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Aliens on the Bench: Lessons in Identity, Race and Politics From the First "Modern" Supreme Court

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ALIENS ON THE BENCH: LESSONS IN IDENTITY, RACE AND POLITICS FROM THE FIRST “MODERN” SUPREME COURT CONFIRMATION HEARING TO TODAY

Lori A. Ringhand*

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The pictures are familiar: a nominee for the Supreme Court sits under hot media lights before a panel of grim, serious faces. Senators ask questions designed to display the depth of their constitutional knowledge, or to please their constituents back home. The nominees’ answers—when they answer at all—are unsatisfying generalities that fail to reveal much of substance. The cameras flash, and the sound bites fly.

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1. The title is taken from a statement made by Charles Carroll, one of the witnesses who testified before the Senate Judiciary Committee in opposition to Frankfurter’s nomination. Nomination of Felix Frankfurter to be an Associate Justice of the Supreme Court: Hearing Before the Subcomm. of the Comm. on the Judiciary, 76th Cong. 95 (1939) (statement of Charles Carroll) [hereinafter Frankfurter Transcript].
This process has been called many things over the years—a "mess," a "subtle minuet" and, most recently, a "kabuki dance." Nonetheless, it maintains its hold on us. Every time a Supreme Court vacancy is announced, the media and the legal academy snap to attention. Even the general public takes note; in contrast to most of the decisions issued by the Court, a majority of Americans are aware of and have opinions about the men and women who are nominated to sit on it. Moreover, public opinion about the nominee has a strong influence on a senator's vote for or against the candidate.

If the confirmation hearing held before the Senate Judiciary Committee is largely an empty ritual, why do so many people seem so enthralled by it? Obviously, who sits on the Court matters, but why is the hearing itself important? The premise of this Article is that the confirmation process—or, more precisely the confirmation process of nominees perceived as racial outsiders—matters in part because such confirmations provide a high profile arena in which we as Americans fight to constitute our national identity. While all Supreme Court confirmations provide a platform for our ongoing debates about constitutional values, confirmations of racial outsiders do more. They provide a forum in which a more fundamental, and certainly more visceral, question arises: just who are "we the people"?

I open my examination of these issues by looking at the confirmation of Felix Frankfurter. Frankfurter's was our first truly modern confirmation hearing: it was the first at which both the nominee and the witnesses provided unrestricted testimony, in an open session, exposed to the full glare of a highly-interested media. It also, perhaps not coincidentally, involved a nominee who was perceived at the time as a racial outsider.

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4. See generally id.
5. To even address the question of race in a discussion of Felix Frankfurter is, admittedly, to enter a realm fraught with complexity. Jews in America have at different times been identified as primarily a racial, ethnic or religious group. See generally Karen Brodkin, How Jews Became White Folks and What That Says About Race in America (1998). To the extent that Judaism is perceived as an ethnicity or religion rather than a race, there is a question of how—and whether—it is appropriate to differentiate the discrimination they faced in America from that faced by Irish, Italian or Catholic immigrants. Id. These issues, while unresolved (and perhaps irresolvable) have been exhaustively discussed elsewhere and will not be elaborated on in great detail here. See, e.g., Michael Omi & Howard Winant, Racial Formation in the United States: From the 1960s to the 1990s, (2d ed. 1994); Matthew Frye Jacobson, Whiteness of a Different Color: European Immigrants and the Alchemy of Race (1998); Nathan Glazer & Daniel Patrick Moynihan, Beyond the Melting Pot: The Negroes, Puerto Ricans, Jews, Italians, and Irish of New York (2d ed. 1970); Brodkin, supra. For current purposes, however, it is sufficient to note that the "whitening" of Jews in America did not begin in earnest until after
Despite this, the Frankfurter hearing has not been thoroughly examined in academic literature and has never been explored from the perspective presented here. This Article fills that scholarly gap. It does so in large part by focusing on the stories of the Americans who showed up at the Senate Judiciary Committee hearing in 1939 to protest Frankfurter's confirmation. Each of these individuals—a wealthy socialite turned zealous communist hunter, a member of the Seneca Indian Tribe, a second term senator from Nevada, and more than a half dozen self-described American patriots—brought the passions, prejudices, and fears of an era into the Senate hearing room. These people were, in their minds, fighting for the very soul of their country, and that fight, to an extent that is perhaps surprising to recall today, was fought in the language of race. Examining Frankfurter's confirmation through their eyes thus illustrates how constitutive of national identity the modern confirmation process has been since its very inception.

I then turn to more recent events, and ask whether the confirmations of other justices perceived as racial outsiders—namely, Justices Thurgood Marshall, Clarence Thomas, and Sonia Sotomayor—have played a similar role in our national dialogue. I conclude that they have, and show how the confirmation battles that ensnared these nominees in many ways echoed, and in some ways amplified, the debates about race and identity that were on such vivid display in the Frankfurter confirmation. I conclude with some thoughts about what the similarities—and differences—among these hearings tell us about the role of such confirmations in our national discourse.

I. THE FRANKFURTER HEARING

There are two reasons why I oppose the appointment of Prof. Felix Frankfurter to the Supreme Court of the United States. One is because I believe his record proves him unfit for the position, irrespective of his race, and the other is because of his race. . . . [T]he Jew has been fostering movements that are subversive to our Government.

- Allen A. Zoll, executive vice-president of the American Federation Against

World War II, BRODKIN, supra, and that at the time of the Frankfurter nomination Jews were still widely considered to be not quite white, JACOBSON, supra, at 188. This also distinguishes Frankfurter's confirmation from that of subsequent Jewish (and Catholic) nominees. More fundamentally, white racial identity and European ethnicity are often overlapping, not binary, categorizations. Id. Nominees like Frankfurter could thus catch the edges of both: a Jew in 1939 (and perhaps a Latina in 2009) could in different circumstances be considered either white or a member of non-white racial group.
Communism, testifying in opposition to
the confirmation of Felix Frankfurter.⁶

I am not opposed to him as a Jew, if he has proved himself.
... [B]ut before he should go into a responsible position he
should prove he is entitled to it and understands the prin-
ciples of our country. He is one that was brought up on a
Communist basis rather than our constitutional basis, and
should not be entrusted with a responsible position dealing
with foreign countries where he could possibly do harm to
our constitutional government.

- John Bowe, retired disabled veteran of
the Spanish-American War and World
War I, testifying in opposition to the
confirmation of Felix Frankfurter.⁷

I want to say one thing, and I don't know if you will permit
it. There is bound to be a law passed in a short while to
prohibit immigration into this country. . . . If such a law is
passed by Congress, it is bound to come up before this man,
and I don't think he should be put up there on that Court. I
believe you will find that most of the people think the same
thing. . . . [I]f you are going to put an alien on the Supreme
Court Bench of the United States it will show others in for-
eign countries that they can come over here and do the
same thing. We have them here in every office, and they
take advantage of everything they can.

- Charles Carroll, carpenter, testifying in
opposition to the confirmation of Felix
Frankfurter.⁸

Given the strong currents of anti-immigrant and anti-Jewish sentiment
surging through America before World War II,⁹ Felix Frankfurter’s friends
did not expect him to receive the nod from President Franklin Roosevelt

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⁶ Frankfurter Transcript, supra note 1, at 74, 76 (statement of Allen A. Zoll, executive vice-president, American Federation Against Communism).
⁷ Id. at 89 (statement of John Bowe).
⁸ Id. at 95 (statement of Charles Carroll).
when the death of Justice Benjamin Cardozo was announced in 1938. Although Frankfurter had long been a friend and advisor to the President, he was nonetheless considered an unlikely appointment for this vacancy. Frankfurter was both a Jew and an immigrant—two groups that were synonymous to many Americans of the time with communism, radicalism, and anti-Americanism. Frankfurter’s appointment also was complicated by the regional politics of the era. Those politics appeared to dictate that the President appoint a Westerner, not another Easterner, to the high court. Giving Cardozo’s seat to a non-Jewish Westerner and saving a Frankfurter appointment for the next vacancy—widely expected to be that of the elderly Justice Louis Brandeis—would help President Roosevelt finesse each of these issues.

In the end, however, Frankfurter got the call. Justice Brandeis’s retirement, announced after Cardozo’s death but before FDR selected his replacement, had opened up the “Jewish seat” on the Court and thus solved the problem of having “too many” Jewish justices sitting on the Court at the same time. It also allowed the President to reassure Westerners that their turn was coming. (Which it was: Brandeis’s seat was filled by William Douglas, who was born in Minnesota and grew up in Washington state.)

Once made, the nomination was generally well-received. The Nation enthusiastically proclaimed that “[n]o other appointee in our history has gone to the court so fully prepared for its great tasks.” Other reports were more circumspect, but the prevailing sense was that Frankfurter was a good choice and that he would be confirmed without much difficulty. The Washington Post, for example, called him a “distinguished liberal thinker” and

11. Frankfurter was born in 1882 in Vienna, Austria and moved with his family to the United States in 1894. See id. at 7, 10.
12. See JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER 64 (1975); see also A Place for Poppa, TIME, Jan. 16, 1939, at 15, 15 (“[U]p to the last moment pressure was strong on the President to make his third Supreme Court appointment count politically by giving it to the West . . . and possibly to a Catholic.”).
13. See PARRISH, supra note 10, at 274.
14. See JOHN ANTHONY MALTESE, THE SELLING OF SUPREME COURT NOMINEES 104 (1995) (“Like Brandeis before him, however, Frankfurter faced opposition from anti-Semites, who were quick to point out that Brandeis already filled the Court’s ‘Jewish seat.’”) Maltese quotes a letter submitted to the Senate Judiciary Committee as saying that “[i]f we put another Jew on the Court, then the Jew element in the Court will represent 29 million of the population . . . . ‘Would you put two Negroes on the Court, or two Chinese on the Court, or two Japanese?’” Id. Although Cardozo also was Jewish, his family, which was of Portuguese descent, had been in America since before the Revolutionary War and he seemed to not have been perceived as holding a “Jewish” seat. PARRISH, supra note 10, at 273-74.
"scholar," while the *New York Times* anticipated little "serious opposition."

Like today, media interest in the confirmation also extended beyond Frankfurter's legal credentials. Reporters recounted the nominee's journey from a poor, non-English speaking Jewish immigrant community in New York City, to Harvard Law School, to the pinnacles of power in the United States government. Journalists wrote of his "story-book" career, seeing in his life the "American dream come true." As the *Atlanta Constitution* put it at the time of his Senate hearing:

No Horatio Alger hero of fiction ever overcame greater obstacles to achieve success than has Felix Frankfurter. He came to the United States with his poor parents from Vienna, Austria, when he was 12 years old. He could speak no English. Before another few days have passed he will have been given the highest honor within the gift of the American people to a foreign-born citizen, a place on the [S]upreme [C]ourt of the United States.

That Frankfurter was Jewish also generated some positive press. Numerous media sources noted the symbolic importance of an American President appointing a Jew to such a prestigious position at a time when Nazism was on the rise in Europe. A columnist wrote in *The Nation* that he had "no doubt that the President welcomed the opportunity to appoint Frankfurter just at this time as another answer to the Nazi ideology." *Time* magazine noted that Hitler had been "offered a subtle rebuke." Frankfurter himself,


18. *Frankfurter Session Set: Senate Subcommittee Moves to Speed Confirmation*, N.Y. TIMES, Jan. 7, 1939, at 2. Jeffrey Segal and Albert Cover, who have evaluated the perceived qualifications of Supreme Court nominees at the time of their appointment, gave Frankfurter a perceived qualification score of .965 on a scale of 1.0. This is slightly below William Brennan, Ruth Bader Ginsburg, and Antonin Scalia (each of whom received a perfect 1.0) and very close to the score received by recent Chief Justice nominee John Roberts (who received a .970). Jeffrey Segal & Albert Cover, *Perceived Qualifications and Ideology of Supreme Court Nominees*, 1937-2005, available at http://www.stonybrook.edu/polsci/jsegal/qualtable.pdf.

