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## On Human Rights and Majority Politics

Samuel Moyn

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## On Human Rights and Majority Politics

*Felix Frankfurter's Democratic Theory*

Samuel Moyn<sup>\*</sup>

### ABSTRACT

*This symposium piece is primarily a reading of Felix Frankfurter's dissent in West Virginia State Board of Education v. Barnette, attempting to draw some lessons from his theory of majoritarian rights for our own moment of crisis for the human rights movement. The situations then and now are only partly comparable, but Frankfurter's call for allowing democratic processes to self-correct even when elite shortcuts beckon—including when it comes to defining and protecting rights—provides food for thought.*

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## I. INTRODUCTION

In September 1937, the U.S. Constitution's 150th anniversary was celebrated. It was a moment when the American people—through their election of the Democratic party to power in the two political branches of government—empowered their president to place the interests of a popular majority above a minority's rights claims. Though the court-packing scheme of Franklin Delano Roosevelt (FDR) that year had failed in achieving its goal of expanding the Supreme Court's membership, the popular majority triumphed indirectly after the court's existing membership deferred to its will. Roosevelt's speech in honor of the Constitution was in fact a defense of majoritarian politics retroactively, after what he considered to be an illegitimate minority was put in its place. Roosevelt hardly rejected human rights. But he insisted that, if defended and pursued in a new way, they could become safe for majority rule, and vice versa.

Human rights were important, but not more so than majority rule, especially since minority protections had been the way of the world, and majority rule had almost never been achieved in practice. For this reason, Roosevelt's central premise was that majority rule should sometimes override many claimed minority perquisites, as they had regularly safeguarded an indefensible ascendancy of elites boasting oligarchic power or plutocratic wealth. In many respects, the history of human rights is not the now-familiar protection of the marginal, vulnerable, or weak, but the shielding of elite power from popular incursion. As a result, it was not so much a matter of withdrawing protection from the needy, as much as putting indefensible minority power in its place for the sake of a majority rule rarely achieved in national life. "The present government of the United States has never taken away and never will take away any liberty from any minority," FDR explained of his pressure tactics and their outcome, "unless it be a minority which so abuses its liberty as to do positive and definite harm to its neighbors constituting the majority."<sup>1</sup> He added: "the

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1. President Franklin Delano Roosevelt, Address on Constitution Day (Sept. 17, 1937), in CONSTITUTION SOCIETY, <https://www.constitution.org/cmt/fdr/>

government of the United States refuses to forget that the Bill of Rights was put into the Constitution not only to protect minorities against intolerance of majorities, but to protect majorities against the enthronement of minorities.”<sup>2</sup>

Understandably, friends of rights past and present rank the tyranny of the *majority* first among their fears. Though hardly friends of rights, Plato and all the heirs of classical political thought have long treated the collapse of democracy into despotism as likely if not inevitable. By Roosevelt’s lights, however, it is more important to begin with the premise that not only rights, but also politics in general, have usually served minorities. This most enduring fact about politics makes tyranny of the *minority* a far more endemic difficulty to confront, even in the midst of modern and formally democratic regimes that have taken large strides beyond premodern monarchy and aristocracy explicitly based on locking most people out of power. Most political thought since the Greeks has not merely feared the people but offered affirmations of the need for minority ascendancy if order and justice are to survive. The modern question, therefore, is what it might mean to take not just rights, but also democracy, seriously.<sup>3</sup> What if the greatest risk is not that majorities will trample the rights of minorities, but that minorities will continue to rule over majorities? If so, then it is all important to focus first on how to counteract this risk, including insofar as a concern for rights becomes a pretext for avoiding its realities.

After a democratic breakthrough he symbolized, Roosevelt was speaking precisely at a moment of profound political mutation that was once again to favor suspicion of majority rule (not only through electoral politics but also through other plausibly majoritarian institutions). This suspicion has lasted through the present in the major forms of wartime and later Cold War and post-Cold War constitutional liberalism.<sup>4</sup> In the United States and around the world, there was a “populist” wave in the 1930s that produced Roosevelt—and fascism. Since then and until recently, political history has become one of “contesting democracy” and containing it.<sup>5</sup> Yet Roosevelt’s

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address\_constitution\_day\_1937.html [https://perma.cc/FGE5-MA56] (archived on Sept. 12, 2019).

2. *Id.*

3. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (Harv. Univ. Press 1977) (arguing against the “ruling” theory in Anglo-American law).

4. See Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 423–25 (1996) (discussing anti-totalitarianism in modern theories of constitutional law).

5. See JAN-WERNER MÜLLER, *CONTESTING DEMOCRACY: POLITICAL IDEAS IN THE TWENTIETH CENTURY* 5–6 (Yale Univ. Press 2011) (analyzing the rise of anti-populist democracy after World War II in response to fascism).

perspective, at the height of a new populist wave, seems more pertinent than ever. From his vantage point, sensitivity to prospective violations of rights should not take priority because consecrating the power of elite minorities could subvert the interests of the common people. Roosevelt hoped that rights could serve majorities, but that could only happen if the protection of rights—for the right minorities—was made consistent with majority rule.

This Article is a call for more thought about how to reconcile ongoing traditions of human rights with majority rule. The conceptual and jurisprudential debate over the relationship of human rights and democratic politics is, of course, hoary. What follows is not yet another intervention in the abstract controversy over whether rights are antecedent to democratic values, “equiprimordial” with them (as Jürgen Habermas influentially claimed),<sup>6</sup> or only plausible if following from them. But in view of the contemporary situation, old debates require some revisiting today from a less abstract and more strategic perspective, with less emphasis on metaphysics and morals and more focus on politics and tactics.

Today, the critical question is how human rights are most plausibly regarded in the midst of a rising “populist” approach to democracy, with little time to waste. The central argument this Article offers is that, in the face of another round of democratic self-assertion, human rights need to be reconceived as a potentially majoritarian project, as well as embedded in larger packages of high-priority policy that can sufficiently appeal to majorities and are congruent with their interests. Indeed, it looks like rights will survive and thrive only if their advocates find ways of participating in such a reconciliation between majority interests and minority protections. (There are of course more and less intelligent approaches to creating those packages.)

As in the 1930s, human rights around the world today are not perceived as serving majorities. They perhaps serve majorities less well than one might hope. Certainly, they are successfully identified by demagogic politicians and right-wing parties as talismans raised on behalf of minorities, including the most vulnerable and weak at the margins of the nation-state. Conversely, they are rarely perceived to be, or to fit with, priorities that will also serve a broad middle and working-class majority. It is most tempting to conclude that what is involved is a failure of marketing—a failure to convince the majority that human rights and the corresponding legal institutions devised to advance them do in fact protect its interests or are easily compatible

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6. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 94 (William Rehg trans., MIT Press, 2d ed. 1996) (1992).

with them. But while persuasive, this is not the whole story. None of the principled reasons Roosevelt offered in support of majoritarian politics of rights have changed. And it is patently clear from a strategic perspective that human rights activism will fail unless it is compellingly subsumed within a broader political agenda that majorities find persuasively advances their ideals and interests.<sup>7</sup> The consequences for most contemporary human rights efforts, whether pursued through activist mobilization, governmental policy, or national and international law (far from exclusively but most definitely including judicial enforcement at various levels), are significant.

While this Article's arguments are portable beyond national settings and particular situations, this Article examines the reconciliation of human rights with majority politics in a specific context by rehabilitating the thinking of a potentially unexpected figure: United States Supreme Court Justice Felix Frankfurter. America generally rejects human rights in international law, except as part of an export strategy that selectively defends human rights abroad in diplomatic relations (and occasional wars).<sup>8</sup> Even so, in its constitutional traditions, America has the deepest experience with the intellectual and political quandary that has gone global today: how to reconcile human rights with majority politics. To be sure, throughout its history and up to the present, the country has distinguished itself as the conservative homeland of rights safeguarded against the upheaval of democratic passions.<sup>9</sup> Yet an equally important truth is that when human rights became associated with powerful and wealthy minorities and drew complaints for obstructing majority rule, the United States, for a brief moment, also bred the most creative thinking about how to save human rights from their unpalatable associations in order to be more compatible with majoritarian democracy. Frankfurter's Rooseveltian thinking surges in importance in this context. From the perspective of this compelling if recessive American tradition, human rights have to be pursued now by convincing one's fellow citizens to adhere enthusiastically to them. This means reinterpreting and safeguarding them in a majoritarian spirit and embedding them in a larger majoritarian package of policies.

