Realism and incongruity Oliver Wendell Holmes and Felix Frankfurter mentor and novitiate on the court

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Realism and incongruity Oliver Wendell Holmes and Felix Frankfurter mentor and novitiate on the court

Geiser, Marlene Surell, M.A.
University of Nevada, Las Vegas, 1994

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REALISM & INCONGRUITY
OLIVER WENDELL HOLMES & FELIX FRANKFURTER
MENTOR AND NOVITIATE ON THE COURT

by

Marlene Surell Geiser

A thesis submitted in the partial fulfillment of the requirements for the degree of Master of Arts in Political Science

Department of Political Science
University of Nevada, Las Vegas
August 1994
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August, 1994
ABSTRACT

Oliver Wendell Holmes and Felix Frankfurter are worthy of examination because in many ways their tenures on the Supreme Court present a fascinating study in similarity. The influence of his friend and mentor, Oliver Wendell Holmes, is clearly visible in the career of Felix Frankfurter. Because neither jurist can be labeled as either liberal or conservative, the opinions they rendered often found the legalistic issues of specific cases superseding political expediency, and often the reverse was true. For both, the integrity of the law would repeatedly take precedence over their shared skepticism, and though surely patriots, neither man believed that the Constitution must be read as an unchanging catechism. It was such complexity of philosophy which made the time each spent on the Supreme Court so important to the history of American jurisprudence. Had either walked an absolutist's line, he might have left a far less impressive heritage.

To study these men is to be privy to a relationship which began at Harvard Law School and displayed itself in a shared intellectual elitism that importantly defined the years each of them sat on the bench.
Examining their work is discovering a strong thread of similarity which binds both their lives in law and their philosophy as human beings. Because neither can be irrevocably categorized, they are representative of that special quality which sets the memorable apart from the ordinary.

What I plan is an examination of the most telling cases in the careers of both of these great judges. My interest is in presenting documentation that their decisions were hardly characteristic of an always divinable ideology. Inconsistency gave color to both their careers on the Court. The possibility that the human intellect is capable of finding new answers is appropriate to a true understanding of the credo which underscored the juristic lives of Felix Frankfurter and Oliver Wendell Holmes, Jr. It is the sense of what represents the responsibility of a Supreme Court justice which joins them, and it is in their work where it may be found.
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CHAPTER 1
INTRODUCTION

In 1938, Felix Frankfurter published his book, Mr. Justice Holmes And the Supreme Court. In the introduction, Frankfurter said:

It is plain, therefore, that judges are not merely expert reporters of pre-existing law. Because of the free play of judgment allowed by the Constitution, judges inevitably fashion law. And law is one of the shaping forces of society...We speak of the Court as though it were an abstraction. To be sure, the Court is an institution, but individuals, with all their diversities of endowment, experience and outlook, determine its actions.¹

Justice Frankfurter is an enigma for those who would categorize the judges who have served on the Supreme Court of the United States. Must we put only certain men in the camp of the Legal Realists and others into that of the Formalists? Can we draw the lines so sharply, or must we accept the fact that we deprive ourselves of understanding in our desire to place individuals in discreet ideological packages? Oliver Wendell Holmes is generally accepted as the prime exponent of Legal Realism on the Court, but both he and his novitiate, Felix Frankfurter, often appeared to

¹Frankfurter, Felix, Mr. Justice Holmes And The Supreme Court (Cambridge, Mass.: Harvard University Press, 1938) P.8
stand somewhere in legal limbo as we consider their decisions. The Constitution was clearly not an unchanging document for either man. The Court's members must recognize the intentional "vagueness" which characterized Constitutional law, but they must also not overstep what both saw as the necessary bounds of their position. Rather than seeing the Constitution as a rigid set of stipulated liberties, Frankfurter insisted that it rested upon an historical evolution of basic ideas. His judicial restraint meant an awareness that the Supreme Court had to limit its intervention into political questions. Frankfurter sought his to be a rational, balanced, system-conserving position. His "realism" was not always unconditional. The Court was only to be political when the situation appeared to require it. The People alone could enjoy the privilege of unfettered political opinion, but the judge must serve as "teacher" in the Socratic sense.

Freed from absolute and immutable first principles, the judge, through the disinterested exercise of judgment, could adapt principle to the changing needs of the progressive society. The rise of the expert, in his view, was democracy's inevitable response to a changing world; the judge, given the same freedom, would protect democracy from its own divisive forces.

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Accepting what was the primary responsibility of the Court and commingling it with his Constitutional viewpoint, Justice Frankfurter's legal philosophy found him balancing between two warring ideological camps. His was surely not the apparently "formalist" position of those, like Justice Black, who would choose to incorporate the tenets of the Bill of Rights into any and all decisions, nor was it that of others who would ask of the judge that he be purely a "relativistic" political animal.

Neither Felix Frankfurter or his mentor, Oliver Wendell Holmes, can be considered categorical realists in the accepted sense of the word. They were, no doubt, "progressive" as to their more open reading of the Constitution, but neither ignored those necessary limits which must exist as it concerned the extent of the Court's decision making power. The Court must not be totally political nor dogmatically literal.

Balance was the issue for Frankfurter, and having chosen this position for himself, his decisions on the bench would vary from formalistic to skeptical--from non-political to political---from liberal to conservative---from rule oriented to pragmatic.

Both men are often examples of a paradoxical philosophy of judicial behavior. Both, as they grew older, came to reconsider their over-riding skepticism. Neither Frankfurter
or Holmes would retire from the bench having remained unchangingly faithful to a realist point of view.

Holmes and Frankfurter are worthy of examination because in many ways their individual tenures on the Supreme Court present a fascinating study in similarity. The influence of his friend and mentor, Oliver Wendell Holmes, is clearly visible in the career of Felix Frankfurter. Because neither jurist can be labeled as either conservative or liberal, the opinions they rendered often found the legalistic issues of specific cases superseding political expediency. For both, the integrity of the law would repeatedly take precedence over their shared skepticism, and though surely patriots, neither man believed that the Constitution must be read as an unchanging catechism. It was such complexity of philosophy which made the time each spent on the Supreme Court so important to the history of American jurisprudence. Had either walked an absolutists line, he might have left a far less impressive heritage.

To study these great judges is to be privy to a relationship which began at Harvard Law School and would display itself in a shared intellectual elitism that importantly defined the years each of them sat on the bench. Examining their work is discovering a strong thread of similarity which bound their lives in law and their philosophy as human beings. Because neither can be
categorized, they are representative of that special quality which sets the memorable apart from the ordinary.

What I plan here is an examination of the most telling cases in the careers of both these men. My interest is in presenting documentation that their decisions were hardly characteristic of an always divinable ideology. Their inconsistency was what gave color to both their careers on the Court. The possibility that the human intellect is capable of finding new answers is appropriate to a true understanding of the credo which underscored the judicial lives of both. The sense that the basic essence of American jurisprudence was constructive openness to change is that philosophy which we can find reflected in their contribution to the history of the Supreme Court.

Socrates might well have argued that both teacher and students can grow in the dialogic process. Holmes and Frankfurter developed in context with a particular sort of dialectic. For them, that dialogue was both a personal as well as a public phenomenon. Frankfurter's words speak well to such a belief. Self-contradiction was not always a negative for him. It could often be characteristic of positive evolution.1

1In 1941, Frankfurter wrote, "It would be comfortable to discover a Procrustean formula...If such were the process of Constitutional adjudications in this most sensitive field, it would furnish an almost automatic task of applying mechanical formula and would hardly call for the labors of Marshall or Taney, of Holmes or Cardozo. To look for such
Legal Realism, which reached its peak in the 1930s and early 1940s, argued that contradictory and conflicting decisions pervade the law:

Judicial decision making is not and cannot be fashioned from logical deduction. The realist claims that formalism must fail because of the limits of our language and logic and the indeterminacy of moral and normative concepts. Under this view, concepts are not embedded in nature but are merely conventions of social life... Words are created, defined, and applied by people saturated by their social conditions and historical context. Each act of judicial interpretation is therefore an act of social choice. To truly understand what underlies judicial decision making, we are bound to look at the behavior of judges and not at abstract legal argument.

So, if we are to validate any claim that both Holmes and Frankfurter stood as primary examples of a realist philosophy, it is incumbent upon us that we examine their performance as adjudicators, recognizing the arguable fact that neither of these men stood irrevocably in the realist camp. Based on such a judgment, and predicated upon my belief that by its very nature Realism necessitates an awareness of the "social context" within which a decision is made, a talismanic formula is to assume that the broad guarantees of the Constitution can fulfill their purpose without the nourishment of history."


made, I have chosen individuals who were surely conscious of their social responsibility, but were also at all times cognizant of their legal obligations as well. Neither man saw himself as a free-wheeling dispenser of the societal good. Both balanced his performance on the Supreme Court between social need and Constitutional supremacy. The law of the land remained for each the central point out of which decision making would emanate. Max Lerner argues:

Accordingly, he favored exercising the judicial power only where there was an obvious abuse of national power or an encroachment of function by the national government or one of its branches, and (with respect for the states) only when there was a real danger of the serious dislocation of the federal system". 

Both Holmes and Frankfurter served on the Court at times in which concept innovation flourished. But as it concerns the issue of civil liberties, they often remained faithful to a more "conservative" stance. Their decisions were often less characteristic of the social innovator, and more those of the controlled interlocutor, the individual who sought first to protect what he saw as the maintenance of the nation's survival.

Oliver Wendell Holmes the mentor, and Felix Frankfurter the willing novitiate, are the subjects of this examination.

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They were men of their particular century, but in many ways represented points of view that make them anything but paradigmatic. It is that sense of what represents the responsibility of a Supreme Court justice which joined them, and it is in their work where it may be found.
CHAPTER 2
OLIVER WENDELL HOLMES, THE MENTOR JOINS THE COURT

The year 1902 marked the appointment of Oliver Wendell Holmes to the Supreme Court of the United States. He was sixty-one years of age, with a personal history that encompassed thousands of cases decided during his tenure on the Massachusetts Court from 1882 to 1902.

Holmes's selection by President Theodore Roosevelt was clearly in line with the precedent which has been established over America's history. Presidents continue to choose members of the Court who represent their own political philosophies. Roosevelt had selected Holmes for several reasons. Firstly, with the retirement of Justice Howard Gray of Massachusetts, it appeared that the choice of another Massachusetts man to replace him was appropriate. Max Lerner says of Roosevelt:

He was attracted by the combination of the scholar with a distinguished military career, and the statesman with a literary and historical bent... He was attracted also by Holmes's high reputation for legal ability and learning. And as for the dissents which Holmes had returned in the labor cases and which had brought down upon him the contumely of the men of substance, Roosevelt was not one to balk at that.

Theodore Roosevelt's major concern was whether Holmes, a man he believed was surely a nationalist, would consistently keep in mind "his relations with his fellow statesmen who in other branches of the government are striving...to advance the ends of government." It would appear that further inquiry into Judge Holmes's political philosophy eventually satisfied the President of his qualifications. Trust busting was in the air, and Roosevelt, a political realist, recognized that it was in his best interests that he accept the inevitable forces of political change while also attempting to stay in command. His choice of Holmes reflected the desire that the man he selected was "sane and sound on the great national policies." Satisfied that he was right, Oliver Wendell Holmes was nominated by the President and quickly approved by the United States Senate.

The early days of Holmes's tenure were surely a great disappointment for Roosevelt. That characteristic quality which is recognizable in Mr. Justice Holmes was his lack of predictability. The persistently individualized stature which would find its reflection in many of the positions Holmes would take in his years on the Supreme Court will be dealt with in a later chapter, but suffice it to say, Holmes was to display his own jurisprudential perspective, and in

\[^8\]Ibid.
its particular quality it would defy categorization. In 1913 in a speech given at a dinner of the Harvard Law School Association of New York, Holmes said:

It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong...Judges are apt to be naïf, simple-minded men, and they need something of Mephistopheles. We too need education in the obvious—to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law.  

Holmes was not always an unmistakably "political" member of the Court. He would argue for change, and position himself against it. He was also not a man who felt himself and his fellow jurists omnipotent:

I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end. But I am not aware that there is any serious desire to limit the Court’s power in this regard.

For most of the things that properly can be called evils in the present state of the law I think the main remedy, as for the evils of public opinion, is for us to grow more civilized.  

A Republican Roosevelt would find his reflection some

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¹⁰ Ibid. P. 296
thirty five years later in another member of the Roosevelt family. Franklin Roosevelt, a Democrat, would also discover that he couldn't definitively predict the political behavior of his Supreme Court selections. He too would come to realize that more than simply political expediency would determine the decisions of certain of his Supreme Court nominees. It is important to note that Theodore Roosevelt was not entirely sure that Holmes's could be relied upon to always make what in the President's judgment would be the most politically expeditious choices. In 1901, just a year prior to his confirmation, Holmes had spoken on the anniversary of the day on which John Marshall had taken his seat as Chief Justice. There is no doubt that this speech radiated respect and reverence, but in Holmes's words we perhaps may find a better understanding first of his humility, and more importantly of his personal views as they related to the position he would soon hold:

A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being there... When we celebrate Marshall we celebrate at the same time and indivisibly the inevitable fact that the oneness of the nation and the supremacy of the national Constitution were declared to govern the dealings of man with man by the judgments and decrees of the most august courts.

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11 Ibid. P. 268
So how may we adequately define this judge whom we may also consider a "great ganglion" in his own right? It is in attempting to understand that particular philosophy which influenced his decision making on the Supreme Court that a clearer picture of Oliver Wendell Holmes may emerge.

Ronald Dworkin argues that Holmes wrote like a dream. The Justice's personal conversion from the position that the First Amendment must be limited to a Blackstonian disapprobation of prior restraint to a radically changed view that it must be understood as a much more abstract and general principle, was a turning point in American Constitutional history. According to Dworkin, most of Holmes's epigrams were representative of only very lazy thoughts, and his philosophical pretensions were almost always characteristic of an unsophisticated, deeply cynical form of skepticism. They were, in fact, embarrassing. But to agree that such criticism has any validity, we must fail to adequately recognize the scholar who in 1881 wrote:

The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only axioms and corollaries of a book of mathematics. In order to know what it is we must know what it has been, and what it tends to become, we must alternately consult history and existing theories of legislation.

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But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient, but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon the past.\footnote{Oliver Wendell Holmes, Jr., The Common Law. (Boston: Little Brown & Company: Copyrights 1881, 1909,1923 by Oliver Wendell Holmes) p. 2-3}

The point of view which defined the career of Mr. Justice Holmes, and which it is reasonable to argue was what made him so vitally significant to the history of the Supreme Court, represented a combination of historical understanding, recognition of existing theories of legislation and the desire that they might combine and produce something new and more importantly appropriate to their time in history. Here was a man who remained intellectually active on into the last days of his tenure on the Court. An openness to knowledge, and a scholarly desire for exposure to the ideas of others is eloquently exhibited in the correspondence between the judge and Harold Laski.

Laski, a friend of the still very young, Felix Frankfurter, was introduced to Holmes in the early days of 1916. This relationship continued to reflect Laski’s earliest correspondence and remained an obvious source of personal and intellectual growth for both Laski and the man he so honored. The words of the brilliant, budding teacher
and intellectual define how he saw the man who was the mentor of his friend Felix Frankfurter, "I do not say 'thank you'-- not merely because it is inadequate but because from one's master one learns that it is simply duty to receive. You teach our generation how we may hope to live." The dialogue Laski shared with Holmes continued on into the very last days of the Justice's life.

In his foreword to Mark DeWolfe Howe's compilation of these extraordinarily telling letters, Felix Frankfurter, no stranger to this very special relationship, noted that Holmes and Laski were obviously men apart. Much about them would seem to have inevitably kept them apart, but the reasons of divergence, antecedents, age, preoccupations and geography were ameliorated by the joining of their feeling for one another and by the intensity and depth of their intellectual interests. 

Frankfurter, perhaps far better than most, enjoyed a relationship with Holmes that spanned many of the years Justice Holmes sat on the Supreme Court. The undeniable influence of the older man on who and what this willing "novitiate" would one day become is reflected not only in

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14 *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, Edited by Mark DeWolfe Howe, With a Foreward by Felix Frankfurter (Cambridge, Massachusetts: Harvard University Press, 1953)*

15 *Ibid., P. xvi*
the metamorphosis that would take place in the younger, strongly liberal Frankfurter, but would find a surprising mirror in his behavior as a justice of the Supreme Court.

In light of Mr. Dworkin's remarks, and attempting to arrive at a judgement as to how Supreme Court Justice Oliver Wendell Holmes can be appropriately understood, it appears worthwhile that we look at some of the diversity of view that exists regarding his judicial philosophy.

Examining the transformation that has characterized constitutional interpretation and judicial power in America, Christopher Wolfe says that the end of the nineteenth and the beginning of the twentieth centuries saw a dramatic change in the understanding of judicial power that prevailed in the legal profession and among legal scholars. The new understanding was fostered by a variety of developments—the rise of legal positivism, historicism, sociological jurisprudence, and legal realism.¹⁶

In his chapter, "The Judge as Legislator for Social Welfare," Wolfe comments that Holmes was undoubtedly the great prophet and patriarch of the new judicial power. He says that it is difficult to communicate a sense of the extraordinary tributes offered to Holmes from a wide variety of sources. The reason for all these encomiums is best

explained by two factors. The first, and of lesser significance, is one that Holmes himself would have appreciated. The judgment of history has followed Holmes's own. The judge's positions on the great issues before the Supreme Court in the first part of the twentieth century, specifically in the areas of economic regulation and free speech, have been adopted by the Court and serve as the basis for most modern constitutional law.

The second factor is a much deeper theoretical victory gained by Holmes. He has shaped more modern thought on the nature of law and the judicial process than any other American. Holmes is the exponent of an historically oriented, constitutionally centered realism, and referring to Missouri v. Holland, Wolfe sees Justice Holmes's point of view as, at worst, that constitutional provisions were "dead mistakes" that had disintegrated. At best, they needed to be developed and to receive an 'improved form,' more in accord with what this country had become. Emerging as a "conservative" innovator, Holmes was aware that constitutional law can avoid the problems of the rigidity or inflexibility of written documents, which are difficult to change through formal processes such as amendments. Such occurrences might be minimized, virtually eliminated by

17 Ibid., P. 223-224
18 Ibid., P. 228
having forms so broad as to be adaptable to all necessary rules. Modern constitutional law rests on the interpretation of certain key constitutional provisions that are thought of as formal enough to provide judges with the opportunity to lay down an appropriate rule for any circumstance. Limitations on judges are a matter of self-restraint. Not specifically seen as constitutional limitations.