19. *See* Frankfurter Named to Supreme Court; Succeeds Cardozo, WASH. POST, Jan. 6, 1939, at 1 [hereinafter Frankfurter Named to Supreme Court]; R. L. Duffus, Felix Frankfurter: The Man Behind the Legend, N.Y. TIMES, Jan. 15, 1939, (Magazine), at 3; *New Jurist Came from Vienna and Soon Won Harvard Degree*, CHRISTIAN SCI. MONITOR, Jan. 5, 1939, at 10.


23. *A Place for Poppa*, supra note 12. A similar sentiment was expressed by some opponents of the nomination. Retired Major General George Van Horn Mosely, a strident opponent of FDR and the New Deal, denounced the nomination in a speech before the American Legion, calling it "a slap at patriotic America[,] . . . a slap at the Dies committee[,] . . . a slap at the [S]upreme [C]ourt[,] . . . [a]nd [it] probably [was] intended as a slap at Mr. Hitler, himself." *Moseley Urges Legion to Fight Reds*, ATLANTA CONST., Jan. 27, 1939, at 12.
speaking later in his life, made a similar observation, saying that "at the time that Hitler was propagandizing the doctrine of [the] Jew as pariah, Roosevelt, the spokesman for the forces of humanity and freedom, had appointed a Jew to America's highest Court."²⁴

Not all the reactions were so positive however. Just outside the mainstream of accolades ran a strong counter-current, a cluster of opposing voices that, while not entirely respectable, nonetheless had legions of compatriots across the nation. To these individuals, Frankfurter was a dangerous man: a communist sympathizer of "alien origins" and a menace to the nation. *Time* magazine referred to these dissenters as the "minor patriots," and they were demanding to be heard.²⁵

The Senate Judiciary Committee gave them their chance. Chastised by criticism of its decision two years earlier to rush Hugo Black's nomination through without openly discussing his Ku Klux Klan affiliation,²⁶ the Committee opened its proceedings to the media. It also invited interested parties to testify, and subjected the nominee himself to unrestricted questions.

One witness appeared to speak in favor of the nomination. The rest were opposed. These witnesses had various motives, prestige, and levels of sophistication, but two stand out: Elizabeth Dilling, an upper-middle class socialite turned author and anti-communist crusader; and Alice Lee Jemison, a Seneca Indian and lobbyist for the Seneca Nation. These two women, along with Senate Judiciary Committee member Pat McCarran (D-Nevada), were nationally known figures with a not insignificant public following. Their opposition to Frankfurter was articulated in the language of anti-communism and American ideals but, as shown below, also had a distinctly racial component. Each of their stories will be examined in detail.

The remaining opposition witnesses were less significant individually, but collectively they captured the openly racist rage of a segment of the population who saw the Frankfurter appointment as a violation of their most cherished ideas about their country. I will examine their testimony at the end of this section.

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²⁴. *Lash, supra* note 12, at 73.
²⁶. *Maltese, supra* note 14, at 101-02. Additionally, direct election of the senators, which had begun just twenty-six years earlier with the ratification of the Seventeenth Amendment, had changed the senators' electoral incentives and made them eager for opportunities to appear responsive to public opinion. *Id.* at 51. The Judiciary Committee charged with considering the Frankfurter nomination therefore found it expedient to hold a public hearing on the nomination and to invite interested citizens to appear. See *Frankfurter Transcript, supra* note 1, at 1 ("[T]his is supposed to be a democratic form of government, and with respect to filling an office of great importance, if any citizens in good faith desire to be heard, I feel that it is our duty to hear them." (statement of Senator King))).
A. "The Lady Patriot": Elizabeth Dilling

Since it is clear from his record that the foreign-born Frankfurter has over a period of 19 years, at least, been giving aid and comfort to the enemies of our American form of government, I beseech the Senate of the United States to refuse confirmation of his appointment to the Supreme Court Bench, where he may exert his pernicious influence for life.28

- Elizabeth Dilling, testifying in opposition to the confirmation of Felix Frankfurter.

Elizabeth Dilling was born in Chicago in 1894.29 In 1931, she and her husband traveled to the Soviet Union. It was that trip that set Dilling on the path that would bring her before the Senate Judiciary Committee and establish her, in the words of one historian, as "the most important woman" of her era "to emerge on the [political] far right."3°

Dilling was horrified by what she saw in the Soviet Union.31 She told of "people who starved to death lying in the streets where they fell, cannibalistic views of dead mothers and babies with half-eaten bodies, and revolutionary scenes of stark horror and misery."32 She was so affected by such images that she returned to the United States determined to share them with others.33 Dilling collected photographs and home movies of her trip and began a career as a traveling speaker and pamphleteer.34 She appeared before women’s groups, civics organizations, and the American Legion.35 The

28. Frankfurter Transcript, supra note 1, at 41 (statement of Elizabeth Dilling).
30. Id.
32. Id.
33. See Christine K. Erickson, "I Have Not Had One Fact Disproven": Elizabeth Dilling’s Crusade Against Communism in the 1930s, 36 J. AM. STUD. 473, 475 (2002).
34. Id. at 477-78. The Daughters of the American Revolution’s embrace of Dilling became an issue, chronicled in the NEW YORK TIMES, within the organization itself. See ‘Who’s Who’ of Reds to be D.A.R. Issue, N.Y. TIMES, Feb. 25, 1935, at 19.
35. Erickson, supra note 33, at 477-78.
Daughters of the American Revolution embraced her as a speaker and author, and distributed thousands of her pamphlets across the country. Her fame grew rapidly, and soon elected officials were clamoring to be seen with her at her large, boisterous rallies.

In 1934, she published what would be her most well-known book, *The Red Network*. *The Red Network* was a “who’s who” of radicalism. Dedicated by Dilling to “sincere fighters for American liberty and Christian principles,” the bulk of the volume was devoted to listing the atheistic, foreign and communist activities of organizations and individuals Dilling deemed dangerous.

More than 500 organizations and 1300 individuals were included. The format for each entry was the same: the name of the organization or individual was followed by a string of affiliations and facts supporting Dilling’s accusation of radicalism. The entry for the League of Women Voters is typical:

LEAGUE OF WOMEN VOTERS: An organization formed by Carrie Chapman Catt, a co-worker with Jane Addams, to educate women to take part in political life. It serves a good purpose and is fair enough in presenting various sides of public questions to render the great majority of its innocent and non-radical members unaware that they are also fed radical propaganda in regular doses. It campaigned for the League of Nations, circulated the W.I.L.P.F. (Jane Addams’) petition for total disarmament of the U.S. 1931, etc.; features many radical speakers. (See under W.I.L.P.F.)

Individuals listed in *The Red Network* included such people as Justice Brandeis and his wife (“consistent financial supporter with [her] husband, radical U.S. Supreme C[our]t Justice Brandeis, of communistic Commonwealth Coll[ege]’); Secretary of the Interior Harold Ickes (“radical Republican; now socialist Democrat . . . attacking ‘individualism’ and upholding socialistic ‘New Deal’ policies’”); and, as was noted with some irony during her testimony at the Frankfurter hearing, several sitting members of the Senate Judiciary Committee.

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36. *See id.*
37. *See 2,000 Attend Rally to Denounce Reds, N.Y. TIMES, Oct. 31, 1938, at 10.*
39. *Id.*
41. *See generally Erickson, supra* note 33, at 488; DILLING, *supra* note 31. Dilling’s many critics frequently pointed out factual errors in her reports.
42. DILLING, *supra* note 31, at 189. The “W.I.L.P.F” was the Women’s International League for Peace and Freedom, founded by social activist Jane Addams. Addams, the founder of Hull House in Chicago, was a favorite target of Dilling’s crusades.
44. *Id.* at 293.
45. *Frankfurter Transcript, supra* note 1, at 36 (statement of Elizabeth Dilling).*
Dilling’s methodology was shoddy. As one scholar later put it, she used guilt by association to label as subversive nearly every New Deal supporter in the country. But there is no doubt that the book was influential. By the time of the 1939 Frankfurter hearings, *The Red Network* had gone through eight printings. It had sold more than 16,000 copies, and Dilling and her associates claimed to have given away thousands more. The book had been reviewed—unfavorably—by *The New Republic*. The *New York Times* called it “the standard reference work” for local employers and public officials fearful of communist infiltrators.

Thus, Elizabeth Dilling, while clearly on the fringe of the 1930s political spectrum, was nonetheless at the time of the Frankfurter hearing a well-known author and public figure with a large national following. The Senate Judiciary Committee, therefore, had a pretty good idea of what to expect when she took the witness seat on the first day of public testimony in the Frankfurter confirmation.

She did not disappoint. Dilling’s assessment of Frankfurter was not subtle. Frankfurter, she argued, was a treasonous propagandist for radicals, who aided and abetted the Communist party. Frankfurter’s entry in *The Red Network*, thoughtfully provided by Dilling for inclusion in the Senate record, reads as follows:

Frankfurter, Felix: Prof. Harvard Law School; nat. com. A.C.L.U.; Mass A.C.L.U. Com.; Griffin Bill sponsor; severely condemned when counsel in Mooney case by Pres. Theodore Roosevelt for “an attitude which seems to me to be fundamentally that of Trotsky and the other Bolshevik leaders in Russia” (letter in Whitney’s ‘Reds in America’); filed charges against the U.S. Dept. of Justice for its activities against Communists with Nat. Pop. Govt. Lg.; Nat. Save Our Schs. Com.; nat. legal com. N.A.A.C.P.; endors. “Professional Patriots”; said to have

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46. JOSEPH P. LASH, ELEANOR AND FRANKLIN 588 (1971). Eleanor Roosevelt, in one of her letters, referred to Dilling as labeling as communistic “everyone in this country who is working for better living conditions.” *Id.*

47. See JEANSONNE, *supra* note 29, at 21.

48. *Id.* Dilling herself claimed in 1939 that more than 100,000 of her books and pamphlets had been sold. Gleason, *supra* note 27, at 66.

49. JEANSONNE, *supra* note 29, at 22. This is perhaps not surprising, given that Frankfurter had helped found *The New Republic*. See LASH, *supra* note 12, at 16.


51. Her fame as a far-right crusader was such, in fact, that Sinclair Lewis based a character on her in his 1935 anti-fascist book *It Can’t Happen Here.* She was, as a biographer later put it, a key link between the “red scare” of the 1910s and 20s, and 1950s-era McCarthyism. Gleason, *supra* note 27, at 5; see also Erickson, *supra* note 33, at 474 (discussing Dilling as a pre-cursor to McCarthy).

52. *Frankfurter Transcript, supra* note 1, at 29 (statement of Elizabeth Dilling).

