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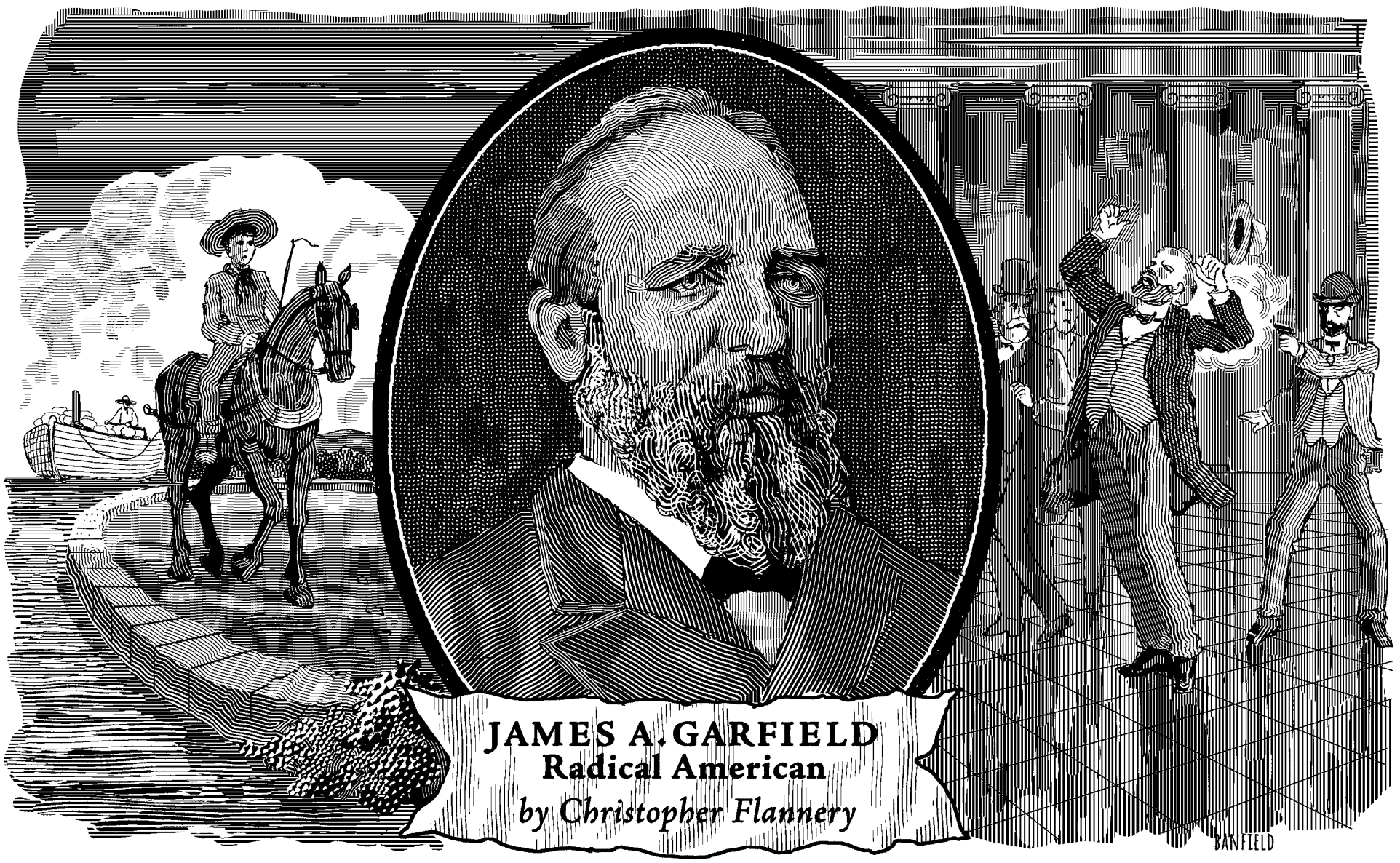

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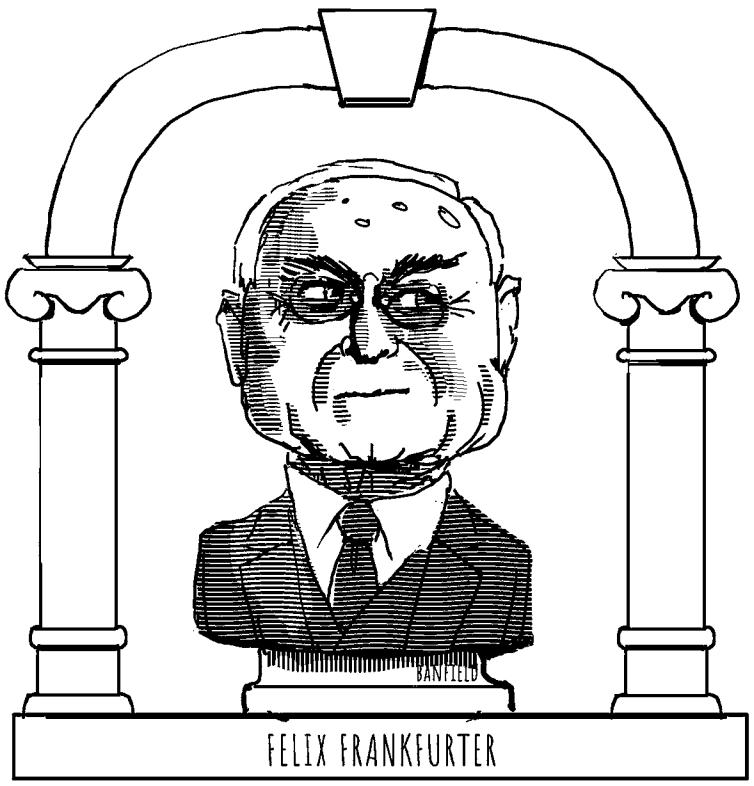
Book Review by Bradley C.S. Watson

