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Felix Frankfurter and the Law

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ABSTRACT

Felix Frankfurter, renowned as a public intellectual fighting for justice, became as a member of the Supreme Court a figure proclaiming his devotion to the rule of law and its corollary, judicial self restraint, even when its results conflicted with his deepest beliefs. Yet an analysis of several of his leading opinions suggests that his famous balancing tests had little to do with law. In sacrificing his policy and ethical goals in the service of law, he often failed to serve the law, and in that sense, his well publicized sacrifices were for nothing.

KEYWORDS

Frankfurter; judicial review; judicial self restraint; balancing tests; Thayer.

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I. Introduction

Americans may not be able to agree on the meaning of greatness when they discuss public figures, but it always seems to entail a strong urge for power. Lincoln's willingness to sacrifice portions of the Constitution to save the whole system,[1] for example, or Lyndon Johnson's stretching the reach of the Senate majority leader beyond anything that had existed before[2] are essential to their reputations. It is not simply that we celebrate their goals, abolishing slavery or fighting racial discrimination; we also celebrate the bare knuckle means they employed because we understand that without them, the goals would have remained unfulfilled. Putting the matter baldly, we accept that the ends justify the means.

The central fact of Felix Frankfurter's judicial career was a very public refusal to accept that justification and that practice. As he often explained in his opinions, this was not always easy, for far from being a Holmesian philosopher uninterested in the world, Frankfurter was highly engaged politically and temperamentally given to constant, often intrusive, activity. Results mattered deeply to him. But as he repeatedly observed, the law mattered more. Indeed, it is his devotion to the law that he considered the most valuable part of his career and his most important legacy.

II. Frankfurter the Man

Frankfurter was born in 1882 in Vienna, the capital of the declining Austro-Hungarian empire, into a Jewish family that for generations had produced rabbis. As a result of widespread anti-Semitism, many Jews in the empire had come to the more cosmopolitan Vienna, which itself then became more aggressively anti-Semitic, with the creation in 1885 of a student union at the University of Vienna based on hostility toward Jews, with the state in 1887 formally prohibiting foreign Jews from emigrating to the country, and with the election in 1894 of the virulently anti-Semitic mayor, Karl Lueger, whose "followers wore an effigy of a hanged Jew on their watch chains."[3] Hitler, born elsewhere in Austria in 1889, lived for six years in Vienna and later declared in *Mein Kampf* that because of this experience, he "became an anti-Semite."[4]

Frankfurter's father came to Chicago for its world's fair in 1893, decided to stay, and the following year sent for the rest of his family. They settled in a cold water flat in the famous Jewish ghetto on the Lower East Side of Manhattan, after a while moving to a more comfortable uptown German neighborhood, Yorkville. From the earliest days, "certainly in the early teens,"[5] young Felix was a brilliant student deeply involved in social and labor issues. At nineteen, a mere seven years after he came to this country speaking no English, he graduated from City College

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1 Letter to Albert G. Hodges, April 4, 1864, Abraham Lincoln, 10 Complete Works 66 (John Nicolay & John Hays eds. 1913).

2 Robert A. Caro, Master of the Senate: The Years of Lyndon Johnson (2002).

3 J. Sidney Jones, Hitler in Vienna, 1907-1913 111 (1982).

4 Adolf Hitler, Mein Kampf 66-84 (1941).

5 Harlan B. Phillips, Felix Frankfurter Reminisces 5 (1960).

third in his class, then worked for a year with the city's Tenement House Department to help pay for law school, and at twenty was admitted to Harvard, where he edited the *Law Review* and compiled a stunning record, graduating first in his class. After graduation, he was hired by a prestigious law firm – he was their first Jewish hire and they asked him to change his name – but a few months later, left to work at the U.S. Attorney's office in New York under Henry Stimson, an establishment figure renowned for his integrity and commitment to fairness,[6] where he helped to prosecute various corporations. With the change of administrations in Washington, Stimson returned to private practice, taking Frankfurter with him, but Stimson shortly decided to run for governor of New York as a Republican, with Frankfurter as his chief aide. Stimson lost, but was later appointed Secretary of War by President Taft, and brought Frankfurter to be law officer in his department's Bureau of Insular Affairs, focusing on overseas possessions. In this capacity, Frankfurter came into extended contact with the military, saw the establishment's racial hierarchy views at first hand, and argued several cases before the Supreme Court. When Taft was succeeded by Wilson, Frankfurter remained in Washington, turning to issues of federal licensing and regulation.

By this time, Frankfurter had developed his fabled networking skills, befriending liberal intellectuals, like Walter Lippmann, Horace Kallen, and Herbert Croly, as well as such establishment figures as Holmes, Learned Hand, and Newton Baker. In a few years, former President Theodore Roosevelt, future President Herbert Hoover, Justice Louis Brandeis, and future president of Israel, Chaim Weizmann, among many others, would be added to the list. As Stimson put it, "You have the greatest facility of acquaintance – for keeping in touch with the center of things – for knowing sympathetically men who are doing and thinking."[7] Barely thirty-two, Frankfurter joined the faculty at Harvard Law School in 1914 as its first Jew, specializing in administrative law and public utilities, a position having been created for him by Jacob Schiff, a wealthy New York financier. He also advised Florence Kelley's National Consumers League, and helped create and wrote for the *New Republic*. In 1917, Secretary of War Baker appointed him to a position supervising war time courts martial, and later that year President Wilson named him counsel to the Mediation Commission set up to settle disputes that might interfere with war production. In this role, he became immersed in labor issues and the radicalism they spawned, convinced that labor merited far better treatment not only as a matter of equity but also, prudentially, to forestall the growth of revolutionary movements. His public defense of the radical labor leader, Tom Mooney, whose murder trial was a cause célèbre, won him admirers on the Left, though it infuriated Theodore Roosevelt. He also made the acquaintance of the Assistant Secretary of the Navy, Franklin Roosevelt.

In the 1920s, Frankfurter was involved with the founding of the American Civil Liberties Union, and drew public attention with his denunciation of the Palmer Raids, directed at radicals and immigrants, and his campaign to spare the lives of Sacco and Vanzetti, anarchists controversially convicted of bank robbery

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6 David F. Schmitz, Henry L. Stimson: The First Wise Man (2001).

7 Joseph P. Lash, *A Brahmin of the Law*, in From the Diaries of Felix Frankfurter 12 (Joseph P Lash ed., 1975).

and murder.[8] The absence of due process in this case and the *Mooney* case made a profound impact upon him.[9] Named to an endowed chair at Harvard Law School, he spoke out against the university's President's plan to establish a quota for Jewish students, provoking vitriolic animosity, and during the 1930s, he provided legal advice to the NAACP.

On Roosevelt's election in 1932, Frankfurter assumed a backstage role in the New Deal, offering advice to the President, placing former students in the administration, and behind the scenes advocating for policies supported by his friend and mentor, Brandeis. He had turned down positions on the Supreme Judicial Court of Massachusetts and as United States Solicitor General, choosing to remain at Harvard, apparently unconcerned that many of his colleagues disapproved of his liberal activism.

By his fifties, in sum, Frankfurter could point to an extraordinary career as a lawyer, public intellectual, and political actor. Much of what he did – his defense of radicals, his attacks on government suppression, his Zionism – were highly publicized, and he seemed to enjoy the attention he received. At the same time, much of what he did – advising officials, lobbying for policies, operating "a nerve center of the apprenticeship network"[10] – was hidden from view, and he also seemed to enjoy exercising influence in this way. Highly intelligent, ethically and ideologically committed, extraordinarily well connected, Frankfurter was one of the most prominent lawyers in the nation, and certainly the lawyer most highly esteemed by liberals.