53. See *id.* at 29-30.
recommended Jerome Frank as Roosevelt appointee and to be an insider with the White House "brain trust."54

Dilling also provided the senators with extensive documentation "proving" her accusations. An exchange published in the *Atlantic Monthly* between Frankfurter and John H. Wigmore (then Dean of the Northwestern College of Law) about Frankfurter's defense of Italian anarchists Nicola Sacco and Bartolommeo Vanzetti was put in the record,55 as was a letter from former president Theodore Roosevelt likening Frankfurter's work on behalf of labor leader Thomas Mooney to that of "murderers and traitors."56

Frankfurter's personal and professional associations with suspected or actual communists also were extensively documented by Dilling.57 Articles and magazines published by communist, socialist, or left-leaning newspapers lauding Frankfurter's Sacco and Vanzetti defense were submitted,58 as was a letter addressed to Joseph Stalin, allegedly written by Thomas Mooney himself, which had been published in the *Communist Labor Defender* magazine.59 An advertisement for a book about Sacco and Vanzetti, edited

54. DILLING, supra note 31, at 282.
55. Although not officially involved in the defense, Frankfurter wrote a long and detailed article condemning the Sacco and Vanzetti trial. The article was published in the *Atlantic Monthly* in March 1927—seven years after the murders, but just five months before the two men were executed. HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES 214-17 (1960). It became the first of a series of increasingly hostile exchanges between Frankfurter and Wigmore published in the magazine.
56. Thomas Mooney was a part-time labor organizer who was convicted in San Francisco for his alleged role in a San Francisco bombing that killed ten people. H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER 56 (1981). Frankfurter was sent to investigate. His investigation convinced him that Mooney had been convicted on perjured testimony, and he encouraged President Wilson to ask the governor of California to suspend Mooney's death sentence and grant him a new trial. Id.; see also LASH, supra note 12, at 23. The governor refused, and Mooney remained in prison until 1939. HIRSCH, supra. Mooney was finally released the same week that Frankfurter was appointed to the Court. Mr. Justice Frankfurter, New Republic, Jan. 18, 1939, at 297. Frankfurter's efforts on Mooney's behalf infuriated even some of his political allies. See HIRSCH, supra. Frankfurter's friend, former president Theodore Roosevelt, condemned Frankfurter's work in the case. Roosevelt, in a letter discussed at length at Frankfurter's hearing, claimed that the future justice was "besmirching the reputation of God-fearing, patriotic Americans . . . destroying respect for law and order, and coddling anarchist, bomb throwers, and cowards." PARRISH, supra note 10, at 99. The former President went on in the letter to accuse Frankfurter of being "engaged in excusing men precisely like the Bolsheviki Russians . . . who are murders and encouragers of murder, who are traitors to their allies, to democracy, and to civilization, as well as to the United States." Id.
57. Among those included were Roger Baldwin, executive director of the ACLU; authors Theodore Dreiser, Maxim Gorki and Romain Roland; and Marxist labor leader William Foster. See Frankfurter Transcript, supra note 1, at 33, 42 (statement of Elizabeth Dilling).
58. Id. at 31.
59. Id. at 38.
by Frankfurter’s wife Marion, was submitted because the book was endorsed by people Dilling considered radicals.60

Dilling’s main target, however, was Frankfurter’s association with the nascent American Civil Liberties Union. Founded in 1920, the ACLU was just nineteen years old at the time of the Frankfurter nomination. But its work on behalf of communists and communist sympathizers had already incurred the wrath of conservatives across the country. The history of the ACLU, Dilling told the senators, “is the history of the entire Communist and ‘red’ revolutionary movement.”61 Additional sins of the ACLU included opposing Bible reading in schools, promoting atheism throughout the country, lobbying against sedition laws, and advocating passivism in times of war.62

Dilling’s case against Frankfurter, as her “evidence” shows, was carefully couched in the language of radicalism, Americanism, and anti-communism. But it had an unambiguous racial component, one which would have been clearly understood by her contemporaries. “Jew” and “communist” were, to many people of the time, treated as essentially synonymous.63 Xenophobia was rampant, and race-based characterizations of immigrants and Jews as inherently anti-American were widely accepted and rarely questioned.64 Dilling, in other words, was speaking in a code that would have been readily deciphered by her audience.

Moreover, Dilling herself was a known anti-Semite. Her second book, The Roosevelt Red Record, had been published two weeks before the 1936 presidential election—three years before the Frankfurter hearing. The Red Record re-labeled the “New Deal” the “Jew Deal” and bemoaned the influence of Jews in the Roosevelt administration.65 The book also repeatedly equated Judaism with Communism.66 Her next book, The Octopus, did the same, while also attributing most of the world’s problems to Jews.67

The depth of Dilling’s bigotries were fully revealed in 1944, when she was indicted, along with more than twenty other defendants, with conspiring with the Nazis to establish a fascist government in the United States.68

60. Id. at 33.
61. Id. at 34.
62. See id. at 37.
63. DINNERSTIEN AND REIMERS, ETHNIC AMERICANS: A HISTORY OF IMMIGRATION 108 (5th ed. 2009); see Hertzberg, supra note 9, at 228-30.
64. Hertzberg, supra note 9, at 230-32.
66. See id. at 156, 161.
67. See Elizabeth Dilling, The Octopus (1940).
68. The case was United States v. McWilliams. 54 F. Supp. 791 (D.C. 1944). The dispute dragged on for five years, only to end with the death of the preceding judge. Citing “serious doubt” about the validity of the case, prosecutors opted to not retry the defendants and the case was closed without any convictions. See Leo P. Ribuffo, The Old Christian
While the sedition trial itself dissolved into farce and the charges were ultimately dismissed, the defense team’s strategy was telling: they argued that their actions were justified on the grounds that Frankfurter and FDR were conspiring with Joseph Stalin to bring communist rule to the United States. To Dilling, then, Frankfurter, the immigrant and the Jew, was brilliant but treasonous. The senators, she argued, must stand up and put their allegiance to “American principles” ahead of their party loyalty. They must deny Frankfurter a place on the Court.

At least one senator seemed ready to comply. Senator Pat McCarran, an anti-New Deal Democrat from Nevada, had just won his second term in the U.S. Senate. He was a man looking for a fight. The battle against Communism would give him one, and would for a time make him one of the most formidable men in American politics.

B. The Senator: Pat McCarran

*I just want to say at this time, Mr. Chairman, that I believe this situation should be explored by this committee, and I believe that we should go to the bottom of it and find what it means.*

- Senator McCarran in response to a letter introduced by Elizabeth Dilling showing Felix Frankfurter’s involvement with ACLU.

There were two things Pat McCarran hated: communists and immigrants. He would dedicate his long public career to trying to rid the country of each. At the time of the Frankfurter hearing, however, McCarran was just a second term senator looking to make a name for himself. He had ridden FDR’s coattails to Washington in the 1932 Democratic sweep of Congress, but McCarran was hardly a New Dealer. He fought the new Presi-
dent from the very beginning, and would over the years become one of FDR's most trying opponents. He decried the President's efforts to enter into trade agreements with the Soviet Union in 1935, he fought joining the World Court in 1935, and he raged against the 1937 Court Packing plan, calling it (among other things) the "way to dictatorship."

McCarran saved his greatest fury, however, for the battle against the threat of domestic communism. If Senator Joe McCarthy would be the showhorse of the coming Second Red Scare, Pat McCarran was destined to be one of its workhorses. While McCarthy's flamboyant tactics captured the headlines, it was McCarran's work in the legislative trenches that culminated in some of the country's most repressive legislation.

Like Dilling, McCarran's anti-communist stance was tinged with anti-immigrant and anti-Semitic tendencies. Throughout his long career, he would see immigration, communism, and Judaism as intertwined dangers. When explaining the need for one of his most lasting pieces of legislation—the Internal Security Act—McCarran told the New York Times, that "[v]ast numbers of 'militant Communists, Sicilian bandits and other criminals [sic]' had poured into the country under lax immigration laws and warned that "'[u]nless we can round up this rabble and dam this contaminated stream, any nation with war-like intentions toward the United States would find a ready-made fifth column in its vanguard.'" He also played a key role in shaping the Wiley-Revercomb Act, a provision of which he perso-

75. McCarran would oppose Roosevelt's very first budget bill on the grounds that it cut funding for veterans' benefits. Id. at 141.
76. See id. at 183.
77. See id. at 112.
78. See id. at 209.
79. McCarran's own words make his obsessions plain. See, e.g., Patrick A. McCarran, The Internal Security Act of 1950, 12 U. PITT. L. REV. 481, 482 (1951) ("The Communist party of the United States constitutes a sizeable army dedicated to trickery, deceit, espionage, sabotage, and terrorism . . . . American communism is not, however, a home-grown product, but is a weed which has been deliberately transplanted in this country by foreign agents. It . . . is a part of a world-wide network under the control and direction of the Kremlin, and that it stands ready to do the Kremlin's bidding."). McCarran certainly was not alone in these beliefs, nor was he entirely incorrect; his commitment to the cause, however, was extraordinary even by the standards of his era.
81. McCarran Charges Alien Infiltering, N.Y. TIMES, Aug. 21, 1951, at 11; see also Clayton Knowles, Alien Law Rewrite Urged by McCarran, N.Y. TIMES, Apr. 21, 1950 (citing McCarran as "pointing out the leaks in our present system that aid subversives of all types and Communists in particular").
82. McCarran Charges Alien Infiltering, supra note 81.
nally crafted to make it difficult for the few Jews remaining alive in Europe following World War II to immigrate to the United States.\footnote{See id. The Wiley-Revercomb Act permitted a mere 100,000 European refugees into the country. \textit{Ybarra}, supra note 73, at 462. Despite this, McCarran opposed the bill as too generous. He agreed to support it only after succeeding in restricting its application to immigrants who had arrived in the Western controlled zones of Europe on or before December 22, 1945. \textit{See id.} The restriction accomplished precisely one thing: it prohibited the legal immigration of many of the Jews still alive in Europe after the Holocaust. \textit{Id.; Haim Genizi, America’s Fair Share: The Admission and Resettlement of Displaced Persons, 1945-1952,} 81 (1993).}

When Felix Frankfurter’s nomination to the high court was announced in January 1939, most of these “accomplishments” remained in McCarran’s future. But Elizabeth Dilling’s concerns about Frankfurter had aroused the budding anti-communist fighter in the Nevada senator.

McCarran was the second senator to question Frankfurter. His questioning was not friendly.\footnote{John P. Frank, \textit{The Appointment of Supreme Court Justices: III}, 1941 \textit{Wis. L. Rev.} 461, 508 (1941).} \textit{The New York Times}, recounting the exchange the day after it took place, called it “dramatic.”\footnote{\textit{Frankfurter Wins Senate Group Vote}, \textit{N.Y. Times}, Jan. 13, 1939, at 1.} McCarran’s attack was, like Dilling’s, framed in the language of communism and patriotism. But his objections to Frankfurter, also like hers, contained more than a small shot of anti-Semitism. McCarran biographer Michael Ybarra has noted that that McCarran’s contemporaries had no doubt that McCarran was anti-Semitic, and that he routinely used racist slurs in private conversations when referring to Jewish individuals.\footnote{\textit{Ybarra}, supra note 73, at 464.} Ybarra also notes that McCarran opposed several Roosevelt nominees (including Frankfurter) who had nothing obvious in common \textit{except} that they were Jewish.\footnote{\textit{Id.}}

McCarran, however, did not put his criticism of Frankfurter in directly racial terms. Like Dilling, he began with the ACLU:

\begin{quote}
Doctor, referring to the American Civil Liberties Union . . . I take it that you are acquainted with the names of the members of that committee, of which you were one?\footnote{\textit{Frankfurter Transcript, supra note 1, at 123} (statement of Felix Frankfurter).}
\end{quote}

As McCarran continued to question him, Frankfurter became increasingly murky about his association with the ACLU. Despite being able to present copious evidence and documents regarding his ACLU work on behalf of right wing groups, in addition to innumerable papers showing the precise limits of his involvement with various liberal causes, Frankfurter claimed that the late notice of the request that he appear before the Committee, combined with his inability to know what questions might come up, made it impossible for him to refresh his recollection of even such basic
matters such as how he came to be a member of the ACLU’s advisory committee.89

I do not recall the exact terms or even the persons through whom came the invita-

tion. . . . I am not sure, because this goes back 20 years, but I would not be sur-

prised if Mr. Roger Baldwin himself . . . had asked me if I would be one of the

group of people who would lend their moral support . . . .90

His poor memory was convenient, given his actual level of involve-

ment with the organization. Frankfurter, along with Jane Addams, Clarence

Darrow, Helen Keller and John Dewey, was one of the founding members

of the ACLU.91 Baldwin, the organization’s first and long-serving executive
director, said later that Frankfurter had been “our constant advisor and critic,
from whom we received endless useful suggestions.”92 When asked by

Dean Acheson, Frankfurter’s representative at the Senate hearing, just how

involved Frankfurter had been in the early years of the ACLU, Baldwin
replied, “a lot.”93

Frankfurter, under McCarran’s questioning, did not seem eager to own

up to this involvement. Nor had he apparently bothered to refresh his recol-
collection of more recent high-profile accusations that had been made against

the ACLU. “I take it,” McCarran asked, “that you have had drawn to your
attention the various reports and statements that have been made with refer-
ce to the American Civil Liberties Union by congressional committees

and others[?]”94

If you mean have I read the report of the Dies committee, I have not. . . . I have not

read the report of the Dies committee; I have not read the report of the Fish com-
mittee; and I have not read the many volumes of the report of the Lusk committee.
...

