Civil Rights because his former student went on to be the Vice Dean at Howard Law School, the mentor of Thurgood Marshall and other important civil rights attorneys, and the first director of the NAACP Legal Defense Fund (LDF), which would eventually win *Brown* and almost all of the other major civil rights cases.[405] Although he never litigated civil rights cases, in the 1920s and 1930s Frankfurter mentored the first generation of twentieth century Black civil rights lawyers, while giving excellent advice to the NAACP.

This record should have led Frankfurter to be the Court's greatest advocate of racial equality since John Marshall Harlan, who sat from 1877 to 1911. In his first decade and a half on the Court, Frankfurter joined majority opinions (but never wrote any) generally supporting civil rights; chipping away at segregation in transportation, higher education, voting, and housing; and protecting the due process rights of African Americans, usually from southern injustice. Often these cases were unanimous. From the early 1940s to the mid-1950s, Frankfurter was generally, but not always,[406] supportive of claims that challenged segregation and racism. However, as noted above, he dissented in decisions supporting civil rights in cases involving police brutality and provided the fifth vote to impose the death penalty in the Willie Francis case.

Frankfurter supported civil rights in cases involving Black litigants who had been denied fair trials,[407] striking down a restrictive covenant that barred the sale of land to an African American,[408] and overturning convictions where African Americans or Mexican Americans were excluded

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[402] What today would be called a J.D.

[403] RICHARD KLUGER, SIMPLE JUSTICE, *supra* note 390, at 116-17, 133-37, 156-58.

[404] *Id.*

[405] ON HOUSTON, *SEE* GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

[406] For example, in Feiner v. New York, 340 U.S. 315 (1951), he joined the majority in upholding the conviction of a white college student for a public speech attaching racism.

[407] Chambers v. Florida, 309 U.S. 227 (1940) (overturning a racially charged conviction where there had been coerced confessions).

[408] Hansberry v. Lee, 331 U.S. 32 (1940). This case is usually taught as a civil procedure case, but the facts and substance were about race. Frankfurter was also part of a unanimous Court in Shelly v. Kraemer, 334 U.S. 1 (1948) and Hurd v. Hodge, 334 U.S. 24, 36 (1948) (Frankfurter, J., concurring), which struck down restrictive covenants in housing under state law and in the District of Columbia.

from jury service.[409] Frankfurter supported using the Interstate Commerce Act to prohibit segregation on interstate trains and protecting African Americans who refused to be segregated on trains.[410] He agreed that all voters, including African Americans, had a constitutional right to vote in primaries for congressional seats[411] and voted to overturn a Texas law denying Black Americans the right to vote in the Democratic primary.[412] He also supported integrating state graduate and professional schools as part of a unanimous Court.[413]

Most importantly, he was part of the unanimous court in *Brown v. Board of Education*,[414] *Brown*'s companion case *Bolling v. Sharpe*,[415] and a less well-known case that ordered the city of Louisville, Kentucky to integrate its public golf course.[416] He joined the unanimous per curiam opinion upholding a lower court ruling that segregation on buses in Montgomery, Alabama (and by extension everywhere else in the South) was unconstitutional, which overturned the precedent in *Plessy v. Ferguson*.[417] He was also part of the unanimous court preventing the state of Alabama from prohibiting the NAACP from operating in that segregated state.[418] During this period, he also supported decisions dismantling California's long history of discriminating against Japanese immigrants and their children in land ownership or obtaining various commercial licenses.[419]

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[409] Smith v. Texas, 311 U.S. 128 (1940); Hernandez v. Texas, 347 U.S. 475 (1954). In another case, Frankfurter joined Douglas and Black in dissenting when the Supreme Court denied death row inmates a rehearing in federal court, despite claims of racial discrimination in jury pools and another claim that the conviction was based entirely on race discrimination. Brown v. Allen, 344 U.S. 443 (1953) (Frankfurter, J. dissenting).

[410] Mitchell v. United States, 313 U.S. 80 (1941) and Morgan v. Virginia, 328 U.S. 373 (1946). In Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948), Frankfurter joined a seven-vote majority to uphold a state law prohibiting segregation, rejecting an argument by Bob-Lo that under various nineteenth century cases, the state could not regulate its boats because they carried passengers from Michigan to Canada. He also supported integration on railroads in Henderson v. United States, 339 U.S. 816 (1950).

