FIVE
Decentralization and
Dispersal of Control

Justice Frankfurter’s name is associated with the theory of judicial self-restraint. He has often been praised or blamed, depending upon the analyst’s findings as to how far in practice he has lived up to his theory. Studies have been made of his use of the self-restraint standard in relation to civil rights or taxation or commerce cases, as if each type of litigation was a closed category and called for a different type of restraint. Such investigations have value in pin-pointing the problem, but they do not go to the heart of the matter. Judicial self-restraint cannot be discussed in a vacuum, for it is not a self-contained concept. It is merely the short-hand way of expressing more fundamental and long-maturing aspects of Justice Frankfurter’s judicial philosophy. These fundamental aspects appear in the guise of techniques of interpretation—the uses of history—and in substantive considerations—symbolism and social unity, the Constitution as an instrument of power. This section investigates the self-restraint standard in
terms of Justice Frankfurter's understanding of the role of the Supreme Court in the American system of government.

His basic premise is that each agency of government has a fairly well-defined area of competence in which it should work and to which it should limit itself. The width and depth of such areas differ with the various units. Legislatures, for example, have greater leeway in controlling the destiny of the nation than does the judiciary. Further refinement shows that the competence of the national legislature precludes state legislative activity on certain matters. Within the area of its competence, however, each governmental unit, be it a state regulatory commission or the Supreme Court of the United States, should be autonomous in the performance of its duties. Decentralization and dispersal of control is, therefore, a dual-pronged theory. It deals with the relations between units of the federal government, and it concerns itself with the proper balance between nation and states.
Many times during our history the Supreme Court and Congress have been at odds. Charges that the Court is usurping and exercising legislative power are not of recent origin, although they have certainly become prevalent over the last decade or so. Legislative competence is jealously guarded by those to whom it is entrusted, and rightly so. It is equally true that no member of the Supreme Court would deny the primacy of Congress' legislative function or intimate that the High Tribunal is better equipped to carry on such an activity. The trouble lies in defining the boundaries between legislative and judicial competence in that misty area where the two are apt to meet. Justice Frankfurter uses certain guideposts in keeping the judiciary on its side of the boundary line. Proper jurisdiction and avoidance of constitutional issues weigh heavily with him. His conception of the legislative function and his theory of representative government are here also directly relevant.
I

“Putting the wrong question is not likely to beget right answers in the law,”¹ for “it is also true of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in.”² Realizing this, Justice Frankfurter has been at some pains to have the Court define exactly where it intends to enter a case. In other words, he localizes the issues upon which the Court will rule.

Writers on the judicial process often give the impression that once the opening statement has been made, logic will inevitably lead to but one result. They center attention on following this logical unfolding and tend to overlook the fact that the choice of a starting point is often the most important element in any case. Hidden behind this choice are the major premises of the jurist. Frankfurter’s choices are extremely revealing. His first concern in cases that come before the Court is whether that tribunal has properly assumed jurisdiction. It is, of course, natural that he should be interested in such an issue, since he taught jurisdiction of the federal courts and co-authored a study entitled *The Business of the Supreme Court*. Fred Rodell suggests that his interest in this type of issue stems from his desire to be the legal profession’s Emily Post. This seems unfair. Writing in 1927 Professor Frankfurter argued that “so-called jurisdictional questions treated in isolation from the purposes of the legal system to which they relate become barren pedantry. After all, procedure is instrumental; it is the means of effectuating policy.”³ Many years later in a Supreme Court opinion he wrote: “The law of the jurisdiction of this Court raises problems of a highly technical nature. But underlying their solution are matters of substance in the practical working of our dual system and in the effective conduct of the

business of the Court.” The solution of jurisdictional problems is important, yes, but only as these solutions lead to a fuller understanding of the legal system and of the Court’s place therein.

Over the years there has been a general contraction of the Court’s jurisdiction. In order to warrant the nation’s confidence, the Supreme Court must adequately dispose of cases presented to it. If it goes too far afield, it cannot fulfill this duty. How then is the Court’s jurisdiction defined? Broadly, the Constitution provides the answer. For Frankfurter, “No provisions of the Constitution, barring only those that draw on arithmetic . . . are more explicit and specific than those pertaining to courts established under Article 3.” By Article 3, the Framers made clear the definition and limitation of judicial power; therefore, “however circumscribed the judicial area may be, [the Court] had best remain within it.”