As one attempts to draw closer to the essence of Justice Holmes's legal philosophy, it becomes ever more clear that he was anything but always predictable. For some, the very contradictory nature of his performance on the Supreme Court was what has made him so significant. If there were contradictions in his philosophy, they were joined with a belief that lines must be drawn only in the event of extreme circumstances. If morality is only a check on force, Holmes would nevertheless spend his life in underlining the value of courage, of truth and of tolerance. His response to critics would have been that life is too short, and is full of contradictions, and it is on the grounds of his overriding skepticism that Justice Holmes is often

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19 Ibid., P. 228
20 Ibid., P. 229
21 Francis Biddle, Mr. Justice Holmes, (New York: Charles Scribner's Sons, 1942) P. 127
criticized. Francis Biddle provides a wonderful insight into
Holmes's legal philosophy when he includes in the early
pages of his study of the Justice, a quotation that had
apparently been importantly marked in Holmes's papers, and
dated October 6, 1885. Biddle suggests that this quotation
from Cairds, Social Philosophy and Religion of Comte must
have struck the judge as curiously satisfying. It offered a
bridge between his doubts as to the value of all ultimates,
and his faith in life and his traditions and aspirations as
an integral part of that life on the other.\footnote{Ibid., P. 13}

Perhaps, if we are to better understand Mr. Holmes, we
must take cognizance of these words which seem to have so
strongly influenced both his philosophy and his
jurisprudence:

All criticism of the whole system of things to
which we belong is, from a truly 'relative' point
of view, irrational. For the critic, and the
standard by which he criticizes, cannot be
separated from that system...It has often been
pointed out that a logical skepticism cannot be
universal...Doubt must rest on a basis of
certainty, or it will destroy itself. But it is
not less true, though it is less frequently
noticed, that all criticism of the world, while it
detects evil in particular, implies an ultimate
optimism. For, if such criticism pretends to be
more than the utterance of the tastes and wishes
of an individual, it must claim to be the
expression of an objective principle--a principle
which, in spite of all appearances to the
contrary, is realizing itself in the world.\footnote{Ibid. P. 13}
Returning again to Christopher Wolfe's estimate of Holmes, we may find more on the subject of the justice's alleged skepticism. Holmes as a legal positivist, was very hostile to the very notion of natural law. He believed that the doctrine of natural law, that concept which argued that there were certain principles objectively knowable and valid always and everywhere, was merely a result of men's confusing the familiar with the necessary. Holmes had applied this skepticism as much to economics as he did to moral philosophy or metaphysics.

The role of a judge was not to enforce the natural law. He must enforce the positive law, the laws made by men. Judicial review, as Holmes saw it, was the enforcement of the most fundamental positive law, the Constitution. In a case where the issue dealt with enforcing a very vague constitutional provision, such as due process, Holmes would argue that the Court should be very slow to strike down legislative acts. After all, the legislature's notions as to what did (or did not) constitute arbitrary action were as likely to be right as the judges'. Judicial review was appropriate only when legislation deprived citizens, without any rational basis, of rights that were fundamental and accepted by virtue of tradition. Where traditional
understanding of fundamental rights was at issue, the judge must defer to the legislature.\textsuperscript{H}

So we have now been introduced to Holmes the positivist, Holmes the constitutionalist, the historicist, the skeptic, etc. And, we may find in the work of Thomas C. Grey yet another Mr. Holmes, and that is Holmes the pragmatist, the man who was capable of resolving the disparate elements in his philosophy and combining them to create a coherent whole.

Robert W. Gordon's reading of Grey's point of view indicates that he had once been inclined to see Holmes's positivism, his formalism and conceptualist projects as representing unresolved contradictions with his historicism. He has, however, convincingly reconciled the two through imputing to Holmes a pragmatic move. It seems reasonable to believe that for the sake of making the lawyer's task of finding and applying doctrine easier, Holmes had indeed been determined to refine the classification scheme, the logical arrangement of doctrine into conceptual categories. In this sense he was a conceptualist. He was also a formalist, in the sense of seeking decision rules that would increase legal certainty by generating predictable results. His historicism told him that a large part of the law in any period would consist of the contingent and irrational.

\textsuperscript{1} Supra. Note 16., P. 161
Conceptual categories could never be more than provisional aids to help practitioners sort out the cases, guidelines for decisions, starting points for legal reasoning. They could never require any particular results.\textsuperscript{15}

David Burton would have us understand that it is "artificial" to attempt to study Holmes's jurisprudence away from his politics. There is a necessary "symbiosis" between the two. The judge's well-known advocacy of judicial restraint was analogous to an abiding respect for the will of legislatures, whether they spoke for the people of a state or the citizens of the United States. Holmes was clearly a republican—a man who respected the the work of an elective body, but was only interested in interfering with its procedures in the most extreme circumstances.\textsuperscript{26}

It is in the lack of agreement, in the plethora of opinion that one finds concerning this enigmatic judge where he must hopefully emerge. Felix Frankfurter speaks well to the necessity that our understanding of Holmes be predicated upon that very diversity which characterizes our subject.

In a book written by this man who would ultimately prove himself the willing acolyte of Oliver Wendell Holmes,


Jr., there surfaces a picture surprisingly similar to that which would later be used to define the writer as well:

These instances must suffice to show the different considerations that determined Mr. Justice Holmes' mind when he sat in judgement on legislation attempting economic readjustments as against legislation restricting freedom of utterance. Just as he would allow experiments in economics which he himself viewed with doubt and distrust, so he would protect speech that offended his taste and wisdom. At bottom, both attitudes came from a central faith and a governing skepticism. Since the whole of truth has not yet been, and is not likely to be, brought up from its bottomless well, the first duty of an educated man was to doubt his major premise even while he continued to act on it. This was the skeptical conviction with which he distrusted dogma, whether economic or intellectual. But his was never the paralyzing skepticism which easily becomes comfortable or corroding cynicism.

An examination of Holmes's record on the Supreme Court may hope to find a better understanding of that philosophy which would effect his often disparate decisions. It seems unfair to relegate his actions to the realm of "cynicism" without understanding that the skeptic, the person who is aware that doubt is the provence of the truly wise, must make his choices with greater honesty, with greater humility.

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27 Felix Frankfurter, Mr. Justice Holmes And The Supreme Court, (Cambridge, Massachusetts: Harvard University Press, 1938) P. 61-62
Contradiction is not always a sign of vacillation. It can also demand a strength of character and an individuality which rarely pleases all. We remember the non-conformist. The ordinary gets lost in the crowd.
CHAPTER 3

HOLMES AND THE EVOLUTION OF A SOCIAL PHILOSOPHY

Oliver Wendell Holmes, Jr. was the product of a generation. The contradictory character that often pervaded his decision making, if examined as the result of a "growing" phenomenon, may be more appropriate to a better understanding of the man as both an individual and a member of the Supreme Court of the United States. That inconsistency we find in Holmes decisions is in fact consistent with the social philosophy he brought to the Court, and even more importantly with the ideas that pervaded the "indefinite" world that produced his personal history. All of us are influenced by our beginnings. Human beings, their roots, the intellectual milieu in which they develop and the society that contributes the earliest foundations for a worldview are inextricably interrelated. Holmes's legal philosophy is clearly the result of such a "visit." 28

28 Written in 1917, "The Love Song of J. Alfred Prufrock", T.S. Elliot's masterpiece of poetic history speaks eloquently to the world in which Holmes developed. "Let us go then, you and I, When the evening is spread out against the sky...To lead you to an overwhelming question...Oh do not ask, 'What is it?' Let us go and make our visit."
Born in the "developmental" years of the 19th century in America, Justice Holmes was a man who had known the horrors of a Civil War that threatened not only his personal world but the stability of his nation. Surviving the ugliness, he had returned to the home of his upper class Brahman father to study law at Harvard and beyond this fortuitous decision, to ply his trade as an attorney in a world alive with change. America in the latter years of the 19th century provided the seedbed for the philosophy of a Ralph Waldo Emerson, a Henry David Thoreau and a John Dewey.

The worldview that pervades the work of such as these, also characterizes the words of the ever curious intellectual who in 1915 wrote for the Illinois Law Review:

To get a little nearer to the practical our current ethics and our current satisfaction with conventional legal rules, it seems to me, can be purged to a certain extent without reference to what our final ideal may be. To rest upon a formula is a slumber that, prolonged, means death...To doubt one's own principles is the mark of a civilized man. To know what you want and why you think that such a measure will help it is the first but by no means the last step towards intelligent legal reform. 19

The "revolt against formalism" which Morton White examines is the social movement which colors the legal philosophy of Oliver Wendell Holmes, Jr. He speaks of the 19th century, that century which had transcended the 18th

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through its concern with change, process, history and culture. This was the century of history, evolutionary biology, psychology and sociology, historical jurisprudence and economics. It was also the century of Comte, Darwin, Hegel, Marx and Spencer. It is not surprising, therefore, that we find American intellectuals in the eighteen nineties, positioning themselves against formalism, since they had been convinced that logic, abstraction, deduction, mathematics, and mechanics were inadequate to social research and incapable of containing the rich, moving, living current of social life.

It is difficult for one who studies Holmes not to recognize a multiplicity of facets. Here was surely more than simply a student of the law. Holmes is better understood, as Judge Richard A. Posner would volunteer, as a "writer-philosopher" in the vein of Nietzsche, a man who interestingly had been Holmes's contemporary. The Justice's attitudes were often not far from Sarte or Heidegger, also men who emerged from the metamorphosis of the late 19th century. One finds in studying Holmes's, allusions to pragmatism, utilitarianism, atheism, (nineteenth century) liberalism, materialism, aestheticism, utilitarianism, militarism, biological, social, and historical Darwinism,

30 Morton White, Social Thought In America (Boston: Beacon Press, 1968) P. 11
skepticism, nihilism, Nietzschean vitalism and "will to power," Calvinism, logical positivism, stoicism, behaviorism, and existentialism. Together with these is the explicit rejection of most of these 'isms' and a sheer zest for living that may be the central plank in the Holmesian platform.\textsuperscript{11}

As one acquaints oneself with Holmes's predecessors, we are surprised to find many of his insights and even expressions anticipated. With power and ingenuity Holmes synthesized, reformulated, and extended the ideas and expression of those who had gone before him.\textsuperscript{12}

In his famous essay, "The Path of The Law," a Harvard Law Review article written in March of 1897, Holmes was surely the scholar in search of the truth. He was the skeptical philosopher often walking in the steps of men like David Hume. Choosing not to pontificate, he was rather the humble student trying to find his way back along the path law had taken, a path that had led to a specific point in its history. Here was a man of the law who would pursue such a road for the remainder of his long life:

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the rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot
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\textsuperscript{12} Ibid., P. xii
know the precise scope of the rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules.

Holmes's seminal book, The Common Law, published in 1881, was not the work of a pedant. Here again is another "skeptical" journey. He would have us look at the past so that perhaps we might find some indicators as to how to better anticipate the future:

The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.

Any attempt toward defining Mr. Justice Holmes, and tying together the multiplicity of views to be found in the literature with reference to this man, necessarily requires that the researcher find his or her personal path toward the truth. Scholarly debate with regard to this enigmatic individual has raged from the time of his earliest days on the bench on into the present moment. His belief that truth

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34 Holmes, The Common Law (Boston: Little, Brown, 1881)p.1
was a changing issue is what often makes his categorization impossible.

John Dewey speaks well to the need that change must be endemic to human thought. How much like Holmesian philosophy are his words:

The pragmatic theory of intelligence means that the function of mind is to project new and more complex ends--to free experience from routine and from caprice. Not the use of thought to accomplish purposes already given either in the mechanism of the body or in that of the existent state of society, but the use of intelligence to liberate and liberalize action, is the pragmatic lesson. Action restricted to given and fixed ends may attain great technical efficiency; but efficiency is the only quality to which it can lay claim. Such action is mechanical (or becomes so), no matter what the scope of the performed end, be it the Will of God or Kultur.

But the doctrine that intelligence develops within the sphere of action for the sake of possibilities not yet given is the opposite of a doctrine of mechanical efficiency. Intelligence as intelligence is inherently forward-looking; only by ignoring its primary function does it become a mere means for an end already given. The latter is servile, even when the end is labeled moral, religious or aesthetic. But action directed to ends to which the agent has not previously been attached inevitably carries with it a quickened and enlarged spirit. A pragmatic intelligence is a creative intelligence, not a routine mechanic.  

Morton White writes, that Holmes and Veblen both believed that law and economics were empirical sciences. They wanted to be free of prejudice and belief in final

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causes; wishing to make a distinction between what they found and what they wanted to find. The same distinction invariably turns up in Holmes's writing, particularly in his conception of legal duty and in his perception of the law itself. A scientist was expected to describe what happened even when he disliked it.\footnote{Id. at 31, p. 206}

In a speech at the banquet of the Middlesex Bar Association given in December of 1902, which he had entitled, "Twenty Years in Retrospect," Holmes's own words may hopefully guide us toward a better insight into his legal philosophy:

I have tried to see the law as an organic whole. I also have tried to see it as a reaction between tradition on the one side and the changing desires and needs of the community on the other. I have studied tradition in order that I might understand how it came to be what it is, and to estimate its worth with regard to our present needs; and my references to the Year Books often have had a skeptical end.

I have considered the present tendencies and desires of society and have tried to realize that its different portions want different things, and that my business was to express not my personal wish, but the resultant, as nearly as I could guess, of the pressure of the past and the conflicting wills of the present.

I have considered the social and economic postulates on which we frame the conception of our needs, and I have to see them in dry light. It has seemed to me that certainty is an illusion, that we have few scientific data on which to affirm that one rule rather than another has the sanction of the universe, that we rarely could be sure that
one tends more distinctly than its opposite to the survival and welfare of the society where it is practiced, and that the wisest are but blind guides.

Studying Mr. Justice Holmes, the issue one must continually confront is the fact that it is not always easy to stand on political common ground with this man. His prejudices were clearly his own, and it is not our interest here to judge the rightness or wrongness of his point of view on every issue.

If awareness is what we are after, then we must recognize that his obvious sexism, his clear intellectual elitism, his ties with an economic philosophy that would conjoin industrial growth and the economic good of all are not necessarily always one's own. The study of this particular individual must relate more importantly to the service he has rendered the development of American jurisprudence. Holmes was the child of a period. The fin de siècle that defined the later years of the 19th and the early years of the 20th century was the intellectual milieu that produced such an individual. It placed its imprint on who and what he would become:

If our imagination is strong enough to accept the vision of ourselves as parts inseverable from the rest, and to extend our final interest beyond the boundary of our skins, it justifies the sacrifice even of our lives for ends outside of ourselves. The motive, to be sure, is the common wants and

37 Id. at 31. p. 151
ideals that we find in man. Philosophy does not furnish motives, but it shows men that they are not fools for doing what they already want to do. It opens to the forlorn hopes on which we throw ourselves away, the vista of the farthest stretch of human thoughts, the chords of harmony that breathes from the unknown.

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CHAPTER 4

FRANKFURTER, IN THE FOOTSTEPS OF HIS TEACHER

The year 1939 saw Franklin Roosevelt's nomination of Felix Frankfurter to fill the seat vacated by the death of Justice Cardozo. Joseph Lash tells us that in Frankfurter's account of his appointment he went to great lengths to portray himself as a man who was happy at Harvard, had no thought he might succeed Cardozo, and who, when in October was told by Franklin Roosevelt that he had promised the next appointment to West, accepted it in good spirits and objectively appraised for Roosevelt, as he had asked him to do, the qualifications of other men who were being proposed.19

Frankfurter had enjoyed a colorful political apprenticeship prior to his sudden choice by President Roosevelt. Hardly a newcomer to political life, he had served as personal assistant to Henry L. Stimson only a short time after being graduated by Harvard Law School in 1906. This political "plum" was surely worthy of the still very young and brilliant attorney, but the route he had taken to that moment had been highly fortuitous.

Born November 15, 1882 in the closing years of the Hapsburg Empire, Felix Frankfurter emigrated with his family to America in 1894. Jewish immigrants on New York's lower East Side confronted a world that was antithetical to the wealthy and prestigious Boston that had earlier nurtured Oliver Wendell Holmes. But Emma Frankfurter, his mother, tyrannized her husband Leopold and for many years had dominated her son. She had been determined that, despite Leopold's lack of business talent, the family would make it out of the ghetto and into the middle class. Within five years, the Frankfurters had moved uptown to Yorkville, and Frankfurter had discovered that academic achievement could provide him his own road toward upward mobility.  

A New York City public school education took Frankfurter next to City College in 1901, and from there to Harvard Law School. At Harvard he imbied the spirit of John Gray's brand of legal skepticism, a precursor of what would later be called "legal realism." Holmes had argued as early as 1881 in his Lowell Lectures that the life of the law was experience, not logic, and Gray explored the various non-legal factors that affected judicial decision making.  

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41 Ibid., P. 2
As research assistant to John Chipman Gray, Frankfurter led his class for three years, made the Harvard Law Review, and was graduated in 1905, and it was a letter from Gray that introduced him to Oliver Wendell Holmes. The time he spent at Harvard established Frankfurter’s sense of self, and gave him the opportunity to walk in the paths of a Brahman culture that affected the course of his future life, and H.N. Hirsch points out that the law as taught at Harvard would become the object of the judge’s energies, as well as the root of his pride. They would become an immensely important source of his self esteem as well. Equally important, Harvard had offered an environment that allowed him to break the bounds of his culture and gain acceptance from the American establishment, which was thus far had been so foreign to him.

The justice’s short experience in private law practice ended only a year later when he joined Henry Stimson in the U.S. Attorney’s office in New York. Following Stimson to Washington in 1911, the young lawyer, not yet thirty, embarked upon personal notations in a diary that would record a life in law and public service that spanned the next half century.

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43 Ibid., P. 21
Stimson, a representative of that "Yankee" culture which Frankfurter had encountered at Harvard, became the major touchstone for the judge's career. It was in Washington where Frankfurter would develop a real relationship with Oliver Wendell Holmes. In Harlan B. Phillips compilation of recorded talks with Felix Frankfurter, who was then a renowned Justice of the Supreme Court of the United States, a highly significant piece of personal memorabilia surfaces:

Apart from my own chief, Secretary Stimson, the great friendship I formed with a person of an older generation was Mr. Justice Holmes. I had a note of introduction to him from a great friend who was a professor of mine at the Harvard Law School. We soon became fast friends, and I became a regular visitor at his home. A regular visitor at his house meant that you sat in front of the fire when there was a fire, and sat in his study when there wasn't a fire, and he did practically all the talking. He was probably the best talker—not the greatest talker in volume, but you just didn't think of talking when he talked because it was such a wonderful stream of exciting flow of ideas in words.\footnote{Harlen B. Phillips, \textit{Felix Frankfurter Reminiscences} (Reynal & Company, Inc., 1960) P. 58}

In Washington, working closely with Stimson, then Secretary of War, Frankfurter suddenly found himself searching for a new path, when with the election of Woodrow Wilson in 1912, Stimson returned to private law practice. Not enamored of practicing law, Frankfurter agreed to accept
a position on the faculty at Harvard, but the advent of the First World War changed his plans.

Harlan Phillips notes that when Frankfurter finally returned to Harvard in the fall of 1919, he was far different from the man he'd been when he left. In 1917 he was still a "wunderkind," the bright young law school graduate who had been Mr. Stimson's assistant and was also well connected to the literary and political intellectuals of the House of Truth and The New Republic. Progressive politics had been a great "game" for Frankfurter. He had been a firsthand witness to the insidious bigotry directed at suspected radicals and the hatred between labor and management. Having been not only an aide to the Secretary of War, but an important figure in his own right in an effort to mobilize American resources for the war, Frankfurter had been an eyewitness to the drama at Paris and had played a key role in moving the Zionist dream closer to reality. The young man from the "other side" had been tested under very trying circumstances and had succeeded brilliantly in his efforts.45

Back at Harvard in 1919, Felix Frankfurter continued to be anything but politically indifferent. Bridging the gap between the conservatism of his Brahman idols and the

45 Supra, Note 40., P. 19
liberalism of those who adamantly defended Sacco and Vanzetti, we find here a man who in the years preceding his selection to serve on the United States Supreme Court maintained a stance which kept him "balancing" between these two ideological positions.

Although he recognized that the system could be perverted by the abuse of prosecutorial and judicial power, Frankfurter never abandoned his faith in its essential rightness. Despite the charges of his supposed radicalism, Frankfurter's basic conservatism is clear. Only by clinging to the law as an instrument of reason and justice could society be saved from the turmoil of prejudice and revolution.\textsuperscript{46}

As a man who was student, teacher and inevitably maker of law, Felix Frankfurter during the 1920's developed a legal point of view that would find its fullest development in the years he spent on the Supreme Court. Frankfurter like Holmes rejected a formalistic, mechanical approach to the law. He didn't see law as a fixed body of eternal verities, but as a set of ideas responding to the changing times. The legal realists had taught him that judges respond as men rather than machines in determining the law, and the conservative bloc of the Supreme Court showed him how dangerous this response could be.