[411] United States v. Classic, 313 U.S. 299 (1941). *Classic* challenged Louisiana's non-racial restrictions on voting in primary elections at a time when Louisiana also barred Blacks from voting in primary or general elections. Although *Classic* did not challenge these racial restrictions, it was the key to striking down such racially discriminatory laws. Significantly, the Louisiana policy that *Classic* did address was based on state laws, and under Frankfurter's later jurisprudence of almost always deferring to state legislatures, he should have opposed this outcome. Instead, he voted with the *Classic* majority in what was a four to three decision.

[412] Smith v. Allwright, 321 U.S. 649 (1944). *See also* Terry v. Adams, 345 U.S. 461 (1953) (Frankfurter, J., concurring).

[413] Sipuel v. Oklahoma State Board of Regents, 332 U.S. 631 (1948); Sweat v. Painter, 339 U.S. 629 (1950); McLaurin v, Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950).

[414] 347 U.S. 483 (1954). He was also past of the unanimous majority in Brown II, 349 U.S. 294 (1955).

[415] 347 U.S. 497 (1954).

[416] Muir v. Louisville, Park Theatrical Association, 347 U.S. 971 (1954).

[417] Gayle v. Browder, 352 U.S. 903 (1956); Plessy v. Ferguson, 163 U.S. 537 (1896),

[418] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). He took a similar position for a unanimous court in Bates v. City of Little Rock, 361 U.S. 516 (1960).

[419] Oyama v. California, 332 U.S. 633 (1948); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948).

After more than a decade of taking on segregation, in 1958 the Court was able to reiterate that "separate but equal" had no place in American life. The case, *Cooper v. Aaron*,[420] involved attempts by officials in Arkansas to circumvent a federal court order to integrate Little Rock's Central High School. This was the first time since *Brown v. Board of Education* that the Court had an opportunity to speak about segregation in public schools. By this time, there were three new members of the Court, and within the Court there was a strong sense that the country, once again, should see the unanimity that the Court had in *Brown*. Tactically, the Court decided on a per curiam opinion, which would not have a single author. The Court heard the case in late August 1958 as part of a special term—the first in five years—so that the school officials would be on notice to allow the Black students to enter Central High when the new school year began in September.

Although he supported an end to segregated schools in *Brown,* in the Little Rock case Frankfurter urged Chief Justice Warren to delay ordering that the school desegregate to placate what Frankfurter considered to be southern moderates. Frankfurter had no actual evidence that such moderates were active in Arkansas, or anywhere else in the former Confederate states.[421] The lawyer for the Board asked for a two-and-a-half-year delay,[422] which was hardly "moderate." The day after the argument, "the Court announced a short, unsigned decision drafted by Frankfurter and Harlan" upholding the lower court and ordering the school to desegregate.[423] Justice Brennan then circulated drafts of an opinion which could be the basis of the unanimous per curiam opinion. Frankfurter read the draft and commented on it.

Brennan also proposed, based on a suggestion from Frankfurter, that all nine justices sign the per curiam opinion. After reading Brennan's final draft, Frankfurter wrote him a note saying, "you have made me content," indicating he would sign the opinion.[424] This would be the first time in Supreme Court history that all Justices would sign a per curiam

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[420] 358 U.S. 1 (1958).

[421] The only exception to this were in some private, mostly Catholic, schools that accepted integration. *See* Library of Congress, *School Segregation and Integration Project*, https://www.loc.gov/collections/civil-rights-history-project/articles-and-essays/school-segregation-and-integration/#:~:text=He%20explains%20how%20the%20Catholic,excommunication%20and%20we%20have%20integration (noting that "Lawrence Guyot, who later became a leader in the Student Nonviolent Coordinating Committee, grew up in Pass Christian . . . [and] explains how the Catholic schools were desegregated there: 'The Catholic Church in 1957 or '58 made a decision that they were going to desegregate the schools. They did it this way. The announcement was we have two programs. We have excommunication and we have integration. Make your choice by Friday. Now there was violence going on in Louisiana. . . . I learned firsthand that institutions can really have an impact on social policy.'"). *See also* MARK NEWMAN, DESEGREGATING DIXIE: THE CATHOLIC CHURCH IN THE SOUTH AND DESEGREGATION, 1945-1992 (2018) 138-168; *and* Daniel Hutchinson, *Catholics and Jim Crow: Recent Scholarship on Southern Catholicism During the Civil Right Movement* 12 J. OF SOUTHERN RELIGION (2010), https://jsr.fsu.edu/Volume12/Catholics%20and%20Jim%20Crow%20Review%20Essay.html.

