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Mediating Pluralism: Felix Frankfurter's Commitment to Majoritarian Democracy

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MEDIATING PLURALISM: FELIX FRANKFURTER'S COMMITMENT TO MAJORITARIAN DEMOCRACY

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> *"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 . . . [A]s judges, we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores."*[1]

ABSTRACT

This Article explores parallels between Frankfurter's faith in democracy, that is, his trust in the legislative and executive branches as reflected in his jurisprudence of judicial restraint, and Frankfurter's vision for Jewish (and other) immigrants' integration into the American polity, namely his conviction that immigrants should shed vestiges of their birth cultures and assimilate into their adopted culture. The Article argues that Frankfurter's commitment to judicial restraint was his means of mediating the pluralist dilemma, that is, the need to accommodate within the law diverse cultures and values; just as Felix

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[1] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646-47 (1943) (Frankfurter, J., dissenting).

Frankfurter, the first-generation Jewish American, wanted to sidestep ethnic particularism, Justice Frankfurter sought to shield the Court from having to balance the competing values, identities, and viewpoints that characterized modern American society. Evading the difficult task of choosing between competing interests and values, Frankfurter's decisions often became an apology for the status quo, that is, the social position of the insider and the political position of the majority. As the Article further suggests, in the 1950s and 1960s, Frankfurter's students and clerks reinvigorated his vision into an ideal of procedural democracy. Frankfurter can thus be described as linking early-twentieth century Progressivism with the postwar ideal of procedural democracy; in different reiterations this model of democracy has come to dominate American legal theory in the second part of the twentieth century. At the same time, Frankfurter's vision may also be described as giving rise to a particular strand of Jewish legal thought. Historians often emphasize Jewish-American jurists' celebration of pluralism and their role in the midcentury fight for civil rights and liberties. In these narratives, Frankfurter's judicial record is deemed an anomaly. But, as this Article concludes, advocates of procedural democracy were often first- and second-generation Jewish Americans who were both committed to the protection of civil rights and liberties and concerned about calling attention to ethnic differences. I hope this Article encourages further explorations of the relationship among the ideal of procedural democracy, Progressivism, and Jewish-American history.

I. INTRODUCTION

On January 9, 1942, the West Virginia Board of Education adopted a resolution requiring all public school students and teachers to salute the flag while reciting the Pledge of Allegiance.[2] Marie and Gathie Barnette, eight- and nine-year-old Jehovah's Witnesses, were instructed by their parents not to participate and, as a result, were expelled from school.[3] The Barnettes sued for an "injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses," who have deemed the salute and Pledge the equivalent of forbidden idol worship.[4] Three years earlier, Justice Felix Frankfurter wrote the U.S. Supreme Court's opinion in *Minersville School District v. Gobitis*,[5] which upheld a similar expulsion of students, who were also Jehovah's Witnesses, for refusing to salute the American flag;[6] seven justices joined him.[7] In *Barnette*,[8] six justices voted to overrule *Gobitis*; Frankfurter wrote the only dissent.[9] With an extraordinary and uncharacteristic nod to his Jewish heritage, followed by a subtle reference to Paul's letter to the Galatians,[10] Frankfurter defended the West Virginia Board of Education's resolution.[11] As he put it, justices

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[2] *Id.* at 626 (majority opinion).

[3] *West Virginia State Board of Education v. Barnette (1943)*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/supreme-court-case-library/west-virginia-board-of-education-v-barnette (last visited Mar. 4, 2024); *A Stand of Courage and Conscience Established Supreme Court Precedent 75 Years Ago*, JEHOVAH'S WITNESSES (June 14, 2018), https://www.jw.org/en/news/region/united-states/barnett-anniversary-20180614/.

[4] *Barnette*, 319 U.S. at 629.

[5] 310 U.S. 586 (1940).

[6] *Id.*

[7] *Id.*

[8] *Barnette*, 319 U.S. at 624.

[9] *Id.* at 646 (Frankfurter, J., dissenting).

[10] *Galatians* 3:28 ("there is neither Jew nor Greek, there is neither slave nor free, there is no male and female, for you are all one in Christ Jesus"); *see also* Paul Finkelman, *Felix Frankfurter: The Jewish Justice Who Lost Track of Justice and His Heritage*, ASS'N FOR JEWISH STUD. (Fall 2022), https://associationforjewishstudies.org/justice-issue/in-justice-in-history-the-jewish-justice-who-lost-track-of-justice-and-his-heritage#endnote-1 (arguing that Frankfurter "ironically paraphras[ed] Paul's letter to the Galatians"). According to Finkelman, "given Frankfurter's incredible education (and the fact that he studied classics at City College of New York), it is not unreasonable to assume that this was deliberate." *Id.*

[11] *Barnette*, 319 U.S. at 647 (Frankfurter, J., dissenting).

had to exercise judicial restraint irrespective of their personal convictions.[12] Further explaining his decision, Frankfurter wrote: "the 'liberty' secured by the Due Process Clause" did not grant the Court "authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen."[13]

Many legal scholars and historians have found Frankfurter's position in *Gobitis* and *Barnette* perplexing, a puzzlement confounded by Frankfurter's support for the incarceration of Japanese Americans in *Korematsu v. United States*[14] and his defense of Sunday blue laws, which "proscribe[d] all labor, business and other commercial activities on Sunday," despite the economic harm such laws imposed, for example, on Orthodox Jews forced to close their businesses on both Saturday and Sunday.[15] As many have since asked: how could a first-generation Jewish American, whose uncle was apprehended in Vienna because he was Jewish, whose people the Nazis were murdering in Europe, who himself had endured antisemitism, not defend minority groups, especially religious minorities, against persecution?[16]

More broadly, opinions about Frankfurter's legacy vary. In an article about Jewish judges, Jeffrey Morris argued that Frankfurter's "philosophy of judicial restraint" was "rooted in a deep faith in democracy . . . as well as in the belief that the Supreme Court had transgressed its proper function in the American system during the early decades of the twentieth century."[17] Brad Snyder has labeled Frankfurter "a democrat," stressing the Justice's steadfast trust in democratic institutions, namely the legislative and executive branches, and his almost stubborn

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[12] *Id.*

[13] *Id.*

[14] 323 U.S. 214, 225 (1944) (Frankfurter, J., concurring).

[15] McGowan v. Maryland, 366 U.S. 420, 422 (1961); *see also* Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617, 630-32 (1961).

[16] Finkelman, *supra* note 10 (commenting that "although Frankfurter's uncle was incarcerated in Vienna for being Jewish, Frankfurter justified the persecution of members of a minority faith in the United States on the grounds that forcing children to violate their religion . . . would instill patriotism in them").

[17] Jeffrey B. Morris, *The American Jewish Judge: An Appraisal on the Occasion of the Bicentennial*, 38 JEWISH SOC. STUD. 195, 209 (1976).

adherence to judicial restraint.[18] Morton Horwitz, in turn, considered Frankfurter a conservative,[19] an antithesis to other early- and midcentury Jewish jurists who, according to Horwitz, combined "a pre-modern, prophetic, and essentialist moralistic passion for social justice with critical modernist sense of socially constructed character of social categories and institutions."[20] Robert Burt pointedly noted that, having assimilated, Frankfurter "derived a mandate zealously to protect the values and status of insiders, such as he had become,"[21] and Paul Finkelman charged that Frankfurter lost track of "justice and his heritage."[22]

Seeking to make sense of such conflicting evaluations, this Article explores parallels between Frankfurter's "faith in democracy,"[23] that is, his trust in the legislative and executive branches as reflected in his jurisprudence of judicial restraint, and Frankfurter's vision for Jewish (and other) immigrants' integration into the American polity, namely his conviction that immigrants should shed vestiges of their birth cultures and assimilate into their adopted culture. Frankfurter believed that assimilation, that is, the rejection of ethnic particularities and the embrace of the dominant American culture, was the first step toward achieving solidarity and the improvement of social and economic conditions.[24] Frankfurter's vision of democracy was similar—

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[18] BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT (2022).

[19] MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE 56 (1998) (noting that Frankfurter led "the conservative wing of the Supreme Court"); *see also* DAVID G. DALIN, JEWISH JUSTICES OF THE SUPREME COURT: FROM BRANDEIS TO KAGAN 159 (2017) (describing Frankfurter as the Court's "foremost judicial conservative").

[20] Morton J. Horwitz, *Jews and Legal Realism*, *in* JEWS AND THE LAW 309, 314-16 (Ari Mermelstein et al. eds., 2014).

[21] ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND 46 (1988).

[22] *See generally* Finkelman, *supra* note 10.

[23] Philip Kurland, *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making* (book review), 2 CONSTITUTIONAL COMMENTARY 191, 192 (1985).

[24] The word "assimilation" has negative connotations and troubling history, given that it was often forced on cultural, religious, and ethnic minorities. *See, e.g.*, Russell A. Kazal, *Revisiting Assimilation: The Rise, Fall, and Reappraisal of a Concept in American Ethnic History*, 100 AM. HIST. REV. 437, 440 (1995). It is thus important to note that the belief that historically marginalized groups should strive to assimilate into and embrace the dominant culture was prevalent at least through the first half of

just as he prioritized majoritarian culture, his jurisprudence of judicial restraint privileged majoritarian norms. Throughout his career as a lawyer, scholar, and justice, Frankfurter stalwartly held on to this majoritarian vision of democracy, even in midcentury when his progressive brethren embraced a conception of democracy that focused on the U.S. Supreme Court's role in protecting members of different cultural, religious, and ethnic groups against discrimination.[25]

Legal scholars and historians have examined the relationship between Frankfurter's social vision and his jurisprudence. Richard Danzig argued that Frankfurter's jurisprudence was premised on a concept of rationality, and that "notions of rationality and assimilation were basic to his conception of democracy."[26] Robert Burt evaluated how Frankfurter's experiences of antisemitism and immigration influenced his decisions.[27] And Nomi Stolzenberg astutely demonstrated how "Frankfurter['s] . . . understanding of the problem of judicial review was informed in good measure by [his] shared view of the acceptability, indeed the positive value, of using the state's authority over education as a tool of cultural assimilation."[28]

Building upon these analyses, this Article situates Frankfurter within the early twentieth-century debates about the relationship between the individual and the group in American society. Amidst a scholarly revolt against moral and legal absolutism and growing skepticism toward universal social norms and values, Progressive jurists (and later legal realists and postwar jurists) struggled with the

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the twentieth century; indeed, support for and advocacy of assimilation often came from members of underprivileged communities. *See, e.g.*, Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era before* Brown, 115 YALE L.J. 256, 280 (2005) (discussing the concept of race uplift that Black lawyers adopted at the turn of the twentieth century. According to Mack, "race uplift affirmed both the rights and duties of citizenship, and based its equality claims on the argument that African-Americans were exhibiting the type of civic responsibility required of those who deserved equal civil rights"); David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 L. & INEQ. 33, 55 (1984) (describing Ruth Bader Ginsburg's strategy for "assimilating" women into "a man's world").

[25] *See* discussion *infra* Section III.B.

[26] Richard Danzig, *Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking*, 36 STAN. L. REV. 675, 698 (1984).

[27] BURT, *supra* note 21.

[28] Nomi M. Stolzenberg, *Un-Covering the Tradition of Jewish "Dissimilation": Frankfurter, Bickel, and Cover Judicial Review*, 3 S. CAL. INTERDISC. L.J. 809, 814 (1993).

following modernist dilemma: how should law respond to or accommodate the plurality of interests, cultures, values, and opinions that characterize modern American society? I have previously explored how, in search of a way out of this pluralist dilemma, some jurists continued to hold on to certain absolute norms, loosely described as promoting social justice; others stressed the need to develop a conception of group rights to substantiate the liberal commitment to individual rights; still others overcame the uncertainties produced by pluralism and skepticism by putting their trust in empiricism as an objective way to learn about society and promote social change.[29] This Article suggests that Frankfurter's solution was to reject cultural pluralism and embrace majoritarian culture and norms as universal. And while over the course of the twentieth century, jurists have responded to changing social and cultural terrains by finding new ways out of the pluralist dilemma, Frankfurter, for the most part, held on to majoritarianism and its concomitant jurisprudence of judicial restraint.[30]

Why such a strong commitment? As this Article suggests, for Frankfurter, mediating the modernist dilemma was an intellectual as well as a personal endeavor.[31] Embracing both majoritarian culture and judicial restraint allowed Frankfurter to evade pluralism. Yearning perhaps to break away from the legacy (and memories) of antisemitism, Frankfurter evaded the possibility of cultural pluralism by privileging one set of cultural values over all others;[32] in turn, his judicial

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[29] Dalia Tsuk Mitchell, *Transformations: Pluralism, Individualism, and Democracy*, *in* TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ 185, 186-89 (Daniel W. Hamilton & Alfred L. Brophy eds., 2008).

[30] *See* discussion *infra* Section III.B.

[31] *See* Jason Schulman, The Limits of Liberalism: A Constitutional Reconsideration of American Jewish Politics 6 (2014) (Ph.D. dissertation) (on file with the author) (noting that "[f]or American Jews, as part of their historical experience in modernity, the relationship between the individual and the group in society has been a constant negotiation").

[32] In her examination of Frankfurter's decisions in the flag-salute cases, Nomi Stolzenberg carefully distinguished between "rejecting parochial identities [that] results in the transcendence of all particular cultural allegiances—the cosmopolitan ideal" and assimilation that "merely leads to the replacement of subgroup affiliations with allegiance to the culture of a particular nation-state." Stolzenberg, *supra* note 28, at 814-15. In this Article, I suggest that Frankfurter was an assimilationist in the latter sense, wishing immigrants to embrace the dominant American culture. Russell Kazal used the term "Anglo-conformity," as distinguished from "melting pot," to describe this allegiance to the dominant culture. Kazal, *supra* note 24, at 442 (noting

approach removed the judiciary, ironically the branch empowered to interpret the Constitution, from participating in deliberations over values.[33] Put differently, just as Felix Frankfurter, the first-generation Jewish American, wanted to sidestep ethnic particularism, Justice Frankfurter sought to shield the Court from having to balance competing values, viewpoints, and identities. Evading the difficult task of choosing between competing interests and values, Frankfurter's jurisprudence of judicial restraint rapidly became an apology for the status quo, that is, the social position of the insider and the political position of the majority.

