

ARTICLE

Frankfurter, Abstention Doctrine, and the Development of Modern Federalism: A History and Three Futures

Lael Weinberger[†]

In its first century and a half, the Supreme Court never used the term “federalism” in its opinions. The Court had talked about federal-state relations before, but the concept had gone unlabeled. That changed in 1939. Something new was happening, thanks in large part to Justice Felix Frankfurter. Just a month after joining the Court, Frankfurter authored the Court’s first opinion using the term “federalism.” Frankfurter introduced federalism as a key concept for analyzing the relationship between state courts and federal courts. Before long, Frankfurter would rely on federalism to fashion an original and enduring doctrine of judicial federalism: abstention, which requires federal courts to sometimes refrain from hearing cases that are within their jurisdiction.

This Article provides a historical study of Frankfurter’s contribution to the modern law of judicial federalism. It documents Frankfurter’s theory of federalism in his judicial opinions with a focus on the abstention cases. It also shows how the abstention cases and their concept of federalism were rooted in Frankfurter’s Progressive politics. They were a reaction to what he perceived as the federal courts’ anti-regulatory and anti-labor attitudes.

The history—relevant today as the political discussion around the courts again echoes the Progressive Era—sets the stage for considering the future of abstention. I suggest three possibilities. The first, an originalist future, would more or less maintain the contemporary Supreme Court’s status quo on abstention, somewhat more modest than what Frankfurter envisioned: a cautious use of abstention in a relatively small number of equitable cases. A second possibility would be a liberal future that backtracks from abstention, as legal liberals recognize a cautionary lesson in Frankfurter’s hostility to an assertive, rights-protecting judiciary. The third future would be one embracing Frankfurter’s vision of abstention in the name of judicial

[†] Raoul Berger-Mark DeWolfe Howe Legal History Fellow, Harvard Law School. For helpful conversations and thoughtful feedback that made this Article better, I am grateful to Patrick Barry, William Baude, Lisa Bernstein, Samuel Bray, Zachary Clopton, Michael Collins, Richard Epstein, Patrick Fuster, Daniel Hemel, Zac Henderson, Aziz Huq, Daniel Kelly, Adam Mortara, Michael Solimine, Manuel Valle, Laura Weinrib, Hon. Diane Wood, Ilan Wurman, and participants in workshops and conferences at the University of Chicago, Loyola University Chicago, and the American Association of Law Schools. Thanks also to the editors of *The University of Chicago Law Review* for their hard work and helpful input.

restraint. Abstention has the potential to curb federal court power and, at least on the margins, put more adjudicative power in state courts. This possibility might bring together modern progressives, who are wary about a largely conservative federal judiciary, with conservatives who want to promote judicial restraint and an increase in democratic accountability.

INTRODUCTION	1739
I. FELIX FRANKFURTER AND THE INVENTION OF FEDERALISM.....	1745
A. 1939: Frankfurter and Federalism Join the Court.....	1747
B. Limiting Injunctions	1751
C. Abstention Doctrine.....	1753
II. THE POLITICS OF COURTS IN THE PROGRESSIVE ERA.....	1755
A. The Political Fight over the Federal Courts in the Progressive Era	1756
B. Federal Versus State	1759
1. The relative priority of state versus federal law.	1759
2. The availability of political means for reining in the state courts.....	1761
III. THE POLITICS OF ABSTENTION: FRANKFURTER'S VISION OF FEDERALISM ..	1763
A. Frankfurter and the Progressive Position	1763
B. Frankfurter and the Burden on the Federal Courts	1766
C. Application of the Lessons of the Progressive Era: The Legislative Origins of Abstention.....	1769
D. Putting Federalism in Context: A Preliminary Look at Why Frankfurter's Vision of Federalism and Abstention Succeeded.....	1771
1. Learning the lessons of the Progressive Era and bringing them into the era of legal liberalism.	1773
2. Frankfurter and Black on abstention.	1775
3. Why federalism succeeded where judicial restraint failed.	1777
IV. THREE FUTURES FOR FEDERALISM-BASED ABSTENTION.....	1781
A. The Textual Problem	1782
B. The Judicial-Role Concern.....	1785
1. <i>Pullman</i> as a cautionary tale.	1786
2. Reasons legal liberals might be willing to delay the judicial protection of rights (and why federalism is not a good reason).....	1787
C. Restraining the Courts	1790
CONCLUSION	1796

INTRODUCTION

The Supreme Court did not use the term “federalism” in any opinions in its first 150 years.¹ The Court had (of course) previously talked about federal-state relations, but it did so without the term “federalism”—it preferred a different vocabulary, discussing the police powers of the states and the enumerated powers of the federal government.² The concept of federalism went unlabeled.³ It was not until 1939 that the term “federalism” came into regular use on the Supreme Court. Federalism arrived at the Court as a free-floating principle of constitutional theory, not explicitly tethered to any particular textual basis in the Constitution. For the ambitious justice who introduced the term, it would provide the basis for a subtle but significant rollback of federal court authority. That ambitious justice was Felix Frankfurter. His innovation fundamentally shaped the relationship between federal and state courts. Particularly through his invention of the federal court abstention doctrine, Justice Frankfurter made federalism a central consideration in assessing whether a particular case should be in state court instead of federal court.⁴ How and why Frankfurter brought federalism to the Supreme Court’s case law is an untold chapter in federalism’s legal, political, and intellectual history. It is situated squarely in the Progressive Era debates about the role of the federal courts in the American constitutional system. It is a history that can also help us to see more clearly the challenges and possibilities for abstention’s future.

¹ The word “federalism” appears only once in the *US Reports* prior to 1939 and then in an oral argument rather than an opinion of the Supreme Court. See *Smith v Turner*, 48 US 283, 340 (1849).

² See generally, for example, *Ex parte Royall*, 117 US 241 (1886) (discussing state-federal relationships in the context of habeas corpus proceedings).

³ The term “federalism” was of course not Frankfurter’s creation. It could be found in prior cases and legal literature. See notes 31–38 and accompanying text. The term, however, had very rarely been used in any judicial opinions prior to Frankfurter’s use of the term on the Supreme Court.

⁴ Frankfurter introduced the terminology of federalism in a series of cases involving federal court review of state taxing power. The first of those cases focused on the authority of a federal court to enjoin state court proceedings, so the first use of the term “federalism” in the Supreme Court was a reference to judicial federalism. See *Hale v Bimco Trading, Inc.*, 306 US 375, 377–78 (1939). See also notes 42–47 and accompanying text. Frankfurter referred to federalism in several other tax cases before he used the conceptual apparatus introduced in those cases to innovate in the field of federal courts. See *Texas v Florida*, 306 US 398, 428 (1939) (Frankfurter dissenting); *Graves v New York*, 306 US 466, 488 (1939) (Frankfurter concurring); *State Tax Commission of Utah v Aldrich*, 316 US 174, 183–84 (1942) (Frankfurter concurring). See also *O’Malley v Woodrough*, 307 US 277, 294–95 n 15 (1939) (Butler dissenting) (quoting Frankfurter’s concurrence in *Graves* on federalism).

Frankfurter invoked federalism to justify creating the first abstention doctrine in *Railroad Commission of Texas v Pullman Co.*⁵ In that case, the Court held that federal courts must decline to decide cases that depend on an unsettled issue of state law, the resolution of which might remove the necessity of deciding a constitutional issue.⁶ Since Frankfurter introduced “*Pullman* abstention,” abstention doctrines have multiplied. Federal courts apply several related abstention doctrines to refuse to hear certain cases that can be heard by state courts.⁷ The federal abstention doctrines have been controversial. A number of scholars have questioned whether it is appropriate for federal courts to refuse to decide a case that is clearly within their jurisdiction.⁸ In response, a leading defense of abstention argues that abstention doctrines are based on longstanding traditions of the judiciary’s discretionary control of its docket.⁹

Federalism, though, was not among the reasons offered to justify judicial discretion to decline hearing cases prior to Frankfurter’s confirmation to the Supreme Court. By offering a history of Frankfurter’s interest in federalism-based abstention, this Article highlights the historical contingency of the doctrine. That doesn’t discredit the doctrine—just about every conceivable legal rule has some element of historical contingency in the circumstances of its creation. But it does show that the federalism justification for abstention doesn’t have the historical pedigree some have used to defend abstention.

This historical point has doctrinal implications for abstention’s scope. The more federalism is treated as a freestanding legal value that might justify abstention,¹⁰ the more likely it is that abstention should apply across the board—to cases at law and equity—when states have strong interests in deciding a given

⁵ 312 US 496 (1941).

⁶ See id at 498–500.

⁷ See Erwin Chemerinsky, *Federal Jurisdiction* §§ 12–14 at 829–938 (Wolters Kluwer 7th ed 2016) (describing the abstention doctrines).

⁸ See generally, for example, Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L J 71 (1984).

⁹ See generally, for example, David L. Shapiro, *Jurisdiction and Discretion*, 60 NYU L Rev 543 (1985).

¹⁰ See, for example, *Courthouse News Service v Brown*, 908 F3d 1063, 1071 (7th Cir 2018) (stating that “general principles of federalism [] underlie all of the abstention doctrines”).

case.¹¹ But if federalism is just to be folded into the equity calculus as another factor when a court already has some measure of discretion, then the current Supreme Court's tendency to limit abstention strictly to actions seeking "equitable or discretionary relief" makes sense.¹² Still, commentators have noted that, despite strong language in some of its opinions, the Supreme Court has not yet directly held that abstention could *never* be used in actions at law.¹³ For his part, Frankfurter preferred the broader version of abstention. Contra the Supreme Court's emphasis in more recent years, Frankfurter denied that abstention was merely a product of equity and claimed it had an independent basis in federalism.¹⁴

Judicial federalism—the management of the relationship between federal and state courts—is not usually at the top of anyone's list of politically charged legal issues. Abstention certainly is not. But Frankfurter's innovations in this field were a means to his very political goal: reducing the power of the federal courts. Federalism was the malleable, ostensibly neutral concept that provided Frankfurter with a rationale to pursue this long-term goal.

Federalism's political flexibility and unpredictability is a key theme that emerges from the history. At various times in American history, federalism has taken on partisan political valences. When the Rehnquist Court cut back on federal power,¹⁵ observers described it as a conservative "federalism revolution"—tied to both the conservative politics and the historically based

¹¹ See *Louisiana Power & Light Co v City of Thibodaux*, 360 US 25, 27–28 (1959) (applying the abstention doctrine to an eminent domain proceeding that was not a traditional equitable proceeding because eminent domain is a "sovereign prerogative" of the state).

¹² See *Quackenbush v Allstate Insurance Co*, 517 US 706, 730 (1996).

¹³ See Richard H. Fallon Jr, John F. Manning, Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 1107–08 (Foundation 7th ed 2015).

¹⁴ *Thibodaux*, 360 US at 28.

¹⁵ See, for example, *United States v Lopez*, 514 US 549, 575 (1995) (Kennedy concurring) (joining the majority in striking down the Gun-Free School Zones Act of 1990 and noting that "[t]his case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution"); *United States v Morrison*, 529 US 598, 627 (2000) (striking down the Violence Against Women Act as beyond federal power and suggesting that "under our federal system" any remedy for such violence must be provided by state, not federal, authorities). See also *Morrison*, 529 US at 654 (Souter dissenting) (criticizing the majority as ironically requiring the states to "enjoy the new federalism whether they want it or not"). These cases were sometimes referred to as the "New Federalism." See, for example, Rosalie Berger Levinson, *Will the New Federalism Be the Legacy of the Rehnquist Court?*, 40 Valp U L Rev 589, 590 (2006).

originalist legal theories of that Court's majority.¹⁶ But recent scholarship has reminded us that federalism has no single political orientation.¹⁷ Federalism may have served conservative ends in some historical episodes, but it served progressive ends in others.¹⁸ Contemporary proponents of progressive federalism¹⁹ argue that federalism should once again be used to further progressive causes.²⁰ To illustrate, today, liberal Democratic state attorneys general are putting progressive federalism into action as they litigate against conservative policies promulgated by a Republican administration in the national government.²¹ The history

¹⁶ See generally, for example, Erwin Chemerinsky, *The Federalism Revolution*, 31 NM L Rev 7 (2001). See also Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* 67–70, 249–78, 338–39 (Norton 2005); Richard H. Fallon Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U Chi L Rev 429, 446–52 (2002) (arguing that legal conservatism is a family of philosophies rather than a single position, and suggesting that federalism may have stronger links with some versions of conservatism and weaker links with others); Linda Greenhouse, *2,691 Decisions* (NY Times, July 13, 2008), archived at <https://perma.cc/U2TG-2L65>; Linda Greenhouse, *States Are Given New Legal Shield by Supreme Court* (NY Times, June 24, 1999), archived at <https://perma.cc/9DHG-UBV8> (discussing how the Court sharply curbed federal power in three then-recent cases).

¹⁷ See, for example, Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 Harv L Rev 4, 44–74 (2010). See also generally Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (Oxford 2018).

¹⁸ With a more recent wave of scholarship associated with the idea of “Progressive Federalism,” Professor Heather K. Gerken has suggested that the federalism in these cases could be thought of as “Federalism 2.0” while the Progressive Federalism scholarship represents “Federalism 3.0.” See generally Heather K. Gerken, *Federalism 3.0*, 105 Cal L Rev 1695 (2017). In another essay, she called it the “new new federalism.” Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 Yale L J 1889, 1889 (2014) (emphasis in original).

¹⁹ When historians refer to the period known as the “Progressive Era,” they generally mean the era of social reform and activism from the late nineteenth century to the early twentieth century. (The exact contours of the period are endlessly debated among historians.) See generally Heather Cox Richardson, *Reconstructing the Gilded Age and Progressive Era*, in Christopher McKnight Nichols and Nancy C. Unger, eds., *A Companion to the Gilded Age and Progressive Era* 7 (Wiley 2017) (reviewing historiographical debates on periodizing the Progressive Era). In more contemporary legal and political discourse, the term is back in vogue. As I suggest below, there is good reason to see links between the modern progressive concerns about the courts and the historical Progressive Era and its priorities. See notes 269–70 and accompanying text. In order to provide some clarity, I capitalize “Progressive” when I use it to refer to the historical era, while I use “progressive” without capitalization to refer to more contemporary political movements.

²⁰ See generally, for example, Heather K. Gerken, *A New Progressive Federalism*, 24 Democracy J 37 (Spring 2012); Heather K. Gerken and Joshua Revesz, *Progressive Federalism: A User’s Guide*, 44 Democracy J 39 (Spring 2017); Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 Harv L & Pol Rev 33 (2009).

²¹ See Elbert Lin, *States Suing the Federal Government: Protecting Liberty or Playing Politics?*, 52 U Richmond L Rev 633, 641–46 (2018) (describing recent litigation against

recounted in this Article provides a historical illustration of the progressive federalism of the Progressive Era itself, showing that Frankfurter used federalism to try to hold back the conservative federal courts. Federalism itself was not viewed as partisan, political language—and that, it seems, is part of the appeal of using the vocabulary of federalism to pursue political objectives.

The history recounted in this Article demonstrates that progressive federalism has deep roots. It also directs the focus to an issue that has mostly been left out of recent progressive federalism scholarship. In that literature, there has been plenty of discussion of the relationship between federal and state legislative, executive, and regulatory powers. This Article instead emphasizes judicial federalism—that is, the relationship between federal and state courts. A close look at the politics of judicial federalism is timely. Since the summer of 2018 and the contentious arguments following the retirement of Justice Anthony Kennedy, there have been renewed calls by a new generation of liberals and progressives to restrain the federal courts.²² The national political conversation around the courts today once again echoes the concerns raised in the Progressive Era. Abstention deserves to be part of the discussion—not only as an option, but as a reminder

the Trump administration initiated by state attorneys general); Philip Green, Comment, *Keeping Them Honest: How State Attorneys General Use Multistate Litigation to Exert Meaningful Oversight over Administrative Agencies in the Trump Era*, 71 Admin L Rev 251, 258–64 (2019) (describing recent litigation against the Trump administration in the context of executive agencies in particular). See also Margaret H. Lemos and Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 Tex L Rev 43, 65–85 (2018) (describing the rise of attorney general–led public-law litigation from the late twentieth century into the era of the Trump presidency). Another historical example illustrating the changing political valences is the use of federalism in two very different civil rights contexts. In the mid-twentieth century, southern segregationists tried to use principles of federalism to impede federal civil rights enforcement. But in the 1840s, principles of federalism allowed states to argue for more extensive citizenship protections for Black Americans. See Maeve Glass, *Citizens of the State*, 85 U Chi L Rev 865, 871, 919–33 (2018).

²² See, for example, Gregg Re, *Liberal Profs Launch Campaign to Pack Supreme Court After Kavanaugh Confirmation* (Fox News, Oct 16, 2018), archived at <https://perma.cc/AP2P-UAAZ>; Daniel Hemel and Christopher Jon Sprigman, *Should Progressives Wage War on the Supreme Court?* (Slate, Oct 11, 2018), archived at <https://perma.cc/CA6P-B8UB>; Dylan Matthews, *Court-Packing, Democrats' Nuclear Option for the Supreme Court, Explained* (Vox, Oct 5, 2018), archived at <https://perma.cc/Y9HG-B3S9>; Ian Ayres and John Fabian Witt, *Democrats Need a Plan B for the Supreme Court. Here's One Option*. (Wash Post, July 27, 2018), online at https://www.washingtonpost.com/opinions/democrats-need-a-plan-b-for-the-supreme-court-heres-one-option/2018/07/27/4c77fd4e-91a6-11e8-b769-e3fff17f0689_story.html (visited May 21, 2020) (Perma archive unavailable); Michael Hiltzik, *How a New Court-Packing Scheme Could Save the Supreme Court from Right-Wing Domination* (LA Times, July 2, 2018), archived at <https://perma.cc/4UVZ-U9AC>.

that the Progressive opposition to the courts had (and likely will have again) consequences that might be discomfiting to today's progressives and liberals.²³ The story of Frankfurter's abstention can, among other things, remind modern observers that principles like federalism can have an element of unpredictability even when wielded strategically for political gains. Progressive politicians discussed something very much like abstention as early as the 1910s, and Frankfurter took note. But by the time Frankfurter made it part of the Supreme Court's jurisprudence, the labor issues that had originally motivated its introduction were (essentially) gone and the doctrine's first application thwarted civil rights litigation instead.

