

The Failed Idea of Judicial Restraint: A Brief Intellectual History

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SNYDER, BRAD. *Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment*. New York: W.W. Norton & Co., 2022.

This essay examines the intellectual history of the idea of judicial restraint, starting with the early debates among the US Constitution's founding generation. In the late nineteenth century, law professor James Bradley Thayer championed the concept and passed it on to his students and others, including Oliver Wendell Holmes Jr., Learned Hand, Louis Brandeis, and Felix Frankfurter, who modified and applied it based on the jurisprudential preoccupations of a different era. In a masterful account, Brad Snyder examines Justice Frankfurter's attempt to put the idea into practice. Although Frankfurter arguably made a mess of it, he passed the idea of judicial restraint on to Alexander Bickel and others. Today it remains a topic of much academic debate, while Supreme Court Justices occasionally give the idea lip service when it advances outcomes they desire.

I propose that the intellectual history of judicial restraint reflects the all-too-human inability to refrain from exercising power. The founders, focused on the need to mitigate the flaws of human nature in designing the executive and legislative branches, failed to sufficiently foresee how the same flaws would affect members of the judiciary. The failed idea of judicial restraint stands as the legacy of the founders' mistake.

INTRODUCTION

According to reviewer Jeffrey Rosen in the *New York Times* (Rosen 2022), the key lesson of Brad Snyder's biography of Felix Frankfurter is that the US Supreme Court and its members, through multiple eras, have regrettably failed to heed warnings against judicial activism. Justice Frankfurter presciently made such warnings during his tenure on the Court, but no one listened and look where we are now. On this account, the Court's failure to heed Frankfurter's admonishments left the country with the Roberts Court's exceedingly aggressive activism on numerous fronts, including but by no means limited to reversing *Roe v. Wade* (1973). As Rosen notes, Chief Justice Roberts, in his concurrence in *Dobbs v. Jackson Women's Health Organization* (2022), invoked Frankfurter's words on judicial restraint to argue for a slower approach to rolling back abortion rights. Others, of course, used the same concept to argue that the Court should not have disturbed that fifty-year-old precedent, just as critics half a century ago accused the Court of improper activism in announcing a constitutional right to abortion when it

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decided *Roe*. Judicial restraint is, in other words, a slippery admonition. Rosen, writing for a popular audience, understandably simplifies this debate in his review. The actual situation, as lawyers are so fond of saying, is much more complex.

Snyder, who has gone toe-to-toe with leading constitutional scholars such as Akhil Amar in discussing the import of his book (Amar 2022), is well aware of the complexity of drawing lessons based on Frankfurter's track record in attempting to implement judicial restraint while on the Court. Snyder's opus, coming in just a little short of one thousand pages, is gripping right through Frankfurter's last breath. A former baseball journalist, Snyder obviously acquired the writing talents to make anything—even that slow and boring game—interesting. In the highly energetic, intellectually lively, and hugely flawed Frankfurter, Snyder chose a topic of tremendous inherent interest. Snyder exploits that potential to its hilt. Several themes of vital contemporary importance weave through his narrative, including, as Snyder signals in his subtitle, Frankfurter's enormous influence in shaping the “liberal establishment” and its sorting mechanisms for selecting new generations of legal elites. But here I leave aside all those other fascinating themes to focus on the one Rosen highlighted in his *New York Times* review as the most important: the promise of judicial restraint. Where did Frankfurter acquire that idea, what form did it take in Frankfurter's judging, how did his attempts at judicial restraint play out in practice, and what truly is Frankfurter's legacy in this regard?

Before proceeding, a word about judicial restraint, the idea that judges should hold back, for whatever reasons, from interfering with the affairs of democracy—to the extent appropriate in context, which is a question subject to debate. The concept of judicial restraint has, of course, many aspects, ranging from the Court's self-imposed prudential doctrines about when it can hear cases, to constitutional limits on the Court's jurisdiction, to doctrines that stay the Court's hand in matters of foreign affairs and “political questions,” to varying levels of deference in standards of review, and much more. It often pertains to judicial review of legislative acts, but it can apply to executive acts too (Adler 1997, 763–64). The aspect of the idea that drove Frankfurter in the cases Snyder highlights primarily concerns the deference the Court should apply in deciding whether to invalidate state and federal legislation on constitutional grounds, though judicial restraint issues came up in Frankfurter's opinions in many other ways as well. In this essay I will focus on judicial restraint in the Court's evaluation of the constitutionality of legislation (state or federal), while recognizing that there are also many other aspects to the question. And, of course, as I will discuss below, the gorilla in the room is the question of in what contexts the Court should exercise restraint.

Judicial restraint must also be distinguished from the related concept of judicial supremacy, succinctly defined as the Court's claim “to say what the Constitution means, for themselves and for everyone else” (Whittington 2007, xi). 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 (Tushnet 2020, 243–46). It is the concept of judicial restraint that I am limiting myself to discussing here.¹

1. I am also aware that there is an important literature on judicial restraint in legal systems other than the United States, but unfortunately space constraints preclude me from venturing into it.

Consistent with this journal's focus, I take a historio-sociological approach to trace how the concept of judicial restraint developed through US constitutional history. I conclude by offering some thoughts about where that history leaves us today, suggesting that the founders committed an oversight when they designed the US Constitution without applying to the judicial branch their insights about the need to protect against the flaws in human nature when structuring government institutions.

THE FOUNDERS' VIEWS ABOUT THE JUDICIARY'S ROLE IN INVALIDATING UNCONSTITUTIONAL LAWS

Discussing what the US founders thought about judicial restraint presents something of a contradiction in terms: the concept of judicial restraint implies that judges have discretion in judging, which is not how eighteenth-century jurists tended to think about judges (Calabresi 2019, 1434–35). The more appropriate question is what the founders thought about the proper scope of judicial review. They left ambiguity on this because they did not squarely address the question in the Constitution's text. Scholars disagree about the prevailing view on judicial review of federal legislation among delegates at the 1787 Philadelphia Convention where they drafted the Constitution (Crosskey 1953, 976–1007; Kramer 2004, 75–76; Beeman 2009, 350). A review of the basic original sources suggests that the majority, though not all, of these delegates believed that the federal judiciary should engage in fulsome review of the constitutionality of both state and federal legislation.² As William Crosskey points out, however, that evidence comes from James Madison's very incomplete notes of the Convention, which he revised many decades later prior to their publication to promote his views about how the Constitution should be interpreted (Crosskey 1953, 1009–12). In all events, many questions about how the judiciary should interact with the elected branches remained unresolved (Kramer 2004, 9–14). As Larry Kramer points out (78), the more important question in understanding original views on judicial review is what the members of the public who debated the Constitution's ratification thought about the judiciary's proper role; the evidence shows that there was much disagreement on those questions (78–92).