Part II of this Article, *Identity and Jurisprudence at A Century's Turn*, recounts Frankfurter's integration into American society. As I suggest, many first- and second-generation Jewish Americans shared Frankfurter's assimilationist hopes (albeit to different degrees of intensity). Informed by their experiences of persecution and poverty in Europe and thus concerned about appearing to dwell on ethnic particularities, Jewish Americans gravitated toward Progressive goals, namely social and economic equality, as universal solutions to the different American experiences.[34] While a student at Harvard Law School, Frankfurter's embrace of such Progressive goals morphed into a faith in majoritarian democracy.[35] Again, he was not alone. Many Progressive jurists, who were troubled by the U.S. Supreme Court's usage of the Due Process Clause of the Fourteenth Amendment to strike down social and economic legislation (i.e., maximum hours and minimum wage laws), described electoral processes as the foundation of democratic legitimacy and called on judges and justices to exercise judicial restraint when reviewing legislation so as not to overturn

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that "[i]deas of Anglo-conformity 'demanded the complete renunciation of the immigrant's ancestral culture in favor of the behavior and values of the Anglo-Saxon core group,' [while] [m]elting pot concepts foresaw 'a biological merger of the Anglo-Saxon peoples with other immigrant groups and a blending of their respective cultures into a new indigenous American type'").

[33] *But see* Susan D. Carle, *The Failed Idea of Judicial Restraint: A Brief Intellectual History*, L & SOC. INQUIRY 1, 2 (2023) (noting that "one can be in favor of judicial restraint and judicial supremacy and vice versa; there is no necessary relationship between the two ideas although proponents of judicial restraint sometimes are also critics of judicial supremacy").

[34] IRVING HOWE & KENNETH LIBO, HOW WE LIVED: A DOCUMENTARY HISTORY OF IMMIGRANT JEWS IN AMERICA 1880-1940, at 161, 174 (1979).

[35] *See* discussion *infra* Section II.B.

decisions of democratically elected officials.[36] As Brad Snyder writes, this became Frankfurter's lifelong vision.[37]

The election of Franklin D. Roosevelt and the passage of his New Deal policies helped bring many progressive reforms to fruition. In the 1940s, with totalitarianism in Europe and a greater realization of the impact of racism, antisemitism, and nativism in the United States, jurists' attention began shifting from universal social and economic citizenship to the rights of historically underprivileged groups, most significantly religious minorities and Black Americans.[38] Gradually, the liberal wing of the U.S. Supreme Court came to view the protection of minority interests from majoritarian power as the cornerstone of democratic legitimacy.[39] Concerned about legislators promoting anti-civil rights legislation, jurists turned to the U.S. Supreme Court to strike down such laws as unconstitutional.[40] Collectively, these jurists described the Court as primarily responsible for defending members of diverse groups against the tyranny of the majority[41] and turned the protection of minority groups into the foundation of the American democratic ideal.[42] It was the Court's role to balance majoritarian power to protect the plurality of particular cultures, values, and opinions that characterized modern American society.[43]

As Part III of this Article, *The Midcentury Civil Rights Challenge*, explores, it was in this intellectual milieu that Frankfurter's

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[36] *See, e.g.*, Carle, *supra* note 33, at 9 (describing Judge Learned Hand's argument "that legislatures, not courts, were best able to 'experiment' with new Progressive-era ideas; courts were biased, supported the wealthy over the poor, and relied on abstract theory rather than scientific fact"). *See also infra* discussion in Section II.B.

[37] SNYDER, *supra* note 18, at 8.

[38] *See, e.g.*, ALAN BRINKLEY, LIBERALISM AND ITS DISCONTENTS 97-102 (1998).

[39] *See Barnette*, 319 U.S. at 644 (Black & Douglas, JJ., concurring) ("Decision as to the constitutionality of particular laws which strike at the substance of religious tenets and practices must be made by this Court. The duty is a solemn one . . . laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men. Neither our domestic tranquility in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation.").

[40] *See, e.g.*, HORWITZ, *supra* note 19, at 79.

[41] *Id.*

[42] *Id.* ("The Warren Court recognized not only that representation of minorities was an integral part of democracy but also that truly effective representation required that all people be guaranteed dignity and worth.").

[43] *Id.*

steadfast commitment to judicial restraint and his refusal to strike down legislation or executive actions even when they disadvantaged different religious and cultural groups appeared to diverge from his earlier commitment to Progressivism. Focusing on the flag-salute cases, I illustrate how Frankfurter held onto the (classical liberal) belief that a strict separation existed between the private and public realms and that pluralism belonged in the former, not the latter. As I suggest, a jurisprudence of judicial restraint allowed Frankfurter not only to evade explicitly addressing the plurality of interests that characterized modern American society but also to repeatedly demonstrate his commitment to majoritarian norms and culture. Rather than viewing the flag-salute and similar cases as addressing a conflict between particular values and majoritarian norms, Frankfurter carefully reframed these cases as involving the appropriate scope of judicial review, thus cautiously sidestepping a conflict that was, especially in view of Nazism in Europe, too personal.[44]

In the 1950s and 1960s, Frankfurter's students and clerks reinvigorated his conception of democracy.[45] Frankfurter's majoritarianism can thus be described as linking early twentieth-century Progressivism with the postwar ideal of procedural democracy;[46] in different

[44] According to Joseph Lash, such sidestepping "uncoupled [Frankfurter] from the locomotive of history." Joseph P. Lash, *A Brahmin of the Law: A Biographical Essay*, *in* FROM THE DIARIES OF FELIX FRANKFURTER 72-73 (1975).

[45] *See, e.g.*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS (1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1978). *See also* GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 42 (noting that "the progressive strand of legal realism remained active in legal studies, but it became largely the theory of the legislative process as legal process scholars of the 1950s and 1960s developed new conceptual theories based on the values of principle and consistency to explain how judicial law making could be consistent in a constitutional democracy that allocated law making authority to the legislature").

[46] On the concept of procedural democracy, see Morton J. Horwitz, *The Constitution of Change: Legal Fundamentality without Fundamentalism*, 107 HARV. L. REV. 30, 62-64 (1993) (suggesting that proponents of procedural democracy view "political equality . . . at most, [as] the only substantive commitment to democratic theory required"; as such, procedural democracy has "nothing to say about the protection of minorities. . . . and judicial review [is] characterized negatively as 'counter-majoritarian'"). On the alternative—substantive democracy—see id. at 63 (explaining that for proponents of a substantive conception of democracy, "democracy [is] not . . . some mechanical and undigestible version of 'the majority must always win,' but . . . a multilayered system of public values").

reiterations, the latter has dominated American legal theory in the second half of the twentieth century.[47] At the same time, Frankfurter's vision may also be described as giving rise to a particular strand of Jewish-American legal thought. Historians have emphasized Jewish-American jurists' celebration of pluralism and their role in the midcentury fight for civil rights and liberties. In these narratives, Frankfurter's judicial record on civil liberties is deemed an anomaly. But, as this Article concludes, Frankfurter was not alone in his rejection of particularism and his reluctance to join in the growing emphasis on ethnic and cultural diversity that characterized American discourse in the second half of the twentieth century.[48] While committed to the protection of civil rights and liberties, Jewish-American jurists were often concerned about calling attention to ethnic differences. Many advocates of a procedural conception of democracy in the 1950s and 1960s were first- and second-generation Jewish Americans. I hope this Article encourages future explorations of the relationship among Progressivism, Jewish-American history, and the ideal of procedural democracy.

II. IDENTITY AND JURISPRUDENCE AT A CENTURY'S TURN

To uncover the origins of Frankfurter's commitment to majoritarianism, this Part II recounts Frankfurter's formative experiences as a first-generation Jewish American. I argue that Frankfurter's path followed that of other Jewish immigrants whose families settled in New York City. What distinguished Frankfurter, and to his mind ensured his success, was his unwavering desire to shed relics of his religion and birth culture and embrace American culture. Once a lawyer, this commitment became intertwined with his belief that in a diverse democratic society, the elected legislative and executive branches were responsible for alleviating social and economic conditions and that the judiciary should exercise caution when reviewing their actions. A

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[47] *See* Brad Snyder, *The Former Clerks Who Nearly Killed Judicial Restraint*, 89 WIS. L. REV. 2129, 2131 (2014) (noting that "[d]emocratic constitutional theory, advocated by Larry Kramer, Robert Post, Pam Karlan, and others, began to look a lot like legal process theory of the 1950s and 1960s").

[48] *See* Murray Friedman, *Opening the Discussion of American Jewish Political Conservatism*, 87 AM. JEWISH HIST. 101, 101 (1999) (noting that while it is "a truism that American Jews are prototypical liberals," it is still true that "a significant, conservative, Jewish, political tradition indeed exists").

wish to assimilate into the dominant culture became a commitment to majoritarian rule. As I further argue, Frankfurter's views fit Progressive politics and helped mark Frankfurter, before his appointment to the U.S. Supreme Court, as a Progressive and liberal lawyer.

A. Di Goldene Medina

Felix Frankfurter's was an immigration success story. Born in Vienna on November 15, 1882[49] ("the third son in a family of six children"[50]), his family immigrated to the United States when he was eleven, settling in New York City's East Village, "a thriving German neighborhood with Italian and Chinese immigrants living nearby."[51] The Lower East Side, where "Eastern European Jewish immigrants crowded into tenement houses" was only a few blocks away.[52] As German-speaking Jews, the Frankfurters were deemed "better off, sociologically and geographically, than their Russian and Eastern European Jewish counterparts."[53]

Despite different backgrounds and experiences, German and Eastern European Jews alike shared a vision of the United States as "the golden land" (*di goldene medina*). Having come to America in search of a promised land, seeking to leave behind a history of segregation and discrimination, Jewish immigrants associated emigration to the United States with "biblical narratives of flight from oppression and the coming of the Messiah."[54] Even as Frankfurter's family continued to struggle to make ends meet (his father "peddled door to door" selling linen[55]), in the golden land and the promised city, their children could dream of assimilation and success.[56]

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[49] SNYDER, *supra* note 18, at 10.

[50] H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 12 (1981).

[51] SNYDER, *supra* note 18, at 12.

[52] *Id.*

[53] *Id.*

[54] HADASSA KOSAK, CULTURES OF OPPOSITION: JEWISH IMMIGRANT WORKERS, NEW YORK CITY, 1881-1905, at 37 (2000).

[55] HIRSCH, *supra* note 50, at 13.

[56] HOWE & LIBO, *supra* note 34, at 17-26. On the immigrants' vision of New York City as the Promised City, see Selma C. Berrol, *Education and Economic Mobility: The Jewish Experience in New York City, 1880-1920*, *in* Jeffrey S. Gurock ed., EAST EUROPEAN JEWS IN AMERICA, 1880-1920: IMMIGRATION AND ADAPTATION 983 (1998).

Frankfurter was eager to assimilate, embracing the plans that many American reformers had for immigrants at the turn of the twentieth century. As millions of immigrants, most of them from poor eastern and southern European towns, poured into the United States, social workers and educators sought to Americanize them—to help immigrants remold their behavior in accordance with the values of mainstream America. German Jews, many of whom were often already assimilated and embarrassed by their ethnic brethren, whom they viewed as "uncouth, barbaric, ill-mannered, [and] fanatical," put money and effort into helping transform Eastern European Jews into respectable American citizens.[57] Advocates of assimilation urged immigrants to divest themselves of every vestige of their native culture and embrace the presumably homogeneous American culture.[58]

Some Jewish reformers believed that immigrants should hold on to their unique cultures. Most notably, Horace Kallen in his *Democracy Versus the Melting Pot*, used a metaphor of "multiplicity in unity" to argue that America ought to remain a nation composed of many cultural or ethnic nations and to urge harmonious cooperation between different cultures.[59] Seeking to demonstrate that "Jewish distinctiveness could be a legitimate contribution to American nationality,"[60] Kallen compared American society to an orchestra, with "each ethnic group . . . the natural instrument, its temper and culture . . . its theme and melody and the harmony and dissonances and discords of them all . . . the symphony of civilization."[61]

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[57] HOWE & LIBO, *supra* note 34, at 55; James R. Barrett, *Americanization from the Bottom Up: Immigration and the Remaking of the Working Class in the United States, 1880-1930*, 78 J. OF AM. HIST. 997 (1992); KOSAK, *supra* note 54, at 11, 92-93, 98.

[58] WERNER SOLLORS, BEYOND ETHNICITY: CONSENT AND DESCENT IN AMERICAN CULTURE 66, 97 (1986).

[59] *Id.* Horace M. Kallen, *Democracy Versus the Melting-Pot*, *reprinted in* CULTURE AND DEMOCRACY IN THE UNITED STATES 125 (1924) (originally published in THE NATION, Feb. 18 and 25, 1915). On Horace Kallen's cultural pluralism, see David A. Hollinger, *Ethnic Diversity, Cosmopolitanism and the Emergence of the American Liberal Intelligentsia*, 27 AM. Q. 142 (1975); Elmer N. Lear, *On the Unity of the Kallen Perspective*, *in* Milton R. Konvitz ed., THE LEGACY OF HORACE M. KALLEN 116 (1987); Sidney Ratner, *Horace M. Kallen and Cultural Pluralism*, *in* Milton R. Konvitz ed., THE LEGACY OF HORACE M. KALLEN, 50 (1987).

[60] JEROLD S. AUERBACH, RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION 152 (1990).