\textsuperscript{46}Ibid., P. 25
Brandeis had also influenced Frankfurter's commitment to law as an agency of reform—but always operating in conjunction with the elective bodies and in accordance with the essential principles of the Constitution.47

Archibald Mac Leish spends considerable time speaking of the relationship enjoyed by Frankfurter and Holmes. According to this author, there were two men who most influenced the thinking of Felix Frankfurter, and they were Louis Brandeis and Oliver Wendell Holmes. Speaking specifically of Holmes, Mac Leish's words provide a wonderful insight into the Justice's philosophy and help the reader to recognize that important thread which ultimately bound Frankfurter to his renowned predecessor. He says that with Frankfurter, and with others of equal exuberance of mind and emotion, the influence of Mr. Justice Holmes was a "sovereign prescription." Holmes had seen the law, as few great jurists have ever seen it. He was capable of understanding its relationship to a world which included men and women, poetry, work and war. He saw the pretensions of the law to final precision as skeptically as he saw the pretensions of philosophers to ultimate truth or the pretensions of politicians to disinterested service. And therefore, he conceived of, taught and argued that the law—even the law of the Constitution—must make its own

47 Ibid., P. 32
adjustments to its time. What Holmes had given his friends, and Mr. Frankfurter among them, was a conception of the law as anything but a means to an end. To most great lawyers the law sooner or later becomes a substantive, a noun. For Mr. Justice Holmes it was always a verb with a predicate to follow it.  

G. Edward White, in his extensive examination of that tradition which has been carried forward by American jurisprudence, spends considerable time with his study of Justice Frankfurter. Clearly not always portraying his subjects with great admiration, White's examination of the members of the Warren Court notes their sensitivity to the implications of status, and one is made aware of that intellectual elitism which Frankfurter may well have carried away from his early days in front of Mr. Justice Holmes's fire.

Frankfurter had been able to reconcile his intellectual elitism with the idea of democracy using notions of paternalism and social responsibility. He obviously believed that the masses needed the opportunity to achieve elite status, but that they could only recognize these opportunities if educated by an elite. Public-mindedness was the obligation that must accompany one's rise in the

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48 *Law and Politics: Occasional Papers of Felix Frankfurter 1912-1938*, Edited by Archibald MacLeish and E.F. Prichard, Jr., with a Foreword by Mr. Mac Leish., P. xviii
meritocracy. He was representative of a group of early twentieth-century thinkers who called themselves "progressives" and who thought that popular sovereignty and elitism were as easily reconcilable as humanitarianism and professionalism. Progressivism had its greatest meaning for Frankfurter predicated upon his concern that elites use their privileged status to further rather than block mass participation in education and politics. Out of this concern had come his conception of the limited role of the Supreme Court.²⁹

The 1930s were years in which Felix Frankfurter found himself involved in both the intellectual life of the law at Harvard, as well as with New Deal politics in Washington. As a professor, he became mentor to James Landis, Alger Hiss, Charles Wyzanski, Thomas Corcoran and others, students who he would send to Washington to be part of the Roosevelt administration. His relationship with Roosevelt had spanned the early years of the twentieth century, and H.N. Hirsch writes that Frankfurter had first come to know Roosevelt when both were middle level functionaries in Washington during World War I. Roosevelt, then Assistant Secretary of the Navy, often discussed labor matters with Frankfurter, who was chairman of the War Labor Policies Board.

Frankfurter later said--perhaps with a touch of exaggeration--that they saw or spoke to each other nearly every day in 1917 and 1918.\textsuperscript{50}

In 1930, Professor Frankfurter had written to Walter Lipmann that he would support Roosevelt in his effort toward becoming president.\textsuperscript{51} And in Max Freedman's remarkable compilation of the correspondence between Felix Frankfurter and Franklin Roosevelt one may draw some real insight into the relationship that these two men shared. Freedman includes a telegram dated June 19, 1930, in which Frankfurter explained to Roosevelt why he had to decline Governor Ely of Massachusetts's offer to serve on the Supreme Court of Massachusetts. Clearly, Frankfurter had other ideas about his potentialities, and history would provide the result.

What emerges here is not only the definitive importance Roosevelt found in Frankfurter's advice, but also the position Professor Frankfurter held as intermediary between the President and Justice Louis Brandeis, another vital center of influence for Frankfurter's legal philosophy. The then prestigious Harvard professor of the law wanted to pull the Roosevelt administration toward the position of what has

\textsuperscript{50} Supra Note 42., P. 101

\textsuperscript{51} FF to Lippmann, quoted in Freedman, Roosevelt and Frankfurter, P. 56
been referred to as Brandeisian liberalism. Walter Lippman
has said that:

Brandeis held an almost mystical aura for
Frankfurter and, especially, for Frankfurter's
proteges...They perceived the New Deal as a chance
to finally bring about some of the reforms for
which they had all struggled since the turn of the
century...The ideological core of Brandeisian
liberalism was its emphasis on smallness...they
sought to restore the simple and decentralized
market economy of the nineteenth century...To the
first New Dealers, business was to be a partner;
to the Brandeisians business was to be the
enemy.\(^2\)

Reading the correspondence between Frankfurter and
Roosevelt, it becomes even more evident that Frankfurter
maintained a central role as advisor to President Roosevelt
before, during and after Roosevelt's move into the
presidency.

In May of 1935, on the heels of the Supreme Decision in
Schecter, Frankfurter recognized that the first New Deal at
the hands of the then sitting Supreme Court would
necessitate a real shift in Roosevelt's policies. Although
he disagreed with the President's plan to "pack the Court,"
Frankfurter maintained his loyalty to Roosevelt, so much so
that he stayed silent and took an active part in Roosevelt's
campaign for re-election. Philosophically he disagreed with
the President's methodology, but the relationship they
shared was far more significant for Frankfurter. H.N. Hirsch

\(^2\) Supra Note 42., P. 104
suggests that the Justice's nomination to the Supreme Court of the United States was in a sense a reward for his loyalty during the Court-packing fight.\(^5\)

Melvin Urofsky offers an extremely interesting view as it relates to the perspective Frankfurter brought to his new position as a Justice of the Supreme Court of the United States. As Frankfurter had taught a generation of students at Harvard how they might see the appropriate role of the Supreme Court and the limits of its jurisdiction as well, he would go on to attempt to teach his brethren on the Court. For 30 years, however, Frankfurter had been either an acolyte of men like Holmes, Brandeis, Stimson, and Roosevelt—or a mentor himself to those he considered his intellectual inferiors.

The sitting Court when Frankfurter came to it was not interested in necessarily following his line of thought. One of the great tragedies of Frankfurter's career is that a man renowned for his talents in personal relations, could have so misread the situation and the characters of those with whom he would serve.\(^6\)

\(^{53}\) Supra Note 42, P. 124

\(^{54}\) Supra Note 40., P. 46
CHAPTER 5

FELIX FRANKFURTER: THE DEFINITION OF AN IDEOLOGY

Both Felix Frankfurter and Oliver Wendell Holmes came to the Supreme Court in their mature years. Each of them had developed conclusive opinions as to the place the Court must hold in American life. Frankfurter was fifty-seven when in 1939 he assumed his seat on the most prestigious bench in the American legal system.

A scholar by anyone's standards, Frankfurter had clearly made his mark as a pre-eminent professor of the law. Also a man of politics, here was a new justice who had for many years found both his hands and mind deeply entrenched in the workings of American politics. As Franklin Roosevelt's friend and advisor, he was, although he often denied it, an important cog in the wheels of New Deal dynamics, and not unlike Oliver Wendell Holmes, Jr., who's words he so often quoted, Frankfurter represented an apparent plus for the policies espoused by the different "Rooseveltian" administration he had been chosen to serve. The professor who left Harvard for the bench in 1939 was generally considered a liberal (in some quarters even a radical). From that point on, for many he became the voice of conservatism. If in fact the apparent change occurred,
its impact upon history was profound. What is significant, however, is that Frankfurter's basic outlook did not change. In private life he was, and continued to be one of the great liberals of his day. But it was integral to his philosophy that a judge's private convictions are one thing, his duty on the bench quite another. This was the teaching of Holmes. As a professor or a judge, whether with respect to liberty or property, Felix Frankfurter was skeptical of government by the judiciary.\textsuperscript{55}

In his writings prior to the January day that he received the telephone call from Franklin Roosevelt which would effect the balance of his life, Frankfurter's words corroborate a belief that he had already arrived at his own view of the place the Supreme Court must hold in America's constitutional system. In 1925 he wrote:

\begin{quote}
   The real battles of liberalism are not won on the Supreme Court. To a large extent the Supreme Court, under the guise of Constitutional interpretation of words whose contents are derived from the disposition of the justices, is the reflection of that impalpable but controlling thing, the general drift of public opinion. Only a persistent positive translation of the liberal faith into the thoughts and acts of the community is the real reliance against the unabated temptation to straight jacket the human mind.\textsuperscript{56}
\end{quote}


\textsuperscript{56} Felix Frankfurter, "Can the Supreme Court Guarantee Toleration?" \textit{New Republic}, 17 June 1925. P.178
In his prologue to *The Antagonists*, James F. Simon speaks of the response to Justice Frankfurter's nomination to the Court. This author notes that according to the New York Times, both liberal Democrats and anti-New Deal Republicans alike ranked him as one of FDR's most popular appointments. As it turned out, the conservatives were more prescient in their forecast than the liberals, for Frankfurter's philosophy of judicial restraint proved to be his pervasive guide, and his record on civil liberties, so exemplary as a private citizen, would be less impressive as a justice.

Ironically, the former member of the Ku Klux Klan, Hugo Black, would become the libertarian hero and liberal leader of the Court—not Frankfurter. In January 1939, the focus was exclusively on Frankfurter, who, appropriately, was taking the scholar's seat on the Court, filed by Cardozo and Holmes before him. Like his predecessors, Frankfurter shared with Holmes (who had been his close friend and mentor) a view of the law as a living, vital force that must change with the times.

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58 Ibid., P. 18
Once again, Frankfurter's views as they related to the function of the Supreme Court and the place of law in modern society were well defined in his tribute to Justice Jackson:

That law in its comprehending sense is at once the precondition and, perhaps, the greatest achievement of an enduring civilization since without it there is either strife or enslavement of the spirit of man; that law so conceived expresses the enforceable insights of morality and endeavors of justice, that law is not word-jugglery or the manipulation of symbols; that precedents, while not foreclosing new truths or enlarged understanding, are not counters to be moved about for pre-conceived ends; that this significance and role of law must particularly be respected in a continental federal society like ours.

The Supreme Court as the ultimate voice of the law must always be humbly mindful of the fact that it is entrusted with power which is saved from misuse only by a self-searching disinterestedness almost beyond the lot of men--these were convictions Justice Jackson passionately entertained.\(^{59}\)

For Frankfurter, and as he so often enunciated, the Supreme Court was to serve as only interpreter and protector of social policy. Although the positions he took would in certain instances be politically controversial, he brought to the Court an ever present awareness of the limits of his position.

Judicial restraint in his hands meant that the country's best hope for the protection of its democratic values lay with the elected branches of government, not with

the Supreme Court. That "disinterestedness" which he had admired in Jackson was surely his chosen credo. Wallace Mendelson has characterized Justice Frankfurter in much the same mode when he says that he was wary of judicial attempts to impose justice on the community. This was to deprive it of the wisdom that comes from self-inflicted wounds and the strength that grows with the burden of responsibility. In the Justice's view, humanitarian ends were served best in that allocation of function through which people by balance of power seek their own destiny. True to the faith upon which democracy ultimately rested, Frankfurter would leave to the political processes the onus of building legal standards. In the Justice's view, only that people is free who chooses for itself when choices must be made. 

In 1916, in an essay written for the Harvard Law Review, Frankfurter paid tribute to Oliver Wendell Holmes, and to his mentor's perception of the position of the Supreme Court. The essay was full of Holmes's words, and in quoting the man he so obviously admired, Frankfurter provided an evocation of his own jurisprudential philosophy:

> We touch here the most sensitive spot in our constitutional system: that its successful working calls for minds of extraordinary intellectual disinterestedness and penetration lest limitations in personal experience and imagination be

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interpreted, however conscientiously or unconsciously, as constitutional limitations.  

And then, quoting Justice Holmes directly, Frankfurter wrote:

Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

Although social responsibility remained the core of Frankfurter's personal ideology, there may well be a clear connection between his views as they related to the place of the Court and the lack of uniformity that often pervaded his judicial opinions. Neither a categorical realist or a formalist in the sense either is commonly understood, Frankfurter commingled the two perspectives, leaving to the Court the job of serving as the moderating voice between the public and their representatives. The essence of his judicial restraint maintained that it was not the province of the Court to make social policy:

In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not. The pressure on legislatures to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed. Above all, they must not be encouraged in irresponsible or undisciplined use

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2. Ibid., P. 686
of language. In the keeping of legislatures perhaps more than any other group is the well-being of their fellow-men.43

Frankfurter's appointment to the Court was confirmed without a dissenting vote on January 17, and on January 30, 1939, he took his oath to "administer justice without respect to person." These words echo with a special clarity as they refer to the Judge, but it is in his most significant opinions where we must look in search of corroboration for his faithfulness to their essential meaning.

Helen Shirley Thomas suggests that we view Justice Frankfurter through his own words as well, "As Frankfurter wrote in 1931, 'for all of us, truth is born when we discover it. But intellectual genealogy is important. The history of ideas is essential to culture; thereby we are saved from being intellectually nouveau riches.'44

But can we discover the "truth" of Felix Frankfurter? Perhaps it will not be possible to categorize this man who has been such a disappointment for some and a definitive example of judicial accomplishment for others. In 1975, a reviewer of J. Lash's book, From The Diaries of Felix

44 Helen Shirley Thomas, Felix Frankfurter Scholar On The Bench, (Baltimore: The Johns Hopkins Press, 1960) P. 40
Frankfurter presented the former view. For the writer, Frankfurter had surely been a disappointment:

In light of Felix Frankfurter's brilliant pre-Court career, what did the country--and Frankfurter himself--expect from him on the bench? What were his role and accomplishments on the Court? Given Frankfurter's early liberalism, could one have foreseen, and can we now explain, his later shift to conservatism? Is there a consistent philosophical thread between the younger Frankfurter and the Justice? Frankfurter's unusual combination of scholarship and activism should have made him a dominating figure on the Supreme Court, and one who in a period of stress, would protect the rights of political and religious minorities. But neither occurred. Instead, Frankfurter emerged as the paradigm rationalist, the academics' Justice. His primary concerns were with regularity, neutrality, and judicial humility. He deferred to administrative expertise, the political processes, and stare decisis.

One must wonder whether the man who had served as counsel to the NAACP and as an active participant in the activities of the American Civil Liberties Union, as well as the person who had written the inflammatory book, *The Case of Sacco and Vanzetti*, in 1927, actually remained the defender of civil liberties and the passionate devotee of liberal causes. Was that pre-Court political position which appeared to characterize Professor Felix Frankfurter contradicted by his behavior on the bench, or were the opinions rendered by this enigmatic Supreme Court Justice

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part of an ideological metamorphosis he underwent as he reflected on the appropriate position of the Supreme Court over a lifetime as both student and teacher of law?

In his dissent in *Baker v Carr*, Frankfurter's obvious concern that the Supreme Court had just suffered a "self inflicted wound" comparable only to Dred Scott, indicated his awareness of the potential danger of its misuse of power:

...Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this court in our constitutional scheme. Disregard of inherent limits in the effective exercise of the Court's "Judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined.

It 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. Such feeling must be nourished by the Court's complete detachment, and by abstention from injecting itself into the clash of political forces in political settlements.

It is therefore to the most memorable of his decisions that we must turn, attempting to hopefully better come to terms with the jurisprudence of Felix Frankfurter. Both he

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66 369 U.S. at 267.
and his mentor Oliver Wendell Holmes, Jr. appear to have remained faithful to a specific point of view as it relates to the responsibilities of a Supreme Court justice.

Perhaps in acknowledging what for both men was a necessary dichotomy between his political preferences and the responsibilities of a Supreme Court judge we will find an answer to the contradictory nature of much of their decision making.

Louis Jaffee, at the time, Dean of the University of Buffalo Law School, spoke of "the judicial universe" of Felix Frankfurter. Holmes definitely was not a liberal, and neither was his disciple, Frankfurter, whose judicial philosophy was so consciously inspired by the elder judge. Neither of these men could be relied upon to deliver a judgement because it immediately implemented some accepted tenet of the liberal legislative program.

Justice Frankfurter was in this sense no more conservative than he was liberal. It is the very essence of his judicial philosophy that his role on the Court precluded him from having a program predicated upon a political point of view. Whether in fact his performance as a justice confirmed such a belief is arguable.

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CHAPTER 6

OLIVER WENDELL HOLMES: FREE SPEECH,
CONSISTENCY OR CHANGE IN HIS LEGAL PHILOSOPHY?

Any attempt to understand the basic philosophy that
underlies the jurisprudence of Oliver Wendell Holmes must
include an examination of his free speech decisions. Some of
his most eloquent and telling words may be found in those
opinions he rendered concerning this vital issue. It is also
here where a clearer picture of the motivations which
underscored his career on the Supreme Court may hopefully
emerge. Max Lerner has written that Holmes’s opinions in the
civil liberties cases gave occasion to some of his most
moving utterances. In this area he was writing with love and
without the sense of inhibition he had felt when dealing
with technical economic problems. Here, in dealing with the
relation of state power to individual intellectual freedom,
Holmes concerned himself with a subject on which Plato,
Milton, Mill, Bagehot and others had given of their best
energies. It was a subject which as it dealt with states
rights was the most difficult and the most challenging. If
there was one job which he was best able to confront, by
reason of preparation and his deepest nature, it was the
issue of freedom of speech.
He brought to it on the one hand a solicitude for individual expression and also a toughness of mind which saw the survival of the state as a condition that came of the creativeness of individuals within it.® (*my italics)

Holmes rendered his first Supreme Court opinion dealing with the issue of freedom of speech in the case of Patterson V. Colorado.® This case concerned an editor in Colorado who had published articles and a cartoon allegedly "reflecting on the motives and conduct of the (judges of) the Supreme Court of Colorado in cases still pending."® The editor in question was convicted of contempt, and appealed his conviction on the basis that "to fine or imprison an accused person in contempt proceedings for publishing the truth about a judge or a court when the truth of the charge is pleaded in justification...is to deprive him of liberty and property without due process of law."®

Choosing to disregard the defendant's allusion to the Due Process Clause, which he had assumed incorporated the First Amendment to the Constitution, the basis for Holmes's decision was that the First Amendment merely codified the law of criminal libel. He argued that, "the main purpose of

® Supra Note 6, P.289
® 205 U.S. 454 (1907)
® Id at 459.
® Id. at 456. Patterson had not stipulated that he was appealing on the basis of the First Amendment, assuming that it was incorporated into the Fourteenth Amendment Due Process Clause.
such constitutional provisions is to prevent all such previous restraints upon publications as had been practiced by other governments, and they did not prevent the subsequent punishment of such as deemed contrary to the public welfare."

Patterson claimed a right to comment about public trials and the judges who decided them, also that the statements about the corrupt and partisan motives of Colorado judges were true, and offered to prove their truth. But the Justice was not concerned with the truth or falsity of Patterson's claims. His opinion in this case related directly to Blackstonian Common Law, in which he argued, "the preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false." This was the law of criminal libel apart from statute in most cases, if not in all. The essence of Holmes's position was that the state of Colorado had the right to decide that it was not in the public welfare for persons to make statements about the conduct or motives of judges, and it could if it so chose, treat these statements as criminal libels.