It was at this time, in 1938, that Benjamin Cardozo died, leaving the Court without a Jewish justice. Roosevelt, fulfilling an informal promise made years earlier, waited six months and chose Frankfurter to replace him. The liberal press was delighted. "Frankfurter's whole life has been a preparation for the Supreme Court," wrote *The Nation*. "No other appointee in our history has gone to the Court so fully prepared for its great tasks."[11] Archibald MacLeish predicted that with Frankfurter, "liberal democracy will be defended on the Supreme Court in the next generation as it has rarely been defended in the history of this country."[12] Harold Ickes, the Interior Secretary, told Roosevelt, "If you appoint Felix, his ability and learning are such that he will dominate the Supreme Court for fifteen or twenty years to come."[13]

Traditionally, nominees had not appeared in person before the Senate Judiciary Committee during the consideration process. Indeed, six years earlier when Judge John J. Parker asked to appear before the committee to rebut serious charges against him, the committee had refused.[14] But Frankfurter's opponents, perhaps hopeful of winning favorable press attention, asked him to speak. Though he was confirmed

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8 Felix Frankfurter, The Case of Sacco and Vanzetti (1927).

9 *Supra* note 5, 130-39; Holmes and Frankfurter: The Correspondence, 1912-1934, 130-31 (Robert M. Mennel & Christine L. Compston eds. 1996).

10 G. Edward White, The American Judicial Tradition 326 (1976).

11 *Justice Frankfurter*, The Nation, Jan. 14, 1939, p. 52.

12 Archibald MacLeish, *Foreword*, in Law and Politics, xxiv (Archibald MacLeish & E. F. Prichard eds., 1939).

13 *Supra* note 7, 64.

14 William C. Burris, Duty and the Law: Judge John J. Parker and the Constitution 84-85 (1987).

without dissent, he was given a grilling by Pat McCarran, an anti-Semitic Senator from Nevada, who questioned his citizenship, and was attacked by witnesses as a Jew,[15] an immigrant,[16] and a Communist.[17]

In addition to their bigotry and ignorance, Frankfurter's critics were notable for their total inability to grasp his judicial philosophy, notwithstanding his many efforts to set down and justify that philosophy. Its origins go back to Holmes and further to Thayer,[18] and are founded on a conviction that democracy is America's governing ideal. Democracy here is conceived in Schumpterian terms as a contest for power exercised through the ballot.[19] It is not Lincoln's government by the people nor is it rote majority rule, but rather a system aiming at accountability. Frankfurter, more generous in his view of the people than Holmes or Thayer, believed that the public's instincts normally would drive them to support what they thought was best for their country. But he was mindful of Thayer's warning that aggressive courts, too eager to declare laws invalid, could inculcate passivity among the public, who would then conclude that "these few wiser gentlemen on the bench are so ready to protect them against their more immediate representatives"[20] that there would be no need of their protecting themselves.

Will the voters sometimes make choices one may regard as foolish, unworkable, wasteful, even immoral? Yes, of course, for they are, as human beings, radically imperfect. But courts, comprised of unelected judges, also radically imperfect, should defer to the lawmakers' decisions unless they can demonstrate that they constitute a clear mistake, that is, that they violate the Constitution in obvious ways that almost any reasonable person could comprehend. Not many statutes will fall under this rationale, it is true, and many laws that one may believe bad will survive. But that is the price of democracy. And the cost is reduced somewhat by the confident belief that the people will not make too many mistakes, that these mistakes will not be too serious, that nearly always the mistakes they do make can be rectified, and that the people will not fail too often to take advantage of these opportunities. Democracy, then, is not flawless, but merely, as Churchill once famously observed, "the worst form of government, except for all those forms that have been tried from time to time."

In terms of Frankfurter's judicial review, the power of courts to pass on the constitutionality of acts of lawmakers, the role of courts – and, consequently, of judges – therefore, is not very robust. For Holmes, "essentially the philosopher [unconcerned with] the evanescent events of the day,"[21] this would not be a major sacrifice. Viewing humanity from his Olympus as engaged in a ceaseless struggle for advantage, he prided himself on his lack of interest in the results and professed

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15 Allan A. Zoll, executive vice-president of the American Federation against Communism, *Senate, Subcommittee on the Judiciary, Hearings on the Nomination of Felix Frankfurter to Be an Associate Justice of the Supreme Court,* 76th Congress, 2d sess. 76 (1939).

16 Elizabeth Dilling, *id.* at 41.

17 John Bowe, *id.* at 89.

18 James Bradley Thayer, *The Origins and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893). Frankfurter called this "the most important single essay" on constitutional law and "the great guide for judges." *Supra* note 5, 301, 300.

19 Joseph Schumpeter, Capitalism, Socialism and Democracy ch. 22 (1942).

20 James Bradley Thayer, John Marshall 104 (1901).

21 Felix Frankfurter, Mr. Justice Holmes and the Supreme Court 55 (2d. ed. 1961).

not to read the daily newspaper. As he wrote to Laski on the day Warren G. Harding was inaugurated, "if my fellow citizens want to go to Hell, I will help them. It's my job."[22] Frankfurter, on the other hand, an immigrant who by pluck and luck had risen to the heights, was deeply committed to a wide range of policies and social values. When he deferred to a legislative policy choice he abhorred, he could not respond with a Holmesian shrug of indifference. On the other hand, for Frankfurter, deference to the political process did not mean bowing to power, but rather facilitating self government. His faith in people was not boundless – like all Progressives, he exalted experts – but it lacked the dismissive cynicism that Holmes cultivated. From this it followed that the Supreme Court, "having such stupendous powers,"[23] should be very parsimonious in using them. Of course, not all Justices, he believed, possessed his stern will power, and he clearly disdained those, like Douglas, Murphy, and Black, whom he regarded as result oriented. "Only the conscious recognition [of the temptation to] read their economic and social views into the neutral language of the Constitution" will suffice.[24]

Behind this lay not simply Thayer's abstract arguments, but decades of experience with courts as principal obstacles to the policies Frankfurter supported. *Lochner v. New York*,[25] *Hammer v. Dagenhart*,[26] and *Adkins v. Children's Hospital*[27] were among the best known of numerous instances of activist Courts striking down Progressive legislation. Judicial self restraint, he was convinced, would have saved these laws, benefited the nation, and spared the Court years of well earned criticism.

This essay examines Frankfurter's commitment to the law in light of four of his best known opinions, *Minersville School District v. Gobitis*, *Colegrove v, Green*, *Rochin v. California*, and *Dennis v. United States*.

III. Minersville School District v. Gobitis

Among the best known illustrations of Frankfurter's self restraint views were a pair of flag salute cases decided in the early 1940s, *Minersville School District v. Gobitis* (1940)[28] and *West Virginia State Board of Education v. Barnette*.[29] In the interest of avoiding duplication, this essay will focus on *Gobitis,* decided a year after his appointment, which concerned young Lillian Gobitas (the Court misspelled her name), who as a Jehovah's Witness refused to salute the flag and recite the Pledge of Allegiance at her public school because "The Bible says at Exodus chapter 20 that we can't have any other gods before Jehovah God."[30] The school board expelled Gobitas, denying that the salute and pledge were religious acts protected

22 Mark De Wolfe Howe, 1 Holmes-Laski Letters 249 (1953).
23 Felix Frankfurter*, The Supreme Court of the United States*, 14 The Encyclopedia of the Social Sciences 424, 425 (1934).
24 *Id.* at 432.
25 198 U.S 45 (1905).
26 247 U.S. 251 (1918).
27 261 U.S. 535 (1923).
28 310 U.S. 586 (1940).
29 319 U.S. 624 (1943).
30 Lillian Gobitas, *The Courage to Put God First*, Awake! July 22, 1993, at 13.

by the First Amendment and charging that she had been indoctrinated by her father. She wanted to return to school but be freed from the salute and pledge. The case was appealed to the Supreme Court, which granted certiorari.

