

**FALSE MODESTY:
FELIX FRANKFURTER AND THE TRADITION OF JUDICIAL RESTRAINT**

The legacy of Felix Frankfurter haunts contemporary proponents of judicial modesty. During the mid-twentieth century, Frankfurter was the leading intellectual advocate of a restrained judiciary in constitutional cases and the least effective champion of that approach to the judicial function. On and off the bench, Frankfurter indefatigably insisted that justices recognize the sharp distinction between wisdom and constitutionality. “It is not easy to stand aloof and allow want of wisdom to prevail,” he wrote,

to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do.¹

Frankfurter’s “personal obsessions, petty antagonisms, and arrogant imperiousness,”² however,

¹ Trop v. Dulles, 356 U.S. 86, 120 (1958) (Frankfurter, J., dissenting). For Frankfurter’s attacks on judicial power before joining the bench, see Sanford V. Levinson, “The Democratic Faith of Felix Frankfurter,” 25 **Stanford Law Review** 430, 438-40 (1973).

² Paul L. Murphy, “Book Review,” 52 **George Washington Law Review** 488, 489

antagonized other justices and prevented him from exercising any leadership on the court.³ A justice who informs a colleague, “(i)f I could be [your] law clerk for a year, how the law would be improved”⁴ is unlikely to be very persuasive on points of constitutional interpretation and legal theory.

Professor Jeffrey Rosen’s Foulston Lecture correctly recognizes that justices who do not tend to their personal connections with colleagues will soon find they lack the necessary professional connections to move the court in desired directions. “(M)any of the most successful Supreme Court justices are not the most academically brilliant or philosophically consistent,” he astutely notes, “but instead those who get along well with their colleagues, are able to compromise, and can set aside their own ideological agendas in the interest of preserving the institutional legitimacy of the Court.”⁵ Joseph Story was the only legal genius who sat on the Marshall Court, but John Marshall was that tribunal’s leader. William Howard Taft is another good example of a justice who successfully led through force of personality rather than intellect.⁶ Antonin Scalia may be the modern Frankfurter, more concerned to demonstrate that he is the smartest person on the judicial bloc than actually gaining votes for preferred constitutional positions.⁷

Supreme Court justices committed to a more restrained judicial role would be well

(1984).

³ See, i.e., H.N. Hirsch, The Enigma of Felix Frankfurter (Basic Books: New York, 1981).

⁴ Roger K. Newman, Hugo Black: A Biography (Pantheon: New York, 1994), p. 298.

⁵ Rosen, “Foulston Lecture,” p. ____.

⁶ See Walter F. Murphy, “In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments,” 1961 Sup. Ct. Rev. 159 (1961)

⁷ See Savage, “Scalia’s Anger Alienates Justices,” *The Denver Post* 9A (July 22, 1996).

advised to follow Professor Rosen's lead. For the past decade, Professor Rosen has performed the near impossible task of tirelessly championing judicial modesty without being tiresome. He is as personally gracious and humble as Frankfurter was disagreeable and arrogant. His elegant essay in this volume as well as his other writings show respect for other constitutional thinkers, even as he raises questions about their views of the appropriate place of courts in a constitutional democracy. Unlike Frankfurter, Professor Rosen works to keep lines of communication open with persons committed to different understandings of the judicial function. That he invited me to contribute this essay is a good example of his willingness to engage divergent views.

Justice Frankfurter's opinions in Poe v. Ullman⁸ and West Virginia State Board of Education v. Barnette⁹ raise different concerns with false modesty. Frankfurter's modesty in these cases was false in the sense that his justification of judicial restraint was grounded in an inaccurate presentation of crucial facts and underlying constitutional politics. Frankfurter urged the justices not to determine the constitutionality of prohibitions on birth control on the ground that such bans were not being enforced. In fact, he was well aware that all birth control clinics in Connecticut had closed down for fear of prosecution. Frankfurter insisted that justices had no business second-guessing elected officials who believed that mandatory flag salutes fostered patriotism. In fact, he was well aware that national elected officials had concluded that mandatory flag salutes were unconstitutionally fostering religious prejudice.