McCarran was not pleased.

All those reports bear upon the activities of the American Civil Liberties Union as

regards communism, and quite broad and emphatic statements are made in some of

those reports. I take it from what you have said that you have not taken it upon

yourself to become familiar with any of those reports?95

“I have not read them,” Frankfurter replied. “I will have to leave it to
the committee to judge what responsibility is upon me to read all of such

89. See id., at 110 (statement of Felix Frankfurter).
90. Id. at 110-11 (displaying Frankfurter’s initial elaboration on his involvement
with the ACLU, prompted by an earlier question from Senator Borah).
91. THE READER’S COMPANION TO AMERICAN HISTORY 32 (Eric Foner & John A.
92. HIRSCH, supra note 56, at 71-72.
93. LASH, supra note 12, at 65.
94. Frankfurter Transcript, supra note 1, at 123 (statement of Felix Frankfurter).
95. Id. at 123.
96. Id. at 124.
reports. I shall only say that the repetition of an error does not make it true.997

"No," McCarran agreed, "but I should think it would cause one of your high place to investigate his associates."998

McCarran then changed tactics.

"Doctor, you were born abroad?"999

Frankfurter’s immigrant status had been a major part of the newspaper coverage of his appointment. As noted above, The Atlanta Constitution had called his life story the “American dream come true.”100 The Washington Post gushed over his “story-book career.”101 Senator McCarran obviously knew all this. But whispered accusations about Frankfurter’s citizenship had tweaked the senator’s interest.102

The accusations were fuzzy, but appear to have been that Leopold, Frankfurter’s father, had never been legally naturalized.103 If Leopold was not a legally naturalized U.S. citizen, then he could not have passed his citizenship onto Frankfurter and his other children.104 Moreover, because Felix and his wife (who was an American citizen) were married before wives were allowed to transfer citizenship to their husbands, Felix could not have obtained U.S. citizenship through his marriage.105 So if Leopold was not a citizen, neither was Felix.

According to Frankfurter’s memoirs, Leopold had been required to wait five years after arriving in the United States before submitting his naturalization papers.106 Thus, if Leopold arrived in America in 1893—one year before Felix and the rest of his family—he could have been legally naturalized in 1898. Although Leopold’s original naturalization papers had been

97. Id.
98. Id.
99. Id.
100. Wolfert, supra note 20.
101. See Frankfurter Named to Supreme Court; Succeeds Cardozo, supra note 19.
103. See Frankfurter Transcript, supra note 1, at 22-23 (statement of Wade H. Cooper); DEAN ACHESON, MORNING AND NOON 202 (1965); see also Frank, supra note 84, at 508 (“McCarran next dug hopefully into the possibility that Frankfurter’s father had not been properly naturalized and that Frankfurter was thus not a citizen . . . .”).
104. ACHESON, supra note 103.
106. See PHILLIPS, supra note 3, at 286.
destroyed in a fire, Frankfurter and Acheson were able to produce certified copies of them. The copies showed that Leopold had in fact been naturalized in 1898.

But McCarran had been told that the naturalization was fraudulent. It is unclear just what the alleged fraud was. Acheson implies in his memoirs that the problem was one of establishing Frankfurter’s age and thus showing that he was still a minor, able to obtain citizenship through the naturalization of his father, at the time of Leopold’s naturalization. Frankfurter’s own comments leave the impression that the difficulty had been in proving the year in which his father arrived in the country, thereby establishing that Leopold had in fact waited the necessary five years before being naturalized.

Regardless, some sort of documentation had been tracked down and presented to the Committee. McCarran waved those documents in front of Frankfurter.

“I have before me, what purports to be the certificate to which you refer. . . . This is the only evidence you know of, I take it, of [Leopold’s] admission?”

It was, but McCarran moved on.

“Doctor, are you acquainted with Harold Laski?”

The “Doctor” (Frankfurter would later write about the poisonous zeal McCarran put into that word) certainly was. Laski was an English economist and professor at the London School of Economics, and a member of the British Labor Party. He also, as Frankfurter knew, was a Marxist. Laski and Frankfurter had become friends years earlier at Harvard. The two were so close that the New York Times, upon Frankfurter’s nomination, had tracked down Laski to interview him about the appointment (Laski, according to the Times, was “jubilant.”)

107. Thorpe, supra note 102, at 376.
108. See Acheson, supra note 103, at 202.
109. Id.
110. Phillips, supra note 3, at 286.
111. Frankfurter Transcript, supra note 1, at 124-25 (statement of Felix Frankfurter).
112. Id.
113. Id. at 125.
115. See Gary Dean Best, Harold Laski and American Liberalism 5 (2005); see also Phillips, supra note 3, at 290.
116. Phillips, supra note 3, at 290 (quoting Frankfurter as saying “Harold Laski was a Marxian, and I was not.”).
117. See Lash, supra note 12, at 16; Frankfurter Transcript, supra note 1, at 125 (statement of Felix Frankfurter).
118. See Frankfurter is Nominated as Supreme Court Justice, N.Y. Times, Jan. 6, 1939, at 1.
119. Id.
“Have you ever read any of his publications?” McCarran asked Frankfurter.120
“Oh, certainly.”121
“Do you agree with his doctrine?”122
Frankfurter refused to answer. “I trust you will not deem me boastful,” he said, “if I say I have many friends who have written many books, and I shouldn’t want to be charged with all the views in books by all my friends.”123
“You can answer that question simply,” McCarran responded.124
“No; I cannot,” Frankfurter retorted. “He is an extraordinarily prolific writer. How can I say I agree with his doctrine? That implies that he has a doctrine.”125
Frankfurter’s evasiveness was making his supporters anxious.126 But he continued in the same vein.
“Do you know whether or not he has a doctrine?” McCarran asked.127
“I assume he has more than one,” Frankfurter answered, “[a]ll people have.”128
McCarran then produced a copy of one of Laski’s books, titled Communism. “Do you subscribe to his doctrine as expressed in that volume?”129
Frankfurter refused to answer.130
McCarran continued to push. “Do you believe in the doctrine set forth in this book?” he asked again.131
“I cannot answer,” Frankfurter said again, “because I do not know what you regard as the doctrine. . . . I understand that it is a study of certain beliefs, of a theory called communism. So far as I know, it would be impossible for me to say whether I agree with the doctrine in that book or not, because I think it is impossible to define what the doctrine is.”132

At some point during this exchange, Senator Mathew Neely, chair of the Committee and one of Frankfurter’s supporters, went to talk to Ache-
son.\footnote{133} Frankfurter, Neely said, should quit playing games with McCarran and just respond directly to the question of whether he was or ever had been a communist.\footnote{134}

Before Neely’s message could find its way to Frankfurter, however, Senator King interrupted with a question of his own. “Do you believe in what might be called the ideology of Marx or Trotsky”? King asked.\footnote{135}

Again Frankfurter avoided a direct answer:

It would be terribly easy for me to answer that question, Senator King. I withhold any further discussion, not because there is any secret about my views or feelings, but because I am in a position in which I cannot help it. It may be that I shall be called to a position that might be very embarrassing. If I were before this committee for any political office, nothing would give me more pleasure than to pursue the line of inquiry of Senator McCarran and Senator King. I think I can appeal to the common understanding of lawyers that this is not a situation in which one can speak freely. I prefer to rest on the general statement I made to Senator McCarran. You will have to decide, in the light of my whole life, what devotion I have to the American system of government.\footnote{136}

Frankfurter’s resistance, however, was short-lived. Acheson reached him with Neely’s message. Neely, Acheson said, would ask Frankfurter directly if he was or ever had been a communist. Frankfurter, Acheson added, should then “be sensible and not reply by asking the Chairman what he meant by ‘[c]ommunist.’”\footnote{137}

Neely asked the question:

Dr. Frankfurter, the chairman, with great reluctance, propounds one inquiry which he thinks ought to be answered as a matter of justice to you. Some of those who have testified before the committee have, in a very hazy, indefinite way, attempted to create the impression that you are a Communist. Therefore, the Chair asks you the direct question: Are you a Communist, or have you been one?\footnote{138}

“I have never been and I am not now,” Frankfurter responded.\footnote{139}

McCarran was not satisfied. “By that,” he jumped in, “do you mean that you have never been enrolled as a member of the Communist Party?”\footnote{140}

“I mean,” Frankfurter replied, “much more than that. I mean that I have never been enrolled, and have never been qualified to be enrolled, because that does not represent my view of life, nor my view of government.”\footnote{141}
As a *Washington Post* headline put it, Frankfurter in that moment "[a]vow[ed] his Americanism." It worked: a few days later, *Time* declared Frankfurter the winner of the exchange. "Nevada’s tawny old Pat McCarran," the magazine reported, "was confounded by the Professor’s Socratic questions." McCarran had a different interpretation. "I think at times past," he told the *Washington Post*, "Frankfurter has perhaps inadvertently found himself in bad company, but there is no evidence that has come to my attention that he ever followed the leadership or dictates of that company."

When the chair of the Senate Judiciary Committee called for a vote on the nomination, McCarran was nowhere to be seen. A clerk eventually found him in a nearby restaurant, and a ballot was sent to him. It was returned, but McCarran had left it blank.

C. The Seneca: Alice Lee Jemison

*I represent the people who helped to form this Nation. I come from the State of New York. My ancestors gave the United States the basic principles on which this Government was founded. We gave it our form of government, which we had lived under for many years before the white man came here. . . . [The ACLU program] is a communistic program and is communizing the Indians. . . . It is time the American public knew these facts and knew what the American Civil Liberties Union is doing to the American Indians today.*

Like Senator McCarran, Alice Lee Jemison did not get much respect from the journalists covering the Frankfurter hearings. *The New York Times* reported that she was "sobbing and pounding the table" during her testimony. The *Washington Post* described her as "[t]all and slender, dressed in
simple black” and explained how she told her story between “stifled sobs.”

She didn’t fare much better with the senators. Senator Neely interrupted her several times to ask just what, exactly, Professor Frankfurter had to do with her complaints. At one point, Neely wondered aloud why Jemison cared so much who sat on the Supreme Court, given that her people, the Seneca Indians, were like all Native American peoples at the time, rarely subject to the jurisdiction or protection of the Court.

