The Vinson Court and the Idol of Restraint

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Few judicial attributes elicit greater praise than self-restraint. Yet the most restrained court of the twentieth century, that of Chief Justice Frederick M. Vinson, is generally considered a failure. This paper first analyzes the Vinson Court's adherence to restraint. I then argue why this judicial philosophy is largely responsible for this Court's poor legacy. I conclude by considering what this says about the nature of judicial restraint itself.

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THE VINSION COURT AND THE IDOL OF RESTRAINT

by Zachary Baron Shemtob*

I. INTRODUCTION

Few judicial characteristics garner greater praise than that of judicial self-restraint. Yet the most restrained court of the twentieth century, that of Chief Justice Frederick Vinson, is largely considered a failure. Using the Vinson Court as a case study, this article questions the value and efficacy of this judicial philosophy.

I begin by providing a general definition for judicial restraint. I then give a (very) brief history of its practice throughout the twentieth century. The majority of my paper explores judicial restraint on the Vinson Court, by way of an empirical comparison, a brief survey of the Court’s Truman appointees, and an exploration of their most important decisions. I conclude with explanations for why the Vinson Court is generally thought a failure, and the implications this has on the philosophy of judicial restraint itself.

II. THE NATURE OF JUDICIAL RESTRAINT

It has become commonplace to criticize so-called judicial activism.¹ Such criticism has come from scholars,² politicians,³ and judges alike.⁴ More recently, liberal

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¹ See Craig Green, An Intellectual History of Judicial Restraint, 58 EMORY L. J. 1195, 1197 (“For pundits, politicians, judges, and the public, activism-talk is so common that it masquerades as something timeless.”).

² See MARK LEVIN, MEN IN BLACK 11-12 (2005) (“Activist judges have taken over school systems, prisons, private-sector hiring and firing practices, and farm quotas.”).


critics have openly decried the Roberts Court’s supposed rightist activism,\(^5\) while conservatives have labeled judicial nominees Elena Kagan and Sonia Sotomayor leftist activists.\(^6\)

Despite over a hundred years of usage,\(^7\) the term judicial activism has no clear definition. Some believe it a vacuous phrase, used merely to dismiss decisions one politically disagrees with.\(^8\) Others have provided more concrete, though still not entirely determinate definitions. According to Senator Jeff Sessions, for example, judicial activists are those who legislate from the bench, twisting “the law to make it say what they want it to say.”\(^9\)

Since judicial decisions are rarely, if ever, transparently political, however, determining whether judges are interpreting or making law is hardly as straightforward as Senator Session’s implies. Perhaps easier is to define judicial activism through its opposite, that of judicial restraint.\(^10\) While activist judges supposedly interpret the law as they please, restrained judges defer to other authorities whenever possible. This philosophy’s first advocate, James Bradley Thayer, argued judges should avoid nullifying

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\(^5\) See NEW YORK TIMES EDITORIAL, THE NEW YORK TIMES, July 4, 2010 (“If Elena Kagan is confirmed, her first task will be…to help the court realize that judicial modesty actually means something.”).


\(^7\) See Michael J. Gerhardt, The Rhetoric of Judicial critique: From Judicial Restraint to the Virtual Bill of Rights, 10 WM. & MARY BILL RTS. J. 585, 586-587 (2002) (“[J]udicial activist”—have been fixtures in the lexicon of judicial critique throughout the past one hundred years); Craig Green, supra note __ (contending this term has actually been in usage for quite a while longer).

\(^8\) See KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS 3 (2006) (“[I]n practice the ‘activist’ turns out to be little more than a rhetorically charged shorthand for decisions the speaker disagrees with.”).

\(^9\) Supra note __.

executive and legislative acts unless they are *clearly* unconstitutional.\textsuperscript{11} Richard Posner summarizes restraint as a judges’ reluctance to “declare legislative or executive action” void, and such deference “at its zenith when action is challenged as unconstitutional.”\textsuperscript{12}

In *Measuring Judicial Activism*,\textsuperscript{13} Stefanie Lindquist and Frank Cross analyze the relevant literature in order to develop the first holistic picture of judicial restraint. According to the authors, judicial restraint is best measured in four ways, each reflecting a different manner of judicial deference. First, and most important, are judges’ willingness to defer to other federal and state actors.\textsuperscript{14} The more judges refuse to override legislative and/or executive provisions, the less likely they will be to carve out their own laws. Second is an adherence to precedent: Obeying precedent shows the court “is not following the whims of political winds or the judge’s own predilections,”\textsuperscript{15} but respects pre-established prerogatives. Third is “institutional aggrandizement,”\textsuperscript{16} or judges’ refusal to grant certiorari. The more cases a Court accepts, the likelier it is to substitute its own principals for the legislature or executive’s. Finally, and perhaps most obvious, is the (in)frequency of result-oriented judging: “When decisions appear to be based almost exclusively on the justices’ own policy preferences, it suggests a more activist orientation,” allowing justices to override legislatures and shape legal provisions however they see fit.\textsuperscript{17}

\textsuperscript{11} See 7 HARV L. REV 129 (1893) (“[A]n act of the legislature” should not “be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.”).
\textsuperscript{12} Richard Posner, THE RISE AND FALL OF JUDICIAL RESTRAINT (tentative draft, to be published next year in the CAL. L. REV. in a revised form).
\textsuperscript{13} *Supra* note _.
\textsuperscript{14} *Id.* at 47.
\textsuperscript{15} *Id.* at 36.
\textsuperscript{16} *Id.* at 37.
\textsuperscript{17} *Id.* at 42.
Lindquist and Cross’s methodology is not without its critics. Many scholars question the boundary between judicial restraint and judicial abdication. What, after all, ultimately determines whether statutes are so unconstitutional they need to be struck down? Even restraint’s champions have failed to give a single answer to this crucial question. While this article uses Lindquist and Cross’s typology to understand judicial restraint, I remain acutely aware of these unresolved issues, and (briefly) revisit them in my paper’s conclusion.

