
RECENT BOOK

BRAD SNYDER, *DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT*. New York, N.Y.: W.W. Norton & Company. 2022. Pp. 979. \$45.00.

On the fourth floor of the Harvard Law School Library sits Justice Felix Frankfurter's rocking chair. It was a fitting seat for Frankfurter, an intellectual in constant motion. Georgetown Law Professor Brad Snyder's new biography of Frankfurter, *Democratic Justice*,¹ tells the story of a restless truth-seeker. Snyder expertly illustrates how Frankfurter never wavered in his deep commitment to democracy and how Frankfurter's belief in objective truth informed his democratic convictions. But Snyder does not grapple with a potential inconsistency on Frankfurter's part. Amidst his lifelong pursuit of truth, Frankfurter was at times unusually reticent to seek, find, and enforce definitive answers in the realm of constitutional interpretation. When confronted with certain constitutional questions, especially ones that pitted the majority's power to govern against the rights of individuals, Frankfurter sometimes did something out of character. He stopped.

Frankfurter immigrated to America from Vienna as a boy without knowing any English,² graduated first in his Harvard Law School class,³ fought for the constitutionality of minimum wage and maximum hours labor laws,⁴ appointed students to Supreme Court clerkships and other governmental posts while a Harvard Law professor,⁵ played an influential role in the infamous Sacco and Vanzetti case,⁶ worked as a behind-the-scenes leader of the Zionist movement,⁷ helped craft landmark New Deal legislation,⁸ advised President Franklin Delano Roosevelt,⁹ was the subject of an FBI file,¹⁰ and served as a Supreme Court Justice.

Many have claimed that the ideological direction of Frankfurter's relentless flurry of activity was inconsistent: they frame him as a political progressive-turned-judicial conservative.¹¹ Snyder upends this conventional wisdom.¹² He deftly traces how Frankfurter's vigorous

¹ BRAD SNYDER, *DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT* (2022).

² *Id.* at 9.

³ *Id.* at 24.

⁴ *Id.* at 81–82.

⁵ *Id.* at 7, 76.

⁶ *See id.* at 160–83.

⁷ *See id.* at 105–16, 490–91.

⁸ *See id.* at 219–22.

⁹ *Id.* at 246–53, 312.

¹⁰ *Id.* at 545.

¹¹ *Id.* at 4, 349, 393, 481, 601.

¹² *See id.* at 393, 536.

progressive political commitments informed his conservative (or rather, restrained) judicial philosophy.¹³

Frankfurter's commitment to seeking truth sustained his enduring commitment to democracy. Unlike his avowed idol,¹⁴ Justice Oliver Wendell Holmes, Jr.,¹⁵ Frankfurter was a "stark empiricist"¹⁶ and a firm believer in "objective truth."¹⁷ And he insisted that the American people, not judges, were the most capable of realizing truths at scale and thus achieving socially optimal outcomes.¹⁸ It followed that unelected judges should get out of their way.

But to hold fast to this "democratic faith,"¹⁹ at times Frankfurter broke with its very foundations: he often did not apply his belief in the need to seek, find, and then live by objective truths to questions of constitutional law. Frankfurter was devoted to Professor James Bradley Thayer's theory of judicial restraint, which prevents judges from invalidating democratic legislation even if they believe it might be unconstitutional.²⁰ The judge's own sense of true constitutional meaning in close cases is irrelevant; he can set aside legislation only if its unconstitutionality is "clear beyond a reasonable doubt."²¹ Such judicial restraint — to which Frankfurter was explicitly committed²² — is not grounded in a belief that the people are superior interpreters of constitutional meaning. Rather, the theory posits that often there is no constitutional meaning clear enough to constrain the democratic branches — especially when those branches come into conflict with individual rights.²³

Granted, the Framers did set forth a capacious, forgiving plan for politics in the form of the Constitution. That "framework for government," to use Frankfurter's phrasing, empowers us to govern ourselves largely as we see fit.²⁴ But its flexibility has limits.²⁵ Perhaps too taken with a faith in American democracy that he himself likened to religious zeal,²⁶ Frankfurter sometimes did not enforce those limits. Thus, Snyder

¹³ See *id.* at 427.