The Accidental Originalist

Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment, by Brad Snyder.
W.W. Norton & Company, 992 pages, $45



Felix frankfurter's tenure on the Supreme Court from 1939 to 1962 coincided with the Court's willful expansion of its powers and its full-throated rejection of the Constitution's language and logic. His uneasy relationship with this jurisprudential progressivism, as well as his outsized role in creating the nation's modern "liberal establishment," are the subjects of a new book by Georgetown law professor Brad Snyder. Snyder offers a carefully researched and richly detailed account of Frankfurter's remarkable rise in his adopted country and his enduring legacy in its law and politics.

Frankfurter arrived in America on Ellis Island as a 12-year-old German-speaking Austrian Jew who knew not a word of English. He nevertheless managed, in less than 20 years, to go from the Lower East Side of Manhattan to Harvard Law School, and then to the political salons of Washington. From there it was back to Harvard, where he became a law school professor and friend to generations of America's progressive elites and an intimate advisor to presidents. His students included Dean Acheson, Alger Hiss, and many others who would shape American domestic and foreign policy at the highest levels, from the New Deal through the Great Society and beyond. He was a friend or acquaintance of almost every president from Theodore Roosevelt to Lyndon Johnson. In his early midlife, he turned down senior judicial and executive branch appointments. At the age of 56—having been on a very short list for years—he was appointed to the Supreme Court of the United States.

Early 20th-century progressives—including Frankfurter's political and intellectual heroes, such as Teddy Roosevelt, Oliver Wendell Holmes, and Louis Brandeis—saw the Court as an enemy of reform. Cases like *Lochner v. New York* (1905) cemented in the progressive mind an image of the Court as a reactionary institution. In *Lochner*, the Court invalidated a state law limiting working hours in bakeries on the basis that it violated the due process clause of the 14th Amendment. Operating under a notion of "substantive" due process, the Court took upon itself the examination of the content of legislation it saw as interfering with important rights, with a particular solicitude for economic and contractual rights. Though its occasional willingness to strike down such legislation hardly amounted to a full-blown embrace of laissez-faire economics or social Darwinism (as Holmes famously suggested in his *Lochner* dissent), it did put the Court squarely within progressive gunsights.

But by the late 1930s—possibly because of Franklin D. Roosevelt's threat to pack the Court—economic due process receded, as did the understanding that the commerce clause restrained rather than licensed Congress's power to regulate. The Court began to offer broad deference to both state and national economic regulation. It also started to use substantive due process, along with ancillary doctrines, to strike down laws it saw as discriminating against discrete and insular minorities, or those whose purported fundamental rights—whether mentioned in the Constitution or not—were infringed. With this, the civil rights revolution began.

The Court also claimed to make itself unassailable by the political branches, grandiosely announcing in the desegregation case of *Cooper v. Aaron* (1958) that "the federal judiciary is supreme in the exposition of the law of the Constitution," and that the Court's mere *interpretation* of the 14th Amendment *is* "the supreme law of the land." It immodestly insisted

that to resist the Court's interpretation is to "war against the Constitution." In *Baker v. Carr* (1962), the Court went so far as to declare state redistricting a justiciable rather than political question, in a case that did not even touch on race. That decision laid the groundwork for the extra-constitutional "one man, one vote" standard, and led to ceaseless judicial meddling in the drawing of electoral boundaries.

Through such actions the court put itself in the vanguard of social, political, and constitutional change, and came to be embraced by many progressives as the most direct route to major policy victories. But Frankfurter, a man of broad progressive sympathies, never accepted the Court's self-proclaimed role as the final arbiter of constitutional meaning. Nor did he accept the Court's inflated sense of itself as the *sine qua non* of national progress. For him, the democratic political process, necessitating persuasion and consent of the governed, remained both possible and necessary. Furthermore, judges, unlike legislators, were in no position to weigh the relative advantages of policy choices, or to inform themselves of the latest findings of social science experts.