While the general contours of this area were set down many years ago, Congress, by the terms of the Constitution, can do some revamping. Any legislation dealing with the courts is, however, under two limitations. First, the types of cases coming before the Court are determined by the predominant concerns of contemporary life. Second, as with all legislation, statutes dealing with courts will operate slightly differently in practice than they would appear to do on paper. Because legislators cannot possibly encompass within a statute all the various ramifications of judicial power for contemporary life and because only as a statute becomes a working document do its strengths and weaknesses appear, the Court must be its own guardian in jurisdictional matters. And this the Court has always deemed itself peculiarly qualified to do. Justice Frankfurter has taken a limited view of the Court’s competence. The prime reason for this is his fear of compromising the powers that duly belong to the judiciary. As he has noted, jurisdictional questions are questions of statecraft. But they are also inevitably questions of power in which each department of the federal and state governments is interested. If the Supreme

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Court claimed for itself certain kinds of power, other units of the government would resist, probably forcing the Court to back down, thus lowering its prestige and hindering its effective operation. In order to avoid such a clash, the justice has at times engaged in what critics call jurisdictional dialectics.

Growing out of such "dialectics" is Frankfurter's insistence that the Court should allow itself to be activated only when a case or controversy, in the strictest sense, is up for consideration. His reasons for this are not hard to find. The Court "escapes the rough and tumble of politics . . . largely because [it moves] only when invoked and then only under the guise of settling a lawsuit."  

This statement came in the late 1920's. He recognized that the Court exercised political functions but he wanted to keep the Court out of politics. After he took the Scholar's Seat, Frankfurter continued to insist that judicial power could come into operation only "as to issues that the long tradition of our history has made appropriate for disposition by judges." And again the reason is given. "This restriction . . . reflects respect by the judiciary for its very limited, however great, function in the proper distribution of authority in our political system . . . ."  

It is quite apparent how much this sounds like his pre-Court writings.

If the Court were not dealing with a real conflict of interest, it would be merely rendering advisory opinions. Such opinions are particularly to be avoided when sought on congressional enactments for they tend to weaken legislative and popular responsibility. "Legislatures and executives may inform themselves as best they can; but the burden of decision ought not to be shifted to the tribunal whose task is the most delicate in our whole scheme of government."  

This was the Harvard professor's position in 1934; it is the position of the Supreme Court Justice in 1960.

While most cases before the Court have a statutory or constitutional background, there are certain instances when its equity

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jurisdiction comes into play. Characteristically, Justice Frankfurter calls for extreme scrutiny before the tribunal can be invoked in this way. "To require a court to intervene in the absence of a statute . . . in the exercise of inherent equitable powers, something more than adverse personal interest is needed." This is a blunt statement, but it is very much in keeping with the tenor of articles written before Frankfurter's elevation to the bench. Over a period of time he produced a series of annual pieces for the *Harvard Law Review* evaluating the work of the Court in the term just ended. In all these evaluations considerable space was given to discussion of the broader issues behind jurisdiction. The article of 1928, for example, carried the comment that "Considerations for abstention from decision, unless technical equity requirements are satisfied, are met with the temptation to make use of the flexible facilities of equity for prompt allaying of uncertainty." Professor Frankfurter made it entirely clear that he did not think easy-going attitudes toward equity jurisdiction helped the Court in the least. As a critic of the Court on jurisdictional matters, he was not gentle; as a self-critic of the institution on which he serves, he has been even more uncompromising.

II

Jurisdiction ascertained and a case or controversy identified, the next step in Justice Frankfurter's attempt to avoid clashes with other government units is to have litigants define exactly what it is they want the Court to do. He is impatient with buck-shot blasts of charges that cover the whole legal target without ever coming to the central point. Indefiniteness forces the Court to cull out the decisive points based solely on its own judgment. This is but an invitation for the Court to give full reign to its own preferences unbounded by even the flimsiest barriers. Such a situation is dangerous enough when only private litigants are involved; it can be fatal when some other governmental agency

is concerned. Specificity in attacking legislation or governmental action cuts down on broad charges of unconstitutionality and thus allows the Court to deal with its heaviest responsibility, that of ruling on the competence of a co-ordinate branch, only when absolutely necessary. As charges must be definite, so the record of the case must be complete and only challenges to the law considered in the courts below can be entertained. Justice Frankfurter once admitted that "exercises in procedural dialectics so rampant in the early nineteenth century still hold for me intellectual interest . . . ." 12 It is perhaps in the area of charges and records that such an interest comes most to the fore. But it may well be that, at times, extreme formalism helps to protect the Court.