¹⁴ See *id.* at 66–67, 69–70, 198–99, 245–46.

¹⁵ See *id.* at 49 ("Ever the skeptic, Holmes thought that there was no such thing as truth, which he defined as 'the system of my (intellectual) limitations' or 'the majority vote of that nation that could lick all others.'").

¹⁶ *Id.* at 219.

¹⁷ *Id.* at 49.

¹⁸ See *id.* at 416 (explaining Frankfurter's "democratic faith").

¹⁹ *Id.*

²⁰ See *id.* at 20–21.

²¹ JAMES BRADLEY THAYER, *THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW* 25 (Boston, Little, Brown & Co. 1893).

²² See SNYDER, *supra* note 1, at 20–21, 710.

²³ See THAYER, *supra* note 21, at 18.

²⁴ SNYDER, *supra* note 1, at 555 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).

²⁵ See, e.g., U.S. CONST. amends. I–X, XIV.

²⁶ See SNYDER, *supra* note 1, at 348, 353, 420.

paints readers a wonderful portrait of a thinker and doer who is an inspiration, but also a caution.

While tracing Frankfurter's tremendous professional career, Snyder profiles Frankfurter the person, providing countless anecdotes that reveal his insatiable "zest for life."²⁷ As one of his contemporaries explained, Frankfurter "collect[ed] people" rather than "books or pictures."²⁸ Snyder relates how Frankfurter's charismatic personality and first-rate mind fueled his meteoric rise. As Frankfurter once wrote: "So much of it . . . is personalia."²⁹

Indeed it was: human connections help explain every success of Frankfurter's staggering career. Having become one of then-U.S. Attorney Henry Stimson's "surrogate sons" while working for him in the Southern District of New York,³⁰ Frankfurter followed Stimson to the War Department.³¹ During World War I, President Woodrow Wilson selected Frankfurter to chair the War Labor Policies Board, where he grew close with the Assistant Secretary of the Navy, Franklin Delano Roosevelt.³² About a decade later, Frankfurter (by then a Harvard Law professor) publicly supported then-Governor Roosevelt during his successful 1932 presidential campaign.³³

As a professor, Frankfurter wielded immense influence by placing his best students in positions of power throughout government. He was a meritocrat through and through,³⁴ and he enjoyed cultivating the brightest minds and then handpicking them for Supreme Court clerkships.³⁵ Once Roosevelt became President, Frankfurter became a "one-man recruiting agency" who sent student after student to work for the Administration.³⁶

Frankfurter's commitment to his students was unbreakable. "Nothing . . . could shake Frankfurter's loyalty to his former students," even to credibly accused Soviet spies like Alger Hiss.³⁷ Frankfurter's many influential protégés reciprocated his loyalty. For example, Frankfurter acolytes helped persuade President Roosevelt to nominate Frankfurter to fill the late Justice Cardozo's seat in 1939.³⁸

²⁷ *Id.* at 413.

²⁸ *Id.* at 38.

²⁹ *Id.* at 108.

³⁰ *Id.* at 29; *see also id.* at 27. Frankfurter landed the job with Stimson thanks to the recommendation of Harvard Law School Dean James Barr Ames. *See id.*

³¹ *Id.* at 37.

³² *Id.* at 98-100.

³³ *Id.* at 211-13.

³⁴ *Id.* at 66 ("What mattered was not [his students'] social standing but their brains, their ideas, and their future goals."); *see also id.* at 337 (recounting how Frankfurter translated his belief in meritocracy into civil service reform during the Roosevelt Administration).

³⁵ *Id.* at 76.

³⁶ *Id.* at 224.