[61] Kallen, *supra* note 59. Kallen, whose family immigrated to the United States from Germany when he was five and whose father was a rabbi in Boston, wanted to

For the most part, though, cultural pluralist ideas did not find receptive audiences during the Progressive Era. As Nomi Stolzenberg and David Myers have noted, the allure of assimilation had a long history; "the liberal promise of emancipation somehow excluded traditional Jewish identity and faith. Jewish life could continue under a regime of liberal tolerance, but only in the private realm."[62] Similarly, Eric Goldstein argued that most Jewish immigrants wished "not to be the subject of scholarly debate and extensive discussion. Jews who came to America wanted, for the most part, to be unobtrusive, unseen, and unproblematic because they saw minimal public visibility as a prerequisite for full acceptance here."[63]

First- and second-generation Jewish Americans thus embraced the universal Progressive ideals of social and economic equality rather than cultural pluralism. Informed by centuries of persecution and economic struggles, Jewish immigrants helped shape the Progressive American identity,[64] describing human fraternity as a means of ending "the exploitativeness, the inhumane competitiveness, the moral frigidity associated with capitalism."[65] Consider, for example, Morris Cohen, Frankfurter's close friend and a renowned philosopher at City College of New York (CCNY).[66] In 1919, Cohen accused cultural pluralists of cultural determinism, of embracing the "very popular racial

be identified as an American, not as a Jew. LOUIS MENAND, THE METAPHYSICAL CLUB: THE STORY OF IDEAS IN AMERICA 388 (2001). But at the influence of his professors at Harvard University, especially Barrett Wendell and William James, Kallen accepted that being Jewish was not inconsistent with being an American. *Id.* at 389. Thereafter, Kallen wanted to make race and ethnicity positive elements of the American experience, although, ironically, Kallen's concept of cultural pluralism was traceable to the scientific, even racist, assumptions of anti-immigrationists and their racial determinism. *Id.* at 392. "Men," Kallen wrote, "may change their clothes, their politics, their wives, their religions, their philosophies, to greater or lesser extents, but they cannot change their grandfathers." *Id.* at 392-93.

[62] Nomi Maya Stolzenberg and David N. Myers, *Community, Constitution, and Culture: The Case of the Jewish Kehillah*, 25 U. MICH. J.L. REF. 633 (1992).

[63] Eric L. Goldstein, Race and the Construction of Jewish Identity in America, 1875-1945*,* at 6 (Ph.D. dissertation, 2000) (on file with the author).

[64] KOSAK, *supra* note 54, at 134; *see also* HOWE & LIBO, *supra* note 34, at 20; GERALD SORIN, THE JEWISH PEOPLE IN AMERICA: A TIME FOR BUILDING: THE THIRD MIGRATION, 1880-1920, at 117 (1992).

[65] HOWE & LIBO, *supra* note 34, at 161, 174.

[66] *Guide to the Morris Raphael Cohen Papers 1898-1981*, U. CHI., https://www.lib.uchicago.edu/ead/rlg/ICU.SPCL. MRCOHEN.pdf (last visited Mar. 2, 2024).

philosophy of history," that is, "the constant tendency to emphasize the consciousness of race."[67] In contrast, Cohen described "liberal America" as "stand[ing] for separation of church and state, the free mixing of races, and the fact that men [could] change their habitation and language and still advance the process of civilization."[68] Years later, Cohen succinctly captured the rejection of ethnic particularism in favor of economic solidarity when he wrote that there were "many human problems, of which Jews, as human beings, [had] perhaps more than their share. But these problems, traced to their ultimate roots in reality, [were] also the problems of other minority groups, and [every] group of human beings [was] . . . a minority in one situation or another."[69]

Celebrating solidarity and the improvement of economic conditions offered a sense of inclusion, of belonging with others in a struggle against injustice. It allowed Jewish Americans to maintain a political identity while disavowing ethnic differences.[70] As the following Section II.B elaborates, such was Frankfurter's attitude; it also informed his jurisprudential vision.

B. Assimilation, Democracy, and Judicial Restraint

Frankfurter traced his rejection of ethnic particularism and his steadfast embrace of the dominant American culture to the actions of his elementary school teacher, Miss Hogan.[71] Frankfurter did not speak English when he joined her class, and Miss Hogan, who "believed in corporal punishment . . . told the other boys that if anybody was caught speaking German with [Frankfurter], she would punish

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[67] MORRIS R. COHEN, *Zionism: Tribalism or Liberalism?*, *in* THE FAITH OF A LIBERAL: SELECTED ESSAYS BY MORRIS COHEN 328 (1946) (The article was published in the NEW REPUBLIC in 1919 as a critique of Zionism, which Morris Cohen associated with Kallen's pluralism.); SUSANNE KLINGENSTEIN, JEWS IN THE AMERICAN ACADEMY, 1900-1940: THE DYNAMICS OF INTELLECTUAL ASSIMILATION 50 (1991); Hollinger, *supra* note 59.

[68] COHEN, *supra* note 67, at 329-30.

[69] MORRIS R. COHEN, A DREAMER'S JOURNEY: THE AUTOBIOGRAPHY OF MORRIS RAPHAEL COHEN 233-34 (1949); *see also* KLINGENSTEIN, *supra* note 67, at 53.

[70] HOWE & LIBO, *supra* note 34, at 188; DEBORAH DASH MOORE, AT HOME IN AMERICA: SECOND GENERATION NEW YORK JEWS 201-30 (1981).

[71] Dr. HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES: RECORDED IN TALKS WITH DR. HARLAN B. PHILLIPS 4-5 (1960) [hereinafter FRANKFURTER REMINISCES].

him"; the students obliged.[72] Likely viewing the German language—a relic of Frankfurter's birth culture—as an obstacle to assimilation into American society, Miss Hogan ensured that Frankfurter would not use it. Years later, Frankfurter reminisced that Hogan's actions guaranteed his successful integration into American society and, as a result, his rewarding career.[73]

CCNY and Harvard Law School solidified Frankfurter's assimilation.[74] America's first municipally owned public college, CCNY was established in 1847 at the initiative of Townsend Harris, a wealthy businessman and the president of the New York City Board of Education.[75] At the time, New York City had no public secondary schools and only two private institutions of higher education, Columbia College and the University of the City of New York (now New York University).[76] The Free Academy (renamed CCNY in 1866) formally opened on January 21, 1849, on East Twenty-Third Street.[77] It offered a program of study that lasted five years—one preparatory year followed by four years of college.[78] By the turn of the twentieth century, working-class first- and second-generation Jewish Americans dominated the student body; many of them had little choice but to attend CCNY because Ivy League colleges, faced with a rising number of Jewish students, instituted quotas to limit the number of Jews they admitted (usually about ten percent).[79] CCNY admitted anyone who qualified, with no restrictions based on ethnicity or race.[80] Many

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[72] *Id.*; *see also* SNYDER, *supra* note 18, at 9.

[73] SNYDER, *supra* note 18, at 9.

[74] HIRSCH, *supra* note 50, at 13. As Hirsch notes, Jewish immigrants "emphasized education as a means of survival and advancement in the New World." *Id.*

[75] JAMES TRAUB, CITY ON A HILL: TESTING THE AMERICAN DREAM AT CITY COLLEGE 21 (1994).

[76] *Id.*

[77] *Id.* at 24.

[78] SHERRY GORELICK, CITY COLLEGE AND THE JEWISH POOR: EDUCATION IN NEW YORK, 1880-1924, at 62 (1981).

[79] BETH S. WEGNER, NEW YORK JEWS AND THE GREAT DEPRESSION: UNCERTAIN PROMISE 23 (1999); s*ee also* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925, at 278 (1992) ("Beginning in 1919, New York University instituted stringent restrictions. Columbia soon cut the number of Jews in her incoming classes from 40 to 22 percent. At Harvard, where Brahmin students feared that the university was becoming a new Jerusalem, President Lowell in 1922 moved, with unseemly frankness, to raise the bars.").

[80] *Id.* at 28. GORELICK, *supra* note 78, at 123 (noting that "by the turn of the century three-quarters of the students at CCNY were Eastern European Jews, although

students were also poor, and CCNY was free.[81] Over time, these Jewish students helped transform CCNY "from a symbol of Jacksonian democracy to a symbol—perhaps *the symbol* of the new America of assimilation, competition, and mobility."[82] As one commentator put it, CCNY was the "proletarian Harvard."[83]

For Frankfurter, CCNY was a significant turning point. In 1897, having graduated P.S. 25, "steeped in his new country's new language, politics, and history," he entered CCNY's "combined five-year high school and college program."[84] Shortly thereafter, Frankfurter, who as a boy was "religiously observant,"[85] "abandoned organized religion . . . walk[ing] out of synagogue [during Yom Kippur services] . . . and never returning."[86] In 1919, he would marry Marion Denman, the daughter of a Congregational minister (Frankfurter's mother refused to attend the ceremony).[87] As Robert Burt elaborated, "For Frankfurter, Jewishness was inextricably linked to the immigrant world in which he had been raised."[88] Leaving the latter also required abandoning the former. While Frankfurter "claimed never to have lost his concern for 'whatever affects the fate of Jews,'" Jerold Auerbach wrote, "in time he redirected his deepest loyalties, even his feelings of piety and worship, to the Harvard Law School . . . to the American rule

German Jewish names predominated among the graduates at least until the 1930s, the dropout rate being extremely high").

[81] TRAUB, *supra* note 75, at 27-28.

[82] *Id.* at 32.

[83] Berrol, *supra* note 56, at 984.

[84] SNYDER, *supra* note 18, at 13.

[85] FRANKFURTER REMINISCES, *supra* note 71, at 289 (noting that he "wouldn't eat breakfast until [he] had done the religious devotions in the morning"); *see also* BURT, *supra* note 21, at 38; Mendes Hershman, *Review of Felix Frankfurter by Liva Baker*, 33 JEWISH SOC. STUD. 74 (1971) (noting that Frankfurter's father "trained for the rabbinate and [was] fond of singing Jewish ritual to opera tunes"); AUERBACH, *supra* note 60, at 154 (noting that Frankfurter's "father descended from a long line of rabbis").

[86] SNYDER, *supra* note 18, at 14; *see also* FRANKFURTER REMINISCES, *supra* note 71, at 290 (remembering thinking "it's a wrong thing for me to be present in a room in a holy service, to share these ceremonies, these prayers, these chants, with people for whom they gave inner meaning as against me for whom they have ceased to have inner meaning").

[87] SNYDER, *supra* note 18, at 123.

[88] BURT, *supra* note 21, at 39.

of law; and to the United States, the adopted country of his childhood."[89]

Harvard Law School was the zenith of Frankfurter's education path as well as his social assimilation. If CCNY bolstered Frankfurter's embrace of American culture, Frankfurter likely viewed being admitted to Harvard as a signal that American culture accepted him. Indeed, while Frankfurter often described choosing Harvard as happenstance,[90] Harvard Law School, as Joseph Lash writes, "awed" him.[91] "I have a quasi-religious feeling about the Harvard Law School," Frankfurter is quoted to have said about his first year there; "I regard it as the most democratic institution I know anything about."[92] The law school was "democratic" because it appeared meritocratic (as Snyder writes, "Harvard Law School was the ultimate meritocracy—at least for white men").[93] "What mattered," Frankfurter noted in retrospect, "was excellence in your profession to which your father or your face was equally irrelevant."[94] When, based on his performance on the first-year final exams, Frankfurter was elected to the *Harvard Law Review*, he echoed his initial sentiment, noting: "There was never a problem whether a Jew or a Negro should get on the *Law Review*. If they excelled academically, they would just go on automatically."[95]

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[89] AUERBACH, *supra* note 60, at 154.

[90] FRANKFURTER REMINISCES, *supra* note 71, at 15-16. Notably, before he attended Harvard, Frankfurter tried New York Law School and New York University Law School. He found both "so bad [he] couldn't stand it." After these experiences, Frankfurter planned to apply to Columbia Law School, but a confluence of events and chance meetings landed him at Harvard. Years later, Frankfurter told Harlan Phillips, "I told my parents that I was going to go to Cambridge. I don't remember any discussion about it . . . It was fixed up like that . . . It seemed Harvard was a good place to go, and off I went." *Id.* at 16-17; *see also* HIRSCH, *supra* note 50, at 18.

[91] Lash, *supra* note 44, at 3.

[92] FRANKFURTER REMINISCES, *supra* note 71, at 19.

[93] SNYDER, *supra* note 18, at 19.

[94] FRANKFURTER REMINISCES, *supra* note 71, at 26-27; *see also* AUERBACH, *supra* note 60, at 155 (noting that "Frankfurter's life was a continuing struggle to overcome . . . the legacy of his 'father' and his 'face'—his origins as an immigrant Jew").

[95] FRANKFURTER REMINISCES, *supra* note 71, at 27; *see also* SNYDER, *supra* note 18, at 19; Jerold S. Auerbach, *From Rags to Robes: The Legal Profession, Social Mobility and the American Jewish Experience*, 66 AM. J. HIST. Q. 249, 252 (1976).

Harvard not only opened doors into the highest echelons of American society,[96] but it also introduced Frankfurter to Progressive legal thought and its critique of absolutism, a critique that would inform Frankfurter's jurisprudence of judicial restraint. Frankfurter credited three scholars for shaping his view of the judicial role: James Bradley Thayer, Oliver Wendell Holmes, and Louis Dembitz Brandeis.

Frankfurter described Thayer, Holmes, and Brandeis as sharing a commitment to democratic institutions and processes; he saw their work as emphasizing the role of state legislatures and Congress in bringing about social change and the expectation that judges would exercise judicial restraint.[97] For one, Thayer's 1893 article, *The Origin and Scope of the American Doctrine of Constitutional Law*, called on federal judges to refrain from striking down federal legislation and executive action, unless it was "very clear" that the action was unconstitutional.[98] As Snyder writes, Frankfurter "embraced Thayer's theory of limited judicial review and deference to elected officials in all but the most extreme circumstances."[99] In a similar manner, Frankfurter described Holmes's famous 1905 dissent in *Lochner v. New York*,[100] which chided the majority for striking down a maximum-hours law, as a "rallying cry against judicial power run amok."[101] As to Brandeis—if Thayer's scholarship and Holmes's decisions influenced Frankfurter's jurisprudential vision, Brandeis became his professional (if not also cultural) role model. Shortly after *Lochner* was decided, Frankfurter heard a talk by Brandeis and determined that he, too, "could be a different type of lawyer; he could oppose monopolies, defend the

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[96] *See, e.g.*, HIRSCH, *supra* note 50, at 21 (noting that "Frankfurter's academic success was translated into a certain degree of academic acceptance from Brahmin, Yankee culture").

[97] SNYDER, *supra* note 18, at 20.

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

[99] SNYDER, *supra* note 18, at 20-21. It is worth noting that Thayer's concern focused on "the Court's restrictions of Congress's power after the Civil War, on matters including but not limited to Congress's powers to enforce the Reconstruction Amendments." Carle, *supra* note 33, at 7. Thayer's article criticized the U.S. Supreme Court's decision to "[strike] down the provisions of the Civil Rights Act of 1875 that prohibited discrimination in quasi-public facilities (The Civil Rights Cases 1883)." *Id.* at 8.

[100] 198 U.S. 45, 75 (1905).