In Virginia, for example, George Mason, who was a member of the Antifederalist camp that opposed the Constitution's ratification, worried that "the judicial branch was 'so constructed as to destroy the dearest rights of the community'" (Mayer 1995, 287). Another Antifederalist writing under the pen name Brutus noted the lack of any check on the members of the judiciary: "No errors they may commit can be corrected by any power above them"³ (Brutus 2003a, 309). Still other Antifederalists worried that

2. Delegates' remarks envisioning that the federal judiciary would review the constitutionality of legislation (Farrand 1996, 1:97, 1:109; 2:27, 2:74) outnumber the remarks of delegates who expressed skepticism or opposed judicial review (Farrand 1996, 2:76, 2:109, 2:298). Some of these discussions took place in connection with a proposal, which the delegates ultimately rejected, under which members of the federal judiciary and others would sit on a Council of Revision to review the constitutionality of legislation; even most of the delegates who opposed that plan supported the idea that the federal judiciary would eventually review the constitutionality of legislation when presented with a proper case raising such issues (Rakove 1997, 1057–60).

3. Brutus also predicted that the Court would destroy federalism by authorizing "the Congress to do any thing which in their judgment will tend to provide for the general welfare" (Brutus 2003b, 319).

the Constitution did not sufficiently preserve the right to trial by jury (Mayer 1995, 289–90). Under the founders' theory of government, all aspects of government derived their authority from the consent of "the People," and placing the authority to interpret law solely in the hands of the judiciary arguably contravened that precept.

On the other hand, the Federalists, who were the group supporting the Constitution's ratification, rejected these concerns. Alexander Hamilton, a prominent Federalist who had been at the Convention, cogently summarized their views in *Federalist No. 78*. The judiciary, as he so famously predicted, "will always be the least dangerous branch to the political rights of the constitution, because it will be least in a capacity to annoy or injure them" (Hamilton, Jay, and Madison 2001, 402). It also would be "beyond comparison the weakest of the three departments of power" (402). As to the Antifederalists' concern that the power of the judiciary to declare acts of another branch void would render it "superior to the one whose acts may be declared void," Hamilton expressed the view often expressed at the Convention that the biggest dangers to the balance of powers in government came from legislatures, in which "the representatives of the people" might "substitute their *will* to that of their constituents" (403–04, emphasis in original). The judiciary would be the branch to ride to the rescue in such situations, serving as an "intermediate body" between the People and the legislature to, "among other things, . . . keep the latter within the limits assigned to their authority" (404). Hamilton made no bones about his view that a core duty of the judiciary must be to declare all acts "contrary to the manifest tenor of the constitution void" (403).

Hamilton did not worry about judges overstepping their authority. The Constitution's article III, section 1 granted life tenure to federal judges on "good Behavior," even though the delegates had viewed anything approaching life tenure as absolutely out of the question for the officers of any other government branch. Hamilton defended this decision, arguing that "nothing will contribute so much as this to that independent spirit in the judges, which must be essential to the faithful performance of so arduous a duty" (405). Hamilton further addressed the argument that judges might substitute their "will" for their judgment—in other words, substitute their preferred outcomes for what the Constitution required. What he responded, rather blithely, was that such arguments amounted to a claim that there could be no judges separate from legislators (405). In other words, judges who substituted their preferred policies for what the Constitution required were no longer acting as judges but had instead become legislators.

Hamilton's position flowed from his view of how judges performed their duty. He envisioned judges being strictly bound by rules and precedents that would "serve to define and point out their duty in every particular case" (407). In short, Hamilton, who was an excellent lawyer himself, was bullish about the role federal judges would play in upholding the Constitution without acquiring tendencies to step outside the appropriate limits of their tightly constricted interpretive duty in each particular case.

This prediction turned out to be overblown. The Court has policed the line between state and national legislative authority, though of course critics disagree about whether it has done so properly. The Court thus did not run amok to the degree Brutus forecast, although, as I argue here, the founders would have benefited from paying more heed to his observations that "[e]very body of men invested with office are tenacious of power" and will seek to "extend their power," leading the members of the judiciary over time to "enlarge the sphere of their own authority" (Brutus 2003a, 313–14).

This optimism is notable, because as to the other branches of government the founders spent a great deal of time focusing on what they saw as inherent flaws in human nature, including the will to power, the inability to separate one's views from one's self-interest, and the tendency to unreflectively assume that one's judgment reflects the public interest rather than one's own political commitments (Carle 2022, 548–49). Their fundamental goal in drafting the Constitution was to design government so as to curtail the dangers arising from these human flaws (560–64). They sought to design a structure that checked the powers of the branches of government, both horizontally through separation of powers and vertically through federalism (560–61). But they largely disregarded the potential for the Court to grow too powerful. This makes sense given their historical context, which had demonstrated the dangers of both excessive executive power—as in the colonists' nemesis, King George III—and potentially inappropriate legislative actions—as in the English Parliament's legislation taxing the colonies and the pressure the 1786 Shay's Rebellion in Massachusetts had put on that state legislature to annul private property rights (Beeman 2009, 17). The judicial branch, to the founders, was going to be the levelheaded one, which would protect individual rights, including the right to private property the founders so venerated (Carle 2022, 551–55). This assumption, I will suggest, turned out to be misguided oversight.

THE DEBATE ABOUT FEDERAL JUDICIAL POWER IN THE EARLY NATIONAL PERIOD

The Antifederalists' concerns about the power of the judiciary continued to grow after the Constitution's ratification, including in Jefferson's later views as he campaigned for president in the 1800 election against the Federalists. Historian David Mayer traces the evolution of Jefferson's thought. In the 1780s, Jefferson had placed “great confidence” in the judiciary and supported judicial review (Mayer 1995, 257, 261). But even at this point, Jefferson raised some concerns about judges' power, including their possible partiality, tendency to become too devoted to party, and susceptibility to improper influences introduced through the close relationships they were likely to form with members of the executive or legislatures (262). All in all, Jefferson preferred juries as interpreters of law because they were closer to the People (262).

Jefferson battled with Federalist President John Adams over the Alien and Sedition Acts of 1798. Those statutes were enacted during a period of high political tension in the United States arising from the war then underway between the French and the English. Jefferson angrily watched Federalist judges uphold these laws and impose sentences for seditious libel against Adams's opponents—who were, conversely, Jefferson supporters (263). He began to oppose the doctrine of judicial review as depriving the People of control over their government, arguing that the lack of an elective check on judges unlike all other members of government was “very dangerous” and would “place us under the despotism of an oligarchy” (265, 271, 280). He even proposed a constitutional amendment to limit the tenure of judges, although he did not push it very hard (266, 276).

Jefferson particularly disliked his Federalist cousin, Chief Justice John Marshall, and wrote in bitter criticism of Marshall's 1803 opinion in *Marbury v. Madison*, rightly pointing out that the Chief Justice had "travel[ed] out of his case" (in other words, made rulings beyond those required to reach judgment) in ways that flagrantly aggrandized the Court's powers (272). And, of course, as every student of US constitutional law knows, *Marbury* did exactly that in boldly announcing the Court's power to review the constitutionality of federal statutes and nondiscretionary executive action, all as part of its superior power to "say what the law is" (*Marbury v. Madison* 1803, 177). By the 1820s, after he had retired from politics, Jefferson was referring to the federal judiciary as a "corps of sappers and miners" that was undermining federalism and taking power away from the People (Mayer 1995, 257, 277).