After a long age of countermajoritarian strategies of human rights advocacy, especially juristocratic ones, Frankfurter's demand that

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7. See *infra* Part IV.

8. MICHAEL IGNATIEFF, *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 7 (Michael Ignatieff ed., Princeton Univ. Press 2005).

9. See generally HENRY SUMNER MAINE, *POPULAR GOVERNMENT* 197 (Henry Reeve trans., Liberty Fund 1976) (1885) (Essay IV) (analyzing the Constitution as a political instrument); 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., London, Saunders & Otley 1835) (examining the legal system in America).

elites learn deference to majority rule, and that human rights figure in a package of policies that serve majority interests, is compelling if risky. In the short run, he may have failed in his agenda. Liberals in the United States opted for countermajoritarian rights enforcement by judicial means over his protest. Now a backlash that has climaxed (so far) in a fifth reliably conservative vote on the Supreme Court today has set in, one promising minority rule for as long as anyone can foresee. And the United States is not the only country to have minorities make recent bids to rule.

The first Part of this Article provides a digest and exegesis of the principal claims of Frankfurter's dissent in *West Virginia Board of Education v. Barnette*. The case, which concerned the rights claims of Jehovah's Witnesses to be free from a state-imposed obligation to salute the American flag, matters because it is where Frankfurter laid out his theory of majoritarian rights at the greatest length.<sup>10</sup> The next Part of this Article reflects on the applicability of Frankfurter's approach to contemporary human rights politics. Along the way, the Article takes up the countermajoritarian rights philosopher Ronald Dworkin's critique of Learned Hand—the judge for whom Dworkin clerked as a young man, not to mention Frankfurter's friend and kindred spirit. In doing so, the goal is to reflect on the profound change in liberal attitudes towards rights and democracy that has supervened since Frankfurter struggled for majority rule, and to suggest that this change now seems a faulty mistake. Democrats need not turn their backs on rights, but they do need to overcome the mistake of relying on the princes of law's empire (as Dworkin famously called judges) and human rights activists (who sometimes assign themselves an analogous role) as the preeminent guardians of rights. In a democracy, that role falls to the people, ruling themselves.

## II. FRANKFURTER ON HUMAN RIGHTS AND MAJORITY RULE

### A. *The Setting*

Frankfurter's dissent in *West Virginia Board of Education v. Barnette* remains a high point of American constitutional law. It is a convenient source, because it eloquently defended majority rule while expressing hard-won and reflexive wariness about the difficulty of making it compatible with human rights. Compared to attempts made by recent generations, it struck a very different balance between the

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10. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).

need to ensure against human rights violations and the importance of countervailing the even greater risks of an elite control of democracy.

After long service as a professor at Harvard Law School, Frankfurter was appointed as a justice in 1939, two years after the "switch in time" of 1937, a storied event that capped fifty years of progressive resistance to the judicial enforcement of the human rights claims made by the powerful and wealthy minority of the country.<sup>11</sup> Notoriously, in *Lochner v. New York* the United States Supreme Court had enforced, under the theory of substantive due process discovered in the Fourteenth Amendment, a human right to the freedom of contract.<sup>12</sup> The decision was explicitly cast as one based on the principle that, in the case of conflict between the will of a legislative majority and "the inherent rights belonging to everyone," the latter trumped the former.<sup>13</sup> For decades, that theory, as Roosevelt insisted, caused enormous pain and suffering to majorities.<sup>14</sup> In the face of popular self-assertion, the Supreme Court finally relented and abandoned the project of testing majority legislation for its interference with human rights.

It therefore fell to Frankfurter to man the ramparts of a former institution of minority rule and save it from falling back into a minoritarian rut. Frankfurter's *Barnette* dissent was shot through with outrage that it was falling back so quickly, since the case reversed a Supreme Court bench that a few years before Frankfurter could still convince to let majorities have their say in the face of human rights claims. In an earlier case, *Minersville School District v. Gobitis*,<sup>15</sup> Frankfurter had argued for a nearly unanimous set of justices that Jehovah's Witnesses had no right under the First Amendment (as incorporated through the Fourteenth's due process clause) to claim an exemption on grounds of free speech or free exercise of religion from a generally applicable law that required students in public schools to salute the American flag.<sup>16</sup> A mere three years after *Gobitis* ensured that majority interests, and their reconciliation by the majority itself with minority interests, were not open to countermajoritarian forces to overturn, *Barnette* abruptly abandoned Frankfurter's search for balance, risking a return of minority rule.

The most important reason for this startling turn of events was a dawning certainty in 1943, now that Americans had been forced into

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11. See, e.g., WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 213 (1995) (analyzing the U.S. Supreme Court during the Franklin D. Roosevelt presidency).

12. 198 U.S. 45, 64–65 (1905).

13. *Id.* at 66.

14. See Roosevelt, *supra* note 1.

15. See generally 310 U.S. 586 (1940).

16. *Id.* at 599–600.



World War II, that they were fighting a “totalitarian” state. True, in fighting Nazi Germany they were also allies with an equally totalitarian Soviet Union. But American elites suddenly converged on the principle that mistreatment of minorities in the name of “nationalism” was something totalitarians did, not free people, even when at war. Another and more proximate reason for the *volte face* may well have been that the *Gobitis* decision had been followed by violence against Jehovah’s Witnesses in several locales,<sup>17</sup> which understandably troubled several justices—even if they neglected that conservative and free market interests were supporting the rights claims of this oppressed minority as a proxy for the advancement of their own interests.<sup>18</sup> As several historians have emphasized, there was a liberal uproar immediately following the *Gobitis* decision, and the heartrending fate of a number of Jehovah’s Witness communities seemed to confirm that *Gobitis* had been a dreadful mistake.<sup>19</sup> At the same time, partisans of *Lochner* seeking its eventual revival sensed a moment to strike.<sup>20</sup>

But it is not the fascinating historical details of either *Barnette* or its predecessor, or even what precise factors caused Frankfurter in this period to lose his majority, that matter for these purposes. After all, *Barnette* was a small if significant event within the much more profound loss Frankfurter suffered in his campaign to restrain the countermajoritarian tendencies of his court, especially when it intervened in the name of human rights. Rather, far beyond the narrow issue of the judicial protection of basic values in particular, it is Frankfurter’s spectacular vision of how to make democratic rule consistent with human rights that deserves close attention for its relevance today. Frankfurter’s rationale for a majoritarian approach to human rights may even survive his potentially mistaken application of it. Whatever one thinks of its outcome, detaching his democratic theory from the details of the case helps one grasp that theory more easily.

### B. Majority Versus Minority Rule

Frankfurter’s first premise is that democracy is about majority rule to determine social priorities, which include how much room to

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17. SHAWN FRANCIS PETERS, JUDGING JEHOVAH’S WITNESSES: RELIGIOUS PERSECUTION AND THE DAWN OF THE RIGHTS REVOLUTION 73 (2000).

18. See *infra* Part II.C.

19. See PETERS, *supra* note 17; see also Robert Tsai, *Prof. Robert Tsai (2018) at 75th Barnette Anniversary*, YOUTUBE (Nov. 8, 2018), [https://www.youtube.com/watch?v=NN\\_7fbwCRA](https://www.youtube.com/watch?v=NN_7fbwCRA) [<https://perma.cc/2JKP-A9AQ>] (archived on Sept. 12, 2019) (lecturing on the effects of *W. Va. v. Barnette*).

20. See *infra* Part II.C.

make for minorities. Human rights are certainly priorities, and it is for this reason that the law sets out to afford them some protection. But majority rule is also a priority, and if the majority has a reason for proceeding *other than violating the minority's right*, then the only question is whether priority goes to majority rule or minority rights. To this question, Frankfurter's answer in *Barnette* was straightforward: "That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority."<sup>21</sup> But far from a cause for alarm, suppression of minority practices is a condition of democratic rule, since the losers of elections must accept policies with which they disagree. As Frankfurter explained:

[T]o deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority.<sup>22</sup>

Allowing majorities to target minorities is one thing; allowing minorities to substitute their policies for those of majorities is another.

