FELIX FRANKFURTER AND JUDICIAL SELF-RESTRAINT

by

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PREFACE

The topic of this thesis grew out of a study of Felix Frankfurter and judicial self-restraint written in 1966 for a research seminar on Public Law taught at The University of Arizona by Clifford M. Lytle. As a result of this study of selected writings of Felix Frankfurter it became evident that further work was needed to clarify apparent contradictions in Frankfurter's writings, contradictions involving the political and policy-making roles of the United States Supreme Court.

The purpose of this present study has been to examine and clarify these two areas of contradiction, as well as to more adequately describe Felix Frankfurter's theory of judicial self-restraint.

During the preparation of this thesis I have been helped by a number of persons. I wish to express my gratitude to my thesis adviser, Clifford M. Lytle, for his patience and help, and to Hazel Gillie, who typed the manuscript and guided it through the administrative formalities. Without the support and assistance of my four parents this thesis would not have been completed. To my husband Loren, whose compassion sustained me, goes my deepest gratitude.

TABLE OF CONTENTS

		Page
	ABSTRACT	v
1.	INTRODUCTION	1
	Scope	3
	Defense of Scope	5
	Life and Writings	6
	Methods and Research Materials	14
	Previous Studies	16
2.	FRANKFURTER'S PERCEPTION OF THE ROLE OF THE UNITED STATES SUPREME COURT IN THE AMERICAN POLITICAL SYSTEM	21
	The American Political System	21
	Society and Government	21
	American Democracy	23
	United States Constitution	26
	The Role of the United States Supreme Court	32
	Conclusion	41
3.	DEFENSE OF A LIMITED ROLE	43
	Supreme Court: Powers and Limitations	43
	Powers of the United States Supreme Court	44
	External Limitations	47
	The Nature of the Judicial Processes	52
	Supreme Court: An Oligarchic Institution	54
4.	TECHNIQUES OF JUDICIAL SELF-RESTRAINT	59
	Judicial Humility	59
	Techniques of Judicial Self-restraint	63
5.	CONCLUSIONS	81
	The Theory of Judicial Self-restraint	81
	Conclusion	89
	SELECTED BIBLIOGRAPHY	91

ABSTRACT

Judicial self-restraint has played a significant role in the judicial history of the United States. Felix Frankfurter (1882-1965), a federal administrator, Harvard Law School professor, and United States Supreme Court justice (1939-1962) was a leading advocate of judicial self-restraint. Frankfurter's theory of judicial self-restraint can be viewed as a prescriptive theory. It prescribes that the role of the U. S. Supreme Court should be limited to the formulation and modification of procedural policies, and that the High Court should avoid initiation and invalidation of substantive policies traditionally within the policy-making spheres of other branches of government. The High Court should assume this role, Frankfurter believed, because the Court's decision-making procedures are unsuited for substantive policy-making, because a limited policy-making role will not evoke external restraint of the Supreme Court's authority, and because American democracy is protected and strengthened by a restraintist Court. Frankfurter's theory of self-restraint also outlines the means, judicial humility and the techniques of judicial self-restraint, by which Supreme Court justices can insure that the High Court will perform its limited policy-making role, thereby fulfilling its important political function in the American political system.

CHAPTER 1

INTRODUCTION

Throughout most of the history of the United States there has been a debate between the advocates of judicial self-restraint and the proponents of judicial activism. This debate has been carried on between members of the United States Supreme Court as well as among legal scholars and political pundits. Self-restraintists have accused judicial activists on the Supreme Bench of legislating policy, of either preventing valuable social and economic experimentation by governmental institutions (as in the early 1930's), or needlessly involving the Supreme Court in politics (as in the 1960's). Judicial activists have responded that the restraintist justices have encouraged the Supreme Court to avoid its policy-making responsibilities in the American political system. Self-restraintists have also been accused of hypocrisy: they preach objectivity and judicial humility, yet, say the judicial activists, they are as eager as the activists to impose their personal policy preferences upon society.

This debate between judicial activism and judicial self-restraint is older than the Supreme Court of the United States. During the Constitutional Convention there were debates between those who favored and those who opposed an active role for the Supreme Court in the formulation of public policy. James Wilson of

Pennsylvania, supported strongly by James Madison, proposed that Supreme Court justices "have a share in the Revisionary power"[1] of the Executive over legislative policy. Elbridge Gerry believed that such a proposal would result in "combining and mixing together the Legislature and the other departments. It was establishing an improper coalition between the Executive and Judicial departments. It was making Statesmen of the Judges; and setting them up as the guardians of the Rights of the people."[2] Gerry's arguments of judicial self-restraint decided the issue: "on Question of Mr. Wilson's motion for joining the Judiciary in the Revision of laws it passed in the negative."[3]

The 20th century has seen two major periods of conflict between judicial activists and judicial self-restraintists, the era between the two world wars and the years of the Warren Court. This conflict has sharpened when judicial activists have formed a majority of the Supreme Bench, not when the majority of justices followed the tenets of judicial self-restraint. Much of the social legislation passed between World War I and 1937 by state and federal governments was struck down by the Supreme Court. Progressives and New Dealers who favored these experiments in social reform accused the activists on the Court of imposing their personal economic and social policy preferences upon the nation. This era of conflict and judicial

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1. Winston U. Solberg (ed.), The Federal Convention and the Formation of the Union, American Heritage Series (Indianapolis: Bobbs-Merrill Co., 1958), p. 235.

2. Ibid., p. 240

3. Ibid.

activism was brought to a close at the time of the Court Packing Plan of President Franklin Roosevelt in 1937. The years of Earl Warren's tenure as chief justice coincided with a rebirth of anti-communism and a growing demand for an expansion of civil rights and liberties to disadvantaged sections of society. The willingness of the Warren Court to initiate policy led to public debates about the role of the Supreme Court and finally to congressional attempts to restrain the Court's activism.

Scope

Before an assessment can be made concerning the relative merits of judicial activism and judicial self-restraint, these concepts must be adequately defined. Judicial self-restraint and judicial activism are ambiguous abstractions: each has more than one definition. Neither can be meaningfully defined in a single sentence nor in several pages. The immensity of the task of defining both dictates that only one of these concepts be examined in a single thesis. Thus, this thesis will focus only on the concept of judicial self-restraint, or judicial self-limitation as it is sometimes called.

While scholarly and popular studies of the Supreme Court frequently mention judicial self-restraint, the concept has rarely been systematically defined. An examination of the articles and Supreme Court opinions of restraintist justices points to an explanation for the lack of definition and agreement among judicial scholars concerning the nature of judicial self-restraint.

Self-restraintist justices differ significantly in their conceptions of judicial self-restraint, so much so that there is not one doctrine of self-restraint, but many. An example of this can be seen in the views of two contemporaries on the Supreme Bench, Justices Harlan F. Stone and Felix Frankfurter. While both justices are viewed as strong advocates of self-restraint they sometimes found themselves supporting opposing policies because their conceptions of self-limitation differed. Justice Frankfurter believed the Supreme Court should refrain from overruling governmental policies even when First Amendment freedoms were involved. Justice Stone modified his conception of judicial self-restraint to include the theory of preferred freedoms, which advocated that a government institution's act not be presumed constitutional if a suit involved First Amendment freedoms.

It is important that all conceptions of judicial self-limitation be examined if students of the Court hope to understand or explain self-restraint. Without such knowledge no sound normative judgments can be made as to the relative value of self-restraint or activism.

Throughout the history of the United States Supreme Court there have been many advocates of judicial self-restraint. Among the most notable of the 20th century restraintists on the Supreme Bench are O. W. Holmes, Louis Brandeis, Benjamin Cardozo, Harlan F. Stone, and Felix Frankfurter. The theories of judicial self-restraint of each of these justices must someday be examined. Because of the

complexity of such a study this thesis will be limited to an examination of the conception of judicial self-restraint of a single justice, that of Felix Frankfurter.

The scope of this thesis has been further limited by focusing entirely on judicial self-restraint as a theory. Justice Frankfurter's use of self-restraint will not be examined. While the variations and consistencies in Frankfurter's adherence to the tenets of his theory should someday be examined, such a study can only be made after his theory of self-restraint has been adequately identified, because it is impossible to compare practice with theory if the theory is insufficiently understood. Unfortunately, it is not possible to accomplish both tasks in a single thesis.

Defense of Scope

Felix Frankfurter's theory of judicial self-restraint is a logical choice for examination. It is a rare discussion of judicial self-limitation that does not at some point mention or quote from one of Frankfurter's numerous statements about self-restraint. Alpheus T. Mason has called Felix Frankfurter "the most articulate exponent of judicial self-restraint on the bench."[4] Furthermore, judicial self-limitation was not a minor aspect of Frankfurter's constitutional jurisprudence. Shortly after Frankfurter's death Samuel Hofstadter and Theodore Richter wrote that "if we were asked to

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4. Alpheus T. Mason, The Supreme Court from Taft to Warren (Baton Rouge: Louisiana State University Press, 1958), p. 170.

single out one tenet which seems to course through Frankfurter's opinions above others it would be that of judicial self-restraint and humility. This is a theme which he seems to feel cannot be over-emphasized."[5] A brief sketch of Frankfurter's life and writings will show the durability and intensity of Frankfurter's espousal of judicial self-limitation, as well as indicate factors aiding and those complicating an analysis of Frankfurter's conception of judicial self-restraint.

Life and Writings

Felix Frankfurter was born in Vienna on November 15, 1882. At the age of twelve he immigrated to the United States, having never heard nor spoken a word of English. Seven years later at the age of nineteen Frankfurter graduated third in his class from City College of New York. After a year working at the Tenement House Department of the City of New York Frankfurter went to Harvard Law School. In 1906 he received his LL. B. having led the class all three years. Frankfurter's intelligence, demonstrated by his remarkable educational career, was reflected in his later writings and work.

The majority of Frankfurter's legal career was spent either as an employee of the federal government or as a professor at Harvard Law School. Little more than a year of this time was spent in private

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5. Samuel H. Hofstadter and Theodore B. Richter, "Mr. Justice Frankfurter - Legal Craftsman," The Record XX (May, 1965), 274.

law practice. For a few months immediately following his graduation from Harvard Frankfurter was a member of the leading New York law firm of Hornblower, Byrne, Miller and Potter. In 1909 Frankfurter returned briefly to private practice with Henry L. Stimson.

It was as an assistant to Henry Stimson that Frankfurter began his public career during the year following his graduation from law school. President Theodore Roosevelt had appointed Stimson United States Attorney for the Southern District of New York and had given him the task of initiating antitrust suits against monopolies. As Stimson's aid, Frankfurter worked on the successful suits against the American Sugar Refining Company and the New York Central Railroad.

Stimson was also responsible for introducing Frankfurter to the administrative branch of the federal government. In 1911 Frankfurter accompanied Stimson, Taft's new Secretary of War, to Washington as Law Officer of the Bureau of Insular Affairs. Unofficially, Frankfurter was Stimson's special assistant, advising him on water power in navigable streams and writing his speeches. Frankfurter remained in this position after Woodrow Wilson's election, but resigned in 1914 to accept a professorship at Harvard Law School. He returned to the Executive branch during World War I as an assistant to Secretary of War Newton Baker. During the war years Frankfurter also served as chairman of the War Labor Policies Board, as secretary and counsel to the President's Mediation Commission, and as a member of the Morgenthau Mission which attempted to divide Turkey from the

Axis powers. During the 1920's and 1930's his knowledge of administrative problems and procedures increased as a result of his friendship with Governor, and later, President Franklin Roosevelt.

Frankfurter's first significant experience with partisan politics was an outgrowth of his friendship with Henry Stimson. Frankfurter helped during Stimson's unsuccessful campaign for governor of New York in 1910. Frankfurter gained further knowledge of partisan activities campaigning for Theodore Roosevelt in 1912, and advising and campaigning for Franklin Roosevelt in 1932 and 1936.

As a result of his administrative and political experiences Felix Frankfurter came to the United States Supreme Court fully cognizant of the complexities of government at the federal level. But politics was not all that Frankfurter knew. Soon after Frankfurter's death Samuel Konefsky wrote: "Few men have come to the Court more familiar with its law and its ways than was Felix Frankfurter.... At the time of his appointment, Felix Frankfurter was without doubt the leading authority in the field of constitutional law, widely recognized also as an expert in administrative law and in labor law."[6]

Frankfurter credited Harvard Law School and his training under Stimson for teaching him to be thorough in his examination of legal problems. He gained invaluable legal experience when he succeeded his friend Louis Brandeis as counsel for Oregon in Bunting v. Oregon

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6. Samuel J. Konefsky, "Justice Frankfurter and the Conscience of a Constitutional Judge," Brooklyn Law Review XXXI (April, 1965), 213-4.

(243 U.S. 426, 1917), and as a counsel in Adkins v. Children's Hospital (261 U.S. 525, 1923).

Felix Frankfurter's friendship with three United States Supreme Court justices had a significant influence on his judicial philosophy. Frankfurter's writings are full of quotations from these three men, O. W. Holmes, Louis Brandeis, and to a lesser extent, Benjamin Cardozo. Archibald MacLeish wrote in his introduction to Law and Politics that what O. W. Holmes gave his friends,

> ...and Mr. Frankfurter among them, was an understanding of the relation of the law to life which made impossible a conception of the law as anything but a means to an end....
>
> The influence of Mr. Justice Brandeis was more immediate, more specific, more controlling, and perhaps less deep. To Mr. Justice Brandeis also the law was a means to social ends, but a specific means to specific social ends.[7]

Frankfurter was influenced to a lesser extent by friends who taught at Harvard Law School, particularly by the judicial realist, Roscoe Pound. From him Frankfurter learned the importance of viewing law within its social context. A significant influence on Frankfurter came from a Harvard Law School professor who died the year before Frankfurter matriculated at Harvard, James Bradley Thayer. From Thayer Frankfurter drew the essence of the theory of judicial self-restraint.