[101] SNYDER, *supra* note 18, at 21-22.

labor movement, and make America's growing industrial democracy more fair and just."[102] As Brad Snyder concludes: "Frankfurter emerged as the foremost champion of Thayer's and Holmes's view that it was up to legislatures, not the Court, to make social and economic policy. . . if Thayer was his constitutional theorist and Holmes his ideal jurist, then Brandeis exemplified the lawyer as a social reformer."[103]

In 1915, in a speech he delivered at the American Bar Association annual convention, Frankfurter—by then a professor at Harvard Law School—drew upon the lessons he learned from Thayer, Holmes, and Brandeis to "outline[] a vision for lawyers and law schools during an age of industrial revolution."[104] He called on judges to "adjust legal principles to changing social and economic conditions,"[105] urged law schools "to teach their students to view law not as a closed system but as an evolving science driven by the discovery of new facts [and] social realities,"[106] and "challenged lawyers to play a leading role in the country's economic and social transformation."[107] Legislation and regulation were the tools of change, and the courts were assigned a rather limited, restricted power of review. As Frankfurter's close friend, Morris Cohen, put it, "to be ruled by a judge is, to the extent that he is not bound by law, tyranny or despotism."[108]

Frankfurter heeded his own advice, becoming a lawyer and advocating for maximum hours and minimum wage legislation as well as laws recognizing "organized labor as the lawful representative of workers."[109] In the 1920s, as the Supreme Court struck down social and economic legislation,[110] Frankfurter used the pages of the *New*

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[102] *Id.* at 23.

[103] *Id.* at 22-23.

[104] *Id.* at 68.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 69.

[108] Morris R. Cohen, *Positivism and the Limits of Idealism in the Law*, 27 COLUM. L. REV. 238, 244 (1927); *see also* Edward A. Purcell, Jr., *American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424, 435 (1969) (discussing Cohen's critique of legal realism).

[109] SNYDER, *supra* note 18, at 79.

[110] This line of cases, traceable to the U.S. Supreme Court's decision in *Lochner* (Lochner v. New York, 198 U.S. 45 (1905)), illustrates the Court's usage of the Fourteenth Amendment's Due Process Clause to strike down laws that (per the Court) substantively interfere with liberties such as the right to contract. *See, e.g.*, Michael

Republic and *Harvard Law Review* to promote his vision for the modern industrial state as well as judicial restraint. Notably, when addressing issues beyond social and economic rights, Frankfurter also criticized the Court "for not invoking due process to protect freedom of speech and fair criminal trials"[111]—two universal rights, the cornerstones of procedural democracy.

Embracing majoritarianism (constrained only by minimal procedural rules) was Frankfurter's means of addressing, or perhaps avoiding, the plurality of values that characterized modern American society.[112] In the nineteenth century, the recognition of diversity in society was tied to a belief in progress and the assignment of subordinated positions to certain social and cultural groups.[113] At the turn of the twentieth century, though, the pragmatic critique of absolutism led to growing skepticism toward existing social norms and values (what historians have described as cultural and ethical relativism, respectively)[114] and toward "traditional foundations of thought and structures of understanding" (what historian Peter Novick labeled cognitive relativism).[115] However, when Progressive jurists, including Frankfurter, tried to describe ways to improve the legal system, they were confronted with the normative implications of such skepticism: does

J. Phillips, *How Many Times was* Lochner*-Era Substantive Due Process Effective*, 48 MERCER L. REV. 1049 (1997).

[111] SNYDER, *supra* note 18, at 129.

[112] While not explored in this Article, it is worth noting here Frankfurter's friendship with the philosopher Isaiah Berlin, remembered as a "staunch advocate of pluralism . . . [who] considered the very notion that there could be one final answer to organizing human society a dangerous illusion that would lead to nothing but bloodshed, coercion and the deprivation of liberty." Marilyn Berger, *Isaiah Berlin, Philosopher and Pluralist, is Dead at 88*, N.Y. TIMES, Nov. 7, 1997; *see also* Maimon Schwarzschild, *Value Pluralism and the Constitution: In Defense of the State Action Doctrine*, S. CT. REV. 129, 130 (1988) (noting that Berlin insisted that "human values are many and varied and cannot be made to harmonize").

[113] LYNN DUMENIL, THE MODERN TEMPER: AMERICAN CULTURE AND SOCIETY IN THE 1920S, at 145 (1995).

[114] DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM 44-47 (2007).

[115] PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION (1988); s*ee also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 180-82 (1992); RICHARD H. PELLS, RADICAL VISIONS AND AMERICAN DREAMS: CULTURE AND SOCIAL THOUGHT IN THE DEPRESSION YEARS 4 (1998).

skepticism toward one's own legal system and ideals entail a nonjudgmental attitude toward all customs and values?

No early-twentieth century jurist adopted a nonjudgmental attitude toward all cultures, values, and structures of understanding; they refused to accept that skepticism implied a relativist stance toward all aspects of life. That which was intellectually possible, and maybe inevitable, was not only practically impossible but also personally destabilizing. A nonjudgmental view of all customs, values, and forms of knowledge involved a level of uncertainty about law and the world that very few could endure. Some legal scholars resolved the tension by suggesting the need to recognize certain group rights; others, many of them Jewish, held on to certain universal or absolute values; still, others, including, to some extent, Brandeis, put their trust in science as the ultimate form of knowledge and in empiricism as an objective way to verify facts and learn about the world.[116] Frankfurter put his faith in majoritarianism.[117]

Throughout his career, Frankfurter credited Holmes and Brandeis for shaping his ideas. It is thus worth emphasizing that neither shared Frankfurter's unfaltering commitment to majoritarianism or judicial restraint.[118] For one, Holmes's dissent in *Lochner*, far from being an endorsement of majoritarianism, drew on the pragmatic revolt against moral absolutism to challenge the classical vision of law as an

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[116] For a detailed description of these positions, see TSUK MITCHELL, *supra* note 114, at 44-47. Notably, Brandeis and others who turned to the social sciences imbued their empirical research with strong moral convictions. As Bruce Murphy writes, "Brandeis's deep moral convictions gave him a considerable measure of security in suggesting reforms for society. He always recommended solutions to social problems in accordance with his own view of life." BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES 21 (1982).

[117] By choosing majoritarianism rather than progressive social science, Frankfurter ultimately distanced himself from Brandeis. On their fallout, see EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH CENTURY AMERICA 195-228 (2000).

[118] *See* Jeffrey Rosen, *The Liberal Justice Who Warned Against an Activist Supreme Court*, N.Y. TIMES, Aug. 26, 2022 (reviewing SNYDER, *supra* note 18) (noting that "Justices Oliver Wendell Holmes and Louis Brandeis, Frankfurter's judicial heroes, also believed in general deference to Congress and the states, but they balanced this deference with a commitment to defending the rights protected by the First and Fourth Amendments. Frankfurter, on the other hand, took judicial deference to new extremes").

autonomous body of abstract axioms from which judges could deduce rules. "General propositions do not decide concrete cases," Holmes stated in his dissent, adding: "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[119] Instead of viewing legal rules as embedded in absolute values, Holmes described law as the outcome of debatable policy judgments about the social utility of diverse activities in a rapidly changing society.[120] As Morton Horwitz explains, if law was "merely a battleground over which social interests clash, then the legislature [was] the appropriate institution for weighing and measuring competing interests."[121] But not always. "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion," Holmes noted, "unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[122]

Similarly, Brandeis was keen on ensuring that the U.S. Supreme Court did not strike down Progressive legislation, not on promoting majoritarianism. Trusting the newly emerging social sciences, Brandeis's (and Josephine Goldmark's) now famous "brief" in *Muller v. Oregon*[123] used pages of sociological data demonstrating that overly long days had negative effects on working women and their families to convince the U.S. Supreme Court to uphold a law mandating maximum working hours for laundresses.[124] Rather than emphasizing

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[119] Lochner v. New York, 198 U.S. 45, 76 (1905).

[120] As Rodger Citron notes, "Holmes also maintained a skeptical attitude toward the law, defining it as nothing more than 'the incidence of public force through the instrumentality of the courts.'" Rodger D. Citron, *The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism, The Revival of Natural Law, and The Development of Legal Process Theory*, 2006 MICH. ST. L. REV. 385, 389 (2006).

[121] HORWITZ, *supra* note 115, at 142.

[122] *Lochner*, 198 U.S. at 75. *See also* Carle, *supra* note 33, at 10 (writing that "Holmes . . . came to view judicial restraint as inappropriate in cases involving rights to speech and conscience. . . . Holmes authored opinions that propelled the Court's expansion of First Amendment protections, such as his dissent in Abrams v. United States . . . in which he argued that the experiment of U.S. democracy required the courts to protect even the most loathsome speech if it did not present a 'clear and imminent danger'").

[123] 208 U.S. 412 (1908).

[124] BRANDEIS ON DEMOCRACY 7-13 (Philippa Strum ed., 1995).

judicial restraint, the Brandeis brief explained why the legislation was within the state's police power and thus constitutional.[125]

For a while, whether Frankfurter's description of Holmes and Brandeis was accurate or self-serving did not matter. Given the conservative leaning of the U.S. Supreme Court at the time, Frankfurter's advocacy of judicial restraint fit the Progressive agenda. Whether focusing on social scientific studies, advocating for social justice, or arguing in support of group rights, Progressives' concerns centered on what they viewed as the Court's attack on Progressive legislation (between the 1880s and the 1930s, the Court held that private property and contracts reflected natural rights and voluntary choices that should be protected from the coercive power of the state to strike down protective labor legislation as an unconstitutional interference with the property rights of employers or with freedom of contract).[126] Frankfurter's commitment to labor and his support for the administrative state further placed him within the ranks of Progressive legal scholars.[127] Frankfurter's book on the labor injunction (written with New York labor lawyer Nathan Greene) remains part of the canon of Progressive literature. Frankfurter and Greene traced the history of the labor injunction and criticized its use to "prevent peaceful strikes, picketing, and boycotts."[128] In 1932, Congress passed the Norris-La Guardia Act, which Frankfurter helped draft; it "banned yellow-dog contracts and labor injunctions and marked the beginning of the federal government's support for organized labor."[129] After the election of Franklin D. Roosevelt, Frankfurter helped draft and pass most of the New Deal legislation—working behind the scenes to ensure support for each of Roosevelt's initiatives.[130]

Once Frankfurter joined the U.S. Supreme Court, though, amid changing demands on the Court, his steadfast commitment to majoritarianism and judicial restraint quickly put him at odds with

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[125] *Id. See also* Carle, note 33, at 9 (noting that in "Gilbert v. Minnesota, Brandeis dissented from the Court's rejection of a challenge to a state sedition law that made it unlawful to discourage enlistment in the military. Such a law, Brandeis argued, interfered with the First Amendment right to freedom of conscience").

[126] On the Progressives' and legal realists' critique of liberal legal thought, see HORWITZ, *supra* note 115.

[127] *Id.* at 184-85.

[128] SNYDER, *supra* note 18, at 193.

[129] *Id.*

[130] *Id.* at 219-25.

progressivism (and the legacy of Holmes and Brandeis).[131] "Billed as the Court's liberal savior,"[132] Frankfurter joined two other Roosevelt appointees: Hugo L. Black and Stanley Reed (William O. Douglas was appointed shortly after Frankfurter to replace Brandeis).[133] Together, they were expected to safeguard the New Deal. Yet, as the following Part III explores, not the New Deal policies but a different issue came to occupy the Court's attention in the 1940s—namely the rights of individuals to be free from persecution and discrimination. In that context, old commitments were put to a challenge. As Robert Cover aptly wrote: "[s]ubstantive due process applied to economic regulation was properly subject to the criticism that it was anti-democratic. But that did not mean that, in the age of Hitler, majoritarianism itself would not require more in the way of justification than its professedly democratic nature."[134] Yet, while others on the Court (and progressive jurists more broadly) were able to adapt their ideas to the changing terrain, Frankfurter remained stubbornly committed to majoritarianism. Rapidly, his decisions not only diverged from the reform-minded commitments of Holmes and Brandeis but also became an apology for the status quo. Part III examines this transformation within the context of Jewish-American history.

III. THE MIDCENTURY CIVIL RIGHTS CHALLENGE

The 1940s witnessed a jurisprudential shift toward civil rights and liberties. As other legal historians have explored, in the early twentieth century, legal scholars associated rights with economic and social needs, specifically the rights of individuals to work, to livelihood, to social insurance, and to economic independence.[135] The so-called cultural politics of the 1920s, including the rebirth of the Ku Klux Klan and the passage of restrictive immigration laws, turned

[131] Mark A. Graber, *False Modesty: Felix Frankfurter and the Tradition of Judicial Restraint*, 47 WASHBURN L. REV. 23, 23 (2007) (noting that "Frankfurter was the leading intellectual advocate of a restrained judiciary in constitutional cases and the least effective champion of that approach to the judicial function").

[132] SNYDER, *supra* note 18, at 312.

[133] *Id.* at 340.

[134] Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1289 (1982). *See also* PURCELL, *supra* note 117, at 198.

[135] William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697, 697-98 (2000).

American intellectuals away from direct engagement with racial problems.[136] Race and culture were seen as divisive issues, especially after racial and cultural battles almost destroyed the Democratic Party in 1924.[137] But in the second third of the twentieth century, amidst growing apprehension about the potential spread of European totalitarianism and growing agitation over racial injustice in the United States, jurists' attention shifted to civil liberties; gradually, the concept of civil rights became associated with the rights of cultural, ethnic, and religious minorities, specifically the right to be different.[138] The Warren Court is remembered as the champion of a vision of democracy that focused on individual rights and liberties.[139]

According to these legal histories, the shift from economics to culture was paralleled by a new understanding of the role of the three branches of government in protecting individual and group rights.[140] In the early twentieth century and during the New Deal, progressive legal scholars emphasized the role of the executive and legislative branches in promoting social and economic rights.[141] In the 1940s, as legal scholars grew concerned about the relationship between statism and tyranny,[142] they reimagined a role for the judiciary. New Dealers turned to the courts, especially the U.S. Supreme Court, to limit the power of the legislative and executive branches to encroach upon individual rights and liberties.[143] In this changing world, rather than leading the Court on issues of civil rights, Frankfurter, who, according to one commentator, "pushed the doctrine of judicial restraint to an

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[136] ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 165 (1995).