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72 Id. at 461.
73 Id. at 462.
According to G. Edward White, the combination of the 'prior restraints' limitation on First Amendment claims and the 'bad tendency' test announced as an evaluative standard for 'police power' limitations on free speech made Holmes' Patterson opinion a very restrictive one. Under its reasoning a state could suppress even true speech if it concluded that the words had a tendency to promote socially injurious acts.

Eight years after Patterson Holmes again advanced a restrictive theory of freedom of speech in a Supreme Court case, once more sanctioning the use of 'bad tendencies' as a justification for subsequent punishment of speech. The "bad tendency test" of which White speaks is that barometer which judges had used to analyze free speech issues. It derived from the English common law of libel as synthesized by Blackstone before the American Revolution. The test determined to measure the legality of speech by its tendency to cause an illegal action. The case referred to here is that of Fox v Washington.

The petitioner in Fox was an editor of a magazine in which an article had appeared that discussed the infiltration into a nudist group of "a few prudes," who "proceeded in the brutal, unneighborly way of the outside

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75 236 U.S. 273 (1915)
world to suppress the people's freedom," and ultimately had four members of the group arrested for indecent exposure.\(^7\)

The article in question called for a boycott of the "prudes" businesses, saying that "the boycott will be pushed until these invaders will come to see the brutal mistake of their action and so inform the people."\(^7\)

The editor of the article had been prosecuted under a state statute, and on appeal to the Supreme Court of the United States, it was held that the article was "not a criticism of the law, but was calculated to, and did, incite the violation of the law." In addition, it noted that the right of free speech did not mean "that persons may with impunity advocate disregard of law."\(^7\)

Holmes's opinion stated that, "we understand the state court by implication at least to have read the statute as confined to encouraging an actual breach of law," and it does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general." (*my italics) He further argued that "the disrespect for law that was encouraged was disregard of it--an overt breach and technically criminal act."\(^7\)

\(^7\) Id.

\(^7\) Id. at 276-77

\(^7\) Id.

\(^7\) Id. at 277.
this, that "by indirection but unmistakably, the article encouraged and incited a persistence in what we must assume would be a breach of the state laws against indecent exposure." 80

There is no doubt that in both Fox and Patterson, Holmes had taken a stance consistent with his reliance on the validity of English Common Law jurisprudence. He had begun his free speech decision making by underlining the basic power of state legislatures to suppress speech if in fact such speech had a tendency to encourage or incite the commission of a crime. His opinion in Schenck, which was delivered some four years later, bore, with its statement of the "clear and present danger" test, a distinct similarity to the philosophical position he had taken in these two earlier free speech decisions. Although the circumstances of the decision were different, Holmes chose once again to rely on both the issues of inciting disregard of the law, as well as those "bad tendencies" to which he had alluded earlier.

The decision in Schenck v. United States 81 was rendered in the context of anti World War I sentiment, and although the issue of free speech was once more at issue, the aftershock of Holmes's opinion would reverberate on into the 20th century. Schenck and Baer had been indicted on three counts of violating the Espionage Act of 1917:

80 Id.
81 249 U.S. 47 (1919)
conspiracy to cause insubordination in the military and to obstruct the recruitment and enlistment; conspiracy to use the mails in violation of the Espionage Act; and the offense of using the mails unlawfully.

The evidence that was presented included minutes of a meeting of the executive committee of the Socialist Party in which a plan had been authorized that Schenck, the secretary, prepare and publish a circular that condemned the draft. In addition, there was testimony that Schenck did order the publication of the circulars. Also entered into evidence was a pile of the circulars that had been found at the party headquarters, as well as newspaper clippings of names of men who had already received their draft notices; the Post Office's discovery of a number of the circulars in the mail posted to men whose names had appeared on the list, and the testimony of several men who had notified the postal authorities that they had received circulars.\(^2\) The jury convicted the defendants on all counts, and the judge sentenced them to ten years on each count, though the sentences were to be served concurrently.

After his conviction, Schenck appealed to the U.S. Supreme Court, questioning the constitutionality of the Espionage Act on First Amendment grounds. In the Schenck appeal, the Court ruled unanimously to uphold the act in question, and Justice Holmes chose to say "a few words"

\(^2\)See Record at 17-62 Schenck.
about it. The words of his opinion must surely help to better explicate his position in the case:

But it is said, suppose that that was the tendency of this circular, it is protected by the First Amendment of the Constitution. Two of the strongest expressions are said to be quoted respectively from well known public men.

It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose. We admit that in many places and in ordinary times the defendants, in saying all that was said in the circular, would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done.

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent... The Statute of 1917, in 4, punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking, or circulating a paper), its tendency and the intent with which it is done, are the same, we perceive no ground for saying that success alone warrants making the act a crime... (*my italics)

Certain issues surrounding the rationale for Holmes's opinion have been raised. H.L. Pohlman has argued that according to Holmes's theory of liability, if persons had conspired to do something unlawful, that sufficed for a conviction. No proximity of harm was required. 84

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83 Id at 52.

David Rabban has responded that the language of clear and present danger should be ignored. We would better look at a sentence that appears later in Holmes's opinion in the case. Rabban argues that after Holmes had commented that the existence of war was relevant to the question of Schenck's liability, in the next sentence he had recurred to the 'bad tendency doctrine'.

Pohlman's response to Rabban's position is that Holmes's opinion that Schenck was guilty didn't necessarily make him an adherent of the bad tendency doctrine. He says that an act, its tendency and the intent with which it is done are in fact the same for Holmes. In other words, if they are illegal or harmful, then in his view liability could be imposed even if the harm did not occur. All that Holmes said, in Pohlman's view, was that conspiring with others was an act whose tendency and accompanying intent were harmful. Accordingly, liability could be imposed on persons who conspired to obstruct the draft through speech.

Holmes treated conspiracy differently when speech was the primary means that the conspirators used to reach their objective. Perhaps the justice thought that liability could be imposed only if the group's purpose was unlawful and only if the planned speech activity had a reasonable chance of

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86 Ibid. P. 68.
causing harm, and liability was appropriate in this case simply because the defendant's speech had been effective enough to make the group illegal. 87

In The Common Law, at Page 35, in Holmes's discussion of early forms of liability may well be found a foreshadowing of the rationale he had used here:

On the other hand, in substance the growth of the law's legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. 88 (*my italics)

Holmes had chosen the terms "new reasons more fitted to the times" in the same context, and had clearly articulated those "instinctive preferences and traditions" which so influenced his own legal thought.

In the case of Debs v United States 89, in a unanimous opinion Holmes wrote for the Court, White will argue that here was still another opportunity to apply his "attempts"

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87 Ibid., P. 69.
88 Supra Note 34, Page 35.
89 249 U.S. 211 (1919)
analogy. This had been the "cause celebre" of the Espionage Act cases. It was the case in which Eugene Debs, the Socialist Party candidate for President in 1912 was convicted of obstructing the war effort on the basis of a speech he made at the Socialists' convention. Several particulars of Debs' speech had been made the basis of a criminal prosecution under the Espionage Act. Debs had alluded in this speech, according to the evidence presented, to a visit that he had made to three 'loyal comrades' who were serving time in the workhouse for 'aiding and abetting another in failing to register for the draft'. The logic of Holmes' approach to criminal attempts applied easily to Deb's acts. Holmes had maintained that the acts in question raised the possibility that the purpose of the speech, whether incidental or not did not matter. It was meant to oppose not only war in general but this war, and that opposition was so expressed that its natural and intended effect would be to obstruct recruiting.\(^9\)

Holmes's words stipulated that the jury was warranted in its conviction, and in his judgment:

\[\ldots\text{finding that one purpose of speech, whether incidental or not does not matter, was to oppose not only war in general, but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended, and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its}\]

\(^9\) Supra Note 74, P. 420.
being part of a general program and expression of a general and conscientious belief.\textsuperscript{91}

It does, nonetheless, seem appropriate that we consider here a letter which Holmes sent to Harold Laski on March 16, 1919. Refering here to Debs, Holmes wrote:

Dear Laski,

...I sent you yesterday some opinions in the (Eugene) Debs and other similar cases (including Schenk). I greatly regretted having to write them-and (between ourselves) that the government pressed them to a hearing. Of course I know that donkeys and knaves would represent us as concurring in the condemnation of Debs because he was a dangerous agitator. Of course, too, so far as that is concerned, he might split his guts without my interfering with him or sanctioning interference. But on the only questions before us I could not doubt about the law.

The federal judges seem to me (again between ourselves) to have got hysterical about the war. I should think the President when he gets through with his present amusements might do some pardoning. I have been interrupted and so perhaps have been less coherent than I should have been.\textsuperscript{92}

The period in which this letter was written undoubtedly was far from normal. The issues with which the Supreme Court had to deal must be considered, according to Holmes, in "light of the circumstances."

It is worth noting that there is a strong similarity in the circumstances which surrounded the decisions Oliver Wendell Holmes would render during the time of the First World War and comparable choices Felix Frankfurter would

\textsuperscript{91} Supra Note 89, 211, 214-214

make in another period of American history. It is yet to be determined whether the basic philosophy upon which Frankfurter predicated such choices was very different from that which had motivated Holmes more than twenty years earlier.

Although both Schenck and Debs are more often discussed in this particular vein, the case of Frohwerk v United States was in actuality the second in line of the espionage cases. It is significant because it stands as part of what it is believed by many to be an important period of transition in the free speech philosophy of Holmes. Frohwerk, like Schenck, involved an alleged conspiracy, no actual danger of harm was required here, and Holmes apparently did not refer back to the "clear and present danger" doctrine in his decision.

The defendant's conviction on conspiracy and eleven counts of attempts to cause insubordination, and refusal of duty elicited the following response from Holmes:

...conspiracy to obstruct recruiting would be criminal even if no means were agreed upon specifically by which to accomplish the intent. It is enough if the parties agreed to set to work for that common purpose...the Court had to take the case on the record as it is, and on the record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.

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93 249 U.S. 204 (1919)

94 Id at 204, 209
In all of the espionage cases, Holmes refused to protect conspiracies to obstruct recruiting or to cause insubordination in the military. The issue here was not whether the unlawful goals were to be obtained by speech or if there was no clear immediate danger of harm. In this instance conspiracy spoke for itself, and in Lecture II of The Common Law, Holmes took a most telling position as it related to the context of this discussion:

...probably most English-speaking lawyers would accept the preventive theory without hesitation. As to the violation of equal rights which is charged, it may be replied that the dogma of equality makes an equation between individuals only, not between an individual and the community. No society has ever admitted that it could not sacrifice individual welfare to its own existence...because no civilized government sacrifices the citizens more than it can help, but still sacrificing his will and his welfare to that of the rest...public policy sacrifices the individual to the general good...when we are dealing with that part of the law which aims more directly than any other at establishing standards of conduct, we should expect there more than elsewhere to find that the tests of liability are external, and independent of the degree of evil in the particular person's motives or intentions... (*my italics)

It is around the question of whether public policy can sacrifice the rights of the individual to the general good that Alexander Meikeljohn has built an argument which is very critical of Holmes and his "clear and present danger doctrine." Meikeljohn underlines the highly threatening character of Holmes's phrase. He points to the dominating influence it has had on our understanding of self

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95 Supra Note 34, P. 43, 44, 49, 51
government. Even opening the discussion of free speech to the question of whether it does or does not have the potential for harm has in fact "led to the annulment of the First Amendment rather than its interpretation."^7

One must ask, as does Professor Meiklejohn, "What is the line, the principle, which marks off those speech activities which are liable to legislative abridgment from those which, under the Constitution, the legislature is forbidden to regulate or to suppress?"^8 For him, there is no rational manner in which we can allow suppression of speech on one ground and allow it on another. The very act of pointing to specific instances where free speech is unallowable is in fact erroneous. "the distinction between speech-actions and speech-thoughts is not, then, the distinction which we need for the proper interpretation of the First Amendment."^9 Holmes had drawn a line around speech-acts and asked us to accept that there may be acts of speech which are not protected by the First Amendment, acts which can be abridged by virtue of the threat of harm which they represent. But the primary purpose of the First Amendment was to guarantee that voters must vote freely, and judges and Congress as well. In none of these instances


^7 Id.

^8 Id. at P. 35

^9 Id.
could freedom of speech be abridged. Holmes's use of the fire-shouting illustration spoke to a criminal action which was not protected by our conception of free speech. But what Holmes succeeded in doing was to make questionable that specific area of speech which might be covered by the rubric "clear and present danger." In Meiklejohn's view, so long as a man's "active" words are those he speaks as a participant in public discussion and the decision of public policy, his words must be free from abridgment. What the "clear and present danger" doctrine accomplished was to present a threat which in its potentiality was far greater than the alleged harm of the behavior it prohibited. The very act of opening up the question of whether freedom of speech could be subject to the judgment of a specific group is what in actuality represented the potential danger. He points to the change in Holmes's thought in the latter days of the year 1919, and of his eventual recognition that the doctrine of "clear and present danger" was unsatisfactory. Nonetheless, the test remains on the books. It is, "a working device."

Holmes's ambivalent phrase which, although rejected by its initiator, continues to constitute an exception to the freedom of speech. It stands on the record of the Court as a

\[100\] Id at P. 53.
peculiarly inept and unsuccessful attempt to formulate an exception to the principle of freedom of speech.\textsuperscript{101}

With reference to the change in perspective to which Meiklejohn alludes, David S. Bogen has made some interesting comments concerning the question of whether there was in fact any evidence of a real metamorphosis in Holmes's view of free speech. He argues that the seeds of what was to become the "clear and present danger" test had been developed early in Holmes's life, and adds that the justice's skepticism and his unwillingness to depart from prevailing legal doctrine had joined in preventing these seeds from coming to fruition until he was in his seventies. Abrams provides the example of such a "metamorphosis." The sacredness of any existing ideas had never appealed to the skeptical Holmes. He goes on to cite a letter from Holmes to Pollack written in April of 1910, in which Holmes indicated his skepticism as to our knowledge about the goodness or badness of laws. Holmes had said that there was no way to make such a definitive judgment outside of doing "what the crowd wants."\textsuperscript{102}

Looking at these points of view, one cannot help but recognize that an attempt to understand Holmes must be more than an examination of his isolated decisions. Are we being

\textsuperscript{101} Id. at P. 50.

entirely fair in judging an individual's choices in microcosm? We may be wrong in condemning Holmes for what at the time seemed the appropriate choice.

I doubt that Meiklejohn's criticism was meant *ad hominem*. His is rather another perspective on the contradictory nature of the opinions which color the variegated fabric of Holmes's career in the law, and the effect that they had on American jurisprudence. Holmes's heritage must necessarily include the fallout from his "clear and present danger" test, but it is recognizable from reading the story of his life that he had always been an ardent patriot. A philosophy such as his does not seem inappropriate in light of his past.

Justice Holmes had fought in the Civil War, almost giving his life on several occasions. He had seen the result of the undecided issue of state's rights, and his response was unquestionably reflected in many of the decisions he rendered. He recognized that freedom of speech might be potentially threatening in certain circumstances. It could also offer the possibility for positive change. This dichotomy apparently vied for Holmes's support. He undoubtedly accepted the concept of free speech in the abstract, but there was also that component of his philosophy which maintained that government must take those steps necessary to protect its ultimate survival, even as it related to this freedom. The Civil War had been a period in which men needed to confront such questions.
If Lincoln had sensed the necessity for doing away with habeas corpus when the future of the nation was at stake, perhaps Holmes saw a comparable rationale on the issue of freedom of speech in yet another highly volatile time. One must wonder whether Holmes had chosen to balance these contending free speech perspectives, selecting what in the circumstances seemed a more "pragmatic" solution to a comparable dilemma.

In the view of many, Holmes's point of view concerning freedom of speech softened prior to his opinion in Abrams. He moved away from the "clear and present danger" doctrine and examined each case on its own merit. It has been suggested that such change may have been the result of pressures exerted by individuals he greatly respected, as well as, and perhaps more importantly, in light of that characteristic quality which pervaded the judicial life of Holmes. The skeptic, the eternal scholar, the justice so often accused of contradictory position taking was not a man who shrank from the possibility for change—not in his own point of view or in the law. He had said, "We too need education in the obvious—to learn, to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law." Was it in fact such "orderly change" which is reflected in his decent in Abrams?

\textsuperscript{103} Supra Note 9
Shortly after the Supreme Court handed down the decision in Debs, Judge Learned Hand wrote to Holmes that, "Opinions are at best provincial hypotheses, incompletely tested...they are never absolutes. So we must be tolerant of opposite opinions or varying opinions by the very fact of the incredulity of our own." Hand had proposed a standard of "direct incitement" which was unusually protective of free speech, and had argued that only "direct advocacy" of unlawful acts could be punished; all other speech, no matter how critical of governmental policies, would be protected.\(^\text{104}\)

Further correspondence between Holmes and Hand late in March of 1919 carried with it Hand's argument that speech only violated the Espionage Act, "when the words were directly an incitement." It was clear that in his view, Debs' intent was not at issue here. He believed that Debs would have been guilty only if he had actually incited his listeners to violate the law. Holmes's response on April 3 indicated that he saw no basic difference in their thinking.\(^\text{105}\)

And, in a letter written by Holmes to Herbert Croly on May 12 of the same year, a letter which he never in actuality sent to Croly, but rather to Harold Laski, Holmes commented on an article by Ernest Freund in The New Republic. The article was titled "The Debs Case and Freedom


\(^{105}\)Id.
of Speech," and in it, Freund had criticized Holmes's decision in Debs, citing the arbitrariness of the whole idea of implied provocation. The copy of this letter appears in the highly telling correspondence Holmes shared with Laski, and based on Holmes's comment that this was "poor stuff," one may recognize the effect such criticism was having on his psyche.

The months that followed his decision in Schenck served to elicit what for some was a changed viewpoint from the judge. It is conceivable that an article that appeared in the Harvard Law Review of June, 1919, and written by Zechariah Chafee, had given Holmes pause. In the article, Chafee had argued that, "unless it is clearly liable to cause direct and dangerous interference with the conduct of the war...the line should be drawn, close to the point where words will give rise to unlawful acts." Chafee had also provided additional questions concerning the rationale Holmes had used in Schenck, Frohwerk and Debs.

Further, in a letter written in October of 1919, interestingly at the time in which the Court would hear argument in the case of Abrams, one may find that, although


107 Holmes-Laski Letters (cited earlier) Supra Note 14, P. 203.

Holmes had chosen not to acknowledge the aforementioned criticism, it is arguable that it had affected him.

Regarding his readings, so well documented in the correspondence with Laski and Sir Frederick Pollack, Holmes had apparently spent considerable time during this period studying political philosophy, biography and history. There can also be little doubt that the opinions of others were in fact on his mind.

In the words of a letter Holmes sent to Laski on October 26, 1919, one must conclude that, although he has been credited with a real metamorphosis in philosophy, Holmes continued to show allegiance to that Common Law philosophy upon which he had earlier relied. He wrote:

I fear we have less freedom of speech here than they have in England. Little as I believe in it as a theory I hope I would die for it and I go as far as anyone whom I regard as competent to form an opinion, in favor of it. Of course when I say I don't believe in it as a theory I don't mean that I do believe in the opposite as a theory. But on their premises it seems to me logical in the Catholic Church to kill heretics and the Puritans to whip Quakers—and I see nothing more wrong in it from our ultimate standards than I do in killing Germans when we are at war. When you are thoroughly convinced that you are right--wholeheartedly desire an end—and have no doubt of your power to accomplish it—I see nothing but municipal regulations to interfere with your using your power to accomplish it.