Felix Frankfurter's students may also have played a role in sharpening his constitutional jurisprudence. Teaching was so important a task to Frankfurter that he turned down two judicial

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7. Felix Frankfurter, Law and Politics, Archibald MacLeish and E. F. Pritchard (eds.) (New York: Harcourt, Brace and Co., 1939), p. xviii.

appointments in order to remain at Harvard Law School. In 1933 he declined an offer by Franklin Roosevelt to become Solicitor General of the United States, and several years earlier he turned down an appointment to the Massachusetts Supreme Court.

Felix Frankfurter taught at Harvard from 1914 to 1917 and from 1919 to 1939. In 1922 he was appointed Byrne Professor of Administrative Law. Besides teaching a course in administrative law Frankfurter taught classes in public utilities, contracts and combinations in restraint of trade, and municipal corporations. While at Harvard Frankfurter edited several textbooks: Cases Under the Interstate Commerce Commission Act;[8] Cases on Federal Jurisdiction and Procedure with Wilber G. Katz;[9] Cases and Other Materials on Administrative Law with J. Forrester Davison;[10] and Cases on Federal Jurisdiction and Procedure with Harry Shulman.[11]

In 1938 Supreme Court Justice Benjamin Cardozo died. On January 5, 1939 President Franklin Roosevelt sent Felix Frankfurter's name to the United States Senate for its advice and consent. Because Frankfurter was a Jew, a naturalized citizen, and active in liberal

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8. Felix Frankfurter (ed.), Cases Under the Interstate Commerce Commission Act (Cambridge, Massachusetts: Harvard University Press, 1922).

9. Felix Frankfurter and Wilber G. Katz (eds.), Cases on Federal Jurisdiction and Procedure, National Casebook Series (Chicago: Callaghan and Co., 1931).

10. Felix Frankfurter and J. Forrester Davison (eds.), Cases and Other Materials on Administrative Law (New York: Commerce Clearing House, 1932).

11. Felix Frankfurter and Harry Shulman (eds.), Cases on Federal Jurisdiction and Procedure, National Casebook Series (Chicago: Callaghan and Co., 1937).

causes, his nomination was not automatically confirmed. Frankfurter had to undergo the then unique experience of appearing personally before the Senate Judiciary Committee to defend his loyalty to America and the Constitution. After several weeks of controversy his nomination was approved unanimously by the Senate. On January 30, 1939 Felix Frankfurter took his seat on the United States Supreme Court.

Justice Frankfurter remained on the Supreme Bench until August 28, 1962 when he resigned because of poor health. When he came to the Court a majority of the Justices were advocates of judicial self-restraint. When he left, the activist justices of the Warren Court were in the majority. After leaving the Court Frankfurter wrote a few brief articles. On February 22, 1965 Felix Frankfurter died.

Throughout his adult life Felix Frankfurter was a prolific writer. This fecundity makes easier an examination of Frankfurter's theory of judicial self-restraint. Frankfurter had written or co-authored six books and edited seven more before he was appointed to the Supreme Bench: The Case of Sacco and Vanzetti;[12] The Business of the Supreme Court, with James M. Landis;[13] The Labor Injunction, with Nathan Green;[14] The Public and Its Government;[15] The Commerce Clause

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12. Felix Frankfurter, The Case of Sacco and Vanzetti (Boston: Little, Brown and Co., 1927).

13. Felix Frankfurter and James M. Landis, The Business of the Supreme Court (New York: The Macmillan Co., 1927).

14. Felix Frankfurter and Nathan Greene, The Labor Injunction (New York: The Macmillan Co., 1930).

15. Felix Frankfurter, The Public and Its Government (New Haven: Yale University Press, 1930).

Under Marshall, Taney and Waite;[16] and Mr. Justice Holmes and the Supreme Court.[17] All of these except The Case of Sacco and Vanzetti and the Labor Injunction discuss, at least tangentially, judicial self-restraint. During this same period Frankfurter edited Criminal Justice in Cleveland, with Roscoe Pound,[18] Mr. Justice Holmes,[19] and Mr. Justice Brandeis,[20] plus the four textbooks mentioned earlier.

Professor Frankfurter did not restrict himself to writing books. In 1914 Frankfurter helped his friend Herbert Croly establish the New Republic as a forum for Croly's Progressive ideals. As a trustee and informal member of the New Republic's editorial board Frankfurter wrote many articles and unsigned editorials about legal and political issues for the periodical. Professor Frankfurter initiated in the Harvard Law Review a series of yearly critiques of the United States Supreme Court's decisions and procedures. He also wrote articles for both scholarly and popular journals on jurists and the law. Many of these articles were republished in Law and Politics. The majority of the articles written by Frankfurter before he became a member of the Court either explicitly or implicitly discuss judicial

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16. Felix Frankfurter, The Commerce Clause Under Marshall, Taney and Waite (Chapel Hill: University of North Carolina Press, 1937).

17. Felix Frankfurter, Mr. Justice Holmes and the Supreme Court (New York: Atheneum, 1965. Originally published Cambridge, Massachusetts: Harvard University Press, 1938).

18. Roscoe Pound and Felix Frankfurter (eds.), Criminal Justice in Cleveland (Cleveland, Ohio: The Cleveland Foundation, 1922).

19. Felix Frankfurter (ed.), Mr. Justice Holmes (New York: Coward-McCann, 1931).

20. Felix Frankfurter (ed.), Mr. Justice Brandeis (New Haven: Yale University Press, 1932).

self-restraint. From them Frankfurter's views on judicial self-limitation and the American political system before his appointment can be pieced together.

Felix Frankfurter was as prolific a writer as a justice as he had been as a professor and Washington bureaucrat. Justice Frankfurter wrote approximately seven hundred and fifty opinions during the twenty-three years he sat of the High Court. Of these, two hundred and seventy were dissenting opinions, two hundred and sixty opinions of the Court, and two hundred and twenty concurring opinions. Unlike many Supreme Court justices, Frankfurter wrote his own opinions from first draft to last: he did not let his law clerks participate in any state of the writing of his opinions as have many justices. This fact makes easier an examination of his ideas.

Justice Frankfurter often stated that a Supreme Court justice ought to limit his discussions outside the Court to statements having no bearing on any case which might come before the Court. While obeying this self-imposed limitation, Justice Frankfurter wrote many articles and reviews and made many speeches, some of which dealt with the Supreme Court and the American political system. Many of these have been collected and republished in Of Law and Men,[21] and Of Law and Life and Other Things that Matter.[22] In 1953 and 1954 Frankfurter recorded reminiscences of his life with Dr. Harlan B. Phillips of

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21. Felix Frankfurter, Of Law and Men, Philip Elman (ed.) (Hamden, Connecticut: Archon Books, 1956).

22. Felix Frankfurter, Of Law and Life and Other Things That Matter, Philip B. Kurland (ed.) (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1965).

Columbia University's Oral History Research Department. These were published in 1960 as Felix Frankfurter Reminisces.[23]

Methods and Research Materials

The approach used in this thesis to define Felix Frankfurter's theory of judicial self-restraint will be the traditional one of examining and analyzing Frankfurter's Supreme Court opinions and his numerous books and articles. All of his Supreme Court opinions and books, and most of his articles, have been examined for materials relating to judicial self-restraint. The literature by legal and political scholars concerning Felix Frankfurter and judicial self-restraint has also been studied.

Several problems arise as a result of basing an analysis upon the writings of Frankfurter. Although he mentioned self-restraint and the role of the Supreme Court frequently in his works, Frankfurter never wrote a systematic analysis of his theory of judicial self-restraint. This means that his theory must be pieced together from unrelated sources. The fact that many of Frankfurter's references to self-restraint are to be found in his Court opinions leads to several complications.

Supreme Court opinions are not objective analyses of judicial or political issues. This fact complicates a study based upon Court opinions. Opinions are arguments which present a decision for or

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23. Harlan B. Phillips, Felix Frankfurter Reminisces (New York: Reynal and Co., 1960).

against a plaintiff and give the reason or reasons of the justice or justices for their conclusion. This aspect of the adversary process encourages exaggeration of points in order to buttress conclusions.

Frankfurter recognized that Supreme Court opinions are not always reliable guides to knowledge about a justice, but he also pointed to a partial solution.

> The obvious map to the minds of the justices - the opinions of the Court - is deceptive precisely because they are the opinions of the Court. They are symphonies, not solos. Inferences from opinions to the distinctive characteristics of individual justices are treacherous, except in so far as a man's life before he went on the bench serves as commentary, or as he expresses individual views in dissent or through personal writings.[24]

Frankfurter wrote of Holmes that he "possessed these qualities of personal genius in richer measure than any member in the Court's history."[25] This complement might as fairly be applied to Frankfurter. Frankfurter expressed his views on self-restraint and the American political system before his appointment to the Court and it is, therefore, possible to discern his ideas when they appear in his opinions for the Court, opinions which are usually agreed to by other members of the Court majority. Frankfurter's dissenting and concurring opinions outnumber his opinions for the Court two to one. Most of these opinions are not concurred with by any other justice; the ideas expressed in them are Frankfurter's, not compromises between the views of Frankfurter and those of another justice. Thus, the legacy

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24. Frankfurter, Mr. Justice Holmes and the Supreme Court, pp. 45-6.

25. Ibid., p. 46.

of his writings makes it possible to discover Felix Frankfurter's theory of judicial self-restraint.

Previous Studies

Previous studies by judicial scholars do not present a unified picture of judicial self-restraint. Most judicial scholars have not attempted to define judicial self-restraint. The majority of works which mention self-restraint discuss it in terms of the historical conflict between judicial activism and self-restraint,[26] or analyze one of the techniques of self-restraint, particularly the political questions doctrine.[27] A few examine the history of self-restraint,[28] and some look at it in terms of a single Supreme Court justice.[29] One of the more systematic examinations of self-restraint is that of John P. Roche, who looks at the techniques of restraint and the conditions which lead to their use.[30] Most constitutional law textbooks examine self-restraint only briefly. Among those who have attempted

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26. Stephen P. Strickland, "Congress, the Supreme Court, and Public Policy: Activism, Restraint and Interplay," American University Law Review, XVIII (March, 1969), 267-98.

27. Melville F. Weston, "Political Questions," Harvard Law Review, XXXVIII (January, 1925), 296-333. Stephen R. Mitchell, "Judicial Self-Restraint: Political Questions and Malapportionment," Washington Law Review, XXXIX (October, 1964), 761-74. Fritz W. Scharpf, "Judicial Review and the Political Question: A Functional Analysis," Yale Law Journal, LXXV (March, 1966), 517-97.

28. F. D. G. Ribble, "Some Aspects of Judicial Self-Restraint," Virginia Law Review, XXVI (June, 1940), 981-998.

29. William L. Morrow, "Constitutional Law - Justiciable Controversy - Mr. Justice Frankfurter and Judicial Restraint," Southwestern Law Journal, XVII (June, 1963), 313-20.

30. John P. Roche, "Judicial Self-Restraint," American Political Science Review, XLIX (September, 1955), 762-72.

to define judicial self-restraint, conceptions vary. Some see it as a broad theory describing the role which the Supreme Court ought to perform in the American political system. Others see self-restraint as a judicial attitude or a code of ethics, or as a label to describe the relationship of a judicial policy to policy developed by another governmental institution.

Loren Beth has described judicial self-restraint as "a sense of judicial ethic reinforced by a lively appreciation of political and social realities."[31] Walter Murphy and C. Herman Pritchett have stated:

> Self-restraint is a broad term, but it does take on a definite meaning in the context of American constitutional development. Closely related to the idea of 'avoidance of constitutional questions'...the essence of the self-restraint notion is that judges should accord maximum respect to decisions of legislators and administrators and should never invalidate those decisions simply because judges would prefer alternate lines of policy.[32]

This definition combines elements of self-restraint as a judicial attitude and judicial self-limitation as a theory concerning the role of the Supreme Court in the American political system.

One of the few attempts to define judicial self-restraint in operational terms is found in Glendon Schubert's Judicial Policy-Making. Schubert defines

> ...restraint in terms of harmony, between the policy of the Court and that of other decision-makers. We define 'other

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31. Loren P. Beth, Politics, the Constitution and the Supreme Court (New York: Harper and Row, Publishers, 1962), p. 83.

32. Walter F. Murphy and C. Herman Pritchett, Courts, Judges, and Politics (New York: Random House, 1961), p. 623.

> decision-makers' quite broadly, to include (1) Congress, the President and administrative agencies, and lower national courts, and (2) the analogous officials of state governments.[33]

Schubert employs a matrix to identify the situations in which judicial self-restraint and judicial activism might occur. The Supreme Court would be restraintist "when there is no change in the policy of either the Court or another decision-maker."[34] When both the Court and another decision-maker change past policies

> ...the Court's position may be one of either activism or restraint, depending upon whether the direction and rate of the change in the Court's policy are different from or the same as those of the other decision-maker: when the policy changes are in opposite directions or unequal in rate, the Court is activist, and when the policy changes coincide, the Court exercises restraint. It should be clear both that this analysis applies irrespective of the substantive content of the policy at issue and that it applies equally to instances in which the Court's position is liberal and those in which it is conservative.[35]

Schubert's conception of judicial self-restraint departs from the conventional view of the doctrine. He explains self-restraint not in the traditional sense of guidelines for future judicial behavior, but in terms of the present relationship of a judicial policy decision to the policy of other branches of government. He views self-limitation not in procedural terms, but in substantive, issue-oriented terms. Schubert's model makes no provision for judicial decision in cases where there is a policy conflict between two

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33. Glendon Schubert, Political Role of the Courts: Judicial Policy-Making (Glenville, Illinois: Scott, Foresman and Co., 1965), p. 154

34. Ibid., p. 155.

35. Ibid.

governmental institutions. His definitions of judicial activism and judicial self-restraint appear to be more useful to political scientists wishing to find labels for judicial policies than for jurists and judicial scholars who wish to understand the United States Supreme Court.