Chief Justice Hughes assigned the opinion to Frankfurter because of his "moving statement at conference on the role of the public school in instilling love of country in our pluralist society,"[31] perhaps recalling his own childhood experience as a young boy from Austria. "Not even you," he had written to President Roosevelt a few months earlier, "can quite feel what this country means to a man like me, who was brought here an eager sensitive lad of twelve."[32] Writing for the 8-1 majority, Frankfurter begins by celebrating the freedom of religion, but then adds that "no single principle can answer all of life's complexities,"[33] and that an absolute right to follow one's conscience would undermine religious tolerance itself. "Conscientious scruples [do] not relieve the citizen from the discharge of political responsibilities."[34] Indeed, "adjustment [may be] deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable."[35] The "ultimate foundation of a free society is the binding tie of cohesive sentiment," he observes, and as "We live by symbols,"[36] the school board may inculcate national cohesion with the flag salute. Schools are tasked with teaching citizenship; saluting the flag is a widespread and generally accepted means to that end.

Having failed to show that "there is no basis"[37] for the rule, Gobitas cannot then seek relief from the courts. Frankfurter entertains the possibility that the law may be a "folly,"[38] but answers that "it is not the personal notion of judges of what wise adjustment requires which must prevail;"[39] "courts possess no marked and certainly no controlling competence;"[40] "The wisdom of training children in patriotic impulses . . . is not for our independent judgment;"[41] "the court-room is not the arena for debating issues of educational policy."[42] The Supreme Court, lacking the authorization and the expertise, is not a national school board. If the Gobitas family opposes the policy, they should look to the legislature for relief, not the unelected Supreme Court. For "the legislature no less than . . . courts is committed [to] the guardianship of deeply cherished liberties."[43] The struggle to change the policy, regardless of the result, is valuable, he says, because "to fight out the wise use of legislative authority . . . serves to vindicate the self-confidence of a free people." [44]

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31 Paul A. Freund, *Charles Evans Hughes as Chief Justice*, 81 Harv. L. Rev.4, 41 (1967).

32 Roosevelt and Frankfurter: Their Correspondence, 1928-1945 511 (Max Freedman ed. 1967).

33 *Supra* note 28, at 594.

34 *Id*.

35 *Id*. at 595.

36 *Id*. at 596.

37 *Id.* at 600.

38 *Id.* at 598.

39 *Id*. at 596.

40 *Id*. at 597-98.

41 *Id*. at 598.

42 *Id.*

43 *Id*. at 600.

44 *Id*. Justice Harlan Fiske Stone, the sole dissenter, thought the school board's requirement invalid because it "seeks to coerce these children to express a sentiment, which, as

Frankfurter's *Gobitis* opinion is studded like raisins in a pound cake with historical and philosophical observations. He speaks of "Centuries of strife over the erection of particular dogmas"[45] and "the ultimate mystery of the universe and man's relation to it;"[46] he quotes Lincoln[47] and footnotes, in addition to the usual citing of precedents, Jefferson, Roger Williams, Bagehot, Santayana, and the treatment of the flag by the Continental Congress.[48] The display of erudition has a look-at-me quality that is only heightened by the recognition that little of this is really essential to the argument. Why, then, is it there? To bully the reader into submission? To distract her from weaknesses in the argument? To add gravitas to the conclusion? One can only speculate.

When we dig a little deeper, we come across tired tricks. One involves repeatedly restating the question, each time moving from a more neutral to a more biased perspective. Thus, first Frankfurter writes, "We must decide whether the requirement of participation in such a ceremony, exacted from a child who refuses upon sincere religious grounds, infringes without due process of law the liberty guaranteed by the Fourteenth Amendment;"[49] next, "the question remains whether school children . . . must be excused from conduct required of all the other children in the promotion of national cohesion;"[50] finally, "The precise issue . . . for us to decide is whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment without which there can ultimately be no liberties, civil or religious."[51] By the end, the reworded question answers itself.

The second trick is saying one thing and doing another. Thus, announcing that "every possible leeway should be given to the claims of religious faith,"[52] precedes a refusal to grant that leeway; thus, claiming that "parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state's educational system is seeking to promote,"[53] precedes a defense of a law whose purpose is precisely that; thus, asserting that "personal freedom . . . is best maintained . . ., when it is engrained in a people's habits, and

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they interpret it, they do not entertain, and which dominates their deepest religious convictions." *Id.* at 601. As for deferring to the legislature, this "seems to me no more than the surrender of the constitutional protection of the liberty of small minorities to the popular will." *Id*. at 606. Where Frankfurter looked to the political process to resolve the dispute, Stone maintained that the Constitution required that legislation that represses religious freedom can stand only if it meets the stiff test of strict scrutiny, that is, there must be a compelling state interest and the law must be narrowly tailored. The flag salute requirement failed this test. *Id.* at 607. (Two years earlier, Stone had written the famous footnote four in *United States v. Carolene Products*, in which he proposed the strict scrutiny test. 304 U.S. 144, 152, n.4 [1938].)

45 *Supra* note 28, 592.
46 *Id*. at 593.
47 *Id*. at 596.
48 *Id.* at 601.
49 *Id*. at 592-93.
50 *Id.* at 595.
51 *Id.* at 597.
52 *Id*. at 594.
53 *Id*. at 599.

not enforced against popular policy by the coercion of adjudicated law,"[54] precedes justifying a policy of naked coercion .

What is most striking is this: notwithstanding Frankfurter's insistence on setting aside personal preferences as legally irrelevant, he relies on the irrelevant himself, for Frankfurter's argument at its core is extralegal. The central issue, as he defines it, is a conflict between a constitutional guarantee and the general good, but "general good" is not a constitutional term at all. Why, then, is it a "task" of the Court to "reconcile two rights,"[55] when only one has a legal basis? He counts "national cohesion" as "inferior to none in the hierarchy of legal values,"[56] but on what basis may it be called a legal value? Platitudes misdirect us away from the action.

If for Frankfurter the flag salute was saved by the school district's plausible defense of the rule, it is obvious that his famous self restraint was poorly articulated. Instead of speaking of Thayer's "clear mistake,"[57] he insisted that Gobitas needed to show that there was "no basis" for the law. But this will nearly always be impossible because laws are not random acts of nature, like Brownian motion, but the results of human acts with purposes. If "no basis" was a reworking of "clear mistake," it was a very sloppy job.