[137] *Id.* at 165-66.

[138] *Id.* at 166-70.

[139] HORWITZ, *supra* note 19, at 3, 91 (noting that the Warren Court "[took] the first steps toward elaborating a vision of 'positive liberty' that would accord with its evolving conception of democracy as requiring both political and substantive equality").

[140] William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 169 (2001).

[141] *Id.*

[142] *See, e.g.*, BRINKLEY, *supra* note 136, at 154-70.

[143] Forbath, *supra* note 140, at 169.

extreme that violated the spirit of Holmes,"[144] became rapidly dissociated from his former friends and supporters.[145]

Recalling another element of these histories, Part III examines Frankfurter's flag-salute decisions in the context of the Jewish-American community's reactions to the rise of totalitarianism and Nazism in Europe and antisemitism in the United States. Viewed through this lens, Frankfurter's almost stubborn commitment to judicial restraint becomes intertwined with his early assimilationist aspirations, grounded as they were in his belief that ethnic and cultural identities were irrelevant in the public realm of law and politics and that one (especially Jewish Americans) should not call attention to them.[146]

A. Hopes and Fears

Jewish immigrants to the United States viewed America as the land of opportunities with open doors and sympathy for persecuted minorities; Progressive Jewish jurists assumed that universal economic and social citizenship, irrespective of ethnic particularities, would ensure that everyone had access to these opportunities.[147] In the interwar years, progress seemed within reach. "Jewish people in the United States became more and more *American* Jews, comfortable with a modern, urban way of life."[148] Still, American society continued to exhibit nativist and anti-alien sentiments. Fears that foreigners would subvert American democratic ideals were as prevalent as the belief in those ideals itself, and government immigration policies reflected the suspicion of the Anglo-Saxon Protestant majority toward racial and

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[144] Lash, *supra* note 44, at 72-73.

[145] *Id.*; *see also* Michael E. Parrish, *Felix Frankfurter, the Progressive Tradition, and the Warren Court, in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 54 (Mark Tushnet ed., 1993).

[146] On the public-private split in this context, see, e.g., Pnina Lahav, *The Eichmann Trial, the Jewish Question, and the American-Jewish Intelligentsia*, 72 B.U. L. REV. 555, 560 (1992) (noting that "Liberalism invited Jews to assimilate, to observe a public/private distinction by becoming 'like everyone' in the public domain while remaining 'Jews' at home (if they so desired)").

[147] *See* discussion *supra* Section II.A.

[148] HASIA R. DINER, A NEW PROMISED LAND: A HISTORY OF JEWS IN AMERICA 68, 69 (2003).

religious minorities—Black Americans, Chinese, Jews, and Roman Catholics.[149]

In the 1930s, economic insecurity, with as many as fifteen million individuals unemployed during the worst periods, led Americans to endorse the nativist slogans "America for the Americans" or "100 percent Americanism."[150] Fears that Hitler or the communist regime in the Soviet Union might attempt to corrupt American institutions with the help of immigrants, as well as general anxiety about the preservation of American culture, added to the nativist and anti-alien sentiments.[151] By 1940, seventy-one percent of the respondents to a Roper poll were convinced that Germany had already begun to form "a 'Fifth Column'" in the United States.[152]

Antisemitism was also on the rise. Americans were not immune to the fear, popularized by Hitler, that "'Red Jews,' 'alien Jews,' 'Jewish-Bolshevists,' 'Jewish radicals,' and 'non-Aryans' were plotting to destroy the foundation of Anglo-Saxon civilization."[153] Old-time patriotic organizations, panicked businessmen, and critics of Roosevelt's "Bolshevist" New Deal quickly embraced this antisemitic propaganda.[154] The German American Bund, with 25,000 dedicated members, worked to frustrate any plan to harbor refugees from

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[149] RICHARD BREITMAN & ALAN M. KRAUT, AMERICAN REFUGEE POLICY AND EUROPEAN JEWRY, 1933-1945, at 7 (1987). Notably, immigration restrictions were imposed against the Chinese and Japanese in the late nineteenth century and, after World War I, also against Europeans. *Id.* A visa system was instituted at the end of the War, and immigration laws in 1921 and 1924 established limits on immigration from European countries. *See id.* On September 8, 1930, President Hoover issued an executive order instructing consular officers to refuse to issue visas if they believed "that the applicant may probably be a public charge at any time, even during a considerable period subsequent to his arrival." *See* DAVID S. WYMAN, PAPER WALLS: AMERICAN AND THE REFUGEE CRISIS, 1938-1941, at 4 (1985). Combined with the Alien Contract Labor Act of 1885, which prevented immigrants from securing jobs in advance to their arrival, Hoover's directive meant that "only the independently wealthy" could emigrate to America. SAUL S. FRIEDMAN, NO HAVEN FOR THE OPPRESSED: UNITED STATES POLICY TOWARD JEWISH REFUGEES, 1938-1945, at 22 (1973). According to one account, "[i]mmigration totals . . . dropped from 241,700 in 1930 to 97,139 in 1931 and to 35,576 in 1932." *Id.*

[150] BREITMAN & KRAUT, *supra* note 149, at 113.

[151] *Id.* at 113-17.

[152] *Id.* at 117.

[153] FRIEDMAN, *supra* note 149, at 25.

[154] *Id.* at 26.

Germany.[155] William Dudley Pelley's Silver Shirt Legion of America, with a claimed membership of 100,000, advocated a program of "Christian Democracy."[156] Father Charles E. Coughlin of Royal Oak, Michigan, helped spread Nazi propaganda through his tabloid newspaper *Social Justice*, "with a reported weekly circulation of one million,"[157] and his Sunday radio broadcasting, "heard by a regular audience of 3,500,000."[158] And the American Liberty League, which was organized in 1934 "to preserve the principles of the Declaration of Independence for succeeding generations of Americans," "bombarded Congress" with objections to changes in immigration policy, claiming that new immigrants would make jobs scarce.[159] This was a message that even more respectable organizations such as the American Federation of Labor (AFL) at times endorsed.[160] Closer to Frankfurter, the growing number of Jews throughout Roosevelt's administration elicited the description of the New Deal as "Jew Deal."[161] And Frankfurter's role in securing their positions earned his students the label "Happy Hot Dogs," "a playful take on Frankfurter's first and last names by *New York Herald Tribune* columnist Mark Sullivan . . . [that] took on a derogatory and anti-Semitic cast."[162]

Meanwhile, the safety of Jews in Europe was deteriorating. Since the Nazi Party's rise to power, German Jews, who constituted less than two percent of the Reich's population in 1933, were subject

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[155] *Id.*

[156] *Id.* This antisemitic program included:

> [A]n alien registration day for persons of "Hebrew Blood," imprisonment of Jews who attempted to use gentile names, prosecution of Jews who supported a Zionist state (on grounds of sedition), disenfranchisement of Jews, abrogation of all civil rights for Hebrews (including the right to hold property), and the establishment of an urban ghetto in one city in every state to pen up all Jews.

Id.

[157] *Id.* at 27.

[158] *Id.*

[159] *Id.* at 29.

[160] *Id.* at 29-31.

[161] RICHARD L. ZWEIGENHAFT & G. WILLIAM DOMHOFF, DIVERSITY IN THE POWER ELITE: IRONIES AND UNFULFILLED PROMISES 16-17 (2018). Notably, some Jewish lawyers were also concerned about the number of Jews in Roosevelt's administration; *see* AUERBACH, *supra* note 60, at 159-60 (quoting a letter from Jerome Frank to Frankfurter, in which Frank, "an assimilated German Jew from Chicago," expressed concerns about "having too many Jews on the legal stuff").

[162] SNYDER, *supra* note 18, at 224-25.

to political, economic, cultural, and physical persecution.[163] Under the Nuremberg Laws, adopted in September 1935, Jews, who had already been banned from the professions, universities, and public service, lost their citizenship and were subject to business regulations that rapidly prevented them from pursuing, let alone making, a living.[164] In 1938, shortly after Germany annexed Austria, Frankfurter's uncle, Salomon, "one of [Vienna's] leading academics and a member of the Austrian government's cultural advisory council" was arrested.[165] He was released to house arrest at the intervention of the U.S. State Department.[166]

The Jewish American community was at a crossroads. As Gerald Sorin writes, Jewish Americans were "not well prepared for the crisis."[167] By the 1930s, "the traditional sources of unity, religion and a common culture and language, had grown somewhat weaker," and "the community was rent by various strategies and ideologies and degrees and kinds of religious persuasion, as well as by duplication and competition."[168] Jewish-American organizations were divided, disordered, and, often, in disagreement. B'nai B'rith, the American Jewish Committee, the Zionist Organization of America, the Jewish Labor Committee, and the American Jewish Congress pressed Roosevelt for action to help their European brethren. But they failed to cooperate in a concerted effort.[169] While some groups advocated opening American borders, some were concerned that advocacy on behalf of European Jews would make them appear "less than '100 percent American,'"[170] and many feared "that a large influx of Jewish refugees would inflame anti-semitism in America."[171] Zionists wanted to settle Jewish refugees from Europe in Palestine, while religious organizations such as the Central Conference of American Rabbis, together with others who

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[163] WYMAN, *supra* note 149, at 27.

[164] *Id.* at 27-29.

[165] SNYDER, *supra* note 18, at 295.

[166] *Id.* at 296. Still under house arrest, Salomon died of bronchitis in September 1941. *Id.* at 381.

[167] GERALD SORIN, TRADITION TRANSFORMED: THE JEWISH EXPERIENCE IN AMERICA 190 (1997).

[168] *Id.*

[169] FRIEDMAN, *supra* note 149, at 42.

[170] Sarah E. Peck, *The Campaign for an American Response to the Nazi Holocaust, 1943-1945*, 15 J. CONTEMP. HIST. 367, 369 (1980).

[171] *Id*.

feared that Jewish nationalism only reinforced the idea that Jews were a distinctive race, opposed any such plan.[172]

Historians differ as to whether divisions within the Jewish community impacted Roosevelt's actions. Some suggest that these divisions prevented American Jews from doing much. As Saul Friedman pointedly put it, "Insecure themselves, constantly wary of raising the specter of double-loyalty which was the grist of anti-Semites," even Roosevelt's close Jewish advisers "ever exerted themselves to display their Americanism, their concern for this nation's welfare to the exclusion of all others, even when doing so meant the deaths of loved ones in Europe."[173] Other historians maintain that, for the most part, these divisions reflected the general frustration of Jewish organizations at their inability to persuade Roosevelt and the State Department to attempt to save the refugees; frustrated that they could not achieve material results, "they blamed each other."[174] As Gerald Sorin explains, political pressure from the Jewish-American community was unlikely to convince Roosevelt to act, because the President never worried about losing their votes; Jewish Americans were "the most loyal Democratic group in the history of the party."[175] Roosevelt listened to individual Jews and Jewish organizations but did not make public statements or change policies to assist Jewish refugees.[176] Given widespread public and congressional support for restrictionist immigration policies, Roosevelt was concerned that any relaxation of the rules would carry little, if any, political gain but would risk stirring up voters' emotions.[177]

Why such loyalty in face of inaction? Jerold Auerbach points to the Jewish-American community's continued eagerness to assimilate. According to Auerbach, American Jews were loyal to Roosevelt because he did not treat them as Jews; "by giving them nothing as

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[172] BREITMAN & KRAUT, *supra* note 149, at 80-111.

[173] FRIEDMAN, *supra* note 149, at 45-50; *see also* Peck, *supra* note 170, at 369 (noting that Roosevelt's Jewish advisors, "sensitive to comments about Roosevelt's 'Jew Deal,' as critics called it, avoided advocating any action that might bias the Administration in favor of Jews").

[174] BREITMAN & KRAUT, *supra* note 149, at 110.

[175] SORIN, *supra* note 167, at 192.

[176] *See, e.g.*, FRIEDMAN, *supra* note 149, at 23-24 (noting that occasionally Roosevelt relaxed some of the administrative procedures that visa applicants faced, but overall, throughout the 1930s, American consular offices in Germany were liberal in their interpretation of restrictions imposed by the Hoover administration).

[177] BREITMAN & KRAUT, *supra* note 149, at 222-28.

Jews, [Roosevelt] was confirming their status as Americans."[178] And they were willing to pay the price—"to assert no interest as Jews independent of presidential definitions of the national interest."[179]

As to Frankfurter—perhaps closer to Roosevelt than most—he raised the relaxation of immigration rules with the president, but not directly. Ever careful not to call attention to his Jewish background, Frankfurter "relied on his connections to high level officials," urging them to raise the matter with the president.[180] Even when his uncle was apprehended in Austria, Frankfurter did not contact Roosevelt, not wanting to "seek favors from" the president.[181] After Salomon's release to home arrest, Frankfurter played down the State Department's assistance, again not wanting to appear as using his connections with Roosevelt.[182]

Public opinion regarding immigration remained unchanged even after the horrific *Kristallnacht*.[183] Many Jewish leaders continued to express fears that any attempt to modify immigration policies would lead to a devastating counterattack on the Jewish community.[184] While a few newspapers immediately called for vigorous action, the General Jewish Council, which met on the day following the massive pogrom, did not discuss the issue; and when the leaders of the American Jewish Congress, the American Jewish Committee, B'nai B'rith, and the Jewish Labor Council finally addressed it, they resolved that it was "the present sense of the General Jewish Council that there should be no parades, public demonstrations, or protests by Jews."[185]

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[178] AUERBACH, *supra* note 60, at 166.

[179] *Id.* at 167.

[180] SNYDER, *supra* note 18, at 226-27.

[181] *Id.* at 296.

[182] *Id.*

[183] FRIEDMAN, *supra* note 149, at 31, 72-73.

[184] DAVID MORRISON, HEROES, ANTIHEROES, AND THE HOLOCAUST: AMERICAN JEWRY AND HISTORICAL CHOICE 129-30 (1995).

[185] *Id. See also* David Brody, *American Jewry, the Refugees and Immigration Restriction (1932-1942)*, *in* AMERICA, AMERICAN JEWS, AND THE HOLOCAUST 181-209 (1998); Rafael Medoff, *American Jewish Responses to Nazism and the Holocaust*, *in* THE COLUMBIA HISTORY OF JEWS AND JUDAISM IN AMERICA 291, 297 (Marc Lee Raphael ed., 2016).