Felix Frankfurter's conception of judicial self-restraint appears to have been misunderstood by several political scientists, particularly by those who view the Court as a political institution and favor an activist role for the Court. Both Loren Beth and Jack Peltason infer that Frankfurter believed judicial self-restraint could lift the Supreme Court above the political process. Loren Beth wrote that "we may not consciously desire or expect judicial decisions to be politically oriented; we merely force them to be.... Holmes and Frankfurter, for all their belief in self-restraint, are thus brothers under the skin to Sutherland and Black."[36] Peltason's view is similar: "A Supreme Court composed of Holmeses and Frankfurters would be just as much a part of the policy-making process as one composed of Sutherlands and Murphys."[37] Alpheus T. Mason similarly misinterpreted Frankfurter's plea in Colegrove v. Green (328 U. S. 549, 1946). "Courts ought not to enter the political thicket," Justice Frankfurter implored in 1946. The warning came too late, for

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36. Beth, Politics, the Constitution and the Supreme Court, p. 150.

37. Jack W. Peltason, Federal Courts in the Political Process (New York: Random House, 1955), p. 3.

the Justices had been firmly entrenched since Marbury v. Madison."[38]

This thesis will attempt to define judicial self-restraint as this theory was developed by Felix Frankfurter. Such a definition cannot be the definitive definition of self-restraint, as other jurists have evolved somewhat different theories, but it will be a contribution towards an understanding of Felix Frankfurter, judicial self-restraint and the United States Supreme Court.

From an examination of Frankfurter's writings, it is apparent that Frankfurter viewed the theory of self-restraint as neither a predictive theory nor as a descriptive one. Frankfurter's theory of judicial self-restraint is prescriptive. It neither describes the role of the Supreme Court as it is, nor does it predict how Supreme Court justices will act. Instead it (1) describes what the role of the United States Supreme Court in the American political system ought to be; (2) explains why the policy-making role of the Supreme Court should be a limited one; and (3) prescribes the judicial techniques and judicial attitude which will insure that the High Court remain within its limited policy-making parameters.

A chapter will be devoted to each of these three aspects of Felix Frankfurter's prescriptive theory of judicial self-restraint. In the concluding chapter Frankfurter's theory of self-restraint will be summarized and analyzed in terms of the implications of judicial self-restraint for the role of the United States Supreme Court in the American political system.

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38. Alpheus T. Mason, "Judicial Activism: Old and New," Virginia Law Review, LV (April, 1969), 386.

CHAPTER 2

FRANKFURTER'S PERCEPTION OF THE ROLE OF THE UNITED STATES SUPREME COURT IN THE AMERICAN POLITICAL SYSTEM

The first part of Felix Frankfurter's theory of judicial self-restraint is descriptive. It outlines the role the United States Supreme Court ought to perform in the American political system. The Supreme Court is part of the American political system. The role performed by the High Court in this system is shaped by: (1) the nature of the system, (2) the Supreme Court justices' conceptions of this system, and (3) the justices' views of what the role of the Court ought to be. The institutions and norms which make up the American political system are man-made abstractions. This means that differing conceptions of the system are possible, all of which may be equally valid. This chapter will commence with an examination of the American political system as Felix Frankfurter conceived it, to be followed by an analysis of the role Frankfurter advocated for the Supreme Court in this system.

The American Political System

Society and Government

Felix Frankfurter believed that "the raw material of politics - the nature and extent of the demands made upon the machinery of

government, and the environment in which it moves"[1] must not be ignored in any examination of American government. "Government is not something outside of or in opposition to the public," wrote Frankfurter in 1936, "but is the expression and agent of society."[2] This recognition of the interrelationship of government and society underlies Frankfurter's judicial philosophy and his conception of the American political system. American government, Frankfurter recognized, has been shaped by the pluralistic character of American society. The United States is populated by men of differing ethnic, regional, and socio-economic backgrounds. As a result American society is divided into a multitude of interest groups. Some of these groups are institutionalized, while most are informal, shifting groups of individual Americans with common needs and desires. Frankfurter believed the purpose of government is to enable as many individuals and groups as possible to achieve their needs.

American society is never static. The conflicts of yesterday are rarely those of today. As new needs and desires arise new groups coalesce and new pressures are placed upon government. Frankfurter understood this.

> Human society keeps changing. Needs emerge, first vaguely felt and unexpressed, unperceptibly gathering strength, steadily becoming more and more exigent, generating a force which, if left unheeded and denied response so as to satisfy

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1. Felix Frankfurter, The Public and Its Government (New Haven: Yale University Press, 1930), p. 7.

2. Felix Frankfurter, "The Young Men Go to Washington," Law and Politics, Archibald MacLeish and E. F. Prichard (eds.) (New York: Harcourt, Brace and Co., 1939), p. 239.

> the impulse behind it at least in part, may burst forth with an intensity that extracts more than reasonable satisfaction.[3]

Technological changes, Frankfurter thought, are a major reason for the evolution of American society. In The Public and its Government Professor Frankfurter devoted his first chapter to an analysis of these new demands on government.

> Startling transformations in the outward face of society.... The great material inventions that are giving life itself the aspect of a cinematograph are innovations of today, at most of yesterday. These new material forces and devices are having their reflex upon finance, upon industrial organization, upon law and government, upon the manner of man's thoughts in ways and to an extent that we have hardly begun to understand.[4]

Government institutions, argued Frankfurter, "must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined."[5] "Democracy," Frankfurter believed, "is the only way, rough as that way may be, to a civilization that adequately respects and thereby helps to unfold the richness of human diversity."[6]

American Democracy

Democracy, for Frankfurter, is one of the distinguishing characteristics of the American political system. The essence of

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3. Felix Frankfurter, "The Judicial Process and the Supreme Court," Of Law and Men, Philip Elman (ed.) (Hamden, Connecticut: Archon Books, 1956), p. 35.

4. Frankfurter, The Public and Its Government, pp. 7-8.

5. Felix Frankfurter, "Supreme Court, United States," Encyclopaedia of the Social Sciences, XV (1934), 481.

6. Frankfurter, "The Young Men Go to Washington," p. 239.

American democratic government is "the active participation in its affairs by the mass of citizens."[7] Frankfurter went so far as to insist that "you cannot have a democracy unless the man, the individual citizen, becomes more than himself in isolation and is forced through public opinion to active participation beyond that cultivated in any other form of organized society."[8]

Frankfurter recognized that democratic government "is not remotely an automatic device for good government nor even for a peaceful society. We now know that it is dependent on knowledge and wisdom beyond all other forms of government."[9] "The popular will can steer a proper course only when sufficiently enlightened to know what is the proper course to steer."[10]

Frankfurter saw education and democracy as symbiotic forces. An educated citizenry makes democratic government possible, while democratic government performs an educational task. "In a democracy politics is a process of popular education -- the task of adjusting the conflicting interests of diverse groups in the community, and bending the hostility and suspicion and ignorance engendered by group interests towards a comprehension of mutual understanding."[11] A

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7. Felix Frankfurter, "The Big City Press and Democracy," Of Law and Men, p. 243.

8. Felix Frankfurter, "Israel's Tenth Anniversary," Of Law and Life and Other Things that Matter," Philip Kurland (ed.) (Cambridge, Massachusetts: Harvard University Press, 1965), p. 119.

9. Frankfurter, The Public and Its Government, p. 127.

10. Felix Frankfurter, "The Permanence of Jefferson," Of Law and Men, p. 235.

11. Frankfurter, The Public and Its Government, p. 161.

democratic government contributes to the political education of its citizens in many ways. By enabling individuals to participate in problem solving at many levels of government, government enables citizens to learn about issues and decision-making processes. Presidential messages and addresses, administrative pamphlets and books, congressional hearing and Supreme Court opinions all have an educational function.

Believing in the inseparability of democracy and popular participation in government it was natural that Frankfurter would stress popular sovereignty. Because he believed public policies should reflect the desire of affected citizens, Frankfurter's theory of government has been labeled "majoritarian."[12] Frankfurter, however, was not oblivious to the Madisonian strand in American democratic theory. He never carried his faith in popular sovereignty to a point where minority rights might be threatened under the guise of democratic government. Frankfurter admitted that governmental institutions responsible to the American voter sometimes formulate unwise policies, and that popular opinion often vacillates between irrational extremes. Nonetheless, he had faith that democratic government in America would ultimately be able to "unfold the richness of human diversity."[13] Frankfurter believed the United States Constitution provided him with a reason for his optimism.

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12. Helen Shirley Thomas, Felix Frankfurter: Scholar on the Bench (Baltimore: John Hopkins Press, 1960), p. 282.

13. Frankfurter, "The Young Men Go to Washington," p. 239.

United States Constitution

The United States Constitution contains provisions which Frankfurter believed would protect minorities from majority tyranny. But Frankfurter viewed the Constitution as more than a protector of the liberties of American citizens. He considered the primary function of the Constitution to be the setting of boundaries on the areas of experimentation open to government in the adjustment of conflicts. It is "a framework of great governmental powers to be exercised for great public ends."[14] The Constitution, however, provides a framework for the solution of public problems, it does not provide the solutions to these problems. The Constitution gains its meaning from legislative and judicial decisions.

"The Constitution is not a dead document. It is, perhaps, the liveliest of our political traditions. It is in a true sense the organ of our political life."[15] Frankfurter believed the Constitution changes because American society changes and new public problems come before government for solution. Frankfurter never tired of expressing his view that "American constitutional law is not a fixed body of truth, but a mode of social adjustment. Indeed, the Constitution owes its continuity to an uninterrupted process of change."[16] The Constitution has survived in a changing society for three reasons:

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14. Felix Frankfurter, Mr. Justice Holmes and the Supreme Court (New York: Atheneum, 1965. Originally published Cambridge, Massachusetts; Harvard University Press, 1938), p. 23.

15. Frankfurter, The Public and Its Government, p. 61.

16. Felix Frankfurter, "Social Issues Before the Supreme Court," Law and Politics, p. 48.

(1) some of "its forms have been adapted to wholly new uses;"[17] (2) "many political results are attained through accommodations outside of the constitutional structure;"[18] and (3) "the Constitution within its own ample and flexible resources permits adequate response to changing social and economic needs."[19]

Felix Frankfurter distinguished between two types of constitutional provisions. The first type includes those which describe the structure of government, the terms of office, and those which are specific guarantees "based upon the history of a specific political grievance, or they embody a specific limitation of power in the formulation of governmental powers which came out of the Philadelphia convention."[20] These constitutional provisions have changed little in meaning since they were written. Most constitutional evolution has occurred in those sections of the Constitution whose meanings are ambiguous. These provisions "derive from the broad standards of fairness written into the Constitution (e.g., 'due process,' 'equal protection of the laws,' 'just compensation') and the division of power as between States and Nation;"[21] and from the inclusion in the Constitution of terms like "liberty" and "property," whose meaning "is not revealed within the Constitution."[22]

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17. Frankfurter, The Public and Its Government, p. 62.

18. Ibid.

19. Ibid.

20. Felix Frankfurter, "The Red Terror of Judicial Reform," Law and Politics, p. 12.

21. United States v. Lovett, 328 U. S. 303, 321 (1946).

22. Frankfurter, "The Red Terror of Judicial Reform," p. 13.

Felix Frankfurter's conception of the framework of government created by the Constitution shaped his view of the role which the Supreme Court ought to perform in the American political system. The Constitution established a federal government; it separated the federal government into three branches with independent sources of power and areas of responsibility; and it insured that each branch would have limited authority to prevent the accrual of tyrannical power in either of the other branches.

Felix Frankfurter viewed federalism as "a response to size."[23] "This element of size," wrote Frankfurter in 1930, "is perhaps the single most important fact about our government and its perplexities. It conditions interests, opinion, administrative capacity."[24] In a large country there is geographic variety leading to diversity in industry, custom and interest. In order to expedite the solution of public problems a federal government was established whose "essence is the division of power between two governments in the same territory, or, to put it more accurately, the co-existence of two governments having authority over the same physical territory in respect to different situations."[25] Authority in America is divided between the national government and the fifty state governments by the Constitution. It is further diffused by the existence of smaller units within the states which have state-delegated areas of policy-making authority.

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23. Frankfurter, Mr. Justice Holmes and the Supreme Court, p. 89.

24. Frankfurter, The Public and Its Government, p. 8.

25. Frankfurter, Mr. Justice Holmes and the Supreme Court, p. 89.

Frankfurter believed state and local governments are closer to the needs and desires of their people than is the federal government. For this reason he argued that "the states need the amplest scope for energy and individuality in dealing with the myriad problems created by our complex industrial civilization."[26] In fact, "the very notion of federalism," wrote Professor Frankfurter, "calls for the free play of local diversity in dealing with local problems."[27]

The United States Constitution not only divided authority between the federal and state governments, it also divided it between the legislative, executive and judicial branches of the federal government. By the doctrine of the separation of powers the three branches of the federal government "are given constitutional and political independence of each other."[28] The Founding Fathers also incorporated a system of checks and balances into the Constitution. Each branch of the government is given tools to limit the power of the other two branches. The President can veto legislation passed by Congress, Congress can refuse to consent to presidential appointees, the President and Congress can restrict the appellate jurisdiction of the Supreme Court, while the Court has assumed the power to nullify legislation approved by Congress and the President. These are a few examples of the constitutional system of checks and balances.

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26. Frankfurter, The Public and Its Government, p. 48.

27. Ibid., p. 49.

28. Edwin S. Corwin and Jack W. Peltason, Understanding the Constitution (4th ed; New York: Holt, Rinehart and Winston, 1967), p. 25.

Frankfurter considered separation of powers and checks and balances to be vital to the American political system because they "embod(y) cautions against tyranny in government through undue concentrations of power."[29] Tyranny is a possibility in any government, Frankfurter thought. "The Framers of our Constitution were not inexperienced doctrinaires. These long-headed statesmen had no illusion that our people enjoyed biological or psychological immunities from the hazards of concentrated power."[30] "The Founders divided our government into three branches, partly to prevent autocratic concentrations of power and partly to achieve appropriate division of labor in the difficult task of government."[31]

The separation of power between the three branches of the federal government should not be too firmly drawn as "the practical demands of government preclude its doctrinaire application."[32] Frankfurter considered separation of powers to be "what Madison called a 'political maxim' and not a technical rule of law."[33]

> Functions have been allowed to courts as to which Congress itself might have legislated; matters have been withdrawn from courts and vested in the executive; laws have been sustained which are contingent upon executive judgment on highly complicated facts.... Enforcement of a rigid conception of separation of powers would make modern government impossible.[34]

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29. Frankfurter, The Public and Its Government, p. 77.