These concerns with false modesty bear directly on the second theme of the Foulston Lecture, the sharp critique of judicial unilateralism. Professor Rosen throughout his career has

⁸ 367 U.S. 497 (1961).

⁹ 319 U.S. 624 (1943).

vigorously condemned justices “when they have tried to impose intensely contested visions of the Constitution on a divided nation.”¹⁰ The constitutional politics responsible for Poe and Barnette challenge a too simple understanding of judicial unilateralism. Connecticut’s experience with birth control suggests that one consequence of deep political divisions may be no clear policy at all, with substantial discriminatory consequences. Barnette suggests that the Court, when deep divisions exist, does not act unilaterally but with the support of prominent members of the dominant national coalition. Professor Rosen’s analysis of Brown illustrates some problems with too sharp a distinction between legitimate judicial activism and judicial unilateralism. Exposing Justice Frankfurter’s false modesty in cases involving birth control and flag salutes introduces further complications. What Justice Frankfurter insisted would be judicial unilateralism in Poe was, in effect, a judicial effort to make policy in the face of legislative paralysis. What Frankfurter regarded as judicial unilateralism in Barnette was the justices siding with the national executive against a few state legislatures. Judicial modesty may still have been appropriate in both instances, but that would have required a more honest assessment of the underlying constitutional politics than Frankfurter offered.

A. Overturning Policy or Filling Policy Voids

Justice Frankfurter’s majority opinion in Poe v. Ullman held that the petitioners lacked standing to challenge Connecticut’s ban on contraception when no evidence existed that state officials were prosecuting married persons who used birth control. “[T]hat Connecticut has not

¹⁰ Rosen, “Foulston Lecture,” p. ____.

chosen to press the enforcement of this statute,” he wrote, “deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication.”¹¹ The facts, as presented in the majority opinion, supported this exercise of judicial modesty. Only one prosecution had ever taken place under the law and that was a test case. Connecticut officials immediately dropped charges once the state supreme court held that the ban on contraception was constitutional.¹² “This Court cannot be umpire to debates concerning harmless, empty shadows,” Frankfurter wrote. In his view, “(t)o find it necessary to pass on these statutes now, in order to protect appellants from the hazards of prosecution, would be to close our eyes to reality.”¹³

The first problem was Frankfurter’s justification for judicial modesty was that Connecticut’s ban on birth control was having a significant influence on public policy. As a result of the state court decision affirming the constitutionality of that prohibition,¹⁴ every birth control clinic in the state had closed down. That was part of the arrangement when charges were dropped against the proprietors of such an establishment. No other clinic had dared open for more than a decade. All this information was revealed to the justices in the briefs and oral argument, but was omitted in the majority opinion.¹⁵ By refusing to consider whether Connecticut’s ban on birth control was constitutional, Frankfurter’s judicial modesty left Connecticut free to prevent birth control clinics from serving the poor, as long as state officials did not interfere when doctors prescribed birth control to their private patients.

¹¹ Poe, at 508.

¹² Poe, at 501-02.

¹³ Poe, at 508.

¹⁴ State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940).

The other problem with judicial modesty in Poe was what Frankfurter described as “tougher and truer law than the dead words of the written text”¹⁶ had never been officially sanctioned by any legitimate democratic or constitutional authority. The Connecticut legislature had never passed a law that could be reasonably interpreted as banning birth control clinics, but not private dispensation of contraception. Connecticut courts had never interpreted Connecticut law in this fashion and no executive official had ever issued a decree limiting enforcement of the state ban on contraception to clinics. Connecticut policy is best understood as the product of an implicit, extra legal agreement between political elites and the Catholic hierarchy. Crucial state legislators would not endorse repealing the ban on birth control as long as that law in practice did not interfere with their family planning practices and those of their middle class constituents. Perhaps such an arrangement could have withstood open democratic debate, but no one seemed interested in testing that proposition.¹⁷

Public policy when the nation is divided, the American experience with birth control suggests, is not always cut from the same cloth. Sometimes the law in action reflects official decisions. The main parties to a constitutional conflict may have reached an uneasy truce. Witness the Missouri Compromise. One party may have taken advantage of temporary ascendancy to make its vision the unstable law of the land. Witness the Kansas-Nebraska Act. Other times, public policy cannot be traced to any recent official decision. Ancient law remains on the books only because opponents do not have the power to secure a repeal and proponents do

¹⁵ Poe, at 511 (Douglas, J., dissenting).