Previous avenues explored for escaping conflict between Court and Congress have been limited and technical in nature. When Justice Frankfurter turns to the "political questions" doctrine, he leaves narrow confines for broad expanses. Because of its very nature, litigation that may involve "political questions" does not fit nicely into any breakdown of Court cases. It must be handled ad hoc. Judges' personal idiosyncrasies and evaluations assume vast proportions, for there is a very fine line "between cases in which the Court [feels] compelled to abstain from adjudication because of their 'political' nature and the cases that so frequently arise in applying concepts of 'liberty' and 'equality.' " 13 Liberty and equality must have meaning read into them. So must the concept of "political questions." When no neutral meaning can be devised, Justice Frankfurter will go out of his way to avoid even the appearance of questioning legislative competence on matters that do not fall definitely within the purview of the judiciary.

The "political questions" concept is a very necessary adjunct to one of his main contentions that we have considered, that no part of the Constitution which can be judicially applied or interpreted is of more value than another. There are, however, some portions of the Constitution and state constitutions that are not

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Judicially enforceable. In large measure, the parts concerning redistricting or the status of constitutional amendments are some of these. In cases such as these Frankfurter will concede judicial impotence rather than draw legislative fire. This is not because Congress or any other legislature warrants undue deference. It is because the judiciary is supposedly the weakest branch of the government. Its meager prestige and power must be protected at all costs. This may be fact or fiction, but it is an integral part of Justice Frankfurter's philosophy.

Justice Frankfurter believes that the Court's heaviest responsibility comes with ruling on the competence of other branches of government. Whether state or national power is at stake, he prefers to forego constitutional adjudication when other grounds are available. Avoidance of constitutional issues was an integral part of James Bradley Thayer's teaching. On the Supreme Court both Holmes and Brandeis advocated such a policy. One of Justice Brandeis' best known opinions was a reasoned but eloquent plea for restraint on constitutional rulings. Frankfurter finds Brandeis' position "frequently cited and always approvingly . . . ." As a scholar he had written that "not to decide, especially constitutional questions, until issues are ripe for the judicial process as tested by traditional canons of adjudication, is as important a function of the Supreme Court as to decide when an issue is inescapable, no matter how difficult or troubling." Thus even before he became a member of the Court he was convinced that settled principles of constitutional adjudication required the Court to forego constitutional issues if any other way was open.

The case of United States v. Rumely illustrates how this philosophy is put into operation. The Court was asked to rule whether a House Committee had infringed First Amendment freedoms in putting certain questions to witnesses. Frankfurter, writing the opinion of the Court, refused to be drawn into constitutional controversy. He based his ruling wholly on the ground

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17 345 U.S. 41 (1953).
that the Committee had exceeded the grant of authority contained in the House authorizing resolution. Therefore, because of this defect, witnesses were under no obligation to respond. "Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication. Until then it is our duty to abstain from marking the boundaries of congressional power or delimiting the protection guaranteed by the First Amendment." The avoidance of constitutional issues can be used as a manipulative device by justices who, fearing the outcome of present litigation, prefer to have the issues treated at a later time by a different Court composed of different members. Some of the present justices do not subscribe to the avoidance theory at all, preferring to meet constitutional objections head on. Justice Black, for example, differed strongly with Frankfurter in the Rumely case and wished to have the ruling based on First Amendment grounds. His reasoning is that, however wise avoidance of constitutional issues may be at times, there is too much of a tendency to turn avoidance into judicial self-abnegation. It may well be that Justice Frankfurter never faces this central point.

Being a constitutional historian, he knows that in many periods the Court has invalidated legislation whose only infirmity was that the Court thought it unwise. The outcome of such invalidation was, not loss of prestige for Congress, but loss of prestige for the Court. And so to escape "self-inflicted wounds," Frankfurter abstains from constitutional adjudication by various devices, statutory construction primarily. He feels that any statutory question that is not frivolous must be met before constitutional issues can be taken into consideration. As it is the duty of the legislature and executive to inform themselves so that advisory opinions will not be necessary, so it is the Court's responsibility, once a statute is on the books, to be very careful in its treatment. "To allow laws to stand is to allow laws to be made by those whose task it is to legislate."

When cases come up that must be decided on constitutional grounds, Justice Frankfurter makes his holdings as narrow as pos-

\[\text{Ibid., p. 48.}\]

\[\text{Tax Commission v. Aldrich, 316 U.S. 174, 185 (1942).}\]
sible. He is reluctant to lay down absolute rules without qualification. Everything cannot be settled at one time. There must be gradations in treatment. A recent book on *Desegregation and the Law* gives Frankfurter considerable credit for the way in which the initial desegregation decrees were drafted. The authors especially pointed out that the way in which the decrees were announced allowed the Court to escape an "either/or" dilemma.  

What the writers of this volume did not pick up was the fact that on three separate occasions the term "with all deliberate speed" had appeared in his opinions. Before the desegregation decisions, such an expression had not come to light in the opinions of any of the other current justices. During hearings on integration, a participating lawyer remarked that "tough problems" were involved. Frankfurter replied immediately, "That is why we are here." He understands full well that the Court must deal with hard constitutional problems. But he also knows that the quiet surrounding the Court is the quiet of a storm center. He is not about to undertake the role of rainmaker. The Court might thereby be inundated.