[422] SNYDER, *supra* note 4, at 651-52. For much of Snyder's discussion of the background to this case, *see id.* at 635-65.

[423] *Id.* at 652.

[424] *Id.* at 653.

opinion, and it would signal to the nation that the Court was still unanimously in favor of school desegregation. It seemed like all the justices were on board. But then Frankfurter announced that while he would sign the per curiam opinion, he was also going to write a concurrence. All eight of the other justices were furious. Harlan and Black, who by this time were his closest colleagues on the Court, tried to talk him out of it. But Frankfurter was adamant, only agreeing to publish his concurrence a week after the opinion was announced.[425]

Frankfurter's action in *Cooper v. Aaron* and his insistence on writing a concurrence after everyone was on board, including Frankfurter himself, illustrates his failure as a Justice. Snyder explains Frankfurter's behavior by saying he was "a bad politician."[426] But this is quite wrong. Frankfurter's whole career demonstrates the opposite. This includes his ability to stay in the Taft administration even as he opposed Taft's reelection and then serve in the Wilson administration, after opposing his election. One of his political skills was his ability to make friends with the right people, like Henry Stimson and Frank Roosevelt, and to serve as an advisor to FDR, even after he was on the Court and was presumably "above" politics. Frankfurter's ability to place his students and friends in places of power is another example of his extraordinary political skills. The issue in *Aaron v. Cooper* was not that Frankfurter was a "bad politician," but that after he went on the bench, he became increasingly egotistical, self-centered, judgmental, and intellectually rigid. His "fault" was that he could only get along with people he could dominate, unless they were clearly more powerful than he was, like Holmes, Brandeis, Stimson, or Roosevelt. As one scholar notes, the "entire episode of Frankfurter's separate opinion in *Cooper v. Aaron* suggests not so much his passion for standing alone on the Court as his compulsion to drive his brethren away."[427] In his diary Frankfurter reported on conversations he had with other justices, showing that the interactions with them were "suffused with hectoring, condescending self-righteousness."[428]

In fact, Frankfurter was an excellent politician, but he was a terrible colleague, who could not compromise or collaborate with eight other men who were his equals in power. Furthermore, Frankfurter could never accept that most of his fellow "brethren" were as smart or talented as he was, and thus he was disdainful of almost all of them. His claim, only a few years after he came on the Court that he was a better jurist than Chief Justice Charles Evans Hughes, underscores his arrogance and his "chutzpah."[429] His last-minute refusal to support a fully unanimous opinion in *Cooper v. Aaron* shows that his ego, rather than successfully dismantling segregation, was what mattered most to him. Fortunately, this act of self-centered indulgence did not derail the power of the unanimous per curiam

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[425] *Id.* Cooper v. Aaron, 358 U.S. 1, 20 (1958) (Frankfurter, J. concurring).

[426] SNYDER, *supra* note 4, at 648. At the same time, Snyder also asserts Chief Justice Warren was "a good politician but a bad constitutional lawyer." Because Frankfurter did not like Warren, it seems that Snyder feels compelled to attack him.

[427] BURT, TWO JEWISH JUSTICES, *supra* note 13, at 52.

[428] *Id.*

[429] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 89.

decision. Justice Brennan, who wrote the opinion, did not need to enhance his ego by claiming it as his own.

After *Cooper v. Aaron*, Frankfurter joined a unanimous Court protecting the Arkansas NAACP from state suppression,[430] and concurred in a unanimous decision supporting the voting rights of Black Americans in Georgia.[431] In *Gomillion v. Lightfoot*, he wrote his only significant majority opinion supporting civil rights.[432] It was an important case. Tuskegee, Alabama, had redrawn its boundaries to exclude almost every African American in the city. In *Colegrove v. Green*,[433] in 1946, Frankfurter had written for a six to three majority, that the Court had no power to overrule a state reapportionment or lack of a reapportionment. In that case Illinois had not had any reapportionment in its Congressional districts for forty-five years. At the time of the case, congressional districts in the state ranged from 914,000 residents to just 112,116.[434] Frankfurter considered this a "political" question, not a legal one. Frankfurter believed that the state legislatures should deal with these issues. He asserted that a decision that would make representation fair and meaningful was "hostile to a democratic system" because it would "involve the judiciary in the politics of the people."[435] This was typical of Frankfurter's refusal, or inability, to look at the reality of politics: no legislature was likely to voluntarily reapportion itself, since sitting members might lose their seats. But Frankfurter did not think there was anything undemocratic about an eight-to-one disparity in population in the size of electoral districts.[436] Frankfurter took the same position in *Baker v. Carr*[437] two years after *Gomillion*. However, in *Gomillion*, Frankfurter departed from *Colegrove* and agreed that the city of Tuskegee had violated the Fifteenth Amendment because the city had redrawn its boundaries to disenfranchise almost every Black voter it could reach. This was a powerful argument for racial equality and is probably Frankfurter's most lasting contribution to constitutional doctrine. It is often seen as his greatest opinion.