The sacredness of human life is a formula that is good only inside a system of law—and so of the rest—all of which apart from its banality I fear seems cold talk if you have been made to feel popular displeasure. I should not be cold about that—nor do I in any way shrink from saying what
I think--but I can't spare the energy necessary to deal with extra legal themes... (*my italics)

The correspondence Holmes shared with Sir Frederick Pollack also overflowed with comment on the reading Holmes found time to do in this very volatile period in his judicial life. In April of 1919 he had written to Pollack that he planned first to read Harold Laski's new book, Authority in the Modern State, a book dedicated by the author to both Holmes and Felix Frankfurter. He also mentioned that he was getting "stupid letters of protest against a decision that Debs, a noted agitator, was rightly convicted of obstructing the recruiting service so far as the law was concerned...There was a lot of jaw about free speech, which I dealt with somewhat summarily in an earlier case-Schenck v U.S.--also Frohwerk v. U.S....As it happens I should go further probably than the majority in favor of it..." These are certainly contradictory words from a man who has been alleged to have taken a real turn in his philosophy on the issue of free speech, a change of mind that would in fact determine his dissent in Abrams.

For some, the change had been from a more conservative philosophy of the law based in Blackstonian Common Law jurisprudence, to the more open minded stance. But for

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others, this is only further corroboration of the philosophy he had followed to date. Here again one is confronted with an enigma. What in fact had been Holmes's rationale for the dissent in the Abrams case?

In Felix Frankfurter's estimate of Justice Holmes, we find another contribution to the debate as to whether Holmes had actually changed his point of view on free speech:

Just as he would allow experiments in economics which he himself viewed with doubt and distrust, so he would protect speech that offended his taste and wisdom. At bottom both attitudes came from a central faith and a governing skepticism. Since the whole of the truth had not yet been, and is not likely to be...The first duty of an educated man was to doubt his major premise even while he continued to act on it. This was the skeptical conviction with which he distrusted dogma, whether economic or intellectual. He had a positive faith—faith in the gradual power to pierce nature's mysteries through man's indomitable endeavors.

This was the road by which he reached an attitude of widest tolerance towards views which were strange and uncongenial to him, lest by a premature stifling even of crude or groping ideas society might be deprived of eventual wisdom for attaining a gracious civilization.  

In his dissent in Abrams, had Holmes in fact, "doubted that major premise" which he had followed prior to it? If the premise had centered around his views concerning the ultimate primacy of government and its objectified law, can we look at Abrams as anything more than a reinforcement of that position?

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111 From Mr. Justice Holmes And The Supreme Court, (previously cited at Note 59), P. 85.
On November 19, 1919, Holmes and Brandeis would cast the two dissenting votes in the case of Abrams v United States. In August of 1918, Jacob Abrams, a Russian immigrant and an anarchist had been arrested in New York, along with several of his associates. The charges had been that they conspired to publish and distribute (1) language about the form of government of the United States that was "disloyal, scurrilous and abusive." (2) "language intended to bring the form of government of the United States into contempt" (3)language "intended to incite, provoke, and encourage resistance to the United States in its war with Germany, and...(4)language that advocated "curtailment of production of things and products, to wit, ordinance and ammunition necessary and essential to the prosecution of the war."

The government's evidence included two circulars, one written in English and the other in Yiddish, and the printing and distribution of these circulars in circles where there was some chance of causing opposition to the American government's policy of intervention in Russia and harm to the war effort in Germany. The issue underlined by the prosecution had been that of "intent," and the defendants had argued that their criticism had only been of policies that President Wilson's administration had pursued

112 250 U.S. 616 (1919)
113 Id at 617.
regarding Russia. They maintained that they had not encouraged resistance to the United States or to the war effort against Germany.

Judge Clayton, in his directions to the jury, had indicated a clear dichotomy between motive and intention, "A motive is that which leads a person to do a certain act. The intention is a design, or a plan, or purpose to use a particular means to effect a certain result." According to Clayton, the jury could convict the accused even if the purpose of his acts had not been to hinder the war effort or to provoke resistance. The appeal to the United States Supreme Court was predicated upon this very issue. The defense argued that there had been no evidence presented that the defendants had violated the Espionage Act. If the evidence was enough for a conviction, then the Espionage Act was unconstitutional.

All that the defendants had done, according to the defense, was to engage in a public discussion of a public policy that dealt with a nation with which our country was not at war. They maintained that the Constitution gave absolute protection to those whose intent was only to criticize existing policy of government officials. Holmes's dissent, if it was based upon his theory of legal liability, appears to have offered him little choice. It was

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114 Recorded at P. 237-238 of Abrams.
unconstitutional to punish a person for conspiracy without evidence of unlawful purposes. He argued that no one could believe that "the surreptitious publishing of a silly leaflet by an unknown man; without more, would present any immediate danger."\footnote{115} (*my italics) And added that publishing "these opinions for the very purpose of obstruction...might indicate greater danger, and at any rate would have the quality of an attempt."\footnote{116} Such an intent could not be found, and was therefore not a basis for imposing liability on the defendants. These defendants had not, as was the case in \textit{Debs}, attempted to obstruct the draft. They had not tried to obtain an unlawful result, nor had they represented a threat of harm to the status quo. The following words from Holmes's opinion in \textit{Abrams}, serve well to explicate both the philosophy he held concerning the case in question, and more importantly, may lead us to a better understanding of that philosophy of law and the Constitution which defined his jurisprudence:

\begin{quote}
That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the
\end{quote}

\footnote{115} \textit{Id.} at 616, 629.

\footnote{116} \textit{Id.}
country...Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, Congress shall make no law...abridging the freedom of speech.\footnote{117}

It is clear that, although Holmes has been considered a liberal by many, the 1950s and 60s saw a growth of commentary which was highly critical of the argument that Abrams represented a distinct change in Holmes's free speech position. Samuel Konefsky has argued that Holmes had no real ideas of his own, only unreflective prejudices—"clear and present danger" accordingly was just a casual remark, a rationalization to uphold criminal convictions, that did not become one for protecting freedom of speech until Justice Brandeis lent his "powerful support."\footnote{118}

Sheldon Novick has also pointed to Yosal Rogat's criticism of Holmes, in which, according to Novick, Rogat has traced the doctrine of Schenck to the external standard of The Common Law.\footnote{119} Novick goes on to take the position that anyone who suggests that Holmes's point of view concerning freedom of speech did in fact change is clearly

\footnote{117} Id at 630-631.


incorrect. Rogat's essay, "Mr. Justice Holmes: A Dissenting Opinion," written for the Stanford Law Review in 1984, is, for the most part, a very strong and well documented argument. In the preface to the article, there is a reference back to a prior statement made by the author:

Holmes's opinions are among the tersest and most elliptical in the history of the Supreme Court. This contributes to their rhetorical power, but it also makes them particularly difficult to construe, and open to diverse interpretation. 120

This article, published by James M. O'Fallon, with the permission of Rogat's children, had been the second half of the work Rogat began in 1962. Rogat once again attacked Holmes's account of legal phenomena. According to Rogat's critique, it was "basically impoverished." In his view, Holmes suffered from a failure to distinguish a crude system of social control which rested upon naked force from a distinctively legal method of control. For Holmes, "a legal system was simply a mechanism to enforce the desires of the dominant group." 121 Justice Holmes's objective approach to the law saw it as simply an attempt to reduce law to an external standard. What follows in Rogat's work is a telling citation from one of Holmes's earliest opinions:


As the aim of law is not to punish sins, but is to prevent certain external results, the act done must come pretty near accomplishing the result before the law will notice it.\textsuperscript{122}

In conclusion, Rogat argues that for Holmes, judges should be "neutral, friction free transmission belts, making political rights exactly equivalent to societal power."\textsuperscript{123}

Novick's essay also speaks to Holmes's views relating to the question of social policy. Holmes had argued that the privilege accorded to free speech was a justification for self restraint on that privilege. Self restraint could from Holmes's perspective, only be based on the self interest of the individual citizen. As far as government was concerned, by virtue of its own self interest, it ought not allow experiments with ideas and laws designed and intended to destroy it. "Clear and present danger" for Holmes, as Sheldon Novick reads it, is just "one of many shorthand expressions for this central idea, the point at which individual liberty was set aside by the importance of governmental interest."\textsuperscript{124} In essence, for Holmes, law was what judges decided, and the rule of law meant a system of peaceful debate to which all individuals were admitted so

\textsuperscript{122} Commonwealth v. Kennedy, 170 Mass. 18, 20, 48 N.E. 770 (1897), as cited in Rogat P. 1365.

\textsuperscript{123} Id. P. 1368

\textsuperscript{124} Id. at 417-419.
long as they followed the rules, no matter how dangerous were the ideas.\textsuperscript{125}

What this examination has produced thus far appears to coincide with many of the views expressed by both White and Novick. There is, however, a point made by White that may be open to discussion. White has suggested that there is no question but that Holmes's later free speech decisions reflect his expanded consciousness of the First and Fourteenth Amendments, and that he diverged from his earlier position, recognizing these amendments as significant in and of themselves and not as simply codification or analogies of the Common Law. He has also commented that toward the conclusion of Holmes's legal career, the Justice seemed more concerned with making clear his increased awareness of the implications of free speech than with maintaining doctrinal consistency.\textsuperscript{126}

If one examines the litany of his free speech opinions, Holmes's first priority appeared to remain consistent with the words he had written in his examination of The Common Law. Public policy must sacrifice the rights of the individual to the general good.\textsuperscript{127} Recognizably, he had been willing to see Abrams on its own merits, but one might

\textsuperscript{125} Id.

\textsuperscript{126} Supra Note 84., P. 437.

\textsuperscript{127} As found in The Common Law, Op cit 95.
comfortably argue that this case was not evidence that Holmes had changed at all. His dissent in Abrams, can only be understood as centered upon the "attempts" rationale he had used earlier. There had been no "attempt" to subvert the ends of government in Holmes's view. That would seem to have been enough to satisfy his standards.

Holmes was undoubtedly the skeptic that Felix Frankfurter had described. It was surely the ability of Oliver Wendell Holmes to recognize the implicit differences in the cases he was to decide—to view them, in his own words, "in the light of different circumstances," that clearly marks his decisions. This does not, however, make a convincing argument that his basic belief in the character of the law had seen a metamorphosis, or that he had come to see the position of a judge as more than the restatement in a particular generation of the "present" point of view.  

The first free speech dissent following Abrams was in United States ex rel, Milwaukee Social Democratic Publishing Co. v Burlsen. The issues in this case dealt with whether the Postmaster General of Milwaukee had discretionary authority to exclude publications from the mails based on a guess as to their future content. The Postmaster General had

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129 255 U.S. 407, 436 (1920)
in fact denied second-class mailing privileges to the newspaper, the Milwaukee Leader, on the grounds that it had printed articles critical of the war effort, and thus under the rules of the Espionage Act of 1917, such newspapers had been "non-mailable." Although the Act had not indicated that future issues of a "non-mailable" publication could be barred, the Postmaster General had taken the position that in the light of past violations the newspaper had forfeited its second class mailing privileges, and therefore the government could refuse to renew them. 130 The majority of the Court held that the articles had clearly violated the Espionage Act and that in the light of this, the Postmaster could presume from this that future publications would do so as well. Holmes, confessing that until he had read Brandeis's dissent he had been inclined to adopt the majority position, indicated that he was now convinced that, "the Postmaster General could not determine non-mailability in advance." The only thing he could do under the statute was to deny second-class mail privileges and after the publications were mailed, refrain from forwarding the papers...and return them to the senders." He was not in Holmes's view empowered to decide on the basis of a publication's content, whether it could not be carried in

130 Id. at 412.
Holmes argued that the Postmaster General had lacked authority to deny access to the mails in future. There had been no explicit statutory language which conveyed him such power. In his opinion, "the use of the mails is almost as much a part of free speech as the right to use our tongues, and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any man." Denial of second-class mailing privileges for the future, in the Justice's view was a serious attack on our liberties.

In a similar case the next year, Leach v Carlile Postmaster (1921), the Post Office refused to transmit advertising literature for "Organo Tablets" on the grounds of fraudulent representation of medicine, Holmes and Brandeis again refused to join in the majority opinion. Holmes's opinion stated that:

I do not suppose that any one would say that the freedom of written speech is less protected by the First Amendment than the freedom of the spoken word. Therefore I can not understand by what authority Congress undertakes to authorize anyone to determine in advance, on the grounds before us, that certain words shall not be uttered. Even those who interpret the Amendment must strictly agree that it was intended to prevent previous restraint.  

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111 Id.

132 Id.

133 258 U.S. 138, 140 (1921)
If one attempts to appropriately understand the significance of Holmes's words here, it seems clear that there was a distinct and necessary separation between what the law would allow and the abstract rights of individual citizens.

It was in Gitlow v. New York and United States v. Schwimmer where some argue that Holmes's reputation as a civil libertarian was greatly advanced. An examination of each of these cases will nevertheless show that his decisions were based on an underlying philosophy of law that in fact permeated his free speech opinions.

Under New York law, Gitlow had been found guilty of advocating criminal anarchy. Six years had passed since the Abrams decision. It was 1925, and the First World War was no longer a central issue. The conviction of Gitlow had been based upon the publication of a pamphlet called "The Left Wing Manifesto," in which he had written of proletarian dictatorship, political strikes and similar issues. He had concluded his pamphlet with the words, "The Communist International calls the proletariat of the world to a final struggle." He had been charged with only the circulation of this pamphlet. No questions had been raised as to overt acts directed toward the overthrow of the government. The issues in the case involved nothing more than whether political agitation by words was constitutionally protected. The
Court's decision was that they were not. Holmes's dissent in this case initially argued that since this was an alleged infringement of free speech by a state rather than by the federal government, free speech was not specifically protected from state encroachment in the Constitution.

The First Amendment related only to actions of the federal government, and thus, the "due process" clause of the Fourteenth Amendment was not applicable here. He then went on to define what in his judgment were the allowable areas of free speech:

If what I think the correct test is applied, it is manifest that there as no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement...The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason...

If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result...But the indictment alleges the publication and nothing more. (*my italics)

Justice Sanford, speaking for the Court indicated that the reasonable exercise of the state's police power was constitutional. Harmful speech acts were within the power of

\[134\] Id.
the state, and the advocacy of anarchy was sufficiently
dangerous to be considered a harmful speech act.\textsuperscript{135} It is
interesting that the Court, without Holmes's support, had
used a somewhat changed version of his "clear and present
danger" test, and that Holmes had cited his own version of
"clear and present danger" but with an important disclaimer.

The Justice's choice not to defer to a legislative
finding that advocating criminal anarchy was harmful to the
state appears somehow contradictory. However, he himself as
early as 1897, had said that the law's purpose was to punish
harmful \textit{acts}, not sinners. Perhaps a person who advocated
criminal anarchy in a situation where no harm could occur
might be an evil person, but he had \textit{done} nothing harmful.
Nonetheless, one must wonder whether Holmes's decision might
have been a different one if the charge had been conspiracy.

H.L. Pohlman argues that Holmes had indicated by his
position in \textit{Gitlow} the necessary balance that had to be
maintained between individual rights and legislative
authority. He has attempted to tie together the motivating
factors recognizable in Holmes's decision. He understood
speech activity according to three categories of his theory
of legal liability: harmful \textit{acts}, attempts, and abuses of
privileges. Harmful \textit{acts} were treated especially harshly.

\textsuperscript{135} \textit{Id. at 671}. 
If a rational and prudent person, knowing what the agent knew in the circumstances of an act, would judge the speaker's act to be harmful in itself, the speaker was liable no matter the intent or foresight. Libel and contempt of court were examples of such harmful acts, while Gitlow's advocacy of anarchy was not.\(^\text{136}\)

It is remarkable, though, that at eighty four, in December of 1925, Oliver Wendell Holmes wrote to his friend Laski, "The Chief called me up by telephone to know if a case that he proposed to assign to me would be too troublesome...I told him that if he spared me in that way I ought to leave. He gave me the case and I polished it off in short metre..."\(^\text{137}\) This letter to Laski is full of talk of the intellectual pleasure his cases for the year had supplied. He had even added a word about his efforts at writing them shortly and compactly with a hint at general theory when it was possible. This had provided "good sport" for a rather remarkable man who by most standards should have been ready to retire.

Although for many, Holmes's opinion in Gitlow marked a turning point in the adjudicative processes of our nation, White has underlined the ambiguities in Holmes's approach in


\(^{137}\)Homes-Laski Letters, P. 806.
the case. He goes so far as to say that even if Gitlow did not present a libertarian trend in Holmes's view of speech, there is evidence that he did feel a sense of commitment in this area, and he argues that in the last years of the Justice's career, his positions on the issue would be irreconcilable with his Espionage Act opinions. In addition, White believes:

The dizzying contradictory implications of these several sentences suggest the risk inherent in assuming that Holmes' striking phrases express a developed ideology. Holmes the judge was often consumed by the sheer attraction of language itself. Phrases like "every idea is an excitement" and "the only meaning of free speech" exemplified his style. Although arresting and memorable, they often collapse as analytical guidelines.\footnote{White, Supra Note 84, P. 444}

In the final analysis, Holmes's Gitlow dissent was more an example of his distinctive literary style than an attempt to develop a new First Amendment jurisprudence. Holmes could not have been expected to be governed by the unqualified language he used, because he himself believed that all legal questions were questions of degree. In the free speech cases that followed Gitlow, cases in which Holmes joined with Brandeis in the years between 1925 and the end of his tenure on the Court, he showed what was in White's view, a clear commitment to free speech.\footnote{G. Edward White, "Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension." In First Amendment Law Handbook, (Deerfield, Ill.:Clark Boardman Callaghan, 1993) P. 487}
As understood by both White and Novick, the opinion which best exemplifies Holmes's consciousness toward free speech is that which he rendered in *United States v Schwimmer*. The case dealt with a forty-nine year old woman of Hungarian citizenship who had applied for American citizenship. The woman, Rosika Schwimmer, was a prominent pacifist, who in 1915, while she was still living in Hungary, had persuaded Henry Ford to send a peace ship to Europe to, in her words, "bring the boys out of the trenches by Christmas."

After coming to the United States in 1921 for a visit and lecture tour, she had settled in Illinois. In November of 1921 Schwimmer had declared her intention to become an American citizen, and in 1926 had filed a petition for naturalization. When asked, as part of the naturalization process, whether she was "willing to take up arms in defense of her country," her answer had been in the negative. Upon filing a petition for citizenship, her request was denied on the grounds that she was "unable...to take the prescribed oath of allegiance," and was therefore, "not attached to the principles of the Constitution of the United States" nor "well disposed to the good order and happiness of the

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140 *279 U.S. 644 (1929)*

141 *Id.*
same." She was, however, granted a hearing by the Court of Appeals for the Sixth Circuit which reversed the original finding, and the case was heard by the Supreme Court in April of 1929.

Holmes’s dissenting opinion, in which he was joined by Brandeis, is unquestionably one of his most respected. His reference back to Schenck makes a rather large portion of the decision worthy of examination here:

Of course the fear is that if war came the applicant would exert activities such as were dealt with in Schenck v United States. But that seems to me unfounded. Her position and motives are wholly different from those of Schenck. She is an optimist and states in strong and, I do not doubt, sincere words her belief that war will disappear and that the impending destiny of mankind is to unite in peaceful leagues. I do not share that optimism nor do I think that a philosophic view of the world would regard war as absurd.

But most people who have know it regard it with horror, as a last resort, and ...would welcome any practicable combination that would increase the power on the side of peace...Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought-- not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country.