As Snyder makes clear, Frankfurter was of the old breed of progressives who saw the legislative branch as the locus of political and economic change. The Constitution neither created nor sanctioned judicial supremacy. But Frankfurter's view stemmed less from a well-thought-out judicial philosophy or deep dive into constitutional theory and history than from his basically sound intuitions, democratic sensibility, and fundamental patriotism. He had great faith in his country and countrymen; an America that had been good to him was good. He was, as it were, an accidental originalist. This marked him out from the intentional non-originalists with whom he served and who would follow him. They would come to dominate the jurisprudential landscape to such an extent that Frankfurter was viewed, especially by fellow liberals, as something of an anomaly.

Following legal scholar James Bradley Thayer, Frankfurter believed federal judges should only hold laws unconstitutional in the clearest of cases. As Court decisions struck down New Deal legislation in the mid 1930s, he remained confident that "there was nothing wrong with the Constitution…there was something wrong with the Court, specifically the justices imposing their personal political views on the nation." And he reported this confidence to his friend Franklin Roosevelt. But like Holmes and Brandeis, Frankfurter was far from a model of consistency in this regard. Like them, he was willing to intervene when civil rights preferred by progressives were at stake.

Frankfurter viewed the constitution less as "a text for interpretation," and more as "an instrument of government." Though he did not publicly endorse FDR's court-packing bill, he viewed it as an opportunity to put "the fear of God" into judges. Frankfurter had always had at least one foot in the world of politics, and even after President Roosevelt appointed him to the Court, Snyder writes, "he continued to enter the White House without being recorded on the daily logs and to advise the president." He would continue to advise presidents over the course of his long life, even on matters that he knew were likely to come before the Court—a reminder that Washington was an even smaller town then than it is now.

In the area of civil liberties, Frankfurter's progressive record is checkered. In *Minersville School District v. Gobitis* (1940), he wrote the majority decision (overturned three years later) that held a school district could impose a compulsory flag salute to promote national cohesion. For him, love of country was a good and necessary thing. As Snyder notes, Frankfurter took a great interest in the war, and at the time of the decision was serving as an informal advisor to the executive branch. But his reasoning also reflected "his skepticism about judicial power and his boundless democratic faith." It was a skepticism reflected in his relatively cautious approach to enforcing the provisions of the Bill of Rights against the states, via the judicial doctrine of "incorporation."

At the same time, Snyder argues, his "aversion to the Due Process Clause as a tool for empowering judges in no way prevented Frankfurter's invocation of the Fifth and Fourteenth Amendments to promote racial equality." Frankfurter insisted that the equal protection clause is "not a fixed formula defined with finality at a particular time," but is rather based on "evolution of opinion."

As school desegregation cases made their way to the Court in the early '50s, Frankfurter extensively advised a friend and former law clerk, who was then in the solicitor general's office. The subject of their discussions was how to draft the Truman Administration's amicus brief, aimed at overturning the "separate but equal" doctrine. Snyder understatedly reports that "extrajudicial conversations with a Justice Department lawyer about a pending case violated judicial ethics and separation of powers."

By the time *Brown v. Board of Education* (1954) was decided, Frankfurter had done much to achieve unanimity in a case that was based more on contemporary and controvertible social science studies than on rigorous constitutional analysis. A few years later, he would even sign on to the Court's opinion in *Cooper v. Aaron*, albeit offering a concurrence that was an attenuated effort to emphasize the rule of law rather than judges. Snyder claims it represented "a more modest, democratic vision of the Supreme Court."

Frankfurter's last years on the Court marked a battle of wills between him and his more activist colleagues, including Black, William Brennan, William O. Douglas, and Earl Warren—of whom he remarked, "They don't understand that there will come a time when there is a very different majority." The decades since have made it clear that Frankfurter had little to worry about on that score.

Baker v. Carr was the last case in which Frankfurter issued an opinion—a vigorous dissent urging the Court to stay out of disputes with respect to which the Constitution issues no commands. Alas, the old "political questions" doctrine that Frankfurter sought to defend has had precious few friends since, as justices have become enamored enough of themselves and the Court to believe that almost any political or moral question is ultimately a justiciable question.

Brad Snyder's book is a triumph of biography, seamlessly weaving together myriad details of a complex and consequential life. It is less satisfying as an account of Frankfurter's constitutional jurisprudence. By accident or design, Snyder's approach submerges important truths which deserve more forceful articulation: Frankfurter stumbled more than reasoned his way into being a relatively reasonable justice in a time of unreason. Furthermore, though he was in some ways a better voice for judicial restraint than his progressive idols or many of his contemporaries or successors, he was hardly consistent. He could have benefited from more constitutionalism and less democratic faith, not to mention a purer judicial temperament. Still, his life reminds us that contemporary America could use more patriotic progressives like Felix Frankfurter.

Bradley C.S. Watson teaches in the Van Andel Graduate School of Government at Hillsdale College in Washington, D.C. His books include Living Constitution, Dying Faith: Progressivism and the New Science of Jurisprudence *(ISI Books), and* Progressivism: The Strange History of a Radical Idea *(University of Notre Dame Press).*