JUDICIAL ACTIVISM IN THE LATE NINETEENTH CENTURY

After *Marbury v. Madison*, the Court avoided declaring a federal statute unconstitutional for more than fifty years, in part by interpreting statutes so as to avoid unconstitutional meanings (Thayer 1893, 9–10; Whittington 2019, 66). It did, on the other hand, invalidate state and local laws on a regular basis (Congressional Research Service 2023).⁴ That track record ended, however, as trouble over the expansion of the slave power grew, culminating in Chief Justice Roger Taney's incendiary opinion in *Dred Scott v. Sandford* (1857). In that opinion Taney not only proclaimed that persons of African descent had no rights that the Court was bound to respect, but also struck down as unconstitutional the Missouri Compromise of 1820, which had sought to avert a national showdown on slavery's expansion.

Soon after came the Civil War, followed by the Reconstruction era. In that period, Congress passed and the states ratified constitutional amendments that gave Congress new powers to enforce civil rights protections in the United States (Carle 2023, 742–60). The Court, however, struck down key provisions of statutes Congress passed under those enforcement powers (770–85). At the end of the federal Reconstruction period in 1873, the Court continued in this vein, in cases including *The Slaughterhouse Cases* in 1873,⁵ which drastically narrowed the reach of the Fourteenth Amendment,⁶ and *The Civil Rights Cases* in 1883, in which the Court struck down the provisions of the

4. Despite some minor errors, the Congressional Research Service tabulation of laws held unconstitutional in whole or part by the Supreme Court is a helpful source. It shows that during the antebellum period, the Court tended not to strike down federal law, instead construing it so as to resolve constitutional problems, but did regularly invalidate state and local laws, usually on Contract Clause or Supremacy Clause grounds, consistent with its focus on protecting private property rights from state interference (Congressional Research Service 2023).

5. This case involved a challenge butchers brought against a city ordinance that granted monopoly privileges to a single meat slaughterhouse within city limits. The Court ruled that the Reconstruction Amendments did not apply to such business regulations, but in doing so construed the Fourteenth Amendment much more narrowly than needed to reach this result. To this day scholars lament the way this case set in motion a path-dependent trajectory of Fourteenth Amendment doctrine that narrowed its potential to improve racial justice in the United States (Carle forthcoming 2024b).

6. The Fourteenth Amendment prohibits states from abridging the "privileges or immunities of citizens of the United States," or denying "any person of life, liberty, or property, without due process of law" or "equal protection of the laws." US Const. amend. XIV, § 2.

Civil Rights Act of 1875 that sought to ban discrimination by quasi-public utilities such as railroads and theaters. It is at this historical juncture that the concept of judicial restraint begins to cohere, in the writings of James Bradley Thayer (Thayer 1884, 314; 1893, 10–11). Thayer most famously articulated his arguments in a law review article and monograph frequently characterized as the most influential of all time (Jackson 2017, 2348).

THAYER'S THEORY OF JUDICIAL RESTRAINT

As Larry Kramer points out, there are echoes of Jefferson's views about judicial review in Thayer's work (Kramer 2012, 622).⁷ But Thayer's biographers point to a more immediate "exciting" cause for Thayer's first writings about judicial restraint. That motivation, according to scholars who have studied Thayer closely, was his concern about 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 (Moyn and Stern forthcoming 2023, 39). Thayer had grown up in an antislavery household, so his concerns about the Court's postbellum tendencies to aggregate power and reduce Congress's role likely came in some part from his ire at the Court's egregious missteps on slavery and civil rights questions. His father had been a newspaper publisher and friend of William Lloyd Garrison, one of the most important antislavery voices in the United States in the 1830s (Stewart 1997, 31). Thayer's family struggled financially after a pro-slavery mob attacked his father printing press, but Thayer was nevertheless able, reportedly with the financial support of a benefactor impressed by his intellectual promise, to go to preparatory school and then Harvard University (Hook 1993, 2). There Thayer associated with leading intellectuals of his generation, joining a Boston social club devoted to debating ideas and policy and having close ties to, though never becoming a member of, the famous Metaphysical Club that gave birth to American pragmatism and associated proto-realist legal ideas (Hook 1993, 4; Carle 2005, 346–48).

Thayer graduated from Harvard Law School in 1856, practiced law in Boston, and became a partner in a law firm, where he worked on cases with the young Oliver Wendell Holmes Jr., who was then an associate there but later became an important proto-realist legal theorist and a member of the Court. After Holmes left the firm, Thayer and Holmes continued their intellectual collaboration (Hook 1993, 4). By the early 1880s, Thayer had become a member of a new generation of full-time law professors at Harvard Law School, professors who would introduce the case method, Socratic teaching, and more. Thayer's expertise was the historical development of evidence and constitutional law. To study those topics he traveled to England, where he focused on juries. He also took note of England's constitutional scheme, which lacked judicial review and left questions of the constitutionality of legislation to Parliament, whose members were elected by a restricted franchise. These legislators made their own

7. Thayer does not make explicit reference to Jefferson in his writing on judicial restraint but does refer to the "anti-republican" nature of nondeferential judicial review of legislation (Thayer 1893).

determinations about the constitutionality of their acts (Moyn and Stern forthcoming 2023, 18–26).

Thayer wrote his first piece arguing for judicial restraint soon after returning from his study in England, the same year the Court struck down the provisions of the Civil Rights Act of 1875 that prohibited discrimination in quasi-public facilities (*The Civil Rights Cases* 1883). In this short piece published in *The Nation*, Thayer argued that courts should only strike down legislation in “clear” cases, much like a court would review a jury’s findings of fact (Thayer 1884, 314). Thayer argued that courts should take care not to assume the legislative function. As his example of the Court erring in this respect, Thayer quoted Justice Bradley’s majority opinion in *The Civil Rights Cases*, which had asserted that the Court must exercise independent judgment in deciding on the constitutionality of congressional acts. That erroneous view, Thayer argued, disregarded the deference owed another body charged with an independent function and its own duty to uphold the Constitution. Quoting from cases in which judges had stated as much, Thayer proposed that judges should confine constitutional review to whether “another department has acted unreasonably” rather than imposing their own views of the Constitution on other branches. In cases of multiple reasonable interpretations of the Constitution, legislatures should decide. A contrary rule that left judgment to the judiciary was a “dangerous one” in that it “tempts the Court into stating its own opinions on questions that may be purely legislative or political” (315).

Formulating an idea he would later repeat, and which future legal theorists would especially take up, Thayer concluded his short piece by gesturing to the consequences of insufficient judicial restraint. The court system was depriving legislatures of their “feeling of responsibility” and their “honor,” and leading communities to mistaken ideas about the judiciary’s power, causing them to forgo political participation with the thought that “oh, the courts will get that right” (315).

Thayer expanded his 1884 views at much greater length and academic seriousness in an 1893 article and monograph (Thayer 1893). Through this writing, Thayer brought to his Harvard Law School colleagues and others a compelling case, based largely on the invocation of numerous precedents, for promoting judicial restraint on questions of legislative constitutionality. Showing again his interest in juries—similar to Jefferson’s preference a half century before for juries as the best embodiment of law’s interpretation by the People—Thayer proposed a “beyond a reasonable doubt” standard for judicial review of federal statutes’ constitutionality. Thayer also made arguments, based on the Constitution’s Supremacy Clause, that courts owed more restraint in reviewing federal than state legislation, though he sometimes waffled on this issue; subsequent critics have found these aspects of his argument somewhat wanting (Moyn and Stern forthcoming 2023, 53–58).