142 Id. at 646
143 Id.
144 Id. at 653-54
Both Novick and White argue that this case represented a total abandonment of the "clear and present danger" test. However, although Meiklejohn would undoubtedly disagree, it has for many become a viable means for protecting those with divergent points of view. If the only limit put on freedom of speech is the question of whether certain statements represent the imminent danger of harm to the nation, then any speech that stands outside of this requisite addendum is in fact not subject to prohibition. Although I would maintain that the impetus for Holmes's original choice of these words was his desire to conserve the power of the state, they are for many an indication of a strongly libertarian point of view. It may also explain why so much confusion exists concerning Holmes's liberal/conservative status.

In White's view, at the time when Holmes was to emerge as one of the founders of modern First Amendment jurisprudence, the locus of philosophical energy animating solicitude for free speech had shifted from the individual as an autonomous being to the individual as participant in a democratic society. According to this new school of thought, the sources of protection for speech were not identified with the interest of the individual whose liberty government existed to further, but rather with the social interest in
furthering democratic principles by encouraging independent public discussion and debate.\textsuperscript{145} He goes on to say that:

The process by which Holmes participated in the transformation of free speech jurisprudence was in the end an idiosyncratic process, despite its larger doctrinal implications. By treating Holmes' free speech cases as if they were the formulations of an orthodox judicial-opinion writer, some scholars have been misled into emphasizing doctrinal continuity or contradiction, when Holmes was not particularly interested, except on a surface level, in those dimensions of his opinions. Others have been overly anxious to identify Holmes as the founder of a modern libertarian tradition of First Amendment analysis...\textsuperscript{146}

But, White argues, early twentieth century First Amendment jurisprudence did not mirror the evolution in Holmes's thought. Holmes was logically inconsistent in his free speech decisions. Looking for some logical progression in Holmes's free speech jurisprudence can only lead to frustration. There is no rational way to square his views with either a positivist view or with conventional theories of judicial deference to the will of the majority.\textsuperscript{147}

Turning back to "The Path of the Law," one finds some clear indicators of the legal philosophy that in actuality colored Holmes's free speech decisions. This essay, seen as the backdrop for the positions Holmes would take as a

\begin{footnotesize}
\begin{enumerate}
\item White, P. 450
\item White, P. 453
\item Id. at 496-97
\end{enumerate}
\end{footnotesize}
Justice of the Supreme Court of the United States, presents the clearest picture of where he stood at the time he wrote it, and where he would continue to stand as an adjudicator. In light of what Holmes had said in 1897, to argue that there was no logical progression in his decision making does not necessarily have to serve as a condemnation. When Holmes argued that, "The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restates it from the present point of view," there can be no doubt that for him, law was an ever-changing phenomenon. The law was,"the prophecies of what the courts will do in fact, and nothing more pretentious."  

Holmes was the skeptic here, the realist who understood that in each given instance where a judge was asked to make a decision, the possibility existed that he might choose a different course, see in a different set of circumstances a reason to change his mind. This was perhaps the judge we find in Gitlow. Nonetheless, he was also the ardent advocate of principles established in the Common Law. Recounting the issues in a case heard some three hundred years earlier, he talked of the "now" in which he found himself, a now where malevolent motives could not be seen in a moral sense, morals were irrelevant. The issue for him was undoubtedly

148 Supra Note 128, P. 458.

149 Id. at 461
the motivation for his decisions in Abrams, Debs and Schenck. These were cases in which the question of liability prevailed for Holmes:

But nowadays no one doubts that a man may be liable, without any malevolent motive at all, for false statements manifestly calculated to inflict temporal damage. In stating the case in pleading, we still could call the defendant's conduct malicious; but, in my opinion, at least, the word means nothing about motives, or even about the defendant's attitude toward the future, but only signifies that the tendency of his conduct under the known circumstances was very plainly to cause the plaintiff temporary harm.\[150\]

There is no definitive rightness or wrongness that the judge may turn to. For Holmes, certainty was generally only an illusion. It was that judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment that was at the heart of every legal proceeding. The law was the preference of a given body at a given time and place. We didn't adequately realize that a large part of the law was open to reconsideration predicated upon only a small change in the public mind.\[151\] Here was Holmes the relativist, and probably the judge we see in Gitlow. But his were also the words of the Legal Realist we find in Schwimmer:

\[150\] Id. at 463.

\[151\] Id. at 466
I think that they themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious judges.

Yes, we have found many aspects of Holmes in his free speech decisions, but we are being unfair if we are too fast in condemning him for his contradictory stances. He said in 1897, and his actions in the years to come would vindicate his belief that, "We are only at the beginning of a philosophical reaction, and of a reconsideration of the worth of doctrines which, for the most part still are taken for granted without any deliberate, conscious and systematic questioning of their grounds."^153

How prescient was this statement. One must wonder what he would have said had he known the full impact of his "clear and present danger" test. He might well have attributed its ramifications to anything but the original significance of the words. It is interesting to consider the possibility that had he lived, Holmes would have understood, as he did in 1897, that the law continued to be what judges decided.

^152 Id. at 467

^153 Id. at 468.
Although many would quote his words with reverence, and others criticize him for a lack in continuity, Holmes might have undoubtedly chuckled at the significance that had been made of his contribution. He was never an ideologue, and surely not a predictable entity. His belief in this system of government is undeniable, as was his confidence that humanity's search for answers would continue long after he was gone. Perhaps Oliver Wendell Holmes cannot entirely satisfy the demands of the libertarians, but neither can he speak for the advocates of totalitarianism.

This judge of the Progressive era didn't always satisfy the progressives. He was also not always the voice of conservatism. Holmes was the product of a generation which had begun to question itself, a generation still influenced by its past, but also recognizing on many levels that it couldn't march securely forward without recognizing that change was endemic to the human condition. His influence was profound, and his acolytes profuse. Felix Frankfurter, one of many who followed, would often attempt to walk in his mentor's footsteps. The question remains as to how Holmes's philosophy effected this younger man, a man who would also make his mark on American jurisprudence.
CHAPTER 7

FELIX FRANKFURTER: FREE SPEECH, FOLLOWER OR INNOVATOR--A QUESTION OF DEGREE

The literature is replete with commentary on the judicial career of Felix Frankfurter, and as one examines the positions he took in the area of civil liberties, there emerges a picture that is often contradictory. Such seemingly inconsistent behavior it might well be argued, does not relate entirely to some philosophical change of heart, because his insistence upon judicial restraint remained consistent.

Undoubtedly, Frankfurter appeared to have come a distance from Gobitis to Sweezy, but one must question whether what seemed an apparent metamorphosis did not in fact serve to reify his basic jurisprudence. What we do find in the litany of Frankfurter's opinions is a clear contradiction of his pre-court, more liberal political stance.

In reviewing his opinions as a member of the Supreme Court, what may be discoverable is the explication of what Felix Frankfurter considered the appropriate position the judiciary must take in American government. This is a position which he appeared to have diligently attempted to maintain, and which by its very nature produced a rather contradictory pattern.
Some would argue that Frankfurter’s tenure on the Court lacked a commitment to civil liberties and civil rights, not living up to the expectations engendered by his pre-Court career. Others would defend him, arguing that his reputation has suffered in this area not because he was paralyzed, but because of the lesson of judicial humility he had learned, and which constantly tempered his judgments. How like words we have heard said of Holmes are these:

Frankfurter brought a unique historical perspective to each problem, seeking always to ensure that the changing currents of contemporary judicial conviction did not overwhelm the steady trend toward responsible democracy....

William T. Coleman, Jr. suggests that for Justice Frankfurter, constitutional litigation was not the provence of absolutes, but only of relative values which were to be articulated, weighed and compared, and Arthur E. Sutherland has chosen to include a quotation from Holmes in examining the jurisprudence of Frankfurter:

...In substance the growth of the law is legislative...The very considerations which judges most rarely mention, and always with an apology,


156 Id.
are the secret roots from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned.157

Sutherland argues that it is precisely Frankfurter's sensitivity to all sides of a question that have made certain of his critics judge him as an intellectual turncoat, and such criticism is certainly understandable. Frankfurter had come to the Supreme Court as what many considered a liberal firebrand, and those decisions he would render had undoubtedly been a disappointment in the view of certain of his detractors. It is interesting to note that Sutherland also comments that Frankfurter distrusted, much as did Holmes before him, any idea that a verbal formula could make decisions for him, and thus eliminate the necessity of hard judicial choices.158

Alexander Bickel provides some interesting insight as well. For him, Frankfurter had deferred in two senses as a judge. He had deferred judgment to the greater precedence of political institutions, and in some instances had simply deferred judgment. Certain issues were not the province of the judiciary. For Frankfurter, courts were not representative bodies. This was the essence of the words he


158 Id. P. 148
had written in his concurrence in Dennis v United States. Here was an instance in which Frankfurter chose to defer to the legislature, thus concluding that the anti-Communist Smith Act did not violate the First Amendment. 159

Frankfurter, although thoroughly progressive and democratic, was also appropriately skeptical. He had apparently listened to Holmes's advice before and after Holmes gave it to him. Justice Frankfurter had never fallen prey to the vulgar cynicism that affected his fellow realists. Constitutional law was to be applied politics and constitutional adjudication was the job of a statesman. 160

Not long after he came to the Court in 1939, Felix Frankfurter would, by those positions he took, indicate that he had undoubtedly brought with him a sense of public responsibility tempered with a belief that the judiciary must remain as apolitical as possible. One might question whether his decision in the Gobitis case was anything but political, however it is reasonable to conclude that in this instance Frankfurter's position was predicated upon his strong sense of public responsibility. It was time and place that appear to have been his major considerations in this


160 Id., P. 23
decision, and in many ways this would parallel future choices he would make as a judge.

In the case of Minersville School District v. Gobitis (1940), Frankfurter, in his opinion for the Court, expressed what he considered his necessary deference to maintaining judicial restraint even in face of what for some represented an open restriction on civil liberties. In 1936, Lillian Gobitis, age twelve, and her brother William had come home to inform their parents that they could no longer attend school because they had refused to salute the national flag. The reason why the children had refused to salute the flag was that as Jehovah's Witnesses, to salute the flag was a violation of their religion. The children's father filed suit on their behalf and his own, asking to be relieved of the financial burden of educating them elsewhere. He also sued to prevent the Board of Education from continuing to require the flag salute as a condition for the children's attendance at the Minersville school.

The case was heard in federal district court in Philadelphia and the family was granted "relief" by the judge. The Minersville Board of Education appealed to the U.S. Circuit Court of Appeals, and was denied. The year was 1940. In a period not unlike that which set the stage for Holmes's opinions in Schenck, Froehwerk and Debs, and world

161 310 U.S. 586 (1940)
war was once again at hand. The Supreme Court, in light of the circumstances, chose to listen to argument in the case. Patriotism was in the air as the threat of war confronted American public opinion.

A committee set up by the American Bar Association argued that:

The compulsory flag salute cannot be sustained on the ground that public school education is granted as a matter of grace so that the requirement, even though arbitrary and capricious, can be enforced by expulsion from public school...We believe that the letter and spirit of our Constitution demand vindication of the individual liberties which are abridged by the challenged regulation.\textsuperscript{162}

The writing of the majority opinion was assigned to Justice Frankfurter, who had come to the Court only a year before. And after recalling "many talks with Holmes about his espionage opinions," which he regarded as providing guidelines for the flag-salute case, Frankfurter explained that his opinion would be:

a vehicle for preaching the true democratic faith of not relying on the Court for the impossible task of assuring a vigorous, mature self-protecting and tolerant democracy...This was the responsibility of the people and their representatives.\textsuperscript{163}

...the flag salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable. But for us to insist that, though the ceremony may be required, exceptional immunity must be given to

\textsuperscript{162} Id.

\textsuperscript{163} Id.
dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of discipline, might cast doubts in the minds of other children which would themselves weaken the effect of the exercise.\textsuperscript{164}

In a letter Frankfurter wrote to Justice Stone, who was the sole dissenter in \textit{Gobitis}, one may find a better understanding of those primary motivations for Frankfurter's opinion in the case. He wrote:

\begin{quote}
But no one has more clearly in his mind than you, that even when it comes to these ultimate civil liberties, insofar as they are protected by the Constitution, we are not in the domain of absolutes...We are not exercising an independent judgment; we are sitting in judgment upon the judgment of the legislature...\textsuperscript{165}
\end{quote}

According to Mark Silverstein, Frankfurter never considered the judiciary the primary protector of civil liberties. Such a position would have, from Frankfurter's perspective, severely restricted the Court's flexibility. Justice Frankfurter emerges here as both a civil libertarian as well as a firm believer in judicial restraint. If the Court was to be responsible for protecting civil liberties, it would loose the ability to weigh and balance critical elements of judicial statesmanship. The judge's view of statesmanship and the judiciary called for judicial

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{Frankfurter to Justice Harlan Fiske Stone, 5/27/40} (As cited in Mark Silverstein, \textit{Constitutional Faiths} (Ithaca: Cornell University Press, 1984) P. 145
enforcement of principles that would aid a progressive society in the accomplishment of its common goals.\footnote{Id. at P. 148}

Frankfurter, echoing Holmes, believed that the place of the judiciary in American government included its necessary reinforcement of federalism, and thus that the states might serve as "laboratories" for social change. In his view, the Supreme Court, during the twentieth century, had used the due process clause to restrict the police power of the states, and in so doing inhibited their function as the place for such innovation. In his book, \textit{The Public and Its Government}, we may find Frankfurter's ideal for our republic, "In simple truth, the difficulties that government encounters from law do not inhere in the Constitution. They are due to the judges that interpret it..." Here again, not unlike his predecessors Marshall and Holmes, Frankfurter recognized the danger implicit in putting too much power in the Court. In so doing he also acknowledged that, constitutional adjudication was an exercise in statecraft and that the Constitution was, "not a text for interpretation but the means of ordering the life of a progressive people."\footnote{Felix Frankfurter, \textit{The Public and Its Government}, (New Haven:Yale University Press, 1930), P. 79-80, P. 76}
In *Gobitis*, Frankfurter had taken the side of the legislative judgment that the symbolic importance of the flag salute served as part of the foundations for social unity. His words spoke to this belief:

> The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured life which constitutes a civilization. We live by symbols.  

Three years later, in *West Virginia State Board of Education v Barnette*, the Court reversed itself and held that participation in patriotic exercises could not be demanded of the Jehovah's Witnesses. Frankfurter's dissent, although he might well have argued to the contrary, was undoubtedly motivated by his strong sense of patriotism. One can hardly understand it as a non-political choice:

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant, I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic...  

As a member of the Court I am not justified in writing my private notion of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard...The constitutional protection of religious freedom terminated disabilities, it did

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168 *Supra. Note 161 (Minersville School District v Gobitis)*
not create privileges...Law is concerned with external behavior and not with the inner life of man...

As a result of the *Gobitis* decree, several children of the Jehovah's Witnesses had been expelled from the West Virginia schools, and were threatened with incarceration in reformatories. A group of the parents of these children challenged the law and its regulations, claiming that it was an invasion of individual rights. Suing in the federal district court in Charleston, Walter Barnette, Paul Stull and Lucy McClure asked for an injunction to stop enforcement of the compulsory ruling against Jehovah's Witnesses.

The state board of education asserting its authority, cited *Gobitis*, and asked that the complaint be dismissed. A special bench was designated to hear the case, and Judge Parker and his colleagues chose not to follow the *Gobitis* precedent. The West Virginia Board of Education appealed the decision directly to the Supreme Court, as the law provided it might do, and the case was heard on March 11, 1943.

On June 14, 1943, in a 6 to 3 vote, the Supreme Court handed down a decision in *West Virginia Board of Education v. Barnett*, reversing the *Gobitis* decision. The dissenting votes were by Justices Roberts and Reed, who chose not to join in the dissenting opinion as written by Frankfurter.

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They merely noted that they adhered to the views as had been expressed in *Gobitis*. Justice Frankfurter remained faithful to the premise which had influenced his earlier decision. "One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs," 170 he wrote.

In Max Freedman's superb compilation of correspondence between Franklin Delano Roosevelt and Felix Frankfurter, the words that the author chooses to add after including a large portion of Frankfurter's dissent in *Barnette* offer an interesting sidelight to our examination of Frankfurter and his life on the Court. Freedman writes:

At the Hyde Park discussion of the *Gobitis* case, of which Frankfurter made a record, Mrs. Roosevelt said she would not presume to question Frankfurter's legal scholarship and reasoning. But there seemed to her to be something wrong with an opinion, both in logic and in justice, that forced little children to salute a flag when such a ceremony was repugnant to their existence...The President disagreed. He said with great emphasis that what the local authorities were doing to the children was 'stupid, unnecessary, and offensive' but it fell within the proper limits of their legal power. That was an exact statement of Frankfurter's own position. 171

The case of *Bridges v. California* was decided by the Supreme Court in 1941. Harry Bridges, a West Coast labor leader, had been held in contempt of the California courts

170 Id.

for sending a telegram to the Secretary of Labor which he subsequently had published in several newspapers. In this telegram he had warned that a strike would take place if the state courts chose to enforce an "outrageous" decision in a labor case. The state courts had found that the publication of the telegram interfered with the orderly administration of justice, and on an appeal to the U.S. Supreme Court, Bridges argued that the contempt citation had abridged his constitutionally protected freedom of speech.\footnote{\textit{314 U.S. 252} (1941) (This case was consolidated with a similar case which involved the \textit{Los Angeles Times}, that had, in an editorial urged that a state court hand out heavy sentences to two convicted "labor goons."\footnote{\textit{Ibid.}}\textit{)}}

Bridges had originally been argued during the 1940 term, and the vote had been 6-3 to affirm the conviction. However, in his original draft opinion for the Court, and in his subsequent dissenting opinion, Frankfurter reinforced the same ideas. He argued that there was no doubt but that freedom of expression was "implicit in the concept of ordered liberty," but that what was of greater significance was that the measure of any freedom was in the specific nature of that freedom and the means by which it had been curtailed.\footnote{\textit{Ibid.}}

Mark Silverstein's rendering of Frankfurter's rationale here is that according to Frankfurter, the task of the
judiciary was to balance, measure, and mediate. Freedom of expression was not an absolute order. It was a principle to be laid out and predicated upon the circumstances of a particular case. To treat freedom of speech as an absolute would prevent courts from controlling its impact on other, equally important values. He argues that throughout Frankfurter's draft opinion as well as in his published dissent, there is a consistent message that there must be a delicate balance between order and freedom. Frankfurter's dissenting 1941 opinion included these words:

By the Constitution of California...the citizens of the state have chosen to place in its courts the power, as we have defined it, to insure impartial justice. If the citizens of California have other desires, if they want to permit the free play of modern publicity in connection with pending litigation, it is within their easy power to say so and have their way.

It is interesting to note that Justice Black, the justice who was later to become the absolutist as it referred to First Amendment doctrine, chose in his draft dissent written during the 1940 hearing to use the "clear and present danger test." After commenting that the Court did have the powers Frankfurter had alluded to in his original draft opinion, Black wrote:

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175 Supra Note 173
Considering the values of the constitutional liberties that are here abridged, I believe it would be much better to say that state courts should never punish for contempt in such cases unless there was found to be a clear and present danger of an immediate interference which could not be averted without the imposition of punishment. 176

Not unlike Holmes, Frankfurter remained firm in his belief that it was the responsibility of the judge to find solutions that meshed with the "felt necessities of the times." We may also see a foreshadowing of the position he would take in his concurrence in Kovacs v Cooper (1949).