III. A (VERY) SHORT HISTORY OF RESTRAINT

Although the phrase “judicial activism” only dates back to the 1940s, the fear of judicial abuse existed at our nation’s founding. Alexander Hamilton warned against judges enshrining their own values into law. Chief Justice John Marshall was cautious not to nullify legislative enactments. Indeed, up until the Dred Scott decision, today

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18 See Green, e.g., supra note _ (arguing such criteria is empirically difficult, if not impossible, to measure).
19 See, e.g., Damon W. Root, Judicial Restraint or Constitutional Abdication, REASON MAGAZINE (May 17, 2010).
21 Id.
22 Id. (covering this issue in much greater detail).
23 See Green, supra note _, at1200 (“[T]he term “judicial activism” was “coined by Arthur Schlesinger in 1947.”).
24 Id. at 1195 (tracing similar fear of judicial abuse to before the Marshall Court).
25 Hamilton, A., Jay, J., & Madison, J. THE FEDERALIST PAPERS 469 (1961) (“[T]he courts must be the sense of the law; and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure for that of the legislative body.”).
26 See James W. Ely, Jr., John Marshall: Definer of a Nation (Review), THE INDEPENDENT REVIEW, Winter 1998 (“Far from championing unbridled judicial activism, Marshall was always mindful of the restraints on judicial power.”).
largely recognized as “the worst imaginable case of judicial activism,” the Court only once overruled a federal statute.

With the turn of the century and the industrial revolution, the Court became considerably less restrained. Interestingly, though today judicial activism is widely viewed as a trope of the left, this label was first applied to conservative jurists during the Progressive Era. Seeking to support property claims and the newly rising industrial elite, court conservatives nullified state and legislative statutes through implicit, immutable property rights and a nebulous “freedom of contract.” Oliver Wendell Holmes, Jr., an early advocate of restraint, complained that his brethren’s support for industry had “hardly any limit but the sky.” Louis Brandeis agreed, chastising the Court for acting as a sort of “super legislature.”

The Court’s activism reached its peak during President Franklin Roosevelt’s first term. The President had been elected on a platform of economic reform, and shortly after taking office attempted to pass a package of sweeping financial measures. When the justices struck a number of these, Roosevelt threatened to retaliate by packing the Court with his own appointees. Although the President’s plan fizzled, the Court majority

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27 See Green, supra note _, at 1214 (not only nullifying existing federal law, but holding slaves were not protected by the U.S. Constitution and could not become U.S. citizens).
28 And state statutes only a handful of times. See Joseph Francis Menez, John R. Vile, and Paul Charles Bartholomew, SUMMARIES OF LEADING CASES ON THE CONSTITUTION 125 (204) (Marbury v. Madison was the only other case in which a federal statute had been nullified).
29 See, e.g., EVAN TSEN LEE, JUDICIAL RESTRRAINT IN AMERICA 24 (2011) (discussing the Lochner era Court).
30 Id.
33 See New State Ice Co. v. Liebmann, 282 U.S. 262 (1932) (Brandes, dissenting).
34 See generally JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010) (discussing the battle waged between Roosevelt and the conservative activist Court).
35 Id. at 263-264 (Roosevelt laid out a plan allowing himself to nominate a justice for every justice who would not retire past the age of seventy).
became markedly less willing to overturn executive and congressional statutes.\(^{36}\) And when a number of the more conservative justices died or retried shortly thereafter, Roosevelt crafted a court almost entirely loyal to his progressive economic agenda.\(^{37}\)

Roosevelt’s philosophy of restraint reached its peak on the Stone and Vinson Courts. Though united in its support for the New Deal, the Stone Court became badly splintered between the judicial ideologies of Felix Frankfurter and Hugo Black.\(^{38}\) While Frankfurter followed Holmes and Brandeis’s calls for restraint in both social and economic matters, Black urged his brethren to more actively enforce individual rights. Justice Robert Jackson, aided by Frankfurter, openly insulted and attacked Black, even trying to sabotage any possibility for the latter to become Chief Justice.\(^{39}\) Black and Justice William Douglas responded in turn, with the latter launching vitriolic, often personal diatribes on Frankfurter and Jackson’s integrity and jurisprudence.\(^{40}\)

Following Roosevelt’s death, President Truman sought to both control the Court’s warring factions and further promote Frankfurter’s restrained approach.\(^{41}\) Truman’s first opportunity to do so arose within three months of his ascension, with the death of Justice Owen J. Roberts.\(^{42}\) A year later Chief Justice Stone died. This was followed shortly after

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\(^{36}\) See Jeff Shesol, *Justices Will Prevail*, THE NEW YORK TIMES, March 13, 2010, at WK10 (spurring him to remark that he “lost the battle but won the war” over control of the Court).

\(^{37}\) Id.

\(^{38}\) See FRANCES RUDKO HOWELL, *TRUMAN’S COURT: A STUDY IN JUDICIAL RESTRAINT* 4 (1988) (“Each [Black and Frankfurter] profoundly influenced the ultimate performance of the Court by the force of his individual opinions, but even more because their sharp differences helped to establish the framework within which the entire Court operated.”).


\(^{42}\) See RUDKO, *supra* note _, at 45.
by two more vacancies, allowing Truman to effectively shape the early Cold War Court.

IV. TRUMAN’S FOLLY

The Vinson Court, like the Stone Court before it, has fared quite poorly in the eyes of most scholars. Perhaps the most meaningful criticism comes from Michael Belknap, who wrote a comprehensive treatment of this Court’s history, rulings, and legacy. Belknap begins his book by acknowledging that “Fred Vinson was not a great chief justice”, “nor was the Supreme Court he headed…a great Court.” Indeed, according to Belknap, the Court was, at best, “mediocre.”

Most other scholars have graded the Court even more harshly. In July of 1970 sixty-five legal historians evaluated the ninety-six justices that served between 1780 and 1969. A third of the Vinson Court was listed as “failures.” Bernard Schwartz identifies two Vinson justices, Frederick Vinson and Sherman Minton, as among the ten worst to have ever served on the Court. Evan Prichard labels the Vinson Court Truman’s “most disastrous legacy.” And according to Fred Rodell, “fifty years hence” few of the Vinson Court’s members “will be any better remembered-or deserves to be better remembered-than the nameless Justices who sat with Chief Justice Marshall.”