Gomillion would also be his last vote for civil rights and against racism. Well before the *Brown* decision (as well as after it), Frankfurter had opposed racial equality or tried to limit decisions that attacked racism. While he clearly despised segregation, in some civil rights cases he worked hard to soften the language of the Court, to "soft-pedal" an "uncompromising condemnation of racism."[438] In *Burton v. Wilmington*

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[430] Bates v. City of Little Rock, 361 U.S. 516 (1960).

[431] United States v. Raines, 362 U.S. 17 (1960).

[432] 364 U.S. 339 (1960).

[433] 328 U.S. 549 (1946).

[434] Colegrove v. Green, 328 U.S. 549 (1946), Black, J., dissenting at 566. *See also* WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 255-56.

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

[436] In dissent Justice Black also noted that the state legislature had not been reapportioned since 1901. Id. at 567. Illustrative of this discrepancy, in 1900 Chicago had a population of 1,698,575 but by 1940 the city had 3,396,808 residents. In a city that had doubled in size no legislative districts had been reapportioned in forty-five years. https://physics.bu.edu/~redner/projects/population/cities/chicago.html

[437] 369 U.S. 186 (1962).

[438] WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2,at 670, in Bob Lo-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948). Similarly, in Sipuel v. Board of Regents of Oklahoma, 332 U.S. 631 (1948), "he strove unsuccessfully to get [Chief Justice Fred] Vinson

Parking Authority, in a dissent, argued for the right of a state to maintain a segregated restaurant on state owned property, and to use taxpayer dollars to subsidize the racist policies of the restaurant.[439]

A month after *Gomillion*, in *Shelton* v. *Tucker*,[440] Frankfurter wrote a dissent in a case involving Black teachers, the NAACP, and Arkansas. At issue was a state law requiring that all teachers in public institutions—from elementary schools to state universities—report if they were members of any organizations or had contributed money to them. The law further required that they list any such organizations to which they belonged in the five years before the law was passed. Because this was not a criminal statute, it could not technically be called an "ex post facto" law, but clearly it was designed to not only intimidate teachers but also set them up to be fired for exercising their right to freedom of association before the law was passed. The purported goal of the law was to prevent communists from teaching in the state, but in reality, the law aimed to expose anyone who was a member of the NAACP or other civil rights organizations. This law was not a holdover from the McCarthy period. It had been passed at the "Second Extraordinary Session of the Arkansas General Assembly of 1958"[441]—a session called to pass laws to prevent the integration of Little Rock's Central High School. The goal of the law was to intimidate Black state employees from joining civil rights organizations, particularly the NAACP, which had led the fight to desegregate Arkansas's schools. In addition, the law violated the First Amendment rights of citizens to join legal organizations without intimidation.

Frankfurter, as he so often did, expressed his personal distaste for the law, even as he supported it. His opinion made almost no mention of Little Rock, race, or segregation and instead focused on trusting the state to act in an unbiased way. This was of course patently absurd. In the wake of *Cooper v. Aaron*, the state had closed the Little Rock schools rather than integrate them, and like all former Confederate states, Arkansas was thoroughly segregated and had a long record of violence and intimidation against Blacks.[442] As he so often did, Frankfurter simply ignored reality. Here Frankfurter was willing to throw many Black teachers to the tender mercies of an avowedly racist and segregationist governor (Orville Faubus), state legislature, local school boards, local prosecutors, and state judges.

A year later, Frankfurter was the lone dissenter in *Monroe* v. *Pape*, which involved Chicago police officers who invaded the home of a Black family without a warrant, forced the entire family to stand naked in front of the officers while they searched the house, and then arrested the

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to eliminate language from the per curiam opinion that might 'serv[e] as a target for contention,'" WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 669-70. In another case involving race, Omaya v. California, 332 U.S. 633 (1948), Frankfurter attacked Justice Murphy's concurring opinion in his diary, calling it "a long-winded soap-boxy attack against racism." WIECEK, BIRTH OF THE MODERN CONSTITUTION, *supra* note 2, at 664.