Thayer thoroughly laid out the many courts and treatise writers that had articulated a deferential standard for evaluating the constitutionality of federal legislative acts. What had enormous staying power after Thayer’s writing, however, was not so much his extensive arguments from precedent, but instead his basic diagnoses of the multiple functional and structural problems that lack of judicial restraint caused for the legal system, including judges imposing their policy preferences on political communities; usurping the legislative function granted under the structure of the Constitution to the People’s directly elected representatives; undermining republican

government; and creating, as Thayer predicted, lethargy and an abdication of responsibilities on the part of the political branches and the People themselves.⁸

Thayer had a special gift of personality that made him beloved both to students and colleagues. When he died in 1902, five hundred students reportedly showed up in snowy conditions to escort his coffin from his home to Harvard's chapel (Hook 1993, 8). Some of his students went on to become prominent judges, and they carried forth Thayer's teaching. Among these judges was Learned Hand (often referred to as the most prominent judge to have *not* sat on the Supreme Court (Gunther 1994, x–xi)). Hand, who studied both evidence and constitutional law with Thayer and proclaimed his courses as “the fitting crown” of his three years of law school (Purcell 1995, 884), modified Thayer's ideas for a new historical period with a new jurisprudence preoccupied with refuting the freedom of contract ideas in *Lochner v. New York* (1905), under which the Court blocked legislatures from finding new solutions to the problems of an increasingly complex industrial era. Railing against *Lochner*, Hand argued 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 (Hand 1908, 501–08; Purcell 1995, 892, 895).

Louis Brandeis, who sat on the Court from 1916 to 1939, was another of Thayer's students. A friend and mentor to Frankfurter, Brandeis championed restraint from the courts while social science experts and legislatures worked out new ideas for the economic and social problems of a new century. On the Court, Brandeis contributed to the development of doctrines based on judicial restraint as related to standing, ripeness, the political question doctrine, and avoidance of deciding questions on constitutional grounds when possible (Posner 2012, 528).

But Brandeis's view of when judicial restraint should be exercised had limits. 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; it could, he observed (in language his mentee Frankfurter would later appear to disregard), invade “the privacy and freedom of the home. Father and mother may not . . . teach son or daughter the doctrine of pacifism. If they do, any police officer may summarily arrest them” (*Gilbert v. Minnesota* 1920, 335–36).

The most powerfully articulated version of Thayer's theory of judicial restraint in the early twentieth century came from towering jurist and Justice Oliver Wendell Holmes Jr. Holmes's version fit with the proto-realist jurisprudence he was expounding, in which law should evolve and reflect the changing values of the community. Holmes and the other progressive jurists of the early twentieth century were centrally concerned with legislatures' power to undertake economic regulation, a very different preoccupation than what motivated Thayer. Holmes took up Thayer's ideas and adapted them to address these new problems and concerns. Thayer's writings gave

8. Devoting most of his argument to historical precedents, Thayer saved until the very end his more “modern” points about policy, comparative institutional competence, and the consequences of various options in choice of doctrine (Thayer 1893, 28–29). Later advocates of judicial restraint would take up and refine these arguments.

Holmes the theoretical basis for hard-hitting attacks on the formalist jurisprudence of the *Lochner* era. In his dissent in *Lochner*, Holmes put it this way:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire* A reasonable man might think [the maximum hours legislation under review] a proper measure on the score of health. (*Lochner v. New York* 1905, 75–76)

Based on this reasonableness test, a less deferential modification of Thayer's standard of beyond reasonable doubt, Holmes dissented from the Court's judgment striking down a statute that imposed maximum hours and other health regulation on the bakery industry. Holmes made similar arguments in other dissents as the Court continued to strike down protective labor legislation (*Adair v. United States* 1908, 181–92; *Coppage v. Kansas* 1915, 27–42).

Holmes, however, like Brandeis, came to view judicial restraint as inappropriate in cases involving rights to speech and conscience. Although he merely concurred rather than joining Brandeis's dissent in *Gilbert*, Holmes authored opinions that propelled the Court's expansion of First Amendment protections, such as his dissent in *Abrams v. United States*, joined by Brandeis, in which he argued that the experiment of US democracy required the courts to protect even the most loathsome speech if it did not present a "clear and imminent danger" (*Abrams v. United States* 1919, 627). In that opinion Holmes discussed the importance of "free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market" (630). That was "the theory of our Constitution . . . an experiment" under which "we should be eternally vigilant against attempts to check the expression of opinions that we loathe," except when the clear and present danger test was met (630). To Holmes, in other words, judicial restraint stopped at the door of preserving the constitutional rights that allowed democracy to thrive. Rather than pitting the concept of strict scrutiny of constitutional rights against the concept of judicial restraint, Holmes reconciled them.

Thayer had not discussed such exceptions to his theory of judicial restraint and there is no way to be sure what he would have thought of Holmes and Brandeis's views. But his influence on Harvard law students persisted. When the brilliant, energetic young Felix Frankfurter arrived there, he gleefully imbibed Thayerism in its original, full-strength version; as Frankfurter later reminisced, he had arrived "too late to the School to encounter the mind I would have found most congenial to mine" (Snyder 2022, 20). Frankfurter "never stopped quoting" Thayer's 1893 monograph, describing it

as “the most important single essay” about US constitutional law and “the great guide for judges” and nonjudges alike of “what the place of the judiciary is in relation to constitutional questions” (21).

When President Franklin Delano Roosevelt (FDR) put Frankfurter on the Court in 1939, the new Associate Justice set out to adapt the ideas about judicial restraint he had absorbed from Thayer, Brandeis, and Holmes “to a new world order” (331). But Frankfurter did not adopt the Holmes and Brandeis view about the limits to judicial restraint. Instead, the next year, Frankfurter applied his own modified version of full-strength Thayerism to a First Amendment challenge to a state flag-salute law. That state law required all children attending public school to salute the US flag and recite the Pledge of Allegiance (*Minersville School District v. Gobitis* 1940, 591–92). Two children whose parents were Jehovah’s Witnesses, who prohibit flag saluting as contrary to the supremacy of God, were expelled from school for refusing to engage in a practice contrary to their religion. As Snyder documents in detail, Frankfurter campaigned with all his prodigious energy to convince his fellow Justices to uphold the state’s policy despite its clash with the constitutional rights to freedom of religion and conscience. He succeeded, pushing several Justices, including newly appointed and still unsure Justice Frank Murphy, reluctantly, to vote against the Gobitis children (Snyder 2022, 358).

Since Thayer generally did not view Court review of *state* laws as meriting judicial deference, Frankfurter’s blast of Thayer-like ideas in his majority opinion in *Gobitis* was not actually in accord with Thayer’s thought, but Frankfurter made no such distinction. Instead, Frankfurter wrote that states must be given deference in their judgments about how to instill patriotism in schoolchildren. As Frankfurter saw it, “[t]o stigmatize legislative judgment . . . would amount to no less than the pronouncement of pedagogical and psychological dogma in a field where courts possess no marked and certainly no controlling competence” (*Minersville School District v. Gobitis* 1940, 598).