¹⁶ Poe, at 502.

¹⁷ For the history of the Connecticut ban on birth control, see David J. Garrow, Liberty and Sexuality, the Right to Privacy and the Making of Roe v. Wade (Scribner: New York, 1994).

not have the power to secure enforcement. The law in action, in these circumstances, more often than not reflects the whims of individual law enforcement officials, with all the attendant prejudices and privileges.

Judicial intervention may help jump start the legislative process when the political system is paralyzed. Social conservatives after Griswold v. Connecticut¹⁸ and Roe v. Wade¹⁹ had to decide whether they were willing to engage in the constitutional politics necessary to secure *enforceable* bans on birth control and abortion. They folded their tents on contraception, but engaged in full scale political mobilization necessary to secure laws mandating that women take all or most pregnancies to term. The intensity of pro-life political activism, in turn, inspired countermobilization by persons committed to keeping abortion legal. Significantly, abortion rights mobilization in the long term might have been stronger because, in the wake of a renewed militant movement to ban reproductive choice, middle class women had every reason to believe that new restrictions would be enforced. If nothing else, Roe set in motion a political chain of events that has made the law on abortion in the books far closer to the law on abortion in practice than was the case previous to 1973.

The actual constitutional politics of birth control and abortion is hardly sufficient to condemn Frankfurter's judicial modesty. Justice William Brennan concurred in Poe. Unlike Frankfurter, however, he recognized that the "true controversy in this case is over the opening of birth-control clinics on a large scale; it is that which the State has prevented in the past, not the

¹⁸ 381 U.S.479 (1965)

¹⁹ 410 U.S. 113 (1973).

use of contraceptives by isolated and individual married couples.”²⁰ Brennan denied standing only because he wanted the lawsuit to be brought by an affected clinic, not a private doctor and patient with only theoretical stakes in the outcome.²¹ A case for judicial restraint might be made even when a birth control clinic opened and was sanctioned by state officials.²² Frankfurter, however, did not make that case. His judicial modesty in Poe portrayed as judicial interference with a deliberate policy decision what was, in fact, a cry for justices to fill a political void.

B. Unilateral Strike or Allied Assault

Justice Frankfurter’s dissenting opinion in West Virginia State Board of Education v. Barnette excoriated the judicial majority for substituting their conviction that mandatory flag salutes were bad policy for the legislative conviction that such laws fostered patriotism. Waiving aside pleas from his colleagues to tone down his rhetoric, Frankfurter began with a powerful expression of judicial modesty.

As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. . . . It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the

²⁰ Poe, at 509 (Brennan, J., concurring).

²¹ Poe, at 509 (Brennan J., concurring).

²² See Griswold, at 507-27 (Black, J., dissenting); at 527-31 (Stewart, J., dissenting).

circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. . . . I cannot bring my mind to believe that the ‘liberty’ secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

Not so long ago we were admonished that ‘the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.’²³

Nearly every paragraph in the Barnette dissent sharply criticized judicial unilateralism.

“[R]esponsibility for legislation lies with legislatures, answerable as they are directly to the people,” Frankfurter stated, “and this Court’s only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.”²⁴ Elected officials were responsible for making fundamental choices in a democracy, not unelected justices. As Frankfurter concluded, “(t)he judiciary, to-day, in dealing with the acts of their coordinate legislators, owe to the country no greater or clearer duty than that of keeping their hands off these acts wherever it is possible to do it.”²⁵ The majority opinions in Barnette largely agreed with Frankfurter’s assertion that the case pitted elected officials against unelected justices. Justice Robert Jackson disputed only the dissent’s claim that mandatory flag salutes were subject to legislative discretion. “The very purpose of a Bill of Rights,” he famously stated,

²³ Barnette, at 647 (Frankfurter, J., dissenting).