After considering the history of Frankfurter's federalism as well as its role in introducing the vocabulary of federalism and creating abstention doctrines, this Article presents three possible futures for federalism-based abstention doctrine. One possible future is to maintain the Supreme Court's current status quo, which emphasizes the division between actions at law and equitable actions. The current state of affairs is more informed by originalist (or at least historical) considerations than was Frankfurter's most expansive vision of abstention: if one believes that legitimate constitutional interpretation requires ascertaining the meaning of the Constitution at the time of its adoption, Frankfurter's originality in crafting abstention doctrine is a liability. The discretionary traditions of equity may provide a historical basis for abstention, but federalism does not. The upshot of this analysis is to support the Supreme Court's tendency in the Rehnquist and Roberts eras to apply abstention in equitable actions but not in actions at law.²⁴

A second future would involve a drastic cutback of abstention doctrine. This might be thought of as a "legal liberal" future. Abstention, as Frankfurter designed it, is in tension with the liberal minority-rights-protecting vision for the courts. Abstention was designed by a Progressive in order to allow federal courts to avoid deciding issues of federal law, which should be troubling to legal liberals who look to federal courts to preserve minority rights.

²³ For a discussion of the racial politics of the *Pullman* decision, see text accompanying notes 249–54.

²⁴ For an example from the Rehnquist court, see *Quackenbush*, 517 US at 716–31. For an example from the Roberts court, see *Sprint Communications, Inc v Jacobs*, 571 US 69, 77 (2013).

A third future would embrace the fullness of Frankfurter's vision for abstention. For either a modern progressive or for a "judicial restraint" conservative interested in reducing the power of the federal courts, Frankfurter's vision might be inspiring. At least on the margins, abstention promises to curb federal court power and put more adjudicative power in state courts.

This Article is structured as follows. Part I describes Frankfurter's introduction of federalism on the Court. Part II describes the Progressive Era conflicts surrounding the federal courts that formed the backdrop for Frankfurter's thinking. Part III explores Frankfurter's analysis of federalism and the role of the federal courts in light of his Progressive commitments. It documents how abstention specifically emerged from the Progressive Era efforts to limit federal court power and instead to empower state courts. Part IV uses this history to consider the three possible futures mentioned above for abstention.

I. FELIX FRANKFURTER AND THE INVENTION OF FEDERALISM

Prior to 1939, the Supreme Court never used the term "federalism." The Court had dealt with classic issues of federal power throughout its history—such as the supremacy of federal law over state law²⁵ and the scope of various enumerated powers in the federal constitution.²⁶ But "federalism" was a term used by scholars, not judges. Scholars were the ones who had the occasion to describe, at a high level of generality, the concept of a government involving multiple locations of authority. This could describe the national and state governments in the American system,²⁷ or similar arrangements in any number of other countries.²⁸ Sometimes the term was also used to refer to a political attitude, in which case

²⁵ See, for example, *McCulloch v Maryland*, 17 US (4 Wheat) 316, 326–27 (1819).

²⁶ See, for example, *Gibbons v Ogden*, 22 US (9 Wheat) 1, 194–222 (1824) (addressing the scope of congressional power under the Commerce Clause).

²⁷ See, for example, Andrew C. McLaughlin, *The Background of American Federalism*, 12 Am Polit Sci Rev 215, 235–37 (1918); John Bassett Moore, *Four Phases of American Development: Federalism—Democracy—Imperialism—Expansion* 9–46 (Johns Hopkins 1912).

²⁸ See generally, for example, Herman G. James, *Federalism in Latin America*, 55 Bull Pan Am Union 229 (1922); Charles Grove Haines, *Judicial Interpretation of the Constitution Act of the Commonwealth of Australia*, 30 Harv L Rev 595 (1917).

it could refer generally to an attitude of centralizing,²⁹ and sometimes to the Federalist political party at the nation's founding.³⁰

The term had rarely been used in *any* judicial opinions prior to Justice Frankfurter's use of the term on the Supreme Court in 1939. Database searches of all state and federal cases for "federalism" reveal only twelve references in any reported cases decided before 1939.³¹ The references to the term were often trivial. One of these uses was in the *US Reports* in an oral argument.³² Two more were in oral argument in state courts.³³ Two were in early nineteenth-century libel cases in which allegedly defamatory newspaper publications mentioned "federalism" in discussions of state politics.³⁴ Two were citations to historical works that used the term in their titles—one was about the United States and one about Australia.³⁵ One was a reference to a French legal theorist as a "leading French writer on Federalism."³⁶ One was a reference to England, not the United States.³⁷ Only in three cases did the

²⁹ See, for example, *Judson Harmon on Jefferson's Ideas: Urges Democrats to Return to Old Principles*, NY Times 5 (Mar 5, 1901); *Congressman Williams Criticises Democrats*, NY Times 5 (Oct 7, 1902).

³⁰ *The Federalists: Their System of Government the Subject of the Second Volume of "The American Nation."*, NY Times BR62 (Feb 3, 1906).

³¹ I ran searches in the databases Westlaw and Lexis Advance for all state and federal cases decided prior to 1939. I compared the results, which were almost but not perfectly identical. Lexis also returned *Ex parte Royall*, 117 US 241 (1886), but I have omitted it from the count because the term "federalism" appears only in a notation added by Lexis.

³² See *Smith v Turner*, 48 US 283, 340 (1849).

³³ See *Commonwealth v Blanding*, 20 Mass 304, 308 (1825) (reprinting a reference from oral argument to an article entitled "Monarchy of Federalism"); *State v Hunt*, 20 SCL (2 Hill) 1, 43–44 (SC App 1834) (reprinting the characterization at oral argument of the election of Thomas Jefferson as a "contest [] between federalism, or national rights and liberal construction on the one side, and democracy, or State rights and strict construction on the other").

³⁴ In one of the cases, the term seemed to be used as one of opprobrium. See *Beardsley v Maynard*, 4 Wend 336, 346 (NY Sup 1830) (reprinting one of the allegedly libelous newspaper publications that used the term "federalism" in discussing state politics). In the other case, the term was used positively. See *United States v Haswell*, 26 F Cases 218, 218 (CC D Vt 1800).

³⁵ See *Bosworth v Harp*, 157 SW 1084, 1085 (Ky App 1913) (citing Henry Adams's book, *New England Federalism*, in a discussion of secession); *Committee for Industrial Organization v Hague*, 25 F Supp 127, 137 (D NJ 1938) (suggesting that the constitutional protection of free speech is a product of "that fear of the central government which is both the reason for and the handicap of Federations" and citing several histories of other federated states, including *Failure of Federalism in Australia*).

³⁶ *United States v Flegenheimer*, 14 F Supp 584, 585–86 (D NJ 1935) (arguing for adoption of a uniform interstate law and citing Louis Le Fur's *Etat Federal et Confederation d'Etats* for the general proposition "that the field for uniformity widens with civilization").

³⁷ See *Winkler v Scudder*, 1 Ga 108, 128 (1846) (using the term "federalism" to describe the nationalization of England's commerce: "She was then throwing off the restraints of Federalism, and multiplying the industrial pursuits of her people").

term appear in an opinion with anything like a substantive reference to the American federal-state relationship.³⁸ With this as the background in jurisprudence, it is all the more striking how suddenly and dramatically Frankfurter introduced the term into the Supreme Court’s jurisprudence.

Federalism appeared repeatedly in Frankfurter’s judicial opinions in a variety of settings. It appeared in Supreme Court opinions almost immediately after Frankfurter joined the Court in 1939 as he began to articulate some of his views on federalism in a diverse range of cases.³⁹ This Part will introduce Frankfurter’s initial statements of his views in his 1939 opinions, before turning to focus on two areas of particular importance to him: the power to issue injunctions and abstention doctrine.

A. 1939: Frankfurter and Federalism Join the Court

Frankfurter made four references to federalism in his judicial opinions in his first year on the Court. Giving a concept a name is a significant development. The label may not change the concept,⁴⁰ but a change in labeling is a clue to the historian that something new is going on.⁴¹

The first time the word “federalism” appeared in a Supreme Court opinion was Frankfurter’s opinion in *Hale v Bimco*

³⁸ See *W.B. Surviving Partner v Latimer*, 4 US Appx (4 Dall Appx) i, vi (Del 1788) (referencing the “spirit of federalism” that motivated the 1776 Delaware constitution to “recogniz[e] the authority of ‘resolutions of congress,’ and . . . requir[e] ‘a judge of admiralty’”); *United States v Parker*, 19 F Supp 450, 453–54 (D NJ 1937) (“This opinion is not the place to expound our hobby of comparative federalism. Suffice it to say that our Constitution differs from that of most federations in failing to allocate the definition, at least, if not the administration of criminal law to the central government.”); *Passett v Chase*, 107 S 689, 692 (Fla 1926):

[t]he development of the law on [habeas corpus] has been a part of the prodigious contest which has been waged in the past history of this Union between the proponents of nationalism and localism, of federalism and states’ rights, of the liberal constructionists, and the strict constructionists, of the federal Constitution, and between those great centripetal and centrifugal forces involved in our admirable but somewhat complex system of government.

³⁹ On Frankfurter’s appointment, see Noah Feldman, *Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices* 152–63 (Twelve 2010).

⁴⁰ Though it might—terminology used to “frame” a concept can shape observers’ perceptions of that concept. See Donald J. Kochan, *The [Takings] Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 Fla St U L Rev 1021, 1081–93 (2018).

⁴¹ On the importance of concepts and terminology in intellectual history, see generally Peter de Bolla, *The Architecture of Concepts: The Historical Formation of Human Rights* (Fordham 2013).

*Trading, Inc.*⁴² The opinion was released on February 27, 1939, barely a month after Frankfurter had joined the Court.⁴³ The case concerned a Florida statute that required the State Road Department to inspect imported cement and collect an inspection fee. In a Florida state court proceeding, a petitioner sought a writ of mandamus to compel Hale, a member of Florida's State Road Department, to enforce the statute.⁴⁴ The Supreme Court of Florida issued the writ of mandamus. Meanwhile, Bimco Trading filed suit in federal district court, arguing that the Florida statute was unconstitutional and seeking an injunction against enforcement of the statute.⁴⁵ The federal court issued the injunction and the Florida Supreme Court stayed the mandamus pending Supreme Court review. The first issue centered on the Anti-Injunction Act.⁴⁶ Frankfurter said it was inapplicable in the present case, precisely because the federal court never in fact enjoined the state court. Frankfurter concluded his discussion of the Anti-Injunction Act with a brief comment on its function: "That provision is an historical mechanism . . . for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts having potential jurisdiction over the same subject-matter."⁴⁷ That was all; Frankfurter then went on to address the merits of the statute's validity. But that reference to "our . . . federalism" would be back.

A few weeks later, Frankfurter again used the phrase "our federalism" to describe the jurisdiction of the Court over controversies between two states.⁴⁸ The phrase appeared again in a tax case⁴⁹ in which the Supreme Court refused to find immunity from state tax for a federal employee.⁵⁰ Frankfurter concurred, arguing that it was essential not to expand intergovernmental immunities

⁴² 306 US 375 (1939). See also Michael G. Collins, *Whose Federalism?*, 9 Const Commen 75, 75 (1992).

⁴³ He was nominated by President Franklin D. Roosevelt on January 5, 1939, confirmed by the Senate on January 17, 1939, and commissioned on January 20, 1939. Federal Judicial Center, *Felix Frankfurter, Biographical Directory of Federal Judges*, archived at <https://perma.cc/GZG5-QPFF>.

⁴⁴ *Hale*, 306 US at 376–77.

⁴⁵ *Id.* at 377.

⁴⁶ The Anti-Injunction Act effective at the time was the Act of Mar. 3, 1911, ch 231, § 265, 36 Stat 1162 (1911).

⁴⁷ *Hale*, 306 US at 378.

⁴⁸ *Texas v Florida*, 306 US 398, 428 (1939) (Frankfurter dissenting) ("The authority which the Constitution has committed to this Court over 'Controversies between two or more States,' serves important ends in the working of our federalism.").

⁴⁹ *Graves v New York*, 306 US 466, 490 (1939) (Frankfurter concurring).

⁵⁰ *Id.* at 487 (majority).

from taxation in such a manner as to undercut the authority of either state or federal government. “[T]he fact that we are a federalism [sic],” Frankfurter wrote, “raises problems regarding these vital powers of taxation. Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other.”⁵¹ In previous cases, Frankfurter suggested, the Court had been insufficiently sensitive to this concern: “A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount.”⁵² In the intervening years, “two other great English federalisms,” Australia and Canada, considered and rejected intergovernmental tax immunity.⁵³ Frankfurter’s phrasing sounds odd to modern ears, unaccustomed to hearing the American state referred to as “a federalism.” This in itself is a striking reminder that federalism was not a widely used term at the time, and its usage was less fixed than it would be by the end of the twentieth century. (Frankfurter may have made federalism a common term in modern constitutional law, but he did not succeed in popularizing all of his own usages.)

In the fall of 1939, Frankfurter was again talking about federalism. The case was *Palmer v Massachusetts*,⁵⁴ and it foreshadowed Frankfurter’s later opinions on abstention. In *Palmer*, a railroad had filed for reorganization under the federal bankruptcy laws. The railroad’s bankruptcy trustees had applied to the Massachusetts Department of Public Utilities for permission to abandon eighty-eight passenger stations.⁵⁵ The Department conducted a series of hearings on the issue. While the proceedings were still ongoing, Palmer, a creditor of the railroad, argued in the bankruptcy proceedings for an order directing the Trustees to abandon the stations. Massachusetts argued that the district court lacked jurisdiction, but the district judge disagreed and issued a decision on the merits, granting “the very relief for which the Trustees had applied to the Department and which was still in process of

⁵¹ Id at 488 (Frankfurter concurring).

⁵² Id at 490 (citation omitted).

⁵³ *Graves*, 306 US at 490 (Frankfurter concurring).

⁵⁴ 308 US 79 (1939).

⁵⁵ Id at 82.

orderly consideration.”⁵⁶ The Court granted certiorari because, in the words of Frankfurter’s majority opinion, the case raised “important questions” about the application of the railroad bankruptcy law, “particularly where it intersects the regulatory systems of the states.”⁵⁷ As Frankfurter formulated the issue, “[t]he District Court assumed power to supplant the relevant authority of the state—an authority which . . . has not been conferred by Congress either upon the federal courts or the Interstate Commerce Commission.”⁵⁸ He made it clear from the outset that “our federalism” was central to the case. “[W]ariness,” he said, is necessary when “the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.”⁵⁹

Frankfurter argued that the Court should be wary about finding congressional interference with state regulation. Congress had chosen to regulate “purely intrastate activities of an interstate carrier” when necessary to effectuate interstate regulation.⁶⁰ But this was the exception rather than the rule, and federalism was the reason why: “[S]uch absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.”⁶¹ The opinion then considered and rejected the claim that the bankruptcy code provided the district court with equal authority in the context of bankrupted railroads as in other contexts.⁶²

Thus, from the very start of Frankfurter’s career on the Supreme Court, he established federalism as an important analytical consideration in a number of doctrinal areas. He also made several points about federalism clear in his opinions. First, federalism was a shared American value (“our federalism,” in *Hale* and *Palmer*). Second, federalism required a careful “balance between national and state authority.”⁶³ Finally, federalism valued independent state action, whether of state courts (*Hale*), state taxing

⁵⁶ Id at 83.

⁵⁷ Id at 82.

⁵⁸ *Palmer*, 308 US at 82.

⁵⁹ Id at 83–84.

⁶⁰ Id at 84.

⁶¹ Id.

⁶² *Palmer*, 308 US at 87–89.

⁶³ Id at 84.

entities (*Graves v New York*⁶⁴), or state regulators (*Palmer*). Whereas the Framers used the term “federalism” to refer to a robust national government,⁶⁵ Frankfurter’s conception of federalism emphasized the continued vitality of the states. In other words, for an eighteenth-century American, the novel point in federalism was the active role of the national government. Federalism continued to have connotations of centralization at the expense of the states into the twentieth century.⁶⁶ By contrast, for Frankfurter, federalism was to be invoked to preserve and protect the states from being supplanted by national action.

B. Limiting Injunctions

Frankfurter’s first major innovation in the field of judicial federalism was to limit the power of federal courts to enjoin state courts. The Anti-Injunction Act had long limited the federal courts’ power in this area, prohibiting the issuance of injunctions by a federal court against proceedings in a state court.⁶⁷ But there had always been a few exceptions to the scope of coverage of the Anti-Injunction Act, some built into the Act itself and others recognized by the courts. In *Toucey v New York Life Insurance Co.*,⁶⁸ the Court heard a case about the limits of the so-called “relitigation exception” to the anti-injunction rule. The case turned on whether federal courts could enjoin state court litigation of matters that had previously been decided by a federal judgment.⁶⁹ Writing for the Court, Frankfurter said that the relitigation exception did not exist, again grounding the rationale in federalism.

⁶⁴ 306 US 466 (1939).

⁶⁵ See, for example, Jonathan Elliot, ed, *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787* 155 (Washington 2d ed 1836) (quoting a speech by Patrick Henry). See also Antonin Scalia, *The Two Faces of Federalism*, 6 Harv J L & Pub Pol 19, 19 (1982) (noting that “[w]hen Alexander Hamilton exalted [federalism’s] virtues, he meant it as a criticism of colonial disunity”).