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43 Id. at 63, 87.
44 Id. at 46 (describing the Stone Court as “marred” by “pettiness and personal animosities.”).
45 Id. at xi.
46 Id.
47 See RUDKO, supra note _, at 35.
48 Id.
49 See BERNARD SCHWARTZ, A BOOK OF LEGAL LISTS 29 (1999).
50 See RUDKO, supra note _, at 37.
51 Id. at 151.
V. VINSONIAN RESTRAINT

Along with its poor legacy, the Vinson Court is perhaps most notable for its philosophy of self-restraint. As detailed earlier, Cross and Lindquist identified five measures of judicial restraint: (1) a willingness to uphold federal statutes, (2) a willingness to uphold state and local statutes, (3) an adherence to precedent, (4) a low certiorari grant rate, and (5) a non-outcome oriented jurisprudence. In all these factors save one, the Vinson Court was indeed among the most restrained Court’s of the twentieth century.

(1) The Vinson Court, along with the Stone Court, struck proportionality fewer federal statutes than any of their predecessors or successors, at only 3%:

<table>
<thead>
<tr>
<th>Approximate percentage of total federal statutes nullified</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>The White Court (1910-1921)</td>
<td>11%</td>
</tr>
<tr>
<td>The Taft Court (1921-1930)</td>
<td>18%</td>
</tr>
<tr>
<td>The Hughes Court (1930-1941)</td>
<td>13%</td>
</tr>
<tr>
<td>The Stone Court (1941-1946)</td>
<td>3%</td>
</tr>
<tr>
<td>The Vinson Court (1946-1953)</td>
<td>3%</td>
</tr>
<tr>
<td>The Warren Court (1953-1969)</td>
<td>30%</td>
</tr>
<tr>
<td>The Burger Court (1969-1986)</td>
<td>15%</td>
</tr>
<tr>
<td>The Rehnquist Court (1986-2005)</td>
<td>34%</td>
</tr>
</tbody>
</table>

(2) The Stone and Vinson Court’s also had the lowest nullification rate regarding state and local statutes, at around 6%:

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52 See RUDKO, supra note _, at xxi (“For Truman, the role of the Court in interpreting the Constitution should be essentially passive. The men he appointed give him basically what he wanted.”); also see BELKNAP, supra note _; also see UROFSKY, supra note _.
53 See supra note _.
54 The certiorari grant rate.
55 Also considered a jurisprudential failure (see UROFSKY, supra note _, at ix (“The chief justiceships of Harlan Fiske Stone and Fred M. Vinson share the unenviable distinction of being the perhaps the least collegial and internally vindictive in the Court’s history. As such they give rise to the supposition that leadership in the person of the chief justice is an essential ingredient of institutional cohesiveness and thus an effective element in the critical conduct of Court business.”)).
### Approximate nullification rate of state and local statutes per term

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>The White Court</td>
<td>11 per term</td>
</tr>
<tr>
<td>The Taft Court</td>
<td>14 per term</td>
</tr>
<tr>
<td>The Hughes Court</td>
<td>8 per term</td>
</tr>
<tr>
<td>The Stone Court</td>
<td>6 per term</td>
</tr>
<tr>
<td>The Vinson Court</td>
<td>6 per term</td>
</tr>
<tr>
<td>The Warren Court</td>
<td>13 per term</td>
</tr>
<tr>
<td>The Burger Court</td>
<td>18 per term</td>
</tr>
<tr>
<td>The Rehnquist Court</td>
<td>8 per term</td>
</tr>
</tbody>
</table>

(3) The Vinson Court was also far less willing to overturn precedent than those Courts before and since, though did not rank the lowest of the twentieth century.\(^{58}\)

### Approximate percentage of total precedents overturned

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>The White Court</td>
<td>2.5%</td>
</tr>
<tr>
<td>The Taft Court</td>
<td>3%</td>
</tr>
<tr>
<td>The Hughes Court</td>
<td>10.4%</td>
</tr>
<tr>
<td>The Stone Court</td>
<td>7.5%</td>
</tr>
<tr>
<td>The Vinson Court</td>
<td>6.5%</td>
</tr>
<tr>
<td>The Warren Court</td>
<td>22.4%</td>
</tr>
<tr>
<td>The Burger Court</td>
<td>25.9%</td>
</tr>
<tr>
<td>The Rehnquist Court</td>
<td>8%</td>
</tr>
</tbody>
</table>

(4) John P. Frank found the Vinson Court denied cert more frequently than any Court before it,\(^{59}\) though succeeding Court’s (perhaps motivated by the Vinson Court’s example) were even stingier.\(^{60}\)

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\(^{58}\) Data gathered from ELLIOT E. SLOTNICK (ED.), JUDICIAL POLITICS: READINGS FROM JUDICATURE 379 (1999).

\(^{59}\) See RUDKO, supra note _, at 35.

\(^{60}\) See JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 209-210 (2011) (Stevens explains the high cert. rate was due to the Court’s mandatory jurisdiction. Indeed, as this jurisdiction waned, the Court began to refuse more and more unmeritorious appeals; see also Robert L. Boucher, Jr. & Jeffrey A. Segal, Supreme Court Justices as Strategic Decision-Makers: Aggressive Grants and Defensive Denials on the Vinson Court, 57 J. POL. 824 (1995) (for a fuller discussion of the Vinson Court’s cert. process); see also Saul Brenner & John F. Krol, Strategies in Certiorari Voting on the United States Supreme Court, 51 J. POL. 828 (discussing grant rates for the different Court’s and tying this to their ideological dispositions).
Certiorari Grant Rates

<table>
<thead>
<tr>
<th>Court</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Vinson Court</td>
<td>.82</td>
</tr>
<tr>
<td>The Warren Court</td>
<td>.75</td>
</tr>
<tr>
<td>The Burger Court</td>
<td>.65</td>
</tr>
<tr>
<td>The Rehnquist Court</td>
<td>.69</td>
</tr>
</tbody>
</table>

(5) The final indicator of judicial restraint, though more difficult to quantify, is the Court’s ideological direction. As detailed by Lindquist and Cross, Courts’ regarded as blanketly liberal or conservative are likely to be more activist, rendering decisions “according to judges’ personal ideologies rather than neutral dictates of the law.”

Since more restrained Courts will not follow a single ideological direction, they will likely display a more moderate judicial record. Of the Court’s surveyed, the Vinson Court was nearest to the center.