²⁴ Barnette, at 649 (Frankfurter, J., dissenting).

²⁵ Barnette, at 670 (Frankfurter, J., dissenting).

was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.²⁶

Judicial modesty in Barnette was as false as in Poe. As was the case with his opinion in the birth control case, Frankfurter offered a misleading account of the policy underlying mandatory flag salutes. The mandatory flag salute, he blithely stated was not an “instrument[] for suppressing heretical beliefs.”²⁷ The mob violence directed at many Jehovah’s Witnesses in communities with mandatory flag salutes might have suggested otherwise.²⁸ The majority opinions in Barnette hinted at this problem when referring to “village tyrants”²⁹ and speaking of flag ceremonies as a “handy implement for disguised religious persecution.”³⁰ More significantly, both the majority and dissenting opinions falsely portrayed the constitutional

²⁶ Barnette, at 638.

²⁷ Barnette, at 663 (Frankfurter, J., dissenting).

²⁸ Citation

²⁹ Barnette, at 638.

³⁰ Barnette, at 645 (Black and Douglas, JJ., concurring).

politics responsible for the flag salute ruling. Barnette raised constitutional issues that pit members of the Roosevelt administration against legislators in a few states, and not unelected justices against the entire universe of elected officials.

The Supreme Court did not act unilaterally when declaring unconstitutional mandatory flag salutes. As wonderfully documented by Robert Tsai, President Roosevelt “led a purposeful effort to erode the cultural foundations of [Minersville School District v.]Gobitis.³¹ His actions and those of his deputies “authorized the Judiciary” to “construct a new vision of the First Amendment.”³² Roosevelt’s speeches between 1940 and 1943 never endorsed Gobitis and consistently emphasized the centrality of First Amendment rights to the American constitutional order. The “freedom of speech and expression—everywhere in the world” was one of the “four essential freedoms” Roosevelt highlighted during his 1941 State of the Union Address.³³ The Roosevelt Administration after 1940 appointed to the Supreme Court jurists who were known to be committed to civil liberties and highly likely to reverse Gobitis. Robert Jackson, appointed in 1941, had implicitly criticized the Supreme Court’s first flag salute opinion in a book published

³¹ 310 U.S. 586 (1940).

³² Robert L. Tsai, “Reconsidering Gobitis: Lessons in Presidential Leadership,” (unpublished paper on file with author). This paragraph summarizes Part II of Tsai’s paper and Mark A. Graber “Counter-Stories: Maintaining and Expanding Civil Liberties in Wartime,” The Constitution in Wartime: Beyond Alarmism and Complacency (edited by Mark Tushnet) (Duke University Press: Durham, North Carolina, 2005).

³³ Citation

that year.³⁴ Wiley Rutledge, appointed in 1943, had vigorously criticized Gobitis for the previous three years.³⁵ Some members of the Roosevelt Justice Department publicly urged the Court to overturn Gobitis. “[A] reversal of that ruling,” Victor Rotnem and F. G. Folsom declared in the **American Political Science Review**, “would profoundly enhance respect for the flag.”³⁶ When Congress passed new legislation on flag saluting in 1942, the Roosevelt administration interpreted this legislation as banning mandatory flag salutes.³⁷ The brief for the American Civil Liberties Union in Barnette, as an alternative ground for relief, insisted that the local flag salute laws had been preempted by this piece of federal legislation³⁸

Justices rarely act unilaterally, the American experience with mandatory flag saluting suggests, when public opinion is divided. Rather, justices side with some governing officials against others. As was the case in Barnette, judicial action is often a consequence of sustained efforts by some members of the dominant coalition to make their constitutional vision the law of

³⁴ Robert H. Jackson, The Struggle for Judicial Supremacy (Knopf: New York, 1941), p. 285.