Not only the holding of *Gobitis*, which sat uneasily with deep US constitutional values, but also its preachy tone, caused even Frankfurter’s law clerks to be “horrified” (Snyder 2022, 359). Still in his very first years on the Court, Frankfurter thus alienated many both on and off the Court (359–61). As Snyder points out, Frankfurter had the alternative in *Gobitis* of using the scheme that Justice Harlan Fisk Stone (who dissented in *Gobitis*) had announced in *United States v. Carolene Products* (1938) a short while before. A footnote in that case, which would later become famously known in US constitutional law as “*Carolene Products* Footnote 4,” articulated a deferential, rational basis standard for constitutional review of economic and business regulation but recognized that legislation impinging on fundamental constitutional rights, including First Amendment rights, required heightened scrutiny. Frankfurter declined to apply this essential distinction—one that his mentors Holmes and Brandeis had helped develop in First Amendment cases. Although Stone had articulated a key principle in *Carolene Products* that would guide the Court’s review of various types of legislation throughout the second half of the twentieth century, he had tucked it away in a footnote; as Snyder puts it, “Footnote Four . . . was not yet Footnote Four” (Snyder 2022, 351).

Frankfurter failed to heed this cue as to the path on which US constitutional law was headed. After the Court repudiated the right to freedom of contract that *Lochner* had embraced, jurists stopped viewing business rights cases as raising fundamental rights

issues. They instead began applying judicial restraint in the form of highly deferential scrutiny in what came to be seen as run-of-the-mill business regulation matters. At the same time, courts engaged in searching scrutiny of infringements on other individual liberties protections, including the rights to freedom in speech and religion. *Gobitis* implicated such rights, but Frankfurter did not value those rights above the interests of the state in prescribing policies to instill patriotism in its public school students.

Prior biographers have analyzed Frankfurter's psychology in deciding *Gobitis*, suggesting, for example, that intense patriotism born of his gratitude to the United States for admitting his family as immigrants and giving him extraordinary opportunities was a factor, and that he perhaps overcompensated for his identity as a member of a religious minority by bending over backward to reject the idea that religion could trump national cohesion. Snyder rightly counsels that one need not put too much weight on these psychological theories because the most straightforward explanation comes from what Frankfurter says himself. In *Gobitis*, Frankfurter is implementing in practice a more extreme version of the judicial restraint edict Thayer espoused in theory.

Snyder sidesteps making the harshest criticisms he could have brought against Frankfurter for this opinion, though others most certainly have presented them (Finkelman forthcoming 2023, 16–20). At the very least, the opinion was tone-deaf to a context in which a European war had started against Nazis who mandated that schoolchildren make salutes to Hitler.⁹ Frankfurter's not infrequent lack of good judgment was on display—a problem he carried with him throughout his tenure on the Court, as I will discuss further below.¹⁰ After all, Thayer and the other advocates of judicial restraint Frankfurter so admired had not said that the Court should *never* invalidate laws on constitutional grounds, and freedom of religion and conscience were at the very core of the constitutional rights the country's founders, such as Jefferson, thought should be enforced.

Frankfurter did not adhere to his principle of judicial restraint on all issues. In Fourth Amendment and Establishment Clause cases, for example, Frankfurter took an interventionist stance, as summarized in Handler (1957, 173–74) and Pines and Bertram (1962, 411n17, 414, 425, 425n92, 426–28).¹¹ Frankfurter's failure to be consistent about judicial restraint where principles were at stake that he really cared about supports this essay's central thesis, which is that it is extremely difficult for Justices to adhere with consistency to the principle of judicial restraint, even when they ardently espouse this principle. Confronted with matters they see as profoundly important, their sense of responsibility, if nothing else, impels them to use the power they have to set matters straight in the way they see appropriate.

9. The *Gobitis* opinion led to thousands of children being expelled from public schools, their parents facing imprisonment and fines, and massive persecution and violence against Jehovah's Witnesses (Finkelman forthcoming 2023, 18).

10. As Snyder pithily sums up this theme in a commentary on his book: "Felix Frankfurter was far from a perfect justice. He did not put enough time into crafting his opinions, was too unwilling to change his mind in major cases, and crossed ethical lines and violated separation of powers during World War II in ways that would prompt calls for impeachment today (yet was more accepted at the time). He personalized disputes with his colleagues, alienated them with pedantic speeches at oral argument and at conference, and wore out his welcome with several Chief Justices, including Earl Warren" (Snyder forthcoming 2024).

11. I am indebted to reviewer Mark Tushnet for this important point.

Sometimes people are intellectually fascinated by the very ideas that they are least adept at implementing in their own lives. This appears true of Frankfurter. He adored the idea of judicial restraint—in other words, restraint from the exercise of power—but he displayed a profound inability to restrain himself in this manner in his own judicial and personal affairs. As Snyder discusses with many examples, in his relations with his Court colleagues Frankfurter could be too insistent, persistent, and even outright obnoxious (Snyder 2022, *passim*). With some of his colleagues, such as Justice William J. Brennan Jr., who had been a former student whom Frankfurter had excluded from his inner circle of the best and brightest, he was arrogant and condescending and thus destroyed possibilities for alliance (Stern and Wermiel 2010, 24–25, 192). Frankfurter diminished his legacy by writing opinions that were annoyingly long. He continued to advise the executive branch and visit the White House through backdoor means that avoided his visits being officially recorded in order to discuss the matters of the day, possibly including the Court's business, with President Roosevelt (Snyder 2022, 365, 371; Finkelman forthcoming 2023, 14). Although other Justices had behaved similarly and the period's ethics standards were not as strict as they are today, it appears, based on their efforts at concealment, that the president and Frankfurter knew that their frequent private meetings would raise eyebrows. And, as Snyder points out, this was far from Frankfurter's worst breach of separation-of-powers considerations: since Frankfurter was closely involved with War Department affairs, he should have recused himself from sitting on the several important cases that came before the Court involving that department, including *Korematsu v. United States* (1944) (Snyder 2022, 445). So much for respecting the separation-of-powers principles Frankfurter extolled.

Worst of all, Frankfurter did not seem to learn from his mistakes; he was not reflective about his own failures of restraint. Even through the eyes of as sympathetic a biographer as Snyder, Frankfurter appears astoundingly unreflective as a general matter, displaying a lack of basic sensitivity to others' needs even with those closest to him, including his highly intelligent, beleaguered wife, Marion. The failure of judicial restraint in Frankfurter's hands thus may arise in part from Frankfurter's flaws of personality and judgment, though his inconsistency in applying this principle suggests that there were also problems other than his personal foibles in play.

Snyder's biography cannot provide definitive analysis on these questions; what it does do is provide a deep and thoughtful case study of one Justice's failed attempt to control the all-too-human "will to power"—including his own—through the all-too-weak device of judicial doctrine and practice.