⁶⁶ See, for example, *Judiciary Rapped by a Chief Justice*, NY Times 11 (Nov 24, 1907) (quoting the Dean of Yale Law School’s statement that “[w]e are threatened with a revival of Federalism and with a Federalism which is more extreme and radical than the leaders of the old Federal Party ever countenanced or would have tolerated” due to the rise of centralization).

⁶⁷ See George A. Martinez, *The Anti-Injunction Act: Fending Off the New Attack on the Relitigation Exception*, 72 Neb L Rev 643, 645 (1993) (noting that “for almost two hundred years, this country has had some form of Anti-Injunction Act”).

⁶⁸ 314 US 118 (1941).

⁶⁹ See *id.* at 126. See also James E. Pfander, *Principles of Federal Jurisdiction* § 9.3.3 at 283 (West 2d ed 2011).

The Anti-Injunction Act, according to Frankfurter, “is not an isolated instance of withholding from the federal courts equity powers possessed by Anglo-American courts.”⁷⁰ Instead, he said, it is part of the “delicate adjustments required by our federalism,” pursuant to which “Congress has rigorously controlled the ‘inferior courts’ in their relation to the courts of the states.”⁷¹ Frankfurter embarked on a detailed examination of the legislative history of the 1793 act in which the Anti-Injunction Act originated.⁷² Frankfurter admitted that the purpose of the Act was really not federalism per se: “Much more probable is the suggestion that the provision reflected the prevailing prejudices against equity jurisdiction.”⁷³ That didn’t stop him from viewing it as a component of federalism.⁷⁴

Frankfurter managed to get six votes on the Court for his opinion reducing the scope of the exceptions for the Anti-Injunction Act, all in the name of “our federalism.” But Justice Stanley Reed, in a dissent joined by Chief Justice Harlan Stone and Justice Owen Roberts, complained that Frankfurter had disregarded or discarded decades of precedent: “We think it may be accurately stated that for more than half a century there has been a widely accepted rule supporting the power of federal courts to prevent relitigation. There are adequate precedents directly in point and others which recognize that the rule exists and is sound.”⁷⁵

The decision in *Toucey* surprised commentators, who viewed it as upsetting substantial law that (they had thought) was settled.⁷⁶ Congress too was surprised, and a few years later, in 1948, explicitly rejected *Toucey*’s result, adding the words “to protect or effectuate its judgments” to the exceptions to the Act.⁷⁷ As the reviser’s note explained, “[T]he revised section restores the basic law as generally understood . . . prior to the Toucy [sic] decision.”⁷⁸ And that is where matters stand today: “[F]ederal courts

⁷⁰ *Toucey*, 314 US at 141.

⁷¹ *Id.*

⁷² *Id.* at 130–32. For an alternative approach to the Anti-Injunction Act, see generally James E. Pfander and Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 *Tex L Rev* 1 (2013).

⁷³ *Toucey*, 314 US at 131.

⁷⁴ *Id.* at 141.

⁷⁵ *Id.* at 152–53 (Reed dissenting).

⁷⁶ See Mary Brigid McManamon, *Felix Frankfurter: The Architect of “Our Federalism”*, 27 *Ga L Rev* 697, 709 (1993).

⁷⁷ Revision of Title 28, United States Code, HR Rep No 308, 80th Cong, 1st Sess, A182 (1947).

⁷⁸ *Id.*

can enforce the doctrines of claim and issue preclusion by enjoining proceedings in state court that would run afoul of those doctrines.”⁷⁹ Frankfurter thus failed to significantly cut back the law of injunctions through judicial interpretation, but it was not for lack of trying.

C. Abstention Doctrine

Much more durable was Frankfurter’s opinion in *Pullman*. *Pullman* established the principle that federal courts should abstain from deciding a constitutional issue when the case involved an unsettled issue of state law, the resolution of which could remove the necessity of deciding the constitutional issue. The case involved a requirement by the Texas Railroad Commission that all railroads with Pullman (sleeper) cars employ a white conductor. There was a statutory argument that the Commission lacked authority to make this requirement and a constitutional argument that the regulation violated the Equal Protection Clause.⁸⁰

Frankfurter thought it inappropriate for the federal court to decide a constitutional issue when construction of a state statute could resolve the issue in such a manner so as to avoid the constitutional question. And the meaning of the state statute was a matter for the state courts, not the federal courts: “The last word on the meaning of Article 6445 of the Texas Civil Statutes, and therefore the last word on the statutory authority of the Railroad Commission in this case, belongs neither to us nor to the district court but to the [S]upreme [C]ourt of Texas.”⁸¹

Frankfurter recognized that he was dealing with judicial equity powers, but he integrated federalism into the equity calculus: “Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with

⁷⁹ Pfander, *Principles of Federal Jurisdiction* § 9.3.3 at 283 (cited in note 69). See also *Chick Kam Choo v Exxon Corp.*, 486 US 140, 146–48 (1988) (discussing the application of the relitigation exception); *Atlantic Coast Line Railroad Co v Brotherhood of Locomotive Engineers*, 398 US 281, 287 (1970). For a discussion of the evolution of the courts of appeals’ treatment of the relitigation exception after 1948, see Andrea R. Lucas, Note, *Balancing Comity with the Protection of Preclusion: The Scope of the Relitigation Exception to the Anti-Injunction Act*, 97 Va L Rev 1475, 1497–1501 (2011) (describing the cases coming after the revisions but before the Supreme Court had addressed the scope of the exception post-*Toucey*); id at 1483–90 (describing the current circuit split since *Chick Kam Choo*). For criticism of Justice Reed’s dissent (and of Congress’s action in restoring the pre-*Toucey* status quo) as inconsistent with “traditional notions of judicial federalism,” see Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U Chi L Rev 717, 722–26 (1977).

⁸⁰ *Pullman*, 312 US at 498.

⁸¹ Id at 499–500.

state policies.”⁸² Frankfurter synthesized a long line of prior cases about equity power into this federalism rubric. “These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, ‘exercising a wise discretion,’ restrain their authority because of ‘scrupulous regard for the rightful independence of the state governments’ and for the smooth working of the federal judiciary.”⁸³ Accordingly, the rule in the *Pullman* case was presented as the employment of the federal courts’ equitable powers “in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers.”⁸⁴

Frankfurter would later double down on the federalism rationale. In *Louisiana Power & Light Co v City of Thibodaux*,⁸⁵ he recognized that *Pullman* and subsequent abstention cases had been equity cases. But he insisted that the abstention principle was not merely “a technical rule of equity procedure.”⁸⁶ The abstention cases, he said, “reflect a deeper policy derived from our federalism.”⁸⁷ Accordingly, he was willing to apply the abstention principle to an eminent domain proceeding that he recognized was not a traditional equitable proceeding.⁸⁸ The City of Thibodaux had initiated expropriation proceedings against an out-of-state corporation’s property and the corporation had removed the case to federal court.⁸⁹ It was appropriate, Frankfurter wrote for the majority, for the federal court to stay proceedings to allow the state supreme court to construe the relevant expropriation statute.⁹⁰ Eminent domain was a “sovereign prerogative,” Frankfurter noted, and it was accordingly respectful of the sovereignty of the states in the federal system to allow them to construe their statutes first.⁹¹

Pullman abstention remains good law to this day. After its introduction, other abstention doctrines have also multiplied and “our federalism” became a central organizing principle of the

⁸² Id at 500.

⁸³ Id at 501, quoting *Cavanaugh v Looney*, 248 US 453, 457 (1919), and *Di Giovanni v Camden Insurance Association*, 296 US 64, 73 (1935).

⁸⁴ *Pullman*, 312 US at 501.

⁸⁵ 360 US 25 (1959).

⁸⁶ Id at 28.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ *Thibodaux*, 360 US at 25.

⁹⁰ Id at 30–31.

⁹¹ Id at 28.

Supreme Court's jurisprudence on federal jurisdiction, particularly as it came into contact with state court proceedings.⁹² Perhaps most famously, Justice Hugo Black invoked "our federalism" in *Younger v Harris*,⁹³ which established the principle that federal courts should abstain from enjoining an ongoing state criminal proceeding.⁹⁴

II. THE POLITICS OF COURTS IN THE PROGRESSIVE ERA

Justice Frankfurter's thoughts about federalism developed before he came to the Court. As a young lawyer coming of age in the Progressive Era, he began his career by engaging in a debate over the place of the courts in the American system of government that would shape the rest of his career. But the link between Frankfurter's early politics and scholarship, on the one hand, and his theory of federalism, on the other, has received little notice in the substantial scholarly literature. The only major work to date that has seriously studied Frankfurter's views on federalism—an insightful article by Professor Mary Brigid McManamon—emphasized Frankfurter's interest in reducing a crowded docket on the Supreme Court.⁹⁵ This was certainly a relevant, and important, consideration, which this Article will also describe briefly in this Part. But it wasn't the only consideration that Frankfurter had in mind when he thought about the federal courts. The historical evidence suggests that his involvement with the politically charged fights over federal courts in the 1910s and 1920s were, if anything, even more important in shaping Frankfurter's worldview.⁹⁶ This point is surprisingly almost entirely absent

⁹² See generally Ann Woolhandler, *Between the Acts: Federal Court Abstention in the 1940s and '50s*, 59 NY L Sch L Rev 211 (2015).

⁹³ 401 US 37 (1971).

⁹⁴ *Id.* at 41, 44. The extent to which the principle of abstention is mandatory or discretionary is debatable, in light of the Court's restatement of the *Younger* rule in *Sprint Communications, Inc v Jacobs*, 571 US 69, 72 (2013) ("When there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution.").

⁹⁵ See McManamon, 27 Ga L Rev at 733–37 (cited in note 76). An additional recent article, much more limited in scope, provided a very specific appreciation of Frankfurter's coedited casebook on federal courts. See generally Evan Tsen Lee, *Federal Jurisdiction According to Professor Frankfurter*, 53 SLU L J 779 (2009). Though that article lacks a broader historical frame, it accords with the points I make in this Article about Frankfurter's commitment to federalism being quite developed before he joined the Court.

⁹⁶ Scholars already know that Frankfurter's experience in this era shaped his later thoughts on judicial restraint, civil liberties, and civil rights. See, for example, Melvin I.

from the otherwise enormous literatures on Frankfurter, on federalism, and on the federal courts.⁹⁷ The point is a crucial one for understanding Frankfurter's jurisprudence generally, and his thinking about federalism and his invention of abstention in particular. This Part introduces the Progressive politics surrounding the courts that informed Frankfurter's thinking.

A. The Political Fight over the Federal Courts in the Progressive Era

Frankfurter entered the legal profession in the Progressive Era, when the legitimacy of the federal courts was hotly contested. The judicial history of the first few decades of the twentieth century has become known as the "*Lochner* era." The idea that the courts were generally conservative and hostile to state regulation was something of a Progressive morality tale. Recent scholarship has shown that federal courts were not as hard-headed in opposing Progressive regulation as the Progressives made them out to be (and correspondingly, that Progressive reform legislation was not as benign as it was often presented to be).⁹⁸ That said, the concern that the judiciary was a threat to Progressivism generally was widespread.

The "*Lochner* era" label encompassed several doctrinal trends. The first was a demanding constitutional scrutiny of state regulatory law. This was the principle embodied in the *Lochner v New York*⁹⁹ opinion itself: that the Constitution protected freedom of contract as part of the "liberty" safeguarded by the Due Process Clause of the Fourteenth Amendment, and that this rendered invalid state regulations on the market.¹⁰⁰ In *Lochner*, the Court

Urofsky, *Felix Frankfurter: Judicial Restraint and Individual Liberties* 1–33 (Twayne 1991); Michael E. Parrish, *Felix Frankfurter and His Times: The Reform Years* 39–219 (Free Press 1982). The impact of Frankfurter's early political observations on his later thinking about the federal courts is, however, lacking.

⁹⁷ Edward A. Purcell Jr is the only historian to note this link, which he did in a review essay that started with Frankfurter and then spent most of its analysis on recent histories of the federal judiciary. See Edward A. Purcell Jr, *Reconsidering the Frankfurterian Paradigm: Reflections on Histories of Lower Federal Courts*, 24 L & Soc Inquiry 679, 681–88 (1999).

⁹⁸ See generally, for example, Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge 2004). See also David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* 40–55 (Chicago 2011).

⁹⁹ 198 US 45 (1905).

¹⁰⁰ *Id* at 53, 64.

struck down a state maximum hours law.¹⁰¹ In his dissent in *Lochner*, Justice Oliver Wendell Holmes Jr famously accused the Court of establishing laissez-faire economics as constitutional law.¹⁰²

A second issue—distinct from the decision of *Lochner* but equally characteristic of the era, and equally formative of public attitudes toward the courts—was the use of the labor injunction.¹⁰³ The injunction rose to prominence in the 1880s as a potent tool to restrain labor.¹⁰⁴ Continuing on through the 1920s, labor injunctions remained one of the most visible interventions of the courts into political hot-button issues around labor, strikes, and industrial regulations. Some 28 injunctions were issued against labor in the 1880s.¹⁰⁵ In 1895, the Supreme Court approved an anti-labor injunction under the Sherman Act,¹⁰⁶ opening the floodgates: 122 injunctions were issued in the 1890s after this decision, and 328 were issued between 1900 and 1909.¹⁰⁷ As one commentator explained, a simple temporary injunction was all that was needed “because strikes are usually won or lost within a few days.”¹⁰⁸

Legislatures responded to the rise of the injunction, and the courts answered. In the process, the courts became still more deeply entangled in the debate about their relationship to the state democratic process. As Frankfurter and his coauthor Nathan Greene summarized the history, Americans were widely troubled by the “expansion of a simple, judicial device to an enveloping code of prohibited conduct, absorbing, *en masse*, executive and police functions and affecting the livelihood and even lives of multitudes.”¹⁰⁹ The historian William E. Forbath explained that “industrial ‘disorder’ and workers’ massive yet articulate defiance of judge-made law gradually persuaded state and national lawmakers and political elites that the old legal order was untenable and that labor’s exiled constitutional claims demanded

¹⁰¹ *Id* at 64–65.

¹⁰² *Id* at 74–76 (Holmes dissenting).

¹⁰³ See Luke P. Norris, *Labor and the Origins of Civil Procedure*, 92 NYU L Rev 462, 482–90 (2017).

¹⁰⁴ See William E. Forbath, *Law and the Shaping of the American Labor Movement* 59–66 (Harvard 1991).

¹⁰⁵ Jon R. Kerian, *Injunctions in Labor Disputes: The History of the Norris-LaGuardia Act*, 37 ND L Rev 49, 49 (1961).

¹⁰⁶ *In re Debs*, 158 US 564, 599–600 (1895).

¹⁰⁷ Kerian, 37 ND L Rev at 49–50 (cited in note 105).

¹⁰⁸ *Id* at 51.

¹⁰⁹ Felix Frankfurter and Nathan Greene, *Labor Injunctions and Federal Legislation*, 42 Harv L Rev 766, 767 (1929).

recognition.”¹¹⁰ Progressive politicians in the nation’s political elite increasingly shared labor’s worries about big business, judicial overreach in the name of property, and an erosion of the First, Thirteenth, and Fourteenth Amendments.¹¹¹

Labor-backed anti-injunction bills began appearing at state and national levels as early as the 1890s. But state laws that were favorable to labor—limiting injunctions, outlawing contracts that prohibited joining a union, and the like—were frequently struck down by the courts, or at least gutted by narrow construction.¹¹² Most famously, in 1914, Congress passed the Clayton Act,¹¹³ which was supposed to rein in the use of the labor injunction by establishing rigorous requirements for the issuance of an injunction.¹¹⁴ But the Supreme Court in 1921 narrowly construed the Clayton Act as merely a restatement of the prior law, removing the teeth from the law.¹¹⁵

In the 1920s, Congress considered a series of proposals to limit the jurisdiction of the federal courts and to limit injunction power.¹¹⁶ In 1928, Senator George Norris introduced a federal anti-injunction bill and began to hold hearings on the use of the injunction. These hearings demonstrated how far labor’s anti-injunction analysis had spread. The anti-injunction law was finally passed in 1932 as the Norris-LaGuardia Act¹¹⁷ (drafted in part by Felix Frankfurter).¹¹⁸ Ultimately the Wagner Act¹¹⁹ would provide more

¹¹⁰ Forbath, *Law and the Shaping of the American Labor Movement* at 9 (cited in note 104).

¹¹¹ See Norris, 92 NYU L Rev at 492–94 (cited in note 103); Forbath, *Law and the Shaping of the American Labor Movement* at 128–66 (cited in note 104).

¹¹² Forbath, *Law and the Shaping of the American Labor Movement* at 128–66 (cited in note 103).

¹¹³ 38 Stat 730 (1914).

¹¹⁴ See Stanley I. Kutler, *Labor, the Clayton Act, and the Supreme Court*, 3 Labor Hist 19, 19–20 (1962); Norris, 92 NYU L Rev at 490–92 (cited in note 111).

¹¹⁵ See *Duplex Printing Press Co v Deering*, 254 US 443, 469 (1921).

¹¹⁶ See Edward A. Purcell Jr, *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America* 85–91 (Yale 2000).

¹¹⁷ 47 Stat 70 (1932), codified at 29 USC § 101 et seq.

¹¹⁸ See Purcell, *Brandeis and the Progressive Constitution* at 88 (cited in note 116); Norris, 92 NYU L Rev at 499–508 (cited in note 103). For Frankfurter’s extensive defense of the Norris-LaGuardia Act, see Felix Frankfurter and Nathan Greene, *The Labor Injunction* 199–228 (MacMillan 1930).