Less than two months after *Kristallnacht*, on January 4, 1939, Roosevelt nominated Frankfurter to the U.S. Supreme Court.[186] For some, the nomination proved America's superiority over Germany. As Lori Ringhand writes, "numerous media sources noted the symbolic importance of an American President appointing a Jew to such a prestigious position at a time when Nazism was on the rise in Europe."[187] Others turned to common antisemitic tropes to protest the nomination. For one, Allen A. Zoll, executive vice-president of the American Federation Against Communism, who testified in Congress against Frankfurter's nomination, stated:

> There are two reasons why I oppose the appointment of Professor Felix Frankfurter to the Supreme Court of the United States. One is because I believe his record proves him unfitted for the position, irrespective of his race, and the other is because of his race. . . .[T]he Jew has been fostering movements that are subversive to our government.[188]

Notably, public opinion polls in the early 1940s revealed that "nearly two-thirds of Americans believed Jews as a group had 'objectionable traits,' and over fifty percent of Americans thought that German anti-Semitism stemmed either partially or wholly from the actions of the German Jews."[189]

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[186] *Frankfurter is Nominated as Supreme Court Justice*, N.Y. TIMES, Jan. 5, 1939, at 1; Melvin I. Urofsky, *The Failure of Felix Frankfurter*, 26 U. RICH. L. REV. 175, 176 (1991).

[187] Lori A. Ringhand, *Aliens on the Bench: Lessons in Identity, Race and Politics from the First "Modern" Supreme Court Confirmation Hearing to Today*, 2010 MICH. ST. L. REV. 795, 800 (2010).

[188] *Id.* at 797 (citing from *Nomination of Felix Frankfurter to be an Associate Justice of the Supreme Court: Hearing Before the Subcomm. of the Comm. on the Judiciary*, 76th Cong. 95 (1939)). *See also* SNYDER, *supra* note 18, at 318 (noting that Zoll was an "ally of anti-Semitic radio preacher Father Coughlin[,] . .. was involved in the Coughlin-inspired Christian Front and founded his own far-right organization American Patriots").

[189] Edward S. Shapiro, *World War II and American Jewish Identity*, 10 MODERN JUDAISM 65, 68-69 (1990). *See also* ZWEIGENHAFT & DOMHOFF, *supra* note 161, at 16–17 (3d ed. 2018) (noting that polls conducted in the 1930s and 1940s revealed that "over half the general public thought Jews were greedy and dishonest, had too much power, were a greater threat to the country than any other religious or racial group, and should face various restrictions in their activities").

Antisemitic sentiments did not dissuade Roosevelt's closest allies. Shortly after the nomination, "a group of top New Dealers gathered to celebrate in the office of Secretary of the Interior, Harold L. Ickes"; among others, the group included Attorney General Frank Murphy, Tommy Corcoran, and then-Chairman of the Securities and Exchange Commission, William O. Douglas.[190] "All of them heartily agreed with Ickes, who described the nomination as 'the most significant and worthwhile thing the President had done.' Liberals in the government, academics, and the general community joined in celebratory praise."[191] None of those in attendance could have predicted that Frankfurter—the Progressive, pro-labor lawyer and scholar—would become one of the most conservative midcentury justices. Committed as they all were to the New Deal causes, none realized Frankfurter's deep personal and intellectual inclination toward majoritarianism and judicial restraint.

Frankfurter considered himself a Jew "without any of the usual 'Jewish' conflicts or difficulties."[192] According to Jerold Auerbach, by the time Frankfurter was nominated, "his involvement in Jewish affairs, sporadic at best, had all but evaporated . . . [and] he remained detached from Jewish issues during the most destructive and creative years in modern Jewish history."[193] Concerns about the war in Europe and fears of rising antisemitism only intensified Frankfurter's reluctance to explicitly embrace or address the plurality of values and opinions that characterized American society.[194] As the following Section III.B explores, while justices associated with the liberal wing of the Court began reevaluating their Progressive predecessors' advocacy of judicial restraint, Frankfurter remained almost unwavering in his acceptance of majoritarian rule, norms, and values. As I argue, while his liberal colleagues undertook the task of balancing particularism and

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[190] Urofsky, *supra* note 186, at 176.

[191] *Id.* (quoting HAROLD L. ICKES, 2 THE SECRET DIARIES OF HAROLD L. ICKES 55 (1954)).

[192] *See* AUERBACH, *supra* note 60, at 160.

[193] *Id.* at 162.

[194] As early as 1937, as the Court reversed course on the New Deal legislation, Frankfurter expressed his concerns about judicial activism. As Purcell writes, "while New Dealers rejoiced at their dramatic constitutional victories, Frankfurter expressed anguish and disgust at the Court's dishonesty. 'To me it is all painful beyond words—the poignant grief of one whose life has been dedicated to faith in the disinterestedness of a tribunal and its freedom from responsiveness to the most obvious immediacies of politics.'" PURCELL, *supra* note 117, at 207.

universalism, Frankfurter held on to his faith in assimilation and judicial restraint. Eager to maintain a clear separation between law and politics, and to remove jurists from the messy task of choosing among competing private visions or values, Frankfurter offered litigants (and members of minority groups more broadly) what emancipation had offered the Jews a century earlier—the "*quid pro quo* of assimilation for rights."[195]

B. "Neither Jew nor Gentile, neither Catholic nor Agnostic"[196]

The first victory for the modern discourse of civil rights came in 1938 (before Frankfurter's nomination) as Justice Stone (soon to be Chief Justice) authored what has since been known as *Carolene Products* Footnote Four.[197] Stone, who "viewed the events taking place in Nazi Germany with great alarm,"[198] suggested a critical role for the Supreme Court in a democratic society, namely the protection of civil rights and liberties against tyranny of the majority.[199] *Carolene Products* addressed "the constitutionality of the Filled Milk Act of 1923, which forbade the shipment in interstate commerce of skimmed milk containing fat or oils."[200] Mindful of the judiciary role, Stone, who wrote the majority opinion, exercised judicial restraint when evaluating the statute, concluding that it was "reasonably related" to the legislative purpose, and therefore valid.[201] Then, he "worked closely with his Jewish law clerk, Louis Lusky, on . . . [a] footnote"[202] suggesting situations in which the Court might more strictly scrutinize legislative

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[195] *See, e.g.*, Stolzenberg & Myers, *supra* note 62, at 635-36, 639.

[196] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646-47 (1943) (Frankfurter, J., dissenting).

[197] United States v. Carolene Prods. Co., 304 U.S. 144, 152-55 (1938).

[198] HOWARD BALL, THE SUPREME COURT IN THE INTIMATE LIVES OF AMERICANS, *Case Study: U.S. v. Carolene Products, 1938, Footnote 4*, at 19 (2002).

[199] *See, e.g.*, Lincoln Caplan, *Ruth Bader Ginsburg and Footnote Four*, THE NEW YORKER, Sept. 13, 2013 (concluding that Footnote Four provides "a coherent justification for unelected justices to overturn legal decisions of elected officials when the fairness of the Constitution, and of democracy, is at stake").

[200] BALL, *supra* note 198.

[201] *Carolene Products Co.*, 304 U.S. at 154 (concluding that "the prohibition of shipment in interstate commerce of appellee's product, as described in the indictment, is a constitutional exercise of the power to regulate interstate commerce").

[202] BALL, *supra* note 198, at 19.

and executive actions. These situations included laws that infringed upon guarantees of the Bill of Rights, laws that "restrict[ed] . . . political [process]," and laws that discriminated against "discrete and insular minorities."[203] As Laura Kalman summarizes the footnote's impact: Stone "seized 'the high ground of democratic theory' from advocates of judicial restraint by claiming that the defects of the majoritarian process created the need for judicial review."[204] Rather than describing judicial review as "inherently undemocratic," Stone aimed to "develop a theory of judicial review that could be compatible with a commitment to democracy."[205]

Less than a year later, Lusky helped draft the ABA Special Committee on the Bill of Rights' friend-of-the-court brief in *Minersville School District v. Gobitis*.[206] The litigation was brought by the parents of William and Lillian Gobitas (misspelled Gobitis by the Court), who were expelled from their elementary school for refusing to salute the flag.[207] The Gobitases questioned a local board of education's requirement that all pupils participate in a daily ceremony of saluting the national flag while reciting the Pledge of Allegiance to it "and to the Republic for which it stands; one Nation indivisible, with liberty and justice for all."[208] As Jehovah's Witnesses, the Gobitas children were raised to believe that "such a gesture of respect for the flag was forbidden by command of [S]cripture."[209]

Notably, the Pledge of Allegiance was composed in 1892 to define and protect "'true Americanism' against the rising tide of southern and eastern European immigrants 'pouring over our country' in the early 20th century from 'races which we cannot assimilate without a lowering of our racial standard.'"[210] Francis Bellamy, who drafted the Pledge, wanted to "'mobilize the masses to support primary American

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[203] *Carolene Products Co.*, 304 U.S. at 152.

[204] LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 20 (1996).

[205] HORWITZ, *supra* note 19, at 78.

[206] Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1955 (2004).

[207] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591 (1940).

[208] *Id.*

[209] *Id.* at 591-92.

[210] Christopher Petrella, *The Ugly History of the Pledge of Allegiance—and Why It Matters*, WASH. POST (Nov. 3, 1917), https://www.washingtonpost.com/news/made-by-history/wp/2017/11/03/the-ugly-history-of-the-pledge-of-allegiance-and-why-it-matters/.

doctrines' by warding off internal enemies hostile to 'true Americanism' . . . to consolidate white Anglo-Saxon Protestant American values that the white mainstream perceived as under siege."[211] In the late 1920s, states began requiring the recitation of the Pledge in schools around the country.[212] By the time *Gobitis* was argued, the U.S. Supreme Court had already "upheld state court decisions validating compulsory flag-salute laws four times."[213]

For Lusky, *Gobitis* was an opportunity to promote the democratic vision embedded in Footnote Four. The ABA brief was thus carefully crafted, concluding that "the compulsory flag salute violated the children's free exercise of religion and individual liberty."[214] As Richard Danzig writes, "Gobitis' lawyers saw [the] case as a conflict between the individual's right of free exercise of religion and the secular authority's power to coerce conduct."[215] Seeking to bring the case within the promise of Footnote Four, the ABA brief thus focused on the difference between justifying democracy by reference to majoritarian rule and embracing a more substantive definition of democracy. As the brief stated:

> The philosophy of free institutions is now being subjected to the most severe test it has ever undergone. Advocates of totalitarian government point to the speed and efficiency with which such systems are administered and assert that democracy can offer nothing to outweigh these advantages. The answer is to be found in the value of certain basic individual rights and the assurance afforded by free institutions that these shall not be required to yield to majority pressure no matter how overwhelming.[216]

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[211] *Id.* Bellamy was "a former pastor of Boston's Bethany Baptist Church," who was asked by *Youth's Companion* (a children's magazine) "to fashion a patriotic program for schools . . . to commemorate the 400th anniversary of Christopher Columbus's 'arrival in America' by 'raising the U.S. Flag over every public school from the Atlantic to the Pacific.'" *Id.* The words "under God" were added in 1954 to ward off "godless Communism." *Id.*

[212] *Id. See also* Jennifer Jacob Henderson, *The Flag Salute before Gobitis and Barnette*, 47 J. CHURCH & STATE 747, 750 (2005).

[213] Urofsky, *supra* note 186, at 188.

[214] SNYDER, *supra* note 18, at 352.

[215] Danzig, *supra* note 26, at 680.

[216] SNYDER, *supra* note 18, at 352.

The strength of American democracy was its commitment to the protection of individual rights and liberties against majoritarian will and power.

Chief Justice Hughes saw matters differently; as did Frankfurter, whose "moving statement at conference on the role of the public education in instilling love of country in our pluralist society" convinced Hughes to assign the case to him.[217] Reformulating the issue as a matter involving the appropriate institutional role of the Court (not the protection of First Amendment rights against tyranny of the majority),[218] Frankfurter focused on judicial restraint. "Conscientious scruples," do not "relieve[] the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs," Frankfurter began.[219] "Religious convictions" did not release citizens "from the discharge of political responsibilities."[220] Elected legislatures (and boards of education) were tasked with determining the balance between particular values and majoritarian norms, not the Court. As Frankfurter put it:

> It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances. So to hold would, in effect, make us the school board for the country. That authority has not been given to this Court, nor should we assume it.[221]

Rejecting Footnote Four's substantive ideal of democracy, Frankfurter declared that it was not the Court's role to mediate the plurality of identities, viewpoints, and values that characterized American society.[222]

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[217] *Id.* at 352-53.

[218] Danzig, *supra* note 26, at 682. *See also* Urofsky, *supra* note 186, at 190 (noting that "Frankfurter paid practically no attention to the Gobitis' claim that First Amendment rights of free exercise of religion had been violated, and in a nominal bow to balancing, found national unity a far more pressing matter").

[219] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 594 (1940).

[220] *Id.* at 594-95.

[221] *Id.* at 598.

[222] *See, e.g.*, SNYDER, *supra* note 18, at 361 ("His *Gobitis* opinion reflected Frankfurter's beliefs in a limited policy-making rule for the judiciary.").

Frankfurter's judicial restraint was intertwined with a deep commitment to the liberal separation of the public realm of politics and the private realm of identity, and a faith in assimilation. As Michael Parrish notes, Frankfurter "believed deeply in the public schools as nurseries of social cohesion and in the melting pot and assimilation as the only viable outcome for the nation's ethnic and religious diversity."[223] Others commented that an obvious thread connected Frankfurter's decision in *Gobitis* to his elementary school teacher's insistence that in America one should speak English.[224]

Viewed through Jewish-American history lenses, Frankfurter's decision reached deeper. With Nazism in Europe, Frankfurter was not only asserting a place in America to all individuals, irrespective of ethnic origin, or religious affiliation, so long as they shed their individual differences, but also reaffirming his loyalty to his adopted country over his ethnic identity.[225] As Frankfurter saw it, to dwell on or protect individual (or even group) beliefs against the expressed will of the majority was disloyal as a social and legal matter. On New Year's Day 1940, only a few months before the oral argument in *Gobitis*, Frankfurter wrote to Roosevelt explaining why loyalty to one's country was so important to him:

> Not even you can quite feel what this country means to a man like me, who was brought here as an eager sensitive lad of twelve . . . from the moment we landed on Manhattan I knew, with the sure instinct of a child, that this was my native spiritual home. I began to read English avidly, and very soon Lincoln became my hero.[226]

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[223] Parrish, *supra* note 145, at 56; *see also* Stolzenberg, *supra* note 28.