<table>
<thead>
<tr>
<th>Court</th>
<th>Liberal Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>The White Court</td>
<td>65%</td>
</tr>
<tr>
<td>The Taft Court</td>
<td>76%</td>
</tr>
<tr>
<td>The Hughes Court</td>
<td>76%</td>
</tr>
<tr>
<td>The Stone Court</td>
<td>82%</td>
</tr>
<tr>
<td>The Vinson Court</td>
<td>58%</td>
</tr>
<tr>
<td>The Warren Court</td>
<td>66%</td>
</tr>
<tr>
<td>The Burger Court</td>
<td>38%</td>
</tr>
<tr>
<td>The Rehnquist Court</td>
<td>N/A</td>
</tr>
</tbody>
</table>

As revealed by the five leading indicators, the Vinson Court was undoubtedly one of the most restrained (if not the most restrained) Supreme Court’s of the twentieth century. It had the lowest nullification rate of federal, state, and local statutes, the third lowest rate of overturning precedent, and was the most ideologically moderate. Though

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61 See supra note __, at 39.
62 Data gathered from KEITH, supra note __, at 37.
63 The data only contains the first few terms, and therefore an inaccurate picture, of the Rehnquist Court.
certiorari grant rates were lower on succeeding Courts, this was likely a result of institutional factors beyond the Vinson Court’s control.  

VI. RESTRAINT TRIUMPHANT

The Vinson Court has generally been broken into two phases. The “first” Vinson Court lasted from 1946 until 1949, encompassing the three years before all four Truman nominees joined the Court. The Truman justices then dominated court proceedings from 1949 until 1953. While the Vinson Court did not begin as an anti-activist body, “by the end of the Vinson era, the picture was unbroken, unchallenged” restraint.

The Court’s earliest terms reflected a deep division between the activist, or “Libertarian four,” consisting of Justices Black, Rutledge, Murphy, and Douglas, and the restrained inclinations of Justices Frankfurter, Jackson, Vinson, Burton, and Reed. From 1946 to 1949 both sides traded occasional victories. Most notable was the record-breaking level of dissent and polarization. Disagreement rates reached their highest point since the 1790s, with two pairs of justices (Jackson and Rutledge, and Frankfurter and Douglas) having the highest disagreement rates in Court history. Additionally, an unprecedented fifteen pairs of justices disagreed in more than forty percent of cases.

Following the 1948 deaths of Murphy and Rutledge, the restraint camp was strengthened by the appointments of Tom C. Clark and Sherman Minton. This reduced

64 See fn. 60.
66 Id.
67 Id. at 376.
68 Id. at 385 (“The Libertarian Four managed to pick up enough votes from the conservative wing (whether from Frankfurter, Jackson, or Reed)…to maintain approximate parity in the won-lost figures.”).
69 Id. at 384.
70 Id.
the libertarians to two members, Black and Douglas, who were consistently overruled.71
This era saw even greater discord than the previous one. The rate of dissent was the
second highest in Court history, with Black and Douglas setting records for their amount
of disagreements.72 The remaining activists voiced their dissent with increasing
frequency as the Court embraced restraint.

VII. THE VINSON BLOC

Since the Vinson Court’s ideology was largely the result of its Truman
appointments, it is necessary to describe their judicial philosophies. While the
jurisprudence of Justices Frankfurter and Jackson were also important in steering the
Court’s restrained direction,73 these two figures ultimately played a secondary role to the
so-called Vinson bloc.74

Truman’s first appointment, Harold Burton, was a long time senator who had
originally served with the President on a committee to investigate a national defense
procurement program.75 Frances Rudko summarizes Justice Harold Burton’s judicial
mind-set as that of a “lawyer’s judge.”76 Rather than focus on the larger principles or
desired outcome of each case, Burton generally decided slowly and methodically.77 This
involved identifying the legal problem, carefully weighing the issues on both sides, and
generally deferring to executive or legislative interests. Each case was treated

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71 Interestingly, the activists were occasionally joined here by Justices Frankfurter and Jackson. While these
latter justices had little issue with state regulation of the marketplace, they sometimes dissented from the
Vinson bloc’s almost reflexive support of government interests in loyalty and subversion cases. Id. at 388.
72 Id. at 395.
73 Both of who often helped form the Court’s majority.
74 And have been explored in much greater depth elsewhere. See, e.g., WILLIAM DOMNARSKI, THE
GREAT JUSTICES 1941-54: BLACK, DOUGLAS, FRANKFURTER, AND JACKSON IN CHAMBERS
75 See RUDKO, supra note _, at 47.
76 Id. at 58.
77 Id. at 56 (“He (Burton) was deliberate, cautious, even slow.”).
individually, “objectively,” and “dispassionately,” with Burton avoiding constitutional matters whenever possible. Melvin Urofsky states that Burton “had a pragmatic mind,” though “one that did not tend toward jurisprudential (or ideological) consistency.”

Truman’s second nominee, Chief Justice Frederick Vinson, had been an ardent New Dealer and briefly served as President Truman’s Secretary of the Treasury. As Chief Justice, Vinson attempted (and generally failed) to unite a fractured Court around narrow decisions. A former clerk recalled that the Chief Justice was, like Burton, a “pragmatist,” leaving the “abstract philosophizing” for Black and Frankfurter. Perhaps most important to Vinson was procedure. The Chief Justice often denied standing to plaintiffs, insisting that they follow a rigorous review structure. When cases did reach the Court, Vinson largely favored executive and legislative interests: “[H]e nearly always favored the power of government…over that of the individual.” His son, Frederick Vinson, Jr. summarized his father’s legacy as neither doctrinaire nor “cause oriented,” but always focused on the case at hand.