³⁵ See Tsai, “Reconsidering Gobitis,” p. ____.

³⁶ Victor W. Rotnem and F.G. Folsom, Jr., “Recent Restrictions Upon Religious Liberty, 36 **American Political Science Review** 1053, 1063 (1942).

³⁷ See Rotnem and Folsom, “Recent Restrictions,” pp. 1063-64.

³⁸ See William G. Fennell, Osmond K. Fraenkel, Arthur Garfield Hays, and Howard B. Lee, “Brief for the American Civil Liberties Union, Amicus Curiae, West Virginia State Board of Education v. Barnette,” pp. 20-23.

the land. The Roosevelt Administration sought to overturn Gobitis through a combination of judicial appointments and clear statements of an administrative commitment to free speech. Elected officials at other times and on other issues have expanded federal jurisdiction, appeared as parties or attorneys before the court, and publicly financed litigation in efforts to have the justices strike down federal or state laws.³⁹ Other members of the dominant national coalition

³⁹ Scholarship on the political construction of judicial power has become a major growth industry in political science. For examples, see Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press: Cambridge, Massachusetts, 2004); George I. Lovell, Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy (Cambridge University Press: New York, 2003); Kevin J. McMahon, Reconsidering Roosevelt on Race: How the Presidency Paved the Road to Brown (University of Chicago Press: Chicago, 2004); Keith W. Whittington, The Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History (Princeton University Press: Princeton, New Jersey, 2007); Paul Frymer, “Acting When Elected Officials Won’t: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85,” 97 **American Political Science Review** 483 (2003); Howard Gillman, “How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891,” 96 **American Political Science Review** 511 (2002); Mark A. Graber, “The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary,” 7 **Studies in American Political Development** 35 (1993). For one summary of this literature, see Mark A. Graber, Constructing Judicial Review, 8 **Annual Review of Political Science** 425 (2005).

have opposed these efforts or at least not been as fully engaged in efforts to influence the courts. Congress in 1942, for example, probably did not intend to ban mandatory flag saluting.⁴⁰ Nevertheless, as was the case in Barnette, the underlying dispute was between different officials in different governing institutions, each with some democratic authority to determine constitutional meanings and not, as Frankfurter consistently suggested, exclusively between unelected justices and elected legislators.

The Supreme Court more often participates in constitutional debates than either engages in unilateral strikes or merely “reflect[s] popular views about contested constitutional issues.”⁴¹ The judicial majority in Barnette neither “defend[ed] certain fundamental principles against majoritarian interference,”⁴² as one of Professor Rosen’s critics contends,⁴³ nor joined a preexisting constitutional consensus. Rather, partly as a consequence of self-conscious executive efforts to pack the Court with civil libertarians and partly as a consequence of the distinctive constitutional visions of individual justices, the justices provided additional support for President Roosevelt’s effort during World War II to foster greater support for religious freedom. Barnette no more than Gobitis settled the constitutional status of mandatory flag salutes. The decision is

⁴⁰ Tsai, “Reconsidering Gobitis,” pp ____.

⁴¹ Rosen, “Foulston Lecture,” p. ____.

⁴² Thomas M. Keck, “Party, Policy, or Duty: Why Does the Supreme Court Invalidate Federal Statutes?” 101 **American Political Science Review** 321, 337 (2007).

⁴³ See Thomas M. Keck, “Party Politics or Judicial Independence: The Regime Politics Hits the Law Schools,” 32 **Law & Social Inquiry** 511 (2007).

best understood as changing the terrain of democratic debate. Advocates of mandatory flag saluting would now have to convince national rather than local majorities when seeking to make their constitutional vision the law of the land.⁴⁴