Lurking in the background of this theory of democracy as majority rule are two interrelated premises. One is a general proposition that claims to individual rights express social priorities in potential competition with others. The second is a focus, not on the best outcome of that competition, but on *who makes the choice* among those priorities; this determines if the people rule themselves or if someone else does. A large number of social disputes, Frankfurter felt, are conflicts about priorities and not things that are easy or even possible to resolve uncontroversially, as if one side's assertion of its priority were a trump card that overcomes the other side's comparable assertion. And whether this is true on the plane of morality, it is certainly the case in law that the people are empowered to rule themselves just as individuals are given rights. If so, the central matter is *who should decide* how to reconcile conflicts between them—majorities themselves, or someone else. "Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law," Frankfurter acknowledged of the ethical pull of minority concerns.<sup>23</sup> He added: "But the real question is, who is to make such accommodations, the courts or the legislature?"<sup>24</sup> *Quis judicabit?*

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21. W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 662 (1943) (Frankfurter, J., dissenting).

22. *Id.*

23. *Id.* at 651.

24. *Id.*

Put another way, Frankfurter's essential normative commitment was to democracy. It was not that there are no rights, whether human or constitutional. But no one other than the people, under organized systems of majority rule, can politically decide how rights claims bear on policy outcomes—at least when the majority has some reason or other for its policy besides a desire to violate minority rights. Indeed, for Frankfurter, what made the decision to overturn the grant of power to legislative majorities in *Gobitis* and earlier cases so fateful was that “never before” had the “Supreme Court overruled decisions so as to restrict the powers of democratic government.”<sup>25</sup> On this account, the history of overturning precedent had always affirmed majority rule, not undermined it. “Always heretofore,” he claimed, the Supreme Court “has withdrawn narrow views of legislative authority so as to authorize what formerly it had denied.”<sup>26</sup> Insofar as that was true, 1943 was as much a landmark date as 1937 was before it. The Supreme Court reversed course on majority rule after six short years, and, since that time, traditions of countermajoritarian jurisprudence for both liberals and conservatives have been robust. That reversal led, as Roberto Unger later expressed it, to “ceaseless identification of restraints upon majority rule, rather than of restraints upon the power of dominant minorities, as the overriding responsibility of judges and jurists.”<sup>27</sup>

Of course, one might intelligibly argue that it is easier than Frankfurter thought to single out rights from other kinds of priorities. It was on this point that Frankfurter lost his former majority on the court in *Barnette*—at least officially. Justice Robert Jackson generally sided with Frankfurter during his time on the bench, against the dominant faction on the Supreme Court, led by Justice Hugo Black, that operated with a very different—more absolutist and more textualist—theory of countermajoritarian rights, which eventually led to the long period of judicialization of American politics.<sup>28</sup> Yet in *Barnette*, Frankfurter lost even Jackson's support, and Jackson wrote the opinion for the court.

Jackson's opinion strongly suggests that his genuine reasons for diverging from his friend concerned the need for symbolic demarcation of American democracy during wartime from “our present totalitarian

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25. *Id.* at 665–66.

26. *Id.* at 666.

27. ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 72–73 (1996).

28. See JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER, AND CIVIL LIBERTIES IN MODERN AMERICA 118–22 (1989).

enemies.”<sup>29</sup> Officially, he explained, he did not view the flag salute as a significant enough social priority to create any conflict among rights claimants, and certainly not one that ought to be decided by a majority.<sup>30</sup> “The refusal of these persons to participate in the ceremony,” Jackson explained of the Jehovah’s Witnesses, “does not interfere with or deny [the] rights of others to do so.”<sup>31</sup> And because Jackson rejected Frankfurter’s view that wartime national unity might plausibly require coercive nationalism, he defended the Jehovah’s Witnesses’ right to abstain from saluting the flag.<sup>32</sup>

Jackson’s principled distinction of the fact pattern in *Barnette* justifying countermajoritarian intervention is interesting. According to Jackson, a conscientious objector’s asserted right should prevail when the majority asserts not its own vision of rights but merely its own policies.<sup>33</sup> Whatever its plausibility of Jackson’s argument, his minor disagreement with Frankfurter on this point took place against the backdrop of major agreement among normative democrats. In other cases involving the Jehovah’s Witnesses, most notably in *Jones v. Opelika* from precisely the same moment, Jackson sided in the majority with Frankfurter when it came to the permissibility of taxing the group.<sup>34</sup> In a related case, Jackson agreed that an asserted minority right against an economic regulation was little more than an invitation for judges to allow minorities to rule.<sup>35</sup> This had been the cardinal error of *Lochner*, and its repetition in the rise of Supreme Court rights protection involved a profound risk for a return of *Lochner*’s principles.<sup>36</sup>

Ironically, Jackson’s routinely cited verbiage about human rights from *Barnette* has obscured this deeper agreement. That “fundamental rights may not be submitted to vote [and that] they depend on the outcome of no elections,” as Jackson put it in *Barnette*, was only true—

29. *Barnette*, 319 U.S. at 641; see also WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920–1980*, 121–37 (2001) (on the pivotal relevance of the specter of totalitarianism for Justice and later Chief Justice Harlan Fiske Stone in this era); BENJAMIN ALPERS, *DICTATORS, DEMOCRACY, AND AMERICAN PUBLIC CULTURE: ENVISIONING THE TOTALITARIAN ENEMY, 1920S–1950S* (Alan Trachtenberg ed., 2003) (on broader context).

30. *Barnette*, 319 U.S. at 630.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Jones v. Opelika*, 316 U.S. 584 (1942).

35. *Douglas v. City of Jeannette*, 319 U.S. 157, 180 (1943) (Jackson, J., dissenting).

36. Cf. Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1920–22 (2016) (discussing the history of civil libertarian challenges to the regulation of economic activity).

he thought—when nobody else's rights were in play.<sup>37</sup> The entire purpose of rights, Jackson famously wrote, is "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."<sup>38</sup> But it was a view Jackson himself rejected for the reasons Frankfurter offered in *Barnette* when majorities wanted to intrude upon allegedly sacrosanct economic rights that their generation had spent its greatest efforts to overcome for the sake of majority rule.

### C. *Minority Rights or Wrong Minorities?*

This whole debate about whether and how to honor human rights was given substance by the extraordinary specter of returning to the *Lochner* regime in the very course of developing premises for countermajoritarian intervention. In between 1937 and 1943—perhaps the most pivotal years in Supreme Court history—Frankfurter and other justices had to figure out what purpose constitutional law had after the new starting point of allowing the majority to determine its destiny in the face of minority rights claims. In interpretations of economic legislation under the commerce clause of the U.S. Constitution and in consideration of state legislation as well, majorities were now given absolute deference, and—as Justice Jackson agreed—no rights claims bore on their prerogatives. What haunted Frankfurter most of all and drove him to an even more complete deference to majorities in *Barnette* than Jackson allowed, was the risk that hewing out *any form* of countermajoritarian minority rights would in practice allow the *wrong minorities* to once again tyrannize majorities.

This all-important concern is difficult to tease out from Frankfurter's dissent in *Barnette*, in part because it is omnipresent. Indeed, Frankfurter's opinion and subsequent career forms one long warning about the expectable association between countermajoritarian rights protection and the tyranny of minorities. He worried that elites, such as judges, who set out to chasten democracy in the name of rights, knowingly or unknowingly serve minorities, as in the *Lochner* era before. An important lesson follows from his caution. Committing to protect the vulnerable and the weak may not always robustly serve those victims, but regularly does open new avenues for the powerful and strong to circumvent democratic agency.

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37. *Barnette*, 319 U.S. at 638.

38. *Id.*

One interesting sign of the concern about opening avenues for the wrong minorities to rule arises right at the start of Frankfurter's dissent—just after his immortal opening, which reminds readers that, as a Jew and thus a member of “the most vilified and persecuted minority in history,” he is far from insensitive to the abuse of the rights of the vulnerable and weak.<sup>39</sup> Yet Frankfurter added immediately that, even so, protecting minorities involves using power that can and will be used for other things. If so, extraordinary care is therefore necessary to assure the proper use of human rights in politics and law, in view of the risk of their abuse. It is for this reason that Frankfurter slyly refers to the fact that “not so long ago we were admonished”<sup>40</sup> as much, citing a prior opinion of Chief Justice Harlan Fiske Stone: “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.”<sup>41</sup> To avoid the risk of minority cooptation of allegedly uncontroversial rights to advance their own controversial interests, the only cure to democracy was democracy—including in instances where rights were arguably at stake.