¹¹⁹ 49 Stat 449 (1935), codified as amended at 29 USC § 151 et seq.

robust protection for labor to associate and engage in collective action.¹²⁰

B. Federal Versus State

Both of these politically contentious lines of cases in the *Lochner* era (the substantive due process cases and the injunction cases) focused attention on the federal courts. But they weren't exclusively the domain of the federal courts. Indeed, in terms of the number of cases decided, the state courts were by far the greatest offenders. When Forbath catalogued cases striking down labor legislation during the nineteenth century, the majority of those cases turned out to be state cases.¹²¹ A study by the US Bureau of Labor Statistics in 1922 listed some three hundred cases where courts struck down labor-related statutes as unconstitutional during the first two decades of the twentieth century.¹²² The report noted, "In all but a very few instances the decisions here noted have been those of courts of last resort of the State in which the law was enacted or of the Supreme Court of the United States."¹²³

In short, the state courts were as much a part of the problem as the federal courts. Indeed, in terms of sheer number of cases decided, the state courts were a greater problem than federal courts. This creates something of a puzzle if we seek to understand Frankfurter's scholarly focus on the federal courts. Why did he ignore the state courts? Two factors are worth considering: the relative priority of state versus federal law and the relative ease of bringing political accountability to bear on the state courts versus the federal courts.

1. The relative priority of state versus federal law.

While state courts did much of the work in striking down legislation and issuing injunctions, much of the law that they applied

¹²⁰ See Forbath, *Law and the Shaping of the American Labor Movement* at 164–65 (cited in note 112); Lawrence M. Friedman, *American Law in the Twentieth Century* 167–69 (Yale 2002). That protection would be significantly diminished just over a decade later by the Taft-Hartley Act, 61 Stat 136, codified as amended in various sections of Title 29 (1947). One historian described the Act's effect as "ghettoizing the . . . labor movement." Nelson Lichtenstein, *State of the Union: A Century of American Labor* 117 (Princeton 2002).

¹²¹ Forbath, *Law and the Shaping of the American Labor Movement* 177–87 (cited in note 104).

¹²² Lindley D. Clark, *Labor Laws That Have Been Declared Unconstitutional*, 321 Bull US Bureau Labor Statistics 1, 2 (Nov 1922).

¹²³ *Id.*

was federal. The constitutional cases predominantly cited the Fourteenth Amendment of the US Constitution. In terms of authoritative interpretation of the federal constitution, the US Supreme Court had the last word. Although state courts had similarly applied substantive due process to strike down legislation, the law at issue was federal. The *Lochner* decision itself, for instance, became the authoritative precedent once it was decided. And it is worth noting that at the time, the Supreme Court's jurisdiction to review state court decisions was asymmetric: the Court only had jurisdiction to review those cases where the federal right was denied, but not where the federal right was vindicated. In other words, if a state high court struck down a state law as a violation of the federal Constitution, US Supreme Court review was unavailable. So, many federal question cases in the lower courts were never going to end up in the Supreme Court, and labor advocates and Progressive reformers alike felt as though the federal courts had a one-way ratchet in favor of the laissez-faire constitutionalism of federal law.¹²⁴

The predominance of federal law reinforced the dominance of the federal courts, and of the Supreme Court in particular, at the top of the judicial hierarchy.¹²⁵ The state courts, when left to their own devices, varied in the extent to which they enforced a strict freedom-of-contract jurisprudence.¹²⁶ There were high profile cases in which state courts struck down state regulations, but this was by no means the universal practice of state courts.¹²⁷

As for the injunctive cases, here too both state and federal courts were implicated, but the greatest focus was on the federal courts. As one scholar put it:

While the agitation against what was called "Government by Injunction" was to a certain extent independent of the

¹²⁴ *Lochner* itself clarified the law: Supreme Court review of federal constitutional questions decided by state courts was at the time asymmetric, so the Supreme Court had not taken appeals from prior state cases that had affirmed the federal right (by striking down regulatory legislation). See Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 211 (MacMillan 1928).

¹²⁵ See Purcell, *Brandeis and the Progressive Constitution* 11–38 (cited in note 116).

¹²⁶ See generally Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 *J Am Hist* 63 (1985).

¹²⁷ *Id.* at 72–77, 88. In a different context, Frankfurter noted the difficulty of effecting any change in state courts in terms of general policy. See Felix Frankfurter and James M. Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 *Harv L Rev* 1010, 1010 n 3 (1924) ("Differences due to differences in constitutional provisions, judicial history and State legislation make resort to State cases treacherous and unscientific.").

agitation for the exemption of labor from the operation of the anti-trust laws, and embraced not only the federal but also the state courts, the injunction cases which aroused the greatest resentment were either directly or indirectly connected with the Sherman Act.¹²⁸

Again, this centered the attention on the federal courts, and not the state courts. As Frankfurter and Greene wrote, “The main considerations which underlie both national and state legislative proposals for regulating the use of the injunction in labor controversies are the same. But the federal aspects of the labor injunction are the more important.”¹²⁹ This also informed Frankfurter’s early interest in federalism as a general concept. He believed that the expanding regulatory power of the federal government, which began in the late nineteenth century with the Interstate Commerce Act¹³⁰ and the Sherman Act,¹³¹ had made the relationship of state and national government a crucial issue for the courts.¹³²

2. The availability of political means for reining in the state courts.

Progressives found federal courts to be the more difficult problem because state courts proved more susceptible to political pressure. The most obvious point is that a great many state judges were elected and were thus sensitive to political pressure. Progressives and other partisans of labor could then use straightforward political channels to put a fear of the people into state court judges.¹³³

Beyond political pressure, there were even more direct means of using politics to express discontent with judicial decisions. A wide variety of proposals were debated in state constitutional conventions during the Progressive Era. They included proposals to abolish judicial review, to require unanimous or supermajority

¹²⁸ Louis B. Boudin, *Organized Labor and the Clayton Act: Part I*, 29 Va L Rev 272, 273–74 (1942).

¹²⁹ Frankfurter and Greene, *Labor Injunctions and Federal Legislation*, 42 Harv L Rev at 766 (cited in note 109).

¹³⁰ 27 Stat 379, codified as amended in various sections of Title 49.

¹³¹ 26 Stat 209, codified as amended at 15 USC § 1 et seq.

¹³² See Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 Harv L Rev 683, 684 (1916).

¹³³ For information on state court elections, see Jed Handelsman Shugerman, *The People’s Courts: Pursuing Judicial Independence in America* 159–76 (Harvard 2012).

votes of judges to strike down legislative enactments, and to recall judges or judicial decisions.¹³⁴

The Progressive proposal that most riled the conservative legal establishment was the recall of judges. A high-profile conflict about this issue occurred when Arizona sought admission to the union in 1910. Arizona's draft constitution included a broad recall provision that covered judges. But this provision, promoted by Progressive Democrats and labor leaders, received pushback from conservative Republicans. When Congress considered the enabling act to grant statehood to Arizona and New Mexico, the issue of the recall provision prompted debate and, ultimately, a veto from President William Howard Taft. President Taft argued that the judicial branch was valuable precisely because it was not bound to majoritarian democracy but was instead charged with upholding legal principles regardless of their popularity.¹³⁵ But by 1912, seven states had adopted the recall of judges, to the chagrin of conservative lawyers.¹³⁶

Another alternative was to allow the recall of judicial decisions. President Theodore Roosevelt was an outspoken proponent of this measure (even though he thought that recalling judges was a step too far).¹³⁷ He viewed this as part and parcel of the increased use of the referendum in state politics—another popular Progressive project. Not only should referenda be employed as a direct method of creating laws, he said, but he also argued that the people should be able to recall judicial decisions by referendum:¹³⁸ “[W]hen a judge decides a constitutional question, when he decides what the people as a whole can or cannot do, the people should have the right to recall that decision if they think it wrong.”¹³⁹ During the course of his quixotic third-party campaign for president on the Progressive Party ticket, Roosevelt would again advocate for the recall of judicial decisions: “We stand for an upright judiciary. But where the judges claim the right to

¹³⁴ See John Dinan, *Framing a “People’s Government”: State Constitution-Making in the Progressive Era*, 30 Rutgers L J 933, 951 (1999).

¹³⁵ See Thomas Goebel, *A Government by the People: Direct Democracy in America, 1890–1940* 61–65 (UNC 2002).

¹³⁶ See John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz St L J 1, 44–45 (1988).

¹³⁷ See Dinan, 30 Rutgers L J at 953–54 (cited in note 134).

¹³⁸ For a discussion of this proposal and its critics, see generally Stephen Stagner, *The Recall of Judicial Decisions and the Due Process Debate*, 24 Am J Legal Hist 257 (1980). See also Goebel, *A Government by the People* 61–65, 112–13 (cited in note 135).

¹³⁹ Theodore Roosevelt, *A Charter for Democracy* (Teaching American History, Feb 21, 1912), archived at <https://perma.cc/4Upk-XSGL>.

make laws by finally interpreting them, by finally deciding whether or not we have the power to make them, we claim the right ourselves to exercise that power.”¹⁴⁰

In sum, then, the Progressives believed that they had a fairly extensive repertoire of resources to employ against state court activism. They were not always successful, of course. But the situation in the states nonetheless could sensibly appear to them to be considerably different from the situation in the federal courts.

III. THE POLITICS OF ABSTENTION: FRANKFURTER’S VISION OF FEDERALISM

Justice Frankfurter was a Progressive. His understanding of federalism generally, and his abstention jurisprudence in particular, was deeply informed by the political controversies of the Progressive Era, as I describe in Part III.A. While Frankfurter’s scholarly writings on the federal courts often put technocratic analysis of caseloads and judicial administration in the forefront, as Part III.B sketches, he had his eye on the political implications of his judicial reform ideas at the same time. Most strikingly, the contours of *Pullman* abstention were lifted almost directly from a Progressive Era legislative effort to limit federal court jurisdiction, as I document in Part III.C. This Part concludes by reflecting on why Frankfurter’s Progressive vision for federalism and abstention gained traction even after the concerns of the Progressive Era were replaced by a new set of priorities in what can be called an era of “legal liberalism.”

A. Frankfurter and the Progressive Position

Lochner and the labor injunction cases provided the backdrop against which Frankfurter developed his views of the federal courts. Telling, perhaps, was his choice of heroes in this period. Frankfurter’s political hero at the beginning of his career was President Theodore Roosevelt.¹⁴¹ After graduating from law school, Frankfurter worked briefly in private practice before going into government (and taking a pay cut), working for Henry Stimson, who had been handpicked by President Roosevelt to be

¹⁴⁰ Theodore Roosevelt, *An Address at Madison Square Garden, 30 October 1912*, in Lewis L. Gould, ed., *Bull Moose on the Stump: The 1912 Campaign Speeches of Theodore Roosevelt* 189 (Kansas 2008).

¹⁴¹ See Parrish, *Felix Frankfurter and His Times* at 23–26 (cited in note 96).

the US Attorney for the Southern District of New York.¹⁴² There, Frankfurter cut his teeth as a lawyer in an active office that investigated and prosecuted everything from small-scale fraudsters targeting immigrants to large-scale revenue fraud by major corporations.¹⁴³ When Stimson was appointed secretary of war by President Taft, Frankfurter went with his mentor to Washington and was given a post in the Bureau of Insular Affairs.¹⁴⁴ Frankfurter thought about leaving his job to campaign for former President Roosevelt's third-party run in 1912.¹⁴⁵ In that campaign, Roosevelt made the courts a campaign issue, harshly criticizing courts that put economic interests over "human rights."¹⁴⁶

Through his early work for the president's appointees, Frankfurter was surrounded by individuals who were deeply concerned with the relationship between Progressive reform and the courts. He shared that concern, and in the years to come it continued to be one of his major interests. Frankfurter was as invested in expanding the space for Progressive legislation as anyone. In 1922, Frankfurter defended a minimum wage law in the case of *Adkins v Children's Hospital*,¹⁴⁷ losing in the Supreme Court.¹⁴⁸

Frankfurter shared the basic Progressive concerns about the courts during this period. In a 1916 article, Frankfurter said that there were two major issues presented to the Supreme Court since the 1890s. The first was the scope of congressional regulatory power under the Commerce Clause (later to become essential to the New Deal's expansion of federal power).¹⁴⁹ The second was the extent to which state regulatory power was limited by judicial application of the Fourteenth Amendment (the *Lochner* line of cases):

There was thus presented to the Court in greater volume and with unparalleled intensity, the determination of the powers

¹⁴² See *id.* at 27–29. For more on Stimson, see generally David F. Schmitz, *Henry L. Stimson: The First Wise Man* (Rowman 2000).

¹⁴³ See Parrish, *Felix Frankfurter and His Times* at 29–32 (cited in note 96). See generally Royal C. Gilkey, *Felix Frankfurter's Career as a Law Officer under Henry L. Stimson*, 33 UMKC L Rev 61 (1965) (focusing on his cases against larger entities).

¹⁴⁴ Parrish, *Felix Frankfurter and His Times* at 37–38 (cited in note 96).

¹⁴⁵ See *id.* at 54.

¹⁴⁶ See Stagner, 24 Am J Legal Hist at 257 (cited in note 138).

¹⁴⁷ 261 US 525 (1923).

¹⁴⁸ *Id.* at 562. For information on Frankfurter's representation, see Liva Baker, *Felix Frankfurter* 112–15 (New York 1969); Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905–1923*, 78 J Am Hist 188, 209–22 (1991).

¹⁴⁹ Frankfurter, 29 Harv L Rev at 684 (cited in note 132).

of the Nation and of the State, and a delimitation of the field between them—questions whose decision probably touched the public at once more widely and more immediately than any issues at any previous stage of the Court’s history.¹⁵⁰

Frankfurter’s other hero during this time was Justice Holmes. Frankfurter consciously worked to promote Holmes’s reputation as a critic of federal court overreach.¹⁵¹ Frankfurter was fond of quoting Holmes’s characterization of the *Lochner* period: “When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the Constitution or the common law.”¹⁵² Frankfurter saw Holmes’s dissent in the *Lochner* case as a turning point in terms of articulating the rightful place of courts as deferential to state regulation.¹⁵³

As Frankfurter observed the anti-labor decisions of the Supreme Court into the 1920s, he continued to voice a Progressive critique. In a series of magazine articles and editorials published in the 1920s, Frankfurter repeatedly endorsed Holmes’s deferential approach to the democratic process.¹⁵⁴ Frankfurter rejected Progressive proposals to amend the Constitution to repeal the Due Process Clause or protect child labor. Instead, as historian Brad Snyder has noted, “Frankfurter preferred Holmes’s democratic solution that the Fourteenth Amendment should not be invoked ‘beyond the absolute compulsion of its words to prevent the making of social experiments.’”¹⁵⁵

¹⁵⁰ Id.

¹⁵¹ See Brad Snyder, *The House of Truth: A Washington Political Salon and the Foundations of American Liberalism* 341–56 (Oxford 2017).

¹⁵² Frankfurter, 29 Harv L Rev at 691–92 (citation omitted) (cited in note 132). Frankfurter would reuse this quote again. See Felix Frankfurter, *Mr. Justice Holmes and the Constitution: A Review of His Twenty-Five Years on the Supreme Court*, 41 Harv L Rev 121, 132 (1927); Felix Frankfurter, *The United States Supreme Court Molding the Constitution*, 32 Current Hist 235, 238 (1930).

¹⁵³ See Frankfurter, 29 Harv L Rev at 691 (cited in note 132) (“Against this subtle danger of the unconscious identification of personal views with constitutional sanction [Holmes] has battled incessantly. Enough is said if it is noted that the tide has turned. The turning point is the dissent in the *Lochner* case.”).

¹⁵⁴ See Snyder, *The House of Truth* at 343–46 (cited in note 151); G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U Chi L Rev 51, 59 (1971).

¹⁵⁵ Snyder, *The House of Truth* at 346 (cited in note 151) (quotation marks omitted), quoting Felix Frankfurter, *The Political Function of the Supreme Court*, New Republic 238 (Jan 25, 1922), quoting *Truax v Corrigan*, 257 US 312, 344 (1921) (Holmes dissenting).

Frankfurter's basic belief about the federal courts was that they were in the habit of overreaching. Frankfurter thoroughly internalized this standard Progressive position, and indeed by the 1920s, helped to shape it. His own spin on the position was distinctive. Unlike some Progressives, Frankfurter identified with the federal judiciary such that he was still anxious to preserve the prestige and autonomy of the federal courts—even as he sought to rein in what he saw as abuses. This concern with protecting the interests of the federal courts could be seen in the way that Frankfurter often coupled the Progressive critique of the courts with another theme that motivated conservatives as well: reducing the workload of the federal courts in order to improve judicial quality.

B. Frankfurter and the Burden on the Federal Courts

The caseload of the federal courts grew enormously from the 1870s into the twentieth century. In his influential book, *The Business of the Supreme Court*, Frankfurter and his former student, Professor James M. Landis, chronicled one aspect of this story in detail: the dramatically expanding caseload of the Supreme Court. A recurring theme of the book was that the Court was subject to human constraints. Supreme Court justices would turn out subpar work when overtaxed with the heavy burdens of riding circuit (in the early days of the Court) or of excessive caseloads (in the later era of the Court). This principle, that an overworked court is less effective, resonated with such conservative jurists as then-Chief William Howard Taft¹⁵⁶ as well as with Progressives. But for Progressives, the reduction of Supreme Court caseload nicely dovetailed with the objective of reducing federal court interference with regulation.

Frankfurter put both of these interests together in his written works in the 1920s. In his explanation of the political discussions about the modification of federal jurisdiction, one can catch glimpses of the basic considerations that would motivate some of Frankfurter's later federalism jurisprudence:

The continuous effort of twenty years to enable the federal courts to cope with mounting litigation by reforming their cumbersome and wasteful organization was paralleled by an equally vigorous movement to enable them to do their work

¹⁵⁶ William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 ABA J 601, 602–03 (1922).

by reducing the range of their business. For twenty years the *Congressional Record* registers this attempt to limit jurisdiction. The more moderate proposal was to increase the pecuniary amount necessary for resort to the federal courts. The more far-reaching remedy was the old attempt to remit litigation affecting foreign corporations to the state courts.¹⁵⁷

The theme was repeated in another article a year later, in which Frankfurter observed (favorably) that there had been repeated calls for “a reexamination of the present scope of federal litigation,” with the goal of “shutting off at its sources business that eventually reaches the Supreme Court.”¹⁵⁸ One of the key aspects of this effort was the reduction of federal jurisdiction in favor of state jurisdiction: “This involves relinquishing of federal concern over conduct more appropriately left to state action as well as providing for trial in state courts of cases now exclusively entrusted to United States courts.”¹⁵⁹ It was a theme he would return to again,¹⁶⁰ one of obvious importance to the development of abstention.