The emptiness of the legal claims extends even to Frankfurter's citations. He cites three cases as examples of religious claims bowing to laws that "were manifestations of specific powers of government,"[58] when, in fact, the cases did no such thing. *Reynolds v. United States*[59] upheld a federal anti-bigamy statute on the ground that bigamy was no more a religious practice than was human sacrifice; *Davis v. Beason*[60] upheld a state statute requiring voters to swear an oath that they were not polygamists or members of organizations that promoted polygamy on the ground that polygamy was not a religious practice but instead one that "offend[s] the common sense of mankind";[61] *Hamilton v. Regents*[62] upheld a state law requiring male students enrolled in public universities to take military courses on the ground that "every citizen owes the . . . duty, according to his capacity, to support and defend government against all enemies."[63] None of these cases, in short, was decided on the basis of a specific constitutional power of government; instead, the Court was driven by certain moral beliefs that appeared so obviously correct that it was necessary only to utter them – no justification was required. In that odd sense, they are relevant to the *Gobitis* case, for when Lillian Gobitas first refused to salute, there existed no legal requirement that she do so, not from the school board or the state legislature or Congress. It was simply a matter of custom.[64] To be sure, once she refused, an infuriated school board formally mandated the salute, but a reading

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54 *Id*.
55 *Id.* at 594
56 *Id*. at 595.
57 *Supra* note 18, at 18.
58 *Id*.
59 98 U.S. 145 (1879).
60 133 U.S. 333 (1890).
61 *Id*. at 342.
62 293 U.S. 245 (1934).
63 *Id.* at 262-63.
64 David Manwaring, Render Unto Caesar 83 (1962).

of the opinion would not disclose this. Instead, there are multiple references to the legislature.

Frankfurter also makes empirical claims that, once one strips away the sonorous language, are exposed as highly problematical. For example, "the enjoyment of all freedom presupposes the kind of ordered society which is summarized by the flag,"[65] when arguably it is better summarized by Gobitas' refusal to salute the flag, for virtually all societies applaud saluting their flags but only those that are free permit citizens to refuse to salute. Normally, that is, we consider freedom more the option of disagreeing than of going along. Citing a coercive law that enjoys nearly unanimous public support is a strange example of the order that presupposes freedom, particularly, since at the time, popular hostility to the Witnesses' refusal to salute the flag was expressed in beatings, kidnappings, and shootings. "Nothing parallel to this extensive mob violence has taken place . . . since the days of the Ku Klux Klan," reported the American Civil Liberties Union a few months after the decision.[66] Of course, the rule of law that punishes conventional crime may be a prerequisite for freedom, but requiring flag salutes hardly approaches that in importance. Indeed, much of the country did not require the salute, and it was not noticeably less free than the part that did.

How to account for Frankfurter's decision? Writing barely a year before joining the Court, he declared, "The Court is the brake on other men's actions, the judge of other men's decisions."[67] Why in *Gobitis* was there no inclination to apply the brake or exercise the judgment? The most obvious answer is that, despite his famous preoccupation with legality, Frankfurter was driven by an immigrant's patriotic fervor made overwhelming by the war in Europe. The same month his *Gobitis* opinion was handed down, France fell to the Germans, the British fled from Dunkirk, and Hitler seemed well on his way toward conquering Europe. Frankfurter had frequently counseled Roosevelt on the necessity of intervention. By this time, he considered it inevitable. Hence, it was essential to prepare the public for this eventuality by stoking patriotism by, for example, instituting patriotic exercises in public schools. Frankfurter, as Harold Ickes said in his diary, "is really not rational these days on the European situation."[68] Legalistic Frankfurter, in short, was responding to extralegal foreign policy concerns. Two years later, when the Court was ruling on a high profile case involving German saboteurs, he urged his colleagues to speak with one voice, imagining soldiers in combat asking, "What in hell do you fellows think you are doing? Haven't we got enough of a job trying to lick the Japs and the Nazis without having you fellows on the Supreme Court dissipate the thoughts and feelings and energies of the folks at home by stirring up a nice row as to who has what power. . .?[69] This was not the kind of memo a judge obsessed with legalisms would write.

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65 *Supra* note 28, at 600.

66 American Civil Liberties Union, The Persecution of the Witnesses 1-3 (1941).

67 *Supra* note 12, at 71.

68 Harold Leclair Ickes, 3 The Secret Diary of Harold Ickes: The Lowering Clouds, 1939-1941 199 (1955) (entry for June 5, 1940).

69 G. Edward White*, Felix Frankfurter's "Soliloquy" in* Ex parte Quirin, 5 Green Bag 2d 423, 440 (2016).

IV. Colegrove v. Green

Colegrove v. Green (1946)[70] raised issues of considerable democratic significance. The case involved three qualified voters in an Illinois congressional election, who complained that their districts had much larger populations than certain other districts, that their vote was therefore worth less than the vote of citizens in these other districts, and that this violated the Fourteenth Amendment's Equal Protection and Privileges and Immunities clauses, Article 1, section 2's provision that members of the House shall be chosen by the people through elections, and the Reapportionment Act of 1911 that requires approximate equality in district population. Colegrove saw the Illinois situation as obviously anti-democratic. If elections are the central democratic mechanism, surely there is something amiss when the value of individual votes varies so widely. At the same time, Illinois saw the effort to have non-elected judges resolve the dispute as obviously anti-democratic, as well. A commitment to democracy entails a willingness to seek answers to issues of this kind through the democratic and not the judicial process.

In a four-three decision, Frankfurter wrote for two other justices, his opinion standing as the opinion of the Court. The relevance of the Reapportionment Act he dismissed easily, as it was amended in 1929 with no mention of district equality. The larger issue concerned constitutionality, and the answer, as often happens, turns on the question. Colegrove, seeing his vote diluted, conceived the question as a private wrong; Illinois, maintaining that the wrong affected the entire state, conceived it as a public wrong. Frankfurter, siding with Illinois, held that the "basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity," since it amounted to "an appeal to the federal courts to reconstruct the electoral process of Illinois."[71] He, therefore, focused not on the constitutional provisions offered by the plaintiffs, but instead on Article 1, section 4 that gave state legislatures control over congressional elections, subject to potential congressional control, and section 5 that made the House the judge of the qualifications of its own members. The import of these provisions, he argued, was that "the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States . . . and left to that House determination whether States have fulfilled their responsibility."[72] The dispute's "peculiarly political nature" means that it "is beyond [the] competence [of the Court] to grant" relief.[73] In short, in holding that the dispute must be resolved by another branch of government, he invoked the doctrine of political questions.

Frankfurter also noted powerful practical reasons for deferring to the House. First, "It is hostile to a democratic system to involve the judiciary in the politics of the people."[74] Unelected justices should not exalt their views over those of elected lawmakers. Second, entering "this political thicket"[75] would be imprudent for the Court, as it would embroil it in political conflicts, thereby undermining the apolitical appearance that is central to its authority. Suppose the Court declares the "existing

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70 328 U.S. 549.
71 *Id.* at 552.
72 *Id.* at 554.
73 *Id.* at 552.
74 *Id.* at 553-54.
75 *Id.* at 556.

electoral system invalid,"[76] for example. What then? The Illinois legislature might not act, leaving its Congressmembers elected at large, counter to congressional law and a "worse"[77] result than the malapportionment system that preceded it. With this example, Frankfurter plainly pointed to the enforceability problem. Courts, lacking as Hamilton noted, both the powers of the purse and of the sword are dependent upon the political branches to implement their decisions.[78] So long as courts do not aggressively intrude onto their turf, this will be no problem. But if they overstep their bounds, the other branches may resist implementation, revealing the vulnerability of courts for all to see and leaving them damaged and weakened. The answer, therefore, lies "ultimately, on the vigilance of the people in exercising their political rights."[79] Illinois may be obligated to apportion its congressional seats properly, but this is not the only constitutional duty that "cannot be judicially enforced." [80]

Oddly, though Frankfurter cited precedents, he neglected to point to a history that demonstrates that not only population but also interests, groups, and regions have affected representation.[81] The Senate, of course, is not based on population at all. The plain inference is that equal representation is not the only constitutionally defensible system, for as an eminent scholar observed, the Constitution seeks a "government responsive to the will of the full national constituency, without loss of responsiveness to lesser voices, reflecting smaller bodies of opinion, in areas that constitute their own legitimate concern."[82]

Yet it is not difficult to imagine situations where Congress' authority over representation would give way to other constitutional considerations. If a state law banned voters who were African American[83] or declared that only whites could be elected to Congress, no justice, even then, would rule this a political question beyond the Court's purview. Colegrove's position was that the dilution of his vote was no less a private wrong, and therefore no less invalid; the duty to defer to Congress is not absolute.