[439] 365 U.S. 715, 727 (1961), (Frankfurter, J., dissenting).

[440] 364 U.S. 479 (1960)

[441] *Id.* at 480. Snyder ignores this case.

[442] For example, *see* Moore v. Dempsey, 261 U.S. 86 (1923) in which the Supreme Court overturned death sentences and long prison sentences for Blacks in Arkansas, who had defended themselves from white mobs, and were convicted at a trial surrounded by a mob.

homeowner and held him incommunicado for ten hours, before releasing him without any charges.[443] Eight justices believed the officers were liable under Section 1983 of the United States Code, which was based on Reconstruction-era laws designed to protect African Americans from state-sponsored violence. Frankfurter, while always claiming to abhor racial discrimination, was the only dissenter. He wrote a fifty-three-page memorandum arguing that the police could not be tried under the federal Ku Klux Klan Act of 1871, which was the origin of Section 1983, but were instead only subject to state prosecutions.[444] This dissent ignored the utter implausibility of Illinois prosecuting the police officers for their behavior. Frankfurter usually supported federal laws, but he would not do so to allow the prosecution of police for illegal and racially motivated violence against Blacks. In trying to convince his colleagues to reverse the convictions of the police, he argued that the history of the Ku Klux Klan Act had not been briefed,[445] and therefore the police should win. Reflecting his life-long support for states' rights, and his passive support for segregation in many cases, Frankfurter simply refused to see the necessity of the federal government prosecuting rogue or racist policemen, since the states would not do it. It was not that Frankfurter thought Black lives did not matter, but he thought states' rights mattered more. His lone dissent in *Monroe v. Pape* was consistent with his positions in other cases.

Burton v. Wilmington Parking Authority, the last civil rights case Frankfurter heard,[446] involved a segregated restaurant in Wilmington, Delaware, operating in a publicly owned building. Although seen as an "upper South" state, Delaware had a long history of segregation and racism.[447] Indeed, Delaware was one of only two states (the other was Kentucky) that refused to end slavery after the Civil War, doing so only when forced to by the Thirteenth Amendment. The majority of the *Burton* Court found that the restaurant constituted unconstitutional state action because the municipal agency not only owned the building where the segregated restaurant was located but was also involved in a number of aspects of its operation, including providing taxpayer support to help the restaurant stay in business.

The Court correctly concluded that the state's action violated the Equal Protection Clause of the Fourteenth Amendment. Frankfurter dissented, once again putting on his hat as an advocate of states' rights in the face of blatant segregation. In Frankfurter's world, states could not segregate Blacks in schools, but the states could subsidize restaurants that refused to serve them. Joining Frankfurter were two recent conservative Eisenhower appointees, John Marshall Harlan, II and Charles Evans Whittaker. Once again, we see the early supporter of the NAACP as "a

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[443] Monroe v. Pape, 365 U.S. 167, 202 (1961) (Frankfurter, J., dissenting).

[444] SNYDER, *supra* note 4, at 676.

[445] *Id.*

[446] Burton v. Wilmington Parking Authority, 365 U.S. 715, 727 (1961), (Frankfurter, J., dissenting).

[447] *See, e.g.,* Neal v. Delaware, 103 U.S. 370 (1881), where the Supreme Court reversed the conviction of Black man because, more than a decade after the ratification of the Fourteenth Amendment Delaware refused to allow any Blacks to serve on juries. See also Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401 (1983).

liberal turned conservative justice."[448] Frankfurter's dissents in these cases and others, on a Court that was dismantling segregation, illustrate that whatever he was before 1939, from the beginning of his Court years he was conservative and sometimes reactionary.

These last three dissents against equal justice and in favor of racism, near the end of Frankfurter's judicial career, were not unique. While he often supported racial equality, as already noted, he was inconsistent and at times oblivious to the reality of racial discrimination. As his painful concurrence in *Cooper v. Aaron* demonstrates, he could not even be trusted to support an outcome when he said he would. Thus, while usually supporting integration, Frankfurter was also inconsistent in many cases involving racism in American life. He dissented in *Screws* v. *United States*, where the Court upheld the power of the United States to prosecute a Georgia sheriff who beat a handcuffed Black man so badly that he soon died. The Court described this as "a shocking and revolting episode in law enforcement," but Frankfurter objected to using a Reconstruction-era statute to protect the civil rights of African Americans in the South, arguing that the statute was unconstitutionally vague.[449] In part, this decision reflected Frankfurter's unwillingness to interfere with oppressive police tactics, often used against Blacks. This case was similar to the position he later took in *Monroe v. Pape*,[450] as the lone dissenter in an equally shocking case, although one that did not lead to a death.