In most of his scholarly work, Frankfurter emphasized his technical expertise and downplayed his political commitments. His account of the jurisdiction-modification plans underplays the Progressive political overlay that provided much of the excitement—and controversy—behind the congressional proposals.¹⁶¹ For the many efforts to modify the jurisdiction of the federal courts in the first decades of the twentieth century there were two primary motivations, and Frankfurter sometimes emphasized one or the other. Some proposals were simply an effort to cope

¹⁵⁷ Felix Frankfurter, *The Business of the Supreme Court of the United States. A Study in the Federal Judicial System, III. From the Circuit Courts of Appeals Act to the Judicial Code*, 39 Harv L Rev 325, 358 (1926). For the parallel passage in Frankfurter’s coauthored book on this same subject, see Frankfurter and Landis, *The Business of the Supreme Court* at 136 (cited in note 124).

¹⁵⁸ Felix Frankfurter and James M. Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System: VIII. The Future of Supreme Court Litigation*, 40 Harv L Rev 1110, 1111 (1927). For the parallel passage in Frankfurter’s coauthored book on this same subject, see Frankfurter and Landis, *The Business of the Supreme Court* at 300 (cited in note 124).

¹⁵⁹ Frankfurter and Landis, 40 Harv L Rev at 1111 (cited in note 158). For the parallel passage in Frankfurter’s coauthored book on this same subject, see Frankfurter and Landis, *The Business of the Supreme Court* at 300 (cited in note 124).

¹⁶⁰ See Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 Cornell L Q 499, 506 (1928).

¹⁶¹ For information on the politics of the proposals, see Purcell, *Brandeis and the Progressive Constitution* at 77–91 (cited in note 116).

with mounting litigation. But others were motivated more directly as responses to the substance of the federal courts' most politically charged decisions. Frankfurter of course recognized this.

To take just one example, Frankfurter was troubled by the fact that asymmetric review of state court decisions by the Supreme Court led to geographical disparity in the application of substantive federal (constitutional) law. Especially important on this topic were a series of cases about worker's compensation. In 1911, the Supreme Court indicated that worker's compensation laws would pass scrutiny under the Due Process Clause.¹⁶² But then New York's high court played the anti-regulatory role. Its 1911 decision invalidating the first American worker's compensation law¹⁶³ attracted considerable national attention.¹⁶⁴ But the Supreme Court could not review the decision because the New York court had "vindicated" a federal right, and under the statute governing Supreme Court review of state court decisions, such vindication was unreviewable. The Washington Supreme Court later affirmed the constitutional validity of similar workers' compensation legislation.¹⁶⁵ As Frankfurter and Landis explained, there was "a wide-spread feeling that, in practice, constitutionality turned on geography."¹⁶⁶ Supreme Court review could ensure that the Constitution was at least interpreted uniformly across the nation. But simply expanding the federal appellate power was not a satisfactory solution, for that would simply increase the burdens on the federal courts. Certiorari jurisdiction for the Supreme Court was a solution proposed by conservative members of the bench and bar.¹⁶⁷ Congress passed expanded certiorari in 1916,

¹⁶² See *Noble State Bank v Haskell*, 219 US 104, 111 (1911) ("[I]t would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume.").

¹⁶³ *Ives v South Buffalo Railway Co*, 94 NE 431, 448 (NY 1911).

¹⁶⁴ See John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* 174–76 (Harvard 2004).

¹⁶⁵ See *State v Clausen*, 117 P 1101, 1119–20 (Wash 1911).

¹⁶⁶ Frankfurter and Landis, *The Business of the Supreme Court* at 195 (cited in note 124).

¹⁶⁷ See generally Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 Colum L Rev 1643 (2000).

and it remarkably did so without debate and without any serious opposition, as Frankfurter noted with satisfaction.¹⁶⁸

While the move toward greater certiorari jurisdiction helped, the concern about federal caseloads continued into the 1920s. What Frankfurter seems to have learned from his careful study of the ongoing debates about federal courts was that Progressives and conservatives shared a concern that the federal courts, and perhaps especially the Supreme Court, were doing too much. The Progressives were more concerned about the substance of federal law standing as an obstacle to regulatory experimentation; legal conservatives were more concerned about the burden on the courts.¹⁶⁹ Frankfurter himself believed that the federal courts were an important institution, and so he shared both concerns.¹⁷⁰ To put it differently, while the Progressive position was political, the concern about overburdened dockets was a position that had bipartisan appeal.

C. Application of the Lessons of the Progressive Era: The Legislative Origins of Abstention

Frankfurter's interest in the legislative efforts to rein in federal court jurisdiction provided him with more than a background for his own thought about federalism and the courts. In at least one case, it provided Frankfurter with a concrete approach to keeping cases in the state courts—an approach which he imported directly into his abstention jurisprudence.

In 1910, the House of Representatives considered an amendment to a bill that would have restricted the federal courts' injunctive power. Under the proposed amendment, the district courts would have been prohibited from taking jurisdiction of suits “to suspend, enjoin, or restrain the action of any officer of a State in the enforcement, operation, or execution of a statute of

¹⁶⁸ Frankfurter and Landis, *The Business of the Supreme Court* at 213 (cited in note 124). This expansion of certiorari jurisdiction would be followed by yet another expansion of certiorari in 1925, which created the modern Supreme Court discretionary docket. See J. Warren Madden, *One Supreme Court and the Writ of Certiorari*, 15 *Hastings L J* 153, 156–57 (1963).

¹⁶⁹ For a conservative perspective, see generally Taft, *Possible and Needed Reforms*, 8 *ABA J* 601 (cited in note 156).

¹⁷⁰ Frankfurter's concern about managing the docket continued in his career, affecting, for instance, his views on three-judge district courts with direct appeal to the Supreme Court. See David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 *U Chi L Rev* 1, 58, 74 n 365 (1964); Michael E. Solimine, *Congress, Ex parte Young, and the Fate of the Three-Judge District Court*, 70 *U Pitt L Rev* 101, 135 & n 165 (2008).

such State, upon the ground of the unconstitutionality of such statute.”¹⁷¹ Frankfurter described this proposal in an article some sixteen years later.¹⁷² The language of the amendment is not exactly pellucid. It seems to focus on federal injunctive power in the situation where that power is premised on the unconstitutionality of a state statute. To explain the purpose of the amendment, Frankfurter quoted Democratic Representative William A. Cullop of Indiana:

The amendment does not destroy the constitutional right of any citizen to have an investigation of his cause in a Federal court. . . . This simply gives the State courts the right to construe their own statutes before the Federal courts construe them in given cases, in order that the doctrine of the State court in the construction of a statute may be before the Federal court when it is called upon to review the statute.¹⁷³

The amendment was ultimately rejected, according to Frankfurter, not on its merits but as a political strategy in order to keep the issue from distracting from the other reform items on the bill to which this amendment had been added.¹⁷⁴

In his written description, Frankfurter did not flag the charged political dynamics of this proposal. But the House debate makes it quite clear that of central concern to several representatives was the interpretation of “police power” regulations—in other words, exactly the kind of matters that were central to the *Lochner* line of cases. “The purpose of his amendment is to have the State[courts] construe their own statutes before they are construed by the Federal courts, is it not? . . . Especially statutes which create police regulations . . . [s]uch as fixing fares, regulation of charges, and so forth,” Representative Cullop asked in one debate.¹⁷⁵

Frankfurter may have had something like this in mind when he suggested in 1928 that the appropriate balance between federal and state courts would take into account specific kinds of

¹⁷¹ 46 Cong Rec 313 (1911).

¹⁷² Frankfurter, 39 Harv L Rev at 365 (cited in note 157). For the parallel passage in Frankfurter’s coauthored book on this same subject, see Frankfurter and Landis, *The Business of the Supreme Court* at 143 (cited in note 124).

¹⁷³ Frankfurter, 39 Harv L Rev at 365 n 171 (cited in note 157) (alterations in original) (quotation marks omitted), quoting 46 Cong Rec 315 (1911) (statement of Rep Cullop).

¹⁷⁴ Frankfurter, 39 Harv L Rev at 365 (cited in note 157).

¹⁷⁵ 46 Cong Rec 314 (1911).

issues.¹⁷⁶ Frankfurter argued that the distribution of responsibilities among these different judicial systems was a matter of “practical sentiment,” of pragmatic evaluation.¹⁷⁷ The details of the proper distribution would vary depending on the issue: “Some federal rights are readily adapted to enforcement by state tribunals; others are clearly meant for the federal courts. Some federal rights involve no lively local interests; others are heavily enmeshed in conflicts between state and national authority.”¹⁷⁸

Whatever Frankfurter was thinking in 1928, Frankfurter’s opinion in *Pullman* put into effect Cullop’s proposal almost precisely. The holding of *Pullman* is that federal courts should abstain when they are faced with an unsettled issue of state law, the resolution of which might remove the necessity of deciding the federal constitutional issue.¹⁷⁹ Alternatively, it could be articulated in Cullop’s words as “giv[ing] the State courts the right to construe their own statutes before the Federal courts construe them.”¹⁸⁰

The approach that Frankfurter would adopt in his abstention jurisprudence was essentially identical to the legislative proposal that Frankfurter himself wrote about in his study of the federal courts. This seems more than mere coincidence. It provides strong circumstantial evidence that Frankfurter’s later federalism jurisprudence should be seen as a development of his observation of the federal courts’ politics in the first decades of the twentieth century.

D. Putting Federalism in Context: A Preliminary Look at Why Frankfurter’s Vision of Federalism and Abstention Succeeded

Federalism is not the only issue for which the Progressive Era informed Frankfurter’s jurisprudence. The most familiar and distinctive element of Frankfurter’s judicial philosophy, his commitment to judicial restraint, stems from the same source. Part III.D.1 explains the parallels between Frankfurter’s commitment to federalism and his commitment to judicial restraint. Frankfurter believed that one of the lessons of the *Lochner* era of jurisprudence was that courts should generally refrain from

¹⁷⁶ Frankfurter, 13 Cornell L Q at 515 (cited in note 160).

¹⁷⁷ Id.

¹⁷⁸ Id.

¹⁷⁹ See *Pullman*, 312 US at 498.

¹⁸⁰ 46 Cong Rec 315 (1911).

striking down democratically enacted legislation. While the *Lochner*-era courts generated controversy by striking down Progressive regulatory laws, Frankfurter carried the principle into his jurisprudence on civil rights and civil liberties. Many of Frankfurter's colleagues on the Court rejected his philosophy of judicial restraint and seemed to be put off by Frankfurter's tendency to craft his jurisprudence in the shadow of the Progressive Era. Justices Hugo Black and William O. Douglas in particular engaged in a long-running and sometimes acrimonious debate with Frankfurter about this subject.¹⁸¹

Strikingly, federalism was an area where Frankfurter was able to win over some of his fellow justices, as I describe in Part III.D.2. This raises another question: Why were Frankfurter's ideas about federalism successful while his views on judicial restraint were not? One might have thought that they would either succeed or fail together, given that both are derived from Frankfurter's view of the courts in the Progressive Era.

Part III.D.3 suggests one part of the answer. Drawing on recent cultural and intellectual history, it briefly describes what we can call the "New Deal federalism fad." While full development of this point would require a book, this short Section serves as a reminder of federalism's flexibility and relevance to different constituencies for different reasons. Frankfurter's federalism was motivated in large part by his formative experience in the Progressive Era. The New Deal federalism had its own flavor, an effort to integrate localism with the national development vision of the New Deal state. It was called at the time a "New Federalism."¹⁸² A full exploration of how Frankfurter's vision of federalism convinced his colleagues would require detailed studies of both jurisprudence and interpersonal relationships. But for now, it's worth simply observing, as a starting point, that new ideas about federalism helped facilitate the rise of New Deal liberalism.

Frankfurter's vision of judicial restraint originated in the same experiences with Progressive judicial politics that informed his thoughts on federalism. Most of his colleagues abandoned

¹⁸¹ See Urofsky, *Felix Frankfurter* at 45–50 (cited in note 96). See also generally Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 Duke L J 71.

¹⁸² See generally Jane Perry Clark, *The Rise of a New Federalism: Federal-State Cooperation in the United States* (Columbia 1938).

judicial restraint during the Warren Court years.¹⁸³ But federalism lived on. The practical relevance of federalism to the New Deal era helped to facilitate federalism's transition from Progressivism to liberalism.¹⁸⁴ The simple fact is that Frankfurter's federalism jurisprudence wasn't quite as out of touch with his times as some of his other positions on the Supreme Court were.

1. Learning the lessons of the Progressive Era and bringing them into the era of legal liberalism.

From the evidence surveyed, one can put together the pieces for a possible way of understanding Frankfurter's long-term vision of federalism in his jurisprudence.¹⁸⁵ Frankfurter internalized the belief that the federal courts posed significant risks of harm if they interfered with democratically enacted legislation. Judicial restraint was a virtue. Still, it was not a value that could be easily protected by legislation—even if desirable subject-matter restrictions, like those in the Clayton Act, were readily subverted. But both conservatives and progressives could agree on trying to reduce the scope of federal judicial activity if the objective was articulated in a palatable and nonpartisan manner, such as when it was described as an effort to clear crowded dockets.

In federalism, Frankfurter found an abstract principle that could support cutting back on federal court decisions.

¹⁸³ See Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 Cal L Rev 579, 597–99 (2012); Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 Cal L Rev 519, 546 (2012); Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* 17–67 (Chicago 2004); Laura Kalman, *The Strange Career of Legal Liberalism* 20, 30–31 (Yale 1996).

¹⁸⁴ Progressive politics had their heyday in the first decades of the twentieth century. For the purposes of this Article, Progressives were generally united in their interest in restraining the courts so as to facilitate social reform legislation. In the New Deal period, many of these themes continued, but historians have widely noted a transformation in the political landscape as the various strands of Progressivism were refashioned into a liberalism that emphasized federal legislative initiative and—more importantly for the purposes of this Article—an activist judiciary that protected individual rights. The transition took time, and historians continue to debate the exact chronology of when the various components of the new liberal ideology came into being. For a discussion of the transition from Progressivism to liberalism, see generally Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York 1995); Alan Brinkley, *Liberalism and Its Discontents* (Harvard 1998) (focusing on the development of liberalism in American history). For a history of this transition in the courts, see generally Purcell, *Brandeis and the Progressive Constitution* (cited in note 116).

¹⁸⁵ The following must take the form of an informed historian's hypothesis rather than a more definitive conclusion; it is possible that further research in Frankfurter's personal papers might provide the additional evidence to move this from hypothesis to historical account.

Frankfurter's tendency to invoke the general principle of federalism was informed by his background belief that federal jurisdiction has very little constitutional specificity. For example, in an article coauthored with then-student James M. Landis, he explained his belief that "the Constitution has prescribed very little in determining the content, and guiding the exercise, of judicial power."¹⁸⁶ This is not to suggest that Frankfurter was insincere in his commitment to federalism.¹⁸⁷ But it is to suggest that, particularly in the abstention context, Frankfurter was strategic in his deployment of the concept. He used it to carve out a limit on the federal courts' jurisdiction that legislators had tried and failed to provide during the Progressive Era.

So far, this story parallels that told by other scholars about Frankfurter's civil rights jurisprudence. Frankfurter's appointment to the Supreme Court had been greeted with enthusiasm by liberals, who expected Frankfurter to emerge as a model liberal justice.¹⁸⁸ As it turned out, however, Frankfurter did not support the rights-based jurisprudence that was becoming a hallmark of legal liberalism in the middle of the twentieth century. Instead, he stuck to the lessons he had learned in the Progressive Era and repeatedly urged his colleagues on the Court to give greater deference to the democratic legislature.¹⁸⁹ In this, Frankfurter disappointed his earlier liberal supporters and clashed with many of his colleagues. Frankfurter was a relic of an earlier age, a Progressive who had failed to make the transition to liberalism.¹⁹⁰

Frankfurter's vision of federalism (with abstention as a concrete application of this principle) was consistent with his Progressive commitments. But unlike his more directly stated views on deference to legislatures regarding the subject of civil rights, Frankfurter was able to convince his colleagues to sign on to the idea of judicial federalism. It was not an idea that the Court had articulated before. But it was an idea that survived the

¹⁸⁶ Frankfurter and Landis, 37 Harv L Rev at 1018 (cited in note 127).

¹⁸⁷ For a statement of Frankfurter's dedication to federalism told in terms of traditionalism and political theory commitments, without referencing Frankfurter's politics, see Helen Shirley Thomas, *Felix Frankfurter: Scholar on the Bench* 315–19 (Johns Hopkins 1960).

¹⁸⁸ See Urofsky, *Felix Frankfurter* at 44 (cited in note 96).

¹⁸⁹ See G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* 280 (Oxford 3d ed 2007); Urofsky, *Felix Frankfurter* at 45–63 (cited in note 96); Feldman, *Scorpions* at 233–34 (cited in note 39).

¹⁹⁰ For a discussion of Frankfurter's failure to transition to legal liberalism, see Kalman, *The Strange Career of Legal Liberalism* at 26–31 (cited in note 183).

Progressive-to-liberal transition in a way that judicial restraint generally did not.