There is another reason beyond protecting the Court that makes Justice Frankfurter wary of touching constitutional questions. That is the outlook of the American people on constitutional rulings. Roscoe Pound once thought that the nineteenth-century conception of legal rights was but a disguised version of the natural right and moral duty found in earlier philosophic jurisprudence. People were convinced that if what they did was morally correct, it must also be legal. Twentieth-century Americans are apt to give the reverse interpretation. Most of them believe that if some action is constitutional then it must be correct. The Court has become the oracle defining "correctness," whether it wishes to be so or not. One can gather from certain of Justice Frankfurter's intimations that he is not really too certain that it is best for the Court to adjudicate constitutional questions at all. Since the Court

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has, from Marshall’s time, called this prerogative its own, there is little to be done about it. But reading into constitutional rulings moral approval or disapproval is another matter. He has always been strongly against the tendency to equate “constitutional” with “right.”

To show the consistency in this matter over the years, even as to phrasing, two of his statements should be compared.

It must never be forgotten that our constant preoccupation with the constitutionality of legislation rather than its wisdom tends to preoccupation of the American mind with a false value. Even the most rampant worshipper of judicial supremacy admits that wisdom and justice are not the basis of constitutionality.\(^\text{23}\)

Preoccupation by our people with constitutionality, instead of with the wisdom, of legislative or executive action is preoccupation with a false value. . . . Focusing attention on constitutionality tends to make constitutionality synonymous with wisdom.\(^\text{24}\)

The first statement came from his pen in 1925, and the second in 1951, over a quarter of a century later. He has taken every available opportunity to stress this theme because it is extremely important from his viewpoint. People must be made to realize that courts cannot be responsible for the deeper, moral life of any group. Only as citizens themselves take responsibility for the Constitution and its working will a well-integrated society result. The Court can do only so much to protect civil rights or economic opportunities. The rest is up to the people. “Holding democracy in judicial tutelage is not the most promising way to foster disciplined responsibility . . . .”\(^\text{25}\) In constitutional adjudication the Court is of course passing on policy matters, but it is doing it in a highly technical and limited way. Responsibility for the broader ramifications of legislation should not be placed on the Court. It is not the proper forum. While it is true that, at times, constitutionality and wisdom coalesce, Frankfurter’s conception of a liberal judge in the tradition of Holmes and Brandeis will not allow him to unite them. It must be a natural mating.


III

Jurisdiction, political questions, and constitutional issues are the specific aspects of Justice Frankfurter's reasoning that allow him to avoid clashes with the legislature. These aspects are, however, but parts of his general philosophy of judicial review. Since in the Justice's writings the concepts of judicial review and self-restraint are so often intertwined, it is almost impossible to separate them. For analytical purposes, however, they must be dealt with consecutively. The basic point in his conception of judicial review is that a politically irresponsible branch of government is sitting in judgment on the competence of a co-ordinate politically responsible branch. Since "legislation is the most sensitive reflex of politics," and is "most responsive to public ends and public feelings," the Court in exercising judicial review calls to account not only the legislature but also the people. For someone who is a majoritarian, as Frankfurter is, this is a most awesome duty. Believing that, with scant exceptions, the will of a majority should prevail in the electorate or in the legislature or even in the courts, he is faced with the prospect of seeing perhaps five men thwart the desires of the nation. However much he might like to circumvent this impasse, the fact remains that it must be faced. And he faces it in much the way in which he imagines Holmes and Brandeis to have faced the same dilemma.

The touchstone of judicial review is establishing the "reasonableness" of legislation under consideration. Frankfurter is convinced in theory that when even the slightest scintilla of evidence can be adduced for the reasonableness of legislative action, such legislation must be allowed to stand. However noble of statement and however consistently adhered to in application such a theory is, it is at least open to some question. Reasonableness and wisdom need not be and often are not synonymous. This is true enough, but it is difficult to define for purposes of judicial review the one without the other. One may argue cogently that the very

attempt to estimate "reasonableness" may be the way in which legitimate judicial creativity can affect the course of law. Reasonableness may be nothing more than a short-hand formula for balancing social interests. Justice Frankfurter is certainly conversant enough with the sociological theories of Pound and others to recognize that in accepting or rejecting a claim of reasonableness he is at the same time directing to some degree the path that legislation should follow. For policy reasons, this admission is not too readily made in his Supreme Court opinions, but it certainly has an extensive place in his pre-Court writings. No less a person than "our great master of constitutional law," James Bradley Thayer, recognized that "the difference, then, in the crucial cases is apt to resolve itself not really to a difference about law, but to a difference in knowledge of relevant facts." 27 Professor Frankfurter understood this in 1924. He has not lost that understanding.