Justice Thomas Clark, Truman’s third nominee, is generally considered his best. Though a firm believer in judicial restraint, Clark was somewhat more flexible than the

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78 Id. at 57.
79 Id. at 153.
80 See BELKNAP, supra note _, at 38.
81 See RUDKO, supra note _, at 68 (“Vinson thought the Court’s work should be primarily the resolution of disputes.”).
82 Id. at 79.
83 Id. at 78 (“He [Vinson] insisted that appeals be considered only on the points legally reserved for review and that cases be brought to the Court through the proper review structure.”).
84 UROFSKY, supra note _, at 150.
85 Id. at 79.
86 See RUDKO, supra note _, at 33 (“In July of 1970, sixty-five legal scholars evaluated the ninety-six justices who served between 1789 and 1969”; of the Truman nominees only Clark was not rated a “failure.” This is admittedly not high praise, but better than the alternative); also see UROFSKY, supra note _, at 155 (quoting Douglas, “(Clark) had the indispensible capacity to develop so that with the passage of time he grew in stature and expanded his dimensions.”). Truman actually called Clark his “biggest mistake” following Clark’s decision against the President’s 1952 seizure of the nation’s seal mills. Reportedly,
other Truman appointments.\textsuperscript{87} A former clerk states that Clark was most “dedicated to the work of judging, not to ideology.”\textsuperscript{88} Especially crucial to Clark was precedent. The Justice believed that only by following previous decisions could the Court best avoid invalidating “appropriate action by the other branches of the federal government or the States.”\textsuperscript{89} Indeed, Clark followed precedent even with decisions he personally disagreed. In \textit{Miranda v. Arizona},\textsuperscript{90} for example, Clark originally dissented from the majority opinion. After \textit{Miranda} became established law, however, the Justice voted to uphold it in every case before him.\textsuperscript{91}

Truman’s final appointment was that of Justice Sherman Minton. A liberal senator and former ally of Justice Black, many expected Minton to show some sympathy for individual rights.\textsuperscript{92} In fact, Minton proved to be the most restrained Truman appointee; “more than any of the other Truman appointees,” Minton “committed himself to the philosophy of judicial restraint.”\textsuperscript{93} A former clerk notes Minton was “extremely conscious of and insistent upon adhering to…statutory limitations,” regardless of the resulting “justice or injustice.”\textsuperscript{94} Even Minton’s (otherwise sympathetic) biographers

\textsuperscript{87} His most lasting legacy may be \textit{Mapp v. Ohio}, which helped incorporate the Bill of Rights.
\textsuperscript{88} See RUDKO, supra note _, at 91.
\textsuperscript{89} Id. at 91-92.
\textsuperscript{90} 384 U.S. 436 (1966).
\textsuperscript{91} Id. at 95.
\textsuperscript{92} See BELKNAP, supra note _, at 82 (“Surprising to many commentators was Justice Minton’s conservatism, which seemed at odds with his history as one of Roosevelt’s most loyal, and liberal, political lieutenants.”).
\textsuperscript{93} Id.
fault the Justice’s almost reflexive sacrifice of individual to legislative or executive interests.95

VIII. NOTABLE CASES

The Vinson Court dealt with a host of important issues, mostly dominated by the beginnings of the Cold War and the civil rights movement. Against stinging dissents by its more activist members, the Court limited free speech, endorsed the deportation and exclusion of aliens, and generally favored government interests in criminal procedure and labor law. The Vinson Court’s record on civil rights is more mixed. While the Court refused to abolish segregation entirely, it must be given credit for opening the door (however slightly) for Brown v. Board of Education.96

Ultimately, the Vinson Court cannot be understood outside the Cold War era. Anxiety of the communist threat unleashed a broad Red Scare throughout 1940s and 50s America, reaching its apex when the Court took shape.97 Fearing Soviet infiltrators, state and federal governments established various so-called loyalty and security programs.98 Chief among these was that brought to the Court in American Communications Associates v. Douds.99 This case challenged the Taft-Hartley Act’s denial of membership to the National Labor Relations Board for union members whom refused to swear they were not communists. In his majority opinion, Chief Justice Vinson recognized this

95 See LINDA C. GUGIN AND JAMES E. ST. CLAIR, SHERMAN MINTON: NEW DEAL SENATOR, COLD WAR JUSTICE 30 (1997) (“Minton tended to view legal issues...in black and white, with no shades of grey.” “Although he was conscientious about his duties on the Court, he was not destined to become one of its most notable justices.”).
96 See BELKNAP, supra note _, at 192 (“It [the Vinson Court] should be lauded for the steps it took regarding the shameful treatment of people of color...while the Warren Court decided Brown and its progeny, it is unlikely that the cases could have been decided that way in 1954 without the earlier decisions of the late 1940s and early 1950s.”).
97 Id. at 3.
98 See UROFSKY, supra note _, at 160.
provision of the Act abridged free speech, but upheld it through an expansive reading of the commerce clause. Using this case as precedent, the Court further backed measures banning subversives from running for office, and upheld a 1952 act deporting longtime resident aliens for former membership in the Communist Party.

Even more controversial was the majority decision in *Dennis v. United States*. In *Dennis*, leaders of the Communist Party were indicted for planning to overthrow the U.S. government. Since the state could only prove the defendants had taught and advocated revolution, they charged them with conspiring to promote subversive actions rather than ever actively engaging in them. Vinson’s plurality opinion recognized the importance of free speech, but stressed the overriding danger of communist infiltration. This involved rewriting Holmes and Brandeis’s prevailing “clear and present danger test” to not only accommodate actual but potential danger.

While scholars have largely criticized Vinson’s *Dennis* plurality, Black’s dissent is considered one of his greatest. Black chastised the plurality for substituting fear for reality, making apparent their bastardization of the “clear and present danger” test. Most powerful was Black’s conclusion, a hope that “in calmer times, when pressures, passions, and fears subside” the First Amendment would be restored to its

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100 See UROFSY, supra note __, at 161 (“This abridgement of free speech...had to be weighed against the government’s power to regulate commerce, and by utilizing the Commerce Clause the chief justice managed to evade the First Amendment issues.”).
103 341 U.S. 494 (1951).
104 Id. at 509 (According to Vinson, the government could not afford to wait until after “the putsch is about to be executed, the plans and have been laid and the signal is awaited.”).
105 See UROFSKY, supra note __, at 170 (All the government now had to show “was that the speech might be dangerous, an easy task in the Cold War atmosphere.”).
106 Id. at 171 (detailing various critiques of the *Dennis* decision).
107 Id. at 579 (praising and detailing the influence of this dissent).
hollowed place. Indeed, Black’s plea won out shortly thereafter: *Dennis* was never invoked as precedent, and hastily buried only a few years after its holding.

The Vinson Court is also faulted for one particular case it did not take, that of Julius and Ethel Rosenberg. Sentenced to death for espionage, the couple’s plight came before the Court and was declined a striking six times. Were Frank Murphy and Wiley Rutledge still serving, certiorari would have likely been granted. As it was, the Vinson Court wanted “nothing to do with such a potentially explosive issue,” and the couple was executed on the flimsiest of grounds.