It was a sly allusion not only because Frankfurter did not name his colleague, but also because Stone, now animated by terror of foreign totalitarianism, had entered a lonely dissent in *Gobitis* and, in 1943, saw the court take his side.<sup>42</sup> Frankfurter's point, however, was that Stone was not respecting the great wariness of countermajoritarian rights enforcement that he had himself urged at the end of the *Lochner* era, and which he had eventually helped overcome before Frankfurter even joined the court. In short, Frankfurter was suggesting that Stone—with the court now following him—was reverting to the very position Stone had once rightly castigated. Frankfurter had warned Stone in private at the time he entered his dissent in *Gobitis*; now, finding himself the loser, Frankfurter made his admonition public.<sup>43</sup>

It is reasonable to wonder why the wrong minorities cannot take advantage of majoritarian practices and institutions, if they can take advantage of countermajoritarian ones. And of course, they can and do. However, Frankfurter and Jackson, like Stone on the court before them, had lived through a remarkable period that convinced them that the universal risks of practical and institutional capture by self-dealing elites were not always equal. They remained wary that the high risk of

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39. See *id.* at 646 (Justice Frankfurter explaining the obligation to the Constitution, regardless of a justice's background or religious identity).

40. *Id.* at 647.

41. *United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J., dissenting).

42. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 601–07 (1940) (Stone, J., dissenting); *Butler*, 297 U.S. at 79. See also *Barnette*, 319 U.S. at 624.

43. Kessler, *supra* note 36, at 1953 (reviewing Frankfurter's and Stone's interactions around the cases).

minority interests dominating legislatures were at least easier to counteract through popular mobilization, while countermajoritarian institutions—though also possible to overcome—required far more effort and time. In Adrian Vermeule's terms, these were figures who did not regard public law as a matter of insuperable contradictions, but of "competing risks and tradeoffs."<sup>44</sup> For them, the balance of risks and tradeoffs favoring majority rule (in spite of the threat that minorities could simply rule through allegedly popular decision-making) was clear, apart from exceptional cases.

In the year of *Barnette*, Columbia University historian Henry Steele Commager wrote a book in Frankfurter's defense, dedicating it to him, arguing much more explicitly than Frankfurter could in his dissent that rights proclaimed for all would likely function in practice to protect powerful and wealthy elites.<sup>45</sup> Commager insisted that, as Thomas Jefferson had predicted in 1801, the power to enforce rights against majorities could function to give powerful and wealthy minorities the highest incentive to "retire into the judiciary as a stronghold," so as to wear down democracy from there.<sup>46</sup> Frankfurter had himself observed in *Barnette* that "Jefferson's opposition to judicial review has not been accepted by history, but it still serves as an admonition against confusion between judicial and political functions. . . . For those who pass laws not only are under duty to pass laws. They are also under duty to observe the Constitution."<sup>47</sup> Crediting Frankfurter in the *Barnette* dissent with a "masterly logic" and canvassing major considerations in favor of Frankfurter's views, Commager insisted that the best and only hope for minority rights—especially if excessive risks of empowering the wrong minorities were to be avoided—lay in majority rule.<sup>48</sup> Or, as Jefferson had put it himself, "[t]he mass of the people is the safest depository for their own rights."<sup>49</sup>

In retrospect, it is difficult to quarrel with Frankfurter's worry that countermajoritarian rights enforcement, like all but the weakest

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44. ADRIAN VERMEULE, *THE CONSTITUTION OF RISK 2* (2013) ("[T]he tensions between and among the values of constitutionalism are best understood not as contradictions, but as competing risks and tradeoffs.").

45. See HENRY STEELE COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* 12–13 (Oxford Univ. Press 1943) (discussing historical concerns of the majority bowing to a minority that can then exploit systems to protect a minority of wealthy, powerful individuals); see also Brad Snyder, *Felix Frankfurter and Popular Constitutionalism*, 47 U.C. DAVIS L. REV. 343, 345 (2013) (discussing Justice Frankfurter's encouragement of Jefferson's views of democratic government).

46. See COMMAGER, *supra* note 45, at 32, 60 (internal citations omitted).

47. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 667 (1943).

48. COMMAGER, *supra* note 45, at 74.

49. *Id.* at 76 (internal citation omitted).

forms of undemocratic intervention, will expectably lead to the contestable empowerment of the wrong minorities. Indeed, this would seem to be one of the principal lessons of the current “neoliberal” era, which has seen the ascendancy of comparable wealth and power that the New Deal in the American case and the rise of the welfare state globally was intended to contain.<sup>50</sup> It can be debated whether Frankfurter was mistaken when it came to *Barnette*’s outcome, for the reasons Jackson laid out.<sup>51</sup> But in a broader sense, these years of reinventing judicial rights enforcement were also, as Jeremy Kessler has powerfully demonstrated, “the early years of First Amendment Lochnerism,”<sup>52</sup> during which the constraint on majority rule in the name of the interests of wealthy and powerful minorities was resurrected within constitutional law, with fateful consequences in the long run.

No longer were those interests to be justified in terms of the due process clause of the Fourteenth Amendment, but instead as a matter of the personal rights protected by the First Amendment.<sup>53</sup> In wartime, the Jehovah’s Witnesses cases crystallized countermajoritarian judicial review for the sake of civil liberties. In doing so, plans laid since 1937 by activist Wall Street lawyer Grenville Clark and others—who recognized the new civil liberties as a powerful mode of reinstating checks on majority rule, including over the organization of the economy—were fulfilled.<sup>54</sup> Soon after Clark announced in 1937 his plan to return to the *Lochner* era via civil liberties, Frankfurter chided him: “Your view, of the Supreme Court, as the great safe-guard of those democratic institutions that you and I so passionately care about, is much too romantic and too simplified”—not least because it reinstated the risk of rule by the wrong minorities.<sup>55</sup> The uses of the First Amendment and many other parts of the Constitution in the decades since suggests that Frankfurter was correct.<sup>56</sup>

50. See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 161–62 (Arthur Goldhammer trans., Harv. Univ. Press 2014) (discussing how development of the welfare state has been impacted by inequality).

51. See *supra* Part II.B.

52. See generally Kessler, *supra* note 36 (discussing the impacts of restricted majority rule).

53. Famously, the Due Process Clause itself was later retrieved as a source of new personal rights not elsewhere guaranteed, notably the much debated right to privacy. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1965) (extending a right to privacy grounded in the Due Process Clause of the Fourteenth Amendment).

54. See Kessler, *supra* note 36, at 1943 (discussing Clark’s Bill of Rights Committee as a means of moderating civil liberties law).

55. *Id.* at 1945.

56. See, e.g., *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010) (holding that government suppression of political speech by a corporation violates the right to free speech protected by the First Amendment).



### D. *Rights and Democratic Learning*

As early as in the *Gobitis* case, Frankfurter had insisted that, far from allocating a monopoly on their enforcement, it was critical for majorities themselves to take rights seriously—in part to avoid abdicating responsibility for them. Indeed, doing so might include the opportunity for *greater* and *more* rights protection than countermajoritarian actors could plausibly supply. After all, even the risk that majorities might violate rights could invite a new conception of democracy as a project of collective learning in defining and institutionalizing rights. “[E]ducation in the abandonment of foolish legislation is itself a training in liberty,” Frankfurter maintained.<sup>57</sup> “To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.”<sup>58</sup>

Now in *Barnette* Frankfurter made explicit the debts he liked to profess to a great intellectual predecessor both at Harvard Law School and as an advocate of near-absolute judicial restraint: James Bradley Thayer.<sup>59</sup> In doing so, however, Frankfurter updated the latter’s eloquent thinking about the value of democratic error for an emerging era of civil liberties and human rights that Thayer could not have foreseen, and for normatively democratic purposes it is not entirely clear that Thayer ever evinced.

A late nineteenth century jurist, Thayer had been rediscovered and even reinvented by Frankfurter and his progressive friends in the early twentieth century.<sup>60</sup> Mark Tushnet has argued (not altogether persuasively) that Thayer may even have originally been a conservative concerned about inadvertent judicial demobilization of a like-minded populace, rather than a protoprogressive concerned that right-wing judges would strike down economic legislation during the imminent *Lochner* era.<sup>61</sup> It is equally if not more likely—though hard to prove—that Thayer’s exposure to the British parliamentary system convinced him that uninhibited majority rule was the best and main

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57. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600 (1940).