In the years preceding *Colegrove*, the political questions doctrine was far more potent than it is today. The conduct of foreign relations, the Court said, belongs to the political branches,[84] as does determining the validity of constitutional amendments[85] and enforcing the clause guaranteeing states a "republican form of government."[86] Frankfurter clearly considered his opinion in accord with this dominant school of thought.

But the future would not treat this view kindly. The Warren Court saw a willingness to embrace malapportionment as justiciable,[87] and this was followed by

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76 *Id.* at 553.
77 *Id.* at 553.
78 Alexander Hamilton, Federalist 78, in The Federalist 402 (Alexander Hamilton, James Madison, & John Jay 2001/1787).
79 *Supra* note 70, at 556.
80 *Id*.
81 Willard Hurst, The Growth of American Law: The Law Makers 39-45 (1950).
82 Herbert Wechsler, The Political Safeguards of Federalism, in Principles, Politics and Fundamental Law 49, 50 (1961).
83 The Supreme Court struck down Texas' white primary system in Smith v. Allwright, 321 U.S. 649 (1944), with Frankfurter voting with the majority.
84 Oetjen v. Century Leather Co., 246 U.S. 297, 302 (1918).
85 Coleman v. Miller, 307 U.S. 433, 450-55, 456-60, 460-70 (1939).
86 Marshall v. Dye, 231 U.S. 250, 256-57 (1913).
87 Baker v. Carr, 369 U.S. 186 (1962).

a willingness to review the House's refusal to seat a member,[88] as well as Congress' acceptance of the line-item veto.[89] All of these, in Frankfurter's day, would have routinely been disposed of as unsuitable for judicial determination. The new view was that worries about the political thicket, if taken seriously, would banish the Court from taking any unpopular decision. The key area was civil rights. Had the Court maintained its allergy to controversy, anxiety about enforcement, and deference to the elected branches, the desegregation cases would never have come to pass. Once they were decided, the Court seems to have taken political questions as less a doctrine than a confession of timidity. When finally *Colegrove* was overturned,[90] there was a period of organized political efforts to undo the decision, by, for example, calling a national constitutional convention, but these were more exercises at letting off steam than at truly changing things, and they expired quickly. Timidity lost its rationale.

What Frankfurter never confronted was the obvious riposte to his reliance on the vigilance of the people. The problem that Colegrove complained of was that malapportionment itself rendered the vigilance impotent. Those who were underrepresented could not vote to change the system precisely because they were underrepresented, and those who were overrepresented plainly would not agree to reduce their own power or in the case of Congressmembers, to substantially reduce their reelection prospects. Frankfurter's advice, naïve on one level, was insulting on another, for its message to Colegrove from his perspective was: accept your inferior position.

What can we say about Frankfurter's reliance on political questions? The Constitution states that certain governmental actions are not judicially reviewable: Congress' power to impeach and convict and to declare war, for example, and the Senate's power to consent to treaties and appointments. These matters are left to the political branches. The application of political questions to other areas is not mandated by the Constitution, but instead has developed as a consequence of judicial decisions. On what are they based? Frankfurter answers, "the wisdom of the Court defines its boundaries."[91] A judge preoccupied with legality and opposed to judicial power might be expected to favor a narrower political questions application more clearly rooted in the Constitution over a broader one, but this was not the position Frankfurter adopted.

V. Dennis v. United States

Dennis v. United States (1951)[92] arose out of a spectacular nine month trial of top Communist leaders that occurred at the peak of the Cold War. The case generated tremendous publicity, the *Washington Post* calling it, "the most important reconciliation of liberty and security in our time."[93] Eugene Dennis, the general

88 Powell v. McCormick, 395 U.S. 486 (1969).
89 INS v. Chada, 462 U.S. 919 (1983).
90 *Supra* note 87.
91 *Supra* note 23, at 430.
92 341 U.S. 494.
93 *Freedom and Security*, Wash. Post, June 6, 1951.

secretary of the Communist Party of the United States, and his ten top aides were accused of knowingly or willfully advocating the violent overthrow of the government as prohibited by the Alien Registration Act of 1940, popularly known as the Smith Act.[94] The Supreme Court upheld their convictions in an opinion written by Chief Justice Fred Vinson.[95]

Frankfurter joined the majority with an extraordinary concurring opinion. It was extraordinary, first, in its length. At thirty-nine pages plus five pages of appendix, it was seventeen pages longer than Vinson's majority opinion, and longer than Frankfurter's own majority opinions in *Gobitis* (thirteen pages), *Colegrove* (seven pages plus a fourteen page appendix), and *Rochin* (eight pages) combined.

Notwithstanding its length, the argument was familiar and not very complex: It is up to the political branches to weigh the competing claims of free speech and national security, and courts should respect their judgment. Along the way Frankfurter brushes off, like crumbs on a tablecloth, the principal claims of free speech proponents. To the absolutists – here, he was anticipating the views soon to be made famous by his well known adversary, Justice Black[96] – he devoted a sentence, "Absolute rules would inevitably lead to absolute exceptions, and such exceptions would eventually corrode the rules."[97] To the defenders of preferred position, he allotted two sentences, noting that it presumes that legislation appearing to abridge expression be presumed invalid and discarding these "attractive but imprecise words."[98] Most of his attacks were directed at the clear and present danger test, perhaps the best known item in his hero, Holmes,' legacy. It is not that Frankfurter objects to the term, he claimed, but only to its "oversimplified"[99] or "wholly out of context"[100] use or if it is taken to "mean an entertainable 'probability.'"[101] Of course, no one could favor an oversimplified use of any test nor its being taken out of context; by definition, they are wrong. But if the reference to probability alludes to the time element – is the danger so near that there is no opportunity for the marketplace of ideas to operate? – then it plainly counters the rationale Holmes himself offered in his most famous free speech opinion.[102] Never does Frankfurter trouble to apply Holmes' test to the set of facts before him to see if it fits.

Celebrated for his gift at statutory interpretation[103] – "No judge before him . . . arrived at the task of statutory construction so well prepared," concluded a distinguished federal judge[104] – Frankfurter devotes exactly none of his thirty-nine

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94 A decade earlier, the Party had called for Smith Act prosecutions of Trotskyists. Philip J. Jaffe, The Rise and Fall of American Communism 24-28 (1975).

95 Vinson rested his argument on Holmes' clear and present danger case, though he conceded that the danger was not imminent, but rather would appear when the Communists "feel the circumstances permit." *Supra* note 91, at 509.

96 Hugo Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865 (1960).

97 *Supra* note 92, at 518.

98 *Id.* at 527.

99 *Id.* at 542.

100 *Id.* at 543.

101 *Id.* at 527.

102 Abrams v. United States, 250 U.S. 616, 630 (1919).

103 Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527 (1947).

104 Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Felix Frankfurter the Judge, 30, 32 (Wallace Mendelson ed. 1964).

pages to this subject, though arguably it was central to the case. Did the statute's ban on knowingly or willfully advocating the violent overthrow of the government mean, "Don't urge someone with a gun to shoot members of Congress" or, instead, "Don't teach from a century old text, *The Communist Manifesto*, that is easily available and lawful to own, to read, and to discuss"? These were questions Frankfurter never entertained. There are references to the Communist menace, to be sure,[105] but none to the specific actions of Dennis and his comrades, and it was they, not the Communist conspiracy, who were on trial.