The Vinson Court was equally restrained regarding labor rights. In 1946 the federal government took control of the nation’s bituminous coal mines in order to end an ongoing labor strike. After a breakdown in negotiations between the government and unions, District Judge Alan T. Goldsborough invoked the Norris-LaGuardia Act to issue a temporary restraining order. He further found the union leaders in civil and criminal contempt and fined them a staggering $3.5 million. The union countered that the Norris-LaGuardia act had no bearing on private labor disputes, accusing Judge Goldsborough of overstepping his jurisdiction.

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108 *Id.* at 581.
109 *Id.* at 175 (“[T]he majority opinion would have practically no doctrinal significance, and within a few years the Court moved to bury *Dennis* with almost indecent haste.”).
110 See BELKNAP, *supra* note __, at 99.
111 *Id.* (“Had Murphy and Rutledge been alive, they almost certainly would have joined” those seeking to review the Rosenberg convictions.”).
112 See UROFSKY, *supra* note __, at 179.
113 See WALTER & MIRIAM SCHNIER, FINAL VERDICT: WHAT REALLY HAPPENED IN THE ROSENBERG CASE (2010) (discussing how Julius Rosenberg was, at most, a low-level Soviet spy and Ethel Rosenberg entirely innocent).
115 See UROFSKY, *supra* note __, at 191.
116 *Id.*
117 *Id.*
The Supreme Court, after weeks of debate, issued a highly fragmented opinion.\textsuperscript{118} The majority sided with Goldsborough, upholding his right to issue an injunction and his finding of contempt. They faulted Goldsborough’s high sum, however, reducing this to an arbitrary $700,000.\textsuperscript{119} While constitutional scholars have split on the Court’s overall decision, most continue to agree that their reasoning made little sense.\textsuperscript{120}

More influential, though only temporarily, were some of the Court’s cases concerning the Fourth Amendment. In \textit{Harris v. United States},\textsuperscript{121} FBI agents conducted a four-hour search of a suspected check-forger’s bedroom without a warrant. When they found numerous illegal selective surface classification cards, they used this as evidence to secure a conviction. Chief Justice Vinson acknowledged the search was disturbing, but upheld the conviction on a “totality of the circumstances rationale.”\textsuperscript{122} Frankfurter, usually an ally of Vinson’s, wrote a passionate dissent.\textsuperscript{123} In what would become the cases’ most celebrated line, Frankfurter declared the Fourth Amendment “not an outworn bit of Eighteenth Century romantic rationalism,” but “an indispensible need for a democratic society.”\textsuperscript{124} Frankfurter’s dissent won the day relatively quickly, becoming precedent even within the Vinson Court.\textsuperscript{125}

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\textsuperscript{118} \textit{Id.} at 193 (“[T]he Court issued a highly fragmented opinion…no fewer than seven separate questions divided the justices.”).
\textsuperscript{119} \textit{Id.} at 195.
\textsuperscript{120} \textit{Id.} (“Vinson’s majority opinion was roundly criticized…Commentators at the time tended to treat the Murphy and Rutledge dissents as better reasoned and better law than the majority holdings,” though even these were quite technical and confusing).
\textsuperscript{121} 331 U.S. 145 (1947).
\textsuperscript{122} UROFSKY, \textit{supra} note \_, at 226.
\textsuperscript{123} \textit{See} Harris, \textit{supra} note \_, at 155.
\textsuperscript{124} \textit{Id.} at 161.
\textsuperscript{125} \textit{See} BELKNAP, \textit{supra} note \_, at 143 (“The Court seemed to move toward the views of the \textit{Harris} dissenters in four 1948 cases.”).
\end{footnotesize}
Perhaps the most dramatic example of the Vinson Court’s lack of long term influence, however, was in *Wolf v. Colorado*.\(^{126}\) Dr. Julius Wolf had been twice convicted of conspiring to perform abortions based on appointment books seized during a warrantless search of his office. Frankfurter’s majority opinion held that the Fourth Amendment was only partially applicable to the states, and rejected the exclusionary rule. According to Frankfurter, if state action violated “the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples,” this qualified as a violation of due process.\(^{127}\) Since the exclusionary rule was a relatively recent innovation, Frankfurter found it constitutionally unnecessary for states to abide by. Justice Douglas dissented, instead recognizing a “right to privacy” implicit within the Fourth Amendment.\(^{128}\) Like in previous cases, the dissent eventually prevailed.

In *Mapp v. Ohio*,\(^{129}\) Justice Clark, a Truman justice, wrote for a majority explicitly overruling *Wolf*. Justice Douglas even got in the final word, declaring *Wolf* without “reason or principle.”\(^{130}\)

With the rise of the civil rights movement, the Court was forced to further interpret the extent of the due process clause. Among the more controversial cases was *Adamson v. California*,\(^{131}\) which became an opening salvo in Black and Frankfurter’s struggle over full incorporation. Frankfurter’s majority won this round, refusing to

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\(^{126}\) 338 U.S. 25 (1949).

\(^{127}\) *Id.* at 28.

\(^{128}\) See Harris, *supra* note _, at 40 (Douglas, J.) (dissenting).

\(^{129}\) *Supra* note _.

\(^{130}\) UROFSKY, *supra* note _, at 229.

\(^{131}\) 332 U.S. 46 (1947).
incorporate the Fifth Amendment. In only a few years, however, Black’s dissent became law, as the Court gradually moved towards full incorporation.

The Vinson Court’s “equal protection” rulings were less restrained, albeit similarly narrow. As Melvin Urofsky summarizes, the Vinson Court left *Plessy* “alive and well,” though somewhat restricted its scope. In *Bob-Lo Excursion Co. v. Michigan*, for example, the Court sided with a plaintiff who had been refused access to an amusement park ride solely based on his skin color. The Court further restricted the separate-but-equal doctrine in *Henderson v. United States*. In this case, Elmer Henderson was prevented from sitting at an empty seat at a white table. While Justice Burton was careful not to challenge segregation itself, he sided with the plaintiff, making it more difficult for expensive interstate carriers to maintain separate cars. Perhaps the Court’s civil rights activism came through most clearly in *Sweatt v. Painter*, where the Court mandated the University of Texas Law School admit a black student, the first time an all-white institution had been ordered to do so. Nevertheless, the Court pointedly refused to expand this ruling to other educational institutions.