2. Frankfurter and Black on abstention.

Justice Black's reaction to Frankfurter's Progressive ideas is a marker of the difference between the reception of Frankfurter's notions of judicial restraint and federalism. Black became well-known on the Court as an absolutist about the Bill of Rights: he was adamant about the judiciary's responsibility to enforce the Bill of Rights as law without any qualification. He and Frankfurter clashed repeatedly on this point and their interpersonal relationship was delicate and often acrimonious.¹⁹¹ Yet, despite the fact that Frankfurter's federalism arguments for abstention mirrored the reasons for judicial restraint more generally, Black bought into the idea of abstention. He would ultimately go beyond Frankfurter in creating the most familiar abstention doctrine in *Younger v Harris*, using Frankfurter's own phrase, "Our Federalism"¹⁹²—though without crediting Frankfurter.¹⁹³

Characteristically, once Black accepted the principle of federalism in the abstention context, he was more systematic in applying it than Frankfurter. They divided over the issue early on in the 1943 decision *Burford v Sun Oil Co.*¹⁹⁴ Black, writing for the majority, built on *Pullman* to hold that the federal court should abstain from deciding a case when its decision would run the risk of disrupting a complex state regulatory scheme.¹⁹⁵ Black claimed that this was an application of the principle in *Pullman* that a federal court exercising its equitable powers should do so in a manner that would "further[] the harmonious relation between state and federal authority."¹⁹⁶ The extension was facially a sensible one, but Frankfurter would have none of it.

From one angle, Frankfurter's position in his *Burford* dissent was ironic. He would apply abstention principles to protect state adjudication in federal question cases, where one might have

¹⁹¹ See White, *The American Judicial Tradition* at 278–84 (cited in note 189); Howard Ball, *Hugo L. Black: Cold Steel Warrior* 139–45 (Oxford 1996); James F. Simon, *The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America* 130–56 (Simon & Schuster 1989); Mark Silverstein, *Constitutional Faiths: Felix Frankfurter, Hugo Black, and the Process of Judicial Decision Making* 127–219 (Cornell 1984).

¹⁹² *Younger*, 401 US at 44.

¹⁹³ For a discussion of Frankfurter's use of the term, see Part I.A.

¹⁹⁴ 319 US 315 (1943).

¹⁹⁵ *Id.* at 332–34.

¹⁹⁶ *Id.*, quoting *Pullman*, 312 US at 501.

thought that it would be most appropriate for federal courts to adjudicate state matters. But he would not apply abstention principles to the diversity cases where state law controlled due to *Erie Railroad Co v Tompkins*.¹⁹⁷

But, in fact, Frankfurter's position made a great deal of sense. If the goal of abstention was, as I have argued, to reduce the opportunities for the federal courts to issue federal injunctions and set constitutional precedents, then the federal question cases were the problem cases. Just five years before, *Erie* had established that federal courts had to apply state substantive law in diversity cases.¹⁹⁸ Justice Louis Brandeis in *Erie* had been pursuing the same Progressive objective as Frankfurter.¹⁹⁹ So Frankfurter would have no reason to think that abstention was needed to accomplish his objective in the diversity context.

In his dissent in *Burford*, Frankfurter argued that it mattered that the case was brought as a diversity action, and that in such a context the federal courts were directly charged with the task of deciding matters of state law.²⁰⁰ In other words, the constitutional avoidance rationale that had figured so prominently in *Pullman* was missing, and Frankfurter thought that the Court should have relied upon that fact to distinguish *Burford* and refuse to abstain.

In any case, though, it was Black who created the most familiar of the abstention doctrines, and he did so by relying on Frankfurter's federalism theory. In a majority opinion written by Black in *Younger*, the Supreme Court held that federal courts should abstain from exercising their jurisdiction when necessary to avoid interfering with ongoing state court criminal proceedings. Black wrote that the "sources of the policy are plain"²⁰¹ and proceeded to offer two bases for the abstention principle. Frankfurter's influence was immediately apparent. The first source of justification for abstention was the historical tradition of the chancellor's discretion in equity.²⁰² The second and "even more vital consideration" was "comity" or federalism:

¹⁹⁷ 304 US 64 (1938).

¹⁹⁸ *Id.* at 78.

¹⁹⁹ See Purcell, *Brandeis and the Progressive Constitution* at 93–191 (cited in note 116).

²⁰⁰ *Burford*, 319 US at 344–46 (Frankfurter dissenting).

²⁰¹ *Younger*, 401 US at 43.

²⁰² *Id.* See also *Samuels v Mackell*, 401 US 66, 68–69 (1971).

[T]hat is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.²⁰³

Black then invoked the phrase that Frankfurter himself had first introduced to the Court: “This, perhaps for lack of a better and clearer way to describe it, is referred to by many as ‘Our Federalism.’”²⁰⁴ The scope of *Younger* abstention, premised on “Our Federalism,” applies now not only to state criminal proceedings (covered by the original decision) but also to state enforcement actions from private suits (such as contempt proceedings)²⁰⁵ and enforcement actions analogous to criminal proceedings (such as public nuisance cases).²⁰⁶ Black gave Frankfurter no credit, not even including a citation to *Pullman*. But when it came to Black’s justification for abstention, Frankfurter had been there first.

3. Why federalism succeeded where judicial restraint failed.

An entire article could be written to flesh out the attitudes of the other justices toward federalism, and to explain why judges who did not agree with Frankfurter on judicial restraint as a general matter might have found the federalism ideology persuasive. For present purposes, it will suffice to note three points about the transition from Progressivism to liberalism, a transition which many scholars associate with the New Deal.²⁰⁷

First, federalism survived the New Deal period without much political controversy. The New Deal’s liberal political economy of a large and active federal government proved quite able to function in tandem with local and regional administrations. If the New Deal marked a new era of big government, in other words, it was one that came to rely on federal-state cooperation.²⁰⁸ (This is

²⁰³ *Younger*, 401 US at 44.

²⁰⁴ *Id.*

²⁰⁵ *Juidice v Vail*, 430 US 327, 335 (1977).

²⁰⁶ *Huffman v Pursue, Ltd.*, 420 US 592, 604 (1975) (“The component of *Younger* which rests upon the threat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding.”).

²⁰⁷ See Brinkley, *Liberalism and Its Discontents* at 17–78 (cited in note 184); Brinkley, *The End of Reform* at 3–48 (cited in note 184).

²⁰⁸ See Jessica Bulman-Pozen, *Our Regionalism*, 166 U Pa L Rev 377, 394–414 (2018).

at odds with the association of federalism with “small government,” as was common in the Rehnquist era, for example.²⁰⁹ In contrast, the debate about judicial engagement and activism was at the center of national politics, thanks to President Franklin D. Roosevelt’s court-packing plan.²¹⁰ Frankfurter’s inclination was to defer to the executive on court-packing, a move that embittered his relationship with his mentor, Justice Brandeis, and arguably affected his relationships with colleagues when he joined the Court.²¹¹ That federalism did not enter into such a fraught political and ideological fight was probably helpful.

Second, a fad for localism meshed nicely with the vision of federalism that Frankfurter articulated. In the 1920s and 1930s, as Professor Jessica Bulman-Pozen has noted, “[a] variety of proponents self-consciously embraced regionalism as an answer to looming ‘vaster and vaster federal bureaucracies’ and a ‘centralizing state.’”²¹² Many leading New Dealers sought to construct linkages with traditions of localism in order to provide cultural rootedness for their programs and avoid the accusation that their social programs were simply top-down impositions. One example of this kind of thinking in action was found in the Tennessee Valley Authority (TVA) project, run by Frankfurter’s protégé David E. Lilienthal. Lilienthal had been a student of Frankfurter’s at Harvard and then obtained a job in the Roosevelt administration on Frankfurter’s recommendation.²¹³ Lilienthal believed that the future of an advanced liberal society lay in combining centralized expertise with localized inputs and controls. It was this combination that he endeavored to put into action with the TVA, though the project in fact fell far short of his goals.²¹⁴

Lilienthal’s attempt at implementation may have been unique, but his sentiment was not. There was robust cultural movement for localism in America in the 1930s that carried forward into the 1940s and beyond. Historian Daniel Immerwahr

²⁰⁹ See generally Calvin Massey, *Federalism and the Rehnquist Court*, 53 *Hastings L J* 431 (2002).

²¹⁰ See Laura Weinrib, *The Taming of Free Speech: America’s Civil Liberties Compromise* 244–57 (Harvard 2016).

²¹¹ Parrish, *Felix Frankfurter and His Times* at 272 (cited in note 96).

²¹² Bulman-Pozen, 166 *U Pa L Rev* at 397 (cited in note 208), quoting Robert L. Dorman, *Revolt of the Provinces: The Regionalist Movement in America, 1920–1945* 129 (UNC 2003).

²¹³ Richard A. Colignon, *Power Plays: Critical Events in the Institutionalization of the Tennessee Valley Authority* 121 (SUNY 1997).

²¹⁴ See David Ekbladh, “Mr. TVA”: *Grass-Roots Development, David Lilienthal, and the Rise and Fall of the Tennessee Valley Authority as a Symbol for U.S. Overseas Development, 1933–1973*, 26 *Diplomatic Hist* 335, 344–45 (2002).

has documented this tendency in academia, in government, and in popular culture.²¹⁵ Bulman-Pozen has similarly documented widespread interest in regional units of American society, suggesting that Americans sought to avoid the excessive homogenization of American culture and society in the face of a growing federal government.²¹⁶

Writing in 1938, Professor Jane Perry Clark identified a vast array of formal and improvised practices of cooperation and collaboration between national and state governments to effect policy objectives. She identified this as a “New Federalism.”²¹⁷ Reviewing the book in the *Harvard Law Review*, Professor David Riesman applauded Clark for revealing the wide extent of national-state cooperation already in practice.²¹⁸ He hoped that it might mark a path forward that would transcend the usual divisions between the “sloganeers” of “states’ rights” and “centralization.”²¹⁹ Riesman opined that “[c]ooperative federalism finds support in our constitutional tradition (as well as in our constitutional law).”²²⁰ He praised its practical potential for administering federal policies on a state level, and also its democratic virtue in giving space for “autonomic forces.”²²¹ Riesman was a star student of Frankfurter’s who had recently completed a clerkship (on Frankfurter’s recommendation) with Justice Brandeis,²²² so Frankfurter certainly read the review. He too was evidently impressed with Clark’s work, and cited it in his opinion in *Palmer*.²²³ For our purposes, the basic point is that Frankfurter’s invocation of judicial federalism was not a mere aberration, but gave judicial expression to a sentiment with considerable cultural currency.

Third, Frankfurter’s judicial federalism deferred to state courts, unlike his more general deference to state legislatures in

²¹⁵ See generally Daniel Immerwahr, *Thinking Small: The United States and the Lure of Community Development* (Harvard 2015).

²¹⁶ See Bulman-Pozen, 166 U Pa L Rev at 394–401 (cited in note 208).

²¹⁷ See generally Clark, *The Rise of a New Federalism* (cited in note 182).

²¹⁸ See generally David Riesman, Book Review, *The Rise of a New Federalism*, 52 Harv L Rev 175 (1938).

²¹⁹ Id at 176.

²²⁰ Id (citation omitted). For similar points, see generally Frank R. Strong, *Cooperative Federalism*, 23 Iowa L Rev 459 (1938).

²²¹ Riesman, 52 Harv L Rev at 176 (cited in note 218).

²²² See Daniel Horowitz, *David Riesman: From Law to Social Criticism*, 58 Buff L Rev 1005, 1005 (2010).

²²³ See *Palmer*, 308 US at 84 (noting that “absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions” and citing generally to Clark’s *The Rise of a New Federalism*).

civil rights cases. Whatever doubts the federal courts may have had about the state courts, it may have been easier for liberal judges to defer to a court than to a legislature. One of the lessons that legal liberals took from the court-packing fight was that the judiciary was an important check on politics.²²⁴ If one thought that the role of courts was (at least in part) to provide an independent check on the political process,²²⁵ one kind of court (federal) could defer to another kind of court (state) without threatening the fundamental role of courts in the system.²²⁶ But deference to legislatures could be seen as an abdication by the courts of their essential role. Frankfurter's judicial federalism theory would have been at least more generally in accord with the principle of judicial competence so central to legal liberalism²²⁷ than his broader deference to democratic legislatures.

* * *

Frankfurter's federalism jurisprudence was deeply informed by the Progressive Era. But it was also in tune with an important line of thought in the New Deal era. This was doubtless helpful in gaining traction for Frankfurter's federalism ideas. A detailed account of how justices like Black thought about federalism will have to await another paper. But for the moment, the New Deal context at least provides clues as to why Frankfurter's federalism jurisprudence managed to persuade his colleagues in a way that his judicial restraint theory did not.

Frankfurter's career spanned a divide in the politics of federal courts. He grew up in the era of Progressivism. There were many divisions among Progressives, but Progressives generally

²²⁴ This vision of legal liberalism did not emerge fully formed in the 1930s but it would develop over the ensuing years. Some of its central ideas have been discerned in the famous footnote four of *United States v Carolene Products Co.*, 304 US 144, 152–53 n 4 (1938). For a historical account of how this liberal vision of a rights-protecting judiciary (separate from, and a check on, political and legislative processes) emerged, see Weinrib, *The Taming of Free Speech* at 244–57, 309 (cited in note 210).

²²⁵ This was an idea that would later become central to liberal political theory. See generally, for example, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard 1980) (highlighting his theory that the judiciary exists to protect participation in the political process).

²²⁶ This goes naturally with the assumption of parity between federal and state courts: the assumption “that state courts are as good as federal courts and that the dignity of the states requires federal respect for their judgments.” Richard H. Fallon Jr, *The Ideologies of Federal Courts Law*, 74 Va L Rev 1141, 1174 (1988) (citation omitted). For a discussion of parity, see note 259 and accompanying text.

²²⁷ See generally Kalman, *The Strange Career of Legal Liberalism* (cited in note 183).

shared skepticism about courts interfering with legislative reforms. They tended to dislike rigid constitutional rights, distrust federal courts, and preferred for matters to be worked out through politics rather than through legal decision.

Frankfurter finished his career in the era of legal liberalism.²²⁸ Legal liberalism can be thought of as an approach to the courts that valorized and celebrated judicial protection of individual rights. In many ways, this orientation toward the federal courts could hardly have been more opposed to the Progressive Era distrust.

IV. THREE FUTURES FOR FEDERALISM-BASED ABSTENTION

In Justice Frankfurter's hands, federalism became a constitutional value that provided the Supreme Court with a rationale to restrain the jurisdiction of the federal courts. The purpose for this doctrinal innovation was connected to a particular political perspective on the judiciary. A clear understanding of this history provides the first step for analysis of abstention's merits.²²⁹ The context in which Frankfurter created federalism-based abstention is different from our own; his motives may have differed from ours. There is always the risk of a genetic fallacy in criticizing a current doctrine based on the history of its creation. Still, the history of its creation can inform contemporary analysis.

The history can provide a jumping-off point for at least three different futures for federalism-based abstention. Two of them are cautious or critical about abstention. The history of federalism-based abstention should remind originalists that the doctrine is only loosely connected to the constitutional text, a problem considered in Part IV.A. An originalist future for abstention would basically maintain the Supreme Court's current status quo, limiting abstention's application to equitable cases. The history should meanwhile remind legal liberals that abstention was designed to provide federal courts an "out" when called upon to adjudicate issues of federal constitutional law (in tension with the rights-protecting theory of the federal courts held by many legal liberals). A legal-liberal future might cut back on abstention's

²²⁸ A full history would of course also analyze the relationship of legal process theory to legal liberalism, but that is beyond the scope of this Article.

²²⁹ As Justice Holmes said, historical research is the first step in informed legal analysis. See Oliver Wendell Holmes Jr, *The Path of the Law*, 10 Harv L Rev 457, 469 (1897) ("When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength.").

application, analyzed in Part IV.B. But a third possible future for federalism-based abstention is to embrace a robust, Frankfurterian version of the doctrine as a means of curbing federal court power and, at least on the margins, putting more adjudicative power in state courts. This possibility might appeal to modern progressives who are wary about a largely conservative federal judiciary as well as to conservatives who want to promote judicial restraint, and it is considered in Part IV.C.

A. The Textual Problem

In the Constitution, the subject matter jurisdiction of federal courts overlaps with that of state courts. But there is no textual hook in the Constitution for the idea that federal courts should sit out a case in order to allow a state court to adjudicate an issue. The Tenth Amendment provides merely that the states retain powers not explicitly delegated to the federal government, which is nothing more than restating explicitly what is already implicit in the Constitution's text and structure—the familiar theory that the Constitution contains enumerated powers.²³⁰ It's possible that there is something more to the Tenth Amendment—that it constitutes a substantive outer limit on federal power—but that idea is controversial.²³¹ The Supreme Court does not endorse that position.²³² The most straightforward reading of the Constitution is that federalism will come before the federal courts as a *substantive* problem. For example, the federal courts have to decide, as a matter of substantive constitutional law, when the national government has—or lacks—the power to regulate a given subject.²³³

²³⁰ See US Const Amend X. For the classic statement of the enumerated powers theory, see Federalist 45 (Madison), in *The Federalist*, 308, 313 (Wesleyan 1961) (Jacob E. Cooke, ed) (“The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.”).

²³¹ See, for example, Charles Cooper, *Reserved Powers of the States*, in David F. Forte and Matthew Spalding, eds, *The Heritage Guide to the Constitution* 479, 479–83 (Heritage 2d ed 2014).

²³² Professor Calvin R. Massey has argued that the abstention cases must implicitly rest on the Constitution, possibly under a Tenth Amendment theory. See Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYU L Rev 811, 821 (1991). If this is the case, it only sharpens the current point that the constitutional analysis is lacking.

²³³ See, for example, *Gonzales v Raich*, 545 US 1, 9 (2005) (holding that the Controlled Substances Act is within the Commerce Clause power and thus trumps permissive state marijuana law); *United States v Lopez*, 514 US 549, 567–68 (1995) (finding that the Gun-

But other than the Tenth Amendment, there isn't really a constitutional hook to hang a federalism theory on. In sum, the Constitution provides pretty sparse grounds for abstention doctrines.