The Court's emphasis on the importance of First Amendment rights had led to what has been called the "preferred freedom" doctrine. The phrase was first used by Chief Justice Stone in his dissent in Jones v Opelika (1941), (in which the Court upheld local licensing fees for those who sold goods; as applied to Johovah's Witnesses selling their literature.) In part, the Chief Justice had written:

The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary, the Constitution, by virtue of the First and Fourteenth Amendments, has put them in a preferred position. 177

176 Id.
177 316 U.S. 584, 608 (1941)
In Frankfurter's concurrence in Kovacs (1949) he chose to take issue with Justice Reed's majority opinion in its reference to "the preferred position of freedom of speech." His objections were that "it expresses a complicated process of constitutional adjudication by a deceptive formula," and that it is, "a mischievous phrase, if it carries the thought, which it may subtly imply, that any law touching communication is infected with presumptive invalidity."^  

Christopher Wolfe believes that Frankfurter's point was that protection of speech must sometimes be balanced against other values. The legislature has the primary responsibility for this. We must, in other words, approach the constitutionality of a law as it applies to free speech in the same manner as we would any other law.  

Another wartime decision presented Felix Frankfurter with the need that he balance a legislative judgment against intervention by the Court. Not unlike the experience of his mentor, Frankfurter found himself also facing the question of whether the deprivation of individual liberties are open to re-consideration in specific circumstances. In light of his opinion in the Schneiderman case, decided in 1943, one gathers that Frankfurter believed, as did Holmes before him,  

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^ 336 U.S. 77, 90 (1949)  

Christopher Wolfe, The Rise of Modern Judicial Review (Supra Note 16, P. 250.)
that government security must under certain circumstances take precedence, even when it meant that the rights of specific individuals were jeopardized. Predicated upon such a rationale, the Justice Department had attempted to revoke the citizenship of naturalized citizens of German and Italian origin who had obtained citizenship illegally or under false pretenses. The case of Schneiderman v United States, was decided by the Court in 1943. William Schneiderman, a Communist born in Russia in 1905, had come to the United States in 1908, and in 1927 had applied for citizenship. He had by that time joined several Communist groups. In 1932, he ran for governor of Minnesota as the Communist party candidate. In 1939, the government moved to strip him of his American citizenship on the grounds of his Communist activities in the five years preceding his naturalization as an American citizen, arguing that he had not been truly attached to the principles of the U.S. Constitution. Schneiderman maintained that he did not believe in using force or violence, and that he had been a good citizen, had never been arrested and had used his rights as a citizen to advocate change and greater social justice.

The Schneiderman case came before the Court in 1942, concurrent with the United States' entrance into the Second

180 320 U.S. 118 (1943)
World War, and its acknowledgment of the Soviet Union as an ally. Schneiderman was represented by Wendell Wilkie, a man who had run as the Republican candidate for president in 1940. Wilkie pleaded with the Court not to establish a legal rule that a person could be punished for alleged adherence to abstract principles. At a pre-decision Court conference on December 5, 1942, Chief Justice Harlan Fiske Stone presented a strong statement that the government should have the power to rid the country of agitators who didn't believe in the Constitution, but worked actively to overthrow the government. 181

Melvin Urofsky comments that, bearing in mind Frankfurter's idolization of Holmes and Brandeis, one might have expected him to speak in defense of Schneiderman, not unlike the manner in which Holmes had defended Rosika Schwimmer. 182 Frankfurter nonetheless supported Stone, and explained his reasons in great length. This case, he began, "arouses in me feelings that could not be entertained by anyone else around this table." He went on to talk about his work in the U.S. Attorney's office in dealing with naturalization cases and confessed that, "as one who has no ties with formal religion, perhaps the feelings that

182 Id. at P. 170.
underlie religious forms for me run into intensification of my feelings about American citizenship."

For Frankfurter, "American citizenship implies entering upon a fellowship which binds people together by devotion to certain feelings and ideas and ideals summarized as a requirement that they be attached to the principles of the Constitution." While mere membership in the Communist party did not constitute grounds for either denying or revoking citizenship, Frankfurter believed that Schneiderman's actions had gone far beyond paying dues. He had made a commitment to a "holy cause" and "no man can serve two masters when two masters represent not only different, but in this case, mutually exclusive ideas."\(^\text{183}\)

The Court handed down its decision, and ruling for Schneiderman the majority held that a naturalized person couldn't be deprived of citizenship without the clearest justification. Justice Stone, joined by Frankfurter and Roberts, dissented vigorously.\(^\text{184}\)

Felix Frankfurter, a naturalized citizen himself, clearly believed that he owed his total allegiance to the United States. Communists could not possibly share that sense of identity to this nation. In this instance, freedom

\(^{183}\) *Summary of discussion at Conference, 5 December 1942, FF-HLS (as cited in Melvin Urofsky, P. 70-71)*

\(^{184}\) *Supra Note, at 175.*
of belief was not applicable. In reaffirmation of that point of view he had enunciated some three years earlier, Frankfurter wrote:

...the relentless choice events may force on every individual cannot be met by such a fair sounding, pernicious abstraction as that 'war never settled anything.'

Clearly, Stone and Frankfurter had not been interested in disproving the concept that war never settles anything. They were, however, interested in conveying the idea that congressional belief in the efficacy of an oath to defend this country had its basis in human reason, and that it must prevail in this instance. The Court's action in overriding the need for such an oath was, in Frankfurter's view, counter to the desires of the legislature, and it might well be argued that his choice to dissent in this case was based on deference to legislative authority, as well as the Judge's pervasive patriotism. Beyond this, one can see further evidence of his preference that policy be based on a moderate "balancing" of interests. In this instance, he apparently believed that the scales must be balanced in the direction of congressional supremacy.

The year 1948 brought still another case to the Court that dealt with the issues of congressional power over immigration and naturalization. This, the case of Ludecke v

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Watkins, concerned a German enemy alien, who, after a hearing held under the authority of the Attorney General, a hearing not required by any provision of the Alien Enemy Act, had been directed to be deported from the United States based on the finding that he was dangerous to the public peace and safety.

Ludecke's petition for habeas corpus had been denied by the lower courts, and it was in the opinion that Frankfurter wrote for the Court that this petition was again denied. Responding to argument that the petitioner was not dangerous, and that the war was over but not in a legal sense, Frankfurter took the position that the Attorney General's decision had been warranted as part of the executive's prerogative. It was up to the executive and the legislature to notify the Court of the war's end. The President's choice to have a non-reviewable war power exercised within narrower limits than were legislatively permitted did not provide sufficient reason for judicial intervention. The concluding words of his dissent may help to define Frankfurter's position here:

we hold that full responsibility for the just exercise of this great power may validly be left where the Congress has constitutionally placed it—on the President of the United States.

186 335 U.S. 160 (1948)

187 Id. at P. 173.
Although this presidential power might be abused, judicial review was not called for until some flagrant violation had taken place. Congress had the power to draw up schemes of naturalization, and the president was the primary holder of war power. Once again deferring to constitutionally granted higher authority, Frankfurter found no reason for the intervention of the judiciary. His tendency to defer to legislative judgment may well have been based on a belief that only in those cases of extreme overbearance by the representative body should the Court move to interfere with its actions. Such perceived occasions would apparently bring a change in his judicial stance, and the 1950s brought what might be construed as a softening in his view on this issue. Whether in fact this was the case is subject to inquiry.

Helen Shirley Thomas argues that the Justice strongly enunciated antipathy toward a doctrinal approach to constitutional law. This had resulted in a partial repudiation of the "clear and present danger test" as it dealt in the area of subversive activities. She adds that Frankfurter admitted that in certain instances legislative judgment concerning the threat to society had been exaggerated, and this, unfettered individual expression should not be tampered with. He did, however, also accept

189 Supra Note at 64.
what he considered the other equally important part of the equation, that when some reasonable argument could be made for legislative fears that a direct and positive danger threatened this country's self-preservation, even the action of individuals must be curtailed.\textsuperscript{189}

Frankfurter's sense of the "clear and present danger" doctrine was that its original reason for existing had been Holmes's interest in protecting public security. Those desirous of specifically protecting absolute freedom for individuals or groups had distorted its meaning, choosing to use it in areas where individual or group rights were at stake.

In the case of \textit{Dennis v United States}\textsuperscript{190}, the Court chose to use the words of Holmes and Brandeis, finding its own road toward an attempted understanding of what they really meant. It has been argued that the Court destroyed the "clear and present danger test" and upheld the punishment of alleged conspiracies to overthrow the government at some uncertain time in the future.\textsuperscript{191}

The meaning of judicial restraint according to Felix Frankfurter was that the decision of Congress must be

\textsuperscript{189} Id at P. 212-213

\textsuperscript{190} 341 U.S. 494 (1951)

\textsuperscript{191} See Hirsch, \textit{The Enigma of Felix Frankfurter}, Supra Note. 42., P. 197
accepted as final unless such action can be proven to be without reason. At issue in Dennis was whether the provisions of the Smith Act that made it a crime to teach or advocate the overthrow of this government, or to help organize or be a member of any group advocating or teaching such overthrow were justiciable. The United States in the year 1948 found itself in a changed political climate. The Soviet Union was no longer our ally, and the Cold War had begun.

The government had obtained indictments against twelve members of the Central Committee of the Communist Party, alleging a conspiracy against the United States in violation of the provisions of the Smith Act. The trial which lasted more than six months was held in the Southern District of New York before Judge Harold Medina. In a jury verdict, the defendants were found guilty, and the convictions were affirmed on appeal in a decision rendered for the Federal Circuit Court by Judge Learned Hand. Hand's words presented a restatement of the "clear and present danger test," In each case (courts) must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid danger."192 In Justice Hand's view, the weighing of the evil and the value of free speech belonged to the legislature. Because it was often

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192 United States v Dennis 183 F.2nd 201 (2 Cir. 1950)
impossible for legislatures to undertake such balancing in specific situations, it was correct for the Court (and not the jury) to act in place of the legislature.\textsuperscript{133}

Frankfurter's opinion was filed as a concurrence with the Supreme Court's decision. His words are worthy of important consideration here. They present with great clarity that point of view which he attempted to maintain:

Congress has determined that the danger created by advocacy of overthrow justifies the ensuing restriction on freedom of speech. The determination was made after due deliberation, and the seriousness of the congressional purpose is attested by the volume of legislation passed to effectuate the same ends.

Can we say that the judgment Congress exercised was denied it by the Constitution? Can we establish a constitutional doctrine which forbids the elected representatives of the people to make this choice? Can we hold that the First amendment deprives Congress of what it deemed necessary for the Government's protection? To make validity of legislation depend on judicial reading of events still in the womb of time—a forecast, that is, of the outcome of forces at best appreciated only with knowledge of the topmost secrets of nations—is to charge the judiciary with duties beyond its equipment.\textsuperscript{134}

Hugo Black, the Justice with whom Frankfurter was often to disagree as it concerned the issue of First Amendment jurisprudence offered a much shorter (only three page) opinion in the case. Stating that it served no useful purpose that he present an extended discussion of his

\textsuperscript{133} Id.

\textsuperscript{134} Supra Note 186, P. 550-551.
disagreement with the Court's decision, as it simply stemmed from a fundamental difference in Constitutional approach, Black went on to say that:

So long as this Court exercises the power of judicial review of legislation, I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.' Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress.\(^\text{135}\)

In 1957, Justice Frankfurter wrote opinions in Watkins and in Sweezy. In both cases he wrote in concurrence with the Court's result. In each of these decisions, he argued that a man, who in the issues under review, had been judged punishable for refusing to answer questions in an investigation of Communist activities, had been convicted improperly.

*Watkins v. United States* was a prosecution under Title 2 United States Code Section 192 for the misdemeanor of "contempt of Congress." This statute provided penalty for refusal to answer questions which were considered "pertinent to the question under inquiry." In refusing to answer certain questions asked of him by the House Un-American Activities Committee, Watkins had been convicted under the statute by the lower federal courts. Frankfurter's words do

\(^{135}\)341 U.S. 550-551
more toward a better understanding of his judicial philosophy than that one might provide in paraphrasing them:

By...making the federal judiciary the affirmative agency for enforcing the authority that underlies the congressional power to punish for contempt, Congress necessarily brings into play the specific provisions of the Constitution relating to the prosecution of offenses and those implied restrictions under which the Courts function...To turn to the immediate problem before us, the scope of inquiry that a committee is authorized to pursue must be defined with sufficiently unambiguous clarity to safeguard a witness from the hazards of vagueness in the enforcement of the criminal process against which the Due Process Clause protects ...While implied authority for the questioning by the Committee, sweeping as was its inquiry, may be squeezed out of the repeated acquiescence by Congress of the Committee's inquiries, the basis for determining the petitioner's guilt is not thereby laid...The circumstances of this case were wanting in these essentials.  

It may well be argued that Frankfurter's opinion in Watkins showed no real change in his view as to the role of the judiciary. It is also conceivable that it does not indicate a more openminded reading of the First Amendment. Freedom of speech was not at issue in his concurrence in the Watkins case. It is further elaboration of Frankfurter's chosen stance that the Court must remain apolitical, and in the view of some an evocation of his judicial restraint. Frankfurter's decision in the Watkins case underlined constitutional issues. It spoke specifically to that

\footnote{354 U.S. 178 (1957)}
"constitutionally allowable" realm in which the Supreme Court could intervene in the business of the legislature.

In his examination of the relationship shared by Frankfurter and Black, Mark Silverstein states that throughout the 1950's, Frankfurter's ad hoc balancing took the middle ground between the absolutism of Black and Douglas and the apparent abnegation of Justices Clark and Burton. He argues that during the days of the McCarthy era, Frankfurter and Harlan offered leadership as they disposed of cases by using procedural grounds or statutory interpretation as their rationale. Frankfurter stood in the swing position on the Court. What the votes of Harlan and Frankfurter served to accomplish proved critical in reversing the Court's direction and in sustaining the power of Congress. The decision in *Sweezy* provides a somewhat different picture of Justice Frankfurter.

In *Sweezy v. New Hampshire*, the Attorney General of New Hampshire, operating under a resolution of the state legislature, embarked upon an investigation to determine whether the state subversive activities act was being violated. Sweezy, a professor at the state university, was asked to testify. When asked about his past Communist affiliations, Sweezy denied ever having been a member of the

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197 *Supra Note 173, P. 204-205*

198 *354 U.S. 234 (1957)*
Communist party, but refused to respond when asked questions that concerned the Progressive party. Additionally, he refused to respond when questioned about a lecture he had given at the university. He was found in contempt of court, and the state court proceeded to confirm the conviction. A six-man majority of the Supreme Court reversed the state court's decision, but chose to avoid any first amendment issues. They held that the failure of the state legislature to stipulate, when granting authority to the Attorney General, that it wished the type of information these questions attempted to elicit, was in their judgment a violation of due process. Frankfurter's concurrence, as joined by Harlan, selected to center his opinion around Sweezy's First Amendment rights:

Insights into the mysteries of nature are born of hypothesis and speculation. The more so is true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society...Whatever, on the basis of massive proof and in the light of history of which this Court may well take judicial notice, be the justification for not regarding the Communist Party as a conventional political party, no such justification has been afforded in regard to the Progressive Party...For society's good--if understanding be an essential need of society--inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible...

\[199\] id. at 261, 267
There can be no doubt that academic freedom was of particular significance for Felix Frankfurter. Both as a teacher of law, and appropriate to his belief that education was integral to the development of a progressive society, his decision in Sweezy does not indicate any dramatic change in Frankfurter's personal philosophy. Here had been another professor attempting to lead his students in the direction of further understanding, and in ruling against the state of New Hampshire, Justice Frankfurter ne Professor Frankfurter, seemingly readjusted his over-riding belief in federalism, balancing it against the importance of a "laboratory of ideas". Frankfurter had surely selected in this case to suppress his belief in judicial restraint. It would appear that in his view, the social worth of what Professor Sweezy had done in the classroom took precedence over some supposed shortsightedness which the state had alleged. What is questionable is whether Frankfurter's opinion was not in fact "political," and if he had not permitted himself the luxury of reinforcing Holmes's view that law was what judges decided it was.

The decision of the Court in Barenblatt v. United States\textsuperscript{200} represented a departure from Sweezy, which had placed limits on the ability of congressional committees to inquire into political beliefs and associations. Barenblatt,\textsuperscript{200} 360 U.S. 109 (1959)
decided by a vote of 5 to 4, found Felix Frankfurter standing with the majority. The case concerned a Lloyd Barenblatt, a man who had previously served as a psychology instructor at the University of Michigan and at Vassar College. Subpoenaed to testify before the House Un-American Activities Committee, Barenblatt had refused to answer questions pertaining to his past or present membership in the Communist Party and in other groups, arguing that the First Amendment prohibited an investigation of his political beliefs and associations. After being convicted of contempt of Congress, Barenblatt appealed his conviction to the Supreme Court. Although Frankfurter wrote no opinion in this case, he selected to join with the majority in denying the plaintiff's request. Justice Harlan, with whom Frankfurter had often voted, wrote the opinion for the Court, upholding the Committee's authority against First Amendment claims of freedom of expression and association, concluding that:

...Undeniably, the First Amendment in some circumstances protects an individual from being compelled to disclose his associational relationships. However, the projections of the First Amendment, unlike a proper claim of the privilege against self-incrimination under the Fifth Amendment, do not afford a witness the right to resist inquiry in all circumstances. Where First Amendment rights are asserted to bar governmental interrogation, resolution of the issue always involves a balancing by the courts of the competing private and public interests...the balance between the individual and governmental
interests here at stake must be struck in favor of the latter.\textsuperscript{133}

Helen Shirley Thomas's belief that the Court, including Justice Frankfurter, felt that the questions asked were germane to the subject under investigation, and that the relationship was made very clear to the witness,\textsuperscript{134} remains open to question.

Frankfurter had concurred in \textit{Watkins} using as his reasoning his concern for that "constitutionally allowable" realm in which the Supreme Court could intervene in the business of the legislature. He obviously believed such an area open to criticism existed. In \textit{Barenblatt} he had returned to a position of judicial restraint from which balancing the rights of the individual against those of government followed. This inconsistency in Frankfurter's record is often difficult to reconcile. It also leaves open the issue of whether he can be understood to have presented a consistent and definable philosophical position.

Although it preceded \textit{Barenblatt}, the case of \textit{Beauharnais v. Illinois} (1952)\textsuperscript{203} provides insight into Frankfurter's jurisprudence in the area of First Amendment adjudication. In this case, the Court was faced with a

\textsuperscript{133} \textit{Id. at P. 143}.

\textsuperscript{134} \textit{Supra Note at 64, P. 284}.

\textsuperscript{203} \textit{343 U.S. 250 (1952)}.
criminal libel case involving an Illinois statute that made criminal any publication that portrayed "depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion" which subjects them "to contempt, derision, or obloquy or which is productive of breach of peace or riots." The defendant Beauharnais was president of a racist Chicago organization, the White Circle League, which had distributed racist leaflets. The leaflets called on the mayor and city council of Chicago, "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by Negro." He urged "one million self respecting people to unite," stating that "if persuasion and the need to prevent the white race from becoming mongrelized by the Negro will not unite us, then the aggressions... rapes, robbers, knives, guns and marijuana of the Negro, surely will."

In his defense to the Illinois Courts, Beauharnais had asked that the jury be instructed that he could not be found guilty unless the leaflets were "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest." The Illinois Court ignored this admonition, and he was

204 Id. at 251 (Quoting the Ill. Rev. Statutes--1949)

205 Id. at 253
The Supreme Court affirmed this conviction in an opinion written by Justice Felix Frankfurter. Frankfurter argued that a sharp distinction existed between restrictions on political speech and restrictions that related to race, color, creed or religion. These terms he argued had, "attained too fixed a meaning to permit political groups to be brought within" their rubric, and therefore stood outside the protection of the First Amendment. "Of course," he commented, "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." For him, there was nothing "political" about this speech. It didn't rise above the level of "discussion." "If a statute sought to outlaw libels of political parties, quite different problems not now before us would be raised ..while this Court sits, it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel."206

The year was 1952, and the decision in this case was characteristic of its time in history. Today, libelous speech stands within the protective arms of the First Amendment207, but obscene speech continues to be regarded as outside the parameters of First Amendment adjudication.208

206 Id.


208 See Roth v. United States, 354 U.S. 476, 478 (1957)
Frankfurter, reinforced here that "fighting words" point of view which had been penned in *Chaplinsky v. New Hampshire* (1942). Specific "well-defined and narrowly limited" categories of speech fell outside of the bounds of constitutional protection, and therefore, "the lewd and obscene, the profane, and libelous, and in this case, "fighting" words, did not fall under the protection of the First Amendment. It is also clear that in his judgment, this case did not fall within the province of the Court.