Frankfurter's failure of judgment became all the more salient when the Court in 1943 faced yet another Jehovah's Witness challenge to a state flag-salute law in *West Virginia State Board of Education v. Barnette* (1943). That law required a straight-arm salute, which even more intensely evoked images of marching Nazis, against whom the United States was now at war. Some of the more hesitant followers of Frankfurter in *Gobitis*, including Murphy, had by this time thought better of the matter and switched their votes. A six-person majority voted in favor of Justice Robert H. Jackson's opinion striking down the flag-salute requirement. In a long dissenting opinion, Frankfurter railed against his colleagues. Critics of *Gobitis* had expressed disappointment that someone of Frankfurter's outsider background as an immigrant and Jew had so little sensitivity to the plight of young children expelled from school for their religious beliefs.

Unrepentant, Frankfurter started his dissent, against the advice of his law clerk (Snyder 2022, 424–25), with the statement that “[o]ne who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant, I should wholeheartedly associate myself with the general libertarian views in the Court’s opinion” (*West Virginia State Board of Education v. Barnette* 1943, 646–47). Frankfurter again emphasized judicial restraint:

As a member of this Court, 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. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an individual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one’s own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one’s duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could, in reason, have enacted such a law. (647)

In the end it was perhaps Frankfurter’s temperament, on display in this opinion and others, as much as any failure in the substantive arguments he put forth, that alienated his colleagues so that he never won wholesale converts to his position despite his twenty years on the Court. Some of his fellow Justices, including Black and Harlan and later Burger, made Thayerian arguments on occasion, but no coherent majority approach emerged.¹²

The fact that a president he idolized was in office during his first years on the Court surely had something to do with Frankfurter’s unwavering commitment to keeping the Court out of the business of the political branches. Even after that, Frankfurter’s basic political bent cohered with national policy trends. Simple observation of human psychology suggests that it is easy to like the concept of judicial restraint when one generally favors the policies potentially subject to review, but to like the idea far less when applied to policies that are abhorrent in the assessor’s view. This observation about human nature may provide the key to why judicial restraint does not work in practice, as I discuss further below.

As Snyder describes, Frankfurter argued for judicial restraint not only in his opinions championing the idea at length but also in many of his other actions on the Court. He voted to uphold convictions under the Smith Act of 1940, the World War II equivalent of the Alien and Sedition Acts of 1798 (Snyder 2022, 540–41). He failed to oppose curfews imposed on Japanese Americans (Snyder 2022, 447–48; Finkelman forthcoming 2023, 21). He declined to follow the lead of Justices Jackson, Owen Roberts, and Murphy in their dissents in *Korematsu v. United States* (1944), now regarded, along with *Dred Scott v. Sandford* (1857), as one of the worst cases in the

12. Nor has the Roberts Court by any means adopted judicial restraint as a general principle, as I and numerous other scholars have been pointing out (Carle forthcoming 2024a).

Court's history. Instead, Frankfurter concurred (this time briefly) in the judgment that putting persons of Japanese ancestry in concentration camps on the basis of race was constitutional, pointing to the military's authority to make such decisions during wartime and stating that the matter was up to Congress and the executive and not the Court (Snyder 2022, 445–51).

Frankfurter saw some limits to judicial restraint. Frankfurter concurred without opinion in *Smith v. Allwright*, which held all-white primary elections sponsored by political parties unconstitutional (*Smith v. Allwright* 1944, 664–66). Snyder makes an important contribution in showing that Frankfurter supported and strategized to obtain the result in *Brown v. Board of Education* (1954), through which the Court unanimously declared public school segregation unconstitutional (notwithstanding Justice Douglas's innuendo in his autobiography that Frankfurter was lukewarm about this outcome (Douglas 1981, 111; Snyder 2022, 578–79)). And Frankfurter wrote a strong majority opinion for a unanimous Court holding that states may not draw election districts with the purpose of denying equal representation to African Americans (*Gomillion v. Lightfoot* 1960, 347–48).

But after *Brown*, Frankfurter repeatedly pushed for slow-walking progress on desegregating other public facilities. He disapproved of the Court's opinions expanding the desegregation principle of *Brown* to public settings such as parks, swimming pools, and municipally owned buildings (Finkelman forthcoming 2023, 13). He voted against, and campaigned energetically for his colleagues to vote against, taking cases when he thought the constitutional questions they raised were best avoided, even “engineering” the postponement of the Court consideration of the unconstitutionality of antimiscegenation laws for many years (Snyder 2022, 612–15, 619).

Paul Finkelman compiles an itemization of instances in which Frankfurter opposed protecting core individual rights under the Constitution. They include Frankfurter's votes to uphold felony convictions where defendants were not represented by counsel; to reject application of federal constitutional protections such as the right against self-incrimination to states' criminal processes; to uphold racist, unconstitutional searches and police brutality; to uphold a state's revocation of a lawyer's license to practice law where the lawyer refused to answer questions about Communist affiliations; and to uphold state “Sunday closing” laws that drove Sabbatarian religious minorities, including Orthodox Jews, out of business (Finkelman forthcoming 2023, 3–4, 13, 23–25). Finkelman fails to appreciate *why* the supposedly progressive Frankfurter rendered opinions that on the merits appear reactionary, and does not cite cases in which Frankfurter did uphold important constitutional rights of individuals, but he has a point in observing that judicial restraint may leave core constitutional rights unprotected unless practiced with consummate good judgment. The problem with strong liberal interventionism is how to stop an interventionist Court with one kind of politics from swinging to an equally (or even more) interventionist Court with the opposite political views (Witt 2022; Carle forthcoming 2024a).

When, late in Frankfurter's tenure, the Court took up the issue of state electoral districting, resulting in Justice Brennan's majority opinion holding such issues justiciable in *Baker v. Carr* (1962), Frankfurter dissented at length. That dissent was his last significant opinion on the Court. Frankfurter died three years later, leaving his wife virtually penniless and reliant on government assistance (Snyder 2022, 708).

His idea of judicial restraint did not die, however, in part because he had passed it on to law clerks who would go on to have their own high-profile academic careers.

JUDICIAL RESTRAINT AFTER FRANKFUTER: ALEXANDER BICKEL AND THE WARREN COURT

Chief among the champions of judicial restraint in Frankfurter's wake was Alexander Bickel, who joined the Yale Law School faculty shortly after his term as Frankfurter's law clerk in 1952 and 1953. Once in academia, Bickel began a series of writings advocating the idea of judicial restraint.¹³ Many of his arguments echoed those of his predecessors, especially various functional and consequentialist arguments. Bickel added his own brilliant touches, coining, for example, the term "counter-majoritarian difficulty" to capture concerns about judges making policy even though they are not directly elected by the People; this term remains prominent in debates about judicial restraint to this day (Zoffer and Grewal 2020, 437). Bickel was a member of the legal process school, the 1950s and 1960s movement in legal scholarship that focused on the comparative institutional competence of various governmental branches. Its adherents added to law school casebooks materials from all three branches and often counseled the importance of the judiciary not overstepping its proper role, urging judges to use only "neutral principles" and to explicate their decisions through nonpolitical "reasoned elaboration" (Snyder 2022, 688).