³⁷ *Id.* at 547; *see also id.* at 532-36.

³⁸ *See id.* at 284. Even after President Roosevelt's death, Frankfurter continued to exert influence in part thanks to friends and former students. *See, e.g., id.* at 443, 460-62, 467.

Frankfurter's loyalty and ability to "collect[] people" faced a tall test on the ego- and conflict-ridden Supreme Court.³⁹ For perhaps the first time in his life, Felix Frankfurter did not pass a test with flying colors. Mutual animosity — particularly his rivalries with Justices Black and Douglas⁴⁰ — prevented Frankfurter from becoming more influential on the Court.⁴¹ Although his intellectual disagreements with his colleagues were real, they grew insurmountable when layered atop the Justices' deep personal distaste for one another.⁴² A monumental exception to this dynamic was Frankfurter's role in *Brown v. Board of Education*.⁴³ Snyder mounts a persuasive case that Frankfurter played an essential role in forming a fragile consensus to invalidate de jure segregation in public schools.⁴⁴

The many hours Frankfurter spent outside of his "marble prison"⁴⁵ advising President Roosevelt also inhibited his judicial success: "Frankfurter's active social life and yen for policy making forced him to sacrifice judicial craftsmanship,"⁴⁶ such that his "opinions were often only as good as his law clerk's editing skills."⁴⁷

His advising activities led to ethical lapses as well. "[I]n advising Roosevelt and [Secretary of War] Stimson on issues that might come before the Court, Frankfurter . . . cross[ed] dangerous ethical lines . . ." ⁴⁸ For example, Frankfurter counseled Secretary Stimson regarding a case of suspected Nazi saboteurs, which was "bound to come before the Court."⁴⁹ Frankfurter did not disqualify himself from the case, even as he pushed Justice Murphy to do so given his Army Reserve post.⁵⁰

While Frankfurter bent certain rules, he did not veer from his commitment to judicial restraint. He had long lambasted judicial overreach. As an attorney and professor, he waged a decades-long fight in court⁵¹ and in the pages of the *Harvard Law Review*⁵² against judges using the

³⁹ See generally NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* (2010).

⁴⁰ See SNYDER, *supra* note 1, at 390, 393, 410–11, 414, 595, 602.

⁴¹ See *id.* at 568 ("Frankfurter was not an effective coalition builder and often alienated his colleagues with long, pedantic conference remarks."). Indeed, Professor Noah Feldman has concluded that the "high point of Frankfurter's judicial influence" came in 1940, only about one year into his Supreme Court tenure. FELDMAN, *supra* note 39, at 185.

⁴² See, e.g., SNYDER, *supra* note 1, at 390, 393.

⁴³ 347 U.S. 483 (1954).

⁴⁴ See SNYDER, *supra* note 1, at 594.

⁴⁵ *Id.* at 362.

⁴⁶ *Id.* at 412.

⁴⁷ *Id.* at 413.

⁴⁸ *Id.* at 365.

⁴⁹ *Id.* at 395.

⁵⁰ *Id.* at 397.

⁵¹ See *id.* at 74, 81–82.

⁵² *Id.* at 129, 140 (citing Felix Frankfurter, *Twenty Years of Mr. Justice Holmes' Constitutional Opinions*, 36 HARV. L. REV. 909, 915, 919, 932 (1923)).