58. *Id.*

59. *See* W. Va. Bd. of Educ. v. *Barnette*, 319 U.S. 624, 667–71 (1943) (citing James Bradley Thayer on judicial review).

60. *See generally* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

61. *Compare* Mark Tushnet, *Thayer’s Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9, 11 (1993) (arguing that Thayer thought judicial review would be used to mitigate the effects of politics on progressive legislation), *with* G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48, 49 (1993) (arguing that “Thayer’s views were characteristic of Brahmin members of gentry political culture.”).

guarantor of freedom and justice.<sup>62</sup> Not only was no judicial review necessary for democracy to preserve basic values in Britain's long constitutional history; it did not even require a written constitution. In the absence of any checks, the bearers of parliamentary supremacy in Britain accepted the grave responsibility of their offices, along with undivided power, even after the vast expansion of suffrage over the nineteenth century.<sup>63</sup> And Thayer reinterpreted the "American doctrine of constitutional law" (which undeniably featured some sort of countermajoritarian arrangements) so that it diverged as minimally as possible from simple legislative supremacy.<sup>64</sup> Thayer probably thought it was superior to eliminate judicial review within the framework of an unwritten constitution, but he did not regard America's different arrangement as fatal to popular rule if it was allowed to take place without interference. In any case, with or without judicial review or a written constitution, the priority was to promote democratic learning and responsibility.

For Thayer, democracy hardly meant that the popular will could not or would not make mistakes. Yet preemption of those mistakes was likely to court even greater risks. There was no hope for freedom and justice if the popular will was not allowed to learn without countermajoritarian obstruction, which would not only cut off the learning process after past mistakes but also deaden responsibility for future ones. To this effect, Frankfurter now cited Thayer at length in the closing peroration of his *Barnette* dissent, now updated in view of the urgent need to reconcile democratic self-rule and rights protection. Frankfurter cited Thayer affirming:

Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence—the power of the judiciary to disregard unconstitutional legislation—it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own

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62. See Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1, 5–6 (1993) (stating that Thayer's familiarity with England's constitution informed his position on judicial reviewability of legislative action and reporting on his visit during the debates over the 1884–85 Reform Act).

63. See JAMES BRADLEY THAYER, JOHN MARSHALL 155–56 (Riverside Press 1901) ("The popular will: it is, in the free countries of the old and new world, the source and end of all power; to the extent it is healthy, nations prosper whatever the imperfections and lapses of their institutions, while if good sense is lacking, and passions carry it away, the most perfect constitutions and the wisest laws are powerless. That ancient maxim, *quid leges sine moribus?*, is thus the last word of political science.") (citing ANDRÉ DE FRANQUEVILLE, *LE SYSTÈME JUDICIAIRE DE LA GRANDE BRETAGNE* 25–26 (J. Rothschild ed., 1893)). The Latin phrase means: what are laws without morals?

64. See generally Thayer, *supra* note 60.

errors. . . . And if it be true that the holders of legislative power are careless or evil, yet the constitutional duty of the court remains untouched; it cannot rightly attempt to protect the people by undertaking a function not its own.<sup>65</sup>

In short, when judicial guardians do *not* act when human rights are at stake, it is an opportunity to “powerfully help to bring the people and their representatives to a sense of their own responsibility.”<sup>66</sup> After these stirring words, Frankfurter closed with his own wisdom:

Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and action of a community is the ultimate reliance against unabated temptations to fetter the human spirit.<sup>67</sup>

Admittedly, in the form in which he left it, Frankfurter’s Thayerian defense of democratic learning is subject to a number of reservations. It is not obvious that people (individuals or groups) will in fact learn from their mistakes, instead of repeating them again and again. Even if learning occurs in the short term, one might hold out for legal mechanisms—such as constitutional rights—to lock in lessons learned for the long term. Moreover, the costs for those who suffer while mistakes are made are potentially high. Yet Frankfurter generalized from his own blessed situation as an immigrant Jew to infer that Americans, whatever their momentary errors, would never stray too far from their high principles. This was despite the fact that he wrote during the height of Jim Crow, and at a moment when the president who appointed him turned a blind eye to Jews in need. Furthermore, learning normally depends on teachers, who enjoy hierarchical superiority and have reliable expertise—neither of which were clearly present in Frankfurter’s model. These are all major difficulties that forbid any simple affirmation of the expectation of democratic learning.

But for all its omissions, the value of what Frankfurter endorsed in Thayer’s approach was a relative optimism about the people (coupled with interlocking pessimism about elites). Based—once again—on a kind of risk assessment, such guarded optimism held that the people could in fact learn to rule well by committing to learning by doing (and sometimes failing). By contrast, elites had a millennial record of ruling for their own sake. Even if elites could hypothetically and occasionally save the people the trouble of ruling well without

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65. *Barnette*, 319 U.S. at 667–68 (quoting THAYER, *supra* note 63, at 104–10).

66. *Id.* at 670.

67. *Id.* at 670–71.

engaging in malignant self-dealing, by doing so they would destroy any possibility that the people could gain practice in ruling themselves. Updating Thayer's argument for an age of human rights, Frankfurter was suggesting that premature or unnecessary action to keep majorities in bounds, attending to the risk of imminent or ongoing rights violations, comes with its own risks—not just of elite capture of countermajoritarian devices, but also of stunting political responsibility and obviating self-correcting education. During the same years that other liberals were drawing lessons from European history that the uttermost had to be done to save human rights from the threat of democratic collapse—going so far, in Karl Loewenstein's famous theory of "militant democracy,"<sup>68</sup> to deny rights themselves to those who threatened them—Frankfurter was drawing lessons from American history that the uttermost had to be done to keep a commitment to human rights from arresting majority rule in the name of chastening it.

Unlike Commager, and Jefferson before him, Frankfurter left room for some form of judicial review. He also stopped short of more recent critic of judicial review Jeremy Waldron, whose recent activism on this score has missed Frankfurter's most momentous suspicion—not that legislatures are better at protecting rights than judiciaries but that they are more immune to the risks of minority tyranny.<sup>69</sup> A Jeffersonian movement may well reemerge in response to conservative judicial activism today, but the arguments for and against that campaign are beyond the scope of this Article. What is interesting about Frankfurter, compared to more radical Jeffersonian populists on judicial review, is his broader concern for the reconciliation of human rights and majority rule. For the question is how Frankfurter's general thinking on the coexistence of democracy and rights in light of elite threats might bear on human rights politics today.

### *E. Rights Fallibilists Versus Rights Guardians*

Frankfurter's theory was premised on a pronounced sense of fallibility (not skepticism) that implied that no one had a superior claim to determine the meaning and scope of rights. Predictably, Ronald Dworkin associated the theory with moral relativism and pragmatism, while suggesting that abandoning such errors about

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68. See Karl Loewenstein, *Militant Democracy and Fundamental Rights*, I, 31 AM. POL. SCI. REV. 417, 417 (1937); Karl Loewenstein, *Militant Democracy and Fundamental Rights*, II, 31 AM. POL. SCI. REV. 638, 638 (1937) (both defending the limitation of rights to protect the democratic order).

69. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348 (2006) (advocating against judicial review in a democratic society).

rights allowed for an enthusiastic confidence in countermajoritarian elites enforcing principles. When it came to Frankfurter's most eminent disciple, Judge Learned Hand, for whom Dworkin once clerked, Dworkin acknowledged the fallibilist roots of a normative commitment to democracy, but nonetheless insisted on the same confidence in an elite alternative. Looking back at Dworkin's arguments against Frankfurter and Hand in an era of "revolt of the elites"<sup>70</sup> may require abandoning them in turn.

In his Oliver Wendell Holmes lectures at Harvard Law School in 1958, Hand had channeled the spirit of the *Barnette* dissent, which he cited and called "unanswerable" a full fifteen years after its issuance—and with much water, notably *Brown v. Board of Education*,<sup>71</sup> under the bridge in the meantime.<sup>72</sup> And for this reason, he cast extraordinary doubt on countermajoritarian enforcement of constitutional rights when majorities were not prepared to grant them, essentially on the Frankfurterian ground that such action came inseparably with the tyranny of the minority, and the Thayerian ground that it ruined democratic learning and vitality.<sup>73</sup> As a result, countermajoritarian action ought to be prevented from devolving into Platonic guardianship.