30. Youngstown Sheet and Tube Co. v. Sawyer, 343 U. S. 579, 593 (1952).

31. United States v. Bethlehem Steel Corporation, 315 U. S. 289, 312 (1942).

32. Frankfurter, The Public and Its Government, p. 77.

33. Ibid., pp. 77-8.

34. Ibid., p. 78.

While Frankfurter refused "to draw abstract analytic lines of separation and has recognized necessary areas of interaction among the departments of government"[35] he did envision a broad area of responsibility for each branch of government. His conceptions of these functions, particularly the legislative function, affected his conception of the function of the Supreme Court.

The primary function of legislative bodies is to formulate and modify public policy. For Frankfurter, this function of legislatures is the most important one in a democratic government, because "legislation is the most sensitive reflex of politics. It is most responsive to public needs and public feelings, and largely determines the orbit within which the judiciary and executive move."[36] Legislative institutions are "most responsible to public needs" because legislators are "answerable as they are directly to the people."[37]

Frankfurter did not distinguish clearly in his writings between the functions of the legislative and executive branches in the formulation of policy. He usually spoke of legislative responsibility for policy-making, even though he was aware of the increasingly active role played by the President and the executive branch in the formulation of public policy.

As a professor, of what was then the new study of administrative law, Frankfurter recognized the increasing role of the

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35. Ibid.,

36. Ibid., p. 10.

37. West Virginia Board of Education v. Barnette, 319 U. S. 624, 649 (1943).

executive branch in the determination of policy. In fulfilling its traditional role as the administrator of policy formulated by Congress, the executive branch has become increasingly involved in policy formulation.

> Hardly a measure passes Congress the effective execution of which is not conditioned upon rules and regulations emanating from the enforcing authorities. These administrative complements are euphemistically called 'filling in the details' of a policy set forth in statutes. But the 'details' are of the essence; they give meaning and content to vague contours. The control of banking, insurance, public utilities, finance, industry, the professions, health and morals, in sum, the manifold response of government to the forces and needs of modern society, is building up a body of laws not written by legislatures, and of adjudications not made by courts and not subject to their revisions. These powers are lodged in a vast congeries of agencies.[38]

The Role of the United States Supreme Court

If the functions of Congress and executive branch of the federal government are to formulate, ratify and administer legislative policies, what role remains for the Supreme Court in the solution of public problems? Did Felix Frankfurter view the United States Supreme Court as a policy-making institution? The answers to these questions rest upon the resolution of Frankfurter's apparently contradictory ideas about the Supreme Court, law-making and policy-making.

Throughout his legal career Frankfurter argued that the Supreme Court can and does engage in law-making. He rejected the traditional judicial myth that justices of the Court do not make the law, but discover it. In a memorandum from Professor Frankfurter to

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38. Felix Frankfurter, "The Task of Administrative Law," Law and Politics, pp. 231-2.

the newly appointed justice of the Supreme Court Hugo Black, Frankfurter said:

> I think one of the evil features, a very evil one, about all this assumption that judges only find the law and don't make it, often becomes the evil of a lack of candor. By covering up the lawmaking function of a judge, we miseducate the people and fail to bring out into the open the real responsibility of judges for what they do.[39]

Even as a Supreme Court justice Frankfurter admitted that judges make the law, as when he wrote that "the process by which this body of rules and exceptions was developed is typical of the growth of judge-made law in our system. Without legislative guidance, judges in deciding cases are necessarily thrown upon their own resource in ascertaining the public policy applicable to particular situations."[40]

As these quotations indicate there is strong evidence Frankfurter thought the Court to be a policy-making institution, if one considers "law-making" synonomous with "policy-making." There are, however, many statements made by Frankfurter as professor and justice which support the opposite contention. A year before his appointment to the Supreme Bench Frankfurter wrote: "Justices of the Court are not architects of policy. They can nullify the policy of others; they are incapable of fashioning their own solutions for social problems."[41] Similar views were expressed in a note written in 1937

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39. Felix Frankfurter to Justice Hugo Black, quoted in Alpheus T. Mason, Harlan Fiske Stone (New York: Viking Press, Inc., 1956), p. 470.

40. United States v. Atlantic Mutual Insurance Co., 343 U. S. 236, 244 (1952).

41. Felix Frankfurter, "Justice Holmes Defines the Constitution," Law and Politics, p. 69.

from Professor Frankfurter to President Franklin Roosevelt:

> For the present at least there appears to be a majority of the Court which realizes that the function of legislating belongs to the Congress and not to the Court. But in every period of economic change, there is a danger of the Court assuming legislative power under the guise of exercising judicial power. Unceasing vigilance is required to preserve the Constitutional rights of a free and democratic people.[42]

A viable explanation for the apparently contradictory statements can be found if one considers policy-making to occur in several levels or forms. The United States Supreme Court can formulate, modify, ratify, and nullify policy. In the desegregation and reapportionment decisions the Supreme Court majority formulated public policies. The Supreme Court's greatest opportunity to modify policy arises during statutory construction. Almost all cases coming before the Court in this century have involved statutory law. In a large percentage of these cases there is doubt as to the meaning of some part of the statutes. Through statutory construction or interpretation the High Court resolves these doubts and in the process may modify legislative or administrative policy. The Court either ratifies or nullifies policy formulated by statutes or court rulings when it engages in judicial review.

Whether the Supreme Court formulates, modifies, ratifies or nullifies policy political scientists consider the product to be some sort of public policy. While a policy formulated by the Supreme

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42. Roosevelt and Frankfurter: Their Correspondence, 1928-1945, annotated by Max Freedman (Boston: Little, Brown and Company, 1967), p. 406.

Bench may be identical to that made by a legislative body and ratified by the Court, the Supreme Court plays a significantly different role when it formulates and when it ratifies a policy. The policy role chosen by the Court can have important consequences for the American political system.

Felix Frankfurter recognized the differences between formulating, modifying, ratifying, and nullifying policy. In Dennis v. United States (341 U. S. 494, 1951) Frankfurter distinguished between formulation of policy and ratification or nullification arising out of judicial review: "The distinction which the Founders drew between the Court's duty to pass on the power of Congress and its complementary duty not to enter directly the domain of policy is fundamental."[43] In an essay Justice Frankfurter differentiated between the formulation of policy and the modification of policy through statutory construction: "The vital difference between initiating policy, often involving a decided break with the past, and merely carrying out a formulated policy, indicates the relatively narrow limits within which choice is fairly open to courts and the extent to which interpreting law is inescapably making law."[44]

It is clear from these quotations that Frankfurter viewed some forms of policy-making as outside the proper scope of the Court. What forms of policy-making did he believe the Supreme Court should

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43. Dennis v. United States, 341 U. S. 494, 552 (1951).

44. Felix Frankfurter, "The Reading of Statutes," Of Law and Men, p. 54.

avoid? Did the issues involved in a case influence his view of the Court's role in deciding the suit?

The answer to these questions rests upon a distinction Frankfurter made between two types of public policy, substantive policy and structural policy. Substantive policy is policy relating to the divisions of authority, wealth, and security between private institutions and groups within society. Structural policy relates to the constitutional division of authority between public institutions, state and federal, the three branches of the federal government, and between governments and their citizens.

With few exceptions Frankfurter thought that in the area of substantive policy the "Court is without power to shape measures for dealing with the problems of society."[45] As a member of the Supreme Court Frankfurter repeatedly lectured his brethren against formulating substantive policy.

There were exceptions to Frankfurter's general premise that "legislating is for Congress."[46] The chief substantive area in which Frankfurter supported the formulation of policy by the Court was the traditional one of admiralty law. "No area of federal law is judge-made at its source to such an extent as is the law of admiralty,"[47] wrote Frankfurter in 1960. He rationalized judicial legislation in this area on the basis of the Court's "constitutional powers in

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45. American Federation of Labor v. American Sash and Door Company, 335 U. S. 538, 557 (1949).

46. Florida Lime Growers v. Jacobsen, 362 U. S. 73, 97 (1960).

47. Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 550 (1960).

matters maritime (Art III, 32)."[48] In one of his opinions in an admiralty suit Justice Frankfurter went so far as to uphold judicial legislation over policy-making by the states, an unusual position for him.

> It is appropriate to recall that the preponderant body of maritime law comes from the Court and not from Congress. Judicial enforcement of nationwide rules regarding marine insurance is, as my brother REED cogently shows, deeply rooted in history. What reason is there for abruptly turning over, pending action by Congress, to the crazy-quilt regulation of the different states what has so long been the business of the Courts?[49]

Frankfurter recognized the Supreme Court may have to formulate substantive policy when cases before the Court involve new public problems for which there is no policy. The labor movement brought such problems before the Court during Frankfurter's tenure on the Bench. "Without legislative guidance," wrote Frankfurter, "judges in deciding cases are necessarily thrown upon their own resources in ascertaining the public policy applicable to particular situations."[50] In this same opinion Frankfurter placed a limitation on this license for judicial policy-making when he stated that "the judge's function and responsibility became otherwise once the legislature has formulated public policy. Courts are then no longer at large. They must carry out the defined policy and disregard their own determination of what the public good demands."[51]

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48. Bisco v. Inland Waterways Corporation, 349 U. S. 85, 98 (1955).

49. Wilburn Boat Company v. Fireman's Fund Insurance Company, 348 U. S. 310, 323 (1955).

50. United States v. Atlantic Mutual Insurance Company, 343 U. S. 236, 244 (1952).

51. Ibid., p. 245.

While Frankfurter believed the role of the Supreme Court should be a limited one in the area of substantive policy-making, his views on structural, or procedural, policy formulation are different. For Frankfurter, the primary role of the Supreme Court in the American political system is the determination of procedural policy. This role grows out of the federal nature of American government.

> Some mechanism for adjusting conflicts between the center and the constituent units is indispensible to a federalism. Such adjustments might be left to the federal legislature, as in part and ineffectively they were under the Confederation. But where the powers in a federalism between the center and the circumference are distributed by a legal document, certainly in any political society where the ideas of public law derive from the common law, it is natural that conflict regarding this distribution of power should become legal issues to be resolved by a judicial and not a political tribunal.[52]

The Supreme Court not only decides whether state governments or the central government have constitutional authority to make policy in a substantive area, it must also determine, when there is conflict, which branch of the federal government has the right to make a policy determination. When Congress and the President clashed over the nationalizing of the steel mills, the Court was called upon to mediate between its co-equals in the federal government. In his concurring opinion Frankfurter argued that "the judiciary may, as this case proves, have to intervene in determining where authority lies as between the democratic forces in our scheme of government. But in doing so we should be wary and humble. Such is the teaching

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52. Frankfurter, "Supreme Court, United States," pp. 474-5.

of the Court's role in the history of the country."[53] Frankfurter believed the Court should be restrained even when carrying out what he considered to be its primary function in the American political system, formulating structural policy.

Frankfurter recognized that the High Court must often become involved in the modification of substantive public policy. Modification of policy and formulation of policy are sometimes synonymous acts. Usually, however, there is a difference in degree between these two levels of policy-making. Modification involves judicial creation of some part of a policy developed by another governmental institution. Judicial formulation of policy involves the making of the entire policy.

Statutory construction involves the Court in the modification of public policy because "construing legislation, is nothing like a mechanical endeavor.... Because of the infirmities of language and the limited scope of science in legislative drafting, inevitably there enters into the construction of statutes the play of judicial judgment within the limits of the relevant legislative materials."[54] In an earlier opinion Frankfurter had expanded upon his thesis that statutory construction may lead to judicial policy-making.

> This case affords a striking illustration of the task cast upon when legislation is more ambiguous than the limits of reasonable foresight in draftsmanship justify. It also proves that when the legislative will is clouded, what is

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53. Youngstown Sheet and Tube Company v. Sawyer, 343, U. S. 579, 597 (1952).

54. Carpenters' Union v. National Labor Relations Board, 357 U. S. 93, 100 (1958).

> called judicial construction has an inevitable element of judicial creation. Construction must make a choice between two meanings, equally sustainable as a matter of rational analysis, on considerations not derived from a mere reading of the text.[55]

Frankfurter often spoke of a second class of cases which encourage the Court to modify policy. These cases arise out of the "broad undefined clauses of the Constitution,"[56] the Due Process Clause and the Commerce Clause.

> In finding the meaning for such phrases the Court reads not the Constitution but its own minds. The Court is compelled to put meaning into the Constitution, not to take it out. In other words, the scope for 'interpretation' of the Constitution is in this field relatively unrestricted, and the room for exercise of individual notions of policy by the Justices correspondingly wide.[57]

Frankfurter thought the Supreme Court should not take full advantage of this opportunity to modify policy. Only when the Court has no alternative should it engage in such policy-making, and when it does, the justices should feel themselves bound by the historical interpretations and the legal precedents surrounding these constitutional phrases. "Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society."[58]

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55. Andres v. United States, 333 U. S. 740, 752-3 (1948).

56. Felix Frankfurter, "The United States Supreme Court Molding the Constitution," Current History XXXII (May, 1930), 237.

57. Ibid.

58. Frankfurter, "The Reading of Statutes," p. 53.

When the Supreme Court agrees to examine the constitutionality of legislative or executive acts, the justices of the Court assume responsibility for deciding whether a public policy formulated and approved by the elected representatives of state or nation should be ratified or nullified. For Frankfurter such a decision is an important one. He recognized that there is a "gulf of difference between sustaining and nullifying legislation."[59] At the heart of Frankfurter's theory of judicial self-restraint is the notion that the Supreme Court should avoid nullifying legislation, executive acts and state or lower federal court ruling whenever possible. Only when a governmental act would be considered unconstitutional without doubt by a reasonable man did Frankfurter think the Court should nullify it. "The function of the courts, when legislation is challenged," wrote Justice Frankfurter, "is merely to make sure that the legislature has exercised an allowable judgment."[60] Only if a governmental institution has exceeded its constitutional authority to make policy, or has formulated a policy clearly impinging on the constitutional rights and freedoms of individuals should the Supreme Bench nullify the policies of another institution.