When he went on the Court, Felix Frankfurter had a background that made him especially conscious of the complexities of modern life. Working with Brandeis he understood how to use the factual method. He knew that while such material had to be presented to courts it was mainly in the legislature that factual findings could most directly be put to work. With growing regularity the theory that appellate courts will rule only on points of law and not on facts has been honored more by its breach than by its fulfillment. "Judicial notice" has become very wide indeed, but it seems true to say that between the judiciary and the legislature, the latter still is more intimately involved with the complex facts of modern society. This being the case, review of legislation on factual, usually termed reasonable, grounds is open to two dangers. In the first place, "judicial attempts to solve problems that are intrinsically legislative—because their elements do not lend themselves to judicial judgment or because the necessary remedies are of a sort which judges cannot prescribe—are apt to be as futile in their achievement as they are presumptuous in their undertaking." 28 In the second place, the fast-moving tempo of twentieth-century life demands immediate relief for many of its

pressures. This the judiciary cannot provide. It can merely stultify
the present and bind the future when disallowing legislative
action without itself being able to provide any positive relief. Con­
gress, on the other hand, can immediately change its course of
direction or the people can change that course by choosing other
representatives. Therefore, Justice Frankfurter would insist, ju­
dicial review must be narrowly exercised if there is to be any free
play for the present, let alone for the future. In addition, opinions
themselves in such cases must be couched in the most guarded
language, for there is great potential danger that language broad
and sweeping in nature will later be applied by false analogy to
cases in which it really does not fit.

Justice Frankfurter's opinion in the case of Trop v. Dulles 29
contains many of his important insights concerning judicial re­
view. That this case was of some moment can be gathered from
the justices' behavior. Anthony Lewis, New York Times corre­
spondent, commented that "the members of the court put their
deep philosophic differences on vivid display . . . in their writ­
ten opinions and even more in their oral comments. Their remarks
in the courtroom verged on the bitter, even waspish." 30 The Trop
case concerned expatriation and denaturalization and the power
of Congress to legislate concerning them. Chief Justice Warren
wrote the opinion of the Court. He found it beyond the power of
Congress to require denationalization because of wartime deser­
tion from the armed forces. Such a power was not included in the
control of citizenship. There was another infirmity. The legislation
conflicted with the Eighth Amendment's prohibition of cruel and
unusual punishment. Justice Frankfurter dissented. As important
as the substantive holding is for constitutional law, major interest
at this point is on the rationale for judicial review as expressed
in Warren's and primarily in Frankfurter's opinion.

Warren's opinion was premised upon the fact that, for the
majority, the Constitution clearly forbade the type of legislation
under review. As for the power of judicial review, he noted that
"in some 81 instances since this Court was established it has deter­

mined that congressional action exceeded the bounds of the Constitution. It is so in this case."  

The Chief Justice's reference to the eighty-one instances in which legislative competence had been denied apparently annoyed Frankfurter considerably. In the oral presentation of his own opinion he interpolated a direct answer to the reference. Commenting rather caustically that holding eighty-one acts of Congress unconstitutional was nothing to boast about, he went on to remark that many of these same decisions had since been overruled.

Frankfurter maintained that there was a difference between limits of power and authority and wise or prudent exercise of power. However subtle the distinction, the Court could oversee only the former category. After quoting Madison to the effect that all power is of an encroaching nature and noting that judicial power could also be thus characterized, he insistently called to the Court's attention the fact that it was sitting in judgment upon a co-ordinate branch of government. Near the end of his opinion he entered the warning that "the power to invalidate legislation must not be exercised as if, either in constitutional theory or in the art of government, it stood as the sole bulwark against unwisdom or excesses of the moment." This sentiment is very much in keeping with his view of the legislature and of the people in a democracy. Trop v. Dulles is not unusual in any way; it is quite characteristic of Frankfurter's opinions. He has been so articulate on the subject of judicial review that almost any of his opinions would have served just as well. If articulateness can be equated with deep preoccupation, then Justice Frankfurter's basic interests are openly on display.

IV

His theory of judicial self-restraint follows as a very natural corollary to his conception of judicial review. In sum, he wants the judiciary to exercise as much self-control as possible, not be-

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cause complete disinterestedness can ever be attained, but precisely because it cannot. He realizes full well that “in law also men make a difference,” and that “five Justices of the Supreme Court are molders of policy, rather than impersonal vehicles of revealed truth.” Once again these are not thoughts that make their appearance often in Court opinions, but the opinions calling for restraint cannot be understood without this underpinning. One may regret the fact that Justice Frankfurter does not many times see fit to include such statements and thus opens himself to charges of inconsistency and self-delusion. But, in view of his pre-Court writings, his calls for judicial self-restraint should not have naïveté attributed to them.