In his half-loving but highly opinionated critique of his old judge's articulation of the "strongest doctrine of restraint ever defended by a major judicial figure," Ronald Dworkin conceded that Hand was no moral skeptic.<sup>74</sup> But Dworkin nonetheless asserted that Hand had had "a disabling uncertainty that he—or anyone else—could discover which convictions were true: he thought moral matters much too subtle and complex to allow anyone much confidence in his own opinions."<sup>75</sup> In short, Hand was a fallibilist. Dworkin responded to his position by

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70. See generally CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* 25 (W.W. Norton 1995) (describing how educated professionals can pose the greatest danger to democracy).

71. See *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1954) (holding lower courts accountable for the enforcement of constitutional principles and implementation of the Supreme Court's landmark decision).

72. See, e.g., LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES* 1, 51 (Harv. Univ. Press 1958) (referring specifically to Frankfurter's refutation of the plausibility of selecting out civil liberties rather than a fallen economic liberty for judicial protection).

73. *Id.* at 10, 56, 68, 73.

74. Others have contended that Hand did indeed descend into skepticism after World War II, given the near absolute deference he showed as a judge in *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951), and other cases. See Edward Purcell, Jr., *Learned Hand: The Trajectory of an Old Progressive*, 43 *BUFF. L. REV.* 873 (1995).

75. RONALD DWORKIN, *FREEDOM'S LAW: A MORAL READING OF THE CONSTITUTION* 342 (Harv. Univ. Press 1997).

observing that fallibilism on its own settles nothing: all decision makers proceed under equal uncertainty, including majorities.<sup>76</sup> Dworkin also acknowledged Hand's Thayerian commitment to democratic learning, brilliantly expressed in his wartime affirmation that "liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it."<sup>77</sup> To this point, Dworkin simply insisted that "individual citizens can in fact exercise the moral responsibilities of citizenship better when final decisions involving constitutional values are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence."<sup>78</sup>

Meant as an engagement with the Frankfurterian position, Dworkin's answer not only presupposes the availability of greater certainty in moral theory than fallibilists consider plausible. It also lacks any concern for democratic legitimation, any assessment of comparative risks of mistake (and which institutions are likelier to learn from it), and above all, any fear of minority rule under the mask of moral principle. The reason, it would seem, is that, in the Platonic tradition, Dworkin actually supported elite rule. As elsewhere in his work, in his reminiscence of Hand, he made a gesture towards committing normatively to democracy. But he certainly did not embrace a majoritarianism that could relieve some set of philosophically careful guardians—ones who shared Dworkin's own views of course—from the obligation to reason about moral values and thereby allow democracy the sort of moral deliberation it would otherwise lack. Shades of mob rule haunted this approach and counted on familiar trust in the rule of the wise. Absent any sense of the unending realities of minority rule, however, Dworkin's position is not aging well. After all, its heirs are currently the right-wing counterrevolutionaries whose decisions are objectionable to Platonists only because they involve a mistake in their ethical substance rather than in their forcible minoritarian imposition—for Dworkin and other defenders of human rights against democratic support would prefer to see their own views imposed by fiat themselves.

Frankfurter's fallibilism was not simply attached to the meaning and scope of human rights but also to any hope of finding specific rights that guardians could more confidently protect. Not only did no one have a plausible case for displacing majority definition of human rights, as Frankfurter contended in *Barnette*, but also there was no reason to do so for the sake of some privileged *set* of rights. Privileging one or more rights—freedom of contract, say, or freedom from torture—for the sake

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76. *Id.*

77. *Id.* (internal citation omitted).

78. *Id.* at 344.

of empowering some higher authority to vindicate them would not work, on this account. Once again, Frankfurter focused less on the ethical substance of rights claims and more on their functional shift of power from democratic self-rule to somebody else. Rights were rights, Frankfurter had insisted, and all were under democratic control despite claimed differences in their substance. None could be seen to have priority over others, and there was no putative way to rank their cognizability by judicial or other authorities such that it would make sense to police majorities by interfering in the name of some rights rather than others.

Frankfurter explained:

The Constitution does not give us greater veto power when dealing with one phase of 'liberty' than with another . . . The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom.<sup>79</sup>

Once again, this claim arose from the long battle against the tyranny of the minority in the name of rights. The same awareness of what it meant in practice to empower judges or other countermajoritarian authorities to protect minorities against allegedly oppressive majorities applied to *all* rights, not just those of freedom of contract and sanctified private property of the *Lochner* era. It would not work to suggest that some new set of rights, like civil liberties, were more eligible for elite control.

In summary, it was not just that Frankfurter disputed that rights were trumps, aside from outlying moments in which majorities behaved so irrationally that judicial intervention was required. Rather, it was that Frankfurter firmly believed that judges possessed no expertise in balancing rights against rights or other priorities "proportionally" or in some other way.<sup>80</sup> His emphasis fell on the universal fallibility of all decision-making, such that the purpose of democracy was to provide mechanisms amidst disagreement and uncertainty to make the decision about the substance and scope of rights in relation to overall policy.

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79. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 648 (1943).

80. *Cf.* Jamal Greene, *Rights as Trumps?*, 132 HARV. L. REV. 28, 96 (2018) (discussing the merits of the "rights-as-trumps" framework, contrasted with a less absolutist framework).

### III. CONTEMPORARY HUMAN RIGHTS POLITICS

Today is widely regarded as a moment of emergency for human rights around the world.<sup>81</sup> There is no doubt that the present moment of human rights politics is quite distinct from any time in the past, especially since so much success has been achieved in recent decades in institutionalizing rights protection in so many domestic settings and at the international level.<sup>82</sup> But it is nonetheless interesting to ask how Frankfurter's vision of a democratic rights culture bears on the crisis of human rights today. It does so powerfully, with certain modifications and updates.

But to begin with, the emergency requires specifying the conditions under which a theory like Frankfurter's might apply at all. Clearly, Frankfurter presupposed that there is a democracy healthy enough for a majority to fight for its rights, a democracy that many may reasonably claim to be unavailable in diverse settings that strongmen rule—or, as many argue, never existed in the first place there or elsewhere. To the extent that democracy genuinely devolves into tyranny or does not exist, Frankfurter's theory becomes inapplicable. Indeed, the international human rights movement was born in response to this situation, whether for the sake of the communist Eastern bloc or the despotic southern cone of Latin America (or the Global South generally).<sup>83</sup> To the extent that international law and transnational movements allow human rights violations due to undemocratic rule to be raised to the level of global concern, opprobrium, and stigma, it is all to the good. Frankfurter himself, an immigrant from Adolf Hitler's Vienna, had an eye on European affairs at the time of *Barnette*; it is doubtful whether he would have had any dispute with human rights movements as commonly understood today, had there been any in response to Nazi tyranny.<sup>84</sup> And transnational legal forms of human rights protection fit perfectly with Frankfurter's outlook because of the extra tool they provide for citizen mobilization

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81. See Will Bordell & Jon Robins, 'A Crisis for Human Rights': *New Index Reveals Fall in Basic Justice*, GUARDIAN, Jan. 31, 2018, <https://www.theguardian.com/inequality/2018/jan/31/human-rights-new-rule-of-law-index-reveals-global-fall-basic-justice> [https://perma.cc/AQ8F-SV3F] (archived Sept. 19, 2019).

82. See SAMUEL MOYN, *THE LAST UTOPIA* 176–77 (Harv. Univ. Press 2010) (examining the development of the role of international law in protecting human rights).

83. See ARYEH NEIER, *THE INTERNATIONAL HUMAN RIGHTS MOVEMENT: A HISTORY* 3 (Princeton Univ. Press 2012); *id.* at 179.

84. However, it is known that Frankfurter was one of the Jewish notables whom the Pole Jan Karski, in a now notorious episode, sought out with some of the earliest news of the Holocaust in 1943—and Frankfurter did not believe him. See WALTER LAQUEUR, *THE TERRIBLE SECRET: AN INVESTIGATION INTO THE SUPPRESSION OF INFORMATION ABOUT HITLER'S "FINAL SOLUTION"* 229–38 (Weidenfeld & Nicolson 1980).



beyond moral claims and constitutional rights.<sup>85</sup> Whether found in claimed or feigned morality, constitutional text or spirit, or international legal sources, democratically pursued human rights were Frankfurter's concern. There is no reason to think that when democratic agency is in the mix of contemporary human rights politics, it courts the risk of minority rule.