[224] SNYDER, *supra* note 18, at 353; BURT, *supra* note 21, at 42.

[225] Edward Purcell suggested a similar connection between Frankfurter's eagerness to assimilate and Frankfurter's negative reaction to Brandeis's decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), noting that Frankfurter's reaction was "both personal and idiosyncratic for another, more speculative, reason. At the core of his values and self-image lay a deep ambivalence about the fact that he was Jewish. He harbored an intense desire to assimilate, to embrace the culture of the Anglo-Saxon Protestant elite, and to become—and to be considered—a true and authentic 'American.'" PURCELL, *supra* note 117, at 212. According to Purcell, by rejecting *Erie*, Frankfurter sought to distance himself from Brandeis, "a Jew closely linked with Zionism, and identif[y] him[self] with near perfect and 'Progressive' embodiments of traditional, established. upper-class, old-family, Anglo-Saxon Protestant America." *Id.*

[226] SNYDER, *supra* note 18, at 348.

Majoritarianism and loyalty were joined at the root.[227] "National unity is the basis of national security," Frankfurter stressed in *Gobitis*;[228] he then elaborated: "The ultimate foundation of a free society is the binding tie of cohesive sentiment. . . . 'We live by symbols.' The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution."[229] National unity required a commitment to majoritarian symbols and values.

Lest one forgets, Frankfurter was an advocate for civil rights. Back in the late 1910s, Frankfurter joined with others to publish a "Report upon the Illegal Practices of the United States Department of Justice," addressing abuses of the Espionage Act; he accepted an invitation to join the newly formed American Civil Liberties Union shortly thereafter.[230] In 1927, he was chief among Progressive jurists who tirelessly attempted to prevent the execution of Nicola Sacco and Bartolomeo Vanzetti, the Italian anarchists who, as a remnant of the Red Scare of post-World War I, were convicted of robbery and murder in Braintree, Massachusetts, based on very sketchy evidence.[231] Yet, when asked as a justice to uphold individual (and group) beliefs against majoritarian culture and rule, Frankfurter balked. If the Gobitas family was dissatisfied, his decision concluded, they could "fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies."[232]

As Brad Snyder writes, "several people close to Frankfurter were horrified by his opinion."[233] Frankfurter's law clerks were so shocked that they declared the decision "the end of our Justice's role on the Court."[234] Justice Stone, who wrote the only dissent in *Gobitis*, charged that "the flag salute violated both freedom of speech and free

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[227] *Id.* at 353 (suggesting that during the conference on *Gobitis*, Frankfurter reiterated what he wrote to Roosevelt, leading Chief Justice Hughes to assign him the responsibility of writing the opinion).

[228] Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 595 (1940).

[229] *Id.* at 596.

[230] Lash, *supra* note 44, at 31.

[231] SNYDER, *supra* note 18, at 160-86.

[232] *Gobitis*, 310 U.S. at 600; *see also* SNYDER, *supra* note 18, at 356 (noting that, according to Frankfurter, "[i]f the parents did not like what the school was doing . . . the solution was not judicial intervention but resort to the democratic political process").

[233] SNYDER, *supra* note 18, at 359

[234] *Id.*; *see also* Lash, *supra* note 44, at 69-70 (describing Harold Laski's and Benjamin Cohen's negative reactions).

exercise of religion."[235] As Stone saw it, Frankfurter's opinion failed to follow the spirit of Footnote Four.[236] Stone criticized Frankfurter's decision, stating that "there are other ways to teach loyalty and patriotism which are the sources of national unity, than by compelling the pupil to affirm that which he does not believe and by commanding a form of affirmance which violates his religious convictions[.]"[237] Even Eleanor Roosevelt felt the need to say something. A few weeks after the decision was announced, she told Frankfurter that "there seemed to be something wrong with an opinion that forced little children to salute a flag when such a ceremony was repugnant to their conscience. She feared the decision would generate intolerance, especially in a period of rising hysteria."[238]

Despite his colleagues' and friends' reactions, Frankfurter would not budge. As Melvin Urofsky writes, "in the weeks following the decision, there had been hundreds of attacks on Witnesses, especially in small towns and rural areas, and this pattern continued for at least two years."[239] But Frankfurter would not change course or even reevaluate his commitments. Two years after *Gobitis*, in *Schneiderman v. United States*,[240] Frankfurter voted to revoke Schneiderman's "naturalized citizenship on the grounds that he was an active Communist party member when naturalized," a membership that the government described as "necessarily inconsistent" with his Naturalization Oath of Allegiance.[241] While Frankfurter did not write an opinion, his diary included a description of the case conference:

> I am saying what I am going to say because perhaps this case arouses in me feelings that could not be entertained by anyone else around this table. It is well known that a convert is more zealous than one born to the faith. None of you has had the experience that I have had with

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[235] SNYDER, *supra* note 18, at 356.

[236] Danzig, *supra* note 26, at 687.

[237] *Gobitis*, 310 U.S. at 603-04 (Stone, J., dissenting).

[238] Lash, *supra* note 44, at 70.

[239] Melvin I. Urofsky, *William O. Douglas and Felix Frankfurter: Ideology and Personality on the Supreme Court*, 24 THE HIST. TCHR. 7, 11. *See also* Justin Driver, *The Greater Talker of His Time*, THE ATLANTIC, Aug. 12, 2022 (noting that the "misbegotten decision provoked violent attacks against Jehovah's Witnesses across the nation and elicited scorn from journalists and academics alike").

[240] 320 U.S. 118 (1943).

[241] BURT, *supra* note 21, at 38.

> reference to the American citizenship . . . As one who has no ties with any formal religion, perhaps the feelings that underlie religious forms for me run into intensification of my feelings about American citizenship.[242]

Loyalty to a country superseded any concern for diverse values and opinions. Just as Frankfurter rejected particularism as a child, shedding old religious loyalties, he expected Schneiderman to have left the Communist Party before he became an American citizen.[243]

Seven justices joined Frankfurter in *Gobitis*; two years later, however, the liberal side of the Court began embracing a more substantive vision of democracy. Rather than viewing democracy as a commitment to majoritarian rule, they developed a concept of democracy that was grounded in the protection of minorities against majoritarian power. In *Schneiderman*, five justices rejected the federal government's attempt to denaturalize Schneiderman.[244] Justice Murphy delivered the opinion of the Court, joined by Justices Black, Reed, Douglas, and Rutledge.[245]

A week before the decision in *Schneiderman* was announced, in *West Virginia State Board of Education v. Barnette*,[246] a similar majority (Justice Jackson joined by Stone, Black, Douglas, Murphy, and Rutledge) overruled *Gobitis*.[247] Justice Jackson wrote the majority opinion, explaining: "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."[248] Then, reframing the flag-salute controversy as analogous to issues involving freedom of speech,[249] Jackson elaborated: "One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they

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[242] *Id.* at 40-41.

[243] *Id.* at 42.

[244] *Schneiderman*, 320 U.S. at 161.

[245] *Id.*

[246] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 638 (1943).

[247] A year earlier, in *Jones v. Opelika*, 316 U.S. 584 (1942), Murphy, Black, and Douglas had already indicated that they were wrong in *Gobitis*. Urofsky, *supra* note 239, at 10-11.

[248] *Barnette*, 319 U.S. at 638.

[249] Danzig, *supra* note 26, at 711.

depend on the outcome of no elections."[250] As the majority opinion saw it, these were not issues left to the legislative or executive branches; the Court's role was indeed to safeguard the "individual idiosyncrasies" that Frankfurter refused to protect in *Gobitis*.[251]

Douglas and Black, who voted with Frankfurter in *Gobitis*, clarified why they changed their position, offering a direct assault on Frankfurter's focus on loyalty. As they explained:

> Words uttered under coercion are proof of loyalty to nothing but self-interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest toleration of conflicting viewpoints consistent with a society of free men."[252]

Against European totalitarianism, Douglas and Black anchored the legitimacy of democratic regimes not in majoritarianism but in a commitment to civil rights and liberties.

Frankfurter wrote the only dissent in *Barnette*, again stressing his commitment to majoritarian rule and culture. Refusing to see the issue differently than the way he framed it in *Gobitis*, Frankfurter's decision began with a personal statement: "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."[253] But even the personal statement was equivocal. Frankfurter did not explicitly state that he was Jewish; rather, he belonged to a "vilified and persecuted minority."[254] As his statement continued, his rejection of pluralism became more pronounced. Responding to calls he received suggesting that, as a Jew, he should protect minorities' rights,[255] Frankfurter stressed that the solution to the minority problem (and the Jewish one) demanded a trust in majoritarian democracy. "As a member of this Court" Frankfurter wrote:

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[250] *Barnette*, 319 U.S. at 638.

[251] *See* discussion *supra* circa notes 218-232.

[252] *Barnette*, 319 U.S. at 644.

[253] *Id.* at 646.

[254] *Id.*

[255] Lash, *supra* note 44, at 253-54.

> I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. . . . I cannot bring my mind to believe that the 'liberty' secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen. . . . Any person may therefore believe or disbelieve what he pleases. He may practice what he will in his own house of worship or publicly within the limits of public order. But the lawmaking authority is not circumscribed by the variety of religious beliefs, otherwise the constitutional guaranty would be not a protection of the free exercise of religion but a denial of the exercise of legislation.[256]

Individuals were free to practice their religion in the private sphere, but in public, majoritarian culture and norms ruled.

In a letter to Justice Jackson, Frankfurter explained that his dissent in *Barnette* was "the expression of my credo regarding the function of this Court in invalidating legislation."[257] The First Amendment granted "freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma," Frankfurter similarly wrote in his dissent.[258] It provoked Justice Douglas's harsh criticism: "The Frankfurter philosophy was finally exposed in that dissent: he held that although free exercise of religion was guaranteed by the First and Fourteenth Amendments, the legislature could nonetheless regulate it by invoking the concept of due process, provided they stayed within reasonable limits."[259] And five decades later, Melvin Urofsky wrote: "The tragedy of Mr. Justice Frankfurter was that he became a prisoner of an idea—judicial restraint—and failed to

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[256] *Barnette*, 319 U.S. at 647, 654.

[257] Urofsky, *supra* note 186, at 193.

[258] *Barnette*, 319 U.S. at 653.

[259] WILLIAM O. DOUGLAS, THE COURT YEARS, 1939-1975, at 45 (1981); *see also* Urofsky, *supra* note 186, at 193.

distinguish between the regulation of economic and property rights and limitations upon individual liberties."[260]

Frankfurter's dissenting and concurring decisions in the following years continued to reflect his commitment to judicial restraint and assimilation. For one, in 1944, he joined the Court in upholding the internment of Japanese Americans, stressing that the issue was one for elected officials to determine, not the courts.[261] "To find that the Constitution does not forbid the military measures now complained of,"—Frankfurter felt the need to emphasize in his concurring opinion in *Korematsu v. United States*—"does not carry with it approval of that which Congress and the Executive did. That is their business, not ours."[262] In 1949, he directly attacked Footnote Four, stressing that "the *Carolene* footnote did not purport to announce any new doctrine . . . . It certainly did not assert a presumption of invalidity against all legislation touching matters related to liberties protected by the Bill of Rights and the Fourteenth Amendment."[263] And in 1951, in *Dennis v. United States*,[264] Frankfurter concurred in upholding the conviction of top leaders of the American Communist Party for advocating the violent overthrow of the U.S. government.[265] Against the legacy of his heroes, Holmes and Brandeis, Frankfurter extended judicial deference to legislation affecting freedom of speech.[266] "History teaches," Frankfurter's concurrence in *Dennis* stressed, "that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures."[267]

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[260] Urofsky, *supra* note 186, at 195.

[261] Korematsu v. United States, 323 U.S. 214, 225 (1944) (Frankfurter, J., concurring).

[262] *Id.*

[263] Kovacs v. Cooper, 336 U.S. 77, 91 (1949) (Frankfurter, J., concurring); *see also* Cover, *supra* note 134, at 1290.

[264] 341 U.S. 494 (1951).

[265] *Id.* at 517.

[266] HORWITZ, *supra* note 19, at 58-59 (noting that Frankfurter substituted "a balancing test, weighing the government's interest in suppressing speech against the individual speaker's First Amendment interest" for Holmes's and Brandeis's "clear and present danger" rule. The balancing test "gave the government much more leeway to enact measures repressive of political speech.").

[267] *Dennis*, 341 U.S. at 525 (Frankfurter, J., concurring). To understand the rift between Frankfurter and his liberal colleagues, it is worth comparing Frankfurter's statement in *Dennis* to a statement Justice Douglas delivered in *Bell v. Maryland*,

"Frankfurter's opinion in *Dennis*, read in light of history," Melvin Urofsky pointedly wrote, "reflects more of judicial abdication of responsibility than measured deference and restraint."[268]

Notably, Frankfurter's reluctance to address pluralism reached deeper than his commitment to judicial restraint. Often, he used the rhetoric of judicial restraint as a justification for upholding laws, but on several occasions, evading pluralism required striking down legislative actions. Two such cases involved programs that allowed for religious education (or release for such education) in public schools: *McCollum v. Board of Education*[269] and *Zorach v. Clauson*.[270] In both, Frankfurter described the arrangements as being

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378 U.S. 226 (1964), a case involving the conviction for trespass of Black students who engaged in a sit-in demonstration at a Baltimore restaurant. Because, prior to disposition of the case on writ of certiorari, the State of Maryland enacted laws "that abolish the crime of which petitioners were convicted," *id*. at 228, Justice Brennan, writing for the court, vacated and reversed the judgments of the Maryland Court of Appeals, remanding the case to the latter "so that it may consider the effect of the supervening change in state law." *Id.* Douglas wrote a concurring opinion, sharply criticizing the court's refusal to address the issue:

> The whole Nation has to face the issue; Congress is conscientiously considering it; some municipalities have had to make it their first order of concern; law enforcement officials are deeply implicated, North as well as South; the question is at the root of demonstrations, unrest, riots, and violence in various areas. The issue, in other words, consumes the public attention. Yet we stand mute, avoiding decision of the basic issue by an obvious pretense . . . [W]e leave resolution of the conflict to others, when, if our voice were heard, the issues for the Congress and for the public would become clear and precise. The Court was created to sit in troubled times, as well as in peaceful days.