When Justice Black was appointed to the Supreme Court, Justice Stone wrote to Frankfurter inquiring how well he knew the new member and remarking that Frankfurter might be able to give Black some assistance. The Harvard scholar responded to this plea with a memorandum for Black on the art of judging. “Writing in the same spirit and for the same academic purposes as I would were I writing a piece as a professor in the Harvard Law Review,” he informed his supposedly less knowledgeable student that a lack of candor often obscured from public view exactly what judges were about in their profession. Thereby, he wrote, the people were miseducated and failed to understand their own or their representatives’ responsibilities for bringing about change in judge-created law. Here was no philosophic treatise on the meaning of self-restraint but a very practical appraisal of the judicial process by a practical observer. Black may have learned the lesson too well for Frankfurter’s comfort, for, in later years when the two had served together on the Supreme Court, it has often been Justice Black who has reminded his former instructor that “in law also men make a difference.” In fairness, however, it should be recalled that Supreme Court opinions are not meant to be political tracts, and if the tone of Frankfurter’s

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opinions seems perhaps too lofty and withdrawn from reality, it is because his conception of the function of an opinion differs substantially from that of other members of the Court.

In Frankfurter's pleas for self-restraint, as in his discussion of judicial review, one must go behind the immediate formulation to earlier statements in order to understand the premises from which he is working. Doing this, one becomes familiar with several themes. One of these is the preponderant weight that individual preference, if unchecked, can have upon constitutional law. Also prevalent is the thought that if the Court is to be effective it must interfere with legislative competence only at crucial times when its action can have some real meaning. Too frequent and strenuous assertion of power, even that which duly belongs to it, will make any assertion of power suspect. Self-restraint has therefore a positive as well as a negative aspect. It saves the Court's prestige so that when it acts, its actions will be decisive; it is the "one quality the great judges of the Court have had in common." 37

While these aspects are important, Justice Frankfurter's primary motivation for self-restraint is his theory of democratic government and the preponderant role that the politically responsible legislature plays therein. This theory of democratic government is majoritarian. He feels that "judicial review is a deliberate check upon democracy through organs of government not subject to popular control." 38 Except when explicit limitations are placed by the Constitution upon the will of the majority, it is the better part of valor for the Court to refrain from intervening. The distinction is often made that what Frankfurter desires is popular government, but what the Framers of the Constitution created was limited government. This seems but a play on words, much like the fruitless arguments over absolute versus conditional majoritarianism. In the United States with its Bill of Rights obviously some limitations are placed upon popular will. The real question is where the limitations are set and how far the legislature can legislate undeterred by the particular views of particular justices at a particular time. What Frankfurter is concerned with,

in judicial self-restraint is reconciling democratic ideals with partial judicial control.

The opinion that he wrote in American Federation of Labor v. American Sash and Door Company is probably one of his finest expositions on the necessarily limited role of the judiciary in a democracy. The Court, unlike Congress, cannot bow to every change in popular fancy. Unless its judgments are shaped by communicable, rational standards, it tends to become despotic. Therefore, because matters of policy are by definition matters that require the resolution of largely imponderable value clashes, "assessment of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people." Like Judge Learned Hand, who does not wish to be ruled by a bevy of Platonic guardians, and like Thayer, who warned that under no system of government could courts go far to save a people from ruin, Frankfurter believes it debilitating to democracy when the legislature and people of a nation refuse to face up to their responsibility.

On more than one occasion Frankfurter has quoted Thayer to the effect that correcting legislative mistakes from the outside has two evil consequences: The people lose political experience and capacity, and they forego the moral education and stimulus that comes from fighting the questions of values out in the ordinary way, thus correcting their own mistakes. It has been said of Frankfurter's performance as a judge that his "contextual method of interpretation, his accentuation of historical perspective and his deliberate judicial humility provide the essentials for the difficult task. He is handicapped only by his inability to admit the reality of unwanted responsibility." But the situation is not so simple. For Frankfurter, it is not a matter of having the judiciary avoid unwanted responsibility; it is a matter of placing responsibility where he thinks it belongs—in the legislature.