But Jemison did care. Jemison was a member of the Seneca Tribe. She grew up near the Seneca-Cattaraugus Indian reservation in New York. Although the Seneca of New York were not plagued with the extreme poverty and land loss suffered by many other tribes, Jemison’s family was poor. Nonetheless, by 1927, she had become the Washington, D.C. lobbyist for the Seneca Nation. She testified frequently before congressional committees—including the controversial Dies Committee—and was a favorite guest speaker of right-wing groups active at the time.

Jemison, like Elizabeth Dilling and Pat McCarran, was rabidly anti-communist. Her agenda, however, ran deeper than the rhetoric she often employed in its pursuit. She was at heart an Indian nationalist, and her political activities had one unifying goal: to free Native American Tribes from what she saw as the stifling control of the Bureau of Indian Affairs (BIA). The BIA had dominated Native American affairs since 1871. Before that time, the U.S. Government had used treaties to govern its interactions with Native Americans. In 1871, the government changed tack and announced that it would no longer deal with the tribes through the treaty-

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151. *Frankfurter Transcript*, supra note 1, at 98-99 (statement of Alice Lee Jemison). The later comment provoked a defense from Senator Connally, who noted that “I cannot accept that statement, Mr. Chairman. She has the right to be concerned as an American on the right of general welfare.” Id. at 99.
153. Id.
154. See id. at 58.
155. Id. at 38.
156. Id. at 45.
158. See HAUPTMAN, supra note 152, at 51.
159. See id. at 52-53 (“Jemison’s Indian newsletter, The First American, published in this period, reveals that her interests were almost entirely concerned with congressional Indian legislation, violations of Indian civil liberties, improving the overall image of the American Indian, the repeal of the IRA, the removal of Commissioner Collier, and the abolition of the BIA. With few exceptions, she was basically a one-issue political activist . . . .”).
making mechanism.161 This shift in focus was deeply troubling to Jemison. Many tribes, including Jemison’s Seneca, considered the treaties to be the key mechanism through which their status as sovereign nations was preserved.162 The change from a treaty-based relationship to one in which the tribes were essentially supervised by the BIA, was seen by them as a serious threat to tribal sovereignty.163

Moreover, the federal government’s decreasing regard for tribal sovereignty brought with it an increasing emphasis on assimilation as the official policy of the BIA.164 Assimilation efforts took many forms, but one of the most important—the one that would ultimately bring Jemison to Washington to testify against Frankfurter—was the enactment of Dawes Allocation Act of 1887.165 The Dawes Act removed land rights held by the tribes and re-allocated them to individual Native Americans. Allocation of tribal held lands was compulsory under the Act, and any land held by the tribes and not allocated was considered “surplus” and made available for sale to non-Indians.166

The Dawes Act allocation system was disastrous for Native American land holdings. Some tribes, such as the Oneida in Wisconsin, lost an estimated 99 percent of their property to non-Indian ownership.167 The Seneca in Oklahoma suffered similar losses.168 President Roosevelt and the New Deal Democrats came to office wanting to undo some of this damage. So in 1934 they passed the Indian Reorganization Act.

The IRA did several things, one of which was to end the allocation system and return individual allocations to tribal ownership.169 It was this provision—and more specifically the ACLU’s involvement in passing it—that Jemison objected to. The IRA, she said, was “communizing” the In-

161. Id.
162. Id. at 5.
163. Id. at 8. The Supreme Court disagreed. In Lone Wolf v. Hitchcock, the Supreme Court held that Congress has plenary power to legislate in regard to all issues relating to Native Americans. Id. at 5.
164. President Theodore Roosevelt articulated this goal most clearly: in arguing that the Dawes Act should be a model for additional legislation governing Tribal funds, he described it as “a mighty pulverizing engine to break up the tribal mass.” Id. at 9.
166. RUSSCO, supra note 160, at 47.
168. See HAUPTMAN, supra note 152, at 91.
169. The original draft of the Act had made this involuntary, which incurred the wrath of anti-communist conservatives in Congress. The version that eventually passed required the consent of the individual owner before title to the property could revert to the Tribe. See RUSSCO, supra note 160, at 198.
dians. At the behest of the ACLU, the Roosevelt administration was, she argued, forcing the tribes into communal living arrangements that they neither wanted nor needed. As Jemison explained it on the editorial pages of the Washington Times:

The Wheeler-Howard Act [the IRA] provides only one form of government for the Indian and that is communal or cooperative form of living. John Collier [BIA director] said he was going to give the Indian self-government. If he was going to give us self-government he would let us set up a form of government we wanted to live under. He would give us the right to continue to live under our old tribal customs if we wanted to.170

Jemison’s distrust of aspects of the IRA was understandable; the details of the Act were notably less empowering than its headlines.171 To Jemison and those she represented, the IRA was simply the most recent of a long series of efforts to use disingenuous “concern” for the Native Americans to further weaken tribal sovereignty.172 She thus vehemently opposed the IRA and all those she deemed responsible for enacting it. Once again, that included the ACLU.

Members of the ACLU, Jemison argued at Frankfurter’s hearing, “wrote [the IRA], and are responsible for its enactment, and their people are administering it.”173 As an ACLU executive committee member, Frankfur-

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170. Alice Lee Jemison, A Different View of Treatment of the Indian, WASH. TIMES, Aug. 8, 1935; see also HAUPTMAN, supra note 152, at 50 (quoting a speech by Alice Lee Jemison to the Black Hills Indian Treaty Council on July 27, 1938).

171. For example, while each Tribe was allowed to vote on whether or not to subject itself to the terms of the Act, the legislation was written to go into effect unless a majority of Tribe members voted against it. Id. at 62. Since turnout in U.S. elections had always been low among Native Americans, the negative-opt out provision virtually ensured that most Tribes would end up being governed by the Act. See id. (describing the reluctance to participate in such elections and the distrust provoked by this provision). Moreover, the Act used its own definition of “Indian” in determining who would vote in the special elections. In doing so, it enfranchised many people whom the Tribes themselves did not consider Tribal members. Id. at 62 (describing the Seneca system). The self-government provisions also offended Jemison, in that they encouraged the creation of U.S.-style constitutions and gave final authority for approving such constitutions not to Tribal leaders but to the Secretary of the Interior, Harold Ickes. Id. at 63 (citing Jemison as objecting to this provision by arguing “that there ‘is no self-government in the act, all final power and authority remains in the Secretary of the Interior, which is exactly where it always has rested heretofore’”). To Indian nationalists like Jemison, these provisions stripped IRA of any legitimacy it may have otherwise had. See Joseph de Raismes, The Indian Civil Rights Act of 1968 and the Pursuit of Responsible Tribal Self-Government, 20 S.D. L. REV. 59, 71 (1975); Hauptman, supra note 167, at 401 (“[T]he Indians truly believed they were at war with the bureau in the 1930s. They feared that the IRA . . . actually breathed new life into an agency that deserved to die. They saw the act as another manifestation of the failure of reform to deal with the real problems that Native Americans faced.”).

172. HAUPTMAN, supra note 152, at 97; see also Hauptman, supra note 167, at 392.

173. Frankfurter Transcript, supra note 1, at 99 (statement of Alice Lee Jemison).
ter was therefore “responsible for what is being done to my people today.” 174 And what was being done, according to Jemison, was nothing less than the forcible imposition of a Soviet-style regime on the Native American people.

Jemison was correct about the ACLU’s involvement with the IRA. Roger Baldwin (executive director of the ACLU) had begun working with the BIA on the repeal of the Dawes Act as early as 1928. 175 The ACLU also had been instrumental in organizing a conference which brought together the BIA, the ACLU, the American Indian Defense Association, and numerous other interested individuals and groups. 176 Moreover, the legislation itself had been drafted by ACLU activists Nathan Margold and Felix S. Cohen, 177 both committed New Dealers who were passionately devoted to the Native American cause. Margold had been the chairman of the ACLU Indian Rights Committee until 1933, when he became the solicitor of the Interior Department. 178 Cohen would go on to produce the first (and hugely influential) treatise on Indian law published in the United States. Both Margold and Cohen also were Frankfurter protégés, dating back to his early years at Harvard. 179

Frankfurter’s connections with the Indian Reorganization Act, while obviously indirect, thus did in fact exist. Frankfurter was a founding member of the ACLU, and the ACLU, along with two of Frankfurter’s close associates, was instrumental in shaping the Act. Jemison, in linking Frankfurter’s nomination to her objections to the IRA, was thus attempting to do exactly what Elizabeth Dilling and Pat McCarran had done: she was trying to hold Frankfurter responsible for the actions of his associates.

It is a tactic Jemison may have been better off avoiding, given that she had some unsavory associates of her own. The American Indian Federation, the group Jemison helped found, attracted numerous far-right reactionaries, including anti-Semitic groups and, eventually, the German-American Bund. 180 While Jemison herself did not appear to be motivated by such prejudices, 181 she was not averse to accepting the assistance of anti-Semitic

174. Id. at 100.
175. RUSCO, supra note 160, at 64.
176. Id. at 184-85.
177. Id. at 193.
178. Id.
179. Id. Frankfurter had been instrumental in getting Margold a position on the Harvard Law faculty, and had fought hard to keep him there during an anti-Semitic purge. HIRSCH, supra note 56, at 96. Cohen, in turn, had been Frankfurter’s student, and his parents were long-time friends of the Frankfurters; Cohen’s wife even claimed Cohen had been named after Frankfurter. RUSCO, supra note 160, at 193.
180. HAUPTMAN, supra note 167, at 379.
181. FBI files kept on Jemison show that the federal government did not consider her a subversive. See HAUPTMAN, supra note 152, at 53. They also show that the main sources of accusations against her were Secretary Ickes and Collier. Id. at 52-53 ("Although Jemison herself was guilty of irresponsible red-baiting, government officials themselves used flimsy
hate-groups drawn to her anti-Roosevelt, anti-New Deal message. These associations with far-right groups gave a powerful weapon to her opponents, one they did not hesitate to use.

Jemison’s criticism of Frankfurter, like Dilling’s and McCarran’s, was thus loaded with racial overtones that would have been apparent to her audience. But it would be a mistake to dismiss her as just another anti-communist, anti-New Deal zealot who flirted with the far right. Jemison also was a smart and passionate advocate, trying to pull something of value out of the tragically difficult relationship between the Native American tribes and the U.S. Government. That relationship was fraught with complex problems, and Jemison may not have always chosen the best battles or the most appropriate allies. But she worked for years to bring the suffering of Native Americans—perhaps the most neglected and invisible racial minority in America—to the attention of Congress. Felix Frankfurter’s confirmation hearing offered her a high-profile chance to do so once again, and she took it.

D. The Minor Patriots

“My name is Collis O. Reed . . . I am national director of the Constitutional Crusaders.”

hearsay testimony to slander her . . . Jemison’s Indian newsletter, The First American, published in this period, reveals that her interests were almost entirely concerned with congressional Indian legislation, violations of Indian civil liberties, improving the overall image of the American Indian, the repeal of the IRA, the removal of Commissioner Collier, and the abolition of the BIA. With few exceptions, she was basically a one-issue political activist . . . .

182. Id. at 51 (“Since her commitment entailed a relentless, Montezumalike holy war against the BIA, she was not averse to appearing throughout the period on the same platform or at the same congressional hearing with leaders of the ‘radical right’ in America . . . .”).