Due Process Clauses of the Fifth and Fourteenth Amendments to legislate from the bench.⁵³ He continued this fight as a Justice even as the Warren Court used those very same provisions to achieve politically progressive ends that he supported.⁵⁴ All the while, Frankfurter recognized that those clauses guarantee minimum *procedural* due process rights.⁵⁵

Frankfurter's lifelong critique of judges leveraging open-ended constitutional language to invalidate legislation is well taken, and *Democratic Justice* ultimately serves as a monument to his philosophy of restraint. As Dean John Manning has argued, the Constitution, like most laws, contains a number of compromises between competing values.⁵⁶ Vague constitutional principles and purposes might be insufficient grounds for undoing democratically enacted legislation.⁵⁷ On the other hand, the judiciary must enforce compromises that the Framers did reach and enshrine in our supreme law.⁵⁸

When assessed under this framework, at times Frankfurter's otherwise compelling democratic philosophy of judicial restraint slipped into an unwillingness to allow enduring constitutional commands to trump the passing will of the people.⁵⁹ Indeed, he sided with the majority in a number of "anticanon" cases,⁶⁰ including *Hirabayashi v. United States*⁶¹ and *Korematsu v. United States*.⁶² Snyder casts Frankfurter's role in these cases in too forgiving a light. For example, he writes that "Frankfurter's concurrence in *Korematsu* . . . was as close as he could come to dissenting from the awful decision."⁶³ But it was nonetheless a concurrence, not a dissent.⁶⁴

Frankfurter's commitment to judicial restraint was in some tension with his devotion to seeking truth. It is striking that the highest form of praise Frankfurter bestowed on others was declaring that they had

⁵³ See *id.* at 149, 157–58, 197.

⁵⁴ See *id.* at 649; see also *id.* at 523 ("[T]oo many so-called liberals . . . are seduced by what Justice Brandeis rightly called the 'odious doctrine that the end justified the means.'" (omission in original)).

⁵⁵ See *id.* at 176–77, 537–38, 568.

⁵⁶ John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1945 (2011) (noting "the Philadelphia Convention's countless compromises").

⁵⁷ *Id.* at 1948 ("[W]here no specific clause speaks directly to the question at issue, interpreters must respect the document's indeterminacy").

⁵⁸ See *id.* at 1947 ("Where the Constitution is specific, the Court should read it the way it reads all specific texts.").

⁵⁹ But see, e.g., SNYDER, *supra* note 1, at 440, 595 (describing Frankfurter's enforcement of the Equal Protection Clause to invalidate racially discriminatory laws and executive actions); *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940) (upholding a petitioner's free speech claim under the "clear and present danger" standard, with Frankfurter in the unanimous majority).

⁶⁰ See generally Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

⁶¹ 320 U.S. 81 (1943).

⁶² 323 U.S. 214 (1944).

⁶³ SNYDER, *supra* note 1, at 450.

⁶⁴ *Korematsu*, 323 U.S. at 224 (Frankfurter, J., concurring).

searched for, discovered, and then lived by truth. Yet his own jurisprudence cannot be characterized in those same terms.

When commemorating the life of his close friend Robert Valentine, Frankfurter professed that Valentine “not only sought, he not only found, he followed truth.”⁶⁵ At Justice Brandeis’s funeral, Frankfurter concluded his eulogy “by reciting several paragraphs from one of Brandeis’s favorite poems, John Bunyan’s *Pilgrim’s Progress*, about the death of ‘Mr. Valiant-for-truth.’”⁶⁶ In a *Harvard Law Review* tribute, Frankfurter praised the late Justice Jackson’s “habit of truth-seeking.”⁶⁷ And toward the end of his own life, Frankfurter gushed when he received that same high praise: he proudly shared the *Times of London*’s description of him as a “fighter for truth” with former students.⁶⁸

Seeking, finding, and following truth was Frankfurter’s guiding light, but his interpretive methodology was somewhat at odds with that ideal. Once Frankfurter had read Thayer’s *The Origin and Scope of the American Doctrine of Constitutional Law* as a student, he “never stopped quoting it” the rest of his life.⁶⁹ Indeed, Frankfurter deemed Thayer’s work “the most important single essay” regarding constitutional law.⁷⁰