Despite the Court’s narrow activism regarding civil rights, perhaps its greatest failing lies in its continual delay to hear public school segregation laws. In the middle of 1952 the Court did announce it would hear challenges to school segregation in Delaware,

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132 *Id.* at 60 (“Less than ten years ago, Mr. Justice Cardozo announced as settled constitutional law…the process of law does assured by the Fourteenth Amendment does not require immunity from self-incrimination.”).
133 *See UROFSKY, supra* note _, at 219 (“During the Warren years nearly all of the first eight amendments guarantees were applied to the states.”).
134 *Id.* at 248.
138 *See BELKNAP, supra* note _, at 157.
139 *Id.* at 157-158 (“[D]espite the steps taken by the Vinson Court in…*Sweatt*, the *Plessy* rule of “separate-but-equal” remained in force.”).
Virginia, South Carolina, Kansas, and the District of Columbia.\textsuperscript{140} The resulting conferences led to no agreement,\textsuperscript{141} however, and Vinson lacked neither the gravitas nor much inclination to push things further. Frankfurter also purposely delayed hearing the issue, convinced that Vinson and the other Truman nominees would rule against the plaintiffs.\textsuperscript{142} Indeed, when Vinson died a year later (and Brown finally landed on the Court’s docket), Frankfurter cruelly declared the Chief Justice’s demise “the first solid piece of evidence I’ve seen to prove the existence of God.”\textsuperscript{143}

\textbf{IX. REASONS FOR FAILURE}

The Vinson Court has been criticized for a variety of reasons. Perhaps the most basic source of criticism has been its dry and repetitive opinions.\textsuperscript{144} Though Black, Douglas, Frankfurter, and (to a lesser extent) Jackson are considered among the Court’s finest wordsmiths, the Truman Justices wrote mechanically and without any rhetorical flourish. Legal scholars have been hard-pressed to find a single line of theirs worth much historical value.\textsuperscript{145}

A second, and considerably more serious, criticism is the Vinson Court’s failure to lay down any lasting legal principles or precedent. As described earlier, none of Truman’s nominees had an articulated philosophy of law. They prided themselves on being lawyers, placing predictability and dependability above all else. Unlike Black or

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\item[\textsuperscript{140}] See UROFSKY, supra note \_\_, at 258.
\item[\textsuperscript{141}] Id. at 258.
\item[\textsuperscript{142}] Id. at 259 (“Frankfurter…told many people that he had delayed the decision in Brown to help the Court reach the right judgment.”).
\item[\textsuperscript{143}] See Philip Elman, The Solicitor General’s Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History, HARV. L. REV. 817, 840 (1987) (interestingly, Frankfurter may have been wrong here. Vinson’s clerk Newton N. Minow believed Brown would have “been decided the same way “and with the same unanimity” had Vinson lived.” See RUDKO, supra note \_\_, at 35.).
\item[\textsuperscript{144}] See BELKNAP, supra note \_\_, at 36, 76, 79, 82 (discussing some of the dry and mechanical writing styles of the Truman nominees).
\item[\textsuperscript{145}] Id.
\end{enumerate}
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Frankfurter, who often used individual cases to reflect on the larger legal system, Truman’s nominees focused solely on the issue before them and “mechanically applied the rules.” Judge Posner remarks that “the test of greatness for the substance of judicial decision” rests on its “contribution to the development of legal rules and principles.”

For the most part, the Vinson Court issued few grand statements or clear directions for the future.

This is not to say no precedent was laid during this period. In Justice Black’s 1947 opinion in Everson v. Board of Education, for example, the Court essentially incorporated the Establishment Clause. This exception proves the rule, however, as Justice Black, largely considered the era’s greatest justice, was more often among the Vinson Court’s minority.

Indeed, one need only look at the cases Black dissented from to get some idea of the Vinson Court’s frustrated legacy. The Court’s abridgement of free speech in Dennis was overturned only a few years after its occurrence, and is now largely viewed as a reactionary product of Cold War paranoia. The Court’s major Fourth Amendment decision, Harris, was overturned by the Vinson Court itself. Perhaps most damning are Wolf v. Colorado and Adamson v. California. Both cases would become most famous for being reversed; Wolf in Mapp and Adamson by a host of succeeding rulings.

The Vinson Court’s greatest failing, however, surely revolves around Brown v. Board of Education. As detailed, the Vinson Court was actually more activist regarding

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146 See RUDKO, supra note __, at 130.
147 The Learned Hand Biography and the Question of Judicial Greatness, 104 YALE L. J. 511, 523 (1994).
149 Id. at 15-16 (Black, J.) (“In the words of Jefferson, the clause against establishment of religion by law was intended to erect ‘a wall of separation between Church and State.’”).
civil rights than most other matters. Nevertheless, public school segregation, the period’s most controversial and far-reaching domestic matter, was a bridge it dared not cross. By kicking this can down the road, Vinson and his brethren not only prolonged the nation’s suffering, but lent no institutional authority to the Court itself. This institutional impotence was further reflected by the Court’s dissent rates, among the highest in history.\textsuperscript{151}

The Vinson Court’s ideological divisions could be found among even those who favored judicial restraint. This can be seen by comparing the Truman nominee’s almost reflexive restraint with Frankfurter’s balancing approach.\textsuperscript{152} While Frankfurter advocated restraint, this was tempered with a constant awareness of real-world consequences.\textsuperscript{153} When it came to civil rights, for example, Frankfurter was among the Court’s most far-reaching and progressive justices. On the matter of due process, Frankfurter was even more activist than Black,\textsuperscript{154} recognizing a vaguely substantive component in cases like \textit{Francis v. Resweber},\textsuperscript{155} and \textit{Malinski v. New York}.\textsuperscript{156}

The Truman justices (save for perhaps Clark) refused such complexities, almost reflexively supporting state interests. The Vinson Court thus came dangerously close to being a rubber stamp for the other two branches, undermining the Court’s independent authority. Frankfurter tempered his deference by refusing to equate judicial restraint with

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\item[\textsuperscript{151}] See Galloway, \textit{supra} note _, at 395.
\item[\textsuperscript{152}] Frankfurter always attempted to balance the interests in play, generally deferring to legislative or executive powers (\textit{see} HELEN THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 59 (1960) (Frankfurter always recognized that “constitutional interpretation…was “to a very large extent the task of weighing competing practical considerations and forming a practical judgment.”)).
\item[\textsuperscript{154}] \textit{Id}.
\item[\textsuperscript{155}] 329 U.S. 459 (1947) (Frankfurter, J.) (concurring) (allowing a botched execution to proceed).
\item[\textsuperscript{156}] 324 U.S. 401 (1945) (Frankfurter, J.) (concurring) (overturning a forced confession).
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judicial abdication. Burton, Vinson, Clark, and Minton seemingly had no such compunction. In reading their opinions, one is often left wondering the need for a High Court at all.