183. Indian Federation Opens Fire on Ickes, N.Y. TIMES, Aug. 31, 1939, at 25. Secretary Ickes, for example, discredited her testimony before the Dies Committee by describing her to the press as “trouble-making” and “pro-Nazi.” Name-Calling Led by Ickes and Dies, N.Y. TIMES, Nov. 24, 1938, at 1. It also was Ickes who released to the media copies of a publication put out by an anti-Semitic group asking for contributions to help support Jemison’s work. Id. The funding Ickes referred to came from James True, an anti-Semitic fascist. See Hauptman, supra note 152, at 51. Jemison was asked about the incident when testifying before the House Committee on Indian Affairs in 1940. She explained that she was in desperate need of money and thus accepted True’s assistance. Id. at 52. She then added this: “And, let the record show that Jim True is a fine, sincere, Christian gentleman, and he is my friend.” Id.

184. The status of the IRA remains a contested issue. Numerous states have long argued that provisions of the Act which exempt some tribal lands from state control are unconstitutional. The issue went to the Supreme Court in the 2008 case of Carceri v. Salazar, but the majority declined to address the constitutional question. 129 S. Ct. 1058 (2009).

185. Frankfurter Transcript, supra note 1, at 33.
“My name is George E. Sullivan. . . . I am appearing as an American Citizen.”\textsuperscript{186}

“[I am] Wade E. Cooper. . . . I am representing myself.”\textsuperscript{187}

“My name is John B. Snow. . . . I am director of the League for Constitutional Government.”\textsuperscript{188}

“My name is Allen A. Zoll . . . of the American Federation Against Communism.”\textsuperscript{189}

“John Bowe. I am a retired disabled veteran.”\textsuperscript{190}

“Charles Carroll . . . I have just a few words to say as an independent”\textsuperscript{191}

“My name is Margaret B. Hopper. . . . I am here representing myself as a member of the public.”\textsuperscript{192}

So went the roll call of the minor patriots who took the witness chair, one by one, to oppose Felix Frankfurter’s nomination. If Elizabeth Dilling, Pat McCarran, and Alice Lee Jemison represented the organized, reasonably polished opposition, these witnesses represented the angry edges. They did not couch their opposition in the (relatively) polite language of communism and radicalism; rather, they laid their biases on the table. Frankfurter was unacceptable, each of them argued, because he was an immigrant and a Jew.

Who were these people, and why did they care enough about a Supreme Court nomination to take on the potentially daunting task of testifying before a U.S. Senate committee? Collis Redd, John Snow, and Allen Zoll were the leaders of insignificant organizations dedicated to fighting communism in the United States.\textsuperscript{193} Redd’s organization was later linked to

\textsuperscript{186} Id. at 22 (statement of George E. Sullivan).
\textsuperscript{187} Id. at 23 (statement of Wade H. Cooper).
\textsuperscript{188} Id. at 73 (statement of John B. Snow).
\textsuperscript{189} Id. at 74 (statement of Allen A. Zoll).
\textsuperscript{190} Id. at 88 (statement of John Bowe).
\textsuperscript{191} Id. at 95 (statement of Charles Carroll).
\textsuperscript{192} Id. at 92 (statement of Margaret B. Hopper).
\textsuperscript{193} Redd, who declared at the hearing that he was the president of an organization called The Constitutional Crusaders for America, went on to note that he was the sole member of the organization. \textit{Frankfurter Transcript, supra} note 1, at 8 (statement of Collis O. Redd). Snow identified himself as the Director of the League for Constitutional Government, and claimed to have 6000 non-dues paying members. \textit{Id.} at 65 (statement of John B. Snow, Director, League for Constitutional Gov’t). Zoll introduced himself as the Executive
a failed effort among American fascist groups to form a single, nation-wide organization. Margaret Hopper and Allen Zoll were connected to the radical anti-Semite and right-wing radio priest, Father Charles Coughlin. George Sullivan was a lawyer and pamphleteer who went on to write vigorously anti-Semitic propaganda. Wade Cooper, a former army colonel of some social standing in Washington, D.C., was the president of a failed bank. John Bowe, it seems, was simply a scared, angry veteran.

Each of these witnesses, in his or her own way, brought the fears, prejudices, and furies of an era into the Senate hearing room. In 1939, America, like the world, was changing. Social paradigms that had governed race and gender relations for centuries were on the cusp of being upended. Roosevelt’s New Deal programs were inserting the federal government into people’s lives in new ways. Additionally, World War II was on the horizon, threatening the post-war isolationism America had tried so hard to cling to, and risking inundating the country with war refugees and other “undesirable” newcomers. To many Americans, these changes were dangerous, and deeply frightening.

The “minor patriots” of the Frankfurter hearings saw themselves as a bulwark against these changes. In their own eyes, they represented a silent, angry majority, the “true” Americans who were deeply troubled by these developments. Revealingly, all of these witnesses, in introducing themselves, went out of their way to emphasize their own “American-ness.” Bowe announced that he was testifying as a veteran of two wars. Sullivan said that he was appearing as an “American citizen.” Cooper also declared himself a citizen, and went on to say that he was there to represent the “wishes of the great body of our citizens, the average American citizen.” Charles Carroll noted that one of his grandfathers “fought . . . with

Vice President of the American Federation Against Communism. Id. at 74 (statement of Allen A. Zoll, executive vice-president, Am. Fed’n Against Communism).

194. Frankfurter Transcript, supra note 1, at 94 (statement of Margaret B. Hopper); see also Frankfurter Goes to Hearing Today, supra note 149. Coughlin was called the “father of hate radio” by one of his biographers. See DONALD WARREN, RADIO PRIEST: CHARLES COUGHLIN, THE FATHER OF HATE RADIO (1996).

195. See, e.g., GEORGE E. SULLIVAN, THE ROAD TO VICTORY! 26, 118-25, 179 (1942) (describing the “Talmudic” criminal conspiracy for world conquest; attacking the appointments of Frankfurter and Louis Brandeis; and asserting that Jewish leaders knew about the attack on Pearl Harbor before it happened but failed to warn the nation).

197. Frankfurter Transcript, supra note 1, at 88 (statement of John Bowe).
199. Frankfurter Transcript, supra note 1, at 88 (statement of John Bowe).
200. Id. at 8 (statement of George E. Sullivan).
201. Id. at 23 (statement of Wade H. Cooper).
George Washington” and that another relative had fought for the North in the Civil War. Hooper claimed to speak for all “loyal” Americans.

These self-proclaimed patriots had a clear message for the senators. The people, they said were not going to stand for putting the foreign-born, liberal, and Jewish Felix Frankfurter on the Supreme Court.

Charles Carroll’s testimony captured this best:

[W]e have plenty of people in every State in the Union . . . that are three or four generations old, that the President of the United States could have appointed as a Supreme Court Justice. But he failed to do that. And I say, if you Senators think that the general public back in the rural districts, in the small towns, and in the big cities, are for this man, just wait a few days and you will see whether they are or not.

Sullivan made the same point, declaring in his testimony that “[t]he real question [was] whether loyal Americans are willing to accept Frankfurter, and his group, as [the] new fathers of our country, in the place and stead of George Washington?”

Snow, the self-proclaimed director of the “League for Constitutional Government,” went a step further, warning the senators that the immigrant Frankfurter could not be trusted to decide cases in which “subversive groups” were interested:

I ask this question: Can we trust a member of the Supreme Court who has championed un-American ideas of collectivism and who has been associated with an organization widely condemned for its un-American activities to uphold the letter and the spirit of the Constitution against all its enemies, and, in particular, to pass on the constitutionality of cases now on their way to the Supreme Court in which subversive groups are vitally interested?

Notably, each of these witnesses used Frankfurter’s race or foreign birth to validate their position. Zoll did this most directly. Frankfurter, he announced, was unfit for a seat on the Supreme Court because of his “record” and his “race.” His “record,” as reported by Zoll, was the same as that so diligently itemized by Elizabeth Dilling: he was a New Dealer, a liberal, a member of the ACLU, and the defender of Sacco and Vanzetti, Mooney, and the Bisbee miners. Zoll’s objections to Frankfurter’s “race” were different. It wasn’t exactly the fact that Frankfurter was a Jew, Zoll explained carefully, but that appointing another Jew to the high court “would cause an uprising in this country.” The uprising, he argued, would be the result of “the people’s” belief that Jews had “been fostering

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202. Id. at 95 (statement of Charles Carroll).
203. Id. at 92 (statement of Margaret B. Hopper).
204. Id. at 95 (statement of Charles Carroll).
205. Id. at 17 (statement of George E. Sullivan).
206. Id. at 73 (statement of John B. Snow, Director, League for Constitutional Gov’t).
207. Id. at 74 (statement of Allen A. Zoll, executive vice-president, Am. Fed’n Against Communism).
208. Id. at 75-76.
movements that are subversive to our Government”—a belief, he noted, that had been increasing throughout the New Deal era.209

John Bowe shared Zoll’s fears. Bowe, like Zoll, declared that it wasn’t really that Frankfurter was Jewish that led to his opposition, but rather that he was a particular kind of Jew—an “internationalist” and a “fixer.”210 It was these Jews, the “insiders” and “international Jews” who were a danger to the country. Among other things, according to Bowe, these “national bankers” were threatening the benefits of veterans and “exploit[ing] the Christian people of this Nation.”211 This was unacceptable, Bowe said, because “our Government [was] based on Christianity.”212 A foreign-born, communist-inspired, non-Christian like Frankfurter could not be trusted, Bowe argued, to preserve our system of government.213

The minor patriots also questioned Frankfurter’s ability to be unbiased in his adjudication. How, Snow asked, can we trust someone with Frankfurter’s background to pass on the constitutionality of cases in which subversive groups are interested?214 He obviously—to Snow—would be inclined to favor his own kind. How, Zoll added in turn, could someone like Frankfurter be trusted to “stand for our constitutional form of government,” rather than hand down decisions favoring radicals like himself?215 Zoll obviously did not think he could be trusted.

Bowe used Frankfurter’s foreign birth to raise the same objection. The Austrian native, Bowe said, had been “brought up on a Communist basis rather than our constitutional basis, and should not be entrusted with a responsible position dealing with foreign countries where he could possibly do harm to our constitutional Government.”216 “Continental Europe,” Sullivan added in turn, “has never been permitted to furnish a single member of our Supreme Court.”217 If there was to be an exception to this “rule,” he declared, it should not happen now, “when the subversive forces of internationalism are engaged in insidious maneuvers to destroy our Republic.”218 Surely no loyal American senator, Sullivan added, could fail to oppose such a nominee.219 Redd agreed. “Why,” he asked, reciting from a letter he had

209. Id. at 76.
210. Id. at 89 (statement of John Bowe).
211. Id. at 92.
212. Id. at 89.
213. See id.
214. Id. at 73 (statement of John B. Snow, Director, League for Constitutional Gov’t).
215. Id. at 78 (statement of Allen A. Zoll, executive vice-president, Am. Fed’n Against Communism).
216. Id. at 89 (statement of John B. Snow).
217. Id. at 9.
218. Id.
219. Id. at 21.
received from a supporter, "not an American from Revolution times, instead of a Jew from Austria just naturalized?"  

II. FROM FRANKFURTER FORWARD

"Why not an American?"  

The message here is unmistakable: Frankfurter, the immigrant and Jew, was not a "real" American. He was not one of those Americans who fought wars or traced their heritage to George Washington's era. He did not understand the principles of our country, and could not be trusted to preserve our way of life. He was, instead, something else—a Jew—a member of a group who was hostile to our government. Consequently, confirming him would lead the people to rise up in protest. Frankfurter, was the racial outsider—the Other.