Conclusion

The role of the United States Supreme Court in the American political system is a vital one, but it is also limited in scope.

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59. American Federation of Labor v. American Sash and Door Company, 335 U. S. 538, 555 (1949).

60. Ibid.

The chief function of the Supreme Court is to formulate and modify procedural policy: to adjust "the relationship of the individual to the separate states, of the individual to the United States, of the forty-eight states to one another, of the states to the union and the three departments of government to one another."[61] Substantive policy-formulation should be avoided. The nullification of policies formulated by other institutions should be avoided except when such policies clearly deny an individual, a group, or a government institution its constitutional rights.

Felix Frankfurter's reasons for advocating such a limited policy-making role for the Supreme Court represent the second aspect of his theory of judicial self-restraint. These reasons will be examined in the following chapter.

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61. Frankfurter, "Supreme Court, United States," p. 474.

CHAPTER 3

DEFENSE OF A LIMITED ROLE

Why should the policy-making role of the United States Supreme Court be a limited one? The answer to this question makes up the second part of Felix Frankfurter's theory of judicial self-restraint. In this chapter Frankfurter's rationale behind judicial self-restraint will be examined in terms of three broad arguments: (1) The powers and limitations of the Supreme Court demand that the High Bench in order to remain strong must restrain itself from formulating substantive policy and from negating "unwise" substantive policies formulated by other governmental institutions; (2) The nature of the judicial processes makes the Supreme Court unsuited for the formulation of substantive policy; and (3) The Supreme Court, as an oligarchic institution, will undermine democratic government in America if a majority of Supreme Court justices assume an activist role.

Supreme Court: Powers and Limitations

Felix Frankfurter's theory of judicial self-restraint is in part a response to the unique position of the United States Supreme Court in the American political system. The High Court can either be powerful or weak depending upon the extent to which its authority is limited by internal and external restraints. The internal restraints derive from the justices judicial and political philosophies and are

synonymous with judicial self-restraint. In this section the powers of the Court deriving from constitutional and statutory law and from legal traditions will be outlined, to be followed by an examination of the external checks on the power of the Supreme Court.

Powers of the United States Supreme Court

The constitutional powers of the United States Supreme Court are enumerated in Article III of the Constitution. "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[1] Only the Supreme Court was established by name in the Constitution. The Supreme Court holds much of its power as a consequence of being the highest court, the final court of appeals in the United States. In most cases a decision by the Supreme Court has finality as it is a "judicial action not subject to subsequent revisory executive or legislative action."[2]

The federal courts are given some independence from the legislative and executive branches and from the short-term whims of public opinion by the constitutional provision decreeing that "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times receive for their Services, a Compensation, which shall not be diminished during their Continuance

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1. U. S., Constitution, Art. III, sec. 1.

2. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 155 (1951).

in Office."[3] These provisions give the Court greater power than it would otherwise have to decide unpopular cases without fear of external restraint.

The areas in which the Court has authority to settle public and private problems are loosely outlined in the Constitution.

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States; and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[4]

The Constitution divides this jurisdiction of the Court into two categories, original and appellate.

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and in those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.[5]

The powers of the Court established in the Constitution are vague. Because the Constitution gives to the law-making branches of the federal government the power to determine the Court's appellate jurisdiction, size, membership and salaries one must look to statutory law for a better understanding of the Court's powers.

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3. U. S., Constitution, Art. III, sec. 1.

4. Ibid., sec. 2.

5. Ibid.

Frankfurter viewed the size of the Court as a significant factor in determining the power of the Court in the American political system. One of the first Congressional acts was to provide for a Supreme Court made up of a chief justice and five assistant justices. As the case load of the Court increased, the size of the High Bench has grown. The Supreme Court

> ...was increased to seven in 1807 and to nine in 1837. Subject to short fluctuations from a tribunal of ten to one of seven between the years 1863 to 1869, this has remained the size of the court. There is no magic in the number nine, but there are limits to effective judicial action. Deliberation by the court is the very foundation of sound adjudication, as is also a lively sense of responsibility by every member of the court for its collective judgment. Experience is conclusive that to enlarge the size of the Supreme Court would be self-defeating.[6]

Congress has passed several laws affecting the appellate jurisdiction of the Supreme Court. The most important of these was the Judicial Act of 1925 which established writs of certiorari. Under a writ of certiorari the Supreme Court has the authority to decide whether or not to review a case appealed from a state or lower federal court. At the same time that it expanded the Court's discretionary jurisdiction, Congress limited the types of cases which can come to the Court on appeal, cases which the Court technically cannot refuse to review. Frankfurter favored expansion of the Court's discretionary jurisdiction. He believed the Court can be stronger when the justices are able to choose those issues for determination which are best suited for judicial decision-making.

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6. Felix Frankfurter, "Supreme Court, United States," Encyclopaedia of the Social Sciences, XV (1934), 478.

Judicial review is the most important power of the Supreme Court, important in terms of the influence it gives the Court in the American political system. Judicial review, the power to find state and federal laws, administrative acts, and judicial rulings unconstitutional, has neither explicit constitutional, nor statutory bases. Instead, it has the authority of tradition. Many words have been written attempting to prove that the Founding Fathers did, or did not, intend for the Supreme Court to have this power. No conclusive argument can be made for either side largely because the Founding Fathers were themselves divided on this point. Regardless of the origins of judicial review, whether with the colonial governments or with Chief Justice Marshall in Marbury v. Madison (1 Cr-137, 1803) this power has become accepted as a legitimate role for the Court by most Americans, Felix Frankfurter included.

When the Supreme Bench agrees to decide the constitutionality of a government act it assumes the burden of deciding whether the policy formulated by a state or federal institution shall be nullified or ratified. Judicial review gives the Court the final authority to determine how public problems will be resolved in the United States.

External Limitations

While Frankfurter recognized that the Constitution, statutory laws and tradition have given the Supreme Court "stupendous powers,"[7] he was aware that there are limitations on these powers of the Court.

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7. Ibid., p. 474.

In this section the external limitations of the Court will be examined.

The system of checks and balances incorporated into the Constitution gives Congress and the executive branch of the federal government control over the size, membership, appellate jurisdiction, salaries and execution of the rulings of the justices of the Supreme Court. Frankfurter knew that throughout the Court's history there have been occasions when Congress or the President have attempted to check the power of the Supreme Court.

The president, and members of the Justice Department, particularly the deputy attorney general, have influence over the Court through the power to nominate justices. "The chances are about one out of five that a president will make one appointment to the Court in less than a year, better than one out of two that he will make one within two years, and three out of four that he will make one within three years."[8] This means that a president faced with closely divided Bench at the beginning of a term can expect to change the balance of an unfavorable Bench by the end of his first term. The president and the federal bureaucracy have constitutional and statutory authority to execute the law. The executive branch can limit the Court's power by refusing to execute the rulings of the Court.

Congress has several important means of restraining the powers of the Supreme Court. Congress, with the President's approval, can

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8. Robert A. Dahl, "Decision-Making in a Democracy," Judicial Review and the Supreme Court, Leonard W. Levy (ed.), Harper Torchbooks (New York: Harper and Row, Publishers, 1967), p. 112.

change the size of the Court. In 1864 the Supreme Bench was increased from nine to ten in order to limit the power of the state's rightists on the Court. In 1937 President Roosevelt failed in his attempt to increase the size of the Court from nine to fifteen to create a majority favorable to New Deal legislation.

The United States Senate has a check on the membership of the Court as a result of the constitutional requirement that presidential appointments be made "with the advice and consent of the Senate."[9] Frankfurter realized that the Senate could use this power to limit an activist Court whose policy-making angered Congress. "Senate opposition to nominations for the Supreme Bench is no novelty in American history," wrote Frankfurter in 1930. "Seldom, indeed, have nominations for the Court been opposed on the score of personal disqualification. Fundamentally, the objections have been political. They have concerned the general outlook of nominees upon the public issues that in different periods of the country's history were likely to come before the Court."[10] The refusal of the Senate to approve the nomination of Abe Fortas as Chief Justice in 1968 is the most recent example of this form of Congressional limitation on the Court as a policy-making institution.

Congress also has the constitutional power to remove members of the Court. The House of Representatives can impeach members of

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9. U. S. Constitution, Art. III, sec. 2.

10. Felix Frankfurter, "The United States Supreme Court Molding the Constitution," Current History XXXII (May, 1930), pp. 235-6.

the Bench, and the Senate can try them. Congress tried to restrain the Federalist justices on the Court by impeaching Justice Chase. The failure of the Senate to find him guilty set a precedent which was thought to have weakened the effectiveness of impeachment as a judicial restraint. In 1969 threat of impeachment coupled with negative popular opinion led to the retirement of Justice Abe Fortas. This successful use of the threat of limitation may have succeeded because judicial impropriety, as well as differences in political and judicial philosophies, was involved.

Congressional control over the salaries of justices has not been used to limit the Court, although the possibility of such restraint may serve to limit the Court. Frankfurter was aware that Congress has successfully limited the power of the Court through use of its power to determine the Supreme Court's appellate jurisdiction. In 1868 Congress repealed legislation which had given the Court jurisdiction over Ex Parte McCardle (7 Wall.506, 1869) because Congress disapproved of the justices' views on reconstruction.

Frankfurter recognized Constitutional amendment as another form of external restraint which may be initiated by Congress, the President, or by state governments. This form of external restraint was used in 1798 -- the Eleventh Amendment barred suits against a state by individuals without the state's consent. The Sixteenth Amendment empowering the federal government to levy income taxes is a second example of this type of external restraint upon the Supreme Court.

Popular opinion represents another source of external restraint on the Supreme Court. In general, this restraint is effective only when it succeeds in mobilizing federal or state institutions to take action against the Court. The refusal for over a decade of Prince Edward County, Virginia to abide by the Supreme Court's ruling in Brown v. Board of Education (347 U. S. 483, 1954) is an example of successful local limitation of the power of the Court, as is the open flouting by numerous public schools of the Supreme Court's rulings forbidding prayers in public schools.

"Whenever Supreme Court decisions have especially offended some deep popular sentiment, movements have become rife to curb the court's power."[11] This response to judicial activism led Felix Frankfurter to plead for judicial self-restraint. In Baker v. Carr he wrote:

> Disregard of inherent limits in the effective exercise of the Court's 'judicial Power'...may well impair the Court's position as the ultimate organ of 'the supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce. The Court's authority -- possessed of neither the purse nor the sword -- ultimately rests on sustained public confidence in its moral sanction.[12]

Although Frankfurter realized that judicial activism had only occasionally resulted in external limitation of the Court, he knew that the possibility of such restraint exists. He understood that "sustained public confidence" is a fragile support for authority.

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11. Frankfurter, "Supreme Court, United States," p. 480.

12. Baker v. Carr, 369 U. S. 186, 267 (1962).

Frankfurter feared that judicial activism would lead to a weakened Court which would be unable to fulfill its primary function in the American political system, that of procedural policy-making.

It was also because of his profound respect for law that Frankfurter advocated a limited policy-making role for the Supreme Court. Judicial activism might lead to popular disrespect for the Court and for law itself. "Broadly speaking, the chief reliance of law in a democracy is the habit of popular respect for law. Especially true is it that law is promulgated by the Supreme Court ultimately depends upon the confidence of the people in the Supreme Court as an institution."[13]

The Nature of the Judicial Processes

Felix Frankfurter's second reason for believing the United States Supreme Court should perform a limited policy-making role is that the judicial processes are inadequate for the task of formulating substantive public policy. In one of his more important articles on the judicial function Frankfurter summarized his reasons for believing the judicial processes make the Court unsuited for substantive policy formulation.

> Moreover, settlement of complicated public issues, particularly on the basis of constitutional provisions conveying indeterminant standards, is subject to the inherent limitations and contingencies of the judicial process. For constitutional adjudications involve adjustment of vast and incommensurable public interests through episodic instances, upon

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13. Felix Frankfurter, "The Judicial Process and the Supreme Court," Of Law and Men, Philip Elman (ed.), (Hamden, Connecticut: Archon Books, 1956), p. 31.

> evidence and information limited by the narrow rules of litigation, shaped and intellectually influenced by the fortuitous choice of particular counsel.[14]

The Constitution limits "the power of the Supreme Court to the disposition of 'cases' and 'controversies,'" to issues which "come before the court...not directly as matters of politics or policy or in the form of principles and abstractions. The court can only deal with concrete litigation."[15] When formulating a policy, members of the legislative and executive branches are free to shape a policy -- to add, subtract, or combine. The Supreme Court is not free to do this. Supreme Court justices must rule only on the legal issues appealed from below. The non-judicial branches also have more influence over the timing of their policy-making: Congress or a state legislature may take twenty years to debate and shape a policy such as Medicare before the final policy becomes law. The Court must wait for a legal injury to occur, for the conflict to be tried in the lower courts, and finally, for the problem to be appealed to the High Court. The Court must then decide within a short period of time whether it should hear the case. If the Court denies a writ of certiorari it must forego deciding the issue, perhaps forever.

Judicial decision-making is restricted by the tradition of stare decisis. Even activist justices feel bound to demonstrate continuity between their decisions and previous rulings of the Court.

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14. Felix Frankfurter, "John Marshall and the Judicial Function," Ibid., p. 24.

15. Frankfurter, "Supreme Court, United States," p. 475.

Legislators and members of an executive branch do not feel compelled to avoid an appearance of formulating original solutions to public problems.

Frankfurter thought the Supreme Court is also limited in its capacity to create policy by its function as a legal institution. The Supreme Court's main function is to settle questions of law not questions of fact. While Frankfurter considered the examination of the social and historical roots of a problem to be an essential ingredient of judicial decision-making, he believed the Court should look at these non-legal factors only to "make sure that the legislature [or executive, or lower court] has exercised an allowable judgment."[16]

While Frankfurter believed the Supreme Court should perform a limited policy-making role because the judicial processes are not suited for substantive policy-making, this was not his most important argument. His most impassioned argument against an activist role for the Court derives from his deep belief in democracy.