X. THE DANGERS OF RESTRAINT

Ultimately, the Vinson Court was a product of the Cold War, believing non-essential liberties subordinate to the perceived Soviet threat. Everything else, including civil rights, was a secondary concern. To the majority, a restrained judiciary was far preferable to one that recognized nebulous social or economic penumbra.

Yet the Vinson Court’s failure also lies in the schizoid nature of judicial restraint itself. Whereas decisions that actively curb economic interests generate widespread praise, those that support social progress are often criticized.157 A prime example is the twentieth century’s most reviled decision, Lochner v. New York.158 This decision, striking down a New York law limiting bakers’ working hours, came to embody the Fuller Court’s misguided war on progressive reform. The early Roosevelt Court was tarred for similar reasons.159 Even today, among the Rehnquist Court’s most unpopular decisions is Kelo v. New London, upholding Connecticut’s eminent domain law.160 The Roberts Court has faced even greater criticism for its ruling in Citizens United v. Federal Elections

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157 See, e.g. William G. Ross, The Ratings Game: Factors That Influence Judicial Reputation, 79 MARQ. L. REV. 401 (1996) (“Since most leading scholars” (and the public it seems) “favor judicial deference to the legislative branch of government in economic matters and judicial activism in cases involving personal liberties, it is not surprising that so-called “liberal” justices are more highly ranked than what might be called “conservative” justices.”).
158 198 U.S. 45 (1905); see STEVENS, supra note _, at 107 (Justice Stevens calls Lochner “universally despised.”); also see DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFOM 1 (2011) (though Bernstein defends Lochner, he recognizes that it “is likely the most disreputable case in modern constitutional discourse.”).
159 See SHESOL, supra note _.
160 545 U.S. 469 (2005); see also Citizens Fighting Eminent Domain Abuse, www.castlecoalition.org, available at http://www.castlecoalition.org/index.php?option=com_content&task=view&id=34&Itemid=119 (the public reaction was so harsh forty-three states subsequently limited the practice of eminent domain).
Though few citizens can likely explain the majorities’ reasoning, both rulings, like *Lochner* before them, have come to represent entrenched corporate interests run amok.

When it comes to social interests, judicial restraint garners far less praise. If *Lochner* stands as the century’s worst decision for the Court’s failure to restrain itself, the greatness of *Brown* lies in the Court’s social activism. The activist *Lawrence v. Texas*, which nullified the nation’s last remaining sodomy laws, has faced similar praise.

Bernard Schwartz’s list of the Court’s ten greatest decisions reflects this dichotomy. Schwartz identifies four as having expanded state control over economic interests and two as having expanded civil liberties. According to Schwartz, not one of the Court’s greatest decisions aided commercial interests or curbed social rights. In Schwartz’s list of the Court’s worst decisions, five of these curbed social rights and five

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164 See Laurence H. Tribe, *Lawrence v. Texas: The ‘Fundamental Right’ That Dare Not Speak Its Name*, 117 HARV. L. REV. 1894-1895 (Lawrence “may well be remembered as the *Brown v. Board of Education* of gay and lesbian America.”); also see Nancy Gibbs, Perry Bacon Jr., and Mark Thompson, *A Yea for Gays*, TIME MAGAZINE, July 7, 2003 (“Gay-rights activists declared Lawrence a victory on the scale of the *Brown v. Board of Education* decision, which desegregated schools in 1954…in cases like this the symbolism, over time, can shape the substance.”).

165 See SCHWARTZ, supra note _, at 47.

166 *Id.* (the rest expanded the Court’s internal jurisdiction).

167 *Id.* at 68.
supported business interests.  

Similar results can be found in a more recent study by Frank Cross and James F. Spriggs. Even the ever-controversial Roe v. Wade has generally enjoyed a majority of public support.

Why economic and social decisions generate such dichotomous reactions lies well beyond the scope of this paper. Regardless of its cause, this phenomenon helps further explain the Vinson Court’s poor legacy. By the time of Vinson’s ascension to the Chief Justiceship, many of the most important economic issues had been decided and resolved in the executive and legislature’s favor. The Cold War, on the other hand, brought a host of social issues for the Court to address. If seated during the New Deal, the Vinson Court may have become known for its championing of individual over economic interests. Instead, enmeshed in the Cold War, the Court’s legacy proved one of social repression.

XI. CONCLUSION

If one is charitable, she could praise the Vinson Court for its judicial consistency. This Court refused to carve out arbitrary social or economic rights, ceding

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168 Interestingly, no Vinson Court decision can be found on either list.
169 See Frank B. Cross & James F. Spriggs, The Most Important (And Best) Supreme Court Opinions and Justices 60 EMORY L. J. 408, 441 (2010). Of the twenty five cases that the authors identify as the most legally relevant (and best) a majority expanded civil liberties. It should be noted, however, that Buckley v. Valeo (which was partially overturned by Citizens United) comes in at number 18.
171 See Ross, supra note _, at 401; also see BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (discussing how Supreme Court decisions have ebbed and flowed in popularity regarding civil rights and economic reform).
172 Indeed, by this time the New Deal was quickly becoming a memory.
173 As the late Hughes Court became known for.
174 This could have partly been resolved through Brown, but, alas, the Court refused to act.
175 If, of course, such a thing is worth praising.
both to the other branches of government. Here was no fair-weather restraintist, but a Court consistently willing to subordinate outcome to process.

Ironically, Felix Frankfurter, restraint’s most eloquent spokesman, identified the problems with such a limiting principle. According to Frankfurter, in a world where “facts are changing, law cannot be static. So-called immutable principles must accommodate themselves to facts of life, for facts are stubborn and will not yield.”

The Vinson Court, in refusing to balance the interests before it, never heeded this advice. Truman’s justices left little practical difference between judicial restraint and abdication.

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176 See THOMAS, supra note __, at 172 (1960).