Despite this, Frankfurter was able to claim his spot on the high court. But he did so only after being forced to defend himself against accusations of treason and disloyalty, and to distance himself from his prior associations (most notably with the ACLU). Moreover, he was awarded his seat only after vocally avowing his Americanism before the senators and the country—by sitting before the U.S. Senate and, in effect, pledging allegiance.

To what extent does Frankfurter's hearing reveal something unique about the confirmation experience of nominees who, like him, are perceived as racial outsiders at the time of their nomination? Since Frankfurter, three such nominees have gone through the process: Justices Thurgood Marshall, Clarence Thomas, and Sonia Sotomayor. Generalizing about this (or any) group of nominees is inherently difficult. Every nomination presents the country with a new set of political, personal, and policy considerations. Both supporters and opponents of each nominee use these highly individualized factors to shape competing narratives about the nomination. Consequently, to say that some nominees are criticized (or praised) for factors ignored in others is in fact to say very little: such inconsistencies are the unsurprising consequences of a relatively rare and high stakes event.

220. Id. at 6 (statement of Collis O. Redd) (emphasis added).
221. Id. (emphasis added).
222. See id. at 89 (statement of John Bowe).
223. See id. at 73 (statement of Allen A. Zoll, executive vice-president, Am. Fed'n Against Communism).
224. See id. at 76.
225. It is interesting to consider whether this experience influenced his decision a mere four years later in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). In Barnette, the Court held that the First Amendment prohibited school officials from forcing children to say the Pledge of Allegiance. Id. at 642. Frankfurter dissented.
226. This list excludes Jewish nominees appointed after World War II. See supra note 5.
Nonetheless, there appear to be ways in which the confirmation experiences of Justices Frankfurter, Marshall, Thomas, and Sotomayor are both similar to each other and also different from the experiences of their ideological peers. This is so in three ways. First, each of these justices underwent a confirmation process in which they confronted a narrative of essentialized group identity and betrayal—they were defined by their racial group and evaluated by their perceived loyalty to that group’s interest. Second, each of them confronted a deeply racialized opposition narrative—criticisms of them tracked known racial stereotypes. Third, each of them overcame these first two hurdles by taking upon themselves responsibility for alleviating racial discomfort by distancing themselves from contemporary racial anger and wrapping themselves in a quintessentially American success story. Like Frankfurter, they avowed their Americanism.

A. Essentialized Group Identity and Betrayal

The essentialized group identity and betrayal narrative relies on the assumption that nominees perceived as racial minorities are: 1) defined by their racial identity; and 2) that, therefore, their racial identity will render them either excessively loyal to their racial group, leading them to betray American ideals of racial equality once on the Court; or that they will be insufficiently loyal to their racial group, making them unworthy of “representing” that group on the Court. Implicit in this narrative is the idea that the interests of the nominee are both defined by their racial group and different from those held by other groups.

This narrative clearly was present in the citizen testimony presented at the Frankfurter hearing. That testimony, as shown above, was replete with accusations that racially defined Frankfurter’s perceived interests and then distinguished those interests from those of other Americans. Frankfurter, the witnesses repeated over and over again, could not be trusted to represent the interests of “real” Americans over members of “his” group. While perhaps the least racially motivated, Alice Lee Jemison’s testimony may nonetheless be the most tragic example of this. Trying to secure the privileges of belonging to her own people, she was compelled to work against the claims of others, like Frankfurter, whom she saw as threatening those efforts.

This concern also manifested itself in the confirmations of Justices Marshall and Sotomayor. Once again, the concern was that the nominee’s racial group identity would trump other (presumptively racially neutral) considerations. Indeed, Justices Marshall and Sotomayor faced virtually identical questioning on this point. Justice Marshall was accused of being a racist and was forced to deny accusations that his jurisprudence would be
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biased against white people. He was at one point explicitly asked whether he was "prejudiced against white people in the South," and he felt compelled to assert repeatedly that he would not unjustly favor African American litigants once on the Court.

Justice Sotomayor's hearing, in turn, revolved almost entirely around the "anti-white" bias her opponents perceived in a series of speeches in which she expressed the hope that the "richness of... experiences" a "wise Latina woman" would go through in her lifetime would make her a better judge than others who had not "lived that life." Commentators used those speeches to label her a "racist," to accuse her of racial favoritism, and to question her commitment to racial equality.

This suspicion of racial group bias faced by Justices Frankfurter, Thomas, and Sotomayor (Justice Thomas, discussed below, faced a different version of the same narrative) is distinct from the routine—although perhaps equally unjust—assertions that white, conservative nominees are indifferent to the needs of nonwhite Americans. The latter invokes the themes of racial insensitivity and judicial ideology, while the former plays to ideas of inherent racial identities. In doing so, the narrative of essentialized racial identity and betrayal evokes deeply-rooted and long-standing intra-group suspicions, rather than the routine concerns heard at all modern confirmations about the suspected constitutional commitments of conservative versus liberal justices.

The distinctness of the identity/betrayal narrative faced by these nominees is apparent when their confirmations are compared to those of their non-minority ideological peers. White liberal nominees, despite their perceived liberalism and prior receptiveness to the constitutional claims of minority litigants, are simply not subjected to the identity/betrayal narrative. Rather, disagreement with these nominees, as with their conservative counterparts, is framed as disagreement about constitutional values, not about the nominees' personal racialized interests. For example, neither Justice Breyer nor Justice Ginsburg—both nominees in the modern era who were per-

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228. See id. (questioning by Senator James Eastland).


ceived as liberal at the time of their nomination—were accused in any way of being “anti-white” or otherwise biased against the interests of white Americans.

The career tracks of Justices Frankfurter, Marshall, and Sotomayor enabled, but cannot fully account for, the salience of the identity/betrayal narrative. Each of these nominees had engaged—albeit to quite different degrees—in careers as legal advocates for civil rights groups—ACLU, the NAACP, and the Puerto Rican Legal Defense and Education Fund. Consequently, opponents looking to construct an identity/betrayal narrative against them had ample ground in which to find support. Frankfurter’s association with the ACLU, as shown above, was repeatedly used to question his loyalty and patriotism. Marshall’s career with the NAACP was held up as proof of his racial bias against white Americans. Sotomayor was criticized for her involvement with a Puerto Rican civil rights group labeled by a former Congressman the “Latino KKK.”

The career choices of non-white nominees have thus made it relatively easy to stoke fears that they, unlike their white counterparts, will be inappropriately loyal to their racial group. But advocacy work, without the racial overlay, does not itself trigger the identity/betrayal narrative: Justice Ginsburg, despite a lengthy and highly successful career as an advocate for women’s rights, was never accused of being “anti-male” or otherwise biased against men.

This narrative of essentialized group identity and betrayal also was on vivid display, albeit in an altered form, in the Clarence Thomas hearing. Thomas, like Frankfurter, Marshall, and Sotomayor, was viewed as having a constitutive racial identity. His race, in other words, was not invisible or irrelevant to how his nomination was perceived, but rather was seen as an essential part of who he was—or who he should be—as a nominee. Thomas’s racial identity, like that of Frankfurter, Marshall, and Sotomayor, thus brought with it distinctly race-based expectations about his judging. In

231. Segal & Cover, supra note 18.
232. See Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 103d Cong. (1993) [hereinafter Ginsburg Transcript].
234. Johnson, supra note 227, at 45.
236. For a general discussion of the presumed neutrality of non-minorities, see Angela Onwuachi-Willig, Representative Government, Representative Court? The Supreme Court as a Representative Body, 90 MINN. L. REV. 1252 (2006).
237. See Ginsburg Transcript, supra note 232.
Thomas's case, however, the concern expressed by his opponents was not that he would be too loyal to his racial group, but rather that he would not be loyal enough.

Because Thomas advocated a conservative judicial approach perceived by his opponents as hostile to African American interests, he was portrayed by critics as insufficiently representative of African Americans to fill the “Black” seat on the Court. He was seen as betraying his race rather than his robe. But the narrative frame of essentialized racial identity and betrayal was still present: Thomas, as an African American jurist, was presumed to bear special responsibility for pursuing a racially defined agenda, and was critiqued for his commitment—or, more precisely in his case, his lack of commitment—to that agenda.

This problem is magnified by the relative scarcity of Supreme Court seats. Supreme Court nominations are rare, and Supreme Court nominations of racial minorities are even rarer. Consequently, there is little room on the Court for interracial ideological diversity. The practice of ensuring that there is a “Jewish seat,” a “Black seat” and now a “Latino seat,” on the Court—a practice that is itself driven by the substantive need for diversity in an institution seeking legitimacy in today’s America—has thus had the effect of making the battles for those few, precious positions even more racially charged than they might otherwise be.

Under such circumstances, nominees perceived as racial minorities simply cannot avoid having their confirmation battles fought in racial terms: whether they like it or not, they are likely to be the only member of their racial group present on the Court, and they thus will be forced to carry the burdens and expectations of that fact throughout their judicial tenure.

B. Racialized Opposition Narrative

Race also manifests itself in a second way at these hearings. Nominees perceived as racial minorities at the time of their confirmation, unlike their white counterparts, face a deeply racialized opposition narrative. Criticism of these nominees, in short, often taps into deep wells of racial bias and prejudice.

I do not want to overstate this dynamic. As noted above, generalizing about Supreme Court nominations is exceedingly difficult: each nomination presents unique political calculations, and each nominee has different strengths and weaknesses. The fact of opposition, therefore, is not automatically attributable to racial hostility. Indeed, there are many reasons to object to nominees—ideology being the foremost one—and opposition to a

nominee perceived as a racial minority certainly should not be assumed to be motivated by racial animus. Those opposed to any given nomination will, however, vocalize their opposition in language that resonates with them or their intended audience. In the case of non-white nominees, that language is often deeply racial.

Professor Onwuachi-Willig has provided a compelling illustration of this by comparing the opposition narratives used against Justices Marshall and Thomas. But for race, these two nominees had very little in common. Thurgood Marshall was a renowned liberal advocate. He was a former NAACP lawyer and solicitor general who litigated twenty-nine successful suits before the U.S. Supreme Court. He graduated first in his class from Howard Law School decades before federal antidiscrimination laws and affirmative action policies began opening the doors of historically white elite institutions like Harvard and Yale. Justice Thomas, in contrast, struggled with his political identity. He felt belittled by liberal America and stigmatized by affirmative action. He came to his confirmation hearing only after rejecting constitutional liberalism and settling on a conservatism grounded in a strand of African American scholarship that emphasizes a distrust of governmental benevolence. He graduated with honors from his Savannah, Georgia high school before going on to place near the middle of his class in a racially integrated Yale Law School.

Despite these differences, Marshall and Thomas were portrayed at the time of their confirmations in strikingly similar ways. Both were portrayed as incompetent and under-qualified. Their intelligence and basic knowledge of the law was questioned. Both were considered destined to be mere tools of the smarter, white justices with whom they would serve. Both also were seen as a bit lazy and of uncertain personal character. All of these criticisms, of course, echo deeply entrenched stereotypes of

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239. *Id.* at 1007.
240. *Id.*
242. *Id.* at 370.
243. *See id.*
244. Onwuachi-Willig, *supra* note 238, at 936.
245. *Id.*
246. *Id.* at 935.
247. *Id.* at 937.
248. Marshall was accused of having communist sympathies, while accusations of sexual harassment, as noted, were lodged against Thomas. *See generally Nomination of Thurgood Marshall, of New York, to be an Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, 90th Cong. 1 (1967); Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, 102d Cong. 1 (1991) [hereinafter Thomas Transcript].
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African American men. Justices Frankfurter and Sotomayor likewise faced deeply racial criticism at their hearings. Justice Frankfurter was the brilliant but communistic and untrustworthy Jew. Sotomayor was the overly emotional Latina who would rely on her "feelings" to decide cases. Frankfurter the immigrant was considered insufficiently "American" and untrustworthy. Sotomayor the Latina was accused of being a hot-tempered "bully" with a racial ax to grind. These criticisms, like those lodged against Marshall and Thomas, tapped deep into the well of racial stereotypes.