In the absence of direct textual support, originalists of various stripes will (sometimes) look to historical practice to inform their constitutional interpretation.²³⁴ This is where Frankfurter comes in—eventually. For most contemporary originalists, those who subscribe to the “original public meaning” approach,²³⁵ practices close in time to the adoption of the Constitution are of greatest importance in that they might provide some evidence of the meaning of key terms in the document at the time of enactment.²³⁶ (Some textualists might value historical practice less and prefer instead to simply look for historical evidence of the meaning of the words;²³⁷ original intent originalists—a small minority now—might value historical practice more.²³⁸) When it comes to

Free School Zones Act of 1990 exceeded the scope of Congress's Commerce Clause power). See also *Bond v United States*, 564 US 211, 222 (2011) (“By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.”).

²³⁴ See, for example, Lawrence B. Solum, *Originalist Methodology*, 84 U Chi L Rev 269, 295 (2017); Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U Ill L Rev 1935, 1978–80; Caleb Nelson, *Originalism and Interpretative Conventions*, 70 U Chi L Rev 519, 525–29, 537–39, 548–50 (2003); John Harrison, *Forms of Originalism and the Study of History*, 26 Harv J L & Pub Pol 83, 87–88, 91–92 (2003). See generally William Baude, *Constitutional Liquidation*, 71 Stan L Rev 1 (2019); Jonathan Gienapp, *Historicism and Holism: Failures of Originalist Translation*, 84 Fordham L Rev 935 (2015); Curtis A. Bradley and Neil S. Siegel, *After Recess: Historical Practice, Textual Ambiguity, and Constitutional Adverse Possession*, 2014 S Ct Rev 1. See also *NLRB v Noel Canning*, 573 US 513, 572 (2014) (Scalia concurring in the judgment) (“[W]here a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision.”).

²³⁵ See, for example, Keith E. Whittington, *Originalism: A Critical Introduction*, 82 Fordham L Rev 375, 378–82 (2013); Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 92–93 (Princeton 2004).

²³⁶ See, for example, Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 Stan L Rev 443, 465–507 (2018) (using an originalist method to analyze the meaning of a constitutional phrase). See also generally Jack M. Balkin, *The New Originalism and the Uses of History*, 82 Fordham L Rev 641 (2013) (analyzing the various uses of history in originalist argumentation).

²³⁷ For an account of the relationship between textualism and originalism, see generally, for example, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 Loyola L Rev 611 (1999).

²³⁸ For a defense of original intent, see generally Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 Nw U L Rev 226 (1988). For a discussion of the eclipse of original intent by original public meaning originalism, see generally Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory* (2011), online at <https://ssrn.com/abstract=1825543> (visited

abstention, the early history doesn't really help provide an originalist pedigree to federalism-based arguments. There is existing scholarship that shows early exercises of discretion by the courts,²³⁹ but not based on federalism. There are reasons to think that courts in equity cases could abstain from issuing a decision. But this does not rely on federalism considerations at all.²⁴⁰

The history of Frankfurter's federalism-derived abstention doctrine doesn't help an originalist connect it to the constitutional text. It also doesn't help in terms of tying it to deep historical practice. Rather, it does the exact opposite. The history presented in Parts I–III of this Article emphasizes the novelty of Frankfurter's invention. For originalists who believe that legitimate constitutional interpretation requires ascertaining the meaning of the Constitution at the time of its adoption, Frankfurter's originality is a liability.

Originalists could respond to this critique by ending abstention in actions at law, where federalism considerations would necessarily have to operate outside the framework of equity. Originalists can accept equity-based abstention as firmly rooted

July 15, 2020) (Perma archive unavailable). For an argument that original public meaning and original intent might be compatible, see generally John O. McGinnis and Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 Nw U L Rev 1371 (2019).

²³⁹ See generally Shapiro, 60 NYU L Rev (cited in note 9) (documenting an expansive equity tradition of jurisdiction). See also, for example, *New Orleans Public Service, Inc v Council of the City of New Orleans*, 491 US 350, 359 (1989) (noting that “federal courts’ discretion in determining whether to grant certain types of relief [is] a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted”).

²⁴⁰ Professor David Shapiro’s influential study defending the federal courts’ use of discretion in exercising jurisdiction invokes both equitable doctrines and common law doctrines to defend abstention. See Shapiro, 60 NYU L Rev at 545–74 (cited in note 9). For an explanation of the influence of his article, see generally Daniel J. Meltzer, *Jurisdiction and Discretion Revisited*, 79 Notre Dame L Rev 1891 (2004). But the common law exercises of discretion come in just two varieties, neither of which is especially helpful for federalism-based abstention. First, there were prerogative writs, like certiorari and mandamus, which the common law courts could, but did not have to, grant. See Shapiro, 60 NYU L Rev at 572 (cited in note 9). Second, there were forum non conveniens cases in which common law courts declined to hear a case when there was another more convenient venue for proceeding. See *id* at 573. (For example, historically in the United Kingdom, English courts deferred to Scottish proceedings or vice versa.) But the prerogative writs live on and don’t really help to justify the creation of a new form of abstention. And forum non conveniens is arguably also unhelpful because it does not grapple with the Supremacy Clause issue; the relations between Scottish and English courts lacked any principle that one had supremacy over the other. For the history of the Act of Union that provided for Parliamentary sovereignty over the Scottish courts, see James E. Pfander and Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 Harv L Rev 1613, 1677 (2011). But this is quite different from a general principle of federal law supremacy over state law that exists under the Supremacy Clause in the United States. See US Const Art VI, cl 2.

in the common law and equity tradition in which the federal courts were created. Within the equity framework, a court could even take into account federalism and comity. The equity maxim is that “equity follows the law”;²⁴¹ federalism is part of the law in the general sense that the Constitution creates a system of limited (enumerated) powers on the part of the federal government and retained (unspecified) powers by the states. Federalism principles could be weighed when considering whether to grant an injunction. But federalism does not provide a sound, text-based reason for abstaining from actions at law.

This originalist future for abstention would formalize the cautious, modest approach to abstention that the Supreme Court has already seemed to favor. In *Quackenbush v Allstate Insurance Co.*,²⁴² the Court declined to apply *Burford* abstention to an action at law.²⁴³ The assumption seems to have been that abstention was limited solely to the context of equity. The Court was not clear as to whether this applies across the board to all forms of abstention, and it has never definitely ruled out the possibility of staying federal actions at law on an abstention theory.²⁴⁴ The originalist approach sketched in this Section would generalize the idea in *Quackenbush* and rule out the possibility of abstaining in actions at law.

B. The Judicial-Role Concern

There is a long tradition of legal scholarship that emphasizes the importance of the judiciary protecting individual rights. This tradition has sometimes been labeled “legal liberalism.” The term is imprecise but will do as a placeholder for present purposes. Legal liberals believe that it is an important responsibility of the judiciary to enforce individual rights and to protect the “discrete and insular minorities”²⁴⁵ who might be vulnerable to the

²⁴¹ See, for example, Joseph Story, 1 *Commentaries on Equity Jurisprudence* § 64 at 53–54 (Little, Brown 12th ed 1877) (noting that the maxim was true in two senses: first, “that equity adopts and follows the rules of law in all cases, to which those rules may . . . be applicable” and second, “that equity, in dealing with cases of an equitable nature, adopts and follows the analogies furnished by the rules of law”).

²⁴² 517 US 706 (1996).

²⁴³ *Id.* at 728–31.

²⁴⁴ See, for example, Fallon, *Hart and Wechsler* at 1108 (cited in note 13).

²⁴⁵ *United States v Carolene Products Co.*, 304 US 144, 153 n 4 (1938).

vicissitudes of the political process.²⁴⁶ There are a number of theoretical paths that one could take to arrive at this position. Professor John Hart Ely's theory of the courts as protecting individual rights in a countermajoritarian manner might be the most influential theoretical statement of legal liberalism.²⁴⁷ The Warren Court's rights-protective jurisprudence is the classic example of legal liberalism in practice. Legal liberals prefer to have an engaged judiciary, confident and assertive when it comes to individual rights.²⁴⁸

The history of abstention presented in this Article should be troubling to legal liberals in a quite different sense than it troubles originalists. While the originalists might object to the method by which the Court arrived at abstention doctrine, the liberals might be more troubled by the substantive uses of abstention, specifically when abstention is employed to allow federal courts to avoid deciding cases involving federal rights protections.

1. *Pullman* as a cautionary tale.

Pullman is a classic example of the anti-liberal potential of abstention. In *Pullman*, Frankfurter wrote for a majority that declined to issue a constitutional ruling on the Equal Protection Clause. The Texas Railroad Commission had issued an order that all sleeping cars operating in Texas had to be in the charge of a Pullman conductor, who was white, as opposed to a Pullman porter, who was black.²⁴⁹ Prior to the order, trains with only one sleeping car were in the charge of the porter.²⁵⁰ The order was transparently motivated by race and the trial proceedings included "extensive testimony by white women relating their fear of being alone in a Pullman coach with a black porter without a white conductor."²⁵¹ The order was challenged as a violation of the

²⁴⁶ In creating this broad-brush-stroke description of legal liberalism, I am indebted above all to the insightful treatment provided by Kalman, *The Strange Career of Legal Liberalism* (cited in note 183).

²⁴⁷ See generally Ely, *Democracy and Distrust* (cited in note 225).

²⁴⁸ See Kalman, *The Strange Career of Legal Liberalism* at 42–59 (cited in note 183).

²⁴⁹ *Pullman*, 312 US at 497–98.

²⁵⁰ *Id.* at 497.

²⁵¹ Barbara Y. Welke, *Beyond Plessy: Space, Status, and Race in the Era of Jim Crow*, 2000 Utah L Rev 267, 290 n 87. See also Judith Resnik, *Rereading "The Federal Courts": Revising the Domain of Federal Courts Jurisprudence at the End of the Twentieth Century*, 47 Vand L Rev 1021, 1039 (1994) (noting that "[r]ace, class, and gender, and the effects thereof, are discretely downplayed" in the usual treatment of the *Pullman* case by federal courts scholars).

Equal Protection Clause and as a statutorily defective use of power by the Railroad Commission.²⁵²

Frankfurter's opinion for the Supreme Court acknowledged at the outset that the case raised "a substantial constitutional issue."²⁵³ Frankfurter went on to say that the issue was "more than substantial. It touche[d] a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."²⁵⁴ The theory was that the Texas court might be able to construe the state statute in such a way as to eliminate the constitutional problem. Maybe. But the result was of course to put off deciding the equal protection issue for several years. The most generous reading of the opinion is that it constituted a clever strategic move by Frankfurter: maybe it was a way to provide that the Court wouldn't fracture over the substantive constitutional question, a way to ensure that the Court wouldn't take a case until it was ready to decide the matter in a progressive manner, or a way to let public opinion catch up. More troublingly, it may be read simply as a decision to insulate the Supreme Court from a public controversy and to preserve institutional capital on the "sensitive" issue of racial discrimination.

Legal liberals should certainly be troubled by the final possibility. For the legal liberal, a countermajoritarian, rights-protective decision is precisely the kind of decision that courts ought to be making when given the opportunity. There might be reasons to delay making such a decision, but they have to be good ones to overcome the default setting in favor of judicial engagement. And federalism-based reasons for delay ought not to be very persuasive to legal liberals.

2. Reasons legal liberals might be willing to delay the judicial protection of rights (and why federalism is not a good reason).

Legal liberals might acknowledge that there could be reasons for a court to delay or decline to decide an issue of rights. For instance, there has been a years-long debate about the extent to which courts can bring about social change and to what extent

²⁵² *Pullman*, 312 US at 498. See also Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U Pa L Rev 1071, 1077 (1974).

²⁵³ *Pullman*, 312 US at 498.

²⁵⁴ *Id.*

they are bound by existing social mores.²⁵⁵ Depending on their view of that debate, a legal liberal might be sympathetic to a strategy that tries to ensure that the Supreme Court doesn't decide a case until it is likely to do more good than ill.²⁵⁶ One might see this as a significant countervailing consideration against the default setting of enforcing federal law.

But federalism as an end in itself will often be a dubious reason for not taking jurisdiction to enforce a facially applicable federal law.²⁵⁷ To the contrary, federalism considerations—such as allowing states to set their own policies and chart their own courses—are especially worrisome reasons for denying enforcement of a federal law that protects individual rights.²⁵⁸ One of the main purposes of federal protection of individual rights is, on this account, to work in a countermajoritarian manner. It is to protect the discrete and insular minorities that are not able to protect themselves through political processes. If these conditions apply, one might think that the Supremacy Clause ought to apply to prevent infringement on those rights. It is precisely in the rights-based cases where federalism is an issue that one might think the

²⁵⁵ See generally, for example, Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago 2d ed 2008) (arguing that courts are not effective at facilitating social change); Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford 2004) (arguing that the Supreme Court did not effect a significant change in civil rights but instead was only successful where it rode the wave of existing popular opinion, and sometimes was counterproductive in prompting a backlash). See also Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* 433–34 (Oxford 2011) (arguing that courts were a necessary, though not sufficient, part of effecting social change in the civil rights era).

²⁵⁶ See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 NYU L Rev 1185, 1200–05 (1992) (discussing the court's remand of a women's rights case to the legislature where it could create laws that would "catch up with a changed world") (quotation marks omitted), quoting Wendy W. Williams, *Sex Discrimination: Closing the Law's Gender Gap*, in *The Burger Years: Rights and Wrongs in the Supreme Court 1969–1986* at 123 (Herman Schwartz ed 1987).

²⁵⁷ See Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 Harv L Rev 1485, 1489 (1987) ("Federal jurisdiction is needed to correct stagnant situations in which the states are not providing a forum or remedy for would-be federal plaintiffs.").

²⁵⁸ For one version of this argument, suggesting that confusion about abstention could lead to the displacement of "cases that should receive federal court adjudication," see Julie A. Davies, Pullman and Burford Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases, 20 UC Davis L Rev 1, 22 (1986). See also *Trainor v Hernandez*, 431 US 434, 455 (1977) (Brennan dissenting) ("[I]t seems to me that this solicitude for the State's use of an unconstitutional ancillary proceeding to a civil lawsuit is hardly compelled by the great principles of federalism, comity, and mutual respect between federal and state courts that account for *Younger* and its progeny.").

federal courts should be most assertive and protective of individual rights.

One might respond that state courts are able to apply federal law too. Much of the federal courts literature posits that state and federal courts must be assumed to be equals. This is sometimes called the “parity” assumption.²⁵⁹ But many scholars have doubted that this formal assumption actually reflects reality. The historical preference of individuals asserting federal rights claims for federal courts should be enough to make one doubt the existence of parity, one scholar wrote decades ago.²⁶⁰ Parity, he concluded, was a myth.²⁶¹

There is some anecdotal evidence that judges are willing to reach for abstention more aggressively in certain types of cases. A study by Professor Theodore Eisenberg reported that judges in Los Angeles seemed to be “straining to abstain” when cases involved challenges to statutes, ordinances, or other official policies.²⁶² The sample of just two years’ worth of cases was too small for the study to draw any firm conclusions, but of the eleven cases in which the issue was seriously litigated, “one was settled” and “three others offered virtually no ground for *Pullman* or *Younger* abstention.”²⁶³ Of the remaining seven cases, abstention was

²⁵⁹ For defenses of parity, see generally Michael E. Solimine and James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 *Hastings Const L Q* 213 (1983); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 *Wm & Mary L Rev* 605 (1981). For a critique of the parity principle, see generally Burt Neuborne, *The Myth of Parity*, 90 *Harv L Rev* 1105 (1977). See also Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 *UCLA L Rev* 233, 237 (1988) (arguing that federal courts “provide an alternative forum for the vindication of constitutional rights,” not that federal courts are “better than state courts”). A useful, though dated, survey of the debate is Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 *BU L Rev* 609 (1991). One article presented as a rebuttal to Professor Burt Neuborne’s critique of parity actually reinforces the point that federal and state courts are different: it argues not that federal and state courts reach the same results, but rather that Neuborne was wrong to assume that federal courts were inherently superior to state courts in enforcing individual rights. See generally William B. Rubenstein, *The Myth of Superiority*, 16 *Const Comm* 599 (1999). See also Sutton, *51 Imperfect Solutions* at 208 (cited in note 17). Another line of federal courts scholarship uses the term “parity” differently, to refer to the equality of all *federal* judges under Article III. See Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 *U Chi L Rev* 443, 472 (1989); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 *BU L Rev* 205, 221 (1985).

²⁶⁰ Neuborne, 90 *Harv L Rev* at 1109–10 (cited in note 259).

²⁶¹ *Id.* at 1105.

²⁶² Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 *Cornell L Rev* 482, 539–40 (1982).

²⁶³ *Id.* at 540.

ordered in six. “In none of the cases was abstention clearly mandated and in some it seemed erroneous,” Eisenberg reported.²⁶⁴ Parity between federal and state courts may very well be mythical in practice.

The history presented in Part III sharpens the point. Legal liberals have been right to worry that abstention would get in the way of protecting federal rights. The story of Frankfurter and the Progressive politics in the background of abstention doctrine show that the failure to protect federal rights was not just an incidental byproduct of protecting federalism. Protecting federalism was, for some Progressives, a way of intentionally reducing the scope of federal rights-protection. It is not too much of a stretch to say that the federalism rationale that Frankfurter created was not built in reliance on a mythical parity. Instead, he advanced the federalism rationale precisely because he believed that parity was a myth. For a Progressive like Frankfurter, the political motivation underlying abstention doctrine seems very likely to have been to avoid constitutional rulings by federal courts. To a legal liberal, this should be troubling: if the federal judiciary’s *raison d’être* is protecting federal rights, then abstention seems often misguided, if not perverse.

C. Restraining the Courts

Strands of thought in both progressivism and in conservatism are skeptical of judicial power. There is a long and respected history of judicial restraint that transcends crude political categories. Legal scholars who invoke judicial restraint often use the term to reference incremental development of the law by the case method.²⁶⁵ That’s part of the idea. But there is a still broader sense for the idea of judicial restraint, which is thinking of the judiciary as self-restrained out of respect for other, more democratic branches of government.²⁶⁶ This broader version of judicial restraint is a preference for matters of democratic governance to

²⁶⁴ *Id.* at 541.