39 335 U.S. 538 (1949).
40 Ibid., p. 557.
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He has a great deal of faith in Congress as an institution. Even in the controversial area of investigations he has leaned over backwards to sustain congressional action. In view of the decision in Watkins v. United States,\textsuperscript{42} which, at the time of its announcement, supposedly curtailed the investigatory powers of Congress, a good deal of notoriety has come from the fact that as a teacher he wrote an article entitled, "Hands Off the Investigations."\textsuperscript{43} The primary purpose of the article was to ward off attacks on studies of governmental corruption. While the disparity between his votes in the Watkins case and his sentiments in the article cannot be explained completely, it is true that in neither instance did he deny congressional power. The Frankfurter opinion in United States v. Rumely, discussed above, is an important bridge between the two so-called contradictory positions. Unlike the majority in the Watkins case, Frankfurter merely concurred on the ground that the scope of an inquiry must be defined with sufficient clarity to protect a witness from the dangers of vagueness in the enforcement of sanctions against him. It was quite natural for him, therefore, to join the 1959 holding in Barenblatt v. United States\textsuperscript{44} in which the Court confirmed committee questioning of a witness as to his associations. The Court felt that the questions asked were germane to the subject under investigation, the relationship was made very clear to the witness, and he was protected against any misunderstanding as to his rights.

Early in the New Deal Frankfurter remarked that no body of men worked harder or with more intelligence than the Senate.\textsuperscript{45} These are still apparently his feelings. He accepts legislating as a highly deliberative process. When during the course of argument before the Court Solicitor General Lee Rankin intimated that Congress passed a statute without realizing its full implications, an annoyed Frankfurter remarked, "You think then that legislation by Congress is like the British Empire, something that is acquired in a fit of absent-mindedness?"\textsuperscript{46} Other lawyers have found that

\textsuperscript{42} 354 U.S. 178 (1957).
\textsuperscript{43} Felix Frankfurter, "Hands Off the Investigations," New Republic, xxxviii (May 21, 1924), 329.
\textsuperscript{44} 360 U.S. 109 (1959).
\textsuperscript{45} New York Times, February 23, 1933.
\textsuperscript{46} Ibid., December 9, 1953.
questioning legislative competence or the legislative function is not the best way to win approval. In the hearings on desegregation at Little Rock, one of the council suggested that perhaps a public opinion poll reflected the will of the nation more accurately than did legislative judgment. This was too exasperating for Frankfurter, who acidly commented, “I sometimes wonder why we have elections, and do not turn it all over to the polls.”

Instances such as those recounted above and the tone of the Justice’s writings, both pre- and on-Court, have led to the speculation that he is a believer in legislative supremacy, in the very special sense in which that term refers to British governmental practice. Frankfurter has not gone out of his way to dispel such a notion. A believer in the empiric approach to problem-solving, he probably also believes that the linguistic absolutes of the Constitution can only be mitigated by the legislature. From his knowledge of and association with persons like Thayer, Pound, and Hand, he has perhaps absorbed much of the sociological jurist’s distrust for written guarantees of fundamental community-centered values. And it must be remembered that the whole sociological approach is not unlike that of the more historically minded British school of constitutional law, represented par excellence by A. V. Dicey, a writer often referred to by the former law professor.

One does not have to look far in Justice Frankfurter’s writings to find at least tacit approval if not preference for the British approach. The most superficial examination of his judicial philosophy reveals self-professed Anglophilism. Its roots trace back to many important figures in English thought. For example, Jeremy Bentham’s dislike for judge-made law and his insistence on the completeness of legislative statement of purpose through codes echo to some degree in Frankfurter’s opinions. Harold Laski and the whole English pluralist school have had their effect, an effect that shows up much more clearly in discussion of geographical disbursion of control and responsibility and in analysis of group theory as related to the concept of social unity.

It is perhaps in this area of bowing before congressional will and advocating self-restraint that Justice Frankfurter comes clos-

\[\textit{Ibid.},\ \text{August 29, 1958.}\]
est to the British legislative supremacy tradition. The case of Perez v. Brownell found him holding for the Court that Congress had power in the Nationality Act of 1940 to declare that a person voting in a foreign election forfeited citizenship. Justice Douglas in dissent called attention to what he thought was a serious flaw in the majority opinion.

The philosophy of the opinion that sustains this statute is foreign to our constitutional system. It gives supremacy to the Legislature in a way that is incompatible with the scheme of our written Constitution. A decision such as this could be expected in England where there is no written constitution, and where the House of Commons has the final say. But with all deference, this philosophy has no place here. By proclaiming it we forsake much of our constitutional heritage and move closer to the British scheme. That may be better than ours or it may be worse. Certainly it is not ours.

Justice Douglas could better have said that certainly the philosophy displayed was not his, for on many occasions Justice Frankfurter has been able to carry a majority with him in sustaining, against vehement protest, congressional competence based on the philosophy expressed in the Perez case.