To be clear, the concern here is not that minority nominees, like all nominees, face sharp criticism, or even that that criticism has at times tracked racial stereotypes. Rather, the point is that raced narratives such as those faced by these nominees may well be used as opposition narratives because they resonate regardless of their validity. With minority nominees, a race-based opposition narrative can become "sticky" not because it is true, but because it plays into deeply-rooted racial stereotypes that people are already primed to accept.

C. Remediing Racial Discomfort

Non-white nominees are not without tools to deal with these problems, however. Indeed, each of the Justices under discussion did so successfully, and in the same way: by assuming the burden of making senators (and perhaps the nation) comfortable with racial difference.

The issue here is a familiar one. Talking about race in America is difficult, and talking about race in the politically charged context of a Supreme Court confirmation hearing is particularly difficult. Senators, the overwhelming majority of whom are white, fear that a clumsy comment involving race could result in front-page accusations of racism. As Professor

249. See supra text accompanying notes 5-7.
250. Johnson, supra note 227, at 43-44; see also Confirmation Hearing on the Nomination of Honorable Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, 111th Cong. 71 (2009) [hereinafter Sotomayor Transcript].
251. See supra text accompanying notes 5, 220.
252. Johnson, supra note 227; see also Sotomayor Transcript, supra note 250, at 137 (questioning on day two by Senator Lindsey Graham in relation to report by Jeffrey Rosen for The New Republic citing anonymous complaints about Judge Sotomayor's temperament while sitting on the Second Circuit Court of Appeals).
253. Social scientists have repeatedly demonstrated that we have a "confirmation bias" that makes us more likely to accept as true information that reinforces our pre-existing expectations. See generally Philip E. Tetlock, Expert Political Judgment: How Good Is It? How Can We Know? (2005).
254. Id.
255. See Sotomayor Transcript, supra note 250, at 138-39 (questioning on day one by Senator Lindsey Graham (R-SC)); see also Sylvia R. Lazos Vargas, Only Skin Deep?: The
Sylvia Lazos Vargas has noted, it therefore becomes necessary for nominees perceived as racial outsiders—nominees whose very presence "creates" the discomfort—to alleviate it. One way to do this is to replace the narrative of racial difference with one of nationalistic sameness. In other words, to do as Frankfurter did: to avow your Americanism.

Marshall, Thomas, and Sotomayor, like Frankfurter, each did this by wrapping themselves in the quintessential "only in America" success story. We all know this tale; indeed, it is a vital part of how we perceive our national identity. A poor protagonist, living in the land of opportunity, overcomes debilitating odds by pulling himself up by his own bootstraps.

Justices Frankfurter, Marshall, Thomas, and Sotomayor each had compelling personal narratives that allowed them to tap our collective pride in this story. Justice Frankfurter’s supporters told of the poor immigrant who came to our welcoming shores and succeeded against all odds in creating a new and better life. Justice Sotomayor’s advocates told a similar story of her journey from a non-English speaking barrio in the Bronx all the way to the threshold of the U.S. Supreme Court. Justices Marshall and Thomas, as African American nominees, had even more gripping versions of the story to tell. Justice Marshall’s advocates repeatedly emphasized his inspirational rise through a segregated America to the pinnacle of professional success. Justice Thomas’s supporters used the “Pin Point strategy”—a carefully crafted narrative about how Thomas escaped an impoverished childhood in Pin Point, Georgia by applying the values of hard work and self-sufficiency imparted to him by his stern but beloved grandfather.

The point is not that these stories are not inspiring or compelling; they are both. Rather, the point is that they also work to provide the senators with a celebratory narrative in which hard work, individual effort, and personal resilience overcome racial barriers and bias. Individual effort, not systemic change, is what conquers racial disadvantage in these stories. This narrative thus serves to absolve the senators—and the rest of the nation—of racial guilt by focusing on the success of the few rather than the difficulties of the many. In Professor Lazos Vargas’ words, it “reinforce[s] the color-blindness myth” by affirming the belief that, at least in this country, hard


256. Lazos Vargas, supra note 255, at 1451 (“[M]inority candidates have an additional obstacle to overcome in the already treacherous confirmation process, the risk of triggering racial stereotypes . . . . Minority nominees have a difficult balancing act, how to be authentic and true to themselves and yet how to avoid negative stereotypes that might invite their becoming a target of interest groups and ideological Senators”).


258. Id. at 971 & n.7.
work can and will overcome even the worst systemic problems. Nominees perceived as racial outsiders alleviate the tension generated by racial difference by adopting this all-American success story as their own.

In doing so, however, they become complicit in advancing a narrative which tacitly criticizes those for whom individual effort and hard work was not enough. Their very success is used to pass judgment on others. These are, moreover, success stories in which there is no place for contemporary racial anger: racial hardship in these narratives is in the past. Anger over current racial discrimination would aggravate rather than alleviate racial tension and therefore is not made part of the story.

Thus, Justice Marshall—who lived through the overt racism of Jim Crow and the violence of the Civil Rights era, and had every right to be angry—was required to maintain a calm demeanor in the face of blatantly racist attacks on his character and intelligence. Justice Frankfurter, aware that he was a symbol for America’s belief in racial equality, felt that he had to tread carefully in discussions of racial issues. Justice Sotomayor was likewise compelled to remain cheerful while being portrayed as racially insensitive and being told, in a caricatured paraphrase of a Cuban sitcom character, that she had “some ‘splaining to do.”

Of these minority nominees, only Justice Thomas was allowed to express contemporary racial anger, which he famously did by referring to the Senate’s response to accusations of sexual harassment brought by law professor Anita Hill as a “high-tech lynching for uppity-blacks.” Thomas presumably could take this tack because, as a black conservative, he was not suspected of being unfairly biased in favor of his own racial group. His invocation of racial victimhood, therefore, did not raise fears that his anger would lead him, once on the bench, to advance the interests of African Americans over whites. Other nominees, those for whom this was the salient fear, had to settle for having senatorial surrogates express anger on their behalf.

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259. Lazos Vargas, supra note 255, at 1453.
260. Id. at 1431-32.
261. Id. at 1469-70; see also Sotomayor Transcript, supra note 250, at 32-35 (showing comments of Sen. John Cornyn).
262. LASI, supra note 12, at 73.
263. Johnson, supra note 227, at 43.
265. Lazos Vargas, supra note 255, at 1474. Interestingly, however, the strand of Justice Thomas’s jurisprudence that has its roots in uniquely black conservative thinking and the black power movement was not explored, by him or the Senators, at his confirmation hearing. See generally Onwuachi-Willig, supra note 238.
266. Senator Neely played this role in the Frankfurter hearing, much like Senator Feinstein did so in the Sotomayor hearing. See Frankfurter Transcript, supra note 1, at 73-75; Sotomayor Transcript, supra note 250, at 15, 95.
CONCLUSION: IDENTITY, POLITICS AND THE CONFIRMATION PROCESS

Derrick Bell, writing about Clarence Thomas and Anita Hill, poignantly observed that their battle, “fought in front of the upper echelons of the white power structure, was unwinnable from the start and desired by neither combatant.”267 The Thomas hearings, he went on, “were a reminder of how frequently in American history blacks became the involuntary pawns in defining and resolving society’s serious social issues.”268 If there is a lesson to be drawn from comparing the confirmation of Felix Frankfurter to those of Thurgood Marshall, Clarence Thomas, and Sonia Sotomayor, it may well be that the confirmation hearings of these nominees appear to play exactly the role Bell identified: we use these confirmations, and the nominees who sit at their center, to fight our ongoing battle about the role of race, identity, and politics in contemporary America.

Frankfurter, Marshall, Thomas, and Sotomayor each faced a confirmation process in which the most pressing racial issues of their day took center stage. Frankfurter, the Jewish immigrant, represented the end of American isolationism and the beginning of a future in which our increasingly diverse country would become more and more entangled with a chaotic and interdependent world. Marshall, the African American litigator who helped bring about the end of segregation, was to his opponents the physical embodiment of the end of a racial system that had held sway over much of the country for more than two centuries. The stories of their confirmation hearings are the stories of these disputes.

Thomas and Sotomayor likewise have come, in part through the dynamics of their confirmation hearings, to represent competing visions of how we as Americans view race today. Are we a colorblind society in which race should rarely have legal relevance, as the first President Bush claimed in nominating Thomas and as Thomas’s own jurisprudence holds; or does race, as Sotomayor said at her hearing, continue to “affect the facts [we] choose to see” in ways that have social and legal salience?269 Is diversity on the bench something we celebrate as a sign of our racial success, or something we need because the life experiences of white and non-white Americans continue to differ in racially significant ways, ways that may not be fully appreciated without people of color on the bench?

Our collective uncertainty about these issues permeated the Sotomayor hearing in particular. Sotomayor herself struggled throughout the hearing to fully explain her views about race, diversity, ethnicity, and judging. Senators and commentators did no better, frequently tripping over their own words as they tried to simultaneously celebrate diversity on the bench while

268. Id.
269. See also Sotomayor Transcript, supra note 250, at 72; Davis, supra note 229.
also criticizing Sotomayor for implying that her racial identity might make a difference in her judging. Senator Lindsey Graham, for example, first explained how, in his view, one of the problems in Iraq and Afghanistan is that women have little say about how those nations are governed.\textsuperscript{270} He then went on, however, to express great concern at Sotomayor's implication that having more women and minorities on the bench here might result in changes to our laws.\textsuperscript{271} Senator John Cornyn ran into similar difficulties, telling the \textit{New York Times} that colorblind justice is an "American ideal" and that Sotomayor's success—which she herself attributed in part to affirmative action policies—brought into doubt the need for race-conscious decision processes like affirmative action.\textsuperscript{272}

Examining the confirmation of Felix Frankfurter—our first truly modern confirmation, and the first modern confirmation involving a racial outsider—shows us that the interaction of race and identity in confirmation battles is not new. The Supreme Court confirmation process has long been one of the battlefields on which we conduct our fights over national identity, and those fights have always been more intense when the nominee's very presence has itself forced us to squarely confront our racial demons. These nominations, unlike that of white nominees, directly raise the question of whether our nation's racial reality has lived up to its rhetoric of equality. Whether they choose to or not, nominees like Frankfurter, Marshall, Thomas, and Sotomayor, serve as bellwethers of our success in realizing those ideals. In making their stories our stories, their confirmation hearings both challenge and change, if only in one small way, our perceptions of just who "we the people" are.

\textsuperscript{270.} \textit{See Sotomayor Transcript, supra} note 250, at 138 ("[O]ne of the biggest problems in Iraq and Afghanistan is [the] mother's voice is seldom heard about the fate of her children. And if you wanted to change Iraq, apply the rule of law and have more women involved in having a say about Iraq. And I believe that about Afghanistan, and I think that's true here. I think for a long time a lot of talented women were asked, 'Can you type,' and we're trying to get beyond that and improve as a Nation. So when it comes to the idea that we should consciously try to include more people in the legal process and the judicial process from different backgrounds, count me in. \textit{But your speeches don't really say that to me}. They—along the lines of what Senator Kyl was saying, they kind of represent the idea, there's a day coming when there will be more of us, women and minorities, and we're going to change the law." (questioning on day two by Senator Lindsey Graham) (emphasis added)).

\textsuperscript{271.} \textit{Id.}