Brown v. Board of Education⁴⁵ is another example in which the court was allied with executive branch officials against local majorities. The Supreme Court's decision declaring segregated public schools unconstitutional was neither "intensely counter-majoritarian"⁴⁶ nor a reflection of a popular consensus in 1954. As was the case with Barnette, the justices sided with the national executive against some local majorities, with Congress too paralyzed to take any action. As was the case with Barnette, Brown forced proponents of segregation to forge a national majority in order to reinstate preferred policies at the local level. As was the case with mandatory flag salutes, proponents of the policy declared unconstitutional were unable to forge that national majority. Most significantly, as was the case with the Roosevelt Administration, the Eisenhower Administration promoted democratic debate by appointing to the bench justices

⁴⁴ In theory, of course, the Supreme Court could hold out even against a national majority. In practice, as Professor Rosen and others note, the justices almost always respond to strong national majorities, both for strategic reasons and because those majorities appoint justices to the bench who share their constitutional vision. See Rosen, "Foulston Lecture," p. ____; Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as National Policy-Maker," 50 **Emory Law Journal** 563, 577 (2001).

⁴⁵ 347 U.S. 483 (1954).

⁴⁶ Rosen, "Foulston Lecture," p. ____.

who publicly declared their support for Brown.⁴⁷ That these justices were all confirmed played a role in the slowly developing national consensus that Jim Crow had no place in a nation committed to “equal protection of the laws.”

Judicial modesty may still have been appropriate in both Barnette and Brown. Perhaps the Supreme Court should not even participate in debates over constitutional meaning, leaving their resolution entirely to elected officials. Judicial review is not a neutral practice. Having courts weigh in on constitutional matters privileges some visions at the expense of others. As the American experience with mandatory flag salutes and segregation illustrates, the Supreme Court tends to nationalize issues, forcing local proponents of restrictive policies to forge broader, more national, majorities in order to make their constitutional vision the law of the land. Judicial review in Barnette, Brown, and other cases has a tendency to privilege the constitutional vision of educated elites and persons who prefer a more limited government.⁴⁸ As was the case with his opinion denying standing to attack birth control laws, however, Frankfurter’s call for judicial modesty was not rooted in the actual constitutional politics underlying debate over mandatory flag saluting. His judicial modesty in Barnette falsely portrayed as a unilateral judicial attack what was, in fact, an allied national assault on a few local policies.

⁴⁷ Cite to Abraham.

⁴⁸ See Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press: Cambridge, Massachusetts, 2004), p. 218; Mark A. Graber, “Does It Really Matter? Conservative Courts in a Conservative Era,” 75 **Fordham Law Review** 675, 706-07 (2006).

C. Whither Unilateralism and Chief Justice Roberts

The persons responsible for the Constitution of the United States sought to design institutions that would guarantee as far as humanly possible that constitutional settlements would reflect a broad societal consensus rather than bare majoritarian sentiment. George Washington believed that government policy should take into account “the wishes of every part of the community.”⁴⁹ James Madison favored large election districts because he believed such arrangements would promote policy based on no “other principle[s] than those of justice and the general good.”⁵⁰ Judicial review may facilitate such a democratic consensus.⁵¹ On issues as diverse as constitutional criminal procedure, affirmative action, reproductive choice, and the role of religion in public life, the Rehnquist Court was consistently more centrist than either the Democratic or Republican Party.⁵² “[I]n a political world where the parties have become more polarized,” H.W. Perry and Scot Powe point out, “the Court in forging a majority opinion is

⁴⁹ George Washington, “Third Annual Message,” George Washington, p. 477.

⁵⁰ Wood, The Creation of the American Republic, pp. 610.

⁵¹ See Arend Lijphart, Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries (Yale University Press: New Haven, 1999) (including judicial review as one element of consensus democracy).

⁵² See H.W. Perry, Jr., and L.A. Powe, Jr., “The Political Battle for the Constitution,” 21 **Constitutional Commentary** 641, 655-88 (2004)

offering the bipartisanship that the public purports to want but is otherwise so lacking in Washington.”⁵³

Americans in practice have not always realized this constitutional aspiration for a consensual politics. Sometimes the judiciary has been the culprit. The Supreme Court for a quarter century thwarted popular efforts to ban child labor.⁵⁴ The culprit in other case has been the national executive. President Buchanan’s effort in 1857 to have Kansas enter the Union as a slave state is probably the worst exercise of unilateralism in American history.⁵⁵ Political parties have also been vehicles for policy polarization. Prominent scholars contend that the contemporary Republican party has found institutional means for making and maintaining more conservative policies than most Americans favor. Conservative elites shift the constitutional regime “off-center,” Jacob Hacker and Paul Pierson document, largely by “run[ning] from daylight,” finding “alternative routes” that typically “throw up fewer roadblocks and attract less attention” than legislation.⁵⁶

Conservatives have adopted “run from daylight” strategies when staffing the federal

⁵³ Powe and Perry, “Political Battle,” p. 643.

⁵⁴ *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Bailey v. Drexel v. Drexel Furniture Co.*, 259 U.S. 20 (1922). See Dahl, “Decision-Making in a Democracy,” p. 576.

⁵⁵ See Kenneth M. Stampp, *American in 1857: A Nation on the Brink* (Oxford University Press: New York, 1990), pp. 295-322.

⁵⁶ Jacob S. Hacker and Paul Pierson, *Off Center: The Republican Revolution and the Erosion of American Democracy* (Yale University Press: New Haven, 2005), p. 71.

courts. Although President Bush professes to admire justices who do not “legislate from the bench,”⁵⁷ the justices he most frequently praises, Justices Antonin Scalia and Clarence Thomas, have voted to strike down federal laws more frequently than any other justice in American history.⁵⁸ Conservative judicial nominees have willingly assisted administration efforts at obfuscation. When asked about their commitment to respecting precedents and legislation, their tendency has been to offer answers that are, to put things politely, evasive.⁵⁹ These unfortunate developments auger a new form of false judicial modesty. Movement conservatives surreptitiously promote wide-ranging judicial activism while piously intoning in public their commitment to judicial humility.

Political movements that use the judiciary as a vehicle to “run from daylight” pose a greater threat than unilateralism to the formation of a democratic consensus on constitutional issues. Presidents Roosevelt and Eisenhower facilitated democratic debate on mandatory flag salutes and segregation by nominating Justices who openly declared they believed Gobitis

⁵⁷ Todd S. Purdum, “Bush Picks Nominee for Court; Cites His ‘Fairness and Civility,’” **New York Times** (July 20, 2005), p. A1.

⁵⁸ See Thomas M. Keck, The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism (University of Chicago Press: Chicago, 2004).

⁵⁹ See David M. Kirkpatrick, “Democrats Prepare Grounds to Challenge Judge Roberts,” **New York Times** (July 23, 2005), p. A9. The less polite word is “perjury.” See Margaret Talbot, “Talking Back,” **New York Times** (October 26, 1997), Section 7, p. 7.

wrongly decided and Brown rightly decided.⁶⁰ Although conservative scholars have a long wish list of laws they believe federal courts should declare unconstitutional⁶¹ and conservative justices on the Supreme Court are beginning to make these dreams come true,⁶² President Bush thwarts public debate on the merits of the so-called “constitution-in-exile” by denying any ambitions to promote aggressive use of judicial power in service of a conservative constitution vision. To the extent Chief Justice Roberts in the future demonstrates a commitment to this still secret constitutional order,⁶³ the main lesson to be learned is that open commitments to judicial activism are democratically superior to false professions of judicial modesty.

⁶⁰ See footnotes ____, above, and the relevant text.

⁶¹ See Mark A. Graber, “Does It Really Matter? Conservative Courts in a Conservative Era,” 75 **Fordham Law Review** 675, 682-84 (2006).

⁶² See Keck, Most Activist Court; Graber, “Conservative Courts,” pp. 676-77 (citing numerous cases)

⁶³ For a possible harbingers, see Parents Involved in Community Schools v. Seattle School District No. 1, 127 S.Ct. 2738 (2007); Federal Election Commission v. Washington Right to Life, Inc., 127 S. Ct. 2652 (2007); Rapanos v. United States, 126 S. Ct. 2208 (2006)