Bickel's first book, named with irony after Hamilton's Federalist No. 78, was entitled *The Least Dangerous Branch* (Bickel 1962). In it he argued that the Court generally should move slowly and cautiously, and in fact entirely avoid deciding constitutional questions whenever possible. Bickel argued, however, that at very rare moments the Court could bring to bear on government actions "principle[s] . . . grounded in ethical and moral presuppositions," though it should limit itself in doing so with "extreme severity" (199–200). In these very rare cases where the Court faced "a proposition 'to which widespread acceptance may fairly be attributed,'" the Court could be justified in pronouncing a new principle and then engaging in "a continuing colloquy with the political branches and with society at large" (240). Bickel thought that most controversial social issues, including birth control and abortion, were ones on which the Court should not opine, but he defended the *Brown* school desegregation case as one of those rare moments in which its intervention was warranted. He also cited abolition of the death penalty as a potential moment for such intervention, on which the Court had unfortunately passed (240–41).

Bickel's argument in *The Least Dangerous Branch* was in part a nuanced and powerful defense of *Brown*, a case that had been before the Court when Bickel was clerking for Frankfurter. Bickel had, in fact, written a key memo arguing that the

13. An important though often overlooked scholar who began publishing shortly before Bickel with a more acerbic take on the illegitimacy of the Court's heavy-handed review of federal legislation is Crosskey, who engaged in a multivolume analysis of the founding period and its early aftermath to support his thesis as to the "palpable want of fit between the Constitution's system of government and the doctrine, practice, or institution of judicial review of acts of Congress, as this exotic and carcinogenic plant has blossomed in these later days" (Crosskey 1953, 34).

historical record could support the Court's decision on originalist grounds (Snyder 2022, 573). Other members of the legal process school, such as Herbert Wechsler, argued that *Brown* failed the neutral principles rule (Wechsler 1959, 33); Learned Hand did the same (Purcell 1995, 919). Bickel saw things differently and said so in a book that rivals Thayer's monograph as a classic on the subject of judicial restraint.

Perhaps because of his defense of *Brown*, Richard Posner characterizes Bickel as an advocate of judicial restraint merely as a "tactical device" to promote "mild liberalism" (Posner 2012, 531). But that accusation ignores Bickel's consistently critical assessments of the Warren Court. Bickel denounced *Baker v. Carr* (1962), the case that declared justiciable states' drawing of electoral districts, just as Frankfurter had (Bickel 1962, 195–97). By 1970, he was lambasting the Court for its "erratic subjectivity" and "analytical laziness" in pushing particular "substantive objectives favoring excluded groups" and favoring "egalitarianism"—the Warren Court's "music" as Bickel put it—rather than letting political processes work policies out through democratic means (Bickel 1970, 45, 76, 81, 200). Blending Thayer in 1893 with Brandeis in the early twentieth century, Bickel argued that society was best left to develop its own strands of tradition; to move forward "in empirical fashion"; and to use problem-solving methods unavailable to courts, which were too "principle-bound," "remote from conditions," and "inaccessible to all the varied interests in play in decisions of great consequence" (175). As Bickel concluded:

The true secret of the Court's survival is not, certainly, that in the universe of change it has been possessed of more permanent truth than other institutions, but rather that its authority, although asserted in absolute terms, is in practice limited and ambivalent, and with respect to any given enterprise or field of policy, temporary. In this accommodation, the Court endures. But only in this accommodation. For, by right, the idea of progress is common property. (181)

Bickel's Yale Law School colleague and close friend Robert Bork made similar but more obviously politically driven arguments (Bork 1968, *passim*). Others similarly joined in a chorus of elite academics criticizing the Warren Court for its lack of judicial restraint. That chorus included Harvard Law School's Herbert Wechsler (Wechsler 1959, 33) and Archibald Cox, who weighed the pros and cons of an activist Court in more moderate tones (Cox 1968, 24–29). These academics raised the concerns proponents of judicial restraint had identified and passed on through generations, including the impropriety of a tiny group of unelected appointees deciding controversial issues, quite possibly in directions counter to the views of the democratic majority.

It remains a fascinating sociological question why leading members of the elite US legal academy so wanted to transmit the judicial restraint catechism to their students and others. Pierre Bourdieu would counsel against naively assuming that "this reproduction of knowledge" was based simply on the worth of ideas (Bourdieu 1998, *passim*). Most likely this battle between the Court and the elite legal academy reflects a competition for power. Outside the rarefied atmosphere of elite law schools, however, a great deal was happening without regard to the legal academy's view of itself as the rightful arbiter of how the Court should behave.

The Warren Court, as Brennan unabashedly acknowledged, was in a big hurry to reform constitutional law, an agenda Brennan justified based on the need to adapt the country's foundational law to the rapid changes occurring throughout society (Carle forthcoming 2024a). Brennan was confident that the nation's citizens were rapidly becoming more enlightened and progressive as the world's future unfolded toward the end of promoting the dignity of all. What the liberal Justices on the Warren Court seem not to have sufficiently foreseen was the likelihood that the Court's majority would soon swing right just as it had swung left with their own appointments (some, ironically, by a Republican president). Their activist interpretative methodologies failed to guard against the rise of the right, which engaged in highly successful political campaigning at both the state and national levels. The right's rise resulted in the election of a series of Republican presidents who would seek (not always successfully) to appoint right-leaning Justices (Graetz and Greenhouse 2016, 2–4).

Political activists on the right used opposition to the Warren Court as a rallying cry. Judicial restraint served as a key theme, even after conservatives dominated the Court. Attorney General Edwin Meese III, appointed by President Ronald Reagan, told students in one address that wrongheaded theorizing about the Constitution had “arisen mainly in certain of our law schools,” leading to the “radical” approach of “the past several decades,” but that a beneficial dialogue had arisen based on Bickel's “brilliant critique of the Warren Court” along with Bork's extension of those ideas (Meese 1986, 11, 10, 12). In another speech Meese decried “an activist jurisprudence, one which anchors the Constitution only in the consciences of jurists,” calling this “a chameleon jurisprudence, changing color and form in each era,” and warning that “the same activism hailed today may threaten the capacity for decision through democratic consensus tomorrow, as it has in many yesterdays” (Meese 1985, 14). As authority for his point, Meese hailed none other than Justice Frankfurter, quoting his words that “[t]here is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary . . . Appeal must be to an informed, civically militant electorate” (14, first alteration in original).

JUDICIAL RESTRAINT TODAY

Meese's words ring with irony today, as the conservative majority that dominates the Court engages in constitutional interpretation that gives lip service to judicial restraint but that constitutional scholars of many political stripes recognize as patently activist (Posner 2013; McConnell 2015, 1789–90; Baude 2020, 313–14). Although members of this majority occasionally invoke the rhetoric of judicial restraint when doing so supports the results they want, there is no question that this Court is at least as aggressively activist as the Warren Court ever was, only in a different direction. This Court has invalidated centerpieces of federal civil rights and social welfare legislation, including major provisions of the Voting Rights Reauthorization and Amendments Act of 2006 and the Patient Protection and Affordable Care Act of 2010 (*National Federation of Independent Businesses v. Sebelius* 2012, 589; *Shelby County v. Holder* 2013, 556–57). It has struck down state regulation of guns, even “concealed carry” permit laws

it had previously said were constitutional (*New York State Rifle & Pistol Association v. Bruen* 2022, 2146, 2156). Judged at this historical moment, judicial restraint as Thayer and Jefferson conceived of it is most certainly “dead,” as Posner put it in a provocative symposium centerpiece article (Posner 2012, 553).