But it is also true that human rights politics has regularly taken forms that conflict with Frankfurter's principled and strategic view that democracy must save itself in the absence of a savior. There are forms—even privileged forms—of human rights politics that do not fit well with democratic politics. Most obviously, human rights are now intimately associated with the judicial enforcement of rights that Frankfurter scrutinized. In spite of Frankfurter's warnings, however, such enforcement has not only conquered his country but the whole world in the age of "juristocracy."<sup>86</sup> Of course, not all judiciaries enforcing rights take action based on constitutional arrangements that entrench the norms or allow invalidation of legislation, since some human rights standards are statutory. Even then, the global tendency has been for judges to take responsibility for expanding and redefining statutory human rights, often outrunning popular legitimation and stoking backlash.<sup>87</sup> In short, no one can doubt that the juristocratic wave of our time has been part of an empowerment of legal elites in a global project that has reached self-evident limits. And, in Frankfurter's own United States, where the syndrome was born and from which it was exported, the advancement of liberal causes under countermajoritarian auspices, however effective for a time, has long since been reversed into reactionary judicial activism. Indeed, many anticipate that a rerun of the progressive campaign against a judiciary enforcing a tyranny of the minority—including in the name of rights, as in the so-called First Amendment Lochnerism of recent cases—will be in the offing sooner or later.<sup>88</sup> In this light, it is ironic that Beth Simmons has defended the democratic uses of human rights, while also

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85. See generally BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

86. See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 1 (Harv. Univ. Press 2007).

87. For incisive reflection on the British case under the auspices of the statutory Human Rights Act, see Chris Bickerton, *The Left's Journey from Politics to Law, in JUDICIAL POWER AND THE LEFT: NOTES ON A SCEPTICAL TRADITION* (Richard Elkins & Graham Gee eds., Policy Exchange 2017).

88. See Jedediah Purdy, *The Left's Guide to Reclaiming the Constitution*, N.Y. TIMES, Sept. 10, 2018, <https://www.nytimes.com/2018/09/10/opinion/brett-kavanaugh-supreme-court-constitution-democrats-.html> [<https://perma.cc/66RC-B8VL>] (archived Aug. 31, 2019).

viewing not just legislation but judicial enforcement as their prized mechanism.<sup>89</sup>

In the current moment, obviously, many will draw the reverse conclusion, especially in light of other national cases where judiciaries are viewed as the last bastion of basic values against populist incursion. On this view, Frankfurter's faith in a popular movement against the juristocratic protection of rights looks very different when the politician in question is (to take one who has stacked his own country's courts with stooges) Viktor Orban rather than FDR.<sup>90</sup> But there are several responses to the nightmare scenario that justify the elite control of democracy across the board on such grounds. For one thing, it is critical to distinguish rather than homogenize national cases, precisely where democracy is nowhere near collapse.<sup>91</sup> And notwithstanding the force of the argument that judges could hypothetically resist fascism, the Frankfurterian perspective begs the question of whether the majorities that have put Orban and other "populists" in power are in revolt for a reason. Furthermore, Frankfurter also worried that the attempt to protect basic rights through judicial agents backfired when it deprived advocates of rights sufficient incentive to take their cause to the people, and, in turn, deprived the people of the opportunity to learn from their mistakes under liberal democracy before it was too late.<sup>92</sup> None of these perspectives figure in contemporary discussion, in which judicial control of rights is romanticized as a quick fix.

But of course, Frankfurter's perspective was far broader than stigmatizing the judiciary. It bore on attending, quite generally, to the risk of embracing elite control on democratic life—and to the fact that rights protection, while a significant concern, could never take a backseat to popular self-rule, let alone function as an end run around it. In this regard, a narrow discussion of the failures (or successes) or dispensability (or necessity) of judicial rights enforcement today would

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89. See generally SIMMONS, *supra* note 85.

90. See Patrick Kingsley, *After Viktor Orban's Victory, Hungary's Judges Start to Tumble*, N.Y. TIMES, May 1, 2018, <https://www.nytimes.com/2018/05/01/world/europe/hungary-viktor-orban-judges.html> [https://perma.cc/K3K2-P9KQ] (archived Aug. 31, 2019).

91. Even though made primarily by conservatives, it is a trenchant objection to the United Kingdom's Human Rights Act, for example, that it has, in some respects, transferred control not merely to national judiciaries but also to supranational judiciaries. See generally NOEL MALCOLM, HUMAN RIGHTS AND POLITICAL WRONGS: A NEW APPROACH TO HUMAN RIGHTS LAW 9 (Policy Exchange 2017); JONATHAN SUMPTION, TRIALS OF THE STATE: LAW AND THE DECLINE OF POLITICS (Profile Books 2019).

92. See *supra* Part II.E.

miss the point of his broader intervention and the Rooseveltian politics of democratization that it defended.<sup>93</sup>

The touchy Frankfurterian question is whether there are forms of contemporary human rights politics that have functioned to defend the interests of the wrong minorities. Clearly, some people believe so. Even without indulging the dubiously conspiratorial approaches of those who see the rise of human rights politics in recent decades as a device of or a smokescreen for elite rule, it is worth considering whether human rights laws, movements, and politics have coexisted with the minoritarian and plutocratic capture of national, regional, and global institutions. In theory, and especially in practice, human rights have been framed to address the most exigent distributive insufficiency, bypassing the extraordinary rises in inequality.<sup>94</sup> The claim is about a disconnect between the priorities established by human rights politics and what majorities might prefer to prioritize—including, of course, their own self-rule. To the extent that this claim is true, it is only natural that the majorities, upset by elite success in the midst of their own disempowerment and stagnation, would respond by turning their backs on the marginal, weak, and vulnerable. And it is not shocking, though it is sad, when the majorities are incited to scapegoat victims in a classic political tactic. Instead of responding with majority politics of their own, however, advocates of human rights have often fretted about the marginal and weak and offered lectures.

Beyond distributional politics, one can also make a broader case that human rights politics has simply bypassed the public policy problem of persistent minority rule. Human rights in general have not been deployed against the strongholds of elite rule; movements have encouraged framing the problem as violations of individual perquisites rather than illicit concentrations of power. One might say, in Commager's or Jefferson's spirit, that even to the extent human rights politics has not been a device of minority rule its participants have had little to say about the fact that the powerful and wealthy have degraded the significance of the democratic will in our time.<sup>95</sup> The optical associations of human rights have tended to move in an elite direction that easily allows their mistaken identification with unaccountable power—a mistaken identification abetted by the fact that human rights laws and movements challenge that power only indirectly, if at all. It is true that human rights politics may sometimes veer in a

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93. Cf. James T. Gathii, *Beyond Samuel Moyn's Countermajoritarian Difficulty as a Model of Global Judicial Review*, 52 VAND. J. TRANSNAT'L L. 1237 (2019).

94. See, e.g., SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 1 (Harv. Univ. Press 2018).

95. See QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE ORIGINS OF NEOLIBERALISM 121 (Harv. Univ. Press 2018).

popular direction themselves, but it has so far been rare. More often than not, both the role of faraway judges *and* the countermajoritarian informational politics of nongovernmental elites—appealing to fellow elites to rein in government heartlessness—have failed to make a connection to majority interests. Just as, on the distributive side, the trade unions and the socialist parties have fallen from prominence in the age of NGOs, so too have party politics and legislative participation been avoided by most advocates of human rights, in part to convincingly assume the guise of political neutrality.

A more democratic form of human rights advocacy would not only have to counteract the risks of contributing to or distracting from minoritarian ascendancy and drop the idealization of and the reliance on elite controls; it would also have to drop its contempt for democracy as a badly flawed, generally irrational, and routinely lesser form of decision-making. “Reasoned argument elaborating underlying moral principles,” Dworkin wrote in his critique of Hand, “is rarely part of or even congenial to” the democratic process, so that “the civil benefits of public discussion . . . can be realized only when judges and the public cooperate in securing them.”<sup>96</sup> For Dworkin, it is not just that guardians are systematically better decision-makers; it is also that even popular forms of decision-making depend on judicial input to have any quality, without which choice becomes a matter of unprincipled compromise, power, and unreason. Late in life, Dworkin wrote a book entitled *Is Democracy Possible Here?*, but like many others, he felt it was only desirable to a limited extent, under the guidance of others.<sup>97</sup>

Finally, a more popular human rights politics that accepts risks would be more open to Frankfurter’s insight into the allocation to majorities of the risk of error, therefore allowing them opportunities to learn from their mistakes. In contrast, the widespread elite mobilization against the votes for Brexit and Donald Trump—attempts to reverse and to undermine both through nonelectoral means<sup>98</sup>—provides graphic evidence that few believe majorities should enjoy the privilege to make mistakes and learn from them. Yet correcting mistakes from within a democracy as fellow citizens is a far more

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96. Ronald Dworkin, *Mr. Liberty*, N.Y. REV. BOOKS (Aug. 11, 1994), <https://www.nybooks.com/articles/1994/08/11/mr-liberty/> [<https://perma.cc/YG5E-XGU2>] (archived Sept. 19, 2019).