But Thayer’s theory of judicial restraint was not motivated by a commitment to searching for, deducing, and then abiding by truth above all else. Thayer expressly stated that for judges deciding constitutional cases, “*the ultimate question is not what is the true meaning of the constitution.*”⁷¹ Rather, the question should be whether a legislative act is unconstitutional “beyond a reasonable doubt.”⁷² Thayer explained that when judges declare “that the question for them” is what is “clear beyond a reasonable doubt,” they lay bare “that their decisions in support of the constitutionality of legislation *do not . . . import their own opinion of the true construction of the constitution.*”⁷³ Therefore, according to Thayer, if judges impose a “beyond a reasonable doubt” burden of persuasion on parties attempting to invalidate legislation,⁷⁴ they are not seeking, finding, and then applying true constitutional meaning as best they see it.

Frankfurter, the professed truth-seeker, relied on Thayer’s framework constantly as a Justice. Apart from the context of policing the

⁶⁵ *Id.* at 79.

⁶⁶ *Id.* at 383.

⁶⁷ *Id.* at 601 (quoting Felix Frankfurter, *Mr. Justice Jackson*, 68 HARV. L. REV. 937, 939 (1955)).

⁶⁸ *Id.* at 5.

⁶⁹ *Id.* at 21.

⁷⁰ *Id.*

⁷¹ THAYER, *supra* note 21, at 24.

⁷² *Id.* at 25.

⁷³ *Id.* (emphasis added).

⁷⁴ For a trenchant analysis of how presumptions and burden-shifting frameworks from the law of evidence informed Thayer’s theory of judicial restraint, see Matthew J. Franck, *James Bradley Thayer and the Presumption of Constitutionality: A Strange Posthumous Career*, 8 AM. POL. THOUGHT 393, 406–09 (2019).

separation of powers, which Frankfurter conceived of as “the basic function of this Court,”⁷⁵ Frankfurter consistently granted Thayerian deference to democratic encroachments upon claims of individual rights. For example, in his majority opinion in *Minersville School District v. Gobitis*⁷⁶ upholding the constitutionality of compulsory flag salutes for public school children, Frankfurter stated that unless “the [government’s] transgression of constitutional liberty is too plain for argument,” its action is valid.⁷⁷ When left dissenting on that very same question three years later in *West Virginia State Board of Education v. Barnette*,⁷⁸ Frankfurter stressed that “reasonable legislators could have taken the action which is before us.”⁷⁹ And in a dissent he penned toward the very end of his judicial career, Frankfurter argued that the Court should only invalidate an act of Congress if it is “clearly outside the constitutional grant of power.”⁸⁰ Frankfurter also encouraged his colleagues to adopt his Thayerian approach. He counseled them that when an issue is “tough,” serious “doubt must be resolved in favor of constitutionality.”⁸¹

These were not positive claims of constitutional truth. They were negative conclusions that the losing party had not overcome the weighty presumption of constitutionality. Frankfurter’s judicial restraint was premised more so on democratic presumptions than propositions about true constitutional meaning. His Thayerian restraint did not square perfectly with his commitment to valuing truth above all else.⁸²

Thus, while Snyder commends “Frankfurter’s flexible approach to constitutional questions,”⁸³ that approach perhaps led him to forsake constitutional constraints. Frankfurter fondly quoted Thomas Jefferson’s remark that “no statesman can plan for more than a generation ahead,”⁸⁴ and Frankfurter insisted that the Constitution is not “a doctrinaire document.”⁸⁵ But in certain respects the Constitution *is* a doctrinaire

⁷⁵ SNYDER, *supra* note 1, at 427.

⁷⁶ 310 U.S. 586 (1940).

⁷⁷ *Id.* at 599.

⁷⁸ 319 U.S. 624 (1943).

⁷⁹ *Id.* at 647 (Frankfurter, J., dissenting).

⁸⁰ *Trop v. Dulles*, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting).

⁸¹ SNYDER, *supra* note 1, at 641.