Frankfurter had chosen in this case, as he had often done, to defer to both the State of Illinois and to the principle of *stare decisis*. The decision in *Chaplinsky* had to stand. Frankfurter did not distinguish between First Amendment cases and the Commerce Clause. His opinion in *Beauharnais* echoed the rational basis test the Court had adopted to deal with economic policy questions. If the assembly had a rational basis for choosing as it did, the courts should not second-guess legislative wisdom.210

Justice Hugo Black's dissent in the Beauharnais case may perhaps provide what in the judgment of some represents the appropriate refutation of Frankfurter's position here:

We are told that freedom of petition and discussion are in danger 'while this court sits.' This case raises considerable doubt. Since

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209 *315 U.S. 568* (1942)

210 Supra Note 181, P. 113
those who peacefully petition for changes in the law are not to be protected 'while this court sits,' who is? I do not agree that the Constitution leaves freedom of petition, assembly, speech, press or worship at the mercy of a case-by-case, day-by-day majority of the Court...To say that a legislative body can, with this Court's approval, make it a crime to petition for and publicly discuss proposed legislation seems as farfetched to me as it would be to say that a valid law could be enacted to punish a candidate for president for telling the people his views...If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'Another such victory and I am undone.'

Frankfurter and Black undoubtedly saw the responsibilities of a Supreme Court justice from very different angles. Despite the powerful position taken by the judiciary, the perception of a judge as to his role in American life is often based in doubt and uncertainty. As they must proceed without the legitimacy that popular sovereignty would provide, judges must continue to justify both to themselves and to the people the exercise of their judicial authority. The result has been that the American judicial tradition has been marked with ambiguity. Justices Black and Frankfurter are part of that tradition.

Oliver Wendell Holmes had written as early as 1897 that:

Behind the logical form (of the judicial opinion) lies a judgment as to the relative worth and

\[211\] 343 U.S. at 274,275.

\[212\] Supra Note 174, P.219.
importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.\textsuperscript{313}

And Justice Cardozo made his own contribution to our understanding in this area when in 1921 he wrote:

More subtle are the forces so far beneath the surface that they cannot reasonably be classified as other than subconscious. It is often through these subconscious forces that judges are kept consistent with themselves, and inconsistent with another... There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals.\textsuperscript{314}

Harold J. Spaeth, in the introduction to an interesting essay that deals with the voting record of Justice Frankfurter and his alleged judicial restraint, argues that, there has been a pronounced reluctance to accept the idea that most, if not all, judicial decisions are in truth products of the judge's attitudes regarding basic policy issues. In his view, "Not only for Frankfurter, but for all the Warren Court justices, the concept of judicial restraint is an effective means of rationalizing responses to policy-

\textsuperscript{313} Oliver Wendell Holmes, "The Path of the Law," Harvard Law Review 10 (March 1897), P. 465.

oriented values."^215 Spaeth's position is clearly worthy of important consideration.

What is also arguable is that Frankfurter the private citizen and Frankfurter the justice of the Supreme Court were apparently contradictory characters. The progressive pre-Court Frankfurter sought a more "liberal" stance from the political arena. The man who sat on the highest court of the land appears to have predicated his positions on an innate sense of what was to be the basic responsibility of a Supreme Court justice. These were not necessarily compatible.

Alexander Meiklejohn, a life-long friend of Felix Frankfurter, cites what he considers to have been, an argument that sapped the very foundations of American political freedom. In his extremely patriotic little book, Political Freedom, The Constitutional Powers of the People, Meiklejohn adds a quotation which Frankfurter had chosen to quote authoritatively. It is the majority decision in Robertson v. Baldwin, rendered in 1897:

The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to

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certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intent of disregarding the exceptions which continued to be recognized as if they had been formally expressed. 116 (*my italics)

In addition, Meiklejohn quotes Felix Frankfurter's own words, "That this represents the authentic view of the Bill of Rights and the spirit in which it must be construed has been recognized again and again in cases that have come here within the last fifty years." 117

It is those "exceptions" which would appear to have often been part of Frankfurter's First Amendment jurisprudence. What must be questioned is whether he considered them as such simply because he had drawn a definitive line around the accepted province of the judiciary, or whether in his frequent deference to the legislature, he was not in actuality making a very "political" statement.

This highly enigmatic justice, although incessantly quoting from Holmes, that man who had become his idol and mentor, appeared to take himself far more seriously as a judge. Although he often maintained that Holmes's skepticism was his own, one must wonder whether he was not, as his


117 Id.
predecessor had been, the product of his past and the era which produced him. Frankfurter's understanding of the place the Court must hold in American life is expressed in words he wrote in 1947:

In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not. The pressure on legislatures to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed. Above all, they must not be encouraged in irresponsible or undisciplined use of language. In the keeping of legislatures perhaps more than any other group is the well-being of their fellow-men. 118

These were the evocations of a lifetime student of the law, an immigrant Jewish boy from the lower East Side of Manhattan, a young student at Harvard who idolized the Brahman culture out of which Oliver Wendell Holmes had come. Felix Frankfurter was a man who had involved himself with great passion in the political life of his adopted country before coming to the Court. He was also the defender of Sacco and Vanzetti, the relativist who saw law as a response to changing times, and the intellectual elitist who as a Harvard professor of law found himself a supporter of Franklin Roosevelt and suddenly a justice of the Supreme Court. Frankfurter was all of these, and it is not difficult to understand why he is so hard to place in one specific

category. His words would often belie his actions, but the
over-riding desire to "balance" between a sense of political
obligation and what he believed was the role of the Supreme
Court remain integral to understanding him. Neither a
categorical realist or consistent in his use of judicial
restraint, Frankfurter's career on the Court was often a
confusing phenomenon.

If the philosophical position taken by Legal Realism
had been that words are created, defined and applied by
individuals within the framework of a specific social and
historical context, thus making each act of judicial
interpretation an act of social choice, Felix Frankfurter's
term on the Court would frequently find him confronting the
viability of such a standard.

He had undoubtedly responded in the Gobitis case to
the social and historical context within which he found
himself. This opinion had been predicated upon its relevance
to the needs of a specific historical period. As Holmes had
done before him, Frankfurter saw the time of war as
different than any other. If perhaps the freedom to freely
practice one's religion was, in ordinary circumstances to be
a given, the realist in Justice Frankfurter saw wartime as
that circumstance in which specific social choices were
mandatory. His opinion in Bridges would follow the same line
of thought, and in Schneiderman as well, he would indicate
what he referred to as his "religious" sense of patriotism. It was clearly his view that in specific instances legal rules did not exist to carry out the logical dictates of abstract principles, but must advance practical results in particular situations.

In Ludecke, we find him standing with the legal absolutists. The year was 1948, and the Second World War was over for all intents and purposes, but pointing to the war powers of the President, Frankfurter chose here to strictly interpret the Constitution. This was an opportunity to stand behind his philosophy of judicial restraint, but it seems to conceal a highly biased belief in conserving the over-riding power of established Constitutional authority.

In his concurrence in the Dennis case Frankfurter's opinion is questionable on the grounds that it did in fact make a politically preferential statement. Was he not, in asking whether the First Amendment could deprive Congress of its constitutionally given power to decide what was necessary for this country's protection, not in actuality speaking from a conservative stance, while also expressing an obviously political view? In deferring to Congressional supremacy, Frankfurter had selected to put extensive power in the hands of the legislature. And although this was not outwardly embracing Legal Realism, his obvious subjectivity is difficult to ignore. The anti-Communist social milieu in
which he stood cannot be separated from the choice he made here.

In *Watkins* Frankfurter would take what might be construed as another partisan position. By virtue of his concurrence in the Court's opinion, and its decision based on the latent ambiguity in the procedures of the Un-American Activities Committee, Frankfurter was not standing on the political sidelines. It is highly possible that he had been influenced by the time in which this opinion was rendered. The year was 1957, and the House Un-American Activities Committee had fallen into disfavor. Although he undoubtedly preferred that his opinion be construed as a reaffirmation of the necessary non-intervention of the Court in matters of national policy, Frankfurter's decision to rule for Watkins made a "silent" but important social statement.

*Sweezy* as well does not provide us with entirely objective behavior. Frankfurter's decision was influenced by his own history, and by a very personal philosophy regarding education and educators. There was no discernable "judicial restraint" in the choice he made in this case. As a man who had spent so much of his life as a professor of law, his opinion was a straightforward evocation of a belief that education played an integral role in the development of a progressive society. Social awareness was clearly his
motivation, and we find him underlining realist epistemology.

His concurrence in the Court's opinion in Barenblatt once more put Justice Frankfurter in a variant position. Why had he selected in this case to contradict his determination in Watkins, using judicial restraint as the rationale? Why did he decide to rule here against an educator when he had earlier made clear his reason for doing so?

Beauharnais also leaves us with doubt as to Frankfurter's calculability as a judge. This decision found him underlining legislative authority, deferring to stare decisis, and ignoring the social implications of his choice. Often the highly verbal advocate of judicial restraint as well as the quiescent voice of Legal Realism, Felix Frankfurter's First Amendment decisions leave us with a confusing vagueness. Not casting any aspersions on his sincerity, one cannot help but attribute much of this discontinuity to his earliest beginnings. Frankfurter sought throughout his judicial life to maintain a system conserving position. His professed judicial restraint was often an effort to underline what he believed to be a justice's necessary deference to the higher authority of the Constitution and the legislature. Nonetheless, it is clear that there are political implications in those opinions he rendered. Some of this confusion may be linked to a desire
to protect the foundations of his adopted country, but it also indicated an underlying need to find a true sense of "belonging". Never feeling entirely confident that he could be accepted by the establishment, Felix Frankfurter assumed a centrist position on the Supreme Court. This was a posture which found him balancing between a belief that the Court must serve as only the mediator between the people and the legislature, and an ongoing wish to truly be part of that culture which had produced an Oliver Wendell Holmes.

Perhaps his opinion in *Dennis*, and the choice he made there to defer to the New York State legislature, provides the place where Frankfurter's awareness of the social context joined with his judicial restraint. In line with Realism, he had undoubtedly made both a political and social choice, a choice predicated upon the societal climate and the growing antipathy Americans were feeling toward Communism. The often deferential position he would take on the issue of state sovereignty as well as legislative supremacy was satisfied here as well.

*Watkins* again provided the opportunity for the Justice to make both a political and a system conserving choice. Although maintaining that the decision had been made on "technical" grounds, Frankfurter's opinion spoke to anything but the actions of a passive observer. The year was 1957, and it was clear that the Un-American Activities Committee
had fallen into disfavor. Although he undoubtedly preferred that his decision be construed as the necessary non-intervention of the judiciary in matters of politics, Frankfurter's decision was undoubtedly a political one.

How does the decision in Dennis align itself with Realism? One must argue that it served as a real enigma. The machinations of the Un-American Activities Committee had clearly made them a questionable entity. Was Frankfurter unaware that the committee had often appeared to infringe on the rights of many American citizens? How could he have rationally chosen, as he would do here, to in fact condone their actions by ruling against the defendants? There is good reason to argue that Frankfurter's alleged desire to remain apolitical and to defer to Congressional supremacy was in this case a highly political stance. In line with a realist philosophy, he had surely made a social choice, but was this a choice predicated upon an awareness of history and the social context in which it was being made, or had he chosen to ignore these issues in order to vindicate his judicial restraint?

In Watkins and Sweezy we find more confusion. In the Watkins case, Frankfurter would take what might be construed as a highly political stance by virtue of his concurrence. Although he maintained that the decision was based on "technical" grounds, and that the defendant had not been
appropriately informed of his rights, this was clearly an act of social choice—hardly an apolitical judgment. The year was 1957, and the House Un-American Activities Committee had fallen into disfavor. Although he undoubtedly preferred that his decision be construed as the necessary non-intervention of the judiciary in matters of politics, Frankfurter's choice to rule for Watkins made a "silent" statement with strong political implications. Sweezy, as well, did not provide the apolitical act of a Supreme Court justice. Frankfurter's opinion was undoubtedly prejudiced by his own history, and by a very personal philosophy. There was no obvious "judicial restraint" apparent in the choice he would make here. As a man who had spent many years as a professor of the law, Frankfurter spoke as a realist, a man who recognized the over-riding importance of education and the undeniable place educators played in American life.

The case of Barenblatt v. United States, and Frankfurter's concurrence in the Court's decision, represents further mystification. One must wonder why he selected here to contradict his decision in Watkins, returning once again to the position of judicial restraint which he had so obviously attempted to maintain.

Beauharnais as well leaves us with doubt as to Frankfurter's predictability. Arguing that the defendant's behavior could not be construed as "political," this opinion
returned the Justice to the stance of the libertarian—the man of social awareness who appeared to have been missing in *Dennis*.

Sometimes the voice of Realism, and often the advocate of judicial restraint, Felix Frankfurter's free speech decisions leave us with a contradictory pattern that defies categorization. He remains as he originally appeared, but in many ways as a somewhat less dynamic contributor to the history of the Supreme Court than his mentor Holmes. This casts no aspersions on his sincerity, but rather on the undeniable truth of his beginnings. Frankfurter fought throughout his judicial life to maintain a system conserving position. Perhaps it was this over-riding desire which had its foundations in his immigrant roots, and his ever present need to belong.
CHAPTER 8
CONCLUSION

The introductory portion of this examination defined Legal Realism as that school of law which reached its peak in the 1930s and early 1940s. It had argued that judicial decision making was not and could not be the result of logical deduction. The realists claimed that formalism had to fail because of the limits of our language and logic and the indeterminacy of moral and normative concepts. Under such a view, concepts were merely conventions of social life.

In presenting such a definition, we have attempted to discover whether Felix Frankfurter and Oliver Wendell Holmes stood as primary examples of such a philosophy. The effort toward finding a satisfactory answer to this question has necessitated a study of more than just the Supreme Court decisions which colored the lives of these two men. Both Frankfurter and Holmes surely were the product of their beginnings. They were also the outgrowth of years spent in defining the responsibilities of a justice on the highest court in the American legal system.
The initial argument made here was that neither man saw himself as a dispenser of the societal good, and both consistently argued that the Supreme Court must only be the "mediator" between the people and the legislature, remaining apolitical, and thus not becoming the dispenser of social policy. After extensive examination, one must conclude that neither justice was successful in producing this desired "judicial restraint."

Judicial responsibility often called for them to make choices that would have social implications, and thus if we are to truly understand them, we must recognize that we cannot separate out political philosophy and social awareness from their jurisprudence.

Perhaps the important question raised by this study is whether one can find a common ground between Legal Realism and Judicial Restraint. A judge who defers to the legislature, is in fact taking a political position. He is not denying his sense of social responsibility. He is simply making a subjective evaluation as to how the best interests of society might be served. What one cannot ignore are the political implications that come of the confluence of these two seemingly disparate philosophies of law.

Justice Holmes, proudly underlining his legal skepticism, saw no problem with rendering opinions which were often contradictory. One can point to his decisions in Schenck or Debs as simply subjective evaluations of the
societal needs of the time. The basis of his jurisprudence was that law was a changing phenomenon. To be a judge was to first be a human being whose choices were necessarily personal responses to specific situations. Of primary importance was that the judge must not be the blind dispenser of objectified law. He was the subjective interlocutor of the law, who in light of the social setting of a particular case must make that judgment which as a member of the Court he was obliged to make. I find no conflict here with Holmes's stated sense that judicial review was appropriate only when legislation deprived citizens, without any rational basis, of rights that were fundamental and accepted by virtue of tradition. If he was responsible as a justice of the Court to render a decision in a particular case, Holmes based his choice on a personal perception of the societal need, not so often on blind compliance with the law of the land.

To the liberals of the early years of the twentieth century, Holmes was the prime example of judicial technique. In his hands, the judiciary was to remain subservient to the will of the majority, and political decisions were to be placed in the hands of reform minded legislators who might thus produce social change. Unfortunately, this point of view would see its fruition in a confusing relationship between the Court and the issues of liberalism and democracy.
during the years that followed his tenure on the Court. Justice Holmes's free speech decisions emphasized the power of the majority to restrict the speech of the minority. His "clear and present danger test" enunciated such a philosophy.

Felix Frankfurter, attempting to pick up the scepter his mentor had handed down, presented a continuation of the same point of view. An ardent advocate of Supreme Court deference to the legislature, and thus to the will of the majority, he argued as Holmes had done before him for judicial restraint. But for both the mentor and the man who had become his willing novitiate, judicial restraint seems simply an idealized view of what each believed the responsibility of a Supreme Court justice to be. In reality, their actions on the Court were never entirely consistent with such a view. It is clear that a judge's choice not to decide is in fact to decide. Even the restrained jurist is promulgating policy decisions when he defers. The question has been asked whether any reasonable individual can believe that a person who has attained the position of Supreme Court justice is able to submerge his politics entirely in deference to vague notions of judicial restraint.²¹³

There is undoubtedly a clear similarity in the performances of Holmes and Frankfurter on the bench. Each brought ideals to the Court. Together they shared the credo of Legal Realism, and in the final analysis were more often true to it than not. Realism is not an unequivocal concept. It changes in each new historical context and does not necessarily speak to either liberal or conservative preferences. It can express itself in both activism and restraint, and often in the contradictory decisions of our Supreme Court justices.

Perhaps what has emerged from this examination is more significant than finding a perfect ideological niche for either Holmes or Frankfurter. What has developed here is only further corroboration of the indeterminacy of their records, and the often inconsistent character of their decisions. To study their free speech opinions is to recognize the ultimate failure of their judicial restraint. Although they clearly wished that the Supreme Court serve as simply the interlocutor between the American people and their representatives, to read Holmes's opinion in *Schenck* or Frankfurter's words in *Gobitis* it is impossible to ignore the political implications to be found there.

Both judges are symbolic of a great tradition. They were men who in their devotion to the American Constitution and the rule of law attempted to avoid personal preferences.
It is clear that neither could realistically fulfill such a goal. Together, Oliver Wendell Holmes and Felix Frankfurter stand as distinctive personalities in the history of the Supreme Court. To acknowledge their individual tenures is to better understand the changing times in which they lived, it is also strong reinforcement for a truth which both men recognized. A justice of the Supreme Court is also a human being, a man who cannot deny his heritage or overlook (no matter how hard he tries) the unavoidable politicality of the job he has been selected to do. To "judge" entails the necessary decisions he or she must make, and to deny this reality is to ignore the etymology of the word. Scholars have attempted to categorize both of these men, but such an endeavor must prove futile. The common thread that binds them can be found in the words of Holmes, written in the year 1881:

"The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men should be governed."

Felix Frankfurter and Oliver Wendell Holmes bore living testament to such a judicial philosophy. It is also important that we consider the possibility that for men such

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As found in The Common Law, Op cit 95.
as these, a necessary congruence did emerge between their obvious belief that a judge's decisions were undoubtedly influenced by subjective motivations, and their recognition that for this very reason, judicial restraint was a goal they must pursue. Regardless of whether they were successful or not, this is a highly significant understanding that has come of this examination, and may well explain the indeterminacy of their records.
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