In *Adamson v. California*[451] Frankfurter wrote a concurrence as part of a five-vote majority with the most conservative members of the Court, refusing to extend a right against self-incrimination in a criminal case involving a Black defendant.[452] While a due process case, rather than a civil rights case, *Adamson* reflected the reality that Black defendants (like Adamson) were more likely to be convicted that Whites. In *Perez v. Brownell*, Frankfurter wrote the majority opinion for a five-to-four Court, upholding the Eisenhower administration's claim that someone born in Texas, who was mostly raised in Mexico, had lost his citizenship when he voted in one Mexican election and failed to register for the draft during World War II.[453] Here Frankfurter, took a very hard line in a citizenship case involving a racial minority, just as he had against a member of a religious minority in *Girouard v. United States*.[454]

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[448] SNYDER, *supra* note 4, at 4. This is another case Snyder ignored.

[449] 325 U.S. 91 (1945).

[450] Monroe v. Pape, 365 U.S. 167 (1961).

[451] Adamson v. California, 332 U.S. 46 (1947).

[452] *Id.*

[453] 356 U.S. 44 (1958).

[454] 328 U.S. 61 (1946). He took an equally hard line in his dissent in Trop v. Dulles, 356 U.S. 86 (1956), where the majority prohibited the U.S. government from taking American citizenship away from a soldier who had briefly deserted (for less than twenty-four hours) and then willingly returned to his military post. The Court held that it was "cruel and unusual punishment" to make someone "stateless" for this relatively minor offense. Frankfurter had no problem making the former soldier stateless for this minor and short-term infraction. It is again worth noting that Frankfurter almost always sided with the federal government *except* in cases involving civil rights and police brutality, like *Screws* and *Pape*; in those cases, he objected to using federal civil rights laws to vindicate civil rights.

On balance, Frankfurter was often inclined to support civil rights and racial equality but was never on the cutting edge of these issues. That he wrote only one important majority opinion in a civil rights case—in *Gomillion*—speaks loudly about how, on the Bench, he abandoned his early support of the NAACP and became increasingly conservative and disconnected from the reality of American race relations. His opinions and memos in *Screws*, *Pape*, *Shelton*, and the Wilmington restaurant case, his behavior in *Cooper v. Aaron*, and his persistent support for states' rights illustrate why scholars have been correct in portraying "Frankfurter as a judicial failure, a liberal turned conservative justice, and as the Warren Court's principal villain."[455]

C. Reapportionment

In his last case, Frankfurter wrote a long dissent in *Baker v. Carr*,[456] which required that state legislative districts be apportioned on the basis of population—under the theory of "one person, one vote." The case came from Tennessee, which had not reapportioned the state legislature since 1901. As a result, representation was skewed in ways that made a mockery of democracy and should have deeply influenced a "Democratic Justice." For example, Hamilton County (which included the city of Chattanooga) was nineteen times larger than tiny Moore County. But each had the same number of representatives in the state legislature. The same was true in other states as well. In Vermont, one legislative district had only 238 people, while another had about 33,000 people. One state senate district in Los Angeles, California had about six million people in it, while another California state senate district had about 14,000 people.[457]

Frankfurter argued that this was a "political question" and "emphasized that the Court should leave purely political questions to the elected branches and to the people themselves."[458] But Frankfurter ignored the reality that short of judicial intervention (or a civil war), there was no path to democratic change for reapportionment. The Tennessee legislature simply refused to redistrict because that would have pushed many sitting representatives out of the legislature. It would also have shifted political power to the many large cities and their suburbs, and away from the tiny rural counties, where few people lived, but from which a hugely disproportionate number of state legislators were elected.

To put it bluntly, there is no democratic "political" solution to absurdly unfair and unrepresentative apportionment if the political system itself is rigged. This was the case in Tennessee and elsewhere. In a six to two decision, the Court set the stage for massive reapportionment to create legislative districts that are substantially the same size.

Snyder argues that Frankfurter's dissent in *Baker v. Carr* was his "most prophetic," but he never explains why he thinks that, or what the

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[455] SNYDER, *supra* note 4, at 4.

[456] Baker v. Carr, 369 U.S. 186 (1962), Frankfurter, J. dissenting at 266-330.

[457] *Baker v. Carr* in PAUL FINKELMAN AND MELVIN I. UROFSKY, LANDMARK DECISIONS OF THE UNITED STATES SUPREME COURT 327 (2nd ed. 2008).