Supreme Court: An Oligarchic Institution

Felix Frankfurter believed the United States Supreme Court to be an oligarchic institution. The Supreme Court, he believed, undermines American democracy when it assumes the responsibility for formulating and nullifying substantive public policy. "In the day-to-day workings of our democracy it is vital that the power of the

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16. American Federation of Labor v. American Sash and Door Co., 335 U. S. 538, 555 (1949).

non-democratic organ of our Government be exercised with rigorous self-restraint,"[17] if democracy is to survive and grow.

Frankfurter considered the Court to be oligarchic because it is not responsible to the American people.

> Judges appointed for life whose decisions run counter to prevailing opinion cannot be voted out of office and supplanted by men of views more consonant with it. They are even further removed from democratic pressures by the fact that their deliberations are in secret and remain beyond disclosure either by periodic reports or by such a modern device for securing responsibility to the electorate as the 'press conference.'[18]

Frankfurter went so far as to argue that "if the function of this Court is to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate."[19]

Some political scientists have expressed the view that "the elaborate 'democratic' rationalizations of the Court's defenders and the hostility of its 'democratic' critics are largely irrelevant, for the lawmaking majorities generally have had their way."[20] Frankfurter rejected this view. He believed judicial activists had significantly frustrated democracy in America. "As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such

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17. Ibid.

18. Ibid., p. 556.

19. West Virginia Board of Education v. Barnette, 319 U. S. 624, 652 (1943).

20. Dahl, Decision-Making in a Democracy," p. 119.

misconceptions are not subject to legislative displacement by the will of the people except at too slow a pace."[21]

Frankfurter not only accepted the fact that the Court is not democratic, that it is not responsible to the American people, he believed that the Court should not attempt to be representative.

> And so, in the end, it is right that the Court should be indifferent to public temper and popular wishes. Mr. Dooley's 'th' Supreme Court follows th' illiction returns' expressed the wit of cynicism, not the demand of principle. A court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will.[22]

The Supreme Court, an oligarchic institution, can insure democratic government in America, Frankfurter believed, not by attempting to discover and obey short-term popular desires, but by limiting the Court's policy-making role chiefly to the formulation of structural policy.

Felix Frankfurter considered experimentation to be essential for democratic government in America.

> For government means experimentation. To be sure, constitutional limitations confine the area of experiment. But these limitations are not self-defining and were intended to permit government. Opportunity must be allowed for vindicating reasonable belief by experience. The very notion of our federalism calls for the free play of local diversity in dealing with local problems.[23]

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21. American Federation of Labor v. American Sash and Door Co., 335 U. S. 538, 556 (1949).

22. Ibid., p. 557.

23. Felix Frankfurter, The Public and Its Government (New Haven: Yale University Press, 1930), p. 49.

Because Frankfurter valued experimentation in the solution of public problems, he believed the Supreme Court should refrain from nullifying policies formulated by democratic institutions more closely tied to public problems. "The frustration of popular government, moreover, is not confined to the specific law struck down; its backwash drowns unnumbered projects that might otherwise be put to trial."[24]

Judicial nullification of government policy also debilitates democracy for it undermines the essence of democracy -- the will of government institutions and of the American people to devise wise solutions to social and political problems.

> Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular government. Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests - the people.[25]

Although Frankfurter viewed judicial review and judicial policy-making as undemocratic, he did not argue that these functions be prohibited the High Court. Instead, he saw in the undemocratic characteristics of the Court a necessity for judicial self-restraint.

> The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of

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24. American Federation of Labor v. American Sash and Door Co., 335 U. S. 538, 556 (1949).

25. Ibid., p. 553.

> the democratic process. The fact that it may be an undemocratic aspect of our system does not call for its rejection or disuse. But it is the best of reasons, as the Court has frequently recognized, for the greatest caution in its use.[26]

The United States Supreme Court can best retain its power to make the vital procedural policies which are suited for judicial decision-making and thereby strengthen instead of weaken democracy in America through adherence to an attitude of judicial humility and use of the techniques of judicial self-restraint. These two aspects of Felix Frankfurter's theory of judicial self-limitation will be examined in the following chapter.

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26. West Virginia Board of Education v. Barnette, 319 U. S. 624, 650 (1943).

CHAPTER 4

TECHNIQUES OF JUDICIAL SELF-RESTRAINT

Many political scientists consider the doctrine of judicial self-restraint to be either a body of rules for judicial decision-making or a judicial attitude towards the role of the judiciary. Felix Frankfurter's theory of self-restraint is broader, for judicial humility and the judicial techniques or rules of self-restraint together make up only the final element in Frankfurter's theory -- the prescriptive element. This prescriptive aspect is the practical aspect setting forth the methods for achieving the limited policy-making goals called for in the first part of his theory. This chapter will begin with an analysis of judicial humility to be followed by a study of the techniques of judicial self-restraint.

Judicial Humility

Judicial humility is the key to judicial self-restraint, for without it there can be no conscious policy of self-limitation. "The effectiveness of the Court's work," Frankfurter believed, "does not derive from any language of the Constitution or the compulsions of logic or the mechanical contrivences of its organization. It depends upon the self-denying ordinances of the Justices."[1] Frankfurter's

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1. Felix Frankfurter, "The Court and Statesmanship," Law and Politics, Archibald MacLeish and E. F. Prichard (eds.) (New York: Harcourt, Brace and Co., 1939), p. 34.

notion of this judicial humility grew out of his beliefs about the nature of man.

Felix Frankfurter believed men to be rational. He even admitted to being "a romantic believer in reason."[2] But at the same time he recognized that men are influenced by their unconscious biases. He knew "how slender a reed is reason -- how recent its emergence in man, how powerful the countervailing instincts and passions, how treacherous the whole rational process."[3] Because he knew the "enormous role which the unconscious plays in ordinary life"[4] Frankfurter consistently warned that a judge's unconscious bias can undermine his capacity as a judge.

Cognizant of the non-rational aspect of man's nature, Frankfurter advocated that Supreme Court justices approach their law-making tasks "in a spirit of humility."[5] "Humility in this context means an alert self-scrutiny so as to avoid infusing one's merely private notions" into the law.[6]

> Like other mortals, judges, though unaware, may be in the grip of prepossessions. The only way to relax such a grip, the only way to avoid finding in the Constitution the

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2. Harlan B. Phillips, Felix Frankfurter Reminisces (New York: Reynal and Co., 1960), p. 139.

3. Felix Frankfurter, "The Permanence of Jefferson," Of Law and Men, Philip Elman (ed.) (Hamden, Connecticut: Archon Books, 1956), p. 235.

4. Felix Frankfurter, Mr. Justice Holmes and the Supreme Court (New York: Atheneum, 1965. Originally published Cambridge, Massachusetts: Harvard University Press, 1938), p. 54.

5. Sweezy v. New Hampshire, 354 U. S. 234, 267 (1957).

6. Haley v. Ohio, 332 U. S. 596, 602 (1948).

> personal bias one has placed in it is to explore the influences which have shaped one's unanalysed views in order to lay bare prepossessions.[7]

Frankfurter adhered to the psychological notion that while men are unable to eradicate the unconscious part of their mind, they may still act on a rational basis if they use their rational powers to become aware of their biases. On retiring from the Supreme Court Frankfurter reminded his brothers on the bench that if justices practice "rigorous self-scrutiny"[8] it will lead them to intellectual disinterestedness, the freeing of "their purposes from the control of their unformulated wishes and impressions."[9] While he rejected the "cynical belief...that it is at best a self-delusion for judges to profess to pursue disinterestedness,"[10] he recognized that a Supreme Court justice does not change his character when he is appointed to the High Court.

> He brings his whole experience, his training, his outlook, his social, intellectual, and moral environment with him when he takes a seat on the supreme bench. But a judge worth his salt is in the grip of his function.... To assume that a lawyer who becomes a judge takes on the bench merely his views on social and economic questions leaves out of account his rooted notions regarding the scope and limits of a judge's authority.[11]

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7. Ibid.

8. U. S., Supreme Court, Supreme Court Reports, Vol. CCCLXXI, pp. ix-x.

9. Felix Frankfurter, "The Judicial Process and the Supreme Court," Of Law and Men, p. 40.

10. Ibid.

11. Ibid, pp. 40-1.

Frankfurter admitted intellectual disinterestedness is not always possible. But, "where there is ground for believing that such unconscious feelings may operate in the ultimate judgment...judges recuse themselves. They do not sit in judgment."[12] Thus, through "rigorous self-scrutiny" a justice can avoid imposing his unconscious, or conscious, biases upon the law even when he is incapable of intellectual disinterestedness. This is the essence of judicial humility.

Judicial humility is closely related to judicial statesmanship in Frankfurter's judicial philosophy. Judicial statesmanship is "the capacity to transcend one's own limitations, the imagination to see society as a whole."[13] "Because, inextricably, the Supreme Court is also an organ of statesmanship and the most powerful organ, it must have a seasoned understanding of affairs, the imagination to see the organic relations of society, above all the humility not to set up its own judgment against the conscious efforts of those whose primary duty is to govern."[14]

A great Supreme Court justice, Frankfurter believed, is also a great statesman.

> Not by chance have the most influential Chief Justices been drawn from the world of affairs.... The accents of statesmen are the recurring motif of Supreme Court opinions.

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12. Public Utilities Commission of the District of Columbia v. Pollak, 343 U. S. 451, 466 (1952).

13. Felix Frankfurter and James M. Landis, The Business of the Supreme Court (New York: The Macmillan Co., 1927), p. 317.

14. Felix Frankfurter, "Social Issues Before the Supreme Court," Law and Politics, pp. 52-3.

> From the beginning, the Court had to resolve what were essentially political issues - the proper accomodation between the states and the central government. These political problems will persist as long as our federalism endures; and the Supreme Court will remain the ultimate arbitrator between Nation and States. Now the still more subtle conflicts of economic forces also presses for answers from the nine justices in Washington. To wisdom in political judgment, talent for industrial statesmanship must be joined. No graver responsibilities ever confronted a judicial tribunal; no more searching equipment was ever extracted from judges.[15]

It is in part because of the Court's crucial political role that Frankfurter believed judicial humility to be essential. It is also important if the Court wishes to avoid alienating the political branches of government. With judicial humility a justice will be a restraintist; without it he will be a judicial activist.

Techniques of Judicial Self-restraint

A Supreme Court justice who practices judicial humility has a number of techniques of judicial decision-making at his disposal. There is little agreement among students of the Court regarding these techniques; each scholar lists different techniques. Felix Frankfurter also was ambiguous about the techniques of judicial self-restraint. Most of his comments about the rules of self-restraint are to be found scattered throughout his Court opinions. In no article or opinion did he describe all the techniques of self-restraint. In this section nine rules of judicial self-restraint discussed by Frankfurter will be examined. Because these techniques overlap and are somewhat ambiguous this list can only be considered tentative. These nine

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15. Frankfurter and Landis, The Business of the Supreme Court, p. 318.

techniques are (1) certiorari rule, (2) case or controversy, (3) finality, (4) standing, (5) political questions, (6) avoidance of constitutional questions, (7) judicial inexpertise, (8) presumption rule, and (9) stare decisis.

The Judiciary Act of 1925 provided Supreme Court justices with an important tool for self-restraint, writs of certiorari. Unlike cases coming to the Court on appeal "a review on a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."[16] The reasons for accepting and refusing writs of certiorari are left to the High Court to determine. Only if four justices agree to review a lower court ruling is a writ granted. Frankfurter thought that the Court should use the certiorari rule to exclude suits which he believed were only a burden on the justices' limited time. Into this category Frankfurter placed torts cases arising out of the Federal Employers Liability Act. He believed that "such cases raise insignificant and unimportant questions...from the point of view of the Court's duties."[17] He also favored use of the certiorari rule to restrict or eliminate appeals coming to the Court on the basis of diversity of jurisdiction. Diversity cases undermine the state courts and, Frankfurter thought, weaken federalism.

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16. "U. S. Supreme Court Rules, Rule 19: Consideration Governing Review of Certiorari," Walter Murphy and C. Herman Pritchett, Courts, Judges and Politics (New York: Random House, 1961), p. 57.

17. Ferguson v. Moore and McCormack Lines, 352 U. S. 521, 529 (1957).

The constitutional restriction of Supreme Court jurisdiction to cases and controversies provides the justices with a useful tool. By strict interpretation of this requirement judicial self-restraintists can avoid ruling on an issue which they feel is unsuited for judicial determination. "The court very early in its history refused to give merely advisory opinions."[18] It will accept a writ of certiorari only if there has been a legal injury to an individual or a group of individuals. Moreover, there must be an actual controversy between the two parties:

> A case or controversy in the sense of litigation ripe and right for constitutional adjudications by the Court implies a real contest - an active clash of views, based upon an adequate formulation of issues, as to bring a challenge to that which Congress /a state legislature, an executive agency, or a lower court/ has enacted inescapably before the Court.[19]

Self-restraintists also advocate strict obedience to the judicial tradition of finality or ripeness. A suit is ripe when no further action can be taken by a court or agency to settle a conflict. Except when "government action is 'final' in the sense here involved when at no future time will its impact on the petitioner become more conclusive, definite or substantial,"[20] the Supreme Court should deny a writ of certiorari, Frankfurter believed.

Ripeness is a judicial canon which "represents a conception of the role of the judiciary in a government premised upon a

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18. Felix Frankfurter, "Supreme Court, United States," Encyclopaedia of the Social Sciences, XV (1934), 476.

19. United States v. CIO, 335, U. S. 106, 125 (1948).

20. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 155 (1951).

separation of powers, a role which precludes interference by courts with legislative and executive functions which have not yet proceeded so far as to affect individual interests adversely."[21] "In part, this practice reflects the tradition that courts, having final power, can exercise it most wisely by restricting themselves to situations in which decision is necessary,"[22] for "political harmony would not be furthered and the court's prestige within its proper sphere would be inevitably impaired"[23] by early adjudication.