⁸² Perhaps the alleged tension can be resolved if Thayer and Frankfurter’s approach is framed as a truth claim about the meaning of the “judicial power” under Article III. Thayer’s argument explicitly said as much. See THAYER, *supra* note 21, at 22 (labeling “[t]he judicial function” as “merely that of fixing the outside border of reasonable legislative action”). But that still might pose a problem vis-à-vis Frankfurter’s commitment to objective truth. It expressly leaves open the possibility that the Constitution actually means one thing, but the judiciary will not enforce that meaning if it is not sufficiently obvious. Even after a difficult search for truth, having been supposedly found, the truth would not be followed. That does not align with Frankfurter’s mantra of honoring truth above all, nor does it square with his belief that “[t]he Supreme Court, like all human institutions, must earn reverence through the test of truth.” Frankfurter, *supra* note 52, at 932.

⁸³ SNYDER, *supra* note 1, at 559.

⁸⁴ *Id.* at 495.

⁸⁵ *Id.* at 391 (quoting *Bridges v. California*, 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting)).

document,⁸⁶ and the Constitution's Framers *did* plan for more than a generation ahead.⁸⁷ They premised their plan on their assessments of our enduring human nature,⁸⁸ and they enacted that plan as the supreme law of the land.⁸⁹ While Jefferson himself proposed redrafting the Constitution every nineteen years,⁹⁰ he nonetheless believed that its constraints must be strictly observed while it remained supreme law. The realities of human nature demanded no less: "In questions of power let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution."⁹¹ Neglecting to acknowledge such chains, at times Frankfurter stood by as Americans broke them.

Frankfurter's belief in our capacity to govern ourselves should nonetheless resonate today. Frankfurter understood what many still refuse to grasp. The Supreme Court "isn't God."⁹² But nor are people angels, which is why we have constitutional government.⁹³ Even as he inspires readers, Frankfurter should serve as a cautionary tale of the dangers of swinging to an opposite extreme — an extreme *so* skeptical of constraining constitutional meaning that it risks ultimately nudging us away from the enterprise of constitutionalism itself.⁹⁴

To what extent Frankfurter was an imperfect interpreter of the Constitution is surely debatable, but as we argue with one another about American politics, judicial power, and the Constitution, his life counsels in favor of keeping the "open minds" required to sustain an "open society."⁹⁵ That duty is particularly incumbent upon those of us lucky enough to attend institutions of higher education, which Frankfurter fondly described as "the special guardians of the free pursuit of truth."⁹⁶ It is essential to argue and debate with the very same commitment to seeking truth — whatever it may ultimately be — as Justice Felix Frankfurter so often did. But where he stopped, we should go further, still.

⁸⁶ See, e.g., U.S. CONST. art. I, § 9, cl. 8 (expressly prohibiting titles of nobility).

⁸⁷ See, e.g., *id.* art. V (laying out an amendment process).

⁸⁸ See, e.g., THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961) ("But what is government itself but the greatest of all reflections on human nature?").

⁸⁹ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (deeming the Constitution "a superior, paramount law, unchangeable by ordinary means").

⁹⁰ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 396 (Julian P. Boyd & William H. Gaines, Jr., eds., 1958).

⁹¹ SNYDER, *supra* note 1, at 552 (recounting advocate John W. Davis's quotation of Jefferson during oral argument in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

⁹² *Id.* at 485.

⁹³ See THE FEDERALIST NO. 51, *supra* note 88, at 349 (James Madison) ("If men were angels, no government would be necessary.").

⁹⁴ This is not a theoretical risk. Some scholars have moved away from supporting a flexible, dynamic mode of constitutional interpretation toward embracing an explicit rejection of the very project of "constitutionalism." See, e.g., Ryan D. Doerfler & Samuel Moyn, Opinion, *The Constitution Is Broken and Should Not Be Reclaimed*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html> [<https://perma.cc/CN37-SCTW>].

⁹⁵ SNYDER, *supra* note 1, at 542.

⁹⁶ *Id.* at 400.