Id. at 242-43.

[268] Urofsky, *supra* note 186, at 203.

[269] 333 U.S. 203, 212-32 (1948) (Frankfurter, J., concurring). *McCollum* involved a First and Fourteenth Amendment challenge to a decision of the Champagne Board of Education to allow "religious teachers, employed by private religious groups . . . to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there, for a period of thirty minutes, substitute their religious teaching for the secular education provided under the compulsory education law." *Id.* at 205.

[270] 343 U.S. 306, 320-23 (1952) (Frankfurter, J., dissenting). *Zorach* involved a "New York City . . . program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises." *Id.* at 308.

unconstitutional.[271] In both, his message was consistent with cases in which he exercised restraint—the majoritarian secular culture need not, in fact could not, accommodate particular beliefs (or different religious cultures more broadly).[272] In 1961, similar assumptions led Frankfurter to uphold Sunday blue laws. Rejecting a suggestion made by Orthodox Jews, among others, that one-day-a-week laws could effectively substitute for Sunday laws, Frankfurter wrote:

> [O]ne day a week laws do not accomplish all that is accomplished by Sunday laws. They provide only a periodic physical rest, not that atmosphere of entire community repose which Sunday has traditionally brought and which, a legislature might reasonably believe, is necessary to the welfare of those who, for many generations have been accustomed to its recuperative effects.[273]

The trust in majoritarian rule was anchored in an endorsement of majoritarian culture.[274] Indeed, even his decision to join the Court's unanimous opinion in *Brown v. Board of Education*[275] reflected Frankfurter's belief that all individuals—irrespective of their background—should assimilate into the dominant American culture.[276]

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[271] *See McCollum*, 333 U.S. at 231 (Frankfurter, J., concurring) ("'The great American principle of eternal separation'—Elihu Root's phrase bears repetition—is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity."); *Zorach*, 343 U.S. at 321 ("The pith of the case is that formalized religious instruction is substituted for other school activity which those who do not participate in the released time program are compelled to attend".).

[272] *See also* Stolzenberg, *supra* note 28, at 829 (arguing that *McCollum*, perhaps more than *Gobitis* and *Barnette*, supports the suggestion that Frankfurter's "endorsement of judicial restraint was actually *driven* by his personal approbation of state-sponsored assimilation rather than the other way around").

[273] McGowan v. Maryland, 366 U.S. 420, 506-07 (1961) (Frankfurter, J., concurring).

[274] Notably, at least one study suggested that Frankfurter did not exercise judicial restraint in cases that involved economic questions, specifically labor and business regulation. *See generally* Harold J. Spaeth, *The Judicial Restraint of Mr. Justice Frankfurter—Myth or Reality*, 8 MIDWEST J. POL. SCI. 22, 23 (1964).

[275] 347 U.S. 483 (1954).

[276] *See* Stolzenberg, *supra* note 28, at 835 ("Although centrally concerned with the meaning of racial equality, *Brown* was also a case about the nature, and legitimacy, of acculturation conducted via the public schools. Both proponents and critics of

Using the rhetoric of judicial restraint, Frankfurter refused to defend what he viewed perhaps as individual idiosyncrasies; in fact, he refused to consider the Court's role in protecting the multiplicity of values, identities, and viewpoints that characterized modern American society. As Louis Jaffe said at the time, Frankfurter was "forever disposing of issues by assigning their disposition to some other sphere of competence."[277] Alexander Bickel, the clerk who worked with Frankfurter on *Brown*,[278] similarly commented that Frankfurter "devised all these jurisdictional ways of withdrawing from problems that were insoluble or that were overly difficult."[279] Concerned about antisemitism in Europe and the United States, Frankfurter devised a jurisprudence that allowed him to evade the question that troubled legal scholars at least since the turn of the twentieth century: in a pluralistic society, are all values, opinions, and identities valid?

IV. EPILOGUE

At least since Oliver Wendell Holmes challenged the description of law as a body of natural and neutral rules, jurists struggled with the modernist dilemma. On the one hand, to allow the state to exercise power over diverse groups risked imposing one's own concededly partial interests and beliefs in the name of a public good. On the other hand, the alternative of deferring to groups risked moral relativism, maybe even nihilism.

Faced with diverse social and cultural interests and hence with a variety of visions of what law ought, as a social and political matter, to be, some jurists adopted one system of beliefs and treated it as the primary guiding light in their analysis of law. Many Progressives and New Dealers, for example, assumed the existence of correct answers to policy questions and the inability of conservative judges to reach them.[280] Similarly, the idea of shared fundamental values deeply influenced the decisions of the Warren Court. But by midcentury, the growing emphasis on ethnic and cultural differences gradually eroded

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school integration perceived it as a method of assimilating students into the public culture.").

[277] Louis L. Jaffe, *The Judicial Universe of Mr. Justice Frankfurter*, 62 HARV. L. REV. 357, 359 (1949).

[278] SNYDER, *supra* note 18, at 572.

[279] Lash, *supra* note 44, at 82 (quoting Bickel).

[280] *See, e.g.*, TSUK MITCHELL, *supra* note 114, at 44-47.

Progressives' and New Dealers' trust in universal answers and, in so doing, placed the modernist dilemma at the center of social, political, and legal debates.

The academic reaction to the Warren Court and the civil rights movement illustrated how intensely scholars experienced this dilemma. In certain circles, Horace Kallen's ideal of cultural pluralism rapidly gained prominence. Writing in 1950, Oscar Handlin, for example, celebrated the hyphenated Jewish-American, reassuring American Jews that "their support of Israel did not imply disloyalty to America."[281] According to Handlin, the American ideal was one of multiple loyalties, of expansive national identity.[282] In 1956, Kallen himself, while reassessing his cultural pluralist ideal, labeled it "the American ideal."[283] As Kallen saw it, this ideal "was embodied in four revolutionary theses set forth in the Declaration of Independence": "that all men are created equal"; "that 'life, liberty, and the pursuit of happiness' are every man's unalienable rights"; that the government has a duty to "secure these rights"; and "that when government neglects or fails to perform the services for which it was devised, the people who instituted the government may 'alter or abolish it' and replace it with a 'new government.'"[284] While Kallen clearly recognized that these ideals were not always fulfilled, the successes of the civil rights movement sustained his belief that they would eventually be realized.[285]

Other scholars pushed the pendulum in the other direction. Across the spectrum of academic literature, the 1950s saw the prioritization of form and procedure over the discussion of values. As Morton Horwitz has written, "from analytical philosophy to legal positivism and behaviorism in the social science to New Criticism in literature, postwar academic thought sought to repress politics by devoting its

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[281] EDWARD S. SHAPIRO, WE ARE MANY: REFLECTIONS ON AMERICAN JEWISH HISTORY AND IDENTITY 45-46 (2005).

[282] Oscar Handlin, *Do Israel Ties Conflict with U.S. Citizenship? America Recognizes Diverse Loyalties*, COMMENTARY (Mar. 1950) ("By the nature of its heritage America is committed; only by denying its own past could it turn away from the multi-cultural pattern which has thus far enriched it. That is not likely to happen.").

[283] Ratner, *supra* note 59, at 53.

[284] *Id.* at 53-54.

[285] *Id. See also* Horace M. Kallen, *Cultural Pluralism and the American Ideal: An Essay in Social Philosophy* (1956).

energies to form instead of substance and to technical accomplishments at the expense of social and political insight."[286]

In law, the turn to process reinvigorated Frankfurter's jurisprudential approach as a new cohort of legal scholars, including Alexander Bickel, Herbert Wechsler, Harry Wellington, Albert Sacks, and Henry Hart, sought to find institutional and conceptual frameworks that would promote democracy by ensuring judicial restraint.[287] Against the Warren Court's substantive conception of democracy, that is, the notion that the Court's role was to protect minority groups against the tyranny of the majority, these scholars reintroduced Frankfurter's conception of democracy. Relying on the newly developed political theory of interest group pluralism, these scholars described the legislature as the governmental body best situated to make policy choices that would accommodate the needs of diverse interest groups, while the role of the judiciary was limited to offering guidance to the legislature, specifically about appropriate processes, and to guaranteeing that legislative processes would not unfairly exclude certain groups, specifically Black Americans.[288] As the following elaborates, these scholars' analysis of the Court's limited role helped shift the attention of the legal community from concerns about the rights of minority groups to apprehension about the Court's power of judicial review—from substantive evaluations of power and vulnerability to obsession with process and procedure.

Take, for example, Herbert Wechsler's search for neutral principles that could justify *Brown v. Board of Education*. Finding it difficult to accept that "racial segregation is, in principle, a denial of equality to the minority against whom it is directed," Wechsler wrote:

> For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of the

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[286] HORWITZ, *supra* note 115, at 253.

[287] *See also* PURCELL, *supra* note 117, at 223 (noting that "[d]uring the 1950 the jurisprudence of institutional process came to dominate academic legal thought. One variant, emphasizing what its proponents called 'reasoned elaboration' and 'process jurisprudence,' was inspired by Frankfurter and associated with Harvard Law School").

[288] Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-war Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 13-16 (1999).

> freedom to associate, a denial that impinges in the same way on any groups or races that may be involved.[289]

Ironically, Wechsler was at a loss to provide a neutral principle for holding that "where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it . . . the Constitution demands that the claims for association should prevail[.]"[290] Still, he insisted that the freedom of association was a neutral principle while antidiscrimination could not serve this function. Freedom of association was neutral, because unlike the discourse of antidiscrimination, freedom of association did not require recognition of the unique experiences of Black Americans.[291]

In turn, Alexander Bickel viewed "judicial review [as] at least potentially a deviant institution in a democratic society"[292] (Bickel coined the term countermajoritarian difficulty). Bickel, who was described as "an inveterate confronter of orthodoxies—liberal or conservative,"[293] wanted the Court to abstain from addressing cases involving values:

> The Court is able to play its full role, as it did in the Segregation Cases, maintaining itself in the tension on which our society thrives, because at least in modern times it nearly always has three courses of action open to it: it may strike down legislation as inconsistent with principle; it may legitimate it; or it may do neither. When it does neither, it need not forsake its educational function, nor abandon principle. Indeed, very often it engages in a Socratic dialogue with the other institutions and with society as a whole concerning the necessity for this or that measure, for this or that compromise.[294]

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[289] Wechsler, *supra* note 45, at 33-34.

[290] *Id.* at 34.

[291] HORWITZ, *supra* note 115, at 265-68. On the significance of freedom of association to postwar jurisprudence, see also Tsuk Mitchell, *supra* note 29, at 201-04.

[292] Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 47 (1961).

[293] Abraham Chayes, *Alexander M. Bickel: A Personal Remembrance*, 88 HARV. L. REV. 693, 694 (1975).

[294] Bickel, *supra* note 292, at 50.

As Gary Minda notes, "Bickel followed Wechsler's neutral principles theory to its logical conclusion . . . that the Supreme Court should stay out of 'social policy' adjudication altogether. By the early 1970s, Bickel embraced Burkean conservatism to justify limiting the role of the Court."[295]

Similarly, Harry Wellington argued that the Court should not impose constitutional constraints "whenever any organization or group performs a function of a sufficiently important public nature."[296] Only as "a last resort" could the Court strike down legislation to promote values that "most people in society desired in the long run."[297]

Finally, Henry Hart and Albert Sacks wanted to shift attention from the traditional emphasis on the common law to the role that legislation and regulation, as well as institutional structures, had in promoting social change. "The starting point of the response which human beings seem invariably to make to the basic conditions of human existence," Hart and Sacks explained, "is to recognize the fact of their interdependence with other human beings and the community of interest which grows out of it. So recognizing, people form themselves into groups for the protection and advancement of their common interests, or they accept membership in groups formed by others."[298] Given such multiplicity of groups in modern society, Hart and Sacks stressed:

> [S]ubstantive understandings or arrangements about how the members of an interdependent community are to conduct themselves in relation to each other and to the community necessarily imply the existence of what may be called constitutive or procedural understandings or arrangements about how questions in connection with arrangements of both types are to be settled. . . . These institutionalized procedures and the constitutive arrangements establishing and governing them are obviously more fundamental than the substantive arrangements in the structure of a society, if not in

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[295] MINDA, *supra* note 45, at 45; *see also id.* at 39 (noting that "Bickel thought that the Supreme Court could avoid adjudicating controversial issues, which raised essentially political questions, more appropriately resolved by the legislative and popular vote").

[296] Harry H. Wellington, *The Constitution, the Labor Union, and "Governmental Action*," 70 YALE L.J. 345, 374 (1961).

[297] Schiller, *supra* note 288, at 16.

[298] HART & SACKS, *supra* note 45, at 3.

> the realization of its ultimate aims, since they are at once the source of the substantive arrangements and the indispensable means of making them work effectively.[299]

Building upon the progressives' and legal realists' argument that adjudication involved policymaking, Hart and Sacks argued that adherence to procedure would allow judges to avoid making "subjective value decisions."[300] As Morton Horwitz pointedly noted, "the *Legal Process* materials symbolize the moment in post-war history at which the New Deal lawyers' conception of the 'common interest' came to be thoroughly transformed from one of substance to one of procedure."[301]

Rarely, discussions of this postwar turn to process note that, like Frankfurter, most of the scholars mentioned above were first- and second-generation Jewish Americans.[302] Such an omission has helped sustain a vision of legal theory as immune to the influences of cultural, social, and even personal interests. Yet, calling attention to jurists' cultural and religious background can only enrich our understanding of the development of American legal thought in the twentieth century. At the very least, I hope this Article demonstrated that Frankfurter's commitment to judicial restraint, indeed his faith in majoritarian democracy, was informed by his personal experiences as a first-generation Jewish American.

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[299] *Id.* at 3.

[300] MINDA, *supra* note 45, at 35.

[301] HORWITZ, *supra* note 115, at 255.

[302] For exceptions, see Stolzenberg, *supra* note 28; Schulman, *supra* note 31. Of course, not all writers associated with the legal process school were Jewish. For more on different scholars that can be associated with the legal process school, see David Wolitz, *Herbert Wechsler, Legal Process, and the Jurisprudential Roots of the Model Penal Code*, 51 TULSA L. REV. 633, 633 n.3 (2016).