Frankfurter's opinion is notable not only for what it slights or omits, but also for what it includes. In his use of precedents, for example, Frankfurter does not wince at citing some of the Court's most disparaged decisions, like the *Chinese Exclusion Case,*[106] which upheld a racist treaty excluding Chinese laborers from emigrating to the United States, or *United States ex rel. Turner v. Williams*,[107] which upheld the administrative exclusion of an alien because he was an anarchist, or *Debs v. United States*,[108] which upheld a twenty year jail term for the leader of the Socialist Party for giving an anti-war speech, or *Frohwerk v. United States*,[109] which upheld the conviction of a journalist who wrote antiwar editorials.

Moreover, among the cases he discusses, Frankfurter attaches considerable significance[110] to a brief opinion of Holmes in *Fox v. Washington*,[111] a case decided four years before *Schenck v. United States*, which is almost universally regarded as the Supreme Court's first important free speech case.[112] Fox was prosecuted for violating a law that punished speech that encouraged or advocated disrespect for the law by ridiculing a ban on nudity. In a perfunctory opinion, Holmes upheld the law, and Frankfurter treats this minor and obscure case as the wellspring for the major Espionage Act cases that followed, even though those cases failed to cite *Fox*. Similarly, to illustrate that speech may be limited in the interest of the "maintenance of a free society,"[113] he chooses to cite a case about a man driving through a neighborhood in a sound truck.[114]

Frankfurter also quotes John Stuart Mill, who almost certainly would strongly differ from his views,[115] and joins the originalist/living Constitution debate, advocating for both sides. He speaks as an originalist discussing the historical antecedents of the Bill of Rights, state experiences in the 1790s, Jefferson,[116] and in the next paragraph, speaks of the Constitution as "not as barren words [but] as a living instrument."[117]

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105 *Supra* note 92, at 542, 547.
106 103 U.S. 581 (1889).
107 194 U.S. 279 (1904).
108 249 U.S. 211 (1919).
109 249 U.S. 204 (1919).
110 *Supra* note 92, at 533.
111 236 U.S. 273 (1915).
112 Vinson in his opinion wrote, "No important case involving free speech was decided by this Court prior to *Schenck v. United States*." *Supra* note 91, at 503.
113 *Id.* at 526.
114 Kovacs v. Cooper, 336 U.S. 77 (194)
115 *Supra* note 92, at 553.
116 *Id.,* at 522.
117 *Id.* at 523.

Yet at the same time, Frankfurter seeks to separate himself from the Smith Act, which liberals had widely condemned. A "judge does not remotely imply that he favors the implications that lie beneath the legal issues,"[118] he wrote, going on to quote four paragraphs from a George Kennan article in the *New York Times Magazine* downplaying Communism as an internal threat.[119] The inference is self celebratory: I disapprove of the law as policy, but will display my professionalism and integrity by doing my duty as judge and vote to uphold it.

The opinion, so bloated by repetition, platitudes, pomposities, and irrelevant citations, drones on and on, so that even an admirer acknowledges that it "becomes almost monotonous."[120] But in it, there is no appreciation of the overwhelming power of the state, armed with what Weber called a *"monopoly of the legitimate use of physical force* within a given territory."[121] Instead, Frankfurter seems to see it merely as Dennis' adversary, as if they are roughly equal combatants, certainly far removed from the puny leftist foes jailed around the time of the First World War.[122] Though Frankfurter may not approve of the Smith Act, he clearly has no use for the Communist party, taking judicial notice of its role as agent of a foreign hostile power.[123] Archives examined following the collapse of the Soviet Union have confirmed the widespread assumption that the party was "an instrument of Soviet espionage."[124] On the other hand, the *Dennis* prosecutors lacked direct evidence tying the defendants to espionage or conspiracy to attempt a violent revolution. Condemning them simply for being Communists, moreover, ignored the fact that their ideology was a source of a broad range of economic, social, and political ideas, whose expression is clearly protected by the Constitution. This fact Frankfurter simply failed to address, as if skipping over it would ensure that it went unnoticed.[125]

VI. Rochin v. California

Rochin v. California (1952)[126] proved to be controversial for a variety of reasons. Three Los Angeles sheriff's deputies, having "some information" that Antonio Rochin sold drugs, burst into his home without a warrant, spied capsules in plain view on a table next to his bed, and asked Rochin, "Whose stuff is this?" Rochin responded by grabbing the capsules and putting them in his mouth, and though the police struggled with him, even putting their fingers down his throat, he managed to swallow the pills. At this point, they took him to a hospital and had a doctor pump

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118 *Id.* at 553.
119 *Id.* at 541-42.
120 Arthur E. Sutherland, *All Sides of the Question*, *Felix Frankfurter and Personal Freedom*, in Mendelson ed., *supra* note 103, at 109, 128.
121 Max Weber, *Politics as a Vocation*, in From Max Weber 78 (H.H. Gerth & C. Wright Mills eds. 1958). Italics in original.
122 *Supra* note 92, at 542.
123 *Id.* at 546.
124 Harvey Klehr, Earl Haynes & Fridrikh Igorevich Firsov, The Secret World of American Communism 323 (1995).
125 Douglas, J. noticed it. *Supra* note 92, at 581-83.
126 342 U.S. 165.

his stomach, which produced vomiting and two of the sought after capsules, which contained morphine. On the basis of this evidence, he was charged and convicted of possessing morphine.

Was the evidence admissible? Frankfurter, speaking for the Court, conceded that "the administration of criminal justice is predominantly committed to the care of the states,"[127] but state discretion is not unlimited but is confined by the Due Process clause. This clause may imply an "absence of formal exactitude,"[128] a "want of fixity in meaning,"[129] "vague contours,"[130] or "indefinite and vague . . . standards of justice [that] are not authoritatively formulated anywhere as though they were specifics."[131] Yet it "does not leave us without adequate guides"[132] nor does it "leave judges at large"[133] or "make due process of law a matter of judicial caprice."[134]

How, then, to determine its meaning? The answer lies not in a "resort to a revival of natural law,"[135] but rather in judicial "self-discipline and self-criticism,"[136] which "requires an evaluation based on a disinterested inquiry pursued in the spirit of science . . . reconciling the needs both of continuity and change in a progressive society."[137] Examining the facts here, it is obvious that the police "conduct . . . shocks the conscience [and] is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation." [138] The methods "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples "[139] and "offend a sense of justice [and] the community's sense of fair play and decency." To hold otherwise would be "to discredit law and thereby to brutalize the temper of society."[140]

There can be no question that his early experience with Mooney, Sacco, and Vanzetti left Frankfurter with great sensitivity toward due process issues. In those cases, official misconduct seemed to him to have infected highly publicized prosecutions and poisoned the trials. *Rochin*, on the other hand, was not a high profile case with heavy political implications. It is hard to read his argument here without suspecting that what disturbs Frankfurter is the "yuck" factor. Pumping a stomach to retrieve evidence seems to him simply disgusting and barbaric. Thus, Frankfurter does not pause even to consider the role of an obvious precedent decided only three years earlier, in which he wrote the opinion. In *Wolf v. Colorado* (1949),[141] the Court considered a case where the state had unlawfully searched an abortionist's office and seized his records, which were then used to convict him.