²⁶⁵ There is a long tradition, associated with Professor James Bradley Thayer, of thought about whether courts should be restrained and decide cases in modest and incremental ways. For a survey of this tradition, see generally, for example, Posner, 100 *Calif L Rev* 519 (cited in note 183). For Thayer’s classic articulation, see generally James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv L Rev* 129 (1893).

²⁶⁶ See, for example, Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 *U Colo L Rev* 1401, 1403–04 (2002); Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 *Ind L J* 1, 11–12 (1983).

be resolved through democratic politics as often as possible.²⁶⁷ For these proponents of restraint, Frankfurter's vision of federalism-based abstention may be appealing.²⁶⁸

Many modern progressives are concerned that federal courts as rights-enforcing bodies have considerable potential to advance conservative causes. For instance, a growing number of modern progressives suggest that modern First Amendment doctrine has become a tool to advance conservative and deregulatory objectives.²⁶⁹ Many scholars have suggested that the First Amendment has become a modern version of *Lochner*.²⁷⁰

²⁶⁷ For a discussion of the recent history of political uses of “judicial activism” and judicial restraint, see generally Jane S. Schacter, *Putting the Politics of “Judicial Activism” in Historical Perspective*, 2017 S Ct Rev 209, 221–223. For a historical study of the tension between democratic politics and the development of case law in the courts, see generally Kunal M. Parker, *Common Law, History, and Democracy in America, 1790–1900: Legal Thought Before Modernism* (Cambridge 2011).

²⁶⁸ I am indebted to Adam Mortara for his suggestions on potential strategic uses of abstention doctrine.

²⁶⁹ For perhaps the most notable recent iteration of this view, see *Janus v American Federation of State, County, and Municipal Employees*, 138 S Ct 2448, 2487, 2502 (2018) (Kagan dissenting), in which Justice Elena Kagan faulted the majority for using First Amendment free speech doctrine to impede economic and regulatory policies. The final sentences of her dissent cast the issue in terms of courts against democracy, “black-robed rulers overriding citizens’ choices.” Id at 2502. The First Amendment, she argued, was being misapplied; it “was meant not to undermine but to protect democratic governance.” Id.

²⁷⁰ See generally Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 Colum L Rev 1915 (2016); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 Colum L Rev 1453 (2015); J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 Duke L J 375. See also Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* 113–228 (Liveright 2018); Amanda Shanor, *The New Lochner*, 2016 Wis L Rev 133, 206; Frederick Mark Gedicks and Rebecca G. Van Tassell, *Of Burdens and Baselines: Hobby Lobby’s Puzzling Footnote 37*, in Micah Schwartzman, Chad Flanders, and Zoë Robinson, eds, *The Rise of Corporate Religious Liberty* 323, 332 (Oxford 2016); Robert Post and Amanda Shanor, *Adam Smith’s First Amendment*, 128 Harv L Rev F 165, 166–67 (2015); Leslie Kendrick, *First Amendment Expansionism*, 56 Wm & Mary L Rev 1199, 1207 n 40 (2015); Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 Stan L Rev 1205, 1233 (2014); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L & Contemp Probs 195, 196–98 (2014); Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 Harv L Rev 30, 109–16 (1993); Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, (New Republic, June 2, 2013), archived at <https://perma.cc/CMM6-UPJY>. For a reflection of this sentiment in recent Supreme Court case law, see *National Institute of Family and Life Advocates v Becerra*, 138 S Ct 2361, 2381–82 (2018) (Breyer dissenting) (hinting that the majority reached a deregulatory result beyond what was done in the *Lochner* era); *Sorrell v IMS Health Inc*, 564 US 552, 591–92 (2011) (Breyer dissenting) (criticizing the Court’s conclusion to review a statute under higher First Amendment scrutiny and citing *Lochner* in the process); *Citizens United v Federal Election Commission*, 558 US 310, 479 (2010) (Stevens concurring in part and dissenting in part) (arguing

At the other end of the political spectrum, some conservatives are similarly wary of aggressive uses of judicial power. They share with the progressives old and new a concern about giving too much power to unelected, unaccountable courts. A judiciary willing to issue sweeping rulings purporting to invalidate democratically enacted laws is claiming a lot of power and proceeding in a nonconservative manner. This line of thought was deeply embedded in modern conservative legal thought. Judicial restraint was one of the watchwords of the early conservative legal movement. It goes back at least to the critics of the Warren Court's legal liberalism: they argued that among its faults was contempt for the democratic process and willingness to legislate from the bench.²⁷¹ The popularity of judicial restraint has waned in the conservative legal movement in recent years.²⁷² (More are now comfortable with an assertive judiciary when it is enforcing the original meaning of the Constitution.) But there are still conservatives who think that the judicial power is one to constrain and that judicial restraint is a key component.²⁷³ And the charge

that the majority's holding "elevat[e]s corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests") (quotation marks omitted), quoting *First National Bank of Boston v Bellotti*, 435 US 765, 817 (1978) (White dissenting).

Recent scholarship has examined the significance of the deregulatory use of the First Amendment in several contexts. For the labor context, see generally, for example, Laura Weinrib, *The Right to Work and the Right to Strike*, 2017 U Chi Legal F 513 (2017); Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 Harv CR-CL L Rev 323 (2016); Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 Minn L Rev 31 (2016); Cynthia Estlund, *Truth, Lies, and Power at Work*, 101 Minn L Rev 349 (2016). For the professional speech context, see generally, for example, Claudia E. Haupt, *Unprofessional Advice*, 19 U Pa J Const L 671 (2017); Claudia E. Haupt, *Professional Speech*, 125 Yale L J 1238 (2016).

²⁷¹ See, for example, Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash U L Q 695, 700–01 (1979). See also Schacter, 2017 S Ct Rev at 221–23 (cited in note 267).

²⁷² For an insightful commentary on the changing role of restraint in the conservative legal discourse, see Joel Alicea, *Chief Justice Roberts and the Changing Conservative Legal Movement* (Public Discourse, July 10, 2012), archived at <https://perma.cc/44TP-UXQG>. See also generally Randy E. Barnett, *The Wages of Crying "Restraint": How John Roberts Ended Up as America's Big Chief*, 45 Am Spectator 16 (Sept 2012).

²⁷³ See, for example, Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 BU L Rev 1745, 1777–85 (2015). See also Thomas R. Lee, *Judicial Activism, Restraint, & the Rule of Law*, 26 Utah Bar J 12, 13–14 (Nov 2013) (highlighting the negative views politicians have on judicial activism); David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 Harv J L & Pub Pol 137, 144–46 (2011) (arguing that conservatives should prefer judicial minimalism and restraint instead of originalism); Stefanie A. Lindquist, Joseph L. Smith, and Frank B. Cross, *The Rhetoric of Restraint and the Ideology of Activism*, 24 Const Commen 103, 124–25 (2007).

of judicial activism (often including a reference to *Lochner*) is still a standard in the conservative rhetorical arsenal.²⁷⁴

Advocates of this kind of judicial restraint might favor adjudication by state courts for basically the same reasons that Frankfurter did. First, to the extent that the emphasis is back on economic inequality, concerns about big business having excessive power in American politics, and other issues having to do with political economy, the state courts might again be thought to be the more sympathetic venue. Elected judges might be more likely to take populist positions, for instance.²⁷⁵

Second, to the extent that the federal constitutional law regime is viewed as excessively strict on at least some metrics or in some areas, the state courts are more likely to be lax in their application. In Frankfurter's era, it was common for Progressives to see the federal courts as more rigidly protective of federal rights and state courts as less so. The same assumption holds true today. The more state courts are able to adjudicate these issues, the less one might expect that rigid federal constitutional rules will be applied in such a way so as to impede the state enforcement scheme. Modern progressives share with their ideological forebears a concern about the use of the federal courts as countermajoritarian and anti-regulatory institutions. Conservative proponents of restraint are also critical of courts expansively enforcing rights claims at the expense of democratic regulations. The basic conceptual move is the same, even though the kinds of regulations that each side wants to safeguard might be different.²⁷⁶ To the extent that progressives and conservatives alike assume that state courts are generally more likely to be sympathetic to regulation and less likely to support strict doctrinal enforcement of constitutional doctrines, abstention on federalism grounds should be popular. A more robust federalism vision of abstention allows more space for states to adopt their own distinctive approaches to regulation. *Pullman*, *Burford*, and *Thibadoux* all can rest on this principle. *Younger* too fits this pattern in the specific context of criminal law. In other words, modern progressives should be

²⁷⁴ See, for example, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612, 2615–18 (2015) (Roberts dissenting).

²⁷⁵ See Amanda Frost and Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 Va. L. Rev. 719, 724 (2010).

²⁷⁶ For example, a modern progressive might want to protect campaign finance regulations from First Amendment attack; a conservative proponent of restraint might want to protect a regulation on the provision of abortions from challenges on the basis of substantive due process.

interested in abstention for the same reasons that legal liberals distrust abstention.

A few objections to the use of abstention for strategic, political reasons are worth considering briefly. First, it might seem like abstention can't make a meaningful policy difference for the kinds of issues proponents of restraint would care about because it has cast the federal court as both the "bad guy" and the "good guy" at the same time. The federal court is the bad guy in the sense that it is the entity that is in need of restraining. And the federal court (or at least the federal judge) must also play the role of the good guy, the one exercising self-restraint to abstain from hearing the case. Surely, the skeptic would say, this can't be realistic. The solution to this apparent conundrum is that federal courts as a whole might be hostile to some policy that one cares about (they could be anti-regulatory, for instance) and yet a particular judge may be sympathetic to regulation. A pro-regulatory judge in the district court could use abstention to keep some issues out of an anti-regulatory court of appeals.

Of course, the appellate court might reverse and get the issue back into federal court. But it won't always be able to do this. Here, the standard of review matters: a federal court reviewing an abstention decision *de novo* could easily reclaim a case for the federal courts if the district judge had abstained in a close case. But a court that reviews abstention decisions only for abuse of discretion would have to defer to the district court's decision to abstain in the close case. The courts of appeals are split on this issue.²⁷⁷ Some review the issue *de novo*, providing little space for a federal district court to try to manipulate outcomes about which it disagrees with the court of appeals by applying abstention aggressively.²⁷⁸ But the potential for manipulation is greater where the standard of review is abuse of discretion, as it is in several circuits.²⁷⁹

²⁷⁷ See *Trust & Investment Advisers, Inc v Hogsett*, 43 F3d 290, 293–94 (7th Cir 1994) (collecting cases); *Green v City of Tucson*, 255 F3d 1086, 1093 n 9 (9th Cir 2001) (en banc) (collecting cases).

²⁷⁸ See, for example, *Traugher v Beauchane*, 760 F2d 673, 675–76 (6th Cir 1985).

²⁷⁹ See, for example, *Nivens v Gilchrist*, 319 F3d 151, 153 (4th Cir 2003); *Gwynedd Properties, Inc v Lower Gwynedd Township*, 970 F2d 1195, 1199 (3d Cir 1992). The Ninth Circuit and the Seventh Circuit each employ a dual form of review—reviewing *Younger* abstention *de novo*, but other forms of abstention for abuse of discretion, at least as long as the minimum legal requirements for abstention are present. See *Hogsett*, 43 F3d at 293–94; *World Famous Drinking Emporium, Inc v City of Tempe*, 820 F2d 1079, 1081–82

Second, one could think (as Professor Martin H. Redish argues) that abstention doctrines are themselves violations of the principle of judicial restraint.²⁸⁰ Federal jurisdiction is created by statutes passed by the democratically accountable legislature.²⁸¹ So when a federal court declines to exercise this jurisdiction on an abstention rationale, it is actually contravening the will of the legislature.²⁸² Well-taken though this argument may be, a defender of abstention might still differentiate the kinds of judicial restraint principles involved. An automatic obedience to the jurisdictional statutes might be restraint. But if one has any skepticism that the jurisdictional statutes are perfectly clear,²⁸³ then there's likely going to be room for second-order judicial restraint principles like abstention. A refusal to take the first stab at an unresolved issue of state law could still be an exercise of restraint.

Third, virtually no one (progressive or conservative) is uniformly hostile to assertive rights protection in federal courts. Modern progressives, for instance, have offered critiques of free speech doctrine and of free exercise doctrine. But to the extent that they support assertive federal court enforcement in other areas (for example, race, gender, or sexual orientation discrimination), they are not likely to offer unqualified support for abstention. If one was to use abstention for maximal political advantage, one would have to decide when and how to apply abstention strategically for some issues and not for others. (This, of course, raises concerns of a different sort—for arguably, the point of neutral principles of law is that they don't perfectly advance a political agenda.²⁸⁴) If *Pullman* and other forms of abstention are

(9th Cir 1987). See also *Courthouse News Service v Planet*, 750 F3d 776, 782 (9th Cir 2014) (explaining that even for *Pullman* abstention, the initial question of whether the requirements for abstention are met is a legal question reviewed de novo, and only if the *Pullman* requirements are met is the decision of whether to abstain reviewed for abuse of discretion).

²⁸⁰ See Martin H. Redish, *Judge-Made Abstention and the Fashionable Art of "Democracy Bashing"*, 40 Case W Res L Rev 1023, 1030–31 (1989); Redish, 94 Yale L J at 76 (cited in note 8). But see William P. Marshall, *Abstention, Separation of Powers, and Recasting the Meaning of Judicial Restraint*, 107 Nw U L Rev 881, 896–99 (2013) (critiquing Redish's premise that abstention is unconstitutional, but commending Redish's view that judicial restraint is not compatible with abstention).

²⁸¹ See Fallon, et al, *Hart and Wechsler* at 20–21 (cited in note 13).

²⁸² See Redish, 40 Case W Res L Rev at 1031–32 (cited in note 280).

²⁸³ See Ann Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 Case W Res L Rev 1035, 1036 (1989).

²⁸⁴ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1, 15–16 (1959). Some, such as Professor Robert H. Bork, would see this as a natural concomitant of a restrained judiciary. See Robert H. Bork, *Neutral Principles and Some*

mandatory, it will be harder to tailor this; if discretionary, it could potentially be better to use as a tool on some varieties of federal claims and not others. These are unsettled questions.²⁸⁵ For the moment, the main point is that Frankfurter's politically motivated federalism theory of abstention might still have a constituency.

CONCLUSION

It is sometimes easy to imagine that a familiar concept like federalism was always a part of American constitutional jurisprudence. A closer examination reveals that this is not the case. State-federal relations may have been a familiar part of American jurisprudence, but the issue wasn't labeled "federalism" in Supreme Court jurisprudence until Justice Felix Frankfurter did so. The introduction of this concept was not happenstance. Frankfurter's vision of federalism, and of the federal courts' proper role in it, was informed by his political commitments and his observations of years of political maneuvering around the federal courts. It was because of his observations in the Progressive Era that Frankfurter believed that federal courts had to be restrained precisely in order to facilitate the development of a robust administrative state. Abstention from interfering with state courts was one way that federal courts could internalize this lesson. And unlike some other aspects of Frankfurter's judicial philosophy, his interest in judicial federalism successfully made the transition from the Progressive Era to the era of legal liberalism.

This history gives present-day scholars of federalism several possible takeaways. First, at the broadest level of generality, it is a reminder that federalism is flexible and susceptible to use for various political ends. The history of federalism doesn't point in a single political direction.²⁸⁶ But more troublingly perhaps, it

First Amendment Problems, 47 *Ind L J* 1, 7 (1971). For discussion of Bork's position, see generally Thomas B. Griffith, *Was Bork Right About Judges?*, 34 *Harv J L & Pub Pol* 157 (2011).

²⁸⁵ See Fallon, et al, *Hart and Wechsler* at 1113 (cited in note 13) (noting that the Supreme Court has given conflicting signals as to whether *Pullman* abstention is mandatory or discretionary).

²⁸⁶ See Heather K. Gerken, *Distinguished Scholar in Residence Lecture: A User's Guide to Progressive Federalism*, 45 *Hofstra L Rev* 1087, 1087 (2017) ("[M]y main point is that federalism doesn't have a political valence."); Sutton, *51 Imperfect Solutions* at 214 (cited in note 17) ("Federalism has no constituency, and it never will.").

reminds us that federalism is easily manipulated.²⁸⁷ As this history reveals, federalism was useful precisely because it was so capacious, so malleable, and so easily employed in a manner untethered from the original meaning or text of the Constitution (at least as to the causes that Frankfurter sought to advance through federalism rhetoric). Second, and following from the first point, the flexibility and malleability of federalism as a conceptual tool should make legal thinkers concerned with text and original meaning a bit more skeptical about invocations of federalism without a good textual hook. More specifically, the federalism rationale for abstention should be suspect to an originalist precisely to the extent that Frankfurter really was original—to the extent, in other words, that the federalism rationale was disconnected from constitutional text. Third, even assuming that federalism is a good background principle, there are reasons for the legal liberal to be suspicious of its invocation in the abstention context.

This study of abstention has revealed that federalism's history is complex and deeply political. What one makes of this history depends very much on one's methodological priors about constitutional interpretation as well as theoretical and policy commitments about the substantive values that ought to be advanced by constitutional law. Depending on those priors, this history can provide support for the elimination of federalism as a distinct rationale for abstention. Or it might motivate others to think more carefully about how to maximally use abstention doctrine to advance particular political or ideological agendas. History does not tell us which of these options to take. But for anyone who cares about the Constitution, federalism, and the federal courts, the history helps us to see how the abstractions of federalism doctrine have been used in the real-world context of contested politics and ideology.

²⁸⁷ See generally Richard P. Nathan, *There Will Always Be a New Federalism*, 16 *J Pub Admin Rsrch & Theory* 499 (2006) (noting in the political context that federalism has made repeated comebacks, even after having supposedly died or become irrelevant, and arguing that federalism is opportunistic).