[458] SNYDER, *supra* note 4, at 710.

"prophecy" of supporting undemocratic representation means in a democracy. It is hard to understand why anyone would want to return to a system where representation is *not* based on population, and where six million residents of Los Angeles would have the same number of votes in the state senate as 14,000 rural Californians. Redistricting has become highly politicized. But that is hardly new. It has been around since 1812, when Governor Elbridge Gerry of Massachusetts invented the Gerrymander.[459]

Political fights over redistricting should be attractive to anyone interested in "democracy," because these fights illustrate democratic politics at its best, provided there is a level playing field to begin with. *Baker* v. *Carr* created level playing fields across the country. The many political arguments over gerrymandering illustrate Frankfurter's notion of letting the democratic process play out. Since *Baker v. Carr*, the political process in the states has determined the shape of electoral districts, with the Courts only making sure they are not unconstitutionally based on race, as Frankfurter seemed to believe in *Gomillion*, and that they are as identical in size as possible. This is what a democratic justice, with faith in state legislatures, should have demanded.

Frankfurter "insisted that the best way to protect people's rights was through the democratic political process."[460] But Frankfurter opposed the requirement of one person, one vote, which is the essence of democracy. And this is precisely what we have today, with reapportionment being very much part of the political process. But before *Baker*, it was not "democratic." There could be no "democratic political process" when the process was rigged by legislative districts that effectively disenfranchised the majority of the people in many states. Frankfurter's opposition to reapportionment suggests that he did not really believe in a "democratic political process," but like the conservative he had become, he favored the status quo of a rigged system.

VIII. CONCLUSION

In his biography Snyder's argues that Frankfurter "treasured free speech."[461] But, but as William M. Wiecek's comprehensive history of the Stone and Vinson Courts shows, Frankfurter "consistently proposed judicial self-restraint, in civil liberties as well as economic issues."[462] He may have "treasured" free speech, but he often opposed it in his opinions. Frankfurter's record on free speech is enormously problematic, as illustrated by one of the last McCarthy-era cases. California deemed Raphael Konigsberg "morally unfit" to be a lawyer because he refused to answer questions about previous Communist Party membership.[463] The Court reversed the case, holding that his refusal was not evidence of bad character. As a co-founder of the ACLU, Frankfurter should have

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[459] Paul Finkelman, *Who Counted, Who Voted, and Who Could They Vote For*, 58 ST. LOUIS UNIV. L. J. 1071, 1073-74 (2014) (Describing the origin of the Gerrymander and .showing a picture of the original political cartoon attacking it).

[460] SNYDER, *supra* note 4, at 710.

[461] *Id.*

[462] WIECEK, BIRTH OF THE MODERN CONSTITUTION *supra* note 2, at 413.

[463] Konigsberg v. State of California, 353 U.S. 252 (1957).

supported this position because one of the major tenets of civil liberties is that private political views should not be a bar to entering a profession. Forgetting his civil liberties background—or simply abandoning it—Frankfurter dissented, joined by Clark and Harlan.[464] Snyder explains Frankfurter dissented because he wanted to remand the case "to clarify the California court's decision."[465] Once again, Frankfurter was more concerned about states' rights than he was about free speech.

Four years later, when the case came back to the Court, Frankfurter was part of a five-justice majority, along with Clark, Harlan, and two other Eisenhower appointees, that upheld a second California decision denying Konigsberg admission to the bar because he would not cooperate with the investigation of his political views.[466] Here, Frankfurter provided the deciding vote in *support* of the idea that the state had a right to question someone's private political views before allowing the person to practice law. Unfairly attacked by Teddy Roosevelt as a Bolshevik, Frankfurter was now firmly in the camp of Cold War red-baiters.

Snyder defends Frankfurter's repressive decisions by claiming that, although he "treasured free speech and religious freedom" he "feared that overprotecting the First Amendment undermined the government's ability to meet people's basic needs."[467] But it is not clear why expelling children from school for not saluting the flag, denying observant Jews and Christian Sabbatarians the right to make a living *and* practice their religion, firing Arkansas teachers for being members of the NAACP, or denying Konigsberg the right to practice law because he might have once been a communist, were necessary to "meeting the people's basic needs." If Frankfurter had been a maker of "the Liberal Establishment," he would have consistently supported freedom of speech and protected minorities, such as Jehovah's Witnesses, Japanese Americans, religious Jews, and Blacks seeking to enter a restaurant in Delaware, from oppression. He did not. If he had been the "Democratic Justice," he would have worked to make sure that the political process gave the people a meaningful vote. But he did not.