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127 *Id.* at 168.
128 *Id.* at 169.
129 *Id*.
130 *Id.* at 170.
131 *Id.* at 172, 169.
132 *Id.* at 169.
133 *Id.* at 170.
134 *Id.* at 172.
135 *Id.* at 171.
136 *Id*.
137 *Id.* at 172.
138 *Id*.
139 *Id.* at 169.
140 *Id.* at 174.
141 338 U.S. 25.

The search and seizure were unlawful, the Court ruled, but the evidence could be used at trial because it did not compromise the defendant's right to a fair trial. The absence of the yuck factor perhaps explains why Frankfurter refused to see the relevance of a case that, in other respects, seems on point.

Still, we may examine the various propositions that constitute Frankfurter's argument. Does the police conduct offend even hardened sensibilities? Evidently not, for it did not offend the hardened sensibilities of the police or the doctor. Is it really like the rack and screw? Hardly, as they cause permanent, debilitating, disfiguring injury and have no therapeutic uses. Does it, then, offend a sense of fair play and decency? To what extent are police required to play fair? Crime, after all, is not a game where police are obliged to give suspected criminals equal chances to win on some level playing field. Police are free to lie to suspects, and when, say, a SWAT team attacks a kidnapper, it is not expected to give him fair warning or to provide him with weapons and manpower comparable to what they possess. Considerations of fair play simply do not enter into discussions of how to respond. And why focus on the notions of the English-speaking people, many of whom live far from the United States and are not governed by the Constitution? Why should the notions of people in Lagos or Liverpool control the Constitution?

Despite his insistence that judges "may not draw on our merely personal and private notions," Frankfurter offers no standard but flimsily disguised subjectivity. Because stomach pumping strikes us as so extreme, we may conclude that nothing more precise is necessary, for he is certainly not alone in finding it revolting and intolerable. And yet when we recall his famous preoccupation with legality, we may ask what is the basis of the shock the conscience rationale, for subjectivity is the very essence of conscience. In *Louisiana ex rel. Francis v. Resweber*, decided five years before *Rochin*, Frankfurter's conscience was not shocked when, after botching an execution by electrocution, Louisiana asked for a second chance. On the contrary, he wrote, such "an innocent misadventure" does not offend a principle of justice;[142] to rule differently, "I would be enforcing my private view."[143] On the other hand, in *Solesbee v. Balkcom*, decided two years before *Rochin*, Frankfurter dissented from a ruling that permitted the execution of a man who had become insane after sentencing. The reason, he explained, was that "the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history."[144] Does *Solesbee* offend these principles more than *Resweber*? What constitutional principles, indeed, is Frankfurter applying? His answer: "The more fundamental the beliefs are, the less likely they are to be explicitly stated."[145]

How, then, to shock the conscience? If conscience, in the old formulation, is simply God speaking to us, it is obvious that He does not say the same thing to everyone, and indeed, to some, He apparently says nothing at all. Hence, when Frankfurter in *Rochin* points to a "disinterested inquiry pursued in the spirit of science," the reader is bewildered, for a disinterested inquiry seems entirely unrelated to the subjective conscience. Indeed, if the spirit of science is the guide,

142 329 U.S. 459, 470 (1947).
143 *Id.* at 471.
144 339 U.S. 9, 16.
145 *Id.*

the evidence obtained from the stomach pump should have been admissible, for there is no question that it was reliable, and science is concerned with reliability, not morality; refusing to admit the evidence constituted a barrier to truth-seeking, though it might be fully justified on other grounds, like the ban against self-incrimination and the principle of privileged communications.[146] Again, what we find are principles of amoeboid contours applied in unpredictable ways floating aimlessly in a sea of advice to shun merely personal preferences and other extralegal considerations.

VII. Closing Thoughts

Frankfurter came to the Court known by friend and foe as a liberal activist, a man committed to causes, a person of deeply held political and social beliefs and the drive to work relentlessly to apply them to the world. This is who he was as a teen-aged immigrant on the streets of New York, as a young Harvard law professor speaking out on the great political topics of the day, and as a disciple of Brandeis and an advisor to Roosevelt. Perhaps no other public intellectual in the first half of the twentieth century matched his record in this regard. Yet the great irony of his career was that his profound commitment to judicial self restraint meant that the confident predictions that accompanied his appointment would be negated by a philosophy that confined the role of the judge and elevated purely legal concerns to the exclusion of other issues. Again and again, in opinion after opinion, he declared his policy and ethical views irrelevant. Only the law mattered.

The chief rationale for self restraint was democracy. If we truly value democracy as much as we routinely claim, he cautioned, we the judges should declare acts of democratically elected officials invalid only when we cannot help it, when we literally have no other choice. There are other arguments – that an activist court will find itself embroiled in political controversies that will undermine the nonpolitical appearance on which its authority is based; that activism will "mutilate the educative process of responsibility"[147] and encourage passivity among the public; and that, in the end, activism cannot do much good because courts are simply not that powerful[148] – but democracy is central. No wonder Frankfurter returns to it over and over and over again.

But whether because this philosophy was sanctioned by his heroes (Holmes, Hand, and Brandeis) or because he lived through decades of activist courts invalidating Progressive reforms, there is no evidence that he ever revisited the topic, except to repeat the familiar mantra. Like an ecclesiastical dogma, its mere enunciation decided the question.

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146 The leading treatise at the time maintained that the only reason to exclude evidence was unreliability. John H. Wigmore, A Treatise on the Anglo-American System of Evidence at Trials at Common Law, Sec. 822 (3d ed. 1940) (1904). Similarly, another scholar predicted, "The manifest destiny of evidence law is a progressive lowering of the barriers to truth." Charles McCormick, Handbook of the Law of Evidence 165-66 (1954).

147 Felix Frankfurter, *The Supreme Court as Legislator*, 46 New Republic 158 (1926).

148 Learned Hand, The Spirit of Liberty: Papers & Addresses of Learned Hand, 189 (Irving Dilliard ed., 3d ed. 1960).

Yet there is another side to the argument. In the first place, judicial activism may be indispensable when the democratic process produces an anti-democratic result. When the authorities ignored Gobitas' religious beliefs, it was absurd to advise a young girl belonging to an unpopular sect to ask a school board or legislature to abolish its mandatory flag salute policy – months before America's entry in World War II. In the legislative malapportionment cases, it was fatuous to urge the voters to correct the defect, when the point was that underrepresented voters lacked the power to do so.[149] Similarly, to the extent that democracy presupposes freedom of speech, the Smith Act was not democratic because it punished political speech. If the democratic process produces an anti-democratic result, sometimes only an institution outside the democratic process can address it. In these circumstances, is self restraint, which preserves and validates the status quo, the proper reaction? There is no sign that Frankfurter ever considered the question. For him, self restraint applied to all laws equally and without distinctions.

Nor, despite his vast political experience, did he stoop to examine how laws are actually made. Frankfurter was very familiar with a series of cases, in which the Court had voided high profile Progressive laws that possessed widespread public support. In such situations, perhaps it is possible to speak of the public's strong preferences being vetoed by an unelected judicial elite. But most laws are smaller affairs, known only to the factions they affect; majorities in legislatures may have voted for them, but in truth only minorities truly cared. To claim that these laws reflect popular majorities that must be respected is not realistic.

Further, the workings of the legislative process suggest a kind of rough division of labor. Lawmakers, preoccupied with getting bills through multiple decision points, naturally focus on the substance of the bill and the political maneuvering necessary to get it adopted; constitutionality is ordinarily a distant side issue. Thus, if courts fail to take constitutionality seriously, probably, no one else will, but the subject is obviously far too important to ignore. In any case, the constitutional system, with its famous checks and balances, is very far from a pure democracy, and so the counter-majoritarian nature of judicial review in the larger context does not represent a great departure from standard practice.