SHOULD JUDICIAL RESTRAINT BE DEAD?

The scholarship debating the merits of judicial restraint and related ideas fills hundreds of bookshelves. Today a new generation of scholars has taken up Bickel’s baton (Doerfler and Moyn 2021; Bowie and Renan 2022), and US constitutional theorists have offered a variety of related ideas, such as judicial minimalism (Sunstein 1999, *passim*), and more popular constitutionalism (Kramer 2004, *passim*; Tushnet 2020, *passim*). This essay’s goal is not so much to evaluate these proposals, but instead to ask, based on the history of the intergenerational transmission of this idea, *why* judicial restraint appears to be so “dead.” The major reason Posner offers is the development of competing theories about constitutional interpretation; according to Posner, judges today find it exceedingly uncomfortable to try to practice judicial restraint because they believe they “know” what the Constitution really means, and it is not feasible to ask judges both to say that they know what the Constitution means and that they are not going to apply this interpretation in the interest of being restrained (537). Posner’s argument ignores *Carolene Products*, however, under which judges have been applying a version of judicial restraint to economic regulation for the past eighty years by permitting any such legislation that meets the most minimal rational basis scrutiny to pass constitutional muster. This shows that it is entirely *possible* for courts to refrain from second-guessing legislative choices; more important seems to be what judges *want* to do. They could develop consistent, robust practices of judicial restraint in reviewing legislative and executive actions, with measured exceptions, but history shows that they generally have not done so.

Jack Balkin advances an alternative explanation for why the Court has not been engaging in judicial restraint despite its occasional lip service to the concept. Drawing on the work of political scientist Keith Whittington (Whittington 2007), Balkin argues that the Court has amassed so much power in modern life that at this point all political players, regardless of their ideological orientation, frequently must rely on the Court to accomplish their objectives (Balkin 2019, 218–20). It is as if the Court has become a supergiant conduit (my words) through which the affairs of the country must flow. That, in my view, best captures how the Court’s history has unfolded. But it still does not explain *why* the Court did not take a different tack.

In theory it could have; my proposition is that the underlying problem lies in the founders’ error in failing to take steps to contravene, in the judicial branch, the negative tendencies of human nature they saw quite clearly in considering how to design and balance power among the other branches. In simplest terms, human nature makes it exceedingly hard for nine individuals vested with enormous power not to flex that power when confronted with issues they deem of crucial importance.

The question becomes the extent to which the Court’s supersized role in modern life should be of major concern. It is surely troubling that so much power to determine

the future of the country rests in the hands of nine individuals who are not directly elected by the People.¹⁴ From an originalist perspective, it is troubling that an institution the founders envisioned as the “weakest” and “least dangerous” branch has become the most powerful and—depending on one’s viewpoint as compared to the prevailing ideology on the Court at any given time—most dangerous one (Whittington 2007). Just as legislatures can err, history shows that Justices can too, even when they are striving to appropriately exercise judicial restraint, as Frankfurter’s example shows. The Court can also err in eschewing judicial restraint, by wrenching the nation’s citizens this way and that in extreme upheavals to the fabric of their lives—sometimes for the better, as in *Brown*—which now virtually everyone views as irrefutably correctly decided¹⁵—but sometimes much less clearly to the better, as in the Robert’s Court’s escalating rate of striking down both state and federal legislation and resulting executive actions in a precarious global situation that includes a pandemic,¹⁶ the threat of global environmental annihilation,¹⁷ and an escalating rate of random slaughter of schoolchildren and others through almost daily mass shootings (*New York State Rifle & Pistol Association v. Bruen* 2022).

CONCLUSION

Snyder’s biography of Frankfurter implicates the contemporary Court as well as its future. What Snyder shows is that Frankfurter, a giant of a person having the gigantic flaws that come along with gigantic strengths, failed, in a big way, in his mission to implement the discipline of judicial restraint, despite trying his hardest to bring this about. The broader issue this case study raises but cannot resolve is whether the idea of judicial restraint *necessarily* must fail. If anything, reading between the lines suggests that Snyder is quite sympathetic to that idea—as well as to Frankfurter himself, despite his weaknesses.

The more damning evidence of judicial restraint’s failure arguably comes in what happened after Frankfurter, as successive Courts largely eschewed judicial restraint in their rulings. That track record suggests that, regardless of ideology or rhetoric, nine individuals charged with unreviewable power to decide the most important

14. Indeed, the Justices do not achieve their appointments even indirectly through majoritarian democratic processes. They are instead increasingly prone to being appointed by presidents who have been elected by less than a popular vote majority and then confirmed by US Senate majorities that represent far less than a democratic majority of the national population due to the growing malapportionment of the Senate (Carle 2022, 575–82).

15. Conservative Justice Amy Coney Barrett, for example, testified in her confirmation hearings that *Brown* is now a “super-precedent” not subject to reexamination (Liptak 2020).

16. In a series of orders issued without reasoned opinions, released late at night right before weekends or holidays, the Court enjoined state laws that limited the permissible size of gatherings during the COVID-19 pandemic as applied to gatherings for religious worship (Vladeck 2023, 278–95). It also struck down a federal requirement that workers choose between either having COVID-19 vaccination or wearing masks and periodically testing themselves for COVID-19 (*National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration* 2022, 2), and invalidated the US Secretary of Education’s order waiving the repayment of students loans under a federal statute that permitted the Secretary to do so on the basis of national emergencies (*Biden v. Nebraska* 2023, 2362).

17. In *West Virginia v. Environmental Protection Agency* (2022), the Court struck down federal clean air regulations designed to control carbon dioxide emissions.

constitutional-mixed-with-policy questions in the United States simply may be *unable to practice judicial restraint as a basic matter of human nature*.

As I noted in my opening, the founders thought a great deal about human nature and its flaws, especially the will to power and human tendencies to substitute self-serving viewpoints for the public interest without even realizing it. The founders specifically designed the US Constitution to mitigate the dangers to the proper functioning of government that these flaws of human personality pose (Carle 2022, 560–62). What they did not foresee, for understandable reasons given their historical context, was the way that the human will to power would play out with respect to the Court. Predicted to be weak and no threat to the contemplated balance of powers under the Constitution, the Court has become enormously powerful and thus inherently, as the founders' theories would lead them to agree, a threat to democracy. But, as Jefferson wrote in criticizing the power of the federal judiciary even in his day, the People retain the power to (and Jefferson would add, periodically should) modify the Constitution. That power the People retain includes the power to change the nature of the Court. Today advocates are bringing back Jefferson's ideas for constitutional amendments (or statutes) that would, for example, impose staggered term limits on Court appointments and/or rotate Justices' active terms on the Court, as well as other fixes (Oliver 1986, 800; Doerfler and Moyn 2021; Sitaraman and Epps 2021, 409–14). The history of the failed idea of judicial restraint provides strong support for such ideas.

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