The Supreme Court can limit its policy-making role by refraining from ruling in a suit where petitioners do not have standing to sue. Standing, like case and controversy and ripeness, can be applied strictly or loosely. Self-restraintists are quick to find that a petitioner lacks standing. The judicial canon of standing requires "the litigant who would challenge official action must claim infringement of an interest particular and personal to himself, as distinguished from a cause of dissatisfaction with the general frame and functioning of government."[24] This personal interest "must not be wholly negligible, as that of a taxpayer of the Federal Government is considered to be."[25]

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21. Communist Party of the United States v. Subversive Activities Control Board, 367 U. S. 1, 72 (1961).

22. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 155 (1951).

23. Frankfurter, "Supreme Court, United States," p. 476.

24. Baker v. Carr, 369 U. S. 186, 270 (1962).

25. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 151 (1951).

The political questions doctrine is one of the more ambiguous and controversial of the techniques of judicial self-restraint, and hence needs to be examined in some detail. John Roche expressed the view of the political questions doctrine held by many political scholars when he wrote that "a juridical definition of the term is impossible, for at root the logic that supports it is circular: political questions are matters not soluble by the judicial process; matters not soluble by the judicial process are political questions."[26] Justice Frankfurter admitted that "to classify the various instances as 'political questions' is rather a form of stating this conclusion than revealing of analysis,"[27] but he did not view the political questions doctrine as a useless tautological exercise. The political questions doctrine was for him a meaningful tool, and an integral part of his theory of judicial self-restraint.

Frankfurter's statements about the political questions doctrine have elicited criticism from political scientists. Frankfurter argued that the Court must not decide certain cases because it is not a political institution and that the "Court ought not to enter this political thicket."[28] Political scientists such as Loren Beth, have replied that "any court with the power of judicial review is inevitably political; the only way to 'get out of politics' is to abolish

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26. John P. Roche, "Judicial Self-Restraint," American Political Science Review, XLIX (September, 1955) 768.

27. Baker v. Carr, 369 U. S. 186, 280-1. (1962).

28. Colegrove v. Green, 328 U. S. 549, 556 (1946).

its power to declare acts of government unconstitutional."[29] In order to understand Frankfurter's notion of the political questions doctrine it is necessary to ascertain what he meant by "political" and whether he viewed the Supreme Court as a political institution.

It is difficult to determine Frankfurter's view of the Court as a political institution. Frankfurter's statements about the political nature of the Supreme Court are on the surface contradictory. He warned his brothers on the Supreme Bench against entering the "political thicket,"[30] yet spoke of the "political aspects of the Supreme Court compared with the functions of courts generally."[31]

The words "politics" and "political" have many meanings. They are abstract terms without objective referents. Like all words lacking extentional meanings, the meanings of these two words vary from individual to individual. The Supreme Court can be considered political by any definition of "political" (1) if the issues decided by the Court are political, (2) if the judicial decision-making processes are political, and (3) if the consequences of the Supreme Court's decisions are political.

"What do we mean by politics and the political? Popular usage offers little help, for Americans use the term in a variety of ways. For some they refer merely to the activity of political parties

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29. Loren P. Beth, Politics, the Constitution, and the Supreme Court, (New York: Harper and Row, Publishers, 1962), p. 152.

30. Colegrove v. Green, 328 U. S. 549, 556 (1946).

31. Felix Frankfurter, "The Supreme Court and the Public," The Forum LXXXIII (June, 1930) p. 330.

and their adherents, a meaning which political scientists prefer to assign to the word partisan."[32] Political scientists' definitions of "political" or "politics" range from Harold Lasswell's broad statement that "the study of politics is the study of influence and the influential,"[33] and Vernon VanDyke's somewhat narrower view that "politics may be defined as a struggle among actors pursuing conflicting desires on public issues,"[34] to the traditional institutionalist definition which labels as "political" only the actions and structures of governmental institutions and government related institutions, such as political parties. Another class of definitions is based on the characteristics singled out by Robert Dahl in his definition of a political system as "any persistent pattern of human relationships that involves, to a significant extent, power, rule or authority."[35] "Politics" and "lawmaking" are sometimes considered identical concepts. Robert Dahl has defined a political institution as a policy-making institution: a political institution is "an institution...for arriving at decisions on controversial questions of national policy."[36]

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32. Francis Sorauf, Political Science: An Informal Overview (Columbus, Ohio: C. E. Merrill Books, 1965), pp. 2-3.

33. Harold Lasswell, Politics: Who Gets What, When, How (New York: Meridian Books, 1958), p. 13.

34. Vernon VanDyke, Political Science: A Philosophical Analysis (Stanford, California: Stanford University Press, 1960), p. 134.

35. Robert A. Dahl, Modern Political Analysis (Englewood Cliffs, New Jersey: Prentice-Hall, 1963), p. 6.

36. Robert A. Dahl, "Decision-Making in a Democracy," Judicial Review and the Supreme Court, Leonard W. Levy (ed.) Harper Torchbooks, (New York: Harper and Row, Publishers, 1967), p. 106.

Felix Frankfurter used "political" in several senses. In his Supreme Court opinions he distinguished between the political branches of government, the legislature and the executive, and the judiciary, the non-political branch. In one opinion he declared that determination of the wisdom of a tax "is the business of the political branches of government, not ours,"[37] and in another he stated his view that responsibility for formulating policy concerning aliens was one "belonging to the political branch of the government...the political and law-making branch of the Government, the Congress," and was "wholly outside the concern and competence of the judiciary."[38]

This view of the Supreme Court as a non-political institution is partially based on a tautology: Congress and the president make statutory law, the making of statutory law is the function of a political institution, the Supreme Court does not make statutory law, therefore, it is not a political institution. Frankfurter had a less circuitous reason for viewing the Supreme Court as a non-political institution. Members of the political branches are elected and are considered responsible for their electors, whereas, members of the judicial branch are appointed and are not held to be directly responsible to the American voters.

Frankfurter occasionally used "political" in Harold Lasswell's and Vernon VanDyke's sense which emphasizesstruggles between

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37. State Tax Commission of Utah v. Aldrich, 316 U. S. 174, 184 (1942).

38. Harrisiadis v. Shaughnessy, 342 U. S. 580, 596 (1952).

adversaries over material or legal benefits. In 1938 Frankfurter spoke of the "stresses and strains within the political society, of which the Court is so pervasive a part."[39] Employing "political" in the Lasswellian sense, Frankfurter admitted that the Supreme Court is frequently called upon to resolve important political controversies. He often, as in the following quotation, praised the prescience of de Tocqueville who noted this many years before: "'Scarcely any political question arises in the United States,' observed the perceptive de Tocqueville as early as 1835, 'that is not resolved, sooner or later, into a judicial question.'"[40] Just as the issues the Court must decide are often political in Lasswellian terms, so too are the consequences of the Court's rulings. "While the Supreme Court has always been arbiter of issues intrinsically political in their consequences, this is pre-eminently the characteristic of the Court's business in our day."[41]

In The Business of the Supreme Court Frankfurter described the Supreme Court as a political institution in the traditional, institutional sense of "political." Defending his devotion of an entire book to an analysis of the jurisdiction of the Court, Frankfurter pointed to the important influence of procedure on the "dynamic

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39. Felix Frankfurter and Adrian Fisher, "Supreme Court - 1935 and 1936 Terms," Harvard Law Review LI (February, 1938), 578.

40. American Communications Association v. Douds, 339, U. S. 382, 415 (1950).

41. Frankfurter, "The United States Supreme Court Molding the Constitution," Current History XXXII (May, 1930), p. 236.

processes of government."[42] "The essentially political significance of the Supreme Court's share in the operation of the Union can hardly be over-emphasized. The role of procedure in the evolution and activity of political institutions has been little heeded by political scientists,"[43] (emphasis added).

Felix Frankfurter often used "political" in the sense of "partisan," particularly in cases in which he invoked the political questions doctrine. In Colegrove v. Green he spoke of "politics, in the sense of party contests and party interests,"[44] and in Baker v. Carr he said of reapportionment that "in every strand of this complicate web of values meet the contending forces of partisan politics.... Apportionment battles are overwhelmingly party or intraparty contests."[45]

In Colegrove v. Green Frankfurter made it clear that he believed the "Court ought not to enter this political thicket."[46] "From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such

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42. Frankfurter and Landis, The Business of the Supreme Court, p. vi.

43. Ibid.,

44. Colegrove v. Green, 328 U. S. 549, 554 (1946).

45. Baker v. Carr, 369 U. S. 186, 324 (1962).

46. Colegrove v. Green, 328 U. S. 549, 556 (1946).

judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law."[47]

Frankfurter thought the Court should refuse to hear cases involving partisan activities, but he did not believe the Court should refuse jurisdiction in all cases involving party activities. In Gomillion v. Lightfoot, he wrote:

> In sum, as Mr. Justice Holmes remarked, when dealing with a related situation, in Nixon v. Herndon, 273 U. S. 536. 540, "Of course the petition concerns political action," but "the objection that the subject matter of the suit is political is little more than a play upon words." A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries.[48]

The Court should also be above partisan considerations when deciding cases. Justices should rise above their partisan affiliations. Frankfurter believed that it was right that

> ...the Court throughout its history has not been the organ of any party or registered merely party differences. Clashes of views, and very serious ones, there have been on the Court almost from the beginning, but these judicial differences have hit deeper than any differences as to old party allegiances; they involve differences of fundamental outlook regarding the constitution and the judge's role in construing it.[49]

While holding that the Supreme Court should neither assume jurisdiction in cases solely involving partisan issues, nor apply partisan considerations to cases before the Court, Frankfurter

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47. Ibid., p. 553.

48. Gomillion v. Lightfoot, 364 U. S. 339, 347 (1960).

49. Frankfurter, "Supreme Court, United States," p. 480.

recognized that the Court must occasionally decide issues whose consequences would probably be partisan in nature.

The answer to the question of whether Frankfurter viewed the Supreme Court as a political institution must be both negative and affirmative. The Supreme Court should not be political in the sense of partisan. By definition the Court is as a judicial institution a non-political institution. On the other hand, the Supreme Court is a political institution as it is a governmental institution with policy-making responsibilities.

Under the political questions doctrine, political questions are issues which are non-justiciable because they involve "complex matters of policy being traditionally committed not to courts but to the political agencies of government for determination by criteria of political expediency" for which "there exists no standard ascertainable by settled judicial experience or process by reference to which a political decision affecting the question at issue between the parties can be judged."[50] Frankfurter included in this category of political questions partisan issues, certain "cases concerning war or foreign affairs,"[51] matters concerning the structure and organization of the political institutions of the States,"[52] and "abstract questions of political power, of sovereignty, of government."[53]

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50. Baker v. Carr, 369 U. S. 186, 282 (1962).

51. Ibid., p. 281.

52. Ibid., p. 284.

53. Ibid., p. 286.

Frankfurter admitted that there is no objective way of determining which questions fall within the category of political question. Nevertheless he believed it was possible to categorize issues as political questions for "particular circumstances may differ so greatly in degree as to differ thereby in kind, and that although within a certain range of cases on a continuum, no standard of distinction can be found to tell between them, other cases will fall above or below the range."[54]

An important argument behind the political questions doctrine for Frankfurter is his belief that the power of the Court ultimately must rest upon the support of the people and their elected representatives. Frankfurter feared external restraints would be placed upon the Court if justices undertook to decide political questions.

Through use of the certiorari rule, the requirements of case or controversy, finality, and standing, and the political questions doctrine, Supreme Court justices can avoid handing down a ruling on a controversy. The goal of the remaining five techniques of judicial self-restraint, avoidance of constitutional questions, judicial inexpertise, judicial parsimony, the presumption rule and stare decisis, is to limit the policy-making role of the Supreme Court to the smallest possible area when ruling on an issue.

If four justices accept a writ of certiorari a majority may "postpone constitutional adjudications and therefore constitutional

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54. Ibid., p. 283.

conflicts until they are judicially unavoidable"[55] through the technique of avoidance of constitutional questions. "The court will avoid decision on grounds of constitutionality if a case may go off on some other ground, as, for instance, statutory construction. So far has this doctrine been carried that at times the court will give an interpretation to a statute much more restrictive than its text or the intention of Congress apparently indicated."[56] Such warping of legislative intent was not looked upon favorably by Frankfurter. "Loose judicial reading," Frankfurter argued, "makes for loose legislative writing."[57] Instead, he advocated "that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."[58] He placed emphasis on the words "possible interpretation." Frankfurter was optimistic that the Court could discover the legislative intent in most cases.

> We cannot avoid what Mr. Justice Cardozo deemed inherent in the problem of construction, making "a choice between uncertainties. We must be content to choose the lesser." But to the careful and disinterested eye, the scales will hardly escape appearing to tip slightly on the side of a more probable meaning.[59]

The Court's duty to avoid ruling on a constitutional issue applies not only to Congressional legislation, but to the actions of all

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55. Frankfurter, "Supreme Court, United States," p. 476.

56. Ibid.

57. Felix Frankfurter, "The Reading of Statutes," Of Law and Men, p. 70.

58. United States v. Lovett, 328 U. S. 303, 329 (1946).

59. Frankfurter, "The Reading of Statutes," p. 68.

governmental institutions at the state as well as federal level.

Unnecessary

> ...decision of federal constitutional issues despite the admitted availability of state-law remedies which would avoid these issues...would make inroads, throughout a large area, upon the principle of federal judicial self-restraint which has become a significant instrument in the efficient functioning of the national judiciary.[60]

The theory of judicial inexpertise, which is closely related to the doctrine of the presumption of constitutionality, decrees that in cases reviewing rulings by administrative agencies the opinions of the agency experts should be given greater weight than those of the Supreme Court justices. The High Court should refrain from nullifying administrative policy unless a clear constitutional infringement has occurred.

"The court will avoid if possible passing on constitutionality; but if the issues cannot be burked, if it must face its responsibility as the arbiter between contending political forces, it will indulge every presumption of validity on behalf of challenged powers."[61] For Frankfurter, this presumption rule applied to action by all governmental institutions not merely legislatures, although he spoke of it most frequently in terms of legislative acts. "Before a duly enacted law can be judicially nullified," argued Frankfurter, "it must be forbidden by some explicit restriction upon political authority in the Constitution."[62] Supreme Court justices

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60. Monroe v. Pape, 365 U. S. 167, 241 (1961).