When he joined the Court, Frankfurter began to oppose civil liberties for religious minorities and to oppose federal prosecutions of police who abused Black people. Shortly after Frankfurter went on the Court, Roger Baldwin, the Founder of the ACLU, chatted with the new Justice while both were summering on Martha's Vineyard. Baldwin told the Justice, he hoped Frankfurter was "still carrying on his traditions."[468] The man who had defended Sacco and Vanzetti, helped the N.A.A.C.P develop a plan for fighting segregation,[469] fought for the rights of workers, and denounced the persecution of labor organizers immediately responded that

[464] *Id.* at 274 (Frankfurter, J., dissenting).

[465] SNYDER, *supra* note 4, at 627.

[466] Konigsberg v. State of California, 366 U.S. 36 (1961). Unfortunately, Snyder did not discuss this case.

[467] *Id.*

[468] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 106.

[469] *Id.* at 90. KLUGER, SIMPLE JUSTICE, *supra* note 390, at 133.

as a Justice he had "different responsibilities on the Court. I am not an advocate."[470]

It is hard to imagine other justices, who had been committed to protecting constitutional rights before going on the Court, categorially arguing that in their previous positions they were effectively hired guns, advocating for a client, rather than trying to protect the constitutional rights of all Americans. Chief Justice John Marshall continued to support a strong national government after he left politics to serve on the Court. Justice John McLean did not abandon his lifelong opposition to slavery when he went on the Court, as his important dissents in *Prigg* v. *Pennsylvania*[471] and *Dred Scott v. Sandford*[472] demonstrate. Chief Justice Salmon P. Chase did not forget his career as an anti-slavery lawyer, senator, and governor or abandon his lifelong commitment to racial equality, just because he went on the Court. The first Justice John Marshall Harlan came to the Court with a strong belief in legal equality for former slaves and their descendants,[473] and continued to express that on the Court. Louis Brandeis remained the "people's lawyer," supporting constitutional liberty and social justice from the Bench. As a district attorney and then an attorney general in California, Earl Warren advocated criminal justice reform and brought that understanding of what the Constitution commanded while on the Court.[474] Thurgood Marshall did not forget his lifelong commitment to civil rights, when he put on robes. Nor did Ruth Bader Ginsburg forget about gender equality when she went to the Court.[475] None of these justices *always* supported outcomes they might have argued for before going on the Court, but they consistently supported the constitutional protections for justice that they had believed in before going to the Court. Other Justices, including Oliver Wendell Holmes, Jr., Charles Evans Hughes, Hugo Black, and Harry Blackmun, grew on the Court, increasingly supporting substantive justice, due process, civil liberties, and civil rights.

The tragedy of Frankfurter is that he abandoned the constitutional rights and protections that he supported from his graduation from law school until he donned his robes. When Roger Baldwin asked him if he still supported civil liberties, Frankfurter replied that as a Justice "I am not an advocate."[476] But his response to Baldwin was intellectually dishonest. He in fact had increasingly become an advocate for states' rights, the status quo, and an aggressive nationalism that persecuted minorities. On the

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[470] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 106.

[471] 41 U.S. (16. Pet.) 539 (McLean, J., dissenting) at 658. On the proslavery nature of *Prigg*, *see* Paul Finkelman, *Story Telling on the Supreme Court:* Prigg v. Pennsylvania *and Justice Joseph Story's Judicial Nationalism*, 1994 SUPREME COURT REV. 247. *See also* FINKELMAN, SUPREME INJUSTICE, *supra* note 138. .

[472] 60 U.S. (19 How.) 393 (1857) (McLean, J. dissenting) at 539.

[473] Unfortunately, he was less protective of the rights of Chinese immigrants and their American-born children. *See* Gabriel "Jack" Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996).

[474] His opinion in Miranda v. Arizona 384 U.S. 486 (1966), reflected his own policies against third degree interrogations in California.

[475] Significantly, while Frankfurter gave his former colleague Al Sacks "carte blanche power to select his clerks," he rejected Sacks's strong recommendation of Ruth Bader Ginsburg, referring to her as "Mrs. Ginsburg." SNYDER *supra* note 4, at 663.

[476] WALKER, IN DEFENSE OF AMERICAN LIBERTIES, *supra* note 3, at 106.

Court he had become an advocate in opposition to civil liberties, civil rights, the free exercise of religion, due process or law, and democracy.