V

A good deal of the criticism of Justice Frankfurter's positions on judicial self-restraint and legislative competence comes from those who desire a variant of judicial supremacy—at least at this particular juncture in constitutional development. Justice Jackson, in his posthumously published work on *The Supreme Court in the American System of Government*, pointed out one of the contradictions of the last three decades. "A cult of libertarian judicial activists now assails the Court almost as bitterly for renouncing power as the earlier 'liberals' once did for assuming too much power." Professor Herman Pritchett is not quite so blunt, but

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he does indicate the difference in perspective between the goal-orientation of the activists and the functional-orientation of Frankfurter and others.\textsuperscript{61} One of the primary differences, of course, is that in emphasis as to how far the Court should sally forth to protect certain interests, especially in the field of civil rights. Because of Frankfurter's conception of the Constitution as a source of power, he is unable to don the crusader's garb. While he has not and would not subscribe to the theory that we have unlimited trust in the majority, neither could he wholeheartedly endorse the view that the function of the Court varies with the types of congressional enactment under consideration. Majority rule, limited only by the Constitution, can be as responsible in the civil rights field as it is in the area of economic supervision.

Those members of the Court who are functionally oriented are more apt to talk in terms of objective standards, thus underplaying the personal contributions of particular justices and emphasizing the continuing role of the Court as an institution. Frankfurter tends to follow this course through most of his opinions. The judicial activists, or absolutists as they have been called, tend to think that it is psychologically impossible even to approximate objectivity and impartiality. Since someone, somewhere, has to make a decision as to what aspects of a civilization's values should be protected above all others, they are willing to undertake the task. In doing this, however, they are driven to an individual-rather than a law-centered philosophy. Justice Frankfurter has suggested that certain decisions, especially those involving the Bill of Rights, could only have been made because certain of the justices were convinced that everyone was completely motivated solely by their own personal ideas of The Just. One may happen to agree with their ideas, as Frankfurter does in many cases, without being convinced that their actions help to dignify law as a social phenomenon. Individual justices dispensing individualized justice, in the sense that each case is determined wholly on disguised sympathy, leaves much to be desired for those who are functionally oriented.

Such an orientation is not itself without limitations. Frankfurter's deference to legislative judgment presupposes that con-

\textsuperscript{61} See C. Herman Pritchett, "Libertarian Motivations on the Vinson Court," \textit{American Political Science Review}, \textbf{XLVII} (June, 1953), 321–36.
gressional acts coming before the Court should be of the kind that would eliminate, as much as possible, any temptation for judges to become lawmakers. The trouble is that, however desirable such legislation might be, there is precious little of it on the statute books today. His insistence that the legislature assume its responsibilities and not attempt to impart segments of its competence to the judiciary should indicate to him that there is somewhat of a practical contradiction in the functionally oriented philosophy. By saying on the one hand that the dictates of Congress as contained in legislation must be followed, while, on the other hand, complaining that Congress often does not provide any policy to be followed, one is left in a no man’s land of doubt and consternation. Many people would agree with the proposition that if Congress completely fulfilled its competence obligations, then the courts should respect the limits of their own area of power. Unfortunately, the first part of the proposition is not always fulfilled, thereby invalidating the second.

Justice Frankfurter’s self-restraint, in the light of his views on Congress, comes in for the fairest and most telling criticism, not because he will not assay an activist role but because others do. By theoretically refusing to assert himself in the face of strong and pronounced views on the part of other members of the Court, Frankfurter is in the dangerous position of losing the match by default, so to speak. Indeed, in the judgment of Professor Pritchett, “Frankfurter, by his conscientious efforts to apply the restraint idea, has carried it to a logical extreme and thereby demonstrated its hollowness as a guide for action.” 52 While his cohorts on the bench may and do question whether the Justice has carried restraint to the extreme where his own personal views have not been infused into decisions, yet Professor Pritchett’s criticism seems sound. If the so-called activists unashamedly show preference for certain programs, FELA and FLSA, and for certain values, “preferred position” of the First Amendment, may it not be better openly to have another set of conceptions vying for prominence?

But Justice Frankfurter is caught in the web of his own theo-

retical formulations. It would be an almost impossible task for him to break, if this were desirable, with the positions that have been a lifetime in developing. A basic formulation of this position holds that “the powers exercised by this Court are inherently oligarchic . . . .” 53 This is true whether humane ends are being served or not. Being inherently oligarchic, it is important to lessen rather than to increase the control that the judiciary exercises. As Roscoe Pound thinks of law as only one element in social control, so Justice Frankfurter thinks of the judiciary as only one, and perhaps a minor, element in a democratic society. By dispersing responsibility and making each agency of government assume the responsibility that duly accrues to it, the nation will be more fully served.