However, even leaving aside arguments against self restraint as a philosophy, Frankfurter's execution of this philosophy was often fatally flawed. Far from setting aside extralegal concerns, Frankfurter frequently allowed them to trump competing legal claims. In *Gobitis*, it was national unity; in *Colegrove,* fear of entering the political thicket; in *Rochin*, disgust at stomach pumping; in *Dennis* anxiety about espionage and an attempted revolution in the distant, unforeseeable future.

Typically, Frankfurter reached his decision after more or less explicitly balancing the competing claims. In ordinary life, we engage in balancing on a regular basis. Shall I eat this piece of pie? I balance the pleasure it will give me against the calories it will give me. Shall I buy this shirt? It looks good, but it's very pricey. At the extremes, balancing is easy. I won't buy a $500 shirt, no matter how well I look in it nor will I buy a $10 shirt that shows off my belly. But otherwise, I sense an arbitrariness. Shall I buy a $50 shirt that makes me look pretty good? It may depend on how I feel today, and may change tomorrow, and in either case, my reactions may be quite different from yours.

[149] Frankfurter conceded this in a white primary case, but was unwilling to apply the principle elsewhere. *Supra* note 83.

Balancing is necessary, Frankfurter writes, because, as he put it in *Dennis*, the "conflict of interests cannot be resolved by a dogmatic preference for one or the other, nor by a sonorous formula which is, in fact, only a euphemistic disguise for an unresolved conflict."[150] In *Gobitis*, too, he speaks of weighing "the conflicting claims of liberty and authority,"[151] and in *Colegrove*, the issue is balancing the benefits from ensuring "standards of fairness"[152] against the risks attaching to judicial activism. But who is to do the balancing? His most extensive treatment of balancing is in *Dennis*. Here, as a spokesman for judicial self restraint, he says, "Full responsibility for the choice cannot be given to the courts;"[153] "How best to reconcile competing interests is the business of legislatures and the balance they strike is not to be displaced by ours, but to be respected unless outside the pale of fair judgment;"[154] "It is not for us to decide how we would adjust the clash of interests which this case presents"[155] But then he announces, "The demands of free speech in a democratic society, as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process"[156] So, who is to do the balancing: the lawmakers or the courts?

More fundamental is the question: how are the competing claims to be balanced? Frankfurter warns that they should not be balanced dogmatically.[157] Of course, as the term suggests a mechanical absence of thought, nearly everyone would agree with that advice. On the other hand, his denunciations of rigidity inescapably call to mind Shaw's famous declension: "I am firm, you are stubborn and he is a pig-headed fool," for one person's dogmatism will be another's stand on principle. If Frankfurter refuses to stand on principle – not on absolutism or preferred position or clear and present danger – what does he stand on? How does he avoid "the risk of an *ad hoc* judgment influenced by the impregnating atmosphere of the times"?[158] The innumerable references to carefully weighing the competing interests offer no answer. Indeed, the reliance on balancing may simply be a device to avoid answering. "These are my principles," said Groucho Marx, "and if you don't like them . . . well, I have others."

For balancing is a metaphor with particular power in the legal context, immediately evoking as it does the image of a blindfolded Lady Justice holding a pair of scales. But the image is insidiously misleading. In the real world, we would place weights on each scale, and the objective force of gravity would determine which was heavier by lowering that scale. Anyone, smart/stupid, learned/ignorant, virtuous/evil, could accurately report which side that was, and there would be no opportunity for disagreement. But in the law, there is no objective way to determine which claim is "heavier," and so apart from the extreme cases, disagreements will be inescapable. Frankfurter's own prose reinforces this point. On the one hand, he

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150 *Supra* note 92, at 519.
151 *Supra* note 28, at 591.
152 *Supra* note 70, at 553.
153 *Id.* at 525.
154 *Id.* at 539-40.
155 *Id.* at 550.
156 *Id.* at 524-25.
157 *Id.* at 519.
158 *Id.* at 528.

concedes in *Dennis* that "both [claims] are supported by weighty title-deeds"[159] that "are not subject to quantitative ascertainment,"[160] and he repeatedly rejects the strawman argument that "freedom of expression requires subordination of all conflicting values."[161] But on the other, he declares, "On any scale of values which we have hitherto recognized, speech of this sort ranks low."[162] Weighty or low value? Even Frankfurter has problems with calibration. Rejecting available tests as too rigid, he is left with subjectivity tied on a long leash. Which recalls the old maxim, You can't beat something with nothing.

It is worth noting, therefore, which of the competing claims Frankfurter tended to find weightier. Prior to joining the Court, of course, his preoccupation was protecting the underdog, and this is how he made his formidable reputation. Tom Mooney. Sacco and Vanzetti. African Americans. But once named to the Court, he most often favored the state. In *Gobitis,* it was the state's claim to national unity that prevailed, in *Colegrove*, its assertion that malapportionment was none of the Court's business, and in *Dennis*, its fear of revolution. Perhaps, only the noxious character of stomach pumping saved *Rochin* from a similar result. Nor were *Gobitis*, *Colegrove*, and *Dennis* atypical. In *Harisiades v. Shaughnessy*,[163] for example, he wrote an opinion upholding the deportation of resident aliens, on the ground of former membership in the Communist party. It was irrelevant, he said, whether the government's policies were "crude and cruel" or "reflected xenophobia in general or anti-Semitism or anti-Catholicism."[164] In *Korematsu v. United States,* he wrote a concurring opinion justifying the government's World War II internment of West Coast residents of Japanese descent as not "transcend[ing] the means appropriate for conducting war."[165] Always, he expressed sympathy for the person he is about to condemn; always, he displayed the moral agony he bravely confronts. As theatre, it may have at first been winning, but repetitions made the recitations seem mechanical gestures.

Thus the irony, which did not crown Frankfurter's achievements but instead contributed so powerfully to undermining his waning once towering reputation and replacing it with neglect[166] In sacrificing his policy and ethical goals in the service of the law, he often failed to serve the law. His sacrifices in these cases were for nothing.

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159 *Id.* at 519.
160 *Id.* at 525.
161 *Id.* at 529; *see also* 532.
162 *Id.* at 545.
163 342 U.S. 582 (1952).
164 *Id.* at 597.
165 323 U.S. 214, 225 (1944).
166 Few today rank Frankfurter as a great justice. Cass R. Sunstein, *Home-Run Hitters of the Supreme Court*, Bloomberg View Sept. 23, 2014; Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 Am. Bar Ass'n. J. 1183 (1972). Most do not. John P. Frank, The Marble Palace: The Supreme Court in American Life 43-44 (1961); George E. Currie, *A Judicial All-Star Nine*, 1964 Wis. L. Rev. 3; Bernard Schwartz, *The Judicial Ten: America's Greatest Judges*, 1979 S. Ill. L. Rev. 405 (1979); James E. Hambleton, *The All-Time, All-Star All-Era Supreme Court*, 58 Am. Bar Ass'n J. 463 (1983). A quantitative study omitted his name from top ten lists of writers of significant majority opinions, signers of significant majority opinions, and writers of dissents that overturned majority opinions; Frankfurter did, however, rank sixth as a subject for articles and books. Lee Epstein et al., *Rating the Justices: Lessons from Another Court*, paper presented at the annual meeting of the Midwest Pol. Sci. Ass'n, April, 1992, 18, 19, 22, 23.