61. Frankfurter, "Supreme Court, United States," p. 477.

62. West Virginia Board of Education v. Barnette, 319 U. S. 624, 666 (1943).

> ...are to determine whether a statute is sufficiently definite to meet the constitutional requirements of due process, and whether it respects the safeguards against undue concentration of authority secured by separation of power.... We must assure fairness of procedure, allowing full scope to governmental discretion but mindful of its impact on individuals in the context of the problem involved.... And, of course, the proceedings in a particular case before us must have the warrant of substantial proof. Beyond these powers we must not go; we must scrupulously observe the narrow limits of judicial authority even though self-restraint is alone set over us. Above all we must remember that this Court's power of judicial review is not an exercise of the powers of a super-Legislature."[63]

Under the presumption rule self-restraintists will limit themselves to the questions of constitutionality and thereby avoid "the too easy transition from disapproval of what is undesirable to condemnation as unconstitutional."[64] "The Supreme Court, being a court even in these matters affecting closely the nation's political life, has enunciated again and again the doctrine that the court cannot enforce its notions of expediency or wisdom but may interpose its veto only when there is no reasonable doubt about constitutional transgressions."[65]

Stare decisis, or the rule of precedent, is another technique of judicial decision-making by which the Supreme Court can limit its policy-making role in the American political system. When the Court invokes stare decisis it lets the previous rulings of the Court on an issue stand unchanged. While it is most frequently employed by lower

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63. Dennis v. United States, 341 U. S. 494, 525-6, (1951).

64. Ibid., p. 552.

65. Frankfurter, "Supreme Court, United States," p. 477.

federal and state courts, it is also used by Supreme Court justices. Self-restraintists rely upon it more frequently than do activists, but it is invoked in a large number of Supreme Court rulings by judicial activists as well. Frankfurter believed that while "the reason for the rule is more compelling in cases involving inferior law, law capable of change by Congress, than in constitutional cases,"[66] there is value in the use of stare decisis in constitutional questions. "We should not be so unmindful, even when constitutional questions are involved, of the principle of stare decisis, by whose circumspect observance the wisdom of this Court as an institution transcending the moment can alone be brought to bear on the difficult problems that confront us."[67]

As the techniques of judicial self-restraint are ambiguous, critics find it easy to ridicule self-restraintists. Frankfurter admitted that "some of these rules may well appear over-refined or evasive to the laity. But," he countered, "they have the support not only of the profoundest wisdom. They have been vindicated, in conspicuous instances of disregard, by the most painful lessons of our constitutional history."[68]

The techniques of judicial self-restraint together with the attitude of judicial humility make complete Felix Frankfurter's prescriptive theory of judicial self-restraint. They provide the means

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66. Monroe v. Pape, 365 U. S. 167, 221 (1961).

67. Green v. United States, 355 U. S. 184, 215 (1957).

68. United States v. Lovett, 328 U. S. 303, 320 (1946).

by which a majority of restraintist Supreme Court justices can restrict the Supreme Court's policy-making role to its proper concern, the formulation of procedural policy, and thereby strengthen American democracy and preserve the authority of the United States Supreme Court.

CHAPTER 5

CONCLUSIONS

Judicial self-restraint was more than a code of ethics or a descriptive label for Felix Frankfurter. As Helen Thomas suggested, judicial self-restraint is "merely the short-hand way of expressing more fundamental and long-maturing aspects of Justice Frankfurter's judicial philosophy."[1] The theory of self-restraint was for Frankfurter a normative theory, although he himself never spoke of it as such. Unfortunately Frankfurter never had time, or perhaps, the inclination, to give his prescriptive theory of judicial self-restraint the most important attribute of a philosophy, coherency. Only a person close to Justice Frankfurter could know whether his theory was more cohesive than is apparent from reading the scattered references to self-restraint in his writings.

The Theory of Judicial Self-restraint

Felix Frankfurter's theory of judicial self-restraint prescribes a role for the United States Supreme Court in the American political system. This role has a positive as well as a negative aspect. It prescribes that the Supreme Court protect, and employ only when necessary, its constitutional authority to determine which

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1. Helen Thomas, Felix Frankfurter: Scholar on the Bench (Baltimore: John Hopkins Press, 1960), p. 265.

governmental institution, if any, has the constitutional authority to formulate or enforce a policy. This structural policy-making role is the positive aspect of Frankfurter's theory of self-restraint. The negative element of his theory prescribes that the Supreme Court refrain from invalidating or initiating policies which are traditionally within the constitutional policy-making spheres of institutions responsible to or in closer contact with the American people.

Felix Frankfurter's defense of the Court's limited policy-making role should not be separated from his normative description of the Court's role in the American political system. His rationale must be considered a part of his judicial theory of self-restraint. It is important to determine whether Frankfurter's rationale was realistic. Would an activist Court which involved itself in formulating or negating substantive policies be in danger of evoking external limitations upon the Court's authority, or was Frankfurter's fear a chimera? Is the Supreme Court as unsuited for substantive policy-making as Frankfurter believed it was? Even if one agrees with Frankfurter that the Supreme Court is an oligarchic institution, does it necessarily follow that a restraintist Court would strengthen democracy, while an activist Bench would undermine it? Total understanding of Frankfurter's theory of judicial self-restraint depends upon the answers to these questions.

The history of the Supreme Court indicates that a lack of judicial humility and avoidance of the techniques of self-restraint by a majority of Court justices may lead to external restraint of

the Court. The Sixteenth Amendment to the Constitution and the defeat of the nomination of Abe Fortas as Chief Justice of the Supreme Court are two examples of this. Judicial activism, however, has more often resulted in the threat of external limitation. Sometimes the threat has had the effect of actual external restraint because the threat had led to internal restraint, to judicial self-restraint. In 1937 President Roosevelt and members of Congress introduced legislation to increase the size of the Court. The activists on the Supreme Court were to be restrained by adding six new liberal justices to the Supreme Bench. Although this attempt at external legislation failed to pass, it was probably a significant factor in convincing some of the activists on the Supreme Court to refrain from invalidating New Deal legislation. Other threats of external limitation have not been successful. In the 1960's constitutional amendments were proposed, but not passed, to overturn the Supreme Court's reapportionment and prayer decisions. This threat did not seem to limit the activism of the Warren Court majority.

Thus, from the history of the Court in the Twentieth Century it is apparent that Frankfurter's fear that judicial activism would lead to successful external restraint of the Supreme Court was only partially sound. While judicial activism may lead to external restraint of the Supreme Court, such restraint is not automatically the consequence of judicial activism.

It is true, as Frankfurter claimed, that the Supreme Court is not as suited for substantive policy-making as are the political

branches of government. It is more difficult for the Court to formulate policy because it has little control over the time at which a public problem is brought before it. The Court is not often free to make a policy at a time when public opinion is not aroused against the Court and when the Court is not apt to have its powers restrained if the policy it formulates is unpopular with significant members of the political branches. Nor do Supreme Court justices have much freedom to shape the scope of a policy.

When a problem does come before the Court in the form of a ripe suit, however, there is no procedural reason why the justices should not formulate public policy on a substantive issue. The formulation of maritime law depends upon knowledge of both fact and legal precedents. If Frankfurter believed the Court has the tools with which to formulate maritime policy, it is difficult to perceive why he believed the Court's procedures are unfitted to formulate policy in other areas. In his last year on the Supreme Bench Frankfurter admitted this when he stated:

> What renders cases of this kind non-judiciable is not necessarily...the nature of the legal questions involved, for the same type of question has been adjudicated when presented in other forms of controversy. The crux of the matter is that courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums.[2]

This quotation suggests a factor behind Frankfurter's notion that the procedures of the Supreme Court are not suited for substantive

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2. Baker v. Carr, 369 U. S. 186, 287 (1962).

policy-making. Frankfurter was deeply conscious of judicial tradition. He valued highly the traditions which link American judicial procedures to the developments of English law. He often cited English legal opinions in his Supreme Court opinions and sometimes reminded his colleagues of these common law traditions. If Frankfurter had not had such respect for the traditions of American law he might have been more willing to see them change, to see the Court evolve new procedures for solving the complex problems of modern society. It is likely that the real reason Frankfurter was reluctant to see the traditions of judicial decision-making change and the Court take on a larger policy-making role was his fear that permanent changes towards activism would result in the emasculation of the authority of the Supreme Court from external sources.

One can agree with Frankfurter that the United States Supreme Court is an oligarchic institution in that members of the Court are chosen in a manner which invites independence. Furthermore, justices, particularly self-restraintist justices, do not consider themselves responsible to the American public, and the judicial processes reinforce this by not providing opportunity for public pressures to be brought to bear upon the justices.

It is true the Supreme Court may frustrate democracy, in the sense of popular sovereignty, when the Court nullifies government acts supported by a majority of concerned citizens. But, it is not equally valid to argue that the formulation of policies by the Supreme Court in areas in which no other institution has acted is equally destructive of democracy, as democracy was conceived of by Frankfurter.

Frankfurter viewed the problems of reapportionment and redistricting as political questions unsuited for solution by the Supreme Court. He argued that solution of such problems by the Court would undermine American democracy. Yet in 1967 the Gallup Opinion Index reported that a representative sample of Americans favored, by a majority of three to two of those expressing an opinion, the Supreme Court's ruling that the number of representatives in both houses of state legislatures must be apportioned on the basis of population.[3] On the basis of this poll it is possible to conclude that in the area of reapportionment Frankfurter's argument is invalid. Democracy, in terms of popular sovereignty, was better served by the judicial activists on the Warren Court than by the advocates of judicial self-restraint.

Frankfurter also feared that negative publicity resulting from attempts to restrain the Bench would result in decreased public support for the Supreme Court. The findings of the Gallup opinion polls show Frankfurter's fear is not supported by fact.

> The public's rating of the U. S. Supreme Court has changed little since the summer of 1963 despite the fact that in the four-year interim the Court has handed down some far-reaching and highly controversial decisions.
>
> Americans today, as earlier, show mixed feelings toward the Court -- about as many give it a 'poor' or 'fair' rating as give it an 'excellent' or 'good' rating.[4]

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3. "The Public Rates the U. S. Supreme Court," Gallup Opinion Index, Report No. 26 (August, 1967), p. 18.

4. Ibid., p. 15.

Frankfurter also believed that judicial activism undermines democracy by removing the need and the will for the popularly elected members of government to initiate policy. Such a charge may be true, but cannot be proved. Frankfurter was probably overly optimistic in hoping that a restraintist Court would induce legislators, judges and members of executive branches to solve public problems wisely and without unnecessary delay.

Judicial humility and the techniques of judicial self-restraint make up the practical part of Felix Frankfurter's theory of judicial self-restraint. His notion of judicial humility has been attacked as a human impossibility. A. S. Miller and R. F. Howell argue that judicial objectivity "is essentially impossible of attainment"[5] and that "Frankfurter and the other espousers of judicial self-restraint are also furthering their own set of values."[6] Frankfurter would not have denied this. While he believed justices could try to be objective when dealing with substantive issues, he knew that justices could not always be neutral. When viewing procedural policy Frankfurter would have agreed with Miller and Howell that his theory of judicial self-restraint was not objective, that it provides guidelines for imposing Frankfurter's own political and judicial philosophies upon the United States.

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5. Arthur S. Miller and Ronald F. Howell, "The Myth of Neutrality in Constitutional Adjudication," Judicial Review and the Supreme Court, Leonard W. Levy (eds.) Harper Torchbooks (New York: Harper and Row, Publishers, 1967), p. 218.

6. Ibid., pp. 217-8.

Both judicial humility and the techniques of self-restraint have been criticized for their ambiguity. As guidelines for decision-making, they are unclear. The techniques of self-restraint are not explicit in setting forth the conditions under which each is applicable. Each gives considerable freedom to a justice to decide whether or not it applies. Justices supporting opposing sides in a case can each support their decision on the basis of one of, or even the same, technique of judicial self-restraint. Nevertheless, judicial humility and the techniques of self-restraint do have an effect on the policy-making role of the Supreme Court. History shows that a Bench made up of a majority of justices who consciously believe in judicial self-restraint and the conscientiously attempt to use judicial humility and the techniques of restraint is less apt to initiate substantive policy and to negate policies validly formulated by other institutions.

Felix Frankfurter did not deny that the United States Supreme Court is a political institution, nor did he believe judicial self-restraint eliminated the Supreme Court's policy-making functions entirely. In fact, his theory of self-restraint is based upon his conception of the Court as a political institution, political in the sense of being a policy-making institution of government. Judicial self-restraint does, however, limit the Court's policy-making role chiefly to procedural policy. What effects might the limitations of Felix Frankfurter's prescriptive theory of judicial self-restraint have upon the American political system if it were adopted by a majority of Supreme Court justices?

Judicial self-restraint would shift the burden of accommodating the law to changing social and political conditions away from the Supreme Court. The most important consequence of this would be the removal of one channel of access to government. Groups whose interests were not represented in state or federal legislatures or executive institutions, or in the lower federal or state courts, would be prevented from appealing to the one institution which might be favorable to their interests. If this were to happen the Supreme Court would retain the approval of the other governmental institutions while loosing favor with those interest groups which were alienated from the same institutions. The authority of the United States Supreme Court would be protected at the expense of American pluralistic democracy.

Conclusion

Whether a majority of Supreme Court justices adopt one of the theories of judicial self-restraint or judicial activism depends upon the choices of the president, the Justice Department, the United States Senate, and ultimately upon the men who are chosen to sit on the Supreme Bench. Whatever the decision it would be best if judicial scholars would first provide systematic analyses of judicial self-restraint and judicial activism.

This thesis represents only a small part of the research which must be done if we wish to understand the theories of judicial activism and judicial self-restraint. Many questions remain to be answered about judicial self-restraint. Judicial humility and each

of the techniques of self-restraint need to be examined in detail. Systematic studies of the theories of judicial self-restraint and activism of other justices of the Court must be done. The theories of activism and restraint of each justice should be compared with the justice's application of his theory in order to determine whether the theories of judicial self-restraint and judicial activism are only unachievable ideals, not meaningful prescriptions for action.

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