97. See generally RONALD DWORKIN, *IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE* (Princeton Univ. Press 2008).

98. There is a parallel, for example, between legalistic attempts to forestall Brexit and to bring down President Donald Trump, both underwritten by similar forces and out of understandable desire for a quick exit for emergency, no matter the cost to democratic legitimation. See Samuel Moyn, *The Mueller Fantasy Comes Crashing Down*, N.Y. TIMES, July 26, 2019, <https://www.nytimes.com/2019/07/26/opinion/mueller-testimony.html> [<https://perma.cc/RHH4-562E>] (archived Aug. 31, 2019).

desirable and plausible vision for human rights activism than circumventing it, which in any case predictably leads to backlash and rage.

Of course, trust in the people, if it is not to be blind, partly depends on how democracy is institutionally organized. Frankfurter's own views were presumably that free and fair elections mattered, but also that mass partisan representation at multiple levels, such as governmental agencies, organized parties, and trade unions, held similar importance.<sup>99</sup> It is notable that much of his early career was devoted to the cause of unions, in support of their political goals as well as their quests for the rights to form, negotiate, and strike.<sup>100</sup> He certainly supported America's last great "populist" politician, Roosevelt, who returned the favor by appointing him to the court. But Frankfurter did not address the problem so many analysts imagine today of a forced choice between elite and more or less technocratic rule on the one hand and apocalyptic or vague appeals to "the people" on the other. What a plausible appeal to the people as the guardian of its own rights would look like has barely been addressed in theory or practice because, forsaking Frankfurter's legacy, proponents of human rights have avoided framing it as a problem—though it is perhaps the central one for the future of human rights politics.

#### IV. CONCLUSION: FROM PRINCIPLE TO STRATEGY

Human rights politics may deserve no blame, on any fair appraisal, for the costs of elite rule in the recent era—and indeed may have lessened those costs in at least some limited respects. But one must add a more openly instrumental and strategic approach to Frankfurter's intrinsic and principled arguments for the imperative of reconciling democracy and rights.<sup>101</sup> For as leading authority in the field Philip Alston has written recently, in the present crisis, "human rights proponents need to rethink many of their assumptions, re-

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99. See generally MICHAEL E. PARRISH, *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS* (1982).

100. See *id.* at 105.

101. "Human rights depend on majority support if they are to be taken seriously. A failure to back a broader politics of fairness is doubly risky. It leaves rights groups standing for principles they cannot see through. And it leaves majorities open to persuasion by troubling forces." Samuel Moyn, *How the Human Rights Movement Failed*, N.Y. TIMES, Apr. 23, 2018, <https://www.nytimes.com/2018/04/23/opinion/human-rights-movement-failed.html> [<https://perma.cc/AF3V-6CGY>] (archived on Aug. 31, 2019).

evaluate their strategies, and broaden their outreach, while not giving up on the basic principles.”<sup>102</sup>

A part of the reorientation is optical: better messaging. But Alston also recognizes that the human rights movement’s attention to the marginal, vulnerable, and weak has been largely a minoritarian concern. “From our traditional perspective,” he goes on to add, “that is how it should be . . . But the reality is that the majority in society feel that they have no stake in the human rights enterprise, and that human rights groups really are just working for ‘asylum seekers,’ felons,’ ‘terrorists,’ and the like.”<sup>103</sup> For this reason, “a new human rights agenda” must be one that “promises to take into account the concerns, and indeed the human rights, of those who feel badly done.”<sup>104</sup> If even the human rights of minorities are hostage to the human rights—and other interests—of majorities, then not only principle, but also strategy calls for a more reconciliationist approach.

Alston may disagree about how much those in revolt can sensibly claim violations of human rights norms and law (since he apparently believes that they cover distributional fairness in general). But Alston himself plausibly shames the human rights community and movement for ignoring inequality for so long.<sup>105</sup> Whoever is correct about whether human rights norms and law are or are “not enough” to engage the distributional fairness across its whole curve from poorest to richest, and from local to global, Alston’s refreshing critique of most forms of human rights politics is most definitely on the right track.

Yet there is a serious lapse in his own argument for reorientation if its horizon is not ultimately a new democratic politics that incorporates majority and minority concerns alike. It was this, after all, that Frankfurter cared most to defend, deferring to majorities to determine the results.<sup>106</sup> Admittedly, where advocacy, narrowly defined, should fit within that picture is not the general problem to think through when it comes to seeking the compatibility of majority rule with human rights, but rather a specific one, albeit of potentially enormous importance. But when it comes to that specific problem of

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102. Philip Alston, *The Populist Challenge to Human Rights*, 9 J. HUM. RTS. PRAC. 1, 2 (2017).

103. *Id.* at 6 (internal quotation marks omitted).

104. *Id.*

105. As Alston writes, “Extreme inequality should also be seen as a cause for shame on the part of the international human rights movement.” It is just that, in his view, human rights law itself is blameless for whatever mistakes have been made in downgrading the priority of economic rights and even distributive inequality (at least of extreme sorts). Philip Alston, *Extreme Inequality as the Antithesis of Human Rights*, OPEN GLOB. RIGHTS (Aug. 27, 2015), <https://www.openglobalrights.org/extreme-inequality-as-the-antithesis-of-human-rights/> [<https://perma.cc/MZ2S-R64Z>] (archived on Aug. 31, 2019).

106. *See supra* Part II.

redefining advocacy, Alston speaks wanly of “broadening the base.”<sup>107</sup> The truth is that the critically significant move for human rights advocates would be to regard themselves first and foremost as participants in a democratic conversation. Even if it is true that the democracies in which they operate are barely worthy of the name (as all democracies so far still are), countermajoritarian devices are hardly a better alternative.<sup>108</sup>

Now, it would be easy to dismiss such suggestions for reorientation as a form of pandering to those who oppose minority rights, especially to the extent that it is mainly strategic alteration in a storm—as Alston forthrightly admits his own proposal is.<sup>109</sup> But no one in the debate about human rights and “populism” is suggesting that human rights advocacy should sacrifice any principles—any more than depriving oneself of judicial activists to defend crucial entitlements would exempt others from advancing them democratically. Indeed, it is essential to protest against those who have drawn the lesson from democratic revolt in our moment that it is time to kowtow, notably in immigration matters.<sup>110</sup> But it is true that human rights and the other concerns of majorities matter (especially to them), and that human rights politics therefore needs to be reconceptualized in the name of, and therefore as a part of, majority interests, partly but not only to build coalitions that can win. A vast reorientation of the human rights enterprise beckons so that, whatever the defensible autonomy of cause groups, human rights are in the end not a “cause” apart from democracy but figure within the electoral alternative and programmatic debate in the contests for majority support.

Whether on a range of Frankfurterian intrinsic grounds or more strategic grounds, human rights need to become more democratic in the name of what Frankfurter called a “persistent positive translation of the faith of a free society into the convictions and habits and actions of a community.”<sup>111</sup> It is likely that, in the long run, this reorientation will involve much less attention to international forms of human rights politics without an equal if not greater attention to how supranational governance can come to fit better with democratic self-government, with which many forms of international law currently interfere. And it will involve the reimagination of human rights activism so that it is

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107. Alston, *supra* note 102, at 10.

108. *Id.* at 4–6.

109. *Id.* at 10–11.

110. See generally MARK LILLA, *THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS* (Harper 2017); YASCHA MOUNK, *THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER AND HOW TO SAVE IT* (Harv. Univ. Press 2018).

111. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 671 (1943).

integrally related to democratic practices that are themselves focused on the acquisition and exercise of majority self-rule—for the sake of human rights and other relevant values